2011-1366

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LEADER TECHNOLOGIES, INC.,

Plaintiff-Appellant,

v.

FACEBOOK, INC.,

Defendant-Appellee.

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

RESPONSE TO THE FEDERAL CIRCUIT BAR ASSOCIATION'S REQUEST FOR REISSUE OF ORDER AS PRECEDENTIAL PURSUANT TO FEDERAL CIRCUIT RULE 32.1(e) BY *AMICUS CURIAE* LAKSHMI ARUNACHALAM, PH.D.

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.

Sep. 17, 2012

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Leader Tech v. Facebook

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**

To be clear, *Amicus Curiae* has no financial interest in either party. The interest of *Amicus Curiae* is in stopping the destruction of the patent property rights of small inventors which is occurring as a result of the precedents being set in this case.

Sep. 17, 2012

/s/
Signature

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

OTHER RESOURCES

MOTIONS

Innovation. Accessed Sep. 15, 2012 <http://www.scribd.com/doc/99816440/Brief-Of-Amicus-Curiae-Lakshmi-Arunachalam-Ph-D-In-Support-Of-Leader-Technologies-Petition-For-Rehearing-And-Rehearing-En-Banc-Filed-Jul-10-2012?in_collection=3701914>.

Motion for Reconsideration, Re. *Amicus Curiae* Lakshmi Arunachalam PhD Brief, 18 Jul. 2012. *Leader Tech v. Facebook*, Case No. 2011-1366 (Fed. Cir.). *Americans For Innovation*. Accessed Sep. 15, 2012 <http://www.scribd.com/doc/100437330/Motion-for-Reconsideration-Re-Amicus-Curiae-Lakshmi-Arunachalam-PhD-Brief-18-Jul-2012?in_collection=3701914>.

Renewed Motion for Leave To File *Amicus Curiae* Lakshmi Arunachalam, Ph.D. Brief, Jul. 27, 2010 *Leader Tech v. Facebook*, Case No. 2011-1366 (Fed. Cir.). *Americans For Innovation*. Accessed Sep. 15, 2012 <http://www.scribd.com/doc/101191619/Renewed-Motion-for-Leave-To-File-Amicus-Curiae-Lakshmi-Arunachalam-Ph-D-Brief-Jul-27-2010-Leader-v-Facebook-CLERK-S-COPY-WITH-EXHIBITS?in_collection=3701914>.

Motion For Relief From Judgment And Order Pursuant To Rules 60(a) And **60(b)** For Newly Discovered Evidence, Mistake, Fraud, Surprise, Misrepresentation, Misconduct And The Judgment Is Void in *Leader v. Facebook* by Amicus Curiae Lakshmi Arunachalam PhD, Sep. 1, 2012. *Leader Tech v. Facebook*, Case No. 2011-1366 (Fed. Cir.). *Americans For Innovation*. Accessed Sep. 15, 2012 <http://www.scribd.com/doc/104546197/Motion-For-Relief-From-Judgment-And-Order-Pursuant-To-Rules-60-a-And-60-b-For-Newly-Discovered-Evidence-Mistake-Fraud-Surprise-Misrepresentation?in_collection=3701914>.

Motion to Compel Each Member Of The Federal Circuit To Disclose Conflicts Of Interest in *Leader v. Facebook* by Amicus Curiae Lakshmi Arunachalam, PhD, Sep. 5, 2012. *Leader Tech v. Facebook*, Case No. 2011-1366 (Fed. Cir.). *Americans For Innovation*. Accessed Sep. 15, 2012 <http://www.scribd.com/doc/104894533/Motion-to-Compel-Each-Member-Of-The-Federal-Circuit-To-Disclose-Conflicts-Of-Interest-in-Leader-v-Facebook-by-Amicus-Curiae-Lakshmi-Arunachalam-PhD>.

RESPONSE TO REQUEST FOR REISSUE ORDER AS PRECEDENTIAL BY *AMICUS CURIAE* LAKSHMI ARUNACHALAM, PH.D.

1. Petition for public hearing and disqualification

Amicus Curiae Lakshmi Arunachalam, Ph.D. ("Dr. Arunachalam") respectfully petitions/requests that this Court invite public comment and conduct a hearing (collectively "Hearing") and recuse itself due to conflicts of interest before the Court rules on The Federal Circuit Bar Association ("FCBA" or "Bar") request to have the Aug. 10, 2012 order ("Order") be reissued as precedential ("Request"). Dr. Arunachalam received notification of the Request pursuant to Federal Circuit Rule 32.1(e) and therefore responds accordingly; whereby she "must be given an opportunity to respond." *Leader Tech v. Facebook*, No. 2011-1366 (Fed. Cir.).

