

1 IN THE UNITED STATES DISTRICT COURT
 2 IN AND FOR THE DISTRICT OF DELAWARE
 3
 4 LEADER TECHNOLOGIES, INC.,) Civil Action
 a Delaware corporation,)
 5)
 Plaintiff and Counterclaim)
 Defendant,)
 6)
 7 v.)
)
 8 FACEBOOK, INC.,)
 a Delaware Corporation,)
 9)
 Defendant and Counterclaim)
 Plaintiff.) No. 08-862-JJF-LPS

12
 13 Wilmington, Delaware
 Friday, October 23, 2009
 11:30 a.m.
 14 Telephone Conference
 15 - - -

16 BEFORE: HONORABLE LEONARD P. STARK, U.S.M.J.

17 APPEARANCES:

18
 19 PHILIP A. ROVNER, ESQ.
 Potter Anderson & Corroon LLP
 -and-
 20 PAUL J. ANDRE, ESQ., and
 JAMES R. HANNAH, ESQ.
 King & Spalding
 (Silicon Valley, CA)
 21
 22
 23 Counsel for Leader
 Technologies, Inc.
 24
 25

11:34:22 1 little bit late starting this morning. As I am sure you all
 11:34:28 2 know, we are very busy over here, the judges, and the court
 11:34:32 3 reporters as well. I know that you are all busy, also. I
 11:34:34 4 do apologize for having to move the call back a bit to track
 11:34:38 5 down a court reporter.
 11:34:40 6 The purpose of the call today is to talk about
 11:34:44 7 the latest discovery disputes that the parties have put in
 11:34:48 8 front of me. Both sides are complaining about certain
 11:34:52 9 aspects of the other side's discovery to date. I have, of
 11:34:56 10 course, reviewed the letters, and I do want to give you all
 11:35:00 11 a chance to add a little bit more, if you wish, to what you
 11:35:04 12 set out in the letters.
 11:35:06 13 Let's start with Facebook's complaint and your
 11:35:14 14 request that there be more complete responses to your
 11:35:18 15 Interrogatories Nos. 4 and 11 regarding the allegation of
 11:35:22 16 willful infringement. And I want to hear first from
 11:35:26 17 Facebook on that, please.
 11:35:26 18 MS. KEEFE: Thank you very much, Your Honor.
 11:35:28 19 Good morning.
 11:35:28 20 Your Honor, it is interesting, having read the
 11:35:32 21 opponent's opposition brief, I might be able to
 11:35:34 22 short-circuit some of this.
 11:35:36 23 This is another case where we had asked for more
 11:35:40 24 information and received more information in their
 11:35:42 25 opposition brief than we had in the original response. If

1 APPEARANCES CONTINUED:

2 STEVEN L. CAPONI, ESQ
 Blank Rome LLP
 3 -and-
 HEIDI L. KEEFE, ESQ., and
 4 MARK R. WEINSTEIN, ESQ.
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11:33:44 13 THE COURT: Good morning, everyone. This is
 11:33:44 14 Judge Stark. Who is there, please?

11:33:46 15 MR. ROVNER: Good morning, Your Honor. This is
 11:33:48 16 Phil Rovner from Potter Anderson on behalf of the plaintiff.
 11:33:52 17 With me on the line is Paul Andre and James Hannah from King
 11:33:58 18 & Spalding.

11:33:58 19 MR. CAPONI: Good morning, Your Honor. Steve
 20 Caponi from Blank Rome. With me on the phone is also Heidi
 11:34:04 21 Keefe and Mark Weinstein from Cleary Godward.

11:34:08 22 THE COURT: Good morning to everyone.
 11:34:08 23 For the record, this is Leader Technologies,
 11:34:12 24 Inc. v. Facebook, Inc., Civil Action 08-862-JJF-LPS.
 11:34:20 25 I want to start just by apologizing. We are a

11:35:46 1 Your Honor would be willing to simply order that the facts
 11:35:50 2 contained in the opposition letter be their interrogatory
 11:35:56 3 response, I think we would be satisfied, since they have
 11:36:00 4 said in their opposition letter that these facts are all
 11:36:02 5 they have. Those are more than in their response. If they
 11:36:06 6 are all concatenated and turned into a response, I think we
 11:36:10 7 would be satisfied.
 11:36:10 8 THE COURT: Let's stop you there and see what
 11:36:12 9 the plaintiff's position is, just on what you have said so
 11:36:16 10 far.
 11:36:16 11 MR. ANDRE: Your Honor, I think most of what we
 11:36:20 12 put in our letter brief was a response. We have no problem
 11:36:28 13 supplementing a response to that level. The big issue with
 11:36:30 14 this is that willfulness is really an examination of the
 11:36:32 15 defendant's activity. We haven't had a chance to do that
 11:36:36 16 yet. We can supplement our interrogatory with what's in our
 11:36:38 17 letter brief and make this issue go away.
 11:36:44 18 THE COURT: Ms. Keefe, if I order Leader to
 11:36:48 19 supplement its interrogatories, let's say, by next
 11:36:54 20 Wednesday, to incorporate the contents of its letter, that
 11:36:58 21 is the end of this dispute and you withdraw your request for
 11:37:02 22 a stay with respect to willful infringement discovery?
 11:37:04 23 MS. KEEFE: Not quite, Your Honor. Close.
 11:37:06 24 What I heard Mr. Andre say was that he is
 11:37:10 25 willing to continue to put that in but everything is still

11:37:12 1 open. Tied in from his opposition letter was that these are
 11:37:18 2 all the facts they have. And therefore I would assume that
 11:37:20 3 in his supplementation he would remove the "on information
 11:37:24 4 and belief," because these are the only facts that he has
 11:37:26 5 right now and this is all there is. So it is not an
 11:37:32 6 open-ended thing. This is what he has as of right now.

