

ESTTA Tracking number: **ESTTA283308**

Filing date: **05/12/2009**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92050675
Party	Defendant FACEBOOK, INC.
Correspondence Address	Jeffrey T. Norberg Cooley Godward Kronish LLP 3000 El Camino Real, Five Palo Alto Square Palo Alto, CA 94306 UNITED STATES jnorberg@cooley.com
Submission	Opposition/Response to Motion
Filer's Name	Jeffrey T. Norberg
Filer's e-mail	jnorberg@cooley.com, laltieri@cooley.com, trademarks@cooley.com
Signature	/s/ Jeffrey T. Norberg
Date	05/12/2009
Attachments	Response to Motion for Consolidation.pdf (22 pages)(602523 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

THINK COMPUTER CORPORATION

Petitioner,

v.

FACEBOOK, INC.,

Respondent.

Cancellation No. 92050675

Mark: FACEBOOK

Reg. No. 3,041,791

Reg. Date: January 10, 2006

RESPONDENT FACEBOOK, INC.’S RESPONSE TO MOTION FOR CONSOLIDATION

In order to save time, effort and expense in nearly identical cancellation proceedings occurring between identical parties, Respondent Facebook, Inc. (“Facebook”) joins in Petitioner Think Computer Corporation’s (“Think”) request for consolidation of Cancellation Nos. 92049206 and 92050675 (the “Cancellations”). However, Facebook opposes Petitioner’s request that discovery “proceed separately” because Petitioner has made no showing to justify its request for two full sets of discovery.

As Petitioner states in its motion, the Cancellations are based on the same operative facts and involve the same parties. Petitioner Think Computer Corporation’s Motion for Consolidation (“Motion”) at 1. Petitioner also raises the same grounds for cancellation of both registrations. *Id.* Indeed, both registrations claim the same mark – FACEBOOK – and share identical descriptions of goods and services.¹ Because the Cancellations raise almost identical

¹ Registration No. 3,041,791 was initially issued for the mark THEFACEBOOK. This Registration was amended to FACEBOOK on October 10, 2006.

questions of law and fact, they would be most efficiently addressed in a consolidated proceeding involving a single discovery process.

Petitioner's sole argument offered in support of its request for two full sets of discovery is that consolidation of discovery would "severely undermine" its ability to serve interrogatories in the later-filed cancellation action. This argument ignores the provisions of Trademark Trial and Appeal Board Manual of Procedure ("TBMP") §405.03(c), which provide that interrogatories beyond 75 are not generally allowed, even "in cases where more than one mark is pleaded and/or attacked by the plaintiff (whether in a single proceeding, or in consolidated proceedings), because in such cases, the propounding party may simply request that each interrogatory be answered with respect to each involved mark of the responding party, and the interrogatories will be counted the same as if they pertained to only one mark." TBMP §405.03(c). Despite being made aware of this provision during the meet and confer process preceding this motion, Petitioner makes no showing in its motion that the issues in the consolidated proceedings would involve "unusually numerous or complex issues" as contemplated by TBMP §405.03(c), nor could Petitioner make such a showing given that the two actions are based on the same set of facts and involve identical parties and identical marks. *See* Declaration of Jeffrey T. Norberg in Support of Facebook's Response to Motion to Consolidate ("Norberg Decl."), Ex. A (April 24, 2009 letter from Jeffrey T. Norberg to Nicholas A. Carlin). Petitioner's request for duplicate discovery should therefore be denied.

Petitioner's claim that it must be allowed a full set of interrogatories in the later filed action because it has already served 75 (or more) interrogatories in the earlier filed action is similarly meritless. As Petitioner states in its motion, Facebook has not yet responded to any interrogatories in the earlier filed proceeding and has instead objected to those interrogatories on the ground that they exceed the numerical limits set by the TBMP. In an effort to avoid needless motion practice

and to address Petitioner's stated need to serve additional interrogatories directed at the registration at issue in the later filed proceeding, Facebook has repeatedly offered to allow Petitioner to withdraw its excessive interrogatories and re-serve a set that both complies with the numerical limits set by TBMP 405.03 and is directed to both registrations. *See* Norberg Decl., Exhibit A. Facebook's offers to allow a new set of interrogatories were consistent with the provisions of the TBMP that require the parties cooperate in discovery and stipulate to new sets of interrogatories when excessive sets are served rather than burden the Board with unnecessary motion practice. *See* TBMP §405.03(e); 408.01. Petitioner has rejected these offers and has instead decided to take the dispute to the Board.

