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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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CONNECTU, INC. : DOCKET NUMBER CA0710593
PLAINTIFF :
versus : UNITED STATES COURTHOUSE
FACEBOOK, INC., ET AL :
DEFENDANTS : BOSTON, MASSACHUSETTS
-----x

JUNE 2, 2008
2:30 p.m.

TRANSCRIPT OF MOTION HEARING

UNSEALED HEARING ONLY

BEFORE: THE HONORABLE DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

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

15
16 THE DEPUTY CLERK: All rise.

17 This Honorable Court is now in session.

18 You may be seated.

19 Calling the case, Civil Action 07-10593,

20 ConnectU, Inc. versus Facebook, Inc., et al.

21 THE COURT: Well, at the outset, I do have a motion
22 to move this case in camera.

23 My general view is, unless there is some showing of
24 specific necessity beyond the generalized discussion, then, I
25 won't do that.

1 If the party has a particular issue that believes
2 we're touching on a particular issue, apart from the general
3 topic, then, you can make a motion at that time, and I'll see
4 whether or not it justifies going into, you know, some sort of
5 in camera session, but I don't find, on its face, that, at
6 least, all of the discussion that we have today should be
7 dealt with in camera.

8 Now, I guess I just want to be sure I understand
9 fully, Mr. Hornick.

10 At the time of the settlement agreement, or, at
11 least, the term sheet -- we'll call it the term sheet -- was
12 executed, was ConnectU aware that there was some sort of a
13 dispute concerning the products of the Parmet inquiries?

14 MR. HORNICK: Your Honor, at the time that the term
15 sheet was signed, ConnectU was aware that Mr. Parmet was in
16 some kind of dispute with the Facebook attorneys.

17 The -- the counsel for ConnectU asked Facebook, on
18 a couple of occasions, to tell what the subject of that
19 dispute was, and they wouldn't tell us, so all we knew was
20 that there was a dispute.

21 THE COURT: Okay; and, then, aware that there was a
22 dispute, as to which Facebook would not disclose the
23 substance.

24 Nevertheless, the term sheet was entered into?

25 MR. HORNICK: I'm not sure the two were necessarily

1 connected, but, yes, the term sheet was signed, and there was
2 knowledge that there was some kind of a dispute with
3 Mr. Parmet.

4 THE COURT: Okay; and, in that connection, there
5 were a number of unresolved Discovery matters at that point?

6 MR. HORNICK: Well, it was known that -- it was
7 known by ConnectU that Facebook had documents that they had
8 not yet produced, but the importance of those document, we
9 didn't know; I mean, Facebook hadn't said we have -- have any
10 material documents that we're going to produce. They didn't
11 say.

12 THE COURT: Were they under an obligation to tell
13 you how material they viewed the documents?

14 MR. HORNICK: I'm sorry?

15 THE COURT: Were they under an obligation to tell
16 you how material they viewed the documents?

17 MR. HORNICK: No, I would say that they were not
18 under an obligation to tell us, per se, but I believe they
19 were under an affirmative obligation to produce the documents.

20 THE COURT: Which was suspended by that settlement
21 exercise, I take it?

22 MR. HORNICK: Well, at some point in time it was
23 suspended, Your Honor, but the defendants knew from Mr. Parmet
24 that these documents had been identified on December 14.

25 We said in our brief that it was no later than

1 January 7; in fact, it was December 14, so they actually had
2 five weeks before the mediation even became a possibility,
3 during which those documents should have been produced, and,
4 after the remediation became a possibility, there was another
5 three weeks during which they could have produced them before
6 mediation was actually scheduled, which was on February 11,
7 and, then, on February 11, there was another week, or so,
8 before the mediation actually occurred.

9 Somewhere in there, there was a decision that
10 parties would hold up. It's in my notes, I can provide it to
11 you, but the point is that there was a period of, somewhere in
12 the neighborhood of, eight weeks, during which the case was
13 business as usual, and, in fact, in mid-February -- I believe
14 it was the day after the parties scheduled the mediation --
15 the day after the parties scheduled the mediation, Facebook
16 filed a Motion for Summary Judgment on the copyright claim,
17 and they, therefore, even as of the day the mediation had been
18 scheduled, believed the case was alive, and, if these
19 documents were, in any way material to that motion, they
20 should have been produced.

21 THE COURT: And you filed a renewed motion under
22 56F?

23 MR. HORNICK: There was a renewed motion under 56F,
24 Your Honor, but it related to the Summary Judgment motion on
25 the contract, which was filed in August of last year.

UNSEALED HEARING

1 Shortly after the motion for Summary Judgment was
2 filed, the parties did put things on hold.

3 I'm sorry, shortly after the copyright
4 Summary Judgment motion was filed in February, the parties put
5 things on hold, so there wasn't a Rule 56 related to that.

6 THE COURT: I see.

7 Now, turning to the order for Discovery on
8 computer-memory devices, Document Number 103, in this case, is
9 it your understanding that the matters to which Mr. Parmet
10 referred are not matters as to which he was properly
11 positioned to bring them to your attention?

12 MR. HORNICK: Well, I don't really know for sure,
13 Your Honor.

14 I can surmise, from what he said to me, that it
15 wasn't code, and the subject to protocol is code.

16 THE COURT: Mm-hmm.

17 MR. HORNICK: But, other than what we put into our
18 brief about the subject matter of those documents, I don't
19 really know what they are.

20 THE COURT: Well, is there any other mechanism by
21 which Mr. Parmet would properly have access to these
22 documents?

23 Let's assume that we're still in the Discovery
24 phase of the case, or they're clearly in the Discovery phase
25 of the case.

1 I should add that I make no judgment about
2 settlement or not settlement.

3 I'm more concerned with compliance with court
4 orders here than the question of settlement.

5 That's a matter, it seems to me, for Judge Ware to
6 deal with, but let's assume that we're still actively pursuing
7 this issue.

8 Is there any basis on which Mr. Parmet could
9 disclose matters beyond code?

10 MR. HORNICK: Your Honor, when you first asked the
11 question, you asked about access and, now, you're asking about
12 disclosure.

13 I'd like --

14 THE COURT: I'd like --

15 MR. HORNICK: -- to answer for both.

16 THE COURT: Yes.

17 MR. HORNICK: With respect to access, the answer
18 is: Yes.

19 Mr. Parmet had the ability and the right to access
20 everything, everything that was on those hard drives, and the
21 reason was the very subject of the September 13 hearing.

22 When we came into the September 13 hearing before
23 Judge Collings, the parties had not agreed, at that point, on
24 a couple of remaining issues in the protocol, and one of them
25 was the scope of the search that he could perform.

1 Now, the defendants took the position that he
2 should only be able to search for code, and I explained to
3 Judge Collings that you don't know it's code, necessarily,
4 until you find it, so, therefore, he had to have the ability
5 to search everything.

6 He had to have access to everything on those hard
7 drives, and I think that's clear in the protocol. I think
8 it's clear in the transcript of the September 13 hearing.

9 With respect to disclosure, if he were to find
10 information that was not code, under the protocol,
11 technically, he was not supposed -- he could not disclose it
12 to ConnectU, but he could -- there were a couple of mechanisms
13 by which that information could have come out.

14 One was, in our view, he could have called or
15 E-mailed Facebook's counsel and ConnectU's counsel and
16 suggested there be a conference call.

17 During that conference call, he could have said,
18 simply: I found information, found documents, that weren't
19 code; may be relevant.

20 That's all he had to say.

21 THE COURT: Where do I find that he's authorized to
22 do that, though?

23 MR. HORNICK: In Paragraph 3 of the protocol,
24 Your Honor, it gives them -- it simply says that, if there is
25 any communication by telephone with ConnectU's counsel,

1 regarding work under the protocol, Facebook's counsel needs to
2 be on the call, so he wasn't prevented from talking to us,
3 talking to ConnectU's counsel.

4 Under the protocol, he was only prevented from
5 talking to ConnectU's counsel without Facebook's counsel also
6 being on the line.

7 THE COURT: I'm just looking at this fairly
8 carefully, I think, and the operative language that I'm
9 concerned about is the language that says that he may not
10 discuss with ConnectU's counsel or with anyone else any
11 information obtained from the Facebook hard drives, except,
12 with respect to program -- produced program code.

13 Wasn't it a condition of his involvement that he
14 was not to discuss with anyone else anything other than
15 produced program code?

16 MR. HORNICK: Yes, Your Honor.

17 Technically, that is correct under the protocol.

18 THE COURT: Okay; so --

19 MR. HORNICK: Now, I can't speak for what
20 Mr. Parmet was thinking.

21 THE COURT: No, I understand.

22 I'm just trying to understand what the provisions
23 of the arrangement are.

24 (Pause.)

25 THE COURT: Okay.

1 MR. HORNICK: Your Honor, we contemplated before
2 the protocol was signed that there could possibly be
3 situations that would arise where you don't know what to do or
4 Mr. Parmet didn't know what to do, and ConnectU, obviously,
5 wanted the situation where Mr. Parmet could approach us about
6 that.

7 Through negotiation, we came to the point where the
8 protocol says that, if there is any communication between
9 Mr. Parmet and ConnectU's counsel, if it's in writing, it has
10 to be approved, first, by defendant's counsel.

11 If it is by telephone, everyone has to be present.

12 THE COURT: No, but the scope of the discussions
13 that he could have were limited to produce program code.

14 MR. HORNICK: Yes, they were.

15 It was impossible at the time to conceive of every
16 possible problem that could have arisen.

17 THE COURT: But that's the one that's in play here.

18 MR. HORNICK: Yes.

19 THE COURT: That's the, apparently, operative
20 position; so is there any other mechanism that you can
21 conceive of that Mr. Parmet would be permitted to disclose to
22 ConnectU's counsel, or anyone else, any information he
23 obtained from the Facebook hard drives?

24 MR. HORNICK: Well, there was a mechanism for
25 disclosing it to The Court, and not to ConnectU's counsel, and

1 that's Paragraphs 7 through 9 of the protocol.

