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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In re: Facebook Internet Tracking Litigation

Case No. 12-md-02314 EJD

**DECLARATION OF KYLE C. WONG IN
SUPPORT OF STIPULATION AND
[PROPOSED] ORDER REQUESTING
LIMITED REDACTION OF NOVEMBER 16,
2017 HEARING TRANSCRIPT**

JUDGE: Edward J. Davila
COURTROOM: 4

REDACTED

Exhibit A

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

IN RE FACEBOOK INTERNET) 5:12-MD-02314-EJD
TRACKING LITIGATION)
) SAN JOSE, CALIFORNIA
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) NOVEMBER 16, 2017
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) PAGES 1-55
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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: BY: STEPHEN G. GRYGIEL
SILVERMAN THOMPSON SLUTKIN WHITE
26TH FLOOR, 201 NORTH CHARLES ST.
BALTIMORE, MD 21201

FOR THE PLAINTIFF: BY: DAVID A. STRAITE
KAPLAN FOX & KILSHEIMER LLP
850 THIRD AVENUE, 14TH FLOOR
NEW YORK, NY 10022

APPEARANCES CONTINUED ON THE NEXT PAGE

OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

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APPEARANCES CONTINUED:

FOR THE DEFENDANT:

BY: MATTHEW DEAN BROWN
LAUREN POMEROY
COOLEY LLP
101 CALIFORNIA ST. FLR 5
SAN FRANCISCO, CA 94111

1 SAN JOSE, CALIFORNIA

NOVEMBER 16, 2017

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

3 (COURT CONVENED AT 9:02 A.M.)

09:02:42 4 THE COURT: AND WE WILL CALL OUR MORNING CALENDAR.

09:02:45 5 THIS IS 12-MD-2314. FACEBOOK INTERNET TRACKING CASE.

09:02:53 6 MAY I HAVE APPEARANCES, PLEASE.

09:02:55 7 MR. GRYGIEL: GOOD MORNING, YOUR HONOR.

09:02:57 8 STEVE GRYGIEL FOR THE PLAINTIFFS. WITH ME IS MY
09:02:59 9 COLLEAGUE, DAVID STRAITE, WHOM I'M SURE YOU REMEMBER.

09:03:03 10 THE COURT: YES, THANK YOU. GOOD MORNING.

09:03:04 11 MR. GRYGIEL: YOUR HONOR, BEFORE I SIT DOWN, I WOULD
09:03:06 12 LIKE TO MENTION IN THIS CASE, AS YOUR HONOR IS AWARE, WE HAVE
09:03:09 13 SOME DOCUMENTS THAT HAVE BEEN PROVIDED TO THE COURT UNDER SEAL.

09:03:11 14 THEY WILL ALMOST CERTAINLY BE REFERRED TO TODAY DURING THE
09:03:13 15 COURSE OF THE ARGUMENT, BY ONE SIDE OR THE OTHER, PERHAPS
09:03:16 16 GENERALLY, PERHAPS MORE SPECIFICALLY. AND I THOUGHT WITH THAT,
09:03:19 17 THIS MIGHT BE A CASE WHERE WE ARE KEEPING THE COURTROOM CLOSED
09:03:22 18 UNTIL WE ARE DONE.

09:03:23 19 THE COURT: WELL, I RECOGNIZE THAT, I JUST WANT TO --
09:03:26 20 IT MAY BE POSSIBLE FOR YOU TO MAKE YOUR ARGUMENT WITHOUT
09:03:28 21 EXPOSING THE CONTENT.

09:03:30 22 MR. GRYGIEL: IT MAY BE BUT, I DIDN'T WANT TO ATTRACT
09:03:33 23 ANY DIFFICULTY WITH THE OTHER SIDE ABOUT MENTIONING A DOCUMENT
09:03:35 24 THEY THOUGHT I SHOULDN'T MENTION.

09:03:37 25 THE COURT: WELL, THANK YOU.

09:03:38 1 MR. BROWN, DO YOU INTEND TO REVEAL SECRETS HERE?

09:03:40 2 MR. BROWN: I DO NOT INTEND TO DO THAT.

09:03:42 3 I THOUGHT THAT THERE HAD BEEN A PROVISION OF THE
09:03:44 4 PROTECTIVE ORDER THAT THE GOVERNS THIS. AND THIS IS THE FIRST
09:03:49 5 TIME HEARING OF THIS. I THOUGHT I TOOK PRIOR NOTICE OF THAT.

09:03:52 6 SO I WOULD OBJECT TO, OBVIOUSLY, DISCUSSING ANY
09:03:55 7 CONFIDENTIAL INFORMATION IN OPEN COURT.

09:03:56 8 THE COURT: AND DO YOU THINK IT'S POSSIBLE TO
09:03:58 9 ACCOMPLISH YOUR ARGUMENT WITHOUT DOING THAT?

09:04:00 10 MR. BROWN: I DO.

09:04:01 11 THE COURT: OKAY.

09:04:02 12 MR. GRYGIEL: WELL, YOUR HONOR, IN MY CASE FRANKLY,
09:04:04 13 THERE ARE SOME PORT PARTS OF THESE DOCUMENTS I DO WANT TO REFER
09:04:07 14 TO. THEY ARE QUITE TELLING. THEY ARE IMPORTANT TO OUR CASE.

09:04:10 15 I CAN CERTAINLY DESCRIBE THEM IN A WAY THAT DOESN'T
09:04:13 16 PARTICULARLY IDENTIFY A SPEAKER AND DOESN'T PARTICULARLY
09:04:15 17 IDENTIFY A TIME.

09:04:15 18 YOUR HONOR HAS THEM AS EXHIBITS, AND THAT MAY BE VERY WELL
09:04:18 19 SUFFICIENT TO DIRECT THE COURT'S ATTENTION TO THEM.

09:04:19 20 THE COURT: I THINK THAT WOULD SUFFICE, YEAH.

09:04:22 21 MR. GRYGIEL: WELL, IF WE GET INTO A PROBLEM AREA,
09:04:25 22 MR. BROWN CAN LET ME KNOW.

09:04:27 23 THE COURT: SURE.

09:04:27 24 MR. BROWN: WELL, YEAH, TO BE CLEAR, IT SHOULDN'T BE
09:04:29 25 MY BURDEN TO LET HIM KNOW AFTER HE'S DISCUSSED CONTENTS OF A

09:04:33 1 CONFIDENTIAL DOCUMENT. AND IT'S NOT JUST ABOUT WITHHOLDING
09:04:36 2 PEOPLE'S NAMES OR THE AUTHORS OF THE DOCUMENTS, IT'S THE
09:04:39 3 CONTENTS.

09:04:40 4 THE COURT: UNDERSTOOD.

09:04:40 5 WELL, I THINK WE CAN -- I'VE READ YOUR PLEADINGS AND I'VE
09:04:44 6 LOOKED AT THIS, AND I HAVE AN INCLINATION OF WHAT YOU ARE
09:04:46 7 SPEAKING ABOUT, BUT I DO THINK WE CAN ACCOMPLISH THE
09:04:49 8 CONVERSATION THIS MORNING WITHOUT SPECIFIC REFERENCE.

09:04:51 9 MR. GRYGIEL: I THINK WE CAN MANAGE IT, YOUR HONOR.

09:04:54 10 THE COURT: MR. BROWN, THERE'S SOMEONE ELSE AT YOUR
09:04:56 11 TABLE.

09:04:56 12 MR. BROWN: SO MATT BROWN FOR FACEBOOK, AND JOINED BY
09:05:01 13 LAUREN POMEROY.

09:05:01 14 THE COURT: THANK YOU. GOOD MORNING.

09:05:02 15 PLEASE BE SEATED. THANK YOU.

09:05:05 16 WELL, THIS IS FACEBOOK'S MOTION. SO MR. BROWN, WOULD YOU
09:05:10 17 OR MS. POMEROY BE MAKING ANY ARGUMENT? OR PERHAPS MR. WONG
09:05:14 18 WILL MAKE THE ARGUMENT WHEN HE ARRIVES.

09:05:18 19 MR. BROWN: YES.

09:05:19 20 THE COURT: WE COULD WAIT FOR HIM IF YOU WOULD LIKE.

09:05:21 21 MR. BROWN: THAT'S OKAY. I UNDERSTAND THERE WAS A
09:05:23 22 BAD ACCIDENT ON 280 THIS MORNING, IT WAS HOLDING A BUNCH OF
09:05:27 23 PEOPLE UP.

09:05:29 24 THE COURT: SO WHY SHOULD THIS MOTION BE GRANTED? I
09:05:32 25 GUESS THAT'S MY QUESTION.

09:05:34 1 MR. BROWN: AND THAT GOES TO THE HEART OF WHY WE ARE
09:05:36 2 HERE TODAY.

09:05:37 3 SO YOUR HONOR WILL RECALL IN THE PREVIOUS ORDER DISMISSING
09:05:40 4 THE SECOND AMENDED COMPLAINT, AND THAT ORDER DEALT WITH A WHOLE
09:05:44 5 ARRAY OF CLAIMS, ONLY TWO OF WHICH ARE THE ONES THAT WE ARE
09:05:48 6 DEALING WITH STILL HERE.

09:05:49 7 FOR THE BREACH OF CONTRACT CLAIM AND THE BREACH OF IMPLIED
09:05:52 8 COVENANT CLAIM, YOUR HONOR DISMISSED THOSE WITH LEAVE TO AMEND.
09:05:56 9 AND IN DOING SO, SAID A COUPLE DIFFERENT THINGS THAT ARE
09:06:01 10 IMPORTANT HERE. IN A SENSE, DIRECTIONS TO THE PLAINTIFFS ON
09:06:04 11 THINGS THEY SHOULD KEEP IN MIND AS THEY AMEND.

09:06:08 12 AND THAT IS, THE FIRST THING WAS, POINT TO WHAT TERMS IN
09:06:14 13 THE STATEMENTS OF RIGHTS AND RESPONSIBILITIES YOU CONTEND WERE
09:06:18 14 BREACHED.

09:06:18 15 THE STATEMENTS OF RIGHTS AND RESPONSIBILITIES IS THE
09:06:19 16 CONTRACT BETWEEN FACEBOOK AND ITS USERS.

09:06:22 17 SECONDLY, IF YOU ARE CONTENDING THAT THERE'S SOME DOCUMENT
09:06:25 18 OUTSIDE OF THE STATEMENT OF RIGHTS AND RESPONSIBILITIES THAT IS
09:06:30 19 SOMEHOW INCORPORATED BY REFERENCE, THEN EXPLAIN HOW, WITH
09:06:34 20 SPECIFICITY, THAT DOCUMENT IS INCORPORATED.

09:06:37 21 AND FOR EXAMPLE, ONE WAY IN WHICH YOU MIGHT SHOW THAT IS
09:06:40 22 TO SHOW WHAT TRAIL OF LINKS YOU WOULD NEED TO FOLLOW TO GET
09:06:44 23 FROM THE SRR, TO THE PARTICULAR, LET'S SAY, HELP CENTER PAGE
09:06:48 24 THAT YOU MIGHT BE RELYING ON.

09:06:50 25 SO THAT WAS SORT OF THE DIRECTIVE GIVEN IN THE LAST ORDER.

09:06:55 1 AND THAT'S, OF COURSE, CONSISTENT WITH A WHOLE LONG LINE OF
09:06:58 2 CASE LAW BEARING ON THE DOCTRINE OF INCORPORATION BY REFERENCE
09:07:04 3 WHICH HOLDS THAT THE REFERENCE MUST BE CLEAR AND UNEQUIVOCAL,
09:07:07 4 THE REFERENCE MUST BE CALLED TO THE ATTENTION OF THE OTHER
09:07:09 5 PARTY, AND THE TERMS OF ANY INCORPORATED DOCUMENT MUST BE KNOWN
09:07:13 6 TO THE PARTIES.

09:07:14 7 AND WHY IS THAT? IT GOES RIGHT TO THE HEART OF CONTRACT
09:07:18 8 LAW. WE ARE TRYING TO EFFECTUATE THE INTENT OF THE PARTIES.
09:07:21 9 AND WE NEED TO MAKE SURE THAT WHAT -- ONE OF THE PARTIES IN THE
09:07:29 10 CASE IS INTENDING A CONTRACT IS, IS ACTUALLY THE CONTRACT THAT
09:07:33 11 WAS AGREED TO AND WAS KNOWN AND CONSENTED TO BY BOTH PARTIES.

09:07:37 12 SO YOU WILL RECALL THAT WE CAME BEFORE YOUR HONOR LAST AT
09:07:39 13 THE END OF JULY, PLAINTIFFS HAD REQUESTED A CASE MANAGEMENT
09:07:42 14 CONFERENCE WHICH YOUR HONOR GRANTED, AND YOU WILL RECALL WE HAD
09:07:46 15 A LONG CONVERSATION ABOUT HELP CENTER PAGES.

09:07:49 16 AND PLAINTIFFS SAID THAT THEY HAD IDENTIFIED ALL THE
09:07:55 17 STATEMENTS IN THE HELP CENTER, AT LEAST WHAT THEY BELIEVED WAS
09:07:58 18 THE HELP CENTER, IN THE CLASS PERIOD THAT THEY WERE GOING TO
09:08:01 19 RELY ON.

09:08:02 20 AND THEY ASKED THE COURT TO ORDER FACEBOOK TO PRODUCE
09:08:07 21 HISTORICAL VERSIONS OF THOSE HELP CENTER PAGES. NOW THEY HAD
09:08:10 22 APPARENTLY IDENTIFIED THESE USING THE WAY BACK MACHINE OR
09:08:14 23 SOMETHING LIKE THAT.

09:08:15 24 SO WE LEFT THE COURTHOUSE THAT DAY, AND A WEEK PASSED, TWO
09:08:21 25 WEEKS PASSED, NO WORD FROM THE PLAINTIFFS.

09:08:26 1 SOME 17 DAYS LATER, WE GOT THE REQUEST, WHICH WAS A LITTLE
09:08:29 2 SURPRISING TO ME, GIVEN THAT WE HAD HEARD THAT THEY HAD ALREADY
09:08:32 3 IDENTIFIED THE LANGUAGE THAT WAS SUPPOSEDLY PART OF THE
09:08:36 4 CONTRACT THAT THEY ARE SUING OVER HERE.

09:08:40 5 SO WE GOT THE LETTER AND THEY SAID, HERE ARE THE FOUR
09:08:43 6 PAGES THAT WE ARE GOING TO RELY ON. SO WE DID OUR DILIGENCE
09:08:48 7 AND SEARCHED FOR HISTORICAL VERSIONS OF THOSE PAGES.

09:08:56 8 AND WE REPORTED BACK TO THEM. IN ONE INSTANCE, THE
09:08:58 9 LANGUAGE WAS NOT EVER FOUND IN THE HELP CENTER. AND THEN WITH
09:09:01 10 RESPECT TO THE OTHER THREE, WE CAME TO LEARN THAT ALL OF THOSE
09:09:07 11 PAGES HAD ALREADY BEEN PRODUCED TO THE PLAINTIFFS EARLIER IN
09:09:10 12 DISCOVERY IN THE CASE.

09:09:11 13 SO WE POINTED THAT OUT AND GAVE THEM THE BATES NUMBERS TO
09:09:15 14 MAKE IT REALLY EASY. AND WE NOTED IN GETTING BACK TO THEM,
09:09:21 15 THAT THE MAJORITY OF THOSE PAGES WERE ACTUALLY DATED AFTER THE
09:09:25 16 CLASS PERIOD, AND THEREFORE, WERE NOT RELEVANT.

09:09:30 17 I THEN GOT AN E-MAIL BACK, WHICH I THINK IS TELLING AND
09:09:38 18 IMPORTANT CONTEXT FOR THE THIRD AMENDED COMPLAINT THAT WAS
09:09:41 19 LATER FILED.

09:09:43 20 AND IT SAYS, AS YOU NOTE, SEVERAL OF THE PRODUCED PAGES
09:09:47 21 POSTDATE THE CLASS PERIOD PROPOSED IN THE SECOND AMENDED
09:09:50 22 COMPLAINT. AND PERHAPS INARTFULLY, THAT WAS THE POINT OF OUR
09:09:54 23 INQUIRY. WE NEED TO CONFIRM WHETHER OLDER HISTORICAL VERSIONS
09:09:57 24 OF HELP CENTER PAGES MIGHT EXIST, OTHER THAN THE ONES ALREADY
09:10:03 25 PRODUCED.

09:10:04 1 IN OTHER WORDS, WE ARE LOOKING FOR PAGES WITHIN THE CLASS
09:10:06 2 PERIOD. IN PARTICULAR, IF THEY EXIST, WE NEED PRODUCTION OF
09:10:09 3 ANY HELP CENTER PAGES THAT CONTAIN THE LANGUAGE FROM THE FIRST
09:10:13 4 SENTENCE OF THE FIRST PARAGRAPH IN EXHIBIT A TO MY LETTER.

