

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES,)	
INC.,)	
)	
Plaintiff,)	
)	C.A. No. 08-862-JJF-LPS
v.)	
)	
FACEBOOK, INC., a)	
Delaware corporation,)	
)	
Defendant.)	

Friday, March 12, 2010
3:31 p.m.
Oral Argument

844 King Street
Wilmington, Delaware

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

APPEARANCES:

POTTER, ANDERSON & CORROON, LLP
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-and-

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THE CLERK: All rise.

THE COURT: Good afternoon, everyone.

THE CLERK: Be seated.

THE COURT: Let's begin by putting appearances on the record.

MR. ROVNER: Do you mind if I do it from here?

THE COURT: That's fine.

MR. ROVNER: Phil Rovner from Potter, Anderson. And with me is Paul Andre and James Hannah from King & Spalding.

THE COURT: Welcome.

MR. ROVNER: Paul and James in person this time.

THE COURT: Yes, in person. They've only been a voice before.

MR. CAPONI: Steve Caponi of Blank Rome for Facebook. And with me is Ms. Heidi Keefe from White & Case.

THE COURT: The voice on the other end.

MS. KEEFE: It's nice to meet you.

THE COURT: Nice to meet you all

1 as well. Thank you for being here.

2 So we've got three matters
3 basically in front of us today. And the way
4 we're going to proceed is we'll first deal with
5 the issue of the common interest privilege.

6 And because the burden is on
7 Leader on that one, I'll hear first and last
8 from Leader. And then after we're done with
9 argument on that, we'll move on to the two
10 discovery issues.

11 And I'll give each side a chance
12 to address both of them as if we were on the
13 phone, except we'll all get to see each other as
14 we do it.

15 Okay. So let's begin on the
16 common interest issue, please.

17 MR. ANDRE: May it please the
18 Court, Paul Andre for Leader Technologies. Your
19 Honor, I think our briefs on this topic have
20 been very thorough. And I think we've covered
21 all that we wanted to cover.

22 I do want to point out to the
23 Court that Facebook doesn't dispute that the
24 documents in question are, in fact, privileged

1 and work product. That's not an issue for the
2 Court.

3 There's no reasonable dispute that
4 Leader entered into written agreements with the
5 litigation finance companies. There was some
6 argument in Facebook's briefing that appear that
7 there were documents exchanged before the NDAs
8 were signed.

9 That's not the case. The date of
10 the document was a little bit different than the
11 actual date of the agreement.

12 But they were sent by email after
13 everything was signed. So the evidence in this
14 case is shown conclusively that Leader insisted
15 upon a signed NDA before they could make any
16 type of confidential information to these
17 financing companies.

18 And then the third point we wanted
19 to bring up is that the common legal interest,
20 if there is a common legal interest, is really
21 the only issue for the Court to decide. We're
22 talking about a very small number of documents
23 that provided a very small number of companies.

24 And what we're claiming to be

1 privileged is even a narrower subject matter of
2 the documents we provided to these companies.
3 We're seeing about one very limited subject and
4 that is the merit of a potential litigation.

5 The only argument that Facebook
6 has to say that's not a common legal interest is
7 they say there's an arm's length negotiation.
8 Well, in every common interest agreement, you're
9 going to have some type of a negotiation. That
10 is just the nature of a common interest.

11 In this particular instance, those
12 documents that related to the commercial aspect
13 of the agreement have been produced. And
14 there's no privilege being asserted against
15 those. So we're only asserting the privilege on
16 the ones relating to the merits in the
17 litigation.

18 The fact that an agreement was
19 eventually commiserated at the end of the day is
20 of no merit.

21 THE COURT: Let's go back to the
22 negotiating at arm's length, because there are
23 at least three cases, I think, that are cited
24 that have specifically said it's that

1 negotiation at arm's length that precludes a
2 finding that there's a common legal interest
3 here.

4 Why should I not agree with those
5 cases?

6 MR. ANDRE: Well, there are also
7 cases that say otherwise. It's very
8 fact-specific instances.

9 THE COURT: Well, we only found, I
10 think, the Hewlett-Packard case that seemed to
11 go the other way. Are there other cases besides
12 that?

13 MR. ANDRE: I believe the case
14 from the Federal Circuit was also an arm's
15 length negotiation as well. I'm drawing a blank
16 on the name. It was In Re.

17 But any way, I'll find the case in
18 one second. But the fact of the matter is that
19 the agreements are signed. There's an agreement
20 entered into, so a portion, something has
21 already been agreed to by the parties before
22 they exchange documents.

23 So there is an agreement in place.
24 And maybe that agreement --

1 THE COURT: Right. But it's not
2 an agreement to actually finance.

3 It's an agreement to exchange
4 documents subject to confidentiality.

5 MR. ANDRE: That's the agreement.
6 Correct.

7 There is -- so there is an
8 agreement in place. That's essential in cases
9 because some of these other cases, there is no
10 such agreement in place that you're talking
11 about.

12 THE COURT: Let's talk about
13 Net2Phone. It was a little stunning to me that
14 you called it in opposite in your briefing, and
15 you attempted to distinguish it on this lack of
16 confidentiality agreement.

17 It seemed to me that what Judge
18 Schwartz was saying was not only is there no --
19 not only was the privilege waived because of the
20 lack of confidentiality, but on the prior,
21 logically prior question of: Is there a
22 privilege, she was also saying there is no
23 privilege, because there's no common interest
24 when you have a litigation financing company on

1 one side and, you know, an actual patent holder
2 on the other side.

3 I guess the questions are: Help
4 me to better understand, if you have any other
5 way of distinguishing, the Net2Phone decision.

6 You know, do I have to reach an
7 opposite conclusion from Judge Schwartz in order
8 to rule for you?

9 MR. ANDRE: Well, it is important,
10 too, Judge Schwartz did say there was no
11 confidentiality agreement in place. And I think
12 that is a distinguishing factor.

13 Because at that point, the parties
14 are exchanging without a belief that they have a
15 confidential-nature relationship, that they're
16 going to maintain that. In this particular
17 instance, both parties had a vigilant belief
18 that these documents would maintain the
19 confidentiality and privilege.

20 THE COURT: All right. But what
21 she wrote was that the interest shared between
22 IDT, which was the company that I think made a
23 tender offer for the patent holder, and GE,
24 which was the party that was negotiating for a

1 loan, they were going to finance the patent, the
2 interest was commercial and not legal.

3 As the purpose of the
4 communications during the negotiations were to
5 entice a third party to loan plaintiff money and
6 not to further a then shared legal interest.

7 Isn't she saying that they're sure
8 if there were a common interest and privilege,
9 she was going to say it was waived because
10 there's no confidentiality agreement? But it
11 seems in the portion I'm reading from, she's
12 also saying there is no privilege because there
13 is no common interest.

14 MR. ANDRE: In that particular
15 instance where Judge Schwartz has made that
16 decision, I think it is opposite to the public
17 policy. In this particular instance, common
18 interest agreements.

19 And I'll just give you an example.
20 If I have cases in the Eastern District of Texas
21 where I'm representing defendants against 14, 15
22 defendants, we sign a joint defense agreement
23 between all of us. We're all common defendants.

24 When those parties settled the

1 case, they no longer have a interest -- common
2 interest with us, but we expect the interest to
3 be maintained.

4 In a similar situation where
5 you're looking to do business with another
6 company and they're concerned about potential
7 litigation with this common interest issue come
8 in play. You're sending a product to a company
9 and they say, Listen, we want to know if there's
10 any patents out there that we need to be worried
11 about, because we don't want to be drawn into a
12 lawsuit by your product.

13 And in that particular instance,
14 they almost inevitably sign an NDA common
15 interest agreement to share certain information,
16 opinions of counsel, whoever it may be.

17 If Judge Schwartz's idea is that
18 the only way you can commis -- effect that
19 common interest is actually to do the deal at
20 the end of the day, which she seems to say that,
21 if they did consummate the deal, they did
22 provide the loan and that there was common
23 interest, it would shield the negotiations
24 between the parties. And that's against the

1 public policy and what the common interest is
2 all about.

3 THE COURT: What about the
4 suggestion that these litigation financing
5 companies all have to undertake their own due
6 diligence any way? They're not going to rely
7 just on what Leader's analysis is.

