IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES, INC., a Delaware corporation,	)	
PLAINTIFF,	)	
v.	)	C.A. No. 08-862 JJF
FACEBOOK, INC., a Delaware corporation,	)	
DEFENDANT.	)	

Tuesday, February 16, 2009
12:00 p.m.
Telephone Conference
Chambers of Judge Stark

844 King Street
Wilmington, Delaware

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

APPEARANCES:

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

-and-

KING & SPALDING LLP
BY: PAUL ANDRE, ESQ.
BY: JAMES HANNAH, ESQ.

Counsel for Plaintiff

(APPEARANCES CONTINUED)

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

COOLEY, GODWARD & KRONISH, LLP
BY: HEIDI L. KEEFE, ESQ.
BY: MARK WEINSTEIN, ESQ.

Counsel for Defendant

THE COURT: Good afternoon or good morning depending on where you are, everyone. This is Judge Stark. Let me know who's on the line, please.

MR. ROVNER: Your Honor, this is Phil Rover from Potter Anderson for plaintiff Leader, and with me on the line is Paul Andre from King and Spalding.

MR. CAPONI: Good afternoon, Your Honor. Steve Caponi from Blank Rome along with Ms. Heidi Keefe and Mark Weinstein for Facebook.

THE COURT: Hello to everybody.

We do have a court reporter present today, and for the record, this is our case of Leader Technologies, Inc., versus Facebook, Inc. It is our civil action number 08-862-JJF-LPS.

And the purpose of today's call is that there are several more discovery disputes between the parties. I've received, I think, a total of four letters, and of course I have reviewed them all. And I want to give each side a chance to tell me anything more that they want me to hear about these disputes.

Let's start first with the request from Leader to take the deposition of Mr. Mark Zuckerberg, so let me hear first from Leader on that one, please.

MR. ANDRE: Your Honor, this is Paul Andre. I'll speak for Leader on this.

As the defendants admit, Mr. Zuckerberg has relevant information, and quite a bit of it actually. He was the original designer and coder of the Facebook website. He came up with the idea on his own, according to not only his own -- not only from his own words, but a deposition we took from his cofounder last Friday.

In his previous testimony in another case, he stated that he relied on source material to come up with the website but could not remember what the source material was.

In his declaration in this case, in this motion in particular, that he submitted on Friday, he stated that he knows he didn't use the Leader white papers as a source. He basically contradicted his previous testimony.

He is also responsible for the

current design of Facebook, and he gets all final approval of the design choices. He makes all the decisions as to what features to incorporate into the website, and that's even after this litigation began. And he is in charge of the core technology and infrastructure.

All of this is obviously relevant information to our case of infringement and to our case of willful infringement.

THE COURT: Let me stop you there. Explain to me how it's relevant to willful infringement because the argument is made by Facebook about the timing, at least with respect to the original design of the Facebook program.

MR. ANDRE: As to the original design, we believe they copied our designs of the white paper that was published in 2003. That paper had a patent pending on it. Obviously you cannot infringe the patent until it is issued. The patent was not issued until 2006.

If you knowingly copied someone else's technology and then turn a blind eye to

it when you know there's a patent pending, that is a factor to look at willful infringement. That's the reason people mark "patent pending" on products. That's the sole basis for it. It's to give people notice that if they want to copy this, beware.

THE COURT: What do you have other than complete speculation that Mr. Zuckerberg ever saw the white paper, particularly given that now, while he says he doesn't know what he looked at, that he does know, according to this declaration, that he did not see or rely on your white paper?

MR. ANDRE: What we have here is the screen shots and some testimony he had given in previous cases in which -- how he designed his first website, his initial site. It is identical to the white paper itself.

It's not speculation, knowing that there was published material out there, he had access to the published material, and the site was designed almost identical to the white paper itself.

So what we want to explore is what

he did get into, what he looked at. It's not complete speculation. It's a high probability, and the odds of him choosing all these various features exactly the same are astronomical, so it is circumstantial at this point, and maybe our case will be a circumstantial case altogether. Nonetheless, it's something we have a right to explore, I believe.

THE COURT: All right. Go on.

MR. ANDRE: In the end, what we have to be mindful of is the fact that him knowing the patent is pending, if he did copy the white paper and the patent issues, and his design choices after the patent issued, and he should know or did know the patent was out there, or a potential one.

