IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES, INC.,	)	
Plaintiff,	)	C.A. No. 08-862-JJF-LPS
v.	)	
FACEBOOK, INC., a Delaware corporation,	)	
Defendant.	)	

April 9, 2010
3:03 p.m.
Teleconference

BEFORE: THE HONORABLE LEONARD P. STARK
United States District Court Magistrate

APPEARANCES:

POTTER, ANDERSON & CORROON, LLP
BY: JONATHAN A. CHOA, ESQ.

-and-

KING & SPALDING, LLP
BY: PAUL ANDRE, ESQ.
BY: LISA KOBIALKA, ESQ.

Counsel for Plaintiff

APPEARANCES CONTINUED:

BLANK ROME, LLP
BY: STEVEN L. CAPONI, ESQ.

-and-

COOLEY, GODWARD, KRONISH, LLP
BY: HEIDI L. KEEFE, ESQ.
BY: JEFFREY NORBERG, ESQ.

Counsel for Defendant

THE COURT: Good afternoon. This is Judge Stark.

Who's there, please?

MR. CAPONI: Good afternoon, Your Honor. For Facebook, you have Steve Caponi with Blank Rome. And you have Ms. Heidi Keefe and Jeffrey Norberg from Cooley Godward.

THE COURT: Okay.

MR. CHOA: Good afternoon, Your Honor. For Leader Technologies, it's Jon Choa from Potter, Anderson. And with me from King & Spaulding is Paul Andre and Lisa Kobialka.

THE COURT: Okay. For the record, of course, this is our case of Leader Technologies versus Facebook, Inc. It's our Civil Action Number 08-862-JJF-LPS.

And the purpose of today's call is there are three more discovery disputes between the parties. I have reviewed the letters and I want to go through these one by one fairly expeditiously.

So let's start first with Leader's renewed request to take a deposition of a Mr. Zuckerberg. And let me hear first from

Leader on that one.

MR. ANDRE: Your Honor, this is Paul Andre and I'll be arguing for Leader.

I could go through and reassert the arguments we made in our last call regarding the subject, but I'll refrain from doing so, unless Your Honor wants to hear it. I do want to point out the fact that Facebook has made our case for us, to some degree, in their responsive letter.

They moved this Court for protective order asking the Court to preclude us from taking the deposition of Mr. Zuckerberg. But yet in their letter they want to reserve the right to bring him to trial as a rebuttal witness. He does have some relevant information, obviously, in their point of view.

That by itself shows that Mr. Zuckerberg has relevant information. And if we can't discover what that is beforehand, it would be extremely prejudicial to us.

Second point is they want to be able to submit declarations both at trial and obviously in their motion for summary judgment

regarding willfulness, once again precluding us from taking discovery into a declaration statement.

I think that it would be extremely prejudicial as well. But they admit the relevance of this witness.

Finally, they admit that if willfulness is in the case, they will make Mr. Zuckerberg available for deposition, once again making an implicit admission that he is relevant in the case.

Now, I have a four-year-old son, so I understand the concept of wanting to have your cake and eat it, too. It's not a sound legal principle, Your Honor.

So what we're asking for is either to abide by the proposed stipulation that we gave them, which means that Mr. Zuckerberg's previous sworn testimony is admissible as in this case, and he is not allowed to sandbag us by putting in declarations or standing for trial. And also we have to stipulate to some declarations.

We could authenticate with

Mr. Zuckerberg before they make him available for testimony in deposition.

THE COURT: All right. Let me hear from Facebook, please.

MS. KEEFE: Sure. Thank you, Your Honor.

The first point is simply that the proposal that was given to us in order to try to resolve this, while we really appreciate the efforts that both parties were going to try to do, this always included things that we couldn't agreed to. There's no -- we never agreed to anything.

In asking that Mr. Zuckerberg's prior testimony be used as though it was given in this case, they also asked for a number of documents to be stipulated to that no one would be able to authenticate from third parties. And so that just made that offer untenable.

What we counter propose is if they wanted to use Mr. Zuckerberg's deposition testimony, which we said might be okay, we simply wanted to be able to have the counter, which is the declaration that we proposed --

sorry, that we submitted to Your Honor where Mr. Zuckerberg said he never heard of these things. If that doesn't work, that's okay.

Our second proposal was given that there seems to be this issue of wanting to be able to talk about Mr. Zuckerberg, we proposed that we will move for summary judgment not using a declaration from Mr. Zuckerberg, not putting his testimony at issue, solely on the law that there has been no evidence which could establish a case of willfulness, and therefore, would make all issues regarding Mr. Zuckerberg irrelevant and immaterial.

If that motion were to be granted, this would seem to be a moot issue, and therefore, under Apex, it would be nothing more than harassment to Mr. Zuckerberg to sit for a deposition.

So all we are really asking is put a pin in that issue. Let that motion be heard.

