

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ARGUMENT.....1

 A. Facebook Failed to Carry Its Burden of Proof on Key Elements of the Public-Use and On-Sale Bars.1

 1. Leader Did Not Offer For Sale Or Publicly Use The Patented Invention More Than One Year Before Filing The Patent Application.2

 (a) Leader did not admit that Leader2Leader included the patented invention in December 2002.2

 (b) Mr. McKibben’s testimony does not support Facebook’s case.4

 2. The Patented Technology Was Not Ready For Patenting More Than One Year Before The Filing Of The Patent Application.....6

 3. Leader’s Purported Public Demonstrations Were Covered By Nondisclosure Agreements.....6

 4. Leader Did Not Make Any Commercial Offers For Sale Of The Patented Invention.7

 B. Leader is Entitled to Judgment as a Matter of Law on Joint Infringement of the Method Claims.8

 C. Leader Preserved Its Grounds for Judgment as a Matter of Law.8

 D. In the Alternative, Leader is Entitled to a New Trial.10

TABLE OF AUTHORITIES

CASES

Acosta v. Honda Motor Co.,
717 F.2d 828 (3d Cir. 1983)9

Bose Corp. v. Consumers Union of U.S., Inc.,
466 U.S. 485 (1984)4

Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.,
140 F.3d 494 (3d Cir. 1998)9

Colorado v. New Mexico,
467 U.S. 310 (1984)2

Combined Sys., Inc. v. Defense Tech. Corp. of Am.,
230 F. Supp. 2d 544 (S.D.N.Y. 2002)3

Cummings v. Adidas USA,
No. 08 Civ. 9860 (SAS), 2010 WL 2076975 (S.D.N.Y. 2010).....3-4

Elan Corp. v. Andrx Pharms., Inc.,
366 F.3d 1336 (Fed. Cir. 2004)7-8

Evans Cooling Sys. Inc. v. Gen. Motors Corp.,
125 F.3d 1448 (Fed. Cir. 1997)3

Greenleaf v. Garlock, Inc.,
174 F.3d 352 (3d Cir. 1999)10

Group One, Ltd. v. Hallmark Cards, Inc.,
254 F.3d 1041 (Fed. Cir. 2001)7

Honeywell Int’l Inc. v. Hamilton Sundstrand Corp.,
370 F.3d 1131 (Fed. Cir. 2004)1

i4i Ltd. P’ship v. Microsoft Corp.,
598 F.3d 831 (Fed. Cir. 2010)9

In re Bose Corp.,
580 F.3d 1240 (Fed. Cir. 2009)2

Lightning Lube, Inc. v. Witco Corp.,
4 F.3d 1153 (3d Cir. 1993)1

Perfect Web Techs., Inc. v. InfoUSA, Inc.,
587 F.3d 1324 (Fed. Cir. 2009)7

<i>Peters v. Active Mfg. Co.</i> , 129 U.S. 530 (1889)	3
<i>Revolution Eyewear, Inc. v. Aspex Eyewear, Inc.</i> , 563 F.3d 1358 (Fed. Cir. 2009)	10
<i>Rhenalu v. Alcoa Inc.</i> , 224 F. Supp. 2d 773 (D. Del. 2002)	8
<i>Roebuck v. Drexel Univ.</i> , 852 F.2d 715 (3d Cir. 1988)	10
<i>Tec Air, Inc. v. Denso Mfg. Mich. Inc.</i> , 192 F.3d 1353 (Fed. Cir. 1999)	3
<i>United States v. Silveus</i> , 542 F.3d 993 (3d Cir. 2008)	10
<i>United States v. Weaver</i> , 267 F.3d 231 (3d Cir. 2001)	4-5
<i>Vanmoor v. Wal-Mart Stores, Inc.</i> , 201 F.3d 1363 (Fed. Cir. 2000)	3
<i>Williams v. Runyon</i> , 130 F.3d 568 (3d Cir. 1997)	9
RULES AND OTHER AUTHORITIES	
Fed. R. Civ. P. 50(a)	9
<i>Restatement (Second) of Contracts</i> § 33(3) (1981)	8
<i>Restatement (Third) of Agency</i> § 7.07(1) (2006)	8

