

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES, INC., a Delaware corporation,
Plaintiff-Counterdefendant,
v.
FACEBOOK, INC., a Delaware corporation,
Defendant-Counterclaimant.

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) Civil Action No.08-862-JJF-LPS
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) **PUBLIC VERSION**
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**PLAINTIFF LEADER TECHNOLOGIES, INC.'S
RESPONSE TO DEFENDANT FACEBOOK INC.'S
OBJECTIONS TO MAGISTRATE JUDGE STARK'S APRIL 27, 2010 ORDER**

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I. STATEMENT OF THE NATURE AND STAGE OF THE PROCEEDINGS

Plaintiff Leader Technologies, Inc. ("Leader") filed a complaint on November 19, 2008, alleging Defendant Facebook, Inc.'s ("Facebook") willful infringement of U.S. Patent No. 7,139,761 (the "'761 Patent"). D.I. 1. Facebook filed its Answer and Counterclaims on January 8, 2009. D.I. 5. Pending is Facebook's motion to amend its Answer a second time to include a counterclaim and defense of inequitable conduct and to amend its false marking claim. D.I. 304. Discovery is closed. Several non-party depositions are pending. The parties have filed summary judgment motions, Daubert motions, and motions *in limine*. See D.I. 382-428. The Parties have prepared the proposed pre-trial order, exchanged deposition designations and objections thereto, prepared the jury instructions, prepared the special verdict form, and prepared their proposed voir dire. The trial date is June 28, 2010. D.I. 76 at 4.

Facebook filed objections to Magistrate Judge Stark's April 27, 2010 order ("Order") on May 11, 2010. D.I. 379. Facebook objects to Judge Stark's Order granting Facebook discovery in regard to six entities Facebook believes may be relevant to its case. *Id.* at 3. Facebook is requesting that the Court supersede Judge Stark's Order, re-open discovery at this late stage of the case, and stay the proceedings. *Id.* at 9. Leader files this response to Facebook's objections in order to clarify some of the positions Facebook has represented to the Court.

II. BACKGROUND

Facebook has filed objections to the Order pursuant to 28 U.S.C. § 636(b)(1)(A) and Federal Rules of Civil Procedure ("Fed. R. Civ. P.") 72(a).¹ *Id.* at 2. As such, the Court may examine the Order under a clearly erroneous or contrary to law standard of review. *Id.* While Facebook acknowledges this standard of review, it nonetheless appears to be seeking *de novo*

¹ Local Rule 72.1 (a)(2) authorizes the Magistrate Judge to hear and determine non-dispositive motions.

review and to expand the record before this Court. Facebook presents many arguments to this Court that were not argued before Judge Stark, [REDACTED]

[REDACTED] D.I. 380 at ¶¶12-

13. Facebook failed however to provide the following context.

The discovery dispute which is the subject of Facebook's objections is in regard to [REDACTED]

[REDACTED]

