

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES,)	Trial Day 7
INC., a Delaware)	
corporation,)	
)	
PLAINTIFF,)	
)	
v.)	C.A. No. 08-862-JJF-LPS
)	
FACEBOOK, INC., a)	
Delaware corporation,)	
)	
DEFENDANT.)	

Tuesday, July 27, 2010
9:00 a.m.

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

APPEARANCES:

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

-and-

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

Counsel for Plaintiff

1 (APPEARANCES CONTINUED)

2

3

4

5

BLANK ROME, LLP
BY: STEVEN L. CAPONI, ESQ.

6

7

COOLEY, GODWARD, KRONISH, LLP
BY: MICHAEL RHODES, ESQ.
BY: HEIDI L. KEEFE, ESQ.
BY: MARK WEINSTEIN, ESQ.
BY: JEFFREY NORBERG, ESQ.

8

9

10

Counsel for Defendant

11

12

13

14

15

16

17

18

19

20

21

22

23

24

1 THE CLERK: All rise. Court is
2 now in session, the Honorable Leonard P. Stark
3 now presiding.

4 THE COURT: Good morning.

5 (Everyone said, Good morning, Your
6 Honor.)

7 THE CLERK: Please be seated.

8 THE COURT: Anything we need to
9 take up before the jury comes in?

10 MR. ANDRE: Just real quick, Your
11 Honor. I'm a little paranoid. I saw that
12 Facebook made a filing this morning on Rule 58.
13 Some objections. I just want to make sure our
14 objections to the jury are noted and the Rule 58
15 motion can come in sometime after the jury
16 verdict, perhaps within ten days. Is that
17 acceptable, Your Honor?

18 THE COURT: That's all acceptable
19 with me. Thank you very much.

20 MR. RHODES: Your Honor, we forgot
21 to move into evidence DTX 278 and 280.

22 THE COURT: It is admitted.

23 MR. RHODES: I appreciate that,
24 Your Honor.

1 THE COURT: That's it?

2 MR. RHODES: I know. It's such a
3 rare event.

4 THE COURT: Not that I am
5 disappointed.

6 We'll stick to the plan from
7 yesterday. We'll bring them in. I'll read the
8 instructions.

9 Mr. Rhodes.

10 MR. RHODES: Not that it's
11 conceivable that I will take up all my time,
12 what would you do to signify me that I was in
13 trouble on time if anything?

14 THE COURT: I think you have in
15 the order of three hours.

16 MR. RHODES: Assuming I was at two
17 hours and fifty-nine minutes.

18 THE COURT: Am I right that
19 Facebook has about three hours?

20 According to this, Leader has an
21 hour and thirteen minutes, and Facebook has
22 three hours and two minutes, so -- but let's not
23 worry about. It is your time, but.

24 MR. RHODES: There is not a force

1 on this great earth that would allow me to take
2 three hours.

3 THE COURT: Someone else will pull
4 you down, or I will.

5 MR. RHODES: On the off chance
6 that he's killing me at hour thirteen, what
7 would happen?

8 MR. ANDRE: I think that's a shot
9 across my bow more than anything else. The time
10 is close. I don't think we'll encroach on that
11 time.

12 THE COURT: We are going to hold
13 you to the hour and thirteen minutes, so if
14 you're getting within five minutes, I imagine
15 I'll have somebody here waving at you.

16 MR. RHODES: I have a dumb
17 question, and I apologize for not knowing the
18 Court's procedures. Do the instructions go in
19 the jury room?

20 THE COURT: It will.

21 MR. ANDRE: I reserve some of the
22 hour and thirteen minutes for rebuttal, so I
23 expect to be sitting down, and as far as the
24 breaks go --

1 THE COURT: Yes, I think -- I
2 certainly think we'll give them a break after --
3 we'll have at least one break before Mr. Rhodes
4 speaks. Depending on how long it takes me, I
5 might give you a five-minute break. If I can
6 get through them quickly enough, we might go
7 right into Leader and go to Mr. Rhodes.

8 MR. ANDRE: That's fine.

9 THE COURT: All right. Let's
10 bring the jury in.

11 MR. ANDRE: Your Honor, for the
12 record, the over/under on Mr. Rhodes's closing
13 is two hours if you want to take action.

14 (The jury entered the courtroom at
15 9:03 a.m.)

16 THE CLERK: All rise.

17 THE CLERK: Please be seated.

18 THE COURT: Good morning, ladies
19 and gentlemen. Welcome back. Again as I told
20 you before letting you go yesterday, the agenda
21 for this morning is that I'm going to read you
22 the final jury instructions and then we will
23 hear closing arguments from both Leader and
24 Facebook, and when they are all finished, the

1 case will be submitted to you all to begin your
2 deliberations.

3 I've got a lot to read to you.
4 You will also be getting a copy of these
5 instructions when you deliberate, so just do
6 your best, of course, to follow along, and I
7 will begin now.

8 Section one is entitled "General
9 Instructions." Jury instruction 1.1 is the
10 introduction. It says,

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

14 I will start by explaining your
15 duties, the general rules that apply in every
16 civil case.

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

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

23 Finally, I will explain the rules
24 that you must follow during your deliberations

1 in the jury room and the possible verdicts that
2 you may return.

3 Please listen very carefully to
4 everything I say.

5 I have provided each of you with a
6 copy of these written instructions. You will
7 have your written copy of these instructions
8 with you in the jury room for your reference
9 during your deliberations. You will also have a
10 verdict form, which will list the questions that
11 you must answer to decide this case.

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

20 Your second duty is to take the
21 law that I give you, apply it to the facts, and
22 decide under the appropriate burden of proof
23 which party should prevail on each of the issues
24 presented.

1 It is my job to instruct you on
2 the law, and you are bound by the oath that you
3 took at the beginning of trial to follow the
4 instructions that I give you, even if you
5 personally disagree with them. This includes
6 the instructions that I gave you before and
7 during the trial and these instructions. All
8 the instructions are important, and you should
9 consider them together as a whole.

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

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

20 The evidence in this case includes
21 only what the witnesses said while they were
22 testifying under oath -- including deposition
23 testimony that has been played or read to you --
24 the exhibits that I allowed into evidence, and

1 any facts that the parties agreed to by
2 stipulations which I will tell you about as part
3 of these instructions.

4 Nothing else is evidence. The
5 lawyer's statements and arguments are not
6 evidence. Their questions and objections are
7 not evidence. My legal rulings are not
8 evidence. My comments and questions are not
9 evidence. The notes taken by any juror are not
10 evidence.

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

23 Further, sometimes I may have
24 ordered you to disregard things that you saw or

1 heard or struck things from the record. You
2 must follow my instructions to completely
3 disregard such things you saw or heard and
4 completely ignore those things struck from the
5 record. Do not even think about them. These
6 things are not evidence, and you are bound by
7 your oath not to let them influence your
8 decision in any way.

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

12 Direct and circumstantial
13 evidence. You have heard the terms "direct
14 evidence" and "circumstantial evidence."

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

21 Circumstantial evidence is simply
22 a chain of circumstances that indirectly proves
23 a fact. If someone walked into the courtroom
24 wearing a raincoat covered with drops of water

1 and carrying a wet umbrella, that would be
2 circumstantial evidence from which you could
3 conclude that it was raining.

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

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

20 Statements of counsel. A further
21 word about statements and arguments of counsel.
22 The attorneys' statements and arguments are not
23 evidence. Instead, their statements and
24 arguments are intended to help you review the

1 evidence presented. If you remember the
2 evidence differently from the attorneys, you
3 should rely on your own recollection.

4 The role of attorneys is to
5 zealously and effectively advance the claims of
6 the parties they represent within the bounds of
7 the law. An attorney may argue all reasonable
8 conclusions from evidence in the record.

9 It is not proper, however, for an
10 attorney to state an opinion as to the truth or
11 falsity of any testimony or evidence. What an
12 attorney personally thinks or believes about the
13 testimony or evidence in a case is not relevant,
14 and you are instructed to disregard any personal
15 opinion or belief concerning testimony or
16 evidence that an attorney has offered during
17 opening or closing statements or any other time
18 during the course of the trial.

19 Credibility of witnesses. You are
20 the sole judges of each witness's credibility.
21 You should consider each witness's means of
22 knowledge; strength of memory; opportunity to
23 observe; how reasonable or unreasonable the
24 testimony is; whether it is consistent or

1 inconsistent; whether it has been contradicted
2 the witness's biases, prejudices, or interests;
3 the witness's manner or demeanor on the witness
4 stand; and all the circumstances that, according
5 to the evidence, could affect the credibility of
6 the testimony.

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

15 In determining the weight to given
16 the testimony of a witness, you should ask
17 yourself whether this is evidence tending to
18 prove that the witness testified falsely about
19 some important fact or whether there is evidence
20 that at some other time the witness said or did
21 something or failed to say or do something that
22 was different from the testimony he or she gave
23 at trial. You have the right to distrust such
24 witness's testimony in other particulars, and

1 you may reject all of some of the testimony of
2 that witness or give it such credibility as you
3 may think it deserves.

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

14 This instruction applies to all
15 witnesses.

16 Number of witnesses. One more
17 point about witnesses. Sometimes jurors wonder
18 if the number of witnesses who testify makes any
19 difference.

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

1 not on the numbers.

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

9 In weighing expert testimony, you
10 may consider the expert's qualifications, the
11 reasons for the expert's opinions, and the
12 reliability of the information supporting the
13 expert's opinions, as well as the factors I have
14 previously mentioned for weighing testimony of
15 any other witness.

16 Expert testimony should receive
17 whatever weight and credit you think
18 appropriate, given all the other evidence in the
19 case. You are free to accept or reject the
20 testimony of experts, just as with any other
21 witness.

22 Deposition testimony. A
23 deposition is the sworn testimony of a witness
24 taken before trial. The witness is placed under

1 oath and swears to tell the truth, and lawyers
2 for each party may ask questions. A court
3 reporter is present and records the questions
4 and answers. The deposition may also be
5 recorded on videotape.

6 Deposition testimony is entitled
7 to the same consideration and is to be judged
8 insofar as possible in the same way as if the
9 witness has been present to testify.

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

18 Leader has the burden of proving
19 patent infringement by what is called a
20 preponderance of the evidence. When a party has
21 the burden of proof by a preponderance of the
22 evidence, it means that you must be persuaded
23 that what the party seeks to prove is more
24 probably true than not true. To put it

1 differently, if you were to put Leader's and
2 Facebook's evidence on opposite sides of a
3 scale, the evidence supporting Leader's
4 assertions would have to make the scales tip
5 somewhat on its side.

6 Facebook is also contending that
7 the asserted claims of the '761 patent are
8 invalid. Because patents are presumed valid,
9 Facebook must prove its claims that the '761
10 patent is invalid by clear and convincing
11 evidence. When a party has a burden of proof by
12 clear and convincing evidence, it means that the
13 evidence must produce in your mind a firm belief
14 and conviction that it is highly probable that
15 the matter sought to be established is true.
16 Proof by clear and convincing evidence,
17 therefore, is a higher burden of proof than
18 proof by a preponderance of the evidence.

19 You might have heard of the
20 "beyond a reasonable doubt" burden of proof of
21 criminal cases. This requirement is the highest
22 burden of proof. It does not apply to civil
23 cases, and therefore you should put it out of
24 your mind.

1 Use of notes. You may use notes
2 taken during the trial to assist your memory.
3 Remember that your notes are for your personal
4 use. They are not to be given or read to anyone
5 else. Do not use your notes or any other
6 juror's notes as authority to persuade your
7 fellow jurors.

8 Your notes are not evidence, and
9 they are by no means a complete outline of the
10 proceedings or list of the highlights of trial.
11 Your notes are valuable only as a way to refresh
12 your memory.

13 Your memory is what you should be
14 relying on what it comes time to deliberate and
15 render your verdict in this case.

16 Now, on to Chapter 2, called "The
17 Parties and Their Contentions," which begins
18 with jury instruction 2.1: The parties.

19 I will now review for you the
20 parties in this action and the positions of the
21 parties that you will have to consider in
22 reaching your verdict.

23 The plaintiff is Leader
24 Technologies, Inc., which I refer to as

1 "Leader."

2 The defendant is Facebook, Inc.,
3 which I refer to as "Facebook."

4 Leader is the owner of United
5 States patent number 7,139,761. I refer to this
6 patent as the '761 patent.

7 The parties' contentions. Leader
8 contends that Facebook infringes claims 1, 4, 7,
9 9, 11, 16, 21, 23, 25, 31 and 32 of United
10 States patent number 7,139,761. These claims
11 may be referred to as the asserted claims.

12 Facebook contends that it does not
13 infringe any of the asserted claims of the '761
14 patent. Facebook further contends that the
15 asserted claims are invalid.

16 Summary of patent issues. You
17 must decide the following issues in this case:

18 One, whether Leader has proven by
19 a preponderance of the evidence that Facebook's
20 manufacture or use of the Facebook website or
21 the methods practiced by the Facebook website
22 infringe any asserted claim of the '761 patent,
23 either literally or under the doctrine of
24 equivalents.

1 Two, whether Facebook has proven
2 by clear and convincing evidence that any
3 asserted claim of the '761 patent is invalid due
4 to anticipation, obviousness, prior public use,
5 or the on-sale bar.

6 Statement of undisputed facts.
7 The following facts are undisputed between the
8 parties:

9 One, Leader is the assignee of all
10 ownership rights, title, and interest in the
11 '761 patent.

12 Two, the 761 patent issued on
13 November 21, 2006.

14 Three, Facebook owns and operates
15 the Facebook website, which is currently located
16 at www.Facebook.com, and was formerly located at
17 www.thefacebook.com.

18 Four, Facebook was launched on
19 February 4, 2004.

20 Five Facebook provides a developer
21 wiki at
22 [http://wiki.developers.facebook.com/index.php/
23 Main_Page](http://wiki.developers.facebook.com/index.php/Main_Page) and
24 <http://developers.facebook.com/docs>.

1 Now we're on to Chapter 3, called
2 "Infringement," and jury instruction number 3.1
3 is called The Patent Laws.

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

14 The asserted claims. Before you
15 can decide any issues in this case, you will
16 have to understand what the patent claims. The
17 patent claims are the numbered sentences at the
18 end of patent.

19 The patent claims involved here
20 are claims 1, 4, 7, 9, 11, 16, 21, 23, 25, 31,
21 and 32 of the '761 patent, which are located in
22 columns 20, 21, 22, 23, and 24 of the '761
23 patent, which is exhibit PTX 1 in evidence. The
24 claims are intended to define in words the

1 boundaries of the invention. The claims define
2 the patent owner's property rights.

3 Infringement is the act of trespassing on those
4 rights.

5 Only the claims of the patent can
6 be infringed. Neither the specification, which
7 is the written description of the invention, nor
8 the drawings of a patent can be infringed.

9 Each of the claims must be
10 considered individually. You must use the same
11 claim meaning for both your decision on
12 infringement and your decision on invalidity.

13 Independent and dependent claims.
14 This case involves two types of patent claims,
15 referred to as independent and dependent claims.

16 An independent claim sets forth
17 all of the requirements that must be met in
18 order to be covered by that claim; thus, it is
19 not necessary to look at any other claim to
20 determine what an independent claim covers. In
21 this case, claims 1, 9, 21, and 23 of the '761
22 patent are each independent claims.

23 The remainder of the claims in the
24 '761 patent are dependent claims. For example,

1 claims 4 and 7 depend upon claim 1. Claims 11
2 and 16 depend upon claim 9. Claims 25, 31, and
3 32 depend upon claim 23.

4 A dependent claim does not itself
5 recite all of the requirements of the claim, but
6 refers to another claim for some of its
7 requirements. In this way, the claim depends on
8 another claim.

9 A dependent claim incorporates all
10 of the requirements of the other claim or claims
11 to which it refers, as well as the additional
12 requirements recited in the dependent claim
13 itself; therefore, to determine the scope of a
14 dependent claim, it is necessary to look at both
15 the independent claim -- it is necessary to look
16 at the dependent claim and the other claim or
17 claims to which it refers.

18 If you find that a claim on which
19 other claims depend has not been infringed,
20 there cannot be any infringement of any
21 dependent claim that refers directly or
22 indirectly to that independent claim.

23 Claim construction for the case.

24 I will now explain to you the meaning of some of

1 the words in this case. In doing so, I will
2 explain some of the requirements of the claims.
3 You must accept my definition of these words in
4 the claims as correct. You should not take my
5 definition of the language of the claims as an
6 indication that I have a view regarding how you
7 should decide the issues that you are being
8 asked to decide, such as infringement and
9 invalidity. These issues are yours to decide.

10 I instruct you that the following
11 claim terms have the followings definitions:

12 One, the term "context" means
13 "environment." The term "context" appears in
14 claims 1, 4, 7, 23, and 25 of the '761 patent.

15 Two, the term "component" means "a
16 computer-related entity, either hardware, a
17 combination of hardware and software, software,
18 or software in execution." The term "component"
19 appears in claims 1, 4, 7, 23, 25, 31, and 32 of
20 the '761 patent.

21 Three, the term "many-to-many
22 functionality" means "two or more users able to
23 access two or more data files." The term
24 "many-to-many functionality" appears in claim 32

1 of the '761 patent.

2 Four, the term "dynamically" means
3 "automatically and in response to the preceding
4 event." The term "dynamically" appears in
5 claims 1, 9, 21, and 23 of the '761 patent.

6 Five, the term "wherein" means "in
7 which." The term "wherein" appears in claims 1,
8 9, and 23.

9 You must not take into
10 consideration any argument that the prosecution
11 history of the patent or the specification of
12 the patent may suggest a different definition of
13 the terms set forth in this instruction. You
14 are not permitted to use any alternative or
15 modified definition in your determination of the
16 infringement and invalidity issues in this case.

17 Open-ended or comprising claims.
18 The preamble to claim 1 uses the phrase "[a]
19 computer-implemented network-based system that
20 facilities management of data, comprising. . ."

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

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

5 The word "comprising" means
6 "including the following, but not excluding
7 others." If you find that Facebook's
8 computer-readable medium practices all of the
9 elements in claim 1, 9 or 21, the fact that
10 Facebook's computer-readable medium might
11 includes additional steps would not avoid
12 literal infringement of a claim that uses
13 "comprising" language.

14 Patent infringement generally. I
15 will now instruct you how to decide whether or
16 not Facebook has infringed the '761 patent.

17 Infringement is assessed on a
18 claim-by-claim basis; therefore, there may be
19 infringement as to one claim but no infringement
20 as to another.

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

1 In order to prove infringement,
2 Leader must meet its burden of proof of a
3 preponderance of the evidence, i.e., that it is
4 more likely than not that all of the
5 requirements for infringement have been proven.

6 Direct literal infringement. In
7 order to directly and literally infringe a
8 patent claim, a product must include every
9 limitation or element of the claim. If the
10 accused Facebook system or method omits even a
11 single element recited in a patent claim, then
12 you must find that the accused Facebook system
13 or method has not literally infringed that
14 claim.

15 Facebook can also be liable for
16 direct infringement of a method claim -- that
17 is, independent claim 9 of the '761 patent and
18 its dependent claims, claims 11 and 16 -- if, by
19 itself or in combination with a third party, it
20 performs all the steps of the claimed method.
21 For Facebook to be liable for the acts of third
22 parties, Leader must have proven by a
23 preponderance of the evidence, that Facebook
24 controls or directs the activity of those

1 parties who perform the steps of the method
2 claims.

