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

IN RE FACEBOOK INTERNET TRACKING LITIGATION. CASE NO. MD-12-02314-EJD

SAN JOSE, CALIFORNIA

APRIL 28, 2016

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

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

FOR THE PLAINTIFF: SILVERMAN, THOMPSON, SLUTKIN & WHITE
BY: STEPHEN G. GRYGIEL
201 NORTH CHARLES STREET, 26TH FLOOR
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(APPEARANCES CONTINUED ON THE NEXT PAGE.)

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

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY, TRANSCRIPT PRODUCED WITH COMPUTER.

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

FOR THE DEFENDANTS:

COOLEY
BY: MATTHEW D. BROWN
KYLE C. WONG
ADAM TRIGG
101 CALIFORNIA STREET, 5TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111

SAN JOSE, CALIFORNIA APRIL 28, 2016

P R O C E E D I N G S

(COURT CONVENED AT 9:07 A.M.)

THE COURT: OUR 9:00 O'CLOCK CALENDAR IS 12-2314, FACEBOOK INTERNET TRACKING LITIGATION.

AND WHY DON'T I HAVE THE PARTIES MAKE THEIR APPEARANCES, PLEASE.

MR. BROWN: MATTHEW BROWN FOR FACEBOOK.

THE COURT: THANK YOU.

MR. WONG: KYLE WONG FOR FACEBOOK.

MR. TRIGG: ADAM TRIGG FOR FACEBOOK.

THE COURT: THANK YOU. GOOD MORNING.

MR. STRAITE: GOOD MORNING, YOUR HONOR. DAVID STRAITE FOR PLAINTIFF AND THE PUNITIVE CLASS.

THE COURT: THANK YOU.

MR. BARNES: JAY BARNES FOR THE PLAINTIFF, YOUR HONOR.

THE COURT: LET ME -- GIVE ME JUST -- OH, YES.

MR. GRYGIEL: GOOD MORNING, YOUR HONOR. STEVE GRYGIEL FOR THE PLAINTIFF AND THE PUNITIVE CLASS.

THE COURT: THANK YOU. GOOD MORNING.

MR. GRYGIEL: GOOD MORNING.

THE COURT: THANK YOU ALL FOR BEING HERE. THIS IS THE DEFENDANTS' MOTION TO DISMISS. AND LET ME INDICATE I'VE BENEFITTED FROM YOUR PLEADINGS, AND I'VE READ THE PLEADINGS IN

THIS CASE. AND IF I USE THE WORD "INTERESTING," YOU WON'T FIND THAT OFFENSIVE, I THINK. THEY'VE BEEN VERY HELPFUL. IT'S A FASCINATING CASE, AS WE ALL KNOW, AND I'M EAGER TO HEAR YOUR COMMENTS.

SO LET ME, WITH THAT, LET'S ASK THE DEFENSE TO COME FORWARD. AND, MR. BROWN, WHY SHOULD I GRANT YOUR MOTION.

MR. BROWN: THANK YOU, YOUR HONOR. AGAIN, MATTHEW BROWN FOR FACEBOOK. I THOUGHT WHAT I WOULD DO, UNLESS YOUR HONOR HAS A DIFFERENT VIEW OF HOW TO PROCEED, WOULD BE TO START WITH JUST IN A MINUTE OR SO OF SOME TABLE SETTING AND KIND OF AN OVERVIEW OF HOW WE VIEW THE MOTION AND THEN MOVE ON TO --

THE COURT: OKAY. MR. BROWN, I SHOULD TELL YOU THAT THIS IS ABOUT INTERNET THINGS, AND THERE ARE SOME INDIVIDUALS -- I DON'T WANT TO SOUND LIKE AN AGIST -- BUT SOMETIMES PEOPLE OF A CERTAIN VINTAGE ARE NOT NATIVE, SHALL WE SAY, TO THE INTERNET AND ALL OF THOSE COMMUNICATION TYPE DEVICES.

I'M NOT SUGGESTING ANYONE IN THIS COURTROOM FALLS IN THAT GENRE, BUT WE DO KNOW THIS AND WHEN WE TEACH, AND I TALK TO OTHER STUDENTS AND THINGS, AND WHEN I TALK TO COLLEAGUES OF MINE, IT IS AN INTERESTING JUXTAPOSITION BETWEEN PEOPLE WHO ARE NATIVE AND OTHERS WHO ARE NOT TO THE INDUSTRY.

SO IT'S BEEN FASCINATING FOR ME TO LEARN THROUGH YOUR PAPERS AND YOUR DISCUSSIONS, I'M CERTAIN I'LL LEARN A LITTLE

MORE ABOUT IT, BUT PERHAPS THAT'S WHAT YOU WERE GOING TO TALK ABOUT. PARDON ME.

MR. BROWN: AND I'D BE HAPPY TO ELABORATE ON ANYTHING AS I'M GOING ALONG. OBVIOUSLY WE'RE HERE FOR A MOTION TO DISMISS, AND SO WE'RE LIMITED TO THE FACTS AS THEY'RE PLED IN THE COMPLAINT OR THE ALLEGATIONS AT LEAST.

WHAT I THOUGHT I WOULD DO IS JUST SPEND A MINUTE OR TWO KIND OF GIVING AN OVERVIEW OF HOW WE SEE THE MOTION, AND THEN MOVE TO ARTICLE III STANDING, AND THEN TO WIRETAP ACTS, AND THEN TO STORED COMMUNICATIONS ACT.

THE COURT: THAT'S FINE.

MR. BROWN: I'M OBVIOUSLY PREPARED TO GO FURTHER, BUT I THOUGHT YOUR HONOR MAY WANT TO TAKE A BREAK AT SOME POINT TO LET THE OTHER SIDE HAVE A SAY AS WELL. SO THERE ARE OBVIOUSLY 11 DIFFERENT CAUSES OF ACTION.

THE COURT: WELL, THAT'S VERY GENEROUS OF YOU TO WANT ME TO ALLOW THE OTHER SIDE.

MR. BROWN: THAT DOES OCCASIONALLY HAPPEN AT THESE HEARINGS.

SO TO SET THE STAGE A LITTLE BIT, OBVIOUSLY YOUR HONOR KNOWS THERE WAS VERY EXTENSIVE BRIEFING ON THE FIRST AMENDED COMPLAINT, AND YOUR HONOR ISSUED AN ORDER IN THE FALL DISMISSING THAT COMPLAINT ON VARIOUS GROUNDS AND SOME ON 12(B)(1) STANDING GROUNDS AND SOME ON 12(B)(6) GROUNDS FOR FAILURE TO STATE A CLAIM.

THE PLAINTIFFS NOW HAVE FILED THEIR SECOND AMENDED COMPLAINT. THEY'VE HAD SOME THREE AND A HALF YEARS TO CONSIDER THEIR PLEADINGS. THEY'VE HAD THREE AND A HALF YEARS TO CONDUCT DISCOVERY THAT THEY FELT THEY NEEDED IN ORDER TO AMEND IN THE EVENT THAT THE FIRST COMPLAINT WAS DISMISSED.

AND ALTHOUGH WE HAVE A PLEADING NOW THAT IS CONSIDERABLY LONGER, THERE ARE MORE ALLEGATIONS, THERE ARE DISCUSSIONS ABOUT OTHER CASES IN OTHER JURISDICTIONS, AND THERE ARE LOTS OF EXHIBITS ATTACHED TO THE COMPLAINT, NOT THAT MUCH AT THE CORE HAS REALLY CHANGED. AND THEY HAVEN'T REALLY DONE ANYTHING IN THE SECOND AMENDED COMPLAINT THAT MEANINGFULLY ADDRESSES THE DEFICIENCIES THAT THE COURT IDENTIFIED IN THE EARLIER ORDER.

TO TAKE SORT OF ONE EXAMPLE, THEY HAVEN'T COME FORWARD WITH ANY SORT OF CONCRETE AND PARTICULARIZED INJURY TO THESE FOUR NAMED PLAINTIFFS. AND THAT, OF COURSE, IS RELEVANT TO NOT ONLY ARTICLE III STANDING BUT ALSO REVERBERATES THROUGH SEVERAL DIFFERENT CAUSES OF ACTION THAT HAVE ELEMENTS OF INJURY OR LOSS OR DAMAGES.

AND THEY HAVE FORWARDED AN ARGUMENT, I THINK, TO TRY AND SOLVE THEIR PROBLEM SAYING THAT, WELL, WE'RE HERE ON DIVERSITY JURISDICTION IN THIS COURT AND BECAUSE OF ERIE ANY SORT OF STATE LAW CLAIM THAT WE'VE PLED, ALL OF A SUDDEN -- AS LONG AS WE'VE PLED A STATE LAW CLAIM, THAT GIVES US STANDING IN THIS COURT, AND THE NINTH CIRCUIT HAS SQUARELY REJECTED THAT.

THE ONE THING I WOULD SAY THAT THE SECOND AMENDED

COMPLAINT DOES ALLEGE MORE CLEARLY THAN THE FIRST AMENDED COMPLAINT IS, WAS THAT THE REFERRED URL THAT FACEBOOK ALLEGEDLY RECEIVED FROM THE PLAINTIFFS WAS CONVEYED TO FACEBOOK IN A SEPARATE AND A DISTINCT COMMUNICATION -- AND WE'LL CALL IT A COMMUNICATION. I'M NOT CONCEDING THAT IT NECESSARILY IS -- FROM THE COMMUNICATION THAT WENT FROM THE PLAINTIFFS' BROWSERS TO THE WEB PAGE THAT THEY WERE ATTEMPTING TO VIEW.

AND THE SIGNIFICANCE OF THAT, THERE ARE A NUMBER OF IMPORTANT ELEMENTS OF THAT AND BECAUSE FACEBOOK RECEIVED THIS INFORMATION DIRECTLY FROM THE PLAINTIFFS' BROWSERS, THAT CAN'T BE AN INTERCEPTION UNDER THE WIRETAP ACT.

THE COURT: IT CANNOT.

MR. BROWN: IT CANNOT BE AN INTERCEPTION UNDER THE WIRETAP ACT AND IT IS NOT IMPROPER ACTS OF INFORMATION IN ELECTRONIC -- THANK YOU. I WILL SLOW DOWN AND TRY TO ENUNCIATE A LITTLE MORE CLEARLY.

IT IS NOT IMPROPER ACCESS OF INFORMATION IN ELECTRONIC STORAGE UNDER THE STORED COMMUNICATIONS ACT. THE RECEIPT OF THE INFORMATION CANNOT BE, QUOTE, "WITHOUT PERMISSION," END QUOTE, UNDER PENAL CODE SECTION 502. IT CANNOT BE UNLAWFUL ACCESS WHICH IS REQUIRED TO TRESPASS, AND IT CAN'T BE THEFT AS REQUIRED FOR LARCENY.

IT ALSO HAS SOME OTHER IMPLICATIONS AS WELL BECAUSE WE NOW HAVE CLEAR ALLEGATIONS OF HOW THIS ALL WORKS. WE KNOW THAT A USER CANNOT HAVE A REASONABLE EXPECTATION OF PRIVACY IN THIS

SORT OF INFORMATION AS NUMEROUS COURTS HAVE HELD.

AND, MOREOVER, FACEBOOK IS ACTUALLY A PARTY TO THE COMMUNICATION UNDER BOTH THE WIRETAP ACT AND THE CALIFORNIA INVASION OF PRIVACY ACT, OR CIPA.

FINALLY, THE -- SORRY. THE SECOND AMENDED COMPLAINT REALLY DOES NOTHING TO GRAPPLE WITH THE NINTH CIRCUIT PRECEDENT THAT HOLDS THAT REFERRED URL'S ARE NOT CONTENTS OF A COMMUNICATION.

THE COURT: THAT'S THE ZYNGA CASE.

MR. BROWN: THAT'S THE ZYNGA CASE WHICH YOUR HONOR CITED IN THE ORDER DISMISSING THE FIRST AMENDED COMPLAINT.

SO THAT'S JUST SORT OF AN OVERVIEW OF HOW WE VIEW THE MOTION. THERE ARE OBVIOUSLY MANY OTHER ARGUMENTS THAT WE HAVE MADE, AND WE THINK MANY OTHER DEFICIENCIES, BUT THAT'S SORT OF AN OVERVIEW.

NOW, TURNING IN MORE DETAIL TO ARTICLE III STANDING. AS YOUR HONOR KNOWS, YOU RULED IN THE PRIOR COMPLAINT THAT THEY HAD NOT ALLEGED CONCRETE AND PARTICULARIZED HARM. THERE WAS REALLY NO ATTEMPT, AND THERE STILL ISN'T ANY ATTEMPT, TO SORT OF TIE THESE ALLEGATIONS THAT THIS INFORMATION HAS VALUE TO ANY PARTICULAR HARM TO THESE NAMED PLAINTIFFS.

THERE'S NO ALLEGATIONS THAT THEY'VE TRIED TO TAKE THEIR BROWSING HISTORY AND MARKET IT IN ANY WAY. THERE'S NO ALLEGATIONS THAT THE FACT THAT FACEBOOK RECEIVED, ALLEGEDLY, THIS BROWSING HISTORY AND HAS SORT OF LESSENED THE VALUE OF

THAT IN ANY WAY.

AND BEYOND THAT, THE COMPLAINT JUST HAS THE VAGUEST OF ALLEGATIONS ABOUT WHAT EXACTLY IT IS THAT FACEBOOK SUPPOSEDLY RECEIVED. THEY SAY THAT THEY VISITED WEBSITES THAT HAD FACEBOOK PLUGINS ON THEM AND THAT THERE WERE THESE DETAILED URL'S SUPPOSEDLY THAT FACEBOOK RECEIVED, BUT THEY HAVEN'T PROVIDED A SINGLE URL TO THE COURT IN THE COMPLAINT.

AND THEY'VE SAID IN THEIR PAPERS THAT THEY COULD PROVIDE THEM IN CAMERA BUT THE FACT IS THAT THEY ARE NOT IN THE COMPLAINT, AND WE'VE HAD NO ABILITY TO SEE WHAT THEY ARE AS WELL.

AND THAT'S THE SORT OF GENERALIZED AND VAGUE PLEADINGS THAT DOESN'T RISE TO THE LEVEL OF ARTICLE III STANDING, AND, FRANKLY, IT CREATES AN IQBAL PROBLEM AS WELL.

AND I WOULD JUST NOTE THAT TWO OF THE CASES THAT THE COURT RELIED ON IN ITS PREVIOUS ORDER CONTINUE TO APPLY HERE AND THAT ONE OF THOSE IS LOW VERSUS LINKEDIN, AND THIS IS THE 2011 DECISION. THAT'S A CASE WHERE LINKEDIN WAS ALLEGED TO HAVE PLACED COOKIES ON THE USER'S COMPUTERS AND PERMITTED THIRD PARTIES TO DO BROWSING HISTORY AND THAT WAS LINKED TO USER I.D. AND HELD THAT WAS TOO ABSTRACT AND HYPOTHETICAL TO SUPPORT THE ARTICLE III STANDING.

AND THERE'S THE LA COURT V. SPECIFIC MEDIA CASE, WHICH I THINK WE'RE ALL FAMILIAR WITH AT THIS POINT, THE CENTRAL DISTRICT OF CALIFORNIA 2011 DECISION.

AND WE'VE ALSO CITED THE ZAPPOS.COM DECISION WHICH IS MORE RECENT, AND THAT'S FROM 2015, HOLDING THERE'S NO INJURY IN FACT WHERE THE PLAINTIFFS DID NOT ALLEGE ANY FACTS EXPLAINING HOW THEIR PERSONAL INFORMATION BECAME LESS VALUABLE OR THAT THEY ATTEMPTED TO SALE THEIR INFORMATION AND THE LIKE SIMILAR IN SOME WAYS TO THE OTHER CASES.

TURNING NOW TO SOME OF THE RELATED ISSUES UNDER ARTICLE III. I'VE ALLUDED TO THIS A MOMENT AGO. THERE'S BEEN AN ARGUMENT ADVANCED THAT BECAUSE THEY'VE SIMPLY ALLEGED CERTAIN STATE LAW CLAIMS, THAT UNDER PRINCIPLES OF DIVERSITY JURISDICTION AND THE ERIE DOCTRINE THAT THAT SOMEHOW GIVES RISE TO STANDING. THAT'S NOT THE CASE. WE HAVE CITED NINTH CIRCUIT CASE LAW, INCLUDING CANTRELL AND LEE, THAT CLEARLY HOLDS THAT THAT'S NOT THE CASE.

THE FEDERAL COURT IS TO LOOK TO WHETHER IT HAS JURISDICTION UNDER ARTICLE III FIRST AND THEN ONLY GETS TO THE ERIE DOCTRINE NEXT IF IT DOES HAVE JURISDICTION.

AS TO THE FEDERAL STATUTORY CLAIMS, AS WE SAID IN PRIOR BRIEFING AND WE'VE SAID AGAIN, OUR VIEW IS THAT EDWARDS AND THE CASES FOLLOWING EDWARDS ARE NOT CORRECTLY DECIDED LIKE CASES LIKE JEWEL, BUT WE ACKNOWLEDGE THAT THAT IS THE PRECEDENT FOR THE TIME BEING AND IN THIS CIRCUIT AT LEAST AND WE KNOW THAT THE SPOKEO CASE FROM THE NINTH CIRCUIT IS NOW PENDING BEFORE THE U.S. SUPREME COURT, AND WE EXPECT A DECISION IN THAT CASE PROBABLY IN THE NEXT TWO MONTHS OR SO.

BUT EVEN UNDER EDWARDS AND IT'S PROGENY, YOU CAN'T SIMPLY ALLEGE A FEDERAL STATUTORY VIOLATION. YOU STILL HAVE TO SHOW THAT THE PLAINTIFFS ARE WITHIN THE GROUP OF PEOPLE THAT THE STATUTE WAS INTENDED TO PROTECT.

AND HERE EVEN THOUGH WE HAVE THAT DOCTRINE FACING US, I THINK THE PLAINTIFFS HAVE STILL A PROBLEM UNDER THAT DOCTRINE BECAUSE THEY HAVEN'T EVEN COME FORWARD WITH ANY URL'S, ANY SORT OF DETAIL. THERE'S JUST GENERALIZED ALLEGATIONS THAT THEY VISITED OTHER WEB PAGES AND THAT FACEBOOK HAS RECEIVED SOME SORT OF URL'S, BUT I WOULD CONTEND THAT THAT'S NOT ENOUGH TO REALLY SHOW HOW THEIR PERSONAL COMPLAINT BEFORE THE COURT FALLS UNDER THESE FEDERAL STATUTORY VIOLATIONS.

WITH RESPECT TO -- THEY'VE ALSO PUT BEFORE YOUR HONOR A CASE FROM THE THIRD CIRCUIT, A GOOGLE COOKIE PLACEMENT CASE, WHICH ADDRESSED A NUMBER OF ISSUES ACTUALLY WHICH ARE ADDRESSED IN THIS CASE INCLUDING ARTICLE III STANDING, AND THEY'RE URGING YOUR HONOR TO FOLLOW THAT DECISION WHICH HELD THAT THERE WAS STANDING, AND SO I FIGURED I OUGHT TO JUST ADDRESS THAT HEAD ON.

THE COURT: IT WOULD BE A GOOD TIME TO DO THAT.

MR. BROWN: IT SEEMED LIKE IT. AND SO THE THIRD CIRCUIT DECISION, WHAT I WOULD SAY ABOUT THAT IS THAT IT'S, FRANKLY, THINLY REASONED ON ARTICLE III STANDING.

IT FIRST REFERS TO THE CONCEPT UNDER WARTH VERSUS SELDIN THAT THERE CAN BE STANDING FOR THE INVASION OF STATUTORY

RIGHTS, BUT THEN IT DOESN'T PROCEED TO ANALYZE STANDING ON A CLAIM-BY-CLAIM BASIS AND THERE WERE BOTH STATUTORY CLAIMS, FEDERAL STATUTORY CLAIMS, STATE STATUTORY CLAIMS, AND COMMON LAW CLAIMS. AND IT DIDN'T -- IT JUST PAINTED WITH A BROAD BRUSH WHICH I DON'T THINK IS THE PROPER WAY TO ANALYZE THE MATTER.

FURTHERMORE, THE ANALYSIS SUCH AS IT IS REALLY COMES DOWN TO ABOUT A SENTENCE OR TWO IN THAT SHORT SECTION IN WHICH THE COURT SAYS, WELL, THE COMPLAINT HERE HAS SHOWN THAT THERE ARE EVENTS ALLEGED THAT ARE CONCRETE AND PARTICULAR AS TO THE PLAINTIFFS.

AND I FOUND THAT QUITE STRIKING BECAUSE THAT'S NOT THE STANDARD. THE STANDARD IS NOT WHETHER THERE ARE CONCRETE AND PARTICULARIZED EVENTS ALLEGED. YOU HAVE TO ALLEGE THAT THERE IS CONCRETE AND PARTICULARIZED INJURY. THAT IS THE ARTICLE III STANDING TEST. SO I ACTUALLY THINK THAT THE WRONG TEST WAS USED THERE.

AND IN THIS CIRCUIT THERE ARE A NUMBER OF CASES, ONES THAT WE HAVE TALKED ABOUT LIKE LOW VERSUS LINKEDIN, AND THE LACOURT VERSUS SPECIFIC MEDIA, AND ZAPPOS.COM WHICH ALTHOUGH THERE WERE CONCRETE EVENTS ALLEGED IN THOSE COMPLAINTS, THERE WAS NO COMPLETE AND PARTICULARIZED INJURY ALLEGED AS TO THOSE PLAINTIFFS.

THE COURT: WAS THE THIRD CIRCUIT SUGGESTING THAT THE INFERENCE COULD BE DRAWN THAT AN INJURY WOULD RESULT FROM

THAT CONDUCT?

MR. BROWN: IT'S POSSIBLE THAT THEY HAD THAT IN MIND. I THINK, QUITE FRANKLY, IN ALL CANDOR IT'S POSSIBLE THAT THEY HAD THAT IN MIND. I DON'T THINK IT'S EVIDENT FROM THE FACE OF THE OPINION AND THAT'S WHAT I HAVE TO LOOK AT.

SO I UNDERSTAND YOU MIGHT BE ABLE TO INFER THAT, BUT I DON'T THINK IT'S THAT CLEAR. AND, FURTHERMORE, I THINK THAT THE FACT THAT THEY HAVE PARTICIPATED WITH SUCH A BROAD BRUSH IN THAT OPINION AND HAVEN'T GRAPPLED WITH THE DIFFERENCE BETWEEN FEDERAL STATUTES OR STATE STATUTES OR COMMON LAW CAUSES OF ACTION IS PROBLEMATIC.

AND I WOULD URGE THE COURT NOT TO FOLLOW THE CONCLUSION IN THAT CASE THAT THERE IS STANDING IN THIS CASE BUT RATHER TO FOLLOW THESE OTHER DECISIONS THAT I HAVE ALREADY MENTIONED.

SO I THOUGHT I WOULD THEN -- I GUESS I WOULD ASK THE COURT IF YOU HAVE ANY QUESTIONS.

THE COURT: WELL, I DID HAVE A COUPLE QUESTIONS EARLIER, BUT I DIDN'T WANT TO INTERRUPT YOU EARLIER.

BUT IN TALKING ABOUT THE PARTICULAR HARM, I THINK THERE'S AN ISSUE ABOUT DO WE NEED TO SHOW THAT SOMEHOW THIS INFORMATION WAS MONETIZED TO SHOW AN INJURY? IS THAT SOMETHING THAT YOU THINK THE PLAINTIFFS NEED TO DO? IS THAT A DEFICIT IN THEIR COMPLAINT?

MR. BROWN: YES, I DO. SO, I MEAN, THEY'VE CLAIMED IN TRYING TO SHOW THAT THEY HAVE ARTICLE III STANDING THAT

BROWSING HISTORY HAS VALUE, AND IT'S SORT OF ALWAYS FRAMED THAT WAY THAT IT HAS VALUE.

AND SO THE POINT IS THAT IF THAT IS YOUR ARGUMENT THAT YOU HAVE STANDING BECAUSE BROWSING HISTORY HAS VALUE, YOU NEED TO SHOW THAT THE CONDUCT THAT IS ALLEGED HERE, AND IT'S ALLEGED THAT FACEBOOK RECEIVED URL'S, YOUR BROWSING HISTORY, YOU HAVE TO SHOW THAT THAT RECEIPT OF INFORMATION SOMEHOW HAD ECONOMIC IMPACT ON YOU AS A NAMED PLAINTIFF.

SO, IN OTHER WORDS, CAN YOU SHOW AS A NAMED PLAINTIFF THAT YOU TRIED TO TAKE YOUR OWN BROWSING HISTORY AND SELL IT TO SOMEONE BECAUSE IT HAS VALUE? NO ALLEGATION OF THAT HERE.

DID YOU EVER EVEN TRY TO DO THAT? IF YOU TRIED TO DO THAT, HAVE YOU ALLEGED THAT THE FACT THAT FACEBOOK ALSO HAS A COPY OF SOME OF THESE URL'S HAS DONE ANYTHING TO AFFECT THE PRICE THAT SOMEONE HAD PAID FOR THAT? NOTHING EVEN APPROACHING THAT.

THE COURT: DID THE THIRD CIRCUIT CASE TALK ABOUT THAT? DIDN'T THEY SAY THAT IT IS NOT NECESSARILY REQUIRED?

MR. BROWN: YEAH, WELL --

THE COURT: I GUESS I'M JUST ASKING HOW TO RECONCILE THOSE TWO.

MR. BROWN: THAT'S RIGHT. THEY DID SAY THAT ARTICLE III STANDING DOESN'T HAVE TO BE ECONOMIC IN NATURE. I THINK YOU'VE GOT TO LOOK AT WHAT THE GRAVAMEN OF A PARTICULAR CLAIM IS AND PART OF THE PROBLEM AGAIN COMES BACK TO THEY

DIDN'T TRY TO ANALYZE STANDING ON THE CLAIM-BY-CLAIM BASIS. THEY SAID, WELL, ECONOMIC INJURY ISN'T REQUIRED. AND I UNDERSTAND THAT IN A VACUUM, BUT I DON'T THINK THAT THAT IS REALLY -- THAT DOESN'T REALLY TRY TO GRAPPLE WITH OR ACCOUNT FOR THE SUBTLETIES, FRANKLY, THAT EXIST IN A MULTI-COUNT COMPLAINT THAT HAS DIFFERENT CATEGORIES OF COUNTS.

SO GIVEN THE NATURE OF THE ALLEGATIONS IN THIS CASE, I WOULD SAY THAT THAT'S WHAT PLAINTIFF NEEDS TO COME FORWARD AND DO AND THEN ALSO, FRANKLY, IT TRACKS WHAT THEY'RE SAYING THE HARM IS AS I UNDERSTAND IT.

THE COURT: OKAY.

MR. BROWN: SO WITH RESPECT TO THE WIRETAP ACT, I THINK THERE ARE OBVIOUSLY -- I THINK WE FORWARDED FIVE OR FOUR DIFFERENT ARGUMENTS HERE, AND I DON'T KNOW IF WE NEED TO HIT EVERY SINGLE ONE ARGUMENT, ALTHOUGH I'M PREPARED TO.

ON THE CONTENTS POINT, AGAIN, THERE'S REALLY NOTHING IN THE SECOND AMENDED COMPLAINT THAT ADDRESSES THIS FUNDAMENTAL PROBLEM WHICH IS THAT IN THE NINTH CIRCUIT THE ZYNGA HOLDING SAYS THAT REFERRED URL'S ARE NOT CONTENTS OF THE COMMUNICATIONS.

THE COURT: WELL, DON'T THEY SAY -- DIDN'T ZYNGA SAY THAT THERE MIGHT BE CIRCUMSTANCES WHERE IT COULD BE?

MR. BROWN: YES, IN DICTA THERE WAS SOME SPECULATION THAT THERE COULD BE OTHER FACT PATTERNS, BUT REALLY IT WAS JUST THAT, IT WAS DICTA. AND THE HOLDING WAS THAT THE REFERRED

URL'S THAT WERE AT ISSUE THERE WERE NOT CONTENT.

AND THE INTERESTING THING ABOUT ZYNGA, YOU KNOW, THERE'S ALL OF THIS TALK IN THE COMPLAINT AND IN THE PAPERS THAT FOR SOME REASON IT SEEMS THAT HERPES WEBSITES HAVE BECOME SORT OF THAT POSTER CHILD HERE.

BUT, YOU KNOW, IT WAS INTERESTING IN THE ZYNGA CASE ONE OF THE VERY SPECIFIC FACTUAL SCENARIOS THAT THE NINTH CIRCUIT ANALYZED AND TOOK ACCOUNT OF WAS THE IDEA THAT -- REMEMBER, THAT CASE DEALT WITH PEOPLE BEING ON THE FACEBOOK DOMAIN AND CLICKING ON THIRD PARTY ADVERTISEMENTS THAT APPEARED THERE AND THE IDEA WAS THAT THE REFERRER WOULD THEN GET SENT TO THE THIRD PARTY ADVERTISER, AND THE ALLEGATION WAS THAT THE REFERRER HEADER CONTAINED BOTH THE REFERRED URL AND AN INDICATION OF THE PAGE THAT THE PERSON WAS ON AND THE USER I.D. OF THE USER, RIGHT?

THE COURT: IT WAS VERY SPECIFIC.

MR. BROWN: IT WAS A VERY SPECIFIC CASE. ALTHOUGH THE REFERRED URL PORTION OF IT IS INDISTINGUISHABLE FROM THE FACTS HERE.

BUT THE IMPORTANT THING THERE WAS ONE OF THE FACT PATTERNS WAS THAT AN ADVERTISER MIGHT BE ABLE TO TELL FROM THE REFERRER HEADER THAT THE USER WAS ON THE FACEBOOK BOOK PAGE FOR A GAY SUPPORT GROUP, AND THE NINTH CIRCUIT ACKNOWLEDGED THAT. IT ANALYZED IT AND IT DEALT WITH IT, AND IT CONCLUDED THAT NEVERTHELESS IT WAS A URL AND A URL IS AKIN TO A RECORD, IF

ANYTHING. I'M NOT EVEN SURE THAT IT WENT SO FAR TO SAY THAT IT IS A RECORD UNDER THE WIRETAP ACT OR THE ELECTRONIC COMMUNICATION PRIVACY ACT.

BUT IT WOULD, IF ANYTHING, BE A RECORD, NOT CONTENTS OF A COMMUNICATION, AND IT'S SOMETHING AKIN TO AN ADDRESS ON AN ENVELOPE. IN FACT, IT'S AN INDICATION OF THE LOCATION ON THE INTERNET THAT SOMETHING EXISTS SO IT'S ACTUALLY A VERY DIRECT PARALLEL. IT'S ESSENTIALLY AN ADDRESS OF WHERE SOMETHING RESIDES ON THE INTERNET AS OPPOSED TO AN ADDRESS THAT YOU MIGHT PUT IN AN ENVELOPE OF WHERE SOMEONE RESIDES PHYSICALLY.