11:37:36 7 We know if something else comes up somewhere
 11:37:38 8 down the line, he can always move to amend those responses.
 11:37:42 9 But as of right now, the responses need to be clear and
 11:37:46 10 complete and not simply information and belief, because that
 11:37:48 11 is not appropriate. That's why if we could incorporate it
 11:37:52 12 in the opposition, since they said this is all I have, that
 11:37:56 13 was the fight.

11:37:56 14 THE COURT: Mr. Andre, I understood that is what
 11:38:00 15 you would be offering to do. That is, that you have
 11:38:02 16 provided the full basis of what you know today, prior to
 11:38:10 17 getting discovery on willful infringement, you have provided
 11:38:14 18 everything that you know about the basis for your willful
 11:38:18 19 infringement claim, and you reserve the right to supplement
 11:38:20 20 to the extent you find something else in discovery.

11:38:24 21 Did I get your position correct, Mr. Andre?

11:38:26 22 MR. ANDRE: You did, Your Honor.

11:38:26 23 THE COURT: Ms. Keefe, that's what you are
 11:38:28 24 looking for?

11:38:30 25 MS. KEEFE: I think it is. I think the only

11:38:32 1 thing I would also note, Your Honor, is that I would like to
 11:38:34 2 simply reserve the right to move for a commensurate stay if
 11:38:38 3 I move for summary judgment of non-willfulness based on the
 11:38:42 4 facts in the record. That can happen at a later time.

11:38:44 5 THE COURT: That is not a matter that is
 11:38:46 6 actually in dispute today.

11:38:48 7 MS. KEEFE: Correct.

11:38:50 8 THE COURT: Any problem with the mechanism that
 11:38:52 9 I give Mr. Andre till next Wednesday to formally supplement
 11:38:58 10 his response with the contents of the letter?

11:39:00 11 MS. KEEFE: No, Your Honor.

11:39:00 12 THE COURT: Any problem with that from your end,
 11:39:02 13 Mr. Andre?

11:39:04 14 MR. ANDRE: No, Your Honor. Thank you.

11:39:04 15 THE COURT: I believe that takes care in full of
 11:39:08 16 Facebook's issue. Is that right, Ms. Keefe?

11:39:12 17 MS. KEEFE: I believe, Your Honor.

11:39:12 18 THE COURT: Fine. I appreciate you flagging
 11:39:16 19 that way of dealing with it for me.

11:39:18 20 Let's move on, then, to Leader's various
 11:39:24 21 complaints about Facebook's compliance with the Court's
 11:39:28 22 September 4th order. Let me hear first from Leader on
 11:39:36 23 this one.

11:39:38 24 MR. ANDRE: Your Honor, James Hannah will be
 11:39:40 25 talking about the technical documents in this matter.

11:39:42 1 MR. HANNAH: Your Honor, James Hannah
 11:39:44 2 representing Leader. Good morning.

11:39:46 3 Simply, we are just asking for Facebook to
 11:39:50 4 provide a complete response and all the technical documents
 11:39:56 5 that it has that we have identified the source code modules
 11:40:00 6 for. As Your Honor remembers, we were asked to identify
 11:40:04 7 source code modules for which we sought technical documents,
 11:40:08 8 for which we found infringing technology. We identified
 11:40:10 9 those documents -- we identified those source code modules
 11:40:16 10 to Facebook, and Facebook, in turn, produced approximately
 11:40:20 11 4,000 pages, most of those, 3900 of them were public
 11:40:26 12 documents. Of that we have got about 400 pages which were a
 11:40:30 13 screen shot of a wicking. We do not have any e-mails, which
 11:40:38 14 Facebook has refused to produce. We do not have any design
 11:40:42 15 documents. We don't have any development documents. All of
 11:40:46 16 these documents are highly relevant to our case.

11:40:50 17 For instance, the e-mails and the design
 11:40:52 18 developments documents, the development documents will
 11:40:56 19 provide information as to when there were product changes,
 11:40:58 20 and we can see when different functionality was implemented
 11:41:00 21 by Facebook. It will provide info as to how employees
 11:41:04 22 characterized the operation and functionality of the site.
 11:41:08 23 It will provide information on how the system operates, so
 11:41:10 24 we have an idea about how each application interacts with
 11:41:14 25 the source code modules. We can look at the source code

11:41:16 1 itself.
 11:41:16 2 But seeing the e-mails, the design documents,
 11:41:20 3 the development documents, and how the source code modules
 11:41:24 4 operate gives us a full picture of the Facebook website and
 11:41:28 5 what's been accused of infringement.

11:41:32 6 The list goes on and on, Your Honor. It gives
 11:41:34 7 you insight as to how the employees use the site and how
 11:41:38 8 Facebook instructs the employees to use the site. It gives
 11:41:42 9 us insight to see how Facebook instructs its users to use
 11:41:44 10 the site, because we do not see any technical manuals in
 11:41:48 11 there, we do not see any instructions, any troubleshooting
 11:41:52 12 guides.

