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              UNITED STATES DISTRICT COURT
              FOR THE DISTRICT OF DELAWARE

  LEADER TECHNOLOGIES,       : CV No. 08-00862(JJF)
  INC.,                      : August 20, 2009
                             :
              Plaintiff,     : 2:05 p.m.
                             :
  v.                         : Wilmington, DE
                             :
  FACEBOOK, INC.,            :
                             :
              Defendant.     :
  .......................    :


           TRANSCRIPT OF TELEPHONE CONFERENCE
       BEFORE THE HONORABLE LEONARD P. STARK
            UNITED STATES MAGISTRATE JUDGE

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1   P R O C E E D I N G S

2   THE COURT: Good afternoon, everyone.

3   This is Judge Stark. Who is there, please?

4   MR. PRESTON: Your Honor, good afternoon.

5   This is Tom Preston, we represent Facebook, and I have

6   with me on the line Mark Weinstein from White & Case.

7   THE COURT: Good afternoon.

8   MR. ANDRE: Good afternoon.

9   MR. MOORE: Good afternoon, Your Honor.

10   David Moore on behalf of the plaintiff

11   and with me today on the line is Paul Andre from King

12   & Spalding.

13   THE COURT: Good afternoon to you as

14   well.

15   This is the time for a teleconference

16   regarding Facebook's request for a stay of a discovery

17   order. And it's our case of Leader Technologies, Inc.

18   versus Facebook. Civil Action Number 08-862-JJF-LPS.

19   I have, of course, reviewed the parties

20   letters, and I have some questions and also, you know,

21   want to give you each an opportunity to let me know

22   whatever else you want me to consider as I consider

23   the request.

24   Because it is Facebook's request, I want

4

1   to start with Facebook. Who will be speaking for

2   Facebook?

3   MR. PRESTON: Your Honor, with your

4   permission, Mr. Weinstein will be handling the

5   argument.

6   THE COURT: That's fine.

7   And, Mr. Weinstein, let me ask you to

8   begin your presentation by articulating for me as

9   clearly as you can what the harm to Facebook would be

10   from having to produce the entirety of its source code

11   subject to a protective order.

12   And I want to especially make sure I

13   understand your contention as to why that harm, if

14   there is such, would not be irreparable in some way if

15   Judge Farnan ultimately disagreed with my order.

16   MR. WEINSTEIN: Thank you, Your Honor.

17   The first point, Your Honor, is that the

18   source code for the Facebook website is not something

19   that we consider, you know, a standard sort of

20   discovery matter.

21   This is the source code that runs the

22   website for one of the most well-trafficked and well-

23   known services in the world.

24   The source code is, essentially for us,

1   the single-most critical and important asset of the

2   company. And while we have made very clear throughout

3   the case that we don't oppose the production of

4   portions of the source code and the production of

5   reasonable subsets of the code that the plaintiff

6   needs to perform its analysis, the production of the

7   entire source code is something that is, what we

8   believe, is beyond what is necessary for this case.

9   As far as the harm to us, the not

10   staying the enforcement of the order will effectively

11   deny Facebook any meaningful judicial review.

12   Essentially it would be very difficult

13   to unring the bell after the source code is produced

14   because the order would require the production prior

15   to the ability of Judge Farnan to review whether or

16   not that production should have taken place in the

17   first instance.

18   THE COURT: What I'm looking forward to

19   understand better is what the harm is from producing

20   the source code subject to all the protective order

21   protections that are in place.

22   I understand and accept that the source

23   code is the single most critical asset that the

24   company has, but that doesn't to me articulate what

6

1   the harm is from having, subject to certain protections

2   in the course of discovery, to make production of it.

3   That's what I'm hoping to hear from you better as to

4   what that harm actually is to Facebook if they are

5   ordered to do that.

6   MR. WEINSTEIN: Yes, Your Honor.

7   I think the bottom line, Your Honor, is

8   yes, there are protections in place. There is a

9   protective order in place. This was the argument that

10   was actually made to Judge Farnan.

11   But obviously we understand that, you

12   know, these protections are not always -- you know,

13   these protections are as good as we can make them.

14   They are subject to human beings. They are subject

15   to...they are subject to -- you know, they're subject

16   to all the fallacies that human beings can undertake

17   when they exchange sensitive information.

18   I think this is not the typical case of

19   just some confidential information that is being

20   disclosed. It is -- the information that is in the

21   wrong hands would allow someone not only to compete

22   with Facebook, it would allow them to perhaps breach

23   the security of the Facebook website, etc.

24   I think the other harm that we're having

1   here, Your Honor, is that when Judge Farnan

2   established the original procedure, the idea was

3   essentially to prevent sort of the fishing into the

4   code, of just going full bore into the source code

5   without having some articulated theory, and that was

6   the original concepts behind what Judge Farnan

7   established, and that would obviously be undermined by

8   an order requiring the production of the entire source

9   code.

10   THE COURT: All right. And what is it

11   about the harm -- I understand the argument that you

12   would effectively lose your opportunity to get review.

