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 "COUNTER-STATEMENT OF DISPUTED MATERIAL FACTS" TO FACEBOOK'S MOTION FOR SUMMARY JUDGMENT BASED ON ANTICIPATION UNDER 35 U.S.C. § 102(b)

[MOTION NO. 6 OF 6]

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Dated: June 11, 2010

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I. INTRODUCTION AND SUMMARY OF RESPONSE

Facebook's motion for summary judgment of anticipation under 35 U.S.C. § 102(b) is based solely on a comparison of U.S. Patent. No. 6,236,994 (the "Swartz patent") to the claims of U.S. Patent No. 7,139,761 (the "'761 patent"). LTI does not, and cannot, dispute the content of these two patents, as the documents speak for themselves. Nor does LTI dispute that Swartz issued more than one year prior to the filing of the application that matured into the '761 patent, meeting the timing requirements for 35 U.S.C. § 102(b) prior art.

Rather, LTI provides only the conclusory opinion of its expert, James Herbsleb, that the Swartz patent does not disclose certain features in the asserted claims of the '761 patent. Such unsupported opinion testimony is insufficient to create a genuine issue of material fact. *See Novartis Corp. v. Ben Venue Labs., Inc.*, 271 F.3d 1043, 1051 (Fed. Cir. 2001) (an expert affidavit on summary judgment must set forth more than conclusory opinions, but rather must "'set[] forth specific facts showing that there is a genuine issue for trial.'") (quoting *Arthur A. Collins, Inc. v. N. Telecom Ltd.*, 216 F.3d 1042, 1047-48 (Fed. Cir. 2000)).

As no genuine issues of material fact exist, Facebook requests that this Court reject LTI's "Counter-Statement of Disputed Material Facts," order LTI to file an answering brief, and proceed to decide the merits of Facebook's motion for summary judgment.

II. RESPONSE TO LTI'S COUNTER-STATEMENT[1]

LTI's Counter-Statement includes 16 numbered paragraphs that purport to identify allegedly "disputed" facts in Facebook's opening brief. As shown in the analysis below, however, these paragraphs fail to identify a single genuine issue of material fact.

A. Response to Paragraph 1 (Pages 2-10)

The only statement to which Paragraph 1 of the Counter-Statement purports to respond is the first sentence of the Summary of Argument of Facebook's opening brief: "Each and every limitation of the alleged invention of U.S. Patent No. 7,139,761 (the "'761 patent") was disclosed, using nearly identical language, in U.S. Patent No. 6,236,994." D.I. 408 at 1. LTI claims that this is a "disputed fact." It is not. Rather, it is the logical conclusion of the factual and legal support set forth in Facebook's Motion.

LTI uses its response to this paragraph to set forth every statement by its expert that relates in any manner to the Swartz reference, no matter how conclusory or irrelevant. LTI further contends that by not addressing Dr. Herbsleb's counterarguments, Facebook has left "no doubt that there are material facts in dispute." D.I. 512 at 10. However, Dr. Herbsleb's arguments are merely bald statements that his *opinion* is that certain elements of the '761 patent claims are not present in the Swartz patent. Assertions without evidentiary support, whether made by counsel or experts, are insufficient to create a genuine issue of material fact. *See Novartis*, 271 F.3d at 1051.

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[1] Much of LTI's Counter-Statement is devoted to raising collateral issues that have no bearing on the outcome of this motion. The law on summary judgment is clear, however, that "[o]nly 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." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Rather, the Swartz and '761 patents speak for themselves. The Court is in the unique position to apply its own construction of the claim terms to determine whether or not the Swartz patent discloses each and every element of the '761 patent, as Facebook contends it does. All that is relevant to this inquiry are the disclosures of the two patents at issue, not an expert's unsupported and vague assertions.

Redacted

B. Response to Paragraph 2 (Pages 10-11)

Paragraph 2 purports to respond to the third sentence of the Summary of Argument portion of Facebook's opening brief: "Swartz was never cited or considered by the U.S. Patent and Trademark Office ("PTO") **during the original prosecution of the '761 patent.**" D.I. 408 at 1 (emphasis added). LTI entirely ignores the emphasized portion of this statement. Instead, LTI claims to dispute Facebook's assertion on the ground that Facebook submitted Swartz in its application for *ex parte* reexamination of the '761 patent—which was submitted years after the original prosecution of the '761 patent—a fact that is irrelevant to the question of whether Swartz was considered by the examiner during the initial prosecution of the patent. *See* D.I. 512 at 10-11. Importantly, LTI does not and cannot dispute that, during the original prosecution of the '761 patent, Swartz was neither cited nor considered.[2]

LTI's recitation of the "facts" surrounding the reexamination petitions and office action are false and misleading.