THE COURT: WHAT IS INTERESTING IS, I THINK TO ME, AND I'M CERTAIN TO ALL OF YOU, IS THAT THIS IS AN AREA OF LAW THAT SEEMS TO BE DEVELOPING.

THE THIRD CIRCUIT HAS, AND I THINK YOU WOULD AGREE WITH THIS, THEY DID A VERY THOROUGH ANALYSIS OF THIS TYPE OF COMMUNICATION, I'LL USE THAT WORD, INCLUDING LOOKING AT THE SURVEILLANCE COURT AND FOURTH AMENDMENT ISSUES THAT MIGHT RUN CONCURRENT WITH THIS ANALYSIS, AND IT'S A VERY IMPRESSIVE ANALYSIS AND VERY THOUGHTFUL.

AND IT DOES -- ONE OF THE POINTS IT LEFT ME WITH IS THAT THIS IS A DEVELOPING AREA AND SUCH THAT OUR NINTH CIRCUIT COURT AND WHAT THEY SAID IN ZYNGA, OF COURSE, IT'S THE LAW OF THE DISTRICT BUT IT ALSO, AS I SAID, THEY SUGGEST IT IN THEIR OPINION PERHAPS IT'S DICTA THAT, WELL, THERE MAY BE CIRCUMSTANCES BECAUSE WE'RE LOOKING AT THIS VERY SPECIFIC URL

AND THE ALLEGATIONS IN THAT PARTICULAR CASE.

BUT WHAT THE GOOGLE CASE FROM THE THIRD CIRCUIT TELLS US IS THAT THERE ARE OTHER CIRCUMSTANCES WHEN YOU DRILL DOWN, NOT NECESSARILY THAT DEEP, THAT YOU CAN FIND THAT THE URL'S HAVE ACTUALLY CONTENT AND OURS COULD BE OFFENSIVE IN SOME MANNER.

MR. BROWN: YEAH, THERE WAS SOME DISCUSSION, AND I'D LIKE TO ADDRESS THAT FOR A MINUTE.

THE COURT: SURE.

MR. BROWN: WE CERTAINLY DON'T BELIEVE THAT'S THE RIGHT RESULT, BUT I THINK IT'S IMPORTANT TO LOOK AT EXACTLY WHAT THE THIRD CIRCUIT SAID THERE.

SO THE COURT SAID THAT, QUOTE, "POST DOMAIN NAMES PORTIONS OF THE URL ARE DESIGNED TO COMMUNICATE TO THE VISITED WEBSITE WHICH WEB PAGE CONTENT TO SEND TO THE USER."

BUT THE COURT ULTIMATELY CONCLUDED THAT IT DID NOT NEED TO DECIDE WHETHER ALL SUCH INFORMATION CONTENT WAS UNDER THE WIRETAP ACT AND STOPPED WELL SHORT OF THAT.

AND, IN ADDITION, THE DEFENDANTS IN THAT CASE ACTUALLY CONCEDED THAT SOME URL'S CONTAINING SEARCH QUERY TERMS MAY QUALIFY AS CONTENT. SO YOU HAD IN THAT CASE A CONCESSION THAT THAT MAY BE CONTENT, AND THERE'S NO CONCESSION IN THIS CASE TO BE CLEAR.

AND THE COURT DID CONCLUDE THAT SOME QUERIED URL'S QUALIFIED AS CONTENT BUT REALLY THAT WAS, IF YOU REALLY LOOK AT IT, AND I AGREE, IT WAS A VERY, VERY LONG INVOLVED DISCUSSION,

BUT IF YOU BOIL IT DOWN, I THINK THAT'S ABOUT THE EXTENT OF THE HOLDING IS THAT THERE ARE SOME URL'S CONTAINING CERTAIN TYPES OF SEARCH QUERIES THAT COULD BE CONTENT UNDER THE WIRETAP ACT.

THE COURT: SO DOES THAT REQUIRE US TO LOOK AT EACH INDIVIDUALIZED CASE? I THINK THAT'S ALSO SOME LANGUAGE THAT THEY USE AND IT REALLY REQUIRES SOME SPECIFIC CONTEXT ANALYSIS.

MR. BROWN: THAT'S CORRECT. IF YOU WERE GOING TO FOLLOW THE THIRD CIRCUIT'S ANALYSIS, THEN I THINK YOU WOULD NEED TO DO THAT.

IN THE POSTURE THAT WE'RE IN HERE, THIS IS ON A MOTION TO DISMISS, AND WE'RE LOOKING AT THE FOUR CORNERS OF A COMPLAINT. AND THE PROBLEM FOR THE PLAINTIFFS IS THAT THERE IS NO ALLEGATION WHAT ANY OF THESE URL'S WERE. THEY HAVE GENERALIZED CLAIMS THAT SOME OTHER URL'S MAY CONTAIN SEARCH QUERIES, BUT THAT'S NOT ENOUGH IN FEDERAL COURT UNDER APPLICABLE LAW AND INCLUDING TWOMBLY AND IQBAL AND THE LIKE.

SO EVEN IF YOU WERE GOING TO FOLLOW THE RATHER LIMITED CONCLUSION OF THE THIRD CIRCUIT THAT SOME URL'S CONTAINING SOME SEARCH QUERIES COULD BE CONTENT, THAT STILL WOULDN'T LEAD TO THE RESULT HERE NOW THAT YOU SHOULD LET THE CASE GO THROUGH. I THINK WE WOULD STILL BE ON SOLID GROUND IN SAYING THAT THE COMPLAINT SHOULD BE -- OR THIS CAUSE OF ACTION, RATHER, SHOULD BE DISMISSED FOR FAILURE TO ALLEGE CONTENTS.

I WANTED TO THEN JUST MOVE TO THE RELATED ISSUES OF NO INTERCEPTION, AND FACEBOOK WAS A PARTY TO THE COMMUNICATION.

AND LIKE I SAID EARLIER, IF THERE IS ONE THING THAT THE SECOND AMENDED COMPLAINT HAS DONE IS CLARIFIED THIS MORE. I FELT THAT IN THE PREVIOUS COMPLAINT THERE WAS SOME FUZZINESS AROUND THIS. AND, AGAIN, WE'RE DEALING WITH THEIR ALLEGATIONS, NOT NECESSARILY THE REAL WORLD, BUT IT IS CLEAR.

SO THE SECOND AMENDED COMPLAINT MAKES CLEAR THAT WHAT HAPPENED IS THAT YOU HAVE A USER WHO WANTS TO GO TO THE FIRST PARTY WEB PAGE. WHEN THEY DO THAT, THEIR BROWSER SENDS A GET REQUEST --

THE COURT: I THINK IT'S PAGE 15 OF THE COMPLAINT THEY HAVE A NICE PARAGRAPH.

MR. BROWN: I THINK IT'S PARAGRAPH 60 THAT IS WHAT I WAS THINKING INSTEAD OF PAGE 15. BUT, YEAH, THAT IS WHAT I HAVE IN MIND AS WELL.

THE COURT: IT'S PARAGRAPH 60.

MR. BROWN: SOMEHOW LODGED BACK INTO MY MIND HERE.

THE COURT: YOUR PERSONAL URL MEMORY STORAGE.

MR. BROWN: THAT'S RIGHT. SO YOU HAVE THE FIRST GET REQUEST TO THE FIRST PARTY WEB PAGE. SO LET'S SAY IT'S WAL-MART.COM OR CNN.COM.

AND THEN CNN.COM SENDS A SECOND SET OF INSTRUCTIONS BACK TO THE USER'S BROWSER. SO IF YOU WANT TO THINK ABOUT THIS AS A SERIES OF COMMUNICATIONS, WELL, WE'LL JUST SAY FOR THE SAKE OF ARGUMENT THAT THESE ARE COMMUNICATIONS, YOU'VE GOT COMMUNICATION 1 FROM THE INDIVIDUAL'S BROWSERS TO THE FIRST

PARTY WEB PAGE, AND YOU HAVE COMMUNICATION 2 FROM THAT WEB PAGE BACK TO THE USER'S BROWSER, AND THEN COMMUNICATION NUMBER 3 IS THE USER'S BROWSER SENDING THE GET REQUEST TO FACEBOOK AS THE THIRD PARTY HERE BECAUSE THAT FIRST PARTY WEB PAGE HAD A FACEBOOK PLUGIN, A LIKE BUTTON, LET'S SAY, OR A SHARE BUTTON.

AND THE ONLY WAY FOR THAT LITTLE PLUGIN TO SHOW UP ON THE WEB PAGE THAT THE USER IS TRYING TO VIEW IS FOR FACEBOOK, THE THIRD PARTY, TO GET A GET REQUEST AND THEN TO KNOW TO POPULATE THAT PAGE.

AND TO BE CLEAR, THE ONLY REASON THAT HAPPENS, REALLY, IS BECAUSE THE FIRST PARTY WEB PAGE HAS DECIDED THAT IT WANTS CERTAIN THIRD PARTY CONTENT IN IT ON ITS PAGE.

AND THIS PROCESS THAT THEY DESCRIBE ISN'T FACEBOOK SPECIFIC IN ANY WAY. THIS IS JUST THE WAY THE INTERNET WORKS.

AND SO THE SAME THING WOULD HAPPEN FOR ANY OTHER THIRD PARTY WHO WAS GOING TO DISPLAY CONTENT. SO WHETHER IT WAS FOR AN ADVERTISEMENT THAT WAS GOING TO APPEAR ON THAT PAGE, IF IT WAS TWITTER THAT MIGHT -- MAYBE HAD A SOCIAL PLUGIN ON THAT PAGE. IT COULD BE ANYTHING. IT COULD BE ANY THIRD PARTY CONTENT.

SO IN THAT RESPECT, WHEN YOU KIND OF PULL AWAY A LOT OF THE WINDOW DRESSING HERE, ALL THEY'RE DOING IS DESCRIBING HOW THE INTERNET WORKS. AND NOW THAT THAT HAS BECOME CLEAR, WE KNOW THAT THAT CAN'T BE AN INTERCEPTION UNDER THE WIRETAP ACT.

THE COURT: WELL, WHERE WAS THE -- I GUESS I HAD TWO

QUESTIONS ABOUT THAT, AND I'M GRATEFUL THAT WE HAVE THE DIAGRAM IN PARAGRAPH 60. I SHOULD TELL YOU THE DIAGRAM APPEARS ON A WHITE BOARD IN MY CHAMBERS AS WE TRACED AND TRACKED FOR THOSE INDIVIDUALS WHO MIGHT BE IMMIGRANTS TO THE INTERNET.

SO WHERE -- I GUESS I HAVE TWO QUESTIONS ABOUT THAT. HOW MANY COMMUNICATIONS ARE THERE, HOW MANY SEPARATE INTERNET COMMUNICATIONS ARE THERE?

AND, SECONDARILY, WHERE WAS THE INTERCEPT IN ALL OF THAT?

MR. BROWN: WELL, I'VE IDENTIFIED THREE ALREADY. THERE'S THE FIRST COMMUNICATION, WE'LL CALL IT, FROM THE USER'S BROWSER TO THE FIRST PARTY WEB PAGE.

THE COURT: EXCUSE ME.

MR. BROWN: AND THERE'S THE COMMUNICATION BACK FROM THE FIRST PARTY WEB PAGE BACK TO THE USER'S BROWSER.

THE COURT: AND THAT'S BETWEEN THOSE TWO? THAT'S INITIATED BY THE INDIVIDUAL?

MR. BROWN: YEAH, THE WHOLE SEQUENCE IS, IS INITIATED BY THE INDIVIDUAL WHO WANTS TO SEE THE PAGE.

THE SECOND COMMUNICATION FROM THE FIRST PARTY WEB PAGE BACK TO THE USER'S BROWSER IS IN A SENSE INITIATED BY THAT FIRST PARTY WEB PAGE BECAUSE THAT WEB PAGE KNOWS THAT IT HAS THIRD PARTY CONTENT THAT NEEDS TO BE POPULATED AND SO IT HAS TO GIVE SOME INSTRUCTIONS BACK TO THE BROWSER.

THE COURT: AND IT ONLY RESPONDS TO THE REQUEST?

MR. BROWN: THAT'S RIGHT. THAT'S RIGHT. AND THEN

THERE'S THE THIRD COMMUNICATION, IF YOU WILL, BETWEEN THE USER'S BROWSER AND FACEBOOK OR WITH ANY OTHER THIRD PARTY THAT WAS NEEDED TO POPULATE --

THE COURT: IS THAT A SEPARATE COMMUNICATION?

MR. BROWN: THAT'S A SEPARATE COMMUNICATION, COMPLETELY SEPARATE AND DISTINCT. AND SO THERE IS NO INTERCEPTION.

WHAT THEY'RE TRYING TO SAY IS THAT THE VERY FIRST COMMUNICATION, COMMUNICATION NUMBER 1 BETWEEN THE USER'S BROWSER AND THE FIRST PARTY WEB PAGE, HAS BEEN INTERCEPTED. AND THIS IS JUST A STATUTE --

THE COURT: LET'S PARSE THAT OUT FOR JUST A MOMENT, IF YOU DON'T MIND, JUST GETTING GRANULAR WITH THAT.

MR. BROWN: SURE.

THE COURT: THAT TOO, YOU KNOW, LOOK AT IT AS A TENNIS BALL GOING OVER THE NET, IF YOU WILL, IS THAT INTERCEPTED IN ANY WAY? IS THERE ANY INTERCEPTION IN THAT FIRST COMMUNICATION?

MR. BROWN: NO, NO, NOT AT ALL. THE PROBLEM HERE IS THAT THE STATUTE REALLY DOESN'T FIT THE SITUATION. IT'S THE WIRETAP ACT. THE WHOLE POINT OF THE STATUTE WAS THAT YOU HAVE A COMMUNICATION AND IT OUTLAWED SOMEONE TAKING THAT DEVICE AND INTERCEPTING THAT COMMUNICATION, RIGHT?

AND HERE WHAT WE'VE GOT IS A WHOLE SERIES OF COMMUNICATIONS AND FACEBOOK ALLEGEDLY RECEIVES A URL BUT IT'S

THROUGH A THIRD COMMUNICATION IN THE STRING, AND THEY'RE ALL SEPARATE AND THEY'RE SEQUENTIAL.

AND UNDER THE LAW OF THE WIRETAP ACT IN THIS CIRCUIT UNDER KONOP, K-O-N-O-P -- I MAY BE MISPRONOUNCING THAT -- THE INTERCEPTION HAS TO BE ACCOMPLISHED DURING THE TRANSMISSION OF THE COMMUNICATION, IN FLIGHT, IF YOU WILL. AND HERE WE HAVE DISTINCT COMMUNICATIONS, SEPARATE COMMUNICATIONS, AND THEY'RE EVEN SEPARATE IN TIME.

AND, AGAIN, UNDER KONOP, YOU CAN'T HAVE A SEPARATE COMMUNICATION, AND IT DOESN'T MATTER THAT IT MIGHT BE IN FAIRLY QUICK SUCCESSION. THAT HAS NOTHING TO DO WITH IT. IT HAS TO BE INTERCEPTED IN TRANSIT.

THE COURT: SO THERE'S THE FIRST LEVEL COMMUNICATION, AGAIN, LOOKING AT PARAGRAPH 60, IT'S THE TOP LEVEL, THE HORIZONTAL ARROWS GOING BACK AND FORTH.

AND THEN PARAGRAPH 60 OF THE DIAGRAM INFORMS US THERE'S ANOTHER COMMUNICATION GOING ON BELOW THE LINE, IF YOU WILL, AND THAT'S THE FACEBOOK BACK TO THE COMPUTER, IF YOU WILL, AND THAT'S A SEPARATE COMMUNICATION IN YOUR VIEW?

MR. BROWN: YES, YES.

THE COURT: AND IS THERE ANY INTERCEPTION OF THAT COMMUNICATION?

MR. BROWN: NO. THERE REALLY AREN'T ANY INTERCEPTIONS HERE. THERE'S A SERIES OF SEPARATE DISTINCT COMMUNICATIONS THAT ARE SEQUENTIAL IN TIME, AND THERE'S NO

INTERCEPTION.

THE COURT: AND SO IN YOUR VIEW THESE ARE SEQUENTIAL COMMUNICATIONS, AND THERE'S NO INTERCEPTION OF EITHER OF THESE COMMUNICATIONS SUCH THAT THIS CONDUCT WOULD FALL UNDER THE WIRETAP ACT.

MR. BROWN: THAT'S CORRECT. AND TO BE CLEAR, I THINK IT'S ALMOST BECOMING OBVIOUS FROM OUR DISCUSSION HERE, THE COOKIE ALLEGATIONS HERE THAT, YOU KNOW, THE ALLEGATIONS BEING THAT THE URL'S WERE SORT OF AGGREGATED OVER TIME, HAS NOTHING TO DO WITH THE WIRETAP ACT OR CIPA.

THOSE ARE COMPLETELY IRRELEVANT, AND I KNOW THAT THAT IS SORT OF THE THRUST OF THE COMPLAINT BUT YOU HAVE TO LOOK AT EACH CLAIM SEPARATELY AND WHAT THAT CLAIM CALLS FOR AND REALLY THE COOKIE ALLEGATIONS DON'T EVEN COME INTO PLAY HERE.

THE COURT: I'VE LOOKED AT THAT, AND I'M SURE I'LL HEAR FROM YOUR COLLEAGUES OPPOSITE ABOUT THEIR OPINIONS ABOUT WHAT THE COOKIE DOES TO ANY OF THIS, WHETHER IT'S A DEVICE OR WHATEVER IT DOES, BUT YOUR POINT IS THAT IT HAS NOTHING TO DO WITH THESE TWO SEPARATE COMMUNICATIONS.

MR. BROWN: TO MAKE OUT A WIRETAP ACT CLAIM, AND THERE ARE A BUNCH OF OTHER CLAIMS HERE, BUT THE ONE WE'RE TALKING ABOUT NOW IS THE WIRETAP ACT AND THAT REQUIRES AN INTERCEPTION OF A COMMUNICATION WHILE IT'S IN FLIGHT AND THE COOKIE HAS NOTHING TO DO WITH THAT AND YOU DON'T HAVE AN INTERCEPTION WHILE IT'S IN FLIGHT. YOU HAVE REALLY A NUMBER OF

DISTINCT SEPARATE SEQUENTIAL COMMUNICATIONS.

THE COURT: HOW IS IT THAT THESE COULD BE INTERPRETED AS ONE COMMUNICATION SUCH THAT YOU WOULD ALLOW FOR AN INTERCEPTION? AND, AGAIN, YOUR COLLEAGUE OPPOSITES WILL TELL ME ABOUT THAT.

MR. BROWN: THEY CAN TRY TO PROFFER AN EXPLANATION. I CANNOT BECAUSE I DON'T THINK THAT IT CORRESPONDS WITH REALITY OR MAYBE EVEN MORE TO THE POINT SINCE WE'RE HERE ON A MOTION TO DISMISS, I DON'T THINK IT CORRESPONDS TO THEIR COMPLAINT. I DON'T SEE HOW YOU GET THERE.

AND THE OTHER POINT THAT I WANTED TO MAKE UNDER THE WIRETAP ACT WHICH IS SORT OF A COUSIN AT THIS POINT, I'LL CALL IT, IS THAT UNDER SECTION 2511(2)(D) THERE'S AN EXPRESS EXEMPTION FROM LIABILITY FOR ONE WHO WAS A PARTY TO THE COMMUNICATION.

THE COURT: WELL, WE SHOULD TALK ABOUT THAT, TOO, RIGHT?

MR. BROWN: YEAH. SO BECAUSE WE HAVE SEPARATE COMMUNICATIONS AND NOW THE SAC HAS MADE THIS VERY CLEAR IN PARAGRAPH 60 AND OTHER PLACES, THE COMMUNICATION HERE WAS BETWEEN -- THAT CONVEYED THE REFERRED URL TO FACEBOOK WAS BETWEEN THE INDIVIDUAL AND FACEBOOK.

THE COURT: AND YOUR CLIENT WAS ALWAYS A PARTY TO THE COMMUNICATIONS, YOUR POSITION IS?

MR. BROWN: WITH RESPECT TO THE CONDUCT THAT IS

ALLEGED, WHICH IS THAT FACEBOOK RECEIVED URL'S ABOUT THE WEBSITES THAT THESE PLAINTIFFS VISITED. AND SO BECAUSE THEY WERE A PARTY TO THAT COMMUNICATION, THEY FALL UNDER THE EXEMPTION IN 2511(2)(D).

SO REALLY, ASIDE FROM WHETHER YOU FIND CONTENTS OR WHETHER YOU FIND INTERCEPTION, THERE'S REALLY A DISTINCT AND THIRD REASON WHY THIS CLAIM SHOULD FAIL, AND THAT IS THAT FACEBOOK WAS A PARTY.

AND THERE'S PLENTY OF AUTHORITY WHICH -- SOME OF WHICH WE CITE IN OUR BRIEFING THAT STANDS FOR THE PROPOSITION THAT IT DOESN'T MATTER WHETHER YOU WERE THE INTENDED RECIPIENT, AND, IN OTHER WORDS, IT DOESN'T MATTER THAT THE PERSON INITIATING THE COMMUNICATION KNEW THAT IT WAS YOU WHO WAS RECEIVING IT. THAT'S IRRELEVANT FOR THIS SECTION AND THIS EXEMPTION.

AND IF YOU THINK ABOUT IT, IT KIND OF MAKES SENSE BECAUSE REMEMBER, AGAIN, THIS IS A WIRETAP ACT STATUTE, AND IT'S PART OF THE CRIMINAL CODE. AND WHEN CONGRESS AMENDED THIS LAW A NUMBER OF YEARS AGO, IT WAS COGNIZANT OF THE CLASSIC SORT OF STING OPERATION WHERE YOU WOULD HAVE A POLICE OFFICER ON ONE END OF THE LINE POSING AS SOMEONE ELSE AND THE PERSON MAKING THE CALL DIDN'T KNOW THAT, RIGHT? IT ALMOST SOUNDS FUNNY TO PUT IT SO FORMALLY BUT YOU KNOW ALL OF THAT STUFF ALL OF THE TIME.

AND THERE WAS CASE LAW THAT DEVELOPED AROUND THAT, AND CONGRESS WAS COGNIZANT OF THAT AND WANTED TO MAKE SURE THAT THE

WIRETAP ACT DIDN'T PROHIBIT THAT SORT OF CONDUCT.

AND SO IF YOU LOOK AT THE WIRETAP ACT, THERE ARE ACTUALLY TWO SEPARATE PROVISIONS, ONE THAT APPLIES TO LAW ENFORCEMENT AND ONE THAT IS VIRTUALLY IDENTICAL THAT APPLIES TO CIVIL PARTIES. SO IT EXTENDED IT NOT ONLY TO LAW ENFORCEMENT BUT THE SAME CONCEPT TO CIVIL PARTIES AS WELL.

SO WHETHER THEY UNDERSTOOD THAT FACEBOOK WAS A PARTY TO THE COMMUNICATION OR NOT, NEVERTHELESS FACEBOOK FALLS UNDER THE EXEMPTION.

AND NOT TO JUMP TOO FAR AHEAD BUT UNDER CIPA THERE'S THE SIMILAR CONCEPT THERE. SORT OF CIPA IS ESSENTIALLY PARALLEL TO THE FEDERAL WIRETAP ACT.

THE COURT: C-I-P-A.

MR. BROWN: THANK YOU. C-I-P-A.

AND, YOU KNOW, ONE THING THAT I WANTED TO RAISE WITH THE COURT IS IN THE PREVIOUS ORDER ON THE FIRST AMENDED COMPLAINT, YOUR HONOR RULED AGAINST US ON THE IDEA OF FACEBOOK BEING A PARTY UNDER CIPA.

YOU DIDN'T REACH THAT QUESTION UNDER THE WIRETAP ACT. I THINK THAT WE'RE IN A DIFFERENT POSTURE HERE GIVEN THE SORT OF NEW AND CHANGED ALLEGATIONS OF THE SECOND AMENDED COMPLAINT THAT NOW MAKES IT CLEAR WHAT THEY'RE ACTUALLY ALLEGING GOES ON WITH RESPECT TO THE COMMUNICATIONS.

AND SO WHILE, WITH ALL DUE RESPECT TO THE COURT, I WOULD ENCOURAGE THE COURT TO LOOK AT THAT CIPA ISSUE AGAIN BECAUSE IT

REALLY IS THE PARALLEL TO THE WIRETAP ACT ISSUE.

AND BECAUSE FACEBOOK WAS A PARTY TO THAT COMMUNICATION AND RECEIVED THE REFERRED URL DIRECTLY FROM THE INDIVIDUAL AND BECAUSE IT DOESN'T MATTER WHETHER OR NOT THE PLAINTIFFS KNEW THAT IT WAS FACEBOOK ON THE OTHER END OF THE LINE, I WOULD SAY, I THINK WE ALSO FALL UNDER THAT EXCEPTION UNDER CIPA JUST AS WE DO UNDER THE WIRETAP ACT.

THE COURT: BEFORE WE MOVE ALONG, AND MAYBE THIS IS ANTICIPATORY ALSO, BUT I WOULD ASK YOU TO ALSO COMMENT, IF YOU WOULD, ABOUT THE ALLEGATION IS THAT HERE WHEN THE USER SIGNED OFF, THERE WAS CONTINUED COMMUNICATION, I'LL CALL IT, BETWEEN FACEBOOK AND THE COMPUTER AND DOES THAT MAKE A DIFFERENCE AS TO ANYTHING THAT WE'VE TALKED ABOUT SO FAR?

MR. BROWN: NO, IT REALLY DOESN'T AND THAT'S KIND OF PART AND PARCEL OF THE COMMENTS THAT I MADE EARLIER THAT THE COOKIE ALLEGATIONS ARE REALLY IRRELEVANT HERE.

BECAUSE WHETHER FACEBOOK USERS WERE LOGGED IN OR LOGGED OUT OR WHETHER IT WAS A NON-FACEBOOK USER WHO WAS TRYING TO GO TO CNN OR WAL-MART.COM, FACEBOOK WOULD BE RECEIVING THAT GET REQUEST IN ANY OF THOSE EVENTS, IN ANY OF THOSE CIRCUMSTANCES.

WHY? BECAUSE THAT'S THE WAY THE INTERNET IS SET UP TO WORK. AND THAT'S REALLY DRIVEN BY THE FACT THAT THERE IS -- THAT THE FIRST PARTY WEB PAGES MADE A CHOICE TO INCLUDE CERTAIN THIRD PARTY CONTENT BECAUSE I THINK THAT'S WHAT IS BEST FOR THEIR SITE AND THE WAY THAT THE INTERNET PROTOCOLS ARE

STRUCTURED MEANS THAT THERE HAS TO BE A SERIES OF SEPARATE AND SEQUENTIAL COMMUNICATIONS IN ORDER TO POPULATE THAT PAGE.

SO REGARDLESS OF WHETHER FACEBOOK USERS WERE LOGGED IN OR LOGGED OUT, THAT SERIES OF COMMUNICATIONS AND THE GET REQUESTS AND THE LIKE WERE GOING TO HAPPEN REGARDLESS. SO IT REALLY DOESN'T MATTER FOR PURPOSES OF WIRETAP ACT OR CIPA, C-I-P-A.

THE COURT: IT SOUNDS LIKE YOU'RE PROPOUNDING A UNIVERSAL DEFENSE WHICH IS THAT'S THE WAY THE INTERNET WORKS, FOLKS, AND GET OVER IT.

MR. BROWN: YEAH. I MEAN, I WOULDN'T WANT TO BE FLIPPANT ABOUT IT BY ANY MEANS.

THE COURT: RIGHT.

MR. BROWN: BUT, YOU KNOW, YOU CAN THINK OF THE POLICY CONSEQUENCES OF THE POSITIONS THAT PLAINTIFFS ARE TAKING ARE RATHER PROFOUND.

I MEAN, WE CAN'T HAVE -- I MEAN, I DON'T THINK THAT THE WIRETAP ACT, LET'S PUT IT THIS WAY, OR CIPA, WERE SET UP TO CRIMINALIZE THIRD PARTY WEBSITES FROM PROVIDING CONTENT TO FIRST PARTY WEB PAGES THAT WANTED TO DISPLAY THEIR CONTENT.

AND ONCE YOU UNDERSTAND HOW THIS WORKS, THAT IS THE CONSEQUENCE OF THEIR POSITION BECAUSE IT HAS NOTHING TO DO WITH FACEBOOK. LIKE I SAID, IT COULD BE TWITTER. IT COULD BE AN ADVERTISER WHO THE FIRST PARTY WEB PAGE DECIDED THAT THEY WANTED TO ADVERTISE ON THEIR SITE. IT COULD BE ANY THIRD PARTY.

SO IF THE ALLEGATIONS HERE MAKE OUT A WIRETAP ACT CLAIM, IT REALLY FUNDAMENTALLY MEANS THAT ANY TIME YOU HAVE A THIRD PARTY WEB PAGE THAT IS PROVIDING CONTENT TO ANOTHER WEB PAGE, THEY SHOULD BE LIABLE FOR INTERCEPTING COMMUNICATION, AND, THEREFORE, CRIMINALLY LIABLE UNDER THE WIRETAP ACT OR CIPA.

I DON'T THINK THAT'S A REASONABLE WAY TO INTERPRET THE STATUTE, AND I DON'T THINK THAT'S THE WAY IT WAS DRAFTED EITHER.

SO THERE WERE A FEW OTHER ARGUMENTS MADE, BUT I THINK I WOULD JUST TRANSITION TO THE STORED COMMUNICATIONS ACT AT THIS TIME, UNLESS YOUR HONOR HAD ANY OTHER QUESTIONS.

THE COURT: THAT'S FINE. I'D LIKE YOU TO TOUCH ON IT, WHENEVER YOU'RE READY TO, A LITTLE BIT ABOUT SOME OF THE STATE ALLEGATIONS, AND I HAVE JUST A FEW QUESTIONS ABOUT THAT.

BUT LET'S TALK ABOUT THE SCA.

MR. BROWN: SO REALLY OUR ARGUMENT IS NOT BASED ON TWO DIFFERENT GROUNDS HERE. AND REMEMBER THAT THE STORED COMMUNICATIONS ACT PROVIDES THAT A CLAIM AGAINST ANYONE WHO INTENTIONALLY ACCESSES WITHOUT AUTHORIZATION A FACILITY THROUGH WHICH AN ELECTRONIC COMMUNICATION SERVICE IS PROVIDED AND THEREBY OBTAINS, ALTERS OR PREVENTS AUTHORIZED ACCESS THROUGH A WIRE OR COMMUNICATION WHILE IT IS IN ELECTRONIC STORAGE.

AND WE HAVE CONTENDED THAT THE SECOND AMENDED COMPLAINT DOES NOT ADEQUATELY PLEAD ELECTRONIC STORAGE OR THAT THERE WAS A FACILITY THAT WAS ACCESSED AND THAT WOULD BE A FACILITY

THROUGH WHICH AN ELECTRONIC COMMUNICATIONS SERVICE PROVIDER.