13   Put that aside.

14   What is it about the harm from the

15   source code being produced that would not potentially

16   be irreparable? Why could the bell not be unrung if,

17   you know, you turn it over tomorrow and a couple of

18   weeks from now Judge Farnan says *I was wrong?*

19   MR. WEINSTEIN: Well, because the

20   portions -- obviously the portions of the source code

21   that -- assuming Judge Farnan was to say, *Okay, you*

22   *need to go with a reasonable suspect*, they will have

23   had complete and unfettered access to the entire

24   source code for that period of time. So you really

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 1        can't unring the bell.

 2                    It's somewhat analogous to when

 3        privileged documents are produced or other kinds of

 4        sensitive information.  Once it's been disclosed, you

 5        can't really pull it back, or they would have had the

 6        information in their possession, you know, before such

 7        time as Judge Farnan decides whether they should have

 8        had it in the first instance.

 9                    THE COURT:  So then the harm you're

10        articulating is Leader would have some advantage, some

11        unfair advantage in the litigation because they might

12        stumble onto an infringement theory that they don't

13        otherwise have and wouldn't properly have access to?

14        Is that the argument?

15                    MR. WEINSTEIN:  Well, the harm is

16        essentially that they would be having access to

17        information that they never should have had access to

18        in the first instance.

19                    I'm not necessarily -- I'm not convinced

20        they're going to find any infringement, no matter how

21        much of the code they review, but it's the access to

22        the information that is the issue.

23                    THE COURT:  I understand that you filed

24        your objections in a timely manner, but nonetheless
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1   you did wait from July 28th to August 10th before you

2   filed the objections and waited two more days, until

3   August 12th, to file your requests for a stay.

4   You know, with the single-most critical

5   asset for the company at stake, why did you not move

6   sooner than that for this relief?

7   MR. WEINSTEIN: Well, we moved -- Your

8   Honor, first of all, the way that the briefing came in

9   to Your Honor, we essentially had to start all over in

10   responding to their allegations when Your Honor's

11   order came out.

12   Obviously, the company had to make a

13   decision as to whether it was going to seek review of

14   the order. And obviously there was an expert

15   declaration that was put in, that we needed to respond

16   to, that we had never seen before the simultaneous

17   briefing that took place on July 23rd. And we had to

18   get our expert in line, have him review the

19   information. He had to review the actual source code

20   that Mr. Vigna reviewed in order to fully evaluate the

21   positions that he had taken.

22   I mean, I think if there is note that

23   the declaration that Mr. Vigna was never shown to us

24   prior to the date where the simultaneous briefs were

1   to be filed.

2   THE COURT: Okay. And explain to me,

3   there's a reference in your letter to the plaintiff

4   having muddied -- I think was your word -- the term

5   source code module, and you think that that somehow

6   led me to make an error that I think would relate to

7   the production of technical documents. Help me

8   understand what you're talking about there.

9   MR. WEINSTEIN: Well, that's sort of a

10   separate issue from the source code, Your Honor.

11   What happened was they put in the

12   declaration from their expert basically defining the

13   word *module* as an *individual source code file*.

14   We produced a list of the entire -- all

15   the files that comprised the source code for the

16   operating version of the Facebook website.

17   Your Honor ordered them to identify the

18   modules for which they seek production of technical

19   documents.

20   What they did, Your Honor, on August 7th

21   when they were ordered to do that, is they came back

22   and said, *Well, we're not going to identify any*

23   *specific modules under their definition. We're going*

24   *to define an entire hierarchy of the directory.*

1   So, basically, they identified 99 percent

2   of the files that were on there. So essentially they

3   asked for every technical document in the company and

4   I think they tacitly recognized that because they're

5   proposing a new schedule in which they would provide a

6   new list of source code modules, you know, by the

7   28th, so I think they kind of acknowledged that point.

8   THE COURT: Okay. I may have more

9   questions for you as we go on, but those were the

10   things I wanted to get out right at the beginning, but

11   I don't mean to preclude you from saying or adding

12   anything else that you wanted to say.

13   MR. WEINSTEIN: Yes. I only have one

14   additional point, Your Honor, and that's that there's

15   not any harm to Leader for a brief stay of this

16   discovery order.

17   And here is why, Your Honor. Leader has

18   only come once to review the source code in this case

19   and that review took place on July 16th.

20   Following their review of source code,

21   the parties engaged in some meet-and-confer discussions

22   during which they identified some additional source

23   code files they hadn't originally requested but which

24   they claim that they needed in order to complete their

1   review.

2   We made those files available to them in

3   late July, and they've never come to review them. And

4   those files are available to them and will be

5   unaffected by a review of Judge Farnan's order.

6   The second point, Your Honor, is that

7   even as to the information that was available on the

8   computer, it's clear they haven't even fully reviewed

9   that.

10   Your Honor may recall, they put in a

11   declaration of their expert identifying about 43 files,

12   source code filings, that they claim they needed in

13   order to do their review, and they claim that they

14   were not on the computer.

15   It turns out, Your Honor, that as to a

16   quarter of those files, that their expert was

17   mistaken. Those files actually were on the computer.

18   He must have just overlooked them, and he only spent

19   between five and six hours reviewing the code.

