

**FACEBOOK’S OBJECTIONS TO LEADER’S PROPOSED JURY
INSTRUCTION NO. 6.1**

Facebook objects to the inclusion of this instruction at the end of the infringement section, as it is a separate claim. Facebook suggests a separate section, including this instruction as well as Facebook’s proposed “False Marking – Damages” instruction.

Facebook objects to Leader’s inclusion of only the Leader2Leader product, as Facebook accuses Leader of falsely marking other products.

Facebook also objects to this instruction for its failure to explain how intent to deceive may be determined, as explained in *Forest Group, Inc. v. Bon Tool Co.*, 590 F.3d 1295 (Fed. Cir. 2009). In *Forest Tool*, the Federal Circuit held that “[a] party asserting false marking must show by a preponderance of the evidence that the accused party did not have a reasonable belief that the articles were properly marked.” *Id.* at 1300.

FACEBOOK'S PROPOSED JURY INSTRUCTION NO. 6.1
FALSE MARKING

In this case, Facebook has alleged that Leader falsely marked products with the '761 patent. To prove false marking of Leader products, Facebook must establish by a preponderance of the evidence (1) that Leader marked the products with the '761 patent; (2) that the '761 patent does not cover the marked products; and (3) that through this marking, Leader had an intent to deceive the public. In order to show that Leader had an intent to deceive the public, Facebook must show by a preponderance of the evidence that Leader did not have a reasonable belief that the marked products were properly marked.

AUTHORITY:

Forest Group, Inc. v. Bon Tool Co., 590 F.3d 1295 (Fed. Cir. 2009); Leader's Proposed instruction, which was adapted from *Lazare Kaplan International, Inc. v. Photocopy Technologies, Inc.*, No. 2009-1251 (February 11, 2008) which cites 35 U.S.C. § 292; *Clontech Laboratories, Inc. v. Invitrogen Corporation*, 406 F.3d 1347 (Fed. Cir. 2005); *DP Wagner Manu., Inc. v. Pro Patch Systems, Inc.*, 434 F. Supp. 2d 445 (S.D. Tex. 2006).

**LEADER'S OBJECTIONS TO FACEBOOK'S PROPOSED JURY
INSTRUCTION NO. 6.1**

Leader objects to this instruction for all the reasons set forth in its briefing in opposition to Facebook's motion to amend and *Daubert* motion because false marking of products other than Leader2Leader are not currently in this case. See D.I. 331. Leader reserves its right to amend this instruction should these allegations be permitted.

7.0 DAMAGES

LEADER'S PROPOSED JURY INSTRUCTION NO. 7.1 **DAMAGES – GENERALLY**

If you find that Facebook infringed any valid claim of the '761 Patent, you must then consider what amount of damages to award to Leader. I will now instruct you about the measure of damages. By instructing you on damages, I am not suggesting which party should win this case, on any issue.

The damages you award must be adequate to compensate Leader for the infringement. They are not meant to punish an infringer. Your damages award, if you reach this issue, should put Leader in approximately the same financial position that it would have been in had the infringement not occurred.

Leader has the burden to establish the amount of its damages by a preponderance of the evidence. In other words, you should award only those damages that Leader establishes that it more likely than not suffered.

. In this case, Leader seeks a reasonable royalty. A reasonable royalty is defined as the money amount Leader and Facebook would have agreed upon as a fee for use of the invention at the time prior to when infringement began.

I will give more detailed instructions regarding damages shortly. Note, however, that Leader is entitled to recover no less than a reasonable royalty.

AUTHORITY:

Modified The Federal Circuit Bar Association Model Patent Jury Instructions § 6.1 (February 2010) which cites 35 U.S.C. § 284; *Dow Chem. Co. v. Mee Indus., Inc.*, 341 F.3d 1370, 1381-82 (Fed. Cir. 2003); *Integra Lifesciences I, Ltd. v. Merck KGAA*, 331 F.3d 860, 870 (Fed. Cir. 2003); *Grain Processing Corp. v. Am. Maize-Prods. Co.*, 185 F.3d 1341, 1349 (Fed. Cir. 1999); *Maxwell v. J. Baker, Inc.*, 86 F.3d 1098, 1108-09 (Fed. Cir. 1996); *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1545 (Fed. Cir. 1995) (en banc); *Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056, 1065 (Fed. Cir. 1983); *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1340 (Fed. Cir. 2009).

**FACEBOOK’S OBJECTIONS TO LEADER’S PROPOSED JURY
INSTRUCTION NO. 7.1**

Facebook objects to Leader’s proposed instruction because it believes that the AIPLA instruction is more fair and balanced, including the instruction that punitive damages are not allowed. Facebook further objects to the sentence “There are different types of damages that Leader may be entitled to recover.” As Leader is only seeking a reasonable royalty, there is no need to bring this up.

FACEBOOK'S PROPOSED JURY INSTRUCTION NO. 7.1
DAMAGES – GENERALLY

If you find that the accused Facebook system or method infringes any of the claims of the '761 patent, and that those claims are valid and enforceable, you must determine the amount of damages to be awarded Leader for the infringement. On the other hand, if you find that each of the asserted patent claims is either invalid or is not infringed, then you need not address damages in your deliberations.

If you need to determine damages, the amount of those damages must be adequate to compensate Leader for the infringement. You may not add anything to the amount of damages to punish the accused infringer or to set an example.

