

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES,)	
INC.,)	
)	
Plaintiff,)	
)	C.A. No. 08-862-JJF-LPS
v.)	
)	
FACEBOOK, INC., a)	
Delaware corporation,)	
)	
Defendant.)	

Wednesday, December 23, 2009
11:00 a.m.
Teleconference

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE LEONARD P. STARK
United States District Court Magistrate

APPEARANCES:

POTTER, ANDERSON & CORROON, LLP
BY: PHILIP A. ROVNER, ESQ.

-and-

KING & SPAULDING
BY: PAUL ANDRE, ESQ.

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APPEARANCES CONTINUED:

BLANK ROME, LLP
BY: STEVEN L. CAPONI, ESQ.

-and-

COOLEY, GODWARD & KRONISH, LLP
BY: HEIDI L. KEEFE, ESQ.
BY: JEFFREY NORBERG, ESQ.

Counsel for Defendant

1 THE COURT: Good morning, everyone.
2 This is Judge Stark.

3 Who's there, please?

4 MR. CAPONI: Good morning, Your
5 Honor. For Facebook, it's Steve Caponi from
6 Blank Rome.

7 And also with me, Heidi Keefe and
8 Jeff Norberg from Cooley Godward.

9 THE COURT: Okay.

10 MS. KEEFE: Good morning, Your
11 Honor.

12 MR. NORBERG: Good morning, Your
13 Honor.

14 MR. ROVNER: Your Honor, for the
15 plaintiff, it's Phil Rovner from Potter Anderson,
16 and Paul Andre from King & Spalding.

17 THE COURT: Okay. Good morning to
18 you all as well.

19 For the record, this is a
20 teleconference to discuss discovery disputes in
21 the matter of Leader Technologies Inc. versus
22 Facebook, Inc. It's our Civil Action Number
23 08-862-JJF-LPS.

24 I have a total of four letters today

1 raising several disputes. And as has been our
2 practice in the past, I'm going to move through
3 them kind of dispute by dispute.

4 I want to start with Leader's
5 complaints that or Leader's request that Facebook
6 produce the change log document under some
7 protection other than the non-source code
8 designation.

9 And let me start on that issue with
10 Leader. And let me tell you all, I do agree with
11 Facebook's reading of Paragraph 8 of the
12 protective order, in that I think that paragraph
13 does cover the change log. I view the change log
14 as a document or other thing that contains a
15 party's source code or the substance thereof.

16 But what I want to hear from Leader
17 is whether you have an argument that, for some
18 reason at this point in the case, I should amend
19 the protective order to require Facebook to
20 produce the change log document under some other
21 designation.

22 And I'll hear first from Leader on
23 that point, please.

24 MR. ANDRE: Your Honor, this is Paul

1 Andre. I'll be arguing for Leader on this issue.

2 The reason we're moving on this
3 particular issue and not -- we don't believe it's
4 source code or substance of source code, because
5 it doesn't consist of source code.

6 The change log itself is nothing
7 more than a general summary of the changes that
8 were made. I mean, in other words, you could not
9 write source code based on the information in the
10 change log. And 99 percent of that change log is
11 just bug fixes.

12 In this particular case, there's
13 been more sensitive information that's been
14 produced under the protective order. You know,
15 the kind of technical documents in which you
16 could write source code from. So we have
17 adequate protection in place for source code.

18 Now, as far as Your Honor's request
19 as to whether we should amend the source code,
20 under the protective order, we believe that it is
21 unduly burdensome to have us review this document
22 as we would review source code. Several reasons
23 for that.

24 One is several hundred pages and you

1 need to read this in context with other technical
2 documents, and in the context with source code of
3 time. So, and the reason being, of course,
4 because our patent issued in 2006, November 2006,
5 we're alleging that Facebook is infringing since
6 that time.

7 Facebook has only given us one
8 version of the source code itself as of today and
9 would not provide us with versions dating back to
10 2006. So the source code is our only -- I mean,
11 the change log is our only basis for showing that
12 the source code as it exists today is
13 substantially the same as it existed in 2006 when
14 their infringement began.

15 So as is given, source code
16 protection would be prejudicial to Leader because
17 the current version of the protective order
18 allows Facebook to actually log all of our visits
19 to the source code. They allow a restriction to
20 a number of attorneys that can see the source
21 code.

22 And also, it is something -- they
23 have an observer in the room with it and that's
24 observing source code. So it is something that

1 would be extremely prejudicial if we cannot go in
2 this and look at it from a point of view of
3 comparing the change log with the patent with
4 technical documents and the source code itself
5 when the time calls for that.

6 The argument for changing the
7 protective order, as Your Honor requested, is
8 unduly burdensome and prejudicial to Leader and
9 requires us to treat this as source code.

10 THE COURT: All right. Let me hear
11 a response, please, from Facebook.

12 MS. KEEFE: Thank you, Your Honor.
13 Your Honor, this is the same level just like
14 everyone said in both letters.

15 The things that we're talking about,
16 this log actually does contain the substance of
17 source code, describes the source code that's
18 being modified and the reasons there for highly
19 sensitive documents.

20 Mr. Andre made an interesting
21 comment. He said that we've only produced one
22 version of the source code. That's absolutely
23 not true.

24 On November 20th, per Leader's

1 request, Facebook produced an entire subversion
2 database, which includes full copies of the code
3 as it existed over time. They've never been able
4 to look at it, but it's been on the stand-alone
5 computer.

6 It was referenced in our discovery
7 responses served December 20th. So it is here
8 for them to review.

9 Regarding their comment that it's
10 unduly burdensome because they can't review it in
11 the context of everything else they need, the
12 stand-alone computer that has these logs on it
13 also contains a subversion database with all of
14 the versions going back as well as the code
15 itself and technical documents.

16 If there's other things that they
17 need in order to be able to do these all in one
18 place, you know, I'm sure that we can work on
19 accommodating them, because we have the
20 production, you know, materials here.

21 Similarly, if they need more
22 attorneys or want to have times when, you know,
23 someone's not in the room, the person in the room
24 is only to make sure that there's no copying.

1 But I'm sure we can work on something like that.

2 But nothing changes the
3 overwhelmingly confidential secret nature of
4 these materials and our need to make sure that
5 there's no inadvertent disclosure. And that's
6 what the protective order was meant for,
7 stipulated and agreed to.

8 So thank you very much.

9 THE COURT: And just address the
10 suggestion that you've produced even more
11 sensitive documents, some type of technical
12 documents under E designation that's not as
13 protective as source code protection, Ms. Keefe.

14 MS. KEEFE: I'm not sure I
15 understand the question. I'm sorry, Your Honor.

16 THE COURT: Well, as I understand
17 it, you've produced technical documents that
18 relate to the source code, and those are for
19 basically attorneys' eyes only. But as I
20 understand it, Leader has been allowed to take
21 copies of those back to its own, you know,
22 counsel's facility.

23 They're not required just to review
24 them on a stand-alone computer. So the

1 suggestion, as I understand it, is that there are
2 things that you've already produced at a lower
3 level of designation that are nonetheless more
4 commercially sensitive to you and that that is
5 somehow inconsistent.

6 MS. KEEFE: It's absolutely not
7 inconsistent. The material that we've allowed
8 them to take back to their offices with them are
9 redacted so that those portions that actually
10 relate to the source code or contain the source
11 code itself have been redacted.

12 The materials that they have are
13 things that talk at a much higher level about
14 certain projects or something of that nature.
15 They don't talk specifically about the code and
16 what's being changed in the code.

17 I think Your Honor can easily
18 understand that sometimes it's the changes to the
19 code that are the most sensitive things. You
20 know, you don't want the public necessarily
21 knowing about a bug set or something that is
22 buggy or what it took to fix it. And sometimes
23 the R & D that goes into figuring out what the
24 problems are and what the fixes are is as

1 sensitive, if not more sensitive, than the code
2 itself.

3 And so direct to Your Honor's point,
4 the only material that they have been able to
5 take back to their offices are less sensitive
6 than that. And the most sensitive portions of
7 those documents actually have been redacted.

8 THE COURT: Okay. Mr. Andre,
9 anything you want to say in response?

10 MR. ANDRE: Just Your Honor, we
11 don't think that the change log has any sensitive
12 information you could actually derive source code
13 from. And this is a simple one-sentence summary
14 what's been changed.

15 The second, technical documents that
16 have been produced to us, if someone were to have
17 those technical documents, you could actually
18 write source code pursuant to those technical
19 documents. They give you that level of detail.