Facebook therefore requests that the Board grant Petitioner's request for consolidation but deny Petitioner's request for additional discovery. It would be both a waste of resources and prejudicial to Facebook if Petitioner were allowed to issue 150 interrogatories and take 20 depositions. Much of the benefit of consolidation would be lost if the parties were allowed two full sets of discovery.

Additionally, rather than adopting the schedule of the later filed proceeding as contemplated by TBMP §511, Facebook requests that the Board apply the schedule of the earlier filed proceeding to the consolidated proceedings. Given that both cases are based on a substantially identical set of facts, Facebook believes that the parties can complete discovery and proceed to resolution of both

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actions according to the schedule in place in the earlier filed proceeding, as modified by the
consented requests of the parties.

Dated: May 12, 2009

COOLEY GODWARD KRONISH LLP
MICHAEL G. RHODES (116127)
ANNE H. PECK (124790)
JEFFREY T. NORBERG (215087)
NOEL K. EGNATIOS (249142)

By: /s/ Jeffrey T. Norberg
Jeffrey T. Norberg (215087)

Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and complete copy of the foregoing Respondent Facebook, Inc.'s Response to Motion for Consolidation and Declaration of Jeffrey T. Norberg In Support thereof to be served by electronic mail on the following part(ies):

Think Computer Corporation
David M. Given, Esq.
Nicholas A. Carlin, Esq.
Meagan McKinley-Ball, Esq.
PHILLIPS, ERLEWINE & GIVEN LLP
50 California Street, 35th Floor
San Francisco, CA 94111
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Email: dmg@phillaw.com
Email: nac@phillaw.com
Email: mmb@phillaw.com
ATTORNEYS FOR PETITIONER, THINK COMPUTER CORPORATION

Date: May 12, 2009

/s/ Jeffrey T. Norberg
Jeffrey T. Norberg (215087)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

THINK COMPUTER CORPORATION

Petitioner,

v.

FACEBOOK, INC.,

Respondent.

Cancellation No. 92050675

Mark: FACEBOOK

Reg. No. 3,041,791

Reg. Date: January 10, 2006


**DECLARATION OF JEFFREY T. NORBERG IN SUPPORT OF RESPONDENT FACEBOOK, INC.'S
RESPONSE TO MOTION FOR CONSOLIDATION**

I, Jeffrey T. Norberg, hereby declare as follows:

1. I am an associate at the law firm of Cooley Godward Kronish LLP, counsel of record for Respondent Facebook, Inc. ("Facebook") in this matter. Unless otherwise stated, I have personal knowledge of the facts set forth in this declaration and, if called to testify as a witness, could and would testify competently thereto.

2. Attached hereto as Exhibit A is a true and correct copy of the correspondence between counsel regarding the consolidation of Cancellation Proceeding Nos. 92049206 and 92050675. For ease of reference, I have marked the section of each letter that pertains to consolidation.

I declare under penalty of perjury that the foregoing statements are true and correct. Executed at Palo Alto, California, this 12th day of May, 2009.



Jeffrey T. Norberg

EXHIBIT A



Jeffrey T. Norberg
(650) 843-5889
jnorberg@cooley.com

VIA EMAIL AND U.S. MAIL

March 20, 2009

Aaron Greenspan
Think Computer Corporation
884 College Ave.
Palo Alto, CA 94306

RE: TTAB Cancellation No. 92049206

Dear Mr. Greenspan:

I write regarding your letter to me dated March 17, 2009.

With respect to Think's request to increase the limit of interrogatories available in this case, we note that Think has failed to provide any facts to support the "good cause" showing necessary to support an increase in the number of interrogatories in this case. Indeed, given the generous number of interrogatories available in TTAB proceedings (a limit of 75 rather than the limit of 25 set forth in the Federal Rules of Civil Procedure), we do not believe any such increase is necessary. We therefore decline Think's requested increase and will oppose any motion to increase the limits for the reasons set forth in this and our prior letters.

