IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

Wednesday, December 23, 2009
11:00 a.m.
Teleconference

844 King Street
Wilmington, Delaware

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

APPEARANCES:

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

-and-

KING & SPAULDING
BY: PAUL ANDRE, ESQ.

Counsel for Plaintiff

APPEARANCES CONTINUED:

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

-and-

COOLEY, GODWARD & KRONISH, LLP
BY: HEIDI L. KEEFE, ESQ.
BY: JEFFREY NORBERG, ESQ.

Counsel for Defendant

THE COURT: Good morning, everyone. This is Judge Stark.

Who's there, please?

MR. CAPONI: Good morning, Your Honor. For Facebook, it's Steve Caponi from Blank Rome.

And also with me, Heidi Keefe and Jeff Norberg from Cooley Godward.

THE COURT: Okay.

MS. KEEFE: Good morning, Your Honor.

MR. NORBERG: Good morning, Your Honor.

MR. ROVNER: Your Honor, for the plaintiff, it's Phil Rovner from Potter Anderson, and Paul Andre from King & Spalding.

THE COURT: Okay. Good morning to you all as well.

For the record, this is a teleconference to discuss discovery disputes in the matter of Leader Technologies Inc. versus Facebook, Inc. It's our Civil Action Number 08-862-JJF-LPS.

I have a total of four letters today

raising several disputes. And as has been our practice in the past, I'm going to move through them kind of dispute by dispute.

I want to start with Leader's complaints that or Leader's request that Facebook produce the change log document under some protection other than the non-source code designation.

And let me start on that issue with Leader. And let me tell you all, I do agree with Facebook's reading of Paragraph 8 of the protective order, in that I think that paragraph does cover the change log. I view the change log as a document or other thing that contains a party's source code or the substance thereof.

But what I want to hear from Leader is whether you have an argument that, for some reason at this point in the case, I should amend the protective order to require Facebook to produce the change log document under some other designation.

And I'll hear first from Leader on that point, please.

MR. ANDRE: Your Honor, this is Paul

Andre. I'll be arguing for Leader on this issue.

The reason we're moving on this particular issue and not -- we don't believe it's source code or substance of source code, because it doesn't consist of source code.

The change log itself is nothing more than a general summary of the changes that were made. I mean, in other words, you could not write source code based on the information in the change log. And 99 percent of that change log is just bug fixes.

In this particular case, there's been more sensitive information that's been produced under the protective order. You know, the kind of technical documents in which you could write source code from. So we have adequate protection in place for source code.

Now, as far as Your Honor's request as to whether we should amend the source code, under the protective order, we believe that it is unduly burdensome to have us review this document as we would review source code. Several reasons for that.

One is several hundred pages and you

need to read this in context with other technical documents, and in the context with source code of time. So, and the reason being, of course, because our patent issued in 2006, November 2006, we're alleging that Facebook is infringing since that time.

Facebook has only given us one version of the source code itself as of today and would not provide us with versions dating back to 2006. So the source code is our only -- I mean, the change log is our only basis for showing that the source code as it exists today is substantially the same as it existed in 2006 when their infringement began.

So as is given, source code protection would be prejudicial to Leader because the current version of the protective order allows Facebook to actually log all of our visits to the source code. They allow a restriction to a number of attorneys that can see the source code.

And also, it is something -- they have an observer in the room with it and that's observing source code. So it is something that

would be extremely prejudicial if we cannot go in this and look at it from a point of view of comparing the change log with the patent with technical documents and the source code itself when the time calls for that.

The argument for changing the protective order, as Your Honor requested, is unduly burdensome and prejudicial to Leader and requires us to treat this as source code.

THE COURT: All right. Let me hear a response, please, from Facebook.

MS. KEEFE: Thank you, Your Honor. Your Honor, this is the same level just like everyone said in both letters.

The things that we're talking about, this log actually does contain the substance of source code, describes the source code that's being modified and the reasons there for highly sensitive documents.

Mr. Andre made an interesting comment. He said that we've only produced one version of the source code. That's absolutely not true.

On November 20th, per Leader's

request, Facebook produced an entire subversion database, which includes full copies of the code as it existed over time. They've never been able to look at it, but it's been on the stand-alone computer.

It was referenced in our discovery responses served December 20th. So it is here for them to review.

Regarding their comment that it's unduly burdensome because they can't review it in the context of everything else they need, the stand-alone computer that has these logs on it also contains a subversion database with all of the versions going back as well as the code itself and technical documents.

If there's other things that they need in order to be able to do these all in one place, you know, I'm sure that we can work on accommodating them, because we have the production, you know, materials here.

Similarly, if they need more attorneys or want to have times when, you know, someone's not in the room, the person in the room is only to make sure that there's no copying.

But I'm sure we can work on something like that.

But nothing changes the overwhelmingly confidential secret nature of these materials and our need to make sure that there's no inadvertent disclosure. And that's what the protective order was meant for, stipulated and agreed to.

So thank you very much.

THE COURT: And just address the suggestion that you've produced even more sensitive documents, some type of technical documents under E designation that's not as protective as source code protection, Ms. Keefe.

MS. KEEFE: I'm not sure I understand the question. I'm sorry, Your Honor.

THE COURT: Well, as I understand it, you've produced technical documents that relate to the source code, and those are for basically attorneys' eyes only. But as I understand it, Leader has been allowed to take copies of those back to its own, you know, counsel's facility.

They're not required just to review them on a stand-alone computer. So the

suggestion, as I understand it, is that there are things that you've already produced at a lower level of designation that are nonetheless more commercially sensitive to you and that that is somehow inconsistent.

MS. KEEFE: It's absolutely not inconsistent. The material that we've allowed them to take back to their offices with them are redacted so that those portions that actually relate to the source code or contain the source code itself have been redacted.

The materials that they have are things that talk at a much higher level about certain projects or something of that nature. They don't talk specifically about the code and what's being changed in the code.

I think Your Honor can easily understand that sometimes it's the changes to the code that are the most sensitive things. You know, you don't want the public necessarily knowing about a bug set or something that is buggy or what it took to fix it. And sometimes the R & D that goes into figuring out what the problems are and what the fixes are is as

sensitive, if not more sensitive, than the code itself.

And so direct to Your Honor's point, the only material that they have been able to take back to their offices are less sensitive than that. And the most sensitive portions of those documents actually have been redacted.

THE COURT: Okay. Mr. Andre, anything you want to say in response?

MR. ANDRE: Just Your Honor, we don't think that the change log has any sensitive information you could actually derive source code from. And this is a simple one-sentence summary what's been changed.

The second, technical documents that have been produced to us, if someone were to have those technical documents, you could actually write source code pursuant to those technical documents. They give you that level of detail.

These are mere summaries of what's going on. If you look at the three categories of information, the date, the name, the file, and the engineer who did the work, those are not sensitive at all. So it's the one-sentence

summary or maybe two sentences at the time or maybe it's just a single sentence written in plain English, no source code. The change log doesn't have any source code at all in it.

