

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES,)
INC.,)
)
Plaintiff,)
) C.A. No. 08-862-JJF-LPS
v.)
)
FACEBOOK, INC., a)
Delaware corporation,)
)
Defendant.)

April 9, 2010
3:03 p.m.
Teleconference

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

APPEARANCES:

POTTER, ANDERSON & CORROON, LLP
BY: JONATHAN A. CHOA, ESQ.

-and-

KING & SPALDING, LLP
BY: PAUL ANDRE, ESQ.
BY: LISA KOBIALKA, ESQ.

Counsel for Plaintiff

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24

APPEARANCES CONTINUED:

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

-and-

COOLEY, GODWARD, KRONISH, LLP
BY: HEIDI L. KEEFE, ESQ.
BY: JEFFREY NORBERG, ESQ.

Counsel for Defendant

1 THE COURT: Good afternoon. This
2 is Judge Stark.

3 Who's there, please?

4 MR. CAPONI: Good afternoon, Your
5 Honor. For Facebook, you have Steve Caponi with
6 Blank Rome. And you have Ms. Heidi Keefe and
7 Jeffrey Norberg from Cooley Godward.

8 THE COURT: Okay.

9 MR. CHOA: Good afternoon, Your
10 Honor. For Leader Technologies, it's Jon Choa
11 from Potter, Anderson. And with me from King &
12 Spaulding is Paul Andre and Lisa Kobialka.

13 THE COURT: Okay. For the record,
14 of course, this is our case of Leader
15 Technologies versus Facebook, Inc. It's our
16 Civil Action Number 08-862-JJF-LPS.

17 And the purpose of today's call is
18 there are three more discovery disputes between
19 the parties. I have reviewed the letters and I
20 want to go through these one by one fairly
21 expeditiously.

22 So let's start first with Leader's
23 renewed request to take a deposition of a
24 Mr. Zuckerberg. And let me hear first from

1 Leader on that one.

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

4 I could go through and reassert
5 the arguments we made in our last call regarding
6 the subject, but I'll refrain from doing so,
7 unless Your Honor wants to hear it. I do want
8 to point out the fact that Facebook has made our
9 case for us, to some degree, in their responsive
10 letter.

11 They moved this Court for
12 protective order asking the Court to preclude us
13 from taking the deposition of Mr. Zuckerberg.
14 But yet in their letter they want to reserve the
15 right to bring him to trial as a rebuttal
16 witness. He does have some relevant
17 information, obviously, in their point of view.

18 That by itself shows that Mr.
19 Zuckerberg has relevant information. And if we
20 can't discover what that is beforehand, it would
21 be extremely prejudicial to us.

22 Second point is they want to be
23 able to submit declarations both at trial and
24 obviously in their motion for summary judgment

1 regarding willfulness, once again precluding us
2 from taking discovery into a declaration
3 statement.

4 I think that it would be extremely
5 prejudicial as well. But they admit the
6 relevance of this witness.

7 Finally, they admit that if
8 willfulness is in the case, they will make
9 Mr. Zuckerberg available for deposition, once
10 again making an implicit admission that he is
11 relevant in the case.

12 Now, I have a four-year-old son,
13 so I understand the concept of wanting to have
14 your cake and eat it, too. It's not a sound
15 legal principle, Your Honor.

16 So what we're asking for is either
17 to abide by the proposed stipulation that we
18 gave them, which means that Mr. Zuckerberg's
19 previous sworn testimony is admissible as in
20 this case, and he is not allowed to sandbag us
21 by putting in declarations or standing for
22 trial. And also we have to stipulate to some
23 declarations.

24 We could authenticate with

1 Mr. Zuckerberg before they make him available
2 for testimony in deposition.

3 THE COURT: All right. Let me
4 hear from Facebook, please.

5 MS. KEEFE: Sure. Thank you, Your
6 Honor.

7 The first point is simply that the
8 proposal that was given to us in order to try to
9 resolve this, while we really appreciate the
10 efforts that both parties were going to try to
11 do, this always included things that we couldn't
12 agreed to. There's no -- we never agreed to
13 anything.

14 In asking that Mr. Zuckerberg's
15 prior testimony be used as though it was given
16 in this case, they also asked for a number of
17 documents to be stipulated to that no one would
18 be able to authenticate from third parties. And
19 so that just made that offer untenable.

20 What we counter propose is if they
21 wanted to use Mr. Zuckerberg's deposition
22 testimony, which we said might be okay, we
23 simply wanted to be able to have the counter,
24 which is the declaration that we proposed --

1 sorry, that we submitted to Your Honor where
2 Mr. Zuckerberg said he never heard of these
3 things. If that doesn't work, that's okay.

4 Our second proposal was given that
5 there seems to be this issue of wanting to be
6 able to talk about Mr. Zuckerberg, we proposed
7 that we will move for summary judgment not using
8 a declaration from Mr. Zuckerberg, not putting
9 his testimony at issue, solely on the law that
10 there has been no evidence which could establish
11 a case of willfulness, and therefore, would make
12 all issues regarding Mr. Zuckerberg irrelevant
13 and immaterial.

14 If that motion were to be granted,
15 this would seem to be a moot issue, and
16 therefore, under Apex, it would be nothing more
17 than harassment to Mr. Zuckerberg to sit for a
18 deposition.

19 So all we are really asking is put
20 a pin in that issue. Let that motion be heard.

21 If the Court determines that the
22 issues of the willfulness and/or copying are
23 still in the case, then we would propose to
24 allow Mr. Zuckerberg to sit for a very limited

1 deposition, so that both parties know what's
2 going to happen at trial. If, on the other
3 hand, the motion is granted and the issues of
4 willfulness and copying are out of the case,
5 then there's nothing left for Mr. Zuckerberg to
6 talk about.

7 THE COURT: Go back to your first
8 compromise or maybe it was your second
9 compromise offer, Ms. Keefe. I forget.

10 There was something about you
11 would agree to a deposition as long as you could
12 also use Mr. Zuckerberg's declaration or -- I'm
13 not sure I understand that.

