

ORIGINAL

IN THE SUPREME COURT OF OHIO

THE AMERICAN CHEMICAL SOCIETY,	:	Case No. 2010-1335
	:	
Appellant,	:	On Appeal from the
	:	Franklin County
v.	:	Court of Appeals,
	:	Tenth Appellate District
LEADSCOPE, INC., et al.,	:	
	:	
Appellees.	:	Court of Appeals
	:	Case No. 08AP-1026
	:	

APPELLANT'S MEMORANDUM IN OPPOSITION TO APPELLEES' MOTION TO STRIKE APPELLANT'S MERIT BRIEF AND TO DISMISS THE APPEAL

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As part of a series of efforts to prevent this Court from reaching the merits of this appeal, Appellees move to strike Appellant’s entire merit brief, on the ground that Appellant purportedly has included material outside the record and has breached a ruling of the trial court preventing Appellant from introducing at trial certain material over which Appellant had validly asserted a claim of privilege. The motion is frivolous and should be denied. Each of the challenged factual assertions in Appellant’s brief is supported by citations to the trial record, and those pages from the record have been provided to the Court in Appellant’s supplement. Appellees misstate the trial court’s ruling at issue, which explicitly allowed Appellant to disclose the fact that it had conducted an internal investigation of the Leadscope product, while prohibiting Appellant from relying upon counsel’s conclusions in the matter. Appellant adhered to that ruling both at trial and in its brief to this Court. Moreover, the challenged factual assertions at issue, although helpful to provide some context for the legal issues presented in this appeal, are largely irrelevant to those legal issues. This appeal turns on questions of law, not this Court’s acceptance or

rejection of issues of fact. Because Appellees won the factual contest before the jury at trial, they seek to replicate that contest on appeal (and then claim they have already won). But this appeal turns on the propositions of law that Appellant has raised, this Court has agreed to review, and Appellees desperately want this Court not to reach.

BACKGROUND

In page after page of hyperbolic rhetoric, Appellees accuse Appellant The American Chemical Society (“ACS”) of “deliberate” and “flagrant” violations of a trial court ruling concerning the admissibility of certain evidence relating to ACS’s pre-suit investigation of its claims. The record belies Appellees’ strident accusations, and this issue may be quickly put to rest.

ACS investigated the validity of Appellees’ patent and software prior to filing the lawsuit that underlies this appeal. *See* Mot. to Strike at 2; Tr. 195-96, 275-79, 398-99, 460, 652-53, 707-08, 818-19, 1905-06.¹ In the course of its investigation, ACS obtained the advice of both in-house and outside legal counsel. When Appellees sought to discover the advice of counsel that ACS received, ACS validly invoked its right to withhold that information under the attorney-client privilege and work product doctrines. Appellees responded by moving to exclude from trial “any testimony regarding the methodologies, opinions, or conclusions relating to” ACS’s pre-suit investigation. *See* Mot. to Strike Ex. 1, at 2. Appellees did not, however, seek to exclude “the fact of the investigation,” which they acknowledged had already been revealed in discovery. *Id.*

The trial court determined that Appellees’ motion was *not* “something that [the court] could give a blanket ruling on and expect [the parties] to abide by it.” Tr. 69. Rather, the court

¹ For the Court’s convenience, all transcript pages cited in this memorandum are reproduced in Exhibit 1 attached hereto.

ruled that the evidentiary issue was “something that needs to be covered individually as the questions come up.” *Id.* Thus, the court granted the motion but instructed Appellees to “object individually with respect to any problems that you have in this area.” *Id.*

The trial went forward under that framework, and as the court considered testimony on a question-by-question basis, it repeatedly allowed the jury to hear the details of ACS’s pre-suit deliberations, which showed that ACS’s investigation was lengthy, thorough, and the basis for its decision to bring suit against Appellees. *See, e.g.*, Tr. 166, 180, 195-96, 261-67, 276-79, 387-88, 398-99, 459-60, 707-08, 818-19, 1817-20, 1905-06, 5785-86.

For example, ACS told the jury in its opening statement that “[t]he timing of this lawsuit was driven by internal authorization requirements at the ACS” and that “[t]his was a very considered issue before [ACS] ever came to any court to file a lawsuit.” Tr. 195. Witnesses then testified that once Appellees filed for a patent, ACS personnel “turned the patent over to [ACS’s] general counsel, and then [an] investigation started.” Tr. 460; *see also* Tr. 652-53, 818-19. Witnesses explained that ACS hired outside counsel and formed a working group – consisting of outside counsel and two ACS scientists – to review Appellees’ patent. Tr. 398-99, 818-19, 1905-06. One member of that working group testified that he spent between one and two thousand hours to “prepare a report looking at features, functions, claims in the Leadscope patent” and in “identifying, reviewing, organizing collections of files related to the PathFinder project.” Tr. 707-08. Witnesses testified that before any decision was made to pursue legal remedies, the matter was presented to and reviewed by two ACS Boards: the ACS Governing Board for Publishing and the ACS Board of Directors. Tr. 1817-19. Each of those Boards explicitly considered and approved this suit before it was commenced. Tr. 275-79, 1817-19. Appellees rarely objected to the presentation of this information and, when they did, their objections were

overruled. *See, e.g.*, Tr. 220-23; 250, 292; 1820. Indeed, it was often Appellees themselves who informed the jury about ACS's pre-suit deliberations.²

ACS's repetition of these facts in its merit brief is not new. Following trial, ACS challenged the jury verdict on the ground that the uncontested evidence of ACS's pre-suit deliberations defeated Appellees' claims as a matter of law. In seeking judgment notwithstanding the verdict, ACS reasoned:

In this case, no reasonable and properly instructed jury could have found that ACS's claims against defendants were "objectively baseless." On the contrary, ACS took substantive steps to (1) inquire directly from defendants whether they were using ACS's proprietary software, and (2) determine based upon publicly available information whether defendants' technology improperly copied ACS's technology. (Tr. 02/05/08 at 85, 90-91, 159, 163, 165; Tr. 02/06/08 at 101, 112-112; Tr. 02/07/08 at 16-17.) Thereafter, Mr. Massie sought and obtained approval from both the CAS governing board and the ACS board to seek an amicable resolution and then pursue appropriate legal remedies. (Tr. 02/05/08 at 166, 176, 178.)

ACS JNOV Br. at 25-26. ACS's reply brief in support of judgment notwithstanding the verdict further argued:

There was no evidence at trial that ACS's lawsuit was objectively baseless. . . . Defendants' patent shared many features of ACS's protected information, and ACS made significant inquiry into the viability of its legal claims before filing suit. (Tr. 02/05/08 at 85, 90-91, 159, 163, 165; Tr. 02/06/08 at 101, 111-112; Tr. 02/07/08 at 6-17.)

² *See, e.g.*, Tr. 166 (Appellees' opening statement recites that ACS "had two senior scientists, Mr. Fisanick and Mr. O'Korn, assigned to review [Appellees' patent application]," had "Mr. Masters [(ACS outside counsel)] review [the patent application]," and had a "committee . . . review [the patent application]"); *id.* at 180 (again informing the jury of the "committee set up, Mr. Masters and Mr. O'Korn and Mr. Fisanick"); *id.* at 398-99 (eliciting testimony on cross-examination of Robert Massie that he had informed ACS's general counsel of Appellees' patent and formed a working group to "start looking at this issue"); *id.* at 707-08 (eliciting testimony on cross-examination of Louis O'Korn, a member of the working group, that he had spent one to two thousand hours reviewing files and preparing a report); *id.* at 818-19 (again eliciting testimony on cross-examination of Louis O'Korn that he had "prepare[d] a report" on Appellees' patent application and that ACS had engaged outside counsel); *id.* at 1905-06 (eliciting testimony on cross-examination of an ACS witness that ACS had engaged outside counsel shortly after ACS had become aware of Appellees' patent application).

ACS JNOV Reply Br. at 28-29. At no time did Appellees object to these arguments as violating the trial court's ruling concerning the investigation.

On appeal, ACS continued to make the very same arguments, each time supported by trial transcript citations. ACS's opening brief to the Court of Appeals explained:

ACS's concerns were heightened when it discovered Leadscope's European patent application in 2001. 2/7 Tr. at 151; 2/8 Tr. at 111 ("lots of areas . . . seemed to overlap with CAS technology"). ACS formed a working group to analyze the patent, referred the matter to the legal department, and retained outside counsel. 2/8 Tr. at 117-20; 2/20 Tr. at 88-90. ACS's investigation acquired greater urgency when Leadscope obtained a U.S. patent in November 2001, threatening to preclude ACS from ever commercializing PathFinder. 2/6 Tr. at 174. Indeed, the preliminary decision to pursue legal remedies was reached in early 2002, just a few months later. 2/6 Tr. at 174 (Massie) ("to bring legal action . . . we had to have something really substantive, and that didn't happen till this patent came out"); 2/20 Tr. at 105 (ACS in-house counsel Michael Dennis) ("We believed that our technology was embodied in that patent."). Once this decision was made, approval was still required from two ACS boards: the Governing Board for Publishing, which consented to legal action unless no "amicable resolution" was possible on March 13, 2002, and the Board of Directors, which did the same on April 7. *Id.* at 15-17.

ACS Ct. App. Open. Br. at 6-7. ACS's brief in the Court of Appeals then noted that "[q]uite appropriately . . . ACS refrained from filing suit until it conducted further factual and legal analysis," and ACS emphasized that it did not commence its suit until it had "formed a working group to evaluate [Leadscope's patent application materials and] was . . . able to confirm that it had a claim against Defendants." *Id.* at 23-24 & n.7. ACS's reply brief also referred to ACS's "lengthy investigation." ACS Ct. App. Reply Br. at 1. Appellees made no motion to strike these factual assertions.

ACS again repeated in its Memorandum in Support of Jurisdiction in this Court that ACS "had filed suit only after a lengthy, careful review." Mem. in Support of Jurisdiction at 4 (July 30, 2010). And again, Appellees raised no objection to this factual reference in its memorandum opposing jurisdiction in this Court. *See* Mem. in Opposition to Jurisdiction (Aug. 30, 2010).

