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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES,)
INC., a Delaware)
corporation,)
)
PLAINTIFF,)
)
v.) C.A. No. 08-862 JJF
)
FACEBOOK, INC., a)
Delaware corporation,)
)
DEFENDANT.)

Tuesday, February 16, 2009
12:00 p.m.
Telephone Conference
Chambers of Judge Stark

844 King Street
Wilmington, Delaware

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

APPEARANCES:

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

-and-

KING & SPALDING LLP
BY: PAUL ANDRE, ESQ.
BY: JAMES HANNAH, ESQ.

Counsel for Plaintiff

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(APPEARANCES CONTINUED)

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

COOLEY, GODWARD & KRONISH, LLP
BY: HEIDI L. KEEFE, ESQ.
BY: MARK WEINSTEIN, ESQ.

Counsel for Defendant

1 THE COURT: Good afternoon or good
2 morning depending on where you are, everyone.
3 This is Judge Stark. Let me know who's on the
4 line, please.

5 MR. ROVNER: Your Honor, this is
6 Phil Rover from Potter Anderson for plaintiff
7 Leader, and with me on the line is Paul Andre
8 from King and Spalding.

9 MR. CAPONI: Good afternoon, Your
10 Honor. Steve Caponi from Blank Rome along with
11 Ms. Heidi Keefe and Mark Weinstein for Facebook.

12 THE COURT: Hello to everybody.
13 We do have a court reporter
14 present today, and for the record, this is our
15 case of Leader Technologies, Inc., versus
16 Facebook, Inc. It is our civil action number
17 08-862-JJF-LPS.

18 And the purpose of today's call is
19 that there are several more discovery disputes
20 between the parties. I've received, I think, a
21 total of four letters, and of course I have
22 reviewed them all. And I want to give each side
23 a chance to tell me anything more that they want
24 me to hear about these disputes.

1 Let's start first with the request
2 from Leader to take the deposition of Mr. Mark
3 Zuckerberg, so let me hear first from Leader on
4 that one, please.

5 MR. ANDRE: Your Honor, this is
6 Paul Andre. I'll speak for Leader on this.

7 As the defendants admit,
8 Mr. Zuckerberg has relevant information, and
9 quite a bit of it actually. He was the original
10 designer and coder of the Facebook website. He
11 came up with the idea on his own, according to
12 not only his own -- not only from his own words,
13 but a deposition we took from his cofounder last
14 Friday.

15 In his previous testimony in
16 another case, he stated that he relied on source
17 material to come up with the website but could
18 not remember what the source material was.

19 In his declaration in this case,
20 in this motion in particular, that he submitted
21 on Friday, he stated that he knows he didn't use
22 the Leader white papers as a source. He
23 basically contradicted his previous testimony.

24 He is also responsible for the

1 current design of Facebook, and he gets all
2 final approval of the design choices. He makes
3 all the decisions as to what features to
4 incorporate into the website, and that's even
5 after this litigation began. And he is in
6 charge of the core technology and
7 infrastructure.

8 All of this is obviously relevant
9 information to our case of infringement and to
10 our case of willful infringement.

11 THE COURT: Let me stop you there.
12 Explain to me how it's relevant to willful
13 infringement because the argument is made by
14 Facebook about the timing, at least with respect
15 to the original design of the Facebook program.

16 MR. ANDRE: As to the original
17 design, we believe they copied our designs of
18 the white paper that was published in 2003.
19 That paper had a patent pending on it.
20 Obviously you cannot infringe the patent until
21 it is issued. The patent was not issued until
22 2006.

23 If you knowingly copied someone
24 else's technology and then turn a blind eye to

1 it when you know there's a patent pending, that
2 is a factor to look at willful infringement.
3 That's the reason people mark "patent pending"
4 on products. That's the sole basis for it.
5 It's to give people notice that if they want to
6 copy this, beware.

7 THE COURT: What do you have other
8 than complete speculation that Mr. Zuckerberg
9 ever saw the white paper, particularly given
10 that now, while he says he doesn't know what he
11 looked at, that he does know, according to this
12 declaration, that he did not see or rely on your
13 white paper?

14 MR. ANDRE: What we have here is
15 the screen shots and some testimony he had given
16 in previous cases in which -- how he designed
17 his first website, his initial site. It is
18 identical to the white paper itself.

19 It's not speculation, knowing that
20 there was published material out there, he had
21 access to the published material, and the site
22 was designed almost identical to the white paper
23 itself.

24 So what we want to explore is what

1 he did get into, what he looked at. It's not
2 complete speculation. It's a high probability,
3 and the odds of him choosing all these various
4 features exactly the same are astronomical, so
5 it is circumstantial at this point, and maybe
6 our case will be a circumstantial case
7 altogether. Nonetheless, it's something we have
8 a right to explore, I believe.

9 THE COURT: All right. Go on.

10 MR. ANDRE: In the end, what we
11 have to be mindful of is the fact that him
12 knowing the patent is pending, if he did copy
13 the white paper and the patent issues, and his
14 design choices after the patent issued, and he
15 should know or did know the patent was out
16 there, or a potential one.