8 And so maybe you're overstating
9 the policy concern.

10 MR. ANDRE: Well, they would have
11 to do their own. And to the extent that they
12 want to talk to Leader's counsel about their own
13 analysis and compare notes, then that would be
14 an issue that these parties get into.

15 In fact, that is a very common
16 thing. That's the communications we're talking
17 about. We're talking about a company that has
18 the exact same common interest in one very
19 specific thing that Leader has.

20 They're going to finance the
21 litigation. We're going to assert the patent.

22 THE COURT: And what about the
23 fact that they don't have the actual interest at
24 that moment? You know, it's at best a potential

1 interest.

2 MR. ANDRE: Well, they have the
3 interest because that's their entire business.
4 I mean, when you look at the Judge Schwartz
5 case, you get GE, just another company that is
6 going to fund litigation, take some interest
7 into a patent case.

8 If you're looking at a company's
9 sole business, the funding of litigation, and
10 there's lots of these companies out there in
11 this world today because a lot of smaller
12 players can't afford litigation. It's just the
13 way it is.

14 That company's sole business is
15 funding litigation. When they enter into the
16 non-disclosure agreement with companies like
17 Leader, at that point, they have one very
18 limited common interest. That is the merit of
19 the litigation.

20 Now, the deals of the term sheets
21 and that kind of stuff are -- they have opposite
22 agreements. The financing company wants to get
23 more money for the return.

24 Leader would not want them to have

1 more money, and that's where their interests
2 diverge. But on the actual merit of the case
3 itself, those interests are identical, because
4 they're in the business of loaning to
5 plaintiffs.

6 The plaintiff has the interest in
7 the patent. They actually want that to go
8 forward. That's their entire -- they're not
9 looking to negate the deal.

10 So --

11 THE COURT: You certainly narrowed
12 the dispute. I agree with you, the issue is the
13 common legal interest.

14 Is there a common legal issue
15 interest there or is there not? That's the
16 issue I see as I see it.

17 And you're only asserting that
18 privilege with respect to three different --
19 three financing companies that you've had
20 communications with; am I correct about that?

21 MR. ANDRE: I believe there's four
22 and possibly -- we haven't seen documents from
23 the fifth one, but no more than a handful that
24 we're aware of.

1 THE COURT: Okay. And the number
2 of documents, is that clear yet?

3 MR. ANDRE: The Number 6
4 documents, you've seen two of them in the in
5 camera inspection. We provided you -- they're
6 essentially email communication where they are
7 talking about the case amongst the lawyers.

8 So the actual number of documents
9 are probably less than five as well.

10 THE COURT: And are you asserting
11 the privilege with respect to any document that
12 you've shared with somebody other than those
13 four or five companies?

14 MR. ANDRE: No, Your Honor.

15 THE COURT: Okay. So the issue is
16 narrow.

17 Tell me, as best you can, what the
18 prejudice is to Leader if you're ordered to
19 disclose these documents.

20 MR. ANDRE: Well, we give up our
21 privilege. I mean, the attorney-client
22 communication is one of the highest and should
23 be most protected sanctities.

24 THE COURT: Let's focus on the

1 practicality. If you're right on the legal
2 argument, then you're not going to have to give
3 it up. If you're wrong, you will have to give
4 it up.

5 What practical impact is there or
6 what burden?

7 MR. ANDRE: Not much, Your Honor.
8 The fact of the matter is these documents, they
9 talk about how great our patent is and how the
10 world infringes.

11 You know, if we do have to give
12 them up, then these are documents that are very
13 favorable to Leader at the end of the day.
14 These are not documents that talk about --
15 Facebook has argued that we made some admissions
16 about prior art, for example.

17 If you look at the actual
18 document, it said that the patent would have
19 been obvious in the 2004, 2003-2004 time period.
20 That was two years after we filed our patent
21 application and when Facebook launched.

22 We published on our White papers
23 on our website at that time. Of course, it
24 would be obvious. We published our data and

1 Facebook was out there.

2 So that's the "admission" they
3 talk about. There's nothing harmful in these
4 documents to Leader other than the fact that
5 they were not meant to be in the public realm.
6 They were not to meant to be used in the
7 litigation context. This was something that
8 Leader took a great amount of care to protect.

9 And we think that the care they
10 took from the signed NDA, the way they marked
11 the documents, the way they protected all their
12 documents of that nature is something that
13 should be protected by the Court.

14 THE COURT: Okay. Anything else
15 you wanted to add?

16 MR. ANDRE: That's all.

17 THE COURT: Okay. Fine.

18 All right. Let me hear from
19 Facebook on this issue.

20 MS. KEEFE: Thank you, Your Honor.
21 Your Honor has actually hit, I think, almost
22 directly on what I was hoping to stand up and
23 say, which is what happened to the Net2Phone
24 case and what Judge Schwartz had to say about

1 the common interest. But I'd like to back up
2 and just answer a couple or address a couple of
3 the points that Mr. Andre raised.

4 He said that this common interest
5 privilege is only being asserted with respect to
6 a very, very small handful of companies and very
7 small handful of documents. This is actually
8 part of what's been plaguing us with uncertainty
9 throughout this whole thing is that on their
10 privilege log, if Your Honor recalls, when you
11 asked Leader to identify where on the privilege
12 log these documents that Neyer had produced
13 existed, what they indicated were that there
14 were two lines on the privilege log where the
15 listing on the privilege log was document
16 created by Mr. McKibben at the request of
17 counsel.

18 Never indicated that had ever been
19 sent to a third party in any way. There are
20 scores of these entries that we assume were all
21 of these types of documents now.

22 So I think that that actually may
23 be a larger number. It's just something that's
24 been unclear to us.

1 Also, he's now saying that there
2 are only three to four, maybe five companies
3 with whom these documents were exchanged.

4 We had originally back in November
5 approximately 20 NDAs between Leader and
6 third-party investment companies. And we're
7 assuming there were documents exchanged between
8 those people because they had an NDA.

9 Earlier this week, Leader also
10 produced an additional 10,000 pages of
11 information which they say comprises 2,300 --
12 not which they say, but which from what we can
13 tell is about 2,300-plus further NDAs, over a
14 hundred of which are after the patent has
15 issued.

16 At least three of which -- because
17 I haven't had a chance to look at all of them,
18 but my people have been trying to scour through
19 them. At least three of which indicate that
20 they had something to do with possible
21 litigation financing or discussions of the
22 strength of the patent enforcement or
23 litigation.

24 I actually have copies of those

1 here if Your Honor wanted to see them.

2 So I'm just not sure what the full
3 scope of this is. I just wanted to note that
4 for the record and note that there may be more
5 here than we thought.

6 With respect to any of the other
7 arguments that were raised, Your Honor, we think
8 that the Net2Phone case directly addresses these
9 issues extremely well. And it does go to the
10 notion that this is not a common legal interest.

11 In fact, that point is reiterated
12 by the witnesses whose depositions we took
13 during the deposition of Neyer. Neyer actually
14 said outright that they did not believe that
15 their legal interests would ever align until
16 they signed an agreement to fund the litigation.

17 THE COURT: Let's talk --

18 MS. KEEFE: Go ahead.

19 THE COURT: And I read that in
20 your brief. Let's talk about the
21 Hewlett-Packard case in the Northern District of
22 California 1997 versus Bausch & Lomb, which I
23 don't think you address in your brief. It did
24 seem to be at least one case, if not the only

1 case, that found -- it seemed to find a common
2 legal interest in a situation like this.

3 MS. KEEFE: I think the
4 Hewlett-Packard case, Your Honor, is
5 distinguishable as Judge Schwartz even
6 acknowledged in her order. In the sense that in
7 that case, there was actually a threat of
8 impending legal action against both parties
9 where there could be an aligned legal interest,
10 something that they had to defend themselves
11 from together. And that was actually what was
12 really the legal interest that was being
13 invoked.

14 Here, there would be no common
15 legal interest. Facebook wasn't reaching out to
16 sue Leader and/or any of its investors, Leader
17 and some kind of insurance company or something
18 like that.

19 Rather, this was an arm's length
20 negotiation for a commercial purpose, which is
21 to see if money could be made and invested.

22 THE COURT: I think historically,
23 the common interest privilege has its roots in
24 the joint defense privilege. It may have arisen

1 originally in a criminal context. I'm not
2 certain.

