EXHIBIT 2

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

LEADER TECHNOLOGIES, INC.,

Plaintiff,

v.

FACEBOOK, INC.,

Defendant.

Misc. Case No.:

Action Currently Pending in the U.S. District Court, D. Del. (Case No. 08-862-JJF)

NOTICE OF MOTION AND MOTION TO QUASH DEPOSITION SUBPOENAS OF NON-PARTIES KAREL BALOUN, STEPHEN DAWSON-HAGGERTY AND THYAGARAJA S. RAMAKRISHNAN AND FOR PROTECTIVE ORDER

Date: April 12, 2010
Time: 9:00 a.m.
Judge: Judge James Ware

NOTICE OF MOTION

PLEASE TAKE NOTICE that, on April 12, 2010 at 9:00 a.m., non-parties Karel Baloun ("Baloun"), Stephen Dawson-Haggerty ("Dawson-Haggerty"), Thyagaraja S. Ramakrishnan ("Ramakrishnan") and the defendant in the underlying litigation, Facebook, Inc. ("Facebook"), will and hereby move this Court for an order quashing subpoenas and for entry of a protective order under Fed. R. Civ. P. 45(c)(3) and 26(c). This Motion is based on this Notice of Motion, the Memorandum of Points and Authorities set forth below, the supporting Declarations of Melissa H. Keyes ("Keyes Decl.") and Jeannie Farren ("Farren Decl."), and any other matter offered at the hearing on this matter and allowed by the Court.

Baloun, Dawson-Haggerty and Ramakrishnan respectfully request that the Court quash the subpoenas to testify at deposition that have been issued upon them by Leader Technologies, Inc. ("LTI"), the plaintiff in the underlying litigation styled *Leader Technologies, Inc. v. Facebook, Inc.*, Civil Action No. 08-862-JJF/LPS, and to enter a protective order preventing such depositions from going forward.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Facebook respectfully seeks an Order from this Court to protect three of its former employees from the undue burden of deposition subpoenas that have been served by LTI. Each of these individuals worked for Facebook for only a short time, and all before the limited time period relevant to the underlying patent case. Despite this fact, and the fact that Facebook is offering numerous other witnesses whose testimony is far more relevant, LTI refuses to withdraw these depositions which serve no purpose other than harassment.

II. BACKGROUND

A. The Underlying Action

On November 19, 2008, LTI filed a complaint for patent infringement against Facebook in the U.S. District Court for the District of Delaware in the action styled *Leader Technologies, Inc. v. Facebook, Inc.*, Civil Action No. 08-862-JJF/LPS (D. Del.). LTI alleges that Facebook infringes certain claims of U.S. Patent No. 7,139,761 B1, which issued on November 21, 2006.

See Keyes Decl., Ex. A. LTI has asserted no other patents in the underlying litigation. Facebook filed its answer and counterclaims on January 8, 2009, asserting the defenses of invalidity and non-infringement of the '761 patent. *See* Keyes Decl., Ex. B. LTI and Facebook are the only parties to the underlying action. A trial date has been set for June 28, 2010.

B. Discovery In the Underlying Litigation

As of the signature date of this motion, LTI has served 177 requests for production of documents, 62 requests for admission, 34 interrogatories, an expansive Rule 30(b)(6) Notice of Deposition listing more than two dozen topics, six notices of deposition for current employees of Facebook, and five non-party subpoenas on former Facebook employees (including the three that are the subject of this motion). Written discovery in the underlying action closed on November 20, 2009. Facebook and LTI are in the process of scheduling depositions for more than a dozen party and nonparty witnesses, which are expected to be completed by early March 2010.

C. LTI's Harassing Nonparty Subpoenas

Between January 8 and January 13, 2010, LTI served nonparty subpoenas from the Northern District of California on Baloun, Ramakrishnan and Dawson-Haggerty, all former employees of Facebook. Each individual was served with a substantially identical subpoena listing eight identical categories for the production of documents. *See* Keyes Decl., Ex. C – E.

Baloun, Ramakrishnan and Dawson-Haggerty worked as engineers for Facebook for short stints during various periods between 2004 and 2006. Each of their terms of employment ended before the issuance of the '761 patent that is being asserted in the underlying litigation. In particular, Baloun was employed by Facebook as an engineer from May 2005 to May 2006, Ramakrishnan's employment with Facebook began in October 2005 and ended in October 2006, and Dawson-Haggerty worked as an engineering intern during the summer of 2004. *See* Farren Decl. at ¶ 2.

