ORIGINAL

IN THE SUPREME COURT OF OHIO

THE AMERICAN CHEMICAL SOCIETY,	:	
	:	Case No. 2010-1335
Appellant,	:	
	:	ON APPEAL FROM THE
vs.	:	FRANKLIN COUNTY COURT OF
	:	APPEALS, TENTH APPELLATE
LEADSCOPE, INC., et al.,	:	DISTRICT
	:	
Appellees.	:	Court of Appeals
	:	Case No. 08AP-10256

FILED
APR 19 2011
CLERK OF COURT
SUPREME COURT OF OHIO

APPELLEES' MOTION TO STRIKE THE MERIT BRIEF OF THE AMERICAN CHEMICAL SOCIETY AND TO DISMISS THE APPEAL

INTRODUCTION

In defiance of a court order that it did not appeal, The American Chemical Society ("ACS") has improperly, and repeatedly, referenced "evidence" in its brief that is not only absent from the record but that it was specifically barred from admitting at trial. This is no mere accident or inadvertence; ACS's violation of the trial court's order goes to the heart of the issues that ACS is asking this Court to consider. ACS even has the temerity to invite the Court to credit this "evidence" over the findings of the jury. The prejudice to Defendants, and to this Court's ability to perform its duty, cannot be overstated. Specifically, before trial, the court granted Defendants' motion in limine to preclude the introduction of any evidence regarding the investigations ACS did or the opinions or conclusions from it or its counsel. The trial court ordered this because ACS adamantly refused to provide this information in discovery, cloaking itself in a claim of privilege.

Introduction of such evidence would have thus caused substantial harm to Defendants since they were never permitted discovery on this critical topic.

While ACS generally adhered to this order during the trial and in its appeal to the Tenth District, now ACS seeks to wield this prohibited evidence in order to convince this Court to reverse. In addition, ACS has authorized and/or encouraged a similar disobedience by its *amicus*, the State of Ohio. The prejudice that has resulted from this violation is so harmful that the only effective remedy is to strike the merits brief of ACS from the files of this Court.

FACTUAL BACKGROUND

A. ACS's Resistance Of Discovery Regarding Its "Investigation" And The Court's Granting Defendants' Motion In Limine

During discovery, ACS disclosed that in January 2001 it undertook an investigation with employees of Chemical Abstract Services ("CAS"), its for-profit division, and legal counsel, both inside and outside counsel, regarding the Leadscope patent and the Leadscope software. In response, Leadscope sought discovery from every ACS, CAS, and/or legal witness involved in that investigation in order to discover the facts relating to any such investigation, any opinions of counsel provided in this investigation, and any expert opinion produced or considered in that investigation. This testimony was relevant for several reasons. First, as one of the counterclaims was unfair competition, which includes malicious litigation, the results of any investigation would have been highly relevant to demonstrating ACS's unfair competition. Second, if ACS intended to rely on any opinions of counsel to negate any bad faith or other improper conduct, Defendants needed to have those opinions in order to defend themselves at trial. An additional relevant issue under Ohio's trade secret misappropriation statue was whether ACS brought its misappropriation claim in "bad faith." Again, discovery of any and all pretrial investigations was critical for an evaluation of bad faith.

ACS thus had an election to make. It could either (1) assert the attorney-client privilege and/or work product privilege over this material, or (2) waive the privilege, reveal the results of its investigation, and subject them to scrutiny in the adversarial process. ACS opted for the former path, refusing to provide *any* discovery from any witness relating to this investigation, asserting blanket privilege objections at every turn in response to Leadscope's discovery requests and questions at depositions. ACS even provided a privilege log listing several documents from the investigation. But, of course, it withheld these from production under a claim of privilege.

Prior to trial, Defendants anticipated that ACS might seek to introduce into evidence alleged conclusions from any so-called investigations and/or opinions of any inside or outside counsel involved in any such investigation. But when a party asserts the attorney-client privilege and/or work product protection during discovery and shields information from discovery, that party cannot be permitted to introduce that evidence at trial:

> To allow a plaintiff to *shield information during discovery and then utilize the information at trial would result in manifest injustice. Mariner v. Great Lakes Dredge & Dock Company*, 202 F. Supp. 430 (N.D. Ohio 1962). "The privilege was never intended, however, to be used as a *trial tactic* by which a party entitled to invoke it may control to his advantage the timing and circumstances of the release of information he must inevitably see revealed at some time." *Doe v. Eli Lilly & Company, Inc.*, 99 F.R.D. 126, 128 (D.D.C. 1983). Invocation of the privilege so as to shield relevant information during discovery only to waive the privilege at trial will *frustrate attempts by the opposition to prepare for trial and will adversely affect the opposition's ability to cross-examine* the witness. Manipulation of the privilege in this manner is *clearly contrary to the goals of the Federal Rules of Civil Procedure* and in no way further the goals underlying the privilege.

(Emphasis added.) *Huzjak v. United States* (N.D. Ohio 1987), 118 F.R.D. 61, 64-65; see *State Medical Bd. v. Miller* (1989), 44 Ohio St.3d 136, 140 (citing *Huzjak* favorably); *Meek v. Wells* (9th Dist.), 2000 Ohio App. LEXIS 992, at *6-7 (same). This rule is hardly unique to Ohio. *See, e.g., Danjonovich v. Robbins* (D. Utah May 15, 2006), 2006 U.S. Dist. LEXIS 31289, at *7 ("[T]he Court finds that [the witness] will not be allowed to testify at trial concerning matters for which he

invoked the Fifth Amendment during discovery."); *Int'l Tel. & Tel. Corp. v. United Tel. Co.* (M.D. Fla. 1973), 60 F.R.D. 177, 186 (stating that the waiver of attorney-client privilege cannot be done as a "matter of timing for strategic advantage at trial"); *Chicago Park Dist. v. Richardson* (1991), 220 Ill. App.3d 696, 702 (holding that numerous invocations of the attorney-client privilege during discovery precluded defendant from introducing an affidavit at trial in which he waived the privilege).

Accordingly, in advance of trial, Defendants filed their "Motion in Limine to Exclude Reference to Methodologies, Opinions, or Conclusions Relating to Any Investigations Conducted by Either the American Chemical Society or Chemical Abstracts Service Regarding Defendants or the LeadScope Patent." (Attached as Exhibit 1). The Court granted the motion after oral argument, (Tr. 66-67 (Attached as Exhibit 2)), and subsequently journalized its decision:

> In their January 18, 2008 "Motion in Limine to Exclude Reference to Methodologies, Opinions, or Conclusions Relating to Any Investigations Conducted by Either the American Chemical Society or Chemical Abstracts Service Regarding Defendants or the LeadScope Patent," Defendants inform the Court that they anticipate Plaintiff will attempt to offer into evidence testimony showing that CAS employees and legal counsel, both in-house and outside counsel, conducted an investigation of LeadScope, the Individual Defendants, the patent application, the LeadScope patent and the product itself before filing suit, and that ACS's action against Defendants is based on that investigation. Defendants argue that any evidence regarding the methodology, opinions or conclusions related to that investigation should be excluded, as Plaintiff asserted the attorney-client privilege throughout discovery and prevented Defendants from discovering any information with respect to the same, other than the fact that the investigation took place. Defendants argue that when Plaintiff asserted privilege with respect to this evidence, it sought to shield the same from disclosure, including disclosure at trial, and Plaintiff cannot now be allowed to present such evidence, having prevented Defendants from discovering this information and cross-examining key ACS employees and their counsel with respect to the same. Allowing the evidence at this late stage, Defendants argue, would be unduly prejudicial to them and would cause unfair surprise.
>
> Defendants' January 18, 2008 "Motion in Limine to Exclude Reference to Methodologies, Opinions, or Conclusions Relating to Any Investigations Conducted by Either the American Chemical Society or Chemical Abstracts Service Regarding Defendants or the LeadScope Patent" is **GRANTED**.

(Attached as Exhibit 3). *ACS never appealed that order, nor did it make any proffer of what the excluded evidence would have been.* At trial, ACS generally adhered to the order. Likewise, in its appeal to the Tenth District, ACS again played by the rules and followed the trial court's order.

B. ACS's Decision To Violate The Trial Court's Order Before This Court

After adhering to the court's order for three years, ACS apparently decided that a different set of rules apply to its merits brief in this Court. ACS elected to flagrantly disobey the court's order in its brief, and these examples are not mere inadvertence; each of them is designed to convince this Court to reverse the decision below by crediting "evidence" that is not in the record. This is inimical to basic norms of appellate review, and ACS knows that. There are at least five separate examples of ACS's violation of the trial court's order.

First, on page 9 of its brief, ACS argues:

> ACS responded that this was not Bob Massie's lawsuit, and that ACS had decided to file suit against Appellees only after reviewing Leadscope's patent claims, obtaining the opinion of outside counsel, and having the matter reviewed by two full boards of respected senior ACS members, who explicitly made the decision to pursue legal claims against Appellees.

Tellingly, ACS provides no record citation for saying it had obtained the "opinion of outside counsel." ACS was specifically forbidden by the court order from referring to any opinion of counsel. Before this Court, ACS decided to disregard that order with the intent to give this Court the impression that an "opinion of counsel" had been given and that the opinion validated ACS's course of action.

Second, on page 22 after noting that their expert witness, Dr. Yalamanchilli, reached certain conclusions about Leadscope and Pathfinder, ACS asserts:

> ACS presented extensive other testimony that these were the conclusions ACS had drawn when it formed a working group to analyze the Leadscope patent and retained outside counsel.

