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.	)	**PUBLIC VERSION**

PLAINTIFF LEADER TECHNOLOGIES, INC.'S OPPOSITION TO FACEBOOK, INC.'S RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW (JMOL) OF NO LITERAL INFRINGEMENT AND NO INFRINGEMENT UNDER THE DOCTRINE OF EQUIVALENTS [MOTION NO. 2]

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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 ("JMOL") 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 pursuant to Fed. R. Civ. P. 50(b) on August 25, 2010. *See* D.I. 628, 629, 630, 631.

II. SUMMARY OF ARGUMENT

The substantial factual evidence of Facebook's infringement of the asserted claims of the '761 Patent dominated the trial in this case. Leader provided the jury with plentiful and overwhelming evidence of Facebook's infringement, which was the basis for the jury's factual finding of infringement. That evidence consisted of, among other things, two days of Dr. Giovanni Vigna's expert testimony, 23 trial exhibits describing the technical aspects of Facebook's website, and trial testimony of five of Facebook's top engineers and executives. Now, however, Facebook requests that this Court disregard the jury's factual finding under the guise of claim construction arguments it either waived or lost prior to trial because it disagrees with the jury's finding of infringement. Notably, Facebook cannot argue that the jury did not have substantial evidence for its conclusion, but instead attempts to argue that Leader did not provide evidence to support infringement based on Facebook's distorted claim construction.

Facebook's entire non-infringement argument requires revisiting claim construction for two claim terms, "updating the stored metadata" and "dynamically." Facebook does not contend, however, that the Court erred in construing those terms. Rather, Facebook challenges Dr. Vigna's opinion of how those constructions apply to Facebook's website. In making its factual determination, the jury was free to accept or reject Dr. Vigna's testimony, just as it was with Facebook's non-infringement expert. The jury found literal infringement of all asserted claims of the '761 Patent, and Facebook's request for judgment as a matter of law as to no literal

infringement should be denied.

Facebook's motion also seeks a judgment as a matter of law regarding the jury's finding under the Doctrine of Equivalents ("DOE"), even though the jury did not find infringement under this theory. Like literal infringement, Leader presented substantial evidence of infringement under the DOE as an alternative theory to literal infringement. Pursuant to the special verdict form, and because the jury found literal infringement, they could not find infringement under the DOE. Facebook's motion on the DOE is therefore not appropriate for judgment as a matter of law. To the extent Facebook challenges the sufficiency of the DOE evidence, Facebook's position is unsupported by the trial record, which contains an overwhelming amount of supporting evidence.

Additionally, Facebook asks for a new trial for the same reasons noted above, and the Court should deny that request for the same reasons. Leader provided extensive infringement evidence at trial and Facebook provided no counter evidence. Furthermore, all of Dr. Vigna's testimony was disclosed in his expert report and he never deviated from that report at trial. As such, the jury's findings should stand, and Facebook's motion should be denied.

III. STATEMENT OF FACTS

At trial, Leader called Dr. Giovanni Vigna to testify as its expert witness regarding the infringement of the '761 Patent by the website www.facebook.com (the "Facebook Website"). Dr. Vigna used the construction in the Court's claim construction order for all terms construed, including the terms "dynamically" and "metadata." *See* Tr. 528:10-529:2.[1] He testified on an element-by-element basis, matching the claim language to Facebook's infringing website. *See* Hopkins Decl., Ex. 29. Dr. Vigna supported his testimony with the Facebook Website's source code, many of Facebook's internal technical documents, and Facebook's own statements. Leader presented 23 exhibits that detailed the technical aspects of Facebook's Website. *See, e.g.*, Tr. 576:4-587:19, 640:22-655:3, 715:16-716:8, 718:10-719:19, 742:7-747:21, 749:13-751:1; *see also*

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[1] All documents cited herein are attached to the Declaration of Ryan Hopkins in Support of Plaintiff Leader Technologies, Inc.'s Oppositions to Defendant Facebook, Inc.'s Renewed Motions for Judgment as a Matter of Law ("Hopkins Decl.").

PTX 145, 180, 190-91, 208, 252, 269, 277, 300, 302, 341, 628-29, 882, 886, 904, 906-07, 911, 920, 942, 1000-01. Facebook called Dr. Michael Kearns in rebuttal. *See, e.g.*, Tr. 1074:9-14.

After evaluating all the factual evidence, the jury found that Facebook literally infringed every asserted claim of the '761 Patent. D.I. 610 at 1. Because literal infringement was found, the jury did not find infringement under the DOE. D.I. 610 at 2.

IV. ARGUMENT

A. The Standard for Granting a JMOL

There is no basis to grant JMOL because there is substantial evidence for the jury's factual findings of infringement. It is black letter law that infringement is a question of fact. *i4i Ltd. v. Microsoft Corp.*, 598 F.3d 831, 849-50 (Fed. Cir. 2010). JMOL is appropriate only if the court finds that a "reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." *Id.* (quoting Fed. R. Civ. P. 50) (citation omitted). The Court must give Leader, 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 [it]." *Mattern & Assocs., L.L.C. v. Seidel*, 678 F. Supp. 2d 256, 264 (D. Del. 2010) (quoting *Williamson v. Consolidated Rail Corp.*, 926 F.2d 1344, 1348 (3d Cir. 1991)).