WITH RESPECT TO ELECTRONIC STORAGE, AS THE COURT RULED PREVIOUSLY IN ITS ORDER ON THE FIRST AMENDED COMPLAINT, PLAINTIFFS INCLUDED ALLEGATIONS THAT THERE WERE PERSISTENT COOKIES PLACED ON THEIR COMPUTERS BY FACEBOOK, AND THE COURT HELD THAT THE PERSISTENT NATURE OF THE COOKIES, AT LEAST AS ALLEGED BY THE COMPLAINT, COULDN'T BE RECONCILED WITH THE TEMPORARY NATURE OF THE STORAGE CONTEMPLATED BY THE STORED COMMUNICATION ACT.

AND THAT'S -- THAT WAS YOUR ORDER AT PAGE 17.

THE STORED -- I'M SORRY, SCA AND SAC ARE QUITE SIMILAR. THE SECOND AMENDED COMPLAINT STILL ACKNOWLEDGES THAT THERE ARE -- THE COOKIES ARE PERSISTENT. THEY ALLEGE THAT THE COOKIES LAST FOR MONTHS OR YEARS. THAT'S -- YOU CAN SEE THAT IN PARAGRAPH 55 OF THE SECOND AMENDED COMPLAINT, AND, THEREFORE, THEY HAVEN'T CURED THAT DEFECT, AND SO THE SCA CLAIM SHOULD BE DISMISSED AGAIN ON THE SAME GROUND.

THEY'VE TRIED TO NOW COME BACK AND ADD A FEW ALLEGATIONS WHICH ARE REAL STRETCHES. THEY NOW SAY THAT SOMEHOW THE TOOLBAR THAT -- WHERE SOME PEOPLE WILL REACH A WEB PAGE BY INPUTTING THE URL, THAT THAT SOMEHOW CONSTITUTES ELECTRONIC STORAGE.

THEY ALLEGE THAT THE BROWSING HISTORY THAT IS STORED, AT LEAST DEPENDING ON HOW THE USER HAS THEIR BROWSER CONFIGURED, THAT THE BROWSING HISTORY IS ELECTRONIC STORAGE.

WE'VE BRIEFED THIS EXTENSIVELY, AND SO I'M NOT GOING TO TRY TO HIT EVERY SINGLE POINT HERE, BUT WE THINK THOSE SIMPLY DON'T FLY.

THERE'S NO ATTEMPT IN THE SAC TO EXPLAIN HOW THE URL THAT MIGHT BE IN THE TOOLBAR IS HANDLING A COMMUNICATION WHILE IT'S IN TRANSMISSION, IN THE MIDDLE OF TRANSMISSION AND THAT'S THE STANDARD.

REMEMBER THE IDEA HERE IS THAT THIS WOULD BE ACCESSING STORAGE OF A COMMUNICATION THAT IS INCIDENTAL TO THE TRANSMISSION ITSELF, A TEMPORARY STORAGE THAT IS INCIDENTAL TO THE TRANSMISSION.

THERE'S NOTHING ABOUT THE PUTTING A URL INTO THE TOOLBAR. THAT'S JUST SIMPLY A COMMAND THAT SOMEONE PUTS IN. EVEN ON THEIR ALLEGATIONS, THE COMMUNICATIONS ITSELF AND THE TOOLBAR IS NOT SORT OF HOLDING THAT IN STORAGE IN THE COURSE OF TRANSMITTING THE COMMUNICATION.

AND WE'VE CITED, BY THE WAY, THE TOYS R US CASE, THE NORTHERN DISTRICT COURT, STANDING FOR THE PROPOSITION THAT THE SCA -- PARDON ME -- ONLY PROTECTS ELECTRONIC COMMUNICATIONS STORED FOR A LIMITED TIME IN THE MIDDLE OF A TRANSMISSION, I.E., WHEN AN ELECTRONIC COMMUNICATIONS SERVICE TEMPORARILY STORES A COMMUNICATION WHILE WAITING TO DELIVER IT.

SO I THINK THAT WAS PROBABLY PUT MORE ARTFULLY THAN HOW I JUST TRIED TO EXPLAIN IT.

WITH RESPECT TO THIS NOTION THAT SOMEHOW THE PLAINTIFFS'

COMPUTERS OR THEIR WEB BROWSERS ON THEIR COMPUTERS ARE A FACILITY THROUGH WHICH AN ELECTRONIC COMMUNICATION SERVICE IS PROVIDED SIMPLY DOESN'T FLY, PARDON ME, UNDER THE CASE LAW. THE NICKELODEON CASE THAT WE CITE MAKES CLEAR THAT THERE'S THE VAST MAJORITY OF PUBLISHED AND NONPUBLISHED DECISIONS THAT HAVE CONSIDERED THIS ISSUE HAVE HELD THAT PEOPLE'S COMPUTERS CAN'T BE THE SORT OF FACILITY THROUGH WHICH AN ELECTRONIC COMMUNICATIONS SERVICE IS PROVIDED.

YOU KNOW, THE QUINTESSENTIAL EXAMPLE HERE WOULD BE THAT LET'S SAY THAT MICROSOFT, WHICH PROVIDES THE HOT MAIL E-MAIL SERVICE, AND THEY MAY HAVE REBRANDED THAT THESE DAYS BUT AT LEAST THEY USED TO, AND THEY HAVE A BUNCH OF E-MAIL ON THEIR SERVERS AND THAT'S THE FACILITY. THEY'RE THE ELECTRONIC COMMUNICATIONS SERVICE PROVIDER. THEY PROVIDE THIS SOFTWARE THAT HELPS YOU SEND COMMUNICATIONS TO ONE ANOTHER.

TO THE EXTENT THAT THEY'RE -- PARDON ME, THAT THEY'RE HOLDING TEMPORARY COPIES OF COMMUNICATIONS IN TEMPORARY STORAGE INCIDENTAL TO THE TRANSMISSION, THAT WOULD BE SORT OF THE QUINTESSENTIAL EXAMPLE. BUT WE HAVE CITED CASE AFTER CASE WHERE THE COURTS HAVE HELD THAT PLAINTIFFS' OWN COMPUTERS CAN'T BE THE SORT OF FACILITY THAT WERE CONTEMPLATED BY THE --

THE COURT: WAS THE THEORY ABOUT THIS, WHEN CONGRESS LOOKED AT THIS, I GET THE SENSE THAT IT WAS SOME OFFSITE SERVERS, OR WHATEVER THEY ARE, IN SOME BUILDING SOMEWHERE AND HOLDING ALL OF THIS INFORMATION AND THAT'S REALLY WHAT THEY HAD

IN MIND, AT LEAST THAT'S THE HISTORY OF THE STATUTE.

MR. BROWN: ABSOLUTELY. I MEAN, THIS WAS LAST AMENDED I THINK IN 1986 AND SO, YEAH, THE IDEA THAT THIS WOULD APPLY TO PEOPLE'S LAPTOPS AND THE BROWSING HISTORY STORED IN THEIR BROWSER ON THEIR LAPTOP WAS NOT SOMETHING THAT CONGRESS WAS CONTEMPLATING.

AND I THINK IF YOU REALLY LOOK CAREFULLY AT THE LANGUAGE OF THE STATUTE, IT'S ABUNDANTLY CLEAR THAT WHEN YOU SAY A FACILITY THROUGH WHICH THE ELECTRONIC COMMUNICATIONS SERVICES PROVIDED, THAT THEY DON'T HAVE IN MIND PEOPLE'S INDIVIDUAL COMPUTERS.

THE COURT: AND IT, AGAIN, PRESENTS THAT ISSUE THAT WE ALL STRUGGLE WITH THAT TECHNOLOGY IS OFTENTIMES SWIFTER THAN CONGRESSIONAL ACTION IN LAW THAT IS SUPPOSED TO REGULATE IT.

MR. BROWN: ABSOLUTELY. AND THERE HAVE BEEN CALLS FOR YEARS WHERE THE WIRETAP ACT AND THE STORED COMMUNICATIONS ACT TO BE UPDATED, BUT THEY HAVEN'T BEEN. AND WE'RE STUCK WITH THE STATUTES AS WORDED, BUT THEY CAN'T BE STRETCHED TO REACH CONDUCT THAT THE STATUTORY LANGUAGE DOESN'T APPLY TO OR THAT WAS NEVER INTENDED.

WERE THERE PARTICULAR STATE LAW CLAIMS THAT YOU --

THE COURT: I WAS JUST CURIOUS ABOUT PERHAPS THE INVASION OF PRIVACY ISSUES AND WHETHER OR NOT YOU THOUGHT THAT THERE WAS ANY 502 ACTION HERE, CALIFORNIA 502 ACTION, AND ALSO THE LARCENY.

MR. BROWN: OKAY. SO WITH RESPECT TO THE INVASION OF PRIVACY CLAIM, AND OBVIOUSLY THE INTRUSION UPON SECLUSION CLAIM IS CLOSELY RELATED TO IT. IT'S, I SUPPOSE, DISTINCT BUT THEY'RE OFTEN ANALYZED VERY CLOSELY TOGETHER.

THERE ARE A NUMBER OF CASES THAT WE HAVE CITED THAT STAND FOR THE PROPOSITION THAT VOLUNTARY DISCLOSURE OF INFORMATION TO THIRD PARTIES DOES NOT IMPLICATE A REASONABLE EXPECTATION OF PRIVACY NOR DOES IT CONSTITUTE A HIGHLY OFFENSIVE SORT OF INVASION OR AN EGREGIOUS BREACH OF SOCIAL NORM DEPENDING ON EXACTLY WHAT CLAIM YOU'RE TALKING ABOUT AND WHICH STANDARD APPLIES.

AND SOME OF THOSE CASES ARE PEOPLE VERSUS STIPO, S-T-I-P-O, WHICH WAS A CALIFORNIA APPELLATE CASE; THERE'S, AGAIN, LOW VERSUS LINKEDIN. THAT WAS A CASE THAT ADDRESSED THIS ISSUE, NOT JUST THE STANDING ISSUE. I REFERRED TO THIS EARLIER, BUT IN LOW VERSUS LINKEDIN, AND THIS IS 900 F. SUPP. 2D 1010, THE COURT THERE HELD THAT THERE WAS NO HIGHLY OFFENSIVE INVASION OF PRIVACY, EVEN IN CIRCUMSTANCES WHERE THE DEFENDANT HAD DISCLOSED USER BROWSING HISTORY. AGAIN, WE'RE BACK TO BROWSING HISTORY IN THAT CASE COUPLED WITH THE DIGITAL IDENTIFICATION PREDICTION OF THE USER AND DISCLOSED THOSE TO THIRD PARTIES IN VIOLATION OF LINKEDIN'S OWN POLICIES.

AND I THINK ONE THING THAT IS BROUGHT OUT BY DESCRIBING THAT FACT PATTERN, IT'S ILLUSTRATIVE OF WHAT A HIGH BAR IT IS TO CLEAR. I MEAN, THIS IS A PARTICULAR CLAIM WITH A PARTICULAR

SET OF STANDARDS AND THE STANDARD OF, YOU KNOW, EGREGIOUS BREACH OF SOCIAL NORMS IS EXTRAORDINARILY HIGH.

AND SO WE HAVE LOW VERSUS LINKEDIN AND IN ADDITION TO PEOPLE VERSUS STIPO, AND YOU ALSO HAVE THE IN RE IPHONE APPLICATION LITIGATION, AND IT'S 844 F. SUPP. 2D 1040. AND THAT WAS A CASE THAT DEALT WITH DISCLOSURE OF THIRD PARTIES OF PEOPLE'S UNIQUE DEVICE IDENTIFICATION INFORMATION, THEIR PERSONAL DATA, GEO LOCATION INFORMATION.

AND, AGAIN, EVEN IN THAT FACT PATTERN, WHATEVER THE COURT MAY HAVE THOUGHT ABOUT THE ALLEGATIONS, WHEN LOOKING AT THIS PARTICULAR CLAIM AND THIS PARTICULAR STANDARD, JUDGE KOH HELD THAT THAT WAS NOT AN EGREGIOUS BREACH OF SOCIAL NORMS.

WE'VE ALSO CITED THE GOOGLE PRIVACY POLICY LITIGATION. AND THIS IS ONE OF SEVERAL GOOGLE CASES THAT HAVE MADE THEIR WAY INTO THE BRIEFING. THIS IS 58 F. SUPP. 3D 968. AND THAT WAS A CASE THAT ALLEGED THAT GOOGLE HAD COMMINGLED INFORMATION THAT IT COLLECTED DURING THE PLAINTIFFS' USE OF A WHOLE VARIETY OF GOOGLE PRODUCTS. SO, FOR INSTANCE, SEARCH QUERIES, ADDRESS LOOKUP, YOUTUBE HISTORY. YOUTUBE IS OWNED BY GOOGLE. TIED THIS INFORMATION TO THE GMAIL ACCOUNT. SO A FAIRLY LARGE AGGREGATION OF PREVIOUSLY DISPARATE DATA. AND, AGAIN, THE COURT HELD THAT THIS CONDUCT DID NOT CONSTITUTE A HIGHLY OFFENSIVE INVASION.

AND NOTING THAT, QUOTE, "COURTS IN THIS DISTRICT HAVE CONSISTENTLY REFUSED TO CHARACTERIZE A DISCLOSURE OF COMMON

BASIC DIGITAL INFORMATION TO THIRD PARTIES AS SERIOUS OR EGREGIOUS VIOLATIONS OF SOCIAL NORMS."

AND WE'VE CITED OTHER CASES, AND I'LL STOP MAYBE THERE WITH A PARTICULAR DISCUSSION OF CASES, BUT ONE, I THINK, IMPORTANT THING TO NOTE, JUST TO PUT A MAYBE FINER POINT ON THIS, THE LAST THREE CASES THAT I DISCUSSED LOW AND THE IPHONE CASE AND THE GOOGLE CASE ALL DEALT WITH AGGREGATION OF DATA.

THERE'S BEEN SOME SUGGESTION HERE THAT, WELL, WE UNDERSTAND THAT IF INFORMATION WAS DISCLOSED TO A THIRD PARTY VOLUNTARILY ONE TIME, THAT THAT MAY NOT BE A PROBLEMATIC CAUSE OF ACTION BUT IF YOU DO IT SEVERAL TIMES AND IT GETS AGGREGATED, THEN THAT'S WHAT CAUSES THE PROBLEM.

SO I THINK THIS IS A PRETTY SIGNIFICANT POINT THAT AT LEAST THESE THREE CASES, THERE COULD BE OTHERS, BUT AS I WAS LOOKING BACK ON THE CASE LAW IN PREPARATION FOR THE ARGUMENT IT REALLY JUMPED OUT AT ME THAT THOSE THREE CASES DEAL DIRECTLY WITH THIS FACT PATTERN OF AGGREGATION OF INFORMATION.

SO I WOULD RESPECTFULLY SUGGEST THAT, YOU KNOW, THAT THEY HAVEN'T MET THE STANDARD HERE IN THIS CASE, AND I MIGHT JUST ADDRESS THE UNG DECISION IN THE SANTA CLARA SUPERIOR COURT WHICH THE PLAINTIFFS HAVE POINTED TO. AND THERE THE COURT DENIED THE DEMURRER ON THIS CLAIM IN A CASE THAT PRESENTED A SOMEWHAT SIMILAR FACT BECAUSE THE COMPLAINT WAS ITS OWN COMPLAINT AND HAD TO BE VIEWED THAT WAY.

BUT WHAT I WOULD SORT OF POINT OUT ABOUT THE UNG DECISION

AND WHY WE THINK IT NOT ONLY WAS WRONGLY DECIDED BUT REALLY SHOULDN'T BE CONSIDERED PERSUASIVE AUTHORITY TO YOUR HONOR, IS IT DIDN'T EVEN ATTEMPT TO DISCUSS THIS ENTIRE BODY OF CASE LAW THAT I'VE JUST BEEN DISCUSSING.

THIS ENTIRE BODY OF CASE LAW HOLDING AT A HIGH LEVEL THAT YOUR DISCLOSURE OF INFORMATION VOLUNTARILY TO THIRD PARTIES NEGATES A REASONABLE EXPECTATION OF PRIVACY OR MEANS THAT THERE ISN'T AN EGREGIOUS BREACH OF SOCIAL NORMS. NONE OF THAT CASE LAW WAS DEALT WITH IN THE OPINION AND THE COURT THERE REALLY RELIED SOLELY, I WOULD SAY, ON A CASE CALLED UNITED STATES VERSUS MAYNARD, M-A-Y-N-A-R-D, AND ULTIMATELY THAT CASE WAS AFFIRMED UNDER A DIFFERENT NAME, U.S. VERSUS JONES, BY THE U.S. SUPREME COURT.

BUT THAT CASE BASICALLY DEALT WITH POLICE SURVEILLANCE. SO THE POLICE WERE SURVEILLING A SUSPECT WITHOUT A WARRANT AND THEY PLACED A GPS DEVICE ON THIS PERSON'S JEEP FOR, LIKE, A MONTH, AND THEY GATHERED DATA 24 HOURS A DAY FOR A MONTH.

AND IT WAS THAT CASE THAT THE COURT, THE SUPERIOR COURT IN UNG SORT OF RELIED ON, BUT I FIND THAT TO BE QUITE A DIFFERENT SET OF CIRCUMSTANCES. I THINK COURTS HISTORICALLY HAVE DEALT WITH SORT OF LOCATION TRACKING AND GEO LOCATION ISSUES IN A SIGNIFICANTLY DIFFERENT WAY. I ALSO THINK THAT THE FACT THAT THAT WAS A CASE INVOLVING POLICE SURVEILLANCE AND WARRANTS IS SIGNIFICANT.

YOU KNOW, COURTS HAVE OBVIOUSLY FOR UNDERSTANDABLE REASONS

IN THE DEMOCRACY THAT WE LIVE IN HAVE TAKEN A CERTAIN VIEW AND WANTED TO MAKE SURE THAT THEY WERE REIGNING IN GOVERNMENT SURVEILLANCE CONDUCT.

SO I WOULD JUST SAY THAT I DON'T THINK IT WAS APPROPRIATE TO REST THE DECISION ON MAYNARD, AND I ALSO DON'T THINK THE COURT HAS GRAPPLED WITH THIS OTHER BODY OF CASE LAW WHICH I DO THINK IS PERSUASIVE AND IN SOME CASES BINDING SUCH AS THE FORRESTER CASE BY THE NINTH CIRCUIT ON THIS COURT. AND SO I DON'T THINK IT IS PERSUASIVE EITHER.

THE COURT: OKAY. GREAT.

MR. BROWN: LET ME JUST MAKE SURE THAT THERE'S NOTHING ELSE TO HIT ON THOSE CLAIMS. AND THERE ARE OBVIOUSLY A NUMBER OF ARGUMENTS, BUT I'M ALSO COGNIZANT OF NEEDING TO KEEP THIS MOVING ALONG HERE.

ON THE LARCENY CLAIMS, BECAUSE YOUR HONOR HAD MENTIONED THAT ONE, OR THE CLAIM, IT'S A SINGLE CLAIM, THEY CITED BOTH PENAL CODE SECTION 484 AS WELL AS PENAL CODE SECTION 496.

JUST FOR CLARITY, WE ADDRESS THIS IN OUR BRIEFS, BUT THERE'S NO PRIVATE RIGHT OF ACTION UNDER PENAL CODE SECTION 484, AND WE'VE CITED AUTHORITIES IN OUR MOTION AT PAGE 38. SO THAT'S OUT.

IN TERMS OF PENAL CODE 496, BASICALLY WHAT YOU HAVE TO ALLEGE HERE IS THAT YOU BOUGHT OR RECEIVED PROPERTY KNOWING THAT IT HAD BEEN OBTAINED BY THEFT OR EXTORTION OR YOU CONCEALED IT OR WITHHELD IT FROM THE OWNER IN SOME WAY.

BASICALLY WHAT THIS STATUTE WAS, IT'S A STATUTE DESIGNED TO CRIMINALIZE FENCING OF STOLEN GOODS, RIGHT, AND RESELLING IT ON THE BLACK MARKET.

SO WHETHER YOU'RE BUYING THOSE GOODS IN ORDER TO RESALE THEM OR WHETHER YOU'RE TAKING POSSESSION OF THEM TO HOLD THEM FOR A WHILE FOR THE PERSON WHO STOLE THEM OR WHAT HAVE YOU, THIS IS, TOO, A CRIMINALIZED OFFENSE.

THE COURT: I GUESS I WAS INTRIGUED BY THIS, AND I'LL HEAR AGAIN FROM YOUR COLLEAGUES, BUT WHERE IS THE THEFT HERE? WHAT IS THE THEFT?

MR. BROWN: YEAH. WELL, THERE'S NOT ONLY NO PROPERTY IN THE FIRST PLACE SO THAT'S SORT OF THE THRESHOLD ISSUE, AND THERE'S NO THEFT BECAUSE, WELL, FIRST OF ALL, I MEAN, TO EVEN TALK IN TERMS OF THEFT IN A FACT PATTERN LIKE THIS IS ALMOST ABSURD, FRANKLY.

BUT THE FACT THAT THE, QUOTE-UNQUOTE, COMMUNICATION WAS COMING DIRECTLY FROM THE PLAINTIFFS TO FACEBOOK SHOWS THAT THERE'S NO THEFT THERE. THE URL THAT WAS BEING TRANSMITTED TO FACEBOOK WAS COMING RIGHT FROM THE INDIVIDUAL, RIGHT FROM THE PLAINTIFFS' OWN BROWSER. SO THERE'S NO THEFT THERE.

AND, YOU KNOW, EVEN IF YOU COULD SOMEHOW CONJURE UP SOME SCENARIO IN WHICH YOU COULD SAY THAT THIS URL WAS STOLEN, CERTAINLY THERE'S BEEN NO SHOWING THAT FACEBOOK HAD REASON TO KNOW THAT THESE URL'S WERE SOMEHOW STOLEN.

AGAIN, IT ALMOST FEELS ABSURD TO BE TALKING LIKE THAT

BECAUSE I THINK IT'S SUCH A POOR FIT BETWEEN THE CONDUCT THAT IS ALLEGED AND THIS PARTICULAR CAUSE OF ACTION.

YOU KNOW, I MEAN, THERE ARE A NUMBER OF ARGUMENTS HERE BUT I MIGHT JUST ALSO POINT OUT THAT FACEBOOK DIDN'T SELL ANY REFERRED URL'S EITHER. YOU KNOW, THE PLAINTIFFS SPECULATE THAT FACEBOOK CHARGED MORE TO ADVERTISERS BASED ON USE OF THIS INFORMATION, AND THEY SUGGEST THAT IN THEIR BRIEFING, BUT THERE'S NO ALLEGATIONS CITED TO IN THE SECOND AMENDED COMPLAINT FOR THAT THEORY, SHALL WE CALL IT.

AND THEY ALSO DON'T CITE ANY CASE LAW TO SUPPORT THIS NOTION OR IDEA THAT THE SALE OF ADVERTISING SOMEHOW AMOUNTS TO SALE OF SUPPOSED PROPERTY THAT THEY ALLEGE WAS STOLEN.

AGAIN, I JUST THINK THAT IT'S ALMOST DIFFICULT TO TALK ABOUT THIS CAUSE OF ACTION BECAUSE IT'S SUCH A POOR FIT BETWEEN WHAT THE STATUTE WAS DESIGNED TO COVER AND WHAT THEY'RE ALLEGING HERE BUT IT CLEARLY, FOR A NUMBER OF REASONS, IN SEVERAL ELEMENTS THEY HAVE FAILED IN THEIR PLEADING AND IT SHOULD BE DISMISSED.

THE COURT: ALL RIGHT. THANK YOU VERY MUCH.

COUNSEL, DO YOU RISE TO CONCEDE THE MOTION, COUNSEL?

MR. STRAITE: I'M SORRY?

THE COURT: DO YOU RISE TO CONCEDE THE MOTION?

MR. STRAITE: NO, YOUR HONOR. I'M SURE MY OPPONENTS WOULD APPRECIATE THAT, BUT I DO HAVE PARAGRAPH 60 OPEN HERE, AND I APPRECIATE YOU DRAWING MY ATTENTION TO.

AGAIN, YOUR HONOR, MY NAME IS DAVID STRAITE REPRESENTING THE PLAINTIFFS AND THE PUNITIVE CLASS. THANK YOU FOR HAVING THIS EXTENSIVE ARGUMENT. WE DO APPRECIATE THE OPPORTUNITY TO ADDRESS AND HIGHLIGHT SOME OF THE ISSUES THAT WE THINK ARE IMPORTANT.

IT'S BEEN A FEW YEARS SINCE WE'VE BEEN BEFORE YOUR HONOR AND A NUMBER OF THINGS HAVE CHANGED. I HAVE A FEW MORE GREY HAIRS AND A FEW OTHER GOOD THINGS HAVE HAPPENED.

I SHARE YOUR LAMENT ABOUT PERHAPS BEING IN A CERTAIN VINTAGE, AND SO WE BROUGHT IN A RINGER HERE, WITH YOUR PERMISSION. THIS IS JAY BARNES, AND MY COLLEAGUE AND HE'S ON THE STEERING COMMITTEE AS OF YESTERDAY. THANK YOU FOR THAT ORDER.

MR. BARNES ARGUED MANY OF THESE ISSUES BEFORE THE FEDERAL CIRCUIT ON BEHALF OF THE PLAINTIFFS. HE WAS THE ONLY LAWYER THAT DID SO, AND WE'VE ASKED HIM TO HELP US WITH SOME OF THE TECHNICAL POINTS THAT MAY BE MORE NATIVE TO HIS UNDERSTANDING GIVEN HIS YOUTH AND EXPERIENCE. AND SO WE APPRECIATE HIM BEING HERE.

WITH YOUR PERMISSION, YOUR HONOR, I'D LIKE TO BRIEFLY HIGHLIGHT WHAT HAS CHANGED IN THE LAST COUPLE OF YEARS AND ADDRESS SOME OF THE ISSUES THAT HAVE BEEN RAISED EARLIER AND THEN FOR SOME OF THE TECHNICAL ARGUMENTS, TURN IT OVER TO MR. BARNES FOR ANY QUESTIONS YOU MIGHT HAVE, AND HE MIGHT HAVE SOME INTRODUCTIONS AS WELL.

THE COURT: THAT'S FINE. THANK YOU.

MR. STRAITE: IN THE LAST FEW YEARS WHAT HAS HAPPENED? OBVIOUSLY WE HAVE HAD OUR ORAL ARGUMENTS ON OCTOBER 25, 2012, ON THE FIRST AMENDED COMPLAINT. AND MR. GRYGIEL, WHO IS AT THE TABLE HERE, AND I ARGUED BEFORE YOU.

AND SINCE THAT TIME OBVIOUSLY THERE HAS BEEN SOME LIMITED DISCOVERY, LIMITED BY THE NUMBER OF DOCUMENTS BUT PRETTY DAMNING IN TERMS OF CONTENT. WE APPENDED 11 DOCUMENTS UNDER SEAL PLUS ADDITIONAL DOCUMENTS OF THE COMPLAINT. WE SAY THEY SPEAK FOR THEMSELVES. THIS IS OPEN COURT, AND WE CAN'T DISCUSS THEM BECAUSE THEY'RE UNDER SEAL, BUT THEY'RE QUOTED LIBERALLY THROUGHOUT THE COMPLAINT, AND WE THINK THEY STRENGTHEN THIS CASE IN WAYS THAT ARE FAIRLY PROFOUND.

IN ADDITION, THEY ALSO PROVIDE AN ADDITIONAL BASIS FOR THESE CLAIMS, AN ADDITIONAL FACTUAL BASIS THAT WE WEREN'T AWARE OF.

IN THE RESPONSE TO THE SEALING MOTION, COUNSEL FOR FACEBOOK CONFIRMED THAT THE INFORMATION IS STILL CONFIDENTIAL, MEANING IT'S NOT IN THE PUBLIC REALM. AND EVEN IN OUR VIEW PLAINTIFFS DON'T KNOW THAT THERE IS NOT A SECOND BASIS FOR THE COMPLAINT, AND WE FEEL THAT IS -- HOPE THAT IS SOMETHING THAT WILL BE REMEDIED IN THE MOTION TO SEAL AND THE DOCUMENTS WILL BE UNSEALED, BUT THEY CERTAINLY SUPPORT THESE CLAIMS WITH THAT SECOND BASIS.

WE ALSO FILED A SECOND AMENDED COMPLAINT FOLLOWING THIS

COURT'S ORDER, AND FOLLOWING THIS COURT'S ORDER THERE WAS ALSO THE DECISION IN GOOGLE COOKIE PLACEMENT. ALL OF THESE ARE DEVELOPMENTS.

LET'S START FIRST WITH THE SECOND AMENDED COMPLAINT. WHAT CHANGED IN ADDITION TO PROVIDING THESE ADDITIONAL FACTS THAT WE'VE COVERED IN DISCOVERY?

WE ALSO ARE MORE CLEARLY ASSERTING AN ADDITIONAL BASIS FOR INJURY. WE'VE FOCUSSED IN THE FIRST AMENDED COMPLAINT ON THE STATUTORY STANDING AND THEN FOR COMMON LAW STANDING YOU CALLED IT A CONSTITUTIONAL STANDING IN YOUR ORDER, WE FOCUSSED ON ECONOMIC DAMAGE. AND I THINK WE WERE REMISS IN NOT FOCUSSING MORE CLOSER ON NONECONOMIC HARM, THAT WOULD BE THE LOSS OF PRIVACY FROM THE TWO PRIVACY CLAIMS THAT WERE MUCH MORE EXPLICIT. WE PROVIDED PARAGRAPH AFTER PARAGRAPH OF FACTS TO SUPPORT THE CONCLUSION THAT THE THIRD CIRCUIT REACHED A FEW MONTHS AGO THAT THIS BEHAVIOR, WHICH YOU REFERRED TO AS FACTUALLY INDISTINGUISHABLE, AND IT'S CERTAINLY TRUE WITH RESPECT TO OUR, I.E., SUBCLASS, IS AN EGREGIOUS BREACH OF SOCIAL NORMS HERE.

WE'RE NOT TALKING ABOUT A WAY THE ENGINE HEAD NORMALLY WORKS. WE'RE TALKING ABOUT UNAUTHORIZED TRACKING OF URL'S OF THE PLAINTIFFS WHEN THEY THOUGHT THEY WERE LOGGED ON. IN FACT, WHEN THEY WERE, IN FACT, LOGGED OUT.

AND AFTER INDEPENDENT RESEARCH HAS UNCOVERED WHAT WAS GOING ON, FACEBOOK ADMITTED THEY COULDN'T HAVE DONE IT WITHOUT

CONSENT AND DISCLOSURE. SO THEY ADMITTED THAT THE ACTIONS THAT OCCURRED WERE IMPROPER AND THESE CAUSES OF ACTION.

SO THAT'S THE FIRST BIG CHANGE THAT WE FOCUSSED MUCH MORE STRONGLY ON THE NONECONOMIC BASIS FOR STANDING.

