

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

IN RE: FACEBOOK INTERNET TRACKING LITIGATION.
CASE NO. MD-12-02314-EJD
SAN JOSE, CALIFORNIA
OCTOBER 5, 2012
PAGES 1 - 58

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: KEEFE BARTELS
BY: STEPHEN G. GRYGIEL
170 MONMOUTH STREET
RED BANK, NEW JERSEY 07701

STEWARTS LAW
BY: DAVID A. STRAITE
535 FIFTH AVENUE
NEWS YORK, NEW YORK 10017

KIESEL BOUCHER LARSON
BY: PAUL R. KIESEL
8648 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90211

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

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

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY,
TRANSCRIPT PRODUCED WITH COMPUTER.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

FOR THE DEFENDANTS:

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

1 SAN JOSE, CALIFORNIA

OCTOBER 5, 2012

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

3 (COURT CONVENED.)

09:43AM 4 THE CLERK: CALLING MDL-12-2314, IN RE: FACEBOOK
09:43AM 5 INTERNET TRACKING LITIGATION.

09:43AM 6 ON FOR MOTION TO DISMISS AND PLAINTIFF'S CORRECTED FIRST
09:43AM 7 AMENDED CONSOLIDATED CLASS ACTION.

09:43AM 8 COUNSEL, PLEASE COME FORWARD AND STATE YOUR APPEARANCES.

09:43AM 9 MR. BROWN: MATTHEW BROWN WITH COOLY FOR FACEBOOK.

09:43AM 10 THE COURT: THANK YOU. GOOD MORNING.

09:43AM 11 MR. GRYGIEL: GOOD MORNING, YOUR HONOR. STEVE
09:43AM 12 GRYGIEL FROM KEEFE BARTELS FOR THE CLASS PLAINTIFFS.

09:43AM 13 THE COURT: THANK YOU. GOOD MORNING.

09:43AM 14 MR. STRAITE: GOOD MORNING, YOUR HONOR. DAVID
09:43AM 15 STRAITE FROM STEWARTS LAW U.S., CO-LEAD COUNSEL FOR THE
09:43AM 16 PLAINTIFFS.

09:43AM 17 THE COURT: THANK YOU. GOOD MORNING.

09:43AM 18 MR. KIESEL: AND, YOUR HONOR, LAST BY NOT LEAST PAUL
09:44AM 19 KIESEL FROM KIESEL BOUCHER LARSON FOR PLAINTIFFS.

09:44AM 20 THE COURT: THANK YOU. GOOD MORNING.

09:44AM 21 MR. BROWN, I BELIEVE THIS IS YOUR MOTION, AND WHAT I FOCUS
09:44AM 22 MY ATTENTION ON, JUST FOR ALL OF YOUR BENEFITS, IS REALLY THE
09:44AM 23 STANDING ISSUE AND THAT JURISDICTIONAL QUESTION AND THAT SEEMS
09:44AM 24 THAT'S REALLY THE PARAMOUNT TOPIC OF DISCUSSION HERE.

09:44AM 25 AND I'M EAGER TO HEAR FROM THE PLAINTIFFS. BUT,

09:44AM 1 MR. BROWN, I'D ALSO LIKE TO HEAR FROM YOU AS TO YOUR THOUGHTS
09:44AM 2 ADDITIONALLY AS TO THE WIRETAP STATUTE AND THE SCA STATUTE AND
09:44AM 3 YOUR THOUGHTS ABOUT THAT AND WHETHER OR NOT THIS CASE --
09:44AM 4 WHETHER OR NOT PLAINTIFFS HAVE STATED SUFFICIENT GROUNDS TO
09:44AM 5 ALLOW THE CASE TO REMAIN.

09:44AM 6 SO I'M HAPPY TO HEAR FROM YOU.

09:44AM 7 MR. BROWN: THANK YOU. WELL, I'M HAPPY THAT YOU
09:44AM 8 HAVE BROUGHT THAT UP BECAUSE THAT'S WHERE I WAS GOING TO BEGIN
09:44AM 9 IN ANY EVENT.

09:44AM 10 AND ONE OF THE MOST STRIKING THINGS, I THINK, ABOUT THE
09:45AM 11 COMPLAINT IS JUST THE UTTER LACK OF ALLEGATIONS OF ANY SORT OF
09:45AM 12 INJURY TO THESE PARTICULAR NAMED PLAINTIFFS.

09:45AM 13 AND AS WE KNOW, EVEN THOUGH IT'S PLED AS A PUNITIVE CLASS
09:45AM 14 ACTION, THE NAMED PLAINTIFFS THEMSELVES HAVE TO ALLEGE INJURY,
09:45AM 15 AND, IN FACT, THAT WAS PROXIMATELY CAUSED BY THE ALLEGED
09:45AM 16 CONDUCT, AND HERE THEY HAVE NOT DONE ANYTHING CLOSE TO THAT LET
09:45AM 17 ALONE FOR CLASS MEMBERS.

09:45AM 18 PLAINTIFFS HAVEN'T ALLEGED WHAT WEBSITES THEY VISITED,
09:45AM 19 THEY HAVEN'T ALLEGED WHAT SORT OF DATA OR INFORMATION WAS
09:45AM 20 ACTUALLY COLLECTED. THEY DON'T HAVE ANY ALLEGATIONS AS TO
09:45AM 21 WHETHER FACEBOOK USED THIS IN SOME WAY OR DISCLOSED IT TO
09:45AM 22 ANYBODY ELSE AND ANY THIRD PARTY.

09:45AM 23 THEY HAVE A CONCLUSORY ALLEGATION THAT THEIR PERSONAL
09:45AM 24 INFORMATION OR THE BROWSING HISTORY HAS VALUES AND SOME SORT OF
09:45AM 25 ECONOMIC VALUE.

09:45AM 1 THE COURT: WELL, IT HAS VALUE TO FACEBOOK.

09:46AM 2 MR. BROWN: WELL, IT MAY. BUT THERE HAVE BEEN -- I
09:46AM 3 MEAN, OUR BRIEFS ARE REplete WITH CITATIONS TO CASE LAW WHERE
09:46AM 4 THIS VERY CLEARLY HAS BEEN REJECTED. THIS THEORY NOW. I MEAN,
09:46AM 5 I CAN THINK OF CASES IN JUST THE LAST THREE YEARS WHERE THIS
09:46AM 6 THEORY HAS PROBABLY BEEN REJECTED TEN TIMES.

09:46AM 7 THE COURT: THIS THEORY BEING THE INDIVIDUAL VALUE
09:46AM 8 OF PERSONAL IDENTITY IN AN INDIVIDUAL CAPACITY.

09:46AM 9 MR. BROWN: YEAH, THAT'S RIGHT. AND THE FACT IS
09:46AM 10 THAT THEY HAVEN'T ALLEGED WHATSOEVER THAT THEY HAVE EVER BEEN
09:46AM 11 OFFERED BY ANYONE TO BE PAID FOR THIS INFORMATION AND THAT
09:46AM 12 THERE'S ANY SORT OF MARKET THAT THEY PERSONALLY CAN TAKE
09:46AM 13 ADVANTAGE OF AND IT'S A LOT OF HIGH THEORY ABOUT THINGS LIKE
09:46AM 14 VALUE-FOR-VALUE EXCHANGE, BUT I WAS ACTUALLY SURPRISED TO SEE
09:46AM 15 LANGUAGE LIKE THAT IN THE COMPLAINT BECAUSE THERE ARE CASES
09:46AM 16 THAT LITERALLY USE THAT SAME LANGUAGE BECAUSE IT'S BEEN ALLEGED
09:46AM 17 IN OTHER COMPLAINTS IN OTHER CASES LIKE THE LACOURT VERSUS
09:46AM 18 SPECIFIC MEDIA CASE, LIKE THE IPHONE APPLICATION CASE THAT IS
09:47AM 19 PENDING BEFORE JUDGE KOH, AND THAT THEORY HAS BEEN REJECTED
09:47AM 20 TIME AND TIME AGAIN.

09:47AM 21 SO IN TERMS OF JUST BRACKETING FOR A SECOND THE WIRETAP
09:47AM 22 ACT AND THE SCA, JUST LOOKING AT SORT OF THE BIG PICTURE AT THE
09:47AM 23 CASE, THERE'S JUST AN UTTER LACK OF ANY ALLEGATION IN THE
09:47AM 24 COMPLAINT THAT THESE SPECIFIC PLAINTIFFS WERE HARMED PERSONALLY
09:47AM 25 AND IN A WAY THAT WAS TETHERED TO THE ALLEGED CONDUCT.

09:47AM 1 AND, AGAIN, BEFORE GETTING TO THAT SCA AND WIRETAP ACT,
09:47AM 2 PORTIONS OF THE ANALYSIS I WOULD HIGHLIGHT THAT WE HAVE
09:47AM 3 OBVIOUSLY HIGHLIGHTED MANY CASES IN OUR BRIEFS THAT STAND ON
09:47AM 4 THOSE BUT TO DRAW OUT A FEW CITATIONS, THE LOW VERSUS LINKEDIN
09:47AM 5 CASE WHICH JUDGE KOH ISSUED A DECISION ON NOVEMBER 11TH, 2011.

09:47AM 6 THAT WAS A CASE WHERE IT WAS ALLEGED LINKEDIN HAD PLACED
09:47AM 7 COOKIES ON THE PLAINTIFF'S COMPUTERS AND PERMITTED THIRD
09:47AM 8 PARTIES TO VIEW THE BROWSER HISTORY AND LINKED TO THE USER I.D.
09:48AM 9 FAIRLY ANALOGOUS.

09:48AM 10 THEY ALLEGE THAT THE RELEVANT HISTORY WAS PERSONAL
09:48AM 11 PROPERTY WITH THE MARKET VALUE THAT WAS TAKEN WITHOUT
09:48AM 12 COMPENSATION AND YET THAT COMPLAINT WAS DISMISSED ON ARTICLE
09:48AM 13 III GROUNDS BECAUSE JUDGE KOH HELD IT WAS TOO ABSTRACT AND
09:48AM 14 HYPOTHETICAL AND PLAINTIFF HAD NOT YET ARTICULATED OR ALLEGED A
09:48AM 15 PARTICULARIZED AND CONCRETE HARM, AND I THINK THAT'S EXACTLY
09:48AM 16 WHAT WE HAVE HERE. THE ANALOGIES ARE STRIKING.

09:48AM 17 SIMILARLY IN THE IPHONE APPLICATION LITIGATION, AND I'M
09:48AM 18 LOOKING SPECIFICALLY AT THE DECISION OF SEPTEMBER 20TH, 2011,
09:48AM 19 ALSO BY JUDGE KOH.

09:48AM 20 AND IN THAT DECISION, JUDGE KOH IDENTIFIED SORT OF TWO
09:48AM 21 DIFFERENT ASPECTS OF THE ANALYSIS. AND THE FIRST WAS THAT THE
09:48AM 22 RISK OF INJURY THAT THE PLAINTIFFS ALLEGE WAS NOT CONCRETE AND
09:48AM 23 PARTICULARIZED TO THEMSELVES.

09:48AM 24 AND SHE HELD THERE THAT PLAINTIFFS DO NOT IDENTIFY WHAT
09:49AM 25 I-DEVICES THEY USE, DO NOT IDENTIFY WHICH DEFENDANT, IF ANY,

09:49AM 1 ACCESSED OR TRACKED THEIR PERSONAL INFORMATION, DO NOT IDENTIFY
09:49AM 2 WHICH APPS THEY DOWNLOADED THAT ACCESS OR TRACK THEIR PERSONAL
09:49AM 3 INFORMATION -- I'LL SLOW DOWN -- AND DO NOT IDENTIFY WHAT HARM,
09:49AM 4 IF ANY, RESULTED FROM THE ACCESS OR TRACKING OF THEIR PERSONAL
09:49AM 5 INFORMATION.

09:49AM 6 SO, IN OTHER WORDS, IT'S NOT ENOUGH TO ALLEGE JUST
09:49AM 7 INFORMATION HAS BEEN ACCESSED OR TRACKED, BUT YOU HAVE TO SHOW
09:49AM 8 SOME RESULTING HARM. THAT'S THE ALLEGED VIOLATION. BUT YOU
09:49AM 9 STILL HAVE TO SHOW SOME HARM THAT IS PROXIMATELY CAUSED BY THAT
09:49AM 10 VIOLATION, AND THOSE ARE TWO DISTINCT THINGS.

09:49AM 11 THE SECOND AND SORT OF DISTINCT GROUND ON WHICH SHE HELD
09:49AM 12 THAT THERE WAS NO ARTICLE III STANDING WAS THAT THE PLAINTIFFS
09:49AM 13 HAD NOT IDENTIFIED A CONCRETE HARM FROM THE ALLEGED COLLECTION
09:49AM 14 AND TRACKING OF THEIR PERSONAL INFORMATION.

09:49AM 15 AND IT'S SLIGHTLY DIFFERENT. IT SOUNDS SIMILAR, BUT ONE
09:50AM 16 IS ARE THE ALLEGATIONS PARTICULARIZED AS TO THE PLAINTIFFS
09:50AM 17 THEMSELVES AND THE OTHER IS, IS THERE TRULY A CONCRETE HARM?

09:50AM 18 AND JUDGE KOH CITED LACOURT VERSUS SPECIFIC MEDIA CASE
09:50AM 19 THAT I MENTIONED BEFORE AND SAID -- AND NORMALLY I DON'T USE
09:50AM 20 LONG QUOTES FROM CASES IN ORAL ARGUMENT, BUT I THINK IT'S
09:50AM 21 IMPORTANT TO EMPHASIZE THIS POINT.

09:50AM 22 IN SPECIFIC MEDIA PLAINTIFFS ACCUSED AN ONLINE THIRD-PARTY
09:50AM 23 ADMIN, SPECIFIC MEDIA, IN SELLING COOKIES ON THEIR COMPUTERS TO
09:50AM 24 CERTAIN USER PRIVACY CONTROLS AND TRACK INTERNET USE WITHOUT
09:50AM 25 KNOWLEDGE OR CONSENT.

09:50AM 1 THE COURT, HOWEVER, HELD THAT THE PLAINTIFFS LACKED
09:50AM 2 ARTICLE III STANDING BECAUSE THEY HAD NOT ALLEGED THAT ANY
09:50AM 3 NAMED PLAINTIFF WAS ACTUALLY HARMED BY DEFENDANT'S ALLEGED
09:50AM 4 CONDUCT; AND, TWO, THEY HAD NOT ALLEGED ANY PARTICULARIZED
09:50AM 5 EXAMPLE OF ECONOMIC INJURY OR HARM TO THEIR COMPUTERS BUT
09:50AM 6 INSTEAD ONLY OFFERED ONLY ABSTRACT CONCEPTS SUCH AS OPPORTUNITY
09:50AM 7 COSTS, VALUE-FOR-VALUE EXCHANGES, CONSUMER CHOICE, AND
09:50AM 8 DIMINISHED PERFORMANCE.

09:51AM 9 OTHER CASES HAVE HELD THE SAME AND THE COURT ALSO CITES
09:51AM 10 THE DOUBLECLICK CASE AND THE JETBLUE CASE, WHICH WE'VE ALSO
09:51AM 11 CITED IN OUR PAPERS.

09:51AM 12 THE SAME IS TRUE HERE. THE COURT HELD IN THE IPHONE
09:51AM 13 LITIGATION, THE PLAINTIFFS HAVE NOT YET ARTICULATED A COHERENT
09:51AM 14 AND FACTUALLY SUPPORTIVE THEORY OF INJURY. THE PLAINTIFFS HAVE
09:51AM 15 STATED GENERAL ALLEGATIONS ABOUT IN THAT CASE THE MOBILE
09:51AM 16 INDUSTRY DEFENDANTS, THE MARKET FOR APPS, AND SIMILAR ABSTRACT
09:51AM 17 CONCEPTS, E.G., OPPORTUNITY COSTS, VALUE-FOR-VALUE EXCHANGES,
09:51AM 18 BUT PLAINTIFFS HAVE NOT IDENTIFIED ANY ACTUAL INJURY TO
09:51AM 19 THEMSELVES FOR ARTICLE III STANDING.

09:51AM 20 AND THANKS FOR YOUR INDULGENCE IN ALLOWING ME TO SPIT ALL
09:51AM 21 OF THAT OUT.

09:51AM 22 BUT THE PARALLELS HERE BETWEEN THE LOW VERSUS LINKEDIN
09:51AM 23 DECISION THAT I CITED EARLIER, THE IPHONE APPLICATION DECISION
09:51AM 24 THAT I JUST READ FROM, WHICH ITSELF CITES THE SPECIFIC MEDIA
09:51AM 25 CASE, DOUBLECLICK, AND JETBLUE, THE PARALLELS ARE QUITE

09:52AM 1 STRIKING.

09:52AM 2 I WOULD BRING TO THE COURT'S ATTENTION AND REMIND THE
09:52AM 3 COURT SINCE THIS COURT IS FAMILIAR WITH THE GAOS VERSUS GOOGLE
09:52AM 4 DECISION. IN THERE THE ALLEGATIONS WERE THAT GOOGLE DISCLOSED
09:52AM 5 TO THIRD PARTIES THESE URL'S THAT CONTAINED WITHIN THEM THE
09:52AM 6 SEARCH QUERIES THAT PEOPLE ENTERED AND IN THAT CASE THE
09:52AM 7 PLAINTIFFS HAD ACTUALLY ALLEGED THAT THEY HAD DONE SEARCHES FOR
09:52AM 8 THEIR OWN NAMES, FOR FAMILY MEMBER NAMES, THAT THEY THEMSELVES
09:52AM 9 CLICKED ON THE LINKS ON THE SEARCH RESULTS PAGE, THAT GOOGLE
09:52AM 10 SENT URL'S TO THIRD PARTIES AND THIS PLAINTIFF DID NOT
09:52AM 11 AUTHORIZE ANY OF THAT.

09:52AM 12 THAT WAS THE STATE OF THE PLEADINGS IN THAT CASE. YOUR
09:52AM 13 HONOR RULED THERE THAT -- AGAIN, BACK JUST FOR A SECOND, THE
09:52AM 14 SCA CLAIMS, AS TO ALL OTHER CLAIMS, SIX COMMON LAW CLAIMS,
09:53AM 15 THERE WAS NO STANDING BECAUSE THAT EVEN WASN'T SUFFICIENTLY
09:53AM 16 PARTICULARIZED OR CONCRETE ENOUGH TO CONSTITUTE ARTICLE III
09:53AM 17 STANDING AND THERE WERE CLAIMS FOR FRAUD, PUBLIC DISCLOSURE OR
09:53AM 18 PRIVATE FACTS SOMEWHAT SIMILAR TO THE CLAIMS IN THIS CASE AND
09:53AM 19 THERE WERE OTHER CLAIMS AS WELL.

