IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES, INC., a Delaware corporation,	)	
	)	
	)	Civil Action No. 08-862-JJF/LPS
Plaintiff-Counterdefendant,	)	
	)	
v.	)	
	)	**PUBLIC VERSION**
FACEBOOK, INC., a Delaware corporation,	)	
	)	
Defendant-Counterclaimant.	)	

PLAINTIFF LEADER TECHNOLOGIES, INC.'S
BRIEF IN SUPPORT OF DETERMINING DOCUMENTS PRIVILEGED AND/OR
WORK PRODUCT UNDER THE COMMON INTEREST DOCTRINE

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I. NATURE AND STAGE OF PROCEEDINGS

On November 19, 2008, Leader Technologies, Inc. ("Leader") filed a Complaint against Facebook, Inc ("Facebook") for infringement of Leader's U.S. Patent No. 7,139,761 ("the '761 Patent"). *See* D.I. 1. Discovery commenced in February 2009. Expert Reports and depositions are scheduled to close in April 2010. *See* D.I. 30. Trial is set for June 28, 2010. *Id.*

II. SUMMARY OF ARGUMENT

The common interest or joint defense privilege (hereinafter the "common interest privilege") protects privileged and/or attorney work product material communicated to a third party under certain circumstances where two parties share a common legal interest. As a preliminary matter, communications conveying a request for legal advice or containing legal advice between a client and attorney are attorney-client communications.[1] The privilege extends to verbal statements, documents, notes, and intangible objects conveyed by both individuals and corporate clients to an attorney in confidence for the purpose of obtaining legal advice, and those papers, prepared by an attorney or by an attorney's agent or assistant at an attorney's request for the purpose of advising a client, which would tend to reveal the client's confidential communications.[2] The work-product doctrine protects materials prepared in anticipation of litigation from discovery including a lawyer's research, analysis of legal theories, mental impressions, notes, memoranda of witnesses' statements, interviews, correspondence, and briefs.[3]

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[1] *Dabney v. Investment Corp. of Am.*, 82 F.R.D. 464, 465 (E.D. Pa. 1979)(holding the attorney-client privilege protects from disclosure confidential communications made to obtain a lawyer's professional advice and assistance)(citations omitted).

[2] *Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955, 960 (3rd Cir. 1984)(holding privilege extends to verbal statements, documents and tangible objects convey by both individual and corporate clients)(citations omitted).

[3] *See Hickman v. Taylor*, 329 U.S. 495, 505 (1947)(describing as work product "interviews, statements, memoranda, correspondence, briefs, mental impressions, [and] personal beliefs").

Where two parties with a common legal interest reach an agreement to share only amongst themselves privileged and work product information, the common interest privilege applies to any privileged or attorney work product information shared confidentially between the parties. Thus, the common interest privilege is an extension of the protections given to attorney client communications and attorney work product.

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III. STATEMENT OF FACTS

Leader is a small technology company based in Columbus, Ohio. Declaration of Michael McKibben in Support of Plaintiff Leader Technologies, Inc.'s Brief in Support of Determining Documents Privileged and/or Work Product Under the Common Interest Doctrine ("McKibben Decl."), ¶ 3. Leader alleges that Facebook stole its technology and willfully infringes its patent. *Id.*, ¶ 2. Realizing that bringing a patent infringement claim is tremendously expensive, Leader sought financial assistance to cover some of the costs of litigating a patent case. *Id.*, ¶ 3. Without such financing, Leader would probably not have been able to protect its intellectual property rights. Leader wanted to stop the infringement of its technology and not have to compete against its own technology in the marketplace. *Id.*

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Id.

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Decl., ¶¶ 4, 7; Declaration of Kristopher Kastens in Support of Plaintiff Leader Technologies, Inc.'s Brief in Support of Determining Documents Privileged and/or Work Product under the Common Interest Doctrine ("Kastens Decl."), Ex. 3.

