

In the Matter Of:

AMY NEVILLE vs SNAP INC.

22STCV33500

MOTION

October 18, 2023



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APPEARANCES :

FOR PLAINTIFFS: SOCIAL MEDIA VICTIMS LAW CENTER
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1 INDEX FOR WEDNESDAY, OCTOBER 18, 2023

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4 M A S T E R I N D E X

5 INDEX OF WITNESSES

6 (NONE)

7
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9
10 EXHIBITS

11 (NONE)

1 CASE NUMBER: 22STCV33500
2 CASE NAME: NEVILLE V. SNAP
3 LOS ANGELES, CA WEDNESDAY, OCTOBER 18, 2023
4 DEPARTMENT SSC-7 HON. LAWRENCE P. RIFF, JUDGE
5 REPORTER: GAIL R. DAVIDSON, CSR NO. 12823
6 TIME: P.M. SESSION
7

8 APPEARANCES:

9 (AS HERETOFORE STATED)
10

11 MS. GRANT: GOOD AFTERNOON, YOUR HONOR. AGAIN,
12 FOR THE COURT REPORTER, JESSICA GRANT ON BEHALF OF SNAP,
13 INC. I WILL RESERVE 20 MINUTES FOR REBUTTAL, SO THAT
14 LEAVES ME WITH ABOUT 25 MINUTES. BEFORE WE BROKE, YOUR
15 HONOR, YOU HAD ASKED ME FOR CALIFORNIA AUTHORITY WHERE
16 COURTS HAVE SUSTAINED A DEMURRER.

17 THE COURT: HOLD ON A SECOND. FOLKS ON COURT
18 CONNECT, PLEASE MUTE OR I WILL HAVE TO DO IT FOR YOU.

19 MS. GRANT: BEFORE WE BROKE, YOU ASKED FOR
20 CALIFORNIA CASES THAT HAVE SUSTAINED DEMURRER WITHOUT
21 LEAVE TO AMEND AND I WANTED TO GIVE YOU THOSE CASES
22 EITHER ON -- STRIKE THAT.

23 THESE ARE PRODUCTS LIABILITY CASES WHERE THE
24 DEMURRER OR MOTION TO DISMISS WAS GRANTED WITHOUT LEAVE
25 TO AMEND.

26 THE COURT: BEFORE YOU DO, ARE THESE IN YOUR
27 PAPERS OR NOT IN YOUR PAPERS?

28 MS. GRANT: SOME OF THEM ARE.

1 THE COURT: SPECIFY WHICH, WOULD YOU? HOLD ON A
2 SECOND, PLEASE.

3 MS. GRANT: JACKSON VERSUS AIR B&B, CENTRAL
4 DISTRICT OF CALIFORNIA 2022 IN OUR BRIEF; SIEVER,
5 S-I-E-V-E-R, VERSUS ESTATE OF CAZES, C-A-Z-E-S, DISTRICT
6 OF UTAH 2019, I BELIEVE THAT'S IN OUR BRIEF; FRY VERSUS
7 SNAP, CENTRAL DISTRICT OF CALIFORNIA 2023 IS IN OUR
8 BRIEF; VANICK VERSUS SNAP, CENTRAL DISTRICT OF
9 CALIFORNIA 2023, AND I SHOULD LET YOU KNOW, YOUR HONOR,
10 THE COURT SUSTAINED THE MOTION TO DISMISS THERE ON
11 GROUNDS THAT SNAPCHAT IS NOT A PRODUCT. THAT WAS THE
12 BASIS OF THE COURT'S -- THE DEMURRER.

13 ANDERSON VERSUS TIKTOK, EASTERN DISTRICT OF
14 PENNSYLVANIA 2022, IN OUR BRIEF; MP VERSUS META, THAT'S
15 THE DISTRICT OF SOUTH CAROLINA 2023, THAT WAS A CHURCH
16 SHOOTING I ALLUDED TO EARLIER; LW VERSUS SNAP, SOUTHERN
17 DISTRICT OF CALIFORNIA 2023, IN OUR BRIEF; GRUPI,
18 G-R-U-P-I VERSUS X-TREME SCOOTERS, CALIFORNIA SUPERIOR
19 COURT 2017, THAT'S NOT IN OUR BRIEF; AND REYES,
20 R-E-Y-E-S, VERSUS L.A. VAPOR WORKS, THAT'S CALIFORNIA
21 SUPERIOR COURT 2017.

22 THEN THERE'S ALSO A BINDING CALIFORNIA AUTHORITY
23 IN MODISETTE VERSUS APPLE. THERE, THE COURT OF APPEAL
24 AFFIRMED THE TRIAL COURT'S ORDER SUSTAINING APPLE'S
25 DEMURRER WITHOUT LEAVE TO AMEND IN A NEGLIGENT PRODUCTS
26 LIABILITY CASE. THE COURT THERE FOUND THAT EVEN IF IT
27 WAS FORESEEABLE THAT ALL CELL PHONE USE BY DRIVERS WOULD
28 RESULT IN ACCIDENTS, FORESEEABILITY IS NOT SYNONYMOUS

1 WITH DUTY NOR IS IT A SUBSTITUTE.

2 AS WE NOTED IN OUR BRIEFS, COURTS IN CALIFORNIA
3 AND ACROSS THE COUNTRY HAVE DETERMINED THAT INTERNET
4 SERVICE PROVIDERS AND SOFTWARE APPLICATIONS ARE NOT
5 PRODUCTS. THERE'S NO CASE LAW THAT SUPPORTS FINDING
6 THAT SNAPCHAT IS A PRODUCT. SO I WANT TO GET MORE INTO
7 YOUR QUESTION ABOUT PRODUCTS LIABILITY, ASSUMING SECTION
8 230 DOES NOT APPLY.

9 THE COURT: PLEASE DO. LET ME ASK YOU, WILL YOU
10 PLEASE FILE A NOTICE OF SUPPLEMENTAL AUTHORITY WITH
11 ANYTHING YOU'VE TOLD ME AND ANY CASE YOU MENTIONED TODAY
12 THAT'S NOT IN YOUR BRIEF?

13 MS. GRANT: WE WILL DO THAT. SO EVEN IF
14 PLAINTIFFS' CLAIMS WERE NOT BARRED BY SECTION 230, AND
15 OBVIOUSLY WE THINK THEY ARE, THEY CAN STILL NOT STATE
16 ANY TYPE OF CLAIM FOR PRODUCTS LIABILITY AS A MATTER OF
17 LAW. NO CASE, YOUR HONOR, HAS EVER INVOLVED AN
18 INTANGIBLE SOFTWARE APP OR SERVICE TO BE A PRODUCT, YOU
19 WOULD BE THE FIRST IN THE UNITED STATES.

20 THE CASE THAT PLAINTIFF PRIMARILY RELIES UPON,
21 WINTER, THAT CASE IN THE 9TH CIRCUIT HELD, ACTUALLY THE
22 9TH CIRCUIT REJECTED AN ATTEMPT TO EXTEND PRODUCTS
23 LIABILITY LAW BEYOND TANGIBLE THINGS. YOU'RE PROBABLY
24 FAMILIAR WITH THE 9TH CIRCUIT'S LANGUAGE WHERE THE COURT
25 HELD: QUOTE, THE LANGUAGE OF PRODUCTS LIABILITY LAW
26 REFLECTS ITS FOCUS ON TANGIBLE ITEMS SUCH AS TIRES,
27 AUTOMOBILES, INSECTICIDES WITH NO INDICATION THAT THE
28 DOCTRINE SHOULD BE EXTENDED BEYOND THAT AREA.

1 THE COURT EMPHASIZED THAT THE PURPOSES SERVED BY
2 PRODUCTS LIABILITY LAW ARE FOCUSED ON THE TANGIBLE
3 WORLD. AND SINCE WINTER, MANY COURTS HAVE CONCERNS THAT
4 ON-LINE SOFTWARE PLATFORMS LIKE SNAPCHAT ARE INTANGIBLE
5 SERVICES, NOT PRODUCTS. SO IT'S ZIENCIK, Z-I-E-N-C-I-K,
6 VERSUS SNAP, CENTRAL DISTRICT IN 2023 HELD THAT SNAPCHAT
7 IS AN INTANGIBLE APP THAT'S MORE LIKE A SERVICE THAN A
8 PRODUCT. AND SERVICES ARE NOT SUBJECT TO PRODUCT
9 LIABILITY LAW. DOE VERSUS UBER, THAT'S L.A. SUPERIOR
10 COURT RIGHT HERE, SUSTAINED A DEMURRER --

11 THE COURT: THAT WAS A COURT OF APPEAL DECISION
12 RELATIVE TO THE SUPERIOR COURT?

13 MS. GRANT: AFFIRMING THAT.

14 THE COURT: PARDON ME.

15 MS. GRANT: SUSTAINED THE DEMURRER ON PLAINTIFF'S
16 STRICT LIABILITY CLAIM BECAUSE IT CONCLUDED THAT, QUOTE,
17 THE UBER APP WAS NOT A PRODUCT, THUS A PRODUCTS
18 LIABILITY THEORY OF RECOVERY WAS NOT LEGALLY VIABLE.
19 THAT'S AT PAGE 419.

20 JAMES VERSUS MEOW MEDIA, THAT'S THE 6TH CIRCUIT,
21 HELD THAT ELECTRONIC MEDIA ARE NOT PRODUCT BECAUSE WORDS
22 AND PICTURES ARE NOT PRODUCTS. AND OF COURSE WHEN YOU
23 SEND A SNAP OR A MESSAGE, THEY'RE CALLED SNAPS ON
24 SNAPCHAT, IT'S PICTURES, VIDEOS AND WORDS.

25 THERE'S QUINTEROS VERSUS INNOGAMES. THAT'S THE
26 WESTERN DISTRICT OF WASHINGTON 2022 HOLDING THAT A VIDEO
27 GAME IS SOFTWARE, IT'S A SERVICE, NOT AN OBJECT.
28 GROSSMAN VERSUS ROCKAWAY IN NEW JERSEY SUPERIOR COURT:

1 QUOTE, THERE ARE NO FACTS ALLEGED THAT WOULD SUPPORT THE
2 THEORY THAT SNAP'S ACTIONS QUALIFY OR CONSTITUTE A
3 PRODUCT UNDER PRODUCTS LIABILITY LAW. THEN JACOBS
4 VERSUS META PLATFORMS, CALIFORNIA SUPERIOR COURT IN
5 MARCH OF 2023: QUOTE, HAVING REVIEWED THE AUTHORITY
6 CITED BY THE PARTIES AND RAISED BY THE COURT, THE COURT
7 FINDS THAT A SOCIAL MEDIA PLATFORM THAT CONNECTS ITS
8 USERS, FACEBOOK, IS MORE AKIN TO A SERVICE THAN PRODUCT.

9 THE COURT: CAN I ASK YOU TWO THINGS? I KNOW
10 YOU'RE RUSHING AND I WORRY, I DO WANT TO HOLD YOU TO
11 YOUR TIME BUT I ALSO DON'T WANT YOU TO RUSH, SO YOU NEED
12 TO TELL ME IF THE TIME I'VE GIVEN IS INADEQUATE.

13 MS. GRANT: THANK YOU, YOUR HONOR.

14 THE COURT: DON'T BE BASHFUL IN THAT REGARD.

15 NO. 1, AS SOON AS THE FLOOR IS OPEN TO THE
16 PLAINTIFF AND THIS TOPIC COMES UP, THEY WILL CITE TO ME
17 THE ELECTRIC CURRENT CASES, RIGHT? SO YOU MIGHT
18 ANTICIPATE THAT AND TELL ME ABOUT THAT.

19 SECOND AND MORE BROADLY, IS THIS WORLD WE ARE NOW
20 TALKING ABOUT A BINARY, SOMETHING THAT'S EITHER A
21 PRODUCT OR A SERVICE AND THERE IS NOTHING IN-BETWEEN?

22 MS. GRANT: I DO THINK SO. I MEAN, I WAS GOING TO
23 MENTION SECTION 19-A OF THE THIRD RESTATEMENT, WHICH
24 DEFINES A PRODUCT AS A TANGIBLE PERSONAL PROPERTY
25 DISTRIBUTED COMMERCIALY FOR USE OR CONSUMPTION. IN THE
26 LAST 25 YEARS, WE'VE HAD A LOT OF DIFFERENT SOCIAL APPS
27 IN THE LAST 25 YEARS. IT HAS NOT BEEN UPDATED TO EXTEND
28 TO ANYTHING BEYOND TANGIBLE PRODUCTS.

1 LET ME TALK ABOUT CAUSATION AND I WANT TO ANSWER
2 ANOTHER QUESTION YOU POSED EARLIER THIS MORNING. I
3 THINK PART OF THE REASON WHY THESE CLAIMS DON'T MAKE
4 SENSE IN REGARDS TO A SOFTWARE APP IS IF YOU THINK OF
5 THE MULTIPLE INTERVENING CAUSES THAT OCCUR --

6 THE COURT: HOW DO I DECIDE THAT ON DEMURRER?
7 ISN'T THAT THE PROTOTYPICAL QUESTION OF FACT AS TO
8 WHETHER AN INTERVENING CAUSE IS A SUPERSEDING CAUSE OR
9 MERELY A CONTRIBUTING CAUSE?

10 MS. GRANT: I WAS GOING TO ADDRESS THAT IN THE
11 QUESTION THAT YOU POSED. I REMEMBER THE QUESTION YOU
12 POSED EARLIER THIS MORNING, I'M PARAPHRASING AND I
13 APOLOGIZE IF I GET IT WRONG. WHO SHOULD BEAR THE COST
14 OF LOSSES ASSOCIATED WITH SOFTWARE APPS IN THE 2023
15 WORLD WE'RE IN WITH ELECTRONIC INTERCONNECTEDNESS.

16 AND I THOUGHT ABOUT IT DURING LUNCH, WHAT STRUCK
17 ME WAS THAT THAT QUESTION PRESUPPOSES THAT THE HARM IN
18 THIS CASE FLOWS DIRECTLY FROM THE USE OF SNAPCHAT.
19 THAT'S NOT THE CASE.

20 NEARLY 400 MILLION USERS USE SNAPCHAT ON A DAILY
21 BASIS AND DID NOT DIE OF FENTANYL POISONING. THE HARM
22 HERE IS ASSOCIATED WITH INJECTING A FENTANYL-LACED DRUG
23 AND THE PARTY THAT BEARS RESPONSIBILITY FOR THAT HARM IS
24 THE PARTY THAT MADE THE DRUG, SOLD THE DRUG, HAD
25 POSSESSION OF THE DRUG AND MADE MONEY OFF THE SALE OF
26 THAT DRUG. AND THAT'S THE DRUG DEALER.

27 SNAP PLAYED NO ROLE IN ANY OF THOSE THINGS I JUST
28 LAID OUT, NOR DID IT PLAY ANY ROLE IN THE CREATION OF

1 THE CONTENT, THE MESSAGES ABOUT BUYING DRUGS. THAT'S
2 WHY YOUR QUESTION, IT DOESN'T REALLY APPLY. IT APPLIES
3 TO A MANUFACTURER WHO MAKES THE PRODUCT AND SELLS THE
4 PRODUCT AND THE DISTRIBUTOR IN THE TRADITIONAL LINE OF
5 PRODUCTS LIABILITY BECAUSE THEY'RE MAKING AND SELLING
6 THE PRODUCT.

7 HERE, THE PRODUCT THAT CAUSED THE HARM, THE
8 OVERDOSE AND DEATH, WAS THE DRUG THAT WAS SECRETLY LACED
9 WITH FENTANYL, A LETHAL DOSE OF FENTANYL.

10 SO WHAT YOUR QUESTION SUGGESTS IS THAT SNAP SHOULD
11 BE HELD LIABLE FOR ALL THE CRIMINAL ACTIVITY THAT CAN
12 OCCUR ON ITS PLATFORM WITH NEARLY 400 MILLION DAILY
13 USERS. SOME OF THEM ARE, YES, UP TO NO GOOD AND DOING
14 THINGS THAT ARE ILLEGAL.

15 THE COURT: YOUR ARGUMENT IS BROADER THAN THE
16 PRODUCTS LIABILITY. YOUR ARGUMENT WOULD REACH TO
17 NEGLIGENCE AS WELL.

18 MS. GRANT: RIGHT, BECAUSE --

19 THE COURT: NOTWITHSTANDING WHAT IS WEIRUM VERSUS
20 RKO AND A VARIETY OF OTHER -- WEIRUM WAS THE WRONG CASE
21 PERHAPS, BUT THERE ARE A COLLECTION OF CASES, CALIFORNIA
22 SUPREME COURT AND OTHERWISE, WHERE THERE ARE CRIMINAL
23 VIOLATIONS BY EMPLOYEES, SAY IN HOSPITALS OR POLICE
24 FORCES THAT ARE OUTSIDE THE SCOPE OF THE EMPLOYMENT OF
25 THE -- OUTSIDE THE EMPLOYMENT RELATIONSHIP. BUT
26 NONETHELESS, THERE IS A DUTY UNDER NEGLIGENCE IN SOME OF
27 THOSE CASES.

28 MS. GRANT: ALL THE CASES THAT PLAINTIFF CITES ARE

1 PREMISES LIABILITY AND IT'S NEVER BEEN EXTENDED IN ANY
2 COURT IN CALIFORNIA TO SOFTWARE APPS. IF YOU'RE TALKING
3 ABOUT THE ROWLAND FACTORS, ONE OF THE -- THERE'S SEVEN
4 FACTORS BUT THERE'S TWO BUCKETS, RIGHT, FORESEEABILITY
5 AND PUBLIC POLICY. I'M REALLY FOCUSING IN ON THAT PART
6 BECAUSE ROWLAND MAKES CLEAR --

7 THE COURT: WHICH PART?

8 MS. GRANT: THE PUBLIC POLICY. WHEN YOU LOOK AT
9 THIS CASE IN TERMS OF THE QUESTION YOU POSE THAT SNAP
10 SHOULD BE RESPONSIBLE FOR CRIMINAL ACTIVITY THAT OCCURS
11 ON ITS PLATFORM WITH 400 MILLION DAILY USERS, THE SCALE
12 OF THAT, THAT IS NOT FEASIBLE, IT'S NOT PRACTICAL AND
13 WOULD CEASE TO EXIST.

14 AND THE 9TH CIRCUIT IN DYROFF MADE IT CLEAR THAT
15 IF YOU IMPOSE THIS DUTY WHERE, QUITE FRANKLY, NONE
16 EXISTS IN THE LAW, IF YOU IMPOSE A DUTY ON A SOFTWARE
17 APP TO BE RESPONSIBLE, NOT THE DRUG DEALER WHO ACTUALLY
18 CAUSED THE HARM HERE, BUT YOU'RE GOING TO MAKE SNAP
19 RESPONSIBLE FOR THAT HARM WHEN IT HAD NO ROLE IN SELLING
20 OR DISTRIBUTING THAT PRODUCT THAT KILLED THE DECEDENTS.
21 THAT'S NOT FEASIBLE AND THE WEBSITE WOULD CEASE TO
22 EXIST. THAT'S WHAT THE 9TH DISTRICT HELD AND OBSERVED
23 IN THE DYROFF CASE, WHICH IS QUITE FRANKLY, YOUR HONOR,
24 ON ALL FOURS.

25 IF YOU WERE TO TAKE THIS POSITION, YOU WOULD BE
26 DIAMETRICALLY OPPOSED TO THE 9TH CIRCUIT IN DYROFF AND
27 YOU WOULD BE DOING SOMETHING THAT NO COURT IN THE
28 COUNTRY HAS DONE, WHICH IS EXTENDED PRODUCTS LIABILITY

1 LAW, WHETHER STRICT PRODUCTS LIABILITY, FAILURE TO WARN,
2 NEGLIGENCE AND EXTENDING IT AND SAYING, WELL, THE
3 SOFTWARE APPS ARE THE INSURERS OF THEIR PLATFORMS FOR
4 CRIMINAL ACTIVITY THAT OCCURS ON THE PLATFORM.

5 THE COURT: I UNDERSTAND. LET ME MAKE TWO
6 OBSERVATIONS FOR YOUR CONSIDERATION AND POTENTIAL
7 COMMENT. EVEN STRICT PRODUCTS LIABILITY, THE LAW DOES
8 NOT TURN A DEFENDANT INTO AN INSURER. I TAKE YOUR POINT
9 THAT IN MANY INSTANCES OF STRICT LIABILITY, THE BURDEN A
10 PLAINTIFF HAS TO SHOW LIABILITY IS LESS THAN UNDER A
11 NEGLIGENCE THEORY. BUT IT'S NOT AN INSURER.

12 THE OTHER COMMENT I WOULD CITE IS PROPOSITION 51
13 IS GOING TO APPLY TO THESE CASES I THINK. I DON'T KNOW
14 WHY IT WOULD NOT. IT IS NOT TRUE THAT AT LEAST WITH
15 RESPECT TO NONECONOMIC DAMAGES, NONECONOMIC DAMAGES,
16 WERE THESE CASES TO GO FORWARD TO TRIAL AND ALL THE
17 REST, THAT -- WELL, I SHOULD EVEN GO ONE STEP MORE
18 CONDITIONAL.

19 IF THE CASES GO TO TRIAL AND IF SNAP WERE HELD
20 LIABLE ON ANY THEORY AND MONEY DAMAGES WERE AWARDED,
21 SNAP WOULD BE PERMITTED AT TRIAL TO ASK THE FINDER OF
22 FACT TO ATTRIBUTE FAULT OF THE DRUG PUSHER. AND
23 POTENTIALLY EVEN TO THE DECEDENT FOR PURPOSES OF AN
24 ALLOCATION OF RESPONSIBILITY, WHICH WOULD HAVE AN EFFECT
25 AT A MINIMUM ON -- WELL, NOT AT A MINIMUM, IT WOULD HAVE
26 AN EFFECT ON NONECONOMIC DAMAGES. AGREED?

27 MS. GRANT: RIGHT. OBVIOUSLY, I DON'T THINK THAT
28 WE SHOULD BE EVER BE ANYWHERE NEAR A TRIAL IN THIS CASE

1 BECAUSE, AGAIN, WHEN YOU'RE ANALYZING, APART FROM
2 SECTION 230, WHICH IMMUNIZES SNAP, BUT WHEN YOU LOOK AT
3 HAS THE PLAINTIFF STATED A VIABLE CLAIM FOR PRODUCTS
4 LIABILITY, WE START AND END WITH IS THE APP A PRODUCT?
5 ANSWER IS NO, THAT'S THE END.

6 IF YOU START TO GO BEYOND THAT AND THEN SAY THAT
7 NOW YOU'RE GOING TO SAY IT'S A PRODUCT AND IT'S
8 SOMETHING THAT THEY SHOULD BE RESPONSIBLE FOR HOW
9 CRIMINALS ABUSE THAT PRODUCT AND THEY SHOULD THEN BEAR
10 THE COST OF THAT LOSS, AGAIN, I MEAN, I CAN'T POINT YOU
11 TO ANY CASE BECAUSE THERE ARE NONE THAT HAVE GONE THAT
12 FAR. AND THAT'S REALLY A LEGISLATURE DETERMINATION.

13 THE COURT: I HEAR YOU AGAIN. LET ME PARAPHRASE
14 WHAT YOU'RE TELLING ME, HOW I'M HEARING IT. AT A
15 MINIMUM WHAT YOU'RE TELLING ME IS IF SOMEHOW STRICT
16 LIABILITY IN TORT WERE TO APPLY TO THIS -- OKAY, LET ME
17 BACK UP.

18 YOU NEED TO TELL ME WHAT WORD TO USE; WHAT IS THIS
19 THING THAT SNAP IS IN THE BUSINESS OF DOING? IS IT --
20 IT'S NOT A PRODUCT, ACCORDING TO SNAP. I KNOW THAT THE
21 PLAINTIFFS SAY WAIT A SECOND, THEIR EXECUTIVES SAY IT'S
22 A PRODUCT AND I KNOW WHAT YOU HAVE TO SAY ABOUT THAT;
23 THAT THAT IS NOT DETERMINATIVE.

24 IF WE'RE NOT GOING TO CALL IT A PRODUCT, IS IT A
25 SERVICE?

26 MS. GRANT: YES.

27 THE COURT: OKAY. THEN I WILL USE YOUR TERM.

28 MS. GRANT: IT'S A SOFTWARE APP, AN INTANGIBLE

1 SOFTWARE APP THAT PROVIDES A SERVICE TO PEOPLE. THAT
2 SERVICE IS A METHOD OF COMMUNICATION. AND IF YOU'VE
3 BEEN ON SNAPCHAT WHAT YOU WILL SEE IS IT'S A WAY TO SEND
4 MESSAGES AND PHOTOS.

5 THE COURT: I GOT IT. I WANT TO USE LANGUAGE THAT
6 SNAP IS COMFORTABLE WITH, WHICH IS SNAP IS A SERVICE
7 THAT IT OFFERS TO THE PUBLIC. OKAY. AND PURVEYS TO THE
8 PUBLIC.

9 SO YOU'RE TELLING ME, I THINK ON THE LAST POINT,
10 EVEN IF SOMEHOW THIS SERVICE THAT SNAP OFFERS WERE TO BE
11 COMPREHENDED WITHIN THE WORLD OF STRICT PRODUCTS
12 LIABILITY SOMEHOW AND, JUDGE RIFF, YOU WOULD BE THE
13 FIRST JUDGE IN CALIFORNIA TO DECIDE THAT. EVEN IF
14 THAT'S A MATTER OF DUTY ANALYSIS, DUTY ANALYSIS, THERE
15 COULD BE NO LIABILITY BECAUSE OF THE INTERVENTION, AS IT
16 WERE, BY THE SELLER OF THE DRUG.

17 AM I GETTING YOUR POINT CORRECT?

18 MS. GRANT: YOU'RE GETTING THERE. NOW, IF WE GO
19 OUTSIDE OF THE PRODUCTS LIABILITY WORLD, WE'RE GOING TO
20 GO OVER INTO IS THERE EVEN A DUTY TO PROTECT USERS FROM
21 THIRD-PARTY CRIMINAL ACTIVITY ON THE SITE. AGAIN,
22 THERE'S NO DUTY, PLAINTIFFS CITED NO DUTY. THEY CITE
23 THE PREMISES LIABILITY CASES THAT ARE DISTINGUISHABLE.

24 BUT WHEN YOU LOOK AT THE ROWLAND FACTORS, RIGHT,
25 YOU ARE LOOKING AT, AGAIN, THE PUBLIC POLICY AND SAYING
26 THAT -- AND IT'S NOT JUST SNAPCHAT. YOU WOULD BE SAYING
27 THAT EVERY SOFTWARE APP IS RESPONSIBLE FOR BEARING THE
28 LOSS OF -- LET'S GET THIS STRAIGHT, IN THIS CASE, THE

1 DRUG DEALER ABUSED SNAPCHAT, VIOLATED THEIR TERMS OF
2 SERVICE.

3 SO THEY ABUSED THE PLATFORM TO TRANSMIT ILLEGAL
4 DRUG MESSAGES AND THE DECEDENTS WANTED TO BUY THE DRUGS.
5 SOMEHOW THE PEOPLE THAT MADE THOSE DECISIONS ARE NOT
6 RESPONSIBLE BUT SNAP IS. AND THE ONLY THING SNAP DID
7 WAS PROVIDE THE TOOL BY WHICH THEY COMMUNICATED.

8 AGAIN, AS I MENTIONED EARLIER, IT WASN'T THAT
9 SNAP, IF YOU TAKE THEIR ALLEGATIONS AS TRUE, SOMEHOW
10 MADE THIS CONNECTION. BUT EVEN IF THAT'S THE TRUE, THAT
11 SNAP IS THE ONE THAT BROUGHT THE DRUG DEALER AND THE
12 USER TOGETHER, JUST MAKING CONNECTIONS IS NOT THE HARM
13 BECAUSE PEOPLE CAN CONNECT AND NEVER TRANSMIT ANY
14 CONTENT. PEOPLE CAN CONNECT AND TRANSMIT CONTENT THAT
15 IS LIKE PET MEMES OR VIDEOS OR FUNNY SILLY FACES. NO
16 HARM.

17 THE HARM HERE CAME FROM THE MESSAGES ABOUT BUYING
18 DRUGS. THE DRUGS WERE BOUGHT AND UNFORTUNATELY WERE
19 SECRETLY LACED WITH A LETHAL DOSE OF FENTANYL.

20 THE COURT: I HAVE A QUESTION OF LAW FOR YOU,
21 WHICH IS WE REFER TO IT AS THE ROWLAND FACTORS, THIS
22 COLLECTION OF POLICY CONSIDERATIONS THAT THE LAW, WHICH
23 MEANS JUDGES, EVALUATE A WAY TO DECIDE WHETHER THE LAW
24 WILL IMPOSE AN OBLIGATION OF DUE CARE TO A CERTAIN KIND
25 OF PLAINTIFF UNDER CERTAIN KINDS OF FACTS.

26 IS THAT A FAIR SUMMARY OF HOW YOU UNDERSTAND WHAT
27 WE CALL THE ROWLAND FACTORS?

28 MS. GRANT: YEAH. AND TO YOUR EARLIER POINT --

1 THE COURT: WAIT, LET ME ASK MY QUESTION AND THEN
2 EXPAND ON WHATEVER YOU NEED TO. DOES THAT POLICY
3 ANALYSIS, THE SO-CALLED ROWLAND FACTORS AS CARRIED
4 FORWARD IN 30 OR 40 MORE CASES SINCE ROWLAND, PUBLISHED
5 OPINION, DOES IT APPLY TO STRICT PRODUCTS LIABILITY? IS
6 THERE THE SAME POLICY ANALYSIS?

7 MS. GRANT: I THINK WHEN YOU'RE LOOKING AT
8 ROWLAND, WHEN YOU LOOK AT THE CONTEXT OF THAT CASE, IT
9 TALKS ABOUT THE LONG RECOGNIZED DUTY OF A LANDLORD TO A
10 TENANT. I THINK THE CALIFORNIA SUPREME COURT MADE CLEAR
11 IN BROWN VERSUS U.S.A. TAEKWONDO. THE PURPOSE OF THE
12 ROWLAND FACTORS IS TO DETERMINE WHETHER THE RELEVANT
13 CIRCUMSTANCES WARRANT LIMITING A DUTY THAT ALREADY
14 EXISTS, NOT TO RECOGNIZE LEGAL DUTIES IN NEW CONTEXTS.

15 WHEN YOU'RE LOOKING -- THAT'S ALSO THE PEREZ CASE.
16 NOTING THAT ROWLAND, QUOTE, HELD THAT THE LIABILITY OF
17 AN OWNER OF LAND WAS TO BE GOVERNED BY ORDINARY
18 PRINCIPLES OF NEGLIGENCE LAW.

19 AGAIN, WHEN WE LOOK AT THE ROWLAND FACTORS, IT'S
20 ALMOST EXCLUSIVELY USED IN THE CONTEXT OF PREMISES
21 LIABILITY OR A LAND OWNER, THE DUTY TO A GUEST.

22 THERE IS NO LEGAL BASIS TO IMPOSE ON SNAP A DUTY
23 OF CARE TO PROTECT USERS FROM THE ACTS OF THIRD-PARTY
24 CRIMINALS. SO I WOULD ARGUE, YOUR HONOR, ROWLAND
25 DOESN'T EVEN APPLY TO THOSE TYPE OF CIRCUMSTANCES. BUT
26 I WOULD POINT YOU AGAIN TO DYROFF. I THINK THE 9TH
27 CIRCUIT HAS DONE A LOT OF THIS WORK. DYROFF ACTUALLY
28 CONSIDERS THE ROWLAND FACTORS AND DECLINED TO IMPOSE A

1 TO DUTY TO PROTECT USERS FROM THIRD-PARTY DRUG DEALERS.

2 HERE'S WHAT THE 9TH CIRCUIT SAID: QUOTE, IMPOSING
3 A DUTY AT BEST WOULD RESULT IN A WEAK AND INEFFECTIVE
4 GENERAL WARNING TO ALL USERS. IT WOULD, QUOTE, HAVE A
5 CHILLING EFFECT ON THE INTERNET BY OPENING THE FLOOD
6 GATES OF LITIGATION ABOUT THIRD-PARTY CRIMINAL CONDUCT
7 AND THAT RISK CAN BE MORE APPARENT IN THE REAL WORLD
8 THAN IN A VIRTUAL SOCIAL NETWORK THAT PLAINTIFF CLAIMS
9 INVOLVED.

10 I DO THINK THAT PLAINTIFFS HAVE ALMOST EXCLUSIVE
11 RELIANCE ON PREMISES LIABILITY CASES UNDERSCORES THAT NO
12 COURT, PARTICULARLY IN CALIFORNIA, HAS DONE WHAT
13 PLAINTIFFS ARE ASKING YOU TO DO, WHICH IS TO FIND A DUTY
14 FOR A COMMUNICATIONS SERVICE TO PROTECT ITS USERS FROM
15 DRUG DEALERS WHO MIGHT HAVE HARMFUL COMMUNICATIONS WITH
16 THEM ON THAT -- ON SNAPCHAT.

17 THE COURT: IT MAY WELL BE SNAP'S POSITION, I
18 DON'T KNOW, THAT -- REMIND ME, THERE ARE HOW MANY SNAPS
19 DAILY ON THE SYSTEM?

20 MS. GRANT: THAT'S A GREAT QUESTION, YOUR HONOR.
21 THERE ARE NEARLY 400 MILLION DAILY USERS. SO EVEN IF
22 JUST ONE PERSON SENT ONE SNAP, YOU WOULD HAVE 400
23 MILLION. BUT YOU COULD HAVE CLOSE TO A BILLION SNAPS A
24 DAY.

25 THE COURT: SO A VERY BIG NUMBER OF SNAPS PER DAY,
26 WHATEVER IT IS. IT MAY WELL BE SNAP'S POSITION THAT
27 USING UTMOST CARE, THE VERY BEST CARE THAT THAT STATE OF
28 THE ART, GOOD INTENTIONS AND FULL RESOURCE, FULL

1 FINANCIAL RESOURCE CAN APPLY WILL BE INEFFECTIVE IN
2 ELIMINATING THE KIND OF, AS YOU PUT IT, ILLEGAL AND
3 PERNICIOUS COMMUNICATION THAT HAPPENED HERE. IT MAY
4 WELL BE SNAP'S POSITION ON THAT.

5 IF THAT WERE TRUE, IF THOSE FACTS ARE TRUE, THAT
6 WOULD CERTAINLY WEIGH UPON A DUTY ANALYSIS, RIGHT,
7 BECAUSE ONE WOULD SAY, ONE WOULD THINK IT'S AN UNWISE
8 SOCIAL POLICY TO IMPOSE A DUTY. FOR THOSE IN THE
9 COURTROOM WHO DON'T KNOW WHAT THAT WORD MEANS, IT REALLY
10 MEANS LEGAL OBLIGATION BECAUSE DUTY SOMETIMES HAS A
11 MORAL SENSE TO IT. ALTHOUGH ROWLAND DOES MENTION A
12 MORAL COMPONENT AS WELL. THAT'S A DIGRESSION.

13 MY POINT IS, I'M GETTING TO IT, I PROMISE, SNAP
14 CERTAINLY WOULD WANT THE COURTS TO KNOW THAT EVEN USING
15 UTMOST CARE, IT CAN'T ELIMINATE THIS PERNICIOUS WRONGFUL
16 CONDUCT, WHICH WOULD IN FACT TURN IT INTO AN INSURER.

17 MS. GRANT: RIGHT --

18 THE COURT: MY POINT, I'M GOING TO GET TO IT. IF
19 THAT'S TRUE, DON'T I NEED A FACTUAL RECORD?

20 MS. GRANT: NO. I THINK COURTS THAT HAVE
21 ADDRESSED THE SIMILAR REQUESTS TO INVENT A BRAND NEW
22 LEGAL DUTY HAVE REPEATEDLY REJECTED IT. LET'S LOOK AT
23 THE UNITED STATES SUPREME COURT, WHAT IT SAYS IN THE
24 TAAMNEH CASE. QUOTE, PLAINTIFFS IDENTIFY NO DUTY THAT
25 WOULD REQUIRE DEFENDANTS OR OTHER
26 COMMUNICATIONS-PROVIDING SERVICES TO TERMINATE CUSTOMERS
27 AFTER DISCOVERING THAT THE CUSTOMERS WERE USING THE
28 SERVICE FOR ILLICIT ENDS.

