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August 30, 2010

BY E-FILE AND HAND DELIVERY

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

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

Dear Judge Stark:

Leader Technologies, Inc. (“Leader”) seeks to strike three of the four improper motions filed by Facebook, Inc. (“Facebook”) on August 25, 2010 under the misnomer Renewed Motions for Judgment as a Matter of Law (collectively “Renewed JMOL Motions”). *See* D.I. 628, 629, 630, 631. On the parties’ deadline to file a single renewed JMOL motion, Facebook filed four separate Renewed JMOL Motions. *Id.* Rule 50(b) of the Federal Rules of Civil Procedure permits a party to file only a single renewed JMOL motion. *See* Fed. R. Civ. Proc. 50(b)(the movant may file *a* renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59)(emphasis added). By filing four separate and distinct motions, Facebook violated Rule 50(b) and did so in an unabashed attempt to circumvent Delaware’s local rule requiring that a motion be no longer than 20 pages. D. Del. LR 7.1.3(a)(4). Also, several issues addressed in the Renewed JMOL Motions are not proper for even the single renewed JMOL motion that Facebook was permitted to file.

Pursuant to this Court’s August 5, 2010 Order, Leader’s answering brief is due on September 15, 2010 (Dkt. 613). As a result, Leader is compelled to bring this issue to the Court’s immediate attention by letter brief in order to avoid any additional prejudice to Leader, including having to oppose improper and numerous JMOL motions. In the alternative, Leader seeks an order requiring Facebook to withdraw its four JMOL Motions and refile them as a single 20 page motion.¹

¹ Leader’s meet and confer with Facebook requesting that it withdraw three of its Renewed JMOL Motions was unsuccessful.

A. Facebook's "Renewed" JMOL Motions Should be Stricken as a Procedurally Improper Attempt to Circumvent the Page Limit Prescribed in the Local Rules

Facebook should not be permitted to circumvent Rule 50(b) and the Delaware Local Rules by filing multiple post-trial motions. Rule 50(b) explicitly states that a movant "may file *a* renewed motion for judgment as a matter of law . . ." Fed. R. Civ. P. 50(b)(emphasis added). To circumvent Delaware's 20 page limit on a single motion, Facebook filed four motions, which, when combined, greatly exceed the page limit for the permitted single Rule 50(b) motion. D. Del. LR 7.1.3(a)(4). Rather than make a request to exceed the page limitation requirement, Facebook filed four Renewed JMOL Motions, totaling fifty-two pages of briefing without including the twenty-five page appendix attached to the Renewed JMOL Motion on Invalidity [Motion No. 4 of 4]. Facebook's actions are particularly troubling, because during trial it filed only a single Motion for JMOL pursuant to Fed. R. Civ. P. 50(a). *See* D.I. 606. If anything, a Rule 50(a) motion should include *more* issues than a Renewed JMOL pursuant to Rule 50(b) and yet, Facebook filed four separate "Renewed" JMOL Motions on what is usually a narrower set of issues. Moreover, issues not raised in a Rule 50(a) motion are considered waived and cannot be raised for the first time in a Rule 50(b) motion. *See Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1172 -1173 (3d Cir. 1993) (holding that "[i]n order to preserve an issue for judgment pursuant to Rule 50(b), the moving party must timely move for judgment as a matter of law at the close of the nonmovant's case, pursuant to Rule 50(a), and specify the grounds for that motion.").

Facebook should not be permitted to blatantly ignore the Federal Rules and the District of Delaware Local Rules by filing four "Renewed" JMOL Motions. It is prejudicial to Leader, a party that followed the rules and filed a single 20 page Renewed JMOL Motion. Leader, too, could have presented additional briefing, but did not do so in order to comply with the requirements of the Federal Rules of Civil Procedure and Delaware Local Rules. Now, Leader is faced with opposing four "Renewed" JMOL Motions that greatly exceed the 20 page limit. Responding to such impermissible briefing will unnecessarily burden Leader, as well as the Court.