Regarding Think's contemplated motion to compel, we believe we have adequately explained that your interrogatories include sub-parts that place them well in excess of the 75 interrogatory limit and, on that basis, we include with this letter a general objection to Think's Revised First Set of Interrogatories. We believe it would be more productive for Think to revise its interrogatories to comply with the rules than to burden the Board with this dispute. On that basis, last week we offered to allow Think to withdraw its Revised First Set of Interrogatories notwithstanding the absence of any requirement that we do so. We remain willing to respond to discovery requests that comply with the limits on discovery set by the Board but will oppose any motion to compel discovery beyond those limits.

Regarding your proposed 30-day extension of discovery, we consent to your proposed extension. Please let us know if you would like us to file the consented motion to extend.

Additionally, I note that we have received Think's petition to cancel Facebook's Registration No. 3,041,791, assigned Cancellation Proceeding No. 92050675. We believe this new cancellation proceeding should be consolidated with the existing cancellation action under TBMP Section 511. Please let me know your availability for a call next week to discuss a possible joint proposal for consolidating the proceedings.

Finally, we have received your request that all correspondence be sent to legal@thinkcomputer.com. We will direct all future correspondence to that e-mail address and ask that all future correspondence to Facebook be directed to jnorberg@cooley.com and



Aaron Greenspan
March 20, 2009
Page Two

negnatios@cooley.com. We also request that the service of any document to Cooley Godward Kronish's Palo Alto office be addressed to my attention.

Sincerely,

A handwritten signature in dark ink, appearing to read "Jeffrey T. Norberg". The signature is written in a cursive, flowing style.

Jeffrey T. Norberg

PHILLIPS, ERLEWINE & GIVEN LLP

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DAVID M. GIVEN
dmg@phillaw.com

April 1, 2009

BY EMAIL <jnorberg@cooley.com>

Jeffrey T. Norberg, Esq.
Cooley Godward Kronish LLP
Five Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306-2155

**Re: Think Computer -w- Facebook
TTAB Cancellation No. 92049206/92050675**

Dear Mr. Norberg:

We represent Think Computer Corporation in the above-referenced TTAB proceedings. Our notices of appearance are enclosed.

There are a number of housekeeping matters we need to take up with you at once.

1. Consolidation of Actions. We agree in principle with your proposal to consolidate the two pending proceedings, as long as consolidation does not act to delay any of the dates currently set in the former proceeding. We believe the latter proceeding is based on the same or substantially the same facts and law and therefore may rely upon the preliminary paperwork (i.e., initial disclosures, etc.), motion practice and discovery of the former proceeding. Our proposal would be to consolidate the two proceedings along those lines.

2. Think's Interrogatories. We agree for meet and confer purposes to withdraw interrogatory no. 1 of Think's pending interrogatories to Facebook. Facebook should answer the balance of those interrogatories. We will grant Facebook another 10 days to comply fully with its discovery obligations attendant to those interrogatories.

Jeffrey T. Norberg, Esq.
April 1, 2009
Page 2

3. Facebook's Interrogatories. Think has provided timely written responses to Facebook's interrogatories. It reserves all objections.

4. Think's Document Demands. Facebook may commence its "rolling" production of responsive documents by delivery of those documents to our office. We will grant Facebook another 10 days to comply fully with its discovery obligations attendant to those demands. While your March 16 letter also speaks of "relevant" documents, as you are no doubt aware, that is not the standard for discovery in this proceeding. We trust Facebook's production will not be so limited.

5. Facebook's Document Demands. Enclosed is a disk containing Think's responsive documents. (This will come to you with the confirming copy of this letter via U.S. mail.) Note that among the file folders on the enclosed disk is one marked CONFIDENTIAL. We intend for all the documents in that folder to be treated as confidential in accordance with the protective order entered in this proceeding.

6. Zuckerberg Deposition. We need dates. We expect the deposition to run more than one day, so please provide at least three consecutive days.

7. The 30(b)(6) Deposition. We need dates. Perhaps you can start by advising us who Facebook intends to produce for that deposition so that we can coordinate calendars; however, we expect the dates for those witnesses' depositions (to the extent there is more than one) to run consecutively.