3 Determining whether Facebook
4 controls or directs the activity of those
5 parties who perform the steps of the method
6 claims is a factual question for you alone to
7 decide. In making this determination, factors
8 you may consider include whether the claims at
9 issue require those third parties to take action
10 for the claims to be performed, or
11 alternatively, whether the third parties merely
12 activate functions already present in the
13 underlying invention; whether there is a
14 contractual relationship between Facebook and
15 the third parties; whether users of Facebook are
16 agents of Facebook; and whether Facebook
17 supplies the instrumentalities, tools, and the
18 website for the person using the website.

19 Infringement under the doctrine of
20 equivalents. If you decide that Facebook does
21 not literally infringe an asserted patent claim,
22 you must then decide if Facebook infringes the
23 claim under what is called doctrine of
24 equivalents.

1 Under the doctrine of equivalents,
2 Facebook can only infringe an asserted patent
3 claim if the Facebook website includes parts or
4 steps that are identical or equivalent to the
5 requirements of the claim. If there is missing
6 an identical or equivalent part or step to even
7 one part or step of the asserted patent claim,
8 Facebook cannot infringe the claim under the
9 doctrine of equivalents. Thus, in making your
10 decision under the doctrine of equivalents, you
11 must first look at each individual requirement
12 of the asserted patent claim and decide whether
13 the Facebook website has an identical or
14 equivalent part or step to that individual claim
15 requirement.

16 You may find that an element or
17 step is equivalent to a requirement of the claim
18 that is not met literally if a person having
19 ordinary skill in the field of technology of the
20 patent would have considered the differences
21 between them to be insubstantial or would have
22 found that the structure or action, one,
23 performs substantially the same function; and
24 two, works in substantially the same way; three,

1 to achieve substantially the same result as the
2 requirement of the claim.

3 In order for the structure or
4 action to be considered interchangeable, the
5 structure or action must have been known at the
6 time of the alleged infringement to a person
7 having ordinary skill in the field of technology
8 of the patent. Interchangeability at the
9 present time is not sufficient. In order to
10 prove infringement by equivalents, Leader must
11 prove the equivalency of the structure or action
12 to a claim element by a preponderance of the
13 evidence.

14 Infringement: Compare Facebook to
15 claims of the; 761 patent. Members of the jury,
16 in considering all of the evidence and
17 determining if Leader has proven that Facebook
18 infringes the asserted claims of the '761
19 patent, you may only compare the Facebook
20 website to the asserted claims of the '761
21 patent. You should not compare any of Leader's
22 products with the Facebook website.

23 Now on to Chapter 4, called
24 "Validity Defenses," and the first instruction

1 in number 4.1 is called Validity in General.

2 The granting of a patent by the
3 Patent Office carries with it the presumption
4 that the patent is valid. Facebook contends
5 that all of the asserted claims of the '761
6 patent are invalid.

7 I will now instruct you on the
8 rules you must follow in deciding whether or not
9 Facebook has proven that claims 1, 4, 7, 9, 11,
10 16, 21, 23, 25, 31, and 32 of the '761 patent
11 are invalid. To prove that any claim of a
12 patent is invalid, Facebook must persuade you by
13 clear and convincing evidence, i.e., you must be
14 left with a clear conviction that the claim is
15 invalid.

16 Prior art. Under the patent laws,
17 a person is entitled to a patent only if the
18 invention claimed in the patent is new and
19 nonobvious in light of what came before. That
20 which came before is referred to as "prior art."

21 Prior art includes any of the
22 following items if they were received into
23 evidence during the trial:

24 One, any patent that issued more

1 than one year before the effective filing date
2 of the '761 patent.

3 Two, any printed publication that
4 was published more than one year before the
5 effective filing date of the '761 patent.

6 Three, any product or method that
7 was in public use or on sale in the United
8 States more than one year before the effective
9 filing date of the '761 patent.

10 Four, any printed publication that
11 was published prior to the invention date of the
12 '761 patent.

13 Five, any published United States
14 patent application or issued United States
15 patent with a filing date that predates the
16 invention date of the '761 patent.

17 And, six, any product or method
18 that was known or used by others in the United
19 States prior to the invention date of the '761
20 patent.

21 Facebook contends that the
22 following are prior art:

23 One, European Patent Number EP
24 1087306, also referred to as Hubert '306.

1 Two, U.S. Patent Number 7,590,934,
2 also referred to as Hubert '934.

3 Three, U.S. Patent Number
4 6,236,994, also referred to as Swartz '994.

5 Four, iManage DeskSite 6.0 User
6 Reference Manual, also referred to as iManage.

7 Five, U.S. Patent Number 6,434,403
8 B1, also referred to as Ausems '403.

9 And, six, Leader's Leader2Leader
10 product, also referred to as Leader2Leader.

11 The date of the invention and the
12 date of filing of the patent application may
13 affect what is prior art.

14 In this case, Leader contends its
15 invention date is August 19, 1999, which is its
16 date of conception of the invention, and that
17 its effective filing date is December 11, 2002,
18 the date of Leader's filing of the provisional
19 patent application.

20 Facebook contends that the
21 invention date and the effective filing date are
22 both December 10, 2003, which is the date of the
23 filing of the patent application.

24 I will give you instructions later

1 regarding how to determine the invention date
2 and the effective filing date. Once you have
3 decided the invention date and the effective
4 filing date, you can determine what is prior art
5 in this case.

6 During Leader's cross-examination
7 of Facebook's expert, Professor Greenberg,
8 Leader's counsel made statements implying that
9 the U.S. Patent Office examiner who worked on
10 the '761 patent, Diane Mizrahi, was aware of and
11 considered the Swartz patent. I instruct you
12 not to draw such a connection. Because of
13 Patent Office procedures, it would not be
14 reasonable for you to draw the inference that
15 the examiner, Ms. Mizrahi, was aware of and
16 considered the Swartz patent during prosecution
17 of the '761 patent.

18 With respect to Facebook's
19 contentions that the '761 patent is invalid due
20 to anticipation or obviousness due to prior art,
21 the only relevant comparisons are between the
22 claims of the '761 patent and the disclosures of
23 the prior to art references. What the PTO or
24 the examiner of the '761 patent considered or

1 did not consider is not relevant to your
2 determination and should not be considered by
3 you.

4 Invention date: Conception and
5 reduction to practice.

6 I will now explain to you how you
7 will determine the invention date that I
8 mentioned earlier. The date of invention is
9 either when the invention was reduced to
10 practice or when it was conceived, provided the
11 inventor was diligent in reducing the invention
12 to practice.

13 Conception is the mental part of
14 an invented act, i.e., the formation in the mind
15 of the inventor of a definite and permanent idea
16 of the complete and operative invention as it is
17 thereafter to be applied in practice, even if
18 the inventor didn't know at the time that the
19 invention would work. Conception of an
20 invention is complete when the idea is so
21 clearly defined in the inventor's mind that, if
22 the idea were communicated to a person having
23 ordinary skill in the field of the technology,
24 he or she would be able to reduce the invention

1 to practice without undue research or
2 experimentation.

3 This requirement does not mean
4 that the inventor has to have a prototype built
5 or have actually explained the invention to
6 another person, but there must be some evidence
7 beyond the inventor's own testimony that
8 confirms the date on which the inventor had the
9 complete idea. Conception may be proven when
10 the invention is shown in its complete form by
11 drawings, disclosure to another person, or other
12 forms of evidence presented at trial.

13 Conception must include every feature or
14 limitation of the claimed invention.

15 Diligence means working
16 continuously, though not necessarily every day.
17 If an inventor attempts to rely on an earlier
18 date of conception, it must show that it
19 exercised reasonable diligence throughout the
20 entire period between the date of conception and
21 the date the invention was reduced to practice.
22 This requires the inventor to show that it took
23 specific and affirmative acts during this entire
24 period that were directly related to the

1 reduction to practice of the invention at issue
2 and that acceptable excuses be provided for any
3 period of inactivity.

4 Voluntarily setting aside
5 development of the alleged invention or taking
6 time to commercially exploit an invention or a
7 separate product or invention do not constitute
8 acceptable excuses. A claimed invention has
9 been reduced to practice when it has been
10 constructed, used, tested, sufficiently to show
11 that it will work for its intended purpose or
12 when the inventor files a patent application.

13 An invention may also be reduced
14 to practice even if the inventor had not made or
15 tested a prototype of the invention if it has
16 been fully described in a filed patent
17 application.

18 If you find that Leader has proven
19 a conception date of August 19, 1999, and that
20 Leader was diligent in reducing the invention to
21 practice, then the invention date is August 19,
22 1999. If you do not find that Leader has proven
23 conception and reduction to practice, then the
24 invention date is the same date as the effective

1 filing date.

2 Prior art effective filing date.

3 Leader filed a provisional patent application on
4 December 11, 2002. You must determine whether
5 the asserted claims of the '761 patent are
6 sufficiently supported by the provisional
7 application.

8 Leader contends that the asserted
9 claims of the '761 patent are entitled to the
10 filing date of the provisional application,
11 while Facebook contends the asserted claims are
12 not.

13 Leader may rely on the filing date
14 of its provisional application to establish the
15 effective filing date if the application teaches
16 one of ordinary skill in the art to make and use
17 the claimed invention of the '761 patent and to
18 do so without undue experimentation.
19 Additionally, the provisional application must
20 disclose each and every element of the asserted
21 claims of the '761 patent.

22 If you determine that Leader has
23 shown by a preponderance of the evidence that
24 the effective filing date is December 11, 2002,

1 then Facebook must prove by clear and convincing
2 evidence that this is not the correct effective
3 filing date.

4 If you find that Leader is
5 entitled to an effective filing date that is the
6 same date as the filing date of the provisional
7 application, then December 11, 2002, is the
8 effective filing date of the '761 patent for
9 purposes of validity and the prior art.

10 Anticipation. A person cannot
11 obtain a patent if someone else already has made
12 an identical invention. Simply put, the
13 invention must be new. An invention that is not
14 new or novel is said to be anticipated by the
15 prior art. Under the U.S. patent laws, an
16 invention that is anticipated is not entitled to
17 patent protection. To prove anticipation,
18 Facebook must prove with clear and convincing
19 evidence that the claimed invention is not new.

20 In this case, Facebook contends
21 that claims 1, 4, 7, 9, 11, 16, 21, 23, 25, 31,
22 and 32 of the '761 patent are anticipated. To
23 anticipate a claim, each and every element of
24 the claim must be present in a single item of

1 prior art that is dated at least one year prior
2 to the effective filing date. You may not
3 combine two or more items of prior art to prove
4 anticipation.

5 In determining whether every one
6 of the elements of the claimed invention is
7 found in the prior art, you should take into
8 account what a person of ordinary skill in the
9 art would have understood from his or her
10 examination of the particular prior art.

11 In determining whether the single
12 item of prior art anticipates a patent claim,
13 you should take into consideration not only what
14 is expressly disclosed in the particular item of
15 prior art, but also what inherently resulted
16 from its practice. This is called "inherency."
17 To establish inherency, the evidence must make
18 clear that the prior art necessarily resulted in
19 the missing descriptive matter and that it would
20 have been so recognized by a person of ordinary
21 skill in the art at the time the patent
22 application was filed.

23 You must keep these requirements
24 in mind and apply them to each piece of prior

1 art you consider in this case. There are
2 additional requirements that apply to the
3 particular categories of anticipation that
4 Facebook contends in this case. I will now
5 instruct you about those.

6 Anticipation: Prior public use.
7 Facebook contends that claims 1, 4, 7, 9, 11,
8 16, 21, 23, 25, 31, and 32 of the '761 patent
9 are invalid because the alleged invention
10 described in those claims was in public use more
11 than one year before the effective filing date
12 of the patent. To prove public use of a
13 particular claim, Facebook must prove by clear
14 and convincing evidence that, one, Leader
15 disclosed a product that meets all the elements
16 of that claim to the public more than one year
17 before the effective filing date; and, two, the
18 invention disclosed in that claim was ready for
19 patenting when alleged public use occurred.

20 Any use of the alleged invention
21 of a patent by any person who is under no
22 limitation restriction or obligation of secrecy
23 to the inventor may constitute a public use that
24 invalidates the patent if the use occurred more

1 than one year prior to the effective filing date
2 of the patent. For example, a demonstration of
3 a product that embodies the alleged invention of
4 the patent claim may constitute a public use
5 that renders the claim invalid if the person who
6 received the demonstration was under no legal
7 obligation to the inventor to maintain secrecy.
8 The absence of affirmative steps to maintain
9 secrecy of prior use of an invention is evidence
10 of a public use.

11 The law does not require prior use
12 of an alleged invention to be widely
13 disseminated to qualify as public use. The
14 disclosure of the invention to even a single
15 third party may qualify as public use, provided
16 the third party was under no legal obligation to
17 maintain secrecy. Mere knowledge of the
18 invention by the public is not sufficient.

19 An invention is ready for
20 patenting either when it's reduced to practice
21 or when the inventor has enabled the invention
22 by preparing drawings or other descriptions of
23 the invention sufficient to allow a person of
24 ordinary skill in the art to make or use the

1 invention.

2 On-sale bar. A patent claim is
3 invalid if it can be shown by clear and
4 convincing evidence that an embodiment that
5 contains all the elements of that claim was,
6 more than one year before the effective filing
7 date, both, one, subject to commercial offer for
8 sale in the United States; and, two, ready for
9 patenting.

10 Facebook contends that claims one,
11 4, 7, 9, 11, 16, 21, 23, 25, 31, and 32 of the
12 '761 patent are anticipated because the
13 invention was on sale in the United States more
14 than one year before the effective filing date.

15 In this case, Facebook must prove
16 by clear and convincing evidence that a product
17 that met all the limitations of the asserted
18 claims was ready for patenting and was offered
19 for sale more than a year prior to the effective
20 filing date. Once again, your determination of
21 the effective filing date will affect whether or
22 not you find that a commercial offer for sale
23 for the Leader invention occurred more than a
24 year before the effective filing date; however,

1 it is irrelevant whether or not the offer for
2 sale was secret or non-secret.

3 An invention was on sale if the
4 claimed invention was embodied in the thing
5 commercially offered for sale.

6 An offer for sale need not be
7 accepted to trigger the on-sale bar. That the
8 offer, even if accepted, might not have
9 ultimately led to an actual sale of the
10 invention is also not relevant. The essential
11 question is whether or not there was an attempt
12 to obtain commercial benefit from the invention.
13 An offer to sell can invalidate a patent even if
14 the offer was secret, such as under the
15 protection of a nondisclosure agreement.

16 An invention is ready for
17 patenting either when it is reduced to practice
18 or when the inventor has enabled the invention
19 by preparing drawings or other descriptions of
20 the invention sufficient to allow a person of
21 ordinary skill until the art to make or use the
22 invention. The claimed invention is ready for
23 patenting when there is reason to believe that
24 it will work for its intended purpose.

1 Experimental use. Leader contends
2 that there were no public demonstrations or
3 offers for sale of the invention more than a
4 year before the effective filing date. One
5 reason for Leader's contention is the law of
6 experimental use.

7 The law recognizes the defense of
8 experimental use for claims of public use and
9 offers for sale because the inventor must be
10 given the opportunity to develop the invention.
11 If the public use or offer for sale was an
12 experimental use performed in order to bring the
13 invention to perfection or to determine if the
14 invention was capable of performing its intended
15 purpose, then such a use does not invalidate the
16 claim.

17 Certain activities are
18 experimental if they are a legitimate effort to
19 perfect the invention or to determine if the
20 invention will work for its intended purpose.
21 So long as the primary purpose is
22 experimentation, it does not matter that the
23 public used the invention or that the inventor
24 incidentally derived profit from it.

1 Only the experimentation by and
2 under the control of the inventor of the patent
3 qualifies for this exception. Experimentation
4 by a third party for its own purposes does not.
5 The experimentation must relate to the features
6 of the claimed invention and it must be for the
7 purpose of technological improvement, not
8 commercial exploitation. A test done primarily
9 for marketing and only incidentally for
10 technological improvement is not an experimental
11 use but a public use. If any commercial
12 exploitation does occur, it must be merely
13 incidental to the primary purpose of
14 experimentation.

15 If you find that Facebook has
16 shown a prior public use or offer for sale of an
17 invention that meets all the elements of the
18 asserted claim at issue by clear and convincing
19 evidence, then Leader must prove by a
20 preponderance of the evidence that the purpose
21 of the prior public use for alleged offer for
22 sale was experimental.

23 Printed publication. For a
24 printed publication to anticipate a patent

1 claim, it must, when read by a person of
2 ordinary skill in the art, expressly disclose
3 each element of the claimed invention to the
4 reader. The disclosure must be complete enough
5 to enable one of ordinary skill in the art to
6 practice the invention without undue
7 experimentation. When the printed publication
8 is an issued U.S. patent, that patent is assumed
9 to be enabling.

10 To prove anticipation of the
11 patented invention, Facebook must show by clear
12 and convincing evidence that before the
13 effective filing date a third party disclosed in
14 a printed publication or that the third party
15 patented an invention which included all of the
16 elements of the asserted claims of the '761
17 patent.

18 In addition, a printed publication
19 must be reasonably accessible to those members
20 of the public who would be interested in its
21 contents. It is not necessary that the printed
22 publication be available to every member of the
23 public. The information must, however, have
24 been maintained in some form, such as printed

1 pages, microfilm, or photocopies. An issued
2 patent is a printed publication. A published
3 patent application is a printed publication of
4 its publication date.

5 Obviousness generally. Even
6 though an invention may not have been
7 identically disclosed or described before it was
8 made by an inventor, in order to be patentable,
9 the invention must also not have been obvious to
10 a person of ordinary skill in the field of
11 technology of the patent at the time the patent
12 was filed.

13 Facebook may establish that the
14 patent claims are invalid by showing that the
15 claimed invention would have been obvious to
16 persons of ordinary skill in the art at the time
17 the patent was filed.

18 In determining whether a claimed
19 invention is obvious, you must consider the
20 level of ordinary skill in the field of computer
21 science that someone would have had at the time
22 the claimed invention was made, the scope and
23 content of the prior art, and any differences
24 between the prior art and the claimed invention.

1 In deciding what the level of
2 ordinary skill for the '761 patent is, you
3 should consider all the evidence introduced at
4 trial, including but not limited to:

5 One, the levels of education and
6 experience of the inventor and other persons
7 actively working in the field.

8 Two, the types of problems
9 encountered in the field.

10 Three, prior-art solutions to
11 those problems.

12 Four, rapidity with which
13 inventions are made.

14 And, five, the sophistication of
15 the technology.

16 The existence of each and every
17 element of the claimed invention in the prior
18 art does not necessarily prove obviousness.
19 Most, if not all, inventions rely on
20 building-blocks of prior art. In considering
21 whether or not a claimed invention is obvious,
22 you may find obviousness if you find that at the
23 time of the claimed invention there was a reason
24 that would have prompted a person having

1 ordinary skill in the field of computer science
2 to combine the known elements in a way the
3 claimed invention does, taking into account such
4 factors as:

5 One, whether the claimed invention
6 was merely the predictable result of using
7 prior-art elements according to their known
8 functions.

9 Two, whether the claimed invention
10 provides an obvious solution to a known problem
11 in the relevant field.

12 Three, whether the prior art
13 teaches or suggests the desirability of
14 combining elements claimed in the claimed
15 invention.

16 Four, whether the prior art
17 teaches away from combining elements in the
18 claimed invention.

19 Five, whether it would have been
20 obvious to try the combinations of elements,
21 such as when there is a design need or market
22 pressure to solve a problem and there are a
23 finite number of identified, predictable
24 solutions.