Again, for the second time, ACS provides no record citation to support this statement. And again, ACS tries to shroud its actions with an aura of legitimacy by its reference to the retention of outside counsel. By blurring the line between expert testimony and the conclusions of the working group, ACS seeks to leave the impression that the working group, guided by counsel, arrived at the same conclusions as its expert retained for trial. Yet ACS did not introduce any such evidence at trial and was specifically prohibited by the court order from referring to any such conclusions.

Third, on page 40, in responding to the defamation claims and seeking (without success) to find support for claiming that it had a basis to make its defamatory statements, ACS insists in a footnote:

> As explained *infra*, ACS had ample "basis to believe" its statements were truthful, and it undertook a comprehensive investigation before making the statements at issue.

Again, for the third time, ACS provides no record citations.

This statement seeks to build (improperly) on its earlier unauthorized representations in order to convince this Court that the "comprehensive investigation before making the statements," which included consultation with retained outside counsel, gave ACS ample "basis to believe" that the statements were true. Of course ACS did nothing wrong, it wants this Court to believe, because all of its actions followed a deliberative investigative process guided by counsel. If the "investigation" truly vindicated ACS, it should have laid the results bare for all to see. Instead, it resisted discovery of any of this and was barred by Court order from injecting such matters into the trial.

Fourth, on pages 42-43 of its brief, ACS makes the following statements again in an effort to defeat the jury's finding of actual malice:

> In the first place, ACS thoroughly investigated its claims before it filed suit. As explained above, ACS formed a working group to analyze the Leadscope patent, referred the matter to the legal department, and retained counsel. Tr. 818-19, 1905-06, Supp. 61-62, 98-99. The assessment of this group then was reviewed by two separate Boards within ACS. Tr. 117-19, Supp. 94-96.

While the court order permitted testimony that there was an "investigation" and there was testimony that ACS did refer it to its legal department and did retain outside counsel, ACS was prohibited from referencing "opinions or conclusions from this group." Accordingly, the reference to "assessment of this group" and to the "thorough[ness]" of the investigation contravene the trial court's in limine ruling. And, then in a further effort to demonstrate its good faith, ACS claims the "assessment of this group was reviewed by two separate Boards within ACS." ACS cites to pages 1817-19 of the trial transcript, but those record pages provide no support that the "assessment of this group" was reviewed by these two boards. (Attached as Exhibit 4).

Fifth, on page 43, ACS seeks to try to defeat the jury's "actual malice" finding by maintaining:

> Far from *failing* to investigate, ACS engaged here in a lengthy investigation that provided the basis for its suit and its statements about the lawsuit. That extensive investigation is sufficient in itself to disprove actual malice.

Again, for the fourth time, this statement is made without any record citations.

After constructing the false foundation in the prior four examples that ACS's actions were blessed by counsel and that its investigation was lengthy, comprehensive, and thorough, ACS seeks to drive home the conclusion that this investigation "disprove[s] actual malice." This is a remarkable assertion and one that demonstrates the lengths to which ACS is apparently willing to go to reverse the judgment. It would have this Court displace the jury's finding of actual malice (amply supported by the record) on the basis of alleged evidence *that it refused to disclose in discovery and that the jury never heard.* This is exactly why Defendants moved in limine to prevent such gamesmanship, and exactly why the trial court granted the motion. ACS cannot be

allowed to evade the trial court's order with impunity. And this Court certainly cannot credit evidence not contained within the record in order to supplant the jury's verdict, as ACS apparently invites.

C. ACS Misleads The State

Not content with its own violations of the trial court's order, ACS apparently encouraged the State of Ohio to disregard the order as well (we presume that the State was unaware of the in limine ruling and that ACS elected not to inform the State of it). Specifically on page ten of its brief, the State of Ohio asserts:

> ACS filed its complaint on the advice of counsel and an expert witness. *See Prosser & Keeton, supra*, at 984 ("advice of counsel . . . that there is a reasonable chance that the claim will be found to be valid is enough to establish probable cause.")

The statement "ACS filed its complaint on the advice of counsel . . ." is a statement ACS was prohibited from making by the court's order. Similarly, to the extent that the "expert witness" was a member of the "investigation," that too is plainly beyond the bounds of the court's order. Like ACS, the State does not provide record cites that would enable a better understanding of this point; Defendants are aware of no record evidence that any "expert witness" provided "advice" to ACS justifying the filing of its complaint. The State of Ohio cannot circumvent the trial court's order and inject new "evidence" into the record that ACS was specifically forbidden from introducing. Nor can ACS dispatch an *amicus* to do that which it was prohibited from doing itself.

LEGAL ARGUMENT

This Court has made it clear that it cannot consider matters that were not a part of the appellate court's record. See *Squire v. Geer* (2008), 117 Ohio St.3d 506, 508 (explaining that the Court cannot "add matter to the record before [it] that was not part of the court of appeals' proceedings and then decide the appeal on the basis of the new matter.") (quoting *North v.*

Beightler (2006), 112 Ohio St.3d 122). When briefs contain material that was not a part of the record of the case, this Court does not hesitate to strike the improper material. See *State ex rel. Blair v. Balraj* (1994), 69 Ohio St.3d 310, 313 (striking report attached to appellant's brief because it was evidence not contained in the record); *Squire*, 117 Ohio St.3d at 508-09 (granting motion to strike appendix of documents not contained in record, as well as aspects of brief that referred to those documents); *In re Contested Election of November 2, 1993* (1995), 72 Ohio St.3d 411, 413 (granting motion to strike materials not contained in record because: "It is axiomatic that a reviewing court cannot add matter to the record before it, which was not part of the trial court's proceedings.").

In this case, striking the offending portions of ACS's brief alone will be insufficient to remedy the harm caused by its violation of the trial court's order. Unlike most situations where a party improperly seeks to inject new evidence on appeal, here there is a specific court order, borne out of a concern for the potential prejudice to Defendants, specifically barring this evidence. ACS made a strategic decision not to waive the privilege and to shield the results of its investigation with the privilege. ACS's actions led the trial court to bar its use at trial of any such evidence. Now, before this Court, ACS runs roughshod over the trial court's order in an attempt to convince this Court to decide the case, not on evidence considered by the jury, but on "evidence" that does not grace any page of this voluminous record. In defying the court's order, it has acted at its peril.

ACS's violation of the court's order was knowing and deliberate, and it must be held accountable for its actions. If ACS had so blithely disregarded the trial court's order at trial, Defendants could have objected and prevented evidence from being introduced or sought a mistrial and sanctions if ACS succeeded in getting such impermissible evidence before the jury.

There must be a consequence for ACS's actions, which have painted for this Court a deceptive picture of the record evidence.

This Court should not countenance such a flagrant violation of the trial court's order that is designed specifically to taint this Court's decisional process. ACS knows that it cannot introduce evidence that is not in the record at this stage, and it knows that it was prohibited from introducing this "evidence" by the trial court. The prejudice to Defendants could not be greater. The only effective remedy is to strike ACS's merits brief and dismiss this appeal.

Respectfully submitted,

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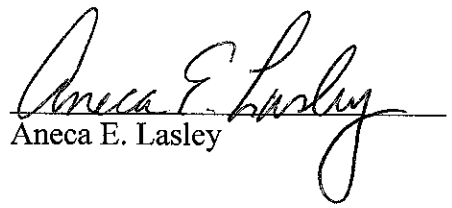
CERTIFICATE OF SERVICE

I certify that a copy of this Motion of Appellees was sent by personal service to counsel for appellant, Michael G. Long, Vorys, Sater, Seymour and Pease LLP, 52 E. Gay Street, Columbus, Ohio 43216-1088 this 19th day of April, 2011.



Aneca E. Lasley

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

THE AMERICAN CHEMICAL SOCIETY	:	
	:	**Case No. 02CVC-07-7653**
Plaintiff,	:	
	:	**Judge Guy L. Reece II**
vs.	:	
	:	
LEADSCOPE, INC., et al.,	:	
	:	
Defendants.	:	

FILED
COURT OF COMMON PLEAS
JAN 18 2008
Franklin County, Ohio
CLERK OF COURTS

FILED UNDER SEAL PURSUANT TO
PROTECTIVE ORDER
FILED MAY 12, 2003 AND AMENDED NOVEMBER 30, 2006
ATTORNEYS' EYES ONLY

DEFENDANTS' MOTION IN LIMINE TO EXCLUDE REFERENCE TO METHODOLOGIES, OPINIONS, OR CONCLUSIONS RELATING TO ANY INVESTIGATIONS CONDUCTED BY EITHER THE AMERICAN CHEMICAL SOCIETY OR BY CHEMICAL ABSTRACTS SERVICE REGARDING DEFENDANTS OR THE LEADSCOPE PATENT

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EXHIBIT
1

IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

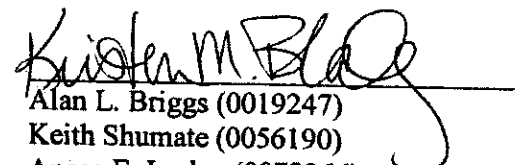
THE AMERICAN CHEMICAL SOCIETY	:	
	:	**Case No. 02CVC-07-7653**
Plaintiff,	:	
	:	**Judge Guy L. Reece II**
vs.	:	
	:	
LEADSCOPE, INC., et al.,	:	
	:	
Defendants.	:	