2 THE COURT: Right.

3 MR. HORNICK: Under -- the way those work is,
4 essentially, Mr. Parmet provides a report on what he has
5 found, and, then, the Facebook attorneys and Mr. Zuckerberg's
6 attorney, look at that report, and they can identify things
7 that they think don't belong there, because they're
8 privileged, or they're private material, or they're not code,
9 or they're not relevant somewhere, and, then, they send that
10 along with their reasoning to Mr. Parmet, and he reviews that,
11 and, if he agrees with them, then, he takes it off of his list
12 of things that should be provided to ConnectU.

13 If he doesn't agree with them, then, Facebook is
14 required to submit to The Court, within fifteen days, not only
15 their reasoning for why these things should be removed from
16 the list, but, also, Mr. Parmet's actual reasoning for why
17 they should be included on the list, and, if you read our
18 brief and if you read the defendant's brief, it appears
19 likely, very likely, that that was in play, that that was
20 actually happening, that process was playing itself out.

21 Now, on March 7, Mr. Parmet would have submitted to
22 Facebook a report in which he would have said: I do not agree
23 with you. These things need to be considered by the judge,
24 essentially.

25 Now, if they weren't code, then, maybe they

1 shouldn't have been in there, but it was a mechanism by which
2 he could have brought the situation to the judge's attention.

3 THE COURT: Well, let's assume it was not code,
4 that it was not what's covered by Paragraph 3.

5 So, if it's not code, then, he's not authorized to
6 pursue this. If he doesn't, in good faith, believe that it's
7 code, he's not authorized to pursue it.

8 Is he under these provisions -- is it 7 through
9 9 -- or -- yes, 7 through 9?

10 MR. HORNICK: I think there is some ambiguity in
11 Paragraphs 7 and 8 about whether the information that Facebook
12 had the right to exclude from the list had to be privileged
13 and not relevant and not code or whether it could be
14 privileged or not relevant or not code.

15 I think that there is some room there by which --

16 THE COURT: Well, let's assume that it's not
17 privileged, it's not irrelevant, but it's, also, not computer
18 program code.

19 Your position is: It could be, then, included
20 there?

21 MR. HORNICK: No, what I'm saying is: There is so
22 much ambiguity in this paragraph, so that, if Facebook were to
23 delete from Mr. Parmet's list information that they believed
24 shouldn't be on the list because it didn't meet all three of
25 those requirements, that they may be wrong in doing that, and,

1 therefore, Mr. Parmet may have concluded -- and he had counsel
2 advising him, he may have concluded -- that he could --

3 THE COURT: Well, I guess, at some point, I think
4 we'll hear from Mr. Parmet or his counsel, but I just want to
5 understand what your reading of this provision is, because
6 he -- to some degree, Mr. Parmet is the subcontractor to you,
7 and let's assume a circumstance in which Mr. Parmet discovers
8 something that is not code, and everybody concedes it's not
9 code.

10 I don't know if that's the case here. It's just
11 simply setting a hypothetical, but whether he assumes it's not
12 code, but, nevertheless, he thinks it's, for whatever reason,
13 important, something he would like to learn about, does he
14 have any authorization under this to initiate that process of
15 back-and-forth?

16 MR. HORNICK: Your Honor, I'd like to address the
17 issue whether or not it could have been code separately, but,
18 to answer your question specifically, in Paragraph 8, about
19 midway down Page 12 of the protocol, it says that, just to
20 paraphrase, Facebook has to provide notice and objection to
21 the list that Mr. Parmet has provided, quote, along with an
22 explanation of why the Facebook defendants believe the
23 objected-to materials are not computer program code, are not
24 relevant, and/or are privileged or protected, and I think that
25 it's possible to read that and to conclude that they may --

1 Facebook may -- not have the right to take them off of the
2 list, unless they meet all three of those requirements, so
3 it's possible that --

4 THE COURT: How would I read it that way, that
5 and/or means just and?

6 MR. HORNICK: Or that it could mean or.

7 If it means only or as opposed to and, then, it's
8 possible that, if it was --

9 THE COURT: Alright. We'll do it a different way.

10 Take the and off and the slash, and that is --

11 MR. HORNICK: The point is that it could be
12 relevant.

13 THE COURT: -- entirely disjunctive?

14 MR. HORNICK: The point is, that, if it were
15 entirely disjunctive, then, it could be relevant information.

16 If it were relevant information, then, it would be
17 relevant to take it off the list, or to argue that it should
18 be taken off the list, but I'd like to address the question of
19 whether --

20 THE COURT: Alright; so that, you suggest, is some
21 sort of ambiguity in this language?

22 MR. HORNICK: I believe the ambiguity occurs in
23 another place, Your Honor, which I'll try to find while we're
24 talking, but, as I said, I'd like to address the question of
25 whether these documents that Mr. Parmet found could be code.

1 Now, I don't know what they are, but reasonable
2 minds might be able to differ about whether they are code, or
3 not, for two reasons.

4 One is that Mr. Zuckerberg was known -- and the
5 reason I know this is because defendants' counsel told me this
6 during meet-and-confer in Texas, Mr. Zuckerberg was known --
7 to write code in text files, so it would be a Word document,
8 for example.

9 He was writing code in a text file, so it might be
10 difficult to determine and to decide, and reasonable minds
11 might differ as to whether that is code or whether that is a
12 document that is not code.

13 THE COURT: Well, then, we're back to the point of
14 which, if it's code, there was a known dispute about code, and
15 nevertheless, the settlement term agreement was entered into.

16 MR. HORNICK: Well, again, Your Honor, I don't
17 think they are necessarily connected, because, for example,
18 Mr. Parmet is saying that these documents should be included
19 on the list, and Facebook is saying they can't be included on
20 the list because they're not code, and he thinks: Well, they
21 are really, arguably, code, and there is another reason why
22 they could have been, and that's because we believe that the
23 documents that are the subject of Mr. Parmet's documents that
24 he found, we believe that they are Instant Message logs, and
25 they, as I understand it -- and Mr. Parmet would be a better

1 person to ask, but as I understand it, they -- were rendered
2 as HTML files.

3 THE COURT: What is the basis for saying that they
4 are IM logs?

5 MR. HORNICK: I'm sorry.

6 Exhibit 14 to Mr. Chatterjee's declaration.

7 Do you have it?

8 (Pause.)

9 MR. HORNICK: If you turn to the next-to-the-last
10 page of this exhibit, it's Number 2 at the bottom.

11 This is Exhibit 14 to Mr. Chatterjee's declaration.

12 THE COURT: I have it.

13 MR. HORNICK: And you refer to the E-mail from
14 Mr. Parmet to Mr. Chatterjee, dated, December 14, 2007.

15 The last paragraph says: The logs can be found on
16 Device 371-01 in the Windows -- Windows partition that we were
17 able to image, and I -- and, I believe your forensic experts
18 were previously able to image the paths to the -- and, then,
19 it's blacked out R, and, then, the path is blocked out.

20 Now, the word, "logs," there, I believe it's
21 referring to Instant Messaging logs.

22 The reason that I believe that is because, at the
23 time, right around the same time that this was all happening,
24 a dispute with Mr. Parmet, the defendants did produce some
25 other Instant Message logs, and this is commonly how they're

1 referred to.

2 Also, 37101, very important number. That's
3 Mr. Zuckerberg's hard drive.

4 That is the hard drive that Mr. Zuckerberg used
5 while he was at Harvard. That means that these are logs, some
6 kind of something, that came up on Mr. Zuckerberg's hard
7 drive.

8 Now, whether it was Instant Message logs or some
9 other kind of log, it was still a computer log, and, for this
10 reason, I think there is an argument, or, at least, reasonable
11 minds might differ, as to whether this was code, or not, and,
12 therefore, Mr. Parmet might have been totally within the
13 protocol to include it, but, if Facebook takes the position
14 that, no, you can't, and it's not code, then, they can make
15 the argument that he's in violation of the protocol.

16 THE COURT: Okay; so let me just see if I can
17 recapitulate a bit on your theory here.

18 One is that there could have been code in this
19 disputed material that was going on.

20 The second is that there is potentially ambiguity
21 to be read into the agreement or the order, I should say, here
22 that would permit Mr. Parmet to raise the question of
23 something that's not code but is arguably relevant.

24 Is that -- that it?

25 Now, if the latter, why would there even need to be

1 an order; that is to say, Mr. Parmet is exposed to all of this
2 material.

3 Presumably, he can, if he's not under some sort of
4 limitation, can disclose that, as well.

5 MR. HORNICK: Nothing under this protocol comes to
6 ConnectU's attention without Facebook's or The Court's
7 permission.

8 THE COURT: Right; and the reason for that is that
9 it's supposed to limit itself to code. That was the whole
10 purpose of this exercise, I assume.

11 MR. HORNICK: But what we don't know, Your Honor,
12 is whether Mr. Parmet believed the information arguably was
13 code.

14 THE COURT: Right.

15 MR. HORNICK: And, therefore, he was trying to --

16 THE COURT: Well, from that perspective, the only
17 basis, I think, fair basis in his authorization to make
18 disclosures is that it is somehow code.

19 The ambiguity, it seems to me, drops out when you
20 look at the purpose and structure of this agreement, which was
21 to limit his exposure or, at least, his ability to pass on his
22 disclosure to other things to be found in the hard drives.

23 MR. HORNICK: Well, Your Honor, I don't really want
24 to box Mr. Parmet in a corner, but I will say this: There was
25 discussion about the purpose of the security provisions in the

1 protocol at the September 13 hearing, and the purpose of these
2 provisions was not to prevent the production of responsive
3 documents.

4 It was to prevent ConnectU from coming into
5 possession of private information; such as, E-mails between
6 girl friends, financial information, and privileged
7 information.

8 THE COURT: No, I understand all of that, and what
9 it did is, it said, I think, that access will be provided,
10 more or less unrestricted access, to review anything on the
11 hard drive, so long as the only disclosure that's made by this
12 subcontractor is of code material.

13 That was the balance that was struck.

14 Now, there's an independent obligation, obviously,
15 on the part of Facebook to provide Discovery according to
16 independent Discovery responsibilities; yet, that's a
17 different issue.

18 The issue here, it seems to me, is -- being a
19 focused issue is -- simply: What is Mr. Parmet authorized to
20 discuss with anybody else; and that, it seems to me, is a
21 question of construction of this order by Judge Collings.

