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COOLEY LLP
HEIDI L. KEEFE (178960)
(hkeefe@cooley.com)
MARK R. WEINSTEIN (193043)
(mweinstein@cooley.com)
MATTHEW J. BRIGHAM (191428)
(mbrigham@cooley.com)
3175 Hanover Street
Palo Alto, CA 94304-1130
Telephone: (650) 843-5000
Facsimile: (650) 849-7400

COOLEY LLP
MICHAEL G. RHODES (116127)
(rhodesmg@cooley.com)
101 California Street, 5th Floor
San Francisco, CA 94111-5800
Telephone: (415) 693-2000
Facsimile: (415) 693-2222

Attorneys for Defendants FACEBOOK, INC., WHATSAPP INC., and INSTAGRAM, LLC

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

BLACKBERRY LIMITED,

Plaintiff,

v.

FACEBOOK, INC., WHATSAPP INC., and INSTAGRAM LLC,

Defendants.

SNAP INC.,

Defendant.

Case Nos. 2:18-cv-01844; 2:18-cv-02693 GW(KSx)

FACEBOOK DEFENDANTS' OPPOSITION TO BLACKBERRY'S MOTION FOR PARTIAL SUMMARY JUDGMENT OF INFRINGEMENT (U.S. PATENT NOS. 8,677,250, 8,279,173, AND 9,349,120)

Hearing Date: September 5, 2019
Time: 8:30 A.M.
Ctrm: 9D

Assigned to the Hon. George H. Wu

REDACTED VERSION OF DOCUMENT
PROPOSED TO BE FILED UNDER SEAL

TABLE OF CONTENTS

REDACTED VERSION OF DOCUMENT
PROPOSED TO BE FILED UNDER SEAL

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

REDACTED VERSION OF DOCUMENT
PROPOSED TO BE FILED UNDER SEAL

I. INTRODUCTION

In its rush to have something heard at the same time as the pending motions for summary judgment under 35 U.S.C. § 101, BlackBerry filed an error laden and deficient motion for partial summary judgment seeking to establish that several accused products infringe claims across multiple patents. Tellingly, the "Statement of Uncontroverted Facts" accompanying the motion relies almost entirely on bald statements that BlackBerry's experts analyzed the systems and provided opinions.[1] When those opinions are closely analyzed, they demonstrate BlackBerry's inability to show that any accused product infringes any asserted claim.

The '250 patent requires enabling a "game application" to utilize a "contact list" for an instant messaging application, but BlackBerry and its expert point only to a "Chats list" that does not contain a list of the user's contacts and cannot be accessed by any supposed game application. The deposition of BlackBerry's expert also uncovered a profound lack of knowledge, as he repeatedly changed positions multiple times in an attempt to salvage BlackBerry's theory, raising credibility issues that provide a separate basis for rejecting BlackBerry's motion. With respect to the '173 patent, which requires the display of a "tag type indicator" for every tag in a tag list, BlackBerry's expert admitted that he was relying on a blank area of the screen – on which **nothing** is displayed – as the supposedly displayed indicator. For the '120 patent, which requires the ability to silence all new message notifications within a thread, BlackBerry's expert acknowledged that the accused products continue to show visual cues that inform the user of the receipt of new messages, even for silenced threads. These and the other flaws with BlackBerry's analysis, as discussed below, actually show non-infringement of the asserted patents. But at a minimum, they raise genuine issues of material fact that preclude summary judgment.

[1] *E.g.*, SUF Nos. 29-36.

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II. LEGAL STANDARD

BlackBerry's motion only attempts to establish *literal* infringement, not infringement under the doctrine of equivalents.[2] The standard for proving literal infringement is well-settled, and exacting. Literal infringement exists 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.'" *DeMartini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1331 (Fed. Cir. 2001) (citation omitted). The absence of even a single limitation precludes a finding of literal infringement. *See, e.g. Kahn v. Gen. Motors Corp.*, 135 F.3d 1472, 1477-78 (Fed. Cir. 1998). Whether an accused product infringes a claim presents a question of fact. *See Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1301-02 (Fed. Cir. 2011).

BlackBerry bears the burden of proving infringement. *See, e.g., Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 198-199 (2014). In the context of summary judgment, "[w]here the moving party will have the burden of proof on an issue at trial," as here, "the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party." *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007); *see also, e.g., L & W, Inc. v. Shertech, Inc.*, 471 F.3d 1311, 1318 (Fed. Cir. 2006). As established below, BlackBerry has not carried its burden with respect to any of the asserted claims or any of the accused products addressed in its motion.

III. ARGUMENT

A. BlackBerry Has Not Shown Infringement of the '250 Patent

It is somewhat puzzling that BlackBerry's motion chose to lead with the '250 patent considering the profound deficiencies in BlackBerry's theory. The problems with BlackBerry's infringement theory run the gamut of summary

[2] BlackBerry's two technical experts (on which BlackBerry's motion entirely relies) only evaluated literal infringement for purposes of the present motion. (Schonfeld Dep., 22:21-23:4, Keefe Ex. 1; Rosenberg Dep., 132:2-9, Keefe Ex. 2.)

