

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

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

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

OF COUNSEL:

Paul J. André  
Lisa Kobialka  
KING & SPALDING LLP  
333 Twin Dolphin Drive  
Suite 400  
Redwood Shores, CA 94065  
(650) 590-0700

Philip A. Rovner (#3215)  
Jonathan A. Choa (#5319)  
POTTER ANDERSON & CORROON LLP  
Hercules Plaza  
P. O. Box 951  
Wilmington, DE 19899  
(302) 984-6000  
[provner@potteranderson.com](mailto:provner@potteranderson.com)  
[jchoa@potteranderson.com](mailto:jchoa@potteranderson.com)

*Attorneys for Plaintiff and Counterdefendant  
Leader Technologies, Inc.*

Dated: September 15, 2010

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## I. NATURE AND STAGE OF THE PROCEEDINGS

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

## II. SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

### III. STATEMENT OF FACTS

At trial, Leader asserted that Facebook infringed system claims 1, 4, and 7; method claims 9, 11, and 16; and computer-readable media claim 21; and system claims 23, 25, 31, and 32. Leader presented extensive expert testimony and documentary evidence that Facebook itself directly infringes each of these claims. *See, e.g.*, Tr. 667:2-3; 670:17-22; 674:6-12; 676:20-21; 706:14-17; 716:2-8; 719:13-19; 722:11-16; 736:9-15; 749:4-9; 750:21-751:1; 755:6-13; 759:6-17; 763:12-18; 691:3-695:21; PTX 1, 145, 180, 190, 191, 208, 252, 269, 277, 300, 302, 341, 628, 629, 882, 886, 904, 906, 907, 911, 920, 942, 1000, 1001.<sup>3</sup> Leader has provided the Court with a claim chart outlining all of the testimony that supports the jury's finding of direct, literal infringement of each claim. *See Hopkins Decl.*, Ex. 29. Based on that evidence, the jury found direct infringement by Facebook of every asserted claim. D.I. 610 at 1.

Because Facebook asserted that the method claims require joint action by Facebook and a user, Leader also submitted evidence of joint infringement of those claims, as an alternative basis for liability. *See Tr.* 677:12-678:4; 679:8-680:2; 691:3-7.<sup>4</sup> The jury found that Facebook does not direct or control either its employees or its users in performing the method claims. D.I. 610 at 2. The jury did not, however, render a verdict on direction or control with respect to the system and computer-readable medium claims; this Court limited both the jury instructions on joint infringement and the relevant question on the verdict form to the method claims. D.I. 601 at 28, No. 3.7; D.I. 610 at 2.

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

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

#### IV. ARGUMENT

##### A. Standard Of Review

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## V. CONCLUSION

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

POTTER ANDERSON & CORROON LLP

OF COUNSEL:

Paul J. André  
Lisa Kobialka  
King & Spalding, LLP  
333 Twin Dolphin Drive  
Suite 400  
Redwood Shores, California 94065-6109  
(650) 590-7100

Dated: September 15, 2010  
982408

By: /s/ Philip A. Rovner  
Philip A. Rovner (#3215)  
Jonathan A. Choa (#5319)  
Hercules Plaza  
P.O. Box 951  
Wilmington, DE 19899  
(302) 984-6000  
[provner@potteranderson.com](mailto:provner@potteranderson.com)  
[jchoa@potteranderson.com](mailto:jchoa@potteranderson.com)

*Attorneys for Plaintiff and Counterdefendant  
Leader Technologies, Inc.*



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

**CERTIFICATE OF SERVICE**

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

**BY CM-ECF AND E-MAIL**

Thomas P. Preston, Esq.  
Steven L. Caponi, Esq.  
Blank Rome LLP  
1201 Market Street  
Wilmington, DE 19801  
[Preston-T@blankrome.com](mailto:Preston-T@blankrome.com)  
[caponi@blankrome.com](mailto:caponi@blankrome.com)

I hereby certify that on September 15, 2010 I have sent by E-mail the foregoing document to the following non-registered participants:

Heidi L. Keefe, Esq.  
Mark R. Weinstein, Esq.  
Jeffrey Norberg, Esq.  
Melissa H. Keyes, Esq.  
Cooley LLP  
Five Palo Alto Square  
3000 El Camino Real  
Palo Alto, CA 94306-2155  
[hkeefe@cooley.com](mailto:hkeefe@cooley.com)  
[mweinstein@cooley.com](mailto:mweinstein@cooley.com)  
[jnorberg@cooley.com](mailto:jnorberg@cooley.com)  
[mkeyes@cooley.com](mailto:mkeyes@cooley.com)

/s/ Philip A. Rovner  
\_\_\_\_\_  
Philip A. Rovner (#3215)  
Potter Anderson & Corroon LLP  
Hercules Plaza  
P. O. Box 951  
Wilmington, DE 19899  
(302) 984-6000  
[provner@potteranderson.com](mailto:provner@potteranderson.com)