

2011-1366

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LEADER TECHNOLOGIES, INC.,

Plaintiff-Appellant,

v.

FACEBOOK, INC.,

Defendant-Appellee.

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

**REPLY BRIEF OF
PLAINTIFF-APPELLANT LEADER TECHNOLOGIES, INC.**

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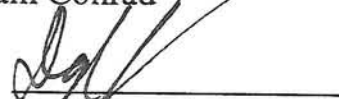
1. The full name of every party or amicus represented by me is Leader Technologies, Inc.
2. The name of the real party in interest represented by me is Leader Technologies, Inc.
3. No parent corporations or publicly held companies own 10 percent or more of the stock of Leader Technologies, Inc.
4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this Court are:

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November 28, 2011

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INTRODUCTION AND SUMMARY OF ARGUMENT

The jury found against Leader for one reason and one reason only: the prior sale/public disclosure bar. But as Leader explained in its opening brief, the evidence shows at most that Leader offered for sale and publicly demonstrated some version of its evolving Leader2Leader product suite before the critical date. There is no sufficient evidence, let alone clear and convincing evidence, that Leader included the patented technology in that suite before the critical date. And Facebook cannot overcome that absence of evidence by the expedient of calling Leader's CEO Michael McKibben to the stand, accusing him of lying, and asking the jury to disbelieve him. That diversion was effective theater before the jury, but courts review jury verdicts to ensure they are based on actual and sufficient evidence. This one is not.

Facebook's appellee brief confirms that conclusion by attempting to refashion a new factual basis for the verdict and then arguing that the district court erred in a number of other respects. Because those alternative arguments lack merit, this Court should reverse and remand.

ARGUMENT

I. FACEBOOK DID NOT PROVE AN INVALIDATING PUBLIC USE OR OFFER FOR SALE BY CLEAR AND CONVINCING EVIDENCE.

As the district court recognized, the jury's invalidity verdict turned not on an element-by-element analysis, but on Mr. McKibben's credibility—and it did so

because Facebook “plac[ed] the jury’s focus . . . squarely” there. JA57. In opposing Leader’s motion for judgment as a matter of law, Facebook again argued that “[t]he sole question for the jury” was when Leader2Leader first embodied the patented technology and “[t]he answer to that question turned on the credibility of Mr. McKibben’s trial testimony.” JA23545, JA23552. The district court agreed and based its decision on the “combination” of the jury’s “evident finding that Mr. McKibben was not testifying credibly” and Leader’s interrogatory responses, making clear that both were necessary to its conclusion. JA54.

Now, however, Facebook attempts to downplay its own trial theory and the district court’s reasoning. Facebook leans instead on misleading combinations of cropped quotations that it did not argue to the jury or the district court in the post-trial briefing, that the district court did not rely on, and that are directly refuted by the same witnesses’ actual, on-point testimony. Facebook’s attempt to change horses on appeal only confirms that it failed to prove its case at trial, especially under the clear-and-convincing-evidence standard.

Facebook is consistent on the one point that matters, though: Facebook concedes it did not offer any technical evidence to show that Leader2Leader practiced each and every element of the claimed invention before the critical date. *See* Facebook Br. 18. That elemental gap in Facebook’s case is dispositive because the “first determination” in any on-sale bar “analysis must be whether the

subject of the barring activity met each of the limitations of the claim, and thus was an embodiment of the claimed invention.” *Scaltech Inc. v. Retec/Tetra, L.L.C.*, 178 F.3d 1378, 1383 (Fed. Cir. 1999); *see also* JA26323; Leader Br. 18.

Facebook argues that it may rely on “any relevant evidence, such as memoranda, drawings, correspondence, and testimony of witnesses” to prove its case. Facebook Br. 18 (quoting *RCA Corp. v. Data Gen. Corp.*, 887 F.2d 1056, 1060 (Fed. Cir. 1989)); *see also* Leader Br. 19 (quoting same language). That misses the point. *RCA* holds that an offer for sale itself need not include an element-by-element description of the patented invention as long as other technical documents and testimony—which existed in spades in that case—confirm that the offered product included the patented technology. *See* 887 F.2d at 1060. That does not help Facebook because its deficiency is not the *type* of evidence but rather the *absence* of evidence. *See* Leader Br. 19. Facebook presented no memoranda, drawings, correspondence, source code, technical documents, or other similar evidence.

Facebook’s failure to present actual proof is especially significant because Leader produced every version of the source code during discovery—a point Facebook does not dispute. *See id.* at 19-20. If there is any inference to be drawn here, it is that Facebook did not present technical evidence because it knew that

evidence did not support its position. *See id.* Facebook's silence on that point in its appellee brief speaks volumes.

A. The District Court Erred By Upholding The Jury Verdict Based On The Jury's Apparent Disbelief Of One Witness.

Facebook banishes the credibility issue to a short section deep into its brief, and cites a few cases for the blanket proposition that lack of credibility is affirmative evidence of the opposite of the witness's testimony. *See* Facebook Br. 41-43. Neither case law nor the district court has gone that far. The district court held that Mr. McKibben's credibility could be considered affirmative evidence based on factual distinctions that Leader refuted in its opening brief and that Facebook does not even attempt to defend. *See* Leader Br. 24-29.

