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

Thursday, May 28, 2009
10:35 a.m.
Courtroom 4B

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE JOSEPH J. FARNAN, JR.
United States District Court Judge

APPEARANCES:

POTTER ANDERSON & CORROON, LLP
BY: PHILIP ROVNER, ESQ.

KING & SPALDING LLP
BY: PAUL ANDRE, ESQ.

Counsel for Plaintiff

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

WHITE & CASE
BY: HEIDI L. KEEFFE, ESQ.

Counsel for Defendant

1 THE COURT: Now we have the group
2 from detention coming in. You all are in the
3 enviable position of having a dispute that seems
4 to be continuing. It's like the kid in class
5 that won't listen. We can take care of this.

6 Want to announce your appearances?

7 MR. ROVNER: Good morning, Your
8 Honor. Phil Rovner from Potter Anderson. And
9 with me from King and Spauling is Paul Andre.

10 THE COURT: Good morning.

11 MR. CAPONI: Good morning, Your
12 Honor. Steve Caponi from Blank Rome, and with
13 me today is Heidi Keefe from White and Case for
14 Facebook.

15 Your Honor, Ms. Keefe has a little
16 laryngitis kicking in.

17 THE COURT: Well, first of all, I
18 have to tell you -- well, in the brief in
19 opposition. This is in this case. Ms. Keefe's
20 brief.

21 What size font is that footnote
22 font? I didn't think they made that. What is
23 that?

24 MS. KEEFE: Which one, Your Honor?

1 THE COURT: All of them. You have
2 this print. I had to go to my ophthalmologist.
3 They thought it was me.

4 MS. KEEFE: I think it's ten. I
5 apologize, Your Honor.

6 THE COURT: Don't apologize. I
7 have fun up here. Trust me. This is all good.

8 What size is yours, Mr. Andre?

9 MR. ROVNER: I believe ours is
10 eleven, Your Honor.

11 THE COURT: Is that all the
12 difference is? That's shocking.

13 Well, we're going to have an order
14 that says nothing less than eleven.

15 MS. KEEFE: No problem. That's
16 easy.

17 MR. ROVNER: Your Honor, I think I
18 misspoke. Ours is twelve, which is the same as
19 the body.

20 THE COURT: Okay. That's good to
21 know. Twelve. Making a note of that. So I was
22 thinking I was getting a lot older all of a
23 sudden.

24 Seriously, we kind of knew this

1 was going to happen. This is -- you know, I got
2 the note from the sixth grade teacher as you
3 came into the seventh.

4 She said, "This is what's going to
5 happen. You have to be on top of it in
6 September."

7 Let me ask both of you, and we'll
8 start with the plaintiff. Give me a description
9 of what a person of ordinary skill in this art
10 would look like. And I know. Believe me, I'm
11 not committing you to this. I'm just interested
12 today in understanding that.

13 MR. ANDRE: Your Honor, I think it
14 would be someone with a computer science degree,
15 maybe even an advanced degree like a master's or
16 doctorate, or someone who has a lot of computer
17 experience, industry experience. Someone who
18 has spent a significant amount of time working
19 on the computer over the last ten, twenty years.

20 That would be my understanding of
21 someone skilled in the art as a layperson
22 reading or using Facebook. I think a layperson
23 without those skills can understand these
24 claims. You characterize it as two guys in a

1 dorm room.

2 I don't think it is overcomplex
3 technology, but for one skilled in the art, I
4 think a definition for validity purposes, it
5 would be that characterization I just gave.

6 THE COURT: And with regard to the
7 case, this case at hand: Pre-filing. And I
8 don't want you to disclose anything prematurely.
9 This is just a yes or no. Did you have a
10 consultation with potential experts?

11 MR. ANDRE: Yes.

12 THE COURT: Would they have been
13 academics or more toward the industry side?

14 MR. ANDRE: It was both, Your
15 Honor, but primarily academics.

16 THE COURT: Okay.

17 And with regard to the claims,
18 your papers tell me that -- and I always want to
19 be a careful reader -- you say in response to
20 their effort at discovery from you, with
21 interrogatory number one, that you've given them
22 your preliminary infringement analysis.

23 MR. ANDRE: Yes, that's correct.

24 THE COURT: Tell me why you use

1 the word "preliminary."

2 MR. ANDRE: Your Honor, what we
3 know is what's available in the public. So we
4 can look at the manifestation of the source
5 code, which is the web site.

6 So what we will do once we get
7 their technical information is take the back end
8 stuff and supplement our infringement
9 contentions. That's why we use the word
10 "preliminary."