THE COURT: Okay. Thank you.

On this request from Leader, I'm going to deny Leader's request. As I indicated from the start of the discussion, I agree with Facebook's reading of Paragraph 8 of the protective order. The agreement was to treat as highly confidential source code material anything that contained source code or the substance thereof.

And I am persuaded by Facebook that the change log, given that it is a summary, a description of the changes to the source code, that it does contain either source code or the substance thereof.

I don't, at this point, see any need to amend the protective order. I think that the burden that has been noted by Mr. Andre was essentially anticipated and agreed upon by the parties as the process for dealing with this highly sensitive information.

I do also note, however, that Ms. Keefe has represented that her client is willing to consider making reasonable accommodations sufficient such as perhaps asking the individuals from Facebook to leave the room at times or to make other materials available within that room.

So as to ease some of the burden on Leader as it's reviewing these materials, and I certainly encourage the parties to work to try to make any reasonable accommodations like that which I think would be entirely consistent with the spirit of the protective order, but for the reasons I've given, I'm denying the request for any additional relief that Leader has made.

Let's move on now to the issues Facebook's raising in their letters. And I'm going to break down those issues into three parts.

And the first issue, the first part goes to these third-party communications. The communications between Leader and other parties in connection with Leader's efforts to raise funds, either for an investment in the litigation

or an investment in itself. But a number of the issues or a number of the requests for production that Facebook has put at issue today relate to this general topic of third-party communication.

And I want to see if we can handle all of the third-party communication issues together. And Facebook, as the moving party, I will hear from you first on this category of issues, please.

MS. KEEFE: Thank you, Your Honor. And we agree that that's a good way to break these down, because I think that many of our requests, including responses to the interrogatories and document request and some concerns we had about the privilege log all lump into the same thing.

If I could, just very quickly, step back to kind of explain how we got here. Back in 2007, Leader began a campaign to solicit funding for the anticipated patent litigation or for the company and recreated a wealth of materials, basically marketing materials that it would use to try to gain, you know, commercial investments in the company or in this litigation.

Sent those documents to upwards of 20 different third parties soliciting these funds. They also started a campaign to make sure that these documents would hopefully never make their way to Facebook by marking them confidential and privileged, even though they were all being disclosed to third parties. So that's kind of how we got to where we are.

A result of this long privilege log, Your Honor, we think that the Corning case is directly on point, and that here in Delaware the Court has acknowledged that there is no common interest privilege. There's definitely no attorney client or work product issue.

But there's further no common interest privilege in documents that are given to third parties for the purpose of soliciting investment, whether it be in a litigation or in the company itself. And the documents that we've received from third parties show both that it was in litigation or in the company itself.

This issue is actually well resolved enough that after reading Leader's letter, I actually went on line and did just a little more

research to make sure there wasn't some distinction drawn by Courts between financing the litigation and financing of a company. And the ABA actually has an ethics opinion, Formal Opinion 00419, which cites to the notion that the question is very common about what a lawyer can refer to his client regarding litigation financing companies.

And the opinion goes on to say that, in fact, lawyers should advise their clients that whatever materials are given to these litigation financing companies may actually waive the privilege. And there's two things in the Third Circuit that have their own formal opinions saying exactly that. And that's both New Jersey and Pennsylvania.

And Delaware does not have an opinion, an ethics opinion that I could find, but Delaware has the Corning case that says exactly the same thing.

We think that all of these third-party communications are relevant and that there is no common interest privilege, and therefore, they should be produced.

THE COURT: Do I need to consider at this point from your perspective whether these documents would be admissible? And if I do, how is it that they would be admissible at trial?

MS. KEEFE: I think Your Honor absolutely does not have to decide at this point whether or not they would be admissible. The standard is whether or not they are discoverable, not whether they are admissible.

And, in fact, they absolutely are discoverable. They are exactly what discovery contemplates, a document that may lead to the discovery of admissible evidence.

They're definitely -- they absolutely are relevant. You can see just from examples of Exhibits 1 and 2 that we attached to our letter how highly relevant these documents are. They go directly to what the inventor, the president of the plaintiff's company thinks about the time line of his own invention, the validity of his own patent, whether or not it's obvious over prior art that he himself has found and used, you know, to give him an idea of what to patent.

If Your Honor wanted to go farther than that, I actually do think that these documents would be admissible as admissions of party opponents. An admission by the inventor regarding his own invention would, in fact, be admissible once we got to that stage.

But I truly do not believe that that is the relevant question at this point. The question is simply whether or not they're discoverable. And they are.

THE COURT: Has Leader at this point provided you the non-disclosure agreements that we discussed in a previous call?

MS. KEEFE: Yes. They absolutely have.

And in fact, the provision of those non-disclosure agreements led us to most of these documents that were never produced by Leader. Once we received all those NDAs, we actually sent subpoenas out to these third parties that we had never known about or heard of before.

And it was through these third parties that we started receiving through some, I should say, of these third parties that we

started receiving these documents, saw how relevant they were. And some of the parties either reached out to Leader or Leader reached out to them. I'm not sure which.

That doesn't matter. But then became represented by King & Spaulding.

And it is in connection with those parties that we are receiving privilege logs claiming a joint interest, or a common defense or some kind of privilege like that. And that's what, you know, brings us to Your Honor.

THE COURT: If it were the case that Leader was clearly raising or, you know, engaged in these communications clearly just to obtain financing to support this litigation, and if it were the case that Leader took all reasonable steps to keep the contents of those communications confidential as between itself and the parties to whom it was having these communications with, your view, Ms. Keefe, is nonetheless, there is no possibility that any of those communications are protected and privileged, you know, and protected from discovery?

MS. KEEFE: That is my position, Your Honor. And it's my position, because the joint interest, or common joint defense or common interest privilege only arises if you look at the Corning case. Absolutely only arises when the legal interests of the two parties are identical, and that they have the exact same legal interests that they're protecting.

They must be identical, not similar. And be legal, not fully commercial.

When a particular plaintiff or defendant approaches a litigation funding company, it's no different from a company approaching a potential purchaser of stock. The investor at that time has to take it upon themselves at an arm's length transaction to determine whether or not this potential investment will make them money.

And so they're going to be at arm's length from each other. In fact, if anything, their legal interests are diametrically opposed in the beginning with the plaintiff saying, Here's why my case is so perfect and why you should invest in it, because of how much money

you are going to make. And the potential investor trying to rip the case apart to make sure that this is, in fact, a valid investment and a good place for them to put their money.

And so, their legal interests are absolutely not aligned. In fact, in the beginning, they're absolutely opposite each other.

And so, I don't believe there can be any joint interests or common interests in these, and therefore, there is no protection.

