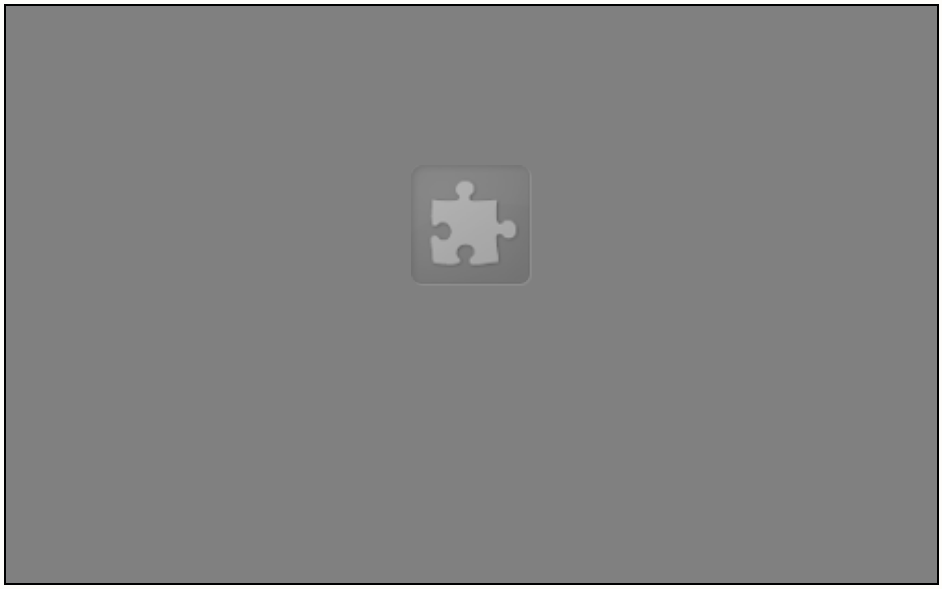
Origin of Facebook's technology?

Original *Leader v. Facebook* trial analyst. Search indexes other related sites

Donna Kline's interview with Leader CEO Michael McKibben



The fight goes on. Click here to read Leader's Federal Circuit Opening Brief and click here to read Donna Kline's blog that includes an eyewitness report from the Federal Circuit Appeal Hearing, including the Facebook appeals attorney's apology to his client.

Sunday, December 25, 2011

Facebook's "clear and convincing" burden of proof in *Leader v. Facebook*

OPINION: One blogger's perspective

If Facebook met its burden, an ill-wind blows over innovation; offer-blocking NDA language is just one piece of evidence fatal to Facebook

December 26, 2011—All the appeal briefs are all in. The next step in *Leader v. Facebook* is the oral argument in this patent infringement trial now on appeal at the Federal Circuit Court of Appeals.

Understanding Facebook's trial arguments are like peeling an onion. The sealed trial arguments are finally seeing the light of day and are as discombobulated as they

***Leader Technologies, Inc. v. Facebook, Inc.*, 08-cv-862 (D.Del. 2008)**

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seemed. Leader's favorable verdicts on infringement of 11 of 11 claims and no prior art are unlikely to be changed given the volumes of evidence on both sides. Put another way, the engine running Facebook is Leader's invention.

Facebook's lone trial victory for "on sale/public disclosure bar" cast a light on the unseemly underbelly of our jury system—it reveals how Cooley Godward attorneys intent on fooling a jury with "dark arts" can frustrate justice.The layers of this onion include: (a) a new federal judge's first jury trial; (b) adding the on sale bar claim *after* the close of discovery, thus preventing Leader from being able to prepare its defenses; (c) a flip-flopping Facebook expert witness presenting bad science; (d) hocus-pocus with a jury binder; (e) exploiting jury confusion over esoteric and intertwined legal concepts; (f) testimony taken out of context; (g) inventor-bashing; (h) video snippet gaming; (i) questionable uses of a jury focus group; (j) missing documents; (k) no corroborating testimony; (l) no source code; and (m) obsequious counsel.

See Facebook's trial conduct.*See* also Facebook's "court room theater", Facebook's "I'm tired" tactic, No evidence? No problem. Fabricate it., Missing Facebook Documents, Expert witness practices "dark arts", Facebook's jury binder innuendo, Patent Office records disprove Facebook, Mark Zuckerberg used Leader white paper to build Facebook, and American Innovation is on the line.

Layperson's smoking gun?

In all of Facebook's machinations, is there a smoking gun from a layperson's perspective? The answer is yes. Leader NDAs (nondisclosure agreements, also known as confidentiality agreements). Facebook used the NDAs to mislead the jury as to their multiple purposes. In addition to confidentiality protections, Leader's NDAs had no-reliance clauses which are fatal to Facebook—clauses which the jury would not understand and the trial court missed as a matter of contract law.

According to Leader, they could not have offered the invention early because it did not exist prior to the filing of their provisional patent application. If Leader's story is true, then they must prove a negative. Proving a negative is always difficult. How do you prove you don't beat your children when there's evidence you got angry at them once? How do you prove you don't steal from your employer, when there's evidence that you once lost receipts in the wash? The "clear and convincing" standard is intended to stop *innuendo* from holding sway over the requirement for hard evidence. Therefore, Facebook's burden was to prove their accusations clearly and convincingly; beyond simply yelling "liar!