22 MR. HORNICK: Well, I would argue here, Your Honor,
23 that, if the situation arose in which Mr. Parmet found
24 documents that, even, arguably were not code, documents that
25 were what everyone else would just call documents; such as, a

1 letter, an E-mail, something like that, then, I would argue
2 that, under Paragraph 3, he had the right to get all the
3 counsel on the line and simply say: I found some things that
4 were not code, and I don't think that would be a violation of
5 the protocol.

6 THE COURT: Well, I don't know how one could
7 discuss something that's not code.

8 MR. HORNICK: Well, I'm saying, Your Honor, he has
9 nothing more than that.

10 THE COURT: Well, that's the -- amounts to the same
11 thing.

12 It's not an extended discussion, but it is a
13 discussion of something that is not code, but I think I
14 understand that argument.

15 MR. HORNICK: There's another possibility,
16 Your Honor, and that is that Mr. Parmet was not restricted in
17 talking to Facebook and Zuckerberg's attorneys about anything
18 that he found.

19 THE COURT: Mm-hmm.

20 MR. HORNICK: Which is what he did or what I
21 understand that he did, at least, and, at that point,
22 Facebook, in our view, had an affirmative obligation to
23 produce those documents, and, in fact, they told him, on
24 December 16 and 18, that they were going to produce these
25 documents.

1 Now, it's a separate subject, I think, of what
2 happens after that, whether they get produced, or not, and
3 whether Mr. Parmet is right or wrong in feeling like he has
4 some kind of an obligation to The Court or to ethics or to
5 what's right and wrong, to bring these documents into the
6 open, but he certainly could have discussed them with
7 Facebook, and it is Facebook that has put -- and
8 Mr. Zuckerberg -- who have put him in this situation.

9 THE COURT: Well, yes, I think that's right.

10 It's a separate set of issues about what their
11 obligations are in an ongoing process, but is there anything
12 else that you want to focus on?

13 MR. HORNICK: Well, I would like to focus on that
14 obligation, unless Your Honor would like to focus on something
15 else.

16 THE COURT: Well, no, I think I want to hear from
17 Mr. Chatterjee, and I'll see what else I want to do, but are
18 there any other approaches to this that you see with respect
19 to Mr. Parmet's obligations?

20 MR. HORNICK: You're asking if there are other ways
21 that the information could have come out, under the protocol?

22 THE COURT: Yes.

23 Through Mr. Parmet.

24 MR. HORNICK: I believe those are the ways that
25 either -- well, I suppose another way is Mr. Parmet could have

1 informed Facebook that he wanted to inform ConnectU of the
2 situation in writing.

3 They would have had to have approved it, so that
4 they could have vetoed that.

5 I mentioned the phone call, and I mentioned the
6 Paragraph 7 through 9, and, I mean, entirely independently of
7 the protocol, and -- oh, and I mentioned Mr. Parmet bringing
8 it to Facebook's attention, and, then, I think, totally
9 independently of that, I suppose Mr. Parmet could have come to
10 The Court; I mean, we are in a very strange situation here.

11 If you look through these -- these E-mails that are
12 the exhibits, Mr. Chatterjee's declaration, E-mails between
13 the Orrick firm and Mr. Parmet, he is an independent expert
14 who does not appear to have counsel, and, yet, they were
15 telling him that they need to meet and confer with him under
16 Local Rules before they file a motion.

17 Now, they don't know that he has counsel, so how
18 does he know what that means?

19 I think that they --

20 THE COURT: I think it's coming out in camera, in
21 my opinion.

22 He did have counsel at that point, but I think he
23 did have counsel at that point.

24 MR. HORNICK: I believe he did, but I don't
25 believe, from reviewing these E-mails, which I just saw for

1 the first time the other day when these were submitted to
2 The Court, I think, from reviewing those E-mails, it is not
3 apparent to me that it would have been apparent to anybody
4 reading them at the Orrick firm that he had counsel, and,
5 therefore, from their point of view, he's an independent
6 expert who is not a lawyer and he needs some kind of
7 protection.

8 It seems to me, at that point, he could have come
9 to The Court and maybe should have come to The Court, because
10 there wasn't anyone protecting him in Orrick's eyes.

11 Now, possibly, maybe he could have been between
12 lawyers at that point, too, because, as we explained in our
13 brief, the first lawyer passed away, but the point is --
14 simply the point is that Mr. Parmet, I think, could have come
15 to The Court in camera and, yet, you wouldn't have learned
16 anything, and the Court could have, then, decided how he
17 should be dealt with, with respect to his relationship with
18 Orrick, and whether these documents needed to be produced by
19 Mr. Zuckerberg and by Facebook.

20 THE COURT: Alright; so, Mr. Chatterjee, let me
21 understand your position on this.

22 Let me make an analogy, not a perfect one, by any
23 means, but one of the things that came to my mind is the
24 Doctrine of Plain View, which authorizes those who are
25 constrained by a search warrant to seize materials not covered

1 by the search warrant but that are in plain view and are
2 evidentiary of the -- some sort of criminal activity, not a
3 perfect analogy on a whole range of issues, but let's put it
4 in the most extreme sense.

5 He encounters some document that discloses, wholly
6 independent of code, the potential for physical harm to some
7 other person, the imminent potential for physical harm to some
8 other person.

9 Is he barred from discussing that, at all?

10 MR. CHATTERJEE: Your Honor, in your hypothetical,
11 which is not a factual situation here -- and I can explain
12 that -- I think the answer to that is: Yes.

13 THE COURT: Alright.

14 Now, he discloses that, how?

15 MR. CHATTERJEE: He --

16 THE COURT: You mean, he is barred?

17 MR. CHATTERJEE: He is barred.

18 THE COURT: He can't disclose that.

19 He's like a -- well, not a psychiatrist, I guess,
20 in California --

21 (Laughter.)

22 THE COURT: -- but like a lawyer or a priest?

23 MR. CHATTERJEE: Yes, Your Honor.

24 I mean, there is a court order that restricts what
25 he may or may not talk to.

1 It was one that the Finnegan Henderson firm
2 originally drafted, and, then, we participated in making
3 revisions, and we litigated some of the issues.

4 THE COURT: Now, so the scope of his writ is
5 entirely to disclose nothing but code?

6 MR. CHATTERJEE: That's absolutely correct,
7 Your Honor.

8 THE COURT: Okay.

9 Now --

10 MR. CHATTERJEE: And, in fact, he's supposed to --
11 if he looks at something; such as, the types of documents
12 Mr. Hornick identified, he is to quickly identify whether it
13 has, what's referred to as, the syntactical style in certain
14 languages.

15 These documents; such as, Exhibit E to the Wolfson
16 declaration that was in the 56F, that Mr. Parmet also found,
17 if you look at them, there is nothing that even closely
18 resembles code, nothing.

19 THE COURT: Well, I guess I wasn't forced to -- or
20 certainly hadn't confronted the question of whether or not
21 he'd exceeded his authority in his Affidavit under the
22 Rule 56F.

23 MR. CHATTERJEE: Oh, no, Your Honor.

24 I'm sorry, I didn't mean to be confusing.

25 The Wolfson declaration was a 56F.

1 THE COURT: Mm-hmm.

2 MR. CHATTERJEE: That was separately submitted by
3 the Quinn Emanuel firm.

4 They attached to it, as Exhibit E, an
5 Instant Message chat log.

6 That Instant Message chat log was one of the
7 documents that Mr. Parmet found.

8 If you look at that document, there is nothing in
9 there that comes even close to resembling code.

10 THE COURT: Let me step back from that a bit.

11 Is it also a document that you have been disclosed
12 by Facebook?

13 MR. CHATTERJEE: It was a document we produced.
14 We produced this document.

15 THE COURT: Okay; so he made reference to a
16 document that was already disclosed by Facebook?

17 MR. CHATTERJEE: No, Your Honor, he actually had
18 identified it, but we already had it in our production tracks,
19 so it was going out the door, and it was produced.

20 THE COURT: Alright; so, let me understand the
21 status of the particular documents that were in dispute here.

22 Were they in the production track at the time that
23 the dispute arose?

24 MR. CHATTERJEE: Yes, Your Honor.

25 THE COURT: That is, things that were going to be

1 disclosed by Facebook?

2 MR. CHATTERJEE: Yes, Your Honor.

3 THE COURT: But could not be disclosed by
4 Mr. Parmet; is that it?

5 MR. CHATTERJEE: Correct.

6 THE COURT: Okay.

7 MR. CHATTERJEE: And there was a reason for that,
8 Your Honor, because we had done a very, very broad keyword
9 search of all of our electronic devices, and we were doing
10 document review of those, eliminating the privilege privacy
11 issues, and the like, and we were rolling out the production
12 and sending it, essentially on a monthly basis, as we were
13 getting through the documents, and we kept the Quinn Emanuel
14 firm fully apprised of that.

15 THE COURT: Well, where were these documents that
16 Mr. Parmet referred to in the disclosure queue?

17 MR. CHATTERJEE: I think what we had said to the
18 Quinn Emanuel firm -- and I think we put this in our papers --
19 we had said we were going to be disclosing them in mid-to-late
20 February, and we said we would be done with all the production
21 from the electronic devices that were subject to the protocol.

22 THE COURT: Now, how do I know that the documents
23 that Mr. Parmet referenced are ones that were going to be
24 disclosed, apart from your representation?

25 MR. CHATTERJEE: Your Honor, what I can tell you

1 is, is: We know the methodology that he used to find these,
2 and we had done the same methodology in the devices.

3 THE COURT: Well, you say you know the methodology
4 that he used to find these, but his methodology was directed,
5 presumably directed at code, rather than non-code but relevant
6 documents.

7 MR. CHATTERJEE: It was not, Your Honor; in fact,
8 that was part of our problem.

9 When we reviewed his logs, which he was obligated
10 to provide us under the protocol, it was very clear that what
11 Mr. Hornick had said in court at the hearing in front of
12 Judge Collings, that there was a computer program that was
13 used to pull out code, but that, in fact, was not what he did.

