

On July 1, 2010, counsel for Plaintiff and Counterclaim-Defendant Leader Technologies, Inc. (“Leader”) and counsel for Defendant and Counterclaim-Plaintiff Facebook, Inc. (“Facebook”) participated in a pretrial conference before this Court. Another pretrial conference is scheduled for July 16, 2010. Pursuant to the Court’s July 1, 2010 Order, Leader and Facebook hereby submit this Joint Pretrial Order relating to the trial of the action commencing on July 19, 2010 for approval by the Court. This pretrial order reflects recent rulings by the Court which bifurcated a number of issues. The parties reserve their right to raise any issues that were set forth in their May 27, 2010 Joint Pretrial Order at a later time, if necessary.

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 seeks any relief that the Court deems appropriate.

2. **Facebook’s Allegations:** On January 8, 2009, Facebook filed its answer, affirmative defenses, and counterclaims, which it amended three times: first on January 28, 2009, again on December 23, 2009 and again on March 25, 2010. Facebook’s affirmative defenses are non-infringement and invalidity under 35 U.S.C. §§ 102 and 103. Facebook’s counterclaims are for declaratory judgment of non-infringement and declaratory judgment of invalidity. Facebook denies Leader’s claim that it has accused “the Facebook website and its underlying architecture[].” Facebook seeks any 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. 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 and Shall Be Inserted into the Preliminary Jury Instructions

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. Facebook owns and operates the Facebook website which is currently located at www.facebook.com and was formerly located at www.thefacebook.com.
4. Facebook provides a developer wiki at 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 B2.¹

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. The parties have agreed, however, to continue meeting and conferring regarding the exhibits, where possible. 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 exchanged electronic copies of their respective exhibits in PDF computer file formats on July 9, 2010.

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.

¹ Since the parties' exhibit list was filed with the Court on July 12, 2010, Leader has withdrawn Exhibit 1027 from its list.

8. Pursuant to the Court's July 1, 2010 Order, the Court will resolve all objections to exhibits during the July 16, 2010 pretrial conference.

VI. Demonstrative Exhibits

1. Demonstrative exhibits for the parties' opening statements shall be exchanged by e-mail 3:00 p.m. on July 15, 2010. Any objections to the opening demonstratives shall be exchanged by e-mail and discussed in a telephonic meet and confer no later than 6:00 p.m. on July 15, 2010. Any objections that remain unresolved shall be raised at the July 16, 2010 pretrial conference.

2. Any subsequent demonstrative exhibits to be used during trial (except closing argument demonstratives) shall be disclosed to the opposing party via email by 7:00 p.m. the night before the party reasonably expects to be able to use the demonstrative. The parties shall meet and confer at 9:00 p.m. regarding any objections to the demonstratives and any objections that cannot be resolved shall be resolved by the Court the next day.

3. Demonstratives to be used on cross-examination that are created before the direct examination of the witness shall be disclosed as set forth in Section VI., paragraph 2. Any objections to cross-examination demonstratives created during examination will be resolved, if necessary, during cross-examination.

4. Demonstratives to be used during closing arguments shall be exchanged by e-mail and submitted to the Court after the conclusion of both parties' evidentiary cases. The parties shall meet and confer regarding any objections to closing demonstratives and any objections shall be resolved prior to the commencement of closing arguments.

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 by 6:00 p.m. the night before the witness is expected to testify.
4. Pursuant to the Court's July 1, 2010 Order, the parties exchanged revised designations of deposition testimony expected to be used at trial on July 7, 2010. On July 9, 2010, the parties exchanged counter-designations of deposition testimony along with objections to designations. On July 13, 2010, the parties exchanged objections to the counter-designations and delivered the designations to the Court in the format requested during the July 1, 2010 pretrial conference.
5. In accordance with the procedures outlined in paragraph 4 above, the parties have designated deposition testimony for their respective cases-in-chief and have also made 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. three nights before the anticipated proffer of the designated testimony via email. No later than 8:30 p.m. three nights before the anticipated proffer of the designated deposition testimony, the opposing party will endeavor to identify any specific pages and lines from that deposition to counter-designate via

email. The parties' previously asserted objections to the designations, any new objections and any objections to counter-designations shall be shall be addressed during a 9:00 p.m. meet and confer.² The party offering the designations shall notify the Court of the deposition testimony it intends to offer, including any counter-designations and whether any objections remain, for the anticipated designated testimony no later than 48 hours before the anticipated proffer of the designated testimony.