11 We know their web site functions
12 just as the claims dictate. We can tell that by
13 looking at it. What we don't know are what
14 components or modules are responsible for those
15 functions.

16 We don't know what components or
17 modules, for example, do the tracking or things
18 of that nature. So these are preliminary
19 infringement contentions based on the public
20 information.

21 There are only two sources of
22 public information available to us: Their web
23 site itself and API. That's it. So we used
24 those two sources to provide preliminary

1 infringement contentions.

2 We're probably borrowing a little
3 bit from the districts that have requirements
4 that you get preliminary infringement
5 contentions early in the case and then your
6 final later, once you get discovery.

7 THE COURT: And the source code,
8 that is what will be, kind of, like, the step
9 off technical information?

10 MR. ANDRE: The source code and
11 the technical documents in support of the source
12 code.

13 The way the source code is written
14 is, usually you have a design note. And they
15 write the code based on that note. Those two
16 sources of technical documents will give us all
17 we need to finalize our infringement
18 contentions.

19 This is unique to all software
20 cases, unless the code is open source of some
21 type or available to the public.

22 I think, Your Honor, one of the
23 points here is that the parties know the source
24 code is going to be produced in the case. We've

1 negotiated it in the protective order.

2 THE COURT: It's all a question of
3 timing, and what I hear all the time,
4 particularly in these cases, is, "as the
5 discovery evolves." And I am never in tune with
6 that evolution, apparently. But that's okay.

7 Let me ask Ms. Keefe some
8 questions. Thank you.

9 If you could just start out
10 helping me with your idea of who might be a
11 person, by characteristics, skilled in the art.

12 MS. KEEFE: At a very broad level,
13 Your Honor, I think I agree. Someone with
14 computer science experience, whether that be
15 from industry experience or from a degree.

16 I think what we find in Silicone
17 Valley most times is that degrees are not the
18 arbiter of a person of skill since so many
19 computer scientists/software engineers come
20 straight out of high school and start working.
21 So it really is someone with some experience in
22 the field.

23 THE COURT: Okay. Now, I guess
24 the way I read your paper was that you felt that

1 you should get a -- I'll say in the first
2 instance -- the full contention of plaintiff
3 with regard to why they think they can accuse
4 you of infringement, and that what has been
5 produced in a -- quote, unquote -- preliminary
6 context doesn't help you because it doesn't
7 define the infringement issue.

8 MS. KEEFE: That's exactly what
9 our point is, Your Honor, especially with
10 respect to the fact that they haven't linked any
11 of their infringement contentions with any of
12 the claim limitations or elements.

13 THE COURT: You say you want a
14 limitation-by-limitation analysis.

15 MS. KEEFE: Correct, that's what
16 our interrogatory asked for.

17 What the case law tells us is that
18 we know that there may be some aspects that are
19 back end that the code would be helpful to them
20 for. Before we get to that point, they still
21 have to tell us everything that they know from
22 the publicly available information. They
23 haven't done that.

24 In fact, we had a broad narrative

1 that wasn't linked to any limitations that
2 didn't link itself to any of the products on
3 Facebook's web site and therefore didn't tell
4 us, even, what code we needed to go and gather.

5 And instead, they've asked for all
6 of the codes for all of the Facebook web site
7 without telling us how that's linked in any way
8 to the claims.

9 So what we're asking for now, Your
10 Honor --

11 THE COURT: What's the feeling
12 there? That they're going to find some
13 additional infringement?

14 MS. KEEFE: I'm sorry. Could you
15 repeat that, please?

16 THE COURT: What's the fear?
17 Say I order you to produce the
18 entire source code. It's electronic. You
19 produce it. You have provisions in the
20 protective order. What's the fear about that
21 production, particularly the protective order?

22 MS. KEEFE: I think for any
23 software company, the first fear is simply
24 wanting to make sure that the amount of code

1 that gets out is limited to what's involved in
2 the case. No matter how good the protective
3 order is, there's always human nature. There
4 are always mistakes. There are always things
5 that happen, and you can't unring that bell.

6 And that's not accusing anyone of
7 doing anything. It's just protecting the
8 possibilities of potential problems.

9 Secondly, Facebook's website is
10 terabytes worth of data. Your Honor had a case
11 recently with a similar thing where the entire
12 source code was produced. And immediately,
13 plaintiffs came back and said, "This is too big.
14 I need you to tell me the lines in here that do
15 X and Y."

16 And Your Honor rightfully said,
17 "You asked for all. You get it." What we're
18 hoping to forestall are any of those types of
19 problems.

20 We understand that our code is
21 going to be disclosed in this case. If they can
22 show us that there are portions of our website
23 that legitimately track to their claim
24 limitations, we will provide that narrow scope

1 of source code.