11:41:54 13 The e-mails will allow us to also narrow and
 11:41:58 14 focus our discovery in depositions. If we don't have any
 11:42:02 15 e-mail communications and if we don't have any design
 11:42:06 16 documents, development documents, we are shooting in the
 11:42:08 17 dark. We don't know exactly the engineers that we need to
 11:42:14 18 depose to ask about the infringing technology, the
 11:42:16 19 infringing source code modules. So it's putting Leader in a
 11:42:20 20 very difficult situation, not having these technical
 11:42:26 21 documents.

11:42:26 22 THE COURT: All right. Well, I appreciate that
 11:42:30 23 you have come up with a list of the potential relevance of
 11:42:36 24 the e-mails. But I got to tell you, none of that sounds
 11:42:40 25 like it's particularly relevant where the issue is a

11:42:46 1 straightforward question of infringement and you now have
 11:42:50 2 full access to the entire source code. I do agree with
 11:42:58 3 Facebook that there has to be some balancing here in light
 11:43:02 4 of the circuit that got us to where we are and to where we
 11:43:06 5 are in the case schedule. So you are welcome to take
 11:43:12 6 another shot. But particularly address the representation
 11:43:16 7 that there would be a significant burden of many months and
 11:43:20 8 330 employees that would have to have their e-mails
 11:43:24 9 reviewed. How could that balance possibly weigh in your
 11:43:28 10 favor when you have been given free access to the full
 11:43:32 11 source code, which is, after all, the alleged infringing
 11:43:34 12 product?

11:43:36 13 MR. HANNAH: Your Honor, I mean, we believe that
 11:43:38 14 Facebook should have already searched their e-mails for the
 11:43:44 15 relevant e-mails. We believe that saying that they have to
 11:43:50 16 search now for the e-mails is disingenuous of them. To
 11:43:54 17 address the particular aspects about the infringing
 11:43:58 18 technology, we need the e-mails to examine the development
 11:44:02 19 and design documents to know exactly when the infringement
 11:44:06 20 began.

11:44:08 21 The source code that we were able to look at was
 11:44:10 22 a snapshot from about July 2009. So we have no idea how the
 11:44:18 23 Facebook site operated when the patent issued, for instance,
 11:44:22 24 in 2006. We have no idea what changes were made from 2006
 11:44:28 25 to 2007 to the present day. And the only way we are going

11:44:32 1 to be able to have that information is if we have the
 11:44:36 2 development documents, the design documents, the e-mails
 11:44:42 3 from Facebook.

11:44:42 4 THE COURT: If I require Facebook to identify
 11:44:46 5 the most relevant engineers for depositions, to the extent
 11:44:50 6 they haven't done that already, why can't you just simply
 11:44:54 7 ask those questions in deposition?

11:44:56 8 MR. HANNAH: Well, during deposition we would
 11:45:00 9 like to have the e-mails and the technical documents so that
 11:45:04 10 we can see what their role is. I mean, I have a feeling
 11:45:08 11 that if you order that, Your Honor, and we do not have the
 11:45:12 12 e-mails, we are still going to be shooting in the dark as to
 11:45:16 13 what their role is.

11:45:18 14 Furthermore, we have a limited amount of
 11:45:20 15 depositions in this case. So if they give us a list of 30
 11:45:24 16 engineers working on a particular aspect or application,
 11:45:28 17 then we are not going to be able to focus in on the people
 11:45:34 18 that are going to be relevant and questions that we need to
 11:45:38 19 ask.

11:45:38 20 THE COURT: That is a problem I can take care
 11:45:44 21 of. If that's what they do and it turns out you need 40
 11:45:44 22 engineering depositions and you can make that showing, I am
 11:45:46 23 open to that possibility.

11:45:46 24 The definition of "technical document" that you
 11:45:58 25 included did not specify, as I read it, e-mails, nor do I

11:46:04 1 recall any reference to e-mails when we were discussing
 11:46:08 2 thoroughly the issue of what technical documents you are
 11:46:12 3 looking for. In that context, why should I not accept the
 11:46:16 4 representation of Facebook that the first time they had any
 11:46:20 5 thought that you were looking for e-mails relating to
 11:46:24 6 technical issues was quite recently?

11:46:28 7 MR. HANNAH: Your Honor, this comes back to our
 11:46:30 8 requests for production, which were served on Facebook on
 11:46:32 9 February 20th of this year, of 2009. Those RFPs all ask for
 11:46:40 10 all documents and communications relating to the
 11:46:42 11 functionality of the Facebook website. In particular, there
 11:46:46 12 is an RFP 26 that asks for all schematics. It asks for all
 11:46:54 13 flowcharts. It asks for all diagrams.

11:46:56 14 Furthermore, the definition of documentation
 11:47:00 15 that we have in the RFPs says, and I am quoting, "The term
 11:47:06 16 'document' shall mean all writings and recordings as those
 11:47:10 17 terms are defined..." and it goes on to say including
 11:47:12 18 e-mail.

11:47:12 19 So they have had notice from eight months ago
 11:47:16 20 that we wanted e-mails, we wanted all technical documents.
 11:47:20 21 And we just really haven't anything in eight months. Now we
 11:47:24 22 have 30 days left in discovery, and they still haven't
 11:47:28 23 fulfilled their obligations under the Federal Rules of Civil
 11:47:32 24 Procedure.

11:47:32 25 THE COURT: What about their argument that you

11:47:32 1 go on to define technical documents as a subset of documents
 11:47:38 2 and there you list a number of things, starting with source
 11:47:40 3 code, and you don't mention e-mails?

