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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES,)
 INC., a Delaware)
 corporation,)
)
 PLAINTIFF,)
)
 v.) C.A. No. 08-862
)
 FACEBOOK, INC., a)
 Delaware corporation,)
)
 DEFENDANT.)

Tuesday, March 3, 2009
2:00 p.m.
Courtroom 4B

844 King Street
Wilmington, Delaware

BEFORE: THE HONORABLE JOSEPH J. FARNAN, JR.
United States District Court Judge

APPEARANCES:

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

KING & SPALDING LLP
BY: PAUL ANDRE, ESQ.

Counsel for Plaintiff

BLANK & ROME, LLP
BY: STEVEN L. CAPONI, ESQ.

WHITE & CASE
BY: HEIDI L. KEEFE, ESQ.

Counsel for Defendant

1 THE COURT: Good afternoon. Do
2 you want to announce your appearances?

3 MR. ROVNER: Good afternoon, Your
4 Honor. Phil Rovner from Potter Anderson for
5 plaintiff Leader Technologies. With me is Paul
6 Andre from King and Spalding.

7 MR. CAPONI: Good afternoon, Your
8 Honor. Steven Caponi from Blank and Rome. With
9 me is the brains of the operation, Heidi Keefe
10 from White and Case in Palo Alto, California.

11 MS. KEEFE: Good afternoon, Your
12 Honor.

13 THE COURT: Okay. We're here to
14 do some scheduling, and we have a disagreement.
15 Pretty large, actually. So start with
16 plaintiff.

17 MR. ANDRE: Thank you, Your Honor.
18 Plaintiff's schedule is based on
19 an eighteen- to twenty-month trial schedule from
20 the date of filing. What we did, we looked at
21 twenty months out from the day we filed the case
22 and traveled backwards based on the Court's
23 scheduling order and imposed the dates.

24 The first disagreement,

1 significant disagreement, is when the written
2 discovery should be completed. There's about a
3 four-month gap there. Our schedule is
4 aggressive, but I think written discovery can be
5 done in that time period just because parties
6 tend to waste a lot of resources with written
7 discovery by trying to extend it out and go
8 further and further.

9 The biggest difference, scheduling
10 difference, I see is in the Markman hearing.
11 Defendants propose to do it in March 2010,
12 whereas we put it in August 2009. That big
13 difference, I think, accounts for a lot of the
14 discrepancy here. Our position is that Markman
15 is based on an intrinsic record. You don't need
16 a year-and-a-half of discovery before the
17 Markman process. I think that's a major
18 difference.

19 With respect to some of the
20 opening expert reports, Your Honor's order had
21 thirty days after the issuance of Markman. They
22 had suggested adjusting it to forty-five days.
23 I don't see a need for that.

24 And then with case dispositive

1 motions, we had provided a specific date of
2 January 2010, and the defendants have put a date
3 based on Markman, saying ninety days after the
4 Markman decision.

5 First of all, I'm not sure case
6 dispositive motions are a good idea in a patent
7 case. I think there are always issues of fact
8 that can be raised to preclude it, but that's my
9 personal opinion. Nonetheless, I think having a
10 definite date on the calendar for parties to
11 file that motion will advance the case at a
12 proportional rate that makes it reasonable to
13 get to trial in a timely manner.

14 The other dates that there are
15 disagreements on, amendment pleading and joining
16 new parties, I'm not sure why the defendants
17 want to push it out so far. There is a big
18 difference. Those issuances -- I'll let them
19 address why they want to push it out further. I
20 don't understand why it would take ten months or
21 a year or two for amendment pleadings.

22 Thank you.

23 THE COURT: All right. Thank you.

24 MS. KEEFE: Thank you, Your Honor.

1 I think one of the places that we
2 have our largest disagreement has to do with
3 what this case is even about, so I'll back up
4 one step.