Nonetheless, it was not Leader's burden to prove that they *did not* offer the invention for sale. Instead, it is Facebook's "clear and convincing" burden to prove with hard evidence that the invention *was* offered for sale. Without such hard evidence, Facebook resorted to the "dark arts" to fool the jury with deceptive lawyering. *See* Leader's lawyer's dismantle Facebook's response brief, ¶2, "Muckraking."

Leader's NDA's trump all of Facebook's machinations. Facebook mocked these secrecy documents at trial—focusing the jury on the NDA dates on these signed ***promises*** as the only way to protect secrets (reminiscent of the Wizard of Oz's deception: "Pay no attention to that man behind the curtain."). Such NDA dates do not prove whether or not disclosures were made in any given meeting. Neither do they prove if verbal confidentiality agreements were in place, nor do they prove whether Leader used other means to protect secrecy, like need-to-know policies and the splitting of tasks. *See U.S. v. Lange* (***deeds***).[1]

Leader NDAs contained a "no-reliance" clause that is fatal to Facebook—the parties agreed that no offers for sale could be construed from their discussions. A lay jury unfamiliar with contract law can be excused for missing this, but the trial court should

Other Research Resources for Leader v. Facebook

1. *Donna Kline Now!*
2. *Americans For Innovation* Blog
3. *Americans For Innovation* Docs
4. IP Blogger PPRATT

Opinion

This is an opinion blog. Free Speech and Freedom of the Press are protected by the First Amendment of the U.S. Constitution and other local, state, national and international laws. Every reasonable effort has been made to insure the accuracy of the information presented. As with all opinion, the information contained in this blog should not be relied upon without independent verification

not have. Leader's post-trial arguments highlighted the no-reliance clause. It's basic contract law. Restatement (Second) Contracts § 21 (1981) (agreement not to be legally bound). That is, if knowledgeable parties agree that nothing they discuss will have any legal effect prior to entering into a written agreement, then that agreement *blocks* anything discussed from being construed as a commercial offer for sale. End of story. The on sale bar verdict is wrong as a matter of law.

Leader's NDA "no-reliance" clause ***blocked*** offers for sale contractually

While an NDA's main focus is secrecy, NDAs can contain other contractual elements, and Leader's NDAs had a "no-reliance" clause that explicitly **blocks** offers for sale. It says (see also Fig. 4 below):

Table 1: Leader's NDA, Paragraph 5:

> *See* WPAFB – Douglas W. Fleser NDA (no-reliance). Leader JMOL, Doc. No. 627-09, ¶5;
>
> *See* WPAFB – Vincent J. Russo NDA (no-reliance). *Id.*, Doc. No. 627-19, ¶5;
>
> *See* WPAFB not a "'buyer/seller' relationship." *Id.*, Doc. No. 627-11, p. 17;
>
> *See* Facebook's Hail Mary attempt to discredit the Vincent J. Russo NDA in its Red Brief. New "Phantom NDA" Debunked;
>
> *See* The Limited – Len Schlesinger NDA (no-reliance). *Id.*, Doc. No. 627-20, ¶5.

Fig. 1 - Doc. No. 627-09 **WPAFB (Douglas W. Fleser) NDA #1** containing a "no-reliance" clause that **blocks** offers for sale contractually.

Fig. 2 - Doc. No. 627-19 **WPAFB (Vincent J. Russo) NDA #2** containing a "no-reliance" clause that **blocks** offers for sale contractually.

Fig. 3 - Doc. No. 627-20 **The Limited (Len Schlesinger) NDA** containing a "no-reliance" clause that **blocks** offers for sale contractually.

and should be considered the sole opinion of the writer, author or commenter.

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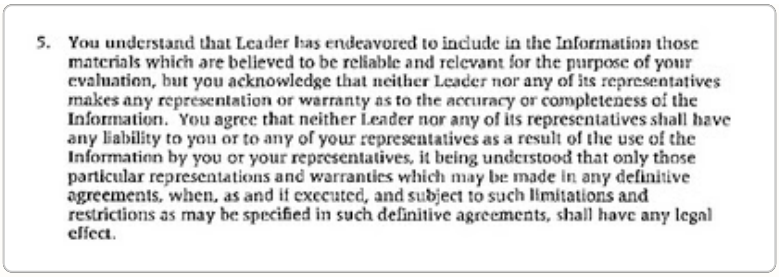


5. You understand that Leader has endeavored to include in the Information those materials which are believed to be reliable and relevant for the purpose of your evaluation, but you acknowledge that neither Leader nor any of its representatives makes any representation or warranty as to the accuracy or completeness of the Information. You agree that neither Leader nor any of its representatives shall have any liability to you or to any of your representatives as a result of the use of the Information by you or your representatives, it being understood that only those particular representations and warranties which may be made in any definitive agreements, when, as and if executed, and subject to such limitations and restrictions as may be specified in such definitive agreements, shall have any legal effect.

