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June 21, 2010

BY E-FILE AND HAND DELIVERY

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

**PUBLIC VERSION
JUNE 28, 2010**

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

Dear Judge Stark:

For the seventh time in this case, Facebook is asking this Court to delay the scheduled trial date. At some point, enough is enough, and Facebook should be precluded from bringing these frivolous motions. While Facebook may consider the substance of its letter zealous advocacy, in reality it is nothing more than outright misrepresentations. The facts, something noticeably absent from Facebook's letter, are inapposite to nearly every assertion made by Facebook in its letter. The simple truth is that [REDACTED]

No Disclosure of Patented Invention Previously, Facebook argued to this Court that Leader gave public *demonstrations* of a product, Leader2Leader, covered by the '761 Patent more than one year before it filed its patent application. Leader's counsel represented to the Court that Leader had given approximately a dozen confidential *demonstrations* of its patented product in the 2002 time period. The Court permitted Facebook to re-open discovery to take the depositions of six third parties¹ it identified as having relevant information. However, all of those parties confirmed they had entered into NDAs with Leader before any demonstration or presentation. See Exhibits A and C. Now, however, Facebook has changed its story and contends that investor *presentations* given from 1997 to 2002 disclosed the patented invention. Initially, it should be pointed out that Facebook was provided with copies of these presentations more than one year ago, yet never marked any of them in deposition. Specifically, Leader produced 516 of these presentations to Facebook, of which 354 were produced on April 14, 2009, 117 were produced on August 3, 2009, and 45 were produced on August 18, 2009. As one would expect in these types of presentations, the materials disclosed were business orientated and did not come even close to disclosing the patented invention. Moreover, all of these presentations were marked confidential. Examples of these presentations can be found attached as Exhibit B.

Even Mr. Zacks,² Leader's former attorney who is currently in litigation *against* Leader, testified that [REDACTED]

¹ Facebook's depositions of five of these third parties lasted approximately one hour (one lasted only 28 minutes). Tellingly, in its recent letter, Facebook included none of the that recent testimony to justify its latest request to delay the trial.

² Facebook states that Leader never identified Mr. Zacks as one of its founders, but fails to note that the Founding Member Agreement produced to Facebook on August 18, 2009 names Mr. Zacks as a founder. See Exhibit C

[REDACTED]

One needs only to read Mr. Zacks' testimony to realize that Facebook is substantially bending the facts outside any reasonable interpretation, and there is no basis for its newly minted position that general investor presentations are invalidating disclosures.

All Presentations Were Confidential. Facebook repeatedly notes that Mr. Zacks testified that

[REDACTED]

[REDACTED]

See Exhibit F. Those are just a few examples. There are others. See Exhibit G for a collection of additional documents evidencing NDAs and/or confidentiality agreements for entities identified by Mr. Zacks.

Significantly, and ignored by Facebook, is that Mr. Zacks *confirmed* the previous testimony of Mr. McKibben --

[REDACTED]

Exhibit D at 41:12-23; see also *id.* at 61:14-62:23. As this Court is aware, "courts have never required secrecy agreements to be written." *TEC Air v. Nippondenso Mfg USA, Inc.*, No. 91c4488, 1995 U.S. Dist. LEXIS 18891, at *24-25 (ED Ill. 1995), citing *TP Labs, Inc. v. Professional Positioners, Inc.*, 724 F.2d at 972 (Fed. Cir. 1984). "The mere fact that there was no evidence of a written confidentiality agreement associated with the disclosures of [an] invention . . . does not necessarily mean that these disclosures were not confidential." *Aspex Eyewear, Inc. v. Concepts In Optics, Inc.*, No. 03-1638, 2004 U.S. App. LEXIS 16649, at *587-88 (Fed. Cir. 2004). Thus, even if Leader disclosed the elements of its patented invention in these investor presentations, *which it did not*, it would not be considered a public disclosure since Leader provided notice that such disclosure was confidential.

No Offers for Sale. Shockingly, Facebook argues that discovery from Mr. Zacks supports its on-sale bar defense. The absurdity of this argument is best demonstrated by Mr. Zacks' actual deposition testimony.

[REDACTED]

[REDACTED]



Exhibit D at 136:2-137:15 (objections omitted). It is incomprehensible how Facebook can come to this Court and claim that discovery from Mr. Zacks provides a basis for its on-sale bar position. In addition, deposition testimony from the other five third parties recently deposed by Facebook also confirms that

Facebook's Requested Privilege Log. Facebook issued a subpoena for Mr. Zacks out of the Southern District of Ohio. Mr. Zacks informed the parties that he would not produce any documents pursuant to the subpoena because he did not have time to do a privilege review of over 30 boxes of Leader documents he maintained.⁴ See Exhibit J. As noted above, Leader is currently in litigation with Mr. Zacks, and, not surprisingly, Leader's counsel does not represent Mr. Zacks in this matter. However, Leader recognized that Facebook likely would use Mr. Zacks' lack of cooperation as a basis for moving the Court to once again delay trial. As such, Leader's counsel volunteered to review the 30+ boxes of documents for privilege, and subsequently had an attorney spend 4 days in Mr. Zacks' office pulling the privileged documents. See Exhibit K. Nearly all of the privileged documents concern issues that have nothing to do with this case. However, proving the maxim that "no good deed goes unpunished," Facebook now insists that Leader's counsel provide a privilege log -- a log that Facebook will no doubt contend is inadequate, and yet another basis for delaying the case.