DEFENDANTS' MOTION IN LIMINE TO EXCLUDE REFERENCE TO METHODOLOGIES, OPINIONS, OR CONCLUSIONS RELATING TO ANY INVESTIGATIONS CONDUCTED BY EITHER THE AMERICAN CHEMICAL SOCIETY OR BY CHEMICAL ABSTRACTS SERVICE REGARDING DEFENDANTS OR THE LEADSCOPE PATENT

Defendants Leadscope, Inc., Paul E. Blower, Wayne P. Johnson, and Glenn J. Myatt (collectively "defendants") hereby move this Court for an order to exclude any testimony regarding the methodologies, opinions, or conclusions relating to any investigations conducted by employees of or counsel to plaintiff the American Chemical Society ("ACS") or its Chemical Abstracts Service ("CAS") division. Based on discovery, defendants anticipate ACS will offer testimony showing that CAS employees and counsel (both in-house and outside counsel) conducted an investigation of the defendants and the Leadscope patent prior to filing suit. Defendants also anticipate ACS will offer testimony that the legal action taken against defendants was based on such investigation. ACS, however, asserted the attorney-client and work product privileges over all aspects of this investigation, leaving defendants completely unable to discover any information other than the fact of the existence of such investigation. ACS cannot have it both ways. It cannot rely on facts at trial that it shielded from discovery, particularly during the depositions. This motion does not seek to exclude the fact of the

investigation, however, as such fact was disclosed during discovery. Accordingly, this Court should grant defendants' motion. A memorandum in support of this Motion is attached. For this Court's convenience, a proposed order is also attached.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Based on discovery and its Motion for Summary Judgment, defendants anticipate ACS will attempt to present a story to the jury about the "careful" and "deliberative" process it and CAS undertook prior to filing suit against defendants in federal court and, again, in the present action. Defendants anticipate ACS will present testimony regarding the fact of, the process involved, and the conclusions reached by an internal litigation strike team whose purpose was to investigate Leadscope, the individual defendants, the Leadscope patent application, the Leadscope patent, and the Leadscope product. At this time, defendants also anticipate ACS will present testimony regarding the investigation to show its good faith in filing suit against defendants and to show why ACS waited over four-and-one-half years after the individual defendants left ACS's employ and over three years after first viewing the Leadscope product to file suit against defendants.

During discovery, ACS faced a choice: A) to shield the facts surrounding the internal investigation from the defendants' discovery efforts by asserting the attorney-client and work product privileges or B) to disclose and rely on the facts surrounding the investigative process and the results reached. ACS chose the former. This choice, however, is not without consequence. ACS cannot now rely at trial on information it shielded from defendants' legitimate discovery requests. In other words, it cannot now use as a sword information it shielded during discovery.[1] ACS made its choice. Now it must proceed to trial without the

[1] A review of ACS's Motion for Summary Judgment demonstrates that ACS has every intention of relying on this information at trial despite its assertion of the attorney-client privilege over the very same information. In ACS's recitation of the facts, it stated:

ability to mention any facts related to the process of the alleged internal investigation and the opinions and conclusions the investigation team reached. To allow ACS to shield the details of the investigative process and the conclusion of the litigation team from discovery but rely on them at trial would cause substantial prejudice to defendants at this late stage in the litigation. Accordingly, this Court should rule, in limine, to exclude from trial any and all reference to the methodologies, opinions, or conclusions of the litigation team. This motion, however, does not seek to exclude the fact of the investigation because this fact was disclosed by ACS during discovery.

A. No CAS Employee Disclosed the Contents or Results of the Internal Investigation.

Discovery revealed that ACS will likely attempt to present testimony concerning an investigation of the defendants, the Leadscope patent application, the issued patent, and the Leadscope product performed primarily by CAS employees with the assistance of Washington D.C. counsel, Robert Masters. Defendants learned that such investigation commenced in full

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When CAS learned about Leadscope's patent application in January, 2001, "the thought of potential litigation arose." (Massie Dep., at 14.) "At this point we turned it over to counsel . . . [to] get professional advice." (*Id.*, at 250.) CAS assembled a team of scientists and patent attorneys to perform an "extensive review" comparing the Leadscope patent application with the PathFinder technology and thereby determined whether Leadscope had used ACS's intellectual property. (*Id.* at 250, 253, 258; Dennis Dep., at 56.)

CAS's concern escaladed in November, 2001 when defendants' patent application was granted and enough details became available for an "in-depth review" of the technology. (Massie Dep., at 93; Dennis Dep., at 52-53, 56.) It was at this point that the concerns about Leadscope "came to a head." (Dennis Dep., at 60-61). Michael Dennis, CAS's Vice President for Legal Administration, had numerous communications with outside legal technical experts, culminating in a meeting in February, 2002, to discuss their findings and legal recommendations (Dennis Dep., at 62-64).

ACS Motion for Summary Judgment, at 6. Defendants specifically objected to ACS's reliance on these facts by virtue of the fact that they have never been afforded the opportunity to engage in discovery on any of them. Defendants' Memorandum Contra Plaintiff's Motion for Summary Judgment on Defendants' Counterclaims, at 8-9 ("Despite relying on its internal 'investigation' of Leadscope in its Motion for Summary Judgment, ACS Motion for Summary Judgment at 6-7, ACS asserted attorney-client privilege over any conclusion reached by its litigation strike force team. Accordingly, Leadscope has been prevented from examining any ACS witness as to the 'investigation' or its results.").

swing in January 2001, following CAS' discovery of the Leadscope patent application. (*See* Massie Dep., at 84-85)[2]. CAS President Robert J. Massie testified that his litigation strike force team consisted of CAS employees Louis O'Korn and William Fisanick, and Mr. Masters, then with the law firm Sughrue Mion. (Massie Dep. at 82; *see also* Fisanick Dep. at 14) (describing Fisanick and O'Korn as the "primary individuals"). Mr. Masters led the team. (*See* Massie Dep. at 83-87; Dennis Dep. at 50-53). Robert Swann, a member of Mr. Massie's senior management team, explained that Messrs. O'Korn and Fisanick were taken from his research group and assigned to Michael Dennis, the senior in-house lawyer at CAS. (Swann Dep. 23-24). Mr. Swann testified that this group was moved to an unknown special location within CAS. (Swann Dep. 27-28) ("I don't know exactly where the room was but they moved it to a different room. I actually didn't even get involved to where it was at.").

A preliminary report of the litigation team was provided to management on January 22, 2001, but it was not produced based on the attorney-client and work product privileges. (Fisanick Dep. at 139-141) ("MR. MASTERS: Well, I'm going to instruct the witness not to answer [a question based on the preliminary report] based on the . . . grounds of attorney-client privilege and attorney work product"); (*see also* O'Korn Dep. at 202-04; The American Chemical Society's Log of Privilege Documents, Dep. Exh. 4) (attached as Exhibit B)). After Leadscope obtained their patent on November 27, 2001, the litigation strike force team did more work and issued another report on January 25, 2002. (Fisanick Dep. at 139-40; *see also* The American Chemical Society's Log of Privilege Documents). Thereafter, the strike force team met with Mr. Massie sometime around February 12, 2002, to report their findings. (Fisanick Dep. at 143-44). From what little testimony defendants were permitted to ascertain, the litigation

[2] All deposition excerpts are attached as Exhibit A.

strike force team told Mr. Massie the Leadscope patent belonged to CAS. Specifically, Mr. Massie testified:

> Chemical Abstracts Service and the American Chemical Society reviewed this patent carefully using internal and external experts, and this is the conclusion drawn and presented by the team that independently analyzed this patent. It is – it was that formal conclusion which took time and which was carefully done that underpins this statement.
>
> * * *
>
> I'll repeat what I said. The statement represents the formal conclusion of a study team, of an analytical team comprising experts who drew this conclusion. That is a fact. The fact is that this is the conclusion handed to the executives. I'm not a patent lawyer, **but when you are informed that this is your patent, and I have to stress to you that that is the conclusion, this patent is your patent, and that's actually the entire problem of this lawsuit right here.**

(Massie Dep. at 81) (emphasis added). Later in the deposition, Mr. Massie reiterated that his decision to pursue litigation was, in fact, based on the extensive findings of the litigation strike force team. (Massie Dep. at 275) ("I think, I think the allegations, and I think I've said it throughout the day, the allegations based on what, based on what this team informed the Society about the patent, the allegation is that the patent came from proprietary information that had to have come from PathFinder.") (*see also* Dennis Dep. at 56) (describing the work of the litigation team as "technical/legal, and a fairly extensive review was performed on the claims in the [patent] application and the PathFinder technology").

Despite relying on the conclusions of the litigation strike force team Mr. Massie assembled, counsel prohibited defendants from engaging in **any discovery** as to the actions, communications, or conclusions of the investigation team. For instance, counsel for ACS prohibited Mr. Massie from testifying as to any aspect of the pivotal meeting at which the strike force communicated its recommendations to Mr. Massie. (*See* Massie Dep. at 89-95). When asked "Who was it of that group that told you this is our patent, this is our intellectual property?", counsel responded: "Objection. Now that is calling for attorney-client communication. He has

told you that conclusion was presented to him in a meeting in which counsel was present, and you're asking him now who said what. We're asserting privilege on that." (Massie Dep., at 92; *see also* Massie Dep. at 103) ("Q. And in terms of the specific communications that were made to you at this meeting at Chemical Abstracts in which you were advised [that the patent belonged to CAS], as I understand, Mr. Long, you will not permit him to tell me because these are privileged communications. . . . MR. LONG: That's correct."). Counsel for ACS asserted privilege over all statements made at this meeting, whether or not they were made to or by counsel. (*See* Massie Dep. at 106; *see also* Dennis Dep. at 64) ("Q. Can you tell me anything of what was said at that meeting, and again that's – MR. LONG: No.").

