LEADER TECH V. FACEBOOK,

CASE NO. No. 2011-1366.

HEARING TRANSCRIPT

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PARTICIPANTS:
JUDGE ALAN D. LOURIE
JUDGE KIMBERLY A. MOORE
JUDGE EVAN J. WALLACH
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JUDGE LOURIE: Next case is Leader Technologies vs. Facebook 6000111366. Mr. Joseffer, ready when you are.

MR. JOSEFFER: Good Morning. The, the key legal question on this appeal is what constitutes clear and convincing evidence. Because.

JUDGE LOURIE: The legal question isn't the question whether there was substantial evidence before a jury?

MR. JOSEFFER: Well, the question was whether there was sufficient evidence from which the jury could could find there was clear and convincing evidence of the timing question. The reason I said it's a legal question is you're going to have to know what does it mean for evidence, not just to be some evidence or even a fair amount of evidence, but clear and convincing evidence. And on that point, the key issue underlying issue in dispute here is the exact issue is when did Leader2Leader first embody the patented invention. Before or after the critical date.

JUDGE WALLACH: Wasn't that a question for the jury?

MR. JOSEFFER: If there's sufficient evidence to go either way, yes. But the whole point of judicial review of jury verdicts is to ensure that there is sufficient evidence, especially under the clear and convincing standard. And on that point, Facebook chose to rely on an

attack on the credibility on Leader's CEO Michael McKibben and on an interrogatory response they just didn't address the question. And as a matter of law, that gives rise to at the most speculation or surmise, not the kind of hard facts that required for clear and convincing evidence. Under any other conclusion, you'd effectively be nullifying the clear and convincing standard.

JUDGE WALLACH: On Page 21 of your opening brief, you say, ah, that the improper attempt to shift the burden of proof to Leader, only confirms Facebook's fundamental failure to carry its own burden. And you sight to Pfizer for that proposition. Saying, quoting "burden of proof never shifts to the patentee to prove validity." In Pfizer, we go on to say that the patentee "would be well advised to introduce evidence sufficient to rebut that of the challenger." But, that doesn't shift the burden. There's two different things. It seems to me that, ah, if Facebook met their burden, initially, with their cross examination, and their argument about interrogatory response and some other things that that District Court judge discussed that was in the body and in the footnote, uh, wouldn't you have been well advised to submit rebuttal evidence such as the source code to the jury? You make a, you make a huge argument about Facebook's

failure to submit that source code. But you could have done it, couldn't you?

MR. JOSEFFER: The fact that we're here kinda answers the question that, you know. Sure, if we put other stuff in the record, maybe, we wouldn't be here, right? Um, but that's frankly always true at every appeal that's I've ever argued that, gee, if the specification had been a little more specific. But, the, the reasons that we didn't do any more are a few things. First, remember Facebook at trial was raising a lot of different issues, including invalidity issues. And on every other one, so we had to make decisions on every other one had an expert presenting an element-by-element analysis based on technical data. So this one we're at didn't, and where it was just relying on witness testimony when both witnesses direct testimony point supported us, it didn't seem to be one where we were going to end up spending a lot of time at trail on. But, second, even at

JUDGE WALLACH: So it's a lawyer decision at trial.

MR. JOSEFFER: In part. Um, because again this is what burden of proof is for. You find out what they are putting on and you decide how to use your time to respond to it. And here, all they were doing was attacking our witnesses who testified in our favor and then looking to an interrogatory that really didn't address the question.

And the, the, if you read the closing arguments the District Court's JMOL decision makes it really clear that that's what Facebook was relying on.

JUDGE WALLACH: Well, they're they're looking at that testi, testimony at trial, live testimony. They're looking at that interrogatory response. But, they've also got a deposition response that seems to be directly contrary and they're relying on that in there.

MR. JOSEFFER: No and that's part of their credibility though because what Mr. McKibben testified to in his deposition, was he said well, that was a long time ago and I don't specifically recall but other people keep track of that information. Now, if the jury wanted to infer that well if he didn't recall then, but he recalls now, he must be lying now. That goes to the credibility attack, you could throw it as testimony for that reason as the jury instructions told the jury that's what they could do. But there's there's no, again, there's no affirmative evidence from that first deposition.