Also his design choices after the patent issued. He is the person making these decisions, and after the case is initiated, he's still making decisions and implementing features. That's something to look at.

In a deposition on Friday, his cofounder talked about how Mr. Zuckerberg was solely responsible for the development of their

mobile application, and the mobile application is one of the infringing elements of our patent. We have a dependent claim on the mobile applications.

There is a plethora of information this witness has that is relevant and is unique to him.

THE COURT: Did you show the screen shots of the original design to the witness last week or, for that matter, any other witness, and have they been able to identify them?

MR. ANDRE: We've only had one deposition with Facebook. They've been procrastinating giving us scheduling of witnesses. We tried to take half a dozen in January, but they put us off until Friday was our first one.

And Mr. Hannah, who is sitting in the office now, I believe you showed him those screen shots, James?

MR. HANNAH: Yes, we showed him some of the screen shots, but again during the deposition, he said that Mr. Zuckerberg would be

the ideal candidate to authenticate any early work in the Facebook website.

THE COURT: I understand ideal, but was the witness on Friday able to identify and authenticate the screen shots you showed him?

MR. HANNAH: He said -- the testimony was, "I'm not sure, but it looked like it could be." And that's what his testimony was about the screen shots.

THE COURT: Anything further on this, Mr. Andre?

MR. ANDRE: Just talking briefly about this idea of not being able to get the apex witness, the case law on this is, if no other employee has superior knowledge in this instance than Mr. Zuckerberg.

Nobody even has the equivalent knowledge that we want to take his deposition on. He has direct knowledge of the issues involved in the case. He has personal knowledge, and he has unique knowledge.

If we do not get Mr. Zuckerberg's deposition, it will be extremely prejudicial to

Leader, whereas this will be a minor inconvenience for Mr. Zuckerberg. We're in his backyard in Silicon Valley. We could take it in his office.

There's minor inconvenience for the witness, and it could be extremely prejudicial to Leader.

THE COURT: Mr. Andre, what's the current cut-off for depositions, and what other depositions do you have on the schedule at this point, and are you willing to put Mr. Zuckerberg off to be the very last witness you would depose?

MR. ANDRE: The answer to your question would be, the court ordered cut-off is March 1st. Facebook has made their -- some of their percipient witnesses available after that date, after March 5th. We've agreed to that to make it go smoothly. We would gladly take Mr. Zuckerberg last.

THE COURT: All right. Let me hear from Facebook on this, please.

MS. KEEFE: Thank you, Your Honor.

I'm not sure really what more I

need to say other than the fact that Mr. Zuckerberg's declaration speaks for itself. He has said that he never saw or had access to this white paper, even if that were relevant to the question of infringement.

He also says in his declaration that though he is the CEO and has some knowledge, he actually said that other people in the company do have more knowledge about the product and how it's working.

They have noticed up a number of people. We're providing a 30(b)(6). They've noticed other people who have responsibility for design changes. There's a team of three.

And during Mr. Moskovitz's deposition, he did in fact identify the screen shots that were placed in front of him, and I would like to note that though Mr. Moskovitz was sitting in a dorm room with Mr. Zuckerberg, they didn't ask Mr. Moskovitz if he'd ever seen the white paper and knew that it was used in any way.

We believe at this time that Mr. Zuckerberg does not have any unique or

independent, specific knowledge that would require his deposition in opposition to the apex doctrine, which indicates that he is, in fact, a very busy CEO. His time should be protected, and it would be a massive burden to have to take him away from his other duties.

THE COURT: I need to press you on some of those points. Let's start with "massive burden." It's hard for me to fathom how it could ever be a massive burden to be prepared to be deposed on topics, including what he acknowledges and has publicly, I guess, declared is a program that he created himself only six years ago.

The deposition, if it were to occur, would be scheduled at a time and place convenient to him. He's evidently -- it's evidently undisputed that he's involved in the design process and has final say over the functionalities that are in the program today.

"Massive burden" is a puzzling phrase to me. What am I missing?

MS. KEEFE: I think, Your Honor, that the burden has to do with the fact that

Mr. Zuckerberg's schedule is incredibly impacted. It would be difficult to find time for him, especially when outweighed by the fact that there are other witnesses who can give this exact, same information. This is not knowledge that is unique to Mr. Zuckerberg.