17 Also his design choices after the
18 patent issued. He is the person making these
19 decisions, and after the case is initiated, he's
20 still making decisions and implementing
21 features. That's something to look at.

22 In a deposition on Friday, his
23 cofounder talked about how Mr. Zuckerberg was
24 solely responsible for the development of their

1 mobile application, and the mobile application
2 is one of the infringing elements of our patent.
3 We have a dependent claim on the mobile
4 applications.

5 There is a plethora of information
6 this witness has that is relevant and is unique
7 to him.

8 THE COURT: Did you show the
9 screen shots of the original design to the
10 witness last week or, for that matter, any other
11 witness, and have they been able to identify
12 them?

13 MR. ANDRE: We've only had one
14 deposition with Facebook. They've been
15 procrastinating giving us scheduling of
16 witnesses. We tried to take half a dozen in
17 January, but they put us off until Friday was
18 our first one.

19 And Mr. Hannah, who is sitting in
20 the office now, I believe you showed him those
21 screen shots, James?

22 MR. HANNAH: Yes, we showed him
23 some of the screen shots, but again during the
24 deposition, he said that Mr. Zuckerberg would be

1 the ideal candidate to authenticate any early
2 work in the Facebook website.

3 THE COURT: I understand ideal,
4 but was the witness on Friday able to identify
5 and authenticate the screen shots you showed
6 him?

7 MR. HANNAH: He said -- the
8 testimony was, "I'm not sure, but it looked like
9 it could be." And that's what his testimony was
10 about the screen shots.

11 THE COURT: Anything further on
12 this, Mr. Andre?

13 MR. ANDRE: Just talking briefly
14 about this idea of not being able to get the
15 apex witness, the case law on this is, if no
16 other employee has superior knowledge in this
17 instance than Mr. Zuckerberg.

18 Nobody even has the equivalent
19 knowledge that we want to take his deposition
20 on. He has direct knowledge of the issues
21 involved in the case. He has personal
22 knowledge, and he has unique knowledge.

23 If we do not get Mr. Zuckerberg's
24 deposition, it will be extremely prejudicial to

1 Leader, whereas this will be a minor
2 inconvenience for Mr. Zuckerberg. We're in his
3 backyard in Silicon Valley. We could take it in
4 his office.

5 There's minor inconvenience for
6 the witness, and it could be extremely
7 prejudicial to Leader.

8 THE COURT: Mr. Andre, what's the
9 current cut-off for depositions, and what other
10 depositions do you have on the schedule at this
11 point, and are you willing to put Mr. Zuckerberg
12 off to be the very last witness you would
13 depose?

14 MR. ANDRE: The answer to your
15 question would be, the court ordered cut-off is
16 March 1st. Facebook has made their -- some of
17 their percipient witnesses available after that
18 date, after March 5th. We've agreed to that to
19 make it go smoothly. We would gladly take
20 Mr. Zuckerberg last.

21 THE COURT: All right. Let me
22 hear from Facebook on this, please.

23 MS. KEEFE: Thank you, Your Honor.

24 I'm not sure really what more I

1 need to say other than the fact that
2 Mr. Zuckerberg's declaration speaks for itself.
3 He has said that he never saw or had access to
4 this white paper, even if that were relevant to
5 the question of infringement.

6 He also says in his declaration
7 that though he is the CEO and has some
8 knowledge, he actually said that other people in
9 the company do have more knowledge about the
10 product and how it's working.

11 They have noticed up a number of
12 people. We're providing a 30(b)(6). They've
13 noticed other people who have responsibility for
14 design changes. There's a team of three.

15 And during Mr. Moskowitz's
16 deposition, he did in fact identify the screen
17 shots that were placed in front of him, and I
18 would like to note that though Mr. Moskowitz was
19 sitting in a dorm room with Mr. Zuckerberg, they
20 didn't ask Mr. Moskowitz if he'd ever seen the
21 white paper and knew that it was used in any
22 way.

23 We believe at this time that
24 Mr. Zuckerberg does not have any unique or

1 independent, specific knowledge that would
2 require his deposition in opposition to the apex
3 doctrine, which indicates that he is, in fact, a
4 very busy CEO. His time should be protected,
5 and it would be a massive burden to have to take
6 him away from his other duties.

7 THE COURT: I need to press you on
8 some of those points. Let's start with "massive
9 burden." It's hard for me to fathom how it
10 could ever be a massive burden to be prepared to
11 be deposed on topics, including what he
12 acknowledges and has publicly, I guess, declared
13 is a program that he created himself only six
14 years ago.

15 The deposition, if it were to
16 occur, would be scheduled at a time and place
17 convenient to him. He's evidently -- it's
18 evidently undisputed that he's involved in the
19 design process and has final say over the
20 functionalities that are in the program today.

21 "Massive burden" is a puzzling
22 phrase to me. What am I missing?

23 MS. KEEFE: I think, Your Honor,
24 that the burden has to do with the fact that

1 Mr. Zuckerberg's schedule is incredibly
2 impacted. It would be difficult to find time
3 for him, especially when outweighed by the fact
4 that there are other witnesses who can give this
5 exact, same information. This is not knowledge
6 that is unique to Mr. Zuckerberg.

