

**IN THE UNITED STATES COURT
FOR THE DISTRICT OF DELAWARE**

LEADER TECHNOLOGIES, INC.,)	
a Delaware corporation,)	CIVIL ACTION
)	
Plaintiff and Counterdefendant,)	No. 1:08-cv-00862-JJF
)	
v.)	
)	
FACEBOOK, INC.,)	PUBLIC VERSION (REDACTED)
a Delaware corporation,)	
)	
Defendant and Counterclaimant.)	

**DEFENDANT FACEBOOK, INC.'S REPLY IN SUPPORT OF MOTION TO STAY
PENDING REEXAMINATION OF U.S. PATENT NO. 7,139,761**

CONFIDENTIAL – FILED UNDER SEAL

Steven L. Caponi (DE Bar #3484)
BLANK ROME LLP
1201 N. Market Street
Wilmington, DE 19801
302-425-6400
Fax: 302-425-6464
*Attorneys for Defendant and
Counterclaimant Facebook, Inc.*

OF COUNSEL:
Heidi L. Keefe (*pro hac vice*)
Mark R. Weinstein (*pro hac vice*)
Jeffrey Norberg (*pro hac vice*)
Melissa H. Keyes (*pro hac vice*)
COOLEY GODWARD KRONISH LLP
3000 El Camino Real
5 Palo Alto square, 4th floor
Palo Alto, CA 94306

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I. INTRODUCTION

Facebook, Inc.'s ("Facebook's") requested stay is appropriate. Despite Leader Technology, Inc.'s ("LTI's") protestations, nothing in its opposition brief changes the fact that a stay preserves judicial and public economy.

First, LTI has not and cannot demonstrate any undue prejudice. LTI and Facebook are not competitors. At best, LTI markets web conferencing services, whereas Facebook is one of the world's largest social networking websites. LTI never sought a preliminary injunction and

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A stay will not prejudice its efforts to obtain damages.

Second, the reexamination will simplify issues for this case. All of the claims in this case relate to LTI's patent. In the vast majority of cases, the Patent Office either invalidates or amends claims, and now that the reexamination is *inter partes*, the effect will be binding on Facebook. It makes no sense to expend Court and party resources determining issues that, in all likelihood, will be mooted by the actions of the Patent Office, or that will be streamlined for trial.

Third, the Patent Office is uniquely suited for invalidity determinations. LTI's claim that Facebook is "forum shopping" by instituting reexamination proceedings is baseless. LTI elected to avail itself of the statutory benefits of the patent system when it asked the Patent Office to issue its patent. LTI cannot now be heard to complain that Facebook has availed itself of the rights afforded to others under the same statutory scheme.

In sum, LTI has failed to provide any reason that the parties and the Court should not allow the Patent Office to provide its expertise on whether the claims are valid before undertaking the substantial tasks remaining in this case. At this stage, the parties have not yet begun depositions, *Markman* proceedings or expert discovery. Facebook brought its request for reexamination as soon as it was able to locate applicable prior art, and brought this motion days

after the Patent Office granted that request. Facebook's motion to stay should be granted.

II. ARGUMENT

A. LTI Will Not Be Unduly Prejudiced By A Stay

A plaintiff seeking to avoid a stay must show that it will suffer *undue* prejudice or that the defendant will gain some tactical advantage. *Abbott Diabetes Care, Inc. v. Dexcom, Inc.*, C.A. No. 05-590 GMS, 2006 WL 2375035, at *5 (D. Del. Aug. 16, 2006). As Judge Sleet has held, mere inability to assert a patent during reexamination is not on its own sufficient to defeat a motion to stay. *Id.* at 6. During the meet and confer leading up to this motion, LTI was unable to provide any explanation of the prejudice it would suffer should this motion be granted.¹ Instead, LTI elected to wait until filing its brief to assert a theory that it might be denied timely injunctive relief if the case is stayed pending reexamination. However, this does not demonstrate undue prejudice in this case.

