

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

LEADER TECHNOLOGIES, INC.,)	
a Delaware corporation,)	
)	
Plaintiff-Counterdefendant,)	Civil Action No. 08-862-LPS
)	
v.)	
)	
FACEBOOK, INC.,)	
a Delaware corporation,)	
)	
Defendant-Counterclaimant.)	

**PLAINTIFF LEADER TECHNOLOGIES, INC.'S OPPOSITION TO DEFENDANT
FACEBOOK, INC.'S RENEWED MOTION FOR JUDGMENT AS A MATTER
OF LAW (JMOL) OF NO DIRECT INFRINGEMENT [MOTION NO. 1]**

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Dated: September 15, 2010

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I. NATURE AND STAGE OF THE PROCEEDINGS

Leader Technologies, Inc. (“Leader”) filed its Complaint against Facebook, Inc. (“Facebook”) on November 19, 2008. The Complaint accused Facebook of infringing U.S. Patent No. 7,139,761 (the “761 Patent”). A jury trial commenced on July 19, 2010, and the jury’s verdict was entered on July 28, 2010. D.I. 610. Facebook moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a) on July 27, 2010. D.I. 606. Facebook filed four separate Renewed Motions for Judgment as a Matter of Law (“JMOL”) pursuant to Fed. R. Civ. P. 50(b) on August 25, 2010. *See* D.I. 628, 629, 630, 631. Leader files this Opposition to Facebook’s Renewed Motion for JMOL of No Direct Infringement [Motion 1 of 4] (“Renewed JMOL Motion No. 1”).

II. SUMMARY OF ARGUMENT

Facebook’s reliance on the standard for *joint* infringement, which asks whether one joint infringer directed or controlled the actions of another joint infringer, is wholly misplaced. This is not a joint infringement case. Contrary to Facebook’s claims, the jury found that *Facebook itself* performed each element of each of the asserted claims, and thus directly infringed the claims *by itself*. Because the actions of Facebook’s users are irrelevant to that basis for liability, it matters not whether Facebook directed or controlled its users’ actions.¹

Leader asserted joint infringement only as an alternative theory of liability, and only with respect to the asserted method claims. Because the jury found Facebook liable for directly infringing all of the claims, including the method claims, Leader’s alternative joint infringement theory is not necessary to support the verdict.

¹ Facebook challenged the jury’s verdict of literal infringement in the second of its four JMOL motions. *See* D.I. 629. Leader’s separate response to that separate motion demonstrates that the jury’s verdict of literal infringement is supported by substantial evidence and that Facebook’s motion should therefore be denied.

Joint infringement principles are completely irrelevant to Leader's system and computer-readable media claims. The joint infringement doctrine *expands* infringement liability for *method* claims by holding a party liable even if it did not perform all of the steps of a claimed method, so long as it directed or controlled another's performance of the remaining steps. That doctrine has no bearing whatsoever on the question of whether Facebook's system infringes the system and computer-readable media claims. Thus, Leader did not advance a joint infringement theory for those claims, this Court did not ask the jury to determine direction or control for purposes of those claims, and the jury did not do so. The jury's actual verdict of direct infringement and the theories that the parties actually tried to the jury flatly refute Facebook's arguments.

Moreover, the language of the claims and the evidence produced at trial also directly refute Facebook's arguments. All of the asserted claims are directed to the back-end *functionality* of the claimed system; no elements must be performed by a user. And by their very nature, the system and computer-readable media claims do not require *anyone* to perform *any* method steps; they are, after all, product rather than method claims. Because Leader presented substantial evidence that Facebook's website and source code satisfied every element of every asserted claim, the jury's verdict of direct infringement must be upheld.

Finally, even if joint infringement were relevant to the validity of the verdict, Leader is entitled to a JMOL of joint infringement, as previously explained in Leader's Memorandum In Support Of Its Motion For Judgment As A Matter Of Law Or A New Trial.²

² Leader filed a motion for JMOL on joint infringement only to preserve joint infringement as an alternative basis for liability in light of Facebook's motion for JMOL as to its own direct infringement.

III. STATEMENT OF FACTS

At trial, Leader asserted that Facebook infringed system claims 1, 4, and 7; method claims 9, 11, and 16; and computer-readable media claim 21; and system claims 23, 25, 31, and 32. Leader presented extensive expert testimony and documentary evidence that Facebook itself directly infringes each of these claims. *See, e.g.*, Tr. 667:2-3; 670:17-22; 674:6-12; 676:20-21; 706:14-17; 716:2-8; 719:13-19; 722:11-16; 736:9-15; 749:4-9; 750:21-751:1; 755:6-13; 759:6-17; 763:12-18; 691:3-695:21; PTX 1, 145, 180, 190, 191, 208, 252, 269, 277, 300, 302, 341, 628, 629, 882, 886, 904, 906, 907, 911, 920, 942, 1000, 1001.³ Leader has provided the Court with a claim chart outlining all of the testimony that supports the jury's finding of direct, literal infringement of each claim. *See Hopkins Decl.*, Ex. 29. Based on that evidence, the jury found direct infringement by Facebook of every asserted claim. D.I. 610 at 1.

Because Facebook asserted that the method claims require joint action by Facebook and a user, Leader also submitted evidence of joint infringement of those claims, as an alternative basis for liability. *See Tr.* 677:12-678:4; 679:8-680:2; 691:3-7.⁴ The jury found that Facebook does not direct or control either its employees or its users in performing the method claims. D.I. 610 at 2. The jury did not, however, render a verdict on direction or control with respect to the system and computer-readable medium claims; this Court limited both the jury instructions on joint infringement and the relevant question on the verdict form to the method claims. D.I. 601 at 28, No. 3.7; D.I. 610 at 2.

³ All documents cited herein, including citations to PTX trial exhibits, DTX trial exhibits, and trial transcripts, are attached to the Declaration of Ryan Hopkins in Support of Plaintiff Leader Technologies, Inc.'s Oppositions to Facebook, Inc.'s Renewed Motions for Judgment as a Matter of Law ("Hopkins Decl.").

⁴ Leader also alleged infringement under induced infringement, contributory infringement, and doctrine-of-equivalents theories. *See, e.g.*, Tr. 691:3-695:21; 666:21-667:7; 706:18-21; 710:18-22; 737:7-10; 740:22-741:7; 751:2-6; 752:24-753:4; 816:8-818:14.

IV. ARGUMENT

A. Standard Of Review

“To prevail on a motion for JMOL, the moving party ‘must show that the jury’s findings, presumed or express are not supported by substantial evidence’” *Cordance Corp. v. Amazon.com, Inc.*, 687 F. Supp. 2d 449, 453 (D. Del. 2010) (citation omitted). “[S]ubstantial evidence is evidence that a reasonable individual might accept as supporting the jury’s decision.” *Id.* at 454 (citation omitted). In assessing the sufficiency of the evidence, the court must give the non-moving party, “as [the] verdict winner, the benefit of all logical inferences that could be drawn from the evidence presented, resolve all conflicts in the evidence in his favor and, in general, view the record in the light most favorable to him.” *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1348 (3d Cir. 1991) (citation omitted). “A determination of infringement is a question of fact, reviewed for substantial evidence when tried to a jury.” *Verizon Servs. Corp. v. Cox Fibernet Va., Inc.*, 602 F.3d 1325, 1340 (Fed. Cir. 2010) (citation omitted).