14 On many occasions, it appears to be a computer -- a
15 keyword searching.

16 As a matter of fact, we had a fully-executed expert
17 declaration that had reviewed his logs that basically was
18 saying what it was told -- what we were told -- he was going
19 to do, in fact, was not what he did.

20 Now, we didn't ultimately file that because of the
21 standstill agreement, the settlement documents which I have
22 here, but I don't know if we need to get into that today.

23 THE COURT: But back to the question of his
24 obligation.

25 As you see it, he is simply barred from any

1 discussion of non-code documents?

2 Simplistic, that's it.

3 MR. CHATTERJEE: Yes, Your Honor.

4 If he does get into a document that isn't code, he
5 can look at it to see if it has what they say is the
6 syntactical style, that looks like it has code in it, but,
7 beyond that, he can't review it in detail.

8 Now, just to be clear, as to these documents that
9 he identified, even though we disputed the interpretation of a
10 protocol, we did log them, we provided the log to Mr. Parmet,
11 and Mr. Parmet was going to be given the opportunity to object
12 and to take it to court if he felt it was appropriate; so,
13 notwithstanding the fact that we disagreed with him under the
14 protocol, and we disagreed with what he did, and we felt he
15 had violated it, we were still willing to take this to court
16 to resolve the dispute.

17 THE COURT: Now, is it your position, then, that
18 all of this was pre-admitted by the settlement discussions and
19 the term agreement?

20 MR. CHATTERJEE: Yes, Your Honor.

21 (Pause.)

22 THE COURT: What do you want me to do?

23 MR. CHATTERJEE: Your Honor, what I'd like you to
24 do is dismiss this case.

25 THE COURT: Well, but that's a matter for

1 Judge Ware; I mean, the term agreement says that he's the one
2 who's got the responsibility for this, in reviewing it, and
3 now, of course, there is a dispute about whether it's actually
4 been settled.

5 Now, I don't think I'm going to go beyond what the
6 term agreement is. That's where the resolution of any
7 disputes regarding this should be; that is, in the San Jose
8 Division of the Northern District.

9 MR. CHATTERJEE: I agree with you, Your Honor.

10 THE COURT: Okay; so I'm not in a position to
11 dismiss the case, I don't think, but to await the outcome, now
12 that there's a dispute, before Judge Ware; so what else do you
13 want me to do?

14 MR. CHATTERJEE: So, Your Honor, the other thing
15 you can do is you can await the outcome of those proceedings
16 in front of Judge Ware.

17 If Your Honor believes that you have jurisdiction,
18 one thing you could do is refer this matter to Judge Collings,
19 for Mr. Parmet, to talk about in camera what he looked at --

20 THE COURT: Well, I'm not going to be doing that.

21 This is not a, you know, trick question.

22 It is a question of what it is that I'm really
23 being asked to do and what my authority is to do it.

24 The only provisional kind of authority I think I
25 have in this area -- or, at least, the only one that I would

1 exercise -- is contempt; that is to say, someone is in
2 violation of a court order and I maintain some sort of
3 authority to deal with that as a contempt.

4 I'm not sure if there's anything else, I mean, you
5 say I could dismiss the case. I suppose it's possible for me
6 to tee it up to dismiss the case by saying that I followed the
7 Massachusetts rules that you've identified, and they're
8 applicable here.

9 I'm loathe to do that when the parties have a
10 mechanism for resolving this locally, which is what they
11 wanted to do, apparently, so it's back again.

12 MR. CHATTERJEE: Okay.

13 Thank you, Your Honor.

14 Going back to your original question: What do we
15 want you to do?

16 If Your Honor is inclined to hold onto this case
17 until the proceedings before Judge Ware are resolved, I would
18 stay this case.

19 Your Honor, the only reason I had suggested
20 Judge Collings handle this is because he handled all the
21 issues leading up to the --

22 THE COURT: But he doesn't have contempt power, and
23 that's the reason I took it.

24 MR. CHATTERJEE: Correct, Your Honor.

25 He can do a court recommendation, but, if

1 Your Honor wants to handle it, that's a perfectly appropriate
2 thing to do.

3 I'll tell you, given the confidentiality issues
4 that we've had in this case, there is a lot of concern at
5 Facebook, and, if Your Honor does feel it's appropriate, we
6 would like to be heard on whether there's been a violation of
7 the order, but we would like ConnectU's counsel to be excluded
8 from the proceedings. It's really an issue between us and
9 Mr. Parmet.

10 THE COURT: It is, if you press it, I suppose, and
11 the question is: Are you pressing it?

12 Mr. Hornick, it seems to me, unless you want to
13 argue otherwise, did the right thing, which is to bring to my
14 attention -- or, bring to The Court's attention -- the
15 question of some issue arising from the application of this
16 rule, and that's, I think, the appropriate way to deal with
17 it.

18 I don't think he's asked me to do anything about
19 that, other than to hold a hearing, which I'm doing.

20 Of course, I'll ask him in a minute what he wants
21 me to do, but I don't hear you asking me to do anything, other
22 than to go encounter with Mr. Parmet and you.

23 MR. CHATTERJEE: Your Honor, what --

24 THE COURT: I guess the answer to the question is:
25 To what end?

1 As interesting as it would be to talk to both of
2 you, on any occasion.

3 MR. CHATTERJEE: Thank you.

4 I think the simple answer here is to deny their
5 motion, deny their motion on the things that they're asking
6 for.

7 I would also like a court order instructing
8 Mr. Parmet not to have further conversations about any of the
9 work he was doing with anyone from ConnectU, and I think; at
10 least, until we resolve the issue before Judge Ware, that
11 should resolve where we are, and we don't need to press
12 anything further at this time.

13 THE COURT: Alright; so you want an order, more
14 specific order, to Mr. Parmet?

15 MR. CHATTERJEE: I think, Your Honor, just having
16 talked through with Your Honor, I think that's probably the
17 most logical way to go at this point.

18 THE COURT: Mr. Hornick, is there anything that you
19 want?

20 MR. HORNICK: Oh, yes, Your Honor.

21 THE COURT: Well, now, that you can get from me.

22 MR. HORNICK: Well, I don't really know what I can
23 get from you, Your Honor, but I'm willing to ask.

24 I mean, what we'd like, Your Honor, is for you to
25 interview Mr. Parmet in camera, because I think that there are

1 overriding considerations here that go beyond what happens to
2 be in this protocol.

3 I think that, if you talk to Mr. Parmet, you will
4 probably find that he was trying to do the right thing, which
5 may not have been in strict compliance with the protocol, and,
6 if so, then, I think, The Court should consider that and
7 should give some credit for that.

8 THE COURT: But to what end?

9 I keep asking the question: To what end, because,
10 ultimately, I don't have this kind of free-floating writ to
11 interview people and chat with them and find out historically
12 interesting information about the conduct of this litigation.

13 I'm supposed to rule on motions or some sort of
14 action that's presented to me, and, so, I've been told to --
15 told -- I've been asked to have some sort of conversation with
16 Mr. Parmet in which I direct him not to have any further
17 conversations, pending the outcome before Judge Ware.

18 Now, is there something specific that you want me
19 to do?

20 MR. HORNICK: Well, in -- in -- we want you to take
21 these documents from Mr. Parmet.

22 I understand that he has them with him today. We
23 also asked Facebook to bring them along today.

24 We would like you to take them in camera and take a
25 look at them, and I think that, if you did that, in the course

1 of having an interview with Mr. Parmet, it may make it easier
2 for the court to see what the relevance is.

3 THE COURT: Why would -- why would I do that?

4 Let me place it in a somewhat different context.

5 Let's assume that the parties entered into an
6 agreement with the understanding that there were unresolved
7 Discovery disputes, but they, nevertheless, entered into the
8 agreement, and, then, there's an agonizing reappraisal of
9 whether it was a good agreement to enter into, and, they're
10 executing the various kinds of initiatives to try to undo it.

11 Isn't the first step to say: If, on the basis of
12 this settlement; at least, as contended by Facebook, the
13 parties entered into it with the knowledge of unresolved
14 matters, then, the first thing for Judge Ware to do is to
15 decide whether or not to permit some further more open
16 Discovery?

17 I'm not -- I don't find compelling the kind of
18 Whitman Sampler of three or four cases regarding settlement
19 representations.

20 There were no settlement representations; at least,
21 as I can see it, in the settlement sheet.

22 Parties chose to do what they did on the basis of
23 imperfect knowledge about what the outcome of the case would
24 be.

25 Uncertainty isn't one of the greatest drivers of

1 settlement, of course, and, so, it seems to me the first thing
2 to do is simply say Judge Ware can decide this case on the
3 basis of what he has there.

4 Why should I look at these documents?

5 If he wants me to look at the documents, I'll look
6 at them, or if he wants to look at the documents.

7 MR. UNDERHILL: Your Honor, I'm Mike Underhill, and
8 I am lead counsel in the California case with ConnectU.

9 May I respond to that question?

10 THE COURT: Sure.

11 MR. UNDERHILL: I appreciate it.

12 First of all, Judge Ware doesn't have any of these
13 issues in front of him. He's not really become aware of these
14 issues.

15 THE COURT: And whose fault is that?

16 MR. UNDERHILL: Well, it's just happening now,
17 Your Honor. It's not anybody's fault.

18 THE COURT: And, so, if you want to raise this with
19 him --

20 MR. UNDERHILL: Right.

21 THE COURT: -- then, you can.

22 MR. UNDERHILL: Right; but here's the issue,
23 Your Honor: Judge Ware, presumably, is not going to have any
24 interest in diving into the protocol, which is a Massachusetts
25 order, in trying to get to the bottom of whether --

UNSEALED HEARING

1 THE COURT: Do you want me to rule on the protocol,
2 whether or not Mr. Parmet was authorized to disclose anything
3 other than the code?

4 MR. UNDERHILL: No, Your Honor.

5 THE COURT: I mean, I'll rule on that.

6 MR. UNDERHILL: I'm not looking at that issue,
7 Your Honor.

8 What I am looking at, however, is, we believe,
9 under the facts as we know them now, is very, very serious
10 attorney misconduct in this case and a violation of
11 This Court's orders by Facebook's attorneys, and that is an
12 issue --

13 THE COURT: Let me see.

14 What does in a mean?

15 Does it mean that they willfully withheld documents
16 that should have been disclosed; that is, they had an
17 obligation to disclose the documents and they didn't disclose
18 them?