THE COURT: But at a high level, what is happening in those communications is the parties are exploring whether or not the litigation is sufficiently valuable that they want to both partner in some way in hopes, I guess, that they'll make money from it.

At that level, aren't their interests at least substantially aligned, that is, they both are hoping to reach the same conclusion that we should work together and invest money in this because we think we'll get more money back in the end?

MS. KEEFE: I actually again

disagree, Your Honor. I think that they're not necessarily both hoping that this is going to work.

The person who's asking for the investment is absolutely saying I hope this works. The person who's being asked to invest has to make a very independent assessment of whether or not this is a good idea.

And at that point, their interests legally are divergent. The plaintiff wanting the money for the investment. Investor trying to determine whether or not this is a good idea.

If it is taken to the logical extreme, you could actually argue then that all marketing documents seeking funding for a company buying stock that a lawyer was ever involved in in any way would be privileged because eventually you go high enough up the chain, you're just trying to get people to invest so that something can go forward. And I know that's taking it a bit far, but that's the logical extreme of kind of the way we're arguing.

In this particular case, we know that Leader is trying to explain why it has a

good case and that the third parties are trying to understand whether or not they want to invest. Their interests are not aligned at that point.

They need to make certain whether or not they could be aligned in the future. So I think perhaps the question would be slightly different after a decision was made to invest, and that's what the joint defense is all about.

When you look at people who have decided we do have the same interest, we absolutely are aligned and we both want this patent to be invalidated as a defendant or we both, you know, need to sue on this patent.

But that's after the decision is made to come together, to ask in concert. All of the communications with potential investors have nothing to do with acting in concert. They're trying to determine whether or not they will ever make an investment and they're opposite each other.

THE COURT: But at a practical level, and maybe you'll say this is irrelevant, but at a practical level, how could somebody entice someone else to invest if they can't

disclose to them the materials that would allow the potential investor to make that evaluation?

Because taking your position to a logical conclusion, nobody can disclose any of the substance without pretty much guaranteeing that it's all going to be revealed in the ensuing litigation.

MS. KEEFE: Your Honor, that's -- Your Honor is absolutely correct, but I will tell Your Honor that I've been involved and Mr. Caponi has been involved in counseling companies before mergers in an M & A deal where there's a litigation ongoing. We've done the research to find out, you know, the company trying to acquire -- the company that's involved in litigation wants to know what are the chances of victory? How is the case going? What's happening?

And what we have done is we've said, We can't provide you with the documents because those documents will be waived once they're disclosed to a third party. If you'd like, we will sit down and talk with you about it, but that's all we can do.

And in fact, some of the documents produced in this case indicated that Andrews Kurth was worried. Andrews Kurth was the law firm that Leader was using before they hired King & Spaulding.

Andrews Kurth actually sent an email to one of the potentials and says, Let's just sit down and talk about this, you know, together in the same room so that we don't have to worry about documents being disclosed.

So this issue was acknowledged by one of the lawyers as being a possible problem. And in order to combat it, they decided to sit down and have a meeting where there wouldn't be written materials that wouldn't be disclosed, that would then have to be produced.

THE COURT: But in your view, the substance of that sit down communication is also discoverable. I guess, at a practical level, the only way you'll get it is through depositions.

MS. KEEFE: Absolutely.

THE COURT: But it is discoverable; correct, in your view?

MS. KEEFE: Yes.

THE COURT: Let me hear from Mr. Andre on these points, please.

MR. ANDRE: First, Your Honor, with the common interests, these financing companies are very particular in their business nature. They are there to finance litigation.

This is not an investment in the company. This is not investing as an M & A deal as Ms. Keefe is talking about.

This is solely towards investing in litigation. These companies have a best interest in the legal proceedings, and disclosures that are made between the parties are made to facilitate the rendition of legal services. So this is not solely a commercial enterprise. This is about a common legal interest.

Every effort was made by Leader to protect the privilege nature of this. The discussion that Ms. Keefe talked about where Andrews Kurth said, Let's sit down in the room, that was before the NDA was signed.

Once they get the NDA signed, their attorney stamped confidential on what they wanted to exchange that they believed contained

privilege information. And they also have the communication that talks about what they need to do to protect privilege.

So the intent of the parties was to protect the privilege. If you take away that, then there's no way these parties can communicate.

I disagree wholeheartedly with Ms. Keefe that they're hoping that the financing is -- hoping this doesn't work. This is their business. Their business is to finance litigation.

They're hoping it does work. They hope they make a lot of money. This is the end game.

But even before that, I disagree a hundred percent that this is relevant information that should be discoverable. And there's absolutely no way this would ever be admitted at trial.

I mean, for example, if a company -- one of the financing companies believed that our patent was, you know, end all, to be the all greatest thing they've ever seen, there's no way

that's going to get admitted.

Conversely, if they thought it was a bad patent that would not get admitted either, that these are all opinions, it would not lead to admissible evidence, because all that is being discussed here are legal opinions as to the merits of the case.

You know, to have a lawyer opine one way or the other about what is -- you know, whether the patent covers is not going to be admissible, should not even be discoverable because there were protections in place to try to prevent that exact case from happening.

THE COURT: Mr. Andre, what about statements by the inventor to a third party?

MR. ANDRE: Well, if there are statements by the inventor, there were any type of admissions. It's possible maybe, but if it's not under the privilege protection.

But the example they use, for example, in their letter where they talk about the obvious reasonable skill in the art to try in 2003 and 2004, that's not an admission. The patent was filed in 2002.

We have an invention date going back to at least 1998. So these are not admissions that are statements saying after, you know, we filed our patent application. We published the White paper in early 2003.

Facebook launched in 2004. So there are no admissions, these documents they're using.

So with respect to party admissions, if they are going to say the admissions are that they think the patent is great, I think Facebook is infringing, that's not going to get in.

THE COURT: So articulate for me, then, what is your view of what types of communications between Leader and these third parties are privileged and stay within the privilege due to the common interest document trend?

Because I take it you're not saying that everything you talk to the third parties about is privileged and non-discoverable, but you seem to think a lot of it is.

Can you articulate for me what the distinction is?

MR. ANDRE: It's when they are

conveying the analysis of their attorneys. The way this process works is the finance company has their attorneys. Leader had its attorneys.

The attorneys want to be able to disclose information to each other, either through the company contact or directly amongst themselves. And if the attorney analysis is being communicated in order to facilitate, you know, the discussion and whether or not they are going to be vested in this legal proceeding, I believe those are privileged.

THE COURT: So if the inventor is part of these meetings and he or she just starts talking about, Here's how I came up with the idea, you know, on such and such a date I did this, such and such a date I did that, that is not privileged. That's discoverable.

Correct?

MR. ANDRE: If it does not reveal attorney-client communication or work product, yes, that's discoverable, Your Honor, if it's relevant. But I don't think it's relevant.

THE COURT: And why would that not be relevant?