If the Court determines that the issues of the willfulness and/or copying are still in the case, then we would propose to allow Mr. Zuckerberg to sit for a very limited

deposition, so that both parties know what's going to happen at trial. If, on the other hand, the motion is granted and the issues of willfulness and copying are out of the case, then there's nothing left for Mr. Zuckerberg to talk about.

THE COURT: Go back to your first compromise or maybe it was your second compromise offer, Ms. Keefe. I forget.

There was something about you would agree to a deposition as long as you could also use Mr. Zuckerberg's declaration or -- I'm not sure I understand that.

MS. KEEFE: Oh, no. One of the proposals that Leader has made is that they would be willing to not take Mr. Zuckerberg's deposition in this case if we agreed to allow the portions of the transcripts of depositions from prior cases that we produced in this case be used as though they were taken in this case.

We said if we were to agree to that, what we would want is simply to have Mr. Zuckerberg's declaration that was submitted to the Court in support of the motion for

protective order to be allowed into evidence as well, so that Mr. Zuckerberg's statement that he had never seen the Leader White paper would also be in evidence.

THE COURT: Right. But you're not asking, under that compromise, for the ability to submit additional declarations or to hold on to Mr. Zuckerberg as a possible rebuttal witness or --

MS. KEEFE: I am not. I am not.

I'm just making certain that there is a statement from Mr. Zuckerberg to counter the inference that we think they would try to make from those other deposition testimonies that he copied something. And so as long as we're able to use the declaration that we submitted to Your Honor in support of the Apex depositions, we would not be seeking to add additional testimony from Mr. Zuckerberg.

THE COURT: Okay. Mr. Andre, start on your response with what's wrong with that compromise. You get the prior testimony of Mr. Zuckerberg. They get just that short declaration that he filed in this case, and

nobody has to worry about surprise, or further testimony or declarations from Mr. Zuckerberg.

MR. ANDRE: Well, Your Honor, the previous testimony in the case is sworn deposition testimony. I believe I can get it even without stipulation. I just want to avoid any type of evidentiary fight to trial.

So it is sworn testimony and the declaration is hearsay. It contradicts the sworn testimony.

And to the extent it does contradict, that's actually the reason to allow him to be deposed, for one, him saying in sworn testimony under oath that he relied on source material, but he doesn't remember what it is. And then have him come in and contradict that with a sworn declaration, which we cannot test the voracity of, say, I remember it wasn't that. Oh, I swear it wasn't the White paper. I don't know what it is.

So to me this actually sets up the fact that his testimony is more needed if we're allowing that sort of hearsay in.

THE COURT: All right. And that,

in part, answers the next question, but other than on willfulness, is there anything that at this point you assert that Mr. Zuckerberg is relevant with respect to and, you know, none of the other witnesses that you've deposed were able to give you the evidence?

MR. ANDRE: Well, what we have, the infringement issue, Your Honor, that several of the witnesses have identified Mr. Zuckerberg as the individual who led the design and development of some of the core technology that we're alleging infringed today.

The reason it may be, certain implementation of the technology was based on Mr. Zuckerberg himself.

They cite that in the documents we produced in this case or related to this hearing that he actually is the lead designer. He's the head of design and development of this core technology.

They just redesigned the website in February of this year. Presumably he was in charge of that.

So the infringement is very

important in this case. And we think he has a lot of relevant information that other witnesses have said that he has unique knowledge of.

THE COURT: Okay.

MR. ANDRE: And as well, Your Honor, with respect to certain documents, we've asked for authentication of these documents.

He is the only individual who can authenticate certain documents. We've attached those to our brief.

There are some documents that only he can attach -- only he can authenticate as well as the statements that he gave in interviews, which are admissions of the party which may be able to get in over the hearsay rule as an exception to hearsay.

But nonetheless, to the extent I could take a deposition on those statements he made in numerous interviews and have that in a deposition context, I believe it would be easier to get that into evidence. And those relate to infringement, damages and willfulness.

THE COURT: Okay. Thank you.

I'm going to rule on this at this

point. And I am going to grant Leader the opportunity to take a deposition of Mr. Zuckerberg not to exceed three hours. I am persuaded that there's at least enough of a showing that there may be testimony that Mr. Zuckerberg has that Leader was not able to get from the others that it has deposed.

And in particular, the alleged discrepancy between the declaration and prior deposition testimony and prior understandings, at least let's say that Leader has as to how it believes and how it alleges the Facebook program was put together.

I think that such evidence would be relevant. I think that we have all accommodated Mr. Zuckerberg's role in the company and his schedule by going through all the other steps of the discovery before asking him, directing him to sit down for a deposition. It will be a limited short deposition, as I said.

I hope it will be done within a time frame that can accommodate Mr. Zuckerberg's busy schedule, but it must also accommodate the

busy schedule of the Court, and in particular the schedule that is imposed in this case.

And so that is another reason that I'm rejecting the proposed compromise of Facebook, which would have the deposition take place sometime down the road.

