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

IN RE:

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

SAN JOSE, CALIFORNIA

JULY 28, 2017

PAGES 1 - 28

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 PLAINTIFFS: KAPLAN, FOX & KILSHEIMER LLP
BY: DAVID A. STRAITE
850 THIRD AVENUE
NEW YORK, NEW YORK 10022

FOR THE DEFENDANTS: COOLEY LLP
BY: MATTHEW D. BROWN
101 CALIFORNIA STREET, 5TH FLOOR
SAN FRANCISCO, CALIFORNIA 94111

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

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY,
TRANSCRIPT PRODUCED WITH COMPUTER.

1 SAN JOSE, CALIFORNIA

JULY 28, 2017

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

09:59AM 3 (COURT CONVENED AT 9:59 A.M.)

09:59AM 4 THE COURT: LET'S CALL OUR MORNING CASE 12-MD-2314.
09:59AM 5 IF I COULD HAVE THE APPEARANCES.

09:59AM 6 MR. STRAITE: THIS IS DAVID STRAITE FROM KAPLAN, FOX
09:59AM 7 & KILSHEIMER NEW YORK FOR THE PLAINTIFFS.

09:59AM 8 THE COURT: THANK YOU. GOOD MORNING.

09:59AM 9 MR. BROWN: AND MATTHEW BROWN FOR FACEBOOK.

09:59AM 10 THE COURT: GOOD MORNING. NICE TO SEE YOU BOTH.
09:59AM 11 WE'RE ON FOR A CASE MANAGEMENT CONFERENCE. YOU CAN COME
09:59AM 12 FORWARD. THANK YOU. I DID RECEIVE -- OH, YOU CAN BE SEATED.
09:59AM 13 THANK YOU FOR YOUR COURTESY. I DID RECEIVE YOUR STATEMENT.

10:00AM 14 SURE, YOU CAN BOTH COME UP. THANK YOU. SO WHAT I INTEND
10:00AM 15 TO DO IS TO GIVE YOU SOME DATES TODAY FOR FILING AND HEARING
10:00AM 16 AND THOSE TYPES OF THINGS.

10:00AM 17 I ALSO WANTED TO TALK A LITTLE BIT ABOUT -- IT SEEMS LIKE
10:00AM 18 THERE'S AN ISSUE ABOUT DISCOVERY AND WHETHER OR NOT FACEBOOK
10:00AM 19 SHOULD PROVIDE ADDITIONAL REQUESTED ADDITIONAL DISCOVERY AS TO
10:00AM 20 NOW SOME DISCRETE ISSUE IT SOUNDS LIKE.

10:00AM 21 CAN YOU JUST TELL ME, WHAT IS IT THAT YOU THINK YOU NEED
10:00AM 22 THAT YOU DON'T ALREADY HAVE.

10:00AM 23 MR. STRAITE: THANK YOU, YOUR HONOR.

10:00AM 24 THE COURT: AND HOW VOLUMINOUS AND BURDENSOME WILL
10:00AM 25 THIS BE FOR FACEBOOK TO PRODUCE?

10:00AM 1 MR. STRAITE: OKAY. THANK YOU, YOUR HONOR. THE
10:00AM 2 FIRST CATEGORY OF DOCUMENTS THAT WE WOULD LIKE WOULD BE COPIES
10:00AM 3 OF THE HELP CENTER PAGES THAT WE'VE ALLEGED INFORM THE MEANING
10:00AM 4 OF THE PRIVACY POLICY AND THE SRR, THAT'S THE STATEMENT OF
10:01AM 5 RIGHTS AND RESPONSIBILITIES. GENERALLY THAT'S THE TERMS AND
10:01AM 6 CONDITIONS.

10:01AM 7 THE COURT: SO CAN YOU TELL ME THOSE WOULD BE
10:01AM 8 SOMETHING ADDITIONAL THAN WHAT APPEARS ON A PUBLIC WEB PAGE?

10:01AM 9 MR. STRAITE: NO, YOUR HONOR. TO OUR KNOWLEDGE
10:01AM 10 EVERY SINGLE HELP CENTER PAGE THAT'S RELEVANT FOR OUR CLAIM DID
10:01AM 11 APPEAR DURING THE CLASS PERIOD.

10:01AM 12 AND ONE THING THAT WE'VE BEEN DOING FOR THE PAST MONTH IS
10:01AM 13 THAT WE HAVE BEEN WORKING VERY HARD WITH OUR OUTSIDE
10:01AM 14 INVESTIGATORS AND INSIDE INVESTIGATORS. WE MAY HAVE -- AND
10:01AM 15 THIS IS SOMETHING THAT WE'VE LEARNED IN THE LAST FEW DAYS SO
10:01AM 16 IT'S NOT IN THE CMC STATEMENT. I JUST TOLD MR. BROWN THIS THIS
10:01AM 17 MORNING THAT WE MAY HAVE AN ALTERNATIVE SOLUTION THAT YOUR
10:01AM 18 HONOR MAY LIKE, AND I JUST RAN IT THROUGH HIM BECAUSE IT WAS A
10:01AM 19 BRAINSTORM.

10:01AM 20 WE HAVE BEEN ABLE TO UNCOVER, WE BELIEVE, IT WOULD BE ALL
10:01AM 21 OF THE RELEVANT LANGUAGE OF THE HISTORICAL HELP CENTER PAGES
10:01AM 22 THAT WE THINK ARE PART OF THE CONTRACT OR AT LEAST HELP DEFINE
10:01AM 23 THE CONTRACT.

10:01AM 24 THE COURT: OH.

10:01AM 25 MR. STRAITE: THEY'RE FROM OLD NOTES AND OUTSIDE

10:01AM 1 SOURCES AND THEY'RE FROM WAFE ACT MACHINE AND FOR ALL SORTS OF
10:01AM 2 DIFFERENT SOURCES IDENTIFIED HERE IN COURT, BUT WE THINK WE
10:02AM 3 HAVE ALL OF THE RELEVANT LANGUAGE THAT WE CAN ALLEGE IN GOOD
10:02AM 4 FAITH IN THE COMPLAINT.

10:02AM 5 THE COURT: I SEE.

10:02AM 6 MR. STRAITE: THAT MAY BE THE CASE. TWO THINGS
10:02AM 7 ABOUT THAT. ONE IS THAT WE CAN'T CONFIRM THAT WE HAVE
10:02AM 8 EVERYTHING. WE'RE STILL LOOKING, AND WE'VE BEEN WORKING VERY
10:02AM 9 HARD OVER THE PAST MONTH. AND, NUMBER TWO, THERE MAY BE
10:02AM 10 ADDITIONAL DOCUMENTS THAT WE'RE NOT AWARE OF, AND WE DON'T KNOW
10:02AM 11 IF WE HAVE A COMPLETE SET.

10:02AM 12 SO WE BELIEVE IT'S HELPFUL TO HAVE ALL OF THE RELEVANT
10:02AM 13 HISTORICAL HELP CENTER PAGES FROM THE CLASS PERIOD PRODUCED
10:02AM 14 PRIOR TO THE DRAFTING OF THE THIRD AMENDED COMPLAINT, BUT AS AN
10:02AM 15 ALTERNATIVE, YOUR HONOR, IN THE INTEREST OF EFFICIENCY AND
10:02AM 16 GETTING THIS DONE, WE WOULD BE WILLING TO HAVE A STIPULATION
10:02AM 17 HERE THAT WE BE LIMITED TO WHAT OUR INVESTIGATORS FOUND PUT
10:02AM 18 THAT IN THE COMPLAINT SO LONG AS IN OPPOSITION FACEBOOK THEN
10:02AM 19 DOES NOT PROVIDE ADDITIONAL HELP CENTER PAGES OR LANGUAGE THAT
10:02AM 20 WEREN'T PRODUCED TO US BECAUSE THAT WOULD BE UNFAIR.

10:02AM 21 THE COURT: DO YOU WANT TO PLAY WITH THE CARDS THAT
10:02AM 22 ARE ON THE TABLE?

10:02AM 23 MR. BROWN: WELL, LET ME FIRST START BY SAYING THAT
10:02AM 24 IT SEEMS UNUSUAL TO SAY THE LEAST AND MAYBE BORDERING ON ABSURD
10:03AM 25 THAT WE HAVE A CASE THAT'S NOW BOILED DOWN TO TWO CLAIMS, TWO

10:03AM 1 CONTRACT RELATED CLAIMS, A BREACH OF CONTRACT CLAIM AND A
10:03AM 2 BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING,
10:03AM 3 AND AT THIS JUNCTURE OF THE CASE WHAT THE PLAINTIFFS ARE
10:03AM 4 ESSENTIALLY SAYING IS THAT WE'RE NOT REALLY SURE WHAT THE
10:03AM 5 CONTRACT IS. WE'RE ALLEGING THAT WE HAD A CONTRACT WITH YOU,
10:03AM 6 FACEBOOK. WE'RE ALLEGING THAT YOU BREACHED THE CONTRACT, BUT
10:03AM 7 WE'RE NOT REALLY SURE WHAT IT IS, AND WE NEED DISCOVERY AND ALL
10:03AM 8 OF THE HELP CENTER PAGES ON THE SITE THAT EXISTED BACK IN 2011
10:03AM 9 SO THAT WE CAN THEN LOOK AT ALL OF THEM AND SEE IF WE CAN
10:03AM 10 SCROUNGE UP SOME PROVISION THAT WE ARE THEN GOING TO ALLEGE
10:03AM 11 THAT WAS PART OF THE CONTRACT.

