

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

LEADER TECHNOLOGIES, INC., a
Delaware corporation

Plaintiff and Counterdefendant,

v.

FACEBOOK, INC., a Delaware
corporation

Defendant and Counterclaimant.

CIVIL ACTION

NO. 1:08-cv-00862-JJF

**DECLARATION OF CRAIG CLARK IN SUPPORT OF DEFENDANT'S OPPOSITION
TO PLAINTIFF'S MOTION TO COMPEL RESPONSES TO PLAINTIFF'S FIRST SET
OF REQUESTS FOR PRODUCTION AND FIRST SET OF INTERROGATORIES**

I, Craig Clark, declare:

1. I am an attorney with White & Case LLP, counsel of record in this action for defendant Facebook, Inc. ("Facebook"). I make this declaration in support of Facebook's Opposition to Plaintiff's Motion to Compel Responses to Plaintiff's First Set of Requests for Production and First Set of Interrogatories. I have personal knowledge of the facts contained within this declaration and, if called as a witness, could testify competently to the matters contained herein.

2. I am informed that in or about December 2008, Sam O'Rourke, in-house counsel for Facebook, spoke with Paul Andre, counsel for LTI and requested certain information about LTI's claims. Attached hereto as **Exhibit A** is a true and correct copy of an email chain between Mr. O'Rourke to Mr. Andre reflecting discussions between Messrs. O'Rourke and Andre.

3. Attached hereto as **Exhibit B** is a true and correct copy of a letter I sent to Meghan Wharton, counsel for LTI dated April 8, 2009.

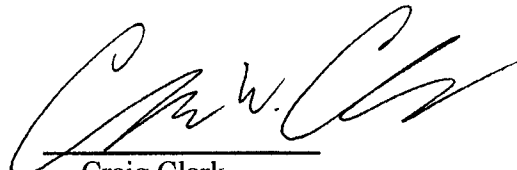
4. Counsel for Facebook participated in conferences of counsel and discussed Facebook's position with respect to LTI's response to Facebook Interrogatory No. 1 with Paul Andre, counsel for LTI, Lisa Kolbialka, counsel for LTI, and/on Ms. Wharton on multiple occasions including, April 2, 2009 and April 10, 2009.

5. Attached hereto as **Exhibit C** is a true and correct copy of a letter I sent to Ms. Kolbialka dated April 21, 2009 advising her that Facebook would produce certain materials and that it would supplement its responses to LTI Interrogatory Nos. 3, 4, 6 and 10.

6. Attached hereto as **Exhibit D** is a true and correct copy of a letter I sent to Ms. Kolbialka dated April 24, 2009 regarding LIT's request for materials filed in unrelated litigations.

7. Attached hereto as **Exhibit E** is a true and correct copy of a letter from Lisa Torres, Senior Legal Assistant at White & Case LLP, to Ms. Kolbialka, dated May 15, 2009 enclosing Facebook's production bates labeled FB00001002 to FB00109303.

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 18, 2009 in Palo Alto, California.



Craig Clark

EXHIBIT A

From: Andre, Paul
To: Sam O'Rourke
Sent: Tue Jan 20 09:24:57 2009
Subject: RE: Leader v. Facebook

Thanks Sam,

Hope you had a nice holiday also, and that 2009 is treating you well so far. Sorry I did not get back with you earlier, but I got backed up and am just now digging out. Regarding Facebook's hold obligation, please have your outside counsel contact Lisa Kobialka or Meghan Wharton to discuss the issue.

Paul

From: Sam O'Rourke [mailto:samo@facebook.com]
Sent: Thursday, January 08, 2009 10:47 AM
To: Andre, Paul
Subject: Re: Leader v. Facebook

Hey Paul -

Hope you had a nice holiday and were able to take some time off.

I wanted to follow up on a call we had a few weeks back. I had asked if you would be willing to provide us a little more info on what aspects of Facebook you are accusing to help us comply with our legal hold obligations and you agreed.

Just wanted to see where we were on that.

Thanks very much,

Sam

From: Andre, Paul
To: Sam O'Rourke

Sent: Tue Nov 25 14:11:25 2008
Subject: RE: Leader v. Facebook

Sam,

This is to confirm the extension.

