Jan Horbaly, Executive & Clerk of Court, Federal Circuit Court of Appeals, OGE Form 278 Financial Disclosure, Any Year

No agency or authority has made Mr. Horbaly's financial disclosures available to date, despite multiple requests by multiple citizens.

The Federal Circuit contained this brief announcement of Mr. Horbaly's resignation as Executive and Clerk of Court for the Court of Appeals for the Federal Circuit:

Nov. 24, 2013

The Departure of Circuit Executive Jan Horbaly (*con'd*)

Responsive to the brief note earlier today there have been several responses including one from a highly knowledgeable senior member of the profession that the Circuit Executive had simply decided to retire; most notes were expressions of puzzlement; while at the other end of the spectrum, speculation centered on matters subsequent to the panel opinion in *Leader Technologies, Inc. v. Facebook, Inc.*, 678 F.3d 1300 (Fed. Cir. 2012)(Lourie, J.), where one Dr. Lakshimi Arunachalam made several accusations to the Supreme Court against members of the Court including but not focused upon the Circuit Executive (*attached*).

This writer has examined the papers filed with the Supreme Court by Dr. Arunachalam insofar as they relate to the Circuit Executive and finds nothing that in any way should be considered to be a blot on the reputation of the Circuit Executive.

This writer would like to believe the comment from the first correspondent: After a long and distinguished career, the incumbent Circuit Executive has simply decided to retire.

Regards,

Hal

Lakshmi Arunachalam, Ph.D.
222 Stanford Avenue
Menlo Park, CA 94025
(650) 854-3393
laks@webxchange.com

August 15, 2012

District of Columbia
Board on Professional Responsibility
Re: Federal Circuit Clerk of Court Jan Horbaly
The District of Columbia Bar
1101 K Street NW, Suite 200
Washington DC 20005
202-737-4700

By USPS Express Mail,
Aug. 15, 2012

Dear Members of the Board,

Re: Disciplinary complaint against Clerk of Court Jan Horbaly re. his conduct in Leader Tech v. Facebook, Case No. 2011-1366 (Fed. Cir.)

I regret but feel compelled to bring the conduct of Federal Circuit **Clerk of Court Jan Horbaly** to your attention. I believe that his conduct in *Leader Tech v. Facebook*, Case No. 2011-1366 (Fed. Cir.) ("*Leader v. Facebook*") has been unethical and does not instill the confidence of the public in the administration of justice.

Frankly, my general concern is that this complaint will be swept under the carpet and not be fully investigated. Pundits label "self-policing" of white collar misconduct in the legal profession as largely ineffective since attorneys are disciplining each other and feel the natural sympathy of "there but by the grace of God go I." Therefore, I challenge this Board to include a majority of laypeople in this evaluation. This will inject a modicum of objectivity and third party accountability into a process that otherwise looks to the average person as nothing more than attorney whitewashing.

My other concern is that if I do not mention a particular matter in this letter, the Board will then not investigate additional matters that may arise from its investigation. Therefore, I respectfully ask that you not limit your investigation to only the matters I raise herein, but rather to all matters that arise from the investigation, including the matters I raise below.

The following are my complaints:

1. Clerk Horbaly signed two Orders regarding my Motions that he had not given to the judges according to Federal Court Clerk of Court staffer, Valerie White on Aug. 7, 2012. Worse, the Jul. 11, 2012 Order was entered only *hours* after my time-stamped motion was received by the court. According to Ms. White, the judges would not have had time to receive and consider my motion.[i] *See* Orders, Jul. 11, 2012[ii] and Jul. 24, 2012,[iii] *Leader Tech v. Facebook*, Case No. 2011-1366 (Fed. Cir.).

2. Clerk Horbaly did not disclose his prior associations with a person likely to be a key Leader witness, Professor James P. Chandler. Professor Chandler was a professor of law at George Washington University and likely quite well known to the whole court. It is also likely that undisclosed differences exist with various members of the court and Professor Chandler since he was instrumental in the passage of the Federal Trade Secrets Act and the Economic Espionage Act in 1996. At the very least these associations required disclosure. This association was likely to inject bias into the proceedings and should have been grounds for disqualification or at least a request for waiver. Instead, the Clerk and the judges were utterly silent. Given that Professor Chandler's testimony (suppressed by the district court) would have been helpful to Leader and not Facebook, this oversight *shouts* for attention.

In addition, Professor Chandler has assisted the Judiciary in the prosecution of trade secrets and economic espionage cases. Therefore, it is quite likely that many, if not most, of the members of the Federal Circuit should have disclosed this association. The entire court was silent.[iv]

3. Clerk Horbaly did not disclose his and the Federal Circuit's prior associations with various Facebook attorneys. These associations were likely to inject bias into the proceedings and should have been grounds for disqualification or at least a request for waiver.[v]

4. Clerk Horbaly did not disclose his Facebook holdings or whether or not he or any of his direct relationships to the third degree held or purchased stock in Facebook during the pendency of the *Leader v. Facebook* proceedings. Since Facebook's highly publicized initial public offering occurred during the pendency of the court's decision, this matter must certainly be material and would inject bias, and the disclosure one way or the other would have satisfied the requirement for judges to avoid even the appearance of impropriety, especially when considering that at least Judges Lourie and Moore had acquired Facebook stock. [vi]

5. Even more specifically, Clerk Horbaly has actually hosted events where he invited Facebook's attorney Thomas Hungar as a guest speaker on the subject of the

future of the Federal Circuit. It is evident that the Federal Circuit courts Mr. Hungar's favor and that this conflict of interest required disclosure.[vii]

6. Clerk Horbaly authorized public disclosure of key court decisions *timed* to Facebook media needs regarding its IPO in what the average person on the street can only consider Facebook bias. The announcement of the decision was *timed* on the same day as the beginning of the Facebook Road Show in New York on May 8, 2012, and the announcement of the denial of the Leader petition for rehearing was *timed* and unexpectedly announced first by *Fox Business* interviewer Shibani Joshi during a nationally televised interview of Leader's Chairman Michael McKibben on July 16, 2012.[viii]

7. In his "hyperactive" role as a surrogate judge, Clerk Horbaly ignored the substance of my motions which included firm evidence of matters that required serious review instead of the cursory denials they received. For example, I provided clear proofs of substantial conflicts of interest among the Clerk and judges, substantial new evidence of Facebook's withholding of key evidence in this case, and egregious oversights of law that cannot possibly pass for judicial discretion.[ix]

8. Clerk Horbaly's court has failed to provide timely FOIA information which asked that the court disclose its conflicts checking process in general, and specifically what conflicts checking occurred prior to and during the pendency of *Leader v. Facebook*.

9. In his "hyperactive" role as a surrogate judge, Clerk Horbaly abused his discretion by denying motions without providing a justifying reason. The U.S. Supreme Court in *Foman v. Davis*, 371 US 178 (1962) at 182 states: "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules."

In his Clerk duties, Clerk Horbaly has failed to docket my motions, leaving the public in the dark as to the subject of the denials of those motions which have been published. Such dereliction of duties is tantamount to the kind of censorship one would expect to see in a totalitarian state. Further, Federal Circuit Clerk staffer Valerie White told caller Steve Williams on Jul 7, 2012 that the court had "no record" of even receiving any of my three motions. This sort of conduct of a major court is unacceptable. [x]

10. The public record shows the possibility of undue influence over the proceeding by political and foreign influences. More specifically, at least Judges Lourie and Moore acquired Facebook stock through well-publicized transactions involving the very substantial involvement of investors in Facebook (including the closely related companies Zynga and Groupon) with close ties to the current U.S. administration and to

the Russian government ("Facebook investor DST comes with ties to Alisher Usmanov and the Kremlin – Three Goldman Sachs bankers, Alexander Tamas,Verdi Israelian and John Lindfors joined DST over the past three years." *The Guardian*, Jan. 4, 2011).[xi]

For the sake of economy, I will not attach hard copies of the supporting documents, but will provide links to the downloadable documents online. Should the Board wish to have hard copy print outs of the cited documents, I will provide them upon request.

Given the already public nature of this case, and the fact that I am already in contact with members of the U.S. legislature, I will be providing copies of this complaint to members of the House and Senate Judiciary Committees, among others. In this spirit, I would request that you make the results of your investigation publicly available.

Respectfully yours,

/s/

Lakshmi Arunachalam, Ph.D.
CEO
WebXchange, Inc.

Resources:

1. White Brief*, Leader Tech v. Facebook*, Case No. 2011-1366 (Fed. Cir.). Accessed Aug. 14, 2012 <http://www.leader.com/docs/Leader-v-Facebook-APPEAL-Opening-Brief-25-Jul-2011.pdf>.

2. Red Brief, *Id*. Accessed Aug. 14, 2012 <http://www.leader.com/docs/Leader-v-Facebook-FACEBOOK-APPELLEE-BRIEF-24-Oct-2011.pdf>.

3. Gray Brief, *Id*. Accessed Aug. 14, 2012 <http://www.leader.com/docs/Leader-v-Facebook-LEADER-REPLY-BRIEF-28-Nov-2011.pdf>.

4. Green Brief, and Motion for Leave to File of Amicus Curiae Lakshmi Arunachalam, Ph.D.; Motion for Reconsideration; Renewed Motion for Leave to File. Accessed Aug. 14, 2012 <http://www.scribd.com/amer4innov>.

5. The *Leader v. Facebook* investigative reports of former *Bloomberg TV* reporter Donna Kline. Accessed Aug. 14, 2012 <http://www.donnaklinenow.com>.

ENDNOTES:

[i] Conversation between Federal Circuit Clerk of Court staff member Valerie White and Ohio resident Steve Williams. "Judicial Hyperactivity at the Federal Circuit. Accessed Aug. 14, 2012 <http://www.donnaklinenow.com/investigation/judicial-hyperactivity-at-the-federal-circuit#comment-3365>.

[ii] Order, Jul. 11, 2012. Accessed Aug. 14, 2012 <http://www.scribd.com/doc/100272477/Delivery-Receipt-and-Order-Re-Amicus-Curiae-Lakshmi-Arunachalam-PhD-Motion-for-Leave-to-File-Jul-11-2012#page=2>.

[iii] Order, Jul. 24, 2012. Accessed Aug. 14, 2012 <http://www.scribd.com/doc/102490453/Order-DENYING-Motion-for-Reconsideration-of-Motion-for-Leave-to-File-Amicus-Curiae-Lakshmi-Arunachalam-P-D-Brief-Re-Leader-v-Facebook-Jul-24-20>.

[iv] Renewed Motion of Lakshmi Arunachalam, Ph.D. For Leave To File Brief of Amicus Curiae In Support Of Leader Technologies' Petition For Rehearing And Rehearing En Banc, *Leader Tech v. Facebook*, Case No. 2011-1366 (Fed. Cir.), July 28, 2012, pp. 6-10 <http://www.scribd.com/doc/101191619/Renewed-Motion-for-Leave-To-File-Amicus-Curiae-Lakshmi-Arunachalam-Ph-D-Brief-Jul-27-2010-Leader-v-Facebook-CLERK-S-COPY-WITH-EXHIBITS#page=15>.

[v] *Id*, pp. 16-17 <http://www.scribd.com/doc/101191619/Renewed-Motion-for-Leave-To-File-Amicus-Curiae-Lakshmi-Arunachalam-Ph-D-Brief-Jul-27-2010-Leader-v-Facebook-CLERK-S-COPY-WITH-EXHIBITS#page=25.>

[vi] Donna Kline. "Judge Alan D. Lourie Chose Retirement Fund Value Over Justice? [citing Judge Moore's public financial disclosure showing T. Rowe Price holdings and Facebook's S-1 disclosure of a 5.2% holding by 158 T. Rowe Price Funds]" *Donna Kline Now!* Accessed Aug. 15, 2012 <http://www.donnaklinenow.com/investigation/hijinks-at-the-high-court>. *See* also T. Rowe Price Associates, Inc. "Principal And Selling Stockholders, fn. 20," Facebook S-1 Filing, p. 129. Accessed Aug. 1, 2012; *See* also Judge Kimberly A. Moore Fidelity Contra-Fund Holdings, Renewed Motion of Lakshmi Arunachalam, Ph.D. For Leave To File Brief of Amicus Curiae In Support Of Leader Technologies' Petition For Rehearing And Rehearing En Banc, *Leader Tech v. Facebook*, Case No. 2011-1366 (Fed. Cir.), July 28, 2012, pp. 13-16 <http://www.scribd.com/doc/101191619/Renewed-Motion-for-Leave-To-File-Amicus-Curiae-Lakshmi-Arunachalam-Ph-D-Brief-Jul-27-2010-Leader-v-Facebook-CLERK-S-COPY-WITH-EXHIBITS#page=22>.

[vii] *Id*.

[viii] *See* Letter Complaint to Mr. William Suter, Clerk of Court, U.S. Supreme Court, written Aug. 11, 2012, submitted Aug. 13, 2012, p. 2. Accessed Aug. 14, 2012

<http://www.scribd.com/doc/102686250/Lakshmi-Arunachalam-Ph-D-Judicial-Misconduct-COMPLAINT-to-the-U-S-SUPREME-COURT-Aug-11-2012>.

[ix] Renewed Motion of Lakshmi Arunachalam, Ph.D. For Leave To File Brief of Amicus Curiae In Support Of Leader Technologies' Petition For Rehearing And Rehearing En Banc, *Leader Tech v. Facebook*, Case No. 2011-1366 (Fed. Cir.), July 28, 2012 <http://www.scribd.com/doc/101191619/Renewed-Motion-for-Leave-To-File-Amicus-Curiae-Lakshmi-Arunachalam-Ph-D-Brief-Jul-27-2010-Leader-v-Facebook-CLERK-S-COPY-WITH-EXHIBITS>.

[x] *See* **"**Court Has 'No Record' Of These Motions as of Aug. 8, 2012." *Donna Kline Now!*, Accessed Aug. 15, 2012 <http://www.donnaklinenow.com/investigation/judicial-hyperactivity-at-the-federal-circuit.>

[xi] *Id*., pp. 14-15 <http://www.scribd.com/doc/101191619/Renewed-Motion-for-Leave-To-File-Amicus-Curiae-Lakshmi-Arunachalam-Ph-D-Brief-Jul-27-2010-Leader-v-Facebook-CLERK-S-COPY-WITH-EXHIBITS#page=23>.

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		Processed hrough USPS Sort Facility	August 16, 2012, 8:42 am	WASHINGTON, DC 20074	
		Processed hrough USPS Sort Facility	August 15, 2012, 5:45 pm	SAN FRANCISCO, CA 94128	
		Processed hrough USPS Sort Facility	August 15, 2012, 3:51 pm	SAN FRANCISCO, CA 94125	
		Dispatched to Sort Facility	August 15, 2012, 1:16 pm	MENLO PARK, CA 94025	
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District of Columbia
Board on Professional Responsibility
The District of Columbia Bar
901 4th Street NW, Suite 200
Washington, DC 20005

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Lakshmi Arunachalam, Ph.D.
222 Stanford Avenue
Menlo Park, CA 94025
(650) 854-3393
laks@webxchange.com

August 11, 2012

Mr. William Suter
Clerk of Court
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543
(202) 479-3000
(202) 479-3472

Dear Mr. Suter,

Re: Complaint about the Federal Circuit Judges and Clerk of Court in Leader Tech v. Facebook, Case No. 2011-1366 (Fed. Cir.)

I write to you pursuant to Chapter 16 of the Judicial Code regarding the conduct of the Federal Circuit itself in *Leader v. Facebook*.[1]

I recognize that the normal procedure would be for me to direct my complaint to the clerk and chief judge. However, I believe that these individuals are participating in the misconduct. Therefore, since it is illogical to ask wrongdoers to investigate themselves, I direct my complaint to you instead as the next more senior clerk.

Where do I start? A panel heard the appeal of Leader Technologies, Inc. on June 5, 2012. The circuit then presented a train-wreck of an opinion that first raised my suspicions of misconduct. The opinion utterly ignored the basis of Leader's appeal, which was the clear and convincing evidence standard. The judges created a substantial evidence argument out of thin air, then capriciously dipped into the cold evidence without asking for a briefing, even adding new evidence not put

[1] I wish to rely upon any and all other statutes and ethical rules involving judicial and attorney conduct, including the Model Rules of Professional Conduct, Federal Rules of Evidence and Civil Procedure, and other Rules for the Governance of the Bar.

before the jury. Then they did not apply their own precedents to evaluate their evidence; ruling against Leader based upon their fabricated argument.