As Leader already explained, and Facebook does not directly dispute, there is a circuit split on whether a witness's lack of credibility can ever be affirmative evidence of the opposite of his testimony, or whether it can be considered affirmative evidence for the limited purpose of tipping the balance in cases where other evidence is "sufficient or very close to sufficient." *United States v. Tyler*, 758 F.2d 66, 69, 70 & n.3 (2d Cir. 1985). Under either approach, Leader is entitled to judgment as a matter of law because Facebook does not have any other evidence that comes close to proving invalidity clearly and convincingly.

Facebook's cases are consistent with that conclusion and the numerous cases cited in Leader's brief that Facebook makes no effort to distinguish. In the very

case that Facebook cites for the “general principle,” Facebook Br. 41, the Supreme Court held that “*a plaintiff’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated.*” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000) (emphasis added); *see also United States v. Villarreal*, 324 F.3d 319, 325 (5th Cir. 2003) (lack of credibility may support a judgment “when combined with all the other evidence in the case”); *United States v. Burgos*, 94 F.3d 849, 867 (4th Cir. 1996) (credibility relevant to “classic example” of two competing witness accounts). Here, Facebook has no independent prima facie case, much less one that is close to being sufficient to prove invalidity.

Facebook attempts to distinguish one of the many cases cited by Leader, *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512 (1984), on the ground that it dealt with constitutional law instead of patent law. *See* Facebook Br. 42. That is no distinction at all, especially in light of the many Third Circuit and other cases—all of which Leader cited—that apply *Bose* in other areas of law. *See, e.g., Eckenrode v. Penn. R. Co.*, 164 F.2d 996, 999 n.8 (3d Cir. 1947); *United States v. Pechenik*, 236 F.2d 844, 847 (3d Cir. 1956); *see also Roper Corp. v. NLRB*, 712 F.2d 306, 310 (7th Cir. 1983); *Bankers Life & Cas. Co. v. Guarantee Reserve Life Ins. Co. of Hammond*, 365 F.2d 28, 33-34 (7th Cir. 1966). Facebook

cannot and has not tried to distinguish those cases. And even cases cited by Facebook endorse and apply *Bose*'s reasoning. *See, e.g., United States v. Urban*, 404 F.3d 754, 782 (3d Cir. 2005).

In the end, it is not clear whether Facebook is even disputing that Mr. McKibben's credibility has at most minimal evidentiary significance because Facebook's argument appears to be that his supposed lack of credibility "legitimately bolstered" other "evidence." Facebook Br. 42; *see also id.* at 43. That might be true if there was other sufficient or almost sufficient "evidence" to "bolster[]." But there is none.

B. Leader Did Not Admit That Leader2Leader Included The Patented Invention Before The Critical Date.

Facebook asserts that Leader admitted that Leader2Leader included the patented invention before December 11, 2002. *See* Facebook Br. 19-20. It derives the purported "admission" from two things: Mr. McKibben's inability to remember during his deposition the "specific point" at which Leader2Leader incorporated the patented invention (information he testified his developers kept track of), JA25761; and Leader's present-tense interrogatory responses. Facebook Br. 21-23. Although Leader already addressed those contentions in its opening brief, Facebook virtually ignores Leader's arguments and authorities on these points. *See* Leader Br. 31-36.

As Leader's opening brief showed, the Third Circuit has held that a lack of recollection is *not* evidence. *See, e.g., United States v. Weaver*, 267 F.3d 231, 245-46 (3d Cir. 2001); *Walton v. Halter*, 243 F.3d 703, 709-10 (3d Cir. 2001); Leader Br. 32. Thus, even if the jury had credited Mr. McKibben's deposition testimony, there would have been *no* evidence on point. Facebook does not address, much less refute, that case law. Instead, Facebook wields the deposition testimony in yet another attack on Mr. McKibben's credibility. *See* Facebook Br. 23. That fails for the reasons discussed above. *See* pp. 4-6, *supra*.

As for the interrogatory responses, nothing in Facebook's brief explains how Leader's present-tense response to a present-tense interrogatory *in 2009* sheds any light on the state of affairs *in 2002*. *See* Leader Br. 32-33; *cf. Carr v. United States*, 130 S. Ct. 2229, 2237 (2010) (holding that use of present tense in statute does not include past actions). Instead, Facebook again attempts to shift the burden of proof, arguing that Leader should have qualified its responses. *See* Facebook Br. 23. As Leader has explained, that burden never shifts. *See* Leader Br. 21. In any event, Leader did qualify its responses by responding in the present tense to the present-tense interrogatories. Especially considering that Facebook had not yet asserted its statutory bar defenses, Leader had no reason to believe that earlier versions of the product were relevant—another point Facebook does not dispute. *See id.* at 9-10, 21-22. And even if the interrogatory responses were

somehow ambiguous, ambiguity is not clear and convincing as a matter of law.