19 MR. UNDERHILL: That is, in fact, the case,
20 Your Honor.

21 THE COURT: Now, how do I deal with that when it is
22 a moving target; that is to say, it was rolling Discovery, and
23 they have not come to the concluding point at which they were
24 obligated to make that disclosure?

25 MR. UNDERHILL: Well, we believe that they were,

1 Your Honor, and I think that it is something Your Honor should
2 rule upon.

3 THE COURT: How is that?

4 MR. UNDERHILL: Your Honor, they were getting
5 E-mails from Parmet on December 14, where he was laying out,
6 with great specificity, apparently, what he felt was the
7 smoking gun.

8 THE COURT: And what is the mechanism for dealing
9 with that?

10 MR. UNDERHILL: The mechanism for dealing with that
11 at that time from Orrick is to produce the documents.

12 You cannot sit on smoking guns when they're, I
13 believe, inferring from the documents a relatively small
14 quantity of documents.

15 Your Honor could certainly find out today, because
16 I understand they are in the courtroom, but you cannot rely on
17 the refusal to produce a small number of smoking-gun documents
18 on the theory that: Oh, we've got lots of documents, and
19 we're going to do it in the ordinary course of time.

20 THE COURT: Why isn't the answer to this to say to
21 someone who enters into an agreement or appears to: You knew
22 you didn't have everything. You didn't ask for representation
23 that there were no smoking guns.

24 You didn't enter into an agreement to say: Are
25 there any other documents that you have not produced that

1 would bear on the question?

2 None of that was done.

3 Parties knew that there was incompleteness to the
4 Discovery process at that point. It had not come to rest its
5 final conclusion.

6 Now, those who would want to unravel an agreement,
7 certainly would want to pull at whatever strings they can pull
8 at, but the first order of business is to say: Why is it that
9 we should unravel this if there was an agreement between the
10 parties, on those premises?

11 MR. UNDERHILL: Right.

12 THE COURT: Including -- you're making the
13 argument -- you're making the argument to Judge Ware: We had
14 no idea there was something out there, and, in fact, nobody
15 will even let us look at it.

16 MR. UNDERHILL: I think there is a compelling
17 answer to your question, Your Honor.

18 I think it is in the documents that counsel has
19 filed with their opposition.

20 There is an E-mail in early February. There is an
21 E-mail by Mr. Wolfson at the Quinn Emanuel firm.

22 THE COURT: Can you --

23 MR. HORNICK: Let me have that?

24 MR. UNDERHILL: Sure.

25 THE COURT: Just bring me to the document.

UNSEALED HEARING

1 MR. HORNICK: Well, I'm going to refer you to a
2 document that I think is more compelling than the one that
3 Mr. Underhill was referring to.

4 This is Exhibit 7 of --

5 THE COURT: The penultimately compelling document?

6 MR. HORNICK: That remains to be seen, Your Honor.

7 THE COURT: Compelling document?

8 MR. HORNICK: That would be Exhibit 7 to
9 Mr. Chatterjee's declaration, in which is a January 23, 2008
10 E-mail from Miss Sutton of the Orrick firm, representing
11 Facebook, and Mr. Zuckerberg to Mr. Wolfson, who was with
12 Quinn Emanuel firm representing ConnectU, and, in the last
13 paragraph on the first page of this E-mail, it says: With
14 regard to Facebook defendants' production, we intend to
15 produce by mid-February all responsive documents, paren, with
16 the exception of code, closed paren, retrieved from the hard
17 drives that are currently subject to the protocol, so, in this
18 E-mail, January 23, which was the day after the California
19 court issued the order, that the case, that case, by the way,
20 only the California case, had to be mediated within 90 days,
21 the day after they promised that they're going to produce
22 these documents by mid-February.

23 At that point in time, they had no idea when the
24 mediation would be scheduled.

25 As it turned out, the mediation was scheduled on

1 February 11 for February 22, but nobody knew that at the time.

2 I'd also like to refer The Court to Exhibit 14 to
3 this declaration, Chatterjee declaration, and that is a
4 December 15 E-mail from Miss Sutton to Mr. Parmet.

5 This is the day after Mr. Parmet brings these
6 documents to Facebook's attention, and, recall, we looked at
7 that document, which was the previous document, Exhibit 14,
8 and, in that document, all he did was tell him that they found
9 some things.

10 He didn't say: Are you going to produce them; when
11 will you produce them; you need to produce them.

12 All he did was tell them about them, and, the next
13 day, in the fourth paragraph, in the middle, they say, quote:
14 We will review these documents consistent with the massive
15 document review we already have underway, and we'll produce
16 it, if appropriate; and, then, the next day, Exhibit 16 --
17 sorry. It was three days later, December 18.

18 This is Exhibit 16 to the Chatterjee declaration,
19 and, if you look at the one that came from that, before that,
20 from Mr. Parmet, he wasn't saying: When are you going to
21 produce these documents; you need to produce them.

22 He wasn't insisting, but, nevertheless, on
23 December 18, they wrote to him again, and, at the bottom of
24 the first page of this E-mail, the penultimate paragraph, they
25 say, quote: We will also review the documents you have

1 identified in violation of the protocol, to the extent we have
2 not done so already, and will produce them if responsive, not
3 privileged or otherwise objectionable. We will tell
4 ConnectU's counsel when production is complete.

5 Now, this was only three days, four days after
6 Mr. Parmet told them about the documents. They told him,
7 unsolicited, that they would produce them, twice.

8 THE COURT: Well, see, the problem with that -- and
9 it really goes back, I guess, to Exhibit 7, which is: You
10 knew, at the time that you entered into the agreement, the
11 settlement term agreement, that it wasn't complete.

12 MR. HORNICK: Well, Your Honor, that happens in
13 many cases, but not in all cases is there an affirmative
14 obligation to produce.

15 Now, Your Honor referred to a case --

16 THE COURT: Wait.

17 The affirmative obligation to produce.

18 Now, what does that mean?

19 MR. HORNICK: Yes.

20 THE COURT: You mean, in Discovery?

21 MR. HORNICK: Yes.

22 THE COURT: And Discovery here is ongoing and
23 incomplete, so what you would like me to do is rear back and
24 say: This disclosure should have been made on "X" date,
25 before the settlement term agreement?

UNSEALED HEARING

1 MR. HORNICK: That's right, Your Honor, and the
2 reason is --

3 THE COURT: Where will I find that in the
4 Federal Rules of Civil Procedure, or anywhere else?

5 MR. HORNICK: Well, Rule 26 says, for example, that
6 there must be a timely supplementation if you find out that
7 your production is incomplete.

8 Now, since Rule 34 only gives you 30 days to
9 produce documents in the first place, I would argue that, if
10 you come into knowledge that your production is incomplete
11 timely, there's a good argument to be made that timely means
12 around thirty days, no more than thirty days.

13 Now, this was not a case, Your Honor, where --

14 THE COURT: Why didn't you come to court and ask
15 for that, then, because you had more than thirty days after
16 your request?

17 MR. HORNICK: But, Your Honor, we had three motions
18 to compel pending over a period of two years.

19 THE COURT: Right; so you didn't bring that one.

20 The short of it is that -- at least, the argument,
21 I think, can fairly be made that -- you knew it was
22 incomplete, you knew there was a dispute, and, yet, you
23 entered into the settlement term agreement.

24 Now, somebody may say: Well, there is still some
25 sort of obligation to provide exculpatory evidence before the

1 negotiations take place; and, maybe, that's true somewhere.
2 I'm not aware of it.

3 MR. HORNICK: Well, Your Honor, we cited to you the
4 Spaulding case, and I believe you indicated a moment ago that
5 you weren't impressed with that case, but I think that case is
6 directly relevant.

7 It did involve a minor who --

8 THE COURT: I mean, that's like saying: It did
9 involve a minor; which is to say it was fundamentally
10 different.

11 MR. HORNICK: No.

12 THE COURT: I have to actually have hearings on
13 whenever a minor comes in here, and I have to make an
14 independent determination.

15 I don't make any determination, nor do I think
16 Judge Ware is going to, about whether or not this was a good
17 agreement or bad agreement; so people with lots of money who
18 have engaged in some discussion and they clearly settled the
19 matter, that's the issue, so Spaulding doesn't really --

20 MR. HORNICK: There is a reason, Your Honor, why
21 Spaulding does apply, and that is because in that case the
22 plaintiff failed to seek the information in Discovery, and,
23 therefore, The Court said the defendant has no obligation to
24 disclose this information and that the reason that the
25 obligation arose was because, when the settlement was

1 submitted to The Court for The Court's approval, that is when
2 the fraud on The Court occurred.

3 However, if, as in this case, the plaintiff had
4 sought Discovery, then, the defendant would have had an
5 obligation to disclose that information, and they didn't do
6 so.

7 THE COURT: It doesn't follow.

8 MR. HORNICK: There's also another case,
9 Your Honor, and that is the KATH v. Western Media case, which
10 we can hand up.

11 This is from the Supreme Court of Wyoming, and, in
12 this case --

13 THE COURT: Why don't you pass it up, sir.

14 MR. HORNICK: Approach?

15 THE COURT: Mm-hmm.

16 (Handed to the Deputy Clerk.)

17 MR. HORNICK: In this case, the appellants were
18 represented by an attorney with a strange name, which is
19 escaping me at the moment, and it was Panell (phonetic),
20 Planell (phonetic) -- Planell (phonetic),
21 Mr. Planell (phonetic), he was an attorney, he represented the
22 appellants, and he testified in a deposition, prior to
23 settlement, that he represented all of the appellants equally,
24 and the appellants had sought Discovery of him, and not just
25 the deposition, but they also had sought Discovery of his

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1 litigation file, and he produced it, but he failed to produce
2 a letter from that file, and that letter admitted, clearly,
3 that he did not represent all the defendants equally.