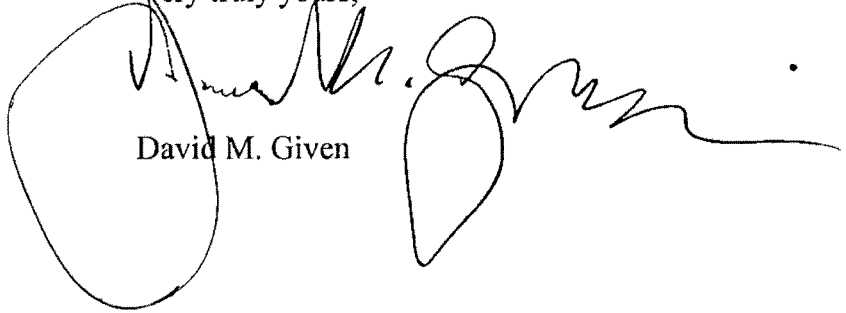
8. Greenspan's Deposition. The current date of May 21 does not work. We will set this deposition in conjunction with the dates for the Zuckerberg and 30(b)(6) depositions.

9. Other Facebook Depositions. We also need dates for the depositions of Chamath Palihapitiya, Neville Bowers and Ami Vora.

Jeffrey T. Norberg, Esq.
April 1, 2009
Page 3

Our client reserves all rights.

Very truly yours,

A handwritten signature in black ink, appearing to read "David M. Given", is written over the typed name. The signature is fluid and cursive, with a large loop at the beginning and a long, sweeping tail.

David M. Given

DMG:hs
Encls.



Jeffrey T. Norberg
(650) 843-5889
jnorberg@cooley.com

VIA E-MAIL

April 2, 2009

David M. Given, Esq.
Phillips, Erlewine & Given, LLP
50 California St., 35th Floor
San Francisco, CA 94111

RE: Think v. Facebook, TTAB Cancellation Proceeding Nos. 92049206 and 92050675

Dear Mr. Given:

I write in response to your letter of yesterday's date.

Thank you for your agreement to withdraw Think's Interrogatory No. 1. We do not agree to serve responses to the remaining interrogatories within 10 days as demanded in your letter. The Trademark Trial and Appeal Board Manual of Procedure ("TBMP") §405.03(e) provides, in part:

In those cases where a party which has propounded interrogatories realizes, on receipt of a general objection thereto on the ground of excessive number, that the interrogatories are, in fact, excessive in number, it is strongly recommended that the parties voluntarily agree to the service of a revised set of interrogatories, in the manner normally allowed by the Board, instead of bringing their dispute to the Board by motion to compel.

As you may be aware, Facebook has previously offered your client the opportunity to serve a revised set of interrogatories, as contemplated by this provision. Your client has repeatedly rejected this offer and therefore Facebook has no obligation to respond to any previously served sets. In keeping with the rule quoted above, however, Facebook will agree to allow service of a revised set of interrogatories and will consider and respond to any such revised set according to the deadlines set forth in the TBMP and applicable Federal Rules of Civil Procedure.

With respect to your request for deposition dates, we are currently conferring with our client and plan to provide available dates as soon as possible. We note, however, that we will be serving objections to your client's 30(b)(6) notice, as many of the topics seek information well beyond the scope of discovery. For your reference, we direct you page 13 of the Board's September 24, 2008 order regarding the relevance of many of Mr. Greenspan's allegations. We will provide appropriate corporate designees after we have served our formal objections to your client's deposition notice.

Moreover, we do not agree to produce Mr. Zuckerberg for multiple days. As you know, Rule 30(d)(1) limits the duration of any individual deposition to one day no longer than seven hours.



David M. Given, Esq.
April 2, 2009
Page Two

Given Mr. Zuckerberg's position in the company, as well as the limited nature of the issues in dispute in this TTAB proceeding, seven hours should be more than sufficient.

With respect to your other requested depositions, we will confer with our client and provide available dates in due course. We note, however, that at least one of the proposed deponents – Ami Vora – has not previously been disclosed in any discovery response. To the extent your client believes this witness has discoverable information, we request that you provide supplemental discovery responses identifying this witness and the general nature of the discoverable information.