Leader must prove each element of its damages by a preponderance of the evidence. Your damages award, if you reach this issue, will be in the form of a reasonable royalty. A reasonable royalty is defined as the money amount Leader and Facebook would have agreed upon as a fee for use of the invention at the time prior to when infringement began. This can take the form of either a one time payment or a running percentage of revenues attributable to the infringing activity.

The fact that I am instructing you as to the proper measure of damages should not be construed as intimating any view of the Court as to which party is entitled to prevail in this case. Instructions as to the measure of damages are given for your guidance in the event you find the evidence in favor of Leader.

AUTHORITY:

Modified AIPLA'S Model Patent Jury Instructions, § 12.0 (2008), which cites 35 U.S.C. § 284 (2004); *Aro Mfg. Co. v. Convertible Top Replacement Co.*, 377 U.S. 476, 507 (1964); *Dow Chem. Co. v. Mee Indus., Inc.*, 341 F.3d 1370, 1381-82 (Fed. Cir. 2003); *Vulcan Eng'g Co. v. FATA Aluminum, Inc.*, 278 F.3d 1366, 1376 (Fed. Cir. 2002); *Grain Processing Corp. v. Am. Maize-Prods. Co.*, 185 F.3d 1341, 1349 (Fed. Cir. 1999); *Maxwell v. J. Baker, Inc.*, 86 F.3d 1098, 1108-1109 (Fed. Cir. 1996); *Hebert v. Lisle Corp.*, 99 F.3d 1109, 1119 (Fed. Cir. 1996); *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1544-45 (Fed. Cir. 1995); *Wang Labs., Inc. v. Toshiba Corp.*, 993 F.2d 858, 870 (Fed. Cir. 1993); *Fromson v. W. Litho Plate & Supply Co.*, 853 F.2d 1568, 1574 (Fed. Cir. 1988), *overruled on other grounds by Knorr-Bremse Systeme Fuer Nutzfahrzeuge v.*

Dana Corp., 383 F.3d 1337, 1342 (Fed. Cir. 2004); *Del Mar Avionics, Inc. v. Quinton Instrument Co.*, 836 F.2d 1320, 1326 (Fed. Cir. 1987).

**LEADER'S OBJECTIONS TO FACEBOOK'S PROPOSED JURY
INSTRUCTION NO. 7.1**

Leader objects to Facebook's proposed instruction because it refers to inequitable conduct, which is not a claim in this case.

LEADER'S PROPOSED JURY INSTRUCTION NO. 7.2

DATE DAMAGES BEGIN

In determining the amount of damages, you must determine when the damages began. Damages commence on the date that Facebook has both infringed and been notified of the alleged infringement of the '761 Patent.

If you find that Leader sells a product that includes the claimed invention, you must determine whether Leader has "marked" that product with the '761 Patent number. "Marking" is placing either the word "patent" or the abbreviation "pat." with the patent's number on substantially all of the products that include the patented invention. Leader has the burden of establishing that it substantially complied with the marking requirement. This means Leader must show that it marked substantially all of the products it made, offered for sale, or sold under the '761 Patent, and that Leader made reasonable efforts to ensure that its licensees who made, offered for sale, or sold products under the '761 Patent marked the products.

If you find that Leader sells such a product but marks the product with the patent number, damages begin without the requirement for actual notice. If you find that the '761 Patent was granted before the infringing activity began, damages should be calculated as of the date you determine that the infringement began. If you find that the '761 Patent was granted after the infringing activity began, damages should be calculated as of November 21, 2006.

AUTHORITY:

Modified The Federal Circuit Bar Association Model Patent Jury Instructions § 6.8
(February 2010).

**FACEBOOK'S OBJECTIONS TO LEADER'S PROPOSED JURY
INSTRUCTION NO. 7.2**

Facebook objects to Leader's instruction because Facebook does not agree that there is a date where Facebook "has . . . infringed."

FACEBOOK'S PROPOSED JURY INSTRUCTION NO. 7.2
DATE OF DAMAGES

To the extent you find infringement, the date upon which damages commences is the first date upon which Leader has proven infringement began. In no event can this date be earlier than the issuance of the patent.

AUTHORITY:

Modified The Federal Circuit Bar Association Model Patent Jury Instructions § 6.8 (February 2010), which cites 35 U.S.C. § 287; *Crystal Semiconductor Corp. v. Trittech Microelectronics Int'l, Inc.*, 246 F.3d 1336 (Fed. Cir. 2001); *Nike Inc. v. Wal-Mart Stores*, 138 F.3d 1437, 1443-44 (Fed. Cir. 1998); *Maxwell v. J. Baker, Inc.*, 86 F.3d 1098, 1108-09 (Fed. Cir. 1996); *Am. Med. Sys. v. Med. Eng'g Corp.*, 6 F.3d 1523, 1534 (Fed. Cir. 1993); *Devices for Med., Inc. v. Boehl*, 822 F.2d 1062, 1066 (Fed. Cir. 1987).