JUDGE LOURIE: Mr. Joseffer, in context to the fact that this is a jury verdict, ah, we're not talking about a little slip here. Uh, this had been under development since what, 1999. And a critical date is '02. And they are demonstrating this to various parties – Wright Patterson, Boston Scientific, The Limited and at least

two of these parties agreed to buy it. Wasn't this clearly on sale and when you couple this with the testimony, ah where ah the key witness was simply unsure of dates. Why wasn't the jury allowed to uh, uh make its decision and be affirmed.

MR. JOSEFFER: Well the point is to keep track of what this is and that's the critical issue. Is there's no dispute. I mean, for purposes of appeal, there's no dispute that evolving Leader2Leader product suite had been subject to borrowing activity. There's no dispute that the patented invention was something they had been working on for a while. Ohm, the question is when was the patented invention, you know, completed, put in the invention properly demonstrated and offered for sale.

JUDGE LOURIE: You said right around the time of December 11th. I mean that almost sounds like it was targeted right after the critical date. The jury didn't believe him.

MR. JOSEFFER: It was targeted because, I mean, it was targeted because of the provisional. Remember, the idea here was they thought the provisional had to be enabled, that it first needed to be completed.

JUDGE MOORE: You gotta slow down. You talk so fast. I'm and I talk fast and I'm having trouble following you. So, please, slow down.

MR. JOSEFFER: Thanks for the reminder. I appreciate that, it's good to know. Uh, what they did, the testimony; they knew the provisional had to be enabled so they filed the provisional just a day or two.

JUDGE WALLACH: It's good to know but you're not doing it.

MR. JOSEFFER: I'm sorry.

JUDGE MOORE: You're at the same speed you were a few minutes ago.

MR. JOSEFFER: So what they did is they filed the provisional right after they reduced it to practice. They then filed the final application uhm, just under a year from the provisional. There's nothing, you know, devious about that. And so, the point is that then what you've got is the critical date and the product being reduced to practice. Basically, at the same time.

Now what Facebook argues and again there's no evidence to the contrary just innuendo speculation. It also makes sense; it's kind of a point of provisional. But what Facebook is arguing then is that while there may have been a two-day window, before December 11 of 2002 in which you had a reduction of practice but the critical date hadn't kicked in yet. But even for that and this is what the District Court's footnote when to in its opinion. There's just no evidence either that the patent

invention was, there are two things about that. One is what they're looking at is e-mail from December 8th discussing efforts for sale of Leader2Leader before then.

And one, that's the first of things before then not after then in that 2 to 3 day window. But second, again the e-mail, like everything else just talks about Leader2Leader. Not about the patented invention. And the whole point of the clear and convincing evidence standard is that you need actual evidence and sufficient evidence and if you look at this Court's decisions of Eli Lilly and in 3M, there was real evidence there. Uhm, there's real evidence to support a jury verdict. But this Court held that it wasn't clear and convincing.

If you look at the Supreme Court's decisions on barbed wire patent case or Nikki Shawa. There was a ton of evidence of pieces of evidence. More than 20 witnesses testified in the barbed wire case. But the Supreme Court held the question isn't whether you got some evidence it's not whether you have a lot of evidence. It's whether you have clear and convincing evidence on a relevant question. And here, their entire theory at trial was unnecessarily to try to uhm draw an inference that's just not true and the source code's really important. If I could just get back to how Facebook would have proved this issue at trial if it was actually right. During

discovery, it moved to compel the source code, and the Court granted the motion to compel us, the source code on the ground that that's the only way Facebook could figure out whether the patent whether Leader2Leader actually practiced the patented invention.

We produced the source code and they reviewed it and guess what, no one ever heard anything about it again. And then they put no expert testimony in on it. Also, during discovery, before they noticed depositions of our customers to ask the customers what was offered for sale what was demonstrated to you, and counsel doesn't take them. So all the ways you actually prove a theory at trial, you know Facebook did try to prove its other defenses at trial with real evidence. Facebook chose not to pursue it.

JUDGE WALLACH: Mr. Joseffer, you're on the horns of a dilemma. You keep saying real evidence. You can't really say to this Court with a straight face that testimony by a witness is not real evidence.

MR. JOSEFFER: But the testimony supports us. When the witnesses, the two witnesses, McKibben and Lamb, when they were directly asked the question about whether they delayed the patent invention Leader2Leader, they both said no.