4 The case settled.

5 After the case settled, Mr. Planell (phonetic)
6 disclosed this letter.

7 In this particular case, the trial court affirmed
8 the settlement. There was a Motion to Enforce the Settlement,
9 trial court affirmed it, went up on appeal, the Wyoming
10 Supreme Court said: No, that Mr. Planell (phonetic) had an
11 affirmative duty to produce this document.

12 They said that he had -- that the appellee's
13 attorney had an ethical duty to disclose the letter before
14 settlement.

15 That case cited another case, called, Virzi versus
16 Grand Trunk.

17 THE COURT: Virzi, V-I-R-Z-I.

18 MR. HORNICK: 571 F.Supp. 507, Eastern District of
19 Michigan.

20 Now, in that case, the plaintiff's attorney, the
21 plaintiff died, and the plaintiff's attorney failed to tell
22 the other side that the plaintiff had died, and, then, the
23 plaintiff's attorney went into settlement talks with the
24 defendant and they settled, and, then, after they settled, the
25 plaintiff's attorney disclosed that the plaintiff had died,

1 and the defendant said: The only reason that I settled this
2 case was because I thought the plaintiff would make an
3 excellent witness at trial; so, in that case, the
4 Eastern District of Michigan overturned the settlement,
5 because this information should have been disclosed before the
6 settlement, and it said, quote, there is an absolute duty of
7 candor and fairness on the part of counsel to both The Court
8 and opposing counsel, end quote.

9 Quote: Zealous representation of interest,
10 however, does not justify a withholding of essential
11 information, such as the death of a client, unquote; when the
12 settlement of the case is based largely upon the defense
13 attorney's assessment of the impact the plaintiff would make
14 on the jury, unquote.

15 So, in these two cases and the Spaulding case,
16 which I urge Your Honor to read cover to cover, because these
17 three cases support --

18 THE COURT: I have.

19 MR. HORNICK: -- the situation here.

20 THE COURT: They don't.

21 The short answer is: They don't.

22 We're dealing with the question of The Court's
23 responsibility to act more or less independently on behalf of
24 minors in Spaulding.

25 Here, in Kath, K-A-T-H, the Wyoming case, we're

1 dealing with a question of whether or not a particular
2 attorney actually represented the parties involved, and, in
3 the third case, we're dealing with the question of whether or
4 not there is even a party to represent, Virzi, and the
5 attorneys' abilities to represent that party.

6 MR. HORNICK: With all due respect, Your Honor --

7 THE COURT: With all due respect, I'll finish my
8 statement, and, then, you'll have an opportunity to respond.

9 MR. HORNICK: Sorry, Your Honor.

10 THE COURT: The short of it is that none of those
11 cases deal with arm's-length negotiations between parties who
12 are aware that they have not resolved their Discovery disputes
13 fully. That's what this case is, entirely different from the
14 protection that The Court provides to shareholders, and
15 children, and dead people or the successors of dead people, so
16 the short of it is: I don't find any of these cases evenly
17 scratching through the digest to find glittering generalities;
18 like, duty of candor, and fairness with respect to The Court,
19 to decide this case.

20 Of course, it's a duty case. No one will deny it,
21 and, of course, there is an obligation to comply with
22 The Court orders, but here, these parties, between these
23 parties, it seems to me, there is an entirely different set of
24 factors and circumstances.

25 But you were saying?

1 MR. HORNICK: Your Honor, I was saying that there
2 is a parallel to these cases, in that, in each one of those
3 three cases, there was material information that was withheld
4 by the opposing party before the parties entered into
5 settlement negotiations.

6 There is no reason to believe in any of those cases
7 that Discovery was complete, but it's not important.

8 What's important is that there was material
9 information that was withheld in all three of those cases from
10 the settling party, and, in all three of those cases,
11 The Court believed that that was a sufficient basis for your
12 opening settlement.

13 Now, we're not asking you to do that, Your Honor.

14 THE COURT: No, and I don't have the power to do
15 it. It's up to Judge Ware.

16 The question is: What do you want me to do?

17 And I'm back to that question: What do you want me
18 to do?

19 MR. HORNICK: The reason why we want Your Honor to
20 review these documents and not to give them to Judge Ware is
21 that these documents -- let me step back for a moment.

22 The California case was ordered to mediation on
23 January 22 of this year by Judge Ware. He did not order this
24 case to mediation.

25 The parties decided to make it a variable

1 discussion, so these documents are not relevant to the
2 California -- well, we don't know, but we don't think that
3 they're relevant to the California case, so, if we make -- so
4 the point is that this is the place.

5 This is the place to address whether these
6 documents are relevant to the disputes between the parties,
7 and, therefore, what we ask This Court to do is not to open
8 the settlement but, simply, to review the documents, determine
9 if they should have been produced in Discovery, and, then,
10 order that they be produced, if you find that they were
11 material or that they were responsive.

12 THE COURT: The parties agreed that the -- in
13 Paragraph 4 -- or, Section 4 of the settlement -- term sheet
14 and settlement agreement, that the cities and federal court
15 shall have jurisdiction to enforce this agreement.

16 This is a question over the enforceability of the
17 agreement.

18 The agreement deals with this case, as well as the
19 San Jose case.

20 That's what the breadth of what you've asked for
21 is, so --

22 MR. HORNICK: May I respond, Your Honor?

23 THE COURT: You always do.

24 MR. HORNICK: I want to make sure that it's okay.

25 Paragraph 4 doesn't say that the jurisdiction is

1 exclusive in the California court.

2 THE COURT: You mean, I have jurisdiction over the
3 California case, too?

4 MR. HORNICK: You have jurisdiction over your own
5 cases, Your Honor.

6 THE COURT: Well, that doesn't mean that I have
7 control over the California case, too?

8 That reading?

9 Here is a term sheet and settlement agreement.

10 I mean, let me ask you this: Are you asking me to
11 deal with the question of whether or not this is an
12 enforceable agreement?

13 MR. HORNICK: No, Your Honor.

14 THE COURT: Okay. I didn't think you would, okay?

15 So the short of it is that we have a dispute that
16 will be resolved in California over whether or not there is a
17 settlement agreement between the parties.

18 I have a vestigial; like, the vermiform appendix,
19 which exists solely to get inflamed and cause some upset, of
20 Discovery dispute in this case, and I keep asking the parties
21 what you want me to do.

22 What I understand from Facebook is that their
23 request is that I instruct Mr. Parmet not to discuss with any
24 other persons his findings.

25 I'm not sure what you're asking me to do. I know

1 now that you don't want me to enforce this rule on whether or
2 not this is an enforceable settlement agreement.

3 MR. UNDERHILL: May I have a short response,
4 Your Honor?

5 THE COURT: Well, let me just ask this; I mean, I'm
6 used to tag-team wrestling.

7 Are you admitted pro hac vice?

8 MR. UNDERHILL: I have applied, Your Honor.

9 My application is on file, as of today.

10 MR. HORNICK: Your Honor, we neglected to introduce
11 Mr. Underhill earlier.

12 THE COURT: Well, he introduced himself.

13 (Laughter.)

14 THE COURT: Mr. Underhill, as a stranger, but as
15 someone who apparently has some interest in this litigation,
16 of course, I'm hear you.

17 MR. UNDERHILL: Thank you, Your Honor.

18 I appreciate that, and I admittedly have quite a
19 bit of interest in this litigation.

20 In response to your question, Your Honor, I would
21 like to make sure that The Court understands the nature of the
22 proceedings that are before Judge Ware.

23 I actually have our briefs without exhibits, that's
24 intended to be merciful, if you would like for me to hand up
25 the briefs.

1 The argument in California is that the term sheet
2 is not an enforceable agreement because it's missing material
3 terms, and I'm happy to go into as much detail as you want,
4 but, probably, you don't want to hear it.

5 THE COURT: I'd have to be somewhat innocent, if I
6 didn't figure out what it was that you were arguing about in
7 California. That's fairly obvious.

8 MR. UNDERHILL: Yes.

9 THE COURT: The issue is what I'm supposed to do
10 here --

11 MR. UNDERHILL: Yes.

12 THE COURT: -- apart from providing a forum for the
13 opportunity to try to pull at the threads of a fabric that was
14 fabricated in California.

15 MR. UNDERHILL: Your Honor, I'm going to get right
16 to it.

17 The second argument in California is a fraud
18 argument, regarding the valuation of the stocks.

19 Again, I don't think those are issues with which
20 This Court has familiarity.

21 The issue that we're here on today, is on an issue
22 that is very much within the familiarity of This Court.

23 The idea, Your Honor, is this: If these documents
24 were withheld and if they are material, This Court is, by far,
25 the much better viewer to understand what would be the

1 relevance of the claims that were being pressed in This Court.

2 With respect to the jurisdictional issues,
3 Your Honor, the forum selection clause only has effect if that
4 agreement is binding. If it's not binding, the forum
5 selection clause doesn't have effect --

6 THE COURT: And who makes that --

7 MR. UNDERHILL: -- immediately.

8 THE COURT: Who makes that determination?

9 It's the chicken-and-egg problem.

10 MR. UNDERHILL: It is, indeed, and that's why we
11 did not contest it in front of Judge Ware, but the other side
12 filed a motion in the courts in California.

13 We didn't oppose it. We didn't understand: This
14 is the situation. It's got to start somewhere.

15 With respect to this issue, Your Honor, and as far
16 as the relief we are asking, I would respectfully disagree
17 that it has anything to do with enforcing the settlement
18 agreement or not enforcing the settlement agreement. That's
19 not what we're asking for.

20 THE COURT: But what -- what --

21 MR. UNDERHILL: That's not, at all.

22 THE COURT: What, precisely, are you asking?

23 MR. UNDERHILL: We're asking for in camera review.

24 If The Court agrees that these documents are
25 material to the claims in the Massachusetts tapes, that

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1 The Court ordered their production, then, you're done; then,
2 we've got to figure out what we're --

3 THE COURT: Why would I do that, when there is
4 pending in California an issue, as to which both parties have
5 apparently briefed, of whether or not there is a settlement
6 agreement that ends this case, and actually ended this case at
7 the time that the parties called the respective clerks and
8 told them the case was over?

