

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

LEADER TECHNOLOGIES, INC., a Delaware corporation,	)	
	)	
Plaintiff-Counterdefendant,	)	C. A. No. 08-862-JJF/LPS
	)	
v.	)	
	)	
FACEBOOK, INC., a Delaware corporation,	)	
	)	
Defendant-Counterclaimant.	)	

**[PROPOSED] JOINT PRETRIAL ORDER**

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On June 3, 2010, counsel for Plaintiff and Counterclaim-Defendant Leader Technologies, Inc. ("Leader") and counsel for Defendant and Counterclaim-Plaintiff Facebook, Inc.

("Facebook") will participate in a pretrial conference before this Court pursuant to Rule 16 of the Federal Rules of Civil Procedure, Local Rule 16.3, and the Court's July 23, 2009 Scheduling Order. Pursuant to Local Rule 16.3(c), Leader and Facebook hereby submit this Joint Pretrial Order relating to the trial of the action commencing on June 28, 2010 for approval by the Court.<sup>1</sup>

#### **I. Nature of the Action and Pleadings**

1. **Leader's Allegations:** On November 19, 2008, Leader filed this patent infringement action against Facebook asserting that Facebook infringed and continues to infringe U.S. Patent No. 7,139,761 ("the '761 Patent"). Leader alleges that the Facebook website and its underlying architecture infringe the asserted claims. Leader asserts that Facebook's acts constitute infringement of the '761 Patent both literally and under the doctrine of equivalents in violation of 35 U.S.C. §§ 271 (a)-(c). Leader alleges that Facebook's infringement is willful. Leader seeks an accounting for all infringing sales, including all sales up until the entry of a final judgment, damages, costs, pre-judgment interest, post-judgment interest and injunctive relief. Further, Leader contends that this is an exceptional case and seeks attorneys' fees. Leader also seeks any other relief that the Court deems appropriate. Leader disputes Facebook's claim that its affirmative defenses and/or counterclaims include a claim for invalidity under 35 U.S.C. § 103, failure to state a claim upon which relief can be granted, laches, unenforceability and any other allegations raised outside of its Second Amended Answer and Counterclaims filed on December 23, 2009.

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<sup>1</sup> The parties reserve their rights to make modifications to this Pretrial Order and the attached exhibits based upon rulings of the Court.

2. **Facebook's Allegations:** On January 8, 2009, Facebook filed its answer, affirmative defenses, and counterclaims, which it amended twice: first on January 28, 2009 and again on December 23, 2009. Facebook's affirmative defenses are non-infringement, invalidity under 35 U.S.C. §§ 102 and 103, failure to state a claim upon which relief can be granted, and laches. Facebook's counterclaims are for declaratory judgment of non-infringement, declaratory judgment of invalidity and/or unenforceability of the '761 patent, and false marking under 35 U.S.C. § 292. Facebook disputes Leader's claim that it has accused "the Facebook website and its underlying architecture[]." Facebook also filed a motion for leave to amend its responsive pleading on March 25, 2010, to further specify its counterclaim of false marking and to assert an affirmative defense and counterclaim of unenforceability on the basis of inequitable conduct. That motion has not yet been ruled upon. Facebook's concerns with Leader's allegations are set forth in Facebook's pending *in limine* and *Daubert* motions. Facebook also seeks any other relief that the Court deems appropriate.

## **II. Basis of Federal Jurisdiction**

1. Leader's claims arise under the Patent Act, 35 U.S.C. § 271 *et seq.* This Court has original jurisdiction over the controversy concerning Leader's infringement claims pursuant to 28 U.S.C. §§ 1331 and 1338. Venue in this judicial district is proper under 28 U.S.C. § 1391(b) and 1400 (b).

2. Facebook's counterclaims are for declaratory relief arising under 28 U.S.C. §§ 2201 and 2202 for non-infringement and invalidity. Facebook's counterclaims also include a claim for false marking arising under 35 U.S.C. § 292. Subject matter jurisdiction concerning Facebook's counterclaims is proper under 28 U.S.C. §§ 1331, 1338, 2201 and 2202. Personal jurisdiction and venue are proper because Leader filed suit against Facebook in this district.