10:03AM 12 THE COURT: HELP US FILE OUR LAWSUIT.

10:03AM 13 MR. BROWN: YES. AND THAT DOESN'T SEEM TO BE THE
10:03AM 14 WAY THAT THIS OUGHT TO PROCEED. IF THEY BELIEVE THAT THEY HAVE
10:03AM 15 A CONTRACT, THEY OUGHT TO BE ABLE TO ALLEGE WHAT THE CONTRACT
10:03AM 16 IS.

10:03AM 17 TYPICALLY WHEN YOU HAVE A PLAINTIFF FILING A BREACH OF
10:03AM 18 CONTRACT CASE, THEY CAN COME TO THE COURT AND SAY HERE'S THE
10:03AM 19 CONTRACT, ALL OF IT, AND HERE ARE THE THREE PROVISIONS IN THE
10:03AM 20 CONTRACT THAT WE BELIEVE THE OTHER SIDE BREACHED. THAT'S
10:04AM 21 PRETTY BASIC.

10:04AM 22 SO I DON'T THINK THAT THEY'RE GOING TO BE ABLE TO
10:04AM 23 SUCCESSFULLY AMEND THE COMPLAINT TO SUCCESSFULLY ALLEGE EITHER
10:04AM 24 OF THESE TWO CLAIMS AND IN PART FOR THAT REASON, BUT THE IDEA
10:04AM 25 THAT WE SHOULD HAVE TO DO SOME ADDITIONAL DISCOVERY IN ORDER

10:04AM 1 TO -- SO THAT THEY CAN SCROUNGE UP SOME ADDITIONAL LANGUAGE IN
10:04AM 2 A HELP CENTER DOESN'T SEEM APPROPRIATE TO ME.

10:04AM 3 THE COURT: WELL, I THOUGHT -- WHAT I HEARD YOU SAY
10:04AM 4 IS THAT WE'RE WILLING TO FOREGO THAT IF EVERYBODY AGREES THAT
10:04AM 5 OUR LAWSUIT CAN BE PLED AND GO FORWARD AND INCLUDING MOTIONS TO
10:04AM 6 DISMISS, ET CETERA, WITH WHAT YOU HAVE NOW.

10:04AM 7 MR. STRAITE: YES. AND IN ALL FAIRNESS, I DID
10:04AM 8 SPRING THIS ON MR. BROWN THIS MORNING. HE HASN'T HAD TIME TO
10:04AM 9 THINK ABOUT IT.

10:04AM 10 THE COURT: OH, HE'S PRETTY SMART. HE CAN RACHET UP
10:04AM 11 AN ANSWER HERE PRETTY QUICKLY.

10:04AM 12 MR. STRAITE: AND FOR THE RECORD, I'LL CONFIRM HE'S
10:04AM 13 SMARTER THAN ME SO EVEN BETTER.

10:04AM 14 TO ADDRESS MR. BROWN'S FIRST POINT ABOUT SCROUNGING UP NEW
10:05AM 15 LANGUAGE, THE IMPORTANT POINT TO REMEMBER IS THAT OUR SECOND
10:05AM 16 AMENDED COMPLAINT DID, IN FACT, QUOTE LANGUAGE FROM ONE OF THE
10:05AM 17 HELP CENTER PAGES.

10:05AM 18 WE ALLEGE IT WAS A PART OF THE CONTRACT AND ALLEGED IT WAS
10:05AM 19 LINKED TO THE PRIVACY POLICY IN THE CONTRACT DRAMATICALLY,
10:05AM 20 THEMATICALLY AND THROUGH HYPERLINKS, NOT DIRECTLY BUT THROUGH
10:05AM 21 THE HELP CENTER GENERALLY. SO THE LANGUAGE WAS QUOTED VERBATIM
10:05AM 22 IN OUR CONTRACT REPEATEDLY.

10:05AM 23 AND THEN IN RESPONSE FACEBOOK ARGUED THAT BECAUSE WE
10:05AM 24 DIDN'T ATTACH AN ACTUAL PRINTOUT OF THE HELP CENTER PAGE THAT
10:05AM 25 WE WERE NOT ABLE TO PLEAD OUR CLAIM. SO IT'S NOT NEW LANGUAGE

10:05AM 1 THAT WE WOULD BE ADDING. IT'S THE DOCUMENTATION, MAYBE THE
10:05AM 2 SCREEN SHOT OR OTHER DOCUMENTATION THAT WOULD PROVE THE
10:05AM 3 LANGUAGE IS CORRECT.

10:05AM 4 SINCE THEN WE HAVE SCROUNGED UP ADDITIONAL LANGUAGE THAT
10:05AM 5 WE WILL BE ADDING TO THE THIRD AMENDED COMPLAINT AND A LOT OF
10:05AM 6 LANGUAGE, IN FACT, FROM VARIOUS OTHER HELP CENTER PAGES. WE,
10:05AM 7 AGAIN, WE DO NOT BELIEVE THAT MR. BROWN IS CORRECT THAT WE HAVE
10:05AM 8 TO SHOW THE SCREEN SHOTS OF WHAT THOSE PAGES LOOK LIKE SIX
10:05AM 9 YEARS AGO. I DON'T HAVE A TIME MACHINE, BUT I DO HAVE THE
10:06AM 10 ACTUAL LANGUAGE.

10:06AM 11 SO WE WOULD BE HAPPY WITH EITHER LANGUAGE. EITHER
10:06AM 12 FACEBOOK PRODUCES THEIR INTERNAL DOCUMENTS AS TO WHAT THE HELP
10:06AM 13 CENTER PAGES ACTUALLY LOOKED LIKE DURING THE CLASS PERIOD OR
10:06AM 14 YOU ACCEPT OUR ALLEGATIONS AS TRUE FOR PURPOSES OF THE
10:06AM 15 COMPLAINT, WHICH ORDINARILY HAPPENS AND TO PROCEED, AND THEY
10:06AM 16 DON'T PUT IN ADDITIONAL EVIDENCE IN OPPOSITION TO OUR COMPLAINT
10:06AM 17 THAT WAS WITHHELD FROM US FOR THE LAST THREE YEARS.

10:06AM 18 THE COURT: SO THAT SOUNDS IMMINENTLY REASONABLE,
10:06AM 19 DOESN'T IT?

10:06AM 20 MR. BROWN: IT'S NOT REASONABLE, AND I CAN'T AGREE
10:06AM 21 TO THAT.

10:06AM 22 SO IN ANY CASE WHERE THE PLAINTIFF IS ALLEGING A BREACH OF
10:06AM 23 CONTRACT AND THEY COME FORWARD AND SAY HERE'S WHAT WE'RE
10:06AM 24 ALLEGING THE CONTRACT IS, YOU ALWAYS, AS THE DEFENDANT, HAVE
10:06AM 25 THE ABILITY ON A MOTION TO DISMISS TO SAY TO THE COURT, WAIT A

10:06AM 1 MINUTE, IF THEY'RE CONTENDING THIS IS WHAT THE CONTRACT IS,
10:06AM 2 THEY'RE ACTUALLY NOT SHOWING YOU ALL OF IT.

10:06AM 3 AND I THINK IT'S COMPLETELY CONSISTENT, AND I'M NOT GOING
10:06AM 4 TO CONCEDE RIGHT NOW THAT THE HELP CENTER PAGES WERE, IN FACT,
10:06AM 5 PART OF THE CONTRACT, BUT IF THE PLAINTIFFS ARE GOING TO COME
10:07AM 6 IN A COMPLAINT AND ALLEGE THAT THEY ARE BUT SELECTIVELY SHOW
10:07AM 7 HELP CENTER PAGES WHEN THERE MAY BE OTHER HELP CENTER PAGES
10:07AM 8 THAT BEAR ON THE INTERPRETATION OF THOSE OR CONTRADICTED OR
10:07AM 9 SUPPLEMENTED IN SOME MEANINGFUL WAY, WE WOULD RESERVE THE RIGHT
10:07AM 10 TO COME TO THE COURT AND SEEK JUDICIAL NOTICE OR INCORPORATION
10:07AM 11 BY REFERENCE UNDER THAT DOCTRINE WHICH IS APPROVED BY THE NINTH
10:07AM 12 CIRCUIT.

10:07AM 13 SO I CAN'T BE IN THE POSITION OF SAYING THAT WE WILL
10:07AM 14 HIGHER ON THE HAND ON A MOTION TO DISMISS, AND WE CAN ONLY HAVE
10:07AM 15 A DEBATE ABOUT THE HELP CENTER PAGES THAT THEY CHOOSE TO PUT
10:07AM 16 FORWARD.

10:07AM 17 THE COURT: SURE, I CAN APPRECIATE THAT. BUT WOULD
10:07AM 18 IT REALLY BE THAT DIFFICULT TO OBTAIN THOSE HISTORIC PAGES
10:07AM 19 DURING THE CLASS PERIOD IF THAT'S REALLY THE FOCUS OF THEIR
10:07AM 20 DISCOVERY, IF YOU WILL, REQUEST?