7 THE COURT: All right.

8 So what about the point that he
9 has evidently -- tell me if there's stuff in the
10 record that contradicts this. I'm happy to hear
11 it. But as I understand the record, it's
12 undisputed that Mr. Zuckerberg was the creator
13 of the program, the Facebook program, that he
14 says he relied on material that he found, I
15 guess, out on the internet somewhere as possible
16 input.

17 He initially said he doesn't know
18 what material that was, but now somehow in the
19 declaration has knowledge that it was not the
20 information from Leader. Why is that not all
21 something that Leader, as the plaintiff, is
22 entitled to explore through testimony under
23 oath?

24 MS. KEEFE: What the facts show

1 from the other depositions is that
2 Mr. Zuckerberg, when he was talking about source
3 material -- if you look at the surrounding
4 quotes in those depositions -- he was talking
5 about things like textbooks because he was at
6 Harvard at the time and had programming classes.
7 And he couldn't remember exactly which ones they
8 were.

9 I think there's a big difference
10 between "I can't remember exactly which document
11 I looked at" and "Was this one of them?" And
12 "No, I absolutely can tell you I've never seen
13 that thing before." If you asked me right now
14 which textbooks I looked at in college, I could
15 not remember the names of them, but if you put
16 one in front of me, I could tell you whether or
17 not I'd ever seen it.

18 And I think that's exactly what
19 Mr. Zuckerberg did here. He said there may have
20 been some other source material he used, like
21 textbooks. When we asked him specifically
22 whether or not he had ever heard of, seen, or
23 accessed a paper authored by Michael McKibben or
24 with the name Leader Technologies on it, he

1 said, "Absolutely not."

2 Right now, it's a fact. It's in a
3 formed declaration right now. I'm not sure that
4 I understand what more there is to probe. It's
5 not contradictive of anything he said before,
6 and even if it were relevant -- which I will
7 contend that it is not, given the fact that
8 there was no patent at the time and the product
9 changed between 2004 and 2006 when the patent
10 issued -- he now said that he never saw the
11 document.

12 THE COURT: What about the
13 contention that Mr. Zuckerberg continues to be
14 involved in the design process of the product
15 today, and, in fact, has final sign-off and also
16 is involved in review? There's a reference to
17 Zuck review or something to that effect.

18 MS. KEEFE: Again if you read,
19 especially paragraph four of Mr. Zuckerberg's
20 declaration, he says that while he does have
21 design authority, he has no unique knowledge on
22 the technical development, the coding, the
23 implementation, or the maintenance of any of the
24 features. And he hasn't had responsibility for

1 any of those things since mid 2006.

2 The patent didn't issue until late
3 2006, and so at no time when the patent has been
4 enforced did Mr. Zuckerberg have any direct
5 responsibility or the unique knowledge of the
6 technical development, the coding, the
7 implementation, or the maintenance.

8 The fact that others do that and
9 he says, "That's a good idea," or "That looks
10 fine to me," proves that there are others in the
11 company with superior knowledge that they need
12 to talk to first, if not exclusively, because
13 they do have the knowledge that Mr. Zuckerberg
14 does not have uniquely.

15 THE COURT: And whose deposition
16 has been noticed that would have equal or
17 superior knowledge about the ongoing design
18 issued at this point, Ms. Keefe?

19 MS. KEEFE: I believe any number
20 of them, depending on the different portions of
21 the site. Josh Weisman, Christopher Cox, Rushi
22 -- I don't remember the last name -- Daniel
23 Chai, James Wang. All of these.

24 THE COURT: Let's go back, for a

1 moment, to the origins of Facebook. Mr. Andre
2 argues that if it were to be proven that there
3 was intentional copying of the white paper that
4 had been marked "patent pending,"
5 notwithstanding that the patent itself did not
6 issue until sometime later, would you agree that
7 that set of facts, if proven, would at least be
8 relevant to a willful infringement analysis?

9 MS. KEEFE: No, Your Honor, I
10 wouldn't because, again, there's nothing to
11 willfully infringe until the patent issues. And
12 it's the decisions made at the time of the
13 knowledge that the company has of the patent
14 itself that's relevant. And so, no, I
15 absolutely do not think that it would be
16 relevant. I think that answers Your Honor's
17 question.

18 The only other thing I would add
19 is I would invite Your Honor to take a look at
20 the white paper. We submitted it to the Court
21 back in November. I would be happy to submit a
22 copy to Your Honor.

23 The white paper itself is
24 identical in no way to the website. It's more

1 of a marketing piece or a consultant-type piece
2 that speaks in large-scale pictures of what they
3 wanted to accomplish, but it doesn't have -- we
4 don't believe it's identical in any way to
5 anything Facebook has ever done, and we would
6 invite Your Honor to look at it before making
7 any decision that it would be relevant or is
8 identical.

9 THE COURT: Ms. Keefe, before I
10 turn it back to Mr. Andre, let me tell you what
11 I'm thinking, but I want to hear your reaction
12 to it.

13 I'm really very open to the
14 possibility of requiring Mr. Zuckerberg to
15 appear for at least a half-day deposition, but
16 it does seem to me, from what I've heard at this
17 point, premature to order that to happen over
18 the defendant's opposition, given that we are so
19 early on in the depositions and it may well
20 prove, as you suggest, that the plaintiff is
21 able to find out everything that they reasonably
22 need to find out from others.