9 Now, ordinarily, I'd, as a matter of course, to
10 deal with, what I'll call, buyer's remorse, issue a thirty-day
11 order of settlement if there isn't a clear stipulation filed
12 or some other document filed, but, from time to time, I have
13 to deal with buyer's remorse, and I deal with buyer's remorse
14 by determining whether or not there was, in fact, an
15 agreement, and somebody else is going to be making that
16 determination.

17 If there was an agreement, then, it is a matter
18 against which you argue on a variety of grounds; then, it is a
19 matter of indifference whether or not there were unresolved
20 Discovery matters in This Court.

21 MR. UNDERHILL: Your Honor, I would agree with you
22 fifty percent.

23 The fifty percent I agree with is: If it's a
24 binding agreement, then, as well, I agree 100 percent, if it's
25 a binding agreement, then, yes, this is completely relevant.

1 However --

2 THE COURT: Right.

3 MR. UNDERHILL: However -- however, Your Honor, if
4 we get those documents and if they're relevant, that's an
5 additional ground that we would apply to The Court for setting
6 aside the settlement agreement, which is, if there was
7 attorney misconduct, they withheld extremely important
8 documents, and, by the way, I'm only assuming that those are
9 the facts, but we're not going to know that those are the
10 facts, unless Your Honor is willing to look at the documents
11 in camera.

12 I do agree, Your Honor, that this idea of: Oh, you
13 settle cases. There is lots of Discovery out there; it's kind
14 of appealing to go there.

15 I think the difference here is that there was a
16 specific, heightened identification of a very small universe
17 of documents that, apparently, inferring from the documents,
18 was the smoking gun that was the difference between victory
19 and loss in the case, or, potentially, the difference between
20 victory and loss.

21 We're never going to know that, unless Your Honor
22 looks at the documents and has some kind of a reaction that we
23 can take to Judge Ware, as to --

24 THE COURT: Some kind of reaction?

25 Is that what is called an advisory opinion?

1 MR. UNDERHILL: No.

2 I'm talking about issuing the documents,
3 Your Honor, issue an order that they have to produce the
4 documents.

5 THE COURT: Right; but they don't have to produce
6 the documents if there is settlement; so the short and
7 sufficient answer, I think, is to say: Judge Ware is entitled
8 to make his determination about the enforceability of this
9 settlement, knowing that there is some sort of dispute about
10 Discovery in Massachusetts, in which you say there is a
11 smoking gun, nobody's indicated there is a smoking gun, but,
12 perhaps reading this in the light most favorable to you, he'll
13 say: Well, until we resolve that, we can't do anything about
14 it, but that's for him to decide, not for me, and not for me
15 to offer my reactions --

16 MR. UNDERHILL: Right.

17 THE COURT: -- to documents; so, if you want me to
18 read them and review them?

19 No.

20 If you want me to have them marked, then, I'll
21 think about that, marked and they're part of the record, and,
22 if Judge Ware thinks that it would be a good idea for somebody
23 in Massachusetts to look at these and decide whether or not
24 there was a failure of some sort of Discovery?

25 Well, I'm think about that.

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1 MR. UNDERHILL: Okay, Your Honor.

2 Obviously, that is our fall-back position, that
3 they be marked.

4 And one last comment, Your Honor, and I understand.
5 I understand that, when a judge rules, a judge rules.

6 I would --

7 THE COURT: Do you -- do you really?

8 MR. UNDERHILL: I'm sorry?

9 THE COURT: Do you really?

10 MR. UNDERHILL: I know it in my heart and not in my
11 head, or vice versa, I guess.

12 (Laughter.)

13 MR. UNDERHILL: What the witness is going to point
14 out, I would assume, is: If we are forced into a settlement,
15 which we don't think we will, particularly on the arguments
16 we've already put before Judge Ware, but, if we were, the next
17 step is going to be a fraud claim, and it's going to be a new
18 lawsuit, and we're going to be back in court, and we will get
19 the documents in non-party Discovery, and we're going to have
20 a whole lawsuit over --

21 THE COURT: Maybe you are. Maybe some judge is
22 going to look at this and say: Somebody can't claim fraud
23 when they managed to settle the case when there were things
24 outstanding and they knew were outstanding, so that's,
25 frankly, a matter of indifference to me.

1 The question is step by step; so, you know, you
2 raised the question of fraud.

3 You won't be the first person to say it, you won't
4 be the first person to be disappointed when the acts of your
5 parties, your client, have undermined it, but I'm not making a
6 determination about that, and, if somebody wants to come back,
7 they can come back.

8 MR. UNDERHILL: Thank you.

9 THE COURT: Alright.

10 Mr. Chatterjee?

11 MR. CHATTERJEE: Your Honor, I just wanted to
12 address one point that Your Honor raised associated with the
13 marking of documents.

14 Many of these documents have a lot of very deeply
15 personal information, similar to some of the things that
16 showed up when we had our the hearing at the 02138 hearing.

17 There's a lot of client sensitivity about putting
18 these into a court file anywhere, even if it's sealed.

19 What I would suggest, Your Honor, is, for example,
20 if you do want to mark them, that we put them in the hands of
21 Mr. Bauer, he's an Officer of This Court, he has an office
22 here, and is subject to The Court's jurisdiction, and he holds
23 onto them should the matter be reopened, and the reason for
24 that is just because of the client sensitivities around a lot
25 of confidential information.

1 THE COURT: Yes.

2 It's a lot of hypersensitivity on the part of the
3 clients, but is there any objection to that, as an
4 alternative, if Mr. Bauer becomes the escrow agent?

5 MR. HORNICK: Yes, there is, Your Honor, because, I
6 think, there's two reasons: One is that this whole
7 confidentiality thing has gotten way out of hand, in this
8 case.

9 THE COURT: Well --

10 MR. HORNICK: The plaintiffs marked documents as
11 confidential, just --

12 THE COURT: Alright; so you object to it.
13 I understand.

14 MR. HORNICK: And I --

15 THE COURT: Just a moment.

16 MR. HORNICK: Okay.

17 THE COURT: If someone objects to it, that's the
18 end of it.

19 It will be held here.

20 The Court of Appeals had an unhappy experience
21 earlier with sealed documents. We'll see if we can do better
22 than that, so I'll put them in a safe in my office.

23 I've not decided that they're particularly
24 confidential, at all, but just to satisfy everyone, and I'll
25 await further direction.

1 MR. HORNICK: May I ask The Court's permission to
2 submit these documents to the California court?

3 They're under seal in This Court.

4 THE COURT: Only if Judge Ware asks me for them.

5 You can ask him to ask me, if you think that he'll
6 find that compelling. I'm not sure I would in his position,
7 but they're here, and the way I'm perceiving this now -- and I
8 think the next stage is that I have to go into in camera
9 proceedings with simply Facebook's attorneys and Mr. Parmet's
10 attorneys, just to clarify matters a bit, but the way I see it
11 is -- I will preserve the basis for this issue.

12 You can argue the issue to Judge Ware. I've made
13 no ruling, with respect to whether or not they're relevant, or
14 not, because I'm not even going to look at them, because I
15 don't think, at this stage, it is necessary for me to look at
16 them, particularly when there is outstanding the question of
17 whether or not there is an enforcement agreement that would
18 obviate that altogether.

19 MR. HORNICK: Well, Your Honor, these -- the
20 subject of whether there is a settlement, it seems to me, is,
21 obviously, before Judge Ware, but there is still the question
22 of whether the two cases that are in This Court are alive, and
23 there is nothing, at all, to indicate that they're not, and,
24 in fact, all of the communications that have been given to
25 This Court about whether those two cases are alive --

1 THE COURT: I'll tell you, my view is, if
2 Judge Ware says that this is an enforceable agreement; that
3 is, the term sheet and settlement agreement's enforceable,
4 these cases were dead on the day that this agreement was
5 entered into or the day after.

6 If it's not, then, you're right, they're over, and
7 that's the whole gist of the question, but it seems to me an
8 undue waste of judicial resources, and the parties have their
9 own and have been making their own choices about the
10 expenditure of theirs, to litigate this in a parallel fashion,
11 particularly when nobody's asking me to enforce this
12 agreement.

13 I will take my direction from Judge Ware and his
14 resolution.

15 If this isn't an enforceable agreement, then, the
16 case is still on -- cases are still on.

17 MR. HORNICK: Your Honor, the way that you've
18 phrased that point several times today makes me wonder whether
19 This Court would entertain a motion to open the settlement,
20 based upon misconduct of the plaintiffs or their counsel in
21 failing to produce documents that they should have produced
22 before; in other words, you've asked me and I'm asking you --

23 THE COURT: Not, until after Judge Ware -- I'd
24 ask -- not until Judge Ware rules on this.

25 I've asked you in a large fashion, whether you want

1 me to rule on the question of the enforceability of the
2 settlement agreement.

3 I'll tell you that I would do it more or less in
4 the same fashion and proceed in more or less the same fashion
5 Judge Ware is doing it, but I don't even think I have the
6 authority to do that.

7 He has the authority -- first, he has the first cut
8 at this. Parties wanted him to have jurisdiction to enforce
9 the agreement.

10 It's kind of a fine nuance to say that that's not
11 an exclusive choice of jurisdiction, although I frankly find
12 that meretricious, but the way in which I think this has to be
13 dealt with is to say: Judge Ware's going to decide it on the
14 basis of the parties' submissions, and he'll decide whether or
15 not it's necessary to -- in order to rule on it, to -- have
16 further proceedings in This Court, and I stand ready to do
17 whatever is necessary, or he can decide that it's not an
18 enforceable agreement, and, then, we're off to the races
19 again.

20 MR. HORNICK: Your Honor, the reason that we were
21 asking you to review these documents is because, if Judge Ware
22 does find that it's an enforceable agreement, then, the
23 logical, one of the logical, places to file a new lawsuit and
24 to reopen this matter, under Rule 60 or based upon fraud on
25 the court or based upon fraud on the parties, would be right

1 here, because this is the court that knows about these issues.

2 THE COURT: Well, you know, always be careful what
3 you ask for.

4 (Laughter.)