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judgment defects, from BlackBerry and its expert misunderstanding how the accused products operate, to serious credibility issues with BlackBerry's expert that cannot be resolved on summary judgment. At a minimum, genuine issues of material fact remain as to whether Facebook infringes any claim of the '250 patent.

The problem with BlackBerry's infringement arguments begin at limitation **[9.a]**, which recites "*enabling a game application on the electronic device to utilize a contact list for an instant messaging application for playing games with contacts in the contact list by identifying game play in the contact list*." BlackBerry's arguments about this limitation provide a clear example of either misunderstanding or misrepresenting how the accused products work. In order to fully understand why BlackBerry's motion must fail, it is helpful to unpack and explain its theory.

Under BlackBerry's theory, the "**game application**" corresponds to an Instant Game that can be invoked from Facebook Messenger or the Facebook website. (Schonfeld Dep., 29:4-13, 29:23-30:9; Mot. at 6-7.) The only specific game that BlackBerry and its expert identify or discuss is "Words with Friends," created by non-party Zynga, Inc. (Schonfeld Dep., 29:23-30:9; Chen Decl., ¶5.)[3] Blackberry then alleges that the claimed "**contact list for an instant messaging application**," corresponds to the "Chats" list shown on the Facebook website and through the Messenger app. (Schonfeld Dep., 33:21-34:1 (citing Schonfeld Decl., pp. 16 & 27); *see also* Mot. at 7:4-6.) With those understandings in mind, we now turn to the specific requirements in limitation **[9.a]**.

As noted, limitation **[9.a]** requires that the alleged "*game application*" (like Words with Friends) be enabled "*to utilize a contact list for an instant messaging application*." BlackBerry simply assumes without explanation that the Chats list qualifies as a "**contact list**" for purposes of claim 9. But a reasonable jury could

[3] For each witness from whom Facebook submits a declaration herewith, BlackBerry has already received document discovery and taken their depositions under Fed. R. Civ. Pro. 30(b)(1) and 30(b)(6).

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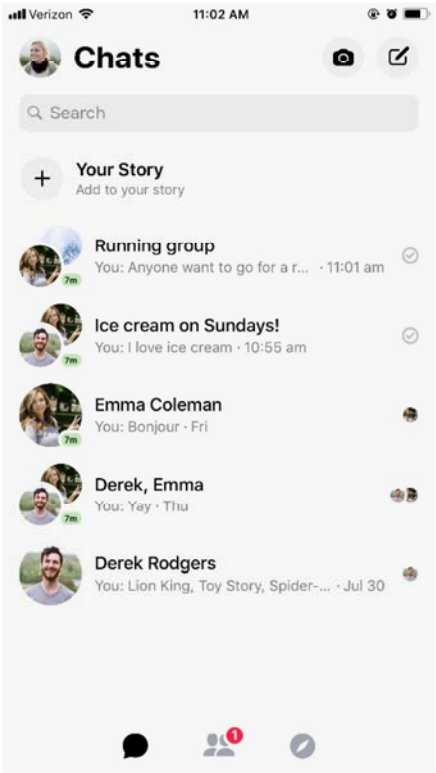
conclude that the Chats list is not a contact list. As explained in the accompanying declaration of Facebook engineer Kun Chen, who was deposed by BlackBerry prior to the filing of its motion, [redacted] (Chen Decl., ¶¶4, 9.)

This difference is illustrated by the exemplary Chats list shown at the right, which shows five exemplary chats. (*Id.*, ¶9.) The first two chats correspond to group chats that have user-selected titles (*e.g.*, "Running group" and "Ice cream on Sundays!"), and do not identify any participating users or "contacts." The remaining three chats include two one-on-one conversations (one between the user and Emma Coleman and the other between the user and Derek Rodgers), and one group conversation (including both Emma and Derek). Although the Chats list can include the names of individuals, as shown, the list is oriented around conversations, not individual contacts. (*Id.*) Thus, the names of other users may be missing from, or included multiple times in, the Chats list (as shown), and contacts who are not in those chats will not be listed at all. (*Id.*)



BlackBerry's infringement theory apparently assumes that any list that may show names of individuals qualifies as a "contact list," regardless of how the list is organized or presented, and regardless of its purpose. BlackBerry never asked for a construction of "contact list," the Court did not construe it, and the term is not defined

in the '250 patent.[4] The term "contact list" therefore takes on its ordinary and everyday meaning, and at a minimum, a question of fact exists as to whether the "Chats" list qualifies under that ordinary meaning. *See Uniloc*, 632 F.3d at 1301-02 (application of the claim to the accused device was a question of fact). A reasonable jury could conclude that a list of "Chats" is not the same as a list of contacts, and therefore does not qualify as a contact list.

This is not the only flaw with BlackBerry's infringement theory – diving down to a more technical level reveals profound deficiencies. As noted, limitation **[9.a]** expressly requires that the alleged "*game application*" be enabled "*to utilize a contact list for an instant messaging application*." But as shown below, an Instant Game such as Words with Friends (the alleged "game application") [redacted] (Chen Decl., ¶10.) [redacted] But BlackBerry and its expert were mistaken. [redacted]

[4] The specification does not provide meaningful guidance on this issue. Figure 3 shows an exemplary "Mike's Contact List" that includes a section for conversations (304), but unlike the accused Chats list, the contact list in the specification also contains a specific section (308) that provides an actual listing of contacts. ('250, Figs. 3-4.)