THE COURT: All right.

So what about the point that he has evidently -- tell me if there's stuff in the record that contradicts this. I'm happy to hear it. But as I understand the record, it's undisputed that Mr. Zuckerberg was the creator of the program, the Facebook program, that he says he relied on material that he found, I guess, out on the internet somewhere as possible input.

He initially said he doesn't know what material that was, but now somehow in the declaration has knowledge that it was not the information from Leader. Why is that not all something that Leader, as the plaintiff, is entitled to explore through testimony under oath?

MS. KEEFE: What the facts show

from the other depositions is that Mr. Zuckerberg, when he was talking about source material -- if you look at the surrounding quotes in those depositions -- he was talking about things like textbooks because he was at Harvard at the time and had programming classes. And he couldn't remember exactly which ones they were.

I think there's a big difference between "I can't remember exactly which document I looked at" and "Was this one of them?" And "No, I absolutely can tell you I've never seen that thing before." If you asked me right now which textbooks I looked at in college, I could not remember the names of them, but if you put one in front of me, I could tell you whether or not I'd ever seen it.

And I think that's exactly what Mr. Zuckerberg did here. He said there may have been some other source material he used, like textbooks. When we asked him specifically whether or not he had ever heard of, seen, or accessed a paper authored by Michael McKibben or with the name Leader Technologies on it, he

said, "Absolutely not."

Right now, it's a fact. It's in a formed declaration right now. I'm not sure that I understand what more there is to probe. It's not contradictive of anything he said before, and even if it were relevant -- which I will contend that it is not, given the fact that there was no patent at the time and the product changed between 2004 and 2006 when the patent issued -- he now said that he never saw the document.

THE COURT: What about the contention that Mr. Zuckerberg continues to be involved in the design process of the product today, and, in fact, has final sign-off and also is involved in review? There's a reference to Zuck review or something to that effect.

MS. KEEFE: Again if you read, especially paragraph four of Mr. Zuckerberg's declaration, he says that while he does have design authority, he has no unique knowledge on the technical development, the coding, the implementation, or the maintenance of any of the features. And he hasn't had responsibility for

any of those things since mid 2006.

The patent didn't issue until late 2006, and so at no time when the patent has been enforced did Mr. Zuckerberg have any direct responsibility or the unique knowledge of the technical development, the coding, the implementation, or the maintenance.

The fact that others do that and he says, "That's a good idea," or "That looks fine to me," proves that there are others in the company with superior knowledge that they need to talk to first, if not exclusively, because they do have the knowledge that Mr. Zuckerberg does not have uniquely.

THE COURT: And whose deposition has been noticed that would have equal or superior knowledge about the ongoing design issued at this point, Ms. Keefe?

MS. KEEFE: I believe any number of them, depending on the different portions of the site. Josh Weisman, Christopher Cox, Rushi -- I don't remember the last name -- Daniel Chai, James Wang. All of these.

THE COURT: Let's go back, for a

moment, to the origins of Facebook. Mr. Andre argues that if it were to be proven that there was intentional copying of the white paper that had been marked "patent pending," notwithstanding that the patent itself did not issue until sometime later, would you agree that that set of facts, if proven, would at least be relevant to a willful infringement analysis?

MS. KEEFE: No, Your Honor, I wouldn't because, again, there's nothing to willfully infringe until the patent issues. And it's the decisions made at the time of the knowledge that the company has of the patent itself that's relevant. And so, no, I absolutely do not think that it would be relevant. I think that answers Your Honor's question.

The only other thing I would add is I would invite Your Honor to take a look at the white paper. We submitted it to the Court back in November. I would be happy to submit a copy to Your Honor.

The white paper itself is identical in no way to the website. It's more

of a marketing piece or a consultant-type piece that speaks in large-scale pictures of what they wanted to accomplish, but it doesn't have -- we don't believe it's identical in any way to anything Facebook has ever done, and we would invite Your Honor to look at it before making any decision that it would be relevant or is identical.

THE COURT: Ms. Keefe, before I turn it back to Mr. Andre, let me tell you what I'm thinking, but I want to hear your reaction to it.

