

EXHIBIT 26 – PART 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES,) Trial Volume 2
INC.,)
)
Plaintiff,)
) C.A. No. 08-862-JJF-LPS
v.)
)
FACEBOOK, INC., a)
Delaware corporation,)
)
Defendant.)

Tuesday, July 20, 2010
9:00 a.m.

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

APPEARANCES:

POTTER, ANDERSON & CORROON, LLP
BY: PHILIP A. ROVNER, ESQ.

-and-

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

Counsel for Plaintiff
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(302) 658-6697 FAX (302) 658-8418

1 I mean, what we are now familiar
2 with, the internet browser, was still in its
3 infancy. And so what we were looking at back
4 then were basically corporate websites that were
5 electronic brochures.

6 So there was no interactivity.
7 And basically you put up a page and it looked
8 like a brochure you could tell about your
9 company. So that was one of the motivations to
10 start Leader was to start looking at how we
11 could develop interactive software. That
12 doesn't say there wasn't any, but it was all in
13 its infancy.

14 Q. And back when you started Leader
15 in 1997, were there big companies around or --
16 strike that.

17 Back when you started Leader, was
18 Google around?

19 A. No. Google didn't start until
20 1998.

21 Q. And how about Facebook?

22 A. Facebook much later, 2004.

23 Q. What were your goals when you
24 founded Leader?

1 A. My goal was to use the internet as
2 a platform for doing large-scale communications
3 and collaboration.

4 Q. And what do you mean by that,
5 "large-scale communication and collaboration"?

6 A. Well, back then --

7 MR. RHODES: Your Honor, may I be
8 heard?

9 THE COURT: You have an objection?

10 MR. RHODES: Yes. I was still
11 under the trigger. Objection; 402.

12 THE COURT: Mr. Andre?

13 MR. ANDRE: Your Honor, we are
14 just laying background of the founding of the
15 company.

16 THE COURT: Overruled.

17 THE WITNESS: Could you repeat
18 your question?

19 BY MR. ANDRE:

20 Q. Yeah. I think I forgot it. I'll
21 ask you : --

22 A. Oh, okay.

23 Q. -- what were your goals when you
24 founded Leader?

1 result -- strike that.

2 Is this the process that
3 eventually resulted in the technology in the
4 '761 patent?

5 A. Yes, it is.

6 Q. When did you conceive of the
7 invention of the '761 patent?

8 A. In 1999.

9 Q. I would like you to turn to what's
10 been marked as PTX 768.

11 MR. ANDRE: Your Honor, while he's
12 getting water, I would also like to move in PTX
13 767 into evidence.

14 MR. RHODES: I stated my
15 objection.

16 THE COURT: Right. It's admitted.

17 MR. ANDRE: Thank you, Your Honor.

18 BY MR. ANDRE:

19 Q. Mr. McKibben, if you look at
20 what's been marked as PTX 768. Can you identify
21 this document?

22 A. Yes. This was a design planning
23 document that we had been working on through
24 1999 that described the technology that we

1 project after you came up with the idea?

2 A. We had about fifteen or twenty
3 people working on it.

4 Q. And how did the development work
5 proceed?

6 A. It proceeded well. It proceeded
7 like any engineering project, it had its ups and
8 downs, its fits and starts. We would go down
9 this path and realize this wasn't it and then go
10 down this path. But we have a very open,
11 collaborative, frank environment and it was
12 quite a process. It took several years.

13 Q. And at that time, did you have a
14 lot of tools available to you to develop this
15 type of technology?

16 A. No, we had to create our own
17 tools.

18 Q. At what point did you think you
19 had the technology that would eventually become
20 the invention of the '761 patent?

21 A. In late 2002.

22 Q. So from the time you founded
23 Leader in 1997 until you had the technology on
24 the '761 patent in late 2002, how many man-hours

1 did you -- did it take to develop the
2 technology?

3 A. About 145,000.

4 Q. And how much money did Leader
5 spend to develop this technology?

6 A. Over \$10 million.

7 Q. After you finally had this
8 technology built and it was working, what did
9 you do?

10 A. We filed a patent.

11 Q. I would like you to turn to what's
12 been marked as PTX 3 in your book.

13 MR. ANDRE: Your Honor, I would
14 like to move into evidence PTX 768.

15 THE COURT: It's admitted.

16 BY MR. ANDRE:

17 Q. Mr. McKibben, do you recognize
18 what's been marked as PTX 3?

19 A. Yes, I do.

20 Q. What is this document?

21 A. This is an application for the
22 patent. It includes a write-up of the invention
23 and some of the source code.

24 Q. When did you file this patent

1 application?

2 A. December 11th, 2002.

3 Q. And why did you file this patent
4 application?

5 A. We wanted to protect this idea and
6 get a patent on it.

7 Q. Why did you decide to file a
8 provisional patent application?

9 A. Because as soon as we felt we had
10 a working invention, we wanted to protect it.

11 Q. Can you tell us what is included
12 in the patent application?

13 A. Well, on the front is a write-up,
14 a description in text of our invention. And
15 then there are a number of pages of actual code
16 that we took from the working code and included
17 in the patent so that somebody in computer
18 science could understand what we had invented.

