

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

LEADER TECHNOLOGIES, INC., a Delaware corporation,)	
)	
Plaintiff-Counterdefendant,)	Civil Action No. 08-862-JJF/LPS
)	
v.)	PUBLIC VERSION
)	
FACEBOOK, INC., a Delaware corporation,)	
)	
Defendant-Counterclaimant.)	

**LEADER TECHNOLOGIES, INC.'S MOTION *IN LIMINE* NO. 3
TO EXCLUDE EVIDENCE OF FACEBOOK'S SETTLEMENT AGREEMENTS AND
EXPERT TESTIMONY REGARDING POTENTIAL DESIGN AROUNDS OR
NON-INFRINGEMENT ALTERNATIVES**

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I. INTRODUCTION

Leader Technologies, Inc. ("Leader") submits this brief in support of its motion to (1) exclude evidence regarding three license agreements that Facebook, Inc. ("Facebook") entered into with third parties as part of settlements for pending or threatened litigation (the "Facebook Settlement Agreements") and (2) exclude expert testimony regarding any potential design arounds or alternatives that allegedly do not infringe the patent-in-suit, U.S. Patent No. 7,139,761 ("the '761 Patent"). In regards to the Facebook Settlement Agreements, Facebook's damages expert Christopher J. Bokhart considers these three agreements in his calculation of a reasonable royalty rate. Introduction of evidence, including testimony by Mr. Bokhart, regarding these agreements is improper because the Facebook Settlement Agreements are not admissible under Rule 408, and, even if they were, they would be inadmissible under Rule 403 because their prejudicial value outweighs their probative value. In regards to testimony regarding potential design arounds or non-infringing alternatives, Mr. Bokhart's testimony is not based upon sufficient facts or data and is therefore inadmissible under Rule 702. Furthermore, Mr. Bokhart's testimony about design arounds or non-infringing alternatives should be excluded because Facebook never identified a fact witness with that knowledge in its initial or supplemental disclosures. *See* Fed. R. Civ. P. 26(a)(1).

II. NATURE AND STAGE OF PROCEEDINGS

On November 19, 2008, Leader Technologies, Inc. ("Leader") filed a Complaint against Facebook, Inc ("Facebook") for infringement of the '761 Patent. *See* D.I. 1. Discovery commenced in February 2009. All expert reports and depositions were completed in May 2010. *See* D.I. 30. Trial is set for June 28, 2010. *Id.*

III. SUMMARY OF ARGUMENT

1. The Court should exclude evidence of the Facebook Settlement Agreements under Rule 408 because they are evidence of a compromise and therefore inadmissible. In addition, the Court should exclude evidence of the Facebook Settlement Agreements because the danger of unfair prejudice substantially outweighs their probative value and they are therefore inadmissible under Rule 403.

2. The Court should exclude Mr. Bokhart's testimony regarding design arounds or non-infringing alternatives because his testimony is not based on sufficient facts or data as required by Rule 702 and Facebook never previously identified a fact witness with knowledge in this area.

IV. STATEMENT OF FACTS

Leader served the expert report of its damages expert, Russell Parr, on April 8, 2010.¹ Facebook served the expert report of its damages expert, Christopher J. Bokhart, on April 22, 2010 ("Bokhart Report"), attached as Ex. 8 to the Declaration of Paul J. André, dated May 20, 2010 ("André Declaration"). In that report, Mr. Bokhart first criticized Mr. Parr's report and then provided his opinion of a reasonable royalty for Facebook's alleged infringement of the '761 Patent. As part of his reasonable royalty calculation, Mr. Bokhart considered the factors enunciated in *Georgia-Pacific Corp. v. U.S. Plywood-Champion Papers Inc.*, 318 F. Supp. 1116 (S.D.N.Y. 1970). Bokhart Report at ¶ 79. In particular, for factor 2, "the rates paid by the licensee for the use of other patents comparable to the patent-in-suit," Mr. Bokhart considered the Facebook Settlement Agreements [REDACTED]