Worse, as confused as the opinion was, it rightly isolated the question of law down to a single 2009 interrogatory asked in the present tense (presumably throwing Leader a bone which would not matter since their decision was a foregone conclusion, the law be damned?) The panel said that the case turned on this question. Therefore, the sole question of law was whether or not the present tense use of the verb "is practiced," answered in 2009, could be retroactively applied to past versions of Leader's products in 2002. Since The Dictionary Act says the present tense cannot apply to the past, this case should have been decided in Leader's favor.

The misconduct becomes evident from this point forward. After the panel ruled in Facebook's favor, Leader filed for a rehearing and rehearing *en banc*. I also filed a motion for leave to file an *amicus curiae* brief on **July 11, 2012**. The court denied my motion within hours of receiving it and has never made my motion and brief available for download on the docket. A court employee, Valerie White, said subsequently that such a quick turnaround is not possible, and said that the court "has no record" of the motion and brief ever being received.

The next surprise was the manner in which Leader learned on **July 16, 2012** that the panel had denied Leader's petition for rehearing—on a nationally televised *Fox Business* interview with Leader's CEO & Chairman Michael McKibben. Leader's attorneys were not informed by the court for three more days, by regular mail. In short, the announcement of the panel's decision was *timed* for Facebook's benefit. However, this is not the first time the court has accommodated Facebook's media needs. The announcement of the court's refusal to reverse the lower court was made the same day that Facebook began its IPO road show in New York on July 16, 2012.

On **July 18, 2012** I filed a Motion for Reconsideration citing new evidence that has emerged in other venues that Facebook withheld material evidence from Leader Technologies. The court issued a denial of this motion on **July 24, 2012** but has never docketed the Motion or its Order. The denial said I exceed the page limit, but this is impossible since the page limit for motions is 20 pages and mine was only 6 pages. It also said my motion was moot, but this too is impossible since the court jumped the gun on the denial of the petition since it was issued during the pendency of the response period of the parties to my motion for leave to file.

On **July 27, 2012** I filed a Renewed Motion for Leave to File and I sent a letter to the Clerk of Court Jan Horbaly. Neither my motion nor letter has been docketed or answered. I asked the Clerk to docket my motions and asked "Is this Court attempting to prevent a full and fair hearing of this case on the merits? " An ordinary person would consider this letter a complaint which the Clerk is duty-bound to answer timely. While the Clerk *was* able to receive, circulate, gather opinions, and mail out the *denial* of my amicus brief request in one day, he has not answered my letter nor are my pleadings posted on the docket.

My motions speak for themselves as to the likely motivations behind the judges' and Clerk's desire to ignore me: **CONFLICTS OF INTEREST** that are being concealed for Facebook's benefit. Whether or not I have complied with the letter of the law on procedure, which I believe I have, the facts presented in my motions prove:[2]

1. Panel judges did not disclose that they held Facebook stock in mutual funds that widely publicized those holdings.

2. Neither the panel judges nor other circuit judges disclosed conflicts of interest to the "third degree" regarding family holdings in Facebook.

3. FOIA inquiries to date regarding the conflicts checking process used in *Leader v. Facebook* have gone unanswered.

4. Court decision announcements have been timed to Facebook-favorable media events.

5. Many if not most, maybe even all, of the judges failed to disclose their prior associations with a key Leader witness, Professor James P. Chandler; including the Chief Judge who was a law student at George Washington University during Professor Chandler's tenure.

6. Both the Clerk and Chief Judge failed to disclose close, long-time associations with Facebook attorneys, including Thomas Hungar who is a well-known Federal Circuit analyst and speaker whose favor the Federal Circuit courts.

[2] *Pro Se* filers are to be afforded the grace of latitude, and are not to be summarily rejected as has occurred here.

7. Interrogatory No. 9 violates The Dictionary Act as the sole remaining matter of law and this neglecting of basic law on use of the English language cannot sanction the Court's Facebook-favorable ruling.

8. Jury Instruction 4.7 regarding on sale bar violates the Federal Circuit's own precedent (on which the Court was *silent*) and cannot sanction the Court's Facebook-favorable ruling.

9. The court is not permitted to fabricate new arguments and facts as if it is a trial court since such "hyperactivity" violates Fifth and Fourteenth Amendment rights to due process.

10. The court did not rule on the law that was the basis of Leader's appeal (clear and convincing evidence standard). Instead it ruled against its own hyperactively fabricated argument (substantial evidence) which was not argued or briefed by the parties. This is a manifest injustice.

11. The court's actions are *supporting* the financial and political agendas of Russian oligarchs with close ties to the Russian government and the Obama administration via former Treasury Secretary Lawrence Summers and his long-time aid and current Facebook Chief Operating Officer Sheryl Sandberg.

12. The Clerk of Court is not a judge and yet is executing orders as if he is; and according to clerk staffer Valerie White, could not have submitted my *amicus curiae* brief motion to the full circuit and received a decision on the same afternoon of July 11, 2012.

I respectfully refer you to the work of an intrepid former *Bloomberg* TV investigative reporter, Donna Kline, who has been investigating *Leader v. Facebook* for a year now, and has much additional supporting evidence and documentation on her website at http://www.donnaklinenow.com. Be sure to click down through each of the "Recent Posts" on the left, which provide a chronological analysis of what is evidently substantial misconduct with many tentacles.

I attach for your review my pleadings that have been submitted to the Federal Circuit, but never docketed, along with the proofs of delivery.

A manifest injustice is being perpetrated here, and I hope and pray that this Court is able to root out this corruption and restore public confidence in the Federal Circuit.

I will make myself available to you for your investigation. Please feel free to contact me at any time.

Respectfully yours,

/s/

Lakshmi Arunachalam, Ph.D.
CEO
WebXchange, Inc.

Exhibits:

1. July 10, 2012, NOT DOCKETED, Motion & Brief of *Amicus Curiae* Lakshmi Arunachalam, PhD, Proof of Delivery (July 11, 2012 10:52 AM).
2. July 18, 2012, NOT DOCKETED, Motion for Reconsideration of *Amicus Curiae* Brief, Proof of Delivery (July 19, 2012 10:46 AM).
3. July 27, 2012, NOT DOCKETED, Renewed Motion for Leave to File *Amicus Curiae* Brief, Proof of Delivery (July 30, 2012 7:16 AM).
4. July 27, 2012, NOT DOCKETED, Letter to Clerk of Court Jan Horbaly, Proof of Delivery (July 30, 2012 7:16 AM), not answered as of Aug. 10, 2012.

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5. July 11, 2012, DOCKETED, Order DENYING Dr. Arunachalam's *Amicus* Brief Motion (document not available on the court's website)
6. July 24, 2012, NOT DOCKETED, Order DENYING Dr. Arunachalam's Reconsideration Motion

cc.

House Committee on the Judiciary

- Lamar Smith, Chairman
- John Conyers, Ranking Member
- Darrell Issa
- Steve Chabot
- Jim Jordan
- Howard Berman

Senate Committee on the Judiciary

- Patrick Leahy, Chairman
- Chuck Grassley, Ranking Member
- Dianne Feinstein
- Al Franken
- Mike Lee
- Tom Coburn

2011-1366

United States Court Of Appeals for the Federal Circuit

LEADER TECHNOLOGIES, INC.,

Plaintiff-Appellant,

v.

FACEBOOK, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the District of Delaware in Case No. 08-CV-862, Judges Joseph J. Farnan and Leonard P. Stark

BRIEF OF AMICUS CURIAE LAKSHMI ARUNACHALAM, PH.D. IN SUPPORT OF LEADER TECHNOLOGIES' PETITION FOR REHEARING AND REHEARING *EN BANC*

Lakshmi Arunachalam, Ph.D.
222 Stanford Avenue
Menlo Park, CA 94025
(650) 854-3393
laks@webxchange.com
for Amicus Curiae
Lakshmi Arunachalam, Ph.D.

July 10, 2012

2011-1366

United States Court Of Appeals for the Federal Circuit

LEADER TECHNOLOGIES, INC.,

Plaintiff-Appellant,

v.

FACEBOOK, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the District of Delaware in Case No. 08-CV-862, Judges Joseph J. Farnan and Leonard P. Stark

BRIEF OF AMICUS CURIAE LAKSHMI ARUNACHALAM, PH.D. IN SUPPORT OF LEADER TECHNOLOGIES' PETITION FOR REHEARING AND REHEARING *EN BANC*

Lakshmi Arunachalam, Ph.D.
222 Stanford Avenue
Menlo Park, CA 94025
(650) 854-3393
laks@webxchange.com
for Amicus Curiae
Lakshmi Arunachalam, Ph.D.

July 10, 2012

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Leader Tech v. Facebook, Case No. 2011-1366

CERTIFICATE OF INTEREST

Amicus Curiae Lakshmi Arunachalam, Ph.D. certifies the following:

1. The full names of every party or amicus represented by me is: **Lakshmi Arunachalam**
2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: **NONE**
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of amicus curiae represented by me are: **NONE**.
4. The names of the law firms and the partners or associates that appeared for the amicus curiae now represented by me in the trial court or agency or that are expected to appear in this Court are: **NONE**

July 10, 2012

/S/
_____
Signature

Lakshmi Arunachalam, Ph.D.
for Amicus Curiae Lakshmi Arunachalam, Ph.D.

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Ms. Lakshmi Arunachalam, Ph.D. ("Dr. Arunachalam") submits this brief as an *amicus curiae* pursuant to Fed. R.App. P. 29(a) and Rule 29(a) of this Court. This brief is accompanied by a motion for leave to file pursuant to Fed. R.App. P. 29(b). Dr. Arunachalam supports Leader Technologies' petition for rehearing and rehearing en banc. The consent of neither party has been sought to file this brief.

INTEREST OF *AMICUS CURIAE*

Ms. Lakshmi Arunachalam, Ph.D. ("Dr. Arunachalam") is the inventor of a portfolio of the earliest Internet patents that give control over any real-time web transaction from any web application. These patents give her control over the internet cloud and any cloud application. Her companies, Pi-Net International, Inc. and WebXchange, Inc., are practicing entities with the earliest products implementing web applications based on her patents. At First Data Corporation her software implementations were certified as ACH-certified for credit card and other transactions. Her web applications were installed as pilot trials and beta tests at Cisco, France Telecom, Lycos, Le Saffre, BNP Paribas and La Poste. Dr. Arunachalam invests 100% of her time in research and development (R&D) and in the patenting of new internet-based products. She bootstrapped her companies with self-funding and relies on her patent portfolio of over a dozen patents to protect those investments. *See* APPENDIX for curriculum vitae.

Dr. Arunachalam is a champion of property rights and has a vested interest in the outcome of *Leader Tech v. Facebook*, Case No. 2011-1366. She believes that Leader's invention is an epoch-making event that will help re-establish America's world leadership in innovation, help America stop borrowing money from former Third World countries, and help revive America's profound constitutional values of "life, liberty and the pursuit of happiness." She believes that the wholesale theft of Leader Technologies' intellectual property dwarfs the conspiracies of Bernard Madoff's Ponzi schemes and undermines America's fundamental values. She believes that such crimes should be punished rather than showered with fame, glory, wealth and power.

Dr. Arunachalam is a champion of intellectual property rights for true inventors, especially small inventors, from whom large companies often steal, using their superior resources to quickly exploit the invention and deprive the small inventors of their rewards. She has a strong interest in seeing well-settled patent law applied fairly in this case, and in every case, at every level.

For these reasons Dr. Arunachalam believes that every champion of property rights in the United States must stand behind Michael McKibben and Leader Technologies. She believes that such activity as jury trickery and other court manipulations cannot be permitted to validate theft of property rights. She believes

that such activity will dissuade innovators from participating in the patenting process and thus deprive the public of the benefit of their innovations.

Dr. Arunachalam would like this Court to acknowledge the fraud and trickery that has transpired in this case and not be tempted by admitted hackers and counterfeiters to look the other way. She would like to remind the Court of the wisdom of Matthews 7:26: "Everyone who keeps on hearing these messages of mine and never put them into practice is like a foolish man who built his house on sand." She believes America must rely on and support brilliant inventors and visionaries like Michael McKibben, and not on intellectual property thieves.

SUMMARY OF ARGUMENT

This Court has determined that on sale and public disclosure bars to patentability under 35 U.S.C. § 102(b) should be evaluated against the Uniform Commercial Code ("U.C.C."). This Court requires hard evidence to prove on sale and public disclosure bar based on the U.C.C. The patent community relies upon this prior body of case law. Surprisingly, the Court did not use its U.C.C. standard in this case. Such an abrupt shift in the Court's well-settled precedent is unfair and inequitable to Leader Technologies, will place a significant undue burden on all patent holders going forward, and will increase litigation costs dramatically—all simply because the Court did not apply its own standards.

Compelling reasons justify the existence of the hard evidence rule founded in the U.C.C. The standard was implemented to avoid an otherwise capricious interpretation of business words like "sell" and "deal" and "offer" that can have many meanings depending upon context. It was also established to avoid mere word chases through the record for uses of brand names without assessing whether real inventions lay beneath the mere words on a page. Jurors unfamiliar with the language of research and development can become confused and easily mistake an offer to sell something once it is invented with an offer for sale. Understandably, such forward-looking language can be misconstrued by a juror unfamiliar with the dynamics of as-yet-unrealized visionary possibility.

Indeed, one of the motivations for companies to invest in research and development is to be able to benefit from the result of that effort, *if* it is successful. However, there are no sure things in research and development. In short, selling a dream of an invention is not the same thing as selling an invention that *might* result from that effort. Indeed, the road to research and development success is paved with failures. **The precedent set in this case could *destroy* the ability of individual inventors to finance their research and development. This decision, as it stands, labels *prospective* conversations about *prospective* inventions as an offer for sale—even when these conversations occur under the protection of secrecy**

agreements where the parties have agreed that their conversations will have no legal effect.

By contrast, this very Court decided over a decade ago to look to the U.C.C. to evaluate whether or not an alleged offer "rises to the level of a commercial offer for sale." While the U.C.C. was not a "bright line," it certainly brought clarity and objectivity to the evaluation and placed the question squarely in the mainstream of contract law. Otherwise, a patent holder's future defenses against on sale and public disclosure bar will be left with no legal guidance. Dr. Arunachalam respectfully requests that this Court apply its U.C.C. standard in this case.

Compelling reasons also justify the existence of the "reasonable measures" test under 18 U.S.C. § 1839 to determine whether or not a patentee has maintained the secrecy of his or her invention under the 35 U.S.C. § 102(b) public disclosure bar. The test brought clarity to the maintenance of a trade secret prior to patenting. Otherwise, jurors would be guided only by mere personal opinion. Federal law mandates that reasonable measures involve both "words" and "deeds." The "reasonable measures" test was not performed on the evidence by this Court. One common measure to preserve trade secrets is the use of nondisclosure agreements.

Leader Technologies exhibited uncommon zeal with regard to nondisclosure agreements and secrecy practices, yet no statutory "deeds test" was performed. The research and development community will be thrown into turmoil if nondisclosure

agreements are no longer recognized as one reasonable means to protect trade secrets from public disclosure. Dr. Arunachalam respectfully requests that this Court perform a "deeds test" on the evidence.

Finally, compelling reasons justify the existence in "The Dictionary Act" under 1 USC § 1 of the provision "words used in the present tense include the future as well as the present." However, this Court did not apply the Act to its interpretation of Interrogatory No. 9's use of "is practiced." This case turns on this interpretation since without an interpretation of this interrogatory to the past, the Court has no legal basis for its decision. The patent community relies upon the prior body of case law on the use of tense. Such an abrupt shift in the Court's well-settled precedent is unfair and inequitable to the Plaintiff-Appellant, will place a significant undue burden on patent holders going forward, and will increase litigation costs dramatically since patent holders will no longer be able to rely upon "plain and ordinary meaning." Dr. Arunachalam respectfully requests that this Court apply the plain and ordinary meaning of the verb "is practiced" to mean the present tense with regard to its interpretation of Interrogatory No. 9. At that point, Facebook's on sale and public disclosure bar verdict must be set aside as a matter of law.

For these reasons, Dr. Arunachalam strongly urges the Court to grant Leader Technologies' petition, re-hear this case, set aside the on sale and public disclosure bar, and remand this case to the district court for further proceedings.

ARGUMENT

I. American Patent Property Rights Will Be Placed In Turmoil If This Decision Is Not Corrected.

Congress ratified the U.S. Constitution on September 15, 1787. The only property right given special attention by the framers was Article I, § 8, cl. 8, granting to the Congress the power

> "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . ."