WE ALSO ALLEGE AN ADDITIONAL BASIS FOR ECONOMIC INJURY. OBVIOUSLY, YOU KNOW, THIS COURT WAS VERY GRACIOUS IN SAYING THAT WE HAD PLED MONETARY VALUE OF THE BROWSING HISTORY. WE KNOW IT DOES HAVE MONETARY VALUE BUT ABSENT THE SHOWING THAT THE PLAINTIFFS LOST THE ABILITY TO MONETIZE THAT DATA THEMSELVES, THEN THERE WAS THE ECONOMIC INJURY WITH RESPECT TO THAT THEORY. WE'VE NOW ALLEGED ALSO ADDITIONALLY WITH RESPECT TO BURDENING OF COMPUTER RESOURCES.

THESE COOKIES, WHICH ARE ACTUALLY DISCUSSED IN DETAIL ON PARAGRAPH 58 OF THE CHART ON THE PREVIOUS PAGE OF THE COMPLAINT, THESE ARE A NUMBER OF COOKIES THAT ARE PRESENT ON THE BROWSER WHEN A FACEBOOK USER INTERACTS WITH THE USER INTERNET.

ONE COOKIE IS MISSING FROM THIS CHART AND THAT IS THE URL OF THE PREVIOUS WEB PAGE THAT THE USER WAS VISITING. THAT URL, NOT JUST THE I.P. ADDRESS, BUT THE FULL URL IS CONVERTED INTO AN ADDITIONAL COOKIE WHICH IS THEN TRANSMITTED WITH ALL OF THIS OTHER DATA TO FACEBOOK EVERY TIME A USER INTERACTS WITH A WEB PAGE, WITH FACEBOOK FUNCTIONALITY.

OUR LAST COUNT WAS 7.5 MILLION WEBSITES HAVE FACEBOOK FUNCTIONALITY, AND THAT'S THE BASIC BULK OF THE INTERNET AS

NORMAL CONSUMERS USE IT. AND SO FOR THOSE PEOPLE WHO SURF THE WEB A LOT, SEVERAL HUNDRED TIMES A DAY THEIR COMPUTERS ARE CALLING UP TO FACEBOOK AND PROVIDING THEM WITH THE WEB BROWSER HISTORY EVERY DAY, EVERY WEEK. IT COMES OUT TO ABOUT 30 BILLION COMMUNICATIONS EVERY DAY ACROSS THE COUNTRY. THAT'S A HUGE NUMBER.

THE THIRD CIRCUIT FACING SIMILAR TYPES OF FACTS FOUND THE TRACKING OF THAT INFORMATION TO BE A SIMILAR EGREGIOUS BREACH OF SOCIAL NORMS.

AN ADDITIONAL CHANGE WE MADE, YOUR HONOR, IN THE SECOND AMENDED COMPLAINT WHICH I JUST ALLUDED TO IS THAT WE FOCUSSED ON URL'S RATHER THAN I.P. ADDRESSES. YOUR ORDER OF OCTOBER 23RD, EMPHASIZED THAT THERE MAY NOT BE REASONABLE EXPECTATION OF PRIVACY IN THE I.P. ADDRESSES. THAT WOULD JUST BE THE DOMAIN NAME, WWW.CNN.COM, THE I.P. ADDRESS, THERE MAY NOT BE A REASONABLE EXPECTATION OF PRIVACY.

SO WE FIXED THAT IN THE SECOND AMENDED COMPLAINT AND ALLEGED MORE CLEARLY THAT WE'RE TALKING ABOUT URL'S. WE NO LONGER ARE FOCUSSING ON THE MERE I.P. ADDRESS. IT'S THE LONGER URL WHICH HAS THE CONTENT OF THE COMMUNICATION WITH THE FIRST PARTY WEBSITE. IT COULD BE THE NAME OF THE ARTICLE. WE'VE -- I GUESS WE'RE TALKING ABOUT FOCUSSING ON HERPES AND ORIGINALLY I THINK WE TALKED ABOUT MENTAL HEALTH WEBSITES BUT THAT MAY FIT TOO CLOSE TO HOME TO MOST LAWYERS SO WE CHANGED IT TO SOMETHING ELSE.

CERTAINLY WE WERE LOOKING FOR A CONTENT THAT WAS SOCIALLY STIGMATIZING IN THE PURPOSE WHICH THE BELGIUM PRIVACY REPORT CITED IN PARAGRAPH 58 OF THE COMPLAINT ALSO WANTED TO FOCUS ON SOCIALLY STIGMATIZING CONTENT TO REALLY DRIVE HOME THE POINT HOW PERNICIOUS THIS TRACKING IS.

AND THIS CONTENT, WHETHER OR NOT IT HAS QUERY SEARCH RESULTS, WHETHER OR NOT IT HAS YOUR SEARCH TERM YOU TYPED IN OR IF IT'S MERELY A SUMMARY OF THE CONTENT OF THE ARTICLE IS CONTENT. THIS IS RECOGNIZED IN WAYS THAT MR. BARNES WILL FOCUS ON IN JUST A MINUTE. BUT THAT IS SOMETHING THAT WE ADDED WITH ALMOST SUMMARY JUDGMENT DETAIL IN THE AMENDED COMPLAINT, AND WE HOPE THAT IT HELPS.

WE ALSO, AS COUNSEL FOR FACEBOOK POINTED OUT, MORE CLEARLY IDENTIFIED THAT THERE ARE TWO COMMUNICATIONS HERE. IT'S NOT JUST ONE COMMUNICATION TO FACEBOOK. THE COMMUNICATION WE CARE MOST ABOUT IS THE COMMUNICATION BETWEEN THE PLAINTIFFS AND THE FIRST PARTY WEBSITE. HERE IT'S WAL-MART IN PARAGRAPH 60, BUT IT COULD BE ANY FIRST PARTY WEBSITE THAT HAS FACEBOOK FUNCTIONALITY, THE LIKE BUTTON.

THAT COMMUNICATION IS CONTAINED CONTENT BACK AND FORTH TO GET POST REQUEST IS A PRIVATE COMMUNICATION BETWEEN THE PLAINTIFF AND A FIRST PARTY TO THAT CONVERSATION. SIMULTANEOUSLY, AND, OF COURSE, MR. BARNES WILL EXPLAIN THIS IN MORE DETAIL, BUT SIMULTANEOUSLY WITH THAT COMMUNICATION, A COPY OF THE COMMUNICATION IS THEN PACKAGED AND SENT OFF TO FACEBOOK

IN A SECOND COMMUNICATION.

SO, YES, WHAT THEY SAID IN THE COMMUNICATION, BUT IT'S NOT VOLUNTARY. THESE COMPUTERS ARE SENDING THESE COMMUNICATIONS WITHOUT THE KNOWLEDGE OR CONSENT OF THE USER BECAUSE THEY CONTAIN FIRST IDENTIFYING INFORMATION WHICH FACEBOOK HAD PROMISED THEY WOULDN'T GATHER IF YOU WERE LOGGED OUT.

THE COURT: THAT'S THE BOTTOM PART OF PARAGRAPH 60?

MR. STRAITE: YES, YOUR HONOR. YES, YOUR HONOR. AND SO ALTHOUGH THERE IS A SECOND COMMUNICATION, IT CONTAINS A COPY OF THE INTERCEPTED FIRST CONVERSATION IN REAL TIME.

THE COURT: SAY THAT AGAIN. YOU USED THE MAGIC WORD "INTERCEPTED."

MR. STRAITE: YES.

THE COURT: SO YOUR POSITION IS THAT THERE WASN'T -- THAT'S WHERE THE INTERCEPTION TAKES PLACE?

MR. STRAITE: THE INTERCEPTION ON THAT FIRST COMMUNICATION, PARAGRAPH 60, THE COMMUNICATION WITH WAL-MART IS BEING INTERCEPTED IN REAL TIME PACKAGED INTO A COOKIE ALONG WITH ALL OF THESE OTHER COOKIES FOR PARAGRAPH 58 AND THEN COMMUNICATED TO FACEBOOK SIMULTANEOUSLY WITH THE COMMUNICATION WITH WAL-MART.

THE COURT: WHO IS DOING THE INTERCEPTION?

MR. STRAITE: MR. BARNES CAN SPEAK IN DETAIL TO THAT. WOULD IT BE OKAY IF I TURN OVER THE TECHNICAL DISCUSSION TO HIM?

THE COURT: I DON'T WANT TO INTERRUPT YOUR PRESENTATION. SO IF MR. BARNES IS GOING TO --

MR. STRAITE: IT MIGHT BE A GOOD TIME FOR MR. BARNES TO ADDRESS.

MR. BARNES: OKAY. ON INTERCEPTION, IF YOU LOOK AT PARAGRAPH 60 IS A GOOD EXPLANATION OF IT THERE. AND IT'S HARD TO NUMBER THE SEQUENCE PERFECTLY BECAUSE IT'S NOT -- IT DOESN'T HAPPEN LIKE CONVERSATIONS HAPPEN IN THE REAL WORLD. EVERYTHING IS --

THE COURT: YOU SAID MILLISECONDS, I THINK.

MR. BARNES: MILLISECONDS. EVERYTHING IS SIMULTANEOUS.

AND IF YOU LOOK AT PARAGRAPH 184, WHAT WE SAY IS, IN FACT, FACEBOOK RECEIVED THE COMMUNICATION, THEY ACQUIRED THE COMMUNICATION BETWEEN THE USER AND THE WEBSITE WITH WHICH THEY'RE COMMUNICATING BEFORE THE COMMUNICATION BETWEEN THE PLAINTIFFS AND THE VARIOUS WEBSITES WERE COMPLETED.

SO WHAT HAPPENS IS THE USER CLICKS THE ENTER BUTTON IT SAYS GET WAL-MART.COM, SLASH, TOWELS FOR MY KID'S TOWELS ON SALE, RIGHT?

WAL-MART SENDS BACK INSTRUCTIONS. THEY START FILLING OUT THE WEB PAGE. IMMEDIATELY THE PLAINTIFFS' WEB BROWSER SENDS ANOTHER GET REQUEST TO FACEBOOK. THE PLAINTIFF DOESN'T KNOW ANYTHING ABOUT THIS GET REQUEST. FACEBOOK IN THIS CASE HAS PROMISED THAT THEY'RE NOT GOING TO TRACK THIS IN A PERSONALLY

IDENTIFIABLE WAY, BUT YET FACEBOOK DOES. AND FACEBOOK RECEIVES THAT SEPARATE BUT SIMULTANEOUS COMMUNICATION.

THE COURT: FROM THE USER'S COMPUTER?

MR. BARNES: FROM THE USER'S WEB BROWSER. BUT THE USER'S WEB BROWSER IS DIFFERENT THAN THE USER. IT IS A TOOL THAT THEY USER USES TO SEND AND RECEIVE COMMUNICATIONS, BUT THE WEB BROWSER CAN DO THINGS AND CAN BASICALLY BE HIJACKED BY SOMEONE ELSE, SOME OTHER COMPANY THAT INSTRUCTS IT ON WHAT TO DO WITHOUT THE ACTUAL USER HAVING DONE ANYTHING, AND THAT'S WHAT HAPPENED IN THIS CASE. THE USER HAS NO IDEA THAT THE INFORMATION IS BEING SENT TO FACEBOOK.

AND HERE'S WHAT IS INTERESTING ABOUT THIS ARGUMENT. THE FIRST CIRCUIT HEARD THE IDENTICAL ARGUMENT IN THE PHARMATRAK CASE. WHAT THE FIRST CIRCUIT SAID, AND THEY SUMMARIZED THE ARGUMENT, "PHARMATRAK ARGUES THAT THERE IS NO INTERCEPTION BECAUSE THERE WERE ALWAYS TWO SEPARATE COMMUNICATIONS, ONE BETWEEN THE WEB USER AND THE PHARMACEUTICAL CLIENT," WHICH IN THIS CASE WOULD BE WAL-MART, AND THE OTHER BETWEEN THE WEB USER AND PHARMATRAK.

THIS ARGUMENT FAILS FOR TWO REASONS. FIRST, AS A MATTER OF LAW YOU CAN SEARCH ADOPTING A NARROW READING ONLY REQUIRES THAT THE ACQUISITION OCCUR AT THE SAME TIME AS THE TRANSMISSION AND SEPARATE BUT SIMULTANEOUS AND IDENTICAL COMMUNICATIONS SATISFY EVEN THE STRICTEST REAL TIME REQUIREMENT.

PHARMATRAK WENT ON TO SAY, AND THIS WAS A COOKIE CASE,

THEY WORK BASICALLY THE SAME WAY NOW THAT THEY DID WHEN THE FIRST CIRCUIT TOOK THE PHARMATRAK CASE. THEY SAID THAT COOKIES WERE EFFECTIVELY AN AUTOMATIC ROUTING PROGRAM, CODE AUTOMATICALLY DUPLICATED THE PARTY COMMUNICATION BETWEEN THE USER AND THE WEBSITE WHICH THEY WERE COMMUNICATING AND SENT IT OFF TO THE THIRD PARTY.

AND THE PHARMATRAK COURT FLATLY REJECTED THIS ARGUMENT THAT THIS WAS NOT AN INTERCEPTION, AND, FRANKLY, I THINK IT'S A DANGEROUS ARGUMENT FOR THE WIRETAP ACT AS A WHOLE BECAUSE IF YOU THINK OF THE BRICK AND MORTAR EXAMPLE, AND IN ONE WAY YOU COULD HAVE A WIRETAP VIOLATION IS A PERSON WHO PUT A BUG ON A TELEPHONE, ON A PERSON'S TELEPHONE.

WHEN THEY PUT THAT BUG ON THE TELEPHONE, IT CAUSES THE TELEPHONE TO DIRECTLY SEND THE COMMUNICATION THAT THE VICTIM IS SENDING FROM THAT PHONE TO WHEREVER THE BUG IS DIRECTING THE INFORMATION TO GO.

AND SO IF FACEBOOK IS CORRECT, THEN PLACING A BUG ON A TELEPHONE, PERHAPS, IS NO LONGER AN INTERCEPTION BECAUSE THAT'S COMMUNICATION THAT ORIGINATES WITH THE VICTIM'S TELEPHONE AND ULTIMATELY ENDS UP WITH THE DEFENDANT.

SO I THINK THE INTERCEPTION SHOULD NOT BE WELL TAKEN AND IF WE CAN -- DO YOU WANT TO GO ON TO THE FURTHER WIRETAP CLAIMS? I DON'T KNOW IF YOU WOULD LIKE TO HEAR MORE FROM MR. STRAITE ON STANDING.

MR. STRAITE: WELL, OBVIOUSLY, YOUR HONOR, YOU CAN

SEE WHY WE BROUGHT IN THE RINGER HERE, BUT IF I MAY JUST FINISH UP SOME OF THE DISCUSSION ON STANDING AND THE REST OF THE TECHNICAL POINTS WILL BE BETTER ADDRESSED BY MR. BARNES. THAT'S A GREAT INTRODUCTION TO WHAT YOU'LL BE HEARING IN JUST A MOMENT HERE.

OTHER CHANGES THAT HAVE HAPPENED OBVIOUSLY SINCE YOUR OCTOBER 23RD ORDER, THE DECISION IN THE GOOGLE COOKIE PLACEMENT, THAT'S AN IMPORTANT CASE. I'VE CALLED IT A LANDMARK CASE. A NUMBER OF OTHER COURTS ARE LOOKING AT THAT CASE, AND THERE'S A CASE IN NEW YORK RIGHT NOW THAT IS CONSIDERING THE IMPORT OF THAT CASE.

AND YOU ASKED COUNSEL FOR FACEBOOK WHETHER IT CAN BE -- THAT DECISION CAN BE RECONCILED WITH OUR ARGUMENTS HERE AND THE ANSWER IS, NO, OF COURSE, IT CAN'T BE. THEY'RE IRRECONCILABLE. SO THIS COURT WILL HAVE TO UNFORTUNATELY ADDRESS WHETHER TO DISAGREE WITH THE THIRD CIRCUIT AND ADOPT FACEBOOK'S ARGUMENTS OR, NOT AND THERE IS NO WAY TO RECONCILE TO BE HELD THERE.

IMPORTANTLY ON STANDING THE THIRD CIRCUIT ESTABLISHED A CLEAN LINE AND THAT'S AN IMPORTANT PART OF THAT HOLDING THAT NO MATTER WHAT WE SAY WHETHER THERE'S A CLAIM ALLEGED, WHETHER OR NOT ALL OF THE ELEMENTS ARE PROPERLY ALLEGED, THAT'S A 12(B)(6) ARGUMENT.

BY FACEBOOK'S LOGIC THEY'RE SAYING THAT ANY TIME THEY HAVE A 12(B)(6) ARGUMENT, THEY AUTOMATICALLY HAVE A 12(B)(1) ARGUMENT, AND THAT'S OBVIOUSLY NOT THE CASE.

BY US NOW FOCUSSING MORE STRONGLY ON THE NONECONOMIC ARGUMENTS HERE, WE BELIEVE THAT UNDER THE ERIE DOCTRINE AND THE OTHER DOCTRINE THAT WE TALKED ABOUT, IT'S A FAIRLY CLEAR AND EASY ANSWER AND, OF COURSE, THERE IS STANDING. IF THERE IS INJURY IN FACT UNDER STATE LAW, THERE IS INJURY IN FACT UNDER ARTICLE III.

IN THE REPLY BRIEF, OBVIOUSLY WE HAVEN'T HAD THE SURREPLY BRIEF SO I'LL COMMENT ON WHAT WAS SAID IN THE REPLY, FACEBOOK ARGUED THAT NINTH CIRCUIT LAW CLEARLY DISAGREES WITH OUR VIEW OF ERIE. I DON'T THINK THAT'S THE CASE BECAUSE I THINK FACEBOOK CONFUSED OUR ARGUMENT WHEN WE SAID THAT THERE WAS -- IF THERE'S INJURY UNDER STATE LAW, THEN THERE'S ARTICLE III. AND, IN FACT, WHAT THESE NINTH CIRCUIT CASES SAY IS THAT JUST BECAUSE THERE'S STANDING IN STATE COURT DOESN'T NECESSARILY MEAN THERE'S STANDING IN FEDERAL COURT, AND WE WOULD AGREE WITH ALL OF THOSE DECISIONS.

SO, FOR EXAMPLE, JUST A QUICK RUN THROUGH OF THE CASES, FACEBOOK CITED LEE VERSUS AMERICAN NATIONAL INSURANCE. THE REASON WHY THE PLAINTIFFS WOULD HAVE STANDING IN STATE COURT IS BECAUSE CALIFORNIA IS A VERY BROAD STANDING RULE FOR TAXPAYERS. AND THAT'S NOT THE CASE IN THE FEDERAL COURT.

THERE THE QUESTION IS CAN AN UNINJURED PLAINTIFF SUE FOR INJURY TO OTHER PLAINTIFFS? CALIFORNIA SAYS, YES. THE FEDERAL COURT, OF COURSE NOT. BUT THAT'S NOT THE FACTS HERE. HERE THESE FOUR PLAINTIFFS HAVE ALLEGED INJURY TO THEMSELVES. OTHER

THAN THE CLASS ACTION CONTEXT, THEY'RE NOT LOOKING TO ASSERT REMEDIES TO OTHER PEOPLE.

SAME EXACT SITUATION IN FIEDLER VERSUS CLARK. THAT'S THE CASE FROM HAWAII WITH THE PINEAPPLE GROWERS AND THERE WERE FOUR STATUTES THAT WERE ALLEGEDLY VIOLATED AND NONE OF THEM HAD A PRIVATE RIGHT OF ACTION, BUT THERE WAS A THEORY THAT THE HAWAII CONSTITUTION ALLOWS FOR PRIVATE ATTORNEY GENERAL STANDING TO ASSERT CLAIMS ON BEHALF OF OTHER PEOPLE EVEN IF YOU WEREN'T INJURED. AGAIN, THE NINTH CIRCUIT SAID, NO, THAT'S NOT THE CASE, JUST BECAUSE YOU HAVE STANDING IN HAWAII DOESN'T MEAN YOU HAVE STANDING IN FEDERAL COURT, AND WE AGREE WITH THAT BECAUSE THAT'S A PRIVATE ATTORNEY GENERAL STANDING.

AND SAME THING WITH BEGAY VERSUS KERR-MCGEE CASE AND THE ARIZONA COURTS MAY OR MAY NOT HAVE JURISDICTION. THAT HAS NO IMPACT ON WHETHER THERE IS DIVERSITY JURISDICTION AND THE FEDERAL COURT -- IN ARIZONA THE JURISDICTIONAL ISSUE WAS REVERSED WHERE THERE WAS FEDERAL JURISDICTION BUT NOT THE STATE STANDING.

THERE WAS.

WALLACE VERSUS CONAGRA WHICH DISCUSSES THESE ISSUES IN THE CAFA CONTEXT. AGAIN, NONE OF THESE CASES APPLY HERE BECAUSE THOSE WERE CASES WHERE THE PLAINTIFF WOULD HAVE STANDING TO ASSERT CLAIMS ON BEHALF OF OTHER INJURED PARTIES EVEN IF THEY WEREN'T INJURED. HERE THEY'RE INJURED. THERE'S NO CASE CITED BY FACEBOOK, AND WE COULD FIND NO CASE, THAT IF YOU'RE INJURED

AS DEFINED BY STATE LAW, YOU LACK A CASE OF CONTROVERSY WITHIN THE MEANING OF ARTICLE III. ZERO CASES. THEY CITE TO NONE. WE FOUND NONE.

CONTRARY WISE, IF THERE IS AN OPPORTUNITY TO PURSUE A CLAIM EVEN WITHOUT OUT-OF-POCKET LOSS, WHICH, OF COURSE, MANY CLAIMS EXIST LIKE THAT, NOT JUST PRIVACY, THERE'S ALSO DEFAMATION CLAIMS, OBVIOUSLY THE SUPREME COURT AGREES THAT THERE COULD BE PRIVACY CLAIMS WITH NO ECONOMIC DAMAGES THAT CAN BE ASSERTED IN FEDERAL COURT. DOE VERSUS CHAO IS A GREAT EXAMPLE OF THAT, THAT FOOTNOTE 3 AND THE ACCOMPANYING TEXT.

I REGRET WE DID NOT CITE TO DOE VERSUS CHAO IN OUR BRIEFING, BUT I APOLOGIZE FOR BRINGING IT UP NOW. THAT'S 540 U.S. 614 WHERE THE SUPREME COURT SAID, OF COURSE, IF IT'S A STATE PRIVACY TORT, EVEN WITH NO ECONOMIC DAMAGE, IF IT'S COGNIZABLE IN STATE COURT, IT'S COGNIZABLE IN FEDERAL COURT. OF COURSE IT IS. THAT'S MY QUICK DISCUSSION OF THE NINTH CIRCUIT CASES THAT WERE CITED IN THE REPLY BRIEF.

A COUPLE OF OTHER POINTS. COUNSEL SAID AND ARGUED AND, OF COURSE, IN THE BRIEFING THAT OUR SECOND AMENDED COMPLAINT LACKS THE SPECIFICITY THAT THEY WOULD LIKE TO SEE WITH RESPECT TO THE ACTUAL URL'S THAT WERE INTERCEPTED.

RESPECTFULLY, THAT SORT OF PROOF IS NOT REQUIRED IN THE COMPLAINT. WHAT IS IMPORTANT IS THAT THERE IS THE ALLEGATIONS.

THE FIRST AMENDED COMPLAINT ONLY ALLEGED, AND YOUR HONOR POINTED THIS OUT IN THE ORDER OF OCTOBER 23RD, WE ONLY ALLEGED

THE INTERCEPTION OF THESE I.P. ADDRESSES. WE DIDN'T ALLEGE THE FULL URL'S WERE ACCEPTED, AND WE DIDN'T ALLEGE THAT THE URL'S CONTAINED CONTENT. WE WENT BACK TO THE URL'S THAT WE COULD FIND AND ABSOLUTELY WE ALLEGED WITHIN THE RULE 11 CONSTRUCT THAT THESE URL'S ARE LONG, THEY'RE DETAILED, THEY CONTAIN CONTENT. THEY WERE, IN FACT, INTERCEPTED BY FACEBOOK AT A TIME WHEN THESE PLAINTIFFS WERE NOT LOGGED INTO THEIR ACCOUNTS. THAT'S ALL THAT IS NEEDED UNDER RULE 8. WE HAVEN'T PROVEN OUR CASE AND IF THIS WERE A SUMMARY JUDGMENT MOTION AND PERHAPS WE WOULD BE HAVING A CONVERSATION. BUT WE MADE ALL OF THE ALLEGATIONS THAT ARE NEEDED.

TO THE EXTENT THAT MORE IS NEEDED, IT'S ALSO A LITTLE BIT INEQUITABLE AT THIS POINT, YOUR HONOR. AS YOU'VE SEEN IN OUR BRIEFING ON THE DISCOVERY MOTIONS, WE'VE ASKED FOR COPIES OF ALL OF THE INFORMATION THAT PLAINTIFF HAS ON FACEBOOK AND INCLUDING ALL OF THE URL'S THAT WERE INTERCEPTED, ALL OF THE INFORMATION THAT WAS GATHERED ON THESE PLAINTIFFS DURING THE CLASS PERIOD, AND WE'VE RECEIVED NOTHING. YOU'VE SEEN THE BRIEFING ON THAT POINT, AND I WON'T GO INTO IT RIGHT NOW BUT IT'S A BIT INEQUITABLE TO SAY THAT WE ARE REQUIRED TO PLEAD FACTS IN A COMPLAINT THAT HAD BEEN IMPROPERLY WITHHELD FROM US IN DISCOVERY, AND THAT'S A BIT ODD.

AND I ALSO BRING UP A CASE FROM TWO WEEKS AGO FROM MAGISTRATE JUDGE COUSINS IN THE ANTHEM DATA BREACH CASE WHO SAID IT WOULD BE A BIT OVERWHELMING TO FORCE THE PLAINTIFFS TO

PROVIDE PERSONAL INFORMATION TO PROVE THE PRIVACY CLAIM.

HERE WE ALLEGE FACTS MUCH MORE SPECIFICALLY THAN WE DID IN THE FIRST AMENDED COMPLAINT, AND IT WOULD BE UNFORTUNATE IF WE MUST RISK DISCLOSURE OF VERY PRIVATE URL'S PUBLICLY IN A COMPLAINT IN ORDER TO PROTECT PRIVACY. IT SEEMS A BIT ODD.

WITH THAT I THINK AT THIS POINT MAYBE IT WOULD BE BEST TO TURN OVER THE ARGUMENTS TO MR. BARNES FOR SOME OF THE TECHNICAL POINTS RAISED BY FACEBOOK'S COUNSEL UNLESS YOUR HONOR HAS ANY QUESTIONS.

THE COURT: NO. THIS WOULD BE A GOOD TIME.

MR. BARNES.

MR. BARNES: THANK YOU, YOUR HONOR. AND I WANT TO START WITH SOMETHING THAT FACEBOOK DIDN'T TOUCH UPON. MR. STRAITE TOUCHED UPON IT, AND THERE ARE A NUMBER OF PARAGRAPHS IN THE COMPLAINT THAT ARE CLOSE RIGHT NOW, BUT THERE'S ONE THAT IS NOT. AND I THINK IT'S VERY IMPORTANT.

PARAGRAPH 27, THIS WAS A PUBLIC COMMENT OF A FACEBOOK EMPLOYEE. WE'VE SAID THAT WE DON'T DO IT AND WE COULDN'T DO IT WITHOUT SOME FORM OF CONSENT AND DISCLOSURE.

SINCE THE DOUBLECLICK CASE, THE LEGALITY OF THE THIRD PARTY COOKIE TRACKING BUSINESS MODEL HAS DEPENDED ON EITHER IMPLICIT OR EXPRESS CONSENT.

AND WHEN FACEBOOK ARGUES THE WAY YOU PUT IT WAS THAT'S THE WAY THAT THE INTERNET WORKS, FOLKS, GET OVER IT, THAT'S NOT TRUE.

OTHER COMPANIES HAVE EXPRESSED OR IMPLIED CONSENT TO DO TRACKING LIKE THIS. IN THIS CASE BY FACEBOOK'S OWN ADMISSIONS IN PARAGRAPH 27 AND A NUMBER OF OTHER PARAGRAPHS IN THE COMPLAINT THAT WE WON'T DISCUSS IN DETAIL RIGHT NOW, THEY SAID THEY DIDN'T HAVE THE CONSENT NECESSARY TO DO THIS. SO THAT PUTS THIS IN A COMPLETELY DIFFERENT CATEGORY.

THE OTHER THING THAT WAS MENTIONED WAS THE POLICY IMPLICATIONS OF A DECISION AND, YOUR HONOR, WE THINK THAT'S ALSO IMPORTANT. I THINK COUNSEL MENTIONED UNITED STATES VERSUS JONES. JUSTICE SOTOMAYOR SAID IN A CONCURRENCE THAT SHE DOUBTS PEOPLE WILL ACCEPT WITHOUT COMPLAINT THE WARRANTLESS DISCLOSURE TO THE GOVERNMENT OF A LIST OF EVERY WEBSITE THAT THEY HAVE VISITED IN THE LAST WEEK OR MONTH OR YEAR.

IF THIS TYPE OF ACTIVITY IS NOT ACTIONABLE UNDER THE WIRETAP ACT OR ECPA, OTHER ACTIONS, THEN SOTOMAYOR'S CONCERN IN THAT CONCURRENCE IS REALITY. AND SO THIS DECISION DOES HAVE POLICY IMPLICATIONS, AND WE THINK IT HAS POLICY IMPLICATIONS THAT WOULD BE VERY BAD FOR THE FUTURE OF PRIVACY IN OUR COUNTRY SHOULD THE PLAINTIFFS NOT PREVAIL ON THIS MOTION.

AFTER A CONSENT, WHICH THEY DID NOT TALK ABOUT, I WANT TO TALK ABOUT THE CONTENT FOR A MOMENT, AND I THINK IT'S IMPORTANT FOR YOUR HONOR TO KNOW THAT WE'VE READ THE ORDER IN NOVEMBER AND WE'VE REPLED ACCORDINGLY. WE WERE FAR MORE SPECIFIC WITH EXACTLY WHAT WE WERE TALKING ABOUT.

PARAGRAPH 185 WE'VE TALK ABOUT THE INTERCEPTION OF THE

URL'S WHICH INCLUDED, AND I QUOTE, "DETAILED URL REQUESTS AND SEARCH QUERIES."

PARAGRAPH 115, 118, 121, AND 124 WE TALK ABOUT DETAILED FILE PATHS CONTAINING THE CONTENT OF GET POST COMMUNICATIONS.

AND THEN WE PROVIDE SOME EXAMPLES. PARAGRAPH 34 IS HOW DO I REDUCE HERPES BREAKOUTS EXAMPLE CHOSEN FOR A REASON BECAUSE IT OBVIOUSLY -- THE INFORMATION IN THAT URL AFTER THE DOT COM HAS A MEANING.

THE WIRETAP ACT IS A VERY BROAD DEFINITION OF CONTENT. IT IS ANY INFORMATION RELATING TO THE SUBSTANCE REPORT OR MEANING OF A COMMUNICATION.