5 One of the reasons that we have
6 proposed the schedule that we have is that we've
7 attempted to make sure that we're not constantly
8 coming back to Your Honor and constantly coming
9 back and saying, "It didn't quite work out. We
10 just need a little bit more time. We weren't
11 sure about that. We need to come back again."

12 Since the very, very beginning of
13 this case, we've actually been relatively --
14 aggressive is the wrong word, but let's just say
15 there have been a number of phone calls to
16 plaintiffs trying to really ask what they're
17 accusing in this case. And through a series of
18 conversations -- sure, I'll let you know. Not
19 really letting us know -- we finally got
20 discovery served on us, as well as one answer in
21 an e-mail that indicated they're contemplating
22 accusing the entire Facebook website of
23 infringement.

24 That would entail almost every

1 single document that Facebook has ever created
2 since its inception. It could potentially
3 entail the inclusion of numerous third parties.

4 There's over 500,000 applications
5 that run on Facebook, and given the definition
6 they've currently given us of what they consider
7 to be the case, those applications could be
8 included, and we could be talking about
9 involving third parties in the case. Therefore,
10 we extended the time to amend pleadings and to
11 add parties based on trying to find out what
12 aspects of our business are actually involved in
13 this case. So needing to see at least one or
14 two rounds of written discovery in order to try
15 to understand the scope and breadth of what
16 we're dealing with here.

17 We have no problem with coming
18 back to Your Honor if they come with a narrowing
19 of the case to try to put it on a shorter
20 schedule. That's not what we're worried about.
21 We're worried about coming back to Your Honor to
22 try to lengthen things because now we've
23 realized that they really are accusing the whole
24 site, and, therefore, we're going to have to go

1 to third parties, potentially outside the United
2 States, et cetera, et cetera.

3 As far as the other things with
4 Markman and with dispositive motions, I'm not
5 sure that a dispositive motion would have much
6 value in a patent case without the claim
7 construction. So we've posited that the
8 dispositive motions be filed after we have the
9 ruling on claim construction. If the claim
10 construction hearing is earlier, the dispositive
11 motions cut-off date would be earlier.

12 Similarly, I think Your Honor has
13 dealt with the need, or lack thereof, with
14 dispositive motions with your standing orders,
15 which would indicate if there, in fact, is a
16 factual issue, the briefing doesn't go forward.
17 And if there is not, then the dispositive motion
18 actually can be extremely helpful.

19 We anticipate at least hoping to
20 file early summary judgment motions, if
21 possible, especially if we find that the case is
22 narrower and narrower and we can actually go for
23 an invalidity charge. That's what's really
24 behind our schedule.

1 THE COURT: Okay. Do you
2 understand in some general way today what your
3 infringing activity is, generally?

4 MS. KEEFE: To be completely
5 honest, Your Honor, I don't. I've taken the
6 patent and read it I don't know how many times,
7 and each time I've read it, I come up with a
8 different thought process about what it might be
9 that they might be accusing. That's why we sent
10 some early e-mails and letters asking, can you
11 please identify for us, either to help us narrow
12 our litigation hold -- which we have a very
13 broad one in place now -- or to help us with
14 Rule 26 disclosures. Give us something.

15 And what we got back was, "The
16 website Facebook.com infringes." And there are
17 ways I could read the claim that potentially
18 could encompass every single thing on Facebook,
19 although I think that would be an invalid
20 patent. There's certainly ways to read it
21 overly broadly.

22 So in all earnest honestness --
23 that's not a word -- I can't figure out what
24 they're accusing, and that's the first time I've

1 said that in a case.

2 THE COURT: Mr. Andre, they don't
3 know what they're doing wrong, maybe.

4 MS. KEEFE: I'd be happy to hear
5 from plaintiffs because that might help us
6 resolve some of these dates, and that's why we
7 served discovery the first day we could, asking
8 them to identify what the infringing product
9 was, how, and why.

