

2011-1366

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LEADER TECHNOLOGIES, INC.,

*Plaintiff-Appellant,*

v.

FACEBOOK, INC.,

*Defendant-Appellee.*

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*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*

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**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***

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Lakshmi Arunachalam, Ph.D.

July 27, 2012

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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

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**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 27, 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. 7,139,761. 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.<sup>1</sup>

**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

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<sup>1</sup> 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 word ‘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.<sup>2</sup> 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.

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<sup>2</sup> 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<sup>3</sup> 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.”<sup>4</sup> Professor Chandler’s consultations with federal courts include the following courts and cases:<sup>5</sup>

<b>Case:</b>	<b>Jurisdiction:</b>
<i>United States v. Okamoto and Serizawa</i> (2001)	N.D. Ohio
<i>United States v. Ye and Zhong</i> (2002)	N.D. Cal.
<i>United States v. Meng</i> (2006)	N.D. Cal.
<i>United States v. Lee and Ge</i> (2007)	N.D. Cal.
<i>United States v. Chung</i> (2008)	C.D. Cal.
<i>United States v. Jin</i> (2008)	N.D. Ill.
<i>United States v. Okamoto and Serizawa</i> (2001)	N.D. Ohio
<i>United States v. Williams</i> (2008)	N.D. Ga.
<i>United States v. Fei Ye</i> (2006)	N.D. Cal., 9th Cir.
<i>United States v. Meng</i> (2009)	N.D. Cal.
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<i>United States v. Zeng</i> (2008)	S.D. Tex.
<i>United States v. Cotton</i> (2008)	E.D. Cal.

<sup>3</sup> 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](http://www.justice.gov/usao/eousa/foia_reading_room/usab5705.pdf)>.

<sup>4</sup> *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.

<sup>5</sup> *Op.cit.*, pp. 7-9.

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.<sup>6</sup> 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.<sup>7</sup>

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).

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<sup>6</sup> 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>>.

<sup>7</sup> 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.

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.<sup>8</sup> 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

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<sup>8</sup> [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 16<sup>th</sup><sup>9</sup> that the Federal Circuit had denied Leader’s petition earlier that day. Two days later, on July 18<sup>th</sup>, Facebook indicated in an email to Dr. Arunachalam that they were aware of the

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<sup>9</sup> 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](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. Denial 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<sup>10</sup> 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):

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<sup>10</sup> 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).<sup>11</sup>
- (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).<sup>12</sup>
- (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).<sup>13 14</sup>

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<sup>11</sup> 16,844,315 shares, Peter Thiel, <<http://www.secform4.com/insider-trading/1211060.htm>>.

<sup>12</sup> 57,726,901 shares, James W. Breyer et al <<http://www.secform4.com/insider-trading/1542464.htm>>.

<sup>13</sup> 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).<sup>15</sup>
- (e) \$717,128,487 -- **Goldman Sachs** et al (Facebook Underwriter).<sup>16</sup>

**(2) Facebook shareholders also with substantial insider stakes in Zynga<sup>17</sup> in addition to Fidelity include:**

- (a) Reid Hoffman (Facebook Director)<sup>18</sup>
- (b) Clarium Capital (Peter Thiel, Facebook Director)].<sup>19</sup>
- (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<sup>20</sup> in addition to Fidelity include:**

- (a) Digital Sky Technologies. *Id.*

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

<sup>14</sup> 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>>

<sup>15</sup> 30,200,000 shares, Mark Zuckerberg,

<<http://www.secform4.com/insider-trading/1548760.htm>>.

<sup>16</sup> 24,324,886 shares, Goldman Sachs et al,

<<http://www.secform4.com/insider-trading/1420392.htm>>.

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

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

<sup>19</sup> Clarium Capital (Peter Thiel), *Op.cit.*

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



- (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.<sup>21</sup> The appearance of impropriety dictates that the Clerk disqualifies himself from this matter. *Byrne v. Nezhad*, 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)

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

**Andrew P. Bridges**, Fenwick & West LLP; and (v) **David L. Hayes**, Fenwick & West LLP.<sup>22</sup>

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.”).

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<sup>22</sup> 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; Never Mentioned 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.” **Exhibit C**; *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 27, 2012  
Menlo Park, California

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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](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/

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Lakshmi Arunachalam, Ph.D.

SWORN AND SUBSCRIBED before me, a Notary Public,  
this \_\_\_\_ day of \_\_\_\_\_, 2012.

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# **EXHIBIT A**



**TITLE 1 - GENERAL PROVISIONS**  
**CHAPTER 1 - RULES OF CONSTRUCTION**

**§ 1. Words denoting number, gender, and so forth**

In determining the meaning of any Act of Congress, unless the context indicates otherwise—  
words importing the singular include and apply to several persons, parties, or things;

words importing the plural include the singular;

words importing the masculine gender include the feminine as well;

words used in the present tense include the future as well as the present;

the words “insane” and “insane person” and “lunatic” shall include every idiot, lunatic, insane person, and person non compos mentis;

the words “person” and “whoever” include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

“officer” includes any person authorized by law to perform the duties of the office;

“signature” or “subscription” includes a mark when the person making the same intended it as such;

“oath” includes affirmation, and “sworn” includes affirmed;

“writing” includes printing and typewriting and reproductions of visual symbols by photographing, multigraphing, mimeographing, manifolding, or otherwise.

(July 30, 1947, ch. 388, 61 Stat. 633; June 25, 1948, ch. 645, § 6, 62 Stat. 859; Oct. 31, 1951, ch. 655, § 1, 65 Stat. 710.)

**Amendments**

1951—Act Oct. 31, 1951, substituted, in fourth clause after opening clause, “used” for “use”.

1948—Act June 25, 1948, included “tense”, “whoever”, “signature”, “subscription”, “writing” and a broader definition of “person”.

**Short Title of 2002 Amendment**

Pub. L. 107–207, § 1, Aug. 5, 2002, 116 Stat. 926, provided that: “This Act [enacting section 8 of this title] may be cited as the ‘Born-Alive Infants Protection Act of 2002’.”

**Short Title of 1996 Amendment**

Pub. L. 104–199, § 1, Sept. 21, 1996, 110 Stat. 2419, provided that: “This Act [enacting section 7 of this title and section 1738C of Title 28, Judiciary and Judicial Procedure] may be cited as the ‘Defense of Marriage Act’.”

**References in Pub. L. 112–74**

Pub. L. 112–74, § 3, Dec. 23, 2011, 125 Stat. 787, provided that: “Except as expressly provided otherwise, any reference to ‘this Act’ contained in any division of this Act [Consolidated Appropriations Act, 2012, see Tables for classification] shall be treated as referring only to the provisions of that division.”

**References in Pub. L. 112–55**

Pub. L. 112–55, § 3, Nov. 18, 2011, 125 Stat. 552, provided that: “Except as expressly provided otherwise, any reference to ‘this Act’ contained in any division of this Act [Consolidated and Further Continuing Appropriations Act, 2012, see Tables for classification] shall be treated as referring only to the provisions of that division.”