09:10:18 5 "CAN YOU CONFIRM WHETHER OR NOT THAT LANGUAGE OR LANGUAGE
09:10:22 6 MATERIALLY SIMILAR APPEARED IN THE HELP CENTER PRIOR TO
09:10:25 7 SEPTEMBER 27, 2011."

09:10:28 8 BECAUSE YOU WILL REMEMBER THAT THE CLASS PERIOD ENDED ON
09:10:32 9 SEPTEMBER 26, 2011.

09:10:35 10 AND WE DID OUR DILIGENCE, AND I RESPONDED THAT WE HAD DONE
09:10:39 11 A REASONABLE SEARCH AND WE DID NOT FIND ANY HISTORICAL PAGES
09:10:43 12 THAT PREDATED WHAT WE HAD ALREADY PRODUCED.

09:10:48 13 SO WHAT WE HAVE HERE IS PLAINTIFFS LOOKING FOR LANGUAGE
09:10:52 14 WITHIN THE CLASS PERIOD AND MAKING SPECIFIC FOLLOW-UP REQUESTS
09:10:58 15 WITH RESPECT TO, APPARENTLY, THE ONE THAT THEY WERE REALLY
09:11:01 16 INTERESTED IN, AND WE TOLD THEM THAT THERE WAS NOTHING MORE
09:11:05 17 THERE.

09:11:06 18 SO I THOUGHT THAT WAS THE END OF IT, BUT THEN THREE DAYS
09:11:10 19 BEFORE THE COMPLAINT WAS DUE, I GOT ANOTHER REQUEST SAYING,
09:11:17 20 JUST TODAY, WE LEARNED OF YET ANOTHER STATEMENT WHICH WE ARE
09:11:20 21 APPARENTLY GOING TO CONTEND IS PART OF THIS CONTRACT THAT WE
09:11:24 22 ARE SUING OVER.

09:11:25 23 AND I SAID THAT THIS IS COMING QUITE LATE, WITH ONLY THREE
09:11:30 24 DAYS LEFT, BUT WE KICKED IT INTO HIGH GEAR AND DID OUR
09:11:34 25 DILIGENCE AND GOT BACK TO THEM WITH THAT.

09:11:38 1 SO I LAY ALL THAT FOUNDATION JUST AS, A SOMEWHAT TABLE
09:11:42 2 SETTING, BUT I THINK IMPORTANT CONTEXT FOR THEN WHAT YOU SEE IN
09:11:45 3 THE THIRD AMENDED COMPLAINT.

09:11:46 4 WE HAVE THE PLAINTIFFS SEARCHING FOR A STATEMENT WITHIN
09:11:52 5 THE CLASS PERIOD THAT THEY CAN HANG THEIR HAT ON, AND EVEN
09:11:55 6 COMING BACK THREE DAYS BEFORE THE COMPLAINT IS DUE, YET LOOKING
09:11:59 7 STILL MORE FOR SUCH A STATEMENT.

09:12:02 8 THEN COMES THE THIRD AMENDED COMPLAINT. AND IF YOU LOOK
09:12:05 9 AT COUNT 1, THE BREACH OF CONTRACT COUNT, THERE ARE NO SPECIFIC
09:12:12 10 REFERENCES TO THE STATEMENT OF RIGHTS AND RESPONSIBILITIES, NO
09:12:17 11 CITATION OF A PARTICULAR PARAGRAPH OR SECTION NUMBER OF THE
09:12:20 12 STATEMENT OF RIGHTS AND RESPONSIBILITIES, NO QUOTATION FROM
09:12:24 13 LANGUAGE OF THE STATEMENT OF RIGHTS AND RESPONSIBILITIES.
09:12:28 14 THERE ARE NO SPECIFIC HELP CENTER TERMS, SPECIFICALLY
09:12:31 15 IDENTIFIED IN COUNT 1, OR EVEN CITED. THIS IS ALL VERY
09:12:38 16 GENERAL, THERE'S KIND OF A CHARACTERIZATION OF WHAT THE SUPPOSE
09:12:40 17 ED PROMISE WAS.

09:12:42 18 EARLIER IN THE THIRD AMENDED COMPLAINT, THERE ARE A NUMBER
09:12:45 19 OF HELP CENTER PAGES THAT ARE CITED OR QUOTED FROM, AS SORT OF
09:12:50 20 A JUMBLE OF THEM. BUT INTERESTINGLY, THERE WERE NO DATES
09:12:57 21 ASSOCIATED WITH ANY OF THEM, AT LEAST WITHIN THE BODY OF THE
09:12:59 22 COMPLAINT.

09:13:02 23 SO THAT ALONE, I WOULD CONTEND IS CERTAINLY NOT CONSISTENT
09:13:06 24 WITH THE COURT'S EARLIER ORDER, OBVIOUSLY THIS COMPLAINT HAS TO
09:13:11 25 BE ASSESSED ON ITS OWN. BUT ONE WOULD HAVE THOUGHT GIVEN THE

09:13:15 1 INSTRUCTION GIVEN IN THE EARLIER ORDER, THAT YOU WOULD HAVE
09:13:17 2 SEEN SPECIFIC DATES ASSOCIATED WITH EACH OF THOSE SUPPOSED
09:13:20 3 PROMISES THAT SUPPOSEDLY MADE UP THE CONTRACT. BUT WE DIDN'T
09:13:24 4 HAVE THE THAT.

09:13:29 5 AS BECAME CLEAR THROUGHOUT BRIEFING, AS YOUR HONOR HAS
09:13:32 6 SEEN, THE FACT THAT THE DATES ARE ALL OVER THE PLACE.

09:13:35 7 I THINK THE FIRST HELP CENTER PAGE THAT'S CITED IN THE
09:13:39 8 COMPLAINT, AND I CAN BE CORRECTED IF I'M WRONG ABOUT THIS, BUT
09:13:43 9 I BELIEVE IT'S DATED IN MAY OF 2011.

09:13:45 10 NOW YOU WILL RECALL THAT THE BEGINNING DATE OF THE CLASS
09:13:48 11 PERIOD WAS APRIL 22ND, I BELIEVE, OF 2010.

09:13:57 12 YES. SO THE CLASS PERIOD HAD BEEN APRIL 22ND, 2010, TO
09:14:02 13 SEPTEMBER 26, 2011.

09:14:03 14 THE VERY FIRST HELP CENTER PAGE THAT I'M AWARE OF IN THE
09:14:09 15 NEW COMPLAINT IS DATED MAY 24TH, 2011. AND WE DON'T KNOW THAT
09:14:19 16 FROM THE FOUR CORNERS OF THE COMPLAINT, WE KNOW THAT LOOKING AT
09:14:21 17 A TINY LITTLE DATE THAT'S ON THE DOCUMENT THAT'S ATTACHED AS AN
09:14:25 18 EXHIBIT TO THE COMPLAINT.

09:14:27 19 SO JUST AS SORT OF A SIDE NOTE, I MEAN, LITERALLY THE
09:14:29 20 FIRST HELP CENTER PAGE IS DATED OVER A YEAR AFTER THE CLASS
09:14:34 21 PERIOD SUPPOSEDLY STARTED. WHICH HELP CENTER PAGE SUPPOSEDLY
09:14:41 22 WAS AGREED TO BY THE PUTATIVE CLASS MEMBERS BEFORE MAY 22ND,
09:14:46 23 2011, BETWEEN APRIL 22ND, 2010 AND MAY 24TH, 2011, WE ARE NOT
09:14:50 24 SURE.

09:14:51 25 BUT IN ANY EVENT, MY MAIN POINT WAS THAT THE DATES WERE

09:14:53 1 ALL OVER THE PLACE. AND SEVERAL OF THE HELP CENTER PAGES ARE,
09:14:59 2 IN FACT, DATED AFTER THE CLASS PERIOD, AND WITH QUITE DIFFERENT
09:15:06 3 LANGUAGE.

09:15:07 4 AND SO AFTER PLAINTIFFS SEARCHED MIGHTILY FOR LANGUAGE
09:15:16 5 WITHIN THE CLASS PERIOD, AND AFTER YOUR HONOR HAD EXPLAINED
09:15:20 6 THAT THEY NEEDED TO IDENTIFY WITH SPECIFICITY AND WITH DATES,
09:15:25 7 THE CONTRACT TERMS THAT THEY WERE RELYING ON, WE END UP WITH A
09:15:29 8 THIRD AMENDED COMPLAINT THAT HAS SORT OF A JUMBLE OF HELP
09:15:34 9 CENTER PROVISIONS CITED OR QUOTED. NO DATES ASSOCIATED WITH
09:15:38 10 THEM. AND IN FACT, DATES THAT ARE ALL OVER THE PLACE,
09:15:41 11 INCLUDING DATES THAT POSTDATE THE CLASS PERIOD.

09:15:47 12 AND SO PLAINTIFFS DECIDED TO JUST ELIMINATE THE LAST DAY
09:15:56 13 OF THE CLASS PERIOD.

09:15:57 14 SO WE NOW NO LONGER HAVE A COMPLAINT THAT HAS
09:16:01 15 SEPTEMBER 26, 2011 AS THE END OF THE CLASS PERIOD. PLAINTIFFS
09:16:03 16 ARE NOW SAYING WELL, GOSH, NOW THERE ACTUALLY IS NO END DATE,
09:16:07 17 AND THAT'S TO BE DETERMINED LATER.

09:16:09 18 SO IN ORDER TO RELY ON THE SUPPOSED CONTRACTURAL
09:16:13 19 PROVISIONS, WHICH ARE REALLY HELP CENTER PAGES, THEY HAVE NOW
09:16:17 20 JUST DONE AWAY WITH THE LAST DATE OF THE CLASS PERIOD.

09:16:23 21 SO THAT NOW LEADS US TO INCORPORATION BY REFERENCE. AND
09:16:31 22 THE SITUATION WE HAVE HERE IS A STATEMENT OF RIGHTS AND
09:16:34 23 RESPONSIBILITIES THAT DOES NOT MAKE REFERENCE TO THE HELP
09:16:39 24 CENTER WHATSOEVER. I THINK PLAINTIFFS WOULD JUST SIMPLY HAVE
09:16:43 25 TO CONCEDE THAT AS A FACT.

09:16:46 1 SO THERE'S CERTAINLY NO INCORPORATION BY REFERENCE INTO
09:16:49 2 THE STATEMENT OF RIGHTS AND RESPONSIBILITIES, WHICH IS IN FACT
09:16:51 3 THE CONTRACT BETWEEN FACEBOOK AND ITS USERS. SO WHAT WE HAVE
09:16:56 4 IS REALLY SORT OF A DAISY CHAIN OF INCORPORATION THEORY, AS I
09:17:01 5 WOULD CALL IT.

09:17:02 6 AND THEY ARGUE THAT WELL, FIRST, THE PRIVACY POLICY IS
09:17:05 7 INCORPORATED BY REFERENCE INTO THE STATEMENT OF RIGHTS AND
09:17:07 8 RESPONSIBILITIES, AND THEN THESE PARTICULAR HELP CENTER PAGES
09:17:12 9 ARE INCORPORATED BY REFERENCE INTO THE PRIVACY POLICY. SO
09:17:16 10 THROUGH SORT OF A TRANSITIVE SORT OF PROPERTY HERE, OR A DAISY
09:17:21 11 CHAIN OF INCORPORATION TYPE THEORY, THESE HELP CENTER PAGES ARE
09:17:25 12 SOMEHOW INCORPORATED INTO THE STATEMENT OF RIGHTS AND
09:17:27 13 RESPONSIBILITIES.

09:17:28 14 THE COURT: COULD THAT EVER WORK? IS THAT EVER
09:17:30 15 POSSIBLE?

09:17:31 16 MR. BROWN: ONLY IN THE MOST EXTREME CIRCUMSTANCES.
09:17:33 17 I MEAN --

09:17:34 18 THE COURT: HOW WOULD THAT BE POSSIBLE?

09:17:35 19 MR. BROWN: WELL, YOU KNOW, THE STANDARD IS THAT IT'S
09:17:38 20 GOT TO BE CLEAR AND UNEQUIVOCAL AND IT'S GOT TO BE BROUGHT TO
09:17:42 21 THE ATTENTION OF THE OTHER PARTY. AND THEY HAVE TO ASSENT TO
09:17:44 22 THAT, RIGHT.

09:17:45 23 SO YOU COULD IMAGINE AN EXTREME SITUATION WHERE THE SRR --
09:17:51 24 WELL, LET'S SPEAK HYPOTHETICALLY. YOU COULD HAVE A CONTRACT, I
09:17:56 25 SUPPOSE, THAT SAID DOCUMENT NUMBER 2 IS HEREBY INCORPORATED BY

09:18:01 1 REFERENCE INTO THIS CONTRACT, BOTH PARTIES SIGN THE CONTRACT OR
09:18:06 2 ASSENT TO IT IN WHATEVER WAY.

09:18:08 3 YOU COULD THEN, IN A VERY CLEAR, CONSPICUOUS PLACE IN
09:18:12 4 DOCUMENT NUMBER 2 SAY, BY THE WAY, IN THIS DOCUMENT, TERMS OF
09:18:19 5 DOCUMENT NUMBER 3 ARE HEREBY INCORPORATED BY REFERENCE AND
09:18:22 6 INCORPORATED BY REFERENCE INTO THE CONTRACT.

09:18:28 7 I WOULD ARGUE THAT YOU MIGHT EVEN NEED THAT LEVEL OF
09:18:31 8 CLARITY, OTHERWISE IT'S NOT COMPLETELY CLEAR WHETHER THE INTENT
09:18:35 9 IS REALLY JUST TO INCORPORATE INTO THE STAND-ALONE DOCUMENT
09:18:39 10 NUMBER 2, OR WHETHER IT'S TRULY INTENDED TO RELATE BACK TO KIND
09:18:42 11 OF THE ASSENTED TO CONTRACT.

09:18:44 12 YOU COULD IMAGINE SOME SITUATION LIKE THAT, AND I'M NOT
09:18:49 13 GOING TO SORT OF SAY IN THE ABSTRACT THAT WHATEVER SET OF FACTS
09:18:53 14 MIGHT COME BEFORE THE COURT, THAT THAT WOULD IN FACT SATISFY
09:18:57 15 IT, BUT I'M TRYING TO GIVE YOU A STRAIGHT ANSWER TO YOUR
09:19:00 16 QUESTION. BUT IT'S NOT WHAT WE HAVE, IT'S NOT EVEN CLOSE TO
09:19:03 17 WHAT WE HAVE HERE.

09:19:04 18 THE COURT: SO WHAT I HEAR YOU SAYING IS THAT THE
09:19:06 19 REASON THE LAW REQUIRES CLARITY AND UNEQUIVOCAL LANGUAGE IS
09:19:10 20 BECAUSE WE AVOID THIS TYPE OF POSSIBLE CONFUSION WITH TERMS.

09:19:15 21 MR. BROWN: SURE.

09:19:16 22 AND HERE IT'S THE PLAINTIFF THAT'S TRYING TO ENGAGE IN THE
09:19:20 23 DAISY CHAIN THEORY OF INCORPORATION. BUT YOU COULD IMAGINE
09:19:23 24 INSTANCES WHERE A DEFENDANT MIGHT FOR ITS OWN ADVANTAGE, AND
09:19:29 25 THE PLAINTIFF MIGHT THINK IT'S QUITE UNFAIR.

09:19:32 1 THE COURT: WHAT HAPPENS IN THE -- I'M SORRY TO
09:19:34 2 INTERRUPT YOU, MR. BROWN.

09:19:36 3 BUT I'M JUST CURIOUS IN THE CONTEXT OF, I DON'T KNOW HOW
09:19:39 4 TO DESCRIBE IT, IN THE CONTEXT OF ELECTRONIC -- THIS BUSINESS
09:19:45 5 WHERE THESE TERMS CHANGE FREQUENTLY, THE SRR SOMETIMES CHANGE,
09:19:52 6 THERE ARE UPGRADES TO SOFTWARE, UPGRADES TO WHATEVER THE
09:19:57 7 PROGRAM IS OR WHATEVER THE FUNCTION IS, AND I THINK THAT'S
09:20:02 8 PRETTY COMMON KNOWLEDGE THAT THAT HAPPENS, PEOPLE RECEIVE, OH,
09:20:06 9 HERE'S YOUR NEW TERMS AND CONDITIONS.

09:20:09 10 AND YOU KNOW, AS WE KNOW, PEOPLE TYPICALLY DO, THEY SCROLL
09:20:12 11 TO THE BOTTOM WITHOUT READING ALL THAT GOOD WORK THAT PEOPLE
09:20:15 12 LIKE YOU AND YOUR FIRMS PUT IN AND ALL OF THAT, AND THEN CLICK
09:20:18 13 THE BUTTON.

09:20:23 14 DOES THAT CHANGE HOW WE LOOK AT THINGS THEN?

09:20:26 15 MR. BROWN: WELL, YOU KNOW, IN A SITUATION LIKE THAT,
09:20:28 16 I MEAN, WHAT YOU'RE BASICALLY HAVING IS YOU ARE HAVING A NEW --
09:20:33 17 YOU ARE HAVING A MECHANISM FOR A NEW ASSENT TO A NEW CONTRACT
09:20:38 18 OR AT LEAST AN AMENDMENT TO A CONTRACT, RIGHT.

