

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES,) Trial Volume 5
INC.,)
)
Plaintiff,)
) C.A. No. 08-862-JJF-LPS
v.)
)
FACEBOOK, INC., a)
Delaware corporation,)
)
Defendant.)

Friday, July 23, 2010
9:00 a.m.

BEFORE: THE HONORABLE LEONARD P. STARK
United States District Court Magistrate

APPEARANCES:

POTTER, ANDERSON & CORROON, LLP
BY: PHILIP A. ROVNER, ESQ.

-and-

KING & SPALDING
BY: PAUL ANDRE, ESQ.
BY: LISA KOBIALKA, ESQ.
BY: JAMES HANNAH, ESQ.

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1 Let's hear from Mr. Andre, and
2 then I want to give Facebook some time.

3 MR. ANDRE: Your Honor, on the
4 contributory infringement, it's a pretty
5 standard instruction. I don't see anything
6 extraordinary about the points, puts out the
7 elements as set forth, looks like Facebook wants
8 to insert the statute into the instruction to
9 some degree, and I don't think that's necessary
10 or appropriate at this point.

11 I don't see the big issue here
12 because the Thrasher case has come out and
13 determined that any type of contributory
14 infringement to the patent requires a product in
15 the stream of commerce, and then you have three
16 elements set for most part.

17 THE COURT: Let me turn it over to
18 Facebook at this point. Feel free to address
19 any of the issues that have been raised or
20 others if you think there are others that are
21 important, and basically we have up to
22 twenty minutes because I do want to leave the
23 last five minutes to hear from Leader.

24 MR. WEINSTEIN: There's only two

1 issues to address. The most critical ones on
2 jury instruction, 3.4.

3 Your Honor, I'd like to hand up a
4 portion of some of the transcript from the trial
5 to illustrate why we need an instruction that
6 "wherein" does not mean when.

7 THE COURT: You've already cited
8 pretty extensively in your support, which we
9 looked at, so in the spirit of compromise,
10 construing at this late moment the term
11 "wherein" to mean in which, which has been
12 agreed to by Leader, is not satisfactory to you?

13 MR. WEINSTEIN: It isn't, Your
14 Honor. The problem with in which, Your Honor,
15 they're going to make the exact, same argument
16 what I heard today, is they think this is a
17 factual issue to go to the jury.

18 When I read the '02 Micro case
19 last night, I was haunted how similar that case
20 is to this. There was a claim term only if like
21 there. This case, they presented witnesses and
22 cross-examined witnesses on what do you think
23 this term means.

24 What ultimately came down and the

1 Court decided, he was going to send it to the
2 jury. The federal circuit said when the parties
3 present a fundamental dispute regarding the
4 scope of a claim term, it is the Court's duty to
5 resolve it.

6 The fundamental dispute is
7 regarding does "wherein" mean when, or does the
8 claim require a dynamic element, which means you
9 look to the proceeding claim element? That's a
10 dispute Your Honor needs to resolve as a matter
11 of law.

12 THE COURT: Help me, though, why I
13 haven't resolve it by construing "wherein" to
14 mean in which, and you all make your arguments
15 or don't. You're stuck with the Court's claim
16 construction as a matter of law. The jury is
17 told they have to follow my claim construction.
18 How is that any different than all the other
19 claim construction issues?

20 MR. WEINSTEIN: Ultimately let's
21 say the construction comes in in which you can
22 say at which point. There's lots of different
23 definitions. Ultimately wherein is a connector
24 between two clauses.

1 The question is, does it connote a
2 temporal sequence like something happens when
3 the user accesses the data from the second
4 context? That's the argument.

5 They're taking the update of
6 method to metadata can happen when the user
7 accesses data. That's a claim construction
8 question. We think it's been resolved by Judge
9 Farnan's order.

10 THE COURT: Where is it resolved
11 in his order?

12 MR. WEINSTEIN: It's resolved in
13 his order.

14 THE COURT: Why do I even need to
15 define wherein if dynamically has done it?

16 MR. WEINSTEIN: The only reason we
17 need to define it, Leader is making these
18 arguments. They're putting prosecution history
19 evidence before witnesses and arguing the
20 meaning of claim terms, which is the exclusive
21 province of Your Honor. There's going to be
22 arguments in closing as to what ultimately the
23 legal implication of wherein is. That's
24 something that should not go to the jury.

1 THE COURT: And your paragraph on
2 prosecution history that you propose, that does
3 not take care of your problem if I were to keep
4 that in as well as your wherein construction?

5 MR. WEINSTEIN: The wherein
6 construction would not do it. The prosecution
7 history would help, but ultimately, Your Honor
8 has to decide whether or not the claims are
9 satisfied with dynamically updating the metadata
10 when user accesses.

11 If that issue is not resolved,
12 ultimately instituting "wherein" as some
13 connecter is not going to stop the arguments
14 from being made that are legal in nature.