### **III. Facts Which Are Admitted and Which Require No Proof**

The following facts are undisputed between the parties:

1. Leader is the assignee of all ownership rights, title, and interest in the '761 Patent.
2. The '761 Patent issued on November 21, 2006.
3. The '761 Patent will expire on December 11, 2023.
4. Facebook owns and operates the Facebook website which is currently located at [www.facebook.com](http://www.facebook.com) and was formerly located at [www.thefacebook.com](http://www.thefacebook.com).
5. Facebook was launched on February 4, 2004.
6. Facebook provides a developer wiki at [http://wiki.developers.facebook.com/index.php/Main\\_Page](http://wiki.developers.facebook.com/index.php/Main_Page) and <http://developers.facebook.com/docs/>.

### **IV. Statement of the Issues of Fact and Law to be Litigated**

1. Leader's statement of issues of fact and law that remain to be litigated is attached as Exhibit A1.
2. Facebook's statement of issues of fact and law that remain to be litigated is attached as Exhibit A2.

### **V. List of Trial Exhibits**

1. A list of the exhibits that both parties intend to offer at trial is attached as Exhibit B1.
2. A list of the exhibits that Leader intends to offer at trial, including Facebook's grounds for objections thereto, is attached as Exhibit B2.
3. A list of the exhibits that Facebook intends to offer at trial, including Leader's grounds for objections thereto, is attached as Exhibit B3.

4. The parties expect to offer as exhibits at trial one or more of the exhibits set forth in the exhibit lists. These lists include the exhibit number to be used at trial and a description sufficient to identify the exhibit, *e.g.*, by production number, deposition exhibit number or otherwise. The parties agree that any description of a document on an exhibit list is provided for convenience only and shall not be used as an admission or otherwise as evidence regarding the document.

5. The parties will exchange electronic copies of their respective exhibits in PDF computer file formats ten (10) calendar days prior to the commencement of trial.

6. The parties reserve the right to seek to offer an exhibit designated by the other party, even if not introduced by the designating party. All objections to such exhibits are preserved.

7. The parties agree that the '761 Patent and its underlying application and file history are authentic and admissible as evidence. Facebook challenges the admissibility of the provisional application.

8. Exhibits anticipated to be offered through direct examination of a witness shall be identified to the opposing party via email by 7:00 p.m. on the day before their anticipated proffer (*e.g.*, on Sunday for a witness testifying on Monday and on Tuesday for a witness testifying on Wednesday). The other party shall identify any objections to the admissibility of the exhibits via e-mail by 8:30 p.m. the day before the anticipated proffer of the exhibits. The parties shall meet and confer telephonically in an attempt to resolve any objections to exhibits at 9:00 p.m. the day before the anticipated proffer of the exhibits. Any objections that cannot be resolved shall be

raised with the Court prior to the testimony of the witness with whom the exhibit is anticipated to be used.<sup>2</sup>

9. Exhibits to be used in opening statements shall be identified to the opposing party by 10:00 a.m. two days before the commencement of trial via email (*i.e.*, on Saturday, June 26). Objections to exhibits to be used in opening statements shall be exchanged via email by 6:00 p.m. the day before the commencement of trial. The parties shall meet and confer telephonically in an attempt to resolve any objections to such exhibits at 9:00 p.m. the day before the commencement of trial. Any objection that cannot be resolved shall be raised with the Court before the opening statements begin.

#### **VI. Demonstrative Exhibits**

1. Any demonstrative exhibit shall be disclosed to the opposing party via email in the same manner and using the same objection and meet-and-confer procedures identified in Section V, paragraph 8, with the exception of those used for cross-examination, those created during the testimony of a witness, those to be used by a party in its opening statement, and those to be used during closing argument. The demonstrative exhibits shall be disclosed in color where applicable. Any objections that cannot be resolved shall be raised with the Court before the witness with whom the demonstrative exhibit is anticipated to be used testifies.