[5] The term "API" stands for Application Programming Interface (API), which is an interface that allows software programs to gain access to certain functionality. (Chen Decl., ¶6; Schonfeld Dep., 38:6-24.) Here, Facebook provides an API for its Instant Games platform that provides a series of functions that allow game developers to adapt their games to interact with the features of Facebook Messenger. (Chen Decl., ¶6.)

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[redacted]

In other words, [redacted]

It was clear from the deposition of BlackBerry's expert that, when he wrote his declaration, he did not understand the limitations of [redacted] He had never tested it, and could not confirm [redacted] – on which he expressly relied – was accurate. (Schonfeld Dep., at 35:25-36:6, 46:7-47:7.) When asked whether [redacted] A reasonable jury could decide, based on the lack of knowledge and equivocations of BlackBerry's expert, to not credit him or BlackBerry's theory of infringement that he attempted to support. *See TypeRight Keyboard Corp. v. Microsoft Corp.*, 374 F.3d 1151, 1158-59 (Fed. Cir. 2004) ("[S]ummary judgment is not appropriate where the opposing party offers specific facts that call into question the credibility of the movant's witnesses.").

The problems do not end there. Limitation **[9.a]** also recites "*enabling a game application on the electronic device to utilize a contact list for an instant messaging application … **by identifying game play in the contact list***." BlackBerry's analysis of the latter portion of limitation **[9.a]** ("by identifying game play in the contact list") does not mention [redacted]. BlackBerry appears to treat "utiliz[ing] a contact list for an instant messaging application," and "identifying game

play in the contact list," as two separate and independent requirements that can be shown by disparate and unrelated functionalities. (Schonfeld Decl., ¶¶40-41, 53-54.) But the claim links the two by reciting the ability to "utilize a contact list … ***by*** identifying game play in the contact list." BlackBerry has articulated no theory that accounts for these interrelated requirements.

BlackBerry's expert had no idea whether [redacted] – had any role in the display of the Chats list (the alleged "contact list"), let alone identifying game play in the alleged contact list. (Schonfeld Dep., 50:21-51:3.) [redacted] An Instant Game, such as Words with Friends, [redacted] BlackBerry thus cannot show that Facebook "enabl[es] *a game application … to utilize a contact list …* ***by identifying game play in the contact list***."

There are even more problems. BlackBerry's expert admitted that the [redacted] would be invoked, if at all, by the Instant Game (the alleged "game application"). (Schonfeld Dep., 37:7-13, 48:18-49:4.) But BlackBerry's expert admitted that he had no idea "if the Words with Friends game ever [redacted]." (*Id.*, 37:16-20.) Nor could he answer this question with respect to any other game available through Facebook Instant Games. (*Id.*, 37:21-38:4.)[6] BlackBerry's expert further admitted that he had never looked at the source code for Words with Friends (or any other Instant Game). (*Id.*, at 31:5-32:1.) He, in fact, claimed he did not need it. (*Id.*, at 32:6-33:4.) In any case, BlackBerry has zero evidence of any game application that used

[6] An Instant Game does not need to use [redacted] in order to function. (Schonfeld Dep., 39:10-22; Chen Decl., ¶8.) The mere existence of an operational Instant Game, therefore, does not provide evidence that the game ever uses [redacted].

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[redacted] performed the function of "utiliz[ing] a contact list" by "identifying game play in the contact list," as the claim requires. This failure of proof provides a further basis to deny BlackBerry's motion for summary judgment.

BlackBerry's theory of infringement also fails with respect to limitation **[9.b]** because BlackBerry has not articulated what its theory (if any) actually is – and its expert's attempts to do so at his deposition called his credibility into question. Limitation **[9.b]** recites, in relevant part, the step of "preparing game messages *to be sent to the particular* contact by including game progress data in an instant messaging message and ***an identifier to associate the data with the game application***." A clear requirement of this claim language is that the "identifier" must be included in a "game message" *that is sent to the particular contact* (*e.g.*, the other game player). BlackBerry's expert agreed. (Schonfeld Dep., 60:2-17.)

The only example of the claimed "identifier" in BlackBerry's motion is "a banner including the name of the game being played." (Mot. at 7-8.) But BlackBerry's expert admitted that he did not know whether that information is actually sent *to the particular contact*, as the claim expressly requires. (Schonfeld Dep., 70:24-71:5 [redacted].)

The deposition of BlackBerry's expert played out like a game of cat-and-mouse, in which BlackBerry's expert repeatedly demurred as to what, if anything, was the "identifier to associate the data with the game application" in the accused product – repeatedly testifying that such an identifier existed but never identifying what it was. (Schonfeld Dep., 57:2-58:21, 61:20-63:18, 70:17-72:15.) The section of his declaration addressing limitation **[9.b]** identified two different IDs used with Instant Games – [redacted] – but the declaration does not state whether

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those IDs (individually or collectively) correspond to the claimed "identifier." (Schonfeld Decl., ¶¶42, 55.) The reason for his hesitancy was apparent from the deposition – BlackBerry's expert had no idea whether any of these supposed identifiers was actually included in any "game messages to be sent to the particular contact," as the claim expressly requires. (Schonfeld Dep., 63:24-64:5, 149:13-20, 150:20-151:19.) As for the "[redacted]," he had no idea how it was generated, how it was represented, or whether it was generated by the Instant Game or by Facebook. (*Id.*, 78:3-13.)

