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ESTTA Tracking number: **ESTTA284737**
Filing date: **05/18/2009**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92049206
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Date	05/18/2009
Attachments	Opposition to Motion to Compel.pdf (17 pages)(63327 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

THINK COMPUTER CORPORATION Petitioner, v. FACEBOOK, INC., Respondent.	Cancellation No. 92049206 Mark: FACEBOOK Reg. No. 3,122,052 Reg. Date: July 25, 2006

RESPONDENT FACEBOOK, INC.'S OPPOSITION TO PETITIONER'S MOTION TO COMPEL

I. INTRODUCTION

Bypassing the good faith cooperation requirements established by the Board, Petitioner Think Computer Corporation ("Think") has filed a motion to compel responses to nearly all of its hundreds of previously issued discovery requests. Apparently determined to burden the Board with a motion regardless of the outcome of any meet and confer efforts, Think filed this motion only one business day after informing Respondent Facebook, Inc. ("Facebook") of Think's specific complaints regarding Facebook's discovery responses. Think notified Facebook of many of the specific issues raised in this motion on Friday, April 24, in an e-mail sent just 19 minutes before a scheduled meet and confer call. During that call, counsel for Facebook explained that 19 minutes was insufficient to review and analyze with the client the numerous issues raised by Think. Rather than allowing counsel for Facebook time to consider its requests, Think took its dispute to the Board the following business day, Monday, April 27. Think's refusal to meet and confer in good faith means that the Board has now been asked to review and rule upon *hundreds* of discovery requests – precisely the situation the TBMP's rules regarding

cooperation of counsel were designed to avoid. For this reason alone, Think's motion should be denied.

Think's hasty motion is but the latest in a long string of bad faith attempts to increase the burden on Facebook associated with this litigation by expanding the scope of this case from the registrability of the FACEBOOK trademark to a dispute over whether Think's founder, Aaron Greenspan, should be credited with the success of Facebook's product. Indeed, a large number of the discovery requests included in Think's motion to compel have nothing to do with the trademark issues before the Board and some even cover topics that this Board has already ruled to be beyond the scope of this case. Think's discovery requests include numerous requests for information or documents with no bearing on trademark issues, such as requests for information regarding which individuals Facebook considers to be "founders" of the company, confidential documents relating to previously settled litigation unrelated to the FACEBOOK trademark, requests for documents relating to the alleged termination of a Facebook executive, requests to take the depositions of Facebook employees who were not employed at Facebook at the time Facebook selected or applied for the FACEBOOK mark and even a request for information regarding the Facebook CEO's undergraduate class enrolment. To the extent the Board considers ruling upon each of the hundreds of requests in Think's motion, the motion should be denied with respect to all requests that seek discovery on topics not relevant to the registrability of the FACEBOOK trademark.

Think's motion to compel responses to its Revised Interrogatories is further evidence of Think's bad faith efforts to increase the burden associated with defending this litigation. In asking this board to compel responses to all but one of Think's interrogatories, Think effectively concedes that its Revised Interrogatories, including subparts, constitute at least 142 separate interrogatories, well in excess of the Board's limit of 75. Notwithstanding this, Facebook has offered to stipulate to the very relief sought by Think so long as Think agrees that Facebook's partial responses do not constitute a waiver of Facebook's objection to Think's excessive interrogatories. Think has rejected this offer, which would allow Facebook 30 days to respond to

what Think has apparently chosen as its final set of interrogatories, in favor of seeking an order from the Board that Facebook provide such responses "immediately." Of course, had Think simply accepted Facebook's offer, Think would have had its responses long before the briefing on this motion could be completed. Think's choice to burden the Board with this motion rather than comply with Facebook's requests and the TBMP provisions regarding re-service of compliant interrogatories is yet another example of Think's refusal to cooperate in this litigation.