I. INTRODUCTION

Facebook continues to fail to come to grips with its burden of proof. On the threshold question of whether Leader2Leader contained the patented technology before December 10, 2002, Facebook fails to provide *any* evidence that Leader2Leader contained the patented technology, much less an element-by-element analysis as required by law. Instead, Facebook argues that the jury was free to find that Michael McKibben's testimony was not credible. Facebook even states that "[t]he sole question for the jury" was when Leader2Leader first embodied the patent claims, and that question "turned on the credibility of Mr. McKibben." D.I. 650 at 1. But if the jury found Mr. McKibben not to be credible, the most it could have done was to disregard his testimony, in which case there would have been *no* evidence on point. Facebook's argument only confirms its failure to satisfy its own, affirmative burden of proof. Facebook tries to circumvent that dispositive point by asserting that Mr. McKibben admitted during his deposition that Leader2Leader had always contained the patented invention, but he did no such thing. Mr. McKibben testified only that he could not remember the "specific point" at which the patented invention was first included in Leader2Leader years earlier. When Facebook's reliance on non-existent admissions and other diversions are stripped away, this is a very simple case for judgment as a matter of law ("JMOL"). Facebook bore the heavy burden of proving invalidity by clear and convincing evidence, but produced *no* evidence on crucial points. Facebook's invalidity case rests on speculative inferences, not hard facts. Accordingly, JMOL, or at least a new trial, is in order.

II. ARGUMENT

A. Facebook Failed to Carry Its Burden of Proof on Key Elements of the Public-Use and On-Sale Bars.

Facebook has no answer to the basic point that it failed to produce *any* evidence to carry its "heavy" burden of proof on crucial elements of its on-sale and public-use defenses. *Honeywell Int'l Inc. v. Hamilton Sundstrand Corp.*, 370 F.3d 1131, 1145 (Fed. Cir. 2004). Moreover, "[t]he question is not whether there is literally no evidence . . . but whether there is evidence upon which a jury could properly find a verdict." *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1166 (3d Cir. 1993)(quotation omitted). That means that Facebook had to produce not just *some* evidence, but

clear and convincing evidence consisting of “hard facts,” (*Colorado v. New Mexico*, 467 U.S. 310, 320-21 (1984)), not just “speculation, inference or surmise.” *In re Bose Corp.*, 580 F.3d 1240, 1243 (Fed. Cir. 2009)(quotation omitted). Facebook did not do so.

1. Leader Did Not Offer For Sale Or Publicly Use *The Patented Invention* More Than One Year Before Filing The Patent Application.

The fundamental issue is whether any public use or offer for sale actually involved the patented invention. Significantly, Facebook does not directly dispute the key points of Leader’s JMOL that: (1) Facebook bore the burden of proof by clear and convincing evidence; (2) the question is whether Leader2Leader included every element of every asserted claim of the patented technology before December 10, 2002; (3) Leader’s interrogatory responses refer to the 2009 version of Leader2Leader, not the 2002 version; and (4) even if the jury found that Mr. McKibben’s testimony at trial was not credible, the most it could have done was to disregard that trial testimony. *See* D.I. 626 at 3-11. Those undisputed points show that Facebook has insufficient evidence, indeed no affirmative evidence, to satisfy its heavy burden of proof.

(a) Leader did not admit that Leader2Leader included the patented invention in December 2002.