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).

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

² 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.

other relief sought, is provided in Exhibit D2, attached hereto.

X. Amendments to the Pleadings

All issues regarding amendments to the pleadings have been ruled on by this Court.

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

During the July 1, 2010 the Court ordered the parties to meet and confer regarding whether Leader's expert Dr. Herbsleb may testify as to whether Facebook's asserted prior art is cumulative of other references previously considered by the patent office. The parties met and conferred on this issue on July 8, 2010 and submitted letter briefs to the Court on July 12, 2010.

XIII. Outstanding Matters

Leader's Outstanding Matters:

1. Facebook's failure to provide 35 U.S.C. § 282 disclosures.

Leader's Statement:

Facebook failed to serve its invalidity positions pursuant to 35 U.S.C. § 282. To satisfy this statutorily-required disclosure, it is common practice for accused infringers file with the Court and serve a Rule 282 disclosure at least thirty days before trial. Facebook cannot dispute that the practice in the District of Delaware is to provide such disclosures. The failure to provide such a disclosure is grounds to preclude Facebook's invalidity allegations at trial, even where the information was provided during discovery. *See Ferguson Beauregard/Logic Controls v. Mega Systems, LLC*, 350 F.3d 1327 (Fed. Cir. 2003) (upholding the District Court's ruling to preclude evidence of showing invalidity due to the accused failure to give notice under 35 U.S.C. § 282, even though the patentee participated in a deposition and received interrogatories related to the prior art the accused was attempting to use for invalidity). Given that Facebook had 30 days before trial to provide this disclosure, this issue was not ripe when Leader filed its motions *in limine*.

Facebook's failure to comply with this statutory requirement is particularly troubling because it has listed on its exhibit list: (a) alleged prior art references that Facebook's expert on issues of validity had not reviewed or were not disclosed in his expert report and which, in at least one instance, as not produced to Leader, and (b) Leader's communications with third parties that Facebook apparently intends to use for its allegations of on-sale bar and public disclosure which were not disclosed in Facebook's last supplemental interrogatory response, which was its Fourth Supplemental Interrogatory Response to Interrogatory No. 4 served on April 19, 2010. In response to Interrogatory No. 4 which asks for the complete factual basis for Facebook's invalidity contentions, Facebook identified (a) 3 alleged offers for sale and (b) 48 companies by name that purportedly received public demonstrations of the patented technology in its Fourth Supplemental Interrogatory Response.

Facebook's Statement:

35 U.S.C. § 282 states, in part:

In actions involving the validity or infringement of a patent the party asserting invalidity or noninfringement shall give notice in the pleadings or otherwise in writing to the adverse party at least thirty days before the trial, of the country, number, date, and name of the patentee of any patent, the title, date and the page numbers of any publication to be relied upon as anticipation of the patent in suit or, except in actions in the United States Court of Federal Claims, as showing the state of the art, and the name and address of any person who may be relied upon as the prior inventor or as having prior knowledge of or as having previously used or offered for sale the invention of the patent in suit.

The purpose of the notice required by Section 282 "is to prevent unfair and prejudicial surprise by the production of unexpected and unprepared-for prior art references at trial." *ATD Corp. v. Lydall, Inc.*, 159 F.3d 534, 551 (Fed. Cir. 1998) (quoting *Eaton Corp. v. Appliance Valves Corp.*, 790 F.2d 874, 879 (Fed. Cir. 1986)) ("The solid entrenchment of the Federal Rules and the principles of orderly discovery weigh heavily against . . . argument that § 282 governs the requirement of notice of prior art despite the elaborate discovery procedures, interrogatories, and explicit directives by which the trial was managed."). Facebook provided notice as required by Section 282, and LTI cannot claim unfair or prejudicial surprise.