10:07AM 21 MR. BROWN: IT MAY VERY WELL BE HARDER THAN YOU
10:07AM 22 IMAGINE. I MEAN, THE HELP CENTER IS A PRETTY BIG AND VAST SET
10:08AM 23 OF WEB PAGES, AND IT'S NOT AS THOUGH YOU CAN, WHEN YOU'RE GOING
10:08AM 24 BACK AND PULLING THINGS FROM THE 2010 OR 2011 PERIOD, IT'S NOT
10:08AM 25 AS THOUGH WE CAN JUST GO AND THOSE ARE SITTING IN A LITTLE

10:08AM 1 VAULT SOMEWHERE AND WE CAN JUST, YOU KNOW, TAKE A QUICK COPY OF
10:08AM 2 THEM. IT'S A LITTLE BIT MORE COMPLICATED THAN THAT TO GO BACK
10:08AM 3 AND PULL HISTORICAL VERSIONS OF WEB PAGES THAT ARE PROBABLY NO
10:08AM 4 LONGER THERE THIS MANY YEARS LATER.

10:08AM 5 AND SO WHAT WE HAVE ALWAYS OFFERED, AND I DON'T THINK WE
10:08AM 6 SHOULD BE RELITIGATING A MOTION TO COMPEL WHICH WAS TERMINATED
10:08AM 7 AND SUPPOSED TO BE RE-FILED, BUT WHAT WE OFFERED DURING THE
10:08AM 8 MEET AND CONFER PERIOD WAY BACK WHEN IS TO SAY IF YOU CAN POINT
10:08AM 9 TO PARTICULAR HELP CENTER PAGES THAT YOU CONTEND ARE RELEVANT
10:08AM 10 AND WE'LL RESERVE OUR RIGHTS TO SAY THAT THEY ARE NOT RELEVANT,
10:08AM 11 BUT IF YOU CAN POINT TO CERTAIN ONES THEN, SURE, WE'LL GO GET
10:08AM 12 THEM FOR YOU.

10:08AM 13 BUT INSTEAD, THEY STUCK TO THE POSITION THAT WE SHOULD
10:09AM 14 JUST PRODUCE EVERY SINGLE PAGE IN THE HELP CENTER, AND IT'S A
10:09AM 15 HELP CENTER. THEY'RE ALL MANNER OF INFORMATION IN THERE THAT
10:09AM 16 HAS NO BEARING WHATSOEVER ON THEIR CLAIM WHICH IS THAT WE
10:09AM 17 IMPROPERLY COLLECTED INTERNET BROWSING HISTORY OF THESE NAMED
10:09AM 18 PLAINTIFFS.

10:09AM 19 SO I DO HAVE A PROBLEM WITH GOING AND JUST SORT OF
10:09AM 20 GENERALLY COLLECTING HELP CENTER PAGES WHEN WE KNOW VERY WELL
10:09AM 21 THAT THE VAST MAJORITY OF THEM DON'T HAVE ANY BEARING AT ALL ON
10:09AM 22 THEIR ALLEGATIONS.

10:09AM 23 THE COURT: WELL, IT SOUNDS LIKE YOUR SEARCH WOULD
10:09AM 24 BE MUCH MORE DISCRETE, THOUGH?

10:09AM 25 MR. STRAITE: I BELIEVE THAT'S THE CASE, YOUR HONOR.

10:09AM 1 AND, IN FACT, IF IT WOULD BE HELPFUL TO REDUCE THE BURDEN ON
10:09AM 2 DEFENDANT, WE COULD IDENTIFY THE LANGUAGE THAT WE'LL BE PUTTING
10:09AM 3 INTO THE THIRD AMENDED COMPLAINT, INCLUDING THE OLD DEAD URL'S
10:09AM 4 THAT WERE USED BACK IN 2011. WE SUSPECT IT WILL BE FEWER THAN
10:09AM 5 TEN HELP CENTER PAGES.

10:09AM 6 SPEAKING TO THE EFFICIENCY, WE TALKED ABOUT THE UNFAIRNESS
10:09AM 7 JUST A WHILE AGO. WE'RE NOT DISCUSSING THIS IN A VACUUM.
10:09AM 8 SEVERAL YEARS AGO IN 2011 JUDGE KOH DECIDED A VERY SIMILAR
10:09AM 9 QUESTION IN THE CASE OF FRALEY VERSUS FACEBOOK. THE CITATION
10:10AM 10 IS 830 F. SUPP. 2D 785. THIS IS FROM 2011. THE PLAINTIFFS
10:10AM 11 QUOTED -- I'M SORRY, A FACEBOOK HELP CENTER PAGE. IN RESPONSE
10:10AM 12 FACEBOOK PUT ADDITIONAL HELP CENTER PAGES ATTACHED TO A REQUEST
10:10AM 13 FOR JUDICIAL NOTICE IN SUPPORT OF THEIR MOTION TO DISMISS.

10:10AM 14 ADDITIONAL HELP CENTER PAGES SUDDENLY BECAME RELEVANT IN
10:10AM 15 OPPOSITION TO THE COMPLAINT AND IN SUPPORT OF THEIR MOTION TO
10:10AM 16 DISMISS.

10:10AM 17 AND JUDGE KOH HAD TO GO THROUGH A LENGTHY OPINION ABOUT
10:10AM 18 STANDARDS FOR JUDICIAL NOTICE. IT WAS INCREDIBLY INEFFICIENT
10:10AM 19 TO HAVE TO HAVE ALL OF THIS ARGUMENT. SHE EVENTUALLY RULED
10:10AM 20 THAT MANY OF THE HELP CENTER PAGES SHE WOULD NOT JUDICIALLY
10:10AM 21 NOTICE. SOME CAME IN AND SOME DID NOT. THERE WAS A BRIEFING
10:10AM 22 ON THE QUESTION OF JUDICIAL NOTICE. IT WOULD BE FAR MORE
10:10AM 23 EFFICIENT SIMPLY TO RESOLVE IT HERE WE WOULD ARGUE.

10:10AM 24 THE COURT: THANK YOU. IF YOU CAN IDENTIFY,
10:10AM 25 MR. BROWN, A CERTAIN PAGES' LANGUAGE AND PAGES, IT SEEMS TO ME

10:10AM 1 THAT THAT WOULD ASSIST YOUR CLIENT AT LEAST IN LOCATING THESE.

10:11AM 2 WHAT I'M TRYING TO DO HERE, AND I THINK -- I HOPE IT'S
10:11AM 3 APPARENT, IS THAT I'M TRYING TO FASHION BEARING F.R.C.P. 1 IN
10:11AM 4 MIND ABOUT THE EFFICIENT MANAGEMENT AND PROGRESS OF THE CASE
10:11AM 5 AND A CASE THAT IS FOUR OR FIVE YEARS OLD AND MAYBE THE WORD
10:11AM 6 "EFFICIENT" SHOULDN'T BE IN THE SAME SENTENCE, BUT I THINK
10:11AM 7 WE'RE AT A PLACE NOW WHERE THERE IS -- THIS CASE HAS BEEN
10:11AM 8 REFINED. IT'S GONE THROUGH MOTION PRACTICE. SO NOW THERE'S --
10:11AM 9 AS YOU POINT OUT, MR. BROWN, IT'S JUST A VERY, VERY FINITE,
10:11AM 10 DISCRETE QUESTION THAT'S HERE. IT'S A BREACH OF CONTRACT
10:11AM 11 QUESTION OF SORTS.

10:11AM 12 I'D LIKE TO ASSIST YOU IN GETTING YOU WHERE YOU BOTH NEED
10:11AM 13 TO BE SUCH THAT YOU CAN GET RESOLUTION ONE WAY OR THE OTHER AND
10:11AM 14 GET SOME ADDITIONAL FOCUS.

10:11AM 15 IT SEEMS TO ME THAT WHAT I WANT TO DO IS TO GIVE YOU A
10:11AM 16 SCHEDULE FOR FILING, AS I TOLD YOU, AND I'D LIKE TO SEE IF YOU
10:11AM 17 CAN ACCOMPLISH THIS DISCOVERY ISSUE. IT SOUNDS LIKE FROM WHERE
10:12AM 18 I SIT AND, PARDON ME, I'M NOT ENGULFED IN THE LITIGATION LIKE
10:12AM 19 YOU ARE, BUT IT SEEMS LIKE IF YOU WERE TO IDENTIFY THESE
10:12AM 20 DISCRETE PAGES LANGUAGE THAT THE DIFFICULTY THAT FACEBOOK WOULD
10:12AM 21 HAVE IN LOCATING THAT DISCRETE INFORMATION WOULD PROBABLY BE
10:12AM 22 LESS TIME THAN IT WOULD TAKE TO FILE MOTIONS IN FRONT OF GOOD
10:12AM 23 JUDGE COUSINS AND ARGUE THOSE MOTIONS AND BE FAR MORE COST
10:12AM 24 EFFECTIVE IF WE CAN JUST NARROW THAT DOWN HERE. THAT'S KIND OF
10:12AM 25 WHAT I'M LOOKING AT.

