

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

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

JOINT PROPOSED FINAL JURY INSTRUCTIONS

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1.0 GENERAL INSTRUCTIONS

STIPULATED PROPOSED JURY INSTRUCTION NO. 1.1 INTRODUCTION

Members of the jury, now it is time for me to instruct you about the law that you must follow in deciding this case.

I will start by explaining your duties and the general rules that apply in every civil case.

I will explain some rules that you must use in evaluating particular testimony and evidence.

I will explain the positions of the parties and the law you will apply in this case.

Finally, I will explain the rules that you must follow during your deliberations in the jury room, and the possible verdicts that you may return.

Please listen very carefully to everything I say.

You will have a written copy of these instructions with you in the jury room for your reference during your deliberations. You will also have a verdict form, which will list the questions that you must answer to decide this case.

AUTHORITY:

Uniform Jury Instructions in the United States District Court for the District of Delaware, Sample: Miscellaneous Jury Instructions (GMS) (January 2006).

STIPULATED PROPOSED JURY INSTRUCTION NO. 1.2
JURORS' DUTIES

You have two main duties as jurors. The first one is to decide what the facts are from the evidence that you saw and heard here in court. Deciding what the facts are is your job, not mine, and nothing I have said or done during this trial was meant to influence your decisions about the facts in any way.

Your second duty is to take the law that I give you, apply it to the facts, and decide, under the appropriate burden of proof, which party should prevail on each of the issues presented. It is my job to instruct you about the law, and you are bound by the oath that you took at the beginning of the trial to follow the instructions that I give you, even if you personally disagree with them. This includes the instructions that I gave you before and during the trial, and these instructions. All the instructions are important, and you should consider them together as a whole.

Perform these duties fairly. Do not let any bias, sympathy or prejudice that you may feel toward one side or the other influence your decision in any way.

AUTHORITY:

Uniform Jury Instructions in the United States District Court for the District of Delaware, Sample: Miscellaneous Jury Instructions (GMS) (January 2006).

DISPUTED PROPOSED JURY INSTRUCTION NO. 1.3
EVIDENCE DEFINED

You must make your decision based only on the evidence that you saw and heard here in court. Do not let rumors, suspicions, or anything else that you may have seen or heard outside of court influence your decision in any way.

The evidence in this case includes only what the witnesses said while they were testifying under oath (including deposition testimony that has been played or read to you), the exhibits that I allowed into evidence, and any facts that the parties agreed to by stipulations.

Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. My comments and questions are not evidence. The notes taken by any juror are not evidence.

During the trial I may have not let you hear the answers to some of the questions the lawyers asked. I also may have ruled that you could not see some of the exhibits that the lawyers wanted you to see. You must follow my orders and completely ignore all of these things. Do not even think about them. Do not speculate about what a witness might have said or what an exhibit might have shown. These things are not evidence, and you are bound by your oath not to let them influence your decision in any way.

[Further, sometimes I may have ordered you to disregard things that you saw or heard, or struck things from the record. You must follow my instructions to completely disregard such things you saw or heard, and completely ignore those things struck from the record. Do not even think about them. These things are not evidence, and you are bound by your oath not to let them influence your decision in any way.]

Make your decision based only on the evidence, as I have defined it here, and nothing else.

AUTHORITY:

Uniform Jury Instructions in the United States District Court for the District of Delaware,
Sample: Miscellaneous Jury Instructions (GMS) (January 2006).

**FACEBOOK'S OBJECTIONS TO LEADER'S PROPOSED JURY
INSTRUCTION NO. 1.3**

Facebook's additional instruction in brackets reminds the jurors that those things that were ordered to disregard or were struck from the record are not evidence.

**LEADER'S OBJECTIONS TO FACEBOOK'S PROPOSED JURY
INSTRUCTION NO. 1.3**

Facebook's addition is unnecessary and redundant.

STIPULATED PROPOSED JURY INSTRUCTION NO. 1.4
DIRECT AND CIRCUMSTANTIAL EVIDENCE

You have heard the terms “direct evidence” and “circumstantial evidence.”

Direct evidence is evidence like the testimony of any eyewitness which, if you believe it, directly proves a fact. If a witness testified that she saw it raining outside, and you believed her, that would be direct evidence that it was raining.

Circumstantial evidence is simply a chain of circumstances that indirectly proves a fact. If someone walked into the courtroom wearing a raincoat covered with drops of water and carrying a wet umbrella, that would be circumstantial evidence from which you could conclude that it was raining.

It is your job to decide how much weight to give the direct and circumstantial evidence. The law makes no distinction between the weight that you should give to either one, nor does it say that one is any better than the other. You should consider all the evidence, both direct and circumstantial, and give it whatever weight you believe it deserves.

AUTHORITY:

Uniform Jury Instructions in the United States District Court for the District of Delaware, Sample: Miscellaneous Jury Instructions (GMS) (January 2006).

STIPULATED PROPOSED JURY INSTRUCTION NO. 1.5
CONSIDERATION OF EVIDENCE

You should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion.

AUTHORITY:

Uniform Jury Instructions in the United States District Court for the District of Delaware,
Sample: Miscellaneous Jury Instructions (GMS) (January 2006).

STIPULATED PROPOSED JURY INSTRUCTION NO. 1.5A
STATEMENTS OF COUNSEL

A further word about statements and arguments of counsel. The attorney's statements and arguments are not evidence. Instead, their statements and arguments are intended to help you review the evidence presented. If you remember the evidence differently from the attorneys, you should rely on your own recollection.

The role of attorneys is to zealously and effectively advance the claims of the parties they represent within the bounds of the law. An attorney may argue all reasonable conclusions from evidence in the record. It is not proper, however, for an attorney to state an opinion as to the truth or falsity of any testimony or evidence. What an attorney personally thinks or believes about the testimony or evidence in a case is not relevant, and you are instructed to disregard any personal opinion or belief concerning testimony or evidence that an attorney has offered during opening or closing statements, or at any other time during the course of the trial.

AUTHORITY:

Uniform Jury Instructions in the United States District Court for the District of Delaware, Sample: Miscellaneous Jury Instructions (GMS) (January 2006).

STIPULATED PROPOSED JURY INSTRUCTION NO. 1.6
CREDIBILITY OF WITNESSES

You are the sole judges of each witness's credibility. You should consider each witness's means of knowledge; strength of memory; opportunity to observe; how reasonable or unreasonable the testimony is; whether it is consistent or inconsistent; whether it has been contradicted; the witness's biases, prejudices or interests; the witness's manner or demeanor on the witness stand; and all circumstances that, according to the evidence, could affect the credibility of the testimony.

If you find the testimony to be contradictory, you must try to reconcile it, if reasonably possible, so as to make one harmonious story of it all. But if you can't do this, then it is your duty and privilege to believe the testimony that, in your judgment, is most believable and disregard any testimony that, in your judgment, is not believable.

In determining the weight to give to the testimony of a witness, you should ask yourself whether there is evidence tending to prove that the witness testified falsely about some important fact, or, whether there is evidence that at some other time the witness said or did something, or failed to say or do something was different from the testimony he or she gave at trial. You have the right to distrust such witness's testimony in other particulars and you may reject all or some of the testimony of that witness or give it such credibility as you may think it deserves.