ACS's merit brief in this Court presented a virtually identical summary of ACS's pre-suit deliberations, largely to provide some context for the legal issues presented in the appeal. As is evident in the passage quoted in full below, this portion of ACS's merit brief is meticulously cited with references to the trial record, and all of the cited pages were provided to the Court in Appellant's supplement:

CAS became aware of Leadscope's product soon after it was released, but was unable to tell from public material how much it was based on PathFinder. Tr. 261, 459-60, Supp. 43, 51-52. Appellees provided oral assurances that the Leadscope product did not contain any intellectual property of ACS. Tr. 262-65, Supp. 44-47. CAS's concerns were heightened, however, when it discovered Leadscope's patent application for the product in 2001, which disclosed substantial areas of overlap with CAS technology. Tr. 266-67, 652-563, Supp. 48-49, 56-57. CAS formed a working group to analyze the patent, referred the matter to the legal department, and retained outside counsel. Tr. 818-19, 1905-06, Supp. 61-62, 98-99. The investigation acquired greater urgency when Leadscope obtained a U.S. patent for its product in November 2001, potentially precluding ACS from using its own technology. Tr. 460, Supp. 52. Before any decision was made to pursue legal remedies, however, the matter first was presented to and reviewed by two ACS Boards: the Governing Board for Publishing and the ACS Board of Directors. Tr. 1817-19, Supp. 94-96. The Boards authorized ACS to pursue legal claims against Appellees, but also to seek an amicable resolution of those claims. Tr. 1819-20, Supp. 96-97.

Merit Br. of Appellant at 5.

ACS's principal arguments on appeal are not in any way dependent upon this Court's acceptance of either the thoroughness or the conclusions of ACS's pre-suit investigation.³ ACS contends in this appeal that the trial court should have ruled (and, to the extent it presented a jury

³ Certainly, every statement in a party's background description of a case need not be legally determinative of the propositions of law presented. As explained in more detail below, ACS contends it is entitled to judgment on Appellees' counterclaims because Appellees never even contended that ACS's claims lacked probable cause and because the trial court found ACS's claims to be sufficient to reach the jury. All of the facts presented in ACS's merit brief – both concerning ACS's pre-suit review of its claims and, more important, concerning the fourteen days of trial testimony ACS provided in support of its claims – provide appropriate context for *why* Appellees never contended that ACS's claims lacked probable cause, *why* the trial court found ACS's claims to raise legitimate issues of fact for the jury, and *why* this Court need not reevaluate those issues itself (as ACS explicitly argues in its merit brief, at 21, 42).

question, should have instructed the jury) that ACS could not be found liable for filing a lawsuit against Appellees unless that lawsuit was objectively baseless, which the U.S. Supreme Court and this Court have equated to a suit that is lacking in “probable cause.” *See* Mem. in Support of Jurisdiction at 5-9; Merit Br. of Appellant at 13-19. And ACS argues that, as a matter of law, its lawsuit satisfied that standard. But that latter argument is not dependent on any facts (disputed or undisputed) concerning ACS’s pre-suit investigation. Rather, the argument is based on the fact that (a) Appellees have never even *contended* that ACS’s lawsuit lacked probable cause, and (b) the trial court, by ruling that ACS’s claims were sufficient to overcome motions for summary judgment and for a directed verdict at trial, *necessarily* found that ACS’s claims were *not* “objectively baseless” or “lacking in probable cause.”

Specifically, ACS argued in its merit brief that “Appellees never claimed, much less proved, that ACS’s lawsuit was objectively baseless,” Merit Br. of Appellant at 20, and that there is “no need for this Court to look beyond the trial court’s rulings that ACS raised a genuine issue of material fact regarding its claims,” *id.* at 21. The statements about ACS’s pre-suit investigation provide relevant context for both Appellees’ response and the trial court’s actions, as do the statements in ACS’s merit brief that “ACS pursued its claims vigorously and presented substantial evidence over the course of an eight-week trial,” *id.* at 1, and that “ACS’s case-in-chief was presented over the course of 14 trial days,” *id.* at 6. But this case does not turn on this Court’s independent determination of these or any other facts; what is determinative is that Appellees have never *contended* that ACS’s lawsuit was objectively baseless and the trial court necessarily *determined* that it was not.

The same point is true with regard to ACS’s challenge to the enormous defamation award in this case. Once again, ACS made clear in its merit brief that this Court does *not* need to

conduct its own review of the record to decide whether ACS acted with “actual malice,” because the trial court already did the relevant analysis in ruling that ACS’s claims were factually and legally sufficient to reach the jury, which Appellees have never disputed. As ACS argues in its merit brief:

The Court does not need to sift through the record to determine whether ACS’s statements were so “inherently improbable” that ACS properly may be found liable for having made the statements with actual malice. As stated above, there is no dispute that ACS supported its allegations against Appellees with substantial evidence, which the trial court found to be legally sufficient to raise a genuine issue of material fact. Just as ACS’s lawsuit may not, for that reason, support a claim of “malicious litigation,” an out-of-court statement about ACS’s allegations may not be found to be so “inherently improbable” as to constitute malicious or reckless disregard for their truth. The same policies support both rules. Courts should not be burdened with a floodgate of “shadow” litigation claiming that allegations in a lawsuit, if ever repeated outside of court, were defamatory simply because the allegations ultimately failed. Because ACS’s allegations had a substantial, objective basis, the statements at issue here cannot be found to have been made with actual malice as matter of law. This Court need go no further.

Merit Br. of Appellant at 42 (emphasis added). Appellees’ motion to strike challenges statements that, while entirely proper and fully supported by the record in this case, ultimately have little relevance to the *legal* issues raised on appeal.

ARGUMENT

Appellees’ extraordinary request to strike ACS’s brief is frivolous. Appellees claim that ACS’s merit brief constituted a “flagrant violation of the trial court’s order.”⁴ But as set forth above, the trial court ruled that Appellees’ motion in limine was *not* “something that [the court] could give a blanket ruling on.” Tr. 69. Instead, the court decided to rule on the admissibility of

⁴ Appellees also assert that ACS’s merit brief was “designed specifically to taint this Court’s decisional process.” Mot. to Strike at 10. There is no basis for the claim, and Appellant expects the Court is not so easily swayed in any event. The normal course to challenge an opposing party’s supposed misstatements or extra-record claims is through a response (or reply) brief or at oral argument. There is no reason for this Court to countenance the extensive collateral motions practice that Appellees have brought here, which needlessly burdens this Court, the appellate process, and the litigants.

ACS's pre-suit deliberations "as the questions come up." *Id.* Accordingly, the court granted Appellees' motion and journalized that ruling in an written docket entry noted by Appellees. Decision & Entry at 1, 11 (Feb. 28, 2008). But the court *applied* that ruling on a question-by-question basis, and, as the trial unfolded, it permitted the jury to learn many facts about ACS's pre-suit deliberations – often because it was Appellees themselves who elicited the testimony. *See supra* pages 3-4 & n.1.

Appellees thus engage in revisionist history when they contend that ACS has relied on extra-record material. Instead, for each of the five passages that Appellees identify, there is clear and explicit support in the record for ACS's statements. ACS discusses each passage in turn.

First, Appellees argue that ACS violated the trial court order when it recounted that it had "obtain[ed] the opinion of outside counsel" before filing suit. Mot. to Strike at 5 (quoting Merit Br. of Appellant at 9).⁵ But as explained above, the record contains multiple references to the fact that ACS obtained the opinion of outside counsel as part of its pre-suit deliberations. *See, e.g.*, Tr. 1905-06 (cited in Merit Br. of Appellant at 5) (testimony of Michael Dennis) ("Q. Okay. Now, we learned about the patent [application] in 2001. . . . And in January, 2001 is when you engage Mr. Masters [(ACS outside counsel)] and his law firm; is that correct? . . . A. Well, the general counsel of [ACS] did, yes."); Tr. 818-819 (cited in Merit Br. of Appellant at 5) (testimony of Louis O'Korn) ("Q. And shortly [after ACS learned of the patent] was Mr. Masters then engaged? A. Yes."). As noted, ACS cited both of these passages just four pages

⁵ Appellees contend that "[t]ellingly, ACS provides no record citation for saying it had obtained the 'opinion of outside counsel.'" Mot. to Strike at 5 (quoting Merit Br. of Appellant at 9). It is true that, *on page 9* of its merit brief, ACS did not provide record citation for the statement that it had obtained the opinion of outside counsel. However, as quoted above (*see supra* at 6), *on page 5* of its merit brief, ACS stated, with full record support: "CAS formed a working group to analyze the patent, referred the matter to the legal department, *and retained outside counsel*. Tr. 818-19, 1905-06, Supp. 61-62, 98-99." Merit Br. of Appellant at 5 (emphasis added). If anything is sanctionable here, it is the motion to strike itself.

earlier in its brief, when it made the identical statement that it had “retained outside counsel.” Merit Br. of Appellant at 5. In addition, ACS had made the same statement in its brief in the Court of Appeals, *see* ACS Ct. App. Open. Br. at 6; this was no change in direction as Appellees also falsely contend, *see* Mot. to Strike at 2. On top of this, additional parts of the record show that outside counsel was a member of the working group that conducted ACS’s pre-suit investigation of Appellees’ patent. *See* Tr. 166 (opening statement of *Appellees*); Tr. 398-99 (testimony of Robert Massie). All of this material was presented to the jury without objection by Appellees and is properly part of the record.