10:12AM 1 WHILE YOU GET YOUR PENCILS OUT, I'LL TELL YOU THE DATES
10:12AM 2 THAT I AM THINKING ABOUT SUCH THAT IT WILL GUIDE YOUR THOUGHTS
10:12AM 3 ABOUT THIS DISCOVERY ISSUE.

10:12AM 4 WHAT I'D LIKE TO DO IS TO HAVE THE THIRD AMENDED COMPLAINT
10:12AM 5 FILED ON NO LATER THAN FRIDAY, AUGUST 25TH; ANY MOTION TO
10:12AM 6 DISMISS WOULD THEN BE FILED ON FRIDAY, SEPTEMBER 8TH;
10:13AM 7 OPPOSITION TO THAT WOULD BE FILED FRIDAY, OCTOBER 13TH; A REPLY
10:13AM 8 WOULD BE FILED FRIDAY, OCTOBER 27TH, AND I'LL RESERVE A MOTION
10:13AM 9 DATE, A HEARING DATE, EXCUSE ME, FOR THURSDAY, NOVEMBER 16TH,
10:13AM 10 THURSDAY, NOVEMBER 16TH AT 9:00 A.M.

10:13AM 11 THAT'S THE SCHEDULE THAT I'D LIKE TO IMPOSE ON THE CASE
10:13AM 12 NOW, AND I'M HOPEFUL THAT THIS ISSUE REGARDING PAGES THAT YOU
10:13AM 13 NEED AND YOUR REQUEST FROM FACEBOOK CAN BE RESOLVED SUCH THAT
10:13AM 14 YOU CAN MEET THIS DEADLINE.

10:13AM 15 MR. STRAITE: I'M CONFIDENT WE CAN. MATT IS A VERY
10:13AM 16 REASONABLE PERSON, AND HE'S A SKILLED LAWYER, AND HE'LL DO HIS
10:13AM 17 BEST, OF COURSE, TO PROTECT HIS CLIENT, BUT I BELIEVE WE CAN
10:13AM 18 GET THIS DONE IN GOOD FAITH.

10:13AM 19 MR. BROWN: SO IF I'M LOOKING AT THE DATES, I DON'T
10:14AM 20 HAVE MY CALENDAR IN FRONT OF ME. SO YOU'RE SAYING THAT THE
10:14AM 21 COMPLAINT WOULD BE FILED AUGUST 25TH AND THEN THE MOTION WOULD
10:14AM 22 BE DUE IS THAT --

10:14AM 23 THE COURT: THE COMPLAINT FILED AUGUST 25TH, THAT'S
10:14AM 24 RIGHT.

10:14AM 25 MR. BROWN: AND THEN WE WOULD HAVE ABOUT, WHAT,

10:14AM 1 14 DAYS TO MOVE TO DISMISS?

10:14AM 2 THE COURT: RIGHT.

10:14AM 3 MR. BROWN: OKAY. I GUESS THE -- YOU KNOW, THE ONE
10:14AM 4 THING THAT I WOULD WANT TO BRING UP WITH THE COURT IF THAT'S
10:14AM 5 WHERE THE COURT WAS LEANING AT, YOU KNOW, ON THE DISCOVERY OF
10:14AM 6 THE HELP CENTER PAGES. YOU KNOW, ONE THING THAT IS OF VERY
10:14AM 7 SERIOUS CONCERN TO FACEBOOK IS A BROADER DISCOVERY INITIATIVE.
10:14AM 8 I KNOW THAT WE HAVE THESE EXISTING ISSUES THAT WERE TEED UP IN
10:14AM 9 THE MOTION TO COMPEL AND YOU RULED THAT THOSE NEED TO BE
10:14AM 10 REFILED WITH JUDGE COUSINS, BUT DURING OUR MEET AND CONFER LAST
10:14AM 11 WEEK AND IN PREPARATION FOR THE CMC I HEARD SUGGESTIONS THAT
10:14AM 12 THERE COULD BE, YOU KNOW, ADDITIONAL DISCOVERY NOW WAGED
10:14AM 13 INCLUDING NOTICING DEPOSITIONS OF FACEBOOK EMPLOYEES AND THE
10:15AM 14 LIKE, AND THAT JUST DOESN'T SEEM RIGHT IN THE POSTURE WE ARE
10:15AM 15 IN.

10:15AM 16 THE COURT: AND LET ME -- I THOUGHT ABOUT THAT. MY
10:15AM 17 THOUGHT INITIALLY WAS WE DON'T NEED ANY DEPOSITIONS. I DON'T
10:15AM 18 THINK YOU NEED ANY DEPOSITION TO PROCEED ON THIS SCHEDULE AND
10:15AM 19 MAYBE YOU SHOULD TELL ME IF I'M WRONG.

10:15AM 20 MR. STRAITE: NO, YOUR HONOR, YOU'RE EXACTLY RIGHT.
10:15AM 21 WE'RE NOT PREPARED TO TAKE DEPOSITIONS FOR A NUMBER OF REASONS
10:15AM 22 FOR THE NEXT COUPLE OF MONTHS.

10:15AM 23 THE MOST IMPORTANT REASON, WHICH WE'LL ADDRESS WITH
10:15AM 24 JUDGE COUSINS, IS THAT 99.9 PERCENT OF THE DOCUMENT PRODUCTION
10:15AM 25 IS DESIGNATED ATTORNEYS EYES ONLY. AND UNDER THE COURT'S

10:15AM 1 CONFIDENTIALITY ORDER I'M NOT ALLOWED TO SHOW THOSE DOCUMENTS
10:15AM 2 TO ANY DEPONENT UNLESS THE DEPONENT WROTE THE DOCUMENT OR
10:15AM 3 OTHERWISE HAS KNOWLEDGE OF IT. THAT MEANS THAT I CAN'T TAKE
10:15AM 4 DEPOSITIONS PERIOD AS A PRACTICAL MATTER. SO UNTIL
10:15AM 5 JUDGE COUSINS RESOLVES THAT -- WE CAN'T DO DEPOSITIONS.

10:15AM 6 AND, SECOND OF ALL, BECAUSE WE ONLY HAVE DOCUMENT
10:15AM 7 DISCOVERY FROM THREE INDIVIDUALS AND WE'RE PROPOSING MORE
10:15AM 8 DOCUMENTS FROM ANOTHER 20 INDIVIDUALS WHICH WERE SUGGESTED BY
10:15AM 9 THE CURRENT DOCUMENT PRODUCTION, WE BELIEVE IT WOULD BE UNWISE
10:16AM 10 TO START DEPOSITIONS UNTIL WE GET ADDITIONAL DOCUMENTS ANYWAY.
10:16AM 11 I WOULD BE SHOCKED IF WE WERE IN A POSITION TO TAKE THE FIRST
10:16AM 12 DEPOSITION BEFORE ORAL ARGUMENT ON AUGUST 16TH. SO I THINK
10:16AM 13 YOUR CONCERNS AND THE PRACTICAL POSTURE OF THE CASE COINCIDE.

10:16AM 14 THE COURT: I DIDN'T ANTICIPATE THERE WOULD BE ANY
10:16AM 15 DEPOSITION PRACTICE AT ALL.

10:16AM 16 MR. BROWN: I DIDN'T EITHER UNTIL THE MEET AND
10:16AM 17 CONFER LAST WEEK.

10:16AM 18 BUT I GUESS BEYOND THAT, AND I UNDERSTAND THAT YOUR HONOR
10:16AM 19 HAS A GENERAL PHILOSOPHY, I THINK, THAT DISCOVERY SHOULDN'T BE
10:16AM 20 STAYED FOR LONG PERIODS OF TIME.

10:16AM 21 BUT, YOU KNOW, GIVEN THE POSTURE THAT WE'RE IN HERE, WE'VE
10:16AM 22 HAD TWO COMPLAINTS DISMISSED, AND WE HAVE 9 OF THE 11 CLAIMS
10:16AM 23 DISMISSED WITH PREJUDICE, AND WE'RE DOWN TO TWO CLAIMS, AND I'M
10:16AM 24 NOT SURE THAT THEY'LL BE ABLE TO REPLEAD THEM SUCCESSFULLY.

10:16AM 25 I WOULD LIKE TO BE ABLE TO AT LEAST HIT THE PAUSE BUTTON

10:16AM 1 ON BRIEFING ON THE MOTION TO COMPEL AND DOCUMENT DISCOVERY AS
10:16AM 2 WELL, AND WE'RE ONLY TALKING ABOUT NOVEMBER 16TH FOR THE
10:16AM 3 HEARING, AND YOU'RE OBVIOUSLY SETTING THIS FOR A MORE EXPEDITED
10:17AM 4 SCHEDULE THAN IS OFTEN THE CASE.

10:17AM 5 SO I ASK THAT WITH HUMILITY BECAUSE I UNDERSTAND YOUR
10:17AM 6 GENERAL PHILOSOPHY, BUT IT JUST SEEMS TO BE APPROPRIATE IN THE
10:17AM 7 PARTICULAR PROCEDURAL POSTURE THAT WE'RE IN NOW.

