

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

LEADER TECHNOLOGIES, INC.,	)	
a Delaware corporation,	)	
	)	
Plaintiff-Counterdefendant,	)	Civil Action No. 08-862-JJF
	)	
v.	)	
	)	
FACEBOOK, INC.,	)	<b>PUBLIC VERSION</b>
a Delaware corporation,	)	
	)	
Defendant-Counterclaimant.	)	
	)	

**LEADER TECHNOLOGIES, INC.'S COUNTER-STATEMENT OF DISPUTED  
FACTS TO FACEBOOK, INC.'S MOTION FOR SUMMARY JUDGMENT OF  
NO WILLFUL INFRINGEMENT [MOTION NO. 4 OF 6]**

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## **I. INTRODUCTION**

This Counterstatement is made pursuant to the Court's standing Memorandum Order that allows a party opposing a Rule 56 summary judgment motion to file a Counterstatement certifying that genuine issues of material fact exist and setting out the material facts in dispute. This Counterstatement is filed in lieu of an answering brief in response to defendant Facebook, Inc.'s ("Facebook") Motion for Summary Judgment of No Willful Infringement of U.S. Patent No. 7,139,761 (the "'761 Patent") ("Motion") (D.I. 404). Accordingly, Leader Technologies, Inc. ("Leader") certifies that there are genuine issues of material fact in dispute that preclude granting Facebook's motion under the standards set forth in Federal Rule of Civil Procedure 56. Leader reserves the right to later dispute any and all material facts identified by Facebook that are not specifically addressed herein.

In its Statement certifying that no genuine issues of material facts exist with regard to the facts argued in support of its motion, Facebook did not enumerate the facts it alleges to be undisputed. In addition, Facebook did not completely address Leader's allegations and ignored Facebook's February, 2010, website redesign, which provides additional evidence of Facebook's willful infringement. Accordingly, in this Counterstatement, Leader will identify the disputed facts that Facebook relies upon in its memorandum in support of this motion. Because Facebook's motion for summary judgment of no willful infringement is based on these disputed issues of material fact, Facebook's motion should be denied.

## **II. COUNTERSTATEMENT OF DISPUTED MATERIAL FACTS**

1. Facebook states that Leader's "willfulness theory rests entirely on speculation that someone at Facebook was aware of an LTI white paper - not the asserted patent - prior to the time LTI filed this lawsuit." D.I. 404 at 1. This fact is DISPUTED. Leader bases its willful

infringement theory on the totality of circumstances demonstrating that Facebook acted objectively reckless in copying Leader's patented technology. 02/16/10 Hearing Tr. at 4:7-8:7. Leader alleges that Facebook's founder, Mark Zuckerberg, copied its technology when he created the Facebook website. *Id.* When all of the facts regarding Facebook's creation are viewed together with the public and private information regarding Leader's technology, the totality of circumstances points to the inescapable conclusion that the then-college sophomore Mark Zuckerberg took the quick and easy route to building his website by copying Leader's technology. *Id.*

For nearly five years from 1997 to 2002, Leader's team of experienced engineers worked over 145,000 man-hours on the conception, functional design and development of an on-line collaboration tool. In December 2002, Leader filed its patent application on its networking and collaboration tool that led to the '761 Patent. *See* '761 Patent. With the application filed, Mr. McKibben, the lead inventor of the '761 Patent, began to write about the concepts and technology outlined in the '761 Patent. In February 2003, he published his first white paper describing the general concepts of Leader's on-line collaboration tool, and in October 2003, he published his second white paper with many more technical details.<sup>1</sup> *See* Leader's Opposition to Facebook's Motions *in Limine* Nos. 1-11 ("Leader's Opposition"), Exs. 28-29. In fact, some of the diagrams in the second white paper are contained in the '761 Patent. *Compare* Leader's Opposition, Ex. 28 *and* '761 Patent, Fig. 9. The Leader website also disclosed information regarding the technology described in the '761 Patent.

Privately, Mr. McKibben was also sending emails to his son, Max McKibben, a student-athlete at Harvard University (a pre-med student on the Harvard football team), detailing some of

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<sup>1</sup> Leader affixed the "Patent Pending" notice on all information regarding its on-line collaboration tool, including both of its 2003 white papers and on its website.

the exciting news and significant events at Leader. The presence of these emails in Max McKibben's Harvard Inbox meant that as of October 2003, information on Harvard University servers included: (a) the fact that venture capitalists in Boston were discussing funding with Leader, (b) the fact that Leader had received awards based on its technology, (c) the fact that patents on Leader's technology were pending, (d) links to Leader's website and white papers, and (e) other disclosures regarding Leader's technology. *See* Leader's Opposition, Ex. 30.

On October 28, 2003, Mr. Zuckerberg hacked into the Harvard University servers to obtain information about Harvard students. The hacking was chronicled and published in a live blog that Mr. Zuckerberg kept as he gained unauthorized access into the Harvard servers. *See* Leader's Opposition, Ex. 31. During a two-week period in January 2004, while studying for final examinations at Harvard, Mr. Zuckerberg claims to have determined the design and function of the Facebook website, and wrote the entire code for the website. Deposition of Mark Zuckerberg ("Zuckerberg Depo.") at 10:14-11:7. He then launched the Facebook website on February 4, 2004. *Id.* The Facebook website is nearly identical to the Leader technology described in its white papers and on its website, including the design choices, functionality and technical specifications. Deposition of Michael McKibben ("McKibben Depo.") at 206:6-213:24.

In the May 2010 issue of WIRED magazine, Mr. Zuckerberg was quoted as saying:

We didn't start with some grand theory but with a project hacked together in a couple of weeks. Our whole culture is, we want to build something quickly.

One good hacker can be as good as 10 or 20 engineers . . .

*See* Leader's Opposition, Ex. 35.