Dr. Arunachalam has sought and been unable to obtain instructions from the Court on response time and page-limitation, therefore Dr. Arunachalam relies upon Fed. Cir. R. 27(b)("preferred organization of a response comparable to . . . "a motion") and Fed. Cir. R. 27(d)("Length of Motion" citing Fed. R.App. Proc. 27(d)(2)(must not exceed 20 pages) or 27(d)(1)(E)(2)(the formatting of the Fed. Cir. Rules pp. 48-49 is ambiguous on the numbering of page limitation rule).[1] The number of copies appears to be guided not by Fed. R.App. Proc. 27(d)(3)(3 copies)

[1] *See* Rule 27. Motions. "Rules of Practice." United States Court of Appeals for the Federal Circuit, p. 47 <http://www.cafc.uscourts.gov/images/stories/rules-of-practice/rules.pdf>.

but rather by Fed. Cir. R. 32.1(e)("[a]n original and 6 copies"). Rule 32.1(e) contains no guidance on the page-limit for a response, therefore, absent guidance from the Court, it is reasonably presumed to be the page length for a motion cited above.

Certificate of Interest rules appear to be guided by (a) FORM 9, Certificate of Interest; (b) Fed. Cir. R. 8, p. 16 ("Practice Notes, CERTIFICATE OF INTEREST"); (c) Fed. Cir. R. 47.4 ("Certificate of Interest"); and (d) Fed. Cir. R. 26.1 ("Corporate Disclosure Statement")

Dr. Arunachalam, an expert in the field of systems workflow, wishes to point out that the rules are unnecessarily *ambiguous* and can be so easily manipulated in order to disqualify a motion by "reinterpreting" the rules *capriciously*. The rules are not objective; they have only the *appearance* of objectivity. The apparent strategy of their discombobulated organization is to interpret them in ways that reward friends and punish enemies. Such is the state of affairs that "the average person on the street" has come to distrust so deeply about the legal system, and as exemplified by the travesty of justice occurring in this *Leader v. Facebook* case. *Foman v. Davis*, 371 U.S. 178, 181-82 (Supreme Court 1962) which directs to assess the motion on its merits and not dismiss it for mere procedural technicalities.

For example, the rules in this Court permit the Clerk of Court judicial powers in *breach* of the Federal Rules of Appellate Procedure ("FRAP"). The ambiguity between FRAP and the Federal Circuit Rules is quite apparent:

The Federal Rules of Appellate Procedure 45(a) states:

> Neither the clerk nor any deputy clerk may practice as an attorney or counselor in any court while in office.

However, the Federal Circuit Rule 45(a) states:

> The clerk may dismiss an appeal for a failure to follow the Federal Rules of Appellate Procedure or these Federal Circuit Rules.

The "average person on the street" can only view this ambiguity as intentional so as to give the Clerk of Court almost dictatorial powers to act as not only an attorney, but as a sort of unaccountable monarch over the Federal Circuit. When these supra-judicial powers are combined with the legion of procedural ambiguities embedded in the Federal Circuit Rules, we see the kinds of cronyism being exposed in this case.

These injustices are discussed further herein with regard to the implications of the Request upon precedent.

---

2. The Request encourages judges to conceal conflicts; these circumstances beckon for public, unbiased scrutiny

---

Approval of the Request without at least a Hearing sets a harmful precedent. It would encourage judges facing conflict of interest allegations to issue orders (like

this Order) excusing their conduct while *concealing* the facts that triggered the allegations. In short, it will allow a court to use the court's own procedures to hide from accountability for conflicts of interest. The rules of equity and fairness were never intended to allow wrongdoers to hide behind them. Instead, they were designed to give accuser and accused alike a fair hearing. If this Request is made precedential, a Court can refuse to docket a motion alleging judicial conflicts (as was done here), then issue an order to cover up the sins—all without public scrutiny.[2] The Request is seeking a "comfort" ruling excusing the proven conflicts of interest in this case without having to address them specifically. No rule or act of the Court should be used for such an inequitable purpose.

Logically, since the Clerk of Court has struck down every one of Dr. Arunachalam's un-docketed motions for alleged procedural noncompliance (in breach of the Supreme Court's ruling in *Foman*), then this Court Order exists in no-man's land since, according to the Clerk's own actions—no underlying motion exists to which this Order corresponds. It also begs the question as to why the Federal Circuit Bar Association has become involved over an *un-docketed, supposedly nonexistent* motion.

[2] Fed. Rule Civ. Proc. 5(e) ("The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices"); 28 U.S.C.A. § 2254 Rule 3(b) (Supp. 2005) ("The clerk must file the petition and enter it on the docket") cited in *Pace v. DiGuglielmo*, 544 US 408 (Supreme Court 2005) , fn. 5.

Indeed, the more the Court and the Bar attempt to cover up their conflicts of interest in this case, the more those conflicts beckon for scrutiny. *Sub*.