09:53AM 20 TURNING THEN TO THE SCA CLAIM AND HERE ALSO THE WIRETAP
09:53AM 21 ACT CLAIM, AS AN INITIAL MATTER, WE WOULDN'T CONCEDE THAT THE
09:53AM 22 ADWORDS VERSUS FIRST AMERICAN DECISION IN THE NINTH CIRCUIT WAS
09:53AM 23 CORRECTLY DECIDED BUT WE ACKNOWLEDGE THAT THAT CASE LAW IS OUT
09:53AM 24 THERE IN THE NINTH CIRCUIT.

09:53AM 25 AND THERE HAVE BEEN SOME DECISIONS FOLLOWING FROM THAT

09:53AM 1 THAT HAVE HELD ON THE PARTICULAR FACTS OF THOSE CASES, THAT
09:53AM 2 THERE WAS STANDING DUE TO THE ALLEGATIONS OF WIRETAP ACT
09:53AM 3 VIOLATIONS OR SCA VIOLATIONS, BUT, AGAIN, THE GAOS VERSUS
09:54AM 4 GOOGLE CASE, I THINK IS AN INTERESTING COUNTERPOINT.

09:54AM 5 YOUR HONOR THERE HELD THAT THERE WAS STANDING FOR THAT
09:54AM 6 PARTICULAR CLAIM, NOT FOR THE REST OF THE CLAIMS, BUT THE FACTS
09:54AM 7 WERE DIFFERENT THERE, AND I SET THEM FORTH JUST A FEW MINUTES
09:54AM 8 AGO.

09:54AM 9 I MEAN, VERY DETAILED ALLEGATIONS ABOUT WHAT KIND OF
09:54AM 10 SEARCHES THEY DID, INCLUDING THEIR NAME AND THEIR FAMILY'S
09:54AM 11 NAMES, THAT THEY ACTUALLY CLICKED ON THE LINKS. THEY
09:54AM 12 APPARENTLY UNDER RULE 11 WERE ABLE TO ALLEGE THAT GOOGLE HAD
09:54AM 13 TRANSMITTED THOSE PARTICULAR URL'S TO THIRD PARTIES. I DON'T
09:54AM 14 KNOW ENOUGH ABOUT THE CASE TO KNOW EXACTLY HOW THEY COULD DO
09:54AM 15 THAT, BUT APPARENTLY THEY COULD CONSISTENT WITH RULE 11 AND
09:54AM 16 THAT THAT PARTICULAR PLAINTIFF DID NOT AUTHORIZE IT.

09:54AM 17 THAT'S DISTINCT FROM THE SITUATION THAT WE HAVE HERE. AND
09:54AM 18 JUST BECAUSE YOU HAVE AN SCA AND YOU ALLEGE AN SCA VIOLATION TO
09:54AM 19 THROW IT INTO YOUR COMPLAINT OR YOU THROW A WIRETAP ACT CLAIM
09:54AM 20 INTO YOUR CLAIM OR INTO YOUR COMPLAINT, DOESN'T MEAN YOU GET A
09:54AM 21 FREE PASS IN ARTICLE III STANDING. IT'S NOT AS THOUGH THE
09:54AM 22 ANALYSIS ENDS THERE.

09:55AM 23 THE COURT: WHAT IS LACKING?

09:55AM 24 MR. BROWN: WELL, YOU STILL HAVE TO SHOW THAT, YOU
09:55AM 25 HAVE TO HAVE ENOUGH FACTS IN YOUR COMPLAINT THAT SHOW THAT THAT

09:55AM 1 VIOLATION IS SOMEHOW TETHERED TO YOU. IT CAN'T JUST BE A
09:55AM 2 GENERALIZED SORT OF POLICY COMPLAINT ABOUT THE CONDUCT AT
09:55AM 3 ISSUE. THAT'S APPROPRIATE FOR LETTERS TO THE COMPANY, PERHAPS,
09:55AM 4 OR LETTERS TO THE EDITOR OR THERE ARE A LOT OF OTHER DIFFERENT
09:55AM 5 FORUMS THAT YOU CAN EXPRESS YOUR OPINIONS ON THOSE THINGS BUT
09:55AM 6 HERE IN FEDERAL COURT YOU'RE SUPPOSED TO HAVE A CASE OR
09:55AM 7 CONTROVERSY, AND IF YOU DON'T HAVE A CASE OR CONTROVERSY THAT
09:55AM 8 DEALS WITH THIS SPECIFIC NAMED PLAINTIFF IN THE CASE, THEN
09:55AM 9 THERE'S NO STANDING AND THE COURT DOESN'T EVEN HAVE SUBJECT
09:55AM 10 MATTER JURISDICTION, AND I THINK THAT THAT IS LACKING HERE AND
09:55AM 11 ALTHOUGH THERE HAVE BEEN SOME OTHER CASES THAT HAVE HELD ON THE
09:55AM 12 PARTICULAR FACTS ALLEGED IN THE COMPLAINT THAT THERE WAS
09:55AM 13 STANDING, BUT I THINK THIS CASE IS DISTINCT.

09:55AM 14 THE COURT: THANK YOU VERY MUCH. MR. STRAITE OR
09:55AM 15 MR. GRYGIEL.

09:56AM 16 MR. GRYGIEL: GOOD MORNING, YOUR HONOR. I'LL BE
09:56AM 17 ADDRESSING THE STANDING ISSUE AND WIRETAP ACT AND MY COLLEAGUE,
09:56AM 18 MR. STRAITE, WILL ADDRESS THE STORED COMMUNICATIONS ACT.

09:56AM 19 LET ME START WITH A COUPLE OF POINTS. WE ARE HERE ON A
09:56AM 20 MOTION TO DISMISS AS WELL AS A MOTION FOR A LACK OF STANDING,
09:56AM 21 12(B) (1) AND 12(B) (6) .

09:56AM 22 NOW, WHAT I JUST HEARD IS ESSENTIALLY THE EQUIVALENT OF A
09:56AM 23 RULE 56 ARGUMENT, AND I WOULD SUBMIT TO THE COURT IT'S ONE RULE
09:56AM 24 AT A TIME. 12(B) (1) IS A VERY DIFFERENT STANDARD FROM
09:56AM 25 12(B) (6), WHICH IS A VERY DIFFERENT STANDARD FROM RULE 56.

09:56AM 1 LET'S START THEN WITH WHAT WE ACTUALLY PLEADED IN OUR
09:56AM 2 COMPLAINT, AND I DIDN'T HEAR ANY MENTION OF IT. LET'S LOOK AT
09:56AM 3 PARAGRAPH 19 OF OUR COMPLAINT.

09:56AM 4 PARAGRAPH 19 OF OUR COMPLAINT, PARAGRAPH 16 OF OUR
09:56AM 5 COMPLAINT, AND PARAGRAPH 26 OF OUR COMPLAINT. WHAT DO WE
09:56AM 6 ALLEGE? IT WENT WHEN THIS COMPANY WAS CONFRONTED WITH EVIDENCE
09:56AM 7 THAT HAD IT HAD BEEN DOING PRECISELY THAT WHICH IT PROMISED IT
09:56AM 8 WOULD NOT DO, THAT IS, TO TRACK ITS USERS AFTER THEY HAD LOGGED
09:56AM 9 OUT, A VERY SIMPLE PARAGRAPH, WHEN THEY DISCOVERED TO HAVE BEEN
09:57AM 10 DOING THAT, WHAT WE DIDN'T HEAR IS ANY OF THE LAWYER CONGERIES
09:57AM 11 WE HAVE READ IN THE PAPERS, WHAT EVERYONE KNEW, IT WAS
09:57AM 12 CONSENTED TO, WE DISCLOSED IT. NO.

09:57AM 13 AN ENGINEER, GREGG STEFANCIK, FOR THE COMPANY SAID AS
09:57AM 14 FOLLOWS: WE DIDN'T EXPLAIN IT WELL ENOUGH. WE WILL BE
09:57AM 15 ADDRESSING THAT TODAY. YOUR POST, HE WROTE TO THE BLOGGER WHO
09:57AM 16 DISCOVERED THIS, HAS RAISED A LOT OF IMPORTANT ISSUES. IT
09:57AM 17 APPEARS THAT THE A USER COOKIE WAS NOT DELETED UPON LOGOUT AS
09:57AM 18 IT WOULD SUPPOSED TO HAVE BEEN. I'M PARAPHRASING, BUT THAT'S
09:57AM 19 QUITE CLOSE. WE WILL BE FIXING THAT TODAY.

09:57AM 20 LET'S PAUSE RIGHT THERE. WHAT HE SAID WAS THAT WE WERE
09:57AM 21 TRACKING YOU, WE INTENDED TO DO IT, WE KNEW WE WERE DOING IT,
09:57AM 22 AND WE HAVE NOT DISCLOSED IT.

09:57AM 23 AND THIS MUST BE A HARM OTHERWISE THERE WOULD BE NO --

09:57AM 24 THE COURT: SAY AGAIN.

09:57AM 25 MR. GRYGIEL: THIS MUST BE A HARM BECAUSE OTHERWISE

09:57AM 1 THERE WOULD BE NO NEED TO, QUOTE, FIX IT BOTH AS TO POLICY OF
09:58AM 2 DISCLOSURE AND AS TO THE FACT THAT WE HAVE THESE TRACKING
09:58AM 3 COOKIES IN THE PROGRAM THAT WERE SUPPOSED TO HAVE BEEN DELETED.

09:58AM 4 SO WE START OUT WITH SOME VERY SERIOUS ADMISSIONS THAT I
09:58AM 5 THINK SHAPES EVERYTHING THE COURT NEEDS TO DO IN TERMS OF
09:58AM 6 LOOKING AT THE SUFFICIENCY OF THE ALLEGATIONS. THAT'S
09:58AM 7 PARTICULARLY TRUE UNDER THE NINTH CIRCUIT'S VIEW OF THE
09:58AM 8 PLEADING RULES AS SET OUT BY TWOMBLY.

09:58AM 9 WE LOOK AT STARR VERSUS BACA. I DON'T HEAR ANYTHING FROM
09:58AM 10 THE DEFENDANTS ABOUT IT AND THAT DOESN'T SURPRISE ME. WHY IS
09:58AM 11 THAT? BECAUSE STARR VERSUS BACA SAYS THAT TWOMBLY SAID THAT
09:58AM 12 NOTICE PLEADING IS THE WAY WE LOOK AT THESE CASES. ALL YOU
09:58AM 13 NEED TO DO IS TO PROVIDE FAIR NOTICE OF THE CLAIM AND THE
09:58AM 14 GROUNDS UPON WHICH IT IS BASED AND THEN WE MOVE TO DISCOVERY.
09:58AM 15 ALL OF THOSE RULES BETWEEN 12 AND 56 ACTUALLY HAVE SOME IMPORT,
09:58AM 16 AND THAT'S WHAT THAT CASE SAYS.

09:58AM 17 WE FRAME OUR ANALYSIS IN TERMS OF WHAT WE ACTUALLY PLEADED
09:58AM 18 AND IN TERMS OF WHAT THE DEFENDANT HAS ADMITTED, AND WE GET A
09:58AM 19 VERY LONG WAY HOME TOWARDS, A, THE SUBSTANTIVE ELEMENTS OF ALL
09:58AM 20 OF THE CLAIMS, EASILY CLEAR THE STANDING HURDLES, WHICH I'LL
09:59AM 21 COME TO IN A MOMENT, AND COME VERY FAR DOWN TO PLEADING
09:59AM 22 ESSENTIALLY ALL OF THE ELEMENTS OF OUR CAUSES OF ACTION.

09:59AM 23 LET'S TALK ABOUT THE PERSONALLY IDENTIFIABLE INFORMATION
09:59AM 24 IF I CAN DIGRESS TO THAT FOR A MOMENT.

09:59AM 25 THE COURT: DOES THIS RELATE TO STANDING?

09:59AM 1 MR. GRYGIEL: YES, IT DOES. ONE OF THE POINTS, AND
09:59AM 2 IN FACT, WHAT YOU HEAR IS PII, PERSONALLY IDENTIFIABLE
09:59AM 3 INFORMATION, THAT HAS NO VALUE AND LOTS OF COURTS HAVE SAID SO.

09:59AM 4 THE FIRST THING IS THAT FOR PURPOSES OF A MOTION TO
09:59AM 5 DISMISS ON 12(B) (1), CONSTITUTIONAL LAW TEACHES US FROM THE
09:59AM 6 DAYS OF WARTH VERSUS SELDIN FROM THE HOUSING CASES OF THE '60S
09:59AM 7 AND THE '70S, GLADSTONE REALTY, HAVENS, LUJAN V. NATIONAL
09:59AM 8 WILDLIFE, THAT GENERALIZED ALLEGATIONS OF HARM, I REPEAT,
09:59AM 9 GENERALIZED ALLEGATIONS OF HARM SUFFICE BECAUSE THEY ARE DEEMED
09:59AM 10 TO INCLUDE SPECIFIC ALLEGATIONS OF THE HARM THAT GO TO THE
09:59AM 11 CAUSE OF ACTION.

09:59AM 12 SO WHEN I HEAR MY COLLEAGUE SAY THAT THEY DON'T PLEAD X,
09:59AM 13 Y, AND Z AS TO THEMSELVES, THE SHORT ANSWER, AND NOT TO BE FLIP
10:00AM 14 IS, THE LAW OF THE LAND SAYS THAT WE NEED NOT. WE ARE AT
10:00AM 15 12(B) (1) GIVING NOTICE OF OUR CLAIM.

10:00AM 16 TO THE SECOND POINT WHEN HE SAYS THAT THEY HAVE TO TETHER
10:00AM 17 IT TO THEMSELVES SOMEHOW? WE DO FOR PURPOSES OF GAOS AND ANY
10:00AM 18 OTHER STATUTORY CLAIM.

10:00AM 19 WHAT WE HAVE TO ALLEGE AND WHAT WE HAVE MORE THAN
10:00AM 20 SATISFACTORILY ALLEGED IS THAT WE WERE USERS; WE USED THE
10:00AM 21 COMPUTERS IN THE WAY THAT WE THOUGHT WE WERE ENTITLED TO; THERE
10:00AM 22 WAS NO DISCLOSURE REGIME THAT TOLD US THAT WE WOULD BE TRACKED
10:00AM 23 POST LOGOUT, AND THAT IS A VIOLATION OF OUR RIGHTS UNDER THE
10:00AM 24 STORED COMMUNICATIONS ACT AND THE WIRETAP ACT, AND THAT'S
10:00AM 25 ENOUGH.

10:00AM 1 THE COURT: THOSE STATUTES THAT PROTECT YOUR
10:00AM 2 CLIENT'S INTERESTS THAT HAVE BEEN VIOLATED.

10:00AM 3 MR. GRYGIEL: ON THE WIRETAP ACT, YOUR HONOR?

10:00AM 4 THE COURT: AND THE SCA.

10:00AM 5 MR. GRYGIEL: YOU'RE ASKING ME WHAT IS THE HARM?

10:00AM 6 THE COURT: RIGHT.

10:00AM 7 MR. GRYGIEL: THE HARM IS THE INVASION OF THE
10:00AM 8 STATUTORILY PROTECTED RIGHT THAT BELONGS TO ME PERSONALLY.

10:00AM 9 NOW, WHAT I HEAR --

10:00AM 10 THE COURT: TELL ME WHAT THAT MEANS.

10:00AM 11 MR. GRYGIEL: SURE. THAT I HAVE THE RIGHT AS THE
10:00AM 12 WIRETAP ACT AND THE STORED COMMUNICATIONS ACT PROVIDES ME TO BE
10:01AM 13 FREE FROM UNCONSENTED TO, UNDISCLOSED INTERCEPTION OF MY
10:01AM 14 COMMUNICATIONS WITH SOMEBODY ELSE, THAT BY ITSELF THE UNITED
10:01AM 15 STATES CONGRESS IN ITS WISDOM HAS DECIDED IS A HARM SUFFICIENT
10:01AM 16 TO GRANT STATUTORY STANDING WITH NOTHING MORE.

10:01AM 17 THE COURT: DO I NEED TO DRILL DOWN, AND I DON'T
10:01AM 18 MEAN TO SUGGEST AND GO INTO THE MERITS, BUT DO I NEED TO DRILL
10:01AM 19 DOWN AS TO WHETHER OR NOT THERE WAS A PURPOSE OF INTERCEPTION?

10:01AM 20 MR. GRYGIEL: FOR PURPOSES OF STANDING, YOUR HONOR?

10:01AM 21 THE COURT: YES.

10:01AM 22 MR. GRYGIEL: I THINK IT'S WRONG, TO GO BACK TO
10:01AM 23 TWOMBLY; MAYA VERSUS CENTEX, A NINTH CIRCUIT CASE; JEWEL,
10:01AM 24 ANOTHER NINTH CIRCUIT CASE, THEY DON'T JUST SAY THAT YOU CAN
10:01AM 25 JUST SAY IT, BUT THEY DO SAY THAT IT'S SUFFICIENT IF YOU GIVE

10:01AM 1 ENOUGH FACTUAL SPECIFICITY TO RAISE THE CLAIM, TO QUOTE
10:01AM 2 TWOMBLY, ABOVE THE LEVEL OF SPECULATION, OR TO QUOTE TWOMBLY
10:01AM 3 AGAIN, IN THE TEST THAT REALLY DOES APPLY, WHETHER YOU HAVE
10:01AM 4 ALLEGED FACTS SUFFICIENT SO THAT IT IS REASONABLE TO BELIEVE
10:01AM 5 THAT DISCOVERY WOULD REVEAL THE EVIDENCE THAT YOU NEED TO PROVE
10:02AM 6 THE CLAIM.

10:02AM 7 AND AS YOUR HONOR SAID IN GAOS, IT'S ONE THING TO ALLEGE A
10:02AM 8 CLAIM, AND IT'S ANOTHER THING TO PROVE THAT CLAIM FOR RELIEF.

10:02AM 9 THE COURT: SO FOLLOWING ON THAT, DO I NEED TO THEN
10:02AM 10 ENGAGE IN SOME TYPE OF A DISCUSSION ABOUT INTERCEPTION AND
10:02AM 11 WHETHER OR NOT THERE WAS -- THIS -- WHAT YOU HAVE ALLEGED
10:02AM 12 CONSTITUTES AN INTERCEPTION?