Have a great Thanksgiving weekend.

Paul

From: Sam O'Rourke [mailto:sorourke@facebook.com]
Sent: Tuesday, November 25, 2008 2:09 PM
To: Andre, Paul
Subject: Leader v. Facebook

Paul -

I'm writing to confirm your grant of the 30 day extension (from the date of service) to respond to Leader's patent complaint. The response date is now January 8, 2009.

Thank you for this courtesy. Much appreciated.

Best regards,

Sam

sam o'rourke | facebook | legal
samo@facebook.com
156 University Ave. Palo Alto, CA 94301

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copies of the message.

EXHIBIT B

White & Case LLP
3000 El Camino Real
5 Palo Alto Square, 9th Floor
Palo Alto, California 94306

Tel + 1 650 213 0300
Fax + 1 650 213 8158
www.whitecase.com

Direct Dial + 650.213.0307 cclark@whitecase.com

April 8, 2009

Via E-Mail (lkobialka@kslaw.com)

Lisa Kobialka, Esq.
KING & SPALDING
333 Twin Dolphin Drive, Suite 400
Redwood City, CA 94065

Re: *Leader Technologies, Inc. v. Facebook, Inc.*, 1:08-cv-00862-JJF (D. Del.)

Dear Lisa:

I write to follow up on the issues we discussed yesterday.

Protective Order

I understand that LTI will make some changes to the circulated protective order and provide us with an updated proposed version in the next few days. As discussed, we believe that the provision on compiling source code is neither necessary nor feasible, but believe the other changes discussed (*i.e.*, ensuring coverage of non-parties; ensuring specifications will be provided only if reasonably available; and allowing authorized reviewers to take notes during any source code review) do not present significant hurdles to finalizing an acceptable version for submission to the court. While not specifically discussed, please note that any notes taken during any source code review should be designated and marked with the ATTORNEYS-EYES-ONLY – SOURCE CODE designation. Please ensure your revisions cover that point.

Electronic Discovery

You suggested that the parties agree to provide certain information regarding custodians, electronic storage systems, and collection information. I agreed to confer with my client on your proposal and discuss the issues further with you during our next call.

Affixing Designations to Facebook-Produced Materials

Facebook produced 72 records to LTI in native format on March 23, 2009. Fifty-five of these records were designated “AEO” in the file name and are subject to Del. L.R. 26.2. In our cover

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letter, we asked that LTI affix the appropriate confidentiality designation to any printed versions of the 55 designated records. LTI has stated that it is unwilling to do so. We maintain that affixing the appropriate designation to materials produced by Facebook in native format is a reasonable measure to protect the Facebook's confidential and sensitive materials. We hope that LTI will reconsider its position. If not, we will have to revisit production format. During our call yesterday, you represented that LTI will not print any of the materials from files bearing the "AEO" designation for one week, or until April 14, 2009. We ask that LTI extend that cut off until the protective order and this issue is resolved. Since LTI is withholding documents it considers confidential until after entry of a protective order, I do not believe this is an unreasonable request.

LTI's Response to Facebook Interrogatory No. 1

As discussed, we believe that despite Mr. Andre's April 6 letter, LTI has still failed to meaningfully respond to Facebook's Interrogatory No. 1. I welcome your offer to revisit the issue of supplementation. As discussed, Mr. Andre's April 6 letter is not a supplemental interrogatory response and therefore raises evidentiary concerns. Second, even if it were a formal supplementation, it fails to elucidate LTI's infringement position on a claim-by-claim and limitation-by-limitation bases.

We believe a meaningful response would connect claim elements to accused feature(s). For example, for claim 1, a meaningful response would identify, among other things, what LTI contends comprises: a "context component;" a "first context;" a "second context;" "user-defined data;" "metadata;" a "storage component;" and a "tracking component" as those terms are used in the patent. LTI has taken the position that these elements are obvious and that Facebook somehow knows what and where they are. Even if that were true, which it is not, Interrogatory No. 1 seeks *LTI's positions* about how any accused features allegedly meet the claim limitations for each asserted claim. As suggested to Mr. Andre last week and again on our call yesterday, one solution may be for LTI to circle or label the components depicted on the various Facebook screen captures with the claim limitations LTI contends are met.

