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.	PUBLIC VERSION
FACEBOOK, INC., a Delaware corporation,	
Defendant and Counterclaimant.	**CONFIDENTIAL FILED UNDER SEAL**

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. NATURE AND STAGE OF THE PROCEEDINGS

Plaintiff Leader Technologies, Inc. ("Leader") filed its complaint against defendant Facebook, Inc. ("Facebook") in this patent infringement action on November 19, 2008, accusing Facebook of infringement of U.S. Patent No. 7,139,761 ("'761 patent"). A jury trial commenced on July 19, 2010. Prior to the submission of the case to the jury, Facebook moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a). (D.I. 606.) The Court reserved ruling and a jury verdict was entered on July 28, 2010. (D.I. 610.) Facebook respectfully renews its motion for judgment as a matter of law under Fed. R. Civ. P. 50(b).

II. SUMMARY OF THE ARGUMENT

The asserted claims of the '761 patent can only be infringed by Facebook through the combined actions of Facebook and its users. Therefore, under the Federal Circuit's decision in *Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318 (Fed. Cir. 2008), Leader was required to prove that Facebook "controls or directs" the actions of its users. The jury in this action unanimously concluded that Leader failed to make such a showing at trial. (D.I. 610 at 2.) The jury's finding compels judgment as a matter of law (JMOL) that Facebook does not infringe any asserted claim of the '761 patent. The Court should also enter judgment for the independent reason that Facebook did not as a matter of law exercise "control or direction" over its users under controlling Federal Circuit law.

III. ARGUMENT

The Federal Circuit has recently confirmed that "[w]here the combined actions of multiple parties are alleged to infringe process claims, the patent holder must prove that one party exercised 'control or direction' over the entire process such that all steps of the process can be attributed to the controlling party, i.e., the 'mastermind.'" *Golden Hour Data Sys., Inc. v. emsCharts, Inc.*, Nos. 2009-1306, 2009-1396, 2010 WL 3133539, at *11 (Fed. Cir. Aug. 9, 2010) ("*Golden Hour*") (citing *Muniauction, Inc.*, 532 F.3d at 1329). The "control or direction" requirement applies not just to process/method claims, but also to system claims when the alleged infringement is based on the actions more than one actor. *Id.* Judgment as a matter of

law is proper on the issue of "control or direction" when "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." *Id.* (quoting Fed. R. Civ. P. 50(a)(1) (affirming district court's grant of JMOL of non-infringement based on lack of evidence of "control or direction")).

The Verdict Form asked the jury to answer the following question: "With respect to its infringement claims against Facebook with respect to claims 9, 11 and 16, has Leader shown by a preponderance of the evidence that Facebook controls or directs the accused actions of Facebook end users and/or Facebook employees?" (D.I. 610 at 2.) The jury answered "NO" as to both "Facebook end users" and "Facebook employees." The jury's conclusion mandates entry of judgment as a matter of law of non-infringement with respect to each asserted claim of the '761 patent.

With respect to method claims 9, 11 and 16, Leader's trial theory of infringement depended entirely on the combined actions of Facebook and its users. Leader's failure to show that Facebook "controls or directs" the accused actions of its users, therefore, is fatal to its claim of infringement as to these method claims. With respect to the asserted system and computer-readable medium claims (*i.e.*, claims 1, 4, 7, 21, 23, 25, 31, and 32), those claims likewise could only be infringed by Facebook through the combined actions of Facebook and its users, thus triggering the requirement that Leader prove "control or direction" under *Muniauction*, which Leader failed to do. Third, separate and apart from the jury's finding, the Court should enter judgment as a matter of law as to all asserted claims because Leader failed to present any legally sufficient evidentiary basis from which a reasonable jury could find for Leader on this issue.

A. Judgment as a Matter of Law of No Direct Infringement Must be Entered as to Method Claims 9, 11 and 16 in Accordance with the Jury's Finding that Facebook does not Control or Direct its Users.

Independent claim 9 covers a method of managing data that includes steps that must be performed, if at all, by at least two distinct parties. Claims 11 and 16 are dependent claims that both depend from claim 9. Claim 9 reads in its entirety:

9. A computer-implemented method of managing data, comprising computer-executable acts of:

[1] 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, the data in the form of at least files and documents;

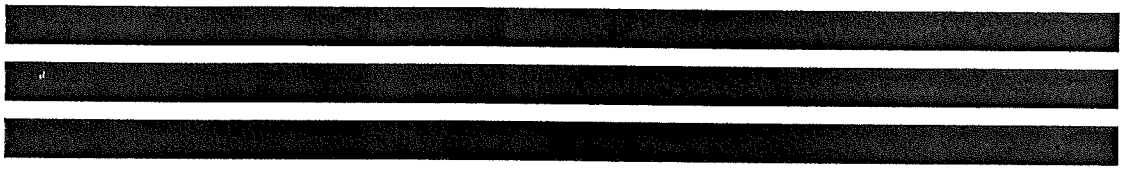
[2] dynamically associating metadata with the data, the data and metadata stored on a storage component of the web-based computing platform, the metadata includes information related to the user, the data, the application, and the user environment;