23 I don't want to slow down the
24 progress we've made in this case, but what I'm

1 thinking is indicating that if there's going to
2 be a deposition, it's going to be within a
3 couple of weeks of the last deposition that the
4 parties have agreed already to schedule, but
5 that there will have to be further litigation
6 before I authorize it to go forward, that there
7 would be very accelerated briefing, I suppose,
8 on a motion for protective order from you so
9 that you could put in full context everything
10 relevant that you think has come out of the
11 earlier depositions so that I can really fully
12 and fairly evaluate the requirements of the Apex
13 doctrine.

14 I want to give enough time for the
15 depositions to play out and enough time for very
16 accelerated but thorough briefing so that if I
17 do order a deposition, it happens really fairly
18 quickly in -- I'm thinking before the end of
19 March so that the case can keep on its progress,
20 so -- but I don't know, as I sit here, what the
21 rest of the schedule is.

22 If you could just react to that
23 and tell me what you think and whether I might
24 be able to keep the case on schedule if I go in

1 direction I'm inclined to go. That's for you
2 first, Ms. Keefe.

3 MS. KEEFE: My first reaction,
4 Your Honor, is that that's exactly what the case
5 law suggests is the right way do this, and we
6 would be happy to comply with that.

7 As far as the schedule goes,
8 there's only one other, kind of, thing that no
9 one can predict at this point, and a lot of the
10 schedule hinges on when Judge Farnan issues his
11 claim-construction order in terms of when the
12 expert reports are due.

13 If Your Honor picks a date and we
14 have to produce -- if it ever came to pass, if
15 after accelerated briefing we had to find a time
16 the last two weeks of March to produce
17 Mr. Zuckerberg, I would do my best to do that.
18 I don't know his calendar at this exact moment,
19 but I would do my best to do that.

20 THE COURT: Mr. Andre, you heard a
21 lot from me and Ms. Keefe, so please respond to
22 whatever you wish to respond to.

23 MR. ANDRE: Your Honor, I'll just
24 reiterate the fact that Mr. Zuckerberg

1 personally designed, coded, and was responsible
2 for design features of this website that we
3 believe infringes today.

4 He did it before the patent
5 issued, but those features are still in place
6 today, and we believe they are infringing, and
7 we have a right to take his deposition.

8 If it's in March, I don't think it
9 will impact the schedule at all. I think it's
10 imperative that we stick with our trial date in
11 late June, as we have been keeping to the
12 schedule all along. Facebook has been doing
13 what it can to delay this case by not providing
14 documents to us, pushing off depositions as long
15 as possible, and making numerous motions to --
16 in front of Your Honor.

17 So we don't object to taking
18 Mr. Zuckerberg last, but we do believe it is
19 imperative for our case that we get him.

20 THE COURT: Okay.

21 MR. ROVNER: Your Honor, this is
22 Phil Rovner for Leader.

23 I just wanted to add, to take
24 Ms. Keefe's position that he's very difficult to

1 schedule, I think that your proposal sounds like
2 a good working proposal, but I'm concerned that
3 we'll get expedited briefing and then hear that
4 he's not available for a month. So I suggest
5 only that Ms. Keefe check with him to keep a
6 date tentatively open just in case what we think
7 should happen does, indeed, happen.

8 THE COURT: Having heard all of
9 that, I remain where I was a couple of minutes
10 ago, which is I can certainly see the real
11 possibility of ordering Mr. Zuckerberg to appear
12 for at least a half of a day of a deposition,
13 but I am mindful that he is a CEO. I'm familiar
14 with the apex doctrine.

15 And the plaintiffs aren't in a
16 position, frankly, at this point to prove that
17 Mr. Zuckerberg's representation that he has no
18 unique or superior knowledge on relevant issues
19 -- the plaintiff cannot meet its burden to
20 disprove that at this point, but I'm open to the
21 possibility that they may be able to.

22 But before I would be able to make
23 a final determination on that, I would want --
24 and will now require -- that the other

1 depositions that have been scheduled -- my
2 understanding is through March 5th -- be taken.

3 Mindful of the schedule, however,
4 if there is going to be Mr. Zuckerberg's
5 deposition, I'm hopeful that we would get it in
6 by the end of March, and between now and then,
7 we need to complete the other depositions.
8 There needs to be a meet-and-confer between the
9 parties upon the completion of those depositions
10 to determine if, by any chance, there is
11 agreement on a deposition of Mr. Zuckerberg.

12 And if there is not, then the
13 parties will hopefully be able to work out a
14 very accelerated, something -- I mean, something
15 on the order of seven to ten days for briefing
16 on a motion for protective order and a response
17 to it and a quick reply to still give me a
18 couple of days to absorb all of that briefing.

19 And if I do end up ruling that
20 there will be a deposition, to try to get that
21 deposition in as close to the end of March as
22 possible.

23 That does not leave a lot of time,
24 I recognize, but I'm going to not be any more

1 precise then I have been, but let things play
2 out as I have suggested.

3 Let's move on from there to the
4 second dispute, which is Facebook's concern
5 about some documents and privilege logs produced
6 by Leader.