The result of the lack of knowledge of BlackBerry's expert was an unsupported and conditional opinion; for example, with respect to the [redacted], BlackBerry's expert testified: [redacted] In other words, to the extent an identifier in Facebook's system meets the claim requirement for an identifier – which BlackBerry's expert did not know – it was part of his infringement theory. Summary judgment cannot be granted based on equivocations and evasions.

Counsel for BlackBerry then conducted an improper, leading redirect at the close of the deposition. Counsel handed his expert pages of the deposition of a Facebook witness [redacted], which were never cited or included with the expert's declaration or BlackBerry's motion, and asked the expert to read them. (Schonfeld Dep., 142:12-25, 144:4-13, 146:4-147:1.) Under the guise of attempting to refresh the memory of the witness, this highly suggestive examination by BlackBerry's counsel guided the expert to a brand new ID – a "[redacted]," which was never previously identified. (*Id.*, 143:2-144:2, 154:18-155:5.)[7]

[7] It is not clear if BlackBerry intends to change its theory to now assert that the "[redacted]" discussed late in the deposition is the claimed "identifier" for purposes of claim **[9.b]**. This would be inappropriate, as any "[redacted]" argument relies on arguments

In the end, the repeated equivocations, flat out lack of knowledge, and changed opinions of BlackBerry's expert call into question his preparation, knowledge, and ultimately his credibility as a witness. *See TypeRight Keyboard Corp.*, 374 F.3d at 1158-59 ("[S]ummary judgment is not appropriate where the opposing party offers specific facts that call into question the credibility of the movants witnesses."). A reasonable jury could conclude that the testimony of BlackBerry's expert – the sole evidence offered in support of the present motion – should not be credited.

B. BlackBerry Has Not Shown Infringement of the '173 Patent

BlackBerry has also failed to show infringement of the '173 patent by the accused Facebook website and Instagram application. Again, BlackBerry has failed to carry its burden with respect to multiple limitations of the asserted claims.

Claim 13, from which the sole asserted claim depends, recites a "computer readable medium" (transitory or non-transitory) that, when loaded into a device, performs the following functions: "displaying a tag list including tags from one or more tag sources matching a search string" **[13.a]**, and "displaying a tag type indicator for each tag appearing in the tag list, said tag type being indicative of a tag source associated with the tag" **[13.b]**. As with the '250 patent discussed above, to fully understand the flaws with BlackBerry's infringement theory, Facebook will unpack and analyze that theory in more detail than was provided in BlackBerry's motion.

A key limitation is the display of a "*tag type indicator for each tag appearing in the list*," as recited in claim **[13.b]**. The Facebook website and Instagram provide photo tagging features that present the user with a list of tag suggestions, allowing the user to specify a particular tag for a photo. (Wang Decl., ¶9; Douglas Decl., ¶3.) The two screen captures below show examples of how the Facebook website and Instagram can present tag suggestions to the user:

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and evidence not included with BlackBerry's motion. BlackBerry never amended its motion or expert declaration to discuss the [redacted], or to withdraw BlackBerry's prior reliance on the other (discredited) identifiers discussed earlier at the deposition.