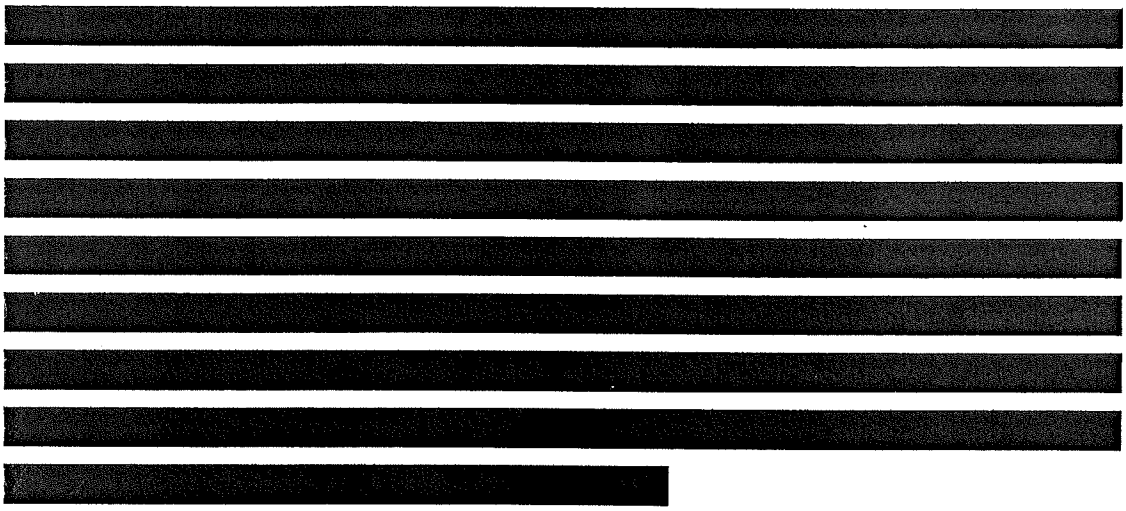
[3] tracking movement of the user from the user environment of the web-based computing platform to a second user environment of the web-based computing platform; and

[4] dynamically updating the stored metadata with an association of the data, the application, and the second user environment wherein the user employs at least one of the application and the data from the second environment. (underlining and numerical brackets added).

At least two of the elements of claim 9 (shown in underlining above) must be performed by "the user," while the remaining elements must be performed by the claimed "web-based computing platform." In particular, the first element [1] of claim 9 listed above, which recites "creating data . . . via user interaction with the user environment by a user using an application," obviously requires action by a user. Likewise, the last half of element [4] claims a specific action that must be performed by the user, i.e., "the user employs at least one of the application and the data from the second environment." The three elements labeled [2], [3], and the first part of element [4], describe operations performed by a "web-based computing platform." The plain language of the claim makes clear that it takes at least two distinct actors to infringe claim 9.

Leader's trial infringement theory precisely tracked this division of steps between Facebook and Facebook users. In particular, Leader's infringement expert, Dr. Vigna, testified





As a matter of law, therefore, Facebook can not be liable for infringement of claim 9 unless Leader proved that Facebook exercises "control or direction" over its users. *See Golden Hour*, 2010 WL 3133539, at *11; *Muniauction, Inc.*, 532 F.3d at 1329. The jury's finding that Leader failed to make such a showing at trial mandates judgment as a matter of law as to claim 9. *See Golden Hour*, 2010 WL 3133539, at *11. And because there is no infringement as to claim 9, there can be no infringement of dependent claims 11 and 16. *Muniauction, Inc.*, 532 F.3d at 1328 n.5 ("A conclusion of noninfringement as to the independent claims requires a conclusion of noninfringement as to the dependent claims."). Furthermore, claim 16 recites "accessing the user environment via a portable wireless device." As Dr. Vigna's testimony shows, this action is taken by the user, not by Facebook. *See* Stameshkin Decl., Ex. 1 at 716:19-717:5, 717:22-719:12.

B. Judgment as a Matter of Law of No Direct Infringement Should be Entered as to all Other Asserted Claims in Accordance with the Jury's Finding of no "Control or Direction" as to Claims 9, 11 and 16.