B. Substantial Evidence Supports The Jury's Verdict that Facebook's Website Infringes the '761 Patent

Leader presented overwhelming evidence that Facebook infringes the asserted claims of the '761 Patent. Leader's expert on infringement, Dr. Vigna, testified over the course of two days regarding how the Facebook Website met every single element of the asserted claims. *See, e.g.*, Tr. 522:20-829:17. Dr. Vigna established infringement using three example use cases, each conclusively demonstrating infringement. *See generally*, Hopkins Decl., Ex. 29. He also supported his testimony with numerous sources of evidence, including the Facebook Website's source code, Facebook's internal technical documents, Facebook's own statements, the Facebook help files, a demonstration of the Facebook Website, the Facebook developer wiki, and

Facebook's internal wiki. *See, e.g.*, Tr. 527:21-735:12-24, 680:8-682:1, 685:20-686:24, 553:5-555:9, 568:21-570:16, 592:19-593:8, 595:12-599:23, 604:9-13, 605:14-607:21, 723:12-724:8, 527:21-529:2; *see also* PTX 145, 180, 190-91, 208, 252, 269, 277, 300, 302, 341, 628-29, 882, 886, 904, 906-07, 911, 920, 942, 1000-01. In fact, multiple documents were used to support the infringement of each claim. *See, e.g.*, Tr. 577:3-588:8. The testimony of five of Facebook's own engineers further supported Dr. Vigna's conclusion and supported the jury's infringement verdict. *See* Tr. 473:8-493:9, 506:9-522:14, 883:19-884:6; *see also* Hopkins Decl., Ex. 29. That evidence clearly surpasses the substantial evidence needed to uphold the jury's verdict, which is viewed in the light most favorable to Leader, the verdict winner. *See Williamson*, 926 F.2d at 1348. Since Facebook is not disputing infringement regarding the vast majority of the claim elements and terms, Leader's opposition focuses on the only two claim terms that Facebook raised, namely "updating the stored metadata" and "dynamically."

1. Leader Presented Overwhelming Evidence that the Facebook Website Updates the Stored Metadata

Leader presented the jury with substantial evidence that the Facebook Website updated the stored metadata as required by the asserted claims of the '761 Patent. *See, e.g.*, Tr. 535:2-607:21, 629:7-749:9. For example, Dr. Vigna testified that the Facebook Website captures context information about an uploaded file and stores this information in metadata:

> This is the context information that I referred to many times. So what the Facebook does when there is an upload, it looks to say, oh, for example, who created this photo, and when it was created. It's been modified and captures that information and stores it as context information in the metadata.

See Tr. 785:19-786:1. Dr. Vigna made clear that the "context information" of the Facebook Website is *part of the metadata* that is stored on the storage component.

> Q. So, for example, the first row may be metadata about the photo that I entered. So my profile picture, and the very next row may actually be the metadata about John Vineyard's photo; is that correct?
> A. That's all metadata. It's all part of the metadata that is stored on the metadata storage component.
> Q. But in this particular instance, it is the metadata about the photo in the particular row of the photo table; correct?
> To be -- just to be precise, that would be the context information that is captured and it's stored as metadata --

A. That is correct.

See Tr. 788:19-789:9; *see also* Tr. 776:20-21; 779:3-5; 781:24-782:4; 784:6-9.

The metadata referred to in the claims resides on the storage component, and the metadata on the storage component on Facebook's Website is continually updated. Dr. Vigna testified that the tracking component of the Facebook Website updates the metadata with information about the second context in which a user accesses data from a second context. *See, e.g.*, Tr. 535:2-538:13, 541:3-588:8, 588:16-607:21, 629:7-666:21. In one example, the user accesses his own profile picture by writing on the wall of another user. *See, e.g.*, Tr. 593:10-604:8. The tracking component updates the stored metadata based on the user's change to the second context. Specifically, in this example, the Facebook Website updates the metadata by [redacted] based on the fact that the user is in the second context. *See, e.g.*, Tr. 601:1-604:8.

In another example, the Facebook Website updates the stored metadata when a user accesses his profile picture by joining a group or fanning a page. Specifically, the Facebook Website updates the metadata by [redacted] In a final example discussed at trial, the stored metadata is updated when a user accesses a picture that was uploaded in the user's album from a group page. *See, e.g.*, Tr. 638:18-640:12. Here, the stored metadata is updated with [redacted] Dr. Vigna provided substantial evidence regarding how the Facebook Website updates the stored metadata when a user accesses data from a second environment, as required by the claims, based on the user's change to the second context.