JUDGE WALLACH: That's correct. That's correct. That testimony says something. And if a wit, if a trier of fact looks at that witness and says, look at him, he's got his hands up in the air and his palms raised to the ceiling. He's looking with his eyes you know and they make a record of that and they say obviously he's lying to me. That's real evidence too, is it not? Demeanor of the witness?

MR. JOSEFFER: This is the point. It's evidence that allows the jury to, according to jury instruction and about 24 cases cited in the brief, to disregard the witness's testimony. It's not evidence, affirmative evidence, that's contrary to what the witness testified is true.

JUDGE WALLACH: Pardon my Latin, but I seem to recall something in law school that says "Falsus in uno, falsus in omnia?" Something like that. If you're lying about one thing, there can be a presumption, presumption that you're lying about everything?

MR. JOSEFFER: For purposes of this appeal, there's a standard of review, right? We're not disputing the jury can conclude that McKibben lied about everything he said. You can just toss all his testimony out. That's a different point. The point, though, is that, and this is Nikki Shawa is again is a Supreme Court case on clear and

convincing. That just means you can throw the testimony out. For summary judgment JMOL to mean anything, the party with the affirmative burden of proof still has to have their own affirmative evidence.

JUDGE WALLACH: And their affirmative evidence is that there's sales negotiations going on with Wright-Patterson Air Force Base, with the GAP, uh The Limited. Um, with one other, Boston Scientific uh, and that uh, that testimony by your key witness is no uh, we didn't have, uh the patent incorporated in the Leader2Leader at that point. You can take those two things together and then you take the evidence that they put on that that interrogatory answer that you say, "oh no, it was only directed at this time" and they say, "oh yea, well if you answered it that way and you meant it that way, you should have explained it."

MR. JOSEFFER: Sir, a couple things. All of that evidence about barring activity, again, that all relates to Leader2Leader. The only. I agree with you about going to interrogatory cause the only thing that they really have used to try to tie patent invention to Leader2Leader such as the barring activity would actually relate to the patent invention, is the interrogatory response which

JUDGE WALLACH: No, there's the deposition response as well.

MR. JOSEFFER: But he didn't remember at the time. And he said other people keep and again you can throw out his testimony. But under the case law, you throw out his testimony, what do you have left?

JUDGE MOORE: Mr. Joseffer.

MR. JOSEFFER: It's the interrogatory. I would like to

JUDGE MOORE: I want to, I want to ask you and I'm going to couch this by saying it's a friendly question, so just listen to it, OK? Uh, if you were trying to prove infringement, forget about clear and convincing evidence for preponderance damage. You're trying to prove infringement, can you establish your case by simply calling the defendant to the stand and asking the defendant whether or not he practices all the claims, having him say no and saying, hah jury, I've established my case. I rest my case.

MR. JOSEFFER: Exactly, and you're at the

JUDGE MOORE: Can you do that?

MR. JOSEFFER: No. Of course not.

JUDGE MOORE: And that's preponderance of the evidence.

MR. JOSEFFER: Correct. And under.

JUDGE MOORE: And you sure can't do it under clear and convincing, right?

MR. JOSEFFER: Exactly. And so the question then and that's what summary judgment and JMOL are for, otherwise they'd never so the question is what else do they have on the key question, not on Leader2Leader, on the key question of when the patent and invention was in Leader2Leader to help them connect the dots, and on that, it really does all come back to the interrogatory. And the reason that's not that's not even close clear and convincing is three things. First, the question asked in the present tense does Leader2Leader, you know, what products embody, and the answers in the present tense, about embodies, this is years later. Second, the present tense is not an accident because at this point in time, remember, Facebook hadn't flipped its theory. At that point, Facebook was still arguing that Leader2Leader is currently falsely marked because.

JUDGE MOORE: Your interrogatory you're going so fast again so I want to make sure that I understand your point. Uhm, your point is the interrogatory says for each claim uh tell us uh that Leader contends is practiced by any product. You're saying we answered it honestly, we said Leader2Leader practices this. Doesn't mean that Leader2Leader at all times practices it. Right?

MR. JOSEFFER: And that wasn't. Right. And the reason

JUDGE MOORE: And that's your point. I just wanted to make sure I understand your argument.

