

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

LEADER TECHNOLOGIES, INC., a Delaware corporation,)	
)	CIVIL ACTION
)	
Plaintiff and Counterdefendant,)	No. 1:08-cv-00862-LPS
)	
v.)	
)	
FACEBOOK, INC., a Delaware corporation,)	
)	
Defendant and Counterclaimant.)	
)	

**DEFENDANT FACEBOOK, INC.’S RENEWED MOTION FOR JUDGMENT AS A
MATTER OF LAW (JMOL) OF NO DIRECT INFRINGEMENT**

[MOTION NO. 1 OF 4]

Defendant Facebook, Inc. (“Facebook”) hereby requests this Court consider its Renewed Motion for Judgment as a Matter of Law of No Direct Infringement, as more fully set forth in the accompanying Memorandum in Support of this Motion.

Dated: August 25, 2010

By: /s/ Steven L. Caponi

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**[PROPOSED] ORDER GRANTING FACEBOOK, INC.’S RENEWED MOTION FOR
JUDGMENT AS A MATTER OF LAW (JMOL) OF NO DIRECT INFRINGEMENT**

[MOTION NO. 1 OF 4]

The Court, having considered Defendant Facebook, Inc.’s motion, and the parties’ positions and arguments related thereto, the Court orders as follows:

IT IS SO ORDERED that Facebook, Inc.’s Renewed Motion for Judgment as a Matter of Law of No Direct Infringement is GRANTED in its entirety.

Hon. Leonard P. Stark

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**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT FACEBOOK, INC.’S
RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW (JMOL)
OF NO LITERAL INFRINGEMENT AND NO INFRINGEMENT
UNDER THE DOCTRINE OF EQUIVALENTS**

[MOTION NO. 2 OF 4]

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Dated: September 27, 2010

TABLE OF CONTENTS

	Page No.
I. INTRODUCTION	1
II. ARGUMENT	1
A. JMOL of No Literal Infringement Must be Entered.....	1
1. Facebook Does Not Update “The Stored Metadata”	2
2. Facebook Indisputably Does Not “Dynamically Update” Metadata	4
B. JMOL Should Be Entered on the Doctrine of Equivalents.....	5
C. A Conditional New Trial Should Be Granted on Infringement if the Court Does Not Grant JMOL of Non-Infringement	6
1. The Jury Resolved a Legal Claim Construction Issue, and Did So Contrary to Judge Farnan’s Order.....	6
2. Dr. Vigna Exceeded His Expert Report at Trial	7
3. The Verdict Was Against The Great Weight of the Evidence.....	9
III. CONCLUSION.....	10

TABLE OF AUTHORITIES

	Page No.
CASES	
<i>Anderson v. Liberty Lobby, Inc.</i> , 477 U.S. 242 (1986).....	2
<i>Gen. Mills, Inc. v. Hunt-Wesson, Inc.</i> , 103 F.3d 978 (Fed. Cir. 1997).....	1, 2
<i>K-2 Corp. v. Salomon S.A.</i> , 191 F.3d 1356 (Fed. Cir. 1999).....	1
<i>Lear Siegler, Inc. v. Sealy Mattress Co.</i> , 873 F.2d 1422 (Fed. Cir. 1989).....	6
<i>Motionless Keyboard Co. v. Microsoft Corp.</i> , 486 F.3d 1376 (Fed. Cir. 2007).....	6
<i>MyMail, Ltd. v. Am. Online, Inc.</i> , 476 F.3d 1372 (Fed. Cir. 2007).....	1
<i>PC Connector Solutions LLC v. SmartDisk Corp.</i> , 406 F.3d 1359 (Fed. Cir. 2005).....	6
<i>Reeves v. Sanderson Plumbing Prods., Inc.</i> , 530 U.S. 133 (2000).....	2
OTHER AUTHORITIES	
Federal Rules of Civil Procedure 26(a)	8
Federal Rules of Civil Procedure 50(a)	3

I. INTRODUCTION

Facebook's opening brief established that the accused Facebook website lacks at least two elements present in each independent claim: (1) Facebook does not update "the stored metadata," and (2) Facebook does not update any metadata (the stored metadata or otherwise) "dynamically" based on the user's change from a first context, environment or workspace to another. Judgment as a matter of law of no literal infringement or infringement under the doctrine of equivalents should therefore be entered. In the alternative, should the Court deny Facebook's motion for judgment as a matter of law, a new trial on infringement should be granted in light of Leader's misconduct at trial as detailed below.

II. ARGUMENT

A. JMOL of No Literal Infringement Must be Entered

Leader's arguments regarding literal infringement rest on the false premise that the jury resolved a factual dispute concerning operation of the Facebook website, but nothing could be further from the truth. Unlike most patent cases, the jury here was not asked to choose between two competing accounts of how the accused product works because the operation of the accused Facebook website was, for all relevant purposes, not in dispute. Leader's opposition does not take issue with Facebook's technical description of its product as Facebook relied on the uncontested testimony of Leader's own expert. The only relevant question, then, is whether the asserted claims of the '761 patent cover that undisputed operation. Federal Circuit law is clear that, in this situation, the question of literal infringement collapses into claim construction and can be resolved as a matter of law. *See, e.g., MyMail, Ltd. v. Am. Online, Inc.*, 476 F.3d 1372, 1378 (Fed. Cir. 2007) ("Because there is no dispute regarding the operation of the accused systems, that issue [of literal infringement] reduces to a question of claim interpretation and is amenable to summary judgment."); *K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1362 (Fed. Cir. 1999) ("Because the relevant aspects of the accused device's structure and operation are undisputed in this case, the question of whether [the accused product] literally infringes the asserted claims of the [patent-in-suit] turns on the interpretation of those claims."); *Gen. Mills,*

Inc. v. Hunt-Wesson, Inc., 103 F.3d 978, 983 (Fed. Cir. 1997) (“Where the parties do not dispute any relevant facts regarding the accused product . . . but disagree over possible claim interpretations, the question of literal infringement collapses into claim construction and is amenable to summary judgment.”); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (“And the standard for granting summary judgment ‘mirrors’ the standard for judgment as a matter of law, such that ‘the inquiry under each is the same.’” (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986))). Leader never provided any evidence, let alone substantial evidence, that Facebook practiced the elements, “updating the stored metadata” and “dynamically,” as properly understood.

1. Facebook Does Not Update “The Stored Metadata”

In its opposition, Leader again tries to blur the identification of the metadata stored in the first context in order to try to obscure the fact that metadata is *never* updated in the second context. It is undisputed that, at trial, Leader pointed to the row of the photo table stored when the user uploads a photo to Facebook as the “context information” that is stored “in metadata” in the first context. *See, e.g.*, D.I. 633 at 5; D.I. 637, Ex. 1 at 798:3-11. Leader does not dispute that that photo table row is never updated, modified or changed in any way whatsoever under any of its infringement theories.

Leader instead responds with a claim construction argument that the element, “updating the stored metadata,” does not require an update to the *actual metadata* that was stored in the first context, as the claim clearly requires. Leader’s basic argument is that any previously-stored metadata, even if it has nothing to do with the photo table row stored in the first context, can qualify as “the stored metadata” for purposes of the ’761 patent. Leader goes as far as to argue that “the metadata includes all of the information maintained in the user database,” and therefore, “as long as the user database is updated when a user accesses data from a second context, Facebook satisfies this claim element.” D.I. 643 at 9. The Facebook user database, however, comprises thousands of servers and hundreds of different tables. *See* Supplemental Declaration of Elizabeth Stameshkin in Support of Reply Memorandum in Support Facebook’s Inc.’s

Renewed Motion for Judgment as a Matter of Law (“Stameshkin Supp. Decl.”) Ex. A at 918:19-919:2 (Wiseman redirect). Arguing that “the stored metadata” of a single row of a single photo table in a massive user database is “updated” when something is added to a different table, used for a different purpose, on a different server ignores the plain language of the claim.

All of the asserted claims clearly require updating of the *same* metadata that was created. Claim 1, for example, expressly requires updating of “***the stored*** metadata,” referring back to the “metadata stored on a storage component” recited earlier in the claim – here the photo table row. Had Leader intended to broadly cover updates to *any* stored metadata, it would not have used the definite article “the.” Leader’s attempt to rewrite its claim language should be rejected.

Leader also relies on a supposed “admission” by Facebook’s expert, Professor Kearns, that one can update metadata by adding new data to that metadata. *See* D.I. 643 at 6. But Leader ignores Dr. Kearns’s testimony that updating the metadata in the context of the claims meant actually changing the previously-stored data. *See* Stameshkin Supp. Decl. Ex. A at 1140:20-1141:5. That, Dr. Kearns opined, was the “most natural interpretation.” *Id.* at 1141:2-3. The supposed admission came only when Dr. Kearns considered a broader definition of metadata and data that was “very, very inclusive.” *Id.* at 1141:15-22. This testimony has nothing to do with whether the specific metadata identified in the claims, “the stored metadata,” was updated.

Leader’s arguments that Facebook is attempting to “recapture” its earlier proposed construction of “metadata,” or propose an untimely new construction of “updating the stored metadata,” are meritless distractions. *See* D.I. 643 at 8-10. Facebook’s non-infringement arguments do not turn on “metadata” meaning anything other than “data about data,” as construed by the Court. Nor do Facebook’s arguments depend on giving “updating” or “storing” anything other than their plain and ordinary meanings. Those plain and ordinary meanings mandate that “the” metadata updated in the second context be the *same* metadata that was stored in the first context – and that does not happen in Facebook’s system as explained above. None of Leader’s attempts to conjure supposed procedural defaults or waivers on Facebook’s part can change that. Facebook properly raised these arguments in its Rule 50(a) motion before the case

was submitted to the jury. D.I. 606 at 4.

2. Facebook Indisputably Does Not “Dynamically Update” Metadata

Each asserted claim also requires that the stored metadata be “dynamically” updated. As construed by the Court, that means that the metadata has to be updated automatically and in response to the user’s movement to a second context, user environment or user workspace. *See* D.I. 633 at 7-8. There is no dispute that Facebook does not operate in this manner. The only disputes relate to claim construction issues that are the province of the Court, not the jury.

Leader’s opposition acknowledges that the alleged metadata update it relies upon occurs **not** in response to the user’s movement to a second context, but in response to a subsequent and separate action by the user – such as the user typing “How are you?” then pressing “Share” on another user’s Profile page. *See* D.I. 643 at 6-7; D.I. 633 at 9-10. Leader openly admits as much in its opposition by arguing that “the Facebook Website meets this claim element because it tracks as a user moves from one environment to another and performs an action in the second environment, and then updates the metadata...” D.I. 643 at 7 (emphasis added). Leader’s argument that the newly-created metadata “takes into account” the fact that the user moved to a second context, *id.* at 6-7, has nothing to do with when or how the metadata update occurs. There is simply no dispute that a Facebook user’s movement to a second context does not itself result in the update of the stored metadata required by the claims.

Leader responds by arguing, as it did in closing argument, that the “preceding event” in Judge Farnan’s construction of “dynamically” does not refer to the preceding event recited *in the claim* (i.e., the user’s movement to a second context), but rather to some other unnamed and unclaimed event in the accused technology. *See* D.I. 643 at 10-11. Leader argues that it is *Facebook* that is seeking to change the construction of “dynamically,” *id.*, but this argument has no merit. The Memorandum Opinion issued by Judge Farnan clearly identified the “preceding event” as “the user creating a context or moving from one context to another,” which is the preceding event recited in the claims. D.I. 280 at 25-26. Leader’s claim construction briefing, arguing against the very construction proposed by Facebook and adopted by Judge Farnan,

acknowledged that the “preceding event” was the preceding event in the claim. For example, Leader admitted that “**Facebook’s proposed construction requires that one must look to the preceding limitation as the ‘preceding event.’**” D.I. 179 at 25 (emphasis added). Leader’s arguments to the contrary should be rejected, as *even Leader* used this understanding of the term “the preceding event” throughout claim construction. It is Leader, not Facebook, who refuses to acknowledge the Court’s claim construction.

Leader also argues in a footnote that Judge Farnan’s explanation of “dynamically” in his Memorandum Opinion has no significance because he issued a separate claim construction order the same day. *See* D.I. 643 at 11 n.4 (citing D.I. 280 and D.I. 281). However, the “actual claim construction order,” as Leader calls it, adopted its constructions “for the reasons discussed in the Memorandum Opinion issued this date,” (D.I. 281 at 1). That Memorandum Opinion is law of the case and Leader was not permitted to ignore it.

Leader’s final argument is that the accused Facebook website satisfies the “dynamically” claim element even under Facebook’s (and Judge Farnan’s) construction. *See* D.I. 643 at 11-12. Leader relies primarily on deposition testimony of a Facebook marketing director, Dan Rose, for the unremarkable proposition that Facebook (like all websites) logs activities visitors take on the site. Leader provides no explanation as to how a generic activity log could satisfy the requirement of updating stored metadata in a second context. These logs could only relate, at most, to the “tracking” step in the asserted claims and not the separate elements addressing the storage and update of metadata. Even Leader’s own infringement expert, despite having extensively reviewed the Facebook source code and deposition transcripts, never suggested at trial that this activity log could satisfy the metadata update limitations in the claims.