You should remember that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth. People may tend to forget some things or remember other things inaccurately. If a witness has made a misstatement, you must consider whether it was simply an innocent lapse of memory or an intentional falsehood, and that may depend upon whether it concerns an important fact or an unimportant detail.

This instruction applies to all witnesses.

AUTHORITY:

Uniform Jury Instructions in the United States District Court for the District of Delaware,

Sample: Miscellaneous Jury Instructions (GMS) (January 2006)

STIPULATED PROPOSED JURY INSTRUCTION NO. 1.7
NUMBER OF WITNESSES

One more point about the witnesses. Sometimes jurors wonder if the number of witnesses who testified makes any difference.

Do not make any decisions based only on the number of witnesses who testified. What is more important is how believable the witnesses were, and how much weight you think their testimony deserves. Concentrate on that, not the numbers.

AUTHORITY:

Uniform Jury Instructions in the United States District Court for the District of Delaware,
Sample: Miscellaneous Jury Instructions (GMS) (January 2006).

STIPULATED PROPOSED JURY INSTRUCTION NO. 1.8
EXPERT TESTIMONY

Expert testimony is testimony from a person who has a special skill or knowledge in some science, profession, or business. This skill or knowledge is not common to the average person but has been acquired by the expert through special study or experience.

In weighing expert testimony, you may consider the expert's qualifications, the reasons for the expert's opinions, and the reliability of the information supporting the expert's opinions, as well as the factors I have previously mentioned for weighing testimony of any other witness. Expert testimony should receive whatever weight and credit you think appropriate, given all the other evidence in the case. You are free to accept or reject the testimony of experts, just as with any other witness.

AUTHORITY:

Uniform Jury Instructions in the United States District Court for the District of Delaware, Sample: Miscellaneous Jury Instructions (GMS) (January 2006).

LEADER'S PROPOSED JURY INSTRUCTION NO. 1.9
DEPOSITION TESTIMONY

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath and swears to tell the truth, and lawyers for each party may ask questions. A court reporter is present and records the questions and answers.

Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if the witness had been present to testify.

AUTHORITY:

Third Circuit Model Civil Jury Instructions, § 2.5, (November 2009).

**FACEBOOK’S OBJECTIONS TO LEADER’S PROPOSED JURY
INSTRUCTION NO. 1.9**

An additional instruction regarding erratas should be included in the event the Court does not grant Facebook’s Motion in Limine to exclude the errata to the deposition of Jeffrey Lamb. This instruction is necessary to inform the jury that an errata does not erase the original testimony of a witness, and that the jury is free to disregard or give substantially less weight to a conflicting errata subject to the same principles that govern the jurors’ assessment of witness credibility in general. See *Donald M. Durkin Contracting, Inc. v. City of Newark*, 2006 WL 2724882 (D. Del. Sept. 22, 2006); *Burns v. Bd. of Cty. Cm’rs of Jackson Cty.*, 330 F.3d 1275, 1282 (10th Cir. 2003).

Facebook additionally objects to Leader’s proposed discussion of Mr. Lamb’s errata because the Court has not “ruled” that these objections were merely clarifications and that Facebook has no recourse. Magistrate Judge Stark noted that he thought they looked like clarifications, but that he would support an effort by Facebook to take another deposition of Mr. Lamb to clarify these issues. Judge Stark noted that he could not order the deposition because Mr. Lamb was a third party in Ohio, not Delaware. Leader’s counsel, representing Mr. Lamb, was obstructionist and refused to allow the deposition to take place without expensive and time-consuming motion practice. Leader’s counsel represents Mr. Lamb, and any claim to the contrary is simply false. Although Leader and Mr. Lamb hired local Ohio counsel to file the motions to quash Facebook’s deposition subpoenas, the declaration filed in support of both motions to quash was created by counsel at King & Spalding, LLP, who stated that King & Spalding—Leader’s counsel—was “counsel of record for third party Jeffrey Lamb.”

The fact that Facebook withdrew the subpoena to Mr. Lamb instead of engaging in such motion practice is not a “waiver” of anything, as Leader contends, and has nothing to do with the fact that the jury is entitled to know it has the right to weigh or disregard the errata. Facebook reserved its right to depose Mr. Lamb in Delaware should

he appear at trial, which would place him under this Court's jurisdiction.

FACEBOOK'S PROPOSED JURY INSTRUCTION NO. 1.9
DEPOSITION TESTIMONY

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath and swears to tell the truth, and lawyers for each party may ask questions. A court reporter is present and records the questions and answers.

Deposition testimony is entitled to the same consideration and is to be judged, insofar as possible, in the same way as if the witness had been present to testify.

A deposition is not a take home exam. However, after a deposition, a witness may submit written corrections to his or her answers to depositions questions, for example because of typographical or other errors. The submission of written changes does not erase the original answers given by the witness during the deposition, which remain among the evidence you may consider.

It is up to you to decide what weight, if any, to give to a witness's written changes to his or her answers to deposition questions. Factors you may consider include the credibility of the witness's explanation or motive for the changes; the nature of the changes; the timing and circumstances of the submission of the written changes; and the importance of the original testimony to the issues you must decide in the case. You have the right to reject all or some of the witness's written changes to his or her testimony or give those changes the weight you think they deserve.

AUTHORITY:

Modified Third Circuit Model Civil Jury Instructions, § 2.5, (November 2009); *Donald M. Durkin Contracting, Inc. v. City of Newark*, 2006 WL 2724882 (D. Del. Sept. 22, 2006); *Burns v. Bd. of Cty. Cm'rs of Jackson Cty.*, 330 F.3d 1275, 1282 (10th Cir. 2003).

**LEADER'S OBJECTIONS TO FACEBOOK'S PROPOSED JURY
INSTRUCTION NO. 1.9**

Leader objects to Facebook's instruction because the Court has already ruled that Mr. Lamb's errata was an appropriate clarification. Additionally, clarification of deposition testimony is completely appropriate and permitted under the law. Fed. R. Civ. P. 30; *Durkin Contracting, Inc. v. City of Newark*, 2006 WL 2724882 at *10 (The Court recognizes that Fed. R. Civ. P. 30 (e) allows a deponent to make changes to deposition testimony in form or substance). Facebook withdrew its subpoena to depose Mr. Lamb regarding his errata and thus Facebook is estopped from objecting to the weight that should be given to an errata. Contrary to Facebook's claim, Leader's counsel did not obstruct any proper deposition of Mr. Lamb. Leader does not have control of Mr. Lamb, who is no longer an employee of Leader. Finally, such instruction is highly prejudicial and not appropriate under FRE 403. To the extent the Court believes a discussion regarding the weight that should be given to an errata is necessary, Leader proposes:

This Court has already ruled that Mr. Lamb's errata was merely a clarification to his existing deposition testimony. Deponents are permitted to make such clarifications to their testimony.