Throughout the course of the deposition schedule, counsel for ACS asserted privilege over all communications made among the members of the litigation strike force team (including its conclusions) and all actions taken by the group. No team members were permitted to testify on this subject. Mr. Dennis refused to testify as to any of his communications regarding the investigation with either Mr. Massie or outside counsel. (Dennis Dep. at 44-45). Mr. O'Korn was prohibited from testifying as to any aspect of his work on the team, including his review of Dr. Myatt's thesis, (*see* O'Korn Dep. at 38-40), determinations of whether any of CAPathFinder was incorporated into other CAS' products, (*see* O'Korn Dep. at 122-39), his knowledge of Leadscope's hiring practices, (*see* O'Korn Dep. at 145, 200-05), his analysis of the Leadscope patent performed at the request of counsel, (*see, e.g.*, O'Korn Dep. at 163), and knowledge of statements relating to the filing of the lawsuit, whether or not made in the presence of counsel, (*see* O'Korn Dep. at 196-97).

Similarly, Mr. Fisanick invoked privilege on all matters relating to his work on the litigation team, including his "familiarity" with Leadscope, (Fisanick Dep. at 8-9), the analysis of

the Leadscope patent authored by Messrs. O'Korn and Fisanick and the process taken to reach their conclusions, (*see* Fisanick Dep. at 12-28, 115-16, 140), any recitation of personal knowledge of facts supporting the complaint, (*see* Fisanick Dep. at 31-32, 37-38, 66-68), his conclusions regarding the alleged wrongdoing of the individual defendants, (Fisanick Dep. at 142-43), and even his analysis, thoughts, and conclusions relating to his study of public documents authored by the defendants, (*see* Fisanick Dep. at 64-69, 124). As just one example of the breadth of the privilege asserted, Leadscope counsel specifically asked Mr. Fisanick "what opinion [he] formed" as a result of the patent investigation. (Fisanick Dep. at 17). Counsel objected: "Well, let me advise the witness that to the extent that opinion is based on discussions with counsel or work done at the request of counsel, then I would instruct you not to answer. If it was formed independent of working with counsel, then you may answer." (*Id.*) Mr. Fisanick responded: "I won't answer then" and refused to testify based on the attorney-client privilege. (Fisanick Dep. at 17-18).

Based on this testimony, it is clear that defendants diligently and steadfastly sought to determine the facts surrounding ACS's and CAS' alleged investigation of the defendants and the Leadscope patent. ACS, however, prohibited defendants from obtaining this information at every step of the way. For this reason, this Court should grant defendants' motion and prohibit ACS from entering into evidence any reference to the methodologies, results, or conclusions of the Leadscope litigation team.

B. ACS Produced No Documents Relating to the "Investigation."

Counsel for ACS not only asserted privilege over testimonial evidence but also asserted privilege over all documents relating to the investigation of Leadscope and the decision to file suit against defendants. Even a cursory examination of the privilege log provided by ACS shows

that ACS prohibited discovery on issues relating to the "Action Plan" against Leadscope as well as the internal investigation relating to the defendants and the Leadscope patent. (*See* The American Chemical Society's Log of Privilege Documents, Dep. Exh. 4). As is evident from the face of this log, ACS asserted privilege over entire binders full of documents relating to this "investigation," as well as the two reports prepared by Messrs. O'Korn and Fisanick during the course of their investigation.

C. Counsel for Defendants Confirmed ACS's Assertion of Privilege For a Deposition of Mr. Masters or Document Requests to Mr. Masters.

After hearing the testimony of Messrs. Massie and Dennis, defendants sought to exhaust all possible avenues of discovery with respect to the issue of the ACS and CAS investigation of defendants and the Leadscope patent. Counsel for defendants sought discovery in the form of document requests and depositions directed toward the attorneys and law firms identified in the deposition testimony of Messrs. Massie and Dennis. Again, counsel for ACS asserted the attorney-client privilege. Defendants memorialized this understanding:

> During our call, I expressed our desire to depose and to obtain the documents of the three law firms identified by Messrs. Massie and Dennis as being involved in the relevant decision to commence this lawsuit. I expressed my belief that Mike [Long] would assert the attorney-client privilege and/or work product protection over this work and testimony. Mike confirmed that my belief was correct and he would. Accordingly those depositions will not be noticed.

(7/17/07 Ltr. from A. Briggs to M. Long, R. Masters, and J. Mazza, at 2) (attached as Exhibit C). Defendants sought all possible avenues of discovery with respect to the issue of the litigation strike force team's investigation and ACS's decision to file suit against defendants. Because ACS asserted privilege over every aspect relating to this issue during discovery, ACS cannot be permitted to present any evidence regarding the steps the investigation team took or the results and conclusions reached by the team.

II. LAW AND ARGUMENT

A. Privileged Statements are Inadmissible.

It goes without saying that a privilege operates as an exclusion of testimony during discovery or at trial. The purpose of privilege is to "preserve the confidentiality of certain private communications." O. Jur. 3d, Evidence & Witnesses, § 735. The privilege applies even when the communications are "highly probative" because "disclosure is inimical to a principle or relationship that society deems worthy of preserving and fastening." *Id.* Privileged communications are inadmissible and have "the effect of withholding information from the judicial factfinder." O. Jur. 3d, Evidence & Witnesses, § 736. The attorney-client privilege is guaranteed in Ohio by statute. *See* O.R.C. § 2317.02(A); Ohio Civ. R. 26(B)(3) (enumerating the work-product doctrine); *see also* O. Jur. 3d, Evidence & Witnesses, § 763 ("An attorney may not testify concerning a communication made to the attorney by a client in that relation, or the attorney's advice to a client, except by express consent of the client."). By virtue of this statute, communications made between an attorney and client may be excluded from disclosure, including disclosure at trial. *See* O.R.C. § 2317.02(A).

Ohio law has long recognized that a privileged document is inadmissible until the privileged is waived. *See Weis v. Weis* (1949), 147 Ohio St. 416, at syllabus ¶5 (holding that "in the absence of waiver" of the physician-patient privilege, medical records are "inadmissible in evidence."). The Franklin County Court of Appeals also recognizes this general rule. *See Storey v. Russolillo* (Franklin Cty. 1989), 1989 Ohio App. LEXIS 425, at *9 (ordering discovery of physician-patient materials but cautioning that such materials "will be inadmissible at trial until waiver occurs").[3] The inadmissibility of privileged documents is a basic tenet of evidence law,

[3] All unpublished decisions are attached at Exhibit D.

and the inadmissibility of privileged documents certainly extends to attorney-client privileged communications.

When ACS asserted the attorney-client privilege and work product privilege over the entirety of the investigation conducted regarding defendants, it essentially sought to shield that information from any disclosure, including disclosure at trial. By this motion, the defendants seek that ACS be prohibited from disclosing any reference to the methodologies of the CAS litigation team as well as the team's opinions and conclusions at trial. Counsel for ACS so diligently protected its client's privilege and prohibited discovery on any of these issues that it would be unduly prejudicial and cause unfair surprise to allow testimony on this subject matter at trial.

B. Information Shielded in Discovery Cannot Be Introduced at Trial.

Because defendants have never been afforded discovery on the issues surrounding the "internal investigation" of defendants and their patent, defendants have never had the opportunity to cross-examine key ACS employees, particularly Messrs. Massie, Dennis, O'Korn, and Fisanick, and their counsel, as to any aspect relating to the substance of the investigation or the results and conclusions thereof. Allowing testimony on these issues at trial would cause the type of unfair surprise and prejudice the Ohio Rules of Civil Procedure sought to avoid. *See Vaught v. Cleveland Clinic Found.* (2003), 98 Ohio St. 3d 485, 488 ("One of the purposes of the Rules of Civil Procedure is to eliminate surprise."); *Feichtner v. Ohio DOT* (Franklin Cty. 1995), 114 Ohio App. 3d 346, 352 ("[O]ne of the purposes of the Rules of Civil Procedure is to prevent surprise to either party at the trial."). If ACS is permitted to testify as to these aspects of the CAS internal investigation and waive privilege before or during trial, such waiver would cause significant prejudice to defendants, who would be without recourse to conduct meaningful

discovery at this late point in the litigation. Accordingly, all testimony on these issues over which privilege was asserted should be precluded from trial.

The difficulties surrounding a late waiver of privilege are detailed in *Huzjak v. United States* (N.D. Ohio 1987), 118 F.R.D. 61, a case cited with approval by the Ohio courts. *See State Medical Bd. v. Miller* (1989), 44 Ohio St. 3d 136, 140; *Meek v. Wells* (Lorain Cty. 2000), 2000 Ohio App. LEXIS 992, at *6-7; *Storey*, 1989 Ohio App. LEXIS 425, at *12 (Bryant, J., dissenting). The *Huzjak* court astutely observed:

> To allow a plaintiff to **shield information during discovery and then utilize the information at trial would result in manifest injustice.** *Mariner v. Great Lakes Dredge & Dock Company*, 202 F. Supp. 430 (N.D. Ohio 1962). "The privilege was never intended, however, to be used as a **trial tactic** by which a party entitled to invoke it may control to his advantage the timing and circumstances of the release of information he must inevitably see revealed at some time." *Doe v. Eli Lilly & Company, Inc.*, 99 F.R.D. 126, 128 (D.D.C. 1983). Invocation of the privilege so as to shield relevant information during discovery only to waive the privilege at trial will **frustrate attempts by the opposition to prepare for trial and will adversely affect the opposition's ability to cross-examine** the witness. Manipulation of the privilege in this manner is **clearly contrary to the goals of the Federal Rules of Civil Procedure** and in no way further the goals underlying the privilege.

