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,	)	
	)	**PUBLIC VERSION**
v.	)	
	)	
FACEBOOK, INC., a Delaware corporation,	)	
	)	
Defendant-Counterclaimant.	)	

PLAINTIFF LEADER TECHNOLOGIES, INC.'S REPLY TO FACEBOOK'S OPPOSITION TO LEADER'S ASSERTION OF PRIVILEGE

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I. INTRODUCTION

The only issue for this Court to decide is whether Leader had a common legal interest with certain litigation financing companies. This common legal interest ***only*** extends to privileged and work product information pertaining to the merits of a potential litigation. Contrary to Facebook's claims, the undisputed facts are that Leader entered into common interest agreements with a select group of litigation financing companies and a few privileged and work product documents were shared with them pursuant to those agreements. Leader has consistently asserted that it shared a common legal interest with these companies regarding the merits of a potential litigation because the companies were looking to finance the potential litigation and their legal interest in the merits of the case were identical to Leader's. Leader has never asserted that commercial aspects of the proposed financing, such as the terms of the deal, negotiations, and other business issues, fall under the community of interest privilege, even though counsel was usually involved in those discussions. Such discussions are simply not relevant in this case.

Facebook argues that the communications between Leader and these companies were ***solely*** commercial, such that the parties did not share a common legal interest. It is unclear how Facebook can ignore the fact that Leader and these companies had a common legal interest since the companies were looking to finance the specific legal interest being discussed, yet that appears to be the meat of Facebook's position. Given the infirmities of its position, Facebook attempts to change the focus of the motion and bootstraps a number of extraneous issues, which the Court has already addressed.[1] Therefore, Leader will not address them any further here.

II. ARGUMENT

A. The Common Interest Privilege Applies to Limited Privileged and Work Product Information Shared Between Leader and Certain Litigation Financing Companies

The common interest privilege protects the limited privileged and work product information shared between Leader and certain litigation financing companies under NDAs and

[1] Facebook has already raised the issues related to Leader's privilege log with the Court and the Court determined that Leader properly logged the privileged documents. *See* D.I. 248.

during subsequent discussions regarding investment in a potential patent litigation. This information is protected because the information communicated was privileged and work product information and the legal interest was the same, and not solely commercial. *See In re the Regents of the Univ. of Cal.*, 101 F.3d 1386, 1389 (Fed. Cir. 1996)(citation omitted). Leader's claim of common interest has always been limited to the privileged and work product information related only to the merits of a potential litigation.

1. A small amount of material exchanged between Leader and certain litigation financing companies is privileged and/or work product

The information that falls under the common interest privilege is protected by the attorney-client privilege or work product doctrine. Facebook has never argued that the documents in question are not privileged and/or work product, but merely that such protection is waived. Thus, it is undisputed that the communications at issue are privileged or work product.

It also cannot be reasonably disputed that Leader and a small number of litigation financing companies took numerous steps to protect the privileged and work product information, including entering into strict confidentiality agreements requiring the companies to hold the information as privileged, work product, and confidential. D.I. 266, ¶¶ 4-7. The evidence demonstrates that Leader only disclosed such information to a select group of companies. *Id.* Facebook, nonetheless, suggests based on pure speculation that Leader disclosed substantial privileged information to a large number of groups.[2] To support its baseless assertion, [redacted]

[2] [redacted]

2. Leader and the litigation financing companies' legal interest in the merits of a potential litigation were identical

Leader and the small group of litigation financing companies shared a common legal interest in the success of a potential patent litigation. In discussions between Leader and these companies, the potential litigation was the asset that was to be financed. As such, the legal interest in the merits of the potential litigation was the same between Leader and these companies. In other words, at no time would the legal interest of a company that finances plaintiff side litigation diverge from the very legal claim a plaintiff is looking to finance. It is difficult to imagine how Facebook can characterize such a legal interest as *solely* a commercial interest, yet that is the only substantive basis for its opposition.