Modified AIPLA's Model Patent Jury Instructions § 12.1, which cites 35 U.S.C. § 287(a); *Gart v. Logitech, Inc.*, 254 F.3d 1334, 1345 (Fed. Cir. 2001); *Lans v. Digital Equip. Corp.*, 252 F.3d 1320, 1327-28 (Fed. Cir. 2001); *Crystal Semiconductor Corp. v. TriTech Microelecs. Int'l, Inc.*, 246 F.3d 1336, 1353 (Fed. Cir. 2001); *Amsted Indus., Inc. v. Buckeye Steel Castings Co.*, 24 F.3d 178, 184-87 (Fed. Cir. 1994); *Devices for Med., Inc. v. Boehl*, 822 F.2d 1062, 1066 (Fed. Cir. 1987).

LEADER'S OBJECTION TO FACEBOOK'S PROPOSED JURY INSTRUCTION

NO. 7.2

Leader objects to Facebook's proposed instruction as it incomplete and legally insufficient. Specifically, Facebook fails to inform the jury that marking a product with the '761 Patent will establish notice and the date calculation of damages commence.

LEADER'S PROPOSED JURY INSTRUCTION NO. 7.3
REASONABLE ROYALTY

If you find that Leader has established infringement, Leader is entitled to at least a reasonable royalty to compensate it for that infringement. A reasonable royalty is not necessarily the actual measure of damages, but is merely the floor below which damages should not fall.

AUTHORITY:

Modified The Federal Circuit Bar Association Model Patent Jury Instructions § 6.5 (February 2010) which cites 35 U.S.C. § 284; *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1340 (Fed. Cir. 2009); *Crystal Semiconductor Corp. v. Tritech Microelectronics Int'l, Inc.*, 246 F.3d 1336 (Fed. Cir. 2001); *Fromson v. W. Litho Plate & Supply Co.*, 853 F.2d 1568, 1574 (Fed. Cir. 1998); *Minco, Inc. v. Combustion Eng'g, Inc.*, 95 F.3d 1109, 1119-20 (Fed. Cir. 1996); *Mahurkar v. C.R. Bard, Inc.*, 79 F.3d 1572, 1579 (Fed. Cir. 1996); *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1554 (Fed. Cir. 1995) (en banc).

Modified AIPLA's Model Jury Instructions § 12.14 (March 2008) which cites 35 U.S.C. § 284; *Crystal Semiconductor Corp. v. Tritech Microelects. Int'l, Inc.*, 246 F.3d 1336,

1354 (Fed. Cir. 2001); *Fromson v. W. Litho Plate & Supply Co.*, 853 F.2d 1568, 1574 (Fed. Cir. 1998) *overruled on other grounds by Knorr-Bremse Systeme Fuer Nutzfahrzeuge v. Dana Corp.*, 383 F.3d 1337, 1342 (Fed. Cir. 2004); *Minco, Inc. v. Combustion Eng'g, Inc.*, 95 F.3d 1109, 1119 (Fed. Cir. 1996); *Mahurkar v. C.R. Bard, Inc.*, 79 F.3d 1572, 1579 (Fed. Cir. 1996); *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1554 (Fed. Cir. 1995) (en banc); *State Indus., Inc. v. Mor-Flo Indus., Inc.*, 883 F.2d 1573, 1579 (Fed. Cir. 1989).

**FACEBOOK'S OBJECTIONS TO LEADER'S PROPOSED JURY
INSTRUCTION NO. 7.3**

Facebook objects to Leader's proposed instruction as unnecessary. This information is set forth in Leader and Facebook's Proposed Jury Instructions Nos. 5.1. It appears from the Federal Circuit Bar Association Model Patent Jury Instructions § 6.5 that the purpose of this instruction is to differentiate reasonable royalty damages from lost profits damages; as lost profits are not at issue in this case, this instruction is unnecessary.

Facebook further objects to Leader's inclusion of the extraneous and prejudicial sentence, "A reasonable royalty is not necessarily the actual measure of damages, but is merely the floor below which damages should not fall," to the Federal Circuit Bar Association Model Patent Jury Instructions § 6.5. Leader does not cite to any authority for this proposition.

**LEADER'S RESPONSE TO FACEBOOK'S OBJECTIONS TO LEADER'S
PROPOSED JURY INSTRUCTION NO. 7.3**

Leader cites Lucent Techs., Inc. v. Gateway which recites the language objected to by Facebook. In addition, the AIPLA instruction specifically has this language in instruction

12.14 "A reasonable royalty is not necessarily the actual measure of damages, but is merely the floor below which damages should not fall."

LEADER'S PROPOSED JURY INSTRUCTION NO. 7.4

REASONABLE ROYALTY – DEFINITION

A royalty is a payment made to the owner of a patent by a non-owner in exchange for rights to make, use, or sell the claimed invention. A reasonable royalty is the amount of royalty payment that a patent holder and the infringer would have agreed to in a hypothetical negotiation taking place at a time prior to when the infringement first began. In considering this hypothetical negotiation, you should focus on what the expectations of the patent holder and the infringer would have been had they entered into an agreement at that time, and had they acted reasonably in their negotiations. In determining this, you must assume that both parties believed the patent was valid and infringed and the patent holder and infringer were willing to enter into an agreement. The reasonable royalty you determine must be a royalty that would have resulted from the hypothetical negotiation, and not simply a royalty either party would have preferred. Evidence of things that happened after the infringement first began can be considered in evaluating the reasonable royalty only to the extent that the evidence aids in assessing what royalty would have resulted from a hypothetical negotiation. Although evidence of the actual profits an alleged infringer made may be used to determine the anticipated profits at the time of the hypothetical negotiation, the royalty may not be limited or increased based on the actual profits the alleged infringer made.

