



Heidi L. Keefe
(650) 843-5001
hkeefe@cooley.com

November 12, 2009

Magistrate Judge Stark
U.S. District Court
District of Delaware
J. Caleb Boggs Federal Bldg
844 North King Street
Wilmington, DE 19801-3519

RE: Leader Technologies, Inc. v. Facebook Inc., No. 1:08-cv-00862-JJF

Dear Magistrate Judge Stark:

Defendant Facebook Inc. ("Facebook") respectfully submits this letter to bring to the Court's attention a matter requiring immediate attention. Within the last 24 hours, we learned of potential spoliation of evidence by Plaintiff Leader Technologies, Inc. ("LTI"). We thus request your assistance to ensure that no documents are destroyed, and to put in place a discovery process to allow Facebook to probe the depth of this issue and seek possible remedies if in fact spoliation has occurred.

By way of background, our investigations and review of documents produced to date have indicated that prior to filing this lawsuit, LTI sent materials to numerous third parties soliciting funding for this litigation. Documents produced to date, including communications between LTI and third parties,¹ hint that the materials given to third parties described the contemplated lawsuit, identified possible prior art, set forth damages estimates, and included other information relevant to this case. As these materials were not forthcoming from LTI, Facebook issued subpoenas to the relevant third parties, including Northwater Patent Funding Corp. ("Northwater") seeking their production.

On November 11, 2009, Daniel Segal of Shearman and Sterling, LLP, outside counsel representing Northwater, contacted Elizabeth Stameshkin, an associate at my firm, to discuss his client's response to the subpoena. After assuring her of his client's willingness to comply with the subpoena and requesting an extension, Mr. Segal volunteered that Paul Andre, lead counsel for LTI, had spoken with him. Mr. Segal explained that Mr. Andre informed him of the existence of a nondisclosure agreement between LTI and Northwater (the "NDA"), that required Northwater to have destroyed documents if the deal did not go through. Mr. Andre then stated that he expected all documents to have been destroyed. Ms. Stameshkin immediately informed me of this conversation.

¹ LTI attempted to claw back some of these communications under a claim of privilege, but has since given up that claim.

Magistrate Judge Stark
November 12, 2009
Page Two

Appreciating the seriousness of Mr. Segal's statements, I contacted Mr. Segal myself to confirm what occurred with Mr. Andre. During my conversation with Mr. Segal, he stated that Mr. Andre had left a message for the general counsel of Northwater, after the issuance of the Facebook subpoena, who relayed the message to Mr. Segal because he was responsible for responding to the Facebook subpoena. Mr. Segal returned Mr. Andre's call and introduced himself. According to Mr. Segal, Mr. Andre introduced himself as representing LTI, and proceeded to inform Mr. Segal that LTI had entered into an NDA with Northwater that required destruction of documents between the parties. As a result, Mr. Andre expected no, or very few documents to exist. To the extent that any documents did exist, Mr. Andre requested the opportunity to review them for privilege prior to production to Facebook. Mr. Segal informed Mr. Andre that he had not yet begun the search of Northwater's records, and was not aware of what documents were or were not in existence, and further had not seen the alleged nondisclosure agreement.²

Mr. Segal assured me that he is aware of his client's duty not to destroy any documents that it presently has, and guaranteed that anything that was not previously destroyed will not be destroyed. However, I am deeply concerned by Mr. Andre's conversation with Northwater and the likelihood that he has had similar conversations with other recipients of Facebook subpoenas. Whether intended or not, it would not be unreasonable for a third party to interpret Mr. Andre's statements as requiring them to destroy documents in order to avoid being in breach of contract with LTI and avert a possible suit by a notoriously litigious party. In this instance, Mr. Andre spoke with a reputable law firm that understood the need to protect documents covered by a subpoena, regardless of the terms of an NDA. In those circumstances where Mr. Andre may have spoken with non-lawyers, I worry that documents may have been, or are currently being, destroyed.

Therefore, Facebook respectfully requests the following:

- that in 24 hours Mr. Andre produce to Facebook a list of every third party LTI and/or LTI's counsel has contacted regarding documents related to this lawsuit so that Facebook can call them to ensure that they are not destroying relevant documents ;
- that the Court issue an order instructing LTI and its counsel not to contact any third party regarding documents related to this lawsuit during this investigation; and
- that the Court immediately stay other discovery in this case, and execute a narrow extension of discovery limited to this issue, so that Facebook has sufficient opportunity to investigate the aforementioned events and determine what message was conveyed to which parties, whether documents were in fact destroyed, and if necessary, seek appropriate remediation for such actions.

² This agreement was not produced in this case, and Facebook has never seen it, despite the fact that it is responsive to Facebook's requests for production. We have sent a letter to Mr. Andre requesting its immediate production.



Magistrate Judge Stark
November 12, 2009
Page Three

Given the urgent nature of this request, we ask the Court's permission to discuss this matter during the hearing on Friday morning, November 13.

Sincerely,

Cooley Godward Kronish LLP

A handwritten signature in cursive script that reads "Heidi L. Keefe".

Heidi L. Keefe

HLK:els

cc: Steven Caponi, Esq., Blank Rome LLP
Paul Andre, Esq., King & Spalding LLP
Paul Rovner, Esq., Potter Anderson & Corroon LLP