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

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LEADER TECHNOLOGIES, INC., a Delaware corporation,

Plaintiff,

v.

FACEBOOK INC., a Delaware corporation,

Defendant.

: CIVIL ACTION

: NO. 08-862 (LPS)

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Wilmington, Delaware
Friday, June 25, 2010 at 9:33 a.m.
TELEPHONE CONFERENCE

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BEFORE: HONORABLE **LEONARD P. STARK**, U.S. MAGISTRATE JUDGE

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APPEARANCES:

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

and

KING & SPALDING
BY: PAUL J. ANDRE, ESQ.
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and

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APPEARANCES: (Continued)

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Counsel for Facebook, Inc.

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P R O C E E D I N G S

(REPORTER'S NOTE: The following telephone conference was held in chambers, beginning at 9:33 a.m.)

THE COURT: Good morning, counsel. This is Judge Stark. Who is there, please?

MR. CAPONI: Good morning, Your Honor. For Facebook, you have Steve Caponi from Blank Rome and Heidi Keefe and Mark Rhodes from Cooley Godward.

THE COURT: Okay.

MR. ROVNER: Your Honor, good morning. This is Phil Rovner for the plaintiffs; and with me on the line is Paul Andre from King & Spalding.

THE COURT: Okay. Good morning again to everybody.

For the record, of course, this is our case of Leader Technologies Inc. v Facebook Inc. It's our Civil Action 08-862-LPS.

The purpose of today's call is to talk about one pending discovery dispute, and also I'll have some things to tell you about the pretrial conference and the trial.

Before we get into the discovery dispute, having reviewed these letters, I just want to take the opportunity once again to remind everybody that it would be best and it would be expected if we could get the rhetoric here toned down just a little bit. The case has been marked throughout and I've had occasion to discuss with the parties before the allegations of bad faith and really some hyperbolic rhetoric on both sides, casting aspersions on one another which I think consistently have been unwarranted and certainly have been unhelpful and unpersuasive. We're all going to be spending quite a lot of time together over the next month or so, and I don't expect to be seeing this type of conduct and rhetoric as we go forward.

With that background, I do want to hear briefly from the parties on the pending discovery dispute which is essentially Facebook's request to reopen certain discovery. I have read the letters but I will give each side a brief opportunity to address that and I'll turn to Facebook first, please.

MS. KEEFE: Thank you, Your Honor. Your Honor, what we've learned throughout the course of the depositions that Your Honor allowed us to take, the very limited discovery Your Honor allowed us, was that Mr. Zacks and Shamrock Technology confirmed what Facebook has suspected all along, which was there were in fact public disclosures of information which could yield invalidating disclosures; these are disclosures without NDAs; and, in fact, that there were offers to sell the underlying technology. As Your Honor knows, both public disclosure of the technology or an offer to sell the technology could support a Section 102(b) defense to the entire case.

In the case of public disclosures, Mr. Zacks confirmed that there were dozens of individuals who received presentations regarding the patented technology who had refused to sign NDAs. Leader represented that all the disclosures that were ever made were under signed NDAs. Mr. Zacks confirmed there were, in fact, numerous individuals who refused to sign those NDAs, and the demonstrations proceeded anyway.

Leader's argument is that they somehow had a confidentiality obligation, but the testimony is clear that the only thing that happened was that Mr. Zacks and Mr. McKibben indicated how confidential they believed the material to be, but absent a binding agreement to keep

those materials to be confidential, it is, in fact, a public disclosure no matter how much the parties wish it to be confidential. These are parties including Steve Roth of Vornado Realty and everyone in his group, the Oliver Wyman and Co., the Wills family of New York, both of which included numerous people who were at the table, all of whom refused to sign NDAs. We need to be able to conduct discovery at least into them to find out what was given to them because those disclosures would themselves have been public disclosures of whatever was given during those presentations.

