

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

LEADER TECHNOLOGIES, INC., a Delaware corporation,)	
)	
Plaintiff-Counterdefendant,)	Civil Action No. 08-862-LPS
)	
v.)	
)	
FACEBOOK, INC., a Delaware corporation,)	PUBLIC VERSION
)	
Defendant-Counterclaimant.)	
)	

**LEADER TECHNOLOGIES, INC.'S MOTION TO STRIKE AND
OPPOSITION TO FACEBOOK, INC.'S MOTION *IN LIMINE* NO. 12**

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I. INTRODUCTION

Leader Technologies, Inc. (“Leader”) files this combined motion to strike and opposition to Facebook, Inc.’s (“Facebook”) twelfth motion *in limine* (“MIL No. 12”). D.I. 503-04.

Facebook filed this motion over two weeks *after* the parties’ agreed-upon deadline for filing pre-trial motions. Facebook should not be permitted to disregard deadlines in the case, particularly at this stage of the case.

Moreover, Facebook’s MIL No. 12 is based entirely on the claim that Leader did not produce any documents or testimony about communications and work product it received from counsel regarding advice about [REDACTED]

[REDACTED] D.I. 504 at 1. This is not true. Leader produced all documents, responded to all of Facebook’s written discovery, and answered all questions Facebook asked during deposition in connection with advice of counsel regarding whether Leader2Leader practices the ‘761 Patent. In fact, Leader did not object on privilege or work product grounds when questions were asked about the advice of counsel that Leader received regarding marking its products during the deposition.¹ Despite engaging Leader in numerous meet and confers and filing numerous motions to compel discovery in this case, Facebook never moved to compel this discovery. Facebook appears to make this untimely motion because it realized that it does not have any evidence of an intent to deceive the public, an essential element of its false marking allegation.² Accordingly, Leader respectfully requests that the Court strike Facebook’s motion or, in the alternative, deny its motion in its entirety.

¹ Notably, Facebook’s motion is limited to seeking to exclude any evidence, testimony or mention of advice of counsel as it relates to whether Leader2Leader practices the ‘761 Patent. *See* D.I. 504 at 1, 3.

II. ARGUMENT

A. Facebook's Motion *in Limine* No. 12 Should be Stricken Because it is Untimely and Prejudicial

The parties mutually agreed to a May 20, 2010 deadline for submitting pre-trial motions, including motions *in limine*, and jointly submitted the list of motions *in limine* filed to the Court in the Proposed Joint Pretrial Order filed on May 27, 2010. *See* D.I. 470, Exs. E1-E2; *see also* Declaration of Shane Glynn in Support of Leader's Motion to Strike and Opposition to Facebook's Motion *in Limine* No. 12 ("Glynn Decl." filed herewith), ¶ 2, Ex. A. On June 4, 2010, two weeks after the agreed-upon deadline, Facebook filed its MIL No. 12, without ever contacting Leader about the motion or discussing it with Leader. *See* D.I. 504.

Facebook should not be permitted to blatantly ignore such case deadlines. It is prejudicial to Leader and will only lead to a practice of filing more motions that completely disregard the case schedule and unnecessarily burden Leader, as well as the Court. This Court has stated that "[m]otions to strike serve 'to clean up the pleadings, streamline litigation, and avoid unnecessary forays into immaterial matters.'" *Sun Microsystems, Inc. v. Versata Enters., Inc. et al.*, 630 F. Supp. 2d 395, 402 (D. Del. 2009)(quotation and citations omitted). Facebook's unsupported and untimely motion should be stricken to streamline the litigation and discourage the filing of untimely motions.

Furthermore, there is absolutely no reasonable basis for Facebook's untimely motion, other than another attempt to delay the case. All of the discovery and motions that Facebook cites to support its motion is information that Facebook had well in advance of the May 20th deadline for filing motions *in limine*. For example, Leader's Motion for Summary Judgment of Facebook's

² Facebook filed a Counterstatement of Disputed Material Facts ("Counterstatement") (D.I. 500) in response to Leader's sole Motion for Summary Judgment regarding the lack of evidence of any intent to deceive necessary to sustain Facebook's false marking claims.