Facebook is not asking for anything more than that which is due under the Federal Rules of Civil Procedure. LTI must demonstrate the steps that it contends constitute infringement of its patent in a meaningful, non-evasive manner. Ample case law supports the position that patentees are required to provide their infringement contentions in a readily accessible manner by mapping the accused features against the each limitation of the asserted claims. *See e.g., Cleo Wrap Corp. v. Elsner Engineering Works, Inc.*, 59 F.R.D. 386, 391 (M.D. Pa. 1972) (compelling patentee to label a "diagram of defendant's machine with the nomenclature of the corresponding parts of its patent"). Without a supplementation, Facebook cannot identify the features at issue and is effectively hamstrung in its defenses and counterclaims. Also, as we discussed, Facebook cannot meaningfully respond to LTI's written discovery absent knowledge of LTI's infringement contentions. LTI's clear supplementation depicting its infringement position should also help pare this case back from its current "stimulus package" level frowned on by the court.

Also, LTI's definition of "Facebook Website" remains unworkable and still includes third-party applications. *See* <http://www.facebook.com/apps/application.php?id=128581025231&ref=s#/>

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[apps/index.php?q=Marketplace](#). Please advise whether LTI is willing to name the specific features it is accusing.

LTI's Response to Facebook Interrogatory No. 3

We believe that LTI is required to provide precise dates of conception and reduction to practice as well as specific details describing the first public disclosure and other information requested in this interrogatory. This information is critical to Facebook's defenses and counterclaims and is necessary to define the universe of prior art. In its response, LTI fails to describe any circumstances of first public disclosure. LTI also modifies the dates given with "not later than" language that effectively incorporates every prior date and makes the response imprecise and evasive. See, e.g., *Boston Scientific Corp. v. Micrus Corp.*, No. C 04-04072, 2007 WL 174475, 1 (N.D. Cal., Jan. 22 2007) (granting accused infringer's motion to compel more complete responses to interrogatories directed to date of conception and reduction to practice); *McKesson Information Solutions LLC v. Epic Systems Corp.*, 242 F.R.D. 689 (N.D. Ga. 2007) (rejecting patentee's argument that it did not have to provide to accused infringer information as to when it conceived and reduced to practice its claimed invention until the accused infringer produced prior art that predated the filing date of the patent).

LTI's Response to Facebook Interrogatory No. 4

I explained that Facebook intends to move to dismiss LTI's willfulness claims based on the lack of evidence provided in response to Facebook's Interrogatory No. 4. Please advise whether LTI will dismiss its willfulness claims and thereby avoid unnecessary motion practice.

LTI's Response to Facebook Interrogatory No. 5

I explained that LTI's response to Facebook's Interrogatory No. 5 fails to provide LTI's inducement and contributory infringement for the same reasons LTI's response to Facebook's Interrogatory No. 1 is deficient. Please advise if LTI will supplement its response to this interrogatory.

LTI's Response to Facebook Interrogatory No. 9

You said LTI was willing to identify LTI products that allegedly embody the invention but was unwilling to provide a claim chart. Information about which LTI products actually embody the claimed invention *and how* they do so is directly relevant to several of LTI's contentions, including its allegations of irreparable harm, its allegation that LTI somehow competes with Facebook, LTI's alleged product marking, and secondary considerations. Moreover, the information is directly relevant to the validity of the patent in that Mr. McKibben has stated that he conceived of the alleged invention a decade prior to issuance of the patent, thus raising the question as to whether any LTI products themselves constitute prior art. Moreover, if LTI is claiming that its products embody the invention, Facebook is entitled to understand how those products allegedly do so. LTI cannot claim the benefit of embodying products without proving up that embodiment. Accordingly, please advise whether LTI will supplement its response to this interrogatory.

Lisa Kobialka, Esq.

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Limiting Asserted Claims

We understand that LTI has declined at this time to limit the number of asserted claims or identify representative claims, despite the fact that the court expressly mentioned that such limitation may be necessary in this case. We reserve the right to move the court for an order compelling LTI to limit the asserted claims and/or identify representative claims.