09:20:41 19 SO ALL THE PRINCIPLES OF CONTRACT LAW WOULD APPLY. AND
09:20:45 20 THERE EITHER NEEDS TO BE SOME SHOWING THAT THERE WAS ACTUALLY
09:20:49 21 ASSENT BETWEEN THE TWO PARTIES.

09:20:50 22 THE COURT: THAT'S THE CLICK OF THE BUTTON.

09:20:52 23 MR. BROWN: EXACTLY. IT'S USUALLY THE CLICK OF A
09:20:54 24 BUTTON.

09:20:55 25 BUT HERE WHAT WE ARE TALKING ABOUT IS LITERALLY, IT'S A

09:20:57 1 HELP CENTER BY ITS NAME, IT IS A HELP CENTER ON A WEBSITE. AND
09:21:02 2 THESE HELP CENTER PAGES ARE CONSTANTLY CHANGING AND EVOLVING,
09:21:07 3 PROBABLY ON A MONTHLY OR MAYBE EVEN WEEKLY BASIS IN SOME
09:21:13 4 INSTANCES.

09:21:14 5 AND WHAT THEY ARE ASKING YOU TO DO IS ACTUALLY FIND THAT
09:21:21 6 THE ENTIRETY OF THE HELP CENTER IS SOMEHOW INCORPORATED BY
09:21:22 7 REFERENCE, FIRST IN THE PRIVACY POLICY, AND THEN SOMEHOW FROM
09:21:26 8 THERE, INTO THE STATEMENTS OF RIGHTS AND RESPONSIBILITIES.

09:21:28 9 SO IMAGINE THE QUAGMIRE WE WOULD GET INTO IN TERMS OF
09:21:33 10 FIGURING OUT WHAT THE CONTRACT IS AT ANY GIVEN TIME.

09:21:37 11 THE COURT: AND YOU SUGGEST THEY DO THAT BECAUSE THEY
09:21:39 12 SAY THERE'S REFERENCE TO THE HELP CENTER IN SOME OF THE
09:21:42 13 LANGUAGE.

09:21:43 14 MR. BROWN: AND SO LET ME LAY THAT OUT EVEN MORE
09:21:46 15 CLEARLY.

09:21:46 16 SO THERE ARE THREE VERSIONS OF THE PRIVACY POLICY THAT ARE
09:21:51 17 REFERRED TO IN THE COMPLAINT. NONE OF THOSE VERSIONS OF THE
09:21:58 18 PRIVACY POLICY REFER SPECIFICALLY TO THE HELP CENTER, AS WE
09:22:01 19 UNDERSTAND IT, AS WE WOULD CONSIDER THE HELP CENTER.

09:22:04 20 THERE ARE SOME REFERENCES TO THINGS CALLED HELP PAGES,
09:22:09 21 LOWER CASE H, LOWER CASE P, THAT REFER USERS TO DIFFERENT TOOLS
09:22:15 22 THEY CAN USE TO CUSTOMIZE FACEBOOK OR PROVIDE ADVICE ON HOW TO
09:22:20 23 CHANGE PASSWORDS AND THINGS LIKE THAT.

09:22:22 24 BUT FIRST OF ALL, WE WOULDN'T -- WE WOULD SAY THAT THOSE
09:22:26 25 ARE NOT ACTUALLY REFERENCES TO THE HELP CENTER. BUT EVEN IF

09:22:29 1 YOU THOUGHT THEY WERE, NONE OF THOSE PAGES ARE AT ISSUE, RIGHT.

09:22:33 2 SO EVEN IF YOU FOUND THAT TO BE A CLEAR AND UNEQUIVOCAL
09:22:37 3 INCORPORATION OF THOSE PAGES INTO THE PRIVACY POLICY, THEY
09:22:43 4 CERTAINLY DON'T INCORPORATE CLEARLY, THE ACTUAL PAGES OF THE
09:22:46 5 HELP CENTER THAT THEY ARE TRYING TO RELY ON FOR THE THIRD
09:22:49 6 AMENDED COMPLAINT, PUTTING ASIDE WHETHER YOU CAN THEN TAKE THE
09:22:52 7 PRIVACY POLICY AND INCORPORATE THAT INTO THE STATEMENT OF
09:22:55 8 RIGHTS AND RESPONSIBILITIES.

09:22:56 9 SO THERE ARE PROBLEMS WITH EVERY STEP OF THE DAISY CHAIN.
09:23:00 10 SO THOSE ARE THE THREE PRIVACY POLICIES. AND THEN THEY ALSO
09:23:04 11 POINT TO A DATA USE POLICY LATER IN THEIR CLASS PERIOD, I THINK
09:23:09 12 LITERALLY WITHIN THE LAST MONTH OF THE CLASS PERIOD.

09:23:13 13 AND THAT DOCUMENT HAS REFERENCE TO THREE HELP CENTER
09:23:18 14 PAGES, ONLY THREE, IT DOESN'T PURPORT, I DON'T EVEN THINK
09:23:22 15 PLAINTIFFS WOULD ARGUE THAT IT PURPORTS TO PULL IN THE ENTIRETY
09:23:26 16 OF THE HELP CENTER. IT'S THREE HELP CENTER PAGES, NONE OF
09:23:29 17 WHICH THEY ARE RELYING ON, NONE OF WHICH THEY ARE RELYING ON.

09:23:33 18 SO LITERALLY, THE THEORY HERE, IN ADDITION TO THIS KIND OF
09:23:36 19 ATTENUATED DAISY CHAIN, WHICH I THINK JUST FAILS PERIOD, I
09:23:41 20 DON'T THINK YOU CAN TAKE ALL THOSE STEPS, EVEN PUTTING THAT
09:23:46 21 ASIDE FOR A MOMENT, THEY ARE TRYING TO PULL IN HELP CENTER
09:23:50 22 PAGES THAT AREN'T REFERRED TO ANYWHERE.

09:23:53 23 AND THAT CLEARLY WASN'T THE INTENT OF THE PARTIES AND
09:23:58 24 WOULD RESULT IN ALL SORTS OF SORT OF CONTRACTURAL
09:24:01 25 INTERPRETATION PROBLEMS AND ALL SORTS -- INVITE MISCHIEF,

09:24:04 1 FRANKLY, IN LITIGATION.

09:24:07 2 THE COURT: SO FOR PLAINTIFF'S CASE TO THRIVE ON THE
09:24:10 3 BREACH OF CONTRACT THEORY, WHAT I HEAR YOU SAYING IS THEY NEED
09:24:19 4 THIS INCORPORATION BY REFERENCE.

09:24:20 5 MR. BROWN: THEY ABSOLUTELY DO. BECAUSE THE CONTRACT
09:24:22 6 ITSELF, WHICH IS THE STATEMENTS OF RIGHTS AND RESPONSIBILITIES,
09:24:24 7 HAS NO PROVISION THAT THEY ARE RELYING ON, PERIOD.

09:24:28 8 THE COURT: STANDING ALONE.

09:24:28 9 MR. BROWN: STANDING ALONE. THEY ABSOLUTELY HAVE TO
09:24:32 10 INCORPORATE THESE HELP CENTER PAGES. AND THAT'S THE THEORY
09:24:35 11 THAT THEY'VE -- THAT THEY ARE RELYING ON.

09:24:39 12 SO, YOU KNOW, I DON'T THINK IT WORKS, AND I THINK THAT IT,
09:24:42 13 FRANKLY, SHOULD JUST BE DISMISSED AT THIS POINT, AND DISMISSED
09:24:45 14 WITH PREJUDICE.

09:24:47 15 AND I DID WANT TO POINT OUT, THERE ARE OTHER ISSUES WE CAN
09:24:51 16 TALK ABOUT, BUT THIS IS SORT OF A THRESHOLD ISSUE.

09:24:53 17 THE COURT: WELL, THIS IS THE ONE, CANDIDLY, I'M MOST
09:24:56 18 INTERESTED IN. I THINK IT IS A THRESHOLD ISSUE AND THE
09:25:01 19 REMAINING COUNT FLOWS FROM THIS AS WELL.

09:25:04 20 MY SENSE OF IT IS, IF THE CONTRACT EXISTS, THEN THE SECOND
09:25:08 21 COUNT EXISTS AS WELL. BUT IF THERE'S NO CONTRACT, THEN --

09:25:12 22 MR. BROWN: THAT'S RIGHT.

09:25:12 23 AND, I MEAN, I THINK THERE ARE PROBLEMS WITH THE DAMAGES
09:25:15 24 ELEMENT, I THINK THERE'S THIS WHOLE ISSUE ABOUT THESE
09:25:18 25 PURPORTEDLY, THROUGH ALLEGATIONS FROM SEPTEMBER 27, 2011 AND ON

09:25:24 1 AND NEW KIND OF CLASS MEMBERS WHICH, UNDER THE LAW, ARE TREATED
09:25:27 2 AS NEW PLAINTIFFS. NEITHER OF THOSE RELATE BACK TO THE EARLIER
09:25:32 3 COMPLAINT IN THE CASE. AND SO THERE'S AN ENTIRE PROBLEM THERE.

09:25:38 4 SO THERE'S SORT OF A STACK OF PROBLEMS HERE, AND I DON'T
09:25:41 5 THINK YOU'VE GOT THE TERMS THAT THEY CONTEND WERE PART OF THE
09:25:44 6 CONTRACT AND CONTEND WERE BREACHED, WEREN'T ACTUALLY PART OF
09:25:47 7 THE CONTRACT, BECAUSE THE INCORPORATION BY REFERENCE DOCTRINE
09:25:50 8 IS NOT SATISFIED.

09:25:51 9 BUT THEN THERE ARE PROBLEMS WITH THE DAMAGES ELEMENT AND
09:25:54 10 THERE ARE ALSO PROBLEMS WITH THE NEW ALLEGATIONS NOT RELATING
09:25:58 11 BACK.

09:25:59 12 THE COURT: IS THERE A PROBLEM WITH INCORPORATING BY
09:26:02 13 REFERENCE, A DOCUMENT THAT DID NOT EXIST AT THE TIME OF THE
09:26:06 14 ORIGINAL CONTRACT?

09:26:08 15 MR. BROWN: WELL, THAT COULD BE A PROBLEM.

09:26:10 16 WE HAVE A SITUATION HERE WHERE THIS STATEMENT OF RIGHTS
09:26:14 17 AND RESPONSIBILITIES, I THINK THE LAST ONE IN TIME, REFERENCED
09:26:17 18 IN THE COMPLAINT, ACTUALLY PREDATED SOME OF THE HELP CENTER
09:26:21 19 PAGES THAT THEY ARE TRYING TO RELY ON.

09:26:26 20 AND SO THAT COULD POTENTIALLY BE A PROBLEM AS WELL. I
09:26:29 21 MEAN, I DON'T KNOW THAT YOU NECESSARILY EVEN NEED TO GET TO
09:26:31 22 THAT ISSUE, BECAUSE OF THE MORE FUNDAMENTAL PROBLEMS, BUT
09:26:35 23 CERTAINLY THE TIMING COULD BE AN ISSUE.

09:26:38 24 IT GETS BACK TO THIS, IN SOME WAYS, A LARGER ISSUE, WHEN
09:26:42 25 YOU ARE TRYING TO INCORPORATE IN SOMETHING LIKE A HELP CENTER

09:26:46 1 WHERE YOU'VE GOT KIND OF DYNAMIC AND CONSTANTLY SHIFTING AND
09:26:49 2 EVOLVING PAGES, IT BECOMES A REAL LEGAL PROBLEM TRYING TO
09:26:54 3 FIGURE OUT HOW THOSE SHIFTING PAGES BECOME PART OF A CONTRACT
09:26:58 4 THAT MAY HAVE ALREADY BEEN ASSENTED TO EARLIER IN TIME.

09:27:02 5 UNLESS THERE'S SOME VERY SPECIFIC PROVISION, YOU CAN
09:27:05 6 IMAGINE PEOPLE CONTRACTING IN A WAY WHERE THERE'S SOME SORT OF
09:27:13 7 AGREEMENT AND UNDERSTANDING THAT AN INCORPORATED DOCUMENT MAY
09:27:17 8 CHANGE IN CERTAIN CIRCUMSTANCES, AND THE PARTIES IN A VERY
09:27:20 9 CLEAR, KNOWING WAY, ASSENT TO KIND OF THOSE CHANGED TERMS,
09:27:29 10 CHANGES IN THE INCORPORATED DOCUMENTS IN THE FUTURE.

09:27:34 11 BUT I'M SPEAKING KIND OF HYPOTHETICALLY, I'M TRYING TO
09:27:37 12 COVER THE WATERFRONT HERE. SO I THINK IT'S POSSIBLE YOU COULD
09:27:39 13 HAVE THAT SITUATION BUT WE ARE NOWHERE CLOSE TO THAT HERE.

09:27:43 14 THERE'S NO REFERENCE TO THE HELP CENTER AT ALL IN THE
09:27:45 15 STATEMENT OF RIGHTS AND RESPONSIBILITIES, LET ALONE SOME
09:27:48 16 UNDERSTANDING REFLECTED THAT ANY CHANGE THAT AN ENGINEER MIGHT
09:27:51 17 PUSH OUT TO THE HELP CENTER MIGHT BECOME A CONTRACTURAL
09:27:55 18 OBLIGATION BETWEEN THE PARTIES.

09:27:56 19 THE COURT: WELL, I'M GOING TO OBVIOUSLY ASK YOUR
09:27:59 20 COLLEAGUE OPPOSITE ABOUT THIS, BECAUSE I THOUGHT IN ADVANCING
09:28:06 21 THIS QUESTION, HE WILL RESPOND TO, I'M CERTAIN, I THOUGHT THAT
09:28:09 22 PLAINTIFFS ARGUE THAT THE DATA USE POLICY PROMISED THAT YOU
09:28:12 23 WOULD NOT, FACEBOOK WOULD NOT LOG -- TRACK LOGGED OUT USERS.

09:28:18 24 AND IT SEEMS THAT THAT VERSION WAS PUBLISHED
09:28:23 25 SEPTEMBER 2011 SOME TIME, SEPTEMBER 7TH I THINK IT WAS, WHICH

09:28:27 1 WOULD HAVE BEEN AFTER.

09:28:28 2 AND I THINK THAT'S WHERE THERE'S INCORPORATION PROBLEM
09:28:31 3 THAT I'M SURE I WILL GET SOME HELP FROM YOUR FRIENDS ON THE
09:28:34 4 OTHER SIDE.

09:28:36 5 MR. BROWN: YEAH. AND THANKS FOR REMINDING ME OF
09:28:38 6 THAT. THAT WAS ONE ISSUE I SORT OF NEGLECTED TO TOUCH ON.

09:28:42 7 SO THERE IS A TIMING ISSUE THERE BETWEEN THE DATE OF THE
09:28:44 8 SRR AND THE DATE OF THE DATA USE POLICY.

09:28:47 9 THERE'S A DISTINCT PROBLEM IN INCORPORATING THAT POLICY BY
09:28:52 10 REFERENCE BECAUSE THE SRR DOESN'T MENTION THE DATA USE POLICY
09:28:58 11 ANYWHERE.

09:28:59 12 AND SO THE STANDARD IS THERE'S GOT TO BE A CLEAR,
09:29:05 13 UNEQUIVOCAL PULLING IN BY REFERENCE OF AN EXTERNAL DOCUMENT,
09:29:09 14 AND IT NEEDS TO BE BROUGHT TO THE OTHER PARTY'S ATTENTION SO
09:29:12 15 THEY CAN ASSENT TO IT, AND THE DATA USE POLICY IS SIMPLY NOT
09:29:17 16 MENTIONED ANYWHERE IN THAT, IN EVEN THE LATEST-IN-TIME
09:29:19 17 STATEMENT OF RIGHTS AND RESPONSIBILITIES.

09:29:21 18 WE ALSO HAVE AN ARGUMENT, IT'S IN THE PAPERS, FOR WHY EVEN
09:29:24 19 IF YOU WERE TO FIND THAT POLICY TO BE INCORPORATED BY
09:29:29 20 REFERENCE, WHY THAT CONTRACTURAL PROVISION ON ITS FACE CAN'T
09:29:33 21 CONSTITUTE A BREACH. IN OTHER WORDS, THE ALLEGED CONDUCT DOES
09:29:38 22 NOT CONSTITUTE A BREACH OF THAT LANGUAGE WHATSOEVER, BUT I
09:29:41 23 DON'T THINK YOU EVEN NEED TO GET THERE.

09:29:42 24 THE COURT: SO FOR THE REASONS YOU'VE ARTICULATED IN
09:29:45 25 YOUR PAPERS AND ADVANCED THIS MORNING, YOU ARE REQUESTING THIS

09:29:49 1 COURT DISMISS THIS ACTION WITH PREJUDICE.

09:29:51 2 MR. BROWN: THAT'S RIGHT.