I'm really very open to the possibility of requiring Mr. Zuckerberg to appear for at least a half-day deposition, but it does seem to me, from what I've heard at this point, premature to order that to happen over the defendant's opposition, given that we are so early on in the depositions and it may well prove, as you suggest, that the plaintiff is able to find out everything that they reasonably need to find out from others.

I don't want to slow down the progress we've made in this case, but what I'm

thinking is indicating that if there's going to be a deposition, it's going to be within a couple of weeks of the last deposition that the parties have agreed already to schedule, but that there will have to be further litigation before I authorize it to go forward, that there would be very accelerated briefing, I suppose, on a motion for protective order from you so that you could put in full context everything relevant that you think has come out of the earlier depositions so that I can really fully and fairly evaluate the requirements of the Apex doctrine.

I want to give enough time for the depositions to play out and enough time for very accelerated but thorough briefing so that if I do order a deposition, it happens really fairly quickly in -- I'm thinking before the end of March so that the case can keep on its progress, so -- but I don't know, as I sit here, what the rest of the schedule is.

If you could just react to that and tell me what you think and whether I might be able to keep the case on schedule if I go in

direction I'm inclined to go. That's for you first, Ms. Keefe.

MS. KEEFE: My first reaction, Your Honor, is that that's exactly what the case law suggests is the right way do this, and we would be happy to comply with that.

As far as the schedule goes, there's only one other, kind of, thing that no one can predict at this point, and a lot of the schedule hinges on when Judge Farnan issues his claim-construction order in terms of when the expert reports are due.

If Your Honor picks a date and we have to produce -- if it ever came to pass, if after accelerated briefing we had to find a time the last two weeks of March to produce Mr. Zuckerberg, I would do my best to do that. I don't know his calendar at this exact moment, but I would do my best to do that.

THE COURT: Mr. Andre, you heard a lot from me and Ms. Keefe, so please respond to whatever you wish to respond to.

MR. ANDRE: Your Honor, I'll just reiterate the fact that Mr. Zuckerberg

personally designed, coded, and was responsible for design features of this website that we believe infringes today.

He did it before the patent issued, but those features are still in place today, and we believe they are infringing, and we have a right to take his deposition.

If it's in March, I don't think it will impact the schedule at all. I think it's imperative that we stick with our trial date in late June, as we have been keeping to the schedule all along. Facebook has been doing what it can to delay this case by not providing documents to us, pushing off depositions as long as possible, and making numerous motions to -- in front of Your Honor.

So we don't object to taking Mr. Zuckerberg last, but we do believe it is imperative for our case that we get him.

THE COURT: Okay.

MR. ROVNER: Your Honor, this is Phil Rovner for Leader.

I just wanted to add, to take Ms. Keefe's position that he's very difficult to

schedule, I think that your proposal sounds like a good working proposal, but I'm concerned that we'll get expedited briefing and then hear that he's not available for a month. So I suggest only that Ms. Keefe check with him to keep a date tentatively open just in case what we think should happen does, indeed, happen.

THE COURT: Having heard all of that, I remain where I was a couple of minutes ago, which is I can certainly see the real possibility of ordering Mr. Zuckerberg to appear for at least a half of a day of a deposition, but I am mindful that he is a CEO. I'm familiar with the apex doctrine.

And the plaintiffs aren't in a position, frankly, at this point to prove that Mr. Zuckerberg's representation that he has no unique or superior knowledge on relevant issues -- the plaintiff cannot meet its burden to disprove that at this point, but I'm open to the possibility that they may be able to.

But before I would be able to make a final determination on that, I would want -- and will now require -- that the other

depositions that have been scheduled -- my understanding is through March 5th -- be taken.

Mindful of the schedule, however, if there is going to be Mr. Zuckerberg's deposition, I'm hopeful that we would get it in by the end of March, and between now and then, we need to complete the other depositions. There needs to be a meet-and-confer between the parties upon the completion of those depositions to determine if, by any chance, there is agreement on a deposition of Mr. Zuckerberg.

And if there is not, then the parties will hopefully be able to work out a very accelerated, something -- I mean, something on the order of seven to ten days for briefing on a motion for protective order and a response to it and a quick reply to still give me a couple of days to absorb all of that briefing.

And if I do end up ruling that there will be a deposition, to try to get that deposition in as close to the end of March as possible.