Finally, Think has failed to inform the Board that many of the parties' disputes regarding the scheduling of depositions have been resolved since the filing of its motion to compel. After Think filed its motion, the parties agreed to deposition dates for Facebook executives Mark Zuckerberg and Chamath Palihapitiya, both of whom are Facebook's corporate designees in the non-objectionable topics in Think's 30(b)(6) notice to Facebook. Think's motion is therefore moot with respect to these depositions. Moreover, Think's motion to compel production of Facebook employees Neville Bowers and Ami Vora should be denied because neither individual is a director, officer or managing agent of a party and Think has now issued subpoenas in an effort to secure attendance. While Facebook contends that Think's efforts to take these depositions is yet another attempt to harass Facebook and its employees, Think's issuance of subpoenas to both individuals means that the appropriate forum to litigate this dispute is the Northern District of California.

II. RELEVANT BACKGROUND

A. Think's Claims and The Relevant Scope of Discovery

Petitioner filed this cancellation action on April 15, 2008, seeking cancellation of the FACEBOOK mark on three bases: (1) priority of use; (2) genericness; and (3) fraud. The crux of Petitioner's claims stem from its founder Aaron Greenspan's claimed use of the term "facebook" in connection with a computer program called houseSYSTEM. April 15, 2008 Petition to Cancel ("Petition"). Mr. Greenspan claims that this program was used by certain Harvard University students starting in September of 2003. Petition ¶2. In its initial petition to cancel, Think

alleged that its prior use of the term "facebook" in connection with this online listing of names and faces prior to Respondent Facebook, Inc.'s February, 2004 launch constituted prior trademark use warranting cancellation of the FACEBOOK trademark. Petition ¶¶2-3. Alternatively, Think claimed that the term "facebook" is generic for "books of any format, whether paper or electronic, in which faces of students, employees or other individuals are displayed in a structured manner[]" and therefore subject to cancellation. *Id.* ¶12. Finally, Think's initial petition to cancel contained a boilerplate claim that Facebook obtained the registration at issue by fraud. *Id.* ¶15.

Facebook subsequently moved to dismiss Petitioner's fraud claim and Petitioner responded by filing an Amended Petition to Cancel ("Amended Petition"). The Amended Petition contained a litany of irrelevant and unsubstantiated attacks on the character of Facebook's founder and CEO Mark Zuckerberg, as well as former Facebook executive Sean Parker. *See, e..g.,* Amended Petition ¶¶19-20. The Board ultimately denied Facebook's motion to dismiss, finding that the facts alleged in the Amended Petition satisfied "albeit minimally," the pleading standards for fraud. September 24, 2008 Order on Motion to Dismiss at 12. However, the Board noted for the record that many of the allegations contained in the Amended Petition have no bearing on Think's fraud claims:

> The Board would be remiss, however, if it did not comment that at least some of the facts alleged by petitioner are not material to its fraud claim. For example, it is not material whether Sean Parker was a founder or a co-founder of respondent and it is not material that respondent successfully petitioned to make its application special for expedited consideration before the Examining Operation. Any statements made by respondent's representative at Stanford University are not material to a claim of fraud in the procurement of the registration. Respondent's asserted "history" of making false statements is not relevant. The allegation regarding Mr. Parker's purported substance abuse issues is not material to the fraud claim except to the limited extent such issues may have a bearing on

> respondent's intent at the time the declaration to the application was signed (February 18, 2005) and the application was filed (February 24, 2005).

Id. at 12-13.

B. Think's Discovery Requests to Facebook

In December 2008, Petitioner (acting *pro se* at the time) served interrogatories, requests for production and requests for admission on Respondent Facebook.[1] Amazingly, Petitioner's discovery sought information on several of the subjects the Board declared to be immaterial in its September 24, 2008 Order. For example, Request for Admission Nos. 53 through 57 asked Facebook to admit certain facts regarding the petition to make special, and Request No. 26 sought information regarding the status of certain Facebook employees as "co-founders" of the company. Declaration of Meagan McKinley-Ball in Support of Petitioner's Motion to Compel ("McKinley-Ball Decl.") Ex. J. Petitioner's requests also inexplicably contained requests for information regarding topics not expressly ruled upon by the Board in its September 24, 2008 Order but with no possible relevant connection to the trademark issues in dispute, such as Mark Zuckerberg's enrollment in a computer science class at Harvard (Request No. 39) and the circumstances surrounding a Facebook executive's alleged termination (Interrogatory No. 50). *Id*.

