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April 8, 2010

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BY E-FILE AND HAND DELIVERY

PUBLIC VERSION

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:

The facts surrounding Leader's March 9 production of NDAs, and the errata sheet provided by third party Jeffrey Lamb after his February 19 deposition undermine Facebook's attempt to strike evidence or re-open discovery. As more fully explained below, Facebook's request should be denied because Facebook was aware of the existence of these NDAs since at least April 2009, yet did not request them until February 2010. Moreover, these NDAs are not relevant to any claim or defense presented by Facebook in this action. Similarly, there is no legal basis for the requested relief regarding Mr. Lamb's errata sheet which clarifies his deposition responses.

A. Leader's March 9 Production of NDAs

Leader has an established business practice of obtaining an NDA from (1) all of its employees, (2) all actual and potential customers, investors, vendors and contractors, and (3) virtually all other individuals and entities with which it interacts. *See* Exhibit 1. Early in discovery, Leader produced hundreds of pages of documents to Facebook that discuss this NDA policy. *See* Exhibits 2-5 (exemplary documents produced to Facebook). Despite having knowledge of the existence of these NDAs since at least Leader's April 14, 2009 document production, Facebook never issued a document request or sent a letter to counsel seeking these types of NDAs. The document requests noted in Facebook's letter simply do not request these NDAs. Contrary to Facebook's assertion, Leader produced all documents responsive to the general requests that Facebook cites, including all documents that Facebook could have relied on for a public disclosure or on sale defense pursuant to 35 U.S.C. §102(b).¹ This included all

¹ Leader produced all documents responsive to Production Request No. 7 (validity of '761 Patent), Nos. 17-19 (any use of the patented invention), No. 21 (identity of actual or potential customers of the patented invention); No. 68 (conception, R&D and reduction to practice), Nos.

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communications with customers, contracts, and marketing material for Leader2Leader and anything that referred to the '761 Patent or the patented technology.

The NDAs at issue are not relevant to any claim or defense alleged by Facebook. To date, Facebook has not alleged that the '761 Patent is invalid due to the on-sale or public disclosure provisions of 35 U.S.C. §102(b). This is probably due to the fact that it knew that Leader had an established business practice of obtaining NDAs for any type of discussion it had with any third party. If Facebook had made such an allegation, however, the NDAs would only be relevant to Leader's defenses to such a claim, as opposed to Facebook's affirmative allegation of invalidity. Facebook's Answer alleged that the '761 patent is invalid under §102. *See* Exhibit 6. Leader served Facebook with interrogatories requesting the basis for this allegation. Facebook supplied several responses to these requests, setting forth a highly detailed explanation of its §102 invalidity allegations. Exhibits 7-10, Responses 4 and 18. None of these allegations involved on-sale, prior public disclosure, or any other §102 claim that would make the NDAs nominally relevant. There is no basis in fact that Leader failed to produce relevant documents or has an obligation to produce documents to support defenses against an unasserted claim.

Furthermore, the NDAs, such as those attached to its letter, especially the unsigned or draft NDAs are not responsive to Facebook's document requests, such as No. 75, that requests "[a]ll documents and communications relating to Leader2Leader which refer to the '761 patent or the alleged invention embodied in the '761 patent." *See* Facebook's letter at 2. These NDAs do not discuss Leader2Leader, the '761 patent, or the invention embodied in the '761 patent. Although this is just one example, the connections between the NDAs at issue and the 10 other document requests to which Facebook claims these NDAs are responsive are equally tenuous.

Leader produced in good faith all NDAs it could locate, including drafts and irrespective to whether they were ever sent to a third party, to Facebook on March 9 in response to Facebook's request for all NDAs at the February 23 deposition on Michael McKibben as a professional courtesy. Most NDAs were in connection with potentially investing in Leader. Leader previously produced all relevant NDAs and those ordered by the Court.² Facebook rejected Leader's offer during the meet and confer process to provide Facebook with an additional day of deposition with Mr. McKibben regarding the NDAs at issue. Despite ample opportunity to request Leader's NDAs, Facebook failed to do so. Now, after Leader provided them as a courtesy and in good faith, Facebook is attempting to delay trial by inventing a "controversy" late in the case.


