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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

APPLE INC., A CALIFORNIA CORPORATION,)	C-11-01846 LHK
)	
)	SAN JOSE, CALIFORNIA
PLAINTIFF,)	
)	AUGUST 20, 2012
VS.)	
)	VOLUME 12
SAMSUNG ELECTRONICS CO., LTD., A KOREAN BUSINESS ENTITY; SAMSUNG ELECTRONICS AMERICA, INC., A NEW YORK CORPORATION; SAMSUNG TELECOMMUNICATIONS AMERICA, LLC, A DELAWARE LIMITED LIABILITY COMPANY,)	PAGES 3712-3940
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)	
DEFENDANTS.)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LUCY H. KOH
UNITED STATES DISTRICT JUDGE

APPEARANCES ON NEXT PAGE

OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595
IRENE RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER 8074

1 A P P E A R A N C E S :

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INDEX OF EXHIBITS

MARKED

ADMITTED

DEFENDANT 'S

556

3722

1 SAN JOSE, CALIFORNIA AUGUST 20, 2012

2 P R O C E E D I N G S

3 (WHEREUPON, THE FOLLOWING PROCEEDINGS
4 WERE HELD OUT OF THE PRESENCE OF THE JURY:)

5 THE COURT: DID YOU SEE THAT WE FILED THE
6 TENTATIVE VERDICT FORM?

7 MS. MAROULIS: YES, YOUR HONOR.

8 THE COURT: ALL RIGHT. LET'S FIRST
9 HANDLE THE RULE 50 MOTIONS. I'VE READ BOTH THE
10 MOTIONS AND THE OPPOSITIONS AND WE'VE ALREADY HAD
11 QUITE EXTENSIVE ARGUMENT ALREADY.

12 IS THERE ANYTHING THAT YOU WOULD LIKE TO
13 SAY IN ADDITION? AND FEEL FREE NOT TO.

14 MR. JOHNSON: YOUR HONOR, I'M HAPPY TO
15 SAY WE DON'T HAVE ANYTHING ELSE TO SAY AT THIS
16 POINT.

17 THE COURT: FANTASTIC. MOST PERSUASIVE
18 ARGUMENTS I'VE HEARD SO FAR.

19 WELL, BOTH SIDES' MOTIONS ARE DENIED AND
20 ALL OF THE ISSUES WILL BE GOING TO THE JURY
21 TOMORROW. OKAY? SO THOSE ARE DENIED.

22 LET'S GO TO THE VERDICT FORM. DO YOU
23 NEED SOME TIME TO LOOK AT IT? SHOULD WE BRING THAT
24 UP AT THE END?

25 MS. MAROULIS: YOUR HONOR, I WAS GOING TO

1 SUGGEST THAT, BECAUSE THERE'S A LOT OF DETAIL,
2 INCLUDING WHICH PRODUCTS ARE ALLEGED TO INFRINGE
3 WHAT, AND WE NEED TO ANALYZE THAT.

4 THE COURT: NO PROBLEM. LET'S DO THAT AT
5 THE END.

6 LET'S -- I'M TRYING TO THINK OF WHAT ELSE
7 WILL BE FAST.

8 OKAY. LET ME GIVE YOU THE RULINGS ON --
9 THIS IS SAMSUNG'S MOTION REGARDING EVIDENCE THAT IS
10 STILL IN DISPUTE, SO LET ME GIVE YOU RULINGS ON
11 THAT.

12 I'LL TELL YOU WHAT MY TENTATIVE IS AND IF
13 YOU WISH TO BE HEARD, YOU CAN BE HEARD VERY
14 BRIEFLY.

15 ON PX 66A AND 66B, THOSE ARE THE VIDEOS
16 SHOWING THE '381 PATENT, PERFORMANCE ON ACCUSED
17 DEVICES AND I -- THIS REALLY IS A DEMONSTRATIVE, SO
18 THIS IS EXCLUDED. THIS IS WHAT I WAS THINKING OF
19 WHEN I WANTED TO EXCLUDE DEMONSTRATIVES. SO THAT'S
20 EXCLUDED.

21 NOW, PX 24.5 THROUGH 24.7, THOSE ARE THE
22 ACTUAL VIDEOS THAT WERE DEMONSTRATED DURING THE
23 SURVEY, SO IT'S NOT -- IT'S NOT -- IT'S NOT A
24 DEMONSTRATIVE. IT WASN'T CREATED FOR THE PURPOSES
25 OF EXPLAINING SOMETHING AT THE TRIAL. IT WAS THE

1 ACTUAL SURVEY VIDEO. SO THAT'S ADMITTED. OKAY?
2 SO I'M DENYING ANY MOTION TO EXCLUDE IT.

3 WITH REGARD TO SDX 3973.009, A
4 DEMONSTRATIVE, THAT'S EXCLUDED.

5 AND THE VIDEO OF HAN, DX 556, I DON'T
6 EVER SEE THAT IT WAS ADMITTED.

7 ALL RIGHT. ANYONE WANT TO BE HEARD VERY
8 BRIEFLY ON THOSE FOUR ISSUES?

9 MR. JOHNSON: YES, JUST BRIEFLY, YOUR
10 HONOR. I WANT TO TAKE UP 3973.009 AND .010.

11 THE COURT: OKAY.

12 MR. JOHNSON: YOUR HONOR, IF YOU RECALL,
13 YOUR HONOR, THOSE WERE -- IF I MAY APPROACH, I CAN
14 HAND UP WHAT THOSE ARE, JUST SO YOU HAVE THEM IN
15 FRONT OF YOU.

16 THE COURT: SURE.

17 MR. JOHNSON: THIS WAS -- IF YOU RECALL,
18 IT'S LABELED AN SDX NUMBER, BUT IT'S ACTUALLY AN
19 EXHIBIT THAT WAS USED, AND WHAT CAME IN DURING THE
20 TESTIMONY OF MS. WANG WITHOUT ANY OBJECTION, AND IF
21 I CAN TURN YOUR ATTENTION TO PAGE 2803 AND -04 OF
22 THE TRANSCRIPT, AND WE CAN PUT THAT UP EVEN.

23 THE COURT: I DIDN'T BRING MY TRANSCRIPT.

24 MR. JOHNSON: AND I CAN GIVE YOU A BINDER
25 THAT'S GOT THE TRANSCRIPT IF YOU FIND THAT HELPFUL.

1 BUT THE ISSUE IS IT'S GOT AN SDX NUMBER,
2 BUT IT WAS REFERRING TO AN ACTUAL EXHIBIT, AND IT'S
3 NOT -- AND IF YOU LOOK AT WHAT'S IN FRONT OF YOU,
4 IT'S NOT A DEMONSTRATIVE.

5 IT'S A PIECE OF EVIDENCE THAT WAS USED
6 WITH A PARTICULAR WITNESS AND IT CAME OUT WITHOUT
7 ANY OBJECTION. I'M ASKING ONLY TO ADMIT .009 AND
8 .010, AND IF WE PULL UP, FOR EXAMPLE, 2803 AT THE
9 BOTTOM, AND THE TOP 2804 -- AND I PUT IT UP, THE
10 TRIAL TRANSCRIPT.

11 THE COURT: YOU KNOW WHAT? I HAVE .009
12 AS HAVING BEEN ADMITTED ON AUGUST THE 15TH. I
13 DON'T HAVE .010.

14 MR. JOHNSON: ON PAGE 2820 OF THE
15 TRANSCRIPT, YOU ADMITTED .010.

16 AND THE ISSUE HERE WAS THAT THIS WAS
17 DURING THE TIME WHEN DEMONSTRATIVES WERE --

18 THE COURT: YOU KNOW WHAT? YOU ARE
19 CORRECT. YOU ARE CORRECT. I APOLOGIZE. THOSE ARE
20 BOTH ADMITTED. EXCUSE ME.

21 MR. JOHNSON: THANK YOU, YOUR HONOR.

22 THE COURT: EXCUSE ME. I WAS WRONG.

23 OKAY. WHAT ELSE?

24 MR. JOHNSON: JUST BRIEFLY ON PX 64, YOU
25 DIDN'T MENTION THAT ONE WHEN YOU JUST RAN THROUGH

1 THE NUMBERS, BUT PX 64 IS THE VIDEO THAT
2 DR. BALAKRISHNAN USED DURING HIS TESTIMONY.

3 IT'S EXACTLY THE KIND OF DEMONSTRATIVE
4 THAT I THINK YOUR HONOR HAD IN MIND THAT SHOULD BE
5 EXCLUDED. IT'S ANNOTATED WITH THE CLAIM LANGUAGE,
6 FIRST PORTION, SECOND PORTION, THIRD PORTION.

7 THE COURT: THAT'S EXCLUDED.

8 MR. JOHNSON: THANK YOU, YOUR HONOR.

9 THE COURT: OKAY. ALL RIGHT. ANYONE
10 ELSE WANT TO GET ANY CLARIFICATION ON ANY OF THESE?

11 MR. JACOBS: WELL, I THINK THE INTERPLAY
12 WE NOTED IN OUR OPPOSITION, YOUR HONOR, IS TO THE
13 DEVICES GOING IN.

14 THE COURT: WE'LL ADDRESS THAT.

15 MR. JACOBS: OKAY.

16 THE COURT: YEAH. OKAY. SO THAT TAKES
17 CARE OF THOSE EXHIBIT ISSUES.

18 MR. JOHNSON: AND YOUR HONOR, SORRY,
19 BRIEFLY, THE HAN VIDEO WAS USED WITH MR. GRAY,
20 SAMSUNG'S EXPERT, AT 2908, LINES 11 TO 25. AND HE
21 EXPLAINED THE DEVICE IN THE HAN VIDEO AT PAGE
22 290 --

23 THE COURT: OH, I KNOW IT WAS SHOWN
24 DURING HIS TESTIMONY. I JUST WASN'T SURE WHETHER
25 IT HAD ACTUALLY BEEN ADMITTED.

1 MR. JACOBS: IT WAS NOT, YOUR HONOR.

2 THE COURT: I HAVE IT NOT BEING ADMITTED,
3 BUT IT WAS DEFINITELY SHOWN ON AUGUST 15TH WHEN
4 MR. GRAY WAS TESTIFYING.

5 MR. JOHNSON: THEN IT WAS AN OVERSIGHT
6 WHY IT WASN'T ADMITTED. IT SHOULD HAVE BEEN
7 ADMITTED. IT WAS SPECIFICALLY SHOWN. HE RELIED ON
8 IT. HE TALKED ABOUT THE PIECE OF PRIOR ART.

9 MR. DEFRANCO, WHO UNFORTUNATELY ISN'T
10 HERE, MAY HAVE FAILED TO SPECIFICALLY MOVE IT INTO
11 EVIDENCE AT THAT POINT.

12 THE COURT: LET ME HEAR FROM MR. JACOBS.
13 IT IS DIFFERENT FROM THE OTHER, YOU KNOW,
14 DEMONSTRATIVE VIDEOS THAT WERE CREATED JUST SOLELY
15 FOR THIS LITIGATION. THAT ACTUALLY WAS EVIDENCE.
16 LET ME HEAR, WHAT'S YOUR VIEW ON THIS?

17 MR. JACOBS: IT SHOULD HAVE BEEN ADMITTED
18 DURING TRIAL, OR SHOULD HAVE BEEN MOVED FOR
19 ADMISSION DURING TRIAL WHEN THE WITNESS WAS ON THE
20 STAND AND IT WASN'T.

21 THE COURT: HOW ARE YOU PREJUDICED BY
22 LEAVING THIS OUT?

23 MR. JACOBS: IT'S A DRAMATIC VIDEO THAT
24 IS QUITE INCOMPLETE IN ITS REPRESENTATION AS PRIOR
25 ART. THERE'S NO CODE ASSOCIATED WITH IT. IT MAKES

1 A GOOD PICTURE.

2 WE PREJUDICED BECAUSE IT'S AN EXHIBIT
3 THEY LOVE AND THEY WOULD LIKE TO SHOW IT AND THEY
4 FAILED TO MOVE IT INTO EVIDENCE DURING TRIAL.

5 MR. JOHNSON: YOUR HONOR, I'M TOLD
6 MR. DEFRANCO TRIED TO MOVE IT IN AND YOUR HONOR
7 SAID IT WAS PENDING A STIPULATION REGARDING
8 DEMONSTRATIVES, BECAUSE IT WASN'T CLEAR AT THAT
9 TIME WHETHER --

10 THE COURT: LET ME SEE THE TRANSCRIPT. I
11 APOLOGIZE I DIDN'T BRING MY COPY. DO YOU HAVE THE
12 HARD COPY, PLEASE?

13 MR. JOHNSON: I CAN HAND UP A HARD COPY.
14 IT HAS SOME TABS ON IT THAT ARE UNRELATED. IT'S
15 JUST MY TABS ON ONE WITNESS. THAT'S ALL IT IS.

16 THE COURT: OKAY. THANK YOU. DO YOU
17 HAVE THE PAGE NUMBER?

18 MR. JOHNSON: 2909.

19 MR. JACOBS: YOUR HONOR WILL ALSO RECALL
20 THAT WE HAD A HEARSAY OBJECTION BECAUSE MR. HAN IS
21 TALKING IN THE VIDEO.

22 BUT IT IS THE CASE THAT THE TRANSCRIPT
23 SAYS "ALL RIGHT, THAT'LL BE PENDING THE
24 STIPULATION." I THINK THE "PENDING THE
25 STIPULATION" THERE WAS ON THE SUBJECT OF

1 DEMONSTRATIVES.

2 THE COURT: I'M GOING TO ADMIT THIS. THE
3 DEMONSTRATIVE WAS -- THE EXCLUSION OF
4 DEMONSTRATIVES WAS DIRECTED AT THE DEMONSTRATIVES
5 THAT WERE CREATED SOLELY FOR THIS TRIAL AND FOR
6 THIS LAWSUIT. SO 556 IS ADMITTED.

7 (WHEREUPON, DEFENDANT'S EXHIBIT NUMBER
8 556, HAVING BEEN PREVIOUSLY MARKED FOR
9 IDENTIFICATION, WAS ADMITTED INTO
10 EVIDENCE.)

11 MR. JOHNSON: THANK YOU, YOUR HONOR.

12 THE COURT: OKAY. ANYTHING ELSE?

13 MR. JOHNSON: THE OTHER ISSUE I THINK WE
14 CAN TAKE UP QUICKLY IS THE USE OF WI-FI IN THE JURY
15 ROOM.

16 THE COURT: OKAY. LET ME JUST MAKE A
17 NOTE -- SO WE WILL NEED TO CHANGE -- DID YOU
18 HAVE -- WELL, I GUESS YOU HAVE -- ANY OTHER CHANGES
19 TO THE EXHIBIT LIST THAT THE COURT FILED LAST
20 NIGHT, OTHER THAN WE'VE NOW ADMITTED DX 556, SDX
21 3973.009, SDX 3973.010?

22 MR. JACOBS: YOUR HONOR, IF I --

23 THE COURT: AND -- EXCUSE ME -- PX 24.5
24 THROUGH 24.7.

25 OTHER THAN THOSE ADMISSIONS, ANY OTHER

1 CHANGES TO THE EXHIBIT LIST?

2 MR. JACOBS: CAN I JUST POINT OUT THAT
3 WHAT'S HAPPENING NOW WITH 3973.009 AND .010 IS THE
4 DEMONSTRATIVE IS COMING IN.

5 THE COURT: THAT'S COMING IN TWICE? IS
6 ONE A BLOW UP OF THE OTHER ONE? IT'S THE SAME
7 DATE, JANUARY 6TH, 2010.

8 MR. JOHNSON: ONE IS ENGLISH, ONE IS
9 KOREAN.

10 MR. JACOBS: IF THE DOCUMENT IS GOING TO
11 GO IN, THE DOCUMENT SHOULD GO IN.

12 THE COURT: DO YOU HAVE THE DOCUMENT?

13 MR. JOHNSON: YES, WE CAN PUT THAT IN.

14 MR. JACOBS: AND THEN THE DEMONSTRATIVES
15 SHOULDN'T GO IN.

16 THE COURT: CAN YOU ALL WORK THAT OUT?

17 MR. JOHNSON: YES.

18 THE COURT: WHAT NUMBER DO YOU WANT TO
19 GIVE THAT?

20 MR. JOHNSON: HOW ABOUT IF WE GIVE IT ONE
21 MILLION?

22 (LAUGHTER.)

23 MR. JOHNSON: I'M REACHING. HOW ABOUT DX
24 900?

25 THE COURT: THAT'S FINE. CAN YOU PLEASE

1 FILE THE NEW E-MAIL? I JUST WANT TO MAKE SURE
2 THERE'S NO DISPUTE, AND THAT YOU ALL -- DID YOU
3 BRING YOUR -- THE FINAL FINAL SET OF EXHIBITS?

4 MR. JOHNSON: WE WERE WAITING UNTIL WE
5 RESOLVED THESE ISSUES AND THEN WE WERE GOING TO
6 BRING IT OVER TO THE COURT.

7 VOICE FROM AUDIENCE: ACTUALLY, IT'S
8 SITTING RIGHT THERE.

9 THE COURT: DO YOU WANT TO LEAVE IT HERE
10 OVERNIGHT OR DO YOU WANT TO MAKE THE CHANGES AND
11 BRING IT BACK TOMORROW MORNING?

12 MS. MAROULIS: I THINK BRING IT TOMORROW
13 TO BE SAFE BECAUSE THERE WERE SOME CHANGES MADE
14 JUST NOW.

15 MR. JOHNSON: THESE CHANGES THAT WE JUST
16 TALKED ABOUT.

17 THE COURT: THAT'S FINE. SO DX 900 IS --
18 WILL BE THE ACTUAL JANUARY 6TH, 2010 E-MAIL, AND
19 THAT WILL REPLACE SDX 3973.001 AND .010.

20 MR. JOHNSON: AND IT'LL BE BOTH THE
21 ENGLISH --

22 THE COURT: ENGLISH AND KOREAN.

23 MR. JOHNSON: THANK YOU.

24 THE COURT: OKAY.

25 MR. JACOBS: THEN, YOUR HONOR, IN

1 SAMSUNG'S MOTION THEY NOTED THAT TWO OTHER EXHIBITS
2 RISE AND FALL WITH THE PRINCIPLE THAT DEMONSTRATIVE
3 VIDEOS COME OUT, AND I'M LOOKING AT THE
4 INTRODUCTION OF THEIR MOTION, DX 751A AND DX 2557.

5 THE BRIEF GOES ON TO SAY THESE ARE
6 DEMONSTRATIVE VIDEOS CREATED FOR PURPOSES OF THIS
7 TRIAL WHICH SHOW THE OPERATION OF CERTAIN ACCUSED
8 PRODUCTS. SO WE WOULD ASK THAT THOSE BE STRUCK, OR
9 STRICKEN AS WELL.

10 THE COURT: GIVE ME THOSE NUMBERS AGAIN,
11 PLEASE.

12 MR. JACOBS: SURE. DX 751A.

13 THE COURT: DO YOU HAVE A DATE OF WHEN
14 THAT WAS -- OH, I'LL JUST LOOK AT OUR FINAL EXHIBIT
15 LIST. THAT'LL HAVE IT.

16 OKAY. EXCUSE ME. DX 751A, YES, THAT
17 SHOULD BE OFF.

18 MR. JACOBS: AND DX 2557.

19 MR. JOHNSON: IT'S FINE TO REMOVE BOTH OF
20 THOSE, YOUR HONOR.

21 THE COURT: OKAY. SO DX 751A AND -- WHAT
22 WAS THAT NUMBER AGAIN, PLEASE, 25 --

23 MR. JACOBS: DX 2557.

24 THE COURT: ALL RIGHT. SO WHAT'S BEEN
25 EXCLUDED TODAY, JUST SO OUR RECORD IS CLEAR, IS DX

1 751A, DX 2557, PX 64, PX 66A, PX 66B, AND
2 EVERYTHING ELSE WAS ADMITTED.

3 SO ARE WE THEN -- IS OUR EXHIBIT LIST NOW
4 FROZEN?

5 MR. JACOBS: I THINK JUST BEFORE THIS
6 HEARING STARTED, A STIPULATION WAS FILED CORRECTING
7 SOME ENTRIES ON THE EXHIBIT LIST, LITERALLY MOMENTS
8 BEFORE, I THINK, YOUR HONOR WALKED OUT.

9 THE COURT: OH, OKAY. I DIDN'T ACTUALLY
10 SEE THAT.

11 MS. MAROULIS: I THINK THEY'RE JUST
12 TYPOS.

13 MR. JOHNSON: I THINK IT WAS JUST TYPOS
14 IN DESCRIPTIONS, AND THERE'S A STIPULATION. IF WE
15 CAN GET THE BINDERS BACK WITH THE EXHIBIT LISTS AND
16 GIVEN YOUR HONOR'S ORDERS NOW, WE CAN PUT IT TO
17 BED.

18 THE COURT: ALL RIGHT. HOW MANY CHANGES
19 ARE ON THAT -- JUST TYPO CHANGES?

20 MR. JACOBS: ABOUT HALF A DOZEN, YOUR
21 HONOR.

22 THE COURT: OKAY. WE'LL MAKE THOSE
23 CHANGES AND TONIGHT WE'LL FILE A FINAL FROZEN
24 EXHIBIT LIST. OKAY?

25 NOW, I ASSUME WE HAVE ALL OF THESE

1 ADMITTED EXHIBITS TO ADD THE DESCRIPTIONS. THE
2 DESCRIPTIONS SHOULD BE ON YOUR EARLIER EXHIBIT
3 LISTS ANYWAY, RIGHT?

4 MR. JOHNSON: RIGHT.

5 THE COURT: OKAY. SO THE EXHIBIT LIST IS
6 NOW FROZEN.

7 LET'S ADDRESS THIS -- ANOTHER SURREAL
8 ISSUE WE HAVE WITH THE PHONES, THE SORT OF PATCHES
9 AND UPDATES QUESTION.

10 OKAY. LET ME GIVE THIS BACK TO
11 MR. JOHNSON. THANK YOU.

12 NOW, HOW LONG HAVE YOU -- I THOUGHT THAT
13 MANY OF THESE EXHIBITS WERE COMING RIGHT OUT OF THE
14 BOX, BUT FROM READING APPLE'S PAPERS, I SEE THAT
15 THEY'VE ACTUALLY BEEN USED IN THE LITIGATION FOR
16 ABOUT A YEAR. IS THAT RIGHT?

17 MR. JOHNSON: THESE ARE DEVICES APPLE HAS
18 HAD POSSESSION OF. IF YOU RECALL, THEY'VE GOT SOME
19 IMAGES ON THEM, LIKE THE RED STICK MEN THAT
20 DR. BALAKRISHNAN USED AND OTHERS THAT APPLE PUT ON
21 THE DEVICES.

22 THE COURT: OKAY. WELL, WHAT'S THE
23 LIKELIHOOD THAT THERE ARE UPDATES THAT HAVE ALREADY
24 BEEN DECLINED, BECAUSE I KNOW A BIG QUESTION WAS IF
25 YOU DECLINE IT THREE TIMES, THE FOURTH TIME, IT'LL

1 AUTOMATICALLY BE INSTALLED. WHAT'S THE LIKELIHOOD
2 THAT ANY OF THE DEVICES ARE IN THAT SITUATION NOW?

3 MR. JACOBS: WE HAVE INSPECTED THEM TO BE
4 SURE THAT THEY DON'T INCLUDE DESIGN AROUND UPDATES.

5 THE COURT: OKAY.

6 MR. JACOBS: AND WHAT WE'D LIKE TO DO,
7 YOUR HONOR, IS -- JUST TO JUMP AHEAD A LITTLE BIT,
8 I THINK WE'RE CLOSE TO AGREEMENT HERE.

9 WHAT WE'D LIKE TO DO IS INSPECT THE
10 PHONES ONE MORE TIME WITH RESPECT TO THE SIM CARDS
11 THAT WILL BE PULLED OUT, MAKE SURE THAT PULLING OUT
12 THE SIM CARDS DOESN'T IN SOME WAY AFFECT THE
13 OPERATION OF THE PHONES, AND AT WHICH POINT -- WE
14 WANTED TO MENTION THIS TO MR. RIVERA THE OTHER
15 DAY -- PHOTOGRAPH THE PHONES AND PHOTOGRAPH THE
16 SCREEN THAT SAYS WHAT LEVEL OF SOFTWARE THEY'RE
17 RUNNING.

18 THE COURT: OKAY.

19 MR. JACOBS: SO THAT WE HAVE A FREEZE ON
20 THAT. AND THEN I THINK WE'RE IN AGREEMENT THAT THE
21 JURORS COULD GET THE INSTRUCTIONS THAT WE DRAFTED.

22 I WANT TO MAKE SURE YOU SAW SAMSUNG'S
23 LAST FILING ON THIS IN WHICH THEY SAID THAT WOULD
24 WORK.

25 MR. JOHNSON: GIVEN THE AT&T AND T-MOBILE

1 ISSUE, I THINK IF WE REMOVE THE SIM CARDS FOR THOSE
2 PHONES, THAT SHOULD TAKE CARE OF IT. SO DURING A
3 BREAK, WE'LL LOOK AT THE ACTUAL PHONES AND SEE IF
4 THAT RESOLVES IT. HOPEFULLY IT DOES.

5 MR. JACOBS: AND WE'LL DOUBLE-CHECK AT
6 THE SAME TIME, YOUR HONOR, THAT THE RELEASE IS
7 CONSISTENT WITH THE ABSENCE OF A FORCED UPDATE OF A
8 DESIGN AROUND.

9 THE COURT: OKAY. WELL, I'M DISAPPOINTED
10 I'M NOT GOING TO GET A DEMONSTRATION TODAY, BUT
11 THAT'S GOOD THAT YOU WORKED IT OUT.

12 NOW, WHAT HAPPENS IF THE SIM CARD REMOVAL
13 PREVENTS ACTUALLY BEING ABLE TO SEE THE BROWSER AND
14 GALLERY AND THAT --

15 MR. JOHNSON: WE'RE PRETTY CONFIDENT
16 THAT'S GOING TO WORK.

17 THE COURT: OKAY. ALL RIGHT. THEN DO WE
18 NEED TO TALK ANYTHING MORE ABOUT THIS?

19 I WAS ALSO WONDERING WHETHER YOU WANTED
20 TO GO AHEAD AND DISABLE AUTO UPDATE APPS. WOULD
21 THAT -- I GUESS THE SIM CARD WOULD TAKE CARE OF
22 THAT, RIGHT?

23 MR. JACOBS: THAT'S -- WE DON'T NEED TO
24 DO THAT, YOUR HONOR.

25 THE COURT: OKAY. ALL RIGHT. SO THEN DO

1 WE NEED TO DISCUSS PATCHES AND UPDATES ANY MORE, OR
2 NO?

3 MR. JACOBS: I THINK THE ONLY REMAINING
4 QUESTION IS THE FORM OF THE DELIVERY OF THIS
5 INFORMATION TO THE JURY.

6 IT'S THE KIND OF THING THAT YOU WOULD
7 KIND OF EXPECT TO SEE IN THE JURY ROOM ON A CARD,
8 YOU KNOW, OR IF YOU GO INTO A CONFERENCE ROOM.

9 IT COULD BE PART OF THE INSTRUCTIONS. IT
10 COULD BE PART OF THE INSTRUCTIONS AND THEN THEY
11 WOULD HAVE A COPY OF IT AS WELL WHEN THEY WENT INTO
12 THE JURY ROOM.

13 SO WHATEVER YOUR HONOR THINKS IS MOST
14 APPROPRIATE.

15 THE COURT: WELL, THEY'RE ACTUALLY EACH
16 INDIVIDUALLY GOING TO RECEIVE A HARD COPY OF THE
17 JURY INSTRUCTIONS AND THEY WILL HAVE THAT FOR THE
18 REST OF THEIR DELIBERATIONS. SO THEY'LL HAVE THAT.

19 MR. JOHNSON: WE COULD ADD EITHER AN
20 ADDENDUM AT THE END, OR WE COULD GIVE THEM AN
21 INSERT THAT GOES INTO THE JURY BOOK, SOMETHING THAT
22 HAS THE INSTRUCTIONS ON -- IT'S BASICALLY WHAT NOT
23 TO DO.

24 THE COURT: OKAY. IS IT DIFFERENT THAN
25 THE INSTRUCTIONS THAT APPLE DRAFTED?

1 MR. JACOBS: IN SAMSUNG'S LAST FILING,
2 THEY SAID THOSE INSTRUCTIONS WERE FINE.

3 MR. JOHNSON: RIGHT. AS LONG AS WE TAKE
4 THE SIM CARD OUT, I THINK WE'RE FINE.

5 THE COURT: EVERYONE'S FINE. OKAY. I
6 WAS JUST -- I HAD ALREADY INCLUDED APPLE'S DRAFT
7 INSTRUCTION IN THE FINAL INSTRUCTIONS THAT WENT OUT
8 LAST NIGHT, SO --

9 MR. JACOBS: TERRIFIC. THAT WORKS GREAT.

10 THE COURT: OKAY?

11 MR. JOHNSON: OKAY.

12 THE COURT: SO WE'LL JUST GO WITH THAT.

13 IF YOU FEEL LIKE WE -- I MEAN, IT WILL BE
14 IN THE INSTRUCTION, IT'LL BE READ TO THEM, THEY'LL
15 KNOW WHERE IT IS. I THINK THAT SHOULD COVER IT.

16 MR. JOHNSON: I THINK THAT'S FINE.

17 THE COURT: THAT TAKES CARE OF PATCHES
18 AND UPDATES.

19 OKAY. ALL RIGHT. LET'S GO TO -- YOU
20 WANT TO HANDLE THE ADVERSE INFERENCE FIRST? AND
21 BECAUSE THAT'S -- THERE ARE TWO PENDING MOTIONS, SO
22 I WON'T DOCK YOUR TIME ON THAT ONE.

23 ALL RIGHT. WHY DON'T WE GO AHEAD AND
24 I'LL JUST TELL YOU WHAT I'M TENTATIVELY THINKING OF
25 DOING. OKAY?

1 SO I'M INTENDING TO ISSUE AN ORDER THAT
2 SAYS THAT A MAGISTRATE JUDGE DOES HAVE AUTHORITY TO
3 ISSUE SPOILIATION SANCTIONS, THAT IT'S NOT AN
4 EXCLUSIVE ARTICLE III POWER, THAT THIS WAS NOT A
5 DISPOSITIVE MOTION.

6 I'M GOING TO AGREE WITH JUDGE GREWAL'S
7 ORDER REGARDING A FINDING OF SPOILIATION AND
8 PREJUDICE AS TO APPLE.

9 SO I'M NOT FINDING CLEAR ERROR, AND I'M
10 GOING TO AFFIRM HIS SPOILIATION FINDING.

11 BUT I THINK IN LIGHT OF ALL OF THE
12 EVIDENCE THAT I HAVE SOME AUTHORITY TO TINKER WITH
13 THE ACTUAL INSTRUCTION, AND WHAT I HAVE FILED LAST
14 NIGHT IS WHAT I INTEND TO ISSUE AS TO THE ADVERSE
15 INFERENCE INSTRUCTION AGAINST SAMSUNG.

16 NOW, WITH REGARD TO SAMSUNG'S MOTION FOR
17 A MIRROR IMAGE INSTRUCTION AGAINST APPLE, THIS IS
18 WHAT I AM TENTATIVELY THINKING OF DOING.

19 YOU KNOW, OBVIOUSLY WOULD IT HAVE BEEN
20 BETTER HAD THIS MOTION BEEN FILED EARLIER? OF
21 COURSE.

22 BUT I AM -- I TAKE SAMSUNG'S POINT THAT
23 THEY THOUGHT IT WOULD BE INCONSISTENT WITH THEIR
24 POSITION THAT THEY BELIEVE THAT THERE WAS NO
25 OBLIGATION TO PRESERVE AND RETAIN ANY DOCUMENTS

1 BASED ON THE AUGUST 2010 SETTLEMENT MEETING, AND SO
2 THEY WERE IN A BIT OF QUANDARY. IF THEY FILED ONE
3 AGAINST APPLE BACK IN MAY, IT WOULD HAVE LOOKED
4 INCONSISTENT WITH THEIR POSITION.

5 ON THE OTHER HAND, THEY PROBABLY COULD
6 HAVE AND SHOULD HAVE DONE IT AS AN "IN THE
7 ALTERNATIVE" ARGUMENT.

8 ON THE OTHER HAND, IN SAMSUNG'S
9 OPPOSITION, WHICH WAS FILED IN MAY, SAMSUNG PLACED
10 APPLE ON NOTICE THAT IF THE DATE OF PRESERVATION
11 WAS AUGUST OF 2010, THAT THAT APPLIED EQUALLY TO
12 BOTH SIDES AND SO APPLE HAD THE SAME OBLIGATION TO
13 RETAIN AND PRESERVE ITS OWN DOCUMENTS.

14 AND, FRANKLY, I THINK THAT APPLE, WHEN IT
15 FILED ITS OWN ADVERSE INFERENCE MOTION AGAINST
16 SAMSUNG ON MAY 1, MUST HAVE KNOWN THAT THIS IS
17 GOING TO BE A TWO-WAY STREET.

18 SO, I MEAN, YOU KIND OF PAY FOR YOUR OWN
19 SUCCESS HERE. YOU WERE SUCCESSFUL IN GETTING THAT
20 DATE, THAT AUGUST 2010 DATE. NOW YOU'VE GOT TO
21 LIVE WITH IT AS WELL.

22 SO TO SAY IT WAS SOMEHOW PREJUDICIAL TO
23 APPLE FOR THIS MOTION TO BE FILED LATE, I -- YOU
24 KNOW, I FEEL LIKE THIS IS A SITUATION OF APPLE'S
25 OWN MAKING. YOU SUCCEEDED IN GETTING AUGUST 2010

1 TO BE THE DATE WHEN THERE WAS A REASONABLE
2 APPREHENSION OF LITIGATION, THUS TRIGGERING
3 DOCUMENT RETENTION LITIGATION.

4 SO I DON'T FIND ANY PREJUDICE BASED ON
5 THE TIMING BECAUSE APPLE KNEW BETTER THAN ANYONE
6 ELSE WHAT ITS OWN DOCUMENT RETENTION POLICIES WERE
7 AS OF AUGUST OF 2010 THROUGH THE FILING DATE OF THE
8 COMPLAINT IN APRIL OF 2011.

9 SO, YOU KNOW, I'M AFFIRMING JUDGE GREWAL
10 ON A FINDING THAT THERE WAS REASONABLE APPREHENSION
11 OF LITIGATION AS OF THAT AUGUST DATE, AND I THINK
12 IT WAS FELT ON BOTH SIDES AND BOTH SIDES HAD
13 OBLIGATIONS TO PRESERVE THEIR DOCUMENTS.

14 YOU KNOW, WE CAN GET INTO THE NITTY
15 GRITTY OF IS SAMSUNG ELECTRONIC CORPORATION'S MY
16 SINGLE TWO-WEEK DELETION POLICY WORSE THAN APPLE'S
17 POLICY OF TELLING THEIR EMPLOYEES THAT THEIR E-MAIL
18 ACCOUNTS ARE TOO BIG AND THEY NEED TO START
19 REDUCING THE SIZE OF THEIR E-MAIL ACCOUNTS, SURE,
20 IN THAT COMPARISON, I THINK SAMSUNG'S IS WORSE THAN
21 APPLE'S.

22 BUT ON THE OTHER HAND, APPLE DIDN'T SERVE
23 ANY LITIGATION HOLD NOTICES UNTIL THE FILING OF THE
24 COMPLAINT IN APRIL OF 2011.

25 SO I JUST FIND IT VERY INCONSISTENT.

1 MR. MUELLER ARGUED VERY AGGRESSIVELY
2 DURING THE TRIAL THAT THERE WAS A DISPUTE AS OF
3 AUGUST 2010, THEREFORE, UNDER RULE 408, I SHOULD
4 EXCLUDE PRESENTATIONS MADE DURING THOSE MEETINGS.

5 SO HERE AGAIN, APPLE'S THE VICTIM OF ITS
6 OWN SUCCESS. YOU SUCCEEDED, I ISSUED A LIMITING
7 INSTRUCTION ON THAT DOCUMENT SAYING YOU CAN'T
8 CONSIDER THIS FOR THE AMOUNT OF DISPUTE, AMOUNT IN
9 DISPUTE OR FOR LIABILITY BECAUSE IT IS COVERED BY
10 FEDERAL RULE OF EVIDENCE 408.

11 SO I JUST FIND APPLE'S POSITION ENTIRELY
12 INCONSISTENT. YOU KNOW, ON THE ONE HAND YOU'RE
13 SAYING, WELL, THE BUSINESS RELATIONSHIP IS A REASON
14 WHY APPLE DIDN'T HAVE TO PRESERVE DOCUMENTS --
15 DIDN'T HAVE AN OBLIGATION TO PRESERVE DOCUMENTS,
16 BUT IT'S NOT A BASIS FOR SAMSUNG TO DO THE SAME.

17 OR YOU'RE SAYING, WELL, AUGUST OF 2010
18 WAS THE DATE BY WHICH SAMSUNG HAD A DUTY TO
19 PRESERVE DOCUMENTS, BUT NOT APPLE.

20 IT'S JUST ENTIRELY INCONSISTENT AND I AM
21 NOT GOING TO -- I MEAN, THIS -- I'M AFFIRMING THAT
22 AUGUST 2010 DATE WAS THE DATE TO START PRESERVING
23 DOCUMENTS BECAUSE THERE WAS A REASONABLE
24 APPREHENSION OF LITIGATION ON BOTH SIDES.

25 AND IT APPLIES TO BOTH SIDES. YOU'RE

1 BOTH UNDER THE SAME OBLIGATION. AND I THINK IT'S
2 WORSE -- I THINK THE LANGUAGE THAT IS IN MICRON
3 TECH, I MEAN, SURELY THE PLAINTIFF KNOWS BETTER
4 THAN THE DEFENDANT WHEN LITIGATION IS ACTUALLY
5 GOING TO COMMENCE.

6 SO ANYWAY, I THINK THAT APPLE'S TAKING
7 THE VERY AGGRESSIVE POSITION THAT AUGUST OF 2010 IS
8 THE DATE THAT DOCUMENT PRESERVATION OBLIGATIONS
9 BEGAN, AND YET APPLE DID NOTHING UNTIL -- FOR EIGHT
10 MONTHS UNTIL APRIL OF 2011, DIDN'T SERVE A SINGLE
11 LITIGATION HOLD NOTICE, WAS FULLY AWARE THAT IT HAD
12 ITS OWN, YOUR E-MAIL ACCOUNT IS TOO FULL, START
13 DELETING DOCUMENTS TO GET IT BELOW A CERTAIN
14 VOLUME. YOU'RE EQUALLY CULPABLE.

15 AND THE FACT THAT MR. JOBS NEVER GOT A
16 LITIGATION HOLD NOTICE WHEN HE'S AN INVENTOR ON THE
17 D'087, THE D'677, THE D'889?

18 SO I ALSO AM GOING TO ISSUE AN ADVERSE
19 INFERENCE ORDER AGAINST APPLE. BUT IT'S GOING TO
20 BE A MIRROR IMAGE. IT'S GOING TO BE THE SAME
21 LANGUAGE.

22 SO LET ME GO AHEAD AND HEAR FROM APPLE.
23 WHAT DO YOU THINK?

24 MS. TUCHER: THANK YOU, YOUR HONOR.
25 ALISON TUCHER FROM MORRISON & FOERSTER ON BEHALF OF

1 APPLE.

2 WE APPRECIATE THAT YOU ARE AFFIRMING THE
3 AUGUST DATE THAT JUDGE GREWAL FOUND APPLIED TO
4 SAMSUNG.

5 WE ARE PREPARED FOR YOU TO JUDGE APPLE'S
6 CONDUCT BY THE SAME STANDARDS THAT YOU APPLY IN
7 JUDGING SAMSUNG'S CONDUCT, BUT I WOULD POINT OUT
8 SOME IMPORTANT DIFFERENCES.

9 THE REASON THAT THE AUGUST DATE APPLIES
10 AGAINST SAMSUNG BUT DOES NOT APPLY AGAINST APPLE IS
11 BECAUSE ONLY SAMSUNG KNEW WHAT SAMSUNG WAS GOING TO
12 DO BETWEEN AUGUST AND APRIL.

13 SAMSUNG KNEW THAT THEY WERE GOING TO
14 CONTINUE TO COPY APPLE, THAT THEY WERE GOING TO
15 CONTINUE TO BRING INFRINGING PRODUCTS TO MARKET,
16 AND IN THEIR INTERNAL DOCUMENTS, WE SEE THAT THAT'S
17 WHAT THEY WERE DOING.

18 THAT'S THE EVIDENCE THAT JUDGE GREWAL HAD
19 BEFORE HIM WHEN HE DECIDED THAT AUGUST WAS THE
20 CRITICAL DATE FOR SAMSUNG.

21 HE ALSO HAD SAMSUNG'S ADMISSION IN THE
22 LITIGATION HOLD NOTICE THAT THEY KNEW THAT
23 LITIGATION WAS REASONABLY LIKELY, PRECISELY BECAUSE
24 THEY KNEW THAT THEY WERE GOING TO CONTINUE TO
25 INFRINGE APPLE'S INTELLECTUAL PROPERTY.

1 APPLE DIDN'T KNOW ANY OF THOSE THINGS,
2 AND THAT'S WHY APPLE IS IN A DIFFERENT SITUATION
3 WITH REGARD TO WHAT THE TRIGGER DATE SHOULD BE.

4 BOTH SIDES KNEW THAT THEY HAD A BUSINESS
5 RELATIONSHIP. BUT SAMSUNG KNEW THAT THE BUSINESS
6 RELATIONSHIP WASN'T GOING TO KEEP THEM FROM
7 COPYING.

8 APPLE KNEW THAT THE PARTIES WERE TALKING
9 AND THAT IT COULD VERY WELL MAKE A DIFFERENCE
10 BECAUSE APPLE KNEW AND SAMSUNG KNEW THAT APPLE WAS
11 SAMSUNG'S LARGEST CUSTOMER.

12 APPLE HAD A REASON TO BELIEVE THAT THAT
13 WOULD MAKE A DIFFERENCE TO SAMSUNG. IT TURNED OUT
14 IT DIDN'T.

15 WHEN APPLE LEARNED THAT IT DIDN'T, APPLE
16 HAD REASONABLE APPREHENSION OF SUIT, BROUGHT SUIT,
17 ISSUED THE LITIGATION HOLD NOTICES AND SO ON.

18 THAT'S THE FIRST IMPORTANT -- ACTUALLY,
19 THAT'S THE SECOND IMPORTANT DIFFERENCE.

20 THE FIRST IMPORTANT DIFFERENCE IS THAT
21 JUDGE GREWAL ISSUED AN ORDER AGAINST SAMSUNG, AND
22 OF COURSE JUDGE GREWAL DID NOT ISSUE AN ORDER
23 AGAINST APPLE, SO THERE'S NOTHING TO AFFIRM WITH
24 REGARD TO APPLE WITH REGARD TO THE AUGUST TRIGGER
25 DATE.

1 BUT MOVING ON FROM THAT, THE MOST
2 IMPORTANT DIFFERENCE IS THAT THERE'S ABSOLUTELY NO
3 EVIDENCE OF ANY DOCUMENTS DESTROYED AT APPLE, AND
4 THERE'S COPIOUS EVIDENCE OF SPECIFIC DOCUMENTS THAT
5 ARE RELEVANT TO THE LITIGATION THAT WERE DESTROYED
6 AT SAMSUNG.

7 SO, FOR EXAMPLE, IN OUR BRIEF OF THIS
8 MORNING, WE POINTED OUT THE EVIDENCE THAT
9 WONG PYO HONG, THE HEAD OF PRODUCT STRATEGY,
10 PRODUCED ZERO E-MAILS IN THIS LITIGATION.

11 WE KNOW HE HAD RESPONSIVE DOCUMENTS, BOTH
12 BEFORE AND AFTER AUGUST OF 2010. THEY INCLUDED
13 CRITICAL DOCUMENTS, INCLUDING DIRECTIONS TO HIS,
14 HIS ENTIRE TEAM THAT THEY PREPARE COMPARISONS OF
15 PRODUCT IN DEVELOPMENT AT SAMSUNG AGAINST THE
16 COMPARABLE APPLE PRODUCTS.

17 WE KNOW THAT MIN-HYOUK LEE, WHO THE
18 EVIDENCE SHOWS WAS THE PRIMARY DEVELOPER OF THE
19 GALAXY S PHONES THAT CAUSED THIS DISPUTE IN THE
20 FIRST PLACE, MIN-HYOUK LEE PRODUCED ZERO E-MAILS.

21 WE KNOW HE HAD RESPONSIVE E-MAILS FROM
22 AUGUST OF 2010 BECAUSE SAMSUNG WAS CONTINUING TO
23 ROLL OUT GALAXY S MODELS IN THE UNITED STATES RIGHT
24 THROUGH FEBRUARY OF 2011.

25 WE KNOW THAT HYONG SHIN PARK, WHO YOUR

1 HONOR RULED COULD NOT COME TO TESTIFY, BUT WHO WAS
2 ON SAMSUNG'S LIST OF THE MOST RELEVANT WITNESSES IN
3 THE CASE, PRODUCED ZERO E-MAILS.

4 WE KNOW THAT SUNGSIK LEE PRODUCED ZERO
5 E-MAILS. SUNGSIK LEE IS ALSO SOMEONE WHO WAS ON
6 SAMSUNG'S ORIGINAL WITNESS LIST.

7 SO THESE ARE WITNESSES WHO ARE CRUCIAL TO
8 SAMSUNG'S CASE WHO PRODUCED ZERO E-MAILS. THAT'S
9 WHY YOU HAVE EVIDENCE THAT SAMSUNG SPOLIATED.

10 BUT APPLE IS IN A VERY, VERY DIFFERENT
11 SITUATION. THE ONE CUSTODIAN YOU MENTIONED IS
12 STEVE JOBS. APPLE HAS ALL OF STEVE JOBS' E-MAILS.
13 NONE HAVE BEEN SPOLIATED.

14 THE COURT: WELL, IF WE'RE GOING TO LOOK
15 AT THE STATISTICAL COMPARISONS, THE NUMBER THAT
16 WERE ACTUALLY PRODUCED FROM HIM AS CUSTODIAN IS FAR
17 DWARFED IN COMPARISON TO ALL OF THE E-MAILS THAT
18 WERE PRODUCED BY OTHERS IN WHICH HE WAS EITHER A
19 SENDER OR RECIPIENT.

20 MS. TUCHER: THE REASON I STARTED WITH
21 THE SPECIFICS OF MIN-HYOUK LEE AND DR. HONG IS
22 BECAUSE I WANTED TO MAKE CLEAR WE ARE NOT RELYING,
23 FIRST AND FOREMOST, ON STATISTICS.

24 WE ARE RELYING, FOR OUR EVIDENCE AGAINST
25 SAMSUNG, ON SPECIFIC E-MAILS FOR SPECIFIC

1 CUSTODIANS THAT WE KNOW THEY SHOULD HAVE HAD AND
2 DIDN'T. IT'S TRUE THAT WE GENERALIZE THE
3 STATISTICS TO SHOW THE EXTENT OF THE PROBLEM.

4 BUT THE EXAMPLE OF STEVE JOBS, THERE'S NO
5 DISPUTE IN THE RECORD THAT -- APPLE ARCHIVES HIS
6 E-MAILS. THEY'VE DONE IT ON A REGULAR BASIS.

7 SO IF YOUR QUESTION IS, HOW COULD IT BE
8 THAT THERE'S THEN A DISCREPANCY BETWEEN THE NUMBER
9 OF E-MAILS PRODUCED FROM MR. JOBS' AND FROM OTHER
10 PEOPLE'S FILES THAT INVOLVE CORRESPONDENCE WITH
11 MR. JOBS, I CAN EXPLAIN SEVERAL DIFFERENT REASONS.

12 ONE IS FOR EACH CUSTODIAN, THERE WAS A
13 DIFFERENT -- WELL, FOR SETS OF CUSTODIANS, THERE
14 WERE DIFFERENT SEARCH TERMS. SO DEPENDING WHAT
15 SEARCH TERMS WERE USED TO EXAMINE ANY SET OF FILES,
16 YOU'RE GOING TO GET A DIFFERENT NUMBER OF E-MAILS.

17 ANOTHER IS SIMPLY -- I GUESS YOU'D CALLED
18 IT MULTIPLICATION. IF STEVE JOBS SENDS AN E-MAIL
19 TO 15 PEOPLE AND EACH OF THEM SAVE IT AND EACH OF
20 THEM PRODUCE THAT E-MAIL AND STEVE JOBS DOES,
21 YOU'RE GOING TO NOW HAVE 16 COPIES OF AN E-MAIL AND
22 ONLY ONE OF THEM IS FROM STEVE JOBS. THAT'S GOING
23 TO MAKE IT LOOK AS THOUGH STEVE JOBS ISN'T
24 PRODUCING AS MANY BECAUSE HE PRODUCED ONE OF THE
25 16. BUT IN FACT, HE PRODUCED EXACTLY THE SAME

1 E-MAIL AS THE OTHER 15.

2 SO YOU CAN'T JUST LOOK AT THE STATISTICS
3 AND FROM THE STATISTICS ASSUME THAT E-MAILS HAVE
4 BEEN SPOLIATED.

5 THE COURT: BUT WHY WASN'T MR. JOBS GIVEN
6 A LITIGATION HOLD NOTICE?

7 MS. TUCHER: BECAUSE APPLE HAS MADE
8 SPECIFIC ARRANGEMENTS WITH MR. JOBS, IN LIGHT OF
9 HIS SPECIFIC ROLE AT THE COMPANY, AND PERHAPS IN
10 LIGHT OF OTHER REASONS AS WELL, TO COLLECT ALL OF
11 HIS E-MAILS ON A REGULAR BASIS.