20   So between the files that we made

21   available in late July, pursuant to their request, and

22   the files that Mr. Vigna had overlooked in his initial

23   review, there's a substantial amount of source code

24   that they can review at any time during the tenancy of

1   Judge Farnan's order.

2   So the idea that their review of source

3   code is going to grind to a halt or is not going to be

4   able to take place, it's simply not true.

5   There is plenty that they can be

6   reviewing and plenty they can be doing while Judge

7   Farnan reviews Your Honor's order.

8   THE COURT: Okay. Let me hear from

9   Leader and then I'll come back to you.

10   MR. ANDRE: Your Honor, this is Paul

11   Andre, and with me in the office is James Hannah.

12   He's an associate who actually went with Dr. Vigna for

13   the source code review, so if there's any specific

14   questions he'll be able to answer them.

15   But let me just start by giving the

16   court a bit of information that may be somewhat

17   helpful. We had scheduled a review of the source code

18   for tomorrow pursuant to the court's order.

19   And we just found out last night that

20   our expert, who reviews source code, his wife went

21   into labor last night, about three to four weeks

22   early. So, it's a little bit moot if we're trying to

23   get the source code reviewed for tomorrow anyway. So

24   we just found that out last night.

1   With respect to any type of harm, I

2   think counsel had a hard time identifying any harm for

3   looking at the source code because there is none.

4   We have extensive measures in place in

5   the protective order that protects the source code.

6   This is not unusual in patent cases. Source code is

7   looked at frequently.

8   We could do an iterative process like

9   they talked about, in coming back every single time

10   asking for a quarter more of the directories or the

11   files or the modules, however they want to describe

12   it. It seems to be a very term for them. But that

13   process is just -- we keep bringing to a dead end.

14   The way the source code is written, it

15   goes from one file to another file, and we don't know

16   how that is going to be set up.

17   So we briefed this all out with Your

18   Honor. You had both sides hearing on it. And there's

19   no reason to delay this any further.

20   I think the most telling aspect in this

21   case is we're six months into discovery and we don't

22   have a single technical document to date.

23   We've asked specific -- for very

24   specific documents in this case. We've e-mailed and

1   produced these documents by name, by file, and today

2   we have not received anything.

3   THE COURT: What about this suggestion

4   with respect to the technical documents that you have

5   been moving around a little bit and that what I

6   probably thought you meant by technical documents

7   related to source code modules is not what you

8   actually designated on August 7th?

9   MR. ANDRE: I don't think that's the

10   case.

11   I want Mr. Hannah to describe exactly

12   what happened here because he's been the one involved

13   with this conversation.

14   James.

15   MR. HANNAH: Good afternoon, Your Honor.

16   THE COURT: Good afternoon.

17   MR. HANNAH: The situation that happened

18   was we entered into a meet-and-confer, and originally

19   we defined *source code module* as a file, which is a

20   discreet part of a program, and it's like a PHP file.

21   Facebook came back to us and said, *No* --

22   and this was -- actually, I should back up.

23   This is in relation to the supposed map

24   that they gave us. When they gave us a list of

1   modules we identified at least 26 to 35 files which

2   were not on this list, and we said, *Why aren't these*

3   *files on this list?* We couldn't even request them to

4   be, you know, present at the source code review.

5   They came back us and said, *Well, the*

6   *definition of source code module is a directory.*

7   So we said, *Okay. Our definition of a*

8   *source code file -- of a module would be a file so we*

9   *need a list of files so we can determine which ones*

10   *we're going to use.*

11   They came back us to and said, again,

12   this bill of directories.

13   So when we identified the particular

14   source code modules that we wanted access to the

15   technical documents, we used their definition so there

16   would be no debate.

17   We thought that that -- the reason we

18   used their definition is because we assumed that that

19   is how they organized their technical documents, is in

20   terms of directories and not particular files.

21   And to be frank, we're kind of shooting

22   in the dark because we haven't seen any technical

23   documents and so we don't know how they organize their

24   files at all.

1   So we identified the directories. We

2   did not identified all of the directories, but we

3   identified the major directories which had interesting

4   source code files within them.

5   Then they came back to us and said, *Well*

6   *that contains 99.9 percent of the source code and it's*

7   *going to be all of the technical documents.* And tried

8   to, you know, put it back on us saying that we changed

9   our definition.

10   You know, from our perspective, it's

11   very difficult. We don't know how they're organizing

12   their documents. Are they describing directories or

13   are they describing files?

14   And we feel that if we identify a

15   particular file, then we're not going to get access to

16   the critical document, which is maybe a directory or

17   vice versa.

18   On another note, as soon as we reviewed

19   the source code we sent them a list and we sent them a

20   list of files, we sent them a list of directories, we

21   sent them a list of specific document names, and we

22   sent them a list of PDFs that we wanted by name which

23   we found in the initial source code. To date, we have

24   not received any of those technical documents.

18

1   So, no matter what the definition of

2   *source code module* is, whether it be a file, a

3   directory, we gave them the specific files that we

4   requested for initial production and still haven't

5   seen anything.

