

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES,	:	CV No. 08-00862 (JJF)
INC.,	:	August 20, 2009
	:	
Plaintiff,	:	2:05 p.m.
	:	
v.	:	Wilmington, DE
	:	
FACEBOOK, INC.,	:	
	:	
Defendant.	:	
.....	:	

TRANSCRIPT OF TELEPHONE CONFERENCE
BEFORE THE HONORABLE LEONARD P. STARK
UNITED STATES MAGISTRATE JUDGE

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1 P R O C E E D I N G S

2 THE COURT: Good afternoon, everyone.
3 This is Judge Stark. Who is there, please?

4 MR. PRESTON: Your Honor, good afternoon.
5 This is Tom Preston, we represent Facebook, and I have
6 with me on the line Mark Weinstein from White & Case.

7 THE COURT: Good afternoon.

8 MR. ANDRE: Good afternoon.

9 MR. MOORE: Good afternoon, Your Honor.
10 David Moore on behalf of the plaintiff
11 and with me today on the line is Paul Andre from King
12 & Spalding.

13 THE COURT: Good afternoon to you as
14 well.

15 This is the time for a teleconference
16 regarding Facebook's request for a stay of a discovery
17 order. And it's our case of Leader Technologies, Inc.
18 versus Facebook. Civil Action Number 08-862-JJF-LPS.

19 I have, of course, reviewed the parties
20 letters, and I have some questions and also, you know,
21 want to give you each an opportunity to let me know
22 whatever else you want me to consider as I consider
23 the request.

24 Because it is Facebook's request, I want

1 to start with Facebook. Who will be speaking for
2 Facebook?

3 MR. PRESTON: Your Honor, with your
4 permission, Mr. Weinstein will be handling the
5 argument.

6 THE COURT: That's fine.

7 And, Mr. Weinstein, let me ask you to
8 begin your presentation by articulating for me as
9 clearly as you can what the harm to Facebook would be
10 from having to produce the entirety of its source code
11 subject to a protective order.

12 And I want to especially make sure I
13 understand your contention as to why that harm, if
14 there is such, would not be irreparable in some way if
15 Judge Farnan ultimately disagreed with my order.

16 MR. WEINSTEIN: Thank you, Your Honor.

17 The first point, Your Honor, is that the
18 source code for the Facebook website is not something
19 that we consider, you know, a standard sort of
20 discovery matter.

21 This is the source code that runs the
22 website for one of the most well-trafficked and well-
23 known services in the world.

24 The source code is, essentially for us,

1 the single-most critical and important asset of the
2 company. And while we have made very clear throughout
3 the case that we don't oppose the production of
4 portions of the source code and the production of
5 reasonable subsets of the code that the plaintiff
6 needs to perform its analysis, the production of the
7 entire source code is something that is, what we
8 believe, is beyond what is necessary for this case.

9 As far as the harm to us, the not
10 staying the enforcement of the order will effectively
11 deny Facebook any meaningful judicial review.

12 Essentially it would be very difficult
13 to unring the bell after the source code is produced
14 because the order would require the production prior
15 to the ability of Judge Farnan to review whether or
16 not that production should have taken place in the
17 first instance.

18 THE COURT: What I'm looking forward to
19 understand better is what the harm is from producing
20 the source code subject to all the protective order
21 protections that are in place.

22 I understand and accept that the source
23 code is the single most critical asset that the
24 company has, but that doesn't to me articulate what

1 the harm is from having, subject to certain protections
2 in the course of discovery, to make production of it.
3 That's what I'm hoping to hear from you better as to
4 what that harm actually is to Facebook if they are
5 ordered to do that.

6 MR. WEINSTEIN: Yes, Your Honor.

7 I think the bottom line, Your Honor, is
8 yes, there are protections in place. There is a
9 protective order in place. This was the argument that
10 was actually made to Judge Farnan.

11 But obviously we understand that, you
12 know, these protections are not always -- you know,
13 these protections are as good as we can make them.
14 They are subject to human beings. They are subject
15 to...they are subject to -- you know, they're subject
16 to all the fallacies that human beings can undertake
17 when they exchange sensitive information.

18 I think this is not the typical case of
19 just some confidential information that is being
20 disclosed. It is -- the information that is in the
21 wrong hands would allow someone not only to compete
22 with Facebook, it would allow them to perhaps breach
23 the security of the Facebook website, etc.

24 I think the other harm that we're having

1 here, Your Honor, is that when Judge Farnan
2 established the original procedure, the idea was
3 essentially to prevent sort of the fishing into the
4 code, of just going full bore into the source code
5 without having some articulated theory, and that was
6 the original concepts behind what Judge Farnan
7 established, and that would obviously be undermined by
8 an order requiring the production of the entire source
9 code.

10 THE COURT: All right. And what is it
11 about the harm -- I understand the argument that you
12 would effectively lose your opportunity to get review.
13 Put that aside.

14 What is it about the harm from the
15 source code being produced that would not potentially
16 be irreparable? Why could the bell not be unrung if,
17 you know, you turn it over tomorrow and a couple of
18 weeks from now Judge Farnan says *I was wrong*?