5 THE COURT: So -- but we do that step by step.

6 We don't have a 60B motion, until we have a final
7 judgment.

8 We don't have a final judgment yet, because it is
9 tied up in this issue of the enforceability of this agreement,
10 as to which a variety of issues have been raised here, but I
11 will be bound by whatever Judge Ware decides, concerning
12 enforceability of this agreement, and I'll deal with whatever
13 follow-on that leads to, either that he finds it to be an
14 enforceable agreement or he doesn't.

15 MR. HORNICK: Well, Your Honor, the risk is that we
16 will ask Judge Ware to order the production of these
17 documents, and he'll say: They're not relevant to the case
18 that's before him.

19 THE COURT: Well, you know, you'll just have to --

20 MR. HORNICK: And that they belong here.

21 THE COURT: Right.

22 Okay; so, then, we'll go step by step.

23 I suspect he won't do that. That's my general
24 view.

25 My general view is: He'll look at all the facts

1 and circumstances surrounding the settlement agreement,
2 including an allegation that there was incomplete disclosure
3 that contained a smoking -- a series of smoking -- guns, and
4 that was not completed at the time that the parties entered
5 into this agreement and make whatever judgments he wants about
6 that, but that's up to him.

7 MR. UNDERHILL: Your Honor, I have a technical
8 question, with respect to the technical order here?

9 THE COURT: Mm-hmm.

10 MR. UNDERHILL: I'm assuming that we're not going
11 to have any issues dealing with anything with Judge Ware on
12 the issues in front of This Court, and, by that, I mean,
13 providing the pleadings in This Court, Mr. Chatterjee's
14 affidavit, those sort of things, to the California court.

15 THE COURT: Is there any problem with that,
16 Mr. Chatterjee?

17 MR. CHATTERJEE: No.

18 THE COURT: It seems to me that those can properly
19 be placed before Judge Ware.

20 MR. CHATTERJEE: Yeah, I think you're right.

21 Your Honor, we're not going to have an issue with
22 that.

23 THE COURT: Okay.

24 MR. CHATTERJEE: We've been doing that throughout
25 this case.

1 THE COURT: Alright; so there is nothing having to
2 do with protective orders in this case that prevent the
3 submission of these documents to Judge Ware, nor the
4 transcript of this hearing.

5 MR. CHATTERJEE: Obviously, Your Honor, that is
6 subject to the protective order provisions and all the things
7 you have to do in California to put things under seal.

8 THE COURT: Right.

9 MR. UNDERHILL: Thank you, Your Honor, and thank
10 you for your courtesy in this position.

11 THE COURT: Alright.

12 So what I think I want to do at this stage is: I
13 do want to hear from Mr. Parmet and his counsel, and I do want
14 to -- I think, my present inclination, and I will tell counsel
15 if that's what happened, is to -- take the documents that he
16 has that he says are relevant, keep them under seal, and we'll
17 keep them under seal in This Court, but, because this deals
18 with the question of whether or not a mechanism for Discovery
19 that was designed to limit disclosure only to that degree
20 necessary is involved, I'm going to close the courtroom, and
21 take this in camera, so I'd ask everyone who is not, either in
22 a representative capacity for Facebook or for Mr. Parmet to
23 leave the courtroom.

24 MR. HORNICK: Your Honor, would you like ConnectU's
25 counsel to wait?

1 THE COURT: I think so; I mean, I don't want to
2 interfere with your schedules, or anything.

3 MR. HORNICK: We're prepared.

4 THE COURT: I'll dictate whatever I do.

5 My intention is to reconvene The Court after this
6 hearing and simply report what I've done.

7 MR. HORNICK: We'll -- we'll be -- we're prepared
8 to wait, Your Honor.

9 THE COURT: Okay; so we'll take, maybe, a
10 five-minute break, at this point.

11 Is that sufficient for you?

12 THE COURT REPORTER: Yes.

13 THE COURT: And, then, we'll hear from the Facebook
14 and Mr. Parmet's counsel.

15 THE DEPUTY CLERK: All rise.

16 (The judge exited the courtroom.)

17 (The parties were sequestered, subject to
18 The Court's order.)

19 (A short recess was taken.)

20 (A SEALED, in camera hearing was held.)

21 (The proceedings were continued onto the next
22 page.)

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1 (All parties returned to the courtroom.)

2 THE DEPUTY CLERK: All rise.

3 This Honorable Court is back in session.

4 You may be seated.

5 THE COURT: Well, having completed in camera
6 hearing with Mr. Parmet and his counsel and counsel for
7 Facebook, I think I should report what I've chosen to do here,
8 which I indicated ahead of time.

9 At the outset, however, let me just say that it
10 seems to me that it is appropriate to keep the transcript of
11 the in camera proceeding in camera, because, necessarily,
12 there was a discussion, to some degree, of the substance of
13 the -- at least, Mr. Parmet's view of the substance of -- the
14 documents that he believes are at issue here.

15 By keeping it in camera, I do not mean to suggest
16 that it's not available to Judge Ware, if he chooses to review
17 it; otherwise, the transcript of the proceedings is open, as
18 is customary in This Court.

19 Mr. Parmet has passed up to me, now, incorporated
20 in this single, three-ring binder, a collection of documents
21 that are at issue in the dispute between parties and have been
22 the focus of the dispute between the parties, and I intend to
23 have them docketed as a sealed exhibit.

24 (A sealed exhibit will be docketed.)

25 THE COURT: I will keep them in the safe, in the

1 control of the court, pending resolution of other matters by
2 the parties, and, more particularly, by Judge Ware.

3 During the course of the proceeding, I found that
4 Mr. Parmet did not engage in any knowing violation of the
5 provisions of the order for Discovery of computer-memory
6 devices that was entered by Judge Collings on
7 September 13, 2007.

8 I did, however, indicate -- and I'll make
9 explicit -- that my view is even to have discussed the
10 existence of documents that he reviewed that did not involve,
11 what we call, code is a transgression of the order.

12 The order, I think, is quite explicit on the issue
13 of what kind of disclosure to others Mr. Parmet could make;
14 more specifically, in Section 3, on Page 7, the order directs
15 that Parmet and Associates may not discuss with ConnectU's
16 counsel or with anyone else any information obtained from the
17 Facebook hard drives, except, with respect to the produced
18 program code, and, in the course of my discussions with
19 Mr. Parmet, I emphasized, again, to him the view that I have,
20 that that means he may not have any discussions, direct or
21 indirect, with ConnectU's counsel or with anyone else --
22 obviously, with the exception of The Court, direction from me
23 or from Judge Ware, for example -- of any information obtained
24 from the Facebook hard drives, except with respect to the
25 produced program code, and I'm satisfied that Mr. Parmet is

1 fully familiar and fully prepared to comply with this
2 provision.

3 My own role in this, I think, is to do no more than
4 simply preserve evidence which may or may not become relevant
5 in the decision-making process, with respect to settlement,
6 which is now ongoing before Judge Ware in California.

7 This seems to me the orderly way to proceed, and my
8 expectation, as I expressed to counsel, is that, if being
9 aware of the universe of potential disputes between the
10 parties, Judge Ware, nevertheless, chooses to enforce the
11 settlement term agreement, that will be the end of the two
12 cases pending before me.

13 Whether there's follow-on litigation or some other
14 initiatives that are undertaken is far too speculative for me
15 to address at this point.

16 If he finds that the settlement agreement expressed
17 in the settlement term sheet is not enforceable, then, we will
18 re-ignite this case -- or, these cases, I should say -- and
19 continue the litigation to some other resolution, but the
20 short of it is that the core of the case is, I think, and the
21 core of the question of whether or not the case is continued
22 is before Judge Ware, and, until he's made those
23 determinations, I do nothing, other than to ensure that there
24 is available such evidence as may become relevant at some
25 point in the process.

1 Is there anything further from counsel?

2 MR. HORNICK: Just one question, Your Honor.

3 I do have occasion to deal with Mr. Parmet --

4 THE COURT: Mm-hmm.

5 MR. HORNICK: -- in other cases, and, also, there
6 may even be situations in this case, and I just want to go on
7 the record, that there are no surprises, and I understand that
8 the order is limited to anything under protocol.

9 THE COURT: It is.

10 MR. HORNICK: Yes.

11 THE COURT: I mean, the order is as the order
12 states.

13 With respect to his exposure to any materials in
14 this case through the hard drives, he is bound not to discuss
15 it with you, except as it is code.

16 Now, I say one other thing, based on all that I
17 know, which in this and in other ways is sometimes less than I
18 think I know, it seems to me that counsel have -- and
19 Mr. Parmet have -- proceeded properly.

20 I said so in open court, with respect to
21 Mr. Hornick bringing it to my attention, and I said so in
22 in camera proceedings with Mr. Parmet.

23 There are sometimes these very difficult issues
24 that the parties have to struggle with, and I made the
25 analogy, I think in open court, but, also with Mr. Parmet,

1 that the priest or the attorney who has disclosed to him
2 information which he is obligated not to disclose to others,
3 that frequently creates tension.

4 I'm not suggesting that's what's involved here,
5 because I don't know, not having reviewed it, it rises or
6 falls to that level, but, when there are these competing
7 considerations, it creates tensions for the parties.

8 They did, I think, what is proper to do in this
9 setting, and I hope I've clarified; at least, provisionally,
10 while we await the resolution from Judge Ware, what their
11 respective responsibilities are.

12 If there's nothing further, then, we'll be in
13 recess.

14 Thank you.

15 MR. HORNICK: Thank you, Your Honor.

16 THE DEPUTY CLERK: All rise.

17 (The proceedings were concluded.)

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19 (Court was adjourned.)

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C E R T I F I C A T I O N

I, DIANE M. MOLAS, a Registered Professional Reporter (RPR), a Certified Shorthand Reporter (CSR) in the State of Delaware, a Certified Court Reporter (CCR) in the State of New Jersey, and a Notary Public in the Commonwealth of Pennsylvania, do hereby certify that the foregoing is a true and accurate transcript of the proceedings reported by me, on June 2, 2008, and that I am neither counsel, nor kin, to any party or participant in said action, nor am I interested in the outcome thereof.

/s/Diane M. Molas
Diane M. Molas, RPR, DE CSR, and NJ CCR
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7/23/09

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