B. JMOL Should Be Entered on the Doctrine of Equivalents

The fact that the jury did not reach Leader’s claim under the doctrine of equivalents does not render Facebook’s motion “moot,” as Leader argues. *See* D.I. 643 at 12. Facebook’s motion would only be “moot” if there was no possibility of the doctrine of equivalents rearing its head again in this case. The fact that Leader does not simply stipulate to the dismissal of its doctrine

of equivalents claim demonstrates that the issue is not moot. If the Court grants JMOL of no literal infringement, for example, it should also grant JMOL on the doctrine of equivalents to foreclose any possibility that Leader could argue for entitlement to a new trial on that issue.

Dr. Vigna's verbatim repetition of claim language and empty assertions of substantial similarity do not provide the "particularized evidence and linking argument" required to sustain a claim under the doctrine of equivalents. *See Motionless Keyboard Co. v. Microsoft Corp.*, 486 F.3d 1376, 1382 (Fed. Cir. 2007). Dr. Vigna's doctrine of equivalents testimony also ran afoul of the principle that "[t]he evidence and argument on the doctrine of equivalents cannot merely be subsumed in plaintiff's case of literal infringement," *PC Connector Solutions LLC v. SmartDisk Corp.*, 406 F.3d 1359, 1364 (Fed. Cir. 2005) (quoting *Lear Siegler, Inc. v. Sealy Mattress Co.*, 873 F.2d 1422, 1425 (Fed. Cir. 1989)), a point reinforced by Leader's opposition. *See* D.I. 643 at 13 ("To support his opinion, Dr. Vigna relied upon the same evidence that he did for literal infringement."). Moreover, Leader does not even attempt to respond to Facebook's arguments that the doctrine of equivalents is legally unavailable based on prosecution history estoppel and claim element vitiation. *See* D.I. 633 at 13-14. Judgment as a matter of law should therefore be entered as to the doctrine of equivalents.

C. A Conditional New Trial Should Be Granted on Infringement if the Court Does Not Grant JMOL of Non-Infringement

1. The Jury Resolved a Legal Claim Construction Issue, and Did So Contrary to Judge Farnan's Order

The question of literal infringement ultimately turned on whether the jury believed Leader's or Facebook's interpretation of "the preceding event" in Judge Farman's construction of "dynamically." As explained in Part II.A.2 above, Leader's infringement case as to the "dynamically updating" element rested on Leader repeatedly urging the jury to reject the interpretation that Judge Farnan, Facebook – and even Leader – always understood it to mean. Leader acknowledged in its claim construction brief that the construction adopted by Judge Farnan "requires that one must look to the preceding limitation as the 'preceding event,'" (D.I. 179 at 25), but then at trial, argued that the preceding event could be found outside the claim

limitations and within the accused technology. *See* D.I. 637, Ex. 1 at 1966:5-8 (Leader closing: “[T]he preceding event was happening in the technology. That’s what the claims are about. It’s not a preceding event in the sentence.”). The verdict of literal infringement was tainted by Leader’s misconduct and improper claim construction arguments, requiring a new trial.

2. Dr. Vigna Exceeded His Expert Report at Trial

The Court warned both parties at the outset of the trial that they could not exceed the scope of their expert reports – and that if a party did, it would pay the costs of a new trial. The Court established this procedure as a prophylactic measure to ensure fairness and compliance with the expert disclosure rules. Facebook abided by these rules. Leader did not. Dr. Vigna’s testimony exceeded the scope of his report because: (1) he testified about a Facebook API application he created months after the close of expert discovery and several documents that pertained to the API; and (2) he presented several videos shown at trial and depicting an analysis using interceptor tools (“Burp” and “Firebug”) that were never disclosed in the report. Either one of these two transgressions would be sufficient to warrant a new trial. Leader’s attempts to minimize its violations of the Court’s directive should be rejected.

First, Leader attempts to minimize the significance of the testimony about the API application Dr. Vigna created by arguing that it was only a “snippet” of testimony. *See* D.I. 643 at 15. That so-called “snippet” spanned more than ten pages of Dr. Vigna’s direct testimony, and included explanations of technical documents that were never discussed in the report. *See* D.I. 637, Ex. 1 at 693:2-703:24. Leader’s suggestion that this testimony is subsumed into the generic discussion of Facebook’s API contained in the background section of Dr. Vigna’s report is unavailing. This testimony was clearly derived from Dr. Vigna’s experience using the Facebook API to build his application – a task he did not begin until July 2010.

Leader’s claim that Facebook had notice of this testimony because Dr. Vigna’s expert report “disclosed his *intent* to create an application based on the API,” at some point in the future, is also without merit. *See* D.I. 643 at 17. Leader’s arguments ignore the rule requiring that Dr. Vigna’s expert report contain “a complete statement of all opinions the witness will

express and the basis and reasons for them,” Fed. R. Civ. P. 26(a)(2)(B)(i) (emphasis added). Under Leader’s view of the rules, any expert could comply with this requirement by submitting a “placeholder” report vaguely referencing future analyses that might yield undisclosed future opinions. This obviously is not the law.

Nor is there any merit to Leader’s argument that these new opinions were not prejudicial because they related only to Leader’s failed indirect infringement claim. Leader never limited or qualified this testimony, and presented it as an integrated part of its case. Leader’s suggestion that this improper testimony had no impact on the jury’s verdict is pure speculation.

Second, a new trial would be warranted because of Leader’s extensive video depictions of the *current* Facebook website (not the one from April 2010) and an undisclosed analysis of that website using interceptor tools. These videos were created the day *after* the Court warned Leader: “You’ll present your case based on some sort of fixed data that has been produced and is part of this case.” D.I. 633 at 19 (quoting D.I. 637, Ex. 21 at 69:8-11) (emphasis added). These videos and Dr. Vigna’s discussion of them consumed hours of his direct testimony.

Leader speciously asserts that Facebook had adequate notice of the videos because Dr. Vigna’s report “specifically disclosed ... that he *would* create a demonstrative using these tools,” D.I. 643 at 20 (emphasis added), sometime in the future. Leader even claims that Facebook had “three months before trial” to respond to these disclosures, *id.*, but never explains how Facebook could respond to disclosures that it had never received (because they did not even exist). Facebook attempted to discover what these demonstrations might contain during Dr. Vigna’s deposition, but he evaded each question, insisting that he could not answer about something that did not exist. Facebook’s concern about the possibility of being sandbagged at trial prompted its pre-trial motion *in limine* to limit Dr. Vigna’s testimony to what was explicitly contained in his report. D.I. 415 at 3-5. The Court’s warning that any party exceeding its expert report would pay the costs of a new trial was in response to that motion. *See* D.I. 637, Ex. 13 at 4:18-5:4.

Leader does not explain its assertion that Dr. Vigna’s use of the “Burp” and “Firebug” interceptor tools was fully disclosed in the expert report. The most Leader can claim is that some

of the *results* of Dr. Vigna's use of those tools may have appeared in the report. But that is a far cry from the lengthy and detailed video presentation, including the analysis and use of the interceptor tools, that the jury saw for hours at trial. Leader claims that "[t]he use of these tools is prevalent throughout Dr. Vigna's expert report," D.I. 643 at 19, but if that was true, then why did Leader wait until trial to capture the use of those tools in video form, and why were the tools, or the names of those tools, not provided to Facebook? When asked at his deposition what tools he had used or was planning to use, Dr. Vigna's only response was a "web browser," and he refused to identify any other tools claiming "it would be premature" to do so. *See Stameshkin Supp. Decl. Ex. B at 24:22-26:3*. Leader either did not perform the interceptor tool analysis until the videos were recorded months after expert discovery, or chose to sandbag Facebook at trial. In either case, Leader violated the Court's directive and a new trial is warranted.

3. The Verdict Was Against The Great Weight of the Evidence

As explained above and in Facebook's opening brief, the verdict of literal infringement was against the clear weight of the evidence, which established that Facebook does not "dynamically updat[e] the stored metadata" as required by all claims. For this additional reason, a new trial on infringement would be required.

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III. CONCLUSION

For the reasons stated above, Facebook respectfully requests that this Court grant judgment as a matter of law of non-infringement as to all asserted claims of the '761 patent.

Dated: September 27, 2010

By: /s/ Steven L. Caponi

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**REPLY MEMORANDUM IN SUPPORT OF FACEBOOK, INC.’S
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[MOTION NO. 3 OF 4]

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Dated: September 27, 2010

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>BMC Res., Inc. v. Paymentech, L.P.</i> , 498 F.3d 1373 (Fed. Cir. 2007).....	1
<i>DSU Med. Corp. v. JMS Co.</i> , 471 F.3d 1293 (Fed. Cir. 2006) (en banc).....	1
<i>Fujitsu Ltd. v. Netgear Inc.</i> , No. 2010-1045, ___ F.3d ___, 2010 WL 3619797 (Fed. Cir. Sept. 20, 2010).....	1
STATUTES	
Federal Rules of Civil Procedure 50(a)	1
35 U.S.C. § 271(b)	1
35 U.S.C. § 271(c)	1

Leader's opposition identifies no reason to deny judgment as a matter of law as to its indirect infringement claims.¹ The Court refused to submit this issue to the jury *because* Leader failed to produce sufficient evidence of indirect infringement. Facebook respectfully submits that the Court implicitly granted Facebook's pre-trial motion for judgment as a matter of law under Fed. R. Civ. P. 50(a), and should make its ruling explicit by granting this renewed motion. Leader's claim that this motion is improper is unsupported by any authority. Facebook is entitled to judgment as a matter of law on Leader's claims of indirect infringement.

Leader's opposition identifies no evidence that could sustain its indirect infringement claims. D.I. 644 at 2. Leader points to a portion of Dr. Vigna's testimony regarding third party applications as "sufficient evidence that Facebook indirectly infringes the '761 Patent."² This testimony is insufficient to show indirect infringement. For example, none of this testimony suggests that Facebook had knowledge of the patent, that Facebook specifically intended to induce infringement, or that the accused Facebook website lacks any substantial non-infringing use, which are essential elements of proof to sustain inducement or contributory infringement, respectively. *See DSU Med. Corp. v. JMS Co.*, 471 F.3d 1293, 1304-05 (Fed. Cir. 2006) (en banc) (liability for induced infringement under 35 U.S.C. § 271(b) requires knowledge of the patent and the specific intent to induce infringement); *Fujitsu Ltd. v. Netgear Inc.*, No. 2010-1045, ___ F.3d ___, 2010 WL 3619797, at *2-3 (Fed. Cir. Sept. 20, 2010) (liability for contributory infringement under 35 U.S.C. § 271(c) requires, among other things, knowledge of the patent and a showing that the accused product has no substantial non-infringing use).

Leader also failed to demonstrate how each step of any asserted claim is performed by a single third party actor. *See BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1379 (Fed. Cir. 2007) ("Indirect infringement requires, as a predicate, a finding that some party amongst the

¹ Leader complains at length in its opposition about "unnecessary litigation costs," but that issue is irrelevant to the briefing on this motion.

² This portion of Dr. Vigna's testimony went well beyond the scope of his expert report, against both the Federal Rules and this Court's specific orders. *See* D.I. 633 at 15-17.

accused actors has committed the *entire act* of direct infringement.”) (emphasis added). The testimony of Dr. Vigna that Leader relies upon, in fact, identifies at least three separate parties necessary to perform the steps of the asserted claims – Facebook, a third party application developer and a Facebook user. *See* D.I. 637, Ex. 1 at 695:19-21 and 697:21-698:9 (noting that “somebody uploads a picture” (the user), “that context information is captured and stored as metadata” (Facebook), and “a subset of that metadata can be directly accessed by a third-party application” (the third party application)).

For the reasons set forth above and in Facebook’s opening brief, Facebook respectfully requests the Court grant judgment as a matter of law of no indirect infringement as to all asserted claims of the ’761 patent.

Dated: September 27, 2010

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

LEADER TECHNOLOGIES, INC., a Delaware corporation,)	
)	CIVIL ACTION
)	
Plaintiff and Counterdefendant,)	No. 1:08-cv-00862-LPS
)	
v.)	
)	
FACEBOOK, INC., a Delaware corporation,)	
)	
)	
Defendant and Counterclaimant.)	
)	

**REPLY MEMORANDUM IN SUPPORT OF DEFENDANT FACEBOOK, INC'S
RENEWED MOTION FOR
JUDGMENT AS A MATTER OF LAW (JMOL) OF INVALIDITY**

[MOTION NO. 4 OF 4]

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Dated: September 27, 2010

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT	1
A. Swartz Discloses all Elements of the Asserted Claims.....	1
B. The iManage User Manual Anticipates All Asserted Claims.....	3
1. The iManage User Manual is Enabling Prior Art	3
2. iManage Discloses Tracking and Contexts.....	5
C. Hubert Discloses All Elements of the Asserted Claims.....	6
D. The Asserted Claims are Obvious.....	7
E. Facebook’s Conditional Request for a New Trial.....	8
F. The Non-Method Claims Are Invalid as Indefinite Under IPXL Holdings.....	9
III. CONCLUSION.....	10

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Brown & Williamson Tobacco Corp. v. Philip Morris Inc.</i> , 229 F.3d 1120 (Fed. Cir. 2000).....	8
<i>CFMT, Inc. v. Yieldup Int’l Corp.</i> , 349 F.3d 1333 (Fed. Cir. 2003).....	5
<i>Exergen Corp. v. Wal-Mart Stores, Inc.</i> , 575 F.3d 1312 (Fed. Cir. 2009).....	1, 2, 3, 5
<i>IPXL Holdings, L.L.C. v. Amazon.com, Inc.</i> , 430 F.3d 1377 (Fed. Cir. 2005).....	9
<i>KSR Int’l Co. v. Teleflex Inc.</i> , 550 U.S. 398 (2007).....	7, 8
<i>Minerals Separation v. Magma Copper Co.</i> , 280 U.S. 400 (1930).....	6
<i>Orion IP, LLC v. Hyundai Motor Am.</i> , 605 F.3d 967 (Fed. Cir. 2010).....	1, 2, 3, 5
<i>Phillips Petroleum Co. v. U.S. Steel Corp.</i> , 673 F. Supp. 1278 (D. Del. 1987).....	6
STATUTES	
Federal Rules of Evidence 702	2
35 U.S.C. § 102(b)	4

I. INTRODUCTION

Leader's opposition attempts to paint the invalidity analysis as a classic "battle of the experts" when no such battle exists. The only real battle here is between the plain and undisputed language of the prior art references themselves and the unsupported conclusions of Leader's expert. Because the Federal Circuit has held that those conclusions do not bar entry of judgment as a matter of law on anticipation when anticipation is clear from the underlying reference itself, there is no battle at all and JMOL should be granted. *See Orion IP, LLC v. Hyundai Motor Am.*, 605 F.3d 967, 974-78 (Fed. Cir. 2010) (reversing trial court's denial of motion for judgment as a matter of law on anticipation despite testimony by plaintiff's experts that prior art was not anticipatory); *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1318-20 (Fed. Cir. 2009) (same). Leader's opposition on obviousness is similarly unsupported by the record and misconstrues the law.