10:02AM 13 MR. GRYGIEL: SURE. AND I'M HAPPY TO DO IT RIGHT
10:02AM 14 NOW, YOUR HONOR. I THINK, FRANKLY, WHAT WE HAVE ALLEGED IN
10:02AM 15 THIS COMPLAINT, OBVIOUSLY I THINK THAT IT'S CLEAR, BUT I
10:02AM 16 BELIEVE WE HAVE MORE THAN SUFFICIENTLY ALLEGED, LOOK AT
10:02AM 17 PARAGRAPHS 71 THROUGH 84, NOT JUST WHO DO DID IT, FACEBOOK; NOT
10:02AM 18 JUST WHY THEY DID IT, LOOK AT PARAGRAPH 12 AND 13, THEIR VALUE
10:02AM 19 PROPOSITION IS INFORMATION. THAT'S WHAT THEY SELL TO
10:02AM 20 ADVERTISERS, AND THAT'S HOW THEY GET INVESTMENTS.

10:02AM 21 WHEN THEY GET IT, THE CLASS PERIOD; WHERE THEY GET IT, IN
10:02AM 22 AMERICA AND THESE CYBERSPACE EXCHANGES WHICH FACEBOOK IS AN
10:02AM 23 UNINVITED PARTY AND CAME IN THROUGH THE BACKDOOR.

10:02AM 24 THE COURT: WELL, LET'S TALK ABOUT THAT BECAUSE I
10:02AM 25 THINK THAT REALLY CUTS TO THE INTERCEPTION, DOESN'T IT?

10:03AM 1 MR. GRYGIEL: YES, IT DOES.

10:03AM 2 THE COURT: IS THIS AN INTERCEPTION OR IS THIS ONE
10:03AM 3 CONTINUOUS COURSE OF COMMUNICATION?

10:03AM 4 MR. GRYGIEL: THIS IS AN INTERCEPTION, AND LET ME
10:03AM 5 EXPLAIN WHY IF I CAN. UNDER THE WIRETAP ACT WE HAVE TO SHOW
10:03AM 6 OBVIOUSLY INTERCEPTION.

10:03AM 7 THE LAW OF THE LAND BASICALLY HAS BEEN SOMEWHAT MUDDLED
10:03AM 8 ABOUT THIS, BUT LET'S TAKE THE WORD OF KONOP, K-O-N-O-P, ROMAN
10:03AM 9 NUMERAL II.

10:03AM 10 WELL, THE FIRST THING THAT KONOP SAYS IS THAT THIS
10:03AM 11 INTERCEPTION HAS TO BE CONTEMPORANEOUS. WHEN YOUR HONOR LOOKS
10:03AM 12 AT OUR COMPLAINT PARAGRAPHS 68 AND 80, WHAT YOU SEE IS THAT WE
10:03AM 13 ALLEGE EXACTLY THAT CONTEMPORANEOUS INTERCEPTION OR OUR
10:03AM 14 COMMUNICATION TO A THIRD-PARTY WEBSITE TO WHICH FACEBOOK HAS
10:03AM 15 MADE ITSELF THROUGH A TRICK, AN UNINVITED PARTICIPANT, AND GETS
10:03AM 16 A COPY OF THAT COMMUNICATION BEFORE IT EVEN COMES TO THE
10:03AM 17 PLAINTIFFS.

10:03AM 18 THE COURT: IS THAT AN INTERCEPTION?

10:03AM 19 MR. GRYGIEL: YES, IT IS, YOUR HONOR. THEY HAVE
10:03AM 20 INTERCEPTED IN TRANSIT A COMMUNICATION BEFORE IT GETS TO THE
10:03AM 21 INTENDED RECIPIENT, WHO IS US, AND THAT'S CLEARLY INTERCEPTION
10:03AM 22 UNDER KONOP.

10:03AM 23 THE COURT: LET'S PARSE THAT OUT.

10:04AM 24 MR. GRYGIEL: SURE.

10:04AM 25 THE COURT: SO YOU PUSH THE BUTTON TO GO TO WHEREVER

10:04AM 1 IT IS YOU WANT TO GO?

10:04AM 2 MR. GRYGIEL: RIGHT.

10:04AM 3 THE COURT: I WANT TO FIND FANCY BOW TIES.

10:04AM 4 MR. GRYGIEL: THERE'S ACTUALLY A WEBSITE CALLED
10:04AM 5 B-A-U-T-I-E-S, THAT IS IN VERMONT, DON'T BUY THEM THERE.

10:04AM 6 THE COURT: YOU PUSHED A BUTTON AND THE SIGNAL GOES
10:04AM 7 OUT. AND WHAT HAPPENS NEXT?

10:04AM 8 MR. GRYGIEL: LET ME SEE IF I CAN EXPLAIN THIS AS
10:04AM 9 CLEARLY AS I CAN FOLLOWING PARAGRAPH 71 THROUGH 84.

10:04AM 10 I'M SITTING THERE IN THE PRIVACY OF MY HOME. I LOGGED OUT
10:04AM 11 OF FACEBOOK, WHICH IS A VERY IMPORTANT POINT SINCE FACEBOOK
10:04AM 12 NOWHERE EVER DISCLOSED UNTIL THREE DAYS BEFORE THE END OF THE
10:04AM 13 CLASS PERIOD THAT THEY JUST MIGHT BE DOING THE TRACKING.

10:04AM 14 I PUNCH THE BUTTON, AND I GO TO WWW.ABUSEDBYPRIESTS.COM.
10:04AM 15 LET'S SAY THAT WEBSITE, IN WHICH OBVIOUSLY I HAVE AN EXPECTANCY
10:04AM 16 OF CONFIDENTIALITY BECAUSE IT'S JUST ME IN MY HOUSE REACHING
10:04AM 17 OUT TO THAT WEBSITE, I'M NOT LOOKING FOR FACEBOOK TO BE A PARTY
10:04AM 18 TO THIS. LET'S SAY THAT WEBSITE HAS, AND THIS IS AN ALLEGATION
10:04AM 19 IN THE COMPLAINT, AND USING CNN AS AN EXAMPLE, A SPACE FOR
10:05AM 20 ESSENTIALLY SOCIAL NETWORK PLUG-IN MATERIAL FROM FACEBOOK. THE
10:05AM 21 ACTUAL FACEBOOK CONTENT, YOUR HONOR, IS NOT IN THE WEBSITE I
10:05AM 22 VISITED. THERE IS INSTEAD THIS IMBEDDED HTML CODE, NOT THE
10:05AM 23 CONTENT, THE CODE. FACEBOOK USES THE CODE.

10:05AM 24 THE INFERENCE UNDER TWOMBLY IS CLEAR BECAUSE THAT ALLOWS
10:05AM 25 THEM TO BE A PARTICIPANT TO THE COMMUNICATION. I HIT THE

10:05AM 1 BUTTON. THE WEBSITE STARTS ON ITS WAY TO ME BUT AS IT COMES TO
10:05AM 2 ME, THERE'S A PROBLEM. IT DOESN'T HAVE THAT FACEBOOK MATERIAL.

10:05AM 3 IT HAS WHAT STATES FOR PURPOSES OF PLAIN ENGLISH LIKE FOR
10:05AM 4 AN OLD GUY LIKE ME A SPACE BOARD AND THAT SPACE IS HELD BY A
10:05AM 5 PLACE HOLDER CODE. THAT CODE COMES TO THE USER COMPUTER, THAT
10:05AM 6 IS MY COMPUTER IN MY LITTLE KITCHEN, AND WHAT HAPPENS THEN IS
10:05AM 7 THAT THAT TRIGGERS MY BROWSER TO REACH TO FACEBOOK TO GET THE
10:05AM 8 CONTENT FROM FACEBOOK'S SERVER. NOW FACEBOOK IS GROUPED INTO
10:05AM 9 THIS CONVERSATION, UNBEKNOWNST TO ME.

10:05AM 10 IF I'M A FACEBOOK USER, WHICH WE ALLEGE ALL OF THE
10:06AM 11 PLAINTIFFS WERE, FACEBOOK HAS PREVIOUSLY DEPOSITED COOKIES,
10:06AM 12 WHICH ARE SMALL TEXT FILES THAT ALLOWS CERTAIN INTERFACES.

10:06AM 13 THE COURT: WE'LL TALK ABOUT WHETHER OR NOT THAT'S
10:06AM 14 STORAGE IN THE OTHER.

10:06AM 15 MR. GRYGIEL: RIGHT. EXACTLY. WHAT HAPPENS THEN IS
10:06AM 16 MY BROWSER GETS THIS CODE AND SAYS, WHOOPS, GO TO THE FACEBOOK
10:06AM 17 SERVER AND GET THIS CONTENT. THAT ALSO MEANS THAT MY BROWSER
10:06AM 18 AND FACEBOOK INTERACT. FACEBOOK REALIZES, OH, THIS IS SOMEBODY
10:06AM 19 WHO WE HAVE BEEN IN COMMUNICATION WITH. HE'S A FACEBOOK USER
10:06AM 20 AND SO THAT MEANS MY COOKIE ALSO GOES TO FACEBOOK.

10:06AM 21 NOW, TO SUM UP THE CONNECTION HERE, FACEBOOK BY THIS
10:06AM 22 DEVICE OF THE IMBEDDED CODE IN THE THIRD-PARTY WEBSITE,
10:06AM 23 UNDISCLOSED TO THE PLAINTIFF, HAS BECOME A PARTICIPANT TO THIS
10:06AM 24 CONVERSATION AND OPERATIVELY.

10:06AM 25 THE COURT: IN WHAT WAY?

10:06AM 1 MR. GRYGIEL: IN THIS WAY, YOUR HONOR, THEY GET A
10:06AM 2 COPY. THEY DUPLICATE A COPY OF MY REQUEST, AND THIS IS IN
10:06AM 3 PARAGRAPHS 82 AND 83. THEY GET A COPY OF MY REQUEST TO THAT
10:06AM 4 WEB PAGE, AND THEY GET A COPY OF WHAT I LOOKED FOR AND WHAT
10:07AM 5 CONTENT I VISITED ON THOSE PAGES.

10:07AM 6 FOR EXAMPLE, IF YOU WERE ABUSED BY PRIESTS IN UPSTATE NEW
10:07AM 7 YORK OR ABUSED BY PRIESTS IN KENTUCKY, THEY CAN GET THAT. THEY
10:07AM 8 ALSO GET THROUGH THE COOKIE CERTAIN USER IDENTIFYING
10:07AM 9 CHARACTERISTICS THAT ARE PERSONALLY IDENTIFIABLE INFORMATION,
10:07AM 10 UNLIKE DOUBLECLICK, THIS IS NOT JUST THE COMPUTER, THIS IS THE
10:07AM 11 USER WHO IS BEING IDENTIFIED.

10:07AM 12 THE COURT: SO YOU'RE SAYING THAT IN YOUR
10:07AM 13 HYPOTHETICAL EXPLANATION, ONCE THAT GOES TO FACEBOOK, THEY THEN
10:07AM 14 HAVE ACCESS TO EVERYTHING YOU DO ON THAT PARTICULAR WEBSITE?

10:07AM 15 MR. GRYGIEL: THEY GET ALL OF THE INFORMATION THAT I
10:07AM 16 HAVE ON THAT PARTICULAR WEBSITE, AND THAT'S WHAT WE ALLEGE.

10:07AM 17 THE COURT: THE INFORMATION THAT YOU HAVE?

10:07AM 18 MR. GRYGIEL: THE INFORMATION, YOUR HONOR, WHAT WE
10:07AM 19 LOOKED AT, WHAT OTHER PAGES I WENT TO, WHAT CONTENT WAS THERE,
10:07AM 20 AND IF I WENT AROUND THAT SITE, WHERE I WENT ON THAT SITE. SAY
10:07AM 21 I WENT TO SOME PLACE SPECIFIC. IF YOU'RE LOOKING FOR
10:07AM 22 COUNSELING HELP OR THINGS LIKE THAT, THAT'S WITHIN THE AMBIT OF
10:07AM 23 OUR PARAGRAPHS 82 AND 83.

10:07AM 24 THE COURT: AND YOU'RE SAYING THAT FORMS THE BASIS
10:07AM 25 OF AN INTERCEPTION WHICH, THEREFORE, ALLOWS YOU TO PURSUE THIS

10:08AM 1 CAUSE OF ACTION UNDER THE WIRETAP STATUTE?

10:08AM 2 MR. GRYGIEL: CORRECT. YES, YOUR HONOR. A NUT
10:08AM 3 SHELL, THE PROVERBIAL NUT, THERE IT IS, BUT THERE ARE A COUPLE
10:08AM 4 OF OTHER THINGS THAT FACEBOOK SAYS ABOUT THE INTERCEPTION.

10:08AM 5 THEIR FIRST ARGUMENT ABOUT THE INTERCEPTION IS IT HAS TO
10:08AM 6 BE IN FLIGHT. WE ALLEGE, AND WHICH IS ALL WE NEED TO DO HERE,
10:08AM 7 AND THERE'S A GOOD FACTUAL BASIS FOR, PARAGRAPHS 82 AND 83 ARE
10:08AM 8 HIGHLY SPECIFIC OF EXACTLY HOW THAT HAPPENED, AND WE PASS ANY
10:08AM 9 SPECIFICITY TEST.

10:08AM 10 AND BY THE WAY, FOR STANDING IN PARTICULAR, THAT
10:08AM 11 SPECIFICITY TEST IS TOTALLY INAPPLICABLE AS MAYA VERSUS CENTEX,
10:08AM 12 THE NINTH CIRCUIT CASE, SAYS, SAYING THAT TWOMBLY AND IQBAL
10:08AM 13 WITH THEIR SPECIFICITY REQUIREMENTS ARE ILL-SUITED TO THE
10:08AM 14 12(B)(1) CONTEXT. THAT BASICALLY TAKES CARE OF THEIR STANDING
10:08AM 15 ARGUMENT.

10:08AM 16 THE SECOND POINT I WOULD MAKE THERE, YOUR HONOR, IS THAT
10:08AM 17 THEY SAY THAT, WELL, KONOP SAYS THAT THIS JUST HAS TO BE
10:08AM 18 COMPLETELY IN TRANSIT. IT CAN NEVER BE IN STORAGE. THAT'S
10:08AM 19 WHAT WE ALLEGE. THAT'S WHAT WE ALLEGE. IT'S IN TRANSIT.

10:08AM 20 NUMBER TWO, KONOP WAS A SUMMARY JUDGMENT CASE; AND,
10:08AM 21 NUMBER THREE, KONOP, VERY MUCH LIKE CHANCE, ANOTHER ONE OF
10:09AM 22 THE CASES THAT THEY CITE, AND VERY MUCH LIKE BUNNELL, ANOTHER
10:09AM 23 CASE THAT THE DEFENDANTS CITE, IN THOSE CASES, YOUR HONOR, THE
10:09AM 24 FACTUAL SCENARIO OF THE INTERCEPTION IS VERY DIFFERENT. THERE
10:09AM 25 YOU HAVE A STACK OF COMMUNICATION THAT SOMEONE COMES AND GETS.

10:09AM 1 THEY'RE NOT INTERCEPTING IT IN THE WAY THAT WE CONCEIVE OF A
10:09AM 2 WIRETAP OR THE INTERCEPTION.

10:09AM 3 WE HAVE SOMEONE DOING WHAT THE CONDE CASE, ONE OF THE
10:09AM 4 DEFENDANT'S CASES, SAYS IT IS NOT INTERCEPTION. HOW? IT'S
10:09AM 5 LIKE SOMEONE COMES IN AND LOOKS OVER YOUR SHOULDER ON SOMETHING
10:09AM 6 THAT IS ALREADY ON YOUR SCREEN. THAT'S DIFFERENT FROM THE
10:09AM 7 SIMULTANEOUS INTERCEPTION OF SOMETHING CONTEMPORANEOUSLY OF THE
10:09AM 8 USER ACTUALLY RECEIVING IT.

10:09AM 9 IN FACT, IN KONOP, WHAT WE HAVE THERE WERE TWO EMPLOYEES,
10:09AM 10 MR. WONG AND GARDNER, AND THEY WERE PILOTS FOR HAWAIIAN
10:09AM 11 AIRLINES AND WHAT THEY DID WAS GET PERMISSION TO GO ONTO A
10:09AM 12 WEBSITE OF MR. KONOP. MR. KONOP WAS A DISGRUNTLED EMPLOYEE OF
10:10AM 13 THE COMPANY, AND HE POSTED HIS VARIOUS VITRIOLIC SCREAM ABOUT
10:10AM 14 THE COMPANY'S DOINGS WITH RESPECT TO LABOR.

10:10AM 15 WELL, THESE TWO GUYS, WONG AND GARDNER, DECIDED IT WOULD
10:10AM 16 BE A GOOD IDEA TO LET THEIR SUPERVISOR, MR. DAVIS, TAKE A LOOK.
10:10AM 17 SO EVERY NOW AND THEN MR. DAVIS COMES IN AND HE TAKES A LOOK AT
10:10AM 18 THIS WEBSITE. HE GETS UNAUTHORIZED -- HE GETS ACCESS. THE
10:10AM 19 QUESTION IS WHETHER IT'S AUTHORIZED OR NOT. I'LL LEAVE THAT TO
10:10AM 20 MR. STRAITE. BUT HE COMES IN AND HE LOOKS AT WHAT IS ON THE
10:10AM 21 SCREEN. THAT'S ENTIRELY DIFFERENT. WE HAVE THERE INTENDED
10:10AM 22 RECIPIENTS, WONG AND GARDNER, GIVING AUTHORITY TO A THIRD PARTY
10:10AM 23 TO TAKE A LOOK AT IT.

10:10AM 24 VERY DIFFERENT FROM OUR CASE WHERE WHAT WE ALLEGE IS THE
10:10AM 25 FIRST INFORMATION IS NOT STATIC, IT'S IN TRANSIT, AND IT'S

10:10AM 1 BEING INTERCEPTED IN TRANSIT. AND THE SECOND THING WE ARE
10:10AM 2 ARGUING IS THAT WE HAD NO POSSIBLE WAY OF KNOWING ABOUT IT
10:10AM 3 BECAUSE FACEBOOK AFFIRMATIVELY DECLARED WE HAD NOT BECOME A
10:10AM 4 PARTICIPANT IN THESE COMMUNICATIONS.

10:10AM 5 SO THE KONOP CASE, I THINK, ESSENTIALLY SHOWS BY
10:10AM 6 DEFINITION WHAT OUR CASE IS NOT AND WHY WE HAVE AN
10:11AM 7 INTERCEPTION.

10:11AM 8 FINALLY ON THE WIRETAP ISSUE, THE DEFENSE SAYS THERE'S NO
10:11AM 9 DEVICE AND THE ANSWER TO THAT IS I THINK THAT'S EASILY
10:11AM 10 RECOGNIZABLE.