False Marking Counterclaim (“Motion for Summary Judgment”), was filed on May 14, 2010, six days before the parties’ agreed-upon deadline to file all motions *in limine*. See D.I. 397. It is well within the Court’s discretion to strike such an untimely pleading. *Poole v. Taylor*, 466 F. Supp. 2d 578, 583 (D. Del. 2006) quoting *River Road Dev. Corp. v. Carlson Corp.*, C.A. No. 89-7037, 1990 WL 69085, at *2 (E.D. Pa. May 23, 1990)(“A Court possesses considerable discretion in disposing of a motion to strike under Rule 12(f).”).

B. Facebook is Trying to Recover from its Lack of Diligence in Seeking Information Regarding Leader’s Defenses to Facebook’s False Marking Claim And Cannot Meet The Burden Of Proof Required For Excluding Leader From Presenting A Defense

Contrary to Facebook’s allegations, Leader produced all responsive discovery to Facebook’s requests regarding Facebook’s false marking allegations. Facebook never asked Leader what defenses it was asserting to Facebook’s claims of false marking. In fact, Facebook failed to propound any such written discovery into Leader’s defenses despite being permitted to take additional written discovery on its false marking claim that was added after the close of written discovery in the case. Glynn Decl., ¶¶ 3-4, Exs. B-C.

It is for this reason that Facebook does not even attempt to meet the burden of proof required for a motion which seeks to preclude Leader from providing evidence of its defenses to Facebook’s false marking allegations. Seeking the exclusion of evidence is a drastic remedy pursuant to Federal Rule of Civil Procedure 37 and reserved for flagrant disregard of discovery abuse. *Meyers v. Pennypack Woods Home Ownership Ass’n*, 559 F.2d 894, 904 (3d Cir. 1977) *overruled on other grounds*, *Goodman v. Lukens Steel Co.*, 777 F.2d 113 (3d Cir. 1985)(“the exclusion of critical evidence is an ‘extreme’ sanction... not normally to be imposed absent a showing of willful deception or ‘flagrant disregard’ of a court order by the proponent of the evidence.”)(citation omitted). Facebook entirely failed to address the following five factors that are supposed to support its motion: “(1) the prejudice or surprise to a party against whom the

evidence is offered; (2) ability of the injury party to cure the prejudice; (3) likelihood of disruption of trial; (4) bad faith or willfulness involved in not complying with the disclosure rules; and (5) importance of the evidence to the proffering party.” *Intermec Techs. Corp. v. Palm Inc.*, C.A. No. 07-272-SLR, 2010 WL 2340228, at *1 (D. Del. June 7, 2010). Facebook ignores its required burden of proof because, as demonstrated below, Leader complied with its discovery obligations and never precluded Facebook from obtaining the information.

1. **Leader has no documents regarding advice from counsel regarding marking**
Facebook falsely alleges that Leader [REDACTED]

[REDACTED] D.I. 504 at 1.

[REDACTED]

Glynn Decl., ¶ 2, Ex. A. Facebook already knew this as of February 2010 based on the two-day deposition of Mr. McKibben, who testified as a fact witness and Leader’s designated 30(b)(6) witness.³ Facebook’s 30(b)(6) notice contained several topics related to marking,⁴ including Topic No. 16 regarding Leader’s “efforts to mark its product with the ‘761 Patent, including ... the analysis, if any, by which the decision to mark such product and/or service was reached.” Glynn Decl., ¶ 5, Ex. D. Mr. McKibben testified that [REDACTED]

[REDACTED] Glynn Decl., ¶ 6, Ex.

E (Deposition of Michael McKibben (“McKibben Depo.”) at 251:1-5). Thus, Facebook’s

⁴ Mr. McKibben was also the designated witness to testify regarding all products and services that are covered by the claims of the ‘761 Patent and how they are covered by the ‘761 Patent. Glynn Decl., ¶ 5, Ex. D (Topics 14, 15 of 30(b)(6) Notice).

statement that it [REDACTED]

[REDACTED] D.I. 504 at 1.

2. Leader provided a 30(b)(6) witness to testify on the analysis done and about Leader's reliance on the advice of counsel

Mr. McKibben answered all questions posed by Facebook about Leader's marking policy, the legal advice Leader received from various counsel relating to marking, and when Leader received such advice. Glynn Decl., ¶ 6, Ex. E (McKibben Depo. at 246:17-251:5). His testimony included [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Id. (McKibben Depo. at 246:17-247:6).