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IV. ARGUMENT

The issue boils down to whether Leader and a few litigation funding companies share a common legal interest. This situation represents the epitome of such an interest. Both parties have a vested stake in the litigation and the outcome has the same affect on both parties. In fact, it is difficult to imagine a situation in which the legal interests of two parties are more aligned. *See SCM Corp. v. Xerox Corp.*, 70 F.R.D. 508, 514 (D. Conn. 1976)("Whether the legal advice was focused on the pending litigation or on developing a patent program that would afford maximum protection, the privilege should not be denied when the common interest is clear."). Because Leader and a few litigation funding companies share in the exact same legal interest, the common interest privilege protects their communications exchanging privileged and work product information from disclosure.

A. Privileged Material Shared By Leader With Litigation Funding Groups Maintains Its Privilege Under The Common Interest Privilege Because They Shared a Common Legal Interest

The common interest privilege operates to extend the attorney-client privilege and attorney work product to privileged communications shared by parties with a common legal

interest for the purpose of furthering that common interest.[4] Continued protection between clients and attorneys "allied in a 'common legal cause'" exists because it is reasonable to expect that parties pursuing common legal interests intended resultant disclosures to be "insulated from exposure beyond the confines of the group." *In re the Regents of the Univ. of Cal.*, 101 F.3d 1386, 1389 (Fed. Cir. 1996)(holding that the common interest privilege applies to and protects legal advice and communications between a patentee and attorneys of its licensee)(quotation omitted). The common interest privilege is recognized in numerous jurisdictions and a common theme has emerged from the cases. Specifically, the common interest privilege permits companies or individuals who share a common legal interest, such as a litigation, to exchange privileged and work product information in a confidential manner.[5] Kastens Decl., Ex. 6.

1. Leader and the Litigation Financing Companies Share a Common Legal Interest

The common interest privilege requires a common legal interest between the parties. Not only does a common legal interest exist between Leader and the litigation financing companies, their circumstances and goals are identical. Simply put, both Leader and the litigation financial companies are seeking a verdict that Facebook infringes Leader's '761 Patent. In fact, this legal interest is why both companies were negotiating terms to finance the litigation.

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[4] *See, e.g., In re Grand Jury Subpoenas, 89-3 & 89-4, John Doe 89-129*, 902 F.2d 244, 249 (4th Cir. 1990) (applying privilege to protect communications disclosed between attorneys for civil plaintiff and its non-party subsidiary)(quoting *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989)); *see also Schachar v. Am. Acad. of Ophthalmology, Inc.*, 106 F.R.D. 187, 191-92 (N.D. Ill. 1985) (applying privilege to communications exchanged between counsel to plaintiffs in separate litigations); *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1175 (D. S.C. 1975) (applying privilege to communications exchanged between counsel to plaintiffs in civil litigation and counsel to non-parties).

[5] James M. Fischer, THE ATTORNEY-CLIENT PRIVILEGE MEETS THE COMMON INTEREST ARRANGEMENT: PROTECTING CONFIDENCES WHILE EXCHANGING INFORMATION FOR MUTUAL GAIN, 16 Rev. Litig. 631, 632 (1997). *See* Kastens Decl., Ex. 6, *see also infra* Part II.C. for a detailed discussion of the common interest privilege.

As long as there is a common legal interest, it is not necessary for the communicant to be a party to this litigation. For example, in *Johnson Elec. N. Am., Inc. v. Mabuchi N. Am. Corp.*, No. 88 Civ. 7737 (JES), 1996 WL 191590 (S.D.N.Y. Apr. 19, 1996), in finding a common interest between defendant and its customer, the court noted that the parties were "de facto allies" because they both faced a threat of liability if plaintiff prevailed on its infringement theories. *Id.* at *4. The court particularly noted that, "the common-interest principle does not require that both, or indeed either, of the communicants be parties to a litigation." *Id.* (citation omitted).

Here, there were only a few litigation financing companies with whom Leader exchanged confidential, privileged and work product information. McKibben Decl., ¶ 4. Leader and these companies were common allies in their claims against Facebook, as well as with respect to any potential related claims that Facebook, a defendant accused of willful infringement, could potentially counterclaim against Leader and the financing companies or the financing companies' interests.