19 MR. WEINSTEIN: Well, because the
20 portions -- obviously the portions of the source code
21 that -- assuming Judge Farnan was to say, *Okay, you*
22 *need to go with a reasonable suspect*, they will have
23 had complete and unfettered access to the entire
24 source code for that period of time. So you really

1 can't unring the bell.

2 It's somewhat analogous to when
3 privileged documents are produced or other kinds of
4 sensitive information. Once it's been disclosed, you
5 can't really pull it back, or they would have had the
6 information in their possession, you know, before such
7 time as Judge Farnan decides whether they should have
8 had it in the first instance.

9 THE COURT: So then the harm you're
10 articulating is Leader would have some advantage, some
11 unfair advantage in the litigation because they might
12 stumble onto an infringement theory that they don't
13 otherwise have and wouldn't properly have access to?
14 Is that the argument?

15 MR. WEINSTEIN: Well, the harm is
16 essentially that they would be having access to
17 information that they never should have had access to
18 in the first instance.

19 I'm not necessarily -- I'm not convinced
20 they're going to find any infringement, no matter how
21 much of the code they review, but it's the access to
22 the information that is the issue.

23 THE COURT: I understand that you filed
24 your objections in a timely manner, but nonetheless

1 you did wait from July 28th to August 10th before you
2 filed the objections and waited two more days, until
3 August 12th, to file your requests for a stay.

4 You know, with the single-most critical
5 asset for the company at stake, why did you not move
6 sooner than that for this relief?

7 MR. WEINSTEIN: Well, we moved -- Your
8 Honor, first of all, the way that the briefing came in
9 to Your Honor, we essentially had to start all over in
10 responding to their allegations when Your Honor's
11 order came out.

12 Obviously, the company had to make a
13 decision as to whether it was going to seek review of
14 the order. And obviously there was an expert
15 declaration that was put in, that we needed to respond
16 to, that we had never seen before the simultaneous
17 briefing that took place on July 23rd. And we had to
18 get our expert in line, have him review the
19 information. He had to review the actual source code
20 that Mr. Vigna reviewed in order to fully evaluate the
21 positions that he had taken.

22 I mean, I think if there is note that
23 the declaration that Mr. Vigna was never shown to us
24 prior to the date where the simultaneous briefs were

1 to be filed.

2 THE COURT: Okay. And explain to me,
3 there's a reference in your letter to the plaintiff
4 having muddied -- I think was your word -- the term
5 source code module, and you think that that somehow
6 led me to make an error that I think would relate to
7 the production of technical documents. Help me
8 understand what you're talking about there.

9 MR. WEINSTEIN: Well, that's sort of a
10 separate issue from the source code, Your Honor.

11 What happened was they put in the
12 declaration from their expert basically defining the
13 word *module* as an *individual source code file*.

14 We produced a list of the entire -- all
15 the files that comprised the source code for the
16 operating version of the Facebook website.

17 Your Honor ordered them to identify the
18 modules for which they seek production of technical
19 documents.

20 What they did, Your Honor, on August 7th
21 when they were ordered to do that, is they came back
22 and said, *Well, we're not going to identify any*
23 *specific modules under their definition. We're going*
24 *to define an entire hierarchy of the directory.*

1 So, basically, they identified 99 percent
2 of the files that were on there. So essentially they
3 asked for every technical document in the company and
4 I think they tacitly recognized that because they're
5 proposing a new schedule in which they would provide a
6 new list of source code modules, you know, by the
7 28th, so I think they kind of acknowledged that point.

8 THE COURT: Okay. I may have more
9 questions for you as we go on, but those were the
10 things I wanted to get out right at the beginning, but
11 I don't mean to preclude you from saying or adding
12 anything else that you wanted to say.

13 MR. WEINSTEIN: Yes. I only have one
14 additional point, Your Honor, and that's that there's
15 not any harm to Leader for a brief stay of this
16 discovery order.

17 And here is why, Your Honor. Leader has
18 only come once to review the source code in this case
19 and that review took place on July 16th.

20 Following their review of source code,
21 the parties engaged in some meet-and-confer discussions
22 during which they identified some additional source
23 code files they hadn't originally requested but which
24 they claim that they needed in order to complete their

1 review.

2 We made those files available to them in
3 late July, and they've never come to review them. And
4 those files are available to them and will be
5 unaffected by a review of Judge Farnan's order.

6 The second point, Your Honor, is that
7 even as to the information that was available on the
8 computer, it's clear they haven't even fully reviewed
9 that.

10 Your Honor may recall, they put in a
11 declaration of their expert identifying about 43 files,
12 source code filings, that they claim they needed in
13 order to do their review, and they claim that they
14 were not on the computer.

15 It turns out, Your Honor, that as to a
16 quarter of those files, that their expert was
17 mistaken. Those files actually were on the computer.
18 He must have just overlooked them, and he only spent
19 between five and six hours reviewing the code.

