IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES, INC., a Delaware corporation, PLAINTIFF, v. FACEBOOK, INC., a Delaware corporation, DEFENDANT.	C.A. No. 08-862 JJF

Tuesday, April 27, 2010
4:30 p.m.
Telephone Conference
Chambers of Judge Stark

844 King Street
Wilmington, Delaware

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

APPEARANCES:

POTTER ANDERSON & CORROON, LLP
BY: PHILIP ROVNER, ESQ.

-and-

KING & SPALDING LLP
BY: PAUL ANDRE, ESQ.
BY: JAMES HANNAH, ESQ.

Counsel for Plaintiff

(APPEARANCES CONTINUED)

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

COOLEY, GODWARD & KRONISH, LLP
BY: HEIDI L. KEEFE, ESQ.
BY: MARK WEINSTEIN, ESQ.

Counsel for Defendant

THE COURT: Good afternoon, everyone. This is Judge Stark.

Who's there, please?

MR. CAPONI: Good afternoon, Your Honor. Steve Caponi for Blank Rome for Facebook as well as Ms. Heidi Keefe for Cooley Godward for Facebook.

MR. ROVNER: Your Honor, this is Phil Rovner from Potter Anderson for plaintiff Leader, and with me on the line is Paul Andre from King and Spaulding.

THE COURT: For the record, this is Leader Technology, Inc. Versus Facebook, Inc. It is our civil action number 08-862-JJF-LPS, and the purpose of today's call is there is another discovery dispute between the parties, and in particular Facebook is seeking to reopen discovery.

Let me first ask -- of course I've read the two letters. Have there been any further developments since these letters were filed, Mr. Caponi.

MR. CAPONI: No, Your Honor.

THE COURT: Mr. Rovner, do you

agree with that?

MR. ROVNER: Yes.

THE COURT: Let me tell you where we are, and I will certainly give the parties a chance to respond to what I have to say.

It does -- it does appear to me, having read the letters, that at least part of what is going on is clearly Facebook believes that this trial should not take place at the date of June 28, 2010, which is the date that has been in place for quite a while. And to grant the relief that Facebook seeks would have, necessarily, the effect of eliminating that trial date.

I am not going to eliminate that trial date. That June 28, 2010, date is a firm trial date, and either Judge Farnan or myself will be trying this case on June 28th, 2010.

Now, it may be, nonetheless, that Facebook is entitled to at least some limited relief, and that's what I need help from the parties on. Given that the trial is going to be on June 28th, what, if any, relief should the Court consider awarding Facebook as a result of

this latest NDA issue?

So let me hear from the parties on that point, and we'll start with Facebook, please.

MS. KEEFE: Thank you, Your Honor.

Your Honor, at an absolute minimum, to avoid essentially depriving Facebook of substantive due process rights to develop its own defenses, Facebook needs discovery into third parties who we didn't know about before so that we can investigate whether those third parties received demonstrations of or offers to purchase the device that Leader itself contends practices the claims of the patent at issue before the patent was filed.

Even one of these demonstrations or offers to sell the patented invention more than one year before the filing date would statutorily bar the patent itself, and Facebook deserves to look into those.

In fact, had these NDAs been produced during the ordinary course of discovery when discovery was open, this wouldn't have been an issue. We would have been conducting

discovery into those third parties, able to make phone calls, follow them up with subpoenas, request for deposition, and court ordered processes of discovery.

For example, in our letter we indicated to Your Honor at least one party who we've been able to formally contact who we didn't know about until after discovery closed has indicated that he does have evidence of something before the critical date, which we would be interested in, but he feels extremely uncomfortable and will not give it to us absent a subpoena, so we need to be able to issue that subpoena.

This is true of countless third parties identified who signed NDAs potentially receiving demonstrations and offers for sale before 2002. 633 in 2000, 389 in 2001, 438 in 2002.

Now, of course, Your Honor, if this had been the normal course of discovery, we would have identified those that looked like the most reasonable companies -- you know, companies that would have nothing to do with Leader's

practice that would look like a company who might buy this product, and we would have gone down that road, starting with a small number, perhaps expanding out depending on what that discovery yielded.

At an absolute minimum at this point, Your Honor, we need the ability and the right to issue document requests to third parties from that NDA list and to follow those requests up with deposition notices that can be taken. If we have to take them during this time frame, we at least have to do that now.

Even if Your Honor or Judge Farnan thinks that somehow this is not relevant, we need to preserve our rights because the Federal Circuit may well have felt that these were relevant, and that each and every one of them could have invalidated the patent.