6   If we see at least those we can tell,

7   you know, how they're organizing their documents.

8   And, you know, we would like to see a production of

9   those at least.

10   MR. WEINSTEIN: If I can briefly

11   respond, Your Honor.

12   The issue of the source code module is

13   kind of a moot point. We produced the list of every

14   source code file in the source code.

15   And what happened was when we originally

16   identified the source code module we identified about

17   a hundred sort of directories that had functionally

18   related files in them and they picked about 20, 25 of

19   them.

20   When they came back, after we produced

21   the entire list of all files, they basically

22   identified five directories.

23   The way it works, Your Honor, is that a

24   directory is nest with another directory and another

1   directory. So the higher up level you go, Your Honor,

2   the more you get.

3   And what they picked was five directories

4   that are very, very high level, and if you add up

5   everything that's contained in them it was essentially

6   the entire source code. So it was essentially asking

7   for every technical document in the company.

8   And so I think they obviously need to

9   come back with a revised list that is facial to their

10   definition and their expert's definition of what a

11   source code module is, since they now have a complete

12   list of every file that constitutes the source code.

13   THE COURT: That was Mr. Weinstein;

14   correct?

15   MR. WEINSTEIN: Yes.

16   THE COURT: And, Mr. Weinstein, what

17   about the specific documents that they say they have

18   requested, even by name?

19   MR. WEINSTEIN: Your Honor, the

20   documents -- if they identified a document by name we

21   endeavored to make it available.

22   I think you have to go into their

23   requests for documents because they read more like

24   document requests. They are like, *All documents*

20

1   *relating to X.* They're not really specific requests.

2   When they asked for specific files, like

3   the source code files we identified, we made them

4   available. Where we didn't make things available,

5   where it was categories of things that were very

6   vaguely defined or that read essentially like very

7   broad document requests.

8   I mean, our position is very clear. If

9   they come up with a tailored specific, you know, list

10   of stuff, you know, we have and will continue to make

11   that available as long it's reasonable.

12   But I think the documents that

13   Mr. Hannah is talking about are ones that really just

14   weren't defined with any level of clarity.

15   THE COURT: Go back to Mr. Andre and

16   Mr. Hannah if need be.

17   In terms of the documents that you're

18   looking for, are you in a position now, even as it

19   sounds likely regardless of what I order, even before

20   you review the source code again with your expert, are

21   you in a position to make a more specific and more

22   limited request for the technical documents that you

23   need to enable you to review the source code?

24   MR. ANDRE: Your Honor, the request you

1   made on July 21st, which was an e-mail that we sent

2   where we listed the very specific files, the documents

3   you wanted for those files, we've made that specific

4   request.

5   Until we get looking at the source code

6   we won't know exactly what files to identify documents

7   for.

8   The hierarchy they gave us was an

9   800-page nonsearchable hierarchy of their source code,

10   and we would literally be shooting in the dark until

11   we actually see the code itself.

12   So at this point we gave them a list --

13   and I'll just give you an example. We would say

14   things of this nature: *All documents relating to*

15   *status dot PHP. All docs related to the function*

16   *requires underscore log in.* So we identified very

17   specific files here and just documents relating to

18   those files.

19   We actually went through and said --

20   when we were looking at the source code, there were a

21   bunch of PDFs that were in the source code. We wanted

22   to see those PDFs.

23   We couldn't print them out because

24   that's part of the source code. We can't print out

1   the source code.

2   So we identified very specific documents

3   from our first source code review, so we can be that

4   specific, and we did that on July 21st.

5   We can't be any more specific than the

6   very general directory structure at this point until

7   we see the rest of the source code. And that's the

8   reason we gave the directory structure in our request.

9   THE COURT: But the July 28th order

10   that's now in place required that you, Leader,

11   identify the source code modules with respect to which

12   you needed production of technical documents, and then

13   contemplated that Facebook would provide you those

14   documents and only thereafter contemplated you would

15   have access to the full source code.

16   What you're requesting now, at least in

17   your alternative to me just staying my order, is that

18   you would -- having made some requests with respect to

19   source code modules that you want technical documents

20   for -- you now want the access to the source code and

21   then want to come back and, I guess, refine somehow

22   your source code module technical document list.

23   Explain to me how we got to that point

24   from where we were in the July 28th order.

1   MR. ANDRE: Your Honor, we were trying

2   to get a compromise to Facebook just so we would avoid

3   this process.

4   What happened was, looking at the

5   hierarchy map they produced to us pursuant to Your

6   Honor's order, we looked at that and we asked for what

7   we believe are modules, which are directories, and we

8   said, "*We want documents related to these modules.*"

9   They complained that it was 99.9 percent

10   of all documents related to the source code.

11   So, in order to try to compromise, we

12   said, *If we saw the rest of the source code we could*

13   *identify the specific files*, like we did on the

14   July 21st e-mail. We identified very specific files

15   there.

16   But short of seeing the source code we

17   couldn't identify that subset of documents. It's just

18   impossible to do. It would be pure guesswork.