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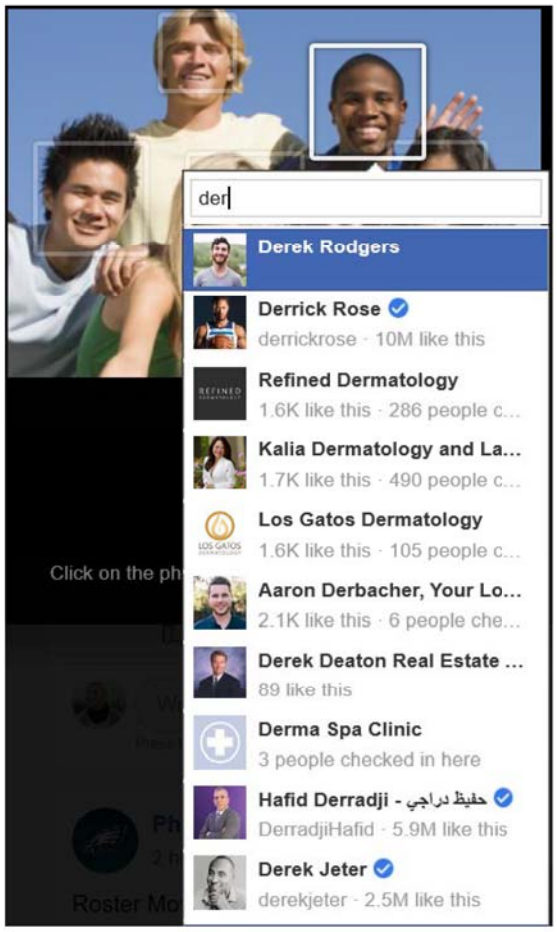
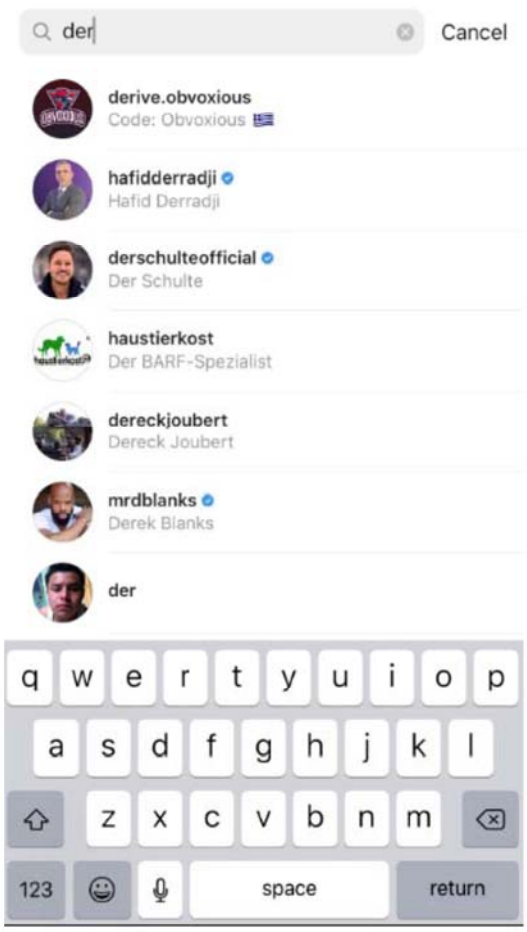
Facebook Website	Instagram App
	

(Douglas Decl., ¶3; Wang Decl., ¶9.) BlackBerry contends that the tag suggestion lists shown above correspond to the claimed "**tag list**" of claim 13.

As noted, a key limitation recites the display of "*a tag type indicator for each tag appearing in the tag list*" **[13.b]**, which on its face requires a tag type indicator for every tag in the list. But the tag suggestion lists shown above (and every example provided by BlackBerry's expert) show tag suggestions unaccompanied by any kind of visual indicator. For example, the screen capture on the left above shows "Derek

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Rogers" with nothing more than his name and a small profile icon (neither of which BlackBerry contends is a "tag type indicator"). The screen capture on the right shows substantially the same for Dereck Joubert (among others). All of the example screen captures provided by BlackBerry show similar examples of tag suggestion lists containing items displayed without any kind of accompanying indicator. (Mot. at 14; Schonfeld Decl., ¶¶35, 36, 84, 88, 105, 129.)

How can BlackBerry claim that Facebook and Instagram display "*a tag type indicator for each tag appearing in the tag list*" **[13.b]**, when the accused products indisputably display tag suggestions without any such indicator? Or stated more simply, how can the *absence* of an indicator qualify as an "indicator"?

BlackBerry responded to this question by inventing a new term – "blank indicator" – which it claims is displayed alongside certain tag suggestions. (Schonfeld Decl., ¶86 [redacted] (underlining added).) BlackBerry's motion even goes as far as to show screen captures of Instagram and Facebook in which BlackBerry placed red boxes over empty areas of the screen to show the locations of these supposed "blank indicators" (see example from BlackBerry's motion shown at the right). (*See* Mot. at 14.)

There is no such thing as a "blank indicator." (Wang Decl., ¶13; Douglas Decl., ¶9.) What BlackBerry calls a "blank indicator" is actually the *absence* of any indicator at all. (*Id.*; Schonfeld Dep., 116:19-22 [redacted] (citing Schonfeld Decl., ¶50); *see also id.*, 115:5-10.) BlackBerry's reliance on its newly concocted "blank indicator" does not even remotely meet its burden of showing that claim **[13.b]** is satisfied; to the contrary, it establishes non-infringement.

BlackBerry's attempts to rationalize its "blank indicator" argument are easily rejected. BlackBerry argues that the absence of any displayed indicator for Facebook

friends and unverified Instagram profiles somehow qualifies as a "tag type indicator" because, according to BlackBerry, the lack of an indicator distinguishes those tag suggestions from other suggestions where some kind of indicator is in fact displayed. (Mot. at 18; Schonfeld Decl., ¶¶86, 87, 107.) But arguing that the ***absence*** of an indicator somehow qualifies as an "indicator" cannot be reconciled with the plain claim language which expressly recites "***displaying*** *a tag type indicator for each tag*." "Displaying" requires an affirmative act of displaying the claimed "indicator." In the case of tag suggestions for Facebook friends and Instagram unverified profiles, no such indicator is displayed. (Wang Decl., ¶13; Douglas Decl., ¶9 n.2.) In other words, the step of "*displaying* a tag type indicator" does not occur for those tag suggestions.

BlackBerry has not established, for purposes of summary judgment or otherwise, that Facebook and Instagram display "a tag type indicator for each tag appearing in the list." BlackBerry never asked for a construction of "tag type indicator" (and the Court did not construe it), so the term must be given its ordinary meaning. At a minimum, a question of fact exists as to whether each of the supposed indicators relied upon by BlackBerry qualifies as a "tag type indicator" under its ordinary meaning. *See Uniloc*, 632 F.3d at 1301-02.

