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17

18 UNITED STATES DISTRICT COURT
19 NORTHERN DISTRICT OF CALIFORNIA
20 SAN JOSE DIVISION
21

22 FACEBOOK, INC.,

23 Plaintiff,

24 v.

25 POWER VENTURES, INC. a Cayman Island
Corporation; STEVE VACHANI, an
26 individual; DOE 1, d/b/a POWER.COM,
DOES 2-25, inclusive,

27 Defendants.
28

Case No. 5:08-cv-05780 JW

**JOINT CASE MANAGEMENT
STATEMENT**

Date: August 23, 2010
Time: 10:00 A.M.
Judge: Hon. James Ware
Courtroom: 8, 4th Floor

1 This Court has set a further Case Management Conference for August 23, 2010.
2 Facebook, Inc. and Power Ventures hereby submit this Joint Case Management Statement.

3 **I. JURISDICTION AND SERVICE**

4 All parties have been served. The parties agree that this Court has subject matter
5 jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367. Facebook has asserted a number of Federal
6 claims, such as the CAN-SPAM Act, 15 U.S.C. §2701 et. seq.; the Computer Fraud and Abuse
7 Act, 18 U.S.C. § 1030 et. seq.; the Digital Millenium Copyright Act, 17 U.S.C. § 1201; as well as
8 Federal copyright and trademark claims. Venue is proper under 28 U.S.C. §1391(b).

9 **II. FACTS**

10 **A. Facebook's Position**

11 Facebook contends that this case is about whether Power.com can access the Facebook
12 website without Facebook's authorization and copy materials to its website. The facts are set
13 forth in detail in the Court's Orders of May 11, 2009, October 22, 2009 and July 20, 2010.
14 Facebook believes the one remaining disputed fact with respect to its California Penal Code
15 section 502 claim should be resolved first. The Court has identified the primary factual area of
16 dispute (for which no discovery has occurred) warranting further investigation. Namely, in the
17 Court's July 20, 2010 Order, the Court stated:

18 Thus, the Court finds that accessing or using a computer, computer
19 network, or website in a manner that overcomes technical or code-
20 based barriers is 'without permission,' and may subject a user to
liability under section 502.

21 Applying this construction of the statute here, the Court finds that
22 Power did not act 'without permission' within the meaning of
23 Section 502 when Facebook account holders utilized the Power
24 website to access and manipulate their user content on the
Facebook website, even if such action violated Facebook's Terms
of Use. However, *to the extent that Facebook can prove that in
doing so, Power circumvented Facebook's technical barriers,
Power may be held liable for violation of Section 502.*

25 July 20, 2010 order at 18:15-23 (emphasis added).

26 Facebook relied solely on pleadings in its previous motion. While factual disputes may
27 exist with respect to other claims, Facebook believes whether or not Power circumvented
28 Facebook's technical barriers after receiving Facebook's cease and desist notice is a central, and

1 likely conclusive issue, in this case. Indeed, if Facebook establishes through discovery that
2 Power did circumvent Facebook's technical barriers and prevails on a supplemental motion for
3 summary judgment, it may drop all other claims.

4 **B. Power's Position**

5 Power contends that this case is really about Facebook's attempts to prevent users from
6 exercising ownership and control over their own data through the assertion of bogus intellectual
7 property claims that have no legal merit, but are brought solely to attempt to intimidate users and
8 competitive companies that seek to offer services to those users. To that end, Facebook filed a
9 159-paragraph complaint against Power asserting eight claims under state and federal computer
10 crime laws, copyright, trademark, and unfair competition laws. All of Facebook's claims are
11 completely meritless, and many of the underlying allegations are simply false. That is why Power
12 made the extraordinary decision to include a lengthy introduction to its Answer (Docket # 54)
13 detailing the falsity of each of the core allegations of Facebook's complaint. With regard to
14 Facebook's allegations that Power committed federal crimes by sending "deceptive and
15 misleading" emails to Facebook users, Power's answer details facts that establish that Facebook
16 itself sent the purportedly offending messages, and that every element of those messages that
17 Facebook contends to be "deceptive and misleading" was appended to the message by Facebook
18 itself. *See id.* at 5-6. At its core, Facebook's lawsuit is an attempt to frame Power with false
19 allegations and falsified evidence manufactured by Facebook itself.

