

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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

July 22, 2010
9:00 a.m.

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

APPEARANCES:

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

-and-

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

Counsel for Plaintiff

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APPEARANCES CONTINUED:

BLANK ROME, LLP
BY: STEVEN L. CAPONI, ESQ.

-and-

COOLEY, GODWARD, KRONISH, LLP
BY: MICHAEL RHODES, ESQ.
BY: HEIDI L. KEEFE, ESQ.
BY: MARK WEINSTEIN, ESQ.
BY: JEFFREY NORBERG, ESQ.
BY: MELISSA KEYES, ESQ.
BY: ELIZABETH STAMESHKIN, ESQ.

Counsel for Defendant

1 THE CLERK: All rise.

2 THE COURT: Good morning. Good
3 morning, Your Honor.

4 THE CLERK: We may be seated.

5 THE COURT: Anything we need to
6 address before we bring the jury in?

7 MR. ANDRE: Just a few issues,
8 Your Honor. We want to lodge our objections to
9 the demonstrative exhibits of Facebook's expert,
10 Dr. Greenberg.

11 Pursuant to the Court's procedure,
12 where just knowing the objection and let them
13 use them at their own risk.

14 Second issue comes with a little
15 bit of the scheduling. I believe we are trying
16 to fork out a schedule with counsel. We talked
17 this morning.

18 He thinks they will be turning
19 over his case to us sometime tomorrow morning.
20 We were wondering when Your Honor wanted to have
21 the prayer conference and charge the jury and
22 all that, assuming we close out all of our
23 evidence tomorrow afternoon.

24 THE COURT: Right. If you started

1 with your rebuttal case tomorrow, do you expect
2 that would be done by afternoon time?

3 MR. ANDRE: I believe so, Your
4 Honor.

5 THE COURT: Okay.

6 MR. ANDRE: We have a little bit
7 of a potential scheduling issue. Our expert
8 wasn't expecting to be here until Monday. We're
9 trying to contact him now and see if we can work
10 it out.

11 THE COURT: Right. Okay.

12 Well, certainly if we get to the
13 rebuttal tomorrow, we'll expect your expert to
14 be here tomorrow, so he can testify.

15 I did not -- given our
16 conversation late yesterday, my anticipation is
17 we'd have a prayer conference sometime Friday,
18 because I wouldn't be charging the jury until
19 Monday.

20 It seemed to me close to ideal if
21 we could be charging the jury first thing Monday
22 morning and do closings. And then, you know,
23 give the case over to the jury.

24 MR. ANDRE: I think that's what we

1 worked out this morning. We want to make sure
2 it's okay with Your Honor.

3 THE COURT: That would be okay
4 with me. That would mean we would have the
5 prayer conference at some undefined time
6 tomorrow. And whatever time seems appropriate,
7 given how everything else is going tomorrow.

8 Any other issues?

9 MR. ANDRE: One more.

10 THE COURT: Okay.

11 MR. ANDRE: He -- the errata of
12 Jeff Lamb that we will be playing the videotape
13 today. Obviously, the errata is not in the
14 videotape.

15 I'm just trying to figure out how
16 Your Honor wants to handle that.

17 THE COURT: I was curious about
18 that. Do you have a proposal and then I'll hear
19 from Mr. Rhodes?

20 MR. ANDRE: Yeah. I talked to Mr.
21 Rhodes. He was wanting to have Your Honor read
22 it in, but I don't know if that's the right
23 procedure or not. I've never had this come up,
24 to be quite frank.

1 We have the questions and answers
2 that are, you know, in play, but --

3 THE COURT: Let me hear from Mr.
4 Rhodes on that and the other issues, to the
5 extent you've got something to say on the other
6 issue.

7 MR. RHODES: No, we were just
8 discussing scheduling, so I think that's fine.

9 Obviously it would be good to get
10 them off for the weekend because I think if we
11 leak into evidence on Monday, then you'll have
12 long instructions and the long closing, it's
13 kind of a brutal day for them.

14 On Lamb, the depo is not to be
15 given to the jury. My suggestion is if the
16 Court wanted to, you could say to them as he
17 indicated, he changed his deposition, here is
18 what he did, end of story.

19 I'm not comfortable just giving
20 them the pages because they don't have the rest
21 of the record to which the paper pertains.

22 THE COURT: Can I see the errata
23 sheet, if anybody has it handy.

24 MR. RHODES: Your Honor, there is

1 -- you could do it, I don't know if you want to
2 do that, you could just show it to them, they
3 can just take a moment to look at it.

4 THE COURT: So first off, pages
5 193 through 199 are part of what is going to be
6 played for the jury; correct?

7 MR. RHODES: Yes.

8 MR. ANDRE: Yes.

9 MR. RHODES: I can't tell you
10 whether the other ones are or not.

11 THE COURT: That's the entire
12 errata sheet.

13 MS. KEEFE: That's the whole
14 thing.

15 MR. ANDRE: Your Honor, we handed
16 up the errata sheet, also.

17 THE COURT: These are multiple
18 copies of the same.

19 MR. ANDRE: And the reason for the
20 correction is the second thing.

21 MR. RHODES: I don't think that's
22 appropriate for the record.

23 THE COURT: Well, tell me this.
24 Do we have -- we have Dr. Kearns before we have

1 Mr. Lamb?

2 MR. RHODES: Yes, Your Honor. And
3 that will be, you know, all told with direct and
4 cross probably a good ninety minutes I would
5 suspect.

6 THE COURT: So we'll get a morning
7 break so I can reflect on this. But again, the
8 proposals are from Facebook what, that I should
9 put this on screen and read it?

10 MR. RHODES: Let me back up. I
11 think the reality is what you should do is
12 nothing, counsel can comment on it. I think the
13 cleanness thing as I said to Paul, since they
14 did do it, there it is, you can throw it up on
15 the screen. I think you would probably have to
16 include in the record somehow --

17 THE COURT: So what do you mean by
18 nothing? You're going to want to argue to the
19 jury I take it.

20 MR. RHODES: I meant nothing -- I
21 didn't want to do anything myself as a lawyer is
22 what I'm saying, Your Honor.

23 THE COURT: What is it you're
24 suggesting I do?

1 MR. RHODES: Either tell them what
2 transpired and just show them the changes.

3 THE COURT: Meaning just put the
4 page up that we're looking at now?

5 MR. RHODES: Yes, unless there is
6 anything offensive on it, just show it to them,
7 they can now look at it, and then you can mark
8 that in some capacity. I don't know. Should
9 that be an exhibit? I don't think it should be
10 an exhibit because the deposition itself is not
11 an exhibit.

12 THE COURT: So your proposal would
13 be that I show it perhaps as we're looking at it
14 now, put it up for some time so they have a
15 chance to read it?

16 MR. RHODES: And read it into the
17 record so there is a record created of the thing
18 that you did, that's why I suggest that you read
19 it to them, that way the court reporter would
20 transcribe it and then it would be in the
21 record.

22 THE COURT: But not mark it as an
23 exhibit?

24 MR. RHODES: Correct.

1 THE COURT: And Mr. Andre, your
2 proposal is?

3 MR. ANDRE: My proposal is one of
4 two things, Your Honor. One, that after they've
5 played the videotape deposition, we go back and
6 read the record of this, you know, question,
7 answer, question, answer, question, answer, with
8 Your Honor giving the instruction that Mr. Lamb,
9 he testified that he clarified his testimony, so
10 you could give the jury instruction, Mr. Lamb
11 clarified his testimony and this is how he
12 clarified it, and have, you know, the attorneys
13 read in the question, answer, question, answer,
14 or alternatively --

15 THE COURT: And excuse me. If we
16 read it in back and forth, what, the person
17 playing Mr. Lamb would read the corrected.

18 MR. ANDRE: The corrected, that's
19 correct. And it would be a short section of
20 read in, or alternatively, they could just read
21 in the entire Lamb testimony instead of playing
22 the videotape.

23 THE COURT: And when you say read
24 in the entire testimony, they would read in his

1 original and then read in his corrections.

2 MR. ANDRE: No, just read in the
3 corrections because they're a clarification.

4 THE COURT: So the jury would
5 never hear the original proposal.

6 MR. ANDRE: That's correct.

7 THE COURT: That's your proposal.

8 Mr. Rhodes?

9 MR. RHODES: I would -- if we did
10 that, then that obviously prevents me from
11 commenting upon the fact that he made the change
12 which, is the standard protocol when a witness
13 says that the traffic light was green, changes
14 it to red. You make a big deal in the close and
15 I obviously will. So that would be very
16 prejudicial to us.

17 THE COURT: Okay. Well, let me
18 give it some further thought. And we will
19 discuss this before anything happens with Mr.
20 Lamb.

21 MR. ANDRE: And Your Honor, Ms.
22 Kobialka just reminded me the objection for the
23 demonstrative this morning, the basis for that
24 is it's outside the scope of his expert report.

1 THE COURT: I had inferred that,
2 but I appreciate you clarifying that record.

3 MR. RHODES: One housekeeping
4 matter, Your Honor. I may -- during Mr.
5 McKibben's examination, I will use interrogatory
6 responses. You may recall earlier in the case
7 you thought that they might not know what a
8 deposition is.

9 I would submit to you they
10 probably won't know what an interrogatory is.
11 So I just suggest to you that you might think
12 about telling them what it is.

13 THE COURT: Mr. Andre.

14 MR. ANDRE: Your Honor, I don't
15 think interrogatory responses is an appropriate
16 exhibit unless it's used for impeachment. I
17 think that's the only appropriate use for it.

18 So to the extent he uses it for
19 impeachment, that's fine. I don't think he
20 should be putting it up there at the very
21 beginning.

22 THE COURT: Didn't this issue come
23 up as to whether it was admissible as to
24 evidence? I thought we dealt with it.

1 MR. RHODES: Yes.

2 MR. ANDRE: I believe it was
3 objected to.

4 THE COURT: I thought I ruled on
5 it. Mr. Rhodes, is that your position?

6 MR. RHODES: We covered this at
7 the final pretrial conference. You ruled that
8 the objections were overruled.

9 And the reason there's just one
10 line in the interrogatories, which is a
11 foundation for the on-sale issue and so for --
12 I'm just going to show him that statement.

13 He signed the verification saying
14 that's what you said and then I'll move on.
15 It's a foundational fact. It's in evidence.

16 THE COURT: Okay. Ms. Kobialka.

17 MS. KOBIALKA: We had understood
18 your ruling to be that if they wanted to use it
19 for impeachment purposes, it could come in. So
20 he has to first establish that he's not going to
21 agree with the interrogatory response, the
22 substance of it.

23 He just can't just go up there,
24 use the document and then try to manage to get

1 it. He has to show -- demonstrates there's some
2 inconsistency.

3 So the problem of having some sort
4 of an instruction about an interrogatory before,
5 you know, there's even that foundation that
6 there would be impeachment in the first place is
7 the problem.

8 THE COURT: Give me one second,
9 please. My belief is that my ruling was and my
10 ruling now is that the document is admissible.
11 It's now used through the admission of the party
12 opponent. It's a sworn statement.

13 It is intended to bind the party
14 in the litigation to it. It is admissible.

15 The issue in front of me now as to
16 whether there needs to be an instruction, at
17 this point I don't think there needs to be any
18 instruction. But depending on how things come
19 in, perhaps I'll feel otherwise.

20 Anything else, Mr. Rhodes?

21 MR. RHODES: No, thank you, Your
22 Honor.

23 THE COURT: Anything further, Mr.
24 Andre?

1 MR. ANDRE: Nothing further, Your
2 Honor.

3 THE COURT: All right. Let's
4 bring the jury in, please.

5 (Jury entering the courtroom at
6 9:10 a.m.)

7 THE CLERK: Be seated.

8 THE COURT: Good morning, again,
9 ladies and gentlemen. Welcome back.
10 We're ready for another day. So
11 let's pick up where we left off, please.

12 MR. HANNAH: Good morning. Good
13 morning, Your Honor.

14 THE COURT: Good morning.

15 THE WITNESS: Good morning, Your
16 Honor.

17 BY MR. HANNAH:

18 Q. How are you doing, Mr. Bosworth?

19 A. Doing well. How about you?

20 Q. Doing great.

21 Let's talk a little bit about your
22 testimony yesterday.

23 Yesterday you testified you were
24 Number 1,681 on Facebook; is that right?

1 A. Yeah. Yeah, that's correct.

2 That is my user ID.

3 Q. That's user numbers; right?

4 A. That's, yeah, my user.

5 Q. How did you find out what number
6 user you were.

7 A. Well, in the very early days of
8 Facebook, you could just look at your user ID,
9 literally say Facebook.com/profile.php/?=N.

10 Q. And in the earlier days, that
11 number actually meant what number you had joined
12 the site?

13 A. Actually to be completely
14 technical about it, but I didn't know it at the
15 time.

16 Q. So how many users are there now?

17 A. Over 500 million.

18 Q. 500 million?

19 A. Yes.

20 Q. When you started at Facebook, how
21 many employees were working with you?

22 A. I think the company is around 40
23 or 50 people. I don't know the exact number.

24 Q. And how many employees are there

1 now?

2 A. I don't know the exact number now,
3 but I think it's close to 1,400 worldwide.

4 Q. How many offices does Facebook
5 have?

6 A. Let's see. Well, we have two
7 engineering offices. Just the one in Palo Alto
8 and Seattle. Sales office and user operations,
9 I would guess a dozen.

10 It could be more. I'm not
11 actually --

12 Q. All over the world?

13 A. They are distributed across the
14 globe.

15 Q. Okay. All right.

16 Yesterday you also testified a
17 little bit about privacy. And I believe you
18 mentioned that it would be a breach of privacy
19 to log how people navigate across the site and
20 display other places; is that right?

21 A. Yeah. Certainly given the
22 expectations of the site today, I think we can
23 all agree using Facebook, we wouldn't want -- we
24 wouldn't want our browsing activity to be

1 displayed in the feed.

2 Q. Let's make it clear. Facebook
3 does log that information; right?

4 A. Sure.

5 Q. And you use it to sell
6 advertising; isn't that right?

7 MS. KEEFE: Objection. Beyond the
8 scope.

9 THE COURT: Overruled.

10 Q. You use that information -- let me
11 just add to a very clear question. In order to
12 sell advertisements, you need to know when users
13 look at a page; isn't that right?

14 A. I'm not an expert in advertising
15 systems. I'm actually -- I honestly do not know
16 the answer to what we need to know for
17 advertising, or I am not familiar with how we
18 track ads or how we target ads.

19 Q. Do you know how many paid views
20 that Facebook has in a month? Let's do a day,
21 how about a day?

22 A. I believe it's a hundred billion.

23 Q. A hundred billion a day. So you
24 need to know somehow how many times people are

1 viewing pages; right? You just don't display it
2 publicly, so you keep it internally for your own
3 use?

4 A. I want to make sure I'm answering
5 the right question. In terms of when pages are
6 loaded from Facebook and a request goes to our
7 servers, we keep track of how many times our
8 servers get hit, that's an important thing to
9 make sure they have the scale to the load. But
10 in so far as how much is it keeping track of,
11 what specific user is doing what, I don't know
12 the answer to that question.

13 Q. Now, we talked a little bit
14 about -- I should say you talked a little bit
15 about minifeed and news feed. Is that right,
16 yes, sir?

17 A. We did.

18 Q. Minifeed and news feed, they were
19 launched at the same time; is that right?

20 A. They were launched the same day.

21 Q. And that was -- strike that.

22 Minifeed and news feed, those were
23 both available as of November 21st, 2006; isn't
24 that right?

1 A. I believe so.

2 Q. So minifeed, we talked a little
3 bit about minifeed and you said yesterday that
4 it's subsumed into the wall; is that right?

5 A. It has since been, yeah, that's
6 correct.

7 Q. Okay. But other than that, there
8 has been no significant changes to minifeed, has
9 there, since November 21st, 2006?

10 A. I am not sure what you mean by
11 significant. That's a pretty vague statement.
12 I think there has been quite a few developments.
13 We added a lot of functionality to the site.
14 For example, when I talked about what actions to
15 show up in the minifeed like joining a group,
16 when we launched we didn't have that change, now
17 if you are a fan of a page that would show up.

18 So there has certainly been
19 additions. And from a technology standpoint in
20 terms of how it's been implemented, there has
21 been a lot of development, but I think it's
22 significant by product changes. I mean, I don't
23 know what you mean by that. I'm sorry.

24 Q. You were deposed in this case,

1 weren't you?

2 A. I was.

3 Q. And you provided testimony under
4 the penalty of perjury, didn't you?

5 A. I did.

6 Q. And I would like to read into the
7 record page 121, lines two through seven.

8 MS. KEEFE: What page?

9 MR. HANNAH: 121, two through
10 seven.

11 MS. KEEFE: I think for
12 completeness, you would have to read to the
13 bottom. I apologize. I believe for
14 completeness you would have to read to the
15 bottom of the page.

16 MR. HANNAH: Your Honor, this is
17 the exact same question and answer.

18 THE COURT: I'm going to have to
19 steal a copy of it.

20 MR. HANNAH: May I approach, Your
21 Honor.

22 THE COURT: You may, but do you
23 have a clean copy of the entire thing?

24 MR. HANNAH: May I approach?

1 THE COURT: You may.

2 Ms. Keefe, how much further are
3 you asking be read?

4 MS. KEEFE: I read to the bottom
5 of the page, Your Honor. I know that ends in
6 the middle of something, so I'm not exactly
7 sure, do you have another copy, I can pick a
8 line.

9 MR. HANNAH: Can I just ask if he
10 was asked the following question and if he gave
11 the following answer, Your Honor? I would like
12 to move on.

13 MS. KEEFE: Your Honor, I
14 apologize. My objection would still stand.

15 THE COURT: Mr. Hannah, if you
16 want to read through to the top of, well, line
17 two of 122, you may start at the point that you
18 want to start.

19 BY MR. HANNAH:

20 Q. Mr. Bosworth, during your
21 deposition, you were asked:

22 "QUESTION: Has there been
23 significant changes to minifeed since its
24 launch?

1 "ANSWER: Not that I know of.

2 "QUESTION: So is it fair to say
3 that it operates in substantially the same way
4 as it did in October 2006?

5 "ANSWER: For some definition of
6 the word substantial.

7 "QUESTION: Significantly.

8 "ANSWER: Well replacing one
9 vague, one vague term for another, the term is
10 not a way to -- I don't know, I can think of no
11 major structural changes. The description I
12 gave you would apply today. The description I
13 gave you today of how it operated at launch
14 applies today. There have been other changes to
15 tables, operations, objects, displays, but to
16 the structure I talked about, I know of
17 nothing."

18 MS. KEEFE: Just one quick
19 clarification, Your Honor. He misread a
20 statement on lines 21 and 22.

21 THE COURT: Yes. I know it was
22 inadvertent, but he did, so let's read from line
23 15 again, Mr. Hannah.

24 MR. HANNAH: On 121?

1 THE COURT: On 121 to the end,
2 there were several words.

3 BY MR. HANNAH:

4 Q. "QUESTION: Significantly.

5 "ANSWER: Replacing one vague, one
6 vague term for another vague term is not a way
7 to -- unfortunately I don't know. I can think
8 of no major structural changes. Whereas the
9 description I just gave you would no longer
10 apply today. The description I gave you for how
11 it operated at launch applies today. There may
12 have been other changes architecturally to
13 tables, names, schemas, operations, objects,
14 displays, but to the structure I talked about, I
15 know of nothing."

16 So, Mr. Bosworth, you knew why I
17 asked if there had been any significant changes,
18 you knew the answer to that question, didn't you
19 during your depo?

20 A. You were as vague when you asked
21 it then as you are now. I think the question
22 sounds the same now as it was then. I agree the
23 definition of substantial. But there is
24 obviously lots of things we added. You also

1 kind -- I was referring in that deposition to
2 some structure that I had described earlier, and
3 that structure much like that I described
4 earlier matches the description that I gave
5 here. So yeah, I feel that still stands today.

6 Q. Okay. Thanks.

7 Now, let's be clear. The minifeed
8 table, it stores information that -- it stores
9 activity information of a user in a minifeed
10 table; is that right?

11 A. And that's correct.

12 Q. And the minifeed table that's in
13 the user database; isn't that right?

14 A. Yes.

15 Q. And you mentioned yesterday that a
16 number of user actions that result in stories
17 are displayed on the wall using the minifeed
18 table; isn't that right?

19 A. That's correct.

20 Q. And that includes writing on
21 someone's wall?

22 A. Actually writing on someone's wall
23 wouldn't be used in the minifeed table on that
24 actual wall, writing on someone else's wall

1 would be, so yes, I want to be very precise.

2 Q. So if I go to someone else's wall
3 and I write on their wall, I'm going to get an
4 action on my profile that says that I wrote on
5 their wall; right?

6 A. That's correct.

7 Q. And these actions also include
8 joining a group; is that right?

9 A. That's correct.

10 Q. Fanning a page?

11 A. Now called liking a page. I have
12 been using the wrong language, but we just made
13 that change.

14 Q. All these actions that are done
15 that are stored, those are all stored in the
16 minifeed table on the user database; isn't that
17 right?

18 A. Yes.

19 Q. You also testified yesterday about
20 a photo table. Do you remember that?

21 A. I do.

22 Q. Now, the photo table, that's also
23 stored in the user database; isn't that right?

24 A. That's correct.

1 Q. Now, you mentioned yesterday that
2 there is no interaction between the minifeed and
3 the photo table, but both these tables are
4 stored in the user database; is that right?

5 A. That's correct.

6 Q. You also testified about a news
7 feed. Do you remember that?

8 A. Yeah.

9 Q. I'm going to get a little bit into
10 the weeds on this, but I just want to be
11 precise. Now, in 2006 when news feed launched,
12 you were part of that launch; is that right?

13 A. I was.

14 Q. All right. Now, when news feed
15 launched, it was using Q feed servers; is that
16 right?

17 A. That's correct.

18 Q. And the Q feed servers, they would
19 tail what are called falcon logs; is that right?

20 A. They would tail falcon logs, yes.

21 Q. Now, just to explain, falcon logs
22 is a way to log users' actions on the site; is
23 that right?

24 A. Falcon logs are -- that's one way

1 to describe it, yeah, absolutely.

2 Q. And falcon is still used today; is
3 that right?

4 A. Falcon is still used today for
5 some things, although not for news feed.

6 Q. We'll get to that.

7 Now, the Q feed servers say they
8 would tail these falcon logs, they would store
9 that information in the memory; is that right,
10 in a memory log?

11 A. Yeah, not in the log, they would
12 store it in memory, though. And I kind of
13 talked about memory yesterday as being this
14 short-term thing that eventually dissolves, it
15 is not permanent.

16 Q. And then workers would come and
17 they would aggregate that data; is that right?

18 A. Yeah, there is a process called
19 the worker.

20 Q. And then the workers, they would
21 rank that data; is that right?

22 A. That's correct.

23 Q. And then that data would get
24 written into the user database; is that right?

1 A. Into a separate table called news
2 feed stories.

3 Q. So the news feed stories would
4 also be stored in the user database?

5 A. That's right.

6 Q. Along with the photo table and the
7 minifeed table?

8 A. I think the best way to think
9 about it is you have a house with like a car and
10 a bike in it, and then it's got a blender in it,
11 and those things aren't related but they're all
12 stored in the house. So I think you're right,
13 these things are stored someplace.

14 Q. All in the user database?

15 A. They were different tables in the
16 user database.

17 Q. Now, there was a change to the
18 news feed in 2008; is that right?

19 A. Yes.

20 Q. And that's when you started using
21 multifeed; is that right?

22 A. That's correct.

23 Q. And multifeed, they would tail the
24 falcon logs as well; isn't that right?

1 A. At first they did, yes.

2 Q. Right. And the Falcon logs, again
3 just to be clear, those?

4 That's responsible for logging a
5 user's actions on the site; is that right?

6 A. That's correct.

7 Q. Now, when tailing, the Falcon
8 logs -- Multifeed would log these actions into
9 memory; is that right?

10 A. That's correct.

11 Q. And then when a user lands on a
12 home page, News Feed would query Multifeed; is
13 that right?

14 A. Well, to be precise, the page
15 that's being built, the home page would send out
16 a query to Multifeed.

17 Q. And that's using RPC; is that
18 right?

19 A. Yeah.

20 Q. Remote procedure call?

21 A. Right. Remote procedure call.

22 Q. Now, once it made those calls,
23 makes the RPC call, Multifeed would go and it
24 would actually -- well, when the page is

1 rendered, I should say, it's going to go and
2 fetch additional data; is that right?

3 A. So, yeah. To be precise, the home
4 page.

5 Q. So News Feed just is a product at
6 this point?

7 A. Just in the system anymore. The
8 home page would make this call to Multifeed to
9 get the data about your friends or about
10 someone's friends to show us who you view or
11 someone.

12 And then when it was trying to
13 display that information to you, it would have
14 to -- you know, some of these things have
15 pictures or they may have, you know, a piece of
16 text that's not stored with Multifeed. So it
17 would go fetch those things.

18 Q. Right. So it would be like a user
19 profile photo or something like that?

20 A. Sure.

21 Q. Now, the way the Multifeed works
22 today is pretty much the identical way; right?
23 The only exception is that the code actually
24 logs it directly into the Multifeed system

1 instead of having to tell the Falcon log; is
2 that right?

3 A. Yeah, the codes. So it's kind
4 of -- you can think of the code as recording it
5 in Multifeed as opposed to recording it in
6 Falcon.

7 Q. Now, yesterday you testified that
8 it would be the opposite of Minifeed and News
9 Feed to display the sheer navigation from one
10 place to another?

11 A. I said opposite of the philosophy
12 of those things. Those were things of members
13 to highlight interesting on it and things that
14 were relevant to them. And so insofar as
15 navigation is not relevant or interesting,
16 that's what I mean.

17 Q. But let's be clear. If a user
18 interact with a page, or writes on a wall or
19 joins a group Minifeed and News Feed, they're
20 going to store that action; right?

21 A. They'll record that action, yeah.

22 Q. Now, yesterday you testified that
23 there's no metadata contained in the Minifeed
24 Table. You remember that?

1 A. Yeah.

2 Q. You know, Mr. Cox testified
3 yesterday that there was metadata in the
4 Minifeed Table. Was he incorrect in saying
5 that?

6 MS. KEEFE: Objection, Your Honor.
7 Improper impeachment. Hearsay, what Mr. Cox
8 said versus what Bosworth said.

9 THE COURT: Mr. Hannah.

10 MR. HANNAH: I'm just asking the
11 witness if Mr. Cox was incorrect when he said
12 metadata was in the Minifeed Table.

13 THE COURT: It's sustained. Find
14 another way to ask him.

15 BY MR. HANNAH:

16 Q. Would you agree with the
17 characterization that metadata is stored in the
18 Minifeed table?

19 A. No. Yesterday I made pretty clear
20 I don't consider any of the data stored in the
21 Minifeed to be metadata.

22 Q. Would any employees in Facebook
23 consider metadata to be in the Minifeed Table?

24 A. I can't speak of any other

1 employees of Facebook. I can explain metadata
2 to you better, if you like.

3 Q. No, that's enough.

4 MR. HANNAH: Thank you, Mr.
5 Bosworth.

6 Thank you Your Honor?

7 THE COURT: Redirect?

8 REDIRECT EXAMINATION

9 BY MS. KEEFE:

10 Q. Mr. Bosworth, is any of the data
11 in the Falcon logs used to update metadata in
12 photo tables?

13 A. Absolutely not.

14 Q. Is any of the information in
15 Falcon logs used to update metadata in Wall
16 Tables?

17 A. No.

18 MS. KEEFE: Thank you, Mr.
19 Bosworth.

20 THE COURT: Thank you. You may
21 step down.

22 Ms. Keefe, you can come retrieve
23 this.

24 MS. KEEFE: Thank you, Your Honor.

1 THE COURT: I don't need it any
2 longer.

3 MS. KEEFE: Thank you. Thank you,
4 Your Honor.

5 THE COURT: You can call your next
6 witness.

7 MR. RHODES: Good morning, Your
8 Honor. May it please the Court, we'd like to
9 call Professor Michael Kearns to the stand.

10 THE COURT: Okay.

11 THE CLERK: Please state and spell
12 your name.

13 THE WITNESS: Michael Kearns.

14 M-I-C-H-A-E-L K-E-A-R-N-S.

15 THE CLERK: Do you swear the
16 testimony you will give to the Court and the
17 jury in the case will be the truth, the whole
18 truth and nothing but the truth so help you God.

19 THE WITNESS: I do. Good morning.

20 THE COURT: Good morning.

21 MR. RHODES: May I proceed, Your
22 Honor?

23 THE COURT: You may.

24 DIRECT EXAMINATION

1 BY MR. RHODES:

2 Q. Good morning.

3 A. Good morning.

4 Q. How old are you?

5 A. I'm 47 years old.

6 Q. Where do you live?

7 A. I live in Philadelphia.

8 Q. What do you do?

9 A. I'm a professor at the University
10 of Pennsylvania in the computer science
11 department.

12 Q. What does that mean?

13 A. Well, it means that I teach at
14 Penn and teach both undergraduate and graduate
15 classes and conduct a research program as well.

16 Q. Would you mind telling us about
17 your academic background? You don't need to go
18 through grade school or kindergarten. Start
19 with high school and go forward.

20 A. I went to high school in Southern
21 California. I was an undergraduate studying
22 math and computer science at the University of
23 California at Berkeley, and then went to
24 graduate school to get a PhD in computer science

1 at Harvard University.

2 Q. Would you mind briefly describing
3 your work history?

4 A. So after getting my Ph.D. at
5 Harvard, I took post-doctoral fellowships for a
6 year at MIT, and then for another year back at
7 Berkeley.

8 And then after that, I basically
9 spent the 1990s in basic research and
10 development at AT&T Bell Labs.

11 And then after one year in venture
12 capital, while talking with Penn about moving to
13 their computer science department, I went to
14 Penn in early 2002. And I've been on the
15 faculty since then.

16 Q. MIT is the Massachusetts Institute
17 of Technology, I take it?

18 A. Yes.

19 Q. We don't need to belabor this, but
20 because it's not always clear to me: What
21 exactly is post-doctoral work?

22 A. So it's quite common when -- after
23 one gets a Ph.D., but before you take a real
24 job, in order to kind of further your research

1 development and maybe work in a couple new areas
2 and broaden yourself, that you might go and do a
3 one-year research, one or two research
4 appointment at a university to just be in a new
5 environment, work with some new people, get
6 exposed to some new ideas.

7 Q. What was the thing that spoke to
8 you about getting into this field in the first
9 place?

10 A. Well, I guess in high school, I
11 started playing around with, you know, computers
12 in my dad's lab. My dad was an academic, also.

13 He was a chemistry professor. And
14 so I started playing around on Unix systems that
15 he had for his research.

16 And I guess I first got interested
17 in computer science just because of the sort of
18 mixture of practicality and creativity. And so,
19 on the one hand, you could do very powerful,
20 practical things with computers, but I was
21 always interested in the sort of open-endedness
22 of it all.

23 So, in particular, you know, the
24 fact that with the same tools, you could also do

1 things like create virtual worlds. And then as
2 I actually started studying the field
3 scientifically, I realized there was a lot of
4 rigger and depth to it as well. I just got
5 sucked in.

6 Q. Do you have experience with not
7 only using computers and studying computer
8 architecture, but have you also yourself been
9 involved with source code? And I'm not computer
10 literate, the codes that --

11 A. Yes. I'm a programmer as well.

12 I don't consider myself a
13 professional software programmer, by any means.
14 But I've certainly participated in large-scale
15 computer programming.

16 The last four years I was at Bell
17 Labs, I was the head of the artificial
18 intelligence research department there. And we
19 had a number of large-scale systems, projects
20 that involved a fair amount of coding.

21 And I was quite involved in those.
22 And aside from my work at Penn, I also, you
23 know, served as a technical advisor to a number
24 of technology start-up companies, mainly trying

1 to help them figure out how to apply machine
2 methods to the very large data sets they have,
3 problems like that.