10 MR. ANDRE: And Your Honor, even
11 before discovery began, we made a good faith
12 effort to identify the information. It wasn't
13 just the Facebook web page. We gave a very long
14 description of the infringing activity of
15 Facebook, so this was before discovery and
16 without obligation.

17 THE COURT: What do you think your
18 patent covers?

19 MR. ANDRE: It is the platform
20 which their website operates on. It's a way
21 that -- we have two different contexts, and how
22 you do tracking on it, and how you do the
23 various aspects the patent lays out. It is a
24 method of operating that type of peer-to-peer,

1 mini-to-mini network.

2 The claims are very clear. You
3 can read the claims, and this is not -- it's not
4 written in a lot of computer software language
5 that makes it incomprehensible. The language is
6 very clear, even though it's a very complex
7 technology. The claims themselves are drafted
8 in a way that do spell out what type of activity
9 will be infringing.

10 I don't think Facebook has any
11 ignorance of how their website works. I think
12 they understand how it works. If they read it,
13 I think they can see what is implied there.

14 Another reason for us to want to
15 conclude written discovery early, including
16 contention interrogatories, is so that we can
17 have this information out to them. They can ask
18 specific interrogatories. We'll tell them
19 exactly what they ask for. There's no reason to
20 expand this for months upon months.

21 Same with the claim construction.
22 Claim construction will obviously help both
23 parties. Pushing this out for two years after
24 filing is a delay tactic. That's what this is

1 about.

2 Claim construction is not based on
3 their activity. It's based on intrinsic record
4 of our patent. If they get the claim
5 construction early, as we propose, get our
6 contention interrogatories early, as we propose,
7 there's no reason why they can't, at that time,
8 make their motions they think are appropriate or
9 get a fair understanding as to where they think
10 their case is.

11 What we're proposing is exactly
12 the solution to what they're claiming now is the
13 problem. They say from the very first day they
14 have a problem understanding what our claims
15 are, so we told them. We didn't have to. We
16 did it voluntarily. We didn't do it as part of
17 discovery or part of our initial disclosures,
18 which we're exchanging today. We told them in a
19 letter, and we also put forward in our discovery
20 request which we propound on them, as well, what
21 we believe is the relevant information with
22 definitions and such. So I don't think there's
23 any big mystery here as to what's being accused.

24 As far as their 5,000

1 applications, we're not accusing third parties,
2 those applications, of infringing at this time.
3 That's not part of this case. I think that's
4 just a red herring, to hold out potentially
5 thousands and thousands of defendants.

6 THE COURT: In a layman's
7 understanding, what you're saying is that the
8 patent covers the way their platform functions?
9 Its foundational functionality?

10 MR. ANDRE: That's correct, Your
11 Honor. You can set up these type of networks
12 in, obviously, different ways. There are ways
13 that make it very efficient, make it very user
14 friendly. And there are ways that make it
15 non-efficient and non-user friendly.

16 And in this particular case, our
17 patent covers a foundation of how you can set up
18 these type of networks that make it very
19 efficient and user friendly and easy to navigate
20 through the web site. And it's -- those claims
21 are laid out in an element-by-element basis.

22 And, like I said, it's not as
23 defense counsel mentioned. You can read the
24 claims and see how. You can read on their

1 actual website itself.

2 As far as the dates regarding the
3 motion to amend the pleadings and join
4 additional parties, I think that there is a
5 logistic disagreement as to time frame. I think
6 it's unnecessary to hold those dates open.

7 But that being said, I don't think
8 there will be any amendment to the pleadings. I
9 don't think additional parties will be added. I
10 think it may be somewhat of a philosophical
11 difference more than a practical difference
12 between the parties.

13 The only date I see that is really
14 of major significance is the Markman hearing
15 itself. To me, that has nothing to do with
16 whether or not they understand their own
17 technology. What we are accusing of infringing,
18 I think that's outside that.