THE COURT: Ms. Keefe, Leader represents now that based on the best available information -- and I'm going to explore with them what the basis is for that, but they say there are no more and, I guess, no less than fifteen third parties in the relevant time

period that may have received one of these offers or presentations. Of those fifteen how many have you learned of in the recent weeks?

MS. KEEFE: Of those fifteen, there are three that we never heard of.

Beyond those fifteen, though, are informal phone calls, and the court documents that were filed in Ohio in the last couple of months indicate at least three other parties that didn't make their list of fifteen.

If I can, Your Honor, relying on Leader to give us this information is simply not fair. Leader is asking for countless dollars of possible injunctions, shutting down Facebook, and has told both this Court and us that it intends to use this patent against other people in the future. Relying on Leader to provide the information that could destroy its patent or its case is not the way the adversarial system was set up. We deserve the right to explore those for ourself and not be forced to take Leader at its word.

THE COURT: Well, certainly it's within the discretion of the Court to require

you to first pursue discovery, if at all, from the three that the plaintiff has now revealed to you and see what that yields and then determine from there if you really need anything further. What are the three new ones that have been identified to you by Leader?

MS. KEEFE: I just need to flip to that exhibit. I apologize.

While I'm flipping through, Your Honor, and getting that information, would we also be able to conduct discovery into the other third parties that we identified in our letter who have indicated to us that they have information that they would want to produce only under subpoena?

THE COURT: Those other three are the Zacks Law Group, SpartaCom, and Sun Management?

MS. KEEFE: Yes, Your Honor.

THE COURT: Well, I haven't ruled anything yet, but I recognize your request as a bare minimum from your perspective.

MS. KEEFE: Sorry, Your Honor. I am still flipping through my documents here, and

I want to make sure to give you the exact, right information. I sent an e-mail to one of my associates to tell me exactly which one.

THE COURT: That's fine. You'll get a chance to tell me the names as we get a little bit further.

MS. KEEFE: Here they are, Your Honor: Platform Venture, LLC; Tutor Ventures, and Shamrock Security Corporation.

THE COURT: Okay. Let me throw something else at you, Ms. Keefe. What about the possibility that we go to trial in June only on infringement, and we defer trial on invalidity to a later date to allow you to pursue the discovery that you're requesting?

MS. KEEFE: Your Honor, I haven't had a chance to think about it to give you a fully informed answer, but my first, gut reaction is that that would certainly be something that we would like to explore the possibility of because certainly that would allow us time to conduct discovery into these issues.

And quite frankly, Your Honor, if

the patent is not infringed, we may save both the Court's time and our own time from having to do any of that since the issue of validity would be moot.

THE COURT: Let me turn to Leader at this point to be heard on these issues.

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

There's a lot of hyperbole and double talk being put forth in both Facebook's letter and their argument now. The fact of the matter is that they had the opportunity to take the depositions of at least two of the three parties that they say there was a prior sale to. This was Balsam Scientific and Limited. They subpoenaed them and decided not to take discovery when discovery was open.

They also recently filed motions pending before Judge Farnan to amend the counterclaims in an inequitable conduct allegation. Inequitable conduct allegation is a mirror image allegation to these 102(b) allegations. They put forth there was a prior sale and public disclosure.

In that briefing that was filed just five days ago, they say, and I quote, "Facebook's proposed amendments do not require additional discovery and will not delay the proceedings."

When they try to add in counterclaims based on the exact, same allegations, they tell the Court that no extra discovery will be needed and will not delay it.

They also put forth the fact that in November -- ignore the fact that in November of last year they went and came to Your Honor to amend their pleadings, and they began to add in a false marking claim.

They've taken the position this entire case, even up to November last year and very recently last week, that Leader does not practice the claims of the 761 patent, and therefore they're doing false marking. That has been their consistent position throughout the entire course of this case.

Now they're saying, well, the Leader to Leader does practice the 761, and a prior sale public disclosure would invalidate

it.

They're taking the inconsistent position -- not inconsistent -- mutually exclusive positions even today. This is not a good-faith dispute. This is a dispute merely to try to bifurcate the trial or postpone the trial or something along that line. What we did produce in this case is every third-party communication regarding Leader to Leader and the 761 patent.

Facebook has had the source documents for these new allegations for almost a year. At least a year for some, eight months for others. They just now added the allegations of 102(b) regarding prior sale and public use.

We produced to them, as well, hundreds, if not thousands, of documents that referenced our NDAs and our NDA policy. We even produced NDAs to them early in the case.

THE COURT: Mr. Andre, let me interrupt you, and let's focus on where we are now.

