



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

2

3           FOR THE DEFENDANTS:           FINNEGAN, HENDERSON,  
4   FARABOW, GARRETT & DUNNER  
5   BY:   SCOTT R. MOSKO  
6   JOHN F. HORNICK  
7   STANFORD RESEARCH PARK  
8   3300 HILLVIEW AVENUE  
9   PALO ALTO, CALIFORNIA 94304

10

11    FENWICK & WEST  
12    BY:   KALAMA LUI-KWAN  
13    555 CALIFORNIA STREET  
14    12TH FLOOR  
15    SAN FRANCISCO, CALIFORNIA  
16    94104

17

18           ALSO PRESENT:                BLOOMBERG NEWS  
19   BY:   JOEL ROSENBLATT  
20   PIER 3  
21   SUITE 101  
22   SAN FRANCISCO, CALIFORNIA  
23   94111

24

25    THE MERCURY NEWS  
   BY:   CHRIS O'BRIEN  
   SCOTT DUKE HARRIS  
   750 RIDDER PARK DRIVE  
   SAN JOSE, CALIFORNIA 94190

   THE RECORDER  
   BY:   ZUSHA ELINSON  
   10 UNITED NATIONS PLAZA  
   SUITE 300  
   SAN FRANCISCO, CALIFORNIA  
   94102

   CNET NEWS  
   BY:   DECLAN MCCULLAGH  
   1935 CALVERT STREET, NW #1  
   WASHINGTON, DC 20009

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

3  
4 (WHEREUPON, COURT CONVENED AND THE  
5 FOLLOWING PROCEEDINGS WERE HELD:)

6 THE CLERK: CALLING CASE NUMBER 07-1389,  
7 THE FACEBOOK, INC., VERSUS CONNECTU, LLC.

8 THE COURT: DO YOU KNOW THE PARTIES?

9 THE CLERK: THEY'RE SITTING OVER HERE  
10 (INDICATING).

11 LIZ.

12 THE CLERK: YES. TESTING ONE, TWO.

13 THE COURT: STATE YOUR APPEARANCES.

14 MR. CHATTERJEE: GOOD MORNING, YOUR  
15 HONOR. NEEL CHATTERJEE REPRESENTING FACEBOOK, MARK  
16 ZUCKERBERG, A NUMBER OF OTHER INDIVIDUAL PARTIES TO  
17 THE MASSACHUSETTS ACTIONS EXCEPT EDUARDO SAVERIN.

18 WITH ME TODAY ARE MY COLLEAGUES SUSAN  
19 RESLEY AND MONTE COOPER WHO WILL BE ASSISTING ME IN  
20 THE HEARING TODAY.

21 THE COURT: VERY WELL.

22 MR. MOSKO: GOOD MORNING. SCOTT MOSKO.  
23 LET ME -- THERE'S GOING TO BE A BIT OF AN  
24 INTRODUCTION HERE. FOR THE PURPOSES OF THE MOTION  
25 THAT FACEBOOK HAS FILED, I AM NOT REPRESENTING

1 CONNECTU; HOWEVER, I DO REPRESENT CONNECTU IN THE  
2 UNDERLYING CASE.

3 THE COURT: AH.

4 MR. MOSKO: AND I DO REPRESENT THE OTHER  
5 DEFENDANTS.

6 WITH ME THIS MORNING IS DAVID BARRETT,  
7 STEVEN HOLTZMAN, AND EVAN PARKE WHO ARE  
8 REPRESENTING CONNECTU ON THE MOTION CONCERNING THE  
9 SETTLEMENT ISSUES.

10 ALSO MY PARTNER JOHN HORNICK.

11 THE COURT: MR. HORNICK. DO I HAVE A  
12 THIRD PARTY?

13 MR. CHATTERJEE: YOUR HONOR, THERE IS ONE  
14 THIRD PARTY HERE WHICH IS ROBERT HAWK, WHO IS FROM  
15 THE HELLER EHRMAN FIRM AND HE REPRESENTS EDUARDO  
16 SAVERIN IN THE MASSACHUSETTS ACTION.

17 AND I WANT TO MAKE SURE THAT I UNDERSTOOD  
18 CORRECTLY, MR. HORNICK IS NOT ADMITTED IN THIS CASE  
19 BUT IN THE MASSACHUSETTS CASE, AND I WANT TO  
20 UNDERSTAND IF HE'S REPRESENTING CONNECTU OR  
21 CONNECTU AND THE THREE INDIVIDUALS WHO ARE  
22 PLAINTIFFS IN THAT CASE.

23 THE COURT: ALL RIGHT. AND I HAVE KALAMA  
24 LUI-KWAN.

25 MR. LUI-KWAN: YES, YOUR HONOR.

1 THE COURT: WHO DO YOU REPRESENT?

2 MR. LUI-KWAN: FENWICK & WEST AND --  
3 SORRY.

4 KALAM LUI-KWAN FROM FENWICK & WEST. I  
5 REPRESENT FENWICK & WEST AND MR. GREGORY ROUSSEL  
6 WHO ARE THIRD PARTIES IN THIS ACTION.

7 MR. CHATTERJEE: YOUR HONOR, I'M SORRY, I  
8 DON'T MEAN TO INTERRUPT.

9 THE COURT: YES.

10 MR. CHATTERJEE: BUT BEFORE WE BEGIN THE  
11 PROCEEDINGS, WE HAD HAD A DISCUSSION BEFORE ABOUT  
12 SEALING THE COURTROOM.

13 THE COURT: THAT WAS THE ISSUE I WAS  
14 ABOUT TO RAISE.

15 ARE THERE INDIVIDUALS HERE WHO ARE NOT  
16 PARTIES OR ATTORNEYS FOR PARTIES INVOLVED IN THIS  
17 CASE?

18 MR. O'BRIEN: YES, YOUR HONOR.

19 MR. ROSENBLATT: YES, YOUR HONOR.

20 THE COURT: THE PARTIES HAVE REQUESTED,  
21 SINCE THE NATURE OF THIS MOTION CONCERNS A  
22 CONFIDENTIAL SETTLEMENT, TO HAVE THE PROCEEDINGS  
23 CONDUCTED IN A SEALED PROCEEDING, AT LEAST  
24 INITIALLY SO THAT I CAN UNDERSTAND THE NATURE OF  
25 THE MOTION AND DECIDE ON A COURSE OF ACTION.

1                   ORDINARILY MATTERS PENDING BEFORE THIS  
2 COURT ARE CONDUCTED IN PUBLIC, AND IT IS RARE THAT  
3 WE CLOSE OUR COURTROOM.

4                   THERE ARE CIRCUMSTANCES UNDER WHICH WE DO  
5 IN CRIMINAL CASES, AS A MATTER OF COURSE. IT'S  
6 RARE THAT WE DO SO IN CIVIL CASES, ALTHOUGH GIVEN  
7 THE NATURE OF SOME OF THE TECHNOLOGY WE GET  
8 INVOLVED WITH IN THIS COURT THERE ARE OCCASIONS  
9 WHEN WE CLOSE OUR COURTROOM IN CIVIL CASES AS WELL.

10                  I THINK THAT I WOULD BE ABLE TO BETTER  
11 HAVE A FRANK DISCUSSION ABOUT THE NATURE OF THIS  
12 MOTION IF I DO SO IN A CLOSED COURTROOM. AND SO I  
13 DO INTEND TO CLOSE THE COURTROOM TO SEAL THE RECORD  
14 OF THESE PROCEEDINGS.

15                  BEFORE I DO, LET ME SEE IF I HAVE ANY  
16 OBJECTIONS.

17                  MR. O'BRIEN: I'M CHRIS O'BRIEN WITH "THE  
18 MERCURY NEWS." JUST TO CLARIFY WHAT YOU'RE ASKING,  
19 ARE YOU PLANNING TO BRIEFLY CLOSE THE COURTROOM AND  
20 THEN READMIT US OR ARE YOU PLANNING TO CLOSE THE  
21 COURTROOM FOR THE WHOLE HEARING THAT YOU'RE  
22 PLANNING TO HAVE?

23                  THE COURT: WELL, I DON'T KNOW THE ANSWER  
24 TO THAT YET.

25                  I DO INTEND TO EXCUSE YOU OR ANY PERSON

1 WHO IS NOT A LAWYER FOR ONE OF THE PARTIES OR ONE  
2 OF THE PARTIES FOR PURPOSES OF HEARING THE MOTION.

3 AND IF DURING THE COURSE OF THE MOTION I  
4 DETERMINE THAT THERE ARE MATTERS THAT SHOULD BE ON  
5 THE PUBLIC RECORD, THEN I WOULD OPEN THE COURTROOM  
6 FOR THAT PURPOSE.

7 MR. O'BRIEN: WELL, IN THAT CASE WE WOULD  
8 REQUEST THAT YOU ALLOW US TO CONTEST THAT AND HAVE  
9 AN ATTORNEY PRESENT TO ARGUE OUR CASE ABOUT WHAT  
10 THE COURT SHOULD DO.

11 THE COURT: DO YOU HAVE SOMEONE HERE  
12 TODAY WHO IS PREPARED TO ARGUE THAT?

13 MR. O'BRIEN: WE DON'T. WE HAVE HEARD  
14 FOR THE FIRST TIME THAT YOU ARE PLANNING TO CLOSE  
15 IT.

16 THE COURT: YES. ANY OTHER OBJECTION?

17 MR. MCCULLAGH: YOUR HONOR, DECLAN  
18 MCCULLAGH FOR CNET, A SUBSIDIARY OF CBS NEWS.

19 WE HAVE THE SAME CONCERNS, AND WE WOULD  
20 ALSO REQUEST A CONTINUANCE AND UNTIL WE CAN RETAIN  
21 COUNSEL, BRING OUR OUTSIDE COUNSEL DOWN TO SUPPORT  
22 OUR FIRST AMENDMENT RIGHT TO OPEN COURT  
23 PROCEEDINGS.

24 THE COURT: YES.

25 MR. ROSENBLATT: AND JOEL ROSENBLATT FOR

1 BLOOMBERG NEWS. THE SAME OBJECTION. I UNDERSTAND  
2 THAT A FRANK DISCUSSION WOULD HAPPEN WITHOUT US  
3 AROUND. SOMETIMES -- YOU HAVE ALWAYS BEEN VERY  
4 SENSITIVE TO THIS ISSUE, AND I APPRECIATE THAT BUT  
5 THERE SEEMS TO BE SOMETIMES A -- I DON'T  
6 UNDERSTAND. I HAVE LOOKED AT THE DOCKET. WHY --  
7 WHAT IS THE ARGUMENT?

8 THE PRESS HASN'T BEEN SHOWN FOR THE  
9 ARGUMENT WHY IT SHOULD BE CLOSED. I UNDERSTAND  
10 IT'S A PREFERENCE, BUT WHEN IS IT A NEED VERSUS A  
11 PREFERENCE AND THAT'S OUR CONCERN. AND WE WOULD  
12 ALSO LIKE TO HAVE AN ATTORNEY PRESENT IF YOU'RE  
13 GOING TO CLOSE IT.

14 THE COURT: I, OF COURSE, I WANT TO GIVE  
15 THE PARTIES AN OPPORTUNITY TO EXPLAIN TO ME THE  
16 CIRCUMSTANCES THAT BRING THEM BEFORE THE COURT.

17 THIS IS A CASE WHERE THEY REACHED A  
18 SETTLEMENT WHICH THEY WOULD NOT OTHERWISE PUT IN  
19 THE PUBLIC DOMAIN EXCEPT FOR SOME PART OF IT.

20 AND SO IT IS ALWAYS OF CONCERN TO THE  
21 COURT TO CLOSE ITS PROCEEDINGS TO MEMBERS OF THE  
22 PUBLIC.

23 I FIRMLY BELIEVE THAT IF PARTIES BRING A  
24 LAWSUIT TO A PUBLIC FORUM SUCH AS THE COURTS,  
25 THOSE -- THEY CHOOSE TO CONDUCT THEIR BUSINESS IN

1 PUBLIC.

2           HOWEVER, EVEN IN A PUBLIC TRIAL, PARTIES  
3 COME TO A POINT IN THEIR CASE WHERE THEY WANT TO  
4 CONDUCT PROCEEDINGS IN CHAMBERS BEFORE THE JUDGE,  
5 OR COME TO A DISCLOSURE BETWEEN THE TWO OF THEM  
6 THAT ARE PRIVILEGED AND THAT THEY WANT TO KEEP  
7 CONFIDENTIAL FROM THE PUBLIC WITH THE IDEA THAT  
8 SOME PARTS OF IT WOULD BE PUT ON THE PUBLIC RECORD.

9           I'VE MADE A JUDGMENT THAT IT WOULD BE  
10 BENEFICIAL TO THE COURT TO AT LEAST HEAR THE NATURE  
11 OF THIS DISPUTE THAT COMES OUT OF A CONFIDENTIAL  
12 PART OF THEIR PROCESS IN A CLOSED COURTROOM AND  
13 THEN TO MAKE A JUDGMENT ABOUT WHAT, IF ANY, PART OF  
14 THAT SHOULD BE CONDUCTED IN PUBLIC PROCEEDINGS.

15           BOTH OF THESE ARE LAWSUITS THAT WERE  
16 PENDING, AS I UNDERSTAND IT, IN PUBLIC PLACES AND  
17 DEPENDING ON WHAT HAPPENS HERE, IT MAY RETURN TO  
18 THAT FORUM, BUT I DO WANT TO HAVE THE BENEFIT OF AT  
19 LEAST HAVING A CONVERSATION WITH THE PARTIES IN A  
20 CLOSED COURTROOM. AND NOTWITHSTANDING THE  
21 OBJECTIONS AND A REQUEST FOR A DELAY, I'M GOING TO  
22 ASK THE CLERK OF COURT TO CLOSE THE COURTROOM.

23           I'LL ASK THE ASSISTANCE OF THE PARTIES TO  
24 IDENTIFY THEIR CLIENTS OR OTHER MEMBERS OF THEIR  
25 FIRM, AND I WILL SET UP A TIME TO GIVE THOSE WHO

1 ARE EXCLUDED AN OPPORTUNITY TO MAKE ANY OBJECTIONS.  
2 AND I WILL DO MY BEST TO ADVISE YOU AT SOME POINT  
3 DURING THE COURSE OF THESE PROCEEDINGS IF I DECIDE  
4 TO OPEN IT SO THAT YOU CAN TAKE ADVANTAGE OF COMING  
5 BACK INTO THE COURTROOM.

6 BUT AT THIS POINT I INTEND TO CLOSE THE  
7 COURTROOM.

8 SO --

9 (PAUSE IN PROCEEDINGS.)

10 THE COURT: I PRESUME IT WON'T BE  
11 NECESSARY TO CALL THE MARSHALS.

12 WOULD YOU ASSIST IN JUST IDENTIFYING YOUR  
13 CLIENTS AND THOSE INDIVIDUALS.

14 MR. CHATTERJEE: YES, YOUR HONOR. ON THE  
15 FACEBOOK SIDE IT'S THE FIRST TWO ROWS ON YOUR  
16 RIGHT-HAND SIDE.

17 THE COURT: ALL RIGHT.

18 (PAUSE IN PROCEEDINGS.)

19 THE COURT: SO THE PARTIES ARE SATISFIED  
20 THAT IN THE COURTROOM, AT LEAST IN THAT PART, I'LL  
21 CONTROL THIS PART UP HERE, ARE INDIVIDUALS WHO YOU  
22 WOULD REGARD AS COVERED BY ANY OF THE PRIVILEGES  
23 AND CONFIDENTIALITIES APPLICABLE TO YOUR SETTLEMENT  
24 PROCESS?

25 MR. CHATTERJEE: YES, YOUR HONOR.

1 MR. MOSKO: ON BEHALF OF THE DEFENDANTS,  
2 YES, YOUR HONOR.

3 THE COURT: SO I'LL REGARD THE RECORD AT  
4 THIS POINT AS A SEALED RECORD TO BE OPENED ON  
5 FURTHER ORDER OF THE COURT OR STIPULATION OF THE  
6 PARTIES.

7 THIS IS A MOTION BY CONNECTU?

8 MR. CHATTERJEE: NO, YOUR HONOR, IT'S A  
9 MOTION BY FACEBOOK TO ENFORCE THE SETTLEMENT.

10 THE COURT: ALL RIGHT. WHAT'S YOUR  
11 MOTION?

12 MR. CHATTERJEE: YOUR HONOR, THE MOTION  
13 PRESENTED BY FACEBOOK AND THE RELATED INDIVIDUAL  
14 DEFENDANTS IS TO ENFORCE A SETTLEMENT AGREEMENT  
15 THAT WAS ENTERED INTO BETWEEN FACEBOOK AND ITS  
16 RELATED PARTIES AND CONNECTU AND THEIR RELATED  
17 PARTIES SUBSEQUENT TO A MEDIATION OR AT THE  
18 CONCLUSION OF A MEDIATION BEFORE JUDGE PIAZZA ON  
19 JANUARY 22ND AND INTO THE WEE HOURS OF JANUARY  
20 23RD.

21 THE COURT: AND WHAT IS IT -- WHEN YOU  
22 SAY TO ENFORCE IT, WHAT IS IT THAT YOU WISH THE  
23 COURT TO DO?

24 MR. CHATTERJEE: YOUR HONOR, WHAT WE HAVE  
25 ASKED THE COURT TO DO, AND THIS HAS BECOME A LITTLE

1 MORE COMPLICATED AND I'LL EXPLAIN WHY IT'S A LITTLE  
2 MORE COMPLICATED IN A MOMENT, WHAT WE'RE ASKING THE  
3 COURT TO DO IS TO RECOGNIZE THAT THE TERM SHEET AND  
4 SETTLEMENT AGREEMENT THAT WE PROVIDED TO YOUR  
5 HONOR, THE TWO-PAGE HANDWRITTEN DOCUMENT, IS AN  
6 ENFORCEABLE AGREEMENT AND TO ORDER CONNECTU TO OR  
7 ORDER THE PRINCIPALS OF CONNECTU TO GIVE US THEIR  
8 SHARES IN THE COMPANY IN EXCHANGE FOR THE MONEY AND  
9 THE SHARES THAT WE WERE GOING TO GIVE THEM.

