/// Donna Kline is a reporter for *Pittsburgh Business Report* and a former reporter for *Bloomberg* New York.

LEADER V. FACEBOOK PRESS BACKGROUND

1. Brief Summary (PDF)
2. Backgrounder (PDF)
3. Muppet Chat (PDF)

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/// Facebook "Liked" Leader's source code ... before it didn't

{ 2012 04 01 }

/// Facebook "Liked" Leader's source code ... before it didn't

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After digging up Facebook's bad-science "prior art / provisional patent" expert testimony from Dr. Saul Greenberg in the *Leader v. Facebook* trial record (click here), I decided to see what else I could find. Rather than put them all in one big blog, I'm going to post them one at a time. To make it easy for you, I will embed the actual trial record and even queue up to the pages I reference. You are welcome.

1. Facebook's attorney Mark R. Weinstein admitted to the judge six months before trial, on Jan. 27, 2010, that he could not prove anything without Leader source code

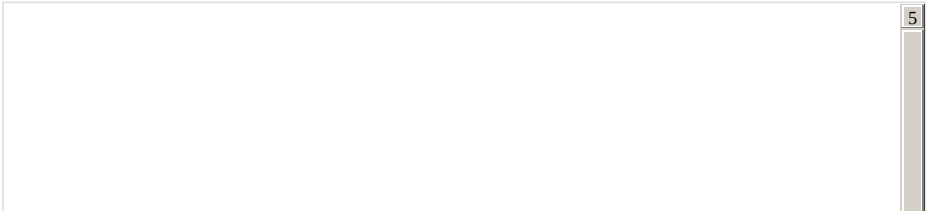
> "in order to analyze whether or not it practices the '761 patent . . . Facebook would require . . . the source code for Leader2Leader."

— ***Mark Weinstein***, *Facebook attorney*

Judge Stark gave Facebook access to Leader's source code based on Weinstein's argument. However, Facebook did not produce ANY of that source code at trial. Instead of hard evidence, they offered tomfoolery: a doctored Interrogatory No. 9, and a tricked-up video clip. Click here for a video explaining this.

Since Facebook produced no source code, by their own admission, they did not prove their "on sale bar" case. **GOTCHA**.

Leader v Facebook – Source Code Order and Weinstein Written Admission – Doc. No. 283, Mar. 9, 2010 at p. 11.



/// Proof Fenwick & West LLP did not disclose Leader as prior art to Facebook
/// MF Global + JP Morgan + Goldman Sachs + Harvard Grads + Politics = A big mess
/// What Facebook, Accel Partners, Goldman Sachs and Fenwick & West don't want us "muppets" to know
/// Make up your mind, Fenwick & West LLP
/// Muppet Mania
/// Haughtiness in the face of "literal infringement"
/// Facebook *ordered* pharma users to allow comments, yet will not return phone calls now
/// First thoughts after leaving courthouse March 5, 2012
/// Judges Selected
/// San Francisco CBS-TV KPIX Coverage
/// NBC-TV4 (Columbus) Interview with Leader founder Michael McKibben
/// How Facebook tricked the jury – *YouTube*
/// New friends?
/// Did Someone Prod the Media?
/// Facebook: The New 'Too Big To Fail?'
/// Big trouble ahead for the Facebook IPO? — PBR / YouTube
/// What happens on March 5th, 2012?
/// More on FB's S-1 omissions & other conflicts of interest
/// Big trouble ahead