20 These are mere summaries of what's
21 going on. If you look at the three categories of
22 information, the date, the name, the file, and
23 the engineer who did the work, those are not
24 sensitive at all. So it's the one-sentence

1 summary or maybe two sentences at the time or
2 maybe it's just a single sentence written in
3 plain English, no source code. The change log
4 doesn't have any source code at all in it.

5 THE COURT: Okay. Thank you.

6 On this request from Leader, I'm
7 going to deny Leader's request. As I indicated
8 from the start of the discussion, I agree with
9 Facebook's reading of Paragraph 8 of the
10 protective order. The agreement was to treat as
11 highly confidential source code material anything
12 that contained source code or the substance
13 thereof.

14 And I am persuaded by Facebook that
15 the change log, given that it is a summary, a
16 description of the changes to the source code,
17 that it does contain either source code or the
18 substance thereof.

19 I don't, at this point, see any need
20 to amend the protective order. I think that the
21 burden that has been noted by Mr. Andre was
22 essentially anticipated and agreed upon by the
23 parties as the process for dealing with this
24 highly sensitive information.

1 I do also note, however, that
2 Ms. Keefe has represented that her client is
3 willing to consider making reasonable
4 accommodations sufficient such as perhaps asking
5 the individuals from Facebook to leave the room
6 at times or to make other materials available
7 within that room.

8 So as to ease some of the burden on
9 Leader as it's reviewing these materials, and I
10 certainly encourage the parties to work to try to
11 make any reasonable accommodations like that
12 which I think would be entirely consistent with
13 the spirit of the protective order, but for the
14 reasons I've given, I'm denying the request for
15 any additional relief that Leader has made.

16 Let's move on now to the issues
17 Facebook's raising in their letters. And I'm
18 going to break down those issues into three
19 parts.

20 And the first issue, the first part
21 goes to these third-party communications. The
22 communications between Leader and other parties
23 in connection with Leader's efforts to raise
24 funds, either for an investment in the litigation

1 or an investment in itself. But a number of the
2 issues or a number of the requests for production
3 that Facebook has put at issue today relate to
4 this general topic of third-party communication.

5 And I want to see if we can handle
6 all of the third-party communication issues
7 together. And Facebook, as the moving party, I
8 will hear from you first on this category of
9 issues, please.

10 MS. KEEFE: Thank you, Your Honor.
11 And we agree that that's a good way to break
12 these down, because I think that many of our
13 requests, including responses to the
14 interrogatories and document request and some
15 concerns we had about the privilege log all lump
16 into the same thing.

17 If I could, just very quickly, step
18 back to kind of explain how we got here. Back in
19 2007, Leader began a campaign to solicit funding
20 for the anticipated patent litigation or for the
21 company and recreated a wealth of materials,
22 basically marketing materials that it would use
23 to try to gain, you know, commercial investments
24 in the company or in this litigation.

1 Sent those documents to upwards of
2 20 different third parties soliciting these
3 funds. They also started a campaign to make sure
4 that these documents would hopefully never make
5 their way to Facebook by marking them
6 confidential and privileged, even though they
7 were all being disclosed to third parties. So
8 that's kind of how we got to where we are.

9 A result of this long privilege log,
10 Your Honor, we think that the Corning case is
11 directly on point, and that here in Delaware the
12 Court has acknowledged that there is no common
13 interest privilege. There's definitely no
14 attorney client or work product issue.

15 But there's further no common
16 interest privilege in documents that are given to
17 third parties for the purpose of soliciting
18 investment, whether it be in a litigation or in
19 the company itself. And the documents that we've
20 received from third parties show both that it was
21 in litigation or in the company itself.

22 This issue is actually well resolved
23 enough that after reading Leader's letter, I
24 actually went on line and did just a little more

1 research to make sure there wasn't some
2 distinction drawn by Courts between financing the
3 litigation and financing of a company. And the
4 ABA actually has an ethics opinion, Formal
5 Opinion 00419, which cites to the notion that the
6 question is very common about what a lawyer can
7 refer to his client regarding litigation
8 financing companies.

9 And the opinion goes on to say that,
10 in fact, lawyers should advise their clients that
11 whatever materials are given to these litigation
12 financing companies may actually waive the
13 privilege. And there's two things in the Third
14 Circuit that have their own formal opinions
15 saying exactly that. And that's both New Jersey
16 and Pennsylvania.

17 And Delaware does not have an
18 opinion, an ethics opinion that I could find, but
19 Delaware has the Corning case that says exactly
20 the same thing.

21 We think that all of these
22 third-party communications are relevant and that
23 there is no common interest privilege, and
24 therefore, they should be produced.

1 THE COURT: Do I need to consider at
2 this point from your perspective whether these
3 documents would be admissible? And if I do, how
4 is it that they would be admissible at trial?

5 MS. KEEFE: I think Your Honor
6 absolutely does not have to decide at this point
7 whether or not they would be admissible. The
8 standard is whether or not they are discoverable,
9 not whether they are admissible.

10 And, in fact, they absolutely are
11 discoverable. They are exactly what discovery
12 contemplates, a document that may lead to the
13 discovery of admissible evidence.

14 They're definitely -- they
15 absolutely are relevant. You can see just from
16 examples of Exhibits 1 and 2 that we attached to
17 our letter how highly relevant these documents
18 are. They go directly to what the inventor, the
19 president of the plaintiff's company thinks about
20 the time line of his own invention, the validity
21 of his own patent, whether or not it's obvious
22 over prior art that he himself has found and
23 used, you know, to give him an idea of what to
24 patent.

1 If Your Honor wanted to go farther
2 than that, I actually do think that these
3 documents would be admissible as admissions of
4 party opponents. An admission by the inventor
5 regarding his own invention would, in fact, be
6 admissible once we got to that stage.

7 But I truly do not believe that that
8 is the relevant question at this point. The
9 question is simply whether or not they're
10 discoverable. And they are.

11 THE COURT: Has Leader at this point
12 provided you the non-disclosure agreements that
13 we discussed in a previous call?

14 MS. KEEFE: Yes. They absolutely
15 have.

16 And in fact, the provision of those
17 non-disclosure agreements led us to most of these
18 documents that were never produced by Leader.
19 Once we received all those NDAs, we actually sent
20 subpoenas out to these third parties that we had
21 never known about or heard of before.

22 And it was through these third
23 parties that we started receiving through some, I
24 should say, of these third parties that we

1 started receiving these documents, saw how
2 relevant they were. And some of the parties
3 either reached out to Leader or Leader reached
4 out to them. I'm not sure which.

5 That doesn't matter. But then
6 became represented by King & Spaulding.

7 And it is in connection with those
8 parties that we are receiving privilege logs
9 claiming a joint interest, or a common defense or
10 some kind of privilege like that. And that's
11 what, you know, brings us to Your Honor.

12 THE COURT: If it were the case that
13 Leader was clearly raising or, you know, engaged
14 in these communications clearly just to obtain
15 financing to support this litigation, and if it
16 were the case that Leader took all reasonable
17 steps to keep the contents of those
18 communications confidential as between itself and
19 the parties to whom it was having these
20 communications with, your view, Ms. Keefe, is
21 nonetheless, there is no possibility that any of
22 those communications are protected and
23 privileged, you know, and protected from
24 discovery?

1 MS. KEEFE: That is my position,
2 Your Honor. And it's my position, because the
3 joint interest, or common joint defense or common
4 interest privilege only arises if you look at the
5 Corning case. Absolutely only arises when the
6 legal interests of the two parties are identical,
7 and that they have the exact same legal interests
8 that they're protecting.

9 They must be identical, not similar.
10 And be legal, not fully commercial.

11 When a particular plaintiff or
12 defendant approaches a litigation funding
13 company, it's no different from a company
14 approaching a potential purchaser of stock. The
15 investor at that time has to take it upon
16 themselves at an arm's length transaction to
17 determine whether or not this potential
18 investment will make them money.

19 And so they're going to be at arm's
20 length from each other. In fact, if anything,
21 their legal interests are diametrically opposed
22 in the beginning with the plaintiff saying,
23 Here's why my case is so perfect and why you
24 should invest in it, because of how much money

1 you are going to make. And the potential
2 investor trying to rip the case apart to make
3 sure that this is, in fact, a valid investment
4 and a good place for them to put their money.