3. The Request encourages more violations of constitutional due process in the secrecy of chambers

This is not the first time this Court has acted by *secret fiat* in this case. The Court ignored Leader Technologies' clear and convincing evidence appeal, and instead created, *in secret*, a novel substantial evidence argument, replete with new evidence not heard by the jury. Leader was given no hearing to confront these new allegations. Further, the Court also *ignored* its own opinion which *invalidated* the last piece of Facebook evidence subject to jury interpretation—disbelieved testimony as ostensible evidence of an opposite reality (allowed by the district court) versus discarding that testimony (pursuant to the jury instructions). In short, this Court is now sustaining an unproven verdict in Facebook's favor by its own *secret* hand. This Fifth and 14th Amendment Constitutional violation is scandalous.

The role of the Federal Circuit is supposed to be corrective. It is not a trial court, yet this Court is acting like one. If the Court is to be allowed to fabricate new arguments and evidence *in the secrecy of chambers*, then hearings on such activity are paramount—before decisions are rendered. Otherwise, such decisions violate

constitutional due process. The right to confront one's accuser is a cornerstone of our American democracy.[3]

4. The Order contains false statements; bad facts make bad law

Propriety dictates that an Order that contains false statements made by the Court should not be made precedential since "'bad facts make bad law.'" *Doggett v. United States*, 505 US 647 (Supreme Court 1992) at 659.

For example, the Order states that Dr. Arunachalam did not include "a certification that the purported amicus has no financial ties to any party in the case." **This statement is false**. Dr. Arunachalam's *amicus curiae* brief contains a certification on page "ii" which states that she has no financial ties to the parties. The Order also states "[n]o certification appears in any brief Dr. Arunachalam filed with this court." **This is a false statement**. Certifications were contained in *every* brief. Of course, the Court can play on both sides of this ball since none of the briefs were docketed; so if called on the carpet for this statement, the Court can claim that there were no certifications because the Clerk *did not see* any certifications in the briefs that he *did not docket*. The convolutions mount. The evident purpose of this statement is to imply without proof that Dr. Arunachalam

[3] *See* "Judicial Hyperactivity: The Federal Circuit's Discomfort with Its Appellate Role; Rooklidge, William C.; Weil, Matthew F." Univ. of California, Berkley, 15 *Berk. Tech. L.J.* 725 (2000). Accessed Aug. 4, 2012.

did not follow the Rules. *See* p. 2 (the "appearance of objectivity" in the Rules). *See* http://www.scribd.com/amer4innov to read a copy of the un-docketed briefs that contain the Certificate of Interest in each motion.

The Order also states that "[a]n earlier such *amicus curiae* was denied entry by the court as moot because the court had already denied Leader's petition for rehearing." **This false statement is proved on national television**. Dr. Arunachalam's *amicus curiae* brief was denied on the same day it arrived—July 11, 2012. However, Leader's petition was not denied until July 16, 2012.[4] The *amicus curiae* brief could not have been mooted by a denial that does not exist.[5]

Remarkably, the violation of Leader Technologies' Due Process Rights, and the uncovering of judicial conflicts of interest like investments in Facebook, has received no response from this Court other than "denied." In an attempt to correct the Court's misperception of this case, Dr. Arunachalam also filed a motion for reconsideration, renewed motion for leave to file, motion to compel disclosure of conflicts and a 60(b) motion. All denied without explanation except for the 60(b) motion which has not been ruled upon (or docketed).

---

[4] Evidence of the almost exact July 16, 2012 timing of the Court's denial was caught on a nationally televised Fox Business interview with Leader Technologies' chairman and founder Michael McKibben. *See* Shibani Joshi. Interview with Michael McKibben, Chairman & Founder of Leader Technologies, Inc. *Fox Business*, Jul. 16, 2012. Accessed Aug. 30, 2012.

[5] A copy of Dr. A's un-docketed amicus curiae brief that is the subject of the Request is available at Americans For Innovation <http://www.scribd.com/amer4innov>.

By contrast, the uncovering of judicial conflicts of interest has generated a four-page Order and Bar Request. When the Court was asked to disclose its conflicts of interest, the Court refused.[6] Therefore, propriety dictates that this Court disqualifies itself from any decision on the Request.

5. Integrity is a moral principle, not a precedential rule

Dr. Arunachalam agrees with the Bar that the public record is scant on the specific subject of judicial conflicts of interest questions raised by bar and bench activities. However, the record may not need further clarification since ethical decisions are individual judgment calls. Integrity is a moral principle, not a precedential rule. To the average person on the street, the socialization of bench and bar generally does only bad things for justice. Fewer bench-bar events may be the better way, not more; and especially not more after being bolstered by the one-side-ness of this Request.

Frankly speaking, these Bar-Bench events provide an atmosphere conducive to certain types of behavior, and it would be naïve to pretend that such behavior does not take place, even if it is not universal among attendees. Attorneys attend to try and "get on the judge's good side," or influence a case, or schmooze political and judicial candidates, and judges attend to make sure the prospects for post

[6] Motion to Compel Each Member Of The Federal Circuit To Disclose Conflicts Of Interest, sent Sep. 5, 2012, rec'd Sep. 6, 2012.

judicial employment are plentiful. Such events also provide the opportunity for more nefarious deals, bribes, coercion and blackmail. Clients, justice and public confidence are always left holding the short end of the stick. The bar-bench altruists turn a blind eye to all such possibilities, or speak about it in such flowery, non-committal, ivory tower language that the criticism fails to be effective.