AUTHORITY:

Modified The Federal Circuit Bar Association Model Patent Jury Instructions § 6.6 (February 2010) which cites *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1340 (Fed. Cir. 2009); *Golight, Inc. v. Wal-Mart Stores, Inc.*, 355 F.3d 1327, 1338 (Fed. Cir. 2004); *Maxwell v. J. Baker, Inc.*, 86 F.3d 1098, 1108-10 (Fed. Cir. 1996); *Mahurkar v. C.R. Bard, Inc.*, 79 F.3d 1572, 1579-81 (Fed. Cir. 1996); *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1554 (Fed. Cir. 1995) (en banc); *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970); *Interactive Pictures Corp. v. Infinite Pictures, Inc.*, 274 F.3d 1371 (Fed. Cir. 2001); *Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.*, 750 F.2d 1552 (Fed. Cir. 1984).

**FACEBOOK'S OBJECTIONS TO LEADER'S PROPOSED JURY
INSTRUCTION NO. 7.4**

Facebook objects to Leader's instruction because it is not clear as to when an accused infringer's actual profits may be taken into account. This is only the case when the actual profits were foreseeable. As jurors should not rely on hindsight in assessing what royalty would have resulted in 2006 based on profits realized today, Facebook reminds the jurors to give less weight to evidence of those events that came after the hypothetical negotiation.

FACEBOOK'S PROPOSED JURY INSTRUCTION NO. 7.4
REASONABLE ROYALTY – DEFINITION

A royalty is a payment made to the owner of a patent by a non-owner in exchange for rights to make, use, or sell the claimed invention. A reasonable royalty is the amount of royalty payment that a patent holder and the infringer would have agreed to in a hypothetical negotiation taking place at a time prior to when the infringement first began. In considering this hypothetical negotiation, you must focus on what the expectations of the patent holder and the infringer would have been had they entered into an agreement at that time, and had they acted reasonably in their negotiations. In determining this, you must assume that both parties believed the patent was valid and infringed and the patent holder and infringer were willing to enter into an agreement. The reasonable royalty you determine must be a royalty that would have resulted from the hypothetical negotiation, and not simply a royalty either party would have preferred. Evidence of things that happened after the infringement first began, for example, the alleged infringer's actual profits, can only be considered in evaluating the reasonable royalty if those things could have been reasonably foreseen at the time of the hypothetical negotiation. Evidence of things that happened after the hypothetical negotiation should be given substantially less weight than what was known at the time of the hypothetical negotiation.

AUTHORITY:

Modified The Federal Circuit Bar Association Model Patent Jury Instructions § 6.6 (February 2010) which cites *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1340 (Fed. Cir. 2009); *Golight, Inc. v. Wal-Mart Stores, Inc.*, 355 F.3d 1327, 1338 (Fed. Cir. 2004); *Maxwell v. J. Baker, Inc.*, 86 F.3d 1098, 1108-10 (Fed. Cir. 1996); *Mahurkar v. C.R. Bard, Inc.*, 79 F.3d 1572, 1579-81 (Fed. Cir. 1996); *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1554 (Fed. Cir. 1995) (en banc); *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970); *Interactive Pictures Corp. v. Infinite Pictures, Inc.*, 274 F.3d 1371 (Fed. Cir. 2001); *Trans-World Mfg. Corp. v. Al Nyman & Sons, Inc.*, 750 F.2d 1552 (Fed. Cir. 1984).

LEADER'S OBJECTION TO FACEBOOK'S PROPOSED JURY INSTRUCTION

NO. 7.4

Leader objects to Facebook's proposed instruction because it is incorrect as a matter of law and argumentative.

LEADER'S PROPOSED JURY INSTRUCTION NO. 7.5
REASONABLE ROYALTY – RELEVANT FACTORS

In determining the value of a reasonable royalty, you should consider all the facts known and available to the parties at the time the infringement began. Some of the kinds of factors that you may consider in making your determination are:

1. Any royalties received by Leader for the licensing of the '761 Patent, proving or tending to prove an established royalty.

2. The rates paid by Facebook for the use of other patents comparable to the '761 Patent.

3. The nature and scope of the license, as exclusive or non-exclusive, or as restricted or non-restricted in terms of its territory or with respect to whom the patented invention may be sold.

4. Whether Leader has an established policy and marketing program to maintain its patent monopoly by not licensing others to use the invention, or by granting licenses under special conditions designed to preserve that monopoly.

5. The commercial relationship between Leader and Facebook, such as whether they are competitors in the same territory in the same line of business, or whether they are inventor and promoter.

6. The effect of selling the patented system, computer readable medium, or method in promoting sales of other products of Facebook; the existing value of the invention to Leader as a generator of sales of its non-patented items; and the extent of such derivative or conveyed sales.

7. The duration of the '761 Patent and the term of the license.

8. The established profitability of the system, computer readable medium, or method made under the '761 Patent, its commercial success, and its current popularity.

9. The utility and advantages of the patented invention of the '761 Patent over the old modes or devices, if any, that had been used for working out similar results.

10. The nature of the patented invention of the '761 Patent; the character of the commercial embodiment of it as owned and produced by Leader; and the benefits to those who have used the invention.

11. The extent to which Facebook has made use of the invention of the '761 Patent; and any evidence that shows the value of that use.