7 Let me hear first from Facebook on
8 that one, please.

9 MS. KEEFE: Thank you, Your Honor.

10 Just to put this back in
11 perspective, I think it behooves us to remember
12 how we got here. Back in late December,
13 Facebook had brought a motion to compel
14 production of documents exchange between Leader
15 and third parties that we had found out existed.

16 And during the course of that
17 hearing, Leader represented to the Court that it
18 had long ago produced all documents related to
19 the 761 patent. This despite the fact that
20 Facebook was not able to find two documents from
21 Neyer, a timeline regarding the patent, and a
22 white paper discussing how Mr. McKibben came up
23 with the patent -- we weren't able to find those
24 in the production, that we could tell -- and

1 that one of the third parties, IP Investments,
2 had produced a log which did not seem to match
3 up with anything in Leader's logs or production.

4 Your Honor then chose to table the
5 motion to compel the third party documents so
6 that Leader could be put to a test of
7 identifying where those documents were in its
8 log or production, and Your Honor actually
9 indicated that this was something because those
10 documents -- we knew those existed because it
11 had been disclosed by third parties.

12 You wanted to make sure it was in
13 Leader's production or on Leader's log, and the
14 very last portion, which I'll quote from Your
15 Honor on page forty-five was: ". . .and if they
16 are, that might very well be the end of the
17 issue, and if they're not, we'll need to
18 understand why they're not."

19 Leader had until January 15th to
20 identify in its log or production the twenty-two
21 documents on IP Investments's log and the two
22 documents, the timeline and the white paper,
23 authored by Mr. McKibben produced by Neyer.

24 The results of that identification

1 we found quite puzzling. The two documents they
2 identified as corresponding to the Neyer
3 documents didn't match up, to us, with
4 information on the face of those documents. The
5 log entries they identified differed in date,
6 did not show that they had ever been sent to
7 third parties, and differed in description.

8 With respect to the IP Investments
9 documents, there were twenty-two. They
10 identified two of those documents as having
11 multiple log entries, again with dates and/or
12 authors or descriptions not matching.

13 And more troubling, with respect
14 to the other twenty documents, Leader simply
15 produced a supplemental log without identifying
16 those documents anywhere in their prior
17 production or log.

18 Rather than coming straight to the
19 Court, we asked Leader to explain these
20 discrepancies and where those documents had
21 been. Leader did not explain why Neyer
22 indicated they had never been sent to a third
23 party and why the descriptions were wrong.

24 They indicated that the dates did

1 not reflect the date on the face of the document
2 as you would expect, but instead were metadata
3 dates. And with regard to the IP Investments
4 documents, they simply told us they didn't have
5 to tell us where they had been, and that
6 frustrated us and confused us.

7 So we asked them during the
8 telephone conference meet-and-confer whether or
9 not they had any further explanation and whether
10 they wanted to tell us anything else about those
11 documents and where they had been. We pointed
12 them to the transcript where Your Honor asked
13 them not only if you couldn't find them, we need
14 to understand why you couldn't find them.

15 They told us they felt comfortable
16 with the disclosures they already made, and that
17 was it.

18 Before -- again before running to
19 the Court, we undertook our own investigation to
20 see if this was just a one-time thing or perhaps
21 this could be miscoding, so we looked through
22 all the other third-party production that had
23 happened so far and tried to find those
24 documents.

1 And instead of finding them, we
2 found a very similar scenario to IP Investments
3 and Neyer in that numerous documents that were
4 logged or produced did not appear to be
5 contained in Leader's log for production.

6 At this point, Your Honor, we
7 simply don't know what to do. We know there are
8 documents that are being either mislabeled or
9 not logged, and we don't know what to do. We
10 know these documents are relevant. At least two
11 of the documents that we have had produced to us
12 that weren't logged are highly relevant. It
13 mentions by the inventor about how he considers
14 to have come up with the patent and the timeline
15 of the patent itself.

16 And we wonder what else is out
17 there. We wonder what other problems there may
18 be with discovery or with this log, and at this
19 point we still need the third-party documents.

20 I think the only thing I'd add,
21 Your Honor, is that since the time we last spoke
22 about this issue, Facebook has taken the
23 deposition of a number of third parties,
24 including Neyer -- who had produced the two

1 highly relevant documents -- Akiril Investments,
2 IP Investments, and Latenberg, and in all of
3 those cases, those third parties indicated that
4 they did not believe that the communications
5 between themselves and Leader were towards the
6 common interest.

7 Instead, every one of those
8 parties testified on the record that they
9 believed that all their communications were at
10 arm's length and that they were protecting their
11 own interest in determining whether or not to
12 make an investment, that they were not aligned
13 legally or even subject-matter wise with Leader
14 so that no common interest would exist.

15 At this point, Your Honor, we come
16 to you hoping, at a minimum, for production of
17 all documents that had been exchanged with third
18 parties.

19 There are a number of log entries
20 which also indicate that there was no privilege.
21 These were documents that were collected by
22 Mr. McKibben and sent to his lawyer. The
23 description is "documents collected at the
24 request of counsel" for which there can be no

1 privilege. And documents authored by
2 Mr. McKibben that seem to have gone nowhere.
3 They have no to or from, exactly like the log
4 entry for the Neyer-produced documents.

