

**IN THE UNITED STATES COURT
FOR THE DISTRICT OF DELAWARE**

LEADER TECHNOLOGIES, INC., a Delaware corporation,)	
)	CIVIL ACTION
)	
Plaintiff and Counterdefendant,)	No. 1:08-cv-00862-LPS
)	
v.)	
)	
FACEBOOK, INC., a Delaware corporation,)	
)	
Defendant and Counterclaimant.)	
)	

**REPLY MEMORANDUM IN SUPPORT OF FACEBOOK, INC.’S
RENEWED MOTION FOR JUDGMENT AS A MATTER
OF LAW (JMOL) OF NO DIRECT INFRINGEMENT**

[MOTION NO. 1 OF 4]

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I. INTRODUCTION

Leader's arguments are foreclosed by the plain language of the claims and contrary to the evidence elicited at trial. The plain language of claim 9 includes a step wherein "the user employs at least one of the application and the data from the second environment;" and the non-method claims asserted by Leader include a substantially similar step. In order to show infringement, therefore, Leader bore the burden of proving that the user, not Facebook, performed this step and did so under the control or direction of Facebook. Leader did not show either, nor could it. Leader argues that its reliance on user actions was only part of an "alternative" theory of joint infringement, but the trial record clearly demonstrates that Leader relied on user actions in every one of its infringement theories as to all asserted claims. For those reasons, Facebook's motion should be granted.

II. ARGUMENT

A. JMOL of Non-Infringement Should be Entered as to Claims 9, 11 and 16

Leader argues that its failed joint infringement claim was merely an "alternative" theory whose rejection by the jury has no consequence to its case. Leader posits that "Facebook alone directly infringed all of the asserted method claims" because "Facebook's source code performs every step of every asserted method claim." D.I. 642 at 4-5. Leader's argument ignores and cannot be reconciled with the plain language of claim 9, which requires at least two elements to be performed by "the user." *See* D.I. 636, Ex. 4, '761 patent, claim 9 ("wherein the user employs at least one of the application and the data from the second environment," and "creating data within a user environment of a web-based computing platform via user interaction with the user environment by a user using an application,") (emphasis added).

Because claim 9 can only be performed through a combination of actions by Facebook and its users, as a matter of law, Facebook can not be liable for infringement because Leader failed to prove that Facebook exercised “control or direction” over its users. *See Golden Hour Data Sys., Inc. v. emsCharts, Inc.*, Nos. 2009-1306, 2009-1396, ___ F.3d ___, 2010 WL 3133539, at *11 (Fed. Cir. Aug. 9, 2010). Judgment as a matter of law of non-infringement as to claims 9, 11 and 16 must therefore be entered in accordance with the jury’s findings.

1. Leader’s Attempt to Revive its Abandoned “Wherein Means When” Argument Should Be Rejected – Again

As to the final element of claim 9, “wherein the user employs at least one of the application and the data from the second environment,” Leader provides no explanation as to how “Facebook alone,” D.I. 642 at 5, could possibly perform this claim step. Nor could it. The claim language itself could not be clearer that “the user” employs the application or data. To attempt to avoid the clear requirement of “user” action in claim 9, Leader reverts to the frivolous argument that it made and abandoned at trial – that “wherein” somehow means “when”:

The “wherein” clause [of claim 9] establishes a condition for when the back-end components “dynamically updat[e] the stored metadata ” PTX 1, ’761 Patent at col. 21:54. Dr. Vigna pointed to specific Facebook source code that performs the dynamically updating step and satisfies the claim language. *See* Tr. 688:24-690:6.

D.I. 642 at 7 (emphasis added). “Wherein” does not mean “when.” The Court construed “wherein” to mean “in which.” (D.I. 601, Jury Instruction 3.4, at 24.)

As the Court will recall, Facebook urged the Court to construe “wherein” because Leader argued throughout trial that “wherein” meant “when.” (D.I. 596 at 4-6); *see also* Supplemental Declaration of Elizabeth Stameshkin in Support of Reply Memorandum in Support Facebook’s Inc.’s Renewed Motion for Judgment as a Matter of Law (“Stameshkin Supp. Decl.”), Ex. A at 1613:24-1618:12. Facebook argued that the term “wherein” should be construed as “in which,”

and should specifically exclude “when” to preclude Leader from continuing to make an inappropriate claim construction argument to the jury. *Id.* In response to Facebook’s concerns, and prior to construing “wherein,” the Court specifically asked Leader:

“is it enough for me to construe wherein as in which and not go the extra mile and say not when?”