B. The Jury Found That Facebook Itself Directly Infringed The Asserted Method Claims.

Facebook starts with the mistaken premise that, “[w]ith respect to method claims 9, 11, and 16, Leader’s trial theory of infringement depended entirely on the combined actions of Facebook and its users.” D.I. 632 at 2. To the contrary, the relevant jury instruction states that “Facebook can . . . be liable for direct literal infringement of a method claim . . . if, *by itself* or in combination with a third party, it performs all the steps of the claimed method.” D.I. 601 at 28, No. 3.7 (emphasis added). That instruction made clear that the jury could find direct infringement of the method claims by Facebook alone. And Leader presented evidence that Facebook’s source code performs every step of every asserted method claim. *See, e.g.*, Tr. 667:2-3; 670:17-22; 674:6-12; 676:20-21; 706:14-17; 716:2-8; 719:13-19; 722:11-16; 736:9-15;

749:4-9; 750:21-751:1; 755:6-13; 759:6-17; 763:12-18; *see also* Tr. 677:12-678:4; 679:8-14.

The jury was free to credit that evidence and to find -- as it did -- that Facebook alone directly infringed all of the asserted method claims. D.I. 610 at 1. The jury's separate finding that Facebook does not direct or control its users or employees is relevant only to Leader's alternative joint-infringement theory; it in no way undermines the jury's on-point finding that Facebook itself directly infringed all the claims.

Facebook's remaining arguments are contrary to both the language of the claims and the evidence presented at trial. Method claim 9 (the independent method claim) recites:

9. A computer-implemented method of managing data, comprising computer-executable acts of:

creating data within a user environment of a web-based computing platform via user interaction with the user environment by a user using an application, the data in the form of at least files and documents;

dynamically associating metadata with the data, the data and metadata stored on a storage component of the web-based computing platform, the metadata includes information related to the user, the data, the application, and the user environment;

tracking movement of the user from the user environment of the web-based computing platform to a second user environment of the web-based computing platform; and

dynamically updating the stored metadata with an association of the data, the application, and the second user environment wherein the user employs at least one of the application and the data from the second environment.

PTX 1, '761 Patent at col. 21:38-58. The preamble of that claim makes clear that the method comprises "computer-executable acts." PTX 1, '761 Patent at col. 21:39. In other words, claim 9 is an example of a claim drafted "to focus on one entity" -- the source code, or more specifically, the source code's execution of the back-end components of Facebook's system. *See BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1381 (Fed. Cir. 2007). Because substantial evidence showed that the source code performs each step of the claimed methods, Facebook is liable for its own direct infringement. User interaction, while perhaps necessary to operate the

software in practice, is immaterial to the more limited back-end process claimed in the '761 Patent. As the Federal Circuit has recognized, "although a user must activate the functions programmed into a piece of software by selecting those options, the user is only activating means that are *already present in the underlying software.*" *Fantasy Sports Props., Inc. v. Sportsline.com, Inc.*, 287 F.3d 1108, 1118 (Fed. Cir. 2002) (emphasis in original). Here, as in *Fantasy Sports*, the method claims cover the systems' functionality, not users' actions.

Facebook points to two steps of claim 9 that it says must be performed by a user: (1) "creating data within a user environment of a web-based computing platform via user interaction with the user environment by a user using an application, the data in the form of at least files and documents," (PTX 1, '761 Patent at col. 21:40-43); and (2) "wherein the user employs at least one of the application and the data from the second environment" requires action by a user (PTX 1, '761 Patent at col. 21:55-57); *see also* D.I. 632 at 3.

As to the first step, Leader presented substantial evidence at trial that the *system* creates a data file containing a copy of the data that are being uploaded. *See, e.g.*, Tr. 573:21-575:3 (discussing PTX 882). In fact, the Facebook website creates multiple copies of uploaded photos in an equivalent number of data files for the system's use, without additional action from the user. *See id.* The further phrase "via user interaction with the user environment by a user using an application" does not impose an additional step by a user; it simply defines *when* the system creates the data -- following user interaction -- for storage and manipulation. Facebook claims that Leader's expert, Dr. Vigna, attributed this step to users, but Dr. Vigna explicitly stated that his testimony concerned "the systems, the code that is performing the function and whatever is being used by the users." Tr. 711:19-22. In support of Leader's alternative joint-infringement theory, Dr. Vigna *also* testified, in a statement Facebook relies on, that users take certain actions

and Facebook directs or controls them. *See* Tr. at 561:8-15; 562:15-19; 565:5-7; 565:21-566-3; 570:17-571:6; 717:1-15; 677:12-678:4. But as explained above, that does not detract from Dr. Vigna's testimony that Facebook also directly infringes.

Nor does the other step Facebook challenges require user interaction. The "wherein" clause establishes a condition for when the back-end components "dynamically updat[e] the stored metadata" PTX 1, '761 Patent at col. 21:54. Dr. Vigna pointed to specific Facebook source code that performs the dynamically updating step and satisfies the claim language. *See* Tr. 688:24-690:6. Facebook also asserts that dependent claim 16 requires action by a user, but the relevant language - - "accessing the user environment via a portable wireless device," again refers to a function performed by Facebook code. Dr. Vigna testified that the "Facebook mobile client" performs that function. *See* Tr. 718:23-719:12. In short, the jury was free to find -- and did find -- that Facebook itself directly infringed all of the asserted method claims. D.I. 610 at 1.

C. The Jury's Verdict With Respect To Direction Or Control Is Immaterial To The System And Computer-Readable Media Claims.

Joint infringement principles have no bearing whatsoever on Facebook's infringement of the asserted system and computer-readable media claims. As a procedural matter, this Court submitted the issue of joint infringement to the jury only with respect to the asserted method claims. The jury instruction stated that, "[f]or Facebook to be liable for the acts of third parties, Leader must have proven, by a preponderance of the evidence, that Facebook controls or directs the activity of those parties who perform the steps *of the method claims*." Tr. 1923:21-1924:2 (emphasis added); *see also* D.I. 601 at 28 (emphasis added). As Facebook admits, the verdict form put the question of direction or control before the jury only for method claims 9, 11, and 16. D.I. 632 at 2; D.I. 610 at 2.

Though Facebook asserts that this clear limit on the verdict form is somehow “no obstacle to applying the jury’s finding” to the system and computer-readable medium claims, Facebook cites no authority to support such a radical proposition. D.I. 632 at 4-5. Nor could it: there is no sense in which a verdict on method claims necessarily means, contrary to this Court’s clear instructions and the verdict form itself, that the jury actually intended to render a verdict on the other claims. Accordingly, the verdict on direction or control applies only to the method claims. *See, e.g., Neely v. Club Med Mgmt. Servs., Inc.*, 63 F.3d 166, 201-03 (3d Cir. 1995) (holding that jury’s finding of contributory fault on one claim could not be applied to another claim); *see also Kinnel v. Mid-Atlantic Mausoleums, Inc.*, 850 F.2d 958, 964-66 (3d Cir. 1988) (holding that jury’s special interrogatory concerning one defendant could not be applied to the other).