5 And at this point we feel we need,
6 at a minimum, for all those to be produced, but
7 to fully understand this log, we may need
8 production of the entire log to understand
9 exactly what these documents are, how they've
10 been logged, and, perhaps, why they have not
11 been logged.

12 THE COURT: Just so I'm clear,
13 Ms. Keefe, the twenty-two documents,
14 essentially, that were part of this test -- the
15 two documents authored by the inventor and the
16 twenty, I guess, communications with Ryan Strong
17 that were identified on the privilege log of IP
18 Investments -- do you have -- does Facebook have
19 all twenty-two of those, or does it just have
20 the first two?

21 MS. KEEFE: Facebook only has the
22 first two. We only have the documents produced
23 by Neyer: The timeline and the white paper
24 discussing the patent.

1 We have no documents from IP
2 Investments. There were twenty-two on the log,
3 two of which Leader gave identifications for
4 that don't match the log itself, and twenty for
5 which no identification was made whatsoever. A
6 supplemental log was given to us. We have none
7 of those documents.

8 THE COURT: And you've already
9 addressed meet-and-confer, but let me put it to
10 you directly.

11 The first argument, of course,
12 from Leader is that you failed to meet and
13 confer on this issue. Do you have anything else
14 to add in response to that?

15 MS. KEEFE: I really am not sure
16 what more they would have wanted us to meet and
17 confer on. We've been discussing the priv log
18 or issues relating to the priv log since
19 September of last year. Most of this revolves
20 around the third parties, documents produced to
21 and from third parties that we met-and-conferred
22 about before coming in front of Your Honor in
23 December.

24 Anything that's come up since

1 then, we talked about either in a series of
2 letters or through phone calls after those
3 letters were exchanged before bringing the
4 results of this test back to Your Honor.

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

7 MR. ANDRE: Your Honor, this is
8 Paul Andre. I'll be speaking for Leader.

9 First of all, let me address some
10 of the issues that Ms. Keefe brought for the
11 first time about this common-interest privilege.

12 This was not in her letter brief.
13 It was not an issue that they brought up, that
14 there was an arm's-length negotiation between
15 these five third parties they've taken
16 depositions on.

17 In fact, I personally defended one
18 of these witnesses, and he testified there was a
19 common interest, and he believes there was a
20 common interest between the parties. We
21 defended another one of these parties in
22 Chicago, and he also stated there was a common
23 interest as well. The one party they've taken
24 recently in Miami, there was no non-disclosure

1 agreement. There was no common interest. We
2 didn't claim one with that party.

3 To be clear, that's a sandbag
4 here. It was not an issue brought up for us in
5 the letter briefs; therefore, we didn't address
6 it.

7 Let me go to the Neyer documents
8 first. The Neyer Exhibit One was logged as --
9 in our privilege log as log entry 386. This is
10 a timeline from Leader technologies and entitled
11 Patent Analysis Timeline. Attorney/client work
12 product containing confidential trade secrets.
13 This was a document that was created by the
14 inventor for his counsel at counsel's request.

15 This was provided to Neyer under a
16 community of interest agreement, and Neyer was
17 supposed to return it to Leader. The document
18 was not destroyed. It was logged in as a
19 privileged document, as it rightfully is.

20 Now, Ms. Keefe says she doesn't
21 believe that's the document. I'm looking at the
22 document now from our privilege log. It has a
23 date on it in the privilege log of 10/10/07.
24 That's based on the metadata when the document

1 was last accessed by Leader and when the
2 document was actually edited to any degree.

3 The date on the face of the
4 document is 10/8/07. That's the revision date
5 that's on the face of the document.

6 We put on the -- the date on the
7 privilege log is 10/10 because that's the most
8 accurate date based on metadata, and we
9 explained that to Facebook, that that's the
10 reason that date is on there.

11 The second document is Neyer
12 Exhibit Two, is privilege log entry 317. This
13 is a paper that was, once again, authored by the
14 inventor, Mr. McKibben, and it has work-product
15 on its face and on every page of the document.
16 It's a multipage document.

17 It has a draft date of October 7,
18 2007, which is obviously the same -- one day
19 before the date of the timeline.

20 On our privilege log, we have it
21 dated as 11/20/07. Based on the metadata, that
22 was the last date it was edited in any way, so
23 therefore we put that date on it in the
24 privilege log because that is the most accurate

1 date of this document, not the draft date, and
2 we explained that to Facebook as well.

3 This is a document also provided
4 to Neyer, and Neyer produced it and did not
5 return it pursuant to the nondisclosure
6 agreement and the agreement they had with the
7 parties.

8 This document was produced, we
9 believe, improperly by Neyer, and there's
10 nothing in this document that has any basis of
11 relevance.

12 I mean, for example, Ms. Keefe
13 keeps talking about omissions because the
14 inventor makes a statement in here that he
15 believes his idea would have been obvious in
16 late 2003, 2004 because that's when these social
17 networking, especially Facebook, began hitting
18 the market.