Facebook’s arguments are largely diversionary because they do not address the basic reasons that Leader is entitled to JMOL. Final Jury Instructions No. 4.7 explicitly states that Facebook had to show by “clear and convincing evidence that an embodiment that contains *all* the elements of the claim” was offered for sale more than one year prior to the effective filing date.¹ However, Facebook did not even attempt an element-by-element analysis of the embodiment of Leader2Leader allegedly offered for sale in 2002 with any of the asserted claims. Indeed, Facebook concedes it did not attempt to prove that Leader2Leader embodied every element of the asserted claims before December 2002. Rather, it argues that “no such requirement exists” and that the jury could ignore the Court’s Final Jury Instructions Nos. 4.6 and 4.7, because Leader conceded that the

¹ Likewise, for its public use defense, Final Jury Instructions No. 4.6 required Facebook to “prove by clear and convincing evidence that (1) Leader disclosed a product that meets all the elements of that claim to the public more than one year before the effective filing date and (2) the invention disclosed in that claim was ready for patenting when alleged public use occurred.” D.I. 601. Facebook conceded that it did not provide such evidence. *See* D.I. 650 at 5-7.

earlier product practiced the patented invention. D.I. 650 at 5-7. But Leader made no such concession.

Facebook's "evidence" of a concession consists of two interrogatory responses. D.I. 651, Ex. B (DTX 963), Ex. C (DTX 969). As Leader's opening memorandum explained, however, those responses addressed the 2009 version of the product "Leader2Leader® powered by Digital Leaderboard®," not the Leader2Leader version as of December 2002. D.I. 626 at 7-8. Facebook notes that the responses were unequivocal (D.I. 650 at 7), but they were only unequivocal that in 2009 Leader2Leader® powered by Digital Leaderboard® "embodies" -- in the present tense -- the patented invention. D.I. 651, Ex. C (DTX 969 at 46). Facebook does not point to anything in the interrogatory responses that could be read to refer to prior versions of the product.

Similarly, Facebook makes no attempt to distinguish the cases confirming the obvious point that a product's inclusion of a patented feature at a later point in time does not show that it included that feature years earlier. D.I. 626 at 9 (citing *Tec Air, Inc. v. Denso Mfg. Mich. Inc.*, 192 F.3d 1353, 1359 (Fed. Cir. 1999); *Combined Sys., Inc. v. Defense Tech. Corp. of Am.*, 230 F. Supp. 2d 544, 550 (S.D.N.Y. 2002)). Facebook ignores those cases and instead cites others that distinguish themselves by emphasizing that they are not "typical." D.I. 650 at 6 (citing *Evans Cooling Sys. Inc. v. General Motors Corp.*, 125 F.3d 1448, 1451 (Fed. Cir. 1997)). Facebook's cases simply hold that a plaintiff alleging infringement by products sold before the critical date may not turn around and assert, for invalidity purposes, that those very same products did not in fact include the patented technology. *See id.*; D.I. 650 at 6, 9 (citing *Vanmoor v. Wal-Mart Stores, Inc.*, 201 F.3d 1363, 1366 (Fed. Cir. 2000); *Cummings v. Adidas USA*, No. 08 Civ. 9860 (SAS), 2010 WL 2076975, at *4-5 (S.D.N.Y. May 24, 2010)). That is a straightforward application of the maxim that "[t]hat which infringes, if later, would anticipate, if earlier." *Peters v. Active Mfg. Co.*, 129 U.S. 530, 537 (1889). Because Leader is not taking inconsistent positions for invalidity and infringement purposes, Facebook's self-described atypical cases are irrelevant.²

² *Cummings* is inapposite for the same reasons. In that case, the plaintiff's complaint and discovery responses broadly alleged infringement by the accused product, which had been sold before the critical date and therefore gave rise to the on-sale bar. *Cummings*, 2010 WL 2076975, at *2. To avoid that bar, the plaintiff tried to argue that only some models of the product

Ultimately, it is not clear how much of a dispute there is on this point, because Facebook emphasizes that the “question for the jury was not *whether* the product embodied the claims, but *when* it did so,” and “[t]he answer to that question turned on the credibility of Mr. McKibben.” D.I. 650 at 1, 8. As explained below, that leaves Facebook with no evidence at all.

(b) Mr. McKibben’s testimony does not support Facebook’s case.

