

2011-1366

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LEADER TECHNOLOGIES, INC.,

Plaintiff-Appellant,

v.

FACEBOOK, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the District of Delaware in
case no. 08-CV-0862, Judge Leonard P. Stark

COMBINED PETITION FOR PANEL REHEARING
AND PETITION FOR REHEARING *EN BANC* OF
PLAINTIFF-APPELLANT LEADER TECHNOLOGIES, INC.

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June 6, 2012

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CERTIFICATE OF INTEREST

Counsel for Appellant Leader Technologies, Inc. certifies the following:

1. The full name of every party or amicus represented by me is Leader Technologies, Inc.
2. The name of the real party in interest represented by me is Leader Technologies, Inc.
3. No parent corporations or publicly held companies own 10 percent or more of the stock of Leader Technologies, Inc.
4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this Court are:

Law Firms: King & Spalding LLP; Potter Anderson & Corroon LLP,
Kramer Levin Naftalis & Frankel LLP

Attorneys: Philip A. Rovner; Jonathan A. Choa; Paul J. Andre; Lisa
Kobialka; James Hannah; Daryl L. Joseffer; Adam Conrad

June 6, 2012
Date

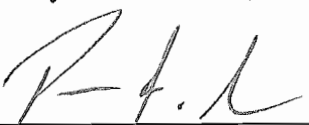

Paul Andre

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| PRELIMINARY STATEMENT..... | 1 |
| I. PANEL REHEARING IS APPROPRIATE BECAUSE THE PANEL MISAPPREHENDED THE FACTS ARGUED IN THE LOWER COURT, AND INCORRECTLY USED THOSE FACTS TO AFFIRM THE DISTRICT COURT JUDGEMENT..... | 4 |
| A. The Panel Misapprehended That Leader Conceded That The Invention Claimed In The '761 Patent Was Ready For Patenting Prior To The Critical Date..... | 6 |
| B. The Panel Misapprehended and Misconstrued Leader's Interrogatory Response As An Admission..... | 7 |
| C. The District Court Did Not Rely On The Evidence And Facts Cited By The Panel Because Those Facts Cannot Be Considered Offers For Sale As A Matter Of Law..... | 10 |
| 1. <i>Wright-Patterson</i> | 11 |
| 2. <i>Boston Scientific</i> | 13 |
| 3. <i>The Limited</i> | 13 |
| 4. <i>American Express</i> | 14 |
| II. <i>EN BANC</i> REVIEW IS NECESSARY TO RECONCILE THE PANEL DECISION'S CONFLICT WITH SUPREME COURT DECISIONS AND THIS COURT PRECEDENT. | 14 |

TABLE OF AUTHORITIES

CASES

| | |
|---|------------|
| <i>Abdul-Akbar v. McKelvie</i> , 239 F. 3d 307 (3rd Cir. 2001) | 9 |
| <i>Banos v. O'Guin</i> , 144 F. 3d 883(5th Cir. 1998) | 9 |
| <i>Barrett v. United States</i> , 423 U.S. 212 (1976)..... | 9 |
| <i>Bose Corp. v. Consumers Union of U.S., Inc.</i> , 466 U.S. 485 (1984)..... | 9 |
| <i>Bronston v. United States</i> , 409 U.S. 352 (1973)..... | 8 |
| <i>Carr v. US</i> , 130 S.Ct. 2229 (2010)..... | 9, 15 |
| <i>Colorado v. New Mexico</i> , 467 U.S. 310 (1984)..... | 10, 15 |
| <i>Dole Food Co. v. Patrickson</i> , 538 U.S. 468 (2003)..... | 9 |
| <i>Egbert v. Lippmann</i> , 104 U.S. 333 (1881)..... | 10 |
| <i>Elan Corp. v. Andrx Pharms., Inc.</i> , 366 F.3d 1336 (Fed. Cir. 2004)..... | 13 |
| <i>Group One, Ltd. v. Hallmark Cards, Inc.</i> , 254 F.3d 1041 (Fed. Cir. 2001)..... | 12, 13, 15 |
| <i>Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.</i> , 484 U.S. 49 (1987)..... | 9 |
| <i>Helifix Ltd. v. Blok-Lok, Ltd.</i> , 208 F.3d 1339 (Fed. Cir. 2000)..... | 11, 15 |

| | |
|---|--------|
| <i>Invitrogen Corp. v. Biocrest Mfg., L.P.</i> , 424 F.3d 1374 (Fed. Cir. 2005)..... | 10 |
| <i>Linear Tech. Corp.,v. Micrel, Inc.</i> , 275 F.3d 1040 (Fed. Cir. 2001)..... | 11 |
| <i>McNeill v. United States</i> , 131 S.Ct. 2218 (2011)..... | 9 |
| <i>Microsoft Corp. v. i4i Ltd. P’ship</i> , 131 S.Ct. 2238 (2011)..... | 10, 15 |
| <i>United States v. Wall</i> , 371 F.2d 398 (6 th Cir. 1967)..... | 8 |
| STATUTES | |
| 1 USC § 1 | 9 |
| 18 USC §1839(3) | 10 |
| OTHER AUTHORITIES | |
| Restatement (Second) of Contracts § 21..... | 12 |
| Restatement (Second) of Contracts § 33(3)..... | 13 |

STATEMENT OF COUNSEL FOR *EN BANC* PETITION

Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance:

1. Whether the use of present tense verbs in written discovery can be deemed clear and convincing evidence of actions alleged to have happened in the past, or do they merely refer to present and future actions.

2. Whether citing to brand names of products can be considered clear and convincing evidence of the on-sale bar or public disclosure for invalidity challenges under 35 U.S.C. § 102(b).

3. Whether discussion that cannot rise to the level of a commercial sale as a matter of contract law can ever be viewed an offer for sale under 35 U.S.C. § 102(b).

4. Whether public disclosure allegations under 35 U.S.C. § 102(b) can be found where a party executes non-disclosure agreements, and other reasonable measures to maintain secrecy.

Based on my professional judgment, I also believe the panel decision is contrary to the following decisions of the Supreme Court of the United States or precedents of this Court:

Microsoft Corp. v. i4i Ltd. P'ship, 131 S.Ct. 2238 (2011).