The current anti-patent and anti-small-inventor trend in our courts belies the lessons of history, which prove that American innovation is fueled by the individual inventor. It is only the predator, thief, counterfeiter, infringer, copycat, interloper, plagiarizer, the unthinking, and those who aid them, who would wish to destroy these most fundamental of American incentives to inventorship.

It has been said before and bears repeating that without the spark of invention in a society, the creative pace of new ideas slow. When creativity is not rewarded, entrepreneurship and job creation fall off. Fewer jobs mean a decrease in tax revenues, which in turn takes away society's ability to provide civil infrastructure and social services. When a government is unable to care for its citizens, civil unrest and the decline of that society is just around the corner. The framers of the U.S. Constitution were students of history and knew this. This is precisely why they

embedded patent property rights into the fabric of our democracy.[1] That fabric is being torn in this case.

Patent holders and those hoping to protect their inventions rely upon the Court's precedents in determining their courses of action in securing a patent. If not overturned, **this Court's decision** against Leader Technologies regarding the on sale and public disclosure bar **will place all patents in peril**.

This one decision:

(1) leaves patentees with no ability to rely upon the plain and ordinary meaning of the English language;

(2) leaves the patent process with no reasonable certainty about how to protect trade secrets prior to filing for a patent;

(3) opens the door wide for predators to cajole courts into ignoring precedential law capriciously; and

(4) gives *carte blanche* to infringers to misdirect the course of justice into trial theater, fabrication of evidence, tricky attorney argument, motion practice and undue influence upon the process itself based upon this precedent.

[1] *BD. OF TRUST. OF LELAND STANFORD v. ROCHE SYS.*, 131 S. Ct. 2188 (Supreme Court 2011) at 2200 ("Patents, for example, help to elicit useful inventions and research and to assure public disclosure of technological advances").

II. The Court Erred In Applying The Substantial Evidence Standard (Quantitative) Without *First* Applying The Clear And Convincing Evidence Standard (Qualitative) To Its Review.

Jury Instructions No. 1.11 specified the clear and convincing evidence standard. The Court can review the "substantial evidence" only in light of this instruction. It did not do that, because if it had it would have "exercise[d] its independent judgment on the evidence of record and weight it as a trial court" and used its precedential standards (e.g., *Group One*, *Linear*, *Allen*, *Helifix*). *Sub*.

Instead this Court sporadically dipped into the record looking for evidence to support a clearly predetermined outcome in favor of Facebook; conveniently issuing its decision within hours of the beginning of Facebook's IPO road show. In doing so, the Court ran roughshod over its own well-settled precedent for judging the sufficiency of evidence to support on sale and public disclosure bar.

The standard is not whether there was **substantial (. . .) evidence**. The standard is whether there was **substantial (clear and convincing) evidence**. Bottom line, the Court's opinion neglected the standard of review completely. In a *de novo* review the Court must think for itself and not simply try to justify a flawed jury conclusion—a conclusion elicited by deception and misconduct. *SSIH EQUIPMENT SA v. US Intern. Trade Com'n*, 718 F. 2d 365 (Fed. Cir. 1983) at 281 ("The court in 'de novo' review must exercise its independent judgment on the evidence of record and **weight it as a trial court**")(emphasis added).

III. The So-Called "Substantial Evidence" Is Not Convincing Grammatically, Logically or Scientifically; An Ambiguous Use Of Grammar For The Definition Of "Is Practiced" Can Never Satisfy The Clear And Convincing Evidence Standard.

Boiled down, Facebook's so-called "substantial evidence" is solely based (according to this Court's opinion) upon Leader's response to Facebook's question in 2009 about any claim of the '761 patent that "is practiced" by any Leader product and/or service. The Court has concluded that this is also an "inventor's admission" of the state of the invention back in 2002, seven years earlier.

This interpretation offends the senses in multiple ways.

Firstly, the present tense English verb "is practiced" cannot be used in reference to the past. This is the law as well as good grammar and plain common sense.

Secondly, as an inventor of internet software, Dr. Arunachalam considers it a fallacious notion to assume *without serious scientific investigation* (of the kind required by this Court's precedent) that a statement about the state of a piece of software in 2009 also applies to all times past. Any axiom that states that "the present state of a thing applies equally to all past states of the thing" is faulty. This Court must reject this faulty logic as the basis for the jury's beliefs about Interrogatory No. 9. No such logic exists in science or philosophy. A jury decision based on faulty logic or science must be set aside as a matter of law. *In re Bose Corp.*, 580 F. 3d 1240 (Federal Circuit 2009)("there is no room for speculation, inference or surmise and, obviously, any doubt must be resolved against the

charging party"). The jury *inferred* an improper meaning to the verb "is practiced" (*present* tense) that must be resolved against Facebook since, according to the Decision, the case turned on this question alone. (The question was not was practiced; *past* tense.) *All* the other so-called "substantial evidence" was contained in this leaky bucket.

Thirdly, stating the previous point a different way, the Court's interpretation belies the 2nd Law of Thermodynamics.[2] That law says that matter (and energy) is in a constant state of decay. Software is not exempt from this law. Software practitioners know that left unattended, software decays, breaks and stops working over time. Therefore, the notion that Leader's answer about the state of its software in 2009 applies equally to its state in 2002 is a ludicrous lapse of logic. It infers that nothing changed. Even if Leader's engineers never touched the software code between 2002 and 2009, entropy happened. Entropy alone changes things. Therefore, no 2009 answer about the software can, as a matter of science, imply anything about its previous 2002 state. Hard investigation is required. All Facebook presented was speculation, innuendo and surmise. Speculation is not evidence and this Court cannot overturn a validly issued US patent based upon speculation.

[2] The irreversible tendency over time toward the natural entropic dissolution of the system itself. Stated more popularly, "Matter is in a constant state of decay."

Clearly Facebook will keep repeating this speculation as long as the courts continue to turn a blind eye to its preposterousness.

Facebook's mere chase through the record for references in business documents to the Leader2Leader brand name did nothing to *prove* one way or the other whether Leader's invention remained exactly the same between 2002 and 2009. Further, the fact that Facebook's own expert witness argued that the only Leader source code put into evidence by Facebook *did not* practice the invention destroys their own argument

Why is this Court arguing for Facebook on both sides of the ball? Facebook is the adjudged infringer. Leader Technologies is the proven inventor. Remarkably, on the one hand, this Court supports Facebook's contention that the only source code in evidence ***did not*** contain the invention. And, on the other hand this Court *also* supports Facebook's contention that the same source code, the only source code shown to the jury, ***did*** contain the invention, and, was offered for sale prematurely. This duplicity defies common sense and is ambiguous at best. Facebook's own expert said the source code did not practice the invention, therefore, the invention could not have been offered for sale during the time in question. Ambiguity is not "clear and convincing."

What else did Facebook do during trial? They attacked the credibility of Michael McKibben, the true inventor, in front of an unsuspecting lay jury. They

called him a liar who was desperate to save his invention and implied (without any hard proof whatsoever) that he must have slipped up and tried to sell it too soon. This Court even added to the innuendo that Leader was "struggling financially." Decision 6. The record shows no analysis of Leader's financial statements anywhere. This statement by the Court as fact is pure hearsay that demeans the inventor and supports the infringer. This is unconscionable.

In short, Facebook played to the naiveté of an uncritical public to believe a lie. While a jury can be forgiven for being fooled, the purpose of this Court on appeal is to prevent such injustice. This Court's duty is to look for hard proof instead of simply relying upon the infringer's trial fiction. Facebook filled the jury's head full of gobbledygook.[3] Dr. Arunachalam prays that this Court does not reward such ignoble conduct any longer.

Where was the adjudged infringer Mark Zuckerberg in all this? Did the jury ever get to assess his credibility as compared to Mr. McKibben's? Remarkably no, because the district court refused to allow Leader Technologies to introduce his testimony or mention his name at trial. This makes absolutely no sense and was clearly prejudicial to Leader Technologies being able to tell the full story to the jury, and in being able to cross-examine the adjudged infringer in front of the jury.

[3] Merriam-Webster Dictionary: "wordy and generally unintelligible jargon;" Language that is meaningless or is made unintelligible by excessive use of abstruse technical terms; nonsense.

The Court's interpretation of the "is practiced" question is ambiguous at best. Therefore, as a matter of law, science and logic, an ambiguous premise *cannot* be the basis for a "clear and convincing" determination. Put another way, an ambiguous item of evidence, upon which all other alleged evidence is based,[4] cannot be the basis for overturning the presumption of validity of a patent issued in the United States of America.

By law, "is practice" cannot be applied in this case to any time prior to the time of the question, which was 2009. Therefore, Interrogatory No. 9 is not even ambiguous.

Even if one were to proceed down the path of reasoning that the fact finder might have believed the "is practiced" response applied to the past, this renders Facebook's interpretation ambiguous at best. Therefore, at best this response classifies as a mere "scintilla of evidence." *Sub*. The other so-called "substantial evidence" in support of this scintilla must, as items of logic, be considered as "sub-scintillas" of evidence, since their basis for validity relies upon the precedent scintilla and cannot themselves be elevated to a higher state of being than the scintilla parent. Then, adding up the lone scintilla with alleged "substantial" sub-

[4] The law of bivalence was breached by Facebook's assertion. A clear and convincing conclusion cannot be based upon a statement that can either be true or false (ambiguous). In fact, in law an ambiguous assertion is generally considered a false assertion for the purposes of impeachment.

scintillas, one cannot raise the sum state of this aggregate of evidence to the level of "clear and convincing" in law, science, logic or common sense. *Anderson v. Liberty Lobby, Inc.*, 477 US 242 (Supreme Court 1986) at 252 ("mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient").

An illustration of Facebook "scintilla" may help clarify the legal question. Here "S" represents a scintilla of *deficient* Facebook evidence:

$$S + S_{sub\text{-}scintilla_1} + S_{sub\text{-}scintilla_2} \ldots \neq \text{Clear and Convincing}$$

Now let's compare the legal standard of review for **substantial (clear and convincing) evidence** (Fig. 1) with Facebook's **substantial (deficient) evidence** whose sub-scintillas must be considered "gray" evidence at best (Fig. 2). "Gray" means the evidence is suspect at best since it is derived from a questionable premise. In Fig. 1 E_N represents an item of *clear and convincing* evidence.

E_1	E_2	E_3
E_4	E_5	E_6
E_7	E_8	E_9

Fig. 1 – *The Legal Standard of Review:* **Substantial (Clear and Convincing) Evidence**

Fig. 2 – Facebook's **Substantial (Deficient) Evidence**

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This analysis illustrates the jury's and courts' confusion. Too much weight was given to the gobbledygook of Facebook's S(sub-scintillas) of evidence without first sorting out the S from the E(*n*) evidence. Without Interrogatory No. 9 there was no E evidence at all; *n*=null. Colloquially speaking, no attempt was made to separate the wheat from the chaff. Winnowing reveals that the evidence was *all chaff*—there was no wheat. Even a few grains of dodgy evidence is not clear and convincing.

Propriety dictates that a jury's belief about an ambiguous statement must be resolved in favor of validity (Leader Technologies, the real inventor). However, the fact is that Interrogatory No. 9 is not ambiguous as a matter of law. Therefore, Facebook fails to meet the clear and convincing burden of proof no matter how its deficient evidence is interpreted.

IV. The Court Neglected To Use Its Own Well-Settled Precedents To Test The Evidence—Precedents Upon Which The Entire Patent World Relies.

This Court is not a mere rubber stamp for district courts and juries. Its purpose is to take a critical look at what transpired in the lower courts for mistakes, prejudices and injustices, and make them right. This Court did not test *any* of Facebook's evidence against well-settled standards for assessing 35 U.S.C. 102(b) claims of on sale and public disclosure bar, including:

A. Element-by-Element Test: Did the Court perform an element-by-element prior art test against the alleged offers? **No.** *Advanced Display Sys., Inc. v.*

Kent State Univ., 212 F.3d 1272, 1282 (Fed. Cir. 2000)("describe every element of the claimed invention").

B. Uniform Commercial Code ("U.C.C.") Test: Did the Court evaluate the alleged offers against the U.C.C.? **No.** Do the alleged offers "rise to the level of a commercial offer for sale" pursuant to the U.C.C.? **No.** *Group One, Ltd. v. Hallmark Cards, Inc.*, 254 F. 3d 1041 (Fed. Cir. 2001) at 1047 ("we will look to the Uniform Commercial Code ("UCC")").

C. Reasonable Measures Secrecy Test: Did the Court perform the reasonable measures "deeds" test to determine if Leader had taken reasonable steps to protect its invention secrets from public disclosure? **No.** 18 U.S.C. §1839(3)(A)("reasonable measures to keep such information secret"); *US v. Lange*, 312 F. 3d 263 (7th Circuit 2002)("This makes it irrelevant that RAPCO does not require vendors to sign confidentiality agreements; it relies on deeds (the splitting of tasks) rather than promises to maintain confidentiality");[5]

D. No-Reliance Contractual Terms Test: Did the Court take notice of the no-reliance agreements in place through the signing of the nondisclosure agreements ("NDA") by alleged recipients of the offers; agreements that

[5] Leader Technologies involved leading experts in the field of intellectual property and trade secrets to help protect its secrets, namely law Professor James P. Chandler and Maj. Gen. James E. Freeze, U.S. Army (ret.). *See* p. 20; fn. 21.

contractually negated offers as a U.C.C. matter of law? **No.** U.C.C., Restatement (Second) Contracts (1981) §21 ("parties . . . may intend to deny legal effect to their subsequent acts");[6]

E. Experimental Use Test: Did the Court test the evidence to determine if the alleged offers were permitted experimental use and therefore exempt from the on sale and public disclosure bar? **No.** *Allen Eng'g Corp. v. Bartell Indus., Inc.*, 299 F.3d 1336 (Fed. Cir. 2002)(experimental use exemption).

F. Enablement Test of Brand References: Did the Court determine whether references to the Leader2Leader brand name "enables a person of ordinary skill in the art to practice the claimed method sufficient to prove on sale and public disclosure bar by clear and convincing evidence? **No.** *Helifix Ltd. v. Blok-Lok, Ltd.*, 208 F. 3d 1339 (Fed. Cir. 2000)("teaser" brand name references in selling documents do not trigger on sale bar because one of ordinary skill cannot build the invention from the mere reference to a brand name).

G. The Dictionary Act Test: Did the Court test the Interrogatory No. 9 evidence against the plain and ordinary meaning of English verb tense? **No.** *Carr v. US*, 130 S. Ct. 2229 (Supreme Court 2010) at 2234 ("the present tense form of the

[6] PTX-1058 at 5 (Wright Patterson NDA: only definitive agreements shall have any legal effect); DTX-725 (LTI-153002) at 5 (Vincent J. Russo NDA); S. Hrg. 108-100 (2003) (testimony places Dr. Russo at WPAFB on Apr. 2, 2001).

verb `to travel' . . ., which according to ordinary English grammar, does not refer to travel that has already occurred").

Inventors rely upon this Court to uphold patent property rights from infringers as a fundamental tenet of our democracy. If the Court does not uphold its own precedential standards, then all patent rights are thrown into disarray.