Facebook's counsel made clear during the deposition that he was not interested in asking about what advice Leader received from its attorneys, without any prompting from Mr. McKibben or Leader's counsel. *Id.* (McKibben Depo. at 246:25-247:2). Leader did not raise a privilege or work product objection, or refuse to answer any question asked on this subject matter at any point during the deposition. Leader responded fully to the questions Facebook asked during the deposition regarding the advice of counsel and never precluded Facebook from seeking such discovery. It was *Facebook* that failed to ask any further questions about the substance of the

advice of counsel provided to Leader and communications between counsel and Leader.

Facebook's counsel chose not to pursue this questioning, despite having time to ask such questions as Facebook ended Mr. McKibben's deposition before the second full day was completed. *Id.* (McKibben Depo. at 246:8-251:5; 400:12-13). Facebook had every opportunity to obtain discovery into Leader's advice of counsel defense, both with written discovery and in deposition, but failed to do so. Thus, contrary to Facebook's assertions, Leader never refused to disclose the opinions or any communications related to those opinions.

3. Leader complied with its discovery obligations

Trying to deflect attention away from Facebook's deficient discovery efforts, Facebook is attempting to lay the blame on Leader's discovery responses. However, Facebook cites exclusively to written discovery propounded *before* Facebook was permitted to assert its false marking claims late in the case. D.I. 504 at 1. Facebook was permitted to file its Second Amended Answer and Counterclaims on December 23, 2009. Facebook cites Interrogatory Nos. 18, 22, 23, 25, and 26 and Requests for Production Nos. 76, 86, and 90, which are discovery requests propounded before false marking was a claim in the case. Leader appropriately and timely responded to each of these requests, all of which were propounded prior to the close of written discovery on November 20, 2009. Because Facebook's claims were permitted after the close of written discovery, Leader supplemented its response to Interrogatory No. 18 pursuant to its obligations under the Federal Rules of Civil Procedure.⁵

Facebook's lack of action with respect to these discovery requests demonstrates that Facebook did not truly have any issues with Leader's responses to these discovery requests. If it

⁵ Notably, this supplementation was done well before the close of fact discovery and before expert reports were due. Facebook's suggestion that Leader supplemented this discovery response late simply ignores the fact that Facebook's false marking claim was not in the case until after the close of written discovery.

had, Facebook would have met and conferred with Leader on these responses or sought to compel further responses for these requests, as this is an activity that Facebook has done frequently throughout this litigation. These discovery requests have never been at issue before the Court and waiting until *after* the deadline for filing motions *in limine* to make an issue out of them is just another delay tactic.

More importantly, however, is the fact that Facebook was permitted to propound additional written discovery after the close of written discovery in November of 2009 related to its false marking claims once the Court permitted Facebook to file its Second Amended Answer and Counterclaims. Despite being given this opportunity, Facebook simply failed to ask Leader what its defenses were to Facebook's false marking allegations. *See* Glynn Decl., ¶¶ 3-4, Exs. B-C. Facebook has known for quite some time, at the very least four months, that Leader was asserting an advice of counsel defense to Facebook's false marking allegations and has simply failed to seek discovery into it. *Id.*, ¶ 6, Ex. E (McKibben Depo. at 246:17-251:5).

Facebook had numerous opportunities, both in written discovery and in deposition, to seek discovery into Leader's defenses to the false marking claims since its false marking claims were permitted in the case. Another example is Facebook's failure to question Mr. McKibben regarding the advice he received from counsel, despite [REDACTED]

[REDACTED] *Id.* (McKibben Depo. at 246:17-251:5). Contrary to Facebook's suggestion in its motion, Leader produced all documents that related to Leader's marking policy and marking of its products in the case over a year ago. For example, there are

[REDACTED] *See* Glynn Decl., ¶¶ 7-8, Exs. F-G. These emails were marked at the depositions of different witnesses and the witnesses were not prevented at any time on the grounds of privilege and/or work product from answering those

questions. *Id.*, ¶¶ 6, 9, Exs. E, H (McKibben Depo. at 240:14-244:4; Deposition of Jeffrey Lamb at 120:2-122:2). Despite the fact that Leader produced numerous documents to Facebook well over a year ago that discuss and are about Leader’s marking policy and practices, Facebook asked very few questions about these documents during deposition and simply failed to follow up with additional questions on Leader’s marking practices and how it related to the advice of counsel. To the extent Facebook did not obtain the information it wanted, it was only because Facebook failed to ask for it.