See id. at 35.

C. Facebook Rewrites The Record To Manufacture “Evidence” To Support The Verdict.

As explained above, the district court relied on the combination of Mr. McKibben’s credibility and Leader’s purported admissions. JA54. Because *neither* of those is close to sufficient, either alone or together, this Court should reverse the denial of JMOL. Facebook’s other arguments mostly amount to alternative grounds for affirmance that attempt to re-invent the record.

1. The inventors consistently testified that Leader2Leader and the patented technology were different things.

Facebook’s efforts in this Court to portray the inventors’ testimony as acknowledging an earlier invention date for the patented invention are flatly refuted by the record (which is presumably why Facebook did not argue these points below). As shown in Leader’s opening brief, the two inventors consistently testified that Leader2Leader was a suite of products that evolved over time, eventually including the patented technology *after* the critical date. *See* Leader Br. 22. The Leader2Leader platform did not embody the patented invention before December 11, 2002 because it “did not exist at that time.” JA25716; *accord* JA25758; JA25727. Despite Facebook’s attacks on Mr. McKibben, it does not question Mr. Lamb’s credibility, and he independently confirmed that Leader did

not complete “the code that was the embodiment of” the ‘761 patent until just before filing the provisional application. JA24836-37; *see also* Leader Br. 7, 11.

Facebook strings together snippets of testimony from here and there to try to turn those witnesses’ testimony on its head—snippets that it did not argue to the jury in this way. *See* JA23549-54. As a matter of law, that is an impermissible basis to sustain a jury verdict. “[I]t was [defendant’s] burden to clearly disclose, discuss, and identify for the jury the supporting evidence upon which it was relying to prove that the claim limitation was present in the prior art.” *Fresenius USA, Inc. v. Baxter Int’l, Inc.*, 582 F.3d 1288, 1300 (Fed. Cir. 2009) (overturning jury verdict) (citing *Koito Mfg. Co. v. Turn-Key-Tech, LLC*, 381 F.3d 1142, 1151 (Fed. Cir. 2004)). Facebook itself argues that an evidentiary inference “never presented to the jury, has been waived.” Facebook Br. 33.

And as a matter of fact, Facebook’s new theories are wrong. Facebook contends that Leader2Leader and the patented invention are one and the same because Mr. Lamb testified that they solved the same technological problem. *See id.* at 24-26. That is incorrect. Mr. Lamb was asked directly “when you talk about Leader2Leader, are you talking about the technology of the ‘761 patent?” JA24852. He testified that “myself and the developers used the term Leader2Leader to refer to a collection of technologies and applications that we

were trying to build, not the '761 patent. That was—that wasn't what we thought.”
Id.

Not one to settle for direct answers to direct questions, Facebook stitches a few other quotations together to draw the opposite conclusion. According to Facebook, Mr. Lamb testified that “from its inception Leader2Leader included the ‘big thing that solved the data burden issue’”—*i.e.*, the ‘761 patented technology. Facebook Br. 25. In fact, Mr. Lamb testified the opposite. When asked the “time period” during which he considered Leader2Leader and the ‘761 patented invention to be different things, he testified “I don’t know when the term Leader2Leader first came into existence, but essentially from that moment until the day I left.” JA24852-53. In other words, Mr. Lamb testified that Leader2Leader and the patented technology were always *different* things.

Facebook’s newly minted theory that the “underlying engine” of Leader2Leader has always been “Digital Leaderboard,” and that “Digital Leaderboard” has always been synonymous with the patented invention, demonstrates the extent to which Facebook is now reaching to construct a factual basis it neither presented nor proved at trial. *See, e.g.*, Facebook Br. 5. During the entirety of the trial, the term Digital Leaderboard was mentioned two times—both in reference to Leader’s 2009 interrogatory responses. *See* JA25624-26, JA25714-16. The only substantive testimony mentioning the Digital Leaderboard was Mr.

McKibben’s testimony that “Leader2Leader powered by the Digital Leaderboard” technology was used only after November 23, 2006—years after the critical date. JA25713-16. Facebook is attempting to defend the verdict on a theory that was not even contemplated during trial, not presented to the jury, and not argued to the district court post-trial.

2. Any reduction to practice of the invention a day or two before the provisional application confirms that it was not a part of Leader2Leader during the time period in question.

Facebook’s last-ditch contention is that Leader may have completed the patented invention a day or two before filing its provisional application. *See* Facebook Br. 17, 30-32. While this point has the virtue of having been raised below and addressed by the district court, it is contrary to Facebook’s other arguments because, if accepted, it would further confirm that the patented technology was *not* synonymous with Leader2Leader all along.¹

More important, Facebook could prevail on this theory only if Leader publicly demonstrated or offered to sell the patented invention within that one- or two-day window. There is no evidence that Leader did. Facebook points to evidence of public demonstrations and offers for sale *before* the brief time window

¹ Leader included relevant portions of the source code that it had completed a day or two earlier in its provisional application. *See* Leader Br. 7. Before the district court, Facebook successfully argued that the code included in the provisional did not embody the ‘761 patent. JA74. Thus, its current position is inconsistent with the basis on which it prevailed below.

at issue, but none *during* it. Theoretical possibility is not evidence, let alone clear and convincing evidence, especially when the only actual evidence is to the contrary. *See* Leader Br. 37 n.3.