14 MS. KEEFE: Oh, no. One of the
15 proposals that Leader has made is that they
16 would be willing to not take Mr. Zuckerberg's
17 deposition in this case if we agreed to allow
18 the portions of the transcripts of depositions
19 from prior cases that we produced in this case
20 be used as though they were taken in this case.

21 We said if we were to agree to
22 that, what we would want is simply to have
23 Mr. Zuckerberg's declaration that was submitted
24 to the Court in support of the motion for

1 protective order to be allowed into evidence as
2 well, so that Mr. Zuckerberg's statement that he
3 had never seen the Leader White paper would also
4 be in evidence.

5 THE COURT: Right. But you're not
6 asking, under that compromise, for the ability
7 to submit additional declarations or to hold on
8 to Mr. Zuckerberg as a possible rebuttal witness
9 or --

10 MS. KEEFE: I am not. I am not.
11 I'm just making certain that there
12 is a statement from Mr. Zuckerberg to counter
13 the inference that we think they would try to
14 make from those other deposition testimonies
15 that he copied something. And so as long as
16 we're able to use the declaration that we
17 submitted to Your Honor in support of the Apex
18 depositions, we would not be seeking to add
19 additional testimony from Mr. Zuckerberg.

20 THE COURT: Okay. Mr. Andre,
21 start on your response with what's wrong with
22 that compromise. You get the prior testimony of
23 Mr. Zuckerberg. They get just that short
24 declaration that he filed in this case, and

1 nobody has to worry about surprise, or further
2 testimony or declarations from Mr. Zuckerberg.

3 MR. ANDRE: Well, Your Honor, the
4 previous testimony in the case is sworn
5 deposition testimony. I believe I can get it
6 even without stipulation. I just want to avoid
7 any type of evidentiary fight to trial.

8 So it is sworn testimony and the
9 declaration is hearsay. It contradicts the
10 sworn testimony.

11 And to the extent it does
12 contradict, that's actually the reason to allow
13 him to be deposed, for one, him saying in sworn
14 testimony under oath that he relied on source
15 material, but he doesn't remember what it is.
16 And then have him come in and contradict that
17 with a sworn declaration, which we cannot test
18 the voracity of, say, I remember it wasn't that.
19 Oh, I swear it wasn't the White paper. I don't
20 know what it is.

21 So to me this actually sets up the
22 fact that his testimony is more needed if we're
23 allowing that sort of hearsay in.

24 THE COURT: All right. And that,

1 in part, answers the next question, but other
2 than on willfulness, is there anything that at
3 this point you assert that Mr. Zuckerberg is
4 relevant with respect to and, you know, none of
5 the other witnesses that you've deposed were
6 able to give you the evidence?

7 MR. ANDRE: Well, what we have,
8 the infringement issue, Your Honor, that several
9 of the witnesses have identified Mr. Zuckerberg
10 as the individual who led the design and
11 development of some of the core technology that
12 we're alleging infringed today.

13 The reason it may be, certain
14 implementation of the technology was based on
15 Mr. Zuckerberg himself.

16 They cite that in the documents we
17 produced in this case or related to this hearing
18 that he actually is the lead designer. He's the
19 head of design and development of this core
20 technology.

21 They just redesigned the website
22 in February of this year. Presumably he was in
23 charge of that.

24 So the infringement is very

1 important in this case. And we think he has a
2 lot of relevant information that other witnesses
3 have said that he has unique knowledge of.

4 THE COURT: Okay.

5 MR. ANDRE: And as well, Your
6 Honor, with respect to certain documents, we've
7 asked for authentication of these documents.

8 He is the only individual who can
9 authenticate certain documents. We've attached
10 those to our brief.

11 There are some documents that only
12 he can attach -- only he can authenticate as
13 well as the statements that he gave in
14 interviews, which are admissions of the party
15 which may be able to get in over the hearsay
16 rule as an exception to hearsay.

17 But nonetheless, to the extent I
18 could take a deposition on those statements he
19 made in numerous interviews and have that in a
20 deposition context, I believe it would be easier
21 to get that into evidence. And those relate to
22 infringement, damages and willfulness.

23 THE COURT: Okay. Thank you.

24 I'm going to rule on this at this

1 point. And I am going to grant Leader the
2 opportunity to take a deposition of
3 Mr. Zuckerberg not to exceed three hours. I am
4 persuaded that there's at least enough of a
5 showing that there may be testimony that
6 Mr. Zuckerberg has that Leader was not able to
7 get from the others that it has deposed.

8 And in particular, the alleged
9 discrepancy between the declaration and prior
10 deposition testimony and prior understandings,
11 at least let's say that Leader has as to how it
12 believes and how it alleges the Facebook program
13 was put together.

14 I think that such evidence would
15 be relevant. I think that we have all
16 accommodated Mr. Zuckerberg's role in the
17 company and his schedule by going through all
18 the other steps of the discovery before asking
19 him, directing him to sit down for a deposition.
20 It will be a limited short deposition, as I
21 said.

22 I hope it will be done within a
23 time frame that can accommodate Mr. Zuckerberg's
24 busy schedule, but it must also accommodate the

1 busy schedule of the Court, and in particular
2 the schedule that is imposed in this case.

3 And so that is another reason that
4 I'm rejecting the proposed compromise of
5 Facebook, which would have the deposition take
6 place sometime down the road.

7 If a forthcoming motion for
8 summary judgment is denied, I think given how
9 this case has proceeded, and particularly the
10 many, many discovery disputes that there have
11 been and the many, many disagreements we've had
12 as to what type of schedule this will proceed
13 on, and all the efforts we've made to try to
14 keep this case on track for the trial that's
15 upcoming, I'm just not inclined to put off some
16 discovery until after a motion and make it
17 contingent on how a particular motion may be
18 ruled on.

