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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-LPS
)
 FACEBOOK, INC., a)
 Delaware corporation,)
)
 DEFENDANT.)

Friday, July 16, 2010
10:00 a.m.
Pretrial Hearing
Courtroom 2A

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.
BY: JONATHAN CHOA

-and-

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

Counsel for Plaintiff

1 (APPEARANCES CONTINUED)

2
3 BLANK & ROME, LLP
4 BY: STEVEN L. CAPONI, ESQ.

5 -and-

6 COOLEY, GODWARD & KRONISH, LLP
7 BY: HEIDI L. KEEFE, ESQ.
8 BY: MARK WEINSTEIN, ESQ.
9 BY: MIKE RHOADES, ESQ.
10 BY: JEFFREY NORBERG, ESQ.
11 BY: ELIZABETH STAMESHKIN, ESQ.

12 Counsel for Defendant
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1 THE CLERK: All rise. Court is
2 now in session. The Honorable Leonard P. Stark
3 now presiding.

4 THE COURT: Good morning,
5 everybody.

6 THE CLERK: Please be seated.

7 THE COURT: Nice to see you all.

8 Let's begin by noting the
9 appearances on the record, please.

10 MR. ROVNER: Your Honor, Phil
11 Rovner from Potter Anderson for the plaintiff,
12 Leader Technologies.

13 With me from King and Spalding is
14 Paul Andre, Lisa Kobialka, and James Hannah.

15 THE COURT: Good morning.

16 MR. ROVNER: And in the back is my
17 associate, Jonathan Choa, and Leader's president
18 and CEO, Michael McKibben.

19 THE COURT: Welcome.

20 MR. CAPONI: Good morning, Your
21 Honor. Steven Caponi with Blank Rome for
22 Facebook.

23 With me today from Cooley is
24 Miss Heidi Keefe, Mike Rhoades, Jeffrey Norberg,

1 Mark Weinstein, my supporting cast, and I'll get
2 all their names wrong, so I won't try to get
3 that in the background there.

4 THE COURT: Welcome to all of you.

5 This is the time for our second
6 pretrial conference in anticipation of our trial
7 that will start on Monday morning. We have a
8 pretty busy agenda, so I will get right to it.

9 I want to start by giving you
10 rulings, first on the Daubert issue that was
11 pending and then on summary judgment, and after
12 that we'll turn to the exhibits issues that you
13 all gave us letters on yesterday and today.

14 First, on the Daubert issue, it
15 was Facebook's motion, I believe it was DI 412
16 regarding Dr. Herbsleb's testimony. Earlier of
17 course, as you all know, I ruled that the motion
18 was granted with respect to Dr. Herbsleb being
19 precluded from testifying regarding his opinion
20 on the lack of the materiality of certain prior
21 art on which Facebook's invalidity arguments
22 rely.

23 I ruled, with respect to
24 precluding that materiality testimony, quote,

1 "The materiality of certain prior art
2 references goes solely to the
3 inequitable conduct defense, which is
4 not part of the forthcoming trial.
5 Dr. Herbsleb will not be permitted to
6 testify to matters that go solely to
7 inequitable conduct."

8 That's the end of the quote.

9 Also earlier I also denied a
10 motion with respect to the effort to preclude
11 Dr. Herbsleb from testifying regarding his
12 opinion on the cumulateness of this prior art
13 that Facebook seeks to rely on.

14 Now, having given the matter
15 further consideration and having ordered the
16 parties to address it as they did in the letter
17 briefs and having reviewed those briefs again, I
18 conclude that I erred in denying Facebook's
19 motion with respect to Dr. Herb's testimony
20 regarding cumulateness, and that's
21 particularly paragraphs fifty-six through
22 seventy-two of Dr. Herb's expert report.

23 As we know, the inequitable
24 conduct issue is separated for the trial, and in

1 my view, the concept of cumulateness, just
2 like the concept of materiality, goes solely to
3 inequitable conduct and not to validity.

4 The validity inquiry is going to
5 rely solely on a comparison between the prior
6 art that Facebook puts before the jury and the
7 claims of the patent in suit as they have been
8 construed by the Court; therefore, whether
9 Facebook's prior art would have been material to
10 the PTO or whether it would have been cumulative
11 of other prior art before the PTO and,
12 therefore, by definition, not material is not
13 relevant to the issue of validity.

14 As Facebook points out in its
15 July 12, 2010, letter, the prior art that would
16 be cumulative for purposes of inequitable
17 conduct may nonetheless support an invalidity
18 challenge to a patent due to obviousness or
19 anticipation, so this trial will be about -- it
20 will not be about the PTO or what the PTO would
21 have done with this other prior art.

22 Dr. Herb's use of the word
23 "cumulative" just Reich the use of the word
24 "material" also does create a potential for

1 confusion, and it's not necessary. His
2 testimony will be a comparison between
3 Facebook's prior art -- that is, the prior art
4 on which Facebook relies -- and the claims of
5 the patent in suit.

6 It follows from that as well that
7 Facebook's expert, Dr. Greenberg, is not going
8 to be testifying about what the PTO reviewed,
9 which is an issue we addressed earlier, other
10 than he can note that the PTO did review the
11 prior art that's cited on the face of the
12 patent. So that's my ruling with respect to the
13 Dr. Herbsleb issue.

14 On summary judgment, I don't have
15 an opinion yet prepared for you. You'll get an
16 opinion sometime down the road, but what it will
17 say in substance is that on Facebook summary
18 judgment motion number one, which went to
19 invalidity, it is the IPXL motion, I'm going to
20 be ordering further briefing, full briefing, on
21 that motion.

22 Number one, the parties are
23 directed to propose a briefing schedule within
24 ten days of the conclusion of the trial. There

1 will be a number of procedural issues, I
2 imagine, that we'll need to discuss after the
3 conclusion of this trial, and this will be one
4 of them, but we'll get full briefing on that
5 motion number one sometime subsequent to this
6 trial.

7 The remaining motions for summary
8 judgment, which have been described as motions
9 two, three, five, and six, are all denied for
10 reasons that will explain in an opinion that
11 will be issued, as I say, sometime down the
12 road.

13 With that, I want to turn now to
14 the objections to exhibits in the trial. As you
15 all know, the Court initially overruled all of
16 the exhibits and then provided an opportunity
17 mechanism for the parties to move to reconsider
18 the rulings on those objections, and both
19 parties have moved for reconsideration.

20 And I want to first talk about
21 Leader's motion for reconsideration of the
22 denial of its objections to the Facebook
23 exhibits, and we do have Facebook's response to
24 these -- to Leader's motion, so I am prepared to

1 give you my rulings in a moment on those.

2 Let me first just say in general
3 -- this was an issue that Leader raised in their
4 letter. In general it is certainly true that
5 the parties should not be attempting to
6 introduce exhibits where that exhibit would only
7 be offered for a purpose that the Court has
8 ruled is not part of the current trial or where
9 the Court has issued a motion in limine with
10 respect to that issue, so I do reiterate that
11 point.

12 Turning to the specifics of
13 Leader's motion to reconsider, the first issue
14 that Leader raises is they wish -- they object
15 to Facebook evidence regarding legal opinions of
16 third parties that include conclusions of law.
17 The Court agrees with Leader and sustains its
18 objections to these exhibits.

19 The next category is Leader's
20 objection to evidence that just goes to the
21 opinions of Mr. McKibben. The Court agrees with
22 Leader on this one and sustains those
23 objections.

24 Next is descriptions of Leader's

1 product after the critical date. It appears
2 that Facebook isn't going to be offering that
3 evidence, so that issue appears to be moot.

4 Next, the 35 U.S.C. Section 282
5 issue, whether Leader was provided sufficient
6 notice of the prior art on which Facebook
7 relies. The Court agrees with Facebook on this
8 one, and therefore the objection continues to be
9 overruled.

10 Next category, communications with
11 third-party financing companies. The Court
12 agrees with Leader that communications with the
13 third-party financing companies are not relevant
14 to the issues in this trial, and there would be
15 -- the prejudice of putting in front of the jury
16 evidence that shows Leader's efforts to obtain
17 financing to support the litigation would be
18 would substantially outweigh any probative value
19 to the evidence that Facebook is offering;
20 therefore, the Court agrees with Leader on that.

21 Evidence regarding Facebook's
22 patents. The Court agrees with Leader, but also
23 agrees that Facebook witnesses can testify
24 generally as they're describing job

1 responsibilities.

2 For instance, if they have some
3 duties with respect to Facebook's patents, "I
4 manage a portfolio of patents," something
5 general like that, the jury can be told in
6 passing that Facebook has patents, but there
7 shouldn't be any reference to the specific
8 substance of any Facebook patents. They
9 shouldn't be identified by number or title.
10 They simply have nothing to do with the issues
11 in the current trial.