Id. Ex. A at 1634:22-1635:2. Leader’s counsel represented to the Court that such a clarification was unnecessary, and reassured the Court that:

“I’m not going to argue when. I’m arguing which. That’s been our position throughout this case. It is in which.”

Id. at 1635:24-1636:3 (emphasis added). Despite this unequivocal representation, Leader is again arguing that “wherein” means “when.” Leader’s attempt to rewrite its claims to say something they do not should be rejected – again. *See Helmsderfer v. Bobrick Washroom Equip., Inc.*, 527 F.3d 1379, 1383 (Fed. Cir. 2008) (“Courts cannot rewrite claim language.”).

Leader has cited no case in which any court has construed “wherein” in such a strained manner. In fact, in *Desenberg v. Google, Inc.*, No. 2010-1212, 2010 WL 3452493, at *2 (Fed. Cir. August 31, 2010),¹ the Federal Circuit recently affirmed the dismissal as a matter of law of a patent infringement claim against Google based on a “wherein” clause that, like the one in claim 9, required action by a third party. The plaintiff argued that the “wherein” clause was not a separate claim step that had to be performed by the user. The court rejected this argument, noting that “[t]he district court treated the [patent’s] ‘wherein’ clauses as a part of the claimed method, and concluded that Google could not be a direct infringer because Google did not

¹ *Desenberg* was not designated for publication but may be cited as persuasive authority. *See* United States Court of Appeals for the Federal Circuit, Rules of Practice, Rule 32.1(a)(ii) (parties may cite unpublished Federal Circuit decisions issued after January 1, 2007) (available at <http://www.cafc.uscourts.gov>). The court did not publish *Desenberg* because it determined that the decision did not add “significantly to the body of law,” *id.* (comments to Rule 32.1), presumably because the joint infringement precedents it applied were already well-established.

perform, or direct or control the performance of, all steps of the claimed method.” *Desenberg*, 2010 WL 3452493, at *2. “Precedent is in accord with the district court’s analysis. The dismissal under Rule 12(b)(6) is affirmed.” *Id.* at *3.

Because Facebook itself does not perform the step of the user employing the application or data, Leader had to prove that Facebook controlled or directed Facebook’s users or employees in performing that action. *See Golden Hour*, ___ F.3d at ___, 2010 WL 3133539, at *11. Because the jury found that Leader failed to do so at trial, judgment as a matter of law in favor of Facebook must be entered. *Id.*

2. The “Creating Data” Step Also Mandates User Participation

Leader’s argument as to the other element of claim 9 that requires user participation, “creating data within a user environment of a web-based computing platform via user interaction with the user environment by a user using an application,” is similarly unavailing. Leader’s argument that Facebook itself performs this claim step not only ignores the plain language of the claim, but invents a theory of infringement never presented at trial.

The language of this claim element is abundantly clear – the user, through “user interaction ... using an application,” creates the data in the user environment. No data can be created, nor this step performed, without user interaction. This interpretation is confirmed by the specification, whose description of this step leaves no doubt that the user – not the claimed underlying system or an application – performs this step:

After login, **the user** can perform data operations (e.g., **create** and manipulate) on a data 106 in any number of ways, including, but not limited to, **viewing, editing, copying, moving and deleting the data**. Such data operations can be performed using at least one application 108. For example, where the data 106 is text data, a text editing or word processing application can be employed.

D.I. 636, Ex. 4, ’761 patent, PTX 1, at Col. 6:33-39 (emphasis added); *see also id.* at Col. 7:31

(“At 204 [of Fig. 2], **the user** performs a data operation.”) (emphasis added). Thus, while the specification and claim language teach that the user will employ a software application (such as WordPerfect) to create data, it is nonetheless the *user* who must perform the creation.

Even if the claim could be construed not to require an action by a user, Leader’s argument would still fail because Leader’s infringement theory for this element rested on action by the user. Leader’s only evidence regarding this claim element came from the following trial testimony from Dr. Vigna:

Q: On the first claim element, creating data within a user environment. Do you see that?

A: Yes.

Q: Can you describe generally what that is referring to?

A: So this is describing a method for creating data, you know, sort of user environment by interacting with the platform using an application and the data that is exchanged as files and documents.

Q: And does Facebook inform its users how to do this action?

A: Yeah. The Facebook provides when the users go to the website, for example, and perform the task of uploading a note, document or uploading a file in a form of a picture, they go through the steps of this method to achieve the goal of creating this data.