2 We never refused to produce source
3 code. We simply said, "Tell us what it is that
4 we're supposed to produce. Not the whole site.
5 We need to protect our assets, but the things
6 that are relevant to this case."

7 And they have yet to come to that
8 hurdle. They still haven't given us that
9 analysis.

10 I think the most striking thing,
11 if you read their interrogatory response, the
12 one that is --

13 THE COURT: If I read their claims
14 and I was a person of skill by whatever
15 definition we use, you're telling me that I
16 could, from reading their claims, I could be
17 able to tell what portions of the source code I
18 want to see?

19 MS. KEEFE: I think so, Your
20 Honor.

21 For example, one of the things
22 that's very striking about what they haven't
23 given us yet in the response itself --

24 The response itself is a broad

1 narrative. Someone goes to Facebook and does
2 something, but it doesn't link it to any web
3 pages or any actual limitations.

4 In their letter and their
5 opposition papers, we're starting to suddenly
6 see an actual linkage to real things that are
7 happening. We see for the first time a mention
8 of when a gift is given on Facebook. It's the
9 gift, and how the gift is tracked.

10 If the interrogatory response was
11 that specific for the publicly-facing material,
12 we would be able to give them the back code that
13 allowed those publicly-facing things to happen.
14 So they would be asking for the very things that
15 they need by virtue of telling us what the
16 front-end facing components are.

17 In the claim, if you would review
18 the declaration of Mr. Gray --

19 THE COURT: Do you have category
20 of bits? Not you personally. Does Facebook
21 have categories of bits in the source code?

22 MS. KEEFE: I'm not 100 percent
23 certain that I understand what you mean. If you
24 mean are there pods or modules that relate to

1 certain applications on the web site, then the
2 answer is yes.

3 What you can do, for example, with
4 an application like gifts, there is a string of
5 codes that affects gifts. There are also
6 multiple other strings of codes and other
7 modules that have nothing to do with gifts that
8 affect other portions of the web site and how
9 they work.

10 So, yes, you can compartmentalize.

11 THE COURT: How many modules are
12 there?

13 MS. KEEFE: My client will be
14 angry that I don't know the number, but it is a
15 very large number. And I know this from a
16 previous case that I worked on with them where
17 we had to parse through to find the module that
18 we needed. And we went to them, got the module
19 that we needed with the attendant arms and limbs
20 that it touched into, and we were able to
21 produce that to the other side.

22 THE COURT: Mr. Andre, if you saw
23 the list of modules, do you think that would
24 help you relate it to your claims?

1 MR. ANDRE: Most likely, Your
2 Honor.

3 If they had some kind of a map of
4 their source code or the list of modules or
5 anything like, I'm sure that would be very
6 helpful to us, and we could probably limit it
7 from there.

8 We offered that to them, saying if
9 they tell us how categorize their source code,
10 how they -- everyone maps their codes so they
11 can find it easily. Someone skilled in the art
12 can easily pinpoint places in the codes.

13 So if we had that, yes. That
14 would be very helpful. We could probably, as
15 long as they did somewhat of an accurate job of
16 labeling the modules, we would be able to do
17 that.

18 Your Honor, one of the things
19 we're concerned about, and Counsel raises it
20 several times a day, is if we give them an
21 example of infringement like the gifts, we don't
22 want just the application for the gift.

23 Our infringing contention is the
24 fundamental architecture of their website. It's

1 a context component and tracking component and
2 other limitations in the claims.

3 Our concern is we can't give them
4 every single example of infringement. There
5 would be hundreds of them because there's
6 hundreds of applications that run on this
7 architecture.

8 If we get the list of their
9 modules, we could probably look at that and
10 determine what part of the architecture would be
11 needed for us to look at.

12 With the protective order, there's
13 no worry at all about source code. There's no
14 copies of it. We're not going to be able to
15 print copies of it. It's held in a secure
16 location at their office. We examine it. They
17 have someone there watching us as we examine it.
18 It's very safe. I don't think there is any
19 threat at all that the source code is going to
20 get out to the public somehow.

21 THE COURT: One of the things -- I
22 know you understand this, and that's a rational
23 argument. But if you and I owned it --

24 MR. ANDRE: Trust me, Your Honor,

1 I'm on both sides of the table involving
2 software. I understand how proprietary
3 engineers get about this.

4 THE COURT: You would be very
5 concerned about anybody looking at it.

6 MS. KEEFE: Your Honor, I think
7 one of the things that we're missing here is the
8 limitation-by-limitation analysis that we still
9 don't have.

