IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES, INC., a Delaware corporation,	)	
PLAINTIFF,	)	
v.	)	C.A. No. 08-862
FACEBOOK, INC., a Delaware corporation,	)	
DEFENDANT.	)	

Tuesday, March 3, 2009
2:00 p.m.
Courtroom 4B

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE JOSEPH J. FARNAN, JR.
United States District Court Judge

APPEARANCES:

POTTER ANDERSON & CORROON, LLP
BY: PHILIP ROVNER, ESQ.

KING & SPALDING LLP
BY: PAUL ANDRE, ESQ.

Counsel for Plaintiff

BLANK & ROME, LLP
BY: STEVEN L. CAPONI, ESQ.

WHITE & CASE
BY: HEIDI L. KEEFE, ESQ.

Counsel for Defendant

THE COURT: Good afternoon. Do you want to announce your appearances?

MR. ROVNER: Good afternoon, Your Honor. Phil Rovner from Potter Anderson for plaintiff Leader Technologies. With me is Paul Andre from King and Spalding.

MR. CAPONI: Good afternoon, Your Honor. Steven Caponi from Blank and Rome. With me is the brains of the operation, Heidi Keefe from White and Case in Palo Alto, California.

MS. KEEFE: Good afternoon, Your Honor.

THE COURT: Okay. We're here to do some scheduling, and we have a disagreement. Pretty large, actually. So start with plaintiff.

MR. ANDRE: Thank you, Your Honor.

Plaintiff's schedule is based on an eighteen- to twenty-month trial schedule from the date of filing. What we did, we looked at twenty months out from the day we filed the case and traveled backwards based on the Court's scheduling order and imposed the dates.

The first disagreement,

significant disagreement, is when the written discovery should be completed. There's about a four-month gap there. Our schedule is aggressive, but I think written discovery can be done in that time period just because parties tend to waste a lot of resources with written discovery by trying to extend it out and go further and further.

The biggest difference, scheduling difference, I see is in the Markman hearing. Defendants propose to do it in March 2010, whereas we put it in August 2009. That big difference, I think, accounts for a lot of the discrepancy here. Our position is that Markman is based on an intrinsic record. You don't need a year-and-a-half of discovery before the Markman process. I think that's a major difference.

With respect to some of the opening expert reports, Your Honor's order had thirty days after the issuance of Markman. They had suggested adjusting it to forty-five days. I don't see a need for that.

And then with case dispositive

motions, we had provided a specific date of January 2010, and the defendants have put a date based on Markman, saying ninety days after the Markman decision.

First of all, I'm not sure case dispositive motions are a good idea in a patent case. I think there are always issues of fact that can be raised to preclude it, but that's my personal opinion. Nonetheless, I think having a definite date on the calendar for parties to file that motion will advance the case at a proportional rate that makes it reasonable to get to trial in a timely manner.

The other dates that there are disagreements on, amendment pleading and joining new parties, I'm not sure why the defendants want to push it out so far. There is a big difference. Those issuances -- I'll let them address why they want to push it out further. I don't understand why it would take ten months or a year or two for amendment pleadings.

Thank you.

THE COURT: All right. Thank you.

MS. KEEFE: Thank you, Your Honor.

I think one of the places that we have our largest disagreement has to do with what this case is even about, so I'll back up one step.

One of the reasons that we have proposed the schedule that we have is that we've attempted to make sure that we're not constantly coming back to Your Honor and constantly coming back and saying, "It didn't quite work out. We just need a little bit more time. We weren't sure about that. We need to come back again."

Since the very, very beginning of this case, we've actually been relatively -- aggressive is the wrong word, but let's just say there have been a number of phone calls to plaintiffs trying to really ask what they're accusing in this case. And through a series of conversations -- sure, I'll let you know. Not really letting us know -- we finally got discovery served on us, as well as one answer in an e-mail that indicated they're contemplating accusing the entire Facebook website of infringement.

That would entail almost every

single document that Facebook has ever created since its inception. It could potentially entail the inclusion of numerous third parties.

There's over 500,000 applications that run on Facebook, and given the definition they've currently given us of what they consider to be the case, those applications could be included, and we could be talking about involving third parties in the case. Therefore, we extended the time to amend pleadings and to add parties based on trying to find out what aspects of our business are actually involved in this case. So needing to see at least one or two rounds of written discovery in order to try to understand the scope and breadth of what we're dealing with here.

We have no problem with coming back to Your Honor if they come with a narrowing of the case to try to put it on a shorter schedule. That's not what we're worried about. We're worried about coming back to Your Honor to try to lengthen things because now we've realized that they really are accusing the whole site, and, therefore, we're going to have to go

to third parties, potentially outside the United States, et cetera, et cetera.

