

IN THE UNITED STATES COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES, INC.,)	
a Delaware corporation,)	CIVIL ACTION
)	
Plaintiff and Counterdefendant,)	No. 1:08-cv-00862-JJF
)	
v.)	PUBLIC VERSION
)	
FACEBOOK, INC.,)	
a Delaware corporation,)	
)	CONFIDENTIAL
Defendant and Counterclaimant.)	FILED UNDER SEAL
)	

**MEMORANDUM IN SUPPORT OF FACEBOOK INC.'S RENEWED MOTION
FOR JUDGMENT AS A MATTER OF LAW OF NO LITERAL INFRINGEMENT
AND NO INFRINGEMENT UNDER THE DOCTRINE OF EQUIVALENTS**

[MOTION NO. 2 OF 4]

Steven L. Caponi (DE Bar #3484)
BLANK ROME LLP
1201 N. Market Street, Suite 800
Wilmington, DE 19801
302-425-6400
Fax: 302-425-6464
*Attorneys for Defendant and
Counterclaimant Facebook, Inc.*

OF COUNSEL:
Michael G. Rhodes (*pro hac vice*)
Heidi L. Keefe (*pro hac vice*)
Mark R. Weinstein (*pro hac vice*)
Jeffrey Norberg (*pro hac vice*)
Melissa H. Keyes (*pro hac vice*)
Elizabeth L. Stameshkin (*pro hac vice*)
COOLEY LLP
3000 El Camino Real
5 Palo Alto Square, 4th Floor
Palo Alto, CA 94306

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I. NATURE AND STAGE OF THE PROCEEDINGS

Leader filed its complaint against Facebook on November 19, 2008. A jury trial commenced on July 19, 2010. Prior to submission of the case to the jury, Facebook moved for judgment as a matter of law under Fed. R. Civ. P. 50(a). The Court reserved ruling and a jury verdict was entered on July 28, 2010. Facebook renews its motions for judgment as a matter of law under Fed. R. Civ. P. 50(b).

II. SUMMARY OF THE ARGUMENT

Leader failed to present any evidence at trial as to at least two elements of each asserted claim of the '761 patent. First, each asserted claim requires the storage of metadata in a first context, environment or workspace, followed by updating of *that same metadata* in a second context, environment or workspace. Second, each asserted claim requires that this same metadata be updated "dynamically," which the Court has construed to mean automatically and in response to the user's movement to a second context, environment or workspace. Realizing that the accused Facebook website did not satisfy either of these claim elements, Leader urged the jury to adopt an interpretation of those elements that contradict the Court's claim construction order. Because Leader presented no evidence that the Facebook website satisfied these elements as properly construed, judgment as a matter of law of no literal infringement must be entered.

The jury has already found that Facebook does not infringe under the doctrine of equivalents. The Court should also enter judgment as a matter of law as to Leader's claim under the doctrine of equivalents because Leader presented no particularized evidence or linking argument with respect to any claim element, as required by Federal Circuit law. Furthermore, the doctrine of equivalents is unavailable as a matter of law in light of prosecution history estoppel and because applying the doctrine would vitiate entire claim elements. Finally, Facebook moves conditionally for new trial on infringement under Fed. R. Civ. P. 59 based on the reasons discussed below, in the event the Court enters judgment in favor of Leader on any ground.

III. ARGUMENT

Evaluating claims of patent infringement involves a two-step process. First, the Court construes the claims as a matter of law. *Bayer AG v. Elan Pharm. Research Corp.*, 212 F.3d 1241, 1247 (Fed. Cir. 2000). “Second, the claims, as construed, are compared to the accused device.” *Id.* The absence of even a single claim limitation from the accused device precludes a finding of infringement. *See, e.g., Telemac Cellular Corp. v. Topp Telecom, Inc.*, 247 F.3d 1316, 1330 (Fed. Cir. 2001).

A jury’s factual finding of infringement necessarily rests upon the Court’s claim construction. Accordingly, a jury’s finding of infringement cannot stand if it is based on an incorrect claim construction. *See 800 Adept, Inc. v. Murex Sec., Ltd.*, 539 F.3d 1354, 1366 (Fed. Cir. 2008) (“When a patent infringement verdict is based on an incorrect claim construction, we reverse the trial court’s denial of a motion for judgment as a matter of law if no reasonable jury could have found infringement under the proper claim construction.”).