09:29:52 3 THE COURT: SO MY SENSE IS THAT THERE'S SOME
09:29:57 4 RECOGNITION THAT YOUR CLIENT MAY HAVE MADE SOME STATEMENTS,
09:30:04 5 MISREPRESENTATIONS ABOUT ITS POLICY AT SOME POINT IN TIME ABOUT
09:30:07 6 THIS TRACKING BUSINESS.

09:30:08 7 I'M NOT ASKING YOU TO CONCEDE THAT YOUR CLIENTS DID THAT,
09:30:11 8 BUT IT SEEMS THAT THERE WAS A CONVERSATION OUT THERE AT A TIME
09:30:19 9 WHEN FACEBOOK SAID THEY DIDN'T AND THEN CHANGED THEIR POLICY
09:30:23 10 SUBSEQUENT.

09:30:26 11 PERHAPS TO THE HARM OF CONSUMERS, THAT'S ANOTHER ISSUE,
09:30:28 12 WHAT'S THE DAMAGES, I UNDERSTAND THAT. BUT SHOULDN'T THERE BE
09:30:31 13 SOME KIND OF REMEDY FOR A COMPANY DOING THAT? MAYBE MR. WONG
09:30:36 14 WANTS TO SPEAK TO THAT IN DEFENSE OF HIS CLIENT. I SEE HE'S
09:30:39 15 ARRIVED.

09:30:43 16 MR. BROWN: WELL, I THINK WHAT YOU ARE REFERRING TO,
09:30:45 17 AND I'M GOING TO SPEAK SOMEWHAT GENERICALLY BECAUSE THE
09:30:48 18 DOCUMENTS, I THINK YOU ARE REFERRING TO, ARE SUBJECT TO A
09:30:50 19 PROTECTIVE ORDER, AND AS I MENTIONED EARLIER, WE HADN'T
09:30:54 20 RECEIVED ANY NOTICE THAT THESE WOULD BE COMING UP DURING THE
09:31:00 21 HEARING TODAY.

09:31:01 22 THE COURT: DON'T ANSWER MY QUESTION IF YOU NEED TO
09:31:03 23 SPEAK ABOUT THOSE, BUT THIS IS VERY GENERAL.

09:31:05 24 AND AS I SAID, I'M CERTAINLY NOT REFERRING TO ANYTHING
09:31:08 25 THAT I THINK IS PROTECTED, I THINK THIS IS PUBLIC CONVERSATION

09:31:12 1 ABOUT THIS SITUATION.

09:31:13 2 MR. BROWN: SURE.

09:31:14 3 THERE WERE CERTAIN STEPS TAKEN TO SORT OF THE SHIFT THE
09:31:19 4 COMPANY'S PRACTICES. AND THAT HAPPENS ALL THE TIME IN THE
09:31:24 5 WORLD. BUT THE QUESTION IS WHETHER THERE WAS ANY WRONGFUL
09:31:30 6 CONDUCT ASSOCIATED WITH THE PRACTICES BEFORE.

09:31:32 7 AND WE'VE NOW BEEN THROUGH IT, I SHOULD HAVE COUNTED
09:31:34 8 BEFORE I CAME HERE TODAY, BUT WE HAVE GONE THROUGH, I WOULD
09:31:37 9 THINK A DOZEN OR MORE CAUSES OF ACTION IN THIS CASE SO FAR.

09:31:42 10 AND SO IT'S SORT OF NOT FOR LACK OF TRYING, BUT, YOU KNOW,
09:31:47 11 WE SHOULDN'T JUST BE SORT OF IN SOME GESTALT OR LOOSE FASHION,
09:31:53 12 SAYING WELL, GOSH, IT SEEMS LIKE MAYBE THERE WAS SOMETHING A
09:31:56 13 LITTLE OFF HERE, LET'S LOOK FOR A WAY TO MAKE IT INTO A FEDERAL
09:32:00 14 MULTI-DISTRICT LITIGATION. THAT SHOULDN'T BE THE POINT.

09:32:05 15 AND IT'S REALLY UP TO THE PLAINTIFFS TO COME FORWARD AND
09:32:08 16 ALLEGE FACTS AND TIE THEM TO LEGAL THEORIES. THEY HAVE TRIED
09:32:12 17 TO DO THAT, THEY SPENT A LOT OF TIME TRYING TO CONVINCING THE
09:32:17 18 COURT THAT THIS WAS A WIRE TAP ACT VIOLATION.

09:32:20 19 I REMEMBER LOTS AND LOTS OF BRIEFING AND ARGUMENT OVER
09:32:22 20 THAT. AND, YOU KNOW, NOT SURPRISINGLY SO, BECAUSE THE
09:32:26 21 AVAILABILITY OF STATUTORY DAMAGES, AND YOU KNOW, THAT WAS FOUND
09:32:30 22 NOT TO BE A SATISFACTORY CLAIM TO BRING, AND WE ARE WHERE WE
09:32:35 23 ARE NOW, WHICH IS BREACH OF CONTRACT CLAIM AND A BREACH OF
09:32:38 24 IMPLIED COVENANT CLAIM. AND THEY SIMPLY HAVEN'T ALLEGED IT.

09:32:43 25 THE COURT: OKAY. THANK YOU VERY MUCH.

09:32:53 1 YOU RISE TO CONCEDE THE MOTION.

09:32:54 2 MR. GRYGIEL: YOUR HONOR, ANYTHING BUT. ANYTHING
09:32:57 3 BUT.

09:32:58 4 IN FACT, AFTER LISTENING TO MR. BROWN'S ARGUMENT, TWO
09:33:02 5 MAJOR POINTS STRUCK ME. THE FIRST ONE IS HE TALKED AN AWFUL
09:33:07 6 LOT ABOUT JUMBLING AND TIMING AND THE DIFFICULTY OF SORTING
09:33:10 7 THINGS OUT.

09:33:11 8 WE ARE HERE ON A 12(B) (6) MOTION, RULE 8(A) IS THE TEST.
09:33:14 9 ARE THEY NOT ON NOTICE OF THAT WHICH WE CLAIM? I LOOK AT THEIR
09:33:18 10 BRIEFING AND THEY ARE FULLY ON NOTICE OF THAT WHICH WE CLAIM.
09:33:22 11 THE ISSUES HE'S RAISING ARE FACTUAL ISSUES THAT REQUIRE
09:33:25 12 DISCOVERY. IN FACT, THEY CITE NO FEWER THAN 19 SUMMARY
09:33:28 13 JUDGEMENT OR TRIAL COURT CASES DEALING WITH THE VERY ISSUES IN
09:33:31 14 THIS CASE. I ADMIT THAT, POINT NUMBER ONE.

09:33:33 15 NUMBER TWO, I COULDN'T HELP IT, AS I HEAR HIM SPEAK, ALL I
09:33:37 16 CAN THINK OF IS, THEY TAKE THE POSITION THAT IS ARTICULATED SO
09:33:42 17 WONDERFUL IN LOSE CARROLL'S *THROUGH THE LOOKING GLASS*, HUMPTY
09:33:46 18 DUMPTY. "A WORD MEANS WHAT I SAY IT MEANS, NOTHING MORE AND
09:33:48 19 NOTHING LESS. THE QUESTION IS WHO IS TO BE MASTER. THAT IS
09:33:52 20 ALL."

09:33:53 21 WELL, THE MASTER ISN'T FACEBOOK. THE MASTER IS THE
09:33:55 22 GOVERNING LAW, THIS COURT AND THE CALIFORNIA CIVIL CODE, ALL OF
09:33:59 23 WHICH SHOW THAT BOTH OF THESE CLAIMS SHOULD BE SUSTAINED.

09:34:03 24 LET'S START WITH SOMETHING I'VE HEARD NOTHING ABOUT FROM
09:34:05 25 MR. BROWN, SOMETHING WE'VE TALKED ABOUT MANY TIMES IN THIS CASE

09:34:08 1 AND IT'S IN FRONT OF YOUR HONOR IN ALL OF THE EXHIBITS. IT'S A
09:34:11 2 CRUCIALLY IMPORTANT POINT.

09:34:13 3 WHEN FACEBOOK'S TRACKING OF ITS LOGGED OUT USERS, WHICH
09:34:19 4 HAD NEVER BEEN DISCLOSED IN ANY OF THE SRR'S IN THE PRIVACY
09:34:24 5 POLICY OR IN THE DATA USE POLICY OR IN ANY OF THE HELP CENTER
09:34:27 6 PAGES, WHEN IT WAS DISCLOSED, FACEBOOK DID NOT RESPOND WITH,
09:34:32 7 WELL, WAIT A MINUTE, WHAT'S THE UPROAR, WE ARE ENTITLED TO DO
09:34:35 8 THIS, WE HAVE GOTTEN CONTRACTURAL UNDERTAKING THAT PERMITS US
09:34:39 9 TO DO THIS.

09:34:40 10 NO, WHAT WE HAD WAS, WE HAVE A PROBLEM AND WE ARE GOING TO
09:34:44 11 FIX IT.

09:34:45 12 NOW WHY WOULD YOU SAY YOU HAD A PROBLEM AND YOU WERE GOING
09:34:47 13 TO FIX IT UNLESS ONE, YOU HADN'T PREVIOUSLY DISCLOSED IT; AND
09:34:52 14 TWO, YOU THOUGHT IT WAS MATERIAL TO FIX.

09:34:55 15 THERE IS AN ABUNDANCE OF QUOTES IN THE THIRD AMENDED
09:34:58 16 COMPLAINT THAT SHOW TWO VERY IMPORTANT THINGS -- THREE VERY
09:35:03 17 IMPORTANT THINGS.

09:35:03 18 ONE, THAT FACEBOOK WAS DOING THIS BECAUSE THEY WERE UNDER
09:35:06 19 PRESSURE TO KEEP USERS LOGGED IN BECAUSE THAT'S WHERE THE MONEY
09:35:10 20 COMES FROM. [REDACTED]

09:35:14 21 [REDACTED]
09:35:14 22 MR. BROWN: EXCUSE ME, EXCUSE ME. THAT'S NOT
09:35:16 23 APPROPRIATE. THAT'S A DOCUMENT THAT'S UNDER SEAL, AND WE
09:35:19 24 ALREADY HAD THIS CONVERSATION ON THE RECORD BEFORE MR. GRYGIEL
09:35:24 25 GOT UP TO SPEAK.

09:35:25 1 AND I'M SORRY, THAT'S NOT APPROPRIATE.

09:35:26 2 THE COURT: SO IF YOU CAN MAKE YOUR ARGUMENTS WITHOUT
09:35:29 3 REFERENCING, I THINK WE ARE IN AGREEMENT THAT WE DO THAT.

09:35:31 4 MR. GRYGIEL: FAIR ENOUGH.

09:35:32 5 AND THEN WE HAVE, TO GENERALIZE, A NUMBER OF ITERATIONS OF
09:35:35 6 ENGINEERS GOING TO BACK AND FORTH WITH, THIS NEEDS TO BE FIXED
09:35:39 7 IMMEDIATELY. THE PRIVACY PEOPLE ARE ON THIS. WE HAVE BEEN
09:35:43 8 TOLD WE SAID WE DON'T DO THIS AND WE CAN'T DO THIS.

09:35:49 9 AND WE QUOTE, AND IT'S AT PARAGRAPH 91 IN THE THIRD
09:35:52 10 AMENDED COMPLAINT, "FACEBOOK DIDN'T SAY WE ARE ENTITLED TO DO
09:35:55 11 THIS, OUR CONTRACT PERMITS US TO DO THIS. FACEBOOK SAID, WE'VE
09:35:58 12 SAID WE DON'T DO IT," AND THIS IS A PUBLIC STATEMENT, "AND WE
09:36:02 13 COULDN'T DO IT WITHOUT SOME FORM OF DISCLOSURE AND CONSENT."

09:36:06 14 YOUR HONOR, THE CONTRACT CASE AND THE IMPLIED COVENANT
09:36:10 15 CASE COULD STOP RIGHT THERE BECAUSE WE HAVE INTERNAL ADMISSIONS
09:36:14 16 DEMONSTRATING THAT A CONTRACT EXISTED OR THEY WOULDN'T HAVE
09:36:17 17 SAID THE THINGS THEY SAID, THAT THEY UNDERSTOOD THE CONTRACT
09:36:20 18 WAS MATERIAL.

09:36:21 19 THE COURT: LET ME STOP YOU THERE.

09:36:22 20 HOW DOES THAT CREATE CONTRACT?

09:36:24 21 MR. GRYGIEL: BECAUSE THAT SHOWS -- EXACTLY THE RIGHT
09:36:27 22 QUESTION, YOUR HONOR.

09:36:28 23 BECAUSE THAT SHOWS THAT OUR THEORY OF THE CONTRACT, THE
09:36:30 24 STATEMENT OF RIGHTS AND RESPONSIBILITIES, INCORPORATED IN THE
09:36:35 25 PRIVACY POLICY, AND THEN THE HELP CENTER PAGES, IS CORRECT.

09:36:38 1 THE COURT: EXCUSE ME.

09:36:39 2 I GUESS THE PIECE I'M MISSING, AND I'M SORRY, IT'S 9:30
09:36:43 3 IN THE MORNING HERE, BUT THE PIECE I'M MISSING IS THE
09:36:46 4 STATEMENTS OF OTHER ENGINEERS, WOULD THOSE BE INCORPORATED BY
09:36:49 5 REFERENCE TO THIS --

09:36:51 6 MR. GRYGIEL: NO, YOUR HONOR.

09:36:51 7 THOSE STATEMENTS AREN'T INCORPORATED BY REFERENCE, THOSE
09:36:54 8 STATEMENTS ARE THE INTERPRETATIVE GLOSS THAT CONSTITUTED
09:36:58 9 ADMISSIONS -- I CAN'T HELP IT, I'M AN OLD TRIAL LAWYER -- THAT
09:37:01 10 CONSTITUTE ADMISSIONS BY THE OTHER PARTY THAT THEIR OWN PEOPLE
09:37:05 11 UNDERSTOOD THAT THEY HAD SAID THEY WOULDN'T DO THIS.

09:37:08 12 THE COURT: SO FIT THAT INTO THE CONTRACT ANALYSIS.

09:37:10 13 MR. GRYGIEL: SURE.

09:37:11 14 LET'S START WITH THE STATEMENT OF RIGHTS AND
09:37:13 15 RESPONSIBILITIES.

09:37:13 16 WE CITED AT PARAGRAPH 24 AND 57, MR. BROWN SAYS WE DON'T
09:37:17 17 SEE ANYTHING ABOUT WHAT THE STATEMENTS OF RIGHTS AND
09:37:19 18 RESPONSIBILITIES SAY. IT SAYS, AMONG OTHER THINGS, "YOUR
09:37:23 19 PRIVACY," THIS IS A QUOTE, "YOUR PRIVACY IS VERY IMPORTANT TO
09:37:27 20 US. WE HAVE DESIGNED OUR PRIVACY POLICY SO THAT YOU CAN
09:37:31 21 UNDERSTAND HOW WE COLLECT AND HOW WE USE YOUR DATA."

09:37:38 22 WE ENCOURAGE YOU TO READ THE PRIVACY POLICY, BECAUSE IT
09:37:41 23 WILL ALLOW YOU TO MAKE INFORMED DECISIONS CONCERNING THESE
09:37:46 24 ISSUES OF PRIVACY THAT ARE SO CENTRAL TO THE SRR.

09:37:49 25 IT'S IN PARAGRAPH 1 OF EVERY ONE OF THE STATEMENTS OF

09:37:52 1 RIGHTS AND RESPONSIBILITIES. SO TO TIE BACK WHAT I WAS SAYING
09:37:56 2 ABOUT THE INTERNAL ADMISSIONS, IT SHOWS THAT THEIR
09:37:59 3 UNDERSTANDING, AND IF IT DOESN'T, IT'S A FACT QUESTION, TIES
09:38:03 4 BACK TO THAT PARAGRAPH IN THE SRR SAYING WE CAN'T DO THIS. WE
09:38:07 5 HAVE SAID WE WON'T DO IT.

09:38:09 6 LET ME MAKE THE CHAIN FOR YOUR HONOR. SO WE'VE GOT THE
09:38:13 7 STATEMENT OF RIGHTS AND RESPONSIBILITIES. THE STATEMENT OF
09:38:16 8 RIGHTS AND RESPONSIBILITIES BEGINS WITH THAT CENTRAL PARAGRAPH.

09:38:30 9 THE COURT: THE GENERAL PRIVACY POLICY.

09:38:32 10 MR. GRYGIEL: THE PRIVACY POLICY. WHICH FACEBOOK
09:38:34 11 SAYS, ITSELF, IN ITS RESPONSE TO CONGRESS, THE PRIVACY POLICY
09:38:38 12 THEN BECOMES, ITSELF, A LAYERED DOCUMENT.

09:38:40 13 ESSENTIALLY, WHAT FACEBOOK SAYS IS WHEN YOU LOOK AT
09:38:43 14 STATEMENT OF RIGHTS AND RESPONSIBILITIES, HERE IS THE STATEMENT
09:38:45 15 OF RIGHTS SPECIAL RESPONSIBILITIES, WE HYPERLINK TO IN TELLING
09:38:47 16 YOU TO READ THE PRIVACY POLICY.