Facebook argues that Dr. Vigna failed to show the Facebook Website "modified or changed" the actual *context information* about the photo he used in his example of infringement. D.I. 633 at 5. Putting aside the fact that "updating" was never limited to "modifying or changing" (*see below*), the claims specifically require updating the metadata -- not updating the context

information. As noted above, Dr. Vigna provided ample evidence that the Facebook Website updates the metadata by adding entries to tables or other data components maintained in the metadata when a user accesses data provided in a first context (such as a profile picture or user album picture) from a second context (such as another user's wall, group or page). *See, e.g.*, Tr. 578:17-580:5; 603:15-604:2; 659:18-661:4; 748:11-17. Facebook admits that features of the Facebook Website result "in the generation of new" metadata, D.I. 633 at 5, such that there can really be no dispute that the jury had substantial evidence to find that the Facebook website updates the stored metadata. Even Facebook's own expert agreed with Leader when he admitted that adding new data to metadata constitutes "updat[ing] the metadata." Tr. 1142:6-11. In all events, the jury was entitled to credit Dr. Vigna's application of the Court's claim construction to these facts. While Facebook disagreed with Dr. Vigna's testimony at trial, this disagreement was the factual dispute the jury resolved in its deliberations based on the substantial evidence at trial.

2. Leader Presented Overwhelming Evidence that the Term "Dynamically" was Met by the Facebook Website

The substantial factual evidence at trial was that the Facebook Website operates "dynamically," as recited in the claims. Dr. Vigna relied on the Court's construction of "dynamically," stating that "[d]ynamically means automatically and in response to the preceding event." *See* Tr. 664:12-19. Using that construction, Dr. Vigna gave numerous examples of how the Facebook Website infringed the tracking component of the '761 Patent, stating that "the moment the users share in the how are you message *in response to that event, automatically* a story is created in the metadata. *Now this story is based on the fact that you change from one profile to another*." *See id.* (emphasis added). He further testified that "this is an important aspect of this system, the fact that what you do is based on how you change your access in the system. You go to one profile to another, the fact that you found the Giants' page and not the Philadelphia Eagles is taken into account. So the metadata is based on this particular change in access." *See* Tr. 665:6-13. Dr. Vigna supported that testimony with Facebook's documents and sections of the actual source code. *See, e.g.*, Tr. 577:7-588:8; *see also* Tr. 568:13-571:6.

Dr. Vigna also testified that the Facebook Website meets the claim element "tracking a change of the user from the first context to a second context and dynamically updating the stored metadata based on the change, wherein the user accesses the data from the second context." PTX 1 at Col. 21, ll. 7-12. He testified that the Facebook Website meets this claim element because it tracks as a user moves from one environment to another and performs an action in the second environment, and then updates the metadata with the tracking information based on the user's change to the second context. Tr. 594:14-19. Dr. Vigna even pointed to specific files within the source code to demonstrate how the Facebook Website tracks its users. For example, he testified

Facebook simply disagreed with Dr. Vigna on whether the Facebook Website met this limitation, yet another factual dispute that the jury resolved.

C. Facebook's Attempt to Turn The Factual Inquiry of Infringement Into a New Claim Construction Argument Should be Rejected

While Facebook's JMOL is simply a disagreement regarding whether the Facebook Website meets certain claim limitations of the '761 Patent, Facebook nonetheless attempts to claim that the jury's factual finding of infringement was based on an "incorrect claim construction." *See* D.I. 633 at 2.[2] All claim construction disputes between the parties, however, were addressed some time ago as the parties thoroughly briefed the constructions of the terms "dynamically" and "updating the stored metadata," and, where necessary, the Court construed those terms. *See* D.I. 179, 191, 196, 219, 224, 280-81. Thus, the Court resolved every properly raised dispute over the meaning of the terms.

Using claim construction as a pretense for its motion, Facebook is attempting to disguise the fact that the entire basis for its JMOL is its attempt to challenge Dr. Vigna's ***application*** of the

[2] Facebook relies on *800 Adept, Inc. v. Murex Secs., Ltd.*, 539 F.3d 1354 (Fed. Cir. 2008) to support its purported "incorrect claim construction" argument. Unlike Facebook's claim that Dr. Vigna applied the "incorrect claim construction," this case concerned the trial court's use of the wrong claim construction. *Id.* at 1366.

Court's claim construction to the Facebook Website in coming up with his infringement opinion. That challenge fails, however, because Dr. Vigna applied the Court's claim construction and compared the asserted claims to the Facebook Website. The jury then decided as a factual matter whether the Facebook Website infringes the asserted claims of the '761 Patent. *See PPG Indus. v. Guardian Indus. Corp.*, 156 F.3d 1351, 1355 (Fed. Cir. 1998) (the Court accords substantial deference to a jury's factual determination regarding infringement). Because Facebook did not like how Dr. Vigna applied the Court's claim construction to its infringing website, it now claims that Dr. Vigna used the wrong claim construction.[3]

As described in detail below, Facebook argues that Dr. Vigna's testimony regarding the operation of the Facebook Website failed to show that "particular metadata was ever modified or changed in any way after it was stored in the photo table" or that "Facebook has a tracking component that dynamically updates stored metadata based on the user's movement." D.I. 633 at 5, 7. Facebook's argument rings hollow because it misstates the Court's claim construction of the relevant claim terms and reads additional limitations into the claims. In all events, Dr. Vigna painstakingly applied the terms "dynamically" and "updating the stored metadata," ***as construed by the Court***, to the Facebook Website. *See, e.g.*, Tr. 588:19-592:16; *see also* Tr. 528:10-529:2.