Even if the Court were to set the verdict and jury instructions to the side, the direction or control test is simply irrelevant to the asserted system and computer-readable media claims. The Federal Circuit adopted that test in response to the loophole that would otherwise result from the rule that infringement of a “patented process” requires a single entity to perform each and every claimed step. *BMC Res.*, 498 F.3d at 1379. The court held that, “where the actions of multiple parties combine to perform every step of a claimed method, the claim is directly infringed only if one party exercises ‘control or direction’ over the entire process” *Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318, 1329 (Fed. Cir. 2008) (emphasis added) (citation omitted). The Federal Circuit thereby *expanded* the scope of liability for *method* claims by holding a party liable even if it did not perform all of the method steps, so long as it directed or controlled another’s performance of the remaining steps. *See id.*

That expansion of liability will rarely if ever apply to product claims, and it certainly does not *limit* them. A single actor typically makes a patented product (by completing the product), uses, or sells the product by itself. *See Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 527-29 (1972). Because those actions do not consist of multiple “steps” that different actors could perform, joint infringement has little if anything to do with such claims. In any event, a party is never *required* to proceed on a joint-infringement theory; that is just an additional theory a patentee may choose to pursue, like indirect infringement or the doctrine of equivalents. Requiring patentees to disclaim their traditional direct infringement cases in favor of joint infringement theories, even when a single defendant’s actions meet all of the claim limitations, would be a radical revision of patent law.

Facebook relies on a serious distortion of *Golden Hour Data Sys., Inc. v. emsCharts, Inc.*, Nos. 2009-1306, 2009-1396, 2010 WL 3133539 (Fed. Cir. Aug. 9, 2010). In *Golden Hour*, two software companies separately created software programs, neither of which individually infringed, but then sold them as a unit that possessed all of the elements of the patent claims. 2010 WL 3133539, at *3, 11. As the Federal Circuit stressed, the plaintiff attempted to prove infringement of its system claims “only on a joint infringement theory.” *Id.* at *11. Accordingly, the Federal Circuit held that the plaintiff’s failure to prove direction or control was fatal. *Id.* But the Federal Circuit twice made clear that it was *not* holding that, under “proper instructions,” direction or control is necessary to prove infringement of a product claim. *Id.* & n.10. Instead, “the problem” in that case was that the plaintiff there -- unlike Leader here -- had agreed to jury instructions requiring it to prove joint infringement. *Id.* Thus, *Golden Hour* stands only for the proposition that litigants’ decisions have consequences, not that infringement of product claims must be proven in all cases under a joint infringement theory.

Facebook's contention that Leader "presented an infringement theory that relied on the actions of two distinct parties to satisfy the elements of its system claims" is false. D.I. 632 at 5. The evidence at trial, including Facebook's documents, source code, and employee testimony, showed that the Facebook system itself meets each and every element of the system claims. *See, e.g.*, Tr. 587:9-19; 588:2-8; 655:17-656:4; 666:17-667:7; 670:17-22; 674:6-12; 817:10-818:20; 819:1-12; *see also* Hopkins Decl. Ex. 29 at 1-96, 150-322.

As with the method claims, Facebook nonetheless argues that the system and computer-readable media claims require a user to create certain data. D.I. 632 at 6. That contention is wrong with respect to these claims for the same reasons it is wrong with respect to the method claims. The system and computer-readable media claims set forth functional language that describes the functionality of the back-end of the claimed system -- not a step performed by a user. *See, e.g.*, Tr. 561:10-565:4; 569:24-570:16; 572:2-573:12; 722:17-725:8; *see also* Hopkins Decl. Ex. 29. And in any event, Leader presented substantial evidence at trial that Facebook's system satisfies that element. *See* pp. 4-9, *supra*; *see also* Hopkins Decl., Ex. 29.

These arguments are also contrary to the testimony of each of the experts in this case. All of the experts explained their understanding of the claims and rendered an opinion on the issues of infringement or validity. No expert testified that the claims were invalid because they contain both an apparatus and a method. Indeed, Facebook separately filed yet another motion asking this Court to hold the claims invalid for that reason. *See* D.I. 382; *see also* D.I. 631. Facebook's attempt to insert a method step into the system and computer-readable media claims turns fundamental canons of patent law on their head by attempting to manufacture validity (and infringement) issues when none exist. *See, e.g., Rhine v. Casio, Inc.*, 183 F.3d 1342, 1345 (Fed. Cir. 1999) (claims must be construed to preserve their validity).

D. The Evidence At Trial Established That Facebook Directs Or Controls Its Employees and Users.

Insofar as it is relevant, Leader established in its JMOL motion that Facebook directs or controls the actions of both its own employees and its users. *See* D.I. 626 at 18-19; *see also* PTX 145; Tr. 677:7-678:4. This Court's jury instructions stated that the jury "may consider" evidence such as "whether there is a contractual relationship between Facebook and the third parties; whether users of Facebook are agents of Facebook; and whether Facebook supplies the instrumentalities, tools, and the website for the person using the website." D.I. 601 at 28, No. 3.7. Leader proved all of those points. Facebook's employees inherently have a contractual relationship and indeed are agents of the company, and there is no question that Facebook provides the "instrumentalities, tools, and the website" for its own employees to use the infringing website. *See* PTX 145; Tr. 677:7-678:4.

Moreover, the "direction or control" test is satisfied as a matter of law where, as here, "the law would traditionally hold the accused direct infringer vicariously liable for the acts committed by another party that are required to complete performance of a claimed method." *Muniauction*, 532 F.3d at 1330 (citations omitted). Facebook infringes the '761 Patent under a joint infringement theory, even under the cases cited in Facebook's brief, because Facebook employees are "contractually bound to visit the website" and are "agents who visit the website within the scope of their agency relationship." D.I. 632 at 8 (citing *Global Patent Holdings, LLC v. Panthers BRHC LLC*, 586 F. Supp. 2d 1331, 1335 (S.D. Fla. 2008)); *see also McKesson Info. Solutions, LLC v. Epic Sys. Corp.*, No. 1:06-CV-2965-JJC, 2009 WL 2915778, at *4 (N.D. Ga. Sept. 8, 2009); *Desenberg v. Google, Inc.*, No. 09 Civ. 10121, 2009 WL 2337122, at *7 (S.D.N.Y. July 30, 2009). Facebook's claim that it does not have a contractual relationship with its employees rings hollow. D.I. 632 at 10. An employer's responsibility for its employees

acting within the scope of their employment is the paradigmatic example of vicarious liability. Restatement (Third) of Agency § 7.07(1). As a matter of law, Facebook directs or controls its employees, and no reasonable jury could find otherwise.

Facebook also directs or controls its end users' use of Facebook. The Statement of Rights and Responsibilities for Facebook "tells the user what they can and cannot do." Tr. 679:13-14 (discussing PTX 1000). Use of the Facebook website requires that a user adhere to Facebook's direction and control pursuant to its Statement of Rights and Responsibilities, or be terminated from its system. *See id.*; PTX 1000 (listing the terms of use and the grounds for termination). Facebook maintains ultimate control of its users' use of the Facebook website. Facebook's contrary position rests on legal arguments this Court rejected when it rejected Facebook's proposed jury instruction on direction or control. There is no reason to revisit that standard now.

V. CONCLUSION

For the foregoing reasons, Leader respectfully requests that the Court deny Facebook's Renewed JMOL Motion No. 1.

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**IN THE UNITED STATES DISTRICT COURT
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I, Philip A. Rovner, hereby certify that on September 15, 2010, the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing(s) to the following; that the document was served on the following counsel as indicated; and that the document is available for viewing and downloading from CM/ECF.

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I. NATURE AND STAGE OF THE PROCEEDINGS

Leader Technologies, Inc. (“Leader”) filed its Complaint against Facebook, Inc. (“Facebook”) on November 19, 2008. The Complaint accused Facebook of infringing U.S. Patent No. 7,139,761 (the “761 Patent”). A jury trial commenced on July 19, 2010, and the jury’s verdict was entered on July 28, 2010. D.I. 610. Facebook moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a) on July 27, 2010. D.I. 606. Facebook filed four separate Renewed Motions for Judgment as a Matter of Law (JMOL) pursuant to Fed. R. Civ. P. 50(b) on August 25, 2010. *See* D.I. 628, 629, 630, 631. This Opposition to Facebook’s Renewed Motion for JMOL of No Indirect Infringement [Motion No. 3 of 4] (“Renewed JMOL Motion No. 3”) requests that the motion be denied.