12. The portion of the profit or of the selling price that may be customary in the particular business or in comparable businesses to allow for the use of the invention of the '761 Patent or analogous inventions.

13. The portion of the realizable profits that should be credited to the invention as distinguished from nonpatented elements, the manufacturing process, business risks, or significant features or improvements added by Facebook.

14. The opinion testimony of qualified experts.

15. The amount that Leader and Facebook would have agreed upon on November 21, 2006 if both sides had been reasonably and voluntarily trying to reach an agreement; that is, the amount which a prudent licensee—who desired, as a business proposition, to obtain a license to manufacture and sell a particular article embodying the patented invention—would have been willing to pay as a royalty and yet be able to make a reasonable profit and which amount would have been acceptable by a prudent patentee who was willing to grant a license.

No one factor is dispositive and you can and should consider the evidence that has been presented to you in this case on each of these factors. You may also consider any other factors which in your mind would have increased or decreased the royalty the infringer would have been willing to pay and the patent holder would have been willing to accept, acting as normally prudent business people. The final factor establishes the framework which you should use in determining a reasonable royalty, that is, the

payment that would have resulted from a negotiation between the patent holder and the infringer taking place at a time prior to when the infringement began.

AUTHORITY:

Modified The Federal Circuit Bar Association Model Patent Jury Instructions § 6.7 (February 2010) which cites *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1340 (Fed. Cir. 2009); *Golight, Inc. v. Wal-Mart Stores, Inc.*, 355 F.3d 1327, 1338 (Fed. Cir. 2004); *Maxwell v. J. Baker, Inc.*, 86 F.3d 1098, 1108-10 (Fed. Cir. 1996); *Mahurkar v. C.R. Bard, Inc.*, 79 F.3d 1572, 1579-81 (Fed. Cir. 1996); *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1554 (Fed. Cir. 1995) (en banc); *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970).

**FACEBOOK'S OBJECTIONS TO LEADER'S PROPOSED JURY
INSTRUCTION NO. 7.5**

Facebook objects to Leader's alterations to the model instruction, as they change the text of the *Georgia-Pacific* factors.

In particular, Leader's change in wording from "realizable profits" to "realized profits" will cause the jury to focus on Facebook's actual profits, rather than those profits foreseeable at the time of the hypothetical negotiation.

FACEBOOK'S PROPOSED JURY INSTRUCTION NO. 7.5
REASONABLE ROYALTY – RELEVANT FACTORS

In determining the value of a reasonable royalty, you should consider all the facts known and available to the parties at the time the infringement began. Some of the kinds of factors that you may consider in making your determination are:

1. The royalties received by Leader for the licensing of the patent-in-suit, proving or tending to prove an established royalty.
2. The rates paid by Facebook for the use of other patents comparable to the patent-in-suit.
3. The nature and scope of the license, as exclusive or non-exclusive, or as restricted or non-restricted in terms of territory or with respect to whom the alleged invention may be sold.
4. Leader's established policy and marketing program to maintain its patent monopoly by not licensing others to use the invention, or by granting licenses under special conditions designed to preserve that monopoly.
5. The commercial relationship between Leader and Facebook, such as whether they are competitors in the same territory in the same line of business, or whether they are inventor and promoter.
6. The effect of selling the patented specialty in promoting sales of other products of Facebook; the existing value of the invention to Leader as a generator of sales of its non-patented items; and the extent of such derivative or convoyed sales.
7. The duration of the patent and the term of the license.
8. The established profitability of the alleged invention made under the patent, its commercial success, and its current popularity.
9. The utility and advantages of the patented property over the old modes or devices, if any, that had been used for working out similar results.

10. The nature of the patented invention; the character of the commercial embodiment of it as owned and produced by Leader; and the benefits to those who have used the invention.

11. The extent to which Facebook has made use of the invention and any evidence probative of the value of that use.

12. The portion of the profit or of the selling price that may be customary in the particular business or in comparable businesses to allow for the use of the invention or analogous inventions.

13. The portion of the realizable profits that should be credited to the invention as distinguished from nonpatented elements, the manufacturing process, business risks, or significant features or improvements added by Facebook.

14. The opinion and testimony of qualified experts.

15. The amount that a licensor (such as Leader) and a licensee (such as Facebook) would have agreed upon on November 21, 2006 if both sides had been reasonably and voluntarily trying to reach an agreement; that is, the amount which a prudent licensee—who desired, as a business proposition, to obtain a license to manufacture and sell a particular article embodying the patented invention—would have been willing to pay as a royalty and yet be able to make a reasonable profit and which amount would have been acceptable by a prudent patentee who was willing to grant a license.

No one factor is dispositive and you can and should consider the evidence that has been presented to you in this case on each of these factors. You may also consider any other factors which in your mind would have increased or decreased the royalty the infringer would have been willing to pay and the patent holder would have been willing to accept, acting as normally prudent business people. The final factor establishes the framework which you should use in determining a reasonable royalty, that is, the payment that would have resulted from a negotiation between the patent holder and the infringer taking place at a time prior to when the infringement began.