The interest between Leader and the companies was not solely commercial. While there may have been some commercial motivation for the litigation financing companies, "[t]he fact that there may be an overlap of a commercial and a legal interest for a third party does not negate the effect of the legal interest in establishing a community of interest." *Duplan Corp. v. Deering Milliken, Inc., et. al.*, 397 F. Supp. 1146, 1172 (D.S.C. 1974)(community of interest protection granted to the privileged and work product materials). Leader's assertion of the community of interest privilege is very narrow -- it does not include communications about commercial aspects of the parties' negotiations, even where counsel was involved. More importantly, commercial aspects to the discussions do not abrogate the privileged and work product shared under the asserted community of interest privilege.

B. The Cases Cited by Facebook are Unpersuasive Regarding the Common Interest Doctrine

Facebook cites to three cases. As set forth in Leader's opening brief, *Corning, Inc. v. SRU Biosystems, LLC*, 223 F.R.D. 189 (D. Del. 2004), does not apply because that case dealt with a purely commercial transaction only concerning an equity stake in the company, where no funding of litigation was contemplated. *Id.* at 189-90. Unlike the facts of *Corning*, Leader's discussions included and focused on potential patent litigation.

Facebook also relies heavily on the unpublished case, *Net2Phone, Inc. v. eBay, Inc*, CV Action 06-2469 (KSH), 2008 U.S. Dist. Lexis 50451 (D.N.J. June 26, 2008), which is inapposite because the Court relied on facts that are not present in this case. In *Net2Phone*, the Court relied on the lack of a formal confidentiality agreement between the parties. *Id.* at *21 ("plaintiff has failed to show that there was a strict confidentiality agreement."). Here, Leader was adamant about protecting its confidential information. [redacted]

Facebook mentions *Ronald A. Katz, Tech. Licensing, L.P. v. AT&T Corp.*, 191 F.R.D. 433 (E.D. Pa. 2000), but does so only to imply that the holding centers around one issue, rather than the totality of the facts. *Katz*, 191 F.R.D. at 437 n.4 ("an alignment of interest [] is a case specific determination to be made under the facts of the case."). Looking at the totality of facts, and just as in *In re Regents*, Leader and the select group of litigation financing companies had a common interest in a "valid and enforceable patent[]." 101 F.3d at 1390. Facebook would have the Court believe that the lack of a final agreement over terms during "arm's length" negotiation proves that the parties lack a common interest. However, *Katz* refutes this position by stating "a final and formal agreement is not required to establish the existence of a community of interests...." *Katz*, 191 F.R.D. at 438 n.6.

C. Mr. McKibben's Declaration Is Appropriate

[redacted] Facebook's unsupported arguments are a red herring. [redacted] *See Hackman v. Valley Fair*, 932 F.2d 239, 240-41 (3d Cir. 1991)(witness affirmatively testified at deposition he was given information on a certain date and then stated in an affidavit that this information was not given on that date); *see also Martin v. Merrell Dow Pharms., Inc.*, 851 F.2d 703, 705-06 (3d Cir. 1988)(witness gave the same date eight times during deposition but gave a contradictory answer in an affidavit). [redacted]

[redacted] Furthermore, Facebook's arguments are misleading because the cited statement only relates to one sentence of Mr. McKibben's declaration, and has nothing to do with the bulk of the declaration. Therefore, Mr. McKibben's declaration is appropriate to establish Leader's practices with the litigation financing companies.

D. Facebook's Reliance on the Deposition Testimony of NW Patent Funding and Neyer Holdings is Misplaced

Facebook ignores prior communications with NW Patent Funding and Neyer that undermine the conclusions they make from the deposition of NW Patent Funding and Neyer. [redacted]

III. CONCLUSION

Leader has established that the common interest privilege applies and requests that the Court uphold the privilege for the confidential communications exchanged between Leader and the litigation financing companies.

[redacted]

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CERTIFICATE OF SERVICE

I, Philip A. Rovner, hereby certify that on March 17, 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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