5 And so, their legal interests are
6 absolutely not aligned. In fact, in the
7 beginning, they're absolutely opposite each
8 other.

9 And so, I don't believe there can be
10 any joint interests or common interests in these,
11 and therefore, there is no protection.

12 THE COURT: But at a high level,
13 what is happening in those communications is the
14 parties are exploring whether or not the
15 litigation is sufficiently valuable that they
16 want to both partner in some way in hopes, I
17 guess, that they'll make money from it.

18 At that level, aren't their
19 interests at least substantially aligned, that
20 is, they both are hoping to reach the same
21 conclusion that we should work together and
22 invest money in this because we think we'll get
23 more money back in the end?

24 MS. KEEFE: I actually again

1 disagree, Your Honor. I think that they're not
2 necessarily both hoping that this is going to
3 work.

4 The person who's asking for the
5 investment is absolutely saying I hope this
6 works. The person who's being asked to invest
7 has to make a very independent assessment of
8 whether or not this is a good idea.

9 And at that point, their interests
10 legally are divergent. The plaintiff wanting the
11 money for the investment. Investor trying to
12 determine whether or not this is a good idea.

13 If it is taken to the logical
14 extreme, you could actually argue then that all
15 marketing documents seeking funding for a company
16 buying stock that a lawyer was ever involved in
17 in any way would be privileged because eventually
18 you go high enough up the chain, you're just
19 trying to get people to invest so that something
20 can go forward. And I know that's taking it a
21 bit far, but that's the logical extreme of kind
22 of the way we're arguing.

23 In this particular case, we know
24 that Leader is trying to explain why it has a

1 good case and that the third parties are trying
2 to understand whether or not they want to invest.
3 Their interests are not aligned at that point.

4 They need to make certain whether or
5 not they could be aligned in the future. So I
6 think perhaps the question would be slightly
7 different after a decision was made to invest,
8 and that's what the joint defense is all about.

9 When you look at people who have
10 decided we do have the same interest, we
11 absolutely are aligned and we both want this
12 patent to be invalidated as a defendant or we
13 both, you know, need to sue on this patent.

14 But that's after the decision is
15 made to come together, to ask in concert. All of
16 the communications with potential investors have
17 nothing to do with acting in concert. They're
18 trying to determine whether or not they will ever
19 make an investment and they're opposite each
20 other.

21 THE COURT: But at a practical
22 level, and maybe you'll say this is irrelevant,
23 but at a practical level, how could somebody
24 entice someone else to invest if they can't

1 disclose to them the materials that would allow
2 the potential investor to make that evaluation?

3 Because taking your position to a
4 logical conclusion, nobody can disclose any of
5 the substance without pretty much guaranteeing
6 that it's all going to be revealed in the ensuing
7 litigation.

8 MS. KEEFE: Your Honor, that's --
9 Your Honor is absolutely correct, but I will tell
10 Your Honor that I've been involved and Mr. Caponi
11 has been involved in counseling companies before
12 mergers in an M & A deal where there's a
13 litigation ongoing. We've done the research to
14 find out, you know, the company trying to
15 acquire -- the company that's involved in
16 litigation wants to know what are the chances of
17 victory? How is the case going? What's
18 happening?

19 And what we have done is we've said,
20 We can't provide you with the documents because
21 those documents will be waived once they're
22 disclosed to a third party. If you'd like, we
23 will sit down and talk with you about it, but
24 that's all we can do.

1 And in fact, some of the documents
2 produced in this case indicated that Andrews
3 Kurth was worried. Andrews Kurth was the law
4 firm that Leader was using before they hired King
5 & Spaulding.

6 Andrews Kurth actually sent an email
7 to one of the potentials and says, Let's just sit
8 down and talk about this, you know, together in
9 the same room so that we don't have to worry
10 about documents being disclosed.

11 So this issue was acknowledged by
12 one of the lawyers as being a possible problem.
13 And in order to combat it, they decided to sit
14 down and have a meeting where there wouldn't be
15 written materials that wouldn't be disclosed,
16 that would then have to be produced.

17 THE COURT: But in your view, the
18 substance of that sit down communication is also
19 discoverable. I guess, at a practical level, the
20 only way you'll get it is through depositions.

21 MS. KEEFE: Absolutely.

22 THE COURT: But it is discoverable;
23 correct, in your view?

24 MS. KEEFE: Yes.

1 THE COURT: Let me hear from
2 Mr. Andre on these points, please.

3 MR. ANDRE: First, Your Honor, with
4 the common interests, these financing companies
5 are very particular in their business nature.
6 They are there to finance litigation.

7 This is not an investment in the
8 company. This is not investing as an M & A deal
9 as Ms. Keefe is talking about.

10 This is solely towards investing in
11 litigation. These companies have a best interest
12 in the legal proceedings, and disclosures that
13 are made between the parties are made to
14 facilitate the rendition of legal services. So
15 this is not solely a commercial enterprise. This
16 is about a common legal interest.

17 Every effort was made by Leader to
18 protect the privilege nature of this. The
19 discussion that Ms. Keefe talked about where
20 Andrews Kurth said, Let's sit down in the room,
21 that was before the NDA was signed.

22 Once they get the NDA signed, their
23 attorney stamped confidential on what they wanted
24 to exchange that they believed contained

1 privilege information. And they also have the
2 communication that talks about what they need to
3 do to protect privilege.

4 So the intent of the parties was to
5 protect the privilege. If you take away that,
6 then there's no way these parties can
7 communicate.

8 I disagree wholeheartedly with
9 Ms. Keefe that they're hoping that the financing
10 is -- hoping this doesn't work. This is their
11 business. Their business is to finance
12 litigation.

13 They're hoping it does work. They
14 hope they make a lot of money. This is the end
15 game.

16 But even before that, I disagree a
17 hundred percent that this is relevant information
18 that should be discoverable. And there's
19 absolutely no way this would ever be admitted at
20 trial.

21 I mean, for example, if a company --
22 one of the financing companies believed that our
23 patent was, you know, end all, to be the all
24 greatest thing they've ever seen, there's no way

1 that's going to get admitted.

2 Conversely, if they thought it was a
3 bad patent that would not get admitted either,
4 that these are all opinions, it would not lead to
5 admissible evidence, because all that is being
6 discussed here are legal opinions as to the
7 merits of the case.

8 You know, to have a lawyer opine one
9 way or the other about what is -- you know,
10 whether the patent covers is not going to be
11 admissible, should not even be discoverable
12 because there were protections in place to try to
13 prevent that exact case from happening.

14 THE COURT: Mr. Andre, what about
15 statements by the inventor to a third party?

16 MR. ANDRE: Well, if there are
17 statements by the inventor, there were any type
18 of admissions. It's possible maybe, but if it's
19 not under the privilege protection.

20 But the example they use, for
21 example, in their letter where they talk about
22 the obvious reasonable skill in the art to try in
23 2003 and 2004, that's not an admission. The
24 patent was filed in 2002.

1 We have an invention date going back
2 to at least 1998. So these are not admissions
3 that are statements saying after, you know, we
4 filed our patent application. We published the
5 White paper in early 2003.

6 Facebook launched in 2004. So there
7 are no admissions, these documents they're using.

8 So with respect to party admissions,
9 if they are going to say the admissions are that
10 they think the patent is great, I think Facebook
11 is infringing, that's not going to get in.

12 THE COURT: So articulate for me,
13 then, what is your view of what types of
14 communications between Leader and these third
15 parties are privileged and stay within the
16 privilege due to the common interest document
17 trend?

18 Because I take it you're not saying
19 that everything you talk to the third parties
20 about is privileged and non-discoverable, but you
21 seem to think a lot of it is.

22 Can you articulate for me what the
23 distinction is?

24 MR. ANDRE: It's when they are

1 conveying the analysis of their attorneys. The
2 way this process works is the finance company has
3 their attorneys. Leader had its attorneys.

4 The attorneys want to be able to
5 disclose information to each other, either
6 through the company contact or directly amongst
7 themselves. And if the attorney analysis is
8 being communicated in order to facilitate, you
9 know, the discussion and whether or not they are
10 going to be vested in this legal proceeding, I
11 believe those are privileged.

12 THE COURT: So if the inventor is
13 part of these meetings and he or she just starts
14 talking about, Here's how I came up with the
15 idea, you know, on such and such a date I did
16 this, such and such a date I did that, that is
17 not privileged. That's discoverable.