MR. JOSEFFER: Yes, yes and there's a reason for that. It wasn't like we were trying to hide something. The reason is, the present tense was technically important because, at the time, Facebook was asserting a false marketing defense where the present tense is what matters.

JUDGE MOORE: They never asked you by interrogatory? Uh, at what point you started to offer the product that tells this that embodies the planes?

MR. JOSEFFER: The key other interog.

JUDGE MOORE: That would be a standard interrogatory that I would expect to see but I didn't see it cited.

MR JOSEFFER: Right. And they didn't they did ask one other interrogatory at the same time as this one which was important and that was.

JUDGE MOORE: And they had the false marking claim, which is probably why they wanted it in the present tense to know which of your sayings actually did.

MR. JOSEFFER: Exactly. If we would have answered that in the past tense, they would have said it was not responsive and they would have been right. Now.

JUDGE MOORE: Because it was related to their false marking claim, that's why they wanted it in the present tense.

MR. JOSEFFER: And they did serve at the same time as separate interrogatory concerning prior uses. And which we answered truthfully that there were none. So, in context, it was clear that that interrogatory was about the present for false marking as separate prior use interrogatory response that they don't talk about a lot. And it also bears emphasis that you know that because of false marking, they were arguing all along until the end of discovery that Leader2Leader did not embody the patent's invention.

And when they pulled this 180-degree switcheroo shortly before trial, we're not raising that as a procedural objection. But, when the question is why is the party that did not hear the burden of proof for clear and convincing evidence did not have more, the answer is well right before trial, they changed us. And of all their theories, this was the one that didn't even have expert or technical evidence, so why wouldn't we have done more or could we have done more at that point.

JUDGE WALLACH: The record doesn't contain everything surrounding the interrogatories? It just has that page or pages? Were there definitional provisions or anything

that required you to expand your, your response at any point?

MR. JOSEFFER: No. And again, they, they because at the same time, they filed a separate prior-use interrogatory. I suppose that, I mean look, as a matter of general updating law, right? With this being a false marking question about embodies, if the answer to embodies for false marking purposes, the current version had changed, I'm sure he would have updated it. But since it wasn't directed at that and there was a separate prior use question, there's no need to update that because the prior uses were what they were. Um.

JUDGE LOURIE: Mr. Joseffer, you have consumed your total time, but you've gotten a lot of questions, we'll give you two minutes for rebuttal.

MR. JOSEFFER: Thank you.

JUDGE LOURIE: Mr. Hungar.

MR. HUNGAR: Thank you your Honor. May it please the court. Thomas Hungar for appellee Facebook. Uh, with respect to what Mr. Joseffer described as the key issue, when did Leader2Leader first embody the invention before or after the critical date. Uh, there is, there are a number of pieces of evidence that support the jury's finding in favor of Facebook on that issue. In the first place, um, Mr. McKibben testified that even under his

version of the events at trial, the invention was fully complete, done, fully coded and part of Leader2Leader a plug into part of Leader2Leader before, a few days before he said.

JUDGE MOORE: This is your attack argument.

MR. HUNGAR: In part your Honor, yes. But, but actually, it goes beyond.

JUDGE MOORE: No. What was offered for sale. But, it actually goes beyond that your Honor because on December 8th which is obviously within a few days before the critical date of December 10, 2002. On December 8th, 2002, Mr. McKibben sent an e-mail in which he described the current state of their negotiations with both The Limited and Boston Scientific. In that e-mail, he specifically said looking to a contract that they expected to sign in January with respect to the Limited that what they were offering to the Limited was Leader2Leader with quote the full suite of technology close quote. December 8th that's three days uh two days before the critical date within the time period when even under Mr. McKibben's own testimony, the invention is done, complete part of Leader2Leader. That's at 25705 of the joint appendix. And they're offering the full suite of Leader2Leader

JUDGE WALLACH: Well, six months before that, if there was a Leader2Leader.

MR. HUNGAR: Yes your Honor.

JUDGE WALLACH: Program.

MR. HUNGAR: Yes your Honor.

JUDGE WALLACH: If they had offered it for sale to someone, wouldn't they have said, this is our full suite of technologies?