12 Next are what Leader describes as
13 prejudicial character documents. That issue
14 appears to be moot based on Facebook's letter.
15 Facebook indicates they're not offering those
16 documents at trial.

17 The litigation-derived documents,
18 specifically Facebook seeks to introduce into
19 evidence Leader's responses to interrogatories
20 and responses to request for admission. The
21 Court agrees with Facebook on that, that
22 Facebook may do that. Those are admissible as
23 evidence against Leader, and therefore, again,
24 the Court agrees with Facebook.

1 And the final issue that Leader
2 raised has to do with exhibits that contain
3 multiple documents. It appears that both
4 parties have now agreed to separate those
5 exhibits, and the Court agrees with that and
6 encourages you to do that.

7 If -- Ms. Keefe, anything that you
8 wish to say or add or get clarification on with
9 respect to those rulings? And if so, you're
10 free to take the podium.

11 MS. KEEFE: Thank you, Your Honor.
12 I think it's mostly just a clarification.

13 With respect to documents in which
14 Mr. McKibben has actually made statements, if
15 Mr. McKibben, while he's testifying on the
16 stand, says something, opens the door, talks
17 about things that are in those documents or
18 makes statements that are inconsistent with
19 them, are we allowed to use those documents in
20 impeachment?

21 THE COURT: Certainly you can use
22 them in impeachment.

23 Now, do you envision also trying
24 to move them into evidence?

1 MS. KEEFE: Potentially, yes,
2 especially given the fact that some of the
3 issues in this case -- for example, the doctrine
4 of equivalence -- specifically says you cannot
5 recapture using the doctrine of equivalence that
6 which has been disavowed by the inventor or the
7 prior art.

8 Some of those documents
9 specifically indicate what Mr. McKibben told the
10 public he did not invent, and so for evidentiary
11 purposes, we would want to be able to show the
12 jury what Mr. McKibben says he did not invent so
13 that it cannot be recaptured by the doctrine of
14 equivalence.

15 THE COURT: I'm going to give
16 Mr. Andre a chance to respond to that.

17 Were there other issues based on
18 what I just ruled that you wanted to raise?

19 MS. KEEFE: No, I think that's it.
20 If Your Honor wanted to see a copy of a document
21 along the lines of what I'm talking about, I'm
22 happy to pass one up.

23 THE COURT: Let's hear from
24 Mr. Andre just on this point.

1 MR. ANDRE: Your Honor, on this
2 point, this is something that usually the Court
3 decides on post-trial motions.

4 If anything, Mr. McKibben is not
5 going to be talking about the doctrine of
6 equivalence. There would be no reason for this
7 kind of document to come in while he's on the
8 stand. I don't think there's any basis
9 whatsoever for admitting these documents.

10 THE COURT: What if they are --
11 they tell me that some of the documents -- let's
12 say, for instance, these communications with
13 litigation financing companies -- contain
14 statements by Mr. McKibben that will at least be
15 relevant to their effort to impeach him,
16 specifically whether or not there are
17 circumstances under which that document itself
18 could come into evidence.

19 Do you envision any, perhaps even
20 beyond ensnarement?

21 MR. ANDRE: No, Your Honor. If
22 there's anything in there, it's Mr. McKibben's
23 opinions about Facebook infringing the patent,
24 like the patent is the best thing since sliced

1 bread. There's nothing there to impeach him. I
2 don't see them using those documents at all,
3 other than for prejudicial reasons, to try to
4 shine a bad light on Leader for trying to get
5 financing.

6 THE COURT: Okay. Thank you.

7 Ms. Keefe, come back.

8 MS. KEEFE: Very briefly, Your
9 Honor. I think we can deal with the issue also
10 by virtue of the fact that we would be using
11 them for the purpose I mentioned.

12 For example, one of the documents
13 I'm talking about, Mr. McKibben specifically
14 states, regarding the invention, "It is not
15 internet cookie and history data. It is
16 not e-commerce session data. It is not
17 snip or packet data. It is not Java
18 Bean session data. All these are prior
19 art and are not claimed by the 761."

20 This is the type of information we
21 would like to be admitted. If it helps, we
22 would be willing to redact any other information
23 from the document to prevent confusion, and if
24 Your Honor wants, we could also deal with a

1 limiting instruction.

2 THE COURT: Certainly it sounds to
3 me like it would be proper impeachment, and I
4 will be open to the possibility of allowing it
5 to be admitted, but it would need to be
6 redacted.

7 Essentially the fact that Leader
8 was soliciting financing to support this
9 litigation is a fact I just think does not need
10 to be disclosed to the jury, so I'm not going to
11 permit any evidence to that effect.

12 MS. KEEFE: We understand, Your
13 Honor, but with respect to other things, you are
14 willing to entertain it as the documents come
15 up?

16 THE COURT: Certainly, it's proper
17 -- it sounds proper -- sounds like proper
18 impeachment if you do what you say, and I'm
19 willing to entertain allowing you to submit a
20 redacted version of that.

21 MS. KEEFE: Thank you, Your Honor.

22 THE COURT: Let me turn to --

23 MR. ANDRE: May I address a couple
24 issues as well?

1 THE COURT: I've already -- I've
2 ruled on that issue, so let's move on. We have
3 a lot of other issues to deal with.

4 We next have Facebook's objections
5 to Leader's proposed evidence, so this is
6 Facebook's motion for reconsideration of the
7 denial of its objections, and there we haven't
8 heard from Leader, so I will call on Mr. Andre,
9 and if you wish to respond briefly to what you
10 saw in the letter from Facebook, and my guess is
11 you can find a way to tell me whatever else you
12 were going to try to tell me a moment ago.

13 MR. ANDRE: Your Honor, I have a
14 question about your earlier ruling. It was
15 about the documents that had not been produced
16 to us, and we still don't have the documents,
17 and they're on the exhibit list.

18 We don't have the documents. We
19 exchanged exhibits recently, but we never had
20 them through discovery.

21 For example, one of the exhibits
22 they marked is a piece of software we don't
23 have. Their expert said he looked at the user
24 manual, but he never the looked at the software

1 itself. That's one issue we imagine they're
2 going to try and play, show the software in
3 action, and we've never seen it.

4 So that's a question -- how do we
5 deal with that?

6 THE COURT: Before we leave today,
7 I'm going to make sure we get back to that
8 issue, so I'll ask you to keep track of it.

9 MR. ANDRE: Will do.

10 With respect to, we just got this
11 letter brief. I'm doing this on the fly.

12 With respect to the financials and
13 other damage-related documents, as we said in
14 our letter brief, we're not going to be
15 presenting any type of damages documents,
16 especially those of the type attached to Exhibit
17 A. We understand the Court has bifurcated that
18 out of the case, and we're not going to be using
19 damage documents.

20 To the extent we want to use any
21 kind of testimony regarding commercial success
22 as a secondary consideration of nonobviousness,
23 I think we can do that without giving the
24 damaging documents. I think we do that with

1 testimony showing the success of Facebook and
2 possibly others to the extent we put that
3 evidence forward.

4 With respect to marketing
5 documents, I think that's a little bit of a
6 nebulous term. Marketing documents to show
7 damages would be improper, I agree, but many
8 times marketing documents are used for
9 describing the product, and if that's considered
10 a marketing document, we have a right to use
11 that for infringement.

12 There's Federal Circuit law that
13 says marketing documents can be used to prove
14 infringement, and we're entitled to use those if
15 there are those type of admissions in those
16 documents. Those are documents kept by the
17 company, make certain admissions about how the
18 product works, and that falls within the claims,
19 and we're entitled to do so.

20 So we're -- if it falls within the
21 damages, we agree we will not put in the damages
22 documents.

23 Regarding the alleged hacking or
24 copying, the document they marked, the hacking

1 document where Mr. Zuckerberg admitted to
2 hacking into the Harvard server, we agree that's
3 not going to be put in the evidence unless they
4 open the door for it, and we can use that for
5 impeachment if that comes up.

6 As far as copying goes, the
7 documents they're talking about, the white
8 papers, that doesn't show copying. That shows
9 conceptionary induction to practice of our
10 inventor, so we're entitled to show the fact
11 that in 2002 we filed a provisional application
12 and throughout 2003 we start publishing papers
13 on that invention.

14 Facebook claims that we're not
15 entitled to the 2002 priority data. We've shown
16 them 2003 priority data. If nothing else, that
17 does show the diligent reduction to practice, so
18 there are reasons why that comes in.

19 There's no reason to keep it out.
20 That's not prejudicial to Facebook, to show that
21 we published our results after we filed our
22 provision.

23 The idea that Facebook was founded
24 in 2004, that's just stating a fact. There's

1 nothing prejudicial to the fact they were
2 founded in 2004. We're not going to try to say
3 they copied because of the timing. They came
4 out after we filed our patents, after we
5 published the short paper.