With respect to Leader's white papers, the numbers of similarities between them and Facebook's original website are simply too many to be coincidence. These features include the

functional requirements, the technical specification, the design, and even the “look and feel” of the site. For example, shared features between Leader’s white papers and the original Facebook website include the following: (1) same operating system choice, (2) same programming language choice, (3) same web server choice, (4) same database choice, (5) same web page markup language, (6) same document markup language, (7) same metadata search model, (8) same approach to metadata tagging of user data, (9) same scalable data storage model, (10) same approach to user tracking, (11) same approach to object-oriented database support, (12) same approach to group workspace sharing, (13) same approach to ASP (application service provider) subscriptions, (14) same approach to a third party apps integration, (15) same approach to a universal collaboration portal, (16) same approach to a thin client, web-based system, (17) same approach to news, chat, calendar, messaging, file sharing, notes, photos, video, group, workspaces, and third party advertising, (18) similar minimalist user interface design, (19) common names to key features, (20) similar approach to data encryption, and (21) same approach to support of wireless devices. Taken in isolation, Facebook’s selection of any single or small group of the same elements listed above would not be unusual. However, given the sheer number of similarities, it is nearly a statistical certainty that Facebook copied Leader’s white papers.

The fact that there are numerous identical features between Leader’s technology and Facebook’s website is strong evidence of copying. Moreover, when one combines the similarities between the two websites, with the facts listed below, a reasonable finder of fact most likely would determine that Mr. Zuckerberg copied Leader’s technology, considering:

- (1) Mr. Zuckerberg had access to Leader’s publications,

(2) Mr. Zuckerberg claims he was able to come up with the design and function, and also write the entire source code for the original Facebook website in a two week period, while also studying for final exams,

(3) it took a team of engineers at Leader years and over 145,000 man-hours to come up with the same conception, functional design and development, and

(4) Mr. Zuckerberg admitted in 2010 that he “hacked” together the original Facebook website in 2 weeks.

In addition to the above, Facebook has taken actions since the November 2008 filing of this action that confirm its willful infringement of the ‘761 Patent. In particular, Facebook undertook a major redesign of its website in February 2010 and, instead of eliminating infringing features, Facebook’s redesign enhanced and increased the prominence of the website’s infringing features. *See* Declaration of Jeffrey Norberg In Support of Facebook’s Motion for Summary Judgment of No Willful Infringement (“Norberg Decl.”), Ex. 4 at 64-65. Changes included interface changes that emphasized infringing features of the Facebook website and increasing the prominence of infringing functionality on the website. *See* Disclosure of Expert testimony for Giovanni Vigna, Ph.D. Pursuant to Fed. R. Civ. P. 26(A)(2) (“Vigna Report”) at ¶ 32. These post-filing changes to Facebook’s website provide additional support for Leader’s claim of willful infringement by Facebook.

2. Facebook states that “[w]illful infringement can only be based upon a prior knowledge of the asserted patent itself.” D.I. 404 at 1. This fact is DISPUTED. Willful infringement is based on a number of factual issues that are relevant to the “totality of the circumstances” in determining willful infringement. *In re Seagate Tech. LLC*, 497 F.3d 1360, 1369 (Fed. Cir 2007)(en banc). For example, a party’s decision to copy technology marked “patent pending” and subsequent disregard of the subsequently issued patent, is relevant to



determining whether or not the copying entity acted in an objectively reckless manner.

3. Facebook states that “there is no evidence of any kind that could support any finding that Facebook acted with knowledge that its actions would create a risk of infringement of LTI’s patent. Instead, LTI’s willfulness case is based entirely on impermissible lawyer speculation and conjecture, which cannot raise a genuine issue of material fact.” D.I. 404 at 1. This fact is DISPUTED. Leader bases its willful infringement theory on the totality of circumstances demonstrating that Facebook acted objectively reckless in copying Leader’s patented technology. Leader alleges that Facebook’s founder, Mark Zuckerberg, copied its technology when he created the Facebook website. The factual basis for this allegation involves Mr. Zuckerberg’s hacking into the Harvard University network of computer servers during his sophomore year there in October 2003. When all of the facts regarding Facebook’s creation are viewed together with the public and private information regarding Leader’s technology, the totality of circumstances points to the inescapable conclusion that the then-college sophomore Mark Zuckerberg took the quick and easy route to building his website by copying Leader’s technology.

In addition, as discussed in paragraph 1 above, Facebook has taken actions since the November 2008 filing of this action that constitute willful infringement of the ‘761 Patent. Facebook’s February 2010 website redesign enhanced and increased the prominence of the website’s infringing features. *See* Norberg Decl., Ex. 4 at 64-65; *see also* Vigna Report at ¶ 32. These post-filing changes to Facebook’s website provide additional support for Leader’s claim of willful infringement by Facebook.

4. Facebook states that “[t]he complaint includes a boiler plate allegation of willful infringement; without a single factual predicate.” D.I. 404 at 1-2. This fact is DISPUTED. The

Complaint in this action sets forth Leader's allegations regarding willful infringement with requisite particularity for a claim of willful infringement and based on the facts available to Leader at the time the Complaint was filed.

5. Facebook states, prior to this lawsuit, Leader "never contacted Facebook." D.I. 404 at 2. This fact is DISPUTED. Mr. Zuckerberg's hacking activity constitutes contact between Facebook and the person who became Facebook's CEO. On October 28, 2003, Mr. Zuckerberg hacked into the Harvard University servers to obtain information about Harvard students. The hacking was chronicled and published in a live blog that Mr. Zuckerberg kept as he gained unauthorized access into the Harvard servers. *See* Leader's Opposition, Ex. 31. During a two-week period in January 2004, while studying for final examinations at Harvard, Mr. Zuckerberg claims to have determined the design and function of the Facebook website, and wrote the entire code for the website. Zuckerberg Depo. at 10:14-11:7. He then launched the Facebook website on February 4, 2004. *Id.* The Facebook website is nearly identical to the Leader technology described in its white papers and on its website, including the design choices, functionality and technical specifications. McKibben Depo. at 206:6-213:24. During his deposition in April 2010, Mr. Zuckerberg authenticated these statements, and testified that they accurately reflect his characterizations of how the Facebook website started. Zuckerberg Depo. at 28:15-31:5.