**References in Pub. L. 112–10**

Pub. L. 112–10, div. A, title IX, § 9015, Apr. 15, 2011, 125 Stat. 102, provided that: “Any reference to ‘this Act’ in this division [Department of Defense Appropriations Act, 2011, see Tables for classification] shall apply solely to this division.”

**References in Pub. L. 111–118**

Pub. L. 111–118, § 3, Dec. 19, 2009, 123 Stat. 3409, provided that: “Except as expressly provided otherwise, any reference to ‘this Act’ contained in any division of this Act [Department of Defense Appropriations Act, 2010, see Tables for classification] shall be treated as referring only to the provisions of that division.”

**References in Pub. L. 111–117**

Pub. L. 111–117, § 3, Dec. 16, 2009, 123 Stat. 3035, provided that: “Except as expressly provided otherwise, any reference to ‘this Act’ contained in any division of this Act [Consolidated Appropriations Act, 2010, see Tables for classification] shall be treated as referring only to the provisions of that division.”

**References in Pub. L. 111–8**

Pub. L. 111–8, § 3, Mar. 11, 2009, 123 Stat. 525, provided that: “Except as expressly provided otherwise, any reference to ‘this Act’ contained in any division of this Act [Omnibus Appropriations Act, 2009, see Tables for classification] shall be treated as referring only to the provisions of that division.”

**References in Pub. L. 111–5**

Pub. L. 111–5, § 4, Feb. 17, 2009, 123 Stat. 116, provided that: “Except as expressly provided otherwise, any reference to ‘this Act’ contained in any division of this Act [American Recovery and Reinvestment Act of 2009, see Tables for classification] shall be treated as referring only to the provisions of that division.”

**References in Pub. L. 110–329**

Pub. L. 110–329, § 3, Sept. 30, 2008, 122 Stat. 3574, provided that: “Except as expressly provided otherwise, any reference to ‘this Act’ or ‘this joint resolution’ contained in any division of this Act [Consolidated Security, Disaster Assistance, and Continuing Appropriations Act, 2009, see Tables for classification] shall be treated as referring only to the provisions of that division.”

**References in Pub. L. 110–161**

Pub. L. 110–161, § 3, Dec. 26, 2007, 121 Stat. 1845, provided that: “Except as expressly provided otherwise, any reference to ‘this Act’ contained in any division of this Act [Consolidated Appropriations Act, 2008, see Tables for classification] shall be treated as referring only to the provisions of that division.”

**References in Pub. L. 110–116**

Pub. L. 110–116, § 2, Nov. 13, 2007, 121 Stat. 1295, provided that: “Except as expressly provided otherwise, any reference to ‘this Act’ contained in any division of this Act [see Tables for classification] shall be treated as referencing only to the provisions of that division.”

**References in Pub. L. 109–289**

Pub. L. 109–289, div. A, title VIII, § 8112, Sept. 29, 2006, 120 Stat. 1299, provided that: “Except as expressly provided otherwise, any reference to ‘this Act’ contained in this division [Department of Defense Appropriations Act, 2007, see Tables for classification] shall be referring only to the provisions of this division.”

**References in Pub. L. 109–148**

Pub. L. 109–148, div. B, title V, § 5002, Dec. 30, 2005, 119 Stat. 2813, provided that: “Except as expressly provided otherwise, any reference to ‘this Act’ contained in either division A [Department of Defense Appropriations Act, 2006, see Tables for classification] or division B [Emergency Supplemental Appropriations Act to Address Hurricanes in the Gulf of Mexico and Pandemic Influenza, 2006, see Tables for classification] shall be treated as referring only to the provisions of that division.”

**References in Pub. L. 109–115**

Pub. L. 109–115, div. A, title VIII, § 847, Nov. 30, 2005, 119 Stat. 2507, provided that: “Except as expressly provided otherwise, any reference to ‘this Act’ contained in this division [Transportation, Treasury, Housing and Urban

Development, the Judiciary, and Independent Agencies Appropriations Act, 2006, see Tables for classification] shall be treated as referring only to the provisions of this division.”

**References in Pub. L. 108–447**

Pub. L. 108–447, § 3, Dec. 8, 2004, 118 Stat. 2810, provided that: “Except as expressly provided otherwise, any reference to ‘this Act’ contained in any division of this Act [Consolidated Appropriations Act, 2005, see Tables for classification] shall be treated as referring only to the provisions of that division.”

**References in Pub. L. 108–199**

Pub. L. 108–199, § 3, Jan. 23, 2004, 118 Stat. 4, provided that: “Except as expressly provided otherwise, any reference to ‘this Act’ contained in any division of this Act [Consolidated Appropriations Act, 2004, see Tables for classification] shall be treated as referring only to the provisions of that division.”

**References in Pub. L. 108–7**

Pub. L. 108–7, § 3, Feb. 20, 2003, 117 Stat. 12, provided that: “Except as expressly provided otherwise, any reference to ‘this Act’ contained in any division of this joint resolution [Consolidated Appropriations Resolution, 2003, see Tables for classification] shall be treated as referring only to the provisions of that division.”

**Continental United States**

Section 48 of Pub. L. 86–70, June 25, 1959, 73 Stat. 154, provided that: “Whenever the phrase ‘continental United States’ is used in any law of the United States enacted after the date of enactment of this Act [June 25, 1959], it shall mean the 49 States on the North American Continent and the District of Columbia, unless otherwise expressly provided.”

# **EXHIBIT B**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES, INC., a Delaware  
corporation, )

Plaintiff-Counterdefendant, )

v. )

FACEBOOK, INC., a Delaware corporation, )

Defendant-Counterclaimant )

Civil Action No. 08-862-JJF

**HIGHLY CONFIDENTIAL—  
FOR ATTORNEY'S EYES ONLY**

**LEADER TECHNOLOGIES, INC.'S FIRST SUPPLEMENTAL RESPONSES  
TO FACEBOOK, INC.'S INTERROGATORIES NOS. 3 AND 9**

Redacted

DEFENDANT'S EXHIBIT  
DTX 0963  
CASE NO. 1:08-CV-00862-LPS  
Exhibit B, p 1

**INTERROGATORY NO. 9:**

For each claim of the '761 Patent that LTI contends is practiced by any product(s) and/or services of LTI, identify all such product(s) and/or service(s) and provide a chart identifying specifically where each limitation of each claim is found within such product(s) and/or service(s).

Redacted

**FIRST SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 9:**

Redacted

Leader2Leader® powered by the Digital Leaderboard® engine is covered by the '761

Patent.