10:11AM 11 WE'D ARGUE ABOUT THE EMBEDDED CODE, THE SERVERS, AND WE'D
10:11AM 12 ARGUE ABOUT THE COMPUTERS AND THE ROUTERS, AND THE POINT IS
10:11AM 13 LET'S LOOK AT THE DEFINITION OF 18 U.S.C. 2510. THE DEFINITION
10:11AM 14 OF A DEVICE IS ANY, ESSENTIALLY, APPARATUS THAT ALLOWS THE
10:11AM 15 INTERCEPTION WITH TWO EXCLUSIONS. ONE OF THE EXCLUSIONS IS FOR
10:11AM 16 TELEPHONE EQUIPMENT.

10:11AM 17 NOBODY HERE IS ALLEGING ANYTHING ABOUT TELEPHONE
10:11AM 18 EQUIPMENT. THE OTHER IS FOR HEARING AIDS. WE'RE NOT TALKING
10:11AM 19 ABOUT HEARING AIDS HERE. THE DEVICE CONCEPT IS EXTREMELY
10:11AM 20 BROAD.

10:11AM 21 THE DEFENDANT SAYS THAT WE'RE NOT -- WE'RE NOT GETTING ANY
10:11AM 22 CONTENTS SO EVEN IF YOU HAVE THE OTHER ELEMENTS, YOU CAN'T HAVE
10:11AM 23 THE WIRETAP IN THAT CLAIM. WE ALLEGE IN PARAGRAPHS 82 AND 83
10:11AM 24 SPECIFICALLY WHAT THE CONTENTS ARE, AND WE'RE ALLEGING IT AS TO
10:11AM 25 ALL OF THE COMMUNICATIONS THAT WE HAVE WITH THESE THIRD-PARTY

1 WEBSITES TO WHICH FACEBOOK HAS PLAYED THE IMBEDDED CODE GAME.

2 FACEBOOK FINALLY SAYS, WELL, YOU CONSENTED THAT FACEBOOK
3 WOULD BECOME A PARTY AND YOU CONSENTED THAT FACEBOOK WOULD KNOW
4 ABOUT THIS STUFF.

5 TWO QUICK POINTS ON THAT, YOUR HONOR. FIRST, IF THAT WERE
6 TRUE, YOU CAN BE SURE THAT WHEN CONGRESS ASKED FACEBOOK JUST
7 WHAT THE HECK ARE WE DOING WITH THESE INTERCEPTIONS POST
8 LOGOUT, YOU NEVER HEARD FACEBOOK COMING BACK AND SAYING, WELL,
9 THEY CONSENTED. YOU DIDN'T HEAR ANYTHING ABOUT CONSENT.

10 AS WE SAY IN OUR COMPLAINT, PARAGRAPHS 35 THROUGH 37,
11 CONGRESSMAN MARKEY AND BARTON SAY FACEBOOK BASICALLY IS SAYING,
12 WELL, WE'RE NOT DOING IT ANY MORE, BUT THEY'RE NOT OBJECTING TO
13 WHAT WENT ON BEFORE. THAT'S NUMBER ONE.

14 AND THE SECOND POINT THERE ON CONSENT IS THAT YOU CANNOT
15 VIOLATE THE STATUTE AS WE CLEARLY ALLEGE THAT FACEBOOK DID AND
16 THROUGH THAT VERY VIOLATION OF THE LIABILITY CREATING STATUTE
17 IN THE FIRST INSTANCE, DEVOLVE UPON YOURSELF, ARROGATE FOR
18 YOURSELF AN EXCEPTION TO THAT LIABILITY. THAT'S WHAT THE APPLE
19 LITIGATION CASE SAYS THAT WE CITE, AND THERE'S NO WAY THAT YOU
20 CAN MANUFACTURE AN EXCEPTION TO LIABILITY FOR THE VERY CRIMES
21 YOU COMMITTED OR THE CIVIL CLAIM THAT YOU HAVE GIVEN RISE TO BY
22 DOING THAT ACTION.

23 THE COURT: NOW, ARE YOU GOING TO SPEAK ABOUT SCA?

24 MR. GRYGIEL: I AM NOT, YOUR HONOR. I'M GOING TO
25 SPEAK ABOUT -- IF I COULD TAKE ONE MORE MOMENT. WE HAVE HEARD

10:13AM 1 ABOUT THE ECONOMIC HARM, AND I WANT TO COME BACK TO THAT FOR
10:13AM 2 JUST A SECOND.

10:13AM 3 THE CASES THAT THE DEFENDANTS RELY ON ARE NOT LIKE OUR
10:13AM 4 CASE FOR A COUPLE OF QUICK REASONS.

10:13AM 5 NUMBER ONE, WE SPECIFICALLY ALLEGE THAT THE DOLLAR VALUES
10:13AM 6 OF THE INFORMATION THAT WE ALLEGE WAS WRONGFULLY TAKEN,
10:13AM 7 DEMOGRAPHIC, PERSONAL, BROWSING HISTORIES. THAT'S IN OUR
10:13AM 8 COMPLAINT WITH DOLLAR VALUES.

10:13AM 9 NUMBER TWO, WE ALLEGE --

10:13AM 10 THE COURT: THOSE DOLLAR VALUES ARE BASED ON WHAT?

10:13AM 11 MR. GRYGIEL: INDUSTRY STUDIES. I HAVE A CHART
10:13AM 12 ACTUALLY AND AGGREGATES THAT COME FROM VARIOUS SOURCES IN THE
10:13AM 13 INDUSTRY WHICH FOR PURPOSES OF THE COMPLAINT HAVE TO BE TAKEN
10:13AM 14 AS FACTUALLY WELL PLED.

10:13AM 15 THE COURT: BUT DOLLAR VALUE, AND I'M SORRY, BUT THE
10:13AM 16 DOLLAR VALUE ARE VALUES TO CORPORATIONS?

10:13AM 17 MR. GRYGIEL: THAT'S OKAY. YES.

10:13AM 18 THE COURT: AS OPPOSED TO THE INDIVIDUALS?

10:13AM 19 MR. GRYGIEL: YES. THE VALUES OF INFORMATION.

10:13AM 20 THE COURT: TO CORPORATIONS, NOT THE INDIVIDUALS.

10:13AM 21 MR. GRYGIEL: THAT'S MY UNDERSTANDING, YOUR HONOR,
10:13AM 22 YEAH.

10:13AM 23 THE COURT: AND THERE'S A DISTINCTION FOR SOME
10:14AM 24 REASON?

10:14AM 25 MR. GRYGIEL: OH, ABSOLUTELY.

10:14AM 1 I MEAN, MR. BROWN SAID, WELL, IT HAS VALUE TO FACEBOOK,
10:14AM 2 DOESN'T IT, BECAUSE IF WE WERE HAVING THIS CONVERSATION OVER A
10:14AM 3 CUP OF COFFEE, WHY WOULD FACEBOOK SPEND ALL OF ITS MONEY TO GET
10:14AM 4 THIS INFORMATION IF IT DIDN'T HAVE SOME VALUE?

10:14AM 5 THE COURT: RIGHT, THAT'S PROBABLY COMMON KNOWLEDGE.

10:14AM 6 MR. GRYGIEL: RIGHT, EXACTLY. BUT THEN THE NEXT
10:14AM 7 QUESTION IS WE ALLEGE THAT NOT ONLY DO WE HAVE SPECIFIC DOLLAR
10:14AM 8 VALUES AND THE INDUSTRY CONSENTS IT'S \$5 ON CERTAIN KINDS OF
10:14AM 9 INFORMATION USING THIS GOOGLE CARD, WHAT WE ARGUE IS THAT
10:14AM 10 FACEBOOK ITSELF ADMITS THIS STUFF HAS REAL VALUE.

10:14AM 11 THE COURT: I GUESS I'M LOOKING AT AN INDIVIDUAL AND
10:14AM 12 I CAN'T GO OUT DOWN TO A KIOSK IN DOWNTOWN SAN JOSE AND SAY WHO
10:14AM 13 WANTS TO BUY -- I KNOW PEOPLE BUY WHOLESALE PHONES AND THAT
10:14AM 14 KIND OF THING, BUT I DON'T KNOW IF THERE'S A KIOSK THAT BUYS
10:14AM 15 PERSONAL INFORMATION.

10:14AM 16 MR. GRYGIEL: I THINK, YOUR HONOR, ON THAT, IF I
10:14AM 17 MAY, IF THE COURT WILL INDULGE ME, I'LL GO BACK TO CASES LIKE
10:14AM 18 KATZ AND HOMESTEAD, AND, THAT IS, AND THEY'RE REALLY REFLECTED,
10:14AM 19 I THINK, IN THE LANGUAGE AND IN THE IMPETUS BOTH IN THE WIRETAP
10:14AM 20 ACT AND THE STORED COMMUNICATIONS ACT AS WELL AS IN THE
10:15AM 21 AMENDMENTS IN 1986 WHICH WERE MEANT TO PROTECT THE ELECTRONIC
10:15AM 22 COMMUNICATIONS AND THAT IS THIS: I HAVE A RIGHT, A VALUABLE
10:15AM 23 RIGHT IN KNOWING WHO KNOWS WHAT ABOUT ME. AND I MIGHT NOT VERY
10:15AM 24 WELL WANT FACEBOOK OR ANYONE TO WHOM IT SELLS INFORMATION OR
10:15AM 25 HELPS IN THE TARGETED AD PROGRAM TO KNOW THAT I VISITED

10:15AM 1 WWW.PEDOPHILE.COM OR SUPPORTFORALCOHOLICS.COM, I HAVE A VALUE
10:15AM 2 IN THAT, AND THAT'S WHY THE STATUTORY STANDING TESTS, WHICH IS
10:15AM 3 SIMPLY WAS IT YOUR RIGHT THAT WAS VIOLATED AND THEN YOU HAVE
10:15AM 4 SUFFICIENT HARM BECAUSE CONGRESS SAID SO IS THE LAW OF THE
10:15AM 5 LAND, AND IT'S THE SAME THING.

10:15AM 6 THE COURT: BUT WE'RE TALKING ABOUT THE VALUE PART,
10:15AM 7 AND I'M JUST, IN LIGHT OF MY TORTURED QUESTION, IS THERE A
10:15AM 8 KIOSK WHERE I CAN SELL THIS INFORMATION?

10:15AM 9 MR. GRYGIEL: YOUR HONOR, MY UNDERSTANDING IS, NO,
10:15AM 10 BUT THERE ARE PEOPLE THAT YOU CAN PROTECT PEOPLE FROM GETTING
10:15AM 11 THAT INFORMATION FROM YOU, AND WE ALLEGE THAT IN OUR COMPLAINT.

10:15AM 12 THE COURT: AND THAT'S A WHOLE DIFFERENT INDUSTRY
10:15AM 13 THAT HAS CROPPED UP BECAUSE OF A RESULT OF ALL OF THIS AND IT'S
10:15AM 14 CALLED THE MUSHROOM EFFECT.

10:16AM 15 MR. GRYGIEL: RIGHT. WELL, WE USED TO MAKE CONGRESS
10:16AM 16 DEAL WITH THINGS AND NOW WE MAKE ARGUMENTS LIKE THE ONE I'M
10:16AM 17 MAKING TODAY.

10:16AM 18 BUT THE ISSUE THERE IS THAT ITSELF IS REFLECTIVE OF THE
10:16AM 19 VALUE. TO SUMMARIZE ON THE VALUE ISSUE, WE PLEAD DIFFERENTLY.
10:16AM 20 WE PLEAD SPECIFIC VALUES OF THIS;

10:16AM 21 NUMBER TWO, FACEBOOK OBVIOUSLY RECOGNIZES THAT VALUE OR IT
10:16AM 22 WOULDN'T BE DOING WHAT IT DOES TO GET THAT INFORMATION; AND,

10:16AM 23 NUMBER THREE, FACEBOOK IS TELLING ITS INVESTORS AND
10:16AM 24 ADVERTISERS, THIS IS WHAT WE'RE OUT THERE GETTING AND THIS IS
10:16AM 25 WHAT OUR VALUE PROPOSITION IS.

10:16AM 1 NOW, FOR PURPOSES OF 12 (B) (1) AND 12 (B) (6), YOUR HONOR,
10:16AM 2 THAT STATES A CLAIM. WE NEED NOT GO ANY FARTHER. THE
10:16AM 3 DEFENDANTS ARE VERY BIG ON TRYING TO CREATE, I THINK, A
10:16AM 4 SPECIFICITY TEST FOR THE PLEADINGS AND IT DOESN'T EXIST. THE
10:16AM 5 MAYA CASE TELLS US THAT AND THE JEWEL CASE THAT THEY CITE TELLS
10:16AM 6 US THAT.

10:16AM 7 THE COURT: I READ YOUR COMMENTS.

10:16AM 8 MR. GRYGIEL: ANYTHING ELSE?

10:16AM 9 THE COURT: NO. I WANT TO MOVE TO SCA, BUT I WANT
10:16AM 10 TO GIVE MR. BROWN AN OPPORTUNITY TO RESPOND TO YOUR COMMENTS IF
10:16AM 11 HE WISHES.

10:16AM 12 MR. BROWN: YES, YOUR HONOR. SO THERE ARE A NUMBER
10:16AM 13 OF THINGS TO ADDRESS HERE. STARTING WITH THE CONSENT ISSUE, I
10:17AM 14 THOUGHT WE WERE GOING TO LIMIT IT TO ARTICLE III STANDING.

10:17AM 15 THE COURT: THAT'S WHERE I STARTED AND THEN IT
10:17AM 16 DRIFTED A LITTLE.

10:17AM 17 MR. BROWN: SO ON THE CONSENT ISSUE, REALLY, THE
10:17AM 18 SECOND KIND OF BIG PICTURE AND MAJOR STRIKING POINT ABOUT THE
10:17AM 19 COMPLAINT IN MY VIEW IS THAT LACK OF CONSENT IS REALLY THE
10:17AM 20 GRAVAMEN OF THEIR COMPLAINT. IT'S FUNDAMENTAL TO MANY OF THEIR
10:17AM 21 CAUSES OF ACTION IF NOT EVERY SINGLE ONE.

10:17AM 22 AND THERE'S JUST AN UTTER FAILURE OF PLEADING ON THAT
10:17AM 23 POINT. AND THEY SAY A LOT OF THINGS AND MAKE IT SOUND AS
10:17AM 24 THOUGH THEY HAVE DONE THEIR JOB IN THE PLEADINGS, BUT IT'S JUST
10:17AM 25 SIMPLY NOT TRUE.

10:17AM 1 WELL, FIRST OFF LET ME SAY THIS, THE PLAINTIFFS ALLEGE AND
10:17AM 2 THEY ACKNOWLEDGE IN THE COMPLAINT THAT THE GOVERNING DOCUMENTS
10:17AM 3 FOR THE FACEBOOK CITE ARE THE TERMS OF USE, WHICH FACEBOOK ALSO
10:17AM 4 STATES IN THEIR RIGHTS AND RESPONSIBILITIES, AND THE PRIVACY
10:17AM 5 POLICY, AND THAT'S FROM THE PLAINTIFF'S COMPLAINT.

10:18AM 6 THE PRIVACY POLICY, THE VERSION DATED APRIL 22ND, 2010,
10:18AM 7 WHICH WAS IN EFFECT AT THE BEGINNING OF THE CLASS PERIOD IN
10:18AM 8 THIS CASE, HAD AN ENTRY TITLED IN BOLD FACE "COOKIE
10:18AM 9 INFORMATION" AND IT SAID WE USE COOKIES, SMALL PIECES OF DATA,
10:18AM 10 AND WE STORE FOR AN EXTENDED PERIOD OF TIME ON YOUR COMPUTER TO
10:18AM 11 MAKE FACEBOOK EASIER TO USE, TO MAKE OUR ADVERTISING BETTER AND
10:18AM 12 TO PROTECT YOU AND FACEBOOK.

10:18AM 13 FOR EXAMPLE, WE USE THEM TO STORE YOUR LOGIN I.D., AND
10:18AM 14 THIS IS IN THE PRIVACY POLICY, BUT NEVER YOUR PASSWORD TO MAKE
10:18AM 15 IT EASIER TO LOG IN WHEN YOU RETURN BACK TO FACEBOOK. AND WE
10:18AM 16 ALSO USE THEM TO CONFIRM THAT YOU WERE LOGGED INTO FACEBOOK AND
10:18AM 17 TO KNOW WHEN YOU ARE INTERACTING WITH FACEBOOK PLATFORM
10:18AM 18 APPLICATIONS AND WEBSITES, MEANING THIRD-PARTY WEBSITES ON THE
10:18AM 19 FACEBOOK PLATFORM, OUR WIDGETS AND SHARE BUTTON, LIKE THE LIKE
10:19AM 20 BUTTON THAT APPARENTLY THIS CASE IS ABOUT ON THIRD-PARTY
10:19AM 21 WEBSITE, AND OUR ADVERTISEMENTS.

10:19AM 22 YOU CAN REMOVE OR BLOCK COOKIES USING THE SETTINGS IN YOUR
10:19AM 23 BROWSERS BUT IN SOME CASES THAT MAY IMPACT YOUR ABILITY TO USE
10:19AM 24 FACEBOOK.

10:19AM 25 THIS IS RIGHT IN THE PRIVACY POLICY. THIS DISCLOSURE

10:19AM 1 RIGHT HERE DISCLOSES THE VERY CONDUCT THAT THEY'RE ALLEGING IS
10:19AM 2 WRONGFUL IN THIS CASE. AND IF YOU READ THE COMPLAINT, THERE
10:19AM 3 ARE VERY BRIEF ILLUSIONS TO THE PRIVATE POLICY WHILE
10:19AM 4 ACKNOWLEDGING THAT THEY'RE ONE OF THE GOVERNING DOCUMENTS OF
10:19AM 5 THIS SITE, BUT THERE'S NO REAL ACCOUNTING FOR THIS VERY
10:19AM 6 EXPLICIT DISCLOSURE WHICH COVERS THE VERY CONDUCT THAT THIS
10:19AM 7 CASE IS ALL ABOUT.

10:19AM 8 THE COURT: MR. STRAITE JUST SAID THAT WE HAD NO
10:19AM 9 KNOWLEDGE, AND I THINK HE SAID THAT SEVERAL TIMES.

10:19AM 10 MR. BROWN: WELL, THEY DID, BECAUSE, IN FACT, TO
10:19AM 11 REGISTER, NOT ONLY IS IT STARING AT THEM IN THE FACE OF THE
10:19AM 12 PRIVACY POLICY BUT WHEN YOU REGISTER FOR THE SITE, YOU ACTUALLY
10:19AM 13 HAVE TO ACKNOWLEDGE THAT YOU READ THE PRIVACY POLICY AND IT'S
10:19AM 14 ALSO REFERENCED IN THE TERMS OF USE.