Similarly, the limited discovery has indicated that there were, in fact, offers to sell the underlying technology. When Mr. Zacks testified, he testified that Leader considered every single person they gave a presentation to to be a potential customer. But, more importantly, they asked during the Shamrock Technologies deposition, Shamrock Technologies witness Mr. Ehlers testified that he went to the meeting thinking that he was going to put on a sales presentation but realized, in fact, that he was the customer and was on the receiving end of a sales pitch for the Smart Camera. And Mr. Zacks' documents, documents we've never seen before and had never been produced by Leader, many of which are on Leader's letterhead or written by Mr. McKibben himself, indicated the Smart Camera could only

be sold with the underlying Leader-to-Leader technology, the software that is at issue in this case, the patented technology, and so an offer to sell Smart Camera would have necessarily included the patented technology and, therefore, was an offer to sell the patented technology as well.

We need to be able to find out whether or not any other offers to sell Smart Camera existed or any other offers to sell the Leader-to-Leader technology existed. We were actually shocked to see in Leader's letter for the first time that Leader is actually admitting that it did, in fact, demonstrate or make presentations about the Leader-to-Leader software more than 500 times.

So it's this landscape that we're in right now, Your Honor: The fact we have found out that despite representations to the Court, there were, in fact, demonstrations or presentations that existed without NDA and that there were, in fact, offers to sell technology which included the underlying technology, and we need to be able to look into those. Now, how could we have known about any of this before because the NDAs had been late produced? The documents that Zacks produced came after the close of discovery. All of these are things we need to be able to press into in order to establish our defense under 102.

THE COURT: All right. Mr. Andre.

MR. ANDRE: Your Honor, the first thing is when

she discusses the Shamrock deposition, that was not mentioned anywhere in their letter. It was not attached as an exhibit. That was the deposition that lasted 28 minutes and absolutely yielded nothing in terms of relevance, and that is the reason it wasn't added, so I take that with a grain of salt.

We never said we gave more than 500 demonstrations either. We said we have 500 presentations, various versions of it. In fact, Leader produced all the presentations that mention Leadership software or Leader-to-Leader to Facebook last year -- early last year in most cases. Presentations are all marked confidential. They usually had the date and the name of the person being provided the presentation on them and Facebook chose not to take any discovery whatsoever on those presentations because there is nothing to them. They're very general in nature. They don't disclose any of the patented technology. It's more of a business-oriented type of presentation. Nonetheless, they didn't send a single interrogatory, a single document request or do a single deposition of the over 500 presentations that they had available to them.

As far as the on-sales go, Leader produced all documents related to offers for sale of the Leader-to-Leader product last year as well and provided witnesses to testify on that topic. Facebook identified three parties that

Leader allegedly offered Leader-to-Leader to sell; and that is Boston Scientific, The Limited, and Wright-Patterson Air Force Base. However, Facebook chose not to pursue third-party discovery of those parties or any other parties related to the offer to sell. Even though they had subpoenaed The Limited in the case during the discovery, they withdrew the subpoena though they never made an attempt to get this type of information.

Finally, with respect to demonstrations of the Leader-to-Leader product, Leader provided all documents relating to the demonstration of that product last year as well. Facebook chose not to take any third-party discovery relating to those demonstrations; and that is what we were talking about earlier in this case was is it public demonstrations or not.

Now, the recent discovery of the six entities that Facebook took, five of them confirm that Leader insisted on confidentiality. They all signed the NDAs, and they also confirm that Leader-to-Leader was not ready for sale in 2002. They weren't selling a product. They didn't have one done.

Facebook hangs its hat pretty much on the testimony of their former counsel, Benjamin Zacks, who is an adverse witness to Leader. They're in active litigation against each other. Even as an adverse witness, Mr. Zacks

confirmed that all the presentations of the technology were general in nature; and you can see that in Exhibit B of our letter brief.

Nothing was presented without understanding that there could be confidential nature of the disclosures; and Leader did not offer to sell any products as far as he was aware -- I mean the Leader-to-Leader product because it wasn't ready to be sold in 2002. That testimony was unambiguous. He did testify that some people did not sign NDAs; and we have shown the Court that he was simply wrong about that, the people he identified. They did, in fact, sign NDAs.

