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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES, INC., : CA. NO. 08-862-JJF
: JUNE 2, 2010
Plaintiff, :
: 12:30 O'CLOCK P.M.
v. :
:
FACEBOOK, INC., a Delaware :
Corporation, :
:
Defendant, :
.....

TRANSCRIPT OF SCHEDULING CONFERENCE
BEFORE THE HONORABLE JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: POTTER, ANDERSON & CORROON, LLP
BY: PHILIP A. ROVNER, ESQ

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-and-

KING & SPALDING, LLP

BY: PAUL ANDRE, ESQ

For the Defendant: BLANK ROME, LLP

BY: THOMAS PRESTON, ESQ

-and-

COOLEY, GODWARD, KRONISH, LLP

BY: HEIDI L. KEEFE, ESQ

Court Reporter:

LEONARD A. DIBBS

Official Court Reporter

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P R O C E E D I N G S

(At this time, court proceedings commenced.)

THE COURT: Be seated, please.

MR. ROVNER: Good afternoon.

THE COURT: All right.

I wanted to get you in because we have this trial scheduled and we have a pretrial tomorrow.

This case will go to trial on its scheduled date. The question is, who's going to preside at the trial? And this case is going to be ultimately assigned to Judge Stark because he's absorbing my caseload. We're in the process of transitioning to that now.

What the court decided was that, you know, we have four job spots on the wheel. So, we now have a quote-unquote vacant judge spot on the wheel. And those cases that go into that are assigned to judges that are assisting from other districts. So, what the court is going to do is maintain that slot so as new cases come in, 25 percent of them will go to that slot until my vacancy is filled.

Judge Stark for purposes of consistency is going to simply absorb my entire caseload when he's confirmed by the senate.

You may have noticed that I've been referring to Judge Stark that are newly assigned to me because he's going to get

1 them anyway. We thought that was a more cogent way rather than,
2 you know, create another vacant judgeship slot for my cases.

3 You're going to get to know Judge Stark real well. As
4 you may know his progress is that he was voted out of the
5 judiciary committee.

6 He's now on a calendar in the United States senate with
7 the endorsement of both the chairman of the judiciary committee.
8 Senator Leahy. Unusual, he has an endorsement from Senator
9 Sessions. He is only waiting how those calendars work for some
10 movement. He's what they consider non-controversial.

11 I suspect he will be confirmed certainly no later than
12 they go on recess in August.

13 But the way the world works, if something happens with
14 those calendars he could come out within a week. He's all
15 through the judiciary committee and he's on a calendar.

16 I say all this because you could consent to Judge Stark
17 who is going to be your Article III judge anyway post-trial or
18 you could go to a visiting judge for the trial. I shouldn't say
19 visiting judge -- not a judge outside the district, but an
20 Article III judge in this district.

21 But even if that was the case it would come back to
22 Judge Stark post-trial, or depending on my actual retirement
23 date. My birth date is June 15th. I can leave that day. I'm
24 not going to leave that day. I'm going to leave sometime in
25 July.

1 I left my date open because I was hoping there would
2 be -- naive as I am, I was thinking actually Judge Stark and
3 somebody replacing me. My replacement probably is not coming
4 until early 2011. It doesn't matter when I go. I was trying to
5 avoid as much as -- to avoid disruption as much as possible.

6 To do that, I would have to stay around a lot longer
7 than I anticipated back when I gave everybody notice at the end
8 of the year. So, I'm not asking for a decision today because I
9 think that would be unfair to you.

10 I thought we would postpone the pretrial until you get
11 a decision from your clients and all. I would say in the first
12 instance is to consent to Judge Stark. If you choose not to do
13 that, you would let me know and then we would decide among the
14 Article III judges what's going to happen focused on the trial
15 date that we have in June here.

16 Do you have any questions? I tried to give it to you
17 in short form.

18 Are there any questions that you would want to put to
19 me or to Judge Stark or the other judges? I mean, this could
20 wind up if you don't consent to Judge Stark -- we're having a
21 judges' meeting tomorrow morning that it could come back to me.
22 It would have to be an awful lot given in exchange.

23 MS. KEEFE: By the other judges, not by us?

24 THE COURT: Exactly. By the other judges.

25 What I'm trying to do is exit with a clean motion list.

1 The motion list is due in September. We've been working real
2 hard so Judge Stark has nothing that's over six months
3 delinquent. That's where everybody agrees I should put my time.

4 Actually, I've been handling criminal cases about 30
5 days longer than we were suppose to when we sat down in June
6 when I gave my notice. The idea was that I would spend the last
7 90 days getting all the motions out.