Second, Appellees take issue with a passage in ACS’s merit brief that notes that the conclusions of its experts at trial were the same as the conclusions ACS had reached in its pre-suit deliberations. *See* Mot. to Strike at 5-6 (citing Merit Br. of Appellant at 22). That statement, however, again is based on the record. ACS’s experts testified that many of the features of Appellees’ product were “similar” or “identical” to ACS’s product. Tr. 1396-97, 1678, 1683. And there was testimony that after ACS formed a working group and conducted an investigation, ACS presented the matter to the ACS Governing Board for Publishing and the ACS Board of Directors, and that each Board explicitly authorized this suit. Tr. 195-96, 275-79, 1817-19. In addition, the trial court permitted an ACS witness to testify that it was “the conclusion of the American Chemical Society that trade secrets were taken.” Tr. 250.⁶ There was no secret at trial that ACS had concluded that Appellees’ product was “similar” and “identical” to ACS’s product. It was the very basis of ACS’s suit and was supported by fourteen

⁶ The trial court overruled Appellees’ motion to strike that statement, asking rhetorically: “One of the reasons we’re here is because their contention is that these gentlemen took something from them, right, when they left?” Tr. 289, 292.

days of trial testimony, which the trial found adequate to present a disputed issue for the jury to decide.

Third, Appellees object to ACS's statement, in a footnote, that "ACS had ample 'basis to believe' its statements were truthful, and it undertook a comprehensive investigation before making the statements at issue." Mot. to Strike at 6 (quoting Merit Br. of Appellant at 39-40 n.10). But as set forth above, there is ample evidence in the record, cited at page 5 of ACS's merit brief, that ACS undertook a comprehensive investigation before filing suit and making the statements at issue. *See* Tr. 460, 818-19, 1905-06.

Fourth, Appellees object to ACS's statements that it "thoroughly investigated its claims before it filed suit" and that the "assessment of this [working] group was reviewed by two separate Boards within ACS." Mot. to Strike at 6-7 (quoting Merit Br. of Appellant at 42-43). That objection is as unfounded as the others; each of the statements in question was based on the record. Trial evidence, cited in ACS's merit brief, showed that ACS's pre-suit deliberations spanned several years, *see, e.g.*, Tr. 1817-20, 1905-06 (cited in Merit Br. of Appellant at 5), and one member of the working group testified that he had spent one to two thousand hours on the project, Tr. 707-08. Moreover, ACS's presentation of this issue in its merit brief is *identical* to its characterization of the matter in its memorandum in support of jurisdiction (and to which Appellees never raised an objection). *See* Mem. in Support of Jurisdiction at 4 (noting that ACS "had filed suit only after a lengthy, careful review"); *see also* ACS Ct. App. Open. Br. at 1 (noting that ACS had undertaken a "lengthy investigation"). In addition, as set forth above, there was extensive testimony that the assessment of its working group was reviewed by two separate Boards within ACS. Tr. 195-96, 275-79, 1817-19; *see* Merit Br. of Appellant at 5.

Fifth, and finally, Appellees object to ACS's statement that "ACS engaged here in a lengthy investigation that provided the basis for its suit and its statements about the lawsuit." Mot. to Strike at 7 (quoting Merit Br. of Appellant at 43). There is nothing new here. The record evidence shows that (a) ACS engaged in an investigation of Appellees' patent, Tr. 166, 180, 398-99, 460; (b) the investigation was lengthy, Tr. 707-08, 1817-20, 1905-06; (c) the matter then was presented to two ACS boards, Tr. 275-79, 1817-19, and (d) each of those Boards explicitly approved this suit, Tr. 275-79, 1817-19. ACS's statements in its merit brief accurately reflect those record facts.

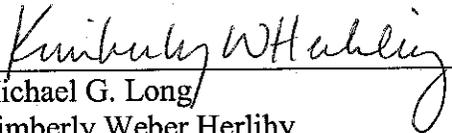
Contrary to the claims in Appellees' motion to strike, therefore, each of the five merit brief excerpts that form the basis of Appellees' motion was based firmly on the record. ACS committed no error here, let alone one warranting the striking of ACS' entire brief and dismissal of its appeal.⁷ Moreover, as set forth above, the statements at issue are not in any way determinative of the *legal* issues raised in this appeal, and thus this motion is ultimately much ado about nothing. Appellees attempt to distract this Court from the central legal issues in this case, which affect litigants well beyond those before the Court.

⁷ Tellingly, Appellees do not cite a single case in which this Court has struck an entire brief for any reason. The two cases they cite involved the inclusion of non-record material in an appendix to the merit brief. In neither case did this Court strike the entirety of the brief itself. *See Squire v. Geer* (2008), 117 Ohio St.3d 506, 508 (granting a motion to strike an appendix that contained documents outside the record and striking "the portions of [the] reply brief relying on the appendix"); *In re Contested Election of Nov. 2, 1993* (1995), 72 Ohio St.3d 411, 413 ("[T]hose portions of the appendix in appellees' brief which constitute new matter are stricken. . . ."); *State ex rel. Blair v. Balraj* (1994), 69 Ohio St.3d 310, 313 (granting a motion to strike a "report" attached in an appendix that was not part of the record below). Here, of course, there is no basis to strike any portion of ACS's brief because ACS has relied solely on record material.

CONCLUSION

For the reasons set forth above, the motion should be denied.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I certify that a copy of this Memorandum In Opposition To Appellees' Motion To Strike Appellant's Merit Brief And To Dismiss The Appeal was sent by ordinary U.S. mail to the following parties on April 29, 2011.

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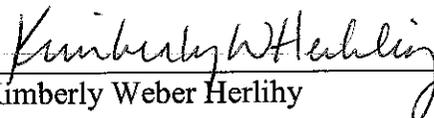
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Exhibit 1

Trial Transcript 69, 166, 180, 195-96, 220-23, 250, 261-67, 275-79, 292, 387-88, 398-99, 459-60, 652-53, 707-08, 818-19, 1396-97, 1678, 1683, 1817-20, 1905-06, 5785-86, *American Chemical Society v. Leadscope Inc.*, Case No. 02CVC-07-7653 (Ohio Ct. C.P., Franklin Cty. Feb. 4, 2008 to Mar. 24, 2008)

1 have questions -- or if they had asked questions during
2 deposition, and if the privilege was asserted at the time of
3 deposition, that it would be inappropriate for you to at
4 some point bring out that same information that they
5 attempted to discover?

6 MR. LONG: And I'm saying that what they asked was
7 what did your lawyer tell you. We said we object, and we're
8 not going to come in here and have these witnesses say what
9 did your lawyer tell you.

10 THE COURT: Well, but -- well, okay, I think then
11 based upon what you just told me, here's what I'm going to
12 do, I'm going to grant the motion. And if there are
13 instances where you need to inquire, or if they object, then
14 I'll rule on the individual questions as they come up. I
15 don't think this is something that I can give a blanket
16 ruling on and expect you all to abide by it. It's something
17 that needs to be covered individually as the questions come
18 up.

19 So motion is granted. And object individually
20 with respect to any problems you have in this area.

21 MR. BRIGGS: Yes, sir.

22 THE COURT: The defendants' motion in limine to
23 exclude references, including attorney arguments, regarding
24 ACS's failure to commercially market CAPathFinder.

25 MR. LONG: That only came up, I think, in one set

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1 and study the patent application, and it is -- well,
2 Mr. Masters indicated it's the European patent application.
3 But what it is, is the United States patent that is filed at
4 that point in time.

5 All of the disclosures are there. So if in
6 January of 1999 -- of 2001 they felt there was any trade
7 secret disclosures, they had all the information then.

8 You will hear that at that point in time they had
9 two senior scientists, Mr. Fisanick and Mr. O'Korn, assigned
10 to review this. They hired Mr. Masters to review this.
11 They had this committee, review this. They didn't complain.
12 They didn't do anything.

13 You will hear that nothing was done. There was no
14 complaint suggested, and Leadscope continues on. They are
15 doing exactly what they have been doing. They are appearing
16 at shows. They are presenting information. They are
17 showing the world what their product is. And the business
18 itself in this point in time, Leadscope, is starting to grow
19 as a business because they have got a product now. They are
20 selling their product. People are buying it.

21 It's just for use on one computer, but they have
22 been working on their enterprise product. Their enterprise
23 product, as you know, is the kind you could give to a
24 company that could then have multiple users throughout the
25 company. And a pharmaceutical company, of course, wants

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1 Chemical Abstracts -- American Chemical Society and Chemical
2 Abstracts had been considering litigation as to Leadscope.
3 I'm not sure I talked about that. You will hear about that
4 in the evidence, and that is January of 2001. I told you
5 that while they had this committee set up, Mr. Masters and
6 Mr. O'Korn and Mr. Fisanick, when they came on the patent
7 application, it was a year and a half before this lawsuit
8 was filed, at that point in time, litigation was being
9 considered as to Leadscope, but they didn't do it then.
10 They did it, the evidence will show, when it was critical to
11 cut off Leadscope's access to capital. They took no action,
12 the evidence will show, in 2001. 2002, when the governor is
13 going to endorse them, Mr. Massie cuts that off, and you
14 will hear about it and why.

15 We went through that.

16 The protected information/trade secret claim. I
17 told you before, there's no basis for that. It's absolutely
18 without support. As the evidence comes in in this case,
19 there's two things to think about as to this protected
20 information, trade secret. That's the claim they say that
21 these guys are thieves and stole something from them. You
22 will hear about source code from PathFinder, and you will
23 hear source code for Leadscope, and you will hear about the
24 question, did these guys, these three dedicated scientists,
25 did they take the source code from PathFinder and put it in

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1 our trade secrets. And for Mr. Briggs to get up here and
2 suggest to you that the evidence is going to show that this
3 lawsuit has been brought maliciously -- which means, by the
4 way without any merit -- absolute nonsense.

5 There are three main points I want to make in my
6 opening statement about the counterclaims of these
7 defendants. Number one, the timing of the ACS bringing this
8 lawsuit had absolutely nothing to do -- absolute nothing to
9 do with Leadscope's efforts to get financing. The timing of
10 this lawsuit was driven by internal authorization
11 requirements at the ACS. The first thing they had to do was
12 analyze this technology that was -- upon which a patent was
13 granted in late November 2001. That's the first thing they
14 had to do, and they had no fair opportunity -- no fair
15 opportunity to analyze that technology and compare it to
16 their technology until that patent was granted. You are
17 going to hear that.