12 HE WAS ALSO APPRISED, THROUGH
13 CONVERSATIONS THAT DIDN'T INVOLVE A WRITTEN NOTICE,
14 OF WHAT THE OBLIGATIONS WERE TO PRESERVE EVIDENCE.

15 THE COURT: WELL, I'M STILL NOT
16 PERSUADED. DO YOU NOT FEEL THAT THERE'S SOME
17 TENSION BETWEEN SAYING THERE WAS A DISPUTE AS OF
18 AUGUST OF 2010, THEREFORE, DOCUMENTATION FROM THAT
19 MEETING SHOULD BE PROTECTED UNDER FEDERAL RULE OF
20 EVIDENCE 408? SAMSUNG HAD AN OBLIGATION TO
21 PRESERVE DATA BECAUSE SAMSUNG HAD A REASONABLE
22 APPREHENSION OF LITIGATION WITH ITSELF AND NOT WITH
23 ANOTHER PARTY? I MEAN, IT JUST DOESN'T MAKE SENSE.

24 MS. TUCHER: I DO UNDERSTAND WHY YOU SEE
25 A TENSION. I BELIEVE THE TENSION IS EXPLAINABLE.

1 BUT I THINK THE MOST IMPORTANT POINT HERE
2 IS THAT THE TRIGGER POINT IS NOT DISPOSITIVE.
3 BECAUSE SAMSUNG HAS TO PROVE, THEY HAVE TO HAVE
4 EVIDENCE NOT ONLY OF A TRIGGER POINT, BUT OF
5 DESTRUCTION, AND THEY HAVE NO EVIDENCE OF
6 DESTRUCTION.

7 IF THEY DIDN'T THINK THAT THEY'D SEEN
8 ENOUGH OF STEVE JOBS' E-MAILS, THEY COULD HAVE
9 ASKED FOR MORE. THEY COULD HAVE LOOKED AT THE
10 STATISTICS AND SAID "THE STATISTICS SUGGEST YOU
11 SHOULD HAVE GIVEN US MORE STEVE JOBS E-MAILS." OR
12 THEY COULD HAVE LOOKED AT SEARCH TERMS AND SAID
13 "YOU SHOULD HAVE SEARCHED FOR A BROADER CATEGORY OF
14 DOCUMENTS FROM MR. JOBS."

15 THE COURT: BUT WHEN THE SHOE WAS ON THE
16 OTHER FOOT, YOU WERE ARGUING, HOW CAN WE PROVE
17 SOMETHING THAT DOESN'T EXIST ANYMORE?

18 BUT REGARDLESS, THEY HAVE A LOT OF
19 STATISTICAL INFORMATION FAR BEYOND MR. JOBS, AND
20 WHY, YOU KNOW, LITIGATION HOLD NOTICES WERE GIVEN
21 LATE TO SCOTT FORSTALL, WHO TESTIFIED DURING THE
22 TRIAL, WHO WAS AN INVENTOR ON SOME OF THE PATENTS,
23 I JUST DON'T FEEL, BASED ON THE RECORD, THAT APPLE
24 FULFILLED ITS OWN OBLIGATIONS TO TIMELY ISSUE
25 LITIGATION HOLD NOTICES.

1 MS. TUCHER: YOUR HONOR, THIS IS TOO
2 IMPORTANT AN ISSUE FOR ME TO JUST SKIP OVER OTHER
3 CUSTODIANS. I STARTED WITH MR. JOBS BECAUSE YOU
4 MENTIONED HIM.

5 BUT LET'S TAKE THE EXAMPLE OF
6 SCOTT FORSTALL. HE HAS LITERALLY DOZENS OF
7 DOCUMENT RETENTION NOTICES THAT HE'S RECEIVED. I
8 THINK THE NUMBER IS SOMETHING LIKE 78.

9 THE COURT: RIGHT. BUT YOU KNOW WHAT?
10 YOU DON'T GET TO SAY "BECAUSE I HAVE LITIGATION
11 WITH EVERY OTHER SMARTPHONE MANUFACTURER IN THE
12 WORLD, OR WHOEVER IT IS, THAT THAT RELIEVES ME OF
13 MY OBLIGATION TO PRESERVE DOCUMENTS IN THIS CASE
14 FOR ISSUES AND PRODUCTS AND INTELLECTUAL PROPERTY
15 THAT IS THE SUBJECT OF THIS CASE."

16 I WAS NOT PERSUADED BY THE LIST OF
17 OTHER -- YOU KNOW, OBVIOUSLY NO ONE WOULD DISPUTE
18 THAT APPLE IS INVOLVED IN A LOT OF LITIGATIONS, SO
19 THAT JUST DOESN'T ABSOLVE APPLE OF ITS OBLIGATION
20 TO DO LITIGATION HOLDS THAT ARE SPECIFIC TO THIS
21 CASE.

22 MS. TUCHER: APPLE UNDERSTANDS ITS
23 OBLIGATION TO ISSUE LITIGATION HOLDS THAT ARE
24 SPECIFIC TO THIS CASE, AND IT DID.

25 BUT THE REASON THAT IT'S IMPORTANT THAT

1 MR. FORSTALL WAS SUBJECT TO 78 DOCUMENT RETENTION
2 NOTICES IN OTHER LITIGATIONS IS THAT HE'S ALSO HAD
3 HIS DOCUMENTS COLLECTED MANY TIMES IN OTHER
4 LITIGATIONS.

5 AND WHEN APPLE GOES TO COLLECT DOCUMENTS
6 FROM A CUSTODIAN LIKE MR. FORSTALL, IT DOESN'T JUST
7 SAY "HERE'S THE SPECIFIC DISPUTE, FIND ME THE
8 RELEVANT E-MAILS."

9 IT SENDS IN AN OUTSIDE VENDOR TO DO A
10 WHOLESALE COLLECTION OF ALL WORK-RELATED E-MAILS.
11 SO BECAUSE MR. FORSTALL WAS A CUSTODIAN IN OTHER
12 LITIGATIONS AND PERIODICALLY THAT'S HAPPENED TO
13 HIM, PERIODICALLY HE GETS AN ENTIRE SNAPSHOT, AN
14 ENTIRE COPY OF HIS WORK-RELATED E-MAILS RETAINED.

15 AND THOSE ARE AVAILABLE TO THIS DAY. IF
16 THERE HAD BEEN A DISPUTE IN THIS CASE ABOUT WHETHER
17 MR. FORSTALL'S E-MAIL COLLECTION HAD BEEN ADEQUATE,
18 OR WHETHER HIS PRESERVATION HAD BEGUN EARLY ENOUGH,
19 APPLE COULD HAVE SAID, WHEN THE ISSUE FIRST AROSE,
20 "WE'LL SHOW YOU ALL OF THE RELEVANT E-MAILS FROM
21 MR. FORSTALL BECAUSE WE HAVE THEM."

22 THERE IS NO SPOILIATION MOTION UNTIL THERE
23 IS EVIDENCE OF DESTROYED, DESTROYED EVIDENCE.

24 AND SO USING THE EXAMPLE OF MR. JOBS OR
25 USING THE EXAMPLE OF MR. FORSTALL -- OR WE CAN KEEP

1 GOING DOWN THE LIST OF CUSTODIANS, WE CAN TALK
2 ABOUT ANY ONE THAT YOU WANT -- IN OUR PAPERS THIS
3 MORNING, WE TALKED ABOUT THE NINE THAT SAMSUNG HAD
4 CHOSEN WHEN THEY DID THIS, LET'S CALL IT
5 DISCREPANCY ANALYSIS.

6 THEY MADE A TABLE OF NINE CUSTODIANS AND
7 SAID THESE ARE THE NINE PEOPLE WHO DIDN'T PRODUCE
8 ENOUGH E-MAIL IF YOU COMPARE WHAT THEY PRODUCED
9 FROM THEIR OWN FILES TO WHAT OTHER PEOPLE PRODUCED
10 OF CORRESPONDENCE INVOLVING THEM.

11 SO WE LOOKED AT THOSE NINE AND WE SAID,
12 DID THEY NOT SAVE E-MAIL FROM FAR ENOUGH BACK?

13 AND WE FOUND THAT MORE THAN
14 THREE-QUARTERS OF THE E-MAIL THAT THEY PRODUCED,
15 THOSE NINE EMPLOYEES PRODUCED, PRE-DATES AUGUST OF
16 2010.

17 SO IF THERE'S A QUESTION OF WHETHER THOSE
18 NINE EMPLOYEES SPOLIATED E-MAIL BECAUSE THEY DIDN'T
19 GET A DOCUMENT RETENTION NOTICE UNTIL SPRING OF
20 2011, WE CAN ANSWER THAT 100 PERCENT WITH
21 CONFIDENCE THAT THAT DIDN'T HAPPEN, BECAUSE WE KNOW
22 THAT THEY SAVED E-MAILS FROM BEFORE AUGUST OF 2010,
23 MORE THAN THREE QUARTERS OF THE E-MAILS THEY
24 PRODUCED. FOR SOME OF THEM IT'S 88 PERCENT.

25 THEY WOULDN'T HAVE BEEN SAVING ALL OF

1 THOSE E-MAILS AND APPLE WOULDN'T HAVE BEEN ABLE TO
2 PRODUCE ALL OF THOSE E-MAILS IF, AS SAMSUNG
3 CONTENDS, APPLE IS SOMEHOW SPOLIATING EVIDENCE
4 BECAUSE IT DIDN'T ISSUE A DOCUMENT RETENTION NOTICE
5 IN AUGUST.

6 THAT'S THE HEART OF OUR CASE. THAT'S
7 THE -- THAT'S ONE OF THE MANY PIECES OF EXPLANATION
8 FOR WHY SAMSUNG'S STATISTICAL ANALYSIS DOESN'T
9 PROVE SPOILIATION.

10 THE COURT: ALL RIGHT. IS THERE ANYTHING
11 ELSE THAT YOU'D LIKE TO STATE?

12 MS. TUCHER: I WOULD LIKE TO ADDRESS ANY
13 CUSTODIAN ABOUT WHOM YOUR HONOR HAS QUESTIONS
14 BECAUSE IT'S IMPORTANT TO MY CLIENT THAT YOU
15 UNDERSTAND THAT FOR EVERY SINGLE ONE OF THE
16 CUSTODIANS, WE HAVE AN ADEQUATE PROGRAM IN PLACE.

17 THE COURT: WHY DIDN'T YOU SERVE A
18 LITIGATION HOLD NOTICE IN AUGUST OF 2010?

19 MS. TUCHER: BECAUSE IN AUGUST OF 2010 WE
20 DIDN'T REASONABLY APPREHEND LITIGATION.

21 THE COURT: OKAY. BUT YOU'RE ARGUING
22 THAT YOU SHOULD GET EVIDENCE EXCLUDED AT TRIAL
23 BASED ON FEDERAL RULE OF EVIDENCE 408 BECAUSE THERE
24 IS A DISPUTE. THAT'S WHAT MR. MUELLER ARGUED AND
25 HE SUCCEEDED.

1 (DISCUSSION OFF THE RECORD BETWEEN
2 COUNSEL.)

3 MR. JACOBS: YOUR HONOR, WE'VE GONE BACK
4 TO CHECK AND MR. JOBS' RECORDS INDICATE A
5 LITIGATION HOLD NOTICE WAS PROVIDED IN
6 APPLE/SAMSUNG ON APRIL 20TH, 2011. SO MR. JOBS DID
7 RECEIVE A LITIGATION HOLD NOTICE IN THIS CASE
8 AROUND THE TIME THE COMPLAINT WAS FILED.

9 THE COURT: WHEN DID MR. FORSTALL GET
10 HIS?

11 MR. JACOBS: I DON'T HAVE THAT ONE IN
12 THIS RECORD.

13 IN THE CASE OF -- TO ANSWER YOUR SPECIFIC
14 QUESTION WHILE MS. TUCHER IS LOOKING, OBVIOUSLY YOU
15 CAN HAVE A DISAGREEMENT THAT GIVES RISE TO A
16 SETTLEMENT NEGOTIATION BEFORE YOU THINK THAT THAT
17 AGREEMENT IS GOING TO GIVE RISE TO THE LITIGATION,
18 AND THE DOCUMENTS OF COURSE THEMSELVES ARE LABELED
19 RULE 408 TO ENCOURAGE A SETTLEMENT DISCUSSION AND
20 AVOID THE NEED FOR LITIGATION AND AVOID THE NEED
21 FOR OUTSIDE COUNSEL AND TO GET ALL OF THAT
22 LAUNCHED. SO THE TWO ARE NOT CONCEPTUALLY
23 INCONSISTENT.

24 THE COURT: ALL RIGHT. I'M GOING TO
25 START COUNTING TOWARDS YOUR OBJECTIONS TIME BECAUSE

1 THIS WAS YOUR VERY FIRST OBJECTION AND I'VE HEARD,
2 WHAT, ABOUT 20, 25 MINUTES ON THIS.

3 MS. TUCHER: THEN LET ME QUICKLY ANSWER
4 YOUR QUESTION ABOUT MR. FORSTALL.

5 THE COURT: GO AHEAD.

6 MS. TUCHER: HE RECEIVED HIS FIRST
7 DOCUMENT RETENTION NOTICE ON JUNE 28TH OF 2011.
8 HIS PATENT, THE '163 PATENT, WAS NOT IN THE
9 ORIGINAL COMPLAINT. THAT WAS IN THE AMENDED
10 COMPLAINT, SO THAT WAS WITHIN DAYS.

11 HE RECEIVED A SECOND DOCUMENT RETENTION
12 NOTICE A MONTH LATER.

13 AND THAT'S JUST IN THIS CASE. HE -- AS I
14 SAID, HE HAD DOZENS OF EARLIER CASES.

15 STEVEN LEMANY, WHO'S ANOTHER CUSTODIAN
16 THAT SAMSUNG MADE A BIG DEAL, RECEIVED A SERIES OF
17 DOCUMENT RETENTION NOTICES IN THIS CASE AND, WHEN
18 HE WAS DEPOSED, HE WAS ASKED ABOUT THE DOCUMENT
19 COLLECTION OF HIS FILES AND HE SAID "THEY'VE COME
20 IN SO MANY TIMES TO COPY ALL OF MY WORK-RELATED
21 E-MAILS, I CAN'T TELL YOU WHICH HAPPENED FOR WHICH
22 CASE ON WHICH DATE."

23 SO THIS IS PART OF THE CULTURE OF
24 PRESERVATION AT APPLE THAT INFORMS APPLE'S DECISION
25 ABOUT WHEN IT HAS TO ISSUE LITIGATION NOTICES,

1 LITIGATION RETENTION NOTICES, AND THAT I THINK
2 CONCLUSIVELY PROVES THAT THERE'S NO EVIDENCE OF
3 DESTRUCTION OF DOCUMENTS HERE.

4 THANK YOU.

5 THE COURT: OKAY. THANK YOU.

6 DOES SAMSUNG WANT TO RESPOND?

7 MR. JOHNSON: YOUR HONOR, UNLESS YOU HAVE
8 SPECIFIC QUESTIONS OF SAMSUNG, I KNOW WE HAVE A LOT
9 TO ACCOMPLISH TODAY AND TO GET READY FOR TOMORROW.
10 SO IF THERE'S SPECIFIC QUESTIONS, MS. ESTRICH, A
11 PARTNER OF MINE, WILL ADDRESS THEM. OTHERWISE WE
12 CAN MOVE ON.

13 THE COURT: WELL, YOU WANT TO ADDRESS
14 THIS SMALL POINT ABOUT DR. HONG NOT PRODUCING ANY
15 E-MAIL?

16 MR. JOHNSON: I'LL LET MS. ESTRICH HANDLE
17 THAT.

18 THE COURT: AND DR. MIN-HYOUK LEE, OR
19 MR. MIN-HYOUK LEE.

20 MS. ESTRICH: FIRST OF ALL, THANK YOU,
21 YOUR HONOR. SUSAN ESTRICH FROM QUINN EMMANUEL FOR
22 SAMSUNG.

23 DR. HONG, THE E-MAIL THAT THEY CALL OUT,
24 IS A MARCH 2010 E-MAIL DEALING WITH THE IPAD 2.

25 THEY ALSO CALL OUT A PX 43 E-MAIL WHICH

1 WAS FROM FEBRUARY 2010.

2 IN THE CASE OF MR. MIN-HYOUK LEE, EXCUSE
3 ME --

4 THE COURT: I'M LOOKING AT ONE APRIL 17TH
5 OF 2011 REGARDING COMPARISONS OF APPLE PRODUCTS.

6 MS. ESTRICH: YOUR HONOR, WHAT I WOULD
7 SIMPLY SAY IS THAT IN OUR BRIEF, WE CALL OUT JUST
8 AS MANY, IF NOT MORE, E-MAILS FROM VARIOUS
9 CUSTODIANS THAT WERE SIMPLY NOT PRODUCED BY THOSE
10 CUSTODIANS.

11 I'LL GIVE YOU A COUPLE OF EXAMPLES THAT
12 THE BRIEF HAS DETAILED TABLES THAT, IN EACH CASE,
13 ARE AS DETAILED AND AS TROUBLING, IF THEY ARE
14 TROUBLING, AS THEIRS.

15 BUT WE'RE REFERRING TO MR. JOBS. I THINK
16 THE NUMBER ON MR. JOBS IS THAT -- THERE'S SO MANY
17 NUMBERS HERE -- BUT MR. JOBS PRODUCED ZERO E-MAILS
18 FROM AUGUST TO APRIL. 51 CUSTODIAL E-MAILS TOTAL,
19 AND WE COUNTED, BASED ON THEIR COUNT AS WELL, 1670
20 NON-CUSTODIAN E MAILS.

21 MR. IVE PRODUCED NINE E-MAILS FROM AUGUST
22 TO APRIL, 45 OVERALL, AND 6 --

23 THE COURT: BUT WHY ARE WE GETTING ZERO
24 FOR DR. HONG AND MR. LEE?

25 MS. ESTRICH: I THINK THE MAJORITY -- IN

1 MR. LEE'S CASE, HE WAS THE DESIGNER WHO FINISHED
2 HIS PRODUCT THAT'S AT ISSUE IN JULY 2010. SO THERE
3 WOULD BE NO PARTICULAR REASON THAT WE WOULD ASSUME
4 THAT HE WOULD HAVE RESPONSIVE E-MAILS GOING TO THIS
5 CASE AFTER THE PRODUCT WAS RELEASED.

6 I THINK THE PROOF THAT -- I KNOW THAT THE
7 PROOF THAT APPLE OFFERED AS TO OUR SPOILIATION
8 CONSISTED ENTIRELY OF CALLING OUT INDIVIDUALS,
9 WHICH WE DID IN THEIRS, AND PROVIDING CHARTS, BOTH
10 OF CUSTODIAL AND NON-CUSTODIAL PRODUCTION.

11 AND IN BOTH CASES, BOTH SIDES WERE ABLE
12 TO SHOW THAT THERE WAS A REAL DISCREPANCY.

13 IN APPLE'S CASE, AS THEY'VE ACKNOWLEDGED,
14 THEY DID NOT ISSUE A LITIGATION HOLD NOTICE IN
15 AUGUST 2010. THEY CONTINUED TO HAVE A POLICY WHERE
16 EMPLOYEES WERE REGULARLY REMINDED TO AUTOMATICALLY
17 ELIMINATE THEIR DOCUMENTS.

18 THIS WOULD BE THE FIRST CASE, YOUR HONOR,
19 IN WHICH A DEFENDANT IS HELD TO AN EARLIER DATE
20 THAN A PLAINTIFF.

21 AS YOU MENTIONED, MICRON SUGGESTS JUST
22 THE OPPOSITE.

23 I THINK OUR BRIEFS, WE'VE BRIEFED THIS
24 MANY, MANY TIMES, MAKE CLEAR THAT OUR STATISTICAL
25 SHOWING AND OUR CALL OUTS OF INDIVIDUAL INVENTORS,

1 SUCH AS MR. JOBS PRODUCING NOTHING FROM HIS FILES,
2 IS EQUIVALENT TO THEIRS.

3 AND THE SPECIFIC CALL OUTS AS TO
4 DOCUMENTS CAME FROM OTHER CUSTODIANS AND THEY HAVE
5 PREVIOUSLY ARGUED, "WELL, YOU'RE CALLING OUT
6 MR. JOBS, BUT YOU GOT IT FROM SOMEBODY ELSE," OR
7 "YOU'RE CALLING OUT MR. IVE, BUT YOU GOT IT FROM
8 SOMEBODY ELSE."

9 AND IN EVERY CASE, THE SAME IS TRUE ON
10 OUR SIDE.

11 SO WE AGREE WITH THE COURT. WE'VE TAKEN
12 THE POSITION CONSISTENTLY THAT APRIL WAS THE
13 APPROPRIATE DATE, BUT IF AUGUST WAS THE APPROPRIATE
14 DATE, THEN BOTH SIDES ARE SUBJECT TO GIVING
15 LITIGATION HOLD NOTICES.

16 AND IN SOME CASES, THEY DIDN'T ISSUE
17 LITIGATION HOLD NOTICES TO KEY CUSTODIANS UNTIL SIX
18 MONTHS AFTER THE SUIT WAS FILED.

19 SO, YOUR HONOR, IF, AS YOUR TENTATIVE
20 INSTRUCTION DOES, THE SAME STANDARDS ARE APPLIED TO
21 BOTH SIDES AND IF THE SAME STATISTICAL EVIDENCE
22 THAT IS USED TO PROVE THAT WE SPOLIATED, IF THAT'S
23 WHAT IS CONSIDERED, THE SAME TEST APPLIED TO THEM
24 PRODUCES EXACTLY THE SAME RESULT.

25 SO IT HAS BEEN OUR POSITION THAT NO

1 INSTRUCTION SHOULD BE GIVEN AS TO EITHER SIDE, BUT
2 IF AN INSTRUCTION IS GIVEN AS TO US, THEN IT WOULD
3 BE ABSOLUTELY UNFAIR AND UNPRECEDENTED TO HOLD THE
4 OTHER SIDE, WHICH DIDN'T ISSUE LITIGATION HOLD
5 NOTICES AND IN WHICH THERE ARE JUST AS MANY
6 DISCREPANCIES, TO A DIFFERENT STANDARD.

7 THE COURT: LET ME ASK APPLE, IF I'M
8 GOING TO KEEP MY TENTATIVE AS MY FINAL AND ISSUE
9 THE IDENTICAL ADVERSE INFERENCE INSTRUCTIONS TO
10 BOTH SIDES, DO YOU WANT TO JUST HAVE AN AGREEMENT
11 THAT I'M NOT GOING TO ISSUE ONE TO EITHER SIDE, OR
12 DO YOU WANT ME TO JUST GO AHEAD AND DO IT AS TO
13 BOTH SIDES?

14 MS. ESTRICH: I THINK OUR VIEW IS THAT WE
15 WOULD AGREE TO HAVE NONE ISSUED AS TO EITHER SIDE.

16 WE HAVE HUNDREDS OF PAGES OF
17 INSTRUCTIONS, AS I UNDERSTAND, AND AN INSTRUCTION
18 THAT IS THE SAME AS TO BOTH SIDES IS, IN SOME
19 SENSE, ONE THAT BALANCES.

20 BUT WE HAVE NOT PREVIOUSLY DISCUSSED
21 THIS, BUT THAT'S OUR POSITION.

22 MS. TUCHER: YOUR HONOR, MAY I MENTION
23 SEVERAL POINTS BEFORE I ANSWER THAT QUESTION --

24 THE COURT: OKAY.

25 MS. TUCHER: -- REALIZING THAT IT COMES

1 OFF OUR CLOCK.

2 THE COURT: WELL, I'LL GIVE YOU A FEW
3 MINUTES FOR FREE RIGHT NOW.

4 MS. TUCHER: THANK YOU.

5 COUNSEL MENTIONED THE REMINDERS THAT GO
6 OUT TO CERTAIN APPLE EMPLOYEES ABOUT THE SIZE OF
7 THEIR E-MAIL BOXES.

8 A COUPLE THINGS THAT ARE REALLY IMPORTANT
9 TO KNOW. FIRST OF ALL, MOST OF THE CUSTODIANS THAT
10 ARE OF INTEREST IN THIS CASE DIDN'T GET THOSE
11 NOTICES AT ALL BECAUSE THEY WERE SUBJECT TO THE
12 LITIGATION -- TO THE DOCUMENT RETENTION HOLDS AND,
13 BECAUSE OF THEIR STATUS IN OTHER LITIGATIONS, THEY
14 DIDN'T GET THOSE NOTICES.

15 SO WE HAVE NO EVIDENCE IN THE RECORD OF
16 ANY PARTICULAR CUSTODIAN IN THIS CASE GETTING EVEN
17 THAT KIND OF WEAK REMINDER THAT THEY OUGHT TO KEEP
18 TRACK OF THE SIZE OF THEIR E-MAILS.

19 SECONDLY, JUST --

20 THE COURT: WHAT IS THE SIZE, ANYWAY,
21 THAT'S PERMISSIBLE OR IDEAL? WHEN DO YOU START
22 GETTING NOTICES THAT YOUR E-MAIL ACCOUNT IS TOO
23 BIG?

24 MS. TUCHER: I CAN'T TELL YOU EXACTLY
25 WHEN YOU START GETTING THEM.

1 BUT THE POINT I WANTED TO MAKE THAT'S
2 RELATED TO THAT IS THERE'S ABSOLUTELY NO
3 REQUIREMENT, NO PRESSURE OR ANY OTHER -- ANYTHING
4 THAT TELLS APPLE EMPLOYEES THAT THEY HAVE TO GET
5 RID OF THAT E-MAIL. THEY CAN SAVE IT TO THEIR --

6 THE COURT: WELL, IF I'M TOLD, "YOUR
7 E-MAIL ACCOUNT IS TOO FULL," I THINK THE
8 UNDERSTANDING IS I'M SUPPOSED TO START DELETING.

9 MS. TUCHER: YOUR HONOR, I CAN'T TELL YOU
10 HOW LONG I'VE BEEN GETTING AUTO GENERATED MESSAGES
11 OF THAT SORT.

12 THE COURT: BUT YOU COULD -- YOU CAN
13 CHOOSE TO IGNORE IT, BUT YOU STILL RECEIVE THE
14 MESSAGE THAT YOU NEED TO REDUCE THE SIZE, RIGHT, BY
15 DELETION?

16 MS. TUCHER: SO FIRST OF ALL, NO EVIDENCE
17 OF SPECIFIC CUSTODIANS WHO RECEIVED THAT MESSAGE IN
18 THIS CASE, NUMBER ONE.

19 THE COURT: BUT YOU AGREE THAT THAT IS
20 THE PATTERN AND PRACTICE AT APPLE TO GIVE NOTICE TO
21 EMPLOYEES THAT THEIR E-MAIL ACCOUNTS HAVE BECOME
22 TOO VOLUMINOUS?

23 MS. TUCHER: NO. ONLY FOR EMPLOYEES WHO
24 ARE NOT SUBJECT TO A DOCUMENT RETENTION NOTICE IN
25 ANY CASE AT ALL.

1 AND I COULD GO THROUGH THE LIST. ALL THE
2 CUSTODIANS WE'RE INTERESTED IN ARE SUBJECT TO
3 DOCUMENT RETENTION NOTICES IN SOME OTHER CASE AND,
4 BECAUSE OF THAT, THEY DIDN'T GET EVEN THIS REMINDER
5 THAT THEY SHOULD KEEP TRACK OF THEIR E-MAIL IN-BOX
6 SIZE.

7 SO ALTHOUGH SAMSUNG HAS ATTEMPTED TO DRAW
8 SOME SORT OF COMPARABILITY BETWEEN THESE E-MAIL
9 NOTICES THAT SOMETIMES GO OUT TO CERTAIN APPLE
10 EMPLOYEES, THERE'S NO EVIDENCE THAT THEY WENT OUT
11 TO THE CUSTODIANS WHO MATTER HERE. AND EVEN IF
12 THEY HAD GONE OUT, THERE'S NO EVIDENCE THAT IT
13 PRODUCED ANY DELETION OF THE E-MAILS.

14 SECOND POINT I WANTED TO MAKE.
15 MS. ESTRICH SAID -- PERHAPS BECAUSE SHE'S NOT FULLY
16 FAMILIAR WITH THE RECORD IN THE COURT BELOW -- THAT
17 THERE WERE SPECIFIC E-MAILS THAT SAMSUNG'S PAPERS
18 CALLED OUT THAT APPLE HAD LOST OR DESTROYED.

19 THAT IS SIMPLY NOT TRUE. SAMSUNG DIDN'T,
20 IN ANY OF THE PAPERS THAT THEY HAVE FILED, CITE A
21 SINGLE E-MAIL OR A SINGLE DOCUMENT THAT THEY
22 THOUGHT A CUSTODIAN SHOULD HAVE PRODUCED AND
23 DIDN'T. NOT A ONE. AND THAT IS THE REASON THAT
24 THEIR -- THAT THEIR MOTION MUST FAIL.

25 AND FINALLY, YOU ASKED ABOUT HONG AND LEE

1 DOCUMENTS, AND I -- IT SOUNDS LIKE YOU HAVE THE
2 APRIL 17TH E-MAIL IN FRONT OF YOU. I BROUGHT A
3 COPY OF IT JUST IN CASE.

4 WE ALSO HAVE OTHER DOCUMENTS THAT SHOW
5 MR. LEE, EVEN AFTER APRIL OF 2011, RECEIVING OR
6 SENDING DOCUMENTS RELATING TO THE GALAXY S THAT
7 OTHER CUSTODIANS HAD AND OTHER CUSTODIANS THOUGHT
8 WERE RELEVANT. WE CITE THOSE IN OUR REPLY BRIEF
9 AND I'D BE HAPPY TO HAND YOU COPIES IF THAT WOULD
10 HELP YOU.

11 BUT THE POINT I WANTED TO MAKE IS JUST AS
12 THE AUGUST VERSUS APRIL QUESTION IS NOT DISPOSITIVE
13 AGAINST APPLE, IT'S NOT EVEN DISPOSITIVE AGAINST
14 SAMSUNG BECAUSE, TO THIS DAY, SAMSUNG IS DESTROYING
15 E-MAILS EVERY 14 DAYS. TO THIS DAY, THEY ARE
16 SPOLIATING EVIDENCE, AND NO MATTER HOW FAR BACK YOU
17 GO, AUGUST OR APRIL, APPLE WAS NOT.

18 AND THAT'S THE CRUCIAL DIFFERENCE BETWEEN
19 THE TWO AND THAT'S WHY APPLYING THE SAME STANDARD
20 TO BOTH COMPANIES COULD, SHOULD, AND WHEN
21 JUDGE GREWAL CONSIDERED THIS, DID LEAD TO A
22 SPOLIATION INSTRUCTION AGAINST SAMSUNG AND NOT A
23 SPOLIATION INSTRUCTION AGAINST APPLE.

24 THAT'S WHAT WE THINK IS THE APPROPRIATE
25 OUTCOME HERE.

1 THE COURT: ALL RIGHT.

2 MS. TUCHER: IT IS ALSO TRUE --

3 THE COURT: SO IF I'M GOING TO ISSUE TWO,
4 THEN APPLE'S POSITION IS JUST GO WITH TWO?

5 MS. TUCHER: IT IS TRUE THAT IF YOU ARE
6 GOING TO ISSUE TWO, IT IS APPLE'S POSITION THAT
7 THAT SHOULDN'T HAPPEN.

8 THE COURT: SO YOU THEN WOULD ALSO AGREE
9 NEITHER SIDE WOULD GET IT?

10 MS. TUCHER: WE THINK IT WOULD BE BETTER
11 FOR NEITHER SIDE TO GET ONE THAN FOR BOTH SIDES TO
12 GET ONE.

13 THE COURT: ALL RIGHT. THANK YOU ALL.

14 MR. JOHNSON: AND YOUR HONOR, JUST FOR
15 CLARIFICATION, IF YOUR HONOR DECIDES TO WITHDRAW --
16 IF THERE IS NO INSTRUCTION TO BOTH SIDES, THEN
17 NEITHER SIDE SHOULD REALLY BE PERMITTED TO REFER TO
18 IT IN CLOSING FOR TOMORROW.

19 THE COURT: YES.

20 MR. JOHNSON: OKAY.

21 THE COURT: YES, I WOULD ASSUME THAT YOU
22 WOULDN'T. OTHERWISE I'D CLARIFIED IT WAS GOING OUT
23 AGAINST BOTH SIDES.

24 MS. ESTRICH: YOUR HONOR, I CAN RESPOND
25 TO THE SPECIFIC POINTS, BUT IN THE INTEREST OF

1 TIME, IF YOU DON'T WANT ME TO, I WILL SIT RIGHT
2 DOWN.

3 THE COURT: NO. WE NEED TO GET THE JURY
4 INSTRUCTIONS DONE.

5 MS. ESTRICH: OKAY. THANK YOU VERY MUCH.

6 THE COURT: I APPRECIATE THAT.

7 LET'S THEN GO TO -- DO YOU STILL WANT ME
8 TO HOLD OFF ON THE VERDICT FORM AND DO JURY
9 INSTRUCTIONS NEXT?

10 MR. JACOBS: YES, YOUR HONOR.

11 THE COURT: ALL RIGHT. SO LET'S GO TO
12 THE JURY INSTRUCTIONS.

13 NOW, HOW DO YOU RESPOND TO SPEND -- YOU
14 EACH HAVE AN HOUR. HOW DO YOU WANT TO SPEND YOUR
15 TIME? I WAS THINKING I CAN GIVE YOU JUST SOME --
16 IF YOU WANT TO JUST SET SOME TIME ASIDE TO GO
17 THROUGH STRAIGHT WHATEVER YOU WANT TO PRESERVE, AND
18 THEN SOME TIME TO HAVE A MORE INTERACTIVE
19 DISCUSSION, BECAUSE I HAVE SOME OF YOUR HIGH
20 PRIORITIES I MIGHT ACCEPT OR I MIGHT MEET YOU
21 PARTWAY OR IT'S GOING TO INVOLVE A LITTLE BIT MORE
22 OF AN INTERACTIVE CONVERSATION. SO HOW DO YOU WANT
23 TO PROCEED?

24 MR. JACOBS: THAT WOULD BE -- SOME KIND
25 OF PROVISION LIKE THAT WOULD MAKE A LOT OF SENSE TO

1 US.

2 THE COURT: OKAY. SO HOW MUCH TIME DO
3 YOU NEED FOR YOUR STRAIGHT PUTTING EVERYTHING ON
4 THE RECORD?

5 MR. JACOBS: PROBABLY 20 MINUTES FOR US,
6 YOUR HONOR.

7 MR. JOHNSON: ABOUT THE SAME. MAYBE NOT
8 QUITE AS LONG.

9 THE COURT: DO YOU WANT TO DO THAT FIRST
10 OR DO THAT SECOND?

11 MR. JACOBS: I WOULD DO IT SECOND, IF
12 ONLY BECAUSE GOING THROUGH THE HPO'S MAY --

13 THE COURT: MAY MOOT SOME OF THEM?

14 MR. JACOBS: YES.

15 THE COURT: OKAY. ALL RIGHT. THAT'S
16 FINE. ALL RIGHT.

17 SO THIS IS WHAT I'D LIKE TO DO. WHAT IF
18 I JUST TOLD YOU WHAT THE TENTATIVE IS AS TO EACH
19 ONE AND THEN YOU CAN DECIDE HOW MUCH OF YOUR TIME
20 YOU WANT TO SPEND ON FIGHTING IT OR NOT. OKAY?

21 ALL RIGHT. SHOULD WE GO THROUGH
22 SAMSUNG'S FIRST?

23 OKAY. THE TIME IS NOW 2:42.

24 ALL RIGHT. WITH REGARD TO SALE IN THE
25 UNITED STATES, THAT'S DENIED. I DON'T BELIEVE THAT

1 DELIVERY INTO THE UNITED STATES IS REQUIRED. I
2 KNOW YOU RELY ON MINEBEA VERSUS PAPST AND THE OTHER
3 CASES. THOSE ARE OUT OF DISTRICT COURT CASES.
4 THEY'RE NOT BINDING ON ME.

5 FEDERAL CIRCUIT CASES REALLY SEEM TO
6 FOCUS ON WHERE THE ACTIVITY TOOK PLACE, SO I THINK
7 THE INSTRUCTION THAT'S IN THE INSTRUCTIONS NOW IS
8 MORE CONSISTENT WITH FEDERAL CIRCUIT LAW.

9 SO I'M DENYING THE SALE IN THE U.S.

10 DO YOU WANT TO FIGHT IT OR NO?

11 MR. JOHNSON: YOUR HONOR, CAN WE GO
12 THROUGH THE WHOLE LIST AND THEN LET US DECIDE?

13 THE COURT: OH, OKAY. SURE. ALL RIGHT.

14 LET'S GO TO DESIGN PATENT COPYING, THAT'S
15 34.4(B). THIS IS DENIED.

16 WHILE IT'S TRUE THAT INTENT TO COPY IS
17 NOT RELEVANT TO AN INFRINGEMENT ANALYSIS, ADDING
18 ANOTHER INSTRUCTION WHEN THIS IS ALREADY COVERED
19 ELSEWHERE I THINK WOULD PLACE UNDUE EMPHASIS ON
20 THIS ISSUE AND I THINK IT'S A RELATIVELY MINOR
21 POINT AND SHOULDN'T BE OVEREMPHASIZED. SO THAT'S
22 DENIED.

23 NOW, WITH REGARD TO DESIGN PATENT
24 FUNCTIONALITY, I'M NOT PERSUADED BY AMINI
25 INNOVATION CORP. THAT SEEMS TO BE AN OUTLIER.

1 THERE AREN'T ANY OTHER FED CIRCUIT CASES THAT ADOPT
2 TRADE DRESS AS A TEST FOR FUNCTIONALITY AND DESIGN
3 PATENTS.

4 AND OTHERWISE I THINK THAT THE DICTATED
5 BY FUNCTIONALITY STANDARD IS THE CORRECT STATEMENT
6 OF THE LAW.

7 NOW, I ALSO, I KNOW THAT I HAD
8 PREVIOUSLY, WHEN I DID THE CLAIM CONSTRUCTION ON
9 THE DESIGN PATENTS, HAD SAID I MIGHT ISSUE AN ORDER
10 ON FUNCTIONALITY AND CALLING OUT SPECIFIC
11 FUNCTIONS, BUT I'M NOT CONVINCED THAT, ON THE
12 RECORD BEFORE US, ANY ADDITIONAL LIMITATIONS HAVE
13 BEEN ESTABLISHED BASED ON FUNCTIONALITY, SO I DENY
14 THAT REQUEST.

15 NOW, THE ONE WHERE I COULD HAVE SOME
16 MOVEMENT ON IS WHETHER WE WANT TO -- EVEN THOUGH
17 THE PGH TECHNOLOGY FACTORS ARE NOT IN THE MODEL
18 INSTRUCTIONS THAT WE'VE BEEN USING, I WOULD NOT BE
19 OPPOSED TO INCLUDING THESE AS SOME FACTORS YOU MAY
20 CONSIDER. I DON'T FEEL THAT STRONGLY.

21 I MEAN, I PREFER GENERALLY -- AS YOU'VE
22 SEEN WITH THE JURY INSTRUCTIONS I'VE ISSUED, I
23 PREFER TO GO WITH THE MODEL LANGUAGE WITHOUT MUCH
24 ALTERATION, BUT THAT'S THE ONE WHERE THERE COULD BE
25 SOME POTENTIAL MOVEMENT.

1 OKAY. LET'S GO TO 40 TO 43, DESIGN
2 PATENT DAMAGES. AS MUCH AS I WOULD LIKE TO MAKE
3 APPLE ELECT UPFRONT, I DON'T THINK THERE'S ANY LAW
4 THAT REQUIRES THEM TO DO THAT, SO I'M NOT GOING TO
5 REQUIRE THAT EVEN THOUGH THAT CERTAINLY WOULD BE
6 HELPFUL.

7 NOW, I DO AGREE WITH YOU THAT THE
8 INSTRUCTIONS SHOULD BE CLEARER, A LITTLE BIT, TO
9 AVOID DOUBLE RECOVERY, AND THESE ARE VERY
10 COMPLICATED INSTRUCTIONS AND I HAVE SOME CONCERNS,
11 WHICH IS WHY I ASKED THE PARTIES TO FILE THE
12 ADDITIONAL BRIEFING ON DAMAGES AND DOUBLE RECOVERY,
13 BECAUSE I SHARE THE SAME CONCERNS THAT SAMSUNG
14 DOES.

15 SO WHAT I MIGHT CONSIDER DOING IS MAYBE
16 REARRANGING THE INSTRUCTIONS, PUTTING LOST PROFITS
17 FIRST, THEN REASONABLE ROYALTY, THEN INFRINGER'S
18 PROFITS AND HAVING -- IN THE LOST PROFITS AND
19 REASONABLE ROYALTY INSTRUCTIONS, MAKE IT A LITTLE
20 MORE CLEAR THAT APPLE MAY RECOVER COMPENSATORY
21 DAMAGES IN THE FORM OF EITHER LOST PROFITS OR
22 REASONABLE ROYALTY; AND THEN IN THE, YOU KNOW,
23 INSTRUCTIONS SAYING THAT, LOOK, YOU CANNOT RECOVER
24 FOR BOTH COMPENSATORY DAMAGES AND AN INFRINGER'S
25 PROFITS FOR THE SAME SALE OF AN INFRINGING PRODUCT.

1 NOW, ALL OF THOSE INSTRUCTIONS ARE
2 ALREADY IN THE CURRENT SET, BUT I AM AMENABLE TO
3 TRYING TO MAKE IT A LITTLE CLEARER IF YOU THINK
4 IT'S STILL POTENTIALLY MISLEADING OR IT MIGHT
5 CONFUSE THE JURY INTO THINKING THEY CAN GIVE DOUBLE
6 RECOVERY. SO THERE'S SOME FLEXIBILITY ON THAT ONE.

7 IF YOU HAVE SPECIFIC LANGUAGE THAT YOU
8 THINK WOULD HELP CLARIFY THAT, I'M OPEN TO IT.

9 LET'S GO TO 42, DESIGN PATENT DAMAGES. I
10 THINK THAT'S SORT OF ALONG THE SAME LINES AS WHAT
11 I'VE JUST DESCRIBED. I MIGHT BE WILLING TO DO A
12 LITTLE BIT MORE BY WAY OF INTRODUCTION IN SOME OF
13 THESE INSTRUCTIONS TO MAKE IT A LITTLE CLEARER.

14 TRADE DRESS FUNCTIONALITY, SO FOR TRADE
15 DRESS, I'M THINKING OF PERHAPS TAKING THIS DISC
16 GOLF LANGUAGE OUT. I THINK IT MIGHT BE CONFUSING
17 TO A JURY.

18 WITH REGARD TO YOUR CHANGE ON NUMBER 51,
19 PARAGRAPH 3, TO SAY "TO DETERMINE WHETHER A PRODUCT
20 FEATURE IS FUNCTIONAL, YOU MAY CONSIDER THE
21 FOLLOWING FACTORS," THAT'S FINE.

22 MODIFYING PARAGRAPH 4 TO DELETE "AFTER
23 CONSIDERING THESE FACTORS," THAT'S OKAY.

24 YOUR REQUEST MODIFYING PARAGRAPH 5 TO
25 DELETE "ALTERNATIVE" AND REPLACING IT WITH "IN

1 ADDITION, " THAT SEEMS OKAY.

2 WITH REGARD TO TRADE DRESS DILUTION,
3 WHICH WAS NUMBER 55, I'M GOING TO DENY SAMSUNG'S
4 FIRST ARGUMENT. I DON'T BELIEVE THE LANGUAGE THE
5 CLAIM IS MISSING IS ACTUALLY MISSING. IT'S IN THE
6 PRECEDING SENTENCE, AND I DON'T THINK THERE'S
7 ANYTHING MISLEADING ABOUT THE JURY INSTRUCTION
8 ITSELF.

9 NOW, YOU DO ASK THAT AT THE END OF THE
10 INSTRUCTION, THE COURT JUST ADD A SENTENCE SAYING
11 "THESE FACTORS SHOULD BE WEIGHED BY YOU GIVEN THE
12 FACTS AND CIRCUMSTANCES OF THE CASE," I THINK
13 THAT'S REASONABLE. THAT WOULD BE OKAY WITH ME.

14 WITH REGARD TO TRADE DRESS NOTICE AND
15 DAMAGES, I WOULD GRANT THAT. YOU WANT THE CLEAN --
16 COMPLETE INSTRUCTION WITH PART OF THE NINTH CIRCUIT
17 MODEL INSTRUCTION CLARIFYING WHAT STATUTORY NOTICE
18 IS, I'M WONDERING IF APPLE MIGHT BE WILLING TO
19 STIPULATE TO THAT SINCE IT'S MODEL JURY INSTRUCTION
20 LANGUAGE AND IT DOESN'T SEEM PARTICULARLY
21 CONTROVERSIAL.

22 SO HEARING THAT, HOW MUCH TIME DO YOU
23 WANT TO SPEND ON THE HIGH PRIORITY OBJECTIONS AND
24 HOW MUCH TIME DO YOU WANT TO JUST MAKE YOUR RECORD?

25 MR. ZELLER: JUST ONE MOMENT, YOUR HONOR?

1 THE COURT: OKAY.

2 (DISCUSSION OFF THE RECORD BETWEEN
3 DEFENSE COUNSEL.)

4 MR. JOHNSON: YOUR HONOR, I THINK WE'RE
5 GOING TO TALK ABOUT THREE OR FOUR POTENTIALLY.

6 THE COURT: OKAY. ALL RIGHT. CAN YOU
7 TELL ME --

8 MS. MAROULIS: YOUR HONOR, WITH RESPECT
9 TO EXHAUSTION, WITHOUT GIVING UP OUR OBJECTIONS,
10 CAN WE PLEASE INCLUDE, IN THE COURT'S CURRENT
11 INSTRUCTION, THE STATEMENT "WHERE THE SPECIAL
12 ACTIVITIES INCLUDE, FOR EXAMPLE, WHERE A PRODUCT IS
13 DELIVERED."

14 IN OTHER WORDS, WE'RE OBJECTING TO THE
15 INSTRUCTION, BUT IF THE COURT IS INTENDING TO KEEP
16 WHAT IT HAS, IF WE CAN INCLUDE DELIVERY AS ONE OF
17 THE ESSENTIAL ACTIVITIES.

18 THE COURT: OKAY. LET ME HEAR FROM -- IS
19 THERE ANY OBJECTION FROM APPLE ON THAT ONE?

20 MR. SELWYN: YOUR HONOR, THERE IS AN
21 OBJECTION TO THAT. THERE'S NO REASON TO SINGLE OUT
22 THAT SPECIFIC EXAMPLE OF AN ACTIVITY IN THIS LIST.

23 IF YOU WERE TO GO DOWN THAT PATH, THERE
24 ARE OTHER THINGS THAT WE WOULD WANT TO IDENTIFY AS
25 EXAMPLES THAT THE JURY CAN CONSIDER.

1 THE COURT: WELL, THERE ALREADY -- THIS
2 WAS LARGELY FROM YOUR -- FROM APPLE'S INSTRUCTION
3 OF NEGOTIATING A CONTRACT AND PERFORMING
4 OBLIGATIONS UNDER THE CONTRACT, AND I THINK
5 PERFORMING UNDER THE OBLIGATIONS OF THE CONTRACT
6 WOULD INCLUDE DELIVERY.

7 MR. SELWYN: WE AGREE.

8 MS. MAROULIS: THAT'S FINE, YOUR HONOR.

9 THE COURT: SO PERFORMING OBLIGATIONS
10 UNDER THE CONTRACT?

11 MS. MAROULIS: INCLUDING WHERE DELIVERY
12 TAKES PLACE.

13 MR. SELWYN: THAT'S WHERE WE HAVE THE
14 DISAGREEMENT. THERE'S NO POINT IN SINGLING OUT ONE
15 EXAMPLE AMONG MANY THAT CAN BE INCLUDED UNDER THE
16 RUBRIC OF PERFORMING UNDER THE CONTRACT.