6. Facebook states, prior to this lawsuit, Leader "never notified Facebook of its patents." D.I. 404 at 2. This fact is DISPUTED. Facebook had ample constructive knowledge of the '761 Patent based on the "patent pending" notice placed on Leader's white papers and by Leader's marking of products with the '761 Patent. In February 2003, Mr. McKibben published his first white paper describing the general concepts of Leader's on-line collaboration tool, and

in October 2003, he published his second white paper with many more technical details. *See* Leader's Opposition, Exs. 28-29. The Leader website also disclosed information regarding the technology described in the '761 Patent. In addition, Leader marked its Leader2Leader™ product with the '761 Patent starting in November 2006. Taken together, these facts provide ample evidence that Facebook had constructive notice of the '761 Patent since October of 2003.

7. Facebook states, prior to this lawsuit, Leader "never notified Facebook of any infringement allegation." D.I. 404 at 2. This fact is DISPUTED. Mr. Zuckerberg's access to Leader's white papers marked "patent pending" gave Facebook notice that Leader was actively seeking patent protection for the technology that it copied. As stated above, Mr. McKibben published two white papers in 2003 describing the general concepts and technical details of Leader's on-line collaboration tool. *See* Leader's Opposition, Exs. 28-29.

The numbers of similarities between them and Facebook's original website are simply too many to be coincidence. These features include the functional requirements, the technical specification, the design, and even the "look and feel" of the site. For example, shared features between Leader's white papers and the original Facebook website include the following: (1) same operating system choice, (2) same programming language choice, (3) same web server choice, (4) same database choice, (5) same web page markup language, (6) same document markup language, (7) same metadata search model, (8) same approach to metadata tagging of user data, (9) same scalable data storage model, (10) same approach to user tracking, (11) same approach to object-oriented database support, (12) same approach to group workspace sharing, (13) same approach to ASP (application service provider) subscriptions, (14) same approach to a third party apps integration, (15) same approach to a universal collaboration portal, (16) same approach to a thin client, web-based system, (17) same approach to news, chat, calendar,

messaging, file sharing, notes, photos, video, group, workspaces, and third party advertising, (18) similar minimalist user interface design, (19) common names to key features, (20) similar approach to data encryption, and (21) same approach to support of wireless devices. Taken in isolation, Facebook's selection of any single or small group of the same elements listed above would not be unusual. However, given the sheer number of similarities, it is nearly a statistical certainty that Facebook copied Leader's white papers.

The fact that there are numerous identical features between Leader's technology and Facebook's website is strong evidence of copying. Moreover, when one combines the similarities between the two websites, with the facts listed below, a reasonable finder of fact most likely would determine that Mr. Zuckerberg copied Leader's technology, considering:

- (1) Mr. Zuckerberg had access to Leader's publications,
- (2) Mr. Zuckerberg claims he was able to come up with the design and function, and also write the entire source code for the original Facebook website in a two week period, while also studying for final exams,
- (3) it took a team of engineers at Leader years and over 145,000 man-hours to come up with the same conception, functional design and development, and
- (4) Mr. Zuckerberg admitted in 2010 that he "hacked" together the original Facebook website in 2 weeks.

Given this strong evidence of copying, and of Facebook's knowledge that Leader was seeking patent protection for the copied technology, Facebook should have known that its activity had an objectively high likelihood of infringing the patent that eventually issued as the '761 Patent.

8. Facebook states that "every witness in this case testified under oath that they never saw any LTI patents, white papers or products, and had never heard of LTI." D.I. 404 at 2. This fact is DISPUTED. The main reason why Leader has limited information regarding this

fact is due to Mr. Zuckerberg's blanket refusal to answer any questions regarding his admitted computer hacking activities while at Harvard. Zuckerberg Depo. at 28:15-31:5. During his deposition in April 2010, Mr. Zuckerberg refused to answer any questions, and the following exchange occurred:

Q. I'll ask the question again. Mr. Zuckerberg, did you hack into the Harvard servers to get the photographs of the students to use in Facemash?

MS. KEEFE: Same objection and this time I instruct you not to answer.

BY MR. ANDRE:

Q. Are you taking your counsel's advice?

A. Yes.

*Id.* at 13:1-9. As a result of this instruction, Leader was precluded from obtaining any further information regarding Mr. Zuckerberg's hacking of the Harvard University servers, other than what is publically available.

9. Facebook states that "[s]ummary judgment must be granted because LTI cannot show that Facebook had knowledge of LTI's patent prior to the filing of this litigation." D.I. 404 at 2. This fact is DISPUTED. There is no absolute requirement that a willful infringer must have knowledge of the willfully infringed patent prior to filing of a lawsuit. Facebook's own Motion indicates that post-filing conduct of a willful infringer is relevant to the "totality of the circumstances" analysis. *See* Motion at 8; *see also* *Ball Aerosol & Specialty Container, Inc. v. Limited Brands, Inc.*, 553 F. Supp. 2d 939, 955 (N.D. Ill. 2008).

In December 2002, Leader filed its patent application on its networking and collaboration tool that led to the '761 Patent. *See* '761 Patent. With the application filed, Mr. McKibben, the lead inventor of the '761 Patent, began to write about the concepts and technology outlined in the '761 Patent. In February 2003, he published his first white paper describing the general

concepts of Leader's on-line collaboration tool, and in October 2003, he published his second white paper with many more technical details.<sup>2</sup> *See* Leader's Opposition, Exs. 28-29. In fact, some of the diagrams in the second white paper are contained in the '761 Patent. *Compare* Leader's Opposition, Ex. 28 *and* '761 Patent, Fig. 9. The Leader website also disclosed information regarding the technology described in the '761 Patent.