As explained in Leader’s opening memorandum, the *only* evidence of *when* Leader2Leader first incorporated the patented technology came from Mr. McKibben and Jeff Lamb, and their testimony supports Leader, not Facebook. D.I. 626 at 10. Facebook therefore focuses on Mr. McKibben’s credibility, even asserting that the issue “turn[s]” on his credibility. D.I. 650 at 1, 8. But the fact that the jury may have disbelieved Mr. McKibben does not help Facebook carry its own affirmative burden of proof. As Leader’s opening memorandum explained, the jury was free to disregard Mr. McKibben’s testimony at trial, but not to take it as affirmative evidence to the contrary. *See* D.I. 626 at 10-11 (citing, *e.g.*, *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512 (1984)). For all of Facebook’s discussion of Mr. McKibben’s credibility, it does not argue that disbelieving a witness amounts to evidence that the opposite is true. Facebook does not attempt to distinguish Leader’s cases, nor does it cite any contrary cases.

Instead, Facebook suggests that, in addition to discounting Mr. McKibben’s trial testimony, the jury could have relied on his deposition testimony. D.I. 650 at 7. But in his deposition, Mr. McKibben testified only that he could not, years later, remember the “specific point” at which Leader2Leader incorporated the claimed invention:

Q. Can you identify any iteration of the Leader2Leader product that, in your opinion, did not implement what’s claimed in the ‘761 patent?

A. That was a long time ago. I -- I can’t point back to a specific point.

Tr. 1377:14-19. Mr. McKibben’s lack of recollection is hardly evidence that Leader2Leader included the invention at any particular point in time. *See, e.g., United States v. Weaver*, 267 F.3d

infringed, but even then it refused to identify which models did or did not infringe. *Id.* at *5. Because the plaintiff was clearly trying to have it both ways, the district court held the plaintiff to its broad infringement allegations, on which the plaintiff bore the burden of proof. *Id.* Here, Leader2Leader is irrelevant to Leader’s infringement theories, and Facebook bears the burden of proof on the only relevant issue -- invalidity.

231, 245 (3d Cir. 2001). At most, the jury might have viewed Mr. McKibben's uncertainty during his deposition as a reason to discredit and disregard his trial testimony. But as discussed above, that would leave *no* evidence on point. And Facebook's suggestion that Mr. McKibben should have identified specific aspects of Leader2Leader "that underwent any change in 2002" is just another improper attempt to shift the burden of proof to Leader. D.I. 650 at 9.

Facebook's counsel speculates that Leader2Leader must have included the patented technology before December 2002 because Leader held that suite out to be a valuable, fully functioning product before then. *Id.* But the evidence at trial showed that Leader2Leader included multiple valuable components, of which the patented invention was (eventually) only one. *See* Tr. 1316:15-1320:12. Indeed, Mr. Lamb's testimony is the only other testimony on point, and it confirms Mr. McKibben's testimony that the invention was not completed until December 2002. Tr. 445:9-19; 452:12-453:8; 468:8-470:15; 1324:23-1325:17. Facebook's resort to *speculative* and unsupported lawyer argument confirms its failure to present actual evidence. Facebook made no attempt to show, by source code, documents, expert witnesses, or even lay testimony, that the Leader2Leader product suite included the patented technology in December 2002. Instead, Facebook relied on sheer speculation and attacks on Leader's witnesses. If there is any inference to be drawn, it is that the reason Facebook did not attempt to prove its case on this issue is that it knew it was wrong. Attacking Mr. McKibben's credibility may have been effective theater before a jury, but as a matter of law it cannot make up for Facebook's lack of affirmative evidence.

Recognizing its failure to carry its burden of proof, Facebook trots out a new, but equally unsupported and speculative, theory -- *i.e.*, that Mr. McKibben purportedly testified that Leader2Leader included the patented technology "a few days before December 11, 2002," and offers to sell the product "may have occurred" during those few days. D.I. 650 at 10. Mr. McKibben actually testified that Leader2Leader did not include that technology "[a]ny time before December 11, 2002," and Facebook offered no contrary evidence. Tr. 1374:21-22; *see also* Tr. 1340:8-21; 1361:13-1363:19. In other words, even if Leader completed the patented invention "a few days" before December 11, there is no evidence that it instantaneously updated the

Leader2Leader suite to include that invention and publicly demonstrated or offered the updated product for sale by 11 am on December 8, which is the date of the marketing email on which Facebook relies. *See* D.I. 651, Ex. F (DTX 766). Moreover, that email clearly refers to marketing efforts *before* December 8, 2002, *i.e.*, to discussions that occurred before the “few days” window on which Facebook now relies for its new theory. Once again, Facebook is relying on unsupported speculation contrary to all of the actual evidence.

