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 13 Third-Party Defendant and Counterclaimant FOX AUDIENCE NETWORK, INC.

14 **UNITED STATES DISTRICT COURT**
 15 **NORTHERN DISTRICT OF CALIFORNIA**

16 MYSPACE, INC.,
 17 Plaintiff,

18 vs.

19 GRAPHON CORPORATION,
 20 Defendant

Case No. C 10-00604 EDL
Case No. C 10-01156 EDL
Consolidated Actions

21 CRAIGSLIST, INC.,
 22 Plaintiff

23 vs.

24 GRAPHON CORPORATION,
 25 Defendant

JOINT MOTION FOR FINAL
JUDGMENT UNDER RULE 54(B) AND
STAY OF CASE ACTIVITY
AND ORDER THEREON

26 **AND RELATED COUNTERCLAIMS**

27
 28 **JOINT MOTION FOR FINAL JUDGMENT UNDER RULE 54(B) AND STAY OF CASE ACTIVITY, Case Nos.**
C 10-00604 & C 10-01156

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TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that all parties to this action hereby jointly move for entry of partial judgment under Federal Rule of Civil Procedure 54(b) and a stay of case activity pending resolution of any appeal by Defendant GraphOn Corporation. The parties have filed the following documents in support of this Motion:

1. Memorandum of Points and Authorities;
2. Proposed Order.

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF JOINT MOTION**
2 **FOR FINAL JUDGMENT AND STAY OF CASE ACTIVITY**

3 Pursuant to Federal Rule of Civil Procedure 54(b), the parties jointly move for
4 entry of partial final judgment under Rule 54(b), and a stay of case activity pending the
5 resolution of any appeal by GraphOn Corporation.

6 Plaintiffs brought these declaratory judgment actions, asserting claims for
7 declaratory judgment that the asserted patents (U.S. Patents Nos. 6,324,538, 6,850,940,
8 7,028,034, and 7,269,591) were (1) invalid; (2) unenforceable; and (3) not infringed. On May
9 24, 2010, Plaintiffs MySpace and craigslist, and third-party defendant Fox Audience Network
10 (FAN), moved for an early hearing on inequitable conduct, which the Court granted (Dkt.
11 No.71). The hearing is currently scheduled for March 17, 2010, with substantial activity,
12 including fact and expert discovery, and pretrial preparation and briefing, to occur before the
13 hearing.

14 On May 26, 2010, MySpace and FAN moved for summary judgment of invalidity
15 of all claims of all four patents. On May 28, 2010, craigslist joined in MySpace and FAN's
16 summary judgment motion. On November 23, 2010, the Court granted the two motions in full,
17 ruling that all claims of all of the asserted patents are invalid as anticipated and/or obvious. (Dkt.
18 No. 111.) As a result of the Order, there is no longer any risk of a finding of infringement, as
19 there can be no infringement of an invalid patent. However, the Plaintiffs' inequitable conduct
20 claims remain pending.

21 The parties have met and conferred in the wake of the Court's summary judgment
22 order in an effort to determine the best way forward. Three key points have emerged. First, the
23 parties are unlikely to resolve their differences without an appeal of the summary judgment
24 order. Second, further proceedings may prove unnecessary or be greatly abbreviated if the
25 judgment is affirmed. Third, preparing for and adjudicating the inequitable conduct hearing will
26 require a substantial investment of resources by the Court and the parties. For these reasons, the
27 parties believe that judicial economy would be best served if GraphOn were permitted to take an
28 appeal regarding the finding of invalidity now, rather than litigating the inequitable conduct

1 claims to completion.¹ To be clear, the parties believe that if the Court’s judgment is affirmed,
 2 the case will be over or all but over; if the Court’s judgment is reversed, there will be no
 3 prejudice from the time taken for the appeal.

4 Federal Rule of Civil Procedure 54(b) is designed for precisely this kind of
 5 situation, providing:

6 When an action presents more than one claim for relief — whether as a claim,
 7 counterclaim, crossclaim, or third-party claim — or when multiple parties are
 8 involved, *the court may direct entry of a final judgment as to one or more, but
 fewer than all, claims or parties only if the court expressly determines that there is
 no just reason for delay.*

9 (Emphasis added.) “A properly entered Rule 54(b) judgment is a ‘final’ appealable judgment for
 10 purposes of 28 U.S.C. § 1291.” *SEC v. Platforms Wireless Int’l Corp.*, 617 F.3d 1072, 1084 (9th
 11 Cir. 2010). The principal factor the Court must consider — once it concludes that there has been
 12 “an ultimate disposition of an individual claim entered in the course of a multiple claims action,”
 13 *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1992)² — is “the interrelationship of the
 14 claims so as to prevent piecemeal appeals.” *Platforms Wireless*, 617 F.3d at 1084.