LEADER'S PROPOSED JURY INSTRUCTION NO. 1.10
BURDEN OF PROOF

In any legal action, facts must be proven by a required standard of evidence, known as the "burden of proof." In a patent case such as this, there are two different burdens of proof that are used. The first is called "preponderance of the evidence." The second is called "clear and convincing evidence."

Leader has the burden of proving patent infringement by what is called a preponderance of the evidence. When a party has the burden of proof by a preponderance of the evidence, it means that you must be persuaded that what the party seeks to prove is more probably true than not true. To put it differently, if you were to put Leader's and Facebook's evidence on the opposite sides of a scale, the evidence supporting Leader's assertions would have to make the scales tip somewhat on its side.

Facebook is alleging that Leader falsely marked its Leader2Leader® product. Facebook must prove by a preponderance of the evidence that Leader falsely marked its Leader2Leader® product with the '761 Patent.

Facebook is also contending that the asserted claims of the '761 Patent are invalid. Because patents are presumed valid, Facebook must prove its claims that the '761 Patent is invalid by clear and convincing evidence. When a party has the burden of proof by clear and convincing evidence, it means that the evidence must produce in your mind a firm belief and conviction that it is highly probable that the matter sought to be established is true. Proof by clear and convincing evidence, therefore, is a higher burden than proof by a preponderance of the evidence.

Leader is also alleging that Facebook's infringement was willful. Leader has the burden of proving willful infringement by clear and convincing evidence.

You may have heard of the "beyond a reasonable doubt" burden of proof from criminal cases. That requirement is the highest burden of proof. It does not apply to civil cases and, therefore, you should put it out of your mind.

AUTHORITY:

Modified Uniform Jury Instructions for Patent Cases in the United States Court for the District of Delaware § 1.3 (March 1993).

**FACEBOOK’S OBJECTIONS TO LEADER’S PROPOSED JURY
INSTRUCTION NO. 1.10**

Leader’s instruction fails to properly summarize Facebook’s causes of action in several respects. It fails to include Facebook’s defense of inequitable conduct, and impermissibly limits Facebook’s false marking claim to just the Leader2Leader product (rather than all of Leader’s products).

Further, Facebook has proposed its own instruction on the burden of proof, which relies on Chief Judge Sleet’s more recent March 2010 suggested instruction regarding burden of proof and Final Jury Instruction No. 9 from *Finjan Software, Ltd. v. Secure Computing Corp.* Facebook believes the more recent instructions are both more informative and more concise, and avoid the duplicative language of Leader’s Proposed Instruction No. 1.10.

Facebook respectfully submits that a “preponderance of the evidence” standard of proof should be applied to Facebook’s invalidity defenses because they are based on prior art that was never considered by the U.S. Patent and Trademark Office during the prosecution of the ’761 patent. Facebook acknowledges that existing Federal Circuit case law does not presently recognize a different burden of proof when, as here, the invalidating prior art was never considered by the Patent Office.

Facebook nonetheless submits this objection to preserve its right to argue for the extension, modification or reversal of existing law on this subject. As the Supreme Court noted in *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398, 426 (2007), “the rationale underlying the presumption [of validity] – that the PTO, in its expertise, has approved the claim – seems much diminished” when, as here, the prior art upon which the validity challenge is based was never considered by the PTO. See Petition for Certiorari in *Microsoft Corp. v. z4 Technologies, Inc.*, 2008 WL 877866 (2008). The patent statute specifies that patents are presumed valid, 35 U.S.C. 282, but does not mandate any particular standard for overcoming that presumption. In this case, there are compelling

reasons for not applying a “clear and convincing” burden of proof. First, the PTO has granted *ex parte* and *inter partes* reexaminations of the ’761 patent on the basis of the new prior art that Facebook is relying upon for its invalidity defense. Second, Facebook’s invalidity defense is also based on the offers of sale and public uses of LTI’s “Leader2Leader” product, which LTI never disclosed to the Patent Office during prosecution of the ’761 patent. There is no rationale justification for forcing Facebook to satisfy a heightened evidentiary standard of proof as to Leader2Leader that was in LTI’s possession at all times, and whose non-disclosure to the USPTO was entirely attributable to LTI.

FACEBOOK'S PROPOSED JURY INSTRUCTION NO. 1.10
BURDEN OF PROOF

Leader has the burden of proving infringement by what is called a preponderance of the evidence. That means that Leader has to produce evidence which, considered in light of all of the facts, leads you to believe that what Leader claims is more likely true than not. To put it differently, if you were to put Leader's and Facebook's evidence on the opposite sides of a scale, the evidence supporting Leader's claims would have to make the scales tip somewhat on Leader's side. If Leader fails to meet this burden, the verdict must be for Facebook. Leader must also prove its damages by a preponderance of the evidence.

Facebook has the burden of proving its marking claim, as well as its damages, by a preponderance of the evidence. Facebook bears the burden of proving its defense of invalidity by [clear and convincing evidence] [a preponderance of the evidence].

In addition, Leader must prove its claim of willful infringement by clear and convincing evidence and not by a preponderance of the evidence. Clear and convincing evidence is evidence that produces an abiding conviction that the truth of a factual contention is highly probable. Facebook must prove its inequitable conduct claim against Leader by clear and convincing evidence.

Finally, keep in mind that "proof beyond a reasonable doubt" does not play any part in this case and you therefore should not consider it at all in your deliberations.

AUTHORITY:

Modified Preliminary Jury Instructions—Patent (Sleet, J.) (rev. March 16, 2010); Modified Final Jury Instruction No. 9, *Finjan Software, Ltd. v. Secure Computing Corp.*, 06-cv-369-GMS (D. Del.) (D.I. 225); Uniform Jury Instructions for Patent Cases in the United States Court for the District of Delaware § 1.3 (March 1993).

KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 426 (2007) ("We nevertheless think it appropriate to note that the rationale underlying the presumption-that the PTO, in its expertise, has approved the claim-seems much diminished" where a defense of invalidity rests on evidence that the PTO never had a chance to consider.); Petition for Writ of

Certiorari, *Microsoft Corp. v. z4 Techs., Inc.*, 2008 WL 877886 (No. 07-1243) (At the district court, Microsoft suggested a jury instruction that “A challenger’s burden is more easily carried when the references on which the assertion of invalidity is based were not directly considered by the examiner during prosecution.”).

LEADER'S OBJECTIONS TO FACEBOOK'S PROPOSED JURY

INSTRUCTION 1.10

Leader objects to this instruction for all the reasons set forth in its briefing in opposition to Facebook's motion to amend because the inequitable conduct and false marking claim that Facebook has in its proposed instruction are not claims currently in this case. *See* D.I. 331. Leader reserves its right to supplement its instruction should these allegations be permitted.

Leader objects to this instruction because it includes unbalanced and unnecessary assertions regarding how to find a verdict for Facebook. Federal Rules of Evidence 402 and 403.