19 Q. And how did you decide what code
20 to put into the provisional patent application?

21 A. We looked at the entire body of
22 code and pulled up code that we felt reflected
23 all the key ideas that we were describing in
24 this text.

1 you know, felt like we had something pretty
2 special. We immediately started talking about
3 project plans, how are we going to get this
4 built?

5 And I started writing a lot of
6 code, stayed up a lot of nights asking employees
7 to do the same. So, yeah, a lot of hands-on
8 keyboard time again.

9 Q. How long did it take -- well, how
10 long did you work on this project to get it
11 implemented so the technology was actually
12 implemented?

13 A. We worked all the way through,
14 what, until two kinds of times for us.

15 One, we wanted to get to an
16 implemented version of the idea that we had. So
17 we worked on that for a couple of years.

18 Maybe three, probably in the, you
19 know, '99 to 2002ish time frame.

20 And then we didn't -- from our
21 perspective, it wasn't any break, or milestone
22 or stop. We kept because we were still trying
23 to pursue building a commercial product.

24 So we -- you know, we just kept

1 that's provided in the provisional application,
2 does it have some meaning?

3 A. Yeah. This is very -- again, just
4 like there is a lot of actions implied in a
5 recipe, this is very dense. There is a lot of
6 meaning in every line. And you have to know
7 what -- you have to go in and parse each word
8 and go through it. And it was intentionally
9 picked for that reason. It's a very, very dense
10 informational section of the giant pile of code
11 that we had at that time.

12 Q. So why did you and Mr. McKibben
13 wait to file the patent application until
14 December of 2002?

15 A. We were waiting to finish the
16 implementation because we thought we had to to
17 file a provisional.

18 Q. And so when you say you were
19 waiting to finish the implementation, I just
20 want to make sure I understand. What do you
21 mean by the implementation?

22 A. We were finishing writing the code
23 that was the embodiment of that
24 invention/concept that we had.

1 Q. And so is that what you were doing
2 between the time you came up with the idea
3 through December of 2002?

4 A. That's what I was doing. That's
5 what my team was doing. We had other duties,
6 too, but a lot of hands on keyboard trying to
7 make this thing live, real, all the lines we
8 needed on the computer's hard drive.

9 Q. Mr. Lamb, were you deposed in this
10 particular case?

11 A. I was.

12 Q. Were you asked very similar
13 questions with respect to what was in the code?

14 A. Yeah, a lot of similar questions.

15 Q. Did you have a chance to review
16 your deposition testimony?

17 A. I did.

18 Q. Before today?

19 A. Yes.

20 Q. And is all the testimony that you
21 provided today --

22 MS. KEEFE: Objection.

23 THE COURT: What is the objection?

24 MS. KEEFE: Objection, Your Honor.

1 Q. I think there were a couple of
2 times you were asked when you left Leader2Leader
3 to go work somewhere else. I just want to make
4 clear, you never worked at Leader2Leader?

5 A. Right, the company was Leader.

6 Q. Fair enough.

7 A. Leader Technologies, you know.

8 Q. So when you talk about
9 Leader2Leader, are you talking about the
10 technology of the '761 patent?

11 A. I still have the habits of that
12 period of time myself and the developers used
13 the term Leader2Leader to refer to a collection
14 of technologies and applications that we were
15 trying to build, not the '761 patent. That was
16 -- that wasn't what we thought.

17 Q. So it's not the same thing in your
18 mind?

19 A. Certainly it wasn't the same thing
20 in my mind and it wouldn't have been the same
21 thing in the developers' mind.

22 Q. When you talk about that time
23 period, you said between you and the development
24 team when you talked about Leader2Leader, what

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES,) Trial Volume 3
INC.,)
)
Plaintiff,)
) C.A. No. 08-862-JJF-LPS
v.)
)
FACEBOOK, INC., a)
Delaware corporation,)
)
Defendant.)

July 21, 2010
9:00 a.m.

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

APPEARANCES:

POTTER, ANDERSON & CORROON, LLP
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-and-

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1 code, my own experience with the website, the
2 deposition of the employees of Facebook that
3 used the website routinely.

4 Q. Did you rely on the confidential
5 documents as well?

6 A. Yes.

7 Q. Let me direct your attention to
8 PTX-145. Dr. Vigna, are you familiar with this
9 document?

10 A. Yes.

11 Q. What is this document?

12 A. So this platform White paper that
13 describes how testing is performed when new
14 functionality is introduced on the website. And
15 I think that interesting -- yeah, that paragraph
16 is particularly interesting. It says that every
17 time that they want to add some functionality,
18 they have the engineers bang on that particular
19 piece of code in every way possible.

20 So this explains that they have
21 their own employees go through the steps of
22 performing particular actions such as fanning
23 the page or uploading a photo internally to make
24 sure that a functionality works correctly.