First,

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See eBay v. Mercexchange, 547 U.S. 388 (2006). Facebook is a social network; LTI is not. LTI is not listed in any online lists of social networking sites. Reply Declaration of Jeffrey T. Norberg in Support of Facebook's Motion to Stay Pending Reexamination ("Norberg Decl.") Exs. J-M. LTI's own website and documents describe Leader's business as a voice and data platform: "Leader develops and markets web-based collaboration platforms that merge voice and

¹ Relying on the *Landis* line of cases, LTI's answering brief complains at length that Facebook has not made out of showing of a clear case of hardship or inequity. Opposition brief at 6-7. Facebook was under no such obligation because LTI failed to articulate any potential prejudice when Facebook asked about this issue during the meet and confer leading up to this motion. Opening Declaration of Jeffrey T. Norberg ¶2. In any event, as discussed in Facebook's opening brief, allowing concurrent proceedings on the issue of patent validity is both an enormous waste of resources and carries a significant risk of inconsistent results, both of which present clear hardships to Facebook.

data.” Norberg Decl. Exs. B; *see also* Ex. C.

Exs. F, O, P, Q.

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Id. Ex. N at 17-18 (Responses to Requests for Production Nos. 65-67). Absent evidence that LTI competes with Facebook, LTI cannot show irreparable harm and it is therefore unlikely that LTI will obtain an injunction in this case.

LTI’s claim that the end goal of this litigation is a permanent injunction is similarly not credible.

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Norberg Decl. Ex. H.

Id. Ex. I at 2.

Id. Exs. C-I. Moreover, LTI never sought a preliminary injunction in this case. This Court has rejected a similar claim of undue prejudice when the plaintiff failed to bring a motion for preliminary injunction. *Abbott*, 2006 WL 2375035, at *5. Finally, the fact that LTI waited *nearly two years* after its patent issued in 2006 to bring this action and the fact that LTI has not

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is

inconsistent with LTI's claim that it is being harmed in the marketplace. Clearly, there is no undue prejudice to LTI.

B. The Patent Office Need Not Decide Every Issue In This Case To Assist The Court And The Parties

LTI's claim that the reexamination procedure will not simplify the issue because the Patent Office will not consider every issue currently before the Court is meritless. As explained in Facebook's opening brief, the Patent Office's expertise on validity issues has proved to be a valuable resource by numerous courts around the country, including this Court. The fact that issues such as infringement, willfulness and damages will not be determined by the Patent Office is inapposite because the Court's consideration of these issues is highly likely to be affected by the Patent Office's decision on validity. Indeed, Judge Sleet recently rejected a nearly identical argument in the *Abbott* case:

... Abbott argues that a stay will not simplify the issues, but prolong the litigation. According to Abbott, the only way to avoid prolonging the litigation would be if the reexamination resulted in the PTO invalidating all of the asserted claims of all of the patents-in-suit. The court cannot agree. Contrary to Abbott's position, the court finds that granting the stay will simplify the issues and focus the litigation. For example, if the PTO determines that some or all of the claims of the four patents undergoing reexamination are invalid, then many of the issues in the litigation will become moot. Additionally, it is beyond dispute that the court, as well as the parties, would benefit from a narrowing of the variety of complex issues relating to the numerous claims at issue, which, if clearly defined, would streamline the discovery process and the remainder of the litigation. As stay, therefore, will conserve the resources of the parties and the court, thereby promoting efficiency. Moreover, the court would not run the risk of inconsistent rulings or issuing advisory opinions.

Abbott, 2006 WL 2375035, at *6.

LTI's claim that the Patent Office will not consider claims 3 and 17 is similarly unpersuasive. As an initial matter, LTI added both of these claims after the deadline for

supplemental infringement contentions in what appears to be little more than an effort to defeat this motion.² Facebook has asked Judge Stark to strike both of these claims as being untimely asserted. Claim 3 is now before the Patent Office. Norberg Decl. Ex. A. Since it is dependent on claim 1, Facebook was able to include it in the request for *inter partes* reexamination, filed today. Claim 17 is not in reexamination yet, but the parties and the Court can still benefit from the Patent Office's expertise with respect to the remaining 27 claims that are currently under reexamination. To the extent the Court is inclined to deny this motion solely due to the fact that claim 17 is not currently before the Patent Office, Facebook requests time to conduct a search so that it can also file a request targeting claim 17, which the Patent Office will merge with the ongoing reexamination.

Beyond that, LTI is simply wrong when it argues that validity issues will not be simplified. Because the reexamination now includes an *inter partes* request, there is no way that the issues will not be simplified, since the art in reexamination cannot be relitigated. Moreover, LTI's disingenuous statement that "90% of claims that are reexamined are confirmed valid 'as is' or with amendment, and often *more* claims emerge" incorrectly conflates claims that are confirmed "as is" with claims that are amended or added to the patent. (Opp'n at 3). This creates a misleading statistic, because LTI cannot seek past damages for claims that are amended or added as a result of reexamination. Moreover, there are intervening rights for products that predate amended claims. Subtracting confirmed or added claims from the *ex parte* reexamination statistics shows that only 25% of claims emerge without amendment, and only 5% of claims emerge from *inter partes* proceedings unchanged. Opening Norberg Decl. Exs. D and

² Indeed the sparse analysis provided with respect to both of these claims indicates that neither is likely to survive when the time comes to select representative claims. Hannah Decl. Ex. E at 25-28.