II. SUMMARY OF ARGUMENT

Because the jury issue of indirect infringement was never submitted to the jury, Facebook’s motion for judgment as a matter of law of no indirect infringement is a complete waste of this Court’s and Leader’s time and resources.

III. STATEMENT OF FACTS

Leader’s complaint against Facebook alleged indirect infringement pursuant to 35 U.S.C. § 271(b)-(c). D.I. 1. Leader provided testimony and evidence at trial that third parties directly infringe the ‘761 Patent and that Facebook induces and contributes to that infringement. *See, e.g.,* Tr. 691:3-695:21.¹ However, this Court stated: “I don’t believe there has been evidence from which the jury could find that any third party other than Facebook is the direct infringer, nor do I think there is evidence of Facebook’s knowledge of the ‘761 patent at this trial.” Tr.

¹ All documents cited herein, including citations to PTX trial exhibits, DTX trial exhibits, and trial transcripts, are attached to the Declaration of Ryan Hopkins in Support of Plaintiff Leader Technologies, Inc.’s Oppositions to Defendant Facebook, Inc.’s Renewed Motions for Judgment as a Matter of Law (“Hopkins Decl.”).

1884:19-24. Because the Court rejected a proposed jury instruction on indirect infringement, and did not include a question about indirect infringement in the verdict form, the jury did not render a verdict on this issue. *See* D.I. 610.

Facebook filed its Renewed JMOL Motion No. 3 pursuant to Fed. R. Civ. P. 50(b) on August 25, 2010. D.I. 630. Leader held a meet and confer with Facebook on August 26, 2010 to request that Facebook withdraw three of its Renewed JMOL Motions, including Renewed JMOL Motion No. 3. *See* Aug. 26, 2010 e-mail (Hopkins Decl., Ex. 32). Facebook refused to withdraw the motion.

IV. ARGUMENT

Facebook has repeatedly brought unnecessary issues before this Court and burdened Leader with unwarranted litigation costs.² The present motion is more of the same. Facebook's Renewed Motion No. 3 relates to an issue the Court clearly decided *in Facebook's favor* at trial and never submitted to a jury. *See* D.I. 634; Tr. 1884:12-24; *see also* D.I. 606 at 8. The Court did not instruct the jury on indirect infringement or include a question regarding indirect infringement in the verdict form. *See* D.I. 610. Because the jury did not consider or decide any issue of indirect infringement, there is no verdict on that issue to overturn, and Facebook's Renewed JMOL Motion No. 3 is an improper waste of this Court's and Leader's resources.

Although a JMOL motion is not appropriate on this issue, Leader wishes to make clear that it has not abandoned its indirect infringement claim. The trial record includes sufficient evidence that Facebook indirectly infringes the '761 Patent. *See* Tr. 691:3-703:24. For example, Leader's expert, Dr. Vigna, used Facebook's publicly available wiki and documents to build a third-party application that uses Facebook's application programming interface. Dr. Vigna

² The most egregiously unnecessary motion is Facebook's motion for judgment as a matter of law on claims not even asserted in this case. *See* D.I. 606 at 1.

thereby demonstrated that third-party developers infringe claim 9 of the '761 Patent. *See* Tr. 691:8-693:14. That and other evidence showed that "Facebook is providing the means for third-party application [sic] to perform the steps of the claim." Tr. 703:2-5; *see also* Tr. 695:19-21 ("Facebook allows third party [sic] to actually perform the steps of the claim."). Facebook's motion does not refute Dr. Vigna's testimony.

V. CONCLUSION

Leader respectfully requests that the Court deny Facebook's Renewed JMOL Motion No. 3.

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

CERTIFICATE OF SERVICE

I, Philip A. Rovner, hereby certify that on September 15, 2010, the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing(s) to the following; that the document was served on the following counsel as indicated; and that the document is available for viewing and downloading from CM/ECF.

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

LEADER TECHNOLOGIES, INC.,)	
a Delaware corporation,)	
)	
Plaintiff-Counterdefendant,)	Civil Action No. 08-862-LPS
)	
v.)	
)	
FACEBOOK, INC.,)	
a Delaware corporation,)	
)	
Defendant-Counterclaimant.)	

**PLAINTIFF LEADER TECHNOLOGIES, INC.'S OPPOSITION TO
DEFENDANT FACEBOOK, INC.'S RENEWED MOTION FOR
JUDGMENT AS A MATTER OF LAW (JMOL) OF INVALIDITY
[MOTION NO. 4]**

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I. NATURE AND STAGE OF THE PROCEEDINGS

Leader Technologies, Inc. (“Leader”) filed its Complaint against Facebook, Inc. (“Facebook”) on November 19, 2008. The Complaint accused Facebook of infringing U.S. Patent No. 7,139,761 (the “761 Patent”). A jury trial commenced on July 19, 2010, and the jury’s verdict was entered on July 28, 2010. D.I. 610. Facebook moved for judgment as a matter of law pursuant to Fed. R. Civ. P. 50(a) on July 27, 2010. D.I. 606. Facebook filed four separate Renewed Motions for Judgment as a Matter of Law (JMOL) on August 25, 2010. *See* D.I. 628, 629, 630, 631. Leader files this Opposition to Facebook’s Renewed Motion for JMOL of Invalidity [Motion No. 4 of 4] requesting that the motion be denied.

II. SUMMARY OF THE ARGUMENT

Facebook’s Invalidity JMOL should be denied because there was ample evidentiary basis for the jury to reach the conclusion that the claims were valid over the three main references Facebook raised at trial. Each of those references suffered from the same deficiency - no reference to a context or tracking a user as claimed in the patent. At bottom, the question whether the references disclosed those elements boiled down to a battle of the experts, in which the testimony of the parties’ experts covered the better part of two trial days and nearly 500 pages of trial transcript. *See generally*, Tr. 1387-1878.¹ The jury ultimately agreed with Leader’s expert and concluded that the claims were valid over the prior art. D.I. 610 at 4-5. Facebook now requests that this Court wade through those hundreds of pages of testimony and documentary evidence, reweigh that evidence according to its own lights, and overturn the jury’s verdict. There is no reason to invade the province of the jury, however. At a minimum, the jury

¹ All documents cited herein, including citations to PTX trial exhibits, DTX trial exhibits, and trial transcripts, are attached to the Declaration of Ryan Hopkins in Support of Plaintiff Leader Technologies, Inc.’s Oppositions to Facebook, Inc.’s Renewed Motions for Judgment as a Matter of Law (“Hopkins Decl.”).

was entitled to credit Leader's expert's understanding of the asserted references, and judgment as a matter of law is therefore unwarranted.

Facebook's request for a new trial should also be denied. Even if the Court deems it improper that Leader's counsel questioned Facebook's expert about the face of the Swartz and '761 Patent, the harsh remedy of striking the testimony from the record and including a limiting jury instruction is more than adequate to remedy any possible prejudice.