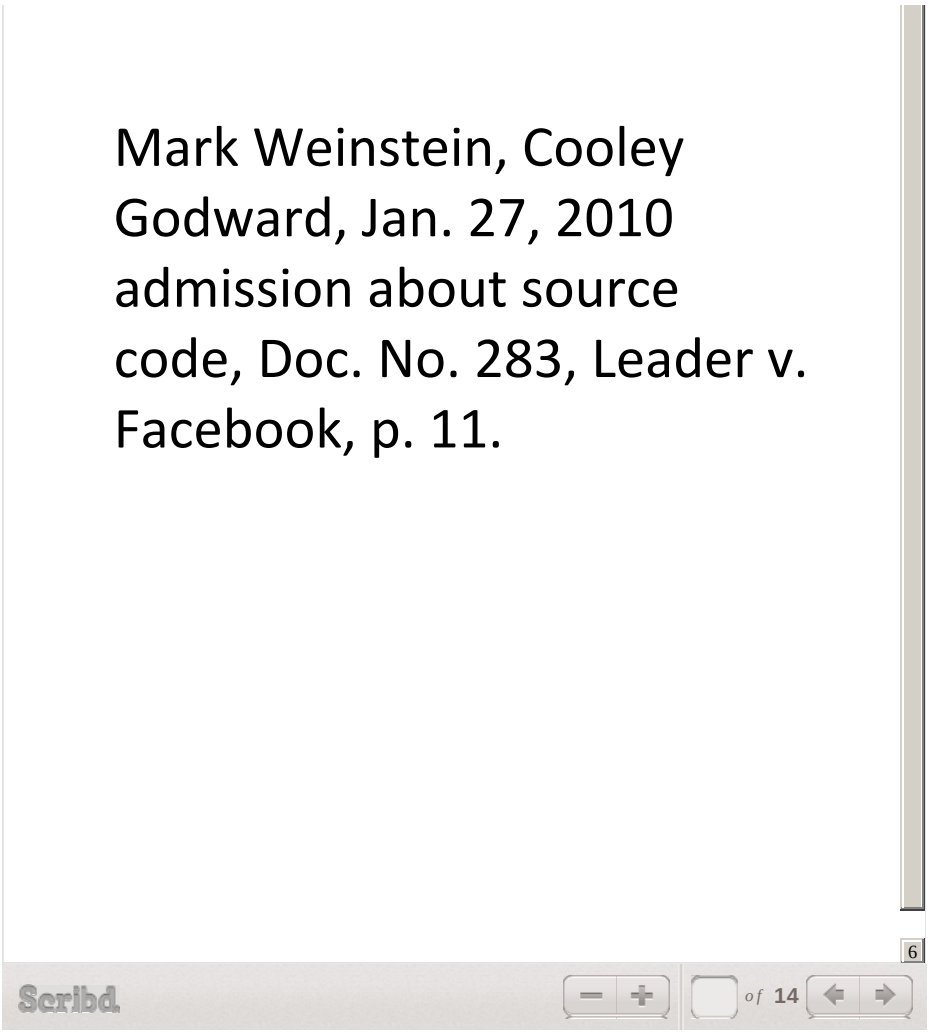
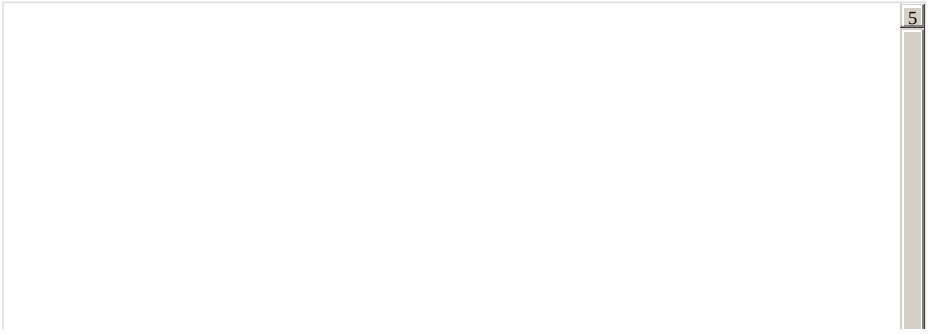


Fig. 1 – *Leader v. Facebook* Doc. No. 283 showing Cooley Goward LLP attorney Mark R. Weinstein's admission that Facebook could not prove whether or not Leader2Leader contained the invention without analyzing the Leader source code.

2. On Why Facebook did not put Leader's source code in evidence.

> "[We] were never given a pristine copy of the code."
>
> — ***Thomas Hungar***, *Facebook attorney, Tr. 24:8-24.*

Leader Tech v. Facebook, Case No. 2011-1366 (Fed. Cir.) Hearing Transcript, Mar. 5, 2012, at p. 24.



for Facebook IPO?
Backgrounder

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Linda W on /// Facebook “Liked” Leader’s source code ... before it didn’t

Steve Williams on /// Facebook “Liked” Leader’s source code ... before it didn’t

Donna Kline on /// New friends?

tabata on /// New friends?