09:38:50 17 THINK OF THE WOLSCHLAGER CASE WHERE THE COURT SAID GHEE,
09:38:54 18 IT'S PRETTY IMPORTANT WHEN ONE DOCUMENT SAYS YOU SHOULD READ
09:38:58 19 ANOTHER, IT'S VERY STRONG INDICIA THAT THIS IS A DOCUMENT
09:39:01 20 THAT'S INCORPORATED. NO MAGICAL BUZZ WORDS ARE REQUIRED.

09:39:03 21 SECOND POINT THERE, YOUR HONOR, THIS IS FACEBOOK'S
09:39:05 22 CONTRACT. FACEBOOK DESIGNED THE COMPONENTS OF, CONSTRUCTED
09:39:10 23 THIS CONTRACT, AND DECIDED WHAT WENT IN IT. THIS ISN'T A CASE
09:39:14 24 LIKE THE MANY THEY CITED, LIKE CHAN COMES TO MIND, WHERE A POOR
09:39:21 25 PERSON SIGNS AN AGREEMENT AND DOESN'T HAVE ANY WAY OF

09:39:23 1 UNDERSTANDING SHE HAS SIGNED UP FOR ARBITRATION AND FORFEITS
09:39:26 2 HER JURY TRIAL RIGHTS UNDER THE 7TH AMENDMENT BECAUSE SHE'S A
09:39:30 3 BROKER NOW SUBJECT TO A BROKER ARBITRATION AGREEMENT.

09:39:32 4 THIS ISN'T LIKE ST. PAUL MERCURY WHERE THE DOCUMENT
09:39:35 5 ALLEGED TO BE INCORPORATED IS FULL OF BLANKS.

09:39:38 6 OUR CASE IS VERY DIFFERENT. THE DOCUMENTS WERE A,
09:39:41 7 READILY ACCESSIBLE TO FACEBOOK. THEY ARE THEIR DOCUMENTS, THEY
09:39:45 8 DESIGNED THE CONTRACTS, THAT CLAUSE IS DINE. THEY WERE KNOWN
09:39:45 9 TO THE OTHER PARTY AND CALLED IT TO THEIR ATTENTION, THEY ARE
09:39:48 10 THE VERY ONES WHO CALLED THESE DOCUMENTS TO THE PLAINTIFF'S
09:39:51 11 ATTENTION.

09:39:52 12 HOW DO THEY DO THAT? LOOK AT EXHIBIT T, YOUR HONOR.
09:39:55 13 EXHIBIT T SAYS A COUPLE OF THINGS THAT ARE IMPORTANT ENOUGH
09:39:57 14 THAT I WOULD LIKE TO MAKE SURE THAT I GET THEM EXACTLY RIGHT.

09:40:01 15 EXHIBIT T, PUBLIC LETTER TO THE CONGRESS PEOPLE WHO WOULD
09:40:04 16 CHALLENGE WHAT FACEBOOK WAS DOING. IT SAYS, "OUR DATA USE
09:40:07 17 POLICY ALSO PROVIDES A LINK TO OUR HELP CENTER WHERE WE ANSWER
09:40:11 18 FREQUENTLY ASKED QUESTIONS ABOUT A VARIETY OF TOPICS, INCLUDING
09:40:15 19 QUESTIONS AROUND SOCIAL PLUG-INS."

09:40:17 20 PRECISELY WHAT WE ARE DEALING WITH HERE, THE FACEBOOK
09:40:21 21 "LIKE" BUTTON FOR THE MOST PART. SOCIAL PLUG-INS. THIS ISN'T
09:40:25 22 AMORPHOUS, THIS ISN'T VAPOROUS, THIS IS THE DATA USE POLICY
09:40:28 23 SAYING, OUR HELP CENTER POLICY IS INCORPORATED HERE, THAT'S
09:40:31 24 EXACTLY WHAT IT SAYS.

09:40:32 25 THE COURT: IS THAT WHAT IT SAYS?

09:40:33 1 MR. GRYGIEL: WELL, REALLY, YOUR HONOR, YES,
09:40:35 2 ABSOLUTELY. BECAUSE IT'S ATTENTION IN THE LANGUAGE IN THE
09:40:38 3 CASES. THE CASES SAY, AND MR. BROWN SAYS YES, THE LANGUAGE OF
09:40:43 4 THE CASES SAY THE STANDARD NUMBER ONE IS YOU HAVE TO HAVE A
09:40:46 5 CLEAR AND UNEQUIVOCAL REFERENCE.

09:40:47 6 BUT THEN IT SAYS NO BUZZ WORDS ARE REQUIRED, AND IT IS
09:40:52 7 SUFFICIENT, SEE WOLSCHLAGER, SEE SHAW, SEE VIRTUALLY EVERY CASE
09:40:55 8 THAT RECITES THE DOCTRINE. AS LONG AS IT GUIDES THE USER.
09:40:58 9 "GUIDES," THAT'S THE OPERATIVE TERM FOR CONTRACTURAL
09:41:01 10 INTERPRETATION HERE. AS LONG AS IT GUIDES THE USER TO THE NEXT
09:41:04 11 DOCUMENT, THAT'S SUFFICE FOR CLEAR AND UNEQUIVOCAL.

09:41:08 12 THE COURT: SO WHAT ARE THE SPECIFIC PAGES AND
09:41:11 13 STATEMENTS IN THE HELP PAGES THAT FORM THIS CONTRACT?

09:41:13 14 MR. GRYGIEL: IF I COULD, YOUR HONOR, I'M GOING TO
09:41:15 15 ANSWER THAT QUESTION. BUT JUST TO GIVE IT --

09:41:17 16 THE COURT: YOU JUST DON'T WANT TO ANSWER IT NOW.

09:41:19 17 MR. GRYGIEL: NO, I WAS GOING TO PUT CONTEXT IN IT.

09:41:21 18 BECAUSE UNDERNEATH WHAT I WAS SAYING, AND YOU CAN ASK ME
09:41:25 19 AGAIN BECAUSE I HAVE AN ANSWER FOR IT, BUT I JUST WANTED TO
09:41:29 20 POINT OUT THAT NOT ONLY DOES EXHIBIT T TALK ABOUT THE DATA USE
09:41:34 21 POLICY INCORPORATING A LINK TO THE HELP CENTER, IT SAYS
09:41:36 22 SOMETHING FURTHER, "WE PROVIDE LINKS TO OUR HELP CENTER PAGES
09:41:40 23 IN THE DROP DOWN MENU OF EVERY PAGE OF OUR SITE TO SEARCH FOR
09:41:47 24 ANSWERS TO PRIVACY-RELATED QUESTIONS."

09:41:50 25 COULD FACEBOOK REALLY BE SURPRISED THAT THIS IS

09:41:52 1 CONSIDERED, THE PRIVACY-RELATED PAGES ARE PART OF THE CONTRACT?
09:41:55 2 WHEN GOING RIGHT BACK TO THE FUNDAMENTAL FOUNDATIONAL DOCUMENT,
09:41:58 3 THE STATEMENT OF RIGHTS AND RESPONSIBILITIES, IT STARTS WITH
09:42:02 4 PARAGRAPH 1 IN BOLD FACE, "YOUR PRIVACY IS VERY IMPORTANT TO
09:42:05 5 US."

09:42:05 6 IN FACT, I THINK IT'S PARAGRAPH 18 OF ALL THE STATEMENTS
09:42:07 7 OF RIGHTS AND RESPONSIBILITIES. AT THE BOTTOM IT SAYS, "OTHER
09:42:11 8 DOCUMENTS YOU SHOULD READ, THE PRIVACY POLICY," AFTER THEY HAVE
09:42:14 9 ALREADY TOLD YOU IN THE BODY OF IT TO READ IT.

09:42:17 10 NOW TO COME BACK TO YOUR QUESTION, YOUR HONOR, WHICH HELP
09:42:19 11 CENTER PAGES ARE INCORPORATED.

09:42:22 12 WE CITE THEM -- IN FACT, WE CITE THEM IN SERIAL FASHION IN
09:42:25 13 OUR EXHIBITS. BUT WHAT I WOULD LIKE TO DO IS POINT, FOR
09:42:27 14 EXAMPLE TO, IT IS EXHIBIT J. "WHAT INFORMATION DOES FACEBOOK
09:42:35 15 RECEIVE ABOUT ME WHEN I VISIT A WEBSITE WITH A SOCIAL PLUG-IN?"

09:42:39 16 AND HERE IS WHERE THE ESSENTIAL FAILURE TO DISCLOSE WHERE
09:42:43 17 THE BREACH OF CONTRACT COMES IN. TECHNICAL INFORMATION.
09:42:47 18 CERTAIN LIMITED INFORMATION.

09:42:48 19 THE REST OF THE EXHIBITS, TO SUMMARIZE, IT WOULD TAKE A
09:42:52 20 LONG TIME TO GO THROUGH ALL OF THEM, THE REST OF THE EXHIBITS
09:42:55 21 SAY THIS, YOUR HONOR, FACEBOOK IS SAYING TO ITS USERS, WHEN YOU
09:42:57 22 GO TO THESE HELP CENTER PAGES, WHEN YOU ARE LOGGED OUT OF
09:43:00 23 FACEBOOK, WE RECEIVE CERTAIN INFORMATION, BUT THAT INFORMATION
09:43:04 24 IS TECHNICAL AND IT IS LIMITED. IF YOU ARE LOGGED INTO
09:43:09 25 FACEBOOK, WE GET ADDITIONAL INFORMATION.

09:43:14 1 IN OTHER WORDS, THE SORT OF INFORMATION THAT CAN LINK A
09:43:17 2 USER AND A USER'S ACTIVITIES ON A SITE TO A USER ID.

09:43:21 3 THAT'S A VERY IMPORTANT DISTINCTION. NO REASONABLE USER
09:43:24 4 IN THE REASONABLENESS OF -- A REASONABLE USER'S UNDERSTANDING
09:43:26 5 IS WHAT'S AT ISSUE HERE. NO REASONABLE USER COULD READ THAT
09:43:29 6 POLICY AND UNDERSTAND FACEBOOK TO HAVE DISCLOSED THAT WHICH IT
09:43:33 7 SHOULD HAVE DISCLOSED.

09:43:35 8 THAT LOOK, WHEN YOU GO TO THIRD-PARTY SITES AND YOU ARE
09:43:40 9 LOGGED OUT, WE ARE STILL GETTING THE SAME INFORMATION THAT WE
09:43:43 10 WOULD GET WHEN YOU ARE LOGGED IT IN.

09:43:45 11 AND AS A MATTER OF COMMON SENSE, YOUR HONOR, I ASK WOULD
09:43:48 12 ANY REASONABLE USER LOOKING AT THEIR FACEBOOK CONTRACT,
09:43:51 13 UNDERSTAND THAT WHEN THEY LOG OUT OF FACEBOOK, THAT FACEBOOK IS
09:43:54 14 STILL TRACKING THEM ACROSS THIRD-PARTY SITES, JUST THE WAY IT
09:43:58 15 WAS DOING WHEN THEY WERE LOGGED IN?

09:44:00 16 I DON'T THINK, YOUR HONOR, BY ANY STRETCH OF EVEN PEOPLE,
09:44:05 17 TO QUOTE THE LA QUINTA CASE, WHO ARE INFLICTED WITH LAW
09:44:09 18 DEGREES, COULD CONJURE UP AND HAVE IT BE REALISTIC.

09:44:12 19 SO TO SUMMARIZE THERE, WHAT WE HAVE IS A PRIVACY POLICY
09:44:16 20 THAT ESSENTIALLY, CLEARLY, GOES RIGHT TO THE PRIVACY POLICY.
09:44:22 21 THE STATEMENT OF RIGHTS AND RESPONSIBILITIES GOES RIGHT TO THE
09:44:23 22 PRIVACY POLICY.

09:44:24 23 THE PRIVACY POLICY, ACCORDING TO EXHIBIT T, ITSELF APPEARS
09:44:28 24 ON ALMOST EVERY PAGE OF FACEBOOK'S WEBSITE. THIS IS SIMPLY NOT
09:44:33 25 A CASE WHERE A COUNTER PARTY IN THE CONTRACT CAN SAY THE

09:44:37 1 INFORMATION, THE CONTRACTURAL PROVISIONS WERE NOT CLEARLY
09:44:41 2 ACCESSIBLE TO ME, THEY WEREN'T DRAWN TO MY ATTENTION, THEY
09:44:44 3 CREATED THEM, AND THAT THE USER WASN'T GUIDED TO THEM.

09:44:47 4 IN FACT, THE EXHIBITS WE ATTACHED SHOW THAT NOT ONLY WAS
09:44:50 5 THE USER GUIDED TO THEM, FACEBOOK SAID YOU SHOULD READ THESE
09:44:53 6 THINGS. THIS IS IMPORTANT.

09:44:55 7 THE COURT: SO IN DOCUMENT 148, WHICH WAS THE ORDER,
09:44:58 8 THE COURT'S ORDER, ON PAGE 13 AT LINE 16, THERE WAS -- I
09:45:05 9 INDICATED THE CLAIMANTS DIDN'T IDENTIFY THE TRAIL OF LINKS
09:45:09 10 LEADING TO THE SRR AND THE STATEMENTS THAT IT IDENTIFIED.

09:45:12 11 AND I THINK MR. BROWN WAS REFERENCING, PERHAPS THIS,
09:45:15 12 EARLIER, BUT THERE WERE SPECIFIC CONTRACTURAL PROVISIONS, I
09:45:19 13 THINK, THAT I KNOW THAT WAS A DEFICIENCY. AND I GUESS RELATED
09:45:25 14 TO MY EARLIER QUESTION, WHAT PART OF THE THIRD AMENDED
09:45:27 15 COMPLAINT ANSWERS THE QUESTION THAT I LEFT?

09:45:32 16 MR. GRYGIEL: PARAGRAPH 44, YOUR HONOR.

09:45:33 17 I BELIEVE IT'S PARAGRAPH 44 OF THE THIRD AMENDED
09:45:36 18 COMPLAINT, SAYS THAT THE HELP CENTER PAGES, THE PRIVACY POLICY
09:45:39 19 REFERS TO THE HELP CENTER PAGES. I DON'T KNOW THAT THIS WAS IN
09:45:43 20 THE BRIEFING, BUT WHEN ONE LOOKS AT THAT, IT'S TO THE FIRST
09:45:47 21 PAGE OF THE HELP CENTER PAGES, AND THAT TENDS TO DEMONSTRATE
09:45:54 22 THAT THE HELP CENTER FOR PARTICULAR REQUESTS IS INCORPORATED BY
09:45:56 23 REFERENCE.

09:45:56 24 THE COURT: IS THIS WHERE THE INCORPORATION BY
09:45:58 25 REFERENCE ANALYSIS BEGINS THEN?

09:46:00 1 MR. GRYGIEL: IT REALLY DOES, YOUR HONOR.

09:46:01 2 THE COURT: TO GO BEYOND, WE NEED TO INCORPORATE BY
09:46:03 3 REFERENCE, THAT DOCUMENT.

09:46:04 4 MR. GRYGIEL: RIGHT.

09:46:05 5 IT'S -- I THINK IT'S VERY IMPORTANT TO STEP BACK THOUGH,
09:46:09 6 AND KEEP IN MIND A POINT I MADE BEFORE, BUT I DO THINK IT BEARS
09:46:14 7 EMPHASIS, THIS IS FACEBOOK'S CONTRACT.

09:46:16 8 AND WHAT WE HAVE HERE IS LAWYER CONJURING SAYING, WELL, WE
09:46:20 9 COULDN'T POSSIBLY KNOW THAT OUR HELP CENTER PAGES, WHICH
09:46:23 10 CHANGED ALL THE TIME, THAT HAD DIFFERENT DATES ON THEM -- AND
09:46:25 11 BY THE WAY, ALL OF OUR EXHIBITS HAVE DATES AT THE VERY TOP, AS
09:46:29 12 I THINK YOU GATHERED WHEN MR. BROWN READ FROM THEM, IT'S VERY
09:46:33 13 ODD TO THINK THAT WHEN THE DOCTRINE OF INCORPORATION BY
09:46:36 14 REFERENCE IS ESSENTIALLY INTERPRETED TO PREVENT UNFAIR SURPRISE
09:46:39 15 TO SOMEBODY, THAT FACEBOOK COULD SAY WE ARE UNFAIRLY SURPRISED
09:46:42 16 BY BEING HELD TO THE SPECIFIC STATEMENTS WE MADE ABOUT HOW WE
09:46:46 17 USE COOKIES, HOW WE COLLECT INFORMATION, HOW WE USE INFORMATION
09:46:50 18 AND WHAT THE DIFFERENCES ARE BETWEEN LOGGED IN AND LOGGED OUT
09:46:53 19 USERS.