10 WE STAND READY TO PERFORM OUR END OF THE  
11 DEAL. THEY DO NOT.

12 NOW, THERE IS A DISPUTE OVER A PHRASE AT  
13 THE VERY END OF THE AGREEMENT THAT SAYS FACEBOOK  
14 WILL TERM THE FORM AND DOCUMENTATION OF THE  
15 TRANSACTION CONSISTENT WITH THE CASH AND STOCK FOR  
16 STOCK ACQUISITION.

17 IT'S OUR VIEW THAT THE COURT CAN PROPERLY  
18 RELY UPON THE DOCUMENTS THAT WE PROVIDED THE COURT  
19 IN ORDERING THEM TO SIGN THOSE DOCUMENTS AND COMPLY  
20 WITH THEM.

21 THEY HAVE RAISED AN ISSUE AS TO THAT. WE  
22 DISAGREE WITH THAT ISSUE AND FUNDAMENTALLY, IF YOUR  
23 HONOR WERE TO ENTER A JUDGMENT TELLING THE PARTIES  
24 TO COMPLY WITH THE TERM SHEET AND SETTLEMENT  
25 AGREEMENT, AND ESSENTIALLY STAPLE IT ON TO THE

1 JUDGMENT THAT THIS IS WHAT THE AGREEMENT IS AND  
2 PEOPLE HAVE TO LIVE WITH IT, THAT WOULD BE  
3 ACCEPTABLE TO FACEBOOK.

4 THE REASON WHY THE ISSUES HAVE BECOME  
5 MORE COMPLEX, YOUR HONOR, WE DIDN'T UNDERSTAND WHY,  
6 WHY CONNECTU WAS NOT WILLING TO HONOR THE AGREEMENT  
7 THAT IT SIGNED.

8 AFTER WE FILED THE MOTION TO ENFORCE, WE  
9 LEARNED THE REASON WHY.

10 AND THE REASON WHY THERE'S A DISPUTE AS  
11 TO THIS AGREEMENT IS NOT BECAUSE OF THE BINDING  
12 NATURE OF THE TERM SHEET AND THE SETTLEMENT  
13 AGREEMENT.

14 AFTER WE FILED THE MOTION, THE QUINN  
15 EMANUEL FIRM, WHO IS NO LONGER COUNSEL OF RECORD  
16 FOR CONNECTU, FILED A NOTICE OF LIEN AGAINST ANY  
17 PROCEEDS OR ANY JUDGMENT AGAINST THIS COURT OR IN  
18 THE BOSTON COURT ASSOCIATED WITH THIS CASE.

19 IT'S OUR VIEW, YOUR HONOR, THAT THE  
20 REASON THAT CONNECTU WANTS OUT OF THIS TERM SHEET  
21 AND SETTLEMENT AGREEMENT IS NOT BECAUSE IT'S A  
22 BINDING AGREEMENT. IT IS.

23 THE REASON THEY WANT OUT OF THE DEAL IS  
24 BECAUSE THEY HAVE SOME SORT OF FINANCIAL  
25 ARRANGEMENT WITH THE QUINN EMANUEL FIRM THAT IS

1           AFFECTING THE ECONOMICS IN SOME WAY THEY DON'T  
2           LIKE.

3                       THE ISSUE FOR US IS PRESUMING YOUR HONOR  
4           FINDS THIS AGREEMENT AN ENFORCEABLE SETTLEMENT  
5           AGREEMENT, WE DON'T KNOW WHO TO PAY RIGHT NOW  
6           BECAUSE THERE'S A NOTICE OF LIEN THAT HAS BEEN  
7           FILED WITH THE COURT AND WE NEED THE COURT'S  
8           GUIDANCE ON HOW TO DEAL WITH THAT.

9                       WE'RE HAPPY TO PUT THE PROCEEDS THAT ARE  
10          REQUIRED UNDER THE AGREEMENT AND INTO SOME SORT OF  
11          CONSTRUCTIVE TRUST OR SOMETHING LIKE THAT THAT THE  
12          COURT CAN ADMINISTER, SUBJECT TO CONNECTU AND ITS  
13          FORMER LAWYERS WORKING OUT WHATEVER IT IS THAT THEY  
14          NEED TO WORK OUT ASSOCIATED WITH THE PROCEEDS OF  
15          THIS CASE.

16                      BUT WHERE WE DON'T WANT TO BE IS WE DON'T  
17          WANT TO BE ORDERED TO GIVE CONNECTU THE MONEY ONLY  
18          TO HAVE QUINN EMANUEL KNOCKING ON OUR DOOR SAYING  
19          WE OWE THEM SOMETHING AND WE DON'T KNOW WHAT IT IS  
20          AND WHAT THE TERMS OF THE ARRANGEMENT ARE.

21                      AND SO THAT'S ONE THING THAT MAKES THINGS  
22          A LITTLE MORE COMPLEX THAN WHEN WE ORIGINALLY  
23          ANTICIPATED WHEN WE FILED THE MOTION BECAUSE OF  
24          THIS NOTICE OF LIEN.

25                      THE COURT:   VERY WELL.   LET ME HEAR FROM

1 YOUR OPPONENT.

2 MR. BARRETT: YOUR HONOR, THANK YOU VERY  
3 MUCH. DAVID BARRETT FROM BOIES, SCHILLER & FLEXNER  
4 REPRESENTING CONNECTU, WHICH I SHOULD NOTE IS THE  
5 ONLY PARTY THAT -- ON THE DEFENDANT'S SIDE WHICH IS  
6 PROPERLY BEFORE THIS COURT, ALTHOUGH THE PLAINTIFFS  
7 ARE ASKING THE COURT TO ENTER AN ORDER THAT WOULD  
8 COMPEL THE INDIVIDUAL PRINCIPALS OF CONNECTU TO  
9 SIGN CERTAIN DOCUMENTS, THE FACT IS THAT THEY  
10 HAVEN'T EVEN SERVED THOSE PEOPLE WITH PROCESS THAT  
11 WOULD BRING THEM PROPERLY BEFORE THIS COURT.

12 SO THAT'S THE REASON THAT I ONLY APPEAR  
13 TODAY IN THIS COURT ON BEHALF OF CONNECTU.

14 SECOND, YOUR HONOR, WITH RESPECT TO  
15 MR. CHATTERJEE'S REQUEST, WE DON'T REALLY LITERALLY  
16 DO NOT UNDERSTAND WHAT IT IS THAT THE PLAINTIFFS  
17 ARE ASKING THIS COURT TO DO.

18 THE PROPOSED ORDER THAT WAS FILED WITH  
19 MR. CHATTERJEE'S MOTION BACK IN APRIL IS AN ORDER  
20 THAT DOESN'T EVEN MENTION THE TERM SHEET AND WHICH  
21 IS THE DOCUMENT THAT HE SAID YOU COULD, YOU COULD  
22 JUST STAPLE TO YOUR ORDER.

23 THE PROPOSED ORDER, WHAT THEY WERE  
24 ORIGINALLY ASKING FOR, DOESN'T EVEN MENTION THAT  
25 TERM SHEET.

1                   WHAT IT DOES SAY IS THAT THE COURT WOULD  
2                   ORDER CONNECTU TO TRANSFER ITS OWNERSHIP TO  
3                   FACEBOOK BY EXECUTING A DOCUMENT CALLED A STOCK  
4                   PURCHASE AGREEMENT.

5                   AND THAT CONNECTU AND THREE OF ITS FOUR  
6                   PRINCIPALS, I SHOULD SAY NOT ALL FOUR OF ITS  
7                   PRINCIPALS BUT THREE OF THE FOUR, TO EXECUTE  
8                   SOMETHING THAT THEY CALL A CONNECTU STOCKHOLDER'S  
9                   AGREEMENT.

10                   THOSE TWO DOCUMENTS AND THE ASSOCIATED  
11                   SCHEDULES AND OTHER PARTS OF THEM ARE, YOUR HONOR,  
12                   A VERY COMPLICATED CORPORATE, CORPORATE  
13                   TRANSACTIONAL DOCUMENT.

14                   THEY'RE OVER A HUNDRED PAGES LONG IN  
15                   TOTAL. A LAWYER, A CORPORATE LAWYER WHO, WHO  
16                   WORKED, WAS RETAINED BY CONNECTU BY THE NAME OF  
17                   GREGORY ROUSSEL, HE'S AN ASSOCIATE AT THE FENWICK  
18                   FIRM, SIGNED AN AFFIDAVIT WHICH WAS SUBMITTED TO  
19                   THIS COURT IN SUPPORT OF THE MOTION TO ENFORCE THE  
20                   SO-CALLED "SETTLEMENT."

21                   AND, AND IN THAT -- I'M SORRY. IT'S A  
22                   DECLARATION, YOUR HONOR, NOT AN AFFIDAVIT.

23                   IN THAT DECLARATION MR. ROUSSEL SAID  
24                   ATTACHED HERETO AS EXHIBIT A IS A CONNECTU'S -- IS  
25                   A CONNECTU STOCKHOLDER AGREEMENT.

1                   THIS AGREEMENT SPECIFIES THE RIGHTS AND  
2                   RESPONSIBILITIES THAT, THAT OUR SIDE WILL HAVE WITH  
3                   RESPECT TO THE OWNERSHIP OF FACEBOOK STOCK.

4                   AND ATTACHED AS EXHIBIT B TO  
5                   MR. ROUSSEL'S DECLARATION IS SOMETHING THAT HE  
6                   CALLS A STOCK PURCHASE AGREEMENT, THE SECOND  
7                   DOCUMENT THAT IS REFERRED TO IN THEIR PROPOSED  
8                   ORDER WHEN THEY FILED THIS MOTION.

9                   AND HE SAYS, MR. ROUSSEL SAYS, UNDER  
10                  OATH, QUOTE, "THIS AGREEMENT GOVERNS FACEBOOK,  
11                  INC.'S, PURCHASE OF CONNECTU'S STOCK AS SET FORTH  
12                  IN THE SETTLEMENT AGREEMENT." AND IT REFERS TO  
13                  THAT PROVISION ABOUT CONNECTU BEING -- OR FACEBOOK  
14                  BEING ABLE TO DETERMINE FORM AND SUBSTANCE.

15                  AND MR. ROUSSEL ALSO SAYS THAT CONNECTU,  
16                  QUOTE, "HAS REFUSED TO EXECUTE THE FORMAL DOCUMENTS  
17                  REQUIRED TO EFFECTUATE THE STOCK PURCHASE AGREEMENT  
18                  AND STOCKHOLDER'S AGREEMENT."

19                  AND HE ALSO ATTACHES AS EXHIBIT C THE  
20                  FORM OF SEVERAL OTHER DOCUMENTS THAT HE SAID ARE,  
21                  QUOTE, "REQUIRED TO FINALIZE THE TRANSACTION."

22                  NOW, THAT'S WHAT THEY SAID IN THEIR  
23                  MOTION, YOUR HONOR. WE RESPONDED TO THAT MOTION  
24                  AND WE OPPOSED IT ON THE BASIS THAT THE ONE AND A  
25                  HALF PAGE HANDWRITTEN TERM SHEET WITH CROSS-OUTS

1 AND SO FORTH, NUMBER ONE, IS NOT ENFORCEABLE ON ITS  
2 FACE BECAUSE IT IS NOT A COMPLETE ENFORCEABLE  
3 CONTRACT.

4 AND, NUMBER TWO, TO THE EXTENT THAT --  
5 AND IT'S SET OUT RIGHT HERE IN THEIR PROPOSED  
6 ORDER, THEY WERE ASKING NOT FOR WHAT MR. CHATTERJEE  
7 SAID HERE TODAY, BUT FOR AN ORDER AGAINST BOTH A  
8 PARTY AND NONPARTIES TO EXECUTE THESE VERY  
9 COMPLICATED COMPLEX CORPORATE DOCUMENTS, THAT, THAT  
10 THE TERMS OF THOSE HUNDRED PLUS PAGE DOCUMENTS ARE  
11 SO VARIED FROM ANYTHING THAT YOU CAN REASONABLY GET  
12 OUT OF THIS ONE AND A HALF PAGE HANDWRITTEN TERM  
13 SHEET THAT, THAT THAT IS A FURTHER REASON THAT,  
14 THAT BASICALLY WHAT THE PARTIES HAD IN THAT TERM  
15 SHEET, YOUR HONOR, WAS AN AGREEMENT TO AGREE, AN  
16 UNENFORCEABLE STATEMENT OF THE GOALS OF A  
17 TRANSACTION THAT IF IT WERE WORKED OUT TO THE  
18 SATISFACTION OF BOTH PARTIES, MIGHT HAVE RESULTED  
19 IN A CLOSING OF A SETTLEMENT. BUT THAT NEVER  
20 HAPPENED.

21 WHAT DID HAPPEN WAS IN THE FIRST PLACE  
22 THE VERY, THE VERY NEXT DAY AFTER THAT ONE AND A  
23 HALF PAGE HANDWRITTEN DOCUMENT WAS, WAS SIGNED,  
24 THEIR COUNSEL, FACEBOOK'S COUNSEL, MR. COOPER, IN  
25 FACT, WHO IS RIGHT HERE IN THE COURTROOM, JUST

1 HOURS LATER REFERRED IN AN E-MAIL TO, QUOTE, "THE  
2 TENTATIVE SETTLEMENT REACHED LAST NIGHT," IN A  
3 MESSAGE THAT MR. COOPER PROPOSED TO SEND TO THIS  
4 COURT, AND I BELIEVE THAT SOME FORM OF IT WAS  
5 ULTIMATELY COMMUNICATED TO THE COURT.

6 HE SAID, QUOTE, "THE PARTIES ARE IN THE  
7 PROCESS OF PREPARING A FINAL AGREEMENT," AND I  
8 REQUESTED THAT THE COURT, QUOTE, "STAY ALL  
9 DEADLINES AND PROCEEDINGS WHILE THE PARTIES,"  
10 QUOTE, "COMPLETE THE SETTLEMENT."

11 AND IN THE MASSACHUSETTS ACTION, WHICH  
12 WAS THE HOPE WOULD BE SETTLED AS PART OF THIS  
13 PROCESS, ANOTHER LAWYER FROM THE OTHER FIRM, FROM  
14 THE PROSKAUER ROSE FIRM WHICH WAS REPRESENTING  
15 FACEBOOK IN THE MASSACHUSETTS COURT, AND HE'S A  
16 LAWYER, BY THE WAY, YOUR HONOR, WHO WASN'T INVOLVED  
17 IN THESE NEGOTIATIONS OUT HERE AT ALL.

18 SO HE WAS CLEARLY TELLING SOMETHING TO  
19 THE MASSACHUSETTS COURT THAT HE HAD BEEN TOLD BY  
20 SOMEONE ON THEIR SIDE BECAUSE HE WOULDN'T HAVE ANY  
21 OTHER WAY TO KNOW IT.

22 AND HE SAID IN AN E-MAIL TO THE  
23 MASSACHUSETTS COURT, "THE PART --" QUOTE, "THE  
24 PARTIES ARE STILL ATTEMPTING TO FINALIZE A  
25 SETTLEMENT, AND IT MAY BE A FEW WEEKS,"

1 QUOTE-UNQUOTE.

2 SO THEY RECOGNIZED IMMEDIATELY AFTER THE  
3 SETTLEMENT IN DOCUMENTS THAT THEIR OWN LAWYER SENT  
4 THAT THIS WAS AN AGREEMENT TO AGREE.

5 AS THE CALIFORNIA STATE CASES PUT IT, IT  
6 WAS AN AGREEMENT ON THE GOALS OF THE SETTLEMENT BUT  
7 NOT ON THE MEANS BY WHICH THAT SETTLEMENT WAS GOING  
8 TO BE AFFECTED.

9 AND I THINK YOU CAN FIND THAT, AND I  
10 THINK YOU CAN FIND THAT IN CASES THAT ARE  
11 PARTICULARLY PERTINENT TO THAT, YOUR HONOR.

12 AND THEY'RE CITED AT LEAST IN THE  
13 SURREPLY BRIEF AND I BELIEVE IN THE OPPOSITION  
14 BRIEF THAT WE SUBMITTED CALLED TERRY V. CONLAN AND  
15 WEDDINGTON PRODUCTS AGAINST FLICK.

16 THOSE ARE STATE COURT OF APPEAL CASES.  
17 AND I THINK THE PARTIES ARE IN AGREEMENT THAT  
18 CALIFORNIA CONTRACT LAW CONTROLS THE ISSUE OF  
19 WHETHER THIS ONE AND A HALF PAGE DOCUMENT IS AN  
20 ENFORCEABLE CONTRACT OR IS NOT.

21 AND THERE IS ALSO A NINTH CIRCUIT  
22 DECISION WHICH ESSENTIALLY ADOPTS THE, THE POSITION  
23 OF THE STATE COURTS. IT'S CALLED PERFUMBAY.COM  
24 AGAINST EBAY.

25 AND, YOUR HONOR, IN TERMS OF THE

1 IMMEDIATE ENFORCEABILITY OF THE CONTRACT, OF THE  
2 ONE AND A HALF PAGE HANDWRITTEN TERM SHEET, THERE  
3 ARE A NUMBER OF PROBLEMS WITH IT, BUT I THINK THE  
4 CLEAREST ONE IS THAT NOTHING, NOTHING IN THAT  
5 DOCUMENT DEFINES THE MEANS BY WHICH THIS GOAL OF  
6 SETTLING THE CASE IS GOING TO BE AFFECTED.