11:47:46 4 MR. HANNAH: Your Honor, if you look at our
 11:47:52 5 RFPs, it states that we asked for all documents and
 11:47:54 6 communications. We have documents defined as including
 11:47:58 7 e-mails. Communications is also defined as including
 11:48:00 8 e-mail.

11:48:02 9 For instance, RFP 26, if you look at that one,
 11:48:08 10 it never says that we want all technical documents relating
 11:48:10 11 to the research, design, implementation, development,
 11:48:14 12 engineering, programming, structure, performance or
 11:48:18 13 operation of the Facebook website. Those are all documents,
 11:48:22 14 communications, which is defined to include e-mails.

11:48:24 15 They have had notice of this for a long time
 11:48:26 16 now. For them to say that they haven't searched any of
 11:48:30 17 their e-mails -- I mean, they haven't even searched the
 11:48:34 18 e-mails for the patent number, apparently, which is highly
 11:48:36 19 relevant to this case and should have been produced months
 11:48:40 20 ago. Even the words Leader Technologies wasn't searched for
 11:48:44 21 in the e-mails, which is another highly relevant term that
 11:48:46 22 should have been produced months ago.

11:48:50 23 MS. KEEFE: Your Honor, I am absolutely sorry to
 11:48:52 24 interject.

11:48:52 25 That is absolutely untrue. We absolutely have

11:48:54 1 searched the e-mails for the term Leader. Leader
 11:48:58 2 Technologies, McKibben, Lamb, white paper, anything that was
 11:49:02 3 an early thing that had to do with the patent and the patent
 76 4 numbers. We have absolutely done that, and in anticipation
 .08 5 of this call actually had the search repeated again
 11:49:10 6 yesterday. I am sorry to interject there. But that was an
 11:49:16 7 absolute untruth that I wanted to clear up.

11:49:16 8 THE COURT: Mr. Hannah, what is your basis for
 11:49:20 9 advising me that those circumstances have not happened?

11:49:22 10 MR. HANNAH: During the meet-and-confer, you can
 11:49:26 11 look at the correspondence that was between the two, they
 11:49:28 12 stated that they have not searched in their e-mail and that
 11:49:32 13 they will not search through their e-mails. I am basing
 11:49:34 14 this off the representation of Facebook.

11:49:36 15 THE COURT: Ms. Keefe, I will turn to you
 11:49:38 16 momentarily.

11:49:40 17 One further thing, Mr. Hannah: Do you have a
 11:49:44 18 basis to dispute the contention of Facebook at this point,
 11:49:52 19 putting aside whether they should have looked more, whether
 11:49:54 20 they have looked, that it would take them months to do what
 11:49:58 21 you are asking them to do going forward, and if I have to
 11:50:02 22 weigh that burden today versus what seems to me the
 11:50:08 23 relatively low relevance, how could I find that that
 11:50:12 24 weighing comes out in your favor?

11:50:14 25 MR. HANNAH: Well, Your Honor, the source code

11:50:16 1 modules that we have identified pursuant to your order was
 11:50:22 2 only about ten percent of the source code modules. So I do
 11:50:24 3 not believe that there is a huge burden, that they are going
 11:50:28 4 to have to produce a lot of e-mail, because we have
 11:50:32 5 identified a limited amount of the source code modules.
 11:50:36 6 Furthermore, they have told us that the technical documents
 11:50:38 7 was limited in nature.

11:50:40 8 So based on those representations from Facebook,
 11:50:44 9 I do not see how it can take many months, as they have
 11:50:48 10 stated. I believe we would be able to get a reasonable
 11:50:50 11 production of the technical documents in a fairly short
 11:50:54 12 amount of time.

11:50:54 13 THE COURT: All right. Let me turn it to Ms.
 11:50:58 14 Keefe to talk about technical documents just on that issue.

11:51:00 15 MS. KEEFE: On the specific issue that Mr.
 11:51:02 16 Hannah just discussed, the burden would be tremendous. The
 11:51:06 17 200 files that they listed in their narrowed search, as they
 11:51:10 18 claim it's narrowed, literally touches the entire site. I
 11:51:16 19 would ask Mr. Hannah to let me know which portions of the
 11:51:20 20 site are actually excluded from that identification. As we
 21 have told Mr. Hannah, those 200 files, because of the ones
 11:51:28 22 they chose, touch almost every single aspect of the entire
 11:51:30 23 site. We have told him that that would involve at least 300
 11:51:34 24 people. The 300 people that we identified in trying to
 11:51:38 25 figure out how we would have to do this search we limited

11:51:42 1 down to people who actually affected those PHC files, not
 11:51:46 2 people who may have talked about them or may have done
 11:51:48 3 something else. This is essentially, Facebook is a one
 11:51:52 4 large web single product.

11:51:52 5 So if we are talking about e-mails about
 11:51:56 6 Facebook, that's all these people do all day every day. And
 11:52:00 7 that search would be incredibly complicated and burdensome,
 11:52:04 8 as Your Honor has noted.

11:52:04 9 The only other thing I would like to add is that
 11:52:08 10 we absolutely have searched e-mails for narrowly tailored
 11:52:12 11 things that we were able to identify, for example, the
 11:52:16 12 patent number, the Leader Technologies, the names of the
 11:52:20 13 inventors, the names of their products, anything of that
 11:52:22 14 nature. What we said during the meet-and-confer was we had
 11:52:24 15 not conducted technical searches or searches based on things
 11:52:30 16 that we couldn't understand or figure out, because they
 11:52:32 17 refused to narrow what they were asking us to search
 11:52:34 18 throughout the e-mail database.

