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February 19, 2010

BY E-FILE AND HAND DELIVERY

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

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

Dear Judge Stark:

Facebook is asking this Court to compel Leader to produce privilege documents based on nothing more than its unfounded, paranoid speculation that documents have been destroyed. This is not the first time that Facebook has leveled unfounded accusations of document destruction, but at least this time it is not directed towards Leader's current trial counsel. Instead, Facebook has concocted an unbelievable theory that third-parties not involved in this case may not have preserved documents that Facebook deems relevant. It is based on this alleged third-party activity that Facebook requests waiver of Leader's asserted attorney-client and attorney work product privilege – there is no allegation that Leader destroyed documents in Facebook's motion. The only thing more troublesome than Facebook's baseless motion is the fact that Facebook did not even attempt to resolve this issue with Leader prior to bringing this motion.

A. Facebook's Failure to Meet and Confer

Facebook failed to comply with Local Rule 7.1.1 by failing to meet and confer with Leader before filing its motion to compel. Local Rule 7.1.1 provides that "every nondispositive motion shall be accompanied by an averment of counsel for the moving party that a reasonable effort has been made to reach agreement with the opposing party on the matters set forth in the motion." Facebook wholly failed to meet this requirement (which is not shocking because Leader has satisfied every request made by Facebook when it provides a reasonable basis). For this reason alone, Facebook's motion should be denied.

B. Leader has Complied with the Court's Order and Every Facebook Request

There is no pending dispute between the parties regarding Leader's privilege log because Leader has satisfied all of Facebook's requests, even though these requests were far beyond what is required by the Federal Rules of Civil Procedure. Based on this Court's Order, Leader was to identify the location of, or log several documents that were identified during the December 23, 2009, hearing and provide Facebook access to Leader's product named Leader2Leader. D.I. 207 at 44 ("And if they've not been produced or logged, then you either need to produce them or log

them."); *id.* at 63-65. On January 15, 2010, Leader identified or logged those documents and provided access to Leader's product. *See* Ex. 1. Specifically, Leader identified [redacted] as logged Entry No. 386, [redacted] as logged Entry No. 317, and identified or logged the [redacted] as directed by the Court. However, with this motion, Facebook is simply stating that Leader is lying about these representations. Facebook identifies fictional discrepancies to base this specious accusation, yet fails to mention to the Court that Leader has attempted to put all of Facebook's concerns about Leader's privilege log to rest.

For example, on January 20, 2010, Facebook asked for an explanation regarding certain dates on Leader's privilege log. *See* Ex. 2. Shortly thereafter, Leader explained that the dates of the documents in question were based on the metadata, not the date shown on the face of the document. *See* Ex. 3. Around the same time, Facebook asked Leader to provide the attorney name and firm for 254 privilege log entries, and the name, job title, and relationship to Leader for 70 people. *See* Ex. 4. On February 5, 2010, Leader provided Facebook with a 17-page letter setting forth all of the information that Facebook asked for. *See* Ex. 5. Leader has bent over backwards to comply with Facebook's demands. Despite Leader's good faith efforts, Facebook has forced Leader to defend a frivolous motion without giving Leader a chance to resolve the dispute without Court intervention.

C. The Documents at Issue are Irrelevant Investment Documents

Facebook's most egregious acts are its misrepresentations to the Court. Namely, Facebook continues to represent that the documents it is seeking are "highly relevant" and "admissions." To be perfectly clear, the documents Facebook is seeking have absolutely no relevance to this case, will not lead to admissible evidence and the jury will never see them. The documents in question [redacted] to the extent such documents relate to the infringement, validity or enforceability of the '761 Patent, they have been produced or logged. [redacted] The same is true in this case, despite Facebook's outrageous accusation that documents have been purposefully destroyed. There is nothing in the record that even suggests that Leader has destroyed any documents in this case, and if Leader possessed any documents or communications that were relevant and non-privileged, they were produced to Facebook.

To date, Facebook has taken the deposition of [redacted] and unsurprisingly there has been no relevant or admissible evidence gleaned from these depositions. Facebook knows, or should know, that the opinions [redacted] is irrelevant and not admissible. Despite Facebook's abusive discovery tactics, Leader is willing to work with Facebook to satisfy any reasonable requests it may have. Thus, Leader suggests that the parties meet and confer in order to determine what additional information Facebook is actually seeking, and its basis for requesting the information, as it is not clear from Facebook's letter to the Court.[2] However, given Facebook's blatant refusal to comply with the rules, and its bad faith efforts, Leader should be reimbursed for the costs associated with having to defend this motion.

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[1] Facebook fails to mention that these communications occurred months before this litigation was commenced, or the fact that third-parties are not required to preserve documents until at least learning that a litigation has started.

[2] It is remarkable that Facebook asks "what did LTI do with all those documents" when it has represented to Leader and the Court that it has produced all relevant emails and technical documents in its 398 page production of technical documents.

D. Attorney Fees are Warranted for Defending this Frivolous Motion

The only way for Facebook's vexatious litigation strategy to end is if costs are awarded to Leader. Accordingly, Leader seeks costs for having to defend Facebook's frivolous motion to compel because (1) Facebook failed to meet and confer with Leader before filing its letter with the Court, (2) Leader has satisfied every request Facebook has made regarding Leader's privilege log, including providing explanations for 254 privilege log entries and 70 individuals, and (3) Facebook continuous to make numerous misrepresentations to the Court.

"It is inherent in the court's discretionary power to award attorneys' fees 'when a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *In re Elonex Phase II Power Mgmt. Litig.*, 279 F. Supp. 2d 521, 525 (D. Del. 2003), quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991). Moreover, under 28 U.S.C. § 1927, "[a]ny attorney ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." As set forth above, it is clear that Facebook acted, and continues to act in bad faith by ignoring the procedures set forth in the District of Delaware. Accordingly, Facebook should be ordered to pay Leader's costs for having to defend against Facebook's frivolous motion.

Therefore, Leader respectfully requests the Court to order Facebook to pay Leader $3,500 for having to defend this motion, which includes 7 hours of attorney time at the blended rate of $500 per hour.

Respectfully,

/s/ Philip A. Rovner

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PAR /mes/953112
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

Public Version: February 19, 2010

Exhibit 1

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Exhibit 2

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Exhibit 3

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Exhibit 4

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Exhibit 5

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