19 Our patent was filed in 2002 with
20 an invention date of 1997. There's no admission
21 that patent was obvious when he published his
22 white papers more than a year after he filed his
23 patent application. There's no admission at all
24 in these papers, and they're properly protected

1 as attorney/client privilege and attorney work
2 product.

3 With those two documents, I don't
4 see any dispute at all. We identified the
5 documents to them. We said, "This is our
6 privilege log before you got the Neyer
7 documents." This is a part of the test Your
8 Honor set up, and we told them if they had
9 anything related to our patent, it's on our log,
10 and there it is. It's on the log.

11 They make a quibble that we did
12 not state that we sent it to Neyer. We didn't
13 put anything we sent to third party. We thought
14 it was irrelevant communications with these
15 third parties.

16 We've made an argument since day
17 one that these third-party finance companies are
18 communications with parties that have no
19 relevance in this case; therefore, we did not
20 put in the fact that we sent this to Neyer. We
21 did not put the Neyer e-mails or however it was
22 sent to us as part of the privilege log.

23 Going to the IP Investments
24 documents, the twenty-two documents they're

1 talking about, they were produced to Facebook by
2 Neyer. They have the e-mails. These are
3 redacted e-mails. They got the documents
4 themselves. They're just in redacted form.

5 So the last -- the hearing we had
6 in December, I told Your Honor, I said, "I don't
7 think we would have logged the e-mails on our
8 privilege log, but if they had information
9 pertaining to the patent, then we would have
10 logged it because we produced everything
11 relevant to the 761 patent."

12 If you look at the actual
13 documents themselves, for example, on the one
14 document where you see there were attachments to
15 the e-mail, the attachments themselves were part
16 of the work-product document. That's what we
17 identified in our log.

18 If you look at our log and the log
19 entry number 693759761, those are three
20 attachments we prepared for our attorneys that
21 were attached to an e-mail with a Bate's number
22 of ITI 196 and 197.

23 So the attachments which are
24 relevant to the 761 patent were properly logged

1 in our privilege log.

2 The same is true with the second
3 document, the Intellectual Properties
4 document 239. It has an attachment as well, and
5 it was logged as number 762.

6 At that point, every single one of
7 the documents that had anything to do with the
8 patent and was given to IP Investments were
9 previously logged in our privilege log.

10 The e-mails themselves were not
11 part of the privilege log, as we told Your
12 Honor. I doubt we put it in the privilege log,
13 so we didn't think communication to IP
14 Investments about funding this litigation was
15 relevant.

16 Your Honor told us it wasn't on
17 the log, so we logged it, which we gave them a
18 supplemental log with those documents on it.

19 I think the issue here is, have we
20 done what the Court asked us to do? Obviously
21 we have. Have we bent over backwards to try to
22 work with Facebook? Yes, we have.

23 Our last communication with them
24 was a seventeen-page letter in which we identify

1 hundreds of entries by name and seventy
2 different individuals, where they worked. We're
3 bending over backwards to work with them on this
4 privilege log issue.

5 Every time they come up with
6 something, we tell them what information they
7 need to know. They asked this information why
8 the IP Investments -- the e-mails -- were not on
9 our privilege log. As we said in this hearing
10 before Your Honor and we told them many times,
11 we don't think it's relevant. It's not in the
12 privilege log because we don't think it's
13 relevant communication.

14 We don't think there's a dispute
15 here with respect to our privilege log. The
16 privilege log is hundreds of pages, thousands of
17 entries. We have gone so far beyond what's
18 required by the federal rules that it's shocking
19 to me that we are here with this motion. We
20 were surprised to get this motion because they
21 didn't mention it to us before.

22 I'll stop there if Your Honor has
23 questions. Sorry about that.

24 THE COURT: No, that's fine.

1 Ms. Keefe, anything you'd like to
2 say in response?

3 MS. KEEFE: I think, Your Honor,
4 the frustrating thing for us is that yet again
5 Mr. Andre is saying that they didn't log
6 communications with the third parties because
7 they didn't think they were relevant, but the
8 only reason they were ever talking to any of
9 these third parties was about funding litigation
10 involving this patent. That contradicts their
11 own statement.

12 If they originally said they
13 logged or produced everything related to the 761
14 patent, these communications with third parties
15 are all about the 761 patent. I'm still
16 struggling with the notion of what's relevant
17 and what's not because all communications
18 regarding the 761 patent are, by definition,
19 relevant. The 761 patent is the patent at the
20 heart of this case.

21 I also still am struggling again
22 with relevance and not admissibility thing. The
23 white paper that we continue to talk about, not
24 only does it discuss what he doesn't believe

1 makes it obvious in 2004, but it also discusses,
2 in Mr. McKibben own hands, prior art that he
3 reviewed and inspired him that's dated 1997,
4 1998, and earlier.

5 So I'm struggling with all of
6 those things, Your Honor, and I think we go back
7 to the notion that this log never indicates that
8 these highly relevant documents were sent to
9 third party, so it doesn't establish that it
10 wasn't privileged, and again we're left
11 wondering where these documents are, what they
12 are. We're getting them from some third
13 parties, who apparently didn't return them.
14 What about all the ones that have been returned?

