IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES, INC., a Delaware corporation, Plaintiff and Counterdefendant, v. FACEBOOK, INC., a Delaware corporation, Defendant and Counterclaimant.	Civil Action No. 1:08-cv-00862-JJF **PUBLIC VERSION**

FACEBOOK INC.'S OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE NO. 6 REGARDING A "PRODUCT-TO-PRODUCT COMPARISON"

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FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES, INC., a Delaware corporation,	**CIVIL ACTION**
Plaintiff and Counterdefendant,	**No. 1:08-cv-00862-JJF**
v.	**CONFIDENTIAL FILED UNDER SEAL**
FACEBOOK, INC., a Delaware corporation,	
Defendant and Counterclaimant.	

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I. INTRODUCTION

Plaintiff Leader Technologies, Inc.'s ("LTI") motion is based on the false premise that Facebook, Inc. ("Facebook") intends to argue that it does not infringe the '761 patent through a comparison between the Facebook website and Leader2Leader, the product that LTI contends embodies the asserted claims. Facebook has never made such an argument in discovery, nor does it intend to make such an argument at trial. Facebook will establish non-infringement at trial by showing that LTI cannot show that the Facebook website satisfies the elements of the asserted claims, as the law requires.

LTI's motion does not appear to be seeking exclusion of Leader2Leader for any purpose other than to argue non-infringement through a "product-to-product" comparison. Leader2Leader and the functionality it provides are clearly relevant and admissible at trial for several unrelated yet entirely permissible purposes, including: (a) refuting LTI's assertion that it is entitled to increased damages under *Georgia-Pacific* because Leader2Leader allegedly competes with Facebook; (b) refuting LTI's allegation of willful infringement; (c) supporting Facebook's defense that the '761 patent is invalid under 35 U.S.C. § 102 because of offers of sale and public uses of Leader2Leader that took place more than one year before the effective filing date of the '761 patent; and (d) supporting Facebook's claim that LTI has falsely marked its products, as explained below.

II. STATEMENT OF FACTS AND ARGUMENT

The Federal Circuit explained the rationale behind the prohibition against so-called "product-to-product" comparisons in *Zenith Laboratories, Inc. v. Bristol-Myers Squibb Co.*, 19 F.3d 1418 (1994). In *Zenith*, the Federal Circuit held that to establish *infringement*, the patentee could not compare the functionality of its own product that embodied the patent with that of the accused infringer's product. *Id.* at 1423. The patentee instead must compare the accused infringer's product against the *claims* of its

patent. *Id.* The purpose of the bar against so-called "product-to-product" comparisons is to ensure that the infringement analysis is focused on whether accused product satisfies the elements of the claims rather than the similarities between the accused product and the patentee's purported commercial embodiment of the patent.

This reasoning has no applicability to the permissible uses to which Leader2Leader will be put at trial. The question of whether Leader2Leader competes with Facebook, for example, is relevant to the calculation of a reasonable royalty under *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970), *modified and aff'd, Georgia-Pacific Corp. v. U.S. Plywood-Champion Papers, Inc.*, 446 F.2d 295 (2d Cir. 1971). One of the factors under *Georgia-Pacific* is "[t]he commercial relationship between the licensor and licensee, such as, whether they are competitors in the same territory in the same line of business." *Id.* at 1120. LTI's damages expert opined in his expert report that Facebook and LTI were "competitors for the on-line collaboration market" at the time of the alleged infringement as part of his analysis of the *Georgia-Pacific* factors. Declaration of Kathryn Robinson in Support of Facebook's Oppositions to Leader Technology, Inc.'s Pretrial Motions ("Robinson Decl."), Ex. 23 at 21-22. Facebook is entitled to introduce evidence relating to Leader2Leader and the functionality it provides, as well as the manner in which LTI has attempted to commercialize the product, to show that Leader2Leader is not in the same line of business as Facebook, is not directed at the same customers, and does not provide competing functionality. LTI, by claiming to be a competitor to Facebook to enhance its damages demand, has clearly put the functionality of Leader2Leader squarely at issue. LTI cannot argue that Leader2Leader competes with Facebook while at the same time attempting to leave Facebook hamstrung to challenge that argument.[1]

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[1] Whether or not LTI's and Facebook's products compete with each other is also relevant to determining whether or not a permanent injunction should issue. Under the first factor of the established four-factor injunction analysis, the court must consider whether a patentee has established that it has suffered irreparable injury as a result of the

Leader2Leader is also relevant to support Facebook's invalidity defenses that LTI offered for sale and publicly demonstrated Leader2Leader more than one year before the application for the patent was filed, rendering the patent invalid under 35 U.S.C. § 102(b). Evidence relating to LTI's offers for sale and public demonstrations of Leader2Leader, the product that LTI claims embodies each asserted claim, will invariably require introduction of evidence regarding the product, its functionality, and LTI's pre-filing attempts to commercialize it. This evidence is also relevant to secondary considerations of non-obviousness under 35 U.S.C. § 103(a), such as the purported commercial success (or lack of success) of Leader2Leader.

The Leader2Leader product and its functionality are also relevant to refute LTI's claim that Facebook willfully infringed the '761 patent.

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This argument by LTI, which is itself an impermissible "product-to-product" comparison, obviously puts the functionality of Leader2Leader at issue. Facebook is entitled to refute LTI's allegation by showing the absence of any similarities between Leader2Leader and any iteration of the Facebook website.

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defendant's infringement. *See eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 391 (2006). Courts have found that this first factor often turns on whether or not the parties are competitors. *See, e.g., TruePosition Inc. v. Andrew Corp.*, 568 F. Supp. 2d 500, 531 (D. Del. 2008) (noting that courts often grant injunctions when a patent owner practices the invention and directly competes with the infringer). Thus, whether or not LTI and Facebook are competitors is relevant to determining whether LTI can meet its burden of showing irreparable injury sufficient to entitle LTI to a permanent injunction.

Facebook has also asserted a cause of action for false marking of LTI products including Leader2Leader. (D.I. 190 at 6-7). The central evidence to support a contention of false marking, as it relates to Leader2Leader, is the operation and functionality of the product itself.

III. CONCLUSION

For the foregoing reasons Facebook does not oppose LTI's motion to the extent it seeks to preclude an argument that Facebook does not infringe the '761 patent through a comparison between Facebook and Leader2Leader. Facebook opposes LTI's motion to the extent it seeks to exclude evidence of Leader2Leader for any other purpose.

Dated: May 27, 2010

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