Isn't that --

MR. ANDRE: I guess if he's saying I came up with the idea here, there, I guess that would be. I think it could be, let's put it that way, depending on the substance of the disclosure.

And to the extent we have those type of documents, they have been produced.

THE COURT: From the documents you've produced, can Facebook identify all of the third parties that you've had these discussions with?

MR. ANDRE: Well, all the ones that I believe we can recall. I mean, I think to the extent there are documents that we had discussions with any of these parties, there was always a NDA disclosed, NDA assigned, and we disclosed with an NDA.

There might have been some cold calls, emails that were sent that they may not be able to determine from the NDAs.

Now, there were a considerable amount of documents. We actually produced emails in this case, unlike Facebook who didn't produce

a single email. And in any of those emails, many of those were the cold call emails to the system.

They were kept in the normal course of business. We did produce those.

So from the document production, they should be able to get all, if not -- or most, if not all, of the third-party financing companies that were contacted by Leader.

THE COURT: And the only exception would be if it was something akin to a cold call, and nobody at Leader has any recollection as to who those third parties are?

MR. ANDRE: That's correct, Your Honor.

THE COURT: That is, you've not expressly excised the names of any third parties that you know were called; correct?

MR. ANDRE: That's correct, Your Honor. At this point, with regard to these third-party financing companies, I think this is -- to point to a phrase used in Texas, they're drilling in a dry hole. We don't care about this issue about what third parties they're going to contact. They subpoenaed over 20 of these third

parties.

They are going to take depositions. They've noticed depositions of individuals.

We don't think this will lead to any discoverable, any admissible evidence in this case. To the extent this will, there are privileged communications. We're trying to protect those.

THE COURT: And have you produced or logged all of the documents that you exchanged with the third parties that you signed NDAs with, all such documents that relate to the '761 patent? Have you either produced them or logged all of them?

MR. ANDRE: I believe we have, Your Honor. Our privilege log is over 2,000 entries.

And to the extent we've done any documents that had the privilege document communications, we've relogged them. If they discuss the '761 -- as I said, there may be some documents if we go to dig.

You know, our policy here was to produce every single document the company had. It's a small company.

We just didn't want to have these fights over and over and over again. That is the reason these things came up in the first place.

To the best of our knowledge, we have produced all the documents that discuss the '761 patent. With these third parties, I could go back and make a further check with the client to make sure they don't have some filed things somewhere else that we didn't believe were relevant, but I think at this point we've logged all the privilege documents.

THE COURT: Well, I think the concern that I'm hearing, at least in part, is you and I have now had some back and forth as to what's relevant, what's not relevant. And at first you indicated you didn't think an inventor statement about, you know, when he conceived of the idea of the invention, you suggested that might not even be relevant.

So I'm trying to put that relevance question aside and just get right to any document relating to the '761 patent, that either Leader sent to the third party or was received back from the third party. Are you in a position to

represent that all of those documents have either been produced, or if you think there's privilege, they've at least been logged?

MR. ANDRE: Your Honor, I believe all those documents have been produced in their original form as they were sent back and forth. And I don't mean to be splitting hairs here.

If we sent a document to a third party like, for example, we sent an email saying attached is a document that describes "X", then the document itself has been produced. The email with the attachment may not have been produced.

I don't know if we look for those -- but all the documents that discuss the '761 patent have been produced or logged. We went through every single document the company had. If it discussed the patent in any way, we produced it or logged it on the privilege log.

THE COURT: Okay.

MR. ANDRE: So I don't want to mislead the Court in any way and say those communications going back and forth have been produced as well, because I can't say with absolute certainty that's the case. But the

documents themselves have been.

THE COURT: All right. Let me turn back to Ms. Keefe.

Anything you want to say in response to what you've heard?

MS. KEEFE: Just that I don't understand how that can be the case when we received a log from IP Investments, one of the third parties, that shows a series of documents that we've never heard of or seen before. So IP Investments logs a series of documents on the privilege log based on common interests that appear nowhere on Leader's log that we can tell or in Leader's production.

Exhibit 1 and 2, the time line itself in this and this White paper were never produced by Leader, and yet are completely relevant, written by the inventor. And also don't appear to appear on the privilege log in any way that we can tell and were certainly never produced to us.

So I don't understand how that can be the case that they've actually produced these documents or logged them. If they have logged

them, I don't understand how.

THE COURT: All right. Let's see, Mr. Andre, could you respond to that specific example?

MR. ANDRE: Well, in response to IP Investments, they have their own privileged documents that would be on the log that would be separate from Leader's log. It won't be just a common document.

They have their own attorneys as well. They have their own privilege issues.

With respect to those two specific documents she's referring to, I believe they have been logged on our log or they have been produced. These are documents that are single-page documents that are part of like a 200-page document that was produced to Facebook.

As I said, if it's referring to the '761, it's either on the log or it's been produced to Facebook, to the extent that Leader kept those documents in the normal course of business.

And I believe, I can't tell you exactly a Bates number where those documents were

produced, but I believe those documents were produced or logged in this case if we still have them.

THE COURT: But you could get that answer, those specific Bates numbers to us pretty quickly; right?

MR. ANDRE: Quickly being relative. Over the holidays I've got a real skeleton crew working.

THE COURT: Understood. But within a couple of business days you could?

MR. ANDRE: Yeah. I'm out of the office. I could get someone in the office.

I could try to dig up those Bates numbers of the documents. And it would be the one page from IP Investment is a page of a much larger document.

We'd have to go through needles in the haystack. We could try to find that within a week, Your Honor.

MS. KEEFE: I am not sure what he's talking about from IP Investments. The two exhibits I was talking about was the exhibit to my letter, the time line indicating everything

the inventor thought about when he came up with the idea and what was the prior art; and the White paper, which is about 10 or 12 pages long where the inventor discusses why he thinks his patent is non-obvious.

Those are the ones I am talking about that I've never seen produced or logged. In our letter we tried to -- we said, It looks like this is in the privilege log at this entry. And we were told in the responsive letter, That's absolutely not what it is.

There's no evidence it was ever produced or logged.

THE COURT: Ms. Keefe, I think we're going to use this example as a test, so let's be as precise as possible. I see the exhibit that has privilege log of IP Investments Group, but you're talking about two particular documents, either on that log or two other documents that you've attached to your letter?

MS. KEEFE: Two other documents, Exhibit 1, which is Neyer, N-E-Y-E-R 00103 produced.

THE COURT: And we are talking about

Exhibit 1 to DI-182, your letter of December 21st, 2009. Okay?

MS. KEEFE: Okay. Correct.

And similarly Exhibit 2 to my letter at Bates labeled N-E-Y-E-R 000208 through N-E-Y-E-R 000218.

THE COURT: Okay. And Mr. Andre, you understand that the two documents that Ms. Keefe is looking to nowhere, either -- where are they in your production or where are they on your privilege log?