18 Correct?

19 MR. ANDRE: If it does not reveal
20 attorney-client communication or work product,
21 yes, that's discoverable, Your Honor, if it's
22 relevant. But I don't think it's relevant.

23 THE COURT: And why would that not
24 be relevant?

1 Isn't that --

2 MR. ANDRE: I guess if he's saying I
3 came up with the idea here, there, I guess that
4 would be. I think it could be, let's put it that
5 way, depending on the substance of the
6 disclosure.

7 And to the extent we have those type
8 of documents, they have been produced.

9 THE COURT: From the documents
10 you've produced, can Facebook identify all of the
11 third parties that you've had these discussions
12 with?

13 MR. ANDRE: Well, all the ones that
14 I believe we can recall. I mean, I think to the
15 extent there are documents that we had
16 discussions with any of these parties, there was
17 always a NDA disclosed, NDA assigned, and we
18 disclosed with an NDA.

19 There might have been some cold
20 calls, emails that were sent that they may not be
21 able to determine from the NDAs.

22 Now, there were a considerable
23 amount of documents. We actually produced emails
24 in this case, unlike Facebook who didn't produce

1 a single email. And in any of those emails, many
2 of those were the cold call emails to the system.

3 They were kept in the normal course
4 of business. We did produce those.

5 So from the document production,
6 they should be able to get all, if not -- or
7 most, if not all, of the third-party financing
8 companies that were contacted by Leader.

9 THE COURT: And the only exception
10 would be if it was something akin to a cold call,
11 and nobody at Leader has any recollection as to
12 who those third parties are?

13 MR. ANDRE: That's correct, Your
14 Honor.

15 THE COURT: That is, you've not
16 expressly excised the names of any third parties
17 that you know were called; correct?

18 MR. ANDRE: That's correct, Your
19 Honor. At this point, with regard to these
20 third-party financing companies, I think this
21 is -- to point to a phrase used in Texas, they're
22 drilling in a dry hole. We don't care about this
23 issue about what third parties they're going to
24 contact. They subpoenaed over 20 of these third

1 parties.

2 They are going to take depositions.
3 They've noticed depositions of individuals.

4 We don't think this will lead to any
5 discoverable, any admissible evidence in this
6 case. To the extent this will, there are
7 privileged communications. We're trying to
8 protect those.

9 THE COURT: And have you produced or
10 logged all of the documents that you exchanged
11 with the third parties that you signed NDAs with,
12 all such documents that relate to the '761
13 patent? Have you either produced them or logged
14 all of them?

15 MR. ANDRE: I believe we have, Your
16 Honor. Our privilege log is over 2,000 entries.

17 And to the extent we've done any
18 documents that had the privilege document
19 communications, we've relogged them. If they
20 discuss the '761 -- as I said, there may be some
21 documents if we go to dig.

22 You know, our policy here was to
23 produce every single document the company had.
24 It's a small company.

1 We just didn't want to have these
2 fights over and over and over again. That is the
3 reason these things came up in the first place.

4 To the best of our knowledge, we
5 have produced all the documents that discuss the
6 '761 patent. With these third parties, I could
7 go back and make a further check with the client
8 to make sure they don't have some filed things
9 somewhere else that we didn't believe were
10 relevant, but I think at this point we've logged
11 all the privilege documents.

12 THE COURT: Well, I think the
13 concern that I'm hearing, at least in part, is
14 you and I have now had some back and forth as to
15 what's relevant, what's not relevant. And at
16 first you indicated you didn't think an inventor
17 statement about, you know, when he conceived of
18 the idea of the invention, you suggested that
19 might not even be relevant.

20 So I'm trying to put that relevance
21 question aside and just get right to any document
22 relating to the '761 patent, that either Leader
23 sent to the third party or was received back from
24 the third party. Are you in a position to

1 represent that all of those documents have either
2 been produced, or if you think there's privilege,
3 they've at least been logged?

4 MR. ANDRE: Your Honor, I believe
5 all those documents have been produced in their
6 original form as they were sent back and forth.
7 And I don't mean to be splitting hairs here.

8 If we sent a document to a third
9 party like, for example, we sent an email saying
10 attached is a document that describes "X", then
11 the document itself has been produced. The email
12 with the attachment may not have been produced.

13 I don't know if we look for those --
14 but all the documents that discuss the '761
15 patent have been produced or logged. We went
16 through every single document the company had.
17 If it discussed the patent in any way, we
18 produced it or logged it on the privilege log.

19 THE COURT: Okay.

20 MR. ANDRE: So I don't want to
21 mislead the Court in any way and say those
22 communications going back and forth have been
23 produced as well, because I can't say with
24 absolute certainty that's the case. But the

1 documents themselves have been.

2 THE COURT: All right. Let me turn
3 back to Ms. Keefe.

4 Anything you want to say in response
5 to what you've heard?

6 MS. KEEFE: Just that I don't
7 understand how that can be the case when we
8 received a log from IP Investments, one of the
9 third parties, that shows a series of documents
10 that we've never heard of or seen before. So IP
11 Investments logs a series of documents on the
12 privilege log based on common interests that
13 appear nowhere on Leader's log that we can tell
14 or in Leader's production.

15 Exhibit 1 and 2, the time line
16 itself in this and this White paper were never
17 produced by Leader, and yet are completely
18 relevant, written by the inventor. And also
19 don't appear to appear on the privilege log in
20 any way that we can tell and were certainly never
21 produced to us.

22 So I don't understand how that can
23 be the case that they've actually produced these
24 documents or logged them. If they have logged

1 them, I don't understand how.

2 THE COURT: All right. Let's see,
3 Mr. Andre, could you respond to that specific
4 example?

5 MR. ANDRE: Well, in response to IP
6 Investments, they have their own privileged
7 documents that would be on the log that would be
8 separate from Leader's log. It won't be just a
9 common document.

10 They have their own attorneys as
11 well. They have their own privilege issues.

12 With respect to those two specific
13 documents she's referring to, I believe they have
14 been logged on our log or they have been
15 produced. These are documents that are
16 single-page documents that are part of like a
17 200-page document that was produced to Facebook.

18 As I said, if it's referring to the
19 '761, it's either on the log or it's been
20 produced to Facebook, to the extent that Leader
21 kept those documents in the normal course of
22 business.

23 And I believe, I can't tell you
24 exactly a Bates number where those documents were

1 produced, but I believe those documents were
2 produced or logged in this case if we still have
3 them.

4 THE COURT: But you could get that
5 answer, those specific Bates numbers to us pretty
6 quickly; right?

7 MR. ANDRE: Quickly being relative.
8 Over the holidays I've got a real skeleton crew
9 working.

10 THE COURT: Understood. But within
11 a couple of business days you could?

12 MR. ANDRE: Yeah. I'm out of the
13 office. I could get someone in the office.

14 I could try to dig up those Bates
15 numbers of the documents. And it would be the
16 one page from IP Investment is a page of a much
17 larger document.

18 We'd have to go through needles in
19 the haystack. We could try to find that within a
20 week, Your Honor.

21 MS. KEEFE: I am not sure what he's
22 talking about from IP Investments. The two
23 exhibits I was talking about was the exhibit to
24 my letter, the time line indicating everything

1 the inventor thought about when he came up with
2 the idea and what was the prior art; and the
3 White paper, which is about 10 or 12 pages long
4 where the inventor discusses why he thinks his
5 patent is non-obvious.

6 Those are the ones I am talking
7 about that I've never seen produced or logged.
8 In our letter we tried to -- we said, It looks
9 like this is in the privilege log at this entry.
10 And we were told in the responsive letter, That's
11 absolutely not what it is.

12 There's no evidence it was ever
13 produced or logged.

14 THE COURT: Ms. Keefe, I think we're
15 going to use this example as a test, so let's be
16 as precise as possible. I see the exhibit that
17 has privilege log of IP Investments Group, but
18 you're talking about two particular documents,
19 either on that log or two other documents that
20 you've attached to your letter?

21 MS. KEEFE: Two other documents,
22 Exhibit 1, which is Neyer, N-E-Y-E-R 00103
23 produced.

24 THE COURT: And we are talking about

1 Exhibit 1 to DI-182, your letter of December
2 21st, 2009. Okay?

3 MS. KEEFE: Okay. Correct.

4 And similarly Exhibit 2 to my letter
5 at Bates labeled N-E-Y-E-R 000208 through
6 N-E-Y-E-R 000218.

7 THE COURT: Okay. And Mr. Andre,
8 you understand that the two documents that
9 Ms. Keefe is looking to nowhere, either -- where
10 are they in your production or where are they on
11 your privilege log?