Redacted

POTTER ANDERSON & CORROON LLP

OF COUNSEL:

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Dated: April 17, 2009  
912447

By: \_\_\_\_\_



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Leader Technologies, Inc.*

**VERIFICATION**

I, Michael T. McKibben, Chairman and Founder of Leader Technologies, Inc., being duly sworn, deposes and says that I am authorized to sign this Verification and that I am informed and believe that the factual statements in **Plaintiff Leader Technologies, Inc.'s First Supplemental Responses to Facebook, Inc.'s Interrogatories Nos. 3 and 9** are true and correct to the best of my knowledge, information and belief. I declare under penalty of perjury under the laws of the State of Ohio and the United States that the above statement is true and correct.

April 17, 2009  
Date

  
Michael T. McKibben



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

**CERTIFICATE OF SERVICE**

I, Philip A. Rovner, hereby certify that on April 17, 2009, true and correct copies of the within document were served on the following counsel of record, at the addresses and in the manner indicated:

**BY HAND DELIVERY AND E-MAIL**

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Mark R. Weinstein, Esq.  
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Hercules Plaza  
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[provner@potteranderson.com](mailto:provner@potteranderson.com)

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/LPS  
 )  
v. ) **HIGHLY CONFIDENTIAL--**  
 ) **FOR ATTORNEY'S EYES ONLY**  
 )  
FACEBOOK, INC., a Delaware corporation, )  
 )  
Defendant-Counterclaimant )

**LEADER TECHNOLOGIES, INC.'S SECOND SUPPLEMENTAL RESPONSE  
TO FACEBOOK, INC.'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**

Redacted

Redacted

**INTERROGATORY NO. 9:**

For each claim of the '761 Patent that LTI contends is practiced by any product(s) and/or services of LTI, identify all such product(s) and/or service(s) and provide a chart identifying specifically where each limitation of each claim is found within such product(s) and/or service(s).

**THIRD SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 9:**

Redacted

Leader2Leader® powered by the Digital Leaderboard® engine is the only product or service provided by Leader which embodies, either literally or under the doctrine of equivalents, any of the asserted claims of the '761 Patent. Leader2Leader® powered by the Digital Leaderboard® engine embodies the following asserted claims of the '761 Patent: 1-17, 21, 23-26, 29, and 31-34.

Redacted

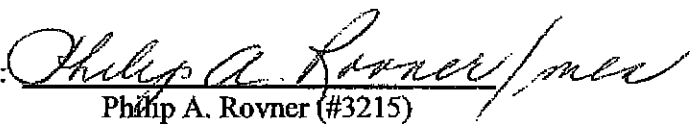
Redacted

OF COUNSEL:

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Lisa Kobialka  
James Hannah  
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333 Twin Dolphin Drive  
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Redwood Shores, California 94065-6109  
(650) 590-7100

Dated: October 28, 2009  
939709

POTTER ANDERSON & CORROON LLP

By:   
Philip A. Rovner (#3215)  
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*Attorneys for Plaintiff-Counterdefendant  
Leader Technologies, Inc.*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

CERTIFICATE OF SERVICE

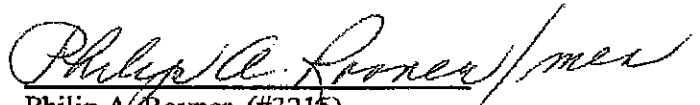
I, Philip A. Rovner, hereby certify that on October 28, 2009, true and correct copies of the within document were served on the following counsel of record, at the addresses and in the manner indicated:

BY EMAIL AND HAND DELIVERY

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# **EXHIBIT C**

**JURY INSTRUCTION NO. 4.7**

**ON SALE BAR**

A patent claim is invalid if it can be shown by clear and convincing evidence that an embodiment that contains all the elements of that claim was, more than one year before the effective filing date, both (1) subject to commercial offer for sale in the United States; and (2) ready for patenting. Facebook contends that Claims 1, 4, 7, 9, 11, 16, 21, 23, 25, 31 and 32 of the '761 Patent are anticipated because the invention was on sale in the United States more than one year before the effective filing date.

In this case, Facebook must prove by clear and convincing evidence that a product that met all the limitations of the asserted claims was ready for patenting and was offered for sale more than a year prior to the effective filing date. Once again, your determination of the effective filing date will affect whether or not you find that a commercial offer for sale of the Leader invention occurred more than a year from the effective filing date. However, it is irrelevant whether or not the offer for sale was secret or non-secret.

An invention was "on sale" if the claimed invention was embodied in the thing commercially offered for sale. An offer for sale need not be accepted to trigger the on-sale bar. That the offer, even if accepted, might not have ultimately led to an actual sale of the invention is also not relevant. The essential question is whether or not there was an attempt to obtain commercial benefit from the invention. An offer to sell can invalidate a patent even if the offer was secret, such as under the protection of a non-disclosure agreement.

An invention is ready for patenting either when it is reduced to practice or when the inventor has enabled the invention by preparing drawings or other descriptions of the invention



sufficient to allow a person of ordinary skill in the art to make or use the invention. The claimed invention is ready for patenting when there is reason to believe it would work for its intended purpose.

# **EXHIBIT D**

**FINANCIAL DISCLOSURE REPORT  
FOR CALENDAR YEAR 2010**

*Report Required by the Ethics  
in Government Act of 1978  
(5 U.S.C. app. §§ 101-111)*

<b>1. Person Reporting (last name, first, middle initial)</b>  Moore, Kimberly A.	<b>2. Court or Organization</b>  Federal Circuit	<b>3. Date of Report</b>  05/12/2011
<b>4. Title (Article III judges indicate active or senior status; magistrate judges indicate full- or part-time)</b>  Circuit Judge	<b>5a. Report Type (check appropriate type)</b> <input type="checkbox"/> Nomination,                      Date <input type="checkbox"/> Initial <input checked="" type="checkbox"/> Annual <input type="checkbox"/> Final <b>5b.</b> <input type="checkbox"/> Amended Report	<b>6. Reporting Period</b>  01/01/2010 to 12/31/2010
<b>7. Chambers or Office Address</b>  U.S.C.A. Federal Circuit 717 Madison Place NW Washington, DC 20439	<b>8. On the basis of the information contained in this Report and any modifications pertaining thereto, it is, in my opinion, in compliance with applicable laws and regulations.</b>  Reviewing Officer _____ Date _____	

**IMPORTANT NOTES:** *The instructions accompanying this form must be followed. Complete all parts, checking the NONE box for each part where you have no reportable information. Sign on last page.*

**I. POSITIONS.** *(Reporting individual only; see pp. 9-13 of filing instructions.)*

NONE *(No reportable positions.)*

<u>POSITION</u>	<u>NAME OF ORGANIZATION/ENTITY</u>
1.	
2.	
3.	
4.	
5.	

**II. AGREEMENTS.** *(Reporting individual only; see pp. 14-16 of filing instructions.)*

NONE *(No reportable agreements.)*

<u>DATE</u>	<u>PARTIES AND TERMS</u>
1.	
2.	
3.	

**FINANCIAL DISCLOSURE REPORT**

Page 2 of 9

Name of Person Reporting <b>Moore, Kimberly A.</b>	Date of Report 05/12/2011
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**III. NON-INVESTMENT INCOME.** (Reporting individual and spouse; see pp. 17-24 of filing instructions.)