Fig. 4 — Leader NDA ¶5—"No-reliance" clause (see also Table 1 above) where the parties agree not to be legally bound by their discussions prior to entering into a definitive agreement. In other words, they agreed in advance that nothing they discussed could have any legal effect prior to a definitive signed agreement. See Restatement (Second) of Contracts § 21 (1981)(agreement not to be legally bound). This no-reliance clause is contained in the multiple WPAFB and The Limited NDAs. In effect, the no-reliance clause mutes Facebook's on sale/public disclosure bar claim since the parties agreed that nothing they discussed could be interpreted as a contractual offer. The other Facebook accusation of an offer for sale was for Boston Scientific where a similar no-reliance agreement was in place. The other "evidence" is a couple of internal Leader emails about the first Boston Scientific meeting attended by Professor James P. Chandler—one of the world's foremost authorities on intellectual property whom Leader had engaged as counsel and a director. Facebook never challenged the Leader NDA "no-reliance" clauses. This is fatal.

Contracts (and contract offers) are a "meeting of the minds." They're situations where a "willing seller" and a "willing buyer" come to terms and form a binding relationship by the affirmative acts of the parties. If the parties choose, they can agree to exclusionary no-reliance NDA language like "nothing discussed shall have any legal effect" and "solely for evaluation" to *explicitly* avoid having anything discussed from being construed as an offer or a sale. Leader did that consistently, and no Facebook evidence disproves this uniform practice.

Congressional testimony dramatically refutes Facebook's Hail Mary attempt to present Vincent J. Russo's signed NDA as fabricated. Although Facebook claims that Mr. McKibben lied in saying that Mr. Russo was associated with WPAFB, Congressional testimony shows that Mr. Russo was indeed the Executive Director of the Aeronautical Systems Center at Wright-Patterson on April 2, 2001, a fact that Facebook could easily have confirmed. *See* New "Phantom NDA" Debunked.

The no-reliance clause in Leader's NDA says the parties are going to explore potential business relationships, but that nothing discussed can be construed as a sale, or even an offer for a sale (no legal effect) (even if numbers and terms are explored). In other words, until the parties have a *signed* contract, nothing they discuss is binding at any level of contract law. It appears the jury and the Court missed this matter of law completely.

See Group One, Ltd. v. Hallmark Cards, Inc., 254 F.3d 1041,1047, 59 USPQ2d 1121, 1126 (Fed. Cir. 2001) ("As a general proposition, we will look to the Uniform Commercial Code ('UCC') to define whether . a communication or series of communications rises to the level of a commercial offer for sale.") citing MPEP 2133.03(b).

"No legal effect" and "solely for evaluation" meant offers for sale could not happen by mutual agreement; therefore Facebook's willing-seller / willing-buyer theory is debunked

Leader highlighted the "no-reliance" clauses in their JMOL (Judgement as a Matter of Law) stating:

> "In addition, The Limited's executed NDA contained a "non-reliance" clause that made it clear that any Leader information exchanged between the parties prior to a formal written agreement shall have no "legal effect." Fig. 3; *See* also *Linear Tech. Corp. v. Micrel, Inc.*, 275 F.3d 1040,1050

(Fed. Cir. 2001)("such communications cannot be considered offers, because they do not indicate LTC's intent to be bound, as required for a valid offer")(citing Restatement (Second) of Contracts § 26 (l981)("A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent."). Leader JMOL 17.

Another provision of the Restatement (Second) of Contracts § 21, cmt. (b) reinforces the concept of an "agreement not to be legally bound."

The no-reliance NDA clauses mute Facebook's on sale bar argument.

Boston Scientific's NDA no-reliance language restricted use of the information "solely" for evaluation

The Boston Scientific NDA also included similar *limiting* no-reliance language. Its purpose was *solely* to explore mutual interests. Merriam-Websters defines "solely" as "exclusively." In other words, the information shared could exclusively *not* be used to define a contract that could be construed as an offer. Such terms *blocked* use of the information for anything other than evaluation, and is another form of no-reliance clause. This evidence is also fatal to Facebook.


Boston Scientific

Fig. 5 - Boston Scientific NDA states that the Leader information was to be used "solely" for evaluating future interest. Such limiting no-reliance language blocks the discussions from "rising to the level of a commercial offer for sale" pursuant to Group One. DTX-736. See Restatement (Second) of Contracts § 21 (1981) (agreement not to be legally bound). Doc. No. 651-13.

Another smoking gun? Facebook's Delaware jury focus group unmasked?

At the bottom of page 5 of Facebook's ostensible Boston Scientific evidence is yet another smoking gun fatal to Facebook. It dates that Leader2Leader evidence at sometime after "July 16, 2003 . . . PATENT PENDING" (p. 5, fn., line 4). That is seven months *after* the critical date. The date is buried in the footnote. This appears to have been a Facebook "dark arts" attempt to confuse the jury with a jumble of dates, esoteric law, and brand name references.

Facebook appears to have attempted to associate this *later* use of the Leader2Leader brand name—after July 16, 2003—with the first meetings ten months *earlier*—before the invention was ready. This document confirms Leader's trial testimony. The trial record shows no discussion of this date, but as a matter of law, the date invalidates this alleged Facebook's evidence.

If Facebook believed this version of Leader2Leader proved on sale bar, then why didn't they produce any source code? More importantly, why did they present this evidence at all since: (a) the NDA prohibits offers, and (b) closer scrutiny of the document date supports Leader? The evident answer is obfuscation—its effect on the jury's "belief" was more important than the truth. Reliable sources say this "belief effect" was tested on a jury focus group in Delaware organized by Facebook seven months before trial. Doc. No. 651-13, p.5, fn., ln. 4 ("July 16, 2003").