20 So between the files that we made
21 available in late July, pursuant to their request, and
22 the files that Mr. Vigna had overlooked in his initial
23 review, there's a substantial amount of source code
24 that they can review at any time during the tenancy of

1 Judge Farnan's order.

2 So the idea that their review of source
3 code is going to grind to a halt or is not going to be
4 able to take place, it's simply not true.

5 There is plenty that they can be
6 reviewing and plenty they can be doing while Judge
7 Farnan reviews Your Honor's order.

8 THE COURT: Okay. Let me hear from
9 Leader and then I'll come back to you.

10 MR. ANDRE: Your Honor, this is Paul
11 Andre, and with me in the office is James Hannah.
12 He's an associate who actually went with Dr. Vigna for
13 the source code review, so if there's any specific
14 questions he'll be able to answer them.

15 But let me just start by giving the
16 court a bit of information that may be somewhat
17 helpful. We had scheduled a review of the source code
18 for tomorrow pursuant to the court's order.

19 And we just found out last night that
20 our expert, who reviews source code, his wife went
21 into labor last night, about three to four weeks
22 early. So, it's a little bit moot if we're trying to
23 get the source code reviewed for tomorrow anyway. So
24 we just found that out last night.

1 With respect to any type of harm, I
2 think counsel had a hard time identifying any harm for
3 looking at the source code because there is none.

4 We have extensive measures in place in
5 the protective order that protects the source code.
6 This is not unusual in patent cases. Source code is
7 looked at frequently.

8 We could do an iterative process like
9 they talked about, in coming back every single time
10 asking for a quarter more of the directories or the
11 files or the modules, however they want to describe
12 it. It seems to be a very term for them. But that
13 process is just -- we keep bringing to a dead end.

14 The way the source code is written, it
15 goes from one file to another file, and we don't know
16 how that is going to be set up.

17 So we briefed this all out with Your
18 Honor. You had both sides hearing on it. And there's
19 no reason to delay this any further.

20 I think the most telling aspect in this
21 case is we're six months into discovery and we don't
22 have a single technical document to date.

23 We've asked specific -- for very
24 specific documents in this case. We've e-mailed and

1 produced these documents by name, by file, and today
2 we have not received anything.

3 THE COURT: What about this suggestion
4 with respect to the technical documents that you have
5 been moving around a little bit and that what I
6 probably thought you meant by technical documents
7 related to source code modules is not what you
8 actually designated on August 7th?

9 MR. ANDRE: I don't think that's the
10 case.

11 I want Mr. Hannah to describe exactly
12 what happened here because he's been the one involved
13 with this conversation.

14 James.

15 MR. HANNAH: Good afternoon, Your Honor.

16 THE COURT: Good afternoon.

17 MR. HANNAH: The situation that happened
18 was we entered into a meet-and-confer, and originally
19 we defined *source code module* as a file, which is a
20 discreet part of a program, and it's like a PHP file.

21 Facebook came back to us and said, No --
22 and this was -- actually, I should back up.

23 This is in relation to the supposed map
24 that they gave us. When they gave us a list of

1 modules we identified at least 26 to 35 files which
2 were not on this list, and we said, *Why aren't these*
3 *files on this list?* We couldn't even request them to
4 be, you know, present at the source code review.

5 They came back us and said, *Well, the*
6 *definition of source code module is a directory.*

7 So we said, *Okay. Our definition of a*
8 *source code file -- of a module would be a file so we*
9 *need a list of files so we can determine which ones*
10 *we're going to use.*

11 They came back us to and said, again,
12 this bill of directories.

13 So when we identified the particular
14 source code modules that we wanted access to the
15 technical documents, we used their definition so there
16 would be no debate.

17 We thought that that -- the reason we
18 used their definition is because we assumed that that
19 is how they organized their technical documents, is in
20 terms of directories and not particular files.

21 And to be frank, we're kind of shooting
22 in the dark because we haven't seen any technical
23 documents and so we don't know how they organize their
24 files at all.

1 So we identified the directories. We
2 did not identified all of the directories, but we
3 identified the major directories which had interesting
4 source code files within them.

5 Then they came back to us and said, *Well*
6 *that contains 99.9 percent of the source code and it's*
7 *going to be all of the technical documents.* And tried
8 to, you know, put it back on us saying that we changed
9 our definition.

10 You know, from our perspective, it's
11 very difficult. We don't know how they're organizing
12 their documents. Are they describing directories or
13 are they describing files?

14 And we feel that if we identify a
15 particular file, then we're not going to get access to
16 the critical document, which is maybe a directory or
17 vice versa.

18 On another note, as soon as we reviewed
19 the source code we sent them a list and we sent them a
20 list of files, we sent them a list of directories, we
21 sent them a list of specific document names, and we
22 sent them a list of PDFs that we wanted by name which
23 we found in the initial source code. To date, we have
24 not received any of those technical documents.

1 So, no matter what the definition of
2 *source code module* is, whether it be a file, a
3 directory, we gave them the specific files that we
4 requested for initial production and still haven't
5 seen anything.

6 If we see at least those we can tell,
7 you know, how they're organizing their documents.
8 And, you know, we would like to see a production of
9 those at least.

