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The Hon. Leonard P. Stark
J. Caleb Boggs Federal Building
U.S. District Court for the District of Delaware
844 N. King Street, Unit 26, Room 6100
Wilmington, DE 19801-3556

Re: ***Leader Technologies, Inc. v. Facebook, Inc.*, Civ. No. 08-862-JJF-LPS**

Dear Judge Stark:

Facebook seeks an order pursuant to Rule 37 striking new cursorily accused claims that LTI unjustifiably attempted to drop into this case on October 28, two weeks after the October 15 deadline for supplemental infringement contentions. LTI's effort to expand this case by adding never before asserted claims using language as sparse as that which originally brought us to the Court regarding their first contentions comes less than a month before the end of discovery, long after LTI's self-described deadline to "finalize" its contentions and well past Facebook's deadline to serve additional written discovery. The sparse analysis provided with these new claims takes the parties back to square one with those claims and reveals that they have not been added based on any newly discovered evidence; but rather, appear to be an effort to defeat Facebook's motion to stay (D.I. 130) by trying to add claims that are not currently part of the granted reexamination. If these claims are allowed to stay in the case, Facebook will be required to begin discovery anew relating at least to one newly asserted independent claim (which is at least facially quite different from previously asserted claims); and would need to seek extensions of the current calendar, including *Markman* and trial.

Facebook further seeks an order striking all mentions of source code modules or files that were not analyzed on a limitation-by-limitation basis. LTI's attempt to preserve mention of

Background

After numerous motions to compel by both sides, in its September 4 Order, this Court established a set procedure for the parties to effectively manage discovery of the technical issues

in this case, including infringement contentions. Ex. M. Therein, Facebook was required to provide access to the entire Facebook source code by September 15 so that LTI could provide detailed infringement contentions based on its review of that code and related technical documents no later than October 15. Facebook has complied with this order while LTI has not.

On October 15, LTI served supplemental infringement contentions which included a [1] Ex. B at 20-21. On October 16, Facebook requested that LTI comply with the Court's order by . Ex. C. After several attempts to obtain a time to meet-and-confer, LTI agreed to provide a second supplemental response. Ex. D at 3.

On October 28, LTI served its second supplement. Ex. E. This supplement did not address *any* of Facebook's concerns, rather, it added three never-before-asserted claims. These new claims included new subject matter, such as "ordering" and "traversing." Moreover, the charts for these new limitations were little more than parroted claim language, bearing strong resemblance to the limited analysis that Facebook has been complaining about since LTI served its defective initial contentions. *See e.g.* Ex. E at 28 ("ordering" and "traversing" limitations).

Facebook immediately insisted that LTI remove these new claims to avoid prejudice, but LTI refused. Facebook offered a compromise of allowing in the new dependent claims while deleting the burdensome new independent claim in order to ameliorate the most prejudicial effects, but LTI refused that offer. Ex. A. Facebook thus brought this motion.

Argument

This Court has the inherent authority to limit supplementation of infringement contentions. *See, e.g.,* Ex. J at 29:5-7 ("The rules also say I can enter an order saying no more supplementation.") Rule 37 further grants the Court the authority to strike discovery responses that violate the Court's orders. *See, e.g., Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592 (4th Cir. 2003). LTI's unsupported eleventh-hour endeavor to expand this case violates this Court's September 4 Order and should therefore be stricken.

Throughout the process of discovery in this case, LTI has repeatedly stated that it would provide firm and final infringement contentions if it were allowed access to Facebook's source code and technical documents. At the May 28 hearing, Judge Farnan told LTI's counsel that

[1] LTI's supplemental infringement contentions also included qualifying language indicating that LTI's contentions were "exemplary" and did not represent its complete contentions. LTI has agreed to remove this language, but refuses to delete inclusion of

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once LTI received the technical documents it needed it would "have to become very firm in [LTI's] infringement analysis, limitation by limitation." Ex. J at 25:12 – 26:3. In a subsequent letter to this Court LTI confirmed that it also understood that the contentions it was to submit after its review of Facebook's source code were to be LTI's firm and final contentions: "documents that will aid Leader in its review of the selected Facebook's [sic] source code are required for Leader to ***finalize*** its infringement contentions." Ex. K at 2 (Emphasis added).

LTI has provided no valid explanation as to why it did not include these three claims before October 28. These claims can not have been added based on some new revelation, because LTI received nothing new in the intervening period. LTI did not review the Facebook source code between October 15 and 28, and Facebook did not produce any new technical documents during this time. LTI's failure to provide any meaningful analysis with respect to the new "ordering" and "traversing" elements of claim 17 further supports this theory. *Compare e.g.* Ex. E at 28 ("traversing" limitation) and Ex. E at 18 ("tracking movement" limitation). Instead, their additions harken back to the starkness of their original contentions and seem to be nothing more than an attempt to argue against Facebook's motion to stay pending reexamination.

Allowing LTI to add these new claims to the litigation at this stage would severely prejudice Facebook. Facebook's written discovery and searches for prior art have not yet focused on these claims since they were not involved. Claim 17, for example, is an independent claim that includes claim terms such as "ordering" and "traversing" that do not appear in any of the other claims. If these claims are allowed in the case, Facebook will have little choice but to seek an extension of written discovery, the start of depositions, *Markman* briefing - which begins in less than one month - and trial in order to allow it to search for relevant prior art and propound written discovery about the new claims. Since Judge Farnan is likely to ask the parties to choose representative claims for *Markman* and trial (Ex. I at 19:1-13), the most expedient and least prejudicial option at this point is to remove the new claims from contention.

Facebook respectfully requests that the Court exercise its authority to strike LTI's October 28 second supplemental infringement contentions and from the preamble of LTI's October 15 contentions.

Very truly yours,

Steven L. Caponi (I.D. No. 3484)