2. The Patented Technology Was Not Ready For Patenting More Than One Year Before The Filing Of The Patent Application.

Facebook also had to prove that the invention was “ready for patenting” before the critical date. D.I. 626 at 11. Facebook argues that the invention was “conceived” before that date. D.I. 650 at 12. But the question is not when the invention was conceived; it is when work on the invention progressed far enough that it was ready for patenting. *See* D.I. 626 at 11. Leader’s December 11, 2002, provisional application was the only evidence at trial of when the invention was ready for patenting. *Id.* at 12. Facebook has not identified any evidence that the invention was ready for patenting before then. *See* D.I. 650 at 14-16. Indeed, Facebook’s opposition studiously avoids any mention of *the patented technology*, and instead cites evidence regarding when the first version of “*Leader2Leader* was operational and the subject of functional demonstrations . . .” *Id.* at 13 (emphasis added). As explained above, the patented invention and the Leader2Leader product suite cannot be so easily conflated.

3. Leader’s Purported Public Demonstrations Were Covered By Nondisclosure Agreements.

Facebook also failed to prove that the alleged public uses were in fact public, *i.e.*, that they were not covered by non-disclosure agreements (“NDAs”). Facebook now relies on a single demonstration of Leader2Leader to Boston Scientific, even though all the evidence presented at trial was that all demonstrations were covered by NDAs. D.I. 650 at 16-17; Tr. 1299:7-1303:4; 1335:16-1337:8; 1363:20-1364:7. Facebook admits, however, that the evidence at trial consisted of two things: Mr. McKibben’s testimony that the demonstration was covered by an NDA (Tr. 1363:20-1364:7); and evidence that Leader secured *additional* NDAs after the demonstration (D.I. 651, Ex.

M (DTX736), Ex. N (DTX 776)). *See also* D.I. 650 at 16. Facebook does not point to any contrary evidence that the demonstration was public. As with many of its other arguments, it simply contends that Mr. McKibben's testimony was not credible. As explained above, however, that would not constitute clear and convincing evidence to the contrary. Furthermore, Facebook's counsel had ample opportunity to question Mr. McKibben on redirect regarding the NDA with Boston Scientific, but did not. *See* Tr. 1369:8-1387:22. Nor did Facebook present evidence from other participants in that meeting.

Facebook speculates that Leader might have forgotten somewhere along the line to execute a NDA for one of its demonstrations. *See* D.I. 650 at 16. But such unsupported attorney argument is not even evidence, much less clear and convincing evidence. D.I. 601 at Final Jury Instructions No. 1.6 ("The attorney's statements and arguments are not evidence."); *Perfect Web Techs., Inc. v. InfoUSA, Inc.*, 587 F.3d 1324, 1332 (Fed. Cir. 2009). Moreover, the actual evidence at trial demonstrated that Mr. McKibben was unusually meticulous about obtaining NDAs. Tr. 1334:6-14. Facebook's ultimate reliance on a purported *absence* of evidence on the confidentiality of the Boston Scientific meeting is proof positive that Facebook did not carry its burden on this issue.

