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April 26, 2010
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BY E-FILE AND HAND DELIVERY

The Honorable Leonard P. Stark
U.S. District Court for the District of Delaware
844 N. King Street
Wilmington, DE 19801-3556

PUBLIC VERSION

Re: Leader Technologies, Inc. v. Facebook, Inc., C. A. No. 08-862-JJF(LPS)

Dear Judge Stark:

Once again, it appears that Facebook, Inc. ("Facebook") seeks to manufacture a discovery dispute with the singular purpose of postponing trial. Since letter briefs are being submitted simultaneously, Leader Technologies, Inc. ("Leader") addresses herein what was discussed during the parties' meet and confers, namely, that Facebook seeks to re-open discovery to take unlimited discovery relating to Leader's irrelevant NDAs and to postpone the June 28, 2010 trial date in this action.

This Issue Has Already Been Before The Court

This Court previously rejected Facebook's attempt to re-open discovery regarding Leader's NDAs. During the April 9 discovery teleconference, Facebook argued that re-opening discovery regarding the NDAs would "require Facebook to seek an extension of the existing schedule...."[1] The Court did not agree. Rather, Your Honor specifically ordered that:

- [redacted]
- [redacted]
- [redacted][2]

[1] Re-opening discovery is an extraordinary remedy that would cause Leader undue prejudice as described in Leader's Opposition to Facebook's Motion to Amend. D.I. 331 at 12-14; see also Smith v. State of Delaware, Civ. No. 07-600-JJF-LPS, 2009 WL 2175635, *4 (D.Del.)(denying a motion to amend after the close of discovery, stating "the Court must 'consider[] whether allowing an amendment would result in additional discovery, cost, and preparation to defend against new facts or theories.'") citing Cureton v. Nat'l Collegiate Athletic Ass'n, 252 F.3d 267, 273 (3d Cir. 2001). In its pending motion to amend, Facebook represented to the Court that discovery would *not* need to be re-opened. D.I. 305 at 1, 8-9.

[2] April 9, 2010 Hearing Transcript at 38-39; see also D.I. 326 briefing these issues.

[redacted]

To date, Facebook has not sought to depose Mr. McKibben, even though he can provide information regarding all the parties identified in Facebook's interrogatory response regarding alleged public disclosure. See Ex. 1. His testimony, corroborated by the documents, would diffuse Facebook's misguided allegations that Leader was somehow able to publicly demonstrate the invention before it was conceived or a product developed. See infra. Rather than avail itself of the Court-ordered relief, namely a third day of deposition of Mr. McKibben, Facebook seeks the extraordinary relief of re-opening discovery and attempting to postpone trial. [redacted] Because this Court previously addressed this issue and Facebook has not availed itself of the relief already granted, this latest discovery "issue" appears to be nothing more than Facebook's latest attempt to postpone trial.

Facebook Raises These Issues In Bad Faith

A. Facebook Cannot Assert Its *New* Allegations of Public Disclosure/On-Sale In Good Faith In Light of Its Counterclaims

In November of 2009, Facebook sought to amend its pleadings to add a new counterclaim of false marking. The Court granted Facebook's motion over Leader's opposition. The specific allegations in Facebook's counterclaims are as follows:

- Leader marked the Leader2Leader product with the '761 Patent; and
- Leader2Leader does not practice the invention of the '761 Patent.

D.I. 190, Second Amended Answer at 6. Facebook has now reviewed the Leader2Leader source code, and apparently ***still*** maintains that Leader2Leader does not practice the '761 Patent. On April 16, 2010, however, Facebook took an entirely antithetical position, alleging for the first time that Leader2Leader practices the patent and therefore is invalid based on the public disclosure and/or sale of Leader2Leader. See Ex. 2 at 3. While inconsistent pleadings are permissible pursuant to Rule 8(d) of the Federal Rules of Civil Procedure ("FRCP"), it is confined by Rule 11 of the FRCP, which requires "the pleader [be] legitimately [] in doubt about the fact in question." Great Lakes Higher Education Corp. v. Austin Bank of Chicago, 837 F.Supp. 892, 894 (N.D.Ill. 1993); see also Diamond Triumph Auto Glass, Inc. v. Safelite Glass Corp., 344 F.Supp.2d 936, 944 (M.D.Pa. 2004).

Facebook has all relevant discovery regarding Leader2Leader. Fact discovery has been completed, including production of Leader2Leader technical documents, Facebook's review of the Leader2Leader source code and depositions regarding Leader2Leader. All expert reports have been exchanged and the parties are in the process of taking expert depositions. Facebook at this point cannot have any "legitimate doubt" as to whether it believes Leader2Leader practices the '761 Patent. See id.; see also Indianapolis Life Ins. Co. v. Hentz, Civ. No. 06-cv-2152, 2009 WL 36454, *4 (M.D.Pa.)(contradictory statements are allowed if the pleader is legitimately in doubt about the facts in question) citing American Int'l Adjustment Co. v. Galvin, 86 F.3d 1455, 1461 (7th Cir. 1996)(finding there was "no legitimate doubt" that counsel was aware of facts

which permitted an election of remedy); see also Emkey v. Sec. of Health and Human Services, No. 08-160V, 2009 WL 3683390, *15 (Ct. Fed. Cl.)(a party asserting inconsistent theories must not possess sufficient knowledge to adopt one or the other and may not assert inconsistent theories just because Rule 8 allows it). Facebook's continued assertion of these mutually-exclusive theories illustrates its bad faith -- Rule 11 dictates that in good faith Facebook can only plead one theory once it no longer has any alleged "legitimate doubt" as to whether Leader2Leader practices the '761 Patent.[3] See id. ("[A] litigant should plead only facts that are consistent with what he knows -- not facts that are inconsistent with what he knows."); see also 5 Wright & Miller Fed. Pract. Proc. § 2185 (3d. ed. West 2004)("A party therefore should not set forth inconsistent... statements in the pleadings unless, after a reasonable inquiry, the pleader legitimately is in doubt about the factual background or legal theories supporting the claims ... and the pleader can represent that he is not doing so for an improper purpose.").