1 And, six, whether the change
2 resulted more from design incentives or other
3 market forces. To find it rendered the
4 invention obvious, you must find that the prior
5 art provided a reasonable expectation of
6 success.

7 In determining whether the claimed
8 invention was obvious, consider each claim
9 separately. Consider only what was known at the
10 time of the invention. Do not use hindsight.

11 In making these assessments, you
12 should take into account any objective evidence,
13 sometimes called secondary considerations, that
14 may have existed at the time of the invention
15 and afterwards that may shed light on the
16 obviousness or not of the claimed invention.

17 Secondary considerations of
18 nonobviousness are Leader's rebuttal to
19 Facebook's claim of obviousness. They include:

20 One, whether the invention was
21 commercially successful as a result of the
22 merits of the claimed invention rather than the
23 result of design needs or market-pressure
24 advertising or similar activities. The Facebook

1 website is commercially successful. It is for
2 you, of course, to determine whether the
3 Facebook website contains all the elements of
4 any of the asserted claims of the '761 patent.

5 Two, whether there was a long-felt
6 need for a solution to the problem facing the
7 inventors which was satisfied by the claimed
8 invention.

9 Three, whether others have tried
10 and failed to make the invention.

11 Four, whether others invented the
12 invention at roughly the same time.

13 Five, whether others copied the
14 invention.

15 Six, whether there were changes or
16 related technologies or market needs
17 contemporaneous with the invention.

18 Seven, whether the invention
19 achieved unexpected results.

20 Eight, whether others in the field
21 praised the invention.

22 Nine, whether persons having
23 ordinary skill in the art of the invention
24 expressed surprise or disbelief regarding the

1 invention.

2 Ten, whether others sought or
3 obtained rights from the patent holder.

4 And, eleven, whether the inventor
5 proceeded contrary to in accepted wisdom in the
6 field.

7 Finding any or all of these
8 secondary considerations may suggest that the
9 claim was not obvious.

10 Scope and content of the prior
11 art. In considering whether the claimed
12 invention was obvious, you must first determine
13 the scope and content of the prior art.

14 The scope and content of the prior
15 art for deciding whether the invention was
16 obvious includes prior art in the same field as
17 the claimed invention -- regardless of the
18 problem addressed by the item -- and prior art
19 from different fields that a person of ordinary
20 skill in the art, using common sense, might
21 combine if familiar so as to solve the problem,
22 like fitting together the pieces of a puzzle.

23 Do not consider what will happen
24 after the trial. Members of the jury, in this

1 case you may have heard or noticed inferences as
2 to what may happen after this trial. You are to
3 disregard any inferences as to what may happen
4 after you have rendered your verdict.

5 And, finally, Chapter 5, which is
6 entitled "Deliberations and Verdict."
7 Instruction number 5.1 is called Deliberation
8 and Verdicts.

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

15 Once you start deliberating, do
16 not talk to the jury officer or to me or to
17 anyone else except each other about the case.
18 If you have any questions or messages, you must
19 write them down on a piece of paper, sign them,
20 and then give them to the jury officer. The
21 officer will give them to me, and I will respond
22 as soon as I can. I may have to talk to the
23 lawyers about what you have asked, so it may
24 take me some time to get back to you.

1 Any questions or messages normally
2 should be sent to me through your foreperson,
3 who by the custom of this court is Juror Number
4 1 in the first row.

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

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

16 It is your duty as jurors to
17 consult with one another and to deliberate with
18 a view towards reaching an agreement if you can
19 do so without violence to your individual
20 judgment. Each of you must decide the case for
21 yourself, but do so only after an impartial
22 consideration of the evidence with your fellow
23 jurors.

24 In the course of your

1 deliberations, do not hesitate to re-examine
2 your own views and change your opinions if
3 convinced it is erroneous, but do not surrender
4 your honest conviction as to weight or effect of
5 evidence solely because of the opinion of your
6 fellow jurors or for the purpose of returning a
7 verdict.

8 Remember at all times that you are
9 not partisans. Your sole interest is to seek
10 the truth from the evidence in this case.

11 A form of verdict has been
12 prepared for you. You will take this form to
13 the jury room. When you have reached -- and
14 when you have reached unanimous agreement as to
15 your verdict, you will have your foreperson fill
16 in, date, and sign the form. You will then
17 return to the courtroom, and your foreperson
18 will give your verdict.

19 It is proper to add the caution
20 that nothing said in these instructions and
21 nothing in the form of a verdict is meant to
22 suggest or convey in any way or manner any
23 intimation as to what verdict I think you should
24 find. What the verdict shall be is your sole

1 and exclusive duty and responsibility.

2 I mentioned you will have a jury
3 verdict form. I want to tell you now before you
4 hear arguments from counsel what the verdict
5 form says because it lists the questions you as
6 a jury need to answer.

7 Section A is called Leader's
8 Patent Infringement Claims Against Facebook, and
9 question one is entitled Literal Infringement.
10 Do you find that Leader has proven by a
11 preponderance of the evidence that Facebook has
12 literally infringed each and every element of
13 any of the asserted claims of U.S. Patent Number
14 7,139,761? Yes or no.

15 And then further, if you answered
16 yes, please place a check mark next to the
17 claims you found to be infringed, and then the
18 asserted claims are listed there for you.

19 Question two is entitled
20 Infringement Under the Doctrine of Equivalents.
21 If you found that Facebook did not literally
22 infringe some or all of the claims of U.S.
23 Patent Number 7,139,761 in question one, do you
24 find that Leader has proven by a preponderance

1 of the evidence that Facebook has infringed any
2 of those claims under the doctrine of
3 equivalents? Yes or no.

4 And then if you answered yes,
5 please mark the claims you found to be infringed
6 under the doctrine of equivalents.

7 Question three is entitled Control
8 or Direction. With respect to its infringement
9 claims against Facebook, with respect to claims
10 9, 11, and 16, has Leader shown by a
11 preponderance of the evidence that Facebook
12 controls or directs the accused actions of
13 Facebook and users and/or Facebook employees?
14 And 3(a), is Facebook end-users instrumental and
15 3(b) is Facebook employees. Yes or no.

16 Question four, prior priority date
17 of U.S. Patent Number 7,139,761. Do you find
18 that Leader has proven by a preponderance of the
19 evidence that U.S. Patent Number 40/432255, the
20 provisional application, fully discloses each
21 and every element of every asserted claim of
22 U.S. Patent Number 7,139,761? Yes or no.

23 If you answered yes, please mark
24 the asserted claims of U.S. Patent Number

1 7,139,761 for which you found that each and
2 every element was fully disclosed by the
3 provisional application, and then there's a list
4 of the asserted claims.

5 Section B of the verdict form is
6 entitled "Facebook's Patent Invalidity
7 Defenses," and under Section B, question one is
8 called on-sale bar. Do you find that Facebook
9 has proven by clear and convincing evidence that
10 the asserted claims of U.S. Patent Number
11 7,139,761 are invalid because the alleged
12 invention was the subject of an invalidating
13 offer of sale? Yes or no question.

14 Two, prior public use. Do you
15 find that Facebook has proven by clear and
16 convincing evidence that the asserted claims of
17 U.S. Patent Number 7,139,761 are invalid because
18 the alleged invention was the subject of an
19 invalidating public use? Yes or no question.

20 Three, anticipation by iManage.
21 Do you find that Facebook has proven by clear
22 and convincing evidence that any of the asserted
23 claims of U.S. Patent Number 7,139,761 are
24 invalid because they are anticipated by iManage

1 DeskSite 6.0, iManage, yes or no. If you
2 answered yes, please mark the claims you found
3 to be anticipated and then there's a chart
4 listing the claims.

5 Question four, anticipation by
6 Swartz. Do you find that Facebook has proven by
7 clear and convincing evidence that any of the
8 asserted claims of U.S. Patent Number 7,139,761
9 are invalid because they are anticipated by U.S.
10 Patent Number 6,236,994 B1, Swartz, yes or no.
11 If you answered yes, please mark the claims you
12 found to be anticipated, and there's a chart
13 listing the asserted claims.

14 Question five, anticipation by
15 Hubert. Do you find that Facebook has proven by
16 clear and convincing evidence that any of the
17 asserted claims of U.S. Patent Number 7,139,761
18 are invalid because they are anticipated by
19 European Patent Number EP 1087306 or U.S. Patent
20 Number 7,590,934 B2, also known also Hubert, yes
21 or no. If you answered yes, please mark the
22 claims you found to be anticipated, and there's
23 a chart listing the asserted claims.

24 And finally, question six,

1 obviousness. Do you find that Facebook has
2 proven by clear and convincing evidence that any
3 of the claims of U.S. Patent Number 7,139,761
4 are invalid on the ground of obviousness, yes or
5 no. And if you answered yes, please mark the
6 claims you found to be obvious, and there's a
7 chart listing the asserted claims.

8 That completes my instructions.
9 They were fairly lengthy. I am going to give
10 you a fifteen-minute break before you begin to
11 hear the arguments of attorneys. Let me just
12 caution you again, although you're about to be
13 ready to deliberate, you're not yet ready to
14 deliberate, so you're still not to talk to one
15 another or to anyone else about the case until
16 after we come back and hear the arguments from
17 counsel, so let's take a fifteen-minute break.

18 THE CLERK: All rise.

19 (The jury exited the courtroom at
20 10:09 a.m.)

21 THE COURT: We'll be back in
22 fifteen minutes.

23 (A recess was taken at 10:09 a.m.)

24 THE CLERK: All rise.

1 (The proceedings reconvened at
2 10:25 a.m.)

3 THE COURT: We'll go ahead and
4 bring the jury in.

5 (The jury entered the courtroom at
6 10:25 a.m.)

7 THE CLERK: Please be seated.

8 THE COURT: Okay, ladies and
9 gentlemen of the jury, we will now hear closing
10 arguments from the parties.

11 Mr. Andre.

12 MR. ANDRE: Thank you, Your Honor.

13 May it please the Court, ladies
14 and gentlemen of the jury.

15 First and foremost, thank you.

16 I'm sure spending six days talking about
17 computer science technologies was not the top of
18 the things on your list you wanted to do this
19 week. We really appreciate the time and
20 attention you paid to this. It means everything
21 to us, the teams that spent hours. It means
22 everything to Leader.

23 This little company in Columbus,
24 Ohio, in the last years had to survive a lot of

1 stuff. They survived the dot-com-bubble burst
2 in the late '90s or 2000. They survived the
3 economic tsunami that's hit the country. Will
4 they survive whatever happens at the end of this
5 trial? They probably will.

6 To be honest with you, these guys
7 are survivors; at least they call it the tough
8 Midwestern mentality. I think that's right, but
9 they really shouldn't have to. They shouldn't
10 have to have survived someone else taking their
11 technology and using it without their
12 permission, and you and you alone can make sure
13 that doesn't happen.

14 I started this case talking about
15 innovation, how Leader was innovators. I showed
16 you a 1997 business plan, PTX 767. This is the
17 business plan at the dawn of the internet.

18 You saw Leader thinking about new
19 ways to solve problems. Innovation. That's
20 what it's all about.

21 I talked about the development
22 team that put forward hours and hours and hours
23 of hard work, 145,000 man-hours in five years,
24 \$10 million this company invested in developing

1 this suite of technologies.

2 That technology was developed for
3 one purpose: To help people communicate better,
4 to network, collaborate, whatever you want to
5 call it. It was about communication.

6 Now Facebook has made an issue of
7 the fact that in 1997, these guys weren't making
8 anything about essential networks. Their
9 invention was not to be used for social
10 networks. It's about business solutions, I
11 believe they said.

12 There's been a ton of great
13 inventions in which people have intended it for
14 one purpose, and it turned out to be something
15 better used for another purpose. You heard
16 about duct tape, Play-Doh, various other
17 inventions like that.

18 My favorite story is about five
19 years before Leader was founded. There was a
20 group of researchers who come up with a drug
21 called sildenafil. These guys discovered a new
22 drug, and they were very excited, thought it was
23 going to help chest pain, angina, and they got
24 patents on the new drug. Very, very excited

1 about it.

2 Did a first clinical trial, and
3 they were disappointed because the drug didn't
4 do so well for heart pain, but it had an
5 interesting side effect. Some of you may have
6 heard this story. That drug today is one of the
7 top-selling drugs in the country -- or in the
8 world rather -- under the name Viagra. The side
9 effect, you can probably guess what that is.

10 Do the inventors still deserve the
11 benefits of inventing the drug? Of course they
12 do. Does Leader deserve the benefit of
13 developing a platform for an internet-based,
14 web-based platform when none were available?
15 None or very few. None the way they came up
16 with it.

17 They invented this technology
18 before social networking. They invented this
19 technology when the founders of Facebook were
20 still in grade school. They were out there
21 doing it, and the first thing they did after
22 they got the technology developed, they shared
23 it with the world.

24 They went out, and we saw PTX 765,

1 and they published this to the world, saying we
2 did it. This is proof we did it.

3 They talk about the platform
4 requirements and platform standards. They gave
5 the world an invention. This is what they did.
6 They did that in 2003.

7 Now, at the beginning of this
8 case, I showed you a timeline. This timeline.
9 We've gone through about how Leader was founded,
10 about when the invention occurred, in 1999. We
11 showed you evidence of that, uncontested.

12 We showed you the year before
13 Google, talked about how they titled the
14 provisional application days after they came out
15 with the invention. The day they went to the
16 patent office, they published their inventions
17 in 2003.

18 Facebook came out in 2004. The
19 patent issued in 2006, and now we have
20 1.8 billion internet users. That's a
21 20,000 percent increase.

22 Everything on this timeline is
23 true and uncontested. The truth is what we're
24 here for today.

1 I mean, a few years back I was
2 working in science. I was a scientist actually.
3 I'm kind of new to this legal thing, and what
4 drew me to the law was the chance to find truth,
5 to come to great courts like this and courtrooms
6 and stand amongst people like you and see if we
7 could find what the truth is.

8 One of the first things they
9 taught in law school is this is not an exercise
10 in finding the truth. It's an exercise in
11 advocacy. I heard judges say it, lawyers say
12 it.

13 I don't believe it. I think this
14 is about truth. Maybe I'm naive. Maybe it's
15 pig-headed. I'm not sure what I am, but I think
16 it's an exercise in truth and what the best way
17 of finding out what the truth is. That's my
18 quest, to give you the evidence.

19 And during the opening statements,
20 Facebook's counsel said we're going to talk
21 about specifics versus generalities. I had
22 hoped we were going to see that, but after
23 ending the week, what you got was a lot of
24 evidence from Leader. We showed you a lot of

1 different types of evidence.

2 And what you got from Facebook
3 were cartoons, a lot of animation and cartoons
4 and artistry. That's the difference, so I
5 wanted to show you how I think the truth and how
6 our team thinks of truth.

7 How do you find the truth? The
8 way to find the truth is through the evidence.

9 Day one I told you I was going to
10 show you overwhelming evidence of infringement.
11 Seven sources said we'll show you Facebook's
12 website, show you confidential Facebook
13 documents, public Facebook documents, the
14 Facebook developer documents, Facebook engineers
15 testimony, Facebook platform application, and
16 the source code itself. Those were the seven
17 sources of truth that I was going to show you.

18 And we went through with
19 Dr. Vigna. Remember him on the stand for two
20 days? And we went through these seven sources
21 of evidence with checking in these boxes. We
22 went through painstakingly, box after box after
23 box, on every claim and put in these red checks.
24 Every time you see a red check next to one of

1 these independent claims, there's at least five
2 sources of truth behind it. The dependent
3 claims, we had at least two more. Every check
4 has evidence behind it. Every single one.

5 Now I want to say a little more
6 about Dr. Vigna. Do you remember Dr. Vigna, our
7 amazing Italian expert who can make source code
8 sound interesting, which is a trick?

9 Dr. Vigna, when he was talking
10 about the Facebook technology, he was the only
11 expert in this entire case that used the right
12 claim construction. He used the construction
13 provided by the Court. He didn't try to rewrite
14 the claims. He used the construction provided
15 by the judge, and you heard the judge read those
16 instructions to you.

17 One of the big issues in
18 contention was what does "wherein" mean.
19 Dr. Vigna says it means "in which." The other
20 experts had different definitions. You heard
21 from the Court it means "in which."

22 Dr. Vigna was the only expert,
23 when we talk about Facebook's technology, that
24 explained what the preceding event meant in the

1 "dynamically updating." What is the preceding
2 event? These claims are written in functional
3 language. These are complex claims in
4 functional language in computer science.

5 Dr. Vigna explained what the
6 preceding event was happening in the technology.
7 That's what the claims are about. It's not a
8 preceding event in the sentence. This is not
9 some kind of exercise. It's complex technology.

10 When you talk about the preceding
11 event, it's based on what's happening in the
12 technology. Dr. Vigna was the one who explained
13 that to you over and over and over again.

14 And finally the most important,
15 Dr. Vigna was the only person in this entire
16 case that showed you Facebook's technology. No
17 one else did. Think about that. They had three
18 of their engineers on the stand. They had their
19 expert on the stand. Only one person showed you
20 Facebook's technology. That was Dr. Vigna, and
21 we'll show you some of the things he showed you
22 last week to remind what we saw.

23 First thing he did was make a
24 movie about going on the internet. Couldn't get

1 internet in the courthouse, not allowed to do
2 so. He showed you getting on the internet and
3 using Google to Facebook, and this interceptor
4 command that stops the commands going out in
5 Facebook and looking at them.

6 Here he is logging into Facebook,
7 and he used the bird analogy, how he cut the
8 bird and looked at it and sent it to Facebook.
9 This is real activity of the Facebook website.

10 He logs in, and he's on his home
11 page. He wants to go to profile page and clicks
12 the button. That signal is being sent to
13 Facebook, but he stops it first.

14 What does he show you? He showed
15 you Facebook tracking him as we went from his
16 home page to his profile page, and he releases
17 this code to go to Facebook and pushes a button
18 and comes back, and now he's on his profile
19 page.

20 He wants to change his photo. He
21 wants to put in new user-defined data, so he
22 sends a request to Facebook. They give him the
23 source code module, how to upload the photo,
24 does so, releases it, comes back, and now he's

1 doing to browse to things, which is user-defined
2 data. He wants to upload.

3 He picks which one. He looks,
4 stops the signal, and there it is. That's
5 information about the user-defined data, the
6 photo and the context information about it is
7 going to be stored in metadata on the Facebook
8 servers.

9 Once he releases it, identify the
10 cookies and tracking information and everything
11 that Facebook collects all this different
12 profile information. He forwards it to
13 Facebook, comes back, uploads the picture, and
14 bingo. User-defined data that he picked is now
15 on Facebook.

16 The context information about that
17 photo is stored in metadata on the photo table.
18 Dr. Vigna showed you that. He then went to show
19 you how they do the tracking.

20 Same thing on the internet. He
21 wants to go down and see his friend Mary Smith,
22 so he clicks over the Mary Smith. Signal goes
23 to Facebook. He stops it. He says it's
24 tracking him, going -- you see here all these

1 unique identifiers. This is him going to
2 another context. First context to second
3 context. You see all the information.

4 He forwards it, and now Mary
5 Smith's page. They know he's there. They kept
6 up the metadata, tracked him going there.
7 Writes a message on Mary's wall, "what do you
8 want to cook tonight," clicks "share." There's
9 going to be an update in the metadata about
10 where he is and what he just did, the action he
11 just took, and that's the preceding event.

12 When it comes back, when you show
13 the information that's being clicked, all this
14 tracking information based on that activity and
15 based on the fact that he's at that second
16 context, it comes back.

17 You notice his new profile photo
18 shows up here. That was accessed from the first
19 context. You can see right here, shows it was
20 in the first context. That was what was in his
21 previous page. That's all the different
22 information.