10 Mr. Andre keeps talking about not
11 wanting to be limited to an application. He
12 hasn't even given one limitation-by-limitation
13 example of how the website infringes, telling us
14 which portion of our code would be affected.
15 Instead, we keep hearing "the platform."

16 The case law tells us it is the
17 plaintiff's burden to prove infringement at the
18 stage of showing an infringement contention,
19 showing how they believe someone infringes.
20 They do have to go limitation by limitation.

21 If they are contending, for
22 example, that the tracking software on the back
23 end or the storage aspect on the back end, which
24 are the two elements they've listed as back end,

1 we would be content to have them not say that,
2 and say this is in things that we don't have.

3 But they still have to tell us
4 where the rest of the user-facing things are
5 when they use the web site. That will help us
6 determine which software to give them. That's
7 what the case law says.

8 The case law says that the
9 Catch-22 we're talking about -- and the parties
10 actually agree. It's a unique situation that
11 the parties agree on the case law that's
12 applied. It's just that we disagree on whether
13 or not they've given sufficient notice.

14 THE COURT: I have to ask you a
15 question because when I read these papers, why
16 would anybody think the case law is more
17 important than the rules?

18 I understand the case law guides
19 the decisions, but every patent case is
20 different. And, well, that's why we don't have
21 patent rules here. If you tried to apply them
22 across the board to every type of patent case
23 you get in, it doesn't work, is the result.

24 When you read the rules, what

1 happens is some judicial officer decides to
2 write about their view of how the rules should
3 be applied.

4 Let me ask this question of both
5 of you. Do you think most of these discovery
6 decisions are informed or arbitrary?

7 MR. ANDRE: In this court or other
8 courts, Your Honor?

9 THE COURT: You can say here
10 because I think it's arbitrary. I wonder what
11 lawyers and clients think.

12 I understand at other courts,
13 because judges talk at these conferences, I
14 think it's arbitrary. Don't you think it's
15 arbitrary?

16 MS. KEEFE: Sometimes I feel like
17 it's arbitrary, but sometimes I think there
18 really are underlying things that can inform
19 decisions.

20 For example, in this case, the
21 facts can inform what feels right and what seems
22 fair based on what the plaintiff is supposed to
23 do in a case and what the defendant is supposed
24 to do.

1 THE COURT: What I think the most
2 interesting thing about this case is, from that
3 kind of point, is that -- and I think somebody
4 mentioned in the papers -- what was out there by
5 the Facebook folks before the inventors of these
6 claims.

7 I'm not asking for an answer, but
8 that's the kind of thing that's nuanced into
9 this, that, to me, if I were a businessperson or
10 on your side of the bench, it would drive me
11 nuts.

12 MS. KEEFE: It's driving Facebook
13 nuts.

14 THE COURT: I get that. I
15 understand what you're telling me. I don't find
16 the case law particularly helpful.

17 I just gave a talk on eBay. eBay
18 didn't do anything but say what was being done
19 anyway, except they wanted to tell us what
20 exceptions they liked as opposed to what the
21 Federal Circuit likes.

22 It's the craziest thing, but they
23 have the equitable principles, which the trial
24 judge applied. They have general principles

1 from Roberts, and then Kennedy tells you, "Watch
2 out for trolls."

3 It's same thing the Federal
4 Circuit said, just different words. I don't
5 think that was any help at all for the trial
6 courts, what they told us.

7 I am concerned, both because I
8 think these claims are readable -- the
9 limitations are readable, even to me -- but I'm
10 also concerned about the property of Facebook.

11 I'll give you one more story. I
12 was on the beach in Saint Thomas in January with
13 my family, and some guy starts talking to me.
14 And he winds up being the head of the computer
15 department at the University of Chicago where
16 they're building the world largest computer now.

17 And he's in charge of that
18 project, and he told me, when he heard I was
19 from Delaware and heard I was judge, he said,
20 "It's just terrible what's going on because
21 inventors can't get tribute, and people who have
22 property are getting abused."

23 He thought the whole thing was
24 crazy and didn't understand why we didn't have

1 people of technology come in and help us
2 regularly get rid of these disputes. Everybody
3 is alerted to this. It's a problem.

4 What I think we need to do to try
5 and make this a little bit informed and to let
6 it evolve a little bit, I think I would like
7 Facebook to produce that category list. Then
8 I'd like to see how reasonable Mr. Andre is in
9 polling that list. Does that make sense?