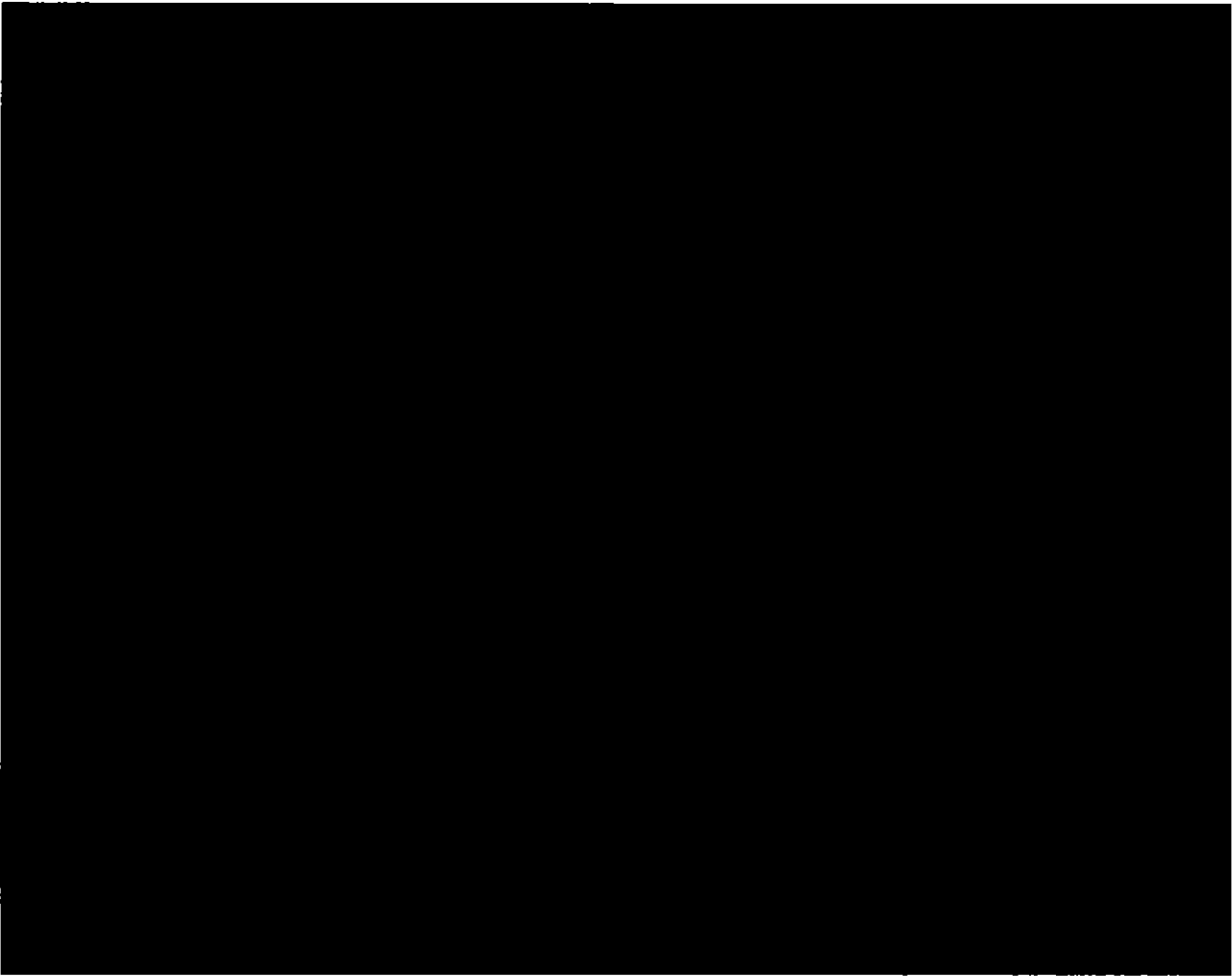
[REDACTED] In addition,

Facebook has had all of Leader's relevant documents that it is currently using to allege a 35 U.S.C. § 102(b) or inequitable conduct, on-sale or public display bar defense.³

A. Facebook's Mutually Exclusive Positions: §102(b) and False Marking

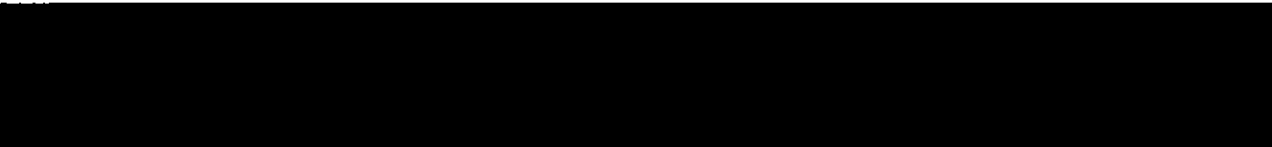
Leader identified the sole product currently covered by the '761 Patent as Leader2Leader ("L2L"). Declaration of Sean M. Boyle in Support of Leader's Response to Defendant Facebook's Objections to Magistrate Judge Stark's April 27, 2010 Order ("Boyle Decl."), ¶2, Ex.