BradH on /// Proof

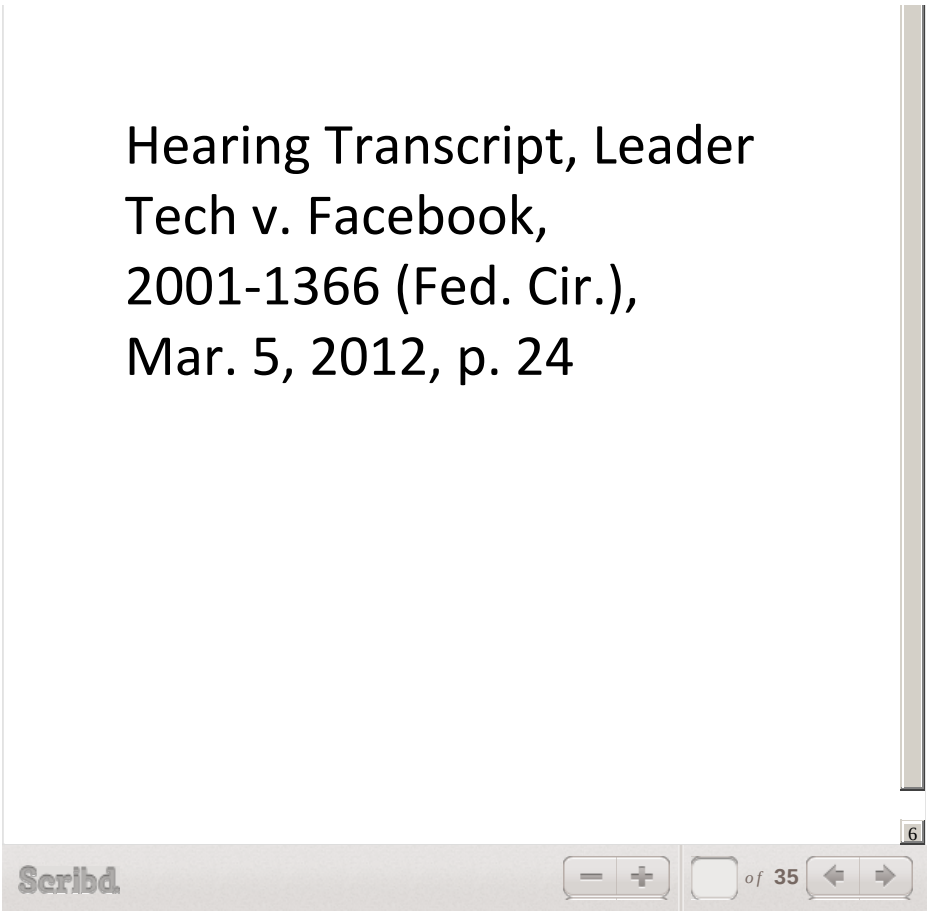
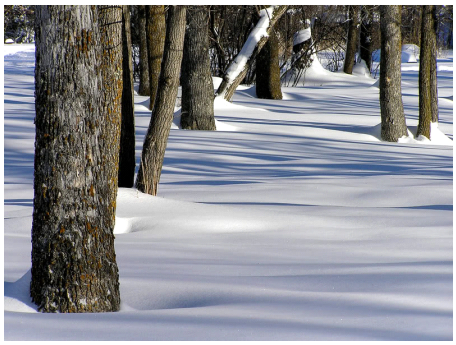


Fig. 2 – *Leader Tech v. Facebook*, Case No. 2011-1366 (Fed. Cir.) Hearing Transcript, Tr. 24:8-24, where Facebook explains their reason for not producing Leader source code to prove “on sale bar.”

3. Judge Moore: “I have no clue what you even mean by that.”

> “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, that that somehow justifies why you, you didn’t include it as any of the evidence?”
>
> — ***Judge Kimberly A. Moore,*** *Federal Circuit*



A pristine snowfall

of pristine source code?