18 So the beginning -- the beginning of any thought
19 of litigation, the evidence will show, occurred in late
20 November, 2001. Not before.

21 Second, the evidence will show that there were
22 certain authorizations that the American Chemical Society
23 had to get. They wanted to be sure. They wanted to be sure
24 they had the right authority from the right people to pursue
25 such a serious claim. There's an advisory board called the

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614.462.3758

1 board of publishing that meets quarterly. It is an advisory
2 board to the main board of directors of the American
3 Chemical Society. That meeting was not scheduled until
4 March of 2002. And our people went down to New Orleans and
5 presented their evidence of misappropriation of trade
6 secrets, and that advisory board said, you should proceed to
7 pursue these claims because we cannot have our employees
8 leaving and taking our technology.

9 The next event that occurred was in early April of
10 2002. That was the main board of directors of the American
11 Chemical Society. This was a very carefully considered
12 issue before we ever came to any court to file a lawsuit,
13 and the main board of directors of the American Chemical
14 Society reviewed these materials. They decided that there
15 was significant evidence that these gentlemen had taken our
16 trade secrets, and authorized the American Chemical Society
17 to pursue the litigation.

18 And, you know what happened, the first thing we
19 did after that? We went to Leadscope, and we went to these
20 three individuals, and we tried to resolve the differences.
21 We tried and tried and tried to resolve those differences.
22 Mr. Briggs claims that's extortion. That is absolute
23 nonsense. These parties sat down for two weeks, virtually
24 every day, and tried and tried and tried to make a business
25 deal. And I'll tell you in a moment why that didn't work,

Allison A. Kimmel, RDR, CRR
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614.462.3758

1 Perhaps it's just as well to ignore it, but I --
2 I'm just terribly concerned by the prejudicial effect that
3 will cause us at this point in time.

4 Secondly is the -- I request a corrective
5 instruction that they are to disregard the statements that
6 were made where the evidence was misrepresented that these
7 are settlement conferences and not admissible in court.

8 Thank you, Your Honor.

9 MR. LONG: Mr. Briggs has argued over and over and
10 over that he's entitled to put the facts. He likes that
11 word. I'm entitled to show what the facts are. Well,
12 indeed, the facts are that the ACS conducted an
13 investigation -- the facts are -- the facts are that the ACS
14 conducted an investigation. That's a fact. The fact is
15 that the ACS came to the conclusion after the patent had
16 been issued that the technology on which the patent had been
17 granted was the ACS technology. That's a fact.

18 I think Mr. Briggs has tried to sandbag me because
19 I had that very conclusion on the time line that I showed to
20 the jury, and I asked Mr. Briggs, before I showed that to
21 the jury if he had any objection to that, and he had none.

22 More importantly than that is the fact that the
23 ACS made a decision at some point in time that the Leadscope
24 technology was the ACS's technology. They are entitled to
25 come into court as a representative of the company and say

Allison A. Kimmel, RDR, CRR
Assistant Official Court Reporter
614.462.3758

1 that and to state that fact. Mr. Briggs is concerned about
2 what lawyers said to the ACS. But it was more than lawyers.
3 It was scientists and lawyers. It was an investigation, and
4 there was a conclusion. We are entitled to put that fact
5 before the jury. The ACS can only testify through one of
6 its members that that was the fact, and that's what they
7 decided, and that's when they decided. Simply facts.

8 And I won't even go to the other parts, unless you
9 seriously want to hear arguments, Your Honor.

10 MR. BRIGGS: I will --

11 THE COURT: Okay.

12 MR. BRIGGS: I will briefly respond to the first
13 one, if I may.

14 THE COURT: Okay.

15 MR. BRIGGS: And with regard to the suggestion of
16 it was a fact, whether it was a fact that the committee
17 reached that conclusion or not, I don't know. The fact --

18 THE COURT: Go ahead.

19 MR. BRIGGS: Whether or not it's a fact the
20 committee reached that conclusion, I don't know because they
21 wouldn't give us any testimony on it. I admit it is a fact
22 that Mr. Massie said that's what the committee told us. But
23 I made a motion in limine to exclude any reference to that
24 because that's a clear hearsay statement, and that's not
25 admissible at all. That's what the Court ruled, that there

Allison A. Kimmel, RDR, CRR
Assistant Official Court Reporter
614.462.3758

1 could be no reference to that. That is what I indicated.

2 While it's a fact that he said it, it's an
3 inadmissible fact because it's hearsay. That's why I moved
4 to have it excluded and that's why the Court granted it.

5 Thank you, Your Honor.

6 MR. LONG: When a corporation conducts an
7 investigation and comes to a conclusion, a representative of
8 that organization is entitled to state what the company's
9 conclusion was. That's what happened here. That's a fact.
10 To say that that is third-party hearsay is simply incorrect.
11 It's an evidentiary matter. It's a fact that that's what
12 they did. It's a fact that they came to a conclusion and
13 that's it.

14 THE COURT: Okay. I think I've heard enough.
15 Okay. We are going to proceed.

16 I'm going to basically tell the jury again that
17 they haven't heard any evidence yet. They have heard some
18 lawyers get up and talk about what they expect the evidence
19 to be.

20 I will also let them know that -- strike that.

21 Here's what I suggest you gentlemen do: Needless
22 to say, they have heard the opening statement, and I'm still
23 thinking about the motion to mistry the case. But I'm not
24 nearly there, and I don't think I'm going to get there,
25 because if we're going through this, we're going to go

Allison A. Kimmel, RDR, CRR
Assistant Official Court Reporter
614.462.3758

1 through it together.

2 The other thing is allowing them or advising them
3 that -- concerning this limited purpose evidence so that
4 they will understand that. And the other thing I would like
5 to have occur is if there are objections when information is
6 attempted to be brought in through evidence, I hear the
7 objections so that I can go ahead and rule on it. I know I
8 can get up and make a decision myself and stop testimony.
9 But I would prefer having an objection. I do feel that both
10 of you probably exceeded what should have been allowed on
11 opening statements. But overall, I'm not going to grant
12 your motions. I will tell the jury that what they have
13 heard is not evidence. The evidence is yet to come.

14 MR. BRIGGS: I would ask -- I understand your
15 rulings, Your Honor.

16 As to the -- I think Mr. Massie is going to be
17 their first witness, it is very important that -- that we
18 not get to the point that Mr. Massie automatically testifies
19 as to the conclusion of this committee.

20 THE COURT: Well, let me say this: That's their
21 witness. They know -- he's their witness. He's a lawyer.
22 I would expect him to know the limits of where he's supposed
23 to go with respect to testimony based on the previous
24 motions that have been filed and ruled on, and we'll proceed
25 from there.

Allison A. Kimmel, RDR, CRR
Assistant Official Court Reporter
614.462.3758

Robert Massie - February 5, 2008
Direct Examination by Michael Long

1 MR. BRIGGS: Objection.

2 THE COURT: Overruled.

3 THE WITNESS: It's the conclusion of the American
4 Chemical Society that trade secrets were taken.

5 Q. Would you explain to the jury the basis --

6 MR. BRIGGS: Objection. Objection. I move to
7 strike that answer as just a corporate conclusion.

8

- - -

9 Thereupon, the Court and counsel conferred out of
10 the hearing of the jury and Court Reporter.

11

- - -

12 THE COURT: Are you all ready for a recess?

13 JURORS: Sure.

14 THE COURT: It's been over an hour and a half.
15 We're going to take a short recess. We'll make it about 10,
16 no more than 15 minutes. We'll come back, and then we'll
17 conclude and get you out of here before 5:00.

18 All right. All rise. Remember the admonition.
19 Leave your notebooks on your seats, please.

20 (Jury leaves courtroom.)

21 (Discussion off the record.)

22 THE COURT: Go ahead.

23 MR. BRIGGS: Thank you, Your Honor. Let me make
24 my -- the point that is so significant, and I've been making
25 in the motions and arguing, but this is what it's all about.

Allison A. Kimmel, RDR, CRR
Assistant Official Court Reporter
614.462.3758

Robert Massie - February 5, 2008
Direct Examination by Michael Long

1 raise questions with your research group on that subject?

2 A. Yes, I asked -- I asked Mr. Swann, who was the --
3 who was the head of IT at the time. I think the title then
4 was director of IT, and Lou O'Korn who worked for him, I
5 asked if they thought there was a problem with this product.

6 Q. And what response were you getting from those
7 gentlemen?

8 MR. BRIGGS: Objection.

9 I'll withdraw it, Your Honor.

10 MR. LONG: It's not hearsay, if that's his
11 objection.

12 THE COURT: Go ahead.

13 THE WITNESS: They almost always said the same
14 thing, which is, they couldn't tell from the outside if
15 there was a problem with the product.

16 Q. What do you mean by that?

17 A. They couldn't tell by just looking -- looking at
18 the materials, the -- what was public. They couldn't tell
19 what was underneath the product so they could see if
20 anything of ours was taken. I think they uniformly said to
21 me, we just don't know.

22 Q. You said you had two issues in 1999. One of them
23 taking -- what were the two issues?

24 A. One is whether there was a problem with the
25 product.

Allison A. Kimmel, RDR, CRR
Assistant Official Court Reporter
614.462.3758

Robert Massie - February 5, 2008
Direct Examination by Michael Long

1 Q. Okay.

2 A. The other is hiring staff from CAS.

3 Q. In 1999, did the company seek any assurances from
4 Leadscope on either of those subjects?

5 A. In '99, my recollection is that Lou O'Korn met
6 with the Leadscope people and asked them directly if there
7 was any product overlap, if they had taken any IP,
8 intellectual property, and that he was given formal
9 assurances that there -- nothing was taken.

