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July 12, 2010

BY E-FILE AND HAND DELIVERY

The Honorable Leonard P. Stark
U.S. District Court for the District of Delaware
844 N. King Street
Wilmington, DE 19801-3556

Re: Leader Technologies, Inc. v. Facebook, Inc., C. A. No. 08-862-LPS

Dear Judge Stark:

I write on behalf of Plaintiff Leader Technologies in response to Your Honor's request for the parties to advise the Court on three issues: (1) Facebook's disagreement with your ruling on its *Daubert* Motion No. 2, Issue No. 2; (2) the proposed timeframe for the second trial; and (3) the schedule for exchanging trial demonstratives. The parties disagree regarding the first two issues and have almost reached agreement on the exchange of demonstratives for direct examinations. An additional dispute has arisen regarding Facebook's continuing amendments to the witness list regarding the witnesses who will appear live at trial, an issue that came up ***after*** the parties exchanged final witness lists on the agreed-upon deadline of July 7, 2010.

1. Dr. Herbsleb's Testimony Regarding Validity Issues

Facebook moved to exclude six portions of Dr. Herbsleb's expert testimony regarding:

1. The Experimental Work of Post-Doctoral Fellow Marcelo Cataldo;
2. The Alleged "Cumulativeness" of Prior Art References;
3. The Alleged Date of Conception of the '761 Patent;
4. Whether References were Properly "Incorporated by Reference;"
5. The Alleged Lack of "Materiality" of Prior Art References; and
6. What the Patent Office "Considered" to be the Priority Date of the '761 Patent.

At the July 1 pretrial conference, the Court granted Facebook's motion with respect to Issue No. 4 relating to "incorporated by reference" and Issue No. 5 relating to "materiality," but denied all others. D.I. 567 at 12:1-12. With respect to Issue No. 5, the Court stated:

> And, second, the issue that I think was number five in the motion, which has to do with the materiality of certain prior art references. That issue goes solely to the inequitable conduct defense which is now part of the forthcoming trial.
>
> Dr. Herbsleb will not be permitted to testify to matters that go solely to inequitable conduct, but in all other respects, the two Facebook motions to preclude evidence are denied.

Id. at 12:4-12. Thus, the Court denied Facebook's *Daubert* motion with respect to whether Dr. Herbsleb could testify regarding Paragraphs 56-72 of his report which state that the prior art

asserted by Facebook in its invalidity case is cumulative of the prior art already considered by the Patent Office during the prosecution of the '761 Patent. D.I. 468 at 22.

Now, Facebook attempts to conflate two distinct issues by equating the ruling on the materiality of prior art in Issue No. 5, which relates to its inequitable conduct claim, to Dr. Herbsleb's proper rebuttal of Dr. Greenberg's validity analysis. D.I. 567 at 59:6-17. In addition to the other forty pages of validity analysis, Dr. Herbsleb provided in Paragraphs 56-72 of his expert report analysis of why the references that Facebook asserts as part of its invalidity case are merely "cumulative" of the references that the Patent Office reviewed during the prosecution of the '761 Patent. Dr. Herbsleb's testimony directly rebuts Dr. Greenberg's claim that the Patent Office did not review the references cited by Facebook for invalidity. D.I. 424, Ex. 1 (Expert Report of Saul Greenberg, Ph.D at ¶ 42). Facebook is seeking to expand the Court's ruling on inequitable conduct to exclude Dr. Herbsleb from rebutting Dr. Greenberg on validity issues.

As set forth in Leader's opposition to Facebook's *Daubert* motion, this section of Dr. Herbsleb's report does not address inequitable conduct, but provides his analysis of the references cited under the section entitled "Anticipation and Obviousness" in Dr. Greenberg's expert report. D.I. 468 at 22. Dr. Herbsleb's use of the word "cumulative" is not as a legal conclusion regarding inequitable conduct, but rather denotes that a given asserted reference provides essentially the same information as a reference the Patent Office already considered. Id. In fact, Facebook agreed that Dr. Herbsleb's analysis "was not designed to respond to Facebook's defense of inequitable conduct." D.I. 415 at 18, n.1. Since Dr. Herbsleb's analysis and proposed testimony concerns the validity of Leader's asserted patent, and not inequitable conduct, Facebook should not be permitted to revisit the Court's denial of its *Daubert* motion with respect to Issue No. 2 regarding validity.

2. Scheduling of Trial On The Bifurcated Claims And Issues

If Leader wins on the liability issues, Leader proposes that a trial on the issues and claims bifurcated from the July 19th trial should be conducted as promptly as possible. All fact discovery, expert reports, and expert discovery on these issues have concluded. The parties already spent significant resources litigating the issues and were prepared to try these issues. The original Pretrial Order addressed the bifurcated claims, with the exception of Facebook's new inequitable conduct claim that was subsequently permitted by the Court. A prompt second trial will permit the parties to file witness lists, finalize the already drafted jury instructions, and update the damages calculations, if appropriate. There is no reason to delay trying all of the issues in the case or for piecemeal appeals, because discovery and expert reports are complete.