The numbers of similarities between Leader's white papers and Facebook's original website are simply too many to be coincidence. These features include the functional requirements, the technical specification, the design, and even the "look and feel" of the site. For example, shared features between Leader's white papers and the original Facebook website include the following: (1) same operating system choice, (2) same programming language choice, (3) same web server choice, (4) same database choice, (5) same web page markup language, (6) same document markup language, (7) same metadata search model, (8) same approach to metadata tagging of user data, (9) same scalable data storage model, (10) same approach to user tracking, (11) same approach to object-oriented database support, (12) same approach to group workspace sharing, (13) same approach to ASP (application service provider) subscriptions, (14) same approach to a third party apps integration, (15) same approach to a universal collaboration portal, (16) same approach to a thin client, web-based system, (17) same approach to news, chat, calendar, messaging, file sharing, notes, photos, video, group, workspaces, and third party advertising, (18) similar minimalist user interface design, (19) common names to key features, (20) similar approach to data encryption, and (21) same approach to support of wireless devices. Taken in isolation, Facebook's selection of any single or small group of the same elements listed above would not be unusual. However, given the

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<sup>2</sup> Leader affixed the "Patent Pending" notice on all information regarding its on-line collaboration tool, including both of its 2003 white papers and on its website.

sheer number of similarities, it is nearly a statistical certainty that Facebook copied Leader's white papers.

10. Facebook states that "[a]n essential and preliminary requirement of this standard is that the alleged infringer must be shown to have had actual knowledge of the patent prior to the filing of the lawsuit." D.I. 404 at 2. This fact is DISPUTED. Leader's statement is quite simply an incorrect statement of the law presented as fact. To establish willful infringement, a patentee need only show that the alleged infringer acted despite an objectively high likelihood that the infringer's activity infringed a patent. *See Seagate*, 497 F.3d at 1371. Courts look to the "totality of the circumstances" in determining willful infringement, and actual pre-filing knowledge of the patent is not an absolute requirement.

11. Facebook states that "[i]n discovery, LTI articulated three 'theories' of willfulness, none of which are legally cognizable." D.I. 404 at 2. This fact is DISPUTED. Leader has consistently articulated its theory of willful infringement in this action which is consistent with the Federal Circuit's jurisprudence in *Seagate*. This theory is grounded in Mr. Zuckerberg's copying of Leader's proprietary technology that was marked as "patent pending" technology, and in Facebook's February, 2010, website redesign that enhanced and increased the prominence of the website's infringing features. When all of the facts regarding Facebook's creation are viewed together with the public and private information regarding Leader's technology, the totality of circumstances points to the inescapable conclusion that the then-college sophomore Mark Zuckerberg took the quick and easy route to building his website by copying Leader's technology.

12. Facebook states that "[k]nowledge of a white paper is legally insufficient to support a claim of willful infringement." D.I. 404 at 3. This fact is DISPUTED. Here,

Facebook is attempting to take one element of Leader's willful infringement theory out of context and claim that this one element, by itself, is insufficient to support Leader's entire willfulness case. Facebook's argument on this point is in direct opposition with the "totality of the circumstances" test used to determine willful infringement. *See Seagate*, 497 F.3d at 1369.

13. Facebook states that "LTI provides no evidence whatsoever to support its 'grassy knoll' theory that Facebook founder Mark Zuckerberg saw the papers." D.I. 404 at 3. This fact is DISPUTED. Leader has presented ample evidence from which a reasonable jury could conclude that Mr. Zuckerberg accessed Leader's white papers. These facts include the substantial similarity between the programs described in Leader's white papers and the first version of the Facebook website, as well as Mr. Zuckerberg's admitted hacking of Harvard's computer servers. When all of the facts regarding Facebook's creation are viewed together with the public and private information regarding Leader's technology, the totality of circumstances points to the inescapable conclusion that the then-college sophomore Mark Zuckerberg took the quick and easy route to building his website by copying Leader's technology.

The fact that there are numerous identical features between Leader's technology and Facebook's website is strong evidence of copying. Moreover, when one combines the similarities between the two websites, with the facts listed below, a reasonable finder of fact most likely would determine that Mr. Zuckerberg copied Leader's technology, considering:

- (1) Mr. Zuckerberg had access to Leader's publications,
- (2) Mr. Zuckerberg claims he was able to come up with the design and function, and also write the entire source code for the original Facebook website in a two week period, while also studying for final exams,
- (3) it took a team of engineers at Leader years and over 145,000 man-hours to come up with the same conception, functional design and development, and



(4) Mr. Zuckerberg admitted in 2010 that he “hacked” together the original Facebook website in 2 weeks.

14. Facebook states that “[o]n May 11, 2010, Mr. Zuckerberg gave deposition testimony under oath confirming his statements of his lack of knowledge of LTI, its white papers or its patent.” D.I. 404 at 3. This fact is DISPUTED. Mr. Zuckerberg refused to answer questions relating to his hacking of Harvard’s computers. The main reason why Leader has limited information regarding this fact is due to Mr. Zuckerberg’s blanket refusal to answer any questions regarding his admitted computer hacking activities while at Harvard. Zuckerberg Depo. at 28:15-31:5. During his deposition in April 2010, Mr. Zuckerberg refused to answer any questions, and the following exchange occurred:

Q. I’ll ask the question again. Mr. Zuckerberg, did you hack into the Harvard servers to get the photographs of the students to use in Facemash?

MS. KEEFE: Same objection and this time I instruct you not to answer.