AND WHAT THAT MEANS, YOUR HONOR, IS THAT THE RELATING TO MEANS THAT IT DOESN'T HAVE TO BE THE COMMUNICATION ITSELF. IT HAS TO BE ANYTHING RELATING TO IT AND RELATING TO THAT MEANING.

WE PROVIDE THIS EXAMPLE BECAUSE OBVIOUSLY THE PHRASE HOW DO I REDUCE HERPES BREAKOUTS HAS A MEANING. AND THE SAME IS TRUE OF THE EXAMPLE THAT WE GAVE ON PARAGRAPH 35 WHICH IS "THE NEW YORK TIMES" EXAMPLE, POST TRAUMATIC DISTRESS DISORDER FROM 9-11 STILL HAUNTS. THAT PHRASE AFTER THE DOT COM HAS SUBSTANCE AND MEANING THAT GOES BEYOND THE PARTY TO THE COMMUNICATION.

YOUR ORDER SAID SOMETHING THAT WE THOUGHT WAS VERY IMPORTANT. IT SAID THE INTERCEPTED INFORMATION DESCRIBED IN THE CCAC IS SO SIMILAR TO THE REFERRER HEADERS ADDRESSED IN ZYNGA PRIVACY THAT WE MAY NEVER BE ABLE TO STATE A WIRETAP CLAIM.

YOUR HONOR, WE WOULD ASK YOU TO LOOK VERY CLOSELY AT THE URL'S THAT WERE AT ISSUE IN THE ZYNGA CASE. IN OUR PETITION IN PARAGRAPHS 43 AND 44 FACEBOOK EXPLAINS THAT THEY DON'T HAVE REFERRER HEADERS ON THEIR WEBSITE LIKE OTHER WEBSITES DO BECAUSE YOU COULD HAVE SENSITIVE INFORMATION CONTAINED WITHIN THEM.

AND SO WHAT FACEBOOK HAS, THEIR REFERRER HEADERS SAY FACEBOOK.COM/USER NAME OR FACE.COM/GROUP NAME. THERE IS NO FACEBOOK URL EQUIVALENT OF NEWYORKTIMES.COM/POST TRAUMATIC STRESS DISORDER FROM 9-11 STILL HAUNTS. THERE'S NO FACEBOOK URL EQUIVALENT OF HOW DO I REDUCE HERPES BREAKOUTS.

"THE NEW YORK TIMES" EXAMPLE WOULD BE FACEBOOK.COM/NEWYORKTIMES. THAT IS SIMILAR TO --

THE COURT: WHAT IS THAT SIGNIFICANT OF?

MR. BARNES: THE SIGNIFICANCE IS THAT IT IDENTIFIES THE OTHER PARTIES, "THE NEW YORK TIMES." IT DOESN'T IDENTIFY A SPECIFIC THOUGHT CONVEYED, AND IT'S IMPORTANT TO KNOW HOW THESE GET REQUESTS ARE SENT.

SO REALLY THERE'S ONE OF TWO WAYS AND THIS IS, I THINK, EVERY DAY EXPERIENCE PEOPLE USE THE INTERNET. EITHER YOU CAN GO INTO THE TOOLBAR, AND YOU CAN TYPE IT INTO THE TOOLBAR. YOU CAN TYPE THIS FULL URL INTO THE TOOLBAR AND HIT ENTER.

I DON'T THINK THERE'S ANY CIRCUMSTANCE IN WHICH SOMEONE COULD ARGUE WITH A STRAIGHT FACE THAT THAT DOES NOT INCLUDE THE CONTENT OF A COMMUNICATION. YOU'VE TYPED IT INTO THE TOOLBAR

YOURSELF.

THE OTHER WAY IT HAPPENS IS THAT THE USER LOOKS ON THE WEB PAGE AND THEY SEE THE HYPERLINK. AND THE HYPERLINK SAYS SOMETHING LIKE POST TRAUMATIC STRESS DISORDER FROM 9-11 STILL HAUNTS. SO WHAT DO YOU DO? YOU USE A TECHNOLOGICAL SHORTCUT. YOU LEFT CLICK ON YOUR MOUSE, IF YOU'RE A WINDOWS USER, AND IT TAKES YOU -- THAT AUTOMATICALLY THEN SENDS A GET REQUEST FOR THIS URL WHICH INCLUDES THE PTSD FROM 9-11 TO "THE NEW YORK TIMES." IN RESPONSE, "THE NEW YORK TIMES" SENDS A 2,000 WORD ESSAY BACK AND NOT SURPRISINGLY IT'S ON PRECISELY THE TOPIC OF PTSD AFTER 9-11.

AND THE PLAINTIFFS' COMMUNICATION IS NOT JUST THE SENDING OF THE COMMUNICATION BUT THE RECEIPT AND RETURN FROM "THE NEW YORK TIMES" IS PROTECTED BY THE ECPA.

SO WE THINK, YOUR HONOR, BASED ON THE NEW FACTS THAT WE HAVE ALLEGED, THERE'S NOTHING TO BE RETHOUGHT ABOUT YOUR ORIGINAL OPINION. THIS CASE FITS VERY EASILY WITHIN ZYNGA. IN FACT, THE ZYNGA COURT SAID SEARCH TERMS OR SIMILAR COMMUNICATIONS. WHEN YOU HAVE A HOOK -- WHEN A SENSITIVE HUMAN BEING HAS THE THOUGHT OF GET ME THAT INFORMATION, THAT IS A SIMILAR COMMUNICATION.

AND NOT ONLY THAT, I THINK YOU BROUGHT UP THE CASE, YOUR HONOR, THE FISA COURT CASE. AND THE FISA COURT CASE INVOLVED A NATIONAL SECURITY AGENCY MAKING PRETTY CLOSE TO THE ARGUMENT THAT FACEBOOK IS MAKING HERE TODAY. THE NSA SAID -- TOLD THE

FISA COURT THAT CONTENT AND DIALLING ROUTING ADDRESS AND SIGNALLING INFORMATION WERE TWO MUTUALLY EXCLUSIVE CATEGORIES. THAT IF SOMETHING WAS AN ADDRESS, IT COULD NOT BE CONTENT.

AND THE FISA COURT IN THE NATIONAL SECURITY CONTEXT FLATLY SAID, NO, THEY'RE NOT MUTUALLY EXCLUSIVE CATEGORIES. SOME THINGS CAN BE BOTH.

AND SO IF YOU HAVE THE POST CUT-THROUGH DIAL DIGITAL CASES THAT THESE COMPORT WITH, YOU'VE GOT THE PATRIOT ACT LEGISLATIVE HISTORY THAT WE'VE CITED, AND BASED ON THESE NEW FACTS I THINK CLEARLY WE WIN ON THE CONTENTS ISSUE.

THE SECOND MAJOR ISSUE RAISED WAS THE PARTY TO THE COMMUNICATION ISSUE. AND I BELIEVE, YOUR HONOR, YOU GOT IT RIGHT ON YOUR FIRST ORDER ON THAT ONE AS WELL.

AND WHAT YOU SAID IS THAT WHILE IT'S TRUE A FACEBOOK SERVER IS INVOLVED, THERE WERE NO ALLEGATIONS WHICH DEMONSTRATED THAT THE PLAINTIFFS KNEW THAT THEIR BROWSER ACTIVITY WAS BEING TRACKED AND COLLECTED.

AND, YOUR HONOR, THINK ABOUT WHAT THE THINGS THAT ARE AT THE BASIS OF THIS ARE CALLED. THEY'RE CALLED THIRD PARTY COOKIES. WE DIDN'T INVENT THAT TERM FOR PURPOSES OF THIS COMPLAINT. IT'S A TERM THAT IS WIDELY USED IN THE INDUSTRY AND THAT IS WHAT THEY ARE. WE EXPLAIN IN THE COMPLAINT EXACTLY HOW THEY WORK. PARAGRAPH 60 EXPLAINS IT, 57.

AND, YOUR HONOR, DESPITE THE GOOGLE CASE, OTHER COURTS HAVE HELD TO THE CONTRARY. THE PHARMATRAK CASE, THAT WAS A

COOKIE CASE. IT WORKED THE EXACT SAME WAY AS THE COOKIES IN THIS CASE.

THERE'S A CASE FROM THE SEVENTH CIRCUIT INVOLVING E-MAIL CALLED SZYMUSKIEWICZ, I THINK.

THE COURT: YOU'LL HAVE TO SPELL THAT, WON'T YOU.

MR. BARNES: IF I'VE GOT IT RIGHT.

THE COURT: YOU CAN GET THAT FOR THE REPORTER A LITTLE LATER.

MR. BARNES: ALL RIGHT. WE'LL GET THAT ONE A LITTLE BIT LATER.

AND THAT WAS AN E-MAIL FORWARDING CASE WHERE THE VICTIM HAD NO KNOWLEDGE THAT THEIR E-MAILS WERE BEING FORWARDED ALONG TO THE DEFENDANT AND NEVERTHELESS THE DEFENDANT WAS NOT DEEMED A PARTY TO THAT COMMUNICATION.

AND WHEN YOU SAID IN YOUR OPINION THAT THE FACEBOOK CASES ARE INAPPOSITE BECAUSE THEY INVOLVE RECORDING BY A KNOWN PARTICIPANT OR RECORDING CONVERSATION, WE THINK YOU WERE EXACTLY RIGHT.

THE NEXT ISSUE WHICH HASN'T BEEN ADDRESSED HERE TODAY BUT I THINK IT IS KEY TO ADDRESS IS THE ISSUE OF A DEVICE. AND LIKE THE CONTENTS ISSUE, WE'VE PLEADED THE DEVICE ISSUE WITH FAR MORE SPECIFICITY THAN THE SAC.

IN PARTICULAR, WE PLED 7 DEVICES, AND WE'VE DEDICATED 20 PAGES TO EXPLAINING HOW THEY WORK TOGETHER TO ALLOW FACEBOOK TO ACQUIRE THE CONTENTS OF COMMUNICATIONS.

AND THOSE ARE COOKIES, THE PLAINTIFFS' BROWSERS, THE PLAINTIFFS' COMPUTING DEVICES, FACEBOOK'S WEB SERVERS, THE FIRST PARTY WEBSITE WEB SERVERS, THE COMPUTER CODE DEPLOYED BY FACEBOOK, AND FINALLY THE ENTIRE PLAN THAT WAS CARRIED OUT.

NOW, THE ACT, THE FEDERAL WIRETAP ACT, DEFINES A DEVICE TO MEAN -- TO BE ELECTRICAL, MECHANICAL OR OTHER DEVICE, AND IT MEANS ANY DEVICE OR APPARATUS WHICH COULD BE USED TO INTERCEPT AN ELECTRONIC COMMUNICATION.

THAT'S A BROAD DEFINITION THAT IS BEST CHARACTERIZED BY ITS FUNCTION. A DEVICE IS SOMETHING WHICH CAN BE USED TO INTERCEPT AN ELECTRONIC COMMUNICATION.

IF YOU GO TO THE DICTIONARY, THE DICTIONARY DEFINITION IS BROAD. IT'S A THING MADE FOR A PARTICULAR PURPOSE, AN INVENTION OR CONTRIVANCE. AND THERE'S CASE LAW THAT SAYS THAT THE THINGS THAT WE HAVE CITED QUALIFIES AS DEVICES UNDER THE WIRETAP ACT.

SO IN THE IN RE CARRIER IQ CASE, JUDGE CHEN SAYS POINT-BLANK THE CARRIER IQ SOFTWARE DEVICE. AND SZYMUSKIEWICZ, S-Z-Y-M-U-S-K-I-E-W-I-C-Z, THE SEVENTH CIRCUIT SAID THE WEB BROWSERS IN COMPUTERS OR DEVICES.

IN THE PHARMATRAK CASE THEY DIDN'T ADDRESS THE ISSUE BUT THEY FOUND LIABILITY FOR A THIRD PARTY COOKIE COMPANY IN THE SAME SITUATION AS FACEBOOK HERE. THESE CASES ARE DIRECTLY ON POINT TO WHETHER THESE THINGS ARE DEVICES OR NOT.

FACEBOOK'S CASES, HOWEVER, ARE NOTHING LIKE THIS CASE. IN

CROWLEY VERSUS CYBER SOURCE, THE ISSUE WAS WHETHER AMAZON'S WEB SERVERS WERE DEVICES UNDER THE ACT WHEN THE PLAINTIFF HAD KNOWINGLY SENT INFORMATION NECESSARILY TO EFFECTUATE A PURCHASE DIRECTLY TO AMAZON.

AMAZON WAS NOT A THIRD PARTY TO THAT COMMUNICATION. IT WAS, IN THE WORDS OF THE COURT, A SECOND PARTY TO THE COMMUNICATION. I'LL ALSO ADD THAT THAT IS A DECISION FROM THE CENTRAL DISTRICT OF CALIFORNIA NOT BINDING ON THIS COURT.

POTTER VERSUS HAVLICEK THAT THEY CITED IS A CASE FROM OHIO. IT IS A STRANGE CASE. IT GREW OUT OF APPARENTLY A NASTY DIVORCE WHERE ONE OF THE PARTIES TO THE DIVORCE PURCHASED COMPUTER SOFTWARE, PUT IT ON THEIR HOME COMPUTER, USED IT TO TRACK THE COMMUNICATIONS OF THEIR SPOUSE.

THE PLAINTIFF WAS NOT ONE OF THE SPOUSES. IT WAS ANOTHER PERSON, AND THAT PLAINTIFF SUED THE SOFTWARE COMPANY.

WELL, THE SOFTWARE COMPANY, IT'S NOT CLEAR WHETHER THEY EVER ACTUALLY RECEIVED COMMUNICATIONS TO BEGIN WITH AT ALL AND SO OTHER PROBLEMS WITH THAT CLAIM.

I RAISE THAT HERE IN THE ECPA CONTEXT. IT'S ALSO AN ISSUE IN THE CIPA CLAIMS, C-I-P-A, AND WHAT IS INTERESTING ABOUT THE CIPA STATUTE IS THAT IT DOESN'T SAY DEVICE ANYWHERE. IT SAYS ANY OTHER MANNER. IT ALSO IS VERY BROAD. SO WE DON'T BELIEVE DEVICE OR APPARATUS OR ANYTHING OF THE SORT IS ACTUALLY AN ELEMENT TO CIPA CLAIM BASED ON THE PLAIN WORDING OF THE STATUTE.

LET ME MAKE SURE I -- YOUR HONOR, IF I COULD SWITCH TO THE STORED COMMUNICATIONS ACT, WHICH IS ALSO UNDER THE ELECTRONIC COMMUNICATIONS PRIVACY ACT. YOUR HONOR HAD FOUND THAT WE HAD NOT ADEQUATELY ALLEGED ELECTRONIC STORAGE. SO LIKE THE OTHER ISSUES WE'VE TALKED ABOUT, WE WERE FAR MORE SPECIFIC THIS TIME AROUND.

THE COURT: SO TELL ME WHY YOUR HISTORY, YOUR BROWSER HISTORY IS STORAGE AND TELL ME WHY THE URL, I GUESS YOUR TOOLBAR, IS STORAGE.

MR. BARNES: WELL, LET ME GO ONE AT A TIME. I'LL DO THE TOOLBAR FIRST.

THE COURT: OKAY.

MR. BARNES: OKAY. SO THE ACT DEFINES ELECTRONICS STORAGE IN TWO WAYS RELEVANT. THE TOOLBAR IS RELEVANT FOR THE FIRST AND I BELIEVE ALSO FOR THE SECOND.

BUT THE FIRST ONE IS TEMPORARY INTERMEDIATE STORAGE INCIDENTAL TO THE ELECTRONIC TRANSMISSION THEREOF.

THAT ITEM, THE URL THENEWYORKTIMES.COM/PTSD, IT GOES INTO YOUR TOOLBAR WHEN YOU FIRST SEND THE TRANSMISSION. IT STAYS THERE AS THE TRANSMISSION RETURNS. AND AS SOON AS YOU GO TO A NEW COMMUNICATION, YOU SEND A NEW COMMUNICATION TO SOMEONE ELSE, IT DISAPPEARS FROM THE TOOLBAR. YOU THEN HAVE WHATEVER YOUR NEXT COMMUNICATION IS IN THE TOOLBAR AND THAT IS A COMMUNICATION THAT IS TAKING PLACE -- THAT IS, I'M SORRY, STORAGE THAT IS IN THAT TOOLBAR WHILE THE COMMUNICATION BETWEEN

THE USER AND THE WEBSITE IS TAKING PLACE.

THE COURT: OKAY. YOU TYPE SOMETHING IN AND YOU GET SIMULTANEOUSLY IT SHOWS UP IN THE TOOLBAR WHATEVER YOU'RE PUTTING IN, WWW, HOW CAN I MAKE THE BEST ARGUMENT TO A FEDERAL JUDGE? YOU CLICK THAT WEBSITE AND IT COMES UP. AND THEN YOU GO TO SOMEPLACE ELSE, HOW CAN I MAKE THE SAME REQUEST TO A SUPERIOR COURT JUDGE? THE FEDERAL JUDGE DISAPPEARS FROM THE TOOLBAR AT THE STORAGE?

MR. BARNES: YES. IN THAT INTERVENING PERIOD OF TIME, IT WAS KEPT IN THAT LOCATION INCIDENTAL TO THE TRANSMISSION OF THE COMMUNICATIONS BEING SENT BETWEEN THE USER AND THE WEBSITE.

THE COURT: THAT -- WHATEVER TIME THAT WAS, THAT STORAGE, AS LONG AS IT APPEARS IN THAT TOOLBAR, WHATEVER YOU PUT IN THERE, THAT IS STORAGE?

MR. BARNES: YES, IT IS THERE INCIDENTAL TO THE TRANSMISSION THEREOF.

THE COURT: AND IT SOUNDS LIKE ANYTHING CAN BE STORAGE THEN. ANY TIME YOU TYPE ANYTHING ON A COMPUTER, IT'S STORED IN SOME MANNER.

MR. BARNES: WELL, THE BROWSER, THE ELECTRONIC COMMUNICATIONS SERVICE IS WHAT PLACES THAT URL INTO THE TOOLBAR OR -- AND WHAT KEEPS IT THERE DURING THE COMMUNICATION.

SO YOU COULD THINK OF THE OTHER WAY TO SEND -- TO SEND THE COMMUNICATION, WHICH IS BY LEFT CLICKING THE MOUSE. YOU

HAVEN'T PLACED IT UP THERE, BUT IT'S PUT UP THERE BY THE ELECTRONICS COMMUNICATION SERVICE WHICH IS THE WEB BROWSER.

THE COURT: SO ISN'T THAT JUST A FUNCTION OF THE WEB BROWSER, THAT'S A PLACE HOLDER SO THEY KEEP SO YOU KNOW WHAT YOU'RE LOOKING AT AND YOU CAN SAY OH, NO, I WANTED SUPERIOR COURT, NOT FEDERAL COURT, AND LET ME CHANGE THAT ADDRESS? ISN'T THAT REALLY THE FUNCTION OF IT?

MR. BARNES: IT IS THE FUNCTION OF THE WEB BROWSER, BUT IN THE E-MAIL CASES WHILE YOU TALK ABOUT THE STORAGE AND WHERE THE INFORMATION IS BEING SENT TO AND FRO, THAT INFORMATION, TOO, IS A FUNCTION OF AN E-MAIL PROVIDER.

THE COURT: IS THERE A DISTINCTION.

MR. BARNES: I DON'T THINK THERE IS A DISTINCTION BECAUSE THE E-MAIL CASE, THAT'S HOW THE E-MAIL FUNCTIONS, AND THIS IS HOW THE BROWSER FUNCTIONS.

THE COURT: THAT'S WHAT MR. BROWN TOLD US, THIS IS HOW THE INTERNET FUNCTIONS.

MR. BARNES: AND WE THINK THAT FITS INTO THAT DEFINITION OF STORAGE BECAUSE IT'S THERE AND IN THAT SPOT WHILE YOU'RE MAKING THAT COMMUNICATION.

THE SECOND DEFINITION OF STORAGE UNDER THE SCA IS FOR PURPOSES OF BACKUP PROTECTION OF SUCH COMMUNICATION, SO IN PARAGRAPH 207, WE FEEL THE BROWSER FITS THIS DEFINITION. ALSO NOTE THAT THEOFEL VERSUS JERRY JONES IS A CASE IN THE NINTH CIRCUIT AND IN THAT CASE THE COURT SAID THE BACKUP PROTECTION

DOESN'T HAVE TO BE FOR THE ELECTRONIC COMMUNICATIONS SERVICE PROVIDER, IT CAN BE FOR THE END USER. AND WHEN YOU HAVE A BROWSER HISTORY, THAT IS SO THE PERSON WHO USES THAT BROWSER CAN GO BACK AND SAY, HEY, I REMEMBER I WAS ON THIS WEBSITE ON THIS DATE, HOW CAN I -- I'VE GOT TO REMEMBER. WHERE CAN I GO TO GET THE BACKUP OF THAT COMMUNICATION? WELL, THE PLACE YOU CAN GO IS TO YOUR BROWSER HISTORY.

TRANSITION BACK FOR A SECOND TO THE TOOLBAR. THE SAME IS TRUE, YOU CAN ACCESS YOUR BROWSING HISTORY BY CLICKING THE BACK BUTTON BECAUSE YOU'VE GONE TO THE NEXT PAGE AND HOW TO MAKE IT TO THE STATE COURT JUDGE AND YOU SAY, WELL, I WANT TO GO BACK TO THE FEDERAL COURT JUDGE.

THE WAY YOU ACCESS THAT BROWSING HISTORY IS BY CLICKING ON THE BACK BUTTON ON YOUR WEB BROWSER TO GET THERE, AND IT'S FOR YOUR PURPOSES, IT'S FOR YOUR CONVENIENCE AND UNDER THE THEOFEL VERSUS JERRY JONES THE NINTH CIRCUIT SAID THAT IS ENOUGH.

MR. STRAITE: YOUR HONOR, I THINK IT'S IMPORTANT THAT YOU POINT OUT THAT WE BOTH ARE DISAGREEING ON HOW THE INTERNET WORKS. AND IT'S IMPORTANT AT THIS POINT TO REMEMBER WE'RE AT THE PLEADING STAGE, AND IF THERE'S A DISPUTE AS TO HOW THE INTERNET WORKS AND IF THE QUESTION OF WHETHER OR NOT THE CLAIM CAN PROCEED TURNS ON THAT FACTUAL QUESTION, THIS MAY NOT BE THE RIGHT TIME TO RESOLVE IT.

THE COURT: I UNDERSTAND.

MR. STRAITE: JUDGE KOH, OF COURSE, IN RE YAHOO MAIL

LITIGATION CASE SAID THE SAME THING. SHE DECLINED TO DISMISS THE CIPA CLAIM THERE BECAUSE SHE SAID IT'S A FACTUAL QUESTION OF WHEN THE E-MAIL IS IN TRANSIT OR NOT AND WE NEED MORE DISCOVERY TO FIGURE THAT OUT, AND THAT MAY BE THE APPROPRIATE RESULT HERE.

THE COURT: I UNDERSTAND THIS IS NOT A MERITS TYPE OF ARGUMENT TODAY BUT THIS IS YOUR EXPERT.

MR. STRAITE: I SAID RINGER.

MR. BARNES: YOU'RE FAR TOO KIND.

THE COURT: YOU TOLD ME HE'D BE WELL EDUCATED AND THAT'S WHY I'M ASKING THESE QUESTIONS.

MR. BARNES: WAY TOO KIND. AND I WOULD NOTE THIS IS OUTSIDE OF THE PLEADINGS. AND THERE'S ANOTHER PLACE, THERE'S A CRASH RECOVERY SYSTEM IN PLACE FOR EVERY WEB BROWSER THAT IF YOUR COMPUTER SHUTS DOWN UNEXPECTEDLY AND YOU START IT BACK UP AND YOU OPEN UP YOUR BROWSER, IT WILL TAKE YOU BACK TO THE EXACT URL'S YOU WERE ON, YOUR COMMUNICATIONS. IT WILL BRING YOU BACK UP AUTOMATICALLY.

THE COURT: TELL ME THE CASES THAT HAVE SUPPORTED THE IDEA THAT STORAGE IS FOUND IN THE TOOLBAR AND IN THE WEB BROWSER?

MR. BARNES: WE THINK THIS IS A CASE OF FIRST IMPRESSION FOR THE TOOLBAR. THE BROWSER HISTORY IS THE SAME. I DON'T THINK IT'S A CASE OF FIRST IMPRESSION FOR FACILITY, BUT --

THE COURT: SO YOU SHOULD HELP ME WITH THAT AS THE RINGER, SHOULDN'T YOU?

MR. BARNES: I THINK -- AND WE'LL GET THERE, YOUR HONOR, IF WE CAN TALK FACILITY, AND I WANT TO TALK ABOUT WHY.

SO FACILITY IS NOT SEPARATELY DEFINED IN THE STORED COMMUNICATIONS ACT. SO YOU HAVE TO DEFINE IT AND LOOK AT ITS CONTENTS IN THE ACT AND THE STORED COMMUNICATIONS ACT PROHIBITS UNAUTHORIZED ACCESS OR ACCESS WHICH EXCEEDS AUTHORIZATION TO, AND I QUOTE, "A FACILITY THROUGH WHICH AN ELECTRONIC COMMUNICATIONS SERVICE IS PROVIDED."

SO REALLY THERE'S A TWO-PART ANALYSIS. THE FIRST IS WHAT IS THE RELEVANT ELECTRONIC COMMUNICATION SERVICE? 18 U.S.C. 2510, PARAGRAPH 15 DESCRIBES IN ECS AS ANY SERVICE WHICH PROVIDES THE USER THE ABILITY TO SEND OR RECEIVE WIRE OR ELECTRONIC COMMUNICATIONS.

IF A WEB BROWSER IS IN THE ECS, YOUR HONOR, I DON'T KNOW WHAT IS. THERE'S NO CASE THAT SAYS WEB BROWSER IS ONE OR ISN'T ONE, BUT IT CLEARLY FALLS WITHIN THAT DEFINITION.

SO THE SECOND QUESTION IS ONCE YOU'VE ESTABLISHED WHAT THE RELEVANT ECS IS, WHAT ARE THE ITEMS THROUGH WHICH THE ELECTRONIC COMMUNICATIONS SERVICE PROVIDES THE SERVICE.

AND WHAT WE HAVE ALLEGED IS THAT THE BROWSER IN ITS FILES ARE THOSE -- SOME OF THOSE THINGS THROUGH WHICH THE SERVICE IS PROVIDED.

NOW, THERE IS CASE LAW ON WHETHER COMPUTERS ARE

FACILITIES. THIS CASE IS SLIGHTLY DIFFERENT. THIS CASE IS ABOUT WHETHER THE BROWSER AND THE FILES WITHIN IT ARE FACILITIES.

AND HERE'S THE DISTINCTION. YOU THINK OF A COMPUTER AS A STORAGE ROOM THAT HAS A BUNCH OF DIFFERENT BOXES IN IT. YOUR WEB BROWSING COMPANY HAS ACCESS TO ONE OF THOSE BOXES. IT HAS ACCESS TO ITS WEB BROWSER APPLICATION.

AND BECAUSE OF THAT I DON'T BELIEVE IT'S PROTECTED FULLY BY THE THIRD PARTY DOCTRINE FROM FOURTH AMENDMENT SEARCH. IF YOU READ THE HISTORY, THE LEGISLATIVE HISTORY OF THE ELECTRONICS COMMUNICATIONS PRIVACY ACT, WHAT THEY HAVE SAID IS THAT THEY WERE CONCERNED TO MAKE SURE THAT FOURTH AMENDMENT STYLE PROTECTION REACH THESE NEW TYPES OF COMPUTER SERVICES.

I THINK THE LEGISLATIVE HISTORY IS ALSO CLEAR THAT THEY CHOSE BROAD LANGUAGE FOR A REASON BECAUSE CONGRESS AND SENATOR LEAHY WAS AT LEAST SMART ENOUGH WHEN THEY PASSED THE ECPA TO KNOW THAT THEY COULDN'T PREDICT THE FUTURE OF TECHNOLOGY AND SO THEY HAD TO DEFINE TERMS IN BROAD WAYS TO TALK ABOUT FUNCTIONS RATHER THAN THE VERY SPECIFICS OF EXACTLY HOW A BUSINESS MODEL IS GOING TO WORK.

AND SO IF YOU THINK OF IT THAT WAY, THE MICROSOFT CASES MAKE A LOT OF SENSE, AND I BELIEVE THAT THERE ARE AT LEAST EIGHT MICROSOFT CASES, AND I DON'T HAVE THE FULL LIST IN FRONT OF ME, BUT THE CASE IN THE EASTERN DISTRICT OF VIRGINIA, THE COURT SAID, MICROSOFT'S WINDOWS OPERATING SYSTEM AND INTERNET

EXPLORER SOFTWARE ARE FACILITIES THROUGH WHICH ELECTRONIC COMMUNICATION SERVICES ARE PROVIDED.

COURTS IN NEW YORK, NORTH CAROLINA, AND WASHINGTON HAVE FOUND THE SAME THING AND THAT IS BECAUSE IT'S ENTIRELY CONSISTENT WITH THE ACTUAL LANGUAGE IN THE STORED COMMUNICATIONS ACT AND THE INTENT OF CONGRESS.

THE OTHER CASES DON'T HIT ON THIS EXACT. IN RE GOOGLE DOESN'T TOUCH ON THE -- THE COURT DIDN'T ANSWER THE QUESTION OF WEB BROWSERS. THEY ONLY TALKED ABOUT COMPUTERS. THEY DIDN'T ANSWER THE WEB BROWSER QUESTION. THAT'S WHY THE WEB BROWSER CAN BE FACILITIES.

THE COURT: WELL, AREN'T THEY TWO SEPARATE THINGS? A WEB BROWSER CAN'T EXIST STANDALONE, I GUESS?

MR. BARNES: YES, IT HAS TO BE -- THE SOFTWARE HAS TO -- AT LEAST NOT YET IT CAN'T, RIGHT.

THE COURT: RIGHT. SO, AS YOU SAY, IT'S A CASE OF FIRST IMPRESSION. IF YOU SAY, THEN, IF A COURT SAYS, WELL, A WEB BROWSER CAN BE A FACILITY, BUT IT CAN'T STAND ALONE, CAN IT?

MR. BARNES: WELL, I DON'T KNOW. I WOULDN'T CHARACTERIZE THE FACILITY ISSUE AS A CASE OF FIRST IMPRESSION. I WOULD CHARACTERIZE THE ELECTRONIC STORAGE ISSUE THAT WAY.

THE FACILITY ISSUE IS THAT'S THE THING THROUGH WHICH THIS IS PROVIDED. YES, IT HAS TO BE ON SOME TYPE OF HARDWARE SOMEWHERE, BUT THE KEY FACT IS THAT THE WEB BROWSING COMPANY

MAINTAINS -- HAS ACCESS TO THE FILES WITHIN THE WEB BROWSER.