6 Those white papers are important
7 to show a lot of things actually, not only the
8 conception and reduction to practice, but to the
9 extent they try to make statements about what
10 our technology did or did not do at that time
11 period, we have those papers to demonstrate
12 otherwise.

13 With respect to the admissibility
14 of character evidence regarding Mr. Zuckerberg,
15 we have no intention of putting anything about
16 the upcoming movie or book or newspaper articles
17 or whatever they're complaining about. I don't
18 think there's anything that we would want to
19 bring in along those lines.

20 Documents relating to Leader's
21 defense to Facebook inequitable conduct claims,
22 I believe you already ruled on this, Your Honor.
23 This is a cumulative issue, so I think that's
24 moot at this point.

1 The documents containing hearsay
2 statements by Leader's witnesses. This is a
3 white paper that Mr. McKibben published
4 regarding the use of the patent technology with
5 the state of Louisiana. There's hearsay
6 exceptions. There's several hearsay exceptions
7 to those type of documents.

8 Everything from business records
9 to present recollections and various other ones,
10 their only basis is it's a hearsay document. We
11 have several exceptions to the hearsay.

12 Mr. McKibben will be on the stand. To the
13 extent we do put that in -- we're not sure we're
14 putting it in or not, but if we do, we'll have
15 the author of that paper on the stand, and there
16 are exceptions to those type of documents going
17 in.

18 To the extent it's pure hearsay
19 and the author of the document -- we agree we're
20 not going to put in documents that would be
21 hearsay. Having one of our third party write an
22 e-mail and try to put that in evidence, and we
23 request the same of Facebook, not to put in
24 those type of hearsay documents as well.

1 And then the Facebook technical
2 documents. I guess that's the last issue.
3 These are the documents that Your Honor ordered
4 them to produce to us, their technical
5 documents. These were business records kept in
6 the ordinary course of business.

7 Facebook would have us try the
8 entire case on nothing but source code, and
9 there would not be a single exhibit of their
10 technology put into evidence, nothing for a
11 single appeal, and the jury obviously is going
12 to be lost.

13 These are the documents they
14 represent to this Court describe the technology
15 that the engineers use to write the source code
16 on, so every source-code module is written with
17 technical notes. You don't sit down and write
18 sort code, so the technical documents are relied
19 upon by our expert.

20 He talks about what they say.
21 They were talked about in deposition testimony
22 we planned on playing with their engineers, so
23 it would be extremely prejudicial, and there's
24 no basis for precluding these technical

1 documents.

2 THE COURT: On the commercial
3 success, is there any chance that could be the
4 subject of stipulation? You know, Facebook was
5 founded in 2004 and has X number of millions of
6 users. Do you need more than a few simple facts
7 like that?

8 MR. ANDRE: Not really. For the
9 commercial success aspect of our secondary
10 consideration, I think that would be sufficient.
11 We wouldn't need documents per se.

12 At the same time, we do want to
13 tell the story. At the end of the day, trial,
14 especially jury trials, are issues of advocacy,
15 and we want to put things in temporal context,
16 and we would like them to hear Mark Zuckerberg,
17 the founder, talk about when he founded
18 Facebook, and we would like to let them hear
19 from the vice president of business development
20 how they obtained 400 million users.

21 We don't want to be precluded from
22 putting forward our case to show these factual
23 issues, whereas a stipulation is evidentiarily
24 fine, for the jury, sometimes they want to hear

1 it from the horse's mouth.

2 To the extent of commercial extent
3 as to number of users, I think we could probably
4 work out some kind of stipulation. That will be
5 fine.

6 THE COURT: Let me give whomever
7 would like to respond on these issues.

8 MR. RHOADES: You have a new face,
9 Your Honor. I'm Mike Rhoades from Cooley. It
10 pleases me to be before Your Honor today.

11 I'm going to respond to two things
12 really quickly. On your last point, which is
13 the secondary consideration of commercial
14 success, the faulty premise there is the
15 conditional fact has yet to be established,
16 namely that they're practicing the patent. So
17 it confuses the jury to talk about all the
18 commercial success of Facebook, and, sort of,
19 suggest to them they make the link.

20 I'm more than comfortable with
21 what you proposed. Indeed, I'm happy to say
22 during my opening that Facebook is a very
23 successful company. It has hundreds of millions
24 people using it, twenty billion page views per

1 day.

2 If there's something you want us
3 to promote, we'll do it. That will solve it.

4 There's no mystery. Facebook is
5 successful. It's pretty obvious.

6 And then with respect to the issue
7 about the movie and books and newspaper, the
8 reason this came up -- I don't know if you've
9 seen it, but the trailer is now out. It's an
10 Aaron Sorkin production, and the trailer is out,
11 and all we would request is that if you wouldn't
12 mind adding to the voir dire questions, just ask
13 anyone in the pool whether they've seen the
14 trailer or not because it would be material to
15 us.

16 And I want a stipulation from
17 counsel that we're not going to hear about
18 collateral newspaper articles. There's been a
19 lot of coverage in the last six months about
20 Facebook from soup to nuts, and I don't want to
21 hear that stuff because there's no bearing on
22 whether or not we're practicing the patent.

23 THE COURT: Usually I don't answer
24 questions, but I can tell you that I haven't

1 seen the trailer, but your request is that we
2 should put it in the minds of our potential
3 jurors by asking them if they've seen it even if
4 they haven't heard of it?

5 MR. RHOADES: It's a two-edged
6 sword. If someone is sitting there and had seen
7 it, I think my client would want me to know when
8 we're picking the jury.

9 THE COURT: If I were to do it, do
10 you know the title of the film?

11 MR. RHOADES: *The Social Network*.
12 Maybe that's the way to do it. Has anyone seen
13 a movie trailer called *The Social Network*?

14 Sounds like someone has seen it.

15 THE COURT: Thank you.

16 Mr. Andre, I understood your
17 comments to indicate you're not going to be
18 making reference to articles or movies or
19 anything. Let me just get you to confirm that,
20 if I've got that right, and how do you feel
21 about the proposed voir dire question?

22 MR. ANDRE: Your Honor, I haven't
23 seen the trailer either. I wasn't aware the
24 movie was coming out this fall.

1 It seems to me, we're going to
2 cover it in the voir dire anyway when you ask
3 about Facebook. If you put that in the minds of
4 jurors, my guess is they're going to go home and
5 look on the internet for the trailer itself, so
6 I think it's going to put that in their mind,
7 like Your Honor said, and they're going to go
8 home and look at it, and Facebook will use that
9 for a potential mistrial.

10 I'd prefer not to put it in their
11 minds at this point. I think if you ask
12 generally are you aware of Facebook and talk to
13 them on sidebar -- how are you aware of them,
14 have you seen any press recently -- without
15 having to put in the trailer. I haven't seen it
16 on TV.

17 THE COURT: What about do you
18 agree not to be referring to articles and things
19 like that?

20 MR. ANDRE: Absolutely, Your
21 Honor. We have no intention of talking about
22 Facebook and the articles. We wouldn't
23 characterize that.

24 I believe Ms. Kobialka had one

1 question on the ruling.

2 THE COURT: I haven't ruled yet on
3 Facebook's motion for reconsideration.

4 Mr. Rhoades, do you have anything
5 urgent?

6 MR. RHOADES: The only thing I
7 wanted to add, Your Honor, with respect to these
8 two white papers, I think the testimony was that
9 the invention is circa 1999. The white papers
10 are substantially later in time.

11 They were originally proffered in
12 the case, as you will recall, as part of the
13 copying theory that was advanced which I
14 understand is bifurcated.

15 I'm concerned this will be the
16 camel's nose under the tent, which is that we're
17 not going to say copying, we're going to do
18 everything we can on this side of the house to
19 line up facts and talk about commercial success
20 the timing of the white papers, the timing of
21 the launch. It's going to be there.

22 I think if Your Honor would
23 entertain it, we might propose a limiting
24 instruction. If the only purpose for the white

1 papers is that they are evidence of reduction to
2 practice, I can live with that. I'm concerned
3 they're going to be used for the purpose of
4 trying to establish solely through temporal
5 proximity that there was copying on behalf of
6 Facebook.

7 THE COURT: Let me give you the
8 rulings on Facebook's motion for
9 reconsideration. Facebook's motion for
10 reconsideration of the denial of their
11 objections to Leader's proposed evidence.

12 The first category is Facebook
13 financials and other documents relating to
14 damages. I think everybody agrees that evidence
15 that solely goes to damages is not part of this
16 trial, and I agree with Facebook that that
17 includes the type of financial statement and
18 other dollar-type evidence that is cited in
19 Facebook's letter motion.