1 THE 9TH CIRCUIT IN DYROFF EMPHASIZED THAT IT IS --
2 THE 9TH CIRCUIT WAS A MOTION TO DISMISS. SO IT'S SAYING
3 LOOKING AT THE DUTY ANALYSIS IN A MOTION TO DISMISS AND
4 SAYING IT'S A LEAP TOO FAR TO REQUIRE THAT A SOCIAL
5 NETWORK WEBSITE OUGHT TO PERCEIVE RISKS THROUGH
6 ALGORITHMS AND OTHER INPUTS ABOUT A DRUG DEALER ON ITS
7 SITE.

8 OF COURSE WHAT WOULD WE DO? WARN? WE DON'T HAVE
9 A DUTY TO WARN OF AN OBVIOUS AND KNOWN DANGER.

10 THE COURT: I DON'T KNOW WHAT HAPPENED IN THE
11 TRIAL COURT IN THAT CASE. WAS THAT A MOTION TO DISMISS?

12 MS. GRANT: YES.

13 THE COURT: LET ME CONTINUE TO PUSH A LITTLE BIT
14 ON THIS. I THINK I WILL SAY THAT -- I THINK THE
15 PRINCIPAL POINT YOU'RE MAKING IS RIGHT, WHICH IS, JUDGE,
16 THIS IS TERRA INCOGNITA, IT'S TERRA NUEVA. THIS IS A
17 NEW THING THAT THE PLAINTIFFS ARE ASKING ME TO DO. IT'S
18 A NEW LAND.

19 NOW, THE PLAINTIFFS MAY SAY, NO, IT'S NOT. AND
20 I'LL HEAR ABOUT THAT SHORTLY. BUT LET'S SAY YOU'RE
21 RIGHT THAT IT'S NOT A -- STRICT PRODUCTS LIABILITY
22 DOESN'T APPLY. SO IF THAT DOESN'T APPLY, WHAT DOES?
23 WELL, NEGLIGENCE, RIGHT?

24 WHEN ALL IS SAID AND DONE, YOU BOIL DOWN THE 16
25 COUNTS, IT'S EITHER A STRICT PRODUCTS LIABILITY OR IT'S
26 NOT. THERE IS FRAUD, I WILL NOTE. SO I GUESS IT'S
27 THREE TIMES BOILED DOWN.

28 YOUR POINT TO ME IS IT'S NOT A PRODUCT, SO STRICT

1 PRODUCTS LIABILITY DOESN'T APPLY. AND TO THE EXTENT
2 IT'S NEGLIGENCE, THE DUTY ANALYSIS IS DISPOSITIVE,
3 THERE'S NO DUTY UNDER THE ROWLAND FACTORS.

4 MS. GRANT: WELL, NOT UNDER THE ROWLAND FACTORS.
5 OF COURSE THE ROWLAND FACTORS ONLY APPLIES TO EXISTING
6 DUTY. THERE WAS NO DUTY HERE, AGAIN, TO PREVENT FROM
7 COMMUNICATING -- HOW WOULD SNAP EVEN DO THAT? WE'RE
8 SUPPOSED TO SURVEIL EVERY MESSAGE?

9 THE COURT: MS. GRANT, IT'S CHICKEN AND EGG AND
10 HERE'S WHY. I THINK THIS IS WHAT THE PLAINTIFFS WILL
11 PROBABLY SAY. NO, THERE IS A DUTY, IT'S FOUND IN CIVIL
12 CODE SECTION 1714. EVERYBODY'S GOT A DUTY TO EVERYBODY
13 TO DO EVERYTHING REASONABLE. THAT'S A LITTLE BIT OF AN
14 OVERSTATEMENT OF 1714. BUT ROWLAND WAS AND IS DESIGNED
15 TO NARROW THAT GENERAL PREEXISTING DUTY OF REASONABLE
16 CARE I THINK.

17 YOU DON'T SEE IT THAT WAY?

18 MS. GRANT: NO, I DON'T, YOUR HONOR. AND I WANT
19 TO GO BACK TO SOMETHING YOU JUST SAID; THAT THE
20 PLAINTIFFS FEAR WE'RE IN NEW TERRITORY HERE. NO, WE'RE
21 NOT BECAUSE MANY, MANY PLAINTIFFS HAVE DONE EXACTLY WHAT
22 THESE PLAINTIFFS ARE DOING. THEY'RE TRYING TO GET
23 PRODUCTS LIABILITY LAW EXTENDED TO A SOFTWARE APP THAT'S
24 A SERVICE. AND THE COURTS HAVE DECLINED TO DO SO.

25 SO WHAT MY POINT WAS, YOU WOULD BE THE FIRST TO
26 ACTUALLY ACCEPT PLAINTIFFS' INVITATION TO EXTEND
27 PRODUCTS LIABILITY LAW FOR INTANGIBLE SERVICES. MANY
28 PLAINTIFFS HAVE TRIED THE SAME ARGUMENT, NO COURT HAS

1 ACCEPTED THE INVITATION SO YOU WOULD BE THE FIRST.

2 THE COURT: THIS IS WHAT I MEANT BY NEW TERRITORY.
3 I HEARD WHAT YOU SAID AND I TAKE YOUR POINT. I TRIED TO
4 ALLUDE TO THIS IN MY FURTHER PRELIMINARY ABSTRACT
5 COMMENTS.

6 THIS CASE IS NOT COMFORTABLY FIT, I DON'T THINK,
7 INTO PREEXISTING CONTAINERS OF THE LAW. READING THE
8 PLAINTIFFS' VERSION OF THE FACTS HERE AND DOING WHAT I
9 MUST DO ON A DEMURRER, WHICH IS TAKE THEM AS TRUE,
10 INDULGING ALL THE INFERENCES IN THEIR FAVOR, I THINK
11 WHAT THEY'RE SAYING EITHER EXPLICITLY OR IMPLICITLY
12 IS -- WELL, THEY'RE SAY IT'S A PRODUCT. BUT IF IT'S NOT
13 A PRODUCT, IT'S NOT PURELY A SERVICE EITHER. IT'S
14 SOMETHING -- IT'S A THIRD THING.

15 THAT'S WHY I ASKED YOU BEFORE IS THE WORLD DIVIDED
16 INTO A BINARY OF PRODUCTS AND SERVICES, IS THERE NOTHING
17 ELSE. I THINK THE PLAINTIFFS WOULD TELL ME, YEAH,
18 THERE'S SOMETHING ELSE; IT'S THE WILD AND WOOLY WORLD OF
19 SOCIAL MEDIA, WHICH IS A THIRD THING.

20 HERE'S MY STRAIGHT-UP QUESTION, AND I'LL DO IT IN
21 PARTS. WERE I, ON THIS DEMURRER, TO CONCLUDE THAT THE
22 LAW OF STRICT PRODUCTS LIABILITY SHOULD APPLY AND DOES
23 APPLY TO THESE SET OF FACTS, IS THERE BINDING CALIFORNIA
24 AUTHORITY THAT SAYS I MAY NOT DO THAT?

25 MS. GRANT: SO LET ME --

26 THE COURT: IS THERE A COURT OF APPEAL DECISION OR
27 A SUPREME COURT DECISION FROM THE CALIFORNIA STATE COURT
28 SYSTEM, NOT A FEDERAL COURT THAT BINDS ME UNDER THE AUTO

1 EQUITIES CASE AND SAYS, JUDGE RIFF, YOU HAVE TAKEN AN
2 OATH TO FOLLOW THE LAW, THIS IS THE LAW, FOLLOW IT ON
3 THIS POINT.

4 MS. GRANT: I DO THINK THE COURT OF APPEAL IN
5 PRAGER AND DOE ON SECTION 230 IS BINDING ON THIS COURT
6 SO I DON'T THINK YOU SHOULD EVER GET TO THE PRODUCTS
7 LIABILITY QUESTION BECAUSE SNAP IS IMMUNIZED FROM ALL
8 THE CLAIMS PLAINTIFFS ALLEGES.

9 IF YOU'RE ASKING ME HAS A COURT CONSIDERED THIS
10 EXACT ISSUE, I ACTUALLY DID GIVE YOU A LIST OF BINDING
11 AUTHORITIES IN CALIFORNIA. I MEAN, YOU CAN LOOK AT THE
12 GRUPI VERSUS X-TREME SCOOTERS; CALIFORNIA SUPERIOR COURT
13 2017 OF THE REYES CASE. IT WAS A PRODUCTS LIABILITY
14 CASE, THE DEMURRER WAS SUSTAINED BECAUSE IT WAS --
15 SECTION 230 APPLIED.

16 IF YOU'RE ASKING ME HAS A COURT EVER ANALYZED
17 WHETHER OR NOT AN APP LIKE UBER OR SNAPCHAT OR FACEBOOK,
18 INSTAGRAM OR MYSPACE OR TIKTOK IS A PRODUCT, YES. AND
19 REPEATEDLY COURTS ACROSS THE COUNTRY CONCLUDED NO.

20 BUT CAN I CITE YOU TO A CASE WHERE YOU'RE BOUND BY
21 THAT? YES, I ALREADY CITED YOU THE CALIFORNIA CASES.
22 SO YOU ASKED ME TO DO ANOTHER SUPPLEMENTAL AUTHORITY.
23 THE MAJORITY OF THESE CASE ARE IN FEDERAL COURT. A LOT
24 OF THOSE CASES ARE IN THE DISTRICT COURTS OR THE 9TH
25 CIRCUIT.

26 AGAIN, I KNOW YOU'RE GRAPPLING AND I DO WANT TO
27 IDENTIFY THIS. I CAN SENSE YOU'RE GRAPPLING WITH WHAT
28 YOU PERCEIVE TO BE THAT WE'RE IN THIS UNCHARTED

1 TERRITORY WITH SOMETHING YOU THINK MAYBE IT'S NOT A
2 PRODUCT, MAYBE IT'S NOT A SERVICE, MAYBE IT'S SOMEWHERE
3 ELSE.

4 BUT WHEN YOU LOOK AT THE JURIS PRUDENCE OF THESE
5 CASES, WITH THE UNITED STATES SUPREME COURT REFERRING TO
6 THESE AS SERVICES, THE 9TH CIRCUIT, CALIFORNIA COURTS OF
7 APPEAL, DISTRICT COURTS IN CALIFORNIA AND ELSEWHERE,
8 THIS IS UNCHARTED. THIS IS NOT A CASE OF FIRST
9 IMPRESSION.

10 PLAINTIFFS HAVE BEEN DOING THIS FOR YEARS WHEN
11 THERE ARE EITHER TRAGEDIES OR SOMETHING LIKE IN THE
12 AMAZON CASE WHERE A BATTERY EXPLODED. THE POINT IS THIS
13 IS NOT NEW, I THINK THERE'S A WELL TRODDEN PATH FOR YOU
14 TO FOLLOW IN TERMS OF IF YOU'RE FOLLOWING THE LAW AND
15 THE GREAT WEIGHT OF AUTHORITY, NO ONE HAS HELD THESE
16 APPS ARE PRODUCTS. THEY HAVE HELD THEY'RE INTANGIBLE
17 SERVICES.

18 THE COURT: I HEAR YOU.

19 MS. GRANT: BEFORE I END, BECAUSE I WANT TO BE
20 MINDFUL OF MY TIME --

21 THE COURT: I'LL GIVE YOU MORE TIME, IF YOU NEED
22 IT. IT'S VERY IMPORTANT THAT WE HAVE THIS
23 COMMUNICATION. I THINK WHAT YOU WOULD HAVE ME
24 UNDERSTAND -- WELL, YOU WOULD HAVE ME UNDERSTAND ON 230,
25 THE LAW IS CLEAR AND THERE'S BINDING AUTHORITY AND
26 THERE'S NOT MUCH FOR ME TO DO, OTHER THAN TO APPLY WHAT
27 IS ALREADY BINDING AUTHORITY THAT I MUST APPLY?

28 MS. GRANT: YES, YOUR HONOR. THERE'S SO FEW CASES

1 THAT HAVE ACTUALLY FOUND SECTION 230 NOT TO APPLY, NONE
2 OF WHICH ARE APPLICABLE HERE. WE MADE THAT CLEAR IN OUR
3 BRIEFS, BUT THERE'S LEMMON, THERE'S OMEGLE. THERE'S THE
4 CASE I CITED, THE AMAZON STORE THAT SOLD A DEFECTIVE
5 BATTERY THAT BLEW UP AND BURNED SOMEONE.

6 THEN WE CITE THE LEE VERSUS AMAZON CASE THAT SOLD
7 FACE CREAM WITH MERCURY THAT DIDN'T HAVE A PROP 65
8 WARNING. THOSE CASES ARE REALLY THE ONLY ONES WHERE
9 THEY DIDN'T APPLY SECTION 230. THEN YOU HAVE NUMEROUS
10 CASES --

11 THE COURT: I GOT IT.

12 MS. GRANT: THAT'S WHY A LOT OF THE PRODUCTS
13 LIABILITY, THE COURTS STOPPED AT SECTION 230. BUT THE
14 ONES THAT HAVE GONE BEYOND THAT HAVE THEN STOPPED WHEN
15 IT SAID IT'S NOT A PRODUCT.

16 THE COURT: OKAY, BUT I'M ASKING YOU TO INDULGE MY
17 HYPOTHETICAL ONE LAST TIME AND I WILL LET YOU SIT DOWN
18 IF YOU WISH. HYPOTHETICALLY, I GET PAST THE 230
19 ARGUMENT AND NOW WE'RE IN THE WORLD OF, QUOTE, PRODUCTS
20 LIABILITY UNDER WHATEVER THEORY IS BEING ASSERTED.

21 IT IS YOUR VIEW THAT THERE'S BINDING CALIFORNIA
22 AUTHORITY WHICH REQUIRES ME TO SUSTAIN THE DEMURRER
23 WITHOUT LEAVE TO AMEND AS TO THOSE THEORIES?

24 MS. GRANT: RIGHT, BECAUSE NO AMENDMENT IS GOING
25 TO CHANGE THE FACT IT'S NOT A PRODUCT. IT'S HARD TOO
26 BECAUSE WE'RE TALKING IN THE ABSTRACT. SO MAYBE YOU CAN
27 SHARE WITH ME SO I CAN BETTER ANSWER YOUR QUESTION, WHAT
28 ARE YOU THINKING THAT SNAP WOULD BE LIABLE FOR UNDER A

1 STRICT PRODUCTS LIABILITY THEORY? I'M NOT FOLLOWING
2 THAT PART OF IT.

3 IT'S GREAT TO HAVE A THEORETICAL, BUT I CAN'T EVEN
4 UNDERSTAND IN PRACTICE, IS IT QUICK AD THE FACT THAT
5 PEOPLE CONNECT TO EACH OTHER QUICKER? WELL, AGAIN, JUST
6 CONNECTING ISN'T IT. SO WE HAVE TO THINK ABOUT IT.
7 WHEN YOU'RE SAYING PRODUCTS LIABILITY, IT IS NOT IN THE
8 ABSTRACT, IT IS WHAT EXACTLY ARE YOU SUGGESTING THAT
9 SNAP WOULD BE LIABLE FOR?

10 THE COURT: I'M NOT SUGGESTING ANYTHING. I'M
11 SUGGESTING THAT THE PLAINTIFFS ARE SUGGESTING A PRETTY
12 DETAILED COLLECTION OF LEGAL THEORIES; NEGLIGENCE
13 FAILURE TO WARN, STRICT LIABILITY FAIL TO WARN, THAT THE
14 RISK OF HARM OUTWEIGHS THE BENEFIT OF THE DESIGN,
15 ET CETERA, ET CETERA. I MEAN THAT'S THEIR THEORY.

16 MS. GRANT: THAT'S THEIR THEORY BUT WE HAVE TO
17 LOOK AT THE ACTUAL FACTS. IF IT'S NOT A PRODUCTS
18 LIABILITY THEORY, WHAT IS CAUSING THE HARM?

19 THE COURT: AGAIN, THAT'S WHY I ASKED THE
20 QUESTION. YOU'RE RIGHT, I'M GRAPPLING AND STRUGGLING.
21 WHAT I'M STRUGGLING WITH IS DO I HAVE AN ADEQUATE BASIS
22 TO SUSTAIN A DEMURRER WITHOUT LEAVE TO AMEND OR SHOULD I
23 PERMIT A FACTUAL RECORD THEN LET YOU COME AT ME WITH
24 SUMMARY JUDGMENT? THAT'S -- I'M JUST SHARING WITH YOU
25 WHAT I TOLD YOU EARLIER THIS MORNING THAT THAT'S
26 SOMETHING ON MY MIND.

27 LAST THING BEFORE YOU SIT DOWN, ANYTHING YOU WANT
28 TO SAY ABOUT THE ELECTRICITY CASES?

1 MS. GRANT: I WILL DO THAT ON REBUTTAL. WHAT YOU
2 JUST POSED ABOUT SHOULD YOU DO THIS ON SUMMARY JUDGMENT,
3 SHOULD YOU FACE THIS DECISION DOWN THE ROAD ON AN
4 EVIDENTIARY RECORD? NO, BECAUSE THEY HAVE ALLEGED,
5 WE'RE GOING TO ACCEPT AS TRUE THE 21 DEFECTS THAT THEY
6 CLAIM. WHEN YOU LOOK AT THE GESTALT OF ALL 21 DEFECTS
7 OR IF YOU WERE TO GO DEFECT BY DEFECT, ALLEGED DEFECT BY
8 ALLEGED DEFECT AND TO ANALYZE EACH ONE OF THOSE, I
9 MENTIONED QUICK AD, THAT'S PEOPLE CONNECTING QUICKER.

10 IF THE ALLEGATION THERE IS YOU SHOULD GET
11 DESIGN -- YOU SHOULDN'T GET RID OF QUICK AD, YOU
12 SHOULDN'T ALLOW PEOPLE TO CONNECT WITH PEOPLE MORE
13 QUICKLY ON YOUR SITE. CONNECTING WITH PEOPLE IS NOT THE
14 HARM. NO ONE DIED BECAUSE THEY CONNECTED WITH SOMEONE.
15 YOU CAN CONNECT WITH SOMEONE AND NOT EXCHANGE ANY
16 CONTENT, YOU CAN CONNECT WITH SOMEONE AND EXCHANGE CAT
17 MEMES ALL DAY LONG.

18 THAT'S NOT THE HARM, YOU CAN'T DIVORCE THE HARM.
19 THEY'RE TRYING TO BECAUSE THEY'RE TRYING TO EVADE
20 SECTION 230. YOU CANNOT DIVORCE THIS CASE FROM THE HARM
21 WHICH STARTS WITH THE OVERDOSE DEATHS THAT CAME FROM THE
22 MESSAGES THAT THE DRUG DEALERS AND USERS CREATED AN
23 EXCHANGE ABOUT BUYING ILLEGAL DRUGS.

24 SO EVERYTHING THAT YOU LOOK AT, AND THESE FEATURES
25 LIKE AGE VERIFICATION AND ALL THESE OTHER THINGS HAVE
26 BEEN LOOKED AT BY COURTS, WE CITED IN OUR BRIEF.
27 EVERYTHING COMES DOWN TO CONTENT FACILITATION. SO
28 CONNECTING PEOPLE OR A SEMARALITY (PHONETIC), HOW LONG

1 IS CONTENT ALIVE ON THE SITE.

2 SO ALL OF THESE DEAL WITH CONTENT FACILITATION,
3 EITHER MAKING IT EASIER FOR USERS TO CONNECT, MAKING IT
4 EASIER FOR USERS TO EXCHANGE MESSAGES. I DON'T THINK WE
5 CAN HAVE THIS CONVERSATION IN THE ABSTRACT. WE NEED TO
6 GROUND IT AND SAY, WELL, WHAT ARE THE CLAIMED DEFECTS?
7 THEY ALL RELATE TO CONTENT EXCHANGE. THAT'S WHY THEY'RE
8 ALL BARRED BY SECTION 230 AND THAT'S WHAT COURTS HAVE
9 CONCLUDED AGAIN AND AGAIN AND AGAIN.

10 I DON'T THINK IT'S APPROPRIATE TO HAVE THESE
11 DISCUSSIONS LIKE IN A THEORETICAL WAY, WE REALLY NEED TO
12 GROUND THEM IN WHAT ARE THEY ALLEGING AND DO THEY RELATE
13 TO CONTENT. AND YES, FOR SECTION 230, WE'RE DONE.

14 NOW YOU'RE TALKING ABOUT A QUICK AD, IT'S A
15 FEATURE OF A PRODUCT. SO CONNECTING PEOPLE, THAT'S NOT
16 THE HARM THOUGH --

17 THE COURT: THE SERVICE.

18 MS. GRANT: THANK YOU, YOUR HONOR. FEATURE OF --
19 FEATURE OF A SERVICE WHERE PEOPLE ARE JUST CONNECTING
20 WITH ONE ANOTHER. NO ONE ALLEGED IN THIS CASE THAT
21 BECAUSE THEY CONNECTED WITH SOMEONE, THEY OVERDOSED FROM
22 FENTANYL. THAT'S NOT THE ALLEGATION. THE ALLEGATION IS
23 THEY BOUGHT DRUGS THAT WERE ILLEGALLY AND
24 SURREPTITIOUSLY LACED WITH FENTANYL AND THE REASON THAT
25 HAPPENED IS BECAUSE OF THE MESSAGES. THAT'S THE HARM.

26 THE COURT: OKAY. I UNDERSTAND YOUR ARGUMENT VERY
27 WELL AND YOU'VE PRESENTED IT VERY WELL. I THANK YOU FOR
28 THAT.

1 MS. GRANT: THANK YOU, YOUR HONOR.

2 THE COURT: PLAINTIFFS SIDE? IN ABOUT MAYBE
3 20 MINUTES WE'LL TAKE A BREAK FOR EVERYBODY IN CASE THEY
4 NEED IT.

5 MR. BERGMAN: MAY IT PLEASE THE COURT, MATTHEW
6 BERGMAN. IT'S MY HONOR TO REPRESENT AARON AND AMY
7 NEVILLE, THE PARENTS OF ALEXANDER NEVILLE WHO DIED AT
8 THE AGE OF 14. IT'S MY HONOR TO REPRESENT JAIME PUERTA
9 WHOSE SON DANIEL DIED AT THE AGE OF 16; MARIAM HERNANDEZ
10 WHOSE SON JEFF DIED AT THE AGE OF 17; CINDY
11 CRUZ-SARANTOS WHOSE SON DYLAN DIED AT THE AGE OF 18;
12 BRIDGETTE NORRING WHOSE SON DEVON DIED AT THE AGE OF 19;
13 JAMES AND SAMANTHA MCCARTHY WHOSE SON JACK DIED ON
14 SEPTEMBER 25, 2021; MATTHEW AND CHRISTINE CAPELOUTO
15 WHOSE SON ALEXANDER DIED AT THE AGE OF 20; PERLA MENDOZA
16 WHOSE SON DANIEL DIED AT THE AGE OF 20; SAMUEL CHAPMAN
17 -- DR. LAURA CHAPMAN BERMAN WHOSE SON SAMMY DIED ON
18 FEBRUARY 7, 2021, AT THE AGE OF 16; JESSICA DIACONT
19 WHOSE SON JACOB DIED AT THE AGE OF 15; AND E.B. WHOSE
20 DAUGHTER P.B. FORTUNATELY DID NOT DIE BUT HAD A FENTANYL
21 OVERDOSE AT THE AGE OF 17.

22 JUDGE, IN RESPONSE TO YOUR INITIAL COMMENTS IN
23 TERMS OF WHERE WE ARE IN THE JURIS PRUDENCE, AT LUNCH I
24 WENT BACK AND LOOKED AT MY JUDICIAL HERO. AND CARDOZA
25 WROTE 110 YEARS AGO A PRECEDENCE DRAWN FROM THE DAYS OF
26 TRAVEL BY STAGECOACH. THEY ARE NOT THE CONDITIONS OF
27 TRAVEL TODAY. THE PRINCIPLE IS THAT THE DANGER MUST BE
28 IMMINENT DOES NOT CHANGE. BUT THE THINGS SUBJECT TO THE

1 PRINCIPLE DO CHANGE. THEY ARE WHATEVER THE NEEDS OF
2 LIFE IN A DEVELOPING CIVILIZATION REQUIRES THEM TO BE.
3 THAT'S JUDGE CARDOZA, NEW YORK COURT OF APPEALS IN THE
4 MACPHERSON VERSUS BUICK CASE.

5 YOUR HONOR, WE ARE IN THE MIDST OF A FENTANYL
6 CRISIS. THIS IS THE LARGEST KILLER OF YOUNG PEOPLE.
7 ACCORDING TO THE CDC, 3500 CHILDREN DIE PER YEAR. AT
8 THE SAME TIME THAT DRUG USE OVERALL IS GOING DOWN AMONG
9 OUR YOUNG PEOPLE, DEATHS HAVE INCREASED 350 PERCENT.

10 IT'S SINGULARLY THE RESULT OF THE AVAILABILITY OF
11 FENTANYL. AND IT IS SINGULARLY THE RESULT OF KIDS THAT
12 ARE NOT SEEKING FENTANYL BUT WHO INADVERTENTLY INGEST
13 FENTANYL TO OTHER COUNTERFEIT DRUGS OR FROM MARIJUANA.

14 THIS IS NOT AN ACCIDENT AND THIS IS NOT A
15 COINCIDENCE, THIS IS DIRECTLY TIED TO SNAPCHAT. THE
16 INSTANCES ARE THAT THE DEATHS, THE VAST MAJORITY OF
17 THESE DEATHS RESULT FROM DRUGS PURCHASED ON-LINE. AND
18 SNAPCHAT IS INVOLVED IN MORE OF THESE CASES THAN ALL
19 OTHER PRODUCTS COMBINED. THAT IS A FACT THAT IS BORN
20 OUT BY LAW ENFORCEMENT.

21 THIS IS NOT -- AND THIS IS WHAT HAS GIVEN RISE TO
22 THIS EPIDEMIC AND BRINGS US HERE TODAY. SNAPCHAT IS
23 INVOLVED IN THEM AND THERE ARE SPECIFIC DESIGN FEATURES
24 OF SNAPCHAT THAT HAVE LED TO THIS MAYHEM, THIS SLAUGHTER
25 OF OUR YOUNG PEOPLE. THEY FALL INTO FOUR CATEGORIES.

26 THE FIRST IS THE ADDICTIVE NATURE OF THE SNAPCHAT
27 PRODUCT. CHILDREN, AND THEY PRAY ON CHILDREN. AND
28 EVERY ONE OF THE PLAINTIFFS' CHILDREN BECAME ADDICTED TO

1 SNAPCHAT, EVEN THOUGH SOME OF THEM DIDN'T PASS AWAY
2 UNTIL LATER. SNAPCHAT CREATES WHAT I WOULD CALL A
3 TARGET RICH ENVIRONMENT THROUGH THEIR GAMEFICATION,
4 THROUGH THEIR INTERMITTENT REWARD SYSTEM, THROUGH THEIR
5 SNAPCHAT REWARD STREAKS, TO ALL THESE FEATURES DESIGNED
6 TO PREPARE AND PRESENT A TARGET RICH ENVIRONMENT OF KIDS
7 THAT ARE ON-LINE AT ALL HOURS OF THE DAY AND NIGHT. AND
8 KIDS WHO READILY AGREE TO ADD OTHER PEOPLE AS FRIENDS,
9 NOT BECAUSE THEY'RE TRUE FRIENDS BUT BECAUSE THEIR
10 SOCIAL STATUS DERIVES FROM HAVING LARGE SNAP STREAKS AND
11 A LARGE NUMBER OF FRIENDS. THAT'S NO. 1.

12 NO. 2, THE ASPECT OF SNAPCHAT'S DESIGN CONNECT
13 AFFIRMATIVELY DRUG DEALERS AND VULNERABLE KIDS. THIS IS
14 NOT AT&T, SOMEONE PICKING UP THE PHONE. THIS IS AT&T
15 SAYING TO A DRUG DEALER, HERE'S A KID THAT WANTS TO BUY
16 YOUR PRODUCT. AND THE SPECIFIC ASPECT OF THIS
17 CONNECTIVITY ARE THAT SNAPCHAT'S TECHNOLOGY IDENTIFIES
18 THE DEMOGRAPHIC FEATURES OF KIDS, IDENTIFIES THE
19 GEOGRAPHIC LOCATION AND AFFIRMATIVELY CONNECTS THEM TO
20 DRUG DEALERS THAT THEY'RE NOT LOOKING FOR. THIS IS
21 OPPOSITE TO THE TELEPHONE ANALOGY WE SEE. AND THAT IS
22 NO. 2.

23 NO. 3, SNAPCHAT'S DESIGN FEATURES ARE SPECIFICALLY
24 DESIGNED TO FACILITATE THESE SALES. THE TECHNOLOGY OF
25 STORIES ALLOWS -- WE CITED TO YOUR HONOR THESE MENUS OF
26 DRUGS THAT ARE PROVIDED TO KIDS, SPECIFICALLY LAYING
27 THEM OUT. IT DOES SO WITHIN A GEOGRAPHIC AREA. THE WAY
28 IN WHICH THE COMMUNICATION, THE GEO LOCATION WORKS, DRUG

1 DEALERS ARE ABLE TO GEO LOCATE. AND ESSENTIALLY, AS
2 THEY DID IN ALEXANDER NEVILLE'S CASE, DELIVER FENTANYL
3 BY DOOR DASH RIGHT TO THE DOORSTEP. THAT IS A
4 FACILITATION DESIGNED WITHIN THE GEO LOCATION FEATURE OF
5 THE SNAPCHAT PRODUCT.

6 NO. 4, THE DESIGN OF THE SNAPCHAT PRODUCT, WHICH
7 IS SEPARATE AND DISTINCT FROM VIRTUALLY EVERY OTHER
8 SOCIAL MEDIA PLATFORM, IS THAT IT FACILITATES DRUG
9 DEALERS TO EVADE LEGAL RESPONSIBILITY AND EVADES AND
10 HIDES THE EVIDENCE OF THEIR CRIME. IT DOES THAT THROUGH
11 THE DISAPPEARING MESSAGE FUNCTION. UNLIKE PLW, WE'RE
12 NOT SIMPLY TALKING ABOUT EPHEMERALITY. WE'RE TALKING
13 ABOUT THE PRODUCT FEATURE THAT'S DESIGNED TO DESTROY ALL
14 EVIDENCE NOT JUST ON THE FRONT END BUT ON THE BACK END
15 AS WELL. SO THE DRUG DEALER KNOWS IT HAS THE BENEFIT OF
16 BEING ABLE TO -- THE DRUG DEALER CAN SCALE THEIR
17 MANIACAL TRADE WHAT WILL BE ON THE STREET CORNER BUT
18 THEY CAN DO SO WITH THE IMMUNITY, KNOWING THAT THE
19 EVIDENCE OF THEIR CRIME ISN'T THERE. IT'S LIKE THE DRUG
20 DEALER CAN PUT A BILLBOARD OR A HUGE BILLBOARD SAYING
21 BUY MY DRUGS BUT KNOW THAT IT'S HIDDEN.

22 THE OTHER THING IS THAT DRUG DEALERS KNOW IF
23 SOMEBODY TRIES TO COPY THAT PRODUCT, THE DRUG DEALER CAN
24 INDEED GET ON A CUSTOMER'S PHONE AND DELETE THE
25 EVIDENCE.

26 THIRD, THE MYEYES FEATURE PREVENTS CHILDREN --
27 PARENTS FROM BEING ABLE TO EXERCISE THEIR RESPONSIBILITY
28 FOR THEIR CHILDREN.

1 FOR THOSE REASONS, JUDGE, WE BELIEVE THERE IS A
2 UNIQUE PRODUCT ISSUE. WHAT IS ALSO UNDISPUTED IS THAT
3 FROM 1917 AT THE LATEST, SNAPCHAT WAS --

4 THE COURT: 1917?

5 MR. BERGMAN: EXCUSE ME, 2017, YEAH, WE'RE PAST
6 THAT. SO 2017 FORWARD, SNAPCHAT IS AWARE THAT ITS
7 UNIQUE DESIGN FEATURES FACILITATE ILLEGAL DRUG SALES.
8 INDEED IT IS OUR ALLEGATION THAT ONE OF THE INSTIGATORS
9 OF THE SPECIFIC DESIGN OF THE DISAPPEARING MESSAGE
10 FUNCTION WAS TO FACILITATE ELICIT NEFARIOUS ACTIVITIES.
11 THAT'S WHY THEY DESIGNED IT THE WAY THEY DID.

12 AND THEY HAVE KNOWN SINCE 2017 THAT DRUG DEALS ARE
13 RAMPANT ON SNAPCHAT AND THEY HAVE KNOWN SINCE 2022 THAT
14 SNAPCHAT IS CONTRIBUTING TO THE DEATHS OF THOUSANDS OF
15 KIDS FROM FENTANYL POISONING. THEY'RE AWARE OF IT AND
16 DO NOT WARN ABOUT IT.

17 THEREFORE, THESE ARE THE FACTS THAT WE HAVE. THEN
18 THE QUESTION IS, IS THIS A LEGAL REMEDY UNDER CALIFORNIA
19 LAW. AND IF SO, IS IT PREEMPTED BY SECTION 230. I WANT
20 TO TALK A LITTLE BIT ABOUT PREEMPTION BECAUSE
21 ULTIMATELY, JUDGE, YOU'RE TASKED HERE TODAY AND
22 PRESUMABLY TASKED DOWN THE ROAD IF WE GET TO A SUMMARY
23 JUDGMENT IS QUINTESENTIALLY ONE OF STATUTORY
24 INTERPRETATION.

25 THE QUESTION IS WHETHER CALIFORNIA TORT LAW, BE IT
26 STRICT PRODUCTS LIABILITY OR BE IT NEGLIGENCE OR FRAUD,
27 IS IPSO FACTO PREEMPTED BY FEDERAL LAW IN SECTION 230.

28 THE COURT: IS PREEMPTION REALLY THE RIGHT CONCEPT

1 HERE? AS I SEEM TO RECALL, SECTION 230 HAS A SAVINGS
2 CLAUSE FOR STATE LAW REMEDIES THAT ARE NOT INCONSISTENT
3 WITH SECTION 230. MAYBE YOU WOULD TELL ME THAT IS WHAT
4 PREEMPTION IS ALL ABOUT.

5 MR. BERGMAN: THAT IS WHAT PREEMPTION IS ALL
6 ABOUT, JUDGE. MY DISPUTE WITH MY COLLEAGUE IS THAT IN
7 ORDER TO TRUMP, NO PUN INTENDED, THE STATE LAW REMEDIES,
8 AND WE'LL ASSUME FOR PURPOSES OF THE CURRENT DISCUSSION
9 THAT YOUR COURT -- YOUR HONOR HAS HELD THERE IS A VIABLE
10 STATE LAW CLAIM, WE WILL GO THERE IN A MINUTE.

11 BUT ASSUMING THAT IS CORRECT, THEN THE QUESTION
12 IS, IS IT INCONSISTENT WITH SECTION 230? AND THE COURT
13 IS -- CALIFORNIA COURT, INCLUDING THE HASSELL CASE IS
14 VERY CLEAR THAT SIMPLY BECAUSE SOMETHING TOUCHES UPON
15 THIRD-PARTY CONTENT DOES NOT MAKE IT PREEMPTIVE.

16 IT'S IMPORTANT TO LOOK AT CALIFORNIA COURTS HAVE
17 HELD THAT PREEMPTION IS NARROWLY CONSTRUED. I
18 ACKNOWLEDGE THE LANGUAGE IN HASSELL, THERE IS SOME
19 LANGUAGE IN HASSELL THAT DISCUSSES BROAD PREEMPTION. IN
20 HASSELL IT REFERS TO DEFAMATION CLAIMS.

21 THEN THE COURT MORE RECENTLY IN LEE, THE COURT OF
22 APPEAL HAS A VERY DETAILED DISCUSSION AND INDICATES THE
23 COURTS NEED TO BE CAREFUL NOT TO EXCEED THE PREEMPTIVE
24 POWER OR THE PREEMPTIVE PURPOSE OF SECTION 230.