D.I. 637, Ex. 1 at 680:13-681:7 (emphasis added). Dr. Vigna went on to describe the process of how the user goes about uploading a photo to Facebook as another example of the user creating data. *See id.* at 680:8-23. This testimony was Leader’s entire presentation on the “creating data” element of claim 9, not merely an “alternative joint-infringement theory,” as Leader now claims. *See* D.I. 642 at 6-7. Dr. Vigna did not address this particular claim element at any other point in his testimony, and the generic testimony Leader cites in its opposition was not linked or directed in any way to this claim element. *See id.*

3. *Fantasy Sports Properties Is Inapplicable*

Leader’s opposition relies on *Fantasy Sports Properties, Inc. v. Sportsline, Inc.*, 287 F.3d

1108 (Fed. Cir. 2002), but its reliance is misplaced. The claims at issue in *Fantasy Sports* covered “a computer” with various “means for” simulating football games based on statistics of real players. *Id.* at 1111-12. The Federal Circuit interpreted the claims as requiring only the presence of software capable of infringing when used, but not actual action by any third party. *Id.* at 1119. The court reasoned that the defendant could, by itself, infringe those claims because “there is no ‘user participation’ or ‘control’ limitation in the claims of the [patent-in-suit] requiring that an accused fantasy football game be operated by any specific entity.” *Id.* This is not the case with claim 9, which plainly requires a user to: (1) employ an application and data from the second environment, and (2) create data by using an application.

Fantasy Sports was decided years before the Federal Circuit’s decisions in *BMC Resources, Inc. v. Paymentech, L.P.*, 498 F.3d 1373 (Fed. Cir. 2007) and *Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318 (Fed. Cir. 2008). None of the Federal Circuit’s decisions relating to “control or direction” have even cited *Fantasy Sports*, let alone relied on it to inform the standards under which joint infringement liability may attach. *See also Fire King Int’l LLC v. Tidel Eng’g, L.P.*, 613 F. Supp. 2d 836, 843 (N.D. Tex. 2009) (granting summary judgment of non-infringement, distinguishing *Fantasy Sports* in light of its “limited holding”). *Fantasy Sports* has nothing to do with joint infringement and provides no basis for denying Facebook’s motion for judgment as a matter of law.

B. JMOL of No Infringement Must be Entered as to the Non-Method Claims

The “control or direction” standard applies not just to claim 9, 11 and 16, but also to the system and computer readable medium claims asserted at trial (*i.e.* claims 1, 4, 7, 21, 23, 25, 31 and 32). *Golden Hour* establishes that when, as here, the alleged infringement of system claims can be accomplished only through joint infringement, *i.e.* through the combined actions of the defendant and a third party, the plaintiff must show “control or direction” over the actions of the

third party. ___ F.3d at ___, 2010 WL 3133529, at *11 (“Such a verdict [of infringement] can only be sustained if there was control or direction of [the third party] by [the direct infringer]. Under these circumstances, JMOL was properly granted as to the systems claims as well as to the process claims.”).

Leader’s attempt to distinguish *Golden Hour* rests upon its unfounded assertion that joint infringement was merely the “alternative” theory it presented at trial. But Leader’s attempt to reinvent its trial theories cannot change the fact that the claims themselves dictated that Leader proceed under a joint infringement theory. All of the non-method claims asserted at trial include an explicit step requiring that “the user” access or employ data in the second context or workspace. See D.I. 636, Ex. 4, ’761 patent, PTX 1, at claim 1 (“the user accesses the data from the second context”); *id.* at claim 21 (“the user employs the application and data from the second user workspace”); *id.* at claim 23 (“the user accesses the data from the second user workspace”). Facebook never argued that *Golden Hour* requires that “infringement of product claims must be proven in all cases under a joint infringement theory,” D.I. 642 at 9, but rather, that infringement of *these* claims must be proven under a joint infringement theory. As with claim 9 discussed above, Leader can provide no explanation as to how Facebook’s source code could perform steps that the claims themselves clearly assign to “the user.”