17 THE COURT: ALL RIGHT. AND I BELIEVE
18 THAT THERE IS SOME CASE LAW IN SUPPORT OF THIS
19 EXACT LANGUAGE, RIGHT?

20 MR. SELWYN: THERE IS.

21 MS. MAROULIS: YES, YOUR HONOR.

22 THE COURT: ALL RIGHT. SO THAT'S DENIED.
23 NEXT, GO AHEAD, PLEASE.

24 YOU CAN CERTAINLY ARGUE THAT. I MEAN, IT
25 DOES FALL WITHIN PERFORMING THE OBLIGATIONS UNDER

1 THE CONTRACT.

2 OKAY. WHAT ELSE?

3 MR. ZELLER: JUST A FEW POINTS, YOUR
4 HONOR.

5 THE COURT: OKAY.

6 MR. ZELLER: FIRST WITH RESPECT TO THE
7 INSTRUCTION ON FUNCTIONALITY FOR A DESIGN PATENT.

8 THE COURT: 39?

9 MR. ZELLER: YES.

10 THE COURT: OKAY.

11 MR. ZELLER: BUT IT'S ACTUALLY A
12 VARIATION ON SOMETHING THAT WE HAD RAISED.

13 THE COURT WILL RECALL THAT UNDER
14 RICHARDSON, AS WELL AS SOME OTHER FEDERAL CIRCUIT
15 AUTHORITY, THE INFRINGEMENT COMPARISON THAT HAS TO
16 BE DONE BY THE JURY NEEDS TO FACTOR OUT ELEMENTS
17 THAT THEY FIND TO BE FUNCTIONAL, AND SO PROCEEDING
18 FROM THE PREMISE THAT THEY'RE NOT GOING TO BE
19 INSTRUCTED AS TO WHAT IS FUNCTIONAL AND WHAT ISN'T,
20 BUT OF COURSE THAT WILL BE LEFT UP TO THEM TO
21 DETERMINE, WE BELIEVE THEY NEED TO BE INSTRUCTED
22 THAT ANYTHING THAT THEY FIND TO BE FUNCTIONAL UNDER
23 THE COURT'S DEFINITION SHOULD NOT BE CONSIDERED FOR
24 PURPOSES OF THE INFRINGEMENT COMPARISON.

25 AND WE DON'T THINK -- AND WE LOOKED FOR

1 EQUIVALENT LANGUAGE ALONG THOSE LINES AND COULD NOT
2 FIND ANY IN THE INSTRUCTIONS, YOUR HONOR.

3 THE COURT: SO WHAT -- I'M SORRY. TELL
4 ME EXACTLY WHAT WOULD YOU LIKE ADDED TO INSTRUCTION
5 NUMBER 39?

6 MR. ZELLER: THAT FOR ANY ELEMENTS OR
7 FEATURES THAT THE JURY DETERMINES ARE FUNCTIONAL,
8 THAT THE JURY SHOULD FACTOR OUT SIMILARITIES
9 BETWEEN THE ACCUSED PRODUCTS AND THE ASSERTED
10 DESIGN PATENTS FOR PURPOSES OF DETERMINING WHETHER
11 OR NOT THE SIMILARITIES ARE DECEPTIVE.

12 THE COURT: OKAY.

13 MR. ZELLER: IN OTHER WORDS, THE
14 APPLICATION OF THE INFRINGEMENT STANDARD.

15 THE COURT: SORRY, BUT CAN YOU GIVE ME
16 THAT AGAIN? FOR ANY ELEMENTS OR FEATURES THE JURY
17 DETERMINES ARE FUNCTIONAL, THE JURY SHOULD FACTOR
18 OUT ANY SIMILARITIES -- CAN YOU GO AHEAD?

19 MR. ZELLER: BASED ON -- OR ANY
20 SIMILARITIES BETWEEN THE ACCUSED DEVICE AND THE
21 DESIGN PATENT BASED UPON THOSE ELEMENTS OR
22 FEATURES.

23 THE COURT: PATENT BASED UPON THOSE
24 ELEMENTS OR FEATURES.

25 OKAY. LET ME HEAR FROM APPLE. WHAT'S

1 YOUR VIEW ON THAT PARTICULAR LANGUAGE?

2 MR. JACOBS: WELL, I THINK, FIRST OF ALL,
3 WE'RE IN THE WRONG INSTRUCTION, YOUR HONOR.

4 I BELIEVE THAT 39 IS ON INVALIDITY, LACK
5 OF ORNAMENTALITY.

6 THE COURT: WELL, THE LACK OF
7 ORNAMENTALITY, IT DOES INCLUDE A LOT OF
8 FUNCTIONAL -- UNFORTUNATELY, THAT IS WHERE WE PUT A
9 LOT OF FUNCTIONAL DISCUSSION.

10 MR. JACOBS: SO I THINK THAT THE OTHER --
11 THE FUNDAMENTAL PROBLEM WITH IT IS THAT THE
12 PRINCIPLE THAT SAMSUNG WOULD LIKE TO RELY ON COMES
13 OUT OF A LINE OF CASES THAT JUST DOES NOT APPLY TO
14 OUR SITUATION HERE.

15 IT'S VERY CLEAR UNDER EGYPTIAN GODDESS
16 THAT YOU LOOK AT THE DESIGN AS A WHOLE AND YOU HAVE
17 AN ORDINARY OBSERVER TEST LOOKING AT THE DESIGN AS
18 A WHOLE AND YOU DON'T TRY TO ELIMINATE --

19 THE COURT: OKAY. I UNDERSTAND WHERE
20 YOU'RE GOING. ALL RIGHT. LET ME JUST TAKE THAT
21 UNDER SUBMISSION. OKAY?

22 MR. JACOBS: THANK YOU, YOUR HONOR.

23 THE COURT: ALL RIGHT. GO AHEAD. WHAT
24 ELSE?

25 MR. ZELLER: A SECOND ISSUE, YOUR HONOR,

1 IS WE WOULD ASK FOR CLARIFICATION OF THE
2 OBVIOUSNESS INSTRUCTION.

3 THE COURT: ALL RIGHT. LET ME ASK YOU
4 ONE MORE QUESTION ON 39.

5 MR. ZELLER: SURE.

6 THE COURT: DID YOU STILL WANT THE PGH
7 TECHNOLOGIES FACTORS IN THERE? OR NOT?

8 MR. ZELLER: YES.

9 THE COURT: OBVIOUSLY YOU'D RATHER HAVE
10 YOUR SUGGESTED LANGUAGE.

11 MR. ZELLER: YES, YOUR HONOR.

12 THE COURT: BUT LET ME HEAR --

13 MR. ZELLER: THE ANSWER TO THE QUESTIONS
14 ARE YES TO BOTH.

15 THE COURT: OKAY.

16 MR. ZELLER: WITH RESPECT TO INSTRUCTION
17 NUMBER 38 ON OBVIOUSNESS --

18 THE COURT: OKAY.

19 MR. ZELLER: -- WE WOULD ASK THAT IT BE
20 CLARIFIED THAT OBVIOUSNESS CAN BE DETERMINED OR
21 FOUND BASED NOT JUST SIMPLY ON A COMBINATION OF
22 REFERENCES, BUT ON A SINGLE REFERENCE.

23 AND A COUPLE OF POINTS I WOULD ELABORATE
24 ON, YOUR HONOR.

25 THE COURT: HOW IS THAT DIFFERENT THAN

1 ANTICIPATION THEN?

2 MR. ZELLER: I'M SORRY?

3 THE COURT: HOW IS -- IF WE'RE SAYING
4 WE'RE FINDING OBVIOUSNESS BASED ON ONE REFERENCE,
5 ISN'T THAT ANTICIPATION?

6 OH, YOU'RE SAYING IF IT DOESN'T HAVE ALL
7 THE ELEMENTS. OH, I SEE.

8 MR. ZELLER: CORRECT.

9 THE COURT: AND IS THERE A SPECIFIC LINE
10 OR LANGUAGE THAT YOU COULD PROPOSE? THAT WOULD BE
11 MOST HELPFUL.

12 MR. ZELLER: YES, THERE IS, YOUR HONOR.

13 THE COURT: OKAY.

14 MR. ZELLER: AND I CAN GET THAT. WE
15 ACTUALLY SUBMITTED THAT ALONG WITH THE SATURDAY
16 MORNING SUBMISSION THAT THE COURT INVITED US TO DO
17 ON ANY UPDATES TO PROPOSED INSTRUCTIONS BASED ON
18 THE EVIDENCE AS IT CAME IN DURING THE CASE.

19 THE COURT: OKAY. IF YOU'VE ALREADY DONE
20 THAT, THAT'S FINE.

21 MR. ZELLER: IF I COULD JUST SIMPLY POINT
22 OUT A COUPLE OF THINGS BRIEFLY ABOUT THAT, YOUR
23 HONOR.

24 THE MODEL INSTRUCTION, THE IPO MODEL
25 INSTRUCTION THAT WAS BEING RELIED UPON ACTUALLY

1 CAME OUT, OR WAS DONE ONE MONTH BEFORE THE
2 INTERNATIONAL SEAWAY DECISION, WHICH IS WHAT WE ARE
3 BASING OUR PITCH ON. WE BELIEVE THAT THERE -- THAT
4 THE COURT, THE FEDERAL CIRCUIT MAKES VERY CLEAR
5 THAT A SINGLE REFERENCE IS ENOUGH.

6 AND THEN THERE'S ALSO BEEN, IN THE
7 UTILITY PATENT CONTEXT, RECENT CASES, SUCH AS
8 BOSTON SCIENTIFIC VERSUS CORDIS, C-O-R-D-I-S, WHICH
9 IS A 2009 DECISION WHERE THE COURT ALSO FOUND THAT,
10 IN FACT, THAT THERE WAS A SINGLE REFERENCE THAT
11 RENDERED A CLAIM OBVIOUS.

12 THE COURT: YOU KNOW, I'M LOOKING AT YOUR
13 SATURDAY -- NO, MAYBE THIS IS YOUR FRIDAY FILING.
14 WHICH -- OH, ARE YOU SAYING YOUR TRIAL IMPACT?

15 MR. ZELLER: YES, YOUR HONOR.

16 THE COURT: I SEE. OKAY.

17 MR. ZELLER: I BELIEVE IT IS -- ALONG
18 WITH THAT SUBMISSION AS EXHIBITS, WE SUBMITTED SOME
19 ADDITIONAL RED LINED PROPOSED INSTRUCTIONS.

20 THE COURT: I SEE. I SEE WHAT YOU'RE
21 SAYING. I SEE WHAT YOU'RE RECOMMENDING NOW. OKAY.

22 LET ME HEAR JUST BRIEFLY FROM APPLE, AND
23 IF IT'S GOING TO BE YOUR SAME POSITION ABOUT
24 OVERALL IMPRESSION AND NOT INDIVIDUAL FEATURES,
25 THEN I UNDERSTAND WHERE YOU'RE COMING FROM AND WE

1 DON'T NEED TO SPEND THE TIME.

2 WHAT'S YOUR -- ANY OBJECTIONS THAT YOU
3 HAVE TO CHANGING THE LANGUAGE FROM "THE ULTIMATE
4 CONCLUSION OF WHETHER A CLAIM DESIGN IS OBVIOUS
5 SHOULD BE BASED UPON YOUR DETERMINATION OF SEVERAL
6 FACTORS AND DECISIONS," AND GOING ON "VERSUS
7 WHETHER IT WOULD HAVE BEEN OBVIOUS FOR A DESIGNER
8 OF SKILL IN THE FIELD TO COMBINE EARLIER DESIGNS OR
9 TO MODIFY A SINGLE EARLIER DESIGN TO ARRIVE AT THE
10 DESIGN IN THE PATENT"?

11 ANYONE WANT TO TALK ABOUT THAT?

12 MR. JACOBS: SO I JUST -- JUST TO BE
13 CLEAR, I WAS HAVING A LITTLE TROUBLE KEEPING UP
14 WITH SAMSUNG'S COUNSEL.

15 IF THE FOCUS -- I'M LOOKING AT 38, AND
16 WHERE WOULD THAT CHANGE GO?

17 THE COURT: I GUESS IT WOULD HAVE TO GO,
18 MR. ZELLER, WHAT, AROUND LINE 15, 16? AROUND THE
19 SECTION THAT TALKS ABOUT ONE OR MORE SECONDARY
20 REFERENCES AND WHETHER THERE WOULD HAVE BEEN A
21 MOTIVATION TO COMBINE THEM? OR WHAT'S YOUR
22 PROPOSAL?

23 IF I DON'T WHOLESALE ADOPT YOUR 38 THAT
24 YOU PROPOSED ON SATURDAY MORNING, IS THERE ANY
25 OTHER PLACE WHERE A SPECIFIC CHANGE COULD BE MADE

1 THAT WOULD ACHIEVE YOUR GOALS?

2 MR. ZELLER: YES, YOUR HONOR. WHERE WE
3 WOULD SUGGEST INSERTING THE LANGUAGE WOULD BE -- SO
4 THIS IS INSTRUCTION NUMBER 38.

5 THE COURT: OKAY.

6 MR. ZELLER: AND STARTING ABOUT LINE 10.

7 THE COURT: ALL RIGHT.

8 MR. ZELLER: SO THE PARAGRAPH THAT BEGINS
9 SECOND.

10 THE COURT: OKAY.

11 MR. ZELLER: AND IT SAYS, "YOU MUST
12 DETERMINE IF A DESIGNER OF ORDINARY SKILL IN THESE
13 DESIGNS WOULD HAVE COMBINED THE PRIOR ART
14 REFERENCES," AND HERE WE WOULD INSERT THE FOLLOWING
15 LANGUAGE, "OR MODIFIED A SINGLE PRIOR ART
16 REFERENCE," AND THEN PICK UP WITH THE REMAINDER OF
17 THE LANGUAGE, "TO CREATE THE SAME OVERALL VISUAL
18 APPEARANCE."

19 THE COURT: ALL RIGHT.

20 MR. ZELLER: THEN WE WOULD ALSO SUGGEST
21 ADDING, AT LINE 13, AFTER THE FIRST SENTENCE OF THE
22 NEXT PARAGRAPH THERE, WHICH BEGINS, "IF YOU
23 IDENTIFY A PRIMARY REFERENCE, YOU THEN MUST
24 CONSIDER WHETHER" --

25 THE COURT: YES.

1 MR. ZELLER: THEN WE WOULD INSERT THE
2 NEXT SENTENCE TO SAY, "YOU DO NOT NEED TO FIND A
3 SECONDARY REFERENCE IF SAMSUNG HAS PROVEN THAT A
4 SINGLE REFERENCE COULD HAVE BEEN MODIFIED TO CREATE
5 THE PATENTED DESIGN AND THAT SUCH MODIFICATION WAS
6 OBVIOUS."

7 AND THEN THE REMAINDER OF THE PARAGRAPH
8 WOULD CONTINUE AS IS.

9 THE COURT: YOU WANT TO ADDRESS THAT,
10 MR. JACOBS?

11 MR. JACOBS: WELL, I THINK THE SECOND
12 PROPOSAL IS GILDING THE LILY ON THIS, YOUR HONOR,
13 AS EXCESS.

14 ON THE FIRST PROPOSAL TO SUGGEST THAT A
15 SINGLE REFERENCE COULD RENDER THE DESIGN OBVIOUS AS
16 MR. ZELLER PROPOSED, I DON'T -- THERE ARE CASES
17 THAT SUPPORT THAT. WE DON'T OPPOSE THAT.

18 THE COURT: YEAH, OKAY. I WASN'T GOING
19 TO ADOPT THE SECOND CHANGE BECAUSE I THINK THAT'S
20 ALSO VERY CONFUSING IN A WHOLE PARAGRAPH ABOUT
21 PRIMARY AND SECONDARY REFERENCES.

22 MR. ZELLER: UNDERSTOOD, YOUR HONOR.

23 THE COURT: OKAY. SO THEN DO WE HAVE A
24 STIPULATION THAT LINE 10 WILL BE CHANGED TO READ
25 "THE PRIOR ART REFERENCES" -- LET ME JUST READ THE

1 SENTENCE. "YOU MUST DETERMINE IF A DESIGNER OF
2 ORDINARY SKILL IN THESE DESIGNS WOULD HAVE COMBINED
3 THE PRIOR ART REFERENCES OR MODIFIED A SINGLE PRIOR
4 ART REFERENCE TO CREATE THE SAME OVERALL VISUAL
5 APPEARANCE AS THE CLAIMED DESIGNS."

6 IS THERE A STIPULATION TO THAT CHANGE?

7 MR. JACOBS: IS THAT THE ONLY CHANGE?

8 THE COURT: THAT'S THE ONLY CHANGE.

9 MR. JACOBS: WE DON'T OPPOSE THAT, YOUR
10 HONOR.

11 THE COURT: ALL RIGHT. SO THAT'S DONE.

12 ALL RIGHT. WHAT ELSE?

13 MR. ZELLER: I THINK FINALLY, YOUR HONOR,
14 AT LEAST MY NOTES HAVE IT AS FINALLY, WE WOULD LIKE
15 SOME ELABORATION ON THE TRADE DRESS DILUTION
16 INSTRUCTION, NUMBER 55.

17 THE COURT: OKAY. LET'S GO THERE.

18 MR. ZELLER: AND IN PARTICULAR, YOUR
19 HONOR, WE'RE CONCERNED ABOUT THE LANGUAGE THAT
20 SEEMS TO DEVIATE FROM THE REMAINDER OF THE
21 INSTRUCTIONS.

22 AND IF YOU BEAR WITH ME, I'M GOING TO
23 FIND THE EXACT LANGUAGE.

24 THIS IS INSTRUCTION NUMBER 55, AND IT'S
25 THE SECOND FULL SENTENCE THAT BEGINS AT LINE 3,

1 APPROXIMATELY, AND CONTINUES ON.

2 AND THIS SAYS, "DILUTION BY BLURRING
3 OCCURS WHEN A TRADE DRESS PREVIOUSLY ASSOCIATED
4 WITH ONE PRODUCT ALSO BECOMES ASSOCIATED WITH A
5 SECOND."

6 AND THAT, AT LEAST STATED THAT STARKLY,
7 IS NOT A CORRECT PROPOSITION OF LAW AS TO WHAT MUST
8 BE SHOWN BY APPLE IN ORDER TO PROVE DILUTION.

9 SO WE THINK THAT, FRANKLY, THAT SENTENCE
10 SHOULD COME OUT, OR AT LEAST IT SHOULD BE MODIFIED
11 TO MAKE CLEAR THAT IT HAS TO HAVE, OF COURSE, THE
12 CONSEQUENCE OF ACTUALLY CREATING, OR LIKELY TO
13 CREATE DILUTION.

14 THE COURT: CAN YOU PROPOSE A SPECIFIC
15 LANGUAGE CHANGE AND THEN WE CAN SEE IF MR. JACOBS
16 WILL AGREE TO THAT?

17 MR. JACOBS: SHOCKINGLY, YOUR HONOR, I
18 MAY BE IN AGREEMENT WITH MR. ZELLER ON THIS. I
19 HAVE LANGUAGE.

20 THE COURT: OH, OKAY. GO AHEAD. MAKE
21 YOUR PROPOSAL, PLEASE.

22 MR. JACOBS: SECOND SENTENCE, INSTRUCTION
23 NUMBER 55, "DILUTION BY BLURRING OCCURS WHEN A
24 TRADE DRESS PREVIOUSLY ASSOCIATED WITH ONE PRODUCT
25 LOSES SOME OF ITS CAPACITY TO IDENTIFY AND

1 DISTINGUISH THAT PRODUCT."

2 AND THAT, BY WAY OF BACKGROUND, IS --
3 CORRESPONDS TO SOME LANGUAGE IN INSTRUCTION 52, I
4 BELIEVE.

5 THE COURT: OKAY. MR. ZELLER, WHAT DO
6 YOU THINK ABOUT THAT?

7 MR. ZELLER: I THINK THAT IS CORRECT,
8 YOUR HONOR, AND THAT WAS, IN SUBSTANCE, THE SAME
9 LANGUAGE THAT I WAS GOING TO SUGGEST.

10 AND MY CONCERN ACTUALLY HAD TO DO WITH
11 THE FACT THAT I THINK 52, WITHOUT WAIVING OBVIOUSLY
12 OUR OBJECTIONS TO IT, WE NEVERTHELESS THOUGHT THAT
13 WAS A MORE COMPLETE AND ACCURATE STATEMENT AND WERE
14 CONCERNED THAT THE JURY MIGHT HAVE PROBLEMS
15 UNDERSTANDING THAT.

16 THE COURT: ALL RIGHT. LET ME JUST
17 CONFIRM. THIS IS PARAGRAPH 55, LINE 3, "DILUTION
18 BY BLURRING OCCURS WHEN A TRADE DRESS PREVIOUSLY
19 ASSOCIATED WITH ONE PRODUCT LOSES SOME OF ITS
20 CAPACITY TO IDENTIFY AND DISTINGUISH THAT PRODUCT."

21 THAT'S FINE, MR. ZELLER?

22 MR. ZELLER: JUST ONE MOMENT, YOUR HONOR.

23 (PAUSE IN PROCEEDINGS.)

24 MR. ZELLER: YEAH, WE'RE IN AGREEMENT.

25 THE COURT: AND MR. JACOBS, THAT'S FINE,

1 CORRECT?

2 MR. JACOBS: YES, YOUR HONOR.

3 THE COURT: OKAY, GREAT. LET'S GO ON TO
4 THE NEXT ONE. WHAT'S NEXT?

5 MR. ZELLER: YOUR HONOR, THAT'S ALL WE
6 INTEND TO ARGUE AT THIS POINT.

7 THE COURT: OH, OKAY.

8 MR. ZELLER: OBVIOUSLY THERE WILL BE
9 MORE.

10 THE COURT: SURE.

11 MR. ZELLER: AND THEN WE INTEND TO ALSO
12 RESERVE OUR TIME SO THAT WE CAN --

13 THE COURT: MAKE THE RECORD?

14 MR. ZELLER: -- MAKE THE RECORD.

15 THE COURT: OKAY, THAT'S FINE.

16 MR. JOHNSON: THERE ACTUALLY ARE TWO
17 OTHER QUICK ONES, THEY WEREN'T PART OF THE HPO'S,
18 BUT WE DID FILE -- EACH SIDE DID FILE A STATEMENT
19 REGARDING THE INDEFINITENESS INSTRUCTION --

20 THE COURT: OKAY.

21 MR. JOHNSON: -- ASKING YOU -- FOLLOWING
22 UP ON THE CONSIDERATION THAT OCCURRED AT THE END OF
23 LAST WEEK THAT THE JURY BE INSTRUCTED TO -- ON THE
24 QUESTION OF INDEFINITENESS WITH RESPECT TO THE '163
25 PATENT. THIS IS THE SUBSTANTIALLY CENTERED ISSUE.

1 THE COURT: UM-HUM.

2 MR. JOHNSON: AND WE'D ASK THAT THE
3 INSTRUCTION THAT WAS -- AS IT WAS EXPLAINED IN OUR
4 BRIEF AT DOCUMENT 1809 BE SUBMITTED TO THE JURY.

5 IN LIGHT OF THE B.J. SERVICES CASE, AND
6 WE CITE A WHOLE LITANY OF CASES WHERE IT'S PROPER
7 TO SUBMIT THE QUESTION OF INDEFINITENESS TO THE
8 JURY, THAT OUR INSTRUCTION BE GIVEN.

9 THE COURT: WELL, INDEFINITENESS IS AN
10 ISSUE FOR THE COURT AND NOT FOR THE JURY, SO I'M
11 NOT INCLINED TO GIVE YOUR INSTRUCTION WHICH
12 BASICALLY HAS THIS ISSUE GO TO THE JURY.

13 MR. JOHNSON: THERE ARE UNDERLYING
14 QUESTIONS OF FACT HERE.

15 THE COURT: UM-HUM.

16 MR. JOHNSON: AND A PERSON OF ORDINARY
17 SKILL IN THE ART AND HOW A PERSON OF ORDINARY SKILL
18 IN THE ART WOULD UNDERSTAND "SUBSTANTIALLY
19 CENTERED," AND THESE CASES TALK ABOUT THE FACT THAT
20 IN THESE SITUATIONS, IT IS APPROPRIATE TO SEND THIS
21 ISSUE TO THE JURY.

22 AND AS MR. GRAY AND DR. SINGH AND EVEN
23 MR. FORSTALL TALKED ABOUT, I THINK THERE IS A REAL
24 ISSUE AS TO WHAT "SUBSTANTIALLY CENTERED" MEANS.

25 AND SO THE PROOF THAT CAME IN ALONG THOSE

1 TERMS, THAT IT'S AN AMBIGUOUS TERM AND THE METES
2 AND BOUNDS OF WHICH CAN'T BE DEFINED, I THINK IT IS
3 AN ISSUE THAT THE JURY HEARD EVIDENCE ABOUT AND
4 IT'S SOMETHING THAT WE THINK SHOULD BE SUBMITTED TO
5 THE JURY.

6 THE COURT: ALL RIGHT. LET ME HEAR FROM
7 APPLE ON THAT ONE.

8 MR. JACOBS: YOUR HONOR, WE WENT THE
9 OTHER DIRECTION ON THAT AND ASKED FOR A CURATIVE
10 INSTRUCTION BECAUSE IT IS NOT AN ISSUE FOR THE JURY
11 AND WE THOUGHT THE JURY COULD WELL BE CONFUSED BY
12 TESTIMONY ABOUT INDEFINITENESS.

13 SO WE ALSO ASKED FOR SOMETHING ON THIS,
14 BUT IT'S THE OPPOSITE OF WHAT SAMSUNG IS ARGUING.

15 WE ASKED THAT THE COURT INSTRUCT THE JURY
16 TO DISREGARD THE TESTIMONY --

17 THE COURT: YEAH.

18 MR. JACOBS: -- AND TO ASSUME THAT ONE OF
19 ORDINARY SKILL -- AND YOUR HONOR HAS THE ISSUE. IT
20 IS A QUESTION OF LAW FOR THE COURT. IT IS -- THAT
21 IS WELL ESTABLISHED.

22 IT IS NOT SOMETHING THAT WAS RAISED IN A
23 PROPER MOTION FOR THE COURT, BEFORE THE COURT, AND
24 GIVING THE INSOLUBLY AMBIGUOUS LANGUAGE OF THE CASE
25 LAW, THAT SUCH A MOTION SHOULD HAVE FAILED IN ANY

1 CASE .

2 THE COURT: LET ME ASK, BECAUSE I THINK
3 WE SHOULD RESOLVE THIS ISSUE FOR TOMORROW, BECAUSE
4 OTHERWISE THERE'S GOING TO BE AN OBJECTION DURING
5 CLOSING ARGUMENT, SO LET ME HEAR FROM MR. JOHNSON,
6 WHAT IS THE SCOPE OF WHAT SAMSUNG IS GOING TO
7 PRESENT DURING CLOSING ON THIS SUBSTANTIALLY
8 CENTERED INDEFINITE ISSUE?

9 I DON'T BELIEVE IT'S ONE FOR THE JURY. I
10 THINK IT IS A COURT ISSUE.

11 SO I JUST WANT TO AVOID, YOU KNOW, HAVING
12 TO DEAL WITH OBJECTIONS. I WOULD RATHER EVERYTHING
13 TOMORROW BE VERY SMOOTH AND WE NOT HAVE ANY FIGHTS
14 AND NOT ARGUE.

15 MR. JOHNSON: ACTUALLY, I DON'T KNOW
16 BECAUSE I HAVEN'T BEEN THERE FOR THE LAST FEW HOURS
17 WHILE THE ARGUMENTS ARE STILL BEING WORKED OUT.

18 THE COURT: SURE, YEAH.

19 MR. JOHNSON: SO ACTUALLY, I DON'T KNOW
20 WHAT, IF ANY, EVIDENCE WE'RE GOING TO GO INTO IN
21 THAT RESPECT.

22 I KNOW EVIDENCE WAS PRESENTED. I KNOW
23 MR. GRAY TALKED ABOUT IT AND MR. SINGH TALKED ABOUT
24 IT.

25 THE COURT: YEAH.

1 MR. JOHNSON: BUT I'M NOT SURE THE EXTENT
2 TO WHICH IT'S GOING TO BE PRESENTED IN THE ARGUMENT
3 TOMORROW.

4 THE COURT: ALL RIGHT. WELL,
5 UNFORTUNATELY, THEN IT'LL BE LEFT TO ME TO DO SOME
6 KIND OF ORDER TONIGHT AND THIS MAY HAVE TO BE A
7 DISCUSSION -- I MEAN, TOMORROW MORNING, IF WE MEET
8 AT 8:30, I'D LIKE TO SEE IF WE CAN HASH OUT ANY
9 DISPUTES IN ADVANCE AND THIS MAY HAVE TO BE ADDED
10 TO THAT LIST.

11 WHY DON'T -- CAN YOU ALL MAKE A PROFFER?

12 MR. JOHNSON: YES.

13 THE COURT: WHAT TIME MAKES SENSE? I
14 KNOW THE TIME IS TICKING.

15 MR. JOHNSON: DEPENDS ON WHEN WE GET OUT
16 OF HERE.

17 THE COURT: I UNDERSTAND THAT.

18 MR. JOHNSON: WITHIN ABOUT, LESS THAN AN
19 HOUR FROM WHENEVER THAT IS. I'LL HAVE PEOPLE START
20 WORKING ON IT NOW.

21 THE COURT: OKAY, COULD YOU? WHY DON'T
22 YOU -- CAN YOU MAKE A COMMITMENT TO ME THAT YOU'LL
23 FILE A PROFFER ON WHAT YOU'RE GOING TO REPRESENT AS
24 TO THIS ISSUE, DO YOU WANT TO SAY, LIKE, 7:00?

25 MR. JOHNSON: SURE.

1 THE COURT: IS THAT DOABLE? OKAY.

2 ANYTHING ELSE? DO YOU HAVE ANYTHING
3 ELSE, MR. JOHNSON?

4 MR. JOHNSON: THE OTHER THING WAS ON
5 INSTRUCTION NUMBER 19, AND I DON'T KNOW IF APPLE
6 IS -- ACTUALLY, I DON'T KNOW IF YOU'RE CONTESTING
7 THIS AT THIS POINT, BUT ON 19, WHICH IS STATUTORY
8 BAR --

9 THE COURT: OKAY.

10 MR. JOHNSON: -- THERE ARE THREE
11 PARAGRAPHS AT THE END OF THAT INSTRUCTION THAT
12 RELATE TO PROVISIONAL APPLICATIONS.

13 THE COURT: YES.

14 MR. JOHNSON: AND THOSE WE THINK SHOULD
15 BE ELIMINATED FROM THE INSTRUCTIONS SINCE THERE'S
16 NO EVIDENCE IN THE RECORD ABOUT PROVISIONAL
17 APPLICATIONS. THEY DIDN'T EVEN PUT IN THE
18 PROVISIONAL APPLICATIONS AS PART OF THE RECORD.

19 SO THIS IS CONFUSING TO THE JURY AND WE
20 THINK IT SHOULD BE ELIMINATED. IT'S STARTING AT
21 LINE 19 THROUGH THE END.

22 THE COURT: OH, I HAVE A DIFFERENT
23 RECOLLECTION OF THAT. BUT LET ME -- DOES ANYONE
24 FROM APPLE WANT TO TAKE THAT ISSUE?

25 MR. JOHNSON: SORRY. WE'RE TALKING ABOUT

1 FOR THE '381 AND '163 PATENTS.

2 THE COURT: OKAY. GO AHEAD, PLEASE.

3 MR. JACOBS: YOUR HONOR, IT TURNS OUT
4 THAT NOTHING TURNS ON WHETHER WE GET THE EFFECTIVE
5 FILING DATES FOR THE PROVISIONAL PATENT
6 APPLICATIONS. THERE'S NO INTERVENING ART THAT IS
7 BEING ASSERTED AGAINST THOSE PATENTS.

8 SO WE ARE -- WE, TOO, THINK THAT THOSE
9 SECTIONS, STARTING WITH LINE 19 --

10 THE COURT: UM-HUM. GOING THROUGH 28?

11 MR. JACOBS: -- GOING THROUGH 28 WITH
12 COME OUT.

13 THE COURT: OKAY, FINE.

14 MR. JACOBS: WHILE WE'RE ON THE COMING
15 OUT PART, THOUGH --

16 THE COURT: THAT'S FINE.

17 MR. JACOBS: -- WE ALSO THINK THAT THE
18 WRITTEN DESCRIPTION INSTRUCTION CAN COME OUT
19 BECAUSE NO ONE HAS ADDUCED EVIDENCE ON WRITTEN
20 DESCRIPTION.

21 AND I'M SORRY, YOUR HONOR, I'M LOOKING --

22 MR. JOHNSON: IT'S NUMBER 17.

23 THE COURT: OKAY. MR. JOHNSON, ARE YOU
24 IN AGREEMENT WITH THAT?

25 MR. JOHNSON: NO, I'M NOT IN AGREEMENT

1 WITH THAT. THAT IS A QUESTION FOR THE JURY.

2 THIS WAS AN INSTRUCTION THAT WAS
3 UNDISPUTED AND ADOPTED BY THE COURT AND THERE'S
4 EVIDENCE THAT CAME IN, AND IT'S THE SAME ARGUMENTS
5 WITH RESPECT TO SUBSTANTIALLY CENTERED ON THE '163,
6 AND MISTERS GRAY, FORSTALL, AND SINGH ALL TESTIFIED
7 ABOUT IT.

8 THE COURT: I'M GOING TO LEAVE THAT IN.
9 ALL RIGHT. WHAT ELSE?

10 MR. JOHNSON: MS. MAROULIS HAS TWO QUICK
11 ISSUES AND THEN I MAY HAVE ONE FINAL ONE.

12 THE COURT: OKAY.

13 MS. MAROULIS: YES, YOUR HONOR, VERY
14 BRIEFLY ON THE UTILITY DAMAGES INSTRUCTIONS.

15 SAMSUNG REQUESTED TO INCLUDE THE GEORGIA
16 PACIFIC INSTRUCTION, AND DURING THE TRIAL SEVERAL
17 EXPERTS REFERRED TO THAT, SO WE THOUGHT THERE WOULD
18 BE NO HARM IN DOING A STANDARD ND CAL INSTRUCTION
19 LISTING THE FACTORS. THAT'S WHAT WE PROPOSED AS
20 29.1.

21 THE COURT: 29.1, THAT SOUNDS FINE TO ME.
22 ANY OBJECTION FROM APPLE? ANY OBJECTION
23 FROM APPLE?

24 MR. JACOBS: JUST A MINUTE, YOUR HONOR.
25 SORRY.

1 THE COURT: OKAY.

2 MR. JACOBS: NO, YOUR HONOR, NO PROBLEM.

3 THE COURT: OKAY. AND THEN LET ME --
4 JUST FOR MY OWN NOTES, IS THERE A SPECIFIC NUMBER
5 THAT YOU WANTED?

6 MS. MAROULIS: THE REASONABLE ROYALTY
7 DEFINITION IS IN 29 IN YOUR HONOR'S INSTRUCTION, SO
8 IT MAY MAKE SENSE TO BE 29.1, BUT IT DOESN'T REALLY
9 MATTER SO MUCH, AS LONG AS IT'S IN THE RIGHT
10 SECTION.

11 THE COURT: OKAY. SO 29.1, YOU JUST WANT
12 ME TO ADD THE GEORGIA PACIFIC FACTORS. I DON'T SEE
13 IT IN THE ND CAL MODEL JURY INSTRUCTIONS, BUT
14 THAT'S FINE.

15 SO I'LL ADD THE GEORGIA PACIFIC FACTORS
16 TO INSTRUCTION NUMBER 29 ON REASONABLE ROYALTY.

17 MS. MAROULIS: GREAT. AND WITH RESPECT
18 TO INSTRUCTION NUMBER 31, ALSO UTILITY PATENT
19 DAMAGES, THE DATE OF COMMENCEMENT, IT IS SAMSUNG'S
20 POSITION THAT WE NEED TO INCLUDE THE WORDS "ACTUAL
21 NOTICE." WE UNDERSTAND YOUR HONOR TOOK IT OUT, BUT
22 WE'D LIKE TO PUT IT BACK IN FOR BOTH APPLE'S
23 REQUEST FOR DAMAGES AND SAMSUNG'S REQUEST FOR
24 DAMAGES.

25 THE COURT: OKAY. LET ME -- GIVE ME A

1 SECOND TO GET THERE. NUMBER 17, YOU WOULD LIKE --

2 MS. MAROULIS: IT'S ACTUALLY INSTRUCTION
3 31, LINES 6 AND 19.

4 THE COURT: 31, LINE 6 -- 6 AND 13?

5 MS. MAROULIS: 19. SO ONE TALKS ABOUT
6 APPLE'S DAMAGES AND ONE TALKS ABOUT SAMSUNG'S
7 DAMAGES, AND WE'D LIKE TO INSERT "EACH SAMSUNG
8 ENTITY HAD ACTUAL NOTICE OF APPLE'S CLAIMS," AND
9 BELOW WE WOULD INSERT "APPLE HAD ACTUAL NOTICE OF
10 SAMSUNG'S CLAIMS."

11 THE COURT: YOU KNOW, I JUST TOOK THIS
12 FROM THE MODEL JURY INSTRUCTION AND THEY DIDN'T
13 HAVE "ACTUAL" IN THERE.

14 MS. MAROULIS: YOUR HONOR, WE --

15 THE COURT: LET ME HEAR, DOES APPLE AGREE
16 OR NOT?

17 MR. JACOBS: NO. WE FAVOR THE MODEL
18 INSTRUCTION ON THIS, YOUR HONOR.

19 MS. MAROULIS: WE REFER THE COURT TO THE
20 FEDERAL CIRCUIT PRECEDENT, INCLUDING THE CASE CITED
21 IN THE COURT'S INSTRUCTIONS, THE SRI VERSUS
22 ADVANCED TECH THAT TALKS ABOUT IDENTIFYING IDENTITY
23 OF THE PATENT AND ACTUAL NOTICE.

24 THE COURT: UM-HUM.

25 MS. MAROULIS: AND THERE WERE SOME

1 ADDITIONAL ONES IN SAMSUNG'S PROPOSED INSTRUCTIONS
2 AS WELL.

3 MR. JACOBS: YOUR HONOR, WE CITED
4 AUTHORITY THAT WE -- THAT IS STILL -- THAT IS GOOD
5 AUTHORITY THAT LEAVES THIS MORE OPEN TEXTURED,
6 INCLUDING THE SICO CASE.

7 THE COURT: WELL, I'M GOING TO GO WITH
8 THE MODEL ON THIS ONE. OKAY?

9 WHAT ELSE DO YOU HAVE?

10 MS. MAROULIS: VERY WELL, YOUR HONOR.

11 THE SAME INSTRUCTION, I THINK THERE'S A
12 TYPO ON THE BOTTOM OF THE INSTRUCTION. IT SAYS
13 "THE PATENT WAS GRANTED AFTER EACH" -- "AFTER APPLE
14 INFRINGEMENT BEGAN." SO IT'S IN YOUR INSTRUCTION,
15 SO I THINK THE COURT MEANT "APPLE" ON THE VERY LAST
16 LINE.

17 THE COURT: YOU KNOW WHAT? I SHOULD HAVE
18 CHANGED THAT TO "AFTER THE INFRINGING ACTIVITY
19 BEGAN." I THINK IT WAS A CUT AND PASTE FROM LINE
20 12, AND IT SHOULD BE CHANGED ON LINE 12 AS WELL.

21 MS. MAROULIS: OKAY.

22 THE COURT: BECAUSE THE MODEL LANGUAGE
23 JUST SAYS "BEFORE AND AFTER THE INFRINGING ACTIVITY
24 BEGAN," SO I APOLOGIZE. THAT WAS A MISTAKE. THAT
25 WAS A MISTAKE THAT WAS IDENTIFIED BUT WASN'T

1 CORRECTED.

2 MS. MAROULIS: OKAY. AND THEN FINALLY,
3 WITH RESPECT TO INSTRUCTION NUMBER 65, WHICH IS
4 RELEVANT MARKET, SAMSUNG MAINTAINS ITS OBJECTION
5 THAT IT SHOULD BE A PRODUCT MARKET AS OPPOSED TO
6 TECHNOLOGY MARKET, AND TECHNOLOGY MARKET IS TAKING
7 IT TOO NARROWLY AND IT'S MORE APPROPRIATE TO LOOK
8 BROADLY BEYOND THE SPECIFIC STANDARD AT ISSUE.

9 THE COURT: ON WHICH INSTRUCTION IS THAT,
10 PLEASE?

11 MS. MAROULIS: IT'S NUMBER 65 IN THE
12 ANTITRUST SECTION.

13 THE COURT: OKAY. YOU KNOW, I -- IN
14 THE -- IN MY ORDER ON THE MOTION TO DISMISS, I HAD
15 SAID THAT TECHNOLOGY MARKET WOULD BE SUFFICIENT,
16 AND ON EQUIVALENT TO A PRODUCT MARKET, AND SO
17 THAT'S WHY I CHANGED IT, SO THAT'S DENIED.

18 MS. MAROULIS: OKAY.

19 THE COURT: OKAY. WHAT ELSE?

20 MS. MAROULIS: I THINK THE REST WE'RE
21 GOING TO PRESERVE.

22 THE COURT: FOR THE RECORD?

23 ALL RIGHT. IT'S 3:18.

24 ALL RIGHT, APPLE, LET'S DO YOURS.

25 MR. JACOBS: MAY I PROCEED FROM HERE,

1 YOUR HONOR?

2 THE COURT: OKAY. THAT'S FINE.

3 GIVE ME ONE SECOND TO -- WE ALREADY
4 HANDLED THE ADVERSE INFERENCE, SO THAT'S DONE.

5 ALL RIGHT. THE TIME IS 3:19.

6 WITH REGARD TO THE DOCTRINE OF
7 EQUIVALENTS, I'M TENTATIVELY GOING TO GRANT THIS.

8 LET ME ASK WHETHER -- I'D LIKE TO GIVE
9 SAMSUNG AN OPPORTUNITY TO BE HEARD, TO REBUT THE
10 PRESUMPTION THAT THE CLAIM LIMITATIONS TRIGGER THE
11 DOCTRINE OF EQUIVALENTS. SO DO YOU WANT TO ADDRESS
12 THAT ISSUE?

13 OTHERWISE I'LL PROBABLY INCLUDE A VERSION
14 OF THE DISPUTED PROPOSED INSTRUCTION NUMBER 15 THAT
15 EXPLAINS THAT "NO EQUIVALENCE CAN EXIST FOR
16 DISPLAYING IMAGE MOST RECENTLY CAPTURED IN A CAMERA
17 MODE AND SEQUENTIALLY DISPLAYING OTHER IMAGES
18 STORED IN MEMORY THROUGH THE USE OF SCROLL KEYS."

19 MR. JOHNSON: SO OBVIOUSLY APPLE HAS THE
20 BURDEN OF PROVING PROSECUTION HISTORY ESTOPPEL
21 APPLIES.

22 YOUR HONOR, WE TALKED ABOUT THIS IN THE
23 CONTEXT OF AN HPO WITH REGARD -- TRYING TO STOP
24 DR. YANG FROM TESTIFYING THAT SWIPING IS EQUIVALENT
25 TO SCROLL KEYS, AND THE COURT NOTED THAT IT'S NOT

1 CLEAR THAT SAMSUNG NARROWED THE SCOPE OF THE CLAIM
2 TO OVERCOME THE PRIOR ART REJECTION AND IT'S NOT
3 CLEAR THAT THE PRIOR ART REJECTION RELATED TO THE
4 USE OF SCROLL KEYS OR ONE OF THE OTHER ASPECTS OF
5 THE AMENDMENT, AND THAT WAS IN YOUR DOCKET ORDER
6 NUMBER 1690.

7 AND IF WE GO BACK AND LOOK AT THE
8 PROSECUTION HISTORY OF WHAT HAPPENED HERE, FIRST OF
9 ALL, I THINK, JUST STEPPING BACK, YOUR HONOR, EVERY
10 OTHER TRIAL I'VE DONE WHERE THERE'S PROSECUTION
11 HISTORY ESTOPPEL, THIS ISSUE USUALLY GOES TO THE
12 JURY.

13 AND THEN ON THE FULL RECORD IN THE CASE
14 AND IN THE CONTEXT OF POST-TRIAL BRIEFING, WE'D
15 ASK -- THAT'S ACTUALLY THE RIGHT PLACE TO DECIDE
16 WHETHER PROSECUTION HISTORY ESTOPPEL APPLIES OR
17 NOT.

18 SO WE THINK DOING IT AT THIS POINT AND IN
19 THE CONTEXT OF A HIGH PRIORITY OBJECTION IS, IS NOT
20 THE PROPER WAY TO DO IT AND WE'D ASK THAT WE DO
21 IT -- WE FLIP IT AFTERWARDS.

22 BUT EVEN IF YOU LOOK AT THE MERITS AND
23 WHAT HAPPENED DURING PROSECUTION, THE FIRST THING
24 THAT HAPPENED DURING PROSECUTION, THE CLAIM AS
25 FILED CONTAINED -- AND THIS IS THE '460 PATENT THAT

1 TALKS ABOUT THE THREE CORE FUNCTIONS, YOUR HONOR,
2 AND THE THREE CORE FUNCTIONS ARE SENDING AN E-MAIL,
3 THAT'S THE FIRST CORE FUNCTION, SENDING AN E-MAIL
4 THAT HAS AN EMBEDDED PHOTO IN IT, AND THEN
5 SCROLLING.

6 AND WITH RESPECT TO WHEN THE PATENT
7 APPLICATION WAS FIRST FILED, IT HAD THE FIRST TWO
8 CORE FUNCTIONS IN IT.

9 THERE WAS AN AMENDMENT THAT WAS MADE TO
10 ADD TWO THINGS: ONE, THE LANGUAGE "MOST RECENTLY"
11 WAS ADDED TO ONE OF THE TWO CORE FUNCTIONS; AND
12 THEN THIS THIRD CORE FUNCTION WAS ADDED.

13 THE COURT: UM-HUM.

14 MR. JOHNSON: IT IS NOT CLEAR FROM THE
15 RECORD THAT IT WAS -- THE THIRD CORE FUNCTION WAS
16 SPECIFICALLY THE IDEA OF SCROLLING WAS ADDED TO
17 OVERCOME THE PRIOR ART. IT'S NOT AS THOUGH THERE
18 WAS SOMETHING ELSE IN THE PRIOR ART THAT DISCLOSED
19 SCROLLING OR OTHERWISE.

20 WHEN WE LOOK AT WHETHER ESTOPPEL SHOULD
21 APPLY, THE REAL QUESTION HERE IS, WHAT IS THE GAP
22 BETWEEN THE TWO CORE FUNCTIONS AND A THIRD CORE
23 FUNCTION? IT COULD HAVE BEEN ANY THIRD CORE
24 FUNCTION.

25 AND SCROLLING, IN AND OF ITSELF -- IT

1 WASN'T AS THOUGH SCROLLING WAS ADDED TO OVERCOME A
2 PARTICULAR OTHER WAY OF MOVING THROUGH THE
3 PHOTOGRAPHS, WHICH IS WHAT THE PROSECUTION HISTORY
4 ESTOPPEL USUALLY TALKS ABOUT. IS THERE A SPECIFIC
5 AMENDMENT THAT'S MADE IN RESPONSE TO A REJECTION TO
6 OVERCOME A STATEMENT IN THE PRIOR ART OR SOMETHING
7 THAT APPEARS IN THE PRIOR ART?

8 HERE SCROLLING WASN'T ADDED TO
9 SPECIFICALLY OVERCOME THE PRIOR ART. IT WAS ADDED
10 AS A THIRD CORE FUNCTION, AND IT COULD HAVE BEEN
11 ANY THIRD CORE FUNCTION, FRANKLY, BECAUSE -- AND
12 IT'S EVEN NOT CLEAR WHETHER THE MOST RECENTLY ADDED
13 LANGUAGE WAS ACTUALLY ADDED TO OVERCOME THE
14 REJECTION, WHETHER THAT WAS IN AND OF ITSELF
15 SUFFICIENT.

16 SO THERE WERE TWO BASES -- WHEN THE
17 CLAIMS WERE ADDED, TWO THINGS WERE AMENDED, LIKE I
18 SAID, "MOST RECENTLY" AND THE THIRD CORE FUNCTION.

19 AND IT'S NOT CLEAR FROM THE PROSECUTION
20 HISTORY, IT'S CERTAINLY NOT, AS THE CLAIMS REQUIRE,
21 OR AS THE LAW REQUIRES, THAT IT BE -- THAT IT WAS
22 NARROWED TO OVERCOME A SPECIFIC PRIOR ART
23 REJECTION.

24 THE THIRD CORE FUNCTION WAS ADDED, ALONG
25 WITH THE "MOST RECENTLY" LANGUAGE, IN ORDER TO

1 ESTOPPEL. IT'S AN ISSUE OF LAW. IT SHOULD BE
2 DECIDED NOW.

3 THERE ARE TWO QUESTIONS THAT NEED TO BE
4 ASKED TO RESOLVE THE ISSUE OF WHETHER PROSECUTION
5 HISTORY ESTOPPEL IS APPLICABLE.

6 FIRST, WAS THERE A NARROWING AMENDMENT?

7 AND SECOND, IF SO, WAS THE REASON A
8 SUBSTANTIAL ONE RELATING TO PATENTABILITY?

9 AND HERE THERE'S NO QUESTION THAT THE
10 ANSWER TO BOTH OF THESE IS YES.

11 AS TO THE FIRST, SAMSUNG ITSELF ADMITS IN
12 THE PAPER THAT IT FILED ON FRIDAY THAT IT WAS
13 NARROWING THE AMENDMENT. IT SAID, BEFORE THE
14 AMENDMENT, THE CLAIM HAD NOTHING TO DO WITH
15 SCROLLING THROUGH PHOTOS.

16 THAT'S CORRECT, AND THEY ADDED THIS
17 LIMITATION THAT NARROWED IT THAT INCLUDES A
18 REQUIREMENT OF SCROLLING THROUGH PHOTOS.