4 I was often, you know, involved in
5 the fairly hands-on programatic source coding
6 elements to them.

7 Q. Let's talk for a moment about the
8 classes you teach. Do you teach a class on
9 social networking?

10 A. I do teach a class on social
11 networking.

12 Q. Can you briefly tell us about it?

13 A. Yes. So this was a course that I
14 designed just about six years ago.

15 I think I taught the -- maybe the
16 sixth or seventh, maybe the seventh offering of
17 it just this last spring. This -- I designed
18 the course back in 2003 when social networks
19 were first becoming popular on the web.

20 And at the same time, there was a
21 group that there was sort of scientific
22 literature emerging trying to sort of understand
23 how social networks evolved, what kind of
24 structural properties they have. You know,

1 people have probably heard of some of these
2 things like sort of six degrees of separation,
3 this notion that in a large social network, any
4 pair of individuals is only a couple of hops
5 away.

6 And so I decided that it would be
7 both fun and interesting for students to kind of
8 see that there was a science behind that, that
9 there was some sort of systematic thing you
10 could predict and say, while at the same time
11 watching it unfold in front of them in systems
12 like Facebook and Friendster and the like.

13 MR. RHODES: Your Honor, we tender
14 this witness as an expert in the field.

15 MR. ANDRE: There's no objection,
16 Your Honor.

17 THE COURT: Okay. He's so
18 recognized.

19 MR. RHODES: Thank you, Your
20 Honor.

21 BY MR. RHODES:

22 Q. I take it you're familiar with
23 Facebook?

24 A. I am very familiar with Facebook,

1 yes.

2 Q. Do you yourself use Facebook?

3 A. Yes, I do.

4 Q. When was the first time that you
5 personally interacted with Facebook?

6 A. I first got a Facebook account in
7 March of 2004.

8 Q. So you would have been one of the
9 earlier doctors?

10 A. So as people may know, the
11 evolution of Facebook is it began as a service
12 only available to members of the Harvard
13 University community. So you actually needed a
14 Harvard edu email address.

15 Shortly after that, it was opened
16 up to other ivy league schools, you know, people
17 with like a UPenn edu address. And I was
18 basically in that first wave of non-Harvard
19 users.

20 Q. And have you been using Facebook
21 continuously since approximately 2004?

22 A. That's correct.

23 Q. And as a result of that past
24 experience and use and in connection with the

1 courses you teach in your field of endeavor, are
2 you generally familiar with the manner in which
3 the site has evolved over time?

4 A. I'm quite familiar. Yeah.

5 Q. And I take it the sites has
6 evolved over time?

7 A. Quite a bit. I mean, Facebook has
8 added and changed a great deal of functionality
9 over time. They've reorganized the service and
10 functionality that they do have. It's changed
11 quite a bit.

12 Q. All right. Let's talk about what
13 you were hired to do.

14 What is your understanding as to
15 what it is we asked you to do?

16 A. I was asked to examine the '761
17 patent, the patent in question. And examine it
18 carefully and compare it to the operation of the
19 Facebook and come to an opinion as to whether
20 Facebook in any way infringes on that patent.

21 Q. And I'm sure this is going to
22 shock the jury. But I take it you have an
23 opinion on that?

24 A. I do have an opinion on it.

1 Q. Go ahead and tell it.

2 A. My opinion is that Facebook does
3 not infringe on any aspects of the patent.

4 Q. All right. And then we'll talk
5 about for the next, you know, period of time why
6 you feel that way.

7 Can you give the jury a sense of
8 -- so we call you up and hire you, ask you to do
9 this.

10 What is it that you do between
11 then and today to form a basis from which you
12 can render that opinion?

13 A. Yeah. So, I mean, obviously the
14 first thing I did was to carefully read the
15 patent, reread the patent, try to understand it,
16 try to understand what it was proposing, problem
17 it thought it was addressing.

18 Tried to understand the various
19 descriptions and diagrams of the, you know,
20 system that's being proposed there, the
21 technology that's being proposed there.

22 Then, of course, I thought first
23 about, you know, how Facebook actually works.
24 And what -- you know, what -- tried to see where

1 elements of the patent might match up against
2 what Facebook does.

3 I then -- you know, a big part of
4 what I was doing was responding to the expert
5 report of Dr. Vigna. So, of course, I had
6 access to that and I read that report and the
7 assertions that it made very carefully, and
8 compared the things that he was saying with how
9 Facebook actually worked.

10 And at some point, I went to
11 California to actually look at the source code
12 in question, including but not limited to, why
13 is there source code that are cited in the Vigna
14 report?

15 I talked to a Facebook engineer at
16 some length to -- you know, made available to me
17 to ask questions that I had about how Facebook
18 really works. Some of the, you know, very, very
19 low-level details that are not easily discerned
20 from just using the system itself and asking
21 questions about the code, and where certain
22 things happen in the code, and in what order, so
23 on and so forth.

24 Q. Let's talk for a moment about the

1 '761 patent. When you read it the first time
2 and perhaps the second and third time as part of
3 your effort to comprehend what it covered, what
4 was your initial impression of that patent?

5 A. Well, my initial reaction is one
6 of confusion. I found the patent quite
7 confusing, the language in it.

8 I found a lot of the language very
9 vague. I felt like there were, you know, many
10 terms that were not well defined, and seemed
11 very similar and were sort of used in a very
12 loose way.

13 So, you know, there's things like
14 webs, and boards, and contexts and environments.
15 And these are sort of all used interchangeably.

16 So it took awhile for me to try to
17 figure out what the patent was trying to
18 propose, but that was my first reaction.

19 Q. So in light of that first
20 reaction, would I be presumptuous to ask you if
21 you then spent more time studying the patent to
22 try to really grasp what problem the inventors
23 thought they were trying to solve?

24 A. Yeah. So I spent quite a bit of

1 time working on that and trying to come to some
2 understanding of it.

3 I think it helped when I went to
4 the claims themselves, you know, which are sort
5 of what matters most, and sort of read them
6 carefully, and realized that, you know, at the
7 end of all this, something rather specific and
8 narrow and precise is described in the patent.
9 Even in other places, the high-level
10 descriptions were a bit confusing to me
11 initially.

12 Q. Do you have an understanding as to
13 what the problem was that the invention of the
14 '761 patent was trying to solve?

15 MR. ANDRE: Objection, Your Honor.
16 Outside the scope of this expert's report. He's
17 an infringement expert.

18 THE COURT: Okay. Well, the
19 objection is noted, but overruled subject to the
20 protocol we've discussed.

21 You may go ahead, Mr. Rhodes.

22 BY MR. RHODES:

23 Q. Let me take a step back. You were
24 asked to render an opinion on whether or not the

1 patent infringed; is that right?

2 A. That's correct.

3 Q. Yeah. And my question is simply:
4 When you read the patent, were you able to, in
5 your own mind, determine what problem you
6 thought the patent was trying to solve?

7 A. Yeah, I mean --

8 MR. ANDRE: Same objection.

9 THE COURT: Okay. There's no need
10 to keep noting the objection. The objection
11 with respect to the protocol we have discussed
12 is noted as a standing objection.

13 MR. ANDRE: Thank you.

14 THE COURT: Okay. You may
15 proceed, if you have recall the question.

16 BY MR. RHODES:

17 Q. Do you have the question?

18 A. I think -- I think I understand
19 the gist of the question. I mean, the patent
20 itself is really rather forthcoming very early
21 on in describing the problem or the situation
22 that it seems to think needs addressing.

23 Q. And what is that?

24 A. So, you know, the language of the

1 patent very much feels as if it's addressing
2 sort of corporate enterprise workflow
3 environments where the management and tracking
4 of information is extremely important.

5 So in the very first couple of
6 pages the patent the laments the fact that, you
7 know, in the modern era in large organizations,
8 people are creating documents, emails, contents,
9 presentations, and there is all sorts of
10 pointers to them in all kinds of places, all
11 kinds of places that are referencing those
12 documents. And it's hard to sort of keep track
13 of all this activity. It's hard to sort of keep
14 track of the context in which a document was
15 created, sort of what the workflow was if you
16 like in sort of getting the document from its
17 initial creation to some later point.

18 And it sort of laments the fact
19 that all of this information that sort of is
20 about the document or should be stored with the
21 document is scattered in a kazillion different
22 places that nobody can find and that's sort of
23 the patent starts by discussing very clearly
24 that pain, if you like, and then goes on to

1 propose that a solution of some sort is required
2 to this. And then goes on to propose that
3 solution.

4 Q. But to be fair, I mean, does the
5 patent limit itself explicitly to corporate
6 environments?

7 A. There is nothing in the language
8 of the claims that says and this shall only be
9 used in, you know, corporate enterprise workflow
10 applications, no.

11 Q. Now, in computer science, is there
12 multiple ways to solve a common problem?

13 A. Yes. I mean, in fact, maybe
14 that's one of the problems of computer science
15 or why computer science is hard. Very often,
16 you know, just specifying what a piece of
17 software, for instance, should do, i.e., what
18 the inputs to it are and what the outputs of it
19 should be leaves things highly under specified,
20 sort of what's under the hood, the details of
21 how far something is implemented can be done in
22 many, many different ways and often for very
23 good reasons.

24 So I might write two programs that

1 will look to the user as they're doing identical
2 things and one of them is a little bit slower
3 but is very efficient in its use of memory, and
4 another one might be faster, but more wasteful
5 of memory. Under ordinary circumstances the
6 user may not realize there is anything different
7 about these two versions.

8 There is many, many different ways
9 that the same functionality or service, whatever
10 you want to call it, could be implemented under
11 the hood.

12 Q. You said under the hood. I assume
13 that's a car metaphor, looking at the engine
14 underneath?

15 A. Yeah. I'm sort of talking about
16 things like -- all the things that mercifully a
17 user should never really be aware of, sort of
18 what does the actual source code look like, what
19 language was that code written in. You know,
20 what kinds of machines are actually implementing
21 or running the software, so on and so forth. So
22 these are all the things -- I think a car is a
23 good analogy. So when things go well, you don't
24 know much about your engine, hopefully, right,

1 unless you're a mechanic or a computer
2 scientist, I guess.

3 Q. So is the distinction that what a
4 user sees on the computer screen may not
5 necessarily tell a computer scientist what's
6 actually occurring inside the machine?

7 A. That's right. In general from
8 just the end user's behavior if you like, it's
9 extremely rare that you can infer anything
10 meaningfully about how the system actually
11 implements what you're seeing.

12 Q. We talked a moment ago about your
13 understanding of what the patent was speaking to
14 as to the problem it was attempting to solve.
15 Is there anything in the patent itself that
16 speaks to that?

17 A. There are many, many parts of the
18 patent that speak very directly about that.

19 Q. May I ask that we get Figure 2 of
20 the patent up. Do you recognize what I have
21 displayed before the jury as looks like a page
22 from the patent, and it's got at the bottom, it
23 looks like F I G, or Figure 2. Do you recognize
24 what that is?

1 A. I do recognize this figure from
2 the patent, yes.

3 Q. What is this?

4 A. So this is if you like, you know,
5 kind of a flow chart or a diagram outlining a
6 sequence of steps and components that must be
7 present in the invention or, you know, in the --
8 that basically embody the steps of the
9 invention.

10 Q. To people skilled in the art which
11 is -- that's a lawyer term. We lawyers have
12 lots of terms like computer scientists and we
13 lawyers speak of people skilled in the art
14 meaning people like yourself who have that
15 particularized expertise in the field.

16 When people skilled in the art of
17 computer science look at -- is that a block
18 diagram or a flow chart?

19 A. Block diagram, flow chart,
20 whatever.

21 Q. When people that are skilled in
22 computer science look at that, do those people
23 imply steps or a sequence from that chart?

24 A. Yes, there is definitely obviously

1 a temporal sequence, a series of events
2 unfolding in a particular order over time that's
3 both implied by this diagram and the sort of
4 textural description that accompanies it in the
5 patent.

6 Q. I realize I gave you my laser
7 pointer and I don't want you to use it for fear
8 of hitting somebody along the table, but you
9 notice that there are arrows in the diagram?

10 A. You're talking about the vertical
11 arrows going from one block to the next? Yes.

12 Q. And I notice that the arrows, they
13 look like they have arrowheads, and they appear
14 to me, at least to my eye, to be going one way.
15 Is that how it appears to you?

16 A. It does appear that way to me,
17 yes.

18 Q. Are there block diagrams where the
19 arrows go both ways?

20 A. That would be extremely unusual.

21 Q. So is it your opinion with respect
22 to that block diagram that this is meant to
23 represent a sequence of steps that -- of
24 something that might embody the claims of the

1 patent?

2 A. It is.

3 Q. And does any of the text inside of
4 these boxes, does any of that language map to
5 any of the languages in the claims?

6 A. It does.

7 Q. Now, let's jump to it.

8 MR. RHODES: And I'm going to with
9 the Court's permission, I would like to set up
10 on the easel in the corner a board that has
11 Claim 1 on it. May I?

12 THE COURT: That's fine.

13 MR. RHODES: Thank you, Your
14 Honor.

15 BY MR. RHODES:

16 Q. Now, Professor Kearns, I have put
17 up a -- it's like a white board with I hope the
18 entirety of the language of the first claim of
19 the patent. And I would like you to walk us
20 through your understanding of what that claim
21 entails?

22 A. Okay. So you know like the block
23 diagram that was up a second ago, this text
24 describes a very precise sequence of events that

1 unfold in time in order to infringe on the
2 patent or to -- basically a description of the
3 claim of the patent, the first claim of the
4 patent.

5 And, you know, not surprisingly
6 and quite naturally, the order of the steps that
7 are meant to occur are written in the order that
8 they occur.

9 So basically you can kind of think
10 if you like of time progressing forward as we go
11 down through the text which, of course, would be
12 the most straightforward way to write a patent
13 which is talking about a temporal sequence of
14 events.

15 So just to say a high level thing
16 for a second. So what's being described in this
17 paragraph is a sequence of events involving some
18 steps taken by an end user of the hypothetical
19 system and some steps taking place, being done
20 by the system. So there is sort of a back and
21 forth. And the system is doing things in
22 response to various actions that the user is
23 taking.

24 I want to sort of in a very

1 pedestrian fashion walk through that sequence of
2 events and highlight some aspects of that.

3 Also, embodied in this paragraph
4 are several components of the system, kind of
5 pieces of the system that must be present in
6 order to embody the invention.

7 So let me just -- let's start from
8 the beginning. So what it says is a
9 computer-implemented network-based system. So
10 computers are involved and presumably computers
11 that are connected to a network.

12 That facilitates management of
13 data. What does that mean? The patent goes on
14 tell you what it means. It's comprising,
15 composed of, or consisting of several sequential
16 steps.

17 First off the network-based system
18 needs to have a context component. There is a
19 context component. And we'll see what the
20 context component does in the subsequent steps.
21 So there is a context component of this system.
22 What does the context component do? It captures
23 context information. So it's capturing not any
24 old kind of information mind you, but context

1 information.

2 So what is that? Well, we'll come
3 to that. But it's not arbitrary information,
4 it's context information. And as you'll see,
5 context is really a synonym in this patent for
6 what environment you're in, what virtual
7 environment you're in, what web page you're on.

8 So if the user is in some context,
9 there is a context component of the system
10 that's capturing this context information. And
11 that context information is associated with some
12 data that the user creates in this first
13 context.

14 So they're in some location. That
15 location is the context and the user creates
16 some data. So it's data created by user
17 interaction, so I also want to circle that it's
18 created.

19 So the user is in this
20 environment. They are in some context or
21 location in this environment and they undergo
22 some act of creation. So if you want to create
23 examples, they perhaps create a new document and
24 start typing a letter to their mother into it.

1 Okay. That's just one example.

2 But so now we're starting to see
3 the interleaving of steps by the system, steps
4 by the user. The system is there. It has a
5 context component. The user is in some
6 context/location. The user then takes a step of
7 creating some data. Okay? And that data, of
8 course, being created in the first context of
9 the network-based system, so on and so forth.

10 Now, the context component is
11 supposed to do something automatically in
12 response to the mere creation of that new
13 content or data by the user.

14 So the context component then
15 dynamically stores the context information in
16 metadata. So that's a lot of words, I realize,
17 but I think at the end of the day it's quite
18 simple.

19 So first of all there is this term
20 dynamically, which I would imagine the jury has
21 been told has been given a precise meaning by
22 the Court. So it's a synonym for automatically
23 and in response to the preceding event.

24 So there is a reference, so

1 everywhere you see dynamically, you can swap in
2 the lengthier but more precise expression,
3 automatically and in response to the preceding
4 events.

5 What is the preceding events?
6 There is only one candidate for it. There is
7 only one thing that's happened so far which is
8 the user has created some data in the first
9 context.

10 The context component has captured
11 information about that context and they're going
12 to automatically store this context component in
13 metadata.

14 As you probably know by now,
15 metadata is sort of a very general computer
16 science term that basically refers to
17 information about information, sort of data
18 about data.

19 So, for instance, you know, as I'm
20 sure you heard in some of the discussions
21 already, if I have a photograph, a digital
22 photograph, right, the digital photo, the file
23 kind of containing the bits of the digital
24 photograph itself, that we would consider data.

1 And then I might have metadata which is sort of
2 annotations or additional information about that
3 photo that I might want to keep around for
4 various reasons, like how high quality is the
5 photograph, what is its resolution, what are the
6 intended width and heights that it should be
7 displayed, so on and so forth, this would be
8 what we would call metadata.

9 So, you know, the sequence is the
10 user is in this first context or environment,
11 they create some data in that first context or
12 environment, the context component silently
13 without any further initiative by the user just
14 in response to the act of creation then
15 automatically stores metadata about the context,
16 right, so not about the data per se, but about
17 the context, and automatically stores that with
18 the data.

19 So this is going to be stored with
20 the user defined data. And this is just one of
21 many places in the patent where it makes it
22 clear that what happens is, you know, the user
23 creates some data, the system automatically
24 wraps up and stores with that piece of data the

1 metadata about the environment or context in
2 which I created it. Something about, you know,
3 some information about the environment in which
4 I created that data and then it gets stored. It
5 gets stored on a storage component of the
6 network-based system.

7 So I just unpacked a lot of words,
8 but I think the temporal sequence of things and
9 the conditions required to meet this first
10 element of the claim are quite clear; user
11 creates the data, system automatically stores
12 metadata with that data, and that metadata
13 should be about the context in which it was
14 created, the context lower environment if you
15 like. So that's sort of the first big paragraph
16 of this claim.

17 And then additionally, there must
18 also exist in the system a so-called tracking
19 component. So this is different from the
20 context component. The context component is
21 sort of the environment in which the user sits
22 and creates data in the first step. And then
23 there is this tracking component.

24 And what is the tracking

1 component's job in life? It's basically to
2 track the user's movement, to track their
3 navigation around this environment. So it was a
4 computer-implemented tracking component of the
5 system. Why is it called a tracking component?
6 What it's doing is it's tracking a change of the
7 user from the first context to a second context.
8 So this thing is watching the -- this thing is
9 sort of perpetually monitoring the user's first
10 movement from one context to another. And the
11 tracking component is going to be doing this in
12 background all the time and any time a user
13 moves from one context to another context the
14 tracking component is going to notice and it's
15 going to do something in response.

16 What is it going to do? It's
17 going to dynamically, that means automatically
18 and in response to the preceding events, it's
19 going to dynamically update the stored metadata
20 based on the change of context. Dynamically
21 updating the stored metadata based on the change
22 in context.

23 So again, we have this word
24 dynamically here again. Remember that means

1 automatically and in response to the preceding
2 events. In preceding events, this dynamically
3 was the user does something, they create data.
4 The creation of the data automatically caused
5 the context component to store metadata about
6 the context with the data.

7 Here we have dynamically again.
8 So here dynamically, what's the preceding event
9 here, what's the -- to what action by the user
10 is being responded to here. It's the change of
11 context. That's the whole reason for the
12 tracking component, right, it's watching the
13 user move around.

14 They're in a first context. When
15 they move to a second context, it very clearly
16 states here that automatically and in response
17 to the preceding event, dynamically the tracking
18 component is going to update the stored metadata
19 to sort of annotate the fact that the user has
20 moved from location A to location B.

21 And furthermore, right, this
22 stored metadata, note that it's updating the
23 stored metadata, okay, not any old data
24 somewhere in the world about something, right,

1 that would be sort of phenomenally vague. It's
2 updating the stored metadata.

3 What stored metadata? There is
4 only one candidate for the stored metadata.
5 It's the same metadata that was stored in the
6 first step up here. So there is data basically
7 tracking the user's navigation or movement
8 around the system and as they move, that data is
9 being changed to track that movement.

10 Okay. So the stored metadata up
11 here clearly refers to the same metadata that's
12 referred to up here.

13 Q. You got a coma there, it says
14 wherein?

15 A. Right. There is a final
16 condition, right. So you sort of have these
17 conditions. And then in addition to all of the
18 preceding, then the user needs to do a final
19 action. So again, this is describing, this is
20 describing a sequence of interaction between a
21 user and the system and the user makes the final
22 move.

23 The final move that the user makes
24 is that they access the data from the second

1 context. They don't just go to the second
2 context and lie around there doing nothing, they
3 need to do something very precise in order to
4 embody the invention. They need to access the
5 data. And again, the data here is the same as
6 the data created up here.

7 So we really have a game or
8 interaction going on between system and user
9 here, very precise sequence of steps unfolding
10 in a particular order in time. And the final
11 move if you like is by the user who then needs
12 to go access that data that was created in the
13 first step, first context.

14 Q. Thank you. You can take a seat.

15 Did you prepare some demonstrative
16 slides to illustrate what you have just related
17 to us?

18 A. I have.

19 Q. Okay. So let's get the first
20 slide up. And here we are again. Can you tell
21 us what this is meant to represent?

22 A. Yeah. So this is just because
23 this is a lot of words and text and description.
24 This is if you like a graphic illustration of

1 the exact steps that I laid out in the sort of
2 deconstruction of the patent itself.

3 What we have here is a
4 hypothetical system embodying the steps
5 described in Claim 1 of the patent. So we have,
6 you know, the system here consist of, you know,
7 multiple contexts. I have two here just to keep
8 the example simple. We have context one and
9 context two to make them visually distinct. I
10 have colored the first one green and the second
11 one blue.

12 We have a server if you like a
13 storage device, someplace where computers can
14 store information and get it later in the middle
15 there. And we have a user who looks kind of
16 like the PC guy from the Apple ads, actually.
17 But we have a user in the first context and what
18 I'm just going to do is just this animation is
19 going to walk us through the sequence of steps
20 that I just described.

21 Q. Why don't you tell us when you
22 want to move to the next slide?

23 A. The user is sitting there in
24 context one and the first thing that is required

1 by the patent is the user creates some data. So
2 let's say, for instance, they create a
3 photograph in the first context. So we have
4 this smiley face representing a digital file
5 with a photo in it. Okay.

6 So the user makes the first move,
7 they create this content or this data if you
8 like. And then the system is going to do
9 something automatically. So can we move to the
10 next step.

11 So the system, of course, you
12 know, better save the data if it's ever going to
13 find it again. So the data gets stored on some
14 kind of storage device or medium. The data is
15 stored on the server. And can you go one step
16 further, please. Automatically without the
17 user, the user has done nothing other than
18 create that photo.

19 Automatically the system decides
20 to not just store the data itself with the file,
21 but to store some information indicative of the
22 context that the user was in. Here I have
23 indicated that by sort of a green wrapper if you
24 like around that data. And it's green because

1 it should be indicative of the context itself
2 that the data was created in, it's not just any
3 other old information.

4 Q. Let me stop you there.

5 MR. RHODES: If I may go to the
6 screen, Your Honor.

7 THE COURT: You may.

8 BY MR. RHODES:

9 Q. In the language of Claim 1, the
10 happy face would be the photograph?

11 A. That would be the data.

12 Q. That's the user created data?

13 A. That's the user created data,
14 correct.

15 Q. And again, this is just to
16 demonstrate what you were trying to illustrate.
17 The green border around the user created data is
18 meant to be the metadata?

19 A. That's the metadata. And the
20 metadata, of course, should be indicative of the
21 context.

22 Q. And the context is that the user
23 interacted in a first context created data and
24 in response to that, the system created

1 metadata?

2 A. That's correct.

3 Q. And the green maps to the context
4 so we know that it's green, then this guy was
5 created by that guy over there?

6 A. That's correct.

7 Q. Continue, please.

8 A. Okay. So this is the first couple
9 of steps. The next step that's described in the
10 patent in the claim that we just went through is
11 that the user then moves from one context or
12 environment to a second context or environment,
13 what's called a context two, the blue context.
14 All right? And again there should be a tracking
15 component.

16 So if we go back one step, there
17 is a tracking component which are represented by
18 these hookie PowerPoint eyeballs here. And, you
19 know, sort of unbeknownst to the user, without
20 them needing to be aware of this tracking
21 component at all, it's go to notice their
22 movement from context one to context two.

23 So let's go forward. Upon arrival
24 of the user in the second context, this tracking

1 component is going to automatically update and
2 adds to the metadata the fact that there is this
3 second context now.

4 Q. Stop. Stop. So in this
5 hypothetical, all that's happened is the user
6 created content in the first environment,
7 metadata was created, they went to the second
8 context, and you now have more --

9 A. Context, yes.

10 Q. -- more context information that
11 was updated in the language of the patent?

12 A. That's right.

13 Q. Has the user done anything in the
14 second context at this point in the
15 illustration?

16 A. No.

17 Q. If you look --

18 A. They have done nothing yet.

19 Q. They have just gone there?

20 A. They have just gone there.

21 Q. If you look at the language of the
22 patent, can you illustrate to the jury why the
23 claim requires nothing more than movement from
24 context one to context two to dynamically update

1 the metadata?

2 A. Yeah. It's described here, it's
3 both explicitly in the phrase dynamically and in
4 the order in which the steps are clearly
5 written. There is a tracking component that
6 tracks the change of the user from a first
7 context to a second context and then dynamically
8 updates the store metadata before the user has
9 done anything.

10 The user accessing the data is the
11 final step here which is naturally, of course,
12 written last in the sequence of text in the
13 claim itself. Right. And dynamically again
14 means automatically and written response to the
15 preceding event.

16 Q. Let me stop you there. Slow down.
17 The word dynamically has two components?

18 A. That's right.

19 Q. At automatically?

20 A. Right.

21 Q. And the second one is in response
22 to the preceding event?

23 A. That's right.

24 Q. Does preceding in your opinion

1 mean the future?

2 A. It does not.

3 Q. Does preceding in your view mean
4 the present?

5 A. It does not.

6 Q. What does it mean?

7 A. It means the past.

8 Q. So if we look at the second
9 dynamically, third line from the bottom of Claim
10 1 that you have got circled there, right there,
11 point the jury to what the prior event was in
12 the claimed language, what is it?

13 A. The prior event is a change of the
14 user from the first context to a second context.
15 The tracking component is tracking movement
16 naturally of the user.

17 Q. So stop. So the event that you're
18 describing is the movement from context one to
19 context two?

20 A. That's correct.

21 Q. And then the second component of
22 dynamically is something called automatically?

23 A. That's right.

24 Q. When the event occurs, movement of

1 one context to another, that's the event that
2 had to occur?

3 A. Right.

4 Q. What does the system do
5 automatically?

6 A. Automatically, it updates and adds
7 to the metadata to indicate the arrival in the
8 second context.

9 Q. Tell us where we see that language
10 sequentially and point to the words, where is
11 the update?

12 A. So dynamically updating the stored
13 metadata based on the change, right, so we have
14 further confirmation here. The update is based
15 on the change, automatically, right. The change
16 occurs and then automatically the system updates
17 the metadata, the user doesn't have to do
18 anything else in order for that update to be
19 caused.

20 Q. The language says the change. Do
21 you see that?

22 A. Yes.

23 Q. Based on this change?

24 A. Yes, based on the change.

1 Q. And do you have an opinion as to
2 whether the words the change modify anything
3 previously in that paragraph?

4 A. Well, again, there is only one
5 possible candidate for the change. There has
6 only been one change referenced anywhere in
7 these two paragraphs and that's the change of
8 the user from the first context to the second
9 context, so clearly the change here is the
10 change here.

11 Q. And then last, the phrase the
12 stored metadata. Do you see that?

13 A. I do.

14 Q. Do you see the word stored?

15 A. I do.

16 Q. Does the word stored imply to you
17 a time element?

18 A. Stored is past tense.

19 Q. Is it future tense?

20 A. It is not.

21 Q. Is it present tense?

22 A. It is not.

23 Q. It is past tense?

24 A. It is past tense.

1 Q. So does that mean that the
2 metadata to which the word stored is applied is
3 something that had already occurred in the
4 system?

5 A. That's right. And there is no
6 mystery as to what that was, because it's
7 exactly the data or metadata that was stored in
8 the first element of the claim.

9 Q. So the stored metadata, would that
10 refer to the metadata from the green context
11 that was automatically created when the
12 photograph was created in the first context?

13 A. That's right. And that's why
14 we're showing this wrapper around the raw data
15 itself changing or growing over time to keep
16 track of the user's movements as the tracking
17 component is described.

18 Q. All right. Have you now explained
19 this animation to us?

20 A. Well, so I mean, we're almost
21 done, right. So we have had this alternation of
22 steps by system and user, user created the data,
23 system automatically created the initial green
24 metadata that wrapped around that data, the user

1 moved, the tracking component clearly saw the
2 movement and then automatically right then and
3 there put the blue metadata with the green
4 metadata to indicate the change in context as
5 it's described in the claim.

6 And then the final step that's
7 required is that then the user has to do
8 something to access the original data, i.e., the
9 smiley face photo in the second context.

10 Q. All right. So let's assume for a
11 second that this was me at my Facebook profile
12 page, I'm a new user, don't have a profile
13 picture. I upload a happy face as my profile
14 picture. And let's assume that some metadata
15 was created about it and stored in something
16 called a photo table. And then I go to another
17 page in the Facebook system, and I do nothing.
18 Are you with me?

19 A. I'm with you.

20 MR. ANDRE: Objection. Mr. Rhodes
21 is testifying here. He's leading this witness
22 quite a bit.

23 MR. RHODES: It's foundation.

24 THE COURT: There has been a lot

1 of leading and there hasn't been an objection
2 previously. I'm going to allow a little leading
3 right now. He's trying to state a long
4 question.

5 MR. ANDRE: I have been trying to
6 give him leeway.

7 THE COURT: You have given him
8 leeway. And let's continue with this question
9 and let's avoid testifying, Mr. Rhodes.

10 BY MR. RHODES:

11 Q. If the user has just gone to that
12 second page but has done nothing, what happens
13 with respect to Facebook in terms of updating
14 the metadata that was created in that first
15 context?

16 A. You're asking me now how Facebook
17 actually works?

18 Q. Just for the moment.

19 A. Nothing happens. I have graphics
20 to illustrate that later.

21 Q. Now, we have been talking about
22 Claim 1. May I now turn your attention to Claim
23 9?

24 A. Sure.

1 Q. So it would be easier if you
2 wouldn't mind just taking the board that's right
3 next to the wall and putting it on the easel.

4 A. You want this one?

5 Q. Yes.

6 A. Okay.

7 Q. Now, I realize that the language
8 of the claims as they go on, there is a lot of
9 duplication and I'm hoping we can kind of avoid
10 torturing everybody by going through everything,
11 but can you walk us through Claim 9, provide
12 your understanding of what it entails, and focus
13 maybe perhaps on the differences between Claim 1
14 as opposed to just repeating everything we've
15 already covered?

16 A. Yes. I mean, there's many
17 independent claims in the patent that are
18 extremely similar to each other.

19 And basically all of them describe
20 the exact same sequence of steps in the same
21 order that I described them for Claim 1. And to
22 be honest with you, I'm not -- for some of these
23 other claims, it's not exactly clear what
24 differences is intended. Right.

1 So, you know, for instance, just
2 looking at one, which you can't see and, you
3 know, one was about a computer-implemented
4 network-based system that facilitates management
5 of data. That is instead a computer-implemented
6 network-based. It's not facilitating management
7 data. Method of managing data.

8 I will be honest that I'm not sure
9 what differences those phrases are intended to
10 mean. But it kind of doesn't matter because,
11 again, exact same order of things occurs.