In response to your request that Facebook "commence" its production of documents, we note that Facebook made its initial production of documents available on March 20, 2009 in Cooley's Palo Alto offices. This production remains available for your inspection during regular business hours. If you prefer, we will allow the copy service of your choice to temporarily remove the documents for copying. Please let us know your preference.

Regarding your claim that Think's responses to Facebook's interrogatories were timely, we disagree as stated in our letters of March 12 and 16. Facebook reserves all rights to raise with the Board Think's failure to timely respond to Facebook's interrogatories.

Finally, we agree that consolidation of the two cancellation proceedings should not delay any deadlines in the earlier filed proceeding. We further agree that the parties should be allowed to rely upon in both proceedings the preliminary work (discovery and motion practice) already conducted in the earlier proceeding. Given the substantial overlap in factual issues, we believe that the discovery limits applicable to the former proceeding should apply to both of the consolidated proceedings collectively. Please let me know if this is acceptable to your client and we will prepare a proposed joint motion.

Sincerely,

Cooley Godward Kronish LLP



Jeffrey T. Norberg

PHILLIPS, ERLEWINE & GIVEN LLP

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DAVID M. GIVEN
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April 3, 2009

BY EMAIL <jnorberg@cooley.com>

Jeffrey T. Norberg, Esq.
Cooley Godward Kronish LLP
Five Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306-2155

**Re: Think Computer -w- Facebook
TTAB Cancellation No. 92049206/92050675**

Dear Mr. Norberg:

In response to your letter received today:

1. I will come to the Cooley office on Monday, April 6 at 10:00 a.m. to review documents produced by Facebook and assess how to arrange for copying. Please confirm that all the documents responsive to Think's demands that your client intends to produce will be there.
2. Facebook has had Think's interrogatories for months. Since you've declined my meet and confer proposal, and insist on a new set and service of those same interrogatories, we will go ahead and move to compel on all outstanding interrogatories, including interrogatory no. 1, and you can explain your client's position to the TTAB hearing officer.
3. Objections to the 30(b)(6) deposition notice are unfounded and untimely. We will take this subject up on our motion to compel if need be.
4. I'm at a loss to understand the contention that we have to supplement previous discovery responses to obtain the deposition of a party witness.

Jeffrey T. Norberg, Esq.

April 3, 2009

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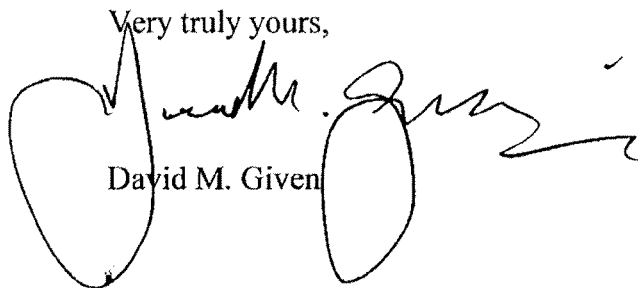
5. We do not agree to the discovery limits you propose with respect to the consolidated action.]

6. We still need dates for the depositions that have been noticed. If your client is intent on continuing to obstruct, we'll take that subject up too on our motion to compel. In this respect, the number of motions to compel and for contempt your client was subject to in the *ConnectU* case is instructive.

Enclosed is a deposition notice for Palihapitiya, Bowers and Vora.

Our client reserves all rights.

Very truly yours,

A handwritten signature in black ink, appearing to read "David M. Given", is written over the typed name. The signature is stylized with a large, looped initial "D" and a long, sweeping horizontal stroke at the end.

David M. Given

DMG:hs

Encl.



Noel K. Egnatios
(858) 550-6026
negnatios@cooley.com

VIA E-MAIL

April 6, 2009

David M. Given, Esq.
Phillips, Erlewine & Given, LLP
50 California St., 35th Floor
San Francisco, CA 94111

RE: Think v. Facebook, TTAB Cancellation Proceeding Nos. 92049206 and 92050675

Dear Mr. Given:

I write in response to your letter to Jeffrey Norberg dated April 3, 2009.