[REDACTED] *Id.* at ¶ 81. Mr. Parr was unable to consider

¹ Mr. Parr produced a corrected version of his report, which fixed a typographical error, before his deposition on April 29, 2010.

these agreements in his expert report because Facebook did not produce them until April 22, the same day it served Mr. Bokhart's report. *Id.* at ¶ 81 n.116. However, by Mr. Bokhart's own admission [REDACTED]

and therefore not relevant to a reasonable royalty calculation. *Id.*, Deposition of Christopher J. Bokhart, May 4, 2010, ("Bokhart Dep.") 236:8-13, attached as Ex. 9 to the André Declaration.

In his report, Mr. Bokhart also opined [REDACTED]

[REDACTED] under

Leader's theory of infringement. Bokhart Report at ¶¶ 32, 33, 69-73, 99. Mr. Bokhart then went further and opined that [REDACTED]

[REDACTED] *Id.* at ¶¶ 69-73. Finally, Mr. Bokhart concluded that [REDACTED]

[REDACTED] *Id.* at ¶ 99. Tellingly, throughout his entire report, Mr. Bokhart never provided a single source for his opinion that [REDACTED]

[REDACTED] Instead, Mr. Bokhart repeatedly relied upon the circumlocution, "it is my understanding."

On May 4, 2010, Mr. Bokhart was deposed regarding his damages opinion. During his deposition, Mr. Bokhart repeatedly testified that [REDACTED]

[REDACTED] For example:



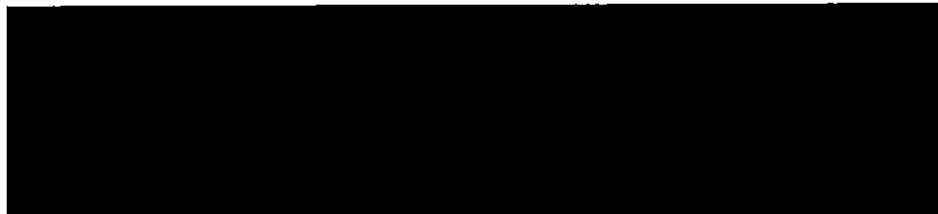
Bokhart Dep. 54:24-55:8.



Bokhart dep. 63:24-64:7



Bokhart Dep. 73:22-74:10. Not only did Mr. Bokhart rely solely upon statements from Facebook's counsel for this section of his opinion, he did not even recall if he knew where Facebook's counsel got its information.



V. ARGUMENT

A. The Facebook Settlement Agreements Are Inadmissible Under Rule 408

Under Rule 408, settlement agreements are not admissible “to prove liability for, . . . or amount of a claim that was disputed . . .” Fed. R. Evid., Rule 408. This Court and others have routinely excluded third party settlement agreements, such as the Facebook Settlement Agreements, when offered for the purposes of establishing a reasonable royalty. *Honeywell Intern., Inc. v. Nikon Corp.*, 2009 WL 577274, at * 1 (D. Del. March 4, 2009) (holding “that the Special Master correctly concluded that the licenses should not be admitted as evidence of either commercial success or reasonable royalty.”); *Pharmastem Therapeutics, Inc. v. Viacell, Inc.*, 2003 WL 22387038, at * 3 (D. Del. Oct. 7, 2003) (holding that “ it is the better practice to exclude the [third party] licenses in view of the policy considerations behind Rule 408” in regards to calculating a reasonable royalty); and Transcript of Pretrial Conference at 26-29 in *Imax, Inc. v. E-Loan, Inc.*, C.A. No 03-1067 (D. Del. December 19, 2005) (Robinson, J.) (declining to deviate from her general standard of excluding settlement agreements as evidence of a reasonable royalty), attached hereto as Ex. A; *see also Hanson v. Alpine Valley Ski Area, Inc.*, 718 F.2d 1075, 1078-79 (Fed. Cir. 1983) (finding that excluding offers made to third parties in contemplation of litigation under Rule 408 was not in error); *The Dow Chem. Co. v. United States*, 36 Fed. Cl. 15, 22 (1996) (citing *Hanson*, in applying Rule 408 to exclude settlement agreement from reasonable royalty analysis.).