McNeill v. United States, 131 S.Ct. 2218 (2011)

Barrett v. United States, 423 U.S. 212 (1976)

Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., 484 U.S. 49 (1987)

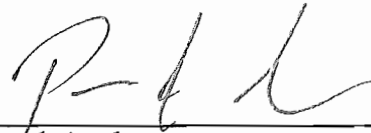
Dole Food Co. v. Patrickson, 538 U.S. 468 (2003)

Carr v. United States, 130 S.Ct. 2229 (2010)

Helifix Ltd. v. Blok-Lok, Ltd., 208 F.3d 1339 (Fed. Cir. 2000)

Group One, Ltd. v. Hallmark Cards, Inc., 254 F.3d 1041, 1048 (Fed. Cir. 2001)

United States v. Lange, 312 F.3d 263 (2002)

A handwritten signature in black ink, appearing to read 'P. Andre', written over a horizontal line.

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PRELIMINARY STATEMENT

Panel rehearing is respectfully requested in this matter because the panel's misapprehension and misapplication of facts have resulted in a manifest injustice. The facts the panel relied upon to affirm the district court's judgment were not the facts argued below to support the jury verdict, nor do they support the panel's affirmance when viewed in their totality. Quite the contrary, the district court did not rely on the facts cited by the panel because Leader demonstrated to the lower court that those facts could not support the jury verdict as a matter of law. As such, the district court relied *exclusively* on the combination of an interrogatory response and the jury's disbelief of the inventor's testimony as the only affirmative evidence supporting the jury's verdict.

The panel has properly rejected the district court's incorrect statement of law that disbelieved testimony is a sufficient basis for drawing a contrary conclusion. Opinion ("Op.") at 14. Therefore, without the combination of the disbelieved testimony and the interrogatory response, the district court's judgment cannot stand. Nonetheless, in order to sustain the district court's judgment, the panel reexamined truncated portions of the record below, parsed out snippets of evidence, and linked the interrogatory response to these fragmented facts to demonstrate a sufficiency of evidence for the jury verdict. Because these facts were not argued below to support the jury verdict, the complete record regarding these facts was not before this Court on appeal and the panel did not have the benefit of viewing the facts in their totality. Leader only appealed the basis and facts used by the district court in its decision – Leader did not appeal every

hypothetical basis and fact the district court could have used, but chose not to use. As a result, the panel did not have before it the totality of facts as presented below. Stated another way, Leader's appeal focused *solely* on whether the only evidence argued to the jury and relied upon by the district court (disbelieved testimony and an interrogatory response) constituted clear and convincing evidence. The panel looked at the small portion of the evidence it had before it and converted the appeal from one asking if the evidence relied upon by the district court constituted clear and convincing evidence to one asking if there was a sufficiency of evidence based on evidence not relied upon by the district court. Because the panel had only a fragment of the evidence presented at trial, it misapprehended the facts. As such, a panel rehearing with full briefing is required, where at the very least the case could be remanded back to the district court for further findings of fact.

Panel rehearing is also necessary because the panel misapprehended the facts concerning Leader's position regarding the "ready for patenting" prong of *Pfaff*. The panel incorrectly stated that Leader did not contest that the invention was ready for patenting prior to the critical date. Op. at 11. Not only did Leader contest this fact, but Facebook also contested this fact throughout the entirety of the litigation – only at trial did Facebook argue the opposite.

Leader argued to the district court that if the source code and technical description of Leader's technology that was submitted with its provisional application did not support the claimed invention, then the invention could not have been ready for patenting because the code submitted with the provisional application was the actual code for the Leader2Leader product at the time. The

panel did not appreciate the fact that source code developed in December 2002 was submitted with Leader's provisional patent application, nor that Facebook and its expert successfully argued that the code did not embody the claims. Had the patent enjoyed the priority date of the provisional application, Facebook's on-sale and public disclosure defenses are moot. But, Facebook convinced the jury and the district court that the code developed in 2002 and submitted with the provisional did not embody the claims, so Leader did not get the benefit of the provisional priority date. The panel misapprehended these facts relating to the ready for patenting prong.

Finally, *en banc* review is required if panel rehearing is denied because the panel's decision, if followed, will conflict with Supreme Court precedent with respect to its findings that (1) the use of present tense verbs are construed to mean actions in the present or in the future, but not actions that occurred in the past, and (2) the clear and convincing standard for patent invalidity requires hard evidence, and not merely supposition. *En banc* review is also required because the panel's decision is contrary to this Court's precedent regarding what constitutes a commercial offer for sale and public disclosure of an invention. Additionally, the panel's decision is contrary to this Court's precedent as to whether brand names of products can be used to demonstrate an offer for sale or public disclosure, instead of hard evidence that demonstrate an element-for-element analysis of the alleged on-sale or public disclosure.

I. PANEL REHEARING IS APPROPRIATE BECAUSE THE PANEL MISAPPREHENDED THE FACTS ARGUED IN THE LOWER COURT, AND INCORRECTLY USED THOSE FACTS TO AFFIRM THE DISTRICT COURT JUDGEMENT.

The panel misapprehended three essential issues that led to a manifest injustice. First, the panel misapprehended that Leader conceded the invention was ready for patenting prior to the critical date, while Leader in fact strongly contested that fact. Second, the panel misapprehended the circumstances surrounding an interrogatory response, and then misconstrued the response as an admission of an essential fact, while the language of the interrogatory itself qualified the response to preclude that finding. Finally, the panel misapprehended and misapplied the facts presented at trial by citing to facts that the district court did not rely on. These misapprehensions are grounded in Facebook's lack of independent evidence and the timing of its assertion of the on-sale bar and public disclosure defenses.

Facebook did not provide any independent evidence that the product allegedly offered for sale or publically disclosed in 2002 was an embodiment of the patented invention claimed in the '761 Patent. On the contrary, Facebook alleged throughout the entirety of this case that Leader's products, namely "Leader2Leader" and "Leader2Leader Powered by Digital Leaderboard," were not embodiments of the '761 Patent claims. Facebook even went so far as to amend its counterclaims *after* the close of fact discovery to add in a claim of false marking against Leader for marking the "Leader2Leader Powered by Digital Leaderboard" with the '761 Patent. Only in the eleventh hour, after the close of all fact discovery and exchange of its validity expert report, did Facebook add an on-sale bar and

public disclosure defenses. As such, Facebook had not developed any supporting evidence for its defense, and relied solely on discrediting the testimony of Michael McKibben and misconstruing Leader’s response to an interrogatory.