B. Jeffrey Lamb's Deposition Errata

Facebook's attempt to have Your Honor intervene regarding the Lamb errata is so legally and factually flawed that there are numerous reasons for denying its request.

1. *This issue is an evidentiary issue, and not a discovery dispute.* Facebook is attempting to cast an evidentiary issue as a discovery dispute. Facebook's concern does not address whether

72-73 (marketing, promotion, and customers of Leader2Leader), No. 74 (testing of Leader2Leader and early adopters), Nos. 75 (communications regarding Leader2Leader that refer to the patented technology), and No. 77 (reasons customers purchase or chose to use Leader2Leader).

² Facebook's claim that 10 of the NDAs at issue are relevant to litigation financing is incorrect.



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Mr. Lamb's deposition will take place, where or when it will take place, or any other matter of discovery. Rather the concern relates to the quality and factual accuracy of Mr. Lamb's testimony - issues that are essentially evidentiary in nature and properly addressed by the trial court in a motion *in limine*.

2. *Facebook stipulated to Mr. Lamb's right to submit an errata to his testimony.* Mr. Lamb, a third party, was deposed pursuant to a subpoena issued by the Southern District of Ohio. See Exhibit 11. During deposition, Facebook's counsel and Mr. Lamb specifically agreed to permit changes and corrections to his transcript as follows:

Q. [REDACTED]

A. [REDACTED]

See Exhibit 12 at 6:25-7:5. To the extent Facebook claims Mr. Lamb's errata are substantive changes, Mr. Lamb did precisely what Facebook's counsel stipulated to. See Exhibit 13. Facebook is estopped from requesting any relief regarding Mr. Lamb's right to submit an errata.

3. *The Southern District of Ohio has jurisdiction over Mr. Lamb.* Mr. Lamb's deposition took place in Ohio pursuant to a subpoena issued by the Southern District of Ohio. Mr. Lamb has not agreed to another day of deposition, and Facebook has not proceeded with any motion to compel a second day of deposition from the Court in Ohio. Facebook's letter has no support for its assertion that this Court should strike part of a deposition that took place in a neighboring state, or that federal case law from Delaware is applicable to a procedural matter in Ohio. The proper location to bring a complaint about Mr. Lamb is in Ohio. See *DMS v. Trammochem*, 451 F.3d 89, 95 (2nd Cir. 2006)(New York cannot enforce or modify a subpoena issued on a Texas corporation).

4. *Mr. Lamb's errata did not change the substance of his testimony.* Rule 30(e) permits a deponent to make changes in the "form or substance" to a deposition transcript if the changes are done within 30 days and the deponent submits a signed "statement listing the changes and the reasons for making them. Fed. R. Civ. P. 30(e). Mr. Lamb's deposition took place in the Southern District of Ohio, a jurisdiction that allows a deponent to correct typographical or translation errors and substantively modify the testimony. See *United States v. Piqua Eng'g, Inc.*, 152 F.R.D. 565, 566-567 (S.D. Ohio 1993) ("under the Rule, changed deposition answers of any sort are permissible, even those which are contradictory or unconvincing, as long as the procedural requirements set forth in the Rule are also followed."); see also *Sauder Indus., Inc. v. The Carborundum Co. v. Alaska Interstate Co.*, 1980 WL 324461 at *4 (N.D. Ohio 1980). Thus, even if Mr. Lamb's errata changes were substantive in nature, such a change in an errata sheet would be permitted under Ohio law.

However, the analysis above is largely academic for the simple reason that Lamb's errata sheet changes are not substantive. A review of the errata and his reasons demonstrates that he only made minor permissible clarifications to his testimony and submitted a document stating the reason for each clarification. See Exhibit 14. [REDACTED]

[REDACTED] These changes are simply not substantive because they do not contradict or significantly alter the answers Mr. Lamb provided in his deposition. Furthermore, even under Delaware law, such clarifications are permitted.

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Respectfully,

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Enc.

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