III. STATEMENT OF FACTS

During the seven-day jury trial, Facebook asserted that the claims of the '761 Patent were invalid based on the testimony of its expert Dr. Saul Greenberg. Dr. Greenberg opined that the asserted claims of the '761 Patent were anticipated by three references, the iManage DeskSite 6.0 User Reference Manual ("iManage User Manual"), European Patent Application No. EP 1 087 306A2 ("Hubert"), and U.S. Patent No. 6,236,994 ("Swartz"). Tr. 1571:14-1572:8. Dr. Greenberg further testified that these references, in combination, would have rendered the claims of the '761 Patent obvious. Tr. 1564:16-23. Leader's expert, Dr. James Herbsleb, rebutted Dr. Greenberg's testimony. Dr. Herbsleb testified that the references relied on by Dr. Greenberg did not disclose many of the elements of the claims of the '761 Patent, and in fact, disclosed fundamentally different systems. Tr. 1787:14-1843:14; 1846:15-1848:20. The jury found that none of the asserted claims of the '761 Patent were anticipated or obvious over the prior art references raised by Facebook. D.I. 610 at 4-5. On August 25, 2010, pursuant to Fed. R. Civ. P. 50(b), Facebook moved for JMOL of Invalidity [Motion No. 4 of 4] ("Invalidity JMOL") and requested that the Court overturn the jury's findings regarding the validity of the asserted claims.

IV. ARGUMENT

A. STANDARD OF REVIEW

Judgment as a matter of law is appropriate only if, when viewing the evidence in the light most favorable to the nonmovant, “there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.” *Bullen v. Chaffinch*, 336 F. Supp. 2d 342, 346 (D. Del. 2004) (quotation and citations omitted). The movant “must show that the jury’s findings, presumed or express, are not supported by substantial evidence or, if they were, that the legal conclusion(s) implied [by] the jury’s verdict cannot in law be supported by those findings.” *Pannu v. Iolab Corp.*, 155 F.3d 1344, 1348 (Fed. Cir. 1998) (quoting *Perkin-Elmer Corp. v. Computervision Corp.*, 732 F.2d 888, 893 (Fed. Cir. 1984) (citation omitted)). The Court must give the nonmoving party, “as [the] verdict winner, the benefit of all logical inferences that could be drawn from the evidence presented, resolve all conflicts in the evidence in his favor and, in general, view the record in the light most favorable to him.” *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1348 (3d Cir. 1991) (citation omitted). The Court “may not weigh the evidence, determine the credibility of witnesses, or substitute its version of the facts for the jury’s version.” *Fowler v. UPMC Shadyside*, 578 F.3d 203, 213 n.8 (3d Cir. 2009) (citation omitted).

An issued patent enjoys a presumption of validity. 35 U.S.C. § 282. A party challenging the validity of a patent has the “heavy burden” of overcoming that presumption by “clear and convincing evidence.” *Honeywell Int’l Inc. v. Hamilton Sundstrand Corp.*, 370 F.3d 1131, 1145 (Fed. Cir. 2004)(citation omitted). Clear and convincing evidence is evidence that “could place in the ultimate factfinder an abiding conviction that the truth of [the] factual contentions [is] ‘highly probable.’” *IMX, Inc. v. Lendingtree, Inc.*, 469 F. Supp. 2d 203, 215 (D. Del. 2007) (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)). The Court must assume that all

factual issues underlying the validity verdict were resolved in favor of the verdict winner.

Honeywell, 370 F.3d 1131, 1144-45 (citing *Hewlett-Packard Co. v. Mustek Sys., Inc.*, 340 F.3d 1314, 1325 (Fed. Cir. 2003)).

Anticipation is a question of fact, reviewed for substantial evidence. *Z4 Techs., Inc. v. Microsoft Corp.*, 507 F.3d 1340, 1347 (Fed. Cir. 2007). On a JMOL motion, this Court “reviews a jury’s conclusions on obviousness, a question of law, without deference, and the underlying findings of fact, whether explicit or implicit within the verdict, for substantial evidence.” *Dippin’ Dots, Inc. v. Mosey*, 476 F.3d 1337, 1343 (Fed. Cir. 2007) (quoting *LNP Eng’g Plastics, Inc. v. Miller Waste Mills, Inc.*, 275 F.3d 1347, 1353 (Fed. Cir. 2001)). A party seeking a judgment that a patent is obvious “bears the burden of demonstrating by clear and convincing evidence that the teachings of the prior art would have suggested the claimed subject matter to one of ordinary skill in the art.” *Union Carbide Chems. & Plastics Tech. Corp. v. Shell Oil Co.*, 308 F.3d 1167, 1187 (Fed. Cir. 2002) (citation omitted).

B. FACEBOOK DID NOT ESTABLISH ANTICIPATION BY CLEAR AND CONVINCING EVIDENCE.

The validity issues presented in Facebook’s Invalidation JMOL center on “a classic battle of the experts.” *Telcordia Techs., Inc. v. Lucent Techs., Inc.*, 514 F. Supp. 2d 598, 608 (D. Del. 2007). Facebook’s expert, Dr. Greenberg, testified regarding his understanding of the asserted prior art, and Leader’s expert Dr. Herbsleb provided an element-by-element analysis that rebutted Dr. Greenberg’s testimony. Tr. 1787:14-1838:23. Key passages of Dr. Herbsleb’s testimony are quoted in this memorandum, but for the Court’s convenience, full excerpts of Dr. Herbsleb’s element-by-element testimony are provided in Exhibit 31 to the Hopkins Declaration filed concurrently herewith. That competing testimony raised a quintessential jury issue regarding which expert to credit and how to weigh the evidence. The jury found that Facebook

did not prove by clear and convincing evidence that any of its prior art references invalidated the '761 Patent. D.I. 610 at 4-5.

Substantial evidence supports the verdict because Facebook's references lack key elements of the claims. The Federal Circuit has long held that "[a]nticipation requires the presence in a single prior art disclosure of all elements of a claimed invention arranged as in the claim." *Connell v. Sears, Roebuck & Co.*, 722 F.2d 1542, 1548 (Fed. Cir. 1983) (citation omitted). As Dr. Herbsleb testified, however, not one of Facebook's asserted references discloses a "context" or tracking a user as required by every asserted claim. *See, e.g.*, PTX 1, '761 Patent at col. 21:1 ("a first context") and col. 21:8 ("tracking a change of the user"); *see also infra* at 6, 8, 10-11, 12-14. Dr. Herbsleb's element-by-element analysis highlighted the fundamental differences between the asserted claims and those references—namely, that Facebook's references are *document*-centric. Tr. 1790:6-21; 1793:10-1838:23. The claims of the '761 Patent, however, are fundamentally user-centric. PTX 1; *see also* Tr. 1790:22-1792:1. The jury was free to rely on that fundamental difference and to credit that testimony. As a result, Facebook's references cannot invalidate the '761 Patent either singly or in combination with one another. Furthermore, with respect to the iManage User Manual, Facebook failed even to establish that the reference qualified as prior art.

The Court may not reweigh the jury's factual determinations on a JMOL motion, yet that is exactly what Facebook requests. Indeed, Facebook buries its expert's testimony in a claim chart appendix and asks the Court itself to piece together the anticipation case. D.I. 635, Appendix A. The jury, however, has already weighed the evidence, gauged the credibility of witnesses, determined the scope of each reference's disclosure, and concluded that the references do not disclose each and every element. Especially given its heavy clear and convincing burden

of proof, Facebook's conclusory statements do not provide any basis for this Court to overturn that verdict.

1. Facebook Failed To Show By Clear And Convincing Evidence That iManage Anticipates The '761 Patent.

a) Facebook did not prove that the iManage User Manual is enabling prior art.