As far as the other things with Markman and with dispositive motions, I'm not sure that a dispositive motion would have much value in a patent case without the claim construction. So we've posited that the dispositive motions be filed after we have the ruling on claim construction. If the claim construction hearing is earlier, the dispositive motions cut-off date would be earlier.

Similarly, I think Your Honor has dealt with the need, or lack thereof, with dispositive motions with your standing orders, which would indicate if there, in fact, is a factual issue, the briefing doesn't go forward. And if there is not, then the dispositive motion actually can be extremely helpful.

We anticipate at least hoping to file early summary judgment motions, if possible, especially if we find that the case is narrower and narrower and we can actually go for an invalidity charge. That's what's really behind our schedule.

THE COURT: Okay. Do you understand in some general way today what your infringing activity is, generally?

MS. KEEFE: To be completely honest, Your Honor, I don't. I've taken the patent and read it I don't know how many times, and each time I've read it, I come up with a different thought process about what it might be that they might be accusing. That's why we sent some early e-mails and letters asking, can you please identify for us, either to help us narrow our litigation hold -- which we have a very broad one in place now -- or to help us with Rule 26 disclosures. Give us something.

And what we got back was, "The website Facebook.com infringes." And there are ways I could read the claim that potentially could encompass every single thing on Facebook, although I think that would be an invalid patent. There's certainly ways to read it overly broadly.

So in all earnest honestness -- that's not a word -- I can't figure out what they're accusing, and that's the first time I've

said that in a case.

THE COURT: Mr. Andre, they don't know what they're doing wrong, maybe.

MS. KEEFE: I'd be happy to hear from plaintiffs because that might help us resolve some of these dates, and that's why we served discovery the first day we could, asking them to identify what the infringing product was, how, and why.

MR. ANDRE: And Your Honor, even before discovery began, we made a good faith effort to identify the information. It wasn't just the Facebook web page. We gave a very long description of the infringing activity of Facebook, so this was before discovery and without obligation.

THE COURT: What do you think your patent covers?

MR. ANDRE: It is the platform which their website operates on. It's a way that -- we have two different contexts, and how you do tracking on it, and how you do the various aspects the patent lays out. It is a method of operating that type of peer-to-peer,

mini-to-mini network.

The claims are very clear. You can read the claims, and this is not -- it's not written in a lot of computer software language that makes it incomprehensible. The language is very clear, even though it's a very complex technology. The claims themselves are drafted in a way that do spell out what type of activity will be infringing.

I don't think Facebook has any ignorance of how their website works. I think they understand how it works. If they read it, I think they can see what is implied there.

Another reason for us to want to conclude written discovery early, including contention interrogatories, is so that we can have this information out to them. They can ask specific interrogatories. We'll tell them exactly what they ask for. There's no reason to expand this for months upon months.

Same with the claim construction. Claim construction will obviously help both parties. Pushing this out for two years after filing is a delay tactic. That's what this is

about.

Claim construction is not based on their activity. It's based on intrinsic record of our patent. If they get the claim construction early, as we propose, get our contention interrogatories early, as we propose, there's no reason why they can't, at that time, make their motions they think are appropriate or get a fair understanding as to where they think their case is.

What we're proposing is exactly the solution to what they're claiming now is the problem. They say from the very first day they have a problem understanding what our claims are, so we told them. We didn't have to. We did it voluntarily. We didn't do it as part of discovery or part of our initial disclosures, which we're exchanging today. We told them in a letter, and we also put forward in our discovery request which we propound on them, as well, what we believe is the relevant information with definitions and such. So I don't think there's any big mystery here as to what's being accused.

As far as their 5,000

applications, we're not accusing third parties, those applications, of infringing at this time. That's not part of this case. I think that's just a red herring, to hold out potentially thousands and thousands of defendants.

THE COURT: In a layman's understanding, what you're saying is that the patent covers the way their platform functions? Its foundational functionality?

MR. ANDRE: That's correct, Your Honor. You can set up these type of networks in, obviously, different ways. There are ways that make it very efficient, make it very user friendly. And there are ways that make it non-efficient and non-user friendly.

And in this particular case, our patent covers a foundation of how you can set up these type of networks that make it very efficient and user friendly and easy to navigate through the web site. And it's -- those claims are laid out in an element-by-element basis.

And, like I said, it's not as defense counsel mentioned. You can read the claims and see how. You can read on their

actual website itself.

As far as the dates regarding the motion to amend the pleadings and join additional parties, I think that there is a logistic disagreement as to time frame. I think it's unnecessary to hold those dates open.

But that being said, I don't think there will be any amendment to the pleadings. I don't think additional parties will be added. I think it may be somewhat of a philosophical difference more than a practical difference between the parties.

The only date I see that is really of major significance is the Markman hearing itself. To me, that has nothing to do with whether or not they understand their own technology. What we are accusing of infringing, I think that's outside that.

THE COURT: All right. Sure.

MS. KEEFE: I was just going to add, Your Honor, but I'm sorry, but that actually didn't completely help me understand how it applies to what we do because our network is inextricably linked to multiple applications,

how it functions.

And if it's that easy to understand, what it is we're doing that's infringing, I'd love it if they just told us.

And that's what we've asked for. There's thirty-five claims at issue in this patent, and so far there's still thirty-five claims. The information that they told Your Honor, told us exactly what they were accusing -- you know, the e-mail says that they're "accusing the Facebook website and all functionality programs and modules, both software and hardware, currently and formerly built, used, or made available by Facebook, but is not limited to all components on the website." So that didn't really help us understand.

As far as claim construction goes, I think the first thing you have to understand is which claims are in the case and which claims are going to be involved, and that's done through discovery, through figuring out which are actually infringed, what you are going to be accusing, so that the parties don't waste time

trying to go down the rat hole of claims that really aren't involved because you haven't had a chance to narrow the case yet and figure it all out.

So I still think that this case, at least until we see the initial interrogatory responses, could potentially be unwieldy, and, therefore, it does require a little bit more time to figure out what's really going on.

Thank you.

MR. ANDRE: Your Honor, as far as which claims are being served, Counsel has asked us, essentially, complete discovery before the scheduling conference. That's not our obligation to do so. We are identifying the claims. We're going to be asserting, based on their first set of interrogatories -- they're due in twenty-some-odd, fifteen days. We'll identify them. They'll know them.

So they're going to want claims. They're going to have all the intrinsic records in front of them by March. So why they need until March of next year to schedule a Markman hearing is -- I don't understand that.

THE COURT: Well, this case actually has the potential to become part of the stimulus package. If I can get you to bill enough against each other, what we'll put into the economy, I could turn the whole thing around.

But let me ask on a serious note. I have a sense now of what the problem is. First thing is going to be summary judgment. My alter ego in Tennessee, Bill, who keeps statistics, says that I'm one of the lowest summary judgment judges or something. Compare me to Judge Ward. I don't have anything to do with summary judgment. The case does. There's either summary judgment or there's not.

We do get you to trial here. I understand some districts don't have the time or the energy for trial. We'll get you to trial. They only give us twenty percent. That's not me. I do summary judgment. I entertain motions.

My procedure I put in place a little bit ago, when I heard the preliminary talks -- I was on a panel somewhere. Someone on

the panel was working on Rule 56. I listen to what they say. I look at my procedure. It's, kind of, the bare bones of what they're proposing. They have a lot more detail now that they flushed out what they want to do, but it's all designed to make it work. But there is a dispute of fact. I can't do anything about that. I give you a trial.

So I heard what both of you have to say, and I think there's a way to proceed that will allow us to accommodate both interests here. What I'm going do in the first instance is take summary judgment because I agree with you, and Mr. Andre, you agree. I really can't do that. Some judges do it in the context of claim construction, but I'm going to take that out of the case for now. But that's not saying I won't entertain a motion.

Ultimately, what I'm going to do is focus, given what's been told to me, on getting fact discovery completed in as efficient a way as possible, which means that in a manner that more comports to what the plaintiffs are asking for. And then get us to a Markman

hearing.

Now, in that context, if this starts to become what you think it might, I'm not going to be reluctant, and I know that Mr. Caponi will remind me of this by presenting this transcript, to give you an extension.

MS. KEEFE: Would Your Honor also be amenable, if it turns out to be one of those cases that looks like it will grow crazily, to possibly appointing a special master? I don't want one now. I'm just asking if that might be something that you'd be amenable to.

THE COURT: Sure, but first I want to get it to the status of a stimulus contributor, which we'll see how that goes. But on application, I will appoint a special master.

Now, having said that, one thing that is a little bit of a concern, as it is in all of these cases -- I don't know if Mr. Andre was at that seminar or Mr. Rovner was -- some judges think you don't have the right to tell folks that I'm not going to allow you to assert all thirty-five claims for claim construction purposes. They think you're entitled to that.

I take the view, and I think this district does, that we can limit the claims to representative claims in order to get the case moving and to get it to a claim construction hearing.

I'm not going to ask you to limit those claims now, but if that becomes part of the issue, I think you ought to be thinking about the need to get us to a representative set of claims that will allow us to get the case efficiently through discovery. But at this point, we have thirty-five claims, and we'll see how it goes.

So what is the time for discovery in this case? Do you know when this case was filed.

MS. KEEFE: End of November, Your Honor.

THE COURT: November 19th. And I'm going to say that you're going get down here and discuss getting your fact discovery completed sometime between the end of June and the end of July of '09, contemplating getting your claim construction experts lined up in

August for a September or October Markman hearing.

And once we get that far and add the claim construction, then we'll set the meter for the finishing-up of patent issue experts and also any summary judgment applications.

Now, as we get through this, as I said, it becomes apparent that that's not going to work because of -- we have trouble with the contentions on the interrogatories on the issues or we have problems with the document production, then you'll come back, and I hopefully will reconsider an extension time. So you're not foreclosed on that. If everybody works together, you ought to be able to get through that.

I'll look at the special master once I see what kind of disputes you're having. Some cases I just keep myself because they're actually an education forum, and others I find that it's more contention and volume, and they're the kind of cases that go to special master so you can get more frequent and immediate attention than you can with me with

the motion days that I have.

So you think you can sit down and agree on that time? I don't want to dictate the schedule. I've given you, basically, where you ought to finish up. Can you sit down and negotiate that and submit an order?

MS. KEEFE: I would certainly be happy to try. I know that I'm going to ask on the lower end -- longer end of it, but I think we could work on that.

MR. ANDRE: That's fine, Your Honor.

THE COURT: What I would like to do is schedule, in addition to what you're going to propose, kind of, like, a ninety-day window, assuming that that first portion holds, for a trial just so we can all have that date we're working to. So if I give an extension, ninety days, you know the trial is going out another ninety days. In other words, push it out.

But we should start to think about that trial date, which is good in a patent case because it, kind of, holds all our focus. So what do you think?

MR. ANDRE: That's fine.

THE COURT: I don't know your availability.

MS. KEEFE: It's a little dicy in the very beginning of 2010. I've got another trial set in Texas in January, and I've got one in March.

But if we had claim construction sometime in October, and give Your Honor a couple months to rule, we could probably be at trial within six months after that. Six to seven months.

THE COURT: So we're look at early 2010, or early in the first six months?

MS. KEEFE: I was going to say May because of my other trials. Early May would work for me maybe, now.

MR. ANDRE: April, May. That's fine.

THE COURT: This will become more of a firm trial date because I'm going to build in.

MS. KEEFE: Mr. Caponi was just reminding me to make sure I have enough time to

do all the experts, which means maybe June or July. I'm not trying to push things out. I'm just trying to make sure that there's time to get on people's schedules and make sure we have enough time after Your Honor rules, so --

THE COURT: This is a jury trial.

MS. KEEFE: Yes.

THE COURT: I have this other little case --

MS. KEEFE: A small one, Your Honor.

THE COURT: -- that I promised them I would try. It's in April of 2010, and I told them it had to go to trial then for a whole lot of reasons. So April 2010.

This is going to become your firm date, pretty much. So I don't know. I don't have any exact time frame of that trial, but I'm going to leave open April, May, and a little bit of June. That's the Intel. Of course, they could settle.

MS. KEEFE: Anything is possible, Your Honor.

THE COURT: Anything is possible.

MR. ANDRE: Curse of the economy, Your Honor. I don't think Intel will settle.

MS. KEEFE: There's your stimulus package.

THE COURT: I want to be exact on this, so we don't have to -- your date will be June 7th of 2010. And we'll work both of your tech files. And are you okay with that day?

MR. ANDRE: That's fine.

THE COURT: You really ought to focus on that. Anything that you do ought to be with the view that June 7th is the trial date in this case, of 2010. So we'll set aside ten trial days for now. That doesn't mean you're going to get ten trial days.

Okay. I think with that information, that kind of gets us scheduled up. I'm going to ask you to have that order here with your negotiated dates, agreed upon dates, let's say in two weeks. So that would be, let's say, by March 19th. You have that order here so I can get it in the scheduling order.

MS. KEEFE: Your Honor, that's absolutely possible. The only thing I might ask

is that you extend that by one week. We would both have each other's initial responses to the very first discovery in this case, and we might know if this is going to be a problem.

We might be able to come back to Your Honor and say, "This is the problem we're having and this is why it's going to be fine." Sorry. There's no problems. It's fine, and this is the problem, and here's what we think. So that might accommodate that.

THE COURT: So let's make it March 25th. I don't think that's a problem, and you'll have a better idea.

MS. KEEFE: I appreciate that, Your Honor.

THE COURT: The order will be here by March 25th.

My parting words will be: Don't lose sight of June 7th, 2010. It's an important date for you.

Anything else that the plaintiff wants to pick up?

MR. ANDRE: No, thank you, Your Honor.

MS. KEEFE: Thank you very much, Your Honor.

THE COURT: Thank you. We'll be in recess.

(Proceeding ended at 2:35 p.m.)

C E R T I F I C A T I O N

I, DEANNA WARNER, Professional Reporter, certify that the foregoing is a true and accurate transcript of the foregoing proceeding.

I further certify that I am neither attorney nor counsel for, nor related to nor employed by any of the parties to the action in which this proceeding was taken; further, that I am not a relative or employee of any attorney or counsel employed in this case, nor am I financially interested in this action.

_____

DEANNA WARNER

Professional Reporter and Notary Public