3 MS. KEEFE: Correct.

4 THE COURT: But it certainly has
5 been expanded to apply to plaintiffs as well.
6 I'm not quite sure what you're suggesting should
7 be the distinction here.

8 Under Leader's view, they and
9 these third parties, had they consummated a
10 deal, would share the same interest in the
11 patent for purposes of litigation. And for that
12 matter, who's to say that Facebook wouldn't have
13 gotten around to finding this patent and sued
14 for declaratory judgment of invalidity, at which
15 point both the litigation financing company and
16 Leader would have had the same interest.

17 MS. KEEFE: I think Your Honor
18 made the most important point when he said had
19 they consummated the relationship. Until a
20 relationship is consummated, there is no joint
21 legal interest.

22 I'm not saying that plaintiffs,
23 co-plaintiffs can't have a joint legal interest
24 in a case. I'm not saying that co-potential

1 D.J. defendants can't have a joint legal
2 interest.

3 What the HP case had, though, were
4 two parties who were facing a common adversary
5 with a possible imminent legal threat. In this
6 case, until such time as the parties agreed to
7 enter into a financing arrangement, they are not
8 jointly aligned.

9 And, in fact, Northwater -- very
10 interesting part of the deposition that took
11 place with Northwater. At one point we asked
12 Northwater's representative about what kinds of
13 documents he expects to see during cases like --
14 during negotiations like this. And he said
15 that, you know, usually it's the patent. And we
16 ask a few questions and then we go off and do
17 our own due diligence.

18 And he was actually quite
19 surprised to see the level of documentation
20 provided by Leader, because they're off doing --
21 you know, Northwater was used to doing its own
22 investigation.

23 So to Mr. Andre's point about
24 somehow squelching the fact that, you know, this

1 can't happen and people won't invest in
2 litigation, I think that's absolutely not true.
3 These investment companies, these litigation
4 investment houses are very familiar with doing
5 their own due diligence with factual scenarios.

6 And they're very accustomed to the
7 fact that the attorney-client privilege is so
8 narrow that if waived by disclosure to a third
9 party, before there is an absolute common legal
10 interest, results in discoverable information.

11 THE COURT: In the Hewlett-Packard
12 case, the judge there was very concerned about a
13 lot of policy implications. And you just dealt
14 with one about essentially whether these
15 litigation financing companies could continue to
16 survive with the ruling in their favor.

17 But one thing that was important
18 to the judge there was that there was no
19 evidence of sort of an unfair use by the parties
20 asserting privilege. They weren't trying to use
21 the privilege as a sword and a shield.

22 Do you have any argument that what
23 Leader's trying to do is in some way unfair
24 here?

1 MS. KEEFE: Your Honor, it feels
2 unfair. And the reason it feels unfair is, as
3 we've kind of gone through this process of
4 trying to determine what these documents are,
5 how they're protected, why they were logged, how
6 they were logged, we've often heard reference to
7 whether or not these documents were relevant.
8 And the fact that numerous ones of these
9 communications were never even logged because
10 they were deemed not to be admissible or not to
11 be relevant.

12 And it was only through kind of
13 accidentally in some cases finding some things
14 and then pursuing that, and then subpoenaing the
15 third parties that we actually found out what
16 these documents were and where they existed.

17 So to me, it does feel unfair in
18 the sense that also looking at the log, we would
19 have never even known that documents had been
20 disclosed to third parties and that there was a
21 common interest being asserted until Your Honor
22 asked for the next three steps to go forward,
23 and until we were actually here today.

24 And just because I haven't had a

1 chance to review all of the additional NDAs that
2 have been produced, I am not sure if there's not
3 even more there.

4 THE COURT: And what about the
5 separate policy argument that a ruling in your
6 favor would help push patent lawyers even
7 further along the line of being concerned with
8 each other's work and not on what, I think, the
9 California judge referred to as, you know, the
10 actual facts of the patent itself?

11 MS. KEEFE: I'm not a hundred
12 percent sure I understand Your Honor's question.

13 THE COURT: It was something to
14 the effect of, you know, why are we all so
15 concerned about what's in the minds of opposing
16 counsel? Why aren't we more concerned with, you
17 know, what's in the patent, what's in the
18 prosecution history, that sort of thing?

19 MS. KEEFE: Well, in this
20 particular case, at least one of the reasons
21 that we're incredibly concerned about what's in
22 those documents is because Mr. McKibben himself,
23 the inventor, is the one that authored at least
24 two of -- the only two documents that we've

1 actually seen so far, he authored.

2 And according to the witnesses who
3 we have subpoenaed, it was Mr. McKibben, in very
4 large part, who was conducting all of the
5 communications with the third-party financing
6 companies. There were some communications with
7 the outside lawyers.

8 And, in fact, a lot of those, Your
9 Honor, didn't have documents generated. A lot
10 of these were exactly, as we talked about last
11 time, where someone said, Okay. Let's sit in a
12 room and talk about this. And then the
13 discovery would have to take place via
14 deposition or some other form of thing.

15 So here especially I think that
16 there is a concern about what the inventor of
17 the patent is putting out there as what he
18 believes to be the scope of his case, the scope
19 of his patent and to see, frankly, if others are
20 challenging.

21 One of the other things that we
22 actually haven't addressed yet, but another
23 relevance to all of these documents, one of the
24 issues in this case is whether or not the patent

1 is valid. One of the ways we would prove that a
2 patent was invalid is by showing that there's
3 prior art, and that renders the patent obvious.

4 Leader has the option, which they
5 have not, you know, said they're not going to do
6 of showing the patent to be non-obvious by going
7 to what are called secondary considerations of
8 non-obviousness. One of those is industry
9 acceptance of the patent or industry rejection
10 of the patent.

11 If, in fact, Leader were out
12 selling the patent to dozens of people, all of
13 whom rejected it, that very well may go to
14 industry rejection of that patent. Similarly,
15 in a damages analysis, one of the things that
16 you look to is industry acceptance or rejection
17 of the patent and the other negotiations that
18 have happened vis-a-vis that patent.

19 So those are also two relevance
20 factors.

21 THE COURT: Okay. Do you have
22 anything else to add on common interest?

23 MS. KEEFE: No, Your Honor. I
24 appreciate your time.

1 THE COURT: Thank you. Mr. Andre.

2 MR. ANDRE: I'll be very brief,
3 Your Honor. The one thing that struck me about
4 Facebook's argument is the position that until
5 an agreement is consummated, there is no legal
6 common interest. It would imply that if there
7 was a deal consummated that was somehow
8 retroactively making their talks previously in
9 line with each other and have a common interest.

10 So every time you would have these
11 discussions or negotiations with parties, unless
12 you were forced to consummate the deal, you'd
13 run the risk of losing your privilege. Every
14 single time. So, therefore, you would never
15 provide this type of information.

16 That's the exact thing that we're
17 trying to avoid. We're trying to have the type
18 of conversations where people can have open
19 discussions when there is a common legal
20 interest, just like there was in the
21 Hewlett-Packard case.

22 Second thing, when we talk about
23 the deposition testimony of Northwater, you saw
24 the emails attached to Mr. McKibben's

1 declaration in which Northwater assured them
2 that the privilege would be maintained in
3 deposition. They testified they didn't care
4 about the privilege. Of course not.

5 That's because we didn't do the
6 deal with them. The deal with these companies,
7 in almost every instance, was they wanted to do
8 the deal with Leader. Talk about the industry
9 acceptance.

10 The deal terms were too onerous
11 for Leader to accept, so therefore, it wasn't
12 like companies were rejecting Leader. It was
13 the other way around.

14 If we, Leader, had -- was in a
15 position where they had to consummate the deal,
16 the pressure would be taken as to avoid not
17 waiving privilege.

18 Last thing, the NDA that they are
19 talking about. During the deposition of Mr.
20 McKibben, two days of deposition, they raised
21 issues about prior to filing a patent
22 application. That has nothing to do with actual
23 litigation, financing the litigation because
24 this is even before the patent was filed.

1 They had raised the issue that
2 there may be a public disclosure. We assured
3 them during deposition that any time
4 Mr. McKibben talked to any potential investor or
5 anybody about this, there was an NDA signed.
6 They asked for those documents. We provided it
7 to them.