The panel appeared to appreciate the fact that Facebook did not provide affirmative evidence of invalidity, but instead “relied almost exclusively on Leader’s own admissions” as found in Leader interrogatory response and its documents. Op. at 15. What the panel did not appreciate, however, is the fact that at trial Leader provided extensive rebuttal evidence and facts regarding its documents proving that they were not offers for sale or public disclosures. It is for this reason that Facebook *only* argued that the disbelieved testimony and the interrogatory response supports its on-sale bar and public disclosure defense to the jury and in its JMOLs – not the documents cited by the panel.

The timeline below vividly illustrates how Facebook’s abrupt “about-face” with regard to its invalidity defenses and Leader’s products influenced the evidence submitted at trial.

| | |
|---------------|--|
| Mar. 23, 2009 | Facebook responds to Leader’s interrogatory regarding its basis for invalidity, but does not allege an on-sale bar or public disclosure defense |
| Apr. 17, 2009 | Mr. McKibben verifies Interrogatory No. 9 that “Leader2Leader® powered by the Digital Leaderboard® engine <i>is</i> covered by the ‘761 Patent.” |
| May 15, 2009 | Facebook supplements response to its interrogatory, but does not allege an on-sale or public disclosure defense |
| Nov. 20, 2009 | Facebook 2 nd supplement to interrogatory, still does not allege the on-sale bar or public disclosure defense |
| Nov. 20, 2009 | Close of written fact discovery |

| | |
|------------------|---|
| Dec. 23, 2009 | Facebook obtains permission from the district court to file its Second Amended Counterclaim adding in false marking stating <i>“Leade2Leader does not practice the invention disclosed by the claims of the ‘761 patent.”</i> |
| Feb. 23-24, 2010 | Mr. McKibben’s deposition |
| Mar. 1, 2010 | Last day to complete fact depositions |
| Apr. 8, 2010 | Facebook submits its expert report on invalidity, but does not allege an on-sale bar or public disclosure defense |
| Apr. 16, 2010 | Facebook 3rd supplement to interrogatory -- <i>for the first time</i> asserts an on-sale bar and public disclosure defense |
| Jul. 19, 2010 | First day of trial |

As the timeline shows, Leader’s interrogatory response had nothing to do with Facebook’s yet-to-be-alleged on-sale invalidity defense.

A. The Panel Misapprehended That Leader Conceded That The Invention Claimed In The ‘761 Patent Was Ready For Patenting Prior To The Critical Date.

A fundamental misapprehension of the panel was that Leader did not contest that the invention was ready for patenting prior to the critical date. Op at 11. Leader did contest this point, repeatedly. As Leader argued to the district court and on appeal, the invention could not have been ready for patenting prior to the critical date as a matter of law because Facebook prevailed in its argument that the code developed at the time of filing of the provisional application did not embody the claims of the ‘761 Patent.

Both inventors testified that they believed they had completed the code for the invention in December 2002, and within days of completing the code they included the relevant portions of the code and updated technical description in the provisional application that was filed on December 11, 2002. Despite Leader’s

argument at trial that the code developed in December 2002 and submitted in its provisional (and subsequently incorporated in its Leader2Leader product suite) embodied the claimed invention, Facebook and its expert argued otherwise and the jury believed them. The district court affirmed the jury verdict that the code completed in December 2002 and submitted with Leader’s provisional did not embody the invention claimed in the ‘761 Patent.

As to this outcome, Leader argued that Facebook’s mutually exclusive position – that the code completed in 2002 was not an embodiment of the invention, but the invention was ready for patenting in 2002 – could not stand as a matter of law. The district court ignored this incongruity and sided with Facebook on these mutually exclusive conclusions. Neither this panel nor the lower court reconciled this fundamental contradiction. As such, rehearing is required to reconcile the panel’s misapprehension regarding Leader’s position regarding the ready for patenting prong of *Pfaff* and these mutually exclusive findings of fact.

B. The Panel Misapprehended and Misconstrued Leader’s Interrogatory Response As An Admission.

The panel did not appreciate the factual predicate, and the issues involved in the case when Leader provided its interrogatory response that the panel viewed as an admission. As demonstrated above, when Leader provided its *present tense* response to Facebook’s *present tense* interrogatory¹ asking for any “claim of the

¹The panel incorrectly characterized Facebook’s interrogatory as using a past tense verb and asking for “all products and services that [Leader] contended practiced the claims of the ‘761 patent.” Op. at 7. The interrogatory actually used a present tense verb in asking what claim “*is practiced*” by any Leader product.

'761 Patent that [Leader] contends *is practiced* by any product(s) and/or service(s),” Facebook had not alleged an on-sale bar or public disclosure defense. The panel’s statement that Leader should have qualified its answer to the interrogatory to exclude past versions (prior to 2009) is unreasonable because there was no reason to believe that versions of Leader’s products prior to 2009 were at issue in the case. *Bronston v. United States*, 409 U.S. 352, 361-62 (1973), citing *United States v. Wall*, 371 F.2d 398 (6th Cir. 1967)(“[t]he burden is on the questioner to pin the witness down to the specific object of the questioner’s inquiry”)(additional citations omitted).

Because the panel did not appreciate the factual circumstances and timing surrounding Leader’s interrogatory response, it faulted Leader for not qualifying its response to a specific point in time. Putting aside the fact that Leader did qualify its response with the proper use of the English language (see *infra*), the earliest that Leader could provide a timely qualified response to the interrogatory as it pertained to the new claim of on-sale and public disclosure was at trial (since written discovery had closed and the defense was first alleged a few months before trial). Mr. McKibben, the individual who verified the interrogatory response, testified that his response was limited to the version of the product at the time of the interrogatory.

In any event, the interrogatory was asked in the present tense and did not suggest otherwise, and Leader’s response was provided in the present tense. The

Remarkably, Facebook’s entire on-sale and public disclosure case turns on what the definition of “is” is in Interrogatory No. 9.

Supreme Court has a long series of precedent² citing the importance of verb tense, and cautioning against the misuse of verb tense. In its recent ruling on verb tense, the Supreme Court held that the “use of the present tense . . . does not suggest otherwise.” *McNeill v. United States*, 131 S.Ct. 2218, 2222 (2011); *see also Barrett v. United States*, 423 U.S. 212, 217 (1976)(“no unintended misuse of language or of tense is apparent”); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 59 (1987)(“use of the present tense strongly suggests . . . the present or the future, not in the past”); *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478 (2003)(present tense means at the time of the action); *Carr v. US*, 130 S.Ct. 2229, 2233-34, 2236 (2010)(“use of the present tense form of the verb ‘to travel’ . . . according to ordinary English grammar, does not refer to travel that has already occurred” . . . “the Dictionary Act instructs that the present tense generally does not include the past.”)(quotation omitted). Under the Supreme Court’s standard, the present verb tense used by Leader in its answer to Interrogatory No. 9 was limiting in itself.