10 Q. Who did he meet with for that assurance?

11 A. I think it's with the president of the company at
12 the time.

13 Q. Okay. Whoever was the head guy of Leadscope at
14 the time?

15 A. Right.

16 Q. 1999, you are talking about?

17 A. Yes.

18 Q. Okay. In 1999, based upon what you knew about
19 Leadscope and the product, was there any plan or intention
20 within your company to try to harm Leadscope in any way?

21 A. No.

22 MR. BRIGGS: Objection.

23 THE COURT: Overruled.

24 THE WITNESS: Absolutely not.

25 Q. Was there any planning for litigation against

Allison A. Kimmel, RDR, CRR
Assistant Official Court Reporter
614.462.3758

Robert Massie - February 5, 2008
Direct Examination by Michael Long

1 Leadscope in 1999?

2 A. Not at all.

3 Q. Let's move to the year 2000. Did you personally
4 have any conversations with anyone associated at Leadscope
5 in the year 2000?

6 A. Yes.

7 Q. About their product?

8 A. Yes.

9 Q. Would you tell the jury about that.

10 A. Well, Leadscope had a succession of presidents
11 apparently, and in 2 -- I think it's in 2000, the new
12 president was someone that I knew -- not well, but I knew
13 him. He had been -- actually been a consultant of CAS. So
14 I thought what I would do is get on the phone and just talk
15 to him directly and tell him what our concerns were and see
16 what he would say.

17 Q. Do you remember that man's name?

18 A. Allen Richon.

19 Q. You say he had been a consultant for your company?

20 A. That's correct. He had done consulting work for
21 us.

22 Q. Was this the first person at Leadscope that you
23 personally knew?

24 A. Well, I think I said earlier I knew Mr. Blower.

25 Q. Yes, I know you said that.

Allison A. Kimmel, RDR, CRR
Assistant Official Court Reporter
614.462.3758

Robert Massie - February 5, 2008
Direct Examination by Michael Long

1 A. But --

2 Q. Other than Mr. Blower, was this the first man
3 that -- running Leadscope that you had you had any personal
4 acquaintance with?

5 A. That's correct. That's correct.

6 Q. And what did you do then?

7 A. I think we had an email exchange to try to set up
8 a phone call. And then he and I talked on the phone, and I
9 said to him, Allen, we have two concerns here.

10 I said, one is this continued unease at CAS about
11 this product you guys have and just a feeling this -- that
12 maybe something was taken from us.

13 And I said our second concern is the hiring of CAS
14 staff, which we really don't want to get out of control.
15 And I said, there's a problem, you shouldn't be talking to
16 these people during work hours in any case. If you want to
17 recruit people, you have to call them at night off-campus.
18 Allen said, let's take the first question -- the second
19 question off the table. He said, I think we have too many
20 CAS people here. We're not hiring any more CAS people. I
21 said, okay, that's fine. It wasn't that big of a deal. I
22 was happy to hear it. He said, as to the product, I can
23 absolutely tell you that this was developed by our people,
24 and there's no intellectual property problem here at all. I
25 said, well, okay, if that's your assurance, I said, well,

Allison A. Kimmel, RDR, CRR
Assistant Official Court Reporter
614.462.3758

Robert Massie - February 5, 2008
Direct Examination by Michael Long

1 you know, we can get on with life and maybe work together.
2 I said, but you need to know that's a concern of ours. I
3 think that was pretty much the whole conversation.

4 Q. And in the year -- you are talking about the year
5 2000?

6 A. Yeah. It was June -- June-something of 2000.

7 Q. All right. In that year of 2000, did your company
8 have any plan to harm Leadscope or to try to file any
9 lawsuit against Leadscope?

10 A. Not --

11 MR. BRIGGS: Objection. Leading.

12 THE COURT: I'm going to overrule it and let him
13 go ahead and answer, but it's leading.

14 Answer the question, sir.

15 THE WITNESS: We had no such plan.

16 Q. Why not?

17 A. We -- we had nothing to base such a plan on, and
18 we don't have any -- didn't have any reason to cause this
19 company any trouble.

20 Q. Had you seen any articles about Leadscope's
21 product or had you gone on their website and looked at
22 Leadscope?

23 A. I had -- I had been on their website, as I do for
24 a lot of websites in the industry, to stay informed. And I
25 actually was looking at the time to see how many people from

Allison A. Kimmel, RDR, CRR
Assistant Official Court Reporter
614.462.3758

Robert Massie - February 5, 2008
Direct Examination by Michael Long

1 CAS were on the website.

2 But I'm sorry, your question is?

3 Q. Did you see any information about their product
4 either on their website or in published articles in the
5 trade magazines?

6 A. At the time, they had some articles out about the
7 product, and I -- I probably saw the articles at the time;
8 but I don't think I studied them particularly closely.

9 Q. Did you have any concern or did those articles
10 cause you any concern?

11 A. Well, as I said, in that time period -- and I
12 don't have any particular date where I could say I saw an
13 article and then I wrote a memo. This would be an ongoing
14 thing where maybe an article would cross my desk or someone
15 would come into my office and say, this -- Leadscope is kind
16 of a worry. And I -- I would then ask Bob Swann, you know,
17 what do you think we have here and he would say, we don't
18 know.

19 Q. All right. Moving to the year 2001. Did anything
20 happen that impacted your concerns about the Leadscope
21 product?

22 A. Early in -- early in -- in '01, someone brought to
23 my attention that Leadscope had filed for a patent.
24 That's -- that's what I remember, and --

25 Q. An application, you mean?

Allison A. Kimmel, RDR, CRR
Assistant Official Court Reporter
614.462.3758

Robert Massie - February 5, 2008
Direct Examination by Michael Long

1 A. Right. Had a patent application in, and that the
2 patent looked an awful lot like PathFinder, and this might
3 be a big problem.

4 Q. Okay. And do you have a recall, as you sit here
5 today, of when you learned that the patent upon which they
6 had filed for an application, when that was granted?

7 A. Oh, the patent was granted a few months later. I
8 think it was November of '01.

9 Q. November of '01?

10 A. Of 2001.

11 Q. You learn that the patent application had been
12 granted?

13 A. That's correct.

14 Q. All right.

15 Now, moving to the early part of 2002, did you
16 receive some instruction from some board of the American
17 Chemical Society about doing something concerning the
18 Leadscope technology?

19 A. Well, the -- both -- I -- both my direct board,
20 which is a so-called governing board, and then the American
21 Chemical Society board, which sits on top of every one of
22 the operations of American Chemical Society, both of those
23 boards instructed the staff to seek an amicable resolution
24 here, but to pursue legal remedies because they had
25 concluded that this patent was our patent.

Allison A. Kimmel, RDR, CRR
Assistant Official Court Reporter
614.462.3758

Robert Massie - February 5, 2008
Direct Examination by Michael Long

1 A. Right.

2 Q. And why you have that composition.

3 A. The chairman of the board is my boss, the
4 executive director. She chairs the board and runs the
5 meetings and calls the votes, et cetera. Also on the board
6 automatically is the chairman of the board of the American
7 Chemical Society and at least two other members of the
8 American Chemical Society. Then you have two -- two experts
9 in our area in business, two experts that know a lot about
10 the type of business that Chemical Abstracts is in. Then
11 you have two experts who are in the business, who know the
12 business of the journals publishing group, and then you have
13 myself and the head of the journals publishing group. And
14 so there are ten people -- ten people.

15 Q. All right. What's the purpose, what generally
16 have they been formed to do?

17 A. Well, they are responsible -- really, they are
18 responsible to manage both of those units in the sense that
19 they -- they review the strategic plans, they approve all
20 the finances, they approve all the hiring and firing at the
21 senior level. For example, I can't hire and fire anybody
22 that reports to me without the board's approval, and that's
23 just an example.

24 They -- they look at capital investments, and they
25 make all the decisions around how the units are run. And

Allison A. Kimmel, RDR, CRR
Assistant Official Court Reporter
614.462.3758

Robert Massie - February 5, 2008
Direct Examination by Michael Long

1 then it's all brought up -- once that's done, it's all
2 brought up to the ACS board, which meets within a month
3 after that, we have a meeting and then the board meets, the
4 ACS board meets, and they have final approval over
5 everything. They review what's been done.

6 Q. When, in the first part of 2002, the year the
7 lawsuit was filed -- let's go in the early part of 2002.
8 When was the next regularly scheduled meeting of the board
9 for publishing?

10 A. The first time that the board -- the publishing
11 governing board met in 2002 is March -- I think it's
12 March 13th. I may have that -- it was early March.

13 Q. Handing you what's been marked as Exhibit --
14 Plaintiff's Exhibit 1. Can you tell us what Exhibit 1 is?

15 A. This is the minutes of the March 13th Governing
16 Board for Publishing meeting, 2002.

17 Q. And that meeting took place in New Orleans,
18 Louisiana?

19 A. Yes.

20 Q. And if you will turn back a few pages, where it
21 says, software patent discussion.

22 A. Software patent discussion, right.

23 Q. You with me?

24 A. Yes, sir.

25 Q. Did that board approve pursuing legal remedies

Allison A. Kimmel, RDR, CRR
Assistant Official Court Reporter
614.462.3758

Robert Massie - February 5, 2008
Direct Examination by Michael Long

1 against Leadscope?

2 MR. BRIGGS: Objection. The document speaks for
3 itself. And I have no objection to the document.

4 THE COURT: Your objection is -- he's reviewing
5 the paper. Overruled.

6 Go ahead and answer the question.

7 THE WITNESS: The governing board approved that --
8 that action be taken against -- against Leadscope on the
9 basis of this patent, yes.

10 Q. Okay. And did that authorization to bring action
11 against Leadscope require any further review and approval?

12 A. Yes. It had to be brought to the ACS board next.

13 Q. What I earlier referred to as the big board?

14 A. Yes, right.

15 Q. And was that done?

16 A. Yes, it was done, I think, a month later.

17 Q. And what was the next -- we've seen that the
18 publishing board met in March of 2002. When was the next
19 regularly scheduled meeting thereafter of the -- of ACS
20 board of directors?