20 I do have to let Leader tell a
21 little bit of the story to establish commercial
22 success, but I really mean a little bit. I
23 don't think it's going to be -- it's going to
24 take very much evidence to establish for the

1 jury that Facebook is successful. Things like
2 the number of users should pretty much do, it
3 and I'm going to keep a very careful check on
4 anything much beyond that.

5 And I do urge the parties, if you
6 can work out a stipulation, that would certainly
7 take care of the issue. But I understand the
8 need to tell a story as well.

9 Next is what Facebook
10 characterizes as its marketing documents. On
11 this one, too, there pretty much is common
12 ground here. If the marketing document really
13 is a damages document and it's talking about how
14 successful Facebook is, then it should not be
15 offered in evidence. If it is a description of
16 Facebook as a product, then it may have a proper
17 purpose at trial, and so that will have to be, I
18 suppose, a document-by-document analysis as we
19 see what they are and how they are offered.

20 But there should be no effort to
21 take what is really a financial statement or
22 financial document and offer it as a marketing
23 document because maybe it has one sentence
24 saying how wonderful Facebook is.

1 With respect to hacking, I
2 reiterate my prior ruling. There should be no
3 reference to copying or hacking. Those issues
4 have nothing to do with the trial that is coming
5 up.

6 Specifically the white papers, it
7 sounds like they are admissible on the
8 reduction-to-practice point. I will be very
9 open to a limiting instruction, and there just
10 should be no explicit or implicit effort to have
11 the jury believe that Mr. Zuckerberg copied,
12 that this was somehow a willful copying.

13 The issue is whether Facebook as a
14 product is practicing the elements of the claim
15 in the Leader patent.

16 Character evidence. Sounds like
17 this issue is moot. That is, Leader isn't
18 seeking to offer evidence with respect to
19 Mr. Zuckerberg's character.

20 Next is whether Leader can offer
21 evidence relating to prior art that was before
22 the PTO. I agree with Facebook on this one. I
23 mean, other than pointing out that the face of
24 the Leader patent indicates that certain prior

1 art was before the PTO, which I said that
2 Mr. Greenberg can do, other than parties
3 eliciting evidence that that's what the face of
4 the patent says, this issue -- the issue, that
5 is, of what was actually examined by the PTO --
6 again is not part of the invalidity analysis at
7 issue in this trial.

8 Next is what Facebook
9 characterizes as hearsay documents containing
10 hearsay statements by Leader witnesses. I
11 essentially agree with Facebook on this with the
12 limited exception that Mr. Andre noted: If the
13 author of the document is on the stand, it may
14 be that we have a hearsay exception, and it may
15 be that the document can come in.

16 Next, what Facebook characterizes
17 as inadmissible hearsay publications. I agree
18 with Facebook. The type of evidence that
19 appears to be at issue in this category looks
20 like it is inadmissible hearsay, and here I'll
21 note that everybody has agreed there isn't going
22 to be general references to articles and media
23 coverage of Facebook.

24 And finally on the technical

1 documents, whether Facebook is limited to using
2 the source code or can use the other technical
3 documents, I agree with Leader on this. I
4 believe that this evidence may be helpful to the
5 jury. I certainly think it is not inadmissible
6 hearsay, and it's up to Leader to determine how
7 it wants to use its time.

8 On the voir dire issue that came
9 up, I think the better exercise of discretion is
10 not to specifically put *The Social Network* film
11 trailer in the minds of jurors, but as you have
12 seen from the voir dire that I will use, we will
13 learn something about everybody's general
14 understanding of Facebook, and that may well be
15 an issue that needs to be explored in further
16 questioning by counsel as we bring the jurors
17 forward.

18 All right. That takes us to other
19 issues that have been raised in the proposed
20 amended joint pretrial order, and here there's
21 some things I can tell you, and there are some
22 things I am going to need to hear further from
23 the parties on.

24 I guess the first one I should

1 give Facebook a chance to address. Facebook is
2 now arguing, as I understand it, that the
3 provisional patent application is not
4 admissible. If I have that correct, I'd like to
5 hear from Facebook on that.

6 I'm specifically referring to on
7 the bottom of page three of the amended joint
8 pretrial order, number seven. "Facebook
9 challenges the admissibility of the provisional
10 application."

11 MS. KEEFE: Your Honor, when we
12 wrote this sentence, we were also at the same
13 time dealing with the preliminary jury
14 instructions, jury instructions, and all the
15 like, and I think at the time we were simply
16 worried about what the definition might be and
17 how it might come into evidence.

18 We can withdraw that objection
19 right now.

20 THE COURT: Okay. Fine. Thank
21 you.

22 Next, on trial witnesses. There's
23 been a lot of correspondence on this. It
24 appears now that you're all in agreement at

1 least as to who's going to be called as a live
2 witness; is that correct, Mr. Andre?

3 MR. ANDRE: It is, Your Honor.

4 THE COURT: And Ms. Keefe?

5 MS. KEEFE: It is, Your Honor.

6 THE COURT: Okay. And you will,
7 mind you, be held to that agreement, so the live
8 witnesses are at most the live witnesses that
9 are disclosed in the amended joint pretrial
10 order.

11 In terms of disclosing the order
12 in which you are going to call the witnesses,
13 tell me where you are on that. What is your
14 current agreement as to, first, when Leader is
15 going to disclose to Facebook the order of the
16 witnesses that you're calling?

17 MR. ANDRE: I've just been
18 informed it wasn't discussed, Your Honor.

19 I think we can make -- what we
20 normally do is, the night before by six o'clock
21 or 6:30, we can disclose the witness and do it
22 that way and then it gives them proper time to
23 prepare for their cross-examination.

24 THE COURT: Looks like Mr. Rhoades

1 has a position.

2 MR. RHOADES: I'm not a big fan of
3 waiting to the list minute. We're perfectly
4 prepared to tell you the order. It's a short
5 trial. It's a week trial, and people have a lot
6 of things to do, and I don't want to see their
7 team working all night.

8 If they want to, we'll tell them
9 the order. If they want to reciprocate, fine.
10 If not, we'll do it the old-fashion way the
11 night before.

12 THE COURT: I'm going to make both
13 sides disclose the order of your witnesses by
14 6:00 p.m. tomorrow, so you figure out how to do
15 that with respect to one another.

16 For rebuttal witnesses, I may have
17 been reading too much between the lines as to
18 what Facebook's position is as to whether you're
19 trying to reserve the right to call someone live
20 in rebuttal who is not disclosed on your witness
21 list.

22 MR. RHOADES: No, Your Honor.

23 THE COURT: Well, you're not going
24 to be permitted to do that.

1 MR. RHOADES: We anticipated that,
2 Your Honor.

3 THE COURT: With respect to the
4 deposition designations, also perhaps I'm
5 overreading what the parties have put here.

6 Pursuant to my order, the maximum
7 possible deposition designations and
8 counter-designations are those that you have
9 highlighted for us in the submission you gave us
10 earlier in the week.

11 You're free to subtract from that,
12 but you're not going to be adding to that.
13 Okay. Everybody understands that.

14 In terms of -- since we need to
15 get you rulings on objections, we had talked
16 about you would let the Court know
17 forty-eight hours in advance of when you intend
18 to offer the deposition testimony so we can get
19 you rulings on exhibits.

20 Of course today is Friday. We may
21 get to some witnesses on Monday, so I do want to
22 know by Saturday what witnesses you may offer in
23 deposition on Monday, and by Sunday what
24 witnesses you may offer in deposition by

1 Tuesday.

2 I'm going to leave it to counsel,
3 I think, to confer with my courtroom deputy
4 after the hearing, perhaps e-mail to chambers
5 may be the best way to get in touch with us on
6 that sort of last-minute thing.

7 Let me turn to what are identified
8 as outstanding matters in the amended pretrial
9 order. Starting first with Leader, and I'm on
10 page seven of the amended pretrial order.

11 The first issue was the 282
12 disclosure. I already dealt with that.

13 The next issue is whether Facebook
14 can discuss changes to Facebook's website and
15 its architecture. That is, recent changes, and
16 I agree with Leader that Facebook is not to do
17 that.

18 The next issue is whether Facebook
19 can introduce exhibits relating to the
20 reexamination that may still appear on
21 Facebook's exhibit list. I agree with Leader
22 that Facebook cannot do that.

23 The next is whether Facebook can
24 discuss or use exhibits of Leader to Leader

1 after December 10, 2002. I believe Facebook has
2 withdrawn any suggestion that it was going to do
3 that, so I agree with Leader on that.

4 Next, whether Facebook's fact
5 witnesses can offer expert testimony or discuss
6 patents issued to Facebook. I already discussed
7 that in passing, a fact witness can mention that
8 Facebook has patents.

9 Next, whether Facebook can offer
10 testimony or exhibits regarding Leader's attempt
11 to obtain financing. I've already addressed
12 that as well.