B. The Companies Facebook Identified Demonstrate Its Bad Faith

[redacted][4]

Facebook Failed To Seek Discovery Of Third Parties

During fact discovery, Facebook issued an astounding 64 third party subpoenas, addressed to at least 43 different entities and individuals. Facebook issued these subpoenas based on the extensive correspondence with third parties that Leader produced, at least as early as April of 2009. [redacted]

[3] This dispute is related to Facebook's pending motion to amend its Answer for a third time, and is further evidence of Facebook's apparent bad faith motives to delay trial and prejudice leader. See In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410, 1434 (3d Cir. 1997)(stating that when exercising its discretion to amend a pleading, a court should consider "undue delay, bad faith, dilatory motive, prejudice, and futility" of the moving party).

[4] [redacted].

Respectfully,

/s/ Philip A. Rovner

Philip A. Rovner (#3215)
provner@potteranderson.com

PAR /mes/964639
Enc.
cc: Steven L. Caponi, Esq. – By E-File and E-mail
Heidi L. Keefe, Esq. – By E-mail
Paul J. Andre, Esq. – By E-mail

EXHIBIT 1

THIS EXHIBIT HAS BEEN REDACTED IN ITS ENTIRETY

EXHIBIT 2

THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY

EXHIBIT 3

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EXHIBIT 4

THIS EXHIBIT HAS BEEN REDACTED IN ITS ENTIRETY

EXHIBIT 5

THIS EXHIBIT HAS BEEN REDACTED IN ITS ENTIRETY

EXHIBIT 6

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EXHIBIT 7

THIS EXHIBIT HAS BEEN

REDACTED IN ITS ENTIRETY

EXHIBIT 8

THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY

EXHIBIT 9

From: Norberg, Jeffrey [mailto:jnorberg@cooley.com]
Sent: Monday, March 01, 2010 4:53 PM
To: Hannah, James
Cc: Kobialka, Lisa; Andre, Paul; 'Philip Rovner'; 'Steven Caponi'; Keyes, Melissa; Keefe, Heidi; Stameshkin, Liz; Weinstein, Mark
Subject: RE: Leader v. Facebook

James,

We agree to your proposal with respect to Mr. Detwiler.

Also, during our call this morning I told you that we need to start the Cox deposition at 8:00 a.m. and hold it at your Redwood Shores office rather than at Cooley as originally scheduled. As mentioned, the witness needs to leave your offices no later than 5:30 on Friday. You said that you did not believe this would be a problem but that you needed to confirm the logistics with the Court reporter. Please confirm as soon as possible.

Thanks,

Jeff

From: Hannah, James [mailto:jhannah@KSLAW.com]
Sent: Monday, March 01, 2010 3:30 PM
To: Norberg, Jeffrey
Cc: Kobialka, Lisa; Andre, Paul; 'Philip Rovner'; 'Steven Caponi'; Keyes, Melissa; Keefe, Heidi; Stameshkin, Liz; Weinstein, Mark
Subject: RE: Leader v. Facebook

Jeff,

We are in agreement with regard to Weckerly and Nester.

We are also in agreement with regard to Design Central, Whiteman, Hanna, Limited Brands, DeMarchi, Boston Scientific and Rosenberg.

With regard to Detwiler, we will withdraw our subpoena if you agree to not use him for any purpose in this case. Please let us know if you agree.

James

From: Norberg, Jeffrey [mailto:jnorberg@cooley.com]
Sent: Monday, March 01, 2010 3:16 PM
To: Hannah, James
Cc: Kobialka, Lisa; Andre, Paul; 'Philip Rovner'; 'Steven Caponi'; Keyes, Melissa; Keefe, Heidi; Stameshkin, Liz; Weinstein, Mark
Subject: RE: Leader v. Facebook

James,

Your e-mail is a bit different than what we discussed. I told you that Facebook will agree not to take the depositions of Deborah Weckerly and Steve Nester, two Leader employees Leader identified in its Rule 26 disclosures, if Leader agrees not to rely on their testimony for any purpose in this case. Please confirm that you agree to this and we will take these two depositions off calendar.

With respect to the other deponents, I told you that we are withdrawing our deposition subpoenas for Design Central, Brad Whiteman, Steve Hanna, Limited Brands, Betsy Foote DeMarchi, Boston Scientific and Rosenberg. We will further agree to withdraw our subpoena for Ed Detwiler if you agree to do the same.

Sincerely,

Jeff

From: Hannah, James [mailto:jhannah@KSLAW.com]
Sent: Monday, March 01, 2010 12:24 PM
To: Norberg, Jeffrey
Cc: Kobialka, Lisa; Andre, Paul; 'Philip Rovner'; 'Steven Caponi'; Keyes, Melissa; Keefe, Heidi; Stameshkin, Liz; Weinstein, Mark
Subject: Leader v. Facebook

Jeff,

Pursuant to our discussions, we can confirm that the following individuals have been taken off calendar for deposition:

Weckerly
Design Central
Whitman
Detwiller
Hanna
Limited Brands
DeMarchi
Boston Scientific (to the extent noticed)
Rosenberg

We mutually agreed that we will not bring these individuals to trial, or use them in any way in the case. Please confirm that this is your understanding as well. Thanks.

James

James Hannah
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EXHIBIT 10

THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY