

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

LEADER TECHNOLOGIES, INC., a  
Delaware corporation,

Plaintiff and Counterdefendant,

v.

FACEBOOK, INC., a Delaware  
corporation,

Defendant and Counterclaimant.

Civil Action No. 1:08-cv-00862-JJF

**PUBLIC VERSION**

**CONFIDENTIAL - FILED UNDER SEAL**

**DEFENDANT FACEBOOK, INC.'S  
MEMORANDUM IN SUPPORT OF ITS MOTION FOR  
SUMMARY JUDGMENT OF WILLFUL  
INFRINGEMENT OF U.S. PATENT NO. 7,139,761**

[Motion 4]

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**FACEBOOK INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR  
SUMMARY JUDGMENT OF NO WILLFUL INFRINGEMENT OF  
U.S. PATENT NO. 7,139,761**

**[MOTION NO. 4 OF 6]**

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## **I. NATURE AND STAGE OF THE PROCEEDINGS**

Plaintiff Leader Technologies, Inc. (“LTI”) filed its complaint against Defendant Facebook, Inc. (“Facebook”) in this patent infringement action on November 19, 2008. Discovery is closed and trial is set for June 28, 2010. (D.I. 30, *Rule 16 Scheduling Order*).

## **II. SUMMARY OF THE ARGUMENT**

LTI’s willfulness theory rests entirely on speculation that someone at Facebook was aware of an LTI white paper – not the asserted patent – prior to the time LTI filed this lawsuit. There is no evidence supporting this claim and, when asked, every witness testified unequivocally that they had never seen an LTI white paper, an LTI patent, an LTI product and, in fact, had never even heard of LTI. Even assuming someone at Facebook had seen an LTI white paper, it does not support a claim of willful infringement – as a matter of law. Willful infringement can only be based upon prior knowledge of the asserted patent itself. Thus, even if everything LTI alleges is true, there is no willful infringement. Moreover, it is undisputed that, prior to the suit being filed, LTI never gave Facebook notice of the asserted patent and never had any communication with Facebook of any kind.

In short, it would violate the Court’s gate-keeping function to allow the issue of willfulness to go to the jury – there is no evidence of any kind that could support any finding that Facebook acted with knowledge that its actions would create a risk of infringement of LTI’s patent. Instead, LTI’s willfulness case is based entirely on impermissible lawyer speculation and conjecture, which cannot raise a genuine issue of material fact. Summary judgment on this issue is thus mandated.

## **III. UNDISPUTED FACTS**

LTI filed this action against Facebook on November 11, 2008, alleging infringement of U.S. Patent No. 7,139,761 (the “’761 Patent”). The ’761 Patent issued in November of 2006. The complaint includes a boiler plate allegation of willful

infringement, without a single factual predicate.

There is no dispute that, prior to this lawsuit, 1) LTI never contacted Facebook, 2) LTI never notified Facebook of its patent, 3) LTI never notified Facebook of any infringement allegation, and 4) when asked, every witness in this case testified under oath that they never saw any LTI patents, white papers or products, and had never heard of LTI. Declaration of Jeffrey T. Norberg in Support of Facebook's Motion for Summary Judgment as to Willful Infringement ("Norberg Decl.") Ex. 2 at Resp. Nos. 31-34; Ex. 3 at Resp. Nos. 1-6.

#### **IV. ARGUMENT**

Summary judgment must be granted because LTI cannot show that Facebook had knowledge of LTI's patent prior to the filing of this litigation. To establish willful infringement, a plaintiff must show by clear and convincing evidence that the alleged infringer acted despite knowledge of an objectively high likelihood that its activity infringed a valid patent. *In re Seagate Tech., LLC*, 497 F.3d 1360, 1371 (Fed. Cir. 2007) (*en banc*), *cert. denied*, *Convolve, Inc. v. Seagate Tech., LLC*, 552 U.S. 1230 (2008). An essential and preliminary requirement of this standard is that the alleged infringer must be shown to have had actual knowledge of the patent prior to the filing of the lawsuit. *Imonex Servs., Inc. v. W.H. Munzprufer Dietmar Trenner GMBH*, 408 F.3d 1374, 1377 (Fed. Cir. 2005) (actual knowledge, not constructive knowledge, is required); *see also In re Seagate Tech., LLC*, 497 F.3d at 1374 ("So a willfulness claim asserted in the original complaint must necessarily be grounded exclusively in the accused infringer's pre-filing conduct."). Implicit in this requirement is also the prerequisite that there be a patent in existence. *State Indus., Inc. v. A.O. Smith Corp.*, 751 F.2d 1226, 1236 (Fed. Cir. 1985).

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Summary judgment is therefore appropriate.

**A. Summary Judgment Standard**

Summary judgment is appropriate “if the pleadings, the discovery and disclosure materials on file, and any affidavits,” when viewed in the light most favorable to the non-moving party, “show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). It has long been settled that summary judgment “is entirely appropriate, in a patent as in any other case, where there is no genuine issue of material fact.” *SRI Int’l v. Matsushita Elec. Corp.*, 775 F.2d 1107, 1116 (Fed. Cir. 1985).