Under Rule 408, license agreements are excluded if they were “(1) . . . reached under a threat of litigation, (2) arose in a situation where litigation was threatened or probable, or (3) . . . negotiated against a backdrop of continuing litigation infringement.” *Pharmastem Therapeutics*, 2003 WL 22387038, at * 2. Here, by Mr. Bokhart’s own admission, all of the Facebook Settlement Agreements that [REDACTED]

[REDACTED] Expert Report at ¶ 81. As such, all of the Facebook Settlement Agreements are inadmissible under Rule 408.

B. The Facebook Settlement Agreements Are Inadmissible Under Rule 403

Even if the Facebook Settlement Agreements are not excluded under Rule 408, they should be excluded under Federal Rule of Evidence 403. Rule 403 states that even relevant evidence may be excluded if “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury” Fed. R. Evid. 403. As part of Mr. Bokhart’s reasonable royalty calculation he considered the fifteen factors set forth in *Georgia-Pacific Corp.* See Bokhart Report at ¶¶ 79-97. The Facebook Settlement Agreements are not relevant to any of these factors.

The factors in *Georgia-Pacific* contemplate an arm’s length hypothetical negotiation to determine a reasonable royalty rate. Such a hypothetical negotiation does not include consideration of settlement agreements. See, e.g. *Dow Chem.*, 36 Fed.Cl. at 22 (“The [hypothetical] negotiation does not include . . . settlement agreements or other evidence not relevant to value.”); *Hanson*, 718 F.2d at 1078-79 (affirming exclusion of settlement offers in contemplation of litigation since “license fees negotiated in the face of a threat of high litigation costs may be strongly influenced by a desire to avoid full litigation.”); *Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.*, 575 F.2d 1152, 1164, n. 11 (6th Cir. 1978) (citing *Rude v. Westcott*, 130 U.S. 152 (1889); *Rude v. Westcott*, 130 U.S. 152, 164 (1889) (“It is clear that a payment of any

sum in settlement of a claim for an alleged infringement cannot be taken as a standard to measure the value of the improvements patented, in determining the damages sustained by the owners of the patent in other cases of infringement.”). Moreover, Mr. Bokhart admitted that the

See

Bokhart Dep. at 236:8-13

C. The Facebook Settlement Agreements Should be Excluded Because Facebook Hid their Existence from Leader

The Facebook Settlement Agreements, which were not produced until April 22, 2010, the same day as Mr. Bokhart’s report, after Mr. Parr’s report was served and long after fact discovery closed, should also be excluded because Facebook actively concealed the existence of these agreements. In response to Leader’s Interrogatory No. 13 that asked Facebook to “[i]dentify all licenses between Facebook and any third-party relating to any patents, proprietary technology or know-how owned by the third party and incorporated into the Facebook Website or otherwise used by Facebook and identify all payments made by Facebook pursuant to such licenses,” Facebook answered “None.” See Facebook, Inc.’s Objections and Responses to Plaintiff Leader Technologies, Inc.’s First Set of Interrogatories, dated March 20, 2009, at p. 13-14, attached as Ex. 10 to the André Declaration. Furthermore, the Facebook Settlement Agreements were plainly responsive to several of Leader’s document requests. See Leader Technologies, Inc.’s First Set of Requests for Production of Documents and Things to Defendant Facebook, Inc. (1-73), dated Feb. 20, 2009, at Requests No. 19-20 (settlement agreements), 54-59 (license agreements), attached as Ex. 11 to the André Declaration. Facebook should not be allowed to refer to the Facebook Settlement Agreements at trial after denying their existence during discovery and only producing them after the close of fact discovery and after Leader

served the report of its damages expert. Facebook's sandbagging tactics are basis alone for precluding evidence of the Facebook Settlement Agreements.