At the outset, we note that we are surprised by both the tone of your recent letters and your accusation that Facebook has in any way "obstruct[ed]" discovery. Facebook has made every effort to work with your client to move discovery forward in this matter notwithstanding your client's insistence on ignoring numerous provisions of the TBMP, including those governing the timing and scope of discovery. Your claim that Facebook has in any way obstructed discovery in this case is not only incorrect, it is inconsistent with the Board's admonition that the parties cooperate in discovery. See TBMP §408.01 ("The Board expects the parties (and their attorneys or other authorized representatives) to cooperate with one another in the discovery process, and looks with extreme disfavor on those who do not.") Consistent with the Board's request and our past practice, we will continue to attempt to cooperate to resolve the various discovery disputes between the parties notwithstanding your inflammatory and inaccurate claims.

With respect to your client's interrogatories to Facebook, your claim that Facebook has been in possession of your client's interrogatories "for months" is inaccurate and is not relevant to the issue of Facebook's obligation to respond. Your client has now served, in two separate discovery devices, more than 200 interrogatories including sub parts. Facebook has repeatedly requested that your client re-serve interrogatories in compliance with the limits set by the Board and has even done so earlier than required in an effort to move this case forward. Your client has repeatedly refused these requests. Moreover, neither you nor your client has provided any explanation as to why Facebook should be required to respond to more than 75 interrogatories, nor have you provided any authority upon which your motion to compel will be based. In light of this, we are perplexed by your insistence on further delaying this case by filing a motion to compel rather than complying with the Board's "strong recommend[ation]" that you re-serve compliant interrogatories. TBMP §405.03(e).

With respect to your request for Ms. Vora's deposition, we note that your client did not disclose Ms. Vora in its Rule 26 disclosures, nor was Ms. Vora disclosed in response to Facebook's interrogatories regarding those with knowledge of Think's claims of confusion or likelihood of confusion (No. 2), priority of use (Nos. 5 and 35), fraud (No. 28) and genericness (No. 24). To



David M. Given, Esq.
April 6, 2009
Page Two

the extent you now believe Ms. Vora has discoverable information on any of these topics, we once again request that you supplement Think's prior discovery responses.

With respect to Facebook's document production, as we stated in our last letter, Facebook's initial March 20 production is available for inspection in our Palo Alto offices. Facebook is continuing to collect and review documents for production and will produce such documents on a rolling basis as they become available.

Finally, with respect to consolidation of the two proceedings, we note that you have rejected without explanation our offer to consolidate using a single set of discovery according to the limits already in place for the first filed action. Please provide your basis for rejecting this proposal in light of your stated belief that "the latter proceeding is based on the same or substantially the same facts and law" as the former proceeding.

Sincerely,

Cooley Godward Kronish LLP

A handwritten signature in black ink, appearing to read "Noel Egnatios".

Noel K. Egnatios



Jeffrey T. Norberg
(650) 843-5889
jnorberg@cooley.com

VIA E-MAIL

April 16, 2009

David M. Given, Esq.
Phillips, Erlewine & Given, LLP
50 California St., 35th Floor
San Francisco, CA 94111

RE: Think v. Facebook, TTAB Cancellation Proceeding Nos. 92049206 and 92050675

Dear Mr. Given:

I write in response to your letter of today's date to Noel Egnatios.

Next week will not work for the three depositions you have requested. I note that we have not received any response to our April 6 letter requesting, among other things, supplemental discovery responses specifying the relevance of Ms. Vora's testimony. As we stated in that letter, Ms. Vora has not been disclosed as a witness with information regarding any issues relevant to this TTAB proceeding. Additionally, given Mr. Bowers' position and tenure with the company, we do not understand how his deposition is reasonably calculated to lead to the discovery of admissible evidence. We suggest the parties meet and confer early next week regarding these issues as well as the scheduling and order of depositions.

Regarding your request to meet and confer on Facebook's discovery responses, we suggest discussing these issues during our proposed call early next week. We believe the call will be more productive if you let us know in advance the specific topics you would like to discuss.

We further note that you have not responded to our request that you provide your basis for rejecting our proposal for consolidating the two cancellation proceedings using a single set of discovery under the limits applicable to a single action. We believe this issue must be resolved prior to proceeding with any depositions in this case and therefore request that you respond no later than Monday of next week.

We also have yet to receive a response to our April 7 request for contact information for witnesses identified in Think's discovery responses. Please provide this information no later than the close of business tomorrow, April 17.