E. Therefore, the reexamination will simplify or eliminate the issues for trial.

Finally, Facebook notes that its *inter partes* reexamination request is being filed today, November 13, 2009, and includes a request that it be merged with the ongoing *ex parte* reexamination. Norberg Decl. Ex. A. Thus, LTI's complaint that this request is purely speculative is without merit, and all of the simplification factors cited in Facebook's opening brief apply.

C. Facebook's Reexamination Requests Were Proper And Timely

LTI spends much of its brief making policy arguments against the reexamination procedure Facebook has invoked in this and at least one other case. Opp'n at 15-20. These arguments ignore the fact that the statutory framework that allows Facebook to seek reexamination of Leader's patent is the very same framework that allowed Leader to obtain the patent in the first place. *See Pegasus Dev. Corp. v. DirecTV, Inc.*, No. Civ. A 00-1020-GMS, 2003 WL 21105073, at *2 (D. Del. May 1, 2003) ("the court reminds plaintiffs that they affirmatively invoked the rights of the patent statute; they can hardly be heard now to complain of the rights afforded others by that same statutory framework."). The statute unquestionably allows Facebook to request reexamination of claims that have been asserted against it. 35 U.S.C. §§302-307.

Contrary to LTI's claim, there is nothing conspiratorial or prejudicial about Facebook's identification of prior art or the timing of Facebook's request to stay this case.

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That disclosure included only art published by third-parties publicly on the Internet and none of that art was used in the reexamination requests. Facebook filed its request

for reexamination on July 2,

and

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on November 2 Facebook disclosed additional art

The fact that Facebook has identified a significant volume of prior art over the course of the written discovery period only weighs in favor of allowing the Patent Office to examine this patent before the Court is tasked with wading through the same art.

This case is still in its early stages when compared against other cases where stays have been granted. *See, e.g., Motson v. Franklin Covey Co.*, No. Civ. 03-1067 (RBK), 2005 WL 3465664, at *2 (D.N.J. Dec. 16, 2005) (granting stay despite completion of discovery and summary judgment motions decided); *see also eSoft, Inc. v. Blue Coat Sys., Inc.*, 505 F. Supp. 2d at 788 (D. Colo. 2007) (granting motion to stay after discovery and motions). Facebook brought this motion just days after learning that its application for *ex parte* reexamination had been granted. The parties still have yet to take any depositions, neither the *Markman* briefing nor hearing has occurred and expert discovery has not even begun. Nearly every aspect of the remaining proceedings will be affected by the outcome of the *ex parte* and *inter partes* reexamination proceedings currently pending in the Patent Office. Facebook respectfully requests that the Patent Office be allowed to offer its expertise on these issues to avoid the waste of resources attendant to concurrent proceedings.

D. Facebook Satisfied Its Rule 7.1.1 Meet and Confer Obligations

Finally, LTI's statement that Facebook did not include the Local Rule 7.1.1 averment in the opening papers is perplexing. This statement appeared twice in the opening papers – once in the notice of motion and once in the opening brief. Facebook did, in fact, attempt to obtain LTI's consent to this motion. LTI, however, refused.

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III. CONCLUSION

The Patent Office's reexamination procedure is almost certain to simplify the issues to be tried in this case, and LTI has failed to make any showing that it would be unduly prejudiced by a stay. Facebook respectfully requests that its motion be granted.

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BLANK ROME LLP

By: /s/ Steven L. Caponi
Steven L. Caponi (DE BAR #3484)
1201 Market Street, Suite 800
Wilmington, DE 19801
(302) 425-6400
FAX: (302) 425-6464

and

OF COUNSEL:
Heidi L. Keefe
Mark R. Weinstein
Jeffrey Norberg
Melissa H. Keyes
COOLEY GODWARD KRONISH LLP
3000 El Camino Real
5 Palo Alto Square, 4th Floor
Palo Alto, CA 94306

Dennis P. McCooe
BLANK ROME LLP
One Logan Square
130 North 18th Street
Philadelphia, PA 19103-6998
Attorneys for Defendant Facebook, Inc.