Facebook’s Mark Weinstein was

Fenwick & West LLP did not disclose Leader as prior art to Facebook
Donna Kline on /// Proof Fenwick & West LLP did not disclose Leader as prior art to Facebook
winston smith on /// Proof Fenwick & West LLP did not disclose Leader as prior art to Facebook
Steve Williams on /// Proof Fenwick & West LLP did not disclose Leader as prior art to Facebook
Jules on /// Proof Fenwick & West LLP did not disclose Leader as prior art to Facebook
Tex on /// Proof Fenwick & West LLP did not disclose Leader as prior art to Facebook
Michael Kennedy on /// Proof Fenwick & West LLP did not disclose Leader as prior art to Facebook
Justice must prevail on /// Proof Fenwick & West LLP did not disclose Leader as prior art to Facebook
Steve Williams on /// Proof Fenwick & West LLP did not disclose Leader as prior art to Facebook
SEC Watchdog on /// Proof Fenwick & West LLP did not disclose Leader as prior art to Facebook
BG761 on /// Proof Fenwick & West LLP did not disclose Leader as prior art to Facebook

given access to Leader's source code—no complaints. Facebook's Thomas Hungar on appeal (who wasn't even on the case then)—complained it wasn't 'pristine.'

Leader Tech v. Facebook, Case No. 2011-1366 (Fed. Cir.) Hearing Transcript, Mar. 5, 2012, at p. 26.

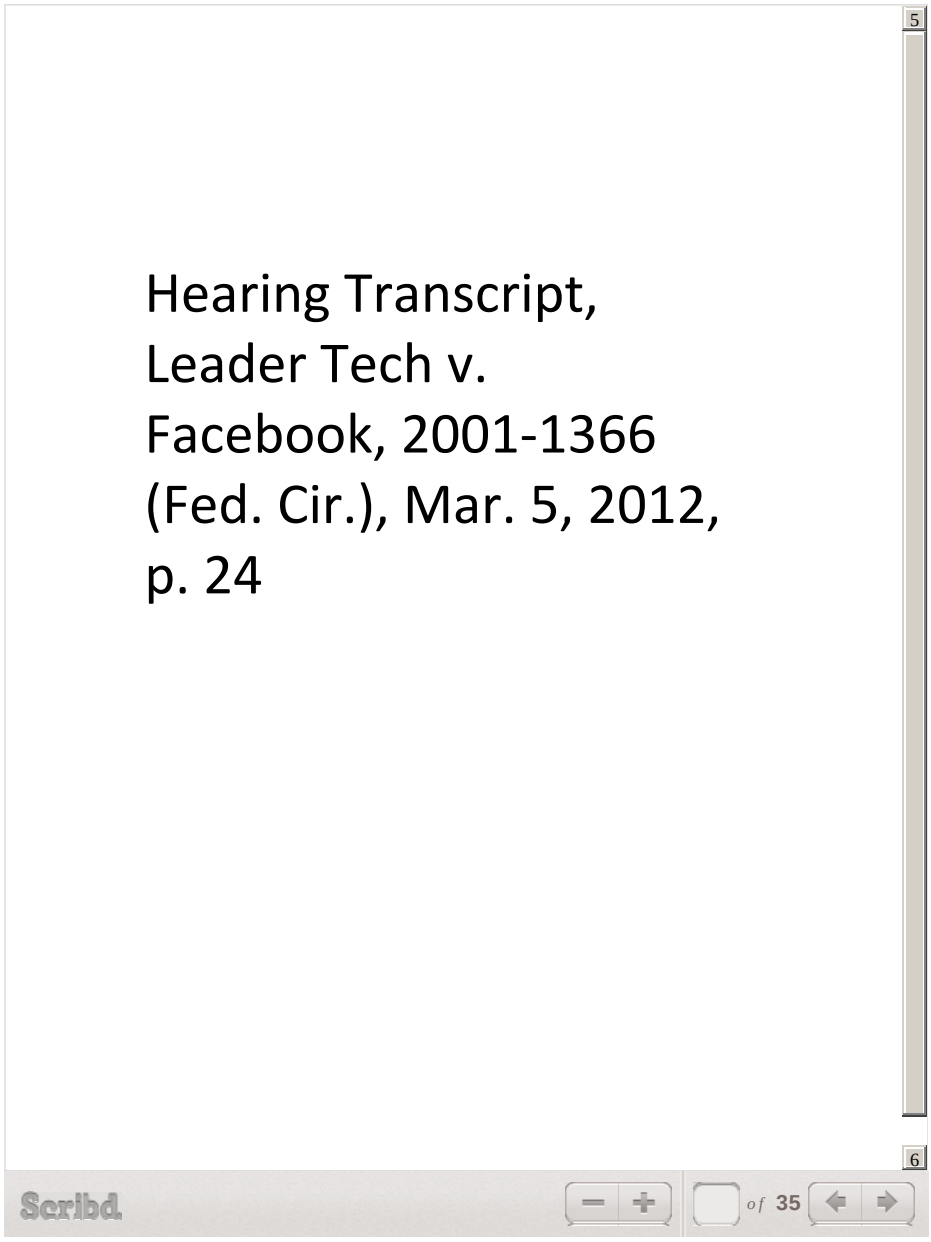
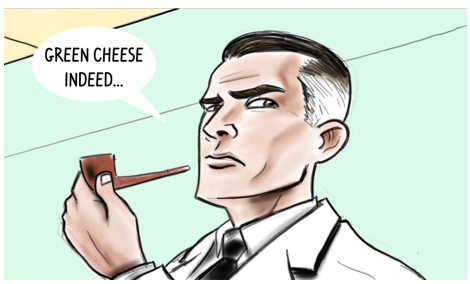