10 MR. WEINSTEIN: If I can briefly
11 respond, Your Honor.

12 The issue of the source code module is
13 kind of a moot point. We produced the list of every
14 source code file in the source code.

15 And what happened was when we originally
16 identified the source code module we identified about
17 a hundred sort of directories that had functionally
18 related files in them and they picked about 20, 25 of
19 them.

20 When they came back, after we produced
21 the entire list of all files, they basically
22 identified five directories.

23 The way it works, Your Honor, is that a
24 directory is nest with another directory and another

1 directory. So the higher up level you go, Your Honor,
2 the more you get.

3 And what they picked was five directories
4 that are very, very high level, and if you add up
5 everything that's contained in them it was essentially
6 the entire source code. So it was essentially asking
7 for every technical document in the company.

8 And so I think they obviously need to
9 come back with a revised list that is facial to their
10 definition and their expert's definition of what a
11 source code module is, since they now have a complete
12 list of every file that constitutes the source code.

13 THE COURT: That was Mr. Weinstein;
14 correct?

15 MR. WEINSTEIN: Yes.

16 THE COURT: And, Mr. Weinstein, what
17 about the specific documents that they say they have
18 requested, even by name?

19 MR. WEINSTEIN: Your Honor, the
20 documents -- if they identified a document by name we
21 endeavored to make it available.

22 I think you have to go into their
23 requests for documents because they read more like
24 document requests. They are like, *All documents*

1 relating to X. They're not really specific requests.

2 When they asked for specific files, like
3 the source code files we identified, we made them
4 available. Where we didn't make things available,
5 where it was categories of things that were very
6 vaguely defined or that read essentially like very
7 broad document requests.

8 I mean, our position is very clear. If
9 they come up with a tailored specific, you know, list
10 of stuff, you know, we have and will continue to make
11 that available as long it's reasonable.

12 But I think the documents that
13 Mr. Hannah is talking about are ones that really just
14 weren't defined with any level of clarity.

15 THE COURT: Go back to Mr. Andre and
16 Mr. Hannah if need be.

17 In terms of the documents that you're
18 looking for, are you in a position now, even as it
19 sounds likely regardless of what I order, even before
20 you review the source code again with your expert, are
21 you in a position to make a more specific and more
22 limited request for the technical documents that you
23 need to enable you to review the source code?

24 MR. ANDRE: Your Honor, the request you

1 made on July 21st, which was an e-mail that we sent
2 where we listed the very specific files, the documents
3 you wanted for those files, we've made that specific
4 request.

5 Until we get looking at the source code
6 we won't know exactly what files to identify documents
7 for.

8 The hierarchy they gave us was an
9 800-page nonsearchable hierarchy of their source code,
10 and we would literally be shooting in the dark until
11 we actually see the code itself.

12 So at this point we gave them a list --
13 and I'll just give you an example. We would say
14 things of this nature: *All documents relating to*
15 *status dot PHP. All docs related to the function*
16 *requires underscore log in.* So we identified very
17 specific files here and just documents relating to
18 those files.

19 We actually went through and said --
20 when we were looking at the source code, there were a
21 bunch of PDFs that were in the source code. We wanted
22 to see those PDFs.

23 We couldn't print them out because
24 that's part of the source code. We can't print out

1 the source code.

2 So we identified very specific documents
3 from our first source code review, so we can be that
4 specific, and we did that on July 21st.

5 We can't be any more specific than the
6 very general directory structure at this point until
7 we see the rest of the source code. And that's the
8 reason we gave the directory structure in our request.

9 THE COURT: But the July 28th order
10 that's now in place required that you, Leader,
11 identify the source code modules with respect to which
12 you needed production of technical documents, and then
13 contemplated that Facebook would provide you those
14 documents and only thereafter contemplated you would
15 have access to the full source code.

16 What you're requesting now, at least in
17 your alternative to me just staying my order, is that
18 you would -- having made some requests with respect to
19 source code modules that you want technical documents
20 for -- you now want the access to the source code and
21 then want to come back and, I guess, refine somehow
22 your source code module technical document list.

23 Explain to me how we got to that point
24 from where we were in the July 28th order.

1 MR. ANDRE: Your Honor, we were trying
2 to get a compromise to Facebook just so we would avoid
3 this process.

4 What happened was, looking at the
5 hierarchy map they produced to us pursuant to Your
6 Honor's order, we looked at that and we asked for what
7 we believe are modules, which are directories, and we
8 said, "*We want documents related to these modules.*"

9 They complained that it was 99.9 percent
10 of all documents related to the source code.

11 So, in order to try to compromise, we
12 said, *If we saw the rest of the source code we could*
13 *identify the specific files, like we did on the*
14 *July 21st e-mail. We identified very specific files*
15 *there.*

16 But short of seeing the source code we
17 couldn't identify that subset of documents. It's just
18 impossible to do. It would be pure guesswork.

19 So we tried to make a compromise
20 solution and said, *Once we see the source code we'll*
21 *identify the specific files, just like we did on*
22 *July 21st.*

23 We did identify the modules pursuant to
24 Your Honor's order and that's what they're complaining

1 about, that we identified too much.