Judgment as a matter of law should be entered here because no reasonable jury could find any asserted claim, as properly construed, infringed by the accused Facebook website. With respect to Leader’s literal infringement claim, Leader failed to present any evidence as to at least two requirements in each asserted claim: (1) that the same “the stored metadata” from the first context be updated in the second context, environment or workspace, and (2) that the update of the stored metadata take place “dynamically,” *i.e.* automatically and in response to the user’s movement. Because Leader could not establish that Facebook satisfied either of these elements at trial, it made improper legal arguments to the jury that contradicted the Court’s claim construction. With respect to Leader’s doctrine of equivalents claim, Leader failed to put forward the minimum quantum of “particularized evidence and linking argument” required by controlling Federal Circuit law. Judgment as a matter of law should be entered.

A. Leader Failed To Show Literal Infringement.

Literal infringement is established only when “every limitation recited in the claim appears in the accused device, *i.e.*, when the properly construed claim reads on the accused device exactly.” *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1331 (Fed. Cir. 2001) (internal quotations and citation omitted). “If any claim limitation is absent from the accused device, there is no literal infringement as a matter of law.” *Bayer AG*, 212 F.3d at 1247. Judgment as a matter of law of no literal infringement should be entered because Leader’s evidence failed to establish that Facebook’s accused system contained at least two elements present in each independent claim as properly construed.

1. Leader Failed To Show a Tracking Component That Updates “the Stored Metadata”

An essential element of each asserted claim is the creation of “metadata” associated with user-defined data in a first context and the updating of *that metadata* after the user moves to a second context. For example, claim 1 reads:

1. A computer-implemented network-based system that facilitates management of data, comprising:
 - a computer-implemented context component of the network-based system for capturing context information associated with user-defined data created by user interaction of a user in a first context of the network-based system, the context component dynamically storing the context information in metadata associated with the user-defined data, the user-defined data and metadata stored on a storage component of the network-based system; and
 - a computer-implemented tracking component of the network-based system for tracking a change of the user from the first context to a second context of the network-based system and dynamically updating the stored metadata based on the change, wherein the user accesses the data from the second context.

Declaration of Elizabeth Stameshkin in Support of Facebook, Inc.’s Renewed Motions for Judgment as a Matter of Law (“Stameshkin Decl.”) Ex. 4 at claim 1 (emphasis added).

Claim 1 above requires a “context component” for “storing the context information in metadata.” The claim next requires a “tracking component” for “updating

the stored metadata” based on the change. The phrase “the stored metadata” obviously refers back to the same metadata that was stored in the first context. The Court construed “metadata” as having its plain and ordinary meaning. (D.I. 281 at 2.)

The three other independent claims asserted have the same requirement. *See* Stameshkin Decl. Ex. 4 at claim 9 (“dynamically associating metadata with the data, the data and metadata stored on a storage component,” followed by “dynamically updating the stored metadata”); 21 (“dynamically associating metadata with the data,” then “dynamically associating the data and the application with the second user workspace in the metadata”); 23 (“storing the context data as metadata on a storage component,” then “dynamically storing the change information on the storage component as part of the metadata”).

It is elementary patent law that the use of the definite article “the” in these claims requires “the stored metadata” (claims 1 and 9) or “the metadata” (claims 21 and 23) to be the same metadata that was referenced earlier in the claim. *See, e.g.*, Stameshkin Decl. Ex. 5, Robert C. Faber, *Faber on Mechanics of Patent Claim Drafting*, App. D (2009) (“the definite article THE is used to refer to an ELEMENT which has been introduced earlier in a claim.”); *see also Process Control Corp. v. HydReclaim Corp.*, 190 F.3d 1350, 1356-57 (Fed. Cir. 1999) (construing “the discharge rate” in a later clause of a claim as the same rate as “a discharge rate” in an earlier clause).