1. Facebook Is Attempting To Recapture Its Proposed Claim Construction for "Metadata" That The Court Rejected

Facebook is trying to recapture what it lost in the claim construction process -- a narrow definition of "metadata" that includes only very specific information stored in metadata. D.I. 633 at 5. Specifically, during claim construction, Facebook requested that metadata be construed as "a *stored item of information* associated with the user's data that identifies at least the context, user workspace or user environment in which the user and the data currently reside." *See* D.I. 191 at 15 (emphasis added). The Court agreed with Leader, finding that "metadata" should be given its plain and ordinary meaning to one of ordinary skill in the art. *See* D.I. 280 at 26-30; *see also* D.I.

[3] At the Markman hearing, the Court advised the parties that "claim construction evidence" would not be presented at trial and it would entertain a party's motion to strike if experts disagreed on the plain and ordinary meaning of claim terms. *See* D.I. 269 at 60:8-63:7, 101:18-104:14. Facebook never sought to strike Dr. Vigna's understanding of "metadata."

281 at 1-2. The Court rejected Facebook's narrow construction, holding that it "imports unnecessary and unwarranted limitations in the term 'metadata'" even though "the claim language demonstrates that the patentee intended 'metadata' to have a broad meaning." *See* D.I. 280 at 27. Facebook cannot now resurrect its rejected narrow construction by faulting Dr. Vigna's use of the Court's claim construction.

To support its argument, Facebook distorts the evidence and the requirements of the asserted claims. Facebook states that the "the *metadata* stored in the first context consisted of several fields of information relating to a photo uploaded by the user." D.I. 633 at 5 (emphasis added). Facebook's narrow interpretation is exactly what the jury rejected in finding infringement. Instead, as Dr. Vigna testified, the information about the photo is "the *context information* that is captured." *See* Tr. 788:19-789:9. This distinction between metadata and context information is important because the claims do not require the context information to be updated as Facebook insists, but rather only require that the metadata where the context information is stored be updated. D.I. 633 at 3-4 ("updating the stored metadata"). In one example discussed at trial, the metadata includes all of the information maintained in the user database. *See, e.g.*, Tr. 632:7-634:11, *see also* Tr. 914:20-916:18. Therefore, as long as the user database is updated when a user accesses data from a second context, Facebook satisfies this claim element. In other words, the claims do not require that context information be updated. Rather, as the jury correctly found, only the metadata (of which the context information is a subpart) needs to be updated. The jury's verdict is correct and therefore should not be overturned.

2. Facebook Waived Its JMOL Argument Regarding the Claim Term "Updating the Stored Metadata"

A defendant may not acquiesce to a claim construction adopted by the Court, and then, after plaintiff has presented infringement evidence matching that construction, argue that a different claim construction should be adopted. *See Enovsys LLC v. Nextel Commc'ns, Inc.*, No. 2009-1167, 2010 WL 3001704, at *9 (Fed. Cir. Aug. 3, 2010). This, however, is exactly what Facebook is doing now with respect to the term "updating."

While Facebook initially argued during claim construction that "updating" means "modifying existing data to make current," it withdrew that proposed construction and agreed to the term's ordinary meaning. *See* D.I. 191 at 40; *see also* D.I. 219. Facebook's counsel acknowledged the acquiescence would result in a waiver by openly stating the need to "make sure I'm not giving up the wrong thing." *See* D.I. 269 at 107:2-5. Moreover, Facebook never proposed that the Court construe the entire term "updating the stored metadata." Nor did Facebook object to the absence of "updating the stored metadata" from the Court's jury instruction regarding claim construction. *See* D.I. 605 at 2-3. It is far too late in the game for Facebook to reclaim its proposed construction for "updating." Facebook waived its claim construction arguments by waiting until after trial to argue for the first time a purported "incorrect claim construction." D.I. 633 at 2. A post-trial request for a construction is simply too late. *See, e.g.*, *Enovsys*, 2010 WL 3001704, at *9 (infringer waived any alleged error with claim construction because it never requested that the term be construed or offered a construction of that term until after trial); *see also* *Broadcom Corp v. Qualcomm, Inc.*, 543 F.3d 683, 694 (Fed. Cir. 2008); *Eli Lilly & Co. v. Aradigm Corp.*, 376 F.3d 1352, 1360 (Fed. Cir. 2004). Facebook's waiver alone requires rejection of its argument with respect to "updating the stored metadata."

Even under Facebook's new construction, which would require modifying or changing the existing metadata, Facebook still infringes the '761 Patent. One example proven at trial was the following: when a user accesses a profile photo from another user's environment, the table entries for the Minifeed and Wall are modified in the user database. *See* Tr. 969:6-973:16 As such, the metadata, which is the information that is maintained in the user database, is modified or changed, satisfying this claim element under Facebook's newly raised construction of "updating." Thus, even using its new construction, Facebook's waived argument does not change the jury's verdict.