Leader's opposition to Facebook's conditional request for a new trial is based on an argument that Leader's counsel acted properly when he misrepresented to the jury that the Swartz reference was considered by the Patent Office during the original prosecution of the '761 patent. This argument has already been rejected by this Court and need not be reexamined here.

II. ARGUMENT

A. Swartz Discloses all Elements of the Asserted Claims

Facebook clearly demonstrated at trial that Swartz discloses each limitation of Leader's asserted claims. *See* Appendix A to Facebook's Opening Brief (D.I. 635). In a tacit admission of how relevant Swartz is, Leader's opposition argues about only two elements it contends are missing: tracking of user movement, and a context "as construed by the Court." D.I. 645 at 13. But rather than present evidence that those elements are lacking, Leader's argument rests on the

naked conclusions of Dr. Herbsleb. Because the plain language of Swartz discloses both elements, Dr. Herbsleb's conclusory testimony to the contrary provides no basis for denying Facebook's motion. *See Orion*, 605 F.3d at 976-77; Fed. R. Evid. 702. Likewise, Dr. Herbsleb's testimony that all the references are document-centric rather than user-centric is immaterial. D.I. 645 at 5. The claims do not require a particular "centricity." The only elements that matter to the invalidity analysis are those in the claims.

Regarding the tracking element, Swartz could not be clearer when in disclosing that "knowledge integration middleware is preferably employed to **identify (including tracking, monitoring, analyzing) the context in which information is employed** so as to enable the use of such context in the management of knowledge." D.I. 636, Ex. 22 at Col. 6:22-26 (emphasis added). This alone refutes all of Leader's arguments that this element is missing.

Leader also argues that this language relates to tracking document use rather than changes in user contexts. D.I. 645 at 13. In *Exergen*, the Federal Circuit reversed a jury verdict and found the asserted claims anticipated, rejecting attempts to distinguish the prior art based on functions "in addition to" those in the claims. 575 F.3d at 1318-19. This is precisely what Leader argues in its opposition – that Swartz is not anticipatory because it tracks document use, while ignoring the fact that Swartz also tracks users. Figure 5 in Swartz states that its system creates a "Record of Transactions" that includes "Context info **from users** & apps..." D.I. 636, Ex. 22 at Fig. 5; *see also id.* at Col. 4:33-35, Col. 8:55-59. Thus, because Swartz clearly tracks user interactions it does not matter that Swartz also tracks document use.

Leader's claim that Swartz does not disclose contexts, environments and workspaces is even more specious. The term "context" appears numerous times throughout Swartz and the discussion of one of the preferred embodiments discloses that the "context" is the environment in which the information is used: "Such a system also preferably captures metadata associated with

the information shared, stored and accessed by the users of the data so as to characterize the ‘context’ in which the information is being used.” D.I. 636, Ex. 22 at Col. 8:56-59. Swartz further discloses that its system “is used to assist in the integration of disparate information sources and their corresponding applications,” *id.* at Col. 6:17-22. This is materially no different from the ’761 patent’s definition of “workspace,” which is “a collection of data and application functionality related to a user-defined topic.” D.I. 636, Ex. 4, ’761 patent, at Col. 7:49-51 (definition of “board”), 3:32-35 (“workspace” and “board” have same meaning). Leader’s expert used the terms “context” and “workspace” interchangeably. *See* D.I. 635 at n.1. Dr. Herbsleb’s conclusory claim that “context” in Swartz means “this regulatory compliance scheme” ignores that Swartz uses “context” to refer to an environment, just like the asserted claims.

In both *Orion* and *Exergen*, the Federal Circuit reversed a jury’s finding that prior art was not anticipatory notwithstanding the existence of conflicting expert testimony. *See Orion*, 605 F.3d at 974-78; *Exergen*, 75 F.3d at 1318-20. The Federal Circuit in both cases looked beyond the experts’ attempts to distinguish the prior art and found anticipation when all elements of the asserted claims were apparent from the face of the prior art itself. *Id.* As in *Orion* and *Exergen*, no reasonable jury could have credited Dr. Herbsleb’s claims that tracking and contexts are missing from Swartz. Judgment as a matter of law is therefore appropriate.

B. The iManage User Manual Anticipates All Asserted Claims

1. The iManage User Manual is Enabling Prior Art

The evidence elicited at trial by Facebook showed that the iManage User Manual (“iManage”) was publicly available before the priority date of the ’761 patent. In order for iManage to qualify as prior art, it needed to be publicly accessible more than one year before the critical date of December 10, 2002. The copy of iManage submitted into evidence established

that the reference was “© COPYRIGHT 1999, 2000, 2001” and “last updated” July 26, 2001 (D.I. 636, Ex. 23 at AUT0020002), which is more than a year prior to the critical date. iManage also includes a statement that the manual is “intended for end users of iManage DeskSite.” *Id.* at AUT0020011. This is sufficient to establish that iManage was a printed publication that was publicly available more than one year prior to the critical date.

Leader’s opposition ignores this evidence and relies on the fact that one of the copies of iManage admitted at trial, DTX1010, was originally stamped “confidential” by the party that produced it in discovery. Leader ignores that a non-confidential version of iManage was also admitted by the Court as Exhibit DTX0925E, and that Dr. Greenberg testified that the document he relied upon bore no confidentiality designation. Declaration of Elizabeth Stameshkin in Support of Reply Memorandum in Support Facebook’s Inc.’s Renewed Motion for Judgment as a Matter of Law (“Stameshkin Supp. Decl.”), Ex. A at 1709:6-20. Leader offered no evidence to rebut the statements in iManage itself, namely that it was available to users of iManage in July of 2001. Absent any rebuttal evidence, no reasonable jury could have concluded that iManage does not qualify as a printed publication under 35 U.S.C. § 102(b).

Leader also failed to offer evidence that the claimed invention was not enabled by iManage. At trial, Dr. Greenberg testified that iManage is an enabling reference as to the asserted claims. Stameshkin Supp. Decl., Ex. A at 1535:5-1536:3. In response, Dr. Herbsleb testified that iManage did not enable someone to build the iManage software. *Id.* at 1792:11-1793:9. But Dr. Herbsleb was applying the wrong test. The test is not whether one of skill in the art could build the iManage product using the manual, or even the Leader product. The test is whether someone could, without undue experimentation, make and use **the claimed invention**. The Federal Circuit, which has held that “Title 35 does not require that a patent disclosure enable one of ordinary skill in the art to make and use a perfected, commercially viable embodiment

absent a claim limitation to that effect.” *CFMT, Inc. v. Yieldup Int’l Corp.*, 349 F.3d 1333, 1338 (Fed. Cir. 2003). The only person who testified to whether or not iManage enabled someone to make and use the claimed invention was Dr. Greenberg, who testified that it did. Because Dr. Herbsleb applied the wrong test, his testimony is not in conflict with Dr. Greenberg’s. No reasonable jury could have found that iManage was not enabling.

2. iManage Discloses Tracking and Contexts

As with Swartz, Leader again identifies only two limitations (the tracking component and contexts) as allegedly absent from iManage. D.I 645 at 8-9. However, again, Leader ignores the plain disclosures of iManage and relies on unsupported conclusory statements by its expert that are refuted by the reference itself. *See Orion*, 605 F.3d at 976-77; *Exergen*, 75 F.3d at 1318-20. Leader argues that iManage has “no view shots anywhere in the manual where you can sort of pull up some user and see what a user has done.” D.I 645 at 8 (D.I. 637, Ex. 1 at 1797:8-10). However, nothing in the asserted claims requires the ability to “pull up some user and see what a user has done.” Instead, each of the asserted claims is limited to tracking user movement between contexts, environments and/or workspaces, and storing that information in the metadata associated with the data. As Facebook’s expert testified, iManage tracks user movement in a number of ways, including by automatically recording information about which “User” accessed documents, when they did so, from what location, for how long and using which application:

User	Applicati..	Activity	Date - Time	Duration	Pages Prin...	Location	Comments
BOWEN	WINWORD	Checkin	6/14/2001 2:20:48 PM	26	0	BOWEN	
BOWEN	WINWORD	Modify	6/14/2001 2:20:47 PM	0	0	BOWEN	
BOWEN	MANAGE32	Checkout	6/14/2001 2:20:22 PM	0	0	BOWEN	
BOWEN	MANAGE32	Create Versi	6/14/2001 2:14:39 PM	0	0	BOWEN	Created from version 1

Figure 3.26: The *Document History* tab displays the activity record for a document.

D.I. 636, Ex. 23 at Fig. 3.26. No reasonable jury could find that tracking is missing from iManage in light of the above which shows, e.g., user BOWEN (col. 1), checking in a document (col. 3, row 1) with an application (col.2) at a particular time (col. 4), from a particular location (col. 7.) along with tracking various other activities by user BOWEN. Furthermore, the Court at Leader's urging defined "context" as "environment," and thus "context information" necessarily includes information about the user's environment. The location of the user (col. 7 in Fig. 3.26) and the application the user is running (col. 2 in Fig. 3.26) both reflect the user's environment and are therefore "context" information as a matter of law.

C. Hubert Discloses All Elements of the Asserted Claims

As with Swartz and iManage, Leader incorrectly asserts that Hubert does not include the tracking and context elements present in the asserted claims. D.I 645 at 10-11. Leader also claims that Hubert does not disclose a network or web-based system, as is required by the claims. Facebook proved at trial, however, that Hubert does include all three of these elements.

Leader's claim that Hubert does not disclose a network based system borders on the absurd. Paragraph 23 of Hubert discloses that "Meta-document 20 is then transmitted over the Internet 36 to source (or environment) 32." D.I. 636, Ex. 24, ¶ 0023. Whether Hubert claims a network-based system in the claims written at the end of the Hubert patent themselves has absolutely no relevance. In order to show anticipation, Facebook need only show the presence of all elements of the asserted claims in a single reference, not that those elements are claimed in the prior art patent. *Phillips Petroleum Co. v. U.S. Steel Corp.*, 673 F. Supp. 1278, 1288 (D. Del. 1987) ("[T]he question is not the precise scope of the claim in the prior patent, but what is disclosed in the specification and made known to the world.") (citing *Minerals Separation v. Magma Copper Co.*, 280 U.S. 400, 402 (1930)) (internal quotations omitted). No reasonable jury could find that Hubert does not disclose the Internet.

The same paragraph, No. 23, also specifically discloses the required “environment” from the claims: “Meta-document 20 is then transmitted over the Internet 36 to source (**or environment**) 32.” D.I. 636, Ex. 24, ¶ 0023 (emphasis added). This statement directly contradicts Dr. Herbsleb’s claim that “there’s absolutely nothing about a context, or environment ...” in Hubert.

Finally, contrary to Leader’s assertions, the evidence plainly shows that Hubert includes tracking. *See* D.I. 636, Ex. 24 at ¶ 009 (“There is also a need for a system and method of managing documents **that can track** document distribution data. There is a further need for a system and method of managing documents **that can track** a document’s path of distribution and a document’s changes”) (emphasis added). In tracking the path of a document with all the changes made to it, the Hubert system necessarily tracks the users that touch that document. The plain language of Hubert and the testimony adduced from Dr. Greenberg are so clear that no reasonable jury could fail to conclude that Hubert discloses every element of the claims.

D. The Asserted Claims are Obvious

Leader’s arguments on obviousness must be rejected for the same reasons discussed above. Leader simply argues that because each reference is purportedly lacking the tracking element, no combination can produce this missing element. As discussed above, however, each reference not only uses the word “tracking” but discloses the exact same tracking concept claimed in the asserted claims.