21 A. The next scheduled meeting was in early April, I
22 think maybe the 3rd.

23 Q. Let me show you Exhibit -- Plaintiff's Exhibit 2.
24 Can you identify Exhibit 2 for us?

25 A. Yes. These are the minutes of the Executive

Allison A. Kimmel, RDR, CRR
Assistant Official Court Reporter
614.462.3758

Robert Massie - February 5, 2008
Direct Examination by Michael Long

1 Session of the Board of Directors of the American Chemical
2 Society meeting, April 4 to 7.

3 MR. LONG: Move for the admission of both Exhibits
4 1 and 2, the board minutes.

5 MR. BRIGGS: Objection, Your Honor.

6 THE COURT: They will be admitted.

7 Q. And does this set of minutes indicate when the
8 board met?

9 A. I'm sorry. It says April 4 to 7.

10 Q. April 4 dash 7, 2002?

11 A. Yes. The board meets across many days.

12 Q. Okay. And did the board of directors of the
13 American Chemical Society on one of those dates, the last
14 one of which is April 7, 2002, authorize the American
15 Chemical Society to pursue legal remedies against Leadscope?

16 A. Yes. The board decided to take legal action if
17 amicable --

18 MR. BRIGGS: Objection. The document speaks for
19 itself without any characterizations as to what it doesn't
20 say.

21 MR. LONG: Well, he's not characterizing what it
22 said. He's saying what it says.

23 THE COURT: If he's reading the document verbatim,
24 he may proceed to do so. If he's not, then let me know.
25 Within those parameters, let him go ahead and testify.

Allison A. Kimmel, RDR, CRR
Assistant Official Court Reporter
614.462.3758

Robert Massie - February 5, 2008
Direct Examination by Michael Long

1 Q. Okay. Turn down to the page that says, CAS 2839
2 on it, please.

3 A. I'm there.

4 Q. Tell the jury what this -- what this page says
5 from the board of directors. Start at the top. Two very
6 short sentences.

7 A. The board of directors were asked to authorize
8 legal action in this matter, and authorization to take such
9 legal action, if necessary, if amicable resolution is not
10 possible. Do you want me to read the vote?

11 Q. And read the next paragraph.

12 A. The board of directors voted to authorize Chemical
13 Abstracts Service, in conjunction with ACS legal counsel, to
14 pursue such legal remedies in regards to Leadscope as are
15 necessary and appropriate to protect the Society's
16 interests.

17 Q. Was that authorization from the ACS board of
18 directors necessary before the ACS could pursue any legal
19 action against Leadscope?

20 A. Yes.

21 MR. LONG: Your Honor, I'm at a break point. If
22 you want -- you asked me to keep you informed on that.

23 THE COURT: Fine. We'll go home. We'll go home.

24 Remember the admonition. We're just storing
25 information, and we'll continue to do so until we get to

Allison A. Kimmel, RDR, CRR
Assistant Official Court Reporter
614.462.3758

1 length about that issue. But that -- that precise question
2 and answer, I moved to strike yesterday -- it's the one on
3 the right, Your Honor -- as I said, that is, number one,
4 just a corporate conclusion. Putting aside the question is
5 violative of a motion in limine order. But it's just a
6 conclusion. And it goes to the heart and soul of what the
7 whole case is about. And it's someone coming in saying we
8 done wrong.

9 THE COURT: Let me ask you this, Mr. Briggs. Why
10 are we here for the next month?

11 MR. BRIGGS: We are here on the complaint that was
12 filed by the plaintiff and the counterclaims, that's why
13 we're here, to receive evidence -- admissible evidence
14 relating to that.

15 THE COURT: I agree. But I think you sort of are
16 skirting around a little.

17 One of the reasons we're here is because their
18 contention is that these gentlemen took something from them,
19 right, when they left? Isn't that what we're --

20 MR. BRIGGS: Yes, that is their contention. They
21 put their contention in a complaint and present admissible
22 evidence through witnesses. Opinions, as to it is the
23 corporate conclusion they took it, is not admissible. It's
24 damaging to us. It's wrong. We move to strike it.

25 THE COURT: What's the damage?

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1 that witnesses are to testify on personal knowledge.

2 Thank you, Your Honor.

3 THE COURT: Okay. Overruled.

4 Where is the jury?

5 MR. LONG: I've got something.

6 THE COURT: Okay. Go ahead.

7 MR. LONG: I want to short-cut something here this
8 morning, because this is an issue that's going to come, and
9 I just want to give you a heads up on this and tell you my
10 position.

11 I am almost done with the direct examination of
12 Mr. Massie. We'll go to cross. I'll tell you what's
13 going -- what's going to come here. And these are
14 defendants' exhibits.

15 Exhibit 501 is an article out of the Columbus
16 Dispatch on Bob Taft's ethics lapses. It's titled "Ethics
17 Lapses Not a Trivial Matter." It's for him playing golf and
18 taking other things from people.

19 Exhibit 502 is from the Dispatch. It shows a list
20 of the people that hosted the governor at golf outings and
21 it says "Taft Freebies."

22 Exhibit 503, same thing, "Taft Freebies," lists
23 the golf outings and other gifts the governor received.

24 Exhibit 504, "Taft Sentenced," pays a \$4,000 fine
25 and apologizes.

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R. Massie - February 6, 2008
Cross-Examination by Mr. Briggs

1 Computational Science.

2 Q. Okay. And this particular article, you are
3 familiar, was published in the journal -- the American
4 Chemical Society's journal in September of 2000, are you
5 not, sir?

6 A. It appears to be, yes.

7 Q. All right. And prior to that point in time, if I
8 understand from your testimony earlier, there had been some
9 contact, you had had -- you or your senior staff had had
10 with Leadscope to acquire assurances with regard to the
11 intellectual property, you wanted assurances with regard to
12 that it wasn't taken from you; is that fair to say?

13 A. That's correct, that's correct.

14 Q. And Mr. O'Korn talked with a -- a president of
15 Leadscope in either late '98 or early '99; is that fair to
16 say?

17 A. I believe Lou O'Korn talked to the president --
18 directly to the president of Columbus Molecular or Leadscope
19 in '99. I believe that's correct, yes.

20 Q. All right. And then sometime thereafter,
21 essentially in June of 1999, you then had a conversation
22 with Allen Richon, who was then the president of Leadscope;
23 is that correct?

24 A. I believe that was June of 2000.

25 Q. Oh, June of 2000. Pardon me, yes. Thank you.

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R. Massie - February 6, 2008
Cross-Examination by Mr. Briggs

1 You had that conversation in June of 2000 with
2 Allen Richon?

3 A. Yes. When he became president in Leadscope.

4 Q. And you essentially asked him for assurances with
5 regard to the intellectual property?

6 A. Yes, I asked him directly.

7 Q. And he told you it was theirs; he had it checked
8 out, and it wasn't --

9 A. Yeah, he gave me direct assurances; that's
10 correct.

11 Q. And I understand at that point in time what you
12 wanted -- you -- I'll withdraw that.

13 I think earlier you had indicated you had had a
14 desire to see -- to understand Leadscope's product more so
15 you could -- from your conversations with Mr. O'Korn -- I'll
16 withdraw that. I'm not stating this well.

17 In August of 1999, the fall of 1999, I think you
18 had indicated you had a conversation with Mr. O'Korn where
19 you wanted assurance -- you wanted to be able to understand
20 the source code or more -- or independent development; do
21 you recall that?

22 A. I'm sorry, I don't recall saying I had a
23 conversation with Mr. O'Korn, but I --

24 Q. Oh, that was Mr. Swann; is that correct?

25 A. Yes, that's correct.

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R. Massie - February 6, 2008
Cross-Examination by Mr. Briggs

- 1 MR. BRIGGS: And I'll offer the exhibit.
- 2 MR. MASTERS: I want to object, Your Honor.
- 3 There's no foundation for this as being the document or
- 4 exhibit that was at ACS at the time.
- 5 MR. BRIGGS: I will hold the exhibit until later,
- 6 Your Honor, for another witness, if there's any concern.
- 7 BY MR. BRIGGS:
- 8 Q. Now, in January of 2001, you were aware, were you
- 9 not, that -- that Chemical Abstracts took steps at that
- 10 point in time to examine the patent application of
- 11 Leadscope?
- 12 A. I'm not aware if we took steps to examine the
- 13 application, but we formed a team to start looking at this
- 14 issue.
- 15 Q. And did you put Mr. Dennis in charge of that?
- 16 A. No.
- 17 Q. Okay. And who did you put in charge of that?
- 18 A. I didn't put anyone in charge of it. The -- when
- 19 the patent application became known, we informed the
- 20 American Chemical Society general counsel that there might
- 21 be a problem here.
- 22 Q. Okay. And at that point in time was a team of
- 23 Mr. Fisanick and Mr. O'Korn assigned, then, along with
- 24 Mr. Masters?
- 25 A. Of -- they were -- they were part of the team that

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R. Massie - February 6, 2008
Cross-Examination by Mr. Briggs

1 was asked to look into this matter, yes.

2 Q. All right, sir. Now, if I understand correctly,
3 you, Mr. Massie, do not hold yourself out to the ladies and
4 gentlemen of the jury in this case as someone with technical
5 competence to tell them as to whether or not a patent
6 application contains the technology in CAPathFinder?

7 A. That's correct.

8 Q. Now, in February of 2002, would it be accurate for
9 me to say that you went to the -- pardon me, let me withdraw
10 that.

11 In 2001 -- January of 2001, I inquired about, and
12 let me ask about at that point in time, in the first quarter
13 then of 2001, at that point in time you had multiple
14 technical articles and publications with regard to
15 Leadscope; you had the Leadscope patent application.

16 Did Chemical Abstracts, in the first quarter of
17 2001, make any complaint to Leadscope in any respect with
18 regard to its intellectual property?