And just remind the Court, the NDAs, they were never asked for in discovery, there are no claims ever alleged during discovery that would make the NDAs relevant, and they're only relevant to our defenses.

Facebook's position that confidential agreements are evidence of nonconfidential disclosures are just a non sequitur.

In this case, Facebook has taken or they have issued over 70 subpoenas to 50 different entities. 27 of those subpoenas are for depositions. In the meet and confer we had before this call with Your Honor, we asked them to actually give us what kind of discovery do they want and give us the limit of what they want, who they want to take,

so that we can actually give an informed decision. They couldn't tell us. Their letter says there are potentially hundreds of third-party witnesses they would be interested in taking discovery from.

I don't need to remind the Court that the Rule 30 limit of 10 depositions was put there for a reason; and the reason being it would be cost effective in this type of discovery dispute. Facebook has blown well past the 10 depositions. They want to take obviously hundreds of more depositions, and they can absolutely spend Leader to oblivion. There is no basis for them to take additional discovery. They had the presentation, they had the sales information, they had the demonstrations. We don't think that any more discovery is necessary, and we don't believe that a further delay of this trial is necessary either.

Thank you.

THE COURT: Okay. Thank you.

Ms. Keefe.

MS. KEEFE: Just a couple of things, Your Honor.

The first thing. I did forget to mention that we also need a privilege log for the materials that Leader has withheld from Mr. Zacks's production. They've given no reason other than the fact that it would be, you know, a lot of work for them, and the fact that maybe some of the documents weren't relevant; but Mr. Zacks indicated that he

thought there was no privilege in these documents and that they were responsive to the subpoena. So if Leader is withholding them, we need a privilege log showing why they're being withheld and what the basis is for their claim of privilege.

Regarding Facebook's knowledge of any of these materials, Your Honor has already heard the argument from us; but, absolutely, we could not have known about these materials. We would not have known about them absent the NDAs that were late produced indicating to us just how many people received these demonstrations.

There is actually a case, Your Honor, System Management -- that I found after we submitted our letter, ***System Management Arts v Avesta Technologies***, 87 F.Supp. 2d 258, which also talks about the fact that beyond any single individual offer for sale or public demonstration, part of looking at 102(b) is how many public demonstrations or how many demonstrations there were and the totality of the circumstances to see exactly how public the demonstration was.

There is another case, ***Articulate v Apple***, 53 F.Supp. 2d 62, which discusses the need to considered the totality of the circumstances in light of the various policies underlining public use bars and, specifically, cites the number of people to whom an invention or product

embodying the invention was disclosed.

And so, Your Honor, it's not a matter of any one individual demonstration, although those are also helpful, but also a matter of how many times this demonstration was given that goes to the notion of how public these demonstrations were or how much the jury can imply that in fact there were offers to sell given the sheer volume of presentations that were made.

THE COURT: Okay. Thank you, counsel. I'm prepared to rule on this discovery dispute.

With respect to Facebook's request to reopen discovery and continue the trial date for perhaps 60 days, that request is denied. The Court finds that in the totality of circumstances, including the number of discovery disputes that have preceded today and the discovery that has been given on issues relating to Facebook's defenses, including relating to offers to sell and the related defenses, the Court concludes that Facebook has had sufficient discovery to assess the merits of these defenses and to put on these defenses. The Court is not persuaded that there is any justification here to reopen discovery and to delay trial at this very late date.

The one relief that the Court will give to Facebook is the Court is directing and ordering that Leader produce a privilege log, logging the withheld Zacks documents,

any that have been withheld on the basis of privilege and to do so within seven days, so that would be next Friday.

Leader, as the party asserting privilege over those documents, does have the burden of establishing at least a prima facie basis for the assertion of privilege; and the way to do that, of course, is through a privilege log.

So that takes care of the pending discovery dispute. I do want to, at this time, note a few other matters.

First, as I trust that the parties will have seen, there were some rulings that were issued yesterday. First, at D.I. 558, Judge Farnan overruled objections of the parties that were pending to certain earlier discovery rulings. And then at D.I. 559, the Court granted in part and denied in part Facebook's motion for leave to amend its counterclaims and affirmative defenses.