The Verdict Form presented the question of "control or direction" in the context of method claims 9, 11 and 16. (D.I. 610 at 2.) The Court did not articulate its reasoning for limiting, over Facebook's objection, the "control or direction" question to claims 9, 11 and 16,[1]

[1] The Special Verdict Form proposed by Facebook included a question on "control or direction" that encompassed all asserted claims. (D.I. 597 at 11.)

but this presents no obstacle to applying the jury's finding as to the other claims asserted at trial, as similar claim language is found in all the remaining claims.

The "control or direction" issue with respect to the system and computer readable medium claims (i.e. claims 1, 4, 7, 21, 23, 25, 31 and 32) was identical to the question the jury resolved as to the method claims, as all the claims mandate that the user "access" or "employ" data in the second context or workspace. *See* Stameshkin Decl. Ex. 4 at claim 1 ("wherein 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"). 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 as to the non-method claims.

1. The "Control or Direction" Requirement Applies to System Claims 1, 4, 7, 23, 25, 31 and 32 and Computer-Readable Medium Claim 21.

The "control or direction" requirement set forth in *Muniauction* applies to claims 1, 21 and 23 for at least two independent reasons.[2] First, the Federal Circuit in *Golden Hour* recently affirmed judgment as a matter of law (JMOL) in favor of an accused infringer as to both method *and* system claims when, as here, the plaintiff failed to show "control or direction." The plaintiff in *Golden Hour*, as Leader did here, presented an infringement theory that relied on the actions of two distinct parties to satisfy the elements of its system claims. *See Golden Hour*, 2010 WL 3133539, at *3. In particular, the plaintiff alleged that one defendant (emsCharts) was a direct infringer that controlled or directed the actions of another defendant (Softtech), and that the defendants' combined systems infringed various method and system claims of the plaintiff's patent. The Federal Circuit affirmed the district court's judgment as a matter of law (JMOL) of non-infringement and set aside the jury's finding of infringement as to the *system claims* because the plaintiff failed to prove "control or direction" under *Muniauction*. "Such a verdict [of

[2] The "control or direction" standard therefore also applies to all claims that depend from claims 1, 21, and 23, including asserted claims 4, 7, 25, 31, and 32.

infringement]," the court held, "can only be sustained if there was control or direction of Softtech by emsCharts. Under these circumstances, JMOL was properly granted as to the systems claims as well as to the process claims." *Id.* at *11.

As explained above and in Facebook's pending Motion for Partial Summary Judgment of Invalidity (Motion No. 1, D.I. 384), the system and computer readable medium claims in this case do not simply claim a system or computer-readable medium, but also include a specific method step that must be performed *by a user* requiring that *the user* accesses or employs data from a second context or user workspace. Like claim 9 discussed above, infringement of these claims by Facebook would necessarily require the combined activity of Facebook and a Facebook user.

2. The Jury's Finding of no "Control or Direction" Must Be Applied to System Claims 1, 4, 7, 23, 25, 31 and 32 and Computer-Readable Medium Claim 21.

Based on the jury's finding of no "control or direction" as to claims 9, 11 and 16, the Court should grant judgment as a matter of law with respect to the other asserted claims because they involve the same "accused actions." (D.I. 610 at 2.) Each claim includes a substantially identical step to claim 9 in which the user accesses or employs the data and/or an application from a second context, user environment or user workspace.

Leader's theory of infringement as to claim 9 was substantially the same as its theory as to the other independent claims, relying on the same use cases and the same division of actions between Facebook and Facebook users. For example, with respect to the "context component" element of the system claims, Dr. Vigna testified [redacted]

Leader's infringement theory as to these claims necessarily depended upon the same combination of actions by Facebook and Facebook users that it relied upon for claim 9.

Facebook therefore could not be liable for infringement of claims 1, 21 or 23 unless Leader proved that Facebook exercised "control or direction" over its users. *See Golden Hour*, *supra*, 2010 WL 3133539, at *11. The jury's finding as to claim 9, which calls for identical actions to be performed by the user, mandates judgment as a matter of law as to claims 1, 21 and 23. And because there is no infringement as to claim 9, there can be no infringement of dependent claims 4, 7, 25, 31 or 32. *See Muniauction*, 532 F.3d at 1328 n.5.

C. Judgment as a Matter of Law of No Direct Infringement Must be Entered as to all Claims Based on Leader's Failure to Present Evidence of Control or Direction.

Even apart from the jury's finding of no "control or direction," Facebook is entitled to judgment of no direct infringement as a matter of law on all asserted claims for the separate and independent reason that Leader failed to offer any evidence at trial that Facebook controls or directs the actions of its users. Leader offered no coherent theory at trial, let alone evidence, to support such a claim. Facebook, for its part, presented uncontroverted evidence and testimony that it does not control or direct users in their use of the Facebook website.