The moral high ground for bench and bar is already well known and needs no new precedent. The Holy Bible's Book of Exodus 20:15-16 (NASB) advises:

You shall not steal.

You shall not bear false witness against your neighbor.

Dr. Arunachalam generally agrees with the Bar that the interests of the legal community can be served by the participation of judges in a wide variety of professional development and community activities. But this is by no means a given when considering the opportunities for dishonesty that also emerge in such events. By contrast, an honest judge is a pillar in a democratic society with whom every freedom-loving American wants to interact. On the other hand, the Request should not become a license for unscrupulous attorneys and judges. A judge's individual conduct at an event must be guided by the cautionary language of the statute advising to "avoid the appearance of impropriety." Arguably, no bright line rule works beyond "do the right thing."

The Request and Order appear to be an attempt to provide some sort of general blessing for the extra-judicial relationships among members of this Court with Facebook principals, powerful Facebook investors and Facebook's attorneys, without a sober evaluation of the contexts of these encounters, or how such contacts may be viewed by "the average person in the street," and how these encounters have biased this case.

6. Judicial conflicts of interests should not be swept under the carpet

Dr. Arunachalam cites judicial disclosure statements and U.S. Securities and Exchange Commission records *proving* that at least two of the three judges in this case hold Facebook stock and stood to benefit personally from a decision favorable to Facebook. Dr. Arunachalam also cites C-SPAN-2 video showing Clerk of Court Jan Horbaly *hosting* Facebook's attorney Thomas Hungar on the subject of "The Federal Circuit, Looking Ahead."[7] Such activity is more than incidental professional contact—it is *active collaboration* on the functioning of the Federal Circuit; the court that provides livelihoods to the judges and clerk in this case. This conflict demanded disclosure.

Dr. Arunachalam also cited the extensive Congressional record of the professional activity of Leader's former director and witness Professor James P.

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

Chandler.[8] The record shows that Chief Judge Randall R. Rader had substantive, long-time contact with Professor Chandler, first as his George Washington University law professor, then as chief counsel to Senator Orrin Hatch's Judiciary Committee to which Professor Chandler consulted specifically on intellectual property matters germane to this case. Such activity is more than "innocent" professional contact. The Request is attempting to sweep all these conflicts under the rug inappropriately.

If the Order becomes precedent, then every judge, good, mediocre and bad, will cite this precedent as an excuse. A reasonable person can only conclude that this Request is an attempt to bless this Court's Facebook conflicts and would make bad law.

7. Bench-Bar interests are not hindered by ethical principles

The Request rightly says this is a "subject of general interest to bar and bench alike." However, the Request then focuses the discussion on a misleading discussion of the first comment of Canon 4 where the Request *omits* the cautionary language that followed the cited element (*omitted* section underlined):

> Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal

[8] Renewed Motion for Leave to File *Amicus Curiae* Brief, pp. 6-10.

> system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and **impartiality is not compromised**, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law. Subject to the same limitations, judges may also engage in a wide range of non-law-related activities (emphasis added).

Canon 4 contains other cautionary language about financial conflicts as well (this underlined section was also *omitted* in the Request):

> (D) Financial Activities . . . A judge . . . should refrain from financial and business dealings that exploit the judicial position . . . or continuing business relationships with lawyers or other persons likely to come before the court on which the judge serves.

8. Federal Circuit Bar, too, fails to disclose conflicts of interest

A reasonable person can only believe that the Federal Circuit Bar Association is advocating new precedent based upon a skewed application of Canon 4 in order to assist both the Bar and the Court in avoiding disclosure of *massive* conflicts of interest among them in this case.

A member of the Bar's Board of Directors[9] is a significant shareholder in Facebook—Microsoft Corporation. Microsoft is a 10% owner in Facebook.[10] Microsoft received $246,422,355 from the sale of its Facebook stock in the

[9] Andrew Culbert, Esquire, Microsoft Corporation. Fed. Cir. Bar Assoc. Accessed Sep. 15, 2012 <http://www.memberconnections.com/olc/pub/LVFC/cpages/misc/contact.jsp>.

[10] Microsoft sold $246,422,355 worth of Facebook shares on May 22, 2012 **during the pendency of this case**. <http://www.secform4.com/insider-trading/789019-1.htm>.

Facebook IPO—**during the pendency of this case**. Propriety dictated that the Bar disclose this evident conflict of interest.

The ethical golden thread sewn into the fabric of Canon 4 is the cautionary proviso "[t]o the extent that . . . impartiality is not compromised."