25 FINALLY, I THINK, JUDGE, REALLY THE CHALLENGE FOR
26 THE COURT IS THAT IT'S -- THE COURT IS REQUIRED TO SEEK
27 A HARMONIOUS INTERPRETATION. IF IT IS POSSIBLE FOR THE
28 COURT TO INTERPRET SECTION 230 CONSISTENTLY WITH STATE

1 LAW, RESPECTFULLY THAT'S WHAT THE COURT NEEDS TO DO.

2 IF THERE'S NO RECONCILIATION, THEN WE'RE OUT ON
3 OUR EAR, I GRANT YOU THAT. BUT WE BELIEVE IT IS. IT'S
4 IMPORTANT TO LOOK AT SECTION 230, NOT JUST THE SECTION
5 OF PUBLISHER THAT WE TALKED ABOUT, BUT THERE'S VERY
6 IMPORTANT PROVISIONS OF SECTION 230 THAT WE BELIEVE ARE
7 EQUALLY IMPORTANT AND NEED TO BE CONSIDERED IN YOUR
8 HONOR'S ANALYSIS.

9 IN HASSELL VERSUS BIRD, THE CALIFORNIA SUPREME
10 COURT SAID WE DO NOT EXAMINE LANGUAGE IN ISOLATION BUT
11 IN THE CONTENTS OF THE STATUTORY FRAMEWORK AS A WHOLE IN
12 ORDER TO DETERMINE THE SCOPE AND PURPOSE AND HARMONIZE
13 THE VARIOUS PARTS. THAT'S IMPORTANT WHEN IT COMES DOWN
14 TO SECTION --

15 THE COURT: CAN YOU SLOW DOWN FOR THE REPORTER.

16 MR. BERGMAN: ABSOLUTELY. SO, JUDGE, SO I THINK
17 IT'S IMPORTANT TO LAY OUT ALL OF THE PROVISIONS RELEVANT
18 OF SECTION 230. SO SECTION 230(B) SAYS IT'S A POLICY OF
19 THE UNITED STATES, ONE, TO PROMOTE THE CONTINUED
20 DEVELOPMENT OF THE INTERNET; AND TWO, TO PRESERVE THE
21 VIBRANT AND COMPETITIVE FREE MARKET. THIS IS REALLY
22 IMPORTANT TO THE ISSUE OF UNWANTED MESSAGES.

23 THREE, TO ENCOURAGE THE DEVELOPMENT OF
24 TECHNOLOGIES WHICH MAXIMIZE USER CONTROL OVER WHAT
25 INFORMATION IS RECEIVED BY INDIVIDUALS, FAMILIES AND
26 SCHOOLS.

27 AND TWO -- I'M SORRY, FOUR, TO REMOVE
28 DISINCENTIVES THAT -- DISINCENTIVES THAT EMPOWER PARENTS

1 TO RESTRICT THEIR CHILDRENS' ACCESS TO OBJECTIONABLE OR
2 INAPPROPRIATE ON-LINE MATERIAL, IN OTHER WORDS, TO
3 EMPOWER PARENTS. THAT IS WHAT THE STATUTORY PURPOSE IS.

4 FINALLY, TO ENSURE VIGOROUS ENFORCEMENT OF FEDERAL
5 CRIMINAL LAWS. THEN WHEN WE TALK ABOUT SECTION C-1,
6 TREATMENT OF A PUBLISHER AND SPEAKER, I BELIEVE IT'S
7 INCUMBENT UPON THE COURT WHEN CONSTRUING THE STATUTE AS
8 IT MUST TO DO SO IN LIGHT OF THE POLICY PURPOSES, WHICH
9 SPECIFICALLY INCLUDE PROTECTING KIDS, ENFORCING THE LAW
10 AND ENCOURAGING TECHNOLOGIES THAT ALLOW PEOPLE TO
11 CONTROL THEIR ON-LINE EXPERIENCE.

12 NOW, I WANT TO TALK A LITTLE BIT ABOUT THEN THE
13 THREE-PART TEST. BARNES VERSUS YAHOO, WHICH -- THERE
14 HAVE BEEN TEN CALIFORNIA COURT OF APPEALS CASES THAT
15 CITED BARNES AND 260 FEDERAL CASES. BARNES IS LIKE THE
16 MAGNA CARTA, IF YOU WOULD, OF SECTION 230. IT HAS A
17 THREE-PART TEST.

18 I FEAR THAT MY COLLEAGUE HAS KIND OF CONFLATED THE
19 THREE ELEMENTS. FOR MY PURPOSES OF MY ARGUMENT, I WANT
20 TO TRY TO KEEP THOSE THREE ELEMENTS DISCRETE. NO. 1 IS
21 THAT PREEMPTION APPLIES IS NO. 1. THE ENTITY IS AN
22 INTERACTIVE COMPUTER SERVICE.

23 NO. 2, THAT THE PLAINTIFFS' CLAIM SEEKS TO HOLD
24 THAT ENTITY LIABLE AS A PUBLISHER OR SPEAKER. THE
25 CLAIM.

26 NO. 3, AGAIN, ALL THREE, THAT THE CONTENT NEEDS TO
27 BE THIRD-PARTY CONTENT.

28 IT'S IMPORTANT THAT ALL THREE OF THEM BE

1 CONSIDERED SEPARATELY BECAUSE THEY ALL APPLY. FOR
2 PURPOSES OF OUR DISCUSSIONS THIS MORNING, WE ALL AGREE
3 THAT SNAPCHAT IS AN INTERACTIVE COMPUTER SUPPLIER. BUT
4 FUNDAMENTALLY, THE ISSUE HERE, JUDGE, IS THE SECOND
5 ELEMENT OF THE PRONG --

6 THE COURT: WHAT ABOUT THE THIRD?

7 MR. BERGMAN: THE THIRD IS IMPORTANT. THE THIRD
8 DEALS WITH IS IT THIRD-PARTY CONTENT OR NOT. THE RECENT
9 OPINION OF THE CALIFORNIA COURT OF APPEALS THAT WE
10 SUBMITTED TO THE COURT IS SUPPLEMENTAL AUTHORITY.
11 THAT'S THE -- I'M SORRY, JUDGE.

12 THE COURT: TAKE YOUR TIME.

13 MR. BERGMAN: THAT'S THE LIAPES VERSUS FACEBOOK
14 CASE HOLDS THAT ALGORITHMS THAT TAKE IN AGE AND GENDER
15 IN A RECOMMENDATION FORM ARE DEEMED TO BE THIRD-PARTY
16 CONTENT, INsofar AS WHEN THE DEFINITION OF THIRD-PARTY
17 CONTENT UNDER SECTION 230 IS DID THE ENTITY CONTRIBUTE
18 IN WHOLE OR IN PART.

19 IT WOULD BE OUR SUBMISSION, YOUR HONOR, THAT BASED
20 ON THE FACTS ALLEGED, THAT SNAPCHAT CONTRIBUTES IN PART
21 TO THE THIRD-PARTY -- TO THE THIRD-PARTY CONTENT AT
22 ISSUE IN THIS CASE.

23 THE COURT: LET ME MAKE SURE I'M FOLLOWING YOU.
24 ON THE SKYPARK ANALYSIS ABOUT WHICH YOU WERE SPEAKING,
25 PLAINTIFFS CONCEDE ITEM 1 BUT DO NOT CONCEDE ITEMS 2
26 AND 3?

27 MR. BERGMAN: THAT'S CORRECT, YOUR HONOR. I THINK
28 THAT MOST OF THE ENERGY, IF YOU WOULD, THAT WE EXPENDED

1 IN OUR BRIEFING WAS ON THE SECOND ITEM. SIGNIFICANTLY,
2 AND WE'LL GET THERE IN A MINUTE, DYROFF CONCEDES THE
3 SECOND ITEM. DYROFF COMES DOWN TO THE THIRD ITEM, IS IT
4 THIRD-PARTY CONTENT?

5 I WOULD AGREE WITH MY COLLEAGUE THAT THE HOLDING
6 IN DYROFF SUGGESTS THAT ALGORITHM RECOMMENDATIONS,
7 ALBEIT IN A FAIRLY RUDIMENTARY GESTALT, IF YOU WOULD,
8 ARE THAT DYROFF SUGGESTS THOSE ARE NOT THIRD-PARTY
9 CONTENT.

10 I WOULD SUBMIT TO THE COURT THAT THE RECENT
11 DECISION OF THE COURT OF APPEALS IN LIAPES SUGGEST THAT
12 INSOFAR AS THEY CONTRIBUTE TO THE ILLEGALITY IN THE
13 LIAPES CASE WHERE THE ALGORITHMS COMBINE AGE AND GENDER
14 AND GEOGRAPHY, THEY DO CONTRIBUTE.

15 WE SUBMIT THAT IN THIS CASE AND IF YOU LOOK AT
16 SOME OF THE ILLUSTRATIONS THAT WE FURNISHED AND SOME OF
17 THE ILLUSTRATIONS OF THE STORY FEATURE, THE ARCHITECTURE
18 OF THE STORY FEATURE, IT IS DESIGNED BY SNAPCHAT. IT
19 HAS CONTRIBUTED TO IN PART.

20 IT WOULD BE OUR POSITION, YOUR HONOR, THAT ON THE
21 THIRD PRONG, AT LEAST WE HAVE PLAUSIBLY ALLEGED THAT
22 SNAPCHAT DOES CONTRIBUTE MATERIALLY TO THE THIRD-PARTY
23 CONTENT. THE OTHER WAY IT DOES THAT IS SNAPCHAT HAS
24 MEMES THAT PEOPLE SEND, THAT'S A SNAPCHAT PRODUCT.
25 SNAPCHAT LICENSES MUSIC AND VIDEO FROM THIRD PARTIES
26 THEN USERS HOOK ONTO THEIR MESSAGES.

27 YOUR HONOR, I THINK THIS IS WHY WE NEED SOME
28 DISCOVERY. I DON'T WANT TO REPRESENT TO THE COURT THAT

1 I'M ABSOLUTELY SURE THAT I'M GOING TO PREVAIL AT TRIAL
2 ON THIS ISSUE. WE BELIEVE WHAT WE KNOW NOW ABOUT THE
3 MANNER IN WHICH SNAPCHAT LICENSES MUSIC, LICENSES VIDEO,
4 UTILIZES MEMES, PROBABLY ARCHITECTURE OF THE STORIES IS
5 PUT TOGETHER. AGAIN, THE STANDARD IS UNDER -- THE
6 ROOMMATES CASE TALKS ABOUT THIS, MATERIALLY IT
7 CONTRIBUTES TO THE ILLEGALITY.

8 WE BELIEVE THAT THE NATURE OF THE DESIGN, IN
9 PARTICULAR THE WAY IN WHICH ADDITIONALLY THE QUICK AD
10 FEATURE WORKS, THAT THAT MATERIALLY CONTRIBUTES TO IT.
11 AT LEAST WE BELIEVE THERE IS ENOUGH THERE THAT WE SHOULD
12 BE PERMITTED TO CONDUCT DISCOVERY AND UNDERSTAND, LOOK
13 UNDER THE HOOD, IF YOU WOULD, JUDGE, AND FIGURE OUT HOW
14 THOSE PRODUCTS WORK IN REALITY.

15 LET ME FOCUS ON THE SECOND PRONG BECAUSE I THINK
16 THAT'S WHERE MOST OF THE INK HAS BEEN SPILLED BY BOTH
17 SIDES, IF YOU WOULD, IN OUR PLEADINGS.

18 WHAT MY COLLEAGUE INDICATED IS THAT BASICALLY A
19 BUT-FOR TEST APPLIES. IF THE HARM ALLEGED IN ANY WAY
20 RELATES TO THIRD-PARTY CONTENT, THEN 230 IMMUNITY
21 APPLIES BECAUSE, AGAIN, WE ARE TREATING THE ENTITY AS A
22 PUBLISHER OR A SPEAKER.

23 WHAT IS IMPORTANT, IN THE COURT OF APPEALS, THE
24 9TH CIRCUIT DID THIS IN BARNES, THIS WAS JUDGE
25 O'SCANLAIN, THIS WAS 15 YEARS AGO. AND SUBSEQUENTLY IT
26 WAS ADOPTED AND REFINED. I THINK A VERY HELPFUL
27 ANALYSIS IN LEE AND IN BOLGER IN PARTICULAR IS THAT
28 WE'RE LOOKING AT WHAT IS THE DUTY ALLEGED THAT A

1 PUBLISHER HAS CERTAIN DUTIES AND A MANUFACTURER HAS
2 CERTAIN DUTIES. IT'S NOT A BUT-FOR TEST.

3 IN DOE VERSUS BROWNS (PHONETIC), FOR INSTANCE, IF
4 IT'S A BUT-FOR TEST, ANYTHING INVOLVING A SOCIAL MEDIA
5 APP IS GOING TO BE IMMUNE.

6 SO I THINK THE ARGUMENT THAT YOU HEARD IS THAT IF
7 THESE CHILDREN HAD RECEIVED SOLICITATIONS FOR, YOU KNOW,
8 JELLY BEANS AND FLOWERS, WE WOULDN'T BE HERE TODAY. YOU
9 KNOW, I WISH THAT WAS THE CASE. BUT THE ARGUMENT IS
10 THAT -- SO THEREFORE, IT'S BUT-FOR THE CONTENT WE
11 WOULDN'T BE HERE. AND THAT IS NOT THE TEST.

12 THE TEST -- THIS WAS ARTICULATED AGAIN IN LEE AND
13 BOLGER IS THAT DO WE -- IS THE DUTY -- YOU FOCUS ON THE
14 DUTY NOT THE HARM. IF THE DUTY IS ONE OF A PUBLISHER,
15 WE'RE OUT. AND THE TRADITIONAL DUTIES OF A PUBLISHER,
16 AS THE COURT SAID IN LEE AND BOLGER, IS DECIDING WHETHER
17 TO POST, TO PRINT, TO EDIT, TO REMOVE.

18 WE HAVE MADE VERY CLEAR THAT WE ARE NOT ALLEGING
19 AND WE'VE AFFIRMATIVELY STATED THAT SNAPCHAT COULD LEAVE
20 EVERY BIT OF CONTENT REGARDING DRUGS ON ITS PLATFORM AND
21 STILL BE SUBJECT TO LIABILITY BECAUSE THAT'S NOT WHAT
22 WE'RE TALKING ABOUT HERE -- I'M SORRY, AND NOT BE
23 SUBJECT TO LIABILITY, YEAH, BECAUSE WE'RE TALKING ABOUT
24 THE MANNER IN WHICH IT'S DESIGNED.

25 SO THE DUTIES OF A PUBLISHER ARE VERY DIFFERENT
26 THAN THE DUTIES OF A MANUFACTURER. AND NUMEROUS COURTS
27 HAVE HELD THAT. I THINK THE COURT IN LEE WAS VERY CLEAR
28 THAT SAID, LOOK, THERE'S A SEPARATE AND INDEPENDENT DUTY

1 UNDER PROPOSITION 65 FOR AMAZON TO PROVIDE WARNINGS.
2 THE FACT THAT -- THERE WAS FAILURE TO WARN ON THE
3 PLATFORM IS NOT SUFFICIENT.

4 THE ANALYSIS IS VERY HELPFUL IN THE SOLE
5 (PHONETIC) CASE BUT IT WAS THE GRANDFATHER CASE IS
6 BARNES VERSUS YAHOO WHERE THERE WAS SALACIOUS MATERIAL
7 INVOLVING THE PLAINTIFF THAT WAS PUBLISHED ON-LINE. AND
8 JUDGE O'SCANLAIN HELD THAT SECTION 230 UNDER A
9 NEGLIGENT UNDERTAKING TEST PREEMPTED BECAUSE THAT
10 INVOLVED THE REMOVAL, THE FAILURE TO REMOVE. THAT WAS A
11 PUBLISHING FUNCTION.

12 UNDER A PROMISSORY ESTOPPEL THEORY, THAT WAS
13 DIFFERENT IN THAT -- IT'S THE SAME CONTENT, IT'S THE
14 SAME HARM BUT BECAUSE THE THEORY OF LIABILITY WAS
15 PROMISSORY ESTOPPEL, THE 9TH CIRCUIT HELD ON TEN
16 OCCASIONS, CALIFORNIA COURTS HAVE FOLLOWED THE ANALYSIS
17 THAT THAT'S A SEPARATE AND INDEPENDENT DUTY.

18 WE SEE THAT IN THE APPLICATION IN DOE VERSUS
19 BROWNS WHERE THERE WAS ON-LINE CONTENT THAT LED TO THE
20 ASSAULT OF A WOMAN, IN SOME VERY SIMILAR WAYS THAT
21 OCCURRED HERE. AND THE 9TH CIRCUIT HELD THAT IT WAS --
22 THAT THE -- AND AS WE HAVE HERE, THE OPERATORS OF THE
23 WEBSITE KNEW ABOUT THIS CONDUCT. THEY KNEW THIS
24 NEFARIOUS ACTIVITY WAS GOING ON AND DIDN'T WARN.

25 THE 9TH CIRCUIT SAYS THE DUTY TO WARN IS A
26 SEPARATE AND INDEPENDENT DUTY BECAUSE IT'S NOT RELATED
27 TO TRADITIONAL PUBLISHING CONTENT, WHETHER TO REMOVE OR
28 ALTER IT.

1 WE COME DOWN TO THE -- I DIDN'T HEAR ABOUT LEMMON
2 VERSUS SNAP OR MAYNARD VERSUS SNAP.

3 TO ANSWER YOUR QUESTION, JUDGE, THERE IS AN
4 EXPLICIT HOLDING BY THE GEORGIA COURT OF APPEAL IN
5 MAYNARD VERSUS SNAP THAT SNAPCHAT IS A PRODUCT SUBJECT
6 TO STRICT PRODUCTS LIABILITY.

7 I WANT TO BE CLEAR WITH THE COURT, IN LEMMON THE
8 COURT WAS A LITTLE BIT MORE NUANCED. I DON'T THINK IT
9 WOULD BE FAIR TO SAY THERE'S A 9TH CIRCUIT HOLDING
10 PER SE THAT SAYS THAT STRICT LIABILITY APPLIES. IT
11 WOULD BE ACCURATE TO SAY, AS YOUR HONOR INDICATED,
12 THAT'S A MORE GENERIC PRODUCT LIABILITY, NEGLIGENT
13 DESIGN APPLIES. I DON'T THINK IT'S FAIR TO PIN THAT.

14 BUT MAYNARD SPECIFICALLY SAYS THAT. BUT THE ISSUE
15 IS THE SAME IS THAT YOU HAVE A DEFECTIVE ASPECT OF THE
16 PRODUCT. AND THAT WAS IN THE CASE OF BOTH MAYNARD AND
17 LEMMON VERSUS SNAP. THE SPEED FILTER, WHICH AGAIN,
18 INCENTIVIZED KIDS TO DO ILLEGAL STUFF. THE LAST TIME I
19 CHECKED, DRIVING A HUNDRED MILES AN HOUR IS ILLEGAL.
20 THAT'S THIRD-PARTY CONTENT, THAT'S NOT SNAPCHAT CAUSING
21 THE INSTRUMENTALITY OF HARM WERE A BUNCH OF CRAZY
22 TEENAGERS DRIVING TOO FAST, MOTIVATED TO DO SO BY THIS
23 DEFECT IN THE PRODUCT.

24 NEVERTHELESS, THE 9TH CIRCUIT AND THE GEORGIA
25 COURT OF APPEALS EQUALLY HELD THIS WAS NOT PUBLISHING
26 ACTIVITY. THE ANALYSIS -- IT'S VERY IMPORTANT TO
27 REMEMBER THAT THE FIRST PART OF THE LEMMON CASE CAME
28 DOWN ON PRONG 2; THAT THE DUTY OF A PUBLISHER AND DUTY

1 TO DESIGN A SAFE PRODUCT ARE SEPARATE AND INDEPENDENT.
2 THE 9TH CIRCUIT AND IN DOE VERSUS BROWNS SPECIFICALLY
3 REJECTED THIS BUT-FOR ANALYSIS THAT YOU HEARD SNAP ARGUE
4 TODAY.

5 THEY SAID YEAH, BUT FOR SOME THIRD-PARTY CONTENT,
6 THIS CAR ACCIDENT WOULDN'T HAVE HAPPENED. BUT THEN
7 THAT'S NOT THE TEST. THE TEST IS THE DUTY THAT'S
8 ALLEGEDLY BROKEN. YOUR HONOR, WE HAVE ALLEGED
9 EXTENSIVE, 21 SEPARATE DESIGN DEFECTS THAT WE BELIEVE
10 FALL WITHIN DUTY. I THINK AS THE COURT ACCURATELY KIND
11 OF PUT THEM INTO THREE OR FOUR BOXES; GENERAL
12 NEGLIGENCE, STRICT PRODUCT LIABILITY, FRAUD, THEN --
13 THOSE ARE THE DUTIES AT ISSUE HERE.

14 I THINK IT'S IMPORTANT THEN TO REALIZE WHEN YOU
15 READ LEMMON TO SEE THAT'S WHERE THE FOCUS IS. IT'S THE
16 DUTY NOT THE HARM. BECAUSE, AS THE COURT RECOGNIZED IN
17 LEMMON, AND THE COURT RECOGNIZED IN DOE VERSUS BROWNS,
18 OTHERWISE, UNDER THE BUT-FOR TEST, YOU WOULD HAVE --
19 ACTUALLY, YOU HEARD SNAP SAY THAT UNDER SECTION 230,
20 THEY'RE IMMUNIZED FROM ANY CLAIM. WE UNDERSTAND THE
21 ARGUMENT BUT WE SUBMIT IT'S NOT CONSISTENT WITH THE
22 LANGUAGE OF 230 OR THE REQUIREMENTS.

23 I WANT TO SAY IT'S IMPORTANT WHEN YOU LOOK AT
24 LEMMON, THEN THERE'S A DISCUSSION ABOUT THE THIRD TEST.
25 YOU SEE ARGUMENT IN MY COLLEAGUE'S BRIEFING SAYING,
26 WELL, LEMMON SAYS IT'S ONLY WHEN THE -- ONLY WHEN THE
27 THIRD-PARTY CONTENT IS IRRELEVANT TO THE HARM THAT
28 LEMMON APPLIES.

1 THAT IS NOT AN ACCURATE READING OF LEMMON. WHEN
2 YOU READ LEMMON, THAT GOES TO THE THIRD PRONG, NOT THE
3 SECOND PRONG. THE SECOND PRONG IS REALLY WHERE MOST OF
4 OUR ENERGY IS DEVOTED TODAY, WHICH IS WE'RE NOT SEEKING
5 TO HOLD THEM LIABLE AS A PUBLISHER. WE SPECIFICALLY
6 ALLEGE IN OUR PLEADINGS, AND I WISH I COULD QUOTE
7 ABSOLUTELY VERBATIM, BUT WE EXPLICITLY DISCLAIM ANY
8 CLAIM SEEKING TO HOLD THEM LIABLE AS A PUBLISHER OR
9 SPEAKER OF THIRD-PARTY CONTENT. AND WE SAY THEY COULD
10 FULFIL THEIR DUTY TO PROVIDE AND MAKE A REASONABLE SAFE
11 PRODUCT WITHOUT BRINGING IN A SINGLE ASPECT OF
12 THIRD-PARTY CONTENT.

13 IF SOMEBODY WANTED TO GO ON SNAPCHAT AND LOOK FOR
14 DRUG CONTENT, A BAD DECISION BUT NOT AN ILLEGAL ONE,
15 THAT'S NOT WHAT -- THE ISSUE IS THE NATURE OF THE DESIGN
16 AND THAT'S WHAT WE HAVE HERE. WE'RE NOT FAULTING THEM.
17 NOR ARE WE FAULTING THEM FOR CONTENT MODERATION. WE ARE
18 NOT SUGGESTING THAT THEY FAILED TO ADEQUATELY MONITOR --
19 THEY SHOULD HAVE TAKEN IT OFF.

20 THAT'S VERY DIFFERENT FROM THE JACKSON CASE. THE
21 JACKSON CASE CITED TODAY, YOUR HONOR, IT'S A GUN SALE
22 CASE, I THINK IT WAS A -- IT WAS A GUN SALE CASE. I
23 THINK IT WAS AN E-BAY GUN SALE. THE ALLEGATION -- IT
24 WAS PHRASED IN TERMS OF PRODUCT LIABILITY. IT WAS
25 PHRASED IN TERMS OF PRODUCT LIABILITY. BUT THE GRAVAMEN
26 WAS THEY FAILED TO MONITOR THE SALE OF ILLEGAL DRUGS
27 ON-LINE.

28 WE'RE NOT FAULTING SNAP, AT LEAST OUR LEGAL CLAIMS

1 ARE NOT FAULTING SNAP FOR FAILING TO MONITOR DRUGS ON
2 ITS PLATFORM. WE'RE FAULTING SNAP FOR DESIGNING A
3 PRODUCT THAT IT KNEW FACILITATED DRUG SALES WITH
4 SPECIFIC PRODUCT FEATURES THAT DID THAT, THAT WERE
5 UNIQUE FROM ANY OTHER SOCIAL MEDIA APP.

6 FOR THAT REASON, WE BELIEVE THAT SECTION 230 DOES
7 NOT IMMUNIZE SNAP IPSO FACTO. AT THE VERY LEAST, WE
8 OUGHT TO BE ABLE TO CONDUCT DISCOVERY TO LEARN MORE
9 ABOUT THE NATURE OF THESE PRODUCTS, THE NATURE OF HOW
10 THEY INTERACT WITH EACH OTHER AND WHAT SNAP KNEW AND
11 WHEN IT KNEW IT.

12 THE IDEA THAT SECTION 230 ALLOWS, AS THE COURT
13 SAID, IN ROOMMATES, A LAWLESS NO MAN'S LAND ON-LINE,
14 THAT'S NOT THE STANDARD THAT THE COURT SHOULD APPLY.
15 FOR THAT REASON, YOUR HONOR, WE BELIEVE THAT THESE CASES
16 SHOULD BE PERMITTED TO GO FORWARD PRESUMING, OF COURSE,
17 WE HAVE A VALID CLAIM UNDER OUR CALIFORNIA LAW.

18 WITH RESPECT TO THE PRODUCT LIABILITY ISSUE --
19 THE COURT: STOP. IF YOU'RE MOVING FROM 230 TO
20 PRODUCT LIABILITY, BY THAT CLOCK UP THERE, LET'S TAKE A
21 BREAK UNTIL 3:00. SEE YOU THEN.

22
23 (RECESS TAKEN.)
24

25 THE COURT: COUNSEL, I NEED TO BRIEFLY HANDLE
26 ANOTHER MATTER ON MY 3:00 CALENDAR. JUST HAVE A SEAT.

27
28 (RECESS TAKEN.)

1
2 THE COURT: BACK ON THE RECORD IN NEVILLE VERSUS
3 SNAP. COUNSEL, YOU WERE SAYING?

4 MR. BERGMAN: I WAS SAYING I THINK IT'S IMPORTANT,
5 JUDGE, TO RECOGNIZE THAT A LOT OF THE STATEMENTS THAT
6 WERE MADE TO THE COURT REGARDING THE NATURE OF THE
7 SNAPCHAT PRODUCT AND WHY IT IS NOT -- WHY IT IS
8 QUINTESSENTIALLY PUBLISHING ACTIVITY IN SNAP'S VIEW IS
9 FACTUALLY DISPUTED HEAVILY. THE CONTENTION THAT
10 SNAPCHAT IS A NEUTRAL COMMUNICATIONS TOOL IS HOTLY
11 DISPUTED.

12 THE FACT THAT THEY MERELY PROVIDE A COMMUNICATION
13 PLATFORM, THAT'S HOTLY DISPUTED. THAT APPEARS TO BE ONE
14 OF THE BASES ON WHICH THEY CLAIM THEY'RE ENTITLED TO
15 SECTION 230 IMMUNITY. WE SUBMIT THAT THAT NEEDS TO BE
16 EXPLORED THROUGH DISCOVERY AND THIS WON'T BE, OBVIOUSLY,
17 THE LAST TIME THE COURT HAS TO ADDRESS THIS ISSUE. EVEN
18 IN THE STATEMENTS AS TO WHY SECTION 230 APPLIES, WE
19 SUBMIT THEY'RE WILDLY DISPUTED ISSUES OF FACT THAT WE
20 THINK MERIT OVERTURNING OR OVERRULING THE DEMURRER AND
21 REVISITING THESE ISSUES UPON THE RECORD.

22 I WILL TELL THE COURT THAT WE ALL KNOW THAT WE ARE
23 CHARTING UNCERTAIN WATERS, WHETHER IT'S COMPLETELY
24 UNCERTAIN AS WE SUBMIT OR SOMEWHAT MORE UNCERTAIN, WE
25 KNOW THAT THE ISSUES THAT YOUR HONOR IS ADJUDICATING ARE
26 IN MANY CASES QUESTIONS OF FIRST IMPRESSION. AND THAT
27 ULTIMATELY, THE COURT OF APPEALS WILL BE THE FINAL
28 ARBITER OR PERHAPS THE CALIFORNIA SUPREME COURT OR MAYBE

1 EVEN THE U.S. SUPREME COURT WILL BE THE FINAL ARBITER OF
2 THESE SECTION 230 ISSUES.

3 HAVING SAT THROUGH THE ARGUMENT OF GONZALEZ VERSUS
4 GOOGLE, THE FRUSTRATION OF THE SUPREME COURT JUSTICES
5 WAS PALPABLE AS THEY YEARNED FOR A RECORD UNDER WHICH
6 THEY COULD OPINE ON THE NATURE, EXTENT AND SCOPE OF
7 SECTION 230. AND ULTIMATELY, DESPITE ALL OF THE
8 ANTICIPATION FROM BOTH SIDES OF THE BAR THAT WE WOULD
9 GET SOME ANSWER, THE COURT SAID WE DON'T HAVE A RECORD
10 TO RULE UPON AND DECLINED TO RULE ON SECTION 230.

11 WE SUBMIT TO YOUR HONOR THESE IMPORTANT ISSUES, AS
12 THE COURT INDICATED, REALLY AFFECTING WHAT THE LAW IS
13 GOING TO EMERGE IN THE 21ST CENTURY REALLY NEED TO BE
14 ADDRESSED BY APPELLATE COURTS AFTER A FULL RECORD HAS
15 BEEN OBTAINED.

16 ALSO, I WANTED TO POINT OUT THE REFERENCE TO THE
17 TAAMNEH CASE, THE COMPANION CASE TO GONZALEZ. I THINK
18 IT'S IMPORTANT FOR THE COURT TO UNDERSTAND THAT THE
19 SUPREME COURT WAS EXTREMELY CAREFUL TO RESOLVE THAT CASE
20 SOLELY ON AN AIDING AND ABETTING THEORY. AND EXPLICITLY
21 DECLINED TO ADDRESS SECTION 230. AND AS INDICATED BY
22 JUSTICE JACKSON'S CONCURRENCE, SO I DON'T THINK TAAMNEH
23 HAS MUCH TO DO ABOUT ANYTHING WITH RESPECT TO THE ISSUES
24 BEFORE THE COURT TODAY.

25 FINALLY, I WANT TO POINT OUT TWO ADDITIONAL CASES
26 THAT ARE WORTHY OF THE COURT'S CONSIDERATION. THE
27 OMEGLE CASE, AND THAT WAS MS. GOLDSTEIN'S CASE ACTUALLY.
28 IT WAS A CASE WHERE THE DISTRICT COURT REJECTED A

1 SECTION 230 IMMUNITY CHALLENGE, WHERE YOU HAD SIMILAR
2 KIND OF CONNECTING ALLEGATIONS THAT YOU HAVE IN THIS
3 CASE. YOU HAVE THE ALLEGATION THAT VULNERABLE KIDS WERE
4 BEING CONNECTED TO PREDATORY ADULTS.

5 AGAIN, AS IN THIS CASE, THE HARM DID NOT -- THE
6 HARM AROSE OUT OF THIRD-PARTY CONTENT. YET
7 NEVERTHELESS, THE DISTRICT COURT JUDGE MOSMAN HELD THAT
8 230 IMMUNITY WAS IMPROPER.

9 THE COURT: IS THAT IN YOUR BRIEF?

10 MR. BERGMAN: YES, IT IS. IT'S A FEDERAL DISTRICT
11 COURT, DISTRICT OF OREGON.

12 I THINK THAT, YOU KNOW, WE DISCUSSED EXTENSIVELY
13 IN OUR PLEADINGS THE DYROFF CASE. I WOULD POINT OUT
14 THAT I THINK THE GREATEST SIGNIFICANCE IS THAT IN
15 DYROFF, YOU HAD AN ADULT PERSON SAYING WHERE CAN I SCORE
16 HEROIN. IN THIS CASE, YOU HAD VULNERABLE KIDS BEING
17 ACCOSTED WITH MESSAGES THEY WEREN'T SEEKING.

18 THE COURT: SO I'M WAITING FOR THAT ARGUMENT. AND
19 I ASK YOU, DOES THAT HAVE SECTION 230 LEGAL SIGNIFICANCE
20 THAT THE VICTIMS, SO TO SPEAK, WERE MINORS?

21 MR. BERGMAN: THAT THE VICTIMS WERE MINORS? YES,
22 I CAN --

23 THE COURT: WHEN WE GET TO PRODUCT LIABILITY AND
24 NEGLIGENCE AND DUTY, I AM ANTICIPATING HEARING FROM YOU
25 ABOUT SPECIAL RELATIONSHIPS AND DUTIES THAT ARISE FROM
26 SPECIAL RELATIONSHIPS RELATIVE TO MINORS. MAYBE I'LL
27 HEAR THAT, MAYBE I WON'T BUT I'M EXPECTING TO.

28 BUT I'M WONDERING IN SECTION 230, IS THAT A

1 DISTINCTION THAT HAS LEGAL SIGNIFICANCE?

2 MR. BERGMAN: WE BELIEVE IT DOES. SECTION B-3
3 INDICATES THAT ONE OF THE PURPOSES OF SECTION 230 IS TO
4 ENCOURAGE THE DEVELOPMENT OF TECHNOLOGIES WHICH
5 MAXIMIZES USER CONTROL OVER WHAT INFORMATION IS RECEIVED
6 BY INDIVIDUALS, FAMILIES AND SCHOOLS. IN THAT RESPECT,
7 YES.

8 THE FACT THAT KIDS IN CONTRAST -- THE FACT THAT
9 USERS IN CONTRAST TO DYROFF ARE RECEIVING UNSOLICITED,
10 NEFARIOUS MATERIAL IS DIRECTLY RELEVANT TO THE STATUTE.

11 FINALLY AND ADDITIONALLY, SECTION 4 -- EXCUSE ME,
12 B-4 THAT ONE OF THE PURPOSES IS TO EMPOWER PARENTS TO
13 RESTRICT THEIR CHILDREN'S ACCESS TO OBJECTIONABLE OR
14 INAPPROPRIATE ON-LINE MATERIAL. I CANNOT THINK OF ANY
15 MATERIAL MORE OBJECTIONABLE THAN THESE PARENTS WOULD
16 HAVE WANTED TO RESTRICT THAN THE HORRIBLE CONTENT THAT
17 THEIR CHILDREN RECEIVED. AND OF COURSE TO ENSURE THE
18 VIGOROUS ENFORCEMENT OF FEDERAL CRIMINAL LAWS.

19 THE COURT: MR. BERGMAN, LET ME ASK YOU. HAVE ANY
20 OF THE CASES CONSTRUED B-1 AND B-2 IN LIGHT OF B-3 AND
21 B-4?

22 MR. BERGMAN: I HAVE NOT FOUND ANY, JUDGE. I
23 THINK WE -- WHAT DOES JUSTICE SCALIA SAY, WHEN A
24 LEGISLATOR HITS (PHONETIC) AMBIGUOUSLY IT PROTECTS THE
25 STATUTE. I THINK THAT THOSE PROVISIONS, I HAVE NOT SEEN
26 IT. IT MIGHT BE THERE. BUT I THINK USUALLY THE FOCUS
27 IS ON THE PUBLISHER OR THE SPEAKER AND KIND OF THE
28 LAUDATORY 1 AND 2 TALKING ABOUT PRESERVING THE INTERNET.