19 SO THE FIRST FESTO REQUIREMENT IS
20 UNMISTAKABLY SATISFIED.

21 THE COURT: F-E-S-T-O.

22 MR. SELWYN: THE SECOND QUESTION IS
23 WHETHER THE REASON FOR THE AMENDMENT IS ONE RELATED
24 TO PATENTABILITY.

25 WE NEED LOOK NO FURTHER THAN THE

1 PROSECUTION HISTORY ITSELF FOR THE ANSWER TO THAT
2 QUESTION.

3 THERE WERE TWO LIMITATIONS THAT WERE
4 ADDED IN THE FILE HISTORY. THE PATENTEE STATES,
5 "CLAIM 20 HAS BEEN AMENDED TO INCLUDE," QUOTE,
6 "DISPLAYING AN IMAGE MOST RECENTLY CAPTURED IN A
7 CAMERA MODE AND SEQUENTIALLY DISPLAYING OTHER
8 IMAGES STORED IN MEMORY THROUGH THE USE OF SCROLL
9 KEYS.

10 "NEITHER WAGNER, SUSO, NOR DAWSON, ALONE
11 OR IN COMBINATION, TEACH OR DISCLOSE THESE
12 LIMITATIONS. BASED ON THE FOREGOING, WITHDRAWAL OF
13 THE REJECTION IS REQUESTED."

14 SO THERE'S NO QUESTION THAT THIS WAS AN
15 AMENDMENT THAT WAS DONE FOR REASONS OF
16 PATENTABILITY.

17 AND EVEN IF THERE WERE SOME QUESTION
18 ABOUT THAT, THE FACT OF THE MATTER IS THAT IF THERE
19 IS NO REASON GIVEN IN THE PROSECUTION HISTORY, AND
20 HERE THERE IS VERY CLEARLY A REASON, THEN THE
21 PRESUMPTION IS THAT THERE IS ESTOPPEL.

22 WARNER JENKINSON SAYS THAT "WHEN THE
23 PROSECUTION HISTORY RECORD REVEALS NO REASON FOR
24 THE AMENDMENT, WARNER JENKINSON PRESUMES THAT THE
25 PATENTEE HAD A SUBSTANTIAL REASON RELATING TO

1 PATENTABILITY."

2 SO HERE WE HAVE AN EXPLICIT RECORD IN THE
3 FILE HISTORY THAT SAYS THAT THE CHANGE WAS MADE FOR
4 REASONS RELATED TO PATENTABILITY.

5 AND AS TO MR. JOHNSON'S POINT THAT THERE
6 WERE ACTUALLY TWO AMENDMENTS MADE AT THE SAME TIME,
7 THAT'S ABSOLUTELY CORRECT, THERE WERE TWO
8 AMENDMENTS MADE STATEMENT.

9 THE FELIX VERSUS AMERICAN HONDA MOTOR
10 COMPANY CASE WHICH WAS CITED IN OUR PAPERS MAKES
11 CLEAR THAT, QUOTE, "IT IS IMMATERIAL THAT THE
12 PATENT OWNER CHOSE TO ADD TWO LIMITATIONS RATHER
13 THAN ONE, THE RESULTING ESTOPPEL ATTACHES TO EACH
14 ADDED LIMITATION."

15 SO WE WOULD SUBMIT THAT IT IS AN ISSUE
16 THAT SHOULD BE DECIDED NOW.

17 THERE'S A PRACTICAL REASON AS WELL. IF
18 IT'S NOT DECIDED NOW, WE HAVE TO CHANGE THE VERDICT
19 FORM TO BREAK OUT D.O.E. AND LITERAL FOR THE '460
20 PATENT.

21 AS YOU MAY RECALL, THE EVIDENCE IS
22 DIFFERENT WITH PRODUCTS RUNNING IOS 4 VERSUS IOS 5.

23 GIVEN THE CLARITY IN THE FILE HISTORY
24 HERE, THIS IS SOMETHING THAT WE THINK SHOULD BE
25 DECIDED NOW AND SHOULD NOT GO TO THE JURY.

1 THE COURT: OKAY. ALL RIGHT.

2 MR. JOHNSON: YOUR HONOR, CAN I RESPOND?

3 THE COURT: YEAH, GO AHEAD, BRIEFLY.

4 MR. JOHNSON: SO I WANT TO JUST GO BACK
5 TO THAT THIRD FUNCTION, BECAUSE THE FUNCTION IS
6 SEQUENTIALLY DISPLAYING IMAGES, AND THERE WASN'T
7 ANY DISCUSSION IN THE PROSECUTION HISTORY ABOUT
8 WHETHER SCROLLING IS EQUIVALENT TO TAPPING. IT'S
9 NOT AS THOUGH SAMSUNG GAVE THAT UP DURING
10 PROSECUTION.

11 FESTO TALKS ABOUT, YOU KNOW, THERE NEEDS
12 TO BE -- PROSECUTION HISTORY ESTOPPEL AFFECTS A
13 GENERAL DISCLAIMER OF THE TERRITORY BETWEEN THE
14 ORIGINAL CLAIM AND THE AMENDED CLAIM. THE ORIGINAL
15 CLAIM HAD TWO FUNCTIONS.

16 THE ISSUED CLAIM, OR AMENDED CLAIM HERE,
17 HAS THREE FUNCTIONS. SO THE ANALYSIS IS WHETHER
18 ULTIMATELY TWO CORE FUNCTIONS SHOULD BE EQUIVALENT
19 TO THREE CORE FUNCTIONS.

20 WHAT'S IN THAT THIRD CORE FUNCTION,
21 WHETHER IT'S SEQUENTIALLY DISPLAYING AN IMAGE,
22 THAT'S THE ISSUE.

23 WHETHER TAPPING IS RELATED TO SCROLLING,
24 THAT WASN'T DISCUSSED IN THE PROSECUTION HISTORY.
25 SCROLLING WAS NOT DISCUSSED IN THIS PROSECUTION

1 HISTORY, PER SE.

2 IT WAS THIS ADDED -- IT WAS THIS IDEA OF
3 ADDING A THIRD FUNCTION.

4 AND THE CASES THAT MR. SELWYN REFERS TO
5 TALK ABOUT THE FACT THAT YOU'RE SUPPOSED TO LOOK AT
6 THE AMENDED CLAIM AND COMPARE IT TO WHAT WAS
7 ORIGINALLY FILED, AND WHATEVER THE DISTINCTION IS,
8 THAT GAP BETWEEN THE ORIGINAL CLAIM AND THE AMENDED
9 CLAIM, THAT'S WHAT THE PATENTEE GIVES UP.

10 SO IN THAT SITUATION, IT'S WHETHER A
11 SECOND -- A CLAIM THAT HAS TWO FUNCTIONS IS
12 EQUIVALENT TO THE CLAIM THAT HAS THREE FUNCTIONS.

13 IT DOESN'T GET DOWN TO THE LEVEL OF
14 SPECIFICITY AS TO WHETHER SCROLLING IS EQUIVALENT
15 TO TAPPING, WHICH IS THE ISSUE THAT'S HERE.

16 AND IT WAS NOT A NARROWING OF THAT IN ANY
17 SENSE.

18 THE COURT: OKAY.

19 MR. SELWYN: CAN I RESPOND VERY BRIEFLY
20 TO THAT?

21 THE COURT: GO AHEAD, PLEASE.

22 MR. SELWYN: THE CLAIM BEFORE AMENDMENT
23 DID NOT REQUIRE SCROLLING THROUGH PHOTOS USING THE
24 SCROLL KEYS. THE AMENDMENT NARROWED THE CLAIM IN
25 ORDER TO ADD THAT.

1 THE CONSEQUENCE OF THAT IS THAT SAMSUNG
2 IS ESTOPPED FROM ARGUING THAT SCROLLING WITHOUT
3 USING SCROLL KEYS, SUCH AS BY SWIPING, IS
4 EQUIVALENT TO SCROLLING WITH KEYS.

5 THEY ARE TRYING, THROUGH EQUIVALENCE NOW,
6 TO RECAPTURE WHAT THEY GAVE UP IN THE PROSECUTION
7 OF THIS PATENT IN ORDER TO GET THIS CLAIM.

8 THE CLERK: ALL RIGHT. LET'S GO TO '460,
9 CLAIM CONSTRUCTION IN INSTRUCTION 15.1.

10 I'M DENYING APPLE'S OBJECTION. THE
11 INSTRUCTION IS CONSISTENT WITH THE SUMMARY JUDGMENT
12 ORDER.

13 WITH REGARD TO INSTRUCTION NUMBER 29,
14 UTILITY PATENT DAMAGES, THE NORTHERN DISTRICT MODEL
15 JURY INSTRUCTION STILL ALLOWS APPLICATION OF THE
16 ENTIRE MARKET VALUE RULE IF THE PERCENTAGE IS LOW
17 ENOUGH, AND I'D LIKE TO STICK WITH THE MODEL RULES,
18 MODEL JURY INSTRUCTIONS, EXCUSE ME.

19 WITH REGARD TO THE LUMP SUM, SAMSUNG
20 CITES TO MR. WAGNER'S TESTIMONY AS TO A LUMP SUM
21 ROYALTY, SO I THINK THERE IS SOME BASIS IN THE
22 RECORD IF THE JURY CHOOSES TO DO THAT. SO BOTH OF
23 THOSE OBJECTIONS WOULD BE DENIED.

24 WITH REGARD TO 34.1, THE DESIGN PATENT
25 INFRINGEMENT, THAT WOULD BE DENIED IN PART AND

1 GRANTED IN PART.

2 I AGREE THAT THE GORHAM TEST IS NOT THE
3 MOST ARTFULLY PHRASED, BUT IT IS THE BEST STATEMENT
4 OF THE LAW TO BE APPLIED TO THE JURORS, OR APPLIED
5 BY THE JURORS, EXCUSE ME, AND THAT'S THE STANDARD
6 THAT SHOULD BE GIVEN. SO I'M NOT GOING TO TAKE
7 THAT OUT.

8 HOWEVER, I MIGHT BE AMENABLE TO ADDING
9 THE SENTENCE THAT APPLE SUGGESTS, WHICH IS "YOU DO
10 NOT NEED, HOWEVER, TO FIND THAT ANY PURCHASERS
11 ACTUALLY WERE DECEIVED OR CONFUSED BY THE
12 APPEARANCE OF THE ACCUSED SAMSUNG PRODUCTS."

13 I BELIEVE THIS IS A CORRECT STATEMENT OF
14 THE LAW AND I MIGHT BE WILLING TO ADD THAT TO
15 CLARIFY THAT PROOF OF ACTUAL DECEPTION IS NOT
16 REQUIRED, AND TO DO THIS IN BOTH INSTRUCTIONS 34.1
17 AND 37.

18 MR. ZELLER, I'M ASSUMING YOU'RE GOING TO
19 OBJECT TO THAT, RIGHT?

20 MR. ZELLER: THE SHORT ANSWER IS YES.

21 THE COURT: OKAY.

22 MR. ZELLER: THE LONGER ANSWER IS THAT IF
23 THE COURT IS INCLINED TO DO THAT, WHAT WE WILL
24 SUGGEST AND PROPOSE, YOUR HONOR, IS THAT IT BE MADE
25 CLEAR THAT THE EXISTENCE OR ABSENCE OF ACTUAL

1 DECEPTION IN THE MARKETPLACE MAY BE A RELEVANT
2 CONSIDERATION, BUT IT IS NOT DISPOSITIVE. AND I
3 CAN PROPOSE SOME EXACT LANGUAGE.

4 BUT THE COURTS HAVE MADE CLEAR, AND THE
5 FEDERAL CIRCUIT HAS MADE CLEAR, THAT IT IS A
6 TWO-WAY STREET ON THAT SUBJECT.

7 SO THE PARTIES, I THINK, ARE ENTITLED TO
8 ARGUE FROM THAT THAT IT SHOULDN'T BE A ONE-WAY
9 STATEMENT, YOUR HONOR.

10 THE COURT: ALL RIGHT. WELL, LET ME HEAR
11 FROM MR. JACOBS THEN. DID I --

12 MR. JACOBS: IT IS QUITE CLEAR, YOUR
13 HONOR, UNDER THE DECISIONAL LAW THAT EVIDENCE OF
14 ACTUAL DECEPTION IS NOT ONLY NOT REQUIRED, BUT IS
15 NOT REALLY A FACTOR IN THE EGYPTIAN GODDESS
16 ANALYSIS, AND TO SUGGEST IT'S EVEN A FACTOR WOULD
17 GIVE IT UNDUE WEIGHT AND WOULD ALLOW AN ARGUMENT TO
18 BE MADE TO THE JURY THAT WOULD BE LEGALLY
19 INCORRECT.

20 I BELIEVE YOU ELICITED THE TRUTH ON THIS
21 FROM SAMSUNG'S COUNSEL IN AN EXCHANGE THAT WE CITED
22 IN OUR BRIEF WHERE SAMSUNG SAID, "THAT'S RIGHT, WE
23 DO NOT MEET -- THERE IS NO REQUIREMENT OR WE DO NOT
24 INTEND TO TRY AND PROVE ACTUAL CONFUSION -- THE
25 ABSENCE OF ACTUAL CONFUSION OR DECEPTION IN ARGUING

1 AGAINST DESIGN PATENT INFRINGEMENT."

2 SO I THINK WE'RE ACTUALLY IN AGREEMENT ON
3 WHAT THE LAW IS HERE. BUT INCLUDING THIS FACTOR
4 WOULD ALLOW AN ARGUMENT TO BE MADE ABOUT THE
5 EVIDENTIARY RECORD THAT WOULD GIVE GREAT WEIGHT TO
6 A FACTOR THAT THE FEDERAL CIRCUIT HAS MADE CLEAR IS
7 REALLY NOT RELEVANT.

8 IT IS THE CASE THAT IF YOU HAVE ACTUAL
9 CONFUSION, THAT GETS CITED IN YOUR FAVOR.

10 BUT IT IS NOT THE CASE THAT THE ABSENCE
11 OF ACTUAL CONFUSION EVER GETS CITED AGAINST YOU IN
12 A FEDERAL CIRCUIT CASE ON DESIGN PATENT
13 INFRINGEMENT POST-EGYPTIAN GODDESS.

14 THE COURT: NOW, THE LANGUAGE THAT YOU
15 SUGGESTED, WHERE DO YOU RECOMMEND THAT ACTUALLY BE
16 INSERTED? IS THERE A SPECIFIC LINE NUMBER IN JURY
17 INSTRUCTION 34.1?

18 MR. JACOBS: YES.

19 THE COURT: WHERE IS THAT?

20 MR. JACOBS: RIGHT AFTER -- IT'S AT LINE
21 7 AND A HALF, YOUR HONOR.

22 THE COURT: OKAY. SO RIGHT AFTER THAT,
23 ADD "YOU DO NOT NEED, HOWEVER, TO FIND THAT ANY
24 PURCHASERS ACTUALLY WERE DECEIVED OR CONFUSED BY
25 THE APPEARANCE OF THE ACCUSED SAMSUNG PRODUCTS"?

1 MR. JACOBS: THAT WOULD GO RIGHT AFTER
2 THE "INDUCING HIM TO PURCHASE ONE SUPPOSING IT TO
3 BE THE OTHER" FRAGMENT.

4 THE COURT: ALL RIGHT. MR. ZELLER, I DO
5 THINK THAT'S AN ACCURATE STATEMENT OF THE LAW.

6 MR. ZELLER: WELL, YOUR HONOR, HERE'S
7 WHAT I WOULD POINT TO, WHICH IS ARMINAK, IT'S
8 A-R-M-I-N-A-K, WHICH IS 501 F.3D 1314, AND IN THIS
9 PARTICULAR CASE, THE FEDERAL CIRCUIT RELIED UPON
10 TESTIMONY ABOUT WHAT WAS GOING ON IN THE REAL WORLD
11 FOR PURPOSES OF THE GORHAM STANDARD.

12 AND THE COURT SPECIFICALLY TALKS ABOUT
13 HOW "THE RECORD ESTABLISHES THAT THE ORDINARY
14 OBSERVER WOULD NOT BE DECEIVED BY THE SIMILARITY
15 BETWEEN ARMINAK'S AA TRIGGER SPRAYER AND CALMAR'S
16 PATENTED SPRAY ERGO SHROUD DESIGNS. INDEED,
17 CALMAR'S OWN EXPERT CONCEDED THAT IT WOULD BE A
18 SIGNIFICANT EXCEPTION FOR A CORPORATE BUYER
19 PURCHASING THE ARMINAK TRIGGER SPRAYER TO CONFUSE
20 THE CALMAR ERGO SHROUD AND THE ARMINAK ERGO SHROUD,
21 AND THAT THERE IS ESSENTIALLY NO QUESTION THAT A
22 CORPORATION BUYER PURCHASING THESE TRIGGER SPRAYERS
23 WITH THESE SPECIFIC SHROUDS WOULD BE ABLE TO TELL
24 THE DIFFERENCES EASILY. A FORMER CALMAR CUSTOMER
25 SERVICE MANAGER ALSO TESTIFIED THAT MOST OF

1 CALMAR'S CUSTOMERS WOULDN'T BE FOOLED FOR A
2 SECOND."

3 THE COURT: CAN I ASK YOU AGAIN,
4 MR. ZELLER, FOR YOUR EXACT LANGUAGE? AND I'M JUST
5 GOING TO TAKE THIS UNDER SUBMISSION AND EITHER DO
6 SOME FRANKENSTEIN THAT'S A COMBINATION OF BOTH, OR
7 I'LL JUST PICK ONE LATER. WHAT'S YOUR LANGUAGE?

8 MR. ZELLER: THE PROPOSED LANGUAGE WOULD
9 BE "HOWEVER, THE PRESENCE OR ABSENCE OF ACTUAL
10 DECEPTION MAY BE RELEVANT TO WHETHER THE
11 HYPOTHETICAL ORDINARY OBSERVER WOULD BE DECEIVED."

12 THE COURT: "HOWEVER, THE PRESENCE OR
13 ABSENCE OF ACTUAL DECEPTION MAY BE RELEVANT TO HOW
14 THE ORDINARY OBSERVER" WHAT?

15 MR. ZELLER: ACTUALLY, "RELEVANT TO
16 WHETHER THE HYPOTHETICAL ORDINARY OBSERVER WOULD BE
17 DECEIVED."

18 THE COURT: "HOWEVER, THE PRESENCE OR
19 ABSENCE OF ACTUAL DECEPTION MAY BE RELEVANT TO
20 WHETHER THE HYPOTHETICAL OR ORDINARY OBSERVER WOULD
21 BE DECEIVED"?

22 MR. ZELLER: YES. AND WE COULD -- I
23 DON'T THINK WE'D ACTUALLY REFER TO HYPOTHETICAL
24 ELSEWHERE.

25 THE COURT: IT MIGHT MAKE IT MORE

1 CONFUSING.

2 OKAY.

3 MR. JACOBS: YOUR HONOR, BRIEFLY.

4 THE COURT: YES.

5 MR. JACOBS: JUST TWO SECONDS. ARMINAK
6 IS PRE-EGYPTIAN GODDESS.

7 THE COURT: YEAH. I'M LIKELY TO GO WITH
8 THE APPLE LANGUAGE, BUT I'M GOING TO TAKE IT UNDER
9 SUBMISSION. OKAY?

10 MR. ZELLER: I WOULD ALSO, I'M NOT SURE
11 WHY EGYPTIAN GODDESS, WHICH DIDN'T ADDRESS THE
12 QUESTION, WOULD BE DEEMED DISPOSITIVE OF IT. THAT
13 IS STILL STANDING FEDERAL CIRCUIT LAW.

14 ALSO, L.A. GEAR, WHICH APPLE HAS RELIED
15 UPON SEVERAL TIMES IN THE COURSE OF THIS
16 LITIGATION, ALSO FOUND THAT THERE WAS NO
17 METHODLOGICAL ERROR IN THE DISTRICT COURT RELYING
18 ON EVIDENCE ABOUT LIKELIHOOD OF CONFUSION IN THE
19 CONTEXT OF DESIGN PATENT.

20 THE COURT: I JUST DISAGREE WITH YOU
21 ABOUT THE ABSENCE OF DECEPTION. I DISAGREE WITH
22 YOU ON THE ABSENCE OF DECEPTION, SO I'M NOT LIKELY
23 TO ADOPT THAT LANGUAGE. OKAY?

24 MR. ZELLER: THANK YOU.

25 THE COURT: LET'S KEEP GOING.

1 SO ON INSTRUCTION NUMBER 40, DESIGN
2 PATENT DAMAGES, OKAY.

3 MR. JACOBS: LET ME, IF I -- WE FILED
4 THIS ONE BEFORE WE GOT THE VERY LAST INSTRUCTION.

5 THE COURT: OH.

6 MR. JACOBS: INSTRUCTIONS, AND I THINK
7 YOUR HONOR'S 61.3 CAPTURES THE ESSENCE OF WHAT WE
8 WERE TRYING TO SAY AND YOU HAD, I THINK YOUR HONOR,
9 ALLUDED TO THIS IN OPENING COMMENTS.

10 61.3 IS A UNIT-BY-UNIT -- PROVIDES FOR A
11 UNIT-BY-UNIT ANALYSIS OF WHAT REMEDY IS CALLED FOR,
12 AND OUR PROBLEM WAS THAT IN SOME OF THE EARLIER
13 INSTRUCTIONS, THE INSTRUCTIONS SUGGESTED THAT WE
14 HAD TO MAKE A RIGHT-BY-RIGHT ELECTION.

15 THE COURT: UM-HUM.

16 MR. JACOBS: SO THIS DESIGN PATENT, WE
17 HAVE TO SEEK ONLY LOST PROFITS ON AND THIS DESIGN
18 PATENT WE CAN SEEK INFRINGER'S PROFITS. BUT 61.3
19 CLARIFIED THAT THAT'S NOT RIGHT.

20 AND I THINK REORDERING PROBABLY MAKES
21 SOME SENSE, BUT ALSO SOME INTERLINEATIONS TO
22 CAPTURE 61.3 AND SOME OF THE OTHER INSTRUCTIONS
23 WOULD BE HELPFUL.

24 IN OTHER WORDS, I DON'T THINK WE'RE IN
25 DISAGREEMENT WITH YOUR HONOR NOW ON THE LAW. I

1 THINK IT'S JUST THAT SOME OF THESE EARLIER
2 INSTRUCTIONS WITH THE LANGUAGE OF ELECTION ARE
3 GOING TO BE CONFUSING.

4 THE COURT: SO GIVE ME A SPECIFIC
5 LANGUAGE CHANGE, PLEASE.

6 MR. JACOBS: SO ON 40, FOR EXAMPLE --

7 THE COURT: OKAY.

8 MR. JACOBS: -- AT LINE 7 AND
9 THREE-QUARTERS AFTER THE POTENTIAL RECOVERY --

10 THE COURT: YES.

11 MR. JACOBS: -- WE WOULD ADD, "WITH
12 RESPECT TO THE SALE OF EACH UNIT OF AN INFRINGING
13 PRODUCT."

14 AND THEN AT THE END OF THAT --

15 THE COURT: I'M SORRY. CAN YOU REPEAT
16 THAT LANGUAGE ONE MORE TIME?

17 MR. JACOBS: SURE. "WITH RESPECT TO THE
18 SALE OF EACH UNIT OF AN INFRINGING PRODUCT."

19 AND THEN AT THE END OF THAT PARAGRAPH,
20 I'LL CALL IT LINE 9, TO MAKE IT CLEAR THAT WE'RE
21 NOT ENTITLED TO A DOUBLE RECOVERY, WE WOULD PROPOSE
22 TO ADD -- SO IT'LL READ AS A WHOLE, "APPLE IS NOT
23 ENTITLED TO RECOVER BOTH COMPENSATORY DAMAGES AND
24 THE DEFENDANT'S PROFITS ON THE SAME UNIT SALE,"
25 WITH "ON THE SAME UNIT SALE" BEING THE PROPOSED

1 ADDITIONAL LANGUAGE.

2 THE COURT: ALL RIGHT. WHO WANTS TO
3 SPEAK FOR SAMSUNG ON THESE TWO CHANGES?

4 MR. ZELLER: AS THE COURT IS AWARE, AND
5 WE'VE BRIEFED THIS PREVIOUSLY, WE MAINTAIN OUR
6 OBJECTION. WE DON'T THINK THAT'S A CORRECT
7 STATEMENT OF THE LAW. WE DON'T THINK IT CAN BE
8 DONE UNIT-BY-UNIT IN THIS MANNER.

9 COUNSEL HAS NOT PROPERLY RECITED OUR
10 POSITION ON THIS, EITHER. WE'RE NOT SAYING IT HAS
11 TO BE DESIGN PATENT BY DESIGN PATENT, BUT
12 THERE'S -- WE DON'T AGREE WITH THE LAW ON THIS.

13 BUT SETTING THAT ASIDE FOR A MOMENT, WE
14 ACTUALLY THINK THAT THIS MAKES IT ALL MORE
15 CONFUSING. THEY LITERALLY ARE GOING TO BE ASKING
16 THE JURY TO GO THROUGH AND DETERMINE MILLIONS AND
17 MILLIONS OF UNIT SALES AND TRY AND GROUP THEM IN
18 VARIOUS WAYS TO DETERMINE WHAT AMOUNT OF THAT
19 PARTICULAR UNIT SALE, OR WHAT GROUPING OF UNIT
20 SALES SHOULD BE LOST PROFITS VERSUS SOME OTHER
21 MEASURE OF REMEDY.

22 AND THIS IS -- THIS IS EXTREMELY
23 CONFUSING IN MY OPINION.

24 THE COURT: CAN YOU ALL GIVE ME -- AND
25 THIS IS WHY THE VERDICT FORM TOOK SO LONG IS JUST

1 TRYING TO FIGURE OUT HOW TO PRESENT THE DAMAGES
2 QUESTIONS WHEN THERE'S SO MANY DIFFERENT
3 ALTERNATIVE REMEDIES HERE. WE CAN'T HAVE DOUBLE
4 RECOVERY.

5 AND YET, I MEAN, SO WHAT -- GIVE ME
6 SOME -- I'M ALL EARS ON HOW WE CAN REVISE THE
7 INSTRUCTIONS TO MAKE THIS CLEAR. DO YOU HAVE
8 SPECIFIC LANGUAGE?

9 BECAUSE I AGREE, I'M NOT -- I UNDERSTAND
10 WHAT APPLE IS TRYING TO DO HERE, BUT I'M NOT
11 SURE -- AND ON BALANCE, PROBABLY IT'S BETTER TO
12 INCLUDE THIS LANGUAGE, BUT I'M NOT SURE THAT IT
13 WON'T MAKE THINGS MORE CONFUSING FOR OUR JURORS.

14 MR. ZELLER: RIGHT. AND THAT IS, FROM
15 OUR PERSPECTIVE, THE PROBLEM.

16 AND IT ALL STEMS FROM, YOUR HONOR, THE
17 FACT THAT IN ORDER TO MAXIMIZE THEIR DAMAGES
18 NUMBER, THEY WANT TO HAVE THE JURY LITERALLY
19 APPLYING DIFFERENT THEORIES TO EVEN THE SAME TYPES
20 OF DEVICES AND THE SAME PATENTS. SO THAT'S THE
21 ROOT OF THE PROBLEM IS THAT THIS IS, THIS IS THE
22 WAY APPLE HAS DONE IT TO MAXIMIZE DAMAGES.

23 THIS IS THE ROOT OF ALSO WHY WE SUGGESTED
24 THAT APPLE SHOULD ELECT. I MEAN, WHETHER THE COURT
25 CAN FORCE IT OR NOT, I UNDERSTAND THE COURT'S

1 POSITION ON THAT.

2 THE COURT: I DON'T THINK I CAN FORCE IT,
3 AS MUCH AS I WOULD LIKE TO.

4 MR. ZELLER: BUT AT THIS POINT, IT MAY
5 BE -- MAYBE APPLE IS GOING TO HAVE TO REALLY CHOOSE
6 TO DO IT IF IT WANTS SOMETHING CLEAR THAT CAN GO TO
7 THIS JURY THAT'S NOT GOING TO CREATE CONSIDERABLE
8 CONFUSION.

9 AND ONE THING I WOULD ALSO NOTE ABOUT
10 THIS INSTRUCTION THAT IS SOMEWHAT PROBLEMATIC THAT
11 OVERLAYS IT AS WELL, AS THE COURT IS AWARE FROM
12 CASES LIKE CATALINA LIGHTING, ONCE THERE'S A
13 RECOVERY ON A PARTICULAR DEVICE OR UNIT OR HOWEVER
14 THIS GETS PARSED OUT, WHETHER IT'S ON UTILITY OR
15 DESIGN PATENTS, YOU CAN'T RECOVER ON BOTH.

16 AND THAT'S NOT MADE CLEAR IN THIS
17 INSTRUCTION, EITHER.

18 SO IF -- SAY, FOR EXAMPLE, ON, AGAIN,
19 WHETHER IT'S A UNIT OR A PARTICULAR CATEGORY OF
20 UNITS, IF SAMSUNG'S PROFITS ARE THE MEASURE OF
21 DAMAGES, THAT'S IT. THEY DON'T GET ANYTHING ELSE,
22 NO MATTER HOW MANY OTHER SUPPOSED INFRINGEMENTS
23 HAVE OCCURRED.

24 AND THAT IS NOT MADE CLEAR IN ANY OF
25 APPLE'S INSTRUCTIONS.

1 I -- I APOLOGIZE, I DON'T HAVE ANY --
2 THE COURT: WELL, WHY DON'T -- I'M GOING
3 TO GIVE MR. JACOBS AN OPPORTUNITY TO SPEAK, BUT IF
4 YOU WANT TO THINK ABOUT SOME WAYS THAT WE CAN
5 CLARIFY THIS?

6 I MEAN, I AM SERIOUSLY CONCERNED,
7 MR. JACOBS, THAT WE MAY GET A VERY CONFUSED JURY
8 HERE WHO MAY NOT -- I MEAN, I HAVE TROUBLE
9 UNDERSTANDING THIS AND I'VE SPENT A LITTLE BIT MORE
10 TIME WITH IT THAN THEY HAVE.

11 SO TELL ME, HOW CAN WE MAKE THIS CLEARER?
12 IT'S VERY CONFUSING.

13 MR. JACOBS: WELL, I'M NOT SURE THAT --
14 WELL, I THINK THE ANSWER IS THIS: OUR DAMAGES
15 EXPERT PRESENTED A DAMAGES MODEL. IT HAD VARIOUS
16 COMPONENTS AND IT HAD VARIOUS ALTERNATIVES.

17 THE DAMAGES MODEL -- THE PRESENTATION TO
18 THE JURY WAS VERY CLEAR THAT WE WERE NOT SEEKING A
19 DOUBLE RECOVERY, WHETHER AS AGAINST DIFFERENT TYPES
20 OF RECOVERIES OR DIFFERENT TYPES OF RIGHTS AGAINST
21 PARTICULAR UNITS.

22 FOR EACH UNIT, YOU'LL RECALL KIND OF THE
23 WATERFALL THAT HE DEMONSTRATED, THE PHONES FELL
24 INTO THE VARIOUS BUCKETS.

25 THERE WAS NO CRITICISM OF THAT MODEL, ON

1 THAT ASPECT OF THE MODEL, FROM SAMSUNG'S DAMAGES
2 EXPERT.

3 SO THERE IS NO CLAIM THAT THE MODEL THAT
4 HE PRESENTED AND THE TOTALS THAT HE PRESENTED, THE
5 CALCULATIONS THAT HE PRESENTED SUFFER FROM A DOUBLE
6 RECOVERY PROBLEM.

7 THAT SHOULD BE SUFFICIENT. IF THE
8 DAMAGES MODEL HAD A FUNDAMENTAL FLAW BY WAY OF
9 DOUBLE RECOVERY AND SAMSUNG HAD SAID THAT, WE WOULD
10 BE IN A DIFFERENT WORLD, BUT WE DON'T.

11 SO THE JURY WILL TAKE ALL OF THIS IN,
12 THEY WILL TAKE THE EVIDENCE FROM BOTH SIDES,
13 MR. WAGNER DID TAKE A RUN AT THE LOST PROFITS
14 COMPONENT AND MR. MUSIKA SAID TO THE JURY "IF YOU
15 REJECT OUR LOST PROFITS COMPONENT, THIS IS WHAT
16 HAPPENS ON INFRINGER'S PROFITS" AND HE PRESENTED
17 THAT ALTERNATIVE CALCULATION.

18 THE COURT: UM-HUM.

19 MR. JACOBS: THE JURY WILL GIVE US A
20 NUMBER BASED ON ALL THE EVIDENCE THAT THEY'VE
21 RECEIVED FROM THE WITNESSES AND THE EXHIBITS THAT
22 GO BACK.

23 AND I'M REASONABLY OPTIMISTIC THAT THE
24 NUMBER THEY PRODUCE WILL BE DEFENSIBLE BASED ON THE
25 LIABILITY FINDINGS THEY GENERATE.

1 I THINK IF WE GET MORE GRANULAR --

2 THE COURT: I MEAN, I'M NOT SAYING THAT
3 AN IMPROPER DAMAGES THEORY WAS PUT FORTH.

4 I'M JUST CONCERNED THAT IT'S VERY COMPLEX
5 AND THERE'S SO MANY PIECES HERE AND THEN THERE ARE
6 ALTERNATIVE RECOVERIES FOR EACH ONE.

7 I'M JUST CONCERNED ABOUT POTENTIAL JURY
8 CONFUSION.

9 SO DO YOU HAVE ANY SUGGESTION, AND MAYBE
10 THE VERDICT FORM WILL HELP US IN TRYING TO SORT
11 THAT THROUGH, BUT -- ANY OTHER SUGGESTIONS ABOUT
12 WHAT WE CAN DO, OTHER THAN THE FEW CHANGES I'VE
13 TALKED ABOUT DURING SAMSUNG'S OBJECTIONS ABOUT
14 MAYBE REORDERING AND SOME OF THE DIFFERENT DAMAGES
15 REMEDIES?

16 MR. JACOBS: I THINK THAT ACTUALLY
17 REORDERING IN THE WAY THE COURT PROPOSED MAY
18 AGGRAVATE THE CONFUSION BECAUSE THE LEAD COMPONENT
19 OF DAMAGES IS REALLY INFRINGER'S PROFITS AND THAT'S
20 HOW MR. MUSIKA PRESENTED IT.

21 SO I THINK IF WE START OUT WITH LOST
22 PROFITS AND REASONABLE ROYALTY, THE JURY MARCHING
23 THROUGH THE INSTRUCTIONS MAY WELL GET CONFUSED.

24 SO I WOULD SUGGEST KEEPING INFRINGER'S
25 PROFITS FIRST, LOST PROFITS SECOND, REASONABLE

1 ROYALTY THIRD, THE REASONABLE ROYALTY ANALYSIS
2 AGAIN, AND THE JURY SHOULD RECALL THE WAY THE
3 WATERFALL WORKED AND THE WAY A FEW PHONES IN THE
4 DIAGRAM FELL INTO THE REASONABLE ROYALTY COLUMN.

5 AND THEY WILL -- THEY SHOULD HAVE IT IN
6 THEIR HEADS THAT INFRINGER'S PROFITS IS THE LARGEST
7 COMPONENT, AND THEN LOST PROFITS IS THE SECOND
8 COMPONENT, AND REASONABLE ROYALTY IS THE THIRD.

9 I DON'T THINK THAT'S GOING TO BE VERY --
10 THAT SHOULDN'T BE THAT CONFUSING TO THEM.

11 IN CLOSING, WE WILL BE PRESENTING
12 ALTERNATIVE CALCULATIONS TO THE JURY THAT EXPLAIN,
13 WELL, IF YOU FIND ON THIS ISSUE IN SAMSUNG'S FAVOR,
14 IF YOU FIND ON THIS ISSUE IN APPLE'S FAVOR, HERE IS
15 THE NUMBER BASED ON THE EVIDENCE THAT WAS ADDUCED
16 AT TRIAL BY BOTH EXPERTS.

17 THE COURT: UM-HUM. OKAY. WELL, WITH
18 REGARD TO THE SUGGESTED CHANGES TO INSTRUCTION
19 NUMBER 40, I UNDERSTAND, MR. ZELLER, YOU'RE
20 OBJECTING TO -- YOU THINK THIS ADDITIONAL LANGUAGE
21 COULD CAUSE CONFUSION ABOUT WHETHER MULTIPLE
22 RECOVERIES COULD BE AWARDED FOR THE SAME UNIT SALE
23 AND YOU THINK THAT'S PROHIBITED.

24 ANY OTHER ALTERNATIVE LANGUAGE THAT YOU
25 WILL LIKE TO PROPOSE?

1 MR. ZELLER: I APOLOGIZE, I DON'T HAVE A
2 PRACTICAL SOLUTION FOR THIS, OTHER THAN THE COURT
3 IS AWARE THAT WE HAVE SUBMITTED WHAT WE THINK IS A
4 CHART THAT SHOULD GO TO THE JURY AS TO WHAT'S BEING
5 ACCUSED AND UNDER WHAT THEORY AND THE LIKE.

6 BUT WE THINK OUR CHART IS MUCH CLEARER
7 THAN APPLE'S, WHICH -- I MEAN, APPLE'S IS PROBABLY
8 GOING TO EVEN CAUSE MORE CONFUSION IF THIS IS
9 WHAT'S GIVEN TO THEM.

10 THE COURT: WELL, THAT'S WHY I WANT YOU
11 ALL -- WHEN WE LOOK AT THE VERDICT FORM, I TRIED TO
12 DO A SEPARATE CHART. IT DIVIDES UP AND REQUIRES
13 THE JURY TO MAKE SEPARATE FINDINGS AS TO SEPARATE
14 PARTIES.

15 MR. ZELLER: RIGHT. AND CERTAINLY
16 SPECIFYING WHAT THE -- WHAT THE THEORY OF RECOVERY
17 IS I THINK IS ABSOLUTELY ESSENTIAL, BECAUSE OF
18 CERTAINLY THE COMPLEXITY OF WHAT'S BEING PRESENTED.

19 WE CAN OBVIOUSLY TALK ABOUT THAT SOME
20 MORE IN THE CONTEXT OF THE VERDICT FORM.

21 BUT WITH RESPECT TO THE INSTRUCTIONS, MY
22 CONCERN HAS TO DO WITH, YOU KNOW, EVEN APART FROM
23 OUR DISAGREEMENT ABOUT THE LAW, IS THAT ADDING IN
24 THINGS SUCH AS "WITH RESPECT TO EACH INDIVIDUAL
25 UNIT," THERE ARE MILLIONS AND MILLIONS OF UNIT

1 SALES INVOLVED HERE, AND THE JURY IS GOING TO LOOK
2 AT THAT AND IS GOING TO BECOME CONFUSED JUST SIMPLY
3 BY WHAT IT'S EVEN ASKING THEM TO DO.

4 AND, AGAIN, I THINK THE PRACTICAL WAY IN
5 WHICH THIS GETS RESOLVED IS FOR APPLE TO CLARIFY
6 ITS DAMAGES THEORIES, AND IT'S PUTTING US ALL AT
7 RISK FOR HAVING A VERY CONFUSED JURY AND ONE THAT
8 MAY NOT EVEN REACH A VERDICT BECAUSE IT WILL NOT
9 CLARIFY WHAT THESE DAMAGES THEORIES ARE.

10 AND I SAW MR. MUSIKA, JUST LIKE EVERYONE
11 ELSE, WITH HIS GRAPHICS ABOUT MOVING THINGS AROUND,
12 AND THAT'S -- THAT'S OBVIOUSLY NOT GOING TO ASSIST
13 THE JURY IN ANY WAY IN TRYING TO DETERMINE WHAT IT
14 CAN OR CANNOT AWARD AND AVOIDING THE DOUBLE
15 RECOVERY PROBLEM.

16 AND I ALSO DISAGREE WITH HOW THE ORDERING
17 OF THESE IS SOMEHOW GOING TO HELP THE JURY.

18 THE PROBLEM IS, PARTICULARLY WITH DESIGN
19 PATENTS, IS THAT YOU CAN'T -- IT'S NOT LIKE UTILITY
20 PATENTS. YOU DON'T HAVE THE SAME REMEDIES THAT ARE
21 AVAILABLE.

22 YOU CAN GET, ON THE ONE HAND, THE ACCUSED
23 INFRINGER'S PROFITS, OR YOU CAN GET EITHER
24 REASONABLE ROYALTY OR YOUR LOST PROFITS.

25 AND THIS LITERALLY, AT VARIOUS POINTS,

1 SUGGESTS THAT THE JURY CAN MIX AND MATCH IN WAYS IT
2 CANNOT -- THAT'S NOT PROPER UNDER DESIGN PATENT
3 LAW.

4 MR. JACOBS: YOUR HONOR, MR. MUSIKA
5 HANDLED -- TOOK HEAD-ON THE DOUBLE RECOVERY ISSUE
6 AND SPENT SEVERAL MINUTES OF HIS VALUABLE TIME
7 DISCUSSING THAT ISSUE. SO THIS HAS BECOME A BIT OF
8 A PHANTASM FROM SAMSUNG'S PART. THERE IS NO CLAIM
9 OF DOUBLE RECOVERY IN THE DAMAGES MODEL.

10 I DO THINK, WHILE WE'RE TALKING ABOUT
11 COMPLICATING THE ISSUE, THAT THE SEPARATE ENTITY
12 ASPECT OF THIS HAS TAKEN ON A LIFE -- HAS TAKEN ON
13 A LIFE GREATER THAN IT SHOULD, AND THAT -- IN
14 LOOKING AT THE VERDICT FORM, FOR EXAMPLE, THIS CAN
15 BE SEEN.

16 I THINK THIS IS EVEN MORE GRANULAR BY WAY
17 OF ENTITY THAN SAMSUNG HAS PROPOSED, AND WE ASKED
18 MR. WAGNER, FROM THE ACCOUNTING PERSPECTIVE, "DO
19 YOU HAVE ANY BASIS FOR DIFFERENTIATING THE AMOUNT
20 THAT'S AWARDED AGAINST ENTITIES," ENTITIES, AND HE
21 SAID NO.

22 SO I THINK WE CAN SIMPLE APPLY THAT BY --
23 THE WAY WE PROPOSED DOING IT JUST HAVING A QUESTION
24 AT THE END ABOUT THE ENTITIES AND GO THROUGH THE
25 VERDICT FORM HAVING LIABILITY ASSIGNED TO SAMSUNG

1 AND THEN ASKING THEM A QUESTION ABOUT THE SPECIFIC
2 ENTITIES THAT TEASED OUT WHETHER THERE WAS ANY
3 MEANINGFUL DIFFERENCE BETWEEN THE -- BETWEEN THE
4 ENTITIES.

5 SO I THINK THAT'S AN AREA WHERE WE COULD
6 SIMPLIFY AND WE WOULD STRONGLY URGE THAT.

7 OTHER THAN THAT, I THINK THE JURY HAS
8 OUR, HAS OUR CHARTS. MR. MUSIKA EXPLAINED HOW, IF
9 THEY WANT TO GO THROUGH 25A AND CALCULATE, AS THE
10 FORM NOW PROPOSES, ON A PRODUCT-BY-PRODUCT BASIS,
11 THEY CAN DO THAT, AND I THINK THEY'LL GET IT RIGHT.

12 THE COURT: ALL RIGHT. LET'S HANDLE YOUR
13 LAST TWO HIGH PRIORITIES AND THEN I WANT TO GIVE
14 YOU BOTH AN OPPORTUNITY -- OH, AND WE NEED TO TAKE
15 A BREAK.

16 (DISCUSSION OFF THE RECORD BETWEEN THE
17 COURT AND THE REPORTER.)

18 THE COURT: WITH REGARD TO YOUR OBJECTION
19 TO 48, THE TRADE DRESS FUNCTIONALITY, FOURTH
20 PARAGRAPH, I'M GOING TO OMIT THAT FOURTH PARAGRAPH.
21 NEITHER PARTY RECOMMENDED IT, AND I AGREE THAT
22 UNDER QUICK BILLIARDS, IT MIGHT INVITE ERROR.

23 OKAY. WITH REGARD TO 57 --

24 MR. ZELLER: I'M SORRY, YOUR HONOR. WE
25 ACTUALLY DID WANT THAT PARAGRAPH. I BELIEVE WE --

1 THEIR OBJECTION IS BASED ON INAPPOSITE CASES, YOUR
2 HONOR. THEY'RE RELYING ON THOSE RESTAURANT TRADE
3 DRESS CASES WHICH THE SUPREME COURT, IN WAL-MART,
4 SAID ARE NOT APPLICABLE TO A PRODUCT TRADE DRESS
5 CASE. WE DO WANT THIS LANGUAGE.

6 AND BY THE WAY, YOUR HONOR, THE COURT'S
7 ALREADY INSTRUCTED THE JURY TO THIS EFFECT, WHICH
8 IS -- AND APPLE OBJECTED THE FIRST TIME AROUND
9 PREVIOUSLY TO THIS, AND WE OPPOSED THAT. THE COURT
10 HAS GIVEN, AS PART OF THE PRELIMINARY INSTRUCTIONS,
11 LANGUAGE TO THIS EFFECT.

12 MR. JACOBS: YOUR HONOR, I'M LOOKING AT
13 SAMSUNG'S PROPOSED INSTRUCTION AND IT DOES NOT HAVE
14 THIS LANGUAGE.

15 THE COURT: YEAH, I DON'T THINK IT DOES.

16 MR. JACOBS: AND WE EXPLAINED THE
17 WAL-MART ISSUE IN OUR BRIEF.

18 THE COURT: ALL RIGHT. WELL, THAT LAST
19 PARAGRAPH IS COMING OUT.

20 OKAY. SO LET'S GO TO YOUR LAST ONE.
21 NUMBER 57, 57, THE SLEEKCRAFT --

22 MR. JACOBS: IF I MAY JUST GIVE YOU TWO
23 SENTENCES OF CONTEXT BEFORE YOU GIVE US YOUR
24 PRELIMINARY INDICATION ON THIS?

25 THE COURT: OKAY.

1 MR. JACOBS: THIS IS ONE OF THOSE THEORY
2 OF THE CASE INSTRUCTIONS, YOUR HONOR, BECAUSE OUR
3 THEORY ON THE SURVEY, FOR EXAMPLE, WAS A POST-SALE
4 CONFUSION THEORY, SO IT'S ESPECIALLY IMPORTANT THAT
5 THE INSTRUCTION CONFORM TO APPLICABLE LAW AND
6 INCLUDE THAT, INCLUDE THAT POSSIBILITY AS A WAY ONE
7 CAN PROVE LIKELIHOOD OF CONFUSION.

8 THE COURT: ALL RIGHT. WHAT ABOUT THIS,
9 AND THIS IS A PROPOSAL. I WANT TO HEAR FROM BOTH
10 PARTIES ON IT. "APPLE MAY PROVE A LIKELIHOOD OF
11 CONFUSION BY PROVIDING DIRECT EVIDENCE OF CONSUMER
12 CONFUSION. EVIDENCE OF NON-CONSUMER CONFUSION MAY
13 ALSO BE RELEVANT WHERE THERE IS CONFUSION ON THE
14 PART OF: 1, POTENTIAL CUSTOMERS; 2, NON-CUSTOMERS
15 WHOSE CONFUSION COULD CREATE AN INFERENCE THAT
16 CONSUMERS ARE LIKELY TO BE CONFUSED; AND, 3,
17 NON-CONSUMERS WHOSE CONFUSION COULD INFLUENCE
18 CONSUMERS."

19 WHY DON'T YOU BOTH COMMENT IF THIS IS
20 ACCEPTABLE OR NOT.

21 MR. ZELLER: AND WE OBJECT, YOUR HONOR,
22 ON A VARIETY OF GROUNDS TO THAT, YOUR HONOR.

23 FIRST OF ALL, I THINK THAT LANGUAGE IN
24 ITSELF IS RATHER CONFUSING TO THE JURY.

25 WE ALSO THINK IT'S CONTRARY TO THE LAW.

1 THE MODEL INSTRUCTIONS DO NOT PROVIDE ANYTHING
2 ALONG THOSE LINES.

3 AND ALSO APPLE DID NOT EVEN DISCLOSE SOME
4 OF THESE SO-CALLED THEORIES NOW, THE NON-CONSUMER
5 CONFUSION, UNTIL ITS PROPOSED JURY INSTRUCTIONS.
6 THIS WAS NOT ASSERTED BY APPLE UNTIL THAT TIME.

7 THE OTHER POINT IS, YOUR HONOR, AND
8 SPECIFICALLY LOOKING AT THE CASES, AND I'LL START
9 WITH THIS REARDON CASE FROM THE NINTH CIRCUIT, IT
10 SAYS --

11 THE COURT: THAT'S MORE HELPFUL TO YOU,
12 RIGHT?

13 MR. ZELLER: I'M SORRY?

14 THE COURT: REARDON IS MORE HELPFUL TO
15 SAMSUNG, RIGHT?

16 MR. ZELLER: YES. IT SAYS "TRADEMARK
17 INFRINGEMENT PROTECTS ONLY AGAINST MISTAKEN
18 PURCHASING DECISIONS AND NOT AGAINST CONFUSION
19 GENERALLY."

20 AND THE LINE THAT APPLE IS TRYING TO
21 CROSS ON THIS IS TO SUGGEST THAT OUT THERE IN THE
22 WORLD, IF THERE'S SOME CONFUSION, AND THE COURT
23 WILL RECALL THIS TESTIMONY FROM MR. SCHILLER ABOUT
24 DRIVING BY A BILLBOARD AT 55 MILES AN HOUR, OR
25 SEEING A SUPER BOWL COMMERCIAL OUT OF THE CORNER OF

1 YOUR EYE ON THE WAY TO THE KITCHEN, THAT SOMEHOW
2 THAT WAS ACTIONABLE.

3 THERE IS ZERO AUTHORITY FOR THAT. THAT
4 IS NOT THE PURPOSE OF THE LANHAM ACT. THE IDEA --
5 BECAUSE THEY'RE TRYING TO CONSTRUCT THIS MARKING
6 CONFUSION NOTION.