Fig. 3 – *Leader Tech v. Facebook*, Case No. 2011-1366 (Fed. Cir.) Hearing Transcript, Tr. 26:11-15, where Facebook explains their reason for not producing Leader source code to prove "on sale bar."

4. Weinstein was granted access to the Leader source code, failed to deliver it as evidence at trial, and only now raises the "pristine" issue on appeal. Hmmmmm.



Judge Stark granted Facebook's Mark Weinstein access to Leader's source code for Leader2Leader. But, according to Facebook's newly-minted Federal Circuit argument, because it was not "pristine," it was not produced as the ONLY evidence that could prove whether or not the 2002 version of Leader2Leader practiced the invention. (BTW, no motion was

Kayce Maria on ///
Haughtiness in the face of "literal infringement"

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ever filed by Facebook complaining of the lack of pristine-ness of Leader's source code. Therefore, it appears that it *was* pristine enough before trial, but suddenly became *un-pristine* at the Federal Circuit appeal hearing. How does that happen??? HA HA HA HA.)

> Judge Moore did not know what Facebook's "pristine" explanation even meant.
>
> Neither do the rest of us.

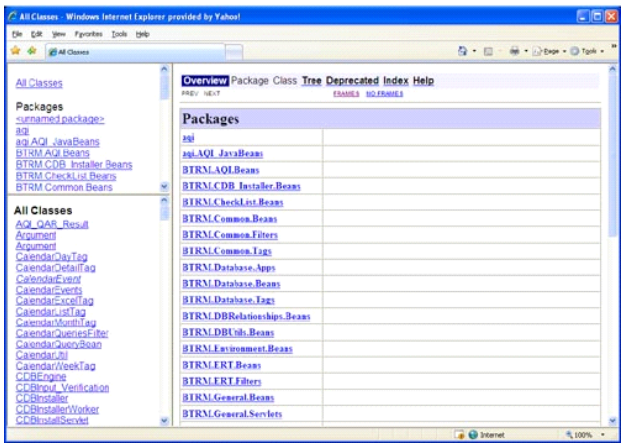
If this is "clear and convincing" evidence, then **the moon is made of green cheese**.

5. Leader's CEO Michael McKibben finally gives some "on sale bar" context that a layman can actually understand!!!

Sponsored by Facebook

I contacted Leader's Chairman & CEO, Mike McKibben, and he was kind enough to explain to me—in layman's terms—what this alleged Wright-Patterson offer was all about. His answers are from my notes. I include more detail than normal because I think it important for readers to understand how Facebook took advantage of a complex set of circumstances to *hoodwink the jury*—circumstances closely tied to Leader's efforts to help the nation in response to the 9/11 terrorist attacks.