If a forthcoming motion for summary judgment is denied, I think given how this case has proceeded, and particularly the many, many discovery disputes that there have been and the many, many disagreements we've had as to what type of schedule this will proceed on, and all the efforts we've made to try to keep this case on track for the trial that's upcoming, I'm just not inclined to put off some discovery until after a motion and make it contingent on how a particular motion may be ruled on.

It will be neater, cleaner and ultimately more efficient to finish up with the discovery, and then deal with motions and then get to trial.

So that's my ruling on Leader's request for the deposition of Mr. Zuckerberg.

Let's move on to the other issues, both of which are Facebook issues. And I want to deal first with the request with respect to the recently produced non-disclosure agreements. So let me hear first from Facebook on that one, please.

MS. KEEFE: Thank you, Your Honor. This is Heidi Keefe.

With respect to the NDAs, the last produced NDA, we think it actually boils down to a simple matter of decisions made by Leader. Early in the case, despite the fact that there were document requests produced by -- propounded by Facebook that would have called for these documents, Leader made the conscious decision not to produce these documents.

There were also subsequent document requests, which would have called for these documents. And again, Leader made a conscious decision not to produce them.

Only after it became clear through testimony given by Mr. McKibben in his deposition that Leader might need these documents to help the case and support the case

did Leader make the decision to finally produce them.

Now, we asked Leader, Well, that's post-discovery and, you know, are you intending to use all of these documents? If Leader had said that it absolutely would not rely on these documents in any way or allude to them at trial in any way, we may not have had an issue. But instead Leader said that they absolutely did intend to use these documents, these late produced documents for which no discovery has taken place in defense of their case.

As a result, Your Honor, we're left hamstrung because we haven't been able to conduct discovery into these documents. And these are all documents which directly affect case dispositive issues regarding validity in terms of on-sale bars or whether disclosures of the patented technology were public or non-public.

THE COURT: Let's take a step back, Ms. Keefe. You say that these documents were responsive to document requests?

MS. KEEFE: Yes.

THE COURT: Your letter says there's 11 of them that it's responsive to. Point me to your best one or two that you think that these NDAs were responsive to.

MS. KEEFE: I'd be happy to, Your Honor. I think that there are three that make our case very, very cleanly.

In the very, very first set of document requests propounded, I would point Your Honor to Document Request Number 7, which is all documents that refer or relate to the validity and/or enforceability of the '761 patent. Everyone who's ever litigated a patent case knows that prior public disclosures or the non-publicness of a disclosure or prior offer for sale are directly related to the validity of the patent. And these NDAs go directly to that issue.

I would also point Your Honor to Request for Production Number 18, which is all documents that refer or relate to any research, design, development, testing, and I think this is the most important one, evaluation, production or sales of any product, device,

technology system, et cetera, that allegedly uses or embodies, in whole or in part, any alleged invention subscribed by the patent.

And here I would say that what Leader even says is that these NDAs were used with potential customers or even investors so that they could demonstrate their products to them for evaluation in whether they would invest in a company or buy the product. And so clearly they'd be responsive to Request Number 18.

And then, finally, Your Honor, I would point you to Document Request for Production Number 74, which was in Facebook's second request for production which specifically asked for documents sufficient to identify every third party who participated in any testing or evaluation of Leader to Leader.

And clearly, this would also have been -- if they had given up the list of every single name or if they produced the NDAs themselves, we would have been able to conduct discovery into those demonstrations if we had the responses to those as well.

THE COURT: All right. So then

what follows is interrogatories from Leader saying disclose to us what your theories are of invalidity. And they assert that you have never asserted in your responses to those interrogatories as a basis for invalidity that there was some sort of a public display of the product prior to the patent.

Is that, in fact, an accurate portrayal of what happened? And also, if it is, why doesn't your response to the interrogatory, you know, modify the scope of what's responsive to those document requests?

MS. KEEFE: Well, I think, Your Honor, I'll take that in a couple of steps. I think the first thing that we have to look back to is the operative pleadings in the case and the operative pleadings we have always pled that the patents are invalid under Section 102, which includes prior uses, prior offers for sale and demonstrations.

In order to sure up our good faith belief that there had been these types of demonstrations and offers for sale, we asked for the early discovery hoping to receive these very

types of documents.

Had we received these documents and been able to conduct discovery into these prior use and public demonstration and offers for sale, perhaps we would have, at that point, been able to amend our interrogatory responses to include that. As Your Honor knows, both parties have actually been supplementing interrogatory responses as they continue to find new information.

In fact, Leader just did a couple of -- they did one of them yesterday and one last week to alter the stage of what's going on in this case.

They are correct that we do not have specific allegations regarding specific offers for sale or public demonstrations in our current interrogatory responses. I am absolutely happy to do so and put one in now.

Because we only became aware of all of the facts that could make this completely relevant following deposition. We also asked Leader what date they believed was the operative critical date for the patent. They always

asserted that it was the earliest possible date.