MR. ANDRE: I understand the two documents. These are not the documents with IP Investments. This is with Neyer. It's a different group.

Exhibit 1 is a one-page time line.

THE COURT: Right.

MR. ANDRE: And I do believe that is one page of a much larger document. That would be on our privilege log. We can go and dig that up.

And Number 2 is the White paper itself. I believe we could dig that up as well on the log.

THE COURT: And Ms. Keefe, yeah, what we're going to do, we're going to play this out as a little bit of a test and see if you either have gotten this material from Leader or where it is on their privilege log. But is there anything from the IP -- what are they called, IP Investments Group log?

You know, I'm willing to send Mr. Keefe's -- I'm sorry, Mr. Andre's staff, forgive me, back with reasonable timing to find a few other documents. Are there a few entries on the IP log that you'd like them to locate?

MS. KEEFE: There absolutely are. There are communications on that log from Mr. McKibben to Ryan Strong, for example, who's an investor over at IP Investments. If you look at that log, which is attached as Exhibit 16 to our letter.

THE COURT: Right.

MR. ANDRE: And the entry -- for example, the first, I would say -- I'm sorry, Your Honor. Let me just get you a specific number that makes the most sense.

There's only four pages so we know

where all these are.

MS. KEEFE: How many?

THE COURT: That's fine. Yeah.

I understand the confusion. Let's say Mr. Keefe -- sorry, forgive me. Clearly my mind is a little tired here.

Mr. Andre, in addition to the two documents, we've already identified Exhibits 1 and 2. I also want you to identify any communications between, I believe, it's Mr. -- let me get the name correct -- between Mr. McKibben and Mr. Strong.

Any of those communications that are listed, and let's say any communication between Mr. McKibben or Mr. Sobdick on the Leader side and Mr. Strong, who I understand would be on the IP Investments Group side.

Any of those communications which are logged here on Exhibit 16 to DI-182, I want you to find out and identify where they are on your privilege log or identify where the documents embodying those communications have been produced.

Understood, Mr. Andre?

MR. ANDRE: I'm not sure I understand, Your Honor. That looks like that would be every single document on the privilege log, because all those involve either Jim Sobdick, Ryan Strong or Mike McKibben. And most of them are emails.

THE COURT: Yeah. It looks like it is all of them, so I'm asking you to do all of them. And I will give you sufficient time to do that.

But you understand what I'm asking you to locate; correct?

MR. ANDRE: I think so, Your Honor. I mean, it sounds a bit -- well, I'll say -- I'll just put it this way: The discovery burdens are extremely one sided in the fact that, you know, Facebook has not produced a single email in this case, and we are trying to go through now and find out where each of these emails that we produced are on the privilege log, if they are.

If not, I guess we have to log them on the privilege log of emails that we don't think are relevant. But we can go through and try to find where on this four-page log if those

were produced or logged.

THE COURT: Right. And if they've not been produced or logged, then you either need to produce them or log them.

And I'm going to give you until January 15th to do that for all of the documents and communications that we've just discussed, and in recognition of certainly that there are holidays coming up. But let me just say the reason I'm doing this is as a test.

You know, I accept the representation, that is, as far as it has gone from you, Mr. Andre, that you believe all documents relating in any way to the '761 patent have either been logged or produced.

You indicated it might be helpful to have a chance to double-check that. I do want to give you that opportunity.

And I'm also concerned, because we have at times talked in the language of relevance or even admissibility. And the parties, obviously, have a substantial dispute as to what is relevant and certainly what would be admissible when it comes to communications with

third-party investment financing groups.

And so before I can really get to the bottom of that issue and determine if any further relief is to be ordered for Facebook on these matters, I think it's fairer and an exercise in my discretion to select a more limited number of documents and communications which have been specifically identified by third parties and just make sure that those documents and communications which we know exist, given they've been disclosed to us by third parties, let's make sure that they are in Leader's production or on Leader's log.

And if they are, that might very well be the end of the issue. If they're not, then we'll need to understand why they're not.

Have I been clear about what it is that I'm asking you to do, Mr. Andre?

MR. ANDRE: You have, Your Honor.

THE COURT: Okay. Ms. Keefe, where does that leave us with respect to the issues raised in your letter? How much of that is covered at this point?

MS. KEEFE: That resolves -- that

starts us down the road of resolving all of those issues. I think there's only two issues that remain.

The first is that for a number of the -- it goes to the issue of how the privilege log itself reads and whether or not it contains enough information to establish the privilege that is their burden to show. For many of the log entries, there's some names, and we just don't know who the names are, if they even are attorneys or employees.

Throughout the meet and confer process, Leader's position was that it had no obligation to give us those names. I note during -- in the letter in opposition to ours that they first for the first time offer that if we identified entries where we didn't know who the people were, that they would look into that and, you know, think about -- giving us those names.

I would offer that I think what we need is a key to understand why they believe these documents to be privileged based on who these people are and what they did for Leader at

the time that the document was created.

So if they're willing to give us that key at this point, I think that would resolve that issue.

THE COURT: Mr. Andre.

MR. ANDRE: I'm not sure what she's asking, Your Honor. I'll be honest with you.

In our privilege log, we've identified in every single instance the to and from. We've identified with the Esq. designation, the attorneys, where they show that there are attorneys involved in these communications.

We've gone above and beyond the legal requirements for a privilege log. If you compare and contrast our privilege log to Facebook, they have only ten entries. Forty percent of those, they don't even have a to and from in those logs.

So there's a little bit of equal dignity argument here, that we, once again, are the -- they're asking for what they're not willing to give.

That is over and over again.

MS. KEEFE: That's actually --

THE COURT: Mr. Andre, I'm not comparing your log to a log that's not in dispute at this point. I'm only looking at your log.

And it would seem to me that by asserting the privilege, the burden is on you to establish all of the elements of the privilege. And what I understand the complaint to be here is that you've not met your burden in a number of instances in identifying that the individuals, the to and from individuals are within the scope of a privilege, because no one can tell who they were employed by, or if they are attorneys, who they were representing.

Is that information that you are offering to provide to Facebook at this time either on a request-by-request basis or some type of key that would just be, as I understand it, basically an index listing all of the names that are on your log and identifying on -- you know, on a single document, Here's who they are employed by? And if they are attorneys here, who they represented?

MR. ANDRE: Your Honor, we've

been -- we've informed Facebook on multiple occasions that we've identified everyone who was an attorney. And to the extent they identified specific instances where they do not know who the individuals are, we will look into determining what relationship they are to the privilege, and where they're employed.

What they ask for is the role these people had in the company. They're asking not only for the employer, but what role they played in the company, what was their position, things of this nature. And that's just overburdensome and not required by law.

THE COURT: I agree with you on the role. But I think identifying who the employer is is required and maybe it is that everybody listed is employed by Leader. In which case, you know, that one blanket representation would take care of it.