Leader further objects to this instruction because Facebook is attempting to use the wrong standard of proof for invalidity. Facebook is required to prove invalidity by clear and convincing evidence because, among other things, Leader's '761 Patent is presumed valid. 35 U.S.C. §282. Facebook has no law to support this lower standard of proof. In *i4i Ltd. P'ship v. Microsoft Corporation*, Microsoft attempted the same argument and failed. 2010 U.S.App. LEXIS 5010 (Fed. Cir. Mar. 10, 2010). The Federal Circuit concluded that jury instructions were correct in light of the court's precedent, "which requires the challenger to prove invalidity by clear and convincing evidence." *Id.* *25.

AUTHORITY:

Third Circuit Model Civil Jury Instructions, § 1.9, (November 2009).

STIPULATED PROPOSED JURY INSTRUCTION NO. 1.11
USE OF NOTES

You may use notes taken during the trial to assist your memory. Remember that your notes are for your personal use. They may not be given or read to anyone else. Do not use your notes, or any other juror's notes, as authority to persuade fellow jurors. Your notes are not evidence, and they are by no means a complete outline of the proceedings or list of the highlights of the trial. Your notes are valuable only as a way to refresh your memory. Your memory is what you should be relying on when it comes time to deliberate and render your verdict in this case.

AUTHORITY:

Modified Third Circuit Model Civil Jury Instructions, § 1.9, (November 2009).

2.0 THE PARTIES AND THEIR CONTENTIONS

**STIPULATED PROPOSED JURY INSTRUCTION NO. 2.1
THE PARTIES**

I will now review for you the parties in this action, and the positions of the parties that you will have to consider in reaching your verdict. The plaintiff is Leader Technologies, Inc., which I will refer to as “Leader.” The defendant is Facebook Inc., which I will refer to as “Facebook.”

Leader is the owner of United States Patent No. 7,139,761. I will refer to this patent as the ’761 Patent.

AUTHORITY:

Uniform Jury Instructions for Patent Cases in the United States Court for the District of Delaware § 2.1 (March 1993).

LEADER'S PROPOSED JURY INSTRUCTION NO. 2.2
THE PARTIES' CONTENTIONS

Leader contends that Facebook infringes claims 1, 4, 7, 9, 11, 16, 21, 23, 25, 31, and 32 of United States Patent No. 7,139,761. These claims may be referred to as the "asserted claims." Leader also argues that Facebook actively induces infringement and contributes to the infringement of claims 9, 11 and 16 of the '761 Patent by others. Leader further contends that Facebook's infringement is willful. Leader also contends that, as a result of the infringement of the '761 Patent by Facebook, Facebook is liable for damages in the form of a reasonable royalty from Facebook.

Facebook contends that it does not infringe any of the asserted claims of the '761 Patent. Facebook further contends that the asserted claims are invalid as being anticipated and/or obvious in light of the prior art. Facebook also contends that Leader has falsely marked its Leader2Leader® product with the '761 Patent.

AUTHORITY:

Uniform Jury Instructions for Patent Cases in the United States Court for the District of Delaware § 2.2-2.3 (March 1993).

FACEBOOK'S OBJECTIONS TO LEADER'S PROPOSED JURY
INSTRUCTION NO. 2.2

Facebook objects to Leader's inclusion of contributory or inducement of infringement theories against Facebook, as no such theories of infringement were properly disclosed in discovery, nor are such theories supported by any evidence of direct infringement by a third party. Facebook further objects to Leader's failure to include Facebook's request for damages under its false marking claim, Leader's limiting of Facebook's false marking claim to Leader2Leader (rather than all of Leader's products), and Leader's failure to mention unenforceability of the '761 patent due to inequitable conduct as a defense.

FACEBOOK'S PROPOSED JURY INSTRUCTION NO. 2.2
THE PARTIES' CONTENTIONS

Leader contends that Facebook has infringed claims 1, 4, 7, 9, 11, 16, 21, 23, 25, 31, and 32 of the '761 patent. These claims may be referred to as the "asserted claims." Leader also contends that, as a result of the alleged infringement of the '761 patent by Facebook, Facebook is liable for damages. Specifically, Leader contends that it is entitled to damages in the form of a reasonable royalty from Facebook.

Facebook contends that it does not infringe any of the asserted claims of the '761 patent. Facebook further contends that the asserted claims are invalid because they are anticipated and/or obvious in light of the prior art. Facebook further contends that the '761 patent is unenforceable because Leader has committed inequitable conduct before the U.S. Patent and Trademark Office during the original prosecution of the '761 patent. Facebook also contends that Leader has falsely marked its products with the '761 patent. Facebook contends that, as a result of this false marking by Leader, Leader is liable for damages.

AUTHORITY:

Uniform Jury Instructions for Patent Cases in the United States Court for the District of Delaware § 2.2-2.3 (March 1993).

**LEADER'S OBJECTIONS TO FACEBOOK'S PROPOSED JURY
INSTRUCTION NO. 2.2**

Leader objects to this instruction for all the reasons set forth in its briefing in opposition to Facebook's motion to amend because the inequitable conduct and false marking claim that Facebook has in its proposed instruction are not claims currently in this case. *See* D.I. 331. Leader reserves its right to supplement its 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 to be decided by the jury.

Leader objects to this instruction for the reasons set forth in its motion *in limine* No. 2 that allegations of invalidity pursuant to 35 U.S.C. § 103 is not a claim or defense that can be alleged at trial.

LEADER'S PROPOSED JURY INSTRUCTION NO. 2.3

SUMMARY OF PATENT ISSUES

You must decide the following issues in this case:

(1) Whether Leader has proven by a preponderance of the evidence that Facebook directly infringes any asserted claim of the '761 Patent, either literally or under the doctrine of equivalents.

(2) Whether Leader has proven by a preponderance of the evidence that Facebook indirectly infringes any asserted claim of the '761 Patent, either by inducement and/or under contributory infringement.

(3) If you decide that at least one claim of the '761 Patent is infringed by Facebook, whether Leader has proven by clear and convincing evidence that Facebook's infringement was willful.

(4) Whether Facebook has proven by clear and convincing evidence that any asserted claim of the '761 Patent is invalid.

(5) If you decide that at least one claim of the '761 Patent is infringed by Facebook, whether Leader has proven by a preponderance of the evidence that it is entitled to recover damages as compensation for Facebook's infringement and, if so, the amount of damages.

(6) Whether Facebook has proven by a preponderance of the evidence that Leader has falsely marked its Leader2Leader® product with the '761 Patent.

AUTHORITY:

Uniform Jury Instructions for Patent Cases in the United States Court for the District of Delaware § 2.4 (March 1993).

**FACEBOOK’S OBJECTIONS TO LEADER’S PROPOSED JURY
INSTRUCTION NO. 2.3**

Facebook objects to this instruction as being unnecessary as this information will be included on the special verdict form.

Facebook objects to Leader’s failure to include either false marking damages claim and its inequitable conduct claim, as well as the limiting of Facebook’s false marking claim to Leader2Leader, rather than all of Leader’s products. Further, jurors should only consider willfulness and/or damages if they find that Facebook infringes a *valid, enforceable* claim of the ’761 patent. In Facebook’s proposed instruction, it places the instructions in the order in which they should be considered and adds in the inequitable conduct and false marking damages issues. Facebook also believes that willfulness should not be included, as Leader has not provided any evidence.