The Federal Circuit’s decision in *Tuna Processors, Inc. v. Hawaii International Seafood, Inc.*, 327 F. App’x 204 (Fed. Cir. 2009) (unpublished disposition), provides a helpful illustration. The claim in that case called for a burning process for generating “smoke,” which was cooled and then used to treat the fish. The court concluded that the use of the definite article “the” describing the “smoke” later in the claim must be the same smoke that had been produced earlier in the claim:

[Plaintiff’s] claim drafting argument misstates traditional claim drafting practice. Indeed, the introduction of a new element is accomplished through the use of an indefinite article, not through the

use of a definite article. . . Thus, the use of the definite article in the third step of claim 1 supports our conclusion that “the smoke cooled” is the smoke from the previous step.

Id. at 210 (citations omitted).

The '761 patent follows this convention when it indicates two separate instances of the same thing. For example, claim 1 includes two “contexts”: “a first context” and “a second context.” When the claim refers again to one of these contexts, it recites “the first context” or “the second context.” Following the same convention, “the stored metadata” is not a separate example of metadata as Leader would suggest, but instead refers back to “metadata stored on a storage component” recited earlier in the claim. In order to prove infringement, therefore, Leader was required to show (among other things) that (1) metadata is stored in the first context, environment or workspace, and that (2) this *same* stored metadata is then updated in the second context, environment or workspace.

Leader did not present any evidence that metadata stored in the first context, environment or workspace was ever updated, modified or otherwise altered after it was stored. Leader’s infringement expert, Dr. Giovanni Vigna, testified [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Facebook employees Chris Cox, Joshua Wiseman and Andrew Bosworth testified that the photo table metadata was never modified in Leader's scenarios. *See* Stameshkin Decl. Ex. 1 at 863:23-864:5, 867:15-21, 869:11-18, 875:23-876:5, 877:6-9, 878:17-21, 880:8-13 (all Cox); *see also id.* at 910:16-21 (Wiseman); 933:14-934:8 (Bosworth). Moreover, Mr. Cox testified that the only actions he could identify that might affect the photo table metadata included changing the dimensions (size) of the photo or removing it (*id.* at 880:14-881:15), both of which have nothing to do with Leader's infringement scenarios. None of this testimony was challenged by Leader.

Because each independent claim explicitly requires an update of or change to the same metadata that was stored in the first context, and because Leader failed to show that Facebook satisfies this element, there can be no literal infringement. And because Leader failed to show infringement of any independent claim, its claims under the dependent

claims likewise fail. *See Muniauction, Inc. v. Thomson Corp.*, 532 F.3d 1318, 1328 n.5 (Fed. Cir. 2008) (no infringement of dependent claim if independent claim not infringed).

2. Leader Failed To Show That Facebook Has a Tracking Component That “Dynamically” Updates Stored Metadata Based on the User’s Movement.

Another essential element that Leader failed to prove is the requirement that when the user moves to a second context, environment or workspace, the stored metadata is “dynamically” updated. In particular, claim 1 recites “tracking a change of the user from the first context to a second context of the network-based system and dynamically updating the stored metadata based on the change” (emphasis added). The Court construed “dynamically” as “automatically and in response to the preceding event.” (D.I. 280 at 24-26.) The claim therefore requires updating the stored metadata automatically and in response to the change of the user from the first to a second context. This requirement also derives from the plain language of the claim requiring “updating the stored metadata based on the change” (emphasis added).

This required sequence is also incorporated into the other three independent claims asserted by Leader at trial: claim 9 (“tracking movement of the user,” followed by “dynamically updating the stored metadata,” *i.e.*, automatically and in response to the user’s tracked movement); claim 21 (“dynamically associating the data and the application with the second user workspace in the metadata”), claim 23 (“dynamically storing the change information on the storage component as part of the metadata”).

a. Leader’s Infringement Case Rested on an Interpretation of “the Preceding Event” that Contradicts the Court’s Claim Construction

Leader’s infringement theory rested on a legal argument regarding the meaning of the final three words in Judge Farnan’s construction of “dynamically,” which, again, was: “automatically and in response to the preceding event.” (D.I. 280 at 24-26 (emphasis added).) Leader argued that “the preceding event” did not refer to the preceding event *in the claim*, but could encompass a preceding event *in the accused system*. *See Stameshkin*

Decl. Ex. 1 at 1965:22-1966:13. Adopting this position, Leader rested its infringement case on the argument that the “preceding event” could be the Facebook user performing some explicit action on a second page separate from the user’s movement. *See, e.g., id.* at 664:12-17.