10:19AM 15 AND I'M NOT JUST BRINGING THAT UP AS A MATTER OUTSIDE OF
10:20AM 16 THE PLEADINGS. THEY ACTUALLY ALLEGE THAT.

10:20AM 17 WHAT THEY BASICALLY DO, THEIR MANEUVER HERE, BECAUSE THEY
10:20AM 18 CONCEDE, WHAT THEY SAY IS THAT WE CONCEDE THAT FACEBOOK HAD THE
10:20AM 19 RIGHT TO DO EVERYTHING, WE'RE ALLEGING, IF USERS WERE LOGGED
10:20AM 20 IN. THEY, THEY -- I MEAN, THAT IS RIGHT IN THEIR COMPLAINT.
10:20AM 21 THEY MAKE THAT ADMISSION.

10:20AM 22 SO THIS CASE IS ALL ABOUT LOGGED OUT FACEBOOK USERS.
10:20AM 23 THERE'S NOTHING THAT I JUST READ TO YOU THAT LIMITS THE
10:20AM 24 DISCLOSURES SOMEHOW TO ONLY LOGGED IN USERS.

10:20AM 25 THE MANEUVER THAT THEY HAVE TO MAKE IS THAT THEY HAVE GONE

10:20AM 1 AND FOUND ONE SENTENCE IN THE HELP CENTER, THE HELP CENTER OF
10:20AM 2 THE WEBSITE THAT, YOU KNOW, THAT SAYS THAT CERTAIN TYPES OF
10:20AM 3 COOKIES WILL BE DELETED WHEN YOU LOG OUT.

10:20AM 4 BUT THERE'S ABSOLUTELY NO ALLEGATION IN THE COMPLAINT THAT
10:20AM 5 ANY OF THESE NAMED PLAINTIFFS EVER SAW THAT HELP CENTER
10:20AM 6 STATEMENT, LET ALONE ANY ALLEGATION THAT THESE NAMED PLAINTIFFS
10:20AM 7 RELIED ON IT. THAT'S FATAL TO ALL OF THEIR CLAIMS THAT RELY ON
10:21AM 8 LACK OF CONSENT. IT'S FATAL. AND THERE'S BEEN NO ACCOUNTING
10:21AM 9 EITHER IN THEIR PLEADING OR THEIR PAPERS OR ARGUMENT TODAY TO
10:21AM 10 DEAL WITH THAT MAJOR FAILURE OF PLEADING.

10:21AM 11 I'D LIKE TO MOVE FROM THERE THEN TO -- SO I SHOULD JUST
10:21AM 12 MENTION THAT I SAY THAT'S FUNDAMENTAL TO MANY OF THEIR CAUSES
10:21AM 13 OF ACTION, AND IT'S FUNDAMENTAL TO THEIR WIRETAP CLAIM AND SCA
10:21AM 14 CLAIMS IN PARTICULAR.

10:21AM 15 THEIR COMMENT EARLIER ABOUT FACEBOOK ENGINEERS MAKING
10:21AM 16 CERTAIN STATEMENTS, I WOULD SUBMIT IT'S SMOKE AND MIRRORS.
10:21AM 17 JUST BECAUSE FACEBOOK SAID THAT THEY DIDN'T INTEND TO NOT
10:21AM 18 DELETE CERTAIN TYPES OF COOKIES UPON LOGOUT AND THEY DIDN'T
10:21AM 19 COMPLY WITH WHAT THEY INTENDED TO DO IS MUCH DIFFERENT THAN
10:21AM 20 SAYING THAT THERE IS LEGAL LIABILITY FOR DOING THAT. THOSE ARE
10:22AM 21 TWO VERY DISTINCT THINGS.

10:22AM 22 THEY HAVE ALLEGED CERTAIN CAUSES OF ACTION THAT REQUIRE
10:22AM 23 LACK OF CONSENT. FACEBOOK HAD THE CONSENT. WHETHER IT
10:22AM 24 INTENDED TO DO A CERTAIN THING OR NOT AND LATER CHARACTERIZED
10:22AM 25 IT AS A MISTAKE IS A VERY DIFFERENT THING FROM WHETHER THAT'S

10:22AM 1 AN ADMISSION THAT THEY WERE SOMEHOW LEGALLY LIABLE UNDER
10:22AM 2 PARTICULAR STATUTES OR UNDER TORT LAW. TWO VERY DIFFERENT
10:22AM 3 THINGS.

10:22AM 4 MOVING NOW TO THE ISSUE OF VALUE, GETTING BACK TO ONE OF
10:22AM 5 THE CORE ARTICLE III CONCEPTS, I WAS LISTENING VERY CAREFULLY
10:22AM 6 WHEN YOU WERE HAVING THE COLLOQUY WITH COUNSEL AND THE DIRECT
10:22AM 7 QUESTION WAS, WAS THERE ANY ALLEGATION THAT THIS PARTICULAR
10:22AM 8 INFORMATION HAS DEMONSTRABLE VALUE TO THESE NAMED PLAINTIFFS?
10:22AM 9 AND THE ANSWER REALLY IS, NO, THERE IS NO ALLEGATION IN THE
10:22AM 10 COMPLAINT.

10:23AM 11 AND, YOU KNOW, THE PHRASE THAT WAS USED A FEW TIMES WAS
10:23AM 12 THAT WE HAVE ALLEGED SPECIFIC VALUES OF THIS.

10:23AM 13 WELL, IT'S NOT A SPECIFIC VALUE OF THIS. SOME ARE OUT
10:23AM 14 THERE IN THE WORLD BASED ON SOME STUDY THAT HAS BEEN DONE OR
10:23AM 15 VALUE TO WHO KNOWS WHAT CORPORATION AND WHERE.

10:23AM 16 IT HAS TO BE DEMONSTRABLE VALUE SHOWN TO THESE NAMED
10:23AM 17 PLAINTIFFS AND OUR PAPERS ARE JUST FILLED WITH CITATIONS TO
10:23AM 18 CASES THAT ARE ON POINT. I'M NOT GOING TO TRY TO RECITE THEM
10:23AM 19 ALL RIGHT NOW, WHICH WOULD BE PROBABLY A FOOL'S ERRAND.

10:23AM 20 BUT I WOULD JUST POINT OUT THAT THERE'S A COUPLE THAT CAME
10:23AM 21 QUICKLY TO MIND. ONE IS IN RE: FACEBOOK PRIVACY LITIGATION IN
10:23AM 22 THIS DISTRICT BEFORE JUDGE WARE, AND JUDGE WARE HELD THAT
10:23AM 23 FACEBOOK WAS FREE, AND, THEREFORE, PLAINTIFFS COULD NOT ALLEGE
10:23AM 24 THAT THEY LOST ANY MONEY OR PROPERTY AS A RESULT OF THE CONDUCT
10:23AM 25 THERE. AND IT'S PRECISELY THE SAME DEFENDANT AND THE SAME

10:24AM 1 WEBSITE AND THE FACT IS THAT FACEBOOK IS FREE, THERE'S NO MONEY
10:24AM 2 PAID TO JOIN THE SITE AND THEY HAVE TO TIE THEMSELVES IN KNOTS
10:24AM 3 IN THESE SORT OF VALUE-FOR-VALUE EXCHANGE THEORIES, WHICH I
10:24AM 4 HAVE SAID BEFORE HAVE BEEN REJECTED REPEATEDLY BY THE COURTS.

10:24AM 5 AND, FURTHERMORE, IN THE IPHONE APPLICATION LITIGATION
10:24AM 6 BEFORE JUDGE KOH, AGAIN, A PLAINTIFF'S PERSONAL INFORMATION
10:24AM 7 DOES NOT SUBSTITUTE MONEY OR PROPERTY. AND THOSE ARE TWO
10:24AM 8 EXAMPLES, AND WE HAVE CITED MANY OTHERS. AND SO THAT SHOULD
10:24AM 9 REALLY BE THE END.

10:24AM 10 THE COURT: DOES THAT PUT THE END TO ALL OF THESE
10:24AM 11 KINDS OF CASES IN YOUR OPINION IF YOU CAN'T SHOW VALUE?

10:24AM 12 MR. BROWN: WELL, IT DEPENDS ON EXACTLY WHAT THE
10:24AM 13 THEORY OF INJURY IS. I DON'T WANT TO SAY -- I DON'T WANT TO
10:24AM 14 SPEAK BROADLY BECAUSE I DON'T KNOW IT'S NECESSARY TO DISPOSE OF
10:24AM 15 THIS CASE TO TAKE SOME BROAD POSITION ON THAT.

10:24AM 16 IT'S CERTAINLY IN A LOT OF THESE PRIVACY CLASS ACTIONS
10:24AM 17 THAT HAVE BEEN BROUGHT IN THE LAST COUPLE OF YEARS, MANY OF THE
10:25AM 18 COMPLAINTS HAVE GOTTEN DISMISSED ON THIS VERY GROUND. IT
10:25AM 19 DOESN'T MEAN THAT EVERY ONE HAS, AND IT DOESN'T MEAN THAT THERE
10:25AM 20 COULDN'T BE CERTAIN FACT PATTERNS.

10:25AM 21 FOR INSTANCE, YOU KNOW, A WEBSITE THAT CHARGES A FEE,
10:25AM 22 POSSIBLY, IT DEPENDS ON THE FACTS, AND IT DEPENDS ON WHETHER
10:25AM 23 THE FEE FOR THE USE OF THE WEBSITE IS SOMEHOW TETHERED TO THE
10:25AM 24 USE OF THE ALLEGED WRONGFUL CONDUCT.

10:25AM 25 THE COURT: SURE. I THINK WE CAN ALL HYPOTHECATE

10:25AM 1 ALL KINDS OF DIFFERENT FACTS, AND I DIDN'T MEAN TO PUT YOU IN A
10:25AM 2 POSITION TO ARGUE AGAINST YOURSELF, BUT I'M JUST CURIOUS
10:25AM 3 WHETHER OR NOT IF YOU CAN'T SHOW THE INJURY AND THERE'S NO
10:25AM 4 VALUE TO ANY OF THIS INFORMATION TO AN INDIVIDUAL, THEN WHAT IS
10:25AM 5 THE INDIVIDUAL'S REDRESS? WHAT DO THEY DO? HOW DO THEY EVER
10:25AM 6 GET INTO COURT?

10:25AM 7 MR. BROWN: WELL, YOU KNOW, YOU OFTEN DO HAVE THESE
10:25AM 8 STATUTORY VIOLATIONS. AGAIN, THERE HAS GOT TO BE SOME
10:26AM 9 TETHERING TO THE ALLEGED STATUTORY VIOLATION AND SOME SORT OF
10:26AM 10 PARTICULARITY TO THE USERS -- I'M SORRY -- TO THE PLAINTIFF.

10:26AM 11 BUT, NO, I DON'T ACTUALLY THINK OUR POSITION LEADS YOU
10:26AM 12 DOWN THAT SLIPPERY SLOPE. I THINK YOU HAVE TO TAKE EVERY CASE
10:26AM 13 THAT COMES BEFORE YOU AND THEN THERE ARE GOING TO BE PLENTY OF
10:26AM 14 CASES THAT YOU CAN SHOW ACTUAL INJURY, IT'S JUST THAT, FRANKLY,
10:26AM 15 THERE HAVE BEEN A LOT, IN MY PERSONAL VIEW, THERE HAVE BEEN A
10:26AM 16 LOT OF CLASS ACTIONS BROUGHT IN THE PAST FEW YEARS WHERE IT IS
10:26AM 17 A HOT AREA AND WHERE THERE REALLY ISN'T AN INJURY. AND SO TO
10:26AM 18 COMPENSATE FOR WHAT THEY'RE LACKING IN THE REAL WORLD WITH
10:26AM 19 ACTUAL FACTS, PEOPLE HAVE COME UP WITH TORTURED THEORIES OF
10:26AM 20 INJURY AND SO YOU ARE SEEING A LOT OF COURTS THROWING THESE
10:26AM 21 CASES OUT.

10:26AM 22 MOVING NOW, IF I COULD, TO THE WIRETAP ACT, BECAUSE WE ARE
10:27AM 23 SORT OF, WE'VE MORE THAN INCHED, I THINK, INTO THE MERITS OF
10:27AM 24 THAT CLAIM.

10:27AM 25 JUST TO GIVE YOU AN OVERVIEW OF OUR ARGUMENT, AND IT WAS

10:27AM 1 DEALT WITH QUITE THOROUGHLY IN OUR PAPERS, BUT THERE ARE REALLY
10:27AM 2 IN MY MIND SIX DIFFERENT REASONS WHY THIS CLAIM SHOULD FAIL,
10:27AM 3 ALL OF THEM INDEPENDENT.

10:27AM 4 ONE OF THOSE IS BECAUSE THERE'S NO INTERCEPTION;

10:27AM 5 TWO, WE'RE NOT TALKING ABOUT CONTENTS OF COMMUNICATIONS AS
10:27AM 6 THAT'S UNDERSTOOD UNDER THE STATUTE; AND,

10:27AM 7 THREE, THERE WAS NO DEVICE ALLEGED, WHICH IS A REQUIREMENT
10:27AM 8 FOR A CLAIM UNDER THE STATUTE;

10:27AM 9 FACEBOOK WAS A PARTY TO THE COMMUNICATION, WHICH
10:27AM 10 ABSOLUTELY DECIMATES THEIR CLAIM;

10:27AM 11 THE PLAINTIFFS CONSENTED TO THE USE OF COOKIES, AS I JUST
10:27AM 12 MENTIONED, BECAUSE OF THE PRIVACY POLICY DISCLOSURE; AND,

10:27AM 13 FINALLY, THIRD-PARTY WEBSITES ALSO CONSENTED AND THAT CAN
10:27AM 14 BE A DEFENSE AS WELL UNDER THE WIRETAP ACT.

10:27AM 15 THE COURT: LET ME EXPLORE JUST FOR A MOMENT THE
10:28AM 16 PARTY AND THE INTERCEPTION. YOU INDICATED THE PARTY, FACEBOOK,
10:28AM 17 WAS A PARTY TO THE COMMUNICATION, WHICH IT SEEMS LIKE IT WOULD
10:28AM 18 THEN DO AWAY WITH AN INTERCEPTION ARGUMENT. AND TELL ME HOW
10:28AM 19 THAT WORKS OUT.

10:28AM 20 MR. BROWN: IT DOES DO AWAY WITH IT. AND THE
10:28AM 21 PROBLEM HERE, AGAIN, I DON'T MEAN TO BE IMPRECISE, AND I'LL GET
10:28AM 22 VERY PRECISE IN A SECOND, BUT THE PROBLEM IS THEY'RE TRYING TO
10:28AM 23 FIT A SQUARE PEG INTO A ROUND HOLE AND THIS IS NOT A STATUTE
10:28AM 24 THAT IS EVER DESIGNED TO COVER CONDUCT LIKE THAT. THIS IS THE
10:28AM 25 WIRETAP ACT.

10:28AM 1 THE COURT: THIS WAS DEVELOPED WAY BEFORE.

10:28AM 2 MR. BROWN: WAY BEFORE.

10:28AM 3 THE COURT: BEFORE OUR FORMER VICE PRESIDENT
10:28AM 4 INVENTED THE INTERNET.

10:28AM 5 MR. BROWN: YEAH. I MEAN, AND SO NATURALLY YOU'RE
10:28AM 6 GOING TO STRUGGLE TO TRY TO APPLY A STATUTE LIKE THIS TO A SET
10:28AM 7 OF FACTS LIKE THIS.

10:28AM 8 AND WHEN YOU START FINDING YOURSELF SEARCHING FOR HOW YOU
10:28AM 9 CAN MAKE THESE PROVISIONS WORK, IT OUGHT TO BE A RED FLAG.

10:29AM 10 HERE THERE IS NO INTERCEPTION. WHAT WE HAVE HERE IS TWO
10:29AM 11 SEPARATE AND CONSECUTIVE TRANSMISSIONS. AND THIS IS FROM THE
10:29AM 12 COMPLAINT, WE'RE TAKING THE NONCONCLUSORY FACTUAL ALLEGATIONS
10:29AM 13 OF THEIR COMPLAINT AS TRUE FOR PURPOSES OF THIS MOTION.

10:29AM 14 NOW, THERE ARE TWO SEPARATE AND CONSECUTIVE TRANSMISSIONS.
10:29AM 15 ONE IS A COMMUNICATION. FIRST OF ALL, IF YOU ASSUME THERE'S A
10:29AM 16 COMMUNICATION, AND I WOULDN'T CONCEDE THAT.

10:29AM 17 THE COURT: THE CLICKING AND THE HYPOTHETICAL THAT I
10:29AM 18 USED, THE CLICKING OF WHEREVER IT WAS AND THAT'S NOT A
10:29AM 19 COMMUNICATION? SENDING THAT REQUEST TO A WEBSITE IS NOT A
10:29AM 20 COMMUNICATION?

10:29AM 21 MR. BROWN: I WOULDN'T CONCEDE THAT, NO. CERTAINLY
10:29AM 22 NOT THE CONTENTS OF THE COMMUNICATION, BUT I DON'T THINK THAT
10:29AM 23 WE NEED TO GET THERE TO DISPOSE OF THE CLAIM.

10:29AM 24 THE COURT: SURE.

10:29AM 25 MR. BROWN: SO LET'S TAKE CNN.COM AS AN EXAMPLE.

10:29AM 1 THE FIRST COMMUNICATION WOULD BE A GET REQUEST TO DISPLAY THAT
10:30AM 2 PARTICULAR CNN WEB PAGE TO THE USER AND PLUS ANY INFORMATION
10:30AM 3 CONTAINED IN THE CNN.COM WEB PAGE TO THE BROWSER.

10:30AM 4 THEN AFTER THAT, THE USER OF THE BROWSER SENDS A DIFFERENT
10:30AM 5 GET REQUEST TO FACEBOOK SERVERS IN ORDER TO GET THE FACEBOOK
10:30AM 6 LIKE BUTTON IMAGE THAT NEEDS TO BE DISPLAYED BY THE CNN SITE
10:30AM 7 AND ALONG WITH THAT ANY INFORMATION THAT WAS IN THE FACEBOOK
10:30AM 8 COOKIE THAT WAS ON THE USER'S BROWSER. TWO DIFFERENT
10:30AM 9 COMMUNICATIONS.

10:30AM 10 AND, YOU KNOW, PEOPLE MIGHT SAY THIS IS A HYPER TECHNICAL
10:30AM 11 LOOK, THE READING OF THE STATUTE. WELL, IT'S A TECHNICAL
10:30AM 12 STATUTE AND IT'S A CERTAIN SET OF FACTS THAT HAVE BEEN BROUGHT
10:30AM 13 BEFORE THE COURT, AND IT DOESN'T FIT.