[REDACTED]

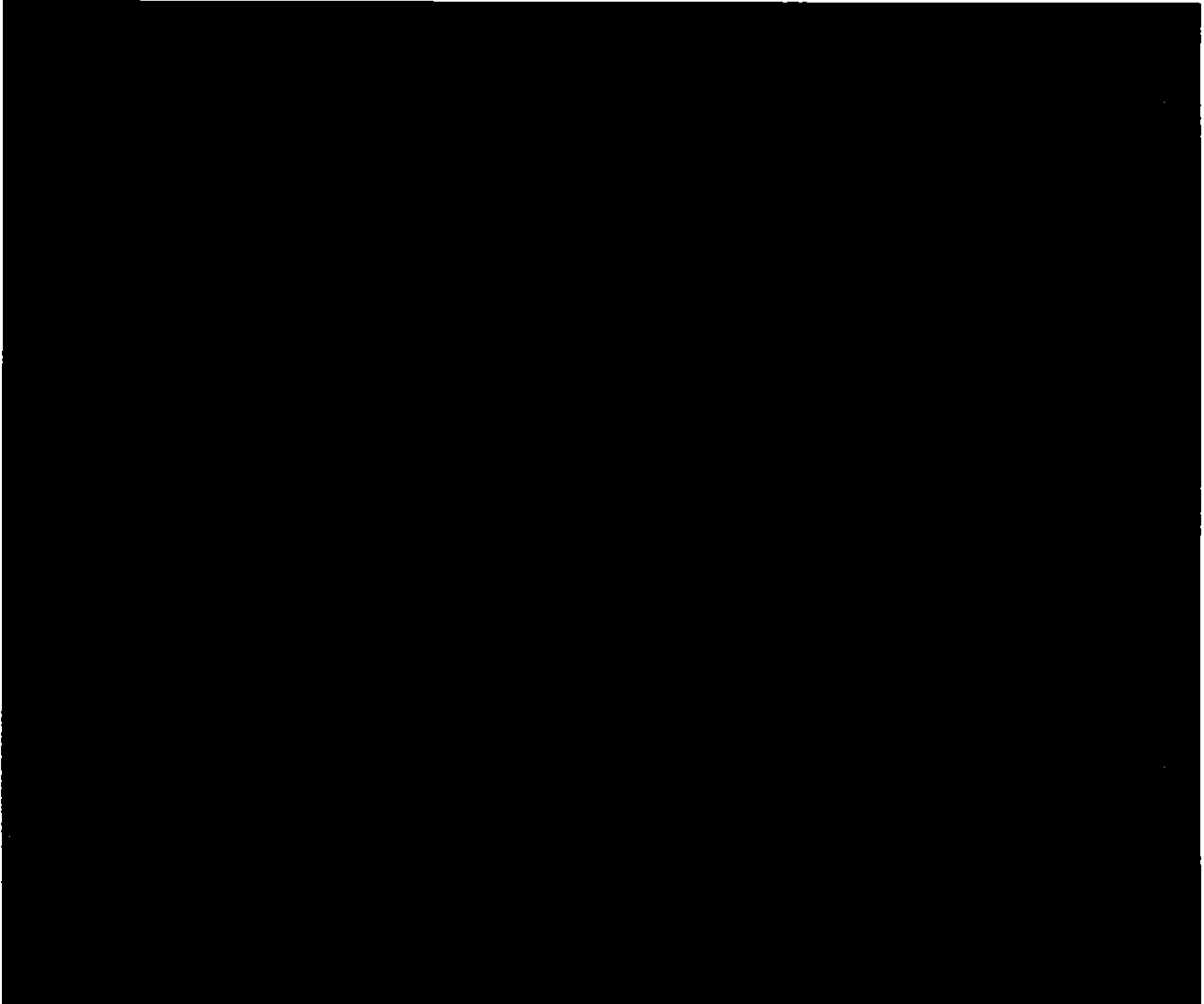


In spite of these irreconcilable positions (one of which Facebook has not attempted to explain or defend,) Judge Stark indulged argument on the matter two times, and each time granted relief to Facebook -- relief Facebook has yet to utilize.⁵ Boyle Decl., ¶4, Ex. 3 (04/27/10 Hearing Tr., at 38:15-20); *id.*, ¶5, Ex. 4 (04/09/10 Hearing Tr., at 23:3-11).

⁴ It is unclear how such positions are reconciled with Facebook's Rule 11 obligations.