Question #1:

> **DLK: "I have obtained the Facebook letter which requested the Leader source code. Explain to me what Leader *did* provide in response to the letter and how it was delivered again?"**
>
> **Mr.**
>
> 
>
>
> *JavaDocs Source Code Tree*
>
> **McKibben** "The day Judge Stark issued the order, we made a mirror-image copy of our developer's "source code tree" on a CD-ROM and overnighted it to our attorneys. They provided it to Facebook on a dedicated computer. This is a common procedure.
>
> Mr. Hungar's comment about our code not being "pristine" was news to me. He implied we had somehow altered it. We did no such thing. They saw everything. It contains many 100's of thousands of lines of code. If we had been intent on doctoring it, such activity would have taken months, if not years. Ask an author about editing a manuscript. It is a continuous work-in-process. It's no different with source code. A change in one place often creates a ripple effect of changes throughout the work. Such changes are ten times more complex with programming code where more than 20 developers contributed over multiple years. The alleged changes to our source code never happened."

Question #2:

DLK: "During the appeal process, there was a reference to an "offer" to Wright-Patterson that supposedly occurred in January 2002. This is the critical part of the case, can you tell me more about this?"


The New York Times

U.S. ATTACKED

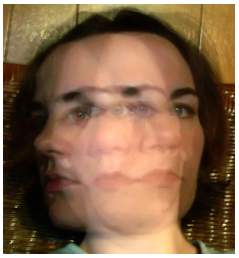
HIJACKED JETS DESTROY TWIN TOWERS AND HIT PENTAGON IN DAY OF TERROR

September 11, 2011

Mr. McKibben: "Facebook made a habit of making up stories to suit their innuendo, then repeating it—even when the evidence proved their stories bogus. For example, one of their favorite fabrications was our research and development activity with Wright-Patterson Air Force Base in Dayton, Ohio.

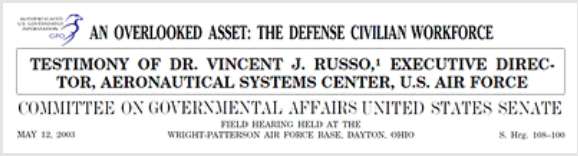
Forward-looking 'What If' Projections

We were working with WPAFB and the University of Dayton to get a research and development grant funded in the aftermath of the 9/11 tragedy. We were working on practical ways to prevent such tragedies in the future. We were all trying to find ways to help out. It is ironic that Facebook attacked us regarding this effort to aid our country in time of crisis. Those were anxious times for everyone. We were also seeing terrorist activity on our telephony technology at the time. Such proposals require forward-looking 'what if' projections. In other words, *if* the cutting-edge research is successful (and there are no guarantees that the proposal would be accepted, or that the research would be successful), what *could* the government expect to pay for the hypothetical end result? Such projections are common in the research world, but foreign to most people in my experience, including our jury. Facebook counted on getting the juror's heads spinning with technical, financing, business and legal jargon.


Juror listening to Facebook's 'on sale bar' arguments

The first point of confusion was the government's *requirement* that we use the word 'Offeror' in the proposal. Anyone who has ever responded to a government proposal request can tell you how picky they get over following their instructions to a 'T.' Missing punctuation can sometimes disqualify proposals! Even though the requirements stated that the proposal had to be non-commercial and was not a 'buyer/seller' relationship, Facebook ignored that and kept playing the 'offer for sale' innuendo like a broken record. In short, these proposals sought to extend the boundaries of science. In the English language we use the word 'offer' in many ways, like offer you a suggestion, a hand, food, advice, new ideas, etc. Every time 'offer' appears it doesn't mean we've made a commercial offer for sale! Our lay jury can be excused for getting confused since government proposals are complicated, and business lingo like 'sell' and 'deal' can mean different things depending on the context. Facebook worked hard to keep the jury's heads spinning regarding 'on sale bar.'