Facebook respectfully submits that a “preponderance of the evidence” standard of proof should be applied to Facebook’s invalidity defenses because they are based on prior art that was never considered by the U.S. Patent and Trademark Office during the prosecution of the ’761 patent. Facebook acknowledges that existing Federal Circuit case law does not presently recognize a different burden of proof when, as here, the invalidating prior art was never considered by the Patent Office.

Facebook nonetheless submits this objection to preserve its right to argue for the extension, modification or reversal of existing law on this subject. As the Supreme Court noted in *KSR Int’l Co. v. Teleflex, Inc.*, 550 U.S. 398, 426 (2007), “the rationale underlying the presumption [of validity] – that the PTO, in its expertise, has approved the claim – seems much diminished” when, as here, the prior art upon which the validity challenge is based was never considered by the PTO. See *Petition for Certiorari in Microsoft Corp. v. z4 Technologies, Inc.*, 2008 WL 877866 (2008). The patent statute specifies that patents are presumed valid, 35 U.S.C. 282, but does not mandate any particular standard for overcoming that presumption. In this case, there are compelling

reasons for not applying a “clear and convincing” burden of proof. First, the PTO has granted *ex parte* and *inter partes* reexaminations of the ’761 patent on the basis of the new prior art that Facebook is relying upon for its invalidity defense. Second, Facebook’s invalidity defense is also based on the offers of sale and public uses of LTI’s “Leader2Leader” product, which LTI never disclosed to the Patent Office during prosecution of the ’761 patent. There is no rationale justification for forcing Facebook to satisfy a heightened evidentiary standard of proof as to Leader2Leader that was in LTI’s possession at all times, and whose non-disclosure to the USPTO was entirely attributable to LTI.

FACEBOOK'S PROPOSED JURY INSTRUCTION NO. 2.3
SUMMARY OF PATENT ISSUES

You must decide the following issues in this case:

(1) Whether Leader has proven by a preponderance of the evidence that Facebook's manufacture or use of the Facebook website, or the methods practiced by the Facebook website, infringe any of the asserted claim of the '761 patent.

(2) Whether Facebook has proven by [a preponderance of the] [clear and convincing] evidence that any asserted claim of the '761 patent is invalid due to anticipation, obviousness, prior public use, or the on-sale bar.

(3) Whether Facebook has proven by clear and convincing evidence that the '761 patent claims are unenforceable due to inequitable conduct.

(4) If you find that at least one valid and enforceable claim of the '761 patent is infringed by Facebook, what amount of damages Leader has proven by a preponderance of the evidence is due to the infringement.

(5) Whether Facebook has proven by a preponderance of the evidence that Leader has falsely marked products with the '761 patent.

(6) If you decide that Leader has falsely marked products with the '761 patent, what amount of damages Facebook has proven by a preponderance of the evidence is due to the false marking.

AUTHORITY:

Final Jury Instruction No. 2.4, *Telcordia Techs., Inc. v. Cisco Sys., Inc.*, 04-cv-876-GMS (D. Del. May 10, 2007); Uniform Jury Instructions for Patent Cases in the United States Court for the District of Delaware § 2.4 (March 1993).

KSR Int'l Co. v. Teleflex, Inc., 550 U.S. 398, 426 (2007).

**LEADER'S OBJECTIONS TO FACEBOOK'S PROPOSED JURY
INSTRUCTION NO. 2.3**

Leader objects to this instruction for all the reasons set forth in its briefing in opposition to Facebook's motion to amend because the inequitable conduct and false marking claim that Facebook has in its proposed instruction are not claims currently in this case. *See* D.I. 331. Leader reserves its right to supplement its instruction should these allegations be permitted. Leader objects to this instruction for the reasons set forth in its motion *in limine* Nos. 2 and 5.

Leader further objects to this instruction because Facebook is attempting to use the wrong standard of proof for invalidity. Facebook is required to prove invalidity by clear and convincing evidence because, among other things, Leader's '761 Patent is presumed valid. 35 U.S.C. §282. Facebook has no law to support this lower standard of proof. In *i4i Ltd. P'ship v. Microsoft Corporation*, Microsoft attempted the same argument and failed. 2010 U.S.App. LEXIS 5010 (Fed. Cir. Mar. 10, 2010). The Federal Circuit concluded that jury instructions were correct in light of the court's precedent, "which requires the challenger to prove invalidity by clear and convincing evidence." *Id.* *25.

Leader 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 to be decided by the jury. .

3.0 INFRINGEMENT

STIPULATED PROPOSED JURY INSTRUCTION NO. 3.1 THE PATENT LAWS

At the beginning of the trial, I gave you some general information about patents and the patent system and a brief overview of the patent laws relevant to this case. I will now give you more detailed instructions about the patent laws that specifically relate to this case. If you would like to review my instructions at any time during your deliberations, they will be available to you in the jury room.

AUTHORITY:

TruePosition Inc. v. Andrew Corp., C.A. No. 05-747-SLR (Sept. 14, 2007) (“The Patent Laws”).

DISPUTED PROPOSED JURY INSTRUCTION NO. 3.2
THE ASSERTED CLAIMS

Before you can decide any issues in this case, you will have to understand the patent “claims.” The patent claims are the numbered sentences at the end of the patent.

The patent claims involved here are claims 1, 4, 7, 9, 11, 16, 21, 23, 25, 31, and 32 of the ‘761 Patent, which are located in Columns 20, 21, 22, 23, and 24 of the ‘761 Patent, which is exhibit __ in evidence. The claims are intended to define, in words, the boundaries of the invention. [The claims define the patent owner’s property rights. Infringement is the act of trespassing on those rights.] Only the claims of the patent can be infringed. Neither the specification, which is the written description of the invention, nor the drawings of a patent can be infringed. Each of the claims must be considered individually. [In addition, the claims of a patent do not have to cover every feature of the patented invention.] You must use the same claim meaning for both your decision on infringement and your decision on invalidity.

[There are three types of claims at issue in this case. These types of claims are (1) system claims, (2) computer-readable medium claims and (3) method claims.]

AUTHORITY:

Modified AIPLA’s Model Patent Jury Instructions § 2.0(March 2008) which cites 35 U.S.C. § 112; *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc); *Catalina Lighting, Inc. v. Lamps Plus, Inc.*, 295 F.3d 1277, 1286 (Fed. Cir. 2002); *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995) (en banc), *aff’d*, 517 U.S. 370 (1996); *SmithKline Diagnostics, Inc. v. Helena Labs. Corp.*, 859 F.2d 878, 882 (Fed. Cir. 1988); *See also, Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318, 1328-1329 (Fed. Cir. 2008); *AT&T Corp. v. Microsoft Corp.*, 414 F.3d 1366, 1367 (Fed. Cir. 2005); *NTP, Inc. v. Research in Motion, Ltd.*, 418 F.3d 1282, 1289-90 (Fed. Cir. 2005).