23 He showed how when he goes back to
24 his profile page, which he'll do here in a

1 second, goes back to his profile, you notice
2 there's a statement there, "John wrote on Mary
3 Smith's wall," evidence that they tracked him
4 going over there, that when he was there he took
5 an action on the page. That preceding event
6 caused metadata to be updated, and the
7 user-defined data, the data from the first
8 context, is accessed into the second context.

9 First of all, getting to see
10 something like that is pretty cool. I didn't
11 know that kind of stuff existed, to be quite
12 frank. Knowing it under the hood, as they call
13 it, seeing it happen, walking through the claim
14 elements one by one, showing it live on the
15 internet. He's the only person who did that.

16 We also looked at documents. We
17 look at three types of documents: The
18 confidential documents, the public documents,
19 and the developer documents. With Dr. Vigna
20 alone, we marked twenty-four exhibits.
21 Twenty-four exhibits on eleven claims. Think
22 about that.

23 The kind of documents we showed
24 you about the context information, PTX 904,

1 returns metadata about all of the photo albums
2 by specific users. We showed you PTX 252,
3 almost walked you through the first claim
4 element, upload data to Facebook, put it on the
5 storage or database. Metadata about it is
6 passed.

7 Confidential documents that show
8 you the very first element, PTX 907, talks about
9 this is the actual photo table. This is the
10 context information of information kept in the
11 photo table. This is in metadata. All these
12 different categories of information they
13 provide, this came from another confidential
14 document.

15 We kept track of the actions you
16 take on Facebook. Facebook tells people we
17 track you. That's what they do.

18 PTX 300, they talk about who you
19 can track, how many people Facebook users start
20 and stop viewing your post in news feed. Once
21 again they tell people, we're tracking you. If
22 you're on Facebook, we know what you're doing.

23 PTX 341. This is confidential
24 document talking about the feed tracking

1 logging. This is how they do the logging of the
2 tracking. Dr. Vigna explained that in great
3 detail.

4 PTX 180, the session table and
5 cookie table. All stored in the user database.
6 Once again tracking the user. The documents in
7 this case were overwhelming.

8 You also heard from multiple
9 Facebook engineers. Now, Mr. Cox came live.
10 When they talked about the technology, they
11 couldn't help but give us the infringement
12 story. You can prove infringement of these
13 claims with their testimony.

14 Mr. Cox talked about -- so the
15 first you -- you uploaded your photo. What was
16 that information? The metadata about the photo
17 itself. The photo table, user-defined data, the
18 photo, the context information is stored in
19 metadata, in the photo table.

20 Mr. Wiseman talking about
21 uploading photos. Depending on what context
22 you're in, might some other information -- it
23 will take some bytes and files and store them in
24 your photo filer, and then it will create a

1 database entry that represents that photo. Once
2 again the context information is being stored in
3 metadata in the photo table.

4 Ms. Keefe talked about when you go
5 from one context to the seconds context -- used
6 those words to people at Facebook.

7 "When they go from one profile
8 page to another profile page, they're
9 going from the first context to the
10 second context; right? They meant that
11 when that was -- they go from first
12 context to second context. That's used;
13 right? That's a page -- you -- you know
14 -- you -- yeah, when they move from one
15 context to another, that's logged
16 metadata, is when you go from one
17 context to another."

18 Next slide, Dan Rose, vice
19 president of Facebook, called it tracking.

20 "When we -- when something shows
21 up on the website, by definition we're
22 tracking it. We have to track it in
23 order for it to show up on the website.

24 "I don't know what you're

1 referring to by tracking, but how
2 logging an action in a database
3 somewhere so we can present that action
4 on the website is something -- that's
5 what we do. That's what the site does.
6 It tracks. Of course it does."

7 Chris Cox. "Does Facebook track
8 user movement from one location to
9 another using anything other than
10 cookies?"

11 "Yeah, it does. It logs."

12 They asked Mr. Cox what that
13 meant.

14 "So when it's logged, is that
15 tracked? I mean, what does that mean,
16 'logged'?"

17 "So there's a file called log
18 file, and that gets a new line, a new
19 row, th at -- just say you know this
20 person looked at this page at this
21 time. You go from one page to another,
22 you get your log file update."

23 "So it gives you information about
24 the ID of the person?"

1 "Yes."

2 "It gives you information about
3 the page they went to?"

4 "Yes, and the time."

5 "Yes, metadata. That's all that
6 is. It's tracking information."

7 That's in the methodology.

8 Next time Mr. Cox talks about,
9 "You testified that when you have a
10 photo, there's metadata stored about
11 that photo in the photo table; right?"

12 "Yes."

13 "And then when you go to someone
14 else's profile, you write on the wall,
15 you get metadata stored in the wall
16 table; correct."

17 "Yes."

18 "And you also get metadata stored
19 in the minifeed table; right?"

20 "Yes."

21 They've proven our case for us.
22 Their engineers.

23 Next slides. Mr. Wang.

24 "What metadata would be stored

1 there?"

2 "So the data, I believe, is stored
3 on the minifeed data. The minifeed data
4 information."

5 "And finally, Mr. Wang, all the
6 tables: The photo table, the minifeed
7 table, the wall table, the log file
8 table, all these tables, all these
9 tables are maintained on the user data;
10 is that right?"

11 "Yes, the user database is
12 basically the service that we use to
13 query all these different tables."

14 Their engineers gave us
15 infringement. They testified. When they talked
16 about the log, they gave it to us. Dr. Vigna
17 confirmed all this. They didn't contest
18 anything Dr. Vigna said on the stand. They only
19 agreed with it.

20 We showed you Exhibit 934, and
21 you'll have this in the jury binder. If you
22 look at the sides and remember what Dr. Vigna
23 testified to, he goes to his first context.

24 This is his home page. So he's in

1 his first context right here. That's it.

2 He wants to interact with the
3 site. He wants to upload a photo. What
4 happens? User-defined data, the photo itself,
5 comes into the site. When that happens,
6 metadata, the context information about this
7 photo, is stored in metadata, and there is it.
8 The context information, associated user
9 environments, profile photo stored in metadata.

10 PTX 907. That's the context.
11 That talks about the metadata about the
12 user-defined data. When he goes to Mary Smith's
13 wall, the second context, you see the tracking
14 information is here. They know he's over there,
15 and that's what we were talking about too,
16 tracking the user from the first context to
17 second context.

18 It's in the session table, the
19 cookie table. It's all stored on the user
20 database right there.

21 Exhibit 180. Takes an action on
22 Mary Smith's wall, accesses data provided in the
23 first context to the second context, her wall,
24 accessing his photo to come to her wall. That's

1 accessing the data previously uploaded in the
2 first context, and that is dynamically updated
3 metadata based on the change. In other words,
4 metadata is updated with information regarding
5 the second context. You saw it in the code
6 right there.

7 Finally go back to Dr. Vigna's
8 page, and it says he just wrote on Mary's wall.
9 This is the evidence of the tracking and dynamic
10 update of the metadata. Those are Exhibit 9842
11 in your packet. You can see it every step of
12 the way.

13 We also showed you source code.
14 Source code. We locked the doors. We taped up
15 the windows to make sure no one sees source
16 code. This is the DNA. This is it. That is
17 what it's all about with computer scientists.
18 They protect source code because this is the DNA
19 of the website.

20 Dr. Vigna got in the source code a
21 lot, and sometimes it seemed hard to follow. It
22 was. He showed it to you and showed you file
23 after file after file, and what was truly
24 amazing was that as he went through that and

1 showed every single aspect of infringement, no
2 one contested it.

3 They had three engineers who coded
4 that source code. Three of them took the stand.
5 They had an expert that took the stand. No one
6 opened up the source code.

7 Do you think if Dr. Vigna was
8 giving improper testimony that someone would
9 have opened up the source code and said he's
10 wrong? They would have, but they couldn't.
11 They couldn't contest it.

12 When the engineers and their
13 expert talked about source code, what you got
14 was this source code. That's what they use.
15 They use cartoons. They use animation.

16 We used source code. That's the
17 evidence.

18 You heard Judge Stark talk about
19 the method claims direction and control. Does
20 Facebook have direction and control of the
21 people who use the site?

22 Well, employees, these people are
23 under employment contracts. They tell them to
24 test the site. They tell them to use the site.

1 You saw evidence of this in PTX 145.

2 How about the users and the
3 developers? Well, there's terms of use there as
4 well. They give users of this website a laundry
5 list of things. You will do this. You will not
6 do that. You will do this. You will not do
7 that. There are rules playing on Facebook. You
8 can't do certain things, and some things you
9 have to do.

10 Facebook supplies the website.
11 You heard that in the jury instructions. They
12 supply the website for people to use it. When
13 people use it, that's infringement. It's under
14 the direction and control of Facebook.

15 We're not saying that Facebook
16 puts a gun to someone's head and says, you have
17 to use Facebook. They don't have that kind of
18 control. That's not what it means.

19 What it means is they supply the
20 website. If you follow the rules, you're under
21 the direction and control of Facebook. You'll
22 see that with claim 9 and the dependent claims.

23 Now I think it's important to
24 compare the evidence you heard from us versus

1 evidence you heard from them. They put three of
2 their engineers on the stand, live testimony.
3 You heard from Mr. Cox, Mr. Wiseman, and
4 Mr. Roswell. You heard from Dr. Herbsleb, and
5 shockingly all you saw, the only exhibits marked
6 with four witnesses, the only exhibit marked,
7 *Yahoo for Dummies* and *e-Bay for Dummies*. Two
8 exhibits. That's it.

9 What you did get a lot of were
10 cartoons and animations drawn up by lawyers.
11 One of the things that's a little thing gets on
12 my nerves, every witness got up there and said,
13 I created some exhibits. I created exhibits. I
14 created slides for everyone. They had three or
15 four witnesses say, I created slides, and then
16 they show the slides, and they're exactly the
17 same as the previous person.

18 They didn't create the slides.
19 The lawyers created the slides. We all know
20 that. Probably a trivial thing, but nonetheless
21 it goes to who can you believe.

22 They did use a lot of cartoons and
23 animations. They showed a picture of the
24 Facebook website and a fake photo table. We

1 were wondering if you took those cartoons and
2 actually applied the real evidence, the evidence
3 that came into trial, the source code, the
4 technical documents, the testimony, if -- what
5 would it look like?

6 This is what it would look like.
7 This is Facebook's slides. He's in the first
8 context. These are the storage components.
9 They have the metadata here and storage
10 component here.

11 First guy wants to upload photo.
12 What happens? You get some photo is stored
13 here, and you get some activity log here that
14 Chris uploaded a photo, and that's the context
15 information right there in the photo table.
16 Context information, tracking information.
17 There you go.

18 Next slide, little guy goes over
19 to context two. What happens? He's tracked on
20 the log table. You heard Mr. Cox talk about
21 this. Metadata is being updated. Him moving A
22 to B, context one to context two. You have the
23 fact that he's tracked, additional tracking
24 information.

1 If he wanted to access the photo
2 he uploaded in the first context, what happens
3 in the second context? What happens, metadata
4 is updated with tracking information. That's
5 what it would look like if you followed the
6 evidence.

7 Now, you saw these mock-ups where
8 they had a mock-up of the website with servers
9 here as well automatically responding to this
10 activity, uploading the photo. What happens?
11 You get tracking information, context
12 information, about the photo, photo is stored in
13 the storage component.

14 You go to the second wall, you're
15 tracked going over there. You take an activity
16 on the second wall, hit the share button,
17 metadata is updated with the tracking
18 information. Once again walking right through
19 the claims.

20 They also showed these type of the
21 three server slides. This is the storage
22 component. Their own expert said storage
23 components can be distributed. All these -- of
24 these make up the storage component.

1 What happens? When you look where
2 metadata is stored, it's stored on different
3 logs and tables. They're in the user database.
4 Tracking information is stored in minifeed table
5 or news feed, context information stored in the
6 photo table.

7 Now, Facebook made a big issue the
8 context information is not changed. It's not
9 changed.

10 Well, the claims don't require
11 that. Why would you change context information
12 about the size of the photo when you take
13 another activity? What the claims require is
14 that the context information be updated, but
15 only the metadata be updated.

16 Look at the claims. Updating the
17 stored metadata base, unchanged, not changing
18 the context information. They now based their
19 whole case on the fact that nothing happens in
20 photo there. All the changes take place
21 elsewhere.

22 That's not what the claims say.
23 Dr. Kearns was their expert regarding
24 non-infringement, and Dr. Kearns didn't use

1 technical documents or source code. All he did
2 was take the claim language. He separated out
3 the claim language.

4 He didn't like the Court's
5 construction. He didn't use it. He used a
6 designation which is in direct violation with
7 what the Court told you in the instructions. To
8 put limited definitions into the claim, he
9 contradicted Facebook's own engineer testimony.

10 Dr. Kearns stated the context
11 information was separate. Mr. Greenberg and
12 Mr. Weinstein all say no context information is
13 captured. You heard three of the witnesses talk
14 about the fact the metadata is used. The
15 context information is stored in metadata. You
16 heard three of their engineers say that.

17 I couldn't get Dr. Kearns to admit
18 they tracked people. He wouldn't agree to that.
19 Everyone in this case knows they track people.
20 The documents, the engineers, everyone.
21 Dr. Kearns was not going to agree to anything.

22 He didn't challenge the technology
23 of Dr. Vigna because he couldn't, and the only
24 thing he could do to give an opinion of

1 non-infringement was manipulate the claim
2 language, ignore the Court's claim construction,
3 and contradict Facebook's engineers.

4 Here's the funny thing about it,
5 if you look at their position that the metadata
6 has to be updated when you go from one context
7 to the second context, simply going from one
8 context to the second context, they still
9 infringe. The little man, again he's in the
10 first context. He's going to go to the second
11 context, and this is based on their own
12 testimony.

13 What happens? Log table comes in,
14 metadata is updated. Even under their theory of
15 the case, which is not correct, infringement is
16 still there. Metadata is updated by the
17 tracking of a user from the first context to the
18 second context.

19 When you go back to the jury room,
20 you're going to look at all the evidence, and
21 you have the scales. The judge said
22 preponderance of the evidence. Just has to tip
23 a little bit one way or the other.

24 We gave you seven sources, source

1 code, website, three types of documents. We
2 showed you testimony of the engineers. We
3 showed you the testimony regarding the
4 applications.

5 They gave you dummies. That's it.
6 *e-Bay for Dummies*. That's it. That's all the
7 evidence they gave you. Their own testimony
8 proves they infringe.

9 Now, I told you at the beginning
10 of the case they didn't have a non-infringement
11 story, and I think we proved they didn't. No
12 evidence of it whatsoever. When you're
13 debating, when you're deliberating the
14 infringement story, we gave you evidence. They
15 gave you nothing.

16 When it comes to invalidity, the
17 kitchen-sink mentality. They have a heavier
18 burden for validity, and they do, but they took
19 a swing at it. They stepped up to the plate and
20 tried it under the clear and convincing
21 standard.

22 They start off by saying that
23 Leader tried to sell the product before they
24 filed the patent application or demonstrated the

1 product. I want to talk about sales.

2 First, in order for them to prove
3 that Leader sold the technology of the '761
4 patent more than one year prior to that
5 effective filing date, they had to prove three
6 things. All three of them. They miss one of
7 them, they're out. All three have to be shown
8 in this case. They can't show one of them, let
9 alone three.

10 They have to show that
11 Leader2Leader contained the technology of the
12 '761 patent prior to December 2002. That would
13 be a neat trick. It wasn't invented until
14 December 2002.

15 Provisional application does not
16 teach one of skill in the art to make and use
17 the invention, and three, an actual offer for
18 sale took place. They need to prove all three.

19 What evidence did Facebook try to
20 prove number one? That Leader2Leader had the
21 patented technology. This is the sole piece of
22 evidence they showed you in this litigation,
23 written by the lawyers. They asked us for each
24 claim of the '761 patent, identify the product

1 that is covered by the patent. We identified
2 Leader2Leader, powered by Digital LeaderBoard is
3 covered by the '761 patent. That is their sole
4 piece of evidence.

5 What is the date of this?

6 April 17, 2009. April 17, 2009. The '761
7 technology was in Leader2Leader, powered by the
8 Digital LeaderBoard. It wasn't there in
9 December 2002, and they didn't try to prove it.
10 That's their sole piece of evidence. Nothing
11 else.

12 Now, when Lisa was taking evidence
13 regarding this, you saw that she put together
14 this timeline and handwrote it up there. This
15 is the date they're talking about, December 11,
16 2002. Leader2Leader did not include '761.

17 We went through methodical
18 testimony evidence, documentary evidence,
19 common-sense evidence, whatever you want to call
20 it, to prove that it did exist then. It was a
21 brand name, Leader brand name, and the '761
22 technology was no more in that brand name before
23 they invented it than the Corvette with the
24 Bluetooth wireless phone headset was in a 1957

1 Corvette. It's a different story.

2 You saw testimony of Mr. Lamb. I
3 loved Mr. Lamb. He reminded me of Kramer in
4 *Seinfeld*. You liked the guy, knew he was as
5 honest as they come. This guy could not tell a
6 lie.

7 He was so specific referring to
8 Leader2Leader, referred to a collection of
9 technologies and applications that we were
10 trying to build. Not a '761 patent.

11 Mr. McKibben testified to the same
12 thing, you may remember. You may remember this
13 little flip pad that we had a problem with a
14 couple times. This was what we were talking
15 about.

16 What was Leader2Leader? It's a
17 collection of technologies. That was
18 Leader2Leader, LeaderPhone Leader Alerts, Leader
19 Camera. When you're talking about Leader2Leader
20 before December 2002, it didn't have the '761 in
21 it. They didn't try to prove it. They didn't
22 take the engineers' testimony. They didn't show
23 you documents or anything other than the
24 interrogatory response from 2009. Even showed

1 you exhibits.

2 When we talk about Leader2Leader
3 as a brand supplied under the brand name
4 Leader2Leader, this is this digital
5 Leader2Leader board, these are brands. They're
6 trying to get you to say since the brand had the
7 technology in 2009, it must have had it in 2001.

8 Ladies and gentlemen, undisputed
9 fact is the patent was filed days after they
10 completed the technology. Days. Undisputed.
11 You heard from Mr. Lamb. You heard from
12 Mr. McKibben.

13 They have the burden of clear and
14 convincing evidence. They didn't get close to
15 proving one. They couldn't prove all three.
16 Didn't prove that.

17 One second thing they had to show
18 was that the provisional application doesn't
19 support the claims. Lot of talk about the
20 provisional didn't have drawings in it.
21 Nine-and-a-half pages of source code. When they
22 invented the technology, they took it out,
23 ripped it out, and put it into the provisional
24 application with a description, and they went to

1 the Patent Office within days.

2 You heard two experts testify to
3 it: Dr. Herbsleb yesterday and Dr. Greenberg.
4 Dr. Herbsleb showed you the code. He had one of
5 his students go through and say here's a
6 provisional, build something with it, nothing
7 else. See if you can build something with it.

8 Dr. Kearns, PTX 1125. He built
9 it. Ten pages of code, ten hours to build
10 something that was embodying the claims of the
11 patent based on the provisional patent only.
12 That's evidence.

13 That's not Dr. Greenberg
14 testifying, I don't know what the code said. He
15 says the provisional didn't have context
16 information in it. Just read it. It talks
17 about gathering context information.

18 Dr. Greenberg wouldn't admit to anything. He's
19 not going to say that provisional application
20 supported these claims. He wasn't paid to do.