Leader’s arguments also misrepresent the current state of the law and ignores Supreme Court precedent. Leader insists that Facebook failed to provide the necessary evidence of “motivations to combine” the prior art, but Leader is wrong on the law and the facts. Legally, there no longer exists a requirement to find an explicit “motivation to combine” references. *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 402 (2007) (“The diversity of inventive pursuits and of

modern technology counsels against confining the obviousness analysis by a formalistic conception of the words teaching, suggestion, and motivation . . .”). To the contrary, a combination of prior art elements performing their known functions is obvious *as a matter of law*. *Id.* at 415-16. And in any event, Facebook provided testimony that in fact did suggest motivations to combine the references. D.I. 637, Ex. 1 at 1564:16-1566:4.

Finally, the secondary considerations proffered by Leader are based on the incorrect and conclusory testimony of Dr. Herbsleb, and therefore do not support the jury’s verdict. Regarding long felt need, Dr. Herbsleb testified that Bell Labs in 2002 was struggling with how teams could share documents. Stameshkin Supp. Decl., Ex. A at 1847:4-17. He does not, however, establish the nexus between this “need” and the claims at issue, for example, by explaining why there was a long-felt need to track user movement from one context to another, and update metadata associated with user-defined data based on that change. Dr. Herbsleb’s testimony on commercial success is similarly unhelpful, as it relies solely on the success of Facebook as an alleged commercial embodiment of the invention without establishing a nexus between that success and the claimed invention. *Brown & Williamson Tobacco Corp. v. Philip Morris Inc.*, 229 F.3d 1120, 1130 (Fed. Cir. 2000) (“A nexus between commercial success and the claimed features is required.”). The commercial failure of Leader2Leader, the only product that both parties agree practices the asserted claims, demonstrates that merely practicing the claimed invention is not enough to create commercial success. No reasonable jury could have found secondary considerations of non-obviousness based on this record.

E. Facebook’s Conditional Request for a New Trial

In opposing Facebook’s conditional request for a new trial, Leader remarkably continues to argue that it appropriately suggested to the jury that the Swartz reference was considered by the PTO during the original prosecution of the ’761 patent. This Court has already ruled on that

issue and found Leader's comments to be improper. Stameshkin Supp. Decl., Ex. A at 1645:17-23 ("Such questioning by Mr. Andre was inappropriate due to my *in limine* ruling. By contrast, on direct, Facebook stayed appropriately within the narrow scope of my ruling, elicited only disputed [sic] evidence that Swartz is not mentioned on the face of the '761 patent."). The Court has also ruled that Leader's conduct prejudiced Facebook. *Id.* at 1647:1-2. The only issue raised by Facebook's motion is whether the Court's remedy of a curative instruction was sufficient to remedy this prejudice. Facebook believes it was not.

The conduct was egregious—counsel repeatedly pushed the issue despite multiple rulings barring the questions and being told to "move on." The improper line of questions implied to the jury that Facebook had been hiding-the-ball through its entire grueling element by element testimony, and misrepresented the facts and law of the case. D.I. 637, Ex. 1 at 1582:3-1583:14. The fact that this inappropriate behavior occurred immediately before the weekend break only enhanced its deleterious effect on the jury, who were left with a weekend to cogitate how and or why Leader was implying that Facebook was hiding something. The curative instruction, while greatly appreciated, was not given until the close of the case, many days after the misconduct occurred, essentially attempting to unring a bell that had sounded long ago. For at least these reasons, the curative instruction was insufficient.

F. The Non-Method Claims Are Invalid as Indefinite Under *IPXL Holdings*

Leader's opposition provides no analysis in response to Facebook's argument in its opening brief that Facebook is entitled to JMOL of invalidity of claims 1, 4, 7, 21, 23, 25, 31, and 32 because they are indefinite under *IPXL Holdings, L.L.C. v. Amazon.com, Inc.*, 430 F.3d 1377 (Fed. Cir. 2005). For the reasons set forth in Facebook's opening brief, Facebook's Motion for Summary Judgment No. 1 (D.I. 384) and Facebook's forthcoming reply in support of Motion for Summary Judgment No. 1 (to be filed by September 30, 2010), this Court should grant

Facebook's motion for judgment as a matter of law that claims 1, 4, 7, 21, 23, 25, 31 and 32 are invalid as indefinite.

III. CONCLUSION

For the foregoing reasons, Facebook's motion should be granted.

Dated: September 27, 2010

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**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/LPS

**SUPPLEMENTAL DECLARATION OF ELIZABETH STAMESHKIN IN SUPPORT OF
REPLY MEMORANDUM IN SUPPORT OF FACEBOOK, INC.'s
RENEWED MOTIONS FOR JUDGMENT AS A MATTER OF LAW**

I, Elizabeth Stameshkin, declare:

1. I am an attorney with Cooley LLP, of counsel in this action for Defendant Facebook, Inc. ("Facebook"). I make this declaration in support of Reply Memorandum in Support of Facebook, Inc.'s Renewed Motions for Judgment as a Matter of Law (JMOL). I have personal knowledge of the facts contained within this declaration, and if called as a witness, could testify competently to the matters contained herein.

2. Attached hereto as Exhibit A are true and correct copies of excerpts from the transcripts of the jury trial in this action held July 19-27, 2010.

3. Attached hereto as Exhibit B is a true and correct copy of excerpts from the transcript of the May 3, 2010 deposition of Giovanni Vigna, Ph.D.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 27, 2010 in Palo Alto, California.


Elizabeth Stameshkin

EXHIBIT A

613

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES,) Trial Volume 3
INC.,)
)
Plaintiff,)
) C.A. No. 08-862-JJF-LPS
v.)
)
FACEBOOK, INC., a)
Delaware corporation,)
)
Defendant.)

July 21, 2010
9:00 a.m.

BEFORE: THE HONORABLE LEONARD P. STARK
United States District Court Magistrate

APPEARANCES:

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BY: PHILIP A. ROVNER, ESQ.

-and-

KING & SPALDING
BY: PAUL ANDRE, ESQ.
BY: LISA KOBIALKA, ESQ.
BY: JAMES HANNAH, ESQ.

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1 me, please.

2 Mr. Wiseman, you were being shown
3 the paragraph I think actually that starts with
4 the word "since"?

5 A. Right.

6 Q. Why is the word "metadata" used in
7 this paragraph, or what's being talked about
8 here?

9 A. I believe the metadata referred to
10 here, it's also called pointers are in file
11 system terminology. It would be called like an
12 inode. It's the means by which any file system
13 takes a file and is able to find it on a disk or
14 whatever storage system it uses.

15 Q. Is that the same metadata that we
16 have been talking about with respect to the
17 photo table?

18 A. No, it's very different.

19 Q. Mr. Wiseman, how many servers make
20 up the user database?

21 A. I don't have an exact number, but
22 it's in the thousands.

23 Q. How many tables are there on the
24 user database?

1 A. On each database, there is several
2 hundred, I would guess.

3 MS. KEEFE: Thank you,
4 Mr. Wiseman. I have nothing further.

5 THE COURT: Thank you. You can
6 step down.

7 THE WITNESS: Thank you.

8 THE COURT: You can call your next
9 witness.

10 MS. KEEFE: They didn't think it
11 would be this fast. Just one second, Your
12 Honor, while he comes down.

13 THE COURT: Fine. Is he on his
14 way?

15 MS. KEEFE: He's definitely on his
16 way. I think he's waiting for the elevator on
17 the fourth floor.

18 THE COURT: I apologize, ladies
19 and gentlemen, but sometimes we run into little
20 scheduling bumps.

21 I believe he's here.

22 MS. KEEFE: He is. Facebook would
23 like at this time to call Andrew Bosworth to the
24 stand.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES,) Trial Volume 4
INC.,)
)
Plaintiff,)
) C.A. No. 08-862-JJF-LPS
v.)
)
FACEBOOK, INC., a)
Delaware corporation,)
)
Defendant.)

July 22, 2010
9:00 a.m.

BEFORE: THE HONORABLE LEONARD P. STARK
United States District Court Magistrate

APPEARANCES:

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BY: PHILIP A. ROVNER, ESQ.

-and-

KING & SPALDING
BY: PAUL ANDRE, ESQ.
BY: LISA KOBIALKA, ESQ.
BY: JAMES HANNAH, ESQ.

Counsel for Plaintiff

Hawkins Reporting Service
715 North King Street - Wilmington, Delaware 19801
(302) 658-6697 FAX (302) 658-8418

1 Q. So, in other words, if someone
2 were to -- if I update my CD collection, I just
3 can't buy new CDs and put them in there, I have
4 to do something and update my CDs?

5 A. I'm not -- I don't quite follow
6 you.

7 Q. Well, the word updating, you're
8 interpreting that to mean changing or altering;
9 correct?

10 A. That's correct.

11 Q. So adding new metadata somewhere,
12 is that altering?

13 A. I guess it would depend. It's
14 sort of adding a new road to this table
15 entirely. I wouldn't consider an update of
16 another row.

17 If you were to write a missing
18 entry into an existing row, I would consider
19 that an update of that row.

20 Q. So if all the rows are full, I
21 mean, all the columns are full on the row as
22 Facebook would do when they collect this
23 information about the photo, your understanding
24 of updating would be they have to actually

1 change what's in those columns; correct?

2 A. That would be my -- the most
3 natural interpretation, yes, as opposed to
4 adding entirely separate rows to this table or
5 changing data in some other place entirely.

6 Q. But the claims themselves just say
7 updating the metadata; right?

8 A. They just say updating the
9 metadata.

10 Q. And if you add a table to a
11 database, is that updating the database?

12 A. If you add a table to a database,
13 you would be updating the overall database,
14 sure, not other tables in the database.

15 Q. And so if you update -- if you
16 added metadata, you would be updating overall
17 metadata?

18 A. I mean, again, if you sort of
19 broaden the definition of metadata and data
20 enough to be very, very inclusive, and we can
21 call, you know, a change of anything an update
22 of anything else.

23 Q. Well, no. I'm talking about
24 metadata. If you have --

1274

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES,) Trial Volume 5
INC.,)
)
Plaintiff,)
) C.A. No. 08-862-JJF-LPS
v.)
)
FACEBOOK, INC., a)
Delaware corporation,)
)
Defendant.)

Friday, July 23, 2010
9:00 a.m.

BEFORE: THE HONORABLE LEONARD P. STARK
United States District Court Magistrate

APPEARANCES:

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BY: PHILIP A. ROVNER, ESQ.

-and-

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1 claim thirty-two vis-a-vis the iManage Reference
2 Manual?

3 A. That the iManage Reference Manual
4 discloses what is found in claim thirty-two.

5 Q. Have you heard of the term
6 enabling reference or enables prior art?

7 A. Yes, I have.

8 Q. What does that mean?

9 A. It means that the description is
10 rich enough that one of ordinary skill in the
11 art could build a system that has those
12 characteristics.

13 Q. As far as the claims of the 761
14 patent -- just have those in mind -- is it your
15 opinion that the iManage Reference Manual is an
16 enabling reference?

17 MR. ANDRE: Objection, Your Honor.
18 Outside the scope of this expert's report.

19 THE COURT: We'll note the
20 objection. You may answer if you have the
21 question in mind.

22 THE WITNESS: Can you read back
23 the question, please, or restate the question.

24 BY MS. KEEFE:

1 Q. Do you believe that the iManage
2 Reference Manual is an enabling reference?

3 A. Yes, I do.

4 Q. Can you pull up the front page of
5 the patent and pull up the references cited
6 section, please. I think we're missing one from
7 the very bottom. The references cited are in
8 two places.

9 Dr. Greenberg, do you see the
10 iManage Reference Manual listed here?

11 A. No, I do not.

12 Q. So in conclusion, regarding the
13 prior art, iManage Reference Manual, what is
14 your opinion regarding the asserted claims of
15 the 761 patent?

16 A. So my opinion is that the iManage
17 Reference Manual discloses each and every
18 element of all of the certified claims of the
19 761 patent.

20 Q. And what does that mean for
21 validity of the 761 claims?

22 A. It means that the patent is
23 invalid. The ideas were expressed in this
24 publication well before the 761 patent was

1 Let's hear from Mr. Andre, and
2 then I want to give Facebook some time.

3 MR. ANDRE: Your Honor, on the
4 contributory infringement, it's a pretty
5 standard instruction. I don't see anything
6 extraordinary about the points, puts out the
7 elements as set forth, looks like Facebook wants
8 to insert the statute into the instruction to
9 some degree, and I don't think that's necessary
10 or appropriate at this point.

11 I don't see the big issue here
12 because the Thrasher case has come out and
13 determined that any type of contributory
14 infringement to the patent requires a product in
15 the stream of commerce, and then you have three
16 elements set for most part.

17 THE COURT: Let me turn it over to
18 Facebook at this point. Feel free to address
19 any of the issues that have been raised or
20 others if you think there are others that are
21 important, and basically we have up to
22 twenty minutes because I do want to leave the
23 last five minutes to hear from Leader.

24 MR. WEINSTEIN: There's only two

1 issues to address. The most critical ones on
2 jury instruction, 3.4.

3 Your Honor, I'd like to hand up a
4 portion of some of the transcript from the trial
5 to illustrate why we need an instruction that
6 "wherein" does not mean when.

7 THE COURT: You've already cited
8 pretty extensively in your support, which we
9 looked at, so in the spirit of compromise,
10 construing at this late moment the term
11 "wherein" to mean in which, which has been
12 agreed to by Leader, is not satisfactory to you?

13 MR. WEINSTEIN: It isn't, Your
14 Honor. The problem with in which, Your Honor,
15 they're going to make the exact, same argument
16 what I heard today, is they think this is a
17 factual issue to go to the jury.