This Court has stated that "[m]otions to strike serve 'to clean up the pleadings, streamline litigation, and avoid unnecessary forays into immaterial matters.'" *Sun Microsystems, Inc. v. Versata Enterprises, Inc. et al.*, 630 F.Supp.2d 395, 402 (D. Del. 2009)(quotation and citations omitted). It is well within the Court's discretion to strike Facebook's JMOL Motions for failing to comply with the Federal Rules of Civil Procedure and Delaware's Local Rules. *See Poole v. Taylor*, 466 F. Supp.2d 578, 583 (D. Del. 2006), quoting *River Road Dev. Corp. v. Carlson Corp.*, C.A. No. 89-7037, 1990 WL 69085, at *2 (E.D. Pa. May 23, 1990)("A Court possesses considerable discretion in disposing of a motion to strike under Rule 12(f)"). Facebook's multiple JMOL Motions should be stricken for failure to follow proper procedure and to reduce the burden on Leader and the Court.

B. Facebook's "Renewed" JMOL Motions Include Issues That Are Not Appropriate for a Rule 50(b) Motion.

Facebook included several issues that are not proper subject matter for a Renewed JMOL Motion. A motion for judgment as a matter of law may be granted only where, "there is such a complete absence of evidence supporting the verdict that the jury's findings could only have been the result of sheer surmise and conjecture, or such an overwhelming amount of evidence in favor of the movant that reasonably and fair minded men could not arrive at a verdict" against the movant. *Diesel v. Town of Lewisboro*, 232 F.3d 92, 103 (2d Cir. 2000). Issues that were not before the jury for verdict are not proper issues for a Rule 50(b) Motion. Requiring Leader to oppose such inappropriate arguments in multiple Renewed JMOL Motions is prejudicial and unnecessarily burdensome to Leader.

For example, Facebook's "Renewed" JMOL Motion No. 3 regarding indirect infringement should be stricken in its entirety because it is not a proper ground for a Rule 50(b) motion. The Court ruled that the jury was not going to decide the issue of indirect infringement and removed the issue from the jury's consideration. Trial Tr. 1884:12-24. Thus, indirect infringement was not an issue decided by the jury or "a jury issue not decided by verdict." Fed. R. Civ. P. 50(b). Therefore, Facebook's "Renewed" JMOL Motion No. 3 is not proper subject matter for a Rule 50(b) motion.

In its "Renewed" JMOL Motion No. 4, Facebook seeks to have the Court find Claims 1, 4, 7, 21, 23, 25, 31 and 32 indefinite as a matter of law under *IPXL Holdings, L.L.C. v. Amazon.com, Inc.*, 430 F.3d 1377 (Fed. Cir. 2005). D.I. 635, pgs. 16-17. Indefiniteness was not an issue that was before the jury. In fact, this is the subject matter of a Motion for Summary Judgment currently pending before the Court that the parties are still briefing. D.I. 382; D.I. 613. Facebook should not be permitted two bites at the apple; therefore, this also is not proper subject matter for a Rule 50(b) motion.

Facebook's "Renewed" JMOL Motion No. 2 addresses infringement under the doctrine of equivalents. The jury found that there was direct infringement and thus, did not find any infringement under the doctrine of equivalents. Consequently, Facebook's "Renewed" JMOL Motion on the doctrine of equivalents issue is moot. Facebook's "Renewed" JMOL Motions addressing issues that were not submitted to the jury should be stricken as defective under the Federal Rules of Civil Procedure and Delaware's Local Rules.

For the foregoing reasons, Leader respectfully requests that the Court immediately strike Facebook's "Renewed" JMOL Motions Nos. 2-4 or, in the alternative, require Facebook to withdraw its four "Renewed" JMOL Motions and refile a single Renewed JMOL Motion of no more than 20 pages.

The Honorable Leonard P. Stark
August 30, 2010
Page 4

Respectfully,



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