15 Here, there is very little interrelationship between the invalidity claims that have
 16 been adjudicated and the inequitable conduct claims that remain. The invalidity claims related to
 17 the comparison of the asserted patent claims, as construed, to the features of the Mother of All
 18 Bulletin Boards prior art reference. The inequitable conduct claims relate to the conduct of the
 19 prosecution of the patents-in-suit. The factual and legal analyses are almost entirely distinct.
 20 Should the inequitable conduct claims ultimately end up before the Federal Circuit, there would

21
 22 ¹ GraphOn believes that Plaintiffs’ inequitable conduct claims are mooted by the Court’s grant of
 23 summary judgment on all patents’ claims, and reserves the right to move accordingly if its appeal
 is unsuccessful. Plaintiffs disagree with this assertion, but for the reasons stated herein, believe
 that the entry of partial final judgment under Rule 54(b) is appropriate in this case.

24 ² It is clear that the Court’s summary judgment order adjudicated a full claim for relief —
 25 invalidity was set out as a separate claim for relief in each of the Plaintiffs’ complaints. (Dkt.
 26 Nos. 1 (MySpace’s Complaint), 29 (FAN’s Counterclaims), & 63 (craigslist’s Second Amended
 27 Complaint.) Furthermore, the Court’s summary judgment order fully adjudicated GraphOn’s
 counterclaim of infringement against MySpace and craigslist and its claim of infringement
 28 against FAN.

1 therefore be little duplication of effort between the two appeals. Thus, “there is no just reason
2 for delay” of an appeal in this matter, and a partial final judgment under Rule 54(b) is
3 appropriate.

4 Consistent with the judicial economy that is promoted by the entry of such a
5 judgment, the parties propose that the Court stay all case activity and indefinitely extend all case
6 deadlines (including the inequitable conduct hearing date and all associated pre-hearing
7 deadlines, as well as any deadlines to move for fees and costs) until any appeal is finally
8 resolved.

9 A proposed order is attached for the Court’s convenience.

10
11 DATED: December 9, 2010

Respectfully submitted,

12
13 COVINGTON & BURLING LLP

14 By: /s/ Kevin B. Collins³
15 Kevin B. Collins

16 ATTORNEYS FOR MYSPACE, INC., AND
17 FOX AUDIENCE NETWORK, INC.

18 PERKINS COIE LLP

19
20 By: /s/ Christopher Kao
21 Christopher Kao

22 ATTORNEYS FOR CRAIGSLIST, INC.
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26 _____
27 ³ In compliance with General Order 45.X.B, I hereby attest that concurrence in the filing of the
28 document has been obtained from each of the other signatories hereto.

WATSON ROUNDS

By: /s/ Michael D. Rounds
Michael D. Rounds

ATTORNEYS FOR GRAPHON CORP.

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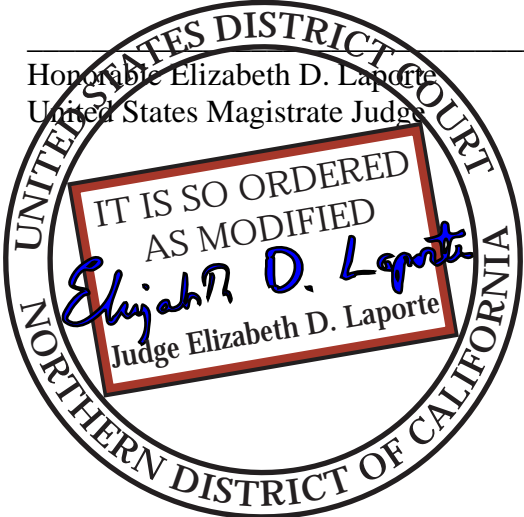
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~~[PROPOSED]~~ ORDER

Upon consideration of the parties' joint motion for judgment under Rule 54(b), the motion is hereby GRANTED. The Court expressly finds that there is no just reason for delay of entry of judgment and any appeal. The Clerk is directed to enter JUDGMENT under Rule 54(b) in favor of Plaintiffs, based on the Court's Order of November 23, 2010, on their claims that the 6,324,538, 6,850,940, 7,028,034, and 7,269,591 Patents are invalid.

All case activities are hereby STAYED, and all pending deadlines (including any deadline for Plaintiffs to move for fees or costs) are hereby extended until any appeal is resolved or the time for taking such an appeal expires. The parties shall inform the Court of the resolution of the appeal process no later than 10 days after any appeal is resolved or the time to take an appeal expires.

DATED: December 10, 2010



Honorable Elizabeth D. Laporte
United States Magistrate Judge