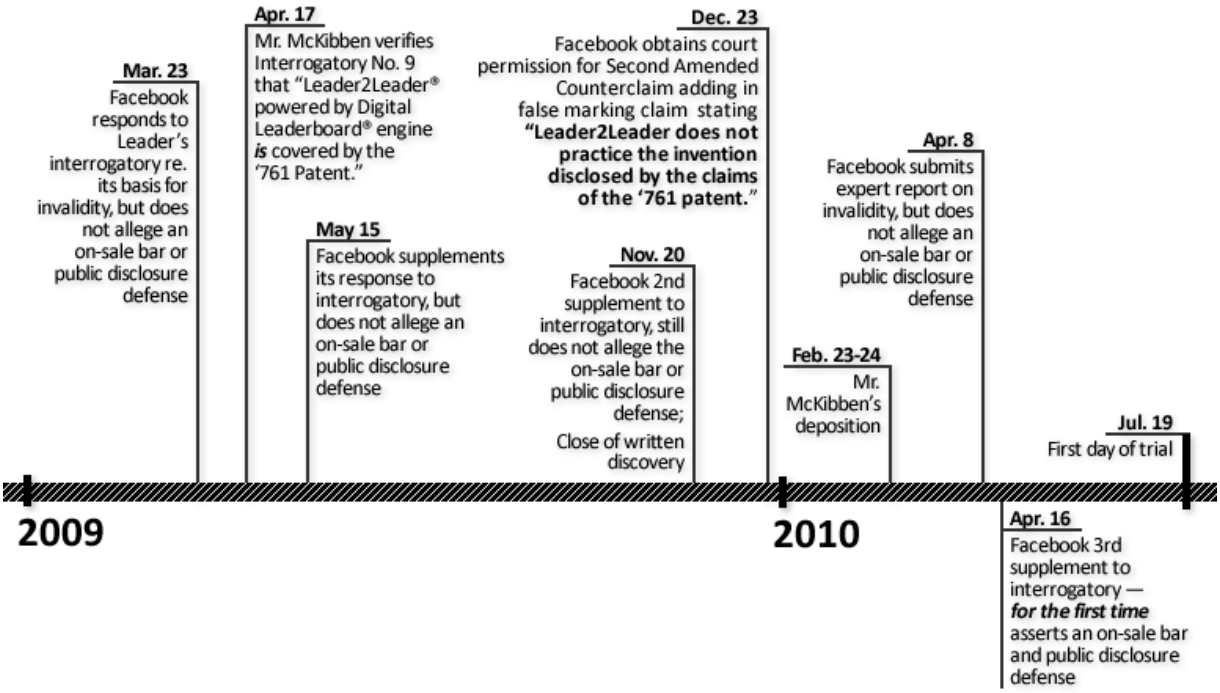
V. This Court Accepted Substantially Prejudicial Conduct In The Lower Court.

A. Prejudicially Late Claims Allowed. The district court changed judges just three months before trial. The new judge, as one of his first acts, allowed Facebook to amend its claims in an "about-face" and add on sale and public disclosure bar. Facebook should not have been permitted to claim on sale and public disclosure bar so close to trial. Besides being an illogical flip-flop in going from false marking (that no invention ever existed) to on sale and public disclosure bar (that an invention not only existed, but was offered for sale too early), this new claim was highly prejudicial since the district court did not allow any new discovery so that Leader could prepare its defenses. Such a decision crosses the line from judicial discretion to judicial prejudice.

For example, had Leader been allowed discovery, Leader would have been able to call expert witnesses including their former director law Professor James P. Chandler to testify on the subject of Leader's "reasonable measures" taken to

protect its trade secrets. He knew these facts from personal knowledge and involvement. Trial Tr. 10799:17-10800:22. The jury would have been unable to ignore Professor Chandler's authority and credibility since he was the chief author of the Federal Trade Secrets Act. His advice is relied upon by the U.S. Judiciary and Congress, among others. DTX-0179 ("Professor James Chandler, Director - President of the National Intellectual Property Law Institute and a principal security, intelligence and intellectual property advisor to over 202 jurisdictions worldwide"); S.Hrg. 104-499 (Economic Espionage); H.Hrg. Y 4.J 89/1:104/30 (Patents Legislation); H.Repts. 104-784, 788, 879, and 887; White House Press Sec., Jan. 18, 2001 (NIAC); DTIC-94-7-18-001.

Even a cursory review of Plaintiff-Appellant Leader's timeline (re-presented below) plainly shows the prejudice imposed on Leader Technologies by the late claim. Corrected Combined Petition 6.



Leader was unfairly surprised and the allowance of this untimely claim confused the proceedings, creating extreme prejudice against the inventor. *Sears, Roebuck & Co. v. Mackey*, 351 US 427 (Supreme Court 1956) at 437 ("any abuse of that [judicial] discretion remains reviewable by the Court of Appeals"); Fed. R.Evid. 403 (excluding evidence for prejudice and confusion); Fed. R.Civ. Proc. 26 (duty to disclose; prohibits unfair surprise).

B. Jury Binder / Interrogatory No. 9 Charade.

Facebook's court room theater surrounding Interrogatory No. 9 was highly prejudicial and went unchecked by the district court. The court allowed Facebook to present a heavily-redacted version of Leader's responses to Interrogatory No. 9

(over Leader's objection). Wigmore, Evidence, 3rd ed. ("Possibilities of error lie in trusting to a fragment of an utterance without knowing what the remainder was.").

To make matters worse, Facebook introduced the doctored interrogatory embedded deep inside a thick jury binder in a stunt that consumes *nine pages of trial transcript*. Tr. 10740:7-10749:3. Facebook handed the jury a heavy binder that contained a raft of Leader engineering drawings dated around 2000. Facebook's heavily-redacted few pages of Interrogatory No. 9 were buried in the back of the binder, forcing the jury to fold over many pages of engineering drawings to get to it. Each of the engineering drawings contained the Leader2Leader logo graphic. The evident innuendo was that these drawings *implied* that actual software programming code *may* lie behind them.

Then, in the *piece de résistance* the next morning, Facebook claimed it made a mistake, claimed they did not intend for the engineering drawings to be given to the jury, and asked for them to be removed before Leader could cross-examine the evidence. Over Leader's vehement objections the district court allowed the removal, at one point even suggesting that he tell the jury a lie as the reason for the removal. Tr. 10742:7-9 ("I've made an administrative mistake by admitting a large document when I meant to admit two pages"). Why would the judge offer to tell a fib for Facebook? Why would the judge allow such unvarnished prejudice? This conduct steps beyond judicial discretion into extreme prejudice.

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By comparison, the district court in *Guy v. Crown Equipment Corp.*, 394 F. 3d 320 (5th Circuit 2004) at 2(b) excluded boxes of accident reports in a transparent attempt by the plaintiff to prejudice the defendant with innuendo by dumping boxes of documents on the jury. On appeal the judge's actions were affirmed, stating "The district court did not abuse its discretion in excluding all but the 360 accident reports for left-leg injuries incurred by operators of forklifts without doors. For starters, the court noted, and criticized, the 'theatrics' employed by Guy in offering the evidence — bringing boxes of accident reports into the courtroom, in the presence of the jury. Obviously, this was prejudicial. *See* Fed. R.Civ.Proc.103(c) (should not suggest inadmissible evidence to jury); Fed. R.Evid. 403."

C. Lack of Expert Witness Credibility.

Patent cases are often highly technical in nature, for this reason one of the solemn duties of the district court judge is to ensure the reliability of expert witnesses. It is the court's responsibility to disqualify unreliable science since the fact-finders rely on that testimony to assess the facts objectively. Without reliable expert testimony, the fact-finders cannot do their jobs, and their conclusions will be founded upon unreliable information. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 US 579 (Supreme Court 1993) at 595-597 (the trial judge must ensure the reliability of scientific testimony).

Facebook's expert witness Dr. Saul Greenberg's testimony regarding Leader's provisional patent was hopelessly flawed and unreliable. The district court had a duty to disqualify him and did not. Specifically, in a sad but somewhat humorous bit of hand waving, Dr. Greenberg first claimed that any comment he made about Leader's source code would be a "wild guess." Tr. 10903:10. Firstly, it is simply not credible for a Java programming expert such as Dr. Greenburg to claim not to know the general purpose of Java "import" statements. This alone was grounds for dismissal. Then, several transcript pages later he waxed eloquent "using my knowledge of programming" to assist Facebook with an opinion about that very code he said that he could not understand. Tr. 10904:8-10905:15. Such testimony is not credible. *See* also fn. 4 regarding the law of bivalence. Specifically, either he could or he could not understand the code. Both claims cannot be true. He claimed to later understand what he could not understand earlier. This ambiguous testimony should have been discarded by the district court.

Dr. Greenberg's contradictory claims discredit *all* of his testimony. Since his was the only testimony arguing against the validity of Leader's provisional patent, Facebook's on sale and public disclosure bar claim would have been moot without Greenberg's unreliable testimony. *Christophersen v. Allied-Signal Corp.*, 939 F. 2d 1106 (5th Circuit 1991) at 1127 ("If the record establishes a critical fact contrary to the expert's testimony, or if a court may take judicial notice of a fact that fatally

contradicts the assumptions of an expert, then his or her testimony ought to be excluded").

D. Leader Was Denied The "Crucible Of Cross-Examination" Of Mark Zuckerberg, The Adjudged Infringer.

The jury was never given the opportunity to hear from Mark Zuckerberg because the district court would not allow Leader to introduce his testimony or even mention his name at the trial. Facebook attacked the credibility of the true inventor of '761, Michael McKibben, but Leader's attorneys were not given the opportunity to put the adjudged infringer Mark Zuckerberg on the stand to test his credibility by comparison. Facebook called Mr. McKibben a liar. The jury was bent toward that unproven innuendo. How might the trial have gone if Leader were given the opportunity to inquire of Mr. Zuckerberg directly about where he obtained the Leader source code? It is quite likely the texture of this trial would have changed completely and the focus would have been rightly placed on the adjudged infringer and not solely on the rightful inventor.

How can any thinking person believe that disallowing Mark Zuckerberg's testimony at this trial was not prejudicial and did not step beyond the bounds of judicial discretion? *Davis v. Alaska*, 415 US 308 (Supreme Court 1974)("We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination"); *See* also *Crawford v. Washington*, 541 US 36 (Supreme Court 2004) at 61, 74

("testing in the crucible of cross-examination . . . cross-examination is a tool used to flesh out the truth, not an empty procedure").

Leader's constitutional right to test Mark Zuckerberg "in the crucible of cross-examination" was denied, leaving Facebook free to attack the true inventor's credibility with impunity. Such a denial is beyond judicial discretion.

New evidence is emerging in other venues that casts serious doubt on Mark Zuckerberg's veracity (veracity that the district court in this case refused to allow Leader Technologies to test). For example, Mr. Zuckerberg now claims for the first time in a sworn declaration that "I conceived of the idea for Facebook in or about December 2003."[7] However, a conflicting witness claims that Mr. Zuckerberg's claim is false.[8] This witness (who recently passed a lie detector test on this question) also says that Mark Zuckerberg sent him Leader Technologies' White Papers in February of 2003.[9] If this is true, then Mark Zuckerberg perjured himself in his Leader deposition since he answered "absolutely not" when asked if he had seen a

[7] Decl. of Mark Elliot Zuckerberg, *Paul D. Ceglia, v. Mark Elliot Zuckerberg and Facebook, Inc.*, 10-cv-569-RJA (W.D.N.Y. 2010), Doc. No. 46, June 1, 2011, Ex. B.

[8] Def. Mot. to Enforce, Jun. 27, 2012, Ex. D., Aff. of David London, No. 10(c), *Edward B. Detwiler et al, v. Leader Technologies, et al*, 09-CV-006857 (Franklin Co. (Ohio) C.P. 2009).

[9] *Id.*, No. 32.

copy of Leader's White Papers in 2003-2004, according to Leader attorneys.[10] The district court blocked Leader's attempt to introduce this evidence at trial.

Mr. Zuckerberg also claimed in 2006 testimony to have built the entire Facebook platform in "one to two weeks" while studying for Harvard final exams in January 2004.[11] However, this claim is now hotly contested by at least two witnesses. One witness claims that Mr. Zuckerberg was waiting for Leader's source code to be "debugged" all through 2003. If this is true, then Mr. Zuckerberg perjured himself again, and proof of patent infringement in this case becomes a *fait accompli*.[12] Another witness states that another heretofore unidentified person named "Jeff" was helping Mr. Zuckerberg, in late 2003[13] thus contradicting his *ConnectU* testimony where he claims to have done everything all by himself .[14]

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[10] Tr. 1107:8, Heidi Keefe, Judge's Conference, Jul. 24, 2009, Doc. No. 77.

[11] Zuckerberg Deposition, Tr. 41:10; 82:4, Apr. 25, 2006, , *ConnectU LLC v. Zuckerberg et al*, 1:04-cv-11923-DPW (D.Mass. 2004).

[12] *Detwiler* (fn. 9 above), Aff. of David London, No. 58.

[13] Amended Complaint, No. 39, Apr, 11, 2011, *Ceglia v. Zuckerberg* (Zuckerberg: "if you could send another $1000 for the facebook (sic) project it would allow me to pay my roommate or Jeff to help integrate the search code and get the site live before them").

[14] Zuckerberg Deposition, Tr. 37:15-20 (Q: "Were you the initial code writer of the initial code for Facebook? A. Yes. Q. Was there anybody else who assisted in writing the initial code for Facebook? A. No.").

Mr. Zuckerberg stated under oath in the *ConnectU* deposition that he had "other" sources for the first version of Facebook, but not surprisingly, he couldn't remember what they were. Was this "Jeff" one of those "other" sources? Facebook did not produce this Nov. 22, 2003 "Jeff" Email to Leader.[15]

Perhaps more egregious than anything else, Facebook provided no copies of Facebook's source code or computer hard drive information to Leader from the critical 2003-2004 timeframe during discovery. However, new information has surfaced that volumes of 2003-2004 information not only exist, but that **Facebook is currently attempting to have it destroyed**. That evidence was never produced to Leader Technologies and may include "at least five computers belonging to and used by Defendant Zuckerberg while a student at Harvard."[16] These computers contain things like "Instant Messaging logs" and source code from Mr. Zuckerberg' s activity at Harvard in 2003-2004 that was never produced to Leader.[17] This

[15] *Id*., Tr. 36:22 (Zuckerberg: "I'm sure there are other things").

[16] Temporary Restraining Order, Doc. No. 232, Nov. 25, 2011, *Ceglia v. Zuckerberg*, (to prevent Facebook's destruction of evidence)("Plaintiff has come across evidence that Defendants and defense counsel have suppressed evidence, made fraudulent arguments related to that suppressed evidence and actively sought, encouraged, urged and solicited destruction of that evidence from those whom [sic] have possession of it.");

[17] Motion Hearing, Tr. 19:21, Doc. No. 361-19, Jun. 2, 2008, *ConnectU, Inc. et al v. Facebook, Inc. et al*, 1:07-cv-10593-DPW, Aug. 19, 2011 (D.Mass. 2007).; *Id*., Doc. No. 361-6, p. 7 ("To date, TheFacebook, Inc. (the "Facebook") has produced

withholding of evidence is unconscionable, especially with the specter that it would prove not only patent infringement, but outright theft.

Facebook's "song and dance" in *all* the litigation against them, including this one, has been that they don't understand the scope of the ligation.[18] This **predatory obfuscation tactic**[19] needs to be exposed by this Court for the whole world to see, understand, and no longer permit as a tactic of obstruction to prevent the rightful owners of patent properties from enjoying the fruits of their labors. Predators should be prevented from using the Rules of Civil Procedure to *hide* their theft of patent properties. **This predatory litigation technique will destroy the small American inventor by putting such disincentives in the way that they will no longer bother sharing their ideas with the public.** *See LELAND STANFORD*, fn. 1 above. As another case in point, the eventual discovery procedure of the Zuckerberg hard drives in *ConnectU* was so narrowly defined as to be able to cleverly avoid any surfacing of

---

three different versions of its source code, with file dates spanning from early to mid 2004 up through 2005").

[18] Tr. 1106:13, Paul Andre, Judge's Conference, Jul. 24, 2009, Doc. No. 77.

[19] Almost one year into the *Leader v. Facebook* litigation, Facebook's Cooley Godward LLP attorney Heidi Keefe continues the obstructive hand-waving mantra "we do not still actually have a good grasp on what they are accusing of infringement." *Id.* 1116:8-9. Similar discovery disputes in the *ConnectU* case went on for the first *two years* of the litigation.

the Leader Technologies' source code.[20] Leader should have been given an opportunity to study all of these hard drives for evidence of its source code and white papers that New Zealander David London testifies and verifies by reputable polygraph he received from Mr. Zuckerberg in Feb. 2003. See fn. 9.

All these discrepancies in Mr. Zuckerberg's story, the possibility that he actually stole Leader's source code, and the possible deliberate concealment of discovery information deserved to be explored by Leader, but Leader was denied that constitutional opportunity by the district court for such inquiry at trial. One of Leader's claims was willful infringement. They were prevented by Facebook's stealth in hiding behind the Rules of Civil Procedure, blocking a full confrontation of Mr. Zuckerberg on all these matters. Surely the spirit and intent of the Rules are not to *obstruct* justice as has occurred here. Such decisions by the lower court step well beyond the bounds of judicial discretion.