As the panel properly rejected the district court’s reliance on discredited testimony (“we generally agree with Leader that ‘[n]ormally,’ a witness’s ‘discredited testimony is not considered a sufficient basis for drawing a contrary conclusion.’ *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512

²Circuit courts also affirm the importance of verb tense. *See e.g., Abdul-Akbar v. McKelvie*, 239 F. 3d 307, 313 (3rd Cir. 2001)(“is cast in the present tense, not in the past tense”); *see also Banos v. O’Guin*, 144 F. 3d 883, 885(5th Cir. 1998)(“by using the present tense, clearly refers to the time when the action or appeal is filed”); 1 USC § 1, the Dictionary Act (“words used in the present tense include the future as well as the present”).

(1984)”) (Op. at 14), the only remaining evidence relied upon by the district court is the present tense interrogatory response. Given the context in which the interrogatory response was provided, the language used in both the interrogatory and the response, and the Supreme Court precedent regarding the use of present tense verbs, the interrogatory response cannot be considered hard evidence to prove invalidity by the clear and convincing standard. *See Microsoft Corp. v. i4i Ltd. P’ship*, 131 S.Ct. 2238, 2246, 2251 (2011); *see also Colorado v. New Mexico*, 467 U.S. 310, 320-21 (1984). At the very least, remand is required for the district court to review the full record below for additional findings of fact.

C. The District Court Did Not Rely On The Evidence And Facts Cited By The Panel Because Those Facts Cannot Be Considered Offers For Sale As A Matter Of Law.

To support affirming the district court, the panel cites to snippets of evidence from four purported offers for sale of the Leader2Leader product in 2002: Wright-Patterson, Boston Scientific, The Limited and American Express. As noted above, no evidence was introduced at trial by Facebook that Leader2Leader in 2002 embodied any claim of the ‘761 Patent.³ Even if one were to assume that the Leader2Leader product was an embodiment of the ‘761 Patent, the record does not

³At trial, Leader proved it had signed NDAs with every party Facebook alleged public disclosures or offers for sale were made. The evidence at trial revealed that Leader took reasonable, if not extraordinary measures to protect its secrets from public disclosure. 18 USC §1839(3) (“reasonable measures to keep such information secret”). At no time was any of Leader’s confidential information disclosed “without any ‘limitation or restriction, or injunction of secrecy.’” *Invitrogen Corp. v. Biocrest Mfg., L.P.*, 424 F.3d 1374, 1381 (Fed. Cir. 2005), quoting *Egbert v. Lippmann*, 104 U.S. 333, 336 (1881).

support affirming the judgment that these alleged offers contained the terms that rise to the level of a commercial offer. The district court did not rely on any of the truncated evidence cited by the panel because none of these alleged offers contained material terms constituting a definite contract nor did the circumstances surrounding the alleged offers suggest they were offers.⁴

Moreover, the evidence cited by the panel for offers for sale relies exclusively on mere referencing the product suite brand name Leader2Leader. This Court does not permit mere use of brand names as proof of on sale bar. *Helifix Ltd. v. Blok-Lok, Ltd.*, 208 F.3d 1339, 1350-52 (Fed. Cir. 2000)(brand names are not sufficient to prove on sale bar). Neither the district court nor the panel evaluated these assertions in light of the well-settled law that requires clear and convincing evidence that the product allegedly being offered in 2002 contained the invention at the time alleged.

1. Wright-Patterson

The panel did not appreciate that before Leader began any discussion with Wright-Patterson, it executed confidentiality agreements that included a blanket prohibition (a “no-reliance” clause) against any discussions rising to the level of a commercial offer for sale. JA 027112-20 (PTX-1058 at ¶5 (“[i]t being understood that only those particular representations and warranties which may be made in any

⁴Courts look to the Uniform Commercial Code (“UCC”) and the Restatement of Contracts to determine if a communication rises to the level of commercial offer for sale. *See, e.g., Linear Tech. Corp., v. Micrel, Inc.*, 275 F.3d 1040, 1050 (Fed. Cir. 2001)(“such communications cannot be considered offers, because they do not indicate [the offeror’s] intent to be bound, as required for a valid offer”).

definitive agreements, when, as and if executed . . . shall have any legal effect.”)). Thus, absent a signed agreement, the representations in the discussions with Wright-Patterson could not be considered an offer for sale as a matter of law. *See* Restatement (Second) of Contracts §21 (“parties . . . may intend to deny legal effect to their subsequent acts”); *see also Group One, Ltd. v. Hallmark Cards, Inc.*, 254 F.3d 1041, 1048 (Fed. Cir. 2001) (“Only an offer which rises to the level of a commercial offer for sale, one which the other party could make into a binding contract by simple acceptance (assuming consideration), constitutes an offer for sale under 102(b).”).

In addition to the “no-reliance” clause, the discussions with Wright-Patterson could not be considered an offer for sale because those discussions could not be made into a binding contract. The document cited by the panel was the first step in a lengthy Federal government grant application process where potential research and development options were being explored. This particular grant application is governed by Broad Agency Announcement (“BAA) guidelines, and was submitted for funding to implement and test aspects of the Leader2Leader platform at Wright Patterson. JA 27204. It was demonstrated at trial that the BAA proposal guidelines dictates that this was *not* intended to be an offer for sale or contract. JA 027156-83 (PTX-1234 at 17 (“AI's differ from contracts in that they are usually more streamlined and less complex. AIs establish a ‘partnership’ between the government and the recipient *rather than a ‘buyer/seller’ relationship* that is common with a FAR contract.”)(emphasis added)). The proposal clearly states that this is not a buyer/seller relationship. Without a buyer and seller, there

can be no offer for sale. The panel did not have the opportunity to consider these facts because the Wright-Patterson grant application was not relied upon by the district court in its decision, and as such it was not at issue on the appeal.