2. Any demonstrative exhibits to be used during opening statements shall be disclosed to the opposing party via email in the same manner and using the same objection and meet-and-confer procedures identified in Section V, paragraph 9. The demonstrative exhibits shall be disclosed in color where applicable. Any objection that cannot be resolved shall be raised with the Court before the opening statements begin.

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<sup>2</sup> If there are an abnormally large number of exhibits, the parties will, in good faith, provide each other with a reasonable extension of time to comply with the requirements for the exchange of exhibits, objections and conducting of a meet and confer.

3. Any demonstrative exhibits to be used during closing arguments (including rebuttal closing arguments) and not previously used during trial shall be identified to the opposing party via e-mail by 7:00 p.m. the day before closing arguments. The other party shall identify any objections to the admissibility of the demonstrative exhibits sought to be used in closing arguments via e-mail by 8:30 p.m. The parties shall meet and confer telephonically to attempt to resolve any objections to demonstrative exhibits at 9:00 p.m. the day before the start of closing arguments. The demonstrative exhibits shall be disclosed in color where applicable. Any objections that cannot be resolved shall be raised with the Court before the start of closing arguments.<sup>3</sup>

#### **VII. List of Trial Witnesses**

1. Leader's list of witnesses it may call at trial, either live or by deposition is attached as Exhibit C1.

2. Facebook's list of witnesses it may call at trial, either live or by deposition is attached as Exhibit C2.

3. The parties agree that they shall identify each witness to be called at trial in the same manner identified in Section V, paragraph 8.

4. The parties exchanged designations of deposition testimony expected to be used at trial on May 17, 2010. On May 24, 2010, the parties exchanged counter-designations of deposition testimony along with objections to designations. On May 27, 2010, the parties exchanged objections to the counter-designations. A list of each party's deposition designations, including objections, counter-designations and objections to counter-designations is attached hereto as Exhibit C3.

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<sup>3</sup> If there are an abnormally large number of exhibits, the parties will, in good faith, provide each other with a reasonable extension of time to comply with the requirements for the exchange of exhibits, objections and conducting of a meet and confer.

5. In accordance with the procedures outlined in paragraph 4 above, the parties shall designate deposition testimony for their respective cases-in-chief and shall also make a good faith effort to designate rebuttal deposition testimony. To the extent rebuttal testimony cannot be reasonably anticipated, the parties reserve the right to designate additional testimony and will give each other reasonable notice to provide counter-designations and object.

6. Each party shall provide the specific pages and lines of each deposition designation it intends to introduce at trial no later than 7:00 p.m. the night before the anticipated proffer of the designated testimony via email. No later than 8:30 p.m. the night before the anticipated proffer of the designated deposition testimony, in addition to any objections, the opposing party will endeavor to identify any specific pages and lines from that deposition to counter-designate via email. Any objections to the counter-designations shall be identified via e-mail by 9:00 p.m. the day before the anticipated proffer of the designated deposition testimony and shall be addressed during the 9:00 p.m. meet and confer.<sup>4</sup>

7. The specific portions of designated testimony shall be read or played in page order. If a party designates deposition testimony and the other party counter-designated, both the designation and counter-designation shall be read together or played together in page order.

8. The parties agree that any deposition testimony to be used at trial may be used whether or not transcripts of such depositions have been signed and filed pursuant to Fed. R. Civ. P. 30(b).

9. The listing of a deposition designation or counter-designation does not constitute an admission as to the admissibility of the testimony (*i.e.*, a waiver of any applicable objection).

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<sup>4</sup> If there are an abnormally large number of deposition designations, the parties will, in good faith, provide each other with a reasonable extension of time to comply with the requirements for the exchange of deposition designations, objections and conducting a meet and confer.



### **VIII. Statement of Proofs for Leader's Claims and Defenses to Counterclaims**

A brief statement of what Leader intends to prove in support of its claims and in defense to Facebook's counterclaims, including the details of the damages claimed, or other relief sought, is provided in Exhibit D1, attached hereto.

