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HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERVAL LICENSING LLC,
Plaintiff,
v.
AOL, INC., et al.,
Defendants.

Case No. No. 2:10-cv-01385-MJP

**FACEBOOK'S MOTION FOR
RECONSIDERATION OF COURT'S
FEBRUARY 16, 2011 SCHEDULING ORDER**

**NOTED ON MOTION CALENDAR:
March 2, 2011**

Pursuant to L.R. 7(h), Defendant Facebook Inc. ("Facebook") respectfully seeks reconsideration of the Court's Scheduling Order of February 16, 2011 ("Scheduling Order") because of the February 18, 2011 ruling in *In re Katz Interactive Call Processing Patent Litigation*,. Nos. 2009-1450, 2009-1451, 2009-1452, 2009-1468, 2009-1469, 2010-1017, 2011 WL 607381 (Fed. Cir. Feb. 18, 2011) which could not have been brought to the Court's attention earlier with reasonable diligence.

I. INTRODUCTION

The Court's Scheduling Order is squarely at odds with the recent Federal Circuit decision in *In re Katz Interactive Call Processing Patent Litigation*, 2011 WL 607381 ("*In re Katz*"). The Court's Scheduling Order "refuses to set a limit on the number of claims Plaintiff may pursue in

FACEBOOK, INC.'S MOTION FOR
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1 this litigation.” (Scheduling Order D.I. 178 at 3.) However, the Federal Circuit decision in *In re*
2 *Katz* found it was appropriate for the court to limit the number of asserted claims. *In re Katz*
3 went on to specifically recognize due process rights in patent litigation cases, and cautioned that
4 limitations which would hinder a party’s ability to fully present its case would not be appropriate.
5 *In re Katz*, 2011 WL 607381, at *3-4. While limiting the case to representative claims will not
6 hinder plaintiff’s ability to present its case, the portion of the Court’s Scheduling Order that limits
7 Defendants to construing 10 claim terms per litigation track will hinder Defendants’ ability to
8 present their full case. Thus, *In re Katz* provides grounds for reconsideration of the Scheduling
9 Order’s limitation on terms for claim construction and refusal to limit the number of asserted
10 claims.

11 **II. ARGUMENT**

12 **A. Limitation of Asserted Claims Is Appropriate**

13 It would be an appropriate exercise of the Court’s discretion to limit the number of claims
14 Interval may assert against Defendants in this case. As held by the Federal Circuit in it’s recent
15 *In re Katz* decision, a court may limit the number of asserted claims allowed in a patent case so
16 long as the limitation does not “risk[] erroneously depriving [Plaintiff] of its rights [where] that []
17 risk outweigh[s] the added costs associated with a substitute procedure.” *In re Katz*, 2011 WL
18 607381, at *3. Thus, the Court should reconsider its refusal to limit the number of asserted
19 claims, as such a limit would result in efficiency and cost savings for the parties and the Court,
20 and would not deprive Interval of its due process rights.

21 **B. Claim Construction Term Limitation Is Prejudicial**

22 While the Court refused to limit Plaintiff’s number of asserted claims, it erroneously
23 limited all parties in each track to a maximum of 10 claim terms for construction. (D.I. 178 at 3.)
24 In light of the large number of defendants with separate accused products and large number of
25 asserted claims over 2 separate patents, as well as numerous issues that also usually encompass
26 claim construction, such as means-plus-function claiming, indefiniteness, *Bilski* challenges, etc., a
27 limitation to 10 claim terms for construction in the 682/507 track violates not only Facebook’s
28 due process rights, but improperly abdicates the Court’s duty to construe all disputed terms rather

1 than let the jury guess as to claim scope. “When the parties present a fundamental dispute
2 regarding the scope of a claim term, it is the court's duty to resolve it.” *O2 Micro Int’l Ltd. v.*
3 *Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1362 (Fed. Cir. 2008). The parties have not yet met
4 and conferred regarding the claim terms to be construed, and the exact number of disputed claim
5 terms is not known. As such, the limit currently set forth in the Scheduling order is improper.
6 Based on Interval’s infringement contentions, Facebook’s non-infringement contentions and the
7 Defendants’ invalidity contentions, it appears the current 10 claim term limitation for the 682/507
8 track will not allow for resolution of all fundamental disputes. Therefore, this limit should be
9 removed.

10 III. CONCLUSION

11 For the foregoing reasons, Facebook respectfully requests reconsideration of the
12 Scheduling Order with respect to these issues.

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15 DATED this 2nd day of March, 2011.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on March 2, 2011, I electronically filed the following document(s):
3 **Facebook's Motion for Reconsideration of Court's February 16, 2011 Scheduling Order**
4 with the Clerk of the Court using the CM/ECF system, which will send an email notification of
5 such filing to the attorney(s) of record listed below.

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