10:17AM 8 MR. STRAITE: YOUR HONOR, OF COURSE GIVEN THE
10:17AM 9 PROCEDURAL POSTURE IT'S IMPORTANT FOR US TO BE REASONABLE AND
10:17AM 10 IF IT WOULD HELP, YOUR HONOR, WE CAN AGREE NO REQUEST FOR
10:17AM 11 ADMISSIONS, NO INTERROGATORIES, NO SCHEDULED DEPOSITIONS, NO
10:17AM 12 NOTICES FOR DEPOSITION UNTIL AFTER NOVEMBER 16TH. IF WE JUST
10:17AM 13 FOCUS ON DOCUMENTS BETWEEN NOW AND THEN, THAT'S A COMPROMISE
10:17AM 14 THAT WE'RE WILLING TO OFFER.

10:17AM 15 MR. BROWN: WELL --

10:17AM 16 THE COURT: THAT SOUNDS PRETTY GENEROUS.

10:17AM 17 MR. BROWN: WELL, IF, IF THEY CAN'T, IF THEY
10:17AM 18 CAN'T --

10:17AM 19 THE COURT: YOU'RE OVERWHELMED BY THE GENEROSITY.

10:17AM 20 MR. BROWN: REALLY, I'M ALMOST LEFT SPEECHLESS
10:17AM 21 BECAUSE OF THE 20 EXTRA CUSTODIANS THAT THEY WANT US TO COLLECT
10:17AM 22 DOCUMENTS FROM.

10:17AM 23 I MEAN, THAT'S THE REALITY HERE. WE'RE TALKING ABOUT
10:17AM 24 ATTORNEY'S FEES THAT COULD BE IN UPWARDS OF SIX FIGURES, IF
10:17AM 25 THEY REALLY FOLLOW THROUGH ON THEIR REQUEST FOR US TO COLLECT

10:18AM 1 DOCUMENTS, AND MAYBE I'M GETTING THE NUMBER 20 WRONG, I CAN'T
10:18AM 2 REMEMBER WHAT IT IS ANYMORE, BUT IT'S A SIGNIFICANT NUMBER OF
10:18AM 3 ADDITIONAL CUSTODIANS, AND WHEN YOU'RE IN A SITUATION LIKE THIS
10:18AM 4 WHEN IT'S VERY, VERY POSSIBLE THAT THE CASE MAY NOT BE GOING
10:18AM 5 FORWARD BEYOND THE END OF THIS YEAR, IT JUST SEEMS TO ME THAT
10:18AM 6 IT MAKES SENSE AT THIS JUNCTURE TO HIT THE PAUSE BUTTON.

10:18AM 7 IF IT TURNS OUT THAT THEY'RE ABLE TO PLEAD ONE OF THESE
10:18AM 8 TWO CLAIMS SUCCESSFULLY AND IT GETS BEYOND OUR MOTION TO
10:18AM 9 DISMISS, THEN THAT'S A DIFFERENT STORY AT THAT POINT.

10:18AM 10 MR. STRAITE: IT SOUNDS LIKE COUNSEL IS ARGUING
10:18AM 11 AGAIN FOR A THIRD TIME FOR A MOTION TO STAY PENDING A RULING ON
10:18AM 12 A MOTION TO DISMISS OR I RECALL OBVIOUSLY JUST BEING DENIED I
10:18AM 13 WOULD SIMPLY SAY EVERYTHING WE SAID THERE WE SAY AGAIN, AND
10:18AM 14 GIVEN OUR NEW OFFER TO HAVE LIMITED DISCOVERY JUST OF
10:18AM 15 DOCUMENTS, AND WE CAN EVEN HAVE DISCUSSIONS WITH JUDGE COUSINS
10:18AM 16 ABOUT NARROWING THE SCOPE OF CUSTODIANS EVEN FURTHER THAN THE
10:18AM 17 20 OR SO THAT WE IDENTIFIED AS RELEVANT, THAT'S SOMETHING THAT
10:18AM 18 JUDGE COUSINS WILL DECIDE IF IT'S APPROPRIATE. BUT WE, OF
10:18AM 19 COURSE, WOULD OPPOSE THIS FOURTH REQUESTED STAY OF DISCOVERY
10:19AM 20 PENDING THE RULING ON THE MOTION TO DISMISS.

10:19AM 21 THE COURT: WELL, I APPRECIATE MR. BROWN EXPRESSING
10:19AM 22 THE CONCERNS THAT HIS CLIENT AND THE COSTS --

10:19AM 23 MR. STRAITE: YES.

10:19AM 24 THE COURT: -- THAT HIS CLIENTS ARE FACING. AND IN
10:19AM 25 HIS LENS THIS CASE IS COMING TO AT LEAST A CLOSURE AT SOME

10:19AM 1 POINT IN TIME. THAT'S HIS VIEW OF IT.

10:19AM 2 MR. STRAITE: AND I WOULD SAY EXACTLY THE OPPOSITE
10:19AM 3 THAT NOT ONLY --

10:19AM 4 THE COURT: I UNDERSTAND.

10:19AM 5 MR. STRAITE: -- BECAUSE NOW WE HAVE FOCUS BECAUSE
10:19AM 6 WE HAVE ADDITIONAL HELP CENTER PAGES THAT WE'LL BE DISCUSSING.
10:19AM 7 THE REAL SALIENT FACT NOW IS THE DATE THAT THIS CASE WAS FILED,
10:19AM 8 THE CLASS PERIOD THAT WE HAVE ALLEGED. WE'RE GOING BACK NOW
10:19AM 9 FIVE, SIX, SOMETIMES SEVEN YEARS BEFORE FOR THESE DOCUMENTS.
10:19AM 10 FURTHER DELAY IS INCREDIBLY PREJUDICIAL. WE DON'T KNOW WHAT
10:19AM 11 HAPPENS TO DOCUMENTS AND IF THEY GO STALE, AND WE DON'T KNOW IF
10:19AM 12 STANDARDS CHANGE.

10:19AM 13 AND REMEMBER IN THE OLD DAYS WE HAD DOCUMENTS ON FLOPPY
10:19AM 14 DISKS, AND WE HAVE TO CONVERT ON FLOPPY DISKS. THE FURTHER
10:19AM 15 DELAY ACTUALLY INCREASES THE COST OF DISCOVERY, THE HARDER IT
10:20AM 16 BECOMES TO FIND THE DOCUMENTS AND PRODUCE THEM AND IN
10:20AM 17 APPROPRIATE FORMAT, WE BELIEVE THAT THE AGE OF THE CASE
10:20AM 18 ACTUALLY MITIGATES IN FAVOR OF MORE OF A RAPID PRODUCTION AND
10:20AM 19 NOT A LESS RAPID PRODUCTION.

10:20AM 20 THE COURT: OKAY. THANK YOU. WHICH IS TO SAY THAT
10:20AM 21 THE PLAINTIFFS HAVE A DIFFERENT VIEW OF THE CASE THAN THE
10:20AM 22 DEFENDANTS, OF COURSE, AND THEY FEEL IT'S A ROBUST CASE AND
10:20AM 23 NOTWITHSTANDING THE SIZE OF THE CASE NOW AND HOW IT APPEARS
10:20AM 24 TRIMMED DOWN.

10:20AM 25 I JUST DON'T THINK THAT IT'S APPROPRIATE TO HIT THE PAUSE

10:20AM 1 BUTTON, PARDON ME, MR. BROWN. I'D LIKE YOU -- I HEAR THE
10:20AM 2 SPIRIT OF COOPERATION HERE THAT THE PLAINTIFFS HAVE SAID, YES,
10:20AM 3 OUR CASE IS REDUCED. WE HAVE THIS DISCRETE ISSUE ABOUT BREACH
10:20AM 4 AND ACCORDINGLY OUR REQUEST FOR THE HELP CENTER LANGUAGE THAT
10:20AM 5 MIGHT HELP IN SOME WAY THE PLAINTIFFS IDENTIFY A BREACH IS
10:20AM 6 IMPORTANT TO THEIR CASE AND WITH THE LIMITATIONS EXPRESSED HERE
10:20AM 7 RECOGNIZING THAT I DON'T WANT THIS TO INVOLVE INTERROGATORIES,
10:21AM 8 DEPOSITIONS, AND PRODUCTIONS.

10:21AM 9 IF YOU CAN JUST GET AND IDENTIFY THOSE PAGES RECOGNIZING
10:21AM 10 THAT THEY MIGHT ASSIST WHAT YOU ALREADY HAVE, AND IT SOUNDS
10:21AM 11 LIKE YOU HAVE, WHAT I'VE HEARD YOU SAY, WE PROBABLY HAVE ENOUGH
10:21AM 12 TODAY TO GO FORWARD WITH THE COMPLAINT.

10:21AM 13 MR. STRAITE: YES, YOUR HONOR. YES.

10:21AM 14 THE COURT: BUT YOU WANT TO CONFIRM IT FOR YOUR
10:21AM 15 CLIENT'S SAKE. I APPRECIATE THAT.