1 Q. So does PTX-145 support your
2 opinion that the Facebook employees actually
3 practice the methods of Claim 9?

4 A. Yes.

5 MR. ANDRE: Your Honor, I'd like
6 to move PTX-145 into evidence.

7 MS. KEEFE: No objection, Your
8 Honor.

9 THE COURT: It's admitted.

10 BY MR. ANDRE:

11 Q. Also, I'd like to turn your
12 attention to PTX-1000. Dr. Vigna, are you --
13 and I am sorry, let's go back to PTX-145 real
14 quick. I'm sorry.

15 Dr. Vigna, go up to the top here.
16 Is this a -- PTX-145, is this a confidential
17 internal document of Facebook's wiki?

18 A. Yes.

19 Q. Thank you.

20 Now, let's go to PTX-1000.

21 Dr. Vigna, are you familiar with
22 what's been marked as PTX-1000?

23 A. Yeah. It's the Statement of
24 Rights and Responsibilities.

1 Q. And who is this directed to?

2 A. This is directed to users of the
3 website.

4 Q. And if you scroll down this page
5 just a little bit, you see all these you will,
6 you will, you will and you will not?

7 A. Yes.

8 Q. Does that inform your opinion that
9 Facebook directs or controls the actions of the
10 users?

11 A. Yes.

12 Q. How does it do so?

13 A. Because it tells the user what
14 they can and cannot do.

15 Q. Dr. Vigna, in your own personal
16 experience, have you witnessed individuals
17 posting to walls and/or up loading photographs?

18 A. Yeah. I mean, I do that routinely
19 on my own Facebook page. So I've done it
20 several times.

21 I've done it, for example, for
22 preparing the exhibits, of course, that I showed
23 you. I had to post things.

24 And I've witnessed many, many

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES,)	Trial Volume 4
INC.,)	
)	
Plaintiff,)	
)	C.A. No. 08-862-JJF-LPS
v.)	
)	
FACEBOOK, INC., a)	
Delaware corporation,)	
)	
Defendant.)	

July 22, 2010
9:00 a.m.

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

APPEARANCES:

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-and-

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1 Q. And then he talks, he keeps
2 talking about -- if you read to yourself, he
3 talks about some kind of snafu with the -- at
4 the end of the day when we were to present to
5 the Wright Patterson Air Force Base rep. Do you
6 see that?

7 A. I do.

8 Q. Then he goes on at the next
9 paragraph says although, do you see that
10 sentence?

11 A. Yes.

12 Q. It says, "Although, this demo was
13 very limited. The Wright Patterson Air Force
14 Base rep did acknowledge that it would be
15 beneficial for us to reschedule."

16 Do you see that?

17 A. Yes.

18 Q. That was what I was eluding to
19 earlier when you were telling your shareholders
20 in December of 2001 about Wright Patterson, the
21 work to get to that point had begun at least by
22 April of 2001; correct?

23 A. This was the initial meeting with
24 the gentlemen, yes.

1 Q. And at the time of this initial
2 meeting, would you agree with me that there was
3 perhaps a very limited, but there was some kind
4 of demonstration; right?

5 A. As I recall this meeting, we
6 demoed LeaderPhone, we demoed Leader
7 SmartCamera, and we demoed a few screen shots of
8 Leader2Leader.

9 Q. And at the time, at the very
10 moment that those screen shots went up on April
11 2 of 2001, with representatives from the Air
12 Force, did you have a signed confidentiality
13 agreement in place?

14 A. Yes.

15 Q. Are you sure about that?

16 A. Very positive.

17 Q. Let's take a look at -- well,
18 Leader's SmartCamera runs on the Leader2Leader
19 platform; right?

20 A. Well, as I explained earlier, the
21 Leader2Leader name is a brand name. Under it
22 has a number -- it's a suite of technologies,
23 and one of those is Leader SmartCamera that we
24 developed in conjunction with Lawrence Livermore

1 A. That's it.

2 Q. I'm sorry.

3 A. It's a lot of NDA's.

4 Q. No, it's just I got confused. If
5 you look in the top of the document, it looks
6 like some kind of stamp up there, time stamp.
7 This is a confidentiality agreement; correct?

8 A. It is. This is the one we
9 generally use.

10 Q. And is Douglas Fleiser, he's the
11 individual associated with the Wright Patterson
12 Air Force Base?

13 A. He is in their advanced
14 technologies section, but he is not the man who
15 was at the meeting referred to by Mr. Hanna.

16 Q. And in the upper right-hand corner
17 it looks like there is a date of April 16, 2001.
18 Do you see that?

19 A. I do.

20 Q. And if I could ask you to then
21 flip to the end of the agreement, which is page
22 three, and blow up that signature block. Do you
23 see a signature there?

24 A. I do.

1 Q. What is the date on that
2 signature?

3 A. April 10th, 2001.

4 Q. Do you agree with me that that's
5 after April 2, 2001; right?

6 A. April 10th is after April two.

7 Q. And if you go a couple more pages,
8 you'll come to a fax cover sheet. Do you see
9 that?

10 A. I do.

11 Q. So am I correct in assuming that
12 this came to Leader from Wright Patterson Air
13 Force Base on April 13, 2001?

14 A. Yes, up at the top it says April
15 13, 2001 on the fax header.

16 Q. At the time that the Leader2Leader
17 screen shots popped up in front of the
18 representatives of Wright Patterson Air Force
19 Base on April 2, this contract had yet to be
20 signed; right?