2 And just a side note, Your Honor. When
3 we talked to the technical people they actually said,
4 *There's not that many technical documents to start off*
5 *with.* This is not going to be a large production,
6 according to them anyway.

7 So, it's kind of like the source code.
8 When they talked to Judge Farnan they said there was a
9 terabyte of data in the source code. We find out it's
10 only 60 megabytes.

11 So we don't think this is an onerous
12 position to be asking to produce technical documents
13 pursuant to our request.

14 THE COURT: All right. Going back to
15 the source code, Mr. Andre. Why have you and your
16 expert not spent more than approximately five to six
17 hours looking at what's already been made available to
18 you?

19 I mean, what about this argument that
20 you're not taking full advantage of what you already
21 had been given access to?

22 MR. ANDRE: He looked at the entire
23 source code portion that we had access of, the 89
24 files of directories or however you want to call them,

1 that we identified from the initial list.

2 He's confident -- he went through it
3 thoroughly. He spent six, seven solid hours doing
4 this. It was a bit frustrating because every time he
5 started tracing a function he'd run into a dead end.

6 So this iterative process is just that.
7 He starts trying to trace a function, a function call,
8 and because not all the files were not made available,
9 he would access, because the way the source code is
10 written, another file, and he would hit a dead end
11 because that file was not made available.

12 So our expert has told us that he feels
13 like he's done all the searching he can do on the
14 source code made available.

15 MR. WEINSTEIN: Your Honor, that's
16 actually not true and --

17 THE COURT: I'm sorry. Is that
18 Mr. Weinstein?

19 MR. WEINSTEIN: Yes, sir.

20 THE COURT: Hold on. I'll come back to
21 you. I want to hear from Mr. Andre at this point.

22 MR. ANDRE: So when we got back from the
23 source code review -- and a part of the -- we
24 requested specific documents from the certain files

1 that we had looked at, we also identified a list of
2 approximately 30-plus additional modules, or files,
3 that they just did not put on the original list. And
4 those -- they then said, *"We'll make those available*
5 *to you as well if you want."*

6 We don't want to go back and once again
7 just enter a process and say we went to Your Honor,
8 and actually the entire source code, so our expert can
9 come up here and do the job he needs to do. We don't
10 want him to have to fly up six times to look at source
11 code in an iterative process and keep running into
12 dead ends.

13 At the end the day, based on his own
14 expert declaration, he needs the entire source code to
15 be able to map it and trace it and to follow the
16 files -- you know, the function of -- the function
17 calls, they go from file to file.

18 So, you know, this isn't doing anything
19 for us other than give us the information we need. It
20 doesn't harm Facebook at all. It's just getting an
21 efficient and effective way of getting discovery going
22 in this case, and we only have three months left.

23 THE COURT: Explain to me, Mr. Andre,
24 how I ended up getting two letters: A letter of the

1 DI74 and 75 instead of the joint letter that I had
2 ordered after the last teleconference?

3 MR. ANDRE: I think that was a
4 misunderstanding, Your Honor, because it was -- I
5 talked with our Delaware counsel and us, and we
6 remembered you saying you wanted a single letter, and
7 we thought it was a single letter from each side.

8 And we thought it was just a
9 simultaneous filing -- and we may confer with Facebook
10 on this. It was our understanding -- we didn't have
11 access to the transcript, it wasn't published at that
12 time. Even after reading the transcript, it wasn't
13 clear that it was going to be a joint letter. We
14 thought it was just a single letter, simultaneous
15 filing, without any responsive letter.

16 So that was just -- if it was meant to
17 be a joint letter, it was just a misunderstanding.

18 THE COURT: And what about this
19 suggestion that you could or should have done better
20 to meet and confer with Facebook and maybe shared the
21 expert declaration that was attached to your letter
22 before I saw it?

23 MR. ANDRE: Your Honor, we met and
24 conferred with them many -- we have provided them with

1 specific documents we've asked for. We've asked for
2 the entire source code. We gave them the basis for
3 doing so. We told them essentially everything that
4 was in that declaration in our meet and confers.

5 We've identified the files that were not
6 listed in their original 400-some-odd file names they
7 put out there.

8 We have been beating our head against a
9 brick wall with this discovery. They're putting up
10 hurdles every step of the way not wanting to give any
11 single technical document.

12 And like I said, I've never been
13 involved in a case where six months into discovery we
14 haven't got a single technical document. That's
15 astounding, especially when we specifically asked for
16 them.

17 So, we've met and conferred with them
18 dozens of times, and we told them exactly what the
19 expert said in the declaration and that was not
20 persuasive at all.

21 THE COURT: And other than the obvious
22 cost that would be involved if we did this as an
23 iterative process, and your expert, once he's back at
24 work, had to travel down maybe six times; other than

1 the financial cost, which could be shifted, what would
2 be the prejudice to Leader from going about it in that
3 way?