1 I HAVE NOT SEEN THAT.

2 BUT I THINK FOR YOUR HONOR'S CONFLICT ANALYSIS IN
3 DETERMINING WHETHER OR NOT THERE'S -- THE CONFLICT --
4 AN IRRECONCILABLE CONFLICT, IF YOU WOULD, EXISTS, I
5 THINK IT'S RELEVANT.

6 THE COURT: I THINK WHAT MS. GRANT WILL TELL ME IS
7 THE POINT IS APPARENTLY OBVIOUS. THE POINT YOU'RE
8 MAKING, THAT IF IT HAS LEGAL MERIT, A COURT WOULD HAVE
9 AT LEAST COMMENTED ON IT. LET'S ASSUME SHE SAID THAT,
10 WHAT WOULD YOU SAY IN RESPONSE TO THAT?

11 MR. BERGMAN: I WOULD SAY THAT THERE'S NOTHING IN
12 THE SECTION B THAT PLACES ANY HIERARCHY ON ONE
13 SUBSECTION BEING MORE MERITORIOUS THAN THE OTHER. I
14 WOULD FURTHERMORE SAY THERE IS EXTENSIVE DISCUSSION AND
15 I WOULD COMMEND TO THE COURT, JUDGE KAPLAN'S PARTIAL
16 DEFENSE IN 4-C DISCUSSING EXTENSIVELY THE LEGISLATIVE
17 HISTORY AS BEING EXPLICITLY DESIGNED TO PROTECT KIDS.
18 THERE'S AN EXTENSIVE DISCUSSION IN THAT CASE.

19 ADDITIONALLY, THERE IS SOME DISCUSSION, AGAIN, NOT
20 NECESSARILY QUOTING THESE SUBSECTIONS, YOUR HONOR, BUT
21 IN JUSTICE THOMAS' STATEMENT CONCURRING REGARDING THE
22 DENIAL OF CERTIORARI IN THE MALWARE VIRUS CASE. THERE'S
23 A DISCUSSION OF PROTECTION OF KIDS.

24 BUT AGAIN, THOSE SPECIFIC SECTIONS, I DON'T HAVE
25 AN ANSWER FOR YOU, JUDGE, EXCEPT I DON'T THINK YOU CAN
26 SAY -- THEY'RE IN THE STATUTE FOR A REASON AND IN
27 DETERMINING WHETHER OR NOT THERE'S A CONFLICT IN
28 CONDUCTING THE STATUTORY INTERPRETATION THAT THE COURT

1 IS REQUIRED TO DO TO DETERMINE WHETHER OR NOT THERE'S A
2 GRANT OF CONFLICT, I DON'T BELIEVE THOSE PROVISIONS CAN
3 OR SHOULD BE IGNORED.

4 THE COURT: LET'S MOVE ON TO THE PRODUCT LIABILITY
5 POINTS. HERE'S WHAT I WOULD LIKE TO KNOW RIGHT OFF THE
6 BAT. IS IT CRITICAL TO YOUR -- TO THE PLAINTIFFS'
7 POSITION THAT THE COURT DETERMINE THAT SNAPCHAT IS A
8 PRODUCT?

9 MR. BERGMAN: I WANT TO -- ARE YOU TALKING ABOUT A
10 PRODUCT FOR APPLICATION OF STRICT LIABILITY?

11 THE COURT: I AM. THANK YOU FOR NARROWING MY
12 QUESTION.

13 MR. BERGMAN: WELL, HONESTLY, JUDGE, NO. THERE IS
14 THE COURT -- I'M AWARE OF YOUR EXTENSIVE SUPERVISION OF
15 ASBESTOS CASES AND AS THE COURT IS WELL AWARE, THERE'S A
16 PRODUCT MANUFACTURER CAN BE SUSCEPTIBLE FOR NEGLIGENCE
17 OR FOR STRICT LIABILITY.

18 THE COURT: LET'S PUT NEGLIGENCE OVER ASIDE FOR A
19 MOMENT. LET'S TALK ABOUT THOSE COUNTS IN THE SECOND
20 AMENDED COMPLAINT THAT SPEAK IN THE LANGUAGE OF STRICT
21 PRODUCTS LIABILITY. BARKER VERSUS LULL DESIGN DEFECT;
22 CONSUMER EXPECTATION DESIGN DEFECT; STRICT LIABILITY
23 FAILURE TO WARN. I THINK THOSE ARE --

24 MR. BERGMAN: THOSE ARE THE THREE, YES.

25 THE COURT: THOSE ARE THE THREE. IS IT NECESSARY
26 FOR THOSE CLAIMS TO GO FORWARD FOR THE COURT TO
27 DETERMINE EITHER NOW OR LATER WHAT SNAP IS DOING OUT
28 THERE IS PROVIDING A PRODUCT AS OPPOSED TO A SERVICE?

1 MR. BERGMAN: WELL, JUDGE, TO BE CANDID WITH
2 THE --

3 THE COURT: THAT'S A GOOD THING, TO BE CANDID.

4 MR. BERGMAN: IF YOU THROW US OUT ON PRODUCT
5 LIABILITY AND NOT ON NEGLIGENCE, WE LIVE TO FIGHT
6 ANOTHER DAY. WE RESPECTFULLY SUBMIT THAT THAT WOULD BE
7 ERRONEOUS FOR THE COURT TO DO THAT FOR A COUPLE REASONS.

8 WE HAVE EXPLICITLY PLED ELEMENTS OF SECTION
9 RESTATEMENT THIRD SECTION 19 THAT RELATE TO WHETHER OR
10 NOT SOMETHING IS OR IS NOT A PRODUCT. I WOULD DIRECT
11 THE COURT TO --

12 THE COURT: I HEAR YOU AND I'VE READ THAT. YOUR
13 ARGUMENT THERE IS YES, IT IS A PRODUCT, JUDGE. I'M
14 ASKING A DIFFERENT QUESTION, WHICH IS, AND I WAS
15 ALLUDING TO THIS AS I WAS GIVING MS. GRANT A REASONABLY
16 HARD TIME ABOUT IT, CAN THE CONCEPT OF STRICT PRODUCTS
17 LIABILITY, WHICH I ALREADY DON'T LIKE THE TERM BUT WE'LL
18 GO WITH IT, CAN IT APPLY TO SOMETHING THAT'S NOT A
19 TANGIBLE PRODUCT?

20 MR. BERGMAN: ABSOLUTELY, JUDGE.

21 THE COURT: AND CAN IT APPLY TO WHATEVER IT IS
22 THAT SNAP IS OFFERING FOR SALE OUT THERE, IF IT'S NOT A
23 PRODUCT OR A SERVICE?

24 MR. BERGMAN: WELL, RESTATEMENT 19 SAYS -- THE
25 THIRD STATEMENT STATES THAT NON -- INTANGIBLE PRODUCTS
26 MAY BE CONSIDERED PRODUCTS, QUOTE, WHEN THE CONTEXT OF
27 THEIR DISTRIBUTION AND USE IS SUFFICIENTLY ANALOGOUS TO
28 THE DISTRIBUTION AND USE OF TANGIBLE PERSONAL PROPERTY.

1 RESTATEMENT TOWARDS PRODUCT LIABILITY 19-A.

2 WE PLED IN PARAGRAPHS 79 THROUGH 88 ALL OF THE
3 ELEMENTS THAT WE BELIEVE RELATE TO ANALOGIES. AND WE
4 SPECIFICALLY ALLEGED THAT THEY HAVE -- THEY'RE MASS
5 PRODUCED, IT'S MASS MARKETED, IT'S AKIN TO THE TANGIBLE
6 PRODUCT FOR PURPOSES OF PRODUCT LIABILITY. IT CAN BE
7 HEARD AND SEEN, IT TAKES UP MEMORY, IT DEPLETES BATTERY
8 LIFE.

9 SNAP CAN BE TURNED ON AND OFF AND CAN BE MOVED
10 FROM ONE SCREEN TO ANOTHER. WHEN INSTALLED ON A
11 CONSUMER'S DEVICE, IT HAS A DEFINITE APPEARANCE AND
12 LOCATION. IT'S OPERATED BY A SERIES OF PHYSICAL SWIPES
13 AND GESTURES, GESTURES. IS PERSONAL AND MOVABLE.
14 DOWNLOADED SOFTWARE SUCH AS SNAPCHAT IS A GOOD,
15 THEREFORE, SUBJECT TO THE UNIFORM COMMERCIAL CODE AND
16 IT'S SIMPLY NOT AN IDEA OR INFORMATION.

17 SO IN ANSWER TO YOUR QUESTION, JUDGE, IF WE'RE
18 RIGHT, AND WE ALLEGED THIS, BUT YES, IF THE ALLEGATIONS
19 IN PARAGRAPHS 79 THROUGH 88 ARE CORRECT, YES, WE DO
20 ESTABLISH THAT TO BE THE CASE. AND --

21 THE COURT: CAN I INQUIRE IF YOU KNOW, THIS IS
22 DIGGING DOWN PRETTY DEEP INTO YOUR FOOTNOTES. HAS
23 RESTATEMENT THIRD SECTION 19 BEEN CITED WITH APPROVAL BY
24 ANY COURTS?

25 MR. BERGMAN: YES, IT HAS. THE FLORIDA CASE --
26 THE LYFT APP, IT WAS LYFT VERSUS -- IT WAS A FLORIDA
27 COURT OF APPEALS CASE FAIRLY RECENTLY CAME OUT AND
28 SPECIFICALLY CITED SECTION 19 WITH RESPECT TO THE LYFT

1 APP. IT'S IN OUR PAPERS, I'LL ASK --

2 THE COURT: OKAY. IF IT'S THERE, BUT I JUST DON'T
3 RECALL IT.

4 MR. BERGMAN: OTHER COURTS HAVE -- I KNOW THE NEW
5 YORK COURT OF APPEALS IN THE TERWILLAGER CASE, IT'S AN
6 ASBESTOS CASE LOOKS TO SECTION 19 AND LOOKS TO THE
7 FACTORS THAT ARE SET FORTH IN THAT. AGAIN, NOT AN APP
8 CASE.

9 SO I WOULD COMBINE THAT, YOUR HONOR. I THINK OUR
10 ALLEGATIONS ESTABLISH UNDER SECTION -- RESTATEMENT
11 SECTION 19 THE ELEMENTS OF PRODUCT. BEYOND THAT THOUGH,
12 I THINK THAT WE ESTABLISHED KIND OF THE PUBLIC POLICY
13 PURPOSE OF PRODUCT LIABILITY THAT JUSTICE TRAYNOR SET
14 FORTH IN HIS CONCURRING OPINION IN ESCOLA VERSUS COCA
15 COLA AND THEN CODIFIED IN HIS MAJORITY OPINION IN YUBA
16 POWER COMPANY.

17 THAT IS THAT -- THE NATURE OF STRICT PRODUCT
18 LIABILITY IS ESSENTIALLY ONE OF INTERNALIZING THE COST
19 OF SAFETY. IT APPLIES IN THE SITUATION WHERE
20 ESSENTIALLY THE KNOWLEDGE OF SAFETY IS, AND JUDGE POSNER
21 ALSO WRITES ABOUT THIS IS WHERE -- YOU HAVE A VERY
22 COMPLICATED PRODUCT OR ITEM AND THE KNOWLEDGE IS WHOLLY
23 IN THE SOURCE OF THE SUPPLIER. THEN PUBLIC POLICY
24 SUPPORTS PLACING THE DUTY OF CARE ON THE ENTITY MOST
25 ABLE TO KNOW ABOUT THE DANGEROUS PROPENSITIES AND
26 CORRECT THEM. IT'S HARD TO IMAGINE ANYBODY MORE
27 MYSTERIOUS --

28 THE COURT: LET ME QUIBBLE WITH YOU. IT'S NOT A

1 DUTY OF CARE. MAYBE WHAT'S PLACED ON THE PRODUCT
2 MANUFACTURER IS LIABILITY WITHOUT FAULT.

3 MR. BERGMAN: THAT IS CORRECT.

4 THE COURT: IT'S NOT AN INSURER, MS. GRANT AND I
5 TALKED ABOUT THAT. BUT IF THE PRODUCT IS DEFECTIVE,
6 EVEN IF MANUFACTURED WITH THE UTMOST CARE, THE PRODUCT
7 SUPPLIER IS ON THE HOOK AS A MATTER OF, AMONG OTHER
8 THINGS, PLACING THE COST ON THE PARTY BEST ABLE TO
9 DISTRIBUTE IT IN SOCIETY. SO I'M QUIBBLING WITH YOU --

10 MR. BERGMAN: IT'S NOT QUIBBLING, JUDGE, IT'S AN
11 IMPORTANT POINT AND I MISSPOKE. THE DUTY OF CARE IS
12 NEGLIGENCE LAND AND WE'RE IN PRODUCT LIABILITY LAND.
13 AND THE PUBLIC POLICY IS THAT THE PARTY MOST ABLE TO
14 KNOW ABOUT THE DEFECT AND CORRECT THE DEFECT IS THE
15 MANUFACTURER.

16 YOU COULD NOT HAVE SOMETHING MORE -- YOU CANNOT
17 HAVE SOMETHING MORE APROPOS OF THAT THAN A HIGHLY
18 COMPLICATED, ARTIFICIALLY INTELLIGENCE-DRIVEN
19 COMPUTER-BASED APPLICATION THAT CONSUMERS HAVE NO IDEA
20 HOW THEY WORK.

21 WE HAVE IDENTIFIED SPECIFIC DESIGN DEFECTS IN THIS
22 PRODUCT THAT WE BELIEVE ARE UNREASONABLY DANGEROUS.
23 ABSOLUTELY, THEY'RE NOT THE GUARANTOR. IT HAS TO BE
24 DANGEROUS BEYOND THE CAN OF THE ORDINARY CONSUMER OR
25 RISK BENEFIT ANALYSIS. BUT WE ALLEGED SPECIFICALLY THAT
26 THE PLAINTIFFS IN THIS CASE WERE NOT AWARE OF THE
27 DANGEROUS PROPENSITIES, THAT -- AND THAT THE RISK
28 BENEFIT OF, FOR INSTANCE, DISAPPEARING MESSAGES, WHAT IS

1 THE SOCIAL GOOD OF THAT VERSUS THE COST TO LAW
2 ENFORCEMENT.

3 THE COURT: LET ME ASK YOU, THIS IS GETTING WAY
4 DOWN THE ROAD AND IF YOU CHOOSE NOT TO ANSWER MY
5 QUESTION, THAT'S OKAY. BUT WHAT WARNING SHOULD SNAP
6 HAVE GIVEN AND TO WHOM?

7 MR. BERGMAN: SNAP SHOULD HAVE DONE A NUMBER OF
8 THINGS.

9 THE COURT: JUST WARNING, THAT'S WHAT I'M TALKING
10 ABOUT. YOU KNOW THIS AND COUNSEL ALL KNOW THIS, STRICT
11 LIABILITY FAILURE TO WARN AND NEGLIGENCE FAILURE TO WARN
12 ARE LARGELY COEXTENSIVE, RIGHT?

13 MR. BERGMAN: THE CALIFORNIA CASE LAW, IT'S HARD
14 TO FLESH THEM OUT.

15 THE COURT: SO I'M JUST ASKING WHAT WARNING WOULD
16 HAVE MADE THIS PRODUCT SAFE? I'M USING PLAINTIFFS'
17 LANGUAGE NOW. THIS IS A PRODUCT, ACCORDING TO
18 PLAINTIFF, WHAT WARNING WOULD HAVE MADE THIS PRODUCT
19 SAFE?

20 MR. BERGMAN: I CAN THINK OF -- THE NATURE OF THE
21 PRODUCT BECAUSE IT WAS SO WELL SUITED TO PROVIDE
22 WARNINGS. YOU COULD SEND -- THEY KNOW THE AGE OF THEIR
23 USERS, THEY COULD PROVIDE INFORMATION REGARDING DRUG
24 DEALS AND ABOUT -- VERY, VERY FEW OF THESE KIDS EVEN
25 KNOW ABOUT THE RISK OF FENTANYL CONTAMINATION. WE KNOW
26 THAT SNAPCHAT FROM 2020, BASED ON THE INFORMATION THEY
27 RECEIVED FROM MR. CHAPMAN AND DR. BERMAN KNOW EXACTLY
28 ABOUT THAT.

1 THE SAME TECHNOLOGY THAT ALLOWS THEM TO CONNECT
2 KIDS TO NEFARIOUS DRUG DEALERS ALLOWS THEM TO WARN.
3 ADDITIONALLY, WARNING PARENTS, PUBLIC SERVICE
4 ANNOUNCEMENTS. I THINK THIS IS -- YOU THINK ABOUT A
5 PHARMACEUTICAL CASE WHERE THERE'S SOME COMPLICATED DRUG
6 AND SOME LITTLE THING DOWN AT THE BOTTOM OF THE THING
7 AND WHAT IS THE WARNING REALLY GOING TO DO.

8 THIS IS A CASE WHERE THE TECHNOLOGY REALLY
9 QUINTESSENTIALLY COULD PROVIDE MEANINGFUL WARNINGS. AND
10 OF COURSE THEY DID KNOW. AND EITHER UNDER A STRICT
11 LIABILITY OR A NEGLIGENCE THEORY, THERE'S SO MUCH THEY
12 COULD HAVE DONE TO HAVE WARNED AND THEY DIDN'T DO
13 ANYTHING.

14 THE COURT: WHAT WOULD YOU SAY TO MS. GRANT'S
15 POINT THAT ONE COULD SAY THE SAME THING ABOUT VERIZON OR
16 AT&T, BECAUSE THE SAME COMMUNICATIONS BETWEEN DRUG
17 DEALERS AND MINORS COULD OCCUR ON THE CELL PHONE RATHER
18 THAN THE SNAP PLATFORM? WHAT IS THE DUTY TO WARN THAT
19 VERIZON AND AT&T HAVE? OR ARE YOU SAYING IT'S NOT
20 ANALOGOUS?

21 MR. BERGMAN: I DON'T BELIEVE IT TO BE ANALOGOUS,
22 UNLESS VERIZON AND AT&T CALL UP DRUG DEALERS, GIVE DRUG
23 DEALERS NAMES OF VULNERABLE KIDS WHO MIGHT BE POTENTIAL
24 CUSTOMERS. I GUESS IN THAT CONTEXT, THEY WOULD SAY, HEY
25 KIDS AND PARENTS, BY THE WAY, I THINK THERE'S A
26 COMPONENT WHEN YOU'RE DEALING WITH MINORS TO WARN
27 PARENTS. AND HEY KIDS, JUST SO YOU KNOW, WE HAVE GIVEN
28 YOUR NAME TO THESE DRUG DEALERS SO BE AWARE. I DON'T

1 BELIEVE THAT -- I DON'T BELIEVE THE VERIZON AT&T IS A
2 VIABLE THING.

3 I WOULD SUBMIT THAT I CANNOT TELL THE COURT THAT
4 AT&T AND VERIZON WOULD HAVE A DUTY TO WARN SIMPLY
5 BECAUSE AMONG -- THERE MIGHT BE NEFARIOUS STUFF GOING ON
6 WHEN PEOPLE ARE TALKING ON THE PHONE. THAT'S NOT WHAT
7 WE HAVE HERE. WE HAVE ARTIFICIALLY-DRIVEN ALGORITHMS
8 AFFIRMATIVELY DIRECTING DRUG DEALERS TO KIDS WHO AREN'T
9 LOOKING FOR DRUGS.

10 THE COURT: LET'S TURN TO NEGLIGENCE FOR JUST A
11 MOMENT BECAUSE AMONG THE ARGUMENTS I HEARD FROM SNAP, AS
12 A MATTER OF LAW, GIVEN THE CRIMINAL THIRD-PARTY CONDUCT
13 INVOLVED, AN APPLICATION OF THE SO-CALLED ROWLAND
14 FACTORS WOULD CAUSE OR SHOULD CAUSE THIS COURT TO
15 CONCLUDE THAT THERE IS NO DUTY OF REASONABLE CARE OWED.
16 WHAT SAY YOU TO THAT?

17 MR. BERGMAN: I SAY CALIFORNIA CODE 1714 AND I SAY
18 THIS. THE ISSUE IN THE ISAACS CASE IS DISPOSITIVE I
19 THINK. AND THE ISAACS CASE --

20 THE COURT: HUNTINGTON HOSPITAL?

21 MR. BERGMAN: VERSUS HUNTINGTON HOSPITAL. JUSTICE
22 BIRD'S DECISION. ISAACS SAYS THAT YOU LOOK AT
23 FORESEEABILITY AND EASE OF CORRECTION. AND IT COMES
24 DOWN TO FORESEEABILITY. AND CALIFORNIA IS REplete WITH
25 CASES WHERE THE INQUIRY IS THE THIRD-PARTY MISCONDUCT
26 WITHIN THE REALM OF FORESEEABILITY. IN MANY CASES THE
27 COURT SAYS IT IS.

28 I WOULD SPECIFICALLY ADDRESS THE COURT -- WE'RE

1 NOT ONLY TALKING ABOUT PREMISES CASES, ALTHOUGH I THINK
2 THE ANALOGY IS APT. WHAT WE HAVE HERE IS ESSENTIALLY A
3 VIRTUAL EQUIVALENT OF A VIDEO ARCADE WITH A ROOM IN THE
4 BACK WHERE KIDS GO TO BUY AND SELL DRUGS AND SNAPCHAT IS
5 AWARE OF THAT AND PROFITS FROM KIDS GOING TO THE VIDEO
6 ARCADE.

7 AS THE COURT SAID IN BOLGER, A THEORY OF LIABILITY
8 THAT WOULD -- THAT A SOCIAL MEDIA COMPANY IS NOT
9 IMMUNIZED FROM THE SAME CONDUCT THAT WOULD INCUR
10 LIABILITY ON A BRICK AND MORTAR COMPANY.

11 SO IF SNAPCHAT OPERATED A VIDEO ARCADE AND KNEW
12 DRUGS WERE BEING SOLD IN THE BACK ROOM AND FACILITATED
13 THAT, THEY COULDN'T BE LIABLE EVEN THOUGH THEY WERE NOT
14 PERSONALLY PROFITING FROM THE THIRD-PARTY CONDUCT. SO I
15 THINK THAT ANALOGY THAT THIS IS A VIRTUAL EQUIVALENT OF
16 A DRUG ARCADE IS VALID, CERTAINLY FOR DEMURRER PURPOSES.

17 SECONDLY, I WOULD DIRECT YOU BEYOND THE ISAACS
18 CASE WHICH FOCUSES ON FORESEEABILITY. THEN WE LOOK TO
19 THE DICKS (PHONETIC) VERSUS ELECTRONIC MUSIC FESTIVAL.
20 I DIDN'T GET THE LAST NAME, BUT IT'S THE DICKS CASE
21 WHERE A 19 YEAR OLD GOES TO A MUSIC CONCERT AND
22 TRAGICALLY OVERDOSES ON DRUGS AND THE CALIFORNIA COURT
23 OF APPEALS SAID LAST YEAR THAT IT WAS -- THAT THE MUSIC
24 PROMOTER HAD AN OBLIGATION TO BETTER POLICE THE CONCERT
25 TO THE ENSURE THIRD-PARTY DRUG DEALERS DID NOT SELL
26 DRUGS TO THIS 19 YEAR OLD. I THINK THAT IS DIRECTLY
27 ANALOGOUS HERE.

28 IF YOU LOOK AT OUR COMPLAINT, AGAIN, WE HAVE

1 ADDRESSED NOT ONLY FORESEEABILITY, WE HAVE ADDRESSED
2 ACTUAL KNOWLEDGE. WE HAVE ADDRESSED MR. ED TURNAN
3 (PHONETIC), THEIR OWN SAFETY DIRECTOR SPECIFICALLY SAID
4 YOU'RE OPERATING AN OPEN-AIR DRUG MARKET. THAT'S NOT
5 THE WORDS HE USED. HE SAID SNAP NEEDS TO UP ITS GAME.
6 KIDS ARE TAKING PERCOCET, THEY DON'T KNOW IT'S LACED
7 WITH FENTANYL.

8 THIS IS A DIRECT E-MAIL THAT THEIR SAFETY
9 DIRECTOR, THAT ONE OF THEIR CURRENT MEMBERS OF THEIR
10 SAFETY BOARD IS WRITING. SO I THINK THAT -- OBVIOUSLY
11 FORESEEABILITY IS QUINTESENTIALLY A FACTUAL INQUIRY. I
12 THINK THE ALLEGATIONS IN THIS CASE AMPLY ESTABLISH A
13 LEVEL OF FORESEEABILITY SUFFICIENT TO TAKE AWAY THE
14 ARGUMENT THAT THE COURT SHOULD -- A LEVEL OF
15 FORESEEABILITY SUFFICIENT TO ALLOW THE CASE TO GO
16 FORWARD AND FOR US TO CONDUCT DISCOVERY ABOUT WHAT SNAP
17 KNEW AND WHAT IT SHOULD HAVE KNOWN.

18 THE COURT: ANYTHING ELSE BEFORE I TURN IT BACK
19 OVER TO MS. GRANT?

20 MR. BERGMAN: I THINK ASSUMING THAT THERE WILL BE
21 NO ADDITIONAL ARGUMENTS ON THE POINTS THAT WEREN'T
22 RAISED IN THE OPENING STATEMENT BY MY COLLEAGUE, THERE
23 ARE OTHER ISSUES TO ADDRESS BUT COUNSEL DID ADDRESS THEM
24 AND WE BOTH WORKED HARD TO PROVIDE YOU WITH A GOOD
25 BRIEFING ON THAT.

26 AS I SAID, WE HAVE SOME VERY WEIGHTY LEGAL ISSUES,
27 WE'RE IN NEW TERRITORY. I BELIEVE IT'S IN THE INTEREST
28 OF JUSTICE TO HAVE THE MOST OPEN RECORD POSSIBLE TO MOVE

1 FORWARD AND TO PROVIDE THIS COURT AND OTHER COURTS WITH
2 OPTIMAL GUIDANCE IN THIS.

3 THE COURT: I APPRECIATE IT. WILL YOU CONCEDE, I
4 GUESS IS THE WORD, THAT WHEN A DEMURRER IS FILED, I AM
5 OBLIGATED UNDER THE RULES OF CIVIL PROCEDURE TO SUSTAIN
6 IT, EVEN IF I THINK THAT A FACTUAL RECORD WOULD BE MORE
7 INFORMATIVE. LET ME SAY IT DIFFERENTLY.

8 IF I CAN LOOK AT THE FOUR CORNERS OF THE COMPLAINT
9 AND I CONCLUDE THAT A DEMURRER SHOULD BE SUSTAINED, EVEN
10 IF I'M CONVINCED THAT A MORE FULSOME ACTUAL RECORD WOULD
11 BE A BETTER RECORD FOR ME TO RULE ON, FOR THE COURT OF
12 APPEAL TO RULE ON, I'M STILL DUTY BOUND TO GRANT OR
13 SUSTAIN THE DEMURRER; AGREED?

14 MR. BERGMAN: THE COURT HAS TO FOLLOW THE LAW. I
15 WOULD SUGGEST THAT -- I WOULD SIMPLY SUGGEST TO THE
16 EXTENT THAT THE COURT IS ON THE FENCE ON THIS ISSUE, IF
17 IT'S THAT -- ALSO THE LAW -- OF COURSE, JUDGE. BUT THE
18 LAW OF DEMURRER ALSO RECOGNIZES THE IMPORTANCE OF
19 PROVIDING PLAINTIFFS WITH THE OPPORTUNITY TO DEVELOP THE
20 RECORD. SO YES, IF THE COURT WERE INCLINED TO THROW US
21 OUT AND WISHED THAT WE HAD MORE FACTS, YOU HAVE TO THROW
22 US OUT.

23 BUT I BELIEVE THAT THE FACTS ALLEGED IN OUR
24 COMPLAINT MORE THAN ADEQUATELY STATE CAUSES OF ACTION.
25 AND FOR THAT REASON, WE BELIEVE THE DEMURRER SHOULD BE
26 OVERRULED.

27 THE COURT: ONE LAST QUESTION. AT 216 PAGES AND
28 NEARLY A THOUSAND PARAGRAPHS, THERE'S NO DOUBT THAT THE

1 FACTS ARE ALLEGED WITH CERTAINTY. I'M NOT HEARING THAT
2 THE PROBLEM WITH THE COMPLAINT IS IT'S UNCERTAIN. YOU
3 HEARD THE ARGUMENTS, YOU READ THE PAPERS. AS AN
4 ULTIMATE FALL-BACK POSITION, IS THE PLAINTIFF ASKING FOR
5 LEAVE TO AMEND?

6 MR. BERGMAN: AS AN ULTIMATE FALL-BACK POSITION,
7 YES.

8 THE COURT: WE'LL SEE IF THAT COMES UP BECAUSE ONE
9 THING I WILL NEED TO HEAR IS HOW YOU WOULD DO IT TO
10 SOLVE -- WERE I TO FIND THAT THIS DEMURRER SHOULD BE
11 SUSTAINED, WHAT WOULD YOU BE ALLEGING TO SOLVE THE
12 PROBLEM? YOU DON'T HAVE TO TELL ME NOW.

13 MR. BERGMAN: I DON'T KNOW WHAT THE COURT HAS
14 DONE --

15 THE COURT: I DON'T KNOW WHAT I'M GOING TO DO, SO
16 FAIR ENOUGH. I'M JUST PUTTING IT OUT THERE.

17 MS. GRANT, I'LL GIVE IT TO YOU.

18 MS. GRANT: A LOT OF GROUND TO COVER. I WANTED TO
19 START WITH THE RESTATEMENT TORT SECTION 19, DEFINITION
20 OF A PRODUCT THAT YOU DISCUSSED WITH CO-COUNSEL. THE
21 RESTATEMENT STATES: A PRODUCT IS A TANGIBLE PERSONAL
22 PROPERTY DISTRIBUTED COMMERCIALY OR USE FOR
23 CONSUMPTION. OTHER ITEMS SUCH AS REAL PROPERTY OR
24 ELECTRICITY ARE PRODUCTS WHEN THE CONTEXT OF THEIR
25 DISTRIBUTION AND USE IS SUFFICIENTLY ANALOGOUS TO THE
26 DISTRIBUTION AND USE OF TANGIBLE PERSONAL PROPERTY THAT
27 IS APPROPRIATE TO APPLY TO THE RULES STATED IN THIS
28 RESTATEMENT. SECTION 19(B) SPECIFICALLY STATES

1 SERVICES, EVEN WHEN PROVIDED COMMERCIALY ARE NOT
2 PRODUCTS.

3 YOU ASKED THE FOLLOW-UP QUESTION IN RESPONSE TO
4 COUNSEL'S STATEMENT WHEN HE SAID WE ALL AGREE THAT SNAP
5 IS AN ISP, INTERNET SERVICE PROVIDER, AS DEFINED IN
6 SECTION 230. YOU ASKED A FOLLOW-UP QUESTION: DO YOU
7 CONCEDE THAT SNAP IS AN INTERNET SERVICE PROVIDER. AND
8 HE SAID YES.

9 AS A PROVIDER OF A SERVICE, AND WE KNOW THE
10 DEFINITION UNDER THE RESTATEMENT THAT A SERVICE IS NOT A
11 PRODUCT. TO YOUR EARLIER POINT ABOUT ELECTRICITY, IT
12 DOES SPECIFICALLY DEFINE ELECTRICITY AS A PRODUCT. I
13 THINK THAT'S VERY TELLING THAT THE RESTATEMENT SAYS
14 ELECTRICITY IS A PRODUCT, TANGIBLE PRODUCT. SERVICES
15 ARE NOT. AND YOU GOT A CONCESSION FROM PLAINTIFFS'
16 COUNSEL THAT SNAP IS AN INTERNET SERVICES PROVIDER.

17 THE COURT: I UNDERSTAND.

18 MS. GRANT: THERE WAS DISCUSSION ABOUT ALLOWING
19 THIS CASE TO PROCEED TO SUMMARY JUDGMENT. I WOULD
20 SUBMIT TO YOU, THAT'S CONTRARY TO THE ENTIRE PURPOSE OF
21 SECTION 230. AS THE CALIFORNIA COURT OF APPEAL HELD IN
22 MURPHY VERSUS TWITTER, SECTION 230 SHIELDS INTERNET
23 SERVICE PROVIDERS, QUOTE, FROM THE BURDENS ASSOCIATED
24 WITH DEFENDING AGAINST CLAIMS, END QUOTE.

25 DEVELOPING A MORE FULSOME RECORD IS NOT GOING TO
26 CHANGE THAT SNAP IS AN INTERNET SERVICE PROVIDER;
27 SNAPCHAT IS A SERVICE. IT'S NOT A PRODUCT. AND THE
28 HARM IN THIS CASE COMES DIRECTLY FROM THE CONTENT OF THE

1 MESSAGES THAT WERE EXCHANGED.

2 THE COURT: DIRECTLY, WHEN YOU SAY DIRECTLY, ARE
3 YOU DISTINGUISHING IT FROM WHAT MR. BERGMAN ACCUSED YOU
4 OF MAKING, WHICH IS AN ATTENUATED BUT-FOR ARGUMENT?

5 MS. GRANT: NOT ACTUALLY FOR MAKING A BUT-FOR
6 ARGUMENT. WHAT WE'RE DOING IS ESCHEWING TO THE
7 STANDARDS AS ENUNCIATED IN SECTION 230 IN COURTS IN
8 CALIFORNIA, INCLUDING THE CALIFORNIA SUPREME COURT AND
9 COURT OF APPEAL. THE 9TH CIRCUIT AND 9TH SUPREME COURT
10 HAVE ALL TRACKED THE SECTION 230 STANDARD. WE'RE NOT
11 DOING A BUT-FOR ANALYSIS. THEY LIKE TO CHARACTERIZE
12 THAT, BUT IT'S SIMPLY INCORRECT.

13 I WANT TO TOUCH UPON, PLAINTIFFS FILED A NOTICE OF
14 SUPPLEMENTAL AUTHORITY YESTERDAY ON THE LIAPES VERSUS
15 FACEBOOK CASE. AGAIN, EVEN A CURSORY REVIEW, YOUR
16 HONOR, OF THAT CASE WILL SHOW THAT THE FACTS ARE
17 RADICALLY DIFFERENT.

18 THE COURT IN LIAPES FOUND THERE WAS LITTLE
19 DIFFERENCE BETWEEN FACEBOOK'S REQUIREMENTS FOR WHAT
20 ADVERTISERS -- FOR WHAT THEIR CRITERIA WAS AND THE
21 WEBSITE IN ROOMMATES. THERE IN LIAPES, THE COURT FOUND
22 VERY IMPORTANT THAT FACEBOOK ALLEGEDLY CONTRIBUTED TO
23 THE PUBLICATION OF CONTENT BY REQUIRING ADVERTISERS TO
24 SELECT AGE AND GENDER PARAMETERS.

25 SO THE ALLEGATION THERE WAS THESE WERE
26 DISCRIMINATORY. AND LIKE THE WEBSITE OPERATOR
27 IN ROOMMATES, WHEN THEY ARE DICTATING THE CRITERIA THAT
28 IS DISCRIMINATORY THAT ADVERTISERS USE ON THEIR SITE,

1 NOW THEY'RE ACTUALLY PARTICIPATING IN CONTENT CREATION.

2 THE COURT IN LIAPES CONCLUDED, QUOTE, THERE IS
3 LITTLE DIFFERENCE WITH FACEBOOK'S AD TOOLS VERSUS THE
4 WEBSITE IN ROOMMATES. LIKE THE WEBSITE AT ISSUE IN
5 ROOMMATES, FACEBOOK REQUIRES USERS TO DISCLOSE THEIR AGE
6 AND GENDER BEFORE IT CAN USE ITS SERVICES.

7 IT GOES THROUGH ALL THESE DIFFERENT FACTORS THE
8 WAY THAT FACEBOOK REQUIRES ADVERTISERS ESSENTIALLY TO
9 USE DISCRIMINATORY CRITERIA.