D. Mr. Bokhart's Testimony Regarding Potential Design Arounds and Non-Infringing Alternatives is Inadmissible Under Rule 702

Pursuant to Rule 702, an expert may testify "in the form of an opinion or otherwise, if ... the testimony is based upon sufficient facts or data." Fed. R. Evid. 702. Under Rule 702, the Court serves as a gatekeeper to ensure the reliability and relevance of the expert testimony admitted into evidence by first evaluating whether the opinions offered are sufficiently connected to the facts of the case. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147-49 (1999); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591-92 (1993). Expert testimony should be excluded if "there is simply too great an analytical gap between the data and the opinion proffered." *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

In order to be considered a non-infringing alternative or design around, it must be both "available" and "acceptable." *Grain Processing Corp. v. American Maize-Prods. Co.*, 185 F.3d 1341, 1346-49 (Fed. Cir. 1999). A non-infringing alternative is considered "available" if the alleged infringer "had all of the necessary equipment, know-how, and experience" to implement the alternative during the time of infringement and had the economic incentive to do so. *Id.* at 1354; *see also Micro Chem., Inc. v. Lextron, Inc.*, 318 F.3d 1119, 1123 (Fed. Cir. 2003). In order to be considered "acceptable," an alleged non-infringing alternative must have the advantages of the patented technology. *See Standard Havens Prods. v. Gencor Indus., Inc.*, 953 F.2d 1360, 1373 (Fed. Cir. 1991). Courts will exclude expert testimony regarding non-infringing alternatives when the expert does not identify a reliable factual basis for such an opinion. *See, e.g. EZ Dock, Inc. v. Schafer Sys., Inc.*, 2003 WL 1610781, at * 6 (D. Minn. Mar. 8, 2003).

It is clear from both his written report and his deposition testimony that Mr. Bokhart does not have a reliable factual basis to testify that [REDACTED]

[REDACTED] First, Mr. Bokhart readily admits that [REDACTED]

[REDACTED] See Bokhart Dep. at 49:1-2 [REDACTED] 111:25-112:16 [REDACTED]

[REDACTED] 112:14 [REDACTED] Instead, Mr. Bokhart couches his opinion in vague statements. For example:

[REDACTED]

However, nowhere in his report does he state the basis for his understanding.

During his deposition, Mr. Bokhart admitted that [REDACTED]

[REDACTED]

[REDACTED] Mr. Bokhart also testified that [REDACTED]

[REDACTED]

When Mr. Bokhart did learn that [REDACTED]

[REDACTED]

[REDACTED] Bokhart Dep. 62:8-13, 67:19-68:1. Moreover, even though Mr. Bosworth was deposed on March 10, 2010, Mr. Bokhart did not see a copy of the transcript before he issued his report and, as of the day of his deposition, he had not read it. Bokhart Dep. 24:1-5.

Not only does Mr. Bokhart not have a reliable factual basis for his opinion that such design arounds or non-infringing alternatives were available and acceptable, he does not have a reliable factual basis that the alleged design arounds or alternatives were in fact non-infringing. That opinion is based on statements he received from [REDACTED]

[REDACTED] See Bokhart Dep. 17:9-21; 47:23-48:10. However, nowhere in his report does [REDACTED]

[REDACTED]

Mr. Bokhart never conducted an analysis into whether design arounds and non-infringing alternatives were possible. He has no knowledge as to whether Facebook had “all of the necessary equipment, know-how, and experience” to implement the purported design arounds or non-infringing alternatives. Nor does Mr. Bokhart have any knowledge as to whether the

purported design arounds or non-infringing alternatives had the same advantages as the '761 Patent. Instead, Mr. Bokhart relied solely on the word of Facebook's counsel and then, after he issued his report and on the day before his deposition, he had a cursory conversation with one Facebook employee. As such, his opinion that Facebook designed or could have designed alternatives to its website that would not have infringed the '761 Patent is wholly unsubstantiated and does not contain a reliable factual basis sufficient to satisfy Rule 702.