7 THE MOST IMPORTANT WAY THAT IT FAILS TO  
8 DO THAT IS THAT IT FAILS TO SPECIFY WHETHER THE  
9 TRANSACTION, WHICH IS DESCRIBED IN THE DOCUMENT AS,  
10 AS ESSENTIALLY THE, THE -- IN FACT, LET ME JUST GET  
11 IT EXACTLY IN FRONT OF ME.

12 "THE ACQUISITION OF CONNECTU'S SHARES  
13 CONSISTENT WITH A STOCK AND CASH FOR STOCK  
14 ACQUISITION."

15 THE PROBLEM WITH THAT LANGUAGE, YOUR  
16 HONOR, IS AS OUR EXPERT WITNESS, WHO IS A PROFESSOR  
17 AT COLUMBIA BUSINESS SCHOOL WHO HAS PARTICIPATED  
18 IN, IN HUNDREDS OF MERGERS AND ACQUISITIONS  
19 TRANSACTIONS AS AN INVESTMENT BANKER AND TEACHES IN  
20 THE FIELD, AS SHE HAS TESTIFIED, YOUR HONOR, THE  
21 WORD "ACQUISITION" IS ITSELF AMBIGUOUS. IT IS A  
22 BROAD TERM.

23 IT INCLUDES BOTH THE CONCEPT OF A MERGER  
24 AND, AND IT ALSO INCLUDES THE CONCEPT OF A SHARE  
25 PURCHASE AGREEMENT, A STRAIGHT PURCHASE OF STOCK

1 FROM THE HOLDERS OF THAT STOCK.

2 NOW, WHAT WAS GOING ON BETWEEN FEBRUARY  
3 22ND AND MID-APRIL WHERE THE -- WHEN THE  
4 NEGOTIATIONS BROKE DOWN HERE, YOUR HONOR, IS THAT  
5 THE PARTIES HERE WERE ACTUALLY NEGOTIATING THE  
6 TERMS OF WHAT WAS BASICALLY A MERGER TRANSACTION.

7 AND, AGAIN, IF THE AGREEMENT WAS SO  
8 CLEAR, AS MR. CHATTERJEE SUGGESTS, THAT FACEBOOK'S  
9 RIGHT TO DETERMINE FORM AND DOCUMENTATION ENTITLED  
10 THEM TO IN EFFECT DICTATE WHAT THE SUBSTANCE OF THE  
11 PARTY'S TRANSACTION WAS GOING TO BE, NOT JUST FORM  
12 AND DOCUMENTATION BUT SUBSTANCE, WHY IN THE WORLD  
13 WOULD THEY SPEND TWO MONTHS NEGOTIATING A MERGER  
14 AGREEMENT IF WHAT THEY REALLY WANTED IS THE  
15 AGREEMENT THAT THEY HAVE PUT IN FRONT OF YOUR HONOR  
16 AND SAID THAT THEY WANT YOU TO ORDER US TO SIGN,  
17 WHICH IS A STOCK PURCHASE AGREEMENT.

18 THEY'RE TWO VERY DIFFERENT KINDS OF  
19 TRANSACTIONS. THEY HAVE A LOT OF SIGNIFICANT --  
20 SUBSTANTIVE DIFFERENCES, SOME OF THEM HAVING TO DO  
21 WITH THE LIABILITIES OF THE BUSINESS THAT IS BEING  
22 REQUIRED, SOME OF THEM HAVING TO DO WITH THE TAX  
23 CONSEQUENCES ON BOTH SIDES OF THE TRANSACTION WHICH  
24 TAX CONSEQUENCES, [REDACTED]

25 COULD BE VERY SIGNIFICANT FOR

1 THE PARTIES.

2 SO, YOUR HONOR, FOR SIX WEEKS OR TWO  
3 MONTHS, THEY WORKED ON A MERGER TRANSACTION. THEY  
4 WERE HAVING SOME PROBLEMS. THEY, THEY -- THEY  
5 WERE, YOU KNOW, MAKING SOME PROGRESS BUT THERE WAS  
6 NO AGREEMENT ON THE FINAL TERMS OF THAT MERGER  
7 TRANSACTION.

8 AND THEN --

9 THE COURT: COUNSEL, WHAT DO YOU MAKE OF  
10 WHAT I'M TO DO?

11 MR. BARRETT: WELL, YOUR HONOR, I THINK  
12 THE SIMPLEST THING TO DO AND WHAT WE WOULD ASK YOU  
13 TO DO IS TO DENY THE MOTION TO ENFORCE BECAUSE THEY  
14 HAVE FAILED TO SHOW YOU THAT THERE'S AN ENFORCEABLE  
15 CONTRACT BETWEEN THE PARTIES REPRESENTED BY THIS  
16 ONE AND A HALF PAGE TERM SHEET AND THEY HAVE  
17 CERTAINLY FAILED, THEY HAVE CERTAINLY FAILED TO  
18 SHOW THAT, THAT THERE IS ANY, ANY LEGAL BASIS IN  
19 CONTRACT LAW TO ORDER THE CONNECTU, AND PERSONAL  
20 JURISDICTION FOR THAT MATTER, TO ORDER THE CONNECTU  
21 PARTIES TO EXECUTE THE HUNDRED PLUS PAGES OF  
22 COMPLEX CORPORATE DOCUMENTS WHICH THEY, BY THE WAY,  
23 SHOWED US FOR THE VERY FIRST TIME WITH THE MOTION  
24 THAT THEY FILED HERE.

25 THOSE WERE NOT THE DOCUMENTS THAT WERE

1 UNDER NEGOTIATION BETWEEN THE PARTIES. THOSE ARE  
2 COMPLETELY NEW DOCUMENTS. THEY ARE SKEWED FOR ALL  
3 KINDS OF ECONOMIC AND LEGAL REASONS AND IN  
4 FACEBOOK'S FAVOR. THEY'RE NOT WHAT YOU WOULD  
5 EXPECT A NEGOTIATED TRANSACTION OF THIS TYPE TO  
6 LOOK LIKE.

7 SO THE FIRST REQUEST WE WOULD MAKE TO  
8 YOUR HONOR IS THAT YOU NOT ENFORCE THAT AGREEMENT.

9 NOW, IN ADDITION TO THE CONTRACT LAW  
10 PROBLEMS WITH THE DOCUMENT THAT THEY'RE TRYING TO  
11 ENFORCE, AND I'D BE HAPPY TO EXPAND ON THOSE  
12 FURTHER.

13 [REDACTED ]  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

24 THE COURT: AND I AM A LITTLE CURIOUS  
25 ABOUT WHAT THE PARTIES AGREED TO IN THIS DOCUMENT.

1                   IS IT YOUR CONTENTION THAT THEY AGREED TO  
2 NOTHING?

3                   MR. BARRETT:   WHAT THEY AGREED TO, YOUR  
4 HONOR, IS THAT -- IT'S VERY SIMPLE.   IT'S AN  
5 AGREEMENT TO AGREE.   THEY HAD THE -- THEY HAVE THE  
6 FORM OR THE GOALS OF A SETTLEMENT.

7                   THE COURT:   WELL, BUT, DO YOU, DO YOU --  
8 WHAT IS YOUR POSITION WITH RESPECT TO THE EXCHANGE  
9 OF CASH AND STOCK?   IS THAT SOMETHING THAT THE  
10 PARTIES AGREED TO?

11                   MR. BARRETT:   THAT WAS PART OF THE  
12 FRAMEWORK OF THE TRANSACTION, YOUR HONOR.   BUT BY  
13 IT'S VERY NATURE, THIS KIND OF COMPLEX CORPORATE  
14 TRANSACTION, WHETHER IT'S A MERGER OR A SHARE  
15 PURCHASE AGREEMENT, AND OUR EXPERT, PROFESSOR  
16 HITSCHERICH, REALLY SPEAKS TO THIS.   YOU SIMPLY,  
17 YOU SIMPLY CAN'T SAY -- IT'S NOT LIKE MY, MY BUYING  
18 A CAR FROM YOU, YOUR HONOR.

19                   YOU HAVE A 2005 PRIUS AND I SAY, GREAT,  
20 I'LL BUY IT FOR \$10,000, AND THAT'S PROBABLY AN  
21 ENFORCEABLE TRANSACTION.   IT'S PRETTY CLEAR WHAT  
22 THE TERMS OF THAT AND THE MISSING TERMS CAN PERHAPS  
23 BE IMPLIED BY THE COURT BY WHAT IN TERMS OF WHAT IS  
24 REASONABLE.

25                   THESE KINDS -- [REDACTED]

1 [REDACTED]

2  
3 CORPORATE TRANSACTION INVOLVING THE ACQUISITION OF  
4 THE STOCK OF ONE CORPORATION AND THE EXTINGUISHMENT  
5 OF ITS EXISTENCE IS NOT THE KIND OF TRANSACTION  
6 THAT YOU AND I CAN JUST SAY TO EACH OTHER YOU'LL  
7 BUY MY COMPANY [REDACTED]

8 IF WE SAID THAT, THAT WOULD BE GREAT AND  
9 THE NEXT THING THAT WE WOULD DO IN THE REAL WORLD,  
10 YOUR HONOR, IS THAT WE WOULD GET TEAMS OF LAWYERS  
11 AND INVESTMENT BANKERS TO GO OUT AND TO DO DUE  
12 DILIGENCE AND SEE, A, WHAT THE LEGAL FORM OF THAT  
13 TRANSACTION WOULD BE; AND, B, IS THERE ANY  
14 INFORMATION THAT, THAT I, AS THE BUYER, MUST NEED  
15 TO KNOW ABOUT THE BUSINESS THAT YOU'RE SELLING ME  
16 AS A SELLER?

17 THE COURT: BUT ISN'T THAT, ISN'T THAT --  
18 CAN'T THAT BE THE SUBJECT OF AN AGREEMENT?

19 IN OTHER WORDS, I UNDERSTAND THE WORLD  
20 THAT YOU'RE, THAT YOU'RE DESCRIBING TO ME BUT, BUT  
21 I WOULD PUT THE WORD "SHOULD" IN THAT SENTENCE  
22 RATHER THAN "MUST."

23 IN OTHER WORDS, IS THERE A REQUIREMENT  
24 UNDER THE LAW --

25 MR. BARRETT: UH-HUH.

1 THE COURT: -- THAT A GROUP OF LAWYERS  
2 GET TOGETHER AND DO THIS OR COULD THE PARTIES SAY  
3 WE'LL SETTLE OUR DISPUTE BY PAYING YOU CASH AND  
4 STOCK AND YOU RELEASE THE CLAIMS?

5 IS THERE ANYTHING ABOUT THAT SETTLEMENT  
6 THAT IS ILLEGAL?

7 MR. BARRETT: UM, WELL, YOUR HONOR, THE  
8 ANSWER IS, YES, THERE COULD BE IF IT INVOLVES THE  
9 EXCHANGE OF STOCK AND THE EXCHANGE OF STOCK UNLIKE  
10 THE CASH TRANSACTION FOR THE CAR.

11 THE EXCHANGE OF STOCK IS GOVERNED BY THE  
12 SECURITIES ACT OF -- THE SECURITIES EXCHANGE ACT OF  
13 1934 AND THAT ACT IMPOSES, IMPOSES ON THE ISSUER,  
14 IN THIS CASE FACEBOOK, THE COMPANY THAT IS GIVING  
15 UP OR THAT IS PROVIDING ITS STOCK TO MY CLIENT IN  
16 EXCHANGE FOR THEIR COMPANY AND THEIR CLAIMS AGAINST  
17 FACEBOOK.

18 IT IMPOSES ON THEM IRRESPECTIVE OF ANY  
19 QUESTIONS THAT CONNECTU MAY ASK OR ANYTHING ELSE  
20 THAT CONNECTU MAY KNOW. NO REQUIREMENT OF  
21 RELIANCE.

22 THE KNOWLEDGE OF THE SELLERS, IF YOU WILL  
23 IN THIS CASE, MY CLIENTS, IS ACTUALLY IRRELEVANT  
24 UNDER SECTION 29 OF THE 1934 SECURITIES ACT IN AN  
25 ACTION FOR RESCISSION OR, AS WE HAVE HERE, A

1 DEFENSE TO ENFORCEMENT OF A CONTRACT.

2 IT'S IRRELEVANT IF THE BUYER, THE  
3 CONNECTU PARTY, THE FACEBOOK PARTY, FAILS TO  
4 DISCLOSE MATERIAL INFORMATION ABOUT, ABOUT THE  
5 COMPANY, THEIR COMPANY, WHOSE STOCK, MY CLIENTS,  
6 ARE RECEIVING.

7 AND, YOUR HONOR, IN OUR, IN OUR SURREPLY  
8 BRIEF --

9 THE COURT: WELL, LET ME -- IF I  
10 UNDERSTAND YOUR POSITION, AND I'M NOT MEANING TO  
11 SIMPLIFY IT.

12 MR. BARRETT: UH-HUH.

13 THE COURT: BUT IT SEEMS TO ME THAT AT  
14 THE HEART OF WHAT I HAVE BEFORE ME IS AN EFFORT BY  
15 THE PARTIES TO SETTLE SEVERAL DISPUTES BY AGREEING  
16 ON THE AMOUNT OF THE CONSIDERATION AND IN THE  
17 LANGUAGE OF THE DOCUMENT, WHICH WAS DRAFTED AT THE  
18 CLOSE OF THE CONFIDENTIAL MEDIATION, THE TWO SIDES  
19 WANTED TO MAKE SURE THAT, THAT CERTAIN TERMS WERE  
20 COMMITTED IN WRITING AND SIGNED TO, AND THEY LEFT  
21 THEMSELVES WITH THE OPPORTUNITY TO DRAFT MORE  
22 FORMAL DOCUMENTS, PERHAPS CONTEMPLATING THAT AS YOU  
23 ACCURATELY POINT OUT, THESE ARE THE KINDS OF  
24 TRANSACTIONS WHICH OFTEN ARE ACCOMPANIED BY OTHER  
25 DOCUMENTS WITH PROTECTIONS AND WARRANTIES AND ALL

1 KINDS OF THINGS BUT WANTING TO MAKE SURE THAT THOSE  
2 THINGS DID NOT STAND IN THE WAY OF THEIR SETTLEMENT  
3 BECAUSE THEY WANTED TO MAKE SURE THAT  
4 NOTWITHSTANDING ALL OF THAT THE SETTLEMENT DIDN'T  
5 FALL APART.

6 AND WHAT I'M TRYING TO ASK IS, IS THAT --  
7 IF THAT IS WHAT I FIND TO BE THE CASE, WHAT DO I  
8 MAKE OF THAT? I MEAN, WHAT DO I DO WITH THAT?

9 IN OTHER WORDS, I'M, I'M FACED WITH  
10 LANGUAGE IN THE SETTLEMENT AGREEMENT WHERE THE  
11 PARTIES CLEARLY COMMUNICATE TO ONE ANOTHER THIS IS  
12 A SETTLEMENT AGREEMENT.

13 THERE MAY BE ASPECTS OF IT THAT ARE NOT  
14 WRITTEN DOWN, BUT THERE ARE ASPECTS THAT  
15 THE PARTIES INTEND TO BE BOUND TO.

16 AND ACTUALLY SET UP THIS COURT AS A PLACE  
17 TO ENFORCE. THE WORD "ENFORCE" MEANS WE'VE GOT  
18 SOMETHING, AND WE NEED A PLACE NOW TO GO MAKE SURE  
19 IT TAKES PLACE.

20 THAT IS PRETTY STRONG LANGUAGE TO ENFORCE  
21 IT. AND SO IS IT YOUR ARGUMENT THAT, THAT THIS  
22 COURT WAS NOT EMPOWERED BY THE PARTIES TO ENFORCE  
23 THAT AGREEMENT?

24 MR. BARRETT: WELL, YOUR HONOR, I THINK  
25 THE COURT HAS JURISDICTION TO CONSIDER WHETHER TO

1 ENFORCE IT.

2 WITH RESPECT TO THE LANGUAGE THAT COUNSEL  
3 REFERS TO, THESE TERMS ARE BINDING AND THIS  
4 DOCUMENT MAY BE SUBMITTED INTO EVIDENCE TO ENFORCE  
5 THIS AGREEMENT.

6 YOUR HONOR, THIS WOULD NOT BE THE FIRST  
7 CASE WHERE, WHERE TWO PARTIES HAD WHAT THEY THOUGHT  
8 WAS A DEAL, AN ENFORCEABLE CONTRACT, AND THEY MAY  
9 HAVE EXPRESSED THAT AS THEY DID IN PARAGRAPH 5 OF  
10 THE TERM SHEET.

11 AND BY THE WAY, YOUR HONOR, IT'S CALLED  
12 TERM SHEET AND SETTLEMENT AGREEMENT.

13 I WOULD CONTEND THAT THE VERY TITLE OF  
14 THE DOCUMENT IS ITSELF AMBIGUOUS.

15 IT DOESN'T SAY IT'S A SETTLEMENT  
16 AGREEMENT. IT SAYS IT'S A TERM SHEET AND  
17 SETTLEMENT AGREEMENT, AND, IN FACT, THE FIRST WORDS  
18 ARE TERM SHEET AND A TERM SHEET, I THINK, IN  
19 GENERAL BUSINESS LANGUAGE IS PROBABLY NOT AN  
20 ENFORCEABLE DOCUMENT.

21 BUT, BUT -- SO, AGAIN, THE DOCUMENT IS  
22 KIND OF A STRANGE MIXTURE, IF YOU WILL, OF, YES,  
23 THE FACT THAT THEY USE THE WORD "BINDING" AND THE  
24 WORD "ENFORCE" IS SOME EVIDENCE THAT THAT IS WHAT  
25 THE PARTIES INTENDED.