12 So, you know, and the other claims
13 are very similar in this way. They all sort of
14 have slightly different phrasing at the
15 beginning. They will or won't talk about
16 computer-implemented or computer-based or
17 network-based management of data versus managing
18 data, so on and so forth.

19 You can sort of easily see that
20 the same steps are here. So, you know, and now
21 the word environment seems to be being used
22 instead of context. And if I remember
23 correctly, I believe that the Court sensibly
24 decided that context is basically a synonym for

1 environment.

2 Correct me if I'm wrong. So it's
3 really the same thing.

4 So we have, you know, creating
5 data within a user environment or a context of a
6 web-based computing platform via user
7 interaction with the user environment by a user
8 using an application.

9 A. Mr. Kearns, please slow down or
10 you're going to kill the reporter.

11 So we basically have, again, a lot
12 of words describing a user in a first
13 environment or context creating data in that
14 environment or context. Okay.

15 We then again have the system
16 dynamically associating metadata with the data
17 created by the user in the first environment or
18 context, and storing that data somewhere where
19 it can get it later.

20 And the metadata, right, should
21 include information related to the user, the
22 data, the application and the user environment.
23 Right.

24 So here for some reason, it's been

1 added. The condition has been added that the
2 metadata also is about the user, the data and
3 the application. But still present as far as --
4 is the fact that the metadata should definitely
5 include information about the environment as
6 well.

7 So it seems like in addition, what
8 seems somewhat like cosmetic changes in the
9 language, there have been additional conditions
10 added to what should be stored in the metadata
11 here. But it still includes what was present in
12 Claim 1, mainly information about the
13 environment or context.

14 We still have the tracking
15 component present. Right. The tracking
16 component that tracks movement of the user from
17 the user environment of the web-based computing
18 platform to a second user environment, a second
19 context. Right.

20 So we, again, have this tracking
21 component that's sort of watching the navigation
22 or movement of the user. And then again, we
23 have that tracking component should dynamically
24 just as -- dynamically up here again here in the

1 first storing of metadata with the -- with the
2 raw data in the first context.

3 We have the tracking component
4 dynamically doing something automatically. And
5 in response to the user moving from one
6 environment to a second environment, it's going
7 to update the stored metadata and association of
8 the data, the application and the second user
9 environment.

10 Okay. And then finally again,
11 user makes the final move. The user then
12 employs at least one of the applications and the
13 data from the second user.

14 So the user then does something to
15 the data or accesses it in some way from the
16 second environment.

17 Q. And so from Claim 9 before the
18 final step of the accessing of the data is
19 achieved, does the system require the user to do
20 anything in the second environment beyond the
21 actual navigation tool?

22 A. No, totally seamless in the
23 background, dynamically, automatically just in
24 response to the move.

1 Q. Thank you, Professor. You may
2 have a seat.

3 And then we'll try to go through
4 the other two quickly. Let's throw up on the
5 screen Claim 21.

6 A. So, yeah. I mean, I don't know
7 how you want --

8 Q. We want as little as possible.
9 But we want you to explain, you know, whether or
10 not this requires the same fundamental steps.

11 A. All right. So clearly it does.

12 All right. Now, work space seems
13 to be being used instead of context and
14 environment. But, again, we have a user in a
15 first workspace of a web-based computed platform
16 using application. The system then dynamically
17 associates metadata with the data.

18 So automatically in response to
19 the user creating this data in the first
20 workspace, metadata is associated with that data
21 automatically by the system. And you know, the
22 metadata should -- you know, it's required that
23 the metadata include a bunch of stuff, but it --
24 definitely included in that is something about

1 the user workspace itself. Again, workspace
2 here, more or less, is synonymous with context
3 and environment from before.

4 We then still have the tracking
5 component which tracks movement of the user from
6 the first workspace to the second user
7 workspace. And that tracking component, again
8 dynamically in response just to the navigation
9 from the first to the second workspace, updates
10 or adds to the metadata.

11 So in the metadata, you know,
12 indicating that they are in this second context
13 or workspace now. And then there's this final
14 step indexing the data created in the user
15 workspace such that a plurality of different
16 users can again access the data from the -- you
17 know, from a variety of workspaces.

18 So somehow this last paragraph is
19 introducing more players into the final step.
20 But the basic order is exactly the same.

21 Q. An then last, but not least, let's
22 look at the -- I think it's independent Claim
23 23.

24 Can you tell us what this one

1 covers?

2 A. Yeah. So, you know, now we're
3 back to context somehow.

4 But at the -- again, a context
5 component for defining a first user workspace.
6 So we have a first workspace context
7 environment.

8 Context data is captured when the
9 user interacts with this first workspace and
10 dynamically stores the context. It has
11 metadata.

12 The metadata is dynamically
13 associated with data created in the first user
14 workspace. Right.

15 So the data is, you know, again
16 the user is creating data in this first
17 environment. And the system is automatically
18 annotating that data with metadata, which is at
19 least indicative of the context/work
20 space/environment.

21 Then again we have the track
22 component present. It's going to track a change
23 of the user from the first user workspace to a
24 second user workspace.

1 And, again, it's going to
2 dynamically store the change information meaning
3 the change of workspace on the storage component
4 as part of the metadata. And then again, after
5 that has happened, it's also required that the
6 user access the data from the second workspace.

7 Q. All right. Let's go back to Claim
8 21 for a moment.

9 I noticed that if you look at the
10 bottom there's a 65 on the left there. You go
11 to the right. It says users can access the
12 data. You see the phrase via the metadata?

13 A. I do.

14 Q. Is that a difference from the
15 prior independent claims we've been looking at?

16 A. It certainly -- it's certainly an
17 addition. I'm not sure what exactly is intended
18 by it, but otherwise we are talking about
19 accessing the data here. There seems to be a
20 condition required that the data not be indexed
21 directly, but somehow through the metadata.

22 Q. Now, let me ask you: Do you have
23 an understanding what it takes to infringe a
24 claim of a patent?

1 A. I do.

2 Q. And what is that?

3 A. So my understanding of patent law
4 is that in order to infringe on a claim, every
5 component or element of the claim must be
6 present in the infringing technology.

7 Q. And do you have an understanding
8 of something called the Doctrine of Equivalents?

9 A. I do.

10 Q. And for purposes of your
11 testimony, what understanding did you acquire in
12 that regard?

13 A. My understanding of the Doctrine
14 of Equivalents is that something that has all of
15 the elements of the claim that essentially has
16 all the elements of the claim where perhaps some
17 of the elements are only very superficially or
18 insubstantially different than as is described
19 in the claim, then you could still find for
20 infringement.

21 Q. Okay.

22 A. So if I don't literally have an
23 exact step or component that the claim embodies,
24 but I have something that anybody would agree is

1 just a cosmetic or insubstantial difference,
2 then you can sort of say, Well, this is
3 performing the same exact function in the same
4 way in the same order, even though it's called
5 something different. And we're going to
6 allow -- we're going to include that as part of
7 infringement.

8 Q. Now, with respect to the four
9 independent claims we've looked at, do you have
10 opinions with regard to whether or not Facebook
11 infringes any of those independent claims,
12 either literally or under the Doctrine of
13 Equivalents?

14 A. I do. My opinion is that it
15 doesn't infringe on any of them, either
16 literally or under the Doctrine of Equivalents.

17 Q. Do you have an understanding as to
18 what a dependent claim is?

19 A. I do.

20 Q. And what is your understanding of
21 what a dependent claim is?

22 A. A dependent claim is one that is
23 sort of a rider or it's based on first
24 infringing on the independent claim and then

1 also doing something else.

2 Q. Do you understand that with
3 respect to a dependent claim, the dependent
4 claim adds an additional limitation or set of
5 limitations to the entirety of the independent
6 claim to which it pertains?

7 A. I do.

8 Q. Now, let's shift gears. We've
9 been talking about the language of the patent.

10 Let's shift gears to Facebook.

11 A. Okay.

12 Q. And I think the jury's heard
13 enough testimony about generally Facebook, how
14 generally Facebook works. Did you read Dr.
15 Vigna's report in connection with your work?

16 A. I did.

17 Q. And did you notice that in Dr.
18 Vigna's report he discussed something that we'll
19 refer to as use cases?

20 A. I did.

21 Q. And these, in effect, were -- were
22 these, in effect, the examples of how he was
23 trying to illustrate examples of how Facebook
24 infringed?

1 A. Yes.

2 Q. So let's talk about uploading
3 photographs.

4 A. Okay.

5 Q. Are you with me?

6 A. Yes.

7 Q. And have you uploaded photographs
8 on Facebook?

9 A. I have.

10 Q. From a user perspective, how does
11 a user -- and again, we've heard some of this,
12 so we can move through this. How does a user
13 upload a photograph?

14 A. Well, first you need to navigate
15 to the page within Facebook where you're given
16 the option to upload or change your profile
17 photograph. I think we have -- you just want to
18 discuss it in -- because I have prepared some
19 screen shots.

20 Q. You want to throw those up?

21 Okay. So what are we looking at
22 here?

23 A. So we're looking at, you know, a
24 screen shot of a Facebook user's page. It looks

1 like it might be you.

2 And what, you know, you can see
3 here if you're a Facebook user, you're very
4 familiar with this interface. But so we're on
5 the page where there is an option to upload a
6 photo -- not to burn anybody's retina here.

7 So over here on the left, there
8 are little buttons. This user right now does
9 not have a photograph at all, and so they have
10 the default silhouette that Facebook provides if
11 you don't actually upload a photo of yourself.

12 You can see that there's little
13 options over here that you can click on to
14 upload a photo.

15 Q. Are you required by the Facebook
16 system to upload a photograph?

17 A. Absolutely not. And many, many,
18 many, many Facebook users never upload a
19 photograph for a variety of reasons.

20 Q. The dialogue box that's popped up,
21 what happens next?

22 A. Okay. So when you click on upload
23 a photo, it basically says, Well, you know, what
24 photo do you want to upload?

1 You know, it assumes here that
2 you're connecting through a computer where you
3 have on your computer a digital file with the
4 photograph you want to upload to it. So there's
5 a little bit under here.

6 It says choose file. If you click
7 on that. So if we click on that, if you click
8 on that, you can then direct it to -- you know,
9 you can sort of pull down a menu or type in what
10 folder on your desktop machine has the photos.

11 So here's a directory with several
12 photographs in it. You can just click on one of
13 those photos to select it.

14 And then the photo will be copied
15 from your computer, uploaded to Facebook and
16 stored on Facebook servers.

17 Q. Now, that's what the user sees.
18 What's going on behind the scenes?

19 A. So what's going on behind the
20 scenes is very straight forward. You know, the
21 bits are being copied over the internet to
22 Facebook, and it's putting them on a -- putting
23 the file on a server somewhere. And in the case
24 of Facebook, it's sort of a dedicated server for

1 storing photographs.

2 Q. And is any information about that
3 photograph captured anywhere?

4 A. Yeah. So there's a separate
5 database table, if you like, which, you know,
6 it's an SQL database, which is just a fancy word
7 for a very, very large table with vast ways of
8 indexes, things and searching, so on and so
9 forth. And data, if you like, metadata about
10 the photograph itself is stored in that photos
11 table.

12 So in this hypothetical example,
13 you will see down at the bottom a row, you know,
14 this photo table has photographs for many, many
15 purposes and many, many users stored in a common
16 database.

17 Right. And a new -- a new row or
18 entry in this table would be added in response
19 to the uploaded photo that basically says things
20 like what's the ID number of the photograph?

21 So some kind of unique key or
22 identifier. What's the name of the user? Who
23 uploaded the photo? What are the intended
24 dimensions of the photo?

1 What -- you know, if the user who
2 was uploading the photo was part of their
3 profile or whether they're, you know, building
4 an album. You can build albums on Facebook, as
5 many of you may know.

6 Whether that photo is associated
7 with a group, so on and so forth, this kind of
8 information.

9 Q. Now, are these pieces of data, the
10 one on the left, does that represent the user
11 defined data?

12 A. That is user created data. Yes.

13 Q. The photograph?

14 A. Yes.

15 Q. The information in the row of the
16 photo table, what would you call that?

17 A. I would call that metadata.

18 Right.

19 And this would be data that, you
20 know, users don't even know about and probably
21 don't want to know about. Right. It's sort of
22 internal information to Facebook.

23 Q. The photo table and the photograph
24 or the information that actually adds up to the

1 photographic image, are they stored in the same
2 place?

3 A. They are not stored in the same
4 physical location in the Facebook system
5 architecture. No.

6 Q. Are they stored in different
7 systems?

8 A. They're stored in different
9 systems and on different physical storage
10 devices. Yes.

11 Q. And from a computer science
12 architectural point of view, is there a reason
13 why you would put the photographic image in one
14 system and put the metadata about the photo in a
15 different place?

16 A. Well, there are many good reasons.
17 I mean, so in general, different types of
18 storage devices and the systems that manage them
19 are optimized for different things. So, for
20 instance, the photos table is basically a
21 so-called SQL, which stands for structure query
22 language, in case you were wondering.

23 But it's basically SQL database.
24 And there's commercial technology.

1 This is available for -- you know,
2 you buy -- you buy SQL servers. I mean, Oracle
3 is a company that basically is a database
4 server, company server and software company.

5 So you would have specialized
6 software and hardware for implementing things
7 like large databases like the photos table. And
8 then you might have the -- it would make good
9 sense to have a separate device for things like
10 photographs, because the needs are completely
11 different. Right.

12 In particular, for instance, for
13 photographs, there's -- you know, photographs
14 are very amenable to compression. Right.

15 So there's a lot of redundant
16 information in a photograph, and you can
17 compress it. And it's sort of stored in much
18 smaller files.

19 So if I go outside and take a
20 picture and most of it is a clear blue sky, you
21 know, you don't -- there's a way -- there's a
22 thing that will take that image and figure out a
23 way of storing them, so that I'm not storing the
24 same blue pixel over and over and over again a

1 hundred thousand times.

2 But basically I just have a line
3 that says, Well, repeat blue for a hundred
4 thousand pixels, so on and so forth. So you
5 have different storage devices and software to
6 optimize each of those things.

7 Q. Now, did you do anything in
8 connection with your work to actually verify
9 that this is the way Facebook systems work?

10 A. I did.

11 Q. What did you do in that regard?

12 A. I looked carefully at the code
13 that's implementing these particular steps in
14 Facebook's system when somebody is uploading a
15 profile photo. And I confirmed my understanding
16 of it with a Facebook engineer.

17 Q. All right. Now, in the steps that
18 we've done so far, how many parties does it take
19 to do what we've demonstrated here?

20 A. Two, the user and the Facebook
21 system.

22 Q. All right. Now, let's take the
23 illustration to the next step, which is -- I
24 think is to go to one of this person's friends'

1 wall.

2 A. Right.

3 Q. Okay?

4 A. Okay. So now maybe go back one
5 step.

6 Right. So just so we can -- how
7 would a user do this?

8 Right. Well, hidden by the server
9 down in the lower left is sort of a list of the
10 friends of this user. And you can just click on
11 the name of one of your friends and be taken to
12 their profile page.

13 So if we go to -- forward one
14 step. So this user has clicked on a friend's
15 page and has arrived at the profile page of that
16 friend.

17 And it can basically see their
18 so-called wall, the wall of that friend, which
19 basically tells you about some of the things
20 that this user has done recently.

21 Q. Okay. Now, was that an act of
22 navigation from one web page to another web
23 page?

24 A. It is.

1 Q. And now that you're at the second
2 web page, with respect to the metadata that had
3 been stored in the photos table pertaining to
4 the photograph that's stored in that server,
5 what, if anything, has happened to that metadata
6 by virtue of the navigation? That is to say,
7 the movement from the first one to the second
8 one?

9 A. Absolutely nothing. And for good
10 reason.

11 There's no need. Nothing has
12 changed about the photograph or the metadata of
13 the photograph.

14 Q. Is there anything that I would be
15 doing in this second context that would result
16 in the system automatically updating the stored
17 metadata that's reflected by that highlighted
18 box?

19 A. No. There's nothing you could do
20 in that second environment to cause that to
21 happen.

22 Q. Now, let's take the illustration
23 further, and suppose that I make a comment or
24 you make a comment on the friend's wall?

1 A. So if I want to make a comment on
2 the friend's wall, I can just go to this little
3 text box up there, and then, you know, write in
4 something like, I can't wait will Friday. And
5 then I can click on the share button.

6 And that will cause -- you know,
7 until I click that share button, nothing has
8 really happened. The comment or message hasn't
9 been saved or sent to the friend yet.

10 Q. Let me interrupt you, if I may.

11 A. Please.

12 Q. Put your laser where you can type
13 in. See where it says write something?

14 A. Yeah.

15 Q. If the user starts to write
16 something in there, but does not press the share
17 button, what, if anything, would happen behind
18 the scenes?

19 A. Nothing. It's -- that's just
20 going on in the user's browser. Facebook
21 doesn't even know about it.

22 Nothing's even been sent from your
23 computer to Facebook if you just type and don't
24 hit share.

1 Q. So if the user interacts with the
2 second context, does anything happen before the
3 user hits the blue share button?

4 A. No.

5 Q. Now, let's assume that the user
6 has hit the blue share button.

7 A. Right. So if you hit the blue
8 share button, now that message will be, you
9 know, uploaded or sent to Facebook. Facebook
10 will save that message and they'll, also on the
11 wall page of the user that -- on the wall page
12 of the friend that the user is looking at,
13 they'll sort of see basically a confirmation
14 that their message was received and saved.

15 So, for instance, you can see that
16 now the screen shot has changed so that the
17 message that was left Can't wait till Friday!!
18 now shows there.

19 It tells you when it was, when the
20 message was left, which was two seconds ago.
21 And then a little thumbnail sketch of the user,
22 photo of the user who left the message is
23 displayed next to the message.

24 Q. The text that appears next to my

1 name that says Can't wait till Friday!!, do you
2 have an opinion as to whether or not that is new
3 user defined data?

4 A. I consider that to be new user
5 created data. Yes.

6 Q. Do you have an opinion as to
7 whether or not that new user defined data, the
8 text itself whether or not that in our example
9 existed in the prior context?

10 A. It did not, obviously. The photo
11 existed in the prior context, but this is a
12 completely separate unrelated new piece of data.

13 Q. Okay. So now that the -- in the
14 second context, additional new user defined data
15 has been created.

16 What, if anything, has occurred
17 with regard to the stored metadata about --

18 A. The photo.

19 Q. -- the user defined data created
20 in the first context, that photo?

21 A. Absolutely nothing, of course.

22 Q. The new user defined data of the
23 text Can't wait till Friday!!, what, if any,
24 metadata is created by virtue of that

1 transaction?

2 MR. ANDRE: Objection, Your Honor.
3 Leading unmercifully.

4 MR. RHODES: The phrasing was
5 what, if anything.

6 THE COURT: I'm going to overrule
7 that.

8 BY MR. RHODES:

9 Q. Would you like the question again?

10 A. Yeah, please.

11 Q. We were talking about the second
12 piece of information that's been created, Can't
13 wait till Friday!! Does that action trigger any
14 new metadata in the system?

15 A. Yeah. So, I mean, obviously
16 Facebook has to store stuff in order to display
17 and retrieve it later, and so there is a
18 separate database. There's another table in
19 which the fresh information that -- other data
20 about that comment is stored.

21 Q. And what is that table?

22 A. That table is the so-called
23 Minifeed Table.

24 Q. And is the Minifeed Table in the

1 same or different system as the Photos Table?

2 A. It's in a different system. It's
3 a separate database with separate format for
4 that database. It's storing something different
5 than photos in that data.

6 Q. And is it the same or different
7 than the system that has the photographic images
8 in it?

9 A. Again, completely different
10 system.

11 Q. Okay. Now, let's continue with
12 the illustration.

13 Can you explain what's being
14 represented here?

15 A. Yeah, to here I'm just sort of
16 popping up a level, if you like, and just
17 talking a little bit about the different storage
18 systems, and what's on them and the fact that
19 they're separate.

20 So, you know, this is kind of a
21 recap of some of the things I've already said.
22 But so we have one system server/storage medium,
23 if you like.

24 It's basically dedicated to

1 storing actual digital photographs, the actual
2 files that render digital photographs when
3 they're displayed on Facebook.

4 You know, on the far right
5 separate from that is a structure SQL database
6 with metadata about those. So for each one of
7 those photos, there will be one or more entries
8 in this photo table, you know, keeping the kind
9 of stuff that we discussed before like what's
10 the resolution of the image? How big is it?

11 When I display it, so on and so
12 forth. And, of course, there would also be, you
13 know, indices, or addresses or pointers, if you
14 like, that let you -- once you found an entry in
15 the photo table that you were interested in, you
16 could follow a link to actually get your hand on
17 the photograph itself. Right.

18 So there's sort of
19 cross-referencing going on between those two
20 separate systems. And then in a completely
21 different system, mainly the Minifeed system,
22 you know, the Minifeed system, it is is
23 basically a database which is logging certain
24 activities by users.

1 And so you'll see, you know, in
2 the sequence of events that have happened to
3 have been logged in, this example, there's one
4 where a photo was uploaded, and later one where
5 the user wrote on the wall.

6 Q. May I ask you to go back to the
7 last slide for a moment?

8 A. Sure.

9 Q. When I -- when the story Can't
10 wait till Friday!! was published by virtue of
11 hitting the share button, the photograph
12 appeared there; right?

13 A. The user's comments -- photograph
14 appeared, yes.

15 Q. Can you tell us how that happens
16 without the -- this may be an awkward question,
17 but can you tell us how the photograph appears
18 next to that post without the metadata about the
19 photo being updated?

20 A. Well, I mean, maybe -- let me make
21 a high-level statement that there's a big
22 difference in a computer system between reading
23 and writing context. Right.

24 So to display a photograph, you

1 don't need to change anything about the
2 photograph or the metadata. You just need to
3 display it.

4 So that's like an act of reading.
5 It's not an act of creating or writing. So all
6 that happens when you leave your little comment
7 is it says okay, the user has left a comment.
8 What's the ID of the user and do they have a
9 profile picture?

10 So it would then take that, you
11 know, user ID. It would go look in the Photo
12 Table database and say, Is there an entry here
13 for a profile photo for this user? So it's just
14 reading that entry.

15 It's not writing and not changing
16 it in any way at all. And it says, Oh, yeah,
17 there it does have a profile photo and here's
18 where I can find it on the separate photo
19 storage system.

20 And it then goes and reads, just
21 accesses that photo and then displays it on the
22 end user's page. So there's no update or change
23 of anything, because there's nothing being
24 altered here. We're just accessing stuff.

1 Q. All right. Now, let's assume that
2 we're here and we want to go back to my profile
3 page. Can we do that?

4 A. Sure. So now, you know, you go
5 back one step maybe.

6 So we can kind of -- yeah. So you
7 are here.

8 You know, you left your little
9 comment here. Your thumbnail was simply then
10 displayed.

11 And then you can click, let's say,
12 back to home or profile. And you'll be taken
13 back to your profile page. And so there you
14 are.

15 Q. And so now you see the section in
16 the middle of the slide that's entitled Recent
17 Activities?

18 A. Yeah. So we're looking at your
19 wall here and it's so-called Recent Activities
20 section of your wall with a subset of the events
21 that Facebook deems newsworthy. And most
22 recent, one post at the top here is the fact
23 that you wrote and left a message on a friend's
24 wall.

1 Q. And what is the name of the
2 function or process that creates that Recent
3 Activity?

4 A. Well, this sort of underlying
5 system that keeps track of these entries is
6 called the Minifeed system.

7 Q. So that's the Minifeed?

8 A. Right. That is the Minifeed.

9 Q. When we are talking about
10 Minifeed, what's that? What are we looking at?

11 A. We essentially did a loop. We
12 started here. We uploaded a photo. We went to
13 Ms. Keefe's page.

14 Q. I wrote a wall post. Now we're
15 back here.

16 What, if anything, has occurred
17 with regard to the metadata that was stored in
18 the first context?

19 A. Absolutely nothing.

20 Q. And what is the -- with regard to
21 the occurrence where it says Mike wrote on Heidi
22 L. Keefe's wall, was the information that was
23 needed to generate that, is that the same or is
24 that different than what is stored in the Photos

1 Table?

2 A. It's entirely different.

3 Q. Is it in a same or different place
4 within the overall system?

5 A. It's in a different place.

6 THE COURT: Mr. Rhodes, we've
7 reached the time for our morning break. And
8 I'll advise the jury this break may be a little
9 bit longer than some of the other ones we've
10 taken.

11 But rest assured we'll get you
12 back and get you back in here as quickly as we
13 can.

14 Can you show the jury out, please?

15 THE COURT: Okay. We'll stand in
16 recess.

17 I don't think we're going to get
18 to Mr. Lamb before the lunch break, right.

19 MR. RHODES: No.

20 THE COURT: We'll bring the jury
21 in and we'll deal with the program issue before
22 the lunch break but after the jury has left for
23 lunch.

24 Mr. Andre.

1 MR. ANDRE: There is one issue
2 that Mr. Rhodes is talking about putting in,
3 Exhibits 281 and 282. These are books we
4 objected to because they were not produced to us
5 in the case. And I think Your Honor ruled that
6 they would not be admitted.

7 THE COURT: Mr. Rhodes.

8 MR. RHODES: My understanding is
9 these were identified in discovery responses as
10 of last fall by, I think they're call ISBN
11 numbers, the people that published books, this
12 is what it is, it's a public document. I
13 believe he also identified them in his expert
14 report.

15 THE COURT: Were they on the
16 exhibit list?

17 MR. RHODES: Yes, they were marked
18 as exhibits.

19 MR. ANDRE: They were objected to
20 because they weren't produced.

21 THE COURT: But I think I
22 overruled that objection. I think I overruled
23 all objections other than anything I said to the
24 contrary, which I don't recall saying with

1 respect to these books.

2 MR. ANDRE: I thought, Your Honor,
3 on that was one of the ten categories we gave
4 the letter brief on. I may be misremembering,
5 but I believe you said it was sustained.

6 THE COURT: Well, I don't recall.
7 Does anybody have a transcript of that hearing?
8 That would be the second pretrial conference.

9 MR. ANDRE: I mean, Your Honor,
10 the IManage software was an example we used.
11 You said if it wasn't produced, it doesn't come
12 in.

13 THE COURT: I remember the IManage
14 software, but I don't think we talked
15 specifically about these books. But if it's
16 covered by substantively a ruling that I gave,
17 then I would like to be made aware of that. So
18 we'll give Mr. Hannah a minute and see what he
19 can find.

20 MR. RHODES: People get a little
21 tired later in the week, Your Honor. I did
22 notice the forecast this morning, 99 for
23 Saturday.

24 THE COURT: I don't want to keep

1 the jury waiting any longer than I have to. I
2 take it you plan to do this --

3 MR. RHODES: At the very end.

4 THE COURT: But you reasonably
5 expect to do it before 12:30?

6 MR. RHODES: Absolutely. I won't
7 be more than about twenty minutes, Your Honor.
8 I think, Your Honor, if I may, I think their
9 argument is --

10 THE COURT: Mr. Hannah thinks he's
11 found something. Let's give him a chance.

12 MR. ANDRE: Your Honor, I mean, it
13 appears to be ambiguous.

14 THE COURT: Ambiguous?

15 MR. ANDRE: This is what happened.
16 We made the objection, and this is on page 17 of
17 the transcript from the pretrial conference, in
18 which I had a question about your earlier
19 rulings. It was about the documents that have
20 never been produced to us and we still don't
21 have the documents and they're on the exhibit
22 list.

23 We don't have the documents. We
24 exchanged exhibits recently, but we never had

1 them through discovery. For example, one of the
2 exhibits they marked is a piece of software we
3 don't have. Their expert said he looked at the
4 user manual, but he never -- he never looked at
5 the software itself. That's one issue we
6 imagine they're going to try to play so the
7 software is in action and we never seen it. So
8 that's a question, how do we deal with that?

9 And Your Honor said before we
10 leave today, I'm going to make sure we get back
11 to that issue so I'd keep track of it.

12 When we got back to the issue, we
13 went specifically toward IManage software, not
14 the general objection.

15 THE COURT: I think Mr. Rhodes
16 indicated they weren't going to use the software
17 so I probably never made any substantive ruling.

18 It seems to me that the books were
19 identified, if not produced. They were I'm
20 being told the subject or at least mentioned in
21 the expert's report. We certainly have had back
22 and forth with respect to the issue of a
23 limiting instruction on these two particular
24 pieces of evidence.

1 And so it's your objection,
2 Mr. Andre. I'm overruling the objection and the
3 books can come in.

4 MR. ANDRE: Thank you, Your Honor.

5 THE COURT: Let's bring the jury
6 in.

7 THE CLERK: All rise.

8 (Jury entering the courtroom at
9 11:15 a.m.)

10 THE CLERK: You may be seated.

11 THE COURT: Welcome back ladies
12 and gentlemen. I'm attempting to apologize for
13 the long break, but perhaps it's not an apology
14 that's owed to you. But in any event, we are
15 now ready to get back to where we are.

16 Mr. Rhodes.

17 MR. RHODES: Thank you, Your
18 Honor.

19 BY MR. RHODES:

20 Q. Let me ask you a couple of
21 questions. We have been talking about these
22 metadata tables and the places where the content
23 are stored. Facebook, does Facebook have a big
24 computer system?

1 A. They have an extremely large
2 system.

3 Q. And is there something in that
4 universe called the user database?

5 A. There is a user database.

6 Q. What does the user database itself
7 consist of?

8 A. The user database would consist of
9 entries that basically identify and keep track
10 of Facebook's 500,000,000 users.

11 Q. So within the user database, would
12 we find one or more of these various tables we
13 have been talking about?

14 A. In the user database?

15 Q. Yes.

16 A. The user database would have, you
17 know, entries specifically related to users.
18 The photo metadata base is a separate database
19 as we were discussing before.

20 Q. But I guess the point I'm trying
21 to make is from the jury's perspective, Facebook
22 is a company and they own computers; right?

23 A. That's correct.

24 Q. And does it take a lot of

1 computers to run a website that has this many
2 people on it?

3 A. It takes a phenomenal number.

4 Q. Is it the totality of those
5 computers where all this stuff is happening?

6 A. That's correct.

7 Q. And then I wanted to ask if you
8 could, just for a moment -- I'm getting off
9 track. Can you just throw up Claim 1, please.
10 Is there any understanding of what you said
11 earlier, is there any language that you look at
12 as someone skilled in the art of computer
13 science when you read that that implies to you
14 one thing has to happen in a sequence relative
15 to another?

16 A. Absolutely.

17 Q. Just can you point us to the
18 language in that claim that to somebody skilled
19 in computer science that that language would say
20 to them under that claim, one thing has to occur
21 relative in time to another?

22 A. Well --

23 Q. If that makes any sense.

24 A. Sort of.

1 As we discussed before, there is a
2 clear temporal order to these statements and
3 they are written in the order in which they
4 occur. And so, you know, I don't know if you
5 want me to go through it again, but there are
6 distinct steps described here and there is
7 language such as dynamically, you know, there is
8 statements such as based on the change, you
9 know, that are clearly referring to the previous
10 events in the sequence.

11 Q. What I'm asking you is whether the
12 things that are described here functionally
13 suggest to people skilled in the art whether or
14 not there is an order to them?

15 A. They suggest that there is an
16 order, yes.

17 Q. Now, let's go back to, we were
18 talking about -- I think where we left off, we
19 were kind of completing one of the examples.
20 Facebook, of course, is a website, so let's just
21 step back for a second.

22 A user first comes to the, I think
23 what's called the home page of Facebook, and now
24 let's assume that that person is not registered.

1 A. Okay.

2 Q. What would they see?

3 A. They would see something inviting
4 them to sign up for Facebook, join their
5 friends, et cetera.

6 Q. So if the person then filled out,
7 you know, your name and your password, what
8 would we call that process?

9 A. I would call that a registration
10 process, perhaps a signup process.

11 Q. A signup process.

12 Once the user has gone to the
13 Facebook home page and they have signed up, they
14 have gone to behind that page; right?