VI. The Efficacy of Nondisclosure Agreements Are Placed In Doubt By The Court's Decision.

Unless the Court changes its mind, its treatment of the efficacy of nondisclosure agreements throws the entire patent world into turmoil. Leader

[20] Order for Discovery of Computer Memory Devices, Doc. No. 361-18, Aug. 19, 2011, p. 4 of 22, *ConnectU v. Facebook* (Order restricting the search to only "PHP or HTML source code"). Leader Technologies' source code was written in Java and XML. Facebook was found guilty of infringing this Leader source code on 11 of 11 claims.

Technologies exhibited admirable diligence in protecting its secrets, even hiring eminent directors who are experts in the field of trade secrets and security. The record shows not just reasonable measures, but extraordinary measures to protect its inventions from public disclosure.[21]

If this Court continues to ignore Leader's reasonable measures deeds as well as their written nondisclosure agreements, the impact of this precedent on the patenting process will be devastating. This Court will be saying that secrecy agreements, no matter how diligently handled, are irrelevant to maintaining secrecy during the invention process. Every infringer from this day forward will attack rightful inventors over the irrelevance of their NDAs and will cite this case as precedent.

Many if not most small inventors seek financial backing to sustain their invention efforts. If secrecy agreements are rendered irrelevant by this case precedent, the small inventors will have no ability to raise research and development funds. This decision will have effectively made the invention patenting process the exclusive domain of large, well-funded companies who can

[21] For example, another Leader Director was Maj. Gen. James E. Freeze, U.S. Army (ret.), former head of the U.S. Army Security Agency; former Asst. Deputy Dir. of the National Security Agency (NSA); author of "The Freeze Report" on national laboratory security; H.Hrg. 106-148; GAO/RCED-93-10; H.Hrg. 100-T91BB192 (J. Tuck); DTX-0179 ("Major General James Freeze, US Army (ret.), Director - former head of the US Army Security Agency; Asst. Deputy Director of NSA; author of "The Freeze Report" on Department of Energy security").

afford to fund research internally. Such a change in the tenor of patent laws requires an Act of Congress based upon the will of the Citizens of the United States. Such a change in the interpretation of the U.S. Constitution Article I, § 8, cl. 8 is outside the jurisdiction of this Court.

CONCLUSION

For the reasons stated above, Dr. Arunachalam strongly urges the Court to grant Leader Technologies' petition, re-hear this case and rule in favor of Leader Technologies in this matter of critical importance to all inventors and patent holders, present and prospective.

Respectfully Submitted,

/S/

July 10, 2012

Lakshmi Arunachalam, Ph.D.
222 Stanford Avenue
Menlo Park, CA 94025
Tel.: (650) 854-3393
for Amicus Curiae Dr. Arunachalam

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Leader Tech v. Facebook, Case No. 2011-1366

ENTRY OF APPEARANCE

Please enter my appearance:	Pro se
I am:	Amicus curiae
As amicus curiae, I support:	Petitioner / Plaintiff-Appellant Leader Technologies, Inc.
My address and telephone are:	Lakshmi Arunachalam, Ph.D. 222 Stanford Avenue Menlo Park, CA 94025 (650) 854-3393 laks@webxchange.com *for Amicus Curiae* Lakshmi Arunachalam, Ph.D.
Certificate of Interest:	See page 2.
July 10, 2012	/S/ Signature Lakshmi Arunachalam, Ph.D. *for Amicus Curiae* Lakshmi Arunachalam, Ph.D.

cc.

Paul Andre, Esq., KRAMER LEVIN LLP, Counsel for Leader Technologies, Inc.

Heidi Keefe, Esq., COOLEY GODWARD LLP, Counsel for Facebook, Inc.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Leader Tech v. Facebook, Case No. 2011-1366

CERTIFICATE OF INTEREST

Amicus Curiae Lakshmi Arunachalam, Ph.D. certifies the following:

1. The full names of every party or amicus represented by me is: **Lakshmi Arunachalam**
2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: **NONE**
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of amicus curiae represented by me are: **NONE**.
4. The names of the law firms and the partners or associates that appeared for the amicus curiae now represented by me in the trial court or agency or that are expected to appear in this Court are: **NONE**

July 10, 2012

/S/
Signature

Lakshmi Arunachalam, Ph.D.
for Amicus Curiae Lakshmi Arunachalam, Ph.D.

2011-1366

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LEADER TECHNOLOGIES, INC.,

Plaintiff-Appellant,

V.

FACEBOOK, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the District of Delaware in Case No. 08-CV-862, Judges Joseph J. Farnan and Leonard P. Stark

NOTICE OF MOTION OF LAKSHMI ARUNACHALAM, PH.D. FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF LEADER TECHNOLOGIES' PETITION FOR REHEARING AND REHEARING *EN BANC*

Civil Appeal No. 2011-1366

Lakshmi Arunachalam, Ph.D.
222 Stanford Avenue
Menlo Park, CA 94025
(650) 854-3393
for Amicus Curiae
Lakshmi Arunachalam, Ph.D.

July 10, 2012

MEMORANDUM IN SUPPORT

Inventor and patent holder Lakshmi Arunachalam, Ph.D. ("Dr. Arunachalam"), as *amicus curiae*, respectfully requests leave of this Court to file a BRIEF OF AMICUS CURIAE LAKSHMI ARUNACHALAM, PH.D. IN SUPPORT OF LEADER TECHNOLOGIES' PETITION FOR REHEARING AND REHEARING *EN BANC* dated July 10, 2012.

Dr. Arunachalam is an inventor and holder of numerous patents in the field of Internet technologies with a principal place of business in Menlo Park, California. She comments in favor of the Petitioner-Appellants' Corrected Combined Petition For Panel Rehearing And Petition For Rehearing *En Banc* Of Plaintiff-Appellant Leader Technologies, Inc. dated June 12, 2012.

Dr. Arunachalam believes this petition raises important issues of patent law that are critical to the future of the patenting process, and most especially for those engaged in the protection of Internet software technologies. As grounds for this request, Dr. Arunachalam states that her *amicus curiae* brief would be of special assistance to the Court because this proceeding presents a number of constitutional, legal and procedures issues of critical importance to the holders of existing patents as well as to prospective patent holders.

Dr. Arunachalam offers a unique perspective as a long time inventor and patent holder who has been involved with protecting her inventions for more than a

decade against the predatory litigation tactics of large law firms which can often deceive busy courts and result in injustices against an inventor's rightful property and denial of rightful returns to their investors who support innovation.

For the foregoing reasons, Dr. Arunachalam, as *amicus curiae*, respectfully requests that this Court grant this motion. The Plaintiff-Appellant's petition is pending and this motion is being submitted in support of the Court's consideration of the petition. As such, no return date is applicable.

Dated: July 10, 2012
Menlo Park, California

Respectfully submitted

/S/

Lakshmi Arunachalam, Ph.D.
222 Stanford Avenue
Menlo Park, CA 94025
(650) 854-3393
laks@webxchange.com
for Amicus Curiae
Lakshmi Arunachalam, Ph.D.

Leader Tech v. Facebook, Case No. 2011-1366

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 31(b) I do hereby certify that twelve (12) copies of the foregoing NOTICE OF MOTION OF LAKSHMI ARUNACHALAM, PH.D. FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF LEADER TECHNOLOGIES' PETITION FOR REHEARING AND REHEARING EN BANC will be sent to the Clerk of the Federal Circuit at:

Clerk of Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Room 401
Washington D.C. 20439

Pursuant to Fed. R. App. P. 31(b), copies of the foregoing were served on the following recipients by overnight mail:

Two (2) copies to:
Paul Andre, Esq.
KRAMER LEVIN LLP
990 Marsh Road
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Attorney for Plaintiff-Appellant

Two (2) copies to:
Heidi Keefe, Esq.
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/S/
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for Amicus Curiae
Lakshmi Arunachalam, Ph.D.

July 10, 2012

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EXHIBIT 1, pg. 52

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

2011-1366

LEADER TECHNOLOGIES, INC.,

Plaintiff-Appellant,

v.

FACEBOOK, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the District of Delaware in case no. 08-CV-0862, Judge Leonard P. Stark.

ON MOTION

Before LOURIE, MOORE, and WALLACH, Circuit Judges.

ORDER

Lakshmi Arunachalam, Ph.D. moves for leave to file a brief as amicus curiae in support of Appellant's corrected combined petition for rehearing and rehearing en banc.

Upon consideration thereof,

IT IS ORDERED THAT:

The motion is denied.

FOR THE COURT

July 11, 2012
Date

Jan Horbaly
Clerk

cc: Paul J. Andre, Esq.
Thomas G. Hungar, Esq.
Lakshmi Arunachalam, Ph.D.

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
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EXHIBIT 1, pg. 53

U.S. Court of Appeals for the Federal Circuit
Howard T. Markey National Courts Building
717 Madison Place, N.W.
Washington,

Lakshmi Arunachalam, Ph.D.
222 Stanford Avenue
Menlo Park, CA 94025

EXHIBIT 1, pg. 54

EXHIBIT 2

2011-1366

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LEADER TECHNOLOGIES, INC.,

Plaintiff-Appellant,

V.

FACEBOOK, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the District of Delaware in Case No. 08-CV-862, Judges Joseph J. Farnan and Leonard P. Stark

MOTION FOR RECONSIDERATION OF NOTICE OF MOTION OF LAKSHMI ARUNACHALAM, PH.D. FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF LEADER TECHNOLOGIES' PETITION FOR REHEARING AND REHEARING *EN BANC*

Civil Appeal No. 2011-1366

Lakshmi Arunachalam, Ph.D.
222 Stanford Avenue
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(650) 854-3393
for Amicus Curiae
Lakshmi Arunachalam, Ph.D.

July 18, 2012

Pursuant to the Federal Rules of Appellate Procedure 27(a)(5) movant has conversed with the parties regarding movant's intent to file. Leader Technologies has indicated no objection to this filing. Facebook says it does not consent to the motion, will not file a response, and requested that this be added: "Facebook . . . notes that the motion is moot because rehearing has been denied."

Facebook's moot argument is out of order. Dr. Arunachalam's ten (10) day response time from July 11, 2012 pursuant to Federal Rules of Appellate Procedure 27(a)(3)(A) was still pending. The Rules require the Court to give "reasonable notice to the parties that it intends to act sooner." No such notice was provided. Therefore, any alleged denial of the petition would be out of order, if indeed this has occurred, since as of July 18, 2012 at 1:09 PM EDT no such notice appears on the Court's docket. In addition, a telephone call to the Clerk's office yesterday indicated that it is highly unlikely that the judges were forwarded copies of Dr. Arunachalam's motion, or had time to read it and give reasonable consideration. If such conduct occurred it would be a shocking denial of due process.

Dr. Arunachalam requests a reasonable explanation of the rationale justifying the denial of her *amicus curiae* brief by the Court in such an uncharacteristically hasty manner, replete with disrespectful typos in the July 11, 2012 docket entry.

EXHIBIT 2, pg. 2

MEMORANDUM IN SUPPORT

On July 10, 2012 inventor and patent holder Lakshmi Arunachalam, Ph.D. ("Dr. Arunachalam") sent by overnight delivery a Notice Of Motion Of Lakshmi Arunachalam, Ph.D., For Leave To File Brief Of Amicus Curiae In Support Of Leader Technologies' Petition For Rehearing And Rehearing *En Banc*. The Clerk of Court received it at 10:52 AM Eastern Standard Time on July 11, 2012. Remarkably, on the same day the Court issued an ORDER from Circuit Judges LOURIE, MOORE and WALLACH signed by Clerk Jan Horably denying Dr. Arunachalam's motion without providing a justifying reason.

Dr. Arunachalam respectfully asks this Court to reconsider the motion pursuant to the Federal Rules of Civil Procedure 54(b) and the Federal Rules of Appellate Procedure 27. In addition, pursuant to Federal Rules of Civil Procedure 59(e) Dr. Arunachalam respectfully points out that her brief cites **substantial new evidence** that has been identified and verified in other forums that was not made available to Plaintiff-Appellant Leader Technologies. This evidence was **withheld by Facebook during discovery**. Amicus Curiae Lakshmi Arunachalam, Ph.D. Brief 26-29. For example, on August 19, 2011 in a motion hearing in *ConnectU,*

EXHIBIT 2, pg. 3

Inc. et al v. Facebook, Inc. et al[1] Facebook claimed that as early as August 18, 2005 they produced "**three different versions of its source code, with dates spanning from early to mid 2004**." However, Facebook told Leader Technologies that *none* of that code existed and produced *none* of this code in discovery.

This Facebook source code information was withheld by Facebook and is material to Leader Technologies' willful infringement claim. Its examination could give rise to new claims, especially if this discovery proves that Mark Zuckerberg actually started Facebook with an actual stolen copy of Leader's source code. The lower court record reveals remarkable latitude given to Facebook in post-discovery-cut-off evidence gathering, but no such latitude was given to Leader Technologies.[2] The withholding of this evidence created a

[1] *ConnectU, Inc. et al v. Facebook, Inc*. et al, 1:07-cv-10593-DPW, Aug. 19, 2011, Doc. No. 361-6, p. 7 of 23 (D.Mass. 2007).

[2] Depositions of Leader Technologies' former attorney Benjamin S. Zacks were permitted by the district court to occur up to July 6, 2010, **just two weeks before trial**. Leader Technologies was surprised to learn during these depositions that Mr. Zacks had removed 30 boxes of Leader's business documents to his law offices; boxes that were previously unknown to Leader and were removed without authorization. Amicus Curiae Brief 26; *See* also Affidavit of Michael McKibben, *Edward B. Detwiler et al v. Leader Technologies, Inc*., et al, 09-CV-006857 (Franklin Co. (Ohio) C.P.). However, no such *quid pro quo* opportunity was given to Leader Technologies to depose individuals like their former directors Professor James P. Chandler and Maj. Gen. James E. Freeze, U.S. Army (ret.) who could have

manifest injustice. *Taitz v. Astrue*, No. 11-402, 2011 U.S. Dist. LEXIS 119453 (D.D.C. Oct. 17, 2011) at 221 ("In seeking reconsideration, a party must show that "there has been an intervening change of controlling law, that new evidence is available, or that granting the motion is necessary to correct a clear error or to prevent manifest injustice"). It is inconceivable that a reasonable person would not consider this as anything other than an **extraordinary circumstance**.

In addition, the Court is not permitted to deny a motion without providing a justifying reason. The U.S. Supreme Court in *Foman v. Davis*, 371 US 178 (1962) at 182 states:

> "outright refusal to grant the leave **without any justifying reason** appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." (emphasis added).

This Court gave no justifying reason for the denial of Dr. Arunachalam's motion and she respectfully requests to be provided that reason with regard to her previous motion and this motion once it is ruled upon.

CONCLUSION

For the reasons stated above, Dr. Arunachalam respectfully requests that the Court grant this Motion For Reconsideration Of Notice Of Motion Of Lakshmi

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provided corroborating evidence to support Leader's on sale and public disclosure bar defenses. Oral Order, Jul. 16, 2010; *See* also Amicus Curiae Brief 17, 19, 20, 31.

EXHIBIT 2, pg. 5

Arunachalam, Ph.D. For Leave To File Brief Of Amicus Curiae In Support Of Leader Technologies' Petition For Rehearing And Rehearing *En Banc,* and provide justifying reasons for the decisions reached.

Dated: July 18, 2012
Menlo Park, California

Respectfully submitted,

/s/

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222 Stanford Avenue
Menlo Park, CA 94025
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laks@webxchange.com
for Amicus Curiae
Lakshmi Arunachalam, Ph.D.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Leader Tech v. Facebook, Case No. 2011-1366

CERTIFICATE OF INTEREST

Amicus Curiae Lakshmi Arunachalam, Ph.D. certifies pursuant to the Federal Rules of Appellate Procedure 27(a)(7) the following:

1. The full names of every party or amicus represented by me is: **Lakshmi Arunachalam**
2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: **NONE**
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of amicus curiae represented by me are: **NONE**.
4. The names of the law firms and the partners or associates that appeared for the amicus curiae now represented by me in the trial court or agency or that are expected to appear in this Court are: **NONE**

July 18, 2012

/s/
Signature

Lakshmi Arunachalam, Ph.D.
for Amicus Curiae Lakshmi Arunachalam, Ph.D.