12 MR. ANDRE: I understand the two
13 documents. These are not the documents with IP
14 Investments. This is with Neyer. It's a
15 different group.

16 Exhibit 1 is a one-page time line.

17 THE COURT: Right.

18 MR. ANDRE: And I do believe that is
19 one page of a much larger document. That would
20 be on our privilege log. We can go and dig that
21 up.

22 And Number 2 is the White paper
23 itself. I believe we could dig that up as well
24 on the log.

1 THE COURT: And Ms. Keefe, yeah,
2 what we're going to do, we're going to play this
3 out as a little bit of a test and see if you
4 either have gotten this material from Leader or
5 where it is on their privilege log. But is there
6 anything from the IP -- what are they called, IP
7 Investments Group log?

8 You know, I'm willing to send
9 Mr. Keefe's -- I'm sorry, Mr. Andre's staff,
10 forgive me, back with reasonable timing to find a
11 few other documents. Are there a few entries on
12 the IP log that you'd like them to locate?

13 MS. KEEFE: There absolutely are.
14 There are communications on that log from
15 Mr. McKibben to Ryan Strong, for example, who's
16 an investor over at IP Investments. If you look
17 at that log, which is attached as Exhibit 16 to
18 our letter.

19 THE COURT: Right.

20 MR. ANDRE: And the entry -- for
21 example, the first, I would say -- I'm sorry,
22 Your Honor. Let me just get you a specific
23 number that makes the most sense.

24 There's only four pages so we know

1 where all these are.

2 MS. KEEFE: How many?

3 THE COURT: That's fine. Yeah.

4 I understand the confusion. Let's
5 say Mr. Keefe -- sorry, forgive me. Clearly my
6 mind is a little tired here.

7 Mr. Andre, in addition to the two
8 documents, we've already identified Exhibits 1
9 and 2. I also want you to identify any
10 communications between, I believe, it's
11 Mr. -- let me get the name correct -- between
12 Mr. McKibben and Mr. Strong.

13 Any of those communications that are
14 listed, and let's say any communication between
15 Mr. McKibben or Mr. Sobdick on the Leader side
16 and Mr. Strong, who I understand would be on the
17 IP Investments Group side.

18 Any of those communications which
19 are logged here on Exhibit 16 to DI-182, I want
20 you to find out and identify where they are on
21 your privilege log or identify where the
22 documents embodying those communications have
23 been produced.

24 Understood, Mr. Andre?

1 MR. ANDRE: I'm not sure I
2 understand, Your Honor. That looks like that
3 would be every single document on the privilege
4 log, because all those involve either Jim
5 Sobdick, Ryan Strong or Mike McKibben. And most
6 of them are emails.

7 THE COURT: Yeah. It looks like it
8 is all of them, so I'm asking you to do all of
9 them. And I will give you sufficient time to do
10 that.

11 But you understand what I'm asking
12 you to locate; correct?

13 MR. ANDRE: I think so, Your Honor.
14 I mean, it sounds a bit -- well, I'll say -- I'll
15 just put it this way: The discovery burdens are
16 extremely one sided in the fact that, you know,
17 Facebook has not produced a single email in this
18 case, and we are trying to go through now and
19 find out where each of these emails that we
20 produced are on the privilege log, if they are.

21 If not, I guess we have to log them
22 on the privilege log of emails that we don't
23 think are relevant. But we can go through and
24 try to find where on this four-page log if those

1 were produced or logged.

2 THE COURT: Right. And if they've
3 not been produced or logged, then you either need
4 to produce them or log them.

5 And I'm going to give you until
6 January 15th to do that for all of the documents
7 and communications that we've just discussed, and
8 in recognition of certainly that there are
9 holidays coming up. But let me just say the
10 reason I'm doing this is as a test.

11 You know, I accept the
12 representation, that is, as far as it has gone
13 from you, Mr. Andre, that you believe all
14 documents relating in any way to the '761 patent
15 have either been logged or produced.

16 You indicated it might be helpful to
17 have a chance to double-check that. I do want to
18 give you that opportunity.

19 And I'm also concerned, because we
20 have at times talked in the language of relevance
21 or even admissibility. And the parties,
22 obviously, have a substantial dispute as to what
23 is relevant and certainly what would be
24 admissible when it comes to communications with

1 third-party investment financing groups.

2 And so before I can really get to
3 the bottom of that issue and determine if any
4 further relief is to be ordered for Facebook on
5 these matters, I think it's fairer and an
6 exercise in my discretion to select a more
7 limited number of documents and communications
8 which have been specifically identified by third
9 parties and just make sure that those documents
10 and communications which we know exist, given
11 they've been disclosed to us by third parties,
12 let's make sure that they are in Leader's
13 production or on Leader's log.

14 And if they are, that might very
15 well be the end of the issue. If they're not,
16 then we'll need to understand why they're not.

17 Have I been clear about what it is
18 that I'm asking you to do, Mr. Andre?

19 MR. ANDRE: You have, Your Honor.

20 THE COURT: Okay. Ms. Keefe, where
21 does that leave us with respect to the issues
22 raised in your letter? How much of that is
23 covered at this point?

24 MS. KEEFE: That resolves -- that

1 starts us down the road of resolving all of those
2 issues. I think there's only two issues that
3 remain.

4 The first is that for a number of
5 the -- it goes to the issue of how the privilege
6 log itself reads and whether or not it contains
7 enough information to establish the privilege
8 that is their burden to show. For many of the
9 log entries, there's some names, and we just
10 don't know who the names are, if they even are
11 attorneys or employees.

12 Throughout the meet and confer
13 process, Leader's position was that it had no
14 obligation to give us those names. I note
15 during -- in the letter in opposition to ours
16 that they first for the first time offer that if
17 we identified entries where we didn't know who
18 the people were, that they would look into that
19 and, you know, think about -- giving us those
20 names.

21 I would offer that I think what we
22 need is a key to understand why they believe
23 these documents to be privileged based on who
24 these people are and what they did for Leader at

1 the time that the document was created.

2 So if they're willing to give us
3 that key at this point, I think that would
4 resolve that issue.

5 THE COURT: Mr. Andre.

6 MR. ANDRE: I'm not sure what she's
7 asking, Your Honor. I'll be honest with you.

8 In our privilege log, we've
9 identified in every single instance the to and
10 from. We've identified with the Esq.
11 designation, the attorneys, where they show that
12 there are attorneys involved in these
13 communications.

14 We've gone above and beyond the
15 legal requirements for a privilege log. If you
16 compare and contrast our privilege log to
17 Facebook, they have only ten entries. Forty
18 percent of those, they don't even have a to and
19 from in those logs.

20 So there's a little bit of equal
21 dignity argument here, that we, once again, are
22 the -- they're asking for what they're not
23 willing to give.

24 That is over and over again.

1 MS. KEEFE: That's actually --

2 THE COURT: Mr. Andre, I'm not
3 comparing your log to a log that's not in dispute
4 at this point. I'm only looking at your log.

5 And it would seem to me that by
6 asserting the privilege, the burden is on you to
7 establish all of the elements of the privilege.
8 And what I understand the complaint to be here is
9 that you've not met your burden in a number of
10 instances in identifying that the individuals,
11 the to and from individuals are within the scope
12 of a privilege, because no one can tell who they
13 were employed by, or if they are attorneys, who
14 they were representing.

15 Is that information that you are
16 offering to provide to Facebook at this time
17 either on a request-by-request basis or some type
18 of key that would just be, as I understand it,
19 basically an index listing all of the names that
20 are on your log and identifying on -- you know,
21 on a single document, Here's who they are
22 employed by? And if they are attorneys here, who
23 they represented?

24 MR. ANDRE: Your Honor, we've

1 been -- we've informed Facebook on multiple
2 occasions that we've identified everyone who was
3 an attorney. And to the extent they identified
4 specific instances where they do not know who the
5 individuals are, we will look into determining
6 what relationship they are to the privilege, and
7 where they're employed.

8 What they ask for is the role these
9 people had in the company. They're asking not
10 only for the employer, but what role they played
11 in the company, what was their position, things
12 of this nature. And that's just overburdensome
13 and not required by law.

14 THE COURT: I agree with you on the
15 role. But I think identifying who the employer
16 is is required and maybe it is that everybody
17 listed is employed by Leader. In which case, you
18 know, that one blanket representation would take
19 care of it.