[Editor: If you were a participant in this Facebook focus group, please provide comments on that experience either here or on other blogs covering this case. Please identify the date, time, location and details.

Jury focus groups intent on deceiving a jury are a breach of the Federal Rules of Evidence (*tampering* with evidence), Federal Rules of Civil Procedure (*Rule 11* "improper purpose") and Rules of Professional Conduct (*Preamble*: "dishonesty, fraud, deceit or misrepresentation"). Such lawyer conduct is harmful to our jury system and should be reported. Sources indicate that the participants in the focus group signed a confidentiality agreement, however, according to the District of D.C. Appeals Court they are not bound by agreements where "manipulation of the truth-seeking process" occurred. *See In re Sealed Case*, 676 F. 2d 793 (D.D.C. 1982) at 807 (confidentiality agreements cannot "be used as a tool for manipulation of the truth-seeking process.") Anonymous comments are welcomed.]

[Editor: After the original post of this blog we received an anonymous report from a participant in the Facebook focus group/mock trial. The credibility has been verified. See the Comments below.]

Leader's preeminent legal counsel oversaw protections

As if the NDAs were not enough, the first Boston Scientific meeting was arranged and attended by world-renowned intellectual property law Professor James P. Chandler, President of the National Intellectual Property Law Institute. The Congressional Record contains many references to Professor Chandler as one of the nation's preeminent advisers to Congress, the White House, and the Judiciary in the areas of trade secrets, economic espionage and intellectual property. *See* Footnote 2 below.[2]

Given Professor Chandler's participation, credulity is stretched to think that any disclosure rising to the level of a commercial offer for sale would have occurred during Professor Chandler's oversight of those first meetings. Facebook's accusation becomes frivolous in light of the fact that they produced no hard evidence like source code to prove their accusation. All the evidence produced by both Facebook and Leader shows Leader's consistent marking of its documents as "Proprietary & Confidential," their engagement of respected intellectual property protection experts, a need-to-know practice, in addition to the testimony of both inventors who said that the invention could not have been offered for sale when alleged since it was not ready. Nothing in the record beyond jury disbelief founded on innuendo supports Facebook. Leader JMOL, Doc. No. 627-12, 13, 14, 27.

No source code; no proof

The offer-blocking NDA language notwithstanding, Facebook's burden was to prove that the products alleged to have been offered for sale to WPAFB, The Limited and Boston Scientific contained *all* the elements of the invention. An offer that lacks even one of the elements fails to meet the on sale/public disclosure bar standard. No source code was proffered, even though Facebook was given access to Leader's source code. Merely showing a few documents that make reference to the Leader2Leader brand name proved nothing, but appear to have hoodwinked the jury.

Software products using the same brand name change over time. Microsoft Word in 2009 is a different product from Microsoft Word in 2002. Showing changes in the *source code* is the only way to prove innovative elements in software. *See* Leader's lawyers dismantle Facebook's response brief, Fig. 8.1

All the alleged offers for sale were *blocked* by agreement (as matters of contract law); therefore, the on sale/public disclosure bar verdict must be overturned

With Facebook's allegations of offers debunked as a matter of law, the on sale/public disclosure bar verdict must be overturned.

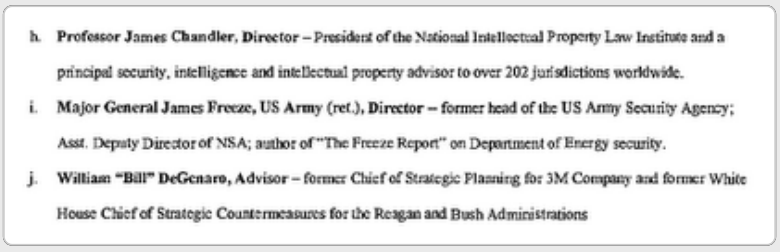
If Facebook prevails in the face of its deplorable trial conduct, an ill-wind blows over the face of patent law in America. Will the wind blow in the direction of *Microsoft v. i4i* ("Supreme Court Affirms Strong Presumption of Patent Validity") in support of the "clear and convincing evidence" standard? Or, will it blow ambiguously in the opposite direction? Time will tell.

* * *

Footnotes:

[1] *U.S. v. Lange*, 312 F.3d 263 (2002) at 266 (secrecy can rely upon *deeds* (splitting of tasks) just as effectively as NDA *promises*). The *Leader v. Facebook* trial record shows no Facebook assessment of Leader's *deeds*, but the evidence shows *substantial* Leader attention to secrecy precautions, especially in their choice of directors who are recognized leaders in the fields of trade secrets, security and intellectual property protection, including **Professor James P. Chandler** and **Major Gen. James E. Freeze**, US Army (ret.). *See* WPAFB white paper evidence. *See* also footnote 2 below.

Most of the following evidence are citations to the Congressional Record which may be judicially noticed during appeal. *See* Fed. R.Evid. Rule 201 (judicial notice may be taken at any time of adjudicative facts and facts not subject to reasonable dispute).



h. **Professor James Chandler, Director** – President of the National Intellectual Property Law Institute and a principal security, intelligence and intellectual property advisor to over 202 jurisdictions worldwide.