**A. Filer's Non-Investment Income**

NONE (No reportable non-investment income.)

<u>DATE</u>	<u>SOURCE AND TYPE</u>	<u>INCOME</u> (yours, not spouse's)
1. 2010	West-Thomson, Book Royalties	\$5,603.76
2.		
3.		
4.		

**B. Spouse's Non-Investment Income -** If you were married during any portion of the reporting year, complete this section.

(Dollar amount not required except for honoraria.)

NONE (No reportable non-investment income.)

<u>DATE</u>	<u>SOURCE AND TYPE</u>
1. 2010	attorney, self-employed, partner
2.	
3.	
4.	

**IV. REIMBURSEMENTS** - transportation, lodging, food, entertainment.

(Includes those to spouse and dependent children; see pp. 25-27 of filing instructions.)

NONE (No reportable reimbursements.)

	<u>SOURCE</u>	<u>DATES</u>	<u>LOCATION</u>	<u>PURPOSE</u>	<u>ITEMS PAID OR PROVIDED</u>
1.	Association of Corporate Patent Counsel	6/28/2010 - 6/30/2010	Philadelphia, Pennsylvania	Conference	Mileage, Meals, & Lodging
2.	Philadelphia Intellectual Property Law Assoc	11/18/2010	Philadelphia, Pennsylvania	PIPLA Dinner	Mileage, Meals, & Lodging
3.	University of San Diego School of Law	12/2/2010 - 12/5/2010	San Diego, California	Conference	Transportation, Meals, & Lodging
4.					
5.					

**FINANCIAL DISCLOSURE REPORT**

Page 3 of 9

Name of Person Reporting <b>Moore, Kimberly A.</b>	Date of Report 05/12/2011
---	------------------------------

**V. GIFTS.** *(Includes those to spouse and dependent children; see pp. 28-31 of filing instructions.)*

NONE *(No reportable gifts.)*

	<u>SOURCE</u>	<u>DESCRIPTION</u>	<u>VALUE</u>
1.			
2.			
3.			
4.			
5.			

**VI. LIABILITIES.** *(Includes those of spouse and dependent children; see pp. 32-33 of filing instructions.)*

NONE *(No reportable liabilities.)*

	<u>CREDITOR</u>	<u>DESCRIPTION</u>	<u>VALUE CODE</u>
1.	National City Mortgage Co.	Mortgage on Rental Property	O
2.	Citibank	Loan	K
3.			
4.			
5.			

# FINANCIAL DISCLOSURE REPORT

Page 4 of 9

Name of Person Reporting

Moore, Kimberly A.

Date of Report

05/12/2011

## VII. INVESTMENTS and TRUSTS – income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)

NONE (No reportable income, assets, or transactions.)

A. Description of Assets (including trust assets)  Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period		C. Gross value at end of reporting period			D. Transactions during reporting period				
	(1)	(2)	(1)	(2)	(1)	(2)	(3)	(4)	(5)	
	Amount Code 1 (A-H)	Type (e.g., div., rent, or int.)	Value Code 2 (J-P)	Value Method Code 3 (Q-W)	Type (e.g., buy, sell, redemption)	Date mm/dd/yy	Value Code 2 (J-P)	Gain Code 1 (A-H)	Identity of buyer/seller (if private transaction)	
1. Rental Property ( 2008 \$2,211,554.00)	F	Rent	P1	S						
2. Chevy Chase Bank Checking Account	A	Interest	M	T						
3. Citibank	D	Interest	J	T						
4. Northwestern Mutual Life Insurance	B	Dividend	J	T						
5. Northwestern Mutual Life Insurance	B	Dividend	J	T						
6. Berkshire Life Insurance	A	Dividend	J	T						
7.										
8. Fidelity Retirement Account										
9. -Fidelity Capital & Income	B	Dividend			Buy	04/12/10	J			
10.					Sold	05/05/10	M	E		
11. -Fidelity Contra		None			Sold	01/08/10	K	D		
12. -Fidelity Contra K	A	Dividend			Buy	01/08/10	K			
13.					Buy (add'l)	04/12/10	J			
14.					Sold	05/05/10	L	A		
15. -Fidelity Low PR STK		None			Sold	01/08/10	K	E		
16. -Fidelity Low PR STK K		None			Buy	01/08/10	K			
17.					Buy (add'l)	04/12/10	J			

1. Income Gain Codes: A = \$1,000 or less  
(See Columns B1 and D4)

2. Value Codes (See Columns C1 and D3)

3. Value Method Codes (See Column C2)

B = \$1,001 - \$2,500  
G = \$100,001 - \$1,000,000  
K = \$15,001 - \$50,000  
O = \$500,001 - \$1,000,000  
R = Cost (Real Estate Only)  
V = Other

C = \$2,501 - \$5,000  
H1 = \$1,000,001 - \$5,000,000  
L = \$50,001 - \$100,000  
P1 = \$1,000,001 - \$5,000,000  
P4 = More than \$50,000,000  
S = Appraisal  
W = Estimated

D = \$5,001 - \$15,000  
H2 = More than \$5,000,000  
M = \$100,001 - \$250,000  
P2 = \$5,000,001 - \$25,000,000  
T = Cash Market

E = \$15,001 - \$50,000

**Exhibit D, p.4**

**FINANCIAL DISCLOSURE REPORT**

Name of Person Reporting <b>Moore, Kimberly A.</b>	Date of Report 05/12/2011
---	------------------------------

**VII. INVESTMENTS and TRUSTS** – income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)

NONE (No reportable income, assets, or transactions.)

A. Description of Assets (including trust assets)  Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1)	(2)	(1)	(2)	(1)	(2)	(3)	(4)	(5)
	Amount Code I (A-H)	Type (e.g., div., rent, or int.)	Value Code 2 (J-P)	Value Method Code 3 (Q-W)	Type (e.g., buy, sell, redemption)	Date mm/dd/yy	Value Code 2 (J-P)	Gain Code 1 (A-H)	Identity of buyer/seller (if private transaction)
18.					Sold	05/05/10	L	B	
19. -Fidelity US BD Index	A	Dividend			Sold	01/08/10	M	C	
20. -Vang Tot Bd Mkt Inst	A	Dividend			Buy	01/08/10	M		
21.					Sold	03/15/10	M	B	
22.					Buy	04/12/10	J		
23.					Buy (add'l)	05/05/10	N		
24.					Sold	05/24/10	N	A	
25. -Fidelity US Gov't Res	A	Dividend			Buy	03/15/10	M		
26.					Sold	05/05/10	M	A	
27.									
28. Smith Barney Retirement Account * (See Part VIII)		None			Closed	07/06/10	M		
29.									
30. Charles Schwab Accounts A									
31. -Proshares Ultra Financial		None			Sold	02/02/10	K	D	
32. -Proshares Ultra Short		None	L	T	Buy (add'l)	05/05/10	K		
33. -Alltel Corp Notes	C	Interest	K	T					
34. -United Health Bonds	B	Interest	K	T					