Furthermore, as a matter of policy, litigation financing companies have a common legal interest if there is an interest expressed in funding a litigation matter. Such companies can come under attack, as they are subpoenaed and deposed, even when they do not invest in a litigation or exchange privileged and work product information. Similarly, these companies or their interests in a litigation can be countersued by a defendant. To date, Facebook has subpoenaed over 20 third parties, most of them litigation financing companies. These companies' documents and depositions are being sought, even in cases where no privileged and work product information was ever exchanged. Thus, irrespective of whether the parties share privileged and work product information pursuant to the common interest privilege, these financing companies share a

common legal interest with their prospects with respect to the merits of litigation matters. They need to be able to appropriately vet a litigation matter without fear that its due diligence would result in a waiver of privileged and work product information, particularly where they have been careful to take steps to ensure that all such information would be maintained as privileged, work product and confidential.

Because a common legal interest exists between Leader and the litigation financing companies, the common interest privilege protects all relevant communications between Leader and the litigation finance companies relating to the litigation with Facebook.

2. Leader Took Substantial Steps to Ensure Confidentiality

There can be no doubt that Leader took all necessary steps to protect the common interest privilege. In communicating with the litigation financing companies, Leader has always required strict confidentiality of the disclosed information. McKibben Decl., ¶¶ 4-6. An example of Leader's stringent confidentiality policy is Leader's insistence that an NDA be executed before any discussion of the litigation against Facebook. Kastens Decl., Exs. 1-3; Strong Decl., ¶¶ 2-3; McKibben Decl., ¶ 4. Leader also made it clear, through markings and discussions, that documents shared between Leader and the litigation finance companies were privileged, work product, or confidential and should be treated accordingly. McKibben Decl., ¶¶ 4-5.

Courts emphasize the importance of confidentiality in determining common interest privilege. For example in *Tenneco Pkg'g Specialty & Consumer Prods., Inc. v. S.C. Johnson & Son, Inc.*, No. 98 C 2679, 1999 WL 754748 (N.D. Ill. Sept. 14, 1999), the district court for the Northern District of Illinois preserved the privilege of an infringement opinion of the patent and product at issue. *Id.* at *1. The opinion was disclosed to the defendant during an asset purchase negotiation. *Id.* In maintaining the privilege of the opinion, the court noted the "substantial steps" taken to ensure that the opinion would remain confidential. *Id.* at *2. In this case, the

discloser "showed the opinion to a limited number of [defendant's] representatives, and then only after they acknowledged that disclosure was subject to a confidentiality agreement." *Id.*

Similarly, Leader took steps to keep all information disclosed confidential and required NDAs and/or Common Interest Agreements before any privileged information or work product was exchanged between the litigation financing companies and Leader. Kastens Decl., Exs. 1-3; McKibben Decl., ¶ 6, Exs. 1-2. Furthermore, Leader clearly marked communications with designations such as "Attorney-Client Work Product/Attorney-Client Privileged Information/Proprietary & Confidential Trade Secrets." McKibben Decl., ¶ 5. Leader took these precautions precisely to keep the information disclosed confidential and to maintain the privilege. McKibben Decl., ¶ 9. When compared to the steps taken in *Tenneco Pkg'g*, Leader's diligence in insuring its privileged information would remain confidential was more than adequate to demonstrate the "substantial steps" required to maintain the privilege under the common interest privilege.

Accordingly, as Leader meets all the elements required for common interest privilege to apply, the privileged documents communicated to these litigation financing companies remain privileged.

B. *Corning v. SRU* is Inapposite as it is Solely Regarding a Commercial Transaction without Anticipation of Litigation.

Leader has stated that these specific litigation financing documents and communications are privileged and work product under the common interest privilege. In attempting to refute this, Facebook relies heavily on *Corning Inc. v. SRU Biosystems, LLC*, 223 F.R.D. 189 (D. Del. 2004). However, notably absent from *Corning* is any mention of a litigation financing company. Instead this case exclusively concerns a commercial transaction without any common legal interest or maintenance of confidentiality.