**FACEBOOK'S OBJECTIONS TO DISPUTED PROPOSED JURY
INSTRUCTION NO. 3.2**

Facebook objects to Leader's additional statements (in brackets) as overly confusing and because they introduce too many outside concepts into the instruction. The statements that the claims "define the patent owner's property rights" and that "infringement is the act of trespassing on those rights" are unfairly prejudicial. Neither of these sentences appear in either the APLA or Delaware instructions and are irrelevant to this jury instruction, which explains what a claim of a patent is.

Patent rights are intangible statutory rights that should not be described using loaded terms like "patent owner's property rights" or "trespass," which improperly attempt to exploit the positive societal views toward ownership of real and personal property, and thus may impact the jury's assessment of invalidity defenses.

Facebook also objects to the unnecessary and confusing classifications of the asserted claims in Leader's proposed instruction (i.e., as "system," "method," and "computer-readable medium" claims), as the claims themselves are self-explanatory and Leader's descriptions add nothing of significance. Leader's characterizations are also inaccurate, as they do not explain that claims 1 and 23 are hybrid system/method claims (system claims that recite a method step), while claim 21 is a hybrid computer-readable medium/method claim.

**LEADER'S OBJECTIONS TO DISPUTED PROPOSED JURY
INSTRUCTION NO. 3.2**

The language in brackets is necessary to clarify a number of issues in this case. The language in brackets that states, "define the patent owner's property rights" and that "infringement is the act of trespassing on those rights," is a fundamental principle of patent law and helpful for a jury to understand infringement. In fact, the Federal Circuit has used this exact language to describe infringement. *See Hoechst-Roussel Pharmaceuticals, Inc. v. Lehman*, 109 F.3d 756 (Fed. Cir. 1997). In addition, the language in brackets that informs the jury of the types of claims at issue is necessary because it informs the jury that there are 3 different types of claims at issue in this case.

LEADER'S PROPOSED JURY INSTRUCTION NO. 3.3
INDEPENDENT AND DEPENDENT CLAIMS

This case involves two types of patent claims, referred to as independent and dependent claims. An “independent claim” sets forth all of the requirements that must be met in order to be covered by that claim. Thus it is not necessary to look at any other claim to determine what an independent claim covers. In this case, claims 1, 9, 21 and 23 of the ‘761 Patent are each independent claims. The remainder of the claims in the ‘761 Patent are “dependent claims.” For example, claims 4 and 7 depend upon claim 1. Claims 11 and 16 depend upon claim 9. Claims 25, 31, and 32 depend upon claim 23. A dependent claim does not itself recite all of the requirements of the claim but refers to another claim for some of its requirements. In this way, the claim “depends” on another claim. A dependent claim incorporates all of the requirements of the other claim or claims to which it refers, as well as the additional requirements recited in the dependent claim itself. Therefore, to determine the scope of a dependent claim, it is necessary to look at both the dependent claim and the other claim or claims to which it refers.

AUTHORITY:

Modified The Federal Circuit Bar Association Model Patent Jury Instructions, § 2.2(a) (February 2010).

**FACEBOOK'S OBJECTIONS TO LEADER'S PROPOSED JURY
INSTRUCTION NO. 3.3**

Facebook objects to Leader's instruction because it should include a chart explaining which dependent claims rely on which independent claims, as suggested by Federal Circuit Bar Association Model Patent Jury Instructions § 2.2(a).

FACEBOOK’S PROPOSED JURY INSTRUCTION NO. 3.3
INDEPENDENT AND DEPENDENT CLAIMS

This case involves two types of patent claims, referred to as independent and dependent claims. An “independent claim” sets forth all of the requirements that must be met in order to be covered by that claim. Thus it is not necessary to look at any other claim to determine what an independent claim covers.

On the other hand, a dependent claim does not itself recite all of the requirements of the claim but refers to another claim for some of its requirements. In this way, the claim “depends” on another claim. A dependent claim incorporates all of the requirements of the other claim or claims to which it refers, as well as the additional requirements recited in the dependent claim itself. Therefore, to determine the scope of a dependent claim, it is necessary to look at both the dependent claim and the other claim or claims to which it refers.

The following is a chart of each claim and what other claim it incorporates, if any.

Claim	Type of Claim	Incorporated Claim
1	Independent	None
4	Dependent	1
7	Dependent	1
9	Independent	None
11	Dependent	9
16	Dependent	9
21	Independent	None
23	Independent	None
25	Dependent	23
31	Dependent	23
32	Dependent	23

If you find that a claim on which other claims depend is not infringed, there cannot be infringement of any dependent claim that refers directly or indirectly to that independent claim.

**LEADER'S OBJECTIONS TO FACEBOOK'S PROPOSED JURY
INSTRUCTION NO. 3.3**

Leader objects to this instruction as the chart is unwieldy, cannot be read to the jury and is unnecessary. Leader's proposed instruction provides in a readable format the same claim information conveyed in Facebook's chart.

AUTHORITY:

Modified The Federal Circuit Bar Association Model Patent Jury Instructions, § 2.2(a) (February 2010).

STIPULATED PROPOSED JURY INSTRUCTION NO. 3.4
CLAIM CONSTRUCTION FOR THE CASE

I will now explain to you the meaning of some of the words of the claims in this case. In doing so, I will explain some of the requirements of the claims. You must accept my definition of these words in the claims as correct. You should not take my definition of the language of the claims as an indication that I have a view regarding how you should decide the issues that you are being asked to decide, such as infringement and invalidity. These issues are yours to decide. I instruct you that the following claim terms have the following definitions:

1. The term “context” means “environment.” The term “context” appears in claims 1, 4, 7, 23, and 25 of the ‘761 Patent.
2. The term “component” means “a computer-related entity, either hardware, a combination of hardware and software, software, or software in execution.” The term “component” appears in claims 1, 4, 7, 23, 25, 31 and 32 of the ‘761 Patent.
3. The term “many-to-many functionality” means “two or more users able to access two or more data files.” The term “many-to-many functionality” appears in claim 32 of the ‘761 Patent.
4. The term “dynamically” means “automatically and in response to the preceding event.” The term “dynamically” appears in claims 1, 9, 21 and 23 of the ‘761 Patent.

AUTHORITY:

Modified The Federal Circuit Bar Association Model Patent Jury Instructions, § 2.3 (February 2010) which cites *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996); *O2 Micro Int’l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1360-63 (Fed. Cir. 2008); *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312-13 (Fed. Cir. 2005) (en banc); *Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 182 F.3d 1298, 1304 (Fed. Cir. 1999); *Cybor Corp. v. FAS Techs.*, 138 F.3d 1448, 1456 (Fed. Cir. 1998); *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 977 (Fed. Cir. 1995); Court’s March 9, 2010 Claim Construction Order.

LEADER'S PROPOSED JURY INSTRUCTION NO. 3.5

OPEN ENDED OR "COMPRISING" CLAIMS

The preamble to claim 1 uses the phrase "[a] computer-implemented network-based system that facilitates management of data, comprising . . ." The word "comprising" means "including the following but not excluding others."

If you find that Facebook's system practices all of the elements in claim 1, the fact that Facebook's system might include additional components would not avoid literal infringement of a claim that uses "comprising" language.