- 1. Income Gain Codes:
  - A = \$1,000 or less
  - F = \$50,001 - \$100,000
  - J = \$15,000 or less
  - N = \$250,001 - \$500,000
  - P3 = \$25,000,001 - \$50,000,000
- 2. Value Codes
  - B = \$1,001 - \$2,500
  - G = \$100,001 - \$1,000,000
  - K = \$15,001 - \$50,000
  - O = \$500,001 - \$1,000,000
  - R = Cost (Real Estate Only)
  - V = Other
- 3. Value Method Codes
  - U = Book Value
  - C = \$2,501 - \$5,000
  - H1 = \$1,000,001 - \$5,000,000
  - L = \$50,001 - \$100,000
  - P1 = \$1,000,001 - \$5,000,000
  - P4 = More than \$50,000,000
  - S = Assessment
  - W = Estimated
- D = \$5,001 - \$15,000
  - H2 = More than \$5,000,000
  - M = \$100,001 - \$250,000
  - P2 = \$5,000,001 - \$25,000,000
  - T = Cash Market
- E = \$15,001 - \$50,000

**FINANCIAL DISCLOSURE REPORT**

Page 6 of 9

Name of Person Reporting <b>Moore, Kimberly A.</b>	Date of Report <b>05/12/2011</b>
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**VII. INVESTMENTS and TRUSTS** -- income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)

NONE (No reportable income, assets, or transactions.)

A. Description of Assets (including trust assets)  Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1)	(2)	(1)	(2)	(1)	(2)	(3)	(4)	(5)
	Amount Code 1 (A-H)	Type (e.g., div., rent, or int.)	Value Code 2 (J-P)	Value Method Code 3 (Q-W)	Type (e.g., buy, sell, redemption)	Date mm/dd/yy	Value Code 2 (J-P)	Gain Code 1 (A-H)	Identity of buyer/seller (if private transaction)
35. -Anheuser Busch Bonds	B	Interest	L	T					
36. -Ingersoll-RND	C	Interest	L	T					
37. -XTO Energy Inc	B	Interest	K	T					
38. -Profunds Ultra Latin America		None			Sold	05/05/10	J	C	
39. -Vanguard GNMA	C	Dividend	L	T					
40. -Vanguard High Yield	C	Dividend	L	T	Buy (add'l)	05/06/10	J		
41.									
42. Charles Schwab Accounts B									
43. -Schwab Stable Value Select		None			Buy	04/05/10	J		
44.					Buy (add'l)	05/04/10	J		
45.					Buy (add'l)	06/03/10	J		
46.					Buy (add'l)	06/09/10	N		
47.					Buy (add'l)	07/06/10	M		
48.					Buy (add'l)	08/03/10	J		
49.					Sold	08/17/10	O	B	
50. -Schwab Stable Value Instl III		None	O	T	Buy	08/17/10	O		
51.					Buy (add'l)	09/02/10	J		

- |  |  |  |  |  |                         |
|--|--|--|--|--|-------------------------|
| 1. Income Gain Codes:<br>(See Columns B1 and D4) | A = \$1,000 or less<br>F = \$50,001 - \$100,000<br>J = \$15,000 or less<br>N = \$250,001 - \$500,000<br>P3 = \$25,000,001 - \$50,000,000 | B = \$1,001 - \$2,500<br>G = \$100,001 - \$1,000,000<br>K = \$15,001 - \$50,000<br>O = \$500,001 - \$1,000,000 | C = \$2,501 - \$5,000<br>H1 = \$1,000,001 - \$5,000,000<br>L = \$50,001 - \$100,000<br>P1 = \$1,000,001 - \$5,000,000<br>P4 = More than \$50,000,000 | D = \$5,001 - \$15,000<br>H2 = More than \$5,000,000<br>M = \$100,001 - \$250,000<br>P2 = \$5,000,001 - \$25,000,000 | E = \$15,001 - \$50,000 |
| 2. Value Codes<br>(See Columns C1 and D3)        | Q = Appraisal<br>U = Book Value  | R = Cost (Real Estate Only)<br>V = Other   | S = Assessment<br>W = Estimated  | T = Cash Market  |                         |
| 3. Value Method Codes<br>(See Column C2)         |  |  |  |  |                         |



**FINANCIAL DISCLOSURE REPORT**

Name of Person Reporting <b>Moore, Kimberly A.</b>	Date of Report 05/12/2011
---	------------------------------

**VII. INVESTMENTS and TRUSTS -- income, value, transactions (Includes those of spouse and dependent children; see pp. 34-60 of filing instructions.)**

NONE (No reportable income, assets, or transactions.)

A. Description of Assets (including trust assets)  Place "(X)" after each asset exempt from prior disclosure	B. Income during reporting period		C. Gross value at end of reporting period		D. Transactions during reporting period				
	(1)	(2)	(1)	(2)	(1)	(2)	(3)	(4)	(5)
	Amount Code 1 (A-H)	Type (e.g., div., rent, or int.)	Value Code 2 (J-P)	Value Method Code 3 (Q-W)	Type (e.g., buy, sell, redemption)	Date mm/dd/yy	Value Code 2 (J-P)	Gain Code 1 (A-H)	Identity of buyer/seller (if private transaction)
52.					Buy (add'l)	10/04/10	J		
53.					Buy (add'l)	11/03/10	J		
54.					Buy (add'l)	12/02/10	J		
55.									

- 1. Income Gain Codes:
  - A = \$1,000 or less
  - F = \$50,001 - \$100,000
  - N = \$250,001 - \$500,000
  - P3 = \$25,000,001 - \$50,000,000
- 2. Value Codes  
(See Columns C1 and D3)
  - J = \$15,000 or less
  - O = \$500,001 - \$1,000,000
- 3. Value Method Codes  
(See Column C2)
  - Q = Appraisal
  - U = Book Value
  - R = Cost (Real Estate Only)
  - V = Other
- C = \$2,501 - \$5,000
  - H1 = \$1,000,001 - \$5,000,000
  - L = \$50,001 - \$100,000
  - P1 = \$1,000,001 - \$5,000,000
  - P4 = More than \$50,000,000
  - S = Assessment
  - W = Estimated
- D = \$5,001 - \$15,000
  - H2 = More than \$5,000,000
  - M = \$100,001 - \$250,000
  - P2 = \$5,000,001 - \$25,000,000
  - T = Cash Market
- E = \$15,001 - \$50,000

**FINANCIAL DISCLOSURE REPORT**

Page 8 of 9

Name of Person Reporting

Moore, Kimberly A.

Date of Report

05/12/2011

**VIII. ADDITIONAL INFORMATION OR EXPLANATIONS.** *(Indicate part of report.)*

Part VII.

Smith Barney Retirement Account:

This is a retirement account that doesn't allow individual control of investment selections. This account was rolled over into Charles Schwab Accounts B - Schwab Stable Value Select on 7/6/2010.