Additionally, we have reviewed Think's recent document production and note that Think has failed to produce a complete set of documents responsive to many of Facebook's document requests, including Request Nos. 4, 6, 19, 21, 22, 34, 35, 36, 37, 40, 45, 53 and 54. Please confirm whether Think intends to produce documents responsive to these categories.

Finally, we note that many of the documents produced by Think appear to be either incomplete or altered from their original state. For example, in the attached e-mail, the names and e-mail



David M. Given, Esq.
April 16, 2009
Page Two

addresses of the "bcc" recipients appear to have been removed from the original e-mail and replaced with the letter "X." Additionally, many of the Instant Messenger chat logs do not include sign-on or sign-off timestamp information. Notwithstanding these apparent alterations, none of the documents produced by Think bear any statement that information has either been redacted or altered, as required by the instructions accompanying Facebook's discovery requests. Moreover, given the protective order governing the treatment of confidential information in these proceedings, we do not believe such alterations are appropriate or necessary. Please re-produce any altered documents in their unaltered state or provide your basis for refusing to do so.

Sincerely,

Cooley Godward Kronish LLP

/s/ Jeffrey T. Norberg

Enclosure



Jeffrey T. Norberg
(650) 843-5889
jnorberg@cooley.com

VIA E-MAIL

April 24, 2009

Nicholas A. Carlin, Esq.
Phillips, Erlewine & Given, LLP
50 California St., 35th Floor
San Francisco, CA 94111

RE: Think v. Facebook, TTAB Cancellation Proceeding Nos. 92049206 and 92050675

Dear Mr. Carlin:

Confirming our discussion regarding consolidation this afternoon, Facebook intends to file a motion to consolidate the two pending cancellation proceedings using the discovery limits applicable to a single proceeding for both proceedings collectively and adopting the schedule of the earlier filed proceeding. See, e.g., TBMP §405.03(c) ("Trademark Rule 2.120(d)(1) does not provide for extra interrogatories in cases where more than one mark is pleaded and/or attacked by the plaintiff (whether in a single proceeding, or in consolidated proceedings), because in such cases, the propounding party may simply request that each interrogatory be answered with respect to each involved mark of the responding party, and the interrogatories will be counted the same as if they pertained to only one mark."). Our understanding is that Think does not object to the consolidation of the proceedings using the earlier schedule but that Think intends to request that it be allowed a complete set of discovery for each action notwithstanding the consolidation (*i.e.* 150 interrogatories, 20 depositions, etc.). We do not agree that two sets of discovery are warranted in this case and we will note Think's opposition in our motion papers.

Also, during the call you reinstated Think's request that Facebook respond to all but Interrogatory No. 1 from Think's Revised First Set of Interrogatories. As I stated during the call and in my prior letters, the Board's rules are clear that the proper course of action for a party who has served an excessive number of interrogatories is to withdraw the excessive set and serve a new set that complies with the numerical limits. TBMP §403(e). Indeed, the rules specifically prohibit Facebook from responding to some but not all of the excessive set or risk waiver of the objection. *Id.*

In light of the unambiguous language of the TBMP, we remain perplexed at Think's continued refusal to serve a new set of interrogatories in compliance with the TTAB limits. As I stated during the call, service of a revised set is not only required by the rules, but would also allow Think to revise its interrogatories so as to avoid the claimed need for two sets of interrogatories to cover both cancellation actions. Notwithstanding the above, Facebook is willing to provide appropriate objections and responses to Interrogatory Nos. 2-48 of Think's Revised First Set of Interrogatories so long as Think agrees that Facebook's provision of such objections and responses does not constitute a waiver of the objection that Think's interrogatories exceed the numerical limit. If Think accepts this proposal, Facebook will provide such responses and objections 30 days following the date of Think's acceptance.



Nicholas A. Carlin, Esq.
April 24, 2009
Page Two

Please contact me at 650-843-5889 if you wish to discuss this matter further.

Sincerely,

Cooley Godward Kronish LLP

A handwritten signature in black ink, appearing to read "Jeffrey T. Norberg".

Jeffrey T. Norberg

CC: David Given; Megan McKinley-Ball