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

FACEBOOK, INC.'S RESPONSE TO LEADER TECHNOLOGIES, INC.'S "COUNTERSTATEMENT OF DISPUTED MATERIAL FACTS" TO FACEBOOK'S MOTION FOR SUMMARY JUDGMENT OF NON-INFRINGEMENT AND NO DAMAGES

[MOTION NO. 2 OF 6]

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Filed: June 11, 2010
PUBLIC VERSION FILED: June 24, 2010

IN THE UNITED STATES COURT

FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES, INC., a Delaware corporation,	**CIVIL ACTION**
Plaintiff and Counterdefendant,	**No. 1:08-cv-00862-JJF**
v.	**CONFIDENTIAL – FILED UNDER SEAL**
FACEBOOK, INC., a Delaware corporation,	
Defendant and Counterclaimant.	

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Dated: June 11, 2010

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I. INTRODUCTION

Under *Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318 (Fed. Cir. 2008), a website operator such as Facebook cannot be liable for infringement of a claim that requires combined actions of both the website and a third-party user unless the website operator exercises "control or direction" over the third party. Facebook's opening brief established that LTI has no evidence that Facebook exercises "control or direction" over third-party users in the performance of any step of the '761 patent. Despite its deceptive length, LTI's Counter-Statement does not present a shred of evidence to the contrary. LTI instead seeks to obfuscate the simple issue presented by this motion by discussing factual issues that have no bearing on the question of "control or direction" under *Muniauction* and arguing issues of law, not facts. The Court should reject LTI's attempt to confuse the issues and proceed with adjudication of this motion on its merits.

II. SUMMARY OF RESPONSE

Muniauction makes clear that "control or direction" exists in those circumstances in which "the law would traditionally hold the accused direct infringer vicariously liable for the acts committed by another party that are required to complete performance of a claimed method." 532 F.3d at 1330. LTI, with no evidence that Facebook exercises "control or direction" over third-party end-users, focuses on four irrelevant arguments that it reproduces (in most cases, verbatim) repeatedly throughout its Counter-Statement. These arguments are addressed in below. They raise no issues of fact.

First, LTI devotes a substantial portion of its Counter-Statement to the assertion that Facebook itself performs each step of the asserted claims

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This argument is an irrelevant distraction. The present motion focuses on LTI's inability

to show infringement through use by third-party end-users and does not address alleged internal use by Facebook employees.[1] LTI's allegations relating to alleged *internal use* are clearly irrelevant to the issue of whether LTI can establish infringement when the website is used by *third-party end-users*. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted"). Moreover, as explained in Facebook's opening brief, LTI's claim for damages is predicated exclusively on use of Facebook by third-party end-users. LTI has plainly admitted that it has no evidence of any damages based on alleged internal use of the website. *See* D.I. 411 at 11.

Second, arguing the law, not facts, LTI alleges that the claims of the '761 patent do not present a divided infringement problem. LTI relies upon *American Patent Development Corp. v. Movielink, LLC*, 637 F. Supp. 2d 224 (D. Del. 2009) – the only case cited in its Counter-Statement – but LTI's reliance is misplaced. The patent in that case covered a technique for delivering a video program to a remote user site. *Id.* at 227. The court found no divided infringement issue because the steps of the claim were performed by the accused software and the claim "include[d] no step (such as a step where a user requests a video product) that must unequivocally be performed by a remote computer user." *Id.* at 236. This stands in stark contrast to every asserted claim of the '761 patent, whose plain language unequivocally includes a step in which "the user employs" or "the user accesses" data from a second context, user environment or user

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workspace. *See* '761 patent, claims 1, 9, 21, 23. *American Patent Development* is therefore inapplicable.

Third, as to use of Facebook by third-party end-users, LTI attempts to argue "control or direction" by repeatedly quoting statements from the report of its infringement expert, Giovanni Vigna, which raise no issue of fact.

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See Shaw by Strain v. Strackhouse, 920 F.2d 1135, 1144 (3d Cir. 1990) (conclusory expert testimony lacking in specific facts insufficient to defeat summary judgment) (citation omitted); *Marvel v. Delaware County*, No. 07-5054, 2009 WL 1544928, at *17 (E.D. Pa. Jun. 2, 2009) ("In the context of summary judgment motions, the Third Circuit has demanded that the factual predicate of an expert's opinion must find some support in the record, and has emphasized that mere 'theoretical speculations' lacking a basis in the record will not create a genuine issue of fact") (citation omitted).

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But, as case law makes clear, how an end-user goes about operating the Facebook website says nothing about the relationship between Facebook and its end-users, or whether Facebook is exerting direction or control over them so as to create vicarious liability. LTI has thus again raised no issues of material fact.