Second, our first meeting with a Wright-Patterson official


AN OVERLOOKED ASSET: THE DEFENSE CIVILIAN WORKFORCE

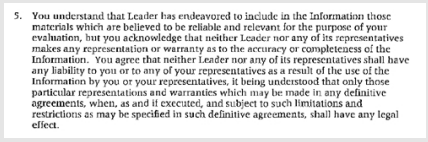
TESTIMONY OF DR. VINCENT J. RUSSO,[1] EXECUTIVE DIRECTOR, AERONAUTICAL SYSTEMS CENTER, U.S. AIR FORCE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

MAY 12, 2003 — FIELD HEARING HELD AT THE WRIGHT-PATTERSON AIR FORCE BASE, DAYTON, OHIO — S. Hrg. 108–100

was with its Executive Director Dr. Vincent J. Russo on April 2, 2001. Prior to that meeting Dr. Russo signed a nondisclosure agreement that contained a common term called a 'no-reliance' clause where the parties agree that no discussion will have any 'legal effect' until reduced to writing and signed in a formal contract. A second such agreement was signed a week later before the second meeting. Facebook's appeal brief spent a whole page calling me a liar about Dr. Russo's association with Wright-Patterson (since he signed the nondisclosure agreement personally). [DLK: To see it click here.] However, the Congressional Record proves he was, indeed, the Executive Director of WPAFB then. To use your term Donna—GOTCHA.

Fig. 4 – Congressional Record that proves Dr. Vincent Russo was Executive Director at Wright-Patterson on Apr. 2, 2001. Facebook's appeal brief accused Leader's Michael McKibben of lying about Dr. Russo's association with WPAFB. This public record proves Facebook's accusation is unfounded (and easily provable as false – **HECK, I FOUND THIS EVIDENCE – C'MON FACEBOOK, YOU GOTTA DO BETTER THAN THAT!!!**).



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

Fig. 5 – Leader NDA No-reliance Clause. Contract law says if two parties agree that preliminary discussions cannot be construed contractually, then that agreement shall govern all subsequent communications. No-reliance governed ALL WPAFB exploratory communications. **GOTCHA AGAIN!**.

This no-reliance agreement meant that none of our communications could be construed as an offer for sale. Facebook ignored this too; evidently counting on the jury and many attorneys not knowing how a no-reliance clause works. It is a legal agreement that prevents either party from claiming a verbal offer before a written agreement is signed, for example.

Third, Facebook played up forward-looking verbiage in the proposal where we were making statements about our technology. Here is where Facebook really confused the jury. We were exploring MANY development ideas with WPAFB. We were using the brand name 'Leader2Leader' as an umbrella reference to many of these ideas. At that stage, we had some elements of our technology working, others close, others further off, and still others in the idea stage. That is the nature of software R&D. It would have been too confusing to give every idea a separate name, so we lumped it altogether into a 'suite' of products and branded the suite as 'Leader2Leader.'

2009 Chevrolet Corvette

Since we had parts of our technology fully working, we could make the claim that those pieces were 'fully-developed.' However, that never meant that future or fledgling ideas were fully developed. At trial we used the example of a Corvette in 2002 did not have Bluetooth, but it did in 2009. Chevrolet could make the claim that the Corvette was fully developed in 2002 even though it did not contain Bluetooth at that stage. Similarly, the technology we were discussing with WPAFB had many fully-developed and working components, it's just that it did not yet have the patented invention plug-in, because it was not perfected until about Dec. 11, 2002.

Facebook's 'clear and convincing' burden of proof was to produce *hard* evidence that we offered the patented invention to Wright-Patterson. All they offered was a doctored interrogatory, several video snippets taken out of context, speculation and brand names. No source code, no engineering documents, no expert testimony, no nothing that was real evidence—instead, they offered only smoke

'Witches brew of innuendo, speculation and surmise'

and mirrors. At one point six months before trial even they argued to the judge that they couldn't prove *anything* without the source code. This was *after* Mark Weinstein actually *used* our 2009 version of Leader2Leader himself (that *did* practice the invention). They said they needed the source code to look 'under the hood,' as it were, to find the invention; which is correct by the way. Without source code, one cannot tell what the gears and pulleys of a piece of software look like or how they function. Even so, they didn't produce any source code as evidence at trial because the internal dates in it *prove* unequivocally that they are wrong. It would have destroyed their witches brew of innuendo, speculation and surmise."

See links here, here, Section 5 here, and here for a WPAFB BAA/PRDA Industry Guide similar (if not identical) to what the jury saw. These are documents and other writings to which Mr. McKibben is referring.