20 Power contends that while Facebook's claims are completely lacking in merit, they have already
21 had their intended effect, as the publicity surrounding this lawsuit has made it difficult for Power
22 to attract investors and operate its business. Power will vigorously defend every aspect of this
23 case, and expect to bring a summary judgment motion seeking the dismissal of this entire case
24 promptly after the completion of necessary discovery.

25 **III. LEGAL ISSUES**

26 **A. Facebook's Position**

27 Facebook believes that the California Penal Code section 502(c) claim should be resolved
28 prior to all other claims. Given the Court's July 20, 2010 ruling, the following disputed legal

1 issues exist as to Facebook's 502(c) claim:

- 2 1. Should Defendants be held liable under California Penal Code section 502?
- 3 2. What damages, if any, are available to Facebook?
- 4 3. What other remedies, if any, are available to Facebook?

5 **B. Power's Position**

6 This lawsuit is now nearly 21-months old. The pendency of Facebook's false claims has
7 hurt, and continues to hurt Power's business. Power wants this case resolved promptly – the
8 entire case. Facebook's desire to stall the case while it takes a second bite at the apple, renewing
9 a summary judgment motion that Facebook just lost, is unacceptable. Power is entitled to defend
10 itself and to clear its name. It is unusual for a plaintiff to seek to stall its own case – but that is
11 what Facebook is proposing here. It appears that Facebook may want to stall discovery on the
12 bulk of its complaint to avoid exposure of its own conduct manufacturing the evidence on which
13 its own false claims are based. That too is unacceptable. Facebook cannot be permitted to hurl
14 unfounded accusations against a competitor, then avoid discovery on the basis for its own
15 accusations. Discovery should commence promptly, subject to the limits imposed by the Federal
16 Rules of Civil Procedure. Given the breadth of the allegations Facebook has raised in its
17 sprawling complaint, there may be grounds for exceeding the limitations in Fed. R. Civ. P.
18 30(a)(2)(A)(i) and 33(a)(1), for example. But Power will make every effort to complete
19 discovery within those limitations.

20 If Facebook wishes to stipulate to the dismissal of all claims other than the 502(c) claim,
21 and stipulate to the dismissal of any claim for monetary damages, then Power would consider
22 agreeing to the discovery limitations Facebook proposes. But so long as Facebook continues to
23 assert those false claims, Power intends to seek prompt discovery, followed by a prompt motion
24 for summary judgment.

25 **IV. MOTIONS**

26 **A. Pending Motions**

27 No motions are currently pending.
28

1 **B. Anticipated Motions**

2 **1. Facebook's Position**

3 Facebook suggests that this Court allow limited discovery on the issue of technical
4 barriers and efforts by Defendants to circumvent technical barriers. Following that limited
5 discovery, Facebook suggests that the Court hear a supplemental Summary Judgment motion on
6 the issue of liability under California Penal Code section 502.

7 **2. Power's Position**

8 Power intends to take plenary discovery subject to the limitations of the Federal Rules of
9 Civil Procedure, and to bring a prompt summary judgment motion that should dispose of the
10 entire case.

11 **C. Resolved Motions**

12 The Court has issued rulings related to various motions to dismiss on May 11, 2009,
13 October 22, 2009 and July 20, 2010. Most recently, on July 20, 2010, the Court denied: 1)
14 Facebook's Motion for Judgment on the Pleadings, 2) the parties' Cross-Motions for Summary
15 Judgment, 3) Facebook's Motion to Strike Defendants' Affirmative Defenses. The Court also
16 granted Facebook's 1) Motion to Dismiss Defendants' counterclaims for violations of Section 2
17 of the Sherman Act, and 2) Facebook's Motion to Dismiss Defendants' UCL counterclaim.