AUTHORITY:

Modified The Federal Circuit Bar Association Model Patent Jury Instructions § 6.7 (February 2010) which cites *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1340 (Fed. Cir. 2009); *Golight, Inc. v. Wal-Mart Stores, Inc.*, 355 F.3d 1327, 1338 (Fed. Cir. 2004); *Maxwell v. J. Baker, Inc.*, 86 F.3d 1098, 1108-10 (Fed. Cir. 1996); *Mahurkar v. C.R. Bard, Inc.*, 79 F.3d 1572, 1579-81 (Fed. Cir. 1996); *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1554 (Fed. Cir. 1995) (en banc); *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970).

**FACEBOOK'S OBJECTIONS TO LEADER'S PROPOSED JURY
INSTRUCTION NO. 7.5**

Leader objects to Facebook's proposed instruction because it is confusing and made improper alterations to the model instruction, making the proposal argumentative and unbalanced. Facebook also includes an improper instruction regarding how to weigh evidence in favor of Facebook, such that the instruction is prejudicial.

FACEBOOK'S PROPOSED JURY INSTRUCTION NO. 7.5A
REASONABLE ROYALTY – EXISTENCE OF NON-INFRINGEMENT
ALTERNATIVES

In determining the reasonable royalty the parties would have agreed upon during the hypothetical negotiation you should also consider the availability of non-infringing alternatives. If at the time of the hypothetical negotiation Facebook could have redesigned the allegedly infringing features to avoid infringement, then Facebook would have been in a stronger position to negotiate a lower royalty rate.

LEADER'S OBJECTIONS TO FACEBOOK'S PROPOSED JURY

INSTRUCTION NO. 7.5A

Leader objects to this instruction because Leader contends it is unnecessary and Facebook has not cited a model jury instruction to support this instruction but relies solely on case law. Leader further objects because contrary to *Zygo Corp.*, Facebook has not provided any evidence that any alternative does in fact exist and prevented any discovery into any alleged alternatives. *Zygo Corp. v. Wyco Corp.*, 79 F.3d 1563 (Fed. Cir. 1996) (remanding with instructions for the court to provide findings “in support of its conclusion that the SIRIS was not an acceptable noninfringing alternative (assuming its actual availability during some of the period the Original Wyko models were on the market”). This is a subject contained in Leader’s pending *Daubert* motion and in opposition to Facebook’s *Daubert* motion. This instruction should be omitted as it is likely to confuse the jury and prejudicial to Leader.

AUTHORITY:

Zygo Corp. v. Wyco Corp., 79 F.3d 1563, 1571-72 (Fed. Cir. 1996).

LEADER'S PROPOSED JURY INSTRUCTION NO. 7.6
REASONABLE ROYALTY – TIMING

Although the relevant date for the hypothetical reasonable royalty negotiation is just before the infringement began, you may consider in your determination of reasonable royalty damages any actual profits by Facebook after that time and any commercial success of the patented invention in the form of sales of the patented or infringing products after that time. You may only consider this information, however, if it was foreseeable at the time that the infringement began.

AUTHORITY:

AIPLA's Model Patent Jury Instructions March 2008 § 12.17 which cites *Trell v. Marlee Elecs. Corp.*, 912 F.2d 1443, 1446-47 (Fed. Cir. 1990); *State Indus., Inc. v. Mor-Flo Indus., Inc.*, 883 F.2d 1573, 1581 (Fed. Cir. 1989); *Fromson v. W. Litho Plate & Supply Co.*, 853 F.2d 1568, 1575 (Fed. Cir. 1988); *Studiengesellschaft Kohle, mbH v. Dart Indus., Inc.*, 862 F.2d 1564, 1571-72 (Fed. Cir. 1988).

**FACEBOOK'S OBJECTIONS TO LEADER'S PROPOSED JURY
INSTRUCTION NO. 7.6**

Facebook objects to this instruction as unnecessary. This information is included in Proposed Jury Instruction 6.4. Inclusion of this instruction will likely be confusing to the jury and will suggest they should focus on Facebook's actual profits, rather than those profits that were foreseeable at the time of a hypothetical negotiation.

**LEADER'S RESPONSE TO FACEBOOK'S OBJECTIONS TO PROPOSED
JURY INSTRUCTION NO. 7.6**

This instruction is different from instruction 6.4 which deals with the commencement of damages. This instruction will give the jury perspective as to the timing of the hypothetical negotiation and factors taken into consideration as of that negotiation.

Leader further maintains that the AIPLA model instruction, upon which instruction 7.6 relies, is a proper instruction and likely to aid the jury.

FACEBOOK'S PROPOSED JURY INSTRUCTION NO. 7.7

FALSE MARKING - DAMAGES

If you find that Leader has falsely marked its products with the '761 patent number, you must determine what damages Leader must pay. Leader is liable for up to \$500 for every instance of false marking.

AUTHORITY:

35 U.S.C. § 292; *Forest Group, Inc. v. Bon Tool Co.*, 590 F.3d 1295 (Fed. Cir. 2009).

**LEADER'S OBJECTIONS TO FACEBOOK'S PROPOSED JURY
INSTRUCTION NO. 7.7**

Leader objects to this instruction for all the reasons set forth in its briefing in opposition to Facebook's motion to amend as false marking of products other than Leader2Leader are not currently in this case. *See* D.I. 331. Leader reserves its right to amend this instruction should these allegations be permitted. Leader further objects to the language added by Facebook that "as a result of this false marking by Leader, Leader is liable for damages." 35 U.S.C. § 292 states a party liable for false marking "shall be fined not more than \$500 for every such offense." This is not an issue decided by the jury and the addition of this sentence violates the Federal Rules of Evidence 402 and 403.