Facebook disclosed its invalidity contentions (including the prior art it intends to assert at trial) in writing prior to the close of written discovery in 2009. Moreover, on April 8, 2010, more than three months before the start of the trial, Facebook served a complete and detailed

expert report of Saul Greenberg, Ph.D, on invalidity that disclosed all of the prior art upon which Facebook intends to rely at trial. LTI took Dr. Greenberg's deposition and submitted its own rebuttal expert report setting forth LTI's positions on those same prior art references. There are therefore no "unexpected and unprepared-for prior art references," *ATD Corp.*, 159 F.3d at 551, that will be presented at trial. Dr. Greenberg specifically stated in his report that he intended to testify at trial regarding the invalidity of the patent as discussed in his report. See April 8, 2010 Greenberg Expert Report at 13. LTI cannot in good faith deny that it has had notice of Facebook's prior art references long before the 30-day period set forth in Section 282, and that it has had more than a full opportunity to examine them. Moreover, the parties have been exchanging jury instructions on invalidity since May, which included instructions identifying these same references.

There is likewise no basis for LTI's complaint with respect to Facebook's defense based on the offers for sale and public uses of Leader2Leader. As the Court is well-aware, the parties have been continuing to conduct discovery on these issue well until July, a delay that was caused by LTI's belated production of non-disclosure agreements after the close of discovery. These offers for sale and public uses are based on LTI's own conduct in commercializing Leader2Leader, so LTI cannot claim in good faith that it is unable to defend itself at trial.

The basis of LTI's argument appears to be a purely technical one -- that Facebook's disclosures did not come in the form of a pleading invoking the magic words of Section 282. But the statute imposes no such requirement. The plain language of Section 282 merely requires that Facebook give notice to LTI in "the pleadings or otherwise in writing" at least thirty days before the trial. It does not mandate or specify any particular form for such notice, and there is no dispute that such notice was provided to LTI more than three months ago. LTI's technical

objection is without basis in the statute and should therefore be rejected. Nonetheless, if the Court desires and although not required by the statute, Facebook would be willing to file a formalized pleading in the Court file setting forth the prior art references it intends to rely upon at trial (which were identified in Dr. Greenberg's expert report).

2. Facebook cannot discuss changes to the Facebook website and its architecture, only as it relates to confidential technical information that Facebook did not produce to Leader. Facebook did not produce any updated version of the source code or confidential technical documents after April 1, 2010, which is in accordance with the Court's various orders on discovery, including the March 12, 2010 Order.

3. Per the Court's ruling on motions *in limine* that reexamination of the '761 Patent is not to be discussed, all exhibits on Facebook's exhibit list relating to the reexamination should not be permitted, including those exhibits attached to Facebook's expert report on issues of validity.

4. Facebook cannot discuss or use exhibits of Leader2Leader after December 10, 2002, because it is not relevant to any claims involved in the July 19, 2010 trial. Examples include screen shots of Leader2Leader after the December 10, 2002 date. *See e.g.*, Facebook Proposed Exhibits 1050-1054.

5. Facebook's fact witnesses cannot offer any expert opinion testimony or discuss patents issued to Facebook.

6. Facebook cannot offer any testimony and/or exhibits regarding Leader's attempt to obtain financing for patent litigation for the '761 Patent because it is not relevant to any claims involved in the July 19, 2010 trial.

Facebook's Outstanding Matters:

1. Facebook's pending motions for summary judgment Nos. 1, 2, 3, 5 and 6.
2. The inclusion on LTI's exhibit list of several categories of documents that relate to subjects, such as alleged copying and/or hacking, that this Court previously held to be not relevant to any issue to be tried on on July 19, 2010.
3. Facebook requests an order precluding Leader from referring to any of the publically available books, movies, previews, articles or other publications regarding Facebook and Facebook's founders.
4. Whether Leader may present undisclosed expert testimony regarding ensnarement.
5. Leader's "Outstanding Matters" two through six lack merit and were not timely raised. Facebook will respond to them, if necessary, at the pretrial conference scheduled for July 10, 2010.

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.

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