Even if Mr. Bokhart's opinion about potential design arounds and non-infringing alternatives was found to have a sufficient factual basis, [REDACTED] [REDACTED] was not disclosed to Leader until May 4, 2010, well after the close of fact discovery. Under Federal Rule of Civil Procedure 37(c)(1), "if a party fails to provide information or identify a witness as required by Rule 26(a) or 26 (e)(10), the party is not allowed to use that information or witness to supply evidence ... at a trial, unless the failure was substantially justified or is harmless." At no point during the entire fact discovery period did Facebook produce a single document, respond to a single interrogatory or identify a single witness with knowledge about potential design arounds and non-infringing alternatives. In fact, as with the Facebook Settlement Agreements, Facebook actively concealed information about potential design arounds and non-infringing alternatives by refusing to answer Leader's Interrogatory No. 30, which asked Facebook to "[d]escribe in detail any and all efforts to design around the claims of the Patent-in-Suit," on the grounds it "call[ed] for information to be disclosed during expert discovery." Defendant Facebook, Inc.'s Responses to Plaintiff Leader Technologies, Inc.'s Fifth Set of Interrogatories, dated November 20, 2009, at p.13, attached as Ex.12 to the André Declaration. However, none of Facebook's experts discussed potential design arounds and non-infringing alternatives in their reports. It was not until Mr. Bokhart's

deposition on May 4, 2010, that Leader learned that [REDACTED]

[REDACTED] let alone had communicated that information to Mr. Bokhart through Facebook's counsel. At that point trial was less than two months away, fact discovery had closed and Mr. Bosworth had already been deposed. Facebook should not be permitted to ambush Leader with an expert opinion based exclusively on new and previously undisclosed "factual" information. Facebook's sandbagging tactics are basis alone for precluding Mr. Bokhart's testimony. *See Dey, L.P. v. Ivax Pharmaceuticals, Inc.*, 233 F.R.D. 567, 573 (C.D. Cal. 2005) (finding expert testimony based on facts not available to the public and not disclosed during fact discovery in the case improper).

VI. CONCLUSION

Accordingly, Leader requests that the Court exclude evidence, including Mr. Bokhart's testimony, of the Facebook Settlement Agreements and Mr. Bokhart's testimony regarding potential design arounds or non-infringing alternatives.

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EXHIBIT A

1 IN THE UNITED STATES DISTRICT COURT
2 IN AND FOR THE DISTRICT OF DELAWARE

3 - - -
4 IMX, INC., : CIVIL ACTION
5 Plaintiff :
6 vs. :
7 E-LOAN, INC., :
8 Defendant : NO. 03-1067 (SLR)

9 - - -
10 Wilmington, Delaware
11 Monday, December 19, 2005
12 10:00 o'clock, a.m.

13 BEFORE: HONORABLE SUE L. ROBINSON, Chief Judge
14 - - -

15 APPEARANCES:

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18 -and-

19 DLA PIPER RUDNICK GRAY CAREY
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1 the point is of saying anything more than we're relying
2 on the things that we've told you about, that's what the
3 statute requires. They've already been given to them in
4 writing.

5 THE COURT: Well, you would be surprised,
6 though, how often people don't really know what happened
7 during discovery, and it seems to me, you know, the
8 admitted facts are one thing and I understand why the
9 defendant was hesitant to admit to 70 admitted facts, but
10 it seems to me as though traditionally in our Court, you
11 specifically list what you believe you've disclosed
12 during discovery, and the list of -- therefore, your
13 limitations as coming to trial. And I will require you to
14 do that.

15 MR. BLUMENFELD: We will do that.

16 THE COURT: And I will come up with a date
17 for all of these things momentarily.

18 MS. DAY: Your Honor, moving, then, to the
19 motion in limine part of the morning, I've broken down
20 our issues with respect to trial exhibits, deposition
21 designations and then expert report issues.