MR. HUNGAR: Actually, in the you're referring to the Wright-Patterson offer in January, 2010. In that offer, they also used language making clear that Leader2Leader with Digital Leaderboard, and that's important, is operational and fully developed. That's what the January in 2010 offer to Right Patterson says and remember, the, their own again, Mr. Lamb, the other inventor's own testimony relies on an August 19, 1999 e-mail as evidence in the conception of the invention, of the patent invention in August, 1999, that e-mail refers to the invention as quote Digital Leaderboard. So we have the, the name of the invention in 1999. Digital Leaderboard with, with Leader2Leader as being offered in January of 2002 so that, we submit provides clear and convincing evidence of what was being offered at that point. And, of course, the interrogatory when they when they described what practice the invention, again, they say Leader2Leader with the Digital Leaderboard engine. So, so, the Digital Leaderboard evidence provides an

additional ground for finding this uh, upholding the verdict.

In addition, I'd like to point out that Mr. Lamb's testimony um, to be sure, he testified as Mr. Joseffer suggests that the jury didn't have to believe that the testimony that supports the other side's version, and he also testified separately. He said that the technology took a couple of years, maybe three to full implement after conception date. Conception is August of 1999, a couple of years would be August of 2001. Three years would be August of 2002. All before the critical date. And that's at 24829.

JUDGE MOORE: Mr. Hungar, if, suppose that all this other evidence that you're referring to didn't exist. I just want to try to focus on principles of law. There's no interrogatory responses, there are no e-mails, there's nothing.

MR. HUNGAR: Yes.

JUDGE MOORE: Do you agree with sort of the relative outrage that somebody couldn't just call the inventor to the stand and say disbelieve him and thereby I've met my clear and convincing evidence burden.

MR. HUNGAR: I agree. That's correct your Honor. The law.

JUDGE MOORE: You agree that if all that other stuff didn't exist, but you're saying this is not that case.

MR. HUNGAR: Yes, that's absolutely right. On that case, the, the jury is entitled to disbelieve and that, that can be, that is affirmative evidence. The Supreme Court said in Reeves that the third circuit said in Urban which is a criminal case so certainly in a civil case, even one subject to clear and convincing evidence standard, it is clear and convincing evidence standard. It is affirmative evidence, but it is also clear that, standing alone, it is not enough to get over the burden. But it does serve as additional evidence to support the other evidence in the record and here we have ample other evidence in the record that confirms that what they were offering was the patented technology.

JUDGE MOORE: But I'm troubled by the interrogatory responses providing that theoretical affirmative evidence, because interrogatory responses were couched absolutely in the present tense and given the presence of your false marketing claim, it seems to me you were going after very much what are you selling today that embodies these claims. And not, and how long have you been selling it in that form. And that's a standard interrogatory I've seen in most patent cases is when did you start selling it as it embodies the claims and that interrogatory

doesn't seem to have been presented to us. So, I want to know what your thoughts are about the interrogatory because certainly the District Court relied on some. The District Court only cited two things, as the evidence substantiates the jury verdict. He cited the interrogatories and he cited the testimony that was disbelieved. So that's you're, you're pointing to other stuff. What do you think about these interrogatories? Let's go piece by piece.

MR. HUNGAR: OK, although I. The District Court actually point to other evidence in the footnote where he goes through other evidence which we also.

JUDGE MOORE: With note of conception, yes. Yes, the evidence of conception in the footnote.

MR. HUNGAR: But also that's, that's what I referred to where they admit, they themselves admit even at trial that the technology is done and part of Leader2Leader before their critical date.

JUDGE MOORE: Prior to the critical date.

MR. HUNGAR: Yes.

JUDGE MOORE: Yes, OK. So.

MR. HUNGAR: And again, they also admitted again that it's part of a plug-in to Leader2Leader at that time once it's complete. But, from that aside with respect to the interrogatory your Honor. Again, even if you're looking

at interrogatory you have to take into account Mr. McKibben's testimony.

JUDGE MOORE: No, but I want, I mean the interrogatory is a legal response and it says is practiced.

MR. HUNGAR: Yes.

JUDGE MOORE: I mean, how in the world did, could it ever be used to support the notion that it was practiced ten years earlier.

MR. HUNGAR: Well your Honor. When you're talking about a product and the product is Leader2Leader. We know that Leader2Leader was on sale they conceded at that trial but now they concede for purposes of appeal that it was on sale prior to the date and they admit without qualification Leader2Leader practices the patent. OK? Now it's true, it's in the present tense but it is certainly evidence from which a jury can infer that well, it practices the patent. They didn't say that there was ever a time when it didn't practice the patent. So, if it's Leader2Leader it seems like it practices the patent. But when you add to that, we, we noticed a 30(b)(6) deposition of Mr. and they put up Mr. McKibben to testify and that.