LTI also makes the confusing statement throughout its Counter-Statement, again copied from the same conclusory paragraph of Dr. Vigna's report, that Facebook "indirectly" infringes because it "participates in or encourages infringement of others that directly infringe." D.I. 508 at 22. LTI appears to misunderstand the legal requirements of indirect infringement. In order for Facebook to be an *indirect* infringer of the '761 patent, LTI would still have to identify another party as the alleged *direct* infringer by showing that the other party performs or satisfies every claim element. *See BMC Resources, Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1379 (Fed. Cir. 2007) ("Indirect infringement requires, as a predicate, a finding that some party amongst the accused actors has committed the entire act of direct infringement"). LTI does not identify any party other than Facebook as the alleged *direct* infringer, let alone explain how anyone else directly infringes the asserted claims. Nor would such an allegation raise any

genuine issue of material fact in response to the present motion, which seeks to show that Facebook is not a *direct* infringer. Nor does LTI adduce even a shred of evidence regarding the intent required for indirect infringement. LTI's misapplied and confused references to "indirect" infringement raise no genuine issue of material fact.

Finally, fourth, LTI claims that Facebook exercises "control or direction" over its users

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See Muniauction, 532 F.3d at 1330 ("That [defendant] controls access to its system and instructs bidders on its use is not sufficient to incur liability for direct infringement"); *Global Patent Holdings, LLC v. Panthers BRHC LLC*, 586 F. Supp. 2d 1331, 1335 (S.D. Fla. 2008) (no control or direction where the plaintiff "has, in no way, alleged that remote users are contractually bound to visit the website, it has not alleged that the remote users are Defendant's agents who visit the website within the scope of their agency relationship nor has it alleged any facts which would render Defendant otherwise vicariously liable for the acts of the remote user").

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III. RESPONSE TO LTI'S COUNTER-STATEMENT

LTI's Counter-Statement includes 33 numbered paragraphs that purport to identify allegedly "disputed" facts in Facebook's opening brief. As shown in the analysis below, however, these paragraphs do not identify any genuine issue of material fact.

A. Response to Paragraph 1 (Pages 1-4)

Paragraph 1 of the Counter-Statement spends three pages struggling to find factual "disputes" relating to issues that were never raised in Facebook's motion, and responding to arguments Facebook never made in its opening brief. In particular, LTI argues that Facebook directly infringes the asserted claims literally or under the doctrine of equivalents because, according to LTI, Facebook's servers are located in the United States, the development and testing of the Facebook website occurs in the United States, and employees of Facebook use the website to locate and fix bugs and errors. *See* D.I. 508 at 1-4. These assertions are immaterial to the question presented by Facebook's motion, i.e., whether LTI can recover for alleged infringement of the '761 patent based on the use of Facebook by *third-party end-users*. As explained above, the only matter upon which this question turns is Facebook's alleged "control or direction" over its end-users such that the actions of those users are legally attributable to Facebook. LTI presents no evidence that Facebook exerts such "control or direction." Therefore, nothing in this paragraph raises any genuine issue of material fact.

B. Response to Paragraph 2 (Pages 4-5)

Paragraph 2 of the Counter-Statement is a repetition of arguments made in Paragraph 1, which were addressed above. LTI also argues in Paragraph 2 that the asserted claims of the '761 patent should not be interpreted such that infringement requires division by Facebook and its end-users. This argument is without merit because

the claims clearly require participation by both. The claims speak for themselves and LTI's specious argument that they say something they do not raises no issues of fact. Even if the Court were to consider this argument, it presents nothing more than a question of law as to the meaning of the claim terms, again rendering it ripe for summary judgment.

C. Response to Paragraphs 3-4 (Page 5)

Paragraphs 3 and 4 of the Counter-Statement purport to "dispute" portions of Facebook's opening brief that provide a general background of the '761 patent, which was derived directly from the patent specification. LTI's half-hearted attempt to dispute what is stated in its own patent specification raises no issue of material fact.

D. Response to Paragraph 5 (Pages 5-7)

Paragraph 5 of the Counter-Statement attempts to address the following statement from Facebook's opening brief: "As shown below, each of the four asserted independent claims of the '761 patent recites steps or structures that must be performed by at least two distinct actors: (1) Facebook and its computer systems; and (2) a Facebook end-user." D.I. 411 at 2. LTI attempts to dispute this statement by repeating the same arguments addressed in connection with Paragraph 1, above. But the requirement of participation by both the system-provider and the end-user derives directly from the language of the asserted claims, and LTI's arguments to the contrary raise (at best) legal issues, not factual questions for a jury to decide. LTI also argues that Facebook directs or controls "its users' utilization of the Facebook software." D.I. 508 at 7. LTI has no evidence to support this assertion, which was addressed in Part II of this response, *supra*. And again, even if it did, the issue of direction or control should be resolved by the Court. This paragraph raises no genuine issue of material fact.