Redacted

[2] Even if the Swartz patent had been considered by the examiner during the original prosecution of the '761 patent, which it was not, "a patent may be found to be anticipated on the basis of a reference that had properly been before the patent examiner in the United States Patent and Trademark Office . . . at the time of issuance." *IPXL Holdings, L.L.C. v. Amazon.com, Inc.*, 430 F.3d 1377, 1381 (Fed. Cir. 2005).

As such, additional allegations throughout LTI's response that, for instance, "Facebook's arguments have already been rejected by the patent examiner in his [sic] recent Office Action" are simply desperate, bad faith attempts to preclude summary judgment through outright deceit. *See, e.g.*, D.I. 512 at 17.

In addition, LTI itself has filed a motion to attempt to keep out evidence about the reexamination. *See* D.I. 420. Thus, even LTI concedes that the disposition of Facebook's reexamination petitions are not relevant in any manner to this motion for summary judgment. LTI should not be allowed to alternately hide and advance these reexamination proceedings when it suits its case.

C. Response to Paragraph 3 (Page 11)

Paragraph 3 purports to respond to the first sentence of the Summary of Undisputed Facts of Facebook's opening brief: "The '761 patent, entitled 'Dynamic Association of Electronically Stored Information with Iterative Workflow Changes,' issued from an application filed on December 10, 2003." D.I. 408 at 1.

LTI only disputes this fact to the extent that LTI is attempting to claim priority to Provisional Application 60/432,255, filed on December 11, 2002. *See* D.I. 512 at 11. It is undisputed that Swartz issued on May 22, 2001, well over a year before December 11,

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2002. Thus, the parties' dispute as to the priority date of the patent is immaterial to this motion and raises no materially disputed facts.

D. Response to Paragraph 4 (Page 12)

Paragraph 4 purports to respond to the second sentence of the Summary of Undisputed Facts of Facebook's opening brief: "The '761 patent purports to disclose a data management tool for use in 'communications, organization, information processing, and data storage." D.I. 408 at 1. LTI only disputes this statement "to the extent it purports to limit the disclosure or claims of the '761 patent." D.I. 512 at 12. However, there is no genuine dispute that this quote from the '761 patent is accurate.

E. Response to Paragraph 5 (Pages 12-13)

Paragraph 5 of LTI's Counter-Statement purports to respond to the first sentence of the second paragraph of the Summary of Undisputed Facts of Facebook's opening brief: "One of the stated goals of the Swartz patent, like McKibben who followed, was to prevent the loss of information between individuals in an organization or enterprise working on large scale projects," followed by a block quote of the Swartz patent. D.I. 408 at 1-2 (quoting Swartz).

The majority of this statement is a direct quote from Swartz, the accuracy of which LTI does not and cannot dispute. As such, LTI disputes this statement only "to the extent that Leader's '761 Patent and Swartz disclose completely different systems, addressed to different problems, and with different goals." D.I. 512 at 12. However, unsupported attorney argument that the two patents disclose different systems is inadequate to create a genuine issue of material fact. Although LTI purports to set forth "facts" in support of its argument, a comparison of LTI's description of "middleware" using selective quotes from the Swartz patent with LTI's description of the '761 patent's

functionality actually demonstrate that the two patents in fact disclose identical systems with identical purposes.

Most importantly, the arguments LTI sets forth are totally irrelevant to the statement Facebook actually made, and LTI never disputes that one of the goals of the '761 patent was to prevent the loss of information between individuals in an organization or enterprise working on large scale projects. Thus, no genuine issue of material fact exists as to this statement.[4]

F. Response to Paragraph 6 (Page 13)

Paragraph 6 of LTI's Counter-Statement purports to respond to the second sentence of the second paragraph of the Statement of Undisputed Facts of Facebook's opening brief: "Because such large scale collaborative processes run the risk of losing data as users continued to make changes to their documents over time, a need existed for a system and method to 'integrate and synchronize the flow of all information, processes and work practices necessary for making better and faster decisions within an enterprise.'" D.I. 408 at 2 (quoting Swartz).