11:52:38 19 I think Your Honor understands the rest of it
 11:52:40 20 well.

11:52:40 21 THE COURT: Let me just ask you, the concern
 11:52:44 22 that Leader is not going to be able to efficiently identify
 11:52:50 23 which engineering witnesses it should depose and is not
 11:52:52 24 going to be able to efficiently depose them without some
 11:52:56 25 further production of technical documents, including

11:53:02 1 e-mails, respond to that concern, please.

11:53:04 2 MS. KEEFE: I think there are three separate
 11:53:06 3 answers to that, Your Honor. The first is that we
 11:53:08 4 understand our obligation under Rule 26 to identify
 11:53:10 5 witnesses that we are going to use to support our case.
 11:53:14 6 That will be one way of helping them.

11:53:16 7 Secondly, they actually have already
 11:53:18 8 identified a number of engineers that they specifically want
 11:53:22 9 to have documents from. They were able to identify those
 11:53:26 10 from the documents that were produced already. Those came
 11:53:28 11 up in their requests for production on October 20th. There
 11:53:32 12 were requests for production limited to those individuals.

11:53:34 13 And then finally, Your Honor, this is exactly
 11:53:36 14 what a 30(b)(6) is used for. They can give us a 30(b)(6)
 11:53:42 15 topic that asks us to identify those persons. We will put
 11:53:46 16 up a witness who identifies those persons, and they can
 11:53:48 17 notify us which of those persons they would like to depose.

11:53:52 18 If Your Honor needs to extended beyond the ten
 11:53:54 19 number, that is obviously something that we will deal with.

11:53:58 20 THE COURT: Okay. Mr. Hannah, any response?

11:54:00 21 MR. ANDRE: Your Honor, I would like to jump in
 11:54:04 22 real quick.

11:54:06 23 My concern is -- and I have been listening to
 11:54:08 24 this -- is that Facebook has effectively denied any type of
 11:54:14 25 discovery to us. They produced 398 pages of technical

11:54:18 1 documents. I have been doing this a long time. I have seen
 11:54:22 2 a lot of different patent cases involving this technology.
 11:54:24 3 I have never seen such a small production of technical
 28 4 documents.
 ..30 5 My guess is, on the e-mail side, they have not
 11:54:34 6 done anything to search for technical documents that would
 11:54:38 7 normally happen in the course of this type of litigation.
 11:54:40 8 When we start taking these depositions, my guess is that the
 11:54:44 9 engineers are going to start identifying a lot of documents
 11:54:46 10 that they have that they used that we do not have access to.
 11:54:50 11 The only thing we have at this point other than
 11:54:52 12 the 390 pages is the source code. We can't use the source
 11:54:54 13 code in deposition. We are lawyers. We are not technical
 11:54:58 14 experts.
 11:55:00 15 So it is something that puts us at a huge
 11:55:04 16 disadvantage by them just, you know, not fulfilling their
 11:55:06 17 obligations under the Federal Rules.
 11:55:08 18 E-mails, as Your Honor knows, are required to be
 11:55:12 19 produced. They are relevant documents under the Federal
 11:55:16 20 Rules of Civil Procedure. Just because they haven't done it
 11:55:20 21 in the last eight months and it will be a burden on them to
 11:55:22 22 do it now, it seems to be prejudicial to us. We produced
 11:55:24 23 our e-mails. It was a burden. But that's what the rulings
 11:55:28 24 call for.
 11:55:28 25 I am more concerned with the technical documents

11:55:32 1 than the e-mails, given search terms for e-mails, to run a
 11:55:36 2 search five or ten times. But the technical documents I
 11:55:40 3 have a huge concern with, because we have to identify some
 11:55:42 4 of the engineers based on 398 pages, but I don't know how
 11:55:48 5 many more there are out there that we should be looking at.
 11:55:50 6 That is my big issue.
 11:55:50 7 THE COURT: But what is it that is in the record
 11:55:54 8 other than your prior experience in other cases with other
 11:55:56 9 types of companies that should cause me to doubt the
 11:56:00 10 repeated representations from Facebook that they have
 11:56:02 11 provided the responsive technical documents, send you off to
 11:56:06 12 do your depositions? If you find there is more, that would
 11:56:10 13 show that Facebook didn't comply with its discovery
 11:56:14 14 obligations, they are going to have to produce them then,
 11:56:18 15 and maybe you will be moving for sanctions. I don't know.
 11:56:20 16 What do you have today that should cause me,
 11:56:22 17 other than your past experience, to believe that they are
 11:56:26 18 not being forthcoming when they insist that they are?
 11:56:28 19 MR. ANDRE: The declarations provided by the
 11:56:32 20 attorney, the search method they used, they really just
 4 21 looked at the wicking. It is something ---these cases come
 11:56:40 22 along, you generally talk to the engineers who work on this.
 11:56:42 23 You then have e-mails to the company, saying do you have
 11:56:46 24 relevant documents? What are your design documents?
 11:56:48 25 They had in-house attorneys and outside counsel