D. Facebook Wrongly Accuses Mr. McKibben Of Lying About Irrelevant Issues.

In the end, Facebook's appellate brief is almost schizophrenic. On one hand, Facebook attempts to minimize the importance of Mr. McKibben's credibility to its case, as explained above; but on the other, it never misses a chance to argue that Mr. McKibben lied. *Compare* Facebook Br. 41 ("[T]here was substantial evidence to support the jury verdict even without considering the implications of McKibben's falsehoods."), *with id.* at 20 ("The jury, discounting McKibben's fabricated new story, found the patent invalid for violation of both the on-sale and public-use bars."). Indeed, Facebook accuses Mr. McKibben of lying on no fewer than 17 pages of its brief, and devotes several pages to arguing that he lied about matters that are not even arguably relevant to the issues on appeal. *See id.* at 9, 13, 17, 20, 23, 27, 35-45.

For example, Facebook argues that Mr. McKibben misled the jury about whether he had offered Leader2Leader for sale and whether he had demonstrated Leader2Leader without first obtaining nondisclosure agreements ("NDAs"). *See id.* at 35-41. That has nothing to do with whether Leader2Leader embodied the patented invention during the relevant time period. And Leader's decision not to

raise those disputed fact issues on appeal is hardly a concession that Leader was wrong about them or that Mr. McKibben lied; it simply reflects the standard of appellate review.

Facebook argues that supposedly false testimony on these issues is evidence of “guilty knowledge.” *Id.* at 17. But Facebook does not cite a single case for the proposition that guilty knowledge constitutes clear and convincing evidence of patent invalidity, especially when the purported knowledge relates to a different point. The case cited by Facebook stands only for the unremarkable proposition that statements by one witness that contradict another witness’s testimony are admissible. *United States v. Kemp*, 500 F.3d 257, 296-97 (3d Cir. 2007).

Facebook’s muckraking is worse than irrelevant because it gets the facts wrong. For example, Facebook initially argued at trial that Mr. McKibben had demonstrated Leader2Leader to a representative from Wright-Patterson Air Force Base on April 2, 2001 before obtaining a NDA on April 10, 2001. *See* JA25644-46. Facebook dropped that argument after realizing that it had overlooked an earlier NDA in the record that was signed on April 2. *See* JA32881-83; JA25644-46; JA25725-27. But now, Facebook attempts to resurrect its erroneous argument by calling the April 2 NDA in the record a “phantom NDA” and then accusing Mr. McKibben of a “clear pattern” of demonstrating Leader2Leader publicly and then “falsely claim[ing] that earlier undisclosed NDAs existed.” Facebook Br. 40.

These arguments serve only to confirm that Facebook’s strategy all along has been to divert attention from its lack of evidence—evidence such as the source code that Facebook could have presented at trial if it supported Facebook’s position—by calling Mr. McKibben to the stand and then attacking him and asking the jury to disbelieve him. As a matter of law, that tactic, which would eradicate any requirement for an element-by-element analysis, cannot support the verdict. *See pp. 2-6, supra.*

E. The Clear-And-Convincing-Evidence Standard Removes Any Doubt That Facebook Failed To Prove Its Case.

Any remaining doubt should be resolved by the clear-and-convincing-evidence standard. At the very most, Facebook has offered inference. But because the clear-and-convincing-evidence standard requires “hard facts,” *Colorado v. New Mexico*, 467 U.S. 310, 320-21 (1984), it leaves “no room for speculation, inference, or surmise,” *In re Bose Corp.*, 580 F.3d 1240, 1243 (Fed. Cir. 2009) (quotation omitted); *see also* Leader Br. 28 (citing cases).

Facebook does not distinguish the case law Leader cited on this point; indeed, Facebook barely acknowledges it. Facebook cites one case from this Court, *Sonoscan, Inc. v. Sonotek, Inc.*, 936 F.2d 1261 (Fed. Cir. 1991), and claims its “evidence is stronger” than that case. Facebook Br. 44. But Facebook has it backward. The defendant in *Sonoscan* supported its case with hard facts: a

technically detailed quotation, a schematic, and a working prototype. *Sonoscan*, 936 F.2d at 1263-64. Facebook’s inferential case does not compare favorably.

Facebook goes on to tout the importance of witness testimony in *Sonoscan*, but in that case, two witnesses confirmed that the patented invention existed before the critical date. *See id.* Here, the only two witnesses on this issue—Mr. McKibben and Mr. Lamb—testified to the opposite. *See* Leader Br. 11. Moreover, *Sonoscan* recognized that “conflicting testimony” would not have sufficed as clear and convincing evidence in the absence of technical evidence. 936 F.2d at 1263. Here, the testimony was not conflicting; it was consistent and opposed to Facebook’s position. And there was no physical or technical evidence.