E. Response to Paragraph 6 (Page 8)

Paragraph 6 of the Counter-Statement actually attempts to dispute the statement from Facebook's opening brief that: "Claim 9 covers a method of managing data . . . ." D.I. 411 at 2. LTI argues that this claim "undeniably describes, by way of the preamble, a computer *system* that assumes the existence of data for which to manage." D.I. 508 at 8 (emphasis added). This argument is clearly wrong – claim 9 is a *method* claim, not a *system* claim as LTI apparently contends. This is clear from the preamble of claim 9, "[a] computer-implemented *method* of managing data . . . ." Though there is clearly no actual issue here, even if the Court were to indulge LTI's flight of fancy, the argument presents a legal question of claim construction, not a factual issue. LTI's attempt to deny the plain language of its own claim 9 again raises no issue of fact.

F. Response to Paragraph 7 (Pages 8-10)

Paragraph 7 of the Counter-Statement also attempts to dispute the plain language of claim 9 of the '761 patent by repeating conclusory statements from its infringement expert report and its argument regarding *American Patent Development*. But LTI's newfound wishes about what it wished it had claimed, instead of what the words of the claims actually say, do not raise genuine issue of material fact and were fully addressed in Part II of this response, *supra*.

G. Response to Paragraph 8 (Page 10)

Paragraph 8 of the Counter-Statement attempts to dispute what claims 1 and 23 cover. The patent claims speak for themselves and any "dispute" arguably raised by LTI would amount to no more than legal arguments, not facts, and as such raise no genuine issue of material fact.

H. Response to Paragraphs 9-10 (Pages 10-16)

Paragraphs 9 and 10 of the Counter-Statement merely repeat arguments that were previously presented in connection with Paragraph 1, *supra*, and the other arguments addressed in Part II of this response. As such, they also do not raise genuine issues of material fact sufficient to defeat summary judgment.

I. Response to Paragraphs 11-12 (Page 16)

Paragraphs 11 and 12 of the Counter-Statement purport to dispute a statement that Facebook never made. Facebook's opening brief made the following statement: "For purposes of this motion, there are no material differences between claim 1 and claim 23." D.I. 411 at 4 (emphasis added). LTI omitted the "[f]or purposes of this motion" qualification in its Counter-Statement, then identified a non-existent dispute with the rest of the statement. Tellingly, LTI does not identify a single difference between claims 1 and 23 that could in any way affect the issues presented in this motion. LTI's manufactured "dispute" raises no genuine issue of material fact and ignores the actual statement made by Facebook. These paragraphs, therefore, should be disregarded.

J. Response to Paragraphs 13-14 (Pages 16-18)

Paragraphs 13 and 14 purport to contest Facebook's description of the last method step in claim 23 and the subject matter of claim 21 of the '761 patent. Again, the claim language speaks for itself and LTI's "disputes" raise no genuine issue of material fact.

K. Response to Paragraph 15 (Pages 18-19)

Paragraph 15 presents another instance where LTI has taken issue with a statement Facebook never made. Facebook's opening brief makes the following statement: "Facebook operates a leading social networking service, www.facebook.com, that connects people with friends and others." D.I. 411 at 4. LTI claims that "[i]t is

DISPUTED that Facebook only 'connects people with friends and others,'" D.I. 508 at 18 (emphasis added), but Facebook never made such a statement. LTI's attempt to create a non-existent dispute over this statement raises no issues of fact. Instead, it is clear that LTI has not disputed the actual statement made by Facebook.

L. Response to Paragraphs 16-17 (Pages 19-20)

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Each asserted claim includes a step in which "the user accesses" or "the user employs" data from the second context, user environment or user workspace. No matter what feature or aspect of the Facebook website LTI chose to accuse, LTI could not recover based on use by third-party end-users because it cannot meet the standard for "control or direction" under *Muniauction*, as explained in Part II above.

M. Response to Paragraphs 18-19 (Pages 20-21)

Paragraphs 18 and 19 attempt to dispute Facebook's description of the claim language and aspects of Dr. Vigna's report. The claims of the '761 patent and Dr. Vigna's expert report speak for themselves, and LTI's unexplained disagreements with Facebook's descriptions are nothing more than attorney argument, and as such raise no genuine issue of material fact.

N. Response to Paragraph 20 (Pages 21-22)

Paragraph 20 of the Counter-Statement does not precisely identify the statement it purports to address, but it appears to be addressing the legal standard set forth on pages 5 and 6 of Facebook's opening brief as it relates to LTI's burden of proving infringement and the standard for summary judgment. These legal statements raise no factual issues.