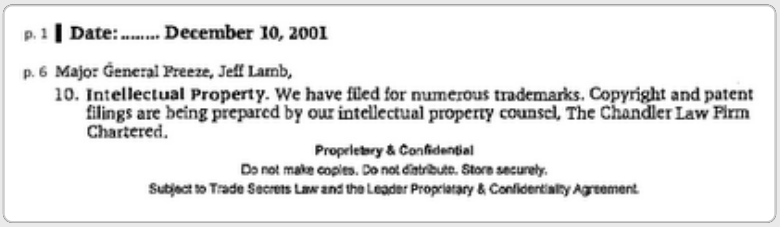
i. **Major General James Freeze, US Army** (ret.), **Director** – former head of the US Army Security Agency; Asst. Deputy Director of NSA; author of "The Freeze Report" on Department of Energy security.

j. **William "Bill" DeGenaro, Advisor** – former Chief of Strategic Planning for 3M Company and former White House Chief of Strategic Countermeasures for the Reagan and Bush Administrations

Fig. 6 - Page 6 of Leader's Wright-Patterson White Paper that identifies **Professor James P. Chandler, President of the National Intellectual Property Law Institute**, **Major General James Freeze, US Army (ret)**, and **William "Bill" DeGenaro** as security and intellectual property advisers to Leader. This evidence was actually submitted by Facebook, but far from supporting Facebook, it shows that Leader engaged respected security advisers to protect its intellectual property. This evidence confirms Leader's "deeds" efforts pursuant to *Lange* to protect its inventions. **Facebook did not perform a *Lange* deeds test regarding Leader's security practices**.

Facebook attempted to use this white paper as evidence for on sale bar, even though: (a) WPAFB made a "no-reliance" agreement blocking offers; (b) WPAFB's research rules also blocked "buyer/seller" relationships; (c) Facebook and the district court misconstrued "fully developed" as a development instead of a financing statement; (d) numerous Leader products were being discussed

with WPAFB that were not differentiated by Facebook, (e) no expert testimony was proffered by Facebook, (f) no WPAFB deposition testimony was proffered by Facebook, (g) no engineering or source code evidence was proffered by Facebook, and (h) the proposal was wholly experimental. All this evidence is fatal to Facebook. Doc. No. 627-13, DTX-179, p. 6.



p. 1 **Date:..... December 10, 2001**

p. 6 Major General Freeze, Jeff Lamb,

10. **Intellectual Property.** We have filed for numerous trademarks. Copyright and patent filings are being prepared by our intellectual property counsel, The Chandler Law Firm Chartered.

Proprietary & Confidential
Do not make copies. Do not distribute. Store securely.
Subject to Trade Secrets Law and the Leader Proprietary & Confidentiality Agreement.

Fig. 7 - Items of a Leader Report, pp. 1, 6 discussing the involvement of Leader directors **Major General James E. Freeze** and **Professor James P. Chandler**. This evidence was also submitted by Facebook, but like the white paper in Fig. 6, this evidence supports Michael McKibben's testimony that Leader engaged in substantial secrecy protection policies and procedures based on the advice of respected security professionals. This evidence also shows the "Proprietary & Confidential" trade secrets protection markings that appear on all of Leader documents. Such advisers and practices validate Leader's "deeds" in compliance with *Lange*, and are fatal to Facebook. Doc. No. 627-12, DTX-178, pp. 1, 6. *Graphic: composite.*

Fig. 8 - **Professor James P. Chandler**, former Leader Technologies Director, IP Counsel (*See* Archive.org "leader.com" 2001); President, National Intellectual Property Law Institute; Partner, Chandler Law Firm Chartered; Professor Emeritus George Washington University; adviser to Congress on intellectual property matters including trade secrets, patents, economic espionage.

Fig. 9 - **James E. Freeze**, former Leader Technologies Director (*See* Archive. org "leader.com" 2001); Chairman of Pinkerton Government Services; former head of the U.S. Army Security Agency; former Asst. Deputy Dir. of the National Security Agency (NSA); author of "The Freeze Report" on national laboratory security.

[2] Congressional testimony of **Professor James P. Chandler**, President of the National Intellectual Property Law Institute, and **Major General James E. Freeze**, U.S. Army (ret.), former head of the U.S. Army Security Agency and former Asst. Deputy Director of the National Security Agency. Both individuals were directors of Leader Technologies. *See* Figs. 8, 9.

Leader's secrecy *deeds* pursuant to *Lange* included reliance on the advice of former director **Professor James P. Chandler** whose congressional testimony and advice to the White House has included:

> (a) S.Hrg. 104-499 - Economic espionage: Hearings before the Select Committee on Intelligence, United States Senate, and the Subcommittee on Terrorism, Technology, and Government Information of the Committee on the Judiciary, United States Senate, 104th Congress, Second Session, Feb. 28 (1996), Y 4.IN 8/19:S.Hrg. 104-499, Serial No. J-104-75 (Testimony of Louis Freeh acknowledging Professor James P. Chandler, p. 10). Last accessed Jan. 9, 2012 from Archive.org USA Gov. Doc. Call

No. 39999059839439, ABSTRACT, PDF Version (5.3 MB), TXT Version (291KB), Online Version (134KB), MARCXML Catalog.