15 A. Right.

16 Q. Does Facebook control where people
17 go after that?

18 A. Absolutely not.

19 Q. Does Facebook require that you go
20 anywhere?

21 A. It does not.

22 Q. Does Facebook require that you put
23 photographs on the site?

24 A. Absolutely not.

1 Q. Does Facebook -- what, if
2 anything, does Facebook do to require users to
3 make wall posts?

4 A. Nothing at all.

5 Q. What, if anything, does Facebook
6 do to require people to join fan pages?

7 A. They don't, nothing.

8 Q. What, if anything, does Facebook
9 do to force people to join groups?

10 A. Nothing.

11 Q. I want to talk about -- shift
12 gears for a second. I want to talk about the
13 other so-called use cases that Dr. Vigna had in
14 his report. You recall that one of the
15 scenarios involved moving to a group page?

16 A. Correct.

17 Q. Do you have an opinion as to
18 whether or not when a user navigates to a group
19 page, whether or not that would automatically
20 and in response to the act of navigation,
21 whether or not that would create an update to
22 metadata that had been stored?

23 A. Absolutely not.

24 Q. What about when a user joins the

1 group, do you have an opinion as to whether or
2 not the act of joining the group would then
3 trigger an update in the metadata that had
4 already been stored?

5 A. Such as the photo uploaded?

6 Q. Right.

7 A. Absolutely not.

8 Q. When a user takes a further step
9 on a group page, say that they upload a
10 photograph, would that act trigger an update in
11 metadata that had already been stored?

12 A. No.

13 Q. And does the navigate -- if I'm a
14 new user, we went to the registration and I get
15 there, and maybe I set up a routine profile and
16 then I just surf, search for people and just
17 looking at pages, does the looking at those
18 pages and the navigation through the web, does
19 that cause any metadata that had already been
20 stored to be automatically updated?

21 A. Absolutely not.

22 Q. Do you have an opinion as to
23 whether any of the use scenarios that Mr., or
24 Professor Vigna -- my apologies, sir -- any of

1 the use cases that he laid out, whether any of
2 those are valid examples of infringement of the
3 '761 patent?

4 A. My opinion is that none of them
5 exhibit infringement of the patent.

6 Q. And with respect to the Doctrine
7 of Equivalents, do you understand that Dr. Vigna
8 expressed opinions that the Doctrine of
9 Equivalents would find that Facebook infringes
10 the asserted claims of the patent?

11 A. I understand that he did, and I
12 disagree with his opinion.

13 Q. Why do you disagree with him?

14 A. Because I think the differences
15 that I have discussed here between how Facebook
16 actually operates and what the patent requires,
17 there are very, very substantial important
18 central pieces of the claimed technology that
19 are entirely absent in Facebook and no amount of
20 hard searching or contortion will let you find
21 something which is even remotely similar.

22 Q. Now, if you -- I'm going to ask
23 you kind of a hypothetical question. Assume for
24 sack of this question that you adopted

1 Dr. Vigna's view of the patent. Are you
2 familiar with his view of the patent?

3 A. I am.

4 Q. As to its scope and breathe?

5 A. Yes.

6 Q. And if you were to adopt, just for
7 sake of discussion today, Dr. Vigna's view of
8 the patent, what, if any, impact would that have
9 on whether or not there were other things much
10 earlier than the patent that would be insnared
11 by that?

12 A. So if I --

13 MR. ANDRE: Objection, Your Honor.
14 Outside the scope of the expert report. Calls
15 for a legal conclusion.

16 THE COURT: Well, consistent with
17 our previous discussions, I'm going to overrule
18 the objection at this time and allow the
19 testimony.

20 THE WITNESS: So I mean, if I kind
21 of blur my eyes and broaden the interpretation
22 of the steps of the patent and ignore the fact
23 that some of them are missing and I sort of make
24 the smallest minimal revision to the

1 interpretation of the patent that would cause
2 Facebook to actually infringe to that revision,
3 then I can definitely state my opinion that as a
4 very long time user of web-based services and
5 technology, many, many very well-known systems,
6 circa the late 1990s, would infringe left and
7 right for the same reasons.

8 Q. And can you give us examples of
9 those -- can you give us any examples to which
10 you previously disclosed in your report, just
11 the names of any of those systems?

12 A. For instance, Amazon.com or eBay
13 or Yahoo's club functionality, all of which were
14 around certainly well before the filing of the
15 patent, some of them in some cases late 1990s,
16 shortly after the dawn of the web.

17 MR. RHODES: Your Honor, I would
18 like to approach the witness.

19 MR. ANDRE: Your Honor, may I just
20 inspect the books for just one second?

21 THE COURT: Yes.

22 MR. ANDRE: I apologize, Your
23 Honor. I'm just trying to find the date on the
24 books.

1 THE COURT: You don't have to tell
2 us what you're looking for, just do it.

3 MR. RHODES: Just to speed things
4 along, would you put the independent Claim 1 on
5 the easel, just so we don't have to slow it
6 down. Thank you.

7 MR. ANDRE: Thank you, Your Honor.
8 Thank you, Mr. Rhodes.

9 MR. RHODES: May I approach the
10 witness, Your Honor?

11 THE COURT: You may.

12 BY MR. RHODES:

13 Q. Professor Kearns, I have handed to
14 you Exhibits 281 and 282, I believe DTX 281 and
15 282. And we were just talking about what would
16 happen if you adopted Dr. Vigna's very broad
17 view of the patent. And you identified some
18 systems that I think you said that were around
19 by the late 1990s. Have you seen these exhibits
20 before?

21 A. I have seen these books before,
22 yes.

23 Q. What relationship do those
24 exhibits play to the testimony you just gave?

1 A. Well, these are sort of books from
2 the so-called Dummy series that people are
3 probably familiar with. And they basically
4 describe the operation of Yahoo and eBay. And
5 they are versions of the books, I believe, that
6 describe -- you know, that are copyrighted, I
7 don't know what this one is, I guess 1999, that
8 describes the operation of those systems at the
9 time of the writing of the book.

10 Q. What is it about? Let's just take
11 the two examples that those books represent.
12 What is it about those two systems that would
13 lead you to the conclusion that those would be
14 implicated by the '761 if one were to adopt
15 Dr. Vigna's view of the world?

16 A. Well, for instance, there is part
17 of the book Yahoo for Dummies, describes circa
18 the late '90s, end user would go about signing
19 up for what I think at that time was called
20 Yahoo Clubs, which was sort of an early, if you
21 like, social networking kind of service where
22 you had a Yahoo user account, you could go start
23 a club on some particular topic of interest to
24 you, sailing, what have you, golf, whatever, and

1 then other users could join that group.

2 And, you know, the steps involved
3 in the process were quite similar. You sign up
4 for the group. You can share photos through the
5 group. There is a signup process. You navigate
6 from one page to another and leave content on a
7 second page at the group, so on and so forth.

8 Q. Were those systems in place by the
9 late 1990s?

10 A. Yes.

11 Q. Now, a final area and then I'll
12 sit down and give my colleague an opportunity to
13 cross-examine you.

14 With respect to the Claim 1, I
15 just want to go through this one time very
16 quickly. And I want you to refer us to the
17 animation for the PowerPoint slides that we went
18 through today. Can you just point out to the
19 jury clearly, simply, what are the elements of
20 that claim that are missing in the Facebook
21 system?

22 A. So if we just walk through it, a
23 context of the network-based system, I don't
24 think I have an objection to the idea that

1 Facebook has a notice of context and there is a
2 context component. Users can create data in
3 Facebook. You know, you can leave messages,
4 upload photos and so on and so forth. These
5 things are largely present.

6 The notion that the context
7 component dynamically stores some context
8 information in metadata, let's say in the case
9 of the photo upload, so as we've discussed
10 clearly Facebook saves the photo and they save
11 some annotation about the photo like its
12 resolution, dimension, so on and so forth.

13 I guess the first place I start to
14 find missing pieces it seems very clear to me
15 from the language in this patent that the
16 metadata should be about the context
17 information, it's storing the context
18 information in metadata.

19 So in the photo example, the
20 photo, the information about the photo isn't
21 information about the context in which it was
22 created. It doesn't specify the location of the
23 web page within Facebook where that photo was
24 uploaded in the metadata about the photo itself.

1 So my first, you know,
2 disagreement here is that the Facebook
3 technology meets the condition that the metadata
4 be storing the context information as it's
5 clearly called for in the first item.

6 Okay. So let's move on. Right.
7 The tracking component is entirely absent. I
8 think this is perhaps the biggest hole in all of
9 this. There is no component of Facebook which
10 is there perpetually watching users navigate
11 from one page to another and then automatically
12 updating the metadata created in the first
13 context in response to that movement. It's just
14 entirely absent. It's just not there.

15 As an aside, I would just comment
16 there is a good reason it's not there. It would
17 be horrifically impractical. They have
18 500,000,000 users now, much of what users are
19 doing on Facebook is not uploading photos or
20 leaving contents, but they're just browsing
21 around. They're not taking any action other
22 than navigating through the system. And if
23 Facebook had to log perpetually all of that
24 navigation information and furthermore store it

1 with the original data created back in the first
2 context or some previous context, they just
3 never would have been able to have a working
4 system of the scale that they have today.

5 So the tracking component is
6 entirely missing. That's doing this tracking
7 from one context to another. The dynamic
8 updating of the stored metadata based on the
9 change of context is, therefore, also missing.

10 And finally, you know, there is
11 no -- there is no requirement that the user when
12 navigating from that second context do anything
13 there? So this final step wherein the user
14 accesses the data from the second context is
15 also entirely missing.

16 Q. So in your opinion, you would
17 agree that there are some elements of that claim
18 that might be present on the Facebook system?

19 A. Right.

20 Q. But the ones that you identify are
21 the ones that are missing?

22 A. Correct.

23 MR. RHODES: Your Honor, thank
24 you.

1 THE COURT: Cross-examination.

2 CROSS-EXAMINATION

3 BY MR. ANDRE:

4 Q. Good morning, Dr. Kearns.

5 A. Good morning.

6 Q. My name is Paul Andre. I'm going
7 to ask you a few questions here.

8 A. Please.

9 Q. Let me just ask you a couple of
10 questions that just came up about the Yahoo for
11 Dummies and eBay for Dummies. Is that what
12 computer scientists like yourself use to build
13 software systems?

14 A. These books?

15 Q. Yeah.

16 A. Of course not.

17 Q. Okay. Who are they meant for?

18 A. They're meant amend for end users
19 who are, you know, not builders of systems, but
20 users of system.

21 Q. Right. Those books wouldn't teach
22 them how to build Yahoo!, for example?

23 A. They would not.

24 Q. And that wouldn't teach them how

1 to build eBay?

2 A. They would not.

3 Q. You didn't do any type of
4 inspection of the back end of Yahoo! or eBay,
5 did you?

6 A. I did not.

7 Q. And you don't know the back end of
8 Amazon, either, do you?

9 A. I do not.

10 Q. Okay. Now, I noticed in your
11 testimony here with Mr. Rhodes that you didn't
12 really take exception with Dr. Vigna's analysis,
13 per se, the technical analysis.

14 A. Well, I think I disagreed with
15 many, many parts of it actually.

16 Q. I'm not talking about if I apply
17 the claims, I'm just talking about how the
18 system operates.

19 A. You know, in his use case, his
20 description of the end user's experience when
21 navigating through various Facebook pages is
22 accurate and easily verified. But, as I said
23 earlier, I think that what matters is the
24 implementation of what's under the hood.

1 Q. So I noticed in your testimony
2 here today, there wasn't a single technical
3 document that you relied on; is that correct?

4 A. In my -- in my testimony?

5 Q. In your testimony today, there
6 wasn't a single technical document that you
7 showed the jury?

8 A. No.

9 Q. You didn't show them a source code
10 either, did you?

11 A. I did not show them the source
12 code.

13 Q. Okay. And basically your opinion
14 is based on your interpretation of the claims;
15 right?

16 A. And an examination of the source
17 code.

18 Q. Yeah. Granted.
19 But it's based on how you
20 interpret this kind of a temporal flow of the
21 claim; right.

22 A. And a detailed comparison of
23 that -- of how Facebook actually works. Yes.

24 Q. Right. Now, you have a copy of

1 your expert report up there with you?

2 A. I do not.

3 MR. ANDRE: Your Honor, may I
4 approach and give him a copy?

5 THE COURT: You may.

6 MR. ANDRE: Thank you.

7 BY MR. ANDRE:

8 Q. Now, when you were formulating
9 your opinion in this case, you didn't write the
10 Claim 1 the way it's written on the board there,
11 did you?

12 A. Sorry?

13 Q. When you were formulating your
14 opinion in this case, you didn't have Claim 1
15 written like it is on the board there; right?

16 A. I'm not sure what you mean.

17 Q. Okay. Let's turn to Page 12 of
18 your report. Can you go to the Claim 1 of
19 Dr. Kearns' report.

20 A. Yes, I'm there.

21 Q. Okay. You can look on the screen
22 as well. When you gave your opinion, you
23 actually separated out this wherein clause;
24 right?

1 A. That's correct.

2 Q. And if you look at the actual
3 claim language itself, though, the wherein
4 clause is part of the tracking component; right?

5 A. Correct. It's contextually made
6 out that way. Yes.

7 Q. But so, for your opinion, you
8 separate out as a separate element; correct?

9 A. That's right. Not as a separate
10 element, but I highlighted it as another
11 sequential step in what I thought was a clear
12 progression of temporal steps laid out in the
13 claim.

14 Q. But the way you wrote out -- do a
15 side-by-side comparison of these two.

16 You had it like this. And this is
17 how the Patent Office issued it; right?

18 A. That's right.

19 Q. Okay. And basically, your opinion
20 is the wherein clause here is not relevant in
21 determining whether or not Facebook infringes a
22 claim; right?

23 A. I'm sorry? No. I consider it
24 relevant.

1 Q. Well, didn't you testify in this
2 case that you didn't believe it was relevant as
3 to Facebook's infringement?

4 A. I -- I view that -- I view that as
5 the final step in a sequence of steps that's
6 described in the patent. And that -- that step
7 should be present in infringing technology.

8 And I, just moments ago, testified
9 that I thought that that final step was absent
10 in Facebook. There's nothing that requires the
11 user in a second context to access the data that
12 was created in the first context.

13 Q. You said nothing that requires it?

14 A. That's right.

15 Q. Now, in Facebook's world, you can
16 access data from a second context, can't you?

17 A. You can. You can do lots of
18 things.

19 Q. So you can do that step, it's just
20 not required?

21 A. You can. Yes.

22 Q. Okay.

23 A. It would seem weird to put it in
24 there just to sort of express an option in the

1 language of the claim, though.

2 Q. Yeah.

3 A. It seems odd. That strikes me as,
4 you know, an odd interpretation of that phrase.

5 Q. That you would just stick it in
6 there for no reason?

7 A. That the writer of the patent
8 would do so, yeah. That strikes me as unusual,
9 or that the Patent Office would do that.

10 Q. Okay. Now, you stated in your
11 report there on Page 4 that you actually
12 reviewed the prosecution history of the patent;
13 right?

14 A. I did.

15 Q. In fact, in forming your opinion,
16 you didn't read the prosecution history, though,
17 did you?

18 A. Sorry?

19 Q. When you actually were forming
20 your opinion, you didn't actually review the
21 prosecution history, did you?

22 A. I'm familiar with the events of
23 the case if that's what you mean.

24 Q. No. I am talking about the

1 prosecution history in the Patent Office. The
2 back and forth between the Patent Office and the
3 patentee.

4 A. There's a transcript of that now.

5 Q. The actual writing of it, yes.

6 That's correct.

7 A. No.

8 Q. The prosecution history?

9 A. No.

10 Q. So in your report, you said that
11 you actually did review it, but you actually
12 didn't; correct?

13 A. I -- I reviewed it and I was made
14 familiar with the back and forth between the
15 Patent Office. I don't know that I actually
16 read the detailed document about the
17 communications between the two.

18 But I know there -- I know about
19 the back and forth process between the Patent
20 Office and the inventor.

21 MR. ANDRE: Your Honor, I'd like
22 to play deposition testimony of Dr. Kearns on
23 Page 26, Line 8 through 27, Line 4.

24 THE COURT: Give counsel a chance

1 to take a look.

2 MR. RHODES: Twenty-six, Line 8?

3 MR. ANDRE: To 27, 4.

4 MR. RHODES: Twenty-seven, Line 4.

5 No objection, Your Honor.

6 THE COURT: Okay.

7 (Beginning of videotape deposition
8 excerpt of Dr. Kearns:)

9 Q. Did you review the prosecution
10 history of the '761 patent?

11 A. Could you clarify what you mean by
12 that?

13 Q. Have you heard the term
14 prosecution history before?

15 A. I believe I've heard it before,
16 but I don't know the technical meaning of it.

17 Q. Have you reviewed -- do you know
18 what an office action is?

19 A. An office action, I do not.

20 Q. Are you familiar with the process
21 used to obtain a patent in the United States?

22 A. Broadly speaking.

23 Q. You -- do you understand there's
24 some communication with the Patent Office, and

1 it goes back and forth between the applicant and
2 the office; is that right?

3 A. Correct. Yes.

4 Q. Did you review any of those
5 communications that went back and forth?

6 A. I did not.

7 (Conclusion of videotape
8 deposition excerpt of Dr. Kearns.)

9 BY MR. ANDRE:

10 Q. So Dr. Kearns, is it your
11 testimony today that you actually did review
12 some of those correspondence going back and
13 forth?

14 A. I think I'm saying something
15 that's consistent with my deposition. I don't
16 recall exactly reading the back and forth, but I
17 was aware through counsel that there was some
18 back and forth in the final patent as a result,
19 as it often is of a dialogue between an inventor
20 and a Patent Office, who often wants the
21 inventor to specialize some of their claims so
22 that they're not overly broad, for instance.

23 But, yeah. I'm not there or here
24 claiming that I had access to detailed

1 communications between the two. I don't know if
2 that's even available.

3 MR. ANDRE: Your Honor, I'd like
4 to approach the witness.

5 THE COURT: You may do so.

6 BY MR. ANDRE:

7 Q. Dr. Kearns, what I've handed you
8 is PTX-2, the prosecution history of the '761
9 patent.

10 MR. RHODES: Your Honor, this
11 prescribes the rules of Markman and claim
12 construction.

13 THE COURT: All right. Let's have
14 a side-bar.

15 (Beginning of conference held at
16 side-bar:)

17 THE COURT: Your objection?

18 MR. RHODES: My objection is that
19 you may not use the specification that were
20 specifically or the prosecution history to try
21 to reanimate the claim language after the Court
22 has construed it in Markman. The Court is the
23 binder of what the claims speak. You have
24 construed the patent.

1 You'll instruct the jury and so
2 forth. There's no foundation for it, because he
3 says he hasn't even seen the specific
4 communications.

5 So to the extent he wants to try
6 to impeach him with it, it's well beyond the
7 scope.

8 MR. ANDRE: Your Honor, he spent
9 the entire morning talking about claim
10 construction with this witness. This witness'
11 whole opinion is based on claim construction.

12 This witness put in his expert
13 report. He reviewed the prosecution history.

14 Now, Mr. Rhodes can say that
15 there's no basis for this at all. But the fact
16 of the matter is it is -- he showed them Figure
17 2 of the patent for a reason and he's trying to
18 interpret the claims.

19 THE COURT: Which portion of the
20 prosecution history are you planning to use?

21 MR. ANDRE: I'm going to go to the
22 one part, Notice of Allowance granted.

23 They noted dynamically in the
24 wherein clause. He just testified that it made

1 no sense for anyone to write that clause into
2 the claim. It was an examiner amendment.

3 THE COURT: And the Court's claim
4 construction, did we construe -- we construed
5 dynamically?

6 MR. ANDRE: Mm-hmm.

7 THE COURT: Did we construe
8 anything about the wherein clause?

9 MR. ANDRE: No. Everything he
10 testified to today, there were things that was
11 construed or attempted to be construed by
12 Facebook. And they were denied by Judge Farnan
13 or they were withdrawn.

14 They've gone back and are
15 recapturing their proposed claim construction.
16 But the dynamically, we did construe. The
17 wherein, we did not construe.

18 MR. ANDRE: Well, it was -- could
19 not be construed, because it was withdrawn.

20 THE COURT: It wasn't before us.
21 Okay.

22 MR. ANDRE: So he's giving his
23 ordinary meaning of it.

24 THE COURT: Okay. Mr. Rhodes.

1 MR. RHODES: We sat through, you
2 know, four hours of Dr. Vigna testifying what
3 the claims meant. I have asked the questions
4 phrased with the modifier to a person skilled in
5 the art, what would this language mean, which is
6 the appropriate foundation for an infringement
7 expert opinion.

8 Now, what Mr. Andre wants to do is
9 he wants to throw the same thing he showed in
10 opening to the jury and then argue his case
11 through the expert witness. It violates the
12 rules of claim construction, creates reversible
13 error.

14 And secondly, there's just no
15 foundation that he has any need to do this.

16 THE COURT: Here's where we are.
17 I'm going to overrule the objection.

18 I have permitted some testimony, I
19 think, along the lines of what has been outlined
20 by counsel. I'm going to stick to that.

21 I believe what Mr. Andre intends
22 to do is consistent with what I've allowed both
23 sides to do. The case has been prepared on the
24 basis of the claim construction that's in the

1 record.

2 This expert has indicated he's
3 seen the claim construction ruling and that his
4 opinion is based on the claim construction
5 ruling. He's not here saying he's got a
6 different opinion about claims than the Court
7 has.

8 And, of course, I'll be
9 instructing the jury on the meaning of the
10 claims afterwards. So I'll overrule the
11 objection.

12 (Conclusion of conference held at
13 side-bar.)

14 BY MR. ANDRE:

15 Q. So, Dr. Kearns, what I've handed
16 you is the prosecution history of the '761
17 patent. And I'd like to direct your attention
18 towards the back of the document.

19 MR. RHODES: Is this in evidence
20 here?

21 MR. ANDRE: It is.

22 THE COURT: I'm being told that it
23 is.

24 MR. ANDRE: Your Honor, it's --

1 THE COURT: It's been admitted.

2 It's PX-2. Correct.

3 MR. ANDRE: Yeah. That's correct.

4 THE COURT: It has been admitted.

5 You may proceed.

6 BY MR. ANDRE:

7 Q. If you will turn to the page with
8 Bates numbers LTI 000645, towards the back of
9 the document.

10 A. Okay.

11 Q. And you'll see a document from the
12 United States Patent Office called Notice of
13 Allowability. Do you see that?

14 A. I do.

15 Q. Okay. And if you'll turn to the
16 next page ending in Bates Number 646.

17 A. Yes.

18 Q. And you will see a paragraph there
19 that says examiner's amendment. Do you see
20 that?

21 A. Uh-huh.

22 Q. This is where the patent examiner
23 has made amendments to the record. It says
24 should the changes and/or additions be

1 acceptable to applicant, an amendment may be
2 filed as provide under 37 CFR.

3 You understand that this is the
4 patent examiner making an amendment to the
5 claims; right?

6 A. Okay.

7 Q. Okay. Turn to the next page.

8 You'll see --

9 MR. RHODES: Note my -- I have a
10 continuing objection, please.

11 THE COURT: Yes. You have a
12 continuing objection to this line of questions.

13 MR. RHODES: Thank you.

14 BY MR. ANDRE:

15 Q. You will see the pending claim at
16 the time that turned out to be Claim 1 in the
17 patent is issued. Do you see that?

18 A. I do.

19 Q. Okay. Now, the patentee
20 originally attempted to get claim language. And
21 what is the substance that is crossed out is
22 what the examiner crossed out.

23 And what is underlined is what the
24 examiner added. Okay.

1 You understand that?

2 A. Yeah.

3 Q. Okay. So the patentee tried to
4 get claim language that says is a
5 computer-implemented tracking component of the
6 network-based system for tracking a change of
7 the user from the first context to a second
8 context of the network-based system.

9 That's exactly as it is up on the
10 tracking component there; right?

11 Q. And then they try to add in and
12 automatically updating the stored metadata based
13 on the change. Do you see that?

14 A. Yes.

15 Q. So that's what the patentee wanted
16 to get. You understand that?

17 A. I do.

18 Q. And the examiner said, No. If you
19 take out the automatically, add in dynamically,
20 and add in wherein the user accesses the data
21 from the second context, then I'll give you a
22 claim.

23 Do you see that?

24 THE COURT: Before you answer.

1 Mr. Rhodes?

2 MR. RHODES: I object because --
3 this is a separate objection. This is now
4 implicating of what transpired at the Patent
5 Office and what -- apparently what the meaning
6 of that was.

7 I understood from the final
8 pretrial conference that that was off limits.

9 THE COURT: I'm going to overrule
10 it. We'll see if the witness has an answer to
11 these questions or not.

12 THE WITNESS: What was the
13 question again?

14 BY MR. ANDRE:

15 Q. I said: Do you understand that
16 the Patent Office made that change putting
17 wherein the user accesses the data from the
18 second context?

19 A. I mean, I'm kind of taking your
20 word here for who did what, and why this
21 language landed here and who took what
22 initiative.

23 So, you know, I'm looking at the
24 document in front of me, but you're also

1 describing a history that led to that. And I'm
2 taking your word for that part of it.

3 Q. Okay. That's fair enough.

4 So if that were the case, would
5 that have changed your opinion as to when the
6 metadata is updated in this claim in a temporal
7 response?

8 A. No.

9 Q. It wouldn't have?

10 A. No, it would not.

11 Q. Okay. Are you defining wherein in
12 the claims here as thereafter?

13 A. I'm viewing it as a wherein and
14 therein are both a little less clear than I
15 would like. I am interpreting that final step
16 as a sequential event following the events that
17 came before it. Yes.

18 Q. And so you are saying -- what is
19 your definition of wherein? I'll just start
20 with that.

21 A. If you actually look at the
22 dictionary definitions, they're not very useful.
23 Some of them are -- there's several of them,
24 depending whether you're viewing them as an

1 adjective or a conjunctive. But I think such as
2 is one of the synonyms.

3 Q. You have actually seen such as?

4 A. I believe so, yeah.

5 Q. How about in which, is that the
6 most popular one?

7 A. I'm not sure.

8 Q. During which?

9 A. I'm not a linguist. I can't tell
10 you what the most popular usage of wherein is.

11 Q. You looked it up in the
12 dictionary, the definition of it, didn't you?

13 A. Some time ago, yeah.

14 Q. And you didn't see in which or
15 during which?

16 A. I can't remember.

17 Q. Okay. But nonetheless, if you
18 would have saw this before you formed your
19 opinion, you would not have changed your
20 opinion?

21 A. No. No.

22 MR. ANDRE: You can take that
23 down.

24 BY MR. ANDRE:

1 Q. Now, your job was to look at the
2 claims of the patent and compare that to the
3 Facebook website; correct?

4 A. Correct.

5 Q. And it was not to look at the
6 prosecution history or -- strike that -- not to
7 look at the specification and use that in your
8 opinion; right?

9 A. Specification?

10 Q. Yeah, like the figures like we
11 just saw on the screen earlier today.

12 A. The stuff other than the claims
13 you mean?

14 Q. Right.

15 A. Correct.

16 Q. So when Mr. Rhodes showed you
17 Figure 2 and you gave testimony on that, that
18 should not have had any basis on your opinion;
19 correct?

20 A. Only insofar as it's sort of
21 consistent with what the claims themselves say
22 and reinforces the intention of the inventor.

23 Q. So --

24 A. But when it comes down to the

1 technical judgment about when Facebook
2 infringes, I stuck to the claims.

3 Q. And you used the Court's claim
4 construction; correct?

5 A. That's correct.

6 Q. Now, on Page 27 of your report,
7 you propose you put forth some claim
8 construction; correct?

9 A. I'm on Page 27. Yeah.

10 Q. Okay. On that page, you have a
11 definition of component; right?

12 A. I'm trying to find it. Can you
13 tell me which paragraph it's in?

14 Q. Sure.

15 A. Right. I see it. I see it.

16 Yeah.

17 Q. See it's in the top paragraph?

18 A. Yes.

19 Q. You've got it there?

20 A. Mm-hmm.

21 Q. And you used the definition of
22 component as a computer-related entity, either
23 hardware, a combination of hardware and
24 software, or software in execution; correct?

1 A. Right.

2 Q. And you gave sworn testimony in
3 your deposition that that was a definition you
4 used in determining whether there was a context
5 component or a tracking component; correct?

6 A. That's correct.

7 Q. This is the Court's claim
8 construction order on component. Do you see
9 that?

10 A. I do.

11 Q. You didn't use the Court's claim
12 construction on component, did you? You see
13 where the software is right here?

14 That's not in your definition, is
15 it?

16 A. I'll take your word for it.
17 Combination of software, okay.

18 Q. What's that?

19 A. Agreed that that's been
20 inadvertently dropped in the quote of the
21 attempt to quote the Court's terminology.

22 Q. And in forming your opinion, you
23 used what was written in your expert report and
24 what you support to in deposition; right?

1 A. That's correct.

2 Q. So you didn't use the Court's
3 construction regarding software being a
4 component?

5 A. I view this as sort of an entirely
6 cosmetic textual error that doesn't in any way
7 affect the opinions I've expressed here or in my
8 report.

9 Q. Well, if software cannot be a
10 component --

11 A. Software in execution and software
12 in this phrase are basically playing the same
13 role.

14 Q. Now, the PHP code, once it's
15 compiled in the Facebook website, that's
16 software; right?

17 A. Well, PHP is a programming
18 language, not software itself.

19 Q. I said when it's compiled.

20 A. Okay. But also PHP can be used to
21 do nothing but actually store textual
22 information. It's not -- PHP could either be
23 data or code, so to speak, for instance.

24 Q. But PHP compiled is software;

1 correct?

2 A. If there's any -- if there's any
3 actual execution coded, yeah.

4 Q. The point being?

5 A. I'm not sure what it is, where you
6 are trying to go with this.

7 Q. My point is you didn't use the
8 Court's claim construction as written; correct?

9 A. I disagree with that. You're
10 basically pointing out that in transcribing what
11 was written in the Court's claim construction
12 into my report, I happened to drop a word. I
13 applied the Court's claim construction in
14 considering the patent and Facebook.

15 Q. But your sworn testimony said
16 otherwise; correct?

17 A. So are you really trying to ding
18 me on the fact that this word got dropped? Is
19 that -- or are you trying to do more than that?

20 Q. I'm just asking you a question,
21 Dr. Kearns. I'm not trying to ding you. I just
22 want to know.

23 A. I disagree. I used what's shown
24 up there, and I happened to not write exactly

1 that with the word that you've highlighted in my
2 report. But I used what's there in that ruling
3 in interpreting the patent.

4 Q. How about the word context, did
5 you use the Court's claim construction of
6 context?

7 A. I did.

8 Q. And what did you use?

9 A. If I recall correctly -- by the
10 way, I mean, I think many of these things don't
11 matter for the opinions I've expressed. But I
12 believe they define context to be the same as
13 environment.

14 Q. And so when you see the term
15 context information, that should be
16 environmental information; correct?

17 A. Sure.

18 Q. But you didn't interpret context
19 information as environmental information, did
20 you?

21 A. I'm not sure what you mean by
22 that. I mean, you're -- let me point out that,
23 I mean, just in my own opinion, the Court's
24 ruling of context and environment being

1 synonyms, I don't find it a super useful
2 definition, because it's sort of equating two
3 equally ambiguous terms, including the way
4 they're used in the patent.

5 But I did. You know, to the
6 extent it -- I don't think it's material to the
7 opinions I expressed.

8 Q. So the Court's construction of
9 context and environment, you also equate that to
10 workspace; correct?

11 A. No. I interpreted workspace
12 separately because it wasn't -- I don't believe
13 a definition was given, or at least it wasn't
14 equated to environment and context.

15 Q. If you look down to Paragraph 46,
16 same page you're on in the expert report, you
17 actually define context information as something
18 quite differently; correct?

19 A. Where exactly are you?

20 Q. Well, don't you define context
21 information to include information relating to
22 context?

23 A. I am just trying to find where on
24 the paper you are.

1 Q. I'm on Paragraph 46.

2 A. Page 46 or Paragraph 46.

3 Q. I am sorry, Paragraph 46.

4 A. Yeah.

5 Q. So you have defined context
6 information with a special meaning; correct,
7 based on the specification?

8 A. Right.

9 Q. And that meaning of context
10 information is not environmental information or
11 environment information, but a special meaning;
12 correct?