O. Response to Paragraph 21 (Pages 22-23)

Paragraph 21 of the Counter-Statement purports to dispute the following statement from Facebook's opening brief:

> LTI has asserted that the Facebook website infringes the '761 patent based on: (1) use of the website by end-users who are members of the public; and (2) internal use of the website by Facebook employees, *e.g.*, for testing purposes.

D.I. 411 at 6. LTI does not actually dispute this statement beyond stating that it "disputes the implied fact" that LTI is only asserting these two bases for infringement. *See* D.I. 508 at 22. LTI contends that it is also asserting infringement by "indirect" infringement. But as explained in Part II above, LTI apparently misunderstands the legal requirements for "indirect infringement" and has neither identified any alleged direct infringer other than Facebook nor adduced a shred of evidence regarding the required intent element.

The other arguments made in this paragraph were likewise addressed in Part II of this response. Nothing here raises any issue of fact.

P. Response to Paragraphs 22-23 (Pages 23-27)

Paragraphs 22 and 23 of the Counter-Statement attempts to address the following statements from Facebook's opening brief:

> LTI has offered no coherent theory, let alone evidence, that Facebook controls or directs end-users in the performance of any claim step. Moreover, Federal Circuit law is clear that LTI cannot establish "control or direction" by simply showing that Facebook provides a website, controls access to it, and/or instructs others on how to use it. [*Muniauction*, 532 F.3d] at 1330. LTI has identified nothing beyond this for its first theory of infringement [based on use by end-users].

D.I. 411 at 6. Despite LTI claims that there is "ample evidence supporting a genuine issue of material fact on the issue of control and direction," LTI does not identify even one. LTI instead points to, (1) its irrelevant allegations that Facebook employees use the website internally, and (2) Dr. Vigna's conclusory assertions of "direction and/or control" by Facebook. Both of these arguments were addressed in Part II above, and neither of them raise any genuine issue of material fact.

Q. Response to Paragraph 24 (Page 27)

Paragraph 24 of the Counter-Statement purports to dispute the contention from Facebook's opening brief that "LTI cannot recover for alleged infringement based on alleged use of the website by Facebook employees for the simple reason that it has asserted no claim for damages based on alleged internal use

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LTI also claims that summary judgment should be denied because of alleged internal use of Facebook by company employees.

This argument is without merit for the reasons stated in Part II, *supra*. LTI has raised no genuine issues of material fact.

R. Response to Paragraph 25 (Page 27)

Paragraph 25 of LTI's response purports to "dispute" Facebook's description of the case law set forth on pages 6 through 8 of its opening brief, but does not identify anything about it that is inaccurate. In any event, the description in Facebook's opening brief is of a purely legal nature and raises no issues of fact.

S. Response to Paragraph 26-28 (Page 27-31)

Paragraphs 26 through 28 of the Counter-Statement present several pages of verbatim duplication of the arguments LTI presented in earlier paragraphs of its Counter-Statement. All of LTI's arguments in these paragraphs were addressed in Part II above.

T. Response to Paragraphs 29-31 (Pages 31-32)

Paragraphs 29 through 31 of the Counter-Statement attempt to address the portion of Facebook's opening brief that explains why *Muniauction* is applicable not just to method claim 9 of the '761 patent, but also to claims 1, 21 and 23. *See* D.I. 411 at 10. The arguments presented on this page are entirely legal in nature. The words of the claims speak for themselves, and even if they are disputed, such disputes would be legal in nature, not factual. As such, LTI has yet again raised no genuine issue of material fact.

U. Response to Paragraphs 32-33 (Pages 32-33)

The final two paragraphs of the Counter-Statement address the argument in Facebook's opening brief that summary judgment should be entered against LTI's claim for damages. Facebook's argument is based on the fact that, (1) LTI cannot establish infringement based on use of Facebook by third-party end-users, and (2) LTI has no evidence of damages for alleged "internal use" by Facebook employees. *See* D.I. 411 at

11. In other words, because the only use of Facebook for which LTI seeks damages is non-infringing under *Muniauction*, summary judgment should be entered against LTI's claim for damages.

LTI responds with distortions and mischaracterizations, but no facts.

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__. But LTI does not explain how it can permissibly recover damages for use of the Facebook website that is non-infringing, because it cannot.

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Therefore, LTI has raised no genuine issue of material fact on the issue of damages.

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IV. CONCLUSION

For the reasons stated above, Facebook respectfully requests that this Court reject LTI's "Counter-Statement of Disputed Material Facts" and order LTI to file an answering brief and proceed to decide the merits of Facebook's motion for summary judgment.

Dated: June 11, 2010

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