18 When I read the '02 Micro case
19 last night, I was haunted how similar that case
20 is to this. There was a claim term only if like
21 there. This case, they presented witnesses and
22 cross-examined witnesses on what do you think
23 this term means.

24 What ultimately came down and the

1 Court decided, he was going to send it to the
2 jury. The federal circuit said when the parties
3 present a fundamental dispute regarding the
4 scope of a claim term, it is the Court's duty to
5 resolve it.

6 The fundamental dispute is
7 regarding does "wherein" mean when, or does the
8 claim require a dynamic element, which means you
9 look to the proceeding claim element? That's a
10 dispute Your Honor needs to resolve as a matter
11 of law.

12 THE COURT: Help me, though, why I
13 haven't resolve it by construing "wherein" to
14 mean in which, and you all make your arguments
15 or don't. You're stuck with the Court's claim
16 construction as a matter of law. The jury is
17 told they have to follow my claim construction.
18 How is that any different than all the other
19 claim construction issues?

20 MR. WEINSTEIN: Ultimately let's
21 say the construction comes in in which you can
22 say at which point. There's lots of different
23 definitions. Ultimately wherein is a connector
24 between two clauses.

1 The question is, does it connote a
2 temporal sequence like something happens when
3 the user accesses the data from the second
4 context? That's the argument.

5 They're taking the update of
6 method to metadata can happen when the user
7 accesses data. That's a claim construction
8 question. We think it's been resolved by Judge
9 Farnan's order.

10 THE COURT: Where is it resolved
11 in his order?

12 MR. WEINSTEIN: It's resolved in
13 his order.

14 THE COURT: Why do I even need to
15 define wherein if dynamically has done it?

16 MR. WEINSTEIN: The only reason we
17 need to define it, Leader is making these
18 arguments. They're putting prosecution history
19 evidence before witnesses and arguing the
20 meaning of claim terms, which is the exclusive
21 province of Your Honor. There's going to be
22 arguments in closing as to what ultimately the
23 legal implication of wherein is. That's
24 something that should not go to the jury.

1 THE COURT: And your paragraph on
2 prosecution history that you propose, that does
3 not take care of your problem if I were to keep
4 that in as well as your wherein construction?

5 MR. WEINSTEIN: The wherein
6 construction would not do it. The prosecution
7 history would help, but ultimately, Your Honor
8 has to decide whether or not the claims are
9 satisfied with dynamically updating the metadata
10 when user accesses.

11 If that issue is not resolved,
12 ultimately instituting "wherein" as some
13 connector is not going to stop the arguments
14 from being made that are legal in nature.

15 THE COURT: If I were to add line
16 five, which claims which would I put the term
17 "wherein" means in which. Perhaps, not when.
18 In which claims, what number claims, would I
19 write in?

20 MR. WEINSTEIN: Your Honor, the
21 claims that have the wherein clause are one,
22 nine, and four also, and --

23 MR. HANNAH: All the dependent
24 claims have wherein as well.

1 MR. WEINSTEIN: I don't think
2 that's right, but I know seven has wherein in
3 it.

4 The claims where it really matters
5 is one, nine, and twenty-three.

6 Twenty-one, very interestingly,
7 Your Honor doesn't use the word "wherein." It
8 uses the term "such that," and that is something
9 that we agreed to, is to construe "wherein" to
10 mean "such that," which is consistent with
11 what's in claim twenty-one. That's another
12 synonym that we think is clearer.

13 THE COURT: Okay. Certainly this
14 is an important issue. I agree with that, but I
15 assume there's probably another you want to
16 address.

17 MR. WEINSTEIN: On Mr. Lamb's
18 testimony, the only thing we wanted was to say
19 two points.

20 One is, a written correction to
21 the deposition does not erase the witness's
22 prior answer, and the jury is free to consider
23 the changes in any way they see fit, the same
24 way they would judge any issue of credibility.

1 parties agree to was a commercial success
2 stipulation, but they have not reached agreement
3 on that as well. So those are the -- we can get
4 those to you as soon -- we'll keep working this
5 weekend and hopefully get them to you --

6 THE COURT: Right. So on all of
7 those issues, the limiting instructions and
8 which I think are limited to nine topics that
9 you just mentioned.

10 MR. ANDRE: Yeah.

11 THE COURT: I do want to see what
12 the parties propose, what their positions are,
13 and let's say by noon tomorrow. We're going to
14 follow this weekend the procedures we did last
15 week where I send -- if it's not under seal, go
16 ahead and do ECF. We can pull it off of ECF.

17 But if any portion of it is under
18 seal, email it to Mr. Golden and he'll get it to
19 the rest of us.

20 MR. ANDRE: Mr. Rovner will take
21 care of the rest.

22 THE COURT: Before you sit down,
23 whoever wants to address it on the 3.4 on this,
24 you know, is it enough for me to construe

1 wherein as in which and not go the extra mile
2 and say not when?

3 Mr. Weinstein, not that I don't
4 enjoy all my time with you, but I don't want to
5 sign up automatically for redoing this trial.

6 MR. ANDRE: Your Honor, the issue
7 of claim construction should have been brought
8 up a long time ago, if they want to bring it up.

9 The fact of the matter, experts
10 have been interpreting this how they've been
11 interpreting it. The expert on the stand, Dr.
12 Greenberg, has interpreted is as a consequence.
13 That's how he termed wherein.

14 Dr. Vigna determined it as in
15 which. I don't think, you know, if you say not
16 when is a negative limitation.

17 THE COURT: Let's be clear. If I
18 don't say not when, you're going to argue when.
19 They're going to argue not when.

20 MR. ANDRE: Well --

21 THE COURT: And you don't think
22 that means we're all going to get reversed the
23 minute we get to the Federal Circuit?

24 MR. ANDRE: Well, I'm not going to

1 argue when. I'm arguing which.

2 That's been our position
3 throughout this entire case. It is in which.
4 That's the dictionary's definition of the word.

5 So we think, as Mr. Hannah said,
6 the dynamically is a functional language, not
7 pure grammatical and temporal in that way. So
8 we're very confident that that's not going to be
9 an issue.

10 But if they start arguing, you
11 know, not thereafter, or as a consequence or
12 something along those lines like they had been,
13 their other expert, Dr. Kearns, did the same
14 thing. I asked him, I said, You mean
15 thereafter?

16 He said, Yeah, afterwards. So
17 everybody has had a different definition. If
18 you want to give a proper definition, give the
19 proper definition.

20 If you want to interpret, say what
21 it's not, we should also put some other things
22 what it's not as well as what your experts have
23 proposed. If you want to say it's not when,
24 then it should not say it's not thereafter or

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES,) Trial Day 6
INC.,)
)
Plaintiff,)
) C.A. No. 08-862-JJF-LPS
v.)
)
FACEBOOK, INC., a)
Delaware corporation,)
)
Defendant.)

Monday, July 26, 2010
9:00 a.m.

BEFORE: THE HONORABLE LEONARD P. STARK
United States District Court Magistrate

APPEARANCES:

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

-and-

KING & SPALDING
BY: PAUL ANDRE, ESQ.
BY: LISA KOBIALKA, ESQ.
BY: JAMES HANNAH, ESQ.

Counsel for Plaintiff

1 THE CLERK: All rise.

2 THE COURT: Good morning,
3 everyone.

4 (Everyone said, Good morning.)

5 THE CLERK: Please be seated.

6 THE COURT: Welcome to week two.
7 All right.

8 Let's begin with developments over
9 the weekend. I have seen and reviewed and am
10 prepared to rule on Facebook's motion for a
11 mistrial, which asks in the alternative for a
12 limiting instruction. All of which arises from
13 Leader's questioning of Professor Greenberg last
14 Friday afternoon as to whether the '761 examiner
15 considered the Swartz patent.

16 Excuse me. I ran in too quickly.

17 Such questioning by Mr. Andre was
18 inappropriate due to my in limine ruling. By
19 contrast, on direct, Facebook stayed
20 appropriately within the narrow scope of my
21 ruling, elicited only disputed evidence that
22 Swartz is not mentioned on the face of the '761
23 patent.

24 It is also true that the '761 is

1 in re-exam in part as a result of the PTO's
2 finding that Swartz was not considered during
3 prosecution of the '761.

4 And further, I have ruled and I
5 adhere to these rulings that the fact of the
6 re-exam and whether there's similarities between
7 the prior art relied on by Facebook in this
8 case, and the prior art considered by the PTO
9 during prosecution of the '761 patent are not
10 relevant to this trial.

11 Therefore, this is not a matter on
12 which the jury should be permitted to draw what
13 might otherwise seems to be reasonable
14 inferences that the examiner considered Swartz
15 since she was also the examiner of Swartz.

16 But, however, I'm not going to
17 permit the parties to get into the re-examine.
18 We're not going to open up the door and get into
19 how many patents Ms. Mizrahi may have examined
20 or what else she was doing.

21 Instead there's going to be no
22 more questioning that relates in any way to what
23 the PTO considered or did not consider.

24 I'm denying the motion for a

1 mistrial because I think while there was
2 prejudice to Facebook, I think it is curable in
3 other ways short of the extraordinary remedy of
4 a mistrial, and in particular through jury
5 instructions and special interrogatories.

6 Leader, of course, claims that
7 it's prejudiced by Facebook's narrow questioning
8 of Greenberg about whether Swartz is listed on
9 the face of the '761 patent, but I absolutely
10 reject Leader's position. Again, as I said,
11 Facebook's questioning was entirely consistent
12 with my prior rulings.

13 Leader did not object during the
14 examination of -- well, even prior Leader, did
15 not object to Facebook giving the jury binder to
16 the jury which contained the Swartz patent.
17 Leader did not object to Facebook displaying the
18 Swartz patent for the jury.

19 Leader did not object to Facebook
20 blowing up the portion of the -- I'm sorry, the
21 Swartz patent that evidently shows the Swartz
22 examiner's name.

23 Leader did not object to
24 Facebook's questions, objections which I would

1 THE COURT: I'm not going to
2 strike it, but let's move on. I'm overruling
3 the motion, or denying the motion to strike.

4 MS. KEEFE: Thank you.

5 BY MS. KEEFE:

6 Q. Also with respect to the iManage
7 DeskSite user reference manual, Dr. Greenberg,
8 when you were writing your report, did the copy
9 of the manual that you were using contain a
10 confidentiality designation?

11 A. No. I have it right in front of
12 me, this is an exact copy used, and it did not
13 have that confidentiality designation.

14 MS. KEEFE: Your Honor, at this
15 time we would move into evidence Exhibit 925E.

16 MR. ANDRE: Objection, Your Honor.
17 This is not the document that he has testified
18 to.

19 THE COURT: I'm overruling the
20 objection. It's admitted.

21 MS. KEEFE: Thank you, Your Honor.

22 Nothing further, Dr. Greenberg.

23 Thank you.

24 THE WITNESS: Thank you very much.

1 cited as prior art.

2 Q. Let's turn to the prior art.

3 Let's go to the iManage User Reference Manual,
4 which is DTX 1010. Now, what is your
5 understanding of what this user reference manual
6 is?

7 A. Well, it's a manual intended for
8 end users to -- you know, people who want to use
9 the iManage DeskSite system would refer to this
10 to figure out, you know, how to use it.

11 Q. And does it actually tell you how
12 to build the iManage software?

13 A. Well, no, not at all. Actually
14 it's as if, you know, we all have owners manuals
15 for our cars that tell you, Here's how you
16 operate the automatic transmission. For
17 example, that tells me absolutely nothing about
18 how to build an automatic transmission.

19 It's just -- it just doesn't
20 disclose anything about that. So in the same
21 way a user manual might tell me how to engage
22 the functionality of the software, but it
23 doesn't tell me anything about how to build it.

24 Q. All right. And within the four

1 corners of this document we've marked as DTX
2 1010, does it give you any information for one
3 of ordinary skill in the art to be able to build
4 the software in all the components that it might
5 reference?

6 A. No, it doesn't. It doesn't say
7 anything about how it's designed, what the
8 structure looks like. It simply tells us how to
9 use it once it's there.

10 Q. Do you know whether this iManage
11 manual, which is marked as DTX 1010 whether that
12 was publicly available in 2001 or 2002?

13 A. I have no idea.

14 Q. Now, do you have an opinion as to
15 whether the iManage User Reference Manual is
16 prior art to the '761 patent?

17 A. Yeah. Because it doesn't
18 disclose, you know, how to make and use this
19 invention, I would say it's not prior art. It
20 doesn't qualify as prior art.

21 Q. What is the difference between the
22 iManage User Manual and the information
23 disclosed within the four corners of that
24 document and the invention of the '761 patent?

1 reasons that you have already provided today; is
2 that right?

3 A. Exactly.

4 Q. In your opinion, does the
5 invention of the '761 patent address a long-felt
6 but unresolved need in the industry?

7 A. I think it does. I mean, this
8 2002 time frame was right at the end of the
9 period where I was doing research in
10 collaboration technology at Bell Labs. We were
11 trying to introduce and develop some
12 technologies to help distribute teams and share
13 documents and it was a huge problem. And I
14 think others were suffering from very similar
15 kinds of problems trying to figure out how to
16 get global distributed teams to share, for
17 example.

18 And, again, in terms of
19 obviousness, I think if, you know, a solution to
20 that had been obvious, someone would have come
21 up with it some time ago.