8 So that's --

9 THE COURT: So there couldn't
10 be -- there aren't thousands of other
11 communications that would be an issue?

12 MR. ANDRE: The vast majority --
13 there may be one or two that date post the
14 patent, but over 2,000 of them were dated before
15 2002. So the patent issued in 2006.

16 And then, finally, the last thing
17 I want to point out is just that, even if Your
18 Honor were to say that somehow privilege had
19 been waived with these documents, these
20 documents would never be admissible in a trial
21 any way. They won't lead to any admissible
22 evidence.

23 This is opinion-type information
24 put on these documents. This is an inventor

1 saying, This is the greatest thing since sliced
2 bread and everybody is infringing.

3 Now, I wish I could get that into
4 evidence, because I'd like to have my inventor
5 take the stand and say such things. But,
6 obviously, Judge Farnan will not permit that.

7 So these documents will not be
8 admissible in this case. Thank you, Your Honor.

9 THE COURT: Okay.

10 MS. KEEFE: I just wanted to make
11 two just -- no, two corrections to the record.
12 There were -- as of our initial review, there
13 were at least 163 NDAs that postdate the
14 issuance of the patent that include a word like
15 patent litigation or litigation about the
16 patent, something like that.

17 And with respect to us not
18 challenging the privileged status of any of
19 these documents, I can't right now because I
20 don't have enough information to know whether or
21 not I can. So the document record is clear that
22 I have not yet, but that's only because I don't
23 know enough about the documents to do so.

24 THE COURT: I understood that from

1 your briefing. Okay.

2 MS. KEEFE: Thank you, Your Honor.

3 THE COURT: Let's move on to the
4 discovery issues at this point. And the first
5 one I want to deal with is Leader's efforts to
6 compel some more technical documents from
7 Facebook.

8 So I'll hear from Leader on that
9 one first.

10 MR. ANDRE: Thank you, Your Honor.
11 There is a little bit of an update regarding
12 this subject.

13 Mr. Hannah took the deposition the
14 day before yesterday, and during the deposition
15 counsel for Facebook informed him that they
16 would agree to do some -- provide some updates
17 of this information, because they produced 398
18 pages of technical documents during our
19 deposition. In the last few weeks, we've
20 learned those topics -- those documents are out
21 of date.

22 So there was an agreement that
23 some, not all, but some of the documents would
24 be updated. We received 15 pages of documents

1 yesterday, which I am told -- I have not seen
2 them personally, because I was traveling here
3 yesterday -- I'm told they are somewhat of an
4 update to some of those pages.

5 And they also agreed to provide
6 one revision for each of those documents. They
7 have not produced all of the revisions. So
8 there has been some movement just in the last
9 two days since we've filed the briefs.

10 With that being said, I do want to
11 remind the Court of, more or less, the procedure
12 leading up to us filing this letter. The
13 parties went back and forth several times trying
14 to get additional documentation.

15 And Facebook's position was we're
16 not sure what you're asking for. We identified
17 modules. Any way it was a lot of back and forth
18 and to get to the point where there was a
19 production of documents eventually.

20 And in those productions, there
21 was 398 pages of technical documents. We
22 obviously said, We know there's more, because
23 just by the very nature of the company. Like I
24 told Your Honor, I've been doing this 17 years.

1 I just know it's there, just intuitively.

2 But Facebook made representations
3 after we moved to Court. We couldn't make any
4 headway to them.

5 They made a representation to Your
6 Honor that they had produced all technical
7 documents. Your Honor said, Mr. Andre, I
8 can't -- you know, they said they produced it.
9 I've got to take them for their word.

10 And you advised us if we start
11 taking depositions and they started identifying
12 additional documents, we could come back to Your
13 Honor and ask for more. Well, that's what we've
14 done.

15 We've taken the depositions, and
16 we've identified a lot of documents. Now, we're
17 not asking for every document in the company
18 like they say. We're asking for very specific
19 documents. There's an Exhibit A attached to our
20 letter brief that specifically identified those
21 documents.

22 We have actually talked to
23 Facebook saying, Well, we'll just take documents
24 from witnesses we depose. We don't want 300

1 engineers.

2 We'll just take the dozen or so
3 people that we've deposed. You can search their
4 files for these keywords. That would be
5 sufficient for us.

6 And they have bulked at that as
7 well. The major argument here seems to be two
8 things.

9 One, they think what we've been
10 told by Facebook's counsel that they are
11 relieved of their discovery obligation, based on
12 Your Honor's September 4th, 2009 order. We
13 don't think that's a proper reading of the
14 order.

15 And the second one is we've given
16 you source code. If you get source code, you
17 don't need anything else.

18 Source code is a very valuable
19 piece of evidence, and in some cases is
20 essential. We agree with that.

21 But that's just one piece of
22 evidence. There's a lot of different types of
23 evidence and not up to one party. You only get
24 one type of evidence. You don't get the other

1 type of evidence, even though it's relevant.

2 THE COURT: They say you've hardly
3 even looked at their source code. Is that not
4 true?

5 MR. ANDRE: No, that's not true.
6 Our expert looked at it for two full days. And
7 Mr. Hannah, my co-counsel, who is an electrical
8 engineer and understands source code, he's
9 looked at it for four or five days.

10 And I've got a young associate in
11 Southern Silicon Valley, who has an
12 undergraduate in computer science, master in
13 computer science. He's worked nine years at
14 Hewlett-Packard as a software engineer and two
15 years at Apple Computer. He spent about 10 to
16 15 days. All told, we've spent about 20 days
17 looking at the source code.

18 We have been in constant contact
19 with her expert about what we're looking at.
20 We've had a hard time with this source code
21 because they said there were revisions. We
22 can't find it.

23 And they can't show it to us. So
24 all told of all the amount of hours we've spent,

1 we spent about 150 man-hours looking at this
2 source code.

3 THE COURT: What about -- they say
4 that they loaded a bunch of other technical
5 documents on that computer where the source code
6 is.

7 Have you looked at those?

8 MR. ANDRE: We have. The most
9 recent is, I think, they just loaded something
10 on about a couple weeks ago, I believe.

11 And I don't know if we're going to
12 again next week. We're going back or actually
13 we're going over there today.

14 Mr. Lee is back over there again
15 for another day. And then we have our technical
16 expert coming in, because they -- obviously, we
17 were going to wait until we got a claim
18 construction order, because then we have -- that
19 tees off the expert report.

20 And we had the most recent
21 information. We don't want our experts coming
22 in looking at source code and have it change,
23 because Facebook is continuously updating their
24 code.

1 So we wanted to have the most
2 recent code based on the expert report. The
3 claim construction came down last week, or this
4 week or recently.

5 THE COURT: Recently.

6 MR. ANDRE: Recently. I'm losing
7 track of time. And our expert is scheduled to
8 come up for two full days to review next week.

9 So we've looked at the source
10 code. We've looked at it at nauseam.

11 THE COURT: Facebook says that
12 what you really need is the Wiki, which they've
13 provided. And it sounds like maybe they're
14 updating the Wiki.

15 They've agreed to do that. I'm
16 not quite clear.

17 But why do you need more than
18 maybe just additional Wiki information? And
19 take a stab at explaining what a Wiki is
20 while --

21 MR. ANDRE: A Wiki is -- it could
22 be internal. They are talking about the
23 internal Wiki.

24 It's just a way of communicating

1 with a group of people. It's somewhat of --
2 it's a modern day message board, as it were.

3 And people update the Wiki that
4 goes on. And they actually put some of their
5 technical information in these Wikis.

6 But they also have, like every
7 quarter, every other month, they have these all
8 hands engineering meetings. They have notes of
9 those where they talk about the functionality of
10 the site.

11 One of the things that strikes me
12 really on the source code and the Wiki is that
13 -- is, you know, in about three months from now,
14 I'm going to have the privilege of, you know,
15 presenting this case to a jury. And they're not
16 going to read the language that source code is
17 written in.

18 I can almost guarantee you of
19 that. We are not going to put that in as an
20 exhibit, either, pursuant to the protective
21 order.

22 THE COURT: I saw that argument in
23 your letter. And as you say, you've been
24 litigating patent cases for a while.

1 I would have thought that it was
2 really the expert's responsibility to translate
3 computer language into something that's
4 understandable and even impressive to a jury.

5 MR. ANDRE: And I'm convinced our
6 expert will. I'm absolutely convinced he will
7 do that.

8 And they will have an expert get
9 up and do something, say just the opposite. So
10 then it becomes a credibility of the experts.