Only during depositions of Mr. Lamb did we find out that Leader itself also did not have support for relying on that earlier date, which then opened up another year window in terms of public use and offers for sale.

We also found out during the deposition of Mr. McKibben that the parties have a differing opinion on what an offer for sale might entail and what they consider to be public demonstrations. So asking us to modify our interrogatory responses to reflect information that we did not have that was solely within their discretion and their ability to produce and then blaming us for the lack of production seems very circular, Your Honor.

THE COURT: On the merits, if we get there of a defense of invalidity based on public display or on sale, what would you have to show?

Would just one showing without protection by an NDA lead potentially to invalidity of the patent or do you need to show something more than that?

MS. KEEFE: Your Honor, all of the situations are very fact dependent, but any individual offer for sale, whether or not there was an NDA or any public disclosure prior to the critical date could serve to invalidate the patent.

Now, the reason that I'm not willing to say anyone is fine and so as long as I have evidence of one I should be happy and I shouldn't be looking into evidence of others, because for every single one, Leader may have different arguments about. Well, but in this case it wasn't really public because of all of these other factors.

And so if we had, for example, a bulk of up to 1,200 times that they did demonstrations and each time they also said, Hey, if you want to buy it it's okay, you can see that the weight of that evidence would be extremely persuasive.

And we also learned during depositions that there may have been times where even though there is an NDA signed, that Leader had sent information to those people prior to

the signing of the NDA kind of excited about getting things going.

The only way we would ever know that that happened would be to be able to talk to the people who are listed in those NDAs and to disclose that.

THE COURT: And you specifically say you know of one instance or I guess where a third party received the technology before signing of an NDA; is that right?

MS. KEEFE: Well, for example, Your Honor, in the case of the other NDAs that help, we had already been talking quite a bit about in terms of Northwater, we know that Leader sent documents to Northwater based on Northwater's own testimony before any NDA was sent, even though they had been discussing the fact that they might want to go into an NDA.

So we know that there have been times where information was sent prior to an NDA being signed.

THE COURT: Okay. Anything else you want to add on this topic, Ms. Keefe?

MS. KEEFE: No. I think -- I

think, Your Honor, though, that the overwhelming importance of these documents and the fact that it was Leader's choice not to produce them until they decided that they might help them really highlights how important these documents are, and how important it is for us to be allowed to conduct discovery into them, to the extent that the Court determines that these documents can be used in this case in any fashion.

THE COURT: All right. Mr. Andre.

MR. ANDRE: Your Honor, the requests for production that Ms. Keefe talks about simply are not specific enough to ask for NDAs that were provided to investors. These NDAs were signed, not because there was any evidence they were demonstrating the product, but because the company was overly cautious about talking about investing in the company at all. And that's all the evidence shows.

The testimony that they received from Mr. McKibben was unequivocal that they signed NDAs with everybody before they talked about anything to do with the company. This was not about demonstration or anything like that.

When they talk about the one NDA that they allege was signed after the fact, the Northwater, that was well after the patent issued. The fact of the matter is that all the documents that they intend to rely upon or could possibly rely upon for this defense of a public disclosure were produced to them at least eight months ago and in many cases a year ago.

We know this because they have a current motion pending to add in a claim of inequitable conduct in which we cite the document they are going to rely upon based on this public disclosure based on these documents. Those were documents that were produced over eight months ago --

THE COURT: Mr. --

MR. ANDRE: -- that they never alleged this as a defense.

THE COURT: Mr. Andre, let me just stop you there for a minute. Are you representing that any NDA that related to a public display of the technology was produced to Facebook long before this recent production?

MR. ANDRE: No, Your Honor. What

we're saying is the documents they rely upon, they would like to rely upon for their affirmative defense. The NDAs, to the extent that we would use them, would be for a defense against public disclosure.

This would be -- this would be Leader using it as a defense to their claim of a public disclosure. They've never made a claim of public disclosure ever in this case.

And to this day, we're sitting here today. We don't have any interrogatory responses. No responses to interrogatories.

Five times regarding invalidity, they've responded. They've never asserted that the patent is invalid based on public disclosure.

THE COURT: Right. But let me -- I just want to try to understand better what it is that you produced recently. Facebook says you produced 2,338 non-disclosure agreements on March 9th.

Is that correct?

MR. ANDRE: That's correct, Your Honor.

THE COURT: And are you able to say what number even approximately of those non-disclosure agreements were executed in connection with what would otherwise be a public display of the technology?

MR. ANDRE: Based on the documents they put forward in their proposed case and what we've seen, less than a dozen. And, Your Honor, we do not intend to use those documents at trial as long as they don't try to put on a defense of a public disclosure which they have not done so at this point.

THE COURT: All right. But if they decide to put on a defense of public disclosure, wouldn't the 12 or thereabouts that relate to a disclosure which you'll say was not public and they'll say maybe was public or at least they want to test it, wouldn't that body of 12 be relevant?

MR. ANDRE: They would at that point, Your Honor. That's correct.