2. Boston Scientific

The evidence cited by the panel regarding the alleged offer for sale to Boston Scientific consisted of a single hearsay, intraoffice email from Steve Hanna. JA 34694. The email does not contain a single commercial term and thus cannot be an “offer” in any contract sense. *Elan Corp. v. Andrx Pharms., Inc.*, 366 F.3d 1336, 1341 (Fed. Cir. 2004)(“[A] communication that fails to constitute a definite offer to sell the product and to include material terms is not an ‘offer’ in the contract sense.”), citing *Restatement (Second) of Contracts* §33(3) (1981). In fact, Mr. Hanna specifically states that Leader was supposed “to put together a plan (proposal) over the next two weeks that lays out how/when they would bring L2L into BSC.” JA 34694. Clearly, the parties were engaged in mere preliminary discussions and no offers were even contemplated at that point. *See Group One*, 254 F.3d at 1047-48 (finding the indefinite nature of the communications between the parties and the lack of specific terms such as price and quantity suggested preliminary proposals or invitations to negotiate, rather than a formal offer.).

3. The Limited

As it was with Wright-Patterson, before Leader began any discussion with The Limited, it also executed confidentiality agreements, which included a blanket “no reliance” clause prohibiting any discussions from rising to the level of a commercial offer for sale. JA 027128-55 (PTX-1172 at ¶5; PTX-1173 at ¶5; PTX-

1174 at ¶5; PTX-1175 at ¶5). Thus, absent a signed agreement, the representations in the discussions with The Limited could not be considered an offer for sale as a matter of law. The no-reliance clause in the parties' NDA renders any further analysis regarding a commercial offer for sale moot. Nonetheless, even the evidence presented at trial, but not before the panel, demonstrates that the discussions were formative and the few terms discussed were exploratory.

4. American Express

A review of the entire trial record demonstrates that American Express was not mentioned by any witness or attorney during trial. Because American Express was not an issue at trial, the panel did not have before it the NDA signed by Michael A. Yanez, Director, American Express Travel Related Services Company, Inc. on Nov. 26, 2002, that includes an agreement that the discussions are for "evaluation only" and that "no representations or warranties of any kind" are made by either party, and "the exchange of information hereunder shall not commit or bind either party to enter into a contract or otherwise.," and "[n]either party shall rely on any information exchanged as a commitment or an inducement to act or not act in any given manner." It is hard to imagine a much more clear prohibition against the discussions from rising to the level of a commercial offer for sale.

II. EN BANC REVIEW IS NECESSARY TO RECONCILE THE PANEL DECISION'S CONFLICT WITH SUPREME COURT DECISIONS AND THIS COURT PRECEDENT.

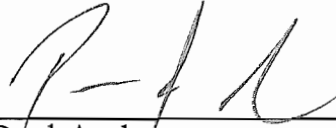
En banc review is required if panel rehearing is denied because the panel's decision, if followed, will conflict with the Supreme Court's precedent which states that the use of present tense verbs are referenced to the present or the future

and not the past. As discussed *supra*, the panel's decision extrapolates a discovery response drafted in the present tense in 2009 to cover products seven years earlier. Permitting parties to ignore the actual language of written discovery and bend it to whatever theory it deems desirable would promote abuse of process and unjust results. The Supreme Court is careful to avoid misuses of verb tense, and this Court should hold the same. *See, e.g., Carr*, 130 S.Ct. at 2233-34, 2236.

The panel's decision, if followed, would also significantly reduce the clear and convincing standard for patent invalidity by affirming a judgment of invalidity where there was no element-by-element comparison done with the prior art, nor was there any type of analysis done of the prior art to determine its functionality. The Supreme Court has determined that hard evidence is required to prove invalidity by the clear and convincing standard. *Microsoft*, 131 S.Ct. at 2246, 2251; *see also Colorado*, 467 U.S. at 320-21. In this case, however, the panel cites only to a present tense interrogatory response seven years after the critical date, and snippets from a few documents that mentions a product's brand name, but not its functionality, as evidence sufficient to find invalidity. *See Helifix*, 208 F.3d at 1350-52. Even in the current anti-patent environment, invalidating a patent should require more than supposition and innuendo .

Finally, the panel's decision, if followed would permit courts to waive and ignore well-settled standards of proof for on sale bar and public disclosure, including *Group One*, 254 F.3d at 1048 (Uniform Commercial Code standard for evaluating whether or not an offer "rises to the level of a commercial offer for sale").

Respectfully Submitted on this 6th day of June, 2012.

A handwritten signature in black ink, appearing to read 'P-Andre', written over a horizontal line.

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United States Court of Appeals
for the Federal Circuit

LEADER TECHNOLOGIES, INC.

Plaintiff-Appellant,

v.

FACEBOOK, INC.

Defendant-Appellee,

2011-1366

Appeal from the United States District Court for the District of Delaware in Case No. 08-CV-0862, Judge Leonard P. Stark.

Decided: May 8, 2012

DARYL L. JOSEFFER, King & Spalding, LLP, of Washington, DC, argued for plaintiff-appellant. With him on the brief was ADAM CONRAD. Of counsel on the brief were PAUL J. ANDRE and LISA KOBIALKA, Kramer Levin Naf-talis & Frankel, LLP, of Menlo Park, California.

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Before LOURIE, MOORE, and WALLACH, *Circuit Judges*.

LOURIE, *Circuit Judge*.

Leader Technologies, Inc. (“Leader”) appeals from the district court’s final judgment in favor of Facebook, Inc. (“Facebook”). The judgment follows a jury trial in which the jury found that Facebook proved that claims 1, 4, 7, 9, 11, 16, 21, 23, 25, 31, and 32 (the “asserted claims”) of Leader’s U.S. Patent 7,139,761 (“the ’761 patent”) were invalid under 35 U.S.C. § 102(b). After trial, the district court denied Leader’s motion for judgment as a matter of law or, in the alternative, for a new trial on the invalidity issues. *Leader Techs., Inc. v. Facebook, Inc.*, 770 F. Supp. 2d 686 (D. Del. 2011). Because substantial evidence supports the jury’s verdict that Leader offered for sale and publicly demonstrated the claimed invention prior to the critical date and because the district court did not abuse its discretion in denying Leader’s motion for a new trial, we *affirm*.

BACKGROUND

I.

This patent case relates to software that allows users on a network to communicate and collaborate on a large scale. Leader, a software company founded in the late 1990s, owns the ’761 patent. Prior to filing the application that issued as the ’761 patent in December, 2003, Leader developed a product referred to as Leader2Leader®, and the central issue in this appeal is whether the Leader2Leader® product that was publicly used and on sale prior to December 10, 2002 fell within

the scope of the asserted claims, thus rendering them invalid under 35 U.S.C. § 102(b).

The '761 patent discloses a system that manages data that may be accessed and created by multiple users over a network. Broadly, the patent improves upon conventional systems by associating data “with an individual, group of individuals, and topical content, and not simply with a folder, as in traditional systems.” '761 patent, col.3 ll.29–31.