19   So we tried to make a compromise

20   solution and said, *Once we see the source code we'll*

21   *identify the specific files,* just like we did on

22   July 21st.

23   We did identify the modules pursuant to

24   Your Honor's order and that's what they're complaining

24

1   about, that we identified too much.

2   And just a side note, Your Honor. When

3   we talked to the technical people they actually said,

4   *There's not that many technical documents to start off*

5   *with.* This is not going to be a large production,

6   according to them anyway.

7   So, it's kind of like the source code.

8   When they talked to Judge Farnan they said there was a

9   terabyte of data in the source code. We find out it's

10   only 60 megabytes.

11   So we don't think this is an onerous

12   position to be asking to produce technical documents

13   pursuant to our request.

14   THE COURT: All right. Going back to

15   the source code, Mr. Andre. Why have you and your

16   expert not spent more than approximately five to six

17   hours looking at what's already been made available to

18   you?

19   I mean, what about this argument that

20   you're not taking full advantage of what you already

21   had been given access to?

22   MR. ANDRE: He looked at the entire

23   source code portion that we had access of, the 89

24   files of directories or however you want to call them,

1   that we identified from the initial list.

2   He's confident -- he went through it

3   thoroughly. He spent six, seven solid hours doing

4   this. It was a bit frustrating because every time he

5   started tracing a function he'd run into a dead end.

6   So this iterative process is just that.

7   He starts trying to trace a function, a function call,

8   and because not all the files were not made available,

9   he would access, because the way the source code is

10   written, another file, and he would hit a dead end

11   because that file was not made available.

12   So our expert has told us that he feels

13   like he's done all the searching he can do on the

14   source code made available.

15   MR. WEINSTEIN: Your Honor, that's

16   actually not true and --

17   THE COURT: I'm sorry. Is that

18   Mr. Weinstein?

19   MR. WEINSTEIN: Yes, sir.

20   THE COURT: Hold on. I'll come back to

21   you. I want to hear from Mr. Andre at this point.

22   MR. ANDRE: So when we got back from the

23   source code review -- and a part of the -- we

24   requested specific documents from the certain files

1   that we had looked at, we also identified a list of

2   approximately 30-plus additional modules, or files,

3   that they just did not put on the original list. And

4   those -- they then said, *"We'll make those available*

5   *to you as well if you want."*

6   We don't want to go back and once again

7   just enter a process and say we went to Your Honor,

8   and actually the entire source code, so our expert can

9   come up here and do the job he needs to do. We don't

10   want him to have to fly up six times to look at source

11   code in an iterative process and keep running into

12   dead ends.

13   At the end the day, based on his own

14   expert declaration, he needs the entire source code to

15   be able to map it and trace it and to follow the

16   files -- you know, the function of -- the function

17   calls, they go from file to file.

18   So, you know, this isn't doing anything

19   for us other than give us the information we need. It

20   doesn't harm Facebook at all. It's just getting an

21   efficient and effective way of getting discovery going

22   in this case, and we only have three months left.

23   THE COURT: Explain to me, Mr. Andre,

24   how I ended up getting two letters: A letter of the

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 1      DI74 and 75 instead of the joint letter that I had

 2      ordered after the last teleconference?

 3                  MR. ANDRE:  I think that was a

 4      misunderstanding, Your Honor, because it was -- I

 5      talked with our Delaware counsel and us, and we

 6      remembered you saying you wanted a single letter, and

 7      we thought it was a single letter from each side.

 8                  And we thought it was just a

 9      simultaneous filing -- and we may confer with Facebook

10      on this.  It was our understanding -- we didn't have

11      access to the transcript, it wasn't published at that

12      time.  Even after reading the transcript, it wasn't

13      clear that it was going to be a joint letter.  We

14      thought it was just a single letter, simultaneous

15      filing, without any responsive letter.

16                  So that was just -- if it was meant to

17      be a joint letter, it was just a misunderstanding.

18                  THE COURT:  And what about this

19      suggestion that you could or should have done better

20      to meet and confer with Facebook and maybe shared the

21      expert declaration that was attached to your letter

22      before I saw it?

23                  MR. ANDRE:  Your Honor, we met and

24      conferred with them many -- we have provided them with
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1   specific documents we've asked for. We've asked for

2   the entire source code. We gave them the basis for

3   doing so. We told them essentially everything that

4   was in that declaration in our meet and confers.

5   We've identified the files that were not

6   listed in their original 400-some-odd file names they

7   put out there.

8   We have been beating our head against a

9   brick wall with this discovery. They're putting up

10   hurdles every step of the way not wanting to give any

11   single technical document.

12   And like I said, I've never been

13   involved in a case where six months into discovery we

14   haven't got a single technical document. That's

15   astounding, especially when we specifically asked for

16   them.

17   So, we've met and conferred with them

18   dozens of times, and we told them exactly what the

19   expert said in the declaration and that was not

20   persuasive at all.

21   THE COURT: And other than the obvious

22   cost that would be involved if we did this as an

23   iterative process, and your expert, once he's back at

24   work, had to travel down maybe six times; other than

1   the financial cost, which could be shifted, what would

2   be the prejudice to Leader from going about it in that

3   way?