09:46:54 20 THIS JUST DOES NOT FIT THAT PARADIGM. THAT, YOUR HONOR,
09:46:58 21 WITH RESPECT, IS A LAWYER'S ARGUMENT. THAT IS NOT AN ARGUMENT
09:47:01 22 THAT ANY REASONABLE USER WOULD NOT.

09:47:02 23 AND THEY CITED THIS CASE, KASHMIRI V. UNIVERSITY OF
09:47:05 24 CALIFORNIA REGENTS, AND I WAS GLAD THEY DID, THEY CITED IT FOR
09:47:08 25 A LIMITED POINT, BUT NATURALLY I READ THE WHOLE THING.

09:47:12 1 AND WHAT THE COURT BASICALLY SAID THERE WAS LOOK, YOU'VE
09:47:14 2 GOT TO INTERPRET CONTRACTS IN A WAY THAT A REASONABLE PERSON
09:47:17 3 WOULD DO THEM. AND SOMETIMES THE RULES REQUIRE SOME MOVEMENT
09:47:20 4 IN ORDER TO RECOGNIZE THAT REASONABLENESS IS THE TOUCHSTONE.

09:47:25 5 NOW I'M SUMMARIZING, BUT THAT'S WHAT IT SAID. IT IS NOT
09:47:28 6 REASONABLE TO SAY THAT THE STATEMENT OF RIGHTS AND
09:47:30 7 RESPONSIBILITIES, WHICH EXPRESSLY REFERS TO THE PRIVACY POLICY,
09:47:37 8 WHICH EXPRESSLY INCLUDES THE HELP CENTER PAGES, WHERE THE HELP
09:47:41 9 CENTER PAGES ARE ON EVERY PAGE OF THE WEBSITE, AND THE PRIVACY
09:47:46 10 POLICY IS, BY FACEBOOK'S ADMISSION, IT JUST DOESN'T DO TO SAY
09:47:48 11 WHEN YOU'VE GOT PRIVACY POLICY PAGES ON VIRTUALLY EVERY PAGE OF
09:47:53 12 THE FACEBOOK'S WEBSITE, WHICH WOULD INCLUDE THE SRR, WHEN
09:47:56 13 YOU'VE GOT HELP CENTER PAGES ON EVERY PAGE OF THE WEBSITE,
09:47:58 14 WHICH CERTAINLY INCLUDES THE SRR, THAT FACEBOOK IS SOMEHOW
09:48:01 15 UNFAIRLY SURPRISED TO BEING HELD TO ITS CONTRACTUAL
09:48:04 16 UNDERTAKING.

09:48:05 17 THE COURT: IS IT REASONABLE TO ASSUME, I THINK THE
09:48:08 18 WORDS MR. BROWN USE WAS A DAISY CHAIN, BUT I WILL JUST SAY IT
09:48:12 19 SOUNDS LIKE THERE'S A MULTIPLE CHAIN OF INCORPORATION BY
09:48:15 20 REFERENCE THAT'S REQUIRED TO FIND CONTRACT UNDER YOUR ANALYSIS.

09:48:18 21 MR. GRYGIEL: WELL, TO FIND CONTRACT HERE,
09:48:20 22 YOUR HONOR, I WOULD SUBMIT THAT WE CAN SIMPLY SUE ON STATEMENT
09:48:24 23 OF RIGHTS AND RESPONSIBILITIES. THAT WHEN YOU SAY YOUR PRIVACY
09:48:28 24 IS VERY IMPORTANT TO US AND YOU DO AN AWFUL LOT OF THINGS THAT
09:48:31 25 ARE DESIGNED, AS THEY'VE ALREADY ADMITTED, TO CIRCUMVENT

09:48:32 1 PRECISELY THAT PROMISE, THAT THAT BY ITSELF SUFFICES FOR A
09:48:34 2 BREACH OF CONTRACT, PARTICULARLY UNDER RULE 8(A).

09:48:37 3 THE COURT: THAT'S NOT THE ALLEGATION THAT'S BEFORE
09:48:38 4 THE COURT NOW.

09:48:39 5 MR. GRYGIEL: RIGHT.

09:48:39 6 THE COURT: BUT, I GUESS, IS IT REASONABLE TO GO
09:48:42 7 THROUGH THAT SERIATUM INCORPORATION BY REFERENCE BY CONTRACT?

09:48:48 8 MR. GRYGIEL: I THINK IT IS, YOUR HONOR.

09:48:49 9 AND ONE OF THE REASONS I THINK IT IS, IS NOT JUST BECAUSE
09:48:51 10 IT HELPS MY CASE, BUT BECAUSE FACEBOOK, ITSELF, SAID THAT.

09:48:55 11 WHEN FACEBOOK WAS RESPONDING TO CONGRESS AND THEY WERE
09:48:57 12 REFERRING SPECIFICALLY HERE TO THEIR PRIVACY POLICY, FACEBOOK
09:49:01 13 DESCRIBED THE WAY IT WAS STRUCTURED IN PRECISELY THE WAY WE ARE
09:49:06 14 MAKING THE INCORPORATION BY REFERENCE ARGUMENT. THEY TOLD
09:49:09 15 CONGRESS WE USE A LAYERED APPROACH.

09:49:11 16 WHAT THEY SAID WAS WE ESSENTIALLY, I'M PARAPHRASING, WE
09:49:17 17 GIVE BULLET POINTS, BROAD CATEGORICAL POINTS, IN THE PRIVACY
09:49:21 18 POLICY. AND IF SOMEONE WANTS TO READ ON FURTHER AND UNDERSTAND
09:49:25 19 THE SPECIFICS OF HOW THAT OPERATES, IN OTHER WORDS TO
09:49:27 20 UNDERSTAND HOW THE PRIVACY POLICY ACTUALLY WORKS, AND WHAT IT
09:49:30 21 REALLY MEANS IN TERMS OF WHEN YOU GO TO THE THIRD-PARTY CITE,
09:49:33 22 THEN YOU GO TO THE HELP CENTER.

09:49:34 23 THE COURT: IS THAT THE SAME THING AS AN OWNERS
09:49:36 24 MANUAL IN YOUR TESLA THAT YOU MIGHT DRIVE? IS IT IN THE
09:49:41 25 OWNER'S MANUAL?

09:49:42 1 MR. GRYGIEL: YOU KNOW, YOUR HONOR, I AM GLAD YOU
09:49:44 2 BROUGHT THAT UP BECAUSE YESTERDAY IN OUR MOOT COURT, I USED
09:49:47 3 THAT EXAMPLE. AND IT WAS SLIGHTLY DIFFERENT, I SAID, LET'S
09:49:48 4 SAY --

09:49:49 5 THE COURT: IT WASN'T A TESLA, IT WAS PROBABLY A FORD
09:49:51 6 OR SOMETHING.

09:49:51 7 MR. GRYGIEL: IN MY CASE, YOUR HONOR, IT WAS A BEAT
09:49:53 8 UP FORD F150.

09:49:55 9 AND MY ARGUMENT WOULD BE LIKE THIS, IF I GO TO AN
09:49:58 10 AUTOMOBILE DEALERSHIP AND I SIGN MY PURCHASE CONTRACT, AND
09:50:00 11 UNDERNEATH THAT THEY STICK A BUNCH OF DOCUMENTS THAT HAVE TO
09:50:04 12 DEAL WITH WARRANTIES AND REVISITS IN THE CASE OF RECALLS, AND
09:50:06 13 THAT SORT OF THING, AND IT REFERS TO THEM, YOU'VE GOT
09:50:09 14 INCORPORATION BY REFERENCE.

09:50:10 15 YOU DON'T HAVE IT IF THEY ALSO GAVE ME A COUPLE OF
09:50:14 16 BROCHURES TO BUY A NEW CAR IN TEN YEARS.

09:50:16 17 OUR CASE IS NOT LIKE THAT. WHAT WE ARE TALKING ABOUT HERE
09:50:17 18 IS --

09:50:17 19 THE COURT: WELL, I'M TALKING ABOUT AN OWNER'S
09:50:19 20 MANUAL.

09:50:19 21 YOU ARE SAYING, GEE, IF YOU NEED MORE HELP WITH THIS HELP
09:50:22 22 CENTER, PERHAPS HOW DO I DO THIS, HOW DO I MOVE THIS, HOW DO I
09:50:26 23 CHANGE PROFILE, WHATEVER IT IS, ISN'T THE HELP CENTER AN
09:50:29 24 OWNER'S MANUAL?

09:50:30 25 MR. GRYGIEL: I SUPPOSE, YOUR HONOR, TO SOME EXTENT

09:50:32 1 IT IS, BUT IT CONTAINS PROMISES, IT CONTAINS COMMITMENTS.

09:50:36 2 WHAT YOU HAVE THERE WHEN YOU READ THE EXHIBITS, WHAT DOES
09:50:39 3 FACEBOOK DO WITH THE INFORMATION IT GETS FROM ME? AND THEN
09:50:42 4 FACEBOOK COMES BACK AND TELLS YOU, THAT IS A CONTRACTURAL
09:50:45 5 REPRESENTATION IN RESPONSE TO A FREQUENTLY ASKED QUESTION ABOUT
09:50:48 6 WHAT WE DO WITH YOUR INFORMATION.

09:50:49 7 THE COURT: SO THAT'S -- I HEAR WHAT YOU ARE SAYING,
09:50:52 8 AND I'M TRYING TO FASHION A SITUATION WHERE IT ALMOST SOUNDS
09:50:57 9 LIKE WHATEVER FACEBOOK SAYS THEN, THEY WOULD CONTRACT, WHATEVER
09:51:02 10 THEY SAY IN WHATEVER PAGE, WHEREVER IT IS, A CONSUMER COULD
09:51:06 11 SAY, WELL, YOU SAID THIS AND THEREFORE WE ARE IN CONTRACT.

09:51:10 12 MR. GRYGIEL: AS IT DEALS WITH WHAT WE ARE HERE
09:51:13 13 BEFORE THE COURT TODAY, ON SOCIAL PLUG-INS, I THINK THE ANSWER
09:51:17 14 IS UNEQUIVOCALLY, YES.

09:51:18 15 YOU CAN'T POSSIBLY -- IT SEEMS TO ME YOU CAN'T CONSTRUCT A
09:51:21 16 RATIONAL CONTRACTURAL UNIVERSE WHERE PEOPLE CAN PREDICT
09:51:24 17 BEHAVIOR AND UNDERSTAND THE ECONOMIC CONSEQUENCES OF BEHAVIOR,
09:51:27 18 A PURELY CONTRACTURAL REGIME, WHERE ONE PARTY CAN SAY HERE IS
09:51:32 19 WHAT WE GET WHEN YOU ARE LOGGED OUT. VERY DIFFERENTLY, HERE IS
09:51:35 20 WHAT WE GET WHEN YOU ARE LOGGED IN. AND THEN HAVE THEM BE ABLE
09:51:38 21 TO SAY, WE DIDN'T MEAN ANY OF IT. THE CONTRACT MEANS WHAT I
09:51:41 22 SAY.

09:51:42 23 THE COURT: I UNDERSTAND THAT PART.

09:51:43 24 BUT THE FLIP SIDE OF THAT IS A CONSUMER SAYING GHEE, MY
09:51:46 25 INTERPRETATION OF THE HELP PAGES, THE OWNER'S MANUAL IS THIS,

09:51:52 1 AND IF I GO BACK TO THE SRR, WHATEVER IT IS, THE STATEMENT OF
09:51:57 2 RIGHTS SPECIAL RESPONSIBILITIES, I THINK I'M IN CONTRACT WITH
09:51:59 3 THEM AND I CAN HOLD THEM TO CONTRACT.

09:52:02 4 DOES THAT OPEN UP A WHOLE DIFFERENT LAYER, THEN, OF
09:52:06 5 INTERPRETATION THAT WE HAVE TO WORRY ABOUT?

09:52:09 6 MR. GRYGIEL: YOUR HONOR IS MAKING THE ARGUMENT OF
09:52:15 7 REDUCTIO AD ABSURDUM. MR. GRYGIEL, DOESN'T YOUR ARGUMENT GO
09:52:16 8 TOO FAR? AND I THINK THE ANSWER IS NO, IT DOESN'T.

09:52:19 9 HERE WE HAVE A LEVIATHAN OF A COMPANY, SAYING THINGS
09:52:22 10 CAREFULLY TO ITS USERS ABOUT HOW IT USES ITS DATA. THERE IS
09:52:27 11 NOTHING TO ME THAT STRIKES ME AS, GHEE WHIZ, THAT'S A REAL
09:52:32 12 PROBLEM TO HOLD FACEBOOK TO THAT, IF THEY SAY IT AND IT IS IN
09:52:35 13 THE HELP CENTER, WHICH IS IN THE PRIVACY POLICY, WHICH IS IN
09:52:38 14 THE STATEMENT OF RIGHTS AND RESPONSIBILITIES, THEN IT'S IN.

09:52:40 15 THE COURT: THAT GETS BACK TO THAT TRAIL.

09:52:45 16 BUT LET'S ANALYZE THAT. I THINK THAT'S WHAT I'M REALLY
09:52:48 17 INTERESTED IN IS THAT TRAIL. HOW DO YOU HACK THROUGH THAT
09:52:52 18 TRAIL, OR DO YOU HAVE TO HACK? IS IT PAVED, OR DO YOU HAVE TO
09:52:55 19 CUT YOUR WAY THROUGH BRUSH TO MAKE THAT CONNECTION?

09:52:58 20 MR. GRYGIEL: THAT'S A GOOD ANALOGY.

09:53:00 21 I THINK IT'S NOT ONLY PAVED, BUT LIGHTED AND GUIDED.
09:53:03 22 BECAUSE HERE WE HAVE FACEBOOK, ITSELF, SAYING NO QUESTION, SRR
09:53:06 23 GOES RIGHT TO THE PRIVACY POLICY; READ IT, IT'S IMPORTANT, IT
09:53:09 24 DEALS WITH HOW WE COLLECT THE DATA.

09:53:11 25 SO THAT PART OF THE "DAISY CHAIN" IS EASY. THERE'S NO

09:53:15 1 QUESTION ABOUT THAT. LOADS OF CASES CAN SAY YOU CAN
09:53:16 2 INCORPORATE ANOTHER DOCUMENT BY REFERENCE.

09:53:18 3 THE PROBLEM COMES WITH THE HELP CENTER PAGES. BUT THE
09:53:21 4 PRIVACY POLICY ITSELF SAYS, WE INCORPORATE, IN SO MANY WORDS,
09:53:24 5 WE ARE INCORPORATING --

09:53:26 6 THE COURT: WAIT, WAIT. IN SO MANY WORDS? DOES IT
09:53:29 7 SAY "WE INCORPORATE."

09:53:29 8 MR. GRYGIEL: LET ME GET THE LANGUAGE FOR YOUR HONOR.
09:53:32 9 "OUR DATA USE POLICY ALSO PROVIDES A LINK." THAT SOUNDS
09:53:42 10 LIKE IT SATISFIES THE TEST FOR ME

09:53:44 11 MR. BROWN: WHICH EXHIBIT ARE WE LOOKING AT?

09:53:47 12 MR. GRYGIEL: THIS IS EXHIBIT T.

09:53:48 13 "OUR DATA USE POLICY ALSO PROVIDES A LINK TO OUR HELP
09:53:51 14 CENTER WHERE WE ANSWER FREQUENTLY ASKED QUESTIONS ABOUT A
09:53:54 15 VARIETY OF TOPICS, INCLUDING QUESTIONS AROUND SOCIAL PLUG-INS."

09:53:57 16 THE COURT: IS THE WORD "INCORPORATE" IN ANY OF THAT?

09:54:00 17 MR. GRYGIEL: NO, YOUR HONOR. BUT IT IS ABSOLUTELY
09:54:02 18 BEYOND PER ADVENTURE THAT YOU DON'T NEED TO USE ANY BUZZ WORDS
09:54:07 19 OF INCORPORATION.

09:54:07 20 THE COURT: WELL, WE START WITH INCORPORATION AND
09:54:09 21 WORK OUR WAY DOWN. SO THERE'S NO INCORPORATION.

09:54:12 22 WHAT IS IT IN THAT LANGUAGE, THEN, THAT WOULD SUGGEST THAT
09:54:15 23 INCORPORATION IS APPROPRIATE?

09:54:16 24 MR. GRYGIEL: TWO THINGS.

09:54:17 25 ONE, THE EXACT WORDS FACEBOOK CHOSE TO USE. "LINK."

09:54:23 1 TWO, THE WORDS FACEBOOK NOWHERE, IN ANY OF THESE
09:54:26 2 DOCUMENTS, CHOSE TO USE.

09:54:29 3 THE COURT: LINK IS A PATH.

09:54:30 4 MR. GRYGIEL: YES, YES.

09:54:32 5 AND DEALING WITH THE VERY ISSUE, PRIVACY POLICY, DATA USE
09:54:36 6 POLICY, AND THAT'S HOW YOU GO TO THE HELP CENTER BECAUSE THAT
09:54:39 7 TALKS ABOUT IT. THAT IS NOT AT ALL A DAISY CHAIN, THAT IS A
09:54:44 8 DIRECT LINK.