Facebook's invalidity defense with respect to iManage fails at the threshold because it did not establish that the iManage User Manual is prior art. To qualify as prior art, the iManage User Manual must have both been publicly available before the priority date of the '761 Patent and enabling. *See* 35 U.S.C. § 102(a); *see also Impax Labs., Inc. v. Aventis Pharms., Inc.*, 545 F.3d 1312, 1314-15 (Fed. Cir. 2008). Facebook did not present clear and convincing evidence that would allow a jury to reach either of these conclusions.

First, the iManage User Manual is not an enabling reference. The iManage User Manual instructs the user on how to interact with the iManage DeskSite 6.0 client.² DTX 1010 at 11. The Manual does not describe how DeskSite itself operates. For example, the iManage User Manual does not include any source code and does not include any description of the operation of "backend" components. *See* Tr. 1793:6-9 ("It doesn't say anything about how it's designed, what the structure looks like. It simply tells us how to use it once it's there."). Dr. Herbsleb testified that the iManage User Manual would not allow a person of ordinary skill in the art to build the system disclosed in the manual. Tr. 1792:11-1793:9. That testimony provided substantial evidence for the jury to conclude that the iManage User Manual was not an enabling reference and was therefore not prior art.

² In its Invalidity JMOL, Facebook continues to contend that it relied on the iManage User Manual and iManage Product. D.I. 635 at 7. The product was not before the jury, and in fact Dr. Greenberg stated that he has never used the product. Greenberg Dep. Tr. at 192:11-12 (Hopkins Decl., Ex. 33).

Second, Facebook did not prove that the iManage User Manual was publicly available before the priority date of the '761 Patent. The exhibit entered into evidence by Facebook at trial was marked "Confidential" on every page and was originally produced during discovery by a third party as a confidential document. DTX 1010; Nov. 20, 2009 Letter re: Autonomy document production (Hopkins Decl., Ex. 34). There is no evidence that the iManage User Manual was ever available to the public, let alone that it was available prior to the '761 Patent's critical date.³ Even Facebook's expert had no knowledge of whether the iManage User Manual at issue was publicly available anytime before it was provided to him by Facebook's counsel. Tr. 1674:12-1675:22. The jury was free to conclude that the reference was not publicly available before the priority date of the '761 Patent. That alone means that iManage cannot support a judgment as a matter of law.

b) The iManage User Manual does not disclose each and every element of the asserted claims.

In all events, the iManage User Manual does not disclose each and every element of the asserted claims. The DeskSite 6.0 client described in the iManage User Manual is the frontend of a traditional document management system used to keep a history of documents stored in a central repository. DTX 1010 at 12. In describing how to use that document management client, the iManage User Manual describes an inherently document-centric system focused on the history of individual documents. DTX 1010 at 12; Tr. 1796:11-18. Noticeably absent from the iManage User Manual is any description of an environment or workspace as described in the asserted claims of the '761 Patent or the tracking of the user's movement.

³ The jury found that the '761 Patent is not entitled to the priority date of provisional patent application No. 60/432255 and, therefore, that the '761 Patent claims priority to its filing date, December 10, 2003. D.I. 610 at 3. Leader argued that this Court should grant judgment as a matter of law reversing that finding and establishing the priority date as December 11, 2002. D.I. 626 at 17-18. Nevertheless, there is no evidence that the confidential iManage Manual was publicly available before either priority date.

The iManage User Manual cannot anticipate the asserted claims at least because it does not disclose tracking a user's movement from contexts or environments. Tr. 1798:6-1799:13; 1799:14-1800:6. As stated by Dr. Herbsleb, the iManage User Manual discloses a system that keeps a document history, meaning "for some particular document, these are the things that happen to that document." Tr. 1796:8-10. Dr. Herbsleb elaborated that "[t]here's no view shots anywhere in the manual where you can sort of pull up some user and see what a user has done." Tr. 1797:8-10.

Facebook's expert, Dr. Greenberg, relied exclusively on Figure 3.26 as supposedly disclosing this element, but the figure does not show or even suggest the tracking of the user. Tr. 1512:9-22; 1513:11-13. Dr. Herbsleb specifically addressed Figure 3.26 and stated that "as you can see here, these are all entries [sic] of documents. So it doesn't track users at all." Tr. 1797:12-14; DTX 1010 at 83, Fig. 3.26. Dr. Herbsleb testified that the figure simply shows a history of a particular document and that only changes to the document are tracked. Tr. 1797:3-20. The Figure itself confirms Dr. Herbsleb's testimony. Figure 3.26 depicts the history of a document, which includes information stored about a document, such as who has checked out a document, if the document has been modified, and the different versions of the document created—thus clearly showing the history of a particular document ("History - Document: 2_2.DOC"), and not a user. DTX 1010 at 83, Fig. 3.26. Accordingly, the jury was entitled to credit Dr. Herbsleb's understanding of the manual and find no anticipation.

The jury also had substantial evidence upon which to conclude that the iManage User Manual did not disclose the concept of a context, user environment, or workspace. *See* Tr. 1798:6-1799:13. Dr. Herbsleb testified that iManage "does not have workspaces as part of the technology. It doesn't provide . . . environments places for people to do work with their tools

and allow people to move from one workspace to another. There is none of that in the technology.” Tr. 1797:24-1798:5. In reference to claim 1, he elaborated that “we have to be very careful what we mean by context here because that’s a word that gets used in many different ways. And . . . we have to use the construction that’s in the claim construction order, which says that context means environment. Okay. So the software to provide a context and have a context component has to provide an environment for a workspace for the user. And the technology described, iManage Manual just does not do that. So it does not have a context component, period.” Tr. 1798:7-1799:13. Dr. Greenberg stated only that these elements were met but did not provide an explanation with which a jury could conclude that these elements were disclosed. For example, Dr. Greenberg stated that the iManage User Manual discloses a context because it refers to a “Manage32” system. Tr. 1500:17-1502:2. However, this cannot be relied upon because the iManage User Manual never even states what the Manage32 system is. Dr. Greenberg simply guesses that “[t]his would probably be an iManage document, the repository system itself.” Tr. 1500:18-19. The testimony of Dr. Herbsleb therefore provided substantial evidence for the jury to find that the iManage User Manual does not disclose a context or user environment.

Furthermore, Facebook did not even attempt to discuss how iManage disclosed each claim on an element-by-element basis for any of the independent claims besides claim 1. Dr. Greenberg only briefly discussed a few chosen elements for claims 9, 21, and 23 and often ignored the clear differences in language between those claims and claim 1. For example, Dr. Greenberg in support of his conclusion that the iManage User Manual discloses a “user workspace,” as in claim 21, stated without support or explanation that “[w]e talked about this before. The only difference is that it’s a user workspace. iManage gives a place for people to do

their work, so by definition it gives them a user workspace, so that's covered." Tr. 1528:2-6.

For this reason and many others, Facebook failed to provide clear and convincing evidence for a jury to conclude that claims 9, 21, and 23, and the claims depending there from were invalid.

Thus, for the reasons discussed above, the Court should deny Facebook's motion.

2. Facebook Failed To Show By Clear And Convincing Evidence That Hubert Anticipates The '761 Patent.

Facebook also relied on the Hubert patent application at trial. Hubert discloses a "meta-document" that keeps track of the actions performed on the document as well as its location.

DTX 922, ¶ 0011. The meta-document is just that—a document. Accordingly, Hubert, just like the iManage User Manual, is also document-centric. Hubert's meta-documents include the data portion of a typical document (*e.g.*, a text document) with added metadata and processing information regarding the location of the document at any particular point in time. *Id.* The purpose of the meta-document is to retain a record of the voyage of a document. *Id.*, ¶¶ 0010-0011. The meta-document is simply a document that records a history of where it has been and the actions that have been performed on it. *Id.*, ¶ 0011.