That does not leave a lot of time, I recognize, but I'm going to not be any more

precise then I have been, but let things play out as I have suggested.

Let's move on from there to the second dispute, which is Facebook's concern about some documents and privilege logs produced by Leader.

Let me hear first from Facebook on that one, please.

MS. KEEFE: Thank you, Your Honor.

Just to put this back in perspective, I think it behooves us to remember how we got here. Back in late December, Facebook had brought a motion to compel production of documents exchange between Leader and third parties that we had found out existed.

And during the course of that hearing, Leader represented to the Court that it had long ago produced all documents related to the 761 patent. This despite the fact that Facebook was not able to find two documents from Neyer, a timeline regarding the patent, and a white paper discussing how Mr. McKibben came up with the patent -- we weren't able to find those in the production, that we could tell -- and

that one of the third parties, IP Investments, had produced a log which did not seem to match up with anything in Leader's logs or production.

Your Honor then chose to table the motion to compel the third party documents so that Leader could be put to a test of identifying where those documents were in its log or production, and Your Honor actually indicated that this was something because those documents -- we knew those existed because it had been disclosed by third parties.

You wanted to make sure it was in Leader's production or on Leader's log, and the very last portion, which I'll quote from Your Honor on page forty-five was: ". . .and if they are, that might very well be the end of the issue, and if they're not, we'll need to understand why they're not."

Leader had until January 15th to identify in its log or production the twenty-two documents on IP Investments's log and the two documents, the timeline and the white paper, authored by Mr. McKibben produced by Neyer.

The results of that identification

we found quite puzzling. The two documents they identified as corresponding to the Neyer documents didn't match up, to us, with information on the face of those documents. The log entries they identified differed in date, did not show that they had ever been sent to third parties, and differed in description.

With respect to the IP Investments documents, there were twenty-two. They identified two of those documents as having multiple log entries, again with dates and/or authors or descriptions not matching.

And more troubling, with respect to the other twenty documents, Leader simply produced a supplemental log without identifying those documents anywhere in their prior production or log.

Rather than coming straight to the Court, we asked Leader to explain these discrepancies and where those documents had been. Leader did not explain why Neyer indicated they had never been sent to a third party and why the descriptions were wrong.

They indicated that the dates did

not reflect the date on the face of the document as you would expect, but instead were metadata dates. And with regard to the IP Investments documents, they simply told us they didn't have to tell us where they had been, and that frustrated us and confused us.

So we asked them during the telephone conference meet-and-confer whether or not they had any further explanation and whether they wanted to tell us anything else about those documents and where they had been. We pointed them to the transcript where Your Honor asked them not only if you couldn't find them, we need to understand why you couldn't find them.

They told us they felt comfortable with the disclosures they already made, and that was it.

Before -- again before running to the Court, we undertook our own investigation to see if this was just a one-time thing or perhaps this could be miscoding, so we looked through all the other third-party production that had happened so far and tried to find those documents.

And instead of finding them, we found a very similar scenario to IP Investments and Neyer in that numerous documents that were logged or produced did not appear to be contained in Leader's log for production.

At this point, Your Honor, we simply don't know what to do. We know there are documents that are being either mislabeled or not logged, and we don't know what to do. We know these documents are relevant. At least two of the documents that we have had produced to us that weren't logged are highly relevant. It mentions by the inventor about how he considers to have come up with the patent and the timeline of the patent itself.

And we wonder what else is out there. We wonder what other problems there may be with discovery or with this log, and at this point we still need the third-party documents.

I think the only thing I'd add, Your Honor, is that since the time we last spoke about this issue, Facebook has taken the deposition of a number of third parties, including Neyer -- who had produced the two

highly relevant documents -- Akril Investments, IP Investments, and Latenberg, and in all of those cases, those third parties indicated that they did not believe that the communications between themselves and Leader were towards the common interest.

Instead, every one of those parties testified on the record that they believed that all their communications were at arm's length and that they were protecting their own interest in determining whether or not to make an investment, that they were not aligned legally or even subject-matter wise with Leader so that no common interest would exist.

At this point, Your Honor, we come to you hoping, at a minimum, for production of all documents that had been exchanged with third parties.

There are a number of log entries which also indicate that there was no privilege. These were documents that were collected by Mr. McKibben and sent to his lawyer. The description is "documents collected at the request of counsel" for which there can be no

privilege. And documents authored by Mr. McKibben that seem to have gone nowhere. They have no to or from, exactly like the log entry for the Neyer-produced documents.