10:21AM 16 SO I'M NOT GOING TO HIT THE PAUSE BUTTON RIGHT NOW. I
10:21AM 17 THINK WE'RE PERILOUSLY CLOSE TO GETTING SOME TYPE OF FINALITY
10:21AM 18 ON THE CASE ONE WAY OR ANOTHER, THAT IS, DEPENDING ON HOW THE
10:21AM 19 MOTIONS GO AND IT WILL EITHER THRIVE OR IT WON'T, I SUPPOSE,
10:21AM 20 AND WE'RE CLOSE TO THAT DATE.

10:21AM 21 SO I'D LIKE TO KEEP THESE DATES THEN. LET ME ASK YOU, YOU
10:21AM 22 TALK ABOUT ADR, AND THIS IS ON ECF PAGE 3 AT LINE 1. SHOULD
10:22AM 23 THAT BE ENGAGED AT ALL NOW? WHAT IS YOUR STATUS ON THAT, YOUR
10:22AM 24 COMMENTS ON THAT?

10:22AM 25 MR. STRAITE: THANK YOU, YOUR HONOR. WE HAVE NEVER

10:22AM 1 HAD A MEDIATION. WE'VE NEVER HAD ANY ASSISTED DISCUSSIONS, NO
10:22AM 2 NEUTRALS, NO NOTHING.

10:22AM 3 WE BELIEVE NOW THAT WE'RE ON THE THIRD AND FINAL AMENDED
10:22AM 4 COMPLAINT, ONE OF TWO THINGS WILL HAPPEN. EITHER WE WILL
10:22AM 5 SUCCEED ON ONE OR TWO OF THE CLAIMS AND WE'LL GO TO TRIAL, OR
10:22AM 6 WE WON'T SUCCEED AND WE GO TO THE NINTH CIRCUIT.

10:22AM 7 GIVEN THAT POSTURE, WE BELIEVE NOW MAY BE AN APPROPRIATE
10:22AM 8 TIME TO HAVE A FORMAL MEDIATION, AND WE WOULD BE WILLING TO
10:22AM 9 SPLIT THE COST 50/50. IF IN GOOD FAITH FACEBOOK BELIEVES IT'S
10:22AM 10 A COMPLETE WASTE OF TIME, WE WILL ACCEPT THAT JUDGMENT, BUT WE
10:22AM 11 PUT FORWARD HERE FORMALLY WE THINK IT'S A GOOD IDEA.

10:22AM 12 THE COURT: MR. BROWN.

10:22AM 13 MR. BROWN: RIGHT. WELL, AS WE SAID IN THE CASE
10:22AM 14 MANAGEMENT STATEMENT, BUT TO GIVE A LITTLE MORE COLOR TO IT,
10:22AM 15 WE'RE AT A POINT WHERE WE REALLY DON'T THINK THAT THEY'RE GOING
10:22AM 16 TO BE ABLE TO REPLEAD.

10:23AM 17 WE'VE NEVER THOUGHT THAT THE COMPLAINTS THAT THEY PUT
10:23AM 18 FORWARD HAD SUFFICIENT FACTUAL ALLEGATIONS TO SUPPORT THE LEGAL
10:23AM 19 THEORIES THAT THEY WERE FORWARDING, AND IT'S NOW BEEN WHITTLED
10:23AM 20 DOWN TO THESE TWO CLAIMS. AND, FRANKLY, GIVEN THE REASONING OF
10:23AM 21 THE LAST ORDER, OBVIOUSLY THEY'VE BEEN GIVEN LEAVE TO AMEND, I
10:23AM 22 JUST DON'T THINK THAT THEY'RE GOING TO BE ABLE TO DO IT.
10:23AM 23 THEY'RE STILL APPARENTLY RELYING ON THIS KIND OF LAYERED
10:23AM 24 APPROACH AS TO WHAT THEY CALL IT TO WHAT THE CONTRACT CONSISTS
10:23AM 25 OF.

10:23AM 1 AND SO IN LIGHT OF THAT, WE JUST DON'T THINK THAT IT'S
10:23AM 2 WORTH THE TIME AND EXPENSE RIGHT NOW TO ENGAGE IN ADR, AND
10:23AM 3 WE'RE GOING TO BE DOING BRIEFING ON A MOTION TO DISMISS AND THE
10:23AM 4 CASE MAY NOT LIVE ON PAST NOVEMBER.

10:23AM 5 MR. STRAITE: AND TO FURTHER PUT MORE COLOR ONTO THE
10:23AM 6 COLOR, THE LAYERED APPROACH TO THE FACEBOOK CONTRACT, THE TERMS
10:23AM 7 OF USE AND THE PRIVACY POLICY AND THE HELP CENTER PAGES, THAT
10:23AM 8 TERM "LAYERED APPROACH" IS NOT SOMETHING THAT WE'VE INVENTED.
10:23AM 9 FACEBOOK DESCRIBED ITS CONTRACT THAT WAY TO CONGRESS AND TO THE
10:23AM 10 FEDERAL TRADE COMMISSION.

10:23AM 11 GRANTED THAT PHRASE WAS USED AFTER OUR CLASS PERIOD BUT
10:23AM 12 USED TO DESCRIBE THE APPROACH THAT WAS IN EFFECT DURING THE
10:24AM 13 CLASS PERIOD, LAYERED APPROACH IS WHAT FACEBOOK TOLD THE
10:24AM 14 GOVERNMENT THAT THEY USED.

10:24AM 15 THE COURT: OKAY. WELL, THANK YOU. IT SOUNDS LIKE
10:24AM 16 PER YOUR OBSERVATION, MR. STRAITE, FACEBOOK IS NOT AT THIS
10:24AM 17 POINT INTERESTED IN PURSUING FORMAL ADR. RATHER, IT SOUNDS
10:24AM 18 LIKE YOU WOULD RATHER FOCUS, MR. BROWN, YOUR EFFORTS ON THIS
10:24AM 19 MOTION PRACTICE AND ACCORDING TO THE SCHEDULE THAT I'VE JUST
10:24AM 20 PROVIDED YOU.

10:24AM 21 MR. BROWN: THAT'S RIGHT.

10:24AM 22 THE COURT: SO THAT'S WHAT IT WILL BE. OKAY. I'VE
10:24AM 23 GIVEN YOU THE DATES. I'VE TALKED TO YOU ABOUT AT LEAST MY
10:24AM 24 VIEWS ABOUT THE -- THIS DISCOVERY ISSUE AND MY SENSE IS THAT --
10:24AM 25 AND I APPRECIATE YOUR -- PLAINTIFFS' WILLINGNESS TO WORK WITH

10:24AM 1 FACEBOOK ON LIMITING YOUR REQUESTS AND SCOPE, AND I HOPE THAT
10:24AM 2 YOUR CLIENTS -- I HOPE THAT YOU CAN MEET AND CONFER SUCH THAT,
10:24AM 3 MR. BROWN, YOU CAN TALK TO YOUR CLIENTS ABOUT PRODUCING THESE,
10:24AM 4 WHATEVER IT IS, THE PAGES AND THAT NEED TO BE DONE. AND I'M
10:25AM 5 HOPEFUL THAT IT'S NOT VOLUMINOUS AND IT'S NOT GOING TO REQUIRE
10:25AM 6 HUNDREDS OF HOURS OF ATTORNEY TIME.

10:25AM 7 MR. BROWN: JUST TO CLARIFY THAT, AND I MAY HAVE
10:25AM 8 MISSPOKEN WHEN I THOUGHT ABOUT HITTING THE PAUSE BUTTON. I HAD
10:25AM 9 ALREADY ASSUMED THAT YOU HAD RULED ON THE HELP CENTER PAGE
10:25AM 10 ISSUE.

10:25AM 11 SO MY UNDERSTANDING IS THAT THEY WILL VERY QUICKLY GET US
10:25AM 12 LANGUAGE FROM THE HELP CENTER PAGES THAT THEY WANT TO INCLUDE
10:25AM 13 IN THEIR COMPLAINT, AND WE WILL SEARCH FOR HISTORICAL VERSIONS
10:25AM 14 OF THOSE PAGES.

10:25AM 15 I GUESS WHAT I WAS TRYING TO ADDRESS IS JUST, YOU KNOW,
10:25AM 16 THE DISCOVERY BURDENS BEYOND THAT. ARE WE -- YOU KNOW, ARE WE
10:25AM 17 LITERALLY GOING TO GET NEW REQUESTS FOR PRODUCTION PROPOUNDED
10:25AM 18 TO US? ARE WE REALLY GOING THROUGH A MOTION TO COMPEL PRACTICE
10:25AM 19 BEFORE JUDGE COUSINS BETWEEN NOW AND NOVEMBER 16TH WHEN IT
10:25AM 20 SEEMS LIKE IT'S REALLY NOT THAT MUCH OF AN IMPOSITION ON
10:25AM 21 PLAINTIFFS UNTIL WE HOLD OFF --

10:25AM 22 THE COURT: MR. STRAITE, DO YOU WANT TO CLARIFY.