THE COURT: So if that's the case, then I mean what Ms. Keefe says is they were entitled to know that there were those 12 or so.

So they could determine whether to -- you know, to test them through some type of discovery and to evaluate whether or not they thought they had a good faith basis to assert this defense.

MR. ANDRE: Your Honor, we've produced hundreds and hundreds of pages, documents in which we informed Facebook and with those documents that we had this NDA policy that you see some of those attached as exhibits to our documents.

We told Facebook through our documents that we had this. If anyone talked to us, investors, or vendors or anybody, that we signed NDAs. They never once asked us for these NDAs.

All the communications with the third parties were actually produced. So we produced all of our communications that they could rely upon.

Now, their document requests are so overbroad. I mean, first of all, they ask us for any documents that would relate to the invalidity of the patent. We don't think there were any documents that make our patent invalid.

So it's one of these kind of Catch 22's. They asked about the document request. They singled out, asked about third parties who tested or evaluated.

We've provided all those documents to those individuals. To the extent they would bring any issues about NDAs, they got fair notice of them. When we were at deposition, they were asking Mr. McKibben about NDAs.

He said it's the policy they sign NDAs with everybody. They said, Well, do you have those? He said, Yes, we do. And they asked for them. We produced them immediately.

THE COURT: Have you identified which of the 2,338 that -- the 12 or so of them relate to a display of the technology, have you identified those for Facebook?

MR. ANDRE: Your Honor, let's put it this way: We've given them the underlying documents that would permit them to determine where a display was made and they asked our witnesses on them.

THE COURT: Okay.

MR. ANDRE: They have the

information of when we made a demonstration of our product. They have that information.

We provided all that information. Whenever we demonstrated it, we gave them that information.

So all you have to do is extrapolate back and say, Well, if you want to see the NDA for that demonstration, it's easy enough to find. They've identified three parties that they believe we gave a public demonstration to.

I believe it was three parties in their proposed amendment for their -- the pleadings. And in each one of those, we can identify those three. They're probably less than 12. I said no more than 12 as an estimate.

THE COURT: All right. And you also offered to put Mr. McKibben up for further deposition; is that right?

MR. ANDRE: Your Honor, what we told them was we have a mediation in this case on Monday. And Mr. McKibben is out here in California.

I said if you want to take him for

a couple hours in our office and talk to him about this, he gave just three answers about his NDAs, how that was policy, we would make him available if that would satisfy them.

We asked them to have the same consideration for us and that was rejected. They want to open up discovery and basically push off the trial date again. That's all this is about.

THE COURT: Okay. Anything else you want to add, Mr. Andre?

MR. ANDRE: Just the fact that in the two different interrogatories where you asked for their basis for invalidity, they have said five responses to those. The original response, two supplemental interrogatories, 4, and the original response and supplemental to Interrogatory 18. And in none of those did they ever allege public disclosure.

THE COURT: Okay. Thank you.

Ms. Keefe.

MS. KEEFE: A couple things, Your Honor. The first is that I find it difficult to believe that there's only 12 that received

demonstrations of these -- of the product given the fact that a number of the names that we had never seen before are accompanied in Lobo Dynamics, Onedentist.com, We Square Software, Value City department stores.

These are all names that we had never heard of that had never shown up anywhere in their prior production in any fashion or form.

So we couldn't have possibly known that these were there in order to ask, Where is the NDA? Similarly, for the ones that we did have some evidence perhaps that there had been a public demonstration like the Ohio Police Department, that's actually how we found out that these NDAs existed.

We asked Mr. McKibben about his demonstration to the police department and he said, Well, if he had done one, it would have been with an NDA.

And only by us asking right then, Well, does that NDA exist, was it produced. It was produced late.

I'd like to be able to ask the

Ohio Police Department during that demonstration, during the verbal communication that you were having, did Mr. McKibben offer to sell you the product? And simply having Mr. McKibben's memory of the conversation or what was disclosed or displayed is not enough.

We'd also need to be able to ask the Ohio Police Department and, frankly, anyone else who had received a demonstration whether or not they were also offered a sale of the product, whether or not there was a document that was produced regarding those sales.

So this issue is quite a bit broader than Mr. Andre wants it to be. And in fact, does involve the possibility of numerous invalidating pieces, especially the offers for sale that may not be reflected in documents whether or not they were produced.

Similarly, Your Honor, I don't understand how a document request asking to identify every third party who had evaluated Leader to Leader doesn't ask for this exact information, and yet we did not receive it in response to that.

Regarding back to the issue of the interrogatory, if what Mr. Andre wants is an interrogatory response that says that I am going to use public disclosure and on-sale bar in this case, I'm happy to give it to him.

But he's known that that issue is in this case. The parties have been conducting discovery regarding those issues throughout this case.

So, Your Honor, we're extremely hamstrung right now without being able to probe into this large, large number of NDAs to determine which one shows Leader to Leader, which of those people potentially received an offer for sale, whether verbal or in writing, and maybe they have documents or they kept documents that Leader doesn't have anymore. And we have a right to look into that.