7 THEY HAVE NEVER TIED IT TO ACTUAL
8 PURCHASING DECISIONS OF ANY KIND, EVEN IN THOSE
9 INSTANCES WHERE INITIAL INTEREST CONFUSION OR
10 POST-SALE CONFUSION IS ALLOWED.

11 THERE IS EVIDENCE THAT THERE'S ACTUALLY
12 HAD AN EFFECT ON PURCHASING DECISIONS, WHICH IS --

13 THE COURT: YOU KNOW WHAT? I'M GOING TO
14 STOP YOU NOW. I'M NOT GOING TO MODIFY THE MODEL
15 INSTRUCTION. I'M NOT GOING TO ADD THAT LANGUAGE.
16 IT'S NOT IN THE MODEL INSTRUCTION. I'M NOT GOING
17 TO ADD IT.

18 MR. ZELLER: THANK YOU.

19 MR. JACOBS: YOUR HONOR, THIS IS -- AS I
20 THINK I SAID A FEW WEEKS AGO, IF YOU REALLY DELVE
21 DEEPLY INTO THESE MODELS AGAINST NINTH CIRCUIT
22 INSTRUCTIONS, THIS IS JUST AN AREA WHERE THEY'RE
23 NOT THAT WELL CONSTRUCTED, AND I DON'T HAVE AN
24 EXPLANATION FOR IT. IT'S A WHO QUESTION.

25 THE COURT: ACTUALLY, I HAVE THE REARDON

1 CASE NOW. IT WAS REASSIGNED FROM JUDGE PATEL TO
2 ME. SO IT'S BACK DOWN FROM APPEAL AND THE PARTIES
3 ARE GOING TO BE SETTING A SCHEDULE.

4 MR. MCELHINNY: AND THE LANGUAGE THAT I
5 BELIEVE THE COURT READ WAS FROM REARDON, CORRECT?

6 THE COURT: IT'S FROM REARDON, YEAH.
7 I'VE GOT THE CASE NOW.

8 MR. JACOBS: SO WE COULD LIVE WITH THAT
9 LANGUAGE AS THE COURT PROPOSED IT. IT'S OBVIOUSLY
10 THE CORRECT STATEMENT OF THE LAW AND THE COURT NOW
11 VERY WELL KNOWS THAT.

12 MR. ZELLER: IT'S --

13 THE COURT: WELL, IT'S NOT -- YOU KNOW, I
14 AGREE WITH YOU THAT THAT -- THE DIFFICULTY THAT
15 WE'RE FACING IS THAT IN MANY AREAS OF THESE LAWS,
16 THEY'RE NOT PARTICULARLY CLEAR, AND SO WE'RE IN A
17 VERY DIFFICULT POSITION OF HAVING TO INSTRUCT
18 JURIES ON UNCLEAR LAW.

19 BUT I'M NOT SURE TO WHAT EXTENT REARDON
20 ACTUALLY CHANGES THE OVERALL BODY OF THE NINTH
21 CIRCUIT LAW, SO I'M --

22 MR. JACOBS: I DON'T THINK IT CHANGES --

23 THE COURT: SO I'M RELUCTANT TO --

24 MR. ZELLER: YOUR HONOR, I --

25 MR. JACOBS: CAN I FINISH, MR. ZELLER,

1 PLEASE? I THINK IT'S MY TURN.

2 REARDON DOES NOT CHANGE NINTH CIRCUIT
3 LAW. POST-SALE CONFUSION IS WELL EMBEDDED IN THE
4 LAW.

5 AND FOR THE MODEL INSTRUCTION NOT TO
6 CONTEMPLATE THE POSSIBILITY OF POST-SALE CONFUSION
7 AS A VIABLE BASIS FOR A TRADEMARK INFRINGEMENT
8 RECOVERY MEANS THAT THE MODEL INSTRUCTION IS
9 INCONSISTENT WITH NINTH CIRCUIT DECISIONAL LAW.

10 AND IT JUST SEEMS -- IT SEEMS TO US TO BE
11 A BIG MISTAKE TO GO INTO THIS KNOWING THAT THERE'S
12 THIS GAP BETWEEN THE MODEL INSTRUCTION AND WELL
13 SETTLED NINTH CIRCUIT LAW WHICH SAYS THAT THERE IS
14 A POST -- THIS IS POST-SALE CONFUSION. POST-SALE
15 CONFUSION IS OUT THERE.

16 SO WE HAD A VERY SIMPLE SENTENCE THAT WE
17 PROPOSED, WHICH IS SOMEWHAT SHORTER THAN THE
18 REARDON LANGUAGE, WHICH LAID OUT THE VARIOUS FORMS
19 IN WHICH CONFUSION CAN TAKE PLACE.

20 MR. ZELLER: THAT SIMPLY DOES NOT ADDRESS
21 THE PROBLEM, YOUR HONOR. THE LAW IS VERY CLEAR,
22 EVEN IN THOSE LIMITED SITUATIONS WHERE POST-SALE
23 CONFUSION HAS BEEN ACCEPTED, THAT THERE'S STILL
24 EVIDENCE THAT IT IMPACTS PURCHASING DECISIONS.

25 WE'RE TALKING ABOUT A PRODUCT

1 CONFIGURATION CASE HERE AS WELL, AND THAT'S AN EVEN
2 NARROWER SUBSET. THERE ARE MANY COURTS, INCLUDING
3 THE SIXTH CIRCUIT AND OTHER CIRCUITS, THAT HAVE
4 ADDRESSED IT DIRECTLY, SAID YOU CANNOT ASSERT
5 POST-SALE CONFUSION AGAINST PRODUCT CONFIGURATION,
6 ON A PRODUCT CONFIGURATION TRADE DRESS THEORY
7 BECAUSE OF ITS SEVERE ANTICOMPETITIVE EFFECTS. SO
8 THAT'S NUMBER ONE.

9 BUT EVEN IN THOSE INSTANCES WHERE IT'S
10 BEEN RECOGNIZED, THERE HAS BEEN EVIDENCE THAT IT
11 HAD AN ACTUAL EFFECT, OR AT LEAST WOULD LIKELY HAVE
12 AN EFFECT ON PURCHASING DECISIONS.

13 AND THAT IS THE POINT ABOUT REARDON, AND
14 THAT HAS BEEN CONSISTENT IN THE LAW FOR LIKELIHOOD
15 OF CONFUSION.

16 WHAT APPLE IS LITERALLY TRYING TO DO IS
17 THEY ARE ACTUALLY ASKING FOR A CHANGE IN THE LAW.
18 NOT ONLY ARE THEY ASKING FOR A DEVIATION FROM THE
19 MODEL INSTRUCTION, THEY'RE ASKING BASICALLY TO HAVE
20 SOME FREE FLOATING FORM OF CONFUSION NOW ACTIONABLE
21 UNDER THE LANHAM ACT, AND THERE IS NO AUTHORITY FOR
22 THAT.

23 EVEN WHEN YOU LOOK AT CASES LIKE
24 BROOKFIELD, RIGHT, THERE THEY CONTEMPLATE THE FACT
25 THAT IT HAS STILL AN EFFECT ON THE PURCHASING

1 DECISION.

2 AND THAT IS TRUE EVEN FOR THE STORITZ
3 CASE WHERE IT TALKS ABOUT DOCTORS BEING MISLED AND
4 THEY WOULD HAVE AN IMPACT ON THE HOSPITAL'S
5 PURCHASING DECISIONS.

6 THE COURT: OKAY. I'D LIKE TO TAKE THAT
7 ONE UNDER SUBMISSION, BUT I'LL GIVE YOU THE LAST
8 WORD, MR. JACOBS, SINCE THIS IS ON YOUR TIME.

9 MR. JACOBS: SURE, YOUR HONOR, THANK YOU.

10 I THINK IF YOU LOOK AT THE DECISIONAL
11 LAW, YOU'LL SEE THAT WE ARE STATING IT CORRECTLY.
12 WE'RE TALKING ABOUT A LIKELIHOOD OF CONFUSION.

13 WE'RE NOT TALKING ACTUAL -- ABOUT ANY
14 FORM OF ACTUAL CONFUSION BEING REQUIRED. THERE IS
15 NO REQUIREMENT OF ACTUAL CONFUSION IN THE LANHAM
16 ACT. IT IS LIKELIHOOD OF CONFUSION.

17 AND THE FORMS OF CONFUSION AS TO WHICH A
18 LIKELIHOOD CAN BE SHOWN UNDER THE CASES THAT WE
19 CITED INCLUDE POST-SALE CONFUSION.

20 THE PROBLEM WITH THE MODEL INSTRUCTION IS
21 TWO-FOLD. IT DOESN'T EXPLICITLY CONTEMPLATE
22 POST-SALE CONFUSION, AND IT HAS A LOT OF POINT OF
23 SALE LANGUAGE IN IT THAT SUGGESTS THAT -- THAT
24 POINTS AWAY FROM POST-SALE CONFUSION.

25 SO THE LACK OF NEUTRALITY OF THE MODEL

1 INSTRUCTION IS ITSELF A PROBLEM IN LIGHT OF THIS
2 DECISIONAL LAW.

3 THANK YOU, YOUR HONOR.

4 THE COURT: OKAY. ALL RIGHT. THANK YOU.
5 IT'S NOW 4:02.

6 UNLESS THERE WERE ANY OTHER OBJECTIONS
7 YOU WANT TO RAISE, OTHERWISE I'M GOING TO NOW
8 JUST -- FIRST WE'RE GOING TO TAKE A BREAK, AND THEN
9 WHEN WE GET BACK, I'M GOING TO GIVE YOU AN
10 OPPORTUNITY TO JUST STATE FOR THE RECORD ALL OF
11 YOUR OTHER OBJECTIONS TO THE INSTRUCTIONS, AND THEN
12 WE NEED TO DO THE VERDICT FORM AND THEN I THINK
13 THAT WAS IT UNLESS YOU HAVE ANYTHING ELSE.

14 MR. SELWYN: YOUR HONOR, IF WE COULD WHEN
15 WE RETURN FROM THE BREAK, WE WANT TO ADDRESS HIGH
16 PRIORITY OBJECTION 15.1 BEFORE GOING THROUGH THE
17 OTHER OBJECTIONS FOR THE RECORD.

18 THE COURT: I'M SORRY. LET ME JUST
19 FIND -- 15.1, WHAT -- OH, OKAY. WHY DON'T WE TAKE
20 OUR BREAK NOW, AND THEN WHEN WE COME BACK, WE'LL
21 TALK ABOUT 15.1, AND THEN I'LL GIVE EACH SIDE THE
22 OPPORTUNITY TO STATE WHATEVER OTHER OBJECTIONS
23 YOU'D LIKE TO, AND THEN WE'LL TALK ABOUT THE
24 VERDICT FORM.

25 MR. JACOBS: FINE, YOUR HONOR. WE'LL

1 ALSO HAVE OUR TYPO SUGGESTIONS AT THAT POINT JUST
2 AS WE MARCH THROUGH THE INSTRUCTIONS.

3 THE COURT: OH, YOU MEAN ON THE VERDICT
4 FORM?

5 MR. JACOBS: NO, ON THE INSTRUCTIONS. AS
6 WE MARCH THROUGH THEM, WE'LL POINT OUT ANY TYPOS WE
7 FIND.

8 THE COURT: OKAY. 15 MINUTE BREAK.
9 THANK YOU.

10 (WHEREUPON, A RECESS WAS TAKEN.)

11 THE COURT: ALL RIGHT. LET'S GO AHEAD,
12 PLEASE.

13 WE HAVE A HOUSEKEEPING ISSUE, AND THAT IS
14 WERE YOU ALL PLANNING TO TAKE THE PHONES OFF SITE
15 TO DO THE PHOTOGRAPHING AND THE SIM REMOVAL?

16 MR. JACOBS: NO.

17 THE COURT: YOU WANTED TO DO THEM HERE?

18 MR. JACOBS: YES, PLEASE.

19 THE COURT: OKAY. ARE YOU THEN GOING TO
20 JUST DO THEM IN THE COURTROOM WHEN WE'RE DONE?

21 MR. JACOBS: YES.

22 THE COURT: OKAY. MS. PARKER BROWN, IS
23 THAT OKAY?

24 THE CLERK: I REALLY DON'T WANT TO BE
25 HERE UNTIL 7:00 O'CLOCK AT NIGHT.

1 THE COURT: I DON'T THINK
2 MS. PARKER BROWN HAS TO BE HERE, BECAUSE YOU'RE
3 BOTH GOING TO BE HERE TOGETHER, RIGHT?

4 MR. JACOBS: CORRECT.

5 THE COURT: IF YOU WANTED TO START NOW,
6 YOU CAN DO THAT.

7 THE CLERK: DO YOU WANT ME TO WHEEL THEM
8 OUT THEN?

9 THE COURT: DO YOU WANT US TO BRING THE
10 PHONES OUT NOW?

11 MR. JACOBS: PLEASE.

12 THE COURT: OKAY. WHY DON'T WE BRING THE
13 PHONES OUT NOW? WHAT YOU COULD DO IS IF YOU -- DO
14 YOU HAVE THE ABILITY TO CALL MY CHAMBERS? WE'RE
15 ALWAYS HERE DOWNSTAIRS ON THE FOURTH FLOOR, SO YOU
16 CAN LET US KNOW WHEN YOU'RE DONE. IT DOESN'T
17 MATTER WHAT TIME IT IS BECAUSE WE'RE HERE, AND THEN
18 WE CAN AT LEAST LOCK THEM UP IN THE CHAMBERS BACK
19 HERE AND THEN YOU DON'T HAVE TO BE HERE AT ALL.

20 THE CLERK: THAT WOULD BE WONDERFUL.

21 MR. JACOBS: DO YOU MIND GIVING US THE
22 BEST NUMBER TO USE?

23 THE CLERK: YEAH, JUST THE 408-535-5357.

24 MR. JACOBS: THANK YOU, YOUR HONOR.

25 THE COURT: AND THEN WE'LL COME AND GET

1 THEM.

2 THE CLERK: SHOULD I WHEEL THEM OUT NOW?

3 THE COURT: YEAH, SURE.

4 THE CLERK: OKAY.

5 THE COURT: LET'S GO AHEAD. THE TIME IS
6 NOW 4:15. I'M SORRY. WE DIDN'T DO 15 MINUTES.

7 ALL RIGHT. GO AHEAD, PLEASE, ON THE
8 SUMMARY JUDGMENT ISSUE WITH REGARD TO THE '460.

9 MR. SELWYN: THANK YOU, YOUR HONOR.

10 YOUR HONOR, APPLE OBJECTS TO JURY
11 INSTRUCTION 15.1, IN PARTICULAR THE LAST TWO
12 PARAGRAPHS. IN APPLE'S VIEW, THE INSTRUCTION
13 PROVIDES AN INCORRECT CLAIM CONSTRUCTION AND IS
14 CONTRARY TO THE JULY 29TH ORDER, WHICH IS ALREADY
15 PART OF THE JUROR'S NOTEBOOK.

16 THE COURT CONSIDERED AND RULED ON THE,
17 BEFORE THE TRIAL, ON THE SPECIFIC ISSUE OF WHETHER
18 THE JURY SHOULD BE GIVEN THE INSTRUCTION THAT
19 SAMSUNG NOW SEEKS.

20 AS THE COURT WILL RECALL, THE PARTIES
21 COULDN'T AGREE ON THE CLAIM CONSTRUCTION TO BE
22 INCLUDED IN THE JUROR BINDER WITH RESPECT TO THE
23 '460 PATENT, AND AT THE JULY 27TH PRETRIAL HEARING,
24 THE COURT INSTRUCTED THE PARTIES TO SUBMIT THEIR
25 COMPETING PROPOSALS.

1 THE PARTIES DID THE NEXT DAY. SAMSUNG
2 WANTED, BASED ON THE COURT'S JUNE 29TH ORDER, FOR
3 THE JURY TO BE INSTRUCTED THAT THE STEPS IN THE
4 '460 PATENT NEED NOT BE PERFORMED IN A PARTICULAR
5 ORDER.

6 ON JULY 29TH, THE COURT REJECTED THAT
7 PROPOSAL AND AGREED VERBATIM WITH APPLE'S PROPOSAL
8 AND ORDERED THAT THE GLOSSARIES IN THE JURY BINDER
9 STATE THAT THE COURT HAS NOT CONSTRUED ANY TERMS
10 FROM THIS PATENT AND, THEREFORE, THE TERMS FROM
11 THIS PATENT SHALL BE GIVEN THEIR PLAIN AND ORDINARY
12 MEANING.

13 THAT, WE BELIEVE, IS THE PROPER RULING.
14 THAT IS WHAT IS ALREADY IN THE JURORS' BINDERS, AND
15 APPLE HAS PRESENTED ITS EVIDENCE THROUGHOUT THIS
16 CASE CONSISTENT WITH THE COURT'S JULY 29TH ORDER
17 AND THE CONSTRUCTION FOR THE '460 PATENT THAT IS
18 ALREADY IN THE JURY BINDER.

19 RESPECTFULLY, FOR THE COURT, AFTER THE
20 CLOSE OF EVIDENCE AND WITHOUT A MARKMAN HEARING, TO
21 CHANGE THE CONSTRUCTION THAT IT ISSUED FOR THE '460
22 PATENT JUST A DAY BEFORE THE START OF TRIAL WOULD
23 BE HIGHLY PREJUDICIAL TO APPLE.

24 IN ADDITION, THE TIMING OF THE COURT'S
25 DECISION IS ADDRESSED IN JURY INSTRUCTION 15.1 WE

1 BELIEVE WILL DO EXACTLY THE OPPOSITE OF WHAT THE
2 COURT TRIES TO GUARD AGAINST IN JURY INSTRUCTIONS
3 10 AND 15 THAT THE JURY SHOULD NOT INFER FROM THE
4 CLAIM CONSTRUCTION DECISIONS THAT THE COURT FAVORS
5 ONE SIDE OR THE OTHER.

6 IF THE COURT WERE TO DETERMINE NOT TO
7 ALTER 15.1, WE WOULD AT LEAST ASK THE COURT TO
8 ORDER THAT SAMSUNG NOT BE PERMITTED, IN ITS CLOSING
9 ARGUMENT, TO COMMENT ON THE CREDIBILITY OF APPLE'S
10 EXPERT BASED ON THE COURT'S CLAIM CONSTRUCTION OR
11 SUGGEST THAT HE DID NOT FOLLOW THE COURT'S CLAIM
12 CONSTRUCTION OR THAT THE COURT HAS IN ANY WAY
13 REJECTED HIS OPINION BECAUSE THE EVIDENCE --

14 THE COURT: I SEE WHAT YOU'RE SAYING NOW.

15 BUT YOUR OBJECTION IS MOSTLY TO THE LAST
16 PARAGRAPH. IS THAT CORRECT? ARE YOU OKAY WITH THE
17 FIRST THREE?

18 MR. SELWYN: YES.

19 THE COURT: OKAY. I SEE WHAT YOU'RE
20 SAYING NOW. I WOULD LIKE TO TAKE THIS UNDER
21 SUBMISSION, BUT I'LL PROBABLY TAKE THAT OUT. BUT I
22 SEE WHAT YOU'RE SAYING.

23 I THOUGHT IT ACTUALLY WOULD BE HELPFUL TO
24 CLARIFY BECAUSE THERE'S BEEN ALL THIS TESTIMONY
25 ABOUT WHETHER THEY ARE, IN FACT, STEPS AND WHAT THE

1 SEQUENCE IS.

2 MR. SELWYN: SO I THINK BOTH PARTIES --

3 THE COURT: I THOUGHT IT WOULD BE

4 HELPFUL.

5 MR. SELWYN: BOTH PARTIES WERE OPERATING

6 UNDER THE JURY INSTRUCTION IN THE BINDER ABOUT WHAT

7 PLAIN MEANING IS. WE ARGUED ABOUT THAT.

8 NOW FOR THE JURY TO BE GIVEN WHAT IS

9 ESSENTIALLY LAW OR INTERPRETATION OF PLAIN MEANING

10 IS GOING TO UNDERCUT OUR OWN EXPERT AND BE VERY

11 PREJUDICIAL TO OUR CASE.

12 THE COURT: I HEAR YOU.

13 MR. SELWYN: THANK YOU.

14 THE COURT: YOU WANT TO COMMENT ON THAT?

15 MR. JOHNSON: YES, YOUR HONOR.

16 FIRST OF ALL, THERE ARE A WHOLE LINE OF

17 CASES FROM THE FEDERAL CIRCUIT THAT THE TIMING OF

18 THE CLAIM CONSTRUCTION IS WITHIN THE TRIAL COURT'S

19 DISCRETION, THE SOFAMOR DANEK CASE, 74 F.3D AT

20 1221, THE CYTOLOGICS CASE, 424 F.3D AT 1172, THE

21 VIVID TECHNOLOGIES CASE, 200 F.3D AT 803.

22 THE ISSUE HERE REALLY IS THIS IS -- WE

23 BELIEVE THAT THE JUNE 29TH ORDER, WITH RESPECT TO

24 SUMMARY JUDGMENT, ACTUALLY IS -- AND I STOOD IN

25 FRONT OF YOU AND WE TALKED ABOUT THIS A LITTLE

1 BIT -- IN DENYING THE MOTION FOR SUMMARY JUDGMENT,
2 THE COURT EXPLICITLY ADOPTED SAMSUNG'S CONSTRUCTION
3 WITH RESPECT TO THE '460 PATENT AND SAID, AT PAGE
4 15, THAT IT WAS ADOPTING ITS CONSTRUCTION OF CLAIM
5 1.

6 AND WE RELIED ON THAT AND WE PRESENTED
7 OUR EVIDENCE IN THAT RESPECT.

8 THE JURY BOOK WAS, IN TERMS OF TRYING TO
9 GO THROUGH AND ANALYZE WHAT HAD BEEN CONSTRUED AND
10 WHAT HADN'T BEEN CONSTRUED, I DON'T THINK THAT WAS
11 A FULL ASSESSMENT OF -- YOUR HONOR WAS RULING ON
12 THE CLAIM CONSTRUCTION WITH RESPECT TO WHAT WAS
13 GOING IN THE JURY BOOK AND WHAT WASN'T GOING IN THE
14 JURY BOOK.

15 THE ISSUE IS -- I AGREE WITH YOUR HONOR
16 THAT THE LAST PARAGRAPH OF, OF INSTRUCTION 15.1 IS
17 INFORMATIVE FOR THE JURY. I THINK IT PROVIDES
18 CONTEXT OF WHAT THIS IS, WHAT THIS IS ABOUT.

19 THE COURT: UM-HUM.

20 MR. JOHNSON: I DON'T THINK THERE'S GOING
21 TO BE ANY ATTEMPT TO GET UP HERE AND SAY THAT
22 DR. SRIVASTAVA, YOU KNOW, HIS POSITION WAS
23 REJECTED.

24 WE, INSTEAD WHAT WE WANT TO SAY IS, LIKE
25 WE'VE SAID AND WHICH, YOU KNOW, THE POINTS THAT

1 CAME THROUGH IN DR. YANG'S TESTIMONY IS THAT THESE
2 CLAIMS CAN BE PERFORMED IN ANY STEP.

3 AND, YOU KNOW, RATHER THAN A PERSONAL
4 ATTACK ON MR. SRIVASTAVA'S CREDIBILITY OR --
5 INSTEAD, WE WANT TO BE ABLE TO ARGUE THAT THESE
6 STEPS CAN BE PERFORMED IN ANY PARTICULAR ORDER.

7 THIS HAS BEEN RESOLVED AND THERE'S
8 NOTHING, FRANKLY, EVEN DOING IT THE NIGHT BEFORE
9 CLOSING ARGUMENTS. I MEAN, THAT'S HAPPENED AND
10 THOSE CASES THAT I CITED ACTUALLY DEAL WITH THAT.

11 SO I DON'T THINK THAT EVEN THIS LAST
12 PARAGRAPH IS PREJUDICIAL. IT'S NOT A PER SE
13 REJECTION OF DR. SRIVASTAVA'S TESTIMONY.

14 INSTEAD, I THINK IT'S -- THIS IS A
15 COMPLICATED CASE. THEY'RE GOING TO BE LISTENING TO
16 AN INCREDIBLE AMOUNT OF JURY INSTRUCTIONS AND IT'S
17 IMPORTANT TO UNDERSTAND THE METHOD CLAIM THAT'S AT
18 ISSUE HERE, THE STEPS CAN BE PERFORMED OUT OF
19 SEQUENCE.

20 AND I CAN ADDRESS OTHER POINTS WITH
21 RESPECT TO WHY I THINK THE STEPS CAN BE PERFORMED
22 OUT OF SEQUENCE, BUT WE LAID OUT IN OUR BRIEF, AND
23 IN RESPONSE, THAT THE SPECIFICATION SPECIFICALLY
24 TALKS ABOUT -- FIGURE 8 SPECIFICALLY SAID THAT THAT
25 THIRD FUNCTION, THE DISPLAYING, SEQUENTIALLY

1 DISPLAYING CAN BE DONE BEFORE THE TRANSMISSION
2 STEP, WHICH SUGGESTS -- WHICH SAYS THAT C CAN BE
3 PERFORMED BEFORE E.

4 AND -- AND SO FROM OUR STANDPOINT, EVEN
5 IF YOU FOLLOW THEIR, APPLE'S CONSTRUCTION THAT SAYS
6 IT HAS TO BE DONE IN A PARTICULAR ORDER, THAT WOULD
7 READ OUT THE VERY SPECIFIC EMBODIMENT THAT'S
8 DESCRIBED PARTICULARLY WITH RESPECT TO FIGURE 8.

9 THE COURT: UM-HUM. LET ME ASK A
10 QUESTION FOR MR. SELWYN.

11 YOU KNOW, I'M KIND OF CURIOUS ABOUT THE
12 PREJUDICE ARGUMENT, BECAUSE WHAT WAS INCLUDED AS
13 PARAGRAPH 4 IN INSTRUCTION NUMBER 50.1 IS
14 CONSISTENT WITH WHAT I SAID IN THE SUMMARY JUDGMENT
15 ORDER.

16 SO I DIDN'T BUY APPLE'S POSITION THAT
17 STEPS 1 THROUGH 5 WERE ACTUALLY SEQUENTIALLY
18 REQUIRED SEQUENCED STEPS.

19 ON THE OTHER HAND, I DON'T BUY SAMSUNG'S
20 POSITION THAT YOU CAN DO ANYTHING IN ANY ORDER, AND
21 THAT'S WHY THIS IS SORT OF IN BETWEEN. IT'S, YOU
22 KNOW, SAYING B HAS TO HAPPEN BEFORE D AND C HAS TO
23 HAPPEN BEFORE E, BUT BEYOND THAT, THERE'S NO
24 REQUIREMENT THAT IT HAS TO HAPPEN IN CERTAIN
25 SEQUENCE.

1 MR. JOHNSON: RIGHT

2 MR. SELWYN: I DON'T --

3 THE COURT: SO FOR YOU AT TRIAL TO ARGUE
4 CONTRARY TO WHAT I SAID SOME SEQUENCE WAS REQUIRED
5 IN MY SUMMARY JUDGMENT ORDER, I MEAN, THAT'S THE
6 RISK YOU TOOK, RIGHT, IF I ALREADY SAID THIS WAS
7 THE MINIMUM SEQUENCE THAT WOULD BE REQUIRED?

8 MR. SELWYN: I DON'T THINK, WITH RESPECT,
9 THAT'S QUITE RIGHT, YOUR HONOR.

10 THE COURT: OKAY.

11 MR. SELWYN: IN YOUR SUMMARY JUDGMENT
12 ORDER, IF YOU LOOK BACK AT IT, WHAT YOU FOUND --
13 AND YOU AGREED WITH SAMSUNG THAT THERE ARE AT LEAST
14 THREE CORE FUNCTIONS. YOU DID NOT RECITE THE
15 SPECIFIC ORDER OF STEPS THAT HAD TO OCCUR OR NOT
16 OCCUR. THAT WAS NOT AN ISSUE THAT WAS PRESENTED IN
17 SUMMARY JUDGMENT.

18 NOW, THE SAME ARGUMENT THAT WE'RE HAVING
19 NOW WE HAD IN THE CONTEXT OF WHAT SHOULD GO IN THE
20 JURY'S BINDER. SAMSUNG MADE THE IDENTICAL ARGUMENT
21 IT MAKES HERE THAT THERE SHOULD BE NO REQUIREMENT
22 ABOUT A PARTICULAR ORDER OF STEPS. WE SAID, LIKE
23 ANY OTHER TERM WHERE THE COURT HAS NOT CONSTRUED
24 IT, THE JURY SHOULD BE TOLD THE PLAIN MEANING.

25 IN THIS CASE THERE HAVE BEEN A LOT OF

1 TERMS WHERE THE COURT'S CONSTRUCTION IS PLAIN
2 MEANING, AND EXPERTS HAVE ARGUED ABOUT WHAT THAT
3 PLAIN MEANING IS AND THE JURY IS GOING TO HAVE TO
4 WORK IT ALL OUT.

5 BUT THE INSTRUCTION AS IT'S NOW PHRASED,
6 WITH RESPECT, IS GOING TO BE TOO MUCH OF A THUMB ON
7 SAMSUNG'S EXPERT AND SAMSUNG'S CONSTRUCTION FOR A
8 TERM THAT HAS BEEN CONSTRUED AS PLAIN MEANING.

9 IT WOULD BE THE ONLY TERM IN THIS ENTIRE
10 CASE WHERE THERE IS AN INTERPRETATION GIVEN BY THE
11 COURT OF WHAT PLAIN MEANING SHOULD BE.

12 MR. JOHNSON: THE DIFFERENCE HERE, AS
13 YOUR HONOR POINTS OUT, WITH RESPECT TO SUMMARY
14 JUDGMENT MOTION, WE WEREN'T STANDING HERE ARGUING
15 THAT IT HAD TO BE PERFORMED IN ANY PARTICULAR ORDER
16 WHATSOEVER. THERE IS SOME LOGIC TO IT.

17 BUT THEY TOOK THE CHANCE OF ARGUING
18 NON-INFRINGEMENT WITH RESPECT TO PARTICULAR
19 SEQUENTIAL STEPS -- AND THIS IS AN ISSUE OF CLAIM
20 CONSTRUCTION, YOUR HONOR, AND I STOOD BEFORE YOU
21 AND SAID I THOUGHT THIS HAS BEEN RULED ON BACK IN
22 JUNE.

23 THEY TOOK THE CHANCE, THEY ARGUED, THEIR
24 EXPERT GOT UP THERE AND TESTIFIED THAT IT COULD
25 ONLY BE DONE IN THIS PARTICULAR SEQUENCE, AND

1 DR. YANG BASICALLY SAID THE OPPOSITE, THAT IT
2 DIDN'T NEED TO BE PERFORMED IN THAT ONLY SEQUENCE.

3 THE COURT: ALL RIGHT. LET ME -- I'D
4 LIKE TO TAKE THIS UNDER SUBMISSION. SO I'M GOING
5 TO GIVE YOU A LAST 30 SECONDS, EACH OF YOU, AND
6 IT'S ALREADY 4:30 ALMOST. WE NEED TO CONCLUDE
7 TODAY.

8 ANYTHING ELSE YOU'D LIKE TO SAY?

9 MR. JOHNSON: I'LL LET HIM GO FIRST.

10 MR. SELWYN: I DON'T HAVE ANYTHING
11 FURTHER TO ADD.

12 THE COURT: OKAY. ANYTHING ELSE,
13 MR. JOHNSON?

14 MR. JOHNSON: NO, YOUR HONOR.

15 THE COURT: OKAY. ALL RIGHT. I THINK
16 THAT'S IT, THEN.

17 WE NEED TO GET THROUGH THE VERDICT FORM,
18 AND THEN I NEED TO GIVE YOU SOME TIME TO LAY YOUR
19 RECORD FOR YOUR OTHER OBJECTIONS.

20 CAN WE DO THE VERDICT FORM? I'M ASSUMING
21 YOU'VE HAD A CHANCE TO LOOK AT IT NOW.

22 MR. MCELHINNY: YES, YOUR HONOR, I THINK
23 WE CAN --

24 MS. MAROULIS: WE CAN START.

25 MR. SELWYN: BEFORE WE GET TO THAT, THERE

1 WERE A FEW, JUST AS SAMSUNG LISTED, WE HAD A FEW
2 HIGH PRIORITY. YOU WANT TO DO THAT AFTER THE
3 VERDICT FORM?

4 THE COURT: YEAH.

5 MR. SELWYN: VERY GOOD.

6 THE COURT: ALL RIGHT. TELL ME WHAT YOU
7 HAVE ABOUT THE VERDICT FORM.

8 MR. JACOBS: I HAVE AN OBJECTION AND A
9 PROPOSAL ON THE MULTI-COLUMN APPROACH.

10 THE COURT: OKAY. YES.

11 MR. JACOBS: THE OBJECTION IS TO BREAKING
12 IT OUT AS I INDICATED EARLIER. IT OVERCOMPLICATES
13 IT.

14 BUT I THINK -- AND SO THAT WOULD BE OUR
15 OBJECTION.

16 MY PROPOSAL, PARTIALLY TO MITIGATE, IS
17 BASED ON THE FOLLOWING.

18 SEA, SAMSUNG ELECTRONICS AMERICA,
19 DISTRIBUTES ONLY A VERSION OF THE TAB, IT'S THE
20 WI-FI TAB. STA DISTRIBUTES ALL OF THE CELLULAR
21 PRODUCTS. IT HAS THE CARRIER RELATIONSHIPS, AND
22 THAT IS IN THE RECORD. AND SO I THINK WE COULD
23 SIMPLIFY THE COLUMNS --

24 THE COURT: OKAY.

25 MR. JACOBS: -- IF WE IDENTIFY SEA AS

1 ASSOCIATED WITH THE WI-FI VERSION OF THE TAB.

2 THE COURT: THAT'S THE ONLY THING THEY
3 SELL?

4 MR. JACOBS: I BELIEVE THAT'S THE CASE,
5 YOUR HONOR.

6 THE COURT: OKAY. LET ME HEAR FROM
7 MS. MAROULIS. IS THAT A CHANGE THAT YOU WOULD BE
8 WILLING TO STIPULATE TO?

9 MS. MAROULIS: YOUR HONOR, IT'S VERY
10 IMPORTANT FOR US TO BREAK OUT BY ENTITY AND WE'RE
11 GLAD THE COURT WENT THROUGH THAT.

12 SO IF MR. JACOBS' PROPOSAL IS MERELY TO
13 BREAK OUT SEA ASSOCIATED WITH THE TAB, THAT'S FINE,
14 BECAUSE TO THE EXTENT HE WANTS TO COLLAPSE ALL THE
15 ENTITIES INTO ONE, WE WOULD DEFINITELY OBJECT TO
16 THAT.

17 IF HE WANTS TO KEEP THE STRUCTURE, BUT
18 PUT IT IN A SEPARATE CHART LIKE WE DO FOR
19 CONCLUSION, THAT WOULD BE ACCEPTABLE.

20 THE COURT: OKAY. SO TELL ME, SEA ONLY
21 DOES THE GALAXY --

22 MR. JACOBS: THE WI-FI.

23 THE COURT: -- TAB 10.1, JX 1037 WI-FI.

24 WHAT ABOUT THE LTE?

25 MR. JACOBS: THE LTE --

1 THE COURT: BECAUSE THAT WAS THE SAME
2 EXHIBIT NUMBER IS THE PROBLEM.

3 MS. MAROULIS: IF IT'S NOT ASSOCIATED
4 WITH A CARRIER, IT'S BY SEA. STA DEALS WITH
5 CARRIERS.

6 THE COURT: LTE IS A CARRIER?

7 MS. MAROULIS: NO.

8 MR. JACOBS: LET ME CHECK ON THE EXHIBIT
9 NUMBER FOR A MINUTE, YOUR HONOR.

10 THE COURT: OKAY.

11 MS. MAROULIS: YES, YOUR HONOR. THEY'RE
12 WITH SEA.

13 THE COURT: WAIT. LTE IS WITH SEA AND
14 NOT STA?

15 MS. MAROULIS: YES, YOUR HONOR.

16 THE COURT: OKAY. SO I COULD BASICALLY
17 MOVE THAT WHOLE ROW OUT, GALAXY TAB 10.1 WI-FI AND
18 LTE, JX 1037? THAT'S OKAY?

19 MR. JACOBS: I THINK WHAT I'M --

20 MS. MAROULIS: I'M SORRY, YOUR HONOR. I
21 GOT IT WRONG. SO LTE IS WITH A CARRIER, SO THAT IS
22 STA.

23 MR. JACOBS: WHAT I'M HEARING, YOUR
24 HONOR, IS 1037 SHOULD JUST BE LISTED AS WI-FI.

25 THE COURT: OKAY. THEN WHAT ABOUT LTE?

1 MR. JACOBS: THAT WOULD BE AN STA
2 PRODUCT. THAT WOULD BE A 4G CELLULAR PRODUCT.

3 THE COURT: WHAT'S THE EXHIBIT NUMBER FOR
4 THAT ONE?

5 MR. JACOBS: THAT'S CORRECT, YOUR HONOR,
6 1038.

7 THE COURT: OKAY. SO IF WE SAY GALAXY
8 TAB 10.1 LTE, JX 1038, THAT IS AN STA PRODUCT?

9 MS. MAROULIS: CORRECT.

10 THE COURT: OKAY. AND THAT IS TRUE,
11 THEN, FOR ALL OF THE GALAXY TAB 10.1 WI-FI'S, JX
12 1037'S IN EVERY SINGLE CHART?

13 MR. JACOBS: YES, YOUR HONOR.

14 THE COURT: OKAY. SO THEN WE CAN TAKE
15 SEA COMPLETELY OUT OF THE CHART.

16 MR. JACOBS: I THINK YOU CAN DO THAT AND
17 BREAK IT OUT AS A LITTLE SEPARATE BOX.

18 THE COURT: OKAY.

19 MS. MAROULIS: AND YOUR HONOR, WHILE
20 WE'RE ON THE SUBJECT OF DIFFERENT ENTITIES, WE OF
21 COURSE OBJECT THAT SEC IS ENGAGED ANY DIRECT
22 ALLEGED INFRINGEMENT, AND FOR THE RECORD, WE ARE
23 PRESERVING THAT OBJECTION AND THAT APPLE DID NOT
24 DISCLOSE THE THEORY OF INDUCEMENT.

25 YOUR HONOR PREVIOUSLY OVERRULED THAT, BUT

1 BECAUSE WE'RE AT THE VERDICT STAGE, WE WANTED TO
2 RAISE THAT AGAIN.

3 THE COURT: THAT'S FINE. THAT'S
4 PRESERVED FOR APPEAL.

5 OKAY. WHAT ELSE?

6 MS. MAROULIS: MOVING ON TO OTHER ISSUES,
7 IF WE'RE STARTING WITH PAGE 2 OF THAT, WITH RESPECT
8 TO THE '381 PATENT, SAMSUNG REQUESTED THAT IT BE
9 BROKEN OUT IN SEPARATE APPLICATIONS, CONTACTS,
10 GALLERY, AND BROWSER, AND THAT WAS PART OF OUR
11 ORIGINAL VERDICT FORM WE SUBMITTED, SO WE ASK THE
12 COURT TO CONSIDER PUTTING THAT BACK IN '381.

13 AND THE REASON THAT'S IMPORTANT IS
14 BECAUSE, FOR EXAMPLE, IF ONE VERSION IS FOUND
15 INFRINGED AND ANOTHER ONE IS NOT, IT GOES TOWARD
16 DESIGN AROUND PLANNING, ET CETERA.

17 SO THERE ARE THREE DIFFERENT INFRINGEMENT
18 THEORIES THAT THEY'RE ALLEGING AGAINST DIFFERENT
19 APPLICATIONS AND WE BELIEVE IT'S IMPORTANT TO
20 PRESERVE THE RECORD AS TO THAT.

21 MR. JACOBS: AND YOU KNOW OUR VIEW ON
22 THIS, YOUR HONOR. THAT WOULD VASTLY OVERCOMPLICATE
23 THE CLAIM AND THE FORM. OUR CLAIM IS AGAINST THE
24 PHONES BECAUSE THE PHONES INFRINGE WITH SOFTWARE ON
25 THEM, AND TO HAVE THREE COLUMNS, ONE FOR EACH

1 APPLICATION, WOULD REALLY MAKE IT DIFFICULT FOR THE
2 JURY.

3 THE COURT: RIGHT. I'M NOT GOING TO DO
4 THAT.

5 OKAY. WHAT ELSE?

6 MS. MAROULIS: STILL ON '381, THERE IS A
7 PRODUCT CALLED GEM. IN THEIR INFRINGEMENT
8 CONTENTIONS, APPLE DID NOT ACCUSE GEM, AND I'M
9 GOING TO HAND TO THE COURT AND COUNSEL APPLE'S
10 INFRINGEMENT CONTENTIONS, EXHIBIT 20, WHERE YOU CAN
11 SEE --

12 MAY I APPROACH, YOUR HONOR?

13 THE COURT: YES, PLEASE.

14 MS. MAROULIS: -- GEM WAS LISTED AS N/A
15 WITH RESPECT TO '381.

16 MR. JACOBS: YOUR HONOR RULED ON PHONES
17 SOME MONTHS AGO NOW AND SAMSUNG DID NOT MOVE ON THE
18 GEM. SAMSUNG'S EXPERT WROTE A REPORT ON THE GEM
19 EXPLAINING WHY THE GEM DID NOT INFRINGE.

20 SAMSUNG THEN HAD A FURTHER DISCUSSION
21 WITH THE COURT ABOUT THE PHONES ISSUE AND DID NOT
22 RAISE THE GEM.

23 SO NOW WE ARE AT THE END OF TRIAL, THERE
24 WAS NO MOTION ON THE GEM, WE PUT ON OUR PROOF ON
25 THE GEM, IT'S TOO LATE NOW TO SAY IT WASN'T IN THE

1 INFRINGEMENT CONTENTIONS.

2 I WOULD NOTE THAT ONE OF THE PHONES WAS
3 RULED OUT BECAUSE WE FLIPPED THE ORDER OF THE TERMS
4 AND WE DIDN'T COME BACK TO THE COURT ON THAT AND
5 ASK FOR RECONSIDERATION. IT WAS --

6 THE COURT: WHICH PHONE WAS THAT?

7 MR. JACOBS: SHOWCASE. I THINK WE SAID
8 THE SHOWCASE, THE GALAXY S SHOWCASE, AND IT'S THE
9 SHOWCASE GALAXY S. THE COURT SAID WE HADN'T PUT IN
10 OUR INFRINGEMENT CONTENTIONS. WE MOVED ON.

11 NOW FOR SAMSUNG TO COME IN AT THE LAST
12 MINUTE AND SAY, "WE FORGOT TO MOVE ON THIS, BUT
13 IT'S OUT OF THE CASE," THAT'S QUITE UNFAIR.

14 MS. MAROULIS: WE ACTUALLY MOVED FOR J MOL
15 AND I THINK WE PREVIOUSLY OBJECTED TO THAT, SO THIS
16 IS DEFINITELY NOT THE FIRST TIME THAT COUNSEL IS
17 HEARING ABOUT IT.

18 THE COURT: WELL, I GUESS WHAT'S
19 CONFUSING TO ME IS IF THESE ARE THE INFRINGEMENT
20 CONTENTIONS, GEM IS ON HERE.

21 MS. MAROULIS: NOT WITH RESPECT TO '381,
22 YOUR HONOR. IT SAYS N/A.

23 THE COURT: OH, I SEE WHAT YOU'RE SAYING.
24 I THINK IT'S UNTIMELY FOR THIS REQUEST.

25 OKAY. GO AHEAD. WHAT'S NEXT?

1 MS. MAROULIS: YOUR HONOR, CAN WE SKIP A
2 LITTLE BIT, THERE'S A PRETTY SIMPLE ISSUE, BEFORE
3 WE GET TO DAMAGES, WHICH IS WAIVER, WHICH IS THE
4 VERY LAST PORTION OF THE VERDICT FORM.

5 WAIVER IS AN EQUITABLE ISSUE, AND YOUR
6 HONOR DID NOT ISSUE JURY INSTRUCTIONS ON WAIVER
7 BECAUSE IT IS AN EQUITABLE ISSUE AND SHOULD NOT GO
8 BEFORE THE JURY. SO WE RESPECTFULLY REQUEST THAT
9 IT BE REMOVED FROM THE VERDICT FORM.

10 THE COURT: LET ME ASK, AND I APOLOGIZE
11 IF THIS WAS A MISTAKE, BUT THE PRELIMINARY
12 INSTRUCTIONS, WE TALKED ABOUT THE SUMMARY OF
13 CONTENTIONS AND ACTUALLY INCLUDED ANTITRUST, PATENT
14 EXHAUSTION, WAIVER, AND BREACH OF CONTRACT.

15 SO IT WAS IN THAT PRELIMINARY --

16 MS. MAROULIS: WE'VE ALWAYS MAINTAINED,
17 SAMSUNG HAS ALWAYS MAINTAINED THAT ESTOPPEL AND
18 WAIVER SHOULD NOT BE BEFORE THE JURY, BUT BECAUSE
19 WE WERE NEGOTIATING JURY INSTRUCTIONS. WE PROPOSED
20 COMPETING LANGUAGE SO THAT IF THE COURT DECIDED IT
21 DOES GO, THERE'S SOMETHING FOR THE JURY TO LOOK AT.

22 BUT THE COURT IS NOT SENDING THIS ISSUE
23 TO THE JURY, SO IT WOULD NOT BE USEFUL TO HAVE THIS
24 IN THE JURY VERDICT FORM.

25 MR. SELWYN: YOUR HONOR, IT WAS IN THE

1 PRELIMINARY JURY INSTRUCTIONS, YOU'RE QUITE RIGHT.

2 IN THE BROADCOM CASE, WHICH IS BASED ON
3 SIMILAR STANDARD SETTING AS THIS ONE, THE COURT
4 ALSO SOUGHT AN ADVISORY VERDICT ON THE WAIVER
5 ISSUE.

6 WE BELIEVE, CONSISTENT WITH THE
7 PRELIMINARY INSTRUCTIONS, IT SHOULD GO TO THE JURY.

8 THE COURT: YOU KNOW, I ACTUALLY DON'T
9 WANT ANY ADVISORY VERDICTS.

10 AND I RECOGNIZE I DID INCLUDE IT IN THE
11 PRELIMINARY. I DON'T HAVE A WAIVER INSTRUCTION IN
12 THIS FINAL SET.

13 I THINK I'M GOING TO TAKE IT OUT. OKAY?

14 MS. MAROULIS: THANK YOU, YOUR HONOR.

15 THE COURT: ALL RIGHT. WHAT ELSE?

16 MS. MAROULIS: RETURNING BACK TO THE
17 BEGINNING OF THE FORM, AGAIN, BECAUSE WE'RE LODGING
18 OUR OBJECTIONS, WE PROPOSE TO INCLUDE VERSION,
19 ANDROID VERSION ON DIFFERENT PHONES THAT ACTUALLY
20 ARE IN THE CASE. WE SEE THAT IT'S NOT IN THERE AND
21 WE RESPECTFULLY REQUEST THAT IT BE INCLUDED.

22 THE COURT: OKAY. THAT'S DENIED.

23 WHAT'S NEXT?

24 MS. MAROULIS: WE'RE MOVING ON TO THE
25 DAMAGES SECTION, AND WITH RESPECT TO DAMAGES, AS

1 YOUR HONOR NOTED, IT'S A COMPLICATED ISSUE, AND ONE
2 THING THAT WE NEED TO ADD TO THE EXISTING DAMAGES
3 CHART -- AND I WAS TRYING TO SCRATCH IT OUT BUT
4 DIDN'T HAVE A CHANCE TO FULLY FIGURE OUT HOW TO DO
5 IT -- BUT THERE ARE THREE DIFFERENT THEORIES ON
6 WHICH APPLE IS SEEKING DAMAGES, AND SAMSUNG
7 INDICATED IN ITS PRETRIAL SUBMISSIONS AND ITS JMOLS
8 THAT THERE ARE INFIRMITIES WITH EACH OF THEM.

9 FOR IT TO BE PROPERLY REVIEWED, TO THE
10 EXTENT THERE'S A REVIEW OF THESE, WE NEED TO
11 IDENTIFY WHICH DAMAGES THEORIES APPLE IS SEEKING
12 DAMAGES ON AND WHAT THE JURORS WOULD AWARD, IF
13 ANYTHING.

14 SO ONE WAY TO DO IT WOULD BE TO ADD
15 COLUMNS TO THE EXISTING CHART, WHICH IS REASONABLE
16 ROYALTY PROFITS AND LOST PROFITS; OR POTENTIAL
17 ALTERNATIVE, WHAT WE SUGGEST IN OUR VERDICT FORM IS
18 TO ASK AN INTERROGATORY, WHICH IS "OF THE NUMBER
19 THAT YOU GAVE, WHAT IS THE BREAKDOWN BETWEEN THE
20 THREE DIFFERENT THEORIES?" TO HAVE THAT IN THE
21 RECORD AND TO UNDERSTAND WHAT THE JURY DID.