8.0 WILLFUL INFRINGEMENT

LEADER'S PROPOSED JURY INSTRUCTION NO. 8.1 WILLFUL INFRINGEMENT

If you find by a preponderance of the evidence that Facebook infringed the '761 Patent, either literally or under the doctrine of equivalents, then you must further determine if this infringement was willful. Willfulness must be proven by clear and convincing evidence showing that:

1. Facebook was aware of '761 patent,
2. Facebook acted despite an objectively high likelihood that its actions infringed the '761 Patent, and
3. This objectively high likelihood of infringement was either known or so obvious that it should have been known to Facebook.

In making the determination as to willfulness, you must consider the totality of the circumstances. The totality of the circumstances comprises a number of factors, which include, but are not limited to whether Facebook intentionally copied the claimed invention covered by the '761 Patent and whether Facebook presented a substantial defense to infringement, including the defense that the patent is invalid.

AUTHORITY:

Modified AIPLA Model Jury Instructions § 13 (March 2008) which cites *In re Seagate Technology, LLC*, 497 F.3d 1360 (Fed. Cir. 2007) (en banc); *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1347 (Fed. Cir. 2004)(en banc).

**FACEBOOK'S OBJECTIONS TO LEADER'S PROPOSED JURY
INSTRUCTION NO. 8.1**

First, Facebook objects to including an instruction on willfulness, as Leader has provided no evidence in support of its willfulness claim.

Second, Facebook objects to including this instruction at this phase of the jury instructions. As the willfulness inquiry depends in part on determinations as to whether Facebook presented a credible invalidity defense, the willfulness inquiry should occur, if at all, after the jury has determined the strength of Facebook's validity case. In addition, the jury need not even consider willfulness if they find the claims to be invalid. Thus, Facebook would place this instruction after the validity instructions.

Facebook objects to the replacement of the phrase "a valid patent" (contained in the AIPLA Model Jury Instruction § 13 upon which Leader relies) with "the '761 patent," as this is a misstatement of the law of willfulness and is misleading. Facebook also objects to the inclusion of the factor "whether Facebook intentionally copied the claimed invention covered by the '761 Patent," as Leader has introduced no evidence of copying and this could easily mislead the jury.

FACEBOOK'S PROPOSED JURY INSTRUCTION NO. 8.1
WILLFUL INFRINGEMENT

If you found infringement and you have determined that the '761 patent is both valid and enforceable, you must go on and address the additional issue of whether or not this infringement was willful. Willfulness requires you to determine by clear and convincing evidence that Facebook acted recklessly. To prove willful infringement of the '761 patent, Leader must prove each of the following by clear and convincing evidence:

1. Facebook knew about the '761 patent prior to Leader's filing of this lawsuit on November 19, 2008.
2. Facebook acted despite an objectively high likelihood that its actions infringed a valid and enforceable patent. Legitimate or credible defenses to infringement, even if not ultimately successful, demonstrate a lack of recklessness.
3. If you find that there was an objectively high likelihood that Facebook's actions infringed, that this unjustifiably high risk of infringement was either known or so obvious that it should have been known to Facebook.

In making the determination as to willfulness, you must consider the totality of the circumstances. The totality of the circumstances comprises a number of factors, which include, but are not limited to whether Facebook presented a substantial defense to infringement, including the defense that the patent is invalid.

AUTHORITY:

Modified AIPLA Model Jury Instructions § 13 (March 2008), which cites *In re Seagate Technology, LLC*, 497 F.3d 1360 (Fed. Cir. 2007) (en banc); *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1347 (Fed. Cir. 2004) (en banc).

Modified Federal Circuit Bar Association Model Patent Jury Instructions § 3.8 (Feb. 2010), which cites 35 U.S.C. § 284; *In re Seagate Tech., LLC*, 497 F.3d 1360 (Fed. Cir. 2007) (en banc); *Knorr-Bremse v. Dana Corp.*, 383 F.3d 1337, 1347 (Fed. Cir. 2004) (en banc); *Crystal Semiconductor Corp. v. Tritech Microelects. Int'l Inc.*, 246 F.3d 1336,

1346 (Fed. Cir. 2001); *WMS Gaming Inc. v. Int'l Game Tech.*, 184 F.3d 1339, 1354 (Fed. Cir. 1999); *Read Corp. v. Portec, Inc.*, 970 F.2d 816 (Fed. Cir. 1992); *Gustafson, Inc. v. Intersystems Indus. Prods., Inc.*, 897 F.2d 508, 510 (Fed. Cir. 1990).

Modified Northern District of California Model Jury Instructions § 3.11, which cites 35 U.S.C. § 284; *In re Seagate Technology, LLC*, 497 F.3d 1360 (Fed. Cir. 2007) (en banc); *Knorr-Bremse Systeme Fuer Nutzfahrzeuge GmbH v. Dana Corp.*, 383 F.3d 1337, 1347 (Fed. Cir. 2004) (en banc); *Crystal Semiconductor Corp. v. Tritech Microelecs. Int'l Inc.*, 246 F.3d 1336, 1346 (Fed. Cir. 2001); *WMS Gaming Inc. v. Int'l Game Tech.*, 184 F.3d 1339, 1354 (Fed. Cir. 1999); *Read Corp. v. Portec, Inc.*, 970 F.2d 816 (Fed. Cir. 1992); *Gustafson, Inc. v. Intersystems Indus. Prods., Inc.*, 897 F.2d 508, 510 (Fed. Cir. 1990).