LTI's Proposed Rolling Production of Documents

We understand that LTI is taking the position that it is entitled to withhold confidential materials and to roll production of documents responsive to Facebook's First Set of Requests for Production only after entry of a protective order. We maintain that Facebook is entitled to LTI's production of confidential materials now, under Del. L.R. 26.2. Hopefully, entry of a protective order will moot the issue, but Facebook reserves its right to move the court for an order compelling LTI's production if the issue is not resolved promptly.

E-Mail Service and Distribution Lists

We agreed that treating e-mail service as personal service would be acceptable subject to details about timing. I propose that the parties treat e-mail service as personal service provided the e-mail in question is sent by 6:01 p.m. Pacific on the day service is to be effected, with confirmation *via* First Class Mail to the parties' California and Delaware counsel. Please let me know if this is acceptable.

We also agreed that distribution lists for correspondence between the parties would be helpful. For Facebook, please direct all correspondence and e-mail service as follows:

hkeefe@whitecase.com;
mweinstein@whitecase.com;
cclark@whitecase.com;
mmcool@whitecase.com; and
caponi@blankrome.com.

Please provide your distribution list and we will ensure all correspondence is sent accordingly.

Thank you for what I feel was a productive call. I am available for our follow-up call this Friday, April 10, 2009 at 3:00 p.m. Please let me know if that time works for you.

Sincerely,

/s/ Craig W. Clark

EXHIBIT C

Direct Dial + 650.213.0307 cclark@whitecase.com

April 21, 2009

VIA E-MAIL

Lisa Kobialka, Esq.
KING & SPALDING
333 Twin Dolphin Drive, Suite 400
Redwood City, CA 94065

Re: *Leader Technologies, Inc. v. Facebook, Inc.*, 1:08-cv-00862-JJF (D. Del.)

Dear Lisa:

I write to follow up on our April 10, 2009 conference regarding discovery. I am a bit confused as to what issues LTI has with Facebook's discovery responses based on your correspondence. For example, you state that LTI will move for an order compelling production of documents responsive to LTI's Request Nos. 60 and 61 (regarding third party applications), yet state that LTI is not seeking information regarding third party applications. As such, I do not believe LTI has met its meet and confer obligations. Nevertheless, we will do our best to provide as much information as we can and I trust the below will alleviate LTI's concerns and moot issues you have expressed. If not, I am available to discuss further.

LTI's Interrogatories

LTI's Interrogatory Nos. 3, 4 and 6 request narratives regarding Facebook's affirmative defenses. As I explained, Facebook's ability to respond to these interrogatories is hindered by LTI inability to articulate an infringement theory. However, Facebook will supplement its responses. Facebook will also supplement its response to LTI's Interrogatory No. 10.

Regarding Interrogatory No. 11, which seeks Facebook's financial information, Facebook is willing to produce responsive materials created after issuance of the patent pursuant to FRCP 33(d) and to provide LTI with a letter identifying such documents after they are produced.

LTI's Interrogatory Nos. 1 and 2 request narratives covering the factual circumstances surrounding the "creation, development, design, programming and/or coding" for "each component, module, and functionality incorporated into the Facebook Website" as well as their "launch or re[-]launch." Facebook's position on these interrogatories goes to the fundamental

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PALO ALTO PARIS PRAGUE RIYADH SÃO PAULO SHANGHAI SINGAPORE STOCKHOLM TOKYO WARSAW WASHINGTON DC

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April 21, 2009

dispute between the parties about LTI's infringement contentions and overbroad definition of "Facebook Website." Further, Facebook's website implicates hundreds of thousands of "components, modules and functionality."

The problem with these interrogatories goes beyond LTI's overbroad definition of "Facebook Website." It is simply not possible to provide narrative responses that would require identification of every minute change to the website over a period of years. The burden imposed by responding to these interrogatories would be oppressive and result in lengthy responses, spanning potentially thousands of pages, with information having no relevance to this action. Responsive information may exist in the revision control history of applicable source code for an identified component, module, or functionality. In the event Facebook is required to produce source code, it will provide LTI with access to the appropriate change logs from which the answers to these interrogatories may be ascertained.

LTI's Requests for Production

Facebook will supplement its production with documents with Facebook financial data since issuance of the patent, representative promotional and marketing materials, and prior art identified by third parties. We believe that this alleviates LTI's expressed concerns.