10:26AM 23 MR. STRAITE: AS WE DISCUSSED EARLIER, WE'RE
10:26AM 24 CERTAINLY WILLING NOT TO PROPOUND ANY INTERROGATORIES, NOT A
10:26AM 25 SINGLE ONE. WE CAN ADDRESS THE HELP CENTER PAGES IN ADVANCE OF

10:26AM 1 THE THIRD AMENDED COMPLAINT IN TELEPHONE CALLS AND LETTERS. WE
10:26AM 2 DON'T NEED DISCOVERY, FORMAL DISCOVERY THERE. WE WILL ALSO NOT
10:26AM 3 SERVE ANY REQUESTS FOR ADMISSIONS, AND WE ALSO WILL NOT NOTICE
10:26AM 4 ANY DEPOSITIONS UNTIL AFTER THE HEARING ON THE 16TH.

10:26AM 5 WHETHER WE'LL PROPOUND ADDITIONAL DOCUMENTS REQUESTS
10:26AM 6 REMAINS TO BE SEEN. WE'RE WILLING TO HOLD THOSE OFF IF WE HAVE
10:26AM 7 AN UNDERSTANDING THAT THE CURRENT DOCUMENT REQUESTS ARE
10:26AM 8 INTERPRETED A CERTAIN WAY OR THERE'S SOME AMBIGUITIES BECAUSE
10:26AM 9 OF MY INARTFUL DRAFTING OF YEARS AGO THAT WE WOULD LIKE SOME
10:26AM 10 UNDERSTANDINGS ON HOW SOME WORDS ARE INTERPRETED. WE PROBABLY
10:26AM 11 COULD PROBABLY AVOID A SECOND ROUND OF DOCUMENT REQUESTS UNTIL
10:26AM 12 NOVEMBER 16TH IF WE CAN HAVE THOSE CONVERSATIONS, BUT I THINK
10:26AM 13 IT'S LIKELY THAT WE'LL BE ABLE TO AVOID A MOTION TO COMPEL
10:26AM 14 PRIOR TO NOVEMBER 16TH SIMPLY BECAUSE ONLY THREE CUSTODIANS
10:26AM 15 HAVE BEEN SEARCHED.

10:26AM 16 IN THOSE DOCUMENTS THERE ARE PEOPLE THERE WHO HAVE SAID --
10:26AM 17 IT WILL SAY JOHN SMITH JUST BY WAY OF ILLUSTRATION. JOHN SMITH
10:27AM 18 IS A PERSON WHO KNOWS ABOUT THESE DOCUMENTS BEST, BUT THEN JOHN
10:27AM 19 SMITH'S DOCUMENTS WEREN'T SEARCHED.

10:27AM 20 GIVEN A MOTION TO COMPEL SIMILAR TO THE ONE WE HAD FILED
10:27AM 21 LAST YEAR, BUT, OF COURSE, CRAFTING IT AROUND THE SURVIVING
10:27AM 22 CLAIMS AND CRAFTING IT AROUND JUDGE COUSINS'S PRACTICES, WE
10:27AM 23 WILL PROPOSE GETTING THAT ON FILE SOONER THAN LATER SIMPLY
10:27AM 24 BECAUSE THERE ARE SO MANY IMPORTANT ISSUES, AND WE WOULD ALSO
10:27AM 25 LIKE TO HAVE A RULING, FOR EXAMPLE, ON THE CONFIDENTIALITY

10:27AM 1 DESIGNATIONS SO THAT IF AND WHEN WE GET PAST THE MOTION TO
10:27AM 2 DISMISS WE'RE ABLE TO AT THAT POINT IMMEDIATELY NOTICE
10:27AM 3 DEPOSITIONS IF WE HAVE FURTHER DOCUMENTS.

10:27AM 4 HOLDING UP THE PROCESS BETWEEN NOW AND NOVEMBER DOES NOT
10:27AM 5 MEAN WE CAN THEN HIT THE GROUND RUNNING ON NOVEMBER 17TH, THE
10:27AM 6 DAY AFTER THE HEARING, BECAUSE THAT WOULD MEAN WE WOULD THEN
10:27AM 7 HAVE TO FILE OUR MOTION ON NOVEMBER 17TH AND THERE WOULD BE
10:27AM 8 MOTION PRACTICE AND KNOW WHEN JUDGE COUSINS IS AVAILABLE. THAT
10:27AM 9 MAY PUSH OFF DISCOVERY YET ANOTHER SIX MONTHS AND EVEN AFTER
10:27AM 10 YOUR HONOR RULES. SO IT'S IMPORTANT TO GET THAT MOTION
10:27AM 11 PRACTICE STARTED NOW EVEN THOUGH WE'RE NOT WILLING TO NOT DO
10:27AM 12 DEPOSITIONS AND NOT DO INTERROGATORIES AND NOT DO RFA'S IN THE
10:27AM 13 INTERIM.

10:27AM 14 THE COURT: WELL, WHAT DOES THAT -- THANK YOU. WHAT
10:27AM 15 DO YOU SEE THAT COMPRISING? I MEAN, TO MR. BROWN'S POINT,
10:28AM 16 SHOULD THEY BE BURDENED WITH A WHOLE HOST OF OTHER DISCOVERY
10:28AM 17 MOTIONS NOTWITHSTANDING YOUR REQUEST FOR JUST THESE DISCRETE
10:28AM 18 HELP PAGE INFORMATIONS? WHAT DOES THAT -- IS THIS OPENING A
10:28AM 19 PANDORA'S BOX HERE?

10:28AM 20 MR. STRAITE: I DON'T THINK SO, YOUR HONOR. WE'RE
10:28AM 21 REALLY ASKING THAT FACEBOOK ACTUALLY RESPOND TO THE DOCUMENTS
10:28AM 22 THAT WE ASKED FOR FIVE YEARS AGO AND THAT WE HAVE HAD MEET AND
10:28AM 23 CONFERS WITH THREE YEARS AGO.

10:28AM 24 FACEBOOK HAS NOT PRODUCED A SINGLE DOCUMENT IN MORE THAN A
10:28AM 25 YEAR AND A HALF. THEY HAVE SIMPLY REFUSED TO PARTICIPATE IN

10:28AM 1 DISCOVERY DURING THE PENDENCY OF A MOTION TO STAY WHICH WAS
10:28AM 2 EVENTUALLY DENIED. WE CAN'T FIND A SINGLE CASE THAT GIVES A
10:28AM 3 PARTY TO UNILATERALLY GRANT ITSELF A STAY WHILE THEIR MOTION TO
10:28AM 4 STAY IS PENDING.

10:28AM 5 THE COURT: SO THE INFORMATION YOU NEED NOW WOULD BE
10:28AM 6 RELATED, AGAIN, TO THE HELP PAGES AND THE CONTRACT ISSUE, NOT
10:28AM 7 THE BROAD ISSUES THAT PREVIOUSLY WERE IN THE CASE?

10:28AM 8 MR. STRAITE: YES AND NO, YOUR HONOR. CERTAINLY WE
10:28AM 9 WOULD NOT -- NO LONGER SEEK DISCOVERY RELATED TO ANY DISMISSED
10:28AM 10 CLAIM, SOLELY RELATED TO THAT DISMISSED CLAIM.

10:29AM 11 HOWEVER, THE QUESTION IN THE CONTRACT CLAIM IS DID
10:29AM 12 FACEBOOK PROMISE THAT THEY WOULD NOT MONITOR POST-BROWSING
10:29AM 13 LOGOUT AND DID THEY IN FACT BREACH THAT CONTRACT OR BREACH THAT
10:29AM 14 IMPLIED TERM OR BREACH THE IMPLIED COVENANT OF GOOD FAITH AND
10:29AM 15 FAIR DEALING?

10:29AM 16 SO MOST OF THE DOCUMENTS WE REQUESTED BEFORE REGARDING
10:29AM 17 WHETHER OR NOT IT ACTUALLY HAPPENED WILL STILL BE RELEVANT SO
10:29AM 18 THERE'S A SIGNIFICANT CHUNK OF THE DOCUMENTS THAT WE REQUESTED
10:29AM 19 BEFORE TO UNDERSTAND WHAT ACTUALLY HAPPENED DURING THE CLASS
10:29AM 20 PERIOD THAT ARE STILL RELEVANT.

10:29AM 21 WE OFFERED TO MEET AND CONFER LAST WEEK WITH MATT
10:29AM 22 REGARDING THE SCOPE OF THOSE DOCUMENT REQUESTS, WHICH ONE WE
10:29AM 23 CAN CUT OUT. MATT SUGGESTED IT WOULD BE MORE EFFICIENT TO HAVE
10:29AM 24 THAT MEET AND CONFER AFTER TODAY'S HEARING AND SO WE DEFERRED
10:29AM 25 THAT CONVERSATION FURTHER. SO I KNOW NOTHING FURTHER SPECIFIC

10:29AM 1 BECAUSE WE WERE NOT ABLE TO MEET AND CONFER LAST WEEK.

10:29AM 2 MR. BROWN: YEAH, WE HAVE NOT REFUSED TO DO
10:29AM 3 ANYTHING. WE HAVE -- WE RESPONDED TO THEIR RFP'S WITH SOME
10:29AM 4 OBJECTIONS AS WELL AS COMMITMENTS TO PRODUCE CERTAIN CATEGORIES
10:29AM 5 OF THINGS. THEY DIDN'T ALWAYS SEE EYE TO EYE WITH OUR
10:29AM 6 RESPONSES. WE HAD EXTENSIVE MEET AND CONFERS, AND THAT
10:30AM 7 RESULTED THEN IN THE MOTION TO COMPEL THAT THEY FILED.