Id. at 64-65 (emphasis added). Were ACS allowed to introduce testimonial or documentary evidence regarding the substance of the investigation or the resulting opinions an conclusions of the team, such waiver would constitute a "trial tactic" that would "frustrate attempts" by defendants to cross-examine the disclosing witnesses. Without the opportunity to cross-examine any witness as to these issues during discovery, defendants would be at a serious disadvantage if witnesses for ACS were allowed to testify as to these aspects of the investigation of the defendants and the Leadscope patent.

Ohio courts have granted motions in limine preventing witnesses from waiving privilege "on the eve of trial" when a privilege was asserted at a deposition. In *AmeriFirst Sav. Bank v.*

Krug (Montgomery Cty. 1999), 136 Ohio App. 3d 468, 493-94, defendant Alexander asserted his Fifth Amendment privilege over certain issues at his deposition, and the plaintiff never sought a motion to compel the testimony over which privilege was asserted. In a motion for summary judgment, Alexander attempted to waive privilege as to some of these subjects. *Id.* at 494. In response, the plaintiff filed a motion in limine seeking to prevent Alexander from testifying as to the matters Alexander "shielded from discovery through the assertion of his Fifth Amendment privilege." *Id.* The trial court granted the motion, prohibiting Alexander's "eleventh hour" waiver on the basis of unfair prejudice to the plaintiff. *Id.* The Court of Appeals affirmed. *Id.* at 494. Because Alexander steadfastly remained committed to his assertion of privilege until the eve of trial, the court correctly "forced him to abide by his decision" at the time of trial, thus minimizing any "unfair surprise" to the other side. *Id.* (quoting *Guiterrez-Rodriguez v. Cartagena* (1st Cir. 1989), 882 F.2d 553, 576-77). Whether or not the plaintiff moved to compel Alexander from testifying had no bearing on the court's decision.

The present case is analogous to *AmeriFirst Savings*, and the policies supporting the court's decision in *AmeriFirst Savings* in the context of Fifth Amendment privilege apply equally here with the assertion of the attorney-client privilege and work product doctrine. As in *AmeriFirst Savings*, every CAS employee asserted the attorney-client or work product privilege over all issues concerning the substance of or results reached by the litigation strike force team investigating defendants and the Leadscope patent. Defendants diligently sought discovery in the form of documents and testimony regarding these issues, but ACS steadfastly asserted its privilege at every step of the way. As noted above, a reading of ACS's Motion for Summary Judgment suggests that ACS may waive the privilege to try to show that it acted deliberately and in good faith when it filed suit against the defendants. However, this is the **very issue** ACS has

shielded from discovery – the determination of the facts supporting ACS's lawsuits. This is simply too late to waive privilege; such waiver would cause unfair prejudice to the defendants and lead to surprise at trial. When CAS employees began asserting the attorney-client and work product privileges as to the substance of its investigation in depositions beginning in July 2007, ACS made a choice. This court should force ACS "to abide by [its] decision" and prohibit ACS employees from testifying as to matters over which ACS asserted privilege in their depositions.

Ohio law on this point is consistent with the law nationwide. *See Danjanovich v. Robbins* (D. Utah May 15, 2006), 2006 U.S. Dist. LEXIS 31289, at *7 ("[T]he Court finds that [the witness] will not be allowed to testify at trial concerning matters for which he invoked the Fifth Amendment during discovery."); *Duffy v. Currier* (D. Minn. 1968), 291 F. Supp. 810, 815 (noting that courts will "not tolerate nor indulge a practice whereby a defendant by asserting the privilege against self-incrimination during pre-trial examination and then voluntarily waiving the privilege at the main trial surprised or prejudiced the opposing party"); *Int'l Tel. & Tel. Corp. v. United Tel. Co.* (M.D. Fla. 1973), 60 F.R.D. 177, 186 (stating that the waiver of attorney-client privilege cannot be done as a "matter of timing for strategic advantage at trial"); *Chicago Park Dist. v. Richardson* (Ill. App. 1991), 220 Ill. App. 3d 696, 702 (holding that numerous invocations of the attorney-client privilege during discovery precluded defendant from introducing an affidavit at trial in which he waived the privilege); *St. Paul Village Condominium Assoc. v. St. Paul Fire & Marine Ins. Co.* (Super. Ct. Mass. 1996), 5 Mass. L. Rep. 376 ("Further, while a party may resist discovery on the basis of privilege, a waiver on the virtual eve of trial is insufficient to allow his adversary time within which to discover the communications and information, and, depending on the circumstances, may justify an order barring the use of privileged evidence."); *A & M Records, Inc. v. Heilman* (Cal. App. 1977), 75 Cal. App. 3d 554,

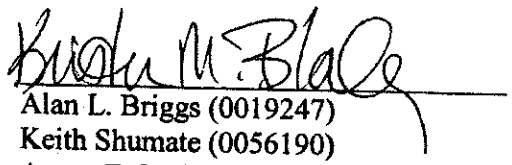
565 ("Such a strategy [of late waiver] subjects the opposing party to unwarranted surprise. A litigant cannot be permitted to blow hot and cold in this manner.").

The cited cases demonstrate how Ohio law is in accordance with law that a waiver of privilege on the eve of trial results in undue prejudice and unfair surprise to the opposing side. Because ACS shielded from defendants all information regarding the substance of its investigation as well as the resulting opinions from the investigation, defendants have never had the opportunity to evaluate ACS's arguments and cross-examine its witnesses on this issue. If ACS attempts to waive its privilege, it is too late for defendants to engage in any meaningful discovery on this issue prior to trial. Accordingly, defendants request this Court grant its motion to exclude all reference to the methodologies, conclusions, and results relating to the investigation of defendants and the Leadscope patent at trial. Defendants, however, do not seek to exclude the fact of the investigation as that fact was disclosed by ACS.

III. CONCLUSION

As demonstrated above, ACS asserted a privilege over all aspects relating to the methodologies, opinions, and conclusions regarding the investigation of defendants and the Leadscope patent. ACS made its choice. Accordingly, defendants request this Court to grant their motion and prohibit ACS employees from testifying as to these issues at trial and prohibit ACS counsel from referring to such methodologies, opinions or conclusions at trial. For this Court's convenience, a proposed order is attached.

Respectfully submitted,



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One of Attorneys for Defendants and Counterclaimants

1 THE COURT: I know you are. I know you are. And
2 I'm not denying that what you can tell me may be of
3 assistance. I just -- maybe I don't need it right now.
4 Okay. Okay.
5 I think -- unless defendants can bring something a
6 little bit more than what we're -- I'm hearing at this
7 point, I certainly cannot, I don't think, allow Mr. Enochs
8 to opine concerning the effect of the lawsuit on these
9 particular individuals involved in this case.
10 Now, with respect to recruiting, et cetera,
11 maybe -- maybe he can testify about that. But certainly I
12 have a problem with him not being a person that has
13 recruited for these specific individuals. I can't even see,
14 given that, how he can even -- the only thing he's able to
15 talk about is recruiting in general. He certainly can't
16 talk about specifics with respect to these folks.
17 MR. BRIGGS: What he can talk about, Your Honor,
18 will be the process. And we believe there's significant
19 relevant testimony here that goes to future damages, and
20 that there is opinion testimony that will be admissible
21 here. And we will carefully craft the opinions that will --
22 the questions that we will ask.
23 THE COURT: Well, here's -- here's what I'm going
24 to say: I think the motion is a motion that should be
25 granted. And I'm going to grant it in part. I'm going to

EXHIBIT
2

1 leave a small window, but you -- I don't think you are going
2 to get through that window unless you show me some more.
3 And that is that -- yeah, he can talk about recruiting in
4 general. But I can't see him at this point, based upon what
5 I see here, being able to opine about anything relative to
6 these gentlemen's recruitment or their availability or their
7 hirability by some company that may be recruiting them,
8 since I don't see anything where he's ever filled their
9 specific positions within companies.
10 MR. BRIGGS: Understood, Your Honor. We'll
11 present him appropriately.
12 MR. STEWART: Your Honor, it would be our position
13 that general testimony on recruiting would be irrelevant to
14 this case.
15 And, secondly, if there would be consideration
16 later on down the road, we would request a Daubert-like
17 hearing to have a chance to explore that further.
18 THE COURT: All right. Appropriate, as far as the
19 Daubert hearing. Appropriate.
20 I'm going to tell -- I'm not even going to go ask
21 for anything. The motion to exclude the expert opinions of
22 Rebekah Smith is denied. I won't even hear anything on
23 that.
24 MR. LONG: The only thing I would want to add,
25 Your Honor, is that this is a Daubert gatekeeping challenge

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO
GENERAL DIVISION

THE AMERICAN CHEMICAL SOCIETY,	:		
Plaintiff,	:	Case No.	02CVC-07-7653
v.	:	Judge:	Guy L. Reece, II
LEADSCOPE, INC., et al.,	:		
Defendants.	:		

FILED
COMMON PLEAS COURT
2008 FEB 28 AM 9:09
CLERK OF COURTS

**DECISION AND ENTRY
DISPOSING OF PLAINTIFF'S AND DEFENDANTS'
VARIOUS MOTIONS IN LIMINE**

RENDERED THIS 28TH DAY OF FEBRUARY 2008.