10:30AM 14 THE COURT: SO YOU'RE SAYING IT'S TWO SEPARATE
10:30AM 15 COMMUNICATIONS AS OPPOSED TO ONE COMMUNICATION THAT WAS THEN
10:30AM 16 INTERCEPTED BY THE FACEBOOK PROCESS, WHATEVER THAT IS?

10:30AM 17 MR. BROWN: THAT'S CORRECT. AND SO THAT'S ONE
10:31AM 18 DISTINCT GROUND IN WHICH THIS CLAIM FAILS AND A DISTINCT GROUND
10:31AM 19 FROM THAT, A SECOND GROUND, IS THAT FACEBOOK, AS I JUST SET
10:31AM 20 FORTH, IS ACTUALLY A PARTY TO THE COMMUNICATION.

10:31AM 21 THE COURT: AND HOW DOES THAT WORK? HOW ARE THEY A
10:31AM 22 PARTY TO THE USER AT HOME AND IN YOUR COLLEAGUE'S KITCHEN WHEN
10:31AM 23 HE WISHES TO GET, HOW ARE THEY A PARTY TO THAT?

10:31AM 24 MR. BROWN: WELL, AGAIN, IF YOU ASSUME IT'S A
10:31AM 25 COMMUNICATION, FIRST OF ALL, AS OPPOSED TO JUST THE PROCESS OF

10:31AM 1 HOW THE INTERNET WORKS AND HOW IT HAS WORKED FOR A LONG TIME, I
10:31AM 2 MIGHT ADD, THEN EITHER THEY'RE A RECIPIENT OF THE COMMUNICATION
10:31AM 3 BETWEEN THE USER OR THE USER'S BROWSER, REALLY TECHNICALLY, AND
10:31AM 4 FACEBOOK, OR THIS IS NOT THE WAY THAT I READ THEIR COMPLAINT OR
10:31AM 5 IF THEY WANT TO CHARACTERIZE THEIR COMPLAINT AS BEING SOMEHOW A
10:31AM 6 COMMUNICATION FROM CNN.COM AND FACEBOOK IS STILL A PARTY TO
10:31AM 7 THAT COMMUNICATION AS WELL. EITHER WAY.

10:31AM 8 THE COURT: BY VIRTUE OF?

10:31AM 9 MR. BROWN: THE COMMUNICATION, IF WE'RE CALLING IT
10:32AM 10 THAT, HAS TO GO TO FACEBOOK, BECAUSE IN ORDER TO POPULATE THE
10:32AM 11 CNN WEBSITE WITH THE FACEBOOK LIKE BUTTON, THERE HAS TO BE A
10:32AM 12 COMMUNICATION WITH THE FACEBOOK SERVER IN ORDER FOR THAT LIKE
10:32AM 13 BUTTON TO GET DISPLAYED.

10:32AM 14 THE COURT: AND THAT LIKE BUTTON WILL BE DISPLAYED
10:32AM 15 IF THEY LOGGED OFF?

10:32AM 16 MR. BROWN: THAT'S RIGHT. THAT'S RIGHT. AND THAT'S
10:32AM 17 JUST THE WAY THAT THE INTERNET WORKS AND IT'S NOT AS IF CNN.COM
10:32AM 18 CAN JUST POPULATE THAT LIKE BUTTON WITHOUT THIS SERVER REQUEST
10:32AM 19 GOING TO FACEBOOK.

10:32AM 20 SO WE TALK THERE ABOUT NO INTERCEPTION AND FACEBOOK WAS A
10:32AM 21 PARTY TO THE COMMUNICATION. THE PLAINTIFF'S COUNSEL -- OH,
10:32AM 22 ACTUALLY JUST ON INTERCEPTION FOR A MOMENT, STICKING WITH THAT,
10:32AM 23 PLAINTIFF'S COUNSEL AT ONE POINT SAID ASSUMING THAT KONOP
10:32AM 24 VERSUS HAWAIIAN AIRLINES IS GOVERNING LAW.

10:32AM 25 WELL, WE DON'T HAVE TO ASSUME IT. WE ARE IN THE NINTH

10:33AM 1 CIRCUIT. IT IS THE GOVERNING LAW. AND THE PLAINTIFFS AGAIN
10:33AM 2 WENT OUT OF THEIR WAY TO ARGUE FIRST CIRCUIT AUTHORITY AND
10:33AM 3 SEVENTH CIRCUIT AUTHORITY, AND THEY SEEMED TO LIKE THAT BETTER,
10:33AM 4 BUT WE ARE IN THE NINTH CIRCUIT AND IT IS GOVERNING LAW.

10:33AM 5 AND UNDER KONOP, THE NINTH CIRCUIT HAS HELD THAT IT MUST
10:33AM 6 BE DURING TRANSMISSION, AND THAT'S WHAT INTERCEPTION MEANS, AND
10:33AM 7 THEY DESCRIBE THAT AS THE VERY SHORT PERIOD WHERE TRAVELS
10:33AM 8 ACROSS THE WIRES OF THE SPEED OF LIGHT.

10:33AM 9 SO HAVING TWO SEPARATE COMMUNICATIONS THAT ARE CLOSE IN
10:33AM 10 TIME OR SOMETHING LIKE THAT DOESN'T CUT IT.

10:33AM 11 THE COURT: ARE THERE ANY CASES, NINTH CIRCUIT OR
10:33AM 12 OTHERWISE, THAT ACTUALLY TELL US WHAT A COMMUNICATION IS, WHAT
10:33AM 13 AN INTERCEPTION IS, WHAT A TRANSMISSION IS VIS-À-VIS THE USE OF
10:33AM 14 THE INTERNET AND THE USER'S USE OF THEIR COMPUTER TRYING TO
10:34AM 15 ACCESS INFORMATION ON THE INTERNET? IS THERE ANY CASE TELLING
10:34AM 16 US THAT'S WHAT THAT IS, AND, IF NOT, ISN'T THAT WHAT YOU'RE
10:34AM 17 ASKING THE COURT TO DEFINE?

10:34AM 18 THAT'S A QUESTION FOR BOTH OF YOU.

10:34AM 19 MR. BROWN: I'M GOING TO BE TOTALLY FRANK WITH THE
10:34AM 20 COURT, I'M A LITTLE BIT ON THE SPOT ON THIS ONE AND I'M FELLING
10:34AM 21 ON THE SPOT.

10:34AM 22 THE COURT: THAT'S WHY WE ASK THIS QUESTION.

10:34AM 23 MR. BROWN: AND I SHOULD, FRANKLY, BE PREPARED TO
10:34AM 24 ANSWER IT AND I SAY THAT SHEEPISHLY. AND I THINK WE ADDRESS A
10:34AM 25 COUPLE OF THOSE CASES IN OUR PAPERS, AND I'LL HAVE TO GO BACK

10:34AM 1 AND LOOK.

10:34AM 2 ONE THAT COMES TO MIND ACTUALLY, AND IT'S CLOSE, I'M NOT
10:34AM 3 SURE IF IT'S EXACTLY WHAT YOU'RE GETTING AT, BUT I THINK IT'S
10:34AM 4 CLOSE, IS THE FACEBOOK PRIVACY LITIGATION. AND SO THAT WAS A
10:34AM 5 CASE WHERE YOU HAD THE ALLEGATION WAS THAT WHEN A FACEBOOK USER
10:34AM 6 CLICKED ON A THIRD-PARTY ADVERTISEMENT THAT APPEARED IN THE
10:34AM 7 FACEBOOK WEBSITE AND THE STANDARD FUNCTIONING OF THE INTERNET,
10:35AM 8 AGAIN, WHAT HAPPENS IS A REFERRER GETS TRANSMITTED FROM THE
10:35AM 9 USER'S BROWSER TO THE KIND OF RECEIVING WEBSITE OR THE
10:35AM 10 ADVERTISER'S WEBSITE. AND THEN, YOU'RE RIGHT.

10:35AM 11 AND THERE JUDGE WARE -- AND THAT'S A STANDARD FUNCTION OF
10:35AM 12 THE INTERNET, BUT THERE JUDGE WARE HELD THAT ESSENTIALLY
10:35AM 13 FACEBOOK IS A PARTY TO THAT COMMUNICATION ONE WAY OR THE OTHER,
10:35AM 14 AND, THEREFORE, THERE CAN'T BE ANY CLAIM UNDER EITHER THE
10:35AM 15 WIRETAP ACT OR THE SCA.

10:35AM 16 IN TERMS OF THE ELEMENT OF THE WIRETAP ACT, RELATING TO
10:35AM 17 DEVICE, THE WIRETAP ACT REQUIRES THAT THE INTERCEPTION BE
10:35AM 18 ACCOMPLISHED USING AN ELECTRONIC, MECHANICAL OR OTHER DEVICE.

10:35AM 19 THE CROWLEY VERSUS CYBERSOURCE CASE, ANOTHER NORTHERN
10:35AM 20 DISTRICT OF CALIFORNIA CASE, EXPLAINED THAT IT HAD TO BE
10:35AM 21 SOMETHING OTHER THAN THE TOOLS THAT ARE USED IN THE ORDINARY
10:35AM 22 COURSE OF COMMUNICATION.

10:36AM 23 SO -- AND THAT MAKES SENSE, RIGHT? I MEAN, THIS IS THE
10:36AM 24 WIRETAP ACT. THE QUINTESSENTIAL EXAMPLE IS THAT YOU TAP A
10:36AM 25 PHONE LINE, YOU TAKE A DEVICE, AND THERE'S A PHONE LINE AND ONE

10:36AM 1 PERSON IS TALKING TO ANOTHER PERSON AND YOU USE IT AND YOU TAP
10:36AM 2 THIS DEVICE, AND YOU STICK IT ON THE PHONE LINE, AND THAT'S THE
10:36AM 3 DEVICE.

10:36AM 4 SO, FINE, OR MAYBE WE'RE NOT IN THAT WORLD IN THIS CASE,
10:36AM 5 BUT I THINK IT'S USEFUL TO THINK ABOUT WHERE THIS STATUTE CAME
10:36AM 6 FROM.

10:36AM 7 SO IF YOU'RE SIMPLY POINTING TO ALL OF THE TYPICAL TOOLS
10:36AM 8 THAT ARE USED IN STANDARD INTERNET USAGE THE WAY THE INTERNET
10:36AM 9 WORKS, THAT'S NOT SUFFICIENT. THOSE CAN'T BE DEVICES. IT HAS
10:36AM 10 TO BE SOMETHING BEYOND THAT.

10:36AM 11 AND THE ONLY THING THAT THEY REALLY POINTED TO, AND
10:36AM 12 THEY'RE ALL OVER THE PLACE AND YOU HAVE TO GO BACK AND LOOK
10:36AM 13 CAREFULLY AT THE COMPLAINT TO LOOK AT WHAT THEY ALLEGED THERE
10:36AM 14 TO SEE WHAT THEY BROUGHT INTO THEIR OPPOSITION BRIEF, WHICH IS
10:36AM 15 A DIFFERENT STORY.

10:36AM 16 BUT ANYTHING THAT THEY POINTED TO, THE COOKIES THEMSELVES,
10:37AM 17 BROWSERS, THEIR COMPUTERS, FACEBOOK SERVERS, THOSE ARE ALL
10:37AM 18 TOOLS THAT WOULD BE USED ORDINARILY TO ACCOMPLISH WHAT IS
10:37AM 19 TRYING TO BE ACCOMPLISHED, WHICH IS TO PULL UP A WEB PAGE AND
10:37AM 20 SHOW THE FACEBOOK LIKE BUTTON.

10:37AM 21 THE COURT: SO THOSE ARE NOT UNUSUAL IN THE CURRENT
10:37AM 22 TECHNOLOGY, AND I MEANT NO DISRESPECT TO OUR FORMER VICE
10:37AM 23 PRESIDENT, BUT SINCE THE ADVENT OF THE INTERNET AND ALL OF THE
10:37AM 24 IMPROVEMENTS THAT IT HAS TAKEN, YOU'RE SAYING THAT THE GROWTH
10:37AM 25 OF THE TECHNOLOGY, THE EQUIPMENT TO ACCESS THAT.

10:37AM 1 MR. BROWN: YEAH. I MEAN, THIS IS THE WAY THAT THE
10:37AM 2 MODERN INTERNET WORKS AND IT NEEDS ALL OF THESE TOOLS AND SO
10:37AM 3 THAT CAN'T BE SORT OF THE, YOU KNOW, EXTERNAL DEVICE, IF YOU
10:37AM 4 WILL, THAT IS BEING EMPLOYED TO UNDERTAKE THIS ALLEGED
10:37AM 5 INTERCEPTION WHILE IN TRANSIT. IT'S NOT ANALOGOUS TO THE OLD
10:37AM 6 FASHIONED PHONE WIRETAP.

10:38AM 7 FINALLY, THIRD-PARTY WEBSITES ALSO CONSENTED AND COURTS
10:38AM 8 HAVE OFTEN INFERRED CONSENT WHERE IT'S CLEAR FROM THE BUSINESS
10:38AM 9 ARRANGEMENT?

10:38AM 10 OBVIOUSLY CNN IS CONSENTING TO THE GET REQUEST AND THE
10:38AM 11 TRANSMISSION TO FACEBOOK BECAUSE CNN OBVIOUSLY WANTS ITS OWN
10:38AM 12 WEB PAGE TO BE POPULATED WITH THE LIKE BUTTON. AND SO ONCE
10:38AM 13 AGAIN, AND WE HAVE CITED SOME CASES, TOYS 'R' US PRIVACY
10:38AM 14 LITIGATION, DOUBLECLICK, THE CHANCE CASE THAT SUPPORT THAT
10:38AM 15 PROPOSITION AS WELL.

10:38AM 16 THE COURT: WHY DON'T WE MOVE TO THE SCA, AND I KNOW
10:38AM 17 MR. GRYGIEL IS GOING TO SPEAK TO THAT, BUT WHY DON'T YOU TELL
10:38AM 18 ME YOUR THOUGHTS ABOUT THAT. I WAS THINKING ABOUT THE COOKIES
10:38AM 19 THING. YOU'LL HAVE A CHANCE.

10:38AM 20 MR. GRYGIEL: NO, ACTUALLY, YOUR HONOR, MR. STRAITE
10:39AM 21 IS GOING TO.

10:39AM 22 THE COURT: THAT'S RIGHT. I BEG YOUR PARDON.
10:39AM 23 MR. STRAITE, YOU'RE GOING TO DO THAT.

10:39AM 24 MR. GRYGIEL: BUT IF HE DOES A GOOD JOB, I'D RATHER
10:39AM 25 BE HIM.

10:39AM 1 THE COURT: SO THIS COOKIE STORAGE, I GUESS THAT'S
10:39AM 2 ONE OF THE FIRST QUESTIONS, THE COOKIE STORAGE.

10:39AM 3 MR. BROWN: SO LET'S START WITH THAT. THERE ARE
10:39AM 4 FOUR MAIN POINTS TO MAKE ON THE SCA, AND, AGAIN, I'LL TRY NOT
10:39AM 5 TO REGURGITATE THE BRIEFING THAT WE SUBMITTED.

10:39AM 6 THE COURT: AND LET ME STOP YOU THERE. BOTH OF YOUR
10:39AM 7 PLEADINGS ARE FANTASTIC. THEY'RE VERY HELPFUL. I APPRECIATE
10:39AM 8 IT. IT'S ALWAYS A PLEASURE TO HAVE WONDERFUL PLEADINGS IN
10:39AM 9 FRONT OF THE JUDGE, AND I APPRECIATE THAT.

10:39AM 10 MR. GRYGIEL: THANK YOU, YOUR HONOR.

10:39AM 11 MR. BROWN: SO THE DEFINITION OF ELECTRONIC STORAGE
10:39AM 12 UNDER THE STATUTE MEANS EITHER TEMPORARY, INTERMEDIATE STORAGE
10:39AM 13 OF A WIRE OR ELECTRONIC COMMUNICATION INCIDENTAL TO AN
10:39AM 14 ELECTRONIC COMMUNICATION OR STORAGE OF SUCH COMMUNICATION BY AN
10:39AM 15 ELECTRONIC COMMUNICATION SURFACE FOR PURPOSES OF BACKUP
10:39AM 16 PROTECTION.

10:39AM 17 I'LL GET INTO THIS IN A LITTLE MORE DETAIL, BUT I THINK,
10:40AM 18 YOU KNOW, JUST LINGERING FROM ON THAT TECHNICAL DEFINITION OF
10:40AM 19 THE STATUTE LEADS YOU TO WONDER HOW THAT DEFINITION COULD EVER
10:40AM 20 BE SATISFIED IN THIS CASE. IT'S A SQUARE PEG, ROUND HOLE
10:40AM 21 PROBLEM ALL OVER AGAIN.

10:40AM 22 AND THE DATA STORED ON PLAINTIFF'S PERSONAL COMPUTERS IS
10:40AM 23 NOT AN ELECTRONIC STORAGE. AND AS THE COMPLAINT ALLEGES,
10:40AM 24 COOKIE IS JUST A TEXT FILE THAT RESIDES ON THE PLAINTIFF'S
10:40AM 25 COMPUTER AND IS PART OF THE BROWSER.

10:40AM 1 AND NONTEMPORARY DATA, AND PARTICULARLY DATA STORED ON A
10:40AM 2 PERSONAL COMPUTER HAS BEEN HELD NOT TO BE ELECTRONIC STORAGE
10:40AM 3 UNDER THE SCA, AGAIN, TOYS 'R' US PRIVACY LITIGATION; IPHONE
10:40AM 4 APPLICATION LITIGATION, THE SECOND OPINION; AND THE COUNCIL ON
10:40AM 5 AMERICAN-ISLAMIC RELATIONS, ALL CASES THAT WE CITED IN OUR
10:40AM 6 BRIEFS.

10:41AM 7 SECONDLY, FOR THESE PURPOSES, PLAINTIFFS HAVEN'T ALLEGED
10:41AM 8 THAT FACEBOOK IS AN ELECTRONICS COMMUNICATION SERVICE, LET
10:41AM 9 ALONE ONE THAT STORES THEIR DATA FOR BACKUP PROTECTION
10:41AM 10 PURPOSES.