13 A. I am not sure what you mean. I'm
14 not sure what you're driving at here.

15 I mean, I'm talking about context
16 information here. The Court has also
17 independently decided that context and
18 environment are synonyms for the purposes of
19 this case. I'm here talking about what the '761
20 refers to. I'm here quoting from the patent
21 their definition of what should be held in the
22 context metadata.

23 Q. But your definition of context
24 information states that it has to include data

1 representation of the first context and the data
2 and the application; correct, that's your
3 understanding of what context information is?

4 A. That's a quote from the patent
5 there.

6 Q. I understand, but that's your
7 definition that you used in your opinion?

8 A. I did apply the language that the
9 patent itself gives to context information in
10 evaluating the patent in Facebook's technology,
11 yes.

12 Q. And that came from the written
13 description before the claims and the
14 specification; correct?

15 A. So here I'm talking about a part
16 of the patent, right, that's -- right, that's
17 prior to the claims.

18 Q. And you also gave a special
19 definition to context data, very similar;
20 correct?

21 A. Where are you looking, in the same
22 place? Yes.

23 Q. And the term workspace, you also
24 gave that a special definition; correct? If you

1 go to page 53.

2 A. Yes, I see it.

3 Q. And did you give workspace a
4 special meaning for the claims?

5 A. I would say that the inventor did.
6 Let me point out that the claims themselves, the
7 patent uses these terms like workspace, context
8 and environment, very liberally and apparently
9 interchangeably as far as I can tell. They are
10 not precisely defined in the claims themselves.

11 They are defined elsewhere in the
12 patent and so to me the best place given, in the
13 claims they are obviously not specified
14 precisely in the claims themselves, the most
15 natural place for me to look was elsewhere in
16 the patent. I'm not -- these are not my
17 interpretations, this is language straight from
18 the patent itself.

19 So if you're asking me does this
20 language actually appear in the claims of the
21 patents, the patent, no, and I would say that's
22 kind of the fault of the patent, not me.

23 Q. And that's exactly my point.

24 You're given these definitions to these claim

1 terms based on what was said in the patent;
2 correct?

3 A. Correct.

4 Q. And like workspace, for example,
5 would not be a -- the interpretation you have
6 given here on page 53 meaning that workspace is
7 a collection of data and applications
8 functionally related to the user defined topic,
9 that wouldn't be a definition of workspace, you
10 would give it in its normal ordinary use when
11 you're teaching at Penn; correct?

12 A. Well, a lot of these terms don't
13 have an ordinary meaning or use.

14 Q. Workspace doesn't have an ordinary
15 meaning or use?

16 A. Not to computer scientists.

17 Q. So you went in and took the
18 language from the patent and applied that for
19 your definition; correct?

20 A. Yes. But again, I don't think
21 that the various interpretations are really
22 material to the opinions I've stated.

23 Q. So the Court's interpretation of
24 the claims were not material?

1 A. I didn't say that. Right.

2 Q. What did you say?

3 A. I said that, you know, again, I'm
4 simply stating the fact that the patent itself
5 offers terms like workspace environment, very,
6 very liberally and quite often interchangeably.
7 But I think that the logic that I described of
8 the steps of the patent sort of holds whether
9 you are talking about context, environments,
10 workspace, what have you.

11 MR. ANDRE: Your Honor, at this
12 point, I would like to make a motion to strike
13 Dr. Kearns' testimony for not using the Court's
14 claim interpretation.

15 THE COURT: Let's go to side-bar.

16 (Side-bar discussion:)

17 MR. ANDRE: Your Honor, he used
18 improper construction of the Court's
19 interpretation of component. He's gone in and
20 added several interpretations of terms that are
21 found in every asserted claim that were rejected
22 by this Court as a limitation and the Court
23 should give ordinary meaning to. He's based his
24 opinion upon his restricted constructions of the

1 claims themselves, therefore, it would be
2 reversible error to allow his opinion to come
3 in.

4 THE COURT: Mr. Rhodes.

5 MR. RHODES: I thought he said
6 that it was a typographical error that they
7 didn't properly transcribe the Markman ruling.
8 He said he applied it is the first point. The
9 second point is he just now testified that it
10 was not material to his analysis what the
11 patentee defined. And he didn't base his
12 analysis on on that definition. I think this is
13 much to do about nothing to quote an ancient
14 English playwright.

15 THE COURT: I'm not going to have
16 a motion to strike at this time, but you might
17 have a basis to make an application after the
18 trial. But I'm not going to strike the
19 testimony at this point in time during the
20 trial.

21 (End of side-bar.)

22 BY MR. ANDRE:

23 Q. Dr. Kearns, on page 25 of your
24 expert report, you provide a basis of

1 noninfringement regarding context; correct?

2 A. That's correct.

3 Q. There are multiple contexts on
4 Facebook's website?

5 A. Right.

6 Q. And it was your opinion both at
7 deposition and in your report that the Facebook
8 website does not have more than one context, you
9 cannot move from context to context; correct?

10 A. That's correct.

11 Q. And you changed your opinion
12 today?

13 A. Let me give a more nuanced opinion
14 which I think that the idea that Facebook is a
15 single context is a much closer, a much more
16 accurate description than viewing every single
17 page view that a user experiences in Facebook as
18 an entirely separate context.

19 Q. But you had previously testified
20 in this case and provided an opinion that your
21 fundamental basis of noninfringement is that
22 Facebook does not have more than one context;
23 correct?

24 A. That's not true. This is sort of

1 an ancillary comment I'm making, but when -- as
2 the report makes very clear when I go on to
3 examine Dr. Vigna's report, I basically adopted
4 the view that each different page view of
5 Facebook is a separate context. So that's not
6 the basis for my noninfringement case. And I'm
7 not discussing the claims of the patent in this
8 part of the report, either.

9 Q. So it is your opinion today that
10 Facebook does have multiple contexts when it
11 goes from profile page to profile page?

12 A. Again, the context has not been
13 precisely defined, so my opinion is that
14 Facebook has far fewer contexts than every
15 single page view being a different one. But
16 yeah, I'm happy to concede the idea that it's
17 possible that it's reasonable to think of
18 Facebook as having multiple contexts and I did
19 so in examining Dr. Vigna's report, that's
20 exactly what I did. In fact, I adopted the
21 extreme view that every single page view was a
22 different context.

23 Q. So put Dr. Kearns' slide where
24 he's talking about the Facebook page. So this

1 was a presentation that you put together;
2 correct?

3 A. That's correct.

4 Q. As we walk through the
5 presentation, go to the next slide; the next
6 one. Keep going. Okay.

7 So when you have this picture of
8 Mr. Rhodes up here, and it goes into the server
9 here; correct?

10 A. Correct.

11 Q. The metadata is added to the photo
12 table; right?

13 A. That's correct.

14 Q. Could you go to the next slide.
15 And this is context information;
16 correct?

17 A. I do not consider that to be
18 context information under any of the
19 interpretations of context that we've discussed.

20 Q. Would it surprise you that we had
21 a few Facebook engineers here yesterday and
22 today, and they have described this as context
23 information?

24 MR. RHODES: Your Honor,

1 objection. The witness was sequestered. If he
2 wants to rephrase it perhaps.

3 THE COURT: Sustained.

4 BY MR. ANDRE:

5 Q. Let me ask you a question. You
6 say it's not context information because it
7 doesn't say anything about the photo here?

8 A. What do you mean about the photo?
9 That's all it talks about is the photo.

10 Q. It doesn't give context of the
11 photo, for example, where it was uploaded?

12 A. The context under Dr. Vigna's
13 interpretation is the sort of profile page
14 itself, the location within Facebook's website
15 that I am.

16 Q. So the album I.D. that's on the
17 profile album, does that tell you where it is?

18 A. No, it doesn't. It tells, like,
19 that's a type, it just says profile. It doesn't
20 say, you know, there is no location information
21 there, in the same way that projects doesn't
22 identify an environment or friends or so on and
23 so forth. This is just to say that it's a photo
24 that's part of the user's profile. It doesn't

1 say anything about the environment in which that
2 photo was created or uploaded.

3 Q. Does it tell you who it was
4 created by?

5 A. It does.

6 Q. And it tells you the -- this is
7 not -- actually this is not a proper photo table
8 from Facebook, is it?

9 A. No, it's not.

10 Q. This is a mockup of a few columns?

11 A. That's correct.

12 Q. If you had the technical documents
13 here, could you look at all the columns they
14 had?

15 A. I could.

16 Q. Could you determine then if they
17 did provide all that information you were
18 talking about like the location?

19 A. Yes, like the URL, the URL isn't
20 stored in that table.

21 Q. The U R L is the only basis for
22 having context information?

23 A. No, I could image others, but
24 there is nothing that I felt was in that table

1 that's indicative of the context that it was
2 created in. It's information about the photo as
3 far as I'm concerned.

4 Q. Keep on with the slides.

5 So this information is not context
6 information to you?

7 A. Not to me.

8 Q. And, therefore, it's your opinion
9 that they're not capturing the context
10 information at Facebook?

11 A. That's correct.

12 Q. Are they capturing the context
13 information at any other place other than the
14 photo table?

15 A. Not to my knowledge, no.

16 Q. So when you upload a photo in
17 Facebook, they have no idea where it came from,
18 it shows up magically?

19 A. No. Clearly they're storing the
20 photo, right, they know about the photo, they're
21 storing the photo, absolutely.

22 Q. Do they know where it came from?

23 A. What do you mean where it came
24 from? They know what user uploaded it, sure.

1 Q. And where he loaded it from?

2 A. Not necessarily, they're not
3 storing that in the photo table.

4 Q. I'm not saying photo table, I'm
5 saying anywhere?

6 A. I'm not aware of precise location
7 or environment or context information about
8 where the photo was uploaded being stored.

9 Q. But you have looked at the
10 Facebook code to some degree; right?

11 A. Yeah.

12 Q. You looked at some of the
13 technical documents?

14 A. Yeah.

15 Q. You know they know where the photo
16 comes from; correct?

17 A. This is not done by Facebook. I
18 mean, I think you're talking about sort of
19 browser technology and cookies.

20 Q. Dr. Kearns, is it your testimony
21 that when I upload a photo to Facebook from my
22 computer at my home, Facebook has no idea that's
23 coming from me at that URL address?

24 A. No, it's not -- it's a question of

1 whether Facebook's technology has anything to do
2 with how they know that.

3 Q. So what about the time the photo
4 was uploaded, is that included in the photo
5 table? Not this photo table, this is not a real
6 photo table.

7 A. I'm not sure. I don't know off
8 the top of my head.

9 Q. If time was included, would that
10 be context information?

11 A. I wouldn't consider it so.

12 Q. You wouldn't consider time context
13 information, environmental information?

14 A. The patent doesn't talk about time
15 being part of context information. It talks
16 about the data and applications that are
17 available, the ways that the user can access
18 those application, the ability to create data.

19 Q. But you're using the Court's claim
20 construction of context as an environment?

21 A. Right.

22 Q. So wouldn't that be time?

23 A. I don't see why equating context
24 and environment argues one way or the other

1 whether time should be context information.
2 Again, I think that one of the problems with the
3 patent is its ambiguity. I'm not going to argue
4 to the end about whether time -- I could see
5 somebody interpreting time information as being
6 context information.

7 Q. Okay. And in this actual photo
8 table, not these cartoons that we have been
9 seeing, in the actual photo table from Facebook,
10 they record the time, don't they?

11 A. They may well do so.

12 Q. And the album ID that's recorded
13 at Facebook actually provides a unique album ID,
14 not a type; correct?

15 A. Correct.

16 Q. And that unique album ID would
17 give you location, wouldn't it?

18 A. It would give you -- I think it
19 would just reference a row of a database table
20 about that album.

21 Q. But that would also give you the
22 location; correct, the unique album ID, that
23 would give you context information?

24 A. It would give you location

1 information about that album.

2 Q. So when you show this photo table
3 here with just the five columns, that doesn't
4 include other information that would be context
5 information, does it, like the time?

6 A. I don't consider those things to
7 be context information, but sure. I mean --

8 Q. I'm not sure I understand that
9 answer. I'm sorry. You wouldn't consider time
10 to be a context information? I thought we
11 agreed it was context information?

12 A. I don't consider it, but I think
13 there is some ambiguity to the point, I'll
14 concede that.

15 Q. What would be context information?

16 A. Context information would be
17 information, I mean, certainly it would --
18 information that precisely located the users
19 within Facebook servers, within its web system,
20 like the URL or some other internal identifier
21 that was sort of unique to that page or
22 environment, because the patent was being
23 interpreted in a way that each page was a
24 separate environment so there was clear

1 identifying information about the precise page
2 and that was being tracked as you went through
3 Facebook, I would consider that under the claim
4 construction as context information.

5 Q. And is there anything else other
6 than that? That's the only information that
7 you're willing to concede?

8 A. To me that would be the most
9 important one. Then if you additionally added
10 other information with that, that could also be
11 considered part of the context information.

12 Q. So as you sit here today, you
13 provided testimony that this mockup of a table
14 doesn't have context information, but that the
15 actual Facebook photo I.D. table might have
16 context information in it?

17 A. That's -- I have expressed my
18 opinion that I don't think so.

19 Q. But you can't say for sure as you
20 sit here today whether it does or not?

21 A. I stand by my assertion that I do
22 not believe that the photo table contains
23 contextual information, context information.

24 Q. Let's roll through the slides one

1 more. So as we go through the slides again, you
2 see Mr. Rhodes becoming a friend, writing on
3 Ms. Keefe's wall here; correct?

4 A. Right.

5 Q. When that happens, you said this
6 photo table doesn't change; right?

7 A. It does not get updated.

8 Q. It doesn't get updated in the
9 metadata. Metadata is being generated
10 elsewhere, though; right?

11 A. Not generated elsewhere, but data
12 about the data.

13 Q. That activity right there
14 generates metadata that's being stored in, for
15 example, the minifeed table?

16 A. The comment posting, yes.

17 Q. And it also generates metadata in
18 the wall table; right?

19 A. Well, the minifeed is what is the
20 service that the wall uses when it wants to
21 display recent activity of the user.

22 Q. But they have separate tables,
23 though; right?

24 A. The recent activity in the wall is

1 fed by minifeed. The wall is sort of the
2 service that accesses minifeed.

3 Q. I understand that. There is a
4 wall table and a minifeed table; right?

5 A. Correct.

6 Q. And when you make this comment,
7 metadata is updated in both those tables; right?

8 A. Correct.

9 Q. And those tables along with the
10 photo table are under the same user database;
11 right?

12 A. They're all about users, yes.

13 Q. I'm not asking about users.

14 A. Are they're separate tables? They
15 are all separate tables.

16 Q. They're all in the same database?

17 A. I wouldn't -- they're separate
18 systems, right. These are separate database
19 systems. They have different number of columns
20 so they have to be sort of stored separately and
21 managed separately because they have a different
22 format to them.

23 Q. So is it your testimony that those
24 three tables are not in the user database as far

1 as you know?

2 A. I'm sort of confused by your
3 terminology. I guess if we want to call the
4 user database the collection of databases that
5 have to do with users, then they're in the
6 common user database, yes.

7 Q. And you testified that the photo
8 table and the minifeed table are in different
9 structures; correct?

10 A. That's my understanding.

11 Q. And when you look at source code,
12 did you look at the schema.multi?

13 A. I believe so.

14 Q. And wasn't the photo table and
15 minifeed table both located at schema.multi?

16 A. They may have been.

17 Q. So doesn't that contradict your
18 statement that they're in different structures?

19 A. I don't think so. It depends what
20 we mean by structure because there is both
21 hardware and software structures going on here.
22 Again, these are separate databases that have to
23 be stored separately because they have a
24 different schema or formats to them.

1 I mean, at some level if we
2 broaden our definition enough, then everything
3 is data about everything else and the whole
4 world infringes on this patent. Right? I mean,
5 but the reality is that these are separate
6 storage tables within Facebook's architecture
7 and they have to be primarily because they have
8 different numbers of columns and different
9 entries in those columns.

10 Q. And the claims themselves, they
11 don't require that storage component to be in
12 the same location, they can be separate, right,
13 they can distributed?

14 A. There is not claim language which
15 explicitly excludes that, you're right.

16 Q. It can be distributed, it can be
17 in multiple places, that's what you testified to
18 earlier; right?

19 A. The claims certainly don't exclude
20 that possibility.

21 Q. Would you go to the next slide.
22 Actually, let me turn to the claims. Do you
23 have Claim 1? I'm sorry, go to Claim 9.

24 When you're going through Claim 1

1 up on the board and drawing out the circles and
2 the lines and kind of going through this
3 temporal issue here, you said that basically
4 they all followed the same temporal path, and it
5 has to be in this series of steps that you've
6 identified; right?

7 A. Correct.

8 Q. And you're not an expert in claim
9 interpretation, right, you're a scientist;
10 right?

11 A. That's correct.

12 Q. So when you're looking at this
13 element right here, the Claim 9, tracking
14 movement of the user from the user environment
15 of the web-based computing platform to a second
16 user environment of the web-based computing
17 platform, do you see that?

18 A. I do.

19 Q. I believe you testified on direct
20 that Facebook doesn't do this; is that correct?

21 A. That's correct.

22 Q. It's your testimony that Facebook
23 doesn't track its users as they go from one
24 profile page to another?

1 A. That's handled by your browser and
2 the cookies in your browser.

3 Q. Can you go to PTX 1001. Go to the
4 second page. Go up here. Blow up that a little
5 bit. This is from a Facebook document. We keep
6 track of the actions you take on Facebook such
7 as adding a friend, becoming a fan of a Facebook
8 page, joining a group, et cetera; correct?

9 A. Correct.

10 Q. Are you saying that Facebook
11 doesn't track its users?

12 A. I'm saying it doesn't track their
13 navigation. So clearly there is a set of
14 actions that Facebook deems sort of sufficiently
15 worth remembering and storing and tracking and
16 it's describing some of those here. It does not
17 track and monitor and store your navigation
18 through the Facebook system.

19 Q. So you don't understand that
20 Facebook has a 20 billion page hit a day?

21 A. Yes, I know it's a very large
22 system.

23 Q. You know they track those page
24 hits every time you go from a new page, they get

1 a person who goes from one page to another page
2 and the time they did it?

3 A. They have very low level -- this
4 is not what I would consider Facebook
5 technology, this is low level like Apache
6 server.

7 Q. But Facebook is doing it?

8 A. I'm sure that Facebook uses
9 standard commercial technology like Apache
10 servers that do store navigation information at
11 a very low level, but this is --

12 Q. Wherever they get the technology
13 from is one thing or the other, but I'm saying
14 Facebook at the Facebook offices, they track
15 their users going from one page to another, they
16 keep track of this; correct?

17 A. I wouldn't put it that way. There
18 is a very real sense that when you get to a
19 Facebook page it's forgotten where you are in
20 its system. Right? So in particular, the way
21 it knows where to take you next if you click on
22 a link is because that link itself contains
23 where you want to go next. And the cookies
24 authenticate who you are.

1 And if you, for instance, erase
2 those cookies and try to then follow a link, it
3 will basically say I don't know who you are, you
4 have to log in again, so on and so forth.

5 Q. So I'm just not sure I'm following
6 you here. I'm sorry, Dr. Kearns, I'm doing my
7 best here.

8 So when Facebook logged me as Paul
9 Andre, and I'm going to go to the Italian Food
10 Lovers group, they know that Paul Andre went to
11 the Italian Food Lovers group page, they log
12 that event and the time I did it; correct?

13 A. I'm not sure that they do.
14 Remember the link that you gave to them when you
15 clicked on that had a self-contained address
16 that told you where to take them.

17 Q. So you don't know if -- how they
18 keep track --

19 A. I think it's possible that at a
20 very, very low level, subsystem that's not
21 Facebook's technology, but is just sort of
22 standard web server technology that they might
23 store sort of the history of location that you
24 have been, but they don't use it in any of them

1 there, they don't use it in any of the
2 technology that a user, that -- you know, in
3 order to implement the actual Facebook -- in
4 other words, if you deleted, they're probably
5 frequently doing that, if they have such logs
6 they would quickly become overwhelmingly large,
7 if you didn't do that, Facebook would operate
8 exactly as it does now. If they have it, it's
9 not used well, it's just too much information.
10 It would be completely unscalable.

11 Q. But you don't know as you sit here
12 today whether they have it or not?

13 A. I would believe that they probably
14 use Apache server technology or similar
15 technology that for some amount of time keeps
16 that information at the lowest level, but I
17 don't believe it's touched by Facebook software
18 at all. These server logs, I mean, the best
19 analogy, they're like the black box in
20 commercial airliners, they're just -- if they're
21 there, they're recording things and they're not
22 used for anything except in the case of let's
23 say a system failure and you want to sort of go
24 back and figure out.

1 Q. I think I get your position. They
2 do it, but it's just not important to them?

3 A. Nor is it used in any of the ways
4 described in the patent.

5 Q. Well, let's go back to Claim 9.
6 It's not used in a way of tracking movement of
7 the user from the first environment to the
8 second environment?

9 A. And then updating metadata, no.

10 Q. I'm not saying that. This is a
11 completely separate claim element here. You
12 understand when you did your a infringement
13 analysis, you did element by element?

14 A. I think we're having an agreement.
15 I believe that Facebook keeps this very, very
16 low level information around. I don't think
17 that constitutes the tracking component that's
18 being described in the patent.

19 Q. Claim 9 doesn't have a tracking
20 component, does it?

21 A. That particular language is not
22 there.

23 Q. This is just what Facebook does,
24 they track people, this is a method claim?

1 A. So if you want to call low level
2 server logs tracking movements, then, you know,
3 every company since the dawn of the web has been
4 doing that and, you know, sure, Facebook does
5 that, too. I concede that.

6 Q. So we're seeing eye to eye on
7 this?

8 A. We see eye to eye. We disagree on
9 its relevance to the patent, but --

10 Q. But it's a claim element, it's a
11 separate claim element. If I have a little box,
12 I would put a checkmark and say that one is
13 infringed by Facebook; right?

14 A. Again, that's not -- that's not my
15 opinion. That's not my opinion. That's not how
16 I'm reading this claim.

17 Q. I'm not talking about the claim,
18 I'm talking about this claim element. That's
19 not how you're reading that claim element?

20 A. I don't think that the technology
21 that we're discussing sort of serves that
22 purpose. If you want me to just say do I
23 consider low level Apache server logs to in some
24 way track movement, then, yes.

1 Q. What I'm asking is -- we're
2 getting close, I think. Does Facebook track
3 movements pursuant to this claim element at
4 Facebook servers in California or on the East
5 Coast or wherever, do they actually do this
6 element here?

7 A. Yes, at an extremely low level
8 that's never used by a system.

9 Q. We got a yes. I'll get off of it
10 then.

11 Now, the next step you have is the
12 dynamically updating the stored metadata within
13 an association of the data, the application,
14 wherein the user employs at least one of the
15 application and the data from the second
16 environment. Do you see that?

17 A. I do.

18 Q. According to you, or your
19 interpretation, I should say, this dynamic
20 updating of the stored metadata with an
21 association of the user data and the second user
22 environment, the claim element kind of stops
23 there, right, it goes -- according to you, it
24 just grammatically -- it comes before the

1 sentence, that's a preceding event, you're using
2 a straight grammatical interpretation?

3 A. I'm not sure what the question is.
4 Say it again.

5 Q. Mr. Rhodes and you have talked
6 quite a bit about dynamically. You said
7 dynamically has to be preceding, something
8 before?

9 A. The Court defined it as
10 automatically and in response to the preceding
11 event.

12 Q. Preceding event?

13 A. Yeah.

14 Q. And in your definition, just based
15 purely on the way the claim is written, that
16 would have to be up here somewhere?

17 A. Yes.

18 Q. So if I said I'm going to the
19 movies after dinner, well, the movies would be
20 before I say dinner, right, and under that
21 definition, the movie would not be a preceding
22 event; correct?

23 A. I'm not sure -- run your example
24 by me again.

1 Q. I'm going to the movie after
2 dinner.

3 A. Right.

4 Q. If I had that in a sentence, movie
5 would not be a preceding event just because it's
6 before that in the sentence?

7 A. That's right.

8 Q. It really turns into why is this
9 wherein clause here; correct?

10 A. Yes.

11 Q. Dynamically update the metadata,
12 you associated with the data, wherein the user
13 employs at least one of the applications from
14 the second environment; correct?

15 A. Correct.

16 Q. And your interpretation is that
17 has to be related to the tracking, even though
18 it's a completely separate claim element?

19 A. That's correct. It's an
20 additional step of this process.

21 Yes.

22 Q. So this is really a two-element
23 process, in your opinion?

24 There's first dynamically

1 updating, second is the wherein?

2 A. That's my interpretation of it.

3 Yeah.

4 Q. All right. So one element is now
5 two elements in your interpretation?

6 A. I think that the word element has
7 some specific legal meaning, so I would prefer
8 to call it just two steps.

9 THE COURT: Mr. Andre, it's not
10 time for dinner, but it is time for lunch.

11 We're going to let the jurors take
12 their lunch break and have you back here in time
13 to get started at 1:30.

14 THE CLERK: All rise.

15 (Jury leaving the courtroom at
16 12:31 p.m.)

17 THE COURT: Professor Kearns,
18 you're free to step down. I'm going to be
19 talking to the lawyers for just a minute.

20 You can all have a seat. I just
21 wanted to tell you what we're going to do when
22 we get to Mr. Lamb's deposition with respect to
23 the errata sheet issue that we discussed this
24 morning.

1 What will happen is when you're
2 playing all of the video excerpts of Mr. Lamb,
3 because I think there are others besides the
4 portion where the errata comes up, just play the
5 original straight through like we've played all
6 of them. After that, I will briefly instruct
7 the jury that, as they've already heard, there
8 is discovery taken before trial including
9 depositions under oath, which are evidence, and
10 that parties who are deposed have the right to
11 enter corrections. And that Mr. Lamb did that
12 in this case.

13 And we're now going to have you
14 hear the testimony that includes the
15 corrections. And at that point, counsel for
16 Facebook, you'll probably need two of you. I
17 want you to read the question and answer of that
18 portion of the testimony, which is roughly
19 speaking 193 to 199.

20 And as you read the answers,
21 you're to read the corrected answers.
22 Understood, Mr. Rhodes?

23 MR. RHODES: I believe so, Your
24 Honor. Do you want us to actually go so far as

1 to put somebody there or you just want me to
2 read it into the record?

3 THE COURT: Mr. Andre, do you have
4 a view on that issue?

5 MR. ANDRE: However they prefer to
6 to it, Your Honor, is fine.

7 MR. RHODES: I'll just read it.
8 That is fine.

9 MR. ANDRE: I'd like to have two
10 people read it.

11 THE COURT: You've got to have two
12 people read it, but whether you have two people
13 standing next to each other or one on the
14 witness stand and one at the podium is up to
15 you.

16 The errata sheet itself will not
17 come into testimony. The testimony will be read
18 into the record and there will be an instruction
19 on this issue in the final jury instructions as
20 well.

21 THE COURT: All right. We're in
22 recess until 1:30.

23 (A brief recess was taken.)

24 THE CLERK: All rise.

1 THE COURT: Good afternoon.

2 (Everyone said, Good afternoon.)

3 THE COURT: Are we ready to bring
4 the jury in?

5 MR. ANDRE: Yes.

6 MR. RHODES: Yes.

7 (Jury entering the courtroom at
8 1:40 p.m.)

9 THE CLERK: All rise. Be seated.

10 THE COURT: Good afternoon and
11 welcome back.

12 Mr. Andre, you may proceed.

13 MR. ANDRE: Thank you, Your Honor.

14 BY MR. ANDRE:

15 Q. Good afternoon, Dr. Kearns.

16 A. Good afternoon.

17 Q. If we could go back to the slide
18 that we were looking at before the lunch break.
19 Dr. Kearns, you recall the photo table we're
20 talking about here, the cartoon of this photo
21 table here.

22 Now, if someone were to say that
23 this table contains context information, would
24 they be wrong, in your opinion?

1 A. They would.

2 Q. Let's assume for argument's sake
3 that this is context information in this table.
4 Okay.

5 This is metadata about the context
6 information; correct?

7 A. You're asking me to assume that?

8 Q. Make that assumption.

9 A. Okay.

10 Q. Now, based on your interpretation
11 of the claims, when the tracking component is
12 activated, you just have to add metadata, you
13 don't have to change the content information;
14 right?

15 A. My understanding or reading of the
16 patent would be that you need to alter the
17 metadata, the contextual metadata stored with
18 the photo.

19 Q. So your understanding is that
20 updating is altering or changing the actual
21 data?

22 A. Or metadata. Yes.

23 Q. It's an update to something?

24 A. Yes.

1 Q. So, in other words, if someone
2 were to -- if I update my CD collection, I just
3 can't buy new CDs and put them in there, I have
4 to do something and update my CDs?

5 A. I'm not -- I don't quite follow
6 you.

7 Q. Well, the word updating, you're
8 interpreting that to mean changing or altering;
9 correct?

10 A. That's correct.

11 Q. So adding new metadata somewhere,
12 is that altering?

13 A. I guess it would depend. It's
14 sort of adding a new road to this table
15 entirely. I wouldn't consider an update of
16 another row.

17 If you were to write a missing
18 entry into an existing row, I would consider
19 that an update of that row.

20 Q. So if all the rows are full, I
21 mean, all the columns are full on the row as
22 Facebook would do when they collect this
23 information about the photo, your understanding
24 of updating would be they have to actually

1 change what's in those columns; correct?

2 A. That would be my -- the most
3 natural interpretation, yes, as opposed to
4 adding entirely separate rows to this table or
5 changing data in some other place entirely.

6 Q. But the claims themselves just say
7 updating the metadata; right?

8 A. They just say updating the
9 metadata.

10 Q. And if you add a table to a
11 database, is that updating the database?

12 A. If you add a table to a database,
13 you would be updating the overall database,
14 sure, not other tables in the database.

15 Q. And so if you update -- if you
16 added metadata, you would be updating overall
17 metadata?

18 A. I mean, again, if you sort of
19 broaden the definition of metadata and data
20 enough to be very, very inclusive, and we can
21 call, you know, a change of anything an update
22 of anything else.

23 Q. Well, no. I'm talking about
24 metadata. If you have --

1 A. Same comment to metadata. If you
2 define metadata to be sufficiently broad and
3 inclusive, then sort of updating any piece of
4 metadata is an update to all of the other
5 metadata.

6 Q. Right. So if we get the
7 definition of metadata of just data about data,
8 the broadest possible interpretation, then if
9 new metadata is added, then you update the
10 metadata?

11 A. Yeah. I would agree.

12 Q. All right. Fair enough.

13 Now, your interpretation of the
14 claims, as you walked through them this morning
15 with Mr. Rhodes, is that essentially all four
16 independent claims all have essentially the same
17 meaning when it comes to the tracking aspect of
18 the claims; correct?

19 A. It seems to me, yes.

20 Q. And you didn't offer an opinion
21 one way or the other regarding the dependent
22 claims, did you?

23 A. I mean in my report, I think I
24 said brief things about them and the fact that

1 since they're all dependent, you know.

2 Q. But I'm talking about today with
3 Mr. Rhodes, you didn't talk about the dependent
4 claim others than the fact --

5 A. Not in any detail, sir.

6 Q. Okay. Now, early in your
7 testimony, you talked about the possible uses
8 for the invention of the '761 patent.

9 And you said it seemed to be
10 somewhat business related, but it could be for
11 other things as well; right?

12 A. Right.

13 Q. And it could be for recreational
14 purposes, for example?

15 A. There's no language in the patent
16 that would exclude that, sir.

17 Q. And back in -- I believe you said
18 you started one of the early social networking
19 courses there at Penn. That was 2003, 2004 time
20 period?

21 A. That's right.

22 Q. And that term didn't really gain a
23 lot of notoriety until probably after that;
24 right?

1 I mean, it wasn't a term used very
2 often at that time?

3 A. I would say circa 2002-2003, we
4 were starting to see that term enter sort of
5 popular language. But, you know, a couple of
6 years before that, most people wouldn't have
7 associated that term with any specific kind of
8 technology.