22 THE SECOND ISSUE WITH THIS IS THAT IT
23 DOESN'T TIE PRODUCTS TO THE PATENT. THERE ARE SOME
24 PRODUCTS ON WHICH APPLE IS SEEKING MULTIPLE
25 THEORIES AND MULTIPLE PATENTS AND ACCUSING THEM OF

1 DIFFERENT I.P.

2 SO IDEALLY WE'D LIKE TO HAVE A CHART OR
3 SOME FORM THAT ADDRESSES ALL OF THESE ISSUES SO THE
4 RECORD IS CLEAR.

5 AND WE IDENTIFIED ISSUES THAT WE HAVE
6 WITH IT, BUT HAVE NOT YET PROPOSED A SOLUTION.
7 THIS IS ONE PLACE WHERE POTENTIALLY IF WE CAN HAVE
8 A FEW HOURS TO BRAINSTORM AND SUGGEST SOMETHING TO
9 THE COURT, IT MIGHT BE USEFUL.

10 THE COURT: I DON'T WANT A MATRIX THAT'S
11 SO COMPLICATED. TO HAVE SEVEN PATENTS AND FOUR
12 TRADE DRESSES BROKEN DOWN BY THIS MANY NUMBER OF
13 PRODUCTS I THINK WOULD BE OVERCOMPLICATED.

14 MS. MAROULIS: WE DO NEED TO INDICATE
15 BOTH WHICH ENTITY THE DAMAGES ARE BEING SOUGHT FROM
16 AND WHICH THEORY OF DAMAGES IS BEING RELIED ON,
17 BECAUSE THEY ALL HAVE DIFFERENT LEGAL FRAMEWORK,
18 AND TO THE EXTENT THAT THE JURY GETS IT WRONG OR
19 DOES NOT APPLY THE CORRECT THEORY OR WHERE WE
20 BELIEVE THE THEORY HAS NOT BEEN SUFFICIENTLY
21 PROVEN, WE NEED THAT RECORD.

22 THE COURT: WELL, WOULDN'T THAT BE
23 REFLECTED IN THE EARLIER PAGES? BECAUSE THE
24 EARLIER PAGES ARE REQUIRING REQUIREMENTS BY
25 PRODUCT, BY PATENT, BY DEFENDANT.

1 SO I'M HOPING THAT THE FIRST 17 PAGES,
2 FROM THE FIRST 17 PAGES AND THE FINAL NUMBER, IF
3 THE JURY PICKS A NUMBER, THAT YOU CAN SORT OF WORK
4 BACKWARDS AND FIGURE OUT WHICH I.P. WAS ACTUALLY
5 FOUND VALID AND INFRINGED, WHICH PRODUCT, WHICH
6 ENTITY.

7 MR. JACOBS: THIS IS A MATTER OF FINDING
8 A HAPPY MEDIUM, YOUR HONOR, AND OVER DETAIL GIVES
9 RISE TO CLAIMS OF ERROR, TOO, BECAUSE IF THE JURY
10 DOES THINGS AT A VERY GRANULAR LEVEL THAT PRESENT
11 INCONSISTENCIES, THEN IT JUMPS OUT.

12 AND WE THINK THIS IS TOO SPECIFIC. WE
13 OBJECT TO THIS LEVEL OF SPECIFICITY IN QUESTION 25,
14 FOR EXAMPLE.

15 BUT TO GO ANY DEEPER WOULD REALLY PRESENT
16 VERY SERIOUS PROBLEMS.

17 MS. MAROULIS: YOUR HONOR, TO ILLUSTRATE
18 AN ISSUE THAT WE MIGHT HAVE IF WE DON'T IDENTIFY
19 THE THEORIES, FOR EXAMPLE, PROFITS ARE NOT
20 APPROPRIATE FOR UTILITY PATENTS. IF THE JURY IS TO
21 INCLUDE PROFITS IN THE UTILITY PATENT
22 DETERMINATION, THAT IS NOT PROPER.

23 THE COURT: UM-HUM.

24 MR. JACOBS: THE JURY WILL GIVE US
25 AMOUNTS, AND THAT'S ALL THAT WE SHOULD ASK THEM TO

1 DO.

2 THE COURT: AS YOU MIGHT IMAGINE, THIS
3 WAS THE PAGE THAT TOOK THE MOST TIME TO FIGURE OUT.

4 MS. MAROULIS: YES.

5 THE COURT: AND IT IS COMPLICATED.

6 BUT OVERALL, I THINK THAT THIS MAY BE THE
7 BEST WAY TO DO IT, ASSUMING THAT THE JURY IS GOING
8 TO FOLLOW THE JURY INSTRUCTIONS AND NOT DO ANYTHING
9 INAPPROPRIATE IN AWARDING IMPROPER DAMAGES FOR ANY
10 PARTICULAR CLAIM AND NOT GIVING DOUBLE RECOVERY.

11 MR. JACOBS: YOUR HONOR --

12 MS. MAROULIS: WOULD YOUR HONOR CONSIDER
13 INCLUDING FORMER QUESTION 23 FROM THE SAMSUNG FORM,
14 WHICH IS -- SAY, "IF YOU FIND ANY DAMAGES, CAN YOU
15 SEPARATE IT BY ENTITY?" IT'S A YES OR NO QUESTION.

16 MR. JACOBS: AND THE PROBLEM THERE IS
17 THAT MR. WAGNER, FROM THE ACCOUNTING PERSPECTIVE,
18 TESTIFIED THERE REALLY WAS NO BASIS TO DO THAT.

19 MS. MAROULIS: YOUR HONOR, WE'RE NOT
20 GOING TO ARGUE ABOUT THE TESTIMONY HERE.

21 MR. WAGNER PROVIDED A ROADMAP FOR THE JURY.

22 BUT THE POINT IS THAT IF YOU CAN'T FIND
23 DAMAGES ATTRIBUTABLE JUST TO ONE SINGLE ENTITY, IF
24 YOU ASSUME THREE DIFFERENT DEFENDANTS, THAT
25 DEFENDANTS HAVE AN OPPORTUNITY TO KNOW WHAT DAMAGES

1 ARE AWARDED AGAINST THEM.

2 MR. JACOBS: NO PREJUDICE HERE, YOUR
3 HONOR. IT'S A CONSOLIDATED ENTITY, CONSOLIDATED
4 BALANCE SHEETS, CONSOLIDATED FINANCIALS, CONTROLLED
5 BY SAMSUNG ELECTRONICS FOR BOTH ENTITIES, VERY
6 CLOSE CONTROL. THAT WAS TESTIFIED TO.

7 THE COURT: WELL, I'M ALSO HOPING THAT
8 PAGES 1 THROUGH 17 WILL ALSO HELP IN INFORMING AS
9 WELL, BECAUSE IT COULD BE THAT THE JURY FINDS ONE
10 OR MORE OF THESE ENTITIES NOT LIABLE AT ALL BASED
11 ON THE EVIDENCE, WHICH WAS REALLY GEARED MORE
12 TOWARDS SEC ANYWAY.

13 LET ME ASK YOU, WITH REGARD TO HOW I
14 SHOULD HANDLE THE TRADE DRESS CLAIMS AGAINST THE
15 TABLETS, I GUESS I SHOULD THEN JUST DIVIDE UP --

16 MS. MAROULIS: YES, YOUR HONOR, THAT WAS
17 ONE OF THE ISSUES THAT WE NOTED IN QUESTION 19.

18 THERE WAS A TAB TRADE DRESS THAT REALLY
19 PROBABLY SHOULDN'T BE THERE BECAUSE YOU'RE ALREADY
20 ASKING QUESTION 18 OF THE TAB TRADE DRESS.

21 MR. JACOBS: AND THEN WHAT YOUR HONOR
22 COULD --

23 THE COURT: ALTHOUGH 18 IS DILUTION AND
24 21 AND 22 ARE INFRINGEMENT. THAT'S WHY IT'S BROKEN
25 OUT DIFFERENTLY.

1 MS. MAROULIS: 19 IS FOR DILUTION.

2 MR. JACOBS: BUT I DO THINK IF WE DO AN
3 18 STYLE BREAKOUT --

4 THE COURT: NO, 19 IS INDUCEMENT. SO THE
5 WAY IT'S WORKED OUT IS ON PAGE 10, 12 AND 13 ARE
6 GOING TO, IS THIS PROTECTABLE? AND THEN 14 SAYS IS
7 THIS FAMOUS?

8 AND THEN 15 SAYS, "IF YOU FIND IT
9 PROTECTABLE AND FAMOUS, THEN HAS THERE BEEN
10 DILUTION OF THE REGISTERED PHONE DRESS?"

11 AND THEN THE NEXT QUESTION IS, "HAS THERE
12 BEEN DILUTION OF THE UNREGISTERED IPHONE 3 DRESS?"

13 AND THEN THE NEXT QUESTION IS, "HAS THERE
14 BEEN DILUTION OF THE UNREGISTERED COMBINATION PHONE
15 DRESS?" AND THEN IT GOES TO THE PATENT.

16 AND THEN AFTER THAT, WE GO TO INDUCEMENT
17 AND WILLFULNESS AND THEN TRADE DRESS AND
18 INFRINGEMENT. SO THAT'S HOW IT'S ORGANIZED.

19 MR. JACOBS: UNDERSTOOD.

20 THE COURT: I'LL FIGURE OUT SOME WAY TO
21 SPLIT UP THESE TABS.

22 MR. JACOBS: I THINK IF YOU SPLIT OUT THE
23 TABS, YOU CAN MAKE THE REST OF THE CHART TWO
24 COLUMNS AND HAVE TWO COLUMNS FOR THE TABS, OR THREE
25 COLUMNS WITH A SHADED BOX FOR THE TABS.

1 A COUPLE OF THINGS ON OUR END, YOUR
2 HONOR.

3 MS. MAROULIS: I'M NOT DONE.

4 WITH RESPECT TO TRADE DRESS, THERE WERE A
5 COUPLE OF PREDICATE QUESTIONS WE INCLUDED IN THE
6 VERDICT FORM AS TO DAMAGES. WE BELIEVE THEY'RE
7 APPROPRIATE.

8 FOR EXAMPLE, YOU HAVE TO SHOW ACTUAL HARM
9 FOR THE SPECIFIC TRADE DRESS DAMAGES, AND THAT WAS
10 FORMER QUESTION 17 ON OUR FORM.

11 AND SIMILARITY, YOU NEED TO SHOW ACTUAL
12 CONFUSION WITH INTENT TO DECEIVE. AGAIN, THIS IS A
13 PREDICATE FOR DILUTION DAMAGES.

14 SO WE RESPECTFULLY REQUEST THAT THEY BE
15 PUT BACK IF POSSIBLE, RECOGNIZING THAT THE FORM
16 IS -- HAS TO HAVE SOME LIMITATIONS, BUT BECAUSE
17 THOSE ARE PREDICATE FOR DAMAGES, WE THINK IT'S
18 NECESSARY FOR TRADE DRESS.

19 THE COURT: I'M GOING TO ASSUME A JURY IS
20 GOING TO FOLLOW JURY INSTRUCTIONS AND MAKE THE
21 REQUIRED FINDINGS BEFORE THEY MAKE ANY LIABILITY
22 DETERMINATION IN AWARDING DAMAGES. OKAY?

23 MS. MAROULIS: AND FINALLY, YOUR HONOR,
24 WITH RESPECT TO TRADE DRESS INDUCEMENT, SAMSUNG
25 BELIEVES THAT THERE'S NO SUCH THEORY UNDER NINTH

1 CIRCUIT LAW, AND IT'S NOT SOMETHING THAT SIMPLY
2 EXISTS BASICALLY IN EITHER THE NINTH CIRCUIT OR
3 SECOND CIRCUIT, WHICH IS THE CLOSEST LAW ON THE
4 POINT, AND WE BELIEVE IT SHOULD NOT BE PART OF THE
5 VERDICT FORM.

6 AND I CAN CITE THE CASES FOR THE COURT.
7 IT'S LOCKHEED MARTIN VERSUS NETWORK SOLUTION, 194
8 F.3D 980, NINTH CIRCUIT FROM 1999, AND THE TIFFANY
9 VERSUS EBAY CASE IN THE SOUTHERN DISTRICT OF
10 NEW YORK.

11 THE COURT: OKAY. I ASSUME YOU DISAGREE
12 WITH THAT, MR. JACOBS.

13 MR. JACOBS: JUST A MINUTE, YOUR HONOR.

14 (PAUSE IN PROCEEDINGS.)

15 MR. JACOBS: WE DON'T HAVE AN INDUCEMENT
16 CLAIM ON TRADE DRESS, YOUR HONOR.

17 THE COURT: OKAY. SO THAT WILL ELIMINATE
18 19. THAT WILL --

19 MR. JACOBS: I BELIEVE THAT'S RIGHT.

20 THE COURT: THAT WILL ELIMINATE --

21 MS. TUCHER: 22.

22 THE COURT: THAT WILL ELIMINATE -- NO, 23
23 IS WILLFULNESS.

24 BUT, YES, 22 IS ALSO INDUCEMENT. SO THAT
25 GOES OUT.

1 WHAT ELSE? I THINK THERE WERE ONLY TWO
2 INDUCEMENT FOR TRADE DRESS.

3 OKAY. THAT'S GOOD. THAT'LL SHORTEN
4 THIS. WHAT ELSE?

5 MS. MAROULIS: YES, YOUR HONOR. AND
6 AGAIN, I THINK THE COURT'S GOING TO DENY THIS
7 BECAUSE IT HAS BEFORE, BUT WE REQUEST THAT THE
8 ACTUAL NOTICE AND INTERROGATORY ABOUT PRACTICING
9 THE PATENTS BY APPLE BE INCLUDED IN THE VERDICT.

10 THE COURT: OKAY. THAT'S DENIED.

11 WHAT ELSE?

12 MR. JACOBS: JUST A COUPLE OF ADDITIONAL
13 POINTS ON OUR END.

14 ON THE THEORY THAT THE JURY WILL APPLY
15 THE INSTRUCTIONS, WE THINK THAT A SEPARATE
16 QUESTION, AS IN QUESTION 14, ABOUT FAME COULD BE
17 DISPENSED WITH. THE JURY HAS TO GET PAST FAME IN
18 ORDER TO FIND DILUTION, AND THERE'S A GOOD
19 INSTRUCTION ON FAME. SO WE THINK THE FORM COULD BE
20 SHORTENED BY ELIMINATING THAT.

21 MS. MAROULIS: YOUR HONOR, WE DISAGREE.
22 THAT'S A PREDICATE FOR A FINDING OF THIS CLAIM, SO
23 THAT NEEDS TO STAY.

24 THE COURT: OKAY. THAT'LL STAY IN.

25 OKAY. WHAT ELSE? WAIT, DO WE HAVE --

1 I'M SORRY TO INTERRUPT YOU. IS THERE A TRADE DRESS
2 INDUCEMENT JURY INSTRUCTION IN THE JURY
3 INSTRUCTIONS?

4 MR. JACOBS: NO.

5 THE COURT: THAT NEEDS TO BE REMOVED IF
6 THERE IS ONE.

7 MR. JACOBS: THERE IS NOT ONE, YOUR
8 HONOR.

9 THE COURT: ALL RIGHT. THANK YOU.

10 MR. JACOBS: AND THEN ON THE STANDARD FOR
11 WILLFULNESS RELATING TO DILUTION IN QUESTION 20 --

12 THE COURT: OKAY.

13 MR. JACOBS: -- FOR DILUTION, THE
14 STANDARD FOR WILLFULNESS IS A PREPONDERANCE OF THE
15 EVIDENCE.

16 THE COURT: OH, I THINK YOU'RE RIGHT, AND
17 THAT'S WHAT WE HAVE IN OUR JURY INSTRUCTIONS.

18 MR. JACOBS: EXACTLY.

19 THE COURT: OKAY.

20 MR. JACOBS: AND THAT IS ALSO TRUE FOR
21 23.

22 THE COURT: OKAY.

23 MR. JACOBS: AND THEN I'M CATCHING --
24 THERE ARE A FEW -- I THINK, IF YOU WOULDN'T MIND,
25 YOUR HONOR, WE CAN CATCH SOME TYPOS AND FILE THEM,

1 THAT WOULD BE THE MOST EFFICIENT WAY.

2 THE COURT: THAT'S FINE. YOU CAN FILE
3 THEM LATER. I JUST WANTED TO GET ANY KIND OF BIG
4 ERRORS, WHICH YOU'VE ALREADY IDENTIFIED SOME.

5 MR. JACOBS: I THINK MR. SELWYN HAS SOME
6 MORE.

7 THE COURT: OKAY.

8 MR. SELWYN: JUST ONE, YOUR HONOR, WITH
9 RESPECT TO NUMBER 26 ON SAMSUNG'S UTILITY PATENT
10 CLAIMS AGAINST APPLE. IF YOUR HONOR IS INCLINED TO
11 ALLOW D.O.E. FOR THE '460 PATENT TO GO TO THE JURY,
12 THEN I THINK WE NEED TO BREAK OUT LITERAL AND
13 D.O.E. SEPARATELY ON THE COLUMN FOR THE '460
14 PATENT.

15 AS YOUR HONOR MAY RECALL FROM THE
16 EVIDENCE, THE IPOD TOUCH, THE IPHONE 3GS, THE
17 IPHONE 4 RUN IOS 4 AND IOS 5. THE CLAIM AGAINST
18 IOS 4 IS LITERAL. THE CLAIM AGAINST IOS 5 IS
19 D.O.E.

20 FOR THE IPAD 2, THE CLAIM IS ONLY --

21 THE COURT: OKAY. I'M SORRY. LET ME
22 WRITE THIS DOWN. SO I WILL SPLIT UP THE '460 CLAIM
23 1 COLUMN, AND I'LL HAVE ONE BE CLAIM 1 LITERAL, AND
24 THE OTHER ONE BE CLAIM 1 --

25 MR. SELWYN: D.O.E.

1 THE COURT: OKAY.

2 MR. SELWYN: AND I THINK IT WOULD HAVE TO
3 BE FURTHER BROKEN DOWN BY IOS 4 AND IOS 5 BECAUSE
4 THE CLAIM AGAINST IOS 4 IS LITERAL AND THE CLAIM
5 AGAINST IOS 5 IS D.O.E.

6 AND I'M NOT TRYING TO INTRODUCE MORE
7 COMPLEXITY INTO AN ALREADY COMPLEX FORM, BUT THE
8 IPAD 2, THE ACCUSATION IS ONLY D.O.E. BECAUSE IT
9 DID NOT HAVE -- IT HAS NEVER HAD ARROW BUTTONS,
10 EVEN IN IOS 4.

11 AND FOR THE IPHONE 3G, THAT IS ONLY RUN
12 ON IOS 4, NOT ON IOS 5, SO THE CLAIM FOR THE IPHONE
13 3G IS ONLY LITERAL.

14 THE CLAIM FOR THE IPOD TOUCH, THE 3GS,
15 AND THE 4 IS BOTH LITERAL AND D.O.E.

16 THE COURT: OKAY. WAIT A MINUTE. ARE
17 THE APPLE ACCUSED PRODUCTS CORRECT? IPHONE 3G,
18 IPHONE 3GS, IPHONE 4, IPAD 2 3G, AND IPOD TOUCH
19 FOURTH GENERATION, ARE THOSE RIGHT?

20 MR. SELWYN: YES.

21 THE COURT: OKAY. SO FOR IPHONE 3G IT'S
22 GOING TO BE LITERAL ONLY AND WE WILL BLACK OUT THE
23 CLAIM 1, D.O.E. BOX.

24 IPHONE 3G, WHAT SHOULD BE THAT BE?

25 MR. SELWYN: IT SHOULD BE BOTH, AS I

1 UNDERSTAND THE IT.

2 THE COURT: OKAY. WHAT ABOUT IPHONE 4?
3 BOTH?

4 MR. SELWYN: IPHONE 4 SHOULD BE BOTH.

5 THE COURT: OKAY.

6 MR. SELWYN: BECAUSE IT RUNS IOS 4 AND
7 IOS 5.

8 THE COURT: I'M SORRY.

9 MR. SELWYN: DEPENDING ON WHETHER IT RUNS
10 IOS 4 OR IOS 5.

11 MR. JOHNSON: AND THIS IS THE ANDROID
12 VERSIONS. NOW WE'RE GETTING INTO SOFTWARE VERSIONS
13 THAT ARE RUNNING ON THESE DEVICES.

14 THE COURT: YEAH, I'M NOT GOING TO BREAK
15 IT UP BY IOS. SO I'LL SAY LITERAL FOR IPHONE 3G,
16 BOTH LITERAL AND D.O.E. FOR IPHONE 3GS AND IPHONE
17 4. IT WILL BE ONLY D.O.E. FOR IPAD 2, IPAD 23G.

18 MR. SELWYN: CORRECT.

19 THE COURT: AND THEN FOR IPOD TOUCH,
20 FOURTH GENERATION, IT'S BOTH?

21 MR. SELWYN: CORRECT.

22 MR. JOHNSON: I NEED TO CHECK ON THE
23 IPAD 2. IF I CAN JUST HAVE A MINUTE?

24 THE COURT: OKAY. ALL RIGHT. WHAT ELSE?
25 WHAT OTHER -- WHAT OTHER KIND OF SUBSTANTIVE

1 CHANGES?

2 MS. MAROULIS: YOUR HONOR, I CHECKED WITH
3 MR. ZELLER AND WE OBJECT TO THE CHANGE IN THE
4 STANDARD FOR DILUTION. WE BELIEVE IT'S ACTUALLY
5 CLEAR AND CONVINCING AND THERE ARE CASES TO THAT
6 EFFECT THAT WE'LL BE HAPPY TO SUBMIT TO THE COURT.

7 THE COURT: THAT WAS FULLY BRIEFED IN THE
8 DISPUTED INSTRUCTIONS, AND I DISAGREE. I THINK IT
9 IS PREPONDERANCE OF THE EVIDENCE.

10 MS. MAROULIS: AND THEN FINALLY, YOUR
11 HONOR, THIS MORNING THE COURT REQUESTED THE PARTIES
12 TO SUBMIT THEIR DAMAGES CHARTS AND SAMSUNG
13 SUBMITTED A PROPOSED DAMAGES CHART, SO WE'D JUST
14 ASK THAT THAT CHART BE INCLUDED AS PART OF THE JURY
15 INTERROGATORIES, EITHER AS QUESTION 31 OR BEFORE
16 THAT BECAUSE THAT'S BASICALLY A CLEAR STATEMENT OF
17 OUR REQUESTED DAMAGES.

18 THE COURT: YOU DON'T LIKE IT BROKEN DOWN
19 JUST BY IPHONE 3G, IPHONE 3GS --

20 MS. MAROULIS: OUR DAMAGES MODEL IS MUCH
21 SIMPLER THAN APPLE'S, SO IT WOULD BE EASIER FOR THE
22 JURY TO GO WITH THE CHART THAT WE PROVIDED. IT HAS
23 THREE OR FOUR ROWS.

24 THE COURT: I SEE. YOU JUST HAD
25 REASONABLE ROYALTY BY PATENT NUMBER.

1 MS. MAROULIS: EXACTLY.

2 THE COURT: AND THEN YOU GROUPED TOGETHER
3 THE '516 AND THE '941.

4 NO, I'M GOING TO HAVE SYMMETRY HERE. IF
5 THE JURY IS HAVING TO FIGURE OUT WHAT THE DAMAGES
6 TO APPLE ARE BY ALL OF THE ACCUSED PRODUCTS, IT'S
7 GOING TO BE THE SAME FOR SAMSUNG. OKAY?

8 ALL RIGHT. WHAT ELSE? ANYTHING ELSE?
9 OTHERWISE WE'LL -- OKAY. GOOD. GOOD.

10 OKAY. SO CAN I -- HOW MUCH TIME DO YOU
11 NEED TO MAKE YOUR RECORD ON YOUR NON-HIGH PRIORITY
12 OBJECTIONS TO THE JURY INSTRUCTIONS?

13 MR. JACOBS: I THINK ABOUT 20 MINUTES,
14 YOUR HONOR.

15 THE COURT: 20 MINUTES. OKAY. AND I'M
16 NOT GOING TO ASK A PEEP, BECAUSE I WANT THIS TO
17 ROLL.

18 MR. JACOBS: PLEASE ASK, YOUR HONOR, IF I
19 SAY SOMETHING THAT STRIKES YOU AS HELPFUL.

20 THE COURT: NOW, YOU'VE ACTUALLY ALMOST
21 EXCEEDED YOUR TIME, BUT I WILL SAY THAT ON THE
22 APPLE ISSUES, THERE WAS ALMOST EQUAL ARGUMENT BY
23 BOTH SIDES.

24 YOU KNOW WHAT? I'M JUST GOING TO GIVE
25 YOU BOTH 20 MINUTES. IS THAT ALL RIGHT? WILL THAT

1 BE SUFFICIENT?

2 MR. ZELLER: I THINK WE CAN COVER IT IN
3 20 MINUTES, YOUR HONOR.

4 THE COURT: ALL RIGHT. I'LL GIVE YOU
5 EACH 20 MINUTES.

6 GO AHEAD. IT'S 4:51. GO FOR IT.

7 MR. SELWYN: YOUR HONOR, BEGINNING AT
8 INSTRUCTION 8, THE SUMMARY OF CONTENTIONS, I
9 BELIEVE THE EXHAUSTION DEFENSE HAS BEEN OMITTED
10 FROM THAT.

11 WE HAD INADVERTENTLY OMITTED IT FROM WHAT
12 WE SUBMITTED. WE WOULD SUGGEST THAT AFTER THE
13 WORDS "FOR THE '516 AND '941 PATENTS," YOUR HONOR
14 ADD "EXHAUSTED DUE TO SAMSUNG'S LICENSE TO INTEL
15 COVERING THESE PATENTS, AS WELL AS," AND THEN PICK
16 UP WITH THE WORD "UNENFORCEABLE," AND THEN TO ADD
17 THE WORD "EXHAUSTION" AFTER "INVALIDITY" IN THE
18 FOLLOWING SENTENCE.

19 THE COURT: OKAY. WHAT WAS -- YOU SAID
20 ARE INVALID, AND FOR THE '516 AND '941 PATENTS,
21 EXHAUSTED DUE TO --

22 MR. SELWYN: SAMSUNG'S LICENSE TO INTEL
23 COVERING THESE PATENTS --

24 MS. MAROULIS: WHAT IS THE JURY
25 INSTRUCTION NUMBER YOU'RE READING FROM?

1 MR. SELWYN: 8.

2 THE COURT: I'M NOT GOING TO GO INTO THAT
3 MUCH DETAIL.

4 COMMA, AND ALSO UNENFORCEABLE?

5 MR. SELWYN: YES, AND THEN TO ADD THE
6 WORD "EXHAUSTION" AFTER THE WORD "INVALIDITY" IN
7 THE NEXT SENTENCE.

8 THE COURT: OKAY.

9 MR. SELWYN: OUR NEXT OBJECTION IS WITH
10 RESPECT TO 14, WHICH, AS WE BRIEFED, IS A HIGH
11 PRIORITY OBJECTION.

12 THE COURT: OKAY.

13 MR. SELWYN: 15.1, WE HAVE ALREADY
14 ADDRESSED AS A HIGH PRIORITY OBJECTION.

15 THE COURT: ALL RIGHT.

16 MR. SELWYN: WITH RESPECT TO 29 --

17 MR. JACOBS: LET ME -- BEFORE YOU GET TO
18 29, LET ME CHECK.

19 THE COURT: OKAY.

20 MR. JACOBS: 17, YOUR HONOR, WE BELIEVE
21 THERE'S NO REASON FOR 17. THERE WAS NO EVIDENCE
22 ADDUCED OF A LACK OF WRITTEN DESCRIPTION.

23 THE COURT: ALL RIGHT. THAT'S GOING
24 TO -- OKAY. THAT'S GOING TO STAY IN.

25 GO AHEAD.

1 MR. JACOBS: WE'VE ALREADY TAKEN CARE OF
2 19 WHERE WE TOOK OUT THE LANGUAGE AT THE BOTTOM ON
3 THE PROVISIONAL APPLICATION, SO THAT'S DEALT WITH.

4 ON 25 --

5 THE COURT: CAN I ASK YOU A QUICK
6 QUESTION?

7 MR. JACOBS: UM-HUM.

8 THE COURT: WHERE DO YOU WANT THE
9 GEORGIA PACIFIC FACTORS IN INSTRUCTION NUMBER 29?
10 DO YOU WANT ME TO JUST PUT THEM BEFORE OR EVEN AT
11 THE END OF THE CURRENT INSTRUCTION, WHICH JUST SAYS
12 "IT IS UP TO YOU, BASED ON THE EVIDENCE, TO DECIDE
13 WHAT TYPE OF ROYALTY IS APPROPRIATE IN THIS CASE,"
14 OR RIGHT BEFORE THAT? MAYBE RIGHT BEFORE THEN,
15 JUST PUT IN THE GEORGIA PACIFIC FACTORS.

16 MR. JACOBS: RIGHT, RIGHT BEFORE "IT IS
17 UP TO YOU."

18 THE COURT: AND JUST SOME LANGUAGE LIKE
19 "YOU MAY CONSIDER THE FOLLOWING FACTORS IN
20 DETERMINING A REASONABLE ROYALTY"?

21 MR. JACOBS: YES.

22 THE COURT: ALL RIGHT. GO AHEAD, PLEASE.

23 MR. JACOBS: ON 25, THIS IS LANGUAGE, I
24 BELIEVE, FROM THE MODEL INSTRUCTION. IT'S JUST
25 WRONG.

1 AT 7 AND 8, "YOU MUST ALLOCATE THE LOST
2 PROFITS BASED UPON THE CUSTOMER DEMAND FOR THE
3 PATENTED FEATURE OF THE INFRINGING PRODUCTS."

4 ALLOCATION IS NOT APPROPRIATE WHERE, AS
5 HERE, APPLE SEEKS RECOVERY UNDER PANDUIT. A GOOD
6 SITE FOR THIS IS DEPUY SPINE AT 567 F.3D 1314 AT
7 1341.

8 PANDUIT DOES THE ALLOCATION -- AND YOUR
9 HONOR WILL RECALL PANDUIT WAS THE BASIS FOR A
10 SUMMARY JUDGMENT RULING IN -- OR A MOTION TO STRIKE
11 RULING, RATHER, IN OUR FAVOR DURING THAT PHASE OF
12 THE LITIGATION.

13 AND PANDUIT DEALS WITH THIS UNDER THE
14 SECOND FACTOR, AND WE DID THAT UNDER THE SECOND --
15 AND MR. MUSIKA'S ANALYSIS HANDLED IT ON THE SECOND
16 FACTOR.

17 THE COURT: WE'VE -- WE LOOKED AT THAT
18 AND WENT BACK AND FORTH ON THIS YESTERDAY, BUT I
19 DISAGREE WITH YOU. OKAY? THAT'S GOING TO STAY IN.

20 MR. JACOBS: NUMBER 26, UTILITY PATENT
21 DAMAGES, THERE'S -- THE PHRASE "COMMERCIALY
22 ACCEPTABLE" SHOULD BE ADDED BEFORE "NON-INFRINGING
23 SUBSTITUTES" AT LINE 4.

24 AGAIN, PANDUIT REQUIRES THE ABSENCE OF
25 ACCEPTABLE NON-INFRINGING ALTERNATIVES.

1 SIMILARLY, GRAYDON PROCESSING ASKS
2 WHETHER THERE ARE ACCEPTABLE NON-INFRINGEMENT
3 ALTERNATIVES.

4 THE COURT: LET ME ASK IF SAMSUNG AGREES
5 TO THAT.

6 MS. MAROULIS: YOUR HONOR, WE DISAGREE
7 WITH THAT AND IT DEVIATES FROM THE MODEL PATENT
8 INSTRUCTIONS, SO WE BELIEVE IT SHOULD BE LEFT AS
9 IS.

10 THE COURT: THAT'S A GOOD POINT.

11 OKAY. I'M NOT GOING TO DO THAT.

12 GO AHEAD. NEXT?

13 MR. JACOBS: I THINK YOU'RE UP NEXT.

14 MR. SELWYN: YOUR HONOR, ON NUMBER 29, WE
15 BELIEVE THAT THAT MISSTATES THE ENTIRE MARKET VALUE
16 RULE. IT DOES FOLLOW THE NORTHERN DISTRICT MODEL,
17 BUT WE BELIEVE THAT MODEL IS INCORRECT IN LIGHT OF
18 THE 2011 FEDERAL CIRCUIT DECISION IN UNILOCK.

19 IT APPEARS TO US THAT THE MODEL JUST HAS
20 NOT BEEN UPDATED FOLLOWING THE UNILOCK DECISION,
21 AND IN PARTICULAR THE SENTENCE THAT BEGINS, "EVEN
22 IF THE PATENTED INVENTION IS NOT THE REASON FOR
23 DEMAND," THAT IS NOT A CORRECT STATEMENT OF THE
24 LAW.

25 UNDER UNILOCK, THE PATENTEE MUST PROVE

1 THAT THE PATENTED RELATED FEATURE IS THE BASIS FOR
2 A CUSTOMER DEMAND, AND IT'S AN INCORRECT STATEMENT
3 TO SAY THAT THE RATE IN A HYPOTHETICAL NEGOTIATION
4 WOULD BE LOWER THAN THE PRICE OF THE VALUE OF WHOLE
5 PRODUCT AND THE PATENTED INVENTION IS NOT THE
6 REASON THAT CUSTOMERS PURCHASED THE PRODUCT.

7 THE COURT: YOU KNOW, THESE MODEL
8 INSTRUCTIONS WERE ISSUED IN NOVEMBER OF 2011, SO
9 ALMOST FOUR OR FIVE MONTHS AFTER UNILOCK. WHY
10 SHOULD I ASSUME THAT THEY MADE A MISTAKE?

11 MR. SELWYN: I WOULD JUST POINT YOUR
12 HONOR TO THE LANGUAGE IN UNILOCK WHICH I THINK IS
13 DIAMETRICALLY OPPOSITE OF WHAT THE MODEL
14 INSTRUCTION SAYS.

15 THE COURT: ALL RIGHT.

16 MS. MAROULIS: WE OBJECT TO THAT, YOUR
17 HONOR. IT'S A MODEL INSTRUCTION.

18 THE COURT: ALL RIGHT. GO AHEAD.

19 MR. JACOBS: 31, YOUR HONOR, PROBABLY A
20 TYPO ON LINE 4, "IF YOU FIND THAT APPLE SELLS
21 PRODUCTS THAT INCLUDE THE CLAIMED INVENTIONS," THE
22 WORD "DESIGNS" IS IN THERE, BUT I THINK IT'S --

23 THE COURT: I'M SORRY. WHAT IS THE LINE
24 NUMBER AGAIN?

25 MR. JACOBS: LINE 4.

1 THE COURT: "IF YOU FIND THAT APPLE SELLS
2 PRODUCTS THAT INCLUDE THE CLAIMED" --

3 MR. JACOBS: "INVENTIONS."

4 THE COURT: OH, SORRY ABOUT THAT. OKAY.

5 MR. JACOBS: AND THEN THE REQUIREMENT OF
6 SEPARATE NOTICE FOR EACH SAMSUNG ENTITY, THAT WAS
7 NOT SOMETHING SAMSUNG REQUESTED. IT'S PROBABLY
8 CONTRARY TO LAW.

9 THE ELONEX CASE IS A GOOD -- E-L-O-N-E-X,
10 2002 U.S. DISTRICT LEXIS 4706 AT STAR 16 TO 19.

11 THE SUBSIDIARIES ARE AGENTS OF SEC FOR
12 PURPOSES OF NOTICE ANALYSIS AND SHOULD NOT BE --
13 AND SHOULD NOT BE SEPARATELY REQUIRED THAT THEY BE
14 GIVEN NOTICE IN ORDER FOR DAMAGES TO RUN.

15 MS. MAROULIS: YOUR HONOR, THESE
16 DEFENDANTS WERE SUED SEPARATELY. THERE SHOULD BE
17 NOTICE AS TO EACH, AND THERE'S NO EVIDENCE OF THIS
18 AGENCY RELATIONSHIP THAT MR. JACOBS IS REFERRING
19 TO.

20 MR. JACOBS: AGAIN, YOUR HONOR, THIS IS
21 NOT SOMETHING SAMSUNG EVEN REQUESTED.

22 THE COURT: ALL RIGHT. WE'LL TAKE A LOOK
23 AT THAT ONE.

24 MR. SELWYN: YOUR HONOR, FOR THE RECORD,
25 YOU HAD NOT ADOPTED APPLE'S PROPOSED INSTRUCTION

1 NUMBER 30, WHICH, FOLLOWING THE LUCENT CASE, ASKED
2 THAT THE JURY BE INSTRUCTED THAT THE DAMAGES AWARD
3 OUGHT TO BE CORRELATED TO THE EXTENT OF USE OF THE
4 INFRINGING METHOD.

5 I JUST WANTED TO NOTE THAT FOR THE
6 RECORD. OUR OBJECTION THAT IT NOT BE INCLUDED.

7 THE COURT: THAT 30 WAS -- THAT YOUR
8 PROPOSED 30 WAS NOT INCLUDED?

9 MR. SELWYN: WE BELIEVE 30 SHOULD BE
10 INCLUDED. YOUR HONOR'S INSTRUCTIONS OMITTS IT.

11 THE COURT: OKAY. ALL RIGHT.

12 MR. JACOBS: ON 42, YOUR HONOR --

13 THE COURT: 42, OKAY.

14 MR. JACOBS: -- THIS IS THE ELECTION
15 ISSUE AGAIN, BUT THERE'S A SMALL FIX THAT I THINK
16 MAY MITIGATE THIS THAT SHOULDN'T BE CONTROVERSIAL.

17 IN THIS CASE, APPLE "SEEKS" RATHER THAN
18 "HAS ELECTED TO SEEK."

19 THE COURT: THAT'S FINE.

20 MR. JACOBS: AND THEN THERE'S THE -- THE
21 PHRASE "YOU MAY AWARD APPLE THAT SAMSUNG
22 DEFENDANTS," I THINK IT'S JUST A TYPO ON LINE 3 AND
23 THREE-QUARTERS.

24 THE COURT: NO. THAT HAD TO DO WITH
25 THREE SEPARATE ENTITIES, SO "IF YOU FIND

1 INFRINGEMENT BY ANY SAMSUNG DEFENDANT, THEN YOU MAY
2 AWARD APPLE THAT SAMSUNG DEFENDANT'S TOTAL PROFIT."

3 MR. JACOBS: I SEE. UNDERSTOOD. THANK
4 YOU.

5 LET'S SEE. ON 44, WE HAVE THE ISSUE
6 AGAIN OF NOTICE TO EACH SAMSUNG ENTITY.

7 AND, AGAIN, THE ELONEX CASE WE WOULD
8 PROPOSE IN BOTH OF THOSE INSTRUCTIONS REGARDING
9 EACH SAMSUNG ENTITY THAT THE INSTRUCTION BE
10 ADJUSTED TO NOT REQUIRE NOTICE TO THE SUBSIDIARIES
11 IF NOTICE TO THE PARENT IS FOUND, OR THAT THAT JUST
12 BE DELETED OF SEPARATE NOTICE.

13 THE COURT: WHAT EVIDENCE IS THERE IN THE
14 RECORD THAT THEY ARE, IN FACT -- THAT THE U.S.
15 ENTITIES ARE AGENTS?

16 MR. JACOBS: THE EVIDENCE IN THE RECORD
17 WOULD INCLUDE THE TESTIMONY OF MR. DENISON AND THE
18 EXHIBITS THAT WERE INTRODUCED DURING HIS TESTIMONY
19 IN WHICH IT'S VERY CLEAR THAT THEY ARE -- THAT THE
20 CHAIRMAN OF, AND THE SENIOR MANAGEMENT AT SEC IS
21 TELLING STA WHAT TO DO AND THAT IT IS SETTING THE
22 WHOLESALE PRICE AND THAT IT IS MAKING --
23 NEGOTIATING WITH THE CARRIERS AND THAT STA IS A
24 SALES -- SERVES A SALES FUNCTION, THAT THE FINANCES
25 ARE HANDLED ON A CONSOLIDATED BASIS, THEY'RE WHOLLY

1 OWNED SUBSIDIARIES.

2 MS. MAROULIS: YOUR HONOR, MAY I ADDRESS
3 THAT? MR. DENISON ACTUALLY TESTIFIED TO THE
4 OPPOSITE. HE TESTIFIED TO THE AUTONOMY DECISION
5 MAKING OF STA, AND APPLE IS NOW SUGGESTING SOME
6 THEORIES THAT WERE NEVER PRESENTED AS PART OF THE
7 CASE.

8 THE COURT: OH, I WAS ASKED TO ASK YOU
9 ALL TO PLEASE SPEAK INTO THE MICROPHONE BECAUSE,
10 SURPRISINGLY, WE DO HAVE FOLKS IN THE OVERFLOW ROOM
11 TODAY AND THEY JUST CAN'T HEAR IF PEOPLE ARE NOT
12 USING THE MICROPHONE.

13 OKAY. ALL RIGHT. GO AHEAD, PLEASE.
14 I'LL TAKE THAT ONE UNDER SUBMISSION.

15 MR. JACOBS: I THINK ONE OF THE PROBLEMS,
16 YOUR HONOR, IS NOT KNOWING THAT SAMSUNG WOULD EVEN
17 SEEK SUCH -- THAT SAMSUNG WOULD NOW URGE SUCH AN
18 INSTRUCTION, OF COURSE WE DIDN'T DEVELOP A RECORD,
19 AN ADDITIONAL RECORD ABOUT AGENCY. AND SO IT WOULD
20 BE PREJUDICIAL NOW TO REQUIRE SEPARATE NOTICE.

21 ON 48, WE HAVE PREVIOUSLY OBJECTED ON
22 LINE 5, IN THE PRELIMINARY INSTRUCTIONS, TO THE
23 LANGUAGE, "IN OTHER WORDS, TRADE DRESS IS THE FORM
24 IN WHICH A PERSON PRESENTS A PRODUCT OR SERVICE TO
25 THE MARKET, ITS MANNER OF DISPLAY," AND WE THINK

1 THAT IS LEGALLY INCORRECT AND BELIEVE IT SHOULD BE
2 DELETED.

3 THE NEXT ONE IS 50.

4 THE COURT: ALL RIGHT. I BELIEVE THAT'S
5 HOW THE MODEL INSTRUCTION IS WORDED, SO THAT'S
6 PROBABLY GOING TO STAY IN.

7 MR. JACOBS: YOUR HONOR, I WASN'T SURE
8 WHAT YOUR -- I DIDN'T QUITE FOLLOW WHAT YOU WERE
9 PROPOSING TO DO WHEN YOU WERE IN DIALOGUE WITH
10 MR. ZELLER ABOUT, I THINK IT'S 50, 51, 52, 53.

11 THE COURT: NO. I WAS TALKING ABOUT --
12 YOU MEAN THE REORDERING AND PERHAPS MORE
13 INTRODUCTORY LANGUAGE ON THE DAMAGES INSTRUCTIONS?

14 MR. JACOBS: NO. I'M SORRY. IT WAS 51
15 WHERE YOU WERE -- I THINK YOU WERE PROPOSING TO
16 TAKE OUT THE FACTORS FROM DISCO GOLF -- DISC GOLF.

17 THE COURT: I'M SORRY. LET ME TAKE A
18 LOOK AT MY NOTES. THAT ONE IS A STRAIGHT NINTH
19 CIRCUIT MODEL INSTRUCTION, SO I'D BE PRETTY
20 RELUCTANT TO --

21 MR. JACOBS: SO, YOUR HONOR, I THINK
22 INDICATED -- AND I'M SORRY, IT WAS MOVING QUICKLY,
23 AT LINE 7 AND A HALF, YOU MAY HAVE INDICATED THAT
24 YOU WOULD BE OPEN TO CHANGING THE LANGUAGE TO "YOU
25 MAY CONSIDER THE FOLLOWING FACTORS IN DECIDING IF

1 THE PRODUCT FEATURE IS FUNCTIONAL OR
2 NON-FUNCTIONAL," AND WE WOULD ENDORSE THAT CHANGE.

3 BUT WE LIKE THE -- WE BELIEVE THE FACTORS
4 SHOULD BE RETAINED.

5 THE COURT: WHAT ABOUT "TO DETERMINE
6 WHETHER A PRODUCT FEATURE IS FUNCTIONAL, YOU MAY
7 CONSIDER THE FOLLOWING FACTORS"? WOULD THAT BE
8 OKAY?

9 MR. JACOBS: YES, AS LONG AS WE DON'T
10 LOSE THE DESIGN AS A WHOLE LANGUAGE, WHICH IS VERY
11 IMPORTANT.

12 THE COURT: I'M TALKING ABOUT THE THIRD
13 PARAGRAPH.

14 MR. JACOBS: TERRIFIC. I WAS CONCERNED
15 YOU WERE GOING TO MOVE UP --

16 THE COURT: THE PARAGRAPH THAT CURRENTLY
17 STARTS "YOU SHOULD ASSESS THE FOLLOWING FACTORS IN
18 DECIDING IF A PRODUCT FEATURE IS FUNCTIONAL OR
19 NON-FUNCTIONAL," CHANGING THAT TO READ "TO
20 DETERMINE WHETHER A PRODUCT FEATURE IS FUNCTIONAL,
21 YOU MAY CONSIDER THE FOLLOWING FACTORS."

22 IS THAT ACCEPTABLE?

23 MR. JACOBS: THAT'S FINE.

24 THE COURT: OKAY. AND THEN IN PARAGRAPH
25 4 -- AND PARAGRAPH 4, AFTER CONSIDERING THESE

1 FACTORS, JUST SAYING "IF YOU FIND BY A
2 PREPONDERANCE OF THE EVIDENCE" --

3 MR. JACOBS: THAT'S FINE, YOUR HONOR.

4 THE COURT: -- "THAT IT'S NOT MANDATORY,"
5 AND THEN CHANGING PARAGRAPH 5, INSTEAD OF
6 "ALTERNATIVELY," JUST SAYING "IN ADDITION."

7 IS THAT OKAY?

8 MR. JACOBS: YES, YOUR HONOR.

9 THE COURT: OKAY. WHAT ELSE?

10 MR. JACOBS: I MISSED ONE. 39, THIS WAS
11 ANOTHER ONE THAT THE COURT DISCUSSED WITH SAMSUNG'S
12 COUNSEL. THIS WAS A DISCUSSION OF WHETHER THE PGH
13 FACTORS WOULD BE INCLUDED.

14 THE COURT: YES.

15 MR. JACOBS: AND AS LONG AS THEY'RE
16 LITERALLY TAKEN FROM THE DECISION, YOUR HONOR, THAT
17 WOULD BE ACCEPTABLE.

18 THE COURT: OKAY.

19 MR. JACOBS: THERE'S SOME LANGUAGE IN THE
20 DECISION THAT'S IMPORTANT. FOR EXAMPLE, BELIEVE IT
21 OR NOT, THE LANGUAGE USES THE -- THE DECISION USES
22 THE WORD "CONCOMITANT" IN REFERRING TO UTILITY
23 PATENTS, AND THAT'S IMPORTANT BECAUSE OBVIOUSLY
24 THERE ARE UTILITY PATENTS THAT RELATE TO THE
25 DEVICES HERE, BUT THEY AREN'T CONCOMITANT WITH THE

1 DESIGN PATENTS.

2 THE COURT: WHAT ABOUT SOMETHING LIKE "IN
3 DETERMINING WHETHER A DESIGN IS DICTATED BY
4 FUNCTIONALITY, YOU MAY CONSIDER WHETHER THE
5 PROTECTED DESIGN REPRESENTS THE BEST DESIGN,
6 WHETHER THESE DESIGNS WOULD ADVERSELY AFFECT THE
7 UTILITY OF THE SPECIFIED ARTICLE, WHETHER THERE ARE
8 ANY CONCOMITANT UTILITY PATENTS, WHETHER THE
9 ADVERTISING TOUTS PARTICULAR FEATURES OF THE DESIGN
10 AS HAVING SPECIFIC UTILITY, AND WHETHER THERE ARE
11 ANY ELEMENTS IN THE DESIGN OR AN OVERALL APPEARANCE
12 CLEARLY NOT DICTATED BY FUNCTION."

13 IS THAT ACCEPTABLE?

14 MR. JACOBS: YES, YOUR HONOR.

15 THE COURT: OKAY. AND WHERE DO YOU WANT
16 ME TO PUT THAT? IS THERE ANY SPECIFIC LOCATION?

17 MR. JACOBS: I THINK BETWEEN 2 AND 3,
18 YOUR HONOR, ON INSTRUCTION NUMBER 39.

19 THE COURT: OKAY, BETWEEN PARAGRAPHS 2
20 AND 3. "IN DETERMINING WHETHER A DESIGN IS
21 DICTATED BY FUNCTIONALITY, YOU MAY CONSIDER," AND
22 THEN I'LL JUST PUT THAT LANGUAGE IN.

23 MR. ZELLER: FOR CLARIFICATION, WHAT LINE
24 IS THAT, YOUR HONOR?

25 THE COURT: INSTRUCTION NUMBER 40, AND IT

1 WOULD BE IN BETWEEN -- I GUESS IT WOULD BE LINE 6 .

2 SO AFTER "YOU SHOULD KEEP IN MIND THAT
3 THE DAMAGES YOU AWARD ARE MEANT TO COMPENSATE THE
4 PATENT HOLDER AND NOT TO PUNISH AN INFRINGER," THE
5 NEXT SENTENCE WILL SAY, "IN DETERMINING WHETHER A
6 DESIGN IS DICTATED BY FUNCTIONALITY, YOU MAY
7 CONSIDER" --

8 NOW, DOES IT MAKE SENSE FOR IT TO BE IN
9 THE BURDEN OF PROOF FOR DAMAGES?

10 MR. JACOBS: SORRY. IT'S 39, YOUR HONOR.
11 I MAY HAVE MISSTATED IT.

12 THE COURT: YEAH. ALL RIGHT. SO IT'S
13 LINE 5, AFTER THE SENTENCE, "IN OTHER WORDS, THE
14 INVENTOR DID NOT DESIGN ANYTHING BECAUSE IN ORDER
15 TO ACHIEVE THE FUNCTION OF THE DESIGN, IT HAD TO BE
16 DESIGNED THAT WAY."