Meep, meep.

"I plead guilty, Your Honor, but only in a nice, white-collar sort of way."

* * *

Credits:

1. Don't Like button. Design Resources Box. Accessed Apr. 3, 2012.
2. Pristine Snowfall Photo. Photobucket.com. Accessed Apr. 2, 2012.
3. Green Cheese Indeed… Graphic. Shawndubin. Accessed Apr. 2, 2012.
4. "I plead guilty, Your Honor, but only in a nice, white-collar sort of way." *The New Yorker*. Accessed Apr. 3, 2012.
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7. Witches Brew. Blogspot.com. Accessed Apr. 3, 2012.
8. Confused juror photo. momology.blogspot.com. Accessed Apr. 4, 2012.
9. Hoodwink Festival 2000 graphic. TicketsInventory.com. Accessed Apr. 4, 2002.
10. JavaDocs Screen. Keener Tech. Accessed Apr. 3, 2012.
11. The New York Times 9/11/2001 Front Page. *The New York Times*. Accessed Apr. 4, 2012.
12. S. Hrg. 108-100 – AN OVERLOOKED ASSET: THE DEFENSE CIVILIAN WORKFORCE, 108th Cong. III, SuDoc. Cl. No. Y 4.G 74/9, p. 11 (2003) (testimony of Dr. Vincent J. Russo), GPO ABSTRACT, PDF version (6 MB), TXT version (174KB). GPO Authenticity Certificate. Dr. Russo's testimony places him at WPAFB on Apr. 2, 2001. Accessed Apr. 3, 2012

Posted by Donna Kline on Sunday, April 1, 2012, at 4:40 pm.

Filed under Investigation.

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Comments

1. **Steve Williams** | April 3, 2012 at 5:35 pm | Permalink

   Sounds to me like Facebook has a case of the (John Kerry's); "I voted for that before I voted against it". Talk about flip-flopping!! And why would Facebook even ask for the source code when they had no intention of presenting it as evidence? (Maybe a case of putting the cart before the horse perhaps?) At any rate, this whole silliness of these courtroom theatrics has made a mockery of not only our judicial system, but are a testament to the phrase "educated idiots"!! And how incredulous and arrogant, once again, that the system itself tends to look down on its own citizenry as a bunch of mindless buffoons. We have at this point in time evolved above grunting and eating our own droppings.

2. **Linda W** | April 3, 2012 at 11:20 pm | Permalink

   These lawyers get away with this crap because the good guy-lawyers don't feel free to report them, and the disciplinary system won't go after white collar misconduct (who has gone to jail from the meltdown? I prove my point!!!) Us muppets are left to pay the bill when their petty games fall apart. Put a majority of laypeople in charge of the disciplinary system and I bet things would change. Dignity. Honor. Integrity. Competency. Are these traits possible in the legal profession?

3. **RobertC** | April 4, 2012 at 8:11 am | Permalink

   Well Linda, one thing is for sure: Attorneys aren't going to CHOOSE to bring laymen into their little professional clique to regulate their conduct and discipline. If this is going to get done, this will have to be a lay movement. Ever wondered why their ethics rules are so detailed? Perhaps because their Mamas didn't raise them to know the difference between right and wrong?

4. **BCaine** | April 4, 2012 at 4:34 pm | Permalink

   The Audacity of Arrogance? Just today is was announced that these same junk yard dogs, sorry, attorneys, have been assigned to the Yahoo lawsuit. Did you notice Donna that Facebook is using the Fenwick & West patents that don't disclose Leader's inventions that you exposed in the previous posts??? Do I smell a deal between Leader and Yahoo to put down this rabid dog called Facebook?

5. **Adelle Grayson** | April 5, 2012 at 8:14 pm | Permalink

Facebook's business model is hacking, a fact that Facebook users seem willing to forgive and forget. But if the foundation of the company is criminal, why should it surprise anyone to learn that Mark Zuckerberg also violated Leader's patent and stole its software platform?

Adelle

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« **/// PROOF FENWICK & WEST LLP DID NOT DISCLOSE LEADER AS PRIOR ART TO FACEBOOK**