Leader’s arguments were foreclosed by Judge Farnan’s Claim Construction Order, which established that the “preceding event” referred to the preceding event in the claims, and specifically the movement to a second context:

[I]n each of the Claims, the actions identified as taking place “dynamically” only occur after some identified action by the user. The specification provides further support for this limitation. “As a user creates a context, or moves from one context to at least one other context, the data created and applications used previously by the user automatically follows the user to the next context. The change in user context is captured dynamically.” ’761 patent, col. 3:1-5. Thus, a change in context is captured “automatically,” but it is only automatic upon the user creating a context or moving from one context to another. Accordingly, the Court concludes that “dynamically” means “automatically and in response to the preceding event.”

(D.I. 280 at 25-26 (emphasis added).)

For purposes of the “dynamically updating” element of each asserted claim, the only “identified action by the user” that could correspond to “the preceding event” was the user’s movement from a first context to a second. Leader’s argument that it could simply point to some event taken later by a user of the accused system was without merit. Had Judge Farnan intended to construe “dynamically” in this fashion, he would have construed it as automatically and in response to any preceding event, or any event in the system, rather than use the term “the preceding event,” with the only frame of reference being the language of the claims.

- b. Under the Proper Construction, Leader Identified No Instance in Which Facebook “Dynamically” Updates the Stored Metadata.**

Leader's infringement expert did not attempt to present evidence that Facebook "dynamically" updated stored metadata as that term was construed by the Court. All of the infringement scenarios presented at trial instead relied upon a user who uploaded a photo to Facebook and then (1) moved to a "second context," (2) took an explicit action in that second context, and (3) *in response to the user having taken that action*, not the user's movement, Facebook allegedly created new unrelated metadata. As explained above, this sequence never results in the update of "the stored metadata" from the first context, environment or workspace. Regardless, the alleged update also never takes place automatically in response to the user's movement as required by the claims.

[REDACTED]

[REDACTED]

B. Leader Failed to Prove Infringement Under the Doctrine of Equivalents

The jury found that Facebook did not infringe any asserted claim under the doctrine of equivalents. In fact, Leader’s counsel affirmatively argued in closing that this should be the jury’s finding. *See* Stameshkin Decl. Ex. 1 at 2004:6-9. Should the Court grant a new trial on infringement, Leader cannot be permitted to assert infringement under the doctrine of equivalents because Leader did not present sufficient evidence to support its claim.

“Infringement under the doctrine of equivalents requires that the accused product contain each limitation of the claim or its equivalent.” *DeMarini Sports, Inc.*, 239 F.3d at 1331. “An element in the accused product is equivalent to a claim limitation if the differences between the two are ‘insubstantial’ to one of ordinary skill in the art.” *Id.* at 1331-32. Due to the jury’s verdict and the arguments below, the Court should enter judgment against Leader’s doctrine of equivalents claim.

a. Leader Failed to Present the Required “Particularized Evidence and Linking Argument”

Federal Circuit law obligated Leader to present “particularized evidence and linking argument as to the ‘insubstantiality of the differences’ between the claimed invention and the accused device, or with respect to the ‘function, way, result’ test.” *Motionless Keyboard Co. v. Microsoft Corp.*, 486 F.3d 1376, 1382 (Fed. Cir. 2007) (citation omitted). “Such evidence must be presented on a limitation-by-limitation basis.

Generalized testimony as to the overall similarity between the claims and the accused infringer's product or process will not suffice.” *Texas Instruments Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1567 (Fed. Cir. 1996). Accordingly, conclusory testimony that the accused device performs the same function, in the same way, to achieve the same result, must fail as a matter of law. *See Hewlett-Packard Co. v. Mustek Sys., Inc.*, 340 F.3d 1314, 1323 (Fed. Cir. 2003).