Let me now tell you some things that I think will help focus you as you prepare for trial and for the pretrial conference scheduled for next Thursday, July 1st.

The first of those is that the Court has decided in the exercise of its discretion to separate certain issues from the trial that will begin on July 19th pursuant to Federal Rule of Civil Procedure 42(b) which allows the Court to separate issues for trial. To further convenience,

efficiency, economy and to avoid prejudice, the Court has decided that the following issues will be separated and will not be tried at the July 19th trial. Those issues that are being separated are:

First, Leader's claim of willful infringement.

Second, Leader's claim for damages and injunctive relief.

Third, Facebook's false marking counterclaim, And,

Fourth, Facebook's counterclaim and affirmative defense of inequitable conduct.

All of those matters will be separated and will be tried at a later date to be determined following the conclusion of the July 19th trial. So the July 19th trial will be limited to issues of infringement and invalidity of the patents and the remaining defenses, counterclaims of Facebook that I have not ordered separated.

As a consequence of the decision to separate out certain issues for separate trials, a number of the pending motions are going to be, and hereby are, denied without prejudice, to be renewed at a later date subsequent to the July 19th trial. Specifically, those motions that are here by denied without prejudice are:

First, Facebook's Motion For Summary Judgment No. 2 of Non-Infringement and No Damages, which is D.I. 385.

Second, Facebook's Motion For Summary Judgment No. 4 of No Willful Infringement, which is D.I. 394.

Third, Leader's Motion For Summary Judgment of Facebook's False Marking Counterclaim, which is D.I. 395.

Then turning to the motion in limines:

Facebook's Motion in Limine No. 4, To Preclude Evidence Or Argument Relating to Damages From Internal Use of Accused Systems By Facebook Employees, D.I. 412.

Facebook's Motion in Limine No. 8, To Preclude Leader From Referring to Or Introducing Any Evidence Relating to Any Alleged Acts of Hacking Or Unauthorized Access By Facebook or Mark Zuckerberg, which is D.I. 412.

Facebook's Motion in Limine No. 9, To Exclude Evidence Or Argument That Mark Zuckerberg Copied Leader's White Papers -- I'm not sure I have the D.I. numbers correct -- okay, which I guess is also D.I. 412.

And we'll get this all out in a written order, counsel.

So Facebook Motion in Limine No. 9 is denied without prejudice.

Facebook's Motion in Limine No. 11, to preclude references to Hurricane Katrina and Terrorism Over At Virginia Tech, D.I. 412.

Facebook's Motion in Limine No. 12, To Include Testimony and Evidence of Advice of Counsel As a Defense to

Facebook False Marking Counterclaim, also D.I. 412.

The following Leader motions are also denied without prejudice:

Leader's Motion in Limine No. 3, To Exclude Evidence of Facebook's Settlement Agreement and Expert Testimony Regarding Potential Design-Arounds Or Noninfringing Alternatives, which is D.I. 419.

Leader's Motion in Limine No. 7, To Exclude References to a Potential Injunction, which is D.I. 423. And,

Also Leader's Daubert Motion to Exclude the Testimony in Its Entirety of Facebook's Experts, James Hughes and Kimberly Felix, D.I. 426, also denied without prejudice.

A couple of other matters. Pending before the Court is D.I. 377, Facebook's Motion For Redaction of Electronic Transcript of Hearing Dated April 9th, 2010. That motion is hereby denied.

The Court has reviewed Facebook's proposed redactions and does not find that any of what is proposed to be redacted discloses confidential information under the confidentiality protective order and, in any event, sees no basis to protect or keep from the public the information that Facebook proposes to redact.

We will certainly be talking about the proposed

pretrial order in much greater detail on Thursday when we're all together, but there is one matter I wanted to point out. The parties had proposed that they will have a meet-and-confer procedure every night following trial in which they'll exchange certain e-mails and have a teleconference and then present unresolved objections for the Court to address in the morning before each trial day.

The Court does not intend to permit that procedure. I believe that would allow important disputes to linger too long and interfere with the orderly and inefficient trial process which is especially necessary when a jury is involved.