---

9. The totality of the circumstances is not "innocent"

The Request cites *In re Aguinda*, 241 F.3d 194, 205 (2nd Cir. 2001) discussing professional development events. The Canon does not prevent such attendance nor do the facts in this case apply. *Aguinda* discusses "events of an entirely **innocent** nature" (emphasis added). Dr. Arunachalam agrees but contends the facts in this case can hardly be characterized as "innocent." Indeed, it stretches credulity to claim that the sheer quantity of conflicts in this case are "innocent." Those conflicts include:

1. Knowingly false statements in the Order;
2. Facebook stock held by members of the Court (and likely their families) without disclosure, who stood to benefit personally from a favorable Facebook ruling;
3. Facebook stock held by board members of the Federal Circuit Bar Association with whom the Court collaborates closely and who filed the Request;
4. Undisclosed biases between members of the Court and a prominent public figure and Federal Circuit analyst, Leader witness and former director, Professor James P. Chandler;
5. Active collaboration between members of this Court and Facebook attorneys from whom the Court actively seeks favor, advice and advocacy for the Federal Circuit;

6. Court decisions timed to Facebook-favorable media events where the media knew about Court decisions before the parties;
7. Court's refusal to docket Dr. Arunachalam's *amicus curiae* pleadings for public review in breach of *Foman*;
8. Court's refusal to disclose its conflicts of interest when asked to;
9. Court's violation of Leader Technologies' Right of Due Process;
10. Relationships among members of the Court and Facebook stakeholders, including Microsoft Corporation, a 10% holder of Facebook stock who pocketed one-quarter of a billion dollars in the Facebook IPO.
11. Inequitable release of Court information to *Fox Business* and the Federal Circuit Bar Association while withholding that information from the parties and the public.

10. Request attempts to create an ethical duty-free zone for Bench & Bar

The Request says the "comfort of a precedential order on this subject would help insulate the community from the chill that could be expected if cooperation in bench/bar activities would alone fuel criticism of the kind included in the proposed amicus brief in this case." The premise here is that the criticism in the *amicus curiae* brief is undeserved. First, the Bar Association has no business even having in its possession the un-docketed *amicus curiae* brief. Second, one of the Bar's directors owns more than ten percent (10%) of Facebook's stock and cannot be considered unbiased. Third, Dr. Arunachalam concedes that underserved criticism is unfair. Fourth, *deserved* criticism is necessary in order to preserve the integrity of our American legal system. This Request can only create a duty-free zone for bench-bar shenanigans. No good for justice and fairness can come of it.

One person's "chilling effect" is another person's wise choice. Certainly, for a judge intent on influence-peddling the conflict of interest rules have a chilling effect. But for conscientious judges, the rules rightly level the playing field as they should. Judges do not need "social" interplay with other attorneys to learn morals. Indeed, the Request seems custom-designed for two purposes: (1) to cover up this Court's (and now the Bar's) conflicts of interest in this case, and (2) to give blessing to future shenanigans in bench-bar events.

11. Circumspection is already the rule for Bar-Bench events

Remarkably, the Request seeks a precedential statement that excludes the cautionary language of Canon 4. Also remarkably, the Request cites a *Nebraska Law Review* article discussing "total isolation of judges from all social contact off the bench." No one suggests total isolation. Such either-or logic is unconstructive and unpersuasive. The balance is already well set in 28 USC §455 requiring a judge to avoid the "appearance of impropriety." *Liljeberg v.* Health Services Acquisition Corp., 486 US 847, 860 (Supreme Court 1988).

The Request's use of words like "cloistered," "isolated," and "hampered" is also unconstructive and attempts to trivialize these circumstances. A judge's moral character is of *great interest* to all citizens. Part of a judge's job description is to be vigilant in avoiding the appearance of impropriety. Canon 2, Code of Conduct for

United States Judges ("A judge should avoid impropriety and the appearance of impropriety in all activities"). Every profession has such constraints. To judges intent on mischief, such rules do indeed "hamper" unethical conduct and serve to "isolate" them from other wrongdoers, which is their purpose. In fact, the 2nd Circuit accepted the fact that judges are cloistered. *Repouille v. United States*, 165 F. 2d 152 (2nd Circuit 1947) at 154. The stiff priestly garb on our judges is there for a reason—to remind them of their high calling and that they *are* set apart; their cloistering is vital to a fair, healthy democracy. Otherwise, they become nothing but free-market hucksters. Is the Bar's Request Freudian? One hopes not.