10 MS. KEEFE: It does, Your Honor.
11 The only thing -- I'll go back to a rule instead
12 of going to case law.

13 THE COURT: You can do both. I'm
14 just being frank with you.

15 MS. KEEFE: I absolutely
16 understand, and I agree with a lot of what Your
17 Honor said.

18 The rule, though, says that the
19 plaintiff is supposed to have the burden of
20 showing what's infringing.

21 THE COURT: I know, but see,
22 you've got a dumb judge who thinks I've bought
23 into that preliminary showing.

24 MS. KEEFE: We still don't know.

1 We even have a declarant with thirty years
2 experience.

3 THE COURT: I had to start
4 somewhere with my arbitrariness.

5 I said, "Okay. They've given
6 enough at this stage of the case, but that's not
7 enough to let them go full bore into Facebook."

8 MS. KEEFE: We understand.

9 THE COURT: I'm trying.

10 But I think you have to come up
11 with something, and I've kind of heard about
12 these modules or bytes or all different things.

13 I thought maybe if we got that
14 list and then I go back and see how reasonable
15 Mr. Andre wanted to be, and you can discuss this
16 between yourselves. And then I'd have you back
17 if you couldn't agree.

18 MS. KEEFE: I think that's
19 probably good.

20 THE COURT: And then we see where
21 we go next.

22 MS. KEEFE: Okay.

23 THE COURT: Mr. Andre?

24 I'm trying to get you to stop

1 talking. I'm getting nervous.

2 MS. KEEFE: It's hard to do, Your
3 Honor.

4 MR. ANDRE: Thank you.

5 Your Honor, that would be fine.
6 One of the things I do tend to agree with Your
7 Honor that these -- my general impression is
8 that discovery disputes are the biggest waste of
9 courts' resources and clients' moneys in the
10 civil litigation process. I think a lot of
11 these rulings are arbitrary. I do tend to agree
12 with you. We're not trying to ask for the
13 world. We just want --

14 THE COURT: I didn't think you
15 were, but I can understand where they think that
16 you are.

17 MR. ANDRE: Absolutely. It is
18 something that if we have a map or list of
19 modules, we can pare that down and selectively
20 target those modules.

21 We can have our expert look at
22 them, and if he says, "Well, this is having a
23 call from another module," we'd like to be able
24 to back and say, "We need that module as well."

1 Because if it's calling information from another
2 module, we need that, obviously.

3 THE COURT: Just so you know I'm
4 not totally off the wall, the reason I asked
5 those questions at the beginning, the next round
6 of this evolution, I may ask each of you to
7 bring in an expert to tell me why you want more
8 than they're willing to give and let their
9 expert tell me why you don't need it. So we
10 have some information beyond legal argument.
11 Does that make sense?

12 MR. ANDRE: It does, Your Honor.
13 If we get that and if we get the technical
14 documents in support of those modules as well,
15 once we identify them, that will take us almost
16 all the way to all the technical documents we
17 need anyway.

18 THE COURT: Then you have to
19 become very firm in your infringement analysis,
20 limitation by limitation.

21 MR. ANDRE: We think we've already
22 done limitation by limitation on a broad scale
23 based on public information. We've done
24 everything we can do based on public

1 information. We'll be glad to supplement
2 interrogatories and give them those limitation
3 by limitation. No problem.

4 I think the bigger issue we're
5 going to have, obviously, is the fact that we're
6 going to have those discovery fights. You heard
7 from the very first time we were in the
8 courtroom.

9 Just to give you an example, kind
10 of, like, Facebook, which is a magnitude larger
11 than my small client, has produced about 2,800
12 documents. We've produced two-and-a-half times
13 that much already. This constant pull to try to
14 get information is getting to be --

15 It's kind of what you said in the
16 earlier case today. They can make us spend a
17 tremendous amount of money to try to pull out
18 every single document.

19 One of the things we were hoping
20 for on this motion, for example, we filed a
21 motion because they said they wouldn't give us
22 documents. In their opposition, they give it to
23 us. They said they weren't going to, then they
24 did. So maybe it's moot now. Some of these

1 categories are moot.

2 But the technical documents, we
3 don't want to have to come back here twenty
4 times because every single time we ask for
5 something, they put up a wall. That's our
6 biggest concern, and that's what I'm most
7 anxious about, I guess.

8 We will be very precise on the
9 modules. We won't go overbroad on this at all.

10 MS. KEEFE: We've never, ever said
11 we're not going to give the documents. We've
12 given over 100,000 pages.

13 If there is specificity to the
14 request for our documentation, it will be
15 forthcoming. There is no I'm pulling it, and
16 you can't have it.

17 We've maintained our position
18 absolutely consistently. The one thing I'm
19 worried about --

20 I don't want Facebook to be
21 trashed.

22 THE COURT: Don't be so defensive.

23 MS. KEEFE: I love my company.

24 The only other thing I am hearing

1 just a little bit, Your Honor, and I know this
2 is just going to be, whenever it comes out is
3 where it comes out.