3. Facebook Is Attempting to Change The Construction For The Term "Dynamically"

Facebook proposed that "dynamically" be construed to mean "automatically and in response to the preceding event." D.I. 280 at 24-26. The Court accepted this proposed

construction and rejected Leader's competing construction. Despite winning claim construction on this term, Facebook argues that the proper construction for "dynamically" is "automatically and in response to the change of the user from the first context to a second context." D.I. 633 at 7. This is not the Court's construction. It is a narrower construction than Facebook's proposal for this term which the Court adopted because the Court's construction does not require the stored metadata to be updated "in response to the change of the user from the first context to a second context." Facebook cannot change the Court's claim construction by adding new limitations into the claim interpretation because it is estopped at this late date from seeking to change the very claim construction it sought and obtained from the Court. *See Interactive Gift Express, Inc. v. CompuServe Inc.*, 256 F.3d 1323, 1347-48 (Fed. Cir. 2001); *see also Loral Fairchild Corp. v. Victor Co.*, 911 F. Supp. 76, 80-81 (E.D.N.Y. 1996) (party is judicially estopped from taking an alternative claim construction position after close of discovery).

Facebook's claim that Dr. Vigna used the wrong claim construction for "dynamically" is a red herring that attempts to repackage an unsuccessful non-infringement argument Facebook made at trial. Dr. Vigna used the Court's construction of "automatically and in response to the preceding event." Tr. 664:12-19. Using this construction, Leader offered overwhelming evidence of Facebook's infringement, as shown above. In finding infringement, the jury rejected Facebook's claim that the Facebook Website does not update the stored metadata "automatically and in response to the change of the user from the first context to a second context," likely because such an argument was not based on the Court's construction.[4]

Even if "updating metadata based on the user's movement" were required, Facebook cannot escape infringement. Facebook's own engineer, Christopher Cox, testified that the

[4] Facebook cites to the Court's Memorandum Opinion which provided the Court's basis for its claim construction as if it were the actual claim construction order. This Memorandum Opinion was not before the jury. *See* D.I. 280. There was a separate order that set forth the Court's claim construction for each disputed term. *See* D.I. 281. The constructions contained in the actual Claim Construction Order were provided to the jury. Leader's position, nonetheless, is consistent with the Memorandum Opinion which explicitly stated that the preceding event could be "some identified action by the user," which is what Leader proved at trial. D.I. 280 at 25.

Facebook Website updates the metadata based on the user's movement by updating a log file which tracks all user action on the website. *See* Tr. 883:19-884:6 ("Facebook tracks user movement from one location to another" as "we log page views in this big log which contains all the page views that happened in the system."). As further explained by Facebook's senior vice-president Dan Rose, "when something shows up on the website, by definition we're tracking it. We have to track it in order for it to show up on the website. I don't know what you're referring to by tracking, but logging an action in a database somewhere so that we can present that action on the website is something that -- that's what we do. That's what the site does." *See* Tr. 514:4-15. That explicit testimony from Facebook's own witnesses fully supports the jury's verdict even under Facebook's new claim construction.

D. Facebook's Arguments Regarding the Doctrine of Equivalents are Moot

Inexplicably, Facebook requests JMOL on the issue of infringement under the DOE. D.I. 633 at 10-14. The relevant jury instruction stated:

> "*If* you decide that Facebook does not literally infringe an asserted patent claim, you must *then* decide whether Facebook infringes the asserted claim under what is called the 'doctrine of equivalents.'" D.I. 601 at 29 (emphasis added).

Following these instructions, the jury found that Facebook literally infringed every asserted claim of the '761 Patent, and as a consequence, it marked "No" for "Infringement Under Doctrine of Equivalents" on the Special Verdict Form. D.I. 610 at 2. The jury therefore correctly concluded that the claims cannot be infringed both literally and under the DOE. More importantly, because the jury did not find infringement under the DOE, there is no jury finding on the DOE for Facebook to challenge. *Id.* As a result, the issue is not appropriate for judgment as a matter of law.

Furthermore, Facebook's argument is factually incorrect. Leader put forward legally sufficient evidence for the jury to find infringement under the DOE had the jury not found literal infringement. Dr. Vigna specifically demonstrated how the DOE applied for every element and explained in detail how the Facebook Website met the elements. *See* Tr. 666:21-670:14, 706:18-711:22, 736:23-741:7, 751:2-753:13. In fact, Dr. Vigna went through each and every element of

the claims and testified how the Facebook Website satisfied each element under the DOE because it performed substantially the same function, in substantially the same way to achieve substantially the same result. *Id.* To support his opinion, Dr. Vigna relied upon the same evidence that he did for literal infringement. *See, e.g.*, Tr. 710:18-22, 740:22-741:4, 752:24-753:4. Thus, there was substantial evidence in the record for the jury to find infringement under the DOE if the jury did not find literal infringement.

E. Facebook's Request For A New Trial On Infringement Must Be Denied.

1. The verdict was not against the clear weight of the evidence.

Facebook's request for a new trial also fails to pass muster because the verdict is not against the clear weight of the evidence. All the evidence of infringement discussed above supports the jury's verdict of infringement. *See supra.* Dr. Vigna provided testimony, supported by the source code, technical documents, and the deposition testimony of Facebook's engineers, that the Facebook Website infringed every limitation of the asserted claims of the '761 Patent. Dr. Kearns' testimony was not supported by any substantive evidence but only a slideshow he created. *See, e.g.*, Tr. 862:17-863:1. If the Court grants Leader's motion for judgment as a matter of law, there is no reason to give Facebook a second bite at the apple on infringement.