1                   BUT, YOUR HONOR, THE LAW IS EXTREMELY  
2                   CLEAR THAT, THAT NOTWITHSTANDING THOSE KINDS OF  
3                   STATEMENTS BY THE PARTIES, IF THE DOCUMENT DOES NOT  
4                   CONTAIN SUFFICIENT TERMS AND SUFFICIENT CLARITY,  
5                   AND IF IT IS AMBIGUOUS TO THE POINT WHERE, WHERE IT  
6                   DOESN'T MEET THE REQUIREMENTS FOR AN ENFORCEABLE  
7                   CONTRACT UNDER STATE LAW, THEN, THEN  
8                   NOTWITHSTANDING WHAT THE PARTIES MAY HAVE THOUGHT  
9                   OR MAY HAVE HOPED WHEN THEY, WHEN THEY HAD THAT  
10                  HANDSHAKE, WHEN THEY SIGNED THAT PIECE OF PAPER,  
11                  THE COURT STILL CANNOT ENFORCE IT BECAUSE IT IS NOT  
12                  A CONTRACT AND CALLING IT A CONTRACT OR CALLING IT  
13                  ENFORCEABLE DOESN'T MAKE IT SO IF IT DOESN'T HAVE  
14                  THE REQUIRED TERMS.

15                 THE COURT: YOU SEE, YOUR STATEMENT JUST  
16                 MADE IS CLOSE TO MY UNDERSTANDING OF THE LAW.

17                 MR. BARRETT: I'M GLAD, YOUR HONOR.

18                 THE COURT: THAT I'M LIMITED IN MY  
19                 ABILITY TO ENFORCE IT IF THE PARTIES HAVE NOT COME  
20                 TO AN ENFORCEABLE AGREEMENT.

21                 MR. BARRETT: RIGHT.

22                 THE COURT: AND SO THAT'S WHY I TURN OVER  
23                 HERE TO YOUR OPPONENT TO ASK DON'T I NEED TO HAVE A  
24                 PROCEEDING TO BE CONVINCED THAT THIS IS AN  
25                 ENFORCEABLE AGREEMENT? AND I DON'T KNOW HOW I GET

1           THERE, BUT I DO NEED TO AT LEAST PUT MYSELF IN A  
2           POSITION ON THIS MOTION TO GO THROUGH THIS AND IN  
3           SOME WAY TO GET TO THE POINT WHERE I UNDERSTAND  
4           WHAT IS IT THAT MAKES THIS ENFORCEABLE AND DO I  
5           HAVE ALL OF THE INGREDIENTS HERE?

6                         MR. CHATTERJEE:   THE ANSWER TO THAT  
7           QUESTION IS NO, YOUR HONOR.

8                         THE MOTIONS FOR ENFORCEMENT AND THE CASES  
9           CITED ARE GENERALLY DEALING WITH THE ISSUE OF IS  
10          THERE A MUTUAL ASSENT, IN OTHER WORDS, THAT BOTH  
11          PARTIES ACTUALLY AGREED TO SOMETHING.

12                        TYPICALLY IN THOSE CASES THERE MIGHT BE  
13          E-MAIL EXCHANGES OR THINGS GOING BACK AND FORTH  
14          WHERE IT'S NOT CLEAR THAT THE PARTIES HAVE AGREED  
15          TO SOMETHING.

16                        IN THIS CASE WE HAVE SPECIFIC TERMS.  IT  
17          SAYS THE TERMS ARE BINDING.  IT SAYS THAT YOUR  
18          HONOR CAN CONSIDER THIS DOCUMENT FOR PURPOSES OF  
19          ENFORCEMENT.

20                        IT HAS SPECIFIC SHARES.  IT HAS SPECIFIC  
21          DOLLARS.  UNUSUAL RESTRICTIONS ON WHAT CAN OR CAN'T  
22          BE DONE WITH THE SHARES.

23                        IT DOESN'T SAY FACEBOOK AND CONNECTU WILL  
24          MUTUALLY DETERMINE THE FORM AND DOCUMENTATION OF  
25          THE TRANSACTION.  IT SAYS FACEBOOK DOES IT.

1           THEY HAD SIX LAWYERS WITH THEM WHEN THEIR  
2 CLIENT CHOSE TO SIGN THIS DOCUMENT. SIX LAWYERS.  
3 THEY HAD A WHARTON BUSINESS PROFESSOR, HOWARD  
4 WINKLEVOSS, WHO IS CONSIDERED AN EXPERT, WHO TAUGHT  
5 THERE FOR 12 YEARS WHO WAS AT THE MEDIATION WHEN  
6 THEY CHOSE TO SIGN THIS DOCUMENT.

7           THE ISSUE OF THE EVIDENTIARY HEARING IS  
8 WHETHER THE PARTIES AGREED TO SOMETHING. THEY  
9 AGREED TO THIS AND THE TERMS ARE CLEARLY LAID OUT  
10 HERE. THERE IS CONSIDERATION ON BOTH ENDS OF IT.

11           EACH PARTY IS GETTING A BENEFIT OF A  
12 BARGAIN THAT THEY STRUCK AND THIS CASE SHOULD BE  
13 OVER. THERE IS NO EVIDENTIARY HEARING NECESSARY AS  
14 TO WHETHER THEY AGREED TO ANYTHING.

15           ANYTHING, YOUR HONOR, THAT YOU WOULD  
16 CONSIDER ABOUT WHAT THIS AGREEMENT MEANS IS GOING  
17 TO HAVE TWO ISSUES WITH IT: THE FIRST ONE IS THAT  
18 IT WOULD DEAL WITH SUBJECTIVE INTENT; THAT IS, WHAT  
19 WAS IN THE MINDS OF THE PARTIES WHEN THEY SIGNED IT  
20 RATHER THAN WHAT IS THE INTENTION OF THE THEM THAT  
21 THEY EXPRESSED ON THE DOCUMENT.

22           THE SECOND ISSUE IS TO THE EXTENT THAT  
23 THERE WAS ANY DISCUSSION BETWEEN THE PARTIES, AND I  
24 DON'T WANT TO GO INTO WHAT HAPPENED AT THE  
25 MEDIATION AT THIS POINT. IT'S ALL PROTECTED BY THE

1 MEDIATION PRIVILEGE.

2 SO THIS IS THE DOCUMENT WHERE THE PARTIES  
3 MANIFESTED THEIR MUTUAL INTENT, CONNECTU DIDN'T  
4 AGREE, DIDN'T ASK TO PARTICIPATE IN THE FORM AND  
5 DOCUMENTATION OF THE TRANSACTION.

6 IT SPECIFICALLY RECITED THE PARTIES MAY,  
7 THAT THEY MAY ENGAGE IN INFORMAL DOCUMENTATION,  
8 THAT THE THINGS THAT MR. BARRETT TALKS ABOUT, BUT  
9 SHOULD THEY NOT AND THIS IS IT AND ALL YOU NEED TO  
10 DO, YOUR HONOR, IS ENFORCE THE WORDS THAT ARE  
11 WRITTEN ON THIS PAGE (INDICATING).

12 THE COURT: WELL, DO YOU TAKE ISSUE WITH  
13 THE STATEMENT OF LAW THAT THIS MUST BE ENFORCEABLE?

14 MR. CHATTERJEE: IN ORDER FOR THE COURT  
15 TO ENFORCE IT?

16 YOUR HONOR, THIS MUST, THIS MUST BE  
17 ENFORCEABLE FOR THE COURTS TO ENFORCE IT AND THIS  
18 IS AN ENFORCEABLE AGREEMENT.

19 THE COURT: WELL, THAT'S A CONCLUSION  
20 THAT YOU WANT ME TO REACH. BUT WHAT MAKES A  
21 DOCUMENT ENFORCEABLE UNDER CALIFORNIA LAW DEPENDS  
22 UPON WHETHER OR NOT THE PARTIES HAVE AGREED TO  
23 WHAT, ALL OF THE MATERIAL TERMS?

24 HOW DO I -- WHAT IS THE DEFINITION OF  
25 WHAT MAKES THIS ENFORCEABLE OR NOT.

1 MR. CHATTERJEE: THE DEFINITION OF WHAT  
2 MAKES THIS ENFORCEABLE IS IF THEY AGREED TO THE  
3 MATERIAL TERMS AND I'LL SUBMIT, YOUR HONOR, YOU  
4 CAN'T HAVE THIRD PARTIES THAT WERE NOT INVOLVED IN  
5 THE NEGOTIATION COMING IN AND REVISITING OF WHAT  
6 MAY OR MAY NOT BE CONSIDERED MATERIAL AFTER THE  
7 FACT.

8 HERE ALL OF THE PARTIES WERE ADVISED BY  
9 SOPHISTICATED COUNSEL.

10 THEY PUT DOWN EVERYTHING THAT THEY FELT  
11 WAS MATERIAL. THEY NEGOTIATED IT, THEY WROTE IT,  
12 AND THEY SIGNED IT.

13 THE COURT: WHOSE HANDWRITING IS THIS BY  
14 THE WAY?

15 MR. CHATTERJEE: THIS IS MR. HOWITSON'S  
16 HANDWRITING.

17 THE COURT: WHO IS HE?

18 MR. CHATTERJEE: HE'S IN-HOUSE COUNSEL  
19 FOR FACEBOOK.

20 THIS IS AN ARM'S LENGTH TRANSACTION  
21 BETWEEN SOPHISTICATED PARTIES. PEOPLE WILL PUT  
22 DOWN WHAT THE MATERIAL INFORMATION THAT THEY NEED  
23 IN THERE. THEY CAN'T COME IN THERE AFTER THE FACT  
24 AND SAY, OH, I WISH I WOULD HAVE KNOWN THAT OR I  
25 WISH I WOULD HAVE KNOWN SOME OTHER THING.

1           THEY HAD AN OBLIGATION AND OPPORTUNITY TO NEGOTIATE  
2           FOR IT AND PUT REPRESENTATIONS IN WHERE THEY WANTED  
3           IT.

4           THE COURT:   WHAT DO I MAKE OF ALL OF THE  
5           POST-SHEET CONSIDERATIONS AND DOCUMENTS IN TERMS OF  
6           THE KIND OF PROVISIONS THAT WERE THERE WHICH DO NOT  
7           APPEAR IN THE SETTLEMENT AGREEMENT?

8           MR. CHATTERJEE:   YOUR HONOR, LIKE IT SAYS  
9           IN THE AGREEMENT, IT CONTEMPLATED THAT THE PARTIES  
10          EXECUTE MORE FORMAL DOCUMENTS.

11          THERE WERE DISCUSSIONS AFTERWARDS ABOUT  
12          HAVING SOME OTHER KIND OF AGREEMENT PUT IN PLACE  
13          THAT WOULD SUPPLANT THE TERM SHEET AND SETTLEMENT  
14          AGREEMENT.   AND THERE WAS, THERE WAS THINGS  
15          NEGOTIATED BACK AND FORTH AND THAT'S WHAT HAPPENED.

16          NOW, THERE WERE TIMES WHEN CONNECTU'S  
17          COUNSEL ASKED OUR CORPORATE COUNSEL FOR MORE TIME  
18          BECAUSE HE WAS HAVING DIFFICULTY WITH HIS CLIENTS.  
19          BUT THAT IS COMPLETELY IRRELEVANT WHEN IT COMES TO  
20          THE ENFORCEMENT OF THE TERMS IN THE SETTLEMENT  
21          AGREEMENT.   IT CONTEMPLATES THAT IT BE BINDING TO  
22          ARBITRATION BUT THIS DID NOT HAPPEN.

23          THE COURT:   WELL, IT SOUNDS IN FRAUD IN  
24          CONNECTION WITH THE SETTLEMENT PROCESS ITSELF.  
25          THERE'S NO PLEADING BEFORE ME THAT RAISES THAT, BUT

1 LET'S ASSUME THAT SOMEHOW THAT'S AN ISSUE. HOW DO  
2 I HANDLE THAT IN THE CONTEXT OF THIS DOCUMENT IN  
3 TERMS OF YOUR CLIENT'S POSITION?

4 MR. CHATTERJEE: YOUR HONOR, OUR POSITION  
5 IS THAT YOU REJECT IT OUTRIGHT. IT'S AN ABSURD  
6 POSITION TO TAKE. THERE'S NO REPRESENTATION IN  
7 THIS DOCUMENT AS TO SHARE PRICE AND FOR THEM TO  
8 RAISE THAT ALLEGATION IS SIMPLY TRANSFORMING WHAT  
9 IS AN OPEN MARKET ISSUE. FACEBOOK IS NOT A  
10 PUBLICLY TRADED COMPANY.

11 FACEBOOK WAS IN LITIGATION WITH THEIR  
12 CLIENTS. DISCOVERY WAS ONGOING. WE PRODUCED  
13 CERTAIN DOCUMENTS WITH STOCK EVALUATION AND WE TOLD  
14 THEM DISCOVERY WAS COMPLETE. THEY DECIDED TO GO  
15 INTO THE MEDIATION KNOWING DISCOVERY WAS  
16 INCOMPLETE.

17 THEY THEN TRIED, ONCE THEY DECIDED NOT TO  
18 HONOR THE TERM SHEET AND SETTLEMENT AGREEMENT, TO  
19 GO TO BOSTON AND INTRODUCE OTHER DISCOVERY ISSUES  
20 ASSOCIATED WITH DOCUMENT PRODUCTION AND THIS IS  
21 NOTHING SHORT OF JUST A DOCUMENT PRODUCTION ISSUE.

22 AND HERE'S WHAT JUDGE WOODLOCK HAD TO SAY  
23 IN THE FEBRUARY ORDER, HE SAID THAT FROM ALL THAT  
24 APPEARS THE PARTIES WERE PREPARED TO SETTLE THEIR  
25 DISPUTES THEN DESPITE THE FACT THAT ASPECTS OF

1 DISCOVERY IN THIS CASE MOST PRESENTLY FOR PRESENT  
2 PURPOSES DOCUMENT PRODUCTION HAD NOT BEEN COMPLETED  
3 AND UNRESOLVED DISCOVERY ISSUES REMAINED  
4 OUTSTANDING."

5 THEY KNEW THAT THEY DIDN'T HAVE ALL OF  
6 THE INFORMATION THEY NEEDED. FOR THEM TO COME IN  
7 NOW AND SAY WE HAVE SOME SORT OF OBLIGATION TO TELL  
8 THEM SOMETHING THEY DIDN'T KNOW, WHEN THEY DIDN'T  
9 ASK FOR THE REPRESENTATION IN THIS DOCUMENT, THEY  
10 KNEW THEY DIDN'T HAVE ALL OF THE DOCUMENTS.

11 IN FACT, THE MICROSOFT INFORMATION AND  
12 THE PRESS RELEASE THAT THEY SUBMIT IN THEIR PAPERS,  
13 THEY DIDN'T HAVE ANY OF THOSE CORPORATE DOCUMENTS  
14 AND THEY KNEW IT AND FOR THEM TO COME IN AND SAY  
15 THAT, OH, WE HAD INCOMPLETE INFORMATION WHEN WE  
16 SETTLED THE CASE, YOUR HONOR, THAT'S WHAT HAPPENS  
17 IN SETTLEMENT.

18 THE COURT: BUT IN ORDER TO REJECT THAT,  
19 DOESN'T IT HAVE TO BE TENDERED TO THE COURT IN SOME  
20 FORM? I'M A LITTLE CONCERNED THAT THE MOTION TO  
21 ENFORCE THE SETTLEMENT AGREEMENT DOES NOT PROVIDE  
22 ME WITH AN OPPORTUNITY TO ADJUDICATE THE ISSUE OF  
23 WHETHER THERE WAS FRAUD IN THE INDUCEMENT OF THE  
24 SETTLEMENT AGREEMENT, NOW MAYBE IT DOES AND I NEED  
25 TO SEE CLEARLY HOW I HANDLE THAT IN CONNECTION WITH

1 THE MOTION.

2 I HAVEN'T READ ENOUGH CASES WHERE PARTIES  
3 HAVE TENDERED A SETTLEMENT AGREEMENT AND SOMEONE  
4 HAS OBJECTED TO IT ON THE GROUNDS THAT IT WAS  
5 INDUCED BY FRAUD AND THE COURT GOES AHEAD AND SAID,  
6 WELL, I'M GOING TO SOLVE THAT IN CONNECTION WITH A  
7 MOTION AND AS OPPOSED TO A TRIAL AND THAT'S WHAT  
8 I'M ASKING FOR IS WHAT IS THE PROCESS?

9 IT'S CLEAR THAT THE PARTIES AGREED THAT I  
10 CAN ENFORCE THIS AGREEMENT AND THAT THIS AGREEMENT  
11 WOULD BE SUBMITTED INTO EVIDENCE AS PART OF THAT  
12 ENFORCEMENT.

13 AND I UNDERSTAND FROM CALIFORNIA LAW THAT  
14 A MOTION IS PERMISSIBLE IN THE CONTEXT OF AN OPEN  
15 CASE THAT WOULD ENFORCE THE SETTLEMENT AGREEMENT.

16 BUT I HAVEN'T GONE FAR ENOUGH INTO IT TO  
17 FIND WHAT HAPPENS IF ANOTHER PARTY IN THAT SAYS,  
18 WELL, IT WAS INDUCED BY FRAUD. HOW DO I SOLVE  
19 THAT?

20 MR. CHATTERJEE: THANK YOU FOR THAT  
21 QUESTION.

22 ONE OF THE ISSUES THAT CONNECTU HAS  
23 RAISED IS THAT THIS CONTRACT IS VOID UNDER SECTION  
24 29 OF THE SECURITIES EXCHANGE ACT. WITH THE  
25 UNDERLYING VIOLATION OF SECTION 29 BEING A 10 OR

1 10(B) VIOLATION AND THEIR POSITION IS THAT THIS  
2 AGREEMENT CANNOT BE ENFORCED UNDER SECTION 29 SO  
3 THEIR OPPOSITION EFFECTIVELY HAS PUT THIS ISSUE  
4 BEFORE YOU.

5 I DON'T THINK YOU NEED TO HAVE FURTHER  
6 EVIDENCE SUBMITTED, YOUR HONOR.

7 THEY ARE TAKING THE POSITION THAT THIS  
8 AGREEMENT IS VOID. IF THEY, IF THEY MAKE -- IF  
9 THEY SUBMIT THAT ARGUMENT TO YOU, YOUR HONOR, AND  
10 YOU DECIDE TO ENFORCE THIS AGREEMENT, YOU HAVE  
11 REJECTED THAT ARGUMENT.