The system achieves this improvement by having users collaborate and communicate through “boards” that are accessible through an Internet browser and appear as a webpage. For example, a board for a project might allow users affiliated with the project to set up meeting sessions with other users, *id.* col.15 ll.19–33, upload and share files, *id.* col.16 ll.54–64, vote on questions posted on the board, *id.* col.15 ll.46–49, or chat with other users, *id.* col.17 ll.39–56.

To facilitate those user-facing functions, the data management system employs metadata. *Id.* col.9 ll.50–61. The metadata are “tagged” to data being created to capture the association between the data and its context. *Id.* col.9 ll.53–56. By tagging the data to a particular context, the system allows users to access the data to communicate and collaborate. Thus, “[a]s users create and change their contexts, the data (e.g., files) and applications automatically follow.” *Id.* col.7 ll.46–49.

The '761 patent's claims are drawn to aspects of the data management system that enable users to collaborate and communicate. Claim 9, reproduced below, is exemplary of the asserted claims:

9. A computer-implemented method of managing data, comprising computer-executable acts of:

creating data within a user environment of a web-based computing platform via user interaction with the user environment by a user using an application, the data in the form of at least files and documents;

dynamically associating metadata with the data, the data and metadata stored on a storage component of the web-based computing platform, the metadata includes information related to the user, the data, the application, and the user environment;

tracking movement of the user from the user environment of the web-based computing platform to a second user environment of the web-based computing platform; and

dynamically updating the stored metadata with an association of the data, the application, and the second user environment wherein the user employs at least one of the application and the data from the second environment.

Id. col.21 ll.38–58. In relation to the Leader2Leader® product, Leader's founder, Michael McKibben, testified that the '761 patent's claims cover the "underlying engine," J.A. 25585–86, which is referred to as Digital Leaderboard®, *Leader*, 770 F. Supp. 2d at 717.

The relevant case history begins in 1999. In August of that year, McKibben and Jeffrey Lamb conceived the invention claimed in the patent. Immediately after conceiving the idea, the inventors began developing software based on that idea with the goal of building a commercial product. In total, about fifteen to twenty people worked on the project. According to Lamb, Leader completed the project within “a couple of years [m]aybe three,” *i.e.*, probably the “2002ish time frame.” J.A. 24829.

Around that time, Leader offered the Leader2Leader® product for sale and demonstrated the product to a number of companies. In January 2002, Leader presented a white paper to people at the Wright Patterson Air Force Base offering 20,000 software licenses to the Leader2Leader® product. In the paper, Leader stated that it was “already commercializing” the product for “government, commerce and education,” J.A. 27203, and that the platform was “operational now with low user volumes,” J.A. 27207. Leader also represented that the Digital Leaderboard® software supplied under the Leader2Leader® brand had been “[f]ully developed.” J.A. 27204.

The white paper also discussed the functionality of Leader2Leader® powered by the Digital Leaderboard® system. The paper described the problem with the communications “glass ceiling,” in which data are aggregated into “silos,” and explained that Leader had “discovered and fixed a plethora of serious shortcomings and flaws in prevailing platform assumptions about mere aggregation vs. true integration of communications technologies.” J.A. 27202. Leader attached to the paper a sample “Big Board” that depicted analyst collaboration and information flow between various agencies and stated that the

“Input & Display Collaboration Devices” for the system included a “Browser.” J.A. 27210.

In November 2002, McKibben demonstrated the Leader2Leader® software to senior staff members at Boston Scientific, a demonstration that he described as “flawless.” J.A. 34694. According to Leader’s Vice President of Technologies, to support its clinical trials communications, Boston Scientific needed “a very secure system” to support “full document management functions” and “collaborative meetings/conferences,” among other functionality. J.A. 34694. He summarized that “in a nutshell” Boston Scientific was looking for Leader2Leader®. J.A. 34694.

By December 8, 2002, Leader had demonstrated and offered Leader2Leader® to a number of other companies, including American Express and The Limited. In its interaction with The Limited, Leader described Leader2Leader® as the company’s “full suite of technology services,” J.A. 34692, and explained that the software had “potentially strong fits” in managing project resources and allowing collaboration, among other areas, J.A. 27221. Regarding American Express, according to McKibben, the head of technology architecture at American Express described the Leader2Leader® product as “disruptive technology” that will “create its own market.” J.A. 34692. After seeing the software, American Express put on hold its collaborative computing initiative and was considering investing in Leader. J.A. 27216, 34692. McKibben similarly described Leader’s prospects as requiring functionality such as “knowledge management,” “new product design collaboration,” “client collaboration,” and “file sharing.” J.A. 27215–16.

At the same time, Leader was struggling financially and was eager to obtain Leader2Leader® customers. By

December 3, 2002, Leader had deferred employee salaries and was facing an economic climate in which raising short term financing “ha[d] never been harder.” J.A. 27215. McKibben explained to Leader’s employees that a contract from Boston Scientific, The Limited, or American Express, among others, would change Leader’s valuation position with institutional investors. Indeed, according to McKibben, the “most significant factor” that would improve Leader’s negotiating position in valuation discussions was “the acquisition of ‘marquee’ paying customers.” J.A. 27216. At that time, Leader also enlisted its prospects’ executives to help it obtain venture capital funding. However, although Leader and the general economy faced “rocky financial times,” McKibben explained that “[t]he bottom line is that we have built the product we said we would build” and that Leader was making every effort to sell that product in the marketplace. J.A. 27217.

Leader filed a provisional patent application on December 11, 2002. On December 10, 2003, Leader filed an application that issued as the ’761 patent.

II.

In 2008, Leader sued Facebook in the United States District Court for the District of Delaware, alleging infringement of various claims of the ’761 patent. During discovery, Facebook served an interrogatory that asked Leader to identify all products and services that it contended practiced the claims of the ’761 patent. Leader provided two responses that were at issue during the litigation. In its First Supplemental Response, Leader asserted that “Leader2Leader® powered by the Digital Leaderboard® engine is covered by the ’761 patent.” *Leader*, F. Supp. 2d at 717. Thereafter, Leader amended its response to more specifically state that “Leader2Leader® powered by the Digital Leaderboard®

engine is the only product or service provided by Leader which embodies, either literally or under the doctrine of equivalents, any of the asserted claims” of the '761 patent. *Id.* McKibben verified those interrogatory responses.