(b) H.Rept. 104-784 - MOORHEAD-SCHROEDER PATENT REFORM ACT: Hearings on H.R. 3460 before the Subcommittee on Courts and Intellectual Property of the Judiciary, June 8, 1995 and November 1, 1995, 104th Congress, Y 1.1/8 (1996) (citing Testimony of Mr. James Chandler, President of the National Intellectual Property Law Institute, Washington D.C., p. 39), GPO ABSTRACT, PDF Version (6 MB), TXT Version (174KB). GPO Authenticity Certificate.

(c) H.Rept. 104-788 - ECONOMIC ESPIONAGE ACT OF 1996: Hearings on H.R. 3723 before the Subcommittee on Crime of the Committee on the Judiciary, May 9, 104th Cong., Y 1.1/8 (1996) (citing Testimony of Dr. James P. Chandler, p. 8), GPO ABSTRACT, PDF Version (6 MB), TXT Version (174KB). GPO Authenticity Certificate; *See* also H.Rept. 104-879.

(d) H.Rept. 104-879 - Trade Secret Law and Economic Espionage: Hearings on H.R. 1732 and H.R.1733 Before the Subcommittee On Crime of the House Committee on the Judiciary, H.R. 359, 104th Congress, Y 1.1/8 (1996) (Testimony of Professor James P. Chandler, President of the National Intellectual Property Law Institute, p. 163, 167, 201), GPO ABSTRACT, PDF Version (740K), TXT Version (684KB). GPO Authenticity Certificate; *See* also H.Rept. 104-879.

(e) H.Rept. 104-879 - Patent Term: Hearings on H.R. 359 during Hearings on H.R. 1732 and H.R.1733 Before the Subcommittee On Crime of the House Committee. on the Judiciary, 104th Cong., Y 1.1/8 (1996) (Testimony of Professor James P. Chandler, President of the National Intellectual Property Law Institute, pp. 167-168), GPO ABSTRACT, PDF Version (740K), TXT Version (684KB). GPO Authenticity Certificate.

(f) H.Rept. 104-879 - Protection of Commercial Trade Secrets in US National Laboratories: Hearings on H.R. 359 Before the Subcommittee On Energy and the Environment of the House Comm. on the Judiciary, 104th Cong. (1996) (Testimony of Professor James P. Chandler, President, National Intellectual Property Law Institute, pp. 167-168), GPO ABSTRACT, PDF Version (740K), TXT Version (684KB). GPO Authenticity Certificate; *See* also H.Rept. 104-879.

(g) H.Rept. 104-887 - SUMMARY OF ACTIVITIES OF THE COMMITTEE ON SCIENCE U.S. HOUSE OF REPRESENTATIVES FOR THE ONE HUNDRED FOURTH CONGRESS: Hearings Changes in U.S. Patent Law and Their Implications for Energy and Environment Research and Development Before the Subcommittee on Energy and Environment of the Committee on Science, 104th Congress, May 2, 1996. Washington: U.S. G.P.O. (1997), Y 1.1/8 (Testimony of Dr. James P. Chandler, President, [N]ational Intellectual Property Law Institute, Washington D.C., pp. 176-177), GPO ABSTRACT, PDF Version (740K), TXT Version (684KB). GPO Authenticity Certificate.

(h) H.Rept 104-879 - REPORT ON THE ACTIVITIES OF THE COMMITTEE ON THE JUDICIARY of the HOUSE OF REPRESENTATIVES during the ONE HUNDRED FOURTH CONGRESS pursuant to Clause 1(d) Rule XI of the Rules of the House of Representatives, Trade Secret Protection for Inventors Should Not Be Abolished While Reforming Patent Law, Patent and Trademark Office

Corporation Act of 1995, United States Intellectual Property Organization Act of 1995: Hearings on H.R. 1659 and H..R. 2533 Before the Subcommittee On Courts and Intellectual Property of the House Comm. On the Judiciary, 104th Congress. Washington: U.S. G.P.O. (1996) (Testimony of Professor James P. Chandler, President, National Intellectual Property Law Institute, pp. 159-161.), GPO ABSTRACT, PDF Version (740K), TXT Version (684KB). GPO Authenticity Certificate.

(i) Y 4.J 89/1:104/30 - Patents Legislation : Hearings Before the Subcommittee On Courts and Intellectual Property of the Committee On the Judiciary, House of Representatives, 104th Congress, First Session, On H.R. 359, H.R. 632, H.R. 1732, and H.R. 1733, June 8 and November 1, 1995. Washington: U.S. G.P.O. (1996). Y 4.J 89/1:104/30, ISBN 0-16-052342-7, OCLC 34470448, 104 PL 308, 110 STAT 3814 (Testimony of Professor James P. Chandler, President, National Intellectual Property Law Institute, pp. III, IV, 349-354, PDF Version), FULL TXT Version of the Hearings; *See* also H.Rept. 104-879, GPO ABSTRACT, PDF Version (740K), TXT Version (684KB). GPO Authenticity Certificate.