21 So you also heard Mr. Lamb's
22 testimony regarding the provisional application.
23 Once again, Mr. Lamb, his integrity cannot be
24 impugned. He asked him, "What does the code in

1 this application implement?"

2 "By itself, this code doesn't
3 implement anything." He was consistent
4 about this every step of the way. The
5 code doesn't implement anything.

6 "Why was it included?"

7 "We included this because they
8 were key sections of a larger pile of
9 code that gave a clear indication to
10 someone that wasn't us trying to build
11 the system they needed to do."

12 The code was there. It gives you
13 a recipe. Add the egg, add the butter, add the
14 flour, bake the cake. You can't run it on a
15 machine and then tell someone how to build it.
16 Mr. Lamb testified can you provide your
17 understanding of what information is included in
18 the code in terms of, does it give an overview
19 such that one can build the technology you're
20 trying to get a patent for.

21 Mr. Lamb: "Yeah, my
22 understanding, my intention is the code
23 would do so. It would give the person
24 instructions necessary to be able to

1 implement the technology we were
2 patenting."

3 Mr. Lamb was on the stand live.
4 Facebook's counsel never challenged him on that,
5 not once.

6 If you look at the three sales
7 that Facebook is going try to allege, they have
8 one to Boston Scientific, one to Limited, and
9 one to Wright-Patterson Air Force Base. If you
10 give Leader the benefit of the provisional date
11 and move this time line back to where it
12 belongs, in 2001, one year before it, these
13 sales go by the wayside, there's nothing there.
14 Strike two.

15 Now we're going to the third
16 element they have to prove now. They're
17 oh-for-two already. There were no offers to
18 sell to those three companies. They said there
19 were offers to sell to. They were not offers or
20 anything.

21 We start off with Wright-Patterson
22 Air Force Base, where they put in a BAA, broad
23 agency announcement. This is a funding request
24 from the government, like putting in a grant

1 application. They put this in, and what they
2 wanted was to get, the government to fund the
3 research. This is right after 9/11, and the
4 government was looking for people to come up
5 with new ways to communicate.

6 They want their technology funded.
7 They put in a BAA in 2002. The BAA is very
8 explicit. This is establishing a partnership
9 between the government and the recipient, rather
10 than a buyer/seller relationship. It's not a
11 sale. This is a partnership where you trade
12 funding from the government.

13 The offer to sale to
14 Wright-Patterson is not. By law, it cannot be.
15 Look at the guidelines. Not an offer for sale.

16 The Limited. Remember The
17 Limited? Heard a lot about the sweetheart deal
18 Mr. McKibben was trying to get Mr. Schlessinger
19 to help him to get some money. They were trying
20 to get \$10 million financing. Help me out.
21 We'll give you a sweetheart deal. He said we
22 will be very flexible in adding Limited's
23 requested features to the system.

24 Obviously the '761 patented

1 technology had not been invented yet. What was
2 he going to give The Limited? E-mail, fax, file
3 exchange, bulletin boards, news ideas, feedback,
4 security. That's what they were talking about
5 at The Limited. There's nothing in record that
6 showed they made an offer to sale to anybody.

7 Go to PTX 773 when they were
8 trying to finally get the deal to The Limited.
9 They tried to do Leader beta agreement. You
10 heard that beta was experimental use. Even when
11 they finally were getting close to doing a deal
12 with The Limited, it was experimental use, and
13 it was in 2003. It wasn't 2002 or 2001. 2003.
14 Once again not a sale.

15 Finally with Boston Scientific,
16 there's nothing in evidence to show that Boston
17 Scientific was ever offered anything until they
18 entered into an agreement in July 2003. Once
19 again nothing in 2002 or 2004, as I said. Even
20 in 2003 with Boston Scientific, everything they
21 were doing at that time were beta testing
22 agreements on the DTX 178, the classic beta
23 customer Leader2Leader broadband platform.

24 '761 was not plugged into that

1 platform until 2003. That's the uncontested
2 evidence in this case.

3 For three, they can't show that
4 '761 technology was in Leader2Leader. They
5 can't show that there was an offer for sale, and
6 the provisional application applies in this
7 case. They can't prove one of the three, let
8 alone all of the three.

9 Talk real quick about the
10 demonstrations. They say they're public
11 demonstrations. In order to be a public
12 demonstration, they had to prove two things:
13 One, that they were demonstrating the '761
14 technology, which obviously wasn't around; and,
15 two, that they didn't have nondisclosure
16 agreements.

17 When you go to the jury room, you
18 will see Exhibit 765. They put in all of our
19 nondisclosure agreements. Thirteen three-inch
20 binders. Now what they had, they were not going
21 to disclose their technology or their business
22 plans in public, period. End of story.
23 Thirteen binders back in the jury room. I hope
24 you don't look at them all, but you can if you

1 want to.

2 The first party that Facebook says
3 it made a demonstration to was Wright-Patterson.
4 Thought they had them. They said you had a
5 meeting with Wright-Patterson on April 3, 2001,
6 and you didn't have a nondisclosure agreement
7 until April 16, two weeks later.

8 Well, that blew up in their face.
9 The meeting was with Vincent Russi. They were
10 talking about the camera system, and that was
11 dated April 2, 2001. Once again NDA was in
12 place. The confidential agreement was in place
13 before they had the meeting.

14 The next person they want to show
15 the public demonstration to The Limited, Len
16 Schlessinger. The problem with that is
17 confidential agreement was signed with
18 Mr. Schlessinger and the people at The Limited.

19 Peter Gartman, who was also at The
20 Limited, you can see he signed it June 7th, well
21 before the meetings. There was fifteen NDAs
22 signed with The Limited. They asked
23 Mr. McKibben, why did you sign so many?

24 "We wanted to be careful and know

1 every individual they met with knew."

2 Boston Scientific was another one,
3 signed a nondisclosure agreement in November.
4 They had a nondisclosure agreement with them as
5 well.

6 All three of them went by the
7 wayside at the beginning of the case. Counsel
8 for Facebook said they were going to show all
9 these demonstrations, all these demonstrations.
10 They were going to show first one back in
11 Leader2Leader, 1999. Guess what? They didn't
12 even try. Didn't put any evidence. Let it go.

13 They also talked about University
14 of Dayton. They were going to put in all this
15 evidence. They didn't try. Forgot about it.

16 They said they were going to show
17 a demo to the State of Ohio Police and Ohio
18 Education Association. Nothing.

19 You also heard about the Columbus
20 Police Department. Once again nothing.

21 And you also heard about a
22 demonstration to apply material. No evidence of
23 it. They didn't mention it.

24 These are ones they didn't try.

1 The ones they did try: Wright-Patterson, NDAs;
2 Boston Scientific, NDAs. Once again nothing
3 there. It's all smoke. There's no substance.

4 Finally talk about the prior art
5 real quick. You heard Dr. Greenberg talk about
6 the prior art, and you also heard Dr. Herbsleb.
7 One thing is very clear about this case: What
8 the '761 patent is about. It's about tracking
9 users and being user-centric.

10 When you look at the '761 patent,
11 the highest contextual assumption is there
12 exists an entity that consists of one or more
13 users. That's it. It's about the user.

14 The three pieces of prior art they
15 brought forward are about documents. You heard
16 Dr. Herbsleb say that was the problem they were
17 trying to solve.

18 Go to the people. Look at the
19 iManage manual. Their expert couldn't tell you
20 if it was public or not. It has to be a
21 publication. We don't know if it's public or
22 not. As far as we know, it's confidential.

23 When I asked him, do you know one
24 way or the other is it is this public document?

1 He said, I don't know.

2 Clear and convincing evidence is
3 better than, I don't know. That's not enough.
4 You have to do better than that. It's not even
5 prior art and definitely not enabling prior art.
6 A user manual? Are you kidding me? That's like
7 getting a user manual to your car and saying, I
8 can build a car from my user manual. It's the
9 same thing in computer science.

10 Nonetheless, it was a
11 document-managed system development. All they
12 did was look at the documents, keeping track of
13 documents.

14 Swartz reference, same thing.
15 Middleware. They tracked documents. Knowledge
16 path is following the documents. This is all
17 about being regulatory compliant.

18 And finally, the Hubert reference
19 metadocument. It's a document itself. They're
20 saying a document flows in space. It's the
21 system of the '761 patent which is user-centric.
22 That was one of the most incredible pieces of
23 testimony, was saying a metadocument is the same
24 thing as the '761 patent. There was nothing in

1 the Hubert reference that indicated in any way
2 it could invalidate the '761 patent.

3 When you look at the problem '761
4 was trying to solve, they're trying to get rid
5 of these hierarchy tables. This was the
6 problem. People had to stick things in files.
7 The '761 solved that. This was what the prior
8 art covered.

9 Finally, secondary considerations
10 of nonobviousness. You heard Dr. Herbsleb talk
11 about it. People wanted a solution to the
12 problems, and the '761 patent provided it, and
13 nobody else talked about secondary
14 considerations of nonobviousness.

15 Now, my time is about up. So
16 stored in metadata. Going to wrap it up real
17 quick.

18 I want to be really clear that
19 Leader is not claiming to have invented the
20 internet. They're not. They didn't invent
21 social networking.

22 What they did invent was a really
23 great way, a fantastic, web-based platform that
24 permits people to collaborate and network

1 better. That's what they tried to do in '97.
2 That's what they achieved. Facebook is using
3 that platform to manage their 50 billion page
4 hits a day.

5 There are other social networks
6 out there. They're not nearly as successful as
7 Facebook. There's a reason they're that
8 successful. The technology works that well.
9 It's that simple.

10 Now, when you finish your
11 deliberations, you're going to get a verdict
12 form, and you'll see when you go back to the
13 room what we're going ask is you to fill out the
14 verdict form in this way.

15 They ask literal infringement, do
16 you find that Leader has proven by a
17 preponderance of the evidence that Facebook has
18 literally infringed? Preponderance of the
19 evidence. Tip the scales a little bit. The
20 evidence.

21 You're going to weigh the
22 twenty-four documents, source code, website, and
23 testimony of their engineers. All you have to
24 weigh that against is their paid expert and

1 e-Bay for Dummies. That's it. That's an easy
2 call. Every one of those boxes are checked with
3 at least five sources of infringing information,
4 so I ask you to check yes on question one, are
5 all the claims literally infringed.

6 Question two talks about doctrine
7 of equivalents. We don't think you want to
8 check that box yes. We can uncheck it no
9 because it's literally infringed.

10 But if for whatever reason you
11 think there's some small thing that was not in
12 the Facebook website that was in the claims,
13 then we want to check yes here and check all
14 those boxes, assuming you find literal
15 infringement.

16 Check no control or direction.
17 This is regarding the method claim 9. Do you
18 find that Facebook has control or direction over
19 their end users? They do. We showed you the
20 terms of use. We showed you the help files. We
21 showed you everything they do to make sure the
22 people that use this website use it
23 appropriately, and they do it in a way they
24 provide the website for them to do exactly those

1 actions.

2 Facebook employees obviously have
3 a contract. They're contracted to do what
4 Facebook tells them to. That's direction and
5 control as clear as it gets. Yes for both of
6 those boxes.

7 Priority date for the '761 patent.
8 Have we proven that we're entitled to the
9 provisional patent application? You saw the
10 evidence. Once again you saw the source code in
11 the provisional. You saw the experiment done to
12 see if that source code would let you build the
13 system. It was there.

14 The only evidence they had to the
15 contrary was an expert on the stand who said, I
16 couldn't tell what the sort code said. The
17 source code is kind of confusing. Not enough.
18 We put forth evidence that showed that we were
19 entitled to the priority date and all the
20 claims. We went through each and every claim,
21 and every single one of those claims are
22 entitled to the priority of the provisional
23 application.

24 On-sale bar. This is clear and

1 convincing evidence that -- has Facebook proven
2 that we have put the '761 technology on sale?
3 Well, if you check yes to that, you have to
4 check no to that. That's just the way it is.

5 More importantly even if you don't
6 say yes to that, you still have to check no
7 because they didn't show any evidence that '761
8 patented technology was in Leader2Leader. None.
9 They showed a 2009 document. That's it.

10 No public prior use. They didn't
11 show a single use of any technology, let alone
12 '761 technology, without a nondisclosure
13 agreement. That's a check no, and go through
14 the prior art references. IManage DeskSite, not
15 even prior art. Don't know if it's
16 confidential, public. We don't know. Their
17 expert couldn't tell us. Clear and convincing
18 evidence? No, it's a user manual.

19 Swartz. Same way.
20 Document-centric document management system.
21 Nothing do with the '761 technology.

22 Hubert metadocument. The
23 metadocument, it's not even in the same
24 ballpark. As you heard the expert talk about,

1 Dr. Herbsleb, not even close.

2 And finally obviousness. You
3 heard the secondary considerations of
4 nonobviousness. Facebook is a successful
5 website. You heard this is a long-felt need
6 otherwise taught away. Not even close.

7 I will conclude my initial remarks
8 now and let Mr. Rhodes have a shot at it. Thank
9 you for your time, and I'll talk to you in a few
10 minutes.

11 THE COURT: Thank you.

12 Mr. Rhodes.

13 MR. RHODES: May I proceed, Your
14 Honor?

15 THE COURT: You may.

16 MR. RHODES: Good morning. I
17 always appreciate a good fight in court. It's
18 what we do, and you may have noticed during the
19 day-to-day exchanges there were some funny
20 moments and tough ones, a little back and forth,
21 but lawyers are competitive actors too, and we
22 like to keep track of things, and we have our
23 own little score cards between us ourselves.

24 But sarcasm is not truth, and

1 sarcasm is not evidence, so I'm going to walk
2 with you through how we see the world.

3 And I was struck by Mr. Andre's
4 comments at the beginning before I launched into
5 my presentation by a couple things. Our
6 animations are cartoons; right? Cartoons are
7 the things that I used to watch when I was a kid
8 on Saturday morning. That's meant to say, don't
9 pay attention to those, I guess.

10 And all the metadata. Did you
11 notice how it all got jammed into one big place?
12 Come back to that.

13 And that this thing called
14 Facebook was created by a bunch of grade school
15 kids. These guys are the best and brightest in
16 America today. Harvard, Stanford. These are
17 the kids that are inventing the future, and the
18 question you have to ask yourself right now,
19 that was pretty persuasive.

20 You're thinking, Mr. Rhodes,
21 you're out of luck. Here this is a very, very
22 serious charge here that Facebook infringes this
23 patent that was conceived in 1999, and he just
24 told you the final part of his argument, the

1 final part. I wrote it down. There was a great
2 problem, and the '761 solved it. Did you hear
3 that? He just said it.

4 Yesterday when Dr. Herbsleb was on
5 the stand, we asked him a real simple question.
6 Ms. Keefe did. Can you think of one company or
7 person that's using it today? He's an expert in
8 the field. What did he say? Do you remember?
9 He said, I can't think of one.

10 The '761 solved the problem, and
11 eleven years later you're being told that
12 Facebook's using it, but no one else is. It's
13 really that simple. Think about it.

14 Now, I want to take you back to
15 the opening statements. Remember we were here a
16 week ago -- seems like an eternity, doesn't it?
17 I told you to keep your eye on the ball.

18 You know, maybe it was an awkward
19 way of thinking about it. That was mine. I'll
20 own it. That was mine, but I went back and
21 looked at what I said to you, and I want to
22 remind you I said what they were going to do.
23 This is my words.

24 They're going to take a, quote,

1 bunch of metadata and say something changes
2 something, gets written, and they're going to
3 lump it all together. Remember that?

4 And then I asked you to do me a
5 favor. I said, keep your eye on one type of
6 metadata. Here's what I said. The stored
7 metadata. Did you notice that? During the
8 entirety of what he was talking about, that word
9 "stored" just kind of ran over. It just jumped
10 right over it like a hurdle. That's the problem
11 with their case.

12 Remember Dr. Kearns and I were
13 talking? I said, straight-up, we're not saying
14 everything is missing, but there are some things
15 missing, and I used that stupid analogy of the
16 bowling pins. Even if one's up there --

17 Before we start walking through my
18 slides -- and guess what? I have a lot of
19 cartoons today, a lot of diagrams, because I
20 think this is stuff you can see if I show it to
21 you, and we're going to get real specific,
22 folks. We're going to get down into the weeds
23 of what the language of the claim is.

24 Jury instruction 3.2 says what you

1 have to do at the beginning of your journey.
2 The starting point is before you can decide any
3 issues in the case, you would have to understand
4 the patent and the patent claims, so that's
5 where we're going to start.

6 And then the jury instructions
7 tell you if the system or method omits even a
8 single element, then you must find the Facebook
9 system or method has not literally infringed the
10 claims. That's the bowling pins. Even at the
11 end of the day, I got one wobbling, if it
12 doesn't go down, I win. So that's where we're
13 going to go.

14 I reminded you in opening what
15 metadata, the stored metadata. Now let's go
16 find it. Here is our framework. What did I
17 tell you at the opening?

18 I told you two things about my
19 credibility. I told you take me with a grain of
20 salt; lawyers are lawyers. And I told you find
21 the truth for yourself; find it on your own.
22 This is what we ask of you.

23 That invention that was allegedly
24 created in the a-ha moment in 1999 that no one

1 in the world is practicing today, Facebook does
2 not infringe it. And why? Because Facebook
3 never updates the stored metadata. The stored
4 metadata. We'll talk about that.

5 And then these three claims here
6 have a unique defense to them. These are the
7 ones that require one of the Facebook users to
8 do something, to practice one of the necessary
9 steps, and the question is whether we control or
10 direct the Facebook users, and I'm going walk
11 you through that.

12 And then I'm going walk you
13 through the invalidity arguments, and then I'm
14 going to end with this whole discussion that
15 we've been having in this case about whether
16 they sold or offered to sell something. That
17 touches on a pretty important point of
18 credibility that I want to come back to.

19 This is our position. Obviously
20 we do not infringe. Remember the relationship
21 of independent claims to dependent claims. The
22 dependent claims simply are everything in the
23 independent claim plus something else. You add
24 one more step to it, so if you find that there's

1 no infringement of the independent claims, by
2 definition the dependent claims fall.

3 So let's take these method claims
4 first. The independent claim is 9; 11 and 16
5 are the dependent claims. Each of these claims
6 has an essential element that a user has to
7 practice, and I'll show them to you.

8 Here's 9. You'll see the
9 language. It says "creating data within a user
10 environment by a user using the application,
11 wherein the user employs. . ." What this is
12 intended to convey is with regard to these
13 method claims, these steps over here are done by
14 the user, and these are allegedly done by the
15 website.

16 And what the law says is, you
17 can't hold the website liable for the actions of
18 users unless the website controls and directs
19 the user.

20 So remember the dependent claims?
21 They're the same as 9. You just add everything
22 of 9 to 11 and 16, so they all require an
23 affirmative act by a user.

24 This is your jury instruction.

1 You can go back and get guidance from it. It
2 tells you what is, under the law, control or
3 direction.

4 What was the evidence on that?
5 What Mr. Andre showed you was a set of rules for
6 Facebook. Now, he's right. Nobody puts a gun
7 to your head, go to Facebook. But if any of
8 your have used Facebook or use websites, what
9 happens, you log in. Very minimal piece of
10 information is required, and then you're in.

11 And what happens then? Do you
12 have to put a photo on your profile page? No.
13 Do we tell you where to go? No. Do we tell you
14 whether you have to join a group page or become
15 a fan or upload photographs? No. It's up to
16 you.

17 It's like a great, big park, like
18 a state park where people go and grab a hiking
19 trail guide. You can pick any trail you want
20 to, walk on what we provide. If you do certain
21 things in our environment, we might kick you
22 out. Are we directing and controlling your use
23 of the website? That's the question.

