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 INDIRECT INFRINGEMENT

[MOTION NO. 3 OF 4]

Steven L. Caponi (DE Bar #3484)
BLANK ROME LLP
1201 N. Market Street, Suite 800
Wilmington, DE 19801
302-425-6400
Fax: 302-425-6464
Attorneys for Defendant and Counterclaimant Facebook, Inc.

OF COUNSEL:
Michael G. Rhodes (*pro hac vice*)
Heidi L. Keefe (*pro hac vice*)
Mark R. Weinstein (*pro hac vice*)
Jeffrey Norberg (*pro hac vice*)
Elizabeth L. Stameshkin (*pro hac vice*)
COOLEY LLP
3000 El Camino Real
5 Palo Alto Square, 4th Floor
Palo Alto, CA 94306

Dated: September 27, 2010

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Leader's opposition identifies no reason to deny judgment as a matter of law as to its indirect infringement claims.[1] The Court refused to submit this issue to the jury *because* Leader failed to produce sufficient evidence of indirect infringement. Facebook respectfully submits that the Court implicitly granted Facebook's pre-trial motion for judgment as a matter of law under Fed. R. Civ. P. 50(a), and should make its ruling explicit by granting this renewed motion. Leader's claim that this motion is improper is unsupported by any authority. Facebook is entitled to judgment as a matter of law on Leader's claims of indirect infringement.

Leader's opposition identifies no evidence that could sustain its indirect infringement claims. D.I. 644 at 2. Leader points to a portion of Dr. Vigna's testimony regarding third party applications as "sufficient evidence that Facebook indirectly infringes the '761 Patent."[2] This testimony is insufficient to show indirect infringement. For example, none of this testimony suggests that Facebook had knowledge of the patent, that Facebook specifically intended to induce infringement, or that the accused Facebook website lacks any substantial non-infringing use, which are essential elements of proof to sustain inducement or contributory infringement, respectively. *See DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1304-05 (Fed. Cir. 2006) (en banc) (liability for induced infringement under 35 U.S.C. § 271(b) requires knowledge of the patent and the specific intent to induce infringement); *Fujitsu Ltd. v. Netgear Inc.*, No. 2010-1045, ___ F.3d ____, 2010 WL 3619797, at *2-3 (Fed. Cir. Sept. 20, 2010) (liability for contributory infringement under 35 U.S.C. § 271(c) requires, among other things, knowledge of the patent and a showing that the accused product has no substantial non-infringing use).

Leader also failed to demonstrate how each step of any asserted claim is performed by a single third party actor. *See BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1379 (Fed. Cir. 2007) ("Indirect infringement requires, as a predicate, a finding that some party amongst the

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[1] Leader complains at length in its opposition about "unnecessary litigation costs," but that issue is irrelevant to the briefing on this motion.

[2] This portion of Dr. Vigna's testimony went well beyond the scope of his expert report, against both the Federal Rules and this Court's specific orders. *See* D.I. 633 at 15-17.

accused actors has committed the ***entire act*** of direct infringement.") (emphasis added). The testimony of Dr. Vigna that Leader relies upon, in fact, identifies at least three separate parties necessary to perform the steps of the asserted claims – Facebook, a third party application developer and a Facebook user. *See* D.I. 637, Ex. 1 at 695:19-21 and 697:21-698:9 (noting that "somebody uploads a picture" (the user), "that context information is captured and stored as metadata" (Facebook), and "a subset of that metadata can be directly accessed by a third-party application" (the third party application)).

For the reasons set forth above and in Facebook's opening brief, Facebook respectfully requests the Court grant judgment as a matter of law of no indirect infringement as to all asserted claims of the '761 patent.

Dated: September 27, 2010

By: *<u>/s/ Steven L. Caponi</u>*

Steven L. Caponi (DE Bar #3484)
BLANK ROME LLP
1201 N. Market Street, Suite 800
Wilmington, DE 19801
302-425-6400
Fax: 302-425-6464
Attorneys for Defendant-Counterclaimant
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