21 A. That's not what happened. There
22 was another gentleman by the name of Vincent
23 Rashow who was the chief civilian running Wright
24 Patterson Air Force Base at the first meeting

1 and he signed a NDA on April 2nd.

2 Q. Let's take a look --

3 MR. RHODES: I'll move into
4 evidence, Your Honor, exhibit 75.

5 MS. KOBIALKA: 725A, no objection.

6 MR. RHODES: 725A.

7 THE COURT: It's admitted.

8 BY MR. RHODES:

9 Q. Let's take a look at DTX 852.

10 Hopefully it's the next tab. Do you see this
11 document?

12 A. I do.

13 Q. It's another one of the Wright
14 Patterson Air Force base documents?

15 A. It's not only Wright Patterson Air
16 Force base, but it's also the University of
17 Dayton Research Institute.

18 Q. I'm just focusing for a moment on
19 Wright Patterson. Is this a document that
20 Leader prepared?

21 A. No, it's not. It was a joint
22 preparation between Wright Patterson, University
23 of Dayton Research Institute and Leader
24 Technologies.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES,) Trial Volume 5
INC.,)
)
Plaintiff,)
) C.A. No. 08-862-JJF-LPS
v.)
)
FACEBOOK, INC., a)
Delaware corporation,)
)
Defendant.)

Friday, July 23, 2010
9:00 a.m.

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

APPEARANCES:

POTTER, ANDERSON & CORROON, LLP
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-and-

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1 Q. Did you sign one before?

2 A. We had a confidentiality agreement
3 sometime in September when I met them the first
4 time.

5 Q. Why would you sign another one the
6 day after the meeting if there was already one
7 in place?

8 A. Well, we often do that with large
9 companies, because we're dealing with different
10 sections of the company as we have conversations
11 that roll through the organization.

12 Q. All right. So let's get this
13 right. So we saw that with the Wright-Patterson
14 Air Force Base, within a few days of that
15 demonstration, you signed a confidentiality
16 agreement. Do you recall that from yesterday?

17 A. What I recall, we had a
18 confidentiality agreement when we had a first
19 meeting.

20 Q. I'm trying to understand the
21 pattern. You sign a confidentiality agreement,
22 and you have a meeting and sign another one?

23 A. We were protective of our
24 technology during that period because we knew we

1 had something special, and we were taking extra
2 efforts to protect it; therefore, when you're
3 dealing with a large organization, you're
4 dealing with different people, and just because
5 you get a general corporate NDA, you try to
6 emphasize to the person you're talking to that
7 may not have seen the corporate NDA that this is
8 a proprietary conversation.

9 So we would often have multiple
10 nondisclosure agreements with these
11 organizations in order to emphasize the fact
12 that we had trade secrets we wanted to protect.

13 MR. RHODES: I'll move into
14 evidence DTX 0736.

15 MS. KOBIALKA: No objection.

16 THE COURT: Admitted.

17 MR. RHODES: Two more or three
18 more. DTX 182, and, Ken, let's be a little
19 careful with this one. Only show the from/sent
20 material above the hard line there for a moment.

21 BY MR. RHODES:

22 Q. This is, I assume, the e-mail
23 correspondence between you and your wife.

24 A. Yes, that's what it appears to be.

1 Q. And it's from December 3, 2002?

2 A. Right, yes.

3 Q. So once again this is more than
4 one year before the filing of the final patent
5 application; correct?

6 A. That's correct.

7 Q. Let's see if I can direct your
8 attention to page two, the third paragraph that
9 deals with Boston Scientific.

10 So a week before December 3rd,
11 there's a reference that you met with Boston
12 Scientific. Do you see that?

13 A. I do.

14 Q. That's the same meeting we were
15 just talking about of November 25th?

16 A. Yes, that is.

17 Q. And you talk about what they want
18 to use Leader2Leader files for. You say we are
19 exchanging a mutual NDA. That means you guys
20 are going to enter into a confidentiality
21 agreement; right?

22 A. Again we were going to enter into
23 another one, yes.

24 Q. Another one. And you say in the

1 parenthetical at the end, "Stop the presses.
2 Their NDA just arrived for my signature."
3 Right?

4 A. Okay.

5 Q. And that would be just -- the
6 sequence of steps is that on November 25th you
7 have the demonstration to the people at Boston
8 Scientific of the Leader2Leader technology;
9 right?

10 A. Yes, 25th. Yes.

11 Q. The confidentiality agreement that
12 arrived for your signature says on its face that
13 it's effective the day after, on November 26th;
14 correct?

15 A. On its face, it does say that.
16 Yes.

17 Q. And here you're telling your wife
18 that very document has just arrived for your
19 signature on December 3rd; right?

20 A. Yes, that's what I'm saying.

21 MR. RHODES: Your Honor, I move
22 into evidence DTX 182.

23 MS. KOBIALKA: No objection.

24 THE COURT: Admitted.

1 to get set up.