12 FOR THEM TO PROCEED ON THEIR FRAUD  
13 THEORY, I THINK THEY HAVE TO PUT FORTH SOME KIND OF  
14 SHOWING. THEY HAVE PUT FORWARD NO SHOWING OF ANY  
15 SCIENTER.

16 THEIR CLAIM APPEARS TO BE SOME SORT OF  
17 OMISSION IN A PRIVATELY HELD ARM'S LENGTH  
18 TRANSACTION. THAT WOULD ONLY COME INTO PLAY IF  
19 THERE WAS A DUTY AND THEY DON'T ANSWER THE QUESTION  
20 OF THEIR KNOWLEDGE OF THE FACT THAT DISCOVERY WAS  
21 ONGOING AND INCOMPLETE.

22 IN FACT, THEY ENDORSE JUDGE WOODLOCK'S  
23 RECOGNITION OF THAT IN HIS ORDER. YOU CAN REJECT  
24 THE EFFORT TO TRY AND VOID THIS AGREEMENT UNDER  
25 SECTION 29 BASICALLY BY SAYING THEY HAVE PUT

1 FORWARD ANY EVIDENCE, NONE TO SUPPORT A 10(B)  
2 VIOLATION THAT WOULD IN TURN LEAD TO SECTION 29  
3 VOIDING OF THE AGREEMENT.

4 THE COURT: WHAT IS YOUR ANSWER TO MY  
5 QUESTION THE PARTIES AGREE THAT THIS MATTER CAN BE  
6 STIPULATED THAT SAN JOSE FEDERAL COURT JURISDICTION  
7 TO ENFORCE THIS AGREEMENT, SUBMIT THIS INTO  
8 EVIDENCE TO ENFORCE THE AGREEMENT AND CALIFORNIA  
9 LAW PROVIDES THAT A, THAT A MOTION TO ENFORCE IS,  
10 IS PERMISSIBLE. HOW DO I HANDLE A CLAIM THAT THERE  
11 IS FRAUD IN CONNECTION WITH THE AGREEMENT?

12 MR. BARRETT: WELL, YOUR HONOR, WE WOULD,  
13 OF COURSE, BE PLEASED TO SUBMIT ANY PLEADINGS THAT,  
14 THAT YOUR HONOR BELIEVES IS NECESSARY TO ASSIST IT  
15 IN DECIDING THAT QUESTION.

16 I DO, I DO THINK THAT, THAT IT WAS RAISED  
17 IN OUR OPPOSITION BRIEF AND IN OUR SURREPLY BRIEF  
18 AND SOME OF THE EVIDENCE WAS PRESENTED IN THE FORM  
19 OF AFFIDAVITS WITH THOSE TWO SUBMISSIONS WHICH WE  
20 UNDERSTAND YOUR HONOR WOULD TAKE INTO ACCOUNT IN  
21 DECIDING WHAT TO DO.

22 AND THEN TO ANSWER COUNSEL'S QUESTION,  
23 FIRST OF ALL, WHEN THIS BECAME A SECURITIES  
24 TRANSACTION, [REDACTED]

25

1 [REDACTED]

WHETHER OR NOT THEY

2 KNEW ABOUT IT, THEY INTENDED IT, WHETHER ALL OF  
3 THOSE FANCY CORPORATE LAWYERS THAT THEY HAD ON  
4 THEIR SIDE, AND YOU HEARD THAT THIS TERM SHEET WAS  
5 WRITTEN BY THEIR IN-HOUSE GENERAL COUNSEL, WHETHER  
6 OR NOT THEY FOCUSSED ON THE FACT THAT THEY HAD  
7 DISCLOSURE OBLIGATIONS BY VIRTUE OF THE SECURITIES  
8 LAW, THEY HAD THOSE OBLIGATIONS.

9 THE LAW IS VERY CLEAR ON THAT, YOUR  
10 HONOR. WE WOULD BE HAPPY TO BRIEF THAT FURTHER,  
11 ALTHOUGH I THINK WE HAVE GOT AMPLE BRIEFING ON IT  
12 IN OUR SURREPLY. SO THAT'S WHERE THE DUTY COMES  
13 FROM.

14 THE DUTY COMES FROM WHEN A COMPANY TRADES  
15 IN ITS OWN SECURITIES WITH AN OUTSIDE PARTY, IT  
16 DOESN'T MATTER WHO THEY ARE, IT DOESN'T MATTER IF  
17 IT'S US OR MICROSOFT. THEY HAVE A DUTY TO DISCLOSE  
18 MATERIAL INFORMATION.

19 SOMETIMES THAT DUTY IS IMPLEMENTED BY  
20 INVITING THE OTHER SIDE TO COME IN AND DO DUE  
21 DILIGENCE. THAT'S ONE WAY TO DEAL WITH IT TO MAKE  
22 SURE THE OTHER SIDE GETS ANYTHING THEY NEED. YOU  
23 JUST GIVE THEM ACCESS TO YOUR COMPANY AND YOUR  
24 BOOKS AND RECORDS.

25 THAT DIDN'T HAPPEN HERE. [REDACTED]

1 [REDACTED ]

2

3

4

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16

THEY, WITH THEIR, NOT ONLY THEIR GENERAL  
COUNSEL, BUT THEIR CHIEF FINANCIAL OFFICER, MR. YU,  
AND, AND MR. ZUCKERBERG, WHO IS NOT ONLY THE CEO OF  
THE COMPANY BUT IS ON THE BOARD OF DIRECTORS OF THE  
COMPANY, AND THAT'S IMPORTANT FOR REASONS I'LL GET  
TO IN A MINUTE, THE THREE OF THEM WERE PRESENT AT  
THE MEDIATION.

17

18

19

20

21

22

23 [REDACTED ]

24

25

1 [REDACTED]

2  
3  
4  
5 WHAT, WHAT THEY DIDN'T TELL US, WHAT  
6 THOSE THREE FACEBOOK EXECUTIVES WHO WERE SITTING IN  
7 THAT MEDIATION DIDN'T TELL US, EVEN THOUGH AS A  
8 MATTER OF FEDERAL SECURITIES LAW THEY HAVE AN  
9 ABSOLUTE OBLIGATION TO DISCLOSE MATERIAL  
10 INFORMATION WHETHER WE ASKED FOR IT OR NOT, YOUR  
11 HONOR, REMEMBER, SECURITIES LAW IS NOT CAVEAT  
12 EMPTOR. SECURITY LAWS IS DISCLOSURE WHEN THE LAW  
13 SAYS THAT YOU HAVE TO MAKE IT AND THE LAW SAYS THAT  
14 WHEN THEY DO THIS TRADE, THEY HAVE TO MAKE IT.

15 WHAT THEY DIDN'T TELL US WAS THAT THE  
16 FACEBOOK BOARD, OF WHICH MR. ZUCKERBERG, WHO WAS AT  
17 THAT MEETING WAS A MEMBER, AND UNDOUBTEDLY THE CFO  
18 AND GENERAL COUNSEL KNEW ABOUT THIS BECAUSE THAT'S  
19 PART OF THEIR JOB.

20 BUT WHAT THEY DIDN'T TELL US AND THEY  
21 ONLY TOLD US LATER ON IN MARCH WHEN THE CORPORATE  
22 LAWYERS, IF YOU WILL, PERHAPS, DOING SOME OF THAT  
23 DUE DILIGENCE IN NEGOTIATING THE TRANSACTION ASKED  
24 THE QUESTION, THEY DIDN'T TELL US ABOUT WHAT IS  
25 CALLED A 409(A) VALUATION. AND I DON'T KNOW IF

1 YOUR HONOR HAS RUN ACROSS THAT TERM IN SOME OF YOUR  
2 OTHER CASES.

3 BUT THAT IS A VALUE THAT, THAT A  
4 VALUATION THAT, THAT A PRIVATE COMPANY HAS A HUGE  
5 INCENTIVE TO MAKE UNDER THE INTERNAL REVENUE CODE  
6 RECENTLY AMENDED WITHIN THE LAST COUPLE YEARS.

7 THE REASON IT HAS A HUGE INCENTIVE TO DO  
8 THAT IS THAT BECAUSE IF IT GRANTS STOCK OPTIONS AT  
9 A PRICE LOWER THAN THE 409(A) VALUATION OR, OR  
10 HIGHER, IT, IT -- THE EMPLOYEES WHO RECEIVED THOSE  
11 OPTIONS MAY FACE EXTREME, EXTREME TAX PENALTIES IN  
12 CONNECTION WITH RECEIVING THOSE OPTIONS AND THE  
13 COMPANY MAY, MAY INCUR SOME LIABILITY AS WELL.

14 SO THERE IS A VERY STRONG TAX REASON TO  
15 DO AN ACCURATE 409(A) VIOLATION.

16 IN ORDER FOR THAT VALUATION TO BE  
17 EFFECTIVE UNDER THE INTERNAL REVENUE CODE, THE  
18 COMPANY HAS TO GO THROUGH CERTAIN STEPS THAT ARE  
19 PRESCRIBED IN THE STATUTE.

20 AND ULTIMATELY THOSE STEPS CULMINATE IN  
21 THE COMPANY'S BOARD OF DIRECTORS PASSING A  
22 RESOLUTION WHICH SAYS THAT THE FAIR MARKET VALUE OF  
23 OUR STOCK IS X. SO THIS IS NOT, YOU KNOW, SOME  
24 VAGUE, VAGUE CONCEPT OF VALUATION. THIS IS, THIS  
25 IS A RESOLUTION OF THE BOARD OF DIRECTORS AND YOU

1 HAD A MEMBER OF THE BOARD OF DIRECTORS AND YOU HAD  
2 THE SENIOR FINANCIAL OFFICER AND THE SENIOR LEGAL  
3 PERSON OF THE COMPANY SITTING THERE AT THAT  
4 MEDIATION, KNOWING THAT THEY HAD AN OBLIGATION TO  
5 DISCLOSE ALL MATERIAL INFORMATION.

6 [REDACTED]

7  
8  
9 AND YOUR HONOR, WHAT WAS THE FAIR MARKET  
10 VALUE ACCORDING TO THE BOARD OF DIRECTORS AT THAT  
11 TIME? [REDACTED]

12  
13  
14 YOUR HONOR, WE ALSO HAVE TO SHOW IT WAS  
15 MATERIAL. [REDACTED]

16  
17  
18  
19  
20 COUNSEL IS RIGHT, WE HAVE TO SHOW  
21 SCIENTER. YOUR HONOR, I THINK I JUST DESCRIBED A  
22 BASIS OF PRIMA FACIE SCIENTER [REDACTED]

1 [REDACTED]

2 THEY KNEW BECAUSE THEY PARTICIPATED IN  
3 THESE BOARD MEETINGS. MR. ZUCKERBERG MUST HAVE  
4 BECAUSE HE'S A BOARD MEMBER AND THE OTHERS I'M SURE  
5 DID BECAUSE OF THEIR POSITION. [REDACTED]

6  
7 THE COURT: LET ME GO BACK AND I'VE READ  
8 ALL OF THIS. BUT LET ME GO BACK TO A STATEMENT  
9 THAT YOU MADE THAT UNDER THE SECURITIES LAW THERE  
10 WAS AN OBLIGATION TO, TO MAKE THE, MAKE THE -- MAKE  
11 A CERTAIN KIND OF DISCLOSURE.

12 MR. BARRETT: UH-HUH.

13 THE COURT: THAT'S THE PART I, I GUESS, I  
14 NEED EDUCATING ON.

15 IN OTHER WORDS, IN THE CONTEXT OF A  
16 SETTLEMENT, IF STOCK IS OFFERED IN THE GIVE AND  
17 TAKE OF THE SETTLEMENT IN CASH, AT THAT POINT THE  
18 NEGOTIATIONS HAVE TO TAKE A DIFFERENT TURN IS WHAT  
19 YOU'RE TELLING ME.

20 AT THAT POINT THE PARTY CANNOT OFFER  
21 STOCK BUT MUST AT THAT POINT MAKE A DISCLOSURE  
22 ABOUT DUE DILIGENCE KIND OF DISCLOSURE AND COMPLY  
23 WITH ALL OF THE SECURITIES LAWS WITH RESPECT TO THE  
24 DISCLOSURE.

25 AND INDEED IT COULD NEVER, UNDER THE LAW,

1 OFFER STOCK WITHOUT THOSE DISCLOSURES AND IF STOCK  
2 IS OFFERED AS A PART OF THE SETTLEMENT, IT IS  
3 ILLEGAL.

4 MR. BARRETT: WELL, THEY ARE CERTAINLY --  
5 IF THEY DO THAT, YOUR HONOR, I THINK THAT'S  
6 ESSENTIALLY CORRECT. IF THEY DO THAT --

7 THE COURT: WHAT IS YOUR AUTHORITY FOR  
8 THAT?

9 MR. BARRETT: I'LL GET TO THAT IN ONE  
10 MINUTE. IF THEY DO THAT, THEY'RE CERTAINLY TAKING  
11 THAT RISK.

12 THE COURT: WELL, BOTH SIDES ARE TAKING A  
13 RISK, IT SEEMS TO ME, BECAUSE IT COULD BE THAT THE  
14 PARTY WHO GETS THE STOCK, GETS STOCK WHEN THE  
15 DISCLOSURE COMES OUT IS WORTH MORE.

16 MR. BARRETT: ABSOLUTELY. AND  
17 OBVIOUSLY --

18 THE COURT: IT JUST DEPENDS ON, IT  
19 DEPENDS ON, AND AS I UNDERSTAND THIS TRANSACTION  
20 NEITHER SIDE IS TRYING TO MOVE AWAY FROM THE  
21 TRANSACTION BECAUSE THEY BELIEVE THAT SOMETHING  
22 ABOUT THE VALUE IS DIFFERENT. IT'S BECAUSE OF THE  
23 FAILURE TO DISCLOSE, YOUR ARGUMENT IS THE FAILURE  
24 TO DISCLOSE THE VALUATION FOR THE STOCK BENEFITS IS  
25 INFORMATION THAT SHOULD HAVE BEEN DISCLOSED.

1                   BUT RATHER THAN IN A MINUTE, I NEED THE  
2                   AUTHORITY NOW. THAT FOR ME IS VERY IMPORTANT TO  
3                   UNDERSTAND A CASE WHERE A JUDGE HAS HELD THAT IN  
4                   THE CONTEXT OF A SETTLEMENT THE PROPOSAL OF STOCK  
5                   OF THAT KIND IS ILLEGAL WITHOUT THE DISCLOSURES  
6                   ACCOMPANYING IT.

7                   DO YOU HAVE A CASE AUTHORITY TO THE  
8                   CONTRARY THAT IN THE COURSE OF A SETTLEMENT THE  
9                   OFFER OF CASH AND STOCK IS OKAY EVEN WITHOUT THE  
10                  DISCLOSURES THAT WOULD ACCOMPANY THE, THE STOCK IF  
11                  IT WERE BEING SOLD IN AN ARM'S LENGTH TRANSACTION?

12                  MR. CHATTERJEE: YOUR HONOR, WE HAVE NOT  
13                  BEEN ABLE TO LOCATE CASES ON EITHER SIDE OF THIS  
14                  CANDIDLY.

15                  I DO THINK THAT ONCE YOU ENGAGE IN AN  
16                  ARM'S LENGTH TRANSACTION AND YOU'RE NOT TALKING  
17                  ABOUT THE OPEN MARKET, THE DYNAMICS DO CHANGE  
18                  CONSIDERABLY.

19                  I MEAN, THE DUTY TO DISCLOSE COMES UP  
20                  BASED UPON THE SOPHISTICATION OF THE RELATIONSHIP,  
21                  THE NATURE OF THE TRANSACTION, PRIVATELY HELD  
22                  VERSUS PUBLICLY HELD. ALL OF THAT IS PRETTY  
23                  STANDARD CASE LAW. AND IF YOU LOOK AT THE CONTEXT  
24                  OF THIS NEGOTIATION, THEY CAN'T COME IN AND SAY  
25                  THERE WAS NO MISREPRESENTATION, THERE WAS NO

1 MISREPRESENTATION MADE IN THIS DOCUMENT AS TO SHARE  
2 PRICE.

3 EVERYTHING YOU HEARD MR. BARRETT SAY  
4 ABOUT HOW MUCH THEY VALUED IT, NONE OF THAT IS  
5 EMBODIED IN THIS DOCUMENT.

6 AND IF WHATEVER THEIR SUBJECTIVE  
7 INTENTIONS WERE, AT THIS POINT IT SEEMS LIKE AN  
8 AFTER-THE-FACT JUSTIFICATION FOR TRYING TO  
9 ESTABLISH FRAUD RATHER THAN SOMETHING THAT THEY  
10 UNDERSTOOD AT THE TIME AND HAD AN OPPORTUNITY TO,  
11 TO HAVE WRITTEN DOWN.

12 THE COURT: UM, THE QUINN EMANUEL LIEN  
13 WAS MENTIONED.

14 DOES THAT PLAY A PART IN THIS?

15 MR. BARRETT: YOUR HONOR, I DON'T THINK  
16 IT PLAYS ANY PART IN THIS AT ALL.

17 [REDACTED]

18  
19  
20  
21  
22  
23  
24 THE COURT: BUT IF I, IN OTHER WORDS,  
25 PART OF WHAT YOU WOULD HAVE ME DO IS TO EVALUATE

1 THE SETTLEMENT?

2 MR. BARRETT: NO, YOUR HONOR.

3 THE COURT: WELL, HOW DO YOU KNOW THAT  
4 THE VALUE IS WHAT YOU'RE CLAIMING IT TO BE?

5 MR. BARRETT: I'M JUST USING THEIR  
6 NUMBERS, YOUR HONOR.

7 THE COURT: I KNOW, BUT WHAT IF THEIR  
8 NUMBER IS NOT CORRECT?

9 MR. CHATTERJEE: THOSE ARE THEIR NUMBERS.  
10 THOSE ARE NUMBERS THAT THEY SUBMITTED. I WANT TO  
11 BE VERY CLEAR ABOUT THAT. THEY CAME UP WITH THE  
12 [REDACTED] PER SHARE. THAT'S  
13 THEIR NUMBER.