24 What do we say? We warn people.

1 We don't direct or control. This is from the
2 same document that you were just shown. This is
3 what Facebook says. The terms of service. This
4 is the rules of road.

5 We do not control and are not
6 responsible for what users post. Of course not.
7 There's 500 million of you people out there. We
8 can't control it. All we can do is react after
9 the fact if somebody has done something
10 inappropriate. That's not direction or control,
11 and the company explicitly says it's not
12 responsible for the conduct of any user. That
13 makes sense. That would be pretty tough, to
14 direct and control the activities of users.

15 So with respect to claims 9, 11,
16 and 16, a necessary step is required of a user,
17 and Facebook does not direct or control. What
18 was the testimony on that point? Mr. Cox: We
19 don't correct or control. That takes care of
20 independent claim 9 and dependent claims 11 and
21 16.

22 So, yes, I want to talk about what
23 the '761 patent is and is not. I know it seems
24 somewhat simple to ask the question of whether

1 you invented the internet when you talk about
2 how the '761 patent has been applied here and
3 how broadly it has been stretched. If you
4 accept this interpretation of the patent, you
5 really are talking about e-Bay and Yahoo!

6 Now, these books are the kind of
7 books I would buy. The point of these books is
8 this was on the shelf of every bookstore in
9 America ten years ago describing these kinds of
10 systems. I didn't mean it to imply you could
11 build a system from these documents, but to
12 indicate to you what was out there at the time
13 of the invention.

14 If this invention really
15 encompasses Facebook and what Facebook does, it
16 encompasses what these people were doing before
17 the invention was created. That's the point.
18 They didn't invent metadata. They didn't invent
19 e-commerce, and they didn't invent tracking.
20 That they agree. That was all.

21 Now, remember the number of the
22 patent? 7 million something. Remember the name
23 of the patent? Work flow. There's a lot of
24 patents, so now what I want to do is spend a few

1 minutes, as the jury instructions tell us, to
2 look at the claim language. The first step of
3 the process is understand what the claim is and
4 apply it to the website.

5 There are all of these elements.
6 Those are my bullet points. If even a single
7 element is missing, you must find no
8 infringement. As you've seen before, the case
9 -- the Court construes some of the claims of the
10 -- construes some of the terms of the claim, and
11 you have to accept these definitions.

12 This is the one that I've been
13 focused on from the beginning and through the
14 case because I think when you get down into the
15 specifics of the claim language, you will see
16 that there is a step that is required that is
17 not present, so we have to look a little deeper.

18 This is where that phrase is
19 expressed two times in the first claim, and I'll
20 show you in a minute this is in every single
21 claim. What does "dynamically" mean? Again
22 there it is, "automatically and in response to
23 the preceding event." Let's take the first
24 paragraph first. That's the definition you have

1 to apply.

2 What's the preceding event? Let's
3 start there. In the first context, what's
4 called user-defined data, you upload a
5 photograph. Let's say context information is
6 stored in metadata.

7 Remember, the metadata is not the
8 table. It's the information in the table. This
9 cartoon is better because this is the actual
10 metadata table. There is the metadata. That's
11 the user-defined data, one created here, and the
12 system, see how it automatically -- by simply
13 doing that, the system automatically and in
14 response to the preceding event --

15 What's the preceding event?
16 Uploading the photograph, and it automatically
17 -- that means the user is not manually doing
18 something. It happens. That's what the system
19 is doing. It creates this metadata and then it
20 associates it. That's the first element.

21 Let's look at the second one.
22 This is where dynamically appears in the second
23 piece, so what is the preceding event in the
24 second piece? Are you following me?

1 Let's break it down. What does
2 preceding mean? Does it mean past, now, or
3 future? Of course it means past, so when you
4 say what is the preceding event, it's the event
5 that has already occurred because if it's in the
6 past, it's already occurred.

7 So what is the event that has
8 already occurred? It's right before it. The
9 event is a change of the user from the first
10 context to a second context, so in the second
11 element of these claims, the "dynamically"
12 language means in response to the preceding
13 event. The event has already occurred: The
14 user moving from one context to another.

15 The system will do something
16 automatically. What is it going to do?
17 Updating the stored metadata on the change, and
18 now we see this word here. The stored metadata.
19 The thing I asked you to keep your eye on from
20 the beginning.

21 Based on the change, what is the
22 change? The change is the user moved from
23 context to context, and based on that change,
24 which is the preceding event, the movement, we

1 are going to be updating the stored metadata
2 based on that change.

3 What is updating? You ever had a
4 job where you were getting unhappy and thinking
5 about moving on, and you say, I better update my
6 resume? So you pull it out of the drawer and
7 look at it. How would you update a resume? Add
8 something to it or delete something. If you
9 didn't have a resume, what would you do? You
10 would create one. Updating and creating are
11 different things.

12 The claim language is "updating."
13 Updating does not equal creating. Different
14 word.

15 What are you going to be updating?
16 The stored metadata. Now, does the word "the"
17 mean some or any, or does it mean something
18 particular? The thing is not the same as some
19 things or any things. "The" is one. It's
20 something particular.

21 What is it? It's the thing that
22 was stored. It is stored already. Occurred in
23 the past. Is it happening in the present, the
24 now, or is it going to happen in the future? We

1 know how to say this. If it's in the future, it
2 will store. If it's in the now, it is storing.
3 Stored. We all know that because it's got -ed
4 at the end. That's past tense.

5 "The updating of the stored" means
6 it's something that's already occurred. What is
7 it? It's the stored metadata. That's when it
8 occurred. It has already happened; right?
9 Because in the first context, when you uploaded
10 that photograph, you were storing the context
11 information in metadata.

12 You uploaded the photograph. The
13 photo table comes up. That's where you were
14 storing it, in the present tense. Now that it's
15 been stored, in the present tense, it is stored.
16 It's already there, stored in the metadata. The
17 metadata.

18 Now you have to ask yourself, is
19 it the same metadata or different metadata? Is
20 it any metadata, or is it the stored metadata,
21 the metadata that was stored in the prior step?

22 The last clause wherein the judge
23 instructs you this morning it means "in which,"
24 "in which" does not mean "when." Remember those

1 things from grade school? Who, what, when,
2 where. When and where. They're different. "In
3 which," "wherein." It's a place. It's not
4 when.

5 And remember when Mr. Andre showed
6 you those excerpts during case of the
7 prosecution history with exchange between the
8 Patent Office and Leader about how the language
9 changed? Remember it said "automatic" and
10 crossed out and the word "dynamically" added.
11 The jury instruction says you can't consider
12 that. That's jury instruction 3.4.

13 Here's my cartoon. Let's
14 illustrate what the claim language actually says
15 and requires. I upload my photograph, my smiley
16 face. User-defined data is created by the user
17 interaction in a first context. The man is the
18 user. The happy face is the user-defined data.

19 What happens automatically and in
20 response to that which is the now preceding
21 event, it's stored and wrapped with metadata
22 dynamically. That means automatically, and in
23 response to the prior event. It's storing the
24 context information, metadata, and there it is.

1 It's stored on a storage component. So far so
2 good.

3 Then we move to a second context.
4 That's the action of this patent. That's what
5 we're talking about. We move to the second
6 context, do it again. Is that the preceding
7 event in the second element of the claim? It's
8 the preceding event, movement from one context
9 to another.

10 And then the language says
11 "dynamically updating the stored metadata."
12 What does "dynamically" mean? Automatically.
13 Nothing else has to happen, and it's in response
14 to the preceding event. The preceding event is
15 I went there. In response to the preceding
16 event, what happens? Tracking a change and
17 dynamically updating the stored metadata.

18 What is happening that they're
19 talking about? The metadata that was being
20 stored in the prior step isn't the prior context
21 because the purpose of the invention is, when I
22 move, my stuff follows me. That's the purpose.
23 That's what the last clause means, "in which the
24 user accesses the data." Not when he does. In

1 which.

2 And that's the fundamental
3 difference between our position and their
4 position. Dr. Vigna described our system pretty
5 correctly. Our dispute is really starting with
6 what the claim language requires this act of
7 updating the stored metadata and not any
8 metadata.

9 What is metadata? Dr. Vigna tells
10 us it's not the table in which the photograph is
11 created. It's the actual data about the
12 photograph that is the metadata, and you can
13 read it to yourself, but I just put up a
14 question and answer from the trial testimony
15 here.

16 That's the stored metadata in our
17 example, and what we saw was the Facebook system
18 has lots of metadata about lots of different
19 things. Remember this? Photos, minifeed
20 stories, wall tables, and they're not the same.
21 They don't have the same number of columns, and
22 they're stored in different places.

23 What they want you to believe is,
24 can you imagine amount of computers you need to

1 have a website like this with this many users
2 and this much activity, all those computers?
3 They want to put their arms around the whole
4 thing, one big user database.

5 But you have to be specific.
6 These items of metadata are not all stored at
7 one time. They are created by virtue of various
8 interactions, and they're placed in different
9 places.

10 When you use the phrase "stored
11 metadata," you need to be very careful about
12 which metadata we're talking about. We're
13 talking about what's in the claim language being
14 compared to the system.

15 What Dr. Vigna has done, as I
16 suspected he did, as I suspected they would in
17 the opening when I warned, I said -- I warned,
18 they'll say that there's a bunch of metadata and
19 something changes and something gets written.
20 They're going to lump it all together. That's
21 what I said to you on the opening statement, and
22 that's what happened.

23 They stuck them all together
24 because the problem they have is that when you

1 move from one context to another, the stored
2 metadata doesn't get updated by virtue of that
3 action alone, but the system language requires
4 automatically. That means it happens just
5 because you do it, and Dr. Vigna and the
6 engineers and everybody agreed that's not
7 present, so to get around that they have to
8 convince you that the language is any metadata.

9 "The" does not mean some or any,
10 and "stored" means something specific in the
11 context of this claim. I need you to work with
12 me on that claim language when you go back in
13 there and study for yourself. Remember what I
14 said you, to find the truth for yourself.

15 So let's look at the example and
16 then I'll show you once again this was one of
17 the use cases that Dr. Vigna testified you --
18 we're in Facebook. We're at the profile page
19 with no photograph, and some of you may have
20 this experience. You're not required to have a
21 photograph on your profile. It's your choice.
22 If you do you upload it, you pick a file and
23 voila, that has now become the user-defined
24 data.

1 And if you accept that this is a
2 context, that's context one. You saw this
3 before. It gets stored on a thing called a file
4 and, separate and apart from that on a different
5 storage component, metadata is created about the
6 photograph. The system did it automatically in
7 response to the prior event. Event two.

8 Event one. Event one takes place.
9 The system automatically and in response to
10 event one creates event two. This is the
11 sequence of steps. Data one, metadata one.

12 I go over to Ms. Keefe's profile.
13 I have change contexts from context one to
14 context two. What does the claim require?
15 Automatically and in response to the prior
16 event. The prior event is me going there.
17 Automatically by going there, did the stored
18 metadata get updated? No. Everybody agrees on
19 that. Everybody agrees on that including
20 Dr. Vigna.

21 I don't dispute his interpretation
22 of how this works. He's right. It doesn't get
23 updated. The stored metadata -- I told you to
24 keep your eye on that ball during this case.

1 Now they made a big deal about
2 what happens when you interact with this wall
3 posting. Let's find out. I write in something.
4 Remember? See, I'm typing in there. Remember
5 the discussion that Ms. Keefe had with Dr.
6 Vigna, what happens if the phone rings here, and
7 you leave? What happens? If you write maybe a
8 hundred different messages because you're mad at
9 somebody, and you're not sure what to say, but
10 you don't push the share button?

11 You could spend an hour writing
12 text in the box. If you don't press "share,"
13 what happens to the stored metadata? Nothing.
14 Nothing happens to it, and my photograph is not
15 there. Nothing has been brought forward to me
16 to the second context.

17 This is the heart beating in every
18 claim of this patent. This was the entire
19 purpose of the patent, to bring with you
20 automatically as you went from context to
21 context all of your information, like a backpack
22 would just come with you automatically. But in
23 Facebook, things don't happen that way.

24 So I push "share," and now my

1 photograph appears in this second context, but
2 you see this language right here? That's a body
3 of new data. That data did not exist in the
4 prior context, did it? What is it? It's a new
5 piece of data stored in a server which
6 automatically generates a piece of metadata
7 stored in the wall table, but the photo table
8 where the stored metadata from the first context
9 was created remains untouched. It did not
10 update.

11 They want you to believe that this
12 is the update. You can't update that which did
13 not exist. That's called "create." The system
14 created new metadata, and new data. It did not
15 update that which already existed. Update and
16 create are different, and that's the answer.

17 We never do the fundamental
18 teaching of this patent. It's that simple.
19 It's in every single claim. By virtue of
20 automatically arriving in the second context,
21 the system does not update the stored metadata.
22 It might create new metadata based on what you
23 do in the second context. It might create no
24 data, but it does not update automatically the

1 stored metadata.

2 That's the key. That's why we
3 don't infringe. That's why we told you at the
4 beginning keep your eye on the specifics, not
5 the generalities. Where is the stored metadata,
6 and where is it being updated, and this is the
7 heart beating in every independent claim.

8 And I'll show that to you right
9 now. Here's claim 9. There's a movement, and
10 there's the dynamically updating the stored
11 metadata. There's a prior event. This is what
12 the system has to do. Facebook doesn't do it.

13 Here's independent claim 21.
14 There's the movement. There's the requirement
15 that the system automatically and in response to
16 movement update the metadata, the stored
17 metadata. Same thing.

18 Now, we did this kind of silly
19 example with Mr. Cox. We asked him what would
20 happen if Facebook actually did practice this
21 patent? Remember that this is what he said. As
22 you moved around Facebook -- because this is
23 what people do on Facebook, they move around --
24 we would be having to create -- every time we

1 moved around, we would have to update the stored
2 metadata to reflect you're over here now. What
3 would we get out of that? What would you, the
4 user, get out of that? Nothing really.

5 If you don't interact with the
6 second context, why does the system need to know
7 you looked at the page and bring forth the
8 content from the first context? That's not how
9 the website is designed to work.

10 There's a simple reason for that.
11 Here it is. Can you imagine the processing that
12 would have to take place every day, every
13 second? How many of these metadata updates
14 would be going on all the time? That's why he
15 said it wouldn't make sense for us to do that.
16 That's what the patent teaches.

17 I know it's silly, but they had
18 to -- as I said with Dr. Kearns, I agree with
19 you there are elements of the claim that are
20 there. A computer system? Yes. It's
21 web-based, yes. But the key elements are not
22 there. That's the story on infringement.

23 Now you're instructed on something
24 called the doctrine of equivalents, and this is

1 what this says is, okay, there's something
2 missing from each of the asserted claims of the
3 patent. We can substitute something else in
4 there if it's really insubstantially different.
5 It's a fudger. This is how you fudge.

6 Even he admits you don't. They
7 can put that box on the form. The problem is
8 there's a fundamental step that goes to the
9 heart of the invention. If you believe me on
10 that, you can't supply that missing element here
11 because there's nothing substantially the same
12 the system is doing.

13 If you're going to stretch this
14 patent beyond all recognition to wrap around
15 Facebook, then I would point to you -- let's
16 time machine back to 1998, '99, 2000. There
17 were other people doing this long time ago, and
18 I would respectfully submit that this patent had
19 been invented.

20 Let's talk about invalidity. We
21 have a right as a defendant in this case -- we
22 didn't bring this lawsuit. They brought it
23 against us, and we have a right, even though the
24 Patent and Trademark Office issued the patent,

1 to argue that it's invalid.

2 What did I tell you in opening?
3 Remember, I said up to this point, the burden
4 has been on them, and now the burden is on me,
5 and I said at the beginning my burden is higher.

6 So what do I have to show you?
7 Let's start with the prior art. First of all,
8 on the dates there's no dispute everything
9 before the time they filed the patent
10 application in December of 2003 -- and if you
11 give them the benefit of the provisional,
12 December of 2002 -- and you've seen these
13 before.

14 I want to remind you what they do.
15 The Swartz reference invalidates everything but
16 claim 16. That's why 16 is not redDED out
17 there. IManage invalidates everything, as does
18 Hubert, with the exception of 16.

19 Claim 16 adds this element. It's
20 the same system, but on a portable device like
21 your iPhone or PDA. That's anticipated by
22 iManage because it explicitly talked about
23 having wireless communication devices to use
24 with that system, and it would have been

1 obvious, as experts testified, in light of those
2 over references.

3 And if you combine any of them
4 with Ausems, which you're allowed to do --
5 you're not allowed to combine for purposes of
6 anticipation. You are for obviousness, and the
7 jury instruction permits that and will explain
8 it to you.

9 And there's the timeline. This is
10 one year before the patent application was
11 filed. I gave them for this purpose the benefit
12 of the provisional, even though I'm going to
13 convince you in a moment, I hope, that the
14 provisional shouldn't stand.

15 These are all in the right time
16 period. They all apply now. This testimony is
17 fresh to you because you had it yesterday with
18 Dr. Herbsleb and Friday with Professor
19 Greenberg. I'm not going to go at length. I
20 know you want to get to deliberations.

21 Let me remind you quickly, here
22 are the dates of Swartz, and this is the easiest
23 way to remind you what it's shown. Try as they
24 might, this is absolutely the same thing. Just

1 compare them. Look at the language. Just take
2 a moment to look at the language.

3 Trying to solve the same problem
4 in the same way is one thing, but imagine the
5 coincidence of two different inventors in two
6 different places -- and remember Swartz is prior
7 expressing the problem with the same language,
8 tracking metadata, data storage context. That's
9 more than a coincidence.

10 Here's more language.
11 Dynamically, dynamic user-accessed data context.
12 Look at the language. Swartz is spot on. This
13 is clear and convincing evidence. It
14 invalidates the patent.

15 IManage is actually a system.
16 It's a product that a company sells, and we had
17 our experts look at their user manual because
18 the best thing that will describe what's in a
19 system is how you use it. That's the
20 functionality of the system. It's from the
21 right date period.

22 I want to remind you of the
23 animation that our expert used to show you how
24 it worked and how it mapped absolutely the same

1 to the '761. That was pretty fast.

2 This is what you end up with. You
3 have users, different applications, activity,
4 different times, different contexts, and then
5 down here you have a whole series of ways to
6 access the information. That's what the '761
7 was trying to solve: Creating information in
8 one context, accessing it in a second, and
9 tracking the movement, and without the user
10 having to do anything. Automatically bringing
11 all the information to the second context.
12 That's what iManage teaches.

13 Hubert is very much the same
14 thing. This was published initially in Europe,
15 and the reason we brought back the American
16 patent behind it is because that American patent
17 that he got takes priority to this date. This
18 is owned by Xerox. Pretty big company. There
19 are others out there doing the same stuff
20 Mr. McKibben was doing. Xerox owns two of the
21 patents we're looking at. They invented this
22 stuff too.

23 This is the '761 patent on the
24 left; Hubert on the right 'isn't it coincidental

1 that two different inventors in different
2 continents are expressing the same ideas with
3 the same language? It's spot-on.

4 Remember the bee? They were
5 arguing yesterday with Dr. Herbsleb that, well,
6 it's not really internet-based. The whole
7 premise of Hubert is you move the documentation
8 through the internet, and then he said it's
9 about user-based. Who creates the document?
10 The users of course.

11 And the bee was the metaphor in
12 the patent itself to describe the idea of
13 pollination. You think what a bee does in a
14 field of flowers. He flies from flower to
15 flowerer. Those are the contexts. And he
16 interacts with the flower, and the idea of this
17 patent is you bring the context information and
18 the document together. The same idea in the
19 '761. Completely invalidates it.