B. Facebook's Contradictory Positions Regarding the NDAs



C. Facebook's Contradictory Positions on Staying the Case

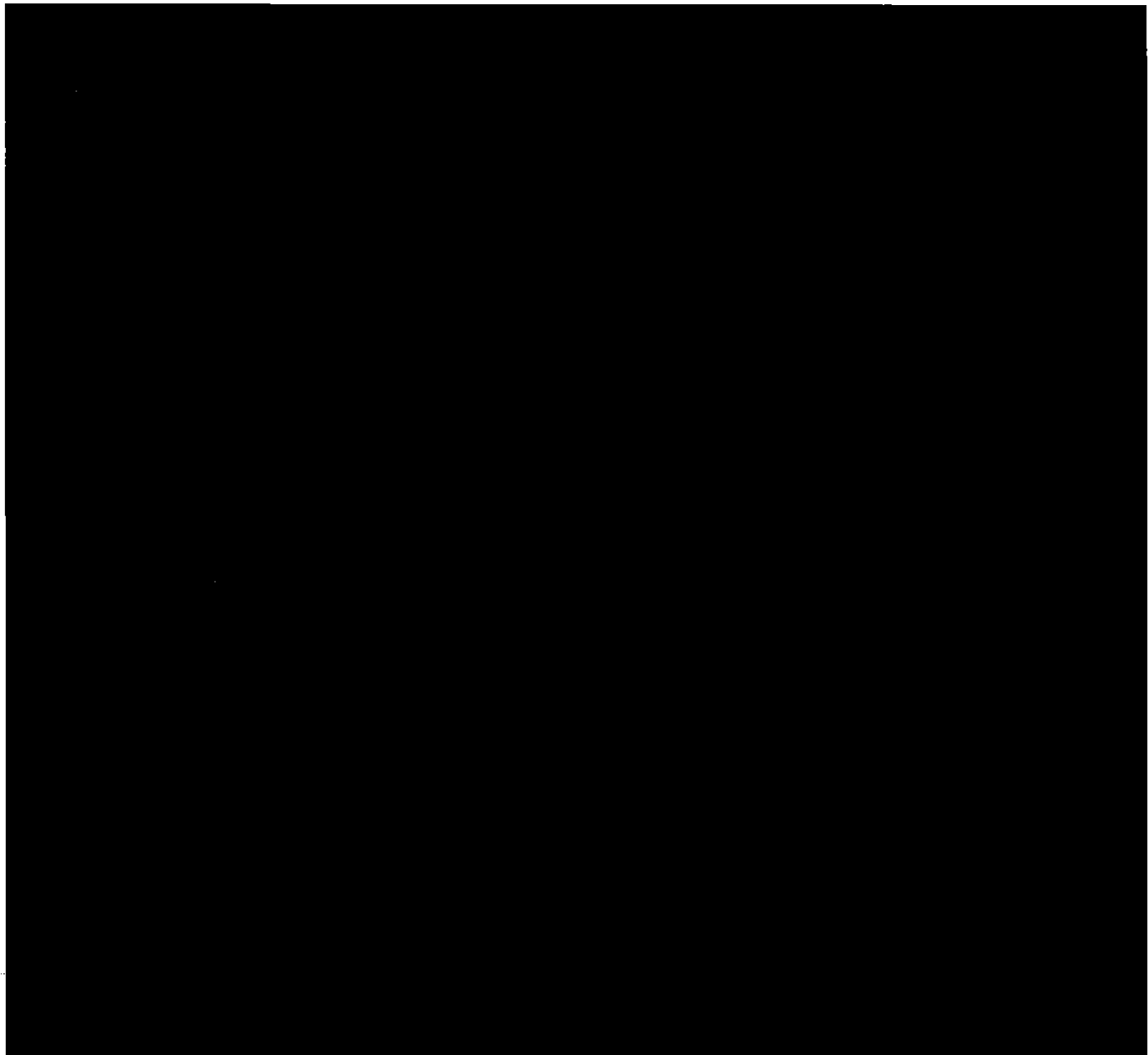
Facebook has had access to all of the underlying documents which may support its public disclosure and on-sale bar defenses for at least eight months, if not longer. D.I. 331 at 3.