10:41AM 11 SO, LIKE I SAID, THERE ARE TWO DIFFERENT ASPECTS OF THE
10:41AM 12 DEFINITION, BUT THERE'S SIMPLY NO -- I MEAN, IT'S HARD TO GET
10:41AM 13 YOUR HEAD AROUND HOW THAT CAN BE THE CASE ON THESE FACTUAL
10:41AM 14 ALLEGATIONS, BUT THERE'S ABSOLUTELY NO ALLEGATION IN THE
10:41AM 15 COMPLAINT THAT FACEBOOK IS SOMEHOW STORING THEIR -- THE
10:41AM 16 PLAINTIFF'S DATA FOR BACKUP PROTECTION PURPOSES. IT'S NOT WHAT
10:41AM 17 THE CASE IS ABOUT. SO THAT PORTION OF THE DEFINITION CERTAINLY
10:41AM 18 CAN'T BE SATISFIED.

10:41AM 19 AT SOME POINT THEY ACTUALLY ALLEGED A SINGLE PARAGRAPH IN
10:41AM 20 THE SCA, AND PLAINTIFF'S AND CLASS MEMBER'S COMPUTERS ARE THE
10:42AM 21 FACILITIES THROUGH WHICH THE ELECTRONICS COMMUNICATION SERVICE
10:42AM 22 IS PROVIDED.

10:42AM 23 SO, AGAIN, IT APPEARS, I DON'T THINK THAT THEY HAVE
10:42AM 24 ACTUALLY ALLEGED WHO THE ELECTRONICS COMMUNICATION SERVICE IS
10:42AM 25 IN THIS CONTEXT, BUT IT'S THE MOST THAT THEY HAVE DONE IS KIND

10:42AM 1 OF MENTIONED IT OFFHANDLY WITHOUT ACTUALLY IDENTIFYING WHO THE
10:42AM 2 ECS WOULD BE UNDER THE SCA.

10:42AM 3 THE THIRD POINT IS REGARDING PLAINTIFF'S THEORY THAT THEIR
10:42AM 4 COMPUTERS ARE FACILITIES UNDER THE SCA AND THERE ARE MANY
10:42AM 5 DECISIONS THAT HAVE HELD THAT PERSONAL COMPUTERS CAN'T BE
10:42AM 6 FACILITIES UNDER THE SCA.

10:42AM 7 AGAIN, THIS SEEMS TO BE A POPULAR DECISION TODAY, THE
10:43AM 8 IPHONE APPLICATION LITIGATION, 844 F.SUPP. 2D, 1040 AND THERE
10:43AM 9 JUDGE KOH COLLECTED A NUMBER OF CASES AND HELD THAT THE COURTS
10:43AM 10 HAVE TAKEN A CLOSER ANALYTICAL LOOK AND HAVE CONSISTENTLY
10:43AM 11 CONCLUDED THAT AN INDIVIDUAL'S PERSONAL COMPUTER DOES NOT
10:43AM 12 PROVIDE AN ELECTRONICS COMMUNICATION SERVICE SIMPLY BY VIRTUE
10:43AM 13 OF ENABLING USE OF ELECTRONIC COMMUNICATION SERVICES.

10:43AM 14 AND, IN FACT, INTERPRETING FACILITIES TO MEAN PERSONAL
10:43AM 15 COMPUTERS THAT ACTUALLY RENDER PARTS OF THE STATUTE ILLOGICAL,
10:43AM 16 AND WE HAVE CITED SOME CASES IN THAT REGARD THAT HAVE MADE THAT
10:43AM 17 VERY POINT AND HAVE USED THAT AS A REASON TO INTERPRET THE
10:43AM 18 STATUTE IN THE WAY THAT WE'RE SUGGESTING IT SHOULD BE
10:43AM 19 INTERPRETED.

10:43AM 20 SO THOSE ARE -- SO I THINK THOSE ARE THE MAIN POINTS, AND,
10:44AM 21 AGAIN, MANY OF THEM HAVE ALREADY BEEN MADE IN THE BRIEFING BUT
10:44AM 22 IT SEEMS LIKE THE ONE YOU WERE MOSTLY INTERESTED IN WAS THE
10:44AM 23 ELECTRONICS STORAGE POINT, AND I DON'T THINK THAT WE'RE IN THE
10:44AM 24 SAME UNIVERSE FACTUALLY AS WHAT YOU NEED TO BE IN FOR THAT
10:44AM 25 DEFINITION TO BE SATISFIED.

10:44AM 1 THE COURT: THANK YOU.

10:44AM 2 I'LL ASK, MR. STRAITE, DID YOU WANT TO COMMENT ON THE SCA
10:44AM 3 ISSUES?

10:44AM 4 MR. STRAITE: SURE. GOOD MORNING, YOUR HONOR.

10:44AM 5 BEFORE WE TURN TO THE SCA, MAY I JUST CORRECT ONE MISSTATEMENT
10:44AM 6 EARLIER MADE?

10:44AM 7 YOU HAD ASKED WHETHER WE HAD PLED ANY FACTS RELATED TO THE
10:44AM 8 VALUE OF PERSONALLY IDENTIFIABLE INFORMATION TO THE USER AND
10:44AM 9 ACTUALLY WE DO IN OUR COMPLAINT PARAGRAPHS 117, 118, 122, ET
10:44AM 10 CETERA, IN OUR COMPLAINT WHERE WE ALLEGE THAT THERE IS NOW,
10:44AM 11 IT'S A NEW DEVELOPMENT, THERE IS A MARKET FOR THE USER TO SELL
10:44AM 12 HIS OR HER PERSONAL INFORMATION.

10:44AM 13 YOU ASKED IS THERE A KIOSK I CAN GO TO, TO SELL MY PII?

10:45AM 14 AND THE ANSWER IS NOW THERE IS, YES, THERE IS. A NEW
10:45AM 15 DEVELOPMENT. AND ONE EXAMPLE, GOOGLE NOW HAS A PANEL CALLED
10:45AM 16 GOOGLE STREETWISE TRENDS WHERE THEY'RE ANALYZING PRECISELY WHAT
10:45AM 17 IS HAPPENING HERE IN THIS CASE, WHERE YOU GO ON THE INTERNET.

10:45AM 18 AND THEY WILL PAY USERS UP TO \$5, VARIOUS COUPONS, GO TO
10:45AM 19 RETAILERS SUCH AS BARNES AND NOBLE AND WALMART AND
10:45AM 20 OVERSTOCK.COM AND YOU CAN USE YOUR \$5 GIFT CARD. SO THIS
10:45AM 21 INFORMATION THAT FACEBOOK, WE ALLEGE, IS ILLEGALLY INTERCEPTING
10:45AM 22 OR STEALING IS WORTH \$5 TO EACH USER. WE MAKE THAT ALLEGATION
10:45AM 23 STARTING AT PARAGRAPH 117.

10:45AM 24 ADDITIONALLY, THERE ARE NOW COMPANIES, THERE ARE
10:45AM 25 ELECTRONIC KIOSKS. ONE COMPANY IS CALLED ALLOW LIMITED. IT'S

10:45AM 1 A U.K. COMPANY, THEY ALSO WILL PAY USERS FOR THEIR PII
10:45AM 2 PRECISELY SO THAT THEY CAN LEARN WHERE YOU PERSONALLY ARE GOING
10:45AM 3 ON THE INTERNET AND THEN THEY WILL TARGET IT AND ADVERTISE TO
10:45AM 4 YOU.

10:45AM 5 SO THE UNIVERSE HAS NOW CHANGED AND JUST IN THE PAST FEW
10:45AM 6 MONTHS THIS IS NO LONGER A SITUATION. THERE'S AN ALTERNATIVE
10:46AM 7 UNIVERSE WHICH HAS SORT OF DEVELOPED IN THE CASE LAW WHERE PII
10:46AM 8 HAS NO VALUE TO YOU BUT IT HAS VALUE TO SOMEBODY WHO STEALS IT
10:46AM 9 FROM YOU.

10:46AM 10 NOW, WE HAVE GONE TO A MORE SENSIBLE SITUATION WHERE
10:46AM 11 PEOPLE REALIZE I CAN PAY PEOPLE FOR THEIR DATA AND FOR THE PII
10:46AM 12 AND I CAN MAKE MONEY BY SIMPLY TAKING IT. AND TO CORRECT AN
10:46AM 13 EARLIER STATEMENT, WE DO ALLEGE IT AND THIS, I THINK, PERHAPS,
10:46AM 14 DISTINGUISHES THIS CASE FROM CASES THAT HAVE GONE BEFORE WHERE
10:46AM 15 COURTS MAY HAVE RULED THAT PII HAS NO VALUE, AND, THEREFORE,
10:46AM 16 THERE'S NO ARTICLE III HARM BECAUSE THE INDUSTRY HAS CHANGED
10:46AM 17 AND WE FEEL THAT THOSE CASES ARE NOW DISTINGUISHABLE AND THAT'S
10:46AM 18 JUST A CORRECTION THERE.

10:46AM 19 MORE SPECIFICALLY ON THE SCA, SINCE I JUST SPOKE ABOUT
10:46AM 20 ARTICLE III STANDING FOR THE THEFT OF PII, I SHOULD NOTE THAT
10:46AM 21 THE SCA DOES NOT REQUIRE THAT. AS WE HEARD THE CONCESSION
10:46AM 22 EARLIER, BUT IF THE INJURY IS THE -- RELATES TO A STATUTORY
10:46AM 23 PROTECTED RIGHT, WE DON'T NEED TO ACTUALLY SHOW ACTUAL
10:47AM 24 OUT-OF-POCKET LOSS, AND WE ONLY NEED TO SHOW THESE OTHER TYPES
10:47AM 25 OF HARMS.

10:47AM 1 THE COURT: YOU HAVE TO SHOW THAT WHATEVER THE
10:47AM 2 CONDUCT IS THAT RELATES TO YOU IN THAT STATUTE, RIGHT, YOU HAVE
10:47AM 3 TO DRILL DOWN A LITTLE FURTHER TO SHOW THAT THIS IS WHY WE
10:47AM 4 CHOSE THIS PARTICULAR STATUTE?

10:47AM 5 MR. STRAITE: YES, WE WOULD HAVE TO ALLEGE IN THE
10:47AM 6 COMPLAINT, FOR INSTANCE, WHAT THE NATURE OF THE HARM WAS. WE
10:47AM 7 CAN'T JUST SAY FACEBOOK IS SPYING ON PEOPLE. WE HAVE TO SAY
10:47AM 8 THIS PARTICULAR LEAD PLAINTIFF IS A MEMBER OF FACEBOOK, AND WE
10:47AM 9 HAVE TO SAY AND THIS PERSON LOGGED OUT AND POST LOGOUT INTERNET
10:47AM 10 TRACKING WAS PERFORMED WITHOUT HIS OR HER CONSENT.

10:47AM 11 THE COURT: AND THAT'S WHAT YOU HAVE TO HAVE FOR THE
10:47AM 12 SCA?

10:47AM 13 MR. STRAITE: ABSOLUTELY, YOUR HONOR. RIGHT.

10:47AM 14 THE COURT: NOTHING MORE?

10:47AM 15 MR. STRAITE: RIGHT. I KNOW WE TALKED AT LENGTH
10:47AM 16 ABOUT GAOS V. GOOGLE AND IN THERE BECAUSE THERE WERE SOME
10:47AM 17 COMMUNICATIONS THAT MAY OR MAY NOT HAVE CONTAINED IMPORTANT
10:47AM 18 INFORMATION THAT MAY NOT HAVE BEEN PROTECTED THAT PLAINTIFF
10:47AM 19 SHOWS ACTUALLY ALLEGED WHICH WEBSITE TO VISIT.

10:48AM 20 I FIND IT INTERESTING THAT HERE THE PLAINTIFFS ARE BEING
10:48AM 21 CHASTISED FOR NOT ACTUALLY PLEADING EXACTLY WHICH WEBSITES WERE
10:48AM 22 VISITED AND WHAT INFORMATION WAS TRANSMITTED AND HOW FROM
10:48AM 23 FACEBOOK AND THEN THE SENTENCE FOR COUNSEL FOR FACEBOOK SAYS,
10:48AM 24 I'M NOT SURE HOW UNDER RULE 11 YOU CAN ACTUALLY PLEAD THESE
10:48AM 25 FACTS AND HOW COULD YOU POSSIBLY KNOW THAT? WELL, THAT'S

10:48AM 1 ACTUALLY THE POINT, WE DON'T ACTUALLY KNOW IT.

10:48AM 2 AND, FURTHERMORE, BASED ON THE PLEADINGS STANDARDS IN THIS
10:48AM 3 CIRCUIT, WE DON'T HAVE TO ALLEGE PRECISELY WHICH WEBSITES WERE
10:48AM 4 VISITED ON WHICH DAY BECAUSE EVERY WEBSITE VISITED WAS
10:48AM 5 INTERCEPTED BY FACEBOOK BECAUSE ALL POST LOGOUT INTERNET
10:48AM 6 BROWSING DURING THE CLASS PERIOD WE PROPOSE WAS, IN FACT,
10:48AM 7 TRACKED. AND SO EVERY SINGLE WEBSITE AND EVERY SINGLE
10:48AM 8 CONVERSATION WHERE THERE WAS STATED FUNCTIONALITY THERE WAS
10:48AM 9 FACEBOOK ON THE BACK END.

10:48AM 10 THE COURT: AND THAT'S SUFFICIENT YOUR PLEADING
10:48AM 11 SUGGESTS FOR SCA COVERAGE?

10:48AM 12 MR. STRAITE: ABSOLUTELY. I DO AGREE WE HAVE TO
10:48AM 13 ALLEGE THAT THE NAMED PLAINTIFFS WERE HARMED, AND WE DO ALLEGE
10:48AM 14 THAT IN SUFFICIENT DETAIL.

10:48AM 15 THE COURT: I GUESS I WAS LOOKING AT SOME OF THESE
10:48AM 16 OTHER CASES SUGGESTED GREATER, LIKE GAOS AND SOME OTHERS,
10:48AM 17 GREATER SPECIFICITY.

10:49AM 18 THE EDWARDS CASE TALKED ABOUT THE RESPA AND YOU LOOK AT
10:49AM 19 THAT AND, WELL, MY GOSH, THERE WASN'T EVEN -- THAT PLAINTIFF
10:49AM 20 WAS NOT EVEN HARMED AND THERE WAS NOT FINANCIAL HARM BUT IN
10:49AM 21 RESPA, THE COURT, AS YOU RECALL, WENT THROUGH AND PARSED OUT
10:49AM 22 EXACTLY WHAT THE CONDUCT WAS THAT ALLOWED THE RESPA CLAIM TO GO
10:49AM 23 FORWARD.

10:49AM 24 WHEN I LOOKED AT THIS CLAIM, I WAS CURIOUS WHETHER OR NOT
10:49AM 25 YOU HAD DONE THAT SAME TYPE OF ANALYSIS WITH YOUR ALLEGATIONS,

10:49AM 1 AND THE COURT ACTUALLY DID IN THE EDWARDS CASE AND I'M CURIOUS
10:49AM 2 WHETHER YOU HAVE DONE THAT.

10:49AM 3 MR. STRAITE: ABSOLUTELY, YOUR HONOR. WE GO THROUGH
10:49AM 4 PARAGRAPH BY PARAGRAPH BY PARAGRAPH EXPLAINING IN OBVIOUSLY
10:49AM 5 VERY TECHNICAL DETAIL HOW GET REQUESTS WORK AND WHAT SORT OF
10:49AM 6 INFORMATION AND WHAT SORT OF HTML CODES ARE TRANSMITTED BACK
10:49AM 7 AND FORTH. AND IT REALLY IS A CONVERSATION BACK AND FORTH
10:49AM 8 BETWEEN THE THIRD-PARTY WEBSITE AND YOUR COMPUTER AND YOU GET
10:49AM 9 REQUESTS AND SOMETIMES VERY REVEALING WEB SEARCHES THAT ARE
10:49AM 10 INCLUDED AND IT'S NOT SIMPLY IT'S PAGES YOU CLICKED THROUGH,
10:49AM 11 AND IT SHOWS WHAT YOU'RE INTERESTED IN, WHEN YOU'RE INTERESTED
10:50AM 12 IN THEM, WHAT YOU CLICK ON AND WHAT YOU SEARCH FOR.

10:50AM 13 AND SOME OF THESE ARE, YOU KNOW, THESE CAN BE VERY LONG
10:50AM 14 CHAINS OF INFORMATION, INCLUDING YOUR NAME AND SEARCH TERMS AND
10:50AM 15 SOMETHING THAT MY LEARNED COLLEAGUE SAID IT WOULD BE VERY
10:50AM 16 DISTURBING IF OTHER PEOPLE KNEW YOU WERE MAKING THESE SEARCHES.
10:50AM 17 THAT INFORMATION IS CONTENT AND THERE IS COMMUNICATION IN THESE
10:50AM 18 SEARCHES, AND WE ALLEGE THAT IN SUFFICIENT DETAIL.

10:50AM 19 BECAUSE FACEBOOK'S ALLEGED ACTIVITIES INVOLVE TRACKING
10:50AM 20 EVERY SINGLE CONVERSATION POST LOGOUT WITH WEBSITES THAT HAVE
10:50AM 21 FACEBOOK FUNCTIONALITY, THERE'S NO NEED TO ACTUALLY GO THROUGH
10:50AM 22 AND REINSTRUCT THE SEARCH HABITS OF EACH NAMED PLAINTIFF. AND
10:50AM 23 YOU CAN DO THAT, BUT IT'S NOT NEEDED.

10:50AM 24 THE COURT: IS THE CRUX OF THE LAWSUIT THEN THE FACT
10:50AM 25 THAT THE CONDUCT OCCURRED AFTER LOGOUT?

10:50AM 1 MR. STRAITE: YES, YOUR HONOR. YES, YOUR HONOR.
10:50AM 2 RIGHT.

10:50AM 3 THE COURT: ALL RIGHT.

10:51AM 4 MR. STRAITE: BACK TO THE SCA, WHILE WE BELIEVE THAT
10:51AM 5 THE LANDSCAPE FOR ARTICLE III STANDING FOR THEFT OF PII IS
10:51AM 6 CHANGING, NOW THAT WE HAVE THIS NEW MARKETPLACE, IT'S NOT
10:51AM 7 NEEDED FOR SCA PURPOSES FOR STANDING BECAUSE THERE IS A
10:51AM 8 STATUTORY PROTECTIVE RIGHT THAT HAS BEEN INFRINGED UPON.