First, what is the best available information that allowed you, on April 13th, to

advise Facebook that there were, at most, fifteen third parties that may have received a demonstration or offer of sale in the relevant time period?

MR. ANDRE: The fifteen parties based on the documents we produced to them early in the case that identified twelve of the people. The other three were based on the recollection of Mr. McKibben, the CEO and founder of the company.

You notice the three they mentioned, those are venture funds, and he was trying to get funding for his company. Every document that we have that would indicate a public disclosure we provided to them. Every document we have that would indicate an offer for sale we provided to them. They've had all these source documents for years.

THE COURT: The three new, the Platform Venture, Tutor Venture, and Shamrock Security Corporation, were ones that Mr. McKibben simply did not recall until April of this year?

MR. ANDRE: There's no

documentation we have regarding those type of communications, and when we were asked to provide -- by Your Honor -- to provide them with everyone we gave a demonstration to of our product during the relevant time period, those were the three that were possible within that time period, the best of his recollection. And so we looked through every possible piece of document, paper, in the company to try to come up with these names.

THE COURT: And what about the other three that defendants think they found out about separate and apart from your representations, the Zacks Law Group, SpartaCom, and Sun Management?

MR. ANDRE: Zacks Law Group was our long time corporate law firm, and Mr. Zacks was on the board of directors and, I believe, a shareholder of Leader, and at one time served as officer.

The document they refer to, if you look at the actual e-mail, they're dated in 2003. Those are not within the relevant time period that we're talking about here. We filed

the provisional patent in December 2002, and we filed the utility application in December 2003. The date on both those e-mails are July 2003.

And if you read those e-mails carefully, it's pretty clear he had not been beta testing yet. He offered to beta test. He saw a demonstration and it looked like Leader. That wasn't the case, if you look at Exhibits Seven and Eight of their brief. So the Zacks Law Firm, there's nothing there.

The SpartaCom was not something we were demonstrating things to. That was a company Leader was looking to acquire. That was an acquisition of Leader, not them acquiring our product. The NDAs we have with SpartaCom we produced to Facebook talk about Leader purchasing that company, not the other way around. There was no demonstration of our product. That was quite the opposite actually.

And then with respect to the Sunrise Community that they mention, there is an NDA with them. We produced an NDA to them, but the time period of that, if you look at the e-mails once again, are in the 2003 time period,

which are not the relevant time period for any of those claims. Those three they name are -- they're complete red herrings.

THE COURT: And what about the suggestion that I bifurcate validity from infringement? What would be wrong with doing that at this point, Mr. Andre?

MR. ANDRE: It would kill Leader, Your Honor. This is -- Leader has leveraged the entire company to go to trial, and to have to go to trial twice as it were, to go through a one-trial process, go back into discovery phase, go through another trial process, would be absolutely devastating to Leader.

It would be extremely prejudicial to have to bring our witnesses back, to have two juries make this decision. It would be prejudicial in the fact that a different jury would hear the validity case. We would have to bring experts back in for tutorial purposes to educate the jury again.

It would have a very dire consequence on this company that is fragile. The way it is with the cost incurred by the

amount of discovery we've been forced to deal with on the third party front -- sixty-four subpoenas, untold third-party subpoenas.

They've gone after third-party finance companies that have absolutely no relevance in this case. They're going after numerous third parties in this case, and to have this issue come up when at no time did they ever raise this issue of on-sale bar or public disclosure.

They had the source documents for a year. They never raised it, so to bifurcate out any portion of the trial at this point would be just devastating to this small company.

THE COURT: And given that the three new companies that you've identified were ones for which your client has no documentation but your client now has a belief received a demonstration or an offer of sale in the relevant time period, doesn't it necessarily follow from that that the defendant should be entitled to some third-party discovery directly from those entities to determine, to flesh out the record given that otherwise all we have is

the recollection of your client, which by your own admission and understandably, isn't perfect?

MR. ANDRE: Your Honor, in our meet-and-confer, what I offered was if they limited discovery to something reasonable and agreed that it would not affect the trial date, go forth and conquer. We're very confident that there's no there there, as it were.

But that wasn't what they wanted. That the whole purpose of all of this, this eleventh hour 102(b) defense for on-sale bar and public use is a complete opposite of their false marking claim, is nothing more than a mechanism to try to stay the trial or bifurcate it out.

If they want to take some limited discovery, we have no problem with that, and that's what we told them during the meet-and-confer last week.

But open-ended discovery, taking hundreds of depositions again, trying to push out the trial date or bifurcate the trial date, which would have extreme prejudice on us, would devastate the company.