F. This Court Should Grant Judgment As A Matter Of Law Or, In The Alternative, A New Trial.

For the reasons explained above, the Court should grant judgment as a matter of law. Alternatively, the Court should order a new trial because, if the “great weight of the evidence” ever warrants a new trial, *Cooper Distrib. Co. v. Amana Refrigeration, Inc.*, 63 F.3d 262, 277-78 (3d Cir. 1995) (Alito, J.), it does here. At most, Facebook’s case consists of “mere conjecture and speculation” derived primarily from discrediting a single witness. *See Urti v. Transport Commercial Corp.*, 479 F.2d 766, 770 (5th Cir. 1973). And Facebook’s changed factual approach on appeal confirms, if nothing else, that its current position would be more appropriately directed to a jury on remand than to this appellate court.

II. THE JURY REASONABLY FOUND THAT FACEBOOK INFRINGED THE METHOD CLAIMS.

Facebook's other alternative grounds for affirmance lack merit. As to the method claims, Leader presented two alternative theories of infringement at trial: that Facebook infringed by itself or, in the alternative, that Facebook jointly infringed these claims with another party. The jury found in a special verdict that Facebook infringed by performing all of the elements *itself*, without regard to joint infringement principles, and the district court upheld the verdict on that basis. *See* JA8-12, 72.

Facebook's contention that this is nonetheless a joint infringement case is incorrect. As the district court held, the asserted claims were drafted "to focus on one entity" (*BMC Res., Inc. v. Paymentech, L.P.*, 498 F.3d 1373, 1381 (Fed. Cir. 2007))—an infringing system, or more specifically, a web server's execution of the back-end components of that system. JA9.

Indeed, the preamble to claim 9, the only independent method claim at issue, specifies that it claims "[a] computer-implemented method of managing data, *comprising computer-executable acts* of" JA257 (emphasis added). Facebook's effort to transform a method claim comprising "computer-executable acts" into a claim requiring *non-computer-executable* acts (*i.e.*, user actions) is at war with the preamble and the structure of the claim. As the district court held, "Facebook's reading of the claim fails to consider its full context" because, "[a]s

recited in the preamble, the method asserted in claim 9 is comprised of ‘computer-executable acts.’” JA9. “Thus, there is no requirement of user interaction recited in the claim.” *Id.*²

Facebook argues that the preamble is not limiting and should therefore be ignored. Facebook Br. 54-55. Leader disagrees because the preamble breathes life into the claim by reciting that the steps consist of computer-executable acts and establishing their centrality as part of a computer-implemented method of managing data. *See, e.g., Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1305 (Fed. Cir. 1999); *Bell Commc’ns Research, Inc. v. Vitalink Commc’ns Corp.*, 55 F.3d 615, 620 (Fed. Cir. 1995).

But whether the preamble is limiting is ultimately beside the point. Either way, the preamble provides valuable intrinsic evidence for construing the remainder of the claim. *See, e.g., Advanced Cardiovascular Sys., Inc. v. Medtronic, Inc.*, 265 F.3d 1294, 1304 (Fed. Cir. 2001); *Lava Trading, Inc. v. Sonic Trading Mgmt., LLC*, 445 F.3d 1348, 1354 (Fed. Cir. 2006). And Facebook’s contention that the preamble is *wrong*, because two of the steps are performed by

² Facebook’s contention that the district court left this claim-construction issue to the jury is incorrect. *See* JA9. The truncated portion of the jury instruction quoted by Facebook told the jury how to decide whether Facebook had directed or controlled another’s actions; it did not address Facebook’s liability for performing all of the steps itself. *See* JA122. If this claim-construction issue was so central to Facebook’s defense, it is hard to understand why Facebook raised it for the first time in an objection to the court’s jury instructions, as opposed to during claim construction itself.

users, runs headlong into the fundamental canon that claims must be read as a whole so as to give meaning to all of their provisions. *See, e.g., Decisioning.com, Inc. v. Federated Dept. Stores, Inc.*, 527 F.3d 1300, 1314 (Fed. Cir. 2008).

When read as a whole and not parsed into smaller phrases, the entire method is performed by a single entity. Facebook first relies on the claim step 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.” JA257. This step refers to the system’s computer-executable act of creating data *in the specified circumstances*. The phrase “via user interaction with the user environment by a user using an application” simply indicates that the system must be capable of creating data in response to that user interaction. As long as this functionality is coded and running on Facebook’s servers, Facebook is performing these computer-executable acts.

Put differently, the relevant phrase helps to “define[] the environment in which an accused infringer must act or describ[e] capabilities that an accused device must have,” and thus does not require performance of any method steps by a second actor. *Advanced Software Design Corp. v. Fiserv, Inc.*, 641 F.3d 1368, 1374 (Fed. Cir. 2011); *see also Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1309 (Fed. Cir. 2011). Indeed, the first step expressly calls for the system to

create data “within a user environment,” and then goes on to describe that environment.