09:54:45 9 AND YOUR HONOR, IT BEARS MENTION HERE, NOWHERE DID
09:54:48 10 FACEBOOK EVER, IN ANY OF THESE UNDERTAKINGS, TELL ITS USERS, BY
09:54:52 11 THE WAY, THIS STATEMENT OF RIGHTS AND RESPONSIBILITIES, IT
09:54:55 12 DOESN'T INCLUDE THE PRIVACY POLICY OR DATA USE POLICY, AND IT
09:55:00 13 DOES NOT INCLUDE THE HELP CENTER PAGES.

09:55:03 14 THE COURT: DO THEY NEED TO DO THAT?

09:55:04 15 MR. GRYGIEL: I DON'T THINK THEY NEED TO DO THAT,
09:55:06 16 YOUR HONOR. THEY HAVE AN INTEGRATION CLAUSE IN THOSE
09:55:09 17 AGREEMENTS, SOMETHING I'VE LOOKED AT. BUT THEN IT BEGS THE
09:55:12 18 QUESTION WHAT ARE YOU INTEGRATING, SO THAT DOESN'T GET YOU VERY
09:55:15 19 FAR.

09:55:16 20 BUT FACEBOOK COULD HAVE SIMPLY CHOSEN AS A SIMPLE
09:55:20 21 DECLARATIVE SENTENCE TO PROTECT ITSELF FROM ANY CLAIMS IT MADE
09:55:23 22 IN THE HELP CENTER BEING CONTRACTURAL, OR THE PRIVACY POLICY
09:55:24 23 BEING CONTRACTURAL, BY DISCLAIMING THOSE AS PART OF ANY
09:55:24 24 CONTRACT.

09:55:24 25 THE COURT: WELL, ISN'T THAT A STATEMENT THAT THEY

09:55:30 1 DIDN'T BELIEVE THEY WERE IN CONTRACT?

09:55:30 2 MR. GRYGIEL: WELL, YOUR HONOR, THAT MIGHT BE.

09:55:31 3 ON THE OTHER HAND, WHEN, AS I'VE MENTIONED BEFORE, WHEN
09:55:34 4 YOU'VE GOT THE PEOPLE INSIDE THE COMPANY SAYING EXACTLY THE
09:55:37 5 OPPOSITE, THAT WOULD BE AN AWFULLY EASY QUESTION FOR A JURY TO
09:55:39 6 RESOLVE IN MY FAVOR.

09:55:41 7 AND THE THIRD WAY I THINK WE GET TO THIS LINK FROM THE
09:55:44 8 DATA USE POLICY, IS THE VERY PRESENCE OF EVERY ONE OF THE -- ON
09:55:51 9 EVERY FACEBOOK WEB PAGE, OF THE HELP CENTER PAGES, AND ON
09:55:55 10 VIRTUALLY EVERY PAGE OF FACEBOOK'S WEBSITE OF THE PRIVACY
09:55:59 11 POLICY.

09:55:59 12 THOSE ARE THEIR WORDS TO CONGRESS. THOSE AREN'T MY WORDS.

09:56:02 13 SO WHAT THEY ARE SAYING IN THE PRIVACY POLICY IS THAT WE
09:56:05 14 USE A LAYERED APPROACH, WE GIVE YOU SOME GENERAL INFORMATION IN
09:56:09 15 THE PRIVACY POLICY, AND WHEN YOU REALLY WANT TO KNOW WHAT WE
09:56:11 16 ARE DOING WITH YOUR DATA THAT WE ARE COLLECTING UP ACROSS THE
09:56:15 17 INTERNET, THEN YOU GO TO THE HELP CENTER AND THAT WILL TELL
09:56:17 18 YOU.

09:56:17 19 AND IT'S FAIR ENOUGH TO SAY THAT FACEBOOK IS ON NOTICE OF
09:56:21 20 WHAT THE CLAIM IS, THE KINDS OF ALLEGATIONS AND PROOF THEY
09:56:24 21 WOULD NEED TO DEFEND IT. AND I THINK WE MORE THAN SATISFIED
09:56:27 22 THE QUESTION OF "BORROWED" FROM TWOMBLY, HAVE WE GENERATED A
09:56:32 23 REASONABLE INFERENCE THAT DISCOVERY WOULD YIELD EVIDENCE TO
09:56:36 24 SUPPORT THE ELEMENTS OF THE CLAIM.

09:56:38 25 AND A COUPLE OF OTHER POINTS THERE, YOUR HONOR, THAT I

09:56:40 1 THINK ARE IMPORTANT. TO THE EXTENT THERE'S ANY AMBIGUITY ABOUT
09:56:44 2 THIS, AS NUMEROUS CASES SAY, IT'S BLACK LETTER LAW, WE CITED
09:56:49 3 SANDQUIST, YOU CONSTRUE THAT AMBIGUITY AGAINST THE PARTY THAT
09:56:52 4 CREATED IT. IN FACT, THE CALIFORNIA CIVIL CODE SAYS PRECISELY
09:56:55 5 THE SAME THING.

09:56:56 6 THE COURT: WELL, WHAT'S YOUR POSITION ON THE DATA
09:56:58 7 USE POLICY?

09:56:59 8 AND I ASK THE TIMING QUESTION, THE SEPTEMBER 7TH DATE AND
09:57:03 9 THE APRIL 26TH DATE. DO YOU HAVE A THOUGHT ABOUT THAT?

09:57:08 10 MR. GRYGIEL: CERTAINLY WITHIN THE ORIGINAL PLEADED
09:57:11 11 CLASS PERIOD, LARGELY CONSISTENT WITH THE REPRESENTATIONS, IN
09:57:14 12 TERMS OF THEIR THEME, THE STRUCTURE IS A LITTLE DIFFERENT AND
09:57:17 13 THE WORDS ARE DIFFERENT, BUT THE THEME IS THE SAME AS THE
09:57:20 14 PREVIOUS PRIVACY POLICIES; ESSENTIALLY, A DISCLOSURE TO THE
09:57:23 15 USERS, HERE IS WHAT WE COLLECT, HERE IS HOW WE USE IT, HERE IS
09:57:27 16 WHAT WE DO WITH IT, HERE'S HOW WE PROTECT IT OR DO NOT PROTECT
09:57:30 17 IT, WITH ALL KINDS OF DISCLOSURES.

09:57:32 18 MY VIEW IS IT IS ONE OF A PIECE. THIS ENTIRE PRIVACY
09:57:35 19 ISSUE IS ESSENTIALLY ONE OF A PIECE. YOU'VE GOT FACEBOOK
09:57:39 20 MAKING A NUMBER OF ITERATIONS, WHICH ISN'T A DEFENSE TO
09:57:41 21 CONTRACT, THAT'S SIMPLY SOMETHING FOR DISCOVERY, I'M SUPPOSED
09:57:46 22 TO UNDERSTAND WHAT EXACTLY PEOPLE ARE RELYING ON. YOU DON'T
09:57:49 23 NEED RELIANCE, IT'S CONTRACT. WHAT EXACTLY WAS THE CONTRACT AT
09:57:52 24 THE RELEVANT TIME FOR A PARTICULAR USER.

09:57:54 25 BUT THAT'S SOMETHING YOU DO IN DISCOVERY. AND AS

09:57:56 1 MR. BROWN WAS UNKIND ENOUGH TO POINT OUT, WE ARE DOWN TO TWO
09:57:59 2 CLAIMS.

09:57:59 3 SO WE'VE GOT A CONTRACT CLAIM AND IMPLIED COVENANT CLAIM.
09:58:03 4 THAT WOULD NOT BE TERRIBLY DIFFICULT TO SORT OUT.

09:58:04 5 AND WE CITED SOME CASES, YOUR HONOR, I THINK WEBER
09:58:07 6 MANUFACTURING WAS ONE, GUIDOTTI WAS ONE OF THE OTHERS THAT SAY,
09:58:11 7 LOOK, TYPICALLY INCORPORATE BY REFERENCE IS A QUESTION OF LAW
09:58:15 8 FOR THE COURT, BUT THERE ARE CIRCUMSTANCES WHERE IT'S DIFFICULT
09:58:18 9 ENOUGH THAT THIS IS A QUESTION OF FACT.

09:58:21 10 I THINK WE ABSOLUTELY PASS MUSTER HERE. BUT IF WE DON'T,
09:58:24 11 IT'S CERTAINLY A QUESTION FOR FACT. IT WOULD BE SIMPLE ENOUGH
09:58:27 12 MATTER TO GO TO FACEBOOK, GET SOME FURTHER DISCOVERY, TAKE A
09:58:31 13 COUPLE OF DEPOSITIONS AND SAY, WHY DIDN'T YOU INCLUDE, FOR
09:58:33 14 EXAMPLE, A DISCLAIMER? DIDN'T YOU UNDERSTAND WHEN YOU SAID WE
09:58:36 15 CAN'T DO THIS AND WE DON'T DO THIS WITHOUT DISCLOSURE AND
09:58:40 16 CONSENT, DIDN'T YOU UNDERSTAND YOU WERE ALREADY PROMISED
09:58:42 17 ELSEWHERE YOU WERE NOT TO DO THIS? AND DIDN'T YOU UNDERSTAND
09:58:45 18 THAT PROMISE WAS MATERIAL?

09:58:45 19 I SEE THAT AS A VERY FINITE MATTER.

09:58:47 20 THE POINT FOR TODAY, YOUR HONOR, IS THAT THAT IS A FACTUAL
09:58:52 21 QUESTION, NOT SOMETHING THAT CAN BE RESOLVED ON LAWYERS
09:58:55 22 CHARACTERIZING DOCUMENTS, PARTICULARLY WHEN YOU HAVE AS CLEAR A
09:58:58 23 CHAIN AS YOU DO HERE.

09:58:58 24 THE FACT THIS INCLUDES THREE DOCUMENTS IS, FRANKLY, A
09:59:01 25 MATTER OF SUPREME INDIFFERENCE. AS LONG AS THE ROAD, TO USE

09:59:04 1 YOUR HONOR'S ANALOGY, IS PAVED, AND WE THINK IT'S LIGHTED,
09:59:06 2 THAT'S GOOD ENOUGH, YOU GET THERE.

09:59:08 3 THE COURT: OKAY. THANK YOU VERY MUCH.

09:59:10 4 MR. GRYGIEL: ANYTHING ELSE? BECAUSE I'VE GOT PLENTY
09:59:13 5 OF OTHER THINGS I WOULD LIKE TO SAY, YOUR HONOR.

09:59:14 6 THE COURT: OH, I'M SURE YOU DO, BUT I'VE READ THE
09:59:17 7 PLEADINGS. THIS WAS THE ISSUE I WAS CURIOUS ABOUT.

09:59:20 8 MR. GRYGIEL: EXCUSE ME, YOUR HONOR.

09:59:21 9 THE COURT: YES.

09:59:22 10 MR. STRAITE: IS IT OKAY -- YOU ASKED A QUESTION, AND
09:59:24 11 IT'S IMPORTANT TO SUPPLEMENT THE RESPONSE, IF I MAY, WITH ONE
09:59:27 12 SENTENCE HERE.

09:59:28 13 THE COURT: OF COURSE.

09:59:28 14 MR. STRAITE: YOU ASKED WHETHER IT'S PERMISSIBLE TO
09:59:31 15 INCORPORATE THE SEPTEMBER 7TH, 2011 DATA USE POLICY, WHICH IS
09:59:35 16 THE NEW NAME FOR THE PRIVACY POLICY, IT'S THE SAME DOCUMENT,
09:59:38 17 BUT NEW NAME, WHETHER IT'S PERMISSIBLE TO INCORPORATE THAT INTO
09:59:41 18 THE EARLIER DATE OF SRR. KIND OF GO BACKWARDS IN TIME.

09:59:45 19 THAT'S ACTUALLY -- PROBABLY NOT THE RIGHT QUESTION. THE
09:59:47 20 QUESTION IS WHEN IS THE DATE OF THE CONTRACT? IT'S NOT THE
09:59:49 21 DATE IT WAS ISSUED, IT'S THE DATE THAT WAS AGREED TO BY THE
09:59:52 22 USER.

09:59:53 23 THE CONTRACT SAYS, THIS IS THE SRR, "BY USING OR ACCESSING
09:59:55 24 FACEBOOK, YOU AGREE TO THIS STATEMENT."

09:59:59 25 SO EVERY TIME THE USER ACCESSES THE FACEBOOK WEBSITE, THEY

10:00:02 1 AGREE TO THE SRR.

10:00:04 2 SO SAY --

10:00:05 3 THE COURT: EVERY TIME YOU ACCESS, YOU ARE IN A NEW
10:00:09 4 CONTRACT?

10:00:10 5 MR. STRAITE: THAT'S FACEBOOK'S POSITION, YES, YOUR
10:00:12 6 HONOR.

10:00:12 7 THAT'S WHAT THE CONTRACT SAYS. I WOULD BE HAPPY
10:00:18 8 INDUSTRY-WIDE IF THAT WEREN'T THE CASE, BUT UNFORTUNATELY THE
10:00:18 9 LAW SAYS OTHERWISE.

10:00:18 10 I HAVE MANY, MANY CASES WHERE I WOULD BE MUCH HAPPIER IF
10:00:21 11 THE CONTRACT IS NOT RE-AGREED TO EVERY TIME WHEN USERS USE THAT
10:00:25 12 SERVICE, BUT THAT'S THE LANGUAGE HERE OF THE CONTRACT.

10:00:27 13 SO IF A SUBSCRIBER OF PLAINTIFF ACCESSES THE SERVICE ON
10:00:31 14 SEPTEMBER 7TH, SEPTEMBER 8TH, 9TH OF 2011, AT THAT POINT THEY
10:00:34 15 ARE RE-AGREEING, ACCORDING TO THE TERMS OF THE CONTRACT, AND
10:00:38 16 THEREFORE WE DON'T HAVE TO GO BACK IN TIME, AND THE DATA USE
10:00:40 17 POLICY --

10:00:40 18 THE COURT: IT'S A CONTINUOUS CONTRACT THEN, ISN'T
10:00:43 19 IT?

10:00:43 20 MR. STRAITE: NO, IT'S ONLY EACH TIME SOMEONE
10:00:46 21 ACCESSES FACEBOOK.

10:00:47 22 IF SOMEONE ACCESSES THE SERVICE EVERY MONTH, ONCE A MONTH,
10:00:50 23 THEN THEY AGREE TO THE CONTRACT EACH TIME.

10:00:52 24 THE COURT: EVERY DAY.

10:00:53 25 MR. STRAITE: MANY PEOPLE ACCESS IT MORE THAN ONCE

10:00:56 1 PER DAY, YES.

10:00:57 2 THE COURT: AND SO THERE'S CONTINUAL CONTRACT GOING
10:00:59 3 ON.

10:00:59 4 MR. STRAITE: IT'S AGREED TO EVERY SINGLE TIME
10:01:01 5 SOMEONE ACCESSES, ACCORDING TO THE TERMS OF THE CONTRACT.

10:01:04 6 THAT'S IN PARAGRAPH 23 OF THE COMPLAINT. SO THAT'S THE
10:01:08 7 TERMS OF THE CONTRACT, AND SO IF THERE'S A PROBLEM WITH THE
10:01:11 8 TIMING, THIS SOLVES THAT TIMING.

10:01:13 9 THE COURT: OKAY.

10:01:13 10 MR. STRAITE: I JUST WANTED TO POINT THAT OUT.

10:01:15 11 THE COURT: OKAY. GREAT. THANK YOU VERY MUCH.

10:01:18 12 MR. GRYGIEL: THANK YOU, YOUR HONOR.

10:01:21 13 THE COURT: MR. BROWN.

10:01:22 14 MR. BROWN: WELL, THE DAILY CONTRACTING POINT JUST
10:01:25 15 MAKES THE MIND RACE WHEN THINKING ABOUT CLASS CERTIFICATION,
10:01:27 16 BUT WE WILL PUT THAT ASIDE FOR TODAY.

10:01:33 17 SO PLAINTIFF'S COUNSEL SPOKE OF A "RATIONAL CONTRACTURAL
10:01:39 18 UNIVERSE," AND I WOULD SUBMIT THAT THE POSITIONS THAT THEY'VE
10:01:44 19 TAKEN HERE ARE FAR FROM RATIONAL.

10:01:48 20 PLAINTIFFS HAVE LITERALLY TAKEN THE POSITION, IF I HEARD
10:01:52 21 IT CORRECTLY, THAT EVERY STATEMENT ON THE WEBSITE, THE FACEBOOK
10:01:57 22 WEBSITE, IS PART OF THE CONTRACT, UNLESS FACEBOOK SPECIFICALLY
10:02:02 23 DISCLAIMS IT WITHIN THE STATEMENT OF RIGHTS AND
10:02:04 24 RESPONSIBILITIES.

10:02:05 25 I HAVE NEVER EVER HEARD ANYBODY TAKE THAT POSITION ABOUT

10:02:11 1 HOW WHEN TWO PARTIES DECIDE AND WHAT TERMS ARE GOING TO BE
10:02:15 2 INCLUDED IN A CONTRACT. THAT'S AN ABSURD PROPOSITION.
10:02:18 3 OBVIOUSLY, IT CAN'T BE THE CASE.