(j) The White House, Office of the Press Secretary. (Jan. 18, 2001). President Clinton Names Eighteen Members to the National Infrastructure Assurance Council [Press release] (citing "Mr. James Phillip Chandler" [Professor James P. Chandler] head of "the National Intellectual Property Law Institute" and "Emeritus Professor of Law at the George Washington University" and "President of Chandler Law Firm Chartered," ¶14). Retrieved from National Archives and Records Administration <http://clinton6.nara.gov/2001/01/2001-01-18-members-named-to-national-infrastructure-assurance-council.html>.

> "The National Infrastructure Assurance Council (NIAC) was established by Executive Order 13010 on July 14, 1999 . . . to propose and develop ways to encourage private industry to perform periodic risk assessments on critical processes, including information and telecommunications systems." *Id.*

Common sense says that Professor Chandler would have been encouraging his then-current client, Leader Technologies, to practice these principles as the company developed its innovations. However, Leader was not given an opportunity to gather testimony from Professor Chandler and Major General Freeze because the trial court allowed Facebook to add its on sale/public disclosure bar claim after the close of discovery. While prejudicial amended claims are technically not permitted by the Rules, such trial court decisions are rarely, if ever, overturned on appeal. That's ashamed in this case. Facebook evidently learned something in their jury focus group that convinced them that they could use fabricated evidence to hoodwink the jury. *See* Jury transforms disbelief into evidence; No evidence? No problem. Fabricate it.; Facebook's' trial conduct; Facebook's "court room theater"; Facebook's "I'm tired" tactic; Missing Facebook Documents; Expert witness practices "dark arts"; Patent Office records disprove Facebook; Facebook's jury binder innuendo.

(k) Theodore R. Sarbin. "Computer Crime: A Peopleware Problem." Proceedings of a Conference held on October 25-26, 1993." Defense Personnel Security Research Center (1993). Doc. Nos. DTIC-94-7-18-001, AD-A281-541. (citing Professor James P. Chandler, National Intellectual Property Law Institute, pp. i, 2, 3, 5, 13, 14, 33-72). Accessed Jan. 12, 2012 . <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA281541>.

(l) James P. Chandler. "Patent Protection of Computer Programs." National Intellectual Property Law Institute (2000). Accessed Jan. 13, 2012 <http://www.nipli.org/docs/computer.pdf>.

Congressional testimony of **Major General James E. Freeze**, U.S. Army (ret.) includes the following; further reinforcing the evident fact that Leader took extraordinary "deeds" steps to protect the secrecy of its inventions pursuant to the *Lange*. *See* Fig. 9.

(a) H.Hrg. 106-148 - Hearing on the WEAKNESSES IN CLASSIFIED INFORMATION SECURITY CONTROLS AT DOE'S NUCLEAR WEAPON LABORATORIES, 106th Congress, Y 4.C 73/8 (2000) (citing "The 1990 Freeze Report" and Major General James E. Freeze, USA (ret.)," pp. 171, 172), GPO ABSTRACT, PDF version (6 MB), TXT version (174KB). GPO Authenticity Certificate.

"The [1990] Freeze Report" is actually mentioned in Leader evidence. The Leader evidence in Fig. 6 verifies Michael McKibben testimony and the Wright Patterson evidence that Leader exercised reasonable measures pursuant to the *Lange* deeds test to preserve secrecy. *See* Fig. 6 above.

(b) GAO/RCED-93-10 - Nuclear Security - Improving Correction of Security Deficiencies at DOE's Weapons Facilities, Report to the Chairman, Subcommittee on Oversight and Investigations, Committee on Energy and Commerce House of Representatives, Nov. 1992. U.S. General Accounting Office. GAO/RCED-93-10 Nov. 1992 (citing Major General James E. Freeze, p. 18). Accessed Jan. 11, 2012 from the U.S. Government Accounting Office <http://www.gao.gov/assets/220/217384.pdf>.

(c) Statement of John C. Tuck, Undersecretary of Energy, U.S. Department of Energy before the Committee on Energy and Commerce, Oversight and Investigations Subcommittee (Serial T91BB192), 100th Congress (1991) ("[Admiral Watkins] commissioned a study conducted by retired Army Major General James E. Freeze to review the broad area of safeguards and security"). Accessed Jan. 11, 2012 from the Federation of American Scientists <http://www.fas.org/irp/congress/1991_hr/h910424.htm>.

(d) Matthew L. Wald. "SECURITY GAP SEEN AT NUCLEAR SITES." *The New York Times*, Dec. 21, 1990 ("James E. Freeze, a retired Army major general who is a former deputy chief of the National Security Agency, called for major management changes"). Accessed Jan 11, 2012 <http://www.nytimes.com/1990/12/21/us/security-gap-seen-at-nuclear-sites.html>.

-END-

Posted by Patent Blogger 4 at 3:29 AM

4 comments:

Patent Blogger 4 January 26, 2012 at 9:53 AM

[Editor: This anonymous post was received from "Melissa in Delaware." This is the 1st half of Melissa's post, the second half follows. Melissa participated in a two-day Facebook mock trial where Facebook tested their use of a forged Interrogatory No. 9 and slivers of McKibben's deposition video, and learned that their innuendo played better with blue collar folk who seemed less discriminating.]

I just stumbled on this site and was blown away at this coincidence.