Hubert does not disclose tracking a user as required by the claims. *See, e.g.*, PTX 1, '761 Patent at col. 21:3 (claim 1). Dr. Herbsleb testified that Hubert is devoid of user movement altogether. Tr. 1814:1-5. Furthermore, Facebook's own expert *agreed* that Hubert does not disclose tracking a user. Dr. Greenberg instead testified that the element is met because Hubert discloses tracking the movement of a *document*. Tr. 1548:12-16 ("And it says a record of the fact that the meta-document 20 was received at Source 32 is stored as processing information and processing information is part of the metadata. So this is tracking the movement."). Likewise, the only evidence presented by Facebook was a figure from Hubert showing *the meta-document* being transferred from one user (source) to another over the Internet. DTX 922, Fig.

2. As Dr. Herbsleb explained, nothing in the figure demonstrates a user moving, let alone tracking this movement: “it’s just a document being sent from one user to the next.” Tr. 1813:23-24. Hubert itself specifically states that the record it creates is a history of the *meta-document*, not the user. DTX 922, ¶ 0011 (“The processing information is recorded on the meta-document each time the meta-document is processed in some manner.”). As a result, a jury could reasonably find, and in fact heard no evidence to the contrary, that Hubert does not disclose tracking a user.

Dr. Herbsleb also testified that Hubert does not disclose a context (*i.e.*, environment), user environment, or user workspace as in the claims of the ‘761 Patent because Hubert discloses only “meta-documents,” and not a platform or system at all. Tr. 1807:24-1808:20; 1814:14-22. Specifically, Dr. Herbsleb testified that “[t]here’s absolutely nothing about a context, or environment or moving from one context to another, tracking users. I mean, it’s just not centered around users. It’s centered around these meta-documents.” Tr. 1811:7-11. Dr. Greenberg only stated that these elements were met by Hubert but gave no further explanation—certainly nothing upon which a jury could conclude that these elements were disclosed. Tr. 1547:17-1549:11. For example, Dr. Greenberg stated that Hubert discloses a context because “it says Source 32 includes a processing program, if we can highlight that, and which processes the document information by copying the document text and storing it in a new document.” Tr. 1548:5-9. Dr. Greenberg never explained why this “Source” is a context/environment, let alone how this is a user environment or user workspace. Dr. Herbsleb’s testimony was more than enough for a reasonable jury to find that Hubert does not disclose the claimed context.

In addition, Hubert does not anticipate the asserted claims because it does not disclose a “network” or “web-based” system as required by all of the asserted claims. *See* Tr. 1815:8-10

(“It’s also not a network-based system. It’s just a document.”). Hubert discloses only a “meta-document”—a normal data document with some further information recorded. A document by itself is not a component of a network-based system just by virtue of being able to be emailed. *See* Tr. 1814:16-22. Facebook did not even address this glaring absence in its Invalidity JMOL, and the jury could have reasonably concluded that Hubert does not disclose a network or web-based system, platform, or server.

Again, Facebook did not even attempt to discuss how Hubert disclosed each claim on an element-by-element basis for any of the independent claims besides claim 1. Dr. Greenberg only briefly discussed a few chosen elements for claims 9, 21, and 23 and often ignored the clear differences in language between those claims and claim 1. For example, and similar to his analysis of the iManage User Manual, Dr. Greenberg concluded that Hubert discloses the claim 21 element of a “user workspace,” without support or explanation, stating “[t]his is a place where people are supposed to do their work. So, by definition, this is a user workspace.” Tr. 1555:21-23. Again, a reasonable jury could have concluded that Facebook did not present clear and convincing evidence that claims 9, 21, and 23, and the claims depending there from were invalid.

3. Facebook Failed To Show By Clear And Convincing Evidence That Swartz Anticipates The ‘761 Patent.

The Swartz patent discloses a system of “middleware” that sits in-between two programs used for clinical studies. DTX 919, Col. 9:5-8. Used for regulatory compliance, this middleware program records steps taken in the flow of information from source documentation to a finished report. *Id.*, Col 3:61-4:58. The Swartz system stores the data and the analysis and plugs it into an audit trail. *Id.*, Col. 9:5-43. Information in the audit trail includes the author of a document, who signed off on a change, or who reviewed the requirements of the regulations, and this system takes the results and integrates them into an audit trail. *Id.* As a result, when the report is

completed, there is not only a report, but it can also be established where the data supporting the report came from. *Id.*, Col. 6:17-26. The system is related to the flow of data into a report, and is not concerned with the users. Again, nothing in the Swartz reference discloses a context, as construed by the Court, or tracking the movement of a user.

Dr. Herbsleb testified that Swartz does not disclose tracking user movement. Dr. Herbsleb contrasted tracking steps going into creating a report, as disclosed by Swartz, and testified that Swartz discloses that the system “keeps track of all those steps that go into the creation of this report documenting exactly how they were taken, so that you can prove at the end that you track them the right way. It doesn’t care about users. There’s no workspace. There’s no moving of a user from one workspace to another workspace. It doesn’t care about users.” Tr. 1824:23-1825:8. The jury was free to credit and rely on that testimony.

Dr. Greenberg supported his opinion by relying on portions of Swartz directed to tracking the steps taken to create a clinical report. Tr. 1452:9-1459:22. For example, Swartz states that “knowledge integration middleware is preferably employed to identify (including tracking, monitoring, analyzing) the context in which information is employed.” DTX 919, col. 6:22-25. This excerpt does not disclose tracking of the user movement but instead discusses tracking *the information*. Dr. Herbsleb specifically addressed that language, testifying that “[Swartz is] talking about tracking what’s going on in this regulatory compliance scheme, what’s being done to the documents, what’s being done to the data. There’s no sense at all of it tracking people, or tracking users or having even workspaces for users. So this is a completely different type of thing.” Tr. 1829:16-23. Any additional sections of Swartz relied on by Facebook are equally clear in that they are not discussing tracking user movement, but recording the history of the

report. *See* Tr. 1452:9-1459:22. Thus, Facebook failed to demonstrate that Hubert discloses tracking the movement of a user.

Swartz also does not disclose the concept of a context, user environment, or user workspace. Dr. Herbsleb stated that, when the term “context” is used in Swartz, it “is the context in this regulatory compliance scheme. . . It’s talking about tracking what’s going on in this regulatory compliance scheme, what’s being done to the documents, what’s being done to the data. There’s no sense at all of it tracking people, or tracking users or having even workspaces for users.” Tr. 1829:8-21. Dr. Greenberg stated only that these elements were met by Swartz but did not provide any further explanation. Tr. 1450:13-1491:11. He stated that because Swartz uses the term “context” it includes the concept of a context. However, he completely glossed over how this is the same as an environment (as context was construed), user environment or user workspace. *Id.* In fact, Swartz uses “context” in a very different manner than the ‘761 Patent. Dr. Greenberg glossed over any distinction stating in a conclusory manner that these elements are met because “Swartz is describing all the stuff people are doing in a system, so that’s their environment for doing their work” Tr. 1477:2-5. Because Swartz does not disclose this key concept of the claims, a jury could reasonably conclude that the asserted claims were not disclosed by Swartz.