Imonex Servs., Inc. v. W.H. Munzprufer Dietmar Trenner GMBH, 408 F.3d 1374, 1377 (Fed. Cir. 2005).

**LEADER'S OBJECTIONS TO FACEBOOK'S PROPOSED JURY
INSTRUCTION NO. 8.1**

_____Leader objects to this instruction as it combines 3 separate jury instructions. Leader sees no reason to deviate from the AIPLA model jury instruction. Facebook's jury instruction is unbalanced as it contains Facebook's arguments and therefore is prejudicial,

9.0 DELIBERATIONS AND VERDICT

**STIPULATED PROPOSED JURY INSTRUCTION NO. 9.1
DELIBERATION AND VERDICT**

That concludes the part of my instructions explaining the rules for considering some of the testimony and evidence. Now let me finish up by explaining some things about your deliberations in the jury room, and your possible verdicts.

Once you start deliberating, do not talk to the jury officer, or to me, or to anyone else except each other about the case. If you have any questions or messages, you must write them down on a piece of paper, sign them, and then give them to the jury officer. The officer will give them to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take me some time to get back to you. Any questions or messages normally should be sent to me through your foreperson, who by custom of this Court is juror No. 1.

One more thing about messages. Do not ever write down or tell anyone how you stand on your votes. For example, do not write down or tell anyone that you are split 4-4, or 6-2, or whatever your vote happens to be. That should stay secret until you are finished.

AUTHORITY:

Uniform Jury Instructions for Patent Cases in the United States Court for the District of Delaware § 7.1 (March 1993).

STIPULATED PROPOSED JURY INSTRUCTION NO. 9.1

DELIBERATION AND VERDICT

That concludes the part of my instructions explaining the rules for considering some of the testimony and evidence. Now let me finish up by explaining some things about your deliberations in the jury room, and your possible verdicts.

Once you start deliberating, do not talk to the jury officer, or to me, or to anyone else except each other about the case. If you have any questions or messages, you must write them down on a piece of paper, sign them, and then give them to the jury officer. The officer will give them to me, and I will respond as soon as I can. I may have to talk to the lawyers about what you have asked, so it may take me some time to get back to you. Any questions or messages normally should be sent to me through your foreperson, who by custom of this Court is juror No. 1.

One more thing about messages. Do not ever write down or tell anyone how you stand on your votes. For example, do not write down or tell anyone that you are split 4-4, or 6-2, or whatever your vote happens to be. That should stay secret until you are finished.

AUTHORITY:

Uniform Jury Instructions for Patent Cases in the United States Court for the District of Delaware § 7.1 (March 1993).

STIPULATED PROPOSED JURY INSTRUCTION NO. 9.2
UNANIMOUS VERDICT

Your verdict must represent the considered judgment of each juror. In order for you as a jury to return a verdict, it is necessary that each juror agree to the verdict. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view towards reaching an agreement, if you can do so without violence to your individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because the opinion of your fellow jurors, or for the purpose of returning a verdict. Remember at all times that you are not partisans. Remember at all times that you are judges of the facts, not me. Your sole interest is to seek the truth from the evidence in the case.

A form of verdict has been prepared for you. You will take this form to the jury room and when you have reached unanimous agreement as to your verdict, you will have your foreperson fill in, date and sign the form. You will then return to the courtroom and your foreperson will give your verdict.

It is proper to add the caution that nothing said in these instructions, and nothing in the form of a verdict, is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

AUTHORITY:

Uniform Jury Instructions for Patent Cases in the United States Court for the District of Delaware § 7.2 (March 1993).

STIPULATED PROPOSED JURY INSTRUCTION NO. 9.2A
DUTY TO DELIBERATE

Now that all the evidence is in and the arguments are completed, you are free to talk about the case in the jury room. In fact, it is your duty to talk with each other about the evidence, and to make every reasonable effort you can to reach unanimous agreement. Talk with each other, listen carefully and respectfully to each other's views, and keep an open mind as you listen to what your fellow jurors have to say. Try your best to work out your differences. Do not hesitate to change your mind if you are convinced that other jurors are right and that your original position was wrong.

But do not ever change your mind just because other jurors see things differently, or just to get the case over with. In the end, your vote must be exactly that – your own vote. It is important for you to reach unanimous agreement, but only if you can do so honestly and in good conscience.

No one will be allowed to hear your discussions in the jury room, and no record will be made of what you say. So you should all feel free to speak your minds.

Listen carefully to what the other jurors have to say, and then decide for yourself.

AUTHORITY:

Uniform Jury Instructions for Patent Cases in the United States Court for the District of Delaware § 7.3 (March 1993)

STIPULATED PROPOSED JURY INSTRUCTION NO. 9.3
COURT HAS NO OPINION

Let me finish by repeating something I said to you earlier. Nothing that I have said or done during this trial was meant to influence your decision in favor of either party. You must decide the case yourselves based on the evidence presented.

AUTHORITY:

Uniform Jury Instructions for Patent Cases in the United States Court for the District of Delaware § 7.4 (March 1993).