10:30AM 8 SO ALL OF THE ISSUES THERE HAVE BEEN CRYSTALLIZED. IT'S
10:30AM 9 NOT AS THOUGH WE HAVE BEEN REFUSING TO DO ANYTHING. IT'S JUST
10:30AM 10 THAT THE PARTIES WERE AT LOGGERHEADS ON WHETHER WE WOULD HAVE
10:30AM 11 ADDITIONAL OBLIGATIONS OR NOT.

10:30AM 12 AND I WOULD TELL YOU, FOR INSTANCE, THAT WE WERE WILLING
10:30AM 13 TO COLLECT FROM ADDITIONAL CUSTODIANS IF THEY HAD BEEN
10:30AM 14 REASONABLE IN MEET AND CONFERS, BUT THEY INSTEAD TOOK A VERY
10:30AM 15 HARDLINE POSITION THAT THERE WERE THESE 20-PLUS ADDITIONAL
10:30AM 16 CUSTODIANS THAT WE HAD TO COLLECT FROM WHICH WAS JUST A
10:30AM 17 NONSTARTER.

10:30AM 18 SO THERE'S A WHOLE HISTORY HERE, AND I FEEL LIKE WE'RE
10:30AM 19 LITIGATING A MOTION TO COMPEL IN AN ODD WAY AT THIS CMC, BUT
10:30AM 20 THERE'S A LONG HISTORY HERE. AND I JUST WANT TO MAKE SURE THAT
10:30AM 21 THE RECORD IS CLEAR THAT WE HAVE NOT BEEN SORT OF REFUSING TO
10:30AM 22 DO ANYTHING. IT'S JUST THAT ALL OF THE ISSUES HAVE ALREADY
10:30AM 23 BEEN CRYSTALLIZED.

10:30AM 24 MY CONCERN IS THAT, I MEAN, THERE'S GOING TO BE NO WAY
10:30AM 25 THAT WE CAN GET MOTIONS TO COMPEL BRIEFED AND HEARD AND IF THE

10:31AM 1 MOTION TO COMPEL IS GRANTED IN PART AND IN OUR FAVOR, ACTUALLY
10:31AM 2 COLLECT AND REVIEW AND PRODUCE DOCUMENTS BEFORE AUGUST 25TH
10:31AM 3 WHICH IS WHEN THEIR COMPLAINT IS DUE.

10:31AM 4 SO ALL I'M SAYING IS THAT I HEAR YOUR HONOR ON THE HELP
10:31AM 5 CENTER PAGE ISSUE. THAT WOULD GIVE THEM WHAT THEY SAY THEY
10:31AM 6 NEED IN ORDER TO FILE THEIR COMPLAINT, BUT THERE'S REALLY VERY
10:31AM 7 LITTLE BURDEN ON THE PLAINTIFFS TO SIMPLY WAIT UNTIL YOUR HONOR
10:31AM 8 RULES ON THE NEXT ROUND OF MOTION TO DISMISS AND SEE IF
10:31AM 9 ANYTHING ACTUALLY GETS THROUGH BEFORE WE UNDERTAKE ALL OF THIS
10:31AM 10 OTHER BURDEN AND DOCUMENT PRODUCTION.

10:31AM 11 MR. STRAITE: AND, YOUR HONOR, I THINK MATT HIT ON A
10:31AM 12 VERY IMPORTANT POINT. THE IDEA OF BRIEFING TWO BRIEFS IN
10:31AM 13 PARALLEL IS THE BURDEN THAT HE'S REFERRING TO, AND I THINK HE'S
10:31AM 14 RIGHT.

10:31AM 15 AND IF IT WOULD HELP YOUR HONOR, WE ARE WILLING TO NOT
10:31AM 16 FILE A MOTION TO COMPEL UNTIL SEPTEMBER 8TH, AND THAT WAY HE'S
10:31AM 17 NOT BRIEFING DOCUMENTS IN PARALLEL WITH THAT. WOULD THAT BE
10:31AM 18 ACCEPTABLE?

10:31AM 19 MR. BROWN: NO, THAT WAS NOT QUITE WHAT I WAS
10:31AM 20 GETTING AT.

10:31AM 21 THE COURT: A BIG SIGH OF RELIEF.

10:32AM 22 MR. STRAITE: IT WAS A BIG SIGH OF RELIEF. I'M
10:32AM 23 GUESSING ABOUT THE RELIEF PART.

10:32AM 24 THE COURT: WELL, I APPRECIATE THE POSITIONS THAT
10:32AM 25 YOU'RE BOTH IN, AND I HOPE YOU APPRECIATE MINE. I'M TRYING TO

10:32AM 1 ASSIST YOU IN GETTING SOME CLARITY ON THE CASE, AND I THINK WE
10:32AM 2 HAVE DONE THIS OVER THE LAST FOUR YEARS. THE CASE IS DOWN TO
10:32AM 3 AT LEAST TWO DISCRETE ISSUES.

10:32AM 4 YOU'RE GOING TO CONTINUE TO MEET AND CONFER AS TO THE
10:32AM 5 INFORMATION ON THE HELP CENTER PAGES THAT I THINK COULD ASSIST
10:32AM 6 YOU AND INFORM YOU AS TO HOW AND HOW YOU SHOULD FILE YOUR THIRD
10:32AM 7 AMENDED COMPLAINT IN THIS CASE.

10:32AM 8 I THINK YOU KNOW MY POSITION. I'D LIKE YOU BOTH TO MEET
10:32AM 9 AND CONFER AND TO PROVIDE AS MUCH AS YOU CAN, ASK FOR WHAT YOU
10:32AM 10 NEED, AND I'M HOPING THAT FACEBOOK CAN PROVIDE AS MUCH AS YOU
10:32AM 11 FEEL YOU CAN PROVIDE WITHOUT GOING TO JUDGE COUSINS AND TRYING
10:32AM 12 TO GET ADDITIONAL DISCOVERIES.

10:32AM 13 I'M NOT GOING TO DISTURB THE TIMING THAT I JUST GAVE YOU.
10:32AM 14 I HOPE YOU CAN GET THIS DONE IN THAT TIME. AND I KNOW YOU'VE
10:33AM 15 BEEN COLLEAGUE OPPOSITES HERE FOR QUITE SOME TIME AND WORKING
10:33AM 16 TOGETHER ON THIS CASE, AND I APPRECIATE YOUR CONTINUED EFFORTS
10:33AM 17 IN THAT REGARD.

10:33AM 18 MR. STRAITE: THANK YOU, YOUR HONOR.

10:33AM 19 THE COURT: ALL RIGHT.

10:33AM 20 MR. STRAITE: IS THERE IS ONE -- A COUPLE OF
10:33AM 21 HOUSEKEEPING ISSUES.

10:33AM 22 THE COURT: YES.

10:33AM 23 MR. STRAITE: IN THE DRAFT CMC STATEMENT THAT WE
10:33AM 24 CIRCULATED TO FACEBOOK, I NEGLECTED TO NOTIFY YOU OF TWO SMALL
10:33AM 25 ADDITIONAL MOTIONS THAT WILL BE COMING YOUR WAY. YOU KNOW THAT

10:33AM 1 THEY'RE UPWARDS OF 20 OR 30 INDIVIDUAL CASES THAT WERE
10:33AM 2 CONSOLIDATED HERE. COUNSEL WERE APPOINTED TO LEADERSHIP ROLES,
10:33AM 3 AND WE'VE BEEN WORKING WITH THEM, BUT THERE ARE TWO PLAINTIFFS,
10:33AM 4 I UNDERSTAND, IN TWO CONSOLIDATED CASES REPRESENTED BY TWO
10:33AM 5 DIFFERENT FIRMS THAT WE'VE NEVER WORKED WITH, AND WE HAVE NEVER
10:33AM 6 GIVEN THEM WORK FOR REASONS UNRELATED TO THE MERITS OF THE
10:33AM 7 CASE. THEY'VE ASKED ME IF IT WOULD BE OKAY TO WITHDRAW AND
10:33AM 8 I'LL FACILITATE THAT. AND I JUST WANTED TO GIVE YOU A HEADS UP
10:33AM 9 THAT THESE MIGHT BE COMING IN THE NEXT WEEK OR TWO OR THREE,
10:33AM 10 BUT THEY'RE NOT RELATED TO THE MERITS.

10:33AM 11 THE COURT: OKAY. THANK YOU. I APPRECIATE THAT.
10:34AM 12 ANYTHING FURTHER?

10:34AM 13 MR. BROWN: NOTHING FROM ME.

10:34AM 14 THE COURT: THANK YOU VERY MUCH. GOOD SEEING YOU
10:34AM 15 BOTH.

10:34AM 16 MR. STRAITE: THANK YOU.

10:34AM 17 MR. BROWN: THANK YOU.

10:34AM 18 THE CLERK: COURT IS ADJOURNED.

10:34AM 19 (COURT CONCLUDED AT 10:34 A.M.)
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CERTIFICATE OF REPORTER

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

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



IRENE RODRIGUEZ, CSR, RMR, CRR
CERTIFICATE NUMBER 8074

DATED: JULY 31, 2017