Leader’s sole evidence on the doctrine of equivalents came from Dr. Vigna. Dr. Vigna only provided doctrine of equivalents testimony with respect to the independent claims (*i.e.* claims 1, 9, 21 and 23). He said nothing about any of the dependent claims. *See* Stameshkin Decl. Ex. 1 at 666:21-670:9 (claim 1), 706:14-710:22 (claim 9), 737:7-741:7 (claim 21), 750:21-753:4 (claim 23). Judgment as a matter of law of non-infringement under the doctrine of equivalents, therefore, should be summarily entered with respect to the dependent claims (*i.e.*, claims 4, 7, 11, 16, 25, 31, 32). As to the independent claims, the testimony Dr. Vigna provided was far from the “particularized evidence and linking argument” that Federal Circuit law demands. [REDACTED]

[REDACTED]

[REDACTED]

and argument on the doctrine of equivalents cannot merely be subsumed in plaintiff's case of literal infringement.") (citation omitted). Dr. Vigna admitted as much on cross-examination, and never identified any element of any claim that was not literally present for purposes of his doctrine of equivalents analysis. Stameshkin Decl. Ex. 1 at 816:24-818:20. [REDACTED]

[REDACTED] Judgment as a matter of law on the doctrine of equivalents should thus be entered.

Leader was well-aware of the differences asserted by Facebook between the claims and Facebook's website. Before trial, and long before Leader submitted Dr. Vigna's expert report, Facebook made clear that the accused Facebook website did not, among other things, *dynamically update the stored metadata based on the change* of a user from one context to a second context. See Stameshkin Decl. Ex. 7 at 8. Therefore, had Dr. Vigna wanted to put on a doctrine of equivalents case, he could have done so. Instead, he merely recited claim language and repeated his conclusion of literal infringement—that is insufficient as a matter of law.

b. The Doctrine of Equivalents is Legally Unavailable.

The doctrine of equivalents is also unavailable as a matter of law due to the doctrines of prosecution history estoppel and claim element vitiation. First, under the doctrine of prosecution history estoppel, "[n]arrowing the claims in response to a rejection during prosecution creates a presumption that the applicant surrendered the territory between the original claims and the amended claims." *Lucent Techs., Inc. v. Gateway, Inc.*, 525 F.3d 1200, 1218 (Fed. Cir. 2008) (citation omitted). Prosecution history estoppel presents a question of law for the Court. See *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 344 F.3d 1359, 1368 (Fed. Cir. 2003). During prosecution of the application that resulted in the '761 patent, the Examiner rejected all of Leader's proposed claims as obvious over the prior art. See Stameshkin Decl. Ex. 8 at 3-

11. Leader responded by adding “dynamically” to each element calling for the metadata to be updated following the user’s movement to a second context, environment or workspace. *See id.* Decl. Exs. 9-11.¹ Because Leader made these amendments to overcome prior art rejections, it surrendered any range of equivalents that would not require metadata to be updated automatically and in response to the user’s movement.

Second, “the doctrine of equivalents cannot be employed in a manner that wholly vitiates a claim limitation.” *SciMed Life Sys., Inc. v. Advanced Cardiovascular Sys., Inc.*, 242 F.3d 1337, 1346 (Fed. Cir. 2001). Employing the doctrine of equivalents to capture an accused system that does not update metadata automatically and in response to the user’s movement to a second context, environment or workspace would entirely and impermissibly vitiate the requirement that the metadata update take place “dynamically.” Leader’s arguments would also erase the antecedent basis in each asserted claim requiring that “the stored metadata” or “the metadata” be updated. Thus, judgment as a matter of law should be entered against Leader’s doctrine of equivalents claims.

