IN THE UNITED STATES COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES, INC., a Delaware corporation, Plaintiff, v. FACEBOOK, INC., a Delaware corporation, Defendant.	**CIVIL ACTION** **No. 1:08-cv-00862-JJF** **ORAL HEARING REQUESTED** **PUBLIC VERSION**

CONFIDENTIAL - FILED UNDER SEAL

DEFENDANT FACEBOOK INC.'S OBJECTIONS TO
MAGISTRATE JUDGE STARK'S APRIL 27, 2010 ORDER

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Filed: May 11, 2010
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I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 72(a) and 28 U.S.C. § 636(b)(1)(A), defendant Facebook, Inc. ("Facebook") respectfully submits the following Objections to the April 27, 2010 oral order of Magistrate Judge Stark granting-in-part and denying-in-part Facebook's motion to reopen discovery.

Redacted

Yet, under the ruling Facebook challenges here, Facebook is prevented from conducting discovery on all but six of those parties (and, even as to those six, it will be able to perform only the most rudimentary discovery). Such circumscribed discovery on a potentially case-dispositive issue –

Redacted

– profoundly compromises Facebook's ability to defend this case

Redacted

Under 35 U.S.C. § 102(b), a patent is invalid if the alleged invention of the patent was either offered for sale or publicly used more than one year before the application for the patent was filed.

Redacted

Facebook's motion noted that adjustments to the trial and pre-trial schedule would be necessary to accommodate this discovery.

In his April 27, 2010 order, Magistrate Judge Stark granted-in-part Facebook's motion. Magistrate Judge Stark allowed Facebook the right to "limited discovery" with respect to six specifically-identified third parties, but refused to allow Facebook to conduct discovery on the scores of other third parties identified in these agreements.

Redacted

Facebook seeks an order fully reopening discovery on this issue so it may obtain the discovery to which it is entitled. Facebook further seeks appropriate adjustments of the calendar to accommodate this discovery.

II. BACKGROUND

A.

On February 22, 2010, Facebook took the deposition of Michael McKibben, LTI's CEO and corporate representative under Fed. R. Civ. P. 30(b)(6).

Redacted

Counsel for LTI then asserted during the deposition that the documents may have been "something that may not have been viewed relevant at the time we made our production," but if

Facebook requested, "[w]e can probably provide those documents to you." *Id.* at 162:18-23. Facebook requested the production of those documents before the conclusion of Mr. McKibben's deposition.

Redacted

s. 35 U.S.C. §102(b); *see also Mfg. Research Corp. v. Graybar Elec. Co.*, 679 F.2d 1355, 1362 (11th Cir. 1982) ("[I]t is well established that any sale or offer, whether public or private, is enough to implicate the statutory bar."). By waiting until after the close of discovery to produce these documents, LTI prevented Facebook from fully exploring this potentially case dispositive defense by issuing subpoenas to these newly disclosed third parties.

B. Facebook Diligently Sought Discovery on LTI's Withheld Production

Redacted

C. Redacted

On April 7, 2010, following the failure of the meet-and-confer efforts, Facebook filed a letter brief with Magistrate Judge Stark

Redacted

Magistrate Judge Stark conducted a telephonic hearing on the motion on April 9, 2010.

Redacted

LTI's letter stated that the list was based upon "the best available information," but provided no accompanying proof that these were the only demonstrations. *See id.* Facebook was never informed how LTI made this determination, nor what "best available information" LTI allegedly relied upon to reach this conclusion.

Redacted

The fact that LTI identified in its April 13 letter only three parties whom Facebook had not already identified to LTI during Mr. McKibben's deposition, highlighted the potential unreliability of this information.

D. LTI's Identification was Proven to be Unreliable

Redacted

E. Magistrate Judge Stark's Order of April 27, 2010

On April 26, 2010, Facebook filed a brief with Magistrate Judge Stark renewing its request that discovery be reopened and that the existing calendar be suspended to allow Facebook to conduct discovery on the newly-produced documents. *See* Norberg Decl., Ex. F.

Redacted

Magistrate Judge Stark held a hearing on April 27, 2010. Judge Stark opened up the hearing stating that he was unwilling to do anything that would threaten the existing June 28, 2010 trial date, and to the extent the relief sought by Facebook would require a continuance of the trial date, it would not be granted. Norberg Decl., Ex. J at 4:3 – 5:4. Magistrate Judge Stark then granted Facebook's request to reopen discovery, but only on a limited basis

Redacted

Other than his concern over the trial date, Magistrate Judge Stark did not articulate any other basis for denying the discovery sought by Facebook. *Id.* This objection followed.

III. STANDARD OF REVIEW

For nondispositive matters considered by a magistrate judge, Federal Rule of Civil Procedure 72(a) provides that the district court shall "modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a); *see also* 28 U.S.C. § 636(b)(1)(A).

IV. FACEBOOK WILL BE HIGHLY PREJUDICED SHOULD THIS DISCOVERY BE DENIED

Magistrate Judge Stark's refusal to allow Facebook to conduct discovery on third parties beyond the six allowed by the order was clearly erroneous because it will cause substantial and incurable prejudice to Facebook for no reason other than to maintain the current trial date.

Redacted

Judge Stark's sole reason for denying this additional discovery – that allowing discovery would jeopardize the June 28 trial date – is not a sufficient basis to deny Facebook potentially case dispositive discovery because it was LTI's own failure to comply with its discovery obligations that created this situation. While Facebook's motion was a discovery motion, Judge Stark treated it as a motion to continue trial:

> It does – it does appear to me, having read the letters, that at least part of what is going on is clearly Facebook believes that this trial should not take place at the date of June 28, 2010, which is the date that has been in place for quite a while. And to grant the relief that Facebook seeks would have, necessarily, the effect of eliminating that trial date.
>
> I am not going to eliminate that trial date. That June 28, 2010, date is a firm trial date, and either Judge Farnan or myself will be trying this case on June 28th, 2010.

Norberg Decl., Ex. J at 4:6-18. In so doing, however, Judge Stark failed to analyze several critical factors relevant to such motions, including the extreme prejudice to Facebook should the discovery be denied, Facebook's diligence in pursuing this issue as soon as it learned of LTI's withholding at Mr. McKibben's deposition, and the fact that it was LTI's own actions that placed the trial date in jeopardy. *See, e.g., United States v. Fisher*, 10 F.3d 115, 117 (3d Cir. 1993) (the

appellate court considered the defendant's right to an "adequate opportunity to prepare a defense," the efficient administration of justice, and the diligence of defendant in seeking a continuance).

Facebook respectfully submits that Magistrate Judge Stark's discovery order is contrary to law because it placed far too much emphasis on maintaining the trial date without giving adequate consideration to factors such as the extreme prejudice to Facebook if Facebook is denied the opportunity to fully develop this case dispositive defense, that it was LTI's own actions that caused this situation, and that Facebook diligently sought relief upon learning of LTI's withholding during Mr. McKibben's deposition. Facebook therefore objects to Judge Stark's April 27 order and requests that this Court grant Facebook full discovery relating to LTI's withheld NDAs.

V. CONCLUSION

For the foregoing reasons, Facebook respectfully requests that the Court sustain its objections to Magistrate Judge Stark's April 27, 2010 order,

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