20 And then the last piece of the
21 puzzle is at the same time period, people are
22 talking about moving things to wireless and
23 mobile, and all you have to do in 1999 is ask
24 yourself, would engineers of the type and

1 quality we've seen in this courtroom, the
2 experts, the Facebook folks, would they have
3 thought to make this wirelessly? If you think
4 they would have, it's obvious.

5 Then for obviousness we can
6 combine their summary of the invention,
7 wireless, be able to access data remotely via
8 wireless. This is the last piece of the story.

9 The piece I want to focus on for a
10 minute, this is the piece of the story that's
11 really a classical jury issue because you have
12 to believe somebody on this one. This is the
13 story that involves what people are really good
14 at, ordinary people. Is someone's story true?

15 So let me explain what the issue
16 is. The law says that you can't jump the gun.
17 If you're going to file for a patent, the law
18 says that you can't jump the gun. If you need
19 to file a patent, then you need to file it, and
20 for one year beforehand you're given a grace
21 period, but if more than one year before the
22 filing you're out in the market trying to offer
23 it for sale or demonstrating it, all bets are
24 off. The inventor is completely in control of

1 this process.

2 I have to prove three things to
3 you. The first step in the process is I have to
4 convince you that they shouldn't get the benefit
5 of the provisional filing date. I have to blow
6 that up first. If I do, then I have to convince
7 you that there were offers to sell, and that
8 what was offered involved the invention.

9 Okay. Let's walk through this.
10 An offer doesn't have to be -- a sale doesn't
11 have to be accepted. Doesn't even have to be
12 specifically for money. This is jury
13 instruction 4.7. As long as what they were
14 trying to get was commercial benefit, it
15 qualifies, and \$54 million from federal
16 government constitutes a commercial benefit. Do
17 you think 2,000 licenses from The Limited is a
18 commercial benefit?

19 And even if the offer is done
20 under the cloak of secrecy under an NDA, it's
21 okay. It's still an offer even if they tried to
22 keep it secret. If it happened, it's an offer.
23 That's the jury instruction.

24 Here's the timeline. This red

1 line, the one year before the actual patent
2 application was filed. Remember the application
3 was filed in December of 2003. The provisional
4 was filed literally 364 days before. You got
5 December 10, '03 versus December 11, '02, so the
6 first question is where does the one-year period
7 end? Does it end with the red line as I said,
8 or does it end with the yellow line as they say?

9 If you look up here, see the
10 exhibit number there? Write that one down, and
11 take a look at that one in the jury room because
12 that one right there was an offer to sell, and
13 it's even before their line. I quoted it.
14 Leader2Leader is complete and I'm going to
15 charge a minute that no reasonable person would
16 think that the thing he's been trying to sell
17 since he invented it in 1999 was the 1965
18 Corvette without the Bluetooth. He was trying
19 to sell the one with the special sauce in it.

20 The starting point of the analysis
21 is, how do I convince you that the provisional
22 shouldn't be the operative filing? We looked at
23 this in the opening. This is the jury
24 instruction you've been given. He's only

1 entitled to the date of the provisional if every
2 element. Stop there. Not most. I'm precise.
3 I like the actual words of things, and I want
4 you to look at the words of things, like the
5 stored metadata. Not any metadata.

6 Every element of the issued claims
7 of a patent, and it's disclosed what kind of
8 disclosure. Fully disclosed. Not partially.
9 Not substantially. Not hinting at it. Fully
10 disclosed. Why would that be the case? Because
11 that's the document that gets filed with the
12 federal government. You have to make full
13 disclosure if you want that date, and you have
14 to describe every element.

15 I showed you this one in opening.
16 I asked you to look at it again. Is full
17 disclosure achieved by difference of twenty
18 pages of text? Is full disclosure referred to
19 as Hubert when that's not figured in the
20 provisional?

21 And twenty-two in the final is
22 full disclosure with no mention of storing
23 context data or metadata, yet there is in the
24 final. Is full disclosure achieved with no

1 mention of updating metadata in response to
2 tracking user movement in everything?

3 That's the heart beating in every
4 claim of the patent. Hold the thought. Here's
5 the provisional.

6 I like Mr. Lamb too, thought he
7 was an interesting guy, and Mr. Lamb said three
8 times -- three times the cock crowed about this.
9 He's honest. Okay. Let's take that. Let's
10 agree that he's honest.

11 So before the trial we sat him
12 down, raise his right hand, took an oath,
13 reporter was talking to him, and we gave him the
14 provisional. Here it is. Take a look at it.
15 You're the guy that wrote the code.

16 Remember, Mr. McKibben said, I
17 don't write code. I hire people to write code.
18 Lamb is the guy he hired to write it. He asked
19 Lamb a simple question: Is something missing?
20 Is there anything missing?

21 "The paragraphs that we reviewed
22 earlier -- and you are free to go back
23 to any of them -- did you see anything
24 in those paragraphs that disclosed

1 tracking movement of a user from one
2 board to another board?"

3 "While reading this? Our time
4 together, I don't remember running
5 across anything that was -- this said to
6 me there was an indication of tracking a
7 user switching from one board to another
8 board."

9 No tracking. We wanted to check
10 though, so remember the so-called pseudocode
11 that's attached to the provisional? They talked
12 about it. Do you remember that pseudocode is
13 not supposed to work? Supposed to be a
14 placeholder.

15 They made a big deal about one
16 line of code. It was this line of code from
17 page sixteen. Remember this line? So we said
18 to Mr. Lamb in his deposition before trial, does
19 that one, is that where the tracking -- tracking
20 is the heart of the invention, and he just got
21 done saying to you that it's not in full
22 disclosure of each and every element.

23 Here's what he has to say about
24 whether tracking is found in that specific piece

1 of code they showed him at trial.

2 "Can you go to page sixteen.

3 Toward the middle of the page, there is
4 a line of code that begins with action
5 dot add action listener open parentheses
6 remove web relationship action listener
7 document global close parentheses. Do
8 you see that?"

9 "I do."

10 "Is there anything in this code,
11 the code you've been talking about on
12 page sixteen, that implements tracking
13 movement of a user from one board to
14 another board?"

15 "No."

16 He's the guy that wrote the code.
17 A critical element is missing from the
18 provisional.

19 And then there was some fuss about
20 whether he changed his testimony. We asked him
21 right here in court. I made a few one-word
22 clarifications at the deposition, but the
23 deposition I gave was accurate. He stands by
24 it. That's it. That's the end of the story

1 right there, folks. The inventor himself says a
2 critical element of tracking is not in the
3 provisional.

4 Under the jury instructions, the
5 provisional, therefore, does not fully disclose
6 each and every element of the patent. It
7 cannot, therefore, be the effective filing date.

8 There's more. Look at all these.
9 This was fascinating. These are these import
10 statements, and every one of those import
11 statements is a separate module of code that
12 gets dropped in there, but no one knows what it
13 is. Educated people can kind of guess or
14 speculate, as Dr. Herbsleb did, but you have to
15 supply all of those missing pieces.

16 Everybody agrees that's not there.
17 That's why it says import it. You have to read
18 it. If you have to import all of that level of
19 functionality, that's not, by definition, fully
20 disclosed in each and every element.

21 Where does that leave us? The
22 provisional is just not the same as the final.
23 It's missing a lot of information, and one
24 critical element of tracking, so if you take the

1 provisional and map it to the final, what does
2 it look like? This is what's missing from the
3 provisional. What I'm showing you is the final.
4 That's not full disclosure, and it's a
5 requirement because you're asking the federal
6 government to give you the monopoly of a patent,
7 so you have to disclose it fully.

8 Now there's a timeline. This
9 becomes the effective date because now that's
10 one year before they actually filed the
11 application because the provisional is gone.
12 Look at all this activity right up to the
13 deadline here, so now the story is, we weren't
14 offering to sell the thing that had the special
15 sauce in it. We weren't offering to sell
16 Leader2Leader that had the invention in it. We
17 were offering to sell something else.

18 Mr. McKibben was on the stand
19 twice, and twice he did not put before you the
20 versions of the product. He never showed you
21 the product, did he? And he didn't say it has
22 this one or this one or this one. It's just
23 sort of on December 11, 2002, the very moment in
24 time they filed the provisional, that's the

1 date. That date is engineered to get around
2 this problem, so let's look at this evidence and
3 the construction.

4 Did he offer to sell it more than
5 one year before the patent application, and did
6 it practice the invention? The product is
7 Leader2Leader. Now again look at the jury
8 instructions. This is 4.7. An offer to sell
9 need not be accepted to trigger, so it doesn't
10 have to be accepted by the other side to trigger
11 this bar.

12 Even if accepted, the fact that it
13 didn't lead to an actual sale, not relevant.
14 The essential question is whether or not there
15 was an attempt to obtain commercial benefit from
16 the invention. Bingo. That's the law. An
17 offer to sell can invalidate the patent even if
18 it was secret, so when we took his deposition,
19 we said to him, did you ever offer to sell it.
20 It's a simple question. Look what he said.

21 "In 2001, had you offered to sell
22 Leader2Leader to anyone?"

23 "Can you repeat that question."

24 "In 2001, had you offered to sell

1 Leader2Leader to anyone?"

2 "I don't understand what you mean
3 by 'sell.'"

4 "In 2001, had you ever offered
5 anyone the opportunity to use
6 Leader2Leader in exchange for payment?"

7 "I don't understand that
8 question."

9 "Had you ever offered anyone the
10 opportunity to use Leader2Leader in
11 exchange for a fee?"

12 "In exchange for a fee? Do you
13 mean sell the product?"

14 "Yes, sir."

15 "No, not that I can recall."

16 Not that he can recall. Let me
17 show you three exhibits, please. This is a
18 moment in history that we'll all remember. A
19 few months after 9/11, the government reaches
20 out to industry and says, give us ideas to how
21 to make us safe.

22 He submits a proposal in
23 January 2002. What is the word he uses to
24 describe himself? Offeror. He wrote it. He

1 copyrighted it. And the date. What does he say
2 that he's selling? What's the goal? To
3 implement a Leader2Leader to
4 enterprise-collaboration environment. Okay.
5 Never offered to sell.

6 He has an extensive body of
7 financial information. He's going to try to get
8 \$8.5 million of the government's money based on
9 that change? DTX 184 at the bottom. He's
10 saying he didn't offer to sell a product that
11 has the product in it because if you believe he
12 sold it on December 10th or 9th or 8th of 2002,
13 this lawsuit that he brought isn't going to fly,
14 but look what he's saying at the time, not when
15 he's in trial, but eight years ago. In writing,
16 people.

17 This is October 10th. We have
18 verbally committed to selling a system. What
19 system was he trying to sell? So based on that
20 change two months before the invention is
21 completed, is he selling last year's Corvette or
22 the one with the Bluetooth, the secret sauce?
23 Do you really believe he would be trying to sell
24 these guys the system that doesn't have this

1 great invention? Does that make sense to you?

2 It's your call. You make the
3 decision, but nonsense he invented this thing in
4 1999 and he's invested \$10 million into it, and
5 we're right on the cusp of the invention, and
6 he's not talking about the one with the patented
7 technology in it. He's selling last year's
8 model without the Bluetooth. That what he says.

9 The Limited. This is the -- this
10 is an interesting one. He needs
11 Mr. Schlessinger to confirm that they've got a
12 deal so he can go over the to the VC and get the
13 deal and then he'll get money. Investment
14 money. That's what he's doing with this one.
15 This one is getting closer to the strike of
16 midnight, when this lawsuit turns into a
17 pumpkin. November 21st.

18 And, Your Honor, I'll finish
19 within ten minutes.

20 I'd like to offer the sweetheart
21 deal. Sweetheart deal. That's an offer. Only
22 question is, what is the offer?

23 And there was a lot of effort to
24 separate out Leader2Leader to LeaderPhone, but

1 he's got a price for Leader2Leader 2000 of these
2 seats for three years down to \$20.84 a month.
3 And you see the document. He separates out
4 LeaderPhone to Leader2Leader. Leader2Leader is
5 some kind of standalone product. He's selling
6 something. He's offering something for a
7 commercial benefit.

8 The only thing standing in the way
9 of invalidating his patent now is just whether
10 or not it practices the invention. This is the
11 jury instruction you're going to look to to help
12 you get there. There is the idea of ready for
13 patenting, whether the inventor has enabled the
14 invention.

15 Remember Lamb? That video we
16 played you? He said it was demonstratable in
17 August of 2002. What did he tell the federal
18 government when he was trying to get funding in
19 the aftermath of 9/11 in January of '02?
20 Operational. Operational, but he wants you to
21 believe that he wasn't ready yet.

22 Compare what he says in court to
23 what he told other people eight years ago in
24 these documents. Don't take my word for it.

1 Make your own comparison and come to your own
2 understanding.

3 By preparing drawings sufficient
4 to allow someone skilled in the art to make it,
5 it's ready for patenting, which there is reason
6 to believe it is ready to work for its intended
7 purpose, and, yes, I asked them before trial,
8 did Leader2Leader practice the invention, and
9 they said, yes.

10 But now what they say is, you
11 didn't ask the question correctly. You didn't
12 ask me about the version in 2002, even though
13 the purpose of asking the question is to figure
14 out whether it did, so now they're dancing. Now
15 they're dancing. This is 2009. Why? Because
16 that's when I asked them the question, in 2009,
17 and he swore to it under penalty of perjury.

18 Mr. McKibben, when he comes to
19 court, he has a really good recollection,
20 doesn't he? At some point, you had it, I had
21 it, on the December 11. At his deposition
22 before trial, we asked him a real simple
23 question: Can you think of any iteration of
24 Leader2Leader, the product, that did not

1 practice the patent? He's the inventor. Can
2 you think of any one that does not practice the
3 patent? Did they also practice it? This year's
4 version. Simple question. Can you think of any
5 iteration that didn't practice the patent? This
6 is what he said.

7 "Can you identify any iteration of
8 the Leader2Leader product that in your
9 opinion did not implement what's claimed
10 in the '761 patent?"

11 "That was a long time ago. I
12 can't point back to a specific point."

13 He can point a to specific point
14 now though in court. There it is, but if you
15 look at what he was telling people at the time,
16 this is from the government funding document,
17 and if you look at this page from DTX 178, 179,
18 that is his description of what it's going to
19 do. He's got these diagrams. This is the
20 thing. You don't have to read it now. Take a
21 look at it and then compare it to the document
22 that Mr. Andre just got done telling you is the
23 document from 2000 in which he described the
24 patent.

1 Just do me a favor and compare
2 them yourself. Get them side by side because if
3 you think what's being disclosed and discussed
4 and proposed to the federal government -- why
5 would you be trying to sell last year's Corvette
6 with no Bluetooth to the federal government?
7 Does that make sense?

8 Compare what he's telling the
9 government and map it to what he describes and
10 look at the commonality of the language. It's
11 clear that what he's trying to sell is his
12 invention, and this is what he tells the
13 government. It's operational, but now he's
14 saying it's operational, but not the one that I
15 invented. It's a different one. To get money,
16 this is what he tells people. To preserve a
17 lawsuit, he might say something different.

18 November, you see how he separates
19 out Leader2Leader from LeaderPhone. Over here
20 it is a suite of products. You see that when
21 you're trying to sell it and commercialize it.
22 Back in the day, it's always separated, and this
23 is to The Limited, and this document, in the
24 ones around it, he's talk about running the

1 entire company on this platform.

2 When he's talking to them about
3 it, it doesn't practice the invention. It's
4 another version, but the dates are starting to
5 be a problem because that's pretty close to
6 December 11.

7 Few days later, this is an update
8 to his shareholders, DTX 776. Look what he
9 says. We were demoing the functionality. He
10 wants you to believe he was demoing last year's
11 functionality, not the Corvette with the
12 Bluetooth. That's what he's selling to The
13 Limited two weeks before the provisional is
14 filed. Last year's model without Bluetooth.

15 And look what it does. It's a
16 tool to support national clinical testing based
17 on the changes in the business, I guess of
18 making method products. They're going to run
19 their entire clinical testing on this
20 functionality because it's last year's Corvette
21 because you don't want to offer them the a-ha
22 moment from 1999, full document management
23 functions.

24 And look at the language.

1 Collaborative. This is the heart. What he
2 says, it is in a nutshell looking for
3 Leader2Leader, but they're looking for the one
4 that doesn't practice the patent. They're
5 looking for last year's model. They're looking
6 for the one without the Bluetooth. Do you
7 believe it?

8 The dates are becoming a problem.
9 We have to thread this needle. This is three
10 days before the provisional. Three days now;
11 right? Remember I have to convince you that a
12 moment before that year period, he made an offer
13 to sell the patented technology. That's my
14 burden. Three days before the provisional was
15 filed, timing is getting tight. We really have
16 to thread this needle.

17 Look what he says. The Limited,
18 this is the big letter. This guy Schlessinger
19 lined this up and got the NDA. He's confirming
20 now from Schlessinger that they have the sale,
21 and they're going to get the contract in January
22 on December 8, 2002, three days before the
23 provisional. He's selling the elements for a
24 contract that gets signed a month later. Last

1 year's model with no Bluetooth. Do you believe
2 it? Last year's model with no Bluetooth.

3 Or is he trying to sell the most
4 important invention of his life for the first
5 time? You decide. You decide.

6 Look what he actually said at
7 trial. I pulled this up last night, and I was
8 struck. Their lawyer asked them, you never did
9 it before. Look at his answer. "It couldn't
10 have been before December 11. That technology
11 wasn't done until days before."

12 Now he admits it wasn't exactly on
13 December 11. It's days before, December 8. He
14 sold it. That's three days before. If you find
15 December 8 is within this, the on-sale bar is
16 now there, and remember it starts in 1999, and
17 it goes all the way here, and yet he wants to
18 say at the strike of midnight is when it
19 happened; right?

20 This is an extraordinary amount of
21 work. I did the math. It's twenty engineers
22 forty hours a week for three years at
23 fifty weeks a year, but he's got to thread that
24 needle. Why does he have to thread the needle?

1 Because he offered it. His lawsuit is over.

2 Public demonstrations. I'm not
3 going to talk about them, but there's a jury
4 instruction that defines it. If he made one
5 demonstration of the functionality to any one
6 person, even if it wasn't widely disseminated,
7 separate grounds for invalidation. That's how
8 many times he was talking about it because if
9 he's not talking about the Corvette with
10 Bluetooth. You don't need 2,000 separate
11 contracts of secrecy.

12 Look at that. Are you telling me
13 is it really the position that a thousand
14 different times with a thousand different
15 contracts a thousand different employees and a
16 thousand meetings with a thousand different
17 people he never once, not one time, ladies and
18 gentlemen, not one time did he offer it for a
19 commercial benefit? Never happened?

20 Look at that chart. Imagine all
21 of the conversations he had. Imagine them and
22 then look at that chart and ask yourself not one
23 time, never? The most exciting thing that's
24 ever happened to him in his life. He invented

1 the thing that's going to change everything, and
2 not once up there, ladies and gentlemen, did he
3 offer it for sale. Not once. Do you believe
4 it?

5 And there's their timeline. He
6 invented it in 1999, and from that point forward
7 look what he was talking about. He was talking
8 about it a lot because he needed these contracts
9 to protect it because he said it was a secret
10 and made his children sign them, so that leaves
11 us with my concluding remark on this point.

12 I was really struck by this
13 comment. This was a communication he sent just
14 about a month before the provisional was filed,
15 and then the report to the shareholders. We had
16 a phenomenal selling week last week. Not
17 selling the invention, folks. He's selling you
18 the last year's version without the Bluetooth,
19 and they had just committed to contracting with
20 The Limited.

