

EXHIBIT 5

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS

2 -----x
3 CONNECTU, INC. : DOCKET NUMBER CA0710593
4 PLAINTIFF :
5 versus : UNITED STATES COURTHOUSE
6 FACEBOOK, INC., ET AL :
7 DEFENDANTS : BOSTON, MASSACHUSETTS
8 -----x

6 JUNE 2, 2008
7 2:30 p.m.

8 TRANSCRIPT OF MOTION HEARING

9 **UNSEALED HEARING ONLY**

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

12 APPEARANCES:

13 ATTORNEYS FOR THE PLAINTIFF:

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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,

UNSEALED HEARING

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

UNSEALED HEARING

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

UNSEALED HEARING

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.

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.

WITNESS my hand, this
Sixth Day of June, 2008.

Diane M. Molas, RPR, DE CSR, and NJ CCR
DE Certification Number 208-RPR
NJ Certification Number 30XI00228400

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