4. Facebook misstates the law and the facts in a failed effort to support its motion *in limine*

Facebook misstated the law regarding the scope of waiver when an advice of counsel defense is asserted and repeatedly cited incorrect dicta to support it. The Federal Circuit held that “documents analyzing the law, facts, trial strategy, and so forth that reflect the attorney’s mental impressions but were not given to the client” are not subject to waiver. *In re Echostar Commc’ns Corp.*, 448 F.3d 1294, 1302 (Fed. Cir. 2006). Thus, any work product documents that were not provided to Leader would not fall within the scope of waiver.

[REDACTED]

[REDACTED]

[REDACTED] Mr.

McKibben testified that [REDACTED]

[REDACTED] Glynn Decl., ¶ 6, Ex. E (McKibben Depo. at 246:8-251:5). Under the law, any work product by Leader’s counsel that was never communicated to Leader is not waived and therefore not subject to discovery by Facebook. Thus, there is no other work product or written communications to be produced by Leader at this point and Leader did not prevent Facebook from seeking such discovery during fact discovery. Leader

has worked in good faith with Facebook to alleviate this issue, but Facebook refuses to concede in the hopes of gaining an unwarranted advantage.

C. Facebook Should Not Be Permitted To Get A Second Chance At Discovery At This Stage of the Case

Facebook's lack of diligence in pursuing discovery related to its false marking claims and lack of evidence of false marking is clear from Facebook's inability to present any evidence in its Counterstatement to Leader's Summary Judgment Motion, which pointed out the lack of evidence to support Facebook's false marking allegations because there is no evidence of an intent to deceive the public. *Forest Group, Inc. v. Bon Tool Co.*, 590 F.3d 1295, 1300 (Fed. Cir. 2009) (the two elements of false marking are marking an unpatented article and an intent to deceive the public). In a last ditch effort to save its false marking claims, Facebook has now made this untimely motion *in limine*.

Now that Facebook realizes that it failed to capitalize on its opportunity to ask written discovery and deposition questions about the actual advice of counsel that Leader received, it now is essentially seeking a "do over" and is hedging its bets with different motions. With this motion, Facebook is seeking to preclude the advice of counsel defense with respect to whether Leader2Leader is covered by the '761 Patent. In its Counterstatement to Leader's summary judgment motion, it is seeking the same relief or, in the alternative, to reopen discovery.⁶ Because Facebook failed to seek information regarding Leader's advice of counsel defense during deposition, it cannot now attempt to claim that it was prevented from seeking such discovery. Facebook has no support whatsoever for its MIL No. 12.

⁶ Notably, Leader's summary judgment motion was not based on Leader's advice of counsel defense. Rather, it was premised on the fact that Facebook has no evidence of any intent to deceive the public by Leader. Thus, Facebook's claims in its Counterstatement are not relevant to producing any alleged evidence it has to support its false marking claims.

D. Facebook Never Attempted to Meet and Confer

The fact that Facebook never met and conferred with Leader regarding its discovery responses is further grounds to deny Facebook's motion. With respect to Interrogatory Nos. 22, 23, 25, 26 and Requests for Production Nos. 76, 86 and 90, Facebook never requested specific further responses to the discovery requests or met and conferred with Leader about these discovery responses after Facebook's false marking claims were permitted in the case. In an email, Facebook demanded that [REDACTED]

[REDACTED]

[REDACTED] Leader never heard back from Facebook on the subject until it received Facebook's belated MIL No. 12.

III. CONCLUSION

For the foregoing reasons, Leader respectfully requests that the Court deny Facebook's Motion *in Limine* No. 12.

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CERTIFICATE OF SERVICE

I, Philip A. Rovner, hereby certify that on June 28, 2010, the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing(s) to the following; that the document was served on the following counsel as indicated; and that the document is available for viewing and downloading from CM/ECF.

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