### **IX. Statement of Proofs for Facebook's Defenses and Counterclaims**

A brief statement of what Facebook intends to prove in support of its defenses and counterclaims, including the details of their damages defense and details of damages claimed or other relief sought, is provided in Exhibit D2, attached hereto.

### **X. Amendments to the Pleadings**

Facebook filed a motion for leave to amend its responsive pleading on March 25, 2010, and awaits the Court's decision. Leader reserves its rights to respond and assert any appropriate challenges and defenses to Facebook's Proposed Third Amended Answer and Counterclaim.

### **XI. Certification**

The parties have met and conferred in good faith in an effort to explore resolution of this patent dispute. Most recently, on April 12, 2010, representatives for each party, along with counsel, attended mediation with Thomas Smegal. The parties were unable to reach a mutually agreeable settlement at that time.

### **XII. Motions in Limine, Evidentiary Issues, and Miscellaneous Issues**

1. Motions in limine, evidentiary issues, and miscellaneous issues raised by Leader are provided in Exhibit E1. Leader reserves its right to respond to Facebook's motions in limine, evidentiary issues, and miscellaneous issues at the Pretrial Conference.

2. Motions in limine, evidentiary issues, and miscellaneous issues raised by Facebook are provided in Exhibit E2. Facebook reserves its right to respond to Leader's

motions in limine, evidentiary issues, and miscellaneous issues at the Pretrial Conference.

3. Pursuant to the Court's Scheduling Order in this matter, the parties served and filed opening briefs regarding dispositive motions on May 14, 2010. Currently, Counterstatements are scheduled to be served and filed on June 4, 2010 and Responses to Counterstatements are scheduled to be served and filed on June 11, 2010.

### **XIII. Outstanding Matters**

#### Leader's Outstanding Matters:

1. The impact of the USPTO ruling in the co-pending inter-parties reexamination.
2. Facebook's proposed witness list that include witnesses who were not identified in a timely manner. See footnote 7 to C2.

#### Facebook's Outstanding Matters:

1. Facebook's Motion for Leave to Amend its responsive pleading, filed on March 25, 2010 (D.I. 304);
2. Summary Judgment Motions: Due to the limited time remaining before the June 28 trial date, Facebook requests that the parties agree to waive the right to a reply to the summary judgment counterstatements, and that the Court order opposition briefs to be filed by June 11, 2010, any replies thereto filed by June 16, 2010, and oral argument, if necessary, during the week of June 21.
3. If and only if Leader brings co-inventor of the patent Jeffrey R. Lamb to trial in Delaware, Facebook intends to take a second deposition of Mr. Lamb as authorized by Magistrate Judge Stark during the April 27, 2010 hearing. Facebook's Objections to Magistrate Judge Stark's April 27, 2010 Order (D.I. 378);
4. Discovery allowed by Judge Stark's April 27, 2010 Order, which has been served

and is still pending;

5. Facebook requests that trial be phased such that the willfulness case is tried, if necessary, following the jury's determination on the issues of infringement and validity.

6. Facebook requests that Leader reduce the claims to be tried to five or fewer.

#### **XIV. Order to Control Course of Action**

This order shall control the subsequent course of the action unless modified by the Court to prevent manifest injustice.

#### **XV. Other Issues**

The parties respectfully request that the Court play the video entitled "An Introduction to the Patent System" to educate the jury on the basic tenets of patent law.

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SO ORDERED this \_\_\_\_\_ day of \_\_\_\_\_, 2010.

\_\_\_\_\_  
U.S.D.J.

968269

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

**CERTIFICATE OF SERVICE**

I, Philip A. Rovner, hereby certify that on May 27, 2010, the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing(s) to the following; that the document was served on the following counsel as indicated; and that the document is available for viewing and downloading from CM/ECF.

**BY CM-ECF, HAND DELIVERY AND E-MAIL**

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