Therefore, the purpose of the Request is puzzling. Since the Canon is clear, the quest for a new precedent seems designed to justify *carte blanche* access to bar-bench activities (as if unethical conduct never occurs at such events). "[T]he average person on the street" believes that such events are often little more than the "old boys" getting together on the public's dime to schmooze and cut side deals for well-heeled clients.[11] *Potashnick v. Port City Const. Co.*, 609 F. 2d 1101 (5th Circuit 1980) at 1111; *See* also *Rome v. Braunstein*, 19 F. 3d 54 (1st Circuit 1994) at 59 (citing *In re Martin*, 817 F.2d 175 (1st Circuit 1987) at 182 ("There must be at

[11] The Board of Directors of the Federal Circuit Bar Association has only two industry representatives currently, Microsoft Corporation and Boeing Corporation, the 37th and 39th largest corporations in America. Tellingly, no small business inventor advocacy voices are represented to temper big infringer bias <http://www.memberconnections.com/olc/pub/LVFC/cpages/misc/contact.jsp>.

a *minimum* full and timely disclosure of the *details* of any given arrangement. Armed with knowledge of all the relevant facts, the bankruptcy court must determine, *case by case*, whether [a conflict exists].") (emphasis added)); *In re Huddleston*, 120 BR 399 (Bankr. Court, ED Texas 1990) at 401 ("this decision [burden of disclosure] **should not be left to counsel**, whose judgment may be clouded by the benefits of the potential employment.")(emphasis added); *In re Roberts*, 46 B.R. (Bankr. Court, D. Utah 1985) at 834 (duty of disclosure and disallowance . . . are designed to **prevent the dishonest practitioner from engaging in fraudulent conduct**)(internal quotes and citation omitted)(emphasis added).

The Request does not appear to be in the public's interest. Reinforcement of such beliefs that judges conspire against the public interest at such events does not instill public confidence in the justice system. If a judge feels "hampered" by such moral constraints, then perhaps he or she is in the wrong profession.

12. The devil is in the details

The Request attempts to sweep all of this Court's (and the Bar's) prior associations with litigant attorneys under the carpet of "law school events," "bar association proceedings" and "educational conferences." As always with issues of conflicts of interest, the "devil is in the details." *US v. Stein*, 435 F. Supp. 2d 330

(SD New York 2006) at 363 (“the government must have the ability . . . to prevent obstruction of its investigations . . . [b]ut the devil, as always, is in the details”).

13. The totality of the circumstances does not validate the Request

By contrast, when one combines the “totality of circumstances” in this case, the Court loses its “innocent” posture. *Illinois v. Gates*, 462 US 213 (Supreme Court 1983) at 231 ("'In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" citing *Brinegar v. United States*, 338 U.S. 160, 176 (1949) at 175). It is evident that members of this Court failed to follow the guidelines of 28 U.S.C. § 455 and the Code of Conduct for United States Judges by failing to disqualify themselves from presiding over this matter. Therefore, the Order, replete with its false statements, should not be made precedential, at least until a public Hearing.

14. Attorney self-policing has failed

Ask the average person on the street about their confidence in the “self-policing” of the legal professional and they will generally react with extreme sarcasm. Legal professionals may waive off such attitudes as sour grapes, but they know in their heart-of-hearts that ethical discipline in the profession is broken.

Attorneys and judges are afraid to report each other under the premise "there but by the Grace of God go I." Attorneys are afraid to speak up against judicial misconduct for fear the judge will *punish them* in a future case. Judges are reticent to discipline attorney misconduct so as not to upset the legal community. As a consequence, justice becomes the *victim* instead of the goal. These ethical compromises make *more bad decisions* and *more bad precedent* in an ever-accelerating deteriorating spiral. By comparison, the former Soviet Union had the *form* of a legitimate legal system too . . . until it collapsed in the late 1980's under its own corruption. America will suffer the same fate if we do not turn it around. If the land of laws and fairness becomes the land of influence-peddling and bribes, America is destined for the rubbish heap of history. More to the point in this case, if our courts stop protecting the patents of the small inventor engine that has made this country, then the American economic engine will quickly begin to sputter.

The "public outcry for accountability" and ethical self-policing is becoming a louder and louder drum beat. The American Bar Association published this caution: "The 'privilege' of self regulation could so easily drift towards the view that it is but an 'option', one that can be easily removed if not treated with the serious sense of purpose it deserves."[12] *See* also *Bates v. State Bar of Ariz.*, 433 US 350 (Supreme

[12] Charles B. Plattsmier, "Self Regulation and the Duty to Report Misconduct, Myth or Mainstay?" *American Bar Association*, May 13, 2008. Accessed Sep. 16, 2012.

Court 1977) at 379 ("it will be in the latter's interest ["candid and honest attorneys"], as in other cases of misconduct at the bar, to assist in weeding out those few who abuse their trust."). Boston College Law Professor Judith A. McMorrow wrote in a seminal 2004 study "[w]e need a better understanding of why judges impose varying sanctions for similar behavior."[13] The average person already knows this answer. Wink, wink. Nod, nod. Let's do better.

REQUEST FOR RELIEF

For the foregoing reasons, Dr. Arunachalam respectfully requests that the Court conduct a full and fair public Hearing before making a decision regarding the Request. Dr. Arunachalam asks further that the Court disqualify itself from this decision due to its evident and egregious conflicts of interest.