13 Facebook's outstanding matters in
14 summary judgment motions, I addressed.

15 Exhibits relating to copying and
16 hacking. I addressed that.

17 References to movies, books, et
18 cetera. We addressed that.

19 And finally, undisclosed expert
20 testimony. I'm sure you all recall what our
21 order has been with respect to that: If anybody
22 believes that expert testimony is being elicited
23 that goes beyond the scope of what was disclosed
24 in the expert reports, you can note that

1 objection during the trial. We'll brief that
2 objection following trial. If you prevail on
3 that objection and a new trial is necessary,
4 then the party offering the improper testimony
5 will be paying costs for that second trial.

6 Let me pause now before I take up
7 a number of what I consider littler matters and
8 see if there are issues the parties want to
9 address at this time.

10 Ms. Kobialka?

11 MS. KOBIALKA: Thank, Your Honor.

12 I just want to get some clarification with
13 respect to our objection that we had made about
14 the prior art references and the 102(b) issues
15 raised with respect to the demonstrations and
16 offers for sale.

17 I understand that they were
18 overruled; however, there's got to be some limit
19 in the scope with respect to what we're talking
20 about because they can't just introduce any
21 prior art that has hasn't been previously
22 disclosed.

23 What we had specifically asked for
24 was, at least with respect to the anticipation

1 and obviousness references, that has to be
2 limited to what their expert was going to
3 testify on, so what's been disclosed within the
4 four corners of the expert report with respect
5 to those issues.

6 And then on the offers for sale
7 and the demonstrations, those should be limited
8 to the interrogatory responses they provided to
9 us on April 19, where they had specifically
10 identified some parties.

11 With respect to the offers for
12 sale, they had three specific entities they had
13 identified as allegedly receiving offers for
14 sale of the patented technology, and with
15 respect to demonstrations, I believe they listed
16 forty-nine different parties.

17 This morning, we received a
18 supplemental interrogatory response we just got
19 at 10:00 a.m., which I haven't reviewed it
20 carefully, but it appears to be listing other
21 parties that supposedly got offers for sale and
22 demonstrations that were not disclosed
23 previously.

24 This goes to the heart of trying

1 to understand what they are permitted to put in.
2 There is a number of potentially alleged prior
3 art references they have listed on their exhibit
4 list. We don't think it's appropriate to not be
5 put before the jury, especially if their expert
6 has testified with respect to anticipation or
7 obviousness, and then we also have this issue
8 with respect to the offers for sale and
9 demonstrations.

10 THE COURT: Let's hear from
11 Facebook on these issues.

12 MS. KEEFE: With respect to
13 anticipation and obviousness, Your Honor, I
14 think it's clear we know that it's what our
15 expert talked about, and those references have
16 been disclosed, and that's fine.

17 With respect to the offers for
18 sale and demonstrations, the reason that we had
19 to give a supplemental interrogatory response
20 this morning was because Mr. Zacks's deposition
21 -- if you recall this was one of the late
22 depositions based on the NDAs, based on further
23 discovery you allowed us to do -- during his
24 deposition, he talked about other offers for

1 sale, and we just received his declaration
2 yesterday regarding authentication of certain
3 documents.

4 So based on that, we provided a
5 supplemental interrogatory response today that
6 goes to those offers for sale and those
7 demonstrations.

8 So that's what this is about.
9 There's not going to be any surprise. There's
10 no offer for sale or demonstration that they
11 don't know about. These are all things that
12 were in their control the entire time.

13 THE COURT: How many offers for
14 sale does that leave us with now? I understand
15 there were three. Now there are how many that
16 are part of your case?

17 MS. KEEFE: If you give me one
18 second, I'll get the list for you, so we're down
19 to --

20 For demonstrations actually.
21 Sorry. You asked offers for sale.

22 For offers for sale, one, two,
23 three, four, five, six, seven, eight.

24 THE COURT: And is it correct that

1 it was three prior to today's supplemental
2 interrogatory response?

3 MS. KEEFE: I'm trying to figure
4 out how to answer that question. There were
5 three that were in our motion to leave to amend
6 regarding inequitable conduct. They were always
7 listed as possible offers for sale to everyone
8 who had signed an NDA. They were always in the
9 case in the interrogatory that way, so I'm not
10 sure how to answer that question because they
11 have always been in the case.

12 THE COURT: And you anticipated my
13 next question was going to be on the
14 demonstrations, and that will require more
15 counting because it was represented that it was
16 forty-nine.

17 MS. KEEFE: The demonstrations are
18 difficult. In terms of very specific
19 demonstrations with named people, I can take it
20 down lower than forty-nine in terms of named
21 persons.

22 One of the problems with the
23 demonstrations is that each of the NDAs that
24 were signed -- you won't be hearing a thousand

1 names.

2 By the same token, we want to be
3 able to ask questions about -- not submit
4 documents regarding, but ask questions about the
5 fact that Mr. McKibben participated in
6 potentially hundreds, definitely potentially
7 thousands, of demonstrations with each of the
8 persons who signed NDAs, and that's testimony we
9 want to be able to explore with Mr. McKibben.

10 So in terms of named
11 demonstrations, I have eighteen.

12 THE COURT: And what's your
13 response to the contention that this is an
14 unfair last-minute surprise?

15 MS. KEEFE: It's absolutely not,
16 Your Honor. This is something that the parties
17 have been actively conducting discovery into.
18 We've been actively discussing, describing --
19 and all of this evidence is within their
20 control. We're only using their documents.
21 We're not using documents from the third parties
22 who received the demonstrations. These are
23 documents from Leader and testimony from
24 Mr. McKibben.

1 THE COURT: Okay. Thank you.

2 MS. KOBIALKA: Thank you, Your
3 Honor.

4 Let me address a couple things.
5 When we start talking about the demonstrations,
6 if you recall we previously briefed out the
7 issue that we had produced all of the Power
8 Point presentations -- I think there were
9 something like over 500 of them -- long ago, and
10 they didn't raise this issue until late in the
11 case.

12 If I take a quick look at their
13 supplemental interrogatory number four, they
14 have listed out a number of parties -- like I
15 said, I haven't had a chance to review it -- but
16 a lot of them -- a lot of them are ZLG
17 designation, and that is a third party, and this
18 is Mr. Zacks who had his deposition on June 10th
19 and another one shortly after that to finish up,
20 authenticate documents, shortly after the
21 July 4th weekend.

22 So most of the information that
23 what I believe that -- the parties they've
24 identified which are new and alleged offers for

1 sale were based on an alleged deposition that
2 was done June 10th. They had plenty of time to
3 supplement the interrogatory response to
4 identify those specific parties.

5 We had a pretrial conference, and
6 we mentioned at that time there was a problem.
7 They hadn't provided their 282 disclosure, and
8 they still haven't provided that information, so
9 today we're now getting for the first time these
10 new alleged offers for sale that they never gave
11 notice for.

12 And there's a reason you have the
13 statutory requirement, and it's specific to
14 invalidity, that you have to provide a
15 disclosure to the opposing party to be sure
16 there isn't an unfair surprise.

17 There isn't a statutory
18 requirement for infringement or damages or
19 anything else. You can't ignore this particular
20 requirement, and that's the reason why it is the
21 practice of trial lawyers on these patent cases
22 to not only serve parties with this particular
23 disclosure but file it with the Court, and
24 that's a common practice everyone does to make

1 sure there are no mistakes about what the issues
2 are going to be.

3 With respect to the offers for
4 sale and the demonstrations, this is an
5 important issue.

6 The other problem I'm having is,
7 they don't have a witness to offer the documents
8 in evidence. I believe at the previous pretrial
9 conference, you said you have to have a witness
10 to offer some of this into evidence.

11 If I look at some of these
12 third-party documents they're attempting to use
13 to support their allegation, I don't know how
14 they're going to get it in. All they got was a
15 declaration from Mr. Zacks saying it was
16 authentic.

17 They can't get it in because it
18 would be hearsay. He can't testify about those
19 documents, among other reasons. So the notion
20 they suddenly got an authentication from
21 Mr. Zacks supposedly authenticating these
22 documents is problematic for a wide range of
23 reasons at this point.

24 THE COURT: Well, I recognize

1 you've just seen their supplemental response,
2 but it was represented to me that all of the
3 documents came from you all, or at least that
4 they were within your possession and control. I
5 don't know whether you produced the copies of
6 them or not, but that's incorrect?

7 MS. KOBIALKA: That is incorrect
8 because the documents that Mr. Zacks had,
9 Mr. Zacks was a former lawyer for Leader and is
10 currently in litigation with Leader. He's not
11 somebody that Leader had custody and control
12 over.