Facebook did not respond to Think's initial Interrogatories and instead issued a general objection on the ground that Petitioner's Interrogatories, as numbered by Petitioner, exceeded the TTAB limit of 75. McKinley-Ball Decl. Ex. E. Petitioner subsequently served a set of Revised Interrogatories, which also exceeded the 75 interrogatory limit. *Id*. Ex. F.

Facebook timely responded to Petitioner's Requests for Admission and Requests for Production of Documents, commencing its rolling production of documents on March 20, 2009[2]

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[1] In violation of 37 C.F.R. §2.120(a)(3), Petitioner served these discovery requests prior to service of its Rule 26 initial disclosures.

[2] Think's claim that Facebook "induced" Think's counsel to travel to Facebook counsel's Palo Alto offices to inspect a small number documents is meritless. Facebook's March 20 document production e-mail to Think notified Think of both the volume of Facebook's production and offered to allow Think to send a copy service for the

and subsequently producing more than 6,000 pages in four separate productions. Declaration of Jeffrey T. Norberg in Support of Respondent's Opposition to Motion to Compel ("Norberg Decl.") ¶6 & Exs. 5, 11, 22, 24. The majority of Facebook's responsive documents have now been produced, and Facebook anticipates completing its production within the discovery deadlines established by the Board.

C. Think's Failure to Meet and Confer in Good Faith

On March 12, more than a week before Facebook's responses to Think's Revised Interrogatories were due, Facebook notified Mr. Greenspan by letter that the Revised Interrogatories exceeded the limit of 75 and, pursuant to TBMP §405.03(e), offered to allow Think to withdraw its excessive interrogatories and serve a further revised set. Norberg Decl. Exs. 1, 3. Think refused this offer and, on March 20, Facebook timely served another general objection. *Id*. Exs. 2, 4, 6.

On April 1, 2009, Think's counsel appeared for the first time in the matter and sent Facebook a terse letter demanding that Facebook provide "at once," among other things, deposition dates for Facebook's executives. *Id*. Ex. 7. Think's April 1 letter also demanded for the first time deposition dates for two Facebook employees, Ami Vora and Neville Bowers, neither of whom is a director, officer or managing agent of Facebook and neither of whom were employed at Facebook at the time Facebook selected or applied for the mark at issue. *Id*. Exs. 26, 27.

The parties subsequently exchanged several letters and, on April 16, counsel for Think requested a meet and confer call to discuss Facebook's responses to Think's Requests for Admission and Requests for Production. *Id*. Exs. 8-12. The parties ultimately scheduled a meet and confer session to occur on Friday, April 24 and Facebook twice requested that Think identify the topics it wished to discuss in advance of the call, so as to make the call as productive as possible for the parties. *Id*. Exs. 13, 14.

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documents rather than come in to inspect them. Norberg Decl. Ex. 5.

On April 24 at 11:41 a.m., just 19 minutes prior to the meet and confer call, counsel for Think sent Facebook for the first time identifying a lengthy list of discovery requests that Think wished to discuss. *Id.* ¶4 & Ex. 14. During the call, the parties discussed a number of issues, including the propriety of the Bowers and Vora depositions, scheduling the Zuckerberg, Palihapitiya and Facebook 30(b)(6) depositions, Facebook's 30(b)(6) designees, and Facebook's objection to Think's Revised Interrogatories. *Id.* ¶¶4, 5. Also during the call, counsel for Facebook noted that he needed to confer with his client regarding the issues raised in Think's e-mail and agreed to respond to Think after conferring with the client. *Id.* The call ended with Think agreeing to provide certain discovery information to Facebook by the following Monday and Facebook agreeing to further confer regarding Think's document requests and requests for admission after discussing the issues with the client. *Id.*

On April 27, just one business day after the parties' meet and confer call, and with no advance notice to Facebook, Think filed this motion to compel.

III. ARGUMENT

A. Think's Motion to Compel Responses to Requests for Production and Test the Sufficiency of Facebook's Responses to Requests for Admission Should be Denied.