11:56:52 1 do searches, that is about it. That declaration was not
 11:56:54 2 what I would call going to the level needed to produce
 11:56:58 3 documents in this type of case.
 11:57:00 4 As far as e-mail goes, they didn't try to search
 11:57:04 5 for technical documents. I mean, I wish e-mails were not
 11:57:08 6 part of discovery, I really do, because they are the biggest
 11:57:10 7 pain in discovery in these types of cases.
 11:57:14 8 But that is not the rules at this point.
 11:57:14 9 E-mails are part of the documents that you have to collect.
 11:57:18 10 And there was no agreement between the parties that e-mails
 11:57:20 11 would not be collected.
 11:57:22 12 So at this point, we are being prejudiced
 11:57:26 13 because we spent the hours, hundreds of attorney hours
 11:57:30 14 reviewing e-mails, producing them, and they didn't try,
 11:57:34 15 other than the fact they didn't even try to look at for
 11:57:40 16 technical information in the e-mails, but then their
 11:57:42 17 declaration was such that they have outside counsel do the
 11:57:46 18 search.
 11:57:46 19 Other than my own experience, that is what I
 11:57:50 20 rely on.
 11:57:50 21 THE COURT: I am prepared to rule on this. I am
 11:57:56 22 denying Leader's request for production of further technical
 11:58:04 23 documents. I believe, considering the fact that we have had
 11:58:06 24 extensive discussions and analysis of what technical
 11:58:14 25 documents and what access to source code Facebook was going

11:58:18 1 to have to provide, given how we got here, given that that
 11:58:26 2 access to the entire source code has been provided and that
 11:58:30 3 there can be no better discovery for plaintiff in trying to
 11:58:38 4 prove infringement in a case like this than to have the
 11:58:42 5 access to the source code, and mindful of the fact that
 11:58:46 6 plaintiff's expert indicated in a declaration that he needed
 11:58:50 7 full access to the source code, along with technical
 11:58:54 8 documents in order to make a meaningful discovery of the
 11:58:58 9 source code, and that I thereafter ordered that to happen,
 11:59:02 10 and that that happened, I am satisfied at this point,
 11:59:08 11 weighing what I find to be the likely very minimal relevance
 11:59:14 12 of additional documents from Facebook, technical documents,
 11:59:18 13 that is, and particularly the very minimal relevance of any
 11:59:24 14 e-mails. Weighing that against the burden that I believe
 11:59:28 15 would be imposed if Facebook were required to do anything
 11:59:32 16 more than the searches that it has already indicated it has
 11:59:36 17 done for e-mails, particularly by searching for keywords on
 11:59:42 18 the most relevant keywords related to this case, that
 11:59:46 19 balance favors, in my view quite strongly, Facebook at this
 11:59:52 20 point in this case.
 11:59:54 21 I am mindful that depositions will be starting I
 11:59:56 22 think about three or four weeks from now that will include
 12:00:02 23 30(b)(6) depositions. I agree with Facebook that Leader can
 12:00:06 24 designate some of these topics on 30(b)(6). They can get
 12:00:12 25 their answers and you can depose engineers and ask them if

12:00:16 1 there are other documents. If it turns out that Facebook
 12:00:22 2 has not actually been sufficiently forthcoming with its
 12:00:26 3 production of technical documents, then we will deal with
 30 4 that when you are able to show that to me. But at this
 34 5 point I accept the representations, and I find that Facebook
 12:00:36 6 has done enough with respect to production of technical
 12:00:40 7 documents. And I am not going to order them to do anything
 12:00:42 8 more in that regard.

12:00:44 9 Let's move on to, I think Leader is next,
 12:00:48 10 raising an issue about the sufficiency of the production of
 12:00:50 11 marketing and financial documents.

12:00:54 12 MR. ANDRE: Your Honor, we just wanted to follow
 12:01:00 13 up on this issue, the fact that Facebook has not given us
 12:01:04 14 any type of date certain as to when they would produce
 12:01:08 15 these marketing and financial documents. They keep saying
 12:01:12 16 we are going to produce, we are going to produce, we will do
 12:01:16 17 it before November 20th, but they don't give us any set
 12:01:20 18 time. Holding out to the 11th hour is an issue for us.
 12:01:24 19 They have not given us firm representations, or given us
 12:01:28 20 business plans or any type of market information,
 12:01:32 21 advertising, things of that nature.

12:01:34 22 What we are asking for, what we asked previously
 12:01:36 23 is give us a date certain and we won't have to go to court,
 12:01:40 24 because you have been stalling for months. And they won't
 12:01:42 25 give us a date certain. That's why we are moving on the

12:01:46 1 marketing and financial documents.

12:01:46 2 THE COURT: Facebook.

12:01:48 3 MS. KEEFE: The most interesting thing on the
 12:01:50 4 financial documents is we have actually given them, the
 12:01:54 5 document we produced on September 20th was a spread sheet,
 12:01:56 6 which was sufficient to show all of the financials for the
 12:02:00 7 company. I am not sure what more they want on that, unless
 12:02:04 8 they want me to produce all of the canceled checks and
 12:02:06 9 everything that goes into that.

12:02:10 10 They actually have documents sufficient to show
 12:02:12 11 full financials. If they need something else, I would like
 12:02:16 12 them to tell me exactly what it is.

12:02:16 13 On the marketing and other types of documents, I
 12:02:20 14 am not sure that I completely understand which ones they
 12:02:22 15 want and how they want them, but I have never refused to
 12:02:26 16 produce them. I have been checking, and they will have them
 12:02:28 17 by the end of discovery, which is no prejudice to anyone
 12:02:32 18 because depositions don't even start until the end of
 12:02:36 19 November/beginning of December. They will have all the
 12:02:38 20 documents before then.