The preamble to claim 9 uses the phrase "[a] computer-implemented method of managing data, comprising computer executable acts of . . ."

If you find that Facebook practices all of the steps in claim 9, the fact that Facebook might include additional steps would not avoid literal infringement of a claim that uses "comprising" language.

The preamble to claim 21 uses the phrase "[a] computer-readable medium for storing computer-executable instructions for a method of managing data, the method comprising . . ."

If you find that Facebook's computer-readable medium practices all of the elements in claim 21, the fact that Facebook's computer readable medium might include additional steps would not avoid literal infringement of a claim that uses "comprising" language.

AUTHORITY:

Modified AIPLA's Model Patent Jury Instructions § 3.7 (March 2008) which cites *Invitrogen Corp. v. Biocrest Mfg. LP*, 327 F.3d 1364, 1368 (Fed. Cir. 2003); *AFG Indus. v. Cardinal IG Co.*, 239 F.3d 1239, 1244-45 (Fed. Cir. 2001); *Moleculon Research Corp. v. CBS, Inc.*, 793 F.2d 1261, 1271 (Fed. Cir. 1986); *AB Dick Co. v. Burroughs Corp.*, 713

F.2d 700, 703 (Fed. Cir. 1983).

**FACEBOOK’S OBJECTIONS TO LEADER’S PROPOSED JURY
INSTRUCTION NO. 3.5**

This is an unnecessary and confusing instruction, particularly in the context of the asserted claims of the ’761 patent. Facebook has not argued and does not intend to argue at trial that it does not infringe the ’761 patent because Facebook includes structures or employs steps in addition to those recited in the asserted claims. This instruction will serve no purpose other than a risk of confusing the jury and create the risk of disregarding the core principle of patent infringement – that all elements of the claim must be present in order to find infringement. This risk is particularly heightened in this case.

Each asserted claim of the ’761 patent recites a specific sequence of steps or actions that must be taken “dynamically,” i.e., automatically and in response to the preceding event recited in the claim. This cause-and-effect relationship is an essential component of Leader’s burden of proof on infringement. A gratuitous instruction on the meaning of the “comprising” transitional phrase in the preamble, however, may confuse the jury into believing that it can disregard the cause-and-effect relationships in the body of the claim elements. For example, the instruction might confuse the jury into believing that an accused system that performs all of the steps of a claim, but not in response to the specific preceding events that the claim requires, nonetheless infringes because of the presence of the “comprising” transitional phrase. This would be improper.

DISPUTED PROPOSED JURY INSTRUCTION NO. 3.6
PATENT INFRINGEMENT GENERALLY

I will now instruct you how to decide whether or not Facebook has infringed the '761 Patent. Infringement is assessed on a claim-by-claim basis. Therefore, there may be infringement as to one claim but no infringement as to another.

[In this case, there are several possible ways that a claim may be infringed. The types of infringement are called: direct infringement; active inducement; and contributory infringement. Active inducement and contributory infringement are referred to as indirect infringement. There cannot be indirect infringement without someone else engaging in direct infringement. To prove indirect infringement, Leader must also prove that Facebook's indirect infringement caused direct infringement.]

In this case, Leader has alleged that Facebook directly infringes Claims 1, 4, 7, 9, 11, 16, 21, 23, 25, 31, and 32 of the '761 Patent.

[In addition, Leader has alleged that others directly infringe Claims 9, 11 and 16 of the '761 Patent and that Facebook is liable for actively inducing and contributing to that direct infringement by others.]

In order to prove infringement, Leader must prove that the requirements for one or more of these types of infringement are met by a preponderance of the evidence, i.e., that it is more likely than not that all of the requirements [of one or more of each of these types of] [for] infringement have been proven.

I will now explain each of these types of infringement in more detail.

AUTHORITY:

Modified The Federal Circuit Bar Association Model Patent Jury Instructions, § 3.1 (February 2010) which cites 35 U.S.C. § 271; *Warner-Lambert Co. v. Teva Pharms. USA, Inc.*, 418 F.3d 1326, 1341 n.15 (Fed. Cir. 2005); *Seal-Flex, Inc. v. Athletic Track &*

Court Constr., 172 F.3d 836, 842 (Fed. Cir. 1999); *Morton Int'l, Inc. v. Cardinal Chem. Co.*, 5 F.3d 1464, 1468-69 (Fed. Cir. 1993).

**FACEBOOK'S OBJECTIONS TO DISPUTED PROPOSED JURY
INSTRUCTION NO. 3.6**

As active inducement and contributory infringement should not be included in this case, Facebook objects to the paragraph discussing different types of infringement, as well as the additional discussion of Leader's allegations of indirect infringement at the close of the third paragraph.

LEADER'S PROPOSED JURY INSTRUCTION NO. 3.7
DIRECT LITERAL INFRINGEMENT

There are two types of “direct infringement”: (1) “literal infringement” and (2) “infringement under the doctrine of equivalents.” In order to prove direct infringement by literal infringement, Leader must prove by a preponderance of the evidence, i.e., that it is more likely than not, that Facebook made, used, sold, offered for sale within, or imported into the United States the Facebook website which meets all of the requirements of the asserted claims and did so without the permission of Leader during the time the ‘761 Patent was in force. You must compare the Facebook website with each and every one of the requirements of the asserted claims to determine whether all of the requirements of that claim are met.

Facebook can also be liable for literal infringement of a method claim if it by itself or in combination with a third party performed all of the steps of the claimed method. To the extent that there are others apart from Facebook that performed one or more method steps of the claims, there is direct infringement of those method claims if Leader has proven that Facebook controlled or directed the activity of the others who performed the method steps.

You must determine, separately for each asserted claim, whether or not there is infringement. There is one exception to this rule. If you find that a claim on which other claims depend is not infringed, there cannot be infringement of any dependent claim that refers directly or indirectly to that independent claim. On the other hand, if you find that an independent claim has been infringed, you must still decide, separately, whether the the Facebook website meets additional requirements of any claims that depend from the independent claim, thus, whether those claims have also been infringed. A dependent claim includes all the requirements of any of the claims to which it refers plus additional requirements of its own.

AUTHORITY:

Modified The Federal Circuit Bar Association Model Patent Jury Instructions, § 2.2(a) (February 2010) which cites *Kim v. ConAgra Foods, Inc.*, 465 F.3d 1312, 1316, n.1 (Fed. Cir. 2006); *MicroStrategy Inc. v. Bus. Objects, S.A.*, 429 F.3d 1344, 1352-53 (Fed. Cir. 2005); *Cross Med. Prods. v. Medtronic Sofamor Danek*, 424 F.3d 1293, 1309-11 (Fed. Cir. 2005); *Netword, LLC v. Centraal Corp.*, 242 F.3d 1347, 1353-54 (Fed. Cir. 2001); *Moleculon Research Corp. v. CBS, Inc.*, 793 F.2d 1261 (Fed. Cir. 1986); *See also, Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318, 1328-1329 (Fed. Cir. 2008); *NTP, Inc. v. Research in Motion, Ltd.*, 418 F.3d 1282, 1289-90 (Fed. Cir. 2005).