19 It will be neater, cleaner and
20 ultimately more efficient to finish up with the
21 discovery, and then deal with motions and then
22 get to trial.

23 So that's my ruling on Leader's
24 request for the deposition of Mr. Zuckerberg.

1 Let's move on to the other issues,
2 both of which are Facebook issues. And I want
3 to deal first with the request with respect to
4 the recently produced non-disclosure agreements.
5 So let me hear first from Facebook on that one,
6 please.

7 MS. KEEFE: Thank you, Your Honor.
8 This is Heidi Keefe.

9 With respect to the NDAs, the last
10 produced NDA, we think it actually boils down to
11 a simple matter of decisions made by Leader.
12 Early in the case, despite the fact that there
13 were document requests produced by -- propounded
14 by Facebook that would have called for these
15 documents, Leader made the conscious decision
16 not to produce these documents.

17 There were also subsequent
18 document requests, which would have called for
19 these documents. And again, Leader made a
20 conscious decision not to produce them.

21 Only after it became clear through
22 testimony given by Mr. McKibben in his
23 deposition that Leader might need these
24 documents to help the case and support the case

1 did Leader make the decision to finally produce
2 them.

3 Now, we asked Leader, Well, that's
4 post-discovery and, you know, are you intending
5 to use all of these documents? If Leader had
6 said that it absolutely would not rely on these
7 documents in any way or allude to them at trial
8 in any way, we may not have had an issue. But
9 instead Leader said that they absolutely did
10 intend to use these documents, these late
11 produced documents for which no discovery has
12 taken place in defense of their case.

13 As a result, Your Honor, we're
14 left hamstrung because we haven't been able to
15 conduct discovery into these documents. And
16 these are all documents which directly affect
17 case dispositive issues regarding validity in
18 terms of on-sale bars or whether disclosures of
19 the patented technology were public or
20 non-public.

21 THE COURT: Let's take a step
22 back, Ms. Keefe. You say that these documents
23 were responsive to document requests?

24 MS. KEEFE: Yes.

1 THE COURT: Your letter says
2 there's 11 of them that it's responsive to.
3 Point me to your best one or two that you think
4 that these NDAs were responsive to.

5 MS. KEEFE: I'd be happy to, Your
6 Honor. I think that there are three that make
7 our case very, very cleanly.

8 In the very, very first set of
9 document requests propounded, I would point Your
10 Honor to Document Request Number 7, which is all
11 documents that refer or relate to the validity
12 and/or enforceability of the '761 patent.
13 Everyone who's ever litigated a patent case
14 knows that prior public disclosures or the
15 non-publicness of a disclosure or prior offer
16 for sale are directly related to the validity of
17 the patent. And these NDAs go directly to that
18 issue.

19 I would also point Your Honor to
20 Request for Production Number 18, which is all
21 documents that refer or relate to any research,
22 design, development, testing, and I think this
23 is the most important one, evaluation,
24 production or sales of any product, device,

1 technology system, et cetera, that allegedly
2 uses or embodies, in whole or in part, any
3 alleged invention subscribed by the patent.

4 And here I would say that what
5 Leader even says is that these NDAs were used
6 with potential customers or even investors so
7 that they could demonstrate their products to
8 them for evaluation in whether they would invest
9 in a company or buy the product. And so clearly
10 they'd be responsive to Request Number 18.

11 And then, finally, Your Honor, I
12 would point you to Document Request for
13 Production Number 74, which was in Facebook's
14 second request for production which specifically
15 asked for documents sufficient to identify every
16 third party who participated in any testing or
17 evaluation of Leader to Leader.

18 And clearly, this would also have
19 been -- if they had given up the list of every
20 single name or if they produced the NDAs
21 themselves, we would have been able to conduct
22 discovery into those demonstrations if we had
23 the responses to those as well.

24 THE COURT: All right. So then

1 what follows is interrogatories from Leader
2 saying disclose to us what your theories are of
3 invalidity. And they assert that you have never
4 asserted in your responses to those
5 interrogatories as a basis for invalidity that
6 there was some sort of a public display of the
7 product prior to the patent.

8 Is that, in fact, an accurate
9 portrayal of what happened? And also, if it is,
10 why doesn't your response to the interrogatory,
11 you know, modify the scope of what's responsive
12 to those document requests?

13 MS. KEEFE: Well, I think, Your
14 Honor, I'll take that in a couple of steps. I
15 think the first thing that we have to look back
16 to is the operative pleadings in the case and
17 the operative pleadings we have always pled that
18 the patents are invalid under Section 102, which
19 includes prior uses, prior offers for sale and
20 demonstrations.

21 In order to sure up our good faith
22 belief that there had been these types of
23 demonstrations and offers for sale, we asked for
24 the early discovery hoping to receive these very

1 types of documents.

2 Had we received these documents
3 and been able to conduct discovery into these
4 prior use and public demonstration and offers
5 for sale, perhaps we would have, at that point,
6 been able to amend our interrogatory responses
7 to include that. As Your Honor knows, both
8 parties have actually been supplementing
9 interrogatory responses as they continue to find
10 new information.

11 In fact, Leader just did a couple
12 of -- they did one of them yesterday and one
13 last week to alter the stage of what's going on
14 in this case.

15 They are correct that we do not
16 have specific allegations regarding specific
17 offers for sale or public demonstrations in our
18 current interrogatory responses. I am
19 absolutely happy to do so and put one in now.

20 Because we only became aware of
21 all of the facts that could make this completely
22 relevant following deposition. We also asked
23 Leader what date they believed was the operative
24 critical date for the patent. They always

1 asserted that it was the earliest possible date.

2 Only during depositions of Mr.
3 Lamb did we find out that Leader itself also did
4 not have support for relying on that earlier
5 date, which then opened up another year window
6 in terms of public use and offers for sale.