22 Q. In your opinion, based on the
23 techniques that were known around 2002, did
24 those techniques teach a way from the invention

EXHIBIT B

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

IN THE UNITED STATES COURT
FOR THE DISTRICT OF DELAWARE

4	LEADER TECHNOLOGIES, INC.,)	
	a Delaware corporation,)	
5)	
	Plaintiff and Counterdefendant,)	
6)	CIVIL ACTION NO.
	vs.)	1:08-CV-00862-JJF
7)	
	FACEBOOK, INC.,)	
8)	
	Defendant and Counterclaimant.)	
9)	

HIGHLY CONFIDENTIAL -- ATTORNEYS EYES ONLY

SOURCE CODE

Videotaped deposition of GIOVANNI VIGNA, PH.D,
taken at 633 East Cabrillo Boulevard, Santa
Barbara, California, commencing at 9:55 a.m.,
Monday, May 3, 2010, before Daryl Baucum, RPR,
CRR, RMR, CSR No. 10356.

PAGES 1 - 254

1 APPEARANCES OF COUNSEL:

2

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14 FOR THE DEFENDANT FACEBOOK:

15

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3 ALSO PRESENT:

4 DAVID WEST, Videographer

5

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1 SANTA BARBARA, CALIFORNIA; MONDAY, MAY 3, 2010

2 9:55 A.M.

3

4 THE VIDEOGRAPHER: Good morning. We are on
5 the record at 9:55 a.m. The date today is May 3, 09:55:03
6 2010.

7 This is the videotaped deposition of
8 Giovanni Vigna --

9 THE WITNESS: That's fine.

10 THE VIDEOGRAPHER: -- Ph.D. 09:55:20

11 My name is David West, here with our court
12 reporter, Daryl Baucum. We here from Veritext
13 National Deposition and Litigation Services at the
14 request of counsel for defendant.

15 The deposition is being held at Fess 09:55:32
16 Parker's Double Tree Resort at 633 East Cabrillo
17 Boulevard in the city of Santa Barbara, California.

18 The caption of this case is Leader
19 Technologies, Inc. versus Facebook, Inc. and
20 counterclaimants. Civil action number is 09:55:46
21 1:08CV-00862-JJF.

22 Please, note that audio and video recording
23 will take place unless all parties agree to go off
24 the record. Microphones are sensitive and may pick
25 up whispers, private conversations, as well as 09:56:04

1 BlackBerry and cellular interference.

2 At this time, will Counsel, please,
3 identify themselves for the record.

4 MR. WEINSTEIN: Mark Weinstein from Cooley,
5 representing the defendant.

6 MS. KEEFE: Heidi Keefe, also from Cooley,
7 representing Facebook, defendant.

8 MR. HANNAH: James Hannah from King &
9 Spalding representing Leader Technologies and here
10 with the witness.

11 THE VIDEOGRAPHER: Thank you.

12 The witness will now be sworn in and we can
13 proceed.

14
15 GIOVANNI VIGNA, PH.D.,
16 having been first duly sworn, was
17 examined and testified as follows:

18
19 EXAMINATION

20 BY MR. WEINSTEIN:

21 Q. Good morning, sir.

22 A. Good morning.

23 Q. Could you state your name for the record,
24 please.

25 A. My name is Giovanni Vigna; G-I-O-V-A-N-N-I,

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Page 6

09:56:53

1 last name, V-I-G-N-A.

2 Q. Are you currently -- and do you go by
3 Dr. Vigna?

4 A. That's fine.

5 Q. Are you currently employed, Dr. Vigna? 09:57:05

6 A. Yes.

7 Q. Who is your current employer?

8 A. University of California in Santa Barbara.

9 Q. How long have you been employed by the
10 University of California, Santa Barbara? 09:57:13

11 A. Since 1997.

12 Q. What is your position there?

13 A. I am a full professor in computer science.

14 Q. Thank you.

15 Dr. Vigna, have you ever had your
16 deposition taken before? 09:57:28

17 A. Yes.

18 Q. How many times?

19 A. I remember one, but I am not a hundred
20 percent sure. I mean I would say one. 09:57:41

21 Q. Okay. What was the case in which you
22 provided this deposition? What was the name of the
23 case?

24 A. I think it was called Finjan versus Secure
25 Computing. This is what I remember. 09:58:00

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Page 24

1 provided in the subversion database 10:21:38
2 and the database schema. I intend
3 to demonstrate and discuss this
4 material even if it is not
5 specifically referenced in the body 10:21:47
6 of my report. If it is found that
7 any of the information that I have
8 relied upon has been updated before
9 trial, that further documentation
10 and information is produced and made 10:21:59
11 available -- or made available or
12 that additional depositions are
13 taken, I reserve the right to rely
14 upon and discuss the updated and new
15 information even if it is not 10:22:12
16 specifically set forth in this
17 report in Exhibit B."
18 Does that answer your question?
19 BY MR. WEINSTEIN:
20 Q. No, it doesn't, but we will get back to 10:22:19
21 that.
22 For paragraph 15, the first sentence says:
23 "For trial, I also intend to
24 demonstrate the operation of the
25 Facebook website live with tools 10:22:29

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Page 25

1 capable of showing the functionality 10:22:31

2 and rendering of the Facebook

3 website."

4 What tools are you referring to in this

5 paragraph? 10:22:38

6 A. There are -- I haven't decided exactly
7 which of the many tools available to perform this
8 type of task I am going to use, but one skilled in
9 the art would immediately identify what that means.

10 These are tools that are capable of showing 10:23:08

11 the functionality of the website and the rendering
12 of the Facebook website.

13 Q. Can you name some of those tools for me,
14 sir?

15 A. For example, the Firefox web browser. 10:23:24

16 Q. Any others?

17 A. There are so many, it's difficult to -- I
18 haven't decided yet which ones I am going to use.
19 So it will be difficult to make a list right now.

20 Q. But when you refer to "tools," are you 10:23:50

21 referring to web browsers?

22 A. I refer to tools which the claim -- the
23 ordinary meaning of "tools" is software tools.

24 Q. Other than Firefox, can you name any other

25 tools that you intend to use with respect to the 10:24:10

10:24:13

1 demonstration reference in paragraph 15?

2 A. I haven't made a decision yet. So I think
3 it would be premature.

4 Q. The next sentence says:

10:24:27

5 "In addition to the
6 demonstratives, I intend to
7 demonstrate and discuss all material
8 I have relied upon."

9 Have you created any demonstratives, sir,
10 in connection with this litigation?

10:24:36

11 A. Let me check my report.

12 So in paragraph 12 of my report, I said:

13 "In order to aid the court and
14 jury in understanding my opinion
15 regarding Facebook's infringement of
16 the 761 patent, I intend to create
17 demonstrative exhibits for trial."

10:25:33

18 And so that's what I intend to do.

19 Q. So the demonstrative exhibits did not exist
20 at the time the report was filed, correct?

10:25:49

21 A. Well, I didn't say that. I said that I
22 intend to create these demonstrative exhibits at
23 trial. So there is information that has been
24 included in the report and then I said in order to
25 aid the court to understand my position, I intend to

10:26:10

DECLARATION

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I hereby declare I am the deponent in the within matter; that I have read the foregoing deposition and know the contents thereof; and I declare that the same is true of my knowledge except as to the matters which are therein stated upon my information or belief, and as to those matters, I believe it to be true.

I declare under the penalties of perjury under the laws of the State of California that the foregoing is true and correct.

This declaration is executed this _____ day of _____, 2010, at _____, California.

W I T N E S S

**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/LPS

**SUPPLEMENTAL DECLARATION OF ELIZABETH STAMESHKIN IN SUPPORT OF
REPLY MEMORANDUM IN SUPPORT OF FACEBOOK, INC.'s
RENEWED MOTIONS FOR JUDGMENT AS A MATTER OF LAW**

I, Elizabeth Stameshkin, declare:

1. I am an attorney with Cooley LLP, of counsel in this action for Defendant Facebook, Inc. ("Facebook"). I make this declaration in support of Reply Memorandum in Support of Facebook, Inc.'s Renewed Motions for Judgment as a Matter of Law (JMOL). I have personal knowledge of the facts contained within this declaration, and if called as a witness, could testify competently to the matters contained herein.

2. Attached hereto as Exhibit A are true and correct copies of excerpts from the transcripts of the jury trial in this action held July 19-27, 2010.

3. Attached hereto as Exhibit B is a true and correct copy of excerpts from the transcript of the May 3, 2010 deposition of Giovanni Vigna, Ph.D.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 27, 2010 in Palo Alto, California.



Elizabeth Stameshkin

**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/LPS

**SUPPLEMENTAL DECLARATION OF ELIZABETH STAMESHKIN IN SUPPORT OF
REPLY MEMORANDUM IN SUPPORT OF FACEBOOK, INC.'s
RENEWED MOTIONS FOR JUDGMENT AS A MATTER OF LAW**

I, Elizabeth Stameshkin, declare:

1. I am an attorney with Cooley LLP, of counsel in this action for Defendant Facebook, Inc. ("Facebook"). I make this declaration in support of Reply Memorandum in Support of Facebook, Inc.'s Renewed Motions for Judgment as a Matter of Law (JMOL). I have personal knowledge of the facts contained within this declaration, and if called as a witness, could testify competently to the matters contained herein.

2. Attached hereto as Exhibit A are true and correct copies of excerpts from the transcripts of the jury trial in this action held July 19-27, 2010.

3. Attached hereto as Exhibit B is a true and correct copy of excerpts from the transcript of the May 3, 2010 deposition of Giovanni Vigna, Ph.D.

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 27, 2010 in Palo Alto, California.



Elizabeth Stameshkin

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I, DARYL BAUCUM, CSR No. 10356, do certify;
That the foregoing deposition was taken
before me at the time and place therein set forth,
at which time the witness named in the foregoing
deposition was placed under oath and was sworn by me
to tell the truth, the whole truth, and nothing but
the truth;

That said testimony of the witness and all
objections by counsel at the time of the examination
were recorded stenographically by me, and were
thereafter transcribed under my direction and
supervision, and that the foregoing pages contain a
full, true and accurate record of all proceedings
and testimony to the best of my skill and ability.

I further certify that I am neither counsel
for any party to said action, nor am I related to
any party in said action, nor am I in any way
interested in outcome thereof.

IN WITNESS WHEREOF, I have subscribed my
name this 17th day of May, 2010.

DARYL BAUCUM, CSR No. 10356

EXHIBIT A

613

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES,) Trial Volume 3
INC.,)
)
Plaintiff,)
) C.A. No. 08-862-JJF-LPS
v.)
)
FACEBOOK, INC., a)
Delaware corporation,)
)
Defendant.)

July 21, 2010
9:00 a.m.

BEFORE: THE HONORABLE LEONARD P. STARK
United States District Court Magistrate

APPEARANCES:

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

-and-

KING & SPALDING
BY: PAUL ANDRE, ESQ.
BY: LISA KOBIALKA, ESQ.
BY: JAMES HANNAH, ESQ.

Counsel for Plaintiff
Hawkins Reporting Service
715 North King Street - Wilmington, Delaware 19801
(302) 658-6697 FAX (302) 658-8418

1 me, please.

2 Mr. Wiseman, you were being shown
3 the paragraph I think actually that starts with
4 the word "since"?

5 A. Right.

6 Q. Why is the word "metadata" used in
7 this paragraph, or what's being talked about
8 here?

9 A. I believe the metadata referred to
10 here, it's also called pointers are in file
11 system terminology. It would be called like an
12 inode. It's the means by which any file system
13 takes a file and is able to find it on a disk or
14 whatever storage system it uses.

15 Q. Is that the same metadata that we
16 have been talking about with respect to the
17 photo table?

18 A. No, it's very different.

19 Q. Mr. Wiseman, how many servers make
20 up the user database?

21 A. I don't have an exact number, but
22 it's in the thousands.

23 Q. How many tables are there on the
24 user database?

1 A. On each database, there is several
2 hundred, I would guess.

3 MS. KEEFE: Thank you,
4 Mr. Wiseman. I have nothing further.

5 THE COURT: Thank you. You can
6 step down.

7 THE WITNESS: Thank you.

8 THE COURT: You can call your next
9 witness.

10 MS. KEEFE: They didn't think it
11 would be this fast. Just one second, Your
12 Honor, while he comes down.

13 THE COURT: Fine. Is he on his
14 way?

15 MS. KEEFE: He's definitely on his
16 way. I think he's waiting for the elevator on
17 the fourth floor.

18 THE COURT: I apologize, ladies
19 and gentlemen, but sometimes we run into little
20 scheduling bumps.

21 I believe he's here.

22 MS. KEEFE: He is. Facebook would
23 like at this time to call Andrew Bosworth to the
24 stand.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES,) Trial Volume 4
INC.,)
)
Plaintiff,)
) C.A. No. 08-862-JJF-LPS
v.)
)
FACEBOOK, INC., a)
Delaware corporation,)
)
Defendant.)

July 22, 2010
9:00 a.m.

BEFORE: THE HONORABLE LEONARD P. STARK
United States District Court Magistrate

APPEARANCES:

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

-and-

KING & SPALDING
BY: PAUL ANDRE, ESQ.
BY: LISA KOBIALKA, ESQ.
BY: JAMES HANNAH, ESQ.