Respectfully submitted

/s/

Dated: Sep. 17, 2012
Menlo Park, California

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

[13] Judith A. McMorrow, "Judicial Attitudes Toward Confronting Attorney Misconduct: A View From The Reported Decisions," *HeinOnline*, 32 Hofstra L. Rev. 1425 2003-2004.

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

CERTIFICATE OF SERVICE

Pursuant to Fed. Cir.R. P. 32.1(e) I do hereby certify that an original and six (6) copies of the foregoing RESPONSE TO THE FEDERAL CIRCUIT BAR ASSOCIATION'S REQUEST FOR REISSUE OF ORDER AS PRECEDENTIAL PURSUANT TO FEDERAL CIRCUIT RULE 32.1(e) BY AMICUS CURIAE LAKSHMI ARUNACHALAM, PH.D. will be sent to the Clerk of the Federal Circuit by Fedex, next day delivery, to:

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

I also certify that two (2) true and correct copies of the foregoing were served on the following recipients by Fedex, next day delivery, to:

Paul Andre, Esq. KRAMER LEVIN LLP 990 Marsh Road Menlo Park, CA 94025 Tel.: (650) 752-1700 Fax: (650) 752-1800 *Attorney for Plaintiff-Appellant*	Thomas G. Hungar, Esq. GIBSON DUNN LLP 1050 Connecticut Avenue, N.W. Washington D.C. 20036-5306 Tel.: (202) 955-8558 Fax: (202) 530-9580 *Attorney for Defendant-Appellee*
Edward R. Reines, Esq. WEIL, GOTSHAL & MANGES LLP 201 Redwood Shores Parkway Redwood Shores, CA 94065 Tel. (202) 802-3000 *Counsel for Federal Circuit Bar Assoc.*	A copy of the foregoing was also provided to Americans For Innovation for publication, the House and Senate Judiciary Committees, and the Washington D.C. Bar.

/s/

Dated: Sep. 17, 2012
Menlo Park, California

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

2011-1366

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LEADER TECHNOLOGIES, INC.

Plaintiff-Appellant,

v.

FACEBOOK, INC.,

Defendant-Appellee.

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

THE FEDERAL CIRCUIT BAR ASSOCIATION'S REQUEST FOR REISSUE OF ORDER AS PRECEDENTIAL PURSUANT TO FEDERAL CIRCUIT RULE 32.1(e)

Terence P. Stewart
President
FEDERAL CIRCUIT BAR ASSOCIATION
1620 I Street, N.W., Suite 900
Washington, DC 20006
(202) 466-3923

Edward R. Reines
WEIL, GOTSHAL & MANGES LLP
201 Redwood Shores Parkway
Redwood Shores, CA 94065
(650) 802-3000

Counsel for Federal Circuit Bar Association

CERTIFICATE OF INTEREST

Counsel for the Federal Circuit Bar Association, certifies the following:

1. The full name of every party or *amicus* represented by me is:

The Federal Circuit Bar Association

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: **N/A**

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None.

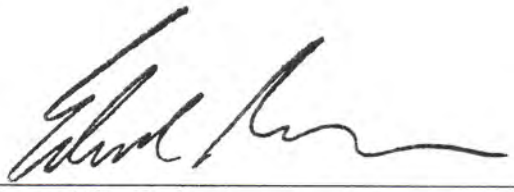
4. There is no such corporation as listed in paragraph 3.

5. The names of all law firms and the partners or associates that appeared for the party or *amicus* now represented by me in the trial court or agency or are expected to appear in this court are:

WEIL, GOTSHAL & MANGES LLP
Edward R. Reines

FEDERAL CIRCUIT BAR ASSOCIATION
Terence P. Stewart, President

September 11, 2012
Date



Edward R. Reines

REQUEST TO REISSUE ORDER AS PRECEDENTIAL

The Federal Circuit Bar Association ("FCBA") respectfully requests the August 10, 2012 order ("Order") in this matter be reissued as precedential. *Leader Techs., Inc. v. Facebook, Inc.*, No. 2011-1366, slip op. at 4 (Fed. Cir. Aug. 10, 2012) (per curiam) (order denying motion for leave to file an amicus brief). Federal Circuit Rule 32.1 authorizes the public to request the reissuance of an order in precedential form if it is initially categorized as non-precedential.[1]

In its Order, this Court addresses the scope of Canon 4A(1) of the Judicial Code of Conduct and explains that judges may participate in a wide variety of educational and community activities. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 4A(1) (June 2, 2011). The Order squarely rebuffs a challenge to the impartiality of this Court because Federal Circuit judges may have participated in law school proceedings and spoken at legal conferences with lawyers or witnesses involved in the case. *Leader Techs.*, slip op. at 3-4.