10 AND THE COURT THEN CONCLUDED IN SO DOING, FACEBOOK
11 DOES NOT MERELY PROLIFERATE AND DISSEMINATE CONTENT OF
12 THE PUBLISHER, IT CREATES SHAPES OR DEVELOPS CONTENT BY
13 MATERIALLY CONTRIBUTING TO THE CONTENTS ALLEGED
14 UNLAWFULNESS.

15 FACEBOOK CREATED A SYSTEM THAT ACTIVELY SHAPES THE
16 AUDIENCE BASED ON PROTECTIVE CHARACTERISTICS SUCH AS AGE
17 AND GENDER.

18 HERE, PLAINTIFFS DO NOT ALLEGE THAT SNAP GAVE
19 EXPLICIT DIRECTION OR TIPS TO DRUG DEALERS ABOUT HERE'S
20 THE CONTENT YOU MUST USE OR IMPOSED ANY FORM OF
21 REQUIREMENT RELATED TO THE SUBSTANCE OF THE MESSAGES
22 THAT WERE EXCHANGED OR CREATED BETWEEN THE DRUG DEALERS
23 AND DECEDENTS, EXCEPT FOR THE FACT THAT OUR GUIDELINES
24 IN TERMS OF SERVICE SAY YOU SHOULD NOT BE POSTING ANY
25 DRUG CONTENT. SO WE ACTUALLY PROHIBITED THE POSTING OF
26 DRUG CONTENT, WHICH THE DRUG DEALERS AND USERS VIOLATED.

27 SO THE LIAPES COURT MADE IT CLEAR THAT, QUOTE, A
28 WEBSITE WOULD BE IMMUNE SO AS LONG AS IT DOES NOT

1 REQUIRE THE USE OF DISCRIMINATORY CRITERIA, END QUOTE.

2 THE COURT: THAT WAS MY QUESTION. YOUR POINT TO
3 ME IS THAT THE SECOND AMENDED COMPLAINT DOES NOT MAKE AN
4 ALLEGATION OF SNAP'S REQUIRING USERS TO DO ANYTHING. IT
5 MAKES ALLEGATIONS OF OPTIONS?

6 MS. GRANT: RIGHT. I THINK WHAT WE'RE REALLY
7 LOOKING AT HERE IS WHEN YOU'RE CREATING THE CONTENT,
8 SECTION 230 DOES NOT APPLY IF LIKE IN ROOMMATES OR IN
9 LIAPES, THE WEBSITE IS ACTUALLY DICTATING THE CONTENT OR
10 DICTATING THE CRITERIA THAT -- SORT OF MORE OF A CONTENT
11 PUBLISHER OR CREATOR AS OPPOSED TO JUST HAVING THE
12 PLATFORM BY WHICH MESSAGES AND CONTENT ARE EXCHANGED
13 WITH ONE ANOTHER.

14 COUNSEL RAISED THE OMEGLE CASE FROM THE OREGON
15 DISTRICT COURT. OBVIOUSLY, IT'S NOT BINDING ON THIS
16 COURT. I'LL BE HONEST, THAT'S AN OUTLIER.

17 THE COURT: THAT WAS FROM MEDFORD, IF I'M NOT
18 MISTAKEN.

19 MS. GRANT: YOU'RE RIGHT. THAT'S AN OUTLIER IN
20 THE CASE LAW, WHICH HAS UNIFORMLY HELD THAT CONNECTING
21 USERS AS A PUBLISHING FUNCTION, PROTECTED BY SECTION
22 230, NO COURT, I WANT TO STRESS THIS, NO COURT HAS HELD
23 THAT THE OMEGLE DECISION EXTENDS BEYOND THE SPECIFIC
24 FACTS OF THAT CASE, WHICH THERE WAS KIND OF A CHAT
25 ROULETTE WHEEL THAT HAD THE TAG LINE: TALK TO
26 STRANGERS. AND IT WAS A SITE THAT WAS A VIDEO CHAT
27 WEBSITE PRIMARILY USED FOR SEXUAL RENDEZVOUSES.

28 THE COURT NOTED THAT THE PLAINTIFF WAS HARASSED

1 AND BLACKMAILED AS A PRETEEN INTO THREE YEARS OF SENDING
2 A PREDATOR OBSCENE CONTENT. AND I THINK THAT SOMETHING
3 THAT STRUCK THE COURT WAS THAT THE PERPETRATOR WAS
4 OUTSIDE THE COUNTRY. SO I THINK THIS JUDGE DEVIATED
5 FROM THE SECTION 230 JURIS PRUDENCE TO CREATE A REMEDY.

6 THE COURT: WHAT IS THE YEAR OF THAT CASE, DO YOU
7 KNOW?

8 MS. GRANT: I THINK IT'S 2020 -- FEBRUARY 2022.

9 THE COURT: WAS IT TAKEN UP TO THE 9TH CIRCUIT?

10 MS. GRANT: I DON'T BELIEVE IT WAS. REALLY QUITE
11 FRANKLY, IF YOU LOOK AT THE CASE, THE JUDGE JUST GOT IT
12 WRONG. THE HARM THERE WAS FROM THE CHILD'S SEXUAL ABUSE
13 MATERIAL THAT WAS EXCHANGED BETWEEN THE PERPETRATOR AND
14 THE ADOLESCENT. SO THE HARM FLOWED FROM THE CONTENT.

15 IT'S WHY -- AND AS THE 2ND CIRCUIT COURT IN FORCE
16 VERSUS FACEBOOK, ARRANGING AND MATCHING CONNECTIONS AND
17 MATCHING PEOPLE WITH ONE ANOTHER SO PEOPLE CAN VIEW
18 CONTENT IS AN ESSENTIAL ASPECT OF PUBLISHING.

19 IF YOU ACCEPT PLAINTIFFS' ARGUMENT, IT WOULD
20 EVISCERATE SECTION 230. A DEFENDANT WOULD BE INELIGIBLE
21 FOR SECTION 230 IMMUNITY BY VIRTUE OF SIMPLY ORGANIZING
22 AND DISPLAYING CONTENT EXCLUSIVELY PROVIDED BY THIRD
23 PARTIES.

24 FOR THAT REASON, NO CASE HAS CITED OMEGLE
25 FAVORABLY. THE ONLY CASE THAT EVEN CITED OMEGLE AT ALL
26 IS DOES 1 THROUGH 6 VERSUS REDDIT. THAT'S THE 9TH
27 CIRCUIT, 51F.4TH 1137, 1141. IN REDDIT, THE 9TH CIRCUIT
28 FOUND THAT SECTION 230 IMMUNITY APPLIES TO CLAIMS

1 AGAINST REDDIT.

2 I CAN CITE YOU, YOUR HONOR, A WHOLE HOST OF
3 POST-OMEGLE DECISIONS AND WE HAVE DONE THAT IN THE BRIEF
4 THAT NO ONE FOLLOWED OMEGLE BECAUSE QUITE FRANKLY, IT IS
5 A DEPARTURE FROM SECTION 230 JURIS PRUDENCE. SO I
6 WANTED TO ADDRESS THAT CASE.

7 ONE CASE THAT I WOULD ADDRESS THE COURT'S
8 ATTENTION TO IS THE LW VERSUS SNAP CASE. THAT WAS
9 DECIDED IN THE SOUTHERN DISTRICT JUNE 5, 2023. THERE,
10 THAT WAS ANOTHER CASE LIKE OMEGLE THAT INVOLVED THE
11 EXCHANGE, THE MATCHING.

12 THE ALLEGATION FROM THE PLAINTIFFS' COUNSEL WAS,
13 WELL, SNAP HAS ALL THESE DEFECTIVE FEATURES, ONE IS THE
14 CONNECTING MINORS WITH SEXUAL PREDATORS. THAT WAS THE
15 ARGUMENT IN THAT CASE.

16 THE COURT DISMISSED THE PRODUCTS LIABILITY CLAIMS
17 AGAINST SNAP WITH PREJUDICE ON A 12(B)(6) MOTION UNDER
18 SECTION 230 BECAUSE THE COURT FOUND THAT -- ESSENTIALLY,
19 THE COURT REJECTED PLAINTIFFS' RELIANCE ON OMEGLE
20 FINDING THAT ALL THE CLAIMS WERE BARRED UNDER SECTION
21 230.

22 THE COURT FOUND CLAIMS THAT SNAPCHAT DESIGNED,
23 FACILITATED CRIMINAL EXCHANGE OF CHILD SEXUAL ABUSE
24 MATERIAL WERE DIRECTLY RELATED TO THE POSTING OF
25 THIRD-PARTY CONTENT THAT WAS EXCHANGED BY THE USERS.

26 QUOTE, WHETHER THEY FILED THEIR ALLEGATIONS AS
27 CLAIMS FOR PRODUCT LIABILITY, FRAUD OR NEGLIGENCE,
28 PLAINTIFF CAN'T SUE DEFENDANTS FOR THIRD-PARTY CONTENT

1 SIMPLY BY CHANGING THE NAME OF THE THEORY.

2 THAT'S EXACTLY WHAT PLAINTIFFS ARE TRYING TO DO
3 HERE. EVERY TIME THIS IS PRESENTED AS AN ISSUE OF FIRST
4 IMPRESSION, WHICH IS WHAT YOU HEARD, IT ABSOLUTELY IS
5 NOT. PLAINTIFFS IN COURTS ACROSS THE COUNTRY HAVE TRIED
6 EXACTLY THESE SAME ALLEGATIONS AND THEY HAVE FAILED TO
7 PERSUADE 99 PERCENT OF THE COURTS THAT SECTION 230
8 DOESN'T APPLY.

9 SO I WOULD DIRECT YOU TO BRY (PHONETIC) VERSUS
10 SNAP. THAT'S CENTRAL DISTRICT 2023. AND OF COURSE
11 PRAGER UNIVERSITY VERSUS GOOGLE. THERE THE COURT OF
12 APPEAL AFFIRMED THE TRIAL COURT'S SUSTAINING OF A
13 DEMURRER WITHOUT LEAVE TO AMEND. AND THE REASON WHY,
14 QUOTE, PRAGER'S CONTENTION THAT DEFENDANTS ARE
15 THEMSELVES AN INFORMATION CONTENT PROVIDER IN THAT THEY
16 DEVELOPED ALGORITHMS USED IN DETERMINING WHETHER TO
17 RESTRICT ACCESS TO PRAGER'S VIDEOS DOES NOTHING TO
18 DEFEAT SECTION 230 IMMUNITY.

19 PRAGER'S CLAIMS TURN NOT ON THE CREATION OF
20 ALGORITHMS BUT ON THE DEFENDANTS CREAT OF PRAGER'S
21 INFORMATION CONTENT, WHICH IS IMMUNE UNDER SECTION 230.

22 AGAIN, ALL OF THE CASES, INCLUDING BINDING
23 CALIFORNIA COURT OF APPEAL CASES DISMISSING THESE CLAIMS
24 AT THE PLEADING STAGE, YOU DON'T NEED ANY DISCOVERY OR
25 ANY EVIDENCE. THESE ARE PURE LEGAL QUESTIONS.

26 I WOULD ALSO DIRECT YOU TO DOE VERSUS MYSPACE,
27 2009. THAT'S BINDING CALIFORNIA AUTHORITY. THERE, THE
28 CALIFORNIA COURT OF APPEAL HELD THAT CLAIMS THAT MYSPACE

1 SHOULD HAVE ENSURED THAT SEXUAL PREDATORS DO NOT GAIN
2 ACCESS TO OR COMMUNICATE WITH MINORS ON ITS WEBSITE IS
3 EXPRESSLY COVERED BY SECTION 230.

4 THIS IS THE QUOTE I WANT TO FOCUS IN ON: ALL THE
5 FEATURES THAT PLAINTIFFS HAVE CHARACTERIZED AS DEFECTIVE
6 IN THESE CASES BOIL DOWN TO ALLEGATIONS THAT THE WEBSITE
7 INTRODUCED USERS TO CRIMINALS OR ALLOWED MINORS ACCESS
8 TO HARMFUL CONTENT OR STEERED HARMFUL CONTENT TO MINORS,
9 ALL OF WHICH RELATE TO PUBLISHING CONTENT AND ARE BARRED
10 BY SECTION 230.

11 PLAINTIFFS' COUNSEL MENTIONED THAT SNAP HAS
12 LICENSED MUSIC AND VIDEOS AND HAS MEMES AND ALLOWS
13 PEOPLE TO SEND VIDEOS AND PERSONAL STORIES, ALL OF WHICH
14 RELATE TO CONTENT AND ALL COVERED BY SECTION 230.

15 HE MENTIONED LEMMON. IT'S IMPORTANT TO REMEMBER
16 THAT LEMMON AND MAYNARD, NEITHER OF THOSE CASES INVOLVED
17 PRODUCTS LIABILITY CLAIMS, IT WASN'T EVEN BEFORE THE
18 COURT.

19 WHAT THE COURT DID DO IN THE 9TH CIRCUIT IN LEMMON
20 IN FOOTNOTE 4, THE 9TH CIRCUIT MADE IT CLEAR THAT IF
21 PLAINTIFF ATTEMPTED TO FAULT SNAP FOR PUBLISHING OTHER
22 SNAPCHAT USER CONTENT THAT MAY HAVE INCENTIVIZED
23 DANGEROUS BEHAVIOR, THIS WOULD TREAT SNAP AS A PUBLISHER
24 OF THIRD-PARTY CONTENT AND WOULD NOT BE PERMITTED UNDER
25 SECTION 230.

26 HE MENTIONED ISAACS VERSUS HUNTINGTON MEMORIAL
27 HOSPITAL. AGAIN, THAT'S A PREMISES LIABILITY CASE. I
28 THINK WHAT'S OMITTED WAS THAT THE SUPREME COURT ACTUALLY

1 NARROWED ISAACS AND LIMITED PREMISES LIABILITY FOR
2 THIRD-PARTY CRIMINAL CONDUCT. THE QUOTE IS: IN A&M, WE
3 EXPRESSLY RETREATED FROM THE OPEN-ENDED FORMULATION SET
4 FORTH IN ISAACS, NAMELY, THAT A PROPRIETOR MIGHT HAVE A
5 DUTY TO PROVIDE GUARDS TO PROTECT AGAINST THIRD-PARTY
6 CONDUCT EVEN IN THE ABSENCE OF PRIOR SIMILAR CONDUCT
7 AGAINST PUTTING THE PROPRIETOR ON NOTICE OF A NEED TO
8 PROTECT AGAINST SUCH CONDUCT.

9 THE DELGADO CASE, AGAIN, ANALOGIZING TO PREMISES
10 LIABILITY CASE, BECAUSE THERE IS NO CASE, OF COURSE,
11 THAT WOULD HOLD THAT AN INTERNET SERVICE PROVIDER, A
12 PROVIDER OF A SERVICE, HAS A DUTY TO PREVENT HARM TO
13 THEIR USERS FROM CRIMINALS ABUSING AND VIOLATING THE
14 TERMS OF THAT SERVICE.

15 THERE WAS A MENTION THAT DYROFF IS DIFFERENT
16 BECAUSE THE VICTIM WAS AN ADULT. HE WAS IN HIS 20'S
17 LIKE SOME OF THE DECEDENTS HERE WERE IN THEIR 20'S.
18 THERE'S NO SPECIAL CARVE OUT FOR AGE OR ADOLESCENCE.

19 THE COURT: UNDER 230.

20 MS. GRANT: UNDER 230.

21 THE COURT: WHAT ABOUT IS THE AGE OF THE VICTIM --
22 THE AGE OF THE DECEDENT A RELEVANT FACTOR FOR A DUTY
23 ANALYSIS UNDER NEGLIGENCE?

24 MS. GRANT: NO. I KNOW THERE WAS MENTION IN THE
25 BRIEF OF SOME TYPE OF A HEIGHTENED DUTY OF CARE FOR
26 CHILDREN. LET ME TURN TO MY SECTION OF WHERE I WANTED
27 TO DISCUSS THAT. I THINK THE IMPORTANT THING THERE IS
28 IN DOE -- FIRST OF ALL, THERE IS NO COURT, THEY HAVE NOT

1 CITED A SINGLE CASE THAT FOUND A HIGHER STANDARD
2 APPLIES.

3 CASES INVOLVING MINORS UNDER SECTION 230, IT'S
4 TREATED EXACTLY THE SAME. I WILL DIRECT YOUR ATTENTION
5 TO THE CALIFORNIA COURT OF APPEAL DECISION IN DOE 2
6 VERSUS MYSPACE. THAT WAS A CASE INVOLVING MINORS
7 ALLEGING THEY WERE SEXUALLY ASSAULTED BY MEN THEY MET
8 THROUGH -- ON MYSPACE. THE COURT OF APPEAL FOUND THAT,
9 QUOTE, GIVEN THE GENERAL CONSENSUS TO INTERPRET SECTION
10 230 IMMUNITY BROADLY, EXTENDING FROM THE ZERON
11 (PHONETIC) TO THE 5TH CIRCUIT'S OPINION IN MYSPACE,
12 ADDRESSING IDENTICAL FACTS AND LEGAL ISSUES, WE ALSO
13 CONCLUDE THAT SECTION 230 IMMUNITY SHIELDS MYSPACE IN
14 THIS CASE.

15 THAT ORIGINAL UNDERLYING CASE WAS, AGAIN,
16 INVOLVING A MINOR. THIS WAS THE 5TH CIRCUIT. AND SHE
17 WAS ASSAULTED BY AN ALLEGED PREDATOR SHE MET ON MYSPACE.
18 AGAIN, THE COURT HELD THAT DOE'S CLAIMS OF NEGLIGENCE
19 ARE BARRED BY SECTION 230.

20 ANDERSON VERSUS TIKTOK INVOLVED A CHALLENGE WHERE
21 KIDS WERE TRYING TO STRANGLE THEMSELVES. THAT CASE WAS
22 BROUGHT BY A MOTHER ON BEHALF OF HER CHILD WHO DIED
23 PARTICIPATING IN THAT TIKTOK CHALLENGE. AND THE COURT
24 HELD THAT PLAINTIFF COULD NOT DEFEAT SECTION 230
25 IMMUNITY BY CREATIVELY LABELLING THEIR CLAIM.

26 A LOT OF THESE CASES DO INVOLVE ADOLESCENTS AND
27 THERE'S NO SPECIAL EXCEPTIONS FOR THE DECEDENT'S AGE.

28 I DID WANT TO SPEND VERY BRIEFLY, YOUR HONOR, ON

1 THE DYROFF CASE. I THINK IT'S REALLY IMPORTANT -- I
2 WANT TO RUN THROUGH THE ALLEGATIONS BECAUSE THEY ARE SO
3 SIMILAR. AND KIND OF GET AWAY FROM THIS NOTION THAT YOU
4 ARE TRODDING A PATH THAT'S NEVER BEEN TRODDEN BEFORE.

5 THE COURT: YOU DON'T HAVE TO DO THAT, I KNOW THE
6 CASE AND I KNOW THE POINT YOU'RE MAKING.

7 MS. GRANT: IF YOU LOOK AT THE ALLEGED DESIGN
8 DEFECT AND THE FACT THAT THE COURT HELD THAT NONE OF
9 THOSE WERE OUTSIDE OF SECTION 230, I THINK THE SAME
10 LOGIC APPLIES HERE.

11 COUNSEL MENTIONED QUICK AD, THAT'S THE FUNCTION
12 WHERE USERS ARE MATCHED UP WITH ONE ANOTHER. I THINK,
13 AGAIN, I WOULD DIRECT YOUR ATTENTION, YOUR HONOR, TO THE
14 BINDING AUTHORITY OF THE CALIFORNIA COURT OF APPEAL IN
15 DOE 2 VERSUS MYSPACE WHERE THE COURT SAYS PLAINTIFF
16 WANTS DEFENDANT TO ENSURE THAT SEXUAL PREDATORS DO NOT
17 GAIN ACCESS, I.E., COMMUNICATE WITH MINORS ON ITS
18 WEBSITE.

19 THAT TYPE OF ACTIVITY TO RESTRICT OR MAKE
20 AVAILABLE CERTAIN MATERIAL, AS EXPRESSLY COVERED BY
21 SECTION 230, SAME WITH THE DYROFF CASE. THE 9TH CIRCUIT
22 SAID RECOMMENDING USER GROUPS, AND IT'S THE FORCE VERSUS
23 FACEBOOK WHERE THE 2ND CIRCUIT ALSO HELD THAT MATCHING
24 PEOPLE TOGETHER, THAT'S ABOUT FACILITATING CONTENT,
25 PEOPLE BEING MATCHED TOGETHER.

26 I HAVE TO AGAIN STATE THAT THE ALLEGATION IS NOT
27 THAT DECEDENTS DIED BECAUSE THEY WERE MATCHED WITH
28 SOMEONE. BECAUSE YOU CAN BE MATCHED WITH SOMEONE AND

1 NEVER EVER EXCHANGE CONTENT. IT'S NOT JUST THE
2 MATCHING, IT'S THE CONTENT OF BUYING OF THE DRUGS THAT
3 WERE LACED WITH FENTANYL.

4 THE COURT: I GET IT. CAN YOU WRAP UP IN ABOUT
5 TWO OR THREE MINUTES?

6 MS. GRANT: I CAN. YOU ASKED WHAT WARNINGS SHOULD
7 SNAP HAVE GIVEN. AND COUNSEL DID NOT ANSWER YOUR
8 QUESTION.

9 THE COURT: I ALSO TOLD HIM HE DIDN'T HAVE TO.

10 MS. GRANT: BUT I THINK IT'S IMPORTANT THERE IS
11 NO -- AS YOUR HONOR KNOWS, THERE'S NO DUTY TO WARN ABOUT
12 AN OPEN AND OBVIOUS DANGER. AND IT'S OBVIOUS THAT
13 BUYING DRUGS IS ILLEGAL AND IT INVOLVES THE POSSIBILITY
14 OF AN OVERDOSE.

15 THE COURT: I DON'T WANT TO GO DOWN THAT ROAD,
16 EVEN THOUGH I'M THE ONE WHO OPENED THE GATE TO THAT
17 ROAD. AS YOU KNOW, THE DUTY TO WARN CAN VARY BASED UPON
18 WHO THE TARGET OF THE WARNING IS. WARNINGS TO KIDS AND
19 WARNINGS TO ADULTS AS TO WHAT IS OPEN AND OBVIOUS MIGHT
20 BE DIFFERENT.

21 MS. GRANT: SO I WILL END WITH THIS, YOUR HONOR,
22 WHERE I STARTED, WHICH IS THIS IS NOT ANYTHING NEW.
23 THIS IS A QUINTESSENTIAL CVA SECTION 230 CASE THAT'S
24 NEARLY IDENTICAL ON ALL FOURS WITH THE DYROFF CASE.

25 PLAINTIFFS' CREATIVE EFFORTS LIKE SO MANY BEFORE
26 THEM TO PLEAD AROUND SECTION 230, THIS IS THE SAME
27 TACTICS THAT HAVE BEEN TRIED AND REJECTED MULTIPLE
28 TIMES.

1 I THINK THE SUPREME COURT, UNITED STATES SUPREME
2 COURT'S DECISION IN TWITTER VERSUS TAAMNEH, AND I WANT
3 TO LEAVE WITH THE SUPREME COURT'S WORDS WHEN THEY SAID,
4 QUOTE, TO BE SURE, IT MIGHT BE THAT BAD ACTORS LIKE ISIS
5 ARE ABLE TO USE PLATFORMS LIKE DEFENDANTS FOR ILLEGAL
6 AND SOMETIMES TERRIBLE ENDS.

7 BUT THE SAME COULD BE SAID OF CELL PHONES, E-MAIL
8 OR THE INTERNET GENERALLY. YET WE GENERALLY DO NOT
9 THINK THAT INTERNET OR CELL SERVICE PROVIDERS INCUR
10 CULPABILITY MERELY FROM PROVIDING THEIR SERVICES TO THE
11 PUBLIC AT LARGE. NOR DO WE THINK THAT SUCH PROVIDERS
12 WOULD NORMALLY BE DESCRIBED AS AIDING AND BETTING, FOR
13 EXAMPLE, ILLEGAL DRUG DEALS BROKERED OVER CELL PHONES,
14 EVEN IF THE PROVIDER'S CONFERENCE CALL OR VIDEO CALL
15 MADE THE SALE EASIER.

16 SO, YOUR HONOR, PLAINTIFFS' CLAIMS IN THIS CASE
17 AND ALL THEIR THEORIES AND ALLEGATIONS IMPLICATE THE
18 CORE OF SECTION 230'S PROTECTION, WHICH EXTENDS TO ANY
19 CLAIM THAT'S NOT FAILED TO EITHER OCCUR, MONITOR OR
20 PROHIBIT DRUG DEALERS' USE OF THE APP OR THE DRUG
21 DEALERS' MESSAGES THAT WERE EXCHANGED WITH DECEDENTS AND
22 CONSISTENTLY DETERMINED THAT CLAIMS RELYING ON THESE
23 SAME ALLEGED DESIGN DEFECTS CANNOT EVADE THE SCOPE OF
24 SECTION 230. BECAUSE THE HARM PLAINTIFFS ALLEGE HERE
25 DOESN'T FLOW FROM A DESIGN DEFECT, RATHER THE HARM
26 ANIMATING PLAINTIFFS' CLAIMS IS, QUOTE, DIRECTLY RELATED
27 TO THE POSTING OF THIRD-PARTY CONTENT ON SNAPCHAT, END
28 QUOTE. THAT'S THE LW CASE QUOTING TWITTER.

1 THANK YOU, YOUR HONOR.

2 THE COURT: THANK YOU, MS. GRANT. HAVE A SEAT AND
3 LET ME TALK WITH YOU ALL ABOUT NEXT STEPS.

4 MS. GOLDBERG: IF I MAY CLARIFY SOMETHING, I WAS
5 THE LEAD ATTORNEY ON THE --

6 THE COURT: WHY DON'T YOU TAKE THE PODIUM AND
7 IDENTIFY YOURSELF FOR THE RECORD.

8 MS. GOLDBERG: CARRIE GOLDBERG, ATTORNEY FOR
9 PLAINTIFF. YOUR HONOR, I WAS THE LEAD ATTORNEY IN THE
10 A.M. VERSUS OMEGLE CASE AND ARGUED BOTH MOTIONS IN FRONT
11 OF JUDGE MOSMAN. I WANTED TO CORRECT THE RECORD ON SOME
12 OF THE THINGS THAT MY COLLEAGUE HERE WAS A LITTLE
13 INACCURATE ABOUT, IF YOU WILL.

14 THE COURT: GO AHEAD.

15 MS. GOLDBERG: THE CASE IS NOT AN OUTLIER, THIS IS
16 A RECENT DECISION. IT'S UNDISTURBED. AND A VERY SOLID
17 APPLICATION OF THE LEMMON VERSUS SNAP DECISION, WHICH
18 BASICALLY TURNED ON WHETHER OR NOT THE CLAIMS TREATED
19 THE DEFENDANT AS A PUBLISHER.

20 IN THIS CASE, THE CAUSES OF ACTION RESTRICT
21 PRODUCT LIABILITY, TRAFFICKING, MANUFACTURING DEFECT,
22 DESIGN DEFECT, FAILURE TO WARN JUST LIKE HERE. WHAT THE
23 JUDGE FOUND WITH THAT, THE OPERATION OF THE PRODUCT, THE
24 MATCHING FUNCTION OF IT, IT PREEXISTED THE ACTUAL HARM
25 TO THE VICTIM. SO EVEN THOUGH -- THERE WAS NO CONTENT
26 MODERATION THAT COULD HAVE PREVENTED THE HARM TO HER.

27 SO JUST LIKE IN THIS CASE, THIS CASE IS VERY MUCH
28 ABOUT THE WAY THE PRODUCT FUNCTIONS AND NOT ABOUT

1 WHETHER OR NOT THERE WAS LIKE A PUBLICATION SYSTEM
2 INVOLVED. THE COURT ACKNOWLEDGED THAT AN APP CAN BE
3 BOTH A PRODUCT AND A SERVICE AND THAT EVEN THOUGH A
4 PRODUCT PUBLISHES THIRD-PARTY CONTENT, THAT DOESN'T MAKE
5 IT OUTSIDE OF -- SECTION 230 DOESN'T NECESSARILY APPLY
6 BECAUSE PUBLICATION WAS INVOLVED.

7 IN THAT CASE, EVERYTHING HARMFUL TO THE CLIENT WAS
8 BASED ON PUBLICATION. HOWEVER, THE MATCHING WAS WHAT
9 MADE THE JUDGE DETERMINE THAT OMEGLE SHOULD BE LIABLE.

10 THE COURT: WHAT HAPPENED TO THAT CASE AFTER THE
11 TRIAL COURT SO RULED?

12 MS. GOLDBERG: WE'RE IN DISCOVERY RIGHT NOW,
13 ALMOST DONE.

14 THE COURT: I SEE.

15 MS. GOLDBERG: IT ALSO WAS COMPLETELY IRRELEVANT
16 THAT THE OFFENDER IN THAT CASE WAS IN CANADA.

17 THE COURT: I UNDERSTAND, THANKS, MS. GOLDBERG,
18 APPRECIATE IT.

19 ONE THING THAT I JUST DON'T REMEMBER FROM OUR
20 PRIOR AND ONLY OTHER STATUS CONFERENCE IS DID I DECIDE
21 OR DID WE ALL AGREE THAT ESSENTIALLY THE OTHER CASES
22 WOULD REMAIN STAYED PENDING THE OUTCOME OF THIS
23 DEMURRER? OKAY. I THINK THAT SHOULD REMAIN THE CASE.
24 DOES ANYBODY DISAGREE? THAT IS TO SAY, ALL THE OTHER
25 CASES CALLED THIS MORNING REMAIN STAYED PENDING THE
26 DETERMINATION OF THIS DEMURRER UNTIL FURTHER ORDER OF
27 THE COURT; ANY PROBLEM? ALL RIGHT. EVERYBODY IS
28 SHAKING THEIR HEAD IN A "NO" FASHION SO THERE'S NO

1 PROBLEM.

2 I'M TAKING THE DEMURRER UNDER SUBMISSION. WHAT
3 THAT MEANS IS I NEED TO THINK A LOT MORE ABOUT IT AND
4 DECIDE WHAT I'M GOING TO DO. TECHNICALLY, I HAVE
5 90 DAYS FROM TODAY TO DO THAT. I DON'T THINK IT WILL
6 TAKE THAT LONG. WHAT I MIGHT DO IS DECIDE BASED ON WHAT
7 I NOW KNOW.

8 WHAT I MIGHT DO IS CALL YOU BACK IN FOR FURTHER
9 ARGUMENT. I JUST DON'T KNOW WHAT I WILL DO YET. SO
10 THAT'S THAT.

11 NOW, THERE ARE SEVERAL OTHER MOTIONS ON CALENDAR.
12 I'M OPEN TO SOME IDEAS ON THIS. SNAP FILED A MOTION FOR
13 SANCTIONS UNDER CCP 128.7. LET ME ASK YOU, WHAT DO YOU
14 WANT TO DO ABOUT THAT PENDING -- THIS DEMURRER, DO YOU
15 WANT TO GO FORWARD WITH IT OR WAIT UNTIL YOU SEE WHAT
16 HAPPENS WITH THE DEMURRER? WHAT'S YOUR PLEASURE?

17 MS. GRANT: WHAT WE WERE GOING TO SUGGEST IS IF
18 YOU WANT TO BRING US BACK FOR A HEARING ON THE SANCTIONS
19 MOTION AND THE MOTION TO STRIKE, OR WE CAN DO IT VIA
20 ZOOM, WHATEVER WORKS BEST FOR YOU. OR WE CAN SUBMIT ON
21 THE PAPERS.

22 I DON'T KNOW WHAT PLAINTIFFS ARE WILLING TO DO,
23 BUT WE REALLY -- WHAT WOULD BE YOUR PREFERENCE, YOUR
24 HONOR?

25 THE COURT: BEFORE I TELL YOU MINE, WHAT IS YOURS,
26 PLAINTIFFS?

27 MR. LAWRENCE: WE WOULD LIKE TO ARGUE THE MOTION
28 FOR SANCTIONS. WE'RE HAPPY TO DO THAT VIA ZOOM.

1 ALTHOUGH IF THE COURT WERE TO DECIDE IT'S BETTER TO WAIT
2 ON THE MOTION FOR SANCTIONS UNTIL AFTER THE DEMURRER IS
3 DECIDED, THAT'S ENTIRELY APPROPRIATE AND ONE WE MIGHT
4 HAVE URGED HAD WE HAD ORAL ARGUMENT ON THAT TODAY.

5 THE COURT: LET ME COME BACK TO THAT IN A SECOND.

6 CAN YOU IDENTIFY YOURSELF FOR THE REPORTER?

7 MR. LAWRENCE: ALEX LAWRENCE, COUNSEL FOR STAFF.

8 IF WE COULD, ONE THING ABOUT THE MOTION FOR SANCTIONS,
9 THE RELIEF WE'RE SEEKING IS ONLY IN THE EVENT THAT THE
10 DEMURRER IS NOT SUSTAINED WOULD IT COME INTO PLAY, SO IT
11 WOULD ACTUALLY BE MOOTED IF THE DEMURRER WERE SUSTAINED.

12 IT ONLY RELATES TO TAKING THE ALLEGATIONS OUT IF
13 THEY'RE ALLOWED TO AMEND AND GO FORWARD. SO IF THAT HAS
14 ANY BEARING ON YOUR DECISION HOW TO PROCEED, THAT'S THE
15 ONLY RELIEF WE'RE SEEKING. THERE'S NO MONETARY RELIEF
16 OR ANYTHING ELSE LIKE THAT IN IT.

17 THE COURT: THANK YOU, I APPRECIATE THAT,
18 MR. LAWRENCE.

19 PLAINTIFF, DO YOU HAVE A POSITION ON SNAP'S MOTION
20 TO SEAL THE DECLARATION OF -- I ASSUME IT'S MR. -- LET
21 ME JUST SAY IT'S NIKESH, N-I-K-E-S-H; SRIVASTAVA,
22 S-R-I-V-A-S-T-A-V-A.

23 MR. BERGMAN: WE'RE AGNOSTIC ON THE ISSUE, YOUR
24 HONOR.

25 THE COURT: WHY SHOULD BE IT SEALED?

26 MR. LAWRENCE: WE'RE NOT SEEKING TO SEAL THE
27 ENTIRE DECLARATION, WE WANTED TO SEAL THE USER NAMES,
28 WHICH ARE IDENTIFIED AND WHICH WE'VE REDACTED. IT'S

1 JUST A FEW USER NAMES BUT THESE ARE REAL PEOPLE. JUST
2 SO PEOPLE'S, THE USER NAMES AREN'T OUT THERE FOR THE
3 PUBLIC.

4 THE COURT: SO YOU FILED A REDACTED VERSION OF
5 THIS DECLARATION?

6 MR. LAWRENCE: EXACTLY, YOUR HONOR, AND WE SERVED
7 AN UNREDACTED VERSION SO THEY KNOW BUT THE PUBLIC
8 DOESN'T GET EVERYBODY'S USER NAME. AND THEY'RE SO MINOR
9 REDACTIONS, IT MAY EVEN BE HARD TO SEE.

10 THE COURT: YOU HIGHLIGHTED ON THE ORIGINAL THE
11 REDACTED MATERIAL; RIGHT?

12 MR. LAWRENCE: YES.

13 THE COURT: OKAY, I'LL GRANT THE MOTION TO SEAL.
14 I THINK THERE'S GOOD CAUSE SO WE WILL TAKE IT FROM
15 THERE.

16 PLAINTIFF, YOU HAVE A MOTION TO STRIKE CERTAIN
17 PORTIONS OF THE DEMURRER? HELP ME UNDERSTAND THAT.
18 MS. GOLDBERG, IS THAT YOU? CAN YOU HELP ME UNDERSTAND
19 WHAT YOU'RE SEEKING TO ACCOMPLISH THERE?

20 MS. GOLDBERG: SO THE MOTION TO STRIKE IS UNDER
21 RULES 435 AND 436. WE JUST FIND THERE IS SO MUCH --

22 THE COURT: LET ME STOP YOU. CALIFORNIA RULE OF
23 COURT, L.A. SUPERIOR COURT LOCAL RULE, WHICH RULE?

24 MS. GOLDBERG: CCP 435(A)(2).

25 THE COURT: LET ME GET CAUGHT UP. I HAVE READ IT
26 BUT I DON'T HAVE IT MEMORIZED. THIS MOTION IS UNDER
27 CODE OF CIVIL PROCEDURE 435 WHAT?