As to LTI's Requests regarding Facebook's knowledge of the patent, Facebook has already searched for and produced documents it has located that relate to its knowledge of Mr. McKibben, LTI, the patent, the patent application and provisional. As explained, we believe LTI has not provided any information to support its willfulness claim. Based on LTI's response to Facebook's Interrogatory No. 4, if LTI is unwilling to voluntarily withdraw its willfulness claim, we believe the issue is ripe for summary judgment.

LTI has requested documents relating to prior litigations, arbitrations or mediations related to the "technology of the Facebook Website." The phrase is vague even without LTI's disputed "Facebook Website" definition. Please explain how such materials would be relevant to this action and provide support for LTI's position that it is entitled to such materials in light of the California Mediation Privilege and *Rojas v. Superior Court*, 33 Cal.4th 407 (2004), or otherwise.

As addressed in ample correspondence and during our April 10 call, LTI has failed to provide clear, coherent and complete infringement contentions and is unwilling to supplement with information it has provided in correspondence or otherwise. LTI will not identify what components, modules or functionality it contends satisfy the key limitations in the patent including, a "context component;" a "first context;" a "second context;" "user-defined data;" "metadata;" a "storage component;" and a "tracking component" or how any Facebook component, module, or functionality might practice the alleged invention through a verified interrogatory response or otherwise. LTI's un-annotated screen captures and references to API calls fail to even hint at how any Facebook feature might satisfy all of the claim limitations. LTI presents no basis for withholding this information other than stating it does not know how Facebook operates. We agreed that this is a threshold issue for the court.

Lisa Kobialka, Esq.

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Further, LTI's definition of "Facebook Website" remains overbroad despite your April 6 and April 17 correspondence purporting to narrow that definition. LTI continues to accuse, without basis, every function, feature and iteration of Facebook's website that may have ever existed. And, as you confirmed on April 10, LTI seeks all source code behind Facebook's website and every document related to the site, with the possible exception of third-party materials, though that remains unclear based on your April 10 correspondence.

We disagree that such a broad scope of materials is relevant to this action. The only documents and source code potentially relevant are those that directly support the features LTI is accusing. As yet, LTI has not identified any accused features and cannot use that refusal as an excuse to conduct a fishing expedition through Facebook's code and documents. Even if proper, the burden and expense on Facebook entailed in producing source code and documents for its "entire sire" far outweigh any tangential probative value they would have for LTI. There is simply no basis to have this universe of documents in the case unless and until LTI can establish relevance.

LTI's Definitions

You expressed concern over Facebook's objection to LTI's definition of "Facebook." Facebook will wrap "TheFacebook LLC" into that definition. However, since LTI has not accused the ConnectU website, we see no reason to incorporate ConnectU into the definition as you suggested.

Facebook believes that LTI's definition of "Patent-in-Suit" is inaccurate and overbroad to the extent it seeks to incorporate documents other than the '761 patent. Obviously, LTI cannot allege infringement of the underlying application or provisional. Please provide me with support for your position that LTI's definition is accurate or otherwise required. To the extent LTI's concern is based on a belief that Facebook did not search for materials bearing on LTI's willfulness claim, the discussion above should satisfy any such concern.

I believe the foregoing addresses LTI's concerns, but I remain available to discuss.

Sincerely,

/s/ Craig W. Clark

EXHIBIT D

Direct Dial + 650.213.0307 cclark@whitecase.com

April 24, 2009

VIA E-MAIL

Lisa Kobialka, Esq.
KING & SPALDING
333 Twin Dolphin Drive, Suite 400
Redwood City, CA 94065

Re: *Leader Technologies, Inc. v. Facebook, Inc.*, 1:08-cv-00862-JJF (D. Del.)

Dear Lisa:

I write to follow up on your April 22, 2009 letter.

I must reiterate the fundamental disagreement between the parties. Facebook maintains that it is LTI's responsibility as the plaintiff/patentee to define the scope of its claims, and it is the responsibility of Facebook as the defendant/accused to produce documents related to those claims. As the plaintiff, LTI is required to identify the aspects of Facebook's website that it contends infringe the '761 patent. While LTI may not be familiar with facebook.com's "back end," all user-facing modules, components and functionality are available 24-hour a day at facebook.com.