Leader Tech v. Facebook, Case No. 2011-1366

PROOF OF SERVICE

Pursuant to Fed. R. App. P. 27(a)(9) and 27(d)(1)(E)(3) I do hereby certify that four (4) copies plus one (1) original of the foregoing MOTION FOR RECONSIDERATION OF NOTICE OF MOTION OF LAKSHMI ARUNACHALAM, PH.D. FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF LEADER TECHNOLOGIES' PETITION FOR REHEARING AND REHEARING *EN BANC* will be sent by overnight delivery to the Clerk of the Federal Circuit at:

Clerk of Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Room 401
Washington D.C. 20439

Two (2) copies by regular mail to:
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Tel.: (650) 752-1700
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Attorney for Plaintiff-Appellant

Two (2) copies by regular mail to:
Thomas G. Hungar, Esq.
GIBSON DUNN LLP
1050 Connecticut Avenue, N.W.
Washington D.C. 20036-5306
Tel.: (202) 955-8558
Fax: (202) 530-9580
Attorney for Defendant-Appellee

A copy was also provided to Americans for Innovation at scribd/amer4innov.

/s/
Lakshmi Arunachalam, Ph.D.
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Menlo Park, CA 94025
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laks@webxchange.com
for Amicus Curiae
Lakshmi Arunachalam, Ph.D.

July 18, 2012

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		Arrival at Unit	July 19, 2012, 9:35 am	WASHINGTON, DC 20018	
		Processed through USPS Sort Facility	July 19, 2012, 8:13 am	WASHINGTON, DC 20074	
		Depart USPS Sort Facility	July 18, 2012	SAN FRANCISCO, CA 94128	
		Processed through USPS Sort Facility	July 18, 2012, 5:07 pm	SAN FRANCISCO, CA 94128	
		Dispatched to Sort Facility	July 18, 2012, 4:03 pm	MENLO PARK, CA 94025	
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Product Description	Sale Qty	Unit Price	Final Price
Utility Mailer	1	$1.19	$1.19
Utility Mailer	1	$1.19	$1.19
MENLO PARK CA 94025 Zone-0 First-Class Large Env 4.80 oz.			$1.70
Issue PVI:			$1.70
WASHINGTON DC 20036 Zone-8 First-Class Large Env 4.90 oz.			$1.70
Issue PVI:			$1.70
WASHINGTON DC 20439 Zone-8 Express Mail PO-Add Flat Rate Env 9.20 oz. Label #: EI081023636US Thu 07/19/12 12:00PM - Expected Delivery. Money Back Guarantee Signature Requested			$18.95
Issue PVI:			$18.95
Total:			$24.73

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Dr Lakshmi Arunachalam
222 Stanford Avenue
Menlo Park, CA 94025

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NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

2011-1366

LEADER TECHNOLOGIES, INC.,

Plaintiff-Appellant,

v.

FACEBOOK, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the District of Delaware in case no. 08-CV-0862, Judge Leonard P. Stark.

ON MOTION

Before LOURIE, MOORE, and WALLACH, Circuit Judges.

ORDER

Lakshmi Arunachalam, Ph.D. requests reconsideration of the court's July 11, 2012 order which denied her motion for leave to file a brief as amicus curiae.

Upon consideration thereof,

IT IS ORDERED THAT:

The motion is denied as the brief is moot and was filed out of time and in excess of the permitted page count.

FOR THE COURT

July 24, 2012
Date

Jan Horbaly
Clerk

cc: Paul J. Andre, Esq.
Thomas G. Hungar, Esq.
Lakshmi Arunachalam, Ph.D.

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
JUL 24 2012
JAN HORBALY
CLERK

EXHIBIT 3

2011-1366

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LEADER TECHNOLOGIES, INC.,

Plaintiff-Appellant,

V.

FACEBOOK, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the District of Delaware in Case No. 08-CV-862, Judges Joseph J. Farnan and Leonard P. Stark

RENEWED MOTION OF LAKSHMI ARUNACHALAM, PH.D. FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF LEADER TECHNOLOGIES' PETITION FOR REHEARING AND REHEARING *EN BANC*

Civil Appeal No. 2011-1366

Lakshmi Arunachalam, Ph.D.
222 Stanford Avenue
Menlo Park, CA 94025
(650) 854-3393
for Amicus Curiae
Lakshmi Arunachalam, Ph.D.

July 26, 2012

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Leader Tech v. Facebook, Case No. 2011-1366

CERTIFICATE OF INTEREST

Amicus Curiae Lakshmi Arunachalam, Ph.D. certifies the following:

1. The full name of every party or amicus represented by me is: **Lakshmi Arunachalam**
2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: **NONE**
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of amicus curiae represented by me are: **NONE**.
4. The names of the law firms and the partners or associates that appeared for the amicus curiae now represented by me in the trial court or agency or that are expected to appear in this Court are: **NONE**

July 26, 2012

/s/
Signature

Lakshmi Arunachalam, Ph.D.
for Amicus Curiae Lakshmi Arunachalam, Ph.D.

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INTEREST OF AMICUS CURIAE

Inventor and patent holder Lakshmi Arunachalam, Ph.D. as *amicus curiae*, respectfully requests leave for renewal and re-argument of her motion for leave to file a BRIEF OF AMICUS CURIAE LAKSHMI ARUNACHALAM, PH.D. IN SUPPORT OF LEADER TECHNOLOGIES' PETITION FOR REHEARING AND REHEARING *EN BANC* dated July 10, 2012 ("Dr. Arunachalam"),

The Court should consider and grant Dr. Arunachalam's motion, particularly in view of the new information that is emerging showing that officers of this Court are in likely multiple conflicts of interest. These *prima facie* conflicts bring the prior rulings into question and have substantially prejudiced Leader Technologies. Dr. Arunachalam seeks re-argument based on the contention that the court overlooked or misapprehended matters of fact and law in assessing the prior petitions and motions, especially in light of conflicts of interest that may have motivated the (in)actions.

Dr. Arunachalam is an inventor and holder of numerous patents in the field of Internet technologies with a principal place of business in Menlo Park, California. She comments in favor of the Petitioner-Appellants' Corrected Combined Petition For Panel Rehearing And Petition For Rehearing *En Banc* Of Plaintiff-Appellant Leader Technologies, Inc. dated June 12, 2012.

Dr. Arunachalam believes her petition filed pursuant to Fed.R.App.P. Rule 27 raises important issues of patent law that are critical to the future of the patenting process, and most especially for those engaged in the protection of internet software technologies. As grounds for this request, Dr. Arunachalam believes that her *amicus curiae* brief would be of special assistance to the Court because this proceeding presents a number of constitutional, legal and procedural issues of critical importance to the holders of existing patents as well as to prospective patent holders.

For the foregoing reasons, Dr. Arunachalam, as *amicus curiae*, respectfully files this motion pursuant to and requests that this Court grant this motion.

MEMORANDUM

Dr. Arunachalam believes that even one minute of this Court's attention to the *sole* remaining issue of law will result in an outright victory by Leader Technologies on the merits. Instead, this Court appears to be avoiding its duty and protecting the interests of the adjudged infringer Facebook behind a wall of conflicting interests.

Dr. Arunachalam emphasizes that Facebook has been adjudged to infringe 11 of 11 claims of Leader Technologies' U.S. Patent No. 7,139761. In addition, after substantial element-by-element analysis at trial of alleged prior art, Leader defeated all prior art allegations. This means that Facebook's fortunes are being

made at the expense of important American private property rights. This circumstance offends the senses of anyone who believes that respect for personal property is a bedrock priority of a democracy. "Property must be sacred or liberty cannot exist." John Adams, *The Works of John Adams*, 6:9, p. 280.

Yet to date, Facebook has succeeded in pulling the wool over the eyes of a jury and thirteen judges regarding Interrogatory No. 9. This Court has determined that Interrogatory No. 9 is the ***only*** item of Facebook evidence standing in the way of Leader's outright victory. Remarkably, this Court is upholding a scandalous misconstruction of The Dictionary Act (**Exhibit A**) regarding Interrogatory No. 9.[1] **Exhibit B**.

STATEMENT

On March 5, 2012 this Court heard oral argument before Presiding Judge Alan A. Lourie, Judge Kimberly A. Moore and Judge Evan J. Wallach. On May 8, 2012 this Court issued a written opinion affirming the lower court. On July 16, 2012 this Court issued a denial of Plaintiff's petition for rehearing and rehearing *en banc* over Clerk of Court Jan Horbaly's signature and presumably considered by

[1] Judge Stark's Order on Sep. 4, 2009 limited Interrogatory No. 9 to the present tense. The record shows the district court's subsequent opinions contradict his earlier decisions. Further, the district court's earlier rulings in *Honeywell International, Inc. v. Nikon Corp*., 04-cv-1337-JJF (D.Del. 2004), Opinion, Dec. 4, 2009 ruled that on sale bar element-by-element proof is required. That standard was ignored.

all members of the Court. No officer of the Court disqualified himself or disclosed conflicts of interest.

Chief Judge Randall R. Rader was a law student at George Washington University Law Center when Professor James P. Chandler the Center's director. Professor Chandler has been a close intellectual property adviser and director of Plaintiff-Appellant Leader Technologies. Judge Rader and Clerk of Court Jan Horbaly have a close association with Facebook's attorney Thomas G. Hungar regarding Federal Circuit business. Judge Kimberly Moore holds Facebook stock through a mutual fund whose holdings are well-publicized. Professor Chandler, whose evidentiary facts are in dispute in this case, has consulted with the Judiciary for over a decade regarding intellectual property, patent and economic espionage matters.

The Court published both of its opinions timed to *coincide* with media events, one the commencement of Facebook's initial public offering road show in New York, and the other a nationally televised *Fox Business* interview with Leader Technologies' Michael McKibben. The denial of the rehearing petition contained no explanation of the important matters of patent and contract law being questioned.

THE LAW

Federal law requires a judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. §455(a).

Because section 455(a) is intended to avoid even the appearance of impartiality, it is not actual bias or prejudice, but rather the *appearance* of bias and prejudice that matters. *Liljeberg v. Health Services Acquisition Corp*., 486 US 847, 860 (Supreme Court 1988); *Liteky v. United States*, 510 US 540 (Supreme Court 1994). Thus, so long as a judge's impartiality might reasonably be questioned, disqualification is required "even though no actual partiality exists . . . because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible." *Liljeberg* at 860. The standard for assessing whether section 455(a) requires disqualification is thus an objective one that "involves ascertaining whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Preston v. US*, 923 F. 2d 731 (9th Circuit 1991).

Moreover, "a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to *the average person on the street*. Use of the world 'might' in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality." *Potashnick v. Port City Const. Co*., 609 F. 2d 1101 (5th Circuit 1980) at 1111 (emphasis added). In "a close case, the balance tips in favor of recusal [disqualification]." *US v. Holland*, 519 F. 3d 909 (9th Circuit 2008) at 912.

Canon 2 of The Code of Conduct for United States Judges, including the Clerk of Court, states "A judge should avoid impropriety and the appearance of impropriety in all activities."

28 U.S.C. § 455 states:

(b) He shall also disqualify himself in the following circumstances:
(1) Where he has a personal bias or prejudice concerning a party, or **personal knowledge of disputed evidentiary facts** concerning the proceeding; . . .
(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a **financial interest in the subject matter** in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
(5) **He or his spouse, or a person within the third degree of relationship** to either of them, or the spouse of such a person:
(i) Is acting as a lawyer in the proceeding;
(ii) Is known by the judge to **have an interest that could be substantially affected by the outcome** of the proceeding;
(iii) Is to the judge's knowledge likely to be a material witness in the proceeding.

FACTS & ARGUMENT

1. New Evidence Suggests That Officers Of The Court Should Have Disqualified Themselves, Or At Least Fully Disclosed Potential Conflicts Of Interest And Sought Waivers.

Chief Judge Randall R. Rader had knowledge that long-time Leader advisor, director and intellectual property counsel **Professor James P. Chandler** was likely to be a material witness in favor of Leader Technologies, and that evidence concerning his involvement was in dispute. At minimum, *en banc* rehearing would have allowed a full and fair assessment of the law without having

to delve into these conflicts. Judge Rader's lack of disclosure, and the lack of disclosure from every justice regarding the personal knowledge of disputed evidentiary facts about Professor Chandler prejudice this case.

The evidence clearly shows that Professor James P. Chandler ("Professor Chandler") was closely associated with Leader Technologies as intellectual property adviser and director during the crucial 2002-2003 time frame. **Exhibit F**, *Amicus Curiae* Lakshmi Alunachalam, Ph.D. Brief 19, 20.

In 1977 Professor Chandler was appointed Professor of Law and Director of the Computers in Law Institute at the George Washington University National Law Center.[2] In 1995 and 1996 the public record as well as the trial testimony of Leader's founder and inventor Michael McKibben confirms that Professor Chandler was a central adviser to both the U.S. Senate and House Judiciary Committees on intellectual property matters including trade secrets, patents and economic espionage. Ex. F, p. 20, Trial Tr. 10799:17-10800:22.

From 1996 to the present day Professor Chandler has consulted closely with the U.S. Department of Justice in the selection and prosecution of economic espionage cases. For example, the "Economic Espionage and Trade Secrets" U.S.

[2] James P. Chandler, Computer Transactions: Potential Liability of Computer Users and Vendors, 1977 Wash. Univ. Law Quarterly 405 (1977), p. 405, fn.* <http://digitalcommons.law.wustl.edu/cgi/viewcontent.cgi?article=2598&context=lawreview>.

Attorneys' Bulletin, Nov. 2009[3] cites the Feb. 28, 1996 testimony of FBI Director Louis J. Freeh who began his testimony acknowledging "I am also pleased that the committees have had the opportunity to consult with Professor James P. Chandler from George Washington University."[4] Professor Chandler's consultations with federal courts include the following courts and cases:[5]

***Case*:**	***Jurisdiction*:**
United States v. Okamoto and Serizawa (2001)	N.D. Ohio
United States v. Ye and Zhong (2002)	N.D. Cal.
United States v. Meng (2006)	N.D. Cal.
United States v. Lee and Ge (2007)	N.D. Cal.
United States v. Chung (2008)	C.D. Cal.
United States v. Jin (2008)	N.D. Ill.
United States v. Okamoto and Serizawa (2001)	N.D. Ohio
United States v. Williams (2008)	N.D. Ga.
United States v. Fei Ye (2006)	N.D. Cal., 9th Cir.
United States v. Meng (2009)	N.D. Cal.
United States v. Chung (2008)	C.D. Cal.
United States v. Lange (2002)	7th Cir.
United States v. Yang (2003)	N.D. Ohio
United States v. Martin (2000)	1st Cir.
United States v. Hsu (1998)	3rd Cir.
United States v. Genovese (2005)	S.D. N.Y.
United States v. Zeng (2008)	S.D. Tex.
United States v. Cotton (2008)	E.D. Cal.

[3] Economic Espionage and Trade Secrets. United States Attorneys' Bulletin, Vol. 57, No. 5, Nov. 2009. U.S. Dept. of Justice Executive Office for U.S. Attorneys, Wash. D.C. <http://www.justice.gov/usao/eousa/foia_reading_room/usab5705.pdf>.

[4] *S.Hrg. 104-499* - Economic Espionage: Hearings before the Select Committee on Intelligence, U.S. Senate, and the Subcommittee on Terrorism, Technology, and Government Information of the Committee on the Judiciary, U.S. Senate, 104th Congress, 2nd Session, Feb. 28 (1996), Y 4.IN 8/19:S.Hrg. 104-499, Serial No. J-104-75, p. 10); *Amicus Curiae* Brief 20, Ex. A.

[5] *Op.cit.*, pp. 7-9.

EXHIBIT 3, pg. 17

Therefore, a conflict of interests exists because Professor Chandler is likely to be a material witness during the pendency of this case, and that evidence regarding his involvement with Leader Technologies is in dispute.

Federal Circuit Chief Judge Randall Rader states on the Federal Circuit's website and in numerous other public documents that he received his "J.D. from George Washington University Law School in 1978.[6] Professor Chandler moved to Washington, D.C. in 1977 to accept an appointment as Professor of Law and Director of the Computers in Law Institute at the George Washington University National Law Center where he served as its Director from 1977 to 1994.[7] Therefore, the public record shows that Mr. Rader studied intellectual property law at George Washington University for two years during Dr. James P. Chandler's professorship of the very program in which then-student Mr. Rader was enrolled. *US v. Kelly*, 888 F. 2d 732 (11th Circuit 1989)(recusal when a close personal friend was a key defense witness).

---

[6] Randall R. Rader. Chief Judge. United States Court of Appeals for the Federal Circuit. Accessed Jul. 23, 2012 <http://www.cafc.uscourts.gov/judges/randall-r-rader-chief-judge.html>.