Similarly, the second step Facebook identifies is “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.” JA257. In context, the “wherein” clause specifies when the back-end components of the system “dynamically updat[e] the stored metadata” This step as a whole, again, is functional language describing the performance of computer-executable acts *when certain conditions occur*. This Court similarly construed a “wherein” clause in *Fiserv* not to require performance by a user, and thus not to give rise to a joint infringement situation. *See* 641 F.3d at 1375. That conclusion is even stronger here, where the preamble specifies that the method is comprised of computer-executable acts.

Facebook’s comparison of isolated parts of the asserted claims with parts of the claims at issue in some other cases fails because it ignores the differences between the claims when read as a whole, especially in light of their preambles. In the other cases cited by Facebook, the claims unambiguously called for multiple entities to perform claim steps, and there was apparently no dispute that, as written, the claims did so. In *McKesson Technologies, Inc. v. Epic Systems Corp.*, No. 2010-1291, slip op. at 4-5 (Fed. Cir. Apr. 12, 2011), for example, the preamble

described the invention as involving multiple parties (“[a] method of . . . communicating between at least one health-care provider and a plurality of users”), and the claim expressly required users to engage in the specific act of “initiating a communication by one of the plurality of users to the provider for information.” *BMC* was even more extreme, as the claims required performance by at least three different actors. *BMC*, 498 F.3d at 1376-77; *see also Desenberg v. Google, Inc.*, 392 Fed. App’x 868, 870 (Fed. Cir 2010) (non-precedential) (the asserted claim “clearly require[d] the participation of multiple parties”).

If anything, Facebook’s dissection of isolated parts of claims only highlights the importance of reading a claim as a whole in light of its preamble. At a bare minimum, the district court’s claim construction is reasonable because nothing in the asserted claims or the specification precludes it; and that construction is then compelled by the context provided by the preamble, as the district court recognized. *See* JA9. This conclusion is further bolstered by Dr. Vigna’s trial testimony and demonstration of how the Facebook servers perform all of the steps when they are operational.³

³ Facebook’s contention that Leader’s *only* factual “theory at trial was joint infringement” (Facebook Br. 55) is incorrect. Leader’s expert Dr. Vigna testified and demonstrated that Facebook’s source code performed all the computer-executable acts recited in the method claims. Specifically, Dr. Vigna showed where each computer-executable process resided in Facebook’s source code, and, using an interceptor program, he actually showed the code in execution. *See, e.g.*, JA24937-42, JA24943-50, JA24952-55, JA24976-91, JA25013-24.

Finally, even if the asserted method claims required joint performance with users, it would not necessarily follow that Facebook is entitled to judgment as a matter of law. As Facebook appears to recognize, that would depend on the legal standard the *en banc* court ultimately articulates for joint infringement in *Akamai Technologies, Inc. v. Limelight Networks, Inc.*, 629 F.3d 1311 (Fed. Cir. 2010). Facebook Br. ix; *see also McKesson*, No. 2010-1291, *supra*.

III. THE DISTRICT COURT CORRECTLY HELD THAT THE COMPUTER-READABLE MEDIUM AND APPARATUS CLAIMS ARE NOT INDEFINITE.

Facebook's contention that all of the asserted non-method claims are indefinite under *IPXL Holdings, L.L.C. v. Amazon.com, Inc.*, 430 F.3d 1377 (Fed. Cir. 2005), is wrong for similar reasons.

Because patents are presumed valid, close questions of indefiniteness "involving issued patents are properly resolved in favor of the patentee," *Exxon Research & Eng'g Co. v. United States*, 265 F.3d 1371, 1380 (Fed. Cir. 2001), and a claim is indefinite only if it "is insolubly ambiguous, and no narrowing construction can properly be adopted," *Microprocessor Enhancement Corp. v. Texas Instruments Inc.*, 520 F.3d 1367, 1374 (Fed. Cir. 2008) (quotation marks and citation omitted). That is not the case here.

At the outset, claim 21 does not even present an *IPXL* issue because it is a computer-readable medium claim, not a system claim. *IPXL* forbids claims that

“recite[] both a system and the method for using that system” because it is unclear whether infringement of such a claim would occur upon making of the apparatus or upon a user’s use of the apparatus. *IPXL*, 430 F.3d at 1384; accord *In re Katz Interactive Call Processing Patent Litig.*, 639 F.3d 1303, 1318 (Fed. Cir. 2011).

Claim 21, however, recites a “computer-readable medium for storing computer-executable instructions for a method of managing data, the method comprising” JA257. The claim goes on to describe the steps of the underlying method for which instructions are to be stored on a computer readable medium. *See id.* Unlike the *IPXL* situation, that claim structure creates no confusion about claim scope: The claim covers a computer-readable medium containing instructions for performing all of the steps, and a person would infringe by storing those instructions on a computer-readable medium. That is dispositive because “[t]he conclusion of *IPXL Holdings* was based on the lack of clarity as to when the mixed subject matter claim would be infringed.” *Microprocessor Enhancement*, 520 F.3d at 1374.