Upon receiving the subpoenas, it was unclear to Facebook what possible relevant testimony these former Facebook engineers could provide that was not duplicative of other discovery in the underlying action. For example, Facebook had already produced in discovery substantial technical information regarding its accused website, including the entire source code

for the website and a source code repository containing versions of the source code dating back to 2006, when the patent issued. *See* Keyes Decl. at ¶ 4. Facebook has also agreed to produce three current Facebook engineers for deposition (Daniel Chai, James Wang and Josh Wiseman), along with Rule 30(b)(6) designees on the technical aspects of the Facebook website's operation. *Id.* at ¶¶ 5-6. As to nonparty depositions of former Facebook employees, Facebook agreed not to challenge the subpoenas served on two other former engineers, Dustin Moskovitz ("Moskovitz") and Adam D'Angelo ("D'Angelo"). Both of these individuals worked at Facebook for a much longer period of time and, accordingly, have both deeper knowledge of the past operation of the company and the website and more recent knowledge than Baloun, Dawson-Haggerty or Ramakrishnan. Moskovitz was a co-founder of Facebook when it was started in 2004, and worked with the company as an engineer until November 2008. *See* Farren Decl. at ¶ 2. D'Angelo began his employment with Facebook in June 2005 and served as the company's Chief Technical Officer from October 2006 until May 2008. *See id.*[1]

In light of the source code and technical documentation produced in the underlying litigation, and the Facebook engineers (current and former) who are being presented for deposition, there is simply no basis to believe that Baloun, Dawson-Haggerty or Ramakrishnan would yield anything different or of any significance. The meet-and-confer efforts between the parties, which did not conclude until this week, failed to resolve this question. Counsel for the moving non-parties, also counsel for Facebook in the underlying litigation, met-and-conferred twice with LTI's counsel in an attempt to understand LTI's theory of relevance. *See* Keyes Decl. at ¶ 3. Counsel explained that the testimony of these three nonparties was either irrelevant or entirely duplicative of other evidence and witnesses that Facebook had already agreed to produce. *Id.* Counsel also asked LTI to identify the topics about which LTI planned to question these nonparties, in an effort to assess relevance. *See id.* Counsel for LTI refused to identify the topics and refused to withdraw the subpoenas. *See id.*

[1] Facebook agreed not to challenge the depositions of Moskovitz or D'Angelo in an effort to move discovery forward. In so doing, Facebook has made no concession that the depositions of those two individuals are likely to lead to discovery of any admissible evidence.

III. ARGUMENT

A. Legal Standard

Rules 26(c) and 45(c) of the Federal Rules of Civil Procedure vest this Court with broad discretion to protect nonparties from the annoyance, oppression, burden, and harassment caused by deposition subpoenas issued within its jurisdiction. Rule 45(c)(3) provides: "On timely motion, the issuing court must quash or modify a subpoena that:...(iv) subjects a person to undue burden." Fed. R. Civ. P. 45(c)(3)(A). Rule 26(c) authorizes the court, for good cause shown, to issue an order to protect a party or person from annoyance, undue burden or expense. Rule 26(b)(2) similarly authorizes a district court to curtail discovery if it determines that "*the burden or expense of the proposed discovery outweighs its likely benefit*, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery involving the issues." Fed. R. Civ. P. 26(b)(2)(C)(iii) (emphasis added). "A litigant," therefore, "may not engage in merely speculative inquiries in the guise of relevant discovery." *Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318, 1327 (Fed. Cir. 1990).

Federal courts have recognized that particular care should be taken to protect nonparties, who are strangers to the underlying litigation, from harassing or burdensome subpoenas. A requesting party must accordingly make a greater showing of necessity when requesting discovery from a nonparty. *See, e.g., Dart Industries Co., Inc. v. Westwood Chemical Co., Inc.*, 649 F.2d 646, 649 (9th Cir. 1980) ("[T]here appear to be quite strong considerations indicating that discovery would be more limited to protect third parties from harassment, inconvenience, or disclosure of confidential documents."); *Del Campo v. Kennedy*, 236 F.R.D. 454, 458 (N.D. Cal. 2006) (Trumbull, M.J.) ("Underlying the protections of Rule 45 is the recognition that 'the word 'non-party' serves as a constant reminder of the reasons for the limitations that characterize 'third-party' discovery.'") (citation omitted). "Thus, a court determining the propriety of a subpoena balances the relevance of the discovery sought, the requesting party's need, and the potential hardship to the party subject to the subpoena." *Id.*

All of these factors favor quashing the subpoenas served on Baloun, Ramakrishnan and Dawson-Haggerty. As explained in more detail below, LTI has made no showing of relevance or need for these depositions, nor could it, considering the expansive discovery Facebook has already provided or agreed to provide in the underlying litigation. LTI has identified no unique information it expects to obtain from these individuals that it does not already possess by virtue of the discovery with which LTI has been, or will be, provided. For these reasons, Facebook and the moving parties respectfully request that the subpoenas be quashed and a protective order entered.