4   MR. ANDRE: It's really the timing. We

5   have three months left in discovery. And we have a

6   full professor at the University of California whose

7   time is very hard to get.

8   And what we -- what Facebook's end game

9   here is is to try to push off the trial date. We have

10   a June 2010 trial date. I'm sure they don't that.

11   They're going to do everything they can to stall and

12   push that off.

13   They tried to get a much later date from

14   Judge Farnan and they're not getting it in the

15   scheduling conference. Now they're going to try to

16   get it through the delay tactics.

17   At the end of the day the end result

18   will be, based on our expert's opinion -- he's going

19   to need the entire source code anyway. He'll just do

20   it in an iterative process, and when push comes to

21   shove, he will have nearly I would imagine every

22   single file that is in their source code because

23   that's how they write the source code.

24   They write in a particular language for

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 1          that very purpose.  These PHP files are written so

 2          it's very difficult for people to be able to hack into

 3          it and get this type of information.  The files are

 4          all inter-related.  That's just the way the PHP

 5          language is used.

 6                    THE COURT:  Okay.  Anything else you

 7          wanted to add, Mr. Andre, before I turn it back to

 8          Mr. Weinstein?

 9                    MR. ANDRE:  Not at this time, Your

10          Honor.

11                    THE COURT:  Okay.  Mr. Weinstein.

12                    MR. WEINSTEIN:  Yes, just very briefly,

13          Your Honor.

14                    I think, when you step back a little

15          bit, what becomes clear from the record is that the

16          situation we are with discovery is one of Leader's own

17          making.

18                    How this started, Your Honor, was from

19          the very beginning of this case we've been struggling

20          to have Leader identify for us what is the specific

21          mechanism, what is the specific feature that's

22          infringing, because that will help us inform what's

23          relevant, how to do our document search, even how to

24          do our document retention policies and our litigation
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31

1   hold letters.

2   To this day, Your Honor, all Facebook

3   has been -- I'm sorry -- all Leader has been able to

4   tell us is, *It's the whole site. It's everything. We*

5   *can't be specific.*

6   And this argument about how one file

7   refers to another file which refers to another file,

8   that's just a pretext, Your Honor.

9   If that was the true argument, Your

10   Honor, you would have to produce the entire source

11   code in every case involving software.

12   And we put in the declaration from our

13   expert, Mr. Gray, who has testified and served as an

14   expert in several software cases, and he basically

15   said, *You don't have to resolve all of these*

16   *dependencies.*

17   He said, you know, *If you come in with a*

18   *workable theory that this is the area that I think my*

19   *claim implicates, you can craft a request for the code*

20   *that you need. The defendant can produce that code*

21   *and the plaintiffs can review it, either confirm that*

22   *its theory of infringement is valid or it can confirm*

23   *that the code didn't work the way it thought it did.*

24   *You can move on.*

1   What we have here, Your Honor, is that

2   Leader came into case without a workable theory. So

3   the reason they're asking for the code is not because

4   they need to resolve dependencies, it's because they

5   don't have a workable theory. And without a workable

6   theory they're not able to articulate what it is

7   they're looking for. And that's why they keep asking

8   for everything, or they ask for technical documents in

9   99 percent of the code because they're not able at

10   this point to even articulate why they want or what it

11   is they're interested in, and that's why they're

12   asking for the entire code. And I think that's why

13   where we are at this point.

14   THE COURT: I'm going to come back to

15   you, Mr. Weinstein.

16   But, Mr. Andre, speak to that argument,

17   that you have a lack of a workable theory and haven't

18   articulated one and that's what's creating the problem

19   here.

20   MR. ANDRE: Your Honor, we've

21   articulated our theory of infringement in this case.

22   What we're looking at here is a website

23   that's infringing. We're not looking at a single

24   application from a program that they're referring to.

1   We put forward the actual public

2   information that's available to show infringement. We

3   put forward screen shots. We put forward the API

4   calls. We put forward a narrative describing the

5   infringement activity.

6   We've done this in amazing detail. We

7   had this theory of infringement well before we even

8   filed the case, as all lawyers should have.

9   So what we're trying to do now is just

10   get the actual hard specific evidence from the source

11   code. That's not public information.

12   Our expert can look this over in a

13   matter of one to two days, and then we'll identify

14   with amazing detail the files, the function of those

15   files, and the documents that those files were

16   designed from, the design documents and other

17   technical documents that show infringement.

18   We can't identify specifically the files

19   of infringement that are not publicly available. We

20   can't identify the documents that are not produced.

21   We can't show the infringement.

22   We have identified all the public

23   documents, all the public information from the website

24   that prove infringement. We've produced that to them.

34

1   So for counsel to come in and say, *We*

2   *don't have a workable theory,* that's lawyers being

3   lawyers.   There's no semblance to the truth there.

4   But if they keep -- if they're able to

5   keep all their technical documents hidden in the

6   entire case we won't be able to identify them because

7   we don't have them, and that's the name of the game

8   here.

9   THE COURT: Mr. Weinstein, do you want

10   to respond to that?