THE COURT: Ms. Keefe, is it correct that you have documents now for which you could identify the approximately 12 NDAs that relate to a display of the technology?

MS. KEEFE: Absolutely not, Your Honor. What we have are the NDAs themselves

from my reading of those NDAs. It is entirely possible that every single one of those people received a demonstration of the Leader to Leader product.

For example, most of them, and Mr. Andre makes the point that they made their employees sign them. They made vendors sign them.

But I don't understand how Onedentist.com, for example, could be a vendor or an employee leading me to believe that Onedentist.com received a demonstration of the Leader to Leader product.

Mr. Andre also tried to mention somewhere in one of the letters that perhaps these NDAs went to other products and not to Leader to Leader. But the other products that Leader had, Leader Phone and Leader Alert were public and publicly assessable products, for which an NDA wouldn't have been necessary.

So we cannot determine from the face of the NDAs who received a demonstration of Leader to Leader. Instead, we have to assume that they all did the things that I would be

willing to do and that I've already started to do to try to narrow down who we would need to talk to was that I started looking only for company names, and I started trying to do the guesswork of figuring out who doesn't look -- even though it's a company, it looks more like an investor than a company that might have been given an offer of sale. But the face of the documents simply don't help us.

THE COURT: Mr. Andre, how quickly could you provide Ms. Keefe the information that would tell her, you know, the approximately 12 NDAs out of the more than 2,000 that relate to a display?

MR. ANDRE: Your Honor, I don't know that. I mean, we think that we've demonstrated the product on a very limited basis. And most of these NDAs relate to the time period before the product was even ready to be demonstrated, because it - obviously, we were trying to -- we have over 500 investors in this company. It is a small company. It deals with a lot of small investors.

So the documents that we could

identify that would show that there was a demonstration of the Leader to Leader product, we could probably get that done in a matter of a few days.

And these documents they've had for at least eight months and in many cases over a year. And once again, this is an unasserted claim that they're talking about. This is not our burden here.

This is something that they have never alleged. They talk about the Ohio Police Department.

The reason they know about the Ohio Police Department is because we provided the underlying document, which we said, We're going to give a demonstration to the Ohio Police Department on this day. They have that already and they've had that for eight months to a year.

THE COURT: All right. Well, here's what we're going to do. This is definitely a messy situation.

What we're going to do is I'm ordering -- first off, I'm denying the request to exclude all of these late produced NDAs. I

don't see a basis today to act so broadly and say that they are excluded from any use in the remainder of this case.

But I am going to direct and am hereby directing that Leader produce to Facebook by the end of the day Tuesday information or evidence sufficient to identify and to establish the back up, I guess, the representation that Mr. Andre has made here that out of the 2,338 recently produced non-disclosure agreements, no more than something on the order of 12 of them relate to a display or demonstration of the technology.

I'm also ordering that if Facebook wants to take an additional deposition of Mr. McKibben with respect to the recently produced NDAs, they are permitted to do that. And they may want to wait until after they get this further information on Tuesday.

Finally, I'm ordering that if Facebook is going to attempt to assert as a defense the basis of a public display, or demonstration or on-sale bar, they should supplement their interrogatory responses to make

that assertion clear. And they should do that within ten days of today if they are going to do that.

Beyond that, I'm going to hope that the parties can work out the remainder of what to do about this issue. And if not, then you'll bring it back to me.

Let me move on to the final issue which has to do with the aerata sheet in relation to a deposition of Mr. Jeffrey Lamb. Let me hear from Facebook on that, please.

MR. CAPONI: Your Honor, Steve Caponi. I'm going to handle this argument.

The issue, Your Honor, is pretty straight forward. Mr. Lamb was a co-inventor, one of the inventors on the technology at issue here.

And one of the core issues in this case is LTI, its effort to have the patent relate back to the provisional application. And as Your Honor knows, one of the touchstones of that is you've got to make sure that everything that's in your -- the issued patent can be found in the provisional application.

Mr. Lamb was subjected to some very specific questioning on that front, particularly, Your Honor, with respect to the word tracking and the tracking feature, that's at issue in this case.

With respect to each one of the questions, which essentially Your Honor, to paraphrase was okay, show us -- here's the application. Here's the code that was in the provisional application.

Is tracking in there? If it is, where is it? Do you see tracking here, there or in the code?

His answer was always essentially a no. Following the deposition and at the deposition, Your Honor -- at the conclusion of the deposition, it was very clear to all the parties the import of that testimony.

It's keyed up for summary judgment the issue of whether or not LTI could claim the provisional patent date. And as a result of this testimony, they essentially would be precluded from doing so.

In the parties' discussions

following the deposition and in Mr. McKibben's deposition, Facebook made it very clear it was going to be moving on that ground, in light of the testimony plus some other information.

That then resulted in this errata sheet coming in. And the errata sheet, Your Honor, is submitted for a couple of reasons.