7 We also found out during the
8 deposition of Mr. McKibben that the parties have
9 a differing opinion on what an offer for sale
10 might entail and what they consider to be public
11 demonstrations. So asking us to modify our
12 interrogatory responses to reflect information
13 that we did not have that was solely within
14 their discretion and their ability to produce
15 and then blaming us for the lack of production
16 seems very circular, Your Honor.

17 THE COURT: On the merits, if we
18 get there of a defense of invalidity based on
19 public display or on sale, what would you have
20 to show?

21 Would just one showing without
22 protection by an NDA lead potentially to
23 invalidity of the patent or do you need to show
24 something more than that?

1 MS. KEEFE: Your Honor, all of the
2 situations are very fact dependent, but any
3 individual offer for sale, whether or not there
4 was an NDA or any public disclosure prior to the
5 critical date could serve to invalidate the
6 patent.

7 Now, the reason that I'm not
8 willing to say anyone is fine and so as long as
9 I have evidence of one I should be happy and I
10 shouldn't be looking into evidence of others,
11 because for every single one, Leader may have
12 different arguments about. Well, but in this
13 case it wasn't really public because of all of
14 these other factors.

15 And so if we had, for example, a
16 bulk of up to 1,200 times that they did
17 demonstrations and each time they also said,
18 Hey, if you want to buy it it's okay, you can
19 see that the weight of that evidence would be
20 extremely persuasive.

21 And we also learned during
22 depositions that there may have been times where
23 even though there is an NDA signed, that Leader
24 had sent information to those people prior to

1 the signing of the NDA kind of excited about
2 getting things going.

3 The only way we would ever know
4 that that happened would be to be able to talk
5 to the people who are listed in those NDAs and
6 to disclose that.

7 THE COURT: And you specifically
8 say you know of one instance or I guess where a
9 third party received the technology before
10 signing of an NDA; is that right?

11 MS. KEEFE: Well, for example,
12 Your Honor, in the case of the other NDAs that
13 help, we had already been talking quite a bit
14 about in terms of Northwater, we know that
15 Leader sent documents to Northwater based on
16 Northwater's own testimony before any NDA was
17 sent, even though they had been discussing the
18 fact that they might want to go into an NDA.

19 So we know that there have been
20 times where information was sent prior to an NDA
21 being signed.

22 THE COURT: Okay. Anything else
23 you want to add on this topic, Ms. Keefe?

24 MS. KEEFE: No. I think -- I

1 think, Your Honor, though, that the overwhelming
2 importance of these documents and the fact that
3 it was Leader's choice not to produce them until
4 they decided that they might help them really
5 highlights how important these documents are,
6 and how important it is for us to be allowed to
7 conduct discovery into them, to the extent that
8 the Court determines that these documents can be
9 used in this case in any fashion.

10 THE COURT: All right. Mr. Andre.

11 MR. ANDRE: Your Honor, the
12 requests for production that Ms. Keefe talks
13 about simply are not specific enough to ask for
14 NDAs that were provided to investors. These
15 NDAs were signed, not because there was any
16 evidence they were demonstrating the product,
17 but because the company was overly cautious
18 about talking about investing in the company at
19 all. And that's all the evidence shows.

20 The testimony that they received
21 from Mr. McKibben was unequivocal that they
22 signed NDAs with everybody before they talked
23 about anything to do with the company. This was
24 not about demonstration or anything like that.

1 When they talk about the one NDA
2 that they allege was signed after the fact, the
3 Northwater, that was well after the patent
4 issued. The fact of the matter is that all the
5 documents that they intend to rely upon or could
6 possibly rely upon for this defense of a public
7 disclosure were produced to them at least eight
8 months ago and in many cases a year ago.

9 We know this because they have a
10 current motion pending to add in a claim of
11 inequitable conduct in which we cite the
12 document they are going to rely upon based on
13 this public disclosure based on these documents.
14 Those were documents that were produced over
15 eight months ago --

16 THE COURT: Mr. --

17 MR. ANDRE: -- that they never
18 alleged this as a defense.

19 THE COURT: Mr. Andre, let me just
20 stop you there for a minute. Are you
21 representing that any NDA that related to a
22 public display of the technology was produced to
23 Facebook long before this recent production?

24 MR. ANDRE: No, Your Honor. What

1 we're saying is the documents they rely upon,
2 they would like to rely upon for their
3 affirmative defense. The NDAs, to the extent
4 that we would use them, would be for a defense
5 against public disclosure.

6 This would be -- this would be
7 Leader using it as a defense to their claim of a
8 public disclosure. They've never made a claim
9 of public disclosure ever in this case.

10 And to this day, we're sitting
11 here today. We don't have any interrogatory
12 responses. No responses to interrogatories.

13 Five times regarding invalidity,
14 they've responded. They've never asserted that
15 the patent is invalid based on public
16 disclosure.

17 THE COURT: Right. But let me --
18 I just want to try to understand better what it
19 is that you produced recently. Facebook says
20 you produced 2,338 non-disclosure agreements on
21 March 9th.

22 Is that correct?

23 MR. ANDRE: That's correct, Your
24 Honor.

1 THE COURT: And are you able to
2 say what number even approximately of those
3 non-disclosure agreements were executed in
4 connection with what would otherwise be a public
5 display of the technology?

6 MR. ANDRE: Based on the documents
7 they put forward in their proposed case and what
8 we've seen, less than a dozen. And, Your Honor,
9 we do not intend to use those documents at trial
10 as long as they don't try to put on a defense of
11 a public disclosure which they have not done so
12 at this point.

13 THE COURT: All right. But if
14 they decide to put on a defense of public
15 disclosure, wouldn't the 12 or thereabouts that
16 relate to a disclosure which you'll say was not
17 public and they'll say maybe was public or at
18 least they want to test it, wouldn't that body
19 of 12 be relevant?

20 MR. ANDRE: They would at that
21 point, Your Honor. That's correct.

22 THE COURT: So if that's the case,
23 then I mean what Ms. Keefe says is they were
24 entitled to know that there were those 12 or so.