4 Mr. Andre seems to be saying,
5 "Once I identify that module, I want every
6 single thing about it, and then I'll keep coming
7 back for more and more and more before I stop
8 looking."

9 One of the biggest points of us
10 bringing this motion was in order to start
11 moving forward in order for us to be able to do
12 a proper invalidity analysis to start looking at
13 claim construction. We need to know what's
14 accused, and we do not still believe that we
15 understand what's accused.

16 So I would just ask that there be
17 a little more give and take, that this just not
18 be, I give a module list, he picks two, then he
19 says he needs four, then six, then eight, and
20 we're still left with no supplementation.

21 Instead, maybe after each time,
22 they have to supplement with additional
23 information they learned each time so that we
24 can keep moving this forward. He seems to be

1 afraid of the fact that each supplementation is
2 a limitation. I know that the rules state that
3 you can supplement interrogatories with newly
4 found information, so --

5 THE COURT: The rules also say I
6 can enter an order saying no more
7 supplementation. That's why I like the rules.

8 MS. KEEFE: Rules are good.

9 THE COURT: In American courts, we
10 don't follow them. You'll get briefs in
11 discovery disputes, and it's all cases, and
12 nobody analyzes the rule. Isn't that crazy?
13 Maybe not. Call me crazy.

14 I can order no more
15 supplementation. I can put that down.

16 You know what I'm going to do in
17 this case? This case got started early, but I
18 think it's an interesting enough case. I'm
19 going to put you in my little study.

20 MS. KEEFE: Oh, no.

21 THE COURT: Yes. You're going to
22 like this. You're not going to. Maybe you
23 will.

24 There's a big push in the courts

1 for a whole lot of things in patent cases, some
2 of which is completely ill-advised, I think.
3 And to some extent, they're going to kill the
4 goose, which is not a good thing for you all, in
5 my view.

6 So -- and there's a lot of this
7 international push, that we do things like they
8 do it other places and why we have juries and
9 all sorts of stuff out there.

10 I'm going put you in the study
11 which is going to, kind of, address what you
12 just raised and also what you raised, Mr. Andre.

13 There's a little questionnaire I
14 have, and, for instance, I'll send you a letter
15 and then you can respond to it.

16 In camera, I'm going to ask you to
17 submit -- which means it doesn't go on the
18 docket, it's not available in the clerk's
19 office, it's only a chambers review document --
20 and I tag it to Rule 1 and Rule 16. The word
21 "inexpensive."

22 Can you imagine that word is in
23 the rules? It really is. There's actually a
24 study commencing by an appellate judge, a guy

1 who was an appellate lawyer who's been a
2 district judge for five years or six years.
3 He's doing a study on patent cases in complex
4 litigation because in all his experience, he
5 figured out how do this. Now he just needs some
6 statistics to support it.

7 He's polling lawyers and trial
8 judges, and this is another ill-advised effort
9 by our federal judicial center, in my view, to
10 destroy the practice for lawyers. I think to
11 make it more inefficient.

12 I want you to send me a letter and
13 tell me what your client spent pre-Rule 16
14 conference to get to the Rule 16 conference,
15 both in fees and costs.

16 Then I want you to tell me in the
17 letter what the budget -- you don't have to
18 share this with each other. It just comes to me
19 -- what the budget your client has for this case
20 to a verdict or whatever interval you've priced
21 the case. A budget of the case. Unless you're
22 on a fixed fee, it would be a budget.

23 And then at the end of the case,
24 I'm going to ask you to tell us what was

1 actually spent to get the verdict, and I will
2 tie that budget number, without being biased or
3 unduly influenced, to the amount of work I allow
4 to be done in the discovery phase and allow the
5 number of revitalizations of positions we'll
6 allow and supplementations by whether or not
7 we're tracking, to some extent, on the numbers.

8 And the other financial collision
9 we have going on is, you understand, even with
10 the limited resources that your clients may be
11 willing to spend on the this case or the
12 extensive resources they may be willing to
13 spend, you understand. Do they understand?

14 And they don't. That's why
15 they're whining to the Congress and all that
16 they're basically throwing that up against a
17 sole practitioner. It's unbelievable.

18 To face, like, an -- even in that
19 patent pilot program we're talking about, for
20 them to seriously allow us to handle what is
21 thrown over this bench just in our patent cases
22 would require a staff of ten law clerks, some of
23 whom would have to have technical backgrounds.
24 They don't get any of that. They look at you

1 like you're crazy.