15 THE COURT: Okay.

16 Well, I think "struggle" is the
17 apt word here. I'm struggling as well, and I
18 think it's partly because there's -- there are
19 issues on several levels here, factual and
20 legal, because clearly one side, Leader, thinks
21 that as a legal matter, there is no relevance
22 and no discovery obligation with respect to
23 communications to third parties, even if those
24 communications relate to the patent and relate

1 potentially to litigation regarding the patent
2 in suit. And obviously Facebook takes a
3 different view as to relevance there.

4 And I have not made a legal
5 determination in this case as to who's right on
6 that point.

7 There is also a dispute factually,
8 really, about some of the premises that would go
9 into whether or not there's a common interest,
10 how broadly the common interest is being
11 asserted by Leader, what has the testimony to
12 date been from some of the witnesses with the
13 third parties, but there's also other questions
14 as to how the things that have been logged, how
15 they have been logged.

16 And for instance, we now
17 understand there's -- in terms of something that
18 would seem to be as simple as the date of the
19 document, one could look at the metadata date or
20 one could look at the date on the face of the
21 hard copy of the document. And those, at least
22 in the instance of these two documents we
23 performed the test for, don't line up.

24 So I'm struggling too, and I'm

1 going to have to take this step by step.

2 My hope was that the results of
3 the test would allow me to understand whether I
4 had to resolve the common-interest privilege
5 legal issue, and if I have to resolve it, it
6 might put me in a position where I could do it,
7 and unfortunately I'm not at that point.

8 What I want to do is better
9 understand what this test has revealed, and to
10 do that I'm afraid I'm going to need to look at
11 these materials in camera. And by these
12 materials, I mean -- and I'm hereby directing
13 Leader to produce to me, let's say by the end of
14 the day Thursday, I want to -- and I know you
15 may have given me some of these documents
16 already, but I want to have them together in a
17 nice, easy-to-follow package.

18 I want to see the original
19 privilege log. I want to see the supplemental
20 privilege log. I want to see the two Neyer
21 documents as produced by Neyer, and I want to
22 see the twenty documents which I understand to
23 be e-mails with attachments which have been
24 referred to as the IP Investments documents

1 along with any attachments to them. I want to
2 look at all those myself and come to some
3 conclusion as to how reliable the privilege log
4 here is.

5 I should also say to plaintiff
6 give me a copy of your letter, the
7 seventeen-page letter of explanation, which I do
8 think I have, but again I want to have that all
9 together nice and neat, and anything else -- I
10 should add, plaintiff, if there's anything else
11 that you think needs to be submitted as part of
12 the in camera review that would put in context
13 my ability to assess the results of the test, go
14 ahead and do that.

15 And I will take a careful look at
16 what is submitted and attempt to form a view as
17 to the reliability of the privilege log and the
18 logging process, and at that point, if the issue
19 is whether or not the common-interest privilege
20 applies here, whether -- if it doesn't, perhaps
21 I need to order Leader to do a privilege log
22 that at least identifies all of the third
23 parties to which these documents have been
24 provided. You know, I'll have to make that

1 determination further down the road.

2 So clearly I've struggled too,
3 which means I may not have been entirely clear,
4 so let me turn to you first, Mr. Andre. Do you
5 understand what I'm asking you to provide by the
6 end of the day Thursday?

7 MR. ANDRE: I do, Your Honor.

8 THE COURT: Ms. Keefe, anything by
9 way of clarification?

10 MS. KEEFE: Nothing by way of
11 clarification, but I was wondering if Your Honor
12 would also want us to submit the depositions of
13 the third parties taken so far so you can see
14 for yourself what they're saying about common
15 interest or what the parties are saying
16 vis-a-vis each other.

17 THE COURT: I don't need that at
18 this time. I'm doubtful, frankly, I'll be in a
19 position to make a substantive ruling on the
20 application of the common-interest privilege
21 without hearing further from the parties, but I
22 do want to see what the results of the test have
23 been before that.

24 Anything else at this time,

1 Mr. Andre?

2 MR. ANDRE: No, Your Honor. I
3 think, as I mentioned earlier, we will -- we
4 have some issues based on Friday's deposition
5 regarding the document production of Facebook,
6 but we'll try to work that out with Facebook,
7 and hopefully we won't have to revisit this with
8 Your Honor.

9 THE COURT: Certainly that would
10 be my hope as well.

11 Ms. Keefe, anything else?

12 MS. KEEFE: Just last, do you want
13 copies of our letters where we ask them about
14 the test, or are you fine with just the
15 materials from Leader?

16 THE COURT: Why don't you go ahead
17 and submit those to me as well -- that is, your
18 letters -- and that way I'll have it all nice
19 and neat and in front of me.

20 Thank you all very much for your
21 time.

22 (Hearing ended at 12:51 p.m.)

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C E R T I F I C A T I O N

I, DEANNA WARNER, Professional Reporter, certify that the foregoing is a true and accurate transcript of the foregoing proceeding.

I further certify that I am neither attorney nor counsel for, nor related to nor employed by any of the parties to the action in which this proceeding was taken; further, that I am not a relative or employee of any attorney or counsel employed in this case, nor am I financially interested in this action.

DEANNA WARNER
Professional Reporter and Notary Public