C. A New Trial on Infringement Would Be Warranted Should The Court Enter Judgment in Favor of Leader.

As the Court is aware, Facebook prevailed at trial on the on-sale bar and prior-use defenses, which render all of the asserted claims invalid under 35 U.S.C. § 102(b). An invalid patent cannot be infringed. *See, e.g., Richdel, Inc. v. Sunspool Corp.*, 714 F.2d 1573, 1580 (Fed. Cir. 1983). If the Court were nonetheless to enter judgment in favor of Leader, or to grant Leader a new trial on any issue on which Facebook prevailed, a new trial would be warranted on infringement. New trials are appropriate when there was improper conduct that unfairly influenced the verdict or the verdict was against the clear

¹ The amendments took place in two responses and an Examiner’s Amendment. *See* Stameshkin Decl. Ex. 9 at 6 (amending claim 40, later issuing as claim 21, to add “dynamically”); *id.* Ex. 10 (discussing Examiner’s Amendment to overcome art); *id.* Ex. 11 at 3 (amending claim 18, later issuing as claim 1), *id.* at 5 (amendment to claim that would issue as claim 9), *id.* Ex. 12 at 10 (adding new claim 45 which would later issue as claim 23).

weight of the evidence. *See Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 585 F. Supp. 2d 568, 580 (D. Del. 2008).

Here, a new trial on infringement would be warranted on three separate bases: (1) Dr. Vigna's trial testimony prejudicially exceeded the scope of his expert report, (2) the jury did not have the benefit of the Court's claim construction on the definition of the "preceding event" required in the Court's construction of "dynamically," and (3) the jury's verdict is against the clear weight of the evidence.

a. Dr. Vigna Exceeded The Scope of His Report.

Federal Rule of Civil Procedure 26(a)(2)(B) required Dr. Vigna's expert report to contain a complete statement of all opinions to be expressed and the bases for those opinions. This Court has held that in determining whether an expert has exceeded its expert report, parties may present testimony that is "consistent with the report and is a reasonable synthesis and/or elaboration of the opinions contained in [it]." *Power Integrations, Inc.*, 585 F. Supp. 2d at 581. The challenged portions Dr. Vigna's trial testimony were not a "reasonable synthesis and/or elaboration" of his report.

During the initial Pretrial Conference on July 1, the Court denied Facebook's motions to prevent Dr. Vigna from testifying outside the scope of his expert report. However, the Court advised the parties that "if any expert, be it Dr. Vigna or any other expert testifies beyond the scope of his expert report, you can make an objection to that effect at trial, the objection will be noted." Stameshkin Decl. Ex. 13 at 4:18-21. Following trial, the objecting party could renew its objection, and if a new trial is ordered, "the party that has proffered the inappropriate expert testimony will be paying the costs of the new trial." *Id.* at 5:1-4. Facebook respectfully renews its objections to Dr. Vigna's trial testimony because it exceeded his report in two respects: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Leader provided no explanation as to why those opinions were withheld until trial. Facebook never had an opportunity to depose Dr. Vigna regarding these opinions and, to this day, has never seen the underlying source code for Collaboratory application. Because all of Facebook witnesses were sequestered during this testimony, Facebook could not respond to this new information.

Second, Dr. Vigna relied on several videos purporting to capture a live demonstration of his use of the Facebook website. [REDACTED]

[REDACTED]

[REDACTED]

Leader's use of the videos was contrary to the Court's instructions at the Final Pretrial Conference prohibiting the parties from discussing changes to the Facebook website after April 1, 2010, which Leader had requested. (D.I. 578 at 10); Stameshkin Decl. Ex. 21 at 39:13-17. Later in that same conference, Leader informed the Court and Facebook that it needed an Internet connection to provide a *live* demonstration of the *current* Facebook website. The Court rejected this request, admonishing Leader that "[y]ou'll present your case base on some sort of fixed data that has been produced and is part of this case." *Id.* at 69:8-11 (emphasis added). The Court further remarked that "[w]hat the Facebook website looks like on July 19, 2010, is not what – we're not going to be able to display that in live terms to the jury." *Id.* at 69:12-15. The Court made clear to both parties that the evidence at trial regarding the Facebook website must reflect the information in the expert reports exchanged in April.