That same limitation of claim 13 provides further problems with BlackBerry's infringement theory. It recites "displaying a tag type indicator for each tag appearing in the tag list, ***said tag type being indicative of a tag source associated with the tag***" **[13.b]**, and BlackBerry's analysis of the claimed "tag sources" fails. The supposed "tag type indicators" identified by BlackBerry, at best, correspond to *categories* of tag suggestions – not their *sources*. (Douglas Decl., ¶¶4-8; Wang Decl., ¶¶10-11.) For Facebook, all tag suggestions – regardless of their category – come primarily from

[redacted]

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[redacted] Facebook, though, can also obtain tag suggestions from a [redacted] But Facebook does not display anything with a tag suggestion to indicate whether the suggestion [redacted] BlackBerry therefore cannot show the display of a tag type indicator "**indicative of a tag source**," as claimed. What BlackBerry calls the "tag type indicators," as mentioned, have no relationship to the source of the tags.

Instagram operates in a similar fashion. All tag suggestions – for verified and unverified profiles – [redacted] BlackBerry's expert did not know whether tag suggestions from "verified" and "unverified" tags came from [redacted] But like Facebook, Instagram [redacted]

Finally, BlackBerry concedes that the claimed tag type indicator must "clearly indicate [the tag's] type, and allow[] the user to quickly distinguish between different types of tags." (Mot. at 18 (alterations in original) (quoting '173, 5:54-55).) Even putting aside the so-called "blank indicator," the other indicators identified by BlackBerry do not provide this capability. (Douglas Decl., ¶¶9-10; Wang Decl., ¶¶12-13.) With both Facebook and Instagram, BlackBerry points to additional information displayed with a tag suggestion (such as the number of "Likes" or a checkmark to indicate whether a profile belongs to a celebrity or public figure). (Schonfeld Decl., ¶¶79, 101.) But this additional information does not indicate a *type* of tag, but rather, provides contextual information about the popularity, prominence, or closeness of the

tag suggestion. (Douglas Decl., ¶¶9-10; Wang Decl., ¶13.)[8] For example, BlackBerry claims that the "tag type indicator" for a Facebook page is simply an identification of the number of users who liked it. (Schonfeld Decl., ¶79.) But the number of "likes" simply provides information about the popularity of a tag suggestion as compared to other suggestions in the list. (Douglas Decl., ¶10.)

At a minimum, a genuine issue of material fact exists as to whether each of the supposed "tag type indicators" identified by BlackBerry actually indicates a type of tag. For all of these reasons, therefore, summary judgment of infringement must be denied with respect to the '173 patent.

C. BlackBerry Has Not Shown Infringement of the '120 Patent

BlackBerry's infringement claims under the '120 patent focus on a feature that allows messaging users to "mute" or disable the presentation of certain types of new message notifications. Although BlackBerry accuses a broad array of products offered by Facebook, WhatsApp, and Instagram, its infringement allegations – and the reasons they fail – are substantially similar for each accused product.

1. BlackBerry Has Not Shown that the Accused Muting Features Satisfy All Limitations of the Asserted Claims

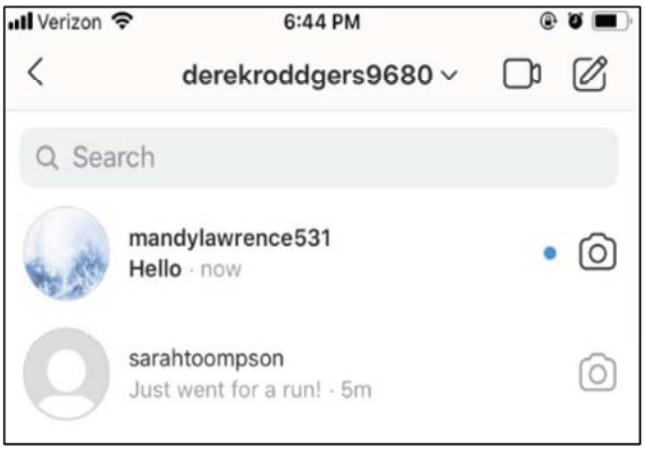
a. The Accused Products Continue to Provide Notifications Even for "Muted" Conversations and Chats

Claims 1 and 13 (the two independent claims in BlackBerry's motion) both recite the ability to activate a "flag" indicating that a particular message thread has been "silenced." When a new incoming electronic message is received, both claims

[8] The '173 patent distinguishes the claimed tag type indicator from *context data* about a tag. Dependent claim 19 separately calls out display of context data. ('173, claim 19 ("The computer readable medium of claim 13, further comprising code for displaying context data with the photo tag.").) But under BlackBerry's theory, the context data under dependent claim 19 would collapse into the "tag type indicator" of claim 13, which would render claim 19 meaningless. *Nazomi Commc'ns, Inc. v. Arm Holdings, PLC*, 403 F.3d 1364, 1370 (Fed. Cir. 2005) ("The concept of claim differentiation 'normally means that limitations stated in dependent claims are not to be read into the independent claim from which they depend.'") (citation omitted).

recite the ability to "*display[] the new incoming electronic message in an inbox together with any message thread not flagged as silenced,* ***while silencing any further notifications pertaining to receipt of the new incoming electronic message***" **[1.g]**, **[13.g]**. The claim thus requires all notifications pertaining to the new incoming electronic message be silenced or prevented. BlackBerry has failed to show that any of the accused products satisfy this requirement.