9 Q. All right. And Facebook itself
10 wasn't founded until 2004 and that's by far the
11 largest social networking site in the world?

12 A. That's right. But things like
13 Friendster were around like a year or more
14 before that.

15 Q. I'll ask you one other question.
16 Do you have Claim 1?

17 When you see the word right here
18 based on the change, the word based, that's what
19 I want to say.

20 Do you interpret that as because?

21 A. In response to.

22 Q. So --

23 A. I see that as sort of reinforcing
24 the phrase dynamically in the Court's

1 construction.

2 Q. I understand. So that's your
3 definition in response to or because of?

4 A. In response.

5 Q. So if I wrote a book based on
6 George Washington's life, it's because I wrote a
7 book because George Washington lived?

8 A. I consider that to sort of be
9 taking what I'm saying out of context here. I
10 mean, we're talking about the patent. We're
11 talking about a precise series of steps to
12 implement my computer.

13 Q. I understand your definition. I'm
14 trying to get the word based.

15 A. Yeah. So the definition of based
16 that I would use here would be in response to.

17 Q. In response to or because of?

18 A. And again, taking that -- if you
19 take that and apply it to a book about George
20 Washington's life, that you can find examples,
21 as you can almost always with language, where,
22 you know, interpretations are different. But
23 here I think it's in response.

24 Q. And that's just interpretation

1 you're choosing to use in this claim. It could
2 be interpreted otherwise by other people; right?

3 A. You know, language is a funny
4 thing.

5 Q. Absolutely. You're being paid by
6 Facebook to be here today; right?

7 A. I'm retained by counsel for
8 Facebook. Yes.

9 Q. And how much are you getting paid
10 an hour?

11 A. \$600 an hour.

12 Q. \$600 an hour?

13 A. That's right.

14 MR. ANDRE: Thank you very much.

15 THE WITNESS: Thank you.

16 MR. ANDRE: Thank you.

17 MR. RHODES: Good afternoon, Your
18 Honor. May I proceed?

19 THE COURT: Good afternoon. You
20 may.

21 REDIRECT EXAMINATION

22 BY MR. RHODES:

23 Q. Let's just go through a couple
24 things. I wanted to show you something.

1 Can you switch over to the elmo?
2 I'm not sure I can get this to work, but I like
3 this thing. So let's see if I can get it to
4 work.

5 A. I haven't seen one of those in
6 years.

7 Q. I hope Mr. Andre is not looking
8 for a fee.

9 MR. ANDRE: Your Honor, objection.
10 This is his expert report. This is hearsay.

11 We have not read from his expert
12 report. We referred to him to it, but we have
13 not read from it.

14 MR. RHODES: I'm not going to
15 introduce it as an exhibit, Your Honor. I am
16 going to use it to explore a subject that was
17 opened up for the first time in
18 cross-examination.

19 THE COURT: Let's try to explore
20 it without the expert report.

21 BY MR. RHODES:

22 Q. You were asked a bunch of
23 questions about what you did and didn't use in
24 connection with your work in terms of the

1 definitions. And counsel put in front of you a
2 report that you had done.

3 Do you recall that?

4 A. Yes, I do.

5 Q. And he pointed you to a page and
6 he said to you, in effect, you didn't use the
7 right definition; do you recall that?

8 A. I did.

9 Q. And as I was sitting here watching
10 this argument, were you trying to tell us that
11 it was a typographical error?

12 A. I was trying to say it was a typo,
13 yes, an inadvertent omission.

14 Q. The sentence that you were
15 directed to, was it a quotation?

16 A. It was meant to be a quotation,
17 yes, from the claim construction.

18 Q. From the claim construction. Can
19 we throw that on the screen. Is this the order
20 that you used?

21 A. This is the claim construction,
22 yes.

23 Q. And --

24 A. These are the definitions that I

1 applied in interpreting the patent.

2 Q. Item two there, it's a -- it says,
3 "Computer-related entity, either hardware, a
4 combination of hardware and software, software,
5 or software in execution." Do you see this
6 here?

7 A. I do.

8 Q. Is that what is missing from your
9 report?

10 A. That's what seems to have been
11 missing from my report.

12 Q. Is that a deliberate and
13 intentional effort to mislead the jury?

14 A. Of course not.

15 MR. ANDRE: Objection, Your Honor.

16 THE COURT: The objection is
17 sustained.

18 BY MR. RHODES:

19 Q. Did you mean to leave that word
20 out?

21 A. I did not mean to leave that word
22 out.

23 Q. Now, there was a dialogue again
24 with Mr. Andre about whether you used these

1 definitions. Can you tell us, did you use these
2 definitions?

3 A. I used these definitions.

4 Q. Did you rely upon them --

5 A. I did.

6 Q. -- in rendering your opinions?

7 A. Based on these, yes.

8 Q. Now, when you look at these
9 definitions, there has been argument between the
10 two of you about whether or not things should be
11 in certain sequences. Do people trained in the
12 art of computer science reading words up there,
13 are there any words up there to those skilled in
14 the art that suggest a time sequence?

15 A. Well, certainly number six, the
16 term dynamically.

17 Q. And what about the term
18 dynamically -- now, just for the record, what
19 we're looking at there, that's what the Court
20 has determined the word dynamically means;
21 right?

22 A. That's correct.

23 Q. Now, what about that definition
24 suggest to people skilled in the art that there

1 is a time component?

2 A. Well, so you have the phrase
3 automatically, which means obviously something
4 is being -- something has happened which has
5 caused something to happen in an automated
6 fashion, and that's reenforced by the specific
7 phrase, "in response to the preceding event."
8 So there is a clear time element to this
9 definition.

10 Q. Can you point us to a word in that
11 definition that suggest to you a component of
12 time?

13 A. Preceding.

14 Q. Now, there was a discussion that
15 sounded like this tracking issue came up again,
16 a lot of tension between the two of you about
17 what it is and isn't. You referred to something
18 called an Apache server. Do you recall saying
19 that?

20 A. Yes.

21 Q. What's an Apache server?

22 A. So Apache is, you know, a company
23 or a protocol if you like that's one of many
24 that basically provides a commodity, web

1 servers. So if you wanted to start a new
2 company and you wanted to have a website and you
3 wanted to have users come to that website and
4 you want to be able to provide functionality to
5 them, have a server that host your website,
6 obviously every little startup company in the
7 world doesn't want to have to re-invent from the
8 bottom, from the ground up all the technology
9 involved in doing that, and you know, otherwise
10 there would be no innovation at all ever.

11 And because this is such a common
12 thing to want these days, to want to start a
13 website, to have it be scalable, to host the
14 content, be able to go modify it, so on and so
15 forth, there are companies that provide
16 off-the-shelf technology for this sort of thing.

17 Q. The Apache server context, the
18 word Apache, does that refer to the name of a
19 company?

20 A. Yes. To the protocol that's used.
21 It's sort of like many things in computer
22 science. There are companies associated with a
23 technology or protocol and then there is the
24 protocol itself which might be open, sort of

1 open knowledge or open source so to speak. But
2 then some companies are actually implementing
3 that particular technology and selling it.

4 Q. And assuming Facebook was using
5 one of those Apache servers, do you know whether
6 the Apache server would be logging each page
7 view for each user?

8 A. I think it's possible that you
9 could configure it to do so, I believe that, you
10 know, you might also because you don't want to
11 store all that stuff, be able to configure it so
12 that it doesn't store absolutely every single
13 page view. But it would not surprise me to
14 learn that you could set things in a way that
15 would cause it to do that.

16 Q. When you were trying to learn
17 about the Facebook system, did you look at
18 source code?

19 A. I did.

20 Q. And did you talk with people at
21 Facebook?

22 A. I did.

23 Q. Did you speak to people at
24 Facebook who wrote the source code?

1 A. I did.

2 Q. And you read Dr. Vigna's report?

3 A. I did.

4 Q. And were there things about
5 Dr. Vigna's report in which he described how
6 Facebook worked with which you took no issue?

7 A. There were, yes.

8 Q. And so with respect to the areas
9 of the report describing how Facebook actually
10 worked, did you then go and verify that what you
11 said was correct in the source code itself?

12 A. Yes, I did.

13 Q. Now, the logging -- let's assume
14 for sake of our discussion that Mr. Andre is
15 right, that there is a server somewhere in
16 Facebook's schema -- I think was the word that
17 people are using -- that is logging every page
18 view. Are you with me?

19 A. I'm with you.

20 Q. Based on your understanding of the
21 Facebook system, have you seen anything with
22 regard to whether or not that kind of logging of
23 what pages people looked at is in any way
24 correlated to the updating of metadata in the

1 photos table?

2 A. I have seen no evidence of such
3 interaction and my understanding is that from
4 both the code and the engineer is that there is
5 none.

6 MR. RHODES: Nothing further, Your
7 Honor.

8 THE COURT: Thank you.

9 MR. RHODES: Your Honor, I have a
10 housekeeping matter. I meant to move into
11 evidence Exhibits 281 and 2282. I completely
12 forget.

13 THE COURT: You stand by your
14 objection?

15 MR. ANDRE: I stand by my
16 objection.

17 THE COURT: They are overruled and
18 the documents are admitted. With that I believe
19 the professor can step down.

20 MR. RHODES: Correct. At this
21 point we're going to shift gears in our
22 infringement case to the validity case.

23 THE COURT: Let's let the
24 professor carefully step down first.

1 THE WITNESS: Thank you.

2 THE COURT: Mr. Rhodes.

3 MR. RHODES: I was going to say
4 may I as a matter of personal privilege just go
5 out of the room for a minute while they're
6 playing the video.

7 THE COURT: Yes, you may.

8 We were going to commence the
9 videos.

10 (Videotape deposition of Jeffrey
11 Richard Lamb:)

12 Q. Good morning.

13 A. Good morning.

14 Q. Could you state your name for the
15 record?

16 A. Jeffrey Richard Lamb. I don't say
17 it that way very often.

18 Q. That's perfectly okay. You don't
19 want to know my middle name.

20 What is your residence address for
21 the record?

22 A. 4608 Paxton Drive, Hilliard, Ohio
23 43026.

24 Q. So Computer Wizards was the

1 company; correct?

2 A. Yes.

3 Q. They provided services; correct?

4 A. Yes.

5 Q. What kind of services did they
6 provide.

7 A. Typically custom programing
8 database development and web application
9 development.

10 Q. And you worked with Computer
11 Wizards; correct?

12 A. Correct.

13 Q. When did you begin working with
14 Computer Wizards?

15 A. I would say when Computer Wizards
16 started working, I was working with Computer
17 Wizards, I don't remember the exact date.

18 Q. That was after your graduation
19 from the University of Illinois; correct?

20 A. Yes.

21 Q. And you held the position of chief
22 technical officer of Computer Wizards?

23 A. At one point in time I think I
24 did. Most of the time with Computer Wizards I

1 held the title of chief executive officer.

2 Q. At some point you started working
3 with Leader Technologies; correct?

4 A. Yes.

5 Q. About what time frame was that?

6 A. I don't remember exactly. It
7 would have been before June 29th, 2000.

8 Q. And why is that?

9 A. Because we had -- why was it
10 before that?

11 Q. Yes, sir.

12 A. Okay. I know that it was before
13 that because I know that we had done consulting
14 work with them as a client before we did, you
15 know, whatever legal thing we did to become more
16 like one company.

17 Q. At some point did Leader acquire
18 Computer Wizards?

19 A. I don't know if acquired -- I'm
20 not sure exactly what acquire means. I can say
21 that I have used the term they acquired Computer
22 Wizards before. I don't know if I used it
23 correctly, though.

24 Q. At some point Computer Wizards

1 became part of Leader Technologies; correct?

2 A. That's correct.

3 Q. About what time frame did that
4 happen?

5 A. I don't remember exactly. And
6 there is also -- well, I don't remember exactly.

7 Q. Looking at Exhibit 233, can you
8 tell me if pages one through five represent an
9 accurate copy of your resume as it would have
10 existed on June 29, 2000?

11 A. Boy.

12 Q. To the best of your knowledge and
13 recollection.

14 A. Well, if this exactly matches what
15 I think it matches, which I -- I don't know that
16 they didn't edit this, she thought it was a
17 typo, it may have been a very important
18 technical nuance or difference. Let me just --
19 it doesn't appear that I was copied on this
20 email. It would be much easier for me to verify
21 individual pieces of this than -- unless you
22 want to go through the whole thing and do that.

23 Q. No, I don't think that's
24 necessary, actually.

1 A. Okay.

2 Q. I will go through a couple of
3 pieces just to make it simpler.

4 A. Okay.

5 Q. If you go to page five, there is a
6 section toward the bottom that says education,
7 certification, do you see that?

8 A. Yes, I do.

9 Q. If you could look at that section
10 and tell me if that accurately reflects your
11 education as of June 29th, 2000?

12 A. Yes, I -- unless the dates have
13 been -- unless the dates have been changed, this
14 at some point in time was an accurate reflection
15 of education and certification.

16 Q. Thank you.

17 But, you don't see anything in
18 there that's inaccurate; correct?

19 A. No. And what I have glanced at so
20 far and certainly focusing on this section, I
21 haven't seen anything that's inaccurate.

22 Q. The section above that it says
23 technologies, do you see that?

24 A. I do.

1 Q. That section of your resume
2 describes the technologies with which you were
3 familiar at the time of this resume; correct?

4 A. It -- again, I'm concerned about
5 the time frame, but that is an accurate
6 reflection -- hold on. I -- there is two things
7 on here that cause me pause. Number one, Visual
8 C++ under languages, and NIS under databases and
9 tools.

10 Q. What about those two items cause
11 you pause?

12 A. Visual C++ I -- I'm not -- I'm not
13 certain that at this point in time this was
14 reflecting my experience or the experience of
15 the team with which I was working. And NIS, I
16 don't know what that is. I can't remember what
17 that is, so it's hard for me to ver -- I mean,
18 it's -- I feel like I've forgotten more than
19 most people know. So I -- I don't know what
20 that is, so I can't confirm that one.

21 Q. I understand.

22 So at the time this resume was
23 written, you were familiar with Java, XML, XSL,
24 Visual Basic, C and C++, SQL, HTML, Javascript,

1 and ASP; correct?

2 A. Yes.

3 Q. And as far as databases and tools,
4 you were familiar with MySQL, Oracle 7, Oracle
5 8, Access, SQLServer, Apache, and Samba;
6 correct?

7 A. Correct.

8 Q. And as far as platforms, you were
9 familiar with Linux, MS Windows, NT, Windows 95,
10 Windows 98, UNIX, Sun Solaris with Motif,
11 OpenWin and CDE, Redha Linux and Novell NetWare;
12 is that correct?

13 A. That's correct.

14 Q. Okay. And then above that, it
15 says, "Employment History". Do you see that?

16 A. Yes.

17 Q. Can you tell me if, at the time
18 this resume was written, that was an accurate
19 summary of your employment history?

20 A. Could you repeat the question,
21 please?

22 Q. In June 2000, was this an accurate
23 summary of your employment history?

24 A. I -- I think that -- I think that

1 someone parsing it finely could say that some
2 things are glossed over, especially some Windows
3 things were explored. I think that a reasonable
4 person would say, Come on.

5 It doesn't contain any -- I don't
6 see any glaring errors in this employment
7 history at this -- at this point in time.

8 Q. As CTO of Leader Technologies,
9 what were your job responsibilities?

10 A. Develop Leader's tech -- develop
11 Leader Technologies' technologies. Manage and
12 oversee the employees who are also involved in
13 the development of technologies.

14 So that's -- those were my -- my
15 two primary responsibilities.

16 Q. Were you involved in writing any
17 of the code to operate any of Leader's products?

18 A. Yes.

19 Q. And you also supervised others at
20 Leader who were involved in writing code for
21 Leader's products; correct?

22 A. Correct.

23 Q. And during your time at Leader
24 Technologies, were you involved in the

1 development of Leader2Leader?

2 A. What do you mean by -- I don't --
3 I can't think of a definition of involved that
4 doesn't -- the answer is yes, but what do you
5 mean exactly by involved?

6 Q. Well, how do you define involved?

7 A. Well, I can tell you what I did.
8 I mean, I was involved in -- in terms of
9 Leader2Leader. I helped come up with what it
10 should do, why, how we were going to accomplish
11 that.

12 Wrote -- did the architecture, not
13 alone certainly, but you know, certainly the
14 primary architect I think would be the
15 consensus.

16 Wrote code, assigned, you know,
17 who was going to write what components in what
18 order and what -- you know, a lot of -- I was
19 involved even in the business -- business
20 decision around what components should be built
21 first, second, third.

22 So -- so I think I've covered
23 about everything you could mean by involved.

24 Q. It does.

1 So you wrote code for implementing
2 Leader2Leader; correct?

3 A. I wrote -- I definitely wrote code
4 while I was at Leader. The code that I wrote
5 eventually got labeled. I wrote code. That
6 part of the code that I -- let me start over.

7 There was a configuration of the
8 code that I and others wrote that got labeled
9 Leader2Leader while I was at Leader
10 Technologies.

11 Q. Who is the person most responsible
12 for the design of the Leader2Leader product?

13 A. The design definitely in this
14 space design means a lot of different things.
15 Which part of design do you mean?

16 Q. Which parts of design are there?

17 A. I'd say there's business solution
18 design. There's user interface design.

19 There's architectural design. And
20 there's individual component design, amongst
21 others. But those would be the -- the big ones.

22 Q. Who was the person most involved
23 in the business solution design of
24 Leader2Leader?

1 A. What eventually got labeled
2 Leader2Leader, I'd say there were, you know,
3 amongst others, but probably two primary people
4 involved in the -- the business solution design
5 for the thing that eventually got labeled
6 Leader2Leader. Those two people would be myself
7 and Mike McKibben.

8 Q. And by "business solution design",
9 what does that include?

10 A. Identify the business, the -- the
11 business problem. And what you think you can do
12 about that in a reasonable amount of time and
13 money.

14 And -- and then, you know, in the
15 end, what are we going to do about solving that
16 business problem, in a general direction sense?

17 Q. Okay. I'd like the court reporter
18 to hand you Exhibit 239 if there's no objection.

19 Have you had an opportunity to
20 review Exhibit 239?

21 A. I've had an opportunity to skim at
22 it and glance at it. Yes.

23 Q. Do you recognize this email?

24 A. I don't recognize this particular

1 email. I do recognize the format and some of
2 the products contained therein.

3 Q. Okay.

4 A. The subject says, "Yesterday in
5 CWC".

6 Q. Was that some kind of a news
7 letter that was sent to CWC personnel?

8 A. Steve Hanna would, on occasion,
9 write emails with the subject Yesterday in C --
10 CWC that contained information that he felt
11 would be of general relevance to the employees
12 of Computer Wizards.

13 Q. Understood. And Mr. Hanna would
14 write these emails to update people on things
15 that were going on within the company?

16 A. Correct.

17 Q. Okay. On the very first
18 paragraph, there is a statement, There are no
19 demos on Friday; however, yesterday Mike had a
20 good size group of investors and a presentation
21 in the afternoon. And late in the day he did an
22 L2L demo over the phone.

23 Do you see that?

24 A. I do.

1 Q. Do you know what L2L demo
2 Mr. Hanna was referring to?

3 A. No, I don't.

4 Q. Okay. At the time this email was
5 written in August 2002, was Leader2Leader in a
6 position where it could be demonstrated?

7 A. In August of 2002, a set of
8 technologies existed that allowed someone who
9 was familiar with those technologies to expose
10 someone to what those technologies were trying
11 to accomplish.

12 Q. And those set of technologies
13 would have included Leader2Leader?

14 A. We referred to a certain
15 configuration of those technologies at that time
16 with the label Leader2Leader.

17 Q. If you could turn to the page that
18 has been numbered Page 2 of the Provisional
19 Patent Application. There's a title listed on
20 the top.

21 I'll just read into the record,
22 Method for Dynamic Association of Electronically
23 Stored Information with Iterative Workflow
24 Changes. Do you see that?

1 A. I do.

2 Q. The first part of the title says,
3 Method for Dynamic Association of Electronically
4 Stored Information. Do you see that?

5 A. I do.

6 Q. Do you have a sense of what that
7 means?

8 A. In -- in totality, it seems to be
9 a legal construct. And as such, I'm not certain
10 there -- there's certainly words in here that I
11 have a particular definition in my head at this
12 time for.

13 Q. Well, the term dynamic
14 association, what does that mean to you?

15 A. Now?

16 Q. Sure.

17 A. Now, those two words together
18 would mean -- dynamic would be an automatic and
19 non-predetermined step, and association would be
20 the creation of a relationship.

21 Q. Can you give me an example of a
22 system that does dynamic association of
23 electronically stored information?

24 A. The only one that's coming to mind

1 off the top of my head is the technology I built
2 for Leader Technologies. I can't think of
3 another example off the top of my head.

4 Q. So Mr. Lamb, the sentence, As
5 users create and change their contexts, the
6 files and applications automatically follow
7 dynamically causing those shifts in context.

8 Do you see that language, this
9 Paragraph 22?

10 A. I do.

11 Q. Do you have an understanding of
12 what the word context means as it appears in
13 that sentence?

14 A. I don't have a current
15 understanding of what those -- the word context
16 and contexts mean in this sentence.

17 Q. The next -- Paragraph 23, the
18 first sentence says, As used herein, a board is
19 defined as a collection of data and application
20 functionality related to a user-defined topic.

21 Do you see that?

22 A. I do.

23 Q. Is that consistent with the
24 definition of board that was employed by Leader

1 Technologies in its products?

2 A. That is one possible consistent
3 way to refer to board in the context of a -- in
4 the context of the technology that we built for
5 Leader.

6 Q. Okay. Paragraph 24 starts with a
7 sentence, As used herein, the term web refers to
8 a collection of interrelated boards.

9 Do you see that?

10 A. Yes. I do see that.

11 Q. Is that definition consistent with
12 your understanding of how web was used in the
13 context of Leader's technologies?

14 A. That -- the definition -- the
15 definition of a web as a collection of
16 interrelated boards is consistent with the way
17 that technical team -- what the technical team
18 meant when it used the word web to communicate
19 to each other.

20 Q. Okay. In Paragraph 25, there is a
21 sentence that says, In accordance with the
22 invention, webs may be used to maintain the
23 location of contents within a complex and
24 changing set of boards and support automation of

1 the workflow process.

2 Do you see that?

3 A. I do.

4 Q. Do you know what's referenced here
5 by changing set of boards?

6 A. I have a distinct recollection of
7 one example that we used amongst the technical
8 team as an example of a changing set of boards.

9 Q. What's an example of a changing
10 set of boards?

11 A. It's the same set of boards that I
12 referred to in an earlier answer that if you
13 assign a board to each individual user and then
14 create a web that is the organizational
15 hierarchy of that organization, then that web
16 would change whenever an employee were hired,
17 fired, promoted, changed roles, things of that
18 nature.

19 Q. So does the changing set of boards
20 refer to changes in the organization of the
21 boards within a web?

22 A. I don't think I followed you.

23 Q. So when it changes set of boards,
24 what exactly is being changed?

1 A. It would depend on the event in
2 the real world. It would depend on what the web
3 was capturing. In the example that I cited
4 earlier, an example of a change in the example
5 of someone being hired would be the creation of
6 a new board and the creation of the relationship
7 between that new board and their supervisor and
8 the creation of the relationships between that
9 board and that person's subordinates.

10 Q. So does a changing set of boards
11 have anything to do with a user of the system
12 moving from one board to another board?

13 A. The technology that I was involved
14 in building to the best of my recollection
15 didn't have scenarios in which a user changing
16 which board they were interested in at that
17 point in time resulting in the relationships
18 between boards changing.

19 Q. So to your understanding, the
20 changing set of boards does not refer to change
21 which board the user is interested in. Would
22 that be a fair statement?

23 A. Within the context of webs in
24 particular, and within the context of the

1 changing set of boards referred to in paragraph
2 25.

3 Q. Right.

4 A. My understanding of changing set
5 of boards within webs does not correspond to the
6 -- a user switching from one board to indicate
7 interest in a different board.

8 Q. Okay. If you could turn to the
9 next page, which is numbered page seven. On the
10 bottom there is a paragraph, I'll just read the
11 first part of it into the record.

12 "In preferred embodiments, webs
13 may be utilized to maintain the location of
14 content within a complex and changing set of
15 boards. Content is preferably associated with a
16 routing algorithm referred to herein as a
17 webslice. Thus the content has an intelligent
18 quantity whereby upon a change of structure of
19 the web, the content knows which board or boards
20 it should be on both before and after the change
21 of structure."

22 Do you see that?

23 A. I do.

24 Q. Do you know what's being

1 referenced in that paragraph by the term change
2 of structure?

3 A. I know what I remember I thought
4 change of structure meant when I was helping to
5 build it. What I thought change of structure
6 meant when I was building it was things like the
7 example that I cited earlier which is if the web
8 were an organizational hierarchy, a change of
9 structure would be what would happen as a result
10 of a higher/fire/promotion, or other type of
11 similar changes.

12 Q. Understood.

13 Is there anything -- withdrawn.

14 You referenced when you were
15 building it. By it, are you referring to
16 Leader's technologies?

17 A. I don't remember the -- exactly
18 which pronoun I was -- you know, that you're
19 referring to, but typically when I'm talking
20 about building something during my employment at
21 Leader, I'm referring to be the technologies I
22 built for Leader while I was there.

23 Q. Does the term change of structure
24 to you have anything to do with a user moving

1 from one board to another board?

2 A. In this paragraph referring to the
3 technology that I was -- that I helped build for
4 Leader, I don't have an association between a
5 user changing which board they're interested in
6 and a change of the relationships between boards
7 within a particular web.

8 Q. So what did you mean by you don't
9 have an association between?

10 A. I don't have a memory of thinking
11 that one would cause the other. I don't have a
12 memory of thinking that the two things happened
13 at the same point in time in the system. And I
14 don't have a memory of the one thing preceding
15 or indicating the other.

16 Q. So you don't have a memory of
17 change of structure referring to a user moving
18 from one board to another board?

19 A. I don't have a recollection of a
20 user changing which board they were interested
21 in resulting in a change of structure.

22 Q. Understood.

23 Page eight, the last sentence
24 reads, "Alternatively the location of content

1 may be determined by detecting changes in
2 structure, detecting the temporary location of
3 the content on the boards in the ready album
4 before and after the change and adjusting
5 location of the affected content as part of the
6 change in structure."

7 Do you see that?

8 A. I do.

9 Q. Obviously I have read over some of
10 the typo errors as you may have noticed. Would
11 your answers about change of structure that you
12 gave me just a moment ago also apply to the term
13 change of structure in this sentence?

14 A. I also don't believe that a user
15 indicating they're interested in a different
16 board would result in the type of change of
17 structure that this sentence refers to.

18 Q. Going to page nine, the third
19 paragraph down says, "Webs can be utilized to
20 maintain the location of content within a
21 complex and changing set of boards. If content
22 has a web slice associated with it, then any
23 change of structure the web would still result
24 in the content with the web slice knowing what

1 boards it should be on both before and after the
2 change of structure."

3 Do you see that?

4 A. I do.

5 Q. Would you agree that the term
6 change of structure as used in that sentence
7 would not result from a user indicating interest
8 in moving from one board to another board?

9 A. I'm not certain what kind of
10 change of structure this particular paragraph is
11 referring to. I can tell you what the term
12 change of structure outside of this document
13 means to me today, if that helps.

14 Q. What do you think it means today?

15 A. The term change of structure in
16 isolation today means that the data on the hard
17 drive is different.

18 Q. Okay. Go back to page seven if
19 you would. The bottom of page seven it says,
20 "Thus the content has an intelligent quality
21 whereby upon a change of structure of the web,
22 the content knows which board or boards it
23 should be on both before and after the change of
24 structure."

1 So the terms change of structure
2 of the web also appears there and you testified
3 about it earlier. Do you remember that?

4 A. I do remember testifying about
5 this section of the document before.

6 Q. Okay. Do you have any reason to
7 believe that a change of structure of the web as
8 it appears on page seven has any different
9 meaning than it appears on page nine in the
10 third paragraph?

11 A. I don't have any reason to doubt
12 that the term change of structure here means
13 something different than in the other paragraph.

14 Q. I understand -- you mean you don't
15 have any reason to believe they mean the same
16 thing? I think you have a double negative in
17 your answer.

18 A. I don't have any reason to doubt
19 they are the same.

20 Q. Okay. If you go to page 11.
21 There appears to be some source code between
22 page 11 and page 19. Do you see that?

23 A. Yes.

24 Q. Toward the bottom half of page 11,

1 there are three authors listed. It list you;
2 right?

3 A. It does list me as an author.

4 Q. Bethany Foote and Eric Rosenberg?

5 A. Correct.

6 Q. Would this have been a code that
7 you would have had a part in writing?

8 A. Within the rules that we set up
9 for writing code, this would indicate that I was
10 one of the authors of this particular file.

11 Q. Okay. Mr. Lamb, if you would go
12 to page 12, you'll see where toward the top half
13 there is a label. It says public content
14 interface, new content?

15 A. Yes.

16 Q. Is that a method?

17 A. In my understand -- in my
18 understanding of the definition method within
19 software development, this would -- this section
20 of source code would be the code that would
21 implement a method.

22 Q. Fair enough. So this code is
23 written in Java; correct?

24 A. Correct.

1 Q. Okay. If you could look at the
2 code between pages 11 and 17 and let me know if
3 you recognize it?

4 A. It seems very familiar to me.

5 Q. Okay. Do you have a recollection
6 as to what the code does? And in answering my
7 question, feel free to refer to it any way you
8 need.

9 A. I remember what the object web as
10 incorporated and defined by the file web.Java,
11 of which this section appears to be a printout
12 of that file.

13 Q. What was the purpose of the code
14 that is reproduced in the provisional
15 application?

16 A. Each method within the object has
17 a different purpose. So there are lots of
18 purposes being served by this code. Each line
19 has a different purpose, you know, a small step
20 toward, you know, the goal of that method or the
21 goal of that object.

22 Q. Uh-huh.

23 A. So I'm not certain what it is
24 you're asking me.

1 Q. Okay. Is there anything in the
2 code that is included with the provisional
3 application that implements tracking a change of
4 a user from one board to another board?

5 A. I would have to have a lot more
6 time to review it to definitively say so. But
7 based on a short review, it does not appear that
8 there is code present in these pages that tracks
9 when a user switches from one board to another
10 board of interest.

11 Q. Or from one web to another web,
12 the same answer?

13 A. There is an assumption in the
14 question that I don't think is accurate. To my
15 recollection, there isn't an event where a user
16 switches from one web to another. So when -- so
17 the question falls apart.

18 Q. Is there anything in the code
19 attached to the provisional that implements
20 associating metadata with user created data?

21 A. Could you repeat the question?

22 Q. Sure.

23 Is there anything in the code
24 attached to the provisional application that

1 implements associating metadata with user
2 created data?

3 A. In my cursory review of this code,
4 I have run across a couple of instances in which
5 the association of metadata with user created
6 data is called, but the implementation is in the
7 methodology being called, not in the code that's
8 listed here.

9 Q. So the implementation of
10 associating metadata with user created data is
11 not contained in the code that you've reviewed;
12 correct?

13 A. In a cursory review I've done, I
14 haven't run across one of those instances yet.

15 Q. Okay. And did you -- you reviewed
16 the code all the way up to Page 19?

17 A. Yeah. You said all the code, so I
18 looked at all of it.

19 Q. I'd like to go back just to Page
20 2. Trust me, we're almost done with this
21 document.

22 Looking at the textual description
23 between Pages 2 and 8, can you identify anything
24 in that text that discloses tracking movement of

1 a user from one board to another board?

2 A. I'd have to spend a lot of time
3 reviewing it to know for sure, but I -- I feel
4 confident deducing from what I do know and
5 remember that tracking a user from -- tracking a
6 user changing from one board to another board as
7 a result of that user expressing interest in
8 that other board is not something that we had
9 implemented in the technology that I think this
10 section refers to.

11 Would -- would you like me to take
12 the time to review the whole thing to --

13 Q. That may not be necessary. So the
14 paragraph that we reviewed earlier and you're
15 free to go back to any of them, did you see
16 anything in those paragraphs that disclosed
17 tracking movement of a user from one board to
18 another board?