REECE, J.

On February 4, 2008, the Court heard arguments from counsel for Plaintiff The American Chemical Society (hereinafter "Plaintiff" or "ACS") and Defendants LeadScope, Inc., Paul E. Blower, Jr., Wayne P. Johnson and Glenn J. Myatt (hereinafter collectively "Defendants"),[1] on various motions in limine that had been filed with the Court in anticipation of evidence and testimony to be introduced during the trial in this matter. Having reviewed the relevant motions, memoranda, depositions transcript excerpts and/or other exhibits with respect to the issues identified in those motions, and having considered the parties' oral arguments as to the same, the Court made verbal rulings on those motions on February 4, 2008.

As previously discussed and in accordance with the Court's reasons as identified on February 4, 2008, the Court hereby journalizes those rulings as follows:

[1] Blower, Myatt and Johnson are also referred herein as "the Individual Defendants."

EXHIBIT
3

In its January 10, 2008 "Motion in Limine to Exclude the Expert Testimony of Stephen Enochs," Plaintiff argues Mr. Enochs is expected to testify that Defendants will have a harder time obtaining future employment, and will earn less money if and when they get such jobs, because of the legal proceeding initiated against them by Plaintiff. Plaintiff argues such testimony should be excluded because Mr. Enochs is not qualified to testify as an expert on that issue and he failed to use any reliable methodology in reaching his conclusions.

While Mr. Enochs owns and manages a recruiting company, and although he recruits employees for pharmaceutical and biotech companies, the focus of his recruiting is on sales and marketing personnel for such companies, not on research scientists and computer software programmers. Plaintiff notes that, while the subject matter of Mr. Enochs' expected testimony will be the alleged impact of this litigation on Defendants' ability to find jobs in specific fields of employment and the impact on their potential salaries, Mr. Enochs acknowledged during his deposition that: 1.) he has no factual basis for his opinion that companies will not look at individuals who have been sued in the past; 2.) he could not think of one instance where a company was looking at a candidate, thereafter discovered that the individual was a defendant in a civil suit, and decided not to hire that person because of that reason; and 3.) he has zero experience in placing research scientists and computer software programmers (although the company where he works staffed research scientists over 20 years ago, he did not do any of that staffing personally).

In addition, Plaintiff argues Mr. Enochs' opinion is not reliable because there is too big of a gap between his opinion and the supporting data. Mr. Enochs admitted

during his deposition that: 1.) he did not refer to any reports or treatises; 2.) he did not consult with any companies to inquire about their hiring practices and policies; and 3.) he did not attempt to determine whether the Individual Defendants had difficulties obtaining new employment or whether their salaries were adversely affected. Instead, Mr. Enochs reached his opinions based on his information and knowledge acquired through his experience as a recruiter, even though he does not have any experience in recruiting technical personnel and has not encountered any instances where companies refused to hire an individual due to his/her status as a defendant in a prior civil action. Furthermore, while Mr. Enochs stated during his deposition that Defendants' involvement in litigation would be exposed via employment-related background checks, he indicated that the third-parties who conduct these background checks keep their search results confidential, and he does not know whether these third-parties actually inquire into or specifically look for civil litigation when doing the background checks.

Plaintiff's January 10, 2008 "Motion in Limine to Exclude the Expert Testimony of Stephen Enochs" is **GRANTED IN PART** and **DENIED IN PART**. While Mr. Enochs may testify about the general process of recruiting, he may not testify, at least not based on the evidence presented to the Court thus far, about the Individual Defendants' recruitment or "hirability" in light of his lack of experience in recruiting for specific positions within companies such as those held by the Individual Defendants.

In its January 10, 2008 "Motion in Limine to Exclude Testimony Regarding Alleged Loss of Reputation, Embarrassment, or Mental Anguish, as Well as Testimony Regarding Medical Conditions," Plaintiff argues that Defendants may present testimony, either from themselves or their family members, regarding alleged loss of reputation,

embarrassment, or mental anguish, and also testimony regarding the medical conditions of the Individual Defendants and/or their family members, as a result of this litigation.

Plaintiff argues Defendants' attempt to assert any claims for embarrassment or mental aguish through such testimony would be untimely and improper in light of Civ.R. 9(G), as Defendants were granted leave to amend their Complaint in July 2007, to specifically identify the damages they have suffered as a result of Plaintiff's suit against them, and they did not at that time include any claims for or identify any embarrassment, humiliation, shame, mental anguish or emotional distress, and they did not at that time make any allegations about their physical conditions or those of Mr. Johnson's two children. Therefore, Plaintiff argues Defendants should not be allowed to make such claims at this time.

Plaintiff further argues such testimony would serve no purpose in this action other than to rouse the sympathy of the jury and to mislead and prejudice the jurors, in violation of Evid.R. 402 and Evid.R. 403. With respect to any allegations of embarrassment or humiliation, Plaintiff argues Defendants would have to link the same to what others have said or how others have reacted, in order to show that Defendants were adversely affected in society because of this lawsuit. Plaintiff argues the evidence and deposition testimonies fail to establish the same. Likewise, Plaintiff argues that, to show loss of reputation, Defendants would have to show some actual effect or manifestation of the loss, and none of the Individual Defendants, nor any of their friends or family members who were deposed, have testified that they have any knowledge, even second- or third-hand, that their reputations have been tarnished in their communities or that people think less of them because of this suit.

Plaintiff notes Evid.R. 602 provides that a witness may not testify unless he/she has personal knowledge of the matter or first-hand knowledge of facts actually perceived, and admissible testimony is further limited by Evid.R. 801 and 802 to that which is not hearsay. Plaintiff argues that, with respect to the deposition testimony it specifically cites to, there are multiple levels of hearsay within the same, such that the testimony is inadmissible unless each level of hearsay falls within an exception or exclusion of the hearsay rule.

Defendants, meanwhile, argue that Plaintiff's motion is nothing more than a red herring that seeks to exclude all evidence related to Defendants' losses based on carefully selected portions of deposition transcripts while ignoring the additional evidence available. Defendants argue they have plenty of admissible evidence with which to establish their losses and the Court should not limit itself to the selective evidence cited by Plaintiff. Defendants likewise note that they are allowed to prove their case through direct or circumstantial evidence and, at the very least, they have adequate circumstantial evidence that is admissible and that establishes their losses.

Plaintiff's January 10, 2008 "Motion in Limine to Exclude Inadmissible Speculation and Hearsay Regarding Alleged Losses by LeadScope" is **DENIED**. However, and as the Court indicated on February 4, 2008, Plaintiff is not precluded from objecting during the course of trial to any areas or evidence deemed to be inappropriate.

In its January 10, 2008 "Motion in Limine to Exclude the Testimony and Expert Report of Harvey Rosen," Plaintiff argues Mr. Rosen is expected to testify as an expert witness with respect to Defendants' entitlement to lost future wages, as the Individual Defendants claim this action has impaired their earning capacity. In addition to arguing

that Mr. Rosen's report makes unsupported assumptions, Plaintiff maintains the expert's testimony should be excluded because: 1.) the Individual Defendants have not made any reasonable attempts to mitigate any alleged impairment to their earning capacity, and they are therefore not entitled to recover any damages that reflect their potential future pay; and 2.) the Individual Defendants are not entitled to recover future pay through the end of their working lives; at most, they can recover future pay until their reemployment outside of LeadScope.

Defendants argue Plaintiff bears the burden of establishing failure to mitigate damages, and its motion attempts to obtain a ruling from the Court, prior to trial and as a matter of law, that there has been no mitigation of damages, which Defendants argue is improper. Furthermore, Defendants note Plaintiff's argument with respect to the length of time of recovery of future pay is based on caselaw that deals with wrongful termination. Defendants argue a wrongful termination does not carry with it the long-term stigmatization of a personal injury-like claim such as a defamation claim. However, Defendants argue it is for the jurors to decide whether the stigmatizing injury of defamation carries forward and, if so, for how long.

As the Court indicated on February 4, 2008, and although the Court's initial inclination has been to deny Plaintiff's January 10, 2008 "Motion in Limine to Exclude the Testimony and Expert Report of Harvey Rosen," the Court will **HOLD** the same **IN ABEYANCE** and will follow the development of this case further before making a decision with respect to the same.

In its January 11, 2008 "Motion to Exclude Expert Opinions of Rebekah A. Smith," Plaintiff submits Ms. Smith is expected to testify on behalf of Defendants to

ACS, by this name or otherwise," and even suggesting that such a project existed would confuse and negatively impact the jurors' perception as it would paint ACS in a bad light, unfairly prejudicing it in the process. Plaintiff further argues that whether such a project existed is irrelevant, as Defendants' counterclaims are not based on this non-existent project.

Plaintiff's January 17, 2008 "Motion in Limine to Preclude Attorney Argument, Testimony, or Other Comments About an Alleged 'LeadScope Rip-Off' Project" is **GRANTED**.

In their January 18, 2008 "Motion in Limine to Exclude the Testimony of American Chemical Society Expert Edward Yourdon Regarding the 'Misappropriator Profile,'" Defendants note Mr. Yourdon's expert disclosure report contains an opinion about a 9-element "misappropriation profile" that he generated specifically for this litigation. Defendants argue Mr. Yourdon is admittedly not a profiling expert with respect to trade secrets, even though he may be an expert in the fields of software development, project management and/or IT management, and he therefore is not qualified as an expert under Evid.R.702 to offer an opinion as to the profile of a trade secret misappropriator. Defendants also maintain that Edward Yourdon's opinion fails to meet the reliability test espoused in Evid.R. 702, as his methodology in arriving at his "misappropriator profile" is unreliable.