In *Corning*, Corning sued SRU for patent infringement. *Id.* at 189-90. Corning sought production of documents disclosed by SRU to past third party acquirers Techno Venture Management ("TVM") and Becton Dickinson and Company ("BD"). *Id.* SRU disclosed these documents to TVM and BD purely to persuade them to invest in or purchase SRU. *Id.* at 190-91. The parties did not anticipate litigation with Corning at the time that SRU disclosed information. *Id.* Instead, the opinions of counsel generated by SRU and disclosed to TVM and BD were entirely for the purposes of a commercial transaction (i.e. an equity investment in the company). *Id.*

The Court found that SRU did not provide sufficient proof to establish that, at the time of their negotiations, BD and SRU shared identical legal interests in these opinions of counsel. *Id.* Instead, the negotiations between these two corporations revealed that the disclosures were made to persuade BD to invest in SRU. *Id.* The Court further noted that SRU did not provide the Court with any evidence by which it could determine if the communications were directed to a common legal cause between the parties. *Id.*

In contrast to *Corning*, Leader shared a common legal cause with the litigation funding companies.

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C. Maintaining Common Interest Privilege for Privileged and Work Product Communications is Vital to those that Lack Sufficient Funds to Bring a Claim or Defend Itself Against Larger Adversaries

Courts have applied the common interest privilege because public policy favors its application. For example, in *Hewlett-Packard Co. v. Bausch & Lomb, Inc.*, 115 F.R.D. 308 (N.D. Cal. 1987), Bausch & Lomb disclosed its patent attorney's opinion letter concerning the validity and possible infringement of Hewlett-Packard's patent to a potential purchaser of a business division. In maintaining the privilege of the letter, the District Court for the Northern District of California relied on policy considerations:

> Holding that this kind of disclosure constitutes a waiver could make it appreciably more difficult to negotiate sales of businesses and products that arguably involve interests protected by laws relating to intellectual property. Unless it serves some significant interest courts should not create procedural doctrine that restricts communication between buyers and sellers, erects barriers to business deals, and increases the risk that prospective buyers will not have access to important information that could play key roles in assessing the value of the business or product they are considering buying.

Id. at 311. The court also noted the company's efforts to keep the privileged information strictly confidential. *Id.* In spite of the plaintiff's potentially substantial interest in disclosure, the court found the balance of interests to favor privilege. *Id.* at 312.

In this case, there is also a strong policy reason to apply the common interest privilege. The purpose of the common interest privilege, like that of the underlying attorney-client privilege, is two-fold—to encourage the free flow of information and to enhance the quality of

legal advice. Courts reason that the privilege has a positive effect on the quality of legal advice and benefits society by promoting justice.[6]

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McKibben Decl., ¶ 2. Leader firmly believes Facebook stole its technology and is now unjustly infringing Leader's patent. *Id.* Yet like most small businesses, Leader did not have the funds required to bring a patent infringement claim against larger, cash-rich companies like Facebook.[7] McKibben Decl., ¶ 3.

Without the application of the common interest privilege to aid communication, it would be difficult for those without sufficient funds, primarily individuals and small businesses, to be able to obtain the necessary funds to bring rightful claims. This is because litigation financing companies need to understand the merits of the litigation before partnering with the company. If any privileged and work product legal analysis is waived despite the fact that these companies share a common legal interest and agreed to maintain the information as privileged, work product and confidential, then funding would become extremely difficult to obtain for small companies. To determine that privilege or work product is waived in such circumstances would disadvantage small businesses and individuals even further when they attempt to prevent larger adversaries from infringing on their patents. Justice is not served when people are precluded from bringing rightful claims or defending itself against larger adversaries. Accordingly, maintaining the privilege of such communications is required to provide individuals and small businesses with the fair chance to adequately enforce and protect their property rights.

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[6] *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)("Its purpose is to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.").

[7] Facebook as a large company with hundreds of millions of dollars in cash is disproportionately able to fund this litigation compared to a small company like Leader. *See* Kastens Decl., Ex. 5.

V. CONCLUSION

Accordingly, Leader requests that the Court uphold privilege and work product protection to the confidential communications exchanged between Leader and the third party financing companies under NDA pursuant to the common interest privilege.

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CERTIFICATE OF SERVICE

I, Philip A. Rovner, hereby certify that on March 8, 2010, the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing(s) to the following; that the document was served on the following counsel as indicated; and that the document is available for viewing and downloading from CM/ECF.

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