1. Think has not Made a Good Faith Effort to Resolve the Issues as Required by TBMP §§523.02 and 524.02.

Think first raised its specific complaints regarding Facebook's responses to Think's Requests for Production and Requests for Admission in an e-mail to Facebook's counsel just 19 minutes prior to a scheduled meet and confer call. Norberg Decl. ¶4 & Ex. 14. During the call, counsel for Facebook advised counsel for Think that the intervening 19 minutes was not enough time to research the particular discovery items that Think had deemed deficient, or to discuss the matter with the client, but that Facebook would consider Think's e-mail and respond shortly. *Id.* Rather than allowing counsel time to investigate the specific complaints or to confer with his client, Think filed its motion to compel just one business day after the April 24 meet and confer. Think's filing of its motion just one day after notifying Facebook of the alleged deficiencies

violates not only the requirement that Think make a good faith effort to resolve its disputes informally prior to bringing a motion to compel (TBMP §§523.02 and 524.02), it also runs contrary to the Board's admonition that the parties cooperate in discovery matters. TBMP §408.01.[3] Because Think has failed to make a reasonable effort to resolve these issues via the meet and confer process, the Board is now forced to deal with a motion to compel responses to *more than a hundred* discovery requests to which Facebook has timely responded. The rules requiring cooperation of counsel and good faith meet and confer efforts were adopted to prevent precisely this type of motion. *See, e.g., Sentrol, Inc. v. Sentex Systems, Inc.*, 231 U.S.P.Q. 666, 667 (T.T.A.B. 1986) ("Inasmuch as the Board has neither the time nor the personnel to handle motions to compel involving substantial numbers of requests for discovery which require tedious examination, it is generally the policy of the Board to intervene in disputes concerning discovery, by determining motions to compel, only where it is clear that the parties have in fact followed the aforesaid process and have narrowed the amount of disputed requests for discovery, if any, down to a reasonable number.").

Facebook remains willing to meet and confer with counsel for Think regarding these matters notwithstanding Think's premature motion. Indeed, since learning of Think's complaints via its motion to compel, Facebook has voluntarily supplemented its responses to Think's Document Requests and Requests for Admission. Norberg Decl. Exs. 29, 30. However, because Think has failed to comply with the good faith meet and confer requirements that are required prior to brining a motion to compel, Think's motion to compel should be denied with respect to Think's Requests for Production and Requests for Admission.

2. Think's Requests for Production.

In its motion, Think requests that the Board order Facebook to produce documents that it has already agreed to produce. Moreover, neither Facebook nor Think has completed its

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[3] Think's refusal to allow Facebook time to confer with its counsel regarding Think's complaints is emblematic of a generally accusatory and non-cooperative tone employed by counsel for Think since it first appeared in this matter less than a month prior to filing its motion to compel. *See* Norberg Decl. Exs. 7-14.

document production in this matter. *Id.* ¶6 & Ex. 19. Yet, Think is apparently dissatisfied with the pace of Facebook's production, and now demands that the Board order Facebook to "immediately" produce all responsive documents. Facebook has now produced more than 6,000 pages of documents that represent a substantial majority of responsive documents in its possession, custody or control. *Id.* Facebook is continuing to gather and produce responsive documents and anticipates that its production will soon be substantially complete. Think's motion to compel production of the documents Facebook has previously agreed to produce should therefore be denied as premature.

Think's motion also seeks production of documents responsive to requests to which Facebook has objected. As discussed above, Think has refused to meet and confer regarding these requests and Facebook therefore has only the benefit of Think's motion to compel from which to discern Think's complaints. Many of these requests seek documents that have no relevance to the trademark issues in dispute in these proceedings. For example:

- Document Request No. 39 inexplicably seeks documents relating to Mr. Zuckerberg's enrollment in a computer science class at Harvard. Mr. Zuckerberg's classes at Harvard bear no relationship to any of the trademark issues before the Board.[4]
- Request Nos. 41 and 46 seek documents and entire hard drives relating to the litigation between Facebook and ConnectU. The ConnectU litigation involved claims regarding ownership of the Facebook product and did not involve the FACEBOOK trademark. Think's efforts to take discovery regarding the claims in the ConnectU matter are a prime example of Think's efforts to harass Facebook by broadening the scope of the litigation to encompass irrelevant issues regarding the founding of the company.