Conclusion. To support its latest attempt to delay trial, Facebook contends that the identity of those who signed *confidentiality* agreements is evidence of *non-confidential* disclosures. Unfazed by logic, the facts or this Court's repeated unambiguous edict that this trial would begin on June 28, 2010, Facebook's letter once again demonstrates that it will do or say anything to delay this trial. It apparently has the resources to take many, if not all, of the depositions of the 2,000+ signatories of Leader's NDAs, and now it is asking the Court for the time to do so. However, any additional third party discovery⁵ would serve only to confirm what the limited third party discovery taken to date has already confirmed -- that Facebook's positions are untenable. For that reason alone, Facebook's motion should be denied and this case should proceed to trial on July 19 as this Court previously ordered.

⁴ Facebook's representation to the Court that "Mr. Zacks produced more than 30 boxes of highly relevant documents" is comical. Because Mr. Zacks was Leader's outside and in-house counsel from 1997 to 2003, he has legal documents concerning all of Leader's business (e.g., leases, employment issues, shareholder issues, etc.). The vast majority of Mr. Zacks documents, both privileged and non-privileged documents, are simply irrelevant to this case.

⁵ Facebook has already issued more than 70 third party subpoenas in this case.

The Honorable Leonard P. Stark
June 21, 2010
Page 4

Respectfully,

/s/ Philip A. Rovner

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

PAR /mcs/971465

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 A

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT B

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT C

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT D

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT E

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT F

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT G

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT H

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT I

**THIS EXHIBIT HAS BEEN
REDACTED IN ITS ENTIRETY**

EXHIBIT J

Andre, Paul

From: Benjamin S. Zacks, Esq. [bszacks@zlglaw.com]
Sent: Wednesday, May 26, 2010 1:19 PM
To: 'Larry James'; 'Norberg, Jeffrey'; Andre, Paul
Cc: 'Esq.'; jrbillings@zlglaw.com
Subject: Leader Technologies v. Facebook Patent Litigation Discovery

Dear Sirs:

So that the issues regarding any document production and deposition testimony of us (in any capacity and including as prior legal counsel to Leader) are clearly understood, Mr. James suggested I share this email with you.

It is my understanding that Facebook has requested documents and a deposition concerning presentations and related information which Facebook contends are outside the scope of any attorney client privilege of us to Leader. Leader has filed for a protective order claiming attorney client privilege.

Our firm and its attorneys, who previously represented Leader in mid 2002 and before, has stated that under Ohio law by virtue of Leader's and its principal's suit filed against the Zacks Law Group LLC and me, Mr. Dunn and Mr. Billings that as between us any attorney-client evidentiary privilege was and is waived. The attorney client ethical confidentiality privilege we believe has also been waived, however consistent with corporate stock holdings in Leader and the Ohio Rules of Professional Conduct, Zacks Law Group LLC and the individual attorneys respectfully do not wish to be embroiled in testimony which is obtainable from others, intimate any attorney-client privileges and also would prefer not to testify or to turn over any alleged relevant documents without in-camera inspections, and also, without Leader first having the opportunity to review the documents, unless ordered to do so by a court with jurisdiction over the individuals and the subject matter.

As a result of the previous representation by our counsel, O. Judson Scheaf, in the prior lawsuits filed by Leader against us, and particularly, the pending defamation lawsuit in Franklin County, the files sought in documentary and electronic form are not organized and require significant time to cull, organize, review, copy and make available. We have approximately thirty-something boxes of files and separately electronic records in multiple locations in computers or hard drives not on any network accessible system covering our involvement with Leader from 1997-2002. We believe that collectively these documents may or may not be of assistance in the patent case and estimate that several days would be required to review the boxed information and the culling of relevant electronic records.

Consequently, until we receive a court order describing appropriate safeguards, which address the privilege issues and/or procedure agreed upon with our counsel Mr. James which accomplishes the same, we are unable to devote resources to addressing these issues.

Please direct any inquiries to Mr. James.