11   MR. WEINSTEIN: Yes, Your Honor.

12   I mean, these are the same arguments

13   that were actually the reason that Judge Farnan

14   adopted the procedures he adopted was.

15   He looked at Mr. Andre's articulation.

16   He actually reviewed the interrogatory response and

17   basically said, you know, *What you have put forward is*

18   *not enough to justify going* what he calls *full bore*

19   *into Facebook,* and that's why he adopted this

20   procedure.

21   I mean, that's why this procedure was

22   adopted was because Judge Farnan didn't think what

23   they had articulated was good enough to just, you

24   know, to just go into everything.

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1   That's why he said, *Go take a subset,*

2   *identify it, go review it, and then provide some*

3   *detailed infringement interrogatory.* That's why --

4   you know, that's why that procedure was adopted, was

5   based on his review of the interrogatory responses.

6   THE COURT: And let me ask you this,

7   Mr. Weinstein. What's being argued is that -- you

8   know, what they're telling me is that they either need

9   all of the technical documents that they've requested,

10   which you say would be essentially all of the

11   technical documents in order to make their review of

12   the source code meaningful, or they need access to the

13   full source code and then they can refine their

14   request for technical documents.

15   I understand that you don't agree that

16   they're in that bind, but if I think they're in that

17   bind, what would you have me do?

18   Would you have me order you to produce

19   all the documents so then they can focus their review

20   of the source code, or would you have me let them, as

21   they currently are allowed to do, review the whole

22   source code and then come back to you with the more

23   limited request for technical documents?

24   MR. WEINSTEIN: If I could suggest a

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1   third option.

2   If Mr. Andre has a theory with amazing

3   detail he should be able to identify what are the

4   mechanisms that are implicated by this patent. This

5   is not a patent that covers the entire website. It's

6   a very specific mechanism that it's talking about.

7   And so there's no reason they shouldn't

8   be able to look at the mechanisms that are at issue

9   and say, *Here is where we want to look. This is what*

10   *we want to look at, and we want you to produce that.*

11   And in which case we would produce that and they would

12   be able to look at it. I think that's what at issue.

13   I mean, the argument that it's the whole

14   website, it just isn't supported by what the property

15   right is that they're asserting.

16   That's why I don't think they're in that

17   bind, Your Honor. If they have a theory as Mr. Andre

18   said, and I'll take him at his word, then they should

19   be able to articulate what are the mechanisms that

20   they -- and I understand they can't understand what

21   they do right now because they have to see nonpublic

22   information -- but they have to have a theory as to,

23   you know, which rock they need to look under in order

24   to find this, and they should be able to identify that

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1   rock, and then be able to confirm their theory if they

2   have one.

3   THE COURT: And the contention by

4   Mr. Andre that they've not received a single technical

5   document yet in this case; that's correct or

6   incorrect?

7   MR. WEINSTEIN: I don't think that's

8   correct, Your Honor.

9   I mean, just to give you an example.

10   The PDF documents that they're talking about, they're

11   actually loaded on the computer that was made

12   available during the inspection. Those PDFs have been

13   collected and are available on the computer.

14   So as to the other documents that were

15   identified, not with specificity, I can't speak to

16   those because they're just not defined with any level

17   of clarity.

18   MR. ANDRE: Your Honor, this is Paul

19   Andre, just real quickly.

20   Those PDFs there on the computer. Under

21   the source code we are not permitted to print those

22   out, so we don't have those documents. That was a

23   source code review and a PDF is a part of that source

24   code, and we are now allowed to print them out and we

1   filed a protective order.

2   THE COURT: Mr. Andre, do you have a

3   sense at this time yet when your expert is next

4   available to go review the source code? And I'll

5   certainly understand if he hasn't given you a date

6   yet.

7   MR. ANDRE: Yeah. We got the word from

8   him last night, and we've contacted him to see if the

9   young baby Vigna has arrived yet and we have not

10   received a word from him.

11   So I'm hoping that that mother and child

12   are fine, but I don't know, to be honest with you.

13   He's pretty responsive.

14   I know the time period -- I don't know

15   if he's teaching this summer or not, so he may do it

16   in the next week or two.

17   THE COURT: All right. Anything further

18   you want to add, Mr. Weinstein?

19   MR. WEINSTEIN: Not at this time, Your

20   Honor. Thank you.

21   THE COURT: Well, I'm prepared to rule,

22   but it is going to be a limited ruling.

23   I think it's fortuitous, undoubtedly a

24   happy thing for the Vigna family, but I think happily

1   for all of us that the original order, which provided

2   access to Leader to the full Facebook source code

3   starting tomorrow, is not an order that Leader is in a

4   position to take advantage of, tomorrow anyway, and I

5   do think that's fortuitous because I want to better

6   understand the competing contentions about the

7   specificity of the infringement theory that Leader is

8   bringing here. And I will come back to that in a

9   moment.

10   Let me say a few things before I get to

11   that and to what the specific relief is that I'm going

12   to grant.

13   One thing that needs to be understood is

14   that as this case has been referred to me by Judge

15   Farnan, he has referred all discovery disputes and

16   management of discovery in its entirety to me.