4 MR. ANDRE: It's really the timing. We
5 have three months left in discovery. And we have a
6 full professor at the University of California whose
7 time is very hard to get.

8 And what we -- what Facebook's end game
9 here is is to try to push off the trial date. We have
10 a June 2010 trial date. I'm sure they don't that.
11 They're going to do everything they can to stall and
12 push that off.

13 They tried to get a much later date from
14 Judge Farnan and they're not getting it in the
15 scheduling conference. Now they're going to try to
16 get it through the delay tactics.

17 At the end of the day the end result
18 will be, based on our expert's opinion -- he's going
19 to need the entire source code anyway. He'll just do
20 it in an iterative process, and when push comes to
21 shove, he will have nearly I would imagine every
22 single file that is in their source code because
23 that's how they write the source code.

24 They write in a particular language for

1 that very purpose. These PHP files are written so
2 it's very difficult for people to be able to hack into
3 it and get this type of information. The files are
4 all inter-related. That's just the way the PHP
5 language is used.

6 THE COURT: Okay. Anything else you
7 wanted to add, Mr. Andre, before I turn it back to
8 Mr. Weinstein?

9 MR. ANDRE: Not at this time, Your
10 Honor.

11 THE COURT: Okay. Mr. Weinstein.

12 MR. WEINSTEIN: Yes, just very briefly,
13 Your Honor.

14 I think, when you step back a little
15 bit, what becomes clear from the record is that the
16 situation we are with discovery is one of Leader's own
17 making.

18 How this started, Your Honor, was from
19 the very beginning of this case we've been struggling
20 to have Leader identify for us what is the specific
21 mechanism, what is the specific feature that's
22 infringing, because that will help us inform what's
23 relevant, how to do our document search, even how to
24 do our document retention policies and our litigation

1 hold letters.

2 To this day, Your Honor, all Facebook
3 has been -- I'm sorry -- all Leader has been able to
4 tell us is, *It's the whole site. It's everything. We*
5 *can't be specific.*

6 And this argument about how one file
7 refers to another file which refers to another file,
8 that's just a pretext, Your Honor.

9 If that was the true argument, Your
10 Honor, you would have to produce the entire source
11 code in every case involving software.

12 And we put in the declaration from our
13 expert, Mr. Gray, who has testified and served as an
14 expert in several software cases, and he basically
15 said, *You don't have to resolve all of these*
16 *dependencies.*

17 He said, you know, *If you come in with a*
18 *workable theory that this is the area that I think my*
19 *claim implicates, you can craft a request for the code*
20 *that you need. The defendant can produce that code*
21 *and the plaintiffs can review it, either confirm that*
22 *its theory of infringement is valid or it can confirm*
23 *that the code didn't work the way it thought it did.*
24 *You can move on.*

1 What we have here, Your Honor, is that
2 Leader came into case without a workable theory. So
3 the reason they're asking for the code is not because
4 they need to resolve dependencies, it's because they
5 don't have a workable theory. And without a workable
6 theory they're not able to articulate what it is
7 they're looking for. And that's why they keep asking
8 for everything, or they ask for technical documents in
9 99 percent of the code because they're not able at
10 this point to even articulate why they want or what it
11 is they're interested in, and that's why they're
12 asking for the entire code. And I think that's why
13 where we are at this point.

14 THE COURT: I'm going to come back to
15 you, Mr. Weinstein.

16 But, Mr. Andre, speak to that argument,
17 that you have a lack of a workable theory and haven't
18 articulated one and that's what's creating the problem
19 here.

20 MR. ANDRE: Your Honor, we've
21 articulated our theory of infringement in this case.

22 What we're looking at here is a website
23 that's infringing. We're not looking at a single
24 application from a program that they're referring to.

1 We put forward the actual public
2 information that's available to show infringement. We
3 put forward screen shots. We put forward the API
4 calls. We put forward a narrative describing the
5 infringement activity.

6 We've done this in amazing detail. We
7 had this theory of infringement well before we even
8 filed the case, as all lawyers should have.

9 So what we're trying to do now is just
10 get the actual hard specific evidence from the source
11 code. That's not public information.

12 Our expert can look this over in a
13 matter of one to two days, and then we'll identify
14 with amazing detail the files, the function of those
15 files, and the documents that those files were
16 designed from, the design documents and other
17 technical documents that show infringement.

18 We can't identify specifically the files
19 of infringement that are not publicly available. We
20 can't identify the documents that are not produced.
21 We can't show the infringement.

22 We have identified all the public
23 documents, all the public information from the website
24 that prove infringement. We've produced that to them.

1 So for counsel to come in and say, *We*
2 *don't have a workable theory*, that's lawyers being
3 lawyers. There's no semblance to the truth there.

4 But if they keep -- if they're able to
5 keep all their technical documents hidden in the
6 entire case we won't be able to identify them because
7 we don't have them, and that's the name of the game
8 here.

9 THE COURT: Mr. Weinstein, do you want
10 to respond to that?

11 MR. WEINSTEIN: Yes, Your Honor.

12 I mean, these are the same arguments
13 that were actually the reason that Judge Farnan
14 adopted the procedures he adopted was.

