

IN THE UNITED STATES COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES, INC.,)	
a Delaware corporation,)	CIVIL ACTION
)	
Plaintiff,)	No. 1:08-cv-00862-JJF
)	
v.)	JURY TRIAL DEMANDED
)	
FACEBOOK, INC.,)	CONFIDENTIAL – FILED UNDER
a Delaware corporation,)	SEAL
)	PUBLIC VERSION
Defendant.)	

UNDER SEAL

FACEBOOK, INC.'S OBJECTIONS TO LEADER TECHNOLOGIES, INC.'S
OBJECTIONS TO THE MARCH 12, 2010 ORDER OF MAGISTRATE JUDGE STARK

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TABLE OF CONTENTS

	PAGE
I. STATEMENT OF NATURE AND STAGE OF THE PROCEEDINGS	1
II. SUMMARY OF ARGUMENT	1
III. STATEMENT OF FACTS	1
IV. ARGUMENT	2
A. Magistrate Judge Stark’s Ruling on the Common Interest Privilege Was Proper	2
B. Magistrate Judge Stark’s Ruling on the Further Production of Facebook’s Technical Documentation Was Also Correct	4
V. CONCLUSION.....	6

TABLE OF AUTHORITIES

	Page
Cases	
<i>Anderson v. City of Bessemer</i> , 470 U.S. 564 (1985).....	4
<i>Concrete Pip & Products, Inc. v. Construction Laborers Pension Trust</i> , 508 U.S. 602 (1993).....	4
<i>Corning, Inc. v. SRU Biosystems, LLC</i> , 223 F.R.D. 189 (D. Del. 2004).....	2
<i>Hewlett-Packard Co. v. Bausch & Lomb Inc.</i> , 115 F.R.D. 308 (N.D. Cal. 1987).....	3, 4
<i>Net2Phone, Inc. v. eBay, Inc.</i> , No. 06-2469, 2008 U.S. Dist. LEXIS 50451 (D.N.J. Jun. 26, 2008).....	2
<i>Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.</i> , 866 F.2d 228 (7 th Cir. 1988).....	4
<i>Teleglobe Comm'ns Corp. v. BCE, Inc.</i> , 493 F.3d 345 (3d Cir. 2007).....	3
<i>In re the Regents of the University of California</i> , 101 F.3d 1386 (Fed. Cir. 1996).....	2
Statutes	
Fed. R. Civ. P. 72(a).....	4

I. STATEMENT OF NATURE AND STAGE OF THE PROCEEDINGS

On November 19, 2008, Leader Technologies, Inc. ("LTI") filed its complaint against Facebook, Inc. ("Facebook"). Written discovery closed on November 20, 2009. D.I. 76 at 2. A Markman hearing was held on January 20, 2010, and a Markman ruling was issued by this Court on March 9, 2010. D.I. 281. Expert discovery is set to close on May 7, 2010. D.I. 311. Trial is set for June 28, 2010. D.I. 76 at 4.

II. SUMMARY OF ARGUMENT

Facebook respectfully submits that LTI's Objections to the March 12, 2010 Order of Magistrate Judge Stark (D.I. 309) should be rejected. In its Objections, LTI has cited *no law* to contradict the Order and therefore, almost by definition, has made no reasonable attempt to dispute its correctness. Instead, LTI appears to object to Magistrate Judge Stark's Order on the sole ground that it disagrees with the Order, which can not form a basis for overturning a magistrate judge's ruling under either the contrary to law or the clearly erroneous standards of review.

III. STATEMENT OF FACTS

On February 22, 2010, following numerous prior hearings, Magistrate Judge Stark ordered the parties to brief the issue of whether a common interest existed between LTI and companies that LTI had approached for litigation financing such that the attorney-client privilege was waived when LTI shared certain confidential documents with those companies. D.I. 248. Pursuant to this Order, LTI filed its Opening Brief on the matter on March 1, Facebook filed a Responsive Brief on March 8, and LTI filed its Reply Brief on March 10. D.I. 264, 273, 289.

On March 9, 2010, Facebook submitted to Magistrate Judge Stark a letter brief requesting that the Court order LTI to produce the source code for its Leader2Leader product. D.I. 282. On the same day, LTI submitted a letter brief requesting that Facebook be compelled to produce further technical documentation. D.I. 285. On March 10, both parties submitted reply letter briefs addressing the other party's arguments. D.I. 286, 288.

Magistrate Judge Stark held a hearing on March 12, 2010 to hear argument on all these issues, and on that same day, issued the Order to which LTI now objects.