11 What I think is required of
12 defendants is to produce documents that describe
13 their language in functional terms, in real
14 English, because that's how source code is
15 written.

16 Your engineers don't just sit down
17 and start writing source code. They --

18 THE COURT: This is not an
19 argument that came up in all the prior times
20 we've talked about your efforts to obtain source
21 code and technical documents, at least not that
22 I recall.

23 MR. ANDRE: We talked about
24 getting documents from Facebook.

1 THE COURT: Which I understood to
2 be to help you and your experts understand what
3 the source code was.

4 Now, it seems like you've got
5 another purpose, which is to make your case to
6 the jury.

7 MR. ANDRE: It is. I mean, it's
8 both cases.

9 Obviously, it helps our experts if
10 they get the design notes, because from those
11 design notes then engineers write source code
12 based on functional requirements in those design
13 notes.

14 The patent claims are written in
15 functional language as well. So we were coming
16 back here to say there had been very, very
17 specific documents identified. There have been
18 power points. There's been roadmaps.

19 There has been other types of
20 presentations that we've specifically identified
21 by these witnesses. And we've identified them
22 with the closest amount of specificity we
23 possibly can.

24 The argument that it will be

1 prejudicial to us with respect to the jury in
2 presenting our case is something that I think
3 has been in all along. Maybe we haven't
4 articulated it as forcefully as we should have.

5 But now we're coming down the home
6 stretch here to trial, and we're thinking about
7 how we're going to try this case. And as you
8 get to this point in the case, we can have our
9 experts battle it out and I think we'll do quite
10 well. That will be fine.

11 But at the same time, you know,
12 the rules don't require us to do so. They don't
13 get to pick and choose what evidence they
14 present. They should be producing all relevant
15 information. They've informed the Court and
16 they should do so.

17 THE COURT: And you've rejected, I
18 take it -- they've offered to produce some stuff
19 as you referred to, but you're still asking the
20 Court to order that everything that you list in
21 that exhibit is what you need to have; is that
22 correct?

23 MR. ANDRE: Well, and to be fair,
24 some of the things in that exhibit are overly

1 broad. They're not specific enough.

2 We don't know what the witness was
3 talking about. We couldn't get him to
4 specifically identify what he was talking about.

5 There's probably four or five
6 categories of the 28 that are vague, because we
7 asked the witness. He said, Well, there's some
8 type of -- you know, I have this type of
9 presentation.

10 And we tried to explore what he
11 was talking about. He didn't identify it.

12 We said, "Go back to your witness.
13 They work for you. Ask them what he was talking
14 about and produce that."

15 So there are a couple topics
16 there, but we tried to be very, very limiting in
17 that respect.

18 THE COURT: All right.

19 MR. ANDRE: And the Wiki is not --
20 we don't have an up to date at this point. We
21 at least require that Wiki be updated, and all
22 of it, not just some of it.

23 Thank you, Your Honor.

24 THE COURT: Let me hear from

1 Ms. Keefe on this point. Thanks.

2 MS. KEEFE: Thank you, Your Honor.
3 I'd just like to first just correct a few
4 things.

5 I think we're all on the same page
6 in terms of what the disputes are. With respect
7 to -- I keep hearing this we've only produced
8 398 pages.

9 You know, obviously, we have
10 produced quite a lot of technical documents on
11 the stand-alone computer itself. Many of which
12 Leader didn't even seem to know were there.

13 In fact, during the deposition
14 that took place on Wednesday, Leader finally
15 asked a question that indicated that the schema
16 which showed the database, the database schema
17 had been loaded. They didn't realize it was
18 there.

19 It's been there since September.
20 And that's a document that they keep asking for
21 a visual representation. It was the database
22 schema. We showed it to them Wednesday, exactly
23 where it was. And they went and looked at it
24 after that, I believe.

1 One of my colleagues just called
2 me yesterday when I landed and said that he
3 found it interesting, because Mr. Lee called him
4 to ask him if he could please show him on the
5 stand-alone computer where the unredacted
6 technical documents were. Implying that they
7 actually hadn't looked at them before.

8 We've also kept a running log,
9 because we have to actually bring the
10 stand-alone computer out and put it in a
11 conference room and then put it back under lock
12 and key. We've actually kept a running log of
13 every single time that Leader has actually
14 visited the stand-alone computer.

15 Aside from it being accessed
16 during depositions, Leader, as of today, has
17 only accessed the stand-alone computer seven
18 times. Two of those were before the technical
19 documents were produced.

20 That was when your order said that
21 we had to produce the entirety of the source
22 code. Leader's expert and Leader came over to
23 review the source code in order to determine
24 which documents they wanted off of them.

1 THE COURT: So what about the
2 representation that they spent 20 days or 150
3 hours?

4 MS. KEEFE: I honestly don't
5 understand how that could be because under our
6 protective order, they have to ask us, say that
7 they're coming in, so we can set everything up
8 and put it in a room.

9 My memory was that it was about
10 six or seven, something like that. So I
11 actually asked our paralegal. She showed me the
12 log of everything.

13 I asked our IT guys to see if
14 their memory confirmed with her memory and the
15 log that she had been drafting. And that was
16 exactly what it was.

17 THE COURT: Why don't you
18 articulate for me what it is you've offered to
19 try to settle this dispute?

20 MS. KEEFE: Absolutely, Your
21 Honor. Every time that Leader has actually come
22 to us with something specific, if a witness has
23 said, I think I remember a power point about a
24 server presentation, something about speeding

1 things up, we have actually gone back to that
2 witness, asked about it.

3 In that particular instance, we
4 actually found the document. It was a document
5 written by Microsoft that has nothing to do with
6 this case, but we went ahead and produced it.

7 With respect to the categories
8 that are listed on Exhibit A, for the ones that
9 we haven't already produced, which are the
10 specifically identified recent Wiki pages for
11 Falcon, recent Wiki page for Mulligan, anything
12 that they've asked us for specifically, we have
13 said that we will do.

14 We've also offered now the Wiki.
15 Mr. Andre makes it sound like they're constantly
16 updating this Wiki.

17 The Wiki is -- a bulletin board is
18 not a bad way to think of it. And it gets
19 updated when people feel like it.

20 There may not be updates. There
21 are some Wiki pages, and the witnesses
22 testified, that are hopelessly out of date,
23 because Facebook is just out writing codes.

24 So we have offered to update the

1 internal Wiki pages that they already have. And
2 we've offered to go back and give them one
3 revision backwards to show the history. And in
4 some of those cases, the revision is nothing
5 more than, you know, a calm over period change,
6 because it actually keeps track of that kind of
7 thing.

8 THE COURT: So one revision
9 backwards means one snapshot predating the
10 version that they already have?

11 MS. KEEFE: Correct.

12 THE COURT: Okay.

13 MS. KEEFE: And they can pick a
14 date in time, any time in the time period
15 between the issuance of the patent to now, and
16 we will take whatever the revision is that's
17 closest to that date.

18 With respect to any -- like I
19 said, with respect to anything else that is
20 identified with any reasonable particularity, we
21 absolutely have offered to do it. With respect
22 to the other documents, they're saying it's our
23 burden to go and ask our witnesses, to the
24 extent that a document came up, that the witness

1 had any memory of.

2 I either did ask them during
3 breaks or after the deposition if this was
4 something that they specifically remembered.
5 And it wasn't.

6 I can point Your Honor to one
7 particular example. You know, they have a
8 listing in their exhibits of Exhibit A. Number
9 23 says all Word documents regarding the
10 functionality.

11 Well, that was because
12 Mr. Moskovitz was asked -- you know, you gave
13 presentations at the engineering all hands.

14 Do you remember that? Yes. Would
15 that be posted on the Wiki? Yes, I think they
16 were.

17 If they weren't posted on the
18 Wiki, how would you find them? You probably
19 would have to come ask me for a copy off of my
20 computer.

21 Question: Are there any other
22 types of documents that you created at Facebook?

23 Answer: I authored some of the
24 Wiki pages. You know, I had Microsoft Word

1 files from time to time that I would send over,
2 emails, other documents.