20 I have one other question for you,
21 Mr. Andre. With respect to the recipients of
22 documents, have you only listed as recipients
23 individuals who are named on the face of the
24 document or have you more broadly listed as

1 recipients everyone that the company knows
2 received the document?

3 MR. ANDRE: It's everyone in the
4 company that knows who has been given a document.
5 We're -- from the face of the document, you can
6 determine obviously who received the document, to
7 some degree.

8 To the extent the company recalls
9 specifically sending it to others, we will
10 identify those instances. And we've talked to
11 our client. In most cases, they can't remember
12 who they sent it to, if they sent it to anyone
13 else.

14 They believe they only sent it to
15 the recipients. To the extent we can determine
16 that they did, we will put this on the log as
17 well. And we have been thus far.

18 THE COURT: Ms. Keefe, it sounds to
19 me like you have a representation from Mr. Andre
20 that he will work with you to give you additional
21 information on an entry-by-entry basis if you
22 identify entries that you don't feel you have
23 enough information on.

24 It sounds to me like that should be

1 satisfactory, but am I missing something?

2 MS. KEEFE: I very much appreciate
3 that. The only thing I would want clarified is I
4 know there are a number of places where they've
5 listed that a person is an attorney, but they
6 don't -- they never volunteered to confirm for us
7 who that attorney was representing at that time.
8 And as long as that's included, so that -- you
9 know, because, obviously, you can have people who
10 are attorneys who aren't practicing law or aren't
11 representing a party at the time.

12 As long as that is part of the
13 information that I can request, that will satisfy
14 everything that I need right now.

15 THE COURT: Mr. Andre.

16 MR. ANDRE: I'm not sure what she's
17 asking, once again. But if she's saying who the
18 attorney is representing is all she asked for, we
19 can reprovide that. We've identified the
20 attorneys in every case on the privilege log.

21 THE COURT: Okay. Fine.

22 Well, I'm going to order that this
23 communication or this, excuse me, conversation
24 continue between the parties. And if Facebook,

1 in good faith, believes it can't figure out
2 whether or not the elements of privilege have
3 been properly asserted on Leader's privilege log,
4 then Facebook can identify the entries for which
5 it wants more information. And Leader will
6 provide the reasonable additional information
7 that we've discussed here.

8 And that will take care of the
9 privilege log issue. I think there is one final
10 issue in your letter, Ms. Keefe.

11 MS. KEEFE: Yes.

12 THE COURT: Do you want to address
13 that now at this point?

14 MS. KEEFE: The final issue, Your
15 Honor, resolves around the production, Leader's
16 production of the product and the source code
17 behind that product or the product that they
18 claim practices the invention claimed in the '761
19 patent.

20 If Your Honor will recall, we've
21 actually been in front of you once before on the
22 issue of how Leader's own product practices the
23 patent. And at the time, Your Honor said that
24 while you understood the relevance to the issue

1 of injunctive relief, lost profits, possibly to
2 other damages type issues, Your Honor said that
3 the burden should be on us to do the
4 investigation, provided that we had access to the
5 products and the source code.

6 Immediately thereafter, we then did
7 a request for production to Leader for the
8 products and the source code that supports that
9 product, so that we could conduct our own
10 analysis of whether or not we believe that Leader
11 can make a claim that it is our competitor, or
12 that it deserves injunctive relief or that it
13 deserves lost profits. All which would require
14 Leader to demonstrate that its own product
15 practices the claims of the patent.

16 And we've been thwarted. Leader has
17 said that they refuse to produce the product or
18 the source code. They've stated that we have
19 some nefarious purpose for forcing them to a
20 product to product or infringement contention,
21 which is obviously not the case.

22 They've indicated that they're going
23 to use the product to support their allegations.
24 They deserve an injunction. And to support

1 things like lost profits, we deserve a chance to
2 investigate that ourselves. And we need the
3 product and the code to do that.

4 If they would prefer to not produce
5 the product and the code, and they would prefer
6 to not rely in any way on the product and the
7 code at trial, I'm fine with that, too. But if
8 they're going to rely on the product and the
9 code, then I deserve the right to look at it, as
10 Your Honor indicated back in September, product
11 to product.

12 THE COURT: If you were given access
13 to the product as an initial matter, why would
14 you also need the code?

15 MS. KEEFE: Well, I think for the
16 exact same reasons that Leader insisted that it
17 needed our code. The claims of their patent go
18 to both forward-facing elements and
19 backward-facing elements. In other words, things
20 that the user can see by using it, but also to
21 how the code is using itself to transform, or
22 track information or anything of that nature.

23 So all of the same reasons that
24 Leader needed to see our code to make the

1 assessment of whether or not the claims cover our
2 product are the same exact reasons that we need
3 to see their code and their product to assess
4 whether or not their arguments that their product
5 is covered by their claims have merit.

6 THE COURT: All right. Mr. Andre,
7 let's turn to you and start with any chance that
8 you're willing to agree not to rely in any way on
9 the product or code at trial?

10 MR. ANDRE: Your Honor, we will not
11 be relying on our source code at trial. It will
12 not be provided in evidence and it will not be a
13 part of what we present at trial.

14 The product itself is a -- it's a
15 service we provide. And we provided to Facebook
16 approximately ten times more documents, technical
17 documents about how the functionality of our
18 product works than they produced to us, even
19 though we're the patentee and they're the
20 defendant.

21 THE COURT: But you will be or at
22 least are reserving the right to rely on your own
23 product as part of your trial presentation?

24 MR. ANDRE: What we will -- what we

1 will be presenting and what we will ask Judge
2 Farnan for is an injunction based on the fact
3 that they are competitors in the marketplace.
4 These are market competitors.

5 We do not want to get into a
6 situation as Facebook has tried on multiple
7 occasions to do to have us have to prove our own
8 product infringes our own patent. That is
9 ridiculous.

10 This is all they're trying to do is
11 a product-by-product comparison saying their
12 product looks different than our product. That's
13 not the issue.

14 The issue here is: Does their
15 product look like our patent? That's the issue.

16 THE COURT: What is your theory by
17 which you are competitors?

18 MR. ANDRE: We are competitors,
19 because they take sells away from us in the
20 marketplace. We offer competing products in the
21 marketplace for enterprise systems that use
22 social networking. Essentially, Facebook is
23 giving away for free what we're trying to sell,
24 because they make their money on targeted

1 advertising.

2 THE COURT: So focusing just on the
3 product then, what's the argument against
4 producing to Facebook fully functioning copies of
5 your product? It seems that you're clearly
6 placing it at interest.

7 MR. ANDRE: We don't sell a product,
8 per se. Like you don't send us a check and we
9 send you a product.

10 What we do is we provide a service.
11 We keep that service in place. And we've given a
12 ton of documentary evidence of how that service
13 functions.

14 We've produced everything to them
15 already that describes how our product is
16 functioning and how our service is provided.

17 MS. KEEFE: But, Your Honor, we
18 can't use it. We don't have a membership.

19 THE COURT: Ms. Keefe, please. I
20 will give you a chance.

21 MS. KEEFE: I apologize.

22 THE COURT: I'm talking to
23 Mr. Andre at this point. Mr. Andre, do you --
24 the issue as to whether or not Leader is a

1 competitor with Facebook is in dispute. Do you
2 agree with that?

3 MR. ANDRE: I believe it will be in
4 dispute, Your Honor. Yes.

5 THE COURT: And do you agree that
6 Facebook is entitled to make the best possible
7 case to support the position that you're not
8 competitors?

9 MR. ANDRE: Your Honor, of course,
10 any party can make their best case in any
11 contested legal element. Of course.

12 THE COURT: And so your position is
13 that simply by providing technical documents
14 without access to your product and without access
15 to your source code is a sufficient basis, is
16 fair enough for -- as a basis for Facebook to
17 make the argument that you're not a competitor?

18 I guess that's your position.

19 MR. ANDRE: Your Honor, if they're a
20 competitor or not, it's our burden. I will say
21 that.

22 And our burden is to show that they
23 are competitors in the marketplace. We plan on
24 doing that using our documents that we put

1 forward and provided them already.

2 If we cannot meet that burden, then
3 it's on us. And Facebook will not be a
4 competitor in that circumstance if we can't meet
5 our burden.

6 What they're trying to do is say
7 that not only do we have to prove that they're
8 competitors, but that somehow the products are
9 identical or that we had to prove infringement of
10 our own patent. That's not what the Federal
11 Circuit has set forward in the test.