12:02:42 21 THE COURT: So the date certain is November 20
 12:02:44 22 and you will do your best to provide documents sooner on a
 12:02:46 23 rolling basis as you have been doing.

12:02:46 24 MS. KEEFE: Absolutely, Your Honor.

12:02:48 25 THE COURT: Mr. Andre, what is wrong with that

12:02:50 1 being the date certain, since you are not deposing anyone
 12:02:56 2 until at least November 21?

12:02:58 3 MR. ANDRE: We are concerned with a huge
 12:03:02 4 document dump on the last day of written discovery, the last
 12:03:04 5 day they can produce documents. We are mindful that we may
 12:03:08 6 get hundreds of thousands of documents at the last hour.

12:03:12 7 THE COURT: Didn't I give you until March 1st to
 12:03:14 8 complete depositions of fact witnesses?

12:03:16 9 MR. ANDRE: You did, Your Honor.

12:03:18 10 THE COURT: I don't understand how, even if they
 12:03:20 11 are waiting to dump all that on you on November 20th, you
 12:03:24 12 are going to be unduly prejudiced to complete your
 12:03:26 13 depositions by March 1st.

12:03:30 14 MR. ANDRE: Your Honor, I don't know if it would
 12:03:32 15 be unduly prejudicial. It is just prejudicial in the fact,
 12:03:36 16 they haven't even produced 2008 yet at this point. There is
 12:03:40 17 no reason why they are withholding these documents. I
 12:03:44 18 understand we have discovery cutoffs for a reason. We have
 12:03:48 19 asked for Facebook to actually produce documents in a timely
 12:03:52 20 manner.

12:03:52 21 At this point, we are not getting any of the
 12:03:56 22 financial documents, either. That is the reason we wanted
 12:04:00 23 to see if Your Honor would give us a date certain as to when
 12:04:02 24 they should start the production of at least the 2008
 12:04:06 25 documents.

12:04:06 1 THE COURT: All right. The date certain is by
 12:04:10 2 November 20th, 2009. I am satisfied that Facebook is doing
 12:04:14 3 its best to produce the relevant and responsive marketing
 12:04:18 4 and financial documents. I accept the representation that
 12:04:20 5 they will continue to do that, that they will complete that
 12:04:24 6 production by November 20th, and that that will provide
 12:04:28 7 sufficient opportunity for the plaintiff to complete the
 12:04:30 8 necessary fact depositions, consistent with the schedule
 12:04:34 9 provided for completion of fact depositions.

12:04:36 10 Let's move on. I think the final issue is
 12:04:40 11 whether Facebook should be compelled to produce any
 12:04:46 12 documents from previous litigations.

12:04:48 13 Let me hear from Leader on that first, please.

12:04:52 14 MR. ANDRE: Your Honor, the supplementation of
 12:04:54 15 the interrogatories regarding our willful infringement is
 12:04:56 16 relying upon some of this information from the previous
 12:05:00 17 litigation to show you what the relevance is.

12:05:02 18 There are two points that we put in our letter
 12:05:06 19 brief that we will be supplementing our interrogatory with.
 12:05:08 20 Those came from the fact that we had the deposition
 12:05:10 21 testimony of the founder of Facebook, on the codes, the
 12:05:18 22 basic website, on the two-week period and using the source
 12:05:24 23 codes to develop Facebook. He also destroyed anything
 12:05:28 24 having to do with the original source code.

12:05:30 25 That testimony from previous litigation is

12:05:32 1 obviously relevant to our case. We are not asking for
 12:05:36 2 everything from the previous litigation. What we are asking
 12:05:38 3 for are Facebook witnesses that he talked about, the
 12 4 founding of Facebook, the development of the website, the
 .46 5 materials relied upon when they were writing the Facebook
 12:05:50 6 code, all that isn't in that previous litigation. And as we
 12:05:56 7 are now going to be supplementing an interrogatory with
 12:05:58 8 information from that, I would like to have the actual
 12:06:02 9 physical transcripts of those depositions instead of relying
 12:06:06 10 upon those that are still on the Internet.

12:06:12 11 THE COURT: All right. Facebook.

12:06:14 12 MS. KEEFE: Your Honor, I am a little flummoxed,
 12:06:18 13 because this is absolutely the first time I have heard any
 12:06:20 14 of this. As we noted in our letter, this is an issue that
 12:06:24 15 Your Honor specifically ordered in July, that if they wanted
 12:06:26 16 to come back and readdress this issue after the motion had
 12:06:30 17 been denied, that we need to meet and confer in good faith
 12:06:34 18 regarding the topic.

12:06:34 19 We started to talk about the fact that they were
 12:06:38 20 going to be asking again for litigation documents, and the
 12:06:44 21 parties specifically agreed to meet and confer on this issue
 12:06:46 22 on Tuesday. So the first time I have ever heard that there
 12:06:48 23 is any -- next Tuesday, sorry. This is the first time I
 12:06:52 24 have heard that there is any narrowing of any relevance of
 12:06:54 25 any form. I still contend that the burden, again, of all of

12:07:00 1 the prior litigation based on the fact that they are
 12:07:06 2 absolutely irrelevant, not regarding the same technology,
 12:07:08 3 not regarding the same patent, overweighs any de minimis
 12:07:12 4 relevance. If Your Honor is inclined to do anything, I
 12:07:16 5 think we should at least meet and confer first. Also, I
 12:07:18 6 stand by the fact that the relevance doesn't outweigh
 12:07:22 7 anything.