As both Heidi and I have explained on several occasions, LTI should be able to easily identify the user-facing components, modules or functions and the steps LTI contends amount to infringement on the screen captures it claims show this information. LTI has refused. And, as it stands, even eliminating third-party applications from LTI's definition of the "Facebook Website," the definition still encompasses every iteration and of every user-facing module, component and function ever on the site. This is a staggering amount of technology for any single patent to cover, and a staggering amount of irrelevant information to produce.

LTI's patent is not a license to conduct a wholesale fishing expedition through all of Facebook's documents and source code in search of an infringement theory. LTI was required to form a theory for each asserted claim before filing this case. But, LTI has not disclosed its theories. And, Facebook cannot be expected to produce information and documents "reasonably calculated to lead to the discovery admissible evidence" when the relevant matter in dispute – the alleged infringement – is not defined.

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Lisa Kobialka, Esq.

WHITE & CASE

April 24, 2009

Turning to the specific demands in your letter, as to LTI's Interrogatory Nos. 1 and 2, LTI ignores the fact that it has failed to identify any accused "component, module or functionality" as used in the interrogatories, or to provide contentions about how they infringe. I have explained on multiple occasions that Facebook is not prepared to provide LTI with unfettered access to documents having no relation to this case. As stated in my April 21 letter, to the extent necessary after resolution of the fundamental dispute, Facebook will answer these interrogatories using the mechanism available under FRCP 33(d).

As for unrelated litigation materials, LTI's "it goes to willfulness" mantra does not magically make documents relevant. LTI has failed to provide any explanation as to why these materials are relevant to the alleged infringement of the '761 patent, willful or otherwise. Moreover, the documents you request are protected from disclosure, by among other things, Protective Orders entered by other courts. We maintain that LTI has failed to demonstrate relevance. We can assure you that neither LTI nor its patent ever came up in any of these cases. As I have stated, Facebook maintains that it has already produced documents in its possession regarding the allegation of willful infringement. Incidentally, LTI has not yet advised whether it will supplement its response to Facebook's Interrogatory No. 4 identifying supporting documents you contend exist somewhere in LTI's production.

With regard to LTI's request for all documents concerning the initial design, development and creation of Facebook, we maintain that, at most, LTI is entitled to information bearing on the specifically accused components, modules and functionality. We are not refusing to produce these documents, and will after LTI adequately identifies them.

LTI already has access to the user manuals for the site. Meghan explained on April 10 that LTI believes it is entitled to all versions and drafts of the user manuals for the entire site. We believe LTI is overreaching again with its definition of Facebook Website and in not limiting its request to any specifically accused components, modules or functionality. We remain open to discussing these issues after LTI properly identifies the components, modules and functionalities.

As to Facebook revenue materials, as stated in my prior correspondence Facebook will make financial data available.

Facebook plans to roll production of materials and supplemental responses as completed.

Finally, I mention that your demand for responses to letters in twenty-four hours seems unnecessary and unreasonable, especially since, we have not, in Facebook's view, hit an impasse, except with regard to the fundamental dispute of LTI's infringement contentions.

As always, I remain available to discuss these matters.

Sincerely,

/s/ Craig W. Clark

EXHIBIT E



White & Case LLP
3000 El Camino Real
5 Palo Alto Square, 8th Floor
Palo Alto, California 94306

Tel: +1 650 213 0300
Fax: +1 650 213 8158
www.whitecase.com

May 15, 2009

VIA E-MAIL & FEDEX

Lisa Kobialka, Esq.
KING & SPALDING LLP
333 Twin Dolphin Drive, Suite 400
Redwood Shores, CA 94065

Re: *Leader Technologies Inc. v. Facebook, Inc.*
Civil Action No. 1:08-cv-00862-JJF

Dear Ms. Kobialka:

Enclosed please find four (4) DVD's containing documents produced by Facebook, Inc. bearing the production numbers FB00001002 to FB00109303. Please note that some of the documents are designated "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" under the terms of the Protective Order entered in this action and must be treated accordingly.

Sincerely,

Lisa R. Torres
Senior Legal Assistant

Enclosures