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** **CONFIDENTIAL** **FILED UNDER SEAL**

FACEBOOK INC.'S REPLY IN SUPPORT OF OBJECTIONS TO MAGISTRATE JUDGE STARK'S APRIL 27, 2010 ORDER

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Dated: June 7, 2010
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IN THE UNITED STATES COURT

FOR THE DISTRICT OF DELAWARE

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

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Dated: June 7, 2010

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Facebook Inc. ("Facebook") submits this reply brief to address Leader Technology, Inc.'s ("LTI's") response to Facebook's Objections to Magistrate Judge Stark's April 27, 2010 Order (the "Order"). LTI's response fails to address the substantive reasons Magistrate Judge Stark's Order was in error, as set forth in Facebook's opening brief, and instead attempts to confuse the issue by focusing on irrelevant side matters. Indeed, LTI fails to adequately address the most critical factors to the analysis, 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. Thus, Facebook has established the appropriateness of an order fully reopening discovery on this issue and adjustment of the calendar to accommodate this discovery, and LTI has utterly failed to counter this position.

A. LTI Ignores Its Own Withholding of Potentially Case-Dispositive Evidence and Facebook's Diligence in Seeking Such Evidence

Critically, LTI's response does not allege that discovery into the late-produced NDAs is immaterial to this case – because it is relevant As set forth in Facebook's opening brief, discovery into the late-produced NDAs is critical to a potentially case-dispositive 35 U.S.C. § 102(b) defense for Facebook. In failing to address the relevance of the NDAs, LTI essentially concedes the point and admits that Facebook would suffer prejudice if denied the opportunity to fully pursue discovery into the matter.

In addition, LTI fails to address the fact that it was solely responsible for causing this dispute by failing to produce the NDAs during the discovery period. Again, LTI cannot even attempt to rebut this fact.

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LTI has not challenged the fact that its own actions have placed the trial date in jeopardy.

On a related issue, LTI also fails to address how it somehow magically believes Facebook could have uncovered this information before the close of discovery. Facebook's diligence in pursuing the matter immediately upon learning about the existence of the additional NDAs highlights LTI's failure. As set forth above, Facebook served several requests early in discovery that would have required disclosure of this information. Facebook then reasonably relied upon LTI's representations that it had produced all relevant information.

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Facebook immediately requested that they be produced in full. Shortly thereafter Facebook moved to re-open discovery. Facebook's efforts to complete discovery in this matter are without fault.

B. LTI Ignores the Prejudice to Facebook in Denying this Discovery, and LTI's Own Role in Creating that Prejudice

LTI's assertion that Facebook cannot claim to be prejudiced because it has yet to complete the limited discovery that was granted ignores the realities of procuring third-party discovery, as well as LTI's own role in delaying this discovery. As is so often the case, particularly when dealing with individuals and dissolved corporate entities, these parties have

discovery, and (2) the potential prejudice of denying additional discovery to the moving party. *Id.* While it is true that the *Fisher* Court denied the moving party's request for additional discovery, it did so because it found that that party had not been diligent in seeking the requested discovery and because the trial date had already been continued numerous times. *Id.* Neither of these is the case here: Facebook has show exemplary diligence in seeking the discovery it now requests, and this case has not previously been continued. Therefore, Fisher is entirely inapposite to this situation.

C. Facebook's Alternative Positions on False Marking and On-Sale Bar Are Both Proper Under Federal Rule 8(d)(2) and Irrelevant to the Discovery Issue Before the Court

Rather than address the proper considerations for re-opening discovery, LTI's response focuses upon perceived inconsistencies in Facebook's positions. As an initial matter, Facebook is permitted to assert alternative, and even inconsistent, theories under Federal Rules of Civil Procedure 8(d)(2) and (3). *See Indep. Enters. Inc. v. Pittsburgh Water & Sewer Auth.*, 103 F.3d 1165, 1175 (3d Cir. 1997) ("This Rule permits inconsistency in both legal and factual allegations.") (citations omitted).

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[1] The Federal Circuit has condoned such an approach. For instance, in *Vanmoor v. Wal-Mart Stores, Inc.*, 201 F.3d 1363, 1366 (Fed. Cir. 2000), the defendants asserted that they sold the accused infringing product before the priority date of the patent. The district court permitted the defendants to use the plaintiff's accusation of infringement as evidence in support of their on-sale bar defense. *Id.* Thus, even though the defendants pled non-infringement in their answers, they were also allowed to proceed on a claim of on-sale bar where they asserted that, at least

LTI also asserts that Facebook has taken contradictory positions where it has not. For instance, LTI claims that Facebook has taken contradictory positions on staying the case based on Facebook's motion to amend its Answer to include an inequitable conduct counterclaim and defense. At the time Facebook filed its motion to amend, it had recently uncovered information – unrelated to the NDAs – that allowed it to sufficiently allege an inequitable conduct claim under the strictures of Rule 11, and felt that further discovery was not needed on *those limited issues* (i.e. inequitable conduct based on a failure to disclose the specific information alleged in the amended answer). This does not require, however, that Facebook forego the opportunity to engage in full discovery related to the late-produced NDAs, which represent a *different issue,* and may in fact yield further evidence of other defenses. Even if evidence connected to the late-produced NDAs might ultimately relate both to an on-sale bar and inequitable conduct, they are distinct and different claims than the ones already confirmed and in the amended answer. To that end Facebook's position that further discovery is not required for its inequitable conduct counterclaim does not contradict its current efforts to re-open discovery on the late-produced NDAs.

D. The Court Should Not Place Priority Upon Maintaining an Arbitrary Trial Date Since LTI's Own Failures Have Prejudiced Facebook's Defense

Finally, LTI's response focuses upon Facebook's alleged ulterior motives in requesting a stay of this case, yet the fault here lies with LTI. Facebook only requests that it be given an adequate opportunity to complete the necessary discovery to which it was deprived by LTI's own dilatory actions. There can be no ulterior motives attributed to Facebook when LTI is the party which caused the present situation. Because the timing of these matters lies solely with LTI, LTI should not be permitted to maintain an arbitrary trial date to the detriment of both Facebook and

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according to the plaintiff, their products infringe. *Id.* at 1365-66.

the truth-seeking mission of the Court.

CONCLUSION

For the foregoing reasons, Facebook respectfully requests that the Court sustain its objections to Magistrate Judge Stark's April 27, 2010 Order, re-open discovery regarding all third parties disclosed in LTI's late-produced NDAs, and stay the remaining dates in this case pending the conclusion of this discovery.

Dated: June 7, 2010

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