

Present:
Hon. _____

At Part of the Supreme Court of
the State of New York, held in and
for the County of New York, located
at Centre Street, New York, NY
on November , 2011

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of

MERCK KGaA,

Petitioner,

to Compel Disclosure Prior to Instituting
Action by

FACEBOOK, INC.,

Respondent.

Index No. 11113215

ORDER TO SHOW CAUSE FOR
PRE-ACTION DISCLOSURE

11113215

Upon the Petition attaching the Affirmation of Robert B. G. Horowitz, dated November 21, 2011, the exhibits annexed thereto, and the Memorandum Of Law In Support Of Pre-Action Disclosure, it is hereby

ORDERED, that Respondent Facebook, Inc. show cause at Part ___ of this Court to be held at the Courthouse, located at ___ Centre Street, Room ___, New York, New York 10007, on the ___ day of _____, 2011 at ___ a.m./p.m., or as soon thereafter as the matter may be heard, why an Order should not be entered granting pre-action discovery to Merck KGaA and a letter rogatory to take such discovery in California.

ORDERED, that service of a copy of this Order To Show Cause and all papers shall be served via _____ on Facebook, Inc. on or before the ___ day of _____, 2011.

FILED
COUNTY CLERK
NEW YORK COUNTY
NOV 21 2011
Unsigned Order to
Show Cause

ORDERED, that all papers in opposition, if any, shall be served for receipt by the _____
of _____, 2011.

ORDERED, that reply papers, if any, shall be served for receipt by the _____ day of
_____, 2011.

Dated: November __, 2011

ENTER:

J.S.C.

Oral Argument Directed:

J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
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**AFFIRMATION OF ROBERT B. G.
HOROWITZ IN SUPPORT OF
PRE-ACTION DISCLOSURE**

**NEW YORK
COUNTY CLERKS OFFICE
NOV 21 2011**

COUNTY OF NEW YORK)

STATE OF NEW YORK) ss.:

FILED

Robert B. G. Horowitz, Esq. swears and affirms under penalties of perjury as follows:

1. I am a partner in the law firm of Baker & Hostetler, LLP, counsel for Petitioner Merck KGaA ("Merck" or "Petitioner"), and am based in New York City. I am admitted to practice law in the State of New York, and I am familiar with the facts and circumstances of this matter, based on a detailed review and analysis of documents referenced herein. I submit this affirmation in support of the motion by Petitioner for pre-action disclosure pursuant to CPLR § 3102(c) and letters rogatory pursuant to CPLR 3108.

2. No prior application for the relief requested herein has been made to this or any other court or tribunal.

3. Merck, which is the oldest and one of the largest producers of pharmaceuticals and chemicals worldwide, intends to initiate an action based on the apparent takeover of its Facebook page at www.facebook.com/merck by its similarly-named and unrelated competitor, Merck & Co. of the U.S. Because Facebook is an important marketing device, the page is of

great value to Merck, and its misappropriation is causing harm to Merck. Because the harm is great, and because the value is inuring to a competitor of Merck's, time is of the essence.

4. While it is clear that Merck's Facebook page has been misappropriated, it is not yet clear how that happened or who is at fault nor, as more fully explained below, is Facebook providing clear information about what happened. Merck is considering causes of action for breach of contract, tortious interference with contract, tortious interference with prospective business advantage, and/or conversion. Merck requires pre-action disclosure from Facebook to determine the nature of the misconduct, to frame the pleadings, and to identify the proper defendant or defendants.

5. Merck is amenable to pursuing disclosure from Facebook, Inc. ("Facebook") in New York, as Facebook has a business presence in New York City, or in California, where Facebook is based. I have contacted counsel in California and have been advised that pre-action disclosure to identify defendants is not available through the California courts, leaving Merck without remedy in California until after it identifies a proper defendant or defendants. Because Merck anticipates that Facebook may demand that service be effectuated in California, Merck seeks letters rogatory to pursue its remedy in the California courts.

This Court has jurisdiction to hear this application and any subsequent action.

6. Merck is a *kommanditgesellschaft auf aktien* organized under German law, which is a form of limited partnership. Its headquarters is in Darmstadt, Germany.

7. Upon information and belief, Facebook is a corporation based in Palo Alto, California and has offices located at 335 Madison Avenue, New York, New York 10017.

Facts underlying the potential action

8. On or about March, 2010, Petitioner Merck entered into an agreement with

Facebook for the exclusive use of the Web page www.facebook.com/merck (the "Web Page"). Merck assigned administrative rights to the Web Page to a limited number of people, who are its employees or its external service provider for registration of domain names and social media user names.

9. On or about October 11, 2011, Merck checked its Facebook account for the Web Page and found that: a) it no longer had administrative rights to the Web Page; and, b) that the Web Page had content that appeared to be created by, and is related to, its competitor Merck & Co. Petitioner and Merck & Co. are unrelated entities – due to a divestiture from Merck under the Treaty of Versailles as war reparation for World War I – which each own the exclusive rights to the Merck trademark in different geographical areas. A true and correct copy of the Web Page containing content appearing to be created by Merck & Co. is attached hereto as Exhibit 1.

10. Merck further found that it was denied administrative rights to the Web Page, despite its agreement with Facebook, which remained active and still remains active. Put another way, nothing has changed with Merck's account with Facebook save for the taking of the address for the Web Page; while Merck has administrative rights under its agreement with Facebook, those rights no longer extend to the Web Page.

11. On behalf of Merck, I sent an overnight letter to Facebook's general counsel on or about October 14, 2011, in an attempt to determine how Merck lost its rightful administrative access to the Web Page. A true and correct copy of that letter is attached hereto as Exhibit 2.