28 MS. GOLDBERG: (A)(2) AND ALSO 436. THE IDEA THAT

1 THE DEMURRERS ARE ONLY SUPPOSED TO CHALLENGE THE LEGAL
2 SUFFICIENCY OF THE COMPLAINT AND NOT THE TRUTH OF ITS
3 FACTUAL ALLEGATIONS OR THE PLAINTIFFS' ABILITY TO PROVE
4 THOSE ALLEGATIONS, THEN WE FIND THAT THE DEMURRER AND
5 THE ATTACHMENT PPA IS CROWDED WITH IRRELEVANT, IMPROPER,
6 MISLEADING ALLEGATIONS THAT ARE JUST VERY AGGRESSIVE
7 ATTEMPTS TO PROVIDE COUNTER FACTS TO PLAINTIFFS'
8 ALLEGATIONS. AND ARE AN EFFORT TO SUPPLANT PLAINTIFFS'
9 VERY WELL PLEADED ALLEGATIONS WITH IMPROPER USE OF
10 JUDICIAL NOTICE AS WELL.

11 THE COURT: SO YOU'RE RELYING ON THE CONCEPT OF,
12 QUOTE, IMPROPER, END QUOTE?

13 MS. GOLDBERG: YES.

14 THE COURT: WHAT IS YOUR VIEW ON ALL THAT,
15 MS. GRANT?

16 MS. GRANT: WELL, COUNSEL JUST SAID THE MOTION IS
17 BROUGHT UNDER CCP 435 AND 436 SO LET'S TAKE A LOOK AT
18 THOSE STATUTES. UNDER CCP 436, A MOTION TO STRIKE CAN
19 BE MADE EITHER TO STRIKE OUT ANY IRRELEVANT, FALSE OR
20 IMPROPER MATTER INSERTED IN ANY PLEADING OR TO STRIKE
21 OUT ALL OR PART OF ANY PLEADING NOT DRAWN OR FILED IN
22 CONFORMITY WITH THE LAWS OF THE STATE OR COURT RULE OR
23 AN ORDER OF THE COURT.

24 CCP 435 DEFINES A PLEADING TO INCLUDE A DEMURRER,
25 ANSWER, COMPLAINT OR CROSS-COMPLAINT WITH NO MENTION OF
26 A MEMORANDUM OF POINTS AND AUTHORITIES. LET'S BE CLEAR,
27 THEY'RE SEEKING TO STRIKE ARGUMENT OUT OF OUR MEMORANDUM
28 OF POINTS AND AUTHORITY IN SUPPORT OF OUR DEMURRER? THE

1 DEMURRER JUST LISTS THE GROUNDS FOR EACH CAUSE OF ACTION
2 AND WHY THEY SHOULD FAIL AS A MATTER OF LAW.

3 SO PLAINTIFFS DON'T CITE A SINGLE CASE OR A COURT
4 WRIT, A MOTION TO STRIKE, A MEMO OF POINTS AND
5 AUTHORITIES IN SUPPORT OF THE DEMURRER. I THINK IF THAT
6 WAS THE LAW, YOU AND EVERY OTHER JUDGE WOULD BE
7 INUNDATED WITH MOTIONS TO STRIKE MEMOS OF POINTS AND
8 AUTHORITIES.

9 BUT THERE ARE CASES THAT REJECT SUCH AN ATTEMPT.
10 I WOULD DIRECT THE COURT'S ATTENTION TO NEW LIVABLE
11 CALIFORNIA VERSUS ASSOCIATION OF BAY AREA GOVERNMENTS,
12 DECLINING MOTION TO STRIKE DEMURRER REPLY BRIEF. AND
13 BRADFORD VERSUS STEWART DECLINING -- OR REJECTING MOTION
14 TO STRIKE DEMURRER MEMORANDUM.

15 SO IT'S JUST PROCEDURALLY IMPROPER WHAT THEY'RE
16 TRYING TO DO.

17 THE COURT: LAST WORD?

18 MS. GOLDBERG: I THINK THE MEMO IN POINTS AND
19 AUTHORITIES IN SUPPORT OF A DEMURRER WOULD PROBABLY FALL
20 UNDER THE DEFINITION OF A DEMURRER THAT COULD BE STRUCK.
21 BUT WITH REGARDS TO THOSE TWO CASES, IN NEW LIVABLE
22 CALIFORNIA, THE COURT OF APPEALS DENIED THE MOTION TO
23 STRIKE PORTIONS OF THE DEMURRER BECAUSE IT WAS, QUOTE,
24 UNNECESSARY TO THE RESOLUTION OF THE APPEAL, NOT BECAUSE
25 IT WAS PROCEDURALLY UNSOUND.

26 IN BRADFORD VERSUS STEWART, THE TRIAL COURT DENIED
27 THE MOTION TO STRIKE FOR FAILING TO ESTABLISH GROUNDS TO
28 STRIKE UNDER 436 AND 437. SO IT SIMPLY WASN'T ARGUED

1 PROPERLY.

2 NEITHER BRADFORD OR NEW LIVABLE SUGGEST THERE WAS
3 IMPROPRIETY BY MAKING THE MOTION TO STRIKE ON A
4 DEMURRER.

5 THE COURT: SUBMITTED? MS. GOLDBERG?

6 MS. GOLDBERG: SUBMITTED.

7 THE COURT: I WILL DENY THE MOTION TO STRIKE
8 AGAINST TWO GROUNDS. I THINK MS. GRANT IS MORE RIGHT
9 THAN YOU ARE, MS. GOLDBERG, THAT THE PLEADING IS THE
10 SPECIFICATION OF THE DEMURRER AND THE MEMO OF POINTS AND
11 AUTHORITIES IS JUST THAT, RELATIVE TO SPECIFICATION OF
12 THE DEMURRER.

13 I AGREE WITH YOU, MS. GOLDBERG, THAT THE PRACTICAL
14 MATTER IN CALIFORNIA, THOSE TWO THINGS ARE PUT IN ONE
15 DOCUMENT AND FREQUENTLY CALLED A DEMURRER.

16 MORE TO THE POINT, I'M GOING TO DECLINE TO REACH A
17 CONCLUSION THAT THE MATERIAL IN QUESTION IS IMPROPER.
18 I'M GOING TO, I GUESS, REASSURE PLAINTIFFS' SIDE OF THE
19 COURTROOM THAT I SURE KNOW THE DIFFERENCE BETWEEN
20 ARGUMENT AND MEMORANDUM OF POINTS AND AUTHORITIES AND
21 ALLEGATIONS IN A COMPLAINT. I CAN MAKE THAT SEPARATION
22 IN WILL. SO FOR THOSE REASONS, THAT MOTION IS DENIED.

23 IN TERMS OF A STATUS CONFERENCE, THERE'S NOTHING
24 TO DISCUSS UNTIL I FIGURE OUT WHAT I'M DOING WITH THIS
25 DEMURRER. IN MY VIEW, LET ME TALK TO PLAINTIFFS' SIDE,
26 ANYTHING YOU WANT TO TALK ABOUT BY WAY OF STATUS
27 CONFERENCE WITH THIS DEMURRER PENDING?

28 MR. BERGMAN: WE AGREE WITH YOUR HONOR, THERE'S

1 NOTHING TO DISCUSS.

2 MS. GRANT: WE AGREE, YOUR HONOR.

3 THE COURT: WHEN AM I GOING TO GET YOUR NOTICE OF
4 SUPPLEMENTAL AUTHORITY? FINE, OKAY. DO YOU WANT AN
5 OPPORTUNITY TO FILE SOMETHING RELATIVE TO THIS NEW
6 AUTHORITY?

7 MR. BERGMAN: WE'LL MAKE THAT DECISION WHEN WE SEE
8 IT.

9 THE COURT: TODAY IS OCTOBER 18TH. WHY DON'T YOU
10 FILE YOUR SUPPLEMENTAL, YOUR NOTICE OF SUPPLEMENTAL
11 AUTHORITY BY 4:30 TOMORROW OCTOBER 19, 2023. AND IF I
12 GIVE YOU TO 4:30 ON TUESDAY, IS THAT ENOUGH TIME? ALL
13 RIGHT. OCTOBER 24, 2023, BY 4:30 FILE AND SERVE
14 PLAINTIFF ANYTHING YOU WISH BY WAY OF A BRIEF BRIEF ON
15 THE SUPPLEMENTAL AUTHORITY.

16 I WILL TAKE THE MATTER AS SUBMITTED THEN AS OF
17 OCTOBER 25, 2023, NOT TODAY. WHAT ELSE? LET ME CHECK
18 WITH OUR CLERK, IS THERE ANYTHING ELSE ON THE CALENDAR I
19 HAVE NOT DEALT WITH?

20 THE MOTION FOR SANCTIONS, I HAVE TO HAVE A CONTROL
21 DATE, THAT'S THE PROBLEM. NOT A PROBLEM, IT'S JUST I
22 HAVE TO MAKE A DECISION. THE PLACEHOLDER, I'M GOING TO
23 CONTINUE THE MOTION FOR SANCTIONS TO A DATE IN JANUARY
24 OF 2024 WITH THE UNDERSTANDING IT COULD MOVE, IT COULD
25 BE ADVANCED OR CONTINUED FROM THAT DATE. SO I'M GOING
26 TO DO THAT.

27 AND I'M GOING TO SET A STATUS CONFERENCE IN ALL OF
28 THESE RELATED CASES FOR THAT SAME DATE AND TIME. AS FAR

1 AS I'M CONCERNED, WE CAN GO OFF THE RECORD ON SCHEDULING
2 TO SAVE OUR REPORTER'S FINGERS OR WE CAN STAY ON.

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4 (PROCEEDINGS CONCLUDED.)
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1 SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 FOR THE COUNTY OF LOS ANGELES

3 DEPARTMENT SSC-7

HON. LAWRENCE P. RIFF, JUDGE

4
5 AMY NEVILLE, ET AL.,)

6 PLAINTIFFS,)

7 VS.)

NO. 22STCV33500

8 SNAP, INC.,)

)REPORTER'S CERTIFICATE

9 DEFENDANT.)
10
11
12

13 I, GAIL R. DAVIDSON, CSR NO. 12823, OFFICIAL

14 REPORTER PRO TEMPORE OF THE SUPERIOR COURT OF THE STATE

15 OF CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY

16 CERTIFY THAT THE FOREGOING PAGES COMPRISE A FULL, TRUE

17 AND CORRECT TRANSCRIPT OF THE PROCEEDINGS HELD IN THE

18 ABOVE-ENTITLED MATTER ON WEDNESDAY, OCTOBER 18, 2023.
19
20
21
22
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24

25 

26 GAIL R. DAVIDSON, CSR #12823
27 CERTIFIED SHORTHAND REPORTER
28

(2023 1:3 2:7,9,15,17 4:6 5:5 6:14 64:9 65:10 80:11,13,17	437 78:28
(A)(2) 76:28	2024 80:24	4:30 80:11,12,13
1	21 23:5,6 39:9	5
1 5:15 27:11 32:20,21 33:25 45:28 63:26	216 57:27	5 64:9
110 25:25	21ST 43:13	51 9:12
1137 63:27	22STCV33500 1:1	51F.4TH 63:27
1141 63:27	230 3:8,14 10:2 19:5,15 20:24 21:1,9,13,18 23:20 24:8,13 29:19, 27 30:1,3,12,24,28 31:4,6,18 32:16 33:17 35:20 37:8 39:19,22 41:6,12,19 42:15,18 43:2,7,10,21 44:1,8,19,28 45:3 59:6,21,22 60:7,10 62:8,22 63:5,20,21,28 64:5,18,21 65:7,18,21 66:3,10,14, 25 67:19,20 68:3,10,13,19,24 69:9,21 70:23,26 71:24 73:5	5TH 68:11,16
12(B)(6) 64:17	230'S 71:18	6
128.7 74:13	230(B) 31:18	6 63:26
12823 1:5	24 80:13	65 21:7 37:1
14 25:8	25 1:14 5:26,27 25:14 80:17	6TH 4:20
15 25:19 35:25	260 32:15	7
16 16:24 25:9,18	2ND 63:15 69:23	7 25:18
17 25:10,21	3	79 49:2,19
1714 17:12,14 54:17	3 27:23 32:26 33:26	8
18 1:3 25:11	30 13:4	88 49:2,19
18TH 80:9	350 26:9	9
19 25:12 48:9,24 49:23,28 50:6,11 55:21,26 58:19 80:11	3500 26:7	90 74:5
19(B) 58:28	3:00 41:21,26	99 65:7
19-A 5:23 49:1	4	9TH 3:21,22,24 8:14,22,26 13:26 14:2 16:1,2 19:24 20:6 35:24 37:15,21,25 38:9,24 39:2 60:9 63:9,26,27 66:19,20 69:21
1917 29:3,4	4 28:6 45:11 66:20	A
2	4-C 46:16	A&m 67:2
2 27:12,22 32:23 33:25 38:28 45:28 68:5 69:15	40 13:4	A.M. 72:10
20 1:13 25:3,15,16	400 6:20 7:12 8:11 14:21,22	AARON 25:6
20'S 67:16,17	419 4:19	ABETTING 43:20
2009 65:27	435 76:21,27 77:17,24	ABILITY 77:3
2017 2:19,21 19:13 29:5,6,12	435(A)(2) 76:24	ABSENCE 67:6
2019 2:6	436 76:21,28 77:17,18 78:28	ABSOLUTELY 31:16 35:1 40:7 48:20 51:23 65:4
2020 52:26 63:8		
2021 25:14,18		
2022 2:4,14 4:26 29:13 63:8		

ABSTRACT 18:4 21:26 22:8 24:5	ADDRESSING 68:12	40:23 44:3 60:25 62:4 64:12 69:26
ABUSE 10:9 63:12 64:23	ADEQUATE 22:21	ALLEGATIONS 12:9 44:2 49:18 50:10 56:12 62:5 64:26 65:6 66:6 69:2 71:17 75:12 77:3,4,6,8,9 79:21
ABUSED 12:1,3	ADEQUATELY 40:18 57:24	ALLEGE 40:6 61:18 71:24
ABUSING 67:13	ADJUDICATING 42:25	ALLEGED 5:1 23:4,7,8 24:20 33:20 34:21 35:19,28 39:8 49:4, 18 51:25 57:23 58:1 61:13 68:17 69:7 71:23
ACCEPT 17:26 23:5 63:19	ADOLESCENCE 67:18	ALLEGEDLY 39:8 60:22
ACCEPTED 18:1	ADOLESCENT 63:14	ALLEGES 19:8
ACCESS 32:1 45:13 65:17 66:2, 7 69:17	ADOLESCENTS 68:26	ALLEGING 24:12 36:18 58:11 68:7
ACCIDENT 26:14 39:6	ADOPTED 35:26	ALLOCATION 9:24
ACCIDENTS 2:28	ADULT 44:15 67:16	ALLOWED 66:7 75:13
ACCOMPLISH 76:19	ADULTS 44:4 70:19	ALLOWING 59:18
ACCOSTED 44:17	ADVANCED 80:25	ALLUDE 18:4
ACCURATE 38:11 40:1	ADVERTISERS 60:20,23,28 61:8	ALLUDED 2:16
ACCURATELY 39:10	AFFECTING 43:12	ALLUDING 48:15
ACCUSED 60:3	AFFIRMATIVELY 27:13,19 36:19 54:8	ALTER 37:28
ACKNOWLEDGE 30:18	AFFIRMED 2:24 65:12	AMAZON 20:12 21:4,6 37:1
ACKNOWLEDGED 73:2	AFFIRMING 4:13	AMBIGUOUSLY 45:24
ACTION 57:24 72:20 78:1	AFTERNOON 1:11	AMEND 1:21,25 2:25 21:23 22:22 58:5 65:13 75:13
ACTIONS 5:2	AGE 23:25 25:8,9,10,11,12,15, 16,18,19,21 33:14 34:13 52:22 60:24 61:5,16 67:18,21,22 68:27	AMENDED 47:20 62:3
ACTIVELY 61:15	AGGRESSIVE 77:6	AMENDMENT 21:24
ACTIVITIES 29:10	AGNOSTIC 75:23	AMPLY 56:12
ACTIVITY 7:11 8:10 9:4 11:21 37:24 38:26 42:8 69:19	AGREE 27:8 33:2 34:5 59:4 73:21 79:13,28 80:2	AMY 25:6
ACTORS 71:4	AGREED 9:26 57:13	ANALOGIES 49:3
ACTS 13:23	AHEAD 72:14	ANALOGIZING 67:9
ACTUAL 22:17 56:2 57:10 72:24	AIDING 43:20 71:12	ANALOGOUS 48:27 53:20,21 55:27 58:25
AD 22:4 23:9,11 24:14 35:9 61:3 69:11	AIR 2:3	ANALOGY 27:21 55:2,15
ADD 27:8	AKIN 5:8 49:5	ANALYSIS 11:14 13:3,6 15:6 16:3 17:2 31:8 33:24 35:27 37:4, 16 38:26 39:3 46:2 51:25 60:11 67:23
ADDICTED 26:28	ALBEIT 34:7	ANALYZE 23:8
ADDICTIVE 26:26	ALEX 75:7	ANALYZED 19:16
ADDITIONAL 43:25 56:21	ALEXANDER 25:7,15 28:2	
ADDITIONALLY 35:9 45:11 46:19 53:3	ALGORITHM 34:6	
ADDRESS 6:10 42:17 43:21 54:28 56:23 64:6,7	ALGORITHMS 16:6 33:14 34:13 54:7 65:16,20	
ADDRESSED 15:21 43:14 56:1, 2	ALIVE 24:1	
	ALLEGATION 23:10 24:22 29:8	

ANALYZING 10:1	APT 55:2	AUDIENCE 61:16
ANDERSON 2:13 68:20	ARBITER 42:28 43:1	AUTHORITIES 19:11 77:26 78:5,8,19 79:11,20
ANGELES 1:3	ARCADE 55:3,6,11,16	AUTHORITY 1:15 2:22 3:10 5:5 18:24 19:22 20:15,25,27 21:22 33:10 60:14 65:27 69:14 77:28 80:4,6,11,15
ANIMATING 71:26	ARCHITECTURE 34:17 35:4	AUTO 18:28
ANNOUNCEMENTS 53:4	AREA 3:28 27:27 78:11	AUTOMOBILES 3:27
ANTICIPATE 5:18	ARGUE 13:24 39:3 74:27	AVAILABILITY 26:10
ANTICIPATING 44:24	ARGUED 72:10 78:28	AWARDED 9:20
ANTICIPATION 43:8	ARGUMENT 7:15,16 17:28 21:19 24:26 32:19 36:6,9 39:21, 25 43:3 44:18 48:13 56:14 60:4,6 63:19 64:15 74:9 75:4 77:27 79:20	AWARE 29:6,15 47:14,15 51:26 53:28 55:5
APOLOGIZE 6:13	ARGUMENTS 54:11 56:21 58:3	<hr/> B <hr/>
APP 3:18 4:7,17 6:4 8:17 10:4,28 11:1,27 17:23 19:17 36:5 41:5 49:26 50:1,7 71:20 73:2	ARISE 44:25	B&b 2:3
APPARENT 14:7	AROSE 44:6	B-1 45:20
APPARENTLY 46:7	ARRANGING 63:16	B-2 45:20
APPEAL 2:23 4:11 18:26 19:4 20:7 30:22 38:4 57:12 59:21 60:9 65:12,23,28 68:5,8 69:14 78:24	ART 14:28	B-3 45:2,20
APPEALS 26:3 32:14 33:9 34:11 35:23 38:25 42:27 49:27 50:5 55:23 78:22	ARTICULATED 36:12	B-4 45:12,21
APPEARANCE 49:11	ARTIFICIALLY 51:18	BACK 10:17 17:19 25:24 28:14 42:2 55:4,12 56:18 74:8,18 75:5
APPEARANCES 1:8	ARTIFICIALLY-DRIVEN 54:7	BAD 40:14 71:4
APPEARS 42:13	ASBESTOS 47:15 50:6	BAR 43:8
APPELLATE 43:14	ASPECT 27:12,16 38:15 40:11 63:18	BARKER 47:21
APPLE 2:23	ASSAULT 37:20	BARNES 32:13,15 35:24 37:6
APPLE'S 2:24	ASSAULTED 68:7,17	BARRED 3:14 24:8 64:20 66:9 68:19
APPLICABLE 21:2	ASSERTED 21:20	BASED 33:19 52:26 61:16 70:17 73:8 74:6
APPLICATION 37:18 47:10 51:19 54:13 72:17	ASSOCIATION 78:11	BASES 42:14
APPLICATIONS 3:4	ASSUME 30:8 46:9 75:20	BASHFUL 5:14
APPLIED 19:15	ASSUMING 3:7 30:11 56:20	BASICALLY 35:18 72:18
APPLIES 7:2 17:5 32:21 35:19, 21 38:10,13 39:28 42:18 50:19 63:28 68:2 69:10	AT&T 27:14 53:16,19,22 54:1,4	BASIS 2:12 6:21 13:22 22:21
APPLY 3:8 7:2 9:13 10:16 13:5, 25 15:1 16:22 17:1 18:22,23 20:26,27 21:1,9 33:1 41:14 48:18, 21 58:27 62:8 65:8 73:5	ATTACHMENT 77:5	BAT 47:6
APPROVAL 49:23	ATTEMPT 3:22 78:9	BATTERY 20:12 21:5 49:7
APPS 5:26 6:14 8:2 9:3 20:16	ATTEMPTED 66:21	BAY 78:11
APROPOS 51:17	ATTEMPTS 77:7	BEANS 36:8
	ATTENTION 64:8 68:4 69:13 78:10	BEAR 6:13 10:9
	ATTENUATED 60:4	
	ATTORNEY 72:5,8,9	
	ATTRIBUTE 9:22	

BEARING 11:27 75:14	BRICK 55:10	19:11,12,21 20:6,7 21:21 29:18, 25 30:13,16 31:9 32:14 33:9 37:16 41:17 42:28 52:13 54:17,24 55:22 59:21 60:8 65:23,27,28 68:5 69:14 76:22 78:11,22 79:14
BEARS 6:23	BRIDGETTE 25:12	CALL 10:24 12:27 27:2 53:22 71:14 74:8
BEHALF 1:12 68:22	BRIEFING 34:1 39:25 56:25	CALLED 4:23 73:25 79:15
BEHAVIOR 66:23	BRIEFLY 41:25 68:28	CANADA 73:16
BENEFIT 22:14 28:15 51:25,28	BRIEFS 3:2 21:3	CANDID 48:1,3
BERGMAN 25:5,6 29:5 30:5 31:16 33:7,13,27 42:4 44:10,21 45:2,19,22 46:11 47:9,13,24 48:1, 4,20,24 49:25 50:4 51:3,10 52:7, 13,20 53:21 54:17,21 56:20 57:14 58:6,13 60:3 75:23 79:28 80:7	BRING 74:18	CAPELOUTO 25:14
BERMAN 25:17 52:27	BRINGING 40:11	CAR 39:6
BETTING 71:12	BRINGS 26:22	CARDOZA 25:24 26:3
BIG 14:25	BROAD 30:19	CARE 12:24 13:23 14:27 15:15 17:16 50:24 51:1,6,11 54:15 67:25
BILLBOARD 28:20	BROADER 7:15	CAREFUL 30:23 43:19
BILLION 14:23	BROADLY 5:19 68:10	CAROLINA 2:15
BINARY 5:20 18:16	BROKE 1:14,19	CARRIE 72:8
BINDING 2:22 18:23 19:5,10 20:25,27 21:21 62:15 65:22,27 69:14	BROKEN 39:8	CARRIED 13:3
BINDS 18:28	BROKERED 71:13	CARTA 32:16
BIRD 31:9	BROUGHT 12:11 68:22 77:17	CARVE 67:18
BIRD'S 54:22	BROWN 13:11	CASE 1:1,2 2:26 3:5,11,17,20,21 6:18,19 7:20 8:9,23 9:28 10:11 11:28 13:8,15 15:24 16:11 18:6 19:1,13,14,20,23 20:8,12 21:4,6 23:20 24:20 25:3 26:4 28:2 30:13 33:14,22 34:13,15 35:6 36:9 37:5 38:16,27 40:20,21,22 43:17,19, 27,28 44:3,5,13,16 46:18,22 49:20,25,27 50:5,6,8 51:26 52:13 53:5,8 54:18,19 55:18,20 56:12, 15 59:19,28 60:15,16 62:14,20,24 63:6,11,24,25 64:6,7,8,10,15 66:27 67:9,10 68:1,6,14,15,21 69:1,6,21 70:23,24 71:16,28 72:10,15,20,27 73:7,10,16,23 78:3
BIT 16:13 17:13 29:20 32:12 36:20 38:8	BROWNS 36:3 37:19 39:2,17	CASES 1:20,21,23 5:17 7:21,27, 28 9:13,16,19 11:23 13:4 14:11 19:21,24 20:5,28 21:8,10 22:28 26:18 32:14,15 41:15 42:26 43:25 45:20 47:15 54:25,26 55:1 65:22, 23 66:6,16 68:3,26 73:21,25 78:9, 21 80:28
BLACKMAILED 63:1	BRY 65:9	CAT 23:16
BLEW 21:5	BUCKETS 8:4	
BOARD 56:10	BUICK 26:4	
BOIL 16:24 66:6	BUNCH 38:21	
BOILED 16:27	BURDEN 9:9	
BOLGER 35:27 36:13,16 55:7	BURDENS 59:23	
BORN 26:19	BURNED 21:5	
BOTTOM 53:6	BUSINESS 10:19	
BOUGHT 12:18 24:23	BUT-FOR 35:19 36:2,4,10 39:3, 18 60:4,5,11	
BOUND 19:20 57:12	BUY 12:4 27:15 28:21 55:4	
BOXES 39:11	BUYING 7:1 12:17 23:23 70:2,13	
BRADFORD 78:13,26 79:2		
BRAND 15:21	<hr/> C <hr/>	
BREAK 25:3 41:21	C-1 32:5	
	C-A-Z-E-S 2:5	
	CA 1:3	
	CALENDAR 41:26 74:11 80:18	
	CALIFORNIA 1:15,20 2:4,7,9, 17,18,20,22 3:2 5:4 7:21 8:2 11:13 13:10 14:12 18:23,27	

CATEGORIES 26:25	CHURCH 2:15	COLLEAGUE 30:6 32:18 34:5 35:18 56:22 72:12
CAUGHT 76:25	CINDY 25:10	COLLEAGUE'S 39:25
CAUSATION 6:1	CIRCUIT 3:21,22 4:20 8:14,26 13:27 14:2 16:1,2 19:25 20:6 35:24 37:15,21,25 38:9,24 39:2 60:9 63:9,15,27 66:19,20 68:16 69:21,23	COLLECTION 7:21 12:22 22:12
CAUSED 7:7 8:18	CIRCUIT'S 3:24 68:11	COMBINE 34:13 50:9
CAUSING 22:18 38:20	CIRCUMSTANCES 13:13,25	COMBINED 26:19
CAZES 2:5	CITE 5:16 9:12 11:22 19:20 21:6 64:2 78:3	COMFORTABLE 11:6
CCP 74:13 76:24 77:17,18,24	CITED 5:6 11:22 19:21 21:4 23:26 27:25 32:15 40:21 49:23,28 63:24,25 68:1	COMFORTABLY 18:6
CDC 26:7	CITES 7:28	COMMEND 46:15
CEASE 8:13,21	CIVIL 17:11 57:5 76:27	COMMENT 9:7,12
CELL 2:27 53:17 71:7,9,13	CIVILIZATION 26:2	COMMENTED 46:9
CENTRAL 2:3,7,8 4:6 65:10	CLAIM 3:16 4:16 10:3 23:6 30:10 32:23,25 39:20 40:8 41:17 42:14 68:25 71:19	COMMENTS 18:5 25:22
CENTURY 43:13	CLAIMED 24:6	COMMERCIAL 49:15
CERTAINTY 58:1	CLAIMS 3:14 6:3 14:8 19:8 30:20 40:28 47:26 59:24 63:28 64:16, 20,22,27 65:19,23,28 66:17 68:18 71:16,22,26 72:18	COMMERCIALLY 5:25 58:22 59:1
CERTIORARI 46:22	CLARIFY 72:4	COMMUNICATE 66:2 69:17
CETERA 22:15	CLAUSE 30:2	COMMUNICATED 12:7
CHALLENGE 30:25 44:1 68:20, 23 77:1	CLEAR 8:6,14 13:10 20:25 21:2 30:14 36:18,27 38:7 61:27 66:20 77:26	COMMUNICATING 17:7
CHANGE 21:25 25:28 26:1 59:26	CLERK 80:18	COMMUNICATION 11:2 15:3 20:23 27:28 42:12
CHANGING 65:1	CLIENT 73:7	COMMUNICATIONS 14:14,15 42:10 53:16
CHAPMAN 25:16,17 52:27	CLOCK 41:20	COMMUNICATIONS- PROVIDING 15:26
CHARACTERISTICS 61:16	CLOSE 14:23	COMPANION 43:17
CHARACTERIZE 60:11	CO-COUNSEL 58:20	COMPANY 50:16 55:8,10
CHARACTERIZED 66:5	COCA 50:14	COMPETITIVE 31:21
CHARTING 42:23	CODE 17:12 49:15 54:17 76:27	COMPLAINT 47:20 55:28 57:8, 24 58:2 62:3 77:2,25 79:21
CHAT 62:24,26	CODIFIED 50:15	COMPLETELY 42:23 73:15
CHECK 80:17	COEXTENSIVE 52:12	COMPLICATED 50:22 51:18 53:5
CHECKED 38:19	COINCIDENCE 26:15	COMPONENT 15:12 53:26
CHICKEN 17:9	COLA 50:15	COMPREHENDED 11:11
CHILD 64:23 68:22		COMPUTER 32:22 33:3
CHILD'S 63:12		COMPUTER-BASED 51:19
CHILDREN 26:7,27,28 28:26,28 36:7 45:17 67:26		CONCEDE 33:25 57:3 59:7
CHILDREN'S 45:13		CONCEDES 34:2
CHILDRENS' 32:1		CONCEPT 29:28 48:16 77:11
CHILLING 14:5		
CHOOSE 52:4		
CHRISTINE 25:14		

CONCERNED 81:1	CONSTITUTE 5:2	CORRECT 11:17 30:11 33:27 49:19 50:26 51:3,14 72:11
CONCERNS 4:3	CONSTRUED 30:17 45:20	CORRECTION 54:23
CONCERT 55:21,24	CONSTRUING 32:7	COST 6:13 10:10 50:18 51:8 52:1
CONCESSION 59:15	CONSUMER 47:22 51:24	COUNSEL 41:25 42:3 52:10 56:23 59:16 62:14 64:12 66:11 69:11 70:7 75:7 77:16
CONCLUDE 18:21 54:15 57:9 68:13	CONSUMER'S 49:11	COUNSEL'S 59:4
CONCLUDED 4:16 19:19 24:9 61:2,10 81:4	CONSUMERS 51:19	COUNTER 77:7
CONCLUSION 79:17	CONSUMPTION 5:25 58:23	COUNTERFEIT 26:13
CONCURRENCE 43:22	CONTAINERS 18:7	COUNTRY 3:3 8:28 19:19 63:4 65:5
CONCURRENCE 43:22	CONTAMINATION 52:25	COUNTS 16:25 47:19
CONCURRING 46:21 50:14	CONTENT 7:1 12:14 23:16,27 24:1,2,7,13 30:15 32:26,27 33:8, 16,17,21 34:4,9,23 35:20 36:10, 20 37:13,19,27 38:20 39:5,27 40:9,12,14,17 44:6 45:16 59:28 60:23 61:1,11,12,20,25,26 62:7,9, 10,12 63:2,14,18,22 64:25,28 65:15,21 66:8,9,14,22,24 69:24 70:1,2 71:27 72:25 73:4	COUPLE 48:7
CONDITIONAL 9:18	CONTENTION 42:9 65:14	COURT 1:12,17,26 2:1,10,19,21, 23,26 3:9,24 4:1,10,11,12,14,28 5:4,6,9,14 6:6 7:15,19,22 8:2,7,27 9:5 10:13,27 11:5 12:20 13:1,10 14:12,17,25 15:18,23 16:10,11,13 17:9,28 18:2,26,27,28 19:4,5,9, 12,16,23 20:5,18,21 21:11,16 22:10,19 24:17,26 25:2,5 26:3 29:4,28 30:9,12,13,21,26,28 31:1, 10,15 32:7,14 33:6,9,10,12,23 34:10,11,28 35:23 36:16,27 38:4, 7,8,25 39:10,16,17 41:12,14,19, 25 42:2,6,17,22,27,28 43:1,4,9, 12,18,19,24,28 44:7,9,11,18,23 45:19 46:6,8,15,28 47:4,7,11,14, 15,18,25,26 48:3,7,11,12,21 49:21,27 50:2,5,28 51:4 52:3,9,15 53:14 54:3,10,14,20,27,28 55:7, 22 56:14,18 57:1,3,11,14,16,20, 27 58:8,13,15 59:17,21 60:2,8,9, 18,21 61:2,10,27 62:2,15,16,17, 22,28 63:3,6,9,15 64:16,18,19,22 65:11,23,28 66:18,19,28 67:19, 21,28 68:5,8,18,23 69:5,8,14,15 70:4,9,15 71:1 72:2,6,14 73:2,10, 11,14,17,27 74:25 75:1,5,17,25 76:4,10,13,22,23,25 77:11,14,22, 23 78:3,17,22,26 79:5,7 80:3,9
CONDITIONS 25:26	CONTENTS 31:11 61:13	COURT'S 2:12,24 43:26 64:7 65:12 71:2,3 78:10
CONDUCT 14:6 15:16 35:12 37:23 41:8 54:12 55:9,14 56:16 67:2,6,8	CONTEXT 13:8,20 48:26 53:24 58:24	COURTROOM 15:9 79:19
CONDUCTING 46:28	CONTEXTS 13:14	COURTS 1:16 3:2 4:3 15:14,20 17:24 19:19,24 20:6,7 21:13 23:26 24:8 30:16,23 36:26 37:16 43:14 49:24 50:4 57:1 60:7 65:5,7
CONFERENCE 71:14 73:20 79:23,27 80:27	CONTINUE 16:13 80:23	
CONFLATED 32:18	CONTINUED 31:19 80:25	
CONFLICT 46:2,3,4,27 47:2	CONTRARY 59:20	
CONFORMITY 77:22	CONTRAST 45:8,9	
CONNECT 1:18 12:13,14 22:5 23:12,15,16 24:3 27:12 53:1	CONTRIBUTE 33:17 34:12,14, 22	
CONNECTED 23:14 24:21 44:4	CONTRIBUTED 34:19 60:22	
CONNECTING 22:6 23:9,13,28 24:15,19 44:2 62:20 64:14	CONTRIBUTES 33:20 35:7,10	
CONNECTION 12:10	CONTRIBUTING 6:9 29:14 61:13	
CONNECTIONS 12:12 63:16	CONTROL 31:24 32:11 45:5 80:20	
CONNECTIVITY 27:17	CONVERSATION 24:5	
CONNECTS 5:7 27:19	CONVINCED 57:10	
CONSENSUS 68:9	COPY 28:23	
CONSIDERATION 9:6 43:26	CORE 71:18	
CONSIDERATIONS 12:22	CORNER 28:17	
CONSIDERED 19:9 31:7 33:1 48:26	CORNERS 57:8	
CONSIDERS 13:28		
CONSISTENT 39:21		
CONSISTENTLY 30:28 71:22		