2 But then you ask them, "How many
3 associates do you have employed in this case as
4 we go to trial?" Or staff and associates. I've
5 never heard less than double digits. Never.

6 So maybe we could use this case as
7 one of our shining ten to twelve examples of how
8 you can get cases through, stay on budget, if
9 the court has knowledge. Then you have
10 different mechanisms like we do here. There are
11 some other things we'll tag, time to resolve
12 discovery disputes.

13 But I'll send you the whole
14 questionnaire and the data we're going to
15 collect. You're now in that study.
16 Congratulations.

17 MR. ANDRE: Sounds like fun.

18 MS. KEEFE: Thank you, Your Honor.

19 THE COURT: At least you can tell
20 the client we're mindful. We're not out there
21 in left field with no understanding of what
22 they're going through and what you're going
23 through to get the litigation completed as far
24 as both sides and to resources.

1 I'm going to deny all the pending
2 motions as moot and order the production just on
3 the transcript. I'm not going to enter a second
4 order of the categories.

5 When do you think you can get
6 those?

7 MS. KEEFE: I'm actually traveling
8 this whole week. If Your Honor would give me
9 until -- not the week of June 1st -- the
10 following week, mid week. I would be able to go
11 to my client --

12 THE COURT: That's the week of
13 June 15th. That's the Monday. So we'll say
14 produce it by the 19th of June. That's the end
15 of that week, and you can have a reasonable
16 extension.

17 MS. KEEFE: Yes, Your Honor.
18 Thank you, Your Honor.

19 MR. ANDRE: Your Honor, I think
20 that's -- with the production they made with
21 their opposition, there was a category of
22 documents where their affirmative defense is
23 they said they produced everything, so we're
24 okay with that. We don't want eleventh hour

1 surprises, obviously. But that's fine.

2 There was also a category of
3 document requests for sales and marketing. They
4 told us they produced those to us. We haven't
5 had a chance to look at 100,000 pages of
6 documents. If we start taking depositions and
7 realize they didn't produce a lot of these
8 documents, we would like to have it on the
9 record that we can renew that portion of the
10 motion in some formal way, re-filing the motion
11 or with a less formal letter brief to Your Honor
12 asking for a teleconference.

13 A good example, Facebook announced
14 in the news they just got a \$200 million
15 financing based on a \$10 billion valuing of the
16 company. I don't know if that kind of
17 information is going to be useful information
18 because George Pacific factors, not that any
19 marked projections and stuff would be useful. I
20 don't know.

21 We will want that type of
22 information from them if it's relevant to our
23 case. We want some process in place where we
24 can come back to Your Honor if we review the

1 technical documents and don't think they are
2 complete. They are the tenable documents I
3 think Your Honor has handled.

4 The fourth category, and this is
5 something that we haven't mentioned today, is
6 the documents in the previous litigations.
7 There's two litigations in particular, one
8 involving trade secrets and another involving
9 patent infringement.

10 In those cases, source code was
11 produced. We've seen some of the deposition
12 testimony from the founder of the company. It's
13 on the web. We're finding it very relevant to
14 our case.

15 Their position has been those two
16 litigations don't involve our patent; therefore,
17 it's not relevant. It involves their
18 technology.

19 In those previous litigations,
20 they made admission about their technology, they
21 made other positions that we think would be very
22 relevant. Their only objection for not
23 producing it is on the relevancy ground.

24 We don't think there will be any

1 burden to producing deposition transcripts,
2 discovery responses, and relevant documents from
3 those litigations without implicating third
4 parties.

5 We want Facebook's information
6 from those litigations. We don't think there's
7 any burden. We think it's highly relevant.

8 That's one issue we'd like to
9 bring to the Court's attention today. There
10 will be motion papers, as well.

11 THE COURT: Right.

12 MS. KEEFE: On taking them
13 backwards, on the prior litigations, we're back
14 to the same problem of Facebook's technology.
15 It's everything on our web site.

16 I actually would prefer that we
17 revisit this issue after we identify which
18 source code is going to be produced so we can
19 see if those cases actually did, in fact, touch
20 on the technology in these cases, so we're not
21 just doing a but you're Facebook and there was
22 technology at issue, so it must be at issue in
23 this case.

24 So far, that's all we have, is

1 that it's relevant because it's about Facebook
2 and about how Facebook developed.

3 Once the technology -- a broad,
4 broad category -- is circumscribed by virtue of
5 this exchange that we're going to do now, I
6 think we can revisit the issue and tell whether
7 or not those cases are, in fact, related. And
8 if they are, we'll produce them.