15 He looked at Mr. Andre's articulation.
16 He actually reviewed the interrogatory response and
17 basically said, you know, *What you have put forward is*
18 *not enough to justify going what he calls full bore*
19 *into Facebook*, and that's why he adopted this
20 procedure.

21 I mean, that's why this procedure was
22 adopted was because Judge Farnan didn't think what
23 they had articulated was good enough to just, you
24 know, to just go into everything.

1 That's why he said, *Go take a subset,*
2 *identify it, go review it, and then provide some*
3 *detailed infringement interrogatory.* That's why --
4 you know, that's why that procedure was adopted, was
5 based on his review of the interrogatory responses.

6 THE COURT: And let me ask you this,
7 Mr. Weinstein. What's being argued is that -- you
8 know, what they're telling me is that they either need
9 all of the technical documents that they've requested,
10 which you say would be essentially all of the
11 technical documents in order to make their review of
12 the source code meaningful, or they need access to the
13 full source code and then they can refine their
14 request for technical documents.

15 I understand that you don't agree that
16 they're in that bind, but if I think they're in that
17 bind, what would you have me do?

18 Would you have me order you to produce
19 all the documents so then they can focus their review
20 of the source code, or would you have me let them, as
21 they currently are allowed to do, review the whole
22 source code and then come back to you with the more
23 limited request for technical documents?

24 MR. WEINSTEIN: If I could suggest a

1 third option.

2 If Mr. Andre has a theory with amazing
3 detail he should be able to identify what are the
4 mechanisms that are implicated by this patent. This
5 is not a patent that covers the entire website. It's
6 a very specific mechanism that it's talking about.

7 And so there's no reason they shouldn't
8 be able to look at the mechanisms that are at issue
9 and say, *Here is where we want to look. This is what*
10 *we want to look at, and we want you to produce that.*
11 And in which case we would produce that and they would
12 be able to look at it. I think that's what at issue.

13 I mean, the argument that it's the whole
14 website, it just isn't supported by what the property
15 right is that they're asserting.

16 That's why I don't think they're in that
17 bind, Your Honor. If they have a theory as Mr. Andre
18 said, and I'll take him at his word, then they should
19 be able to articulate what are the mechanisms that
20 they -- and I understand they can't understand what
21 they do right now because they have to see nonpublic
22 information -- but they have to have a theory as to,
23 you know, which rock they need to look under in order
24 to find this, and they should be able to identify that

1 rock, and then be able to confirm their theory if they
2 have one.

3 THE COURT: And the contention by
4 Mr. Andre that they've not received a single technical
5 document yet in this case; that's correct or
6 incorrect?

7 MR. WEINSTEIN: I don't think that's
8 correct, Your Honor.

9 I mean, just to give you an example.
10 The PDF documents that they're talking about, they're
11 actually loaded on the computer that was made
12 available during the inspection. Those PDFs have been
13 collected and are available on the computer.

14 So as to the other documents that were
15 identified, not with specificity, I can't speak to
16 those because they're just not defined with any level
17 of clarity.

18 MR. ANDRE: Your Honor, this is Paul
19 Andre, just real quickly.

20 Those PDFs there on the computer. Under
21 the source code we are not permitted to print those
22 out, so we don't have those documents. That was a
23 source code review and a PDF is a part of that source
24 code, and we are now allowed to print them out and we

1 filed a protective order.

2 THE COURT: Mr. Andre, do you have a
3 sense at this time yet when your expert is next
4 available to go review the source code? And I'll
5 certainly understand if he hasn't given you a date
6 yet.

7 MR. ANDRE: Yeah. We got the word from
8 him last night, and we've contacted him to see if the
9 young baby Vigna has arrived yet and we have not
10 received a word from him.

11 So I'm hoping that that mother and child
12 are fine, but I don't know, to be honest with you.
13 He's pretty responsive.

14 I know the time period -- I don't know
15 if he's teaching this summer or not, so he may do it
16 in the next week or two.

17 THE COURT: All right. Anything further
18 you want to add, Mr. Weinstein?

19 MR. WEINSTEIN: Not at this time, Your
20 Honor. Thank you.

21 THE COURT: Well, I'm prepared to rule,
22 but it is going to be a limited ruling.

23 I think it's fortuitous, undoubtedly a
24 happy thing for the Vigna family, but I think happily

1 for all of us that the original order, which provided
2 access to Leader to the full Facebook source code
3 starting tomorrow, is not an order that Leader is in a
4 position to take advantage of, tomorrow anyway, and I
5 do think that's fortuitous because I want to better
6 understand the competing contentions about the
7 specificity of the infringement theory that Leader is
8 bringing here. And I will come back to that in a
9 moment.

10 Let me say a few things before I get to
11 that and to what the specific relief is that I'm going
12 to grant.

13 One thing that needs to be understood is
14 that as this case has been referred to me by Judge
15 Farnan, he has referred all discovery disputes and
16 management of discovery in its entirety to me.