One is the only changes that were made in this errata sheet go to the questions pertaining to tracking. And each one of the changes takes the answer from a no to a yes. And the way it does it, Your Honor, is very crafty wordsmithing by using the word just.

And so they throw just in front of the word tracking in a number of these answers and essentially what you get to as an example, if you get pulled over by a police officer, and he says, Did you run that red light? And you would say, No.

Okay. That means you didn't run the red light.

But if you throw just in front of it, did you run the red light? No, I did not just run the red light. You're now saying, Yes,

I ran the red light and I did some other things. Maybe I was drinking. Maybe I hit somebody. Maybe I was on my cell phone.

So this inclusion of the word just is not an innocuous clarification. It changes a yes to a no. A no to a yes, which was done in an effort to fight off the pending motion for summary judgment.

Your Honor, Mr. Lamb is not just a third party who received his transcript and made these changes. He's represented by counsel for LTI.

We think it's noteworthy that with assistance of counsel, these changes were made on an issue that was teed up for summary judgment and that goes to the heart of this case.

Your Honor, the ability to claim the provisional patent application date is very significant as Ms. Keefe indicated earlier with respect to public demonstrations and offers for sale, et cetera.

A number of things occurred in that one-year time period which we believe can

be dispositive of this case. Your Honor, I think the arguments that LTI makes to this Court that it lacks jurisdiction are not well founded. The rules as to why you would go to Ohio, Your Honor, deal with personal jurisdiction.

How a Court or how a party gets a Court to compel someone to show up at a particular date, time for a deposition, whether you're in Federal Court or you are in State Court doing an out-of-state deposition to obtain control of the person, you need the assistance of a Court via the person. The deposition itself is a completely different matter and the conduct of the deposition is a different matter. That always rests with this Court, Your Honor.

As Your Honor is aware, in this case we were taking a deposition in Ohio and there was a dispute regarding the conduct of counsel, improper objections, coaching the witness, et cetera. You get on the phone. We would have called Your Honor to say, We have a situation. We would not have gone to a Court in Ohio.

This Court also always has control

over how a deposition is used in the trial in which it has jurisdiction. And that's what we're talking about.

We want this errata sheet with the substantive change, we think it's an improper change. And as Judge Sleet and other judges in this district have held and we cited the cases, the deposition is not a take-home exam. These are not innocuous changes.

Your Honor, so I think this Court has the jurisdiction. We think the errata sheet should not be permitted to be changed. It's already been made clear to us that Mr. Lamb does not intend to show up at trial, which means Facebook walked out of a deposition having clear-cut answers to very important questions.

And through an errata sheet is deprived of those answers and has no ability to compel Mr. Lamb to appear at trial. He's in the control of Mr. Andre and LTI, and they've indicated he's not going to appear.

Your Honor, that's the crux of it. We think a fall-back position, which we don't think is necessary here, we think the errata

sheet should be excluded, would be to open Mr. Lamb up for another deposition.

The cases cited by LTI in the Ohio case provide that relief. They made, the counsel for the witness here, it would be LTI, pay the expense of travel and the time for the lawyers to take that deposition.

And Your Honor, crucially on that point, the cases hold and we think it's important here is the opportunity to explore "where the changes originated". We think if Mr. Lamb is offered up for a deposition, and we've made this clear to LTI, and they reject the notion, that Facebook should have the opportunity to inquire as to why the change was made, where it originated. And that would include communications Mr. Lamb had with his counsel.

And, Your Honor, we think that's important, because, A, as indicated by the cases in Ohio, it's an appropriate remedy.

And, B, in Delaware, as Your Honor's aware, when the witnesses are under oath, even at a break at lunch, or dinner or

coming in the next day, any communications they have with counsel regarding the substance matter of the deposition are not protected by privilege.

We think that same logic applies to any changes to the testimony to an errata sheet. It's no different than a lunch break because it substantively changes the deposition. Your Honor, that's my presentation, unless you have any questions.

THE COURT: Let me hear from Leader, please.

MR. ANDRE: Your Honor, this is Paul Andre. I'll be arguing for Leader.

Let me just clarify some misstatements Mr. Caponi made. Mr. Lamb is an independent third party. He's not under my control for sure and definitely not under Leader Technologies' control.

He was subpoenaed by Facebook from the Southern District of Ohio. We've never made any allegations or assertions that he will not show up at trial. To be frank, we don't know.

Mr. Lamb is in the process of

getting married right now. And he really doesn't want to deal with this case, to be quite frank.

That's where we stand at this point. We will try to endeavor to get him to come to trial, but we just don't know at this point.

Going through the issues that were raised, one thing that Facebook doesn't address is this is an evidentiary issue, not a discovery dispute. So we don't think it's appropriate to even be dealing with it in this form.

Even if it were, and they don't mention this at all, they stipulated to Mr. Lamb's right to submit an errata. They specifically told him that he was permitted to do so and asked him if he understood.