8 It's amazing the letters I get. Judge, before you go
9 would you do our motion for Summary Judgment one way or the
10 other. We are trying to do that for the parties.

11 Nothing goes exactly the way you plan with the
12 vacancies. If you have any questions, I'm happy to answer them.

13 MR. ANDRE: One question. When will we know if you
14 could handle the trial and pass off post-trial motion to Judge
15 Stark? Will we know that after the judges meeting tomorrow
16 morning?

17 THE COURT: I don't think so. You probably wouldn't
18 know that until later next week.

19 MR. ANDRE: The way it's scheduled, if we keep with the
20 current trial schedule -- last day -- we would be finish by no
21 latter than July 9th. I don't know if you would still be
22 hanging around on the bench after that time period and handing
23 it off to Judge Stark.

24 THE COURT: After a discussion with the Article III
25 judges it came to me, if I presided at the trial, that's about

1 all I would do, then I would leave.

2 I suspect given the closest then we have to Judge
3 Stark's appointment, the motions -- let me say this: I wouldn't
4 be deciding the motions because I'm not staying past the last
5 week of July. I don't know -- I don't know the exact date. It
6 would be sometime between the end of the trial and say July
7 27th. I have a retirement party planned for July 30th. I'm not
8 going to be a government employee when that party starts at 5:00
9 o'clock, whatever it is on that Friday.

10 I would like to get out at least the week before that
11 party, get out of government service.

12 MR. ANDRE: What I'm asking is if we do consent to have
13 Judge Stark handle the post-trial motions, even though he's not
14 confirmed at that point and try to keep you as the presiding
15 judge.

16 I do think this is going to be a complex trial. I
17 would like to have someone who's had the kind of experience that
18 you've had in patent cases over the years.

19 THE COURT: Are you asking me that question?

20 MR. ANDRE: Is there any chance that we could consent
21 for Judge Stark to take over the post-trial even before he's
22 confirmed?

23 THE COURT: I don't think you can do that. As I
24 understand the rule -- I see what you're saying now. I don't
25 think so you can do that. You have to consent prior to the

1 trial. Post-trial motions to be handled by the judge. If I
2 drop dead, there is a substitution rule, but then it would have
3 to be an Article III judge.

4 MR. ROVNER: My first question is, is tomorrow off
5 calendar?

6 THE COURT: I'm going to take it off just to give you a
7 chance to decide.

8 MS. KEEFE: Perfect. I have to talk to my client
9 anyway.

10 THE COURT: Let me say this: I'm not going to look for
11 an answer until the early part of next week. So you can have a
12 chance to have a good discussion with your clients.

13 MS. KEEFE: The client would be very grateful for that.
14 Actually, they told me before I walked in here today,
15 we would like to talk about whatever he wants to talk about.

16 The second question is, if we were to consent to Judge
17 Stark now, would all of the pending motions -- we have a number
18 of Summary Judgement motions pending, a Motion for Leave to
19 Amend pending. Would they all go to Judge Stark, the whole case
20 would go to Judge Stark?

21 THE COURT: Yes.

22 The reason why I'm offering this to you with Judge
23 Stark is only about consistency.

24 If you start so chopping it up, I know you're going to
25 have a hard time believing this, but judges see things

1 differently sometimes. Hard to believe given the rule of law.
2 It happens here in the courts. The idea was that with whoever
3 is going to do the trial -- who was going to do the trial would
4 do all work.

5 As I think about the question of consenting to Judge
6 Stark post-trial, what would probably happen is the trial would
7 end, there would be filings. I would fully anticipate that he
8 will be an Article III judge by the time you're done briefing.

9 So, consent really probably isn't an issue. I clearly
10 won't be working on post-trial motions. This is a nightmare.

11 Let me say this: Too many -- I'm open to any ideas
12 that you have to make it -- if you can agree to something that
13 works for you.

14 I'm just coming with the routine kind of proposal. If
15 there is something else that you can think of, I'll listen to
16 it.

17 MR. ANDRE: All things being equal, we would obviously
18 love to have your Honor at trial. Post-trial briefs handled,
19 however they are assigned, whether Judge Stark be confirmed or
20 whatever. That would be our preference.

21 MS. KEEFE: Unfortunately, your Honor, I can tell you
22 right now, that's nothing that we would be happy with.

23 We want to make sure that we have the same judge at the
24 trial who does post-trial hearings, if possible. Maybe we have
25 to talk with each other.

1 THE COURT: You have to convince them. I can only do
2 it -- Judge Stark can only do it if both sides consent. If one
3 side -- I don't want to enter into those discussions. If one
4 party doesn't consent then we can't do it. We'll have to take
5 it internally. I've given you some of the options.