[7] *H.Hrg. Y 4.J 89/1:104/30* - Patents Legislation : Hearings Before the Subcommittee On Courts and Intellectual Property of the Committee On the Judiciary, House of Representatives, 104th Congress, First Session, On H.R. 359, H.R. 632, H.R. 1732, and H.R. 1733, June 8 and November 1, 1995. Washington: U.S. G.P.O. (1996)(Testimony of Professor James P. Chandler, President, National Intellectual Property Law Institute, pp. III, IV, 349-354); *Amicus Curiae* Brief 20.

EXHIBIT 3, pg. 18

Mr. Rader became General Counsel to Senator Orrin G. Hatch between 1980 and 1988. Professor Chandler consulted with committees chaired by Senator Hatch multiple times. For example, this consultation was acknowledged prominently by FBI Director Louis J. Freeh in testimony before Senator Hatch's Committee on the Judiciary in 1996.[8] A reasonable assumption from all this contact is that Judge Rader knows Professor Chandler very well as his former intellectual property law professor and the close mutual associations with Senator Hatch regarding intellectual property matters. Judges with knowledge of disputed facts in a case are duty-bound to disqualify themselves. *Potashnick, sub*.

Judge Rader appears to have misperceived the circumstances in this case and neglected to disqualify himself and his fellow justices who have conflicts of interest. At very minimum he should have granted rehearing *en banc* so that a full and fair hearing on the legality of the Court's misconstruction of the The Dictionary Act. *Supra*.

2. Facebook Stock Held By Officers Of The Court

Federal judges are required to disqualify themselves if they have a fiduciary conflict of interest in matters that come before them. 28 U.S.C. §455(b)(4). While

[8] *S.Hrg. 104-499* - Economic espionage: Hearings before the Select Committee on Intelligence, United States Senate, and the Subcommittee on Terrorism, Technology, and Government Information of the Committee on the Judiciary, United States Senate, 104th Congress, Second Session, Feb. 28 (1996), Y 4.IN 8/19:S.Hrg. 104-499, Serial No. J-104-75, (Testimony of FBI Director Louis Freeh acknowledging Professor James P. Chandler, p. 10).

the trend has been not to disqualify judges when investments in a litigant are held in mutual funds, this circumstance is different since (a) Facebook went public *during* this Court's deliberations, and (b) the appearance of conflict from a well-publicized mutual fund in a judge's portfolio is impossible for that judge *not* to notice.

a. **The Federal Circuit's Decision Was Conveniently Issued Within Hours Of Facebook's IPO Road Show Commencement In New York On May 8, 2012.**

The Federal Circuit Panel announced its decision on Tuesday, May 8, 2012 which was timed within hours of the beginning of Facebook's Road Show in New York City the same day. The average person on the street would consider this timing suspiciously accommodating to Facebook, and cause that person to "harbor doubts about the judge's impartiality." *Postashnick, sub*.

b. **The Federal Circuit's Denial of Leader's Rehearing And Rehearing *En Banc* Petition was suspiciously timed within hours of Leader Chairman and Founder Michael McKibben's nationally televised interview with *Fox Business* on July 16, 2012**.

Mr. McKibben was informed while on the air during a nationally televised *Fox Business* interview at about 2:45 PM EDT on July 16th[9] that the Federal Circuit had denied Leader's petition earlier that day. Two days later, on July 18th, Facebook indicated in an email to Dr. Arunachalam that they were aware of the

[9] Shibani Joshi. Interview with Michael McKibben. *Fox Business*, Jul. 19, 2012, 2:40 PM EDT. <http://video.foxbusiness.com/v/1738073255001/leader-technologies-sues-facebook-for-patent-infringement/?playlist_id=163589>.

decision. However, Leader's attorneys received no notice until Thursday, July 19, 2012. A reasonable person would consider that the Court was acting prejudicially and with suspicious timing, and thus "would harbor doubts about the judge's impartiality." *Potashnick, sub*.; *See* also *Lamprecht v. FCC*, 958 F. 2d 382 (D.C. Circuit 1992) at 403, 404 (breach of trust by a law clerk providing information to a news organization before it was known by the parties).

c. <u>Denial</u> Of Rehearing Out-Of-Order; Pleadings Un-docketed.

The Court is further prejudicing this case with questionable docketing practices. The Court has never posted for downloading by the public the 7/11/2012 Dr. Arunachalam's Motion of Lakshmi Arunachalam, Ph.D. for Leave to File Brief of Amicus Curiae. Then, the Court denied the motion the *same day*. No reasonable person believes that all twelve justices had time to consider this motion.

Likewise, the Court has never posted for downloading by the public Dr. Arunachalam's 7/19/2012 Motion for Reconsideration. Further, the Court's declaration of "moot" and exceeding the page limit is improper since conclusory declarations without citing page limit rules are not convincing except in totalitarian states, it cannot be moot if the petition denial was out of order, and even if there was a deficiency, no courtesy cure time was extended. *Pro se* parties are to be provided "liberal construction." *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

The actions of this Court do not "promote public confidence in the integrity of the judicial process" and are procedurally out of order. *Liljeberg, supra*; Fed.R.App.P. Rule 27(a)(2); *See* also *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, 526 US 344 (Supreme Court 1999)(case reversed and remanded due to improper dismissal of the case during a notice period); *Burns v. Ohio*, 360 US 252 (Supreme Court 1959)(case remanded where clerk refused to docket a filing on clerk-contrived procedural grounds); Fed. Cir. R.27(d)(1)(E)(2) ("not exceed 20 pages").

d. At Least Judge Kimberly A. Moore Has Undisclosed Fiduciary Conflicts Of Interests

In her Financial Disclosure Form AO10 Judge Kimberly A Moore reveals that she holds investments in **Fidelity Contrafund**. **Exhibit D**. Fidelity Contrafund[10] widely publicized its holdings in Facebook during the course of these proceedings. **Exhibit E**. This publicity created a temptation for Judge Moore to act in her own self-interest in this case. Fidelity Contrafund's Facebook holdings are (all footnotes accessed 7/24/12):

[10] Fidelity Contrafund. Form N-Q, Mar. 31, 2012. U.S. S.E.C. <http://www.sec.gov/Archives/edgar/data/24238/000003540212000012/main.htm>; *See* also Tim McLaughlin. "Fidelity's Contrafund snaps up stakes in Facebook at $63 billion valuation." *Silicon Valley Business Journal*, Jun. 2, 2011. <http://www.bizjournals.com/sanjose/news/2011/06/02/fidelitys-contrafund-snaps-up-stakes.html>; See also Miles Weiss. "Fidelity's Danoff Bets on Facebook, Zynga." *Bloomberg*, Jun. 1, 2011. <http://www.bloomberg.com/news/2011-06-01/fidelity-s-danoff-bets-on-facebook-zynga.html>.

i. 2.97 million shares of **Facebook, Inc.** Class B stock valued at $74.2 million at the end of March 2012;
ii. 2.93 million shares of **Zynga Game Network Inc.** convertible preferred stock valued at $82.24 million; and
iii. 2.63 million shares of **Groupon, Inc.** convertible preferred stock.

Judge Moore appears to have misperceived the circumstances in this case and neglected to acknowledge her conflicts of interest and acknowledge the perceived impropriety that would dictate her disqualification. *Potashnick v. Port City Const. Co.*, 609 F. 2d 1101 (5th Circuit 1980) at 1114 ("The judge's business dealings . . . constituted a ground for disqualification under section 455(a). Had the judge fully disclosed his relationship . . . on the record, the parties could have waived this ground").

(1) Facebook shareholders who sold their Facebook interests between May 22-24, 2012 following the Facebook IPO are:

(a) $633,009,358 -- **Peter Thiel** (Facebook Director) (not including option awards and purchases).[11]
(b) $2,169,376,940 -- **James W. Breyer** (Facebook Director) / **Accel Partners** et al / **Ping Li** (not including option awards and purchases; total value is approx. $6,510,000,000).[12]
(c) $ 2,540,482,881 -- **DST** Holdings Ltd. / Mail.ru Group Ltd. et al . (**Juri Milner**, Moscow, Russia)(Facebook's second largest shareholder)(not including option awards and purchases; total value is approx. $3,790,000,000).[13] [14]

[11] 16,844,315 shares, Peter Thiel, <http://www.secform4.com/insider-trading/1211060.htm>.
[12] 57,726,901 shares, James W. Breyer et al <http://www.secform4.com/insider-trading/1542464.htm>.
[13] 9,821,228 shares, Yury Milner, DST USA Ltd.; 18,340,758 shares, DST Global III, L.P.; 19,835,710 shares, DST Managers Ltd.; 19,600,699 shares, Mail.ru Group

(d) $745,465,653 -- **Mark Zuckerberg** (not including option awards and purchases).[15]
(e) $717,128,487 -- **Goldman Sachs** et al (Facebook Underwriter).[16]

(2) Facebook shareholders also with substantial insider stakes in Zynga[17] in addition to Fidelity include:

(a) Reid Hoffman (Facebook Director)[18]
(b) Clarium Capital (Peter Thiel, Facebook Director]).[19]
(c) Peter Thiel (Facebook Director). *Id*.
(d) Digital Sky Technologies (Moscow, Russia, second largest Facebook stockholder). *Id*.
(e) Andreessen Horowitz (Marc L. Andreessen, Facebook Director). *Id*.
(f) T. Rowe Price. *Id*.

(3) Facebook shareholders also with substantial insider stakes in Groupon[20] in addition to Fidelity include:

(a) Digital Sky Technologies. *Id*.

Ltd. <http://www.secform4.com/insider-trading/1549931.htm | 1545066.htm | 1550224.htm | 1326801.htm>.

[14] Ryan Tate, "The 'Hard' Russian Oligarch Behind Facebook's New Money." *Gawker*, May 27, 2009. Last accessed May 2, 2011 <http://gawker.com/5537538/the-humiliation-of-a-creepy-russian-sugar-daddy>; *See* also Simon Goodley. "Facebook investor DST comes with ties to Alisher Usmanov and the Kremlin – Three Goldman Sachs bankers, Alexander Tamas, Verdi Israelian and John Lindfors joined DST over the past three years." *The Guardian*, Jan. 4, 2011. http://www.guardian.co.uk/technology/2011/jan/04/facebook-dst-goldman-sachs>

[15] 30,200,000 shares, Mark Zuckerberg, <http://www.secform4.com/insider-trading/1548760.htm>.

[16] 24,324,886 shares, Goldman Sachs et al, <http://www.secform4.com/insider-trading/1420392.htm>.

[17] Zynga, Inc., Crunchbase. <http://www.crunchbase.com/company/zynga>.

[18] Hoffman, Reid, Director, Zynga, Inc. <http://www.secform4.com/insider-trading/1439404.htm>.

[19] Clarium Capital (Peter Thiel), *Op.cit*.

[20] Groupon. Crunchbase. <http://www.crunchbase.com/company/groupon>.

EXHIBIT 3, pg. 24

(b) Accel Partners. *Id*.
(c) Morgan Stanley Ventures. *Id*.
(d) Andreessen Horowitz. *Id*.

3. Undisclosed Attorney Associations Among Facebook, Federal Circuit Justices and Clerk of Court.

a. Clerk of Court Jan Horbaly sponsored a Federal Circuit conference in 2006 titled "The State of the U.S. Court of Appeals" where Facebook's appellate attorney in this case, **Thomas G. Hungar** of Gibson, Dunn & Crutcher LLP, was one of *his* guest speakers.[21] The appearance of impropriety dictates that the Clerk disqualifies himself from this matter. *Byrne v. Nezhat*, 261 F. 3d 1075 (11th Circuit 2001) at 1102 ("a law clerk has a financial incentive to benefit a future employer").

b. Chief Judge Randall Rader was the keynote speaker on March 15, 2012 at the 2012 USC Law Intellectual Property Institute where Facebook's appellate **Thomas G. Hungar** of Gibson, Dunn & Crutcher LLP was, again, a session speaker on the topic of "The Supreme Court's Impact on Intellectual Property Law and the *Federal Circuit*" (emphasis added). Five other Facebook attorneys participated in the invitation of Judge Rader, namely: (i) **Wayne M. Barsky**, Gibson, Dunn & Crutcher LLP; (ii) **James C. Brooks**, Orrick, Herrington & Sutcliffe LLP; (iii) **Mark P. Wine**, Orrick, Herrington & Sutcliffe LLP; (iv)

[21] Thomas Hungar. "The Federal Circuit, Looking Ahead." C-*SPAN-2* video, @33m53s. May 19, 2006.<http://www.c-spanvideo.org/program/192618-1>.

EXHIBIT 3, pg. 25

Andrew P. Bridges, Fenwick & West LLP; and (v) **David L. Hayes**, Fenwick & West LLP.[22]

The average person would never believe that these familiar relationships among **Chief Judge Randall Rader**, **Clerk of Court Jan Horbaly**, and **Facebook's** appellate counsel **Thomas G. Hungar** would not create temptations to do favors for attorney Hungar, who is an analyst of the Federal Circuit. *See* H. Rep. 111-427 (Mar. 4, 2010), Impeachment of G. Thomas Porteous, Jr., Judge of the United States District Court for the Eastern District of Louisiana; and H. Res. 1031, 111th Cong. 2d Sess. (Mar. 11, 2010)("solicitation and receipt of things of value").

The record shows no attempt by any of the justices to disclose their conflicts in this case, or to address how their participation in this case "looks to the average person on the street." *Postashnick* at 1111.

Maintenance of an untarnished judiciary compels the judges in this case to err on the side of caution and disqualification. *Id*. 1111 ("question the judge's impartiality" due to attorney associations); *Id*. 1112 (" Our desire to maintain an untarnished judiciary compels us to hold that Judge Hand was required by 28 U.S.C. § 455(a) to disqualify himself from the Potashnick case, and his failure to do so constituted an abuse of sound judicial discretion.").

---

[22] USC LAW. 2012 Intellectual Property Institute, Mar. 15, 2012. Accessed Jul. 26, 2012 <http://weblaw.usc.edu/why/academics/cle/ip/assets/docs/IPIbrochure.pdf>.

4. Judicial Officials Should Provide Full Disclosure Before Proceeding So That Disqualification Or Waiver May Be Fully And Fairly Considered To Insure Impartiality And Avoid The Appearance Of Impropriety.

"In certain situations, disqualification can be waived. When the basis for disqualification is that the judge's "impartiality might reasonably be questioned," section 455(e) permits waiver after a full disclosure on the record of the grounds for disqualification." *Potashnick* at 1114. The Clerk of Court and Justices should provide full disclosure of potential conflicts before this proceeding continues.

"Moreover, advancement of the purpose of the [impartiality] provision — to promote public confidence in the integrity of the judicial process . . . — does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew." *Liljeberg* at 859, 860.

5. **Jury Instruction 4.7 For On Sale Bar Is Deficient As A Matter Of Law; <u>Never Mentioned</u> The Uniform Commercial Code.**

Remarkably, Jury Instruction No. 4.7 does not contain a single instruction of law. Nowhere is the jury instructed to look to the Uniform Commercial Code ("U.C.C.") to determine whether an alleged offer "rises to the level of a commercial offer for sale." **<u>Exhibit C</u>**; *Group One, Ltd. v. Hallmark Cards, Inc.*, 254 F. 3d 1041 (Fed. Cir. 2001).

Further, the jury instruction implies that nondisclosure agreements are "irrelevant" to on sale bar. 35 U.S.C. 102(b). As this case shows, and as the Restatement (Second) of Contracts §21 (1981) dictates (i.e., if you agree not to be legally bound by your discussions, then you are not legally bound), nondisclosure contracts among parties become absolutely relevant. The instructions are a naked misstatement of the law. The court-approved Facebook edits provided no assistance. Without such assistance, ***the jury was understandably lost***. It is the duty of this Court to correct this error and **create new law** to clarify the totality of what constitutes a minimum standard to prove on sale bar by clear and convincing evidence, including the proper role of nondisclosure agreements and other secrecy deeds.

6. Since A Reasonable Probability Of A Different Outcome Exists, Except For Conflicts Of Interest; Why Else Would The Court Not Rehear This Case?

Except for conflicts of interest, why else would the Court not rehear this case? Only one remaining issue of law exists—whether Interrogatory No. 9 can be interpreted to apply to past states of Leader's products. Justice demands attention to this question of law since application of The Dictionary Act to this legal question will create "a different result"—Leader will win this case outright. Exs. A, B.