17 Now, of course, that gives either side,
18 if they're dissatisfied with the ruling from a
19 Magistrate Judge on a discovery matter referred to
20 him, that gives you a right to object, of course, but
21 you don't get an opportunity to wait until your
22 objections are ruled on to comply with the discovery
23 order.

24 The discovery order of the Magistrate

1 Judge is an order of the court. It's only going to be
2 reversed if the District Court judge finds it's
3 clearly erroneous, contrary to law or an abuse of
4 discretion.

5 And the point is it's an order of the
6 court, and sometimes it may happen that because
7 discovery is moving more quickly than the objections'
8 process can move, that you end up having to comply
9 with the discovery order that otherwise you might have
10 found you could of had reversed.

11 Further, it needs to be understood that
12 I am not limited at this point to follow the procedure
13 that Judge Farnan set forth when he was handling
14 discovery in this case.

15 As I understand the referral, part of
16 what's referred to me is to manage this process as it
17 evolves. Nobody believed that it was going to just
18 stand still. And so the fact that I view something
19 differently than Judge Farnan is not an argument that
20 limits my discretion in terms of how I'm going to
21 handle discovery.

22 I want to further say the argument that
23 Facebook is making -- and I've given you every
24 opportunity to articulate it today -- that the

1 prejudice to Facebook will somehow be overwhelming and
2 irreparable just by virtue of opening up the entirety
3 of the source code to a litigant that claims the
4 source code is infringing the litigant's patent
5 rights, when opening up that source code is subject to
6 very stringent protections, which have been discussed
7 here and are an order of the court, is not an
8 especially persuasive argument against the discovery
9 and the particular circumstances of this case.

10 With all that said, however, I do think
11 a brief stay of my order allowing Leader to have
12 access to the entirety of the source code, I believe a
13 brief stay is in order.

14 I'm not granting a stay that will
15 necessarily run as long as it takes for the objections
16 to be resolved. In fact, at this point I'm only going
17 to stay my order for a period of ten calendar days,
18 and during that time frame I want to receive separate
19 letters from the parties focusing on the issue of
20 exactly where Leader has articulated its theory that
21 the entirety of Facebook's website infringes, and what
22 the implications are from that theory for which parts
23 of the source code and which technical documents are
24 thereby made relevant and subject to discovery.

1 Specifically, I'm going to give you a
2 schedule. I want to hear first from Leader. I want
3 you to explain to me in your letter, citing to
4 interrogatories or whatever it is, exactly where
5 you've articulated, and articulate with as much
6 specificity as you can what the theory of infringement
7 is. I want to receive your letter by next Thursday,
8 the 27th of August.

9 And then I want a response from Facebook
10 by Tuesday, September 1st, and Leader can then respond
11 to Facebook's letter by the end of the day Wednesday,
12 September 2nd.

13 And I guess, just to be clear -- and I
14 will put this all in an order for you that I will get
15 out later today -- I'm going to stay my order until
16 Friday, September 4th.

17 So that will give us time to do this
18 round of letters and for me to evaluate them and
19 revise my order, which may just be a revision of dates
20 or it may be something of a more substantial revision.

21 I do want to say, also, I'm very mindful
22 of the fact that the trial date is set for June
23 of 2010. It is not my intent that my order today, or
24 any other order I might issue going forward, will

1 affect that trial date of June 2010. I'm determined
2 to keep this case on track to keep that trial date.

3 And so things may move extremely quickly
4 after September 4th if I do lift the stay at that
5 point and reinstate the order giving Leader full
6 access to Facebook's source code.

7 I know that's been a little bit
8 rambling. And, as I say, I will get out a written
9 order shortly with these dates.

10 I don't want to have any further
11 argument at this time, but I could certainly
12 understand if I've been unclear and you have any
13 questions or clarification.

14 Mr. Weinstein, do you?

15 MR. WEINSTEIN: No, I do not, Your
16 Honor. Thank you.

17 THE COURT: And Mr. Andre?

18 MR. ANDRE: Your Honor, I don't have any
19 questions. I do have one unrelated question, I guess.

20 We have another issue that's coming up
21 that's relating to discovery, as to when discovery
22 closes and when we can take depositions.

23 Would you like us to brief that out for
24 Your Honor or would you like to hear briefly what the

1 issue is today?

2 THE COURT: I don't want to hear what
3 the issue is today.

4 If, after you've engaged in full good
5 faith efforts to confer with one another, you find
6 that you really can't resolve that, then start the
7 process over by calling chambers and we'll get you a
8 date and we'll issue an order for letters.

9 MR. ANDRE: That's great. Thank you,
10 Your Honor.

11 THE COURT: Anything else?

12 MR. ANDRE: No, Your Honor.

13 THE COURT: Thank you all for your time.

14 MR. WEINSTEIN: Thank you, Your Honor.

15 (Telephone conference concluded at 2:55 p.m.)

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1 CERTIFICATE

2 I, EDWARD N. HAWKINS, Registered Merit
3 Reporter, certify that the foregoing pages are a
4 correct transcript from the record of proceedings in
5 the above-entitled matter.

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8 Edward N. Hawkins, RMR
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