12:07:22 8 THE COURT: Okay. Mr. Andre, do you want to
 12:07:24 9 respond?

12:07:24 10 MR. ANDRE: Your Honor, on October 16th, our
 12:07:28 11 letter, Exhibit 10 to our brief, you see that we once again
 12:07:32 12 requested documents from the previous litigation. Mr.
 12:07:40 13 Hannah had a meet-and-confer with counsel for Facebook,
 12:07:42 14 saying that we cannot wait any longer on this and we will
 12:07:46 15 move in the court on it. They said we can keep talking
 12:07:50 16 about it. We said, no, we need an answer now because we
 12:07:52 17 need those documents because we do want to supplement our
 12:07:56 18 willful infringement case. Obviously, stuff that we got
 12:07:58 19 from the previous testimony is relevant to that and is
 12:08:00 20 really key to it.

12:08:06 21 So we did tell them that this was an issue and
 12:08:08 22 that we were going to move on it.

12:08:08 23 Secondly, like I said, this is no burden to them
 12:08:12 24 at all. This is in their file. This is in sitting their
 12:08:16 25 lawyers' files right now. This is a matter of taking it out

12:08:18 1 and copying it and producing it. There is no search
 12:08:22 2 required. These are litigation documents.

12:08:24 3 That is what we are asking for, Your Honor.

12:08:26 4 THE COURT: All right. With respect to this
 12:08:28 5 one, I am today also going to deny Leader's request for
 12:08:34 6 production of the litigation documents. But that is without
 12:08:38 7 prejudice to it being raised again. If this is going to
 12:08:44 8 remain in dispute, I would like to see it raised fairly
 12:08:50 9 soon, within the next 30 days or so. But right now, I think
 12:08:54 10 it is premature for me to rule today, given that what I have
 12:09:00 11 heard from Mr. Andre is a significant narrowing of what the
 12:09:04 12 purpose is and therefore what the breadth is of what
 12:09:10 13 litigation documentation Leader thinks it needs.

12:09:14 14 The fact that Leader is now going to be
 12:09:16 15 supplementing its interrogatories next Wednesday, consistent
 12:09:20 16 with my order from earlier in the call, does not provide any
 12:09:24 17 basis for requiring Leader to be provided with any prior
 12:09:32 18 litigation documents, because my order is that the
 12:09:36 19 supplementation next Wednesday will extend only so far as
 12:09:44 20 Leader incorporating its letter response into its
 12:09:50 21 supplemental interrogatory responses, which means what
 12:09:54 22 Leader will be doing is saying, on the record, what
 12:10:00 23 information it has based on publicly available information
 12:10:04 24 to support its willful infringement claim. There will be
 12:10:08 25 further supplementation of that if and when Leader learns

12:10:12 1 something in discovery to add to its willful infringement
 12:10:16 2 contentions.

12:10:18 3 So the requirement to provide supplemental
 12:10:20 4 responses to the interrogatories does not provide a basis
 12:10:24 5 for requiring Facebook to produce any additional or any
 12:10:28 6 previous litigation documents at this time.

12:10:30 7 I can tell you -- and this may be relevant to
 12:10:34 8 your meeting and conferring -- I am inclined to the view
 12:10:40 9 that prior deposition testimony related to what materials
 12:10:48 10 were relied on in the development of the Facebook website
 12:10:50 11 sounds to me like it may very well prove to be relevant and
 12:10:54 12 the production of it could also streamline and thereby make
 12:11:00 13 more efficient the deposition process in this case.

12:11:02 14 I am not prepared at this time to put that in a
 12:11:06 15 ruling. At this point, I am denying, as I said, the request
 12:11:10 16 for the production, but without prejudice to it being
 12:11:12 17 renewed fairly soon, after a further meet-and-confer based
 12:11:16 18 on everything else that we have talked about today.

12:11:20 19 I think that's all the issues that the parties
 12:11:22 20 have raised. Am I correct about that, Mr. Andre?

12:11:24 21 MR. ANDRE: That's correct, Your Honor. Thank
 12:11:26 22 you.

12:11:26 23 THE COURT: And, Ms. Keefe, am I correct about
 12:11:30 24 that?

12:11:30 25 MS. KEEFE: Yes, you are, Your Honor. Thank you

12:11:32 1 very much.

12:11:32 2 THE COURT: I have one question for all of you.

12:11:34 3 The objections to one of my earlier discovery

10 4 orders, are those still pending? I believe those would be

11 44 5 Facebook's objections. Are those objections still pending?

12:11:48 6 Or have they been mooted by subsequent developments?

12:11:52 7 MS. KEEFE: I believe they have been mooted by

12:11:52 8 subsequent developments, Your Honor, and we would withdraw

12:11:56 9 them.

12:11:56 10 THE COURT: If that is the case, put together a

12:12:00 11 letter of some sort, or some sort of filing, so Judge Farnan

12:12:02 12 will see that and know that he doesn't have to deal with

12:12:06 13 those.

12:12:06 14 MS. KEEFE: Absolutely, Your Honor.

12:12:08 15 THE COURT: Thank you all for your time.

12:12:10 16 (Counsel respond "Thank you.")

12:12:12 17 (Conference concluded at 12:10 p.m.)

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19 Reporter: Kevin Maurer

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