19 THE COURT: All right. Sure.

20 MS. KEEFE: I was just going to
21 add, Your Honor, but I'm sorry, but that
22 actually didn't completely help me understand
23 how it applies to what we do because our network
24 is inextricably linked to multiple applications,

1 how it functions.

2 And if it's that easy to
3 understand, what it is we're doing that's
4 infringing, I'd love it if they just told us.

5 And that's what we've asked for.
6 There's thirty-five claims at issue in this
7 patent, and so far there's still thirty-five
8 claims. The information that they told Your
9 Honor, told us exactly what they were accusing
10 -- you know, the e-mail says that they're
11 "accusing the Facebook website and all
12 functionality programs and modules, both
13 software and hardware, currently and formerly
14 built, used, or made available by Facebook, but
15 is not limited to all components on the
16 website." So that didn't really help us
17 understand.

18 As far as claim construction goes,
19 I think the first thing you have to understand
20 is which claims are in the case and which claims
21 are going to be involved, and that's done
22 through discovery, through figuring out which
23 are actually infringed, what you are going to be
24 accusing, so that the parties don't waste time

1 trying to go down the rat hole of claims that
2 really aren't involved because you haven't had a
3 chance to narrow the case yet and figure it all
4 out.

5 So I still think that this case,
6 at least until we see the initial interrogatory
7 responses, could potentially be unwieldy, and,
8 therefore, it does require a little bit more
9 time to figure out what's really going on.

10 Thank you.

11 MR. ANDRE: Your Honor, as far as
12 which claims are being served, Counsel has asked
13 us, essentially, complete discovery before the
14 scheduling conference. That's not our
15 obligation to do so. We are identifying the
16 claims. We're going to be asserting, based on
17 their first set of interrogatories -- they're
18 due in twenty-some-odd, fifteen days. We'll
19 identify them. They'll know them.

20 So they're going to want claims.
21 They're going to have all the intrinsic records
22 in front of them by March. So why they need
23 until March of next year to schedule a Markman
24 hearing is -- I don't understand that.

1 THE COURT: Well, this case
2 actually has the potential to become part of the
3 stimulus package. If I can get you to bill
4 enough against each other, what we'll put into
5 the economy, I could turn the whole thing
6 around.

7 But let me ask on a serious note.
8 I have a sense now of what the problem is.
9 First thing is going to be summary judgment. My
10 alter ego in Tennessee, Bill, who keeps
11 statistics, says that I'm one of the lowest
12 summary judgment judges or something. Compare
13 me to Judge Ward. I don't have anything to do
14 with summary judgment. The case does. There's
15 either summary judgment or there's not.

16 We do get you to trial here. I
17 understand some districts don't have the time or
18 the energy for trial. We'll get you to trial.
19 They only give us twenty percent. That's not
20 me. I do summary judgment. I entertain
21 motions.

22 My procedure I put in place a
23 little bit ago, when I heard the preliminary
24 talks -- I was on a panel somewhere. Someone on

1 the panel was working on Rule 56. I listen to
2 what they say. I look at my procedure. It's,
3 kind of, the bare bones of what they're
4 proposing. They have a lot more detail now that
5 they flushed out what they want to do, but it's
6 all designed to make it work. But there is a
7 dispute of fact. I can't do anything about
8 that. I give you a trial.

9 So I heard what both of you have
10 to say, and I think there's a way to proceed
11 that will allow us to accommodate both interests
12 here. What I'm going do in the first instance
13 is take summary judgment because I agree with
14 you, and Mr. Andre, you agree. I really can't
15 do that. Some judges do it in the context of
16 claim construction, but I'm going to take that
17 out of the case for now. But that's not saying
18 I won't entertain a motion.

19 Ultimately, what I'm going to do
20 is focus, given what's been told to me, on
21 getting fact discovery completed in as efficient
22 a way as possible, which means that in a manner
23 that more comports to what the plaintiffs are
24 asking for. And then get us to a Markman

1 hearing.