**FINANCIAL DISCLOSURE REPORT**

Page 9 of 9

Name of Person Reporting

Moore, Kimberly A.

Date of Report

05/12/2011

**IX. CERTIFICATION.**

I certify that all information given above (including information pertaining to my spouse and minor or dependent children, if any) is accurate, true, and complete to the best of my knowledge and belief, and that any information not reported was withheld because it met applicable statutory provisions permitting non-disclosure.

I further certify that earned income from outside employment and honoraria and the acceptance of gifts which have been reported are in compliance with the provisions of 5 U.S.C. app. § 501 et. seq., 5 U.S.C. § 7353, and Judicial Conference regulations.

Signature: *s/ Kimberly A. Moore*

**NOTE: ANY INDIVIDUAL WHO KNOWINGLY AND WILFULLY FALSIFIES OR FAILS TO FILE THIS REPORT MAY BE SUBJECT TO CIVIL AND CRIMINAL SANCTIONS (5 U.S.C. app. § 104)**

Committee on Financial Disclosure  
Administrative Office of the United States Courts  
Suite 2-301  
One Columbus Circle, N.E.  
Washington, D.C. 20544

# **EXHIBIT E**



twitter

Email Print Reprints Comments

## ★ Fidelity's Contrafund snaps up stakes in Facebook at \$63 billion valuation

Silicon Valley / San Jose Business Journal by Tim McLaughlin  
Date: Thursday, June 2, 2011, 7:13am PDT - Last Modified: Thursday, June 2, 2011, 8:42am PDT

Fidelity's Contrafund snapped up nearly 3 million Class B shares of Facebook Inc., paying \$25 each in an investment that values the privately held, venture-backed social media company at nearly \$63 billion.

Run by [William Danoff](#), the \$80 billion Contrafund is Boston-based Fidelity's largest stock fund. The fund reported holding 2.97 million Class B Facebook shares valued at \$74.2 million at the end of March, according to a U.S. regulatory filing. That puts Palo Alto-based Facebook's value, with an estimated 2.5 billion shares outstanding, at \$62.5 billion.

A Fidelity spokesman told Bloomberg News that more than 30 Fidelity funds held Facebook shares as of April 30. No fund had more than 0.15 percent of its assets invested in Facebook, Bloomberg reported, quoting the Fidelity spokesman.

Fidelity also reported investments in San Francisco-based [Zynga Game Network Inc.](#), the creator of Facebook games such as Farmville and Mafia Wars. The Contrafund reported holding 2.93 million shares of Zynga convertible preferred stock valued at \$82.24 million. That works out to \$28.06 per share.

The Contrafund also owned the convertible preferred stock of a third venture-backed company, [Groupon Inc.](#), holding 2.63 million shares worth nearly \$83 million. That put Groupon's value at \$31.59 per share.

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# Fidelity's Danoff Bets On Facebook, Zynga

By Miles Weiss - 2011-06-01T19:28:47Z

William Danoff, the manager of Fidelity Investment's largest stock fund, established a toehold in the social-networking industry during the first quarter by acquiring shares of Facebook Inc. and Zynga Inc.

Danoff's Fidelity Contrafund invested \$74 million in Facebook Class B common shares and \$82 million in Zynga convertible preferred stock, according to a quarterly report the fund filed yesterday with the U.S. Securities and Exchange Commission. Danoff, 50, has managed the \$80 billion Fidelity Contrafund since September 1990.

Fidelity and rivals T. Rowe Price Group Inc. and Capital Group Cos. are snapping up stakes in social-networking companies before they go public, after the mutual-fund industry avoided privately traded stocks for years. Boston-based Fidelity and Baltimore's T. Rowe Price may recognize an opportunity as a growing percentage of clients access their fund holdings through Facebook, said Geoff Bobroff, a fund consultant in East Greenwich, Rhode Island.

"We are seeing more of these fund companies embrace and adopt social media as something they are providing to their shareholders," Bobroff said today in an interview. "It's somewhat logical they would think there is value."

Vincent Loporchio, a spokesman for Fidelity, said more than 30 of its funds held Facebook shares as of April 30. No fund had more than 0.15 percent of its assets invested in Facebook, according to Loporchio, who declined to comment further.

T. Rowe, American

T. Rowe Price reported in April that 19 of its mutual funds invested at least \$191 million during the first quarter in Facebook, the Palo Alto, California-based owner of the world's most popular social-networking website. American Funds Growth Fund of America, a \$168 billion stock fund overseen by Los Angeles-based Capital Group, invested \$66.5 million on Feb. 18 in Zynga, the largest maker of games on Facebook, according to an April 29 filing.

Fidelity Contrafund (FCNTX) averaged annual gains of 7 percent over the past 10 years to beat 99 percent of its large-capitalization growth stock peers, according to Chicago-based research firm Morningstar Inc.

Danoff's fund aims to invest in stocks whose value hasn't been fully recognized by the public. At the end of last year, it had about 33 percent of net assets in information technology shares, including a \$5.3 billion stake in Apple Inc. (AAPL) and \$3.8 billion in Google Inc.

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The fund acquired 2.97 million Facebook shares during the first quarter for about \$25 each, the same price T. Rowe Price reported paying, according to yesterday's filing. Facebook in January said it had raised \$1.5 billion from investors led by [Goldman Sachs Group Inc. \(GS\)](#), placing a \$50 billion valuation on the closely held business at the time.

## Convertible Preferred Shares

Fidelity Contrafund also bought its Zynga convertible preferred stock on Feb. 18, according to yesterday's filing. Zynga held talks in February with T. Rowe Price and Fidelity about selling shares at a price that implied the company's market value was close to \$10 billion, two people familiar with the situation said at the time.

Facebook and Zynga last year laid the groundwork for initial public offerings by imposing fees on employees who sell their shares. Zynga may file for an IPO by the end of June, a person familiar with the plans said last week.

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Facebook Inc. logos are displayed on computer screens. Photographer: Daniel Acker/Bloomberg





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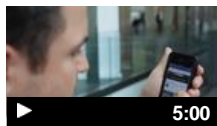
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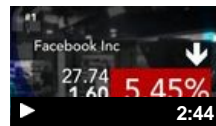
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**Citation links updated Mar. 13, 2014:** On Fri. Mar. 7, 2014, the document service *Scribd* removed all documents cited herein that had been accessible from *Scribd* for two years. Some of the documents had over 10,000 reads. *Scribd* principals Trip Adler and Jared Friedman have Harvard associations with Mark Zuckerberg. The documents have been moved and the links updated herein. No content changes have been made.

**Docketing irregularities:** On Aug. 7, 2012, [Clerk staffer, Valerie White](#), told Marion, Ohio caller Steve Williams that the court had no record of receiving this brief on Jul. 10, 2012, and had never docketed it for public review.