And at this point we feel we need, at a minimum, for all those to be produced, but to fully understand this log, we may need production of the entire log to understand exactly what these documents are, how they've been logged, and, perhaps, why they have not been logged.

THE COURT: Just so I'm clear, Ms. Keefe, the twenty-two documents, essentially, that were part of this test -- the two documents authored by the inventor and the twenty, I guess, communications with Ryan Strong that were identified on the privilege log of IP Investments -- do you have -- does Facebook have all twenty-two of those, or does it just have the first two?

MS. KEEFE: Facebook only has the first two. We only have the documents produced by Neyer: The timeline and the white paper discussing the patent.

We have no documents from IP Investments. There were twenty-two on the log, two of which Leader gave identifications for that don't match the log itself, and twenty for which no identification was made whatsoever. A supplemental log was given to us. We have none of those documents.

THE COURT: And you've already addressed meet-and-confer, but let me put it to you directly.

The first argument, of course, from Leader is that you failed to meet and confer on this issue. Do you have anything else to add in response to that?

MS. KEEFE: I really am not sure what more they would have wanted us to meet and confer on. We've been discussing the priv log or issues relating to the priv log since September of last year. Most of this revolves around the third parties, documents produced to and from third parties that we met-and-conferred about before coming in front of Your Honor in December.

Anything that's come up since

then, we talked about either in a series of letters or through phone calls after those letters were exchanged before bringing the results of this test back to Your Honor.

THE COURT: Okay. Let me hear from Leader, please.

MR. ANDRE: Your Honor, this is Paul Andre. I'll be speaking for Leader.

First of all, let me address some of the issues that Ms. Keefe brought for the first time about this common-interest privilege.

This was not in her letter brief. It was not an issue that they brought up, that there was an arm's-length negotiation between these five third parties they've taken depositions on.

In fact, I personally defended one of these witnesses, and he testified there was a common interest, and he believes there was a common interest between the parties. We defended another one of these parties in Chicago, and he also stated there was a common interest as well. The one party they've taken recently in Miami, there was no non-disclosure

agreement. There was no common interest. We didn't claim one with that party.

To be clear, that's a sandbag here. It was not an issue brought up for us in the letter briefs; therefore, we didn't address it.

Let me go to the Neyer documents first. The Neyer Exhibit One was logged as -- in our privilege log as log entry 386. This is a timeline from Leader technologies and entitled Patent Analysis Timeline. Attorney/client work product containing confidential trade secrets. This was a document that was created by the inventor for his counsel at counsel's request.

This was provided to Neyer under a community of interest agreement, and Neyer was supposed to return it to Leader. The document was not destroyed. It was logged in as a privileged document, as it rightfully is.

Now, Ms. Keefe says she doesn't believe that's the document. I'm looking at the document now from our privilege log. It has a date on it in the privilege log of 10/10/07. That's based on the metadata when the document

was last accessed by Leader and when the document was actually edited to any degree.

The date on the face of the document is 10/8/07. That's the revision date that's on the face of the document.

We put on the -- the date on the privilege log is 10/10 because that's the most accurate date based on metadata, and we explained that to Facebook, that that's the reason that date is on there.

The second document is Neyer Exhibit Two, is privilege log entry 317. This is a paper that was, once again, authored by the inventor, Mr. McKibben, and it has work-product on its face and on every page of the document. It's a multipage document.

It has a draft date of October 7, 2007, which is obviously the same -- one day before the date of the timeline.

On our privilege log, we have it dated as 11/20/07. Based on the metadata, that was the last date it was edited in any way, so therefore we put that date on it in the privilege log because that is the most accurate

date of this document, not the draft date, and we explained that to Facebook as well.

This is a document also provided to Neyer, and Neyer produced it and did not return it pursuant to the nondisclosure agreement and the agreement they had with the parties.

This document was produced, we believe, improperly by Neyer, and there's nothing in this document that has any basis of relevance.

I mean, for example, Ms. Keefe keeps talking about omissions because the inventor makes a statement in here that he believes his idea would have been obvious in late 2003, 2004 because that's when these social networking, especially Facebook, began hitting the market.