B. The Subpoenas Should Be Quashed and a Protective Order Entered

LTI has never articulated a coherent theory as to why it needs deposition testimony of Baloun, Dawson-Haggerty and Ramakrishnan. LTI is presumably seeking the testimony of these former engineers as it relates to the operation of the accused Facebook website, as any other purpose would be pure harassment. But such a theory of relevance would fail for several reasons.

First, it is hornbook patent law that LTI cannot seek recovery for alleged infringement of its patent based on activities that took place *prior* to its issuance. *See, e.g.*, *Marsh v. Nichols*, 128 U.S. 605, 612 (1888) ("Until the patent is issued there is no property right in it, that is, no such right as the inventor can enforce."); *Gaylor v. Wilder*, 51 U.S. (10 How.) 477, 493 (1850) ("no suit can be maintained by the inventor against any one for using it before the patent is issued"). In other words, how the Facebook website allegedly operated *before* the issuance of the '761 patent is irrelevant to its infringement claims. But this is all these nonparties could possibly testify about because, as noted above, their employment with Facebook ended before the '761 patent issued.[2]

Second, the testimony of Baloun, Dawson-Haggerty and Ramakrishnan would be unreasonably duplicative of other evidence and depositions already scheduled. The respective dates of employment of all three individuals overlap entirely with those of Moskovitz, a Facebook

[2] Even assuming that testimony about the pre-issuance operation of the Facebook website had relevance, it is questionable whether Baloun, Dawson-Haggerty and Ramakrishnan would be able to sufficiently testify, given that none has been employed by Facebook for the last three years. The deposition would devolve into little more than LTI's attempt to elicit intricate technical details from the witness' faded memories, which are embodied in source code the witnesses have not had access to for years.

co-founder and former engineer whose deposition has been set for February 12, 2010. LTI has refused to identify any unique knowledge or information Baloun, Dawson-Haggerty and Ramakrishnan supposedly possess that cannot be obtained via the depositions of:

- Moskovitz and D'Angelo, both of whom were involved in engineering the Facebook website,
- the six current Facebook employees noticed for deposition in this Action,
- Facebook itself, pursuant to Fed. R. Civ. P. 30(b)(6),

not to mention the technical documents and full source code already produced by Facebook in the underlying litigation. The depositions of these nonparties should not be permitted to go forward, as LTI cannot show any true need for the testimony of these third parties that cannot be obtained from other sources of proof. *See Micro Motion*, 894 F.2d at 1323.

Finally, forcing these nonparties to appear at deposition places unnecessary burden and inconvenience upon them and, given the duplicative nature of their testimony, would serve only to harass them. *See* 9-45 Moore's Federal Practice – Civil § 45.32 ("Ultimately, the test for 'undue burden' is a balancing test that pits the need of a party for the sought production against the interests of the subpoenaed witness in resisting compliance.") (*citing Heidelberg Ams., Inc. v. Tokyo Kikai Seisakusho, Ltd.*, 333 F.3d 38, 40 (1st Cir. 2003)). These nonparties will be unduly inconvenienced by having to take time out of their busy work schedules to attend depositions at which they will have nothing either relevant or unique to add to the information already received by LTI from other sources. Furthermore, by refusing to avail itself of other available discovery to obtain the same information it demands from these individuals, LTI has failed to take reasonable steps to reduce the burden on these nonparties. Therefore, pursuant to Fed. R. Civ. P. 26(c) and 45(c), the deposition subpoenas of these individuals should be quashed and a protective order entered.

IV. CONCLUSION

For the foregoing reasons, Facebook and non-parties Baloun, Dawson-Haggerty, and Ramakrishnan respectfully request that the Court exercise its authority to quash LTI's deposition subpoenas and enter a protective order prohibiting LTI from taking their respective depositions.

Dated: February 4, 2010

Respectfully submitted,

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