When Ms. White was shown the USPS delivery receipt, she seemed puzzled and promised to investigate. The next day, her phone extension was disconnected, and she has not returned follow-up phone calls from Mr. Williams.

Nonetheless, this *amicus curiae* brief was accepted at **10:39am on Jul. 10, 2012**, never docketed, and denied under the signature of "Jan Horbaly Clerk" on **Jul. 11, 2012**, less than 24 hours later.

[CLICK HERE to see the delivery receipt and Horbaly denial attached.](#)

GREEN BRIEF

2011-1366

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United States Court Of Appeals  
for the  
Federal Circuit

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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*

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

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July 10, 2012

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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

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**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**
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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.<sup>1</sup> 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.

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<sup>1</sup> [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 [2<sup>nd</sup> Law of Thermodynamics](#).<sup>2</sup> 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.

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<sup>2</sup> 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.<sup>3</sup> 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.

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<sup>3</sup> 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,<sup>4</sup> 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-

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<sup>4</sup> 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”).

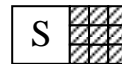
An illustration of Facebook “scintilla” may help clarify the legal question. Here “S” represents a scintilla of *deficient* Facebook evidence:

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

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**

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”);<sup>5</sup>

**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

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<sup>5</sup>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”);<sup>6</sup>

**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

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<sup>6</sup> [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.

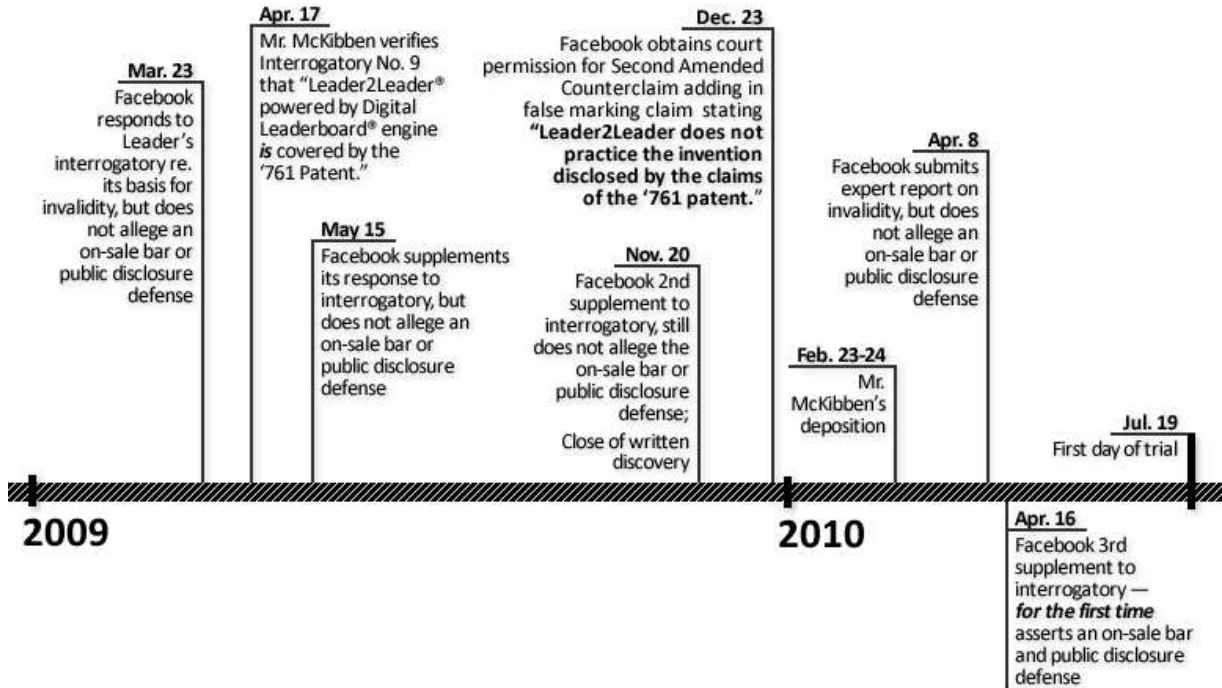
**V. This Court Accepted Substantially Prejudicial Conduct In The Lower Court.**

**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, 3<sup>rd</sup> 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.

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. Greenberg 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.”<sup>7</sup> However, a conflicting witness claims that Mr. Zuckerberg’s claim is false.<sup>8</sup> 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.<sup>9</sup> 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

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<sup>7</sup> [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.

<sup>8</sup> 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).

<sup>9</sup> [Id., No. 32](#).

copy of Leader's White Papers in 2003-2004, according to Leader attorneys.<sup>10</sup> 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.<sup>11</sup> 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*.<sup>12</sup> Another witness states that another heretofore unidentified person named "Jeff" was helping Mr. Zuckerberg, in late 2003<sup>13</sup> thus contradicting his *ConnectU* testimony where he claims to have done everything all by himself.<sup>14</sup>

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<sup>10</sup> [Tr. 1107:8, Heidi Keefe](#), Judge's Conference, Jul. 24, 2009, Doc. No. 77.

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

<sup>12</sup> *Detwiler* (fn. 9 above), [Aff. of David London, No. 58](#).

<sup>13</sup> [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").

<sup>14</sup> [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.<sup>15</sup>

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.”<sup>16</sup> 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.<sup>17</sup> This

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<sup>15</sup> [Id., Tr. 36:22](#) (Zuckerberg: “I’m sure there are other things”).

<sup>16</sup> [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.”);

<sup>17</sup> [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 litigation.<sup>18</sup> This **predatory obfuscation tactic**<sup>19</sup> 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

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

<sup>18</sup> [Tr. 1106:13, Paul Andre](#), Judge's Conference, Jul. 24, 2009, Doc. No. 77.

<sup>19</sup> 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.<sup>20</sup> 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

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<sup>20</sup> [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.<sup>21</sup>

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

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<sup>21</sup> 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*



## **APPENDIX**

### **CURRICULUM VITAE**

Lakshmi Arunachalam, Ph.D.  
*Amicus Curiae*

---

Dr. Lakshmi Arunachalam is a thought leader, inventor and pioneer in Internet multimedia web applications. She is Founder, Chairman and CEO of WebXchange, Inc, an online web applications platform for real-time exchange of multimedia information on the net, connecting users and devices with multimedia content owners and applications on the net. She holds key Internet patents on Internet Channel Control and web applications. In recent times, she has been focusing on patent licensing.

Dr. Arunachalam is also Chairman and Founder of Pi-Net International, Inc., a professional services company specializing in IT, IP, software, networking, security and Internet-related technologies. Dr. Arunachalam is also Chairman and Founder of e-pointe, Inc, Nithya Innovations, Inc. and WebXmagnet, Inc.

Prior to her current positions, Dr. Arunachalam directed network architecture at Sun Microsystems, IBM, AT&T Bell Labs, Carnegie Mellon Andrew File System and NSFNET. She held leadership positions in the IEEE802 and IEEE

POSIX X.500 standards bodies. She also worked at NASA Johnson Space Center with MITRE Corporation.