Very Truly,

Benjamin S. Zacks, Esq.
Zacks Law Group LLC
Counselors and Practitioners at Law
The eBuilding at Broad and James
3rd Floor
33 South James Road
Columbus, Ohio 43213
Cell Phone No: 614.353.1070
Work No: 614.236.8000
Fax No: 614.236.3236

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6/19/2010

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Zacks Law Group LLC

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EXHIBIT K

Andre, Paul

From: Andre, Paul
Sent: Thursday, May 27, 2010 4:02 PM
To: 'Benjamin S. Zacks, Esq.'; 'Norberg, Jeffrey'; 'Larry James'
Cc: 'Esq.'; jrbillings@zlglaw.com
Subject: RE: Leader Technologies v. Facebook Patent Litigation Discovery

Mr. Zacks,

Thanks for getting back to us regarding the documents. While we do not necessarily agree with Facebook counsel's assertion and characterization of Leader's position on privilege, we do agree that we would be able to get into Columbus next week to review those documents that you identify as satisfying Facebook's requests regarding third party presentations as noted in # 1 to Jeff's email below. As for confidentiality, if the documents are properly designated under the protective order, there should not be any issue regarding the confidentiality of the information. Because of the holiday weekend, I don't think we can get someone there on June 1 but should be able to get someone there on either June 3 or June 4. Please let me know if those days would work for you.

Thank you,
Paul

From: Benjamin S. Zacks, Esq. [mailto:bszacks@zlglaw.com]
Sent: Thursday, May 27, 2010 7:32 AM
To: 'Norberg, Jeffrey'; 'Larry James'; Andre, Paul
Cc: 'Esq.'; jrbillings@zlglaw.com
Subject: RE: Leader Technologies v. Facebook Patent Litigation Discovery

Mr. Norberg and Mr. Andre:

If we can get confirmation of these issues it would be possible to devote some time to identifying some of the documents over the holiday weekend. Then after segregating these from the other material, Leader's attorneys could come to my office to review the assembled documents the early part of the coming week. Please advise so that I could work some time into my schedule on June 1 as currently I have matters scheduled most of the day.

Thank you,

Ben

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Counselors and Practitioners at Law
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.....

From: Norberg, Jeffrey [mailto:jnorberg@cooley.com]
Sent: Wednesday, May 26, 2010 5:57 PM
To: Benjamin S. Zacks, Esq.; 'Larry James'; 'Andre, Paul'
Cc: 'Esq.'; jrbillings@zlglaw.com
Subject: RE: Leader Technologies v. Facebook Patent Litigation Discovery

Mr. Zacks,

Mr. Andre, Leader's counsel, has previously confirmed to me that Leader does not consider presentations made to third-party investors to be privileged. Paul, please confirm that my understanding is correct and that Leader agrees that the following two categories of information and documents are discoverable and not privileged:

1. Any documents disclosed to third-parties other than Leader's lawyers, such as Powerpoint presentations regarding Leader's products; and
2. Mr. Zacks' testimony regarding any such presentations he witnessed.

Paul, please also confirm that Leader does not have any confidentiality related objections to Mr. Zacks' production and testimony on these topics, assuming Leader is allowed to review the documents before they are produced to Facebook and also that the documents and testimony are appropriately designated under the protective order in place in this matter.

Sincerely,

Jeff

From: Benjamin S. Zacks, Esq. [mailto:bszacks@zlglaw.com]
Sent: Wednesday, May 26, 2010 1:19 PM
To: 'Larry James'; Norberg, Jeffrey; 'Andre, Paul'
Cc: 'Esq.'; jrbillings@zlglaw.com
Subject: Leader Technologies v. Facebook Patent Litigation Discovery

Dear Sirs:

So that the issues regarding any document production and deposition testimony of us (in any capacity and including as prior legal counsel to Leader) are clearly understood, Mr. James suggested I share this email with you.

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Our firm and its attorneys, who previously represented Leader in mid 2002 and before, has stated that under Ohio law by virtue of Leader's and its principal's suit filed against the Zacks Law Group LLC and me, Mr. Dunn and Mr. Billings that as between us any attorney-client evidentiary privilege was and is waived. The attorney client ethical confidentiality privilege we believe has also been waived, however consistent with corporate stock holdings in Leader and the Ohio Rules of Professional Conduct, Zacks Law Group LLC and the individual attorneys respectfully do not wish to be embroiled in testimony which is obtainable from others, intimate any attorney-client privileges and also would prefer not to testify or to turn over any alleged relevant documents without in-camera inspections, and also, without Leader first having the opportunity to review the documents, unless ordered to do so by a court with jurisdiction over the individuals and the subject matter.

As a result of the previous representation by our counsel, O. Judson Scheaf, in the prior lawsuits filed by Leader against us, and particularly, the pending defamation lawsuit in Franklin County, the files sought in documentary and electronic form are not organized and require significant time to cull, organize, review, copy and make available. We have approximately thirty-something boxes of files and separately electronic records in multiple locations in computers or hard drives not on any network accessible system covering our involvement with Leader from 1997-2002. We believe that collectively these documents may or may not be of assistance in the patent case and estimate that several days would be required to review the boxed information and the culling of relevant electronic records.

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