Counsel for Plaintiff

Hawkins Reporting Service
715 North King Street - Wilmington, Delaware 19801
(302) 658-6697 FAX (302) 658-8418

1 Q. So, in other words, if someone
2 were to -- if I update my CD collection, I just
3 can't buy new CDs and put them in there, I have
4 to do something and update my CDs?

5 A. I'm not -- I don't quite follow
6 you.

7 Q. Well, the word updating, you're
8 interpreting that to mean changing or altering;
9 correct?

10 A. That's correct.

11 Q. So adding new metadata somewhere,
12 is that altering?

13 A. I guess it would depend. It's
14 sort of adding a new road to this table
15 entirely. I wouldn't consider an update of
16 another row.

17 If you were to write a missing
18 entry into an existing row, I would consider
19 that an update of that row.

20 Q. So if all the rows are full, I
21 mean, all the columns are full on the row as
22 Facebook would do when they collect this
23 information about the photo, your understanding
24 of updating would be they have to actually

1 change what's in those columns; correct?

2 A. That would be my -- the most
3 natural interpretation, yes, as opposed to
4 adding entirely separate rows to this table or
5 changing data in some other place entirely.

6 Q. But the claims themselves just say
7 updating the metadata; right?

8 A. They just say updating the
9 metadata.

10 Q. And if you add a table to a
11 database, is that updating the database?

12 A. If you add a table to a database,
13 you would be updating the overall database,
14 sure, not other tables in the database.

15 Q. And so if you update -- if you
16 added metadata, you would be updating overall
17 metadata?

18 A. I mean, again, if you sort of
19 broaden the definition of metadata and data
20 enough to be very, very inclusive, and we can
21 call, you know, a change of anything an update
22 of anything else.

23 Q. Well, no. I'm talking about
24 metadata. If you have --

1274

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES,) Trial Volume 5
INC.,)
)
Plaintiff,)
) C.A. No. 08-862-JJF-LPS
v.)
)
FACEBOOK, INC., a)
Delaware corporation,)
)
Defendant.)

Friday, July 23, 2010
9:00 a.m.

BEFORE: THE HONORABLE LEONARD P. STARK
United States District Court Magistrate

APPEARANCES:

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

-and-

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(302) 658-6697 FAX (302) 658-8418

1 claim thirty-two vis-a-vis the iManage Reference
2 Manual?

3 A. That the iManage Reference Manual
4 discloses what is found in claim thirty-two.

5 Q. Have you heard of the term
6 enabling reference or enables prior art?

7 A. Yes, I have.

8 Q. What does that mean?

9 A. It means that the description is
10 rich enough that one of ordinary skill in the
11 art could build a system that has those
12 characteristics.

13 Q. As far as the claims of the 761
14 patent -- just have those in mind -- is it your
15 opinion that the iManage Reference Manual is an
16 enabling reference?

17 MR. ANDRE: Objection, Your Honor.
18 Outside the scope of this expert's report.

19 THE COURT: We'll note the
20 objection. You may answer if you have the
21 question in mind.

22 THE WITNESS: Can you read back
23 the question, please, or restate the question.

24 BY MS. KEEFE:

1 Q. Do you believe that the iManage
2 Reference Manual is an enabling reference?

3 A. Yes, I do.

4 Q. Can you pull up the front page of
5 the patent and pull up the references cited
6 section, please. I think we're missing one from
7 the very bottom. The references cited are in
8 two places.

9 Dr. Greenberg, do you see the
10 iManage Reference Manual listed here?

11 A. No, I do not.

12 Q. So in conclusion, regarding the
13 prior art, iManage Reference Manual, what is
14 your opinion regarding the asserted claims of
15 the 761 patent?

16 A. So my opinion is that the iManage
17 Reference Manual discloses each and every
18 element of all of the certified claims of the
19 761 patent.

20 Q. And what does that mean for
21 validity of the 761 claims?

22 A. It means that the patent is
23 invalid. The ideas were expressed in this
24 publication well before the 761 patent was

1 Let's hear from Mr. Andre, and
2 then I want to give Facebook some time.

3 MR. ANDRE: Your Honor, on the
4 contributory infringement, it's a pretty
5 standard instruction. I don't see anything
6 extraordinary about the points, puts out the
7 elements as set forth, looks like Facebook wants
8 to insert the statute into the instruction to
9 some degree, and I don't think that's necessary
10 or appropriate at this point.

11 I don't see the big issue here
12 because the Thrasher case has come out and
13 determined that any type of contributory
14 infringement to the patent requires a product in
15 the stream of commerce, and then you have three
16 elements set for most part.

17 THE COURT: Let me turn it over to
18 Facebook at this point. Feel free to address
19 any of the issues that have been raised or
20 others if you think there are others that are
21 important, and basically we have up to
22 twenty minutes because I do want to leave the
23 last five minutes to hear from Leader.

24 MR. WEINSTEIN: There's only two

1 issues to address. The most critical ones on
2 jury instruction, 3.4.

3 Your Honor, I'd like to hand up a
4 portion of some of the transcript from the trial
5 to illustrate why we need an instruction that
6 "wherein" does not mean when.

7 THE COURT: You've already cited
8 pretty extensively in your support, which we
9 looked at, so in the spirit of compromise,
10 construing at this late moment the term
11 "wherein" to mean in which, which has been
12 agreed to by Leader, is not satisfactory to you?

13 MR. WEINSTEIN: It isn't, Your
14 Honor. The problem with in which, Your Honor,
15 they're going to make the exact, same argument
16 what I heard today, is they think this is a
17 factual issue to go to the jury.

18 When I read the '02 Micro case
19 last night, I was haunted how similar that case
20 is to this. There was a claim term only if like
21 there. This case, they presented witnesses and
22 cross-examined witnesses on what do you think
23 this term means.

24 What ultimately came down and the

1 Court decided, he was going to send it to the
2 jury. The federal circuit said when the parties
3 present a fundamental dispute regarding the
4 scope of a claim term, it is the Court's duty to
5 resolve it.

6 The fundamental dispute is
7 regarding does "wherein" mean when, or does the
8 claim require a dynamic element, which means you
9 look to the proceeding claim element? That's a
10 dispute Your Honor needs to resolve as a matter
11 of law.

12 THE COURT: Help me, though, why I
13 haven't resolve it by construing "wherein" to
14 mean in which, and you all make your arguments
15 or don't. You're stuck with the Court's claim
16 construction as a matter of law. The jury is
17 told they have to follow my claim construction.
18 How is that any different than all the other
19 claim construction issues?

20 MR. WEINSTEIN: Ultimately let's
21 say the construction comes in in which you can
22 say at which point. There's lots of different
23 definitions. Ultimately wherein is a connector
24 between two clauses.

1 The question is, does it connote a
2 temporal sequence like something happens when
3 the user accesses the data from the second
4 context? That's the argument.

5 They're taking the update of
6 method to metadata can happen when the user
7 accesses data. That's a claim construction
8 question. We think it's been resolved by Judge
9 Farnan's order.

10 THE COURT: Where is it resolved
11 in his order?

12 MR. WEINSTEIN: It's resolved in
13 his order.

14 THE COURT: Why do I even need to
15 define wherein if dynamically has done it?

16 MR. WEINSTEIN: The only reason we
17 need to define it, Leader is making these
18 arguments. They're putting prosecution history
19 evidence before witnesses and arguing the
20 meaning of claim terms, which is the exclusive
21 province of Your Honor. There's going to be
22 arguments in closing as to what ultimately the
23 legal implication of wherein is. That's
24 something that should not go to the jury.

1 THE COURT: And your paragraph on
2 prosecution history that you propose, that does
3 not take care of your problem if I were to keep
4 that in as well as your wherein construction?

5 MR. WEINSTEIN: The wherein
6 construction would not do it. The prosecution
7 history would help, but ultimately, Your Honor
8 has to decide whether or not the claims are
9 satisfied with dynamically updating the metadata
10 when user accesses.

11 If that issue is not resolved,
12 ultimately instituting "wherein" as some
13 connecter is not going to stop the arguments
14 from being made that are legal in nature.

15 THE COURT: If I were to add line
16 five, which claims which would I put the term
17 "wherein" means in which. Perhaps, not when.
18 In which claims, what number claims, would I
19 write in?

20 MR. WEINSTEIN: Your Honor, the
21 claims that have the wherein clause are one,
22 nine, and four also, and --

23 MR. HANNAH: All the dependent
24 claims have wherein as well.

1 MR. WEINSTEIN: I don't think
2 that's right, but I know seven has wherein in
3 it.

4 The claims where it really matters
5 is one, nine, and twenty-three.

6 Twenty-one, very interestingly,
7 Your Honor doesn't use the word "wherein." It
8 uses the term "such that," and that is something
9 that we agreed to, is to construe "wherein" to
10 mean "such that," which is consistent with
11 what's in claim twenty-one. That's another
12 synonym that we think is clearer.

13 THE COURT: Okay. Certainly this
14 is an important issue. I agree with that, but I
15 assume there's probably another you want to
16 address.

17 MR. WEINSTEIN: On Mr. Lamb's
18 testimony, the only thing we wanted was to say
19 two points.

20 One is, a written correction to
21 the deposition does not erase the witness's
22 prior answer, and the jury is free to consider
23 the changes in any way they see fit, the same
24 way they would judge any issue of credibility.

1 parties agree to was a commercial success
2 stipulation, but they have not reached agreement
3 on that as well. So those are the -- we can get
4 those to you as soon -- we'll keep working this
5 weekend and hopefully get them to you --

6 THE COURT: Right. So on all of
7 those issues, the limiting instructions and
8 which I think are limited to nine topics that
9 you just mentioned.

10 MR. ANDRE: Yeah.

11 THE COURT: I do want to see what
12 the parties propose, what their positions are,
13 and let's say by noon tomorrow. We're going to
14 follow this weekend the procedures we did last
15 week where I send -- if it's not under seal, go
16 ahead and do ECF. We can pull it off of ECF.

17 But if any portion of it is under
18 seal, email it to Mr. Golden and he'll get it to
19 the rest of us.

20 MR. ANDRE: Mr. Rovner will take
21 care of the rest.

22 THE COURT: Before you sit down,
23 whoever wants to address it on the 3.4 on this,
24 you know, is it enough for me to construe

1 wherein as in which and not go the extra mile
2 and say not when?

3 Mr. Weinstein, not that I don't
4 enjoy all my time with you, but I don't want to
5 sign up automatically for redoing this trial.

6 MR. ANDRE: Your Honor, the issue
7 of claim construction should have been brought
8 up a long time ago, if they want to bring it up.

9 The fact of the matter, experts
10 have been interpreting this how they've been
11 interpreting it. The expert on the stand, Dr.
12 Greenberg, has interpreted is as a consequence.
13 That's how he termed wherein.

14 Dr. Vigna determined it as in
15 which. I don't think, you know, if you say not
16 when is a negative limitation.

17 THE COURT: Let's be clear. If I
18 don't say not when, you're going to argue when.
19 They're going to argue not when.

20 MR. ANDRE: Well --

21 THE COURT: And you don't think
22 that means we're all going to get reversed the
23 minute we get to the Federal Circuit?

24 MR. ANDRE: Well, I'm not going to

1 argue when. I'm arguing which.

2 That's been our position
3 throughout this entire case. It is in which.
4 That's the dictionary's definition of the word.

5 So we think, as Mr. Hannah said,
6 the dynamically is a functional language, not
7 pure grammatical and temporal in that way. So
8 we're very confident that that's not going to be
9 an issue.

10 But if they start arguing, you
11 know, not thereafter, or as a consequence or
12 something along those lines like they had been,
13 their other expert, Dr. Kearns, did the same
14 thing. I asked him, I said, You mean
15 thereafter?

16 He said, Yeah, afterwards. So
17 everybody has had a different definition. If
18 you want to give a proper definition, give the
19 proper definition.

20 If you want to interpret, say what
21 it's not, we should also put some other things
22 what it's not as well as what your experts have
23 proposed. If you want to say it's not when,
24 then it should not say it's not thereafter or

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES,) Trial Day 6
INC.,)
)
Plaintiff,)
) C.A. No. 08-862-JJF-LPS
v.)
)
FACEBOOK, INC., a)
Delaware corporation,)
)
Defendant.)

Monday, July 26, 2010
9:00 a.m.

BEFORE: THE HONORABLE LEONARD P. STARK
United States District Court Magistrate

APPEARANCES:

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

-and-

KING & SPALDING
BY: PAUL ANDRE, ESQ.
BY: LISA KOBIALKA, ESQ.
BY: JAMES HANNAH, ESQ.

Counsel for Plaintiff

1 THE CLERK: All rise.

2 THE COURT: Good morning,
3 everyone.

4 (Everyone said, Good morning.)

5 THE CLERK: Please be seated.

6 THE COURT: Welcome to week two.
7 All right.

8 Let's begin with developments over
9 the weekend. I have seen and reviewed and am
10 prepared to rule on Facebook's motion for a
11 mistrial, which asks in the alternative for a
12 limiting instruction. All of which arises from
13 Leader's questioning of Professor Greenberg last
14 Friday afternoon as to whether the '761 examiner
15 considered the Swartz patent.

16 Excuse me. I ran in too quickly.

17 Such questioning by Mr. Andre was
18 inappropriate due to my in limine ruling. By
19 contrast, on direct, Facebook stayed
20 appropriately within the narrow scope of my
21 ruling, elicited only disputed evidence that
22 Swartz is not mentioned on the face of the '761
23 patent.