2. The jury did not decide a fundamental claim construction dispute between the parties.

Facebook's supposed "fundamental claim construction dispute" concerning the claim term "dynamically" provides no basis for its request for a new trial on literal infringement. D.I. 633 at 19-20. Facebook's reliance on *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351 (Fed. Cir. 2008), is entirely misplaced. In *O2 Micro*, the Federal Circuit held that a district court, by never construing a disputed term, improperly permitted the jury to decide the issue. *See id.* at 1360-63. In this case, however, the Court *did* construe the term. Indeed, the Court actually adopted Facebook's proposed construction of "dynamically" and instructed the jury to use that construction. D.I. 280 at 24-26; D.I. 601 at 24, No. 3.4. Facebook cannot now be heard to complain that its own construction was insufficient.

Furthermore, the Court's construction of "dynamically" was precisely the construction adopted and argued by both sides' experts. *See* Tr. 528:10-529:2; 1003:20-23. Rather than a *legal* question of construction, this dispute boiled down to a *factual* application of the Court's construction. Facebook's expert, Dr. Kearns, testified, "[t]here is no component of Facebook which is there perpetually watching users navigate from one page to another and then automatically updating the metadata created in the first context in response to that movement." *See* Tr. 1074:9-14. By contrast, Dr. Vigna testified that "the moment the users share in the how are you message in response to that event, automatically a story is created in the metadata. *Now this story is based on the fact that you change from one profile to another.*" *See* Tr. 664:12-19 (emphasis added). That factual dispute concerning the application of Facebook's own claim construction fell well within the province of the jury, which was free to credit Dr. Vigna over Dr. Kearns -- hardly grounds for a new trial.

3. Dr. Vigna Testified Within the Scope of his Expert Report

The Court should reject Facebook's argument that a new trial should be granted because Dr. Vigna testified outside the scope of his expert report. *See* D.I. 633 at 15. The determination of whether an expert's testimony exceeded his report is a two part test: (1) "the Court examines whether the objecting party had sufficient notice of the testimony based upon the contents of the report and the elaborations made during expert discovery and deposition"; and (2) if the Court determines that an expert's testimony was not sufficiently disclosed in his report, "the objecting party must also demonstrate that it suffered undue prejudice before the Court determines that a new trial is required." *See Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 585 F. Supp. 2d 568, 581 (D. Del. 2009). Facebook has not established that either of these requirements has been met. Dr. Vigna's expert report provided Facebook with more than sufficient notice of his testimony at trial. In fact, Dr. Vigna's expert report walked through each of the exemplary use cases in detail, even beginning with the log-in procedure of the Facebook Website. *See, e.g.*, Hopkins Decl., Ex. 36, Vigna's Report ¶¶ 36, 44, 53. The report proceeded element-by-element, showing how the backend components and specific source code modules meet the requisite

limitations for *each* of the use cases. Moreover, Dr. Vigna attached a series of screen shots that show the exact steps he went through in preparing his report. *See, e.g.*, Hopkins Decl., Ex. 36, Vigna's Report ¶ 43; *see also* PTX 942. As shown in the chart set forth as Exhibit 30 to the Hopkins Declaration, Dr. Vigna's report was used as a basis for his trial testimony. Furthermore, Dr. Vigna's testimony did not unfairly prejudice Facebook.

i. A new trial is not warranted based on the Facebook API application.

Facebook objects to the fact that Dr. Vigna developed an application that interfaced with the Facebook Website using its API, but it has not shown any semblance of prejudice from that application. For one thing, Facebook fails to mention that this application was *never presented at trial* -- not the name of the application, the functionality of the application, or any other information about the application. The only mention of the API application was a single snippet of testimony from Dr. Vigna in reference to some documents about the API, where he stated that he was able to create an application using the Facebook API and as described in the Facebook Developer Wiki. *See* D.I. 636 at Exs. 17-20; *see also* D.I. 633 at 16-17. If anything, this testimony merely demonstrated that he had personal knowledge of the functionality of Facebook's API. Moreover, Dr. Vigna constructed the API application to support Leader's *indirect* infringement case. The Court did not instruct the jury on that issue, extinguishing any residual prejudice associated with the brief mention of the application built by Dr. Vigna.

Even if Dr. Vigna had actually shown the application, he would still have been well within his report. He explicitly stated in his report that he was able to create an application based on the Facebook API using the Developer Wiki pages. Hopkins Decl., Ex. 36, Vigna Report ¶ 12. He further disclosed Facebook API and Facebook Developer Wiki documents. *See, e.g.*, *id.*, Vigna Report ¶ 147 ("LTI 156977 - 156977 is a Facebook Wiki for external developers, which describes the operation of the Groups application and the data gathered by Facebook. LTI 156990 - 156990 is a Facebook Wiki page for external developers, which describes the operation of the Events

application and the data gathered by Facebook."). For example, Dr. Vigna provided specific technical details regarding his opinion of Facebook's API, such as:

> The Facebook API is documented in the Developers' Wiki (http://wiki.developers.facebook.com). This Wiki provides technical details about how to develop a third-party application integrated with Facebook. It also describes the functions that are exported by Facebook and that can be invoked by an application. Examples of these functions include: friends.get: Returns the identifiers for the current user's Facebook friends. groups.get: Returns all visible groups according to the filters specified. notes.get: Returns a list of all of the visible notes written by the specified user. status.get: Returns the user's current and most recent statuses. stream.get: This method returns an object [...] that contains the stream from the perspective of a specific viewer -- a user or a Facebook Page. users.getInfo: Returns a wide array of user-specific information for each user identifier passed, limited by the view of the current user. status.set: Updates a user's Facebook status through your application. stream.publish: This method publishes a post into the stream on the user's Wall and News Feed. This post also appears in the user's friends' streams (their News Feeds). photos.get: Returns all visible photos according to the filters specified. photos.upload: Uploads a photo owned by the current session user and returns the new photo.
> *See* Hopkins Decl., Ex. 36, Vigna Report ¶ 14.

Facebook even tacitly acknowledges that Dr. Vigna disclosed the API Wiki documents in his report, stating that Dr. Vigna's report "reference[d]" the "documents he relied upon at trial" by providing citations to these documents in paragraph 60 of his report. *See* D.I. 633 at 17. Instead of asserting insufficient notice of these documents, Facebook merely complains that (1) Dr. Vigna's report provides only one reference to these documents, which Facebook argues it had difficulty finding; and (2) Dr. Vigna's report provided "no further elaboration" beyond mere citation of the documents. *See id.* at 17. Both allegations are unpersuasive. Throughout Dr. Vigna's report, these documents are correlated to infringement analysis of particular claims. This is easily demonstrated using the example of Dr. Vigna's testimony of the Photo (FQL) table document. Hopkins Decl., Ex. 36, Vigna Report ¶¶ 60, 85, 117, 126, 151, 166, 214, 231, 246, 312, 343. For example, paragraph 85 of his report states:

> "LTI 156973 - 156973... are Facebook Wiki pages for external developers that describe the operation of the Photos application and the data collected by Facebook."
> *Id.*, Vigna Report ¶ 85.

This description was specifically correlated with a detailed explanation of how it related to Use Case No. 3:

"the user's photos are updated, and the update is reflected within the album into which the photo was uploaded. In summary, new user-defined data has been captured by the Facebook application, including the associated metadata and stored on a storage component. *Id.*, Vigna Report ¶¶ 84-85.

It was also correlated with the context component of claim 1. *Id.*, Vigna Report ¶¶ 66-85. This correlation of the API documents to claims and use cases was provided throughout Dr. Vigna's report. *See, e.g.*, *id.*, Vigna Report ¶¶ 85, 94, 99, 103, 115, 117, 121, 126, 147, 151, 161. As a result, Facebook had more than sufficient notice of Dr. Vigna's testimony of Facebook's API.

Dr. Vigna also disclosed his intent to create an application based on the API, stating that "these demonstratives will include an application that I will build based on Facebook's publically available API." *See id.*, Vigna Report ¶ 12. Thus, Facebook was provided with sufficient notice of his testimony about an API application. *See Power Integrations,* 585 F. Supp. 2d at 581.

Facebook's only allegation of unfair prejudice is the assertion it could not respond because it could not review the application's underlying source code. *See* D.I. 633 at 17. How and why Facebook was harmed by its inability to see the underlying source code of an application *never presented to the jury* is never explained. Given that Dr. Vigna disclosed his plan on building an application based on Facebook's own API three months before trial, Facebook's argument that its expert, Dr. Kearns, was unable to respond because he was sequestered is meritless.

ii. A New Trial is Not Warranted Based on a Demonstration of the Facebook Website

During his testimony Dr. Vigna showed live videos he created demonstrating the operation of the Facebook Website. *See, e.g.*, Tr. 553:5-558:9. These videos went step-by-step through the exact use cases described at length in Dr. Vigna's expert report. *See, e.g.*, Hopkins Decl., Ex. 36, Vigna Report ¶¶ 36-60. This live demonstration also followed the screenshots Dr. Vigna included with his expert report. PTX 942. For example, Dr. Vigna provided 29 screenshots for his analysis of the context component of Claim 1 which demonstrate the exact same steps of posting a comment on a wall as in his live demonstration. *See* Hopkins Decl., Ex. 36, Vigna Report ¶ 73, *see also* PTX 942. Given Dr. Vigna's complete and nearly verbatim disclosure of the content disclosed in his expert report, Facebook's argument that the information was undisclosed is

completely contrary to the facts.

Facebook takes issue with the fact that these videos were not produced during discovery. However, these videos were demonstratives and not entered into evidence. Like Facebook's demonstratives, Leader did not prepare or produce any of its demonstratives during discovery. Instead, Leader prepared these videos as demonstrations of the live operation of the Facebook Website, which is exactly what Dr. Vigna disclosed in his expert report.