BY MR. ANDRE:

Q. Are you taking your counsel’s advice?

A. Yes.

*Id.* at 13:1-9. As a result of this instruction, Leader was precluded from obtaining any further information regarding Mr. Zuckerberg’s hacking of the Harvard University servers, other than what is publically available.

15. Facebook states that “these so-called ‘uncanny similarities’ amount to nothing more than the color blue, the word ‘profile’ and the use of standard Internet programming languages, all of which Mr. McKibben admits he did not invent.” D.I. 404 at 3. This fact is DISPUTED. Mr. McKibben testified that there are a large number of similarities between the systems described in Leader’s white papers and the first version of the Facebook website. Mr. McKibben did not enumerate each and every one of these similarities during his deposition but,

as stated above, these similarities include (1) use of the same operating system, (2) the same programming languages, (3) same web server choice, (4) same database choice, (5) same web page markup language, (6) same document markup language, (7) same metadata search model, (8) same approach to metadata tagging of user data, (9) same scalable data storage model, (10) same approach to user tracking, (11) same approach to object-oriented database support, (12) same approach to group workspace sharing, (13) same approach to ASP (application service provider) subscriptions, (14) same approach to a third party apps integration, (15) same approach to a universal collaboration portal, (16) same approach to a thin client, web-based system, (17) same approach to news, chat, calendar, messaging, file sharing, notes, photos, video, group, workspaces, and third party advertising, (18) similar minimalist user interface design, (19) common names to key features, (20) similar approach to data encryption, and (21) the same approach to support of wireless devices.

16. Facebook states that “[i]n the absence of any link between LTI (a small telecommunications company in Ohio), and Mr. Zuckerberg (a college sophomore at Harvard), no reasonable jury could find that Mr. Zuckerberg accessed LTI’s white papers.” D.I. 404 at 3. This fact is DISPUTED. Leader has demonstrated several links between itself and Mr. Zuckerberg. Leader alleges that Facebook’s founder, Mark Zuckerberg, copied its technology when he created the Facebook website. The fact that Mr. Zuckerberg’s hacked into the Harvard University network of computer servers when Leader’s confidential information was residing on the Harvard servers established another connection between Leader and Facebook. When all of the facts regarding Facebook’s creation are viewed together with the public and private information regarding Leader’s technology, the totality of circumstances points to the

inescapable conclusion that the then-college sophomore Mark Zuckerberg took the quick and easy route to building his website by copying Leader's technology.

The fact that there are numerous identical features between Leader's technology and Facebook's website is strong evidence of copying. Moreover, when one combines the similarities between the two websites, with the facts listed below, a reasonable finder of fact most likely would determine that Mr. Zuckerberg copied Leader's technology, considering:

- (1) Mr. Zuckerberg had access to Leader's publications,
- (2) Mr. Zuckerberg claims he was able to come up with the design and function, and also write the entire source code for the original Facebook website in a two week period, while also studying for final exams,
- (3) it took a team of engineers at Leader years and over 145,000 man-hours to come up with the same conception, functional design and development, and
- (4) Mr. Zuckerberg admitted in 2010 that he "hacked" together the original Facebook website in 2 weeks.

17. Facebook states that "[m]arking is insufficient as a matter of law to support a claim of willfulness." D.I. 404 at 3. This fact is DISPUTED. Here, utilizing the same tactic discussed in paragraph 8, supra, Facebook again attempts to take one element of Leader's willful infringement theory out of context and claim that this one element, by itself, is insufficient to support Leader's entire willfulness case. Facebook's argument on this point is in direct opposition with the "totality of the circumstances" test used to determine willful infringement. *Seagate*, 497 F.3d at 1369. Leader's marking activity is but one element supporting the conclusion that Facebook's either knew it was infringing the '761 Patent or that this risk was so obvious that Facebook should have known it was infringing the '761 Patent. *Id.* Marking is just one element of Leader's proof on this point, that, when combined with Mr. Zuckerberg's hacking activity, Leader's publication of its "Patent Pending" white papers, and the uncanny similarities

between Facebook's first website and the systems described in Leader's white papers, can reasonably lead a jury to conclude that Facebook willfully infringed the '761 Patent.

18. Facebook states that "LTI, however, failed to seek a preliminary injunction or temporary restraining order against Facebook - both predicates to a cognizable claim of post-filing willfulness." D.I. 404 at 3-4. This fact is DISPUTED. Here, Facebook simply misstates the relevant law by selectively quoting portions of the *Seagate* decision. While *Seagate* does state that "a patentee *can* move for a preliminary injunction" based on an infringer's post-filing activity, doing so is not mandatory and failure to do so is not a bar to a later finding of willful infringement. *Seagate*, 497 F.3d at 1374 (emphasis added). Similarly, the *Seagate* opinion states that a patentee "should not be allowed to accrue enhanced damages based *solely* on the infringer's post-filing conduct" but, again, this is under the circumstances in which post-filing conduct is the *sole* basis for willfulness. *Id.* Here, Leader has ample evidence, discussed above, of Facebook's pre- and post-filing activity sufficient to demonstrate willful infringement.

19. Facebook states that "[a]t trial LTI must show by clear and convincing evidence that Facebook had actual knowledge of the '761 Patent. Yet, in more than a year of discovery, LTI has produced no evidence - either direct or circumstantial - that Facebook knew anything about LTI, LTI's patent, or its product, prior to being sued in late 2008." D.I. 404 at 4-5. This fact is DISPUTED. Leader has produced significant circumstantial evidence of Facebook's knowledge of LTI and of the invention that is embodied in the '761 Patent prior to the filing of this action. See ¶¶ 1 and 3, *supra*. Leader alleges that Facebook's founder, Mark Zuckerberg, copied its technology when he created the Facebook website. When all of the facts regarding Facebook's creation are viewed together with the public and private information regarding Leader's technology, the totality of circumstances points to the inescapable conclusion that the

then-college sophomore Mark Zuckerberg took the quick and easy route to building his website by copying Leader's technology.