It is true that, when a particular chat or conversation (which BlackBerry calls the claimed "thread") is muted in the accused Facebook, WhatsApp, and Instagram messaging products, some notifications pertaining to new incoming messages in that chat or conversation are prevented. But the accused muting feature does not prevent "***any further*** *notifications* pertaining to receipt of the new incoming electronic message," because the accused products continue to provide other types of notifications upon receipt of new messages in muted chats or conversations.



For example, the screen capture shown at the right shows a list of conversations (the alleged "inbox") in Instagram. (Wang Decl., ¶¶5-8.) The first listed conversation (mandylawrence531) shows the name and message text shown in **boldface** type, with a blue dot ● on the right of that entry in the list. These visual cues – the boldface type and the blue dot – notify the user a new incoming message has been received in the "mandylawrence531" conversation. (*Id.*) They do not appear next to the second conversation shown in the list (sarahtoompson) because no new message was received in that conversation.

The accused Facebook and WhatsApp features function in a substantially similar way with respect to displaying chats or conversations in which a new incoming

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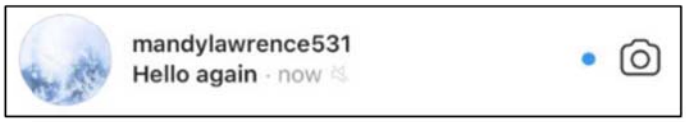
message has been received. Just like Instagram, the accused Facebook and WhatsApp products provide a substantially similar visual cue to the user (such as a blue or green dot, bolded or different colored text, moving to the top, etc.) to notify the user that a new incoming message has been received for a particular chat. (Nachman Decl., ¶¶4-5, 7-8 (WhatsApp); Biczo Decl., ¶¶4-6, 9-10 (Facebook).) With respect to all of the accused products, the purpose of these visual cues is to draw the attention of the user to the fact that a new message has been received in a particular chat or conversation. (Wang Decl., ¶¶6, 8; Nachman Decl., ¶8; Biczo Decl., ¶¶6, 10, 13, 16.)

Critically, it is undisputed that *the accused products continue to present these new message notifications even with respect to chats or conversations that have been "muted" by the user*. (Wang Decl., ¶¶7-8; Nachman Decl., ¶¶7-8; Biczo Decl., ¶¶8-11, 15-16.) When a new message is received in a muted conversation (*e.g.*, denoted by icons such as " " or " "), the accused products still show new message notifications. For example, as shown below, Instagram shows a blue dot and bolded text next to a new message in a thread that has been muted. (Wang Decl., ¶8.) The accused Facebook and WhatsApp features similarly show new message notifications. (*E.g.*, Nachman Decl., ¶¶7-8; Biczo Decl., ¶¶8-11, 15-16.) BlackBerry's expert agreed that [redacted]



His declaration, in fact, identifies numerous screen captures showing, even after muting a particular conversation, the accused products continuing to display these visual notifications when new incoming messages are received. (*E.g.*, Rosenberg Decl., ¶¶151, 232, 259, 297, 328, *passim*.)

This is fatal to BlackBerry's theory of infringement. As explained, both independent claims require, while displaying the new electronic message in an inbox, "silencing ***any*** *further notifications* pertaining to receipt of the new incoming

electronic message" **[1.g]**, **[13.g]**. It is undisputed that, while displaying the conversation or chat list (the accused "inbox"), the accused products continue to present new message notifications even for chats or conversations in the list that have been muted by the user. Accordingly, at a minimum, there are genuine issues of material fact as to whether the accused products satisfy at least claim limitations **[1.g]** and **[13.g]**, requiring that BlackBerry's motion be denied. The evidence presented above, in fact, affirmatively establishes non-infringement.[9]

BlackBerry argues that these visual cues do not avoid infringement because, according to BlackBerry, they do not qualify as "notifications" under the Court's order. But the Court's construction directly covers those visual cues.

During claim construction, BlackBerry argued that "notification" should be given its plain and ordinary meaning, or in the alternative, construed as "user alert." (Dkt. No. 157 at 29.) The Court did not adopt BlackBerry's proposal, and instead construed the term as "*some form of visual, auditory, or physical cue to draw attention to an incoming message that would not otherwise have been noticed, at the time of the incoming message*." (Dkt. No. 157 at 31.) BlackBerry has no explanation as to why the visual changes discussed above do not fall within this definition.