19 A. No.

20 Q. Let me ask the same question with regard to the
21 second quarter of 2001. Again, you had all of these
22 materials. Did Chemical Abstracts or the American Chemical
23 Society make any complaint of any kind whatsoever to
24 Leadscope with regard to its intellectual property in the
25 second quarter of 2001?

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R. Massie - February 6, 2008
Redirect Examination by Michael Long

1

1 Q. Were you aware, however, that Leadscope was about
2 to close on a major round of financing?

3 A. No.

4 Q. Other than Mr. Crocker telling you -- your company
5 that he was thinking about an investment in Leadscope, did
6 the American Chemical Society or you know anything about
7 Leadscope's financing plans?

8 A. No. Not any specifics, no.

9 Q. Let me go back to the time frame of 1999 and the
10 time frame of 2000. In that two-year time frame, Mr. Briggs
11 asked you a number of questions, and they concerned, number
12 one, demonstrations of the Leadscope product of which ACS
13 people were present; two, presentations at ACS meetings of
14 the Leadscope product; and three, articles published in
15 trade journals about the Leadscope product. So that's the
16 context of my question.

17 Would you tell the jury that -- given those
18 questions and those answers about events on these matters I
19 just articulated, events in 1999 and 2000, would you tell
20 the jury why the ACS did not pursue legal remedies in either
21 year.

22 A. Yeah. If you look at those years -- and I have to
23 summarize all of this for the jury, I would say, on the one
24 hand, we had these slowly increasing concerns. An article
25 would come in. You would hear about a presentation.

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R. Massie - February 6, 2008
Redirect Examination by Michael Long

1

1 Somebody would ask a question. And that's what's building
2 up pressure on the one end. So I would keep asking
3 questions. I would say to my technical people, you know,
4 did they take anything? Is there really a problem here? If
5 there's not, we leave them alone. If there's not, we can do
6 business with them.

7 So picture this pressure building up on the one
8 hand.

9 On the other hand, you really have three things
10 happening. One, every time I ask about this, I get the same
11 answer, we cannot tell from the outside; two, every time we
12 talked to them, and we talk to their president, they say,
13 absolutely, we didn't take anything; and the third thing I
14 would like to tell the jury is you got to know the American
15 Chemical Society, it's big, it's a little bit slow, and
16 it's -- as pointed out by Mr. Briggs -- it's a nonprofit.
17 We don't get up in the morning and try to give people a hard
18 time. We don't get up in the morning and try to sue them or
19 cause them trouble.

20 I can absolutely guarantee you that to bring legal
21 action or do anything, we had to have something really
22 substantive, and that didn't happen till this patent came
23 out. And when this patent came out, we were all in shock.
24 I turned the patent over to the general counsel, and then
25 the investigation started, and that's what happened.

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Lou O'Korn - February 7, 2008
Direct Examination by Rob Masters

1 email, it said -- on September 14th. Probably within the
2 next week or so, I asked him to also give me the article. I
3 looked it over. I had my meeting with Swann.

4 And then you asked for the next thing that
5 happens, this is now September of 2000, which would have
6 been after the first of the year, right in January of 2001,
7 then, Kim Dunwoody brings in an abstract of a patent
8 application.

9 Q. Okay.

10 Let me show you Plaintiff's Exhibit 664. Is
11 Plaintiff's 664 a copy of a foreign application you had
12 received from Ms. Dunwoody?

13 A. Yes. I believe to be accurate, probably -- the
14 information that's on the cover page -- I think from
15 Ms. Dunwoody I received an abstract, primarily, not a whole
16 patent. And she had some sort of search set up that she got
17 just the abstract. And when I looked at that, again, it's
18 still at that very high level, it describes some things that
19 look similar to the thing that CAS would do. And so I asked
20 for a copy of the abstract or for the full patent, and I got
21 that.

22 Q. In terms of your concerns at this time, where did
23 they rank?

24 A. I would say as I looked at the details of how they
25 approached things and things that were described in the

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Lou O'Korn - February 7, 2008
Direct Examination by Rob Masters

1 patent, I thought that there were now lots of similarities.

2 Q. And as a result of your impressions at this time,
3 what did you do next?

4 A. I talked to Swann, the vice president of the area.
5 I think he agreed with my assessment and said, let's talk to
6 legal. And I think he probably took the next steps at that
7 point.

8 Q. Okay. And that was January 2001 time frame; is
9 that correct?

10 A. Best of my recollection, yes.

11 Q. And at that point in time did you ever have access
12 to any internal information from Leadscope, any of their
13 internal documents about their product?

14 A. Internal, no internal documents. I think their
15 website is probably starting to appear, so I saw some things
16 that were publicly available, but nothing internal.

17 MR. MASTERS: Thank you. I have no further
18 questions.

19 THE COURT: Thank you, counsel.

20 Mr. Briggs, cross-examination.

21 MR. BRIGGS: Thank you, Your Honor.

22 (Pause in proceedings.)

23 THE COURT: Counsel, you want to go ahead and move
24 it at this time.

25 MR. MASTERS: Yes, I would move Mr. O'Korn's

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Louis O'Korn - February 8, 2008
Cross-Examination by Alan Briggs

1 responsibility, not all the time, full-time, every day, but
2 that has been a continued assignment you've had?

3 A. Yes. And, obviously, dwindling in size. For
4 example, last year, for everything that I did in behalf of
5 CAS, it was probably 80 hours or less total, so ten days or
6 less.

7 Q. Over the last seven years, in your litigation
8 support for Chemical Abstracts relating to Leadscope, do you
9 know how many hours you spent?

10 A. No, I do not know exactly, to be honest, what I
11 spent.

12 Q. Was it in excess of a thousand, do you know? Or
13 do you know?

14 A. Now -- take a minute to just think about the
15 number.

16 Q. Yes, sir. Take whatever time you need.

17 A. Okay. Yes, I would say in excess of a thousand.

18 Q. Do you know if it's in excess of 2,000?

19 A. I would just -- just as a rough estimate, I would
20 put it in the one to 2,000 total staff hours.

21 Q. Okay. Thank you.

22 A. That's it. That's an estimate.

23 Q. Okay. And can you generally describe for me,
24 without getting into the specifics, exactly what you did,
25 but generally describe for me the nature of what you've done

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Louis O'Korn - February 8, 2008
Cross-Examination by Alan Briggs

1 in that period of one to 2,000 hours?

2 A. Yes. Probably the initial things were prepare a
3 report looking at features, functions, claims in the
4 Leadscope patent to functionality, capabilities that exist
5 within CAS technology.

6 Q. Uh-huh.

7 A. At a later point in time, there was a review --
8 identifying, reviewing, organizing collections of files
9 related to the PathFinder project.

10 Q. Okay.

11 A. And then after suits were filed, which I wouldn't
12 have gotten involved in looking at the suits, but there were
13 questions about things, and they would say, are there
14 supporting documents that I would be aware of that could
15 answer these kinds of questions.

16 Q. Okay.

17 A. Which also generate -- and I did -- and found
18 those, and sort of would reclassify them into the collection
19 of documents that I had initially prepared for CAS. You
20 know, I guess when there was filings, there were other
21 documents that came in, and I was asked to look at those and
22 do that.

23 Q. Okay.

24 A. So most of it was that, but there would be -- it
25 seems like there were other types of tasks of litigation I

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Louis O'Korn - February 8, 2008
Cross-Examination by Alan Briggs

1 Q. So you were sort of out of it at that stage?

2 A. Right.

3 Q. And as to whether or not Mr. Fisanick prepared a
4 report in late January, you do not have any personal
5 knowledge?

6 A. No. Oh, no. We were at -- at this point, I was
7 monitoring developments just as part of my technical
8 management responsibilities.

9 This patent came up; we were concerned. I was.
10 Brought it up to the VP that I reported to, and he involved
11 the VP from legal, and I would say the prime responsibility
12 of this shifted from a technical to a legal issue.

13 So they had that responsibility. I was more
14 shifting now to take action as requested. And there was a
15 request to -- for Bill and I to record our thoughts on here
16 in a more formal way, in a document, and we did prepare a
17 report at that point.

18 Q. And was that on January 25th of 19 -- of 2001?

19 A. I -- I -- that would be a reasonable time frame,
20 but I -- I don't remember that date exactly. But there was
21 a document prepared, and we can look at the date on it.

22 Q. Only at the document you prepared at that time,
23 you and Bill Fisanick?

24 A. Yes.

25 Q. And shortly thereafter was Mr. Masters then

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Louis O'Korn - February 8, 2008
Cross-Examination by Alan Briggs

1 engaged?

2 A. Yes. Yes, he was.

3 Q. Now, is it accurate for me to say that in the
4 first quarter of the year of 2001, you did not -- you,
5 Chemical Abstracts, Chemical Abstracts Service, to the best
6 of your knowledge, didn't make any complaint whatsoever to
7 Leadscope? Isn't that fair to say?

8 A. Make any complaint to Leadscope? To Leadscope?

9 Q. Yes.

10 A. No. I don't -- I can speak for myself. And I
11 don't --

12 Q. You didn't?

13 A. No, right. And I don't -- I was not aware of any
14 that I could --

15 Q. I'm sorry. Again, I interrupted you. I didn't
16 mean to --

17 A. I was not.

18 Q. Had you completed your answer?

19 A. I was not aware of it.

20 Q. As to Spotfire, in the year of 2001, did you have
21 an expectation that Spotfire was going to take action to
22 kill the patent?

23 A. I know I didn't have any expectations that they
24 were going to take any action.

25 Q. Now you knew there was a patent application

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Anton Hopfinger - February 14, 2008
Direct Examination by Rob Masters

1 the witness can answer.

2 BY MR. MASTERS:

3 Q. Dr. Hopfinger, based on the information you have
4 considered and the analysis you have done, have you formed
5 an opinion as to the relationship between the PathFinder
6 technology and the Leadscope products?