For nearly five years from 1997 to 2002, Leader's team of experienced engineers worked over 145,000 man-hours on the conception, functional design and development of an on-line collaboration tool. In December 2002, Leader filed its patent application on its networking and collaboration tool that led to the '761 Patent. *See* '761 Patent. With the application filed, Mr. McKibben, the lead inventor of the '761 Patent, began to write about the concepts and technology outlined in the '761 Patent. In February 2003, he published his first white paper describing the general concepts of Leader's on-line collaboration tool, and in October 2003, he published his second white paper with many more technical details.<sup>3</sup> *See* Leader's Opposition, Exs. 28-29. In fact, some of the diagrams in the second white paper are contained in the '761 Patent. *Compare* Leader's Opposition, Ex. 28 and '761 Patent, Fig. 9. The Leader website also disclosed information regarding the technology described in the '761 Patent.

Privately, Mr. McKibben was also sending emails to his son, Max McKibben, a student-athlete at Harvard University (a pre-med student on the Harvard football team), detailing some of the exciting news and significant events at Leader. The presence of these emails in Max McKibben's Harvard Inbox meant that as of October 2003, information on Harvard University servers included: (a) the fact that venture capitalists in Boston were discussing funding with Leader, (b) the fact that Leader had received awards based on its technology, (c) the fact that patents on Leader's technology were pending, (d) links to Leader's website and white papers, and (e) other disclosures regarding Leader's technology. *See* Leader's Opposition, Ex. 30.

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<sup>3</sup> Leader affixed the "Patent Pending" notice on all information regarding its on-line collaboration tool, including both of its 2003 white papers and on its website.

On October 28, 2003, Mr. Zuckerberg hacked into the Harvard University servers to obtain information about Harvard students. The hacking was chronicled and published in a live blog that Mr. Zuckerberg kept as he gained unauthorized access into the Harvard servers. *See* Leader's Opposition, Ex. 31. During a two-week period in January 2004, while studying for final examinations at Harvard, Mr. Zuckerberg claims to have determined the design and function of the Facebook website, and wrote the entire code for the website. *Zuckerberg Depo.* at 10:14-11:7. He then launched the Facebook website on February 4, 2004. *Id.* The Facebook website is nearly identical to the Leader technology described in its white papers and on its website, including the design choices, functionality and technical specifications. *McKibben Depo.* at 206:6-213:24.

In the May 2010 issue of WIRED magazine, Mr. Zuckerberg was quoted as saying:

We didn't start with some grand theory but with a project hacked together in a couple of weeks. Our whole culture is, we want to build something quickly.

One good hacker can be as good as 10 or 20 engineers . . .

*See* Leader's Opposition, Ex. 35.

With respect to Leader's white papers, the numbers of similarities between them and Facebook's original website are simply too many to be coincidence. These features include the functional requirements, the technical specification, the design, and even the "look and feel" of the site. For example, shared features between Leader's white papers and the original Facebook website include the following: (1) same operating system choice, (2) same programming language choice, (3) same web server choice, (4) same database choice, (5) same web page markup language, (6) same document markup language, (7) same metadata search model, (8) same approach to metadata tagging of user data, (9) same scalable data storage model, (10) same approach to user tracking, (11) same approach to object-oriented database support, (12) same

approach to group workspace sharing, (13) same approach to ASP (application service provider) subscriptions, (14) same approach to a third party apps integration, (15) same approach to a universal collaboration portal, (16) same approach to a thin client, web-based system, (17) same approach to news, chat, calendar, messaging, file sharing, notes, photos, video, group, workspaces, and third party advertising, (18) similar minimalist user interface design, (19) common names to key features, (20) similar approach to data encryption, and (21) same approach to support of wireless devices. Taken in isolation, Facebook's selection of any single or small group of the same elements listed above would not be unusual. However, given the sheer number of similarities, it is nearly a statistical certainty that Facebook copied Leader's white papers.

The fact that there are numerous identical features between Leader's technology and Facebook's website is strong evidence of copying. Moreover, when one combines the similarities between the two websites, with the facts listed below, a reasonable finder of fact most likely would determine that Mr. Zuckerberg copied Leader's technology, considering:

- (1) Mr. Zuckerberg had access to Leader's publications,
- (2) Mr. Zuckerberg claims he was able to come up with the design and function, and also write the entire source code for the original Facebook website in a two week period, while also studying for final exams,
- (3) it took a team of engineers at Leader years and over 145,000 man-hours to come up with the same conception, functional design and development, and
- (4) Mr. Zuckerberg admitted in 2010 that he "hacked" together the original Facebook website in 2 weeks.

Furthermore, this is an incomplete statement of Leaders' basis for its claim of willful infringement. Facebook has taken actions since the November 2008 filing of this action that confirm its willful infringement of the '761 Patent. In particular, Facebook

undertook a major redesign of its website in February 2010 and, instead of eliminating infringing features, Facebook's redesign enhanced and increased the prominence of the website's infringing features. *See* Ex. 4 to the Norberg Decl. at 64-65. Changes included interface changes that emphasized infringing features of the Facebook website and increasing the prominence of infringing functionality on the website. *See* Vigna Report at ¶ 32.

20. Facebook states that “[i]n the absence of any evidence of knowledge of the patent, no reasonable jury could find that Facebook acted despite knowledge of an objectively high likelihood that its activity infringed a valid patent.” D.I. 404 at 5. This fact is DISPUTED. Leader has produced evidence that Facebook had knowledge of the invention embodied in the ‘761 Patent, and further that this technology was “patent pending.” Leader alleges that Facebook's founder, Mark Zuckerberg, copied its technology when he created the Facebook website. When all of the facts regarding Facebook's creation are viewed together with the public and private information regarding Leader's technology, the totality of circumstances points to the inescapable conclusion that the then-college sophomore Mark Zuckerberg took the quick and easy route to building his website by copying Leader's technology.