6 MS. KEEFE: There is no guarantee, your Honor, that you
7 would be the one trying the case? The judges still have to
8 decide whether you're going to take the case on the 28th?

9 THE COURT: We would have to see what everybody is
10 doing. We would have a discussion internally. That's why I
11 think the first decision for both you is, do you consent to
12 Judge Stark or not consent to Judge Stark?

13 Once we have that, and I know if it's yes, then he'll
14 take on the case from now through the end. If you don't consent
15 to Judge Stark then, I'll take that decision internally and then
16 I'll tell you who your judge is going to be for the trial.

17 Let's say it's me. You know, I'm not going to be the
18 post-trial judge. If it's not me, there will be another judge
19 stepping in. There will be some internal exchange. I might be
20 doing criminal work another 30 days to help them out. I don't
21 know how that discussion is going to go.

22 MS. KEEFE: Just to be clear, this is not a binary
23 decision of you versus Stark?

24 This is a binary decision of Stark versus another
25 Article III judge?

1 THE COURT: Possibly.

2 MS. KEEFE: It might be you? It might be Judge Sleet?
3 It might be Judge Robinson, or someone from the visiting
4 benches?

5 THE COURT: Right. But if it's me, you will definitely
6 get a different post-trial judge.

7 MS. KEEFE: Either Stark or anyone of those same people
8 depending on what happens?

9 THE COURT: I think you got the problem now.

10 MS. KEEFE: Thank you, your Honor.

11 MR. ROVNER: In that situation, we would be no
12 different than the case you're trying today? You would be doing
13 the jury trial and someone else would be doing the post-trial
14 motions, I suppose?

15 THE COURT: I'm not so sure about that. I don't want
16 to make announcements.

17 This is Roper and Farabow. They understand that in
18 this case they spent their careers on these co-polymers,
19 particularly Roper. When they get a jury verdict, do you know
20 where they want to be? They want to be in the Federal Circuit.

21 We've talked a little bit but not enough that I can say
22 something to you.

23 This might be a different situation. The reason I put
24 this case on because I had them in February and they had a long
25 discussion. Actually, this is all public, as far as client Nova

1 really thinks their winner is standing. And the other side has
2 a different view on the merits of the case.

3 So this is a different kind of case.

4 What I did was I told them I would actually get them in
5 and out before I leave. This is different.

6 MR. ROVNER: In any event, regardless of who tries the
7 case, we would still be going to trial on June 28th? We can be
8 certain of that?

9 THE COURT: Right around June 28th.

10 We're going to give up a little time here.

11 Yes, you're definitely going to trial on June 28th,
12 29th, July 1st. You're going to trial within that timeframe.

13 MR. ROVNER: Okay. Thank you.

14 THE COURT: I don't have my calendar here.

15 MR. ROVNER: June 28th is a Monday.

16 THE COURT: You might like go the 29th or 30th.

17 MR. ROVNER: We're just thinking because some of our
18 experts, we would have to rearrange their schedules. We're more
19 than happen to do that.

20 THE COURT: When you said that, June 28th is my wedding
21 anniversary. I won't be here that day. I have to be somewhere
22 else that day. It might Tuesday, the 29th or Wednesday.

23 MR. ROVNER: Okay. Thank you.

24 THE COURT: Okay.

25 Again, I apologize to you. I know this is tough to

1 explain to clients. I just don't know what else to do though.

2 I think everybody sitting around thought Judge Stark
3 would be here by now and my replacement would be selected.

4 I told the selectors that I was leaving. I told them
5 back in November. They asked me to hold up. I held up until
6 January, waiting a couple of weeks until they told me it was
7 okay to send my later. They were starting the selection process
8 right away, but they didn't start it until April.

9 I understand the open period keeps getting extended to
10 get the names, even in Delaware, selected.

11 I apologize. It's hard to explain to clients. I know.
12 They just think all judges are the same.

13 Why don't you just get moving and get the case going.
14 I apologize to you. What I need to know from you is maybe like
15 Monday whether there's a consent to Judge Stark. If you tell me
16 there is not, then I would take it internally and I'll get you
17 an answer by, let's say, the first, so that you have it before
18 the weekend who your trial judge is going to be.

19 Like I said, it could be me or one of the others.

20 If it's me, we'll reschedule the pretrial. If it's
21 someone else, they will reschedule. I'll try and do it quickly.
22 You're all in the mode to get this thing moving.

23 Probably early the following week we would have the
24 pretrial, if it's me so we're ready for the end of the month.

25 Okay?

1 Thank you.

2 MS. KEEFE: Thank you, your Honor.

3 MR. ROVNER: Thank you, your Honor.

4 (At this time, court proceedings concluded.)

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