

## Behind the \$500M Curtain: How Skadden Handed Wilkinson Her First Trial Loss

By Jenna Greene

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For a terrifying moment, P. Anthony Sammi felt it all slipping away.

After three days of deliberating, the federal jury in Dallas was back on Feb. 1, ready to answer a \$6 billion question: Did Facebook Inc. steal virtual reality technology for the Oculus Rift from Sammi's client, videogame maker ZeniMax Media Inc.?



DAILY DICTA

JENNA GREENE

As the Skadden, Arps, Slate, Meagher & Flom partner listened, U.S. District Court Judge Ed Kinkeade read the first question, in some ways the centerpiece of ZeniMax's case.

"Did ZeniMax prove, by a preponderance of the evidence, that any defendant misappropriated the trade secrets claimed by ZeniMax and [subsidiary] id Software?"

The answer was no.

"I thought 'Oh my goodness. This might be a rough ride,'" Sammi recalled.

Still, he felt confident about the case that the 12-lawyer Skadden team plus co-counsel from Haynes and Boone had put on over the course of the three week trial. They faced off against ace litigator Beth Wilkinson, founder of Wilkinson Walsh + Eskovitz, and co-counsel from Cooley for Facebook, which bought Oculus in 2014. Witnesses included Facebook CEO Mark Zuckerberg.

"We had positioned the case well," Sammi said. "We had evidence that took years to find. We felt confident that the jury would find liability on one of more claims. But you never know what a jury is going to do."

His faith turned out to be well-founded. Handing ZeniMax a \$500 million award, the nine-member jury unanimously found that while the defendants didn't steal any trade secrets, Oculus did infringe ZeniMax's copyrights, causing \$50 million in damages. They also found that Oculus violated a non-disclosure agreement with ZeniMax, for \$200 million in damages.



Courtesy photo

In addition, the jury determined that Oculus and two individual defendants infringed ZeniMax's trademarks, finding them liable for \$250 million for false designation—a surprise move, given the scant attention the issue received during trial.

To be sure, the \$500 million total award is far less than the maximum penalty ZeniMax suggested—\$6 billion. But even for Facebook, it's still real money.

Wilkinson, named a litigator of the year by The American Lawyer in December 2015, said in an interview that it was her first-ever loss at trial on the defense side.

"The verdict shows that the jury was not persuaded on the key allegations and came to a compromise on the more minor claims," she said. But she also anticipated making a strong argument in a forthcoming motion for judgment notwithstanding the verdict to set aside the trademark award. "They never even said the word 'false designation,'" she said, nor did the plaintiffs present damages evidence. And she said the other findings are vulnerable as well.

Sammi, in turn, told the court that ZeniMax will file motions seeking injunctive relief and legal fees.

After dismissing the jury ("I hope it was a good experience for you and something that you will remember in a good way,

not in a bad way, not like having the flu.”), Kinkeade praised the lawyers, according to a transcript of the proceedings.

“I will say for the record both sides had great representation,” said the judge, who was nominated to the bench by President George W. Bush in 2002. “I mean, it's unfortunate that in the way our system works somebody has to win, somebody has to lose. They do, but that's where we are.”

## AT WAR OVER IP

Oculus was founded in 2012 by Palmer Luckey, who as a teenager built the Rift prototype in his parent's garage.

He connected with John Carmack, a legendary video game programmer based in Texas who worked for ZeniMax.

Luckey sent Carmack his virtual reality headset. Carmack wrote specialized software for it, as well as adding other components. The device debuted to great acclaim in June 2012 at the Electronic Entertainment Expo—using for its demonstration a ZeniMax game called *Doom 3: BFG*.

According to the 2014 complaint, that's when the trouble started. “Defendants became increasingly evasive and uncooperative in discussions with ZeniMax regarding appropriate compensation for its technology and support. No resolution of that issue was reached, and indeed Oculus never provided ZeniMax with any compensation whatsoever.”

And then Carmack quit—and went to work for Oculus as its chief technology officer.

A lawsuit was already in the works when Facebook bought Oculus in 2014 for \$2 billion (though the plaintiffs argued the true cost was more like \$3 billion).

Sammi was involved in the case from Day One, flying to Washington, D.C. to pitch ZeniMax CEO Robert Altman and others, invited thanks to another Skadden partner who had a pre-existing relationship with the company.

“I felt they had very strong claims,” said Sammi, an intellectual property litigator with a background in electrical engineering. In leading the representation, he teamed up with Skadden partner Kurt Hemr, a litigator with securities, M&A and IP experience, who had tried several cases with him before.

Their overriding theme: “There was a right way and a wrong way to do this. This technology is ground-breaking and could change the world, but it shouldn't be stolen,” Sammi said.

But a key piece of evidence was excluded by Kinkeade. Before the Facebook purchase of Oculus could close, Carmack insisted on an indemnity agreement. Not a boilerplate one—but one that specifically shielded him from any settlement or judgment involving ZeniMax and the Oculus Rift.

From ZeniMax's point of view, Carmack betrayed his old employer and used proprietary intellectual property to create the Rift.

Wilkinson, by contrast, argued that ZeniMax lacked the vision to appreciate what it had. “They're really mad about it. They're jealous, they're angry, and they're embarrassed, because they had the opportunity to get in on this,” she said in closing arguments.

They jury in declining to find trade secret theft or unfair competition was apparently unimpressed by evidence, for example, that Carmack copied 10,000 files when he left ZeniMax, and may have wiped a MacBook.

But the jurors did latch on to the trademark violation. The key evidence: an Oculus Kickstarter funding video that featured ZeniMax trademarks.

Sammi said relatively little about it at closing. “What is the point of the trademark claim? The point of the trademark claim is that—it's like my example of when I stand in front of something, a big sign that says Coca-Cola and I'm selling Tony's Cola. You might look at that and you might think I guess he's sort of in business with Coca-Cola somehow and I might be confused if that's a new type of soda from Coke,” he said.

Oculus was warned by ZeniMax not to use images from its “Doom” game in the Kickstarter video, but did so anyway, Sammi said in his closing. “You can't just grab something off the internet and use it in your business. You're not teaching a class, you're not in a library, you're not using it for educational purposes, you're not at home. That's fair. You're using it to raise money in your business.”

For that, the jury nailed Oculus, Luckey and Oculus co-founder Brendan Iribe for a combined \$250 million.

The question now: will it stand?

Perhaps the parties should heed a post-verdict suggestion from Kinkeade.

“I would encourage both sides to continue talking about whether you can work this out, because you both are very successful businesses, and you need to get on with the business of business and get away from people like me,” the judge said. “We are expensive animals. You know, we really are.”

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