17   Now, of course, that gives either side,

18   if they're dissatisfied with the ruling from a

19   Magistrate Judge on a discovery matter referred to

20   him, that gives you a right to object, of course, but

21   you don't get an opportunity to wait until your

22   objections are ruled on to comply with the discovery

23   order.

24   The discovery order of the Magistrate

1   Judge is an order of the court. It's only going to be

2   reversed if the District Court judge finds it's

3   clearly erroneous, contrary to law or an abuse of

4   discretion.

5   And the point is it's an order of the

6   court, and sometimes it may happen that because

7   discovery is moving more quickly than the objections'

8   process can move, that you end up having to comply

9   with the discovery order that otherwise you might have

10   found you could of had reversed.

11   Further, it needs to be understood that

12   I am not limited at this point to follow the procedure

13   that Judge Farnan set forth when he was handling

14   discovery in this case.

15   As I understand the referral, part of

16   what's referred to me is to manage this process as it

17   evolves. Nobody believed that it was going to just

18   stand still. And so the fact that I view something

19   differently than Judge Farnan is not an argument that

20   limits my discretion in terms of how I'm going to

21   handle discovery.

22   I want to further say the argument that

23   Facebook is making -- and I've given you every

24   opportunity to articulate it today -- that the

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1   prejudice to Facebook will somehow be overwhelming and

2   irreparable just by virtue of opening up the entirety

3   of the source code to a litigant that claims the

4   source code is infringing the litigant's patent

5   rights, when opening up that source code is subject to

6   very stringent protections, which have been discussed

7   here and are an order of the court, is not an

8   especially persuasive argument against the discovery

9   and the particular circumstances of this case.

10   With all that said, however, I do think

11   a brief stay of my order allowing Leader to have

12   access to the entirety of the source code, I believe a

13   brief stay is in order.

14   I'm not granting a stay that will

15   necessarily run as long as it takes for the objections

16   to be resolved. In fact, at this point I'm only going

17   to stay my order for a period of ten calendar days,

18   and during that time frame I want to receive separate

19   letters from the parties focusing on the issue of

20   exactly where Leader has articulated its theory that

21   the entirety of Facebook's website infringes, and what

22   the implications are from that theory for which parts

23   of the source code and which technical documents are

24   thereby made relevant and subject to discovery.

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1   Specifically, I'm going to give you a

2   schedule. I want to hear first from Leader. I want

3   you to explain to me in your letter, citing to

4   interrogatories or whatever it is, exactly where

5   you've articulated, and articulate with as much

6   specificity as you can what the theory of infringement

7   is. I want to receive your letter by next Thursday,

8   the 27th of August.

9   And then I want a response from Facebook

10   by Tuesday, September 1st, and Leader can then respond

11   to Facebook's letter by the end of the day Wednesday,

12   September 2nd.

13   And I guess, just to be clear -- and I

14   will put this all in an order for you that I will get

15   out later today -- I'm going to stay my order until

16   Friday, September 4th.

17   So that will give us time to do this

18   round of letters and for me to evaluate them and

19   revise my order, which may just be a revision of dates

20   or it may be something of a more substantial revision.

21   I do want to say, also, I'm very mindful

22   of the fact that the trial date is set for June

23   of 2010. It is not my intent that my order today, or

24   any other order I might issue going forward, will

1   affect that trial date of June 2010. I'm determined

2   to keep this case on track to keep that trial date.

3   And so things may move extremely quickly

4   after September 4th if I do lift the stay at that

5   point and reinstate the order giving Leader full

6   access to Facebook's source code.

7   I know that's been a little bit

8   rambling. And, as I say, I will get out a written

9   order shortly with these dates.

10   I don't want to have any further

11   argument at this time, but I could certainly

12   understand if I've been unclear and you have any

13   questions or clarification.

14   Mr. Weinstein, do you?

15   MR. WEINSTEIN: No, I do not, Your

16   Honor. Thank you.

17   THE COURT: And Mr. Andre?

18   MR. ANDRE: Your Honor, I don't have any

19   questions. I do have one unrelated question, I guess.

20   We have another issue that's coming up

21   that's relating to discovery, as to when discovery

22   closes and when we can take depositions.

23   Would you like us to brief that out for

24   Your Honor or would you like to hear briefly what the

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1   issue is today?

2   THE COURT: I don't want to hear what

3   the issue is today.

4   If, after you've engaged in full good

5   faith efforts to confer with one another, you find

6   that you really can't resolve that, then start the

7   process over by calling chambers and we'll get you a

8   date and we'll issue an order for letters.

9   MR. ANDRE: That's great. Thank you,

10   Your Honor.

11   THE COURT: Anything else?

12   MR. ANDRE: No, Your Honor.

13   THE COURT: Thank you all for your time.

14   MR. WEINSTEIN: Thank you, Your Honor.

15   (Telephone conference concluded at 2:55 p.m.)

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1   CERTIFICATE

2   I, EDWARD N. HAWKINS, Registered Merit

3   Reporter, certify that the foregoing pages are a

4   correct transcript from the record of proceedings in

5   the above-entitled matter.

6

7   _____

8   Edward N. Hawkins, RMR

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