3 That's pretty broad. Just a key
4 note presentation that I delivered at NWUC. I
5 don't know. That probably covers it.

6 Question: Anything else you can
7 remember?

8 Answer: Not that I recall.

9 They didn't push down and get
10 resistance from Mr. Moskovitz about what those
11 documents might have been. Those are just
12 broad-brush categories.

13 When I asked Mr. Moskovitz, he
14 said, I just didn't want to say I've never seen
15 one because I probably did at some point have
16 one. But I couldn't remember.

17 THE COURT: There's reference to
18 revision history documents in the letters. What
19 are those?

20 MS. KEEFE: That's exactly what
21 Your Honor just talked about, going back one
22 level in the Wiki, finding if the Wiki existed
23 in one format and then got updated to what we
24 produced in September.

1 And then if there has been a
2 revision since, we will also produce that.

3 THE COURT: So if you end up
4 producing, say, three snapshots of the Wiki, the
5 one that you've already produced and one
6 predating it, and one postdating it, --

7 MS. KEEFE: Correct.

8 THE COURT: -- that would, by
9 definition, give Leader the revision history --

10 MS. KEEFE: Correct.

11 THE COURT: -- documents, to the
12 extent they exist?

13 MS. KEEFE: Absolutely, Your
14 Honor, to the extent that they exist.

15 The other thing that revision
16 history may mean, depending on Your Honor's
17 reading of it in the briefs, we have also
18 produced to Leader on the stand-alone computer
19 something called a subversion database.

20 We talked a little bit about this
21 during one of our past hearings. The subversion
22 database is a running list of every version
23 revision of the Facebook source code that
24 exists. And so that's also a revision history

1 and that is of the code itself.

2 They have that. And that's on the
3 stand-alone computer.

4 THE COURT: Okay. Anything else?

5 MS. KEEFE: No, Your Honor. Just
6 to reiterate that the code is the best source,
7 and every single witness has testified that
8 that's the best source of documents in this
9 case.

10 THE COURT: Okay. Thank you.

11 Mr. Andre, any response on this
12 issue?

13 MR. ANDRE: Your Honor, I'll start
14 with the last point on the subversion database.
15 That was -- we were told it was on the
16 stand-alone computer, but it was produced
17 without the interface. And we couldn't access
18 it, so we were not able to get that sub version
19 database.

20 I don't know if -- we're told --
21 we're trying to get it again. We've talked to
22 them, so hopefully we will be able to get that
23 and that will solve the database issue any way,
24 meaning with respect to the source code.

1 Your Honor, Ms. Keefe actually
2 points out why we need more than the Wiki. The
3 Wiki is not continuously updated. It's updated
4 when people feel like it.

5 Presentations that have been
6 listed on Exhibit A, those actually provide the
7 functional language that is being used at the
8 Facebook website. And at the end of the day,
9 what this comes down to is, you know, waiting.

10 The burden, it would come to cause
11 Facebook to produce relevant documents. Even in
12 Ms. Keefe's presentation, she's testified
13 there's relevant documents there. So it's the
14 burden.

15 THE COURT: She says if you ask
16 for a specific one, you'll get it.

17 MR. ANDRE: That's what we've
18 asked for. We put it down in Exhibit A.

19 It talks about the personal Wiki
20 pages of the relevant Facebook employees and
21 where other people, being the ones that we've
22 deposed, they said no to engineering roadmaps.

23 We've got testimony where they
24 have engineering roadmaps. We haven't seen a

1 single engineering roadmap produced in this
2 case.

3 So the burden here is going to be
4 very light. We're asking for very -- a very
5 focused set of documents from a few individuals.
6 So the burden on Facebook is next to none.

7 They have been stonewalling us on
8 this document production since discovery began
9 on this case. And at this point, it's getting
10 to a point where it's going to be prejudicial to
11 us. And the burden versus the prejudice is --
12 the weighing is not even close.

13 THE COURT: Okay.

14 MR. ANDRE: Thank you, Your Honor.

15 THE COURT: Let's move on now to
16 the final issue, which is Facebook's effort to
17 compel access to the Leader source code. We
18 will hear from Facebook on this one.

19 MS. KEEFE: We will be very brief
20 on this one. The last time we were before Your
21 Honor, we said that we needed access to Leader's
22 product, because they're claiming to be a
23 competitor. So we need to understand if, in
24 fact, they are a competitor, if in fact, they do

1 practice the patent.

2 Your Honor said, Let's go back and
3 look at what happened with you guys and your
4 source code. I'll give you access to the
5 product itself.

6 And if by using the product, you
7 find that you can't do the analysis without
8 access to the underlying source code, we can
9 revisit it. That's where we are here today.

10 Mr. Weinstein has used the
11 service. I used the service. And we absolutely
12 cannot figure out which metadata is being stored
13 by using the front-end facing portions of the
14 website.

15 Very similar to what Leader's
16 expert found when using our own website.
17 Similarly, just to make sure that there wasn't
18 something that we were missing, that there was
19 something in the product that made it easier, we
20 asked Mr. Fathbruckner, who is one of the
21 engineers who worked on the Leader to Leader
22 product whether or not he could tell us, looking
23 at the screen shots, what metadata was being
24 stored. And he said, No. He said, you'd

1 probably have to look at the code or something
2 else, because it wasn't within the service
3 itself.

4 So we're here, Your Honor, asking
5 for access to that source code so that we can
6 make the analysis that we asked for before.

7 THE COURT: So Leader argues that
8 in addition to Mr. Fathbruckner, there were
9 other witnesses you could have asked a whole
10 bunch of technical questions to, and that that
11 would be less burdensome than producing their
12 whole source code.

13 Were there other witnesses? And
14 if so, why didn't you ask them these questions?

15 MS. KEEFE: There were no other
16 witnesses that I can think of that I could have
17 asked that question of. I may have been able to
18 ask Mr. Lamb. Mr. Lamb is no longer an employee
19 and so no longer has access to their source
20 code.

21 And so I did -- I wasn't -- I
22 wouldn't have been able to ask him, And where
23 would you find it in that, because he doesn't
24 see where it exists today or what it is today.

1 THE COURT: And what's
2 Mr. Fathbruckner's position?

3 MS. KEEFE: He's currently one of
4 their engineers. He's an engineer at the
5 company.

6 THE COURT: What about the
7 argument that they can be your competitor, even
8 if they're not practicing their own patent?

9 MS. KEEFE: You know, Your Honor,
10 the case law is pretty specific. In order to be
11 a competitor, you actually -- in order to be a
12 competitor within the realm of the patent
13 itself, you actually have to be practicing it.

14 I'm not sure -- I'm sure there may
15 be a way that someone might be able to show that
16 they are a competitor. They don't use this
17 exact piece of technology.

18 But you always are head to head
19 with each other on pinches and sales. And maybe
20 they could do that.

21 But this is certainly an extremely
22 relevant factor. We also have a false marking
23 claim in this case.

24 And in order to determine whether

1 or not their product was properly marked, we
2 would also need to analyze the product.

3 THE COURT: Okay. Thank you.

4 MS. KEEFE: Thank you, Your Honor.

5 THE COURT: Let me hear from
6 Leader, please.

7 MR. ANDRE: Your Honor, what is
8 being involved since the day this case began,
9 it's a product-to-product comparison. That's
10 what they're looking to do here.

11 THE COURT: But I can prevent that
12 at trial, right, just by letting them see the
13 source code? I mean, the jury's never going to
14 see the source code of your product.

15 MR. ANDRE: I agree, Your Honor.
16 And one of the things that we -- that is a
17 little bit surprising about their talk about
18 they want to know how the metadata is stored, it
19 doesn't matter how it's stored, just that it is
20 stored. That's what's relevant here.

21 They did have other sources.
22 Mr. McKibben, who's the lead inventor, founder
23 of the company, designer of our product, was
24 also our 30(b)6 witness on this specific topic.

1 We designated him. He was ready to testify on
2 this specific topic.

3 We had Leader to Leader up and
4 running on their computer. We activated it for
5 them for his deposition both days.

6 THE COURT: You had the program or
7 the source code?

8 MR. ANDRE: We had the actual
9 program running. He could show on the program
10 itself.

11 You can actually see the questions
12 that were asked, how the metadata is being
13 updated and things of that nature. So they had
14 that information available to them.

15 More importantly, and I apologize
16 to Your Honor, but this was inadvertently left
17 off as an exhibit to our letter. We were rushed
18 in getting this out.