Facebook also deposed McKibben. In his deposition, McKibben could not identify any iteration of the Leader2Leader® product that did not fall within the scope of the claims of the '761 patent, testifying that “[t]hat was a long time ago. I – I can’t point back to a specific point.” *Id.* at 719.

The interrogatory responses and McKibben’s deposition testimony were a focus at trial. At trial, McKibben testified that the interrogatory and Leader’s responses, by employing the present tense, were directed at whether Leader2Leader® practiced the '761 patent’s claims in 2009. McKibben also testified at trial that the Leader2Leader® product powered by the Digital Leaderboard® engine was covered by the asserted claims in 2007 and 2010, but not prior to December of 2002. Specifically, McKibben testified at trial that he “vividly remember[ed]” that the patented technology was not incorporated into the Leader2Leader® product “until days before” the December 11, 2002 filing of the provisional patent application. J.A. 25708–09; *see also Leader*, 770 F. Supp. 2d at 722 n.16. On cross-examination, Facebook played McKibben’s inconsistent deposition testimony before the jury.

After the parties argued their positions to the jury, the jury returned a verdict in favor of Facebook on the on-sale and public use bars. First, the jury specifically found that the '761 patent was not entitled to the priority date of the provisional patent application, a finding that Leader does not challenge on appeal. The jury also specifically found that the asserted claims of the '761 patent were invalid on two independent grounds: (1) that the

invention was subject to an invalidating sale; and (2) that the invention was subject to an invalidating public use.

The district court thereafter denied Leader's post-trial motions for judgment as a matter of law or, in the alternative, for a new trial. Specifically, regarding whether the Leader2Leader® product embodied the asserted claims prior to the critical date, the district court concluded that McKibben's discredited trial testimony coupled with the interrogatory responses were sufficient evidence to support the jury's verdict of invalidity. *Leader*, 770 F. Supp. 2d at 716–22. In addition, the court pointed to Leader's offering of the Leader2Leader® product in the 2001 to 2002 time period as evidence supporting the jury's verdict. *Id.* at 722 n.16. Finally, after exercising its own assessment of the evidence, the court concluded that the jury's invalidity verdict was not against the great weight of the evidence. *Id.* at 727.

The district court entered judgment against Leader, from which it timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(1).

DISCUSSION

I.

We apply the law of the regional circuit, here the Third Circuit, to review the district court's denial of Leader's motion for judgment as a matter of law or for a new trial. *Union Carbide Chem. & Plastics Tech. Corp. v. Shell Oil Co.*, 308 F.3d 1167, 1182, 1188 (Fed. Cir. 2002). Under Third Circuit law, we review *de novo* the denial of a motion for judgment as a matter of law, viewing the record in the light most favorable to the verdict winner and drawing all reasonable inferences in its favor. *Eddy v. V.I. Water & Power Auth.*, 369 F.3d 227, 230 (3d Cir. 2004). Under this review, “[a] court must not weigh

evidence, engage in credibility determinations, or substitute its version of the facts for the jury's." *Pitts v. Delaware*, 646 F.3d 151, 155 (3d Cir. 2011). Instead, we may reverse the district court's denial of a motion for judgment as a matter of law only if "the record is critically deficient of that minimum quantity of evidence from which a jury might reasonably afford relief." *Trabal v. Wells Fargo Armored Serv. Corp.*, 269 F.3d 243, 249 (3d Cir. 2001) (quoting *Powell v. J.T. Posey Co.*, 766 F.2d 131, 133–34 (3d Cir. 1985)).

We review the denial of a new trial for an abuse of discretion. *Foster v. Nat'l Fuel Gas Co.*, 316 F.3d 424, 429–30 (3d Cir. 2003). Considered "extraordinary relief," *Marra v. Phila. Housing Auth.*, 497 F.3d 286, 309 n.18 (3d Cir. 2007), a new trial should be granted only if the great weight of the evidence cuts against the verdict and "where a miscarriage of justice would result if the verdict were to stand," *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1076 (3d Cir. 1996) (en banc). However, unlike a sufficiency of the evidence claim, a court in the motion for a new trial context "does not view the evidence in the light most favorable to the verdict winner, but instead exercises its own judgment in assessing the evidence." *Marra*, 497 F.3d at 309 n.18.

Under 35 U.S.C. § 102(b), a patent is invalid if "the invention was . . . in public use or on sale in this country" more than one year prior to the date the patent application is filed. "Whether a patent is invalid for a public use or sale is a question of law, reviewed *de novo*, based on underlying facts, reviewed for substantial evidence following a jury verdict." *Adenta GmbH v. OrthoArm, Inc.*, 501 F.3d 1364, 1369 (Fed. Cir. 2007). One of those underlying facts is "whether the subject of the barring activity met each of the limitations of the claim, and thus was an embodiment of the claimed invention." *Scaltech Inc. v.*

Retec/Tetra, L.L.C., 178 F.3d 1378, 1383 (Fed. Cir. 1999); see also *Juicy Whip, Inc. v. Orange Bang, Inc.*, 292 F.3d 728, 736–37, 738 (Fed. Cir. 2002). Because we presume that an issued patent is valid, 35 U.S.C. § 282, the party challenging the validity of a patent must prove by clear and convincing evidence that the product used or on sale prior to the critical date was embodied by the claimed invention, *Juicy Whip*, 292 F.3d at 736–37, 738.

II.

In this case, Leader does not contest that a Leader2Leader® product was offered for sale and publicly used prior to December 10, 2002, the critical date. Nor, for the purposes of the on-sale bar, does Leader contest that the invention was “ready for patenting” prior to the critical date. See *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 67–68 (1998). Instead, Leader argues that Facebook failed to offer clear and convincing evidence that the version of Leader2Leader® offered for sale or used prior to December 10, 2002 fell within the scope of the asserted claims. Specifically, Leader argues that Facebook failed to offer any evidence, such as expert testimony, source code, or schematics, to prove when Leader incorporated the patented technology into the Leader2Leader product. Indeed, Leader argues that the only evidence at trial was testimony that showed that Leader did not use or offer for sale the invention until after the critical date. Leader asserts that even if the jury found that testimony incredible, incredible testimony is not affirmative evidence of its opposite, *viz.*, that the invention was on sale or used prior to the critical date. Thus, argues Leader, Facebook failed as a matter of law to prove invalidity by clear and convincing evidence. In the alternative, Leader argues that the district court abused its discretion in denying its request for a new trial because the verdict of invalidity was against the great weight of the evidence.