JUDGE MOORE: Mr. Hungar, suppose this is turned around on infringement. How would you like it if your

interrogatory said our current version of Leader2Leader or, it doesn't say current, but it says Leader2Leader practices the claim you admit it. And then, they say, therefore, we're entitled to get damages for all years you've ever sold this. And you say, wait a minute, time out, it didn't always have this form. I mean this is software. This stuff is changing every single day.

MR. HUNGAR: Well it may be. I mean it's not like; this isn't like Microsoft Word where you have it a different version coming out. It's not like there's something called Version 1 of Leader2Leader and Version 2 of Leader2Leader. There aren't many documents that say that. It's always been called Leader2Leader, but.

JUDGE MOORE: But Digital Leaderboard. Right. It had a whole different name when [garbled].

MR. HUNGAR: That, that, that's part of that, but I described as part of it but that was the engine of.

JUDGE MOORE: That's the functionality that's at issue.

MR. HUNGAR: Yes. And that's the functionality.

JUDGE MOORE: Even a separate name.

MR. HUNGAR: That was part of the offer.

JUDGE MOORE: But that name was never mentioned in those earlier offers.

MR. HUNGAR: That's not correct your Honor. In the January, 2002 offer to Wright Patterson, it specifically referred to Digital Leaderboard being part of the system and fully operational.

JUDGE MOORE: Is that prior to the critical date?

MR. HUNGAR: Yes your Honor. That's January, 2002. The critical date is December 10, 2002. Um.

JUDGE WALLACH: I do think that Helen raises a good question. Why shouldn't you put in the code. I mean it's a question I asked appellate counsel too; but.

MR. HUNGAR: Your honor, the whole argument about argument about the code, of course, has nothing to do with the record before the jury. They claim in their brief that, oh we gave them all the copies of the source code. There's nothing in the evidence in the record before the jury to that effect. In fact, there's nothing in the record to that effect. The only thing the record says is we'll make we'll give them what's available so my understanding, not that this is in the record, but my understanding is, in fact, that we did not have, were never given a pristine copy of the code, as it existed, before the critical date. But whether, that's neither here nor there. The question is what was in front of the jury.

There's no case from this court that says you must offer the source code. In fact, the standard is any relevant evidence. And when you're trying, just as Mr. Joseffer said, when you have a lot of issue to try. A lot of different factual issues, and here you've got the admission of the party opponent on the critical issue that you can give to the jury, why try to complicate matters further by trying to introduce technical evidence. Particularly in the case of source code, it's often the case you just can't get it because

JUDGE MOORE: Why didn't your expert testify on it?

MR. HUNGAR: Well, again, your Honor. My understanding, not in the record. My understanding we were never given a pristine copy of the source code as it existed before the critical date so we wouldn't have been in the position to do it. Also.

JUDGE MOORE: What do you mean, pristine – does it have a coffee stain on it? I mean what, what does that mean? What were you.

MR HUNGAR: Without any um additions without any changes made afterwards.

JUDGE MOORE: But whose obligation is it to get the discovery from them that you want? It's yours. You've got to file the appropriate interrogatories. You've got to file the appropriate requests for documents.

MR. HUNGAR: Your Honor, we filed a 30(b)(6) notice as I was saying earlier and it specifically addressed question after question that we want to know every version at what time was conception, at what time was reduction to practice. We're going to ask you on every version that practiced the patent and when.

JUDGE MOORE: And do you believe they failed to comply? And if so, why didn't you move for a motion to compel them on it?

MR. HUNGAR: Your honor, we asked.

JUDGE MOORE: You're up here on appeal complaining that you didn't have a pristine copy. I have no clue what you even mean by that. And, and that that somehow justifies why you, you didn't include it as any of the evidence.