I live in Delaware and was paid $460 to attend a two-day "mock trial" along with about 70 people organized by Delaware Research Company on May 1-2, 2010 at the Riverfront Center, Wilmington, Delaware. I have been hired by them before for other focus groups and usually received about $60, so $460 got my attention. I was surprised at seeing 70+ people.

We all thought that lawyers for both Facebook and Leader made the presentations. We were uniformly surprised when it was all over that it was Facebook lawyers who had been making all the arguments. From my notes, Heidi Keefe and Mark Weinstein presented for Facebook and Michael Rhodes and a Ms. Keyes presented for Leader. No one acted as judge and we were given no instructions on the law or courtroom practice. Eric Jensen acted as a sort of moderator or administrator of the event. Jensen talked to us about the importance of deliberating on the issues, etc... he was a rather slick character.

During the second day we broke into 7-8 groups to assess the case. We were video-taped the entire time. The lawyers came in and out of our sessions and interrupted our discussions numerous times to ask us to talk more about this or that subject.

Facebook presented Leader as a desperate, greedy little Ohio company who sued Facebook as a way to get money. They showed us certain emails that made it sound that way to a non-salesperson, but the professionals in our groups said that the emails were just normal selling and fund raising lingo. This selling jargon really seemed to be significant to the blue-collar-types--they couldn't get past the idea that if he is selling, then he must be selling the secret sauce, regardless of the fact that we were shown nothing but words. No programming code. Nothing even remotely close to proof. (I work with computer programs daily and know the difference between pretty screens and words, and the unseen gears and pulleys underneath them. We were not shown any gears and pulleys of an invention.)

Reply

Patent Blogger 4 January 26, 2012 at 9:55 AM

[Editor: This anonymous post was received from "Melissa in Delaware." This is the 2nd half of Melissa's post, the first half is above. Melissa expresses regret at being "used" by Facebook. She said the professionals in the focus group uniformly sided with Leader who they believed was being "ripped off" by Facebook's infringement.]

The "Leader" attorney (Facebook's attorney Michael Rhodes) argued that Facebook as big business was screwing the little guy and thought nobody would catch them. This was persuasive until the Facebook lawyers got up and

painted McKibben as a desperate inventor who was lying to save his patent. This too seemed a very persuasive argument to the blue collar folks. No proof, just emotion.

Facebook showed us different small pieces of video of Michael McKibben's deposition which were all unflattering. That made me immediately suspicious of Facebook. While those snippets were unflattering (replete with poor lighting), I concluded it would not be fair to judge somebody based upon a couple of snippets of video. Case in point: Our former governor was skewered unfairly for a harmless, off-the-cuff comment about witchcraft. Using video deceptively is not a new tactic, and the amount of time Facebook spent on the McKibben video made me somewhat skeptical, but of course, we didn't know what they were hoping to do with it at the time. Had I known what they would be eventually used for I would have spoken out. (I know, they'll just say "you took our money.") Shame on me.

I don't want to make it sound like I am profiling, but I definitely saw a dividing line between the blue collar and white collar folks. Strange for me was that the blue collar folks sided with Facebook -- the big company, whereas the professionals sided with Leader and McKibben as the entrepreneur/inventor who was getting ripped off.

We were shown lots of dates for this or that other technology. I thought Facebook's presentations of their own technology were not done well, almost comic-book-like. I thought that was strange at the time that they would not do a better job of presenting their own technology. They showed us pictures instead of real stuff.

The afternoon of the second day the lawyers revealed that they were all from Facebook, which surprised us all. They asked many questions about their dress, demeanor, believability. We all thought that Michael Rhodes was pompous and "West Coast" and suggested he should be more relaxed. Overall, the other Facebook lawyers seemed believable enough. At the end we felt somewhat cheated at not meeting any of Leader's real attorneys. We thought we were being objective with two real sides of an argument.

I will check my notes when I get home to see if anything else stuck out at me. After reading this blog I see better what went on at Facebook's mock trial. Regarding Michael McKibben, Facebook was looking to discredit his character. I now realize that that part of the focus group data was used deceptively. For that I am ashamed that I allowed myself to be used to hurt a real American entrepreneur and inventor.

(By contrast, we were not presented anything about Mark Zuckerberg's character, which I also thought was a glaring omission given all the publicity about his hacker mentality (i.e., steal people's stuff).

Reply

▼ Replies

dave123 April 24, 2012 at 4:48 AM

New risk factors to its S-1, facebook ongoing patent battle with Yahoo

Risk factor (2) Fenwick’s failure to disclose s-1 conflict of interest Leader’s patent will invalidate many of Facebook’s patents Yahoo . zuckerberg stole from Leader Technologies Fenwick’s failed to

disclose this. Fenwick new of facebook when he was working for Leader Technologies

Risk factor (3) zuckerberg stole from Leader Technologies for Ceglia street-mapping contract and Facebook contract . you know of facebook (working at Leader's Technologies) like to say some-thing Fenwick . And you know how zuckerberg stole facebook and from who.

chris Hughes and eduardo Savrin and Dustin If a crime is being committed they have a duty to report it.

You wont internet freedom start with honesty and integrity

Reply

John Martin April 12, 2012 at 3:09 AM

Pretty good post. I just stumbled upon your blog and wanted to say that I have really enjoyed reading your blog posts. Any way I'll be subscribing to your feed and I hope you post again soon.

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