EVERY TERM OF SERVICE OF A MAJOR WEB BROWSING COMPANY IN THE WORLD TO OUR KNOWLEDGE HAS TERMS OF SERVICE WHICH SAYS, LOOK, WE CAN STILL ACCESS THESE FILES. AND THAT'S WHAT IS KEY IS WHETHER THE ELECTRONIC COMMUNICATIONS SERVICE PROVIDER HAS THE LEGAL RIGHT TO ACCESS THE FILES, TO ACCESS THE COMMUNICATIONS NO MATTER WHERE THEY ARE.

AND THE WEB BROWSING COMPANIES DO HAVE THAT RIGHT THROUGH THEIR TERMS OF SERVICE.

THE COURT: OKAY. YOU'RE GOING TO RETURN TO THE STORAGE ARGUMENT IN A MOMENT, ARE YOU? ARE YOU FINISHED WITH STORAGE?

MR. BARNES: THAT'S RIGHT. SO WE HAVE TWO FORMS OF STORAGE, THE TOOLBAR, TEMPORARY, INCIDENTAL. WE ALSO THINK IT FITS INTO THE BACK-UP PROTECTION. WE HAVE THE BROWSER HISTORY WHICH IS BACK-UP PROTECTION. I ADMIT THIS IS OUR MISTAKE, THERE'S CRASH/RECOVERY SYSTEM THAT I THINK ANYONE WHO HAS HAD THEIR COMPUTER CRASH UNDERSTANDS HOW THAT WORKS. AND THOSE FIT WITHIN THE STORAGE DEFINITION OF THE SCA.

THE COURT: I GUESS I'LL GIVE YOU AN OPPORTUNITY TO CONVINCE ME A LITTLE FURTHER ABOUT THAT.

MR. BARNES: WELL, YOUR HONOR, I DON'T KNOW THAT IT'S PRETTY -- IT IS THERE FOR THAT PURPOSE.

THE COURT: YOU HEARD ME TELL MR. BROWN WHEN WE TALKED ABOUT STORAGE WHEN THIS STATUTE WAS ENACTED WAS I THINK

IN THE '80S, AND I THINK BACK THEN THE THOUGHT AS WE TALKED ABOUT LEGISLATIVE HISTORY, THE THOUGHT WAS STORAGE, AND SOME CONCRETE BUILDING SOMEWHERE OFFSITE SOME MILES AWAY AND IT'S LOW RENT AND THEY CAN BUILD SOMETHING UP THERE AND COMMUNICATE DOWN TO A METROPOLITAN AREA WHERE RENTS ARE SIGNIFICANTLY HIGHER. THAT IS YOUR CLASSIC IDEA OF STORAGE, ISN'T IT?

MR. BARNES: THAT IS THE CLASSIC IDEA. I THINK THE IDEA THAT WAS COMING TO A REALITY THEN.

I ALSO THINK IF YOU ALSO LOOK AT THE DEFINITION AND HOW BROAD THE DEFINITIONS ARE, THE COUNCILMAN CASE SAYS THE DEFINITIONS OF STORAGE IN THE SCA ARE EXTRAORDINARY AND INDEED ALMOST BREATHTAKINGLY BROAD, AND THAT'S CONSISTENT THROUGHOUT THE ENTIRE COMMUNICATIONS PRIVACY ACT BECAUSE IT WAS AN ATTEMPT TO UNDERSTAND THAT THE WORLD AS IT WAS WHEN IT WAS PASSED WOULD NOT BE THE WORLD 20 YEARS INTO THE FUTURE.

THE COURT: SURE.

MR. BARNES: AND SO THEY USE THESE BROAD DEFINITIONS AND THE LEGISLATIVE HISTORY WHICH I BELIEVE WE HAVE PROVIDED IS VERY CLEAR THAT THEY'RE THINKING BROAD LAND AND THEY WANT TO MAKE SURE THAT THIS APPLIES TO PROTECT ITEMS BASED ON NEW TECHNOLOGY THAT OTHERWISE MIGHT NOT BE PROTECTED BY THE FOURTH AMENDMENT.

THE COURT: IS A ROUTER A STORAGE, THEN? WHY COULDN'T A ROUTER BE CONSIDERED STORAGE?

MR. BARNES: THE QUESTION IS WHO -- IT COULD HAVE

STORAGE IN IT, YES.

THE COURT: WELL, IT DOES HAVE STORAGE, DOESN'T IT? IT COMMUNICATES SOME INFORMATION, EVEN IF IT'S FOR A MILLISECOND. AS WE'VE DESCRIBED, IT DOES HAVE SOME TYPE OF STORAGE CAPABILITIES. SO SHOULDN'T THAT BE CONSIDERED A STORAGE DEVICE ALSO?

MR. STRAITE: IN FACT, YOUR HONOR, IT PROBABLY DOES. THERE ARE TWO WAYS THAT ELECTRONIC COMMUNICATIONS PROCEED AND ONE IS STORING FORWARD. THE ENTIRE MESSAGE IS COMMUNICATED TO AN INTERMEDIATE SERVER AND A INTERMEDIATE COMPUTER DEVICE AND FORWARDED AGAIN. AND THAT'S EXPLAINED IN ACTUALLY THE COUNCILMAN II DECISION AND INCLUDING THE EXCELLENT AMICUS BRIEFS THAT WERE FILED IN THAT CASE AND ONE BY THE TECHNICAL EXPERTS AND THE ONE BY SENATOR LEAHY HIMSELF, THE AUTHOR OF THE ECPA ABOUT AMICUS THERE.

AND THE SECOND TYPE OF COMMUNICATION WHICH IS MORE RELEVANT HERE IS THE INTERNET STYLE WHERE INFORMATION GETS BROKEN UP INTO PACKETS, ET CETERA, AND THE MESSAGE RECONSTRUCTED.

IN EITHER OF THOSE MODES OF TRANSPORTATION, THE COMMUNICATION CAN BE BOTH IN TRANSIT AND IN STORAGE AT THE SAME TIME, AND THAT WAS AN IMPORTANT POINT THAT SENATOR LEAHY MADE AND THAT THE TWO PARTS OF THE ECPA AT THE TIME, THE WIRETAP ACT AND THE SCA, ARE NOT MUTUALLY EXCLUSIVE. IT IS THE NATURE OF THE ELECTRONIC COMMUNICATIONS THAT COMMUNICATIONS ARE BOTH IN

TRANSIT AND IN STORAGE AT THE SAME TIME.

SO AS LONG AS THE STORAGE IS INCIDENTAL TO THE COMMUNICATION, IT CAN BE EITHER BOTH OR JUST THE SCA. AND SO IF A ROUTER DOES HAVE SOME LIMITED STORAGE IN IT, WHICH FACILITATES THIS NEW FORM OF COMMUNICATION, THEN, YES, THEN THE SCA MIGHT COVER THAT DEVICE. I'M NOT SURE WE'VE RESEARCHED THAT FOR THIS CASE, BUT, YES, I BELIEVE IT CAN BE COVERED BY THE SCA.

MR. BARNES: AND, YOUR HONOR, I BELIEVE THE LEGISLATIVE HISTORY ALSO SPEAKS TO RANDOM ACCESS MEMORY WHICH IS SOMETHING THAT IS CONTAINED ON A COMPUTING DEVICE AS WELL AS BEING A STORAGE ELEMENT AND IT SHOWS -- THEY'RE THINKING BROADER THAN JUST THE REMOTE FACILITY.

THE COURT: OKAY. LET ME ASK YOU TO SPEAK, IF I CAN, AND I DON'T MEAN TO INTERRUPT YOUR PRESENTATION, BUT COULD YOU SPEAK A LITTLE BIT MORE TO THE INTERCEPT?

AND YOU'VE HEARD ME TALK TO MR. BROWN, AND MR. BROWN SAYS THERE'S NO INTERCEPT AND THERE'S TWO SEPARATE COMMUNICATIONS AND THERE'S NOTHING THAT WAS INTERCEPTED AT ALL HERE. AND I'M HAPPY TO HEAR YOUR THOUGHTS ABOUT THAT.

MR. BARNES: YEAH. AND I THINK -- A NUMBER OF THOUGHTS. FIRST, PHARMATRAK IS DIRECTLY ON POINT. THE DEFENDANT THIRD PARTY COOKIE COMPANY AND PHARMATRAK MADE AN ALMOST, IF NOT ENTIRELY, IDENTICAL ARGUMENT AND THE FIRST CIRCUIT SAID, NO, THIS IS CONTEMPORANEOUS TO THE COMMUNICATION

BETWEEN THE USER AND THE WEBSITE.

THE COURT: THE BOTTOM PART OF PARAGRAPH 60 OF YOUR DIAGRAM.

MR. BARNES: THE BOTTOM PART OF PARAGRAPH 60 OF THE DIAGRAM. OKAY. AND I THINK PARAGRAPH 60 NEEDS TO BE THOUGHT OF IN CONJUNCTION WITH PARAGRAPH 184.

SO PARAGRAPH 184 SAYS FACEBOOK RECEIVED THE COMMUNICATIONS BEFORE THE COMMUNICATION BETWEEN THE CLIENTS IN THE VARIOUS WEBSITES WERE COMPLETED.

AND SO IT'S VERY HARD TO SHOW THIS IN EXACTLY HOW IT WORKS BECAUSE IT'S ALL HAPPENING AT THE SAME TIME. SO USER LEFT CLICKS ON THEIR MOUSE, SENDS IT TO -- SENDS IT TO -- YOU'RE THE WEBSITE AND SENDS IT TO YOU.

IN RESPONSE YOU HAVE COMPUTER CODE WHICH SENDS BACK A RESPONSE THAT HAS CONTENT IN IT AND ALSO IT INSTRUCTS NOT THE USER BUT THE WEB BROWSER ON WHAT TO DO NEXT.

THE CODE ON THE WEBSITE, THE CODE FROM THE WEBSITE INSTRUCTS THE BROWSER, HEY, SEND A SEPARATE GET REQUEST TO FACEBOOK.

THE CONTENT THAT IS REQUIRED BY FACEBOOK IS NOT NECESSARILY IN THE GET REQUEST THAT IS SENT BY FACEBOOK. IT'S CONTAINED WITHIN THE REFERRER HEADER THAT IS ATTACHED TO THE GET REQUEST TO FACEBOOK, AND IT'S AN IDENTICAL SIMULTANEOUS COPY OF THE COMMUNICATION THAT WAS SENT TO THE WEBSITE.

SO THE WEB BROWSER, UNBEKNOWNST TO THE PLAINTIFF, HAS

SIMULTANEOUSLY SENT THE URL THROUGH THE REFERRER HEADER, WHICH INCLUDES THE GET REQUEST, COOKIES, AND A GET REQUEST TO FACEBOOK.

FACEBOOK PROMISED IN THIS CASE THAT THEY WOULD NOT TRACK USERS IF THEY WERE LOGGED OFF OF FACEBOOK.

WHAT THAT MEANS IS THAT FACEBOOK IS SAYING THAT IF YOU GO TO THENEWYORKTIMES.COM AND YOU'RE NOT LOGGED ON FACEBOOK, WE'RE NOT GOING TO DO THIS INDIVIDUALLY IDENTIFIABLE COOKIE GAME WITH YOU WHERE WE TRACK THE CONTENT OF YOUR COMMUNICATIONS CONNECTED TO YOU.

FACEBOOK SAID THAT THEY COULDN'T DO IT AND WITHOUT CONSENT PARAGRAPH 27 AND YET THEY DID IT ANYWAY.

AND FACEBOOK RECEIVES, THEY ACQUIRE THAT COMMUNICATION BEFORE ALL OF THE CONTENT IS DOWNLOADED COMPLETELY ONTO THE USER'S WEB BROWSER.

SO THEY'RE ALL GOING ON AT THE SAME TIME. SZYMUSKIEWICZ, AND THERE'S THAT WORD AGAIN, AND SZYMUSKIEWICZ AND PHARMATRAK SEPARATE BUT SIMULTANEOUS AND IDENTICAL COMMUNICATION SATISFY EVEN THE STRICTEST REAL TIME REQUIREMENT.

FACEBOOK MENTIONED KONOP. I DON'T KNOW IF I'M PRONOUNCING IT CORRECTLY EITHER. KONOP IS INAPPOSITE AND HERE IS WHY, KONOP WAS A CASE ABOUT AN INTERNET BULLETIN BOARD WHERE THE PLAINTIFF HAD PLACED A COMMUNICATION ONTO THIS INTERNET BULLETIN BOARD WHERE IT SAT FOR SOME UNSPECIFIED PERIOD OF TIME.

AND THEN THE DEFENDANT CAME IN, AND IT'S NOT EXACTLY CLEAR WHETHER IT'S DAYS OR WEEKS OR MONTHS, LATER AND VIEWED THE COMMUNICATION THAT WAS SITTING ON THE MESSAGE BOARD. THAT IS FAR DIFFERENT THAN THE INSTANTANEOUS ACQUISITION OF THE INFORMATION THAT IS AT ISSUE IN THIS CASE.

THE SECOND CASE THEY CITE IS THE BUNNELL CASE. NOT BINDING. OF COURSE, THE OTHER THING IS THAT'S A DIFFERENT CASE. IT'S AN E-MAIL FORWARDING CASE WHERE THE COMMUNICATION HAS BEEN RECEIVED AND THEN AGAIN IT'S -- WE'RE TALKING ABOUT AS QUICK AS YOU CAN BE, AUTOMATICALLY REROUTED SOMEWHERE ELSE.

IN THIS CASE, THE FULL COMMUNICATION BACK FROM THE WEBSITE FACEBOOK ACQUIRES THE COMMUNICATIONS BEFORE THE FULL COMMUNICATION BACK FROM THE WEBSITE IS COMPLETELY RECEIVED AND THE WIRETAP ACT PROTECTS NOT JUST WHEN I SEND IT TO THE WEBSITE AND THE USER SENDS IT TO THE WEBSITE, IT ALSO PROTECTS WHEN THE USER RECEIVES A COMMUNICATION BACK FROM THE WEBSITE.

THE COURT: SO MR. BROWN TALKED ABOUT 2511(2)(D). AND HE SAYS, HE SUGGESTS THAT FACEBOOK WAS A PARTY HERE AND IT'S AN ABSOLUTE DEFENSE.

MR. BARNES: WELL, YOUR HONOR, THEY'RE A THIRD PARTY. THEY'RE NOT ONE OF THE FIRST PARTIES TO THE COMMUNICATION.

THE COURT: SO YOU SAY THAT THAT DOESN'T HELP THEM, THEY'RE NOT --

MR. BARNES: NO -- YEAH, THAT DOES NOT HELP THEM AT

ALL. THEY'RE A THIRD PARTY TO THE COMMUNICATION. THEIR ENTIRE INDUSTRY DESCRIBES THESE COOKIES AS THIRD PARTY COOKIES.

IF -- WHEN YOU AND I ARE HAVING A CONVERSATION HERE, A PERSON STANDING IN THE CORNER IS NOT A PARTY BETWEEN YOU AND I AND PARTICULARLY IF WE DON'T KNOW THE PERSON WHO IS STANDING IN THE CORNER OR, MORE IMPORTANTLY, IF THERE'S A BUG SITTING IN THE CORNER TRANSMITTING MY COMMUNICATIONS OFF TO SOME OTHER LOCATION WITHOUT MY KNOWLEDGE.

THE COURT: WELL, HERE IT IS A LITTLE DIFFERENT BECAUSE FACEBOOK IS KNOWN TO THE PARTIES. I MEAN, THE PERSON WHO INITIATES THE CONVERSATION, YOU, IN THAT HYPOTHETICAL, HAVE AGREED THAT THE PERSON IN THE CORNER CAN BE PART OF A CONVERSATION BECAUSE THEY'RE CONNECTED WITH YOU SOMEHOW.

MR. BARNES: IN CERTAIN CIRCUMSTANCES. THE DIFFERENCE HERE IS THE PROMISE NOT TO TRACK WHILE THE USER WAS LOGGED OFF.

SO IF -- IF I TELL MY SEVEN-YEAR OLD --

THE COURT: TOO MANY HYPOTHETICALS HERE, I REALIZE THAT.

MR. BARNES: OKAY.

THE COURT: BUT GO AHEAD. GO AHEAD. YOU WANT TO TALK ABOUT YOUR --

MR. BARNES: THEY'RE A THIRD PARTY. AND, AGAIN, I THINK IT'S IMPORTANT. WE DIDN'T MAKE UP THAT TERM. THAT'S WHAT THESE HAVE BEEN CALLED SINCE THE DAWNING OF THE COOKIE

AGE.

THE COURT: SO IS THE GRAVAMEN OF YOUR CASE, THEN, IT SOUNDS LIKE I HEARD -- YOU MENTIONED THIS SEVERAL TIMES.

IS THE REAL GRAVAMEN OF YOUR CASE THE FACT THAT WHILE YOUR CLIENTS WERE LOGGED OFF, THIS TRACKING OCCURRED? THAT'S THE VIOLATION. THAT'S THE SIN THAT BRINGS YOU TO THIS COURT.

MR. BARNES: AND FACEBOOK PROMISED NOT TO TRACK THEM WHILE THEY WERE LOGGED OFF.

THE COURT: IT'S NOT WHILE THEY'RE LOGGED ON. IT'S WHILE THEY'RE LOGGED OFF THAT YOU'RE CONCERNED.

MR. BARNES: THAT'S EXACTLY RIGHT. WHILE THEY'RE LOGGED OFF AFTER FACEBOOK PUBLICLY SAID -- I DON'T HAVE IT IN FRONT OF ME -- WE'VE SAID WE DON'T TRACK YOU AND WE DON'T TRACK AND WE COULDN'T DO IT WITHOUT SOME FORM OF CONSENT.

THE COURT: THAT YOU DISCOVERED SUBSEQUENT TO THAT, OH, THEY DID TRACK.

MR. BARNES: THEY DID TRACK. THEY DID KNOW. THEY HAD KNOWLEDGE OF THIS, AND THEY KEPT DOING IT ANYWAY.

THE COURT: SO LET ME ALSO DRAW YOU BACK -- I'M INTERRUPTING YOU FOR JUST A SECOND, BUT I WANT TO MAKE SURE THAT WE CAPTURE THIS.

SINCE YOU WERE INTIMATE WITH THE GOOGLE PLACEMENT, I'M CURIOUS, THERE WAS SOME DISCUSSION THERE ABOUT THE SUFFICIENCY OF THE PERSONAL ALLEGATIONS OR THE ALLEGATIONS PERSONAL TO THE PLAINTIFFS THERE. AND I'M CURIOUS IF YOU COULD COMMENT AS TO

WHETHER OR NOT THE ALLEGATIONS IN THIS -- IN THE SECOND AMENDED COMPLAINT ARE ALSO SUFFICIENT TO ALLEGE THE PERSONAL, THE PERSONAL DAMAGE.

MR. BARNES: I THINK THEY ARE AND AT 115, 118, 121, AND 124, IT TALKS ABOUT EACH INDIVIDUAL PLAINTIFF AND HOW THEY'VE USED THEIR BROWSING DEVICE, THEY'VE REGULARLY LOGGED OFF, THEY VISITED THESE WEBSITES.

THE COURT: YOU SEE, BECAUSE WE DON'T HAVE THE BENEFIT OF THE PLEADINGS IN GOOGLE.

MR. STRAITE: NOT BEFORE US TODAY, OF COURSE.

MR. BARNES: NOT BEFORE US TODAY.

THE COURT: THAT'S RIGHT. AND WHEN I LOOKED AT THIS AND I LOOKED AT THAT ARGUMENT, I THOUGHT, WELL, I WONDER, HOW DO THE TWO RECONCILE.

MR. BARNES: AND I THINK THERE ARE TWO OTHER THINGS OF NOTE THERE.

THE FIRST IS THAT I BELIEVE WE CITED A CASE KLAYMAN VERSUS OBAMA WHICH WAS THE CASE AGAINST THE NSA, AND THE NSA REFUSED TO TURN OVER RECORDS. BUT THE PLAINTIFF ALLEGED IT WAS A BUSINESS PRACTICE, IT WAS PUBLIC KNOWLEDGE, AND IT WAS A BUSINESS PRACTICE. AND THE FEDERAL CIRCUIT SAID YOU DON'T HAVE TO PLEAD EVERY DETAIL OF EVERY COMMUNICATION THAT WAS CAPTURED WHEN THE DEFENDANT HAS ADMITTED TO THE GENERAL CONDUCT AND YOU'VE TAKEN ACTIONS WHICH FIT WITHIN THE CATEGORY OF PERSONS AFFECTED.

THIS CASE HAS SOME SIMILARITIES IN THAT REGARD. MR. STRAITE TALKED ABOUT THE MOTION TO COMPEL WHICH HAS BEEN OUT FOR A NUMBER OF TIMES. HE ALSO MENTIONED IN THE COMPLAINT, AND MR. STRAITE CAN SPEAK MORE ABOUT THE DETAILS OF PARTICULAR URL'S BUT OUR PLAINTIFFS, WE DO HAVE SOME PARTICULAR URL'S.

MR. STRAITE: YES. AND IN FAIR DISCLOSURE, COUNSEL, MR. GRYGIEL, HELPED WITH THE COMPLAINT IN THE GOOGLE CASE AND SOME OF THE BRIEFING. AND WE ARE PRETTY FAMILIAR WITH THE COMPLAINT.

IT'S NOT MY RECOLLECTION, AND I DIDN'T PREPARE IT, ALTHOUGH I DON'T THINK THE COMPLAINT CONTAINED THE FULL URL'S. I BELIEVE IT WAS -- THE ALLEGATIONS WERE SIMILAR HERE, BUT WE CAN GET THAT TO YOU IF IT'S IMPORTANT.

BUT, MORE IMPORTANTLY, AS MR. BARNES NOTED, THE KLAYMAN VERSUS OBAMA CASE REALLY IS THE STARTING PLACE. WHEN WE, AS WE DID, WE WOULD LIKE TO SAY IN SUMMARY JUDGMENT LIKE DETAIL A PERVASIVE BUSINESS PRACTICE WHERE FACEBOOK ADMITTED POST LOGOUT WE TRACKED YOUR INTERNET USE, EVERYONE, WITHOUT EXCEPTION.

THE QUESTION IS WHETHER IT WAS DONE KNOWINGLY OR ACCIDENTALLY. FINE, WE'LL GET TO THAT IN DISCOVERY BUT IF IT'S AN ADMITTED PRACTICE AND IT AFFECTED EVERYONE IN THE COUNTRY.

WE WENT BACK AND FOUND THESE URL'S THAT WERE VISITED, SOME WERE TYPED AND SOME WERE SEARCH TERMS AND CLICKED ON AND WERE THESE WEBSITES WERE VISITED WHILE THE PLAINTIFFS WERE LOGGED OUT AND WE PLED THAT WITH SPECIFICITY.

IT'S CONSISTENT WITH THE BUSINESS PRACTICE. WE ACTUALLY DID THEM AS WELL, AND WE DID NOT ACTUALLY PUT THE URL'S IN THERE TO PROTECT THE PRIVACY OF PLAINTIFFS. I DON'T BELIEVE THE COMPLAINT IN GOOGLE ALSO PLED, AND HOPEFULLY WE CAN GET THEM TO YOU BUT HOPEFULLY IT'S NOT NECESSARY.

THE COURT: I GUESS IT'S A THRESHOLD QUESTION, AND I COULD HAVE ASKED, AND I'LL ASK MR. BROWN THIS ALSO, SHOULD THIS COURT JUST FOLLOW THE THIRD CIRCUIT GOOGLE CASE?

MR. STRAITE: AS A THRESHOLD MATTER, YOUR HONOR, WE WOULD BE VERY HAPPY IF YOUR HONOR WERE TO ADOPT MANY OF THE RULINGS IN THE GOOGLE CASE, ALL OF THE RULINGS WE WOULD ALSO BE HAPPY.

THERE ARE ONE OR TWO TECHNICAL AREAS WHERE WE DISAGREE WITH WHAT THEY RULED, BUT WE ALSO PLED THE SECOND AMENDED COMPLAINT WITH THE KNOWLEDGE OF WHAT THE THIRD CIRCUIT HELD.

SO WE NOT ONLY HAD THE BENEFIT OF YOUR RULING BUT THEN TWO AND A HALF WEEKS LATER WE HAD THE BENEFIT OF THE THIRD CIRCUIT'S RULING.

SO WE HAVE TO ADMIT, AS MUCH AS WE WOULD LOVE FOR YOU TO REPEAT AND ECHO THE RULINGS FROM THE THIRD CIRCUIT, WE HAVE TO -- STRICTLY SPEAKING, IT MAY NOT BE NECESSARY BECAUSE WE PLED NEW FACTS IN THE SECOND AMENDED COMPLAINT.

THE COURT: AND WHAT DID THE THIRD CIRCUIT DO WITH THE FEDERAL CLAIMS?

MR. BARNES: IT DISMISSED ON THE PARTY TO THE

COMMUNICATION ISSUE, WHICH WE HAVE FASHIONED THIS COMPLAINT IN A WAY WHICH WE BELIEVE MORE THOROUGHLY EXPLAINS THAT FACEBOOK IS NOT A PARTY TO THESE COMMUNICATIONS. WE DON'T BELIEVE GOOGLE WAS A PARTY TO THESE COMMUNICATIONS EITHER. AND THE PHARMATRAK CASE SAYS AS MUCH.

IN A FOOTNOTE OF THE THIRD CIRCUIT'S OPINION, IT DISTINGUISHES PHARMATRAK OR IT SAYS SEE IF PHARMATRAK, BUT THERE'S NO FUNDAMENTAL DISTINCTION BETWEEN HOW PHARMATRAK COOKIES OPERATED AND THE GOOGLE COOKIES OPERATED.

SO THE WIRETAP ACT CLAIM, EVERYTHING EXCEPT FOR THE PARTY'S COMMUNICATION IS WHAT WE WOULD ASK YOU FOR AND WE THINK WE'VE PLED THIS DIFFERENTLY AND EXPLAINED IT IN A BETTER WAY AND YOU CAN FOLLOW THE PHARMATRAK DECISION.

MR. STRAITE: AND THERE WAS THE CFAA CLAIM IN THE THIRD CIRCUIT THAT WAS DISMISSED. WE DROPPED THAT CLAIM. THE FACTS, AS YOU'VE SAID, WERE VIRTUALLY INDISTINGUISHABLE BUT THERE WERE A FEW FACTS THAT WERE DIFFERENT IN THE GOOGLE CASE. THERE WAS THE SURREPTITIOUS HACKING OF THE SAFARI COOKIE BLOCKER HERE. IT WAS THE FAILURE TO EXPIRE COOKIES UPON LOGOUT, AND THE FACTS ARE A LITTLE BIT DIFFERENT BASED ON THAT AND A COUPLE OF OTHER REASONS WE OPTED TO DROP THE CFAA CLAIM AND SO THE THIRD CIRCUIT RULING THERE IS NO LONGER PRECEDENT.

MR. BARNES: AND THE THIRD CIRCUIT NEVER DIRECTLY ANSWERED THE QUESTION OF WHETHER THE WEB BROWSER ITSELF IS A FACILITY OR NOT. THEY TALKED ABOUT THE COMPUTER. WE PLED THAT

OUR WEB BROWSER WAS.

IF I COULD, YOUR HONOR, YOU ASKED COUNSEL FOR FACEBOOK ABOUT CAL. PENAL CODE 496 STATUTE. AND PUT 484 TO THE SIDE HERE. 496(A), YOUR HONOR, SAYS THAT A PRINCIPAL AND ACTUAL THEFT OF PROPERTY MAY BE CONVICTED PURSUANT TO 496(A). THAT'S IN THE STATUTE.

THERE'S A CASE THAT WE THINK IS PRETTY IMPORTANT HERE CALLED CTC REAL ESTATE SERVICES VERSUS LEPE, L-E-P-E, AND TWO THINGS THE COURT HELD THERE ARE CRITICALLY IMPORTANT, "A VICTIM OF THEFT IS ENTITLED TO RECOVER THE ASSETS STOLEN OR ANYTHING ACQUIRED WITH THE STOLEN ASSETS, EVEN IF THOSE ASSETS HAVE A VALUE THAT EXCEEDS THE VALUE OF THAT WHICH IS STOLEN AND ONCE PII CAN BE THE OBJECT OF THEFT.

YOU ASK FACEBOOK COUNSEL, WHERE IS THE THEFT HERE? THE NONCONSENSUAL TAKING OF ELECTRONIC INFORMATION IS THEFT. WHEN YOU TAKE SOMETHING WITHOUT PERMISSION, YOUR HONOR, WE CONTEND THAT IS THEFT.

THE COURT: OKAY. SO AT TRIAL WE'LL HAVE TO -- YOU'LL HAVE TO PROVE, I GUESS, A QUASI CRIMINAL TYPE OF CAUSE OF ACTION AS TO WHETHER OR NOT A SPECIFIC INTENT CRIME OR A GENERAL INTENT CRIME.

MR. BARNES: THEY KNEW THAT THEY HAD PROMISED NOT TO TAKE THIS INFORMATION WHILE PEOPLE WERE LOGGED OFF, AND THEY DID IT ANYWAY WITHOUT AUTHORIZATION.

THE COURT: OKAY. WHAT I'D LIKE TO DO IS TO TAKE

ABOUT A FIVE MINUTE BREAK HERE AND GIVE OUR REPORTER A REST AND EVERYONE ELSE A REST, AND WE'LL COME BACK AND GIVE YOU A COUPLE OF MINUTES TO WRAP UP, AND THEN WE'LL HEAR FROM MR. BROWN.

MR. STRAITE: OKAY. WOULD YOU ALSO LIKE US TO ADDRESS ANY OF THE OUTSTANDING SEALING OR DISCOVERY MOTIONS?

THE COURT: NO. NO. I DON'T THINK WE'LL TALK ABOUT THAT THIS MORNING. I SHOULD HAVE SAID THAT AT THE OUTSET.

MR. STRAITE: THANK YOU, YOUR HONOR.

THE COURT: WE'LL BE IN RECESS FOR ABOUT SEVEN MINUTES.

(RECESS FROM 11:14 A.M. UNTIL 11:25 A.M.)

THE COURT: PLEASE BE SEATED. THANK YOU FOR YOUR COURTESY. WE'RE BACK ON THE RECORD. ALL PARTIES PREVIOUSLY PRESENT ARE PRESENT ONCE AGAIN.

AND, LET'S SEE, LET ME JUST ASK, MR. BARNES, WHAT -- LET ME ASK YOU, IS THERE ANYTHING ELSE YOU WANTED TO FINISH UP WITH?

MR. BARNES: THERE IS, YOUR HONOR. WE DIDN'T TOUCH UPON THE INVASION OF PRIVACY OR THE INTRUSION UPON SECLUSION CLAIM.

SO IF MR. STRAITE WANTS TO SPEAK TO THAT.

THE COURT: DO YOU WANT TO SPEAK TO THAT FOR A MOMENT?

MR. STRAITE: IF YOU WOULD INDULGE.

THE COURT: SURE. THAT'S FINE.