14 THE COURT: I UNDERSTAND THAT. BUT YOUR  
15 POSITION IS THAT THE SETTLEMENT CAN'T BE ENFORCED  
16 BECAUSE THERE WAS A FAILURE TO DISCLOSE THIS STOCK  
17 OPTION PRICE.

18 MR. BARRETT: YES, IT'S A STOCK OPTION,  
19 PRICE, BUT WHAT IT IS, IS A FAILURE TO DISCLOSE A  
20 RESOLUTION OF THE BOARD OF DIRECTORS THAT SAYS THAT  
21 THE FAIR MARKET VALUE OF COMMON STOCK IS [REDACTED]

22 THE REASON I BRING UP THE VALUE, YOUR  
23 HONOR, IS NOT -- IS PURELY TO SHOW YOU THE  
24 MATERIALITY OF THE MISREPRESENTATION, HOW OBVIOUS  
25 IT IS THAT THIS IS, THAT THIS IS MATERIAL NONPUBLIC

1 INFORMATION.

2 NOW, THEY CAN DO -- YOU CAN DO A PRIVATE,  
3 A PRIVATE TRADE IN YOUR STOCK BUT WHAT YOU HAVE TO  
4 DO IS YOU HAVE TO MAKE SURE THAT THE OTHER PARTY  
5 HAS ALL MATERIAL INFORMATION OR HAS ACCESS TO  
6 MATERIAL INFORMATION. THAT WASN'T DONE HERE.

7 YOUR HONOR, YOU ASKED FOR, YOU ASKED FOR  
8 SOME, SOME CASE AUTHORITY. FIRST OF ALL, I WANT TO  
9 CITE A CASE CALLED LIVID HOLDINGS AGAINST SOLOMON  
10 AND SMITH BARNEY, WHICH IS A NINTH CIRCUIT CASE AT  
11 PAGE 13 OF OUR SURREPLY.

12 AND THAT WAS A CASE, AMONG OTHER THINGS,  
13 DISCUSSING THE QUESTION OF SCIENTER THE NINTH  
14 CIRCUIT SAID IF YOU ALLEGE THAT THE DEFENDANTS IN  
15 THIS CASE, THE PLAINTIFF FACEBOOK, KNEW THE  
16 CONTESTED STATEMENTS MOST OBVIOUS INTERPRETATION  
17 WAS FALSE WHEN MADE.

18 THAT'S --

19 THE COURT: WELL, WHAT I'M ASKING,  
20 THOUGH, THERE ARE LOTS OF SECURITIES CASES. WHAT  
21 I'M CONCERNED WITH IS WHETHER OR NOT THERE IS A  
22 DIFFERENCE WHEN PARTIES COME TOGETHER TO SETTLE A  
23 LAWSUIT --

24 MR. BARRETT: RIGHT.

25 THE COURT: -- AND TRY TO IN THE COURSE

1 OF THAT COME TO TERMS THAT THEY ARE SATISFIED WITH.

2 I'M JUST NOT AS FAMILIAR WITH THAT  
3 BECOMING THE SUBJECT OF LITIGATION LATER ON OVER  
4 EVALUATION BECAUSE ONCE I OPEN THAT UP, THERE'S  
5 GOING TO BE A LOT OF LITIGATION IN THE COURT.

6 PARTIES ARE PERMITTED TO, IN THE COURSE  
7 OF SETTLEMENT, SAY THAT THE PRICE WILL DEPEND ON AN  
8 AUDIT; LATER ON WE'LL DO SOME KIND OF THINGS TO  
9 FIGURE OUT THE PRICE. I'M NOT USED TO PARTIES  
10 SAYING, OKAY, IT'S GOING TO BE [REDACTED] PLUS  
11 STOCK.

12 MR. BARRETT: UH-HUH.

13 THE COURT: AND THEN LATER ON HAVING COME  
14 TO THE COURT AND SAY, WELL, YOU KNOW, I SAID  
15 [REDACTED] WORTH OF STOCK, BUT I THOUGHT THE STOCK WAS  
16 WORTH A LOT MORE THAN IT TURNS OUT TO BE.

17 MR. BARRETT: RIGHT, RIGHT.

18 THE COURT: AND I NOW WANT TO GET A -- I  
19 WANT TO BACK AWAY FROM THIS AND ASKING THE COURT  
20 FOR PERMISSION TO DO IT.

21 YOU'RE NOT QUITE ASKING THAT BUT THAT'S  
22 WHAT I'M CONCERNED ABOUT.

23 AND I'D LIKE TO SEE CASES THAT SAY THAT A  
24 PARTY IS PERMITTED TO DO THAT BECAUSE ONCE YOU PUT  
25 STOCK INTO THE MIX, THERE HAS TO BE A DISCLOSURE

1 THAT GOES WITH THE STOCK WHICH THEN BECOMES A BASIS  
2 IF NOT DONE FOR SAYING TO THE PARTIES ALTHOUGH YOU  
3 WANTED TO SETTLE ALONG THOSE TERMS AND YOU DIDN'T  
4 ASK FOR IT, THE LAW GETS IT. AND IF PAGE 13 GETS  
5 ME THERE, I'LL LOOK AT IT AND SEE IF IT GETS ME  
6 THERE.

7 MR. BARRETT: I DON'T THINK IT DOES, YOUR  
8 HONOR. IT DOESN'T ADDRESS THAT SPECIFIC ISSUE.  
9 AND I THINK LIKE MR. CHATTERJEE, WE HAVE NOT  
10 LOCATED, ALTHOUGH WE'RE STILL LOOKING FOR A CASE  
11 THAT ANSWERS YOUR HONOR'S PRECISE QUESTION.

12 ALTHOUGH WE CAN GIVE YOU CHIARELLA  
13 AGAINST THE UNITED STATES, THE GENERAL PRINCIPLE  
14 THAT A COMPANY SELLING ITS OWN STOCK HAS AN  
15 AFFIRMATIVE DUTY TO ABSTAIN FROM TRADING IN THE  
16 SHARES UNLESS IT FIRST DISCLOSES ALL MATERIAL  
17 NONPUBLIC INFORMATION WHICH, WHICH IT KNOWS.

18 NOW, THERE IS NO, THERE IS NO -- I DON'T  
19 THINK THERE'S ANY SETTLEMENT EXCEPTION. I DON'T  
20 KNOW ANY REASON WHY THERE WOULD BE.

21 THIS, IN MANY WAYS, I THINK IS REALLY A  
22 SUI GENERIS CASE.

23 I THINK TYPICALLY WHAT YOU WOULD HAVE IN  
24 A SITUATION LIKE THIS IS THAT IF YOU HAD PARTIES  
25 FIGHTING AND THEN A SETTLEMENT THAT INVOLVED THE

1 EXCHANGE OF STOCK AND PRIVATELY HELD BUSINESS I --  
2 IT WOULD PROBABLY BE PARTIES THAT HAD BEEN DOING  
3 BUSINESS WITH EACH OTHER, YOU KNOW, FOR EXAMPLE,  
4 FORMER PARTNERS OR SOMETHING LIKE THAT WHERE THE  
5 CHANCES ARE THAT THEY WOULD ACTUALLY HAVE A GREAT  
6 DEAL OF INFORMATION ABOUT EACH OTHER ALREADY  
7 BECAUSE OF THE NATURE OF THEIR BUSINESS  
8 RELATIONSHIP OR THEY MIGHT PROVIDE, AS YOU WOULD DO  
9 IN A CORPORATE ACQUISITION OR A MERGER CONTEXT,  
10 YES, HERE'S THE AGREEMENT IN PRINCIPAL, WE'LL, YOU  
11 KNOW, TRADE THIS MUCH SHARES OF STOCK FOR THIS MANY  
12 AND SUBJECT TO NORMAL DUE DILIGENCE, SUBJECT TO AN  
13 APPRAISAL AS YOUR HONOR SUGGESTED, SUBJECT TO AN  
14 AUDIT.

15 BUT TO COME IN HERE AND AS THEY ARE  
16 SAYING IN EFFECT SAYING THAT THERE WAS INFORMATION,  
17 AND YOU DON'T HEAR THEM DENYING IT, [REDACTED]

18 THAT'S THE BOARD OF  
19 DIRECTORS NUMBER. THEIR COUNSEL GAVE IT TO OUR  
20 CORPORATE COUNSEL. [REDACTED]

21  
22 THE COURT: LET ME ASK JUST AS A MATTER  
23 OF HISTORIC FACT, THAT BOARD EVALUATION WAS DONE  
24 SUBSEQUENT TO THE MICROSOFT TRANSACTION, WHATEVER  
25 THAT WAS?

1                   MR. BARRETT:  YES, YES.  OUR  
2 UNDERSTANDING, YOUR HONOR, WAS THAT IT WAS.  
3 ALTHOUGH I CANNOT TELL YOU THE EXACT DATE.  THEY  
4 WOULD NOT DISCLOSE THAT TO US.

5                   MR. CHATTERJEE:  YOUR HONOR, IF I COULD  
6 EXPLAIN BECAUSE I SEE SOME CONFUSION IN YOUR EYES,  
7 AND I THINK THERE ARE A COUPLE OF IMPORTANT ISSUES  
8 HERE.

9                   THE MICROSOFT TRANSACTION WAS FOR  
10 [REDACTED]                   AND A BUSINESS DEAL.

11                   CONNECTU DIDN'T GET THAT AND THEY KNEW  
12 THEY WEREN'T GETTING THAT.

13                   IF YOU LOOK AT THE SETTLEMENT AGREEMENT  
14 THERE'S A RESTRICTION FOR SERIES D PREFERRED STOCK,  
15 ONLY ONE, BUT THE DOCUMENT ON IT'S FACE IDENTIFIES  
16 THAT THERE IS SERIES D PREFERRED STOCK AND THERE'S  
17 COMMON STOCK.

18                   WHAT MICROSOFT GOT OUT OF THE DEAL AND  
19 WHAT CAUSED THESE VALUATION NUMBERS OF THE PRESS  
20 RELEASE ARE FUNDAMENTALLY DIFFERENT THAN WHAT  
21 CONNECTU IS GETTING OR THE PRINCIPALS OF CONNECTU,  
22 WHICH WAS SUBJECT TO THE FAIR MARKET VALUATION  
23 NUMBER.

24                   THERE IS NOT A FAIR MARKET VALUATION THAT  
25 HAS BEEN DONE OF THE SERIES D PREFERRED STOCK.

1 I'LL POINT OUT TO YOU, YOUR HONOR, THAT  
2 WE DID PRODUCE SEVERAL FAIR MARKET VALUATIONS  
3 THROUGHOUT THE LITIGATION, AND IN THOSE DOCUMENTS  
4 IT SPECIFICALLY CALLED OUT OTHER DEALS THAT  
5 FACEBOOK WAS CONSIDERING WHERE PREFERRED STOCK WAS  
6 PART OF THE CONSIDERATION FOR THE PARTNERSHIPS.

7 IN THOSE DOCUMENTS THERE WAS SPECIFIC  
8 PREFERRED PRICES THAT WERE IN THERE THAT WERE  
9 SUBSTANTIALLY DIFFERENT THAN WHAT THE CONCLUDED  
10 FAIR MARKET VALUE OF THE COMMON SHARES WERE.

11 WHAT THAT MEANS IS THAT THE DOCUMENTS WE  
12 PRODUCED IN THE LITIGATION THAT THEY SOUGHT  
13 IDENTIFY ON THEIR FACE THAT THE PREFERRED STOCK HAD  
14 DIFFERENT VALUE THAN THE COMMON STOCK.

15 BUT, AGAIN, YOUR HONOR, I DON'T THINK YOU  
16 NEED TO REACH THAT ISSUE BECAUSE THEY HAD THE  
17 OPPORTUNITY TO ASK FOR A REPRESENTATION AS TO  
18 VALUE.

19 YOU'RE ABSOLUTELY RIGHT THAT THEY DID NOT  
20 ASCRIBE A DOLLAR VALUE AND ASK FOR AN INDEPENDENT  
21 APPRAISAL. THAT WOULD BE A VERY COMMON COURSE.

22 HERE THEY AGREED TO A VERY SPECIFIC  
23 NUMBER OF SHARES, AND THAT'S WHAT WE'RE ASKING YOUR  
24 HONOR TO HONOR AND THEY'RE COMMON SHARES. THEY'RE  
25 NOT THE [REDACTED] SHARES THAT MICROSOFT GOT.

1                   THERE'S NONE OF THE OTHER BUSINESS  
2 PARTNERSHIP THAT MICROSOFT GOT OUT OF THE DEAL.  
3 THEY'RE COMMON SHARES.

4                   MR. BARRETT: YOUR HONOR, UM, UM, THOSE,  
5 THOSE -- THERE ARE THOSE ADDITIONAL EVALUATIONS.  
6 THOSE CAME AT A MUCH EARLIER POINT IN TIME AND AS,  
7 PERHAPS, IS OBVIOUS, FACEBOOK IS A COMPANY THAT HAS  
8 BEEN ON AN INCREDIBLE UPWARD TRACK IN TERMS OF ITS,  
9 ITS SUCCESS AND SO A VALUATION, EVEN IF IT'S ONLY A  
10 FEW MONTHS OLD, MAY, MAY WELL BE OUTDATED.

11                   BUT THAT REALLY ISN'T THE POINT, YOUR  
12 HONOR.

13                   THE POINT IS THAT THEIR DUTY IS TO  
14 DISCLOSE ALL MATERIAL, ALL MATERIAL INFORMATION,  
15 NOT INFORMATION FROM THE PAST THAT THEY MAY HAVE  
16 HAPPENED TO DISCLOSE IN THE COURSE OF DISCOVERY.

17                   IT'S TO DISCLOSE ALL INFORMATION THAT IS  
18 MATERIAL TO A REASONABLE PURCHASER AT THE TIME OF  
19 THE TRANSACTION THAT THEY'RE ENGAGING IN.

20                   AGAIN, THEY'RE IN A FUNNY POSITION  
21 BECAUSE THEY'RE A PRIVATE COMPANY AND THEY'RE NOT  
22 OUT THERE IN THE MARKETPLACE AND MAKING 10-K AND  
23 13-D DISCLOSURES AND ALL OF THE THINGS THAT PUBLIC  
24 COMPANIES DO WHEN SOMETHING MATERIAL TO THE COMPANY  
25 HAPPENS. THEY DON'T HAVE TO DO THAT.

1                   BUT IF THEY DECIDE TO ENGAGE IN A PRIVATE  
2 TRADE OF THEIR STOCK, THEY DO HAVE TO DISCLOSE  
3 MATERIAL INFORMATION.

4                   THE COURT: BUT THAT'S THE PART THAT I'M,  
5 THAT I'M STUCK ON AND I DO WANT TO, I DO WANT TO,  
6 TO STUDY FOR A MOMENT BEFORE I GO FURTHER IN THIS  
7 BECAUSE I'LL TELL YOU, MY INITIAL REACTION IS THAT  
8 AS YOU'RE BOTH ACCURATELY DESCRIBING, THERE'S NO  
9 REAL DISPUTE HERE, THAT WHAT I HAVE BEFORE ME IS A  
10 TERM SHEET AND SETTLEMENT AGREEMENT.

11                   WHEN I PRACTICED LAW FOR 15 YEARS, I DID  
12 LOTS OF THESE. AS A JUDGE FOR THE LAST 15 SOME ODD  
13 YEARS, I'VE SEEN LOTS OF THESE, AND IT DOES SEEM TO  
14 ME -- I KNOW IT'S LONGER -- BUT IT DOES SEEM TO ME  
15 THAT I HAVE SEEN CIRCUMSTANCES WHERE THE PARTIES  
16 TRY TO GO AS THESE PARTIES APPEAR TO HAVE GONE TO  
17 THE POINT OF MAKING IT BINDING.

18                   AND WHEN PARTIES ATTEMPT TO MAKE IT  
19 BINDING, IT PUTS THE COURT IN A POSITION OF WANTING  
20 TO SUPPORT THE MEDIATION RESOLUTION DISPUTE PROCESS  
21 BY GIVING IT BINDING EFFECT BECAUSE EITHER ONE OF  
22 YOU COULD HAVE BEEN BEFORE THIS COURT ARGUING THAT  
23 YOU WANT TO ENFORCE THIS AGREEMENT.

24                   THERE'S NOTHING ON THE FACE OF THIS  
25 DOCUMENT THAT SUGGESTS THAT SOMEBODY WAS TAKEN

1           ADVANTAGE OF ONE WAY OR THE OTHER.

2                   AND SO EITHER SIDE WOULD BE DEPRIVED OF  
3           THE BENEFIT OF THIS PROCESS IF COURTS WERE NOT TO  
4           HONOR THE LANGUAGE THAT THEY CAME TO.

5                   IT, IT -- AND SO WHAT I'M, WHAT I'M  
6           TRYING TO BE CAREFUL ABOUT IS, IS THERE SOME POLICY  
7           OF CALIFORNIA OR FEDERAL OR OTHER LAW THAT, THAT  
8           SUPERIMPOSES UPON THE PARTIES WHO COME TO WHAT THEY  
9           CONSIDER TO BE A BINDING AGREEMENT AND SAYS,  
10          ALTHOUGH YOU HAVE CONSIDERED IT BINDING, THE LAW  
11          RESTRICTS YOU IN SOME WAY?

12                   NOW, I AM CONCERNED THAT IN THE POST-TERM  
13          SHEET SETTLEMENT AGREEMENT SUBMISSION THAT THERE  
14          WERE ALL KINDS OF THINGS HAVING TO DO WITH THIS  
15          TRANSACTION THAT DON'T SHOW UP ON THE FACE OF THIS.