I have one other question for you, Mr. Andre. With respect to the recipients of documents, have you only listed as recipients individuals who are named on the face of the document or have you more broadly listed as

recipients everyone that the company knows received the document?

MR. ANDRE: It's everyone in the company that knows who has been given a document. We're -- from the face of the document, you can determine obviously who received the document, to some degree.

To the extent the company recalls specifically sending it to others, we will identify those instances. And we've talked to our client. In most cases, they can't remember who they sent it to, if they sent it to anyone else.

They believe they only sent it to the recipients. To the extent we can determine that they did, we will put this on the log as well. And we have been thus far.

THE COURT: Ms. Keefe, it sounds to me like you have a representation from Mr. Andre that he will work with you to give you additional information on an entry-by-entry basis if you identify entries that you don't feel you have enough information on.

It sounds to me like that should be

satisfactory, but am I missing something?

MS. KEEFE: I very much appreciate that. The only thing I would want clarified is I know there are a number of places where they've listed that a person is an attorney, but they don't -- they never volunteered to confirm for us who that attorney was representing at that time. And as long as that's included, so that -- you know, because, obviously, you can have people who are attorneys who aren't practicing law or aren't representing a party at the time.

As long as that is part of the information that I can request, that will satisfy everything that I need right now.

THE COURT: Mr. Andre.

MR. ANDRE: I'm not sure what she's asking, once again. But if she's saying who the attorney is representing is all she asked for, we can reprovide that. We've identified the attorneys in every case on the privilege log.

THE COURT: Okay. Fine.

Well, I'm going to order that this communication or this, excuse me, conversation continue between the parties. And if Facebook,

in good faith, believes it can't figure out whether or not the elements of privilege have been properly asserted on Leader's privilege log, then Facebook can identify the entries for which it wants more information. And Leader will provide the reasonable additional information that we've discussed here.

And that will take care of the privilege log issue. I think there is one final issue in your letter, Ms. Keefe.

MS. KEEFE: Yes.

THE COURT: Do you want to address that now at this point?

MS. KEEFE: The final issue, Your Honor, resolves around the production, Leader's production of the product and the source code behind that product or the product that they claim practices the invention claimed in the '761 patent.

If Your Honor will recall, we've actually been in front of you once before on the issue of how Leader's own product practices the patent. And at the time, Your Honor said that while you understood the relevance to the issue

of injunctive relief, lost profits, possibly to other damages type issues, Your Honor said that the burden should be on us to do the investigation, provided that we had access to the products and the source code.

Immediately thereafter, we then did a request for production to Leader for the products and the source code that supports that product, so that we could conduct our own analysis of whether or not we believe that Leader can make a claim that it is our competitor, or that it deserves injunctive relief or that it deserves lost profits. All which would require Leader to demonstrate that its own product practices the claims of the patent.

And we've been thwarted. Leader has said that they refuse to produce the product or the source code. They've stated that we have some nefarious purpose for forcing them to a product to product or infringement contention, which is obviously not the case.

They've indicated that they're going to use the product to support their allegations. They deserve an injunction. And to support

things like lost profits, we deserve a chance to investigate that ourselves. And we need the product and the code to do that.

If they would prefer to not produce the product and the code, and they would prefer to not rely in any way on the product and the code at trial, I'm fine with that, too. But if they're going to rely on the product and the code, then I deserve the right to look at it, as Your Honor indicated back in September, product to product.

THE COURT: If you were given access to the product as an initial matter, why would you also need the code?

MS. KEEFE: Well, I think for the exact same reasons that Leader insisted that it needed our code. The claims of their patent go to both forward-facing elements and backward-facing elements. In other words, things that the user can see by using it, but also to how the code is using itself to transform, or track information or anything of that nature.

So all of the same reasons that Leader needed to see our code to make the

assessment of whether or not the claims cover our product are the same exact reasons that we need to see their code and their product to assess whether or not their arguments that their product is covered by their claims have merit.

THE COURT: All right. Mr. Andre, let's turn to you and start with any chance that you're willing to agree not to rely in any way on the product or code at trial?

MR. ANDRE: Your Honor, we will not be relying on our source code at trial. It will not be provided in evidence and it will not be a part of what we present at trial.

The product itself is a -- it's a service we provide. And we provided to Facebook approximately ten times more documents, technical documents about how the functionality of our product works than they produced to us, even though we're the patentee and they're the defendant.

THE COURT: But you will be or at least are reserving the right to rely on your own product as part of your trial presentation?

MR. ANDRE: What we will -- what we

will be presenting and what we will ask Judge Farnan for is an injunction based on the fact that they are competitors in the marketplace. These are market competitors.

We do not want to get into a situation as Facebook has tried on multiple occasions to do to have us have to prove our own product infringes our own patent. That is ridiculous.

This is all they're trying to do is a product-by-product comparison saying their product looks different than our product. That's not the issue.

The issue here is: Does their product look like our patent? That's the issue.

THE COURT: What is your theory by which you are competitors?

MR. ANDRE: We are competitors, because they take sells away from us in the marketplace. We offer competing products in the marketplace for enterprise systems that use social networking. Essentially, Facebook is giving away for free what we're trying to sell, because they make their money on targeted

advertising.

THE COURT: So focusing just on the product then, what's the argument against producing to Facebook fully functioning copies of your product? It seems that you're clearly placing it at interest.

MR. ANDRE: We don't sell a product, per se. Like you don't send us a check and we send you a product.

What we do is we provide a service. We keep that service in place. And we've given a ton of documentary evidence of how that service functions.

We've produced everything to them already that describes how our product is functioning and how our service is provided.

MS. KEEFE: But, Your Honor, we can't use it. We don't have a membership.

THE COURT: Ms. Keefe, please. I will give you a chance.

MS. KEEFE: I apologize.

THE COURT: I'm talking to Mr. Andre at this point. Mr. Andre, do you -- the issue as to whether or not Leader is a

competitor with Facebook is in dispute. Do you agree with that?

MR. ANDRE: I believe it will be in dispute, Your Honor. Yes.

THE COURT: And do you agree that Facebook is entitled to make the best possible case to support the position that you're not competitors?

MR. ANDRE: Your Honor, of course, any party can make their best case in any contested legal element. Of course.

THE COURT: And so your position is that simply by providing technical documents without access to your product and without access to your source code is a sufficient basis, is fair enough for -- as a basis for Facebook to make the argument that you're not a competitor?

I guess that's your position.

MR. ANDRE: Your Honor, if they're a competitor or not, it's our burden. I will say that.

And our burden is to show that they are competitors in the marketplace. We plan on doing that using our documents that we put

forward and provided them already.

If we cannot meet that burden, then it's on us. And Facebook will not be a competitor in that circumstance if we can't meet our burden.

What they're trying to do is say that not only do we have to prove that they're competitors, but that somehow the products are identical or that we had to prove infringement of our own patent. That's not what the Federal Circuit has set forward in the test.