LTI does not and cannot dispute the accuracy of the quote from Swartz. Rather, LTI claims that it disputes this fact only "to the extent Facebook purports to limit the purpose of the '761 Patent with a method to 'integrate and synchronize the flow of all information, processes and work practices necessary for making better and faster decisions within an enterprise.'" D.I. 512 at 13. Although it is difficult to understand what LTI means by "limiting the purpose of the '761 Patent with a method," it appears

[4] LTI's assertion that it disputes this fact to the extent it implies that the sole inventor of the '761 patent is Michael McKibben, as Jeffrey Lamb is also an inventor on the patent, is immaterial to this Motion.

that LTI does not dispute that the '761 patent discloses such a method, among other alleged disclosures.

Redacted

Even if LTI were able to set forth a cognizable distinction, it would be immaterial to the statement to which this paragraph purports to respond. Thus, no genuine issue of material fact exists as to this statement.

G. Response to Paragraph 7 (Pages 13-14)

Paragraph 7 of LTI's Counter-Statement purports to respond to the third sentence of the second paragraph of the Statement of Undisputed Facts of Facebook's opening brief: "Swartz proposed a solution referred to as 'knowledge integration middleware,' which he defined as: 'any software used to assist in the integration of disparate information sources and their corresponding applications for the purposes of recording, distributing, and activating knowledge, knowledge applications, or knowledge services.'" D.I. 408 at 2 (quoting Swartz).

LTI disputes this statement only to the extent that Facebook "purports that the disclosed cite from Swartz discloses a system similar to that in the claims of the '761 Patent." D.I. 512 at 13. However, LTI does not identify any inaccuracies with Facebook's statement, which is simply a quote from the Swartz patent summarizing its disclosure. Thus, no material issue of fact exists as to this statement. Any additional statements by LTI are immaterial argument not responsive to this statement.

H. Response to Paragraph 8 (Page 14)

Paragraph 8 of LTI's Counter-Statement purports to respond to the first sentence of the third paragraph of the Summary of Undisputed Facts of Facebook's opening brief:

"In one embodiment, Swartz discloses a system known as 'DataDocket,' which 'manages the flow of information between two or more applications that comprise the information system of an enterprise.'" D.I. 408 at 2 (quoting Swartz).

LTI disputes this statement only to the extent that Facebook "purports that the disclosed cite from Swartz discloses a system similar to that in the claims of the '761 Patent." D.I. 512 at 14. However, LTI does not identify any inaccuracies with Facebook's statement, which is simply a quote from the Swartz patent summarizing its disclosure. Thus, no material issue of fact exists as to this statement. Any additional statements by LTI are immaterial argument not responsive to this statement.

I. Response to Paragraph 9 (Page 14)

Paragraph 9 of LTI's Counter-Statement purports to respond to the second sentence of the third paragraph of the Summary of Undisputed Facts of Facebook's opening brief: "The management functions in Swartz rely on 'context information' that is automatically collected from users and applications, which is stored in a 'metadata catalog.'" D.I. 408 at 2 (quoting Swartz).

LTI disputes this statement only to the extent that Facebook "purports that Swartz discloses a system which automatically generates metadata is related to user movement similar to that disclosed in the claims of the '761 Patent." D.I. 512 at 14. Although this sentence is difficult to parse, again LTI does not identify any inaccuracies with Facebook's statement, which is simply a description of the disclosure of the Swartz patent using Swartz's own terminology. Thus, no material issue of fact exists as to this statement. Any additional statements by LTI are immaterial argument not responsive to this statement.

J. Response to Paragraph 10 (Pages 14-15)

Paragraph 10 purports to respond to the third sentence of the third paragraph of the Summary of Undisputed Facts of Facebook's opening brief: "In particular, Swartz discloses a system that 'captures metadata associated with the information shared, stored and accessed by the users of the data so as to characterize the 'context' in which the information is being used.' *Id.* at Col. 8:56-60; *see also id.* at Col. 6:22-26 ('More specifically, knowledge integration middleware is preferably employed to identify (including tracking, monitoring, analyzing) the context in which information is employed so as to enable the use of such context in the management of knowledge.')." D.I. 408 at 2 (quoting Swartz, emphasis added).

LTI disputes this statement only to the extent that Facebook "implies that the system discloses the dynamic creation of metadata in relation to user movement as in the '761 Patent." D.I. 512 at 14-15. LTI does not identify any inaccuracies with Facebook's statement, which are simply a series of quotes from the Swartz patent. Thus, no material issue of fact exists as to this statement. Any additional statements by LTI are immaterial argument not responsive to this statement.