19 We actually gave them a printout
20 on the database file. This is something they put
21 on their stand-alone computer that has
22 everything.

23 This is a document that's been
24 produced to them. This has the database schema.

1 It actually has right here how the metadata is
2 being updated.

3 I would kill to get this from
4 Facebook. They won't give it to me.

5 But we gave it to them. So they
6 have everything.

7 They have the database schema on
8 their stand-alone computer. We talked about the
9 stand-alone computer.

10 We can't mark that out. We can't
11 mark it as an exhibit in this case.

12 We show it, but we can't print it
13 out and use it. We can't take it home with us
14 and study it back within our office.

15 So we had given them not only the
16 database schema, all the development emails we
17 had on our server developing the product, which
18 we didn't get a single email from them, from any
19 of their developers as they developed their
20 product.

21 Those emails identified
22 individuals who they had subpoenaed and
23 cancelled the deposition.

24 THE COURT: I don't know why you

1 don't give them the source code if you gave them
2 all that. Why --

3 MR. ANDRE: I don't understand why
4 we should have to. That's my point.

5 It's something --

6 THE COURT: Are you intending to
7 tell the jury, in one fashion or another, that
8 you practice your patent?

9 MR. ANDRE: Yes.

10 THE COURT: So then why aren't
11 they allowed to test out and determine for
12 themselves whether you really practice the
13 patent?

14 MR. ANDRE: It's not a case
15 whether our product is infringing the patent or
16 not.

17 THE COURT: No, but you're going
18 to make a representation to the jury or attempt
19 to prove a premise to the jury, We practice our
20 patent. Our Leader-to-Leader product practices
21 or is an embodiment of our patent.

22 They're allowed to defend
23 themselves with respect to that premise, are
24 they not?

1 MR. ANDRE: Well, and we've given
2 them the information to do so, Your Honor. The
3 source code, in this particular instance, is
4 something that because our product is not being
5 accused of infringement, as that's what this is
6 turning into. It's turning into is our product
7 infringing our own patent, and it just keeps
8 going further and further down this road. So
9 that's our concern.

10 You asked if there's a major -- an
11 issue of prejudice to us. The prejudice to us
12 is and why we don't produce it is because we
13 produced everything. The inequities of this
14 discovery in this case is getting to be
15 burdensome.

16 So if they get source code, that
17 means we're going to have to set up a system to
18 put our source code on a stand-alone computer,
19 have it set up for them to come to visit the
20 computer how many times they want to come visit.

21 They have deep pockets and they
22 can suck a lot of our resources from us. They
23 have every single document they need.

24 They have more than -- we've

1 provided them more information about our product
2 than they provided about their product. So I
3 think this is just one of those unduly
4 burdensome requests by Facebook in this
5 particular instance.

6 THE COURT: Okay.

7 MR. ANDRE: Thank you, Your Honor.

8 THE COURT: Thank you. Ms. Keefe,
9 anything else?

10 MS. KEEFE: Just to say, Your
11 Honor, I do know that we have the database
12 schema and it's not sufficient. That just shows
13 how it's stored, not what causes it to be
14 stored. And the code would help us do that.

15 So thank you, Your Honor.

16 THE COURT: Okay. We're going to
17 take a short recess, and I'll come back and give
18 you at least some rulings. Okay.

19 THE CLERK: All rise.

20 (A brief recess was taken.)

21 THE CLERK: All rise. You may be
22 seated.

23 THE COURT: Unless you all have
24 dissolved any of these issues in the last few

1 minutes -- I take it, no.

2 Okay. I am prepared to give my
3 rulings on all of the issues that have been
4 argued today.

5 And let me start with the common
6 interest privilege issue. As I see it, it is a
7 very narrow issue, and that issue is whether the
8 privileged communications, and we're assuming
9 that they're privileged, relating to the merit
10 of the proposed patent infringement enforcement
11 litigation, those communications that Leader
12 shared with three or maybe up to five financing
13 companies, whether those communications retain
14 their privilege, or was any such privilege
15 waived by virtue of being disclosed outside of
16 Leader to these finance companies?

17 Or another way to put it is: Was
18 there a common legal interest between Leader, on
19 the one hand, and the litigation financing
20 companies, on the other. I think it's fair to
21 say that this area of the law is unsettled,
22 somewhat inconsistent and, frankly, difficult to
23 apply.

24 Courts have noted those facts

1 about the law in this area and I certainly agree
2 with it. And so I think this presents a close
3 and difficult question.

4 Among other things that courts
5 have had differing views on here are as to how
6 common the supposed common interests have to be.
7 A number of the cases, picking up with the
8 Federal Circuit case, the In Re: Regents case
9 say that the nature of the interest must be
10 identical, not similar.

11 And among the cases that pick up
12 and quote that language, of course, are Judge
13 Farnan's decision in the Corning case here in
14 this Court, as well as the Cargo decision in the
15 Eastern District of Pennsylvania.

16 And the Cargo decision also in the
17 Third Circuit, I think out of the Eastern
18 District of Pennsylvania.

19 Other cases have stated that the
20 common interest doesn't have to be entirely
21 identical. Most recently the Teleglobe decision
22 in the Third Circuit noted, without deciding,
23 that the members of the community of interest
24 must share at least a substantially similar

1 interest.

2 And the Middle District of
3 Pennsylvania in the case of Andritz Sprout-Bauer
4 versus Beazer East said that the interest of the
5 parties need not be identical and may even be
6 adverse in some interests. So clearly the
7 courts are somewhat inconsistent as to how
8 common the interests have to be.

9 There is more of an agreement, I
10 think, as to the type of interest. That is, the
11 interest must be legal and not solely
12 commercial.

13 But whether contemplation of a
14 business arrangement that would have a
15 consequence of giving both parties a common
16 interest in the outcome of anticipated
17 litigation, whether that is a legal and not
18 solely commercial interest has been resolved in
19 conflicting ways.

20 The Net2Phone case, which we
21 talked about, the Corning case and the Katz case
22 all say, no, that that would not be a common
23 legal interest. But the Hewlett-Packard
24 decision out of the Northern District of

1 California says that it would be.

2 So all of that establishes to me,
3 again, that the law is unsettled and
4 inconsistent. This is a close question. It's a
5 difficult area of the law.

6 Where I come out is that,
7 fortunately for me, I don't think I have to
8 resolve the whole area of the difficulty in the
9 law here in order to resolve the dispute in
10 front of me. I think what I'm left with is a
11 very discretionary decision which turns on the
12 practicalities and a decision, frankly, in which
13 reasonable minds could certainly differ.

14 And when I weigh the factors, I
15 come out in favor on this one of Facebook. That
16 is, I find that there's not -- the common
17 interest privilege has not been established.

18 The factors that have influenced
19 me most on that are: First, the burden of proof
20 on this issue is on Leader as the party
21 asserting privilege. And to the extent there is
22 uncertainty, that suggests a ruling in favor of
23 the party that doesn't have the burden, namely
24 Facebook.

1 Also, I don't find that there is
2 any significant prejudice in this instance to
3 Leader. I can see prejudice potentially if
4 documents are admitted in evidence, but that's
5 not a ruling I need to make today.

6 If it turns out that these
7 documents should not be admitted or are unduly
8 prejudicial in a way that I think means they
9 shouldn't be seen by a jury, then I'll make that
10 ruling at the appropriate time. This is not an
11 admissibility ruling today. It's purely a
12 discovery ruling.

13 The weight of the precedent, to
14 the extent there is a trend, it is a trend that
15 moves in favor of Facebook's position here. The
16 three recent cases that I mentioned out of the
17 Third Circuit all favor a finding of no common
18 interest here.

19 I've considered the competing
20 policy interests, including the need, the
21 important need to create space for business
22 entities to do business for patent financing
23 companies -- for litigation financing companies
24 to do their work and enable relatively small

1 patent holders to enforce their rights.

2 Those are all important interests.
3 I don't believe that my ruling today will unduly
4 burden those efforts.

5 As I say, there are other cases
6 out there already that go in this direction.
7 And I am persuaded that, to a certain degree,
8 due diligence is going to be undertaken
9 independently by litigation financing companies
10 on their own. And as important as the privilege
11 is, there is also, of course, a truth-seeking
12 function to litigation.

13 And the cases recognize that
14 truth-seeking function would be something that
15 would weigh as a policy matter in favor of the
16 position that Facebook has articulated.