19 A. While reading this in our time
20 together, I don't remember running across
21 anything that was -- that said to me there was
22 an indication of tracking a user switching from
23 one board to another board.

24 Q. Was the ability to track movement

1 of a user from one board to another board
2 something that Leader did not implement, to the
3 best of your knowledge?

4 A. I -- the technologies that I
5 remember building did not track the -- did not
6 track a user switching from -- simply switching
7 from one board to another board.

8 Q. You said simply switching. Is --
9 did it track movement at all?

10 A. I don't remember anything like
11 that.

12 Q. Okay. Last section, I promise.
13 If you could go to Page 16.

14 Towards the middle of the page,
15 there is a line of code that begins with
16 `action.addActionListener`
17 `(RemoveWebRelationshipActionListener.GLOBAL).`

18 Do you see that?

19 A. I do.

20 Q. And then go down maybe about a
21 dozen or so lines, the end of that section
22 begins with -- ends with `return form`. Do you
23 see that?

24 A. Mm-hmm.

1 Q. If you look at the code between
2 those two sections and including those two
3 lines, if you could review that and let me know
4 when you're finished.

5 A. Okay. I'm done.

6 Q. Does this code implement a user
7 interface for the user?

8 A. What a member of the technology
9 team would have said to another member of the
10 technology team at that point in time is that
11 this code does create the object that contains
12 the data necessary for the construction of a
13 form that the user could use to interact with
14 the system.

15 Q. I understand. Is there anything
16 in -- in this code, the code we've been talking
17 about on Page 16, that implements tracking
18 movement of a user from one board to another
19 board?

20 A. No.

21 Q. Okay.

22 (Conclusion of videotape
23 deposition excerpt of Mr. Lamb.)

24 THE COURT: Okay. That's the end

1 of the videotape portions; correct?

2 MR. RHODES: I'm sorry, Your
3 Honor.

4 THE COURT: Am I correct that's
5 the end of the videotape portions?

6 MR. RHODES: Of Mr. Lamb.

7 THE COURT: Right. So I'm going
8 to instruct the jury consistent with what we
9 discussed earlier.

10 MR. RHODES: Your Honor, and I
11 apologize. I think I may have misunderstood
12 precisely exactly what you want us to read.
13 I've been passing notes to Mr. Andre making sure
14 we agree.

15 Can I just come to side-bar to
16 make sure I have it right?

17 THE COURT: Certainly. Let's all
18 do that.

19 (Beginning of conference held at
20 side-bar:)

21 MR. RHODES: I just didn't want to
22 get it wrong. Did you want us to read
23 everything or just the question and answer?
24 Like I'm confused.

1 THE COURT: Well, not the
2 objections.

3 MR. RHODES: No. No, I got those
4 out.

5 THE COURT: The whole question.

6 MR. RHODES: Even the questions
7 that aren't affected?

8 THE COURT: If they were just
9 played as part of the video, then yes.

10 MR. RHODES: Okay. So read
11 everything?

12 THE COURT: So like from 193 to
13 199. I don't know if it needs to start on 192
14 and go to 200. I didn't double-check that, but
15 everything in that chunk of testimony that we
16 just watched.

17 MR. RHODES: Not just the
18 individual questions?

19 THE COURT: Exactly, the full
20 context.

21 MR. RHODES: And then the last
22 thing that they -- we agreed since the last one,
23 there was a question hanging. We were going to
24 stop at Line 22 because it's just a question,

1 MR. ANDRE: That's fine.

2 THE COURT: You're okay with that?
3 Did you decide to have somebody going to the
4 stand?

5 MR. RHODES: That probably is more
6 interesting, if you don't mind.

7 THE COURT: I'll go and instruct
8 them first and then we can do that.

9 (Conclusion of conference held at
10 side-bar:)

11 THE COURT: Ladies and gentlemen
12 of the jury, as you know by now, the parties are
13 entitled to discovery before trial, and that
14 includes depositions. And you have seen some
15 excerpts of depositions, including just
16 witnessing some excerpts of the deposition of
17 Mr. Lamb.

18 Individuals who are witnesses who
19 are subject to deposition have a right to
20 provide certain corrections to their testimony
21 after they testify. Mr. Lamb did so, and now
22 what you're going to hear a portion, excuse me,
23 of the testimony of Mr. Lamb from his deposition
24 that includes those corrections that he made

1 afterwards.

2 And because we don't have a
3 videotape of that, I'm going to have counsel
4 read to you question and answer of that portion
5 of Mr. Lamb's deposition testimony. And you may
6 proceed, Mr. Rhodes.

7 MR. RHODES: Thank you, Your
8 Honor. I will turn into the witness for the
9 moment and then I'll become a lawyer again.
10 So...

11 THE COURT: All right.

12 MR. RHODES: Mr. Weinstein is
13 going to read in the questions.

14 THE COURT: So just to be clear,
15 Mr. Rhodes is going to be reading the answers of
16 Mr. Lamb.

17 (Beginning of read-in portion of
18 the deposition of Mr. Lamb:)

19 Q. Okay. Is there anything in the
20 code that is included with the provisional
21 application that implements tracking a change of
22 a user from one board to another board?

23 A. I'd have to have a lot more time
24 to review it to definitively say so. But based

1 on a short review, it does not appear that there
2 is code -- code present in these pages that
3 implements tracking where -- when a user just
4 switches from one board to another board of
5 interest.

6 Q. Or from one web to another web,
7 same answer?

8 A. There's -- there's an assumption
9 in that question, excuse me, in the question
10 that I don't think is accurate. To my
11 recollection, there isn't an event where a user
12 switches from one web to another.

13 So when -- so the -- the question
14 kind of falls apart.

15 Q. I completely understand.

16 A. Okay.

17 Q. Is there anything in the code
18 attached to the provisional that implements
19 associating metadata with user-created data?

20 A. Could you repeat the question?

21 Q. Sure.

22 Is there anything in the code
23 attached to the provisional application that
24 implements associating metadata with

1 user-created data?

2 A. In my cursory review of this code,
3 I run across a couple of instances in which the
4 association of metadata with user-created code
5 is called, but the implementation is in the
6 method being called, not in the code that's
7 listed here.

8 Q. I understand. So the code would
9 assume -- withdrawn.

10 So the implementation of
11 associating metadata with user-created data is
12 not contained in the code that you have
13 reviewed; correct?

14 A. In cursory review I have done, I
15 haven't run across one of those instances yet.

16 Q. Okay. And did you review the code
17 all the way up to page 19?

18 A. Yeah. You said all of the code,
19 so I looked at all of it.

20 Q. Okay. Thank you. I would like to
21 go back just to page two. Trust me, we're
22 almost done with the document.

23 Looking at the textual description
24 between pages two and eight, can you identify

1 anything in that text that discloses tracking
2 movement of a user from one board to another
3 board?

4 A. I'd have to spend a lot of time
5 reviewing it to know for sure. But I -- I feel
6 confident deducing from what I do know and
7 remember that tracking a user from just tracking
8 a user changing from one board to another board
9 as a result of that user expressing interest in
10 that other board is not something that we had
11 implemented in the technology that I think this
12 section refers to. Would -- would you like me
13 to take the time to review the whole thing, too?

14 Q. That may not be necessary. So the
15 paragraph that we reviewed earlier, and you are
16 free to go back to any of them, did you see
17 anything in those paragraphs that disclosed
18 tracking movement of a user from one board to
19 another board?

20 A. While reading this in our time
21 together, I don't remember running across
22 anything that was -- that -- that to me there
23 was an indication of just tracking a user from
24 switching -- just tracking a user switching from

1 one board to another board.

2 Q. Was the ability to track movement
3 of a user from one board to another board
4 something that Leader did not implement to the
5 best of your knowledge?

6 A. I -- the technologies that I
7 remember building did not track the -- did not
8 just track a user switching from -- simply
9 switching from one board to another board.

10 Q. You said simply switching. Is --
11 is -- did it track movement at all?

12 A. I don't remember anything like
13 simply switching.

14 Q. Okay. Last section, I promise.
15 If you can go to page 16 toward the middle of
16 the page, there is a line of code that begins
17 with, `action.add action listener(remove web`
18 `relationship action listener.global);`. Do you
19 see that?

20 A. I do.

21 Q. And then go down maybe about a
22 dozen or so lines, the end of that section
23 begins -- ends with `return form`. Do you see
24 that?

1 A. Uh-huh.

2 Q. If you look at the code between
3 those two sections, and including those two
4 lines, if you could review that and let me know
5 when you're finished.

6 A. Okay. I'm done.

7 Q. Do you have a sense as to what --
8 what functions are implemented by that code --
9 withdrawn. That's a little imprecise.

10 Do you have a sense -- withdrawn.

11 Does this user code implement a
12 user interface for the user?

13 A. What a member of the technology
14 team would have said to another member of the
15 technology team at that point in time is that
16 this code does create the object that contains
17 the data necessary for the construction of a
18 form that the user could use to interact with
19 the system.

20 Q. I understand. Is there anything
21 in -- in this code, the code you have been
22 talking about on page 16 that implements
23 tracking movement of a user from one board to
24 another board?

1 A. No. Nothing that implements
2 tracking, just movement of a user from one board
3 to another board.

4 Q. Okay. You can put this one down
5 for now. I'd like to mark as the next exhibit
6 in order --

7 (End of read in.)

8 MR. RHODES: Thank you, Your
9 Honor.

10 THE COURT: Thank you. So that
11 completes the deposition excerpts of Mr. Lamb,
12 correct, Mr. Rhodes?

13 MR. RHODES: Yes, Your Honor.

14 THE COURT: Okay. What are we
15 going to do next?

16 MR. RHODES: We're going to play
17 the deposition excerpt of Mr. McKibben.

18 THE COURT: Do we have more than
19 ten minutes of that?

20 MR. RHODES: Yes, Your Honor.

21 THE COURT: So let it go to right
22 around three o'clock and then find a place to
23 stop and we'll take our break and finish it
24 after the break.

1 MR. RHODES: Thank you, Your
2 Honor.

3 Your Honor, the technology person
4 was going to publish the documents that are
5 referred to in testimony. I had previously
6 provided a book to counsel. I'm not sure if
7 there is any objection or not, that's why I'm
8 hesitating.

9 THE COURT: Let's see if there is
10 an objection.

11 MS. KOBIALKA: There was no
12 objection, Your Honor.

13 THE COURT: No objection.

14 MR. RHODES: It sounds like we can
15 publish the document.

16 THE COURT: That's what I
17 understand no objection means.

18 MR. RHODES: I just wanted to make
19 sure, Your Honor.

20 THE COURT: I appreciate that.

21 Videotape deposition:)

22 Q. Good morning, sir.

23 A. Good morning.

24 Q. Could you state your full name for

1 the record?

2 A. Michael Thomas McKibben.

3 Q. And just so I have a clear record
4 of this, what was Leader2Leader?

5 A. Well, that's a past tense. Again,
6 Leader2Leader is a brand name.

7 Q. Underneath the brand name, there
8 is a product; correct?

9 A. There is.

10 Q. What does that product do?

11 A. Well, I'm not sure what do means,
12 but I'm going to assume you want to know the
13 functionality of the system?

14 Q. Correct.

15 A. Okay. It enables people to
16 collaborate in a more streamlined manner with
17 different types of communications and sharing of
18 information using a web browser.

19 Q. Can you recall when the first
20 version of Leader2Leader was created?

21 A. It was a collaborative effort that
22 involved many years, so as is the nature of R &
23 D, it emerged. There wasn't one magic point.

24 Q. So when you say it emerged, what

1 do you mean by that?

2 A. Well, in product design, you -- if
3 you set up your product design the way we did,
4 you intentionally iterate toward your solution,
5 recognizing that some very difficult problems
6 like we were addressing had not been -- they
7 were chronically underserved in the marketplace
8 and therefore, we recognized we couldn't take a
9 traditional approach to designing the product
10 because many runs had been taken at large scale
11 collaboration failed, and so therefore, we
12 recognized that we needed to throw out all of
13 the preconceived notions and start over.

14 Once you start over, we basically
15 worked to a solid design process that I oversaw
16 and we essentially said we're not coming out of
17 the room until we've figured out what's not
18 happening and then what needs to happen, and
19 then work toward a design to do that.

20 So that all was iterative over a
21 long period of time.

22 Q. When did a solid design emerge?

23 A. Well, I'm not sure whether you
24 mean actual code or not, but if you talk about

1 conceptual design, I can point -- I can remember
2 probably in the seven -- or '98, '98 time frame
3 when we were fairly confident we knew how to do
4 it. But there again, we were still iterating,
5 so '98 feels like the right time.

6 Q. At some point there came a time
7 when you had a product implemented; correct?

8 A. Well, as was -- software is never
9 finished, so even version one of a product is
10 not implemented in the sense that it's perfect.
11 But we were confident of a fairly stable design
12 by '98 and then we started coding and -- now
13 these are rough time frames, but I would say we
14 were coding -- well, we haven't stopped coding,
15 so a fairly stable collaborative environment was
16 working by I'm going to say 2001/2002 time
17 frame.

18 Q. Did you write any of the Java code
19 for this technology?

20 A. No, I hired people to do that.

21 Q. Did you write any of the C code
22 for this technology?

23 A. We had different people do that.

24 Q. Were you among them?

1 A. In terms of writing the code?

2 Q. Yes, sir.

3 A. I did not write the code. I hired
4 people to write that code.

5 Q. And the HTML code, did you write
6 any of that code for the technology?

7 A. I may have. I don't recall
8 whether -- I mean, I was more involved with that
9 side of it, but I don't know whether they used
10 any of my code or not, but I was definitely very
11 involved in that part of it.

12 Q. What technology of Leader, if any,
13 implements what's being claimed in the '761
14 patent?

15 A. Okay. Well, I can't answer any of
16 the -- respond to any of the legal issues
17 involved with the '761 patent, but as far as I'm
18 concerned, that is what Leader2Leader is using.

19 Q. Your answer is from an engineering
20 standpoint; correct?

21 A. As one of the inventors, yes.

22 Q. Are there any other products of
23 Leader that implements what's claimed in the '
24 '761 patent?

1 A. Well, I mean, it's -- I'm not sure
2 how -- you know, I'm not sure what you're asking
3 actually because we may sell the product in many
4 different forms.

5 But it would still be the
6 underlying engine and we have products that
7 don't use that engine. So I don't understand
8 your question.

9 Q. I'd like to mark Exhibit 302, a
10 multipage document production labeled LTI 048195
11 through 048206 entitled Advanced Cross Platform
12 Communication and Anti-Terrorism Command Center
13 Prototype.

14 Mr. McKibben, when you get a
15 chance to look at the document, let me know if
16 you recognize it.

17 A. I haven't seen this document since
18 then, but I recognize it.

19 Q. And what is it?

20 A. I believe it's a presentation to
21 the federal government to obtain research and
22 development funding from one of the agencies.
23 Maybe DARPA, but I'm not sure which one.

24 (Conclusion of videotape)

1 deposition excerpt of Mr. McKibben.)

2 THE COURT: I think that's an
3 appropriate time for our break. We'll let the
4 jury out for 15 minutes.

5 THE CLERK: All rise.

6 (Jury leaving the courtroom at
7 three o'clock p.m.)

8 THE COURT: We'll stand in recess.

9 THE CLERK: All rise. Court's now
10 in session.

11 THE COURT: Bring the jury in.

12 MR. ANDRE: Your Honor.

13 THE COURT: Yes.

14 MR. ANDRE: There might be --
15 there's some documents that are going to be
16 passed out for the next witness. We have
17 binders for them.

18 I think Ms. Kobialka has some
19 objections to it.

20 THE COURT: All right. So hold on
21 in getting the jury. Everyone can sit down.
22 Let's quickly deal with that.

23 MS. KOBIALKA: So we object
24 basically to two categories of documents. The

1 first one is the proposed DTX 1051. And what
2 these are are screen shots of the Leader2Leader
3 product that was registered with the copyright
4 office September 9th, 2003.

5 And you can see the stamp clearly
6 from the copyright office that that is when they
7 received those particular screen shots. They're
8 trying to suggest that they should be able to
9 use them, even though this was, you know, filed
10 with the copyright office after the critical
11 date, because as you recall, you had said that
12 we're not going to have any comparisons,
13 product-to-product comparisons. And
14 Leader2Leader, after that December 11th, 2002
15 time, was not going to be in this case.

16 So there's plenty of other screen
17 shots that are available to them. But we're
18 going to object to that particular one because
19 we want to ensure that there's not any kind of
20 product-to-product comparison.

21 The other category of documents
22 relates just to three emails. Those are DTX
23 1348, 184 and 776.

24 And what these are are emails by

1 someone named Steve Hanna. And he wrote to the
2 engineering group at Leader at the time and
3 said, Hey, I just spoke to Mike and we talked
4 about different things. And he would write
5 various things.

6 Now, there's a number of problems
7 with those particular emails, because Mr.
8 McKibben was never on those emails. So he had
9 never seen them.

10 So it's not something you can
11 admit with him and get into evidence, because he
12 has no personal knowledge of it. And you have
13 to -- in order to bring that particular exhibit
14 admitted in, they've got to bring it in through
15 a witness. And Mr. McKibben can't do that.

16 So there's that problem, in
17 addition to the hearsay. To the extent that
18 they want to use that particular -- any kind of
19 statements in there by Mr. Hanna about a
20 conversation with Mr. McKibben, they have --
21 they would do that, I imagine, for impeachment
22 purposes.

23 But in order to impeach, they've
24 got to lay the foundation. So this is not

1 something that they're going to be able to
2 provide to the jury just upfront in the jury
3 books.

4 They're going to have to do
5 something else. You know, if they want to use
6 it to refresh his recollection or show him,
7 that's a different issue. Although once again,
8 we're going to object because he has no
9 knowledge of it.

10 He hadn't seen and wasn't on the
11 emails and due to the hearsay.

12 THE COURT: Okay. Thank you.

13 MR. RHODES: Your Honor, the
14 screen shots appended to the copy right or
15 registration are clearly from 2000. They're
16 earlier in time. They're public records.

17 They're -- you know, it's a
18 certified certification of the screen shots that
19 were lodged with the copyright office. And if
20 you just look at them, they are from 2000.

21 I'm not interested in the cover
22 page, which is the certification from the
23 federal government, that these are what they
24 gave to the government.

1 The Steve Hanna email, if you
2 recall the riveting testimony of Mr. Lamb by
3 video just now, he did say that Steve Lamb was
4 one of the people that was part of the group at
5 Computer Wizards that was acquired by Leader.

6 Later, he was an employee. In
7 fact, the emails themselves have signatures from
8 him. He's VP of technology.

9 They're not only business records,
10 which are obviously admitted. They're 801(d)
11 material, because they contain statements of the
12 party. And they were produced to us by Leader
13 in the litigation.

14 THE COURT: On the screen shots, --

15 MR. RHODES: Yes.

16 THE COURT: -- I probably will
17 need to see them, but not yet, your
18 representation is that they are from 2000, even
19 though they were gathered in the current form, I
20 suppose, and submitted in 2003?

21 MR. RHODES: Yes, Your Honor. I
22 could just hand you one, and you can just look
23 at the column, the date fields that are on them,
24 I just wanted him to explain to the jury what

1 the product looked like. It's not a
2 product-to-product comparison, this is the
3 on-sale bar defense, and I wanted the jury to
4 know what it is that he's selling.

5 THE COURT: It is your view that
6 that is an embodiment of the product as it
7 existed in and around 2000?

8 MR. RHODES: Yes.

9 THE COURT: All right. You can
10 pass those up, please.

11 MR. RHODES: Your Honor, I didn't
12 give you the whole exhibit. I didn't figure you
13 would want to look at all of them.

14 THE COURT: No, I'm sure this will
15 be enough to get started. And the emails, you
16 propose to offer them into evidence directly
17 based on them being admissions and business
18 records?

19 MR. RHODES: Both levels. And
20 they were produced to us, they're authenticated,
21 they have LTI production numbers on them. They
22 were properly designated on our exhibit list.

23 THE COURT: Thank you.

24 Ms. Kobialka.

1 MS. KOBIALKA: So just turning to
2 the screen shots, the issue that I have with
3 them is that they have never established that,
4 in fact, that was what it looked like in
5 2000/2001. They're guessing that based on the
6 date that's on there. So I have got some issues
7 on it.

8 They have plenty of other screen
9 shots. They have a huge book of exhibits of
10 other ones that we're not objecting to. I am
11 concerned about this one because it was
12 registered in 2003.

13 THE COURT: What if I make
14 Mr. Rhodes first elicit testimony from
15 Mr. McKibben, if he can, by having Mr. McKibben
16 look at it before it's published by the jury,
17 and Mr. McKibben --

18 MR. RHODES: I'll withdraw it,
19 Your Honor. I'll make it easier. I'll withdraw
20 the exhibit.

21 THE COURT: Fine.

22 MS. KOBIALKA: Then with respect
23 to these emails in order for it to be a party
24 admission, these are not statements made by this

1 particular declarant. This double hearsay.
2 This is someone saying what someone had said and
3 him putting it into a particular email and he
4 never saw them. So I have got a problem with
5 that. It may be a business record, but there is
6 a way for them to get it --

7 THE COURT: What about it being a
8 business record, that doesn't get it admitted?

9 MS. KOBIALKA: No, because you
10 said it has to be admitted by a witness. In
11 order for a witness to come in, unless we would
12 be able to show any documents that a witness has
13 ever seen and say okay, now it's in, it's
14 provided for the truth of the matter asserted,
15 in this particular instance. It's particularly
16 problematic because it's double hearsay.

17 THE COURT: All right.

18 Mr. Rhodes.

19 MR. RHODES: My grandfather used
20 to have an expression, what's good for the goose
21 is good for the gander. They put in a whole
22 bunch of Facebook exhibits yesterday with people
23 that never seen them. So I don't know if that
24 gets us very far.

1 By way of an example, DTX 00776 is
2 an email from Mr. Hanna within the operative
3 period of time. What counsel just told you is
4 that she didn't point out to you that he signs
5 the email as Stephen Hanna, vice-president of
6 technologies, Leader Technologies, Inc., bears a
7 Leader production number, was produced to us in
8 the litigation, was on the exhibit list. It's a
9 business record. It's self authenticating. And
10 it's an 801(k) statement. I don't need to
11 authenticate it with him, it comes into
12 evidence.

13 THE COURT: Remind me of an
14 example where that happened against you?

15 MS. KEEFE: Haystack.

16 MR. RHODES: The haystack
17 document, for example, which I think I forget
18 which witness it was used with. He hadn't seen
19 it before, but they were examining him about it.

20 THE COURT: I'm overruling the
21 objection. You can use the emails document.

22 Ms. Kobialka.

23 MS. KOBIALKA: So on those grounds
24 I can also use other emails that Mr. Hanna had

1 written because --

2 THE COURT: Well, we'll take those
3 up as we go forward. Right now I have made a
4 ruling with respect to the email that I'm told
5 is in the binder.

6 All right. So we can bring the
7 jury in at this point.

8 THE CLERK: All rise.

9 (Jury entering the courtroom at
10 3:26 p.m.)

11 THE CLERK: Please be seated.

12 THE COURT: Welcome back. I think
13 we're going to continue with playing
14 Mr. McKibben. Correct?

15 MR. RHODES: Yes, Your Honor.

16 THE COURT: Go ahead.

17 (Videotape deposition:)

18 Q. When this document was written,
19 the purpose of this document was to outline a
20 proposal for implementing Leader2Leader at the
21 Wright Patterson Air Force Base; correct?

22 A. I would say that was our
23 objective. I'm not sure that was Wright
24 Patterson's objective.

1 Q. I'm not asking you about Wright
2 Patterson's, I'm just asking about your
3 objective?

4 A. Our objective was to find
5 opportunities to complete the development of our
6 project, of our technology.

7 Q. Sir, if you could turn to page
8 four of this document, production labeled LTI
9 048199. There is a paragraph four that says
10 Summary of Approach. And on the bottom
11 paragraph there is a sentence that says, "Leader
12 is already commercializing LeaderPhone and
13 Leader2Leader to government, commerce and
14 education, and plans to add the LeaderCubes to
15 its product mix at the end of this BAA."

16 Do you see that, sir?

17 A. I do.

18 Q. Was that an accurate statement as
19 of January 9, 2002?

20 A. Well, this was a sales document.
21 These are generalized statements. It's
22 generally what we were trying to do, but
23 specifically related to this project without
24 getting into the details of each one of the

1 development cycles of each of those products,
2 that was a high level statement, not intending
3 to be a treaties on each one of those products.

4 Q. The statement that Leader is
5 already commercializing LeaderPhone and
6 Leader2Leader to government, commerce and
7 education, let's take that part of the
8 statement. Was that an accurate statement at
9 the time this document was prepared?

10 A. We were working on -- as we were
11 completing Leader2Leader, we were looking at
12 potential implications for what we were going to
13 do in the marketplace. At that time those
14 conversations were obviously prospective and
15 very much in flux, in process.

16 Now, related to LeaderPhone in
17 that time frame, LeaderPhone was being sold.
18 But Leader2Leader was not finished. So that
19 would be reference to prospective work.

20 Q. How had Leader2Leader been
21 commercialized at that time?

22 A. Well, I tried to just answer that.
23 It was prospective work to identify markets
24 where we could -- markets and users where we

1 could implement what we were completing. So as
2 with any R & D, you start working on the next
3 phase before you've got it ready. You start
4 thinking about who you're going to sell it to
5 when you build it.

6 Q. In 2001, had you offered to sell
7 Leader2Leader to anyone?

8 A. Can you repeat that question?

9 Q. In 2001, had you offered to sell
10 Leader2Leader to anyone?

11 A. I don't understand what you mean
12 by sell.

13 Q. Had you presented a -- well, what
14 do you understand sell to me?

15 A. Well, sales is a continuum from --
16 you don't have somebody to be -- they might be a
17 customer, so they're a prospect, and you have a
18 customer and you work the customer, so I seen
19 sales as a continuum.

20 Q. 2001, had you ever provided a
21 proposal to anyone for providing Leader2Leader?

22 A. I don't recall.

23 Q. When it says Leader is already
24 commercializing LeaderPhone and Leader2Leader to

1 government, do you know to whom within
2 government Leader was developing Leader2Leader,
3 if anyone?

4 A. Right. I think I've already
5 answered that.

6 Q. That was the answer that you
7 couldn't recall?

8 A. I don't remember what my answer
9 was.

10 Q. In 2001, had you ever offered
11 anyone the opportunity to use Leader2Leader in
12 exchange for payment?

13 A. I don't understand that question.

14 Q. Had you ever offered anyone the
15 opportunity to use Leader2Leader in exchange for
16 a fee?

17 A. In exchange for a fee? You mean
18 sell the product?

19 Q. Yes, sir.

20 A. No.

21 Q. Okay.

22 A. Not that I can recall.

23 Q. That first sentence of that
24 paragraph says, "The Leader2Leader platform is

1 operational now with low user volumes." Do you
2 see that?

3 A. I do.

4 Q. Was that an accurate statement as
5 of when this document was prepared?

6 A. This was eight years ago. I don't
7 recall.

8 Q. Okay. Do you have any reason to
9 doubt that this was an accurate statement at the
10 time this document was prepared?

11 A. Can you repeat the question?

12 Q. Do you have any reason to doubt
13 that this was an accurate statement as of the
14 time this document was prepared?

15 A. Well, this document was a sales
16 document and was not intended to be a technical
17 treatise. And the -- the way this is worded
18 signals to me that we knew the system was
19 available.

20 It was working, but not very well.
21 And that's the euphemism low user volumes.

22 Q. So by low user volumes, could the
23 system be used with five users?

24 A. I -- I don't recall at the time.

1 Q. You -- you would agree that the
2 time this table was written, the system was
3 operational?

4 A. As I recall, we would not have
5 been engaged in this kind of dialogue with a
6 major university in a major resource institute
7 unless it was.

8 Q. If you could turn back to the Page
9 7. It's production labeled LTI 048202.

10 There's a Paragraph 7.1
11 Deliverables. Do you see that?

12 A. Yes.

13 Q. To the best of your memory, does
14 that paragraph summarize the deliverables that
15 Leader would provide for their Wright Patterson
16 Air Force Base?

17 A. No. That wasn't the nature of
18 this proposal.

19 Q. And why not?

20 A. This was a hypothetical construct
21 to get money for two research organizations and
22 Leader. It needed to project budget numbers,
23 and these were budget numbers projected.

24 But this would have not been

1 implemented for years.

2 Q. For years. Sir, if you could turn
3 to Paragraph 7.2a. It says Leader2aLeader
4 platform installation and training to be fully
5 implemented by the end of Q1 2002. Do you see
6 that, sir?

7 A. Mm-hmm.

8 Q. And what's the basis for saying it
9 would not have been implemented for years?

10 A. I -- I had one answer that I was
11 trying to be humorous here. But have you ever
12 seen a government project go on time?

13 Q. So in Paragraph 7.1a, were you
14 prepared to sell 2,000 site licenses by the end
15 of first quarter 2002 for Leader2Leader?

16 A. As the -- as the CEO of this
17 company, I was ready to do this in 1997.

18 Q. Was Leader ready to do this by the
19 end of Q1 2002?

20 A. The practical matter is probably
21 not, but this is the nature of these kind of
22 proposals. You kind of project and are very
23 optimistic.

24 Q. Sir, if you could turn to Page 9.

1 That's on LTI 048204.

2 Sir, if you could look at the line
3 item, it says Leader2Leader licenses. And it
4 says \$8.4 million. Do you see that, sir?

5 A. I do.

6 Q. And correct me if I'm wrong, but
7 you were projecting license revenue of \$700,000
8 for each month from the commencement for the
9 BAA; correct?

10 A. That's what this appears to be
11 saying, but I would have to remember a lot more
12 about this before I can say more.

13 Q. And these are license fees Leader
14 obviously would have accepted if the system at
15 Wright Patterson was actually approved; correct?

16 A. Well, I really can't say right now
17 because these projects never go like these
18 proposals are presented, or whether those would
19 even be included.

20 Q. But if they had accepted this
21 proposal, Leader would have endeavored to fill
22 it; correct?

23 A. I can't -- I can't say whether we
24 would or wouldn't.

1 Q. What makes you say that?

2 A. This was a nebulous R & D group
3 and with very different agendas. And as it
4 turned out, the Wright Patterson folks got
5 reorganized at a -- fairly recently after this.
6 So this would have -- this may have all been
7 smoke as far as they were concerned.

8 Q. But as far as you were concerned,
9 when this was submitted, this was a system that
10 Leader would have delivered if this proposal was
11 approved; correct?

12 A. Frankly, from where I'm sitting
13 now, we probably wouldn't have.

14 Q. Would you have attempted to fill
15 it?

16 A. I -- I can't say whether we would
17 or wouldn't.

18 Q. When you say you "wouldn't" have,
19 is that because Leader may not have been able to
20 deliver the product in the time frame that is
21 outlined in this proposal objection?

22 Is that the reason for your
23 answer?

24 A. I mean, I can't speculate whether

1 I would or wouldn't have. But I didn't find
2 these people very committed to this project.

3 Q. Why did Leader make this proposal
4 then?

5 A. I don't frankly remember why we
6 did it. It seemed a good thing to do at the
7 time.

8 Q. Mr. McKibben, the court reporter
9 has just handed you a document labeled Exhibit
10 305. If you could take an opportunity to look
11 through the document. Let me know if you
12 recognize it.

13 Who was Karen Houser when this
14 email was dated, August 29th, 2002?

15 A. She was our office manager.

16 Q. In the second paragraph, it says
17 Mike had two demos on Tuesday. One to the State
18 of Ohio Police, who are interested in the L2L
19 platform. Yesterday there was one
20 demo/presentation to the Ohio Education
21 Association.

22 Do you see that, sir?

23 A. I do.

24 Q. Do you recall giving demos to the

1 Ohio State Police Department and the Ohio
2 Education Association?

3 A. Not specifically. I gave a lot of
4 demos back then.

5 Q. Mr. McKibben, the court reporter
6 has just handed you a document labeled Exhibit
7 309. If you could take a look at it and let me
8 know if you recognize it.