Facebook responds that the district court properly entered judgment on the jury's verdict of invalidity. Specifically, Facebook points to Leader's internal documents and correspondence to potential customers, Leader's interrogatory responses, and testimony by co-inventors Lamb and McKibben. Facebook also argues that the jury was permitted to weigh McKibben's lack of credibility against Leader in rendering a verdict. Thus, in light of this evidence, Facebook argues that the district court properly denied Leader's motion for judgment as a matter of law or for a new trial.

We agree with Facebook that legally sufficient evidence supported the jury's verdict that the version of Leader2Leader® demonstrated and offered for sale prior to the critical date was an embodiment of the asserted claims. Contrary to Leader's arguments, the record is not devoid of the minimum quantity of evidence to support the jury's verdict. First, Leader admitted in its interrogatory responses that Leader2Leader® powered by the Digital Leaderboard® engine "embodies" the asserted claims of the '761 patent. *Leader*, 770 F. Supp. 2d at 717. Leader argues that, by employing the present tense, its admissions were limited to only the instance of the Leader2Leader® powered by the Digital Leaderboard® engine that existed at the time Leader served its responses on Facebook. But Leader did not qualify its interrogatory responses in that manner. The responses did not specify any date ranges nor did they identify versions or builds of the software—information that Leader appears to have tracked, J.A. 25761. Indeed, consistent with a broader reading of Leader's responses untethered to the precise moments in which they were served, McKibben contended at trial that the Leader2Leader® powered by the Digital Leaderboard® engine not only fell within the scope of the asserted claims

in 2009 when Leader served its responses, but also in 2007, before the lawsuit was initiated, and in 2010 during the trial. *Leader*, 770 F. Supp. 2d at 718. Moreover, in his deposition, McKibben could not identify a single instance of Leader2Leader® that did not fall within the scope of the '761 patent's claims. *Id.* at 719.

Coupled with Leader's admission, the record contains legally sufficient evidence linking the pre-critical date software to the software that Leader admitted fell within the scope of the asserted claims. In its offer to Wright Patterson in January 2002, Leader offered for sale the exact software product that Leader admitted fell within the scope of the asserted claims—the Digital Leaderboard® engine supplied under the Leader2Leader brand—and described that software as “fully developed” and “operational.” J.A. 27204, 27207. Like Leader's admissions, Leader did not identify a specific build or version of the software in the offer for sale. Moreover, in the offer, Leader depicted the fully developed system as powering a browser-accessible “Big Board” that allows analysts and agencies to collaborate and share information, J.A. 27210, a disclosure that matches the embodiments of the '761 patent in material respects, *e.g.*, '761 patent fig. 15, col.5 ll.14–17 (depicting a “screenshot of a management tool window of a browser used as a user interface to facilitate user interaction with meeting information in accordance with the present invention”). This description is consistent with Leader's other pre-critical date documents, which describe the software as facilitating the same type of user interaction described in the '761 patent's embodiments, such as document management, *id.* col.4 ll.24–31, collaborative meetings, *id.* col.15 ll.19–33, and file sharing, *id.* col.16 ll.54–64. Those documents also state that, by December 3, 2002, Leader had “flawless[ly]” demonstrated the software, J.A. 34694,

which contained the company's "full suite of technology services," J.A. 34692, and had been "built," J.A. 27217.

In addition to Leader's contemporaneous documents, Lamb's trial testimony supports the jury's finding that the Leader2Leader® product powered by the Digital Leaderboard® engine that was on sale and demonstrated prior to the critical date fell within the scope of the asserted claims. In particular, Lamb testified that, after conceiving the invention in August 1999, Leader immediately started to implement the patented technology and completed the project within "a couple of years [m]aybe three." J.A. 24829.

Finally, regarding the jury's decision to discredit McKibben's trial testimony that the pre-critical date Leader2Leader® did not fall within the scope of the asserted claims, we generally agree with Leader that "[n]ormally," a witness's "discredited testimony is not considered a sufficient basis for drawing a contrary conclusion." *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 512 (1984). However, as recounted above, the record contains substantial evidence that the Leader2Leader® product that was on sale and in public use prior to the critical date fell within the scope of the asserted claims. At a minimum, McKibben's lack of credibility fortifies that conclusion and provides an independent basis for disbelieving his factual assertions.

In upholding the verdict, we recognize that as a general matter a computer scientist can easily modify and change software code and that two versions of the same software product may function differently. But, in this case, Leader fails to point to any contemporaneous evidence in the record that indicates that the Leader2Leader® powered by the Digital Leaderboard® engine that existed prior to the critical date was substan-

tively different from the post-critical date software; indeed, the evidence points in the opposite direction. As for McKibben's testimony that Leader was constantly revising the software and just completed the final version right after the pre-critical date demonstrations and offers for sale, the jury was entitled to disbelieve such a transparently convenient assertion in light of all of the evidence before them. On appeal, we cannot reweigh the evidence or supplant the record. We are bound by the record developed below, viewed in the light most favorable to Facebook, and can only reverse the verdict if the record is critically deficient of the minimum quantity of evidence from which the jury might have reasonably rendered a verdict against Leader. *Trabal*, 269 F.3d at 249. Even if we may have reached a different verdict had we sat on the jury, it is not our role as an appellate court to overturn the jury's verdict when it was supported by substantial evidence.

Similarly, we agree with Facebook that the district court did not abuse its discretion in denying Leader's motion for a new trial. Facebook relied almost exclusively on Leader's own admissions to prove invalidity and those documents, on their face, do not support Leader's position. Thus, it was not in error to conclude that the verdict was not against the great weight of the evidence. Moreover, Leader fails to cogently explain on appeal why upholding the verdict would result in a miscarriage of justice.

CONCLUSION

We have considered Leader's remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgment of the district court is

AFFIRMED

PROOF OF SERVICE

The undersigned hereby certifies that on June 6, 2012, an original and eighteen copies of “Combined Petition for Panel Rehearing and Petition for Rehearing *En Banc* of Plaintiff-Appellant Leader Technologies, Inc.” were submitted for filing by overnight delivery to:

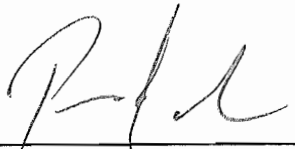
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On the same date, the foregoing “Combined Petition for Panel Rehearing and Petition for Rehearing *En Banc* of Plaintiff-Appellant Leader Technologies, Inc.” was served upon counsel for Defendant-Appellee, by depositing two copies of the brief with Federal Express for delivery to the party’s counsel as follows:

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