4. Leader Did Not Make Any Commercial Offers For Sale Of The Patented Invention.

Facebook likewise failed to prove that the purported offers for sale contained all of the "material terms" of a contract, and thus constituted "an 'offer' in the contract sense." *Elan Corp. v. Andrx Pharms., Inc.*, 366 F.3d 1336, 1341 (Fed. Cir. 2004)(citing omitted). Facebook attempts to reduce the concept of a "commercial offer for sale" to a search for the word "offer" or "offeror" in its trial exhibits. D.I. 650 at 11-12. But the word "offer" is not dispositive; instead, the question is whether the proposal, if accepted, would have constituted a binding contract under traditional principles of contract law. In addition, any alleged discussions of contractual terms would have "no legal effect" pursuant to the non-reliance clause in Leader's NDAs. *Group One, Ltd. v. Hallmark Cards, Inc.*, 254 F.3d 1041, 1048 (Fed. Cir. 2001); *see also, e.g.*, DTX 725A at LTI 155169; DTX 725 at LTI 149298, LTI 150931, LTI 151130, and LTI 151147.

On that question, Facebook argues that Leader's communications with two or three

companies constituted commercial offers for sale because they contained some important contractual terms. D.I. 650 at 11-12. Notwithstanding the agreement between the parties that their discussion would have no legal effect, while such terms may be *necessary* for a proposal to be a binding offer under contract law, they are not by themselves *sufficient* to constitute an offer. The purported offers did not contain other essential terms—including the functionality that would be included in any purchased system, *i.e.*, what would actually be bought and sold. *See* D.I. 626 at 17. Indeed, the Wright Patterson documents actually abjure a “buyer/seller relationship.” D.I. 627, Ex. 11 (PTX 1234 at 17). As a matter of law, that means the purported offers were at most “invitations for further discussion” or unenforceable agreements to agree. *Rhenalu v. Alcoa Inc.*, 224 F. Supp. 2d 773, 804 (D. Del. 2002) (granting JMOL); *see also Elan*, 366 F.3d at 1341 (citing *Restatement (Second) of Contracts* § 33(3) (1981)). Facebook does not cite a single case or treatise that suggests its evidence is sufficient to demonstrate an enforceable contractual offer.

B. Leader is Entitled to Judgment as a Matter of Law on Joint Infringement of the Method Claims.

JMOL is also appropriate on joint infringement of the asserted method claims. Facebook admits that “Facebook employees test the website’s functionality from time to time.” D.I. 650 at 19 (citing D.I. 626 at 19). That is dispositive because Facebook’s employees act as agents of the company within the scope of their employment, and there is no question that Facebook provides the “instrumentalities, tools, and the website” for its own employees to use the infringing website. *See* D.I. 627, Ex. 3 (PTX 145); Tr. 677:7-678:4. The evidence is clear that Facebook instructs “engineers of all sorts” to test the website’s functionality in order to ensure the reliability of its performance. D.I. 627, Ex. 3 (PTX 145). Facebook makes no serious attempt to show otherwise. And as a matter of law, an employer directs or controls its employees and is legally responsible for their actions where, as here, they are acting within the scope of their employment *See* D.I. 626 at 19 (citing, *e.g.*, *Restatement (Third) of Agency* § 7.07(1)(2006)).

C. Leader Preserved Its Grounds For Judgment as a Matter of Law.

Facebook’s reliance on a meritless procedural argument is telling. Facebook’s contention

that Leader forfeited its grounds for JMOL³ by not raising them with greater specificity before the verdict ignores what actually occurred at trial. This Court, which has discretion over how to handle proceedings in its own courtroom, authorized and even encouraged the approach Leader took here. The Court made clear at the outset that it would “be reserving judgment on” any motions for JMOL until after the verdict. Tr. 1711:10-11. The Court also urged counsel to keep any verbal pre-verdict motions short so as to prevent disruption to the jury. See Tr. 1711:11-13; Tr. 1720:8-14. It was *Leader* that insisted on making a clear, though short, record by moving for JMOL before the verdict, pursuant to Fed. R. Civ. P. 50(a). Tr. 1711:14-20. Leader sought JMOL on the public-use bar, on-sale bar, and infringement, thereby preserving its present motion. Tr. 1713:13-1719:17. Leader can hardly be faulted for not going beyond what this Court instructed, especially considering that Facebook made no objection to either this Court’s approach to JMOL motions or the specificity of Leader’s pre-verdict motion.