The Federal Circuit's decision in *Muniauction* established the framework for evaluating joint infringement claims in the context of an Internet website like Facebook. 532 F.3d at 1329. The asserted claims in *Muniauction*, like the asserted claims of the '761 patent, required actions by the accused website and the end-users of the website. *Id.* at 1328-29. The court clarified that "the control or direction standard is satisfied in situations where the law would traditionally hold the accused direct infringer vicariously liable for the acts committed by another party that are required to complete performance of a claimed method." *Id.* at 1330. The plaintiff argued that the defendant controlled or directed users by controlling access to its online system and instructing end-users in its use, but the Federal Circuit found those actions insufficient as a

matter of law. *Id.* at 1330 ("That [defendant] controls access to its system and instructs bidders on its use is not sufficient to incur liability for direct infringement.").

Federal decisions decided after *Muniauction* have reaffirmed this principle and have repeatedly rejected the theory that operators of publicly available websites such as Facebook exercise "control or direction" over their users. For example, in *PA Advisors, LLC v. Google, Inc.*, No. 2:07-cv-480 (RRR), 2010 WL 986618 (E.D. Tex. Mar. 11, 2010), Chief Judge Rader of the Federal Circuit, sitting by designation, granted a motion for summary judgment under facts similar to the ones presented here. The patent claim in *PA Advisors* covered a network search method in which all steps were performed by the accused system (website), except one that was performed by the end-user. Judge Rader granted summary judgment of non-infringement, noting that: "While Google and Yahoo benefit and invite users to visit their websites and run searches, they in no way 'control or direct' them once they are there. Significantly, users are free to search as they please." *Id.* at *8.

In *Global Patent Holdings, LLC v. Panthers BRHC LLC*, 586 F. Supp. 2d 1331 (S.D. Fla. 2008), the plaintiff alleged that the defendant's website infringed a claim that required actions of both the website operator and the user. That court rejected the plaintiff's "control or direction" argument, noting that the plaintiff "has, in no way, alleged that remote users are contractually bound to visit the website, it has not alleged that the remote users are Defendant's agents who visit the website within the scope of their agency relationship nor has it alleged any facts which would render Defendant otherwise vicariously liable for the acts of the remote user." *Id.* at 1335; *see also McKesson Info. Solutions, LLC v. Epic Sys. Corp.*, No. 1:06-CV-2965-JJC, 2009 WL 2915778, at *4 (N.D. Ga. Sept. 8, 2009) (following *Muniauction*); *Desenberg v. Google, Inc.*, 2009 WL 2337122, at *8 (S.D.N.Y. Jul. 30, 2009) ("[Plaintiff] has not alleged that those who participate in Google AdWords do so at the behest of Google, even under an expansive interpretation of 'direction or control.'").

Leader's entire theory of "control or direction" as to Facebook end users rested entirely on facts that the Federal Circuit has squarely held to be irrelevant, as a matter of law, to the

question of "control or direction." For instance, Dr. Vigna argued [redacted]

None of this had anything to do with whether Facebook exercised "control or direction" over its users. *Muniauction* specifically held that whether "one party [was] teaching, instructing, or facilitating the other party's participation" was not relevant to whether the defendant satisfies the "control or direction" standard. 532 F.3d at 1329-30. The court further held that the fact that the defendant "controls access to its system and instructs [users] on its use is not sufficient to incur liability for direct infringement." *Muniauction*, 532 F.3d at 1330. But Leader presented nothing more. As in *Muniauction*, that Facebook adopted standards to govern users' access to the website ("controls access to its system") and furnished users with help files ("instructs users on its use") cannot show control or direction as a matter of law.

Moreover, Facebook presented evidence that affirmatively negated the existence of "control or direction." Chris Cox, for example, testified that Facebook does not require users to upload profile photos, which was an essential component of all of Leader's infringement theories. *See* Stameshkin Decl. Ex. 1 at 849:15-22. Mr. Cox further explained that Facebook does not force its users to use the website in any particular way, that Facebook does not have control over how users navigate through the Facebook website, and that Facebook does not have control over the content that users upload to the website. *Id.* at 886:11-24. This testimony was unchallenged.

Leader's claim of infringement as to Facebook employees was similarly deficient as a matter of law. Leader provided no evidence that Facebook employees perform any of the accused actions at the control or direction of Facebook. The fact that a Facebook employee may have used the website for personal reasons, such as writing on a friend's wall, is obviously not sufficient to find control or direction. *See id.* at 507:22-508:6. Dr. Vigna's testimony [redacted] And despite arguing in closing argument that Facebook employees have "contracts," *id.* Ex. 1 at 2005:2-6, 1979:22-1980:1, Leader failed to provide any evidence of even a single employment contract between Facebook and an employee, let alone that any hypothetical contract would have required Facebook employees to perform the accused steps on the Facebook website.

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.

IV. 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: August 25, 2010

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