2 Mr. McKibben, you've been asked a
3 lot of questions yesterday and today about
4 Leader2Leader. And there was one very important
5 question that hadn't been asked yet which is:
6 Is Leader2Leader exactly the same thing as the
7 technology of the '761 patent?

8 MR. RHODES: Objection, Your
9 Honor. Leading.

10 MS. KOBIALKA: This is
11 cross-examination.

12 THE COURT: Overruled.

13 THE WITNESS: No.

14 BY MS. KOBIALKA:

15 Q. Okay. So we probably need to
16 discuss a little bit about what, in fact,
17 Leader2Leader is and then how that plays with
18 respect to the technology in the '761 patent; is
19 that right?

20 A. That is correct.

21 Q. Okay. I believe you mentioned
22 that Leader2Leader is a suite of technologies
23 that falls under a brand; is that right?

24 A. That is correct.

1 Q. And I think it's helpful if we
2 take a look at what you mean by that. What do
3 you mean by a brand?

4 A. Well, in this case, Leader2Leader
5 was a brand name that we acquired from the
6 Patent & Trademark Office. And we use it in the
7 similar way you would use a name for any kind of
8 product line or suite of products.

9 And it's a name you apply to, in
10 this case, multiple technologies that we were
11 developing simultaneously.

12 Q. Okay. So let's say prior to when
13 you filed the provisional patent application,
14 and what date was that?

15 A. December 11th, 2002.

16 Q. Okay. So December 11th, 2002.

17 And prior to that date, what
18 technologies fell under this Leader2Leader
19 brand? And I'm going to go over here and see if
20 I can help demonstrate it.

21 A. Okay. Well, as I was pointing out
22 in Mr. Rhodes' question on Mr. Schlesinger's
23 email, we had many brand names under the
24 umbrella of Leader2Leader. For example,

1 LeaderPhone, LeaderMail.

2 MR. ANDRE: Your Honor, may I --

3 THE COURT: You may help.

4 MR. ANDRE: Sorry.

5 MS. KOBIALKA: My apologies.

6 Sorry. This thing is about as big as I am.

7 All right. Everyone can see that?

8 BY MS. KOBIALKA:

9 Q. So we had, all right,

10 Leader2Leader. You mentioned LeaderPhone?

11 A. Right, LeaderPhone.

12 Q. What else was there?

13 A. LeaderMail.

14 Q. Do you have another example?

15 A. Leader Smart Camera.

16 Q. Anything else?

17 A. Then there would be LeaderFile.

18 Q. Okay.

19 A. LeaderNews.

20 Q. All right.

21 A. Leader -- I can keep going.

22 Q. All right. But there was all

23 different technologies that included this Leader

24 name in it --

1 A. Yes.

2 Q. -- that fell under this brand. So
3 this is overarching brands; correct?

4 A. Correct.

5 Q. And so it could include
6 LeaderPhone?

7 A. Yes.

8 Q. It could include LeaderFile?

9 A. Yes.

10 Q. LeaderMail? Leader Smart Camera?

11 A. Yes.

12 Q. Could it include LeaderVoicemail?

13 A. Yes. It could.

14 Q. LeaderChat?

15 A. Yes.

16 Q. LeaderContact?

17 A. Yes.

18 Q. So there was a variety of things?

19 A. A variety of things.

20 Q. And so when you're talking about
21 the suite of technologies, LeaderPhone is just
22 an example of one of those technologies;
23 correct?

24 MR. RHODES: Objection. This is a

1 friendly witness.

2 THE COURT: It's
3 cross-examination. Overruled.

4 MS. KOBIALKA: Thank you, Your
5 Honor.

6 THE WITNESS: I'm sorry. Can you
7 repeat the question?

8 BY MS. KOBIALKA:

9 Q. When you're talking about the
10 suite of technologies, LeaderPhone is just one
11 of those technologies as an example?

12 A. That's correct.

13 Q. Okay.

14 A. You could put them together any
15 way you wanted to.

16 Q. Okay. Now, was LeaderPhone, could
17 that be sold just separately and apart from
18 Leader2Leader?

19 A. Yes, it could. And it is.

20 Q. Okay. At some point, you had the
21 technology of the '761 patent; correct?

22 A. On December 11th, 2002, we did.

23 Yes.

24 Q. Okay. And then you had a product

1 right.

2 So you founded the company
3 sometime in 1997; is that right?

4 A. Yes, that's correct.

5 Q. And when did the patent issue for
6 the -- we'll find it. It will be on there at
7 some point. There it is.

8 And when did the patent issue?
9 The 761 patent.

10 A. November 23rd, 2006.

11 Q. So November 2006. And when did
12 you file the provisional patent application?

13 A. On December 11, 2002.

14 Q. Okay. There was reference earlier
15 in questions about the final patent application.
16 The final application was in connection with the
17 filing that occurred after, I believe, it was
18 December 10, 2003.

19 Do you believe that the
20 December 11, 2002, wasn't the filing of the
21 patent application that led to the 761 patent?

22 A. We never thought of it that way.

23 Q. So prior December 11, 2002, when
24 you referred to Leader2Leader, did that include

1 the 761 technology that's a plug-in to
2 Leader2Leader?