Significantly, Facebook does not cite any case law applying *IPXL* to computer-readable media claims; nor does it contend that a claim structure of storing a computer-executable method on a computer-readable medium is somehow improper. Thus, Facebook’s *IPXL* objection is irrelevant to claim 21.

See Netscape Commc'ns Corp. v. ValueClick, Inc., 684 F. Supp. 2d 699, 704, 722-23 (E.D. Va. 2010).

Even more fundamentally, none of the asserted claims runs afoul of *IPXL* because, as the district court held, “there is nothing in the claims that requires the user to perform certain steps or take certain actions for the claim elements to be satisfied.” JA36. Instead, as with the method claims discussed above, the language cited by Facebook is functional language describing the claimed capability of the back-end components of an infringing system, which is entirely proper. *See Microprocessor Enhancement*, 520 F.3d at 1375; *Fantasy Sports Props., Inc. v. Sportsline.com, Inc.*, 287 F.3d 1108, 1118 (Fed. Cir. 2002); *In re Schreiber*, 128 F.3d 1473, 1478 (Fed. Cir. 1997). Even Facebook agrees that claims may describe an invention “by what it does, not by what it is.” Facebook Br. 47. That is what these claims do.

For example, claim 1, an apparatus claim, recites “a computer-implemented *tracking component* of the network-based system *for tracking* a change of the user from the first context to a second context of the network-based system *and dynamically updating the stored metadata based on the change, wherein the user accesses the data from the second context.*” JA256-57 (emphases added); *see also* JA258. Claim 23 is comparable for this purpose. JA258. Facebook zeroes in on

the phrase “user accesses” in the wherein clause and superficially equates it with the phrase “user uses” in *IPXL*.

But claims 1 and 23 do not fit the *IPXL* model—reciting a component and then requiring a user to use that component. *See IPXL*, 430 F.3d at 1384. Instead, as with the method claims described above, they describe the circumstances or environment in which *the system* must be capable of performing the recited functions, *i.e.*, tracking and dynamically updating. That is a “system capabilit[y],” not a “user action,” and thus does not pose an *IPXL* concern. *Katz*, 639 F.3d at 1318.

As the district court reasoned, the context confirms that conclusion because “both claims are directed toward *back-end* components of a network-based system” JA36 (emphasis added). A user *cannot* use the tracking component or stored metadata because the back-end functions are performed by an infringing computer network, not by users. Instead of requiring the impossible—a user’s use of the back-end components—the asserted system claims require only that *the system* be capable of responding to any user action in the claimed manner. Similar to its interpretation of the method claims, Facebook’s contrary argument is an attempt to force a round peg into *IPXL*’s square hole. *See Yodlee, Inc. v. CashEdge, Inc.*, No. C 05-01550 SI, 2006 WL 3456610 at *5 (N.D. Cal. Nov. 29,

2006) (holding that *IPXL* does not apply to claims that describe what an apparatus does when used a certain way).

Similarly, the claim element that Facebook challenges in claim 21—“dynamically associating the data and the application with the second user workspace in the metadata such that the user employs the application and data from the second user workspace,” JA257—requires only that the claimed medium store instructions for the “dynamically associating” described in the claim. Claim 21’s reference to a user in the transitional phrase “such that the user employs . . .” relates only to the context in which the stored instructions must be capable of performing the recited functions. For that reason, Facebook’s reliance on the prosecution amendment that changed “can employ” to “employs” is misplaced. *See* Facebook Br. 49. The phrase “can employ” would have meant that, for purposes of this step, the user environment could be *either* the first *or* the second workspace; the change narrowed the claim to specify that the user environment in which this step operates is the second workspace.

Any doubt about the definiteness of these claims is resolved by the well settled rule that “claims are generally construed so as to sustain their validity, if possible.” *Whittaker Corp. v. UNR Indus., Inc.*, 911 F.2d 709, 712 (Fed. Cir. 1990). That maxim has particular force here, where both “wherein” clauses resulted from an examiner’s amendment. *See* JA23834, JA23842. In fact, the

examiner's amendments in the prosecution history demonstrate that the components were required to have this functionality, *i.e.*, the ability to dynamically update metadata wherein a user accesses data in a second context, in order to overcome the prior art. *See K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1369 (Fed. Cir. 1999) (examiner's amendment for "reasons of patentability").

In *IPXL* and *Katz*, there was no reasonable construction under which the claims could be held valid because they clearly recited an apparatus that could be accessed by users and the use of that apparatus. Here as in *Microprocessor Enhancement*, however, the relevant clauses' "effect on the definiteness of [the] claim[s] lacks the conclusiveness with which King Claudius's guilt is established by his reaction to Hamlet's play within a play." 520 F.3d at 1374. Claim 21 is not even a system claim, and the relevant language in the system claims is reasonably read (indeed, most naturally read) as specifying the technological environment in which the claimed system must be capable of exercising certain functionality.