[4] Think has produced in its own document production numerous documents on this and other irrelevant topics, including Mr. Zuckerberg's application to Harvard, a photograph of Mr. Greenspan with his parents at his graduation and even photographs of Mr. Greenspan as a child. *See* Norberg Decl. ¶7 & Ex. 25.

- Request No. 32 seeks production of unmodified digital copies of the Facebook home page and "about" pages of all versions of Facebook's website. Facebook has already produced printouts of its website showing how the FACEBOOK mark has historically been used. The digital coding underlying those printouts is not necessary to prove Facebook's use of the FACEBOOK mark, and has no relevance the trademark issues in this matter.

None of these requests have even remote relevance to the trademark issues before the Board. Think's motion should therefore be denied with respect to these requests.

The remainder of the request to which Facebook has objected (11, 15, 16, 21, 23, 24, 27, 28, 29, 31, 32, 36, 39, 41, 43, 44, 46 and 47) either seek documents that are duplicative of documents already requested by Think in other requests, or seek documents that are not within Facebook's possession, custody or control. Having now had an opportunity to review Think's complaints regarding these particular requests, Facebook has now served supplemental responses to Request Nos. 11, 15, 16, 21, 23, 24, 27, 28, 43 and 44. Norberg Decl. Ex. 30. Think's motion to compel responses to these requests should therefore be denied as moot. The remainder of the Requests (29, 31, 32, 36, 39, 41, 46 and 47) seek information that is not relevant to these trademark proceedings.

3. Facebook's Responses to Think's Requests for Admission

Think's Requests for Admission seek admissions on a broad range of topics – both controversial and irrelevant – rather than those topics which are non-controversial and designed to streamline the determination of issues at trial. *See* TBMP §407.02. These requests also seek admissions regarding the activities of third-parties and individuals or institutions that are not affiliated with Facebook in any significant way, such as Stanford University. *See, e.g.,* Request No. 12. Think issued these Requests for Admission early in the case, before either party had produced any documents or responded to any interrogatories. In light of this, it should not have come as a surprise to Think that many of Facebook's responses to requests seeking admissions

regarding information in the possession of third-parties contained a statement that Facebook lacked information sufficient to admit or deny the request and, on that basis denied the request.

Think's chief complaint regarding Facebook's denials on the basis of lack of information appears to be that Facebook has not included a statement that it has made a reasonable inquiry into each matter and has still been unable to provide a response. This is misleading. Facebook stated in its first general response to these requests that "Facebook's response . . . [was] made to the best of Facebook's present knowledge, information and belief." McKinley-Ball Decl. Ex. K at 1-2. Of course, at the time of its responses, Facebook made a reasonable inquiry of all information within its possession custody or control, and, had Think made an effort to meet and confer on the subject, Facebook would have agreed to provide supplemental responses including this statement. Facebook has now submitted supplemental responses stating that Facebook has made a reasonable inquiry; Think's complaints with respect to this issue are therefore moot. Norberg Decl. Ex. 29.

Think's motion to compel responses to Requests that seek information not relevant to these trademark proceedings (20-26, 28-30, 46 and 51-57) should also be denied. Think's motion incorrectly rests on the premise that the discoverability limitations of Rule 26 do not apply to Requests for Admission. Fed. R. Civ. Proc 36(a)(1) (Rule 26(b)(1) governs scope of permissible requests for admission). As with Think's interrogatories and deposition requests, discussed below, many of Think's Requests for Admission seek admissions on topics that have no relevance to the trademark issues in these proceedings, including topics expressly held to be immaterial in the Board's September 24, 2008 Order. However, having now had an opportunity to review Think's complaints, Facebook has served supplemental responses to Think's Request Nos. 20-25, rendering its motion moot with respect to those requests. The remaining Requests – Nos. 26, 28-30, 46 and 51-57, all seek information not relevant to these proceedings and Think's motion should therefore be denied.