Furthermore, Facebook did not even attempt to discuss how Swartz disclosed each claim on an element-by-element basis for any of the independent claims besides claim 1. Dr. Greenberg only briefly discussed a few chosen elements for claims 9, 21, and 23 and often ignored the clear differences in language between the claims and claim 1. For completely different independent claims he would often refer back to his previous analysis, making statements such as “[t]his is very much the same with some minor differences. I know it seems

tedious.” Tr. 1485:6-8. For example, in reference to claim 23, Dr. Greenberg simply ignored the limitation that the system is “for defining a first user workspace” and stated that “we saw how we can access this system via the web, so this would give it the functionality of a web-based server for defining, first, user work space” Tr. 1485:19-22. For this reason alone, Facebook failed to provide sufficient evidence for a jury to conclude that claims 9, 21, and 23, and the claims depending there from were invalid.

C. FACEBOOK DID NOT ESTABLISH OBVIOUSNESS BY CLEAR AND CONVINCING EVIDENCE.

At trial, Facebook put up only a token effort to establish that the references relied upon, if insufficient to anticipate, would still somehow render the claims obvious. *See* Tr. 1564:16-23. The jury found as a factual matter that none of the references anticipate the claims of the ‘761 Patent. Thus, because the references all suffer from similar deficiencies, the *combination* of those same references *a fortiori* could not render the claims obvious.

Dr. Herbsleb also explained that these references could not be combined together in any form at will. Tr. 1838:24-1841:22. Facebook did not provide an element-by-element explanation of which elements would be combined from which reference, and instead resorted to broad statements. Tr. 1564:16-23. As a result, Facebook presented insufficient evidence to establish that any of the asserted claims of the ‘761 Patent were invalid as a result of some hypothetical and undisclosed combination of the references.

Leader’s evidence of secondary considerations of non-obviousness further demonstrate support for the jury’s verdict. *See Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17-18 (1966). Dr. Herbsleb testified that the asserted claims of the ‘761 Patent addressed a long-felt need in the industry and that others taught away from the solution presented in the claims of the ‘761 Patent. Tr. 1847:4-1848:20. Furthermore, Facebook stipulated an additional secondary

consideration by agreeing that the Facebook website, which was found by the jury to be an embodiment of the '761 Patent, was commercially successful. D.I. 601 at 47, No. 4.10. Thus, the jury had sufficient evidence to find that Facebook failed to offer clear and convincing evidence that the claims of the '761 Patent would have been obvious.

Facebook attempted to cure any lapse in these references in regard to claim 16 by adding U.S. Patent No. 6,434,403 ("Ausems"). However, Facebook provided no reason to combine this reference with iManage, Hubert, or Swartz. Tr. 1566:5-1567:10; 1568:8-1570:15. Dr. Greenberg merely stated in a conclusory fashion that Ausems would be obvious to combine with the other references because "if you had an end user who was just using their wireless computer at the time, they would just do that as a matter of consequence of using a wireless computer." Tr. 1567:3-7. The jury could have also reasonably concluded that Ausems could not be combined with any of the other references in light of the secondary considerations of non-obviousness, as discussed above.

D. A NEW TRIAL IS NOT WARRANTED AS A RESULT OF SHOWING THE FACE OF SWARTZ AND THE '761 PATENT TO THE JURY.

Facebook's request for a new trial should be denied. During his direct examination, Dr. Greenberg was directed several times by Facebook's counsel to the references listed on the face of the '761 Patent. *See* Tr. 1491:16-21; 1536:1-11; 1561:24-1562:8; 1571:2-13. In fact, Facebook's counsel enlarged on a projector the patent's face to underscore the references not relied upon by the examiner. Once Facebook opened the door by its line of questioning and by providing the jury with an unredacted copy of Swartz, Leader was within its rights to cross-examine Dr. Greenberg. Accordingly, Leader was free to direct the jury to the fact that the same examiner appears on both the '761 Patent and Swartz. *See* PTX 1; DTX 919; *see also* Tr. 1581:13-1583:12.

Even if the questioning by Leader's counsel was improper, Facebook was not prejudiced. A new trial is warranted only if it was "reasonably probable" that the verdict was influenced by improper statements. *Draper v. Airco, Inc.*, 580 F.2d 91, 96-97 (3d Cir. 1978). An isolated improper remark will not support the grant of a new trial. *Salas v. Wang*, 846 F.2d 897, 908 (3d Cir. 1988). It is not "reasonably probable" that the jury considered this in their verdict because the Court took harsh measures to make sure that the jury disregarded the comments. Tr. 1648:8-15. The Court struck that testimony (Tr. 1583:13-14) and gave a stern limiting instruction. D.I. 601 at 33, No. 4.2. Those remedies more than adequately apprised the jury that they were not to consider this information.

In light of these measures, Facebook's statement that the questions were "highly prejudicial false statements" falls flat. D.I. 635 at 18. Furthermore, it was *Facebook's* questioning that took unfair advantage of the Court's ruling limiting arguments on what was considered by the Examiner by highlighting the information on the front of the '761 Patent. The only party prejudiced by the situation was Leader because it was unable to discuss the undisputed facts on the cover of the '761 Patent and Swartz and put in issue by Facebook. Counsel simply directed Dr. Greenberg to the name of the examiner on the face of the patent and asked if it would be reasonable to conclude that the examiner was aware of both patents. Tr. 1581:13-1583:12. It is clear that not only was this a question and not a statement, but that it was accurate given that the same examiner examined the applications for both patents. Under the circumstances, it was appropriate for Leader to point out information that was *on the face* of both Swartz and the '761 Patent. Therefore, a new trial on Swartz is completely inappropriate.

The Court's remedial measures here were fully sufficient to protect Facebook. Indeed, the Court also used a limiting instruction to address improper statements by Facebook's counsel

in opening statements regarding the possibility of an injunction. Tr. 244:2-6; D.I. 601 at 50, No. 4.12. A limiting instruction was sufficient to enforce the Court's order not to raise the potential for an injunction against the Facebook Website. *Id.* The same reasoning holds true here. Facebook cannot be heard to complain that a different remedy is needed for Leader's cross-examination of Dr. Greenberg.⁴

E. CLAIMS 1, 4, 7, 21, 23, 25, 31, AND 32 ARE NOT INVALID AS INDEFINITE.

Facebook also reprises its pending summary judgment motion and argues that claims 1, 4, 7, 21, 23, 25, 31, and 32 are invalid as indefinite. D.I. 635 at 16-17 (citing *IPXL Holdings, L.L.C. v. Amazon.com, Inc.*, 430 F.3d 1377 (Fed. Cir. 2005)). Leader will demonstrate why that argument is wrong when it responds to these arguments on September 20, 2010 as set by the Court's post-trial briefing schedule. D.I. 613. In short, the system and computer-readable media claims do not include method steps to be performed by a user. Rather, those claims set forth functional language that describes the functionality of the claimed system. Furthermore, there is no ambiguity in the claims because both parties' experts understood the scope of the claims in forming and providing their opinions at trial. Accordingly, Facebook's motion should also be denied with respect to indefiniteness.

V. CONCLUSION

For the foregoing reasons, Leader respectfully requests that the Court deny Facebook's JMOL Motion for Invalidity and for a new trial.

⁴ Swartz is no longer at issue in the pending reexamination of the '761 Patent. In its first office action, the USPTO has declined to adopt the rejection based on Swartz suggested by Facebook. USPTO May 21, 2010 Office Action (Hopkins Decl., Ex. 35). The USPTO's action also undermines Facebook's rationale for a new trial.

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

CERTIFICATE OF SERVICE

I, Philip A. Rovner, hereby certify that on September 15, 2010, the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing(s) to the following; that the document was served on the following counsel as indicated; and that the document is available for viewing and downloading from CM/ECF.

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