1 So they could determine whether to -- you know,
2 to test them through some type of discovery and
3 to evaluate whether or not they thought they had
4 a good faith basis to assert this defense.

5 MR. ANDRE: Your Honor, we've
6 produced hundreds and hundreds of pages,
7 documents in which we informed Facebook and with
8 those documents that we had this NDA policy that
9 you see some of those attached as exhibits to
10 our documents.

11 We told Facebook through our
12 documents that we had this. If anyone talked to
13 us, investors, or vendors or anybody, that we
14 signed NDAs. They never once asked us for these
15 NDAs.

16 All the communications with the
17 third parties were actually produced. So we
18 produced all of our communications that they
19 could rely upon.

20 Now, their document requests are
21 so overbroad. I mean, first of all, they ask us
22 for any documents that would relate to the
23 invalidity of the patent. We don't think there
24 were any documents that make our patent invalid.

1 So it's one of these kind of Catch
2 22's. They asked about the document request.
3 They singled out, asked about third parties who
4 tested or evaluated.

5 We've provided all those documents
6 to those individuals. To the extent they would
7 bring any issues about NDAs, they got fair
8 notice of them. When we were at deposition,
9 they were asking Mr. McKibben about NDAs.

10 He said it's the policy they sign
11 NDAs with everybody. They said, Well, do you
12 have those? He said, Yes, we do. And they
13 asked for them. We produced them immediately.

14 THE COURT: Have you identified
15 which of the 2,338 that -- the 12 or so of them
16 relate to a display of the technology, have you
17 identified those for Facebook?

18 MR. ANDRE: Your Honor, let's put
19 it this way: We've given them the underlying
20 documents that would permit them to determine
21 where a display was made and they asked our
22 witnesses on them.

23 THE COURT: Okay.

24 MR. ANDRE: They have the

1 information of when we made a demonstration of
2 our product. They have that information.

3 We provided all that information.
4 Whenever we demonstrated it, we gave them that
5 information.

6 So all you have to do is
7 extrapolate back and say, Well, if you want to
8 see the NDA for that demonstration, it's easy
9 enough to find. They've identified three
10 parties that they believe we gave a public
11 demonstration to.

12 I believe it was three parties in
13 their proposed amendment for their -- the
14 pleadings. And in each one of those, we can
15 identify those three. They're probably less
16 than 12. I said no more than 12 as an estimate.

17 THE COURT: All right. And you
18 also offered to put Mr. McKibben up for further
19 deposition; is that right?

20 MR. ANDRE: Your Honor, what we
21 told them was we have a mediation in this case
22 on Monday. And Mr. McKibben is out here in
23 California.

24 I said if you want to take him for

1 a couple hours in our office and talk to him
2 about this, he gave just three answers about his
3 NDAs, how that was policy, we would make him
4 available if that would satisfy them.

5 We asked them to have the same
6 consideration for us and that was rejected.
7 They want to open up discovery and basically
8 push off the trial date again. That's all this
9 is about.

10 THE COURT: Okay. Anything else
11 you want to add, Mr. Andre?

12 MR. ANDRE: Just the fact that in
13 the two different interrogatories where you
14 asked for their basis for invalidity, they have
15 said five responses to those. The original
16 response, two supplemental interrogatories, 4,
17 and the original response and supplemental to
18 Interrogatory 18. And in none of those did they
19 ever allege public disclosure.

20 THE COURT: Okay. Thank you.

21 Ms. Keefe.

22 MS. KEEFE: A couple things, Your
23 Honor. The first is that I find it difficult to
24 believe that there's only 12 that received

1 demonstrations of these -- of the product given
2 the fact that a number of the names that we had
3 never seen before are accompanied in Lobo
4 Dynamics, Onedentist.com, We Square Software,
5 Value City department stores.

6 These are all names that we had
7 never heard of that had never shown up anywhere
8 in their prior production in any fashion or
9 form.

10 So we couldn't have possibly known
11 that these were there in order to ask, Where is
12 the NDA? Similarly, for the ones that we did
13 have some evidence perhaps that there had been a
14 public demonstration like the Ohio Police
15 Department, that's actually how we found out
16 that these NDAs existed.

17 We asked Mr. McKibben about his
18 demonstration to the police department and he
19 said, Well, if he had done one, it would have
20 been with an NDA.

21 And only by us asking right then,
22 Well, does that NDA exist, was it produced. It
23 was produced late.

24 I'd like to be able to ask the

1 Ohio Police Department during that
2 demonstration, during the verbal communication
3 that you were having, did Mr. McKibben offer to
4 sell you the product? And simply having
5 Mr. McKibben's memory of the conversation or
6 what was disclosed or displayed is not enough.

7 We'd also need to be able to ask
8 the Ohio Police Department and, frankly, anyone
9 else who had received a demonstration whether or
10 not they were also offered a sale of the
11 product, whether or not there was a document
12 that was produced regarding those sales.

13 So this issue is quite a bit
14 broader than Mr. Andre wants it to be. And in
15 fact, does involve the possibility of numerous
16 invalidating pieces, especially the offers for
17 sale that may not be reflected in documents
18 whether or not they were produced.

19 Similarly, Your Honor, I don't
20 understand how a document request asking to
21 identify every third party who had evaluated
22 Leader to Leader doesn't ask for this exact
23 information, and yet we did not receive it in
24 response to that.

1 Regarding back to the issue of the
2 interrogatory, if what Mr. Andre wants is an
3 interrogatory response that says that I am going
4 to use public disclosure and on-sale bar in this
5 case, I'm happy to give it to him.

6 But he's known that that issue is
7 in this case. The parties have been conducting
8 discovery regarding those issues throughout this
9 case.

10 So, Your Honor, we're extremely
11 hamstrung right now without being able to probe
12 into this large, large number of NDAs to
13 determine which one shows Leader to Leader,
14 which of those people potentially received an
15 offer for sale, whether verbal or in writing,
16 and maybe they have documents or they kept
17 documents that Leader doesn't have anymore. And
18 we have a right to look into that.