MR. HUNGAR: I'm not complaining your Honor, I'm simply answering the question about why it is that we chose to try the case in a different way which trial counsel, as Mr. Joseffer said, have to make judgments about what's to be most effective in the limited time available. And that's the reason, or one of the reasons why we tried it that way, but with respect 30(b)(6) deposition your Honor, the 30(b)(6) deposition noticed notified them and this was in February of 2010. Some five months before the trial. That the notice said we want to

talk about these issues: reduction to practice and which which versions of the software practice or patent and so, we asked Mr. McKibben. Can you identify any version of Leader2Leader that didn't practice the patent. He can't identify any version. That, combined with the interrogatory response, those two facts, in and of themselves, provide strong evidence that if he, if the inventor and president of the Company can't identify any version that didn't practice the patent and then given an unqualified answer that says it does talk to the patent.

JUDGE MOORE: Did he say I can't identify anything or did you ask him specifically at which point in time a different version that didn't have these features existed and he responded that he couldn't recall.

MR. HUNGAR: Um, the question was: Can you identify any iteration of the Leader2Leader product.

JUDGE MOORE: Which can you tell me what page you're on?

MR. HUNGAR: 25761 of the joint [garbled].

JUDGE WALLACH: Can you identify any iteration of the, of the Leader2Leader product, and that, in your opinion, did not implement what was claimed in the 761 patent. Answer, that was a long time ago, I can't point to a specific point. So he admit.

JUDGE MOORE: That's a timing question as opposed to a response that there never existed one. Right? If he's not saying that his response is not an acknowledgement that Leader2Leader has always.

MR. HUNGAR: But, but, but.

JUDGE MOORE: Can you agree? Leader2Leader when first, when first put on the market didn't have the Digital Leaderboard in it.

MR. HUNGAR: No, no we don't agree your Honor, to the contrary. The first offering the record to Wright-Patterson where they specifically say it has Digital Leaderboard. That evidence standing alone is sufficient to support the jury's verdict.

JUDGE MOORE: I'm still which page did you say it on 257. I'm sorry.

MR. HUNGAR: 25761.

JUDGE WALLACH: [garbled] 20.

MR. HUNGAR: That's in Volume 2. The joint appendix. And the Wright-Patterson offer which refers specifically to Digital Leaderboard is Defendant's Exhibit 179 and the references to Digital Leaderboard are at 27202 and 27204, uh, perhaps among others. And, again, it specifically talks about Leader2Leader with the Digital Leaderboard system and how it's going to provide a collaboration environment, it's operational, it's already developed and

this was well before the critical date. So, your Honor, that evidence, as well even if you leave the interrogatory response completely aside, which, of course, you can't do. Reading the evidence most favorable to the verdict. But even putting the interrogatory response aside, that other evidence provides clear and convincing evidence of invalidity.

JUDGE MOORE: Can I ask you a quick question about your divided infringement alternative grounds for a permit?

MR. HUNGAR: Yes.

JUDGE MOORE: Um, the claim says the computer implemented method of managing data comprising computer executable act. The key phrase it seems to me is "computer executable acts" which comes after the work comprising. Yet, you all claim it's part of the preamble and somehow Mr. Joseffer didn't respond to the contrary, but um, do you know, the MPEP and pretty much all patent books say that the transition phrase comprising is the end of the preamble and these words come after it. So I don't see that limitation as being part of the preamble, I see it as the body of the claim.

MR. HUNGAR: Well, even if that's true, your Honor. The fact remains that

JUDGE MOORE: Do you question whether that's true or do you know, are you certain as you stand here what portion of this claim represents the preamble.

MR. HUNGAR: Well, my understanding of the preamble is what comes before the list of the body of the elements of the claim that are

JUDGE MOORE: Do you know what a transition is in a conductive preamble at the end of comprising of?

MR. HUNGAR: Yes, comprising would be a transition, yes.

JUDGE MOORE: Right, consisting of consisting essentially of. The MPEP actually defines all of this in case you.

MR. HUNGAR: Right. I've looked at it your Honor, and I understand that comprising of the transition term, our, our understanding of this question is as set forth in the brief, but, as was also argue in the brief whether or not you view that as uh, limiting or applying to the claim, the fact remains that in the final step, they add a user step. And you can't give meaning to those words. I mean this court again and again considering similar language has concluded that requires third party, third party user action. And it's not, therefore, uh, something that Facebook can do.

JUDGE MOORE: Well, it says dynamically updating the stored metadata? Is that the.