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IV. ARGUMENT

A. Magistrate Judge Stark's Ruling on the Common Interest Privilege Was Proper

Magistrate Judge Stark's holding that no common interest privilege existed between LTI and the companies it approached for litigation financing is not contrary to the law. Quite the opposite, it is the result of well-reasoned analysis of all law cited by the parties in their briefing, as well as additional Third Circuit law not cited by the parties that was independently found and considered by Magistrate Judge Stark.¹

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Net2Phone, Inc. v. eBay, Inc., No. 06-2469, 2008 U.S. Dist. LEXIS 50451 (D.N.J. Jun. 26, 2008) (holding that the common interest privilege did not apply to communications between a patent owner and a company considering partnering with the patent owner for the purpose of enforcing the owner's patent portfolio); *Corning, Inc. v. SRU Biosystems, LLC*, 223 F.R.D. 189 (D. Del. 2004) (finding that common interests must be identical, not merely similar, and legal, not solely commercial in order to uphold privilege; holding that the common interest privilege did not apply to communications between one company and another, unrelated company from whom it was seeking financing); *In re the Regents of the University of California*, 101 F.3d 1386 (Fed.

¹ Findings reflecting the independent work of a magistrate judge are generally reviewed more favorably by the reviewing court. 9-52 Moore's Federal Practice - Civil § 52.31[9][c] (2010) (citing *Anderson v. City of Bessemer*, 470 U.S. 564, 572 (1985)).

Cir. 1996) (holding that parties sharing privileged information must have an identical legal interest in order to sustain the common interest privilege); *Teleglobe Comm'ns Corp. v. BCE, Inc.*, 493 F.3d 345 (3d Cir. 2007) (noting that parties must share at least a substantially similar legal interest in order to sustain the common interest privilege); and *Hewlett-Packard Co. v. Bausch & Lomb Inc.*, 115 F.R.D. 308 (N.D. Cal. 1987) (holding that a patent owner did not waive privilege by showing a privileged document to a non-party with whom it was negotiating sale of a part of its business). *See* D.I. 310 at 66:4 – 68:1.

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Above and beyond considering the law, however, Magistrate Judge Stark took into account the policy implications of his decision.

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Therefore, Magistrate Judge Stark's decision with regard to the common interest privilege was well thought-out and based on painstakingly thorough analyses of both case-law precedent and policy.

LTP's complaint with Magistrate Judge Stark's holding does not appear to be with his methods or analysis, but rather with the fact that he acknowledges that his decision was close, that it was discretionary, and that reasonable minds could differ. *See* D.I. 309 at 9, n. 5. However, the mere fact that a decision is close is not grounds for overturning it as contrary to law. All judges must face questions of law and, close or not, render their decisions; acknowledgment of such does not suffice to overturn these decisions.

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Therefore, Magistrate Judge Stark's Order regarding the common interest privilege was well-considered and reflects a correct application of the law. LTI has stated no reasonable grounds on which the Order should be set aside as contrary to the law. As such, LTI's Objections on this matter should be rejected.

B. Magistrate Judge Stark's Ruling on the Further Production of Facebook's Technical Documentation Was Also Correct

Magistrate Judge Stark's Order regarding the further production of Facebook's technical documentation was a non-dispositive ruling, and as such is subject to review under the "clearly erroneous" standard. Fed. R. Civ. P. 72(a). Under the clearly erroneous standard, the reviewing court must be convinced that the decision is more than just maybe or probably wrong: the magistrate judge's ruling must strike the reviewing court "as wrong with the force of a five-week-old, unrefrigerated dead fish." 9-52 Moore's Federal Practice – Civil § 52.31[1] (2010) (quoting *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988)) (internal quotations omitted). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985). See also, *Concrete Pip & Prods., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 623 (1993) ("clearly erroneous" standard is significantly deferential, requiring a 'definite and firm conviction that a mistake has been committed"). Under this rigorous standard,

Magistrate Judge Stark's Order regarding Facebook's technical document production should be upheld.

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In its Objections, LTI says that this ruling is clearly erroneous because it unduly prejudices LTI's ability to try its case. D.I. 309 at 5. However, LTI cites *no case law* to support either the proposition that discovery that may enable a party to "translate" its case to a jury should be granted, or the proposition that a magistrate judge's denial of such discovery should be overruled.

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As such, any complaint that LTI's case will be prejudiced by Magistrate Judge Stark's Order is contrary to both their prior argument to this Court and to the previous, uncontested findings of this Court.

Because LTI's sole argument against Magistrate Judge Stark's Order denying production of further Facebook technical documentation is both untrue and unfounded in law, and because LTI does not cite a single case in support of its Objections, these Objections should be rejected.

V. CONCLUSION

For the foregoing reasons, Facebook respectfully requests that the Court affirm Magistrate Judge Stark's Order denying the existence of a common interest privilege between LTI and the companies it approached for litigation financing and denying LTI's motion to compel further Facebook technical documentation.

Dated: April 9, 2010

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