15 THE COURT: If I were to add line
16 five, which claims which would I put the term
17 "wherein" means in which. Perhaps, not when.
18 In which claims, what number claims, would I
19 write in?

20 MR. WEINSTEIN: Your Honor, the
21 claims that have the wherein clause are one,
22 nine, and four also, and --

23 MR. HANNAH: All the dependent
24 claims have wherein as well.

1 MR. WEINSTEIN: I don't think
2 that's right, but I know seven has wherein in
3 it.

4 The claims where it really matters
5 is one, nine, and twenty-three.

6 Twenty-one, very interestingly,
7 Your Honor doesn't use the word "wherein." It
8 uses the term "such that," and that is something
9 that we agreed to, is to construe "wherein" to
10 mean "such that," which is consistent with
11 what's in claim twenty-one. That's another
12 synonym that we think is clearer.

13 THE COURT: Okay. Certainly this
14 is an important issue. I agree with that, but I
15 assume there's probably another you want to
16 address.

17 MR. WEINSTEIN: On Mr. Lamb's
18 testimony, the only thing we wanted was to say
19 two points.

20 One is, a written correction to
21 the deposition does not erase the witness's
22 prior answer, and the jury is free to consider
23 the changes in any way they see fit, the same
24 way they would judge any issue of credibility.

1 parties agree to was a commercial success
2 stipulation, but they have not reached agreement
3 on that as well. So those are the -- we can get
4 those to you as soon -- we'll keep working this
5 weekend and hopefully get them to you --

6 THE COURT: Right. So on all of
7 those issues, the limiting instructions and
8 which I think are limited to nine topics that
9 you just mentioned.

10 MR. ANDRE: Yeah.

11 THE COURT: I do want to see what
12 the parties propose, what their positions are,
13 and let's say by noon tomorrow. We're going to
14 follow this weekend the procedures we did last
15 week where I send -- if it's not under seal, go
16 ahead and do ECF. We can pull it off of ECF.

17 But if any portion of it is under
18 seal, email it to Mr. Golden and he'll get it to
19 the rest of us.

20 MR. ANDRE: Mr. Rovner will take
21 care of the rest.

22 THE COURT: Before you sit down,
23 whoever wants to address it on the 3.4 on this,
24 you know, is it enough for me to construe

1 wherein as in which and not go the extra mile
2 and say not when?

3 Mr. Weinstein, not that I don't
4 enjoy all my time with you, but I don't want to
5 sign up automatically for redoing this trial.

6 MR. ANDRE: Your Honor, the issue
7 of claim construction should have been brought
8 up a long time ago, if they want to bring it up.

9 The fact of the matter, experts
10 have been interpreting this how they've been
11 interpreting it. The expert on the stand, Dr.
12 Greenberg, has interpreted is as a consequence.
13 That's how he termed wherein.

14 Dr. Vigna determined it as in
15 which. I don't think, you know, if you say not
16 when is a negative limitation.

17 THE COURT: Let's be clear. If I
18 don't say not when, you're going to argue when.
19 They're going to argue not when.

20 MR. ANDRE: Well --

21 THE COURT: And you don't think
22 that means we're all going to get reversed the
23 minute we get to the Federal Circuit?

24 MR. ANDRE: Well, I'm not going to

1 argue when. I'm arguing which.

2 That's been our position
3 throughout this entire case. It is in which.
4 That's the dictionary's definition of the word.

5 So we think, as Mr. Hannah said,
6 the dynamically is a functional language, not
7 pure grammatical and temporal in that way. So
8 we're very confident that that's not going to be
9 an issue.

10 But if they start arguing, you
11 know, not thereafter, or as a consequence or
12 something along those lines like they had been,
13 their other expert, Dr. Kearns, did the same
14 thing. I asked him, I said, You mean
15 thereafter?

16 He said, Yeah, afterwards. So
17 everybody has had a different definition. If
18 you want to give a proper definition, give the
19 proper definition.

20 If you want to interpret, say what
21 it's not, we should also put some other things
22 what it's not as well as what your experts have
23 proposed. If you want to say it's not when,
24 then it should not say it's not thereafter or

1 State of Delaware)
)
2 New Castle County)

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CERTIFICATE OF REPORTER

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7

I, Heather M. Triozzi, Registered

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Professional Reporter, Certified Shorthand Reporter,

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and Notary Public, do hereby certify that the

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foregoing record, Pages 1274 to 1642 inclusive, is a

11

true and accurate transcript of my stenographic notes

12

taken on July 23, 2010, in the above-captioned

13

matter.

14

15

IN WITNESS WHEREOF, I have hereunto set my

16

hand and seal this 23rd day of July, 2010, at

17

Wilmington.

18

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Heather M. Triozzi, RPR, CSR
Cert. No. 184-PS

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23

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