12 They say if they're a market
13 competitor, our patent gives us a right to
14 exclude them from the market. That's an
15 irreparable harm issue.

16 That's the only issue they bring us
17 up on. Are we competitors for the issue of
18 irreparable harm? If we can't prove it with the
19 documents we've provided them already and the
20 documents we produced in this case and the
21 testimonial evidence and whatever -- anything
22 else we put forward in this case, we will fail
23 our burden. But we believe we can prove it with
24 the documents we've put forward.

1 If they can show in any way that
2 we're not competitors, that's not their burden.
3 The burden is on us.

4 THE COURT: But they have made out
5 representations that they can show that you're
6 not competitors, if only they have access to your
7 product and your source code. So what am I to
8 make of that?

9 MR. ANDRE: Well, the only purpose
10 they would -- what they're really saying is not
11 that we're not competitors, what they are saying
12 is that we don't practice our invention, that we
13 do not have a -- they're going to go in and try
14 to put in evidence that our product is not
15 infringing our patent.

16 That is not a competitor basis.
17 That's not how you determine if one party is a
18 competitor of the other party. The products will
19 look different. Whether our product is covered
20 by our patent or not can be determined by the
21 documents we've produced and the testimony that
22 we're willing to give.

23 This is not a case where they're
24 accusing us of infringing their patent, and

1 therefore, they get a look at our product in that
2 level. This is a case where all they're saying
3 is that we're not competitors.

4 Well, if they can prove that in the
5 market -- in the marketplace, that's where the
6 determination is. That's what the Federal
7 Circuit has said. That is what courts have said
8 throughout the country is a marketplace
9 determination.

10 If we can't prove we're competitors
11 in the marketplace, then we will not be able to
12 achieve the first prong of the four-part test for
13 getting to injunction. This is an issue where --
14 obviously an equitable issue that Judge Farnan
15 will decide.

16 I think at this point in the case,
17 there's absolutely no reason to open up our
18 source code, which is very sensitive to us, to
19 Facebook, especially in light of the fact that
20 we've produced ten times the documents about our
21 product than they've produced to us.

22 THE COURT: All right. Ms. Keefe,
23 you may go ahead at this point.

24 MS. KEEFE: Thank you, Your Honor.

1 Not much to add.

2 They've told -- they've represented
3 to us and the Court that they do practice their
4 patent. They've marked their product with the
5 patent number. All of their documentation says
6 that the product is patented by the '761 patent.

7 And they use that in order to try to
8 establish that we're a competitor. One factor in
9 determining competition is whether or not you
10 know both products practice the same claim.
11 That's one way that you can be a competitor.

12 Regardless of whose burden it is to
13 establish competition, we still deserve the right
14 to be able to challenge the fact of competition.
15 And one of the things we need to investigate is
16 what their product does. And we can't do that
17 without a membership to this service. We can't
18 even use the product right now.

19 THE COURT: Well, is that what you
20 mean by your request for a fully functioning
21 version of the product? Fully functioning
22 includes some type of membership, I take it?

23 MS. KEEFE: I believe so, yes.

24 THE COURT: Okay. All right.

1 Well, I'm prepared to rule on this
2 one. And having weighed the competing arguments,
3 I am persuaded that Facebook is entitled to some
4 relief on this issue, and specifically I am going
5 to order that Leader provide fully functioning
6 copies of the Leader to Leader, and I guess
7 Leader to Leader Enterprise social networking
8 products.

9 I'm looking specifically at
10 Facebook's Request for Production Number 65 and
11 66, which are attached as Exhibit 18 to Docket
12 Entry 182.

13 So with respect to 65 and 66, I'm
14 overruling Leader's objections and I'm granting
15 the motion to compel of Facebook. I do believe
16 that while the burden of proving competition in
17 connection with the request for an injunction and
18 other types of damages or damages relief, while
19 that burden is on Leader, a defendant here,
20 Facebook, has a right to defend itself, not
21 solely by arguing that the plaintiff has failed
22 to meet its burden, but also by, if it can,
23 proactively proving that the two companies, in
24 this case, are not competitors.

1 And I think that Facebook is
2 entitled to access fully functioning access to
3 the product that is the basis for the contention
4 of Leader that the companies are competitors.
5 Facebook's entitled to access to that product to
6 determine if it may have a basis for arguing
7 through the product that the two companies are
8 not competitors.

9 At this point, I'm denying the
10 request for relief under Production Request
11 Number 67, which seeks a copy of the complete
12 source code for Leader to Leader. I do recall
13 fairly well the back and forth over many weeks or
14 months and phone calls that we had which led
15 ultimately to the production of the entire source
16 code of Facebook to Leader.

17 And it may turn out that Facebook
18 will persuade me that they need access to the
19 entirety of Leader's source code. But seeing as
20 Facebook has not yet even had access to a fully
21 functioning version of the product, seeing as I'm
22 sure Leader will view the source code as the most
23 important commercial property, and seeing as I
24 think, I would want a very strong showing before

1 I'm going to provide access to the source code
2 just as I required when Leader was seeking
3 Facebook's source code, I just don't think that
4 showing has or can be made at this point given
5 that Facebook has not even had a moment to access
6 fully functioning access to the product to the
7 Leader product.

8 So that's my ruling on that issue.

9 We should talk about the timing for
10 when Leader can provide the fully functioning
11 product. Mr. Andre, given the holidays, you want
12 to suggest a date by which you could do this?

13 MR. ANDRE: Your Honor, I will
14 endeavor to do all the issues you brought up by
15 January 15th, if that's acceptable.

16 THE COURT: That is acceptable. So
17 you'll do that by January 15th.

18 I believe that addresses all the
19 issues raised in the letters.

20 Is that correct, Ms. Keefe?

21 MS. KEEFE: It does, Your Honor. I
22 had one other question, if you don't mind.

23 THE COURT: Just one second.

24 Mr. Andre, were there any other issues in the

1 letters that you think have not been addressed?

2 MR. ANDRE: No, Your Honor. I think
3 everything has been addressed.

4 THE COURT: Okay. Ms. Keefe.

5 MS. KEEFE: The simple question, I
6 think Your Honor still has two motions pending
7 before Your Honor, and I just wanted to know if
8 we could anticipate a ruling on those or a
9 hearing if you needed one.

10 THE COURT: The answer is, yes, I'm
11 going to rule on those motions right now.

12 MS. KEEFE: Thank you.

13 THE COURT: Okay. So the two
14 pending motions are Facebook's motion to stay
15 pending re-examination and Facebook's motion for
16 leave to amend its responsive pleading to add a
17 counterclaim for false marking. And I am going
18 to give you my rulings on both of those motions
19 right now.

20 First, on the motion to stay pending
21 re-examination, I am denying Facebook's motion to
22 stay. Facebook, as we know, seeks a stay until
23 the conclusion of a pending ex parte and inter
24 parte's re-examinations by the PTO of Leader's

1 '761 patent, which is the sole patent-in-suit.

2 In reviewing the parties' papers, I
3 note that both sides recognize that the issue of
4 whether to grant such a stay is a matter within
5 the Court's discretion. I agree with that.

6 I do not agree with Facebook's
7 suggestion that this Court routinely stays
8 litigation pending re-examinations. Each case is
9 fact specific, of course, and always requires the
10 careful exercise of discretion.

11 And I also note, I think it was
12 Leader, put in the record some commentary or
13 study that suggests actually in this district, we
14 have a relatively low rate of granting these
15 stays. But in any case, it's not routine to
16 grant such a stay.

17 Turning to the specific factors that
18 need to be considered, I find that the factors
19 weigh decidedly against staying this case pending
20 the re-examination. First, while it might be
21 true that the stay could eventually simplify
22 issues that are pending, in this case, I think
23 it's very unlikely that granting a stay would
24 lead to an ultimate resolution of all the

1 disputes between the parties.

2 As I understand it, Claim 17, which
3 has been asserted here by Leader, is not even
4 part of the re-examination. And moreover, the
5 PTO, of course, only deals with issues of
6 validity during the re-examination. It does not
7 deal with issues such as infringement, damages,
8 and injunctive relief.

9 And so unless the outcome of the
10 re-examination were to cancel all of the asserted
11 claims that are in re-examination, there will
12 still be things left for this Court to do with
13 respect to those claims that emerge from the
14 re-examination.