They say if they're a market competitor, our patent gives us a right to exclude them from the market. That's an irreparable harm issue.

That's the only issue they bring us up on. Are we competitors for the issue of irreparable harm? If we can't prove it with the documents we've provided them already and the documents we produced in this case and the testimonial evidence and whatever -- anything else we put forward in this case, we will fail our burden. But we believe we can prove it with the documents we've put forward.

If they can show in any way that we're not competitors, that's not their burden. The burden is on us.

THE COURT: But they have made out representations that they can show that you're not competitors, if only they have access to your product and your source code. So what am I to make of that?

MR. ANDRE: Well, the only purpose they would -- what they're really saying is not that we're not competitors, what they are saying is that we don't practice our invention, that we do not have a -- they're going to go in and try to put in evidence that our product is not infringing our patent.

That is not a competitor basis. That's not how you determine if one party is a competitor of the other party. The products will look different. Whether our product is covered by our patent or not can be determined by the documents we've produced and the testimony that we're willing to give.

This is not a case where they're accusing us of infringing their patent, and

therefore, they get a look at our product in that level. This is a case where all they're saying is that we're not competitors.

Well, if they can prove that in the market -- in the marketplace, that's where the determination is. That's what the Federal Circuit has said. That is what courts have said throughout the country is a marketplace determination.

If we can't prove we're competitors in the marketplace, then we will not be able to achieve the first prong of the four-part test for getting to injunction. This is an issue where -- obviously an equitable issue that Judge Farnan will decide.

I think at this point in the case, there's absolutely no reason to open up our source code, which is very sensitive to us, to Facebook, especially in light of the fact that we've produced ten times the documents about our product than they've produced to us.

THE COURT: All right. Ms. Keefe, you may go ahead at this point.

MS. KEEFE: Thank you, Your Honor.

Not much to add.

They've told -- they've represented to us and the Court that they do practice their patent. They've marked their product with the patent number. All of their documentation says that the product is patented by the '761 patent.

And they use that in order to try to establish that we're a competitor. One factor in determining competition is whether or not you know both products practice the same claim. That's one way that you can be a competitor.

Regardless of whose burden it is to establish competition, we still deserve the right to be able to challenge the fact of competition. And one of the things we need to investigate is what their product does. And we can't do that without a membership to this service. We can't even use the product right now.

THE COURT: Well, is that what you mean by your request for a fully functioning version of the product? Fully functioning includes some type of membership, I take it?

MS. KEEFE: I believe so, yes.

THE COURT: Okay. All right.

Well, I'm prepared to rule on this one. And having weighed the competing arguments, I am persuaded that Facebook is entitled to some relief on this issue, and specifically I am going to order that Leader provide fully functioning copies of the Leader to Leader, and I guess Leader to Leader Enterprise social networking products.

I'm looking specifically at Facebook's Request for Production Number 65 and 66, which are attached as Exhibit 18 to Docket Entry 182.

So with respect to 65 and 66, I'm overruling Leader's objections and I'm granting the motion to compel of Facebook. I do believe that while the burden of proving competition in connection with the request for an injunction and other types of damages or damages relief, while that burden is on Leader, a defendant here, Facebook, has a right to defend itself, not solely by arguing that the plaintiff has failed to meet its burden, but also by, if it can, proactively proving that the two companies, in this case, are not competitors.

And I think that Facebook is entitled to access fully functioning access to the product that is the basis for the contention of Leader that the companies are competitors. Facebook's entitled to access to that product to determine if it may have a basis for arguing through the product that the two companies are not competitors.

At this point, I'm denying the request for relief under Production Request Number 67, which seeks a copy of the complete source code for Leader to Leader. I do recall fairly well the back and forth over many weeks or months and phone calls that we had which led ultimately to the production of the entire source code of Facebook to Leader.

And it may turn out that Facebook will persuade me that they need access to the entirety of Leader's source code. But seeing as Facebook has not yet even had access to a fully functioning version of the product, seeing as I'm sure Leader will view the source code as the most important commercial property, and seeing as I think, I would want a very strong showing before

I'm going to provide access to the source code just as I required when Leader was seeking Facebook's source code, I just don't think that showing has or can be made at this point given that Facebook has not even had a moment to access fully functioning access to the product to the Leader product.

So that's my ruling on that issue.

We should talk about the timing for when Leader can provide the fully functioning product. Mr. Andre, given the holidays, you want to suggest a date by which you could do this?

MR. ANDRE: Your Honor, I will endeavor to do all the issues you brought up by January 15th, if that's acceptable.

THE COURT: That is acceptable. So you'll do that by January 15th.

I believe that addresses all the issues raised in the letters.

Is that correct, Ms. Keefe?

MS. KEEFE: It does, Your Honor. I had one other question, if you don't mind.

THE COURT: Just one second.

Mr. Andre, were there any other issues in the

letters that you think have not been addressed?

MR. ANDRE: No, Your Honor. I think everything has been addressed.

THE COURT: Okay. Ms. Keefe.

MS. KEEFE: The simple question, I think Your Honor still has two motions pending before Your Honor, and I just wanted to know if we could anticipate a ruling on those or a hearing if you needed one.

THE COURT: The answer is, yes, I'm going to rule on those motions right now.

MS. KEEFE: Thank you.

THE COURT: Okay. So the two pending motions are Facebook's motion to stay pending re-examination and Facebook's motion for leave to amend its responsive pleading to add a counterclaim for false marking. And I am going to give you my rulings on both of those motions right now.

First, on the motion to stay pending re-examination, I am denying Facebook's motion to stay. Facebook, as we know, seeks a stay until the conclusion of a pending ex parte and inter parte's re-examinations by the PTO of Leader's

'761 patent, which is the sole patent-in-suit.

In reviewing the parties' papers, I note that both sides recognize that the issue of whether to grant such a stay is a matter within the Court's discretion. I agree with that.

I do not agree with Facebook's suggestion that this Court routinely stays litigation pending re-examinations. Each case is fact specific, of course, and always requires the careful exercise of discretion.

And I also note, I think it was Leader, put in the record some commentary or study that suggests actually in this district, we have a relatively low rate of granting these stays. But in any case, it's not routine to grant such a stay.

Turning to the specific factors that need to be considered, I find that the factors weigh decidedly against staying this case pending the re-examination. First, while it might be true that the stay could eventually simplify issues that are pending, in this case, I think it's very unlikely that granting a stay would lead to an ultimate resolution of all the

disputes between the parties.

As I understand it, Claim 17, which has been asserted here by Leader, is not even part of the re-examination. And moreover, the PTO, of course, only deals with issues of validity during the re-examination. It does not deal with issues such as infringement, damages, and injunctive relief.

And so unless the outcome of the re-examination were to cancel all of the asserted claims that are in re-examination, there will still be things left for this Court to do with respect to those claims that emerge from the re-examination.