Perhaps this is the reason that Facebook represented to the Court that allowing amendments to its Answer to include an inequitable conduct counter-claim and defense (based on alleged offers for sale and public disclosure) would not result in additional discovery, nor delay the proceedings.

D.I. 353 at 5. Facebook represented to the Court that it had all the information it required for its

inequitable conduct claim based on on-sale and public disclosure allegations. *Id.* at 2. Just four days later however, Facebook requested that Judge Stark stay the case and re-open discovery on these very same issues, albeit in the context of 35 U.S.C. 102(b). D.I. 365. There can be no doubt based on these contrary positions that Facebook is attempting to manipulate these proceedings.

III. STATEMENT OF FACTS



IV. ARGUMENT

A. Judge Stark's Denial of Re-opening Discovery and Staying the Case is Not Clearly Erroneous or Contrary to Law

Judge Stark's Order denying a re-opening of discovery and staying the case was a non-dispositive ruling, subject to review under the "clearly erroneous" or "contrary to law" standard. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a). To be sure, the standard is deferential. As one court artfully put it, the ruling should only be modified or rejected if it appears "as wrong with the force of a five-week-old, unrefrigerated dead fish." *Parts & Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir. 1988).

Judge Stark clearly articulated his reasoning as to why he would grant Facebook the relief of taking six depositions and allow document collection so close to trial. Facebook is not quite accurate when it states that Judge Stark's "sole reason for denying" what it terms as "full discovery" was Judge Stark's unwillingness to stay the case. D.I. 379 at 8. Judge Stark indicated that he had in fact read the letter briefs, and stated "part of what is going on is clearly Facebook believes that this trial should not take place" on June 28, 2010. Boyle Decl., ¶ 5, Ex. 4 at 4:6-10. Given the background information above, including the April 9, 2010 hearing, it is disingenuous for Facebook to imply that Judge Stark ruled off the cuff.

As is his normal practice, Judge Stark gave ample opportunity for Counsel to be heard. Indeed, Judge Stark often goes further. For example, this discovery issue was heard initially on April 9, 2010. [REDACTED]

[REDACTED] *Id.*, ¶ 5, Ex. 4 at 23:3-11. Judge Stark

indicated that based on this discovery, the Court would determine if further discovery was warranted. *Id.* at 8:23-9:9. Judge Stark also indicated that the Parties would have to “start meeting and conferring immediately....[to] get[] this additional discovery done as quickly and efficiently as possible...” *Id.* at 23:12-17. Thus Judge Stark clearly articulated his reasoning behind his Order -- to allow limited discovery to determine if further discovery was warranted.



Facebook appears to be arguing that it will suffer prejudice should the case not be stayed. Facebook relies on *Fisher* for the proposition that Judge Stark failed to consider the factor of prejudice to Facebook when denying its request to stay the case and re-open discovery. D.I. 379 at 8-9. The *Fisher* case is a criminal appellate case wherein a requested continuance based on the call for further psychiatric testing was denied by the trial court, leading to an appeal for a new trial. *United States v. Fisher*, 10 F.3d 115, 117 (3d Cir. 1993). In *Fisher*, the appellate court denied a request for a new trial based on the grounds that such a continuance would have antagonized “the efficient administration of justice.” *Id.* at 118. It is clear from Judge Stark’s Order that the Court is maintaining the trial date to efficiently administer justice in this case.

Facebook’s claim that it will suffer prejudice rings hollow in light of its failure to take advantage of the relief the Court has already granted -- failing to take even a single deposition in the time since the Order was given.



Boyle Decl., ¶5, Ex. 4 at 8:23-9:9. Thus,



any danger of prejudice was specifically examined and diffused by the Court. There is no ruling here that is contrary to law.

V. CONCLUSION

For the foregoing reasons, Judge Stark's Order is not clearly erroneous or contrary to law and Facebook's objections should be denied.

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CERTIFICATE OF SERVICE

I, Philip A. Rovner, hereby certify that on June 7, 2010, the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing(s) to the following; that the document was served on the following counsel as indicated; and that the document is available for viewing and downloading from CM/ECF.

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