In addition, as discussed in paragraph 1 above, Facebook has taken actions since the November 2008 filing of this action that constitute willful infringement of the ‘761 Patent. Facebook's February 2010 website redesign enhanced and increased the prominence of the website's infringing features. *See* Norberg Decl., Ex. 4 at 64-65; *see also* Vigna Report at ¶ 32. These post-filing changes to Facebook's website provide additional support for Leader's claim of willful infringement by Facebook.

21. Facebook states that “LTI's claim that Facebook had ‘constructive notice’ of the



'761 patent based on the issuance of the patent and LTI's marking of its products does not save LTI's willfulness claim. Federal Circuit law is clear that constructive notice cannot be the basis of a claim for willfulness." D.I. 404 at 5. This fact is DISPUTED. Once again, Facebook takes one element of Leader's willful infringement evidence, Leader's marking of its patent product, and attempts to claim that this one element, by itself, is insufficient to support Leader's entire willfulness case. As an initial matter, Facebook does not dispute that it had actual knowledge of the '761 Patent as of the filing date of the complaint in this action. In addition, Facebook's constructive notice of the '761 Patent is evidence that Facebook knew, or should have known, it was infringing the '761 Patent.

22. Facebook states that "LTI's theory that Mr. Zuckerberg had access to LTI's white papers in 2004 is irrelevant to LTI's willfulness claim because those papers were published more than three years before the '761 patent issued." D.I. 404 at 5. This fact is DISPUTED. Far from being irrelevant, Mr. Zuckerberg's access to the "patent pending" Leader white papers is highly relevant to the *Seagate* analysis of Facebook's willful infringement of the '761 Patent. Copying technology clearly marked "patent pending" puts an infringer on notice that there is a high likelihood that the copied technology will be subject to patent in the future. That fact goes directly to the "objectively high likelihood" element of the willful infringement analysis under *Seagate*. *Seagate*, 497 F.3d at 1371.

23. Facebook states that "[s]imply marking an unpatented document 'patent pending' does not provide notice sufficient to support a claim of willful infringement, especially a patent issuing more than three years later." D.I. 404 at 5. This fact is DISPUTED for the same reasons as detailed in paragraph 18, above. An individual who knowingly copies technology for which a patent is pending acts creates an objectively high likelihood that such action will lead to patent

infringement, satisfying the first prong of the *Seagate* test, and such risk is obviously apparent to the copier, satisfying the second prong of the *Seagate* test. *Seagate*, 497 F.3d at 1371.

24. Facebook states that “[w]hile every Facebook witness who was asked testified under oath that they never saw these papers, even if they did, it would be legally insufficient to provide notice of infringement. These white papers, therefore, are insufficient to sustain LTI’s willful I infringement claim as a matter of law.” D.I. 404 at 6. Once again, this fact is DISPUTED for the same reasons as detailed in paragraphs 18 and 19, above. An individual who knowingly copies technology for which a patent is pending creates an objectively high likelihood that such action will lead to patent infringement, satisfying the first prong of the *Seagate* test, and such risk is obviously apparent to the copier, satisfying the second prong of the *Seagate* test. *Seagate*, 497 F.3d at 1371. Facebook’s knowledge of the Leader white papers is just one piece of evidence of Facebook’s willful infringement of the ‘761 Patent. See ¶¶ 1 and 3, *supra*. Taken together, Leader’s combined evidence will show, under the “totality of the circumstances” analysis, that Facebook willfully infringed the ‘761 Patent. *Ball Aerosol*, 553 F. Supp. 2d at 955.

25. Facebook states that “[d]espite completing full discovery, including a deposition of Mr. Zuckerberg, LTI has produced no evidence that Mr. Zuckerberg (or anyone else at Facebook) ever saw LTI’s white papers. Instead, LTI speculates that Mr. Zuckerberg must have seen them because (1) they were available on LTI’s company website; (2) Mr. Zuckerberg coded the initial Facebook site in only two weeks; and (3) Mr. McKibben believes the initial basic Facebook site bore ‘uncanny similarities’ to what was described in LTI’s white papers.” D.I. 404 at 6. This fact is DISPUTED. In making the above statement, Facebook ignores the bulk of Leader’s evidence regarding the connection between Mr. Zuckerberg, Facebook, and Leader’s white papers. See ¶¶ 1 and 3, *supra*. A reasonable jury could conclude, based on Leader’s

evidence, that Mr. Zuckerberg and/or other individuals at Facebook incorporated the invention described in the white papers in the Facebook site.

26. Facebook states that “[t]hat Mr. Zuckerberg never saw the white papers is unsurprising given the unrelated nature of the papers and LTI’ s business to anything Mr. Zuckerberg was doing.” D.I. 404 at 7. This fact is DISPUTED. The Leader white papers describe a web-based collaborative user environment that permits individuals to create and share information with other users of the system. This is precisely the same technology that Mr. Zuckerberg was attempting to develop in 2004.

27. Facebook states that “[t]he white papers also contain no software code, and instead describe very broad concepts (if they can even be called that, given that they are couched in consultant-speak generalities) for data management without providing any practical information as to how those concepts could be implemented. Such information would certainly be of no use to someone who was attempting to code a social networking site in a two week period.” D.I. 404 at 7. This fact is DISPUTED. While it is correct that the Leader white papers do not contain computer code as such, they provide a detailed description of the tools and software needed to build a social networking site. These details include the choice of operating systems, programming languages, web servers, metadata models, storage models, interface design, and the names and descriptions of common interface features. Not only is the information highly relevant to building a social networking website, each of the above-listed features are used by Facebook in the same way as described in Leader’s white papers.