19 THE COURT: Ms. Keefe, is it
20 correct that you have documents now for which
21 you could identify the approximately 12 NDAs
22 that relate to a display of the technology?

23 MS. KEEFE: Absolutely not, Your
24 Honor. What we have are the NDAs themselves

1 from my reading of those NDAs. It is entirely
2 possible that every single one of those people
3 received a demonstration of the Leader to Leader
4 product.

5 For example, most of them, and
6 Mr. Andre makes the point that they made their
7 employees sign them. They made vendors sign
8 them.

9 But I don't understand how
10 Onedentist.com, for example, could be a vendor
11 or an employee leading me to believe that
12 Onedentist.com received a demonstration of the
13 Leader to Leader product.

14 Mr. Andre also tried to mention
15 somewhere in one of the letters that perhaps
16 these NDAs went to other products and not to
17 Leader to Leader. But the other products that
18 Leader had, Leader Phone and Leader Alert were
19 public and publicly assessable products, for
20 which an NDA wouldn't have been necessary.

21 So we cannot determine from the
22 face of the NDAs who received a demonstration of
23 Leader to Leader. Instead, we have to assume
24 that they all did the things that I would be

1 willing to do and that I've already started to
2 do to try to narrow down who we would need to
3 talk to was that I started looking only for
4 company names, and I started trying to do the
5 guesswork of figuring out who doesn't look --
6 even though it's a company, it looks more like
7 an investor than a company that might have been
8 given an offer of sale. But the face of the
9 documents simply don't help us.

10 THE COURT: Mr. Andre, how quickly
11 could you provide Ms. Keefe the information that
12 would tell her, you know, the approximately 12
13 NDAs out of the more than 2,000 that relate to a
14 display?

15 MR. ANDRE: Your Honor, I don't
16 know that. I mean, we think that we've
17 demonstrated the product on a very limited
18 basis. And most of these NDAs relate to the
19 time period before the product was even ready to
20 be demonstrated, because it - obviously, we were
21 trying to -- we have over 500 investors in this
22 company. It is a small company. It deals with
23 a lot of small investors.

24 So the documents that we could

1 identify that would show that there was a
2 demonstration of the Leader to Leader product,
3 we could probably get that done in a matter of a
4 few days.

5 And these documents they've had
6 for at least eight months and in many cases over
7 a year. And once again, this is an unasserted
8 claim that they're talking about. This is not
9 our burden here.

10 This is something that they have
11 never alleged. They talk about the Ohio Police
12 Department.

13 The reason they know about the
14 Ohio Police Department is because we provided
15 the underlying document, which we said, We're
16 going to give a demonstration to the Ohio Police
17 Department on this day. They have that already
18 and they've had that for eight months to a year.

19 THE COURT: All right. Well,
20 here's what we're going to do. This is
21 definitely a messy situation.

22 What we're going to do is I'm
23 ordering -- first off, I'm denying the request
24 to exclude all of these late produced NDAs. I

1 don't see a basis today to act so broadly and
2 say that they are excluded from any use in the
3 remainder of this case.

4 But I am going to direct and am
5 hereby directing that Leader produce to Facebook
6 by the end of the day Tuesday information or
7 evidence sufficient to identify and to establish
8 the back up, I guess, the representation that
9 Mr. Andre has made here that out of the 2,338
10 recently produced non-disclosure agreements, no
11 more than something on the order of 12 of them
12 relate to a display or demonstration of the
13 technology.

14 I'm also ordering that if Facebook
15 wants to take an additional deposition of
16 Mr. McKibben with respect to the recently
17 produced NDAs, they are permitted to do that.
18 And they may want to wait until after they get
19 this further information on Tuesday.

20 Finally, I'm ordering that if
21 Facebook is going to attempt to assert as a
22 defense the basis of a public display, or
23 demonstration or on-sale bar, they should
24 supplement their interrogatory responses to make

1 that assertion clear. And they should do that
2 within ten days of today if they are going to do
3 that.

4 Beyond that, I'm going to hope
5 that the parties can work out the remainder of
6 what to do about this issue. And if not, then
7 you'll bring it back to me.

8 Let me move on to the final issue
9 which has to do with the aerata sheet in
10 relation to a deposition of Mr. Jeffrey Lamb.
11 Let me hear from Facebook on that, please.

12 MR. CAPONI: Your Honor, Steve
13 Caponi. I'm going to handle this argument.

14 The issue, Your Honor, is pretty
15 straight forward. Mr. Lamb was a co-inventor,
16 one of the inventors on the technology at issue
17 here.

18 And one of the core issues in this
19 case is LTI, its effort to have the patent
20 relate back to the provisional application. And
21 as Your Honor knows, one of the touchstones of
22 that is you've got to make sure that everything
23 that's in your -- the issued patent can be found
24 in the provisional application.

1 Mr. Lamb was subjected to some
2 very specific questioning on that front,
3 particularly, Your Honor, with respect to the
4 word tracking and the tracking feature, that's
5 at issue in this case.

6 With respect to each one of the
7 questions, which essentially Your Honor, to
8 paraphrase was okay, show us -- here's the
9 application. Here's the code that was in the
10 provisional application.

11 Is tracking in there? If it is,
12 where is it? Do you see tracking here, there or
13 in the code?

14 His answer was always essentially
15 a no. Following the deposition and at the
16 deposition, Your Honor -- at the conclusion of
17 the deposition, it was very clear to all the
18 parties the import of that testimony.

19 It's keyed up for summary judgment
20 the issue of whether or not LTI could claim the
21 provisional patent date. And as a result of
22 this testimony, they essentially would be
23 precluded from doing so.

24 In the parties' discussions

1 following the deposition and in Mr. McKibben's
2 deposition, Facebook made it very clear it was
3 going to be moving on that ground, in light of
4 the testimony plus some other information.

5 That then resulted in this errata
6 sheet coming in. And the errata sheet, Your
7 Honor, is submitted for a couple of reasons.