Furthermore, Facebook has always known what the disputed issues are. The requirement that a party raise its grounds for JMOL before the verdict “is essentially a notice provision,” designed to prevent unfair surprise to the other party. *Acosta v. Honda Motor Co.*, 717 F.2d 828, 831-32 (3d Cir. 1983). Thus, as Facebook appears to acknowledge, the question is simply whether the motion had “sufficient specificity to put [Facebook] on notice.” D.I. 650 at 3 (quoting *Williams v. Runyon*, 130 F.3d 568, 571-72 (3d Cir. 1997)). Because that is “judged in context,” motions are sufficient so long as the opposing party knew what the disputed issues were. *Acosta*, 717 F.2d at 832; *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 519 n.18 (3d Cir. 1998). Facebook does not even allege that it lacked notice of the issues, that it would have put forth any additional evidence if the motion had been more specific, or that it was prejudiced by the level of generality of Leader’s motion. Nor could it—both parties fully litigated these issues at trial.

In all events, Leader supplemented its verbal pre-trial motion with a subsequent written filing. This Court stated that subsequent written filings would be deemed submitted at the time of

³ Facebook does not argue that Leader failed to preserve its right to a new trial. See *i4i Ltd. P’ship v. Microsoft Corp.*, 598 F.3d 831, 856-57 (Fed. Cir. 2010).

the oral motion. *See, e.g.*, Tr. 1730:5-9; 1734:1-12. Facebook itself followed that approach. *See* Tr. 1720:8-11. And the Court expressly approved the timing of Leader's written motion. Tr. 1898:10-19; D.I. 650 at 4. Again, Facebook did not object to that ruling. *See* Tr. 1897:10-19. By waiting until now to object to the specificity of Leader's pre-verdict motion, it is Facebook that is attempting to unfairly sandbag Leader and the Court, not the other way around.⁴

D. In the Alternative, Leader is Entitled to a New Trial.

At a minimum, a new trial is warranted. Without citing any case law of its own, Facebook disputes the standard of review for a new trial motion. *See* D.I. 650 at 20. But it is well settled that the Court need not view the evidence in the light most favorable to the verdict when determining whether to grant a new trial. *See, e.g., United States v. Silveus*, 542 F.3d 993, 1004 (3d Cir. 2008); *see also Revolution Eyewear, Inc. v. Aspex Eyewear, Inc.*, 563 F.3d 1358, 1371 (Fed. Cir. 2009). This Court must rely on its own observation of the trial and may grant a new trial "where there is insufficient evidence to support the verdict or where the verdict was against the great weight of the evidence." *Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 365 (3d Cir. 1999) (citations omitted). That determination "is confided almost entirely to the exercise of discretion on the part of the trial court." *Roebuck v. Drexel Univ.*, 852 F.2d 715, 735 (3d Cir. 1988) (quotation omitted).

Facebook does not dispute or distinguish controlling Third Circuit precedent holding that a new trial is especially appropriate when the verdict is based on speculative inferences, as opposed to hard evidence. *See* D.I. 626 at 20 (citing, *e.g., Roebuck*, 852 F.2d at 735-36). Instead, Facebook simply asserts that its evidence is not speculative. As discussed above, however, *at most*, all Facebook has is inference on some of the key issues. That makes this a classic case for a new trial, especially considering that the evidence supports Leader. *Roebuck*, 852 F.2d at 735-36.

⁴ Facebook incorrectly asserts that Leader never sought JMOL on the experimental use and direction or control issues. D.I. 650 at 3-4. Leader's written motion specifically argued that "any alleged offer for sale was legally untenable due to beta or experimental testing of the product in question." D.I. 612 at 3. The direction or control test relates to infringement, which Leader raised in its oral motion, and both parties squarely disputed the issue at trial. *See, e.g.*, Tr. 1716:8-11 (oral JMOL); Tr. 2013:16-2015:21 (closing argument).

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**IN THE UNITED STATES DISTRICT COURT
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