MR. HUNGAR: No, it says that, which clearly the system can do. But, then, after that you have the wherein, wherein clause, which introduces an additional limitation, the user employs at least one of the application in data from the second environment. That requires the user to do something. And, therefore, the Facebook system must do something and the user must do something. And, ultimately, what the user does is going to, is going to result in some computer execution. Even if you're reading computer executable in, that's still being, that's still happening; but the user has to do something. That's unambiguous language requiring user action and therefore, you have to prove joint infringement and the jury found against the them on that.

JUDGE LOURIE: Thank you Mr. Hungar. We have your argument. Mr. Joseffer has a couple of minutes left.

MR. JOSEFFER: Thanks. Um. To start out, if you take what the evidence of Facebook has proffered and you remove two things. One is McKibben on the theory that he lied but Mr. Hungar said that's not you know, that's not going to get you there and you take out the interrogatory for reasons that we've been discussing with Judge Moore. The answer is, what would be left? And the answer is

nothing that would even be near, near clear and convincing evidence. And we know that in part because the District Court in the JMOL opinion relied solely on the combination of those two things. And then the footnote, you know, drop the footnote but it said that it was relying on those two things.

If you read the closing argument, Facebook was pounding credibility all along. So we've now gone from Facebook argument credibility as the linchpin of its case below saying, aw, there's lots of other stuff. Don't worry about credibility. And, and the bottom line is that all this other stuff they're arguing now is either waived because it wasn't presented below or is wrong or both.

For example, Digital Leaderboard now seems to be their key effort to try to tie Leader2Leader to the patented invention. If you read the entire trial transcript, you won't see a single description of what a Digital Leaderboard is, much less a clear and convincing one. The reason is it's not what Facebook was trying to prove its case on below. The correct answer which, again, you're not going to find this in the record, but the correct answer, if it's helpful to the Court, is additional Leaderboard is the software component, the engine that drives the overall Leader2Leader product. Leader2Leader's an evolving product over time, whatever

it happens to include in it, the software component, will now be included in Digital Leaderboard, which is why the phrase is Leader2Leader powered by the engine.

JUDGE MOORE: Do you mean that Digital Leaderboard refers to the plug-in that is really the functionality [garbled].

MR. JOSEFFER: No, that's, that's our point, whatever, whatever software Leader.

JUDGE MOORE: No, but that's our point. I don't understand what that means.

MR. JOSEFFER: No, we don't at all and there's no evidence that it is because this is the key thing. If the problem is, from the jury, you read the trial transcript, there's no description of Leader of Digital Leaderboard, 'cause there's no evidence on this.

Going outside of the record, this is what it is. And we would have explained this if they had actually raised the point at trial. Digital Leaderboard is just the software module or the engine that drives the entire Leader2Leader product. Digital Leaderboard is the software module. So, before the patented invention was in the product, you had a Leader2Leader powered by Digital Leaderboard. OK? And the Digital Leaderboard was the software module for the product.

After you later complete the patented invention and put it in the product, the patented invention is then in software prod, the software that goes into Digital Leaderboard for sure. But, Digital Leaderboard is not synonymous with just the patented invention any more than Leader2Leader is synonymous with just the patented invention.

But, the reason that at the appellate court is you really don't have to try and sort through all of these, you know, convoluted factual connect-the-dots factual theories is that, one, they weren't presented below, and two um, they certainly are not clear and convincing evidence. And even if you look, even with the interrogatory.

JUDGE MOORE: Do you agree it was reduced to practice prior to the critical date?

MR. JOSEFFER: It just, and that was the whole point of the filing of the provisional patent application then. The problem is Facebook at trial actually did it. Remember, because the critical date is right at the time that the application was filed and the barring activity in that few days window just before?

Facebook, at trial, was arguing that the invention was ready for patenting for purposes of barring activity. But, was not enabled for purposes of giving us the

benefit of the provisional under which we easily would have won. Which I think is another reason that Facebook really tried not to prove its case too meticulously here because, in addition to being wrong, it was really on the horns of a dilemma there between whether it was ready for patenting for the one purpose or the other. Either way, we should have won. They have a factual way to distinguish that, but it's dicey. So that's why they didn't have evidence. I know, I know I'm well over. If you want me to respond to method point, I could.

JUDGE LOURIE: No, I think we've heard the case. Thank you, Mr. Joseffer. We'll take the case under advisement.

MR. JOSEFFER: Thank you.

[END RECORDING]