Our patent was filed in 2002 with an invention date of 1997. There's no admission that patent was obvious when he published his white papers more than a year after he filed his patent application. There's no admission at all in these papers, and they're properly protected

as attorney/client privilege and attorney work product.

With those two documents, I don't see any dispute at all. We identified the documents to them. We said, "This is our privilege log before you got the Neyer documents." This is a part of the test Your Honor set up, and we told them if they had anything related to our patent, it's on our log, and there it is. It's on the log.

They make a quibble that we did not state that we sent it to Neyer. We didn't put anything we sent to third party. We thought it was irrelevant communications with these third parties.

We've made an argument since day one that these third-party finance companies are communications with parties that have no relevance in this case; therefore, we did not put in the fact that we sent this to Neyer. We did not put the Neyer e-mails or however it was sent to us as part of the privilege log.

Going to the IP Investments documents, the twenty-two documents they're

talking about, they were produced to Facebook by Neyer. They have the e-mails. These are redacted e-mails. They got the documents themselves. They're just in redacted form.

So the last -- the hearing we had in December, I told Your Honor, I said, "I don't think we would have logged the e-mails on our privilege log, but if they had information pertaining to the patent, then we would have logged it because we produced everything relevant to the 761 patent."

If you look at the actual documents themselves, for example, on the one document where you see there were attachments to the e-mail, the attachments themselves were part of the work-product document. That's what we identified in our log.

If you look at our log and the log entry number 693759761, those are three attachments we prepared for our attorneys that were attached to an e-mail with a Bate's number of ITI 196 and 197.

So the attachments which are relevant to the 761 patent were properly logged

in our privilege log.

The same is true with the second document, the Intellectual Properties document 239. It has an attachment as well, and it was logged as number 762.

At that point, every single one of the documents that had anything to do with the patent and was given to IP Investments were previously logged in our privilege log.

The e-mails themselves were not part of the privilege log, as we told Your Honor. I doubt we put it in the privilege log, so we didn't think communication to IP Investments about funding this litigation was relevant.

Your Honor told us it wasn't on the log, so we logged it, which we gave them a supplemental log with those documents on it.

I think the issue here is, have we done what the Court asked us to do? Obviously we have. Have we bent over backwards to try to work with Facebook? Yes, we have.

Our last communication with them was a seventeen-page letter in which we identify

hundreds of entries by name and seventy different individuals, where they worked. We're bending over backwards to work with them on this privilege log issue.

Every time they come up with something, we tell them what information they need to know. They asked this information why the IP Investments -- the e-mails -- were not on our privilege log. As we said in this hearing before Your Honor and we told them many times, we don't think it's relevant. It's not in the privilege log because we don't think it's relevant communication.

We don't think there's a dispute here with respect to our privilege log. The privilege log is hundreds of pages, thousands of entries. We have gone so far beyond what's required by the federal rules that it's shocking to me that we are here with this motion. We were surprised to get this motion because they didn't mention it to us before.

I'll stop there if Your Honor has questions. Sorry about that.

THE COURT: No, that's fine.

Ms. Keefe, anything you'd like to say in response?

MS. KEEFE: I think, Your Honor, the frustrating thing for us is that yet again Mr. Andre is saying that they didn't log communications with the third parties because they didn't think they were relevant, but the only reason they were ever talking to any of these third parties was about funding litigation involving this patent. That contradicts their own statement.

If they originally said they logged or produced everything related to the 761 patent, these communications with third parties are all about the 761 patent. I'm still struggling with the notion of what's relevant and what's not because all communications regarding the 761 patent are, by definition, relevant. The 761 patent is the patent at the heart of this case.

I also still am struggling again with relevance and not admissibility thing. The white paper that we continue to talk about, not only does it discuss what he doesn't believe

makes it obvious in 2004, but it also discusses, in Mr. McKibben own hands, prior art that he reviewed and inspired him that's dated 1997, 1998, and earlier.

So I'm struggling with all of those things, Your Honor, and I think we go back to the notion that this log never indicates that these highly relevant documents were sent to third party, so it doesn't establish that it wasn't privileged, and again we're left wondering where these documents are, what they are. We're getting them from some third parties, who apparently didn't return them. What about all the ones that have been returned?

THE COURT: Okay.