We put this in our letter. Mr. Lamb agreed that he would be willing, he would submit. He thought it was necessary and so he did so.

At this point, Facebook is estopped from complaining of Mr. Lamb doing exactly what the parties agreed that he could

do.

Third, the issue, when we talk about the jurisdiction over Mr. Lamb, he is subject to the jurisdiction of the Southern District of Ohio. And if they want to compel Mr. Lamb to sit for another deposition, they should go to the Southern District of Ohio and make the objection there.

The Court has jurisdiction over him and that's the open forum to take. Nonetheless, even if this Court were to look at this issue as a discovery issue, we do believe this took place in the Southern District of Ohio and the legal authority of the jurisdiction where the issue arose would have the controlling factor.

Finally, all you've got to do is look at testimony, Your Honor. We don't think this is a substantive change at all.

I think these are clarifications. Mr. Lamb stated it was a clarification. He was answering very specific -- a very specific answer to a very specific question.

And I think the word just doesn't

change a yes to no. In fact, his answers throughout his deposition were very clear. He was a very precise individual.

So when they asked him precise questions, he would ask for a clarification. When they asked him very specific questions like they did, he gave a very specific answer. That's all he was trying to clarify.

So we don't think that, even under the law in Delaware or Ohio, this is a substantive change. He did provide reasons for his changes. Nonetheless because we had a meet and confer, we asked him if he would provide reasons for it and he agreed to do it, even though we don't think it's necessary because it's a clarification. He did provide the reasons already.

THE COURT: Okay. Mr. Caponi, any response?

MR. CAPONI: Your Honor, just very briefly. The consequence of stipulating to an errata sheet, it's not something a party stipulates to or control or a statement of the obviousness.

The Federal Rules embody the procedure for dealing with an errata sheet.

It's not as if Facebook could have precluded an errata sheet from being submitted. And, Your Honor, I think, again, he's represented by -- Mr. Lamb is represented by Mr. Andre. This is not some completely independent third party.

And we think when you look at the totality of the circumstances, the nature of the change, the limited nature, subject of the change and its significance to the issues in this case, it paints a very stark picture and one that suggests some gamesmanship is afoot.

And if Facebook was -- you know, what we have here is a party trying to mend damage from its self-inflicted wound, trying to take back testimony it knew was harmful, but to do it in a crafty way.

I think that's fairly obvious. The relief is the errata sheet should not be included. The testimony should be as it was as he walked out of that room. If not, I think a deposition should be ordered.

Your Honor has jurisdiction over Mr. Andre and his firm. They were admitted pro hac in that case. That is why in Delaware cases lawyers that participate in depositions need to be pro haced in Delaware, so this Court can control the counsel and the conduct of those depositions.

And here, if, you know, even if we take the most favorable light, look at the most favorable light, if Mr. Lamb made a substantive change, we clearly should have another opportunity to depose him if the change is permitted. And it should not be done at Facebook's expense.

THE COURT: Okay.

MR. CAPONI: Thank you, Your Honor.

THE COURT: All right. Thank you, counsel.

On this one, I am not going to strike the errata sheet. I think that -- well, first, let me say our review of the errata sheet makes it appear to us that the changes are not substantive and are more in the nature of

clarifying.

So it seems that even under the Delaware standard and the Delaware cases that have been cited, it looks to us like these changes are merely clarifying and it would be appropriate.

With that said, I certainly understand the desire to take a further limited deposition of Mr. Lamb to understand that they are clarifying and not substantive. But I am not clear, as I sit here, whether, in fact, I have the authority, the jurisdictional authority or otherwise to order a nonparty resident of another state to appear for a further deposition.

So I'm not, at this point, ordering that Mr. Lamb be produced for a further deposition. If relief to that effect is sought in the Southern District of Ohio, certainly I have no problem with that Court being advised that I think it would be appropriate that he sit for an additional deposition to explain further the basis for the clarifications on the errata sheet. But at this point, I'm not ordering it.

So that is my ruling on this issue. And I believe I have addressed all the issues that are pending in front of the Court at the moment.

Is that correct, Mr. Andre?

MR. ANDRE: That's correct, Your Honor.

THE COURT: And Ms. Keefe, is that correct?

MS. KEEFE: I believe so, Your Honor.

THE COURT: Okay. Thank you very much, counsel. Bye-bye.

MR. ANDRE: Thank you, Your Honor.

MS. KEEFE: Thank you.

(Teleconference was concluded at 3:56 p.m.)

State of Delaware)
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New Castle County)

CERTIFICATE OF REPORTER

I, Heather M. Triozzi, Registered Professional Reporter, Certified Shorthand Reporter, and Notary Public, do hereby certify that the foregoing record, Pages 1 to 54 inclusive, is a true and accurate transcript of my stenographic notes taken on April 9, 2010, in the above-captioned matter.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 13th day of April, 2010, at Wilmington.

Heather M. Triozzi, RPR, CSR
Cert. No. 184-PS