13 A lot of the documents I'm looking
14 at in the interrogatory response -- I'm happy to
15 show them to you -- have a ZLG designation,
16 which represent documents they got from him,
17 which were produced in early June.

18 Once again this was something they
19 could have disclosed long ago. That's what
20 we're going to take issue with. They have, I
21 believe, it's five new parties they're claiming
22 offers for sale. It may be eight new parties.
23 I'm not sure where she's getting the number
24 from. I can't tell from this disclosure that

1 they provided.

2 This goes to the heart of it. We
3 start trial on Monday, and we should have been
4 entitled to the information previously.

5 THE COURT: Let me hear response,
6 particularly on whether these are third-party
7 documents or not and whether they're going to be
8 admissible at trial.

9 MR. RHOADES: Your Honor, two
10 things. One is, I will be cross-examining
11 Mr. McKibben. I would like to have the
12 opportunity to inquire him of the practice of
13 these NDAs, what they were representative of. I
14 will not go through forty-nine examples.

15 You've given us a fifteen-hour
16 clock. I understand Mr. Zacks was their lawyer.
17 These documents were within their custody and
18 control because he was acting as their counsel
19 during the time period.

20 I think what we've got here is a
21 little bit of much ado about nothing. This is
22 not going to be a big part of the case in terms
23 of time, but we are going to be soliciting
24 evidence to show that for '99, 2000, 2001, 2002,

1 he was in the market demonstrating his product
2 and offering it for sale.

3 I intend to do it more anecdotally
4 rather than Party X, who did you speak to. It's
5 not going to be that kind of examination.

6 Thank you, Your Honor.

7 THE COURT: Here's where we are on
8 this. I'm going to need to hear further from
9 the parties on this issue, and I'll tell you how
10 we're going to do that in just a minute.

11 First, with respect to the notice
12 of the prior art that's the basis for
13 anticipation and obviousness, I heard from
14 Facebook that they understand they're limited
15 there to what has been disclosed in their expert
16 report, and certainly I'm going to hold them to
17 that.

18 On offers for sale and the
19 demonstrations, at this point I'm limiting that
20 evidence to the information that was disclosed
21 prior to the most recent supplement, the one
22 that's represented to me was received last night
23 or today.

24 If Facebook wishes to use evidence

1 beyond that, then you're going to need to file a
2 three-page letter. We'll call it a motion to
3 admit. Get it to me by ten o'clock tomorrow
4 morning. If you do that, Leader has a chance to
5 respond with a three-page letter by ten o'clock
6 Sunday morning.

7 And we'll confer with the
8 courtroom deputy on how to get those to us by
9 e-mail if you do file them under seal. If you
10 file them publicly, we'll see them through ECF.

11 Leader, other issues you'd like to
12 raise at this time?

13 MR. ANDRE: One is a housekeeping
14 matter regarding sequestering of witnesses.

15 Obviously Mr. McKibben is going to
16 be sequestered. I'd like to have him here
17 during open statements so I can introduce him,
18 but I didn't know if we were going to have
19 sequestration during opening statements or not.

20 THE COURT: I recall we had a
21 dispute on whether he was going to be at the
22 table. I take it he's not going to be at the
23 table for length of the trial.

24 MR. ANDRE: He won't be at the

1 table the length of the trial. As soon as we
2 finish opening statements, as soon as we finish
3 that, we ask him to leave the room and come back
4 at the time of his testimony.

5 THE COURT: Objection?

6 MR. RHOADES: Yes, Your Honor. I
7 would object. If the witness is to be
8 sequestered, that the witness should be
9 sequestered during my opening statement.

10 THE COURT: He can be present for
11 his own attorney opening statement?

12 MR. RHOADES: I assume he's heard
13 things. Unless counsel is going to refer to
14 materials that would be covered by some kind of
15 confidentiality that would be inappropriate for
16 him to hear, I will not object to him sitting
17 through his own opening statement.

18 But I think if he's sequestered,
19 he should be sequestered for our opening
20 statement thereafter. Frankly, Your Honor,
21 given how short the trial is, I assume he's
22 going to be on direct, and we're going to cross
23 him, and I assume what I'm hearing is they're
24 going to stand on ceremony and insist that we

1 follow or adhere to the rules of scope.

2 That doesn't make sense to me.

3 Personally I would proffer to the Court that it
4 makes more sense to get the witness on and off.
5 I'll leave that to Your Honor's discretion.

6 THE COURT: Mr. Andre, where does
7 this leave us? Did you want him here to hear
8 Mr. Rhoades's opening?

9 MR. ANDRE: I just want to
10 introduce him to the jury at the time.

11 THE COURT: Then I take it that
12 you are reserving the right to call Mr. McKibben
13 more than once and/or require Facebook to call
14 him separately; correct? That's the reason he's
15 not at the table?

16 MR. ANDRE: As we discussed in a
17 previous pretrial conference, that's correct.

18 THE COURT: That's fine.

19 MR. ANDRE: With respect to
20 opening statements, since we're on the topic,
21 the parties exchanged proposed demonstratives
22 for opening statements last night, and we have
23 serious issues regarding counsel's opening
24 statement.

1 There are sixty-eight static
2 slides, over a hundred Power Point slides built
3 up on it. As the Court is aware, the purpose of
4 opening statement is a limited statement to talk
5 about what the parties tend to prove. It's the
6 facts they're going to show in trial.

7 Counsel's opening statement is
8 replete with instructions on the law. They talk
9 about what the law is and how -- basically
10 taking Your Honor's role here. What is the
11 burdens of proof and what does that mean, what
12 is infringement. They talk about claim
13 construction.

14 As Your Honor is aware, there's
15 multiple Supreme Court cases, Third Circuit
16 cases, that talk about the idea of an opening
17 statement is limited to a general statement of
18 facts which are intended to be proved, not a
19 place to discuss the pertinent law, and that's
20 U.S. versus De Rosa, 548 F.2d 464.

21 There's also a case in the Seventh
22 Circuit Schwartz versus Systems Software, 32
23 F.3d 284, Seventh Circuit.

24 Obviously there's also a great

1 deal of argumentation in counsel's opening
2 statement as well. It looks more like a closing
3 statement to be frank. There's a lot of
4 argument going on. They talk about the ultimate
5 conclusion of the law and put in certain
6 demonstratives that are prejudicial at this
7 stage in the case.

8 There is a Supreme Court case
9 talking about no argumentation: U.S. versus
10 Dinitz, 424 U.S. 600; and Arizona versus
11 Washington, 434 U.S. 497, 1978.

12 Once again, these are limited
13 purposes. I don't know how to cure this. I
14 count sixty-eight static slides over 100 slides,
15 if you count the number they build on. Over
16 sixty percent are objectionable on these
17 grounds. They talk about claim construction.
18 They talk about burdens of proof.

19 THE COURT: Did they get the law
20 wrong in your view, or you don't want them
21 addressing the legal standards in front of the
22 jury at the opening?

23 MR. ANDRE: I don't know what
24 they're going to say. They got the law regard

1 claim interpretation. I think they are
2 misinterpreting -- they use the Court's order in
3 the opening slides, and they quote from that,
4 but then they apply that to the claims, and that
5 is misapplied to the claims in my opinion.

6 And they talk about they have a
7 figure of the preliminary jury instructions.
8 They're pointing things out from the preliminary
9 jury instructions.

10 They talk about the burdens of
11 proof that the parties will be talking about.
12 Obviously that's an issue Your Honor will read
13 to the jury, and it's an issue we have been
14 discussing and debating.

15 With respect to argumentative
16 issues, they put in certain issues regarding --
17 for example, to prove infringement, you have to
18 knock down these ten bowling pins, as if there
19 are ten claim elements in the claims, which
20 there are not.

21 And there's issues in the bowling
22 pins that are not in the claims.

23 THE COURT: Let me hear briefly
24 from Facebook on this, please.

1 MR. RHOADES: Your Honor, no one
2 disputes that an opening statement should not be
3 argumentative. No one disputes that if it is
4 argumentative, you will be on my back, and there
5 will be objections.

6 I do want to, with the Court's
7 permission, quote from the instructions you're
8 going to give verbatim because I think as you
9 instruct in your preliminary jury instructions
10 on page ten, quote, "Opening statements are
11 intended to explain to you what each side
12 intends to prove and are offered to help you
13 follow the evidence."

14 And that's what I want to do. I
15 want to show them what we intend to prove, what
16 we think the evidence will show them, and in
17 some instances, I want to show them what the
18 provisional application says and what the final
19 one says.

20 I'm not allowed to argue what it
21 means. I'm not allowed to argue how they should
22 review the evidence.

23 But I'm entitled to lay out my
24 evidence and to suggest methodologies buy which

1 they should assess the evidence as it comes to
2 them through the course of the trial. That's
3 all we propose.