16                   AND THE MOST THAT, THAT IT SEEMS THAT I,  
17          THAT I CAN DO AT THIS POINT IS TO ENFORCE THIS  
18          AGREEMENT AND NOTHING MORE.

19                   THE PARTIES NEED, PERHAPS, MORE, BUT THIS  
20          IS WHAT THEY AGREED TO.

21                   THIS IS COMMON STOCK. IT DOESN'T SAY  
22          ANYTHING ABOUT IT BEING LETTERED STOCK IN ANY WAY.  
23          IT OUGHT TO BE FREELY TRADED, UNLESS SOMEONE  
24          CONVINCES ME THAT THERE WAS SOMETHING ABOUT THE  
25          COMMON SHARES THAT REQUIRE IT HAVE RESTRICTIONS ON

1 IT AND AS I READ THROUGH THE DOCUMENT THERE WERE  
2 RESTRICTIONS THAT WERE BEING SUGGESTED.

3 THIS TALKS ABOUT A STOCK ACQUISITION.  
4 THERE'S NOTHING ABOUT A MERGER. THERE'S NOTHING  
5 ABOUT SUBSIDIARIES.

6 I UNDERSTAND FROM THE TRANSACTION THAT  
7 DIFFERENT KINDS OF TERMS WERE BEING SUGGESTED SO  
8 IT -- THE TWO QUESTIONS THAT I CAME TO THE BENCH  
9 HOPING TO GET CLARIFICATION ON IS WHAT ARE THE  
10 ESSENTIAL MATERIAL TERMS THAT ARE MISSING FROM THIS  
11 IF ANY, AND TO HEAR WHETHER OR NOT THERE WAS SOME  
12 LEGAL BASIS UPON WHICH I COULD NOT ENFORCE THIS.

13 AS I HAVE SAID, I WAS SOMEWHAT CONCERNED  
14 THAT THIS WAS DONE THROUGH A MOTION AS OPPOSED TO  
15 PLEADINGS AND SOMEONE WAS RAISING QUESTIONS HAVING  
16 TO DO WITH FRAUD IN THE INDUCEMENT AND THAT MEANS  
17 THAT THERE IS SOMETHING BEYOND THE DOCUMENT THAT I  
18 HAVE TO CONSIDER FOR THAT PURPOSE. THAT'S A LITTLE  
19 BIT IN CONFLICT WITH THE NATURE OF THE SETTLEMENT  
20 AGREEMENT WHERE I'M RESTRICTED TO THE FACE OF IT.

21 THERE IS -- I HAVEN'T ACTUALLY ASKED YOU  
22 ALL ABOUT THE NATURE OF THE MEDIATION PRIVILEGE AND  
23 THE CONFIDENTIALITIES THAT THIS COURT IS BOUND TO  
24 RESPECT WITH RESPECT TO GOING INTO THOSE  
25 NEGOTIATIONS, CALLING THE MEDIATOR, HAVING THEM

1 CROSS-EXAMINED ABOUT WHO CAME UP WITH THESE TERMS,  
2 AND WHETHER OR NOT ONE PARTY IS BEING, IS BEING  
3 SOMEHOW TAKEN ADVANTAGE OF AND IN THE COURSE OF  
4 THIS, I HAVEN'T CROSSED THAT BRIDGE. I DON'T THINK  
5 THAT I ACTUALLY NEED TO UNLESS SOMEONE CONVINCED ME  
6 THAT THERE'S A BASIS FOR DOING THAT.

7 SO I GUESS WHAT I HAVE ARE TWO MOTIONS.  
8 ONE IS A MOTION FOR AN EVIDENTIARY HEARING OF SOME  
9 SORT AND THE OTHER IS TO ENFORCE THE AGREEMENT AS  
10 IT IS WRITTEN AND ATTACH IT TO A JUDGMENT AND, AND  
11 THE REASON I'M, I'M SORT OF GIVING YOU THIS STREAM  
12 OF CONSCIOUSNESS IS TO SORT OF TELL YOU WHAT I'M  
13 THINKING AT THIS POINT AND SEE IF YOU WANT TO ADD  
14 ANYTHING TO WHAT YOU HAVE SAID UP TO NOW TO  
15 INFLUENCE WHAT I DO WITH THIS.

16 YOU'RE THE MOVING PARTY. YOU GO FIRST.

17 MR. CHATTERJEE: YOUR HONOR, IT SEEMS  
18 LIKE YOU UNDERSTAND THAT THIS IS A BINDING  
19 SETTLEMENT AGREEMENT AND TERM SHEET. I UNDERSTAND  
20 YOUR QUESTIONS.

21 I DON'T THINK WE REALLY HAVE ANYTHING  
22 ELSE TO ADD. WE DON'T THINK AN EVIDENTIARY HEARING  
23 IS NECESSARY. THERE ARE MOTIONS TO COMPEL AGAINST  
24 A THIRD PARTY CURRENTLY PENDING BEFORE JUDGE LLOYD  
25 ASSOCIATED WITH THE DEPOSITIONS OF GREG ROUSSEL ON

1 THE FOLLOW-ON DISCUSSIONS WHERE THEY TRIED TO AGREE  
2 UPON FORMAL DOCUMENTS. WE DON'T THINK THAT ANY OF  
3 THAT IS NECESSARY. WE THINK YOUR HONOR CAN ENTER  
4 JUDGMENT IN THE WAY THAT WE REQUESTED.

5 THE COURT: THIS -- IF THIS IS PART OF A  
6 JUDGMENT, THIS WOULD THEN BE PUT IN THE PUBLIC  
7 DOMAIN?

8 MR. CHATTERJEE: YOUR HONOR, AS WE SAID I  
9 THINK DURING OUR PHONE CALL THE OTHER DAY, IF IT  
10 WERE ATTACHED AS A JUDGMENT, WE WOULD ASK THAT YOUR  
11 HONOR SEAL AT LEAST PARAGRAPH 7 OF THE AGREEMENT.

12 I THINK EVERYTHING ELSE --

13 THE COURT: WHERE DOES IT SAY THAT THAT  
14 IS NOT PART OF WHAT WOULD BE PUT IN THE PUBLIC?

15 MR. CHATTERJEE: I'M SORRY?

16 THE COURT: IT SAYS ALL TERMS ARE  
17 CONFIDENTIAL.

18 MR. CHATTERJEE: WE WOULD ASK, IF YOUR  
19 HONOR WANTS TO PUT ALL OF THIS IN, IT IS CERTAINLY  
20 APPROPRIATE AND COVERED BY THE SETTLEMENT  
21 AGREEMENT.

22 IT'S BASED UPON OUR PHONE CALL THE OTHER  
23 DAY WHERE OUR FUNDAMENTAL CONCERN ON  
24 CONFIDENTIALITY IS REALLY PARAGRAPH 7, BUT I DON'T  
25 KNOW WHAT MR. BARRETT'S VIEWS ARE.

1           BUT IF WE PUT THE WHOLE THING UNDER SEAL,  
2 WE CERTAINLY WOULDN'T HAVE ANY OBJECTION TO THAT.

3           THE COURT: ALL RIGHT. FINAL WORDS?

4           MR. BARRETT: YES, YOUR HONOR. I DO  
5 THINK THAT, FIRST OF ALL, AS YOU SAY, THERE'S A  
6 MOTION TO ENFORCE. I THINK THE FIRST THING IS THAT  
7 THE COURT CAN DENY THAT MOTION ON THE BASIS OF  
8 THESE PAPERS.

9           THE SECOND THING YOU, YOU ASKED WHAT ARE  
10 THE MATERIAL TERMS THAT ARE MISSING?

11           I HAVE TO SAY THAT BASED ON WHAT -- THE  
12 WAY THAT FACEBOOK HAS LITIGATED THIS MOTION, I AM  
13 COMPLETELY AT A LOSS TO UNDERSTAND THEIR POSITION.

14           THEY CAME IN HERE. THEY FILED THIS  
15 MOTION. THEY SAID THEY ASKED THIS COURT IN THE  
16 FORM OF A PROPOSED ORDER AND IN A DECLARATION, A  
17 SWORN STATEMENT FROM THEIR COUNSEL THAT NOT JUST  
18 CONNECTU, BUT THE PRINCIPALS WHO ARE NOT EVEN  
19 PROPERLY BEFORE THIS COURT, BE ORDERED TO SIGN,  
20 EXECUTE CERTAIN DOCUMENTS TO SIGN THE DEED, IF YOU  
21 WILL, IN EFFECT.

22           AND NOW THIS MORNING FOR THE FIRST TIME  
23 MR. CHATTERJEE IS GETTING UP SAYING, NEVER MIND, WE  
24 DON'T NEED ANY OF THAT. THAT'S NOT IMPORTANT. ALL  
25 WE WANT YOU TO DO IS TO ATTACH THIS TO THE

1 JUDGMENT.

2 I DON'T EVEN KNOW, YOUR HONOR, WHERE WE  
3 WOULD START, WHAT, WHAT THAT TRANSACTION WOULD BE.

4 AS I INDICATED EARLIER, YOUR HONOR, THE  
5 NOTION OF THE ACQUISITION OF CONNECTU SHARES,  
6 CONSISTENT WITH THE STOCK AND CASH FOR STOCK  
7 ACQUISITION, IS IN THE EXPERT OPINION OF AT LEAST  
8 ONE BUSINESS PROFESSOR WHO HAS DONE HUNDREDS OF  
9 THESE TRANSACTIONS, LITERALLY INCOMPREHENSIBLE  
10 LANGUAGE. YOU DON'T KNOW IF IT'S GOING TO BE A  
11 MERGER OR ESSENTIALLY JUST A PURCHASE OF STOCK.

12 AND THAT LANGUAGE, AS A MATTER OF USAGE  
13 IN THE BUSINESS, IS AMBIGUOUS AS TO THAT POINT.

14 WELL, THAT IS THE MOST FUNDAMENTAL  
15 STRUCTURAL ASPECT OF THE TRANSACTION.

16 THE COURT: AND THERE'S NOTHING ABOUT A  
17 MERGER ON HERE?

18 MR. BARRETT: THE WORD ISN'T USED, YOUR  
19 HONOR. BUT AN ACQUISITION OF STOCK FOR CASH AND  
20 STOCK IS A TERM OF ART THAT ENCOMPASSES A MERGER.

21 AND THE DISTINCTION, YOUR HONOR, IS THAT  
22 THE WAY THAT THAT TRANSACTION IS SET UP, IF IT'S A  
23 MERGER OR IF IT'S A STOCK PURCHASE.

24 AND WHAT THEY PUT BEFORE YOU, REMEMBER,  
25 WASN'T DENOMINATED ACQUISITION. IT WAS DENOMINATED

1 BY THEM A STOCK PURCHASE, HAS HUGE TAX SEQUENCES,  
2 [REDACTED]

3 TURN JUST ON THE FORM OF THAT TRANSACTION. SO IT  
4 IS CLEARLY A MATERIAL TERM.

5 OUR EXPERT TESTIFIES THAT THAT ISSUE OF  
6 THE TRANSACTION IN A PROPERLY DONE, EVEN TERM  
7 SHEET, IS SOMETHING THAT WOULD BE ADDRESSED IN THE  
8 DOCUMENT, THAT YOU WOULD EXPECT TO BE ADDRESSED IN  
9 A DOCUMENT OF A DECLARATION OF THIS TYPE. THEY  
10 DIDN'T DO THAT.

11 YOUR HONOR, IF YOU ENTER THE JUDGMENT  
12 THAT MR. CHATTERJEE IS SUGGESTING, I SUBMIT WHAT IS  
13 GOING TO HAPPEN IS NEXT WEEK OR NEXT MONTH WE'RE  
14 GOING TO BE BACK IN FRONT OF YOU AND WE'RE GOING TO  
15 BE SAYING, YOUR HONOR, WE DON'T KNOW WHAT WE'RE  
16 SUPPOSED TO DO.

17 WE'RE HAVING A FIGHT NOW ABOUT, ABOUT  
18 WHAT, WHAT YOU KNOW, YOU CAN'T, YOU CAN'T JUST DO  
19 ONE OF THESE TRANSACTIONS. MAYBE THEY NOW WANT TO.  
20 MAYBE THEY DON'T CARE ABOUT THE RIGHT OF FIRST  
21 REFUSAL, ABOUT THE LOCK UP.

22 BECAUSE AS YOUR HONOR, BECAUSE -- ABOUT  
23 THE INDEMNITIES AND WARRANTIES. MAYBE THEY'RE  
24 SAYING THAT'S NOT IMPORTANT. IT SURE WAS IMPORTANT  
25 TO THEM WHEN THE CORPORATE LAWYERS WERE NEGOTIATING

1 A MERGER; IT SURE WASN'T IMPORTANT TO THEM WHEN  
2 MR. ROUSSEL PUT IN THE DECLARATION AND SWORE THAT  
3 THESE DOCUMENTS WERE REQUIRED. THAT'S ALL OVER  
4 THOSE DOCUMENTS.

5 IF THEY'RE SAYING THAT THEY DON'T CARE  
6 ABOUT THOSE, THEY DON'T THINK THAT THEY'RE  
7 MATERIAL, I HAD A STRANGE FEELING, YOUR HONOR,  
8 THAT, THAT THAT ORDER, WHILE COUNSEL, WHILE COUNSEL  
9 SAYS HE WANTS IT NOW, YOU KNOW, IS NOT GOING TO  
10 WORK BECAUSE THE TRANSACTION THAT THE INFORMATION  
11 THAT YOU HAVE HERE JUST, JUST ISN'T, ISN'T SPECIFIC  
12 AND DETAILED ENOUGH TO DO THIS KIND OF A  
13 TRANSACTION.

14 [REDACTED]

15  
16  
17 YOU CAN'T DO IT WITH THIS KIND OF A  
18 TRANSACTION. THAT IS -- THERE IS DISPUTED FACTUAL  
19 EVIDENCE IN FRONT OF YOUR HONOR ON THAT ISSUE AND I  
20 SUBMIT THAT THAT -- THAT THE CASES, BOTH THE STATE  
21 CASES AND THE NINTH CIRCUIT CASES, ARE QUITE CLEAR  
22 THAT UNDER THOSE CIRCUMSTANCES YOU CANNOT, YOU  
23 CANNOT SUMMARILY ENFORCE THE SETTLEMENT.

24 AND IN ADDITION, AS YOUR HONOR POINTED  
25 OUT, THERE IS THE WHOLE QUESTION OF WHETHER THOSE,

1 THOSE NUMBERS THAT ARE IN THERE THE MOST  
2 FUNDAMENTAL TERM, WHICH AS PLAINTIFF'S COUNSEL  
3 INDICATES, THE NUMBER OF SHARES OF STOCK WAS  
4 INDUCED BY FRAUD.

5 AND THAT IS CERTAINLY A QUESTION, A  
6 QUESTION THAT AS YOUR HONOR POINTED OUT, WE WOULD,  
7 WE WOULD NEED TO BE ABLE TO SUBMIT EVIDENCE AND I  
8 WOULD THINK THAT YOU WOULD -- MIGHT WELL WANT TO,  
9 TO HOLD A HEARING ON.

10 ALSO, YOUR HONOR, PERHAPS TO ANSWER YOUR  
11 PROCEDURAL QUESTION, PERHAPS IT WOULD MAKE SENSE TO  
12 ACTUALLY HAVE A COMPLAINT FILED SEEKING ENFORCEMENT  
13 OF THIS AGREEMENT TO HAVE AN ANSWER THAT, THAT SETS  
14 OUT DEFENSES IN THE MANNER THAT, THAT IS, PERHAPS,  
15 ONE THAT IS MORE, MORE USUAL IN LITIGATION SO THAT  
16 THE COURT HAS THE CLAIMS AND WE, AND WE KNOW WHAT  
17 THE ACTUAL CLAIM IS BECAUSE, AS I SAY, THEY KEEP  
18 CHANGING THEIR POSITION ON WHAT IT IS THAT THEY'RE  
19 REALLY ASKING FOR.

20 IF WE HAVE A COMPLAINT, IT WILL SET FORTH  
21 THE CLAIM, AND WE CAN ANSWER IT AND PUT IN OUR  
22 DEFENSES TO THE CLAIM THAT THEY'RE ACTUALLY MAKING  
23 AND THEN, AND THEN WE CAN FIGURE OUT, YOU KNOW, IF  
24 THEY WANT TO SEEK SUMMARY JUDGMENT, WE CAN FIGURE  
25 OUT IF WE NEED DISCOVERY, WHAT DISCOVERY IT IS WE

1 NEED, AND, AND ESSENTIALLY HAVE IT IN THE FORM OF  
2 AN INDEPENDENT PROCEEDING TO ENFORCE THE SETTLEMENT  
3 AGREEMENT.

4 AND PERHAPS THAT WOULD CLARIFY SOME OF  
5 THE PROCEDURAL UNCERTAINTY THAT I UNDERSTAND IS  
6 CONCERNING YOUR HONOR.

7 THE COURT: WELL, LET ME ASK ONE  
8 HOPEFULLY FINAL AREA BECAUSE I DO NEED TO BRING  
9 THIS TO A CLOSE.

10 SEVERAL TIMES YOU HAVE MENTIONED THE  
11 PARTIES. MY UNDERSTANDING OF THIS AGREEMENT IS  
12 THAT IT SETTLES ALL DISPUTES BETWEEN CONNECTU AND  
13 ITS RELATED PARTIES.

14 MR. BARRETT: UH-HUH.

15 THE COURT: AND FACEBOOK AND IT'S RELATED  
16 PARTIES.

17 AND THEN THE STATEMENT IS THAT, "THE  
18 PARTIES STIPULATE THAT THE COURT SHALL HAVE  
19 JURISDICTION TO ENFORCE THIS."