Although the moving party bears the initial burden of providing the Court with the basis for its motion and identifying the evidence that demonstrates the absence of any genuine issue of material fact, once this threshold burden is met, the non-moving party has an affirmative burden of coming forward with specific facts evidencing the need for a trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). When the moving party does not bear the burden of proof at trial, it may establish that the other party has failed to “make a showing sufficient to establish the existence of an element essential to that party’s case.” *Celotex*, 477 U.S. at 322-23. Relevant to this determination is the substantive evidentiary standard applicable to the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The dispute here is genuine only if a reasonably jury could find by clear and convincing evidence that Facebook willfully infringed LTI’s patent. *Id.* at 255-56.

**B. Facebook Had No Notice of LTI’s Patent**

At trial LTI must show by clear and convincing evidence that Facebook had actual knowledge of the ’761 patent. Yet, in more than a year of discovery, LTI has produced no evidence – either direct or circumstantial – that Facebook knew anything



about LTI, LTI's patent, or its product, prior to being sued in late 2008.

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In the absence of *any* evidence of knowledge of the patent, no reasonable jury could find that Facebook acted despite knowledge of an objectively high likelihood that its activity infringed a valid patent.

LTI's claim that Facebook had "constructive notice" of the '761 patent based on the issuance of the patent and LTI's marking of its products does not save LTI's willfulness claim. Federal Circuit law is clear that constructive notice cannot be the basis of a claim for willfulness. *Imonex*, 408 F.3d at 1377 (there must be actual knowledge, not constructive notice).

**C. LTI's "White Papers" Provide No Notice of the Patent**

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In the *State Industries* case, the Federal Circuit held that the accused infringer's access to and potential copying of a product marked "Patents Applied For" did not provide sufficient notice to sustain a claim of willful infringement. *Id.* at 1234-36. In that case, the accused infringer purchased and examined the plaintiff's product in order to design a competing product. *Id.* at 1234. The product included a notice that the plaintiff

had applied for a patent, but at the time of the defendant's purchase no patent had yet issued. *Id.* at 1236. After the defendant began marketing its competing product, the plaintiff's patent issued and the plaintiff filed suit. The Federal Circuit held that the "patent pending" notice was not enough to sustain a claim of willful infringement, even in the face of actual copying:

To willfully infringe a *patent*, the patent must exist and one must have knowledge of it. A "patent pending" notice gives one no knowledge whatsoever. It is not even a guarantee that an application has been filed. Filing an application is no guarantee any patent will issue and a very substantial percentage of applications never result in patents. What the scope of claims in patents that do issue will be is something totally unforeseeable.

*Id.* at 1236.

Here, as in *State Industries*, LTI's "patents pending" marked white papers were published long before the patent issued and contained no notice other than the "patents pending" statement. While every Facebook witness who was asked testified under oath that they never saw these papers, even if they did, it would be legally insufficient to provide notice of infringement. These white papers, therefore, are insufficient to sustain LTI's willful infringement claim as a matter of law.

**D. LTI Has No Evidence That Facebook Ever Saw The White Papers**

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**E. LTI's Post-Filing Willfulness Claim Fails as a Matter of Law**

The Federal Circuit in *In re Seagate* recently emphasized that “a willfulness claim asserted in the original complaint must necessarily be grounded exclusively in the accused infringer’s pre-filing conduct.” *In re Seagate*, 497 F.3d at 1374. However, if post-filing conduct does suggest willfulness a patentee should seek a preliminary injunction. *Id.* In so holding, the Federal Circuit noted that a patentee should not be entitled to accrue enhanced damages based solely on post-filing conduct if it makes no attempt to first stop those activities by seeking a preliminary injunction. *Id.* LTI has not sought a preliminary injunction against Facebook in this case, and as such should not be permitted to assert post-filing willfulness.

The district court decisions that have examined post-filing conduct in analyzing willfulness have involved evidence of pre-filing willful conduct as well. *See, e.g., Ball Aerosol & Specialty Container, Inc. v. Limited Brands, Inc.*, 553 F. Supp. 2d 939, 955 (N.D. Ill. 2008) (noting that while it may play into the “totality of the circumstances,” post-filing conduct should not be the “sole” basis for a willful infringement claim), *vacated on other grounds*, 555 F.3d 984 (Fed. Cir. 2009). As discussed above, LTI has no evidence that Facebook had any knowledge of the '761 patent before this litigation was filed. Accordingly LTI cannot seek to tether any allegations of post-litigation conduct to any pre-litigation conduct.

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V. CONCLUSION.

For the reasons stated above, Facebook respectfully requests that this Court grant summary judgment that Facebook does not willfully infringe the '761 patent.

Dated: May 14, 2010

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