The freedom of judges to participate in extra-judicial law-related activities is an important subject of general interest to the bar and bench alike—and is of specific significance to the FCBA. A vital purpose of the FCBA is to offer "a forum for common concerns and dialogue between bar and court, government

[1] Federal Circuit Rule 32.1(e) provides, in part: "Within 60 days after any nonprecedential opinion or order is issued, any person may request, with accompanying reasons, that the opinion or order be reissued as precedential."

counsel and private practitioner, litigator, and corporate counsel." *See Federal Circuit Bar Association Bench & Bar – Purpose*, FEDERAL CIRCUIT BAR ONLINE COMMUNITY, http://www.fedcirbar.org/olc/pub/LVFC/cpages/purpose/who.jsp (last visited Sept. 4, 2012).

The Order is an important precedent because it confirms that judges may properly participate in law school events, bar association proceedings and educational conferences. It also confirms that an appearance of impropriety is not created merely because co-participants in such gatherings are involved in cases that come before the Court. The comfort of a precedential order on this subject would help insulate the community from the chill that could be expected if co-participation in bench/bar activities would alone fuel criticisms of the kind included in the proposed amicus brief in this case.

There is need for precedent because there is no existing precedent by this Court regarding Canon 4 on the issues addressed by the Order. Moreover, the existing precedent nationally is thin. *But see In re Aguinda*, 241 F.3d 194, 205 (2d Cir. 2001) ("No reasonable person would believe that expense-paid attendance at such events would cause a judge to be partial, or to appear so, in litigation involving a minor donor-whether a party or counsel to a party-to a bar association, law school, or program administering a particular seminar. Were we to take a different view, judges would as a practical matter either have to recuse themselves

in a vast number of matters or decline invitations to numerous events of an entirely innocent nature that are of importance to the judiciary, the profession, and legal education.").

It is well-recognized that judicial participation in the wider legal and academic community is desirable. A cloistered and isolated judiciary would be hampered in evaluating the effect of legal decisions on society and limited in its exposure to the legal thinking of the day. Likewise, given the caliber of the judiciary, its expertise, and its practical experience, judges have much to contribute to the bar and the academy that should not be forsaken. This is explained, for example, by the commentary to Canon 4 of the Judicial Code of Conduct:

> Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice.

CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 4 cmt. (June 2, 2011); *see also* Howard T. Markey, *A Judicial Need for the 80's: Schooling in Judicial Ethics*, 66 NEB. L. REV. 417, 425 (1987) ("[J]udges are in their judging being involved more and more in the management of society. If total isolation of judges from all social contact off the bench would guarantee a totally ethical judiciary, what would be the cost?").

Moreover, reissuing the Order as precedential is consistent with this Court's statements regarding the characteristics of precedential decisions. *See Seligson v. Office of Pers. Mgmt.*, 878 F.2d 369 (Fed. Cir. 1989) (explaining that an opinion was not selected for publication where "it did not add significantly, we thought, to the body of law, and was not of widespread legal interest"). As explained above, the Order adds significantly to a scant body of law in an area of substantial public interest.

For all the foregoing reasons, the FCBA respectfully requests the reissuance of the Order as precedential.

Dated: September 11, 2012

Respectfully submitted,

Edward R. Reines
WEIL, GOTSHAL & MANGES LLP
201 Redwood Shores Parkway
Redwood Shores, CA 94065
(650) 802-3000

Terence P. Stewart
President
FEDERAL CIRCUIT BAR ASSOCIATION
1620 I Street, N.W., Suite 900
Washington, DC 20006
(202) 466-3923

Counsel for Federal Circuit Bar Association

CERTIFICATE OF SERVICE

I hereby certify that an original and six copies of the foregoing **FEDERAL CIRCUIT BAR ASSOCIATION'S REQUEST FOR REISSUE OF ORDER AS PRECEDENTIAL PURSUANT TO FEDERAL CIRCUIT RULE 32.1(e)** were filed on this date via Federal Express, next day delivery, to the Clerk of Court, Office, U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, DC 20439.

I also certify that two true and correct copies of the foregoing **FEDERAL CIRCUIT BAR ASSOCIATION'S REQUEST FOR REISSUE OF ORDER AS PRECEDENTIAL PURSUANT TO FEDERAL CIRCUIT RULE 32.1(e)** were served via Federal Express, next day delivery, on this date to each of the principal counsel of record and as follows:

Paul J. Andre, Esq. KRAMER LEVIN LLP 990 Marsh Road Menlo Park, CA 94025 Tel.: (650) 752-1700 Fax: (650) 752-1800 *Counsel for Plaintiff-Appellant*	Thomas G. Hungar, Esq. GIBSON DUNN & CRUTCHER LLP 1050 Connecticut Avenue, NW Washington D.C. 20036-5306 Tel.: (202) 955-8558 Fax: (202) 530-9580 *Counsel for Defendant-Appellee*
Lakshmi Arunachalam, Ph.D. 222 Stanford Avenue Menlo Park, CA 94025 (650) 854-3393 *Movant for leave to file amicus curiae brief*	

September 11, 2012
Date

Edward R. Reines
Counsel for Federal Circuit Bar Association