2 Now, in that context, if this
3 starts to become what you think it might, I'm
4 not going to be reluctant, and I know that
5 Mr. Caponi will remind me of this by presenting
6 this transcript, to give you an extension.

7 MS. KEEFE: Would Your Honor also
8 be amenable, if it turns out to be one of those
9 cases that looks like it will grow crazily, to
10 possibly appointing a special master? I don't
11 want one now. I'm just asking if that might be
12 something that you'd be amenable to.

13 THE COURT: Sure, but first I want
14 to get it to the status of a stimulus
15 contributor, which we'll see how that goes. But
16 on application, I will appoint a special master.

17 Now, having said that, one thing
18 that is a little bit of a concern, as it is in
19 all of these cases -- I don't know if Mr. Andre
20 was at that seminar or Mr. Rovner was -- some
21 judges think you don't have the right to tell
22 folks that I'm not going to allow you to assert
23 all thirty-five claims for claim construction
24 purposes. They think you're entitled to that.

1 I take the view, and I think this
2 district does, that we can limit the claims to
3 representative claims in order to get the case
4 moving and to get it to a claim construction
5 hearing.

6 I'm not going to ask you to limit
7 those claims now, but if that becomes part of
8 the issue, I think you ought to be thinking
9 about the need to get us to a representative set
10 of claims that will allow us to get the case
11 efficiently through discovery. But at this
12 point, we have thirty-five claims, and we'll see
13 how it goes.

14 So what is the time for discovery
15 in this case? Do you know when this case was
16 filed.

17 MS. KEEFE: End of November, Your
18 Honor.

19 THE COURT: November 19th. And
20 I'm going to say that you're going get down here
21 and discuss getting your fact discovery
22 completed sometime between the end of June and
23 the end of July of '09, contemplating getting
24 your claim construction experts lined up in

1 August for a September or October Markman
2 hearing.

3 And once we get that far and add
4 the claim construction, then we'll set the meter
5 for the finishing-up of patent issue experts and
6 also any summary judgment applications.

7 Now, as we get through this, as I
8 said, it becomes apparent that that's not going
9 to work because of -- we have trouble with the
10 contentions on the interrogatories on the issues
11 or we have problems with the document
12 production, then you'll come back, and I
13 hopefully will reconsider an extension time. So
14 you're not foreclosed on that. If everybody
15 works together, you ought to be able to get
16 through that.

17 I'll look at the special master
18 once I see what kind of disputes you're having.
19 Some cases I just keep myself because they're
20 actually an education forum, and others I find
21 that it's more contention and volume, and
22 they're the kind of cases that go to special
23 master so you can get more frequent and
24 immediate attention than you can with me with

1 the motion days that I have.

2 So you think you can sit down and
3 agree on that time? I don't want to dictate the
4 schedule. I've given you, basically, where you
5 ought to finish up. Can you sit down and
6 negotiate that and submit an order?

7 MS. KEEFE: I would certainly be
8 happy to try. I know that I'm going to ask on
9 the lower end -- longer end of it, but I think
10 we could work on that.

11 MR. ANDRE: That's fine, Your
12 Honor.

13 THE COURT: What I would like to
14 do is schedule, in addition to what you're going
15 to propose, kind of, like, a ninety-day window,
16 assuming that that first portion holds, for a
17 trial just so we can all have that date we're
18 working to. So if I give an extension, ninety
19 days, you know the trial is going out another
20 ninety days. In other words, push it out.

21 But we should start to think about
22 that trial date, which is good in a patent case
23 because it, kind of, holds all our focus. So
24 what do you think?

1 MR. ANDRE: That's fine.

2 THE COURT: I don't know your
3 availability.

4 MS. KEEFE: It's a little dicy in
5 the very beginning of 2010. I've got another
6 trial set in Texas in January, and I've got one
7 in March.

8 But if we had claim construction
9 sometime in October, and give Your Honor a
10 couple months to rule, we could probably be at
11 trial within six months after that. Six to
12 seven months.

