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BY E-FILE AND E-MAIL TO CHAMBERS

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

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

Dear Judge Stark:

A. Leader's Objections To Facebook's Amended Demonstratives

Nearly all of Facebook's proposed opening slides are beyond the scope of a proper opening statement of providing the jury with a general statement "of what evidence will be presented." Arizona v. Washington, Jr., 434 U.S. 497, 513 (1978). For example, Facebook has no witness who can testify as to "What is a Patent," as described in slides 2-5. It is equally certain that Facebook will not have a witness provide testimony on the preliminary jury instructions (slides 39-40), as this was not a document relied upon by their experts or known to their fact witnesses. Thus, these slides do not present "facts" which Facebook intends to prove at trial. It is extremely prejudicial for Facebook's counsel to attempt to cast themselves as the "trusted source" for issues of patent law by describing the parts of a patent and then providing the law of the case with respect to claim construction. This is supposed to be within the sole province of the Court, and the proper role of counsel is to advocate the facts of the case. However, Leader does not wish to burden the Court with objections based on the general principal that, almost without exception, all of the slides are inappropriate for an opening statement (as opposed to use at closing), and thus will only address the slides which are most prejudicial to Leader.

Leader objects to slides 8-10 regarding the Court's claim construction of the "dynamically" term. During opening statement, counsel should not be instructing the jury on the pertinent law of the case. *See e.g.*, U.S. v. DeRosa, 548 F.2d 464, 470 (3d Cir. 1977) (opening statement is "to be limited to a general statement of facts which are intended or expected to be proved" and is not the proper place to discuss the "pertinent law")(citations omitted).

Leader objects to slide 11 regarding Facebook's improper interpretation of the Court's claim construction as it relates to the "metadata" and "based on the change." Facebook attempted and failed to obtain such a limited interpretation of the '761 Patent claims when it lost its construction of the term "metadata" and withdrew its proposed construction of "based on the change" after the Markman Hearing. *See* Facebook's Claim Construction Brief, D.I. 191 at 15-

20 (proposed construction of "metadata" and "based on the change," among other terms, to limit the claims to where the metadata requires the user's location and "based on the change" is limited to movement of a user from one context to another); D.I. 269 at 106-122 (withdrawal of claim terms); D.I. 219 (Facebook's identification of claim terms to be construed). It is now trying to recapture its rejected interpretation with its opening statement. In addition to the objection noted above regarding the impropriety of discussing the pertinent law during opening statement, Leader also objects that this proposed demonstrative is a misstatement of the law because it is improper claim interpretation.

Leader objects to slides 12-13 regarding the Court's claim construction of the "component" term. In addition to providing the jury with instructions on the law, Facebook seeks to improperly instruct the jury that "a storage component" is a single storage component. This is apparent based on Facebook slides 18-23 entitled "Leader's '761 Patent" (discussed below). The law regarding the article "a" is well settled; "a" in a patent claim means "one or more." Baldwin Graphic Sys., Inc. v. Siebert, Inc., 512 F.3d 1338, 1342 (Fed. Cir. 2008)("[t]his court has repeatedly emphasized that an indefinite article 'a' or 'an' in patent parlance carries the meaning of 'one or more' in open-ended claims containing the transitional phrase 'comprising.'"), citing KCJ Corp. v. Kinetic Concepts, Inc., 223 F.3d 1351, 1356 (Fed.Cir. 2000). That "a" or "an" can mean "one or more" is best described as a rule, rather than merely as a presumption or even a convention. If Facebook intended to construe "a" in such a manner, it should have raised it during claim construction.

Leader objects to slides 18-23, entitled "Leader's '761 Patent," as improperly attempting to limit the scope of the claims to a single server/storage component. In addition to incorporating the objections above regarding instructing on law in opening statements and misstatement of law, Leader also objects to these slides as argumentative. Arizona, 434 U.S. at 513 (the purpose of an opening statement "is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow it is not an occasion for argument.") Moreover, both of Facebook's technical experts have testified that the storage component of the '761 Patent is not limited to a single server. Kearns Depo. 147:25 - 149:12; Greenberg Depo 251:24-254-12.

B. Facebook's Response

Through its objections, Leader is simply trying to control how Facebook presents its case. As Leader's trial counsel Mr. Andre noted at the Final Pre-Trial Conference yesterday, this is a jury trial and it is inherent that story telling be a part of the process. Facebook's opening demonstratives are textbook "what the evidence with show" plus "roadmap" constructs that relate directly to the evidence that will be adduced during this trial. Notably, given the Court's pre-instructions and rulings on claim construction, there can be no basis for asserting that these law-of-the-case references cannot be shown to the jury in opening. Fairness dictates that the Court allow Facebook to put on its case without needless back-seat driving from Leader. If Leader feels that Facebook's counsel has crossed the line into argument during the opening, objections may be made (although we note that such objections are rare and not in keeping with customary trial practice).

Initially, Facebook notes that this response addresses only the objections that counsel for Leader disclosed to Facebook during the meet and confer process. As the Court knows,

Facebook in good faith immediately after the Final Pre-Trial Conference modified the demonstratives to minimize the basis for objection. After a meet and confer last evening in which Leader's counsel failed to provide legal authority to support their objections and stated that they had objections they would not be disclosing, Facebook ***once again*** modified the demonstratives in an attempt to appease Leader. Ex. A. Leader, however, essentially wants to draft Facebook's opening for it.

Leader objects to slides 8 through 13 of Facebook's second revised opening demonstratives (entitled "Court's Claim Construction") on the grounds that these slides are argumentative and contain statements of the law. However, slides 8 through 13 contain no argument. Instead, they consist only of *direct quotes* from the Court's claim construction order. Facebook has included these slides to provide a "roadmap" to the evidence that Facebook will put forward. As the Court will pre-instruct the jury: "[o]pening statements [] are intended to explain to you what each side intends to prove and are offered to help you follow the evidence." D.I. 580 at 10. The case cited by Leader during the July 16 pretrial conference, *Schwartz v. System Software Assocs., Inc.*, 32 F.3d 284 (7th Cir. 1994), is inapposite. There, the party replaced words in the applicable statute with its own language and thereby misstated the law during opening statement. By contrast, Facebook is using the literal claim construction ordered by the Court. Thus, Facebook has not usurped the authority of the Court to instruct the jury on the law because these slides contain *only the Court's actual construction* regarding how the claims of the '761 patent should be interpreted. These exact instructions are included within the Court's jury instructions.

Finally, Leader's objections that slides 18 through 23 (entitled "Leader's '761 Patent") are argumentative should also be overruled. These slides contain demonstratives that appeared in expert witness Dr. Michael Kearns' report (that is, this is what his evidence will show) and are offered to help the jury follow exactly what Facebook intends to prove at trial. This is therefore not like *United States v. De Rosa*, 548 F.2d 464 (3d Cir. 1977), cited yesterday by Leader. In that case, a prosecutor read verbatim from inadmissible wiretap transcripts during the government's opening statement. Nothing here is inadmissible, and therefore the case is inapposite. There is therefore no basis for Leader's request that Facebook be prohibited from explaining during the opening statement what the jury can expect to see at trial.

For the foregoing reasons, Facebook respectfully requests that this Court overrule Leader's objections to slides 8 through 13 and 18 through 23.

Respectfully,

/s/ Philip A. Rovner

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