4 With respect to metaphors and
5 analogies for how to think about the evidence,
6 I've used everything from Zen rock gardens to
7 archaeology sites. Maybe it's just me he's
8 objecting to.

9 With respect to the law, the law
10 I'm going to quote is from your instructions
11 verbatim, and with respect to the Markman order,
12 that is how the Court has construed the claims,
13 and I think we're entitled to show that to the
14 jury.

15 THE COURT: Thank you.

16 Mr. Andre, do you have anything
17 you want to add?

18 MR. ANDRE: Your Honor, he's not
19 trying to give the ultimate legal conclusion,
20 and just look at the slides. The titles of the
21 slides are pretty self-apparent, where they talk
22 about the proposal to sell the Wright-Patterson
23 Air Force Base, they talk about the language is
24 identical between the prior art and the 761

1 patent, so this is the ultimate legal
2 conclusion.

3 The fact of the matter is opening
4 statements are not meant to be tutorials and
5 presentations of this nature. I think this is
6 extremely prejudicial.

7 We have one demonstrative that we
8 proposed in our opening statements, a timeline.
9 They objected to a few issues on the timeline as
10 well. At this point if the parties can't come
11 to resolution on this type of prejudicial
12 activity, we eliminate all demonstrations,
13 whether they be exhibits or demonstratives.

14 This is prejudicial, and counsel
15 give opening statements and no showing exhibits
16 or demonstratives.

17 THE COURT: Mr. Rhoades, I need to
18 know, are there objections to the proposed
19 demonstratives from Leader that they intend to
20 use in their opening statement?

21 MR. RHOADES: A very minor one.
22 In the proposed timeline, they list as
23 December 2002 -- they say patent application.

24 The patent application was filed

1 in December of '03. I don't know if the '03 is
2 a typo or whether they need to add the word
3 "provisional."

4 THE COURT: That's your objection?

5 MR. RHOADES: That's the
6 objection.

7 THE COURT: Mr. Andre, I assume
8 you're going to clarify that with respect to
9 your exhibit; correct?

10 MR. ANDRE: I'm willing to do so,
11 Your Honor. I think it's accurate this way it
12 is, but if it gets us over the objection, that's
13 fine.

14 THE COURT: Let's either add the
15 word "provisional" or make the date correct.

16 MR. ANDRE: I think the
17 provisional patent application is a patent
18 application in 2002. That doesn't hurt me at
19 all.

20 THE COURT: With respect to your
21 objections to Facebook's proposal, I'm going to
22 have to take a look at what Facebook has
23 proposed to.

24 It appears that Mr. Andre has a

1 copy of it. Pass it up to me, and we will get
2 back to you sometime prior to the opening
3 statement on Monday.

4 MR. ANDRE: And just for
5 clarification, Your Honor, this is a PDF
6 conversion of what they did. They have
7 overlays. We couldn't print out as they --

8 THE COURT: Let me ask the
9 Facebook folks, do you have any doubt this is
10 what I should be looking at?

11 MR. RHOADES: No, Your Honor. I'm
12 happy to provide the actual in realtime what it
13 looks like, we could e-mail that or send a thumb
14 drive over.

15 THE COURT: Looks like you have it
16 right there. We'll take the hard copy and PDF
17 version.

18 MR. ANDRE: Just so the record is
19 clear, that is the order it was produced to us.
20 I think they scrambled it intentionally. They
21 -- it's completely out of order, and we know it
22 is. We couldn't put it in any order that we
23 think could be accurate. That's how it was
24 produced to us.

1 THE COURT: We'll take a look at
2 both versions and get back to you.

3 MR. RHOADES: To make your life
4 easier, if it helps everybody, I'll take all the
5 titles off.

6 And with regard to the bowling
7 pins, I'll take all the words off the bowling
8 pins. I just want to use the idea of bowling
9 pins as a metaphor. If the Court finds that
10 argumentative, I'll come up with another one.
11 It's the idea that you have to find every part
12 of claim language is what I'm trying to drive
13 at.

14 THE COURT: Other issues from
15 Leader?

16 MR. ANDRE: Your Honor, those are
17 examples I gave.

18 THE COURT: I understand. You
19 object to the -- essentially the entirety of it.

20 MR. ANDRE: Like I said,
21 sixty percent of it, and I could identify the
22 slides if Your Honor is inclined.

23 I think that is all we have at
24 this point. I think we've handled the

1 demonstratives and the deposition play. We
2 found playing our first deposition on Tuesday,
3 and we'll work with your clerk as a way to get
4 the designations to you.

5 THE COURT: I think you said
6 earlier there are some exhibits you don't have.

7 MR. ANDRE: This goes to the idea
8 of the expert report, the expert, Dr. Greenberg
9 relied on the I-Manage user manual, and he used
10 that as prior art that he used for anticipation
11 and obviousness, and he gave a claim chart on
12 that.

13 He makes a passing reference to
14 the user manual describes how the software
15 works. The software was never produced to us in
16 this case. We asked Dr. Greenberg at deposition
17 had he ever seen the software, did he rely on
18 it.

19 He said he had never seen it,
20 never operated it. He had not relied on it for
21 his opinion.

22 When we got their exhibit list,
23 there was an exhibit for the I-Manage software.
24 We don't know if it's the same version. I have

1 no idea what this is.

2 We asked them to take it off the
3 exhibit list saying they could not use the
4 software in court to demonstrate it. They could
5 use the manual only because that's what
6 Dr. Greenberg relied upon, and we still have not
7 received a copy of that software.

8 They have refused do so and stated
9 that they believe the software is fair game and
10 plan on using it. I assume they want to use it
11 with Dr. Greenberg, which would be something
12 outside his expert report and outside his
13 deposition testimony.

14 We would like to preclude them
15 from bringing the software in. Our expert did
16 not have a chance to review it or rebut it and
17 use it as well. At this late stage, that would
18 be prejudicial to come up. That's the issue we
19 have with the software.

20 MR. RHOADES: We're not going to
21 use the software. I think it was a reference in
22 the report, but we're not going to use the
23 software he's concerned about.

24 THE COURT: Okay. Fine.

1 Something else, Mr. Andre. You
2 might want to ask for more.

3 MR. ANDRE: I'm going to call him
4 instead.

5 There's an issue, and we -- the
6 internet connectivity. I don't know if we were
7 able to get that.

8 THE COURT: Tell me what it is
9 that you want and why.

10 MR. ANDRE: We're trying to get
11 the internet in this courtroom. We have some
12 Sprint cards and Verizon cards. We could try to
13 do it wirelessly.

14 I think the parties will want to
15 show the Facebook website in action, and you
16 have to go on the internet to do so. That's in
17 our expert report. We have screenshots and
18 whatnot, how that's demonstrated with the site
19 itself with the internet connection. I don't
20 know if there's a policy with that.

21 THE COURT: There's a way to show
22 it without a live connection?

23 MR. ANDRE: If need be. We would
24 not be able to show certain aspects of the

1 functionality of the site. We could do it, but
2 that would not be the way we prefer.

3 Maybe our cards will work, the air
4 cards, whatever. But I don't know if the Court
5 had any policy about us tapping into the
6 internet.

7 THE COURT: Pretty much we have a
8 policy that you don't do it.

9 MR. ANDRE: We couldn't find a
10 policy.

11 THE COURT: I'm not telling you
12 it's written down, but what is Facebook's
13 position on this?

14 MR. RHOADES: Your Honor, last
15 time I was in Delaware for trial, it was
16 December, and now it's July. I'm getting the
17 best of your weather. We had this issue in
18 December.

19 My view is that if you have a live
20 internet connection in the courtroom, and you
21 walk a witness through it, it's difficult to
22 capture that from an evidentiary standpoint. I
23 would object to it I think they could offer
24 boards or testimonial support to get to the same

1 place.

2 THE COURT: Okay. We're not going
3 to have a live connection, so do your best
4 without it.

5 MR. ANDRE: Your Honor, it's okay
6 if we can manage it ourself for demonstration
7 purposes? If we could pull a net card --

8 THE COURT: We're not going to
9 have a live internet connection. You'll present
10 your case based on some sort of fixed data that
11 has been produced and is part of this case.

12 What the Facebook website looks
13 like on July 19, 2010, is not what -- we're not
14 going to be able to display that in live terms
15 to the jury.

16 MR. ANDRE: The reason we're
17 asking for it, Your Honor, is not to display the
18 website. It's to show the function calls in the
19 files.

20 Our expert in his expert report
21 talked about when you ask the website to do
22 something, it will call the file, and you can
23 show that file being called, and that's in his
24 expert report, is a file showing infringement.

1 THE COURT: You must have a way of
2 doing that without getting on the internet.

3 MR. ANDRE: I'll ask my tech
4 worker here.

5 Mr. Hannah informs me there's no
6 way of doing it because of the way the files are
7 pulled. There's no physical copy or
8 reproduction you can do to show that.