28. Facebook states that “LTI’s claim that the original Facebook site bore ‘uncanny similarities’ to what was described in LTI’s white papers similarly stretches all credibility.” D.I. 404 at 7. This fact is DISPUTED. Leader alleges that Facebook’s founder, Mark Zuckerberg,

copied its technology when he created the Facebook website. The numbers of similarities between Leader's white papers and Facebook's original website are simply too many to be coincidence. These features include the functional requirements, the technical specification, the design, and even the "look and feel" of the site. For example, shared features between Leader's white papers and the original Facebook website include the following: (1) same operating system choice, (2) same programming language choice, (3) same web server choice, (4) same database choice, (5) same web page markup language, (6) same document markup language, (7) same metadata search model, (8) same approach to metadata tagging of user data, (9) same scalable data storage model, (10) same approach to user tracking, (11) same approach to object-oriented database support, (12) same approach to group workspace sharing, (13) same approach to ASP (application service provider) subscriptions, (14) same approach to a third party apps integration, (15) same approach to a universal collaboration portal, (16) same approach to a thin client, web-based system, (17) same approach to news, chat, calendar, messaging, file sharing, notes, photos, video, group, workspaces, and third party advertising, (18) similar minimalist user interface design, (19) common names to key features, (20) similar approach to data encryption, and (21) same approach to support of wireless devices. Taken in isolation, Facebook's selection of any single or small group of the same elements listed above would not be unusual. However, given the sheer number of similarities, it is nearly a statistical certainty that Facebook copied Leader's white papers.

29. Facebook states that "[d]uring his deposition, Mr. McKibben testified that the extent of these similarities consisted of the common use of the color blue, the words 'my profile,' and in Facebook's use of widely used (and standard) programming languages such as XML, SQL, HTML front end and Java." D.I. 404 at 7. This fact is DISPUTED. For example, shared

features between Leader's white papers and the original Facebook website include the following: (1) same operating system choice, (2) same programming language choice, (3) same web server choice, (4) same database choice, (5) same web page markup language, (6) same document markup language, (7) same metadata search model, (8) same approach to metadata tagging of user data, (9) same scalable data storage model, (10) same approach to user tracking, (11) same approach to object-oriented database support, (12) same approach to group workspace sharing, (13) same approach to ASP (application service provider) subscriptions, (14) same approach to a third party apps integration, (15) same approach to a universal collaboration portal, (16) same approach to a thin client, web-based system, (17) same approach to news, chat, calendar, messaging, file sharing, notes, photos, video, group, workspaces, and third party advertising, (18) similar minimalist user interface design, (19) common names to key features, (20) similar approach to data encryption, and (21) same approach to support of wireless devices. Taken in isolation, Facebook's selection of any single or small group of the same elements listed above would not be unusual. However, given the sheer number of similarities, it is nearly a statistical certainty that Facebook copied Leader's white papers.

30. Facebook states that "LTI makes no showing that any of these features were unique to LTI's alleged invention, nor can they." D.I. 404 at 8. This fact is DISPUTED. Again, Facebook selectively chooses a small subset of Leader's evidence and draw a conclusion that deliberately ignores the bulk of the evidence. Facebook's statement is both factually incorrect and misleading because it would be irrelevant even if it were true.

31. Facebook states that "[h]owever, if post-filing conduct does suggest willfulness a patentee should seek a preliminary injunction." D.I. 404 at 8. This fact is DISPUTED. There is no requirement that a patentee seek a preliminary injunction. *See Seagate*, 497 F.3d at 1374.

This is doubly true when it was entirely unpractical for Leader, a small technology company, to be able to post the requisite bond needed to secure injunctive relief against a multi-billion dollar company such as Facebook. It is illogical for Facebook to allege that Leader “should” have undertaken a course of action that was impossible for Leader to successfully prosecute due to the size disparity between the companies.

32. Facebook states that “[i]n so holding, the Federal Circuit noted that a patentee should not be entitled to accrue enhanced damages based solely on post-filing conduct if it makes no attempt to first stop those activities by seeking a preliminary injunction. LTI has not sought a preliminary injunction against Facebook in this case, and as such should not be permitted to assert post-filing willfulness.” D.I. 404 at 8. This fact is DISPUTED. Yet again, Facebook draws an erroneous factual conclusion based on a misstatement of the law. *Seagate* states that “a patentee *can* move for a preliminary injunction” based on an infringers post-filing activity, and that a patentee “should not be allowed to accrue enhanced damages based *solely* on the infringer’s post-filing conduct” but, again, this is under the circumstances in which post-filing conduct is the *sole* basis for willfulness. *Seagate*, 497 F.3d at 1374 (emphasis added). Here, Leader has ample evidence, discussed above, of Facebook’s pre- and post-filing activity sufficient to demonstrate willful infringement.

33. Facebook states that “[a]s discussed above, LTI has no evidence that Facebook had any knowledge of the ‘761 patent before this litigation was filed. Accordingly LTI cannot seek to tether any allegations of post-litigation conduct to any pre-litigation conduct.” D.I. 404 at 8. This fact is DISPUTED. Again, this statement is simply incorrect. Willful infringement is based on a number of factual issues that are relevant to the “totality of the circumstances” in determining willful infringement. *Seagate*, 497 F.3d at 1369. It is entirely proper for Leader’s

willfulness claim to be based on the substantial evidence of Facebook's objectively reckless pre-litigation conduct combined with its continuing post-filing infringing activity.

### III. CONCLUSION

For the reasons noted above, Facebook's motion for summary judgment of no willful infringement of the '761 Patent is based on disputed issues of material fact, and should be denied.

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

**CERTIFICATE OF SERVICE**

I, Philip A. Rovner, hereby certify that on June 4, 2010, the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing(s) to the following; that the document was served on the following counsel as indicated; and that the document is available for viewing and downloading from CM/ECF.

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