THE COURT: Ms. Keefe, anything

you want to say in response?

MS. KEEFE: Quite a few things, Your Honor, but I'll limit it to two.

The first thing is that Mr. Andre's suggestion was that we simply take document discovery, that they wouldn't oppose us seeking documents, but the original NDAs that are from this original time frame all have document destruction clauses.

If Your Honor looks to Exhibit Three of their letter, one of the early NDAs, paragraph three indicates that those parties will either return the document or destroy it. Simple document discovery would not do what we needed, nor would it potentially reveal oral offers for sale that might also have happened.

Further, Your Honor, we think that Leader's claim of prejudice based on what would amount to a small extension, potentially, of the trial on validity is of its own making. These documents were late-produced, even though they were requested in the very beginning of the case. We're only here because they

late-produced these documents and now are choosing to rely on them and attempt to use them as a shield rather than letting us explore whether or not there are also sword qualities to these documents.

I believe, actually, that bifurcation would be a good idea. It's nothing we raised with Your Honor, but the more I think about it, the more I think it could accomplish exactly what all parties need, which is to allow the trial date to stick for infringement and then to allow this discovery to proceed into the late-produced documents and then only go to validity to the extent that it's necessary.

THE COURT: Okay. Thank you for that argument.

Here's what we're going to do. I do think that Facebook is entitled to take some limited additional discovery with respect to the possibility that there may be support for an invalidity defense based on an invalidity defense based on an on-sale or an offer for sale or a demonstration in the relevant time period.

And I base that conclusion --

certainly I think such evidence would be relevant to an invalidity defense, and there's certainly reason to believe that there may be discoverable evidence, given that there are three newly identified entities by -- newly identified by Leader, that even Leader recognizes at least may have received either an offer of sale or a public demonstration in the relevant time period, and that's mainly Platform Ventures, Tutor Ventures, and Shamrock Security Corporation.

I also have the representation from Facebook that they have reason to believe there are three others that may have received similar offers of sale or demonstrations, namely Zacks Law Group, SpartaCom, and Sun Management.

And while I understand Leader's response at this point is it believes that there were not relevant offers of sale or public demonstrations to those other three, given the way, at least, three admitted new possibilities, the first three I mentioned, have only recently been disclosed and identified by Leader, it's at least possible that there may be something

relevant to be discovered from those latter three as well.

And so I am going to permit Facebook to serve limited document requests on all six of those entities and to take limited depositions. I can't, sitting here, tell you exactly what "limited" means, but I can tell you that it's going to be done -- that the parties are to work together to do this as quickly and efficiently as possible, and it is not going to affect the June 28th trial date.

So you're all going to have to start meeting and conferring immediately, attempt to come up with a schedule that gets this additional discovery done as quickly as possible while you're doing all the other things to get this case ready for trial.

If you can't work out a schedule then I will impose one that will be extremely accelerated because we're going to keep this case on track for the trial of June 28th, 2010.

At this time I'm not going to bifurcate, so we're onboard for the trial that will deal with both infringement and invalidity.

Any -- no further reargument at this point, but have I been clear in what my ruling is today, Ms. Keefe?

MS. KEEFE: You have, Your Honor. The only question I would ask is whether or not, given what the parties find or if it turns out, since these are third parties -- the parties can work together to try to do this quickly, but we're relying on the schedules of third parties.

Would Your Honor entertain the possibility of a bifurcation motion -- again not to destroy the June 28th trial for infringement, but regarding the invalidity issues, would Your Honor entertain a bifurcation motion if it becomes necessary?

THE COURT: Certainly I'm not going to preclude that possibility, but if I receive such a motion, I'm going to be heavily influenced in evaluating it by evidence that the parties have both tried very hard, as hard as possible, to see if they can get this all done in time to preserve the fuller trial that is currently scheduled for June 28th.

Anything else, Ms. Keefe?

MS. KEEFE: Not that I can think of right now, Your Honor.

THE COURT: Okay.

And Mr. Andre?

MR. ANDRE: Thank you, Your Honor.

THE COURT: Thank you all for your time.

(Proceeding ended at 5:00 p.m.)

C E R T I F I C A T I O N

I, DEANNA WARNER, Professional Reporter, certify that the foregoing is a true and accurate transcript of the foregoing proceeding.

I further certify that I am neither attorney nor counsel for, nor related to nor employed by any of the parties to the action in which this proceeding was taken; further, that I am not a relative or employee of any attorney or counsel employed in this case, nor am I financially interested in this action.

_____

DEANNA WARNER

Professional Reporter and Notary Public