B. Think's Interrogatories

Think's motion to compel responses to its interrogatories should be denied because Think's interrogatories, including subparts, constitute more than 75 interrogatories in violation of TBMP §405.03(d). Think's Interrogatory No. 1 asks "For each of Petitioner's First Set of Requests for Admission denied by Respondent, state in reasonable detail the basis for such denial." Because Facebook has denied 76 of Petitioner's Requests for Admission, this interrogatory alone includes 76 separate subparts and therefore violates the 75 interrogatory limit set by TBMP §405.03(d). *See, e.g., Safeco of Am. v. Rawstron*, 181 F.R.D. 441, 445 (C.D. Cal. 1998); *McConnell v. PacifiCorp, Inc.*, 2008 WL 3843003 (N.D. Cal., Aug. 15, 2008). Moreover, several of Think's remaining Interrogatories contain separately numbered subparts, each of which should be counted by the Board as a separate interrogatory. *See* TBMP §405.03(d) ("If an interrogatory includes questions set forth as numbered or lettered subparts, each separately designated subpart will be counted by the Board as a separate interrogatory. The propounding party will, to that extent, be bound by its own numbering system . . ."). Thus, Think's Revised Interrogatories constitute at least 142 separate interrogatories, including sub-parts (76 subparts for Interrogatory No. 1 and 66 subparts for interrogatories 2 through 48, counting all separately lettered or numbered subparts). Facebook's general objection should therefore be sustained.

In support of its claim that Interrogatory No. 1 constitutes only a single interrogatory, Think cites the very case upon which Facebook relied in its general objection: *Safeco of Am. v. Rawstron*, 181 F.R.D. 441. Think cites this case in support of the proposition that "a single question asking for multiple pieces of information relating to the same topic counts as one interrogatory." Motion at 11. While the *Safeco* case does posit that it may be possible for several requests for admission to encompass a single subject matter, Think has made no such showing here. Nor could Think make such a showing because Think's Requests for Admission cover a broad range of subject matters, including, for example, priority of use (Request No. 3), the appearance of the parties' respective claimed marks (Request No. 4), the ConnectU matters (Request No. 28), the functionality of Facebook's product (Request No. 38), an alleged meeting

between Mr. Greenspan and others (Request No. 44), and the fame of the FACEBOOK mark (Request No. 62).

Apparently anticipating that the Board will rule against it regarding its counting method for Revised Interrogatory No. 1, Think's motion requests that Facebook be ordered to respond only to Revised Interrogatory Nos. 2 through 48. This ignores the provision of TBMP §405.03(d), which states that the Board will normally order a party who has served excessive interrogatories to serve a new set, in compliance with the appropriate limit. Consistent with the Board's strong recommendation that the parties agree to service of a new set of interrogatories rather than bringing disputes to the Board (TBMP §405.03(e)), Facebook has repeatedly requested that Think serve a compliant revised set. Think has refused these requests. Norberg Decl. Exs. 1-4, 8-10, 15.

Facebook has also offered to provide appropriate objections and responses to Revised Interrogatory Nos. 2 through 48 so long as Think agrees that doing so would not constitute a waiver of Facebook's objection to the excessive numbers of the original set. Norberg Decl. Ex. 15; *see also* TBMP §405.03(e). Think never responded to this offer and instead chose to file this motion to compel, complaining in its motion that Facebook's offer would allow Facebook an "additional" 30 days to respond to Think's request. Given that Think has now served what amount to hundreds of interrogatories, including subparts, in two separate discovery devices, it is not unreasonable for Facebook to insist upon the full 30 days to research and respond to the as yet unknown set of further revised interrogatories Think may choose to serve. Of course, had Think simply served a compliant set of revised interrogatories in March when Facebook initially offered this solution, Think would have had its responses a month ago.

C. Depositions

1. Think's Motion is Moot With Respect to Mark Zuckerberg, Chamath Palihapitiya and Most Rule 30(b)(6) Topics.

Subsequent to the filing of its motion, the parties were able to agree upon appropriate deposition dates for Facebook executives Mark Zuckerberg and Chamath Palihapitiya. Norberg

Decl. Exs. 18, 20. Think's motion to compel these individuals' depositions should therefore be denied as moot.