Furthermore, for each of the non-method claims, Leader’s expert relied on actions *by the user* to assert infringement. See, e.g., D.I. 637, Ex. 1 at 658:21-666:8 (claim 1). In arguing that it presented a theory of solo infringement by Facebook alone, Leader cites only the one- or two-sentence conclusions by its expert. D.I. 642 at 4-5 (citing, e.g., D.I. 637, Ex. 1 at 667:2-3 for claim 1); D.I. 642 at 10 (citing, e.g., D.I. 637, Ex. 1 at 666:17-667:7 for claim 1). But barebones conclusions cannot change the plain language of the claims and certainly cannot support a

finding of infringement. Moreover, the foundation for each of Leader's infringement conclusions rested on *user* actions. For example, on direct examination, Leader's counsel "walk[ed]" Leader's expert through his infringement theory of claim 1. D.I. 637, Ex. 1 at 658:7-8. At each step of that walk, Dr. Vigna relied on user action to support his theory: "the user uploads a profile feature," "the user, John Vineyard, goes to visit the profile of Mary Smith," "what the user is going to do is going to write something on the wall," "when the share button is pressed, there is tracking information in the form of a story," "when this happens, the user access the data from the second context." D.I. 637, Ex. 1 at 659:12-662:15; *see also id.* at 663:7-13 (conclusion based on screen shots showing user actions); *id.* at 664:10-666:20. For each of the other non-method claims, Leader's expert relied on the same or similar user actions. *See, e.g., id.* at 723:11-724:8 (claim 21, "first element"); *id.* at 729:22-730:19 (claim 21, "third element"); *id.* at 731:8-732:7 (claim 21, "fourth element"); *id.* at 745:2-747:5 (claim 23, "first element"); *id.* at 748:7-18 (claim 23, "second element"). Leader also argues that the Court lacks authority to extend the jury's finding on claims 9, 11 and 16 to the non-method claims, but this argument is without merit. The cases Leader cites in its opposition stand for the unremarkable proposition that a district court cannot apply a jury's finding on one issue to a different issue when the two issues are substantively different. *See Neely v. Club Med Mgmt. Servs., Inc.*, 63 F.3d 166, 201-03 (3d Cir. 1995) (refusing to apply jury's finding of contributory fault on one claim to another claim because of the differences in factual allegations and theories of liability); *Kinnel v. Mid-Atl. Mausoleums, Inc.*, 850 F.2d 958, 964-66 (3d Cir. 1988) (refusing to extend jury's finding of liability of one defendant to another defendant). In contrast, the jury's finding of no "control or direction" with respect to the method claims is identical to that which must be determined for the non-method claims of the '761 patent. All asserted claims share the same requirement that the

user access or employ data in the second context, user environment or user workspace. The Court should therefore, based on the jury's finding as to the method claims, enter judgment of no direct infringement as a matter of law for the non-method claims.

C. JMOL of Non-Infringement Must be Entered as to All Claims for Lack of Evidence

JMOL of non-infringement should be entered as to all claims because Leader failed to present evidence from which a reasonable jury could find in its favor. *See* Fed. R. Civ. P. 50. Leader attempts at the end of its opposition to argue that it presented sufficient evidence of “control or direction” of Facebook employees and end users, but clearly it did not as the jury’s verdict confirms. As explained in Facebook’s opening brief, Leader presented no evidence that Facebook controls or direct its users beyond terms of use which themselves expressly disclaim that Facebook has any ability to control actions of its users. D.I. 632 at 8-9.

Leader also presented no evidence that Facebook controls or directs the actions of its employees with respect to any step of any asserted claim. The jury form makes clear that Leader had the burden of showing that “[w]ith respect to its infringement claims” Facebook directs or controls “the accused actions” of its employees. D.I. 610 at 2. Leader’s recitation of the general law of agency does not establish that Facebook employees performed any action required by the claims, nor that performing such actions fell within the scope of any employee’s duties.

Leader took the depositions of countless Facebook employees, including its CEO and ten Facebook engineers, yet the only argument it can make in its opposition to argue “control or direction” is the assertion that “Facebook’s employees *inherently* have a contractual relationship and indeed are agents of the company,” D.I. 642 at 11 (emphasis added), with no citation to evidence. Leader failed to provide evidence of even a single employment contract, let alone explain how any such contract would have required Facebook employees to perform the accused

claim steps through use of the Facebook website. Nor did Leader present any evidence relating to the existence of any agency relationship, let alone its scope. In light of Leader's complete failure of proof at trial, the Court should grant judgment as a matter of law with respect to Leader's claims for direct infringement as to all asserted claims.

III. CONCLUSION

For the reasons stated above, Facebook respectfully requests that this Court grant judgment as a matter of law of no direct infringement as to all asserted claims of the '761 patent.

Dated: September 27, 2010

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