10:02:22 4 THE PLAINTIFFS HAVE TOLD YOU THAT, HAVE TAKEN THE POSITION
10:02:29 5 THAT THE SRR INCORPORATES BY REFERENCE THE PRIVACY POLICY,
10:02:34 6 BECAUSE ESSENTIALLY THE STATEMENT OF RIGHTS AND
10:02:37 7 RESPONSIBILITIES SAYS READ THE PRIVACY POLICY. THAT'S
10:02:41 8 ESSENTIALLY THEIR POSITION.

10:02:42 9 WHAT I WANTED TO POINT OUT IS, YOU KNOW, THERE ARE
10:02:49 10 DIFFERENT WAYS THAT PARTIES CAN DO THIS. AND AT THE TIME, AT
10:02:58 11 THE TIME THAT WE ARE TALKING ABOUT HERE, THE PRIVACY POLICY WAS
10:03:00 12 NOT INCORPORATED INTO THE STATEMENT OF RIGHTS AND
10:03:02 13 RESPONSIBILITIES, WHICH IS THE POSITION THAT I TOOK EARLIER.

10:03:05 14 AND THE MERE SORT OF REFERENCES AND ENCOURAGEMENT TO READ
10:03:08 15 IT DOESN'T SOMEHOW MAKE IT A CONTRACTURAL TERM.

10:03:11 16 BUT I ALSO WANTED TO JUST PROVIDE BY WAY OF EXAMPLE, AND
10:03:15 17 THIS WAS ATTACHED AS EXHIBIT 6 TO MY DECLARATION IN SUPPORT OF
10:03:23 18 THE MOTION, THIS IS A STATEMENT OF RIGHTS AND RESPONSIBILITIES.
10:03:27 19 IT'S DATED JANUARY 30TH, 2015, SO QUITE A BIT LATER THAN THE
10:03:33 20 TIME PERIOD THAT WE ARE TALKING ABOUT HERE.

10:03:38 21 AND AT THE END OF THAT STATEMENT OF RIGHTS AND
10:03:40 22 RESPONSIBILITIES IN BOLD FACE FONT, IT SAYS, "BY USING OR
10:03:45 23 ACCESSING FACEBOOK SERVICES, YOU AGREE THAT WE CAN COLLECT AND
10:03:49 24 USE SUCH CONTENT AND INFORMATION IN ACCORDANCE WITH THE DATA
10:03:53 25 POLICY, AS AMENDED FROM TIME TO TIME."

10:03:57 1 SO HERE WE HAVE A VERY SPECIFIC STATEMENT WITHIN THE SRR
10:04:04 2 WHEREBY USERS ARE VERY CLEARLY AND UNEQUIVOCALLY AGREEING THAT
10:04:10 3 THE TERMS OF THE DATA POLICY NEED TO BE COMPLIED WITH.

10:04:15 4 AND THAT IS DIFFERENT FROM WHAT WE HAVE IN ANY OF THE
10:04:18 5 THREE PRIVACY POLICIES THAT ARE ATTACHED TO THE COMPLAINT, OR
10:04:22 6 THE DATA USE POLICY ATTACHED TO THE COMPLAINT.

10:04:31 7 LET'S SEE, THE NEXT POINT IS THAT YOU ASK A NUMBER OF
10:04:38 8 REALLY POINTED QUESTIONS ABOUT WHAT LANGUAGE IN THE DATA USE
10:04:44 9 POLICY THEY WERE RELYING ON FOR THEIR PROPOSITION THAT THESE
10:04:48 10 PARTICULAR HELP PAGES THAT THEY ARE RELYING ON ARE
10:04:52 11 INCORPORATED.

10:04:53 12 AND I FOUND IT VERY STRIKING BECAUSE THE ANSWER WAS NOT TO
10:04:59 13 PULL UP THE DATA USE POLICY AND POINT YOUR HONOR TO ANY
10:05:02 14 LANGUAGE IN THE DATA USE POLICY, WHICH IS WHAT ONE WOULD EXPECT
10:05:05 15 IN RESPONSE TO A QUESTION LIKE THAT, BUT RATHER TO GO TO THIS
10:05:10 16 LETTER DATED JANUARY 6, 2012 A LITTLE BIT LATER, BY THE WAY,
10:05:18 17 THAN THE CLASS PERIOD HERE, AND THIS IS ATTACHED AS EXHIBIT T,
10:05:23 18 AS IN TOM, TO THE COMPLAINT. YOU RECALL I ASKED FOR
10:05:28 19 CLARIFICATION WHAT HE WAS READING FROM BECAUSE IT DIDN'T SOUND
10:05:33 20 LIKE THE DATA USE POLICY.

10:05:35 21 AND ESSENTIALLY, WHAT THEY ARE DOING IS THEY ARE TRYING TO
10:05:38 22 USE THIS LETTER TO SOMEHOW ESTABLISH THAT THE HELP CENTER WAS
10:05:41 23 INCORPORATED INTO THE DATA USE POLICY, RATHER THAN POINTING TO
10:05:45 24 THE LANGUAGE IN THE DATA USE POLICY ITSELF, WHICH I THINK IS
10:05:48 25 VERY, VERY TELLING.

10:05:53 1 AND I MIGHT JUST MAKE ONE ADDITIONAL POINT WHILE WE ARE
10:05:56 2 TALKING ABOUT EXHIBIT T, AS IN TOM.

10:05:58 3 THEY MAKE A LOT OUT OF THIS LANGUAGE IN THE LETTER ABOUT A
10:06:03 4 LAYERED APPROACH. AND WHAT THEY ARE TRYING TO SUGGEST, AND I
10:06:08 5 WOULD SUGGEST MISREPRESENT, IS THAT FACEBOOK IS SOMEHOW BOUGHT
10:06:13 6 INTO THIS CHAIN OF INCORPORATION THEORY THAT THEY ARE PUSHING
10:06:16 7 HERE IN THIS THIRD AMENDED COMPLAINT. AND IT HAS ABSOLUTELY
10:06:22 8 NOTHING TO DO WITH THAT.

10:06:23 9 WHAT IT SAYS HERE IS THEY ARE TALKING ABOUT THE DATA USE
10:06:27 10 POLICY. THIS IS ON PAGE 9 OF THE LETTER. SO THIS IS DOCUMENT
10:06:32 11 ECF NUMBER 157-20, AND PAGE 9 OF THE LETTER, BATES NUMBER
10:06:39 12 ENDING 248.

10:06:41 13 AND IT SAYS IN IT, MEANING IN THE DATA USE POLICY, WE USE
10:06:46 14 A LAYERED APPROACH. SUMMARIZING OUR PRACTICES ON THE FRONT
10:06:51 15 PAGE, AND THEN ALLOWING PEOPLE TO CLICK THROUGH THE POLICY FOR
10:06:54 16 MORE DETAILS.

10:06:55 17 THEY ARE TALKING ABOUT A LAYERED APPROACH WITHIN THE DATA
10:06:59 18 USE POLICY, SIMPLY THAT YOU'VE GOT A SUMMARY OF THE DATA USE
10:07:03 19 PRACTICES ON THE FIRST PAGE, AND THEN YOU CAN HYPERLINK TO MORE
10:07:07 20 THOROUGH DESCRIPTIONS OF THOSE GENERAL PRACTICES.

10:07:10 21 IT'S A LAYERED APPROACH WITHIN THE DATA USE POLICY ITSELF.
10:07:14 22 THERE IS NO SORT OF ADMISSION IN THIS LETTER OF JANUARY 2012
10:07:20 23 THAT FACEBOOK WAS SOMEHOW ENDORSING THIS DAISY CHAIN THEORY OF
10:07:25 24 INCORPORATION WITH RESPECT TO ITS STATEMENT OF RIGHTS AND
10:07:28 25 RESPONSIBILITIES.

10:07:33 1 MIGHT I ALSO POINT OUT IN TERMS OF INCORPORATION OF THE
10:07:38 2 HELP CENTER, THERE WAS A LOT OF TIME SPENT TRYING TO CONVINCING
10:07:41 3 YOUR HONOR THAT THE PRIVACY POLICY WAS INCORPORATED INTO THE
10:07:45 4 STATEMENT OF RIGHTS AND RESPONSIBILITIES, BUT OF COURSE
10:07:47 5 ULTIMATELY, THEY NEED ONE MORE LINK IN THE CHAIN AS WELL IN
10:07:50 6 ORDER TO GET TO THE HELP CENTER PAGES.

10:07:51 7 AND WE DON'T NEED TO TALK ABOUT THESE IN TOO MUCH DETAIL,
10:07:57 8 BUT I WANTED TO GUIDE THE COURT'S ATTENTION TO THE WOODS V.
10:08:00 9 GOOGLE CASE WHICH WE CITE IN OUR BRIEF, THAT WAS A DECISION BY
10:08:04 10 JUDGE FOGEL IN 2011. AND THAT WAS A CASE THAT -- IT WAS A
10:08:09 11 CLASS ACTION, AND IT WAS A CLASS OF ADVERTISERS SUING GOOGLE
10:08:13 12 OVER THE AD WORDS IN THE PRODUCT.

10:08:15 13 AND THE AGREEMENT THERE NOTED, "PROGRAM USE IS SUBJECT TO
10:08:22 14 ALL APPLICABLE GOOGLE AND PARTNER POLICIES, INCLUDING THE
10:08:26 15 EDITORIAL GUIDELINES."

10:08:30 16 AND JUDGE FOGEL HELD THERE THAT, "WHILE THE REFERENCE IN
10:08:33 17 THE AGREEMENT TO INCORPORATION OF ALL APPLICABLE GOOGLE
10:08:36 18 POLICIES IS CLEAR AND UNEQUIVOCAL, IT IS NOT APPARENT THAT THE
10:08:40 19 TERMS OF GOOGLE'S INVALID CLICKS POLICY IN THE AD WORDS HELP
10:08:45 20 CENTER ARE KNOWN OR EASILY AVAILABLE TO THE CONTRACTING
10:08:49 21 PARTIES.

10:08:49 22 THE COMPLAINT REFERS TO MORE THAN A DOZEN PAGES IN BOTH
10:08:53 23 THE AD WORDS HELP CENTER AND AD SENSE HELP CENTER, THAT
10:08:57 24 ALLEGEDLY IDENTIFIED GOOGLE'S OBLIGATIONS UNDER THE INVALID
10:09:01 25 CLICKS POLICY.

10:09:03 1 THE FACT THAT STATEMENTS ABOUT INVALID CLICKS ARE SPREAD
10:09:10 2 ACROSS A VARIETY OF PAGES IN A VARIETY OF FORMATS, MAKE IT
10:09:13 3 DIFFICULT TO IDENTIFY THE TERMS OF ANY ACTUAL AND UNAMBIGUOUS
10:09:17 4 CONTRACTURAL OBLIGATIONS."

10:09:19 5 STRIKINGLY SIMILAR TO THE SITUATION THAT WE HAVE HERE.

10:09:24 6 AND FURTHER, THERE WAS THE DUNKEL V. EBAY CASE WHICH WAS A
10:09:29 7 DECISION BY YOUR HONOR IN 2014, WHICH CITED WOODS V. GOOGLE.

10:09:35 8 AND THERE, THERE WAS A CAUSE OF ACTION AGAINST EBAY
10:09:40 9 RELATING TO THE SUSPENSION OF THE PLAINTIFF'S ACCOUNTS. AND
10:09:44 10 PLAINTIFFS ARGUED THAT THE HELP CENTER PAGES THAT THEY ATTACHED
10:09:46 11 TO THE COMPLAINT WERE INCORPORATED INTO THE USER AGREEMENT.
10:09:51 12 BUT THE COURT HELD THAT THE PLAINTIFFS HAD STILL FAILED TO
10:09:54 13 PROPERLY ALLEGE THE EXISTENCE OF AN AGREEMENT, PARTICULARLY IN
10:09:58 14 HOW THE HELP PAGES ARE INCORPORATED INTO THE USER AGREEMENT.
10:10:04 15 AND THAT CLAIM WAS DISMISSED WITHOUT LEAVE TO AMEND.

10:10:07 16 NOT ONLY DID THAT CASE FAVORABLY CITE WOODS V. GOOGLE, BUT
10:10:12 17 I WOULD JUST NOTE THAT THAT WAS ALSO A CONTRACT OF ADHESION AND
10:10:15 18 THAT WAS NOT REALLY RELEVANT TO THE ANALYSIS IN ANY WAY, AND
10:10:19 19 WAS ALSO DECIDED ON THE PLEADINGS.

10:10:23 20 SO THIS IDEA THAT THERE ARE ALL THESE FACTUAL ISSUES,
10:10:26 21 REALLY, I DON'T THINK HOLDS ANY WATER. THIS IS AN ISSUE THAT
10:10:31 22 CAN CERTAINLY BE DECIDED AS A MATTER OF LAW AT THE PLEADINGS
10:10:34 23 STAGE.

10:10:37 24 I MIGHT JUST MAKE ONE OTHER POINT TOO, IF I COULD. AND
10:10:42 25 THAT IS, YOU KNOW, IF THE ENTIRETY OF THE HELP CENTER IS

10:10:44 1 INCORPORATED, YOU KNOW, I DON'T THINK THAT WE'VE EVEN EXTENDED
10:10:50 2 THE LOGIC AS FAR AS IT CAN GO.

10:10:54 3 I ALREADY THINK THAT THAT IS, FRANKLY, AN ABSURD
10:10:57 4 PROPOSITION THAT YOU COULD DO THAT. BUT WHY STOP THERE? THERE
10:11:01 5 ARE LINKS IN THE HELP CENTER, FOR INSTANCE, TO A HELP
10:11:04 6 COMMUNITY, AND THE HELP COMMUNITY, THERE ARE ALL SORTS OF
10:11:07 7 USER-GENERATED COMMENTS ABOUT VARIOUS THINGS ON FACEBOOK, USERS
10:11:12 8 HELPING EACH OTHER. AND THEN FACEBOOK REPRESENTATIVES CHIMING
10:11:16 9 IN WITH HELPFUL COMMENTS, YOU KNOW, FACEBOOK TOOLS AND
10:11:22 10 PRACTICES AND THE LIKE.

10:11:23 11 SO WHY SHOULD WE STOP AT THE HELP CENTER? DOES THE
10:11:27 12 ENTIRETY OF THE HELP COMMUNITY, WHICH IS LINKED TO IN THE HELP
10:11:30 13 CENTER, BECOME PART OF THE CONTRACT?

10:11:31 14 YOU CAN SEE WHERE IT JUST CREATES A WHOLE HOST OF MESSY
10:11:35 15 PROBLEMS, AND THAT'S WHY WE HAVE THE STANDARD OF CLEAR AND
10:11:39 16 UNEQUIVOCAL AND NEEDING THE INCORPORATED DOCUMENT TO BE BROUGHT
10:11:45 17 CLEARLY TO THE REFERENCE OF BOTH CONTRACTING PARTIES AND FOR
10:11:48 18 THERE TO BE CLEAR ASSENT TO IT. IT REINFORCES THE FUNDAMENTAL
10:11:53 19 PRINCIPLE UNDERLYING CONTRACT WHICH IS THAT WE NEED TO ENFORCE
10:11:57 20 THE CONTRACTURAL INTENT OF THE PARTIES.

10:12:00 21 THE COURT: THANK YOU. THANK YOU VERY MUCH.

10:12:02 22 MR. BROWN: THANK YOU, YOUR HONOR.

10:12:03 23 MR. GRYGIEL: MAY I HAVE JUST --

10:12:04 24 THE COURT: OH, I THINK I'VE GOT ENOUGH. THANK YOU.

10:12:06 25 I'M REMINDED OF THE MALTESE FALCON, I THINK IT WAS, WHEN

10:12:11 1 SIDNEY GREENSTREET SPOKE TO SAM SPADE AND SAID, "HERE'S TO
10:12:17 2 PLAIN SPEAKING AND CLEAR UNDERSTANDING." AND I SUPPOSE THEY
10:12:19 3 WERE TALKING WITH CONTRACTS, WEREN'T THEY. I'M SURE THEY WERE.
10:12:23 4 THE MATTER IS UNDER SUBMISSION.

10:12:24 5 THANK YOU VERY MUCH. I APPRECIATE YOUR HELP THIS MORNING.

10:12:27 6 MR. GRYGIEL: THANK YOU, YOUR HONOR.

10:12:30 7 MR. BROWN: THANK YOU, YOUR HONOR.

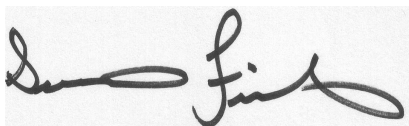
10:12:31 8 (THE PROCEEDINGS WERE CONCLUDED AT 10:12 A.M.)
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CERTIFICATE OF REPORTER

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, CONSTITUTES A TRUE, FULL AND
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY.



SUMMER A. FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

DATED: 11/21/17