

IN THE UNITED STATES COURT  
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES, INC.,	)	
a Delaware corporation,	)	<b>CIVIL ACTION</b>
	)	
Plaintiff and Counterdefendant,	)	<b>No. 1:08-cv-00862-JJF</b>
	)	
v.	)	
	)	<b>CONFIDENTIAL –</b>
FACEBOOK, INC.,	)	<b>FILED UNDER SEAL</b>
a Delaware corporation,	)	
	)	
Defendant and Counterclaimant.	)	REDACTED VERSION
	)	

**MEMORANDUM IN SUPPORT OF  
FACEBOOK, INC.’S MOTION IN LIMINE NO. 12**

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**MOTION IN LIMINE TO EXCLUDE TESTIMONY AND EVIDENCE OF ADVICE OF COUNSEL AS A DEFENSE TO FACEBOOK'S FALSE MARKING COUNTERCLAIM**

Facebook seeks an order precluding the introduction of any evidence, testimony or mention of advice Leader Technologies, Inc. ("LTI") may have received from counsel regarding whether its Leader2Leader product practiced or practices the claims of U.S. Patent No. 7,139,761 (the "'761 patent"). This motion is based upon the ground that LTI relies upon such advice as a defense to Facebook's false marking counterclaim, yet has failed to either produce any documents or to testify about communications and work product it received from counsel regarding such advice.

Facebook has diligently pursued evidence regarding LTI's belief that its product, Leader2Leader, practices the claims of the '761 patent. Since discovery opened more than a year ago, Facebook has propounded no fewer than five interrogatories and three requests for production related to this matter. *See* Declaration of Melissa Keyes in Support of Facebook's Motion in Limine No. 12 ("Keyes Decl."), Ex. 1 at Interrogatory No. 18; Ex. 2 at Interrogatory Nos. 22, 23, 25, 26; Ex. 3 at Request No. 76; Ex. 4 at Request Nos. 86, 90. [REDACTED]

[REDACTED]

Facebook has carefully reviewed LTI's entire document production and can identify no document referring to, much less disclosing, any advice of counsel on the matter of whether Leader2Leader practices the claims of the '761 patent.

Four and a half months after the close of written discovery, in an attempt to reconcile its discovery responses with statements made by LTI CEO Michael McKibben

during deposition, LTI supplemented its response to Facebook's Interrogatory No. 18. See Keyes Decl., Ex. 5 at First Supplemental Response to Interrogatory No. 18. [REDACTED]

[REDACTED] In addition, LTI has recently asserted the advice of counsel as a defense to Facebook's false marking counterclaim in its May 14 motion for summary judgment. See D.I. 397 at 4.

Reliance on the advice of counsel as a defense in litigation operates as a waiver of attorney-client privilege and work product protection with respect to the subject matter of the advice. See, e.g., *In re Echostar Commc'ns Corp.*, 448 F.3d 1294, 1299 (Fed. Cir. 2006); *Novartis Pharms. Corp. v. Eon Labs Mfg., Inc.*, 206 F.R.D. 396, 398 (D. Del. 2002) (J. Farnan); *RCA Corp. v. Data Gen. Corp.*, Civ. A. No. 84-270-JJF, 1986 U.S. Dist. LEXIS 23244, at \*4, \*6 (D. Del. Jul. 2, 1986) (J. Farnan) ("The correct rule is that a party who relies upon advice of counsel as an essential element of its defense waives the attorney-client privilege with respect to the subject matter of that advice. . . . [T]he 'waiver' principle . . . applies to work product immunity as well as to the attorney-client privilege."). However, despite clear precedent and Facebook's numerous attempts to meet and confer on the matter, LTI has refused to produce those opinions and/or any communications or work product related to those opinions, or to agree to withdraw its advice of counsel defense. See Keyes Decl., Ex. 6. LTI cannot rely upon the advice of counsel to shield itself from liability while simultaneously refusing to disclose that advice. Permitting such conduct would severely prejudice Facebook, particularly at this late stage of litigation wherein there is no time remaining for discovery disputes. See, e.g., *Novartis*, 206 F.R.D. at 399 ("In the Court's view, it is critical for the [claimant] to have a full opportunity to probe, not only the state of mind of the [claim defendant], but also the mind of the [claim defendant's] lawyer upon which the [claim defendant] so firmly relied.").

Based on the foregoing, Facebook respectfully requests that the Court exclude any testimony, documentary evidence or mention of any advice LTI may have received from its counsel regarding whether its Leader2Leader product practiced or practices the claims of the '761 patent.

Dated: June 4, 2010

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