20 AND THE SIGNATURES ARE BY VARIOUS PEOPLE.

21 MR. BARRETT: UH-HUH.

22 THE COURT: INCLUDING THE COMPANIES AS  
23 WELL AS INDIVIDUALS.

24 IS YOUR POSITION THAT ONLY THE COMPANIES  
25 ARE PARTIES TO THIS SETTLEMENT AGREEMENT AND NOT

1 THE INDIVIDUALS?

2 MR. BARRETT: THERE ARE TWO POINTS, YOUR  
3 HONOR. FIRST OF ALL, THERE IS ONE SHAREHOLDER,  
4 HOWARD WINKLEVOSS.

5 THE COURT: I UNDERSTAND.

6 MR. BARRETT: WHO IS NOT A PARTY TO THE  
7 DOCUMENT.

8 THE COURT: RIGHT.

9 MR. BARRETT: SO HE'S NOT A PARTY TO THE  
10 DOCUMENT, PERIOD.

11 THE COURT: IS HE REPRESENTED HERE TODAY?

12 MR. BARRETT: HE IS NOT AS SUCH, YOUR  
13 HONOR, BECAUSE HE'S NOT BEEN SERVED AND NO RELIEF  
14 IS BEING SOUGHT IN OUR VIEW AGAINST HIM.

15 MR. CHATTERJEE: ALTHOUGH HE DID APPEAR  
16 IN THE BOSTON HEARING WHERE THIS VERY MOTION WAS  
17 DISCUSSED IN DETAIL.

18 MR. BARRETT: I'M NOT SURE WHAT YOU MEAN  
19 BY "APPEAR."

20 THE COURT: YOU DON'T REPRESENT HIM?

21 MR. BARRETT: NOT FOR THIS PURPOSE.

22 THE COURT: NO ONE ELSE HERE REPRESENTS  
23 THAT PERSON?

24 MR. BARRETT: THAT IS CORRECT, YOUR  
25 HONOR.

1 THE COURT: BUT AS TO THE OTHERS?

2 MR. BARRETT: AS TO THE OTHERS, YOUR  
3 HONOR, MY POINT IS A LITTLE DIFFERENT.

4 THEY OBVIOUSLY SIGNED THE DOCUMENT;  
5 HOWEVER, JUST BECAUSE SOMEONE ENTERED INTO A  
6 CONTRACT DOES NOT GIVE A COURT THE LEGAL POWER TO  
7 ORDER THAT PERSON TO SPECIFICALLY PERFORM THE  
8 CONTRACT.

9 WHAT IS NECESSARY IS THAT THE PERSON BE  
10 SERVED, AND I WILL SAY, YOUR HONOR, THAT THESE  
11 THREE INDIVIDUALS PREVAILED ON A MOTION TO DISMISS  
12 FACEBOOK'S ORIGINAL COMPLAINT AGAINST THEM, THE  
13 COMPLAINT THAT WAS FILED IN STATE COURT AGAINST  
14 THEM.

15 THEY PREVAILED ON A MOTION TO DISMISS ON  
16 THE GROUND THAT THERE WAS NO PERSONAL JURISDICTION  
17 OVER THEM.

18 THE COURT: BUT WHAT DO YOU -- WHAT IS  
19 YOUR POSITION WITH RESPECT TO PARAGRAPH 4?

20 MR. BARRETT: I THINK THAT THAT -- IT'S  
21 POSSIBLE THAT THAT COULD BE READ AS A SUBMISSION TO  
22 JURISDICTION BUT THAT IS DIFFERENT FROM ACTUALLY  
23 SERVING PEOPLE AND REQUIRING THEM TO COME INTO  
24 COURT AND DEFEND.

25 THEY HAVE NOT BEEN SERVED, YOUR HONOR.

1 I CAN SIGN A CONTRACT WITH  
2 MR. CHATTERJEE, BUT HE CAN'T JUST WALK IN FRONT OF  
3 YOUR HONOR AND SAY BARRETT AGREED TO SELL ME HIS  
4 CAR AND ENFORCE IT AND HE HAS TO SERVE ME WITH A  
5 SUMMONS AND COMPLAINT.

6 THE COURT: WHAT IS YOUR POSITION?

7 MR. CHATTERJEE: THE FIRST IS THAT YOU  
8 HAVE TWO DECLARATIONS FROM CAMERON WINKLEVOSS.  
9 IT'S ABSURD FOR THEM TO SAY THAT CAMERON  
10 WINKLEVOSS, WHO SIGNED THIS DOCUMENT AND PUT IN  
11 DECLARATIONS IN OPPOSITION TO OUR MOTION, ISN'T  
12 FULLY AWARE AND HASN'T HAD AN OPPORTUNITY TO SAY  
13 WHAT HE REALLY WANTS TO SAY.

14 THESE THREE PEOPLE CAMERON AND TYLER  
15 WINKLEVOSS AND DIVYA NARENDRA CONSTITUTE 99 PERCENT  
16 OF THE COMPANY. THEY, THEY ARE THE COMPANY FOR ALL  
17 INTENTS AND PURPOSES.

18 WHEN WE FILED THIS MOTION, WE FILED A  
19 NOTICE OF THE RELATED CASE OR OF THIS FILING IN  
20 BOSTON. MR. HORNICK, WHO IS HERE TODAY, REPRESENTS  
21 THEM IN THAT CASE. THEY ARE INDIVIDUALS WHO ARE  
22 PLAINTIFFS IN THAT CASE.

23 THEY RECEIVED A NOTICE OF THE FILING AND  
24 A COPY OF THE BRIEF. HE RECEIVED IT.

25 MR. HORNICK AND MR. MOSKO ARE IN THE SAME

1 FIRM. THEY BOTH REPRESENT CAMERON WINKLEVOSS AND  
2 TYLER WINKLEVOSS AND DIVYA NARENDRA. THEY DIDN'T  
3 DISPUTE THAT.

4 DIVYA NARENDRA CAME TO COURT AND HE WAS  
5 FULLY AWARE OF THIS MOTION AND THIS MOTION WAS  
6 SUBMITTED TO JUDGE WOODLOCK AS PART OF THE  
7 PROCEEDINGS WHERE THEY WERE REPRESENTING CONNECTU  
8 AND THE THREE PRINCIPALS.

9 AT END OF THE DAY, YOUR HONOR, IF YOU  
10 FIND THIS AN ENFORCEABLE CONTRACT AGAINST CONNECTU,  
11 IT WOULD IN OUR VIEW, NO MATTER WHAT, CONSTITUTE  
12 RES JUDICATA AGAINST THE THREE INDIVIDUALS BECAUSE  
13 THEY ARE IN PRIVITY WITH THE COMPANY, THEY ARE THE  
14 BOARD OF DIRECTORS. IT WOULD ALSO APPLY TO HOWARD  
15 WINKLEVOSS AND HE WAS AT THE MOTION.

16 AND SO AT THE END OF THE DAY, HOWEVER  
17 THEY CAST IT, IT'S A NONISSUE.

18 THE COURT: WELL, WHAT I'M RAISING FOR  
19 MYSELF, AND I HESITATE TO DO THIS BECAUSE IT'S LATE  
20 IN THE DAY, BUT IT SEEMS TO ME THAT UNLESS WE'RE  
21 TALKING ABOUT A TREASURY STOCK, THEY ALL --  
22 CONNECTU STOCK IN EXCHANGE FOR MONEY AND STOCK  
23 WOULD REQUIRE FOR MY ENFORCEMENT THE ABILITY TO  
24 ORDER INDIVIDUALS WHO OWN CONNECTU STOCK TO MAKE  
25 THE EXCHANGE.

1                   NOW, MAYBE IT'S NOT IN THIS PROCEEDING  
2                   THAT THAT HAPPENS BUT SOME, SOME SUBSEQUENT  
3                   PROCEEDING.

4                   I'M JUST TRYING TO THINK THROUGH WHAT IT  
5                   IS THAT, THAT I'M BEING ASKED TO DO AND AGAINST  
6                   WHOM I'M BEING ASKED TO DO IT AND THE FORM.

7                   THEY'RE NOT PARTIES TO THE CURRENT  
8                   LITIGATIONS?

9                   MR. CHATTERJEE:   THEY ARE PARTIES TO THE  
10                  LITIGATION IN MASSACHUSETTS.   THEY ARE PLAINTIFFS  
11                  IN THAT CASE.

12                  THE COURT:   I SEE.   THEY ARE PLAINTIFFS  
13                  IN THAT CASE.

14                  MR. CHATTERJEE:   AND THEY SUBMITTED TO  
15                  THIS COURT FOR RESOLUTION OF ALL OF THE DISPUTES,  
16                  YOUR HONOR, AS YOU CORRECTLY NOTED IN PARAGRAPH 4.

17                  THE COURT:   I KNOW THAT, BUT IT SEEMS TO  
18                  ME THAT WHAT I UNDERSTOOD FROM COUNSEL IS THAT THEY  
19                  ARE NOT PARTIES TO THE LITIGATION BUT THEY ARE  
20                  PARTIES TO AT LEAST THE MASSACHUSETTS LITIGATION.

21                  MR. HORNICK:   MAY I, YOUR HONOR?

22                  THE COURT:   YES.

23                  MR. HORNICK:   I'M JOHN HORNICK, AND I  
24                  REPRESENT CONNECTU IN THE MASSACHUSETTS CASE.   I AM  
25                  NOT ADMITTED BEFORE THIS COURT, AND I HAVE NOT

1 FILED A MOTION PRO HAC VICE, HOWEVER, I WOULD TAKE  
2 THE POSITION THAT THE INDIVIDUALS, THE WINKLEVOSS  
3 TWINS AND MR. NARENDRA ARE NOT YET PLAINTIFFS IN  
4 THE MASSACHUSETTS CASE BECAUSE ALTHOUGH THERE WAS  
5 AN AMENDED COMPLAINT THAT WAS ENTERED ON OR FILED,  
6 I SHOULD SAY, ON AUGUST 8TH OF 2007, THAT NAMED  
7 THEM AS COPLAINTIFFS FOR THE FIRST TIME,  
8 IMMEDIATELY AFTER THAT, THE DEFENDANTS FILED A  
9 MOTION TO DISMISS WITH RESPECT TO THAT AMENDED  
10 COMPLAINT.

11 THE JUDGE NEVER RULED ON THEM. SO I  
12 THINK THE QUESTION OF WHETHER OR NOT THEY EVER  
13 BECAME PLAINTIFFS IS STILL AN OPEN ISSUE.

14 THE COURT: THANK YOU.

15 MR. CHATTERJEE: YOUR HONOR,  
16 RESPECTFULLY, THEY PUT THEMSELVES AS PLAINTIFFS IN  
17 THE MASSACHUSETTS CASE.

18 THEY ASSERTED CLAIMS WHICH WE HAD ARGUED  
19 WERE NONTRANSFERABLE.

20 THE EXISTENCE OF A MOTION TO DISMISS  
21 DOESN'T CHANGE THE FACT THAT THEY IRREVOCABLY  
22 SUBMITTED THEMSELVES TO THE MASSACHUSETTS CASE AS A  
23 PLAINTIFF IN THAT CASE. THIS IS ABSURD.

24 THE COURT: WELL, I DON'T WANT TO GET  
25 INTO THE MERITS OF IT. I SIMPLY HEARD THREE OR

1 FOUR TIMES FROM COUNSEL SOME CONCERN ABOUT HOW FAR  
2 THIS MOTION COULD GO WITH RESPECT TO THE  
3 INDIVIDUALS.

4 I DO SEE THAT, THAT THEY ARE SIGNATORIES.  
5 I DO SEE THAT THEY ARE DESCRIBED AS PARTIES. I  
6 ALSO SEE THAT THEY ARE -- I PRESUME THEY'RE BEING  
7 REFERRED TO AS FOUNDERS AND THEY MADE CERTAIN  
8 REPRESENTATIONS AND WARRANTIES IN THE SETTLEMENT  
9 AGREEMENT.

10 AND SO I WILL BE VERY CAREFUL IN  
11 ARTICULATING WHATEVER I DO TO SEPARATE MY  
12 CONSIDERATIONS SO THAT THE INDIVIDUALS CAN MAKE ANY  
13 OBJECTIONS THAT THEY WISH SEPARATE AND APART FROM  
14 THE COMPANY.

15 WELL, I --

16 MR. BARRETT: YOUR HONOR, EXCUSE ME. IF  
17 I COULD JUST MAKE ONE POINT ABOUT THAT.

18 THE COURT: YES.

19 MR. BARRETT: BECAUSE I'M VERY  
20 SYMPATHETIC TO YOUR HONOR'S CONFUSION AND I THINK  
21 ALL OF IT ULTIMATELY COMES BACK TO THE FACT THAT,  
22 THAT THE PROBLEM HERE IS THAT, IS THAT YOU DON'T  
23 HAVE A CLEAR ENFORCEABLE CONTRACT THAT SETS --  
24 CLEARLY SETS FORTH THE RIGHTS AND OBLIGATIONS OF  
25 BOTH PARTIES TO THE CONTRACT.

1                   WHAT THIS LAST FIVE OR TEN MINUTES OF  
2                   DISCUSSION SHOWS AND IS ILLUSTRATIVE OF IS WHAT  
3                   FACEBOOK IS REALLY ASKING YOU TO DO IS TO WRITE A  
4                   CONTRACT FOR THESE PARTIES THAT THEY NEVER AGREED  
5                   ON FOR THEMSELVES. AND I'M SURE YOUR HONOR KNOWS,  
6                   THAT IS EXACTLY WHAT, WHAT THE COURT CAN'T DO IN  
7                   ANY CONTRACT CASE AND WE HAVE CITED, YOU KNOW, ANY  
8                   NUMBER OF SETTLEMENT CASES THAT, THAT MAKE CLEAR  
9                   THAT, THAT THAT IS NOT THE FUNCTION OF THE COURT.

10                   SO THE COURT IS TRYING TO BEND OVER  
11                   BACKWARDS TO FIGURE OUT, WELL, CAN I UNDERSTAND  
12                   PEOPLE WHO MAY HAVE BEEN PARTIES OUT IN  
13                   MASSACHUSETTS BUT HAVE NOT BEEN PROPERLY SERVED IN  
14                   THIS ACTION?

15                   YOUR HONOR, I DON'T THINK YOU SHOULD HAVE  
16                   TO DO THAT.

17                   YOU SHOULDN'T BE -- HAVE TO BE STRUGGLING  
18                   WITH THOSE KINDS OF QUESTIONS.

19                   LET THEM, YOU KNOW, MAKE A PROPER MOTION  
20                   OR A PROPER COMPLAINT. LET THEM SERVE PARTIES IF  
21                   THEY THINK THEY HAVE OR ELSE THERE'S NOTHING HERE  
22                   TO ENFORCE.

23                   THE COURT: I SAID FINAL WORD SO PERHAPS  
24                   I SHOULD STICK TO MY GUNS. ALTHOUGH I SAW ONE OF  
25                   YOUR COLLEAGUES PASS YOU A NOTE.

1 IS THERE ANYTHING?

2 MR. CHATTERJEE: YOUR HONOR, I'M NOT  
3 GOING TO BELABOR WHAT HAPPENED IN THE OTHER CASE.

4 THE ONLY THING I WANT TO SAY ABOUT THEIR  
5 CHARACTERIZATION OF THERE NOT BEING A MEETING OF  
6 THE MINDS ON THE STOCK IN CASH FOR STOCK  
7 ACQUISITION, WHAT MR. HITSCHERICH SAID, WHICH WAS  
8 THEIR EXPERT, WAS THAT THAT COULD BE A BROAD SET OF  
9 DIFFERENT TYPES OF TRANSACTIONS, NOT THAT IT ISN'T  
10 ANY OF THEM. IT COULD BE ALL OF THEM.

11 AND THE FOLLOWING SENTENCE SAYS THAT "WE  
12 WILL DETERMINE THE FORM AND DOCUMENTATION OF THE  
13 ACQUISITION OF CONNECTU'S SHARES."

14 IT SPECIFICALLY CONTEMPLATED THERE MAY BE  
15 MULTIPLE DIFFERENT FORMS THAT ARE CONSISTENT WITH  
16 IT AND FACEBOOK CAN DETERMINE IT.

17 THAT WAS THE ONLY POINT I WANTED TO MAKE  
18 TO RESPOND TO HIS POINT.

19 THANK YOU, YOUR HONOR. I APPRECIATE YOUR  
20 TIME.

21 MR. BARRETT: BUT THEY CAN'T CHANGE THE  
22 SUBSTANCE, THE MATERIAL SUBSTANCE OF THE  
23 TRANSACTION AND THAT'S --

24 THE COURT: PRECISELY. THANK YOU. THANK  
25 YOU BOTH.

1 MR. BARRETT: THANK YOU, YOUR HONOR.

2 SHOULD WE AWAIT THE COURT OR --

3 THE COURT: I DON'T KNOW THE -- IF I KNEW  
4 THE TIMING OF WHAT I DO IN THIS JOB.

5 SOMEONE ONCE REMINDED ME, AS I BECAME A  
6 JUDGE, THAT JUDGING IS A CONTEMPLATED ART.

7 I HAVE NEVER TAKEN FULL ADVANTAGE OF THAT  
8 BECAUSE I RARELY FEEL I HAVE TIME TO CONTEMPLATE.

9 BUT I HAVE BENEFITED FROM YOUR ARGUMENT  
10 TODAY, AND I'LL HAVE THE MATTER UNDER SUBMISSION.

11 I WILL GIVE YOU A DECISION AS QUICKLY AS  
12 I CAN.

13 I UNDERSTAND HOW IMPORTANT THIS IS THAT  
14 YOU HAVE A QUICK DECISION. IF I CAN DO IT IN 24  
15 HOURS, I'LL DO MY BEST TO DO THAT.

16 MR. CHATTERJEE: THANK YOU, YOUR HONOR.

17 MR. BARRETT: THANK YOU, YOUR HONOR.

18 (WHEREUPON, THE EVENING RECESS WAS  
19 TAKEN.)

20

21

22

23

24

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