9 We intend on showing the source
10 code obviously, and the source code is not the
11 compiled code which would be implemented to show
12 the site working. We don't have the compiled
13 code. We asked for it, but the Court overruled
14 our request to get that.

15 We have the source code and the
16 technical documents. What we were trying to
17 show was the machine-readable code in action.
18 We have a claim to machine-readable code as
19 well. We want to show that is the
20 machine-readable code in action.

21 To the extent we get the internet
22 up and running, we were going to do it with
23 controlled pages of our expert's pages. We
24 weren't going to go on the internet and shop

1 around.

2 THE COURT: I don't know what that
3 means, to control it to his pages, because you
4 did his expert report on a particular day, and
5 now we're at a different day, and my
6 understanding is Facebook's website changes all
7 the sometime.

8 MR. ANDRE: I see your point, Your
9 Honor.

10 THE COURT: You can confer, or
11 Mr. Hannah can come forward.

12 MR. HANNAH: Your Honor, the
13 source code module, those won't change. What
14 will happen, it will be a demonstration showing
15 the Facebook website and the actual function
16 calls that come in. Those have not changed.

17 When he shows those function
18 calls, those would be from the source code
19 computer the defendants have produced. It will
20 be the exact, same information, but it will show
21 there's a live way that you're able to get this
22 onto the computer, and that's required by the
23 claims.

24 The claims go to a web-based

1 computing platform, so it's necessary for him to
2 show this is on the web and able to be accessed.
3 Once you see that source code module come down,
4 the one that the jury will see is going to be
5 the one from April 1, 2010, which is the latest
6 snapshot of the source code.

7 THE COURT: I don't think it's in
8 dispute that Facebook is a web-based
9 functionality; correct?

10 MR. RHOADES: So stipulated, Your
11 Honor.

12 THE COURT: If we stipulate to
13 that fact, which probably the jury is going to
14 know anyway, why can't you work from a
15 standalone computer?

16 MR. HANNAH: There are disputes
17 depending on how certain source code modules
18 interact with each other.

19 Their non-infringement expert
20 says. The photoselect.PHP, photo.PHP, these
21 modules do not interact and become a context
22 component. Our expert is going to say this is
23 the context component. As you can see, you have
24 the option of uploading a profile picture, and

1 he'll click on that.

2 From that, he'll be able to show
3 the source code modules that are invoked, and
4 then he'll show the source code that is
5 demonstrated on the source code computer as of
6 April 1, 2010.

7 It is a demonstrative that will
8 used for the jury. We can't move the website
9 itself into evidence, but then they'll have the
10 technical documents and source code to explain
11 what's happening on the back end.

12 THE COURT: To the extent that's
13 your request, I'm overruling it. There's not
14 going to be internet functionality within the
15 courtroom.

16 The evidence is whatever you have
17 on the standalone computer and other
18 demonstratives you've put together, and we'll
19 read a stipulation to the jury or add it to the
20 jury instructions, if need be, that Facebook is
21 on the internet and is an internet-based
22 functionality.

23 If you need more than that, then
24 you're going to have a raise that issue with

1 counsel for Facebook and then present it to me
2 as we go forward, but we're not going to have a
3 live internet connection, wired, wireless, or
4 any other way in the courtroom.

5 MR. ANDRE: With that respect,
6 Your Honor, we can raise this when the time
7 comes.

8 We described we were going to do
9 that in his expert report. To the extent we
10 have to do an alternative way to try to show the
11 same thing, that may not have been disclosed.
12 This is to accommodate the fact we can't show --

13 THE COURT: If that's in your
14 expert report, obviously I don't know as I sit
15 here, then I may have to cut you some slack, but
16 you're going to have to work very closely with
17 Facebook over the coming days to figure out what
18 the way is to deal with this.

19 I'm surprised, frankly, that this
20 issue is coming up an hour-and-a-half into our
21 second pretrial conference if it really is
22 crucial to your case to have live internet
23 functionality during a trial when I believe it's
24 policy in this court that we don't have that.

1 Any issues Facebook wants to raise
2 at this time?

3 MR. RHOADES: Your Honor, with the
4 Court's indulgence, do you have any particular
5 logistical or housekeeping issues you would like
6 to talk with us about?

7 Do you want us to approach with
8 exhibits? How do you want us to address the
9 witness with regard to exhibits? Is there
10 anything in particular that we should know
11 mechanically about your courtroom before we
12 start on Monday?

13 And I would appreciate any
14 observations you care to give.

15 THE COURT: The only thing I can
16 say on that right now -- and I do have some
17 notes here that I'm going to get into which may
18 tell you some other things -- I do want counsel
19 to request leave to approach the witness, but
20 just once is fine. If you request leave the
21 first time, I'll grant it. You don't have to
22 ask every other time that you approach the
23 witness.

24 Let me tell you some other things

1 that are not necessarily directly responsive to
2 that question.

3 With respect to jury selection, we
4 issued the voir dire. As you will have seen,
5 I'm going to turn to counsel right from, I think
6 it's question number one, and direct you to
7 introduce yourselves, your colleagues, your law
8 firms, and all of your potential witnesses.

9 I then will read all of the
10 remaining questions, and I will indicate to the
11 potential jurors that they should raise their
12 hand if they have a yes answer to any of the
13 questions, but that's just to get a feel for how
14 many yeses.

15 Thereafter, we'll retire to the
16 jury room back here. Each side can send up to
17 three people with me and the court reporter and
18 my staff, and we'll bring the jurors -- any of
19 them who have raised their hand affirmatively in
20 response to any of the questions, we'll bring
21 them in one-by-one, and there will be colloquy
22 if necessary and any motions to strike for cause
23 once we know exactly what their concerns are.

24 After that we'll return to the

1 courtroom, and we'll pull eighteen jurors'
2 numbers of the group that have not been stricken
3 for cause. We'll put those eighteen in the jury
4 box, and then each side will get a chance to do
5 five peremptories, and then we'll end up with
6 the jury of eight.

7 On the preliminary jury
8 instructions, as you note, they have been
9 issued. We will be playing the FJC video.

10 We have it in VHS and DVD. If we
11 give you the copy on Monday, do I trust you have
12 the technological capability to press play at
13 the appropriate time? I'm seeing yeses.

14 And we received your proposed
15 final jury instructions. I do want to get a
16 submission of those in Word Perfect format.
17 Send that by e-mail to the courtroom deputy, and
18 try to get them to us by the end of the day
19 today.

20 An issue was raised in the
21 letters, I believe, about the timing of the
22 second or subsequent trials if necessary. What
23 I can tell you for sure is I intend to try the
24 whole remainder of the case prior to any appeal.

1 In terms of the specific timing,
2 that's a matter that we're going to have to
3 address after we see what happens at the first
4 trial, but I will very promptly solicit your
5 proposals as to how to proceed after we finish
6 with the first trial.

7 We talked about confidentiality
8 last time. I'm going to need the parties to
9 advise me ahead of time which are the witnesses
10 that you intend to use the source code with, and
11 who it is that's going to have to be cleared out
12 of the courtroom. Once you provide that
13 information to us by the 10:00 Sunday time
14 frame, and we'll do that probably by e-mail as I
15 indicated before.

16 On equipment, there was some back
17 and forth with staff about equipment. I think
18 that's all been resolved, Mr. Andre; correct?

19 MR. ANDRE: That is correct, Your
20 Honor. They'll be here 1:30 this afternoon to
21 set up.

22 THE COURT: On Monday, I plan to
23 meet with counsel at nine o'clock. My hope is
24 there won't be any issues to talk about. Just

1 in case there's anything to talk about, we'll
2 meet briefly at nine o'clock.

3 We'll bring the jury in around
4 9:30. I intend to make the lunch break
5 generally at 12:30 instead of 1:00, so that's a
6 change from what we talked about previously.

7 That's it on my list. Let me turn
8 to Mr. Andre again. Anything further at this
9 time?

10 MR. ANDRE: No thank you, Your
11 Honor.

12 THE COURT: And defense?

13 MR. RHOADES: I have a really dumb
14 one. Do you mind if we put the bottles of water
15 on the table?

16 THE COURT: I assume they're not
17 going to say "brought to you by Facebook."

18 I don't mind. Obviously do you
19 best not to spill.

20 Nothing else? Okay. All right.

21 We'll take a look at your proposed
22 opening. We'll get back to you on that. Confer
23 with my staff on how to get in touch with us
24 over the weekend for last minute things, and

1 we'll see you Monday.

2 Thank you.

3 (Everyone said, thank you.)

4 THE CLERK: All rise.

5 (Proceeding ended at 11:34 a.m.)

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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.

DEANNA WARNER

Professional Reporter and Notary Public