Defendants' January 18, 2008 "Motion in Limine to Exclude the Testimony of American Chemical Society Expert Edward Yourdon Regarding the 'Misappropriator Profile'" is **GRANTED**.

In their January 18, 2008 "Motion in Limine to Exclude Reference to Methodologies, Opinions, or Conclusions Relating to Any Investigations Conducted by Either The American Chemical Society or Chemical Abstracts Service Regarding Defendants or The LeadScope Patent," Defendants inform the Court that they anticipate Plaintiff will attempt to offer into evidence testimony showing that CAS employees and legal counsel, both in-house and outside counsel, conducted an investigation of LeadScope, the Individual Defendants, the patent application, the LeadScope patent and the product itself before filing suit, and that ACS's action against Defendants is based on that investigation. Defendants argue that any evidence regarding the methodology, opinions or conclusions related to that investigation should be excluded, as Plaintiff asserted the attorney-client privilege throughout discovery and prevented Defendants from discovering any information with respect to the same, other than the fact that the investigation took place. Defendants argue that when Plaintiff asserted privilege with respect to this evidence, it sought to shield the same from disclosure, including disclosure at trial, and Plaintiff cannot now be allowed to present such evidence, having prevented Defendants from discovering this information and cross-examining key ACS employees and their counsel with respect to the same. Allowing the evidence at this late stage, Defendants argue, would be unduly prejudicial to them and would cause unfair surprise.

Defendants' January 18, 2008 "Motion in Limine to Exclude Reference to Methodologies, Opinions, or Conclusions Relating to Any Investigations Conducted by Either The American Chemical Society or Chemical Abstracts Service Regarding Defendants or The LeadScope Patent" is **GRANTED**.

In their January 18, 2008 "Motion in Limine to Exclude Reference to the Reasons The American Chemical Society Filed and Dismissed Suit in Federal Court and Dismissed the Conversion and Breach of Loyalty Claims Against Defendants," Defendants argue Plaintiff should not be allowed to present testimony about the following: 1.) the reason why suit was originally filed in federal court on May 1, 2002; 2.) the reason why the federal action was dismissed on July 12, 2002; and 3.) the reason why Plaintiff dismissed the conversion claim and the breach of duty of loyalty claim (including allegations of violations of criminal law) in this action on December 6, 2006. Defendants argue that, as Plaintiff shielded the reasons behind these decisions during discovery via the attorney-client privilege, Plaintiff should not be now allowed to disclose that information at trial.

The Court notes that, with respect to the filing of suit in federal court, Mr. Massie testified during his deposition that the filing was a mistake, and that he learned about it after the fact. However, Mr. Massie asserted attorney-client privilege as to any conversations he had with counsel about the decision to file suit in federal court. With respect to the dismissal of the federal action, Mr. Dennis, chief legal counsel for CAS, testified during his deposition that he was not involved in the decision to dismiss the federal action and that the decision was made by the three law firms that represent Plaintiff's interests herein. On that issue, Mr. Massie testified that the decisions related to this lawsuit were made by ACS; he did not authorize any of the decisions and he does not know who at ACS authorized them. Mr. Massie further stated that his understanding was that "suit was filed almost as a reflex in federal court using diversity jurisdiction" and that "it was discovered later that that was inappropriate." Again, he did not divulge

any other information about the filing or dismissal of the federal action. Furthermore, Mr. Dennis refused to disclose the reasons why the conversion and breach of duty of loyalty claims were dismissed in this proceeding, approximately four years after they were pled.

Defendants' January 18, 2008 "Motion in Limine to Exclude Reference to the Reasons The American Chemical Society Filed and Dismissed Suit in Federal Court and Dismissed the Conversion and Breach of Loyalty Claims Against Defendants" is hereby **GRANTED.**

In their January 25, 2008 "Motion in Limine to Exclude the Testimony of American Chemical Society Expert Gerald Bjorge," Defendants seek to exclude Mr. Bjorge's testimony, which, according to Defendants, amounts to a tutorial on patent law and a legal conclusion with respect to the Individual Defendants' obligations under their employment contracts. Defendants argue such testimony is irrelevant and inappropriate. They explain that this case does not involve any claims against the LeadScope patent, does not deal with patent invalidity, patent infringement, or any procedures related to the patent or the Patent and Trademark Office. Furthermore, this action cannot involve such claims because the federal courts have exclusive jurisdiction when it comes to patent claims in light of 28 U.S.C. §1338(a). As the interpretation of law is the sole province of the court and an expert witness cannot offer legal conclusions, Defendants further argue that Mr. Bjorge's anticipated testimony about the obligations flowing from the Individual Defendants' employment agreements should likewise be excluded.

Defendants' January 25, 2008 "Motion in Limine to Exclude the Testimony of American Chemical Society Expert Gerald Bjorge" is **GRANTED IN PART** and

DENIED IN PART. As the Court indicated on February 4, 2008, the motion is granted as to any anticipated testimony regarding the Individual Defendants' employment agreements. The Court will consider the remainder of the arguments raised in this motion as they arise after further development in this action.

In its January 25, 2008 "Motion in Limine to Preclude Attorney Argument, Testimony, or Other Comments Regarding Plaintiff American Chemical Society's Privilege Log," Plaintiff argues that its counsel provided Defendants' counsel with a copy of its privilege log as a courtesy, to verify claims of attorney-client privilege and/or work product privileges, yet Defendants have listed the privilege log as a potential trial exhibit. Plaintiff argues Defendants should not be allowed to use the privilege log as a trial exhibit because, among other things: 1.) the privilege log is not evidence but a discovery tool, used to provide opposing counsel and the Court with enough information to determine the existence of a privilege; 2.) using it during jury selection or trial would be improper under Ohio's Rules of Evidence; 3.) as the privilege log is not evidence, it cannot be relevant evidence, and it is therefore not admissible; and 4.) Defendants cannot use the privilege log to establish that various communications took place, as the same should be established through witness testimony. Defendants, meanwhile, indicate that the privilege log will not be introduced into evidence but may be used as a means of refreshing one's recollection and, although not anticipated, perhaps as an impeachment tool.

Plaintiff's January 25, 2008 "Motion in Limine to Preclude Attorney Argument, Testimony, or Other Comments Regarding Plaintiff American Chemical Society's Privilege Log" is **GRANTED**. However, as the Court indicated on February 4, 2008, to

the extent an occasion arises where Defendants may seek to utilize the privilege log to refresh one's recollection, the Court will consider such an argument at that time.

In its January 25, 2008 "Motion to Exclude Argument, Suggestion or Testimony Regarding Defendants' Insurance Coverage and the Dismissal of Claims for Conversion and Breach of Loyalty," Plaintiff submits Defendants are expected to argue that Plaintiff voluntarily dismissed its conversion and breach of duty of loyalty claims in order to deprive Defendants of their insurance coverage. Plaintiff argues Defendants should be "prohibited from arguing, suggesting, or soliciting testimony regarding the defendants' insurance coverage or denial of coverage, the conditions or scope of their insurance coverage, or any disputes or settlements between defendants and their insurers, specifically including ACS's dismissal of its claims of conversion and breach of loyalty earlier in these proceedings." Plaintiff argues its decision to dismiss the claims and its reasons behind that decision are absolutely privileged, and legal decisions of parties and counsel are not subject to jury consideration or review. Furthermore, Plaintiff argues insurance coverage is irrelevant to any issue in this case and any reference to the same would substantially prejudice Plaintiff.

In response, Defendants argue that the filing and dismissal of those claims is admissible as a factual matter, to show that such events took place. Defendants maintain they are not claiming that the dismissal of the conversion claim took away their insurance coverage, but that Plaintiff, by filing the claim and subsequently dismissing it, attempted to take away insurance coverage upon determining that the conversion claim resulted in insurance coverage, and the same is relevant with respect to their unfair competition claim because it shows Plaintiff attempted to "play" with the litigation process "in an

effort to achieve an unfair competitive advantage." Unlike insurance coverage in a personal injury case, Defendants argue they are not attempting to inject insurance into this action but to simply put into evidence the facts, "that is, people testifying as to what occurred." Likewise, with respect to the filing and dismissal of the breach of loyalty claim, Defendants argue they simply seek to show that threats were made that criminal allegations would be included in the lawsuit, and that those threats were carried out and criminal allegations were indeed included in the federal action and in this action, which allegations remained pending for over four years and were thereafter dismissed without giving Defendants an opportunity to vindicate themselves.

Plaintiff's January 25, 2008 "Motion to Exclude Argument, Suggestion or Testimony Regarding Defendants' Insurance Coverage and the Dismissal of Claims for Conversion and Breach of Loyalty" is **DENIED**.

In its January 25, 2008 "Motion in Limine to Preclude Individual Defendants from Claiming Damages Based Upon Alleged Share Dilution or Option Expiration," Plaintiff argues that, in their Joint Pre-Trial Statement, Defendants claim damages related to dilution in LeadScope and stock option expiration, valued at $1,000,000.00 per Individual Defendant. However, Plaintiff agues Defendants have not provided any documentary evidence or testimony as to those values and calculations. While the Individual Defendants acknowledged during their depositions some damage due to lost equity and expired stock options related to the April 2002 financing, Plaintiff notes none of them could give specifics and each deferred to Mike Conley, who performed the calculations and had more specific information on this issue. Plaintiff argues its counsel requested from Defendants' counsel supporting documents related to the Individual

Defendants' testimony, especially any calculations or reports generated by Mr. Conley, and despite two e-mails requesting the same, counsel received no response. Plaintiff argues allowing Defendants to introduce such evidence at this late stage would be untimely, unfair, unduly prejudicial and improper.