MR. STRAITE: THANK YOU, YOUR HONOR. THIS SHOULD PROBABLY TAKE TWO MINUTES. I THINK WE COVERED MOST OF THIS IN OUR INTRODUCTION, WHAT HAS CHANGED IN THE SECOND AMENDED COMPLAINT AND OUR DISCUSSION OF STANDING.

AS YOUR HONOR, OF COURSE, STARTED TO SAY IS THAT THIS IS AN EVOLVING AREA OF LAW, AND WE AGREE WITH YOUR HONOR. BUT WHAT HAS BEEN CONSISTENT OVER THE PAST THREE OR FOUR YEARS IS THAT WHAT FACEBOOK ALLEGEDLY DID, WHAT WE ALLEGE IN THE COMPLAINT, IS BY ANY MEASURE AN EGREGIOUS BREACH OF SOCIAL NORMS. SO SAID THE THIRD CIRCUIT AND SO SAID THE CALIFORNIA SUPERIOR COURT.

NO COURT HAS SAID THE OPPOSITE. THERE ARE SOME CASES WHERE IT LOOKS LIKE THE AGGREGATION OF DATA WOULD NOT BE AN EGREGIOUS BREACH OF SOCIAL NORMS, FOR EXAMPLE, GOOGLE PRIVACY POLICY LITIGATION. THAT'S A DISTINGUISHABLE CASE. HOWEVER, BECAUSE EVERY ITEM OF DATA THAT GOOGLE HAD, THEY HAD WITH CONSENT. THE ONLY QUESTION IS WHETHER IT WAS PERMISSIBLE TO USE THE DATA IN WAYS THAT MAYBE WEREN'T DISPOSED OF EARLIER.

THAT'S A VERY DIFFERENT QUESTION THAN WHETHER FACEBOOK MAY DO BOTH THE UNLAWFUL GATHERING OF INFORMATION AND THE UNLAWFUL AGGREGATION. SO GOOGLE PRIVACY POLICY LITIGATION IS DISTINGUISHABLE ON THAT BASIS ALONE.

SO OUR CLAIM FOR INVASION OF PRIVACY AND ALSO INTRUSION UPON SECLUSION IS DIFFERENT NOW IN THE SECOND AMENDED COMPLAINT THAN IT WAS IN THE FIRST AMENDED COMPLAINT.

THERE IS SIGNIFICANT DETAILS THAT OUTLINE WHY THERE IS A BREACH OF REASONABLE EXPECTATION OF PRIVACY. NOT NECESSARILY TO THE EXTENT OF THE URL. I WOULD LOVE IT IF WE GET TO THAT POINT IN SOCIETY WHERE WE SAY WE NOW HAVE A REASONABLE EXPECTATION OF PRIVACY BUT THIS COMPLAINT ALLEGES THAT IT'S THE AGGREGATION OF YOUR ENTIRE WEB BROWSING HISTORIES, INCLUDING NOT ONLY WHAT YOU VIEW BUT WHAT YOU SEARCH FOR. THAT'S WHAT THE EXPECTATION OF PRIVACY RESIDES.

AND IT'S DIFFICULT TO FIND ANY CASES IN THE LAST FEW YEARS AND IT IS AN EVOLVING AREA OF LAW THAT GO THE OTHER WAY.

AND FINALLY, YOUR HONOR, WE TALKED ABOUT THE PLEADING STANDARDS HERE. AND, OF COURSE, THIS IS PRIMARILY A RULE 8 CASE BECAUSE THERE ARE A COUPLE OF FRAUD CLAIMS BUT UNDER RULE 8 IT'S OBVIOUS THAT FACEBOOK KNOWS PRECISELY, THEY'RE ON NOTICE WHAT CLAIMS ARE HERE, AND THEY KNOW WHAT TO EXPECT AND THE ONLY QUESTION IS WHETHER IT IS SOME FORMALISTIC PROPOSITION OF HOW DETAILED THE ALLEGED URL'S ARE ACTUALLY IN THE BODY OF THE COMPLAINT, AND WE BELIEVE THE KLAYMAN CASE ADDRESSES THAT QUITE WELL.

WE'VE HAD A LOT OF REALLY INTERESTING CONVERSATION HERE, AND I'M REALLY GRATEFUL THAT MR. BARNES IS ABLE TO JOIN US. AND YOU CAN SAY HE'S AN EXPERT AND, OF COURSE, THAT IS INAPPROPRIATE BECAUSE HE IS A LAWYER. WE SAY A RINGER.

BUT THERE MAY COME A POINT FOR EXPERT TESTIMONY, AND WE'VE PROBABLY REACHED IT NOW, WHERE THERE WILL BE TIME FOR EXPERTS

TO OPINE ON THESE QUESTIONS AND NOT MERE LAWYERS, CERTAINLY PEOPLE MUCH SMARTER THAN US SHOULD BE WEIGHING IN. BUT THAT'S A QUESTION OF FACT DISCOVERY, AND WE SHOULD GET INTO THAT, AND I DON'T BELIEVE THERE'S ANYTHING MORE THAT IS NEEDED UNDER RULE 8(A) FOR THE COMPLAINT.

AND FINALLY AS TO STANDING I WOULD LIKE TO END WITH A SHORT QUOTE TO LUJAN, L-U-J-A-N FOR OUR COURT REPORTER, 504 U.S. 578 IS THE PINPOINT CITE WHERE THE COURT SAYS, "NO MATTER IF THE HARM COMES FROM A VIOLATION OF RIGHTS FROM A CONSTITUTION, A STATUTE OR COMMON LAW, 'THERE IS ABSOLUTELY NO BASIS FOR MAKING THE ARTICLE III INQUIRY TURN ON THE SOURCE OF THE ASSERTED RIGHT.'"

AND SO HERE WE BELIEVE THERE'S STANDING FOR ALL OF THE CLAIMS, AND THE ONLY QUESTION IS WHETHER THERE'S A CAUSE FOR DISMISSAL UNDER 12(B)(6).

THE COURT: ALL RIGHT. THANK YOU. I DO WANT TO GIVE YOU ONE OPPORTUNITY TO COMMENT AGAIN ABOUT THE -- I GO BACK TO YOUR PARAGRAPH 60 AND MY PHRASING OF MR. BROWN'S ARGUMENT AND THAT THIS IS THE WAY THE INTERNET WORKS.

AND THE BOTTOM PORTION OF THE -- IT'S NUMBERS 3 AND 4 ON YOUR DIAGRAM THERE.

DOESN'T THAT HAPPEN EVEN IF YOU'RE NOT A FACEBOOK MEMBER? DOESN'T THAT HAPPEN WHEN YOU GO TO, YOU GO TO A WEB PAGE OR WHATEVER AND YOU GET ADVERTISEMENTS? THIS HAPPENS IN EVERY COMMUNICATION, DOESN'T IT?

MR. BARNES: IT COULD, BUT THERE'S A BIG DISTINCTION AND THAT IS FACEBOOK'S PROMISES AND THE LACK OF CONSENT TO DO THIS IN THE EXACT WAY THAT THEY DID IT.

THE COURT: OFF LINE.

MR. BARNES: WHILE LOGGED OFF, YES.

THE COURT: RIGHT.

MR. BARNES: NON-FACEBOOK USERS WOULD ALSO HAVE SOME INFORMATION SENT TO FACEBOOK, BUT IT WOULD BE DIFFERENT.

IT WOULD BE -- FACEBOOK WOULD PROBABLY CONTEND IT WAS ANONYMOUS, AND WE WOULD DISPUTE THAT. BUT IT WOULDN'T BE THE SAME TYPE OF INFORMATION THAT IS INCLUDED IN PARAGRAPH 58. IT WOULD BE LESS IDENTIFIABLE INFORMATION THAT IS INCLUDED IN PARAGRAPH 58. AND WHAT FACEBOOK SAID, IF YOU'RE LOGGED OFF, WE'RE NOT GOING TO TRACK YOU LIKE YOU'RE LOGGED ON.

THE COURT: SO THE DISTINCTION HERE, AS WE USE THE INTERNET, WE CLICK ON SOMETHING, WE GO TO THE WAL-MART, AND WE GET BACK AN ADVERTISEMENT FOR WHATEVER IT MIGHT BE THAT, THAT SOMEBODY THINKS WE'RE INTERESTED IN, THAT HAPPENS TO EVERYBODY. THAT'S JUST THE NATURE OF IT.

MR. BARNES: AND IT'S BASED ON EXPRESS OR IMPLIED CONSENT.

THE COURT: AND ONE OF THE DISTINCTIONS, IF NOT THE MAJOR DISTINCTION HERE, IS THE FACT THAT THERE'S A FACEBOOK COOKIE THAT DOES SOMETHING ELSE; IS THAT RIGHT?

MR. BARNES: THAT IS CORRECT.

MR. STRAITE: MULTIPLE COOKIES, YOUR HONOR. ACTUALLY, IN PARAGRAPH 58 IT LISTS I THINK 11 OR 12 COOKIES MANY OF WHICH CONTAIN NOT ONLY YOUR USER IDENTIFICATION BUT COULD HAVE CONTAINED THE IDENTIFICATION OF THE LAST USER TO USE THAT BROWSER AND IT COULD ALSO BE CRYPTED I.D. A LOT OF USER IDENTIFIABLE INFORMATION IS PACKAGED WITH THAT.

THE COURT: AND THAT'S YOUR ARGUMENT ABOUT AGGREGATION, THEN, IT'S THIS INFORMATION THAT IS AGGREGATED?

MR. STRAITE: YES, YOUR HONOR. I THINK THE THIRD CIRCUIT GOT IT RIGHT WHEN IT SAYS EVEN A SOPHISTICATED INTERNET USER COULD REASONABLY EXPECT THAT HER URL QUERIES WILL NOT BE ASSOCIATED WITH EACH OTHER.

SO, AGAIN, IT IS IMPLICITLY SAYING IF THERE'S NOT A REASONABLE EXPECTATION OF PRIVACY IN THE SINGLE URL, ONE CAN REASONABLY EXPECT, AND, IN FACT, EVEN A SOPHISTICATED INTERNET USER CAN REASONABLY EXPECT THAT MULTIPLE URL'S WILL NOT BE ASSOCIATED WITH THE SAME USER.

THE COURT: THANK YOU. AND THIS IS PERHAPS APROPOS TO NOTHING, BUT IN TODAY'S WORLD IS THERE DE-SENSITIVITY AS TO PRIVACY OR HAS IT INCREASED?

MR. STRAITE: IN FACT, YOUR HONOR, AS WE PLEADED IT'S INCREASED AS MORE INTERNET USERS UNDERSTAND EXACTLY WHAT IS AT STAKE, THERE'S ACTUALLY AN INCREASE IN THE AMOUNT OF AWARENESS AND INCREASING AMOUNT OF CONCERN MULTIPLE PLACES IN THE COMPLAINT WHERE WE TALK ABOUT AND ALLEGE MULTIPLE STUDIES.

PUGH HAS DONE STUDIES AND OTHERS THAT MR. BARNES WILL DISCUSS, BUT THERE'S AN INCREASED SENSITIVITY AND EVEN CONGRESS HAS INCREASING SENSITIVITY.

WE DON'T NEED ADDITIONAL CONGRESSIONAL ACTION TO MAKE THIS CASE WORK, BUT IT DEMONSTRATES THAT THERE IS INCREASING AWARENESS OF THE EROSION OF PRIVACY AND INCREASING UNCOMFORTABLENESS WITH THE SURVEILLANCE THAT IS BEING BUILT PRIMARILY IN THE CORPORATE SECTOR AND WITHOUT GOVERNMENT ACTION AND HOW EASY IT IS FOR THE GOVERNMENT TO GET INFORMATION THROUGH CORPORATE BEHAVIOR EVEN IF THEY, THEMSELVES, ARE NOT THE ONE TRACKING AND SURVEILLING YOU.

THE COURT: BUT THIS IS MORE CIVILIAN USE. THIS IS A BUSINESS USE.

MR. STRAITE: RIGHT, BUT EVEN THE ACLU SAYS IT RIGHT ON THE FRONT PAGE OF THEIR WEBSITE THAT PRIVACY IN THIS ECONOMY STARTS WITH CORPORATE PRIVACY BECAUSE SO MUCH SURVEILLANCE THE GOVERNMENT DOES IS BY GETTING INFORMATION FROM THE CORPORATIONS THAT THEY EITHER WITH OR WITHOUT CONSENT OBTAINED FROM CITIZENS.

MR. BARNES: AND, YOUR HONOR, THE OPPERMAN DECISION SPEAKS TO THIS POINT WHERE THERE WAS A DEFENSE IN ONE OF THE CLAIMS THAT, LOOK, THIS IS THE SAME SORT OF THING. THIS IS JUST THE WAY THE INTERNET WORKS. THIS IS THE WAY THE WORLD IS.

AND I BELIEVE THE COURT IN THAT CASE MADE CLEAR THAT THE NONCONSENSUAL TAKING OF INFORMATION, WHETHER IT'S ELECTRONIC OR

IN PAPER FORM, TAKING SOMEONE'S STUFF WITHOUT THEIR CONSENT HAS NEVER BEEN AND SHOULD NEVER BE AN ORDINARY BUSINESS PRACTICE THAT IS EXCUSED AND THE POLLING DATA IS ODD, QUOTE, "POLLING DATA."

THE COURT: I APPRECIATE THAT. THE QUESTION HERE IS WHETHER OR NOT THESE URL'S AND THESE OTHER THINGS ARE STUFFED.

MR. BARNES: AND, YOUR HONOR, I THINK THEY CLEARLY ARE, THAT THEY ARE STUFFED. IF YOU LOOK AT THE FISA COURT OPINION AND THE GOOGLE OPINION, THEY'RE THE EVERY DAY COMMUNICATIONS OF AMERICANS.

THE COURT: AND BEFORE YOU SIT DOWN, I JUST WANT TO GIVE YOU YOUR -- GIVE YOU AN OPPORTUNITY TO GIVE ME YOUR BEST CASE SCENARIO FOR WHY THE TOOLBAR IS A STORAGE DEVICE.

MR. BARNES: THE TOOLBAR IS A STORAGE LOCATION.

THE COURT: STORAGE LOCATION.

MR. BARNES: IT IS A STORAGE LOCATION BECAUSE IT IS A PLACE WHERE THE COMMUNICATIONS THAT ARE SENT IN THE PROCESS OF BEING SENT TO THE WEBSITE AND RECEIVED BACK AND IN RESPONSE FROM IS KEPT BY THE WEB BROWSER.

THE WEB BROWSER FUNCTIONS IN A WAY THAT THE WEB BROWSER AUTOMATICALLY PUTS IT THERE WHILE THE COMMUNICATION IS HAPPENING.

THE CORRESPONDING -- THE COMPARISON WOULD BE TO E-MAIL. THE E-MAIL COMPANY STORES IT IN A CERTAIN LOCATION WHILE IT'S BEING SENT TO SOME PLACE AND WHILE THAT COMMUNICATION IS

HAPPENING.

YES, THIS IS IN A DIFFERENT CONTEXT, SLIGHTLY DIFFERENT CONTEXT WITH E-MAIL, BUT IT'S THE SAME CONCEPT. IT'S THE SAME GENERAL FUNCTIONALITY.

THE COURT: I'M JUST TRYING TO GRASP THAT, AND I APPRECIATE YOUR ASSISTANCE. I LOOK AT THAT AND I THINK, WELL, IT'S JUST A PLACE HOLDER. IT'S JUST A -- IT'S LIKE ON THE RADIO SCREEN, ON A DIGITAL RADIO IN YOUR CAR AND YOU PUNCH IN THE RADIO NUMBER AND THE NUMBER SHOWS UP. I WANT TO GO HEAR JAZZ, AND THEY'RE PLAYING SOMETHING YOU DON'T LIKE AND YOU PREFER TO HEAR SOME SZYMUSKIEWICZ AND YOU PUSH A BUTTON AND GO TO THE CLASSICAL RADIO STATION. WAS THAT STORAGE, THE FIRST RADIO STATION?

MR. BARNES: I THINK THIS IS A DIFFERENT CONTEXT.

THE COURT: SURE.

MR. BARNES: AND A PLACEHOLDER CAN CERTAINLY BE A STORAGE LOCATION. IT IS SOMEWHERE THAT YOU PUT SOMETHING WHILE YOU'RE DOING SOMETHING. YOU WERE GOING TO KEEP IT THERE FOR RIGHT NOW.

A PLACEHOLDER CAN BE STORAGE IN THAT HYPOTHETICAL, IN YOUR PARTICULAR HYPOTHETICAL. YOU USED THE WORD PLACEHOLDER, I BELIEVE.

THE COURT: I'M JUST TRYING TO GET ADDITIONAL INFORMATION FOR YOU TO HELP ME AND UNDERSTAND THAT CONCEPT OF THE TOOLBAR BEING THE ACTUAL STORAGE AND SINCE, AS YOU SUGGEST,

IT'S A CASE OF FIRST IMPRESSION.

MR. BARNES: AND I THINK YOU LOOK AT THE FUNCTIONALITY OF IT.

THE COURT: ALL RIGHT. THANK YOU VERY MUCH.

MR. STRAITE: WE APPRECIATE YOU TAKING SO MUCH TIME.

THE COURT: THANK YOU. THIS IS HELPFUL. THANK YOU.

MR. BROWN, HAS ANY OF THIS CHANGED YOUR OPINION?

MR. BROWN: WELL, THERE ARE CERTAINLY A NUMBER OF THINGS TO BE ADDRESSED. I HEARD A LOT OF FACTUAL STATEMENTS THAT ARE NOT CONTAINED WITHIN THE COMPLAINT HERE TODAY. I'VE HEARD A LOT OF DISCUSSION ABOUT OUT-OF-CIRCUIT CASE LAW, AND I HEARD ABOUT SOME CASES THAT WERE NOT CITED IN THE BRIEFING AS WELL.

SO LET ME TRY TO HIT SOME OF THESE POINTS AND IN AS A METHODICAL WAY AS I CAN STARTING WITH STANDING.

SO I THINK I HEARD A FEW DIFFERENT POSITIONS THAT ARE NOT RECONCILABLE FROM THE PLAINTIFFS IN THEIR ARGUMENT.

THEY'VE MADE THE POINT THAT NONECONOMIC INJURY IS NOT NECESSARY FOR ARTICLE III STANDING, AND THEN THEY QUICKLY PIVOTED FROM THAT TO SAYING, WELL, WE'RE ALLEGING INVASION OF PRIVACY.

BUT AS I UNDERSTAND IT, IT'S NOT JUST THAT WE'RE ALLEGING INVASION OF PRIVACY. THAT'S JUST ANOTHER WAY OF SAYING WE'RE ALLEGING A WHOLE BUNCH OF CAUSES OF ACTION IN THIS CASE, SOME OF WHICH ARE STATE LAW CLAIMS, LET'S SAY, COMMON LAW, OR

STATUTORY CLAIMS.

AND I THINK REALLY THIS IS JUST, FRANKLY, A REPACKAGING OF THIS ARGUMENT THAT IS MERELY ALLEGING A VIOLATION OF A STATE LAW CLAIM IS ENOUGH IN FEDERAL COURT.

AND IT'S NOT ENOUGH. IT'S MERELY ALLEGING A STATE LAW CLAIM. AND THAT'S WHAT EDWARDS AND IT'S PROGENY STAND FOR IN THE FEDERAL STATUTE CONTEXT, AND THAT'S WHAT IS GOING TO BE DECIDED MAYBE BY THE U.S. SUPREME COURT IN SPOKEO BUT AT LEAST THAT WAS THE ISSUE THAT WAS PRESENTED.

IN THE STATE LAW CONTEXT, THAT'S NOT THE CASE. IF YOU HAVE A STATE LAW CLAIM, YOU STILL HAVE TO MAKE OUT THE REQUIREMENTS OF ARTICLE III AND, AGAIN, WE CITED THE CASE LAW THERE.

THEY THEN MENTION THE DOE VERSUS CHOU CASE AND, AGAIN, I DON'T KNOW THAT CASE, AND THEY MAY HAVE ACKNOWLEDGED THIS, THAT THAT CASE WAS CITED IN THE BRIEFING. AND THEY TRIED TO CHARACTERIZE DOE VERSUS CHOU AS THE U.S. SUPREME COURT HOLDING THAT A MERE ASSERTION OR ALLEGATION OF A STATE LAW PRIVACY VIOLATION WOULD BE SUFFICIENT UNDER ARTICLE III.

IT WAS INTERESTING, IN THE THIRD CIRCUIT'S GOOGLE COOKIE PLACEMENT DECISION, THEY ACTUALLY MENTION DOE VERSUS CHOU BUT THIS IS ALL THAT I HAVE IN FRONT OF ME RIGHT NOW.

BUT IN THE STANDING SECTION, THEY REFER TO IT, AND THERE'S A FOOTNOTE WHICH REFERS TO JUSTICE GINSBERG'S DECISION, AND THE QUOTE HERE IS THAT DOE HAS STANDING TO SUE, THE COURT AGREES,

BASED ON ALLEGATIONS THAT HE WAS TORN ALL TO PIECES AND GREATLY CONCERNED AND WORRIED BECAUSE OF THE DISCLOSURE OF HIS SOCIAL SECURITY NUMBER AND ITS POTENTIALLY DEVASTATING CONSEQUENCES.

SO THERE THEY HAD, WHETHER IT WAS FACTUAL ALLEGATIONS IN THAT CASE OR IT WAS SOME SORT OF FACTUAL RECORD BEFORE THE COURT, THE BASIS THERE WAS ON APPARENTLY PERCEIVED EMOTIONAL HARM OF SOME SORT THAT HAD BEEN EITHER ALLEGED OR PROVED. SO IT WASN'T THE MERE ASSERTION THAT THERE WAS A STATUTORY VIOLATION. THERE WAS -- OR A STATE LAW VIOLATION. THERE WAS SOMETHING MORE, AND SO I JUST WANTED TO CORRECT THE RECORD ON THAT.

IN TERMS OF THE URL ISSUE AND THE LACK OF THE SPECIFICITY IN THE COMPLAINT, I JUST WANTED TO NOTE THAT THE COURT HAS A PROCESS FOR FILING THINGS UNDER SEAL AND THE IDEA THAT THERE WAS SOMETHING PROHIBITING THEM FROM COMING FORWARD AND DISCLOSING TO THE COURT AND THE DEFENDANT WHAT THE SUPPOSED COMMUNICATIONS WERE, WHAT THE COMMUNICATIONS WERE THAT THEY ARE COMPLAINING ABOUT. I MEAN, THAT'S THE ESSENCE OF THIS CASE, RIGHT? THAT THERE WERE CERTAIN COMMUNICATIONS THAT WERE SUPPOSEDLY INTERCEPTED AND CAUSED THEM HARM. WE DON'T KNOW WHAT THEY ARE.

BUT THEY DIDN'T TAKE ADVANTAGE OF THE COURT'S SEALING PROCEDURES, AND WE CERTAINLY HAVEN'T AS TO OTHER PAPERS IN THE CASE.

AND THERE'S A LOT OF TALK AGAIN ABOUT THE HERPES PAGES AND

ALL OF THIS. THOSE ARE ALL THEORETICAL. THOSE ARE SORT OF THEORETICAL EXERCISES, AND THERE'S BEEN NO TETHERING OF THOSE TO ANY NAMED PLAINTIFF AT THIS POINT.

TURNING TO THE WIRETAP ACT. SO ONE OF THE THINGS THAT COUNSEL SAID IS THAT IN THEIR SECOND AMENDED COMPLAINT THEY CLARIFIED THAT THE REAL PROBLEM HERE WAS THE COLLECTION OF URL'S AS OPPOSED TO I.P. ADDRESSES. I FIND THAT VERY SURPRISING AND VERY PUZZLING TO HEAR, AND I THINK I KNOW WHY.

BUT THE FACT IS, IS THAT IN THE FIRST AMENDED COMPLAINT, IT WAS ABSOLUTELY THE SAME. THE WHOLE POINT OF THE FIRST AMENDED COMPLAINT, AGAIN, WAS THAT FACEBOOK CAME INTO POSSESSION OF THE BROWSING HISTORY, OR THE URL. IT HAD NOTHING TO DO WITH FACEBOOK COMING INTO POSSESSION OF I.P. ADDRESSES.

AND, OF COURSE, THE SECOND AMENDED COMPLAINT, BECAUSE IT'S STILL ALLEGING RECEIPT OF URL'S, DOESN'T SOLVE THE SINGLE PROBLEM THAT THEY HAVE.

SECONDLY, TALKING ABOUT THE FISA COURT OPINION, AGAIN, IT PROBABLY GOES WITHOUT SAYING THAT THAT'S NOT BINDING AUTHORITY ON THIS COURT WHEREAS ZYNGA IS, BUT IN THAT DECISION THE COURT HELD THAT DIALING, ROUTING, ADDRESSING OR SIGNALLING INFORMATION CAN BE CONTENT. AND THEN THE COURT OBSERVED THAT IF A USER RUNS A SEARCH USING AN INTERNET SEARCH ENGINE AND THE SEARCH PHRASE, WHATEVER IT IS, APPEARS IN THE URL, THE URL INCLUDES THE CONTENTS OF COMMUNICATIONS.

SO, AGAIN, WE'RE BACK TO THE IDEA OF THE SEARCH QUERIES

BUT THE CASE DOESN'T STAND FOR THE PROPOSITION THAT I THINK THEY'RE TRYING TO CITE IT FOR THAT SOMEHOW ALL REFERRED URL'S ARE CONTENTS. AGAIN, IT'S COMPLETELY IN CONTRAST WITH ZYNGA ANYWAY, BUT I DON'T THINK THIS POSITION EVEN EXTENDS THAT FAR.

BUT EVEN IF IT WERE THE CASE THAT THIS WAS THE LAW OF THE CIRCUIT, HERE WE DON'T HAVE ANY EVIDENCE OF WHAT THE URL'S WERE FOR THESE PARTICULAR PLAINTIFFS.

SO WHETHER THEY INCLUDED SEARCH QUERIES IN THEM OR NOT, WE DON'T KNOW, AND, THEREFORE, THIS FISA COURT OPINION WOULDN'T BE ON POINT IN ANY EVENT.

I ALSO WOULD JUST NOTE THAT THERE'S, YOU KNOW, NOTHING IN THE COMPLAINT TO SUGGEST THAT THERE ARE FACEBOOK PLUGINS SUCH AS THE LIKE BUTTON ON THE MOST COMMON SEARCH ENGINE.

SO IF YOU GO TO GOOGLE OR BING TO DO SEARCH QUERIES, WHICH IS WHAT ALL OF THESE CASES SEEM TO BE TALKING ABOUT, YOU WILL NOT FIND FACEBOOK SOCIAL PLUGINS ON THOSE SITES.

SO, AGAIN, WE DON'T REALLY KNOW WHAT THE URL'S ARE FOR THESE PLAINTIFFS. BUT THERE'S A MAJOR QUESTION AS TO WHETHER FACEBOOK WOULD BE RECEIVING A REFERRED URL THAT HAD COME FROM SEARCH ENGINES SUCH AS GOOGLE OR BING THAT WOULD CONTAIN SEARCH QUERIES IN THEM.

STILL ON CONTENT. THEY WERE MAKING A POINT ABOUT THE PTSD ARTICLE ON "THE NEW YORK TIMES" WEBSITE, AND THEY POINTED TO AN EXAMPLE WHERE THE URL CONTAINED A TITLE OF THE ARTICLE ON "THE NEW YORK TIMES." AND THEY MADE THE COMMENT THAT THERE'S

NO URL IN FACEBOOK THAT IS SIMILAR.

QUITE TO THE CONTRARY, AND THIS IS JUST REITERATING SOMETHING THAT I SAID EARLIER, THE ZYNGA OPINION ITSELF TALKED ABOUT A FACEBOOK PAGE FOR A GAY SUPPORT GROUP AND IN THAT CASE THE ALLEGATION WAS THAT IF YOU CLICKED ON THAT ADVERTISEMENT WHILE YOU WERE ON THAT PAGE, THE THIRD PARTY ADVERTISER WOULD GET THE IDENTITY, THE USER I.D., THAT IS, OF THE INDIVIDUAL CLICKING ON IT, WOULD GET THE URL AND WOULD KNOW THAT YOU, IN FACT, WERE ON A FACEBOOK GAY SUPPORT PAGE.

SO THE IDEA THAT SOMEHOW THIS EXAMPLE ABOUT THE PTSD ARTICLE IS SOMEHOW DISTINGUISHABLE AND THAT SHOULD BE HELD TO BE CONTENTS IN THIS CIRCUIT IS COMPLETELY CONTRARY TO THE HOLDING AND THE TEACHINGS OF ZYNGA.

MOVING THEN TO THE INTERCEPTION ISSUE UNDER THE WIRETAP ACT, THE VERY FIRST THING THAT THEY SAID WHEN THEY STARTED TALKING ABOUT THAT PRONG WAS THAT THEY CONFIRMED THAT THE SAC ALLEGES TWO SEPARATE COMMUNICATIONS, AND YOU SPENT A LOT OF TIME TALKING ABOUT PARAGRAPH 60. AND I WANT TO TRY TO CLEAR THIS UP BECAUSE THERE WERE A LOT OF DIFFERENT THINGS BEING SAID, SOME OF WHICH CAN'T BE RECONCILED.

AT ONE POINT THEY SAID THAT THESE SEPARATE COMMUNICATIONS ARE SIMULTANEOUS. AND ANOTHER TIME THEY SAID THAT THEY WERE ACTUALLY WITHIN MILLISECONDS OF ONE ANOTHER. THOSE TWO THINGS CAN'T BE RECONCILED. IT'S GOT TO BE ONE OR THE OTHER.

I WOULD SUGGEST TO YOUR HONOR THAT IF YOU LOOK AT THE

COMPLAINT, THE COMPLAINT DOESN'T ALLEGE THAT THEY ARE SIMULTANEOUS. THE COMPLAINT ALLEGES THAT THEY'RE CONSEQUENTIAL BUT THAT THEY'RE CLOSE TOGETHER.

WHEN ASKED TO EXPLAIN HOW THEY WERE SIMULTANEOUS, EVEN THOUGH SEPARATE, IT WAS VERY TELLING. THERE WAS A LOT OF DISCUSSION ABOUT IT. AT ONE POINT THEY FINALLY SAID, WELL, WHEN THE SECOND AND SEPARATE COMMUNICATION WAS SENT FROM THE INDIVIDUAL'S BROWSER TO FACEBOOK, THE FIRST PARTY WEB PAGE WAS STILL LOADING. THAT'S WHAT THEY SAID. THE FIRST PARTY WEB PAGE WAS STILL LOADING.