17 I THINK IT MIGHT BE BETTER BETWEEN
18 PARAGRAPHS 2 AND 3. RIGHT?

19 MR. JACOBS: YES, YOUR HONOR.

20 THE COURT: AND THEN IT WILL SAY "IN
21 DETERMINING WHETHER A DESIGN IS DICTATED BY
22 FUNCTIONALITY, YOU MAY CONSIDER," AND THEN PUT IN
23 THE PGH TECHNOLOGIES LANGUAGE, AND THEN THE NEXT
24 PARAGRAPH WILL CONTINUE WITH "WHEN THERE ARE
25 SEVERAL OTHER DESIGNS THAT ACHIEVE THE FUNCTION OF

1 AN ARTICLE," ET CETERA.

2 IS THAT OKAY, MR. ZELLER?

3 MR. ZELLER: I HAVE CONCERNS ABOUT SOME
4 OF THAT. PART OF IT, YOUR HONOR, IS IT'S A LITTLE
5 HARD TO CONSTRUCT EVERYTHING HERE AND EXACTLY HOW
6 THAT'S GOING TO LOOK.

7 I WOULD PREFER, IF THE COURT COULD
8 INDULGE US AT LEAST TO SEE THE LANGUAGE WRITTEN OUT
9 AND THEN PERHAPS CHECK?

10 THE COURT: SURE. SO WHAT I'M PLANNING
11 TO DO, AT SOME POINT, IS TO MAKE ALL OF THE
12 CHANGES, REFILE THEM.

13 CAN YOU ALL GIVE ME A VERY QUICK TURN
14 AROUND, SO THEN WE CAN FINALIZE THEM?

15 AND FOR THIS LAST SET, PLEASE, NO
16 ARGUMENT. JUST REALLY OBVIOUS ERRORS JUST SO WE
17 CAN GET IT OUT.

18 MR. ZELLER: AND THEN ALSO JUST FOR
19 PRESERVATION PURPOSES, YOUR HONOR -- WE WOULD LIKE
20 THE OPPORTUNITY, AT LEAST FOR PRESERVATION
21 PURPOSES, FOR ANY CHANGES TO HAVE SOME OPPORTUNITY,
22 WITHOUT BURDENING THE COURT, OF COURSE, TO AT LEAST
23 STATE ANY ADDITIONAL OBJECTIONS.

24 THE COURT: OKAY. BUT CAN WE PUT A PAGE
25 LIMIT ON THAT? BECAUSE WE HAVE TO FINALIZE THE

1 VERDICT FORM --

2 MR. ZELLER: SURE.

3 THE COURT: -- THE EXHIBIT LIST, THE JURY
4 INSTRUCTIONS, AND IT'S ALREADY TEN AFTER 5:00.

5 MR. ZELLER: AND THESE WOULD SIMPLY BE
6 THE CHANGES, THAT'S ALL.

7 THE COURT: SO LET'S PUT A CAP AT, WHAT,
8 LIKE TWO PAGES? PLEASE.

9 MR. ZELLER: THAT'S FINE.

10 THE COURT: AND I'LL SAY TWO PAGES. AND
11 THEN IF YOU COULD FILE IT TWO HOURS AFTER WE FILE
12 IT, WOULD THAT BE ENOUGH TIME?

13 OKAY. I'M ASSUMING THAT YOUR TEAMS ALSO
14 WANT FINAL INSTRUCTIONS ANYWAY SO THAT YOU KNOW
15 EXACTLY WHAT'S GOING TO BE GIVEN OUT SO THAT YOU
16 DON'T SAY ANYTHING INCONSISTENT IN YOUR
17 PRESENTATIONS TOMORROW.

18 MR. JACOBS: AND THEN JUST TO BE CLEAR
19 PROCEDURALLY, YOUR HONOR, SINCE YOU'RE ON THIS
20 POINT, OUR OBJECTIONS THAT WE STATE NOW TO THIS SET
21 OF INSTRUCTIONS WOULD BE CARRIED FORWARD INTO THE
22 NEXT SET OF INSTRUCTIONS AND WE DO NOT NEED TO
23 RESTATE THEM.

24 THE COURT: YES. IT'S PRESERVED. IT'S
25 PRESERVED.

1 OKAY. WHAT ELSE?

2 MR. JACOBS: NUMBER 50. WE PROPOSE A
3 COUPLE OF CHANGES TO 5, 7, AND THE PARAGRAPH AFTER
4 7.

5 SO FOR EXCLUSIVITY, WE PROPOSE, "WHETHER
6 APPLE'S USE OF THE CLAIMED TRADE DRESS WAS
7 EXCLUSIVE," QUOTE, "AS OF THE TIME OF THE FIRST
8 ALLEGED INFRINGEMENT OR DILUTION," PERIOD, CLOSED
9 QUOTE.

10 ARGUMENT IN FAVOR, "IT'S CLEAR THAT
11 DILUTION IS MEASURED AS OF THAT TIME." THE COURT
12 MAY RECALL ARGUMENT DURING SUMMARY JUDGMENT ABOUT
13 WHEN FAME MUST BE ESTABLISHED. THE SAME IS TRUE
14 FOR EXCLUSIVITY.

15 THE COURT: "AS OF THE TIME OF THE FIRST
16 INFRINGEMENT OR DILUTION"?

17 MR. JACOBS: ALLEGED -- YES, ALLEGED
18 INFRINGEMENT OR DILUTION.

19 THE COURT: "AS OF THE TIME OF THE FIRST
20 ALLEGED INFRINGEMENT OR DILUTION"?

21 MR. JACOBS: THEN IN NUMBER 7 --

22 THE COURT: ANY OBJECTION TO THAT?

23 MR. ZELLER: YES, MOST DEFINITELY, YOUR
24 HONOR.

25 AND THIS IS A MATTER OF PROTOCOL. I

1 DON'T KNOW IF I SHOULD BE RESPONDING OR WAIT UNTIL
2 OUR TIME ON A NUMBER OF THESE CHANGES, BUT THEY'RE
3 PROPOSING VERY SIGNIFICANT, SUBSTANTIVE CHANGES
4 THAT, NUMBER ONE, THEY'RE SIMPLY NOT IN THE MODEL
5 INSTRUCTION, NUMBER TWO, ARE TOO -- IT'S SIMPLY
6 ERRONEOUS AS A MATTER OF LAW.

7 TRADE DRESS AND TRADEMARK, IN TERMS OF
8 THE STRENGTH AND THESE OTHER FACTORS THAT NEED TO
9 BE ASSESSED, IS JUDGED ON AN ONGOING BASIS, JUST
10 LIKE THEIR TRADEMARK OR TRADE DRESS CAN BECOME
11 GENERIC OVER TIME.

12 SO THE IDEA THAT SOMEHOW IT WAS FROZEN IN
13 TIME IS A --

14 THE COURT: OKAY.

15 MR. JOHNSON: YOUR HONOR, I'M SORRY. I
16 ALSO UNDERSTOOD WHAT WAS GOING TO HAPPEN IS THEY
17 WERE GOING TO LIST THEIR OBJECTIONS, IT WAS GOING
18 TO TAKE 20 MINUTES, AND WE WEREN'T GOING TO REARGUE
19 A BUNCH OF THESE AT THIS POINT.

20 THE COURT: YEAH, I KNOW.

21 HOW MUCH MORE DO YOU HAVE?

22 MR. JACOBS: JUST A FEW MORE, YOUR HONOR.

23 THE COURT: OKAY. BECAUSE I THINK YOU
24 ARE OVER YOUR TIME. WE STARTED AT 4:51.

25 MR. JACOBS: THEN IN NUMBER 7, WE OBJECT

1 TO THE "ACTUAL CONFUSION" LANGUAGE. WE BELIEVE IT
2 SHOULD READ, "IF SAMSUNG'S USE OF APPLE'S ALLEGED
3 TRADE DRESS HAS LED TO ACTUAL CONFUSION AMONG A
4 SIGNIFICANT NUMBER OF CONSUMERS, SUCH CONFUSION MAY
5 SUPPORT A FINDING OF SECONDARY MEANING."

6 AND THEN IN THE NEXT PARAGRAPH, WE
7 BELIEVE THE FOLLOWING SENTENCE SHOULD BE ADDED,
8 "FOR EXAMPLE, THE ABSENCE OF ACTUAL CONFUSION DOES
9 NOT MEAN THAT APPLE'S TRADE DRESS LACKS SECONDARY
10 MEANING."

11 WE BELIEVE THIS IS IMPORTANT BECAUSE THE
12 PROPOSED INSTRUCTION OTHERWISE MOVES INTO THE
13 SECONDARY MEANING INQUIRY THE QUESTION OF ACTUAL
14 CONFUSION.

15 THE COURT: DID YOU PROPOSE THAT IN YOUR
16 FIRST -- IN YOUR ECF 1604?

17 MR. JACOBS: WE DIDN'T HAVE ACTUAL
18 CONFUSION IN THERE AT ALL, YOUR HONOR.

19 THE COURT: THAT'S RIGHT. I SEE YOUR
20 ACTUAL INSTRUCTION.

21 BUT I THINK THAT SAMSUNG DID. YES, THEY
22 DID.

23 MR. JACOBS: AND SO I SUPPOSE I SHOULD
24 SAY WE OBJECT TO THE INCLUSION OF 7.

25 WITHOUT WAIVING THAT OBJECTION, WE

1 PROPOSE THE ADDITIONAL LANGUAGE THAT I SUGGESTED.

2 THE COURT: ALL RIGHT. I'VE ALREADY
3 CONSIDERED THAT.

4 OKAY. GO AHEAD, PLEASE.

5 MR. JACOBS: 51, WE OBJECT -- ON 51, THE
6 SECOND SENTENCE SHOULD BE STRICKEN. THE SENTENCE
7 READS -- THE SECOND AND THIRD SENTENCE -- "HOWEVER,
8 IF THE FEATURE SERVES NO PURPOSE OTHER THAN AS AN
9 ASSURANCE THAT A PARTICULAR ENTITY MADE, SPONSORED,
10 OR ENDORSED THE PRODUCT THAT IS NON-FUNCTIONAL, A
11 PRODUCT FEATURE IS ALSO NON-FUNCTIONAL IF ITS SHAPE
12 OR FORM MAKES NO CONTRIBUTION TO THE PRODUCT'S
13 FUNCTION OR OPERATION."

14 THAT'S INCONSISTENT WITH THE APPEARANCE
15 AS A WHOLE DOCTRINE APPLICABLE TO TRADE DRESS, AND
16 IT'S POTENTIALLY QUITE CONFUSING AND WE OBJECT TO
17 THOSE TWO SENTENCES.

18 THE COURT: ALL RIGHT. THAT WAS FROM THE
19 NINTH CIRCUIT MODEL INSTRUCTIONS, SO --

20 MR. JACOBS: ON 55, WE ALREADY ADDRESSED
21 THE LANGUAGE THAT SAMSUNG'S COUNSEL AND I AGREED
22 ON.

23 THE COURT: YES.

24 MR. JACOBS: ONCE AGAIN, WE HAVE A
25 TIMING -- WE HAVE AN OBJECTION THAT THE INSTRUCTION

1 LACKS A TIMING ELEMENT.

2 WE WOULD ADD AT LINE 3 AND THREE-QUARTERS
3 BEFORE, "IN DETERMINING THE FOLLOWING LANGUAGE,"
4 "DILUTION SHOULD BE MEASURED AT THE TIME SAMSUNG
5 COMMENCES SALES OF AN ACCUSED PRODUCT."

6 AND THEN WE PROPOSE TO ADD AT THE END OF
7 THE FACTORS --

8 THE COURT: WHAT WAS THAT SENTENCE AGAIN?
9 "DILUTION SHOULD BE MEASURED AT THE TIME SAMSUNG"?

10 MR. JACOBS: "COMMENCES SALES OF AN
11 ACCUSED PRODUCT." THAT'S OUT OF THE STATUTE, OR
12 IT'S ADAPTED FROM THE STATUTORY LANGUAGE.

13 THE COURT: "SALES OF AN ACCUSED
14 PRODUCT"?

15 MR. JACOBS: CORRECT.

16 AND THEN WE PROPOSE TO ADD AT THE END OF
17 THE FACTORS, "APPLE IS NOT REQUIRED TO PROVE ACTUAL
18 DILUTION. APPLE IS REQUIRED ONLY TO PROVE THAT
19 DILUTION IS LIKELY TO OCCUR."

20 THAT, TOO, IS RIGHT OUT OF THE STATUTE,
21 15 U.S.C. 1125.

22 THE COURT: AND WHERE DID YOU WANT THAT?

23 MR. JACOBS: AFTER 6.

24 THE COURT: YOU DON'T THINK THAT LINES
25 14 -- 13 AND 14 TAKE CARE OF THAT? IT JUST SAYS

1 "APPLE BEARS THE BURDEN OF PROVING THAT THE ACCUSED
2 PRODUCTS ARE LIKELY TO DILUTE." IT DOESN'T SAY
3 THAT YOU HAVE AN OBLIGATION TO PROVE ACTUAL
4 DILUTION.

5 I THINK THAT TAKES CARE OF IT, SO THAT
6 REQUEST IS DENIED.

7 GO AHEAD. WHAT'S YOUR NEXT ONE?

8 MR. JACOBS: ON 58 -- JUST A FEW MORE,
9 YOUR HONOR --

10 THE COURT: YOU KNOW, I'M NOT GOING TO
11 ALLOW TWO MORE PAGES OF MORE OBJECTIONS AND MORE
12 PRESERVING THE RECORD. I'VE READ THE SAME RULE 51.
13 YOU ARE NOT ENTITLED TO FOUR OR FIVE TIMES.

14 YOU ALL FILED OVER 300 PAGES THE FIRST
15 TIME. YOU FILED 273 PAGES THE SECOND TIME. I LET
16 YOU FILE ONE PAGE OBJECTIONS LAST NIGHT. YOU FILED
17 16 PAGES OF OBJECTIONS THIS MORNING. YOU'VE BEEN
18 GIVEN MULTIPLE HOURS OF OBJECTIONS THIS AFTERNOON.

19 ENOUGH IS ENOUGH. OKAY?

20 SO I'LL LET YOU FILE ONE PARAGRAPH AND
21 THAT'S ONLY IF THERE'S ANY TYPOS OR OBVIOUS ERRORS.
22 NOTHING ELSE TONIGHT.

23 MR. JOHNSON: WE UNDERSTAND, YOUR HONOR.

24 IT'S JUST TO PRESERVE --

25 THE COURT: YOU'VE ALREADY PRESERVED,

1 OKAY? I MEAN, YOU'VE GOT A PETRIFIED FOREST HERE.
2 YOU DON'T NEED ANYTHING ELSE. ENOUGH IS ENOUGH.

3 WHAT'S YOUR NEXT ONE?

4 MR. JACOBS: 58, YOUR HONOR. I THINK I'M
5 RESPONDING NOW TO SAMSUNG, WHICH PROPOSED AN ACTUAL
6 OR STATUTORY NOTICE INSTRUCTION, AND YOU ASKED US
7 ABOUT IT.

8 I THINK THE PROBLEM IS THAT IT'S ONLY FOR
9 REGISTERED TRADE DRESS WITH THIS NOTICE REQUIREMENT
10 TO APPLY.

11 AS YOUR HONOR HAS PREVIOUSLY RULED IN
12 SOME OF THE MOTION PRACTICE, FOR UNREGISTERED TRADE
13 DRESS, THERE IS NO NOTICE REQUIREMENT.

14 THE COURT: I THINK IT'S IN THERE. LOOK
15 AT THE SECOND PARAGRAPH. DAMAGES FOR TRADE DRESS,
16 DILUTION AND TRADE DRESS INFRINGEMENT OF
17 UNREGISTERED TRADE DRESSES.

18 MR. JACOBS: I'M LOOKING AT -- I'M SORRY,
19 YOUR HONOR. I'M LOOKING AT WHAT SAMSUNG PROPOSED
20 AND I BELIEVE THE COURT INDICATED IT MIGHT BE
21 WILLING TO ADOPT.

22 THE COURT: ON 58?

23 MR. JACOBS: IT'S AN ADDITIONAL 58 ON
24 ACTUAL OR STATUTORY NOTICE. IT'S ATTACHED TO
25 MS. HUTNYAN'S DECLARATION. I THOUGHT THAT'S WHAT

1 THE COURT MIGHT BE REFERRING TO.

2 MR. ZELLER: WHAT WE PROPOSED, YOUR
3 HONOR, IS RIGHT OUT OF THE MODEL INSTRUCTION,
4 15.24.

5 THE COURT: THIS IS FOR 58? I'M SORRY.

6 ALL RIGHT. TELL ME WHERE YOU WANTED WHAT
7 LANGUAGE, PLEASE.

8 MR. JACOBS: ON -- SO CAN I HAND THIS TO
9 YOUR HONOR, BECAUSE I'M NOT SURE YOU HAVE WHAT I'M
10 LOOKING AT. DO YOU HAVE --

11 THE COURT: GO AHEAD, PLEASE.

12 MR. JACOBS: SO WE WOULD PROPOSE THAT
13 THAT BE INTRODUCED BY LANGUAGE REFERRING TO
14 REGISTERED TRADE DRESS.

15 THE COURT: SO THIS IS EXHIBIT E TO
16 DECLARATION OF DIANNE -- IS IT HUTNYAN -- IN
17 SUPPORT OF SAMSUNG'S OBJECTIONS TO TENTATIVE JURY
18 INSTRUCTIONS.

19 YOU WANT SAMSUNG'S PROPOSED NUMBER 58?

20 MR. JACOBS: NO. I THINK THE COURT
21 INDICATED IT WAS WILLING TO ENTERTAIN IT, AND IF
22 THE COURT DOES ENTERTAIN IT, WE WOULD ASK FOR IT TO
23 BE CLEAR THAT THAT REQUIREMENT APPLIES ONLY TO
24 REGISTERED TRADE DRESS.

25 MR. ZELLER: YOUR HONOR, FIRST OF ALL,

1 THAT'S A MISSTATEMENT OF THE LAW. COURTS HAVE
2 FOUND THAT WHERE BOTH REGISTERED AND UNREGISTERED
3 TRADE DRESS IS ASSERTED, THE STATUTORY REQUIREMENTS
4 OF SECTION 1111 OF THE LANHAM ACT --

5 THE COURT: WELL, I'M SORRY TO INTERRUPT
6 YOU. EXHIBIT E SAYS "IN ORDER FOR APPLE TO RECOVER
7 DAMAGES, APPLE HAS THE BURDEN OF PROVING BY A
8 PREPONDERANCE OF THE EVIDENCE THAT ALL THE SAMSUNG
9 ENTITIES HAD EITHER STATUTORY OR ACTUAL NOTICE THAT
10 APPLE'S TRADE DRESS WAS REGISTERED."

11 SO I THINK IT'S PRETTY CLEAR.

12 MR. ZELLER: AND IT'S VERBATIM FROM THE
13 MODEL, YOUR HONOR. 15.24.

14 MR. JACOBS: BUT IT'S -- BUT THAT ONLY
15 APPLIES TO REGISTERED TRADE DRESS, YOUR HONOR, NOT
16 TO UNREGISTERED TRADE DRESS. THERE'S NO NOTICE
17 THAT CAN BE GIVEN.

18 THE COURT: I KNOW. I THINK THE
19 COMBINATION OF WHAT I HAVE IN 58, AND IF WE INCLUDE
20 THIS, IT'LL BE PRETTY CLEAR THAT IT ONLY APPLIES TO
21 REGISTERED TRADE DRESSES. OKAY.

22 MR. ZELLER: AND FOR THE RECORD, WE
23 OBJECT TO THAT.

24 THE COURT: OH, YOU DON'T WANT -- I
25 THOUGHT THIS IS WHAT YOU WANTED.

1 MR. ZELLER: WE DO WANT THAT LANGUAGE IN
2 THERE. WE WANT 15.24 TO BE USED.

3 WE DON'T THINK THAT THE STATEMENT THAT
4 BEGINS ON LINE, PRACTICALLY LINE 7, "FOR APPLE'S
5 REGISTERED TRADE DRESS CLAIM," AND THEN IT
6 CONTINUES ON, WE DON'T THINK THAT THAT'S A CORRECT
7 STATEMENT OF THE LAW.

8 WHAT WE WOULD SUGGEST IS SIMPLY THAT THAT
9 BE STRUCK AND THE MODEL INSTRUCTION FROM THE NINTH
10 CIRCUIT BE USED ESSENTIALLY.

11 THE COURT: ALL RIGHT. I'LL TAKE A LOOK
12 AT THAT. I'LL TAKE THIS UNDER SUBMISSION.

13 OKAY. WHAT ELSE?

14 MR. JACOBS: MR. SELWYN HAS A COUPLE.

15 THE COURT: TIME IS UP.

16 MR. SELWYN: NUMBER 65, YOUR HONOR.

17 MR. JACOBS: SORRY. LET ME DO 60 THEN.
18 SORRY.

19 ON 60, YOUR HONOR, AT LINE 9, THERE'S A
20 REFERENCE TO APPORTIONMENT. THAT IS THE PORTION OF
21 THE PROFIT -- OF PROFIT ATTRIBUTABLE TO FACTORS
22 OTHER THAN USE OF THE INFRINGED OR DELETED TRADE
23 DRESS. THERE IS NO EVIDENCE TO SUPPORT
24 APPORTIONMENT.

25 THE COURT STRUCK, IN ITS DAUBERT ORDER,

1 MR. WAGNER'S APPORTIONMENT ANALYSIS WITH RESPECT TO
2 APPLE'S TRADE DRESS CLAIMS AT DOCKET 1157, PAGE 10,
3 LINES 3 AND 4. SO THAT LANGUAGE SHOULD BE DELETED.

4 MR. ZELLER: AND I'LL REMIND YOU, YOUR
5 HONOR, THIS WAS ALREADY BRIEFED PREVIOUSLY AND
6 APPLE LOST ON IT. I CAN ADDRESS IT FURTHER, BUT
7 THAT IS NOT CORRECT.

8 THE COURT: WHAT ELSE DO YOU HAVE?

9 MR. JACOBS: ON 61.3, THIS IS THE ONE
10 THAT THE LANGUAGE, "APPORTIONED LOST PROFITS" AT
11 LINE 9.

12 THE COURT: 61.3? OH, I SEE.

13 MR. JACOBS: RIGHT. THAT "APPORTIONED"
14 LANGUAGE IS INCORRECT AND WE OBJECT TO IT.

15 I'M SORRY. JUST A MINUTE.

16 AND NOW I CAN TURN IT OVER TO MR. SELWYN.

17 THANK YOU VERY MUCH FOR THE TIME.

18 MR. SELWYN: YOUR HONOR, WITH RESPECT TO
19 INSTRUCTION 65, THE SECOND TO LAST SENTENCE IN
20 PARAGRAPH 3, WHICH CURRENTLY READS "THAT IS A
21 PRACTICAL TEST WITH REFERENCE TO ACTUAL BEHAVIOR OF
22 BUYERS AND MARKETING EFFORTS OF SELLERS," WE OBJECT
23 TO THE WORDS "BUYERS" AND "SELLERS" AND SUGGEST
24 THAT THE SAME LANGUAGE THAT'S USED IN HYNIX BE
25 ADOPTED HERE, WHICH IS "USERS" AND "LICENSORS"

1 INSTEAD OF "BUYERS" AND "SELLERS."

2 THAT'S MORE APPROPRIATE IN THE PRESENT
3 CONTEXT OF A STANDARD SETTING ORGANIZATION AND IT
4 WAS USED IN HYNIX.

5 THE COURT: "USERS" FOR "BUYERS" AND
6 "LICENSORS" FOR "SELLERS"?

7 MR. SELWYN: CORRECT. "USERS" REPLACES
8 "BUYERS," "LICENSORS" REPLACES "SELLERS."

9 THE COURT: OKAY. I'LL TAKE A LOOK AT
10 THAT.

11 WHAT ELSE?

12 MR. SELWYN: AND THEN THE LAST ONE --

13 THE COURT: YEA.

14 MR. SELWYN: INSTRUCTION 68.

15 THE COURT: OKAY.

16 MR. SELWYN: UNDER SUBPART 1 IN THE THIRD
17 PARAGRAPH.

18 THE COURT: OKAY.

19 MR. SELWYN: WE WOULD PROPOSE THAT THE
20 TERM "DECLARED ESSENTIAL" BE ADDED BEFORE IPR SINCE
21 I DON'T THINK ANY PARTY CONTENDS THAT ETSI MEMBERS
22 MUST LICENSE THEIR NON-DECLARED ESSENTIAL PATENTS
23 ON FRAND TERMS.

24 THE COURT: OKAY.

25 MR. SELWYN: AND THE LAST ONE, ON SUBPART

1 3 IN THE SAME PARAGRAPH, WE WOULD SUGGEST REPLACING
2 THE WORD "APPLIED" WITH "MIGHT REASONABLY COVER,"
3 WHICH WOULD CONFORM WITH THE LANGUAGE UNDER SUBPART
4 2 IN THE SECOND PARAGRAPH.

5 MS. MAROULIS: I'M SORRY, YOUR HONOR. I
6 COULDN'T FIND THE PLACE TO WHICH MR. SELWYN WAS
7 REFERRING.

8 MR. SELWYN: I APOLOGIZE. I DID THAT TOO
9 FAST.

10 MS. MAROULIS: CAN YOU GO BY LINE NUMBER,
11 PLEASE?

12 MR. SELWYN: YES, LINE 18, AND I'M
13 LOOKING AT SUBPART 3 OF THE THIRD PARAGRAPH WHICH
14 READ "ETSI MEMBERS RELIED ON THE REQUIREMENT WHEN
15 THEY ADOPTED THE STANDARDS TO WHICH THE DECLARED
16 ESSENTIAL IPR APPLIED."

17 WE'RE PROPOSING THAT THE WORD "APPLIED"
18 BE REPLACED WITH "MIGHT REASONABLY COVER," WHICH IS
19 THE LANGUAGE THAT'S ALSO USED IN THE SECOND
20 PARAGRAPH AT LINE 11.

21 MS. MAROULIS: YOUR HONOR, WE OBJECT TO
22 THAT.

23 THE COURT: OKAY. I THINK ON THIS
24 INSTRUCTION I FOLLOWED MORE SAMSUNG'S INSTRUCTION
25 ON THIS. BUT THAT'S FINE, I'LL TAKE A LOOK AT

1 THAT.

2 OKAY. IS THAT IT?

3 MR. SELWYN: YES, THANK YOU, YOUR HONOR.

4 THE COURT: OKAY. ALL RIGHT.

5 LET'S HEAR FROM SAMSUNG.

6 MR. JOHNSON: YOUR HONOR, JUST BRIEFLY

7 BEFORE WE TALK ABOUT THE JURY INSTRUCTIONS, TO

8 ANSWER THAT QUESTION ON IPAD 2 FOR THE VERDICT

9 FORM.

10 THE COURT: YES, LET ME GO GET THAT.

11 OKAY.

12 MR. JOHNSON: THE IPAD 2 WAS OFFERED BOTH

13 WITH IOS 4 AND IOS 5, SO THAT MEANS IT'S BOTH

14 LITERAL AND DOCTRINE OF EQUIVALENTS.

15 THE COURT: OKAY.

16 MR. JOHNSON: AND WE OFFERED -- ACTUALLY,

17 WE ADMITTED JX 1050, WHICH IS AN IPAD 2 WITH IOS 4,

18 AND JX 1051, WHICH WAS AN IPAD 2 WITH IOS 5.

19 WHEN THE IPAD 2 WAS FIRST INTRODUCED, IT

20 HAD IOS 4 ON IT.

21 MR. SELWYN: I AGREE WITH THAT, BUT I

22 THINK THE EVIDENCE WAS EVEN IN IOS 4, THE IPAD 2

23 NEVER HAD ARROW BUTTONS. SO IT ONLY HAD THE

24 SWIPING AND, THEREFORE, WOULD ONLY BE ACCUSED UNDER

25 DOCTRINE OF EQUIVALENTS.

1 THE COURT: DO YOU AGREE WITH THAT,
2 MR. JOHNSON?

3 MR. JOHNSON: THAT -- LET ME LOOK AT
4 THAT.

5 THE COURT: OKAY. ALL RIGHT. GO AHEAD.
6 LET'S GO.

7 MR. ZELLER: THANK YOU, YOUR HONOR.

8 WITH RESPECT TO INSTRUCTION NUMBER 8, WE
9 OBJECT ON THE GROUNDS THAT THIS IS NOT PROPERLY
10 ENUMERATED. THE -- WE'RE OBJECTING TO INSTRUCTION
11 NUMBER 8 BECAUSE IT DOES NOT PROPERLY ENUMERATE THE
12 ACTS FOR WHICH DESIGN PATENT INFRINGEMENT MAY BE
13 FOUND.

14 IN ADDITION, WE OBJECT TO THE
15 CHARACTERIZATION OF THE REGISTRATION IN LINES 23
16 THROUGH 24.

17 WITH RESPECT TO INSTRUCTION NUMBER
18 12.1 --

19 THE COURT: I'M SORRY. CAN YOU GIVE ME
20 THE PAGE NUMBER FOR 8? BECAUSE THESE ARE OUT OF
21 ORDER.

22 MR. ZELLER: YES. WITH RESPECT TO NUMBER
23 8, IN LINES 4 --

24 THE COURT: NO. THE PAGE NUMBER, PLEASE,
25 FOR NUMBER 8.

1 MR. ZELLER: OH, I'M SORRY. 21 OF THE --
2 I HAVE THEM AS THEY WERE PROVIDED BY THE COURT ON A
3 ROLLING BASIS. I DON'T KNOW IF THAT'S THE FINAL
4 PAGE, BUT IT'S FINAL JURY INSTRUCTION NUMBER 8,
5 SUMMARY OF CONTENTIONS.

6 THE COURT: OKAY. I HAVE IT NOW.

7 I'M SORRY. WHAT WERE YOUR OBJECTIONS ON
8 THIS ONE?

9 MR. ZELLER: IN LINE -- STARTING ON LINE
10 4.

11 THE COURT: YES.

12 MR. ZELLER: IT ENUMERATES A SERIES OF
13 ACTS BY MAKING, IMPORTING, USING, SELLING.

14 THE COURT: YES.

15 MR. ZELLER: AND IN FACT, DESIGN PATENT
16 INFRINGEMENT DOES NOT FOLLOW UTILITY PATENT LAW IN
17 TERMS OF WHAT ACTS MAY BE INFRINGING.

18 THE COURT: SO WHICH ACTS NEED TO BE
19 REMOVED FOR THAT ONE?

20 MR. ZELLER: THE STATUTORY LANGUAGE IS
21 APPLIES, SELLS, OR EXPOSES FOR SALE.

22 THE COURT: APPLIES, YOU SAID?

23 MR. ZELLER: APPLIES.

24 THE COURT: APPLIES, SELLS, OR OFFERS FOR
25 SALE? WHAT DOES THE APPLIES MEAN?

1 MR. ZELLER: APPLYING THE DESIGN TO AN
2 ARTICLE.

3 THE COURT: OH. OKAY. WHAT ELSE?

4 MR. ZELLER: AND THEN WITH RESPECT TO THE
5 CHARACTERIZATION I'M REFERRING TO, THIS STARTS ON
6 LINE 23, IT STARTS ON LINE 23, AND IT SAYS "THIS
7 TRADE DRESS RELATES TO THE IPHONE."

8 WE JUST DON'T THINK THAT'S AN APPROPRIATE
9 PLACE TO CHARACTERIZE IT. IF APPLE WANTS TO ARGUE
10 ABOUT THAT, IT SHOULD. BUT IN OUR PERSPECTIVE,
11 THERE'S AN ISSUE AS TO WHETHER OR NOT ANY OF THIS
12 STUFF IS BEING USED BY APPLE.

13 THE COURT: ALL RIGHT. GO AHEAD. THAT'S
14 DENIED. I THINK THAT WAS IN THE PRELIMINARY
15 INSTRUCTIONS.

16 GO AHEAD.

17 MR. ZELLER: WITH RESPECT TO INSTRUCTION
18 12.1, WE OBJECT TO THE DEFINITION OF THE SALE IN
19 THE UNITED STATES.

20 THE COURT: 12.1, OKAY, YEAH, YOU'VE MADE
21 THAT BEFORE.

22 MR. ZELLER: CORRECT. WE'VE MADE THESE
23 ARGUMENTS PREVIOUSLY.

24 WE OBJECT TO THE COURT'S OMISSION OF OUR
25 PROPOSED INSTRUCTION 17 RELATING TO WRITTEN

1 DESCRIPTION REQUIREMENT.

2 NUMBER 19 PERTAINING TO STATUTORY BAR, WE
3 BELIEVE THAT THOSE ARE RELEVANT TO THE '163 PATENT.

4 THE COURT: ALL RIGHT. WELL, ON 17 I
5 JUST USED THE NORTHERN DISTRICT'S MODEL
6 INSTRUCTION, AND I USED THAT AS THE BASE FOR
7 STATUTORY BAR AS NUMBER 19.

8 GO AHEAD, PLEASE. WHAT'S NEXT?

9 MR. ZELLER: IN ADDITION, WE OBJECT TO
10 THE OMISSION OF OUR PROPOSED INSTRUCTION ON
11 INDEFINITENESS --

12 THE COURT: OKAY.

13 MR. ZELLER: -- WHICH WAS DOCKET NUMBER
14 1809.

15 THE COURT: YOU KNOW, FOR WHATEVER YOU
16 HAVE ALREADY ARGUED OR HAS ALREADY BEEN IN THE
17 HUNDREDS OF PAGES THAT HAVE ALREADY BEEN FILED, I
18 SAY THAT'S BEEN PRESERVED.

19 SO FOR NOW I'D LIKE YOU TO FOCUS ON
20 THINGS THAT HAVEN'T BEEN RAISED YET.

21 MR. ZELLER: THANK YOU, YOUR HONOR.
22 THAT'S HELPFUL TO KNOW.

23 I MAY ACTUALLY NEED A MINUTE OR TWO TO GO
24 THROUGH THEM, BECAUSE OUR UNDERSTANDING OF IT WAS
25 THAT EVEN IF IT HAD BEEN RAISED PREVIOUSLY AND

1 ARGUED, WE NEEDED TO RAISE IT AS PART OF THIS LIST.

2 THE COURT: WE JUST RAISED IT DURING THE
3 SAME HEARING. THE WHOLE THING ABOUT WHETHER IT HAS
4 TO BE DELIVERED IN THE U.S. WAS IN YOUR HIGH
5 PRIORITY OBJECTION THIS IS MORNING AND WE JUST
6 TALKED ABOUT IT.

7 MR. ZELLER: I UNDERSTAND, YOUR HONOR.
8 BUT THIS IS, AGAIN, FOR THE RECORD.

9 THE COURT: THAT'S FINE. GO AHEAD THEN.

10 MR. ZELLER: SAME POINT WITH RESPECT TO
11 INSTRUCTION NUMBER 21. IT FAILS TO REQUIRE THE
12 JURY TO CONSIDER THE LOCATION OF DELIVERY.

13 NUMBER 26, WE OBJECT TO THE FIRST PANDUIT
14 FACTOR BECAUSE IT SHOULD READ INSTEAD, "DEMAND FOR
15 PATENTED INVENTION."

16 WE OBJECT TO THE OMISSION OF OUR
17 INSTRUCTION 29.1.

18 NUMBER 31 WE DO NOT BELIEVE ACCURATELY
19 STATES THE LAW OR THE FACTS IN THIS CASE.

20 IN LINE 4, THE WORD "DESIGN" SHOULD BE
21 REPLACED WITH THE WORD "INVENTION."

22 AND WE THINK ALSO IT SHOULD BE MADE CLEAR
23 THAT IT APPLIES TO EACH SAMSUNG ENTITY AND SHOULD
24 BE REPLACED WITH THE WORD "APPLE'S."

25 AND THEN WE ALSO OBJECT BECAUSE IT DOES

1 NOT INCLUDE A STATEMENT OF THE PATENTEE'S BURDEN OF
2 PROOF.

3 WITH RESPECT TO INSTRUCTION NUMBER 32, WE
4 OBJECT BASED ON OUR PRIOR CLAIM CONSTRUCTION
5 POSITIONS.

6 AND WITH RESPECT TO THE DESCRIPTION HERE
7 OF THE '087 DESIGN PATENT, THIS MAY JUST BE AN
8 ERROR OF SOME KIND, IT HAS QUOTATION MARKS AROUND
9 PART OF THE DESCRIPTION THERE AS TO WHAT IT COVERS,
10 AND ALSO WE OBJECT TO THE PHRASE "THE PATENTED
11 DESIGN" SINCE IT SOUNDS LIKE THE COURT IS ENDORSING
12 IT.

13 MR. JACOBS: WE HAVE NO OBJECTION TO THE
14 DELETION OF THE QUOTATIONS, YOUR HONOR.

15 THE COURT: WHICH QUOTATIONS IS THAT?

16 MR. JACOBS: THAT'S AT 18, LINE 18 TO 19
17 ON PAGE 55 OF INSTRUCTION NUMBER 32.

18 THE COURT: SO JUST LEAVE IT AS "THE
19 D'087 PATENT CLAIMS AN ORNAMENTAL DESIGN OF AN
20 ELECTRONIC DEVICE AS SHOWN IN FIGURES 1 THROUGH
21 48," AND NOTHING ELSE?

22 MR. JACOBS: NO. I'M SORRY. THERE
23 LITERALLY ARE QUOTATION MARKS THAT MR. ZELLER
24 POINTED OUT THAT I HADN'T NOTICED BEFORE AT LINE
25 19, AND THE QUOTATION MARKS THEMSELVES --

1 THE COURT: YEAH, BUT THAT'S THE
2 CONVENTION FOR ALL OF THESE OF DESCRIBING -- IF YOU
3 LOOK AT LINES 13 AND 14 --

4 MR. JACOBS: THANK YOU, YOUR HONOR.

5 MR. ZELLER: YES, THAT'S TRUE.

6 BUT IN THIS PARTICULAR INSTANCE, BECAUSE
7 IT CALLS ATTENTION TO ITSELF, IT'S JUST, IN MY
8 VIEW, SOMEWHAT CONFUSING BECAUSE IT LOOKS LIKE IT'S
9 QUOTING SOMETHING FROM THE PATENT OR FROM SOME
10 OTHER SOURCE.

11 BUT ALSO EMBEDDED IN THIS IS "OF THE
12 PATENTED DESIGN."

13 MR. JACOBS: THAT LANGUAGE HAS BEEN
14 STABLE FOR A LONG TIME, YOUR HONOR.

15 THE COURT: YEAH, THAT WAS MY
16 CONSTRUCTION.

17 SO GO AHEAD, PLEASE.

18 MR. ZELLER: WITH RESPECT TO INSTRUCTION
19 NUMBER 33, WE OBJECT THAT IT DOES NOT DISTINGUISH
20 BETWEEN THE SAMSUNG ENTITIES.

21 WITH RESPECT TO NUMBER 34, WE HAVE THE
22 SAME OBJECTIONS AS BEFORE. THEY DO NOT CORRECTLY
23 STATE THE ACTS THAT CONSTITUTE DESIGN PATENT
24 INFRINGEMENT.

25 THE COURT: WE'LL FIX NUMBER 33.

1 MR. ZELLER: AND THEN ALSO WE HAVE THE
2 SAME OBJECTIONS ABOUT WHAT CONSTITUTES A SALE
3 WITHIN THE UNITED STATES TO THIS AS WELL.

4 AND THEN ALSO, WE WOULD ADD THAT WE THINK
5 WITH RESPECT TO 34.1, THAT -- SINCE IT DOES COMMENT
6 ON HOW SIZE IS NOT PERTINENT, WE THINK IT SHOULD BE
7 CLARIFIED TO SAY THAT PROPORTIONS DO MATTER.

8 THERE WAS TESTIMONY ON THAT DURING THE
9 COURSE OF THE TRIAL, AND WE DON'T WANT THE JURY TO
10 BE CONFUSED THINKING THAT THEY CAN'T CONSIDER THE
11 PROPORTIONS.

12 THE COURT: OKAY. THAT'S OVERRULED.

13 GO AHEAD, PLEASE.

14 MR. ZELLER: WITH RESPECT TO -- WE OBJECT
15 THAT INSTRUCTION 44.4 AT DOCKET NUMBER 1860,
16 EXHIBIT C, WHICH IS ABOUT FUNCTIONALITY, IS NOT
17 BEING GIVEN.

18 WITH RESPECT TO NUMBER -- TO INSTRUCTION
19 34.1, WE OBJECT BECAUSE WE DO NOT BELIEVE IT
20 ACCURATELY STATES THE LAW. AS WE MENTIONED
21 EARLIER, WE BELIEVE THAT THE JURY SHOULD BE
22 INSTRUCTED TO FACTOR OUT FUNCTIONALITY ELEMENTS AS
23 PART OF THE INFRINGEMENT ANALYSIS.

24 WE ALSO OBJECT TO THE PHRASE "MINOR
25 DIFFERENCES" SHOULD NOT PREVENT A FINDING OF

1 INFRINGEMENT SINCE IT DOESN'T DEFINE WHAT "MINOR
2 DIFFERENCE" IS.

3 AND ALSO, IT SUGGESTS SOMETHING IN
4 TENSION WITH NUMBER 1, THE STATE OF THE LAW OF THE
5 FEDERAL CIRCUIT, BUT IT DOESN'T MAKE CLEAR THAT
6 MINOR DIFFERENCES SHOULD NOT PREVENT A FINDING OF
7 INFRINGEMENT, THAT DOESN'T SUPERSEDE THE TEST, THE
8 GORHAM TEST.

9 WE ALSO OBJECT THAT, IN THIS VEIN, THAT
10 OUR PROPOSED INSTRUCTION NUMBER 44.4 WAS NOT GIVEN,
11 AS WELL AS OUR PROPOSED INSTRUCTION 34.1, AS WELL
12 AS 34.2, AND 43.3.

13 WE ALSO OBJECT TO THE OMISSION OF OUR
14 PROPOSED INSTRUCTIONS 34.4B, AS WELL AS 34.6.

15 WITH RESPECT TO INSTRUCTION 36, WE OBJECT
16 TO THE FILING DATES THAT ARE PROVIDED THERE. WE
17 DON'T BELIEVE THAT THOSE ARE THE APPROPRIATE DATES
18 THAT SHOULD BE USED.

19 THERE WAS NO EVIDENCE THAT WAS ADDUCED
20 THAT ALLOWS APPLE TO CLAIM THE EARLIER DATES.
21 THESE WERE CONTINUATIONS, AND IT WAS APPLE'S BURDEN
22 TO PROVE IT AND THEY DID NOT, SO WE THINK THE
23 FILING DATE FOR '677 SHOULD BE NOVEMBER 18TH, 2008
24 AND FOR D'087 SHOULD BE JULY 30TH, 2007.

25 WITH RESPECT TO INSTRUCTION NUMBER 38, I

1 WON'T REITERATE OUR PRIMARY OR OUR PREVIOUS
2 OBJECTIONS; HOWEVER, WE DO THINK THAT THE
3 INSTRUCTION DEVIATES FOR REASONS THAT WE'VE ALREADY
4 TALKED ABOUT FROM THE SUPREME COURT'S HOLDING IN
5 KSR.

6 WE OBJECT ON THE GROUNDS THAT OUR
7 PROPOSED INSTRUCTION 38.2 WAS NOT GIVEN, AS WELL AS
8 38.3.

9 WITH RESPECT TO THE COURT'S 39,
10 INSTRUCTION NUMBER 39, WE OBJECT TO THE LAW THAT
11 THERE -- WE OBJECT THAT IT'S INCONSISTENT WITH THE
12 LAW ON FUNCTIONALITY IN A NUMBER OF RESPECTS.

13 I DON'T KNOW IF THE COURT WANTS
14 ELABORATION ON THAT, BUT THE COURT IS AWARE THAT
15 WE, OF COURSE, HAVE TAKEN CONTRARY POSITIONS AS TO
16 WHAT IT IS THAT WE THINK THAT FUNCTIONALITY COVERS
17 IN THIS CONTEXT.

18 I KNOW THE COURT HAS ALREADY COMMENTED
19 THAT AT LEAST IT DID NOT FIND SOME OF THE CASE LAW
20 THAT WE'RE RELYING ON TO BE PERSUASIVE.

21 AND FOR RECORD PURPOSES, WE DO OBJECT THAT
22 THE COURT IS NOT GIVING OUR INSTRUCTION NUMBER 39
23 FROM DOCKET 1860.

24 AND ALSO, THE SAME IS TRUE FOR OUR
25 PROPOSED INSTRUCTIONS 39.1, 39.2 AND 39.3.

1 WITH RESPECT TO INSTRUCTION NUMBER 40,
2 THERE'S LANGUAGE FROM THE NORTHERN DISTRICT OF
3 CALIFORNIA MODEL INSTRUCTION THAT'S BEEN OMITTED
4 THAT WE THINK SHOULD BE INCLUDED, AND THAT IS THE
5 LANGUAGE THAT SAYS "A DAMAGES AWARD SHOULD PUT THE
6 PATENT HOLDER IN APPROXIMATELY THE FINANCIAL
7 POSITION IT WOULD HAVE BEEN IN HAD THE INFRINGEMENT
8 NOT OCCURRED, BUT IN NO EVENT MAY THE DAMAGES AWARD
9 BE LESS THAN A REASONABLE ROYALTY."

10 AND THAT'S FROM NORTHERN DISTRICT OF
11 CALIFORNIA MODEL B.5.1.

12 WITH RESPECT --

13 THE COURT: THAT'S FOR UTILITY PATENTS.

14 MR. ZELLER: WELL, IT'S A -- THAT IS
15 TRUE, YOUR HONOR.

16 IT ALSO, HOWEVER, IS A WELL SETTLED
17 PROPOSITION OF LAW FOR DAMAGES, PERIOD. AND THAT'S
18 WHY WE THINK IT'S APPROPRIATE IN THIS CONTEXT.

19 THE COURT: OKAY.

20 MR. ZELLER: THE -- WITH RESPECT TO THE
21 COURT'S INSTRUCTION NUMBER 41, WHICH DEALS WITH
22 LOST PROFITS, WE HAVE OBVIOUSLY DISCUSSED THAT
23 PREVIOUSLY, INCLUDING IN OUR WRITTEN OBJECTIONS, SO
24 I WILL NOT REPEAT THOSE, BUT WE DO REASSERT THOSE.

25 WITH RESPECT TO INSTRUCTION NUMBER 42,

1 IT'S REALLY THE SAME SITUATION. WE ARE CONCERNED
2 ABOUT, IN PARTICULAR, THESE INSTRUCTIONS IN
3 IMPLYING THAT APPLE CAN OBTAIN RECOVERIES THAT WE
4 DON'T THINK ARE ALLOWED UNDER THE LAW, AS WELL AS
5 RISKING A DOUBLE RECOVERY.

6 THERE'S ALSO SOME PARTICULAR LANGUAGE WE
7 THINK IN THIS INSTRUCTION THAT'S OF CONCERN.

8 IN THE SECOND PARAGRAPH, THE FIRST
9 SENTENCE, THE COURT USES THE PHRASE, QUOTE, "OR
10 WITH WHICH IT IS USED," END QUOTE, AND THAT'S IN
11 THE CONTEXT OF APPLYING THE DESIGN, OR TO WHICH THE
12 DESIGN IS APPLIED, AND THEN THIS LANGUAGE "OR WITH
13 WHICH IT IS USED."

14 THOSE WORDS DO NOT APPEAR IN THE STATUTE
15 AND THEY ARE -- IT'S NOT LANGUAGE THAT'S BEEN
16 ENDORSED BY ANY CASE THAT WE'VE BEEN ABLE TO FIND.

17 THE STATUTE'S PLAIN LANGUAGE SAYS THAT
18 WHAT CAN BE AWARDED ARE THE PROFITS FROM THE
19 ARTICLE TO WHICH THE DESIGN IS APPLIED.

20 THE COURT: I DON'T EVEN KNOW "OR WITH
21 WHICH IT IS USED" MEANS.

22 MR. ZELLER: THAT WAS GOING TO BE MY NEXT
23 POINT, TOO, THAT IT'S VERY, VERY GENERAL AND IT
24 SUGGESTS THAT, CONTRARY TO THE LAW AS WELL, THAT
25 ANYTHING ASSOCIATED WITH THE ARTICLE THAT HAS THE

1 SUPPOSEDLY INFRINGING DESIGNS COULD BE THE SUBJECT
2 OF A DISGORGEMENT AWARD.

3 MR. JACOBS: YOUR HONOR, THAT WAS
4 SAMSUNG'S PROPOSED LANGUAGE.

5 MR. ZELLER: WE'RE OBJECTING TO IT.

6 BEFORE JURY RETIRES, OR BEFORE THE COURT
7 CHARGES, WE HAVE A RIGHT TO RAISE OUR OBJECTIONS.
8 THERE CAN BE NO WAIVER OF THAT.