Other than true emergencies or something that truly could not be anticipated, the Court's intent is to decide these matters prior to the start of the trial. So we will work together and the parties will meet and confer as much as is necessary over the next several weeks so that we can be in a position to decide these matters at the pretrial conference on July 1st.

I am, and hereby do, schedule a second pretrial conference for Friday, July 16th at 10:00 a.m. That's the last business day before we begin trial on Monday the 19th. So we'll meet again next Thursday, and then we'll meet as well on the morning of July 16th at 10:00 a.m.; and again the intent is that we will resolve these issues no later

than that July 16th conference.

As I'd said, I will get a written order out for you that embodies the decisions that I have given you today and then we will look forward to seeing all of you next Thursday morning.

Is there anything further that needs to be discussed at this time, Ms. Keefe?

MS. KEEFE: Your Honor, just one question. You mentioned that Summary Judgment No. 2 was denied without prejudice? Summary Judgment No. 2 had to do with mini auction, which is a non-infringement issue. Was that a mistake.

THE COURT: It may have been. Just bear with me a minute, please.

MS. KEEFE: Sure.

(Pause.)

THE COURT: Thank you for raising that, Ms. Keefe.

You have thrown a lot of stuff at us, you will recognize.

MS. KEEFE: I do, Your Honor. Of course.

THE COURT: My recollection is that there were two issues in that motion. One went to infringement and one went to damages, and my intent is to deny without prejudice the portion of the motion that goes to damages but not the

portion that goes to non-infringement. So I will attempt to word that more carefully in the written order that I get out, but that was the intent.

MS. KEEFE: Thank you, Your Honor.

Similarly, with respect to the summary judgment motion, is Your Honor contemplating setting a date for hearing on the remaining motions for summary judgment?

THE COURT: Yes. Those are on the table for next Thursday at the pretrial conference.

MS. KEEFE: Thank you, Your Honor. Does that mean we should be prepared to argue them next Thursday at the pretrial conference?

THE COURT: If you wish to be heard, you should be prepared.

MS. KEEFE: Thank you.

THE COURT: I'm not promising you I'll hear you on all of them but you should be prepared to address them, if you wish to do so.

MS. KEEFE: I absolutely understand. I appreciate that, Your Honor. Thank you.

THE COURT: Mr. Andre.

MR. ANDRE: Your Honor, just a couple issues.

With regards to the summary judgments, obviously, we followed the procedure set by Judge Farnan. We just put the material issues of disputed facts, and we didn't

actually brief out the oppositions thoroughly because that was Judge Farnan's instructions. I assume that if there is anything that would be taken into consideration, we have further opportunity to brief out the opposition properly?

THE COURT: I'm certainly aware of how we got to where we are, and if I need further briefing on anything, I will let you know that. And if there is any pending matter that you are requesting leave to further brief, you should be prepared to address that at next Thursday pretrial conference.

MR. ANDRE: And then with respect to the motions that you are denying without prejudice, Your Honor, one that you didn't mention was Facebook's Daubert Motion No. 3, which was to preclude our damages expert. I assume that since damages are being bifurcated from the trial that that was one that would be denied without prejudice as well?

THE COURT: I think you are right. I think that was probably an oversight. And, of course, we'll take another look at that as we prepare the written order for you.

MR. ANDRE: And then the last thing is you have given us seven days to prepare a privilege log document to Mr. Zacks, test and control. To the extent that we are not able to get those copies from him, if he is, for whatever reason, not cooperative with us in giving us those documents, can we come back to the Court and ask for an extension of

that time?

THE COURT: If it turns out to be something beyond your control, yes.

MR. ANDRE: Okay. We'll try to see if he will send the documents to us so we can do the privilege log. If he refuses to do so, we can try to -- I don't know if we can fly someone there to Ohio to do it, or ...

THE COURT: Is there anything else, Mr. Andre?

MR. ANDRE: I think that is it, Your Honor.

THE COURT: Okay. Thank you, counsel. We will see you next Thursday. Good-bye.

(Telephone conference ends at 10:03 a.m.)