COVER 58:18	27 66:23	DEFEAT 65:18 68:24
COVERED 66:3,14 69:20	DANIEL 25:9,16	DEFECT 23:7,8 38:23 47:21,22 51:14 69:8 71:25 72:21,22
CRAZY 38:21	DASH 28:3	DEFECTIVE 21:4 38:15 51:5 64:13 66:5
CREAM 21:7	DATE 80:21,23,25,28	DEFECTS 23:5,6 24:6 39:9 51:21 71:23
CREAT 65:20	DAUGHTER 25:20	DEFENDANT 9:8 63:20 69:16 72:19
CREATE 63:5	DAVIDSON 1:5	DEFENDANTS 15:25 64:28 65:14,20 71:5
CREATED 23:22 61:15,22	DAY 14:24,25 23:17 27:7 48:6	DEFENDING 59:24
CREATES 27:2 61:12	DAYS 25:25 74:5	DEFENSE 46:16
CREATING 62:7	DEAL 24:2	DEFINE 59:12
CREATION 6:28 61:1 65:19	DEALER 6:26 8:17 12:1,11 16:6 27:15 28:15,16,20,23	DEFINED 59:5
CREATIVE 70:25	DEALERS 14:1,15 23:22 27:13, 20 28:1,9,22 53:2,17,22,23,28 54:8 55:25 61:19,22,26	DEFINES 5:24 77:24
CREATIVELY 68:25	DEALERS' 71:20,21	DEFINITE 49:11
CREATOR 62:11	DEALING 53:26	DEFINITION 33:16 58:19 59:10 78:20
CRIME 28:10,19	DEALS 29:12 33:8 52:24 71:13	DELETE 28:24
CRIMINAL 7:11,22 8:10 9:4 11:21 14:6 32:5 45:18 54:12 64:23 67:2	DEALT 80:19	DELGADO 67:9
CRIMINALS 10:9 13:24 66:7 67:13	DEATH 7:8	DELIVER 28:2
CRISIS 26:6	DEATHS 23:21 26:9,16,17 29:14	DEMOGRAPHIC 27:18
CRITERIA 60:20,27 61:9 62:1,10	DECEDENT 9:23 67:22	DEMURRER 1:16,20,24 2:12,25 4:10,15 6:6 18:9,21 19:14 21:22 22:22 42:20 55:16 57:4,9,13,18, 25 58:10 65:13 73:23,26 74:2,14, 16 75:2,10,11 76:17 77:4,24,28 78:1,5,12,14,19,20,23 79:4,10,12, 15,25,27
CRITICAL 47:6	DECEDENT'S 68:27	DEMURRERS 77:1
CROSS-COMPLAINT 77:25	DECEDENTS 8:20 12:4 61:23 67:17 69:27 71:21	DENIAL 46:22
CROWDED 77:5	DECIDE 6:6 11:13 12:23 73:20 74:4,6 75:1	DENIED 78:22,26 79:22
CRUZ-SARANTOS 25:11	DECIDED 64:9 75:3	DENY 79:7
CSR 1:5	DECIDING 36:16	DEPARTMENT 1:4
CULPABILITY 71:10	DECISION 4:11 18:26,27 23:3 34:11 40:14 54:22 62:23 68:5 71:2 72:16,17 75:14 80:7,22	DEPARTURE 64:5
CURRENT 5:17 30:8 56:9	DECISIONS 12:5 64:3	DEPLETES 49:7
CURSORY 60:15	DECLARATION 75:20,27 76:5	DERIVES 27:10
CUSTOMER'S 28:24	DECLINE 79:16	DESIGN 22:14 23:11 26:23 27:12,23 28:6 29:7,9 35:8 38:13 39:1,9 40:15 47:21,22 51:21 69:7 71:23,25 72:22
CUSTOMERS 15:26,27 53:24	DECLINED 13:28 17:24 43:10,21	
CVA 70:23	DECLINING 78:12,13	
<hr/> D <hr/>	DEEMED 33:15	
DAILY 6:20 7:12 8:11 14:19,21	DEEP 49:22	
DAMAGES 9:15,20,26	DEFAMATION 30:20	
DANGER 16:9 25:27 70:12		
DANGEROUS 50:25 51:22,24,		

DESIGNED 17:14 27:5,24 28:4, 13 29:11 34:18 36:24 46:17 64:22	DISAGREE 73:24	11 62:15 64:9 65:10
DESIGNING 41:2	DISAPPEARING 28:11 29:9 51:28	DIVIDED 18:15
DESTROY 28:13	DISCLAIM 40:7	DIVORCE 23:18,20
DETAILED 22:12 30:22	DISCLOSE 61:5	DOCTRINE 3:28
DETERMINATION 10:12 73:26	DISCOVERING 15:27	DOCUMENT 79:15
DETERMINATIVE 10:23	DISCOVERY 34:28 35:12 41:8 42:16 56:16 65:24 73:12	DOE 4:9 19:5 36:3 37:18 39:2,17 65:26 67:28 68:5 69:15
DETERMINE 13:12 31:12 47:1, 7,27 73:9	DISCRETE 32:20	DOE'S 68:18
DETERMINED 3:3 71:22	DISCRIMINATORY 60:26,28 61:9 62:1	DOOR 28:3
DETERMINING 46:3,27 65:16	DISCUSS 67:27 79:24 80:1	DOORSTEP 28:3
DEVELOP 57:19	DISCUSSED 44:12 58:20	DOSE 7:9 12:19
DEVELOPED 65:16	DISCUSSES 30:19	DOUBT 57:28
DEVELOPING 26:2 59:25	DISCUSSING 46:16	DOWNLOADED 49:14
DEVELOPMENT 31:20,23 45:4	DISCUSSION 30:8,22 39:24 46:14,18,19,23 59:18	DRAWN 25:25 77:21
DEVELOPS 61:12	DISCUSSIONS 24:11 33:2	DRIVERS 2:27
DEVIATED 63:4	DISINCENTIVES 31:28	DRIVING 38:19,22
DEVICE 49:11	DISMISS 1:24 2:10 16:2,3,11	DRUG 6:22,24,25,26 7:8 8:17 9:22 11:16 12:1,4,11 14:1,15 16:6 23:22 26:8 27:13,15,20,28 28:8, 15,16,19,22,23 29:7,12 40:14 41:3 52:23 53:2,5,16,22,28 54:8 55:16,25 56:4 61:19,22,25,26 71:13,20
DEVON 25:12	DISMISSED 64:16	DRUGS 7:1 12:4,18 23:23 24:23 26:13,17 27:26 28:21 36:20 40:26 41:1 54:9 55:4,12,22,26 70:2,13
DEVOTED 40:4	DISMISSING 65:23	DUE 12:24
DIACONT 25:18	DISPLAYING 63:22	DUTIES 13:14 36:1,2,15,25,26 39:13 44:25
DIAMETRICALLY 8:26	DISPOSITIVE 17:2 54:18	DUTY 3:1 7:26 8:15,16 11:14,20, 22 13:9,13,21,22 14:1,3,13 15:6, 8,10,22,24 16:3,9 17:2,3,6,11,12, 15 35:28 36:13,14,28 37:17,25,26 38:28 39:7,10,16 40:10 44:24 50:24 51:1,11 53:18 54:4,15 57:12 67:5,12,22,25 70:11,17
DICKS 55:19,20	DISPUTE 30:6	DYLAN 25:11
DICTATING 60:27 62:9,10	DISPUTED 42:9,11,13,19	DYROFF 8:14,23,26 13:26,27 16:1 34:2,3,6,8 44:13,15 45:9 67:15 69:1,21 70:24
DIE 6:21 25:20 26:7	DISSEMINATE 61:11	<hr/> E <hr/>
DIED 23:14 25:7,9,10,11,12,13, 15,16,17,19 68:22 69:27	DISTINCT 28:7	E-BAY 40:23
DIFFERENCE 60:19 61:3 79:19	DISTINCTION 45:1	
DIFFERENTLY 57:7	DISTINGUISHABLE 11:23	
DIGGING 49:22	DISTINGUISHING 60:3	
DIGRESSION 15:12	DISTRIBUTE 51:9	
DIRECT 48:10 55:17 56:8 65:9, 26 68:4 69:13 78:10	DISTRIBUTED 5:25 58:22	
DIRECTING 54:8	DISTRIBUTING 8:20	
DIRECTION 61:19	DISTRIBUTION 48:27,28 58:25, 26	
DIRECTLY 6:18 26:15 45:10 55:26 59:28 60:2 64:24 71:26	DISTRIBUTOR 7:4	
DIRECTOR 56:3,9	DISTRICT 2:4,5,7,8,13,15,17 4:6, 26 8:22 19:24 20:7 43:28 44:7,10,	

E-MAIL 56:8 71:7	ENSURE 32:4 45:17 55:25 69:16	EXCHANGED 60:1 61:22 62:12 63:13 64:25 71:21
E.B. 25:19	ENSURED 66:1	EXCLUSIVE 14:10
EAR 31:3	ENTIRE 59:20 75:27	EXCLUSIVELY 13:20 63:22
EARLIER 2:16 6:2,12 12:8,28 22:25 59:11	ENTITLED 42:14	EXCUSE 29:5 45:11
EASE 54:23	ENTITY 32:21,24 33:17 35:21 50:24	EXECUTIVES 10:21
EASIER 24:3,4 71:15	ENUNCIATED 60:7	EXERCISE 28:27
EASTERN 2:13	ENVIRONMENT 27:3,6	EXIST 8:13,22
ED 56:2	EPHEMERALITY 28:12	EXISTING 17:5
EDIT 36:17	EPIDEMIC 26:22	EXISTS 8:16 13:14 46:4
EFFECT 9:24,26 14:5	EQUALLY 31:7 38:25	EXPAND 13:2
EFFORT 77:8	EQUITIES 19:1	EXPECTATION 47:22
EFFORTS 70:25	EQUIVALENT 55:3,15	EXPECTING 44:27
EGG 17:9	ERRONEOUS 48:7	EXPENDED 33:28
ELECTRIC 5:17	ESCHEWING 60:6	EXPERIENCE 32:11
ELECTRICITY 22:28 58:24 59:11,12,14	ESCOLA 50:14	EXPLICIT 38:4 61:19
ELECTRONIC 4:21 6:15 55:19	ESSENTIAL 63:18	EXPLICITLY 18:11 40:7 43:20 46:17 48:8
ELEMENT 33:5	ESSENTIALLY 28:1 50:18,20 55:2 61:8 64:18 73:21	EXPLODED 20:12
ELEMENTS 32:19,20 48:8 49:3 50:11	ESTABLISH 49:20 50:10 56:12 78:27	EXPLORED 42:16
ELICIT 29:10	ESTABLISHED 50:12	EXPRESSLY 66:3 67:3 69:20
ELIMINATE 15:15	ESTATE 2:5	EXTEND 3:22 5:27 17:26
ELIMINATING 15:2	ESTOPPEL 37:12,15	EXTENDED 3:28 8:1,28 17:23
EMERGE 43:13	EVADE 23:19 28:9 71:23	EXTENDING 9:2 68:10
EMPHASIZED 4:1 16:1	EVADES 28:9	EXTENDS 62:23 71:18
EMPLOYEES 7:23	EVALUATE 12:23	EXTENSIVE 39:9 46:14,18 47:14
EMPLOYMENT 7:24,25	EVENT 75:9	EXTENSIVELY 44:12 46:16
EMPOWER 31:28 32:3 45:12	EVERYBODY'S 17:12 76:8	EXTENT 17:1 43:6 57:16
ENCOURAGE 31:23 45:4	EVIDENCE 28:10,14,19,25 65:25	EXTREMELY 43:19
ENCOURAGING 32:10	EVIDENTIARY 23:4	
END 10:4,5 20:19 28:14 59:24 62:1 70:21 71:27 77:12	EVISCERATE 63:20	F
ENDS 15:28 71:6	EXACT 19:10	FACE 21:7 23:3
ENERGY 33:28 40:4	EXAMINE 31:10	FACEBOOK 5:8 19:17 33:13 60:15,22 61:5,8,10,15 63:16 69:23
ENFORCEMENT 26:20 32:4 45:18 52:2	EXCEED 30:23	FACEBOOK'S 60:19 61:3
ENFORCING 32:9	EXCEPTIONS 68:27	FACES 12:15
	EXCHANGE 23:15,16,23 24:4,7 64:11,23 70:1	FACILITATE 27:24 29:7,10

FACILITATED 41:3 55:12 64:23	FEATURES 23:24 26:23 27:5, 18,23 29:7 41:4 64:13 66:5	FOCUSING 8:5
FACILITATES 28:8	FEBRUARY 25:18 63:8	FOLKS 1:17
FACILITATING 69:24	FEDERAL 18:28 19:23 29:27 32:4,15 44:10 45:18	FOLLOW 19:2 20:14 57:14
FACILITATION 23:27 24:2 28:4	FENCE 57:16	FOLLOW-UP 59:3,6
FACT 6:7 9:22 15:16 21:25 22:4 26:19 37:2 42:12,19 45:8 61:23 69:8	FENTANYL 6:21 7:9 12:19 24:22,24 25:20 26:5,11,12,13 28:2 29:15 52:25 56:7 70:3	FOOTNOTE 66:20
FACTO 29:27 41:7	FENTANYL-LACED 6:22	FOOTNOTES 49:22
FACTOR 67:22	FESTIVAL 55:19	FORCE 63:15 69:22
FACTORS 8:3,4 11:24 12:21,27 13:3,12,19,28 17:3,4,5 50:7 54:14 61:7	FIGHT 48:5	FORCES 7:24
FACTS 5:1 12:25 15:5 18:8,23 22:17 29:17 33:20 57:21,23 58:1 60:16 62:24 68:12 77:7	FIGURE 35:13 79:24	FORESEEABILITY 2:28 8:4 54:23,24,26 55:18 56:1,11,13,15
FACTUAL 15:19 22:23 56:11 57:6 77:3	FILE 3:10 80:5,10,13	FORESEEABLE 2:27
FACTUALLY 42:9	FILED 57:4 60:13 64:26 74:12 76:4 77:21	FORM 33:15 61:20
FAIL 22:13 78:2	FILTER 38:17	FORMULATION 67:3
FAILED 40:18,26 65:6 71:19	FINAL 42:27 43:1	FORTUNATELY 25:20
FAILING 41:1 78:27	FINALLY 30:25 32:4 43:25 45:11	FORWARD 9:16 13:4 29:6 41:16 47:26 56:16 57:1 74:15 75:13
FAILURE 9:1 22:13 37:2,10 47:23 52:11 72:22	FINANCIAL 15:1	FOUND 2:26 17:11 21:1 45:22 60:18,21 63:28 64:18,22 68:1,8 72:23
FAIR 12:26 38:9,13 58:16	FIND 14:13 58:10 76:21 77:4	FOURS 8:24 70:24
FAIRLY 34:7 49:27	FINDER 9:21	FRAMEWORK 31:11
FALL 26:25 39:10 78:19	FINDING 3:5 64:20	FRANKLY 8:15,23 63:11 64:4
FALL-BACK 58:4,6	FINDS 5:7	FRAUD 16:26 29:26 39:12 64:27
FALSE 77:19	FINE 80:4	FREE 31:21
FAMILIAR 3:24	FINGERS 81:2	FREQUENTLY 79:15
FAMILIES 31:25 45:6	FIT 18:6	FRIENDS 27:8,9,11
FASHION 73:28	FLESH 52:14	FRONT 28:14 72:10
FAST 38:22	FLOOD 14:5	FRUSTRATION 43:4
FAULT 9:22 51:2 66:21	FLOOR 5:15	FRY 2:6
FAULTING 40:16,17,28 41:1,2	FLORIDA 49:25,26	FULFIL 40:10
FAVOR 18:10	FLOW 71:25	FULL 14:28 43:14
FAVORABLY 63:25	FLOWED 63:14	FULSOME 57:10 59:25
FEAR 17:20 32:18	FLOWERS 36:8	FUNCTION 28:11 29:10 37:11 62:21 69:11 72:24
FEASIBLE 8:12,21	FLows 6:18	FUNCTIONS 72:28
FEATURE 24:15,18,19 28:4,13, 26 34:17,18 35:10	FOCUS 3:26 35:15 36:13 39:15 45:26 66:4	FUNDAMENTALLY 33:4
	FOCUSED 4:2	FUNNY 12:15
	FOCUSES 55:18	FURNISHED 34:16

<hr/> <p>G</p> <hr/> <p>G-R-U-P-I 2:18</p> <p>GAIL 1:5</p> <p>GAIN 66:1 69:17</p> <p>GAME 4:27 56:5</p> <p>GAMEFICATION 27:3</p> <p>GATE 70:16</p> <p>GATES 14:6</p> <p>GAVE 61:18</p> <p>GENDER 33:14 34:13 60:24 61:6,17</p> <p>GENERAL 14:4 17:15 39:11 68:9</p> <p>GENERALLY 71:8</p> <p>GENERIC 38:12</p> <p>GEO 27:28 28:1,4</p> <p>GEOGRAPHIC 27:19,27</p> <p>GEOGRAPHY 34:14</p> <p>GEORGIA 38:4,24</p> <p>GESTALT 23:6 34:7</p> <p>GESTURES 49:13</p> <p>GIVE 1:21 19:10 20:21 53:22 58:17 80:12</p> <p>GIVING 48:15</p> <p>GOLDBERG 72:4,8,15 73:12,15, 17 76:18,20,24,28 77:13 78:18 79:5,6,9,13</p> <p>GOLDSTEIN'S 43:27</p> <p>GONZALEZ 43:3,17</p> <p>GOOD 1:11 7:13 14:28 48:3 49:14 52:1 56:24 76:14</p> <p>GOOGLE 43:4 65:11</p> <p>GOVERNED 13:17</p> <p>GOVERNMENTS 78:11</p> <p>GRANDFATHER 37:5</p> <p>GRANT 1:11,12,19,28 2:3 3:13 4:13,15 5:13,22 6:10 7:18,28 8:8 9:27 10:26,28 11:18 12:28 13:7 14:20 15:17,20 16:12 17:4,9,18</p>	<p>18:25 19:4 20:19,28 21:12,24 22:16 23:1 24:18 25:1 31:3 46:6 47:2 48:15 51:4 56:19 57:12 58:17,18 59:18 60:5 62:6,19 63:8, 10 67:20,24 69:7 70:6,10,21 72:2 74:17 76:13 77:15,16 79:8 80:2</p> <p>GRANT'S 53:14</p> <p>GRANTED 1:24</p> <p>GRAPPLING 19:26,27 22:20</p> <p>GRAVAMEN 40:25</p> <p>GREAT 14:20 20:15 22:3</p> <p>GREATEST 44:14</p> <p>GROSSMAN 4:28</p> <p>GROUND 24:6,12 58:18</p> <p>GROUND'S 2:11 78:1,27 79:8</p> <p>GROUPS 69:22</p> <p>GRUPI 2:17 19:12</p> <p>GUARANTOR 51:23</p> <p>GUARDS 67:5</p> <p>GUESS 16:26 53:24 57:4 79:18</p> <p>GUEST 13:21</p> <p>GUIDANCE 57:2</p> <p>GUIDELINES 61:23</p> <p>GUN 40:21,22,23</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>HANDLE 41:25</p> <p>HAPPENED 15:3 16:10 24:25 39:6 73:10</p> <p>HAPPY 74:28</p> <p>HARASSED 62:28</p> <p>HARD 21:25 48:16 50:26 52:13 56:24 76:9</p> <p>HARM 6:17,21,23 7:7 8:18,19 12:12,16,17 22:14,18 23:14,18,20 24:16,25 35:19 36:14 37:14 38:21 39:16,27 44:5,6 59:28 63:12,14 67:12 71:24,25 72:24,26</p> <p>HARMFUL 14:15 66:8 73:7</p> <p>HARMONIOUS 30:27</p>	<p>HARMONIZE 31:12</p> <p>HASSELL 30:13,18,19,20 31:9</p> <p>HEAD 73:28</p> <p>HEAR 10:13 16:20 20:18 38:1 44:27 48:12 58:9</p> <p>HEARD 18:3 36:6 39:3,19 49:7 54:11 58:3 65:4</p> <p>HEARING 10:14 44:24 58:1 74:18</p> <p>HEAVILY 42:9</p> <p>HEIGHTENED 67:25</p> <p>HELD 3:21,25 4:6,21 7:11 8:22 9:19 13:16 20:15,16 30:9,17 36:27 37:8,15,21 38:25 44:7 59:21 62:20,22 65:28 68:18,24 69:8,23</p> <p>HELPFUL 35:26 37:4</p> <p>HERETOFORE 1:9</p> <p>HERNANDEZ 25:9</p> <p>HERO 25:24</p> <p>HEROIN 44:16</p> <p>HEY 53:24,27</p> <p>HIDDEN 28:21</p> <p>HIDES 28:10</p> <p>HIERARCHY 46:12</p> <p>HIGHER 68:1</p> <p>HIGHLIGHTED 76:10</p> <p>HIGHLY 51:17</p> <p>HISTORY 46:17</p> <p>HITS 45:24</p> <p>HOLD 1:17 2:1 5:10 32:23 40:5,8 67:11</p> <p>HOLDING 4:26 34:5 38:4,9</p> <p>HOLDS 33:14</p> <p>HON 1:4</p> <p>HONEST 62:16</p> <p>HONESTLY 47:13</p> <p>HONOR 1:11,15 2:9 3:17 5:13 8:23 13:24 14:20 17:18 20:28 24:18 25:1,6,8 26:5 27:25 30:9 33:19,27 34:20,27 38:11 39:8</p>
---	---	--

40:21 41:15 42:25 43:11 46:20 50:9 60:16 64:2 68:28 69:13 70:11,21 71:16 72:1,9 74:24 75:24 76:6 79:28 80:2	IMMUNITY 28:18 35:20 42:15 44:1,8 63:21,28 65:18 68:10,13, 25	INDIVIDUALS 31:25 45:6
HONOR'S 31:8 46:2	IMMUNIZE 41:7	INDULGE 21:16
HOOD 35:13	IMMUNIZED 19:7 39:20 55:9	INDULGING 18:10
HOOK 34:26 51:7	IMMUNIZES 10:2	INEFFECTIVE 14:3 15:1
HORRIBLE 45:16	IMPLICATE 71:17	INELIGIBLE 63:20
HOSPITAL 54:20,21 66:27	IMPLICITLY 18:11	INFERENCE 18:10
HOSPITALS 7:23	IMPORTANCE 57:18	INFORMATION 31:25 45:5 49:16 52:23,26 65:15,21
HOST 64:2	IMPORTANT 20:22 30:16 31:4, 6,7,13,17,22 32:28 33:7 35:23 38:26 39:14,23 42:4 43:11,18 51:11 60:22 66:15 67:27 69:1 70:10	INFORMATIVE 57:7
HOTLY 42:10,13	IMPOSE 8:15,16 12:24 13:22,28 15:8	INGEST 26:12
HOUR 38:19	IMPOSED 61:20	INITIAL 25:22
HOURS 27:7	IMPOSING 14:2	INJECTING 6:22
HUGE 28:20	IMPRESSION 20:9 42:26 65:4	INK 35:16
HUNDRED 38:19	IMPROPER 44:8 77:5,9,12,20 78:15 79:17	INNOGAMES 4:25
HUNTINGTON 54:20,21 66:26	IMPROPRIETY 79:3	INPUTS 16:6
HYPOTHETICAL 21:17	IN-BETWEEN 5:21	INQUIRE 49:21
HYPOTHETICALLY 21:18	INACCURATE 72:13	INQUIRY 54:25 56:11
<hr/> I <hr/>	INADEQUATE 5:12	INSECTICIDES 3:27
I.E. 69:17	INADVERTENTLY 26:12	INSERTED 77:20
IDEA 41:12 49:16 51:19 76:28	INAPPROPRIATE 32:2 45:14	INSTAGRAM 19:18
IDEAS 74:12	INCENTIVIZED 38:18 66:22	INSTALLED 49:10
IDENTICAL 68:12 70:24	INCLINED 57:20	INSTANCE 36:3 51:28
IDENTIFIED 51:21 75:28	INCLUDE 32:9 77:24	INSTANCES 9:9 26:16
IDENTIFIES 27:17,18	INCLUDING 30:13 60:8 65:22	INSTIGATORS 29:8
IDENTIFY 15:24 19:27 72:7 75:6	INCOGNITA 16:16	INSTRUMENTALITY 38:21
ILLEGAL 7:14 12:3 15:2 23:23 29:7 38:18,19 40:14,26 70:13 71:5,13	INCONSISTENT 30:2,12	INSURER 9:8,11 15:16 51:4
ILLEGALITY 34:12 35:7	INCORRECT 60:12	INSURERS 9:3
ILLEGALLY 24:23	INCREASED 26:9	INTANGIBLE 3:18 4:4,7 10:28 17:27 20:16 48:25
ILLICIT 15:28	INCUMBENT 32:7	INTELLIGENCE-DRIVEN 51:18
ILLUSTRATIONS 34:16,17	INCUR 55:9 71:9	INTENDED 30:7
IMAGINE 50:26	INDEPENDENT 36:28 37:17,26 39:1	INTENTIONS 14:28
IMMINENT 25:28	INDICATION 3:27	INTERACT 41:10
IMMUNE 36:5 61:28 65:21		INTERACTIVE 32:22 33:3
		INTERCONNECTEDNESS 6:15
		INTEREST 56:27

INTERMITTENT 27:4	JACKSON'S 43:22	KNOWLEDGE 50:20,22 56:2
INTERNALIZING 50:18	JACOB 25:19	
INTERNET 3:3 14:5 31:20 45:28 59:5,7,16,22,26 67:11 71:8,9	JACOBS 5:3	<hr/> L <hr/>
INTERPRET 30:28 68:9	JAIME 25:8	L.A. 2:20 4:9 76:23
INTERPRETATION 29:24 30:27 46:28	JAMES 4:20 25:13	LABELLING 68:25
INTERVENING 6:5,8	JANUARY 80:23	LACED 7:8 12:19 24:24 56:6 70:3
INTERVENTION 11:15	JEFF 25:10	LAI 6:28
INTRODUCED 66:7	JELLY 36:8	LAND 13:17,21 16:18 41:13 51:12
INUNDATED 78:7	JERSEY 4:28	LANDLORD 13:9
INVENT 15:21	JESSICA 1:12 25:18	LANGUAGE 3:24,25 11:5 30:18, 19 31:10 39:22 47:20 52:17
INVITATION 17:26 18:1	JUDGE 1:4 11:12,13 16:15 19:1 25:22 26:3 29:1,21 30:6,25 31:16 33:4,11 35:13,24 37:8 38:3 42:5 44:7 45:22 46:15,25 47:13 48:1, 13,20 49:17 50:20 51:10 57:17 63:4,11 72:11,23 73:9 78:6	LARGE 27:10,11 71:11
INVOLVE 68:26	JUDGES 12:23	LARGELY 52:12
INVOLVED 3:17 14:9 26:18,23 37:10 54:13 64:10 66:16 68:20 73:2,6	JUDGMENT 22:24 23:2 29:23 59:19	LARGEST 26:6
INVOLVES 70:13	JUDICIAL 25:24 77:10	LATEST 29:3
INVOLVING 36:4 37:7 68:3,6,16	JUNE 64:9	LAUDATORY 45:28
IPSO 29:27 41:7	JURIS 20:4 25:23 63:5 64:5	LAURA 25:17
IRRECONCILABLE 46:4	JUSTICE 43:22 45:23 46:21 50:13 54:21 56:28	LAW 3:5,17,23,25 4:2,9 5:3 8:16 9:1,7 12:20,22,23 13:18 17:23,27 18:7,22 19:2 20:14,25 26:20 29:19,25,27 30:2,7,10 31:1 32:9 41:17 43:12 52:1,13 54:12 57:14, 17,18 62:20 78:2,6
IRRELEVANT 39:27 73:15 77:5, 19	JUSTICES 43:4	LAWLESS 41:13
ISAACS 54:18,19,22 55:17 66:26 67:1,4	<hr/> K <hr/>	LAWRENCE 1:4 74:27 75:7,18, 26 76:6,12
ISIS 71:4	KAPLAN'S 46:15	LAWS 32:5 45:18 77:22
ISOLATION 31:10	KID 27:15	LAY 31:17
ISP 59:5	KIDS 26:11 27:6,8,13,18,26 29:15 32:9 38:18 44:3,16 45:8 46:17,23 52:24 53:2,23,25,27 54:8 55:4,5 56:6 68:21 70:18	LAYING 27:26
ISSUE 19:10 29:2 31:22 33:4,22 35:2 38:14 39:13 40:15 41:18 42:17 54:18 57:16 61:4 65:3 75:23	KILLED 8:20	LEAD 72:5,9
ISSUES 42:19,21,25 43:2,11,23 56:23,26 68:12	KILLER 26:6	LEAP 16:4
ITEM 33:25 34:1,3 50:22	KIND 12:24 15:2 32:18 39:10 44:2 45:27 50:12 62:24 69:3	LEARN 41:8
ITEMS 3:26 33:25 58:23	KINDS 12:25	LEAVE 1:21,24 2:25 21:23 22:22 36:19 58:5 65:13 71:3
<hr/> J <hr/>	KNEW 37:23 41:3,10,11 55:11 56:17	LEAVES 1:14
JACK 25:13	KNOWING 28:18	LED 26:24 37:19
JACKSON 2:3 40:20,21		LEE 21:6 30:21 35:27 36:12,16, 27

LEGAL 13:14,22 15:10,22 22:12 28:9 29:18 40:28 44:19 45:1 46:8 56:26 65:25 68:12 77:1	LONG 13:9 23:17,28 61:28 74:6	MATCHED 69:12,25,27,28
LEGALLY 4:18	LOOKED 23:26 25:24	MATCHING 63:16,17 64:11 69:23 70:2 72:24 73:8
LEGISLATIVE 46:16	LOS 1:3	MATERIAL 32:2 37:6 45:10,14, 15 63:13 64:24 69:20 76:11 79:17
LEGISLATOR 45:24	LOSS 10:10 11:28	MATERIALLY 34:22 35:6,10 61:13
LEGISLATURE 10:12	LOSSES 6:14	MATTER 3:16 11:14 41:26 51:7 54:12 77:20 78:2 79:14 80:16
LEMMON 21:3 38:1,7,17,27 39:15,17,24,26,28 40:1,2 66:15, 16,19 72:17	LOT 5:26 13:27 19:23 21:12 42:5 58:18 68:26 74:3	MATTHEW 25:5,14
LETHAL 7:9 12:19	LULL 47:21	MAXIMIZE 31:24
LEVEL 56:13,14	LUNCH 6:16 25:23	MAXIMIZES 45:5
LIABILITY 1:23 2:26 3:7,16,23, 25 4:2,9,16,18 5:3 7:5,16 8:1,28 9:1,7,9,10 10:4,16 11:12,15,19,23 13:5,16,21 14:11 16:21,25 17:1, 23,27 18:22 19:7,13 21:13,20 22:1,7,13,18 29:26 36:21,23 37:14 38:6,10,12 39:12 40:24,25 41:18,20 44:23 47:4,10,17,21,22 48:5,17 49:1,6 50:13,18 51:2,12 52:11 53:11 55:7,10 64:16,27 66:17,27 67:1,10 72:21	LW 2:16 64:8 71:28	MAYHEM 26:24
LIABLE 7:11 9:20 21:28 22:9 32:24 40:5,8 55:13 73:9	LYFT 49:26,28	MAYNARD 38:2,5,14,16 66:16
LIAPES 33:13 34:11,13 60:14,18, 21 61:2,27 62:9		MCCARTHY 25:13
LICENSED 66:12	M	MEANINGFUL 53:9
LICENSES 34:25 35:3	MACPHERSON 26:4	MEANS 12:23 15:9,10 74:3
LIFE 26:2 49:8	MADE 6:24,25 8:14 12:5,10 13:10 21:2 36:18 42:6 52:16,18 61:27 66:20 71:15 73:9 77:19	MEANT 18:2
LIGHT 32:8 45:20	MAGNA 32:16	MEDFORD 62:17
LIMITED 67:1	MAJORITY 19:23 26:16 50:15	MEDIA 4:20,21 5:7 18:19 28:8 36:4 41:5 55:8
LIMITING 13:13	MAKE 6:3 8:18 9:5 30:15 33:23 40:10 62:3 69:19 73:4 79:21 80:7, 22	MEMBERS 56:9
LIST 19:10	MAKES 7:3 8:6 62:5	MEMES 12:15 23:17 34:24 35:4 66:12
LISTS 78:1	MAKING 7:5 12:12 16:15 24:3 46:8 60:4,5 69:6 79:3	MEMO 78:4,18 79:10
LITIGATION 14:6	MALWARE 46:22	MEMORANDUM 77:26,27 78:14 79:20
LIVABLE 78:10,21 79:2	MAN'S 41:13	MEMORIAL 66:26
LIVE 48:5	MANIACAL 28:17	MEMORIZED 76:26
LOCAL 76:23	MANNER 35:3 36:24	MEMORY 49:7
LOCATE 28:1	MANUFACTURED 51:6	MEMOS 78:7
LOCATION 27:19,28 28:4 49:12	MANUFACTURER 7:3 36:1,26 47:16 51:2,15	MEN 68:7
LOGIC 69:10	MANUFACTURING 72:21	MENDOZA 25:15
	MARCH 5:5	MENTION 5:23 15:11 67:15,24 77:25
	MARIAM 25:9	MENTIONED 3:11 12:8 23:9 66:11,15,26 69:11
	MARIJUANA 26:13	MENUS 27:25
	MARKET 31:21 56:4	MEOW 4:20
	MARKETED 49:5	MERCURY 21:7
	MASS 49:4,5	

MERIT 42:20 46:8	MOTION 1:24 2:10 16:2,3,11 64:17 74:12,19,27 75:2,8,19 76:13,16,20,26 77:16,18 78:4,12, 13,22,27 79:3,7,22 80:20,23	NEUTRAL 42:10
MERITORIOUS 46:13		NEVILLE 1:2 25:7 42:2
MESSAGE 4:23 17:8 28:11 29:9		NEVILLE'S 28:2
MESSAGES 7:1 11:4 12:4,17 23:22 24:4,25 31:22 34:26 44:17 51:28 60:1 61:21 62:12 71:21	MOTIONS 72:10 74:11 78:7	NIGHT 27:7
MET 68:7,17	MOTIVATED 38:22	NIKESH 75:21
META 2:14 5:4	MOVABLE 49:13	NONECONOMIC 9:15,26
METHOD 11:2	MOVE 47:4 56:28 80:24	NONETHELESS 7:26
MIDST 26:5	MOVED 49:9	NORRING 25:12
MILES 38:19	MOVING 41:19	NOTE 16:26
MILLION 6:20 7:12 8:11 14:21,23	MP 2:14	NOTED 3:2 62:28
MIND 22:26	MULTIPLE 6:5 70:27	NOTICE 3:10 60:13 67:7 77:10 80:3,10
MINDFUL 20:20	MURPHY 59:22	NOTING 13:16
MINE 74:25	MUSIC 34:25 35:3 55:19,21,23 66:12	NOTION 69:3
MINIMUM 9:25 10:15	MUTE 1:18	NOTWITHSTANDING 7:19
MINOR 68:16 76:8	MYEYES 28:26	NUANCED 38:8
MINORS 44:20,21,26 53:17,26 64:14 66:2,7,8 68:3,6 69:17	MYSPEACE 19:18 65:26,28 68:6, 8,11,13,17 69:15	NUEVA 16:16
MINUTE 30:10 34:2	MYSTERIOUS 50:27	NUMBER 1:1 14:25 27:11 52:7
MINUTES 1:13,14 25:3 70:5	<hr/> N <hr/>	NUMEROUS 21:9 36:26
MISCONDUCT 54:25	N-I-K-E-S-H 75:21	<hr/> O <hr/>
MISLEADING 77:6	NAMES 53:23 75:27 76:1,2	O'SCANNLAIN 35:25 37:8
MISSPOKE 51:11	NARROW 17:15	OATH 19:2
MISTAKEN 62:18	NARROWED 67:1	OBJECT 4:27
MODERATION 40:17 72:26	NARROWING 47:11	OBJECTIONABLE 32:1 45:13, 15
MODISETTE 2:23	NARROWLY 30:17	OBLIGATED 57:5
MOMENT 47:19 54:11	NATURE 26:26 35:8 40:15 41:9 42:6 43:6 50:17 52:20	OBLIGATION 12:24 15:10 55:24
MONETARY 75:15	NECESSARILY 46:20 73:5	OBSCENE 63:2
MONEY 6:25 9:20	NEFARIOUS 29:10 37:24 45:10 53:2 54:5	OBSERVATIONS 9:6
MONITOR 40:18,26 41:1 71:19	NEGLIGENCE 7:17,26 9:2,11 13:18 16:23 17:2 22:12 29:26 39:12 44:24 47:16,18 48:5 51:12 52:11 53:11 54:10 64:27 67:23 68:18	OBSERVED 8:22
MOOTED 75:11		OBTAINED 43:15
MORAL 15:11,12		OBVIOUS 16:9 46:7 70:12,19
MORNING 6:2,12 22:25 33:2 73:25	NEGLIGENT 2:25 37:9 38:12	OCCASIONS 37:16
MORTAR 55:10	NETWORK 14:8 16:5	OCCUR 6:5 7:12 53:17 71:19
MOSMAN 44:7 72:11		OCCURRED 37:21
MOTHER 68:22		OCCURS 8:10 9:4