Facebook cannot support its argument that Dr. Vigna's videos did not "reflect the information in the expert reports exchanged in April." D.I. 633 at 18. Indeed, Facebook fails to identify a single difference between the topics in the videos and Dr. Vigna's report. Facebook's sole basis is its assertion that Dr. Vigna's videos "*appear to have been* created on Saturday, July 17, 2010." *Id.* at 18 (emphasis added). Even if there were some cosmetic changes to the front-end of the Facebook Website between expert discovery and trial, it would be immaterial because it is the back-end components of the Facebook Website that infringes the claims. Thus, Dr. Vigna was extra careful to ensure that the same source code modules that were called in his videos were also referenced in his expert report. By doing this, Dr. Vigna's videos reflected the exact same functionality as the screenshots and source code modules of the Facebook Website included throughout Dr. Vigna's report. For example, Dr. Vigna testified that certain source code modules were called by the Facebook Website by intercepting the requests made in his videos. *See, e.g.*, Tr. 559:23-566:3, 570:17-571:6, 600:19-604:8, 639:1-640:12, 724:14-725:1, 727:24-729:2, 732:8-733:21, 735:12-24. These were the exact same requests and source code modules which were disclosed in Dr. Vigna's expert report. For example, with regard to Claim 1, Dr. Vigna's report disclosed: [redacted] contained infringing functionality which are precisely the same source code modules that Dr. Vigna testified to. *See, e.g.*, Tr. 561:8-565:4; *compare with* Hopkins Decl., Ex. 36, Vigna Report ¶¶ 69-73. Dr. Vigna then proceeded to testify how the back-end components, which are reflected in the source code, infringe the asserted claims. Thus, the date the videos were shot is immaterial

because the same source code modules that were identified in Dr. Vigna's report were the ones used for the demonstrations and it is the source code which contains the infringing functionality.

In the videos, Dr. Vigna used two applications required to show the functionality and rendering of the Facebook Website as explicitly disclosed in his expert report. These two applications are the same tools that Dr. Vigna used to create his expert report. Dr. Vigna was forced to use these tools because Leader was not provided with any executables during discovery. Therefore, the only way for Dr. Vigna to identify the relevant source code modules was to intercept the traffic sent to and from the Facebook Website, and use rendering tools to identify where the information was stored. The use of these tools is prevalent throughout Dr. Vigna's expert report and would be readily identifiable to anyone with a background in computer science. For example, in Dr. Vigna's expert report, he identifies the specific requests that he intercepted and the specific modules which are called in the requests, including the id of the user and the cookies, which can only be captured using a tool capable of intercepting the traffic to show the functionality of the Facebook Website [redacted]

[redacted]

[redacted] Hopkins Decl., Ex. 36, Vigna Report ¶ 91; *see also id.*, ¶¶ 93, 95, 98, 100, 109, 111, 120, 122, 171, 174, 176, 188, 205, 252, 254, 256, 318, 321, 323, 325. He also identified the specific Content Distribution Partners used to display a user's profile picture which can only be captured using a rendering tool. *Id.*, Vigna Report ¶¶ 93, 120, 122, 184, 264, 319, 350 [redacted]

[redacted] This is the exact same information that he used at trial to demonstrate Facebook's infringement at trial. *See* Tr. 554:1-558:9; *see also* Tr. 598:18-599:23; 606:21-607:2. These tools are readily available to any computer scientist and

were properly disclosed during expert discovery. Moreover, Dr. Vigna specifically disclosed in his expert report that he would create a demonstrative using these tools, stating:

> For trial, I also intend to demonstrate the operation of the Facebook website live with tools capable of showing the *functionality* and *rendering* of the Facebook website.

See Hopkins Decl., Ex. 36, Vigna Report ¶ 15 (emphasis added). Accordingly, Facebook had sufficient notice of Dr. Vigna's intention to create a demonstrative to show the Facebook Website's functionality and rendering.

The Court also stated that it would give leeway to the parties because an internet connection was not allowed in the courtroom. D.I. 607 at 74:5-15 (The Court stated that "I may have to cut some slack."). Ideally, the accused product would have been demonstrated using a live internet connection. Dr. Vigna created the demonstrative videos as a backup plan to show the operation of the Facebook Website to the jury. Tr. 771:15-19.

Facebook is also unable to show that it suffered any unfair prejudice from these videos. Dr. Vigna made clear in his report that he would "demonstrate the operation of the Facebook website" using "tools capable of showing functionality and rendering of the Facebook website." Facebook had the opportunity to depose Dr. Vigna on this topic. As Dr. Vigna's disclosure was made over three months before trial, Facebook's argument that it had "no opportunity to...meaningfully respond to them at trial" is false. D.I. 633 at 18.

Contrary to Facebook's argument, there was nothing preventing it from creating "competing videos." *See id.* at 19. Facebook's argument that "the lack of competing videos from Facebook" was somehow "unfairly prejudicial to Facebook" is meritless. *Id.* at 18-19. Indeed, as owner of the accused product, Facebook does not explain why it did not present anything beyond a basic slideshow to support its non-infringement theory. Facebook appears to be asking the Court to penalize Leader because of Facebook's ineffective trial strategy.

As Dr. Vigna's report provided more than sufficient notice of his testimony and Facebook failed to show that it suffered any undue prejudice, Dr. Vigna's testimony was within the scope of his report and Facebook's request for a new trial should be denied.

V. CONCLUSION

For the foregoing reasons, Leader respectfully requests that the Court deny Facebook's Renewed JMOL Motion No. 2.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CERTIFICATE OF SERVICE

I, Philip A. Rovner, hereby certify that on September 22, 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.

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