22 With respect to trial exhibits, LendingTree
23 has identified as Exhibits 18 through 21 on its trial
24 exhibit list a settlement agreement between IMX and one
25 of the former defendants, Price Line, and the negotiations

1 or correspondence related thereto.

2 We believe that this agreement is irrelevant
3 and should not be admitted into evidence under Federal
4 Rule of Evidence 408, given that it was an agreement
5 reached during litigation, the license was not reached
6 as a result of an arm's-length negotiation, but, again,
7 as a result of a settlement from litigation.

8 In addition, IMX's damages expert did not
9 rely on the Price Line agreement for purposes of
10 determining the reasonable royalty in this case, and it
11 was executed five years after the date of the
12 hypothetical negotiation. So the hypothetical negotiation
13 is November 30th, 1999, the settlement agreement between
14 Price Line and IMX was executed in December 2004.

15 To the extent the Court is interested in any
16 case law in support of IMX's position, I would refer the
17 Court to Panduit, 575 F. 2d, 1152, as well as a more
18 recent opinion by Judge Sleet in the Pharmastem
19 Therapeutics case, 2003 Westlaw, 22387038.

20 So we believe that the Price Line agreement
21 and any correspondence related thereto should not be
22 admitted into evidence.

23 THE COURT: All right. That's generally my
24 standard. I don't allow this kind of evidence in, Mr.
25 Blumenfeld. Why should this be an exception?

1 MR. BLUMENFELD: Your Honor, on the timing
2 issue, I'm not sure that's the basis for your opinion on
3 the timing issue, they're relying on the 2002 agreement,
4 so I'm not sure where that gets them.

5 The license agreement, and it is a settlement
6 agreement and license agreement with Price Line, it's not
7 only settlement of litigation, it has specific provisions
8 whereby IMX granted to the defendants an irrevocable
9 nonexclusive, nontransferable, fully-paid, royalty-free
10 license under the patents with the right to sublicense,
11 and then it goes on for several paragraphs, talking
12 about what their relationship is in the future, in terms
13 of who they can sublicense to, things having to do with
14 vendors, things like that. It's not solely Here's some
15 money for the past. There's an ongoing license
16 relationship for the future.

17 It's something -- Ms. Day said that their
18 expert didn't rely on it. Our expert did rely on it,
19 not as the major point of his opinion, but as supporting
20 evidence. It is a license agreement under this patent and
21 we think that their concerns about its value because of
22 litigation really go to weight. It is a license agreement
23 under this patent, one of only two.

24 THE COURT: Well, as I said, generally, I
25 don't allow this sort of evidence, particularly when it

1 has been a co-defendant who said this. And I'm not going
2 to change my standard for this particular case. So it
3 will be excluded.

4 MS. DAY: The next issue, your Honor, is
5 with respect to LendingTree Trial Exhibits 227 through
6 229, which relate to IMX's pending patent application.
7 IMX has filed a continuation on the '947 patent that is
8 still pending before the United States Patent Office.
9 We believe that this patent application should be
10 excluded as irrelevant under Federal Rule of Evidence
11 401 and 402. Obviously, the claims of the pending
12 application are different than the ones being asserted
13 against LendingTree today, and the validity of the
14 pending application has yet to be determined.

15 In addition, we think that the admission of
16 IMX's pending application would be highly prejudicial
17 under Rule 403. Again, having the jury hear anything
18 about a pending application has nothing to do with IMX's
19 claims of infringement or whether the '947 patent is
20 valid.

21 We also believe that admission of this
22 evidence may lead to a trial within a trial and that
23 we'd have to talk about what perhaps the scope of this
24 pending application may be in the future, whether, in
25 fact, the Patent Office may grant or may issue this

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE**

CERTIFICATE OF SERVICE

I, Philip A. Rovner, hereby certify that on May 26, 2010, the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing(s) to the following; that the document was served on the following counsel as indicated; and that the document is available for viewing and downloading from CM/ECF.

BY CM-ECF AND E-MAIL

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I hereby certify that on May 26, 2010 I have sent by E-mail the foregoing document to the following non-registered participants:

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