3 A. No, it couldn't have because that
4 technology wasn't done until days before the
5 December 11, 2002, filing.

6 Q. How do you know that?

7 A. I vividly remember that because
8 this had been a long R and D cycle, and we had
9 been struggling during 2002 to get the code
10 ready, and we ran into some more difficulties,
11 so we were working into the fall.

12 And within days of actually
13 getting the code working, the technology
14 working, we actually pulled a section of that
15 code out of the working code and put it into the
16 provisional patent, and we went to the patent
17 office.

18 Q. That's all the pages of code we've
19 been seeing on that provisional patent
20 application?

21 A. Yes.

22 Q. You wanted to make sure you had
23 your code before you did the filing?

24 A. So that would tell a computer

1 science person how the system works.

2 Q. Now, the technologies that fell
3 under Leader2Leader change and develop over
4 time?

5 A. Certainly. That's the nature of
6 any software R and D project. You start small
7 and keep growing and solve problems and come
8 down blind alleys and come back. As we did
9 that, the technology grew, and as it grew, we
10 got more and more excited about our invention.

11 Q. Can you give me an analogy for a
12 brand that's changed over time.

13 A. Well, yeah, as an example, I
14 understand that this Leader2Leader brand
15 question is what were we talking about, so for
16 example, let's take the Corvette.

17 Corvette today is a great brand
18 name. It's been a brand name around for many
19 decades, and today it has blue tooth. But in
20 2002, I don't believe it had blue tooth phone
21 technology, so between that time, you've got the
22 same brand, but the technology is changed, and
23 that's the basis on which there's a difference
24 when you refer to Leader2Leader, as to what's

1 under the hood.

2 Q. Okay. So prior to December 11,
3 2002, was there any technology in Leader2Leader
4 that could permit someone to move from one work
5 space to another work space?

6 A. No, it wasn't done yet.

7 Q. Or move from board to board within
8 the system?

9 A. No, that technology was not done
10 until a few days before December 11, 2002.

11 Q. You couldn't track any movement
12 obviously since you didn't have that movement;
13 right?

14 A. It was not finished until right
15 before 2002. That is correct.

16 Q. At some point, you had a version
17 of the software; right? Is that correct?

18 A. Yeah, right around that time
19 December 11th.

20 Q. Okay. And you started to do some
21 beta testing of that software; right?

22 A. Yeah, what happens after that is
23 we had an experimental version then, so we
24 started doing experimental testing first inside

1 our company, and then as 2003 rolled around, we
2 started talking to a few companies about
3 participating in this experimental beta program
4 to continue to refine the invention.

5 Q. What do you mean by beta program?

6 A. Well, in software, first you build
7 it, and then you want to start testing it. And
8 so us in the computer science world, we break
9 that testing into two parts.

10 And the first part is when you
11 just do it internally and just test it among
12 your employees. That's called an alpha test,
13 alpha examination test.

14 And once you feel like you have
15 bugs worked out, you give it to a few third
16 parties who are usually friendly and will put up
17 with things not working right and crashing and
18 bugs, and you put it out for testing, and that's
19 what we started doing in early 2003.

20 Q. Around that same time in 2003, did
21 you also publish a white paper entitled "What
22 Convergence Was Meant To Be"?

23 A. I do recall publishing that paper,
24 yes.

1 MS. KOBIALKA: And, Your Honor,
2 may I approach?

3 THE COURT: The witness? Yes, you
4 may.

5 BY MS. KOBIALKA:

6 Q. Do you have that document in front
7 of you currently?

8 A. I do.

9 Q. We've marked that as PTX 1240, and
10 you authored this particular document?

11 A. Yes, I did.

12 MS. KOBIALKA: At this time, Your
13 Honor, I'd like to move this into evidence.

14 MR. RHODES: No objection.

15 THE COURT: Admitted.

16 BY MS. KOBIALKA:

17 Q. We had looked at some
18 interrogatory responses yesterday, so I'd like
19 to point to those. That was DTX 963 and DTX
20 969. Maybe we could pull up 963.

21 What I'm interested in looking at
22 was the question -- what the actual
23 interrogatory was. That would be for
24 interrogatory number nine.

1 A. I believe it was the first tab in
2 the big binder?

3 Q. That's correct.

4 So, Mr. McKibben, is it correct to
5 say you were asked, "For each claim of the 761
6 patent that LTI contends is practiced by
7 any products and/or services of LTI,
8 identify all such products and/or
9 services and provide a chart specifying
10 where each limitation of each claim is
11 found within the product."

12 Is that correct?

13 A. That's what I read.

14 Q. And what did you understand you
15 were being asked with respect to that
16 interrogatory?

17 MR. RHODES: Objection, Your
18 Honor. I'm going to object to that as a
19 conclusion, and I renew my objection of her
20 leading of 611(c).