The display of colored dots, the bolding or coloring of text, etc., clearly provide some form of visual cue, and as explained, their purpose is to draw the user's attention to the new incoming message that might otherwise have gone unnoticed. (Wang Decl., ¶¶6, 8; Nachman Decl., ¶8; Biczo Decl., ¶¶6, 10, 13, 16.) BlackBerry's expert admitted, in fact, that these visual cues are [redacted] It is also undisputed

[9] BlackBerry's claims against the iOS version of Instagram fail for a separate and independent reason. In that version, when a user is viewing the conversation list (the alleged "inbox"), Instagram provides a haptic vibration upon arrival of a new incoming message, even if the conversation to which the message belongs has been muted. (Wang Decl., ¶8.)

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that these visual cues are displayed in the chat or conversation list [redacted] pursuant to the Court's construction. (Wang Decl., ¶6; Nachman Decl., ¶5; Biczo Decl., ¶6; Rosenberg Dep., 161:23-162:2[redacted] Accordingly, the visual cues provided by the accused products discussed above satisfy each aspect of the Court's construction. Because the accused products continue to present "notifications" even for chats or conversations that have been muted, BlackBerry cannot show infringement of any claim of the '120 patent.

BlackBerry's argument that these visual cues do not qualify as "notifications" relies not on the Court's actual construction, but the discussion on page 31 of the claim construction order about whether certain hypothetical visual changes in a user interface would qualify as notifications. The specific examples cited by the Court included "a change to a numeric character on a phone application icon, without any other cue to draw attention to it," "a change in the listed number of unread messages in an email inbox, without any other cue to draw attention to it," and "a changing numeric icon or a changing number of unread messages in an email inbox." (Dkt. 157 at 31 & 31, n.13.) The Court commented that a construction of "notification" that would include those types of visual changes could be too broad. (*Id.*)

But the visual cues provided by the accused Facebook, Instagram, and WhatsApp products do not resemble any of the hypotheticals described in the Court's order. A common thread running through each of the hypotheticals in the Court's order is the use of generic user interface elements that would not draw the user's attention *to the new message (or its associated thread)*. But in this case, the accused products present specific visual cues that show up directly in the conversation or chats list, and apply *specifically* to the conversation or chat in which the new incoming message was received. (Rosenberg Dep., 165:17-20 [redacted]

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[redacted] These visual cues are not analogous to generic application icons or numeric values of unread messages which, unlike the accused products, do not draw the user's attention in any kind of thread-specific or message-specific way. They are visual cues drawing attention to the incoming message as described in the Court's construction.

b. The Accused Facebook and WhatsApp Products Do Not Store a Flag Indicating That a Chat Is Muted

A second non-infringement argument applicable to Facebook and WhatsApp also precludes summary judgment. Claim 1 recites the ability to "*activate* ***a flag*** *stored in the non-transitory media in association with the selected message thread, wherein* ***the flag indicates that the selected message thread has been silenced***." ('120, claim 1; *see id.*, claim 13 ("activating one or more flags … wherein the one or more flags indicate that the associated one or more selected message threads have been silenced").) The claims require use of the "flag" to determine whether a message thread associated with a new message is silenced. (*Id.*)

The accused Facebook and WhatsApp products do not store such a "flag." When a user mutes a chat, [redacted] For example, if a user muted a particular chat in WhatsApp for one week, the program would [redacted] The accused products can ascertain, at any given point in time, if a chat is muted by [redacted]

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[redacted] [redacted] "best before" date stamps one might find on food items at the grocery store. These stamps do not themselves indicate that the food item is still safe to eat or should be thrown away; it simply states a date whose significance depends entirely on when one looks at it.

BlackBerry's expert stated that the plain and ordinary meaning of "flag" was [redacted] One would never argue that the "BEST BEFORE 12/15/2017" stamp on a can of food was a flag, because that date tells you nothing about the status or condition of the contents of the can. The same date could signal to a customer in 2016 that the food is fresh, or to a customer in 2020, that the food should probably be thrown away. [redacted]

This is consistent with the asserted claims, which do not contemplate the use of a single purported "flag" to indicate both a silenced and non-silenced state for a thread. To the contrary, claim 13 recites the step of "*activating* one or more flags … [that] indicate that the associated one or more message threads have been silenced," and claim 19 further recites the ability to "allow the message thread to be unflagged by *deactivating* the flag." At a minimum, a question of fact exists as to whether [redacted] qualify as "flags" under the ordinary meaning of that term. *See Uniloc*, 632 F.3d at 1301-02.

IV. CONCLUSION

For the foregoing reasons, BlackBerry's motion should be denied.

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RESPECTFULLY SUBMITTED,

/s/ Heidi L. Keefe

COOLEY LLP
HEIDI L. KEEFE (178960)
(hkeefe@cooley.com)
MARK R. WEINSTEIN (193043)
(mweinstein@cooley.com)
MATTHEW J. BRIGHAM (191428)
(mbrigham@cooley.com)
3175 Hanover Street
Palo Alto, CA 94304-1130
Telephone: (650) 843-5000
Facsimile: (650) 849-7400

COOLEY LLP
MICHAEL G. RHODES (116127)
(rhodesmg@cooley.com)
101 California Street, 5th Floor
San Francisco, CA 94111-5800
Telephone: (415) 693-2000
Facsimile: (415) 693-2222

Attorneys for Defendants
FACEBOOK, INC., WHATSAPP INC.,
and INSTAGRAM, LLC