

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

LEADER TECHNOLOGIES, INC., a
Delaware corporation,

Plaintiff and Counterdefendant,

v.

FACEBOOK, INC., a Delaware
corporation,

Defendant and Counterclaimant.

Civil Action No. 1:08-cv-00862-JJF

PUBLIC VERSION

**FACEBOOK INC.'S OPPOSITION TO PLAINTIFF'S MOTION IN
LIMINE NO. 3 REGARDING NON-INFRINGEMENT ALTERNATIVES
AND LICENSE AGREEMENTS**

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FOR THE DISTRICT OF DELAWARE**

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

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STATUTES

Federal Rules of Evidence 703 1, 6, 7

I. INTRODUCTION

LTI's motion to exclude testimony regarding non-infringing alternatives by Facebook's damages rebuttal expert Christopher Bokhart should be denied because the testimony is based on information obtained from an inherently reliable source of information: Facebook's own engineers. In arguing for exclusion, LTI ignores the fact that the non-infringing alternatives presented in Mr. Bokhart's report were disclosed only two weeks after LTI disclosed a brand new infringement theory in its opening expert reports. Given the incredibly short time between LTI's brand new allegation and the deadline for expert rebuttal reports, there was nothing improper about the timing of Facebook's disclosure or the way that Facebook communicated the information to the expert. LTI offers no explanation as to how it has been prejudiced or why any alleged prejudice is not the result of its own belated disclosure of its infringement theories. The motion to exclude should therefore be denied.

LTI's motion regarding Facebook's other license agreements should similarly be denied because the Federal Rules of Evidence explicitly allow expert witnesses to consider whatever information would normally be considered by an expert in the field, without regard to admissibility. Fed. R. Evid. 703.

Redacted

Further, LTI has offered no explanation as to how this testimony will cause any prejudice. There is therefore no reason to prevent this testimony.

II. STATEMENT OF FACTS AND ARGUMENT

1. Mr. Bokhart's Sources of Information Regarding Non-Infringing Alternatives Were Reliable, and Timely Disclosed

On April 8, 2010, more than four months after the close of written discovery, LTI included – for the first time –

Redacted

Redacted

Facebook's counsel passed this information on to Mr. Bokhart during the two week rebuttal period, and Mr. Bokhart included this information in his report. See D.I. 424, Declaration of Paul J. Andre in Support of Leader Technologies, Inc.'s Motions *in Limine* Nos. 1-7 ("Andre Decl."), Ex. 8 at 12.

Redacted

Finally, Mr. Bokhart confirmed via a conversation with Facebook's technical rebuttal expert, Michael Kearns, that Facebook would not infringe any of the asserted claims

Redacted

¹ Redacted

Rather than ask Mr. Bokhart about this document LTI's counsel elected to ignore it. Facebook's counsel therefore asked Mr. Bokhart about the document on redirect, and only then did LTI's counsel cross-examine him on the topic. See Robinson Decl., Ex. 11 at 241:20-256:13.

In light of the incredibly short turnaround time required for expert rebuttal reports, and LTI's withholding of several of its infringement theories until April 8, 2010, LTI cannot reasonably complain that Facebook's disclosure of non-infringing alternatives was untimely. Facebook disclosed its non-infringing alternatives to LTI in Mr. Bokhart's rebuttal damages report within the deadline for expert discovery agreed to by the parties and ordered by the Court, and as Facebook promised to do in its interrogatory responses, which LTI has never challenged. *See* Robinson Decl., Ex. 12 at 13. Indeed, during discovery, Facebook filed numerous motions to compel LTI to provide greater detail in its infringement contentions,

Redacted

Simply put, Facebook could not have provided any potential design-around alternatives until LTI disclosed its infringement theories, which occurred two weeks before Facebook's expert rebuttal reports were due.

LTI's complaints regarding the method by which Mr. Bokhart obtained his information are similarly flawed. Contrary to LTI's claims, Mr. Bokhart's expert opinion was not based "solely on statements from Facebook's counsel" but instead on information that was initially conveyed from Facebook via counsel and subsequently confirmed in conversations with Facebook employees. Indeed, LTI's claim that Mr. Bokhart relied solely on counsel is flatly contradicted by Mr. Bokhart's testimony, much of which is inexplicably omitted or selectively quoted in LTI's motion:

Redacted

Redacted

Redacted

Robinson Decl., Ex. 11 at 55:19-56:17, 59:15-60:8, 60:17-25, 63:24-64:7, 64:13-25. Clearly, counsel relayed information from Facebook to Mr. Bokhart. Mr. Bokhart then confirmed that information with Facebook itself. Therefore, any testimony regarding what Facebook employees said is merely an elaboration on the same opinion Mr. Bokhart originally stated in his report. As this Court recently held, it is not improper for experts to provide elaborating testimony on opinions that were previously disclosed in the expert's report. *See Dow Chem. Co. v. Nova Chems. Corp.*, Civ. A. No. 05-737-JJF, 2010 U.S. Dist. LEXIS 50101, at *4-8 (May 20, 2010 J. Farnan) (denying exclusion of expert declaration that elaborated on opinion already disclosed in expert report).

Finally, LTI has failed to show that it has been prejudiced in any way, or that any prejudice it has suffered was not the result of its own inaction, two critical factors in the *Pennypack* analysis. *Meyers v. Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 904-05 (3d Cir. 1977). LTI has not pointed to any additional discovery it needs to take as a result of Facebook's rebuttal disclosures, nor has LTI explained why it could not have

asked about these design arounds – which essentially amount to a disabling of the accused infringing technology and, by extension, the value of the accused features – during the discovery period.

Redacted

Having elected not to pursue this information during discovery LTI cannot now claim that it was “ambushed” by Facebook’s expert rebuttal report. LTI’s motion to exclude this information should be denied.

2. Redacted

the Federal Rules of Evidence allow Mr. Bokhart to consider anything he deems relevant to his analysis, without regard to admissibility. Federal Rule of Evidence 703 allows an expert to rely on inadmissible evidence if that evidence is “of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.”

Redacted

as part of his analysis of the “[t]he rates paid by the licensee for the use of other patents comparable to the patent in suit,” which is the second of fifteen *Georgia Pacific* factors. *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970), *modified and aff’d*, *Georgia-Pacific Corp. v. U.S. Plywood-Champion Papers, Inc.*, 446 F.2d 295 (2d Cir. 1971).

Redacted

Expert testimony regarding inadmissible evidence should only be excluded if the Court determines that the probative value substantially outweighs its prejudicial effect.

Fed. R. Evid. 703. ¶

Redacted

However, LTI has failed to make any showing that allowing Mr. Bokhart to testify that he considered them as part of the multi-factor *Georgia Pacific* analysis will create any prejudice at all, and certainly not “substantial” prejudice.

Redacted

In light of the lack of demonstrable prejudice here, Mr. Bokhart should not be prohibited from testifying

III. CONCLUSION

For the foregoing reasons, LTI’s motion *in limine* number three should be denied.

Dated: May 27, 2010

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