K. Response to Paragraph 11 (Page 15)

Paragraph 11 purports to respond to the fourth sentence of the third paragraph of the Summary of Undisputed Facts of Facebook's opening brief: "This context information and metadata can be used to create a 'knowledge path' that allows users to reflect back and track all interactions and transactions that took place with respect to their data." D.I. 408 at 2-3 (quoting Swartz).

LTI disputes this statement only to the extent that Facebook "purports to imply that Swartz discloses anything related to the claims of the '761 Patent." D.I. 512 at 15.

LTI does not identify any inaccuracies with Facebook's statement, which is simply a description of the disclosure of the Swartz patent using Swartz's own terminology. Thus, no material issue of fact exists as to this statement. Any additional statements by LTI are immaterial argument not responsive to this statement.

L. Response to Paragraph 12 (Pages 15-16)[5]

Paragraph 12 purports to respond to the first and second sentences of the section entitled "Swartz Anticipates Claims 1, 4, 7, 9, 11, 21, 23, 25, 31 and 32" of Facebook's opening brief: "It should come as no surprise that Swartz '994 previously disclosed each and every element later claimed by Mr. McKibben. They were *both* trying to solve the problem, in their own words, of information loss over time and use by many people." D.I. 408 at 4. LTI purports to dispute this statement, which contains no facts susceptible of dispute, but rather merely sets forth Facebook's argument for why it is not surprising that Swartz anticipates the '761 patent. Not surprisingly, LTI's response is purely conclusory argument, consisting of fruitless and unsupported attempts to distinguish Swartz from LTI's invention.

M. Response to Paragraph 13 (Page 16)

Paragraph 13 purports to respond to the first and second sentences of the section entitled "Swartz Anticipates Claims 1, 4, 7, 9, 11, 21, 23, 25, 31 and 32" of Facebook's opening brief: "Therefore, both needed tracking and metadata updating systems." D.I. 408 at 4. LTI purports to dispute this fact because it contends that Swartz does not disclose a system that "tracks user movement" or "updates metadata" as disclosed in the '761 patent. However, once again, this statement merely sets forth Facebook's argument

[5] LTI's assertion that it disputes this fact to the extent it implies that the sole inventor of the '761 patent is Michael McKibben, as Jeffrey Lamb is also an inventor on the patent is immaterial to this Motion.

for why it is not surprising that the Swartz patent anticipates the '761 patent; it does not contain any facts to dispute. LTI's dispute with this argument, then, does not raise a genuine issue of material fact.

N. Response to Paragraph 14 (Page 17)

Paragraph 14 of LTI's Counter-Statement attempts to respond to Facebook's claim chart, which demonstrates the invalidity of the '761 patent in view of Swartz. The language of the claims of the '761 patent and Swartz is undisputed and speaks for itself. The chart set forth by LTI "for the convenience of the Court" is simply a rehashing of its arguments about how it believes the language of the two patents should be interpreted. Redacted There is no dispute as to the contents of either the Swartz or the '761 patents. Rather, the parties dispute the meaning of the terms within the two patents—an issue of claim construction for the Court to decide.

O. Response to Paragraphs 15-16 (Pages 32-33)

Paragraphs 15 and 16 of the Counter-Statement purport to respond to the following sentences from Facebook's opening brief: (1) "Although Swartz does not explicitly disclose the use of a portable wireless device, claim 16 adds nothing of patentable significance and is invalid as obvious;" and (2) "Claim 16 recites nothing more than the trivial additional element of accessing a user environment from a 'portable wireless device.'" D.I. 408 at 18.

LTI's response to these statements is that Claim 16 adds "a further limitation and therefore is of patentable significance." These assertions are immaterial and do not set forth any disputed facts. LTI does not dispute Facebook's statement that the only additional element found in Claim 16 is the accessing of a user environment from a

"portable wireless device." Further, LTI does not dispute the following sentence: "It is beyond dispute that portable wireless devices, such as laptop computers or handheld personal digital assistants, were well-known long before the application for the '761 patent was filed." D.I. 408 at 18-19. LTI's conclusion, with no explanation or evidentiary support, that the additional element of Claim 16 is "non-trivial" is not sufficient to raise an issue of disputed fact, particularly as Facebook has set forth substantial evidence as to the obviousness of this combination.

III. 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.

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