24 It is also true that the '761 is

1 in re-exam in part as a result of the PTO's
2 finding that Swartz was not considered during
3 prosecution of the '761.

4 And further, I have ruled and I
5 adhere to these rulings that the fact of the
6 re-exam and whether there's similarities between
7 the prior art relied on by Facebook in this
8 case, and the prior art considered by the PTO
9 during prosecution of the '761 patent are not
10 relevant to this trial.

11 Therefore, this is not a matter on
12 which the jury should be permitted to draw what
13 might otherwise seems to be reasonable
14 inferences that the examiner considered Swartz
15 since she was also the examiner of Swartz.

16 But, however, I'm not going to
17 permit the parties to get into the re-examine.
18 We're not going to open up the door and get into
19 how many patents Ms. Mizrahi may have examined
20 or what else she was doing.

21 Instead there's going to be no
22 more questioning that relates in any way to what
23 the PTO considered or did not consider.

24 I'm denying the motion for a

1 mistrial because I think while there was
2 prejudice to Facebook, I think it is curable in
3 other ways short of the extraordinary remedy of
4 a mistrial, and in particular through jury
5 instructions and special interrogatories.

6 Leader, of course, claims that
7 it's prejudiced by Facebook's narrow questioning
8 of Greenberg about whether Swartz is listed on
9 the face of the '761 patent, but I absolutely
10 reject Leader's position. Again, as I said,
11 Facebook's questioning was entirely consistent
12 with my prior rulings.

13 Leader did not object during the
14 examination of -- well, even prior Leader, did
15 not object to Facebook giving the jury binder to
16 the jury which contained the Swartz patent.
17 Leader did not object to Facebook displaying the
18 Swartz patent for the jury.

19 Leader did not object to Facebook
20 blowing up the portion of the -- I'm sorry, the
21 Swartz patent that evidently shows the Swartz
22 examiner's name.

23 Leader did not object to
24 Facebook's questions, objections which I would

1 THE COURT: I'm not going to
2 strike it, but let's move on. I'm overruling
3 the motion, or denying the motion to strike.

4 MS. KEEFE: Thank you.

5 BY MS. KEEFE:

6 Q. Also with respect to the iManage
7 DeskSite user reference manual, Dr. Greenberg,
8 when you were writing your report, did the copy
9 of the manual that you were using contain a
10 confidentiality designation?

11 A. No. I have it right in front of
12 me, this is an exact copy used, and it did not
13 have that confidentiality designation.

14 MS. KEEFE: Your Honor, at this
15 time we would move into evidence Exhibit 925E.

16 MR. ANDRE: Objection, Your Honor.
17 This is not the document that he has testified
18 to.

19 THE COURT: I'm overruling the
20 objection. It's admitted.

21 MS. KEEFE: Thank you, Your Honor.

22 Nothing further, Dr. Greenberg.

23 Thank you.

24 THE WITNESS: Thank you very much.

1 cited as prior art.

2 Q. Let's turn to the prior art.
3 Let's go to the iManage User Reference Manual,
4 which is DTX 1010. Now, what is your
5 understanding of what this user reference manual
6 is?

7 A. Well, it's a manual intended for
8 end users to -- you know, people who want to use
9 the iManage DeskSite system would refer to this
10 to figure out, you know, how to use it.

11 Q. And does it actually tell you how
12 to build the iManage software?

13 A. Well, no, not at all. Actually
14 it's as if, you know, we all have owners manuals
15 for our cars that tell you, Here's how you
16 operate the automatic transmission. For
17 example, that tells me absolutely nothing about
18 how to build an automatic transmission.

19 It's just -- it just doesn't
20 disclose anything about that. So in the same
21 way a user manual might tell me how to engage
22 the functionality of the software, but it
23 doesn't tell me anything about how to build it.

24 Q. All right. And within the four

1 corners of this document we've marked as DTX
2 1010, does it give you any information for one
3 of ordinary skill in the art to be able to build
4 the software in all the components that it might
5 reference?

6 A. No, it doesn't. It doesn't say
7 anything about how it's designed, what the
8 structure looks like. It simply tells us how to
9 use it once it's there.

10 Q. Do you know whether this iManage
11 manual, which is marked as DTX 1010 whether that
12 was publicly available in 2001 or 2002?

13 A. I have no idea.

14 Q. Now, do you have an opinion as to
15 whether the iManage User Reference Manual is
16 prior art to the '761 patent?

17 A. Yeah. Because it doesn't
18 disclose, you know, how to make and use this
19 invention, I would say it's not prior art. It
20 doesn't qualify as prior art.

21 Q. What is the difference between the
22 iManage User Manual and the information
23 disclosed within the four corners of that
24 document and the invention of the '761 patent?

1 reasons that you have already provided today; is
2 that right?

3 A. Exactly.

4 Q. In your opinion, does the
5 invention of the '761 patent address a long-felt
6 but unresolved need in the industry?

7 A. I think it does. I mean, this
8 2002 time frame was right at the end of the
9 period where I was doing research in
10 collaboration technology at Bell Labs. We were
11 trying to introduce and develop some
12 technologies to help distribute teams and share
13 documents and it was a huge problem. And I
14 think others were suffering from very similar
15 kinds of problems trying to figure out how to
16 get global distributed teams to share, for
17 example.

18 And, again, in terms of
19 obviousness, I think if, you know, a solution to
20 that had been obvious, someone would have come
21 up with it some time ago.

22 Q. In your opinion, based on the
23 techniques that were known around 2002, did
24 those techniques teach a way from the invention

EXHIBIT B

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

IN THE UNITED STATES COURT
FOR THE DISTRICT OF DELAWARE

4	LEADER TECHNOLOGIES, INC.,)	
	a Delaware corporation,)	
5)	
	Plaintiff and Counterdefendant,)	
6)	CIVIL ACTION NO.
	vs.)	1:08-CV-00862-JJF
7)	
	FACEBOOK, INC.,)	
8)	
	Defendant and Counterclaimant.)	
9)	

HIGHLY CONFIDENTIAL -- ATTORNEYS EYES ONLY

SOURCE CODE

Videotaped deposition of GIOVANNI VIGNA, PH.D,
taken at 633 East Cabrillo Boulevard, Santa
Barbara, California, commencing at 9:55 a.m.,
Monday, May 3, 2010, before Daryl Baucum, RPR,
CRR, RMR, CSR No. 10356.

PAGES 1 - 254

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14 FOR THE DEFENDANT FACEBOOK:

15

16 COOLEY, GODWARD, KRONISH

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1 SANTA BARBARA, CALIFORNIA; MONDAY, MAY 3, 2010

2 9:55 A.M.

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4 THE VIDEOGRAPHER: Good morning. We are on
5 the record at 9:55 a.m. The date today is May 3, 09:55:03
6 2010.

7 This is the videotaped deposition of
8 Giovanni Vigna --

9 THE WITNESS: That's fine.

10 THE VIDEOGRAPHER: -- Ph.D. 09:55:20

11 My name is David West, here with our court
12 reporter, Daryl Baucum. We here from Veritext
13 National Deposition and Litigation Services at the
14 request of counsel for defendant.

15 The deposition is being held at Fess 09:55:32
16 Parker's Double Tree Resort at 633 East Cabrillo
17 Boulevard in the city of Santa Barbara, California.

18 The caption of this case is Leader
19 Technologies, Inc. versus Facebook, Inc. and
20 counterclaimants. Civil action number is 09:55:46
21 1:08CV-00862-JJF.

22 Please, note that audio and video recording
23 will take place unless all parties agree to go off
24 the record. Microphones are sensitive and may pick
25 up whispers, private conversations, as well as 09:56:04

1 BlackBerry and cellular interference.

2 At this time, will Counsel, please,
3 identify themselves for the record.

4 MR. WEINSTEIN: Mark Weinstein from Cooley,
5 representing the defendant.

6 MS. KEEFE: Heidi Keefe, also from Cooley,
7 representing Facebook, defendant.

8 MR. HANNAH: James Hannah from King &
9 Spalding representing Leader Technologies and here
10 with the witness.

11 THE VIDEOGRAPHER: Thank you.

12 The witness will now be sworn in and we can
13 proceed.

14

15 GIOVANNI VIGNA, PH.D.,
16 having been first duly sworn, was
17 examined and testified as follows:

18

19 EXAMINATION

20 BY MR. WEINSTEIN:

21 Q. Good morning, sir.

22 A. Good morning.

23 Q. Could you state your name for the record,
24 please.

25 A. My name is Giovanni Vigna; G-I-O-V-A-N-N-I,

1 last name, V-I-G-N-A.

2 Q. Are you currently -- and do you go by
3 Dr. Vigna?

4 A. That's fine.

5 Q. Are you currently employed, Dr. Vigna? 09:57:05

6 A. Yes.

7 Q. Who is your current employer?

8 A. University of California in Santa Barbara.

9 Q. How long have you been employed by the
10 University of California, Santa Barbara? 09:57:13

11 A. Since 1997.

12 Q. What is your position there?

13 A. I am a full professor in computer science.

14 Q. Thank you.

15 Dr. Vigna, have you ever had your
16 deposition taken before? 09:57:28

17 A. Yes.

18 Q. How many times?

19 A. I remember one, but I am not a hundred
20 percent sure. I mean I would say one. 09:57:41

21 Q. Okay. What was the case in which you
22 provided this deposition? What was the name of the
23 case?

24 A. I think it was called Finjan versus Secure
25 Computing. This is what I remember. 09:58:00

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Page 24

1 provided in the subversion database 10:21:38
2 and the database schema. I intend
3 to demonstrate and discuss this
4 material even if it is not
5 specifically referenced in the body 10:21:47
6 of my report. If it is found that
7 any of the information that I have
8 relied upon has been updated before
9 trial, that further documentation
10 and information is produced and made 10:21:59
11 available -- or made available or
12 that additional depositions are
13 taken, I reserve the right to rely
14 upon and discuss the updated and new
15 information even if it is not 10:22:12
16 specifically set forth in this
17 report in Exhibit B."
18 Does that answer your question?
19 BY MR. WEINSTEIN:
20 Q. No, it doesn't, but we will get back to 10:22:19
21 that.
22 For paragraph 15, the first sentence says:
23 "For trial, I also intend to
24 demonstrate the operation of the
25 Facebook website live with tools 10:22:29

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Page 25

1 capable of showing the functionality 10:22:31
2 and rendering of the Facebook
3 website."

4 What tools are you referring to in this
5 paragraph? 10:22:38

6 A. There are -- I haven't decided exactly
7 which of the many tools available to perform this
8 type of task I am going to use, but one skilled in
9 the art would immediately identify what that means.

10 These are tools that are capable of showing 10:23:08
11 the functionality of the website and the rendering
12 of the Facebook website.

13 Q. Can you name some of those tools for me,
14 sir?

15 A. For example, the Firefox web browser. 10:23:24

16 Q. Any others?

17 A. There are so many, it's difficult to -- I
18 haven't decided yet which ones I am going to use.
19 So it will be difficult to make a list right now.

20 Q. But when you refer to "tools," are you 10:23:50
21 referring to web browsers?

22 A. I refer to tools which the claim -- the
23 ordinary meaning of "tools" is software tools.

24 Q. Other than Firefox, can you name any other
25 tools that you intend to use with respect to the 10:24:10

10:24:13

1 demonstration reference in paragraph 15?

2 A. I haven't made a decision yet. So I think
3 it would be premature.

4 Q. The next sentence says:

10:24:27

5 "In addition to the
6 demonstratives, I intend to
7 demonstrate and discuss all material
8 I have relied upon."

9 Have you created any demonstratives, sir,
10 in connection with this litigation?

10:24:36

11 A. Let me check my report.

12 So in paragraph 12 of my report, I said:

13 "In order to aid the court and
14 jury in understanding my opinion
15 regarding Facebook's infringement of
16 the 761 patent, I intend to create
17 demonstrative exhibits for trial."

10:25:33

18 And so that's what I intend to do.

19 Q. So the demonstrative exhibits did not exist
20 at the time the report was filed, correct?

10:25:49

21 A. Well, I didn't say that. I said that I
22 intend to create these demonstrative exhibits at
23 trial. So there is information that has been
24 included in the report and then I said in order to
25 aid the court to understand my position, I intend to

10:26:10

DECLARATION

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I hereby declare I am the deponent in the within matter; that I have read the foregoing deposition and know the contents thereof; and I declare that the same is true of my knowledge except as to the matters which are therein stated upon my information or belief, and as to those matters, I believe it to be true.

I declare under the penalties of perjury under the laws of the State of California that the foregoing is true and correct.

This declaration is executed this _____ day of _____, 2010, at _____, California.

W I T N E S S

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I, DARYL BAUCUM, CSR No. 10356, do certify;

That the foregoing deposition was taken before me at the time and place therein set forth, at which time the witness named in the foregoing deposition was placed under oath and was sworn by me to tell the truth, the whole truth, and nothing but the truth;

That said testimony of the witness and all objections by counsel at the time of the examination were recorded stenographically by me, and were thereafter transcribed under my direction and supervision, and that the foregoing pages contain a full, true and accurate record of all proceedings and testimony to the best of my skill and ability.

I further certify that I am neither counsel for any party to said action, nor am I related to any party in said action, nor am I in any way interested in outcome thereof.

IN WITNESS WHEREOF, I have subscribed my name this 17th day of May, 2010.

DARYL BAUCUM, CSR No. 10356