Piecemeal disposition of this action that results in a lengthy delay will be extremely prejudicial to Leader. Appeals to the Federal Circuit regarding the liability issues and final reexamination decisions that Facebook filed on the '761 Patent will take years. Federal Circuit appeals frequently take at least a year and the average pendency of a final decision in an *inter partes* reexamination is 78.4 months, almost 6 ½ years. D.I. 148 at 16. Such delays put Leader's patent rights and Leader, an operating company competing in the marketplace, at risk. Facebook would be permitted to infringe Leader's patent unfettered for years, while Leader will be forced to compete against its own technology in the marketplace. Leader has already been harmed in the marketplace and it should not bear the burden of continued risk to its business due to Facebook's continued infringement. Relevant witnesses' memories will fade and they may not be available if there is a lengthy delay. Also, Leader will need updated discovery on damages, and will spend more time and money for such discovery and to get its expert back up to speed.

Leader also has no assurances that Facebook's current meteoric rise means that its solvency is guaranteed. The list of failed internet companies in the last decade includes many well-known names, like America Online, AltaVista, Webvan, Pets.com, and WorldCom. Today, large brick and mortar companies like Enron, Lehman Brothers, and General Motors, are bankrupt or dissolved. In addition, Facebook is incentivized to "wait it out" against a small company, hoping that it will not survive a lengthy delay in enforcement of its patent rights. Delay of more than a few weeks will effectively stay this case and should require that Facebook provide a bond in the damages amount set forth by Leader's expert, which only represents about 10% of Facebook's expected revenues for 2010.[1]

3. The Parties' Proposal For Exchanging Demonstratives

The parties have agreed to the following schedule, pending any further unexpected revisions by Facebook. Opening statement demonstratives will be exchanged by email on July 15, 2010 by 3:00 p.m. EDT. Any objections will be exchanged by email and discussed no later than 6:00 p.m. EDT that day. Unresolved objections will be raised at the July 16, 2010 pretrial conference. Demonstratives for each subsequent day of trial shall be exchanged by 7:00 p.m. EDT the night before it is to be used and the parties will confer regarding objections at 9:00 p.m. EDT that same day. Any unresolved objections will be raised with the Court the following morning for resolution. Closing argument demonstratives are to be exchanged by email and submitted to the Court at the conclusion of the parties' evidentiary cases. The parties will confer and raise any unresolved objections with the Court prior to commencement of closing arguments.

4. Facebook has added two previously unlisted, potential party witnesses to its witness list

Facebook represented at the July 1st Pretrial Conference that it would be prepared to exchange witness lists on Wednesday, July 7th. D.I. 567 40:2-6. The parties subsequently agreed to that proposal and exchanged final witness lists, in which Facebook identified the four witnesses who would testify live. Hopkins Declaration attached hereto, Exs. A-B. On July 10th, Facebook added two new witnesses, Andrew Bosworth and Josh Wiseman, without any explanation.[2] Id., Ex. C. Adding these potential witnesses at this late date prejudices Leader's ability to prepare for trial or rely upon Facebook's representations.[3] Facebook should be precluded from adding any witnesses at this late date. Facebook has control of its employees and should be capable of determining their availability for trial within the time agreed to by the parties. Leader requests that Facebook be precluded from having any witnesses testify at trial that it failed to disclose on the agreed-upon deadline.

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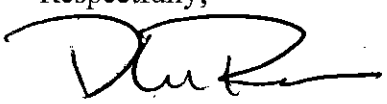
[1] The purpose of a bond is to preserve the status quo and secure the appellee's interests during appeal. Such a bond is at the discretion of the Court and "only 'extraordinary circumstances' will support the provision of security other than a supersedeas bond." *U.S. on Behalf of Small Business Admin. v. Kurtz*, 528 F.Supp. 1113 (E.D. Pa. 1981).

[2] It appears that these witnesses will testify about Facebook's U.S. Patent No. 7,669,123, Facebook's Proposed Ex.No. 928, as they are listed as inventors. Such irrelevant testimony will only confuse the jury into believing that Facebook cannot infringe because it has patents covering its accused website. It is well established that the existence of a patent "does not constitute a defense to infringement of someone else's patent. A patent grants only the right to *exclude others* and confers no right on its holder to make use or sell." *Bio-Technology General Corp. v. Genentech*, 80 F.3d 1553, 1559 (Fed. Cir. 1996)(no emphasis added); *see also Cordis Corp. v. Medtronic Vascular*, 2005 WL 885381 at *4 (D.Del)(evidence of patents covering defendants' accused stents excluded because they "are not relevant to an infringement analysis").

[3] This is just one of several deadlines Facebook has failed to honor after proposing and agreeing to them for pretrial matters.

Respectfully,



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