IV. THE JURY REASONABLY FOUND INFRINGEMENT OF ALL CLAIMS UNDER ANY CONSTRUCTION OF "DYNAMICALLY."

Finally, Facebook relies on a claim construction of the term "dynamically" that Facebook is estopped from asserting, that is wrong, and that Leader satisfied at trial. During claim construction, the district court adopted Facebook's construction of the claim term "dynamically" as meaning "automatically and in response to the preceding event." JA6730-31. During trial and now on appeal, however,

Facebook has advocated a narrower claim construction—“automatically and in response to the change of the user from the first context to a second context.” Facebook Br. 60.

While Facebook claims that its second proposed claim construction is merely a clarification of the first, the district court recognized that it is not. The second construction “is an attempt to further limit the Court’s construction of the term ‘dynamically’ to include limitations that were not proposed by Facebook during claim construction”—specifically, the limitation that the dynamic updating must occur “in response to the change of the user from the first context to a second context,” as opposed to occurring in response to the preceding event. JA18. The “district court’s interpretation of its order is entitled to deference unless the interpretation is unreasonable or is otherwise an abuse of discretion.” *Amado v. Microsoft Corp.*, 517 F.3d 1353, 1358 (Fed. Cir. 2008). It is not.

Facebook’s attempts to conflate the two claim constructions, and to assure this Court that everyone understood below that there was no difference between the two, fail for the simple reason that nothing in the district court’s claim construction order conflated “the preceding event” with “the change of the user from the first context to a second context.” To the contrary, the district court explained that it adopted Facebook’s first proposed construction because, while “in response to the preceding event” did not “explicitly appear in the Claims or the

specification,” “the actions identified as taking place ‘dynamically’ only occur after some identified action by the user.” JA6730. Nothing in that reasoning required that the user’s action be limited to changing from the first to the second context.

Because Facebook’s second claim construction is substantively narrower than the first, and thus not a mere clarification, Facebook was estopped from asserting the second at trial. JA18; *see Cordis Corp. v. Boston Scientific Corp.*, 658 F.3d 1347, 1355 (Fed. Cir. 2011); *Interactive Gift Express, Inc. v. CompuServe, Inc.* 256 F.3d 1323, 1347-48 (Fed. Cir. 2001). The estoppel is especially clear because Facebook waited until during the trial, and indeed until after Leader had closed its affirmative case, before seeking to change the claim construction. *See* JA26003; *see also Eli Lilly & Co. v. Aradigm Corp.*, 376 F.3d 1352, 1360 (Fed. Cir. 2004).

Even apart from estoppel, Facebook’s argument lacks merit. The claim element at issue, which concerns a tracking component, reads as follows:

a computer-implemented tracking component of the network-based system for tracking a change of the user from the first context to a second context of the network-based system and *dynamically* updating the stored metadata based on the change, *wherein* the user accesses the data from the second context.

JA257 (emphases added). Although Facebook does not discuss the “wherein” clause, that clause is crucial. At Facebook’s request, the court construed “wherein”

to mean “in which.” JA26305. Applying the court’s claim constructions, the complete claim element reads as follows:

a computer-implemented tracking component of the network-based system for tracking a change of the user from the first context to a second context of the network-based system and [automatically and in response to the preceding event] updating the stored metadata based on the change, [in which] the user accesses the data from the second context.

Read as a whole, this tracking element expressly requires that the dynamic updating occur based on a change in which the user not only changes from one context to another, as Facebook now claims, but also accesses data from the second context. While a full set of arguments concerning the proper construction of the claim is beyond the scope of this reply brief, that context alone confirms that Facebook’s latest claim construction is too narrow.

In any event, Leader proved its case under either claim construction. Facebook does not appear to dispute that Leader presented sufficient evidence from which the jury could have reasonably found that Facebook practiced the claimed tracking under the district court’s claim construction. *See* JA18-19.

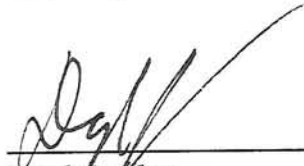
Even if Facebook’s second claim construction applied, Facebook’s own engineers and senior executives confirmed that Facebook tracks its users’ movement and updates metadata based solely on the users’ movement from one context to another. *See, e.g.,* JA25267-68, JA25281-82; *see also* JA24898. Facebook’s contention that Leader’s expert did not rely on that factual theory at

trial or tie it to the claim language is incorrect. Leader's expert Dr. Vigna testified extensively about the capability of Facebook components to track users by updating metadata based on their movement. *See, e.g.*, JA24977, JA25114, JA25183. The testimony of Facebook's own witnesses, combined with Leader's expert testimony, provided a more than adequate factual basis for the jury's finding of infringement under either proposed claim construction.

CONCLUSION

This Court should reverse and remand.

Respectfully submitted on this 28th day of November 2011.



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This is to certify that I have this day served the foregoing "Reply Brief of Plaintiff-Appellant Leader Technologies, Inc." upon counsel for Defendant-Appellee, by depositing two copies of the brief with UPS for delivery to each party's counsel as follows:

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This 28th day of November 2011.


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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that the foregoing brief, exclusive of the exempted portions as provided in Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b), contains 6,973 words and therefore complies with the type-volume limitations of Fed. R. App. P. 28.1(e)(2)(A)(i).



Daryl Joseffer

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