OCTOBER 1:3 80:9,11,13,17	OVERDOSED 24:21	PEOPLE'S 76:2
OFFENDER 73:16	OVERDOSES 55:22	PERCEIVE 16:5 19:28
OFFERING 48:22	OVERRULED 57:26	PERCENT 26:9 65:7
OFFERS 11:7,10	OVERRULING 42:20	PERCOCET 56:6
OMEGLE 21:3 43:27 62:14,23 63:24,25 64:4,10,19 72:10 73:9	OVERSTATEMENT 17:14	PEREZ 13:15
OMITTED 66:28	OVERTURNING 42:20	PERLA 25:15
ON-LINE 4:4 26:17 27:7 32:2,11 37:7,19 40:27 41:13 45:14	OWED 54:15	PERMIT 22:23
OPEN 5:15 56:28 70:12,19 74:12	OWNER 13:17,21	PERMITTED 9:21 35:12 41:16 66:24
OPEN-AIR 56:4	<hr/> P <hr/>	PERNICIOUS 15:3,15
OPEN-ENDED 67:3	P.B. 25:20	PERPETRATOR 63:3,13
OPENED 70:16	P.M. 1:6	PERSON 14:22 44:15
OPENING 14:5 56:22	PAGES 57:27	PERSONAL 5:24 48:28 49:13 58:21,26 66:13
OPERATED 49:12 55:11	PALPABLE 43:5	PERSONALLY 55:14
OPERATING 56:4	PAPERS 1:27 50:1 58:3 74:21	PERSUADE 65:7
OPERATION 72:23	PARAGRAPHS 49:2,19 57:28	PET 12:15
OPERATOR 60:26	PARAMETERS 60:24	PHARMACEUTICAL 53:5
OPERATORS 37:22	PARAPHRASE 10:13	PHONE 2:27 27:14 28:24 53:17 54:6
OPINE 43:6	PARAPHRASING 6:12	PHONES 71:7,13
OPINION 13:5 33:9 50:14,15 68:11	PARDON 4:14	PHONETIC 23:28 36:3 37:5 45:24 55:19 56:3 65:9 68:11
OPPORTUNITY 57:19 80:5	PARENTS 25:7 28:27 31:28 32:3 45:12,15 53:3,25,27	PHOTOS 11:4
OPPOSED 8:26 47:28 62:11	PART 6:3 8:5,7 22:2 33:18,20 34:19 38:27 77:21	PHRASED 40:24,25
OPPOSITE 27:21	PARTIAL 46:15	PHYSICAL 49:12
OPTIMAL 57:2	PARTICIPATING 61:1 68:23	PICKING 27:14
OPTIONS 62:5	PARTIES 5:6 34:25 63:23	PICTURES 4:22,24
ORAL 75:4	PARTS 18:21 31:13	PIN 38:13
ORDER 2:24 30:7 31:12 73:26 77:23	PARTY 6:23,24 51:8,13	PLACEHOLDER 80:22
ORDINARY 13:17 51:24	PASS 27:1	PLACES 46:12
OREGON 44:11 62:14	PAST 21:18 29:5	PLACING 50:24 51:8
ORGANIZING 63:21	PATH 20:13 69:4	PLAINTIFF 3:20 5:16 7:28 9:10 10:3 12:25 14:8 37:7 52:18 58:4 62:28 64:28 66:21 68:24 69:15 72:9 75:19 76:16 80:14
ORIGINAL 68:15 76:10	PENDING 73:22,25 74:14 79:27	PLAINTIFF'S 4:15
OUTCOME 73:22	PENNSYLVANIA 2:14	PLAINTIFFS 10:21 11:22 14:10, 13 15:24 16:17,19 17:10,20,21, 22,28 18:17 19:8 20:10 22:11
OUTLIER 62:16,19 72:15	PEOPLE 11:1 12:5,13,14 22:5 23:9,12,13,28 24:15,19 26:6,9,25 27:8 32:10 34:24 54:6 63:17 66:13 69:24,25 76:1	
OUTWEIGHS 22:14		
OVERDOSE 7:8 23:21 25:21 70:14		

25:2 33:25 51:26 57:19 60:13 61:18 65:2,5 66:5 71:24 74:22,26 78:3	POST 36:17	PREVENT 17:6 67:12
PLAINTIFFS' 3:14 17:26 18:8 26:28 32:23 47:6 52:16 59:15 63:19 64:12,19 66:11 70:25 71:16,26 77:3,7,8 79:18,25	POST-OMEGLE 64:3	PREVENTED 72:26
PLATFORM 5:7 7:12 8:11 9:4 12:3 28:8 36:20 37:3 41:2 42:13 53:18 62:12	POSTING 61:24,25 64:24 71:27	PREVENTS 28:26
PLATFORMS 4:4 5:4 9:3 71:5	POTENTIAL 9:6 53:23	PRIMARILY 3:20 62:27
PLAUSIBLY 34:21	POTENTIALLY 9:23	PRINCIPAL 16:15
PLAY 6:28 75:10	POWER 30:24 50:16	PRINCIPLE 25:27 26:1
PLAYED 6:27	PPA 77:5	PRINCIPLES 13:18
PLEAD 70:26	PRACTICAL 8:12 79:13	PRINT 36:17
PLEADED 77:9	PRACTICE 22:4	PRIOR 67:6 73:20
PLEADING 65:24 77:20,21,24 79:9	PRAGER 19:5 65:11	PROBLEM 58:2,12 73:27 74:1 80:21
PLEADINGS 35:17 40:6 44:13	PRAGER'S 65:14,17,19,20	PROCEDURALLY 78:15,25
PLEASURE 74:16	PRAY 26:27	PROCEDURE 57:5 76:27
PLED 48:8 49:2	PRECEDENCE 25:25	PROCEED 59:19 75:14
PLW 28:11	PREDATOR 63:2 68:17	PROCEEDINGS 81:4
PODIUM 72:6	PREDATORS 64:14 66:1 69:16	PRODUCED 49:5
POINT 9:8 10:10 11:9,17 12:28 13:26 15:13,18 16:15,28 17:25 18:3 19:3 20:12 43:16,25 44:13 46:7 51:11 53:15 59:11 62:2 69:6 79:16	PREDATORY 44:4	PRODUCT 2:11 3:6,18 4:8,17,21 5:3,8,21,24 7:3,4,6,7 8:20 10:4,7, 9,20,22,24 16:28 18:12,13 19:18 20:2 21:15,25 24:15 26:27 27:16 28:5,6,13,23 29:2 34:24 38:5,12, 16,23 39:1,12 40:11,24,25 41:3,4, 18,20 42:7 44:23 47:4,8,10,16,28 48:4,10,13,19,23 49:1,6 50:11,13, 17,22 51:1,5,6,12,22 52:16,17,18, 21 58:20,21 59:11,12,14,27 64:27 72:21,23,28 73:3,4
POINTS 47:5 56:21 77:26,28 78:4,7,18 79:10,20	PREEMPTED 29:19,27 37:9	PRODUCTS 1:23 2:25 3:5,7,16, 22,25 4:2,5,17,22 5:3,28 7:5,16 8:28 9:1,7 10:3 11:11,19 13:5 16:21,25 17:1,23,27 18:16,22 19:6,13 20:16 21:12,19 22:1,7,17 26:19 29:26 35:14 38:6 41:9 47:21 48:16,25,26 58:24 59:2 64:16 66:17
POISONING 6:21 29:15	PREEMPTIVE 30:15,23,24	PROFITING 55:14
POLICE 7:23 55:24	PREEXISTED 72:24	PROFITS 55:5
POLICY 8:5,8 11:25 12:22 13:2,6 15:8 31:18 32:8 50:12,23 51:13	PREEXISTING 17:15 18:7	PROHIBIT 71:20
PORTIONS 76:17 78:23	PREFERENCE 74:23	PROHIBITED 61:25
POSE 8:9	PREJUDICE 64:17	PROLIFERATE 61:11
POSED 6:2,11,12 23:2	PRELIMINARY 18:4	PROMISE 15:13
POSITION 8:25 14:17,26 15:4 34:20 47:7 58:4,6 75:19	PREMISES 8:1 11:23 13:20 14:11 55:1 66:27 67:1,9	PROMISSORY 37:12,15
POSNER 50:20	PREPARE 27:6	PROMOTE 31:19
POSSESSION 6:25	PRESENT 27:6	
POSSIBILITY 70:13	PRESENTED 24:27 65:3	
	PRESERVE 31:20	
	PRESERVING 45:28	
	PRESUMING 41:16	
	PRESUPPOSES 6:17	
	PRETEEN 63:1	
	PRETTY 22:11 49:22	
	PREVAIL 35:1	

PROMOTER 55:24	PUBLISHING 37:11,27 38:25 42:8 62:21 63:18 66:9,21	QUOTING 46:20 71:28
PRONG 33:5 34:21 35:15 38:28 40:2,3	PUERTA 25:8	<hr/> R <hr/>
PROP 21:7	PUN 30:7	R-E-Y-E-S 2:20
PROPENSITIES 50:25 51:27	PURCHASED 26:17	RADICALLY 60:17
PROPERLY 79:1	PURE 65:25	RAISED 5:6 56:22 62:14
PROPERTY 5:24 48:28 58:22, 23,26	PURELY 18:13	RAMPANT 29:13
PROPOSITION 9:12 37:1	PURPOSE 13:11 30:24 31:12 32:3 50:13 59:20	REACH 7:16 79:16
PROPRIETOR 67:4,7	PURPOSES 4:1 9:23 30:8 32:8, 19 33:2 45:3,12 49:6 55:16	READ 39:15 40:2 48:12 58:3 76:25
PROTECT 11:20 13:23 14:1,14 46:17 67:5,8	PURVEYS 11:7	READILY 27:8
PROTECTED 62:21	PUSH 16:13	READING 18:7 40:1
PROTECTING 32:9	PUSHER 9:22	REAL 14:7 58:23 76:1
PROTECTION 46:23 71:18	PUT 15:2 28:20 35:5 39:11 47:18 79:14	REALITY 35:14
PROTECTIVE 61:16	PUTTING 58:16 67:7	REALIZE 39:14
PROTECTS 45:24	<hr/> Q <hr/>	REALM 54:26
PROTOTYPICAL 6:7	QUALIFY 5:2	REASON 6:3 24:24 41:6,15 46:26 57:25 63:24 65:13
PROVE 77:3	QUESTION 3:7 6:2,7,11,17 7:2, 10 8:9 12:20 13:1 14:20 18:20 19:7 21:27 22:20 29:18,25 30:11 38:3 47:12 48:14 49:17 52:5 57:27 59:3,6 62:2 70:8 79:17	REASONABLE 17:13,15 40:10 54:15
PROVIDE 12:7 37:1 40:10 42:12 52:21,23 53:9 56:24 57:1 67:5 77:7	QUESTIONS 42:26 65:25	REASONS 29:1 48:7 79:22
PROVIDED 27:26 59:1 63:22	QUIBBLE 50:28	REASSURE 79:18
PROVIDER 59:5,7,9,16,26 65:15 67:11,12	QUIBBLING 51:9,10	REBUTTAL 1:13 23:1
PROVIDER'S 71:14	QUICK 22:4 23:9,11 24:14 35:9 69:11	RECALL 30:1 50:3
PROVIDERS 3:4 59:23 71:9,11	QUICKER 22:5 23:9	RECEIVED 31:25 36:7 45:5,17 52:27
PROVIDING 47:28 57:19 71:10	QUICKLY 23:13	RECEIVING 45:9
PROVISIONS 31:6,17 45:25 47:2	QUINTEROS 4:25	RECENT 33:8 34:10 72:16
PRUDENCE 20:4 25:23 63:5 64:5	QUINTESSENTIAL 70:23	RECENTLY 30:21 49:27
PUBLIC 8:5,8 11:7,8,25 50:12,23 51:13 53:3 71:11 76:3,7	QUINTESSENTIALLY 29:23 42:8 53:9 56:11	RECESS 41:23,28
PUBLICATION 60:23 73:1,6,8	QUOTE 3:25 4:16 5:1,5 13:16 14:2,4 15:24 21:19 40:6 48:26 59:23,24 61:2,27 62:1 64:26 65:14 66:4 67:2 68:9 71:4,26,28 77:12 78:23	RECOGNIZE 13:14 42:5
PUBLISHED 13:4 37:7		RECOGNIZED 13:9 39:16,17
PUBLISHER 31:5 32:6,24 35:22 36:1,14,15,25 38:28 40:5,8 45:27 61:12 62:11 66:23 72:19		RECOGNIZES 57:18
PUBLISHES 73:4		RECOMMENDATION 33:15
		RECOMMENDATIONS 34:6
		RECOMMENDING 69:22
		RECONCILIATION 31:2
		RECORD 15:19 22:23 23:4 42:2, 21 43:5,9,14 56:28 57:6,10,11,20

RECOVERY 4:18	RENDEZVOUSES 62:27	RICH 27:3,6
REDACTED 75:28 76:4,11	REPEATEDLY 15:22 19:19	RID 23:11
REDACTIONS 76:9	REPLETE 54:24	RIFF 1:4 11:12 19:1
REDDIT 63:26,27 64:1	REPLY 78:12	RISE 26:21
REFER 12:21	REPORTER 1:5,12 31:15 75:6	RISK 14:7 22:14 51:25,27 52:25
REFERENCE 43:16	REPORTER'S 81:2	RISKS 16:5
REFERRING 20:5	REPRESENT 25:6,8 34:28	RKO 7:20
REFERS 30:20	REQUESTS 15:21	ROAD 23:3 29:22 52:4 70:15,17
REFINED 35:26	REQUIRE 15:25 16:4 62:1	ROCKAWAY 4:28
REFLECTS 3:26	REQUIRED 30:26 47:1	ROLE 6:27,28 8:19
REGARD 5:14	REQUIREMENT 61:21	ROOM 55:3,12
REJECT 78:9	REQUIREMENTS 39:22 60:19	ROOMMATES 35:6 41:13 60:21, 27 61:4,5 62:8
REJECTED 3:22 15:22 39:3 43:28 64:19 70:27	REQUIRES 21:22 26:2 61:5,8	ROULETTE 62:25
REJECTING 78:13	REQUIRING 60:23 62:4	ROWLAND 8:3,6 11:24 12:21,27 13:3,4,8,12,16,19,24,28 15:11 17:3,4,5,14 54:13
RELATE 24:7,12 48:9 49:3 66:9, 14	RESERVE 1:13	RUDIMENTARY 34:7
RELATED 37:26 61:21 64:24 71:26 80:28	RESOLUTION 78:24	RULE 43:10 57:11,12 76:22,23 77:22
RELATES 35:20 75:12	RESOLVE 43:19	RULED 73:11
RELATIONSHIP 7:25	RESOURCE 14:28 15:1	RULES 57:5 58:27 76:21
RELATIONSHIPS 44:25,26	RESPECT 9:15 41:18 43:23 45:6 49:28	RUN 69:2
RELATIVE 4:12 44:26 79:11 80:5	RESPECTFULLY 31:1 48:6	RUSH 5:11
RELEVANT 13:12 31:17 45:10 46:5 67:22	RESPONSE 25:22 46:10 59:3	RUSHING 5:10
RELIANCE 14:11 64:19	RESPONSIBILITY 6:23 9:24 28:9,27	
RELIEF 75:9,15	RESPONSIBLE 8:10,17,19 10:8 11:27 12:6	<hr/> S <hr/>
RELIES 3:20	REST 9:17	S-I-E-V-E-R 2:5
RELYING 71:22 77:11	RESTATEMENT 5:23 48:9,24 49:1,23 50:10 58:19,21,28 59:10, 13	S-R-I-V-A-S-T-A-V-A 75:22
REMAIN 73:22,23,25	RESTRICT 32:1 45:13,16 65:17 69:19 72:20	SAFE 39:1 40:10 52:16,19
REMEDIES 30:2,7	RESULT 2:28 14:3 26:10,11,17	SAFETY 50:19,20 56:3,8,10
REMEDY 29:18 63:5	RETREATED 67:3	SALACIOUS 37:6
REMEMBER 6:11 38:27 66:15 73:19	REVIEW 60:15	SALE 6:25 40:21,22,23,26 48:22 71:15
REMIND 14:18	REVIEWED 5:5	SALES 27:24 29:7 41:3
REMOVAL 37:10	REVISITING 42:21	SAMANTHA 25:13
REMOVE 31:27 36:17 37:10,27	REWARD 27:4,5	SAMMY 25:17
	REYES 2:19 19:13	SAMUEL 25:16

SANCTIONS 74:13,18,28 75:2,8 80:20,23	SENDING 63:1	SIMPLY 28:12 30:14 49:16 54:4 57:15 60:12 63:21 65:1 78:28
SAT 43:3	SENSE 6:4 15:11 19:27	SINGLE 40:11 68:1 78:3
SAVE 81:2	SEPARATE 28:7 36:28 37:17,26 39:1,9	SINGULARLY 26:10,11
SAVINGS 30:1	SEPARATELY 33:1	SIT 21:17 22:27
SCALE 8:11 28:16	SEPARATION 79:21	SITE 11:21 16:7 23:13 24:1 60:28 62:26
SCALIA 45:23	SEPTEMBER 25:14	SITUATION 50:19
SCHEDULING 81:1	SERIES 49:12	SKYPARK 33:24
SCHOOLS 31:26 45:6	SERVE 80:13	SLAUGHTER 26:24
SCOOTERS 2:18 19:12	SERVED 4:1 76:6	SLOW 31:15
SCOPE 7:24 31:12 43:6 71:23	SERVICE 3:4,18 4:7,27 5:8,21 10:25 11:1,2,6,10 12:2 14:14 15:28 17:24 18:13 20:2 24:17,19 32:22 47:28 48:23 53:3 59:5,7,9, 10,23,26,27 61:24 67:11,12,14 71:9 73:3	SNAP 1:2,12 2:7,8,16 4:6,23 6:27 7:10 8:9,18 9:19,21 10:2,19,20 11:6,10 12:6,9,11 13:22 14:22 15:13 17:7 19:7 21:28 22:9 27:10 38:2,5,17 39:3,19 40:28 41:1,2,7, 10 42:3 47:27 48:22 49:9 52:5,7 53:18 54:11 56:5,16 59:4,7,16,26 61:18 64:8,13,17 65:10 66:11,21, 23 70:7 72:17 74:12
SCORE 44:15	SERVICES 4:5,8 15:26 17:27 18:16 20:6,17 59:1,14,16 61:6 71:10	SNAP'S 5:2 14:17,26 15:4 42:8 62:4 75:19
SCREEN 49:10	SESSION 1:6	SNAPCHAT 2:11 3:6 4:4,6,24 6:18,20 11:3,26 12:1 14:16 19:17 26:15,18,22,24,26 27:1,2,5 28:5,6 29:3,6,13,14 33:3,20 34:18,22,23, 24,25 35:3 36:19 38:5,20 40:13 42:7,10 47:7 49:14 52:26 55:4,11 59:27 64:22 66:22 71:27
SEAL 75:20,26,27 76:13	SET 18:23 50:7,13 67:3 80:27	SNAPCHAT'S 27:12,17,23
SEALED 75:25	SEXUAL 62:27 63:12 64:14,23 66:1 69:16	SNAPS 4:23 14:18,23,25
SEAT 41:26 72:2	SEXUALLY 68:7	SO-CALLED 13:3 54:13
SECRETLY 7:8 12:19	SHAKING 73:28	SOCIAL 5:7,26 14:8 15:8 16:4 18:19 27:10 28:8 36:4 41:5 52:1 55:8
SECTION 3:7,14 5:23 10:2 17:12 19:5,15 21:1,9,13 23:20 24:8,13 29:19,27 30:1,3,12,24,28 31:4,6, 14,18 32:5,16 33:17 37:8 39:19 41:6,12 42:15,18 43:2,7,10,21 44:1,19,28 45:2,3,11 46:12 48:8,9 49:23,28 50:6,10,11 58:19,28 59:6,21,22 60:7,10 62:8,21 63:5, 20,21,28 64:5,18,20 65:7,18,21 66:3,10,14,25 67:26 68:3,9,13,19, 24 69:9,21 70:23,26 71:18,24 73:5	SHAPES 61:12,15	SOCIETY 51:9
SECTIONS 46:24	SHARE 21:27	SOFTWARE 3:4,18 4:4,27 6:4, 14 8:2,16 9:3 10:28 11:1,27 17:23 49:14
SEEK 30:26	SHARING 22:24	SOLD 6:24 21:4,6 55:12
SEEKING 26:12 40:4,8 44:17 75:9,15,26 76:19 77:27	SHIELDS 59:22 68:13	SOLE 37:4
SEEKS 32:23	SHOOTING 2:16	SOLELY 43:20
SELECT 60:24	SHORTLY 16:20	SOLICITATIONS 36:7
SELL 55:4,25	SHOW 9:10 60:16	SOLID 72:16
SELLER 11:16	SIDE 25:2 79:18,25	
SELLING 7:5 8:19	SIDES 35:17 43:8	
SELLS 7:3	SIEVER 2:4	
SEMARALITY 23:28	SIGNIFICANCE 44:14,19 45:1	
SEND 4:23 11:3 34:24 52:22 66:13	SIGNIFICANTLY 34:1	
	SILLY 12:15	
	SIMILAR 15:21 37:20 44:1 67:6 69:3	

SOLVE 58:10,11	STATUS 27:10 73:20 79:23,26 80:27	SUBMITTED 33:10 79:5,6 80:16
SON 25:9,10,11,12,13,15,16,17, 19	STATUTE 32:7 45:10,25 46:26	SUBSECTION 46:13
SORT 62:10	STATUTES 77:18	SUBSECTIONS 46:20
SOURCE 50:23	STATUTORY 29:23 31:11 32:3 46:28	SUBSEQUENTLY 35:25
SOUTH 2:15	STAY 81:2	SUBSTANCE 61:21
SOUTHERN 2:16 64:9	STAYED 73:22,25	SUBSTITUTE 3:1
SPEAK 44:20 47:20	STEERED 66:8	SUE 64:28
SPEAKER 32:6,24 35:22 40:9 45:27	STEP 9:17	SUFFICIENCY 77:2
SPEAKING 33:24	STEPS 72:3	SUFFICIENT 37:3 56:13,15
SPECIAL 44:25,26 67:18 68:27	STEWART 78:13,26	SUFFICIENTLY 48:27 58:25
SPECIFIC 26:23 27:16 29:9 41:4 46:24 51:21 62:23	STOP 41:19 76:22	SUGGEST 34:11 57:15 74:17 79:2
SPECIFICALLY 27:23,26 32:9 38:14 39:2 40:5 49:4,28 51:25 54:28 56:3 58:28 59:12	STOPPED 21:13,14	SUGGESTING 22:8,10,11 40:18
SPECIFICATION 79:10,11	STORE 21:4	SUGGESTS 7:10 34:6,8
SPEED 38:17	STORIES 27:25 35:4 66:13	SUITED 52:21
SPEND 68:28	STORY 34:17,18	SUMMARY 12:26 22:24 23:2 29:22 59:19
SPILED 35:16	STRAIGHT 11:28	SUPERIOR 2:18,21 4:9,12,28 5:4 19:12 76:23
SRIVASTAVA 75:21	STRAIGHT-UP 18:20	SUPERSEDING 6:8
SSC-7 1:4	STRANGERS 62:26	SUPERVISION 47:14
STAFF 75:7	STRANGLE 68:21	SUPPLANT 77:8
STAGE 65:24	STREAKS 27:5,10	SUPPLEMENTAL 3:10 19:22 33:10 60:14 80:4,10,15
STAGECOACH 25:26	STRESS 62:22	SUPPLIER 33:3 50:23 51:7
STANDARD 35:5 41:14 60:10 68:1	STRICT 4:16 9:1,7,9 10:15 11:11 13:5 16:21,25,28 18:22 22:1,13 29:26 38:6,10 39:12 47:10,17,20, 22 48:16 50:17 52:10 53:10	SUPPORT 5:1 77:28 78:5,19
STANDARDS 60:7	STRIKE 1:22 74:19 76:16,20 77:18,19,20,27 78:4,7,12,14,23, 27,28 79:3,7	SUPPORTS 3:5 50:24
START 10:4,6 58:19	STRUCK 6:16 63:3 78:20	SUPPOSED 17:8 77:1
STARTED 70:22	STRUGGLING 22:20,21	SUPREME 7:22 13:10 15:23 18:27 20:5 31:9 42:28 43:1,4,19 60:8,9 66:28 71:1,3
STARTS 23:21	STUFF 38:18 54:5	SURREPTITIOUSLY 24:24
STATE 3:15 14:27 18:27 30:2,7, 10,28 57:24 69:26 77:22	SUBJECT 4:8 25:28 36:21,23 38:5 49:15	SURVEIL 17:8
STATED 1:9 10:3 36:19 58:27	SUBMISSION 33:19 74:2	SUSCEPTIBLE 47:16
STATEMENT 46:21 48:25 56:22 59:4	SUBMIT 34:10,15 39:21 42:15, 19,24 43:11 48:6 54:3 59:20 74:20	SUSTAIN 21:22 22:22 57:5,13
STATEMENTS 42:5,18		SUSTAINED 1:16,20 2:10 4:10, 15 19:14 57:9 58:11 75:10,11
STATES 3:19 15:23 20:5 31:19 48:25 58:21,28 71:1		SUSTAINING 2:24 65:12
		SWIPES 49:12

<p>SYNONYMOUS 2:28</p> <p>SYSTEM 14:19 18:28 27:4 61:15 73:1</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>TAAMNEH 15:24 43:17,22 71:2</p> <p>TACTICS 70:27</p> <p>TAEKWONDO 13:11</p> <p>TAG 62:25</p> <p>TAKES 49:7</p> <p>TAKING 56:6 74:2 75:12</p> <p>TALK 6:1 29:20 32:5,12 47:19 62:25 72:3 79:25,26</p> <p>TALKED 31:5 51:5</p> <p>TALKING 5:20 8:2 21:26 24:14 28:12 36:22,23 45:28 47:9 52:9 54:6 55:1</p> <p>TALKS 13:9 35:6</p> <p>TANGIBLE 3:23,26 4:2 5:24,28 48:19,28 49:5 58:21,26 59:14</p> <p>TARGET 27:3,6 70:18</p> <p>TASKED 29:21,22</p> <p>TECHNICALLY 74:4</p> <p>TECHNOLOGIES 31:24 32:10 45:4</p> <p>TECHNOLOGY 27:17,24 53:1,8</p> <p>TEENAGERS 38:22</p> <p>TELEPHONE 27:21</p> <p>TELLING 10:14,15 11:9 59:13</p> <p>TEN 32:14 37:15</p> <p>TENANT 13:10</p> <p>TERM 10:27 48:17</p> <p>TERMINATE 15:26</p> <p>TERMS 8:9 12:1 20:14 25:23 40:24,25 61:24 67:14 79:23</p> <p>TERRA 16:16</p> <p>TERRIBLE 71:6</p> <p>TERRITORY 17:20 18:2 20:1 56:27</p>	<p>TERWILLAGER 50:5</p> <p>TEST 32:13,17 35:19 36:2,4,11, 12 37:9 39:7,18,24</p> <p>THEORETICAL 22:3 24:11</p> <p>THEORIES 21:23 22:12 71:17</p> <p>THEORY 4:18 5:2 9:11,20 21:20 22:1,15,16,18 37:12,14 43:20 53:11 55:7 65:1</p> <p>THING 10:19 12:6 16:17 18:14,19 22:27 28:22 48:3 53:6,15 54:2 58:9 67:27 73:19 75:8</p> <p>THINGS 3:23 5:9 6:27 7:14 23:25 25:28 51:8 52:8 72:12 79:14</p> <p>THINKING 21:28</p> <p>THIRD-PARTY 11:21 13:23 14:1,6 30:15 32:27 33:8,15,16,21 34:4,8,22 35:20 38:20 39:5,27 40:9,12 44:6 54:12,25 55:14,25 64:25,28 66:24 67:2,5 71:27 73:4</p> <p>THOMAS' 46:21</p> <p>THOUGHT 6:16</p> <p>THOUSAND 57:28</p> <p>THOUSANDS 29:14</p> <p>THREE-PART 32:13,17</p> <p>THROW 48:4 57:20,21</p> <p>TIED 26:15</p> <p>TIKTOK 2:13 19:18 68:20,23</p> <p>TIME 1:6 5:11,12 20:20,21 21:17 26:8 33:12 38:18 42:17 48:16 65:3 80:12,28</p> <p>TIMES 16:27 70:28</p> <p>TIPS 61:19</p> <p>TIRES 3:26</p> <p>TODAY 3:11 25:27 26:22 29:21 36:8 39:4 40:4,21 43:24 74:5 75:4 80:9,17</p> <p>TOLD 3:11 22:25 70:9</p> <p>TOMORROW 80:11</p> <p>TOOL 12:7 42:10</p> <p>TOOLS 61:3</p> <p>TOPIC 5:16</p>	<p>TORT 10:16 29:25 58:19</p> <p>TOUCH 60:13</p> <p>TOUCHES 30:14</p> <p>TRACKED 60:10</p> <p>TRADE 28:17</p> <p>TRADITIONAL 7:4 36:15 37:27</p> <p>TRAFFICKING 72:21</p> <p>TRAGEDIES 20:11</p> <p>TRAGICALLY 55:22</p> <p>TRANSMIT 12:3,13,14</p> <p>TRAVEL 25:26,27</p> <p>TRAYNOR 50:13</p> <p>TREAT 66:23</p> <p>TREATED 68:4 72:18</p> <p>TREATING 35:21</p> <p>TREATMENT 32:6</p> <p>TRIAL 2:24 9:16,19,21,28 16:11 35:1 65:12 73:11 78:26</p> <p>TRODDEN 20:13 69:4</p> <p>TRODDING 69:4</p> <p>TRUE 9:14 12:9,10 15:5,19 18:9 23:5 27:9</p> <p>TRUMP 30:7</p> <p>TRUTH 77:2</p> <p>TUESDAY 80:12</p> <p>TURN 9:8 15:16 54:10 56:18 65:19 67:26</p> <p>TURNAN 56:2</p> <p>TURNED 49:9 72:18</p> <p>TWITTER 59:22 71:2,28</p> <p>TYPE 3:16 13:25 67:25 69:19</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>U.S. 43:1</p> <p>U.S.A. 13:11</p> <p>UBER 4:9,17 19:17</p> <p>ULTIMATE 58:4,6</p> <p>ULTIMATELY 29:21 42:27 43:7</p>
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UNCERTAIN 42:23,24 58:2		
UNCHARTED 19:28 20:8		
UNDERLYING 68:15		
UNDERScores 14:11		
UNDERSTAND 9:5 12:26 20:24 22:4 24:26 35:12 39:20 43:18 59:17 73:17 76:17,18		
UNDERSTANDING 80:24		
UNDERTAKING 37:9		
UNDISPUTED 29:2		
UNDISTURBED 72:16		
UNIFORM 49:15		
UNIFORMLY 62:20		
UNIQUE 29:2,7 41:5		
UNITED 3:19 15:23 20:5 31:19 71:1		
UNIVERSITY 65:11		
UNLAWFULNESS 61:14		
UNLIKE 28:11		
UNNECESSARY 78:24		
UNREASONABLY 51:22		
UNREDACTED 76:7		
UNSOLICITED 45:9		
UNSOUND 78:25		
UNWANTED 31:22		
UNWISE 15:7		
UPDATED 5:27		
URGED 75:4		
USER 12:12 31:24 45:5 66:22 69:22 75:27 76:1,2,8		
USERS 5:8 6:20 7:13 8:11 11:20 13:23 14:1,4,14,21 23:22 24:3,4 34:26 45:9 52:23 61:5,26 62:4,21 64:25 66:7 67:13 69:12		
UTAH 2:6		
UTILIZES 35:4		
UTMOST 14:27 15:15 51:6		
	V	W
	VALID 41:17 55:16	WAIT 10:21 13:1 74:15 75:1
	VANICK 2:8	WAITING 44:18
	VAPOR 2:20	WANTED 1:21 12:4 40:13 43:16 45:16 58:18 64:6 67:26 72:11 75:27
	VARIETY 7:20	WARN 9:1 16:8,9 22:13 29:16 37:2,24,25 47:23 52:11 53:2,18, 26 54:4 70:11,17 72:22
	VARY 70:17	WARNED 53:12
	VAST 26:16	WARNING 14:4 21:8 52:5,9,15, 18 53:3,7 70:18
	VERBATIM 40:7	WARNINGS 37:1 52:22 53:9 70:6,18,19
	VERIFICATION 23:25	WARRANT 13:13
	VERIZON 53:15,19,22 54:1,4	WASHINGTON 4:26
	VERSION 18:8 76:4,7	WATERS 42:23
	VERSUS 2:3,5,6,8,13,14,16,18, 20,23 4:6,9,20,25,28 5:4 7:19 13:11 19:12 21:6 26:4 31:9 32:13 33:13 36:3 37:6,18 38:2,5,17 39:2,17 42:2 43:3 47:21 49:26 50:14 52:1 54:21 55:19 59:22 60:14 61:3 63:16,26 64:8 65:9,11, 26 66:26 68:6,20 69:15,22 71:2 72:10,17 78:11,13,26	WAYS 37:20
	VIABLE 4:18 10:3 30:9 54:2	WEAK 14:3
	VIBRANT 31:21	WEBSITE 8:21 16:5 37:23 60:21, 26 61:4,28 62:9,27 66:2,6 69:18
	VICTIM 67:16,21 72:25	WEDNESDAY 1:3
	VICTIMS 44:20,21	WEIGH 15:6
	VIDEO 4:26 34:25 35:3 55:3,5,11 62:26 71:14	WEIGHT 20:15
	VIDEOS 4:24 12:15 65:17 66:12, 13	WEIGHTY 56:26
	VIEW 21:21 42:8 63:17 77:14 79:25	WEIRUM 7:19,20
	VIGOROUS 32:4 45:18	WESTERN 4:26
	VIOLATED 12:1 61:26	WHEEL 62:25
	VIOLATING 67:13	WHOLLY 50:22
	VIOLATIONS 7:23	WILD 18:18
	VIRTUAL 14:8 55:3,15	WILDLY 42:19
	VIRTUALLY 28:7	WINTER 3:21 4:3
	VIRTUE 63:21	WISHED 57:21
	VIRUS 46:22	WOMAN 37:20
	VULNERABLE 27:13 44:3,16 53:23	WONDERING 44:28
		WOOLY 18:18
		WORD 10:18 15:9 57:4 78:17
		WORDS 4:21,24 32:2 56:5 71:3

WORK 13:27 35:14 51:20

WORKED 56:24

WORKS 2:20 27:28 35:10 74:20

WORLD 4:3 5:19 6:15 11:11,19
14:7 18:15,18 21:19

WORRY 5:10

WORTHY 43:26

WRAP 70:4

WRIT 78:4

WRITES 50:21

WRITING 56:10

WRONG 6:13 7:20 63:12

WRONGFUL 15:15

WROTE 25:25

X

X-TREME 2:18 19:12

Y

YAHOO 32:13 37:6

YEAR 26:7 55:21,23,26 63:6

YEARNED 43:5

YEARS 5:26,27 20:10 25:25
35:25 63:1

YESTERDAY 60:14

YORK 26:3 50:5

YOUNG 26:6,9,25

YUBA 50:15

Z

Z-I-E-N-C-I-K 4:5

ZERON 68:10

ZIENCIK 4:5

ZOOM 74:20,28