21 THE COURT: I overrule the
22 leading.

23 Ms. Kobialka, calling for
24 conclusion?

1 MS. KOBIALKA: I asked his
2 understanding of what was being asked of him.

3 THE COURT: Overruled. You can
4 answer the question if you recall it.

5 THE WITNESS: I recall.

6 It's being asked what aspects of
7 our products and/or services today practice the
8 761 patent today.

9 BY MS. KOBIALKA:

10 Q. Today. So what do you mean by
11 today?

12 A. Well, I mean, the question had to
13 have occurred -- they're asking about the 761
14 patent, which did not issue until November 23,
15 2006. So this question had to refer to whatever
16 our products and services were after
17 November 23, 2006, and so that was the answer I
18 gave.

19 Q. If we go down to the response
20 where it says "Leader2Leader powered by Digital
21 Leaderboard engine is covered by the 761
22 patent." Do you see that?

23 A. I do.

24 Q. Was that an accurate statement

1 when you answered that response?

2 A. It is because we did do
3 Leader2Leader powered by Digital Leaderboard,
4 and we did use the technology after December 23,
5 2006.

6 Q. Is that a true statement today in
7 2010?

8 A. Yes, it is.

9 Q. And is that a true statement in
10 2008?

11 A. Yes, it was.

12 Q. And would it have been a true
13 statement in 2007?

14 A. Yes, I believe so.

15 Q. Would that have been a true
16 statement prior to December of 2002?

17 A. No, it could not have because that
18 technology of the 761 patent did not exist at
19 that time.

20 Q. Now, we heard a lot of questions
21 about demonstrations that you had done, and you
22 mentioned something about NDA. What are you
23 talking about when you say NDA?

24 A. It's a very common practice in the

1 software business where you're building
2 something that takes, sometimes, years to build,
3 and you're the trying to raise money to pay your
4 programmers and feed your staff, that you go out
5 and you talk to investors to get money to be
6 able to pay your bills.

7 And so the practice in our
8 business is to, if you're going to do that and
9 still protect your intellectual property, the
10 first thing you have to do before you present
11 any of your business information to that third
12 party is you get them to agree to a
13 confidentiality agreement.

14 The shorthand is NDA. It means
15 nondisclosure agreement. People refer to it as
16 NDA, but it's a confidentiality agreement where
17 that person is willing to agree to the trade
18 secret laws of the United States where you can
19 have confidential information.

20 Q. Did Leader have an NDA policy in
21 place?

22 A. We did.

23 Q. Starting from when?

24 A. From the inception of the company.

1 Q. And you were a bit paranoid about
2 protecting confidential and proprietary
3 information.

4 A. I have been accused of being
5 paranoid.

6 Q. And that you also required your
7 family members to sign NDAs as well?

8 A. I do.

9 Q. Did your daughter, who was an
10 intern at Leader, sign an NDA?

11 A. She did.

12 Q. How many NDAs do you think you
13 have currently?

14 A. The last count was about 2400.

15 Q. Was it your understanding this NDA
16 was intended to protect all of the different
17 technologies that were confidential and
18 proprietary to Leader?

19 A. Yes. It's my understanding of the
20 non-disclosure agreements that they protect all
21 business information in the company, whether
22 it's financials, whether it's technology,
23 whether it's sales plans, business strategy.
24 Whatever it is, it protects it.

1 A. He attended my very first meeting
2 with Boston Scientific.

3 Q. Is it correct to say you would
4 never do a demonstration of any of the
5 proprietary technology of Leader unless there
6 was an NDA in place?

7 A. I never presented our technology
8 without a confidentiality agreement in place.

9 Q. And during any of the
10 demonstrations that you did prior to December
11 11, 2002, did you ever show anyone what was
12 under the hood, so to speak, of the
13 Leader2Leader technologies?

14 A. Well, prior to that time, it
15 didn't exist. So I couldn't have shown it.

16 Q. Well, I'm talking about just
17 Leader2Leader generally, I'm not referring to
18 the technology of the '761 patent. So let me
19 try that again.

20 A. Oh, okay.

21 Q. During any of your demonstrations
22 prior to December 11th, 2002, did you ever show
23 anyone what was under the hood of Leader2Leader?

24 A. We showed different aspects,

1 THE COURT: Hold on a second.

2 MR. RHODES: As a phrase,
3 technology of the '761, I thought we were
4 talking about the products, Leader2Leader.

5 THE COURT: Sustained. Let's
6 restate the question.

7 BY MS. KOBIALKA:

8 Q. At any time, did you ever
9 demonstrate the '761 technology that was plugged
10 in to Leader2Leader?

11 MR. RHODES: Objection. Same
12 objection.

13 THE COURT: Overruled. If you can
14 answer the question, answer it.

15 MS. KOBIALKA: Thank you.

16 THE WITNESS: Yes, we did. After
17 December 11, 2002, that technology was working.
18 And as I recall, the very first time we ever
19 showed the actual working technology was in the
20 advanced technology lab at The Limited to about
21 10 or 15 of their technology researchers.