Think's motion to compel Facebook to produce its 30(b)(6) witnesses should also be denied. On April 24, 2009, before Think filed the present motion, Facebook designated Mr. Zuckerberg as its 30(b)(6) witness on topics 4 and 19 and Mr. Palihapitiya as the Facebook designee on topics 5 through 14, 16 and 20. Because the dates for both of these depositions have now been set, Think's motion should be denied with respect to these topics.

Think's motion should be denied with respect to the remaining 30(b)(6) topics because Think made no effort to meet and confer regarding these topics prior to filing its motion. Facebook served objections to each of these topics on April 24, 2009. Think did not make any effort to meet and confer regarding those objections, instead choosing to file the present motion and then later sent a cryptic letter that ignored Facebook's objections and demanded that Facebook produce a witness in response to numerous topics numbers, including several topic numbers – one through three – that do not exist in Think's notice. Norberg Decl. Ex. 20. Facebook is willing to meet and confer with Think regarding the remaining topics, even though many of the topics seek information regarding issues that are not relevant to this trademark action, such as the various ConnectU actions. Because Think failed to meet and confer on this issue, and because the remaining topics seek non-discoverable information, Think's motion should be denied.

2. The Board Should Deny Think's Request for the Depositions of Ami Vora and Neville Bowers.

Ignoring the requirements of the Federal Rules, Think seeks an order compelling Facebook to produce for deposition two employees – Ami Vora and Neville Bowers – who are not directors, officers or managing agents of Facebook. TBMP §404.03(a)(1); Norberg Decl. Exs. 27, 28. Facebook has notified Think that, at a minimum, a subpoena will be required to compel both of these non-parties to testify and counsel has offered to accept service of subpoenas to avoid the need for personal service. Norberg Decl. Ex. 18. Think served

subpoenas on counsel for Facebook on May 15, 2009. *Id*. Ex. 23. On this basis alone, Think's motion to compel should be denied. TBMP §404.03(a)(2) ("If a person named in a subpoena compelling attendance at a discovery deposition fails to attend the deposition, or refuses to answer a question propounded at the deposition, the deposing party must seek enforcement from the United States District Court that issued the subpoena; the Board has no jurisdiction over such depositions").

Moreover, Think has failed to articulate any reason that either of these Facebook employees is likely to have discoverable information that it cannot obtain from the parties. Both Mr. Bowers and Ms. Vora began working for Facebook in 2007 – long after Facebook began using its mark and filed the declarations at issue in Think's fraud claim. Norberg Decl. Exs. 27, 28. Neither employee was involved with the formation of Facebook and its first use of the FACEBOOK mark. While both employees attended Harvard, neither was involved in the creation of houseSYSTEM, or any components thereof. Indeed, Ms. Vora graduated in the Spring of 2003, before Think claims to have first used its alleged marks on the Harvard campus in September of 2003. Norberg Decl. Ex. 28. Absent any explanation of the relevance of these individuals' potential testimony, Think's deposition notices appear to be little more than an attempt to harass Facebook's employees and increase the costs of this litigation.[5] For this additional reason, Think's motion to compel the testimony of Mr. Bowers and Ms. Vora should be denied.

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[5] At the end of the day on May 15, 2009, one business day prior to the deadline to file this Opposition, Think sent a letter for the first time explaining its belief that Ms. Vora witnessed alleged use of what Think calls "facebooks" on the Harvard campus and that Mr. Bowers was a member of the TECH Student Association, the apparent precursor to the student organization that published houseSYSTEM. Norberg Decl. Ex. 23. These new claims do not establish that Mr. Bowers or Ms. Vora have any knowledge of relevant facts that cannot be obtained via former Harvard students who are also parties to the litigation.

IV. CONCLUSION

For the foregoing reasons, Think's Motion to Compel should be denied.

Dated: May 18, 2009

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Facebook Inc.'s Opposition to Petitioner's Motion to Compel and the Declaration of Jeffrey T. Norberg in Support thereof was served by electronic mail on the following part(ies):

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Date: May 18, 2009

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