AND ANOTHER TIME THEY SAID IT HASN'T DOWNLOADED COMPLETELY. WELL, THAT'S SOMETHING DIFFERENT. THAT'S NOT THAT THE COMMUNICATION HASN'T FINISHED YET. THERE WAS A COMMUNICATION FROM THE WEB BROWSER TO THE FIRST PARTY SAYING, HEY, I WANT TO VIEW YOUR WEB PAGE. THAT COMMUNICATION IS DONE. JUST BECAUSE IT TAKES A WHILE FOR THE WEB PAGE TO ACTUALLY RENDER ON YOUR SCREEN DOESN'T MEAN THAT THE COMMUNICATION IS SOMEHOW IN TRANSIT. THOSE ARE TWO DIFFERENT THINGS, AND I THINK THERE'S SMOKE AND MIRRORS HERE ABOUT THE TIMING OF ALL OF THIS IN ORDER TO MAKE IT SEEM AS THOUGH THE TWO SEPARATE COMMUNICATIONS, WHICH THEY'VE CONCEDED NOW MANY TIMES, THAT THEY ARE SEPARATE. THEY'RE TRYING TO SUGGEST TO YOU THAT THEY'RE ALSO SIMULTANEOUS, AND THEY'RE CLEARLY NOT.

AND I WOULD JUST POINT OUT THAT, AGAIN, THE -- UNDER KONOP IN THE NINTH CIRCUIT, IT MUST BE, QUOTE, "DURING TRANSMISSION,"

END QUOTE, AS THE COMMUNICATION BEGAN, QUOTE, "TRAVELED ACROSS THE WIRES AT THE SPEED OF LIGHT," END QUOTE.

SO THE FACT THAT THERE MAY BE -- THAT THESE MIGHT BE LOCATED CLOSELY IN TIME DOESN'T MATTER. THE FACT THAT THEY'RE SEPARATE COMMUNICATIONS WHICH HAS BEEN CONCEDED CLEARLY NOW MEANS THAT THIS DOESN'T FLY UNDER THE INTERCEPTION PRONG UNDER THE NINTH CIRCUIT DOCTRINE.

IN THE BUNNELL, B-U-N-N-E-L-L, VERSUS NPAA DECISION, CENTRAL DISTRICT OF CALIFORNIA, THAT CASE CITED KONOP AND, IN FACT, SAID -- AND THIS IS INTERESTING THAT THEY TALKED ABOUT MILLISECONDS.

THAT COURT SAID WHETHER A DEFENDANT RECEIVED THE MESSAGES IN MILLISECONDS OR DAYS MAKES NO DIFFERENCE UNDER KONOP. THE KEY IS WHETHER THE INTERCEPTION OCCURS BEFORE THE COMMUNICATION REACHES ITS DESTINATION. THAT CASE HAD TO DO WITH FORWARDING OF THE E-MAILS SO THE DEFENDANT HAD RECEIVED E-MAILS THAT WERE FORWARDED BY ANOTHER PERSON AND THE QUESTION IS, IS THAT AN INTERCEPTION.

AND THE EVIDENCE THERE OR THE ALLEGATIONS THERE WERE THAT THE INITIAL E-MAIL AND THEN THE SUBSEQUENTLY FORWARDED E-MAIL WERE SENT IN REAL CLOSE PROXIMITY TO ONE ANOTHER, PERHAPS IN MILLISECONDS, BUT THE POINT BEING THAT THERE WERE TWO SEPARATE COMMUNICATIONS. THERE WAS THE INITIAL E-MAIL AND THEN THERE WAS THE FORWARDING OF THE E-MAIL. THE FACT THAT THERE WERE TWO DISTINCT COMMUNICATIONS, IF YOU WILL, MEANS THERE CAN'T BE AN

INTERCEPTION UNDER THE NINTH CIRCUIT DOCTRINE.

IF YOU'LL BEAR WITH ME FOR A MOMENT.

WITH RESPECT TO THE PHARMATRAK CASE, I WILL SAY THIS, THE PHARMATRAK CASE IS NOT BINDING HERE. I THINK IT GOES WITHOUT SAYING IT'S A FIRST CIRCUIT CASE, AND IT ACTUALLY ACKNOWLEDGED THAT OTHER CIRCUITS TAKE A DIFFERENT APPROACH ON THE ISSUE. AND SO IT MAY VERY WELL BE THAT THERE'S A CIRCUIT SPLIT DEVELOPING HERE, BUT WE'RE NOT LITIGATING IN THE FIRST CIRCUIT.

I MIGHT ALSO JUST QUICKLY ADDRESS THIS IDEA THAT THERE'S A TERM OF ART THAT HAS DEVELOPED IN THE INDUSTRY CALLED THIRD PARTY COOKIES AND THAT SOMEHOW SUPPORTS THEIR ARGUMENT FOR AN INTERCEPTION.

YOU CAN'T JUST SEIZE ON THESE TERMS. THE REASON IT'S CALLED A THIRD PARTY COOKIE IS BECAUSE IN THE CASE OF FACEBOOK HERE, IT'S NOT THE WEB PAGE THAT THE USER IS ATTEMPTING TO VIEW SO YOU CALL THAT WEBSITE THAT THEY'RE TRYING TO VIEW THE FIRST PARTY WEB PAGE, AND YOU REFER TO THE OTHER COMPANY THAT IS PROVIDING THE THIRD PARTY CONTENT AS A THIRD PARTY.

BUT FOR PURPOSES OF LOOKING AT WHETHER THERE'S AN INTERCEPTION OF THE WIRETAP ACT, YOU HAVE TO LOOK AT THE FACTS AS THEY EXIST THAT ARE RELEVANT, AND YOU HAVE TO LOOK AT IT FROM A FUNCTIONAL PERSPECTIVE, AND YOU DON'T SEIZE ON THIS THIRD PARTY TERM THAT HAS NOW COME INTO VOGUE IN THE INDUSTRY.

TURNING NOW TO THE STORED COMMUNICATIONS ACT AND THE ELECTRONIC STORAGE ISSUE, THE URL THAT A USER MIGHT CHOOSE TO

TYPE INTO THE TOOLBAR IS NOT COMMUNICATION. THERE IS A LOT OF TALK ABOUT HOW LONG THE -- THIS WILL STAY THERE BEFORE YOU ACTUALLY GET TO THE WEBSITE AND ALL OF THIS, BUT THE POINT IS THAT IT IS NOT THE COMMUNICATION.

WHAT THEY ALLEGE, AND LET'S COME BACK TO THE COMPLAINT AND INSTEAD OF ALL OF THE EXTRANEOUS ASSERTIONS THAT HAVE BEEN MADE HERE TODAY OUTSIDE OF THE COMPLAINT.

THE COMPLAINT DEEMS THE GET REQUEST THAT GOES FROM THE PLAINTIFFS' BROWSER TO THE FIRST PARTY WEB PAGE, WAL-MART, CNN, AS THE COMMUNICATION. THAT IS SUPPOSEDLY WHAT IS INTERCEPTED. THEY DIDN'T ALLEGE THAT THE COMMUNICATION WAS THE URL THAT THEY PUT IN A TOOLBAR. THOSE ARE TWO DIFFERENT THINGS.

SO YOU'VE GOT TO BRING IT BACK TO THE FACTS AS ALLEGED AND WE'VE GOT TO LOOK AT, YOU KNOW, WHAT THE DEFINITION ACTUALLY IS.

THE COMMUNICATION THAT IS IN THIS TEMPORARY STORAGE INCIDENT TO THE TRANSMISSION ACTUALLY HAS TO GO SOMEWHERE. THE WHOLE POINT HERE IS THAT YOU CAN'T ACCESS A COMMUNICATION WHILE IT'S BEING TEMPORARILY STORED IN THE COURSE OF THE TRANSMISSION PROTOCOL OR SEQUENCE.

AND SO THE URL THAT APPEARS IN THE BROWSER NEVER GOES ANYWHERE. THAT'S NOT THE COMMUNICATION. THAT'S JUST SOMETHING THAT YOU'VE TYPED INTO YOUR TOOLBAR. THE COMMUNICATION THAT GOES SOMEWHERE IS ACTUALLY THIS GET REQUEST WHICH IS WHAT PLAINTIFF ALLEGES IS THE COMMUNICATION.

ONE OTHER POINT I WOULD JUST MAKE ON THIS IS IT'S EASY TO TALK ABOUT BUT IT'S ACTUALLY NOT EASY BUT YOU CAN TRY TO TALK ABOUT STORAGE IN A VACUUM UNDER THE STATURE BECAUSE THAT IS ONE ELEMENT, BUT IF YOU THINK YOU STEP ONE LITTLE BABY STEP BACK AND THINK ABOUT WHAT IS ACTUALLY GOING ON IN THIS STATUTE, IN ORDER FOR THEM TO HAVE A CLAIM, FACEBOOK ACTUALLY HAS TO ACCESS THE COMMUNICATION WHILE IT'S IN ELECTRONIC STORAGE, AND THAT'S THE WHOLE POINT OF THIS SECTION OF THE STORED COMMUNICATIONS ACT. THERE'S NO ALLEGATION IN THE SECOND COMPLAINT THAT THIS IS WHAT HAPPENED. THERE'S NO ALLEGATION THAT FACEBOOK ACCESSED THE URL THAT SOMEONE TYPED INTO THE TOOLBAR.

AND, IN FACT, WHAT IS ALLEGED AND WHAT I'VE SAID PROBABLY 20 TIMES NOW IS THAT FACEBOOK RECEIVED THE URL FROM THIS SEPARATE DISTINCT GET REQUEST FROM THE USER'S BROWSER TO FACEBOOK.

SO THE IDEA THAT SOMEHOW THE URL THAT HAS BEEN TYPED INTO A BROWSER IS THE ELECTRONIC STORAGE DOESN'T FLY REALLY UNDER THE DEFINITION OF THE STATUTE BUT ALSO MAKES NO SENSE IN TERMS OF WHAT THEY ARE ALLEGING AND WOULDN'T BE ABLE TO MAKE OUT THE CLAIM BECAUSE IT HASN'T ALLEGED THAT FACEBOOK ACCESSED THAT SAME LOCATION THAT THEY ARE NOW CLAIMING IS THE ELECTRONIC STORAGE.

TURNING NOW TO THE CONCEPT OF A FACILITY THROUGH WHICH AN ELECTRONIC COMMUNICATIONS SERVICE IS PROVIDED. PLAINTIFFS' COUNSEL CONCEDED THAT THIS IS NOT A CASE OF FIRST IMPRESSION,

AND THAT IS TRUE. AND, IN FACT, WE CITED THE CROWLEY CASE, 166 F. SUPP. 2D AT 1271, AND THE CROWLEY COURT EXPLAINED THAT IF A PLAINTIFFS' PERSONAL COMPUTER COULD BE A FACILITY, THAT WOULD LEAD TO THE NONSENSICAL RESULT THAT THE PROVIDER OF THE COMMUNICATIONS SERVICE COULD GRANT ACCESS TO ONE'S HOME COMPUTER TO THIRD PARTIES. SO UNDER A DIFFERENT SECTION UNDER OF THE SCA.

SO IF THEIR THEORY IS CORRECT, THEN THE PROVIDER OF THE COMMUNICATIONS SERVICE CAN ACTUALLY GRANT ACCESS TO THAT HOME COMPUTER TO THIRD PARTIES UNDER ANOTHER SECTION OF THE SCA WHICH IS CLEARLY WHAT WAS NOT INTENDED.

IN THE IPHONE APPLICATION LITIGATION, NUMBER 2, 844 F. SUPP. 2D AT 1063, JUDGE KOH RULED THAT IF A PLAINTIFFS' PERSONAL COMPUTER WAS A FACILITY, WEBSITES WOULD BECOME USERS OF THE ELECTRONIC COMMUNICATIONS SERVICE PROVIDED BY THE PERSONAL COMPUTER, AND THEN THEY COULD, THEREFORE, AUTHORIZE ACCESS TO ANY COMMUNICATION THAT WAS INTENDED FOR THAT WEBSITE UNDER 2701(C)(2).

AND I REALIZE THAT'S A LITTLE BIT DIFFICULT TO FOLLOW WITHOUT REALLY LOOKING AT THE STATUTE BUT THE POINT BEING THAT ADVANCING OR FOLLOWING THE INTERPRETATION THAT THEY'RE PROFFERING HERE WOULD LEAD TO ALL SORTS OF ABSURD RESULTS, AND THIS IS NOT A CASE OF FIRST IMPRESSION. MANY COURTS HAVE ALREADY DEALT WITH THIS AND REALIZED THAT THAT'S NOT WHAT THE STATUTE MEANS OR HOW IT SHOULD BE CONSTRUED.

FINALLY, THEY CITED IN THEIR PAPERS THE CASE CALLED CHANCE, C-H-A-N-C-E, AND INTERESTINGLY THAT COURT DIDN'T HOLD -- DID NOT HOLD THAT PERSONAL COMPUTERS WERE FACILITIES. THEY CONSIDERED THAT INTERPRETATION FOR THE SAKE OF ARGUMENT AND THEN EXPLAINED WHY, QUOTE, THE SUBSEQUENT IMPLICATIONS OF THIS RATHER STRAINED INTERPRETATION OF A FACILITY THROUGH WHICH AN ELECTRONIC COMMUNICATION SERVICES PROVIDER ARE FATAL TO THEIR CAUSE OF ACTION. AND THAT'S AT 165 F. SUPP. 2D AT 1161.

IN CONTRAST TO THAT WHOLE BODY OF AUTHORITY, WELL REASONED, I MIGHT ADD, THEY'VE CITED THESE MICROSOFT CASES, AND THESE ARE A BUNCH OF DOE CASES WHERE THERE WERE NO DEFENDANTS ON THE OTHER SIDE. YOU KNOW, MICROSOFT WAS INITIATING THESE DOE CASES, I BELIEVE, AND I'M NOT 100 PERCENT CERTAIN ON THIS, BUT I BELIEVE IT WAS FOR THE PURPOSE OF GETTING SUBPOENAS TO ISSUE TO THIRD PARTIES. THERE WAS NOBODY ON THE OTHER SIDE TO ARGUE AGAINST THEIR INTERPRETATION.

AND IT IS TRUE IN THE EASTERN DISTRICT OF VIRGINIA, WHICH PLAINTIFFS' COUNSEL SAID, THAT THE COURT ACCEPTED BUT WITHOUT QUESTION AND WITHOUT ANYONE ON THE OTHER SIDE THAT MICROSOFT BROWSER WAS A FACILITY UNDER THE STORED COMMUNICATIONS ACT.

I WOULD CONTEND THAT'S NOT A WELL REASONED OPINION, AND THE COURT SHOULD INSTEAD FOLLOW ALL OF THE OTHER REASONS THAT INSTEAD THAT I HAVE GIVEN YOU.

ON THE LARCENY CAUSE OF ACTION, AS I MENTIONED EARLIER, THE INFORMATION THAT WE'RE ALLEGED TO HAVE CORRECTED ISN'T

PROPERTY UNDER 496, AND WE HAVE CITED THE ZYNGA CASE AT LEAST BY WAY OF ANALOGY. THERE THE COURT HELD THAT THE PERSONALLY IDENTIFIABLE INFORMATION DOES NOT CONSTITUTE PROPERTY FOR PURPOSES OF THE UCL CLAIM, AND I REALIZE WE'RE NOT DEALING WITH THE UCL CLAIM HERE BUT I WOULD SUBMIT THAT PERSONALLY -- PERSONAL INFORMATION DOESN'T CONSTITUTE PROPERTY FOR LARCENY PURPOSES EITHER. WE'VE ALSO CITED THE LOW VERSUS LINKEDIN CASE.

THE PLAINTIFF CITED HERE TODAY THE CTC REAL ESTATE SERVICES CASE, A CALIFORNIA STATE CASE. WHAT THEY DIDN'T SAY IS THAT THAT CASE DID NOT DEAL WITH PENAL CODE SECTION 496. INSTEAD, IT DEALT WITH THE SEPARATE SECTION OF THE CALIFORNIA PENAL CODE, SECTION 530.5, AND THAT SECTION DOES NOT DEFINE PROPERTY AND INSTEAD IT'S A SECTION THAT PROSCRIBES OBTAINING PERSONAL INFORMATION WITH THE INTENT TO DEFRAUD.

SO IT'S A COMPLETELY DIFFERENT STATUTE, AND THE VERY CONDUCT THAT IS BEING PROHIBITED THERE UNDER THAT PENAL CODE SECTION RELATES TO PERSONAL INFORMATION.

AND THAT PARTICULAR STATUTE'S DEFINITION OF PERSONAL INFORMATION INCLUDES ITEMS LIKE CREDIT CARD NUMBERS AND HEALTH CARE RECORDS, AND THERE'S NO REFERENCE TO BROWSING HISTORY OR ANYTHING ANALOGOUS. AND THAT'S IN SECTION 530.55, SUBSECTION B.

SO, AGAIN, THE CTC REAL ESTATE SERVICES CASE DOES NOT STAND FOR THE PROPOSITION THAT THE TYPE OF INFORMATION AT ISSUE

HERE IS PROPERTY FOR LARCENY PURPOSES.

AND THEN TURNING TO THE INVASION OF PRIVACY AND INTRUSION UPON SECLUSION CLAIMS, AGAIN, PLAINTIFFS' COUNSEL SAID YET AGAIN WHAT HAS CHANGED IN THIS CASE FROM A FIRST AMENDED COMPLAINT TO A SECOND AMENDED COMPLAINT? AND I HAVE ACKNOWLEDGED THAT THERE WERE SOME CHANGES.

THEY SAY, WELL, WE'VE MADE IT CLEAR THAT URL'S ARE REALLY WHAT WE'RE INTERESTED IN AND NOT I.P. ADDRESSES, AND WE'RE GOING TO SEE WHY I THINK THEY'RE SAYING THIS. AND THEY ALSO SAID THAT, WELL, WE'RE NOW MAKING IT CLEAR THAT FACEBOOK PROMISED ONE THING BUT DID ANOTHER.

WHAT THEY'RE TRYING TO DO, OF COURSE, IS TO MAKE YOU THINK THAT THERE'S SOMETHING DIFFERENT IN THIS COMPLAINT THAT SHOULD LEAD YOU TO RULE DIFFERENTLY THAN YOU DID IN YOUR ORDER LAST TIME AROUND AT PAGE 12 AND AT 5 WHERE YOU HELD IN THE ALTERNATIVE THAT THESE INVASION AND INTRUSION CLAIMS WOULD BE SUBJECT TO DISMISSAL UNDER 12(B)(6) FOR FAILURE TO STATE A CLAIM. AND THERE YOU CITED AS ONE EXAMPLE THE FORRESTER CASE, WHICH WAS -- THAT CASE DEALT WITH I.P. ADDRESSES AND MADE CLEAR THAT PEOPLE'S I.P. ADDRESSES WERE NOT SOMETHING IN WHICH YOU HAD A REASONABLE EXPECTATION OF PRIVACY. BUT THAT IS PART OF THIS BODY OF CASE LAW THAT STANDS FOR THE BROADER PROPOSITION THAT INFORMATION THAT YOU VOLUNTARY PROVIDE TO THIRD PARTIES ON THE INTERNET ISN'T ACTIONABLE FOR INVASION OR INTRUSION PURPOSES.

SO WHAT I WOULD SAY ON THIS IS, FIRST OF ALL, THE COMPLAINT HASN'T CHANGED IN THOSE WAYS MATERIALLY. AND IN THE LAST COMPLAINT IT WAS ALL ABOUT URL'S AND IT HAD NOTHING TO DO WITH I.P. ADDRESSES. AND IN THE LAST COMPLAINT THEY, OF COURSE, ARGUED OR ALLEGED THAT FACEBOOK PROMISED ONE THING AND DID ANOTHER.

SO IN THAT RESPECT THE COMPLAINTS ARE NOT DIFFERENT AT ALL FOR MATERIAL PURPOSES, AND THERE'S NO REASON THAT THE COURT SHOULD CHANGE ITS VIEW EXPRESSED IN THE PREVIOUS ORDER.

IN TERMS OF THE GOOGLE COOKIE PLACEMENT CASE, WHICH THE PLAINTIFFS RELY ON HERE, I MIGHT JUST TAKE A MOMENT TO TALK ABOUT THAT. WE WOULD OBVIOUSLY ENCOURAGE THE COURT NOT TO FOLLOW THAT CASE BUT --

THE COURT: THAT WAS GOING TO BE MY QUESTION ULTIMATELY THAT I POSED TO YOUR COLLEAGUES.

MR. BROWN: SURE. I MEAN, WE DON'T CITE GOOGLE COOKIE PLACEMENT IN OUR OPENING MOTION, AND WE THINK THAT OUR POSITIONS ARE SOLID UNDER ALL OF THE OTHER LAW THAT WE'VE PROVIDED.

THEY CAME BACK IN OPPOSITION AND GOT VERY EXCITED ABOUT THIS THIRD CIRCUIT OPINION AT LEAST ON A FEW ISSUES AND KIND OF IGNORED THE FACT THAT THE THIRD CIRCUIT ACTUALLY RULED IN GOOGLE'S FAVOR ON A WHOLE HOST OF DIFFERENT ISSUES. AND I THINK YOU'VE NOW HEARD THEIR ACKNOWLEDGEMENT THAT THE CASE KIND OF CUTS BOTH DIRECTIONS FOR BOTH PARTIES, RIGHT?

BUT AS TO THE INVASION OF PRIVACY AND INTRUSION UPON SECLUSION CLAIMS, THERE'S A LONG, LONG DISCUSSION IN THE THIRD CIRCUIT'S DECISION ABOUT THE FACTS OF THAT CASE, AND I THINK WHEN YOU LOOK AT IT YOU GET A CERTAIN TONE OF WHAT COMES OUT OF THAT OPINION AND WHAT THE COURT VIEWED AS THE FACTS IN THAT CASE.

IN THAT CASE, AND I DON'T KNOW WHETHER THIS IS TRUE IN THE REAL WORLD, BUT THIS IS SIMPLY WHAT THE ALLEGATIONS WERE. THIS WAS ON A MOTION TO DISMISS AS WELL. BUT THE COURT WENT OUT OF ITS WAY TO DISTINGUISH THE FACTS AT ISSUE IN THAT CASE FROM MERE TRACKING AND DISCLOSURE, WHICH IS ESSENTIALLY WHAT WE HAVE IN THIS CASE THAT IS BEFORE THIS COURT.

AND WHAT THEY SAID IS THAT IT GOES WELL BEYOND MERE TRACKING AND DISCLOSURE. AND IN THAT CASE WHAT HAPPENED IS THAT, YOU KNOW, GOOGLE BASICALLY ALLEGEDLY SAID TO ITS USERS, LIKE THE SAFARI BROWSER HAS THIS COOKIE BLOCKING TECHNOLOGY, AND THAT'S GREAT IF YOU WANT TO USE IT AND FEEL FREE TO USE IT.

BY THE WAY, WE ALSO HAVE OUR OWN PROPRIETARY PLUGIN, I BELIEVE IT WAS, THAT WILL ALSO BLOCK COOKIES, BUT THERE'S NO REASON TO USE THAT IF YOU'RE USING ONE OF THESE OTHER BROWSERS LIKE SAFARI THAT HAS THE COOKIE BLOCKING TECHNOLOGY.

IT TURNS OUT THAT ALLEGEDLY GOOGLE DEVELOPED SOME CODE -- SO LET ME JUST BACK UP HERE. SO THE CONTEXT IS PEOPLE GOING TO WEB PAGES THAT ARE GOING TO HAVE GOOGLE SUPPLIED ADS RUN ON THEM, RIGHT?

GOOGLE DEVELOPED A CODE THAT WOULD BE SENT TO THE USER'S BROWSER IN THOSE SITUATIONS THAT WOULD THEN TRIGGER THE BROWSER TO SEND A FORM BACK TO GOOGLE AND WHEN THE BROWSER SENDS A FORM LIKE THAT, IT BELIEVES THAT THE WEBSITE IT'S INTERACTING WITH IS ACTUALLY THE FIRST PARTY WEBSITE, NOT THE THIRD PARTY WEBSITE.

AND SO THE ALLEGATION WAS THAT GOOGLE DID A COUPLE OF THINGS, ONE, REPRESENTED TO USERS THAT THIS COOKIE BLOCKING TECHNOLOGY WAS EFFECTIVE AND ACTUALLY SO EFFECTIVE THAT THEY DIDN'T NEED TO USE GOOGLE'S OWN PRODUCT, BUT THEN TOOK STEPS TO SUBMIT CODE TO THE WEBSITES TO TRICK THE BROWSERS INTO ESSENTIALLY CIRCUMVENTING THE COOKIE BLOCKING TECHNOLOGY.

SO IT WAS UPON THAT SET OF FACTS THAT THE COURT FOUND THERE WAS AN EGREGIOUS BREACH OF SOCIAL NORMS AND INVASION OF THEIR PRIVACY INTERESTS. AND I MIGHT ALSO POINT OUT THAT THE COURT REALLY DIDN'T GET INTO THIS WHOLE BODY OF CASE LAW THAT I GAVE TO YOU EARLIER, AND I'M NOT GOING TO TRY TO MARCH THROUGH IT ALL AGAIN, BUT IN THE DISCUSSION OF WHY I THOUGHT THAT THE UNG DECISION WAS NOT PERSUASIVE AND SHOULDN'T BE FOLLOWED, AND I MENTIONED MANY DIFFERENT CASES.

I'LL JUST GIVE THE NAMES AGAIN SO WE HAVE A CLEAR RECORD BUT THAT WAS IN ADDITION TO FORRESTER. ALSO THE STIPO, S-T-I-P-O, LOW VERSUS LINKEDIN, IPHONE APPLICATION LITIGATION, GOOGLE PRIVACY POLICY LITIGATION, AND ALSO THE FOLGELSTROM VERSUS LAMPS PLUS CASE WHICH I DIDN'T GET TO. BUT THAT WAS A

CASE ABOUT DISCLOSURE OF CUSTOMER'S ADDRESS INFORMATION TO MARKETING AGENCIES SO MARKETING AGENCIES COULD SEND ADS AND FLYERS AND THE LIKE TO THE CUSTOMER'S HOME AND WHATEVER THE COURT FELT ABOUT THE FACTUAL ALLEGATIONS, AGAIN, GIVEN THE RATHER HIGH BAR THAT YOU HAVE TO VAULT TO PROCEED ON THIS SORT OF CLAIM, FOUND THAT THAT WAS NOT HIGHLY OFFENSIVE BEHAVIOR BUT RATHER ROUTINE COMMERCIAL BEHAVIOR.

SO I WOULD SUBMIT THAT RATHER THAN FOLLOWING THE GOOGLE COOKIE PLACEMENT DECISION ON THESE CLAIMS, AND THE UNG DECISION ON THESE CLAIMS, THE COURT SHOULD INSTEAD FOLLOW ITS PREVIOUS RULING NOT FROM THE ALTERNATIVE FROM THE ORDER AT 1295 AND SHOULD ALSO FOLLOW THIS OTHER BODY OF CASE LAW THAT I JUST REFERRED TO.

AND I THINK THAT'S ALL I HAVE SUBJECT TO QUESTIONS FROM THE COURT, OF COURSE.

THE COURT: AGAIN -- WELL, THANK YOU. AND I GO BACK TO THE GOOGLE PLACEMENT AND YOU'RE SUGGESTING THAT I DON'T FOLLOW THAT?

MR. BROWN: YEAH. I MEAN, AGAIN, IT'S A CASE THAT CUTS BOTH WAYS ON DIFFERENT CLAIMS BUT LET'S BE HONEST ABOUT IT, I DON'T THINK THAT YOU SHOULD FOLLOW IT ON THE INVASION OF PRIVACY AND INTRUSION UPON SECLUSION. IT RULED IN A WAY THAT CUTS IN OUR FAVOR ON OTHER ISSUES. IT HELD THAT, FOR INSTANCE, THE WIRETAP ACT AND THE CIPA, C-I-P-A, CLAIMS SHOULD NOT GO FORWARD BECAUSE GOOGLE WAS A PARTY TO THE COMMUNICATION WHICH

IS EXACTLY WHAT I WAS ARGUING EARLIER. AND, AGAIN, I BELIEVE THAT IN THE CONTEXT OF THE SECOND AMENDED COMPLAINT THAT IT WOULD ACTUALLY BE APPROPRIATE TO RULE IN OUR FAVOR EVEN ON THE CIPA PORTION OF IT. I ACTUALLY DON'T THINK THAT THE WIRETAP ACT AND THE CIPA ELEMENTS ARE REALLY ALL THAT DIFFERENT.

AND THE THIRD CIRCUIT HELD THAT UNDER THE PENAL CODE 502 CLAIM THAT THERE WAS AN INSUFFICIENT ALLEGATION OF LOSS, RIGHT? AND THAT ACTUALLY IF YOU'RE GOING TO LOOK AT THAT OPINION, IT'S A LITTLE BIT CONFUSING BUT NEAR THE END OF THE OPINION THAT'S WHERE THEIR HOLDING IS ON THE 502 CLAIM, THAT THERE'S NO LOSS AND THEY BASICALLY ADOPT THEIR REASONING FROM THE CFAA DISCUSSION IF THE COURT IS GOING TO LOOK AT THAT DECISION.

SO, LOOK, LIKE I SAID, I THINK THAT WE'RE ON SOLID GROUND WITHOUT THE THIRD CIRCUIT OPINION AT ALL, AND WE'VE GOT AMPLE CASE LAW THAT SUPPORTS OUR ARGUMENTS.

AND SO I'M NOT IN A POSITION TO SAY THAT YOU SHOULD SORT OF FOLLOW IT ALTOGETHER OR NOT. I THINK THAT IT GOT IT WRONG ON THESE INTRUSION AND INVASION CLAIMS, AND I HAPPEN TO THINK THAT IT GOT IT RIGHT ON A FEW OTHER CLAIMS, AND I THINK THE PLAINTIFFS PROBABLY FEEL THE SAME WAY.

THE COURT: ALL RIGHT. WELL, THANK YOU VERY MUCH, MR. BROWN. I APPRECIATE IT.

MR. STRAITE, MR. BARNES, I APPRECIATE --

MR. BARNES: YOUR HONOR, MIGHT I HAVE TWO MINUTES TO RESPOND TO SOME NEW ARGUMENTS HE MADE?

THE COURT: WELL, IT'S HIS MOTION SO HE GETS THE LAST WORD.

MR. BARNES: FAIR ENOUGH, YOUR HONOR. I THOUGHT WE WOULD ASK.

THE COURT: YES, THAT'S THE WAY IT WORKS. ALL RIGHT. THANK YOU VERY MUCH. I APPRECIATE THE INFORMATION AND ALL OF YOUR HELP AND GOOD PLEADINGS.

THE MATTER IS UNDER SUBMISSION.

I'LL GET SOMETHING OUT ALSO AS TO YOUR DISCOVERY QUESTIONS AND THOSE ISSUES ALSO. I'VE LOOKED AT THOSE, AND I'VE FOCUSSED PRIMARILY ON ARGUMENTS THIS MORNING, AND YOU'LL GET SOMETHING SHORTLY.

MR. GRYGIEL: THANK YOU, YOUR HONOR.

THE COURT: I APPRECIATE YOU BEING HERE.

(COURT CONCLUDED AT 12:11 P.M.)

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, RMR, CRR
CERTIFICATE NUMBER 8074

DATED: MAY 2, 2016