**FACEBOOK’S OBJECTIONS TO LEADER’S PROPOSED JURY
INSTRUCTION NO. 3.7**

Facebook objects to Leader’s description of direct infringement based on direction or control of third parties who provide some elements of the claim. Leader’s description merely lists “control or direction” without explaining what type of control or direction is required. For instance, a person can direct a tourist how to get to a landmark, but this sort of “direction” is not what the Federal Circuit in *BMC* and *Muniauction* had in mind. Thus, Facebook’s proposed instruction includes additional clarifications from case law to help explain to jurors what is and is not “control or direction.”

Facebook also believes the first sentence is unnecessary, as this instruction is purely about direct literal infringement. If doctrine of equivalents is allowed, another instruction will explain infringement under the doctrine of equivalents; including a mention of it here is potentially confusing to jurors. Facebook also objects to the use of the term “computer-readable medium.” Facebook’s instruction relies in part on the Model Patent Jury Instructions for the Northern District of California (2007), as it believes the wording is clearer and more understandable.

In its objections, Leader proposes a “definition” of control or direction from a Restatement of Agency Law. However, Leader’s instruction is inaccurate, misleading and confusing, in particular the contention that the following is a factor involved in determining control or direction: “(1) the extent of control which by the agreement, Facebook may exercise over the use of the website.” This comes from a passage describing the difference between an independent contractor and an employee, which originally read “(1) the extent of control which, by the agreement, the master may exercise over the details of the work.” Restatement (2d) of Agency § 220(2)(a). Leader’s equation of “details of the work” performed by an independent contractor with “use of the website” by Facebook users is absurd. Facebook has a hard time believing that Leader is seriously contending that Facebook’s users are either employees or

independent contractors of Facebook. Leader has not pointed to an “agreement” so this instruction, aside from being nonsensical, is misleading and confusing as well.

Leader’s second “factor” listed is “(2) whether Facebook supplies the instrumentalities, tools, and the website for the person using the website.” The Restatement text Leader has modified states the following: “whether the **employer or the workman** supplies the instrumentalities, tools, and **the place of work for the person doing the work.**” Restatement (2d) of Agency § 220(2)(e) (emphasis added). Leader’s equation of “the place of work” with “the website” is both nonsensical and problematic.

Further, *Muniauction* specifically held that controlling of access to a website and providing instructions on its use is not sufficient to establish direction or control. *Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318, 1328-1329 (Fed. Cir. 2008). Here, Leader’s improper changes to the Restatement of Agency to support its unsupportable legal theory that Facebook controls or directs its users, and its refusal to follow recent precedent, highlights the profound issues with Leader’s instruction on direct infringement.

Finally, in Leader’s objection, it claims that Facebook’s instruction requires “that Leader must show by a preponderance of the evidence that the third parties supplied the missing elements on Facebook’s behalf by virtue of a contractual obligation.” However, Leader has misquoted Facebook’s instruction, as it clearly states, “Leader must show by a preponderance of the evidence that the third parties supplied the missing elements on Facebook’s behalf by virtue of a contractual obligation **or other relationship that gives rise to vicarious liability.**” By ignoring the bolded portion of the sentence, as well as the established law on the subject, Leader’s objection is meritless.

FACEBOOK'S PROPOSED JURY INSTRUCTION NO. 3.7
DIRECT LITERAL INFRINGEMENT

In order to directly and literally infringe a patent claim, a product must include every limitation or element of the claim. If the accused Facebook system or method omits even a single element recited in a patent claim, then you must find that the accused Facebook system or method has not literally infringed that claim.

If the accused Facebook system or method does not itself include every requirement in the patent claim, Facebook cannot be liable for infringement merely because Facebook users may have supplied missing elements of the claims, unless Facebook directed or controlled the acts by those parties to do so. To show that Facebook directed or controlled the acts by those third parties, Leader must show by a preponderance of the evidence that the third parties supplied the missing elements on Facebook's behalf by virtue of a contractual obligation or other relationship that gives rise to vicarious liability. The fact that Facebook controls access to the Facebook website and instructs Facebook users on its use is not sufficient to show direction or control over its users' actions. Nor is the fact that Facebook may be benefitting from users visiting its website or inviting users to visit its website, as users are free to interact with the Facebook website as they please.

You must determine, separately for each asserted claim, whether or not there is infringement. There is one exception to this rule. If you find that a claim on which other claims depend is not infringed, there cannot be infringement of any dependent claim that refers directly or indirectly to that independent claim. On the other hand, if you find that an independent claim has been infringed, you must still decide, separately, whether the system or method meets additional requirements of any claims that depend from the independent claim, thus, whether those claims have also been infringed. A dependent claim includes all the requirements of any of the claims to which it refers plus additional requirements of its own.

AUTHORITY:

Modified Final Jury Instruction No. 16, *Finjan Software, Ltd. v. Secure Computing Corp.*, 06-cv-369-GMS (D. Del. March 12, 2008).

Modified Model Patent Jury Instructions for the Northern District of California, § 3.3 (Nov. 2007), which cites *MicroStrategy Inc. v. Business Objects, S.A.*, 429 F.3d 1344, 1352-53 (Fed. Cir. 2005); *Networld, LLC v. Centraal Corp.*, 242 F.3d 1347, 1353 (Fed. Cir. 2001); *Cole v. Kimberly-Clark Corp.*, 102 F.3d 524, 532 (Fed. Cir. 1996); *Cross Med. Prods. v. Medtronic Sofamor Danek*, 424 F.3d 1293 (Fed. Cir. 2005); *On Demand Machine Corp. v. Ingram Industries, Inc.*, 442 F.3d 1331 (Fed. Cir. 2006); *BMC Res., Inc. v. Paymentech, L.P.*, 2007 U.S. App. LEXIS 22413 (Fed. Cir. 2007).

Modified The Federal Circuit Bar Association Model Patent Jury Instructions, § 2.2(a) (Feb. 2010) which cites *Kim v. ConAgra Foods, Inc.*, 465 F.3d 1312, 1316, n.1 (Fed. Cir. 2006); *MicroStrategy Inc. v. Bus. Objects, S.A.*, 429 F.3d 1344, 1352-53 (Fed. Cir. 2005); *Cross Med. Prods. v. Medtronic Sofamor Danek*, 424 F.3d 1293, 1309-11 (Fed. Cir. 2005); *Netword, LLC v. Centraal Corp.*, 242 F.3d 1347, 1353-54 (Fed. Cir. 2001); *Moleculon Research Corp. v. CBS, Inc.*, 793 F.2d 1261 (Fed. Cir. 1986).

Muniauction, Inc. v. Thomson Corp., 532 F.3d 1318, 1328-1329 (Fed. Cir. 2008); *PA Advisors, LLC v. Google, Inc.*, 07-cv-480 (RRR), 2010 WL 986618, --- F. Supp. 2d --- (E.D. Tex. Mar. 11, 2010); *Global Patent Holdings, LLC v. Panthers BRHC LLC*, 586 F. Supp. 2d 1331 (S.D. Fla. 2008).