9 THE COURT: Since you're in the
10 study with the test group, you're -- in the test
11 group, you will be --

12 I'm going to order this category
13 production by June 19th, but you're going to be
14 with Judge Stark, and you're not going to have
15 to follow the Motion Day procedure.

16 He has agreed to work with me on
17 this study, and, actually, since he's a younger
18 person and much brighter, he's going to be the
19 one that goes out and talks about the study, I
20 think.

21 He's out in Berkeley right now at
22 the program run by Professor Munell. He'll be
23 back this weekend. You'll be able to call him
24 up and present discovery disputes, and he's

1 tracking the time it takes to resolve them and
2 what you present.

3 And then if you have an objection
4 to his ruling, it'll come up to me, and I'm
5 going to schedule it on the telephone. So I'm
6 going to agree with you.

7 Let's get the June 19th -- I don't
8 want to be inconsistent in the rulings since
9 he's going to be taking as part of this group.
10 Let's get that produced first, and then we'll
11 take up these, Mr. Andre.

12 MR. ANDRE: That's fine, Your
13 Honor.

14 THE COURT: And you'll have very
15 good access to him because we've limited the
16 cases, and we have this two-page data poll.
17 And, of course, Judge Stark will want to look
18 good, so I think he's going to have everything
19 resolved in five days.

20 I think it's going to be good to
21 see what you can do, and -- you know what the
22 other part of that is? You have to hire a
23 person to handle mediation. We don't care if
24 you go there because you both have to agree to

1 go to mediation.

2 We want you to put somebody on
3 board and then we'll give you a reporting
4 interval. It will probably be every ninety
5 days, and you can report to us that we didn't
6 meet, so it doesn't cost anything.

7 We're tracking it through various
8 stages of discovery and then right up to the
9 trial. But if you do meet, and you say, "We
10 met. Progress made. Progress not made."
11 That's all we want.

12 Since we're putting all these
13 financial resources -- again, we have this
14 financial collision with Judge Stark and myself
15 into these cases. We felt that that was
16 something that was the least cost that we could
17 move out, and what could it cost you to retain
18 somebody? \$1,000 or \$500 a piece?

19 And you can select them from the
20 list of people we have here. You can't use one
21 of the judicial officers. Someone asked me
22 could they go to Vice Chancellor Parsons, who
23 was a patent litigator at Morris Nichols. He's
24 at the Chancery Court, and they have a program

1 where they mediated intellectual property. You
2 can go to him, or you can agree on somebody
3 that's in Silicone Valley. I don't care.

4 MS. KEEFE: Could we use a JAMS
5 mediator?

6 THE COURT: Sure. Whatever you
7 want. That's the point. You get them. You
8 decide what to pay them, and we're out of that.

9 But, we're fulfilling our ADR
10 obligation, and we're not imposing costs on you
11 and not sapping resources here meeting every --
12 the only thing we're going to tell you is how
13 often we're suggesting you report this on
14 anything you've done in that regard. It's
15 strictly up to the parties to engage it.

16 MS. KEEFE: That's easy, Your
17 Honor.

18 THE COURT: We're interested in
19 getting to a trial.

20 MS. KEEFE: That sounds easy.
21 Only one other question, and that is, with
22 respect, we actually have, just to please Your
23 Honor, we've filed a second motion to compel
24 already. Would you like us to now address that

1 to Judge Stark?

2 THE COURT: That would go to Judge
3 Stark. I'm not trying to get rid of it. I
4 think you're going to find this test group --
5 we're trying to find a way to expeditiously and
6 inexpensively move patent cases through courts,
7 so I think this is actually going to be less
8 arbitrary and more informed for you and get you
9 to the trial date more efficiently.

10 MS. KEEFE: So for this second
11 motion, it was on Your Honor's calendar for
12 June 18th, is that now on Judge Stark's
13 calendar?

14 THE COURT: We'll send it down to
15 Judge Stark. You don't have to use the patent
16 Motion Day procedure in your case. You're going
17 to have access to him by phone call or whatever
18 he sets up with you.

19 He's going to be tracking volume
20 and that type of thing, which is something you
21 both raised.

22 MS. KEEFE: Thank you, Your Honor.

23 THE COURT: Any other questions?

24 MR. ANDRE: No, thank you.

1 MS. KEEFE: No, thank you very
2 much.

3 THE COURT: You talked me into
4 putting you in that group. I think it's going
5 to be good for this case, and it'll get you,
6 hopefully, better decisions and get them more
7 expeditiously.

8 But there is that one order, so
9 ordered on this transcript, for June 19th.
10 We'll be in recess.

11 (Proceeding ended at 11:15 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