Well, I think "struggle" is the apt word here. I'm struggling as well, and I think it's partly because there's -- there are issues on several levels here, factual and legal, because clearly one side, Leader, thinks that as a legal matter, there is no relevance and no discovery obligation with respect to communications to third parties, even if those communications relate to the patent and relate

potentially to litigation regarding the patent in suit. And obviously Facebook takes a different view as to relevance there.

And I have not made a legal determination in this case as to who's right on that point.

There is also a dispute factually, really, about some of the premises that would go into whether or not there's a common interest, how broadly the common interest is being asserted by Leader, what has the testimony to date been from some of the witnesses with the third parties, but there's also other questions as to how the things that have been logged, how they have been logged.

And for instance, we now understand there's -- in terms of something that would seem to be as simple as the date of the document, one could look at the metadata date or one could look at the date on the face of the hard copy of the document. And those, at least in the instance of these two documents we performed the test for, don't line up.

So I'm struggling too, and I'm

going to have to take this step by step.

My hope was that the results of the test would allow me to understand whether I had to resolve the common-interest privilege legal issue, and if I have to resolve it, it might put me in a position where I could do it, and unfortunately I'm not at that point.

What I want to do is better understand what this test has revealed, and to do that I'm afraid I'm going to need to look at these materials in camera. And by these materials, I mean -- and I'm hereby directing Leader to produce to me, let's say by the end of the day Thursday, I want to -- and I know you may have given me some of these documents already, but I want to have them together in a nice, easy-to-follow package.

I want to see the original privilege log. I want to see the supplemental privilege log. I want to see the two Neyer documents as produced by Neyer, and I want to see the twenty documents which I understand to be e-mails with attachments which have been referred to as the IP Investments documents

along with any attachments to them. I want to look at all those myself and come to some conclusion as to how reliable the privilege log here is.

I should also say to plaintiff give me a copy of your letter, the seventeen-page letter of explanation, which I do think I have, but again I want to have that all together nice and neat, and anything else -- I should add, plaintiff, if there's anything else that you think needs to be submitted as part of the in camera review that would put in context my ability to assess the results of the test, go ahead and do that.

And I will take a careful look at what is submitted and attempt to form a view as to the reliability of the privilege log and the logging process, and at that point, if the issue is whether or not the common-interest privilege applies here, whether -- if it doesn't, perhaps I need to order Leader to do a privilege log that at least identifies all of the third parties to which these documents have been provided. You know, I'll have to make that

determination further down the road.

So clearly I've struggled too, which means I may not have been entirely clear, so let me turn to you first, Mr. Andre. Do you understand what I'm asking you to provide by the end of the day Thursday?

MR. ANDRE: I do, Your Honor.

THE COURT: Ms. Keefe, anything by way of clarification?

MS. KEEFE: Nothing by way of clarification, but I was wondering if Your Honor would also want us to submit the depositions of the third parties taken so far so you can see for yourself what they're saying about common interest or what the parties are saying vis-a-vis each other.

THE COURT: I don't need that at this time. I'm doubtful, frankly, I'll be in a position to make a substantive ruling on the application of the common-interest privilege without hearing further from the parties, but I do want to see what the results of the test have been before that.

Anything else at this time,

Mr. Andre?

MR. ANDRE: No, Your Honor. I think, as I mentioned earlier, we will -- we have some issues based on Friday's deposition regarding the document production of Facebook, but we'll try to work that out with Facebook, and hopefully we won't have to revisit this with Your Honor.

THE COURT: Certainly that would be my hope as well.

Ms. Keefe, anything else?

MS. KEEFE: Just last, do you want copies of our letters where we ask them about the test, or are you fine with just the materials from Leader?

THE COURT: Why don't you go ahead and submit those to me as well -- that is, your letters -- and that way I'll have it all nice and neat and in front of me.

Thank you all very much for your time.

(Hearing ended at 12:51 p.m.)

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

I, DEANNA WARNER, Professional Reporter, certify that the foregoing is a true and accurate transcript of the foregoing proceeding.

I further certify that I am neither attorney nor counsel for, nor related to nor employed by any of the parties to the action in which this proceeding was taken; further, that I am not a relative or employee of any attorney or counsel employed in this case, nor am I financially interested in this action.

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DEANNA WARNER

Professional Reporter and Notary Public