13 THE COURT: So we're look at early
14 2010, or early in the first six months?

15 MS. KEEFE: I was going to say May
16 because of my other trials. Early May would
17 work for me maybe, now.

18 MR. ANDRE: April, May. That's
19 fine.

20 THE COURT: This will become more
21 of a firm trial date because I'm going to build
22 in.

23 MS. KEEFE: Mr. Caponi was just
24 reminding me to make sure I have enough time to

1 do all the experts, which means maybe June or
2 July. I'm not trying to push things out. I'm
3 just trying to make sure that there's time to
4 get on people's schedules and make sure we have
5 enough time after Your Honor rules, so --

6 THE COURT: This is a jury trial.

7 MS. KEEFE: Yes.

8 THE COURT: I have this other
9 little case --

10 MS. KEEFE: A small one, Your
11 Honor.

12 THE COURT: -- that I promised
13 them I would try. It's in April of 2010, and I
14 told them it had to go to trial then for a whole
15 lot of reasons. So April 2010.

16 This is going to become your firm
17 date, pretty much. So I don't know. I don't
18 have any exact time frame of that trial, but I'm
19 going to leave open April, May, and a little bit
20 of June. That's the Intel. Of course, they
21 could settle.

22 MS. KEEFE: Anything is possible,
23 Your Honor.

24 THE COURT: Anything is possible.

1 MR. ANDRE: Curse of the economy,
2 Your Honor. I don't think Intel will settle.

3 MS. KEEFE: There's your stimulus
4 package.

5 THE COURT: I want to be exact on
6 this, so we don't have to -- your date will be
7 June 7th of 2010. And we'll work both of your
8 tech files. And are you okay with that day?

9 MR. ANDRE: That's fine.

10 THE COURT: You really ought to
11 focus on that. Anything that you do ought to be
12 with the view that June 7th is the trial date in
13 this case, of 2010. So we'll set aside ten
14 trial days for now. That doesn't mean you're
15 going to get ten trial days.

16 Okay. I think with that
17 information, that kind of gets us scheduled up.
18 I'm going to ask you to have that order here
19 with your negotiated dates, agreed upon dates,
20 let's say in two weeks. So that would be, let's
21 say, by March 19th. You have that order here so
22 I can get it in the scheduling order.

23 MS. KEEFE: Your Honor, that's
24 absolutely possible. The only thing I might ask

1 is that you extend that by one week. We would
2 both have each other's initial responses to the
3 very first discovery in this case, and we might
4 know if this is going to be a problem.

5 We might be able to come back to
6 Your Honor and say, "This is the problem we're
7 having and this is why it's going to be fine."
8 Sorry. There's no problems. It's fine, and
9 this is the problem, and here's what we think.
10 So that might accommodate that.

11 THE COURT: So let's make it March
12 25th. I don't think that's a problem, and
13 you'll have a better idea.

14 MS. KEEFE: I appreciate that,
15 Your Honor.

16 THE COURT: The order will be here
17 by March 25th.

18 My parting words will be: Don't
19 lose sight of June 7th, 2010. It's an important
20 date for you.

21 Anything else that the plaintiff
22 wants to pick up?

23 MR. ANDRE: No, thank you, Your
24 Honor.

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MS. KEEFE: Thank you very much,
Your Honor.
THE COURT: Thank you. We'll be
in recess.
(Proceeding ended at 2:35 p.m.)

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C E R T I F I C A T I O N

I, DEANNA WARNER, Professional Reporter, certify that the foregoing is a true and accurate transcript of the foregoing proceeding.

I further certify that I am neither attorney nor counsel for, nor related to nor employed by any of the parties to the action in which this proceeding was taken; further, that I am not a relative or employee of any attorney or counsel employed in this case, nor am I financially interested in this action.

DEANNA WARNER
Professional Reporter and Notary Public