In addition to her patent and intellectual property work and entrepreneurial ventures, Dr. Arunachalam has taught at the University of Toronto and University of Madras. Her courses study the effects of the Internet and media technology on society. She has also taught courses in physics and computer networks, as well as refereed for computer journals. Dr. Arunachalam was a post-doctoral fellow at Rice University, Houston, Texas. She received her Ph.D. in Electrical Engineering from Salford University, Manchester, England, and M.S. in Physics from Simon Fraser University, British Columbia, Canada, graduate courses in Computer Science from University of Houston, and a B.S. and M.S. in Physics from University of Madras, India. She has published several books and papers in computer networking and holds patents, namely U.S. Patent Nos. [5,778,178](#); [6,212,556](#); [7,340,506](#); [5,987,500](#); [7,930,340](#); [8,037,158](#); and [8,108,492](#). She also has patents pending, namely U.S. Patent Application Nos. 12/628066; 12/628,068 (Notice of Allowance issued); 12/628,069; 12/932,758; and 13/199,077.

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**CERTIFICATE OF SERVICE**

Pursuant to Fed. R. App. P. 31(b), copies of the foregoing BRIEF OF *AMICUS CURIAE* LAKSHMI ARUNACHALAM, PH.D. IN SUPPORT OF LEADER TECHNOLOGIES' PETITION FOR REHEARING AND REHEARING EN BANC in green cover pursuant to Fed. R. App. P. 28.1(d) including a CERTIFICATE OF INTEREST and ENTRY OF APPEARANCE, were served on the following recipients by overnight mail:

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Fax: (650) 849-7400

*Attorney for Defendant-Appellee*

A copy of the foregoing was also provided to Americans for Innovation at scribd/amer4innov for publication.

*/S/*

---

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laks@webxchange.com

*for Amicus Curiae*

Lakshmi Arunachalam, Ph.D.

July 10, 2012

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION,  
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1. This BRIEF OF *AMICUS CURIAE* LAKSHMI ARUNACHALAM, PH.D. IN SUPPORT OF LEADER TECHNOLOGIES' PETITION FOR REHEARING AND REHEARING EN BANC complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) or Federal Rule of Appellate Procedure 28.1(e). 2. The brief contains 6425 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) or Federal Rule of Appellate Procedure 28.1(e) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally-spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

Any noncompliance with the aforementioned Rules is purely inadvertent and will be corrected immediately upon notification.

July 10, 2012

/S/  
\_\_\_\_\_  
Signature

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

---

**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

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LEADER TECHNOLOGIES, INC.,

*Plaintiff-Appellant,*

v.

FACEBOOK, INC.,

*Defendant-Appellee.*

---

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*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*

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**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/

---

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laks@webxchange.com  
*for Amicus Curiae*  
Lakshmi Arunachalam, Ph.D.

**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:

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*Attorney for Plaintiff-Appellant*

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*Attorney for Defendant-Appellee*

/S/

---

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laks@webxchange.com  
*for Amicus Curiae*  
Lakshmi Arunachalam, Ph.D.

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# 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.

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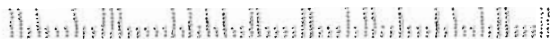
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Washington,



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

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*Attorney for Plaintiff-Appellant*

*Two (2) copies to:*  
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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/

---

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laks@webxchange.com  
*for Amicus Curiae*  
Lakshmi Arunachalam, Ph.D.

July 27, 2012

**Lakshmi Arunachalam, Ph.D.**

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

July 27, 2012

Sent by Express Mail overnight  
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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: (1) Motion for Leave to File Amicus Curiae Brief, mailed July 10, 2012 and received on July 11, 2012 at 10:52 AM and (2) 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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FedEx Office is your destination for printing and shipping.

249 S CALIFORNIA AVE  
Palo Alto, CA 94306  
Tel: (650) 328-3381

7/27/2012 6:07:18 AM PST  
Team Member: Maurice L.  
Customer: lakshmi arunachalam

SALE

book	Qty 10	82.50	
BW 1S Copy/Print	1100 @	0.0750	T
000001 Reg. Price	0.12		
Price per piece	8.25		
Regular Total	132.00		
Discounts	49.50		
<b>Sub-Total</b>		<b>82.50</b>	
Tax		6.92	
Deposit		0.00	
<b>Total</b>		<b>89.42</b>	
Visa (S)		89.42	
Account: 3970			
Auth: 027915 (A)			
<b>Total Tender</b>		<b>89.42</b>	
Change Due		0.00	
<b>Total Discounts</b>		<b>49.50</b>	



*Lakshmi Arunachalam*



EI 081023653 US

**ORIGIN (POSTAL SERVICE USE ONLY)**

PO ZIP Code 94025  
Day of Delivery  
Date Accepted 7/27/12  
Time Accepted 11:00 AM  
Flat Rate  or Weight  lbs. ozs.  
Int'l Alpha Country Code  
Sched. Date of Delivery  
Sched. Time of Delivery  
COD Fee  
Return Receipt Fee  
Insurance Fee  
Acceptance Emp. Initials

FROM: (PLEASE PRINT) PHONE (650) 854 3393  
Dr. Lakshmi Arunachalam  
222 Stanford Avenue  
Menlo Park, CA 94025

**FOR PICKUP OR TRACKING**  
Visit [www.usps.com](http://www.usps.com)  
Call 1-800-222-1811



UNITED STATES POSTAL SERVICE®  
DELIVERY (POSTAL USE ONLY)

Post Office To Addressee

Customer Copy  
Label 1-B, March 2004

Delivery Attempt  
Mo. Day Time  
Delivery Date  
Employee Signature  
Time AM PM  
Employee Signature AM PM

**CUSTOMER USE ONLY**

PAYMENT BY ACCOUNT  
Express Mail Corporate Acct. No.  
Federal Agency Acct. No. or Postal Service Acct. No.  
NO DELIVERY  
Weekend  Holiday   
Mailing Signature

TO: (PLEASE PRINT) PHONE  
Clerk of Court  
U.S. Court of Appeals for the Federal  
717 Madison Place, N.W.  
Room 401  
Washington, D.C.



ZIP + 4 (U.S. ADDRESSES ONLY. DO NOT USE FOR FOREIGN POSTAL CODES.)  
2 0 4 3 9 +  
FOR INTERNATIONAL DESTINATIONS, WRITE COUNTRY NAME BELOW.

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

The UPS Store - #2388  
 325 Sharon Park Dr  
 Menlo Park, CA 94025  
 (650) 233-1953

07/27/12 10:25 AM

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
<b>Total:</b>			<b>\$126.83</b>

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

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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 83296622856749888327 018 Items  
 CSH: Helen Tran: 8573 Reg: 001

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 WIN \$1000

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 Refunds for guaranteed services only  
 Thank you for your business

\*\*\*\*\*  
 \*\*\*\*\*  
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