9 IT'S INCORRECT. WHATEVER THE SOURCE OF
10 IT IS --

11 THE COURT: I ASSUME THAT, MR. JACOBS,
12 YOU HAVE NO PROBLEM WITH TAKING OUT "OR WITH WHICH
13 IT IS USED."

14 MR. JACOBS: YOUR ASSUMPTION IS CORRECT,
15 YOUR HONOR.

16 THE COURT: ALL RIGHT. SO THAT'S GONE.

17 MR. ZELLER: THERE IS ALSO A SENTENCE
18 THAT IS DISCUSSED, AND I THINK IT'S IN THIS
19 INSTRUCTION, YES, IT'S THE SECOND PARAGRAPH AT THE
20 LAST SENTENCE, AND IT TALKS ABOUT BASICALLY
21 DISGORGEMENT OF NON-PARTIES, SUCH AS, AND
22 PRESUMABLY THOSE WOULD BE THE CARRIERS.

23 THAT DOESN'T SEEM TO BE APPLICABLE HERE,
24 AND ALSO IT COULD POTENTIALLY LEAD TO CONFUSION.
25 WE DON'T THINK THAT'S APPLICABLE.

1 WE ALSO OBJECT TO THE FAILURE OF -- TO
2 INSTRUCT ON A CAUSATION REQUIREMENT ALONG THE LINES
3 OF WHAT WE HAD PROPOSED IN OUR INSTRUCTION NUMBER
4 42.

5 THE COURT: LET ME HEAR FROM MR. JACOBS,
6 WHAT'S YOUR VIEW ON SELLERS IN THE CHAIN OF
7 DISTRIBUTION?

8 I DO THINK THIS WAS ORIGINALLY A SAMSUNG
9 INSTRUCTION, BUT YOU'RE NOT EVEN ASKING -- YOU'RE
10 NOT ASKING FOR THE PROFITS OF SAMSUNG'S CARRIERS,
11 ARE YOU?

12 MR. JACOBS: NO, YOUR HONOR. WE'RE
13 ASKING -- BUT THE SELLERS THERE WOULD REFER TO THE
14 STA AND SEA.

15 THE COURT: OH, I SEE.

16 MR. ZELLER: WELL, THAT'S CERTAINLY NOT
17 CLEAR FROM THAT LANGUAGE.

18 THE COURT: WELL, IF YOU WANT DIFFERENT
19 LANGUAGE, WHY DON'T YOU PROPOSE IT?

20 MR. ZELLER: OUR PROPOSAL DIDN'T COME
21 OUT.

22 I DON'T THINK, FRANKLY, THAT IT'S A
23 CORRECT STATEMENT OF THE LAW, EITHER, THAT SOMEHOW
24 ONE OF THE U.S. ENTITIES COULD BE ORDERED TO PAY
25 SEC'S PROFITS.

1 THE COURT: I'M SORRY. LET ME JUST STOP
2 YOU.

3 MR. JACOBS, DO YOU HAVE ANY PROBLEM WITH
4 JUST STRIKING THAT LAST SENTENCE? BECAUSE IT
5 ALREADY SAYS "TOTAL PROFIT OF SEC, SEA AND/OR STA
6 MEANS THE ENTIRE PROFIT ON THE SALE OF AN ARTICLE
7 TO WHICH THE PATENTED DESIGN IS APPLIED." THAT'S
8 THE FIRST SENTENCE OF THIS PARAGRAPH.

9 MR. JACOBS: WHAT I WOULD SUGGEST, YOUR
10 HONOR, INSTEAD IS, "BUT ALSO OF OTHER SELLERS IN
11 THE CHAIN OF DISTRIBUTION" BE MODIFIED TO "BUT ALSO
12 OF SAMSUNG'S SUBSIDIARIES WHO SELL IN THE CHAIN OF
13 DISTRIBUTION" OR "WHO ARE IN THE CHAIN OF
14 DISTRIBUTION."

15 THE COURT: DO YOU HAVE ANY OBJECTION TO
16 THAT?

17 MR. ZELLER: YES, YOUR HONOR. THAT'S A
18 COMPLETE MISSTATEMENT OF THE LAW.

19 AND IN FACT, WHAT THAT DOES IS -- IT'S
20 ESSENTIALLY SAYING THAT, CONTRARY TO ALL THE OTHER
21 INSTRUCTIONS, ESSENTIALLY THEY CAN BE HELD LIABLE
22 FOR ANOTHER PARTY'S PROFITS THAT WERE EARNED, EVEN
23 WITHOUT A FINDING OF LIABILITY AS TO THAT OTHER
24 ENTITY, WHICH IS JUST DEAD WRONG.

25 AND, IN FACT, CONTRIBUTORY AND SECONDARY

1 THEORIES OF LIABILITY ARE WELL DEFINED BY THE
2 SUPREME COURT AND THEY HAVE ADDITIONAL
3 REQUIREMENTS.

4 THIS IS JUST A NAKED STATEMENT THAT ONE
5 PARTY, BECAUSE OF A SUBSIDIARY OR BECAUSE ANY OTHER
6 RELATIONSHIP, CAN SIMPLY BE FORCED TO PAY FOR THE
7 PROFITS OF ANOTHER WITHOUT THE REQUIREMENTS OF
8 SECONDARY LIABILITY IS JUST WRONG AND THERE IS NO
9 AUTHORITY THAT APPLE CAN CITE FOR THAT PROPOSITION.

10 MR. JACOBS: THIS IS THE IPO MODEL, YOUR
11 HONOR, BUT I DON'T THINK THAT'S WHAT THE LANGUAGE
12 SAYS.

13 MR. ZELLER: BUT CLEARLY WHAT THE IPO --

14 MR. JACOBS: MR. ZELLER IS OVER READING
15 THE -- WAY OVER READING THE LANGUAGE.

16 MR. ZELLER: WELL, IT'S AT BEST
17 AMBIGUOUS, AND IT'S ALSO INAPPLICABLE HERE, AND NOW
18 APPLE IS ATTEMPTING TO MASSAGE IT INTO SOMETHING
19 THAT IS A COMPLETELY UNDISCLOSED THEORY OF RECOVERY
20 AGAINST --

21 THE COURT: I DON'T THINK YOU NEED IT. I
22 DON'T THINK WE NEED IT. THE FIRST PARAGRAPH OF
23 THAT SENTENCE SAYS "TOTAL PROFIT OF SEC, SEA AND/OR
24 STA MEANS THE ENTIRE PROFIT ON THE SALE OF AN
25 ARTICLE TO WHICH THE PATENTED DESIGN IS APPLIED AND

1 NOT JUST A PORTION OF THE PROFIT ATTRIBUTABLE TO
2 THE DESIGN ORNAMENTAL ASPECTS COVERED BY THE
3 PATENT."

4 I DON'T THINK WE NEED THAT LAST SENTENCE.
5 I WILL STRIKE THE WHOLE THING. OKAY?

6 MR. ZELLER: WITH RESPECT TO THE THIRD
7 PARAGRAPH AND THE FIRST SENTENCE, THERE'S THE USE
8 OF THE WORDS "ALLEGED TO" AND WE WOULD PROPOSE THAT
9 THAT -- THAT THOSE WORDS "ALLEGED TO" BE DELETED
10 AND SUBSTITUTE THE WORD "THAT" INSTEAD.

11 THE CONCERN IS THAT THE JURY MAY THINK
12 JUST ALLEGING IT IS ENOUGH.

13 THE COURT: OKAY. THAT'S FINE. THAT'S
14 FINE.

15 MR. ZELLER: AND THEN FOR REASONS WE'VE
16 ALREADY TALKED ABOUT PREVIOUSLY, YOUR HONOR, BOTH
17 INCLUDING ON THE DAUBERT MOTION AND PRIOR MOTIONS,
18 WE DO OBJECT TO THE LACK OF AN APPORTIONMENT
19 INSTRUCTION.

20 AND ALSO WE OBJECT TO NOT INCLUDING THE
21 LANGUAGE THAT WE PROPOSED, BECAUSE WE DON'T THINK
22 IT'S A CORRECT STATEMENT OF THE LAW THAT JUST
23 BECAUSE THE DESIGN, AS APPLE ALLEGES, APPLIED TO
24 THE FRONT FACE OF THESE ARTICLES, THE OUTSIDE OF
25 IT, THAT THEY CAN THEN RECOVER FOR THE UNDERLYING

1 TECHNOLOGY.

2 AND, IN FACT, THAT'S THE EXACT KIND OF
3 SITUATION THAT THE PIANO CASES FOUND WERE A
4 WINDFALL, AND WE BRIEFED THIS PREVIOUSLY, YOUR
5 HONOR.

6 THE COURT: I KNOW THERE'S NO
7 APPORTIONMENT FOR SAMSUNG PROFITS IN DESIGN PATENT
8 CASES.

9 I'M ASSUMING THERE IS APPORTIONMENT IF
10 APPLE IS ASKING FOR APPLE'S PROFITS. IS THAT
11 RIGHT?

12 MR. ZELLER: ABSOLUTELY.

13 THE COURT: YEAH.

14 MR. ZELLER: AND ALSO, YOUR HONOR, WHAT
15 I'M TALKING ABOUT WITH THE PIANO CASES, JUST TO BE
16 CLEAR, THERE'S NOT APPORTIONMENT. IT'S ACTUALLY
17 THE DEFINITION OF WHAT THE ARTICLE IS.

18 AND IN THE PIANO CASES, BASICALLY THE
19 ARTICLE WAS THE OUTSIDE OF THE PIANO AND THE
20 RECOVERY THAT WAS GIVEN WAS FOR ALL OF THE PROFITS
21 FROM THE SALE OF THE PIANO, AND THE COURT SAID THAT
22 WAS ESSENTIALLY A WINDFALL BECAUSE THE WORKINGS OF
23 IT, IT'S NOT APPORTIONMENT, IT'S RATHER THAT WAS
24 THE ARTICLE TO WHICH THE DESIGN WAS APPLIED.
25 THAT'S WHAT THE PROFITS HAVE TO BE FROM.

1 THE COURT: OKAY.

2 MR. ZELLER: WITH RESPECT TO NUMBER 41 --
3 EXCUSE ME, NUMBER 42.1 ON DESIGN PATENT DAMAGES,
4 PROFITS, WE WOULD OBJECT TO THE OMISSION OF OUR
5 PROPOSED INSTRUCTION.

6 WITH RESPECT TO NUMBER 43, WE HAVE
7 DISCUSSED THIS ABOUT OUR -- OUR CONCERN ABOUT IT
8 NOT BEING CLEAR AND THE LIKE, WHICH I WON'T
9 REITERATE, AS WELL AS WE DISAGREE THAT IT'S A
10 CORRECT STATEMENT OF THE LAW.

11 BUT WE ALSO THINK AT A BARE MINIMUM, THIS
12 SHOULD CLARIFY THAT THE ROYALTY, THE REASONABLE
13 ROYALTY CAN ONLY BE CONSIDERED IF LIABILITY IS
14 FOUND.

15 THE LANGUAGE IS SOMEWHAT BLUNT IN A SENSE
16 WHERE IT JUST SEEMS TO SUGGEST THAT THEY -- IN NO
17 EVENT CAN APPLE OBTAIN ANYTHING OTHER THAN A
18 REASONABLE ROYALTY WITHOUT ANY OTHER KIND OF
19 PREDICATE. SO WE WOULD JUST SIMPLY SUGGEST THAT WE
20 CLARIFY THAT.

21 MR. JACOBS: YOUR HONOR, IT REFERS TO
22 INFRINGING SALES.

23 THE COURT: YEAH, GO AHEAD, PLEASE.

24 MR. ZELLER: WITH RESPECT TO NUMBER 43.2,
25 WE OBJECT TO THE OMISSION OF OUR PROPOSED

1 INSTRUCTION.

2 IN NUMBER 44, IN THE FOURTH PARAGRAPH,
3 FIRST SENTENCE, WE THINK THAT THE WORD "DESIGN"
4 SHOULD BE INCLUDED BEFORE "PATENT" TO MAKE IT CLEAR
5 THAT THIS IS DESIGN PATENTS.

6 I UNDERSTAND IT'S IN THE HEADING, BUT
7 JUST TO ELIMINATE ANY QUESTIONS.

8 THE COURT: THAT'S FINE.

9 MR. ZELLER: SINCE OBVIOUSLY THEY'RE
10 DEALING WITH MORE THAN ONE.

11 WITH RESPECT TO NUMBER 45, WE HAVE MADE
12 THIS OBJECTION BEFORE AND WE WOULD SIMPLY REITERATE
13 THAT THIS INSTRUCTION SHOULDN'T APPLY TO -- IN THIS
14 PARTICULAR CASE FOR A HOST OF REASONS THAT WE'VE
15 ALREADY RAISED.

16 THE COURT: WELL, THERE'S NO -- THERE IS
17 INDUCEMENT ON THE DESIGN PATENTS; CORRECT?

18 MR. ZELLER: I'M SORRY, YOUR HONOR?

19 THE COURT: THAT'S BEEN ALLEGED. THERE
20 IS INDUCEMENT OF BOTH THE DESIGN AND THE UTILITY
21 PATENTS, RIGHT? WHAT'S YOUR POINT, THAT IT'S
22 INAPPLICABLE?

23 MR. ZELLER: WE'VE OBJECTED PREVIOUSLY,
24 YOUR HONOR, BECAUSE WE DO NOT BELIEVE, AND WE'VE
25 RAISED THIS BEFORE, THAT THIS THEORY OF INDUCEMENT

1 WAS TIMELY RAISED.

2 THE COURT: I SEE.

3 MR. ZELLER: THIS WAS BRIEFED PREVIOUSLY,
4 YOUR HONOR, AND THE COURT HAS RULED ON IT, BUT WE
5 JUST WANT TO --

6 THE COURT: PRESERVE YOUR OBJECTION?

7 MR. ZELLER: EXACTLY.

8 THE COURT: OKAY.

9 MR. ZELLER: ALSO, FOR THE SAME REASONS
10 WE TALKED ABOUT PREVIOUSLY, WE DON'T BELIEVE THIS
11 IS AN ACCURATE STATEMENT OF THE LAW.

12 THE COURT: OKAY.

13 MR. ZELLER: WITH RESPECT TO NUMBER 46,
14 WE OBJECT ON THE BASIS THAT THE COURT HAS ALREADY
15 CONSIDERED, WHICH DEALS WITH THE STANDARD FOR
16 WILLFUL INFRINGEMENT. WE BELIEVE THAT THERE'S
17 AUTHORITY THAT SHOWS THAT IT HAS TO BE PROVEN BY
18 CLEAR AND CONVINCING EVIDENCE.

19 MR. ZELLER: ALSO, WE OBJECT ON THE BASIS
20 THAT IT DOESN'T INCLUDE THE LANGUAGE FROM THE
21 NORTHERN DISTRICT OF CALIFORNIA MODEL PATENT JURY
22 INSTRUCTIONS, B.3.10.

23 WITH RESPECT TO INSTRUCTION NUMBER 48, WE
24 OBJECT TO THE DELETION OF THE FOURTH PARAGRAPH AS
25 WE DISCUSSED PREVIOUSLY. AND WHAT I WAS SAYING,

1 YOUR HONOR, IS THAT THIS LANGUAGE HAS ALREADY BEEN
2 PRESENTED TO THE JURY. IT'S IN PRELIMINARY
3 INSTRUCTION NUMBER 21.

4 AND WE'RE CONCERNED THAT ITS ABSENCE HERE
5 MAY CAUSE SOME CONFUSION. THAT'S BEEN IN THE -- IN
6 FACT, THE COURT WILL RECALL THAT EVEN BEFORE WE
7 SUBMITTED THE PRELIMINARY INSTRUCTIONS TO THE JURY,
8 APPLE SPECIFICALLY OBJECTED TO TWO DIFFERENT
9 PARAGRAPHS IN THAT INSTRUCTION, AND THE COURT RULED
10 IN OUR FAVOR.

11 WE BELIEVE THAT THEY SHOULD GO IN. THESE
12 ARE RIGHT OUT OF THE MODEL INSTRUCTION.

13 THE COURT: YOU'RE RIGHT ON THAT. THAT'S
14 NOT GOING TO BE DELETED. IT WAS IN PRELIMINARY
15 INSTRUCTION NUMBER 21. OKAY.

16 MR. ZELLER: WE OBJECT ON THE GROUNDS
17 THAT OUR PROPOSED INSTRUCTIONS 48.1 AND 48.2
18 DEALING WITH TRADE DRESS ARE NOT BEING GIVEN.

19 THE COURT: OKAY.

20 MR. ZELLER: WITH RESPECT TO INSTRUCTION
21 NUMBER 49, WE DON'T BELIEVE THAT THIS ACCURATELY
22 STATES THE LAW, AND THE SAME IS TRUE OF INSTRUCTION
23 NUMBER 50.

24 AND WE OBJECT TO THE OMISSION OF OUR
25 INSTRUCTIONS 50.1 THROUGH 50.5.

1 WITH RESPECT TO INSTRUCTION NUMBER 51, WE
2 OBJECT THAT THIS DOES NOT PROPERLY OR CORRECTLY
3 STATE THE LAW.

4 IT'S ALSO MISSING A SENTENCE FROM THE
5 MODEL THAT SHOULD BE INCLUDED IN THE FIRST
6 PARAGRAPH, AND THAT LANGUAGE IS "IF THE FEATURE IS
7 PART OF ACTUAL BENEFIT THAT CONSUMERS WISH TO
8 PURCHASE WHEN THEY BUY THE PRODUCT, THEN THE
9 FEATURE IS FUNCTIONAL."

10 THAT'S FROM THE MODEL INSTRUCTION.

11 AND WITH RESPECT TO THE CHANGES THAT WERE
12 MADE DURING THE COURSE OF THIS HEARING, WE OBJECT
13 TO THOSE AS WELL.

14 THE LAW, AS WE UNDERSTAND IT, INCLUDING
15 FROM INWOOD AND OTHER DECISIONS, IS THAT IF THE
16 INWOOD TEST IS MET, THE INQUIRY IS OVER. THE
17 FACTORS ARE NOT CONSIDERED.

18 AND I BELIEVE THAT WE HAVE BRIEFED THIS
19 PREVIOUSLY, SO I WILL RELY ON THAT BRIEFING.

20 BUT WE DO THINK THAT IT'S -- AND THIS WAS
21 IN PARTICULAR ON SUMMARY JUDGMENT WHEN THIS WAS
22 AIRED, SO WE WOULD REITERATE THOSE GROUNDS.

23 WITH RESPECT TO NUMBER 52, WE DO NOT
24 BELIEVE THAT THIS ACCURATELY STATES THE LAW.

25 THERE'S LANGUAGE FROM THIS ABA MODEL

1 INSTRUCTION NUMBER 3 THAT HAS BEEN OMITTED, AND WE
2 THINK IT SHOULD BE INCLUDED, AND THAT IS THAT
3 "DEFENDANT IS MAKING OR HAS MADE USE IN COMMERCE OF
4 AN IDENTICAL OR NEARLY AN IDENTICAL TRADE DRESS."

5 WE OBJECT TO THE OMISSION OF OUR PROPOSED
6 INSTRUCTIONS 52.1 -- ACTUALLY, I APOLOGIZE -- YEAH,
7 51.1 AND 52.2.

8 WITH RESPECT TO INSTRUCTION NUMBER 53,
9 AND WE DON'T BELIEVE THAT THIS ACCURATELY STATES
10 THE LAW AND WE THINK THAT IT SHOULD SAY THAT THE
11 PUBLICITY IS FEATURING THE TRADE DRESS.

12 ALSO, WE OBJECT ON THE GROUNDS THAT THIS
13 OMITTS LANGUAGE FROM THE ABA MODEL INSTRUCTION.

14 AS TO INSTRUCTION NUMBER 55, WE OBJECT
15 THAT WE DO NOT BELIEVE THIS IS A CORRECT STATEMENT
16 OF THE LAW.

17 AS TO NUMBER 58, WE OBJECT. THIS ALSO
18 DOES NOT CORRECTLY STATE THE LAW.

19 AND WE ALSO OBJECT THAT IT -- THAT THE
20 TWO FORMS OF MONETARY RELIEF TO WHICH APPLE MAY BE
21 ENTITLED SHOULD BE STATED AS APPLE'S ACTUAL DAMAGES
22 OR THE PROFITS OF THE SAMSUNG ENTITY YOU FIND
23 LIABLE FOR INFRINGEMENT OR DILUTION" TO MAKE IT
24 CLEAR THAT YOU CAN'T, AGAIN, HAVE THIS KIND OF
25 MIXING AND MATCHING THAT APPLE IS ADVOCATING.

1 WE OBJECT TO THE OMISSION OF THE SECOND
2 PARAGRAPH OF THE NINTH CIRCUIT MODEL INSTRUCTION
3 52.4.

4 AND WE BELIEVE IT'S ON CLEAR AND
5 CONVINCING EVIDENCE HERE AS WELL.

6 WE OBJECT TO THE FAILURE TO GIVE OUR
7 PROPOSED INSTRUCTION 58, OR AN INSTRUCTION THAT'S
8 CONSISTENT WITH ABA MODEL INSTRUCTION 3.6.1.

9 WE OBJECT TO THE INSTRUCTION UNDER 59 ON
10 THE GROUNDS THAT IT DOES NOT PROPERLY STATE THE
11 LAW, AND THE SAME IS TRUE FOR NUMBER 60.

12 AND THESE INCLUDE, IN PARTICULAR, YOUR
13 HONOR, THE POINT WE MADE PREVIOUSLY ABOUT THE CLEAR
14 AND CONVINCING EVIDENCE STANDARD.

15 WITH RESPECT TO 61.3, I DID RAISE THIS
16 PREVIOUSLY, BUT I WANTED TO, PERHAPS, DISCUSS IT A
17 LITTLE BIT FURTHER, AND WE DO BELIEVE THAT IT NEEDS
18 TO BE CLARIFIED, IN ADDITION TO THE OTHER PROBLEMS
19 WE'VE RAISED, THAT THERE CANNOT BE A DOUBLE
20 RECOVERY FOR BOTH PATENT AND UTILITY PATENT. AND
21 THAT'S RIGHT OUT OF FEDERAL CIRCUIT PRECEDENT.

22 ONCE THERE'S AN AWARD OF AN INFRINGER'S
23 PROFITS FOR, AGAIN, WHETHER A UNIT OR A DEVICE OR
24 CATEGORY OF DEVICES, THERE JUST SIMPLY CANNOT BE
25 THEN A FURTHER AWARD. THEY'RE DONE.

1 AND I DON'T THINK THAT THAT'S MADE CLEAR
2 TO THE JURY AT ALL.

3 AND CONSIDERING THAT MR. MUSIKA HAS THIS
4 ANALYSIS WHERE HE'S ATTEMPTING TO CLAIM THAT
5 MULTIPLE TYPES OF RECOVERY SHOULD BE ALLOWED, WE
6 THINK THAT'S -- IT'S VERY DANGEROUS AND THAT THEY
7 ARE GOING TO POTENTIALLY START ADDING ON ADDITIONAL
8 SUMS BEYOND THAT ONE RECOVERY THAT'S SIMPLY
9 ALLOWED.

10 THE COURT: DO YOU HAVE ANY SPECIFIC
11 LANGUAGE FOR THIS ONE?

12 MR. ZELLER: I, I --

13 MR. JACOBS: I DO, YOUR HONOR.

14 THE COURT: WHAT'S THAT?

15 MR. JACOBS: IF -- AT THE END OF THE
16 INSTRUCTION 61.3, "IF A SALE IS AWARDED ONE REMEDY,
17 THAT SAME SALE SHOULD NOT BE AWARDED A DIFFERENT
18 REMEDY."

19 THE COURT: "IF A SALE IS AWARDED ONE
20 REMEDY, THAT SALE" --

21 MR. JACOBS: -- "THAT SAME SALE SHOULD
22 NOT BE AWARDED A DIFFERENT REMEDY."

23 THE COURT: HOW ABOUT "CANNOT BE"?

24 MR. JACOBS: "CANNOT BE" --

25 THE COURT: -- "AWARDED ANOTHER REMEDY."

1 DOES THAT HELP, MR. ZELLER?

2 MR. ZELLER: I THINK IT ADVANCES THE BALL
3 A LITTLE BIT. I THINK INSTEAD OF SOMETHING LIKE
4 "REMEDY," WE SAY SOMETHING LIKE "ONE FORM OF
5 MONETARY RECOVERY."

6 MR. JACOBS: THAT'S FINE, YOUR HONOR, "IF
7 A SALE IS AWARDED ONE FORM OF MONETARY RECOVERY,
8 THAT SAME SALE SHOULD NOT BE AWARDED ANOTHER FORM
9 OF MONETARY RECOVERY." WE AGREE WITH THAT.

10 THE COURT: DO YOU WANT THAT JUST TO BE A
11 SEPARATE FINAL PARAGRAPH AT THE END?

12 MR. JACOBS: THAT WOULD ALSO BE FINE.

13 MR. ZELLER: THAT WOULD BE FINE.

14 THE COURT: OKAY. WHY DON'T I SEPARATE
15 THAT. I THINK THAT'S IMPORTANT ENOUGH TO
16 EMPHASIZE.

17 MR. ZELLER: AND THAT'S HELPFUL -- JUST
18 FOR THE RECORD, WE STILL OBJECT TO THE USE OF IT ON
19 A SALE FOR THE REASONS WE'VE ALREADY TALKED ABOUT,
20 BUT AT LEAST I THINK IT DOES HELP ADDRESS THE ISSUE
21 THAT I WAS RAISING ABOUT UTILITY PATENTS.

22 THE COURT: OKAY. BREACH OF CONTRACT IS
23 UNDISPUTED. LAW OF MONOPOLIZATION IS UNDISPUTED.

24 BUT GO AHEAD IF YOU HAVE ANY REMAINING
25 ONES.

1 MR. ZELLER: WITH RESPECT TO INSTRUCTION
2 NUMBER 65, WE DISPUTE THAT THE INSTRUCTION SHOULD
3 SPECIFY THAT THE RELEVANT MARKET IS A PRODUCT
4 MARKET.

5 THE COURT: UM-HUM.

6 MR. ZELLER: WITH RESPECT TO INSTRUCTION
7 NUMBER 68, WE OBJECT BECAUSE WE DO NOT BELIEVE THAT
8 THE STANDARD THAT THE COURT HAS RECITED THERE IS IN
9 ACCORDANCE WITH APPLE'S CONTENTIONS AS WELL AS WHAT
10 SAMSUNG IS REQUIRED TO DISCLOSE.

11 WITH RESPECT TO NUMBER 69, WE HAVE SOME
12 CONCERN ABOUT THIS LANGUAGE WHERE IT SAYS, "YOU MAY
13 CONSIDER ANY EVIDENCE THAT SAMSUNG INTENDED TO
14 DECEIVE ETSI TO THE EXTENT IT HELPS YOU -- IT HELPS
15 TO UNDERSTAND THE LIKELY EFFECT OF SAMSUNG'S
16 CONDUCT."

17 WE'RE UNAWARE OF ANY AUTHORITY THAT
18 SUPPORTS THAT, BUT WE'RE CONCERNED THAT IT'S NOT
19 VERY CLEAR. IT'S A VAGUE SENTENCE.

20 THE COURT: DO YOU HAVE A PROPOSAL?

21 MR. ZELLER: I'M SORRY?

22 THE COURT: DO YOU HAVE A PROPOSAL TO
23 CLARIFY IT?

24 MR. SELWYN: WHILE, WHILE HE'S --

25 THE COURT: MR. SELWYN STEPPED UP.

1 MR. SELWYN: I BELIEVE THAT SENTENCE IS
2 SUPPORTED BY THE ASPEN SKIING CASE, WHICH SAYS THAT
3 "IN A MONOPOLIZATION CASE, SPECIFIC INTENT IS NOT
4 REQUIRED," AS WELL AS THE BROADCOM CASE, 501 F.3D
5 297, WHICH NOTES THAT IN ASPEN SKIING, THE SUPREME
6 COURT INDICATED THAT EVIDENCE THAT BUSINESS CONDUCT
7 IS NOT RELATED TO ANY APPARENT DEFICIENCY MAY
8 CONSTITUTE PROOF OF A SPECIFIC INTENT TO
9 MONOPOLIZE. SO I BELIEVE THAT IS A CORRECT
10 STATEMENT OF THE LAW.

11 THE COURT: OKAY. ALL RIGHT.

12 MR. ZELLER: WE'RE CHECKING ON SOME
13 PROPOSED LANGUAGE.

14 THE COURT: OKAY.

15 MR. ZELLER: I BELIEVE THAT THAT -- AND
16 THEN ALSO FINALLY, YOUR HONOR, WE DO OBJECT FOR THE
17 RECORD ON ANY ADVERSE INFERENCE INSTRUCTION FOR THE
18 REASONS THAT WERE ALREADY DISCUSSED AT LENGTH.

19 AND I THINK THAT CONCLUDES THEM. I WANT
20 TO CHECK WITH MY COLLEAGUES AS TO WHETHER THERE'S
21 ANYTHING THAT I MISSED.

22 THE COURT: OKAY.

23 MR. ZELLER: BUT WE'LL PROPOSE SOME
24 CLARIFYING LANGUAGE ON THAT INSTRUCTION.

25 THE COURT: YOU DON'T HAVE TO. I THINK

1 I'M GOOD.

2 OKAY.

3 MR. JOHNSON: I THINK, YOUR HONOR, WITH
4 RESPECT TO 69, THE -- APPLE -- THE CONSTRUCTION
5 THAT'S SETS FORTH THERE IN THAT PARTICULAR
6 INSTRUCTION DOESN'T ADD ANYTHING TO CLARIFY THE
7 INTENT REQUIREMENT THAT'S ALREADY SET FORTH IN
8 UNDISPUTED FINAL INSTRUCTION NUMBER 64, SO WE DON'T
9 THINK IT NEEDS TO BE BASICALLY ADDED OR REFERRED
10 TO.

11 THE COURT: OKAY. ALL RIGHT.

12 MR. ZELLER: IT DOES APPEAR I OVERLOOKED
13 SOMETHING. THIS IS INSTRUCTION 50.6, AND THIS
14 INSTRUCTION DOES INCLUDE A DATE BY WHICH THE IPAD,
15 THE CLAIMED IPAD TRADE DRESS MUST HAVE ACQUIRED
16 SECONDARY MEANING, BUT IT DOESN'T GIVE A
17 CORRESPONDING INSTRUCTION AS TO THE DATES BY WHICH
18 THE IPHONE TRADE DRESS MUST HAVE ACQUIRED SECONDARY
19 MEANING. IT ONLY GIVES A DATE AS TO FAME.

20 THE COURT: I DON'T HAVE A 50.6.

21 MR. ZELLER: LET ME DOUBLE CHECK, YOUR
22 HONOR.

23 THE COURT: DID YOU MEAN 56? NO.

24 MR. ZELLER: I MUST HAVE A TYPO IN THESE.

25 THE COURT: MAYBE YOU MEANT 56?

1 MR. ZELLER: WE'RE DOUBLE CHECKING, YOUR
2 HONOR.

3 (PAUSE IN PROCEEDINGS.)

4 MR. ZELLER: YES, YOUR HONOR. IT IS --
5 IT DOES HAVE A NUMBER OF 50.6. IT'S --

6 THE COURT: MAYBE THAT WAS ONE OF THE
7 PARTIES.

8 MR. ZELLER: IT'S DOCKET NUMBER 1849.

9 THE COURT: HM. OH, YOU'RE RIGHT. I'M
10 SORRY. I MISSED IT. I SEE IT. I'M SORRY.

11 MR. ZELLER: 1849 IS THE DOCKET NUMBER,
12 IT'S PAGE 87 OF 106, AND IT'S GOT -- 87 IS THE PAGE
13 NUMBER.

14 THE COURT: OKAY. AND WHAT WAS THE
15 ISSUE?

16 MR. ZELLER: THE ISSUE IS THAT THERE IS
17 A -- IT GIVES A --

18 THE COURT: YOU DON'T LIKE THE JUNE 8TH,
19 2011 DATE?

20 MR. ZELLER: YES, YOUR HONOR, EXACTLY.

21 IT ALSO, TO BE A LITTLE BIT MORE
22 SPECIFIC, TOO, ON ONE ISSUE I WAS RAISING ABOUT THE
23 DATES THAT ARE GIVEN FOR THE -- FOR FAME AND THE
24 LIKE OR -- APPLE INITIALLY ACCUSED THE F700 OF
25 INFRINGEMENT AND DILUTION.

1 BUT WE THINK THAT'S THE APPROPRIATE DATE
2 THAT OUGHT TO BE USED. I MEAN, JUST BECAUSE THEY
3 HAVE SINCE RETRACTED THAT ACCUSATION DOESN'T MEAN
4 THAT THAT'S -- THAT THEY CAN THEN BASICALLY HAVE A
5 LATER DATE FOR FAME OR SECONDARY MEANING.

6 IT NEEDS TO BE AS OF THE TIME WE BEGAN
7 SUPPOSEDLY USING WHAT THEY'RE COMPLAINING ABOUT,
8 THIS TRADE DRESS, AND IT -- IN ITS AMENDED
9 COMPLAINT, IT SPECIFICALLY SAID THAT WE WERE USING
10 THE APPLE TRADE DRESS IN 2007, SO WE THINK THAT'S
11 THE APPROPRIATE DATE.

12 MR. JACOBS: YOUR HONOR, JUST ON THAT
13 ONE, WE REALLY HAVE BEEN AROUND THAT MANY TIMES,
14 BUT A CLOSE READING OF THE COMPLAINT WILL REVEAL
15 THAT MR. ZELLER'S ARGUMENT IS ERRONEOUS.

16 MR. ZELLER: IT SAYS THAT WE COPIED THE
17 CLEAN FACE OF APPLE'S SUPPOSED TRADE DRESS.

18 MR. JACOBS: YOUR HONOR, ON 50 --

19 THE COURT: 50.6 IS THE IPAD. IT WASN'T
20 IN EXISTENCE IN 2007, SO --

21 MR. ZELLER: RIGHT, I UNDERSTAND.

22 THE COURT: SO I'M A LITTLE BIT CONFUSED.

23 MR. ZELLER: WHAT I'M DOING, YOUR HONOR,
24 IS JUST CLARIFYING THAT THERE ARE DATES THAT ARE
25 USED IN THE INSTRUCTIONS THAT WE DISAGREE WITH

1 BECAUSE WE THINK IT SHOULD BE AN EARLIER DATE.

2 NOT -- OBVIOUSLY NOT FOR THAT, FOR 50.6.

3 THE COURT: UM-HUM. OKAY.

4 MR. ZELLER: I'M TALKING ABOUT THERE ARE
5 OTHER DATES THAT ARE USED, AND --

6 THE COURT: OKAY.

7 MR. ZELLER: AND THIS IS PARAGRAPH 80 OF
8 APPLE'S AMENDED COMPLAINT, YOUR HONOR.

9 THE COURT: OKAY. ALL RIGHT. WELL,
10 THANK YOU.

11 MR. ZELLER: THANK YOU.

12 THE COURT: ALL RIGHT. SO VERDICT FORM,
13 DID YOU FIGURE OUT THE ISSUE ON THE IPAD?

14 MR. JOHNSON: YES, YOUR HONOR.

15 THE COURT: OKAY.

16 MR. JOHNSON: SO ON THE IPAD 2, WE
17 ONLY -- WE'RE ONLY ALLEGING DOCTRINE OF EQUIVALENTS
18 WITH RESPECT TO THE '460 PATENT.

19 THE COURT: OKAY.

20 MR. JOHNSON: SO I THINK ACTUALLY YOU CAN
21 LEAVE IT AS ONE BOX. THE PROOF THAT'S IN IS ONLY
22 D.O.E. FOR THE '460 ANYWAY. I DON'T THINK YOU NEED
23 TO BREAK IT OUT LITERAL VERSUS DOCTRINE OF
24 EQUIVALENTS.

25 IF THE JURY RETURNS A VERDICT FOR

1 INFRINGEMENT OF THAT, IT'LL BE UNDER THE DOCTRINE
2 OF EQUIVALENTS. THAT'S THE PROOF THAT WAS ADDUCED
3 AND SET FORTH DURING THE TESTIMONY.

4 MR. SELWYN: I THINK, YOUR HONOR, WE
5 SHOULD SPECIFY WHICH FORM OF INFRINGEMENT IS
6 ALLEGED AND IT'S D.O.E. FOR THAT PARTICULAR
7 PRODUCT.

8 THE COURT: OKAY. SO WHAT'S GOING TO GO
9 TO THE JURORS ARE THE VERDICT FORM, THE FINAL
10 EXHIBITS, THE FINAL EXHIBIT LIST, JURY NOTES, AND
11 JURY INSTRUCTIONS.

12 I DON'T INTEND TO SEND ANY OF THE
13 PLEADINGS BACK.

14 IS EVERYONE IN AGREEMENT THAT THAT'S
15 GOING TO BE THE UNIVERSE OF WHAT'S GOING TO BE SENT
16 BACK?

17 MR. JOHNSON: UNDERSTOOD.

18 MR. JACOBS: YES, YOUR HONOR.

19 THE COURT: OKAY. ALL RIGHT. ARE WE
20 DONE?

21 MR. JACOBS: LET'S JUST GO OVER THE
22 SCHEDULE AND WHAT COMES NEXT, YOUR HONOR. OKAY?

23 THE COURT: OKAY. SO I NEED TO FILE THE
24 REVISED VERDICT FORM AND JURY INSTRUCTIONS AND
25 EXHIBIT LIST AND TO FILE THE ADVERSE INFERENCE

1 ORDER, WHICH HOPEFULLY WE'LL DO TONIGHT.

2 WHAT ELSE?

3 MR. JACOBS: YOUR HONOR, FOR PLANNING
4 PURPOSES, IF YOU WOULDN'T MIND TIPPING YOUR HAND IN
5 LIGHT OF THE COMMITMENTS OF BOTH SIDES ON THAT.

6 THE COURT: UM-HUM.

7 MR. JACOBS: WHAT IS YOUR -- WHAT SHOULD
8 WE ANTICIPATE?

9 THE COURT: YOU MEAN ON THE ADVERSE
10 INFERENCE?

11 MR. JACOBS: YES.

12 THE COURT: THAT IT'S GOING TO BE AN
13 ADVERSE INFERENCE AGAINST BOTH PARTIES, AND MY
14 UNDERSTANDING IS THAT YOU ALL HAVE ELECTED THAT
15 YOU'D RATHER NOT HAVE ANY, SO I'M GOING TO TAKE
16 THEM OUT.

17 MR. JOHNSON: UNDERSTOOD.

18 MR. JACOBS: THANK YOU, YOUR HONOR.

19 THE COURT: ALL RIGHT. WHAT ELSE?
20 ANYTHING ELSE?

21 SO I FEEL LIKE YOU HAVE PRESERVED ALL OF
22 YOUR OBJECTIONS EXTREMELY WELL. SO REALLY, NO
23 FURTHER PRESERVATION IS NECESSARY FOR YOUR
24 OBJECTIONS.

25 SO WHEN I FILE THE NEW VERDICT FORM AND

1 EXHIBIT LIST AND JURY INSTRUCTIONS, I'M GOING TO
2 PUT ON THE FRONT PAGE THAT THE PARTIES HAVE
3 PRESERVED ALL OF THEIR PREVIOUS OBJECTIONS. SO
4 PLEASE DON'T FEEL COMPELLED THAT YOU NEED TO DO
5 THAT.

6 SO ANY FEEDBACK I'D LIKE ON THESE FINAL
7 DOCUMENTS IS JUST REALLY ERRORS, TYPOS, THINGS OF
8 THAT NATURE, PLEASE.

9 SO I WOULD LIKE TO TRY TO FINALIZE ALL OF
10 THESE THIS EVENING IF IT'S POSSIBLE.

11 CAN YOU ALL THEN JUST GIVE ME A
12 COMMITMENT THAT, WHAT, AN HOUR OR TWO AFTER THESE
13 ARE FILED, YOU CAN JUST LET ME KNOW OBVIOUS ERRORS.
14 YOU HAVE VERY WELL PRESERVED ERRORS OBJECTIONS ON
15 THE SUBSTANCE.

16 MR. JACOBS: I THINK IT WILL HELP US IF
17 YOU TELL US VERY CLEARLY THE COURT WILL NOT
18 ENTERTAIN ANOTHER ROUND OF OBJECTIONS.

19 THE COURT: I WILL NOT. I WILL NOT.

20 MR. JACOBS: THANK YOU, YOUR HONOR.

21 MR. JOHNSON: WE APPRECIATE THAT.

22 MR. JACOBS: AND THEN THE ONLY OTHER
23 QUESTION -- THE COURT HAS RECEIVED OBJECTIONS TO
24 THE OPENING SLIDES. I BELIEVE WHAT THE COURT SAID
25 EARLIER WAS YOU'RE PLANNING TO ADDRESS THOSE AT

1 8:30 TOMORROW MORNING AND --

2 THE COURT: HOW MANY ARE THERE? ARE
3 THERE A LOT?

4 MR. JACOBS: THAT I DON'T KNOW. I'M
5 SORRY, YOUR HONOR.

6 THE COURT: AND DID YOU DO HIGH PRIORITY
7 ONES OR --

8 MR. JOHNSON: IT LOOKS LIKE, JUST SITTING
9 HERE, THAT THERE ARE A FAIR AMOUNT ON BOTH SIDES.
10 I HAVEN'T SEEN HIGH PRIORITIES.

11 THE COURT: I'M SORRY. I DIDN'T HEAR THE
12 LAST THING YOU SAID, MR. JOHNSON.

13 MR. JOHNSON: I THINK BOTH SIDES FILED
14 FOUR OR FIVE OR SIX PAGES EACH, SOMEWHERE IN THERE.

15 THE COURT: OKAY.

16 MR. JOHNSON: I HAVEN'T SEEN THEM.

17 MR. JACOBS: THE SPECIFIC QUESTION I'M
18 BEING ASKED BY THE TEAM BACK WORKING ON THE
19 OPENINGS IS WHETHER THE COURT WOULD LIKE RESPONSES
20 TO THOSE OBJECTIONS OR WOULD YOU PREFER TO JUST
21 DISCUSS THEM AND --

22 THE COURT: NO. I THINK OBJECTIONS WOULD
23 BE HELPFUL.

24 MR. JACOBS: YOU MEAN RESPONSES.

25 THE COURT: I MEAN RESPONSES WOULD BE

1 HELPFUL.

2 MR. JACOBS: WHAT TIME WOULD YOU LIKE
3 THAT?

4 THE COURT: IS THAT THE UNIVERSE? AS YOU
5 CAN TELL, THERE'S NOT A LOT OF CHANGES THAT'S GOING
6 TO HAPPEN ON THESE INSTRUCTIONS, SO WHAT I SENT YOU
7 LAST NIGHT, THAT'S PRETTY MUCH STABLE. SO I
8 HOPE -- I KNOW WE HAD PREVIOUSLY THOUGHT THAT THERE
9 MIGHT BE A LATER ROUND OF OBJECTIONS, BUT I HOPE
10 THIS IS THE UNIVERSE.

11 MR. JACOBS: I WOULD SUGGEST, YOUR HONOR,
12 IF ANYTHING COMES UP BY WAY OF OBJECTIONS TO THE
13 INSTRUCTIONS, THAT BE DEALT WITH AT 8:30 TOMORROW.

14 THE COURT: THERE'S REALLY NOT GOING TO
15 BE ANY SIGNIFICANT CHANGE HERE. I THINK THE ONLY
16 ONE THAT WAS SOMEWHAT UP IN THE AIR WAS THE
17 PROSECUTION HISTORY ESTOPPEL, WHICH I'M GOING TO
18 LET GO TO THE JURY.

19 SO OTHER THAN THAT ONE QUESTION, CAN YOU
20 THINK OF ANYTHING ELSE THAT WAS -- I DON'T REALLY
21 THINK ANY OF THESE ARE REALLY GOING TO SERIOUSLY
22 IMPACT CLOSINGS.

23 MR. JACOBS: UNDERSTOOD, YOUR HONOR.

24 THE COURT: SO THAT'S THE ONLY ONE THAT
25 CAN BE FILED. I'M NOT OPEN TO ANY FURTHER

1 OBJECTIONS.

2 SO WHEN CAN YOU FILE RESPONSES?

3 MR. JACOBS: MAYBE 9 -- WHAT TIME WOULD
4 YOU LIKE THEM, YOUR HONOR?

5 THE COURT: YOU KNOW, AS EARLY AS
6 POSSIBLE BECAUSE WE NEED TO TRY TO GET ALL OF THIS
7 DONE. CAN YOU FILE THEM BY 8:00?

8 MS. MAROULIS: YES, YOUR HONOR.

9 MR. JACOBS: WE'LL MAKE IT HAPPEN, YOUR
10 HONOR.

11 THE COURT: I PREFER 7:00. HOW LONG HAVE
12 YOU ALL HAD THEM? SINCE 5:00 O'CLOCK.

13 MR. JOHNSON: A LITTLE BIT AFTER 5:00.

14 THE COURT: OKAY.

15 MS. MAROULIS: WE CAN DO BETWEEN 7:30 AND
16 8:00.

17 THE COURT: WHY DON'T YOU DO 7:30,
18 PLEASE. SO 7:30 FOR RESPONSES. AND I THINK THAT'S
19 IT.

20 MR. JACOBS: THE ONLY OTHER -- WE DID
21 FILE A MOTION ON CLOSING ARGUMENT ISSUES IN THE
22 AFTERNOON TO TRY AND FLAG SOME CONCERNS WE HAD
23 ABOUT CLOSINGS IN LIGHT OF WHAT HAPPENED IN THE
24 OPENING, AND I WOULD JUST NOTE THAT FOR YOUR HONOR.

25 MR. JOHNSON: YOUR HONOR --

1 THE COURT: THAT'S SEPARATE FROM THE
2 OBJECTIONS?

3 MR. JACOBS: CORRECT, YOUR HONOR.

4 MR. JOHNSON: SO WE'D LIKE THE
5 OPPORTUNITY, IF YOUR HONOR IS GOING TO ENTERTAIN
6 THAT MOTION, WHICH IS A TOTALLY NEW MOTION, WE'D
7 LIKE THE OPPORTUNITY TO RESPOND TO IT.

8 THE COURT: OKAY.

9 MR. JOHNSON: IT'S BASICALLY TRYING TO
10 PRECLUDE US FROM MAKING CERTAIN ARGUMENTS.

11 THE COURT: ALL RIGHT. CAN YOU DO THAT
12 BY 7:30?

13 MR. JOHNSON: WE WILL TRY, YES. YES.

14 THE COURT: OKAY. THANK YOU. THANK YOU.

15 OKAY. WHAT ELSE? I MEAN, I JUST THINK
16 WE'RE GOING TO HAVE JUST HUMAN BANDWIDTH ISSUES
17 TRYING TO GET ALL THIS DONE FROM OUR END TONIGHT.

18 ON THE OTHER HAND, THOUGH, I REALLY DON'T
19 WANT TO HAVE A LOT OF FIGHTS DISRUPTING BOTH SIDES'
20 CLOSINGS TOMORROW. BUT I'M HOPING THAT NO MORE
21 MOTIONS ARE GOING TO BE FILED. I THINK WE'RE ABOUT
22 TO HIT 2,000 DOCKET ENTRIES IN THIS CASE AND ENOUGH
23 IS ENOUGH.

24 ANYTHING ELSE?

25 MR. JACOBS: NO, YOUR HONOR.

1 MS. MAROULIS: IT'S AN UNCONTROVERSIAL
2 REQUEST, BUT LAST NIGHT YOUR HONOR ISSUED AN ORDER
3 SAYING WE SHOULD LODGE BUT NOT FILE OUR EXCLUDED
4 EXHIBITS.

5 THE COURT: YES.

6 MS. MAROULIS: AND FEDERAL RULES OF
7 APPELLATE RULES REQUIRE THAT ANYTHING THAT IS PART
8 OF THE RECORD ON APPEAL BE FILED, SO WE
9 RESPECTFULLY REQUEST THAT WE BE ABLE TO FILE THEM
10 AS OPPOSED TO LODGE THEM.

11 THE COURT: YOU LODGED THE DEPOSITION
12 TRANSCRIPTS THAT WERE SHOWN OF DEPOSITIONS THAT
13 WERE SHOWN, BUT THE TESTIMONY WAS NOT TRANSCRIBED.

14 MS. MAROULIS: RIGHT, YOUR HONOR. BUT IN
15 TERMS OF EXHIBITS, IF THEY'RE NOT FILED, THEY
16 CANNOT BE PART OF THE RECORD ON APPEAL. SO THAT'S
17 THE ONLY REASON WHY.

18 THE COURT: THAT'S FINE. GO AHEAD THEN.

19 MS. MAROULIS: THANK YOU.

20 THE COURT: IS THAT IT?

21 MR. JOHNSON: AND JUST TO FOLLOW UP ON
22 YOUR HONOR'S REQUEST FROM FRIDAY, I THINK BOTH
23 SIDES DID SPEAK AND THERE WAS NO RESOLUTION, SO WE
24 WILL SEE YOU TOMORROW.

25 THE COURT: OKAY. ALL RIGHT. WELL,

1 THANK YOU. I APPRECIATE THAT THEY DID THAT.

2 OKAY. THANK YOU VERY MUCH. WE'LL SEE
3 YOU THEN AT 8:30 TOMORROW.

4 (WHEREUPON, THE EVENING RECESS WAS
5 TAKEN.)

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT
REPORTER OF THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY.

/S/

LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

DATED: AUGUST 20, 2012