15 That's the first factor. The second
16 factor deals essentially with the timing of when
17 the stay was sought.

18 And this factors also, in the
19 circumstances of this case, disfavors a stay. At
20 the time that the motion for stay was filed,
21 paper discovery was largely completed.

22 We were on the eve of depositions.
23 Now, of course, a couple of months, I think, have
24 gone on further since when the motion was filed.

1 Claim construction at this point is
2 imminent. But most important with respect to the
3 timing issue is that this is a fast track
4 litigation by agreement.

5 This case was set from the beginning
6 for a trial in June 2010, which was a period of
7 only approximately 19 months from the filing of
8 the complaint. And as the parties well know, not
9 only have the parties expended substantial time
10 and other resources in litigating this case
11 vigorously over the last 13 months, but the
12 Court, too, has spent much time and resources
13 resolving discovery disputes, among other things,
14 and making every effort to keep this case on
15 track on the fast track towards a trial in June
16 of next year.

17 The final factor is whether the stay
18 would unduly prejudice the non-moving party,
19 Leader, and I accept the representation. I find
20 sufficient evidence in the record to accept that
21 representation, for purposes of this motion, that
22 there would be undue prejudice to Leader, as
23 we've already discussed in another context today.

24 Leader asserts that it is a

1 competitor of Facebook. And Leader asserts
2 further that delay would decimate the market for
3 Leader's Leader to Leader product, and further
4 represents that Leader will likely cease to exist
5 if this case is stayed pending re-examination as
6 the much larger and successful competitor,
7 Facebook, essentially allegedly gives away the
8 technology that Leader allegedly owns and is
9 trying to sell.

10 In this regard, it's notable, I
11 think, that none of us have any idea how long
12 this stay that's requested would last. It's
13 likely to be at least two and as many as five or
14 six years. But we don't know exactly how long it
15 would last.

16 And given that, it's also quite
17 possible that the delay could create evidentiary
18 problems for Leader due to faded memories and
19 that sort of thing, if and when the case were to
20 come back to this Court some years down the road.

21 And finally, I perceive no clear
22 hardship or inequity to Facebook if the stay is
23 denied. And, therefore, for those reasons, I am
24 denying Facebook's motion to stay and will issue

1 an order to that effect after this call.

2 Next, and finally, I want to deal
3 with Facebook's motion for leave to amend the
4 responsive pleading to add a counter claim for
5 false marking.

6 I am going to grant this motion.
7 Facebook's theory is that Leader marked the
8 Leader to Leader product with the '761 patent
9 designation without having a reasonable belief
10 that this product was covered by its patent,
11 because Facebook alleges that Leader undertook no
12 analysis at all to support such a reasonable
13 belief prior to marking.

14 As both parties note, Federal Rule
15 of Civil Procedure 15(a) embodies a liberal
16 policy to allow amendment of pleadings, and I
17 find having reviewed the papers that none of the
18 reasons that are usually given for denying leave
19 to amend, none of those reasons are present here.

20 First, I find no evidence that
21 Facebook has engaged in undue delay, bad faith or
22 exercised dilatory motive with respect to the
23 filing seeking leave to amend. I find that
24 Leader -- Facebook sought leave in a timely

1 fashion after comments were made by Leader's
2 litigation counsel and after a response to an
3 interrogatory, which seemed to Facebook to
4 provide a basis for its proposed counterclaim.

5 And even if Facebook's intent is to
6 delay, the Court is not going to let Facebook use
7 its counterclaims as a basis for delay. As I've
8 told the parties many times, I'm trying to keep
9 this case on the fast track to the June trial
10 date. And I intend to continue to make those
11 efforts.

12 It's also worth noting that the
13 scheduling order contemplated and permitted
14 motions for leave to amend to be filed up until
15 November 20th. And the motion for leave to amend
16 that I'm dealing with now was filed by Facebook
17 approximately a month prior to that deadline.

18 I also find there have been no
19 repeated failures to cure deficiencies through
20 amendments. This is the first requested
21 amendment to a pleading by Facebook.

22 Next, I find no undue prejudice to
23 Leader from granting the relief that I'm granting
24 today to Facebook. I am going to allow for

1 expedited targeted discovery.

2 If the parties find it necessary,
3 though, I'm anticipating that any discovery on
4 this new counterclaim will be very limited given
5 that almost all, if not all, of what Leader needs
6 to support the reasonable belief that its Leader
7 to Leader product is covered by the patent,
8 almost all, if not all, of that evidence I would
9 imagine is within the control of Leader itself.

10 And, also, Facebook has represented
11 that it has already and had already through
12 October served most, if not all, of the discovery
13 it thought it would need with respect to the
14 proposed counterclaim.

15 Next, I note that the proposed
16 amendment would not be futile in reaching that
17 conclusion. I applied the motion to dismiss
18 standard to the proposed counterclaim.

19 And taking Facebook's allegations as
20 true, I find that they do adequately allege all
21 of the elements of a false marking claim under
22 Title 35 United States Code Section 292(a).

23 Specifically Facebook alleges that
24 Leader has marked its Leader to Leader product

1 with the patent designation since November 2006,
2 and Facebook alleges that Leader lacked any
3 reasonable belief that its Leader to Leader
4 product actually practices the invention of the
5 '761 patent, because it's alleged Leader
6 undertook no analysis prior to making that
7 designation. So I find that the proposed
8 amendment is not futile.

9 And finally, I just want to say that
10 in exercising my discretion in this manner, to
11 allow the proposed amendment, I'm exercising it
12 in just the same way I'm exercising my discretion
13 to deny the stay. And that my view is that what
14 is most efficient for the parties, for the Court,
15 and what provides for the proper economy to all
16 relevant institutions is to keep this entire
17 dispute between the parties here in this Court
18 where it has been pending now for some time where
19 the parties and the Courts have engaged in a lot
20 of work.

21 And there's certainly no sense, it
22 would seem to me, in encouraging Facebook to
23 pursue a false marking claim in another suit,
24 particularly if it were to do so in another

1 district. So, for all those reasons, I've
2 exercised my discretion and will be granting the
3 motion for leave to file the response, the
4 amended responsive pleading, Exhibit A.

5 We will issue an order on this
6 effect that I am granting Facebook's motion for
7 leave to amend. Exhibit A to the motion will be
8 deemed to be filed as the responsive pleading.

9 And as I mentioned, I will provide
10 some time for limited discovery related to this
11 counterclaim, to the extent it's necessary. And
12 I'm directing the parties to meet and confer and
13 to submit to the Court no later than January 15th
14 a proposed plan for limited supplemental
15 discovery related to the counterclaim that we
16 have just added.

17 The relief that is the proposed
18 discovery plan should not in any way impact other
19 dates in the scheduling order. I should just
20 say, also, again, I've already said I expect
21 there to be relatively little discovery necessary
22 for either side. I'll add, I don't believe I'm
23 opening the door to a full-blown
24 product-by-product comparison, though I do

1 anticipate it will be likely that Leader will
2 have to describe the process by which it came to
3 form the reasonable belief that Leader to Leader
4 practices the patent.

5 But I am, in the first instance,
6 going to leave it to the parties to discuss and
7 hopefully come to agreement as to precisely what
8 limited discovery will be necessary with respect
9 to this counterclaim.

10 I don't want to hear any argument on
11 either of the motions I've just ruled on, and I
12 will get an order out. But is there anything
13 else that needs to be addressed at this time,
14 Mr. Andre?

15 MR. ANDRE: No, thank you, Your
16 Honor.

17 THE COURT: And Ms. Keefe?

18 MS. KEEFE: No, thank you, Your
19 Honor.

20 THE COURT: Okay. Thank you and
21 Happy Holidays to all of you.

22 (Everyone said, Happy Holidays, Your
23 Honor.)

24 (Teleconference concluded at 12:28

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p.m.)

1 State of Delaware)
2 New Castle County)

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5 CERTIFICATE OF REPORTER

6

7 I, Heather M. Triozzi, Registered
8 Professional Reporter, Certified Shorthand
9 Reporter, and Notary Public, do hereby certify
10 that the foregoing record, Pages 1 to 78
11 inclusive, is a true and accurate transcript of
12 my stenographic notes taken on December 23, 2009,
13 in the above-captioned matter.

14

15 IN WITNESS WHEREOF, I have hereunto
16 set my hand and seal this 30th day of December,
17 2009, at Wilmington.

18

19

20

21 _____
22 Heather M. Triozzi, RPR, CSR
23 Cert. No. 184-PS

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