12. On or about October 21, I received an email from an individual identifying herself as Marissa, User Operations, Facebook in response to my letter. After an exchange of several emails, it became clear to me that Marissa either did not understand the problem faced by Merck or was intentionally giving unresponsive answers to my inquiries. On or about October 21, 2011

I sent her an email politely asking for a telephone number I could call to discuss the matter more fulsomely. I did not receive a response. On or about October 25, 2011, I sent an email asking for the name and email address of a supervisor. True and correct copies of these emails are attached hereto as Exhibit 3.

13. Several hours after sending my October 25 email, I sent another email to Marissa at Facebook attempting to explain the situation comprehensively and convey the seriousness with which Merck takes its rights, as well as the urgency of the situation. A true and correct copy of that email is attached hereto as Exhibit 4.

14. Approximately two days after sending the comprehensive email described above, I received a cursory email from the Facebook employee identified as Marissa stating that Facebook was looking into the matter. Approximately six days after that, I sent a reminder email to Marissa. On November 4, 2011, I received an email from someone identifying himself as Xavier, User Operations, Facebook. It was clear from Xavier's email that he, too, either did not understand the basic facts of the problem or was being intentionally evasive in his response. On November 6, 2011, I sent an email asking Xavier for a contact telephone number. Xavier wrote back on November 14, 2011, stating that "we do not offer functionality or technical support from this email alias," and again displaying either an incomplete knowledge of the problem or evasiveness. I asked again for a telephone number in order to better explain the issue, to which Xavier incredibly replied that "[n]o one is available for a call at this time." On November 15, 2011, I emailed Xavier for a final time in an attempt to clarify the problem, and to determine how, why and by whom Merck's rights to the Web Page were violated. True and correct copies of these emails are attached hereto as Exhibit 5. To date, I have received no further reply from anyone at Facebook.

The Facebook Terms of Use and California Choice of Venue Provision

15. Facebook's terms of use include the following clause:

You will resolve any claim, cause of action or dispute (claim) you have with us arising out of or relating to this Statement or Facebook exclusively in a state or federal court located in Santa Clara County. The laws of the State of California will govern this Statement, as well as any claim that might arise between you and us, without regard to conflict of law provisions. You agree to submit to the personal jurisdiction of the courts located in Santa Clara County, California for the purpose of litigating all such claims.

16. Merck does not believe that this clause applies to the instant Petition, which is not a claim, cause of action or dispute. However, because Facebook has not been cooperative with Petitioner's good-faith attempts to seek information in a non-litigious manner, Merck believes that Facebook may seek to further delay the restoration of Merck's rights by insisting that this disclosure be sought in Santa Clara County, California.

17. I have conferred with counsel in California, who informs me that California does not permit pre-litigation disclosure of the type sought here for the purposes of identifying a proper litigant. This leaves Merck with no remedy in California to pursue its rights until after a defendant or defendants are identified.

18. Because Facebook may seek to delay or curtail discovery based on the above clause, and because time is of the essence while Merck's competitor continues to benefit from the Web Page, Merck seeks letters rogatory pursuant to CPLR 3108 in connection with its pre-action disclosure, so that it may pursue such disclosure in California.

19. Submitted herewith is a proposed letters rogatory document for the Court's consideration.

Pre-Action Disclosure Sought

20. Merck seeks the following documents from Facebook in electronic form and hard copy, to the extent they are non-privileged and within Facebook's possession, custody or control:

- a. Documents sufficient to identify all those with administrator's access to the Web Page and the persons within and outside of Facebook who have knowledge about who: i) took the Web Page from Merck; and ii) transferred the Web Page to Merck & Co., and the reasons therefor;
- b. Documents sufficient to identify all people, entities, users and/or any others who have uploaded content to or otherwise altered the Web Page (legally or illegally, licitly or illicitly, properly or improperly) at any time;
- c. All versions of the Web Page, including all documents showing changes thereto;
- d. All agreements related to the Web Page, including drafts thereof;
- e. All correspondence, file notes and memoranda regarding the Web Page;
- f. Facebook's rules and/or policies concerning access to the Web Page;
- g. Facebook's rules and/or policies concerning illegal, illicit, or improper access to the Web Page, including hacking; and
- h. Any and all other documents concerning the issues identified in this Affirmation.

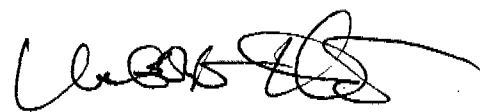
21. Merck also seeks to take the deposition of a Facebook representative with knowledge of the issues described in this Affirmation.

Conclusion

22. Based on the foregoing, Petitioner Merck's petition for pre-action disclosure pursuant to CPLR § 3102(c), in accordance with the Proposed Order submitted herewith, should be granted, as the knowledge Merck seeks is exclusively within Facebook's control and Facebook will not provide such information to Merck.

23. Based on the foregoing, Merck's petition for letters rogatory pursuant to CPLR 3108, in accordance with the form submitted herewith, should be granted.

Dated: New York, New York
November 21, 2011



Robert B. G. Horowitz

Index No.

Year

2011

RJI No.

Hon.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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-against-

To Compel Disclosure Prior to Instituting
Action by

FACEBOOK, INC.,

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ORDER TO SHOW CAUSE FOR PRE-ACTION DISCLOSURE

BAKER & HOSTETLER LLP

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Petitioner

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To

Signature (Rule 130-1.1-a)

Attorney(s) for

Print name beneath

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

Please take notice

NOTICE OF ENTRY

that the within is a (certified) true copy of a
503835732 duly entered in the office of the clerk of the within named court on

NOTICE OF SETTLEMENT

that an order
settlement to the HON.
of the within named court, at
on

of which the within is a true copy will be presented for
one of the judges

at

M

Dated,

Yours, etc.