18 **V. AMENDED PLEADINGS**

19 With the motions to dismiss resolved, the case is now fully at issue.

20 **VI. EVIDENCE PRESERVATION**

21 **A. Facebook's Position**

22 Facebook has taken appropriate measures to preserve relevant evidence.

23 **B. Power's Position**

24 Defendants have taken appropriate measures to preserve relevant evidence.

25 **VII. INITIAL DISCLOSURES**

26 **A. Facebook's Position**

27 The parties have not yet exchanged Rule 26 disclosures.
28

1 **B. Power's Position**

2 Power suggests that Rule 26 disclosures should be made within 14 days after the August
3 23, 2010 CMC conference.

4 **VIII. DISCOVERY**

5 **A. Facebook's Position**

6 Facebook suggests that discovery for the next 90 days be limited to the issue of whether
7 Power circumvented, assisted others in circumventing, or took measures to circumvent technical
8 barriers put in place by Facebook after Facebook notified Power that it should cease and desist
9 from accessing the Facebook site. To that end, Facebook believes the following limited discovery
10 is necessary:

- 11 1. A copy of Power's source code.
- 12 2. Documents, including instant messages and emails, related to any actions
13 taken by Power related to technical barriers put in place by Facebook.
- 14 3. Any technical documents, such as specifications, describing any actions
15 taken by Power related to technical barriers put in place by Facebook.
- 16 4. Any communications to Power users about accessing Facebook's website
17 after technical barriers were put in place.
- 18 5. All documents relating in any way the cease and desist letter sent by
19 Facebook and the other communications between Facebook and Power
20 regarding Power's accessing the Facebook site.
- 21 6. A 30(b)(6) deposition related to any actions taken by Power to circumvent
22 Facebook technical measures or assist others in circumventing Facebook's
23 technical measures.
- 24 7. 2-3 fact depositions of witnesses who may have knowledge of the facts
25 underlying efforts taken by Power.

26 **B. Power's Position**

27 Power believes that plenary discovery, limited only by the Federal Rules of Civil
28 Procedure, should commence promptly after the initial Rule 26 disclosures. It is simply unfair to

1 allow Facebook to make false allegations based on fabricated evidence, and to prevent Power
2 from

3 **IX. CLASS ACTIONS**

4 This is not a class action case.

5 **X. RELATED CASES**

6 There are no related cases.

7 **XI. RELIEF**

8 Facebook prays for injunctive relief and monetary damages to be proven at trial. The
9 bases for Plaintiff's monetary damages include compensatory, statutory, and punitive damages as
10 permitted by law. Facebook also seeks its attorneys' fees.

11 **XII. SETTLEMENT AND ADR**

12 The parties engaged in an ADR mediation session on December 14, 2009. The session
13 was facilitated by mediator Daralyn Durie, who has filed papers with the Court indicating that the
14 ADR process is not yet complete and that further facilitated discussions are expected. *See* Dkt.
15 No. 59.

16 **XIII. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES**

17 The parties have not consented to a magistrate judge.

18 **XIV. OTHER REFERENCES**

19 **A. Facebook's Position**

20 Facebook does not believe the case is suitable for other references at this time.

21 **B. Power's Position**

22 Power does not believe the case is suitable for other references at this time.

23 **XV. NARROWING OF ISSUES**

24 Facebook believes issues can be narrowed considerably by focusing on the remaining
25 factual issue in the California Penal Code 502(c) claim first. The details are discussed above.
26
27
28

1 **XVI. EXPEDITED SCHEDULES**

2 An expedited schedule is not necessary in this case.

3 **XVII. SCHEDULING**

4 Facebook suggests that the parties be permitted to conduct discovery limited to the
5 remaining factual issue with respect to the California Penal Code section 502(c) claim until
6 November 15, 2010. The parties may then file supplemental motions for summary judgment on
7 December 6, 2010 under this Court's normal calendar. Following resolution of those motions, the
8 Court can schedule a supplemental case management conference, if necessary.
9

10 **XVIII. TRIAL**

11 Facebook has requested a jury trial.

12 **XIX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES AND PERSONS**

13 Pursuant to Civil L.R. 3-16, the undersigned certifies that as of this date, other than the
14 named parties, there is no such interest to report.

15 **XX. OTHER MATTERS**

16 None.

17 Dated: August 13, 2010

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23 Dated: August 13, 2010

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