21 So we asked a real simple question
22 at his deposition because he put his hand up in
23 the air and took the oath. Is that statement
24 accurate? That's not a big question of the

1 lawyer. If I ask you if something is accurate,
2 it's either yes, it's accurate, or no, it's not.
3 This is what he told us.

4 "Sir, if you look at the second
5 full paragraph of the e-mail from you,
6 toward the middle there is a paragraph
7 that begins 'we had a phenomenal selling
8 week last week. The Limited,
9 www.limited.com just committed to
10 contracting with Leader for LeaderPhone
11 and Leader2Leader.'

12 Do you see that, sir?"

13 "I do."

14 "Was that an accurate statement as
15 of November 3rd, 2002?"

16 "Again I don't know who I'm
17 communicating with here. I don't recall
18 this person, and I don't recall
19 specifically writing this, but it's
20 referring to -- we met with their COO,
21 CEO, and CTO, and do I have some memory
22 of that meeting? And in that meeting
23 the COO -- and I believe that would be
24 Len Schlessinger that we talked about

1 earlier -- came in the meeting and in a
2 strategic sense committed to moving
3 forward with a relationship with us
4 regarding Leader's company, Leader's
5 products, and so I was probably giving
6 more detail to this person based on a
7 positive meeting."

8 "So the sentence that says The
9 Limited just committed to contracting
10 with Leader for LeaderPhone and
11 Leader2Leader, was that sentence
12 accurate when it was written on November
13 3, 2002?"

14 "I would say accurate in the sense
15 it was hyperbole."

16 "Which portion of it was
17 hyperbole?"

18 "The entire statement."

19 "And by hyperbole, what do you
20 mean by that?"

21 "Well, I would have to get a
22 definition or get a dictionary to define
23 hyperbole, but in general it means
24 an overstatement to make a point, that

1 we had a good meeting. But again I
2 don't know who my audience because I
3 don't remember who this person is."

4 Do you get my point? When he has
5 a purpose, a commercial purpose, he sometimes
6 uses something called hyperbole, which is an
7 overstatement to make a point. He has every
8 reason to thread this needle, ladies and
9 gentlemen, because if he doesn't, the lawsuit he
10 brought against Facebook, that dog won't hunt.

11 And this jury instruction, I'd ask
12 that you look at this because this is the
13 instruction you have to look at to assess
14 credibility. What it tells you is if there are
15 parts of the story that are contradictory and
16 inconsistent, you can ask yourself whether you
17 want to leave the whole story. That's what it
18 says. That's 1.7.

19 So I'll leave you with this. This
20 is a very serious case to Facebook. This is an
21 invention which counsel says solved everything
22 which nobody else is using. Facebook is not
23 using. Facebook does not infringe. This patent
24 -- this patent is invalid, and Facebook takes it

1 very seriously.

2 I've had at counsel table senior
3 executives of the company. They're watching,
4 and I told you at the beginning of this case we
5 picked you. We've given you a solid task, and I
6 ask that you do that task based on the evidence,
7 based on your judgments, your truth. I ask that
8 you give me your verdict when you go through
9 those questions in verdict form A. Do we
10 infringe? It's noes when you go through the
11 verdict form B. Is the patent valid invalid?
12 The answer is yes.

13 I appreciate your patience. I
14 know it's gone long. Thank you.

15 THE COURT: Mr. Andre, you have up
16 to fifteen minutes.

17 MR. ANDRE: Hi again. Very
18 dramatic.

19 Lawyer advocates talk about
20 executives being here, both lawyers in-house
21 lawyer. In-house lawyer. That's what this is
22 about. Lawyers on their side of the table.
23 It's all about lawyer argument.

24 They propose to call Mr. McKibben

1 a liar because they show a videotape under two
2 solid days of his deposition. They spent almost
3 all their time on this on-sale issue because
4 they have nothing else. They can't beat the
5 technology. There's no evidence of it.

6 Mr. McKibben was on the stand.
7 You saw him live. You judge the credibility of
8 the man.

9 It's their burden of proof to show
10 that there were these sales. What did they
11 show? They didn't try. They didn't even try to
12 show that '761 patented technology was in
13 Leader2Leader. They said Mr. McKibben should
14 have brought the product up and showed you it.
15 Didn't have to. That's not his job. It's their
16 job.

17 One thing that was undisputed in
18 this case, no one argued about it, was the
19 moment that invention was done, within a day,
20 two, it was in the patent office. They could
21 not have sold it before they got it done.

22 Look at the jury instructions.
23 Was it ready for patenting? It had to be done.
24 It wasn't. They showed Mr. Lamb's video. He

1 proposed Mr. Lamb gave inaccurate testimony. We
2 showed you his live testimony just as well. He
3 said the code could not implement the
4 technology. That's written in that provisional
5 he did.

6 He said it live on the stand. It
7 doesn't. It's a piece of the code that gives
8 the recipe. You can't run it in the machine.
9 It gives the recipe. He said the same thing
10 live. They showed you his videotape to indicate
11 that somehow he made a comment or omission that
12 the provisional patent application wasn't in the
13 technology.

14 That's not true. Every bit of
15 evidence shows that the provisional patent
16 application supports the claims. You saw an
17 experiment. You saw results of that experiment,
18 real evidence.

19 Mr. Rhodes's closing arguments.
20 He's a very skilled attorney. What he did not
21 show you was evidence. You can spin the story.
22 As a lawyer, that's what they train you as a
23 lawyer to do. I mean, when I left science to
24 get into the practice of law, one thing that

1 still boggles my mind, to be honest with you, is
2 how lawyers can argue about what a comma means,
3 how one word means this. They can twist words
4 in such a way they can take a letter I wrote to
5 my mother and deconstruct that letter in such a
6 way and manipulate the words in such a way that
7 it would look like. I did not love my mother.
8 They can do that. That's what lawyers do.

9 People, I love my mother. That's
10 what lawyers do. He goes through the words of
11 these claims and twists them all around. "The"
12 means this and that and everything else. These
13 are functional claims, functional language for
14 scientists, computer scientists.

15 The one computer scientist who
16 tried to show what these words meant is
17 Dr. Vigna. They don't contest that he's right
18 on the technology. They talk about the word
19 "update." Does it update the metadata? In
20 order for them to update something, you have to
21 change it. He used it as resume. You have to
22 update your resume. What if you add something
23 onto it? I don't change what's there. I just
24 add more stuff to it.

1 That's updating the metadata. You
2 add no metadata to it. I gave the example at
3 trial of update my CD collection. I like music.
4 I have 200 CDs. If I buy more, I update. I
5 don't change the 200 I have. I add new ones.
6 That's what updating the metadata is about.

7 They have no non-infringement
8 case. That's clear, so they have to rely on the
9 invalidity from prior art that they show, and
10 they show these charts and snippets same words.
11 Same words. They match the words up. They
12 don't match the concepts.

13 When computer scientists write new
14 technology, they don't invent new words. They
15 all use the same words. These are common terms
16 in the art, but anyone who saw Dr. Herbsleb's
17 testimony about the prior art, anyone who saw it
18 knows the concepts are apples and oranges. One
19 is about managing documents, tracking documents.
20 The other is about people and users. Completely
21 different.

22 They talk about demonstrations.
23 We had a question on the verdict form. Did they
24 make public demonstrations? He didn't try to

1 answer because it was blown out of the water
2 with the NDAs. The implication was this whole
3 company was about one thing: Building this
4 patented technology.

5 One thing you heard was the
6 company was a technology suite of companies back
7 in those days. Microsoft was the model.
8 Microsoft didn't sell one product. They sold a
9 suite of products. You buy Microsoft Office,
10 you get Word, e-mail, the groups, Excel
11 spreadsheets. You get all these different
12 products within the product suite.

13 Leader calls their product suite
14 Leader2Leader, and they went out and they were
15 trying to develop that product suite. It's
16 undisputed. Undisputed. There's not a single
17 piece of evidence they can provide that shows
18 the '761 technology and Leader2Leader.

19 When they finally got around to
20 having the product work in 2003, you saw the
21 agreements with Limited based on that changes
22 and others when they got it close to working.
23 Not '761 necessarily, but the product suite
24 altogether. Beta agreements. They're still

1 doing experimentation of it. They need to see
2 if it will work in the field. Every time it was
3 beta agreements.

4 By definition -- look at the jury
5 instructions -- if you're doing experimental
6 testing, it's not a sale. It's not invalidated.
7 That was in 2003.

8 Every single time -- the BAA.
9 That's one that kills me. That's a funding
10 request from the government. Give us a grant.
11 Doesn't mention the '761 technology. They talk
12 about smart cameras and -- but it's not about
13 the '761. They're trying to get funding, grant.
14 The BAA instructions say this is not a
15 buyer/seller relationship. They can try to spin
16 it that way, but by law, it's not. The
17 agreement itself said it's not.

18 It talks about the fact that this
19 invention was the most important, exciting day
20 of Mr. McKibben's life. This was it. I know
21 Mr. McKibben now. He has a wife and five kids.
22 I can swear this was not the most important day
23 of his life. Not close.

24 He took a risk in 1997. He took

1 his -- quit his job and started a company based
2 on an idea, some invention he wanted to come up
3 with, and his wife and five kids supported him.
4 That's what innovators do. To sit here and have
5 lawyers cast any kind of aspersion on that
6 activity or anything he would say is hard for
7 me.

8 I know lawyers do, and that's his
9 job. I get it. It's hard. The fact of the
10 matter is on our burden of proof, which is
11 lower, we gave you evidence of infringement and
12 tons of it.

13 On Facebook's burden of proof
14 about invalidity, which is much heavier, it's
15 clear and convincing, they didn't give you
16 anything. They give you innuendo. They said
17 since Leader2Leader has '761 in it in 2009, it
18 was there. Come on. We know, don't we?

19 Not true. There's no evidence.
20 This is about truth, finding out what the truth
21 is, and that's based on evidence. They didn't
22 give you any. We did. When you deliberate,
23 look at the evidence. Remember the people who
24 took the stand and gave the testimony. You'll

1 come to the right decision.

2 Thank you. Thank you, Your Honor.

3 THE COURT: Thank you, ladies and
4 gentlemen of the jury. I have two more very
5 short instructions to read to you which you will
6 see at the end of the instructions in the copies
7 that you'll get when you're in the jury room.

8 First is jury instruction number
9 5.3, entitled Duty to Deliberate. Now that all
10 the evidence is in and the arguments are
11 completed, you are free to talk about the case
12 in the jury room. In fact, it is your duty to
13 talk with each other about the evidence and to
14 make every reasonable effort you can to reach
15 unanimous agreement.

16 Talk with each other. Listen
17 carefully and respectfully to each other's
18 views, and keep an open mind as you listen to
19 what your fellow jurors have to say. Try your
20 best to work out your differences. Do not
21 hesitate to change your mind if you are
22 convinced that other jurors are right and that
23 your original position was wrong, but do not
24 ever change your mind just because other jurors

1 see things differently or just to get the case
2 over with.

3 In the end, your vote must be
4 exactly that: Your own vote. It is important
5 for you to reach unanimous agreement, but only
6 if you can do so honestly and in good
7 conscience.

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

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

14 The final instruction is entitled
15 The Court Has No Opinion. So I want to finish
16 by repeating something I said earlier, which is
17 that nothing I have said or done during this
18 trial is meant to influence your decision in
19 favor of either party. You must decide the case
20 yourselves based on the evidence presented, and
21 that concludes the instructions.

22 With any luck your lunch will be
23 waiting for you, and we're going to excuse you
24 now to begin your deliberations.

1 THE CLERK: All rise.

2 (The jury exited the courtroom at
3 12:56 p.m.)

4 THE COURT: So I think as long as
5 you stick around and make sure Mr. Golden knows
6 how to reach you if the jury has a question or
7 anything, other than that I think you're all
8 free to go at the moment, and we'll ask the
9 court security officer who is going to be around
10 the jury to come and be sworn. Let's do this on
11 the record and swear her.

12 THE CLERK: Please state your full
13 name for the record.

14 (Andeniece Houston was sworn in by
15 the clerk.)

16 THE COURT: Thank you. Is there
17 anything else before we break, Mr. Andre?

18 MR. ANDRE: Two things, Your
19 Honor. These are actual exhibits that need to
20 go back to the jury room. Pass them up?

21 THE COURT: Please do. Anything
22 else, Mr. Andre?

23 MR. ANDRE: Just if Mr. Golden
24 could notify us if the jury leaves for the

1 night.

2 THE COURT: We'll make sure he
3 does that.

4 Mr. Rhodes, anything?

5 MR. RHODES: I have to messenger
6 up, I think, what is the binder of your
7 exhibits, Your Honor. May I hand it to your
8 clerk?

9 THE COURT: Is it the admitted
10 evidence?

11 MR. RHODES: Yes.

12 THE COURT: Please pass it up. I
13 see further stuff coming.

14 MR. ANDRE: Your Honor, we also
15 have the boxes of that one massive exhibit as
16 well.

17 THE COURT: Make sure you deliver
18 all that to Mr. Golden, and he'll make sure all
19 the evidence gets where it needs to be.

20 MR. RHODES: Your Honor, again on
21 when the verdict comes in and who comes back
22 from our side, there may not be the entire cast
23 of characters. It's been a privilege being
24 here, and if someone isn't here, no disrespect

1 is intended.

2 THE COURT: No offense will be
3 taken. Thank you very much. Good-bye.

4 (A recess was taken at 12:58 p.m.)

5 (The proceedings reconvened at
6 3:22 p.m.)

7 THE COURT: Good afternoon
8 everybody. This is Judge Stark. Who's there
9 for Leader, please?

10 MR. ROVNER: Your Honor, it's Phil
11 Rovner and Paul Andre.

12 THE COURT: Okay. And who's there
13 for Facebook?

14 MR. RHODES: Your Honor, it's Mr.
15 Rhodes, I have everybody here.

16 THE COURT: For our record here,
17 of course, I have the court reporter. It's our
18 case 08-862-LPS. I wanted to update you.

19 There have been a few, I guess,
20 inquiries from the jury, including one that I
21 wanted to confer with you all on before I
22 respond to them, so let me tell you where we are
23 and what I propose to do, and then I certainly
24 am very interested in what the parties say, what

1 your views may be.

2 So very shortly after the
3 deliberations, began the CSO, the court security
4 officer, called my deputy to say that the jury
5 wanted copies of the jury instructions and the
6 verdict form, and since we had not previously
7 provided those copies and said that we would do
8 that, we did go ahead and provide copies of
9 those.

10 Then about ten minutes after that,
11 the CSO told my deputy that the jury wanted a
12 whiteboard or a large pad so that they could
13 write some things down. We thought that was
14 okay, and so we've provided them with a
15 whiteboard.

16 Then within the last half hour,
17 the CSO told my deputy that the jurors were
18 requesting individual copies of a particular
19 document that's in evidence. The CSO showed the
20 document to my deputy. He believes it's the
21 patent in suit which was admitted, I think, as
22 PTX 1, but he's not sure. He didn't want to
23 linger and spend any time looking at it.

24 We have not responded yet to that

1 last request about getting individual copies of
2 a particular document, but I think there are two
3 issues.

4 The first one is that it seems the
5 jury and the CSO do not understand that the
6 questions and messages, if any, need to be
7 conveyed in writing.

8 And second, that we may have an
9 issue of should we be giving multiple copies of
10 a particular document that's in evidence to the
11 jury.

12 What I propose is that on the
13 first issue, what I propose is I've written down
14 a few sentences which I will read to you in a
15 second which I propose to have my deputy go tell
16 -- that is, go read to the jurors and to the CSO
17 -- indicating that questions and messages need
18 to be written down, and here's what I came up
19 with that I would have him read to the jury:

20 "The jury is reminded that any
21 messages or questions for the Court must
22 be in writing. If you have a message or
23 question, write it down and give it to
24 the CSO. Messages and questions cannot

1 be conveyed verbally through the CSO."

2 That would be my proposal on issue
3 one.

4 And issue two, if I did get a
5 written question shortly thereafter asking for
6 eight copies of the patent in suit, I would plan
7 to give those copies to the jury.

8 As I said, it seemed clear to me I
9 need to bring you all in the on the loop at this
10 point, and I'm open to other ideas and comments.
11 Let me ask Leader what your view is.

12 MR. ANDRE: Your Honor, we concur
13 with your view.

14 THE COURT: And Mr. Rhodes?

15 MR. RHODES: Your Honor, what you
16 propose is absolutely fine with us, and I
17 appreciate your suggestion of it. We agree.

18 THE COURT: All right. We'll go
19 ahead and do that. If we do get messages in
20 writing, we'll endeavor to keep you in the loop
21 on that.

22 Thank you all very much.

23 (A recess was taken at 3:26 p.m.)

24 (The proceedings reconvened at

1 3:57 p.m.)

2 THE COURT: Good afternoon again,
3 everybody. This is Judge Stark. Who's there
4 for Leader?

5 MR. ANDRE: Paul Andre again.

6 THE COURT: And for Facebook?

7 MR. CAPONI: Your Honor, Steven
8 Caponi. Ms. Keefe and Mr. Rhodes are sitting
9 next to me.

10 THE COURT: Again for the record,
11 it's our case number 08-862-LPS.

12 So I sat my deputy down. He read
13 the instruction as he was directed to do, and in
14 response we've gotten four written questions
15 which I will read to you and then I'll tell you
16 what I propose to state back to the jury as
17 answers.

18 The first question is, "Can we
19 maybe -- can we make eight copies of provisional
20 patent PTX 3?"

21 Next question, "Can we have eight
22 copies of pages twenty-nine to thirty-one of
23 patent, PTX 1?"

24 Next question, "How do we have to

1 stay?"

2 And last question, "Can we have a
3 smoke break?"

4 What I propose --

5 MR. RHODES: Your Honor, I'd love
6 to hear the last question answered first.

7 THE COURT: Let me do it in order.
8 I'm sure you would. I'm surprised they didn't
9 list the last question as the first question.

10 In response to "can we make eight
11 copies of provisional patent," I interpreted
12 that to be, can we have eight copies of PTX 3,
13 and my proposed answer is yes.

14 "Can we have eight copies of pages
15 twenty-nine to thirty-one of the patent, PTX 1?"
16 I propose to say yes, you can have eight copies
17 of the complete patent and provide them to them.

18 "How do we have to stay?" I read
19 as how long do we have to stay, and I propose to
20 write back to them if you are still
21 deliberating, which is fine, at 5:00 p.m., you
22 may leave at that point and be back at 9:00 a.m.
23 tomorrow to continue your deliberations.

24 And then on the smoke break, I

1 propose to say yes, but a CSO will need to
2 escort you.

3 What does Leader have to say about
4 any of this?

5 MR. ANDRE: We concur with Your
6 Honor's suggestions.

7 THE COURT: And Facebook?

8 MR. CAPONI: We concur as well,
9 Your Honor.

10 THE COURT: All right. Okay.
11 Thank you very much.

12 (The proceedings ended at 4:00
13 p.m.)

14

15

16

17

18

19

20

21

22

23

24

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

C E R T I F I C A T I O N

I, DEANNA WARNER, Professional Reporter, certify that the foregoing is a true and accurate transcript of the foregoing proceeding.

I further certify that I am neither attorney nor counsel for, nor related to nor employed by any of the parties to the action in which this proceeding was taken; further, that I am not a relative or employee of any attorney or counsel employed in this case, nor am I financially interested in this action.

DEANNA WARNER

Professional Reporter and Notary Public