17 I think it's also relevant to note
18 that there has been ethical guidance, which I
19 think was cited in Facebook's briefing within
20 the last or lasting for at least the past
21 decade, ethical guidance to attorneys within the
22 Third Circuit that indicates that this type of
23 information, if shared with a financing --
24 litigation financing company may turn out to be

1 discoverable. And specifically we've looked at
2 the New Jersey Advisory Commission on
3 Professional Ethics Opinion Number 691 out of
4 2001, which states that the attorney must insure
5 that the client fully understands the risks of
6 disclosure of such information, including the
7 possible loss of the attorney-client privilege.
8 Before securing the client's authorization to
9 disclose information, the financial institution
10 may require that in order to assess the risk of
11 the transaction.

12 Upon securing such authorization,
13 the attorney should still endeavor to limit, to
14 the extent possible, the amount of information
15 provided to the institution. For example, the
16 attorney should provide the institution with
17 only that information which would be
18 discoverable by the attorney's adversary.

19 And there's a similar guidance
20 given from the Committee on Legal Ethics and
21 Professional Responsibility of the Pennsylvania
22 State Bar in their Opinion Number 99-8 in 1999.

23 So factoring all of that in, I am
24 ruling for Facebook on this issue. I find that

1 Leader has not established that the documents at
2 issue here are within the scope of the common
3 interest privilege. And I am directing that
4 Leader will produce the documents that it has
5 withheld on the basis of the common interest
6 privilege no later than next Friday, March 19th.

7 Let me turn to the other two
8 issues that brought us here today.

9 First is Leader's request to
10 compel additional technical documentation from
11 Facebook. And on this one, I'm providing Leader
12 only very limited relief.

13 Namely, I am ordering that
14 Facebook produce the additional Wiki data points
15 that were referenced in the argument, and that I
16 believe have already been offered by Facebook.
17 And as I understand it, that would mean that
18 Leader would choose a date prior to the snapshot
19 date for which they had been provided the Wiki
20 already, as well as a date that postdates the
21 date that they were given the Wiki.

22 So that would leave Leader with
23 three sets of the Wiki for which it could track
24 a revision history.

1 I find that that is a reasonable
2 offer of technical information to Leader, as has
3 been noted. Of course, Leader has access to the
4 source code, which they emphasized from the
5 beginning was the most crucial evidence that
6 they would need in order to prove infringement.

7 They have asked for technical
8 documents all along to enable them to understand
9 and to enable their expert to understand what is
10 in the source code. And I am persuaded that
11 such documents that would enable an expert to
12 understand its own source code have been
13 produced.

14 There are additional documents
15 that are loaded onto the computer that contains
16 the source code. And fundamentally, I just
17 don't agree with the argument that Leader is
18 entitled to additional documents now for the
19 purpose of translating computer language and
20 computer science to the jury.

21 In my mind, that's the task of
22 primarily the expert, but of course, attorneys
23 as well.

24 And I think that I've given

1 everything that Leader's expert will need in
2 order to undertake that task.

3 Finally, Facebook moves to compel
4 access to Leader's source code. And I'm going
5 to grant this request of Facebook's.

6 I am convinced that Facebook does
7 need access to Leader's source code in order to
8 evaluate the premise that Leader claims and will
9 claim in front of the jury that Leader itself
10 and the Leader-to-Leader product practices the
11 patent.

12 Facebook is not obligated to rely
13 on that premise. It can challenge that premise.

14 And I'm persuaded that in order to
15 have fair opportunity to challenge that premise,
16 it needs not just technical documents, but it
17 needs access to the source code for all the same
18 reasons that I was persuaded earlier in the
19 case, that Leader needed access to Facebook's
20 source code.

21 I understand the concern about
22 this case in front of the jury not turning into
23 a product-by-product comparison. There's only
24 one product in the case. I believe it's only

1 one.

2 There's only Facebook products in
3 the case that are alleged to have infringed.
4 And that's what the trial will primarily be
5 about.

6 But for purposes of analyzing the
7 contention of Leader that they are practicing
8 their own patent, that they're a competitor and
9 perhaps for other reasons as well, it's relevant
10 for Facebook to have a chance to determine for
11 themselves if Leader does practice the patent.

12 And I think that any burden on
13 Leader is fully taken care of the advantage by
14 the protective order, which of course, remains
15 in place and will apply to the same, to access
16 to Leader's source code, that it applies to
17 access to Facebook's source code.

18 So that is my ruling on the issues
19 that are before us today. As you heard me say
20 on the phone, I don't want to have any argument.
21 We've had plenty of argument.

22 But I do want to make sure I am
23 clear in what I have ruled. Mr. Andre?

24 MR. ANDRE: Just the timing, Your

1 Honor, --

2 THE COURT: Right.

3 MR. ANDRE: -- when Facebook should
4 produce its updated Wiki and we should produce
5 the source code available? Do we have a time
6 frame for that?

7 THE COURT: Right. Sure.

8 Do you want to -- well, let me see
9 if Ms. Keefe has any suggestions on those
10 points.

11 MS. KEEFE: What's today?

12 THE COURT: Today's Friday.

13 MS. KEEFE: I said what's today's
14 date? Friday the 11th?

15 THE COURT: The 12th.

16 MS. KEEFE: As soon as you give us
17 the date. I could assume we could have that
18 done in about a week's time.

19 THE COURT: Okay.

20 MR. ANDRE: That would be fine.
21 We'll endeavor to get the date to them on Monday
22 and then the following Monday. And then as far
23 as the source code, we'll make that available
24 the same day. It could be the 19th as well

1 probably.

2 MS. KEEFE: Great. My question
3 has nothing to do with what we just did.

4 It is actually more of a
5 scheduling question. Facebook has a motion that
6 it would actually like to bring in front of what
7 would normally be on Judge Farnan's calender.
8 It's a motion to leave to amend our answer to
9 include some facts that were included during
10 discovery.

11 And we called Judge Farnan's
12 chambers, because there was no hearing date
13 listed on his web page or his calender. And
14 when we called to ask what hearing date we
15 should use, they told us to talk to you.

16 So what does Your Honor suggest we
17 do in terms of filing motions that would not
18 normally be in front of Your Honor, but normally
19 would have gone in front of Judge Farnan?

20 THE COURT: Remind me. I think
21 the case is only referred to me for discovery
22 purposes.

23 MS. KEEFE: That's correct.

24 THE COURT: This is not a

1 discovery issue.

2 MS. KEEFE: But Judge Farnan's --

3 THE COURT: I don't challenge your
4 representation as to what you were told by
5 chambers. What I would say is let me see if I
6 can get some further guidance for you --

7 MS. KEEFE: I would very much
8 appreciate that.

9 THE COURT: -- and get back to
10 you.

11 MS. KEEFE: Thank you very much,
12 Your Honor.

13 THE COURT: Anything else?

14 MR. ANDRE: Nothing.

15 MS. KEEFE: And the only other
16 thing, Your Honor, is just to make sure that
17 your ruling today regarding no common interest
18 also applies to any NDA that was disclosed just
19 in this last go around, just to make sure that
20 it extends to that.

21 THE COURT: You know, I can't be
22 sure, as I sit here, because I don't have those
23 facts in front of me. But I've given you my
24 ruling.

1 You know what I think about the
2 issue. Hopefully that will allow the parties to
3 figure out the implications going forward.

4 MS. KEEFE: Thank you, Your Honor,
5 very much.

6 THE COURT: Thank you all very
7 much.

8 THE CLERK: All rise.

9 (Court was recessed at 4:58 p.m.)

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1 State of Delaware)
2)
3 New Castle County)
4

5 CERTIFICATE OF REPORTER
6

7 I, Heather M. Triozzi, Registered
8 Professional Reporter, Certified Shorthand Reporter,
9 and Notary Public, do hereby certify that the
10 foregoing record, Pages 1 to 80 inclusive, is a true
11 and accurate transcript of my stenographic notes
12 taken on March 12, 2010, in the above-captioned
13 matter.
14

15 IN WITNESS WHEREOF, I have hereunto set my
16 hand and seal this 19th day of March, 2010, at
17 Wilmington.
18
19

20 _____
21 Heather M. Triozzi, RPR, CSR
22 Cert. No. 184-PS
23
24