Despite this, the video demonstration that Leader presented at trial relating to the July 2010 website appears to have been created on Saturday, July 17, 2010, the day after the Court admonished Leader to present its case based on "fixed data that *has already been produced.*" *Id.* at 69:8-11. Dr. Vigna described the new videos as a "backup plan" in light of having no Internet access in court, *id.* Ex. 1 at 771:15-19, but they were clearly about the Facebook website, [REDACTED]

[REDACTED]

Dr. Vigna's pervasive use of videos of the Facebook website as of July 2010 was unfairly prejudicial to Facebook. Because the videos were not produced until the night before Dr. Vigna's testimony, Facebook had no opportunity to depose Dr. Vigna about them or to meaningfully respond to them at trial. Moreover, Leader relied on these

belatedly-produced videos – and the lack of competing videos from Facebook – to argue that Dr. Vigna should be credited over Facebook’s witnesses. *See* Stameshkin Decl. Ex. 1 at 1970:9-15 (“First of all, getting to see something like that is pretty cool. I didn’t know that kind of stuff existed, to be quite frank. Knowing it under the hood, as they call it, seeing it happen, walking through the claim elements one by one, showing it live on the internet. He’s the only person who did that.”) (emphasis added).

b. A New Trial is Warranted Because a Fundamental Claim Construction Dispute Was Decided By the Jury.

As discussed in Part III.A above, one of the central disputes over infringement turned on whether metadata was “dynamically” updated, *i.e.*, updated automatically and in response to the user’s movement to a second context, environment or workspace. Leader presented two related arguments in its attempts to avoid this requirement. First, Leader repeatedly suggested that the word “wherein” in each independent claim actually meant “when.” *See, e.g.*, Stameshkin Decl. Ex. 1 at 228:21-229:1, 232:13-19, 668:12-17, 669:13-17, 687:24-688:5, 708:16-21, 746:19-24. Second, after the Court construed “wherein” as “in which,” Leader shifted to another unresolved claim construction issue – the identity of the “preceding event.” Leader argued that the jury should find infringement because it should believe and credit Dr. Vigna’s interpretation of “the preceding event,” even though it contradicted the Court’s construction of “dynamically.” *See id.* at 1966:5-8 (Leader closing: “Dr. Vigna explained what the preceding event was happening in the technology. That’s what the claims are about. *It’s not a preceding event in the sentence.*”); *id.* at 1966:10-13 (Leader closing: “When you talk about the preceding event, it’s based on what’s happening *in the technology*. Dr. Vigna was the one who explained that to you over and over and over again.”). Facebook’s counsel, on the other hand, argued that the “preceding event” was the preceding event in the claim, *i.e.*, the user’s movement to a second context. *See id.* at 2019:8-14 (Facebook closing:

“The event is a change of the user from the first context to a second context, so in the second element of these claims, the ‘dynamically’ language means in response to the preceding event. The event has already occurred: The user moving from one context to another.”).

The question of infringement ultimately turned on the jury resolving the meaning of “the preceding event,” which was a legal question for the Court, not the jury. *See O2 Micro Int’l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1362-63 (Fed. Cir. 2008) (district court erred by allowing jury to resolve disputed question of claim interpretation). Accordingly, if the Court is not inclined to grant judgment as a matter of law for the reasons expressed above on infringement, Facebook should be granted a new trial on literal infringement, with the jury instructed that the “preceding event” is the preceding event in the claim, *i.e.* the user’s movement from the first to a second context, user environment or user workspace.

c. The Jury’s Verdict on Infringement Was Against the Clear Weight of the Evidence.

Finally, Facebook moves conditionally for a new trial as to infringement based on the discussion in Part III.A above, which shows that the accused Facebook website is missing at least two elements of each asserted claim. The verdict that Facebook literally infringes the asserted claims is against the clear weight of the evidence, and thus at a minimum, a new trial on infringement would be required.

IV. CONCLUSION

For the reasons stated above, Facebook respectfully requests that this Court grant judgment as a matter of law that Facebook does not infringe the ’761 patent.

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By: /s/ Steven L. Caponi
Steven L. Caponi (DE BAR #3484)
BLANK ROME LLP
1201 Market Street, Suite 800
Wilmington, DE 19801
(302) 425-6400

FAX: (302) 425-6464

OF COUNSEL:
Michael G. Rhodes
Heidi L. Keefe
Mark R. Weinstein
Jeffrey Norberg
Melissa H. Keyes
Elizabeth L. Stameshkin
COOLEY LLP
3000 El Camino Real
5 Palo Alto Square, 4th Floor
Palo Alto, CA 94306

*Attorneys for Defendant and
Counterclaimant Facebook, Inc.*

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