The Supreme Court has defined materiality in terms of a "reasonable probability" of a different outcome. *Kyles v. Whitley,* 514 US 419 (Supreme Court 1995). Such a reasonable probability results when nondisclosure places the case in

a different light so as to undermine confidence in the verdict. *Id*. at 435. As Dr. Arunachalam has shown, one minute of attention by this Court to The Dictionary Act and Interrogatory No. 9 will create a different outcome. Confidence in the verdict has been undermined by the current state of the evident conflicts of interest.

CONCLUSION

For the reasons stated above, Dr. Arunachalam respectfully submits the RENEWED MOTION OF LAKSHMI ARUNACHALAM, PH.D. FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF LEADER TECHNOLOGIES' PETITION FOR REHEARING AND REHEARING *EN BANC*.

Dr. Arunachalam. further respectfully requests that the Court rule its July 16, 2012 denial of rehearing and rehearing *en banc* to be out of order since Dr. Arunachalam was not given ten day's notice before the denial was issued, and grant Leader's *en banc* rehearing once the conflict of interests issues disclosed in this motion have been addressed.

Respectfully submitted

/s/

Dated: July 26, 2012
Menlo Park, California

Lakshmi Arunachalam, Ph.D.
222 Stanford Avenue,
Menlo Park, CA 94025
(650) 854-3393
for Amicus Curiae
Lakshmi Anrunachalam, Ph.D.

AFFIDAVIT OF MS. LAKSHMI ARUNACHALAM, PH.D.

State of California }
} ss:
County of San Mateo }

FIRST BEING DULY CAUTIONED AND SWORN, AFFIANT STATES:

1. My name is Ms. Lakshmi Arunachalam, Ph.D., and I am of legal age, sound mind and otherwise competent to make this affidavit. At all times herein, I am a resident of 222 Stanford Avenue, Menlo Park, CA 94025. I have personal, direct knowledge of each of the facts set forth in this affidavit.

2. I certify and verify that the document contained in **Exhibit A** titled "1 USC 1, Title 1 – General Provisions, Chapter 1 – Rules of Construction, §1. Words denoting number, gender, and so forth" is a true and accurate copy of the document downloaded from the Cornell University Law School, Legal Information Institute with the URL <http://www.law.cornell.edu/uscode/pdf/uscode01/lii_usc_TI_01_CH_1_SE_1.pdf > on July 26, 2012 ("The Dictionary Act").

3. I certify and verify that the documents contained in **Exhibit B** captioned (a) Case 1:08-cv-00862-LPS, Document 627-23, "Leader Technologies, Inc.'s First Supplemental Responses To Facebook, Inc.'s Interrogatories Nos. 3 and 9," and (b) Case 1:08-cv-00862-LPS, Document 627-24, "Leader Technologies, Inc.'s Second Supplemental Response To Facebook's Interrogatory No. 1, First Supplemental Responses To Facebook's Interrogatory Nos. 4, 11-17 And Third Supplemental Response To Facebook's Interrogatory No. 9" are true and accurate copies of the documents downloaded from the District Court of Delaware PACER docket obtained on or before July 26, 2012.

4. I certify and verify that the document contained herein in **Exhibit C** titled "Jury Instruction No. 4.7, On Sale Bar" was downloaded from the District Court of Delaware PACER docket on July 25, 2012. I further certify and verify that the caption on this document is "Case 1:08-cv-00862-LPS, Document 601, Filed 07/26/10, Page 44 of 57" and that the PACER document entry read "Date Filed: 07/26/2010. Final Jury Instruction. (ntl) (Entered: 07/26/2010)." I further certify and verify that the pages contained in the exhibit, namely Pages 44 and 45 are not altered in any way.

5. I certify and verify that the document contained herein in **Exhibit D** titled "Financial Disclosure Report For Calendar Year 2010; 1. Person Reporting: Moore, Kimberly A.; 2. Court or Organization: Federal Circuit; Date of Report: 05/12/2011" is a true and accurate copy of the document as downloaded without alteration from JudicialWatch.org <http://www.judicialwatch.org/judge/moore-kimberly/> on July 25, 2012.

6. I certify and verify that the documents contained in **Exhibit E** are true and accurate copies of the financial articles downloaded on July 26, 2012 and represented by the following citations: (a) Tim McLaughlin. "Fidelity's Contrafund snaps up stakes in Facebook at $63 billion valuation." *Silicon Valley Business Journal*, Jun. 2, 2011. <http://www.bizjournals.com/sanjose/news/2011/06/02/fidelitys-contrafund-snaps-up-stakes.html>; and (b) Miles Weiss. "Fidelity's Danoff Bets on Facebook, Zynga." *Bloomberg*, Jun. 1, 2011. <http://www.bloomberg.com/news/2011-06-01/fidelity-s-danoff-bets-on-facebook-zynga.html>.

7. I certify and verify that the document contained herein in **Exhibit F** titled "BRIEF OF AMICUS CURIAE LAKSHMI ARUNACHALAM, PH.D. IN SUPPORT OF LEADER TECHNOLOGIES' PETITION FOR REHEARING AND REHEARING *EN BANC*" dated July 10, 2012 is a true and accurate copy of the document sent to the Clerk of Court on July 10, 2012 by United States Express Mail and signed for by the Clerk's office at 10:52 AM via U.S. Express Mail No. EI 081 026 663 US. To my best knowledge and belief, the Clerk has not made these documents available for public review as of the date of this affidavit.

FURTHER AFFIANT SAYETH NAUGHT

/s/
_____
Lakshmi Arunachalam, Ph.D.

SWORN AND SUBSCRIBED before me, a Notary Public,
this ____ day of _____, 2012.

_____

EXHIBIT A

EXHIBIT B

EXHIBIT C

EXHIBIT D

EXHIBIT E

EXHIBIT F

Leader Tech v. Facebook, Case No. 2011-1366

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 31(b) I do hereby certify that twelve (12) copies of the foregoing RENEWED MOTION OF LAKSHMI ARUNACHALAM, PH.D. FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE IN SUPPORT OF LEADER TECHNOLOGIES' PETITION FOR REHEARING AND REHEARING *EN BANC* will be sent to the Clerk of the Federal Circuit at:

Clerk of Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Room 401
Washington D.C. 20439

Pursuant to Fed. R. App. P. 31(b), copies of the foregoing were served on the following recipients by overnight mail:

Two (2) copies to:
Paul Andre, Esq.
KRAMER LEVIN LLP
990 Marsh Road
Menlo Park, CA 94025
Tel.: (650) 752-1700
Fax: (650) 752-1800
Attorney for Plaintiff-Appellant

Two (2) copies to:
Thomas G. Hungar, Esq.
GIBSON DUNN LLP
1050 Connecticut Avenue, N.W.
Washington D.C. 20036-5306
Tel.: (202) 955-8558
Fax: (202) 530-9580
Attorney for Defendant-Appellee

A copy of the foregoing was also provided to Americans For Innovation for publication.

/s/
_____
Lakshmi Arunachalam, Ph.D.
222 Stanford Avenue
Menlo Park, CA 94025
(650) 854-3393
laks@webxchange.com
for Amicus Curiae
Lakshmi Arunachalam, Ph.D.

July 26, 2012

Lakshmi Arunachalam, Ph.D.
222 Stanford Avenue
Menlo Park, CA 94025
(650) 854-3393
laks@webxchange.com

July 26, 2012

Sent by Express Mail overnight delivery on July 26, 2012

Mr. Jan Horbaly
Clerk of Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Room 401
Washington D.C. 20439

Dear Mr. Horbaly,

> Re: Motion for Leave to File Amicus Curiae Brief, mailed July 10, 2012 and received on July 11, 2012 at 10:52 AM / BRIEF OF AMICUS CURIAE LAKSHMI ARUNACHALAM, PH.D. IN SUPPORT OF LEADER TECHNOLOGIES' PETITION FOR REHEARING AND REHEARING EN BANC mailed and received at the same time.

It has come to my attention that as of the date of this letter my motion and brief cited above have not been docketed pursuant to the Federal Rules of Appellate Procedure.

I note, however, that the Court's:

(a) 7/11/2012 denial of the above-mentioned motion for leave to file and brief is docketed, but the motion and brief are *not available for public review*, and

(b) 7/19/2012 denial of my motion for reconsideration is docketed, but the motion is not available for public review.

Will you kindly docket for downloading the above-mentioned motion and brief immediately pursuant to the Rules? The Clerk is not permitted to censor pleadings. See *Burns v. Ohio*, 360 US 252 (Supreme Court 1959).

Further, the docket notes that I have exceeded page limitations, despite the fact that Federal Circuit Rule 27(d)(1)(E)(2), p. 49 says the motion page limit is "not exceed 20 pages." In addition, no notice of deficiency courtesy was provided, and I remind the Court that *pro se* filers are to be afforded liberal construction. See *Haines v. Kerner*, 404 US 519 (Supreme Court 1972). I do note that notice of deficiencies was provided to others during the pendency of this case.

Is this Court attempting to prevent a full and fair hearing of this case on the merits? It appears that way to "the ordinary person in the street." I trust you will work to correct this perception in the interests of justice and preserving the integrity of the Court.

Respectfully,

/s/

Ms. Lakshmi Arunachalam, Ph.D.
For Amicus Curiae
Lakshmi Arunachalam, Ph.D.

cc.

Paul Andre, Esq., KRAMER LEVIN LLP, Attorney for Plaintiff-Appellant
Thomas G. Hungar, GIBSON DUNN LLP, Attorney for Defendant-Appellee

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EXHIBIT 3, pg. 41

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Total Discounts	49.50	

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Lakshmi Arunachalam

EXHIBIT 3, pg. 42

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Issue PVI:			$102.55
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Bubble Mailer 10.5" x 16"	1	$2.19	$2.19
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EXHIBIT 4

Lakshmi Arunachalam, Ph.D.
222 Stanford Avenue
Menlo Park, CA 94025
(650) 854-3393
laks@webxchange.com

July 26, 2012

Sent by Express Mail overnight delivery on July 26, 2012

Mr. Jan Horbaly
Clerk of Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Room 401
Washington D.C. 20439

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For Amicus Curiae
Lakshmi Arunachalam, Ph.D.

cc.

Paul Andre, Esq., KRAMER LEVIN LLP, Attorney for Plaintiff-Appellant
Thomas G. Hungar, GIBSON DUNN LLP, Attorney for Defendant-Appellee

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		Processed through USPS Sort Facility	July 28, 2012, 7:29 am	WASHINGTON, DC 20074	
		Processed through USPS Sort Facility	July 28, 2012, 7:24 am	LINTHICUM HEIGHTS, MD 21090	
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Auth: 027915 (A)		
Total Tender		89.42
Change Due		0.00
Total Discounts	49.50	

5101003924 3

Lakshmi Arunachalam

EXHIBIT 4, pg. 4

USPS, WEST MENLO
MENLO PARK, California
940259992
0567830147 -0097
07/27/2012 (800)275-8777 11:18:08 AM

Sales Receipt

Product Description	Sale Qty	Unit Price	Final Price
WASHINGTON DC 20439 Zone-8 Express Mail PO-Add 16 lb. 15.2 oz. Label #: EI081023653US Sat 07/28/12 12:00PM - Expected Delivery. Money Back Guarantee Signature Requested			$102.55
Issue PVI:			$102.55
Bubble Mailer 10.5" x 16"	1	$2.19	$2.19
Bubble Mailer 10.5" x 16"	1	$2.19	$2.19
MENLO PARK CA 94025 Zone-0 Priority Mail 2 lb. 6.50 oz.			$6.05
Issue PVI:			$6.05
WASHINGTON DC 20036 Zone-8 Priority Mail 2 lb. 6.50 oz.			$13.85
Issue PVI:			$13.85
Total:			$126.83

Paid by:
VISA $126.83
Account #: XXXXXXXXXXXX3970
Approval #: 027092
Transaction #: 83
23 903470284

****
****
BRIGHTEN SOMEONE'S MAILBOX. Greeting cards available for purchase at select Post Offices.
****
****

Order stamps at usps.com/shop or call 1-800-Stamp24. Go to usps.com/clicknship to print shipping labels with postage.
For other information call 1-800-ASK-USPS.
****
****
Get your mail when and where you want it with a secure Post Office Box. Sign up for a box online at usps.com/poboxes.
****
****

Bill#: 1000304040925
Clerk: 13

All sales final on stamps and postage
Refunds for guaranteed services only
Thank you for your business
****
****
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07/27/12 10:25 AM

We are the one stop for all your shipping, postal and business needs.

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www.menloups.com

001 036001 (003)	T1 $	1.70
8.5 X 11 Copies	QTY 17	
Reg Unit Price	$ 0.10	
002 000003 (011)	TO $	10.00
Notary		
SubTotal	$	11.70
Tax (T1)	$	0.14
Total	$	11.84
VISA	$	11.84
ACCOUNT NUMBER *	************3970	
Appr Code: (S) Sale		

Receipt ID 8329662265674988832 7 018 Items
CSH: Helen Tran: 8573 Reg: 001

Thank you for visiting our store.
Please come back again soon.

Whatever your business and personal needs, we are here to serve you.

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WIN $1000

We value your feedback
To enter please complete the customer satisfaction survey located at:

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For official rules and Terms and Conditions go to www.theupsstore.com and click on the Customer Experience Survey link

EXHIBIT 4, pg. 5

EXHIBIT 5

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

2011-1366

LEADER TECHNOLOGIES, INC.,

Plaintiff-Appellant,

v.

FACEBOOK, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the District of Delaware in case no. 08-CV-0862, Judge Leonard P. Stark.

ON MOTION

Before LOURIE, MOORE, and WALLACH, Circuit Judges.

ORDER

Lakshmi Arunachalam, Ph.D. moves for leave to file a brief as amicus curiae in support of Appellant's corrected combined petition for rehearing and rehearing en banc.

Upon consideration thereof,

IT IS ORDERED THAT:

The motion is denied.

FOR THE COURT

July 11, 2012
Date

Jan Horbaly
Clerk

cc: Paul J. Andre, Esq.
Thomas G. Hungar, Esq.
Lakshmi Arunachalam, Ph.D.

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
JUL 11 2012
JAN HORBALY
CLERK

EXHIBIT 5, pg. 1

U.S. Court of Appeals for the Federal Circuit
Howard T. Markey National Courts Building
717 Madison Place, N.W.
Washington,

Lakshmi Arunachalam, Ph.D.
222 Stanford Avenue
Menlo Park, CA 94025

EXHIBIT 5, pg. 2

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Track & Confirm

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YOUR LABEL NUMBER	SERVICE	STATUS OF YOUR ITEM	DATE & TIME	LOCATION	FEATURES
EI081026663US	Express Mail®	Delivered	July 11, 2012, 10 52 am	WASHINGTON, DC 20439	**Guaranteed By:** July 11, 2012, 12:00 PM Proof of Delivery
		Arrival at Post Office	July 11, 2012, 9:34 am	WASHINGTON, DC 20018	
		Processed through USPS Sort Facility	July 11, 2012, 8:23 am	WASHINGTON, DC 20074	
		Depart USPS Sort Facility	July 10, 2012	SAN FRANCISCO, CA 94128	
		Processed through USPS Sort Facility	July 10, 2012, 6:11 pm	SAN FRANCISCO, CA 94128	
		Dispatched to Sort Facility	July 10, 2012, 11:17 am	MENLO PARK, CA 94025	
		Acceptance	July 10, 2012, 10:39 am	MENLO PARK, CA 94025	

Check on Another Item

What's your label (or receipt) number?

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EXHIBIT 5, pg. 3

EXHIBIT 6

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

2011-1366

LEADER TECHNOLOGIES, INC.,

Plaintiff-Appellant,

v.

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Defendant-Appellee.

Appeal from the United States District Court for the District of Delaware in case no. 08-CV-0862, Judge Leonard P. Stark.

ON MOTION

Before LOURIE, MOORE, and WALLACH, Circuit Judges.

ORDER

Lakshmi Arunachalam, Ph.D. requests reconsideration of the court's July 11, 2012 order which denied her motion for leave to file a brief as amicus curiae.

Upon consideration thereof,

IT IS ORDERED THAT:

The motion is denied as the brief is moot and was filed out of time and in excess of the permitted page count.

FOR THE COURT

July 24, 2012
Date

Jan Horbaly
Clerk

cc: Paul J. Andre, Esq.
Thomas G. Hungar, Esq.
Lakshmi Arunachalam, Ph.D.

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
JUL 24 2012
JAN HORBALY
CLERK

EXHIBIT 6, pg. 1