22 BY MS. KOBIALKA:

23 Q. Let's talk about Wright Patterson.
24 So you had a meeting, I believe, with Wright

1 Patterson around April 2 of 2001; correct?

2 A. As I recall, that was our first
3 contact with Wright Patterson. Yes.

4 Q. Okay. And we had looked at one of
5 the NDAs that you had with Wright Patterson. It
6 was PTX 1058.

7 If you want to take a look at
8 that, You want to look on the screen?

9 That might --

10 A. Oh, okay. Okay.

11 Q. Yeah.

12 A. Yes.

13 Q. And you remember seeing this
14 particular NDA?

15 A. I do.

16 Q. The meeting that you had on April
17 2nd, 2001, was it with Mr. Fleser?

18 A. No. I had not met him yet.

19 Q. Okay. Who was at that meeting?

20 A. The person at that meeting was
21 invited by the senior people from University of
22 Dayton to attend. And he was the top civilian
23 at the Wright Patterson Air Force Base. His
24 name was Vincent Russo.

1 Q. Did you obtain an NDA for Mr.
2 Russo?

3 A. I did.

4 MR. KOBIALKA: Your Honor, I'd
5 like to approach and provide this to the
6 witness.

7 THE COURT: You may.

8 MS. KOBIALKA: It is part of DTX
9 725, which had numerous exhibits. So I'd be
10 happy to re-mark it as a PTX number so we don't
11 have to mark 2,000 of --

12 THE COURT: It's fine. Keep it as
13 it is.

14 MS. KOBIALKA: So this is DTX 725,
15 and it starts with Bates number LTI 153001
16 through 3003.

17 BY MS. KOBIALKA:

18 Q. Is this the NDA that you had with
19 Mr. Russo?

20 A. Yes. Not that one.

21 Q. It's in the middle of the
22 document.

23 MS. KOBIALKA: At this time, Your
24 Honor, I'd like to move in, I guess, the entire

1 Exhibit 725 into evidence.

2 MR. RHODES: No objection.

3 THE COURT: It's admitted. We're
4 still trying to get the correct page on the
5 screen; is that correct?

6 MS. KOBIALKA: That's correct.

7 BY MS. KOBIALKA:

8 Q. While we're getting the correct
9 page up on the screen, that meeting on April
10 2nd, 2001, did you disclose any of the
11 technology of the '761 patent?

12 A. No, it was impossible. It didn't
13 exist then.

14 Q. Did you demonstrate it?

15 A. It didn't exist. I did a demo.

16 Q. What did you demonstrate to them?

17 A. Some of the elements of
18 Leader2Leader.

19 Q. Now, you had talked about a White
20 paper and there was a Quad paper in connection
21 with DARPA.

22 A. Right.

23 Q. What is DARPA?

24 A. It's a -- it's the primary funder

1 of advanced technology research run by the
2 Department of Defense.

3 Q. And can we take a look at DTX 179?
4 And that is in the jury binders.

5 Do you have it in front of you?

6 A. Yes, I do.

7 Q. Okay. I'd like to take a look at
8 the page that has the Bates number on the bottom
9 48199. If you could take a look at the second
10 paragraph from the bottom where it says WPAFB,
11 which is I believe Wright Patterson Air Force
12 Base will use the LeaderPhone services within
13 its fire walls. WPAFB will become a classical
14 beta customer for the full Leader2Leader
15 platform and will receive commensurate licenses
16 to do so.

17 Do you see that?

18 A. Yes, I do.

19 Q. What specific technology were you
20 talking about in this document?

21 A. I was talking about various
22 elements of the Leader2Leader platform as you
23 illustrated up on the easel that we were showing
24 to them and they were expressing interest in.

1 Q. How do you know it didn't include
2 the technology of the '761 patent?

3 A. Because that technology didn't
4 exist yet, so it couldn't have.

5 Q. So was this a joint -- I heard --
6 I believe you testified yesterday this was some
7 sort of a joint development project?

8 A. Right.

9 Q. Okay. What were you guys
10 discussing about what you were going to jointly
11 develop together?

12 A. Well, at that time, this was right
13 after the September 11th terrorist attack. And
14 they were interested in talking to us about
15 using some of our technologies in conjunction
16 with some of their other research to help the
17 problem that was identified by the 9/11 disaster
18 in getting different intelligence agency data to
19 speak -- to talk together basically.

20 Q. And let's flip towards the end.
21 It's Page 9 of this document, which is entitled
22 Project Plan Management Milestones and
23 Deliverables.

24 Okay. Do you see that?

1 objecting to the question with respect to?

2 MS. KOBIALKA: Your Honor, it was
3 brought in.

4 THE COURT: I'm overruling it.
5 You can explore this area.

6 MS. KOBIALKA: I'd like to mark
7 these NDAs together to make it easier. They
8 would be PTX 1175, PTX 1049, PTX 1173, PTX 1174,
9 PTX 1172.

10 And one day, Mr. Andre will keep
11 up with me.

12 May I approach?

13 THE COURT: You may.

14 BY MS. KOBIALKA:

15 Q. Mr. McKibben, are these the NDAs
16 for the individuals I just identified?

17 A. Yes, they are.

18 Q. And why did you obtain so many
19 NDAs from a single entity?

20 A. Well, with larger companies, you
21 find as a small company, an entrepreneur, that
22 people forget they signed NDAs. If it's a
23 corporate NDA, you want to make a point.

24 When you're talking to someone