7 A. Yes. What I --

8 Q. Can you briefly -- briefly summarize that opinion
9 with respect to the Leadscope product?

10 A. I'm sorry, with respect to the Leadscope products?

11 Q. Yes. In comparing the PathFinder technology --

12 A. Yes.

13 Q. -- to the Leadscope products, can you briefly
14 summarize your opinion?

15 A. I have found that in terms of the operational
16 functionality of the two programs, they are amazingly
17 similar to one another.

18 Q. And, Dr. Hopfinger, have you also considered the
19 Leadscope patent?

20 A. Yes, I have.

21 Q. And based on the information you have considered
22 and your analysis, have you formed an opinion as to the
23 relationship between the PathFinder technology and the
24 Leadscope patent?

25 A. Yes.

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Anton Hopfinger - February 14, 2008
Direct Examination by Rob Masters

1 Q. And can you briefly summarize the opinions that
2 you have formed?

3 A. In my opinion, the claims of what the software
4 product outlined in or given in the patent can do are
5 remarkably similar to what the PathFinder software can do.

6 Q. And, Dr. Hopfinger, have you also considered -- or
7 based on the information you have considered in your
8 analysis, have you formed an opinion as to whether
9 CAPathFinder was publicly disclosed?

10 MR. BRIGGS: Objection.

11 THE WITNESS: Ye --

12 THE COURT: Sustained.

13 MR. MASTERS: Your Honor, may I approach?

14 THE COURT: If you -- I think for that question,
15 you need a foundation, at best. Okay.

16 MR. MASTERS: Okay. Thank you.

17 BY MR. MASTERS:

18 Q. Dr. Hopfinger, during the course of your
19 consideration of information and analysis, have you
20 considered certain pieces of information, including articles
21 or purported presentations?

22 A. Yes. I looked at what I believed to be were the
23 articles as well as the presentations made by members of the
24 American Chemical Society dealing with the reaction database
25 and -- yes.

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Sudhakar Yalamanchili - February 19, 2008
Direct Examination by Rob Masters

1 Q. And what have you found in your consideration of
2 the operational flow of the Leadscope products?

3 A. That the operational flow is identical to that
4 which I have described for the PathFinder project.

5 Q. And have you prepared a series of slides to
6 illustrate the similarities between the operational flow of
7 the PathFinder technology and the Leadscope products?

8 A. Yes, I have.

9 Q. And do you believe these slides fairly and
10 accurately depict the operational flows of the PathFinder
11 technology and Leadscope products?

12 A. Yes, I do.

13 Q. And do you believe these slides will assist the
14 jury in understanding the issues that need to be decided?

15 A. Yes, I do.

16 MR. MASTERS: Can we project Plaintiff's 1107.

17 BY MR. MASTERS:

18 Q. Doctor, here's Plaintiff's 1107. And maybe you
19 can explain the operational flow with respect to this
20 illustration. First describe what it is.

21 A. This is figure 1 from the 852 patent, which I
22 believe has been discussed in earlier testimony.

23 Q. That's the Leadscope patent?

24 A. That's the Leadscope patent, yes. And earlier
25 testimony also established that it was a representation of

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Sudhakar Yalamanchili - February 19, 2008
Direct Examination by Rob Masters

1 Leadscope were the same, and this was intended to illustrate
2 that fact by showing the previous figure, which described
3 the preprocessing phase of PathFinder, and the figure from
4 the 852 patent of Leadscope that reflects the Leadscope
5 products. And if you superimpose the PathFinder figure on
6 the Leadscope figure, we find that the preprocessing phase
7 and the interactive exploration phase that are coupled by
8 this compiled database that is retained in this project, we
9 see that the flows are identical. It's a graphical
10 representation of what I was describing earlier.

11 Q. Doctor, your opinion that these flows are
12 identical, is that opinion expressed to a reasonable degree
13 of scientific certainty based on your education, training,
14 and experience, and based on the information you have
15 reviewed in this matter?

16 A. Yes.

17 Q. And you may sit down, if you'd like.

18 Doctor, maybe we can take this analysis step --
19 one additional step.

20 MR. MASTERS: And can we project Plaintiff's -- I
21 guess it's 1106, please.

22 BY MR. MASTERS:

23 Q. And, Doctor, what were you intending to illustrate
24 here in Plaintiff's 1106?

25 A. Well, if we -- as I was mentioning earlier, there

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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

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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

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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

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1 three individual defendants?

2 MR. SHUMATE: Objection.

3 THE COURT: I'm going to let him go ahead and
4 answer the question. Overruled. Go ahead.

5 THE WITNESS: Yes. The direction was broad. It
6 was to seek, I believe, any and all legal remedies as are
7 reasonable and appropriate in order to protect the Society's
8 interests.

9 BY MR. LONG:

10 Q. And at the time of the board of directors meeting
11 of the board of directors of the American Chemical Society,
12 I think you mentioned the date of April 4th through 7th,
13 2002, did you or the ACS, to your knowledge, have any notice
14 or knowledge of Leadscope's financing plans at that point in
15 time?

16 A. No, none.

17 Q. After the April 7 board of directors meeting of
18 the ACS, did you have an occasion to talk to Curtis Crocker
19 by telephone? And I'm referring to the Crocker who was
20 associated with a venture capital fund.

21 A. Yes, Curtis Crocker called me.

22 Q. Would you tell the jury about that call.

23 A. Curtis Crocker called me on, I believe,
24 April 10th. He first asked me about participating in a
25 fund that he was managing. He asked me about becoming an

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Michael Dennis - February 20, 2008
Cross-Examination by Keith Shumate

1 A. Yes.

2 Q. Your name appears on that list, doesn't it?

3 A. Yes.

4 Q. Now, wasn't there a dinner afterwards that you
5 talked about the subjects of this conference at?

6 A. I don't remember if there was a dinner after this
7 meeting. But there was a dinner that I attended that Dr.
8 Myatt and some of these folks listed here attended in -- in
9 German Village; so I do remember a dinner, yes.

10 Q. Okay. Now, we learned about the patent in 2001.
11 You had a conversation with Mr. Massie, didn't you?

12 A. Yes. Just to clarify, the patent or the patent
13 application?

14 Q. You are correct. I'm sorry. You are right.
15 Patent application.

16 A. Yes.

17 Q. And in January, 2001 is when you engage
18 Mr. Masters and his law firm; is that correct?

19 A. Well, first, no, I did not engage Mr. Masters and
20 his law firm.

21 Q. Okay.

22 A. That was --

23 Q. The American Chemical Society?

24 A. Well, the general counsel of the American Chemical
25 Society did, yes.

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Michael Dennis - February 20, 2008
Cross-Examination by Keith Shumate

1 Q. On behalf -- on behalf -- I'm sorry. The general
2 counsel engaged Mr. Masters on behalf of the American
3 Chemical Society; is that correct?

4 A. Yes.

5 Q. And that would have been 2001, January of 2001?

6 A. That sounds about the right time frame; it's when
7 we discovered the patent application, yes.

8 Q. Now, am I fair to say that there was no legal
9 action taken against Leadscope in 2001?

10 A. That's correct.

11 Q. The entire year went by and ACS did nothing with
12 regard to Leadscope?

13 A. That's not correct.

14 Q. Okay.

15 A. We were studying --

16 Q. Okay. And did anyone from ACS contact Leadscope
17 during 2001?

18 A. Not that I know of.

19 Q. Now, Leadscope continued to publish articles in
20 the American Chemical Society publications, didn't it,
21 following January of 2001?

22 A. That's correct. The ACS didn't stop them from
23 publishing any information.

24 Q. Okay. And they continued to appear at the ACS
25 trade shows after January of 2001; is that correct?

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CLOSING ARGUMENT ON COUNTERCLAIM ON BEHALF OF ACS (LONG)

1 demonstration or reading an article what our witnesses
2 called the inner workings of the Leadscope product. They
3 simply couldn't tell from the demonstrations and the
4 articles. All of them said the same thing.

5 They did not see the Leadscope 70-page business
6 plan which Leadscope people completed within 30 days of
7 their departure from our company. The ACS people did not
8 see this Leadscope multi-page description of its Genoa
9 product, a description that is virtually identical to the
10 functions performed by PathFinder. And then in 2001, the
11 ACS inadvertently discovers the Leadscope patent
12 application, it had been filed in a chemistry category not
13 normally followed by the ACS.

14 Next point: Dr. Blower testified that during the
15 course of the application Leadscope made multiple changes to
16 the application, and it was then in late 2001, when the
17 patent was granted by the patent office that the ACS had
18 full access to the supporting documents which more fully
19 described the inner workings of the Leadscope patent. And
20 it was not until after that patent was granted that
21 Leadscope decided that they needed to do something. They
22 concluded that their intellectual property had been taken.
23 They concluded that they had an obligation to protect their
24 intellectual property. And they made a decision to do
25 something. And doesn't a company have a right to protect

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CLOSING ARGUMENT ON COUNTERCLAIM ON BEHALF OF ACS (LONG)

1 its intellectual property? Nobody has suggested it doesn't.
2 And when they came to the conclusion that this Leadscope
3 product was based at least in part on PathFinder technology,
4 they had an obligation to the company as a whole to do
5 something. And, in early 2002, you've heard the testimony,
6 the decision was made to pursue whatever remedies were
7 appropriate.

8 They went to the governing board in March. The
9 governing board said -- and the governing board -- both of
10 these boards, the ACS board is April; the governing board is
11 March. Both of these boards are comprised of senior people
12 in the American Chemical Society, but they are also
13 comprised of reputable, established business people outside
14 the ACS. And both of these boards looked at this issue of
15 whether the Leadscope technology incorporates in some part
16 the PathFinder technology, and both boards came to the
17 conclusion that it did, and both boards said: Try to go
18 resolve this, Chemical Abstracts. But if you can't resolve
19 it in an amicable way, then you need to pursue appropriate
20 legal remedies.

21 And the defendants stand here and suggest to you
22 that the timing of the lawsuit was such because we
23 deliberately wanted to interfere with their financing.
24 Again, that's lawyer argument. That's not evidence.

25 There has been no evidence that we knew anything

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