10:51AM 9 A COUPLE ISSUES THAT WERE RAISED. DISTINGUISHING THE
10:51AM 10 CASES THAT SAY THAT A PC IS NOT A FACILITY, I'M NOT SURE
10:51AM 11 ACTUALLY THAT'S WHAT THE IPHONE CASE AND OTHER CASES HELD. I
10:51AM 12 BELIEVE THOSE CASES HELD THAT IT WAS NOT SUFFICIENTLY PLED THAT
10:51AM 13 A COMPUTER WAS A FACILITY. HERE BECAUSE WE HAVE PARAGRAPH
10:51AM 14 AFTER PARAGRAPH AFTER PARAGRAPH EXPLAINING PRECISELY HOW
10:51AM 15 FACEBOOK HAS TAKEN OVER THESE USER'S COMPUTERS BY PUTTING THE
10:51AM 16 COOKIE ONTO THE COMPUTER, WITH CONSENT WHILE YOU'RE LOGGED IN,
10:51AM 17 NOT EXPIRING THE COOKIE UPON LOGOUT, AND HAVING THESE
10:51AM 18 COMMUNICATIONS WITH THIRD-PARTY WEBSITES THEN COMBINED WITH THE
10:52AM 19 INFORMATION THAT IS IN THAT TEXT FILE AND THEN SENDING IT BACK
10:52AM 20 TO FACEBOOK WITHOUT THE KNOWLEDGE OR THE CONSENT OF THE USER,
10:52AM 21 THAT MEANS THAT THIS COMPUTER IS THE DEVICE, IT IS A FACILITY
10:52AM 22 FOR ACCOMPLISHING THE TASK THAT FACEBOOK IS USING IT FOR.

10:52AM 23 SO WHILE THERE ARE CASES OUT THERE AND WE ACKNOWLEDGE THEM
10:52AM 24 THAT HAVE HELD THAT A PERSON'S PERSONAL COMPUTER MAY NOT BE A
10:52AM 25 FACILITY IN THOSE CASES, HERE OUR FACTS ARE DIFFERENT AND THOSE

10:52AM 1 FACTS REALLY HELD THAT IT WAS NOT PLED AS PROPERLY AS A
10:52AM 2 FACILITY UNDER THE STATUTE WHERE WE HAVE.

10:52AM 3 THE COURT: OKAY. GREAT. THANK YOU. MR. BROWN.

10:52AM 4 MR. BROWN: AGAIN, GOING BACK TO THIS ISSUE ABOUT
10:52AM 5 THE VALUE OF THE PERSONAL INFORMATION AND MR. STRAITE MENTIONED
10:52AM 6 SOME OF THESE STUDIES OUT THERE AND THESE COMPANIES LIKE ALLOW
10:52AM 7 LIMITED.

10:53AM 8 THESE THEORIES HAVE ALREADY BEEN TRIED IN A NUMBER OF
10:53AM 9 OTHER CASES, AND THEY HAVE BEEN REJECTED. SO IT'S NOT TRUE
10:53AM 10 THAT THEIR ALLEGATIONS IN THIS COMPLAINT DISTINGUISH THEMSELVES
10:53AM 11 FROM THESE OTHER CASES.

10:53AM 12 AND I'M DOING THIS OFF THE TOP OF MY HEAD, I MUST
10:53AM 13 ACKNOWLEDGE. BUT I WOULD -- I THINK IT MIGHT BE AN INTERESTING
10:53AM 14 EXERCISE, SHALL I SAY, TO PULL UP THE COMPLAINTS AND IN THE
10:53AM 15 LACOURT COURT VERSUS SPECIFIC MEDIA CASE AS WELL AS THE IPHONE
10:53AM 16 APPLICATION LITIGATION BECAUSE IT MAY NOT BE -- I THINK
10:53AM 17 ACTUALLY IN THOSE CASES IT IS. YOU CAN TELL FROM THE OPINIONS
10:53AM 18 THEMSELVES, BUT I THINK IT'S EVEN MORE INTERESTING WHEN YOU
10:53AM 19 PAIR UP THOSE COMPLAINTS WITH THE OPINIONS, AND I THINK YOU
10:53AM 20 WILL FIND THAT THESE VERY THEORIES HAVE ALREADY BEEN ALLEGED IN
10:53AM 21 OTHER CASES AND SOUNDLY REJECTED.

10:53AM 22 ON THE ISSUE OF STATUTORY HARM, YOU KNOW, THE LACK OF
10:53AM 23 CONSENT REQUIREMENT OF THE STATUTE BOTH THE UCL AND THE WIRETAP
10:54AM 24 ACT, I'M SORRY, THE SCA AND THE WIRETAP ACT, REALLY START TO
10:54AM 25 MERGE INTO THE ARTICLE III ANALYSIS AS I THINK THE COURT IS

10:54AM 1 GETTING AT, AND HERE IT WAS VERY INTERESTING.

10:54AM 2 SO THE PLAINTIFFS HAVE SAID THAT ALL YOU NEED TO DO IS
10:54AM 3 ESSENTIALLY SHOW THAT THEY LOGGED OUT AND THEN THEY WENT TO
10:54AM 4 ACCESS THE WEBSITE THAT HAD THE FACEBOOK LIKE BUTTON. I MIGHT
10:54AM 5 BE SIMPLIFYING A LITTLE BIT, BUT THAT'S ESSENTIALLY WHAT
10:54AM 6 THEY'RE SAYING. THAT'S ABSOLUTELY WRONG. THAT CAN'T BE WHERE
10:54AM 7 THE INQUIRY ENDS BECAUSE THEY HAVE NOT ALLEGED IN THEIR
10:54AM 8 COMPLAINT SUFFICIENTLY LACK OF CONSENT. THE ENTIRE CASE IS
10:54AM 9 ABOUT THE POST-LOGOUT WORLD.

10:54AM 10 AS WE HAVE SEEN, THE PRIVACY POLICY DISCLOSES THE USE OF
10:54AM 11 COOKIES AND DOESN'T DISTINGUISH BETWEEN LOG IN AND LOGOUT
10:54AM 12 USAGE. THE ONLY THING THAT THEY POINT TO -- THIS IS REALLY
10:54AM 13 WHAT THE ENTIRE THEORY OF THEIRS COMES DOWN TO IS THE ONE
10:55AM 14 SENTENCE IN THE HELP CENTER WHICH, FRANKLY, I THINK THAT IS A
10:55AM 15 PROBLEMATIC BASIS FOR THEM TO BASE THIS ENTIRE THEORY ON ANYWAY
10:55AM 16 BECAUSE THEY HAVE ALREADY ACKNOWLEDGED THAT THE GOVERNING
10:55AM 17 DOCUMENTS, THEIR WORDS, ON THE SITE ON THE TERMS OF USE AND THE
10:55AM 18 PRIVATE POLICY, BUT EVEN IF THAT WEREN'T PROBLEMATIC
10:55AM 19 FUNDAMENTALLY, THEY HAVE NOT ALLEGED THAT THEY ACTUALLY SAW
10:55AM 20 THAT HELP CENTER CONTENT OR RELIED ON IT BEFORE TAKING THE
10:55AM 21 ACTIONS THAT FORM THE BASIS OF THE COMPLAINT. I DON'T SEE HOW
10:55AM 22 YOU CAN --

10:55AM 23 THE COURT: AND YOU THINK THAT'S FATAL TO THEIR
10:55AM 24 CLAIM?

10:55AM 25 MR. BROWN: I DO. IT'S FATAL TO THE CLAIMS IF YOU

10:55AM 1 WERE LOOKING AT IT FROM A 12(B) (6) PERSPECTIVE BUT EVEN FROM A
10:55AM 2 12(B) (1) STANDING PERSPECTIVE, IN TERMS OF THE UCL, THE SCA AND
10:55AM 3 THE WIRETAP ACT, EVEN FROM JUST THAT PERSPECTIVE UNDER
10:55AM 4 12(B) (1), I ALSO THINK IT'S FATAL TO THAT BECAUSE THAT'S WHAT
10:55AM 5 WOULD GIVE YOU THE TETHERING BETWEEN THESE NAMED PLAINTIFFS AND
10:55AM 6 THE TYPE OF HARM THAT THE SCA AND THE WIRETAP ACT WERE INTENDED
10:56AM 7 TO PREVENT.

10:56AM 8 AND THAT IS THE STANDARD. YOU CAN'T SIMPLY JUST ALLEGE
10:56AM 9 THOSE VIOLATIONS KIND OF ON THE FACE OF IT AND HOPE TO, YOU
10:56AM 10 KNOW, PRESENT A CASE FOR CONTROVERSY TO THE COURT.

10:56AM 11 THE COURT: OKAY. THANK YOU VERY MUCH.

10:56AM 12 COUNSEL, MR. BROWN IS GOING TO HAVE THE LAST WORD HERE BUT
10:56AM 13 DO YOU WANT TO --

10:56AM 14 MR. GRYGIEL: I DO, YOUR HONOR, IF I MIGHT. I
10:56AM 15 PROMISE NOT TO TROUBLE THE COURT LONG. JUST A COUPLE OF BRIEF
10:56AM 16 POINTS.

10:56AM 17 NUMBER ONE, WE HAVE HEARD ABOUT THE CONSENT ISSUE. IT IS
10:56AM 18 NOT THE PLAINTIFF'S JOB TO CARRY THE BURDEN ON THE CONSENT
10:56AM 19 DEFENSE, THAT IS THE DEFENDANT'S. THEY SHOULD CARRY THAT WITH
10:56AM 20 THE SAME SPECIFICITY THAT THEY ARGUE THAT THE PLAINTIFFS SHOULD
10:56AM 21 CARRY IN THEIR CASE IN CHIEF. THEY HAVEN'T BEGUN TO DO THAT.

10:56AM 22 NUMBER TWO, THE GOVERNING DOCUMENTS. I WILL SAY THIS
10:56AM 23 ABOUT THE GOVERNING DOCUMENTS. I WOULD SUBMIT THAT EVERYBODY
10:56AM 24 IN THIS ROOM CAN SPEND FROM NOW UNTIL THE END OF NEXT WEEK
10:56AM 25 READING THEM AND UNDERSTANDING THEM AND YOU WILL COME AWAY WITH

10:56AM 1 ONE THEME FOR SURE, NOWHERE DOES FACEBOOK AFFIRMATIVELY SAY TO
10:57AM 2 ANY USER, WE ARE INVOLVED IN YOUR COMMUNICATIONS WITH
10:57AM 3 THIRD-PARTY WEBSITES AFTER YOU LOG OUT.

10:57AM 4 WHAT YOU WILL SEE, AND THIS IS IN EXHIBIT C TO THE SOLINKY
10:57AM 5 DECLARATION IN THE FIRST BRIEF, WHAT YOU WILL SEE IS FACEBOOK
10:57AM 6 SAYING DOWNLOAD THOSE SOFTWARE AND APPELLATES, BASICALLY SAYING
10:57AM 7 WE DO CERTAIN THINGS THAT CAN TRIGGER INFORMATION COMING TO US
10:57AM 8 FROM THIRD PARTIES. SO FAR SO GOOD.

10:57AM 9 AND AS MR. BROWN'S BRIEF POINTS OUT, PAGE 11 OF HIS FIRST
10:57AM 10 BRIEF, WE DON'T DISTINGUISH BETWEEN PRE AND POST LOGOUT AS TO
10:57AM 11 COOKIES.

10:57AM 12 AND WHAT THAT SAYS IS THAT WHEN WE GET INFORMATION THAT WE
10:57AM 13 DON'T THINK THAT WE HAVE DISCLOSED TO YOU THAT WE WILL BE
10:57AM 14 GETTING, WE'LL ALERT YOU THE FIRST TIME WE GET IT. THAT BY
10:57AM 15 ITSELF PUTS PAID TO THE IDEA THAT THERE WAS ANY CONSENT BECAUSE
10:57AM 16 THERE'S NO ALLEGATION ANYWHERE IN THIS CASE THAT THAT HAPPENED
10:57AM 17 AND THEIR FINAL CHANGE IN THE LAST ROUND OF BRIEFING SHOWING
10:57AM 18 THAT THREE DAYS BEFORE THE END OF THE CLASS PERIOD THEY GOT A
10:57AM 19 LITTLE MORE SPECIFIC IS A READILY ADMISSION THAT THEY NEVER HAD
10:58AM 20 DONE SO BEFORE.

10:58AM 21 ON THE WIRETAP ACT NOT FITTING MISCONDUCT, I DON'T THINK
10:58AM 22 COUNSEL FOR FACEBOOK COULD BE MORE WRONG. ALL YOU NEED TO DO
10:58AM 23 IS LOOK AT THE SENATE REPORTS PRE-AMENDMENTS TO THE WIRETAP ACT
10:58AM 24 IN 1986, AND LOOK AT IT AGAIN WITH THE PATRIOT ACT AMENDMENT
10:58AM 25 AND WHAT YOU WILL SEE IS CONGRESS'S DESIRE LUMBERING, AND

10:58AM 1 UNARTFUL IN SOME PLACES, TO PROTECT ELECTRONICS COMMUNICATIONS
10:58AM 2 IN THE SAME WAY THAT THE TELEPHONE AND OTHER ORAL
10:58AM 3 COMMUNICATIONS WERE PROTECTED.

10:58AM 4 THE COURT: ELECTRONICS COMMUNICATIONS MEANING
10:58AM 5 INTERNET?

10:58AM 6 MR. GRYGIEL: YES, THAT'S RIGHT, AMONG OTHER THINGS.
10:58AM 7 THERE ARE OTHER WAYS TO DO IT, BUT THE DEFINITION OF ELECTRONIC
10:58AM 8 INTERCEPT OF ELECTRONIC COMMUNICATIONS IS ACTUALLY QUITE BROAD.
10:58AM 9 SO WHAT IT SHOWS IS CONGRESS MEANT TO PROTECT THOSE THINGS.

10:58AM 10 ON THE FACEBOOK PRIVACY ACT, I'M NOT DOING THIS IN ANY
10:58AM 11 SEQUENCE. THAT WAS A VERY DIFFERENT CASE. FOR ONE THING, THE
10:58AM 12 FACEBOOK PRIVACY LITIGATION, THE PLAINTIFFS THERE PLEADED THAT
10:58AM 13 FACEBOOK IS FREE. WE DON'T PLEAD THAT. WE PLEAD EXACTLY THE
10:58AM 14 OPPOSITE AS MR. STRAITE HAS POINTED OUT.

10:58AM 15 NUMBER TWO, THERE WHEN THE PLAINTIFF WENT ON A WEBSITE
10:59AM 16 WHAT HE GOT WAS AN ADVERTISER'S DESIGN AND SO HE'S DEALING WITH
10:59AM 17 FACEBOOK AND HE'S ALSO DEALING WITH AN ADVERTISER AT THE SAME
10:59AM 18 TIME. YOUR EXPECTATIONS I THINK, YOUR HONOR, ARE QUITE
10:59AM 19 DIFFERENT WHEN YOU REALIZE YOU'RE DEALING WITH FACEBOOK AND AN
10:59AM 20 ADVERTISER.

10:59AM 21 OUR CASE, TO MAKE A LARGE FACTUAL DISTINCTION, DOESN'T
10:59AM 22 SHOW THAT WE KNEW THAT WE WERE INTERACTING WITH FACEBOOK WHEN
10:59AM 23 WE WERE GOING TO THE THIRD PARTY WEBSITES. THAT'S A VERY BIG
10:59AM 24 DIFFERENCE.

10:59AM 25 AND FINALLY UNDER THE LACOURT CASE ABOUT WHICH WE HAVE

10:59AM 1 HEARD SO MUCH, THERE THE COURT IS CHARACTERIZING THE
10:59AM 2 PLAINTIFF'S ALLEGATIONS OF FINANCIAL HARM AS FOLLOWS: TEPID,
10:59AM 3 HALF-HEARTED, ESSENTIALLY ADOPTED THE DEFENDANT'S FRAMING OF
10:59AM 4 THE ISSUE, AND THE COURT WENT ON TO SAY, BUT I WON'T
10:59AM 5 CATEGORICALLY SAY THAT THEY COULDN'T MAKE OUT A CAUSE OF ACTION
10:59AM 6 FOR THIS PARTICULAR VALUE, THEY JUST HAVEN'T DONE SO HERE.

10:59AM 7 THANK YOU, YOUR HONOR.

10:59AM 8 THE COURT: MR. BROWN, IT'S YOUR MOTION SO YOU'LL
10:59AM 9 HAVE THE LAST WORD HERE.

10:59AM 10 MR. BROWN: THANK YOU. IN THE FACEBOOK PRIVACY
10:59AM 11 LITIGATION, WHILE THE PLAINTIFFS THERE MAY HAVE GIVEN LIP
11:00AM 12 SERVICE TO THE UNDENIABLE REALITY THAT FACEBOOK IS FREE, THEY,
11:00AM 13 TOO, ARGUED THAT YOU EFFECTIVELY PAY FOR FACEBOOK WITH YOUR
11:00AM 14 PERSONAL INFORMATION AND SO THAT CASE IS NOT DISTINGUISHABLE IN
11:00AM 15 THAT RESPECT.

11:00AM 16 AND I ARGUED BEFORE JUDGE WARE IN THAT CASE AND I KNOW IT
11:00AM 17 AND THAT THEORY WAS REJECTED.

11:00AM 18 AND THEN SECONDLY, I DON'T KNOW IF I HEARD THIS CORRECTLY
11:00AM 19 OR NOT, BUT I THINK I MAY HAVE HEARD A SUGGESTION THAT
11:00AM 20 SUGGESTING THAT IT'S FACEBOOK'S JOB TO PROVE CONSENT HERE ON
11:00AM 21 THE MOTION TO DISMISS. AND, IN FACT, WE ARE ON A MOTION TO
11:00AM 22 DISMISS AND LOOKING AT THEIR COMPLAINT AND WHETHER THEIR
11:00AM 23 COMPLAINT IS WELL PLED AND IT'S THEIR BURDEN TO ALLEGE LACK OF
11:00AM 24 CONSENT UNDER THE SCA AND WIRETAP ACT AND NOT TO REPEAT MYSELF,
11:00AM 25 BUT THEY HAVE NOT ALLEGED THAT ANY OF THE NAMED PLAINTIFFS SAW

11:01AM 1 THE HELP CENTER CONTENT THAT FORMS THE ENTIRE BASIS OF THAT
11:01AM 2 THEORY OR RELIED ON.

11:01AM 3 THE COURT: THANK YOU VERY MUCH. THANK YOU,
11:01AM 4 COUNSEL. I HAVE ENJOYED THIS. IT'S BEEN VERY HELPFUL TO ME
11:01AM 5 AND, AGAIN, I WANT TO CONGRATULATE YOU ON THE PLEADINGS AND THE
11:01AM 6 MATTER IS UNDER SUBMISSION.

11:01AM 7 MR. GRYGIEL: THANK YOU, YOUR HONOR.

8 MR. BROWN: THANK YOU, YOUR HONOR.

9 (COURT CONCLUDED.)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

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

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



IRENE RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER 8076

DATED: OCTOBER 17, 2012