8 One is the only changes that were
9 made in this errata sheet go to the questions
10 pertaining to tracking. And each one of the
11 changes takes the answer from a no to a yes.
12 And the way it does it, Your Honor, is very
13 crafty wordsmithing by using the word just.

14 And so they throw just in front of
15 the word tracking in a number of these answers
16 and essentially what you get to as an example,
17 if you get pulled over by a police officer, and
18 he says, Did you run that red light? And you
19 would say, No.

20 Okay. That means you didn't run
21 the red light.

22 But if you throw just in front of
23 it, did you run the red light? No, I did not
24 just run the red light. You're now saying, Yes,

1 I ran the red light and I did some other things.
2 Maybe I was drinking. Maybe I hit somebody.
3 Maybe I was on my cell phone.

4 So this inclusion of the word just
5 is not an innocuous clarification. It changes a
6 yes to a no. A no to a yes, which was done in
7 an effort to fight off the pending motion for
8 summary judgment.

9 Your Honor, Mr. Lamb is not just a
10 third party who received his transcript and made
11 these changes. He's represented by counsel for
12 LTI.

13 We think it's noteworthy that with
14 assistance of counsel, these changes were made
15 on an issue that was teed up for summary
16 judgment and that goes to the heart of this
17 case.

18 Your Honor, the ability to claim
19 the provisional patent application date is very
20 significant as Ms. Keefe indicated earlier with
21 respect to public demonstrations and offers for
22 sale, et cetera.

23 A number of things occurred in
24 that one-year time period which we believe can

1 be dispositive of this case. Your Honor, I
2 think the arguments that LTI makes to this Court
3 that it lacks jurisdiction are not well founded.
4 The rules as to why you would go to Ohio, Your
5 Honor, deal with personal jurisdiction.

6 How a Court or how a party gets a
7 Court to compel someone to show up at a
8 particular date, time for a deposition, whether
9 you're in Federal Court or you are in State
10 Court doing an out-of-state deposition to obtain
11 control of the person, you need the assistance
12 of a Court via the person. The deposition
13 itself is a completely different matter and the
14 conduct of the deposition is a different matter.
15 That always rests with this Court, Your Honor.

16 As Your Honor is aware, in this
17 case we were taking a deposition in Ohio and
18 there was a dispute regarding the conduct of
19 counsel, improper objections, coaching the
20 witness, et cetera. You get on the phone. We
21 would have called Your Honor to say, We have a
22 situation. We would not have gone to a Court in
23 Ohio.

24 This Court also always has control

1 over how a deposition is used in the trial in
2 which it has jurisdiction. And that's what
3 we're talking about.

4 We want this errata sheet with the
5 substantive change, we think it's an improper
6 change. And as Judge Sleet and other judges in
7 this district have held and we cited the cases,
8 the deposition is not a take-home exam. These
9 are not innocuous changes.

10 Your Honor, so I think this Court
11 has the jurisdiction. We think the errata sheet
12 should not be permitted to be changed. It's
13 already been made clear to us that Mr. Lamb does
14 not intend to show up at trial, which means
15 Facebook walked out of a deposition having
16 clear-cut answers to very important questions.

17 And through an errata sheet is
18 deprived of those answers and has no ability to
19 compel Mr. Lamb to appear at trial. He's in the
20 control of Mr. Andre and LTI, and they've
21 indicated he's not going to appear.

22 Your Honor, that's the crux of it.
23 We think a fall-back position, which we don't
24 think is necessary here, we think the errata

1 sheet should be excluded, would be to open
2 Mr. Lamb up for another deposition.

3 The cases cited by LTI in the Ohio
4 case provide that relief. They made, the
5 counsel for the witness here, it would be LTI,
6 pay the expense of travel and the time for the
7 lawyers to take that deposition.

8 And Your Honor, crucially on that
9 point, the cases hold and we think it's
10 important here is the opportunity to explore
11 "where the changes originated". We think if Mr.
12 Lamb is offered up for a deposition, and we've
13 made this clear to LTI, and they reject the
14 notion, that Facebook should have the
15 opportunity to inquire as to why the change was
16 made, where it originated. And that would
17 include communications Mr. Lamb had with his
18 counsel.

19 And, Your Honor, we think that's
20 important, because, A, as indicated by the cases
21 in Ohio, it's an appropriate remedy.

22 And, B, in Delaware, as Your
23 Honor's aware, when the witnesses are under
24 oath, even at a break at lunch, or dinner or

1 coming in the next day, any communications they
2 have with counsel regarding the substance matter
3 of the deposition are not protected by
4 privilege.

5 We think that same logic applies
6 to any changes to the testimony to an errata
7 sheet. It's no different than a lunch break
8 because it substantively changes the deposition.
9 Your Honor, that's my presentation, unless you
10 have any questions.

11 THE COURT: Let me hear from
12 Leader, please.

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

15 Let me just clarify some
16 misstatements Mr. Caponi made. Mr. Lamb is an
17 independent third party. He's not under my
18 control for sure and definitely not under Leader
19 Technologies' control.

20 He was subpoenaed by Facebook from
21 the Southern District of Ohio. We've never made
22 any allegations or assertions that he will not
23 show up at trial. To be frank, we don't know.

24 Mr. Lamb is in the process of

1 getting married right now. And he really
2 doesn't want to deal with this case, to be quite
3 frank.

4 That's where we stand at this
5 point. We will try to endeavor to get him to
6 come to trial, but we just don't know at this
7 point.

8 Going through the issues that were
9 raised, one thing that Facebook doesn't address
10 is this is an evidentiary issue, not a discovery
11 dispute. So we don't think it's appropriate to
12 even be dealing with it in this form.

13 Even if it were, and they don't
14 mention this at all, they stipulated to
15 Mr. Lamb's right to submit an errata. They
16 specifically told him that he was permitted to
17 do so and asked him if he understood.