That's the first factor. The second factor deals essentially with the timing of when the stay was sought.

And this factors also, in the circumstances of this case, disfavors a stay. At the time that the motion for stay was filed, paper discovery was largely completed.

We were on the eve of depositions. Now, of course, a couple of months, I think, have gone on further since when the motion was filed.

Claim construction at this point is imminent. But most important with respect to the timing issue is that this is a fast track litigation by agreement.

This case was set from the beginning for a trial in June 2010, which was a period of only approximately 19 months from the filing of the complaint. And as the parties well know, not only have the parties expended substantial time and other resources in litigating this case vigorously over the last 13 months, but the Court, too, has spent much time and resources resolving discovery disputes, among other things, and making every effort to keep this case on track on the fast track towards a trial in June of next year.

The final factor is whether the stay would unduly prejudice the non-moving party, Leader, and I accept the representation. I find sufficient evidence in the record to accept that representation, for purposes of this motion, that there would be undue prejudice to Leader, as we've already discussed in another context today.

Leader asserts that it is a

competitor of Facebook. And Leader asserts further that delay would decimate the market for Leader's Leader to Leader product, and further represents that Leader will likely cease to exist if this case is stayed pending re-examination as the much larger and successful competitor, Facebook, essentially allegedly gives away the technology that Leader allegedly owns and is trying to sell.

In this regard, it's notable, I think, that none of us have any idea how long this stay that's requested would last. It's likely to be at least two and as many as five or six years. But we don't know exactly how long it would last.

And given that, it's also quite possible that the delay could create evidentiary problems for Leader due to faded memories and that sort of thing, if and when the case were to come back to this Court some years down the road.

And finally, I perceive no clear hardship or inequity to Facebook if the stay is denied. And, therefore, for those reasons, I am denying Facebook's motion to stay and will issue

an order to that effect after this call.

Next, and finally, I want to deal with Facebook's motion for leave to amend the responsive pleading to add a counter claim for false marking.

I am going to grant this motion. Facebook's theory is that Leader marked the Leader to Leader product with the '761 patent designation without having a reasonable belief that this product was covered by its patent, because Facebook alleges that Leader undertook no analysis at all to support such a reasonable belief prior to marking.

As both parties note, Federal Rule of Civil Procedure 15(a) embodies a liberal policy to allow amendment of pleadings, and I find having reviewed the papers that none of the reasons that are usually given for denying leave to amend, none of those reasons are present here.

First, I find no evidence that Facebook has engaged in undue delay, bad faith or exercised dilatory motive with respect to the filing seeking leave to amend. I find that Leader -- Facebook sought leave in a timely

fashion after comments were made by Leader's litigation counsel and after a response to an interrogatory, which seemed to Facebook to provide a basis for its proposed counterclaim.

And even if Facebook's intent is to delay, the Court is not going to let Facebook use its counterclaims as a basis for delay. As I've told the parties many times, I'm trying to keep this case on the fast track to the June trial date. And I intend to continue to make those efforts.

It's also worth noting that the scheduling order contemplated and permitted motions for leave to amend to be filed up until November 20th. And the motion for leave to amend that I'm dealing with now was filed by Facebook approximately a month prior to that deadline.

I also find there have been no repeated failures to cure deficiencies through amendments. This is the first requested amendment to a pleading by Facebook.

Next, I find no undue prejudice to Leader from granting the relief that I'm granting today to Facebook. I am going to allow for

expedited targeted discovery.

If the parties find it necessary, though, I'm anticipating that any discovery on this new counterclaim will be very limited given that almost all, if not all, of what Leader needs to support the reasonable belief that its Leader to Leader product is covered by the patent, almost all, if not all, of that evidence I would imagine is within the control of Leader itself.

And, also, Facebook has represented that it has already and had already through October served most, if not all, of the discovery it thought it would need with respect to the proposed counterclaim.

Next, I note that the proposed amendment would not be futile in reaching that conclusion. I applied the motion to dismiss standard to the proposed counterclaim.

And taking Facebook's allegations as true, I find that they do adequately allege all of the elements of a false marking claim under Title 35 United States Code Section 292(a).

Specifically Facebook alleges that Leader has marked its Leader to Leader product

with the patent designation since November 2006, and Facebook alleges that Leader lacked any reasonable belief that its Leader to Leader product actually practices the invention of the '761 patent, because it's alleged Leader undertook no analysis prior to making that designation. So I find that the proposed amendment is not futile.

And finally, I just want to say that in exercising my discretion in this manner, to allow the proposed amendment, I'm exercising it in just the same way I'm exercising my discretion to deny the stay. And that my view is that what is most efficient for the parties, for the Court, and what provides for the proper economy to all relevant institutions is to keep this entire dispute between the parties here in this Court where it has been pending now for some time where the parties and the Courts have engaged in a lot of work.

And there's certainly no sense, it would seem to me, in encouraging Facebook to pursue a false marking claim in another suit, particularly if it were to do so in another

district. So, for all those reasons, I've exercised my discretion and will be granting the motion for leave to file the response, the amended responsive pleading, Exhibit A.

We will issue an order on this effect that I am granting Facebook's motion for leave to amend. Exhibit A to the motion will be deemed to be filed as the responsive pleading.

And as I mentioned, I will provide some time for limited discovery related to this counterclaim, to the extent it's necessary. And I'm directing the parties to meet and confer and to submit to the Court no later than January 15th a proposed plan for limited supplemental discovery related to the counterclaim that we have just added.

The relief that is the proposed discovery plan should not in any way impact other dates in the scheduling order. I should just say, also, again, I've already said I expect there to be relatively little discovery necessary for either side. I'll add, I don't believe I'm opening the door to a full-blown product-by-product comparison, though I do

anticipate it will be likely that Leader will have to describe the process by which it came to form the reasonable belief that Leader to Leader practices the patent.

But I am, in the first instance, going to leave it to the parties to discuss and hopefully come to agreement as to precisely what limited discovery will be necessary with respect to this counterclaim.

I don't want to hear any argument on either of the motions I've just ruled on, and I will get an order out. But is there anything else that needs to be addressed at this time, Mr. Andre?

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

THE COURT: And Ms. Keefe?

MS. KEEFE: No, thank you, Your Honor.

THE COURT: Okay. Thank you and Happy Holidays to all of you.

(Everyone said, Happy Holidays, Your Honor.)

(Teleconference concluded at 12:28

p.m.)

State of Delaware)
)
New Castle County)

CERTIFICATE OF REPORTER

I, Heather M. Triozzi, Registered Professional Reporter, Certified Shorthand Reporter, and Notary Public, do hereby certify that the foregoing record, Pages 1 to 78 inclusive, is a true and accurate transcript of my stenographic notes taken on December 23, 2009, in the above-captioned matter.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 30th day of December, 2009, at Wilmington.

Heather M. Triozzi, RPR, CSR
Cert. No. 184-PS