Defendants essentially argued there was no calculation or report to provide, as Mr. Conley knows what pre-litigation and post-litigation ownership interest each Individual Defendant had, and all Plaintiff had to do was ask Mr. Conley during his deposition how to calculate the values, which Defendants contend is a simple mathematical calculation. Defendants argue the only expert testimony needed is with respect to the value assigned to the difference in percentage ownership between the pre- and post-litigation ownership figures, to which Ms. Rebekah Smith will testify.

In accordance with the reasons identified on February 4, 2008, Plaintiff's January 25, 2008 "Motion in Limine to Preclude Individual Defendants from Claiming Damages Based Upon Alleged Share Dilution or Option Expiration" in **GRANTED**. However, as the Court indicated at that time, such a ruling does not preclude testimony from the Individual Defendants as to what they owned and what they did not own.

In its January 25, 2008 "Motion in Limine to Exclude Argument, Suggestion or Testimony That ACS Filed Criminal Charges or Made Criminal Allegations Against Defendants," Plaintiff argues Defendants should not be allowed to argue, solicit or suggest testimony that Plaintiff filed criminal charges or made criminal allegations or accusations against them. While Plaintiff acknowledges that it included, in both the federal Complaint and in the Complaint in this action, an allegation of a violation of

R.C. §1333.81 as part of the breach of duty of loyalty claim, Plaintiff notes that claim was subsequently dismissed and, as the allegation was contained in the Complaints, it is therefore absolutely privileged. Plaintiff further argues that R.C. §1333.81 has been used as a reference guide by Ohio courts in determining civil liability for trade secret misappropriation, and alleging a violation of that statute does not constitute the initiation of an indictment or criminal proceeding against Defendants.

Plaintiff's January 25, 2008 "Motion in Limine to Exclude Argument, Suggestion or Testimony That ACS Filed Criminal Charges or Made Criminal Allegations Against Defendants" is **DENIED**.

In their January 28, 2008 "Motion in Limine to Exclude Reference, Including Attorney Argument, Regarding The American Chemical Society's Failure to Commercially Market CAPathFinder," Defendants submit Plaintiff may present evidence or testimony that it did not commercially market CAPathFinder because its attorneys advised it such actions may interfere with the LeadScope patent. Defendants argue that when ACS in-house counsel, Michael Dennis, was questioned on the issue, he asserted the attorney-client privilege but acknowledged that "patent counsel reviewed the patent and our technology, [and] there were concerns that if we were to commercialize any form of that PathFinder technology, we would be infringing upon that patent." Defendants thus argue that, as Plaintiff asserted the attorney-client privilege with respect to this issue, and as they therefore could not cross-examine anyone on the issue, Plaintiff should not be allowed to now disclose the reasons why CAPathFinder was not commercially marketed. In addition, Defendants argue such statements are hearsay, as Mr. Dennis testified about what someone else said to him.

Defendants' January 28, 2008 "Motion in Limine to Exclude Reference, Including Attorney Argument, Regarding The American Chemical Society's Failure to Commercially Market CAPathFinder" is **GRANTED** with respect to the parties' opening statements. As the Court indicated on February 4, 2008, the Court will consider the issue, if it arises at other times throughout the trial, as needed and in light of the applicable context and circumstances.

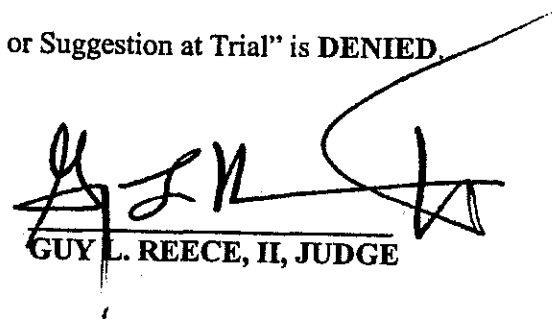
In its January 31, 2008 "Motion in Limine to Exclude All Privileged Statements From Evidence, Argument, or Suggestion at Trial," Plaintiff argues that, since the Court found some of the statements that form the basis for Defendants' counterclaims to be privileged, the same should not be introduced into evidence or otherwise referenced at trial. Plaintiff cites to the Court's January 25, 2008 Decision and Entry that found the following to be absolutely privileged with respect to Defendants' defamation counterclaims: 1.) the statements contained in the July 12, 2002 Complaint, which was filed in this action; 2.) the statements contained in the May 2, 2002 federal Complaint, even when viewed as extra-judicial statements; and 3.) the extra-judicial statements made in the draft Complaint and in the April 15, 2002 letter, as well as statements made during the April 2002 meetings between the parties, regardless of how those meetings are characterized. Plaintiff argues that, as these statements are absolutely privileged and cannot form the basis for Defendants' defamation counterclaim, Defendants should also be precluded from attempting to introduce them into evidence or referencing them or suggesting the statements in arguments in support of their remaining counterclaims.

In response, Defendants argue that this motion is nothing more than a motion to reconsider the Court's earlier decision that granted absolute privilege as to certain

statements and denied the request that Defendants' counterclaims be dismissed. Even if the motion was not an improper motion to reconsider, Defendants argue the motion should be denied because the statements it seeks to exclude are part of the overall acts and events that occurred, factually speaking. The fact that those events took place, according to Defendants, is relevant to their counterclaims, particularly their counterclaim of unfair competition, as the fact those events took place establishes the alleged malicious litigation that Plaintiff engaged in as a way of unfairly competing with Defendants. While acknowledging that those facts and events are absolutely privileged as to the libel claims arising out of the same, Defendants argue those facts are relevant, proper and appropriate with respect to their other counterclaims, and any risk of "bleed-over" into the impermissible areas can be prevented by specific and detailed jury verdict forms.

In accordance with the Court's decision and based on the reasons identified on February 4, 2008, Plaintiff's January 31, 2008 "Motion in Limine to Exclude All Privileged Statements From Evidence, Argument, or Suggestion at Trial" is **DENIED**.

IT IS SO ORDERED.



GUY L. REECE, II, JUDGE

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1 THE COURT: Okay. Fine.
2 In open court:
3 BY MR. LONG:
4 Q. Let me move to a different area, Mr. Dennis. In
5 the early part of 2002, let's say the first quarter of 2002,
6 did you or the ACS, to your knowledge, know anything about
7 Leadscope's financing plans?
8 A. No.
9 Q. In early February of 2002, did you have any
10 involvement with an email that was sent by Bob Massie to the
11 office of the governor?
12 A. No.
13 Q. The date of that email is February 5, 2002, and
14 that's the content -- or the context of my next question.
15 On the date of that email, did you or the ACS, to
16 your knowledge, have any specific knowledge about
17 Leadscope's financing plans?
18 A. No.
19 Q. When the -- you've told the jury that the decision
20 was made in early 2002 to pursue steps to initiate legal
21 remedies against the defendants.
22 What was the first step in that process?
23 A. The first step was to seek approval from the ACS
24 Governing Board for Publishing.
25 Q. And why did you go to that board, that Governing

EXHIBIT
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1 Board for Publishing first?
2 A. That board is a board that the CAS division and
3 another division of the American Chemical Society reports
4 into, it's a governing board, an advisory board of Chemical
5 Abstracts Service.
6 Q. When you say it was an advisory board, what do you
7 mean?
8 A. It's created by the ACS board of directors; but
9 the CAS division reports first into that Governing Board for
10 Publishing, not into the ACS board of directors.
11 Q. You said it's created by the board of directors of
12 the ACS. Does it get its authority from the board of
13 directors of the ACS?
14 A. Yes.
15 Q. And in the first quarter of 2002, when was the
16 next regularly scheduled meeting of that Governing Board for
17 Publishing?
18 A. March 13th, 2002, in New Orleans.
19 Q. And did the Governing Board for Publishing make
20 some decision relating to legal remedies at that March 13,
21 2002 meeting?
22 A. Yes.
23 Q. And what was the authorization that they gave the
24 company?
25 A. They authorized us to pursue legal remedies

1 against Leadscope and to -- as a next step, to take this
2 matter to the ACS board of directors.
3 Q. At the time of the Governing Board for Publishing
4 meeting, which you have said was March 13, 2002, did you or
5 the ACS, to your knowledge, have any notice or knowledge of
6 Leadscope's financing plans?
7 A. We had none.
8 Q. After that Governing Board for Publishing meeting
9 in mid-March, 2002, when was the next regularly scheduled
10 meeting of the board of directors of the American Chemical
11 Society?
12 A. I don't remember the exact date, but it was
13 sometime between April 4th, 5th, through the 7th, 2002, in
14 Florida.
15 Q. And that date in early April of 2002, did the
16 board of directors of the American Chemical Society make
17 some decision on the next steps relating to legal action
18 against Leadscope?
19 A. Yes, it did.
20 Q. And what authorization was the company given by
21 the board of directors in early March, 2002?
22 A. To pursue legal remedies against Leadscope; and,
23 in addition, to first seek an amicable resolution.
24 Q. Did the authorization, based upon your
25 understanding, include pursuing legal remedies against the