18 We put this in our letter. Mr.
19 Lamb agreed that he would be willing, he would
20 submit. He thought it was necessary and so he
21 did so.

22 At this point, Facebook is
23 estopped from complaining of Mr. Lamb doing
24 exactly what the parties agreed that he could

1 do.

2 Third, the issue, when we talk
3 about the jurisdiction over Mr. Lamb, he is
4 subject to the jurisdiction of the Southern
5 District of Ohio. And if they want to compel
6 Mr. Lamb to sit for another deposition, they
7 should go to the Southern District of Ohio and
8 make the objection there.

9 The Court has jurisdiction over
10 him and that's the open forum to take.
11 Nonetheless, even if this Court were to look at
12 this issue as a discovery issue, we do believe
13 this took place in the Southern District of Ohio
14 and the legal authority of the jurisdiction
15 where the issue arose would have the controlling
16 factor.

17 Finally, all you've got to do is
18 look at testimony, Your Honor. We don't think
19 this is a substantive change at all.

20 I think these are clarifications.
21 Mr. Lamb stated it was a clarification. He was
22 answering very specific -- a very specific
23 answer to a very specific question.

24 And I think the word just doesn't

1 change a yes to no. In fact, his answers
2 throughout his deposition were very clear. He
3 was a very precise individual.

4 So when they asked him precise
5 questions, he would ask for a clarification.
6 When they asked him very specific questions like
7 they did, he gave a very specific answer.
8 That's all he was trying to clarify.

9 So we don't think that, even under
10 the law in Delaware or Ohio, this is a
11 substantive change. He did provide reasons for
12 his changes. Nonetheless because we had a meet
13 and confer, we asked him if he would provide
14 reasons for it and he agreed to do it, even
15 though we don't think it's necessary because
16 it's a clarification. He did provide the
17 reasons already.

18 THE COURT: Okay. Mr. Caponi, any
19 response?

20 MR. CAPONI: Your Honor, just very
21 briefly. The consequence of stipulating to an
22 errata sheet, it's not something a party
23 stipulates to or control or a statement of the
24 obviousness.

1 The Federal Rules embody the
2 procedure for dealing with an errata sheet.

3 It's not as if Facebook could have
4 precluded an errata sheet from being submitted.
5 And, Your Honor, I think, again, he's
6 represented by -- Mr. Lamb is represented by
7 Mr. Andre. This is not some completely
8 independent third party.

9 And we think when you look at the
10 totality of the circumstances, the nature of the
11 change, the limited nature, subject of the
12 change and its significance to the issues in
13 this case, it paints a very stark picture and
14 one that suggests some gamesmanship is afoot.

15 And if Facebook was -- you know,
16 what we have here is a party trying to mend
17 damage from its self-inflicted wound, trying to
18 take back testimony it knew was harmful, but to
19 do it in a crafty way.

20 I think that's fairly obvious.
21 The relief is the errata sheet should not be
22 included. The testimony should be as it was as
23 he walked out of that room. If not, I think a
24 deposition should be ordered.

1 Your Honor has jurisdiction over
2 Mr. Andre and his firm. They were admitted pro
3 hac in that case. That is why in Delaware cases
4 lawyers that participate in depositions need to
5 be pro haced in Delaware, so this Court can
6 control the counsel and the conduct of those
7 depositions.

8 And here, if, you know, even if we
9 take the most favorable light, look at the most
10 favorable light, if Mr. Lamb made a substantive
11 change, we clearly should have another
12 opportunity to depose him if the change is
13 permitted. And it should not be done at
14 Facebook's expense.

15 THE COURT: Okay.

16 MR. CAPONI: Thank you, Your
17 Honor.

18 THE COURT: All right. Thank you,
19 counsel.

20 On this one, I am not going to
21 strike the errata sheet. I think that -- well,
22 first, let me say our review of the errata sheet
23 makes it appear to us that the changes are not
24 substantive and are more in the nature of

1 clarifying.

2 So it seems that even under the
3 Delaware standard and the Delaware cases that
4 have been cited, it looks to us like these
5 changes are merely clarifying and it would be
6 appropriate.

7 With that said, I certainly
8 understand the desire to take a further limited
9 deposition of Mr. Lamb to understand that they
10 are clarifying and not substantive. But I am
11 not clear, as I sit here, whether, in fact, I
12 have the authority, the jurisdictional authority
13 or otherwise to order a nonparty resident of
14 another state to appear for a further
15 deposition.

16 So I'm not, at this point,
17 ordering that Mr. Lamb be produced for a further
18 deposition. If relief to that effect is sought
19 in the Southern District of Ohio, certainly I
20 have no problem with that Court being advised
21 that I think it would be appropriate that he sit
22 for an additional deposition to explain further
23 the basis for the clarifications on the errata
24 sheet. But at this point, I'm not ordering it.

1 So that is my ruling on this
2 issue. And I believe I have addressed all the
3 issues that are pending in front of the Court at
4 the moment.

5 Is that correct, Mr. Andre?

6 MR. ANDRE: That's correct, Your
7 Honor.

8 THE COURT: And Ms. Keefe, is that
9 correct?

10 MS. KEEFE: I believe so, Your
11 Honor.

12 THE COURT: Okay. Thank you very
13 much, counsel. Bye-bye.

14 MR. ANDRE: Thank you, Your Honor.

15 MS. KEEFE: Thank you.

16 (Teleconference was concluded at
17 3:56 p.m.)

18

19

20

21

22

23

24

1 State of Delaware)
)
2 New Castle County)

3

4

5

CERTIFICATE OF REPORTER

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

I, Heather M. Triozzi, Registered Professional Reporter, Certified Shorthand Reporter, and Notary Public, do hereby certify that the foregoing record, Pages 1 to 54 inclusive, is a true and accurate transcript of my stenographic notes taken on April 9, 2010, in the above-captioned matter.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 13th day of April, 2010, at Wilmington.

Heather M. Triozzi, RPR, CSR
Cert. No. 184-PS