9 A. I would have to refresh my memory
10 on the conversation, but I do recall
11 communicating with Les Schlesinger.

12 Q. So Mr. Schlesinger is the person
13 to whom this email is addressed at
14 LSchlesinger@LIMITED.com?

15 A. Is that a question?

16 Q. Yes. So LSchlesinger@LIMITED.com
17 is the email address for Mr. Schlesinger;
18 correct?

19 A. Mr. Schlesinger, I believe his
20 title was CEO of Limited.

21 Q. So this an email that you sent to
22 Mr. Schlesinger again on November 21st, 2002?

23 A. That's what it says at the top.

24 Q. And do you have any reason to

1 doubt that this is accurate?

2 A. I -- I don't know. I mean,
3 sometimes I drafted things I didn't send. But
4 it -- it appears that that's where it went.

5 Q. In the second paragraph, it says
6 in the second sentence, At this stage, even an
7 estimate from you of what the Leader contract
8 amount would be would go a long way in my
9 valuation negotiations.

10 Do you see that, sir?

11 A. I do.

12 Q. The Leader contract amount was
13 referring to the amount that Limited would be
14 willing to pay for purchasing Leader
15 Technologies' products; correct?

16 A. Prospectively, yes. Prospectively
17 if we had a working product.

18 Q. But that's what you were referring
19 to in that sentence; correct?

20 A. The primary -- as I read this
21 again, the primary purpose here was to get
22 investors interested in investing in the
23 company. And in any professional Form A
24 projections the VC's look at, they want to know

1 what the potential revenues are for a particular
2 product or service that they would be interested
3 in investing in. And so we were -- again, it's
4 a chicken and an egg.

5 And I was either dealing with the
6 chicken or the egg on that subject and I'm not
7 sure which it was.

8 Q. So the idea was that these VC's
9 would contact The Limited and The Limited would
10 confirm their interest in obtaining -- in
11 purchasing Leader Technologies' products;
12 correct?

13 A. Well, this assumes that Len
14 Schlesinger read this, which I'm not sure he
15 did. And I'm not sure I sent this actually.

16 Q. Do you have any reason to believe
17 you didn't send this?

18 A. Yes. I just told you, I'm not
19 sure I did. This may have been a draft to see
20 how it looked.

21 Q. Do you have any specific
22 information that leads you to believe that you
23 didn't send this email?

24 A. Yes. This is a pretty ballsy

1 email to send to the CEO of The Limited.

2 Q. The second line, sir, says, "Sent,
3 Thursday, November 21st, 2002, at 9:01 a.m." Do
4 you have any reason to doubt that that line is
5 inaccurate?

6 A. I have no reason to doubt that.

7 Q. In order to get a VC to invest in
8 Leader Technologies, you would need to show that
9 someone might be willing to purchase your
10 product; correct?

11 A. There are a lot of things, a lot
12 of many factors that VC's look at in terms of
13 whether they would be interested in looking at a
14 company. Len Schlesinger is from the Harvard
15 Business School, very familiar with what
16 entrepreneurs have to go through to get funding,
17 and I perceived him to be a cooperative person
18 at a very senior level of a future buyer of the
19 services. So to that extent, I was really
20 reaching out to Len to engage him in assisting
21 an entrepreneur that was just up the road from
22 him.

23 Q. And Len's interest in potentially
24 buying Leader Technologies' products would go a

1 long way to help you obtain financing; correct?

2 A. I don't know whether it would with
3 these companies or not, but in general, those
4 kinds of efforts do make a difference.

5 Q. In the fourth paragraph, there is
6 a sentence that says, "In exchange for Limited's
7 support in helping us secure this VC round, I'd
8 like to offer the following sweetheart deal."

9 Do you see that?

10 A. Yes.

11 Q. Below that there is a section
12 discussing LeaderPhone. Do you see that?

13 A. Yes, I do. Yes.

14 Q. In the second section there is a
15 section discussing Leader2Leader; correct?

16 A. Correct.

17 Q. This was an offer you made to The
18 Limited for purchase of licenses to
19 Leader2Leader; correct?

20 A. No, it wasn't.

21 Q. And why wasn't it?

22 A. Well, first of all, The Limited
23 was under a nondisclosure agreement, so this was
24 a trade secret discussion with them. We were

1 engaging in dialogue with a warm friendly
2 entrepreneur friendly individual, and we were
3 exploring, that's as far as this ever got. So
4 to construe this as any kind of definitive
5 engagement or offer is -- is an incorrect
6 assumption.

7 Q. Then what was meant by the phrase,
8 "I'd like to offer the following sweetheart
9 deal"?

10 A. I can't remember what was in my
11 head, but I would say generally when you've been
12 entrepreneuring as long as I have, and you're
13 ahead of the curve by five or ten years, you're
14 always putting ideas in people's minds that they
15 aren't thinking in order to get them interested.

16 Q. And what was the idea that Len
17 wasn't thinking of in order to get him
18 interested?

19 A. I don't understand that question.

20 Q. So what did you mean by sweetheart
21 deal?

22 A. I don't remember what I meant
23 then. Generally a sweetheart deal means some
24 favorable treatment.

1 Q. So you were offering Leader2Leader
2 at a price or terms more favorable than you
3 would otherwise offer it; correct?

4 A. No.

5 Q. So you were offering Leader2Leader
6 at less favorable terms?

7 A. I have already given you kind of
8 an overview of this. The objective of this
9 document as I read it and remember it was to get
10 investments.

11 Q. From The Limited?

12 A. Potentially, but from those
13 venture capitalists.

14 Q. Correct. And so you wanted
15 Mr. Schlesinger to confirm that he was going to
16 make a purchase of Leader Technologies's
17 products; correct?

18 A. No, that wasn't the purpose of
19 this document.

20 Q. If you look at the Leader2Leader
21 section of this, toward the middle. The second
22 sentence says, "May I suggest that Limited
23 purchase the licenses for 2,000 Leader2Leader
24 user-seats for three years."

1 Do you see that, sir?

2 A. I do.

3 Q. So the purpose of this email was
4 to convince The Limited to purchase licenses for
5 2,000 Leader2Leader user-seats; correct?

6 A. No.

7 Q. Was that one of the purposes of
8 this email?

9 A. No. As I've described earlier,
10 this -- the purpose of this was to get venture
11 capital investment.

12 Q. So the court reporter has handed
13 you a document marked as Exhibit 310. If you
14 could take a chance to look through it and let
15 me know if you recognize it.

16 A. Okay.

17 Q. Sir, if you look at the second
18 full paragraph of the email from you, toward the
19 middle there is a paragraph that begins, "We had
20 a phenomenal selling week last week. The
21 limited www.limited.com just committed to
22 contracting with Leader for LeaderPhone and
23 Leader2Leader."

24 Do you see that, sir?

1 A. I do.

2 Q. Was that an accurate statement as
3 of November 3rd, 2002?

4 A. Again, I don't know who I'm
5 communicating with here. I don't recall this
6 person. And I don't recall specifically writing
7 this, but it's referring to we met with their
8 COO, CIO and CTO. And I do have some memory of
9 that meeting. And in that meeting the COO, and
10 I believe that would be Len Schlesinger that we
11 talked about earlier, came in the meeting and in
12 a strategic sense committed to moving forward
13 with a relationship with us regarding Leader's
14 company, Leader's products. And so I was
15 probably giving more detail to this person based
16 on a positive meeting.

17 Q. So the sentence that says, "The
18 Limited just committed to contracting with
19 Leader for LeaderPhone and Leader2Leader," was
20 that sentence accurate when it was written on
21 November 3rd, 2002?

22 A. I would say accurate in the sense
23 it was hyperbole.

24 Q. Which portion of it was hyperbole?

1 A. The entire statement.

2 Q. And by hyperbole, what do you mean
3 by that?

4 A. Well, I would have to get a
5 definition, or get a dictionary to define
6 hyperbole, but in general it means an
7 overstatement to make a point that we had a good
8 meeting. But again, I don't know my audience,
9 because I don't remember who this person is.

10 Q. Could he have been a potential
11 investor in Leader?

12 A. I can't speculate who he is
13 because I don't remember him.

14 Q. So at the time this email was
15 sent, November 3rd, 2002, did Leader have a
16 commitment with The Limited to contract for
17 Leader2Leader?

18 A. We had a very positive indication
19 from Len Schlesinger that he was going to do
20 something, but it was a strategic visionary
21 commitment at that stage.

22 Q. By do something, he was going to
23 contract for the purpose of Leader2Leader;
24 correct?

1 A. I have said earlier that that was
2 definitely hyperbole to make the point that we
3 had a good meeting.

4 Q. Mr. McKibben, the court reporter
5 has just handed you a copy of the '761 patent.
6 If I could direct your attention to column three
7 of the patent. There is a section entitled
8 Summary of the Invention. Do you see that, sir?

9 A. I do.

10 Q. Does the section entitled Summary
11 of the Invention accurately describe what you
12 believe you invented with respect to the '761
13 patent?

14 A. So, I can't comment to the legal
15 nature of this document, but do you want me to
16 answer as an engineer, an inventor of this
17 technology?

18 Q. Yes, sir.

19 A. Now can you repeat the question?

20 Q. Yes, sir.

21 Does the section entitled Summary
22 of the Invention accurately describe what you
23 believe you invented with respect to the '761
24 patent?

1 A. Accurately, I'm not sure what you
2 mean by that, but I believe this is a good
3 summary of the invention.

4 MR. RHODES: That's it, Your
5 Honor.

6 THE COURT: Okay.

7 MR. RHODES: May we call our next
8 witness?

9 THE COURT: You may.

10 MR. RHODES: I'm sorry, we're
11 going to pass out the binders. May we call to
12 the witness stand Mr. Michael McKibben.

13 THE COURT: You may do so.

14 Pass two up to us, please.

15 THE CLERK: Please stand and raise
16 your right hand. State and spell your full name
17 to remember the record.

18 THE WITNESS: Michael Thomas
19 McKibben, M-I-C-H-A-E-L. T-H-O-M-A-S.
20 M-C-K-I-B-B-E-N.

21
22 MICHAEL THOMAS McKIBBEN,
23 the deponent herein, having first
24 been duly sworn on oath, was

1 examined and testified as follows:

2 THE COURT: Good afternoon, again.

3 THE WITNESS: Hello.

4 MR. RHODES: Your Honor, may I
5 proceed?

6 THE COURT: You may.

7 BY MR. RHODES:

8 Q. Good afternoon, Mr. McKibben.

9 A. Good afternoon.

10 Q. I'd like to -- do you have a
11 fairly weighty binder around your area?

12 A. No.

13 Q. Okay. I need one more.

14 MR. RHODES: Your Honor, may I
15 approach the witness?

16 THE COURT: You may.

17 BY MR. RHODES:

18 Q. Mr. McKibben, may I ask you to
19 turn to what I'm hoping is the first tab which
20 for identification is DTX 0963.

21 MR. RHODES: And Your Honor, based
22 on the video deposition, may I move into
23 evidence Exhibits 179, 181, 185 and 186?
24 They're all defendant's exhibits.

1 THE COURT: Any objection?

2 MS. KOBIALKA: No objection.

3 THE COURT: Okay. They're
4 admitted.

5 MR. RHODES: Thank you, Your
6 Honor.

7 DIRECT EXAMINATION

8 BY MR. RHODES:

9 Q. Mr. McKibben, I'm showing to you
10 one of the legal documents that the parties
11 exchanged before you come to trial. These are
12 called interrogatories.

13 Do you recognize this document?

14 A. I do.

15 Q. Okay. And if I could get you to
16 turn to the next to last page, there's a
17 document entitled Verification.

18 Let me know when you have that
19 before you.

20 A. I have it.

21 Q. Do you have an understanding as to
22 what this is?

23 A. I believe it's I affirm that what
24 these statements have -- these statements are

1 true.

2 Q. You understand that this is a
3 legal formalism in which my side asks questions
4 of your side and your side provides answers?

5 A. Yes, in general I understand that.

6 Q. Right. And like all things with
7 lawyers, we can't say questions. We call them
8 interrogatories.

9 You with me?

10 A. I got that.

11 Q. And when we get the answers back
12 from your side, somebody signs a verification
13 under penalty of perjury that those things that
14 you stated to us are true. Do you understand
15 that?

16 A. I do.

17 Q. And if we look at this
18 verification here, do we see your signature
19 there?

20 A. That appears to be my signature.

21 Q. In fact, you signed this; correct?

22 A. I signed quite a few
23 verifications, and so I believe this is my
24 signature.

1 Q. And did you understand that when
2 you signed that signature, you were attesting to
3 the truthfulness of the statements made in this?

4 A. I did understand that.

5 Q. All right. Let me ask you to look
6 then to the document itself.

7 And if you look to Page 4, you'll
8 see a Roman Numeral IV. Excuse me, numeral four
9 at the bottom.

10 A. Interrogatory Number 9?

11 Q. Precisely. And you see the first
12 paragraph?

13 A. I do.

14 Q. Take a look at the last sentence
15 in the first paragraph.

16 MR. RHODES: Ken, can you
17 highlight that for me?

18 THE WITNESS: Isn't that the whole
19 sentence?

20 BY MR. RHODES:

21 Q. No. I'm sorry.

22 Bottom of Page 4 there's what's
23 called a First Supplemental Response to
24 Interrogatory Number 9. Do you see that?

1 A. Yes.

2 Q. I'm sorry, I probably just
3 directed you incorrectly.

4 And you see -- no. Just start
5 with after the -- Ken, where it says
6 Leader2Leader. No, right there, that whole
7 sentence.

8 It says Leader2Leader. Now,
9 Leader2Leader is a brand name of a product;
10 right?

11 A. That is one description, yes. It
12 is a brand name.

13 Q. It says Leader2Leader and then it
14 has a circled R. Do you see that?

15 A. I do.

16 Q. Does that mean there was a
17 copyright or trademark?

18 A. Registered trademark.

19 Q. Trademark.

20 So it was a registered trademark
21 at that point in time?

22 A. I'm not sure I had understand that
23 question.

24 Q. It was a bad question, wasn't it?

1 Didn't have a time period on it.

2 I apologize. I'm tired.

3 A. Okay.

4 Q. The statement says Leader2Leader
5 powered by the digital Leader board engine is
6 covered by the '761 patent. Do you see that?

7 A. I do see that.

8 Q. And that was a true and correct
9 statement; correct?

10 A. In answer to Interrogatory Number
11 9, yes.

12 Q. All right. May I ask that you
13 turn to the next tab in the binder, which is DTX
14 0969.

15 MR. RHODES: Your Honor, I
16 apologize. I was always bad at this.

17 May I move into evidence 0963?

18 THE COURT: Any objection?

19 MS. KOBIALKA: We have no
20 objection.

21 THE COURT: Okay. It's admitted.

22 BY MR. RHODES:

23 Q. This is another and hopefully it's
24 the shorter version. But do you have a really

1 long version?

2 A. It looks to be about 30 pages.

3 Q. Okay.

4 A. Fifty pages.

5 Q. Try to short circuit it. But this
6 is another one of these answers that you guys
7 gave to us in the case, and I'm interested in a
8 statement on Page 46.

9 Is that before you?

10 A. Yes.

11 Q. All right. Now, if you look at
12 the very top, it says Third Supplemental
13 Response. Do you see that?

14 A. I do.

15 Q. And then look at the last sentence
16 of that paragraph.

17 MR. RHODES: And Ken, can you
18 highlight that for me, please?

19 BY MR. RHODES:

20 Q. Do you see that?

21 A. I do.

22 Q. And it says Leader2Leader powered
23 by the digital Leader board engine embodies the
24 following asserted claims of the '761 patent.

1 Do you see that?

2 A. I do.

3 Q. And do you understand that was a
4 statement that was made from your side to our
5 side during the conduct of the litigation?

6 A. Based on what you just asked me,
7 is that --

8 Q. Yes.

9 A. Okay. I understand that.

10 MR. RHODES: Okay. Your Honor, I
11 move into evidence Exhibit DTX 0969.

12 MS. KOBIALKA: No objection.

13 THE COURT: It's admitted.

14 BY MR. RHODES:

15 Q. Skip the really large document and
16 go to the tab that's marked 178.

17 A. Okay.

18 Q. Do you have that before you?

19 A. I do.

20 Q. And if you take a look at the to
21 and from line, let's take a look at that.

22 You see that this document is from
23 December 10, 2001; do you see that?

24 A. I see that's the date. Yes.

1 Q. And do you understand that the
2 final patent application that led to the
3 issuance of the '761 was filed on December 10 of
4 2003?

5 A. We filed the provisional on
6 December 11th of 2002.

7 Q. Thank you.

8 My question, though, was not about
9 the provisional. My question was about the
10 final patent application. Do you understand,
11 sir, that that was filed on December 10 of 2003?

12 A. I do understand that.

13 Q. And you agree with me that the
14 date that's on that screen is more than one year
15 before December 10, 2003?

16 A. December 10th, 2001 is more than
17 one year before the date you just cited.

18 Q. Okay. Now, this is from you;
19 right?

20 A. This appears to be a report that I
21 sent to my shareholders around Christmastime in
22 2001.

23 Q. And you say this is a report that
24 you wrote; correct?

1 A. I believe it is, yes.

2 Q. And you sent it to people that had
3 invested money in your company; right?

4 A. Yes.

5 Q. And you sent it around December of
6 2001; right?

7 A. That's correct.

8 Q. Are the statements that you made
9 to your shareholders in December of 2001 in this
10 document true and accurate?

11 A. I endeavor to make truthful
12 statements to my shareholders. Yes.

13 Q. So whatever is in that document
14 that you wrote, we can say to ourselves we know
15 that it's true; correct?

16 A. I believe I make true statements
17 to my shareholders.

18 Q. Let me direct your attention to --
19 it looks like it's 4 of 6 at the top.

20 MR. RHODES: Ken, if you look at
21 the top of the line, it says 4 of 6. And may I
22 ask that you blow up the first three lines of
23 Paragraph 4?

24 BY MR. RHODES:

1 Q. In December of 2001, you wrote to
2 your shareholders that Leader -- that's the
3 company; correct?

4 A. That is our name, yes.

5 Q. And you were the CEO and chairman
6 at the time; correct?

7 A. Correct. Actually that's
8 incorrect. I was senior manager at the time.

9 THE COURT: Hold on a second,
10 Mr. McKibben.

11 MS. KOBIALKA: I'm going to object
12 to this line of questioning to the extent it's
13 beyond the interrogatory information, which was
14 provided. And you overruled this issue.

15 THE COURT: Let's go to side-bar.

16 (Beginning of conference held at
17 side-bar:)

18 MS. KOBIALKA: Your Honor, my
19 objection is on the basis that I believe he's
20 trying to get into potential other offers for
21 sale or demonstrations that were not included in
22 the Fourth Supplemental Interrogatory Responses
23 for Interrogatory Number 4.

24 I believe that particular

1 reference that he's referring to is not among
2 the names that were listed when we addressed
3 this issue. So I am going to have an objection
4 on this ground.

5 THE COURT: Mr. Rhodes.

6 MR. RHODES: I'm not sure I
7 understand the objection, but we're going to
8 cover the ones you have heard about, Wright
9 Patterson, Limited, Boston Scientific. That is
10 what my intention is.

11 THE COURT: And this --

12 MR. RHODES: Those are the ones.

13 THE COURT: That sentence that was
14 off a clip was a more general statement?

15 MR. RHODES: Exactly.

16 MS. KOBIALKA: There's some
17 National Science Laboratory. So there are other
18 sections of that document that talk about Wright
19 Patterson and the other entity.

20 And that's why -- the reason I
21 didn't object to that particular document,
22 because it was going to be used for those
23 purposes.

24 MR. RHODES: I thought the concern

1 the Court had was that we were trying to exhume
2 other episodes. That it was so late in the
3 game, you said too late. You can't do it.

4 So we're going to limit ourselves
5 to the specific ones you said I could use. But
6 the subject matter of what he was doing is fair
7 game.

8 I can ask him how they all were --
9 I thought you said I couldn't go down, you know,
10 a couple specific instances.

11 THE COURT: So you don't go to
12 specifics beyond the ones that were disclosed at
13 the time and we talked about. But on the issue
14 of generally did you make offers, were you
15 trying to sell, be truthful to your shareholders
16 about your efforts to sell, I'm not sure why
17 that's objectionable, because it's just a
18 general matter.

19 MS. KOBIALKA: Correct. It was
20 when he highlighted that specific one.

21 THE COURT: Right.

22 MS. KOBIALKA: And now I think
23 he's headed down that road.

24 THE COURT: Apparently there's

1 some specifics in that sentence.

2 MR. RHODES: I'll take it off the
3 screen and look at it again.

4 THE COURT: To the extent it has a
5 specific --

6 MR. RHODES: I won't go into
7 specifics.

8 THE COURT: Right. We just want
9 the general, plus the specific cases we talked
10 about.

11 MS. KOBIALKA: Thank you, Your
12 Honor.

13 (Conclusion of conference held at
14 side-bar.)

15 BY MR. RHODES:

16 Q. Mr. McKibben, in that sentence I
17 just directed your attention to, there's a
18 reference to -- you talk about -- and I am not
19 going to ask you about the specifics. I just
20 want to talk about generalities.

21 Was one of the reasons you sent
22 this communication to your shareholders to
23 update them of the status of the company at the
24 time?

1 A. You had just asked me if my title
2 was CEO and president. I needed to correct
3 that.

4 I was senior manager. We were
5 LLC, limited liability company at the time. So
6 I wanted to correct that.

7 Q. Thank you. I accept that.

8 A. Could you repeat your question?

9 Q. I'm going to try to speed things
10 up because it's Thursday and I'm tired. Let's
11 go to paragraph five.

12 A. We're done with four?

13 Q. No. The Judge has learned with
14 me, sometimes I just give up on things. There
15 is a reference there to Wright Patterson Air
16 Force Base. Do you see that?

17 A. I do.

18 Q. Now, that's a government
19 institution?

20 A. That is a large research and
21 development air base in Dayton, Ohio.

22 Q. And you state there that it says
23 Leader teams, forget the other one, to pursue a
24 joint venture with. Do you see that language?

1 A. Yes, I do.

2 Q. The word teams is present tense;
3 right?

4 A. Correct.

5 Q. So that means it's happening;
6 right?

7 A. It was in the process, yes.

8 Q. And what was in the process was a
9 joint venture with Wright Patterson Air Force
10 Base, and then what does it say right after
11 that?

12 A. To install Leader2Leader at Wright
13 Patterson and build special data sharing modules
14 for use by the U.S. Air Force.

15 Q. You actually installed the product
16 at the Air Force base; right?

17 A. That is correct. The
18 Leader2Leader reference there.

19 Q. True statement?

20 A. Yes.

21 Q. Every time?

22 A. Very true. We were in the midst
23 of looking to develop post 9/11 command and
24 control systems to help the different

1 intelligence agencies better share their data
2 after 9/11.

3 Q. Indeed you had been talking with
4 them about this very thing since April of that
5 year; correct?

6 A. I don't recall the exact date, but
7 that sounds about right.

8 Q. Let's go to the next page and look
9 at paragraph 8C. This one refers to Len
10 Schlesinger. Do you see that?

11 A. Yes, I do.

12 Q. Mr. Schlesinger was an executive
13 with the company called The Limited?

14 A. Yes. The Limited is headquartered
15 in Columbus, Ohio and it's a Fortune 500
16 retailer.

17 Q. They have a chain of stores;
18 right?

19 A. The Limited is the family brand
20 name and then they have a number of stores,
21 different brands underneath it.

22 Q. He says in the third line down,
23 after his latest viewing of the Leader2Leader
24 platform, do you see that?

1 A. I do.

2 Q. He says that if you go after his
3 quote, he saw our concepts back in 1998, do you
4 see that?

5 A. I do.

6 Q. You had been prospecting the sale
7 to The Limited since 1998; right?

8 A. In general, that's a
9 mischaracterization. We weren't talking
10 Leader2Leader back at the beginning.

11 Q. You're talking Leader2Leader here,
12 though; right?

13 A. I am in this paragraph, yes.

14 Q. Now, let me ask you to take a look
15 at the last page, paragraph ten. It says here
16 that you filed for numerous trademarks. Do you
17 see that?

18 A. I do.

19 MR. RHODES: I would move into
20 evidence Exhibit DTX 178, Your Honor.

21 MS. KOBIALKA: No objection.

22 THE COURT: It's admitted.

23 BY MR. RHODES:

24 Q. Did the Leader2Leader product, was

1 it sometimes known as Leadership Software?

2 A. Not generally. The Leadership
3 Software name we used earlier in our company and
4 we decided not to use that going forward, so we
5 stopped using it somewhere around that time and
6 started using the Leader2Leader name.

7 Q. Are they the same thing?

8 A. They're brand names.

9 Q. No, but I'm sorry, not the name of
10 the thing, the thing itself, was it one time
11 referred to as Leadership Software and then
12 later the same thing was referred to as
13 Leader2Leader?

14 A. Well, I'm confused by what the
15 thing is. What thing are you asking?

16 Q. I share your confusion.

17 A. I'm not sure what thing is.

18 Q. Well, the product that was being
19 sold as Leader2Leader or being branded as
20 Leader2Leader, was that product previously
21 branded as Leadership Software?

22 A. Well, I mean, just like you asked
23 me about The Limited, the same way,
24 Leader2Leader was an umbrella brand name under

1 which we sold a number of different offerings,
2 Leader Alert, LeaderPhone, Leader Meeting,
3 Leader Voicemail, so we had a number of
4 different product technologies that were
5 referenced underneath the name Leader2Leader, so
6 when you ask me about things, there were lots of
7 things underneath it.

8 Q. Was one of those things something
9 called Leadership Software?

10 A. No, we stopped using the name by
11 the time we developed these brands.

12 Q. What was the brand name for
13 Leadership Software, what was it?

14 A. Leadership Software was a concept
15 we developed back in late '97 early '98 to
16 develop valid scorecard technologies for
17 preparing Internet software that would put
18 reports in front of managers in the company to
19 help them better organize their information and
20 get feedback from their different groups so that
21 they could better manage their particular
22 responsibilities.

23 Q. Did it use the Leader2Leader
24 engine?

1 A. I'm confused by the question.

2 Q. Okay. Let's take a look at DTX
3 1348, which is in your binder, a couple of tabs
4 behind it.

5 A. What was the number?

6 Q. 1438. Do you see that this is an
7 email from somebody named Steve Hanna?

8 A. I do.

9 Q. And Steve Hanna was part of the
10 group that was at a company called Computer
11 Wizards that Leader bought; right?

12 A. Yes, we purchased Computer Wizards
13 and Steve Hanna was the project manager for our
14 software projects.

15 Q. And eventually he became the VP of
16 technologies at Leader; correct?

17 A. That was one of the titles, yes.

18 Q. So this is an email from him, this
19 is April of 2001. Do you see that?

20 A. My copy says April 3rd.

21 Q. April of 2001?

22 A. April 3rd, 2001, yes.

23 Q. And among other things, he talks
24 about in that second line Wright Patterson Air

1 Force Base, that's what I'm interested in.
2 Second line of the email. He says, Eric and I
3 attended meetings with various representatives
4 from Wright Patterson Air Force Base. Do you
5 see that?

6 A. I do.

7 Q. And if you go up to the subject
8 line, Ken. He writes this email on as you
9 pointed out to me, April 3. Do you see that?

10 A. I do, yes.

11 Q. So yesterday in the context of
12 this email, the day before, that would be April
13 2; right?

14 A. Correct.

15 Q. So what he's saying is that on
16 April 2, he and someone named Eric met with a
17 representative from the Wright Patterson Air
18 Force Base. Are you with me?

19 A. I do.

20 Q. And then if you go down to the
21 third paragraph where it starts overall, he
22 says, "Overall, the demos were very successful."
23 Do you see that?

24 A. I do.

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

7 A. I do.

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

11 A. Yes.

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

16 Do you see that?

17 A. Yes.

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

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

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

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

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

14 A. Yes.

15 Q. Are you sure about that?

16 A. Very positive.

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

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

1 National Laboratories out in Livermore,
2 California.

3 Q. And you're very sure that when the
4 Leader2Leader slides went up at that moment in
5 time, there was a signed written confidentiality
6 agreement in place; right?

7 A. I'm very confident of that, yes.

8 Q. Take a look at the next exhibit
9 which is DTX 0258A.

10 MR. RHODES: Your Honor, we move
11 DTX 1348 into evidence.

12 MS. KOBIALKA: No objection.

13 THE COURT: It's admitted.

14 THE WITNESS: What's the number?

15 Q. It's DTX 0725A as in apple.

16 A. Okay. That's not what I seen on
17 the screen there.

18 Q. Me neither. What's the title of
19 this document?

20 A. Excuse me, what I see on the
21 screen is not what I'm looking at. I'm looking
22 at a confidentiality agreement with Douglas
23 Fleser. There it is.

24 Q. Is that it?

1 A. That's it.

2 Q. I'm sorry.

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

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

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

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

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

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

19 A. I do.

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

24 A. I do.

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

3 A. April 10th, 2001.

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

6 A. April 10th is after April two.

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

10 A. I do.

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

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

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

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

1 and he signed a NDA on April 2nd.

2 Q. Let's take a look --

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

5 MS. KOBIALKA: 725A, no objection.

6 MR. RHODES: 725A.

7 THE COURT: It's admitted.

8 BY MR. RHODES:

9 Q. Let's take a look at DTX 852.
10 Hopefully it's the next tab. Do you see this
11 document?

12 A. I do.

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

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

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

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

1 Q. Well, what's the date on the
2 document?

3 A. December 20 of 2001.

4 Q. That's about almost two years
5 before the final patent application was filed;
6 right?

7 A. That date is.

8 Q. And I notice that in the middle of
9 the document under what it says quad chart, it
10 says Leader, blow that up for me. It says
11 Leader Technologies, Michael T. McKibben. Do
12 you see that?

13 A. I do.

14 Q. And I didn't see anybody else's
15 information suggesting that it was a combined
16 document. Do you see anything else in the front
17 there that indicates that this document is from
18 either Dayton or Wright Patterson Air Force Base
19 on the front of the page?

20 A. Well, you need to look at the quad
21 that's on the next page to see the description
22 of the project.

23 Q. I see the description of the
24 project. My question is: Do you see anything

1 on the document that suggest that it came from
2 anybody other than Leader?

3 A. Well, this is an internal
4 document. This was never distributed and the
5 final version of this was in sometime the next
6 year. But to answer your question, there is
7 nothing here that identifies anything other than
8 me on the front cover.

9 Q. All right. Next to the Leader
10 Technologies, LLC column on the left there is a
11 word there. Blow that word up, Ken. It says
12 offeror. Do you see that?

13 A. I do.

14 Q. What is an offeror?

15 A. That is the technical term for
16 DARPA requirements for this kind of submission.
17 It's just a term of art that DARPA uses for
18 their proposals.

19 Q. It's someone who makes an offer,
20 isn't it?

21 A. That's what they required for the
22 name. We were just following their template.

23 Q. Sir, December of 2001 and January
24 of 2002, upon your oath, do you deny making an

1 offer to sell Leader2Leader licenses to the
2 Wright Patterson Air Force Base?

3 A. That is a mischaracterization of
4 this project.

5 Q. Do you deny on your oath that you
6 made such an offer to license Leader2Leader to
7 the Wright Patterson Air Force Base in December
8 of 2001 and January of 2002, do you deny that?

9 A. Leader2Leader is a suite of
10 products that we put in a proposal to DARPA for
11 an advanced research project with the University
12 of Dayton and Wright Patterson Air Force Base,
13 and this was complying with their projections
14 and how they wanted the project submitted.

15 Q. Do you deny on your oath that you
16 made an offer for sale to them?

17 A. We put numbers in a proposal that
18 are not considered an offer by the United States
19 government, by their own requirements.

20 Q. Take a look at page two of the
21 exhibits. The lower right-hand quadrant where
22 it says phase one, phase two.

23 What does ROM mean?

24 A. I don't recall. I don't recall

1 what that means.

2 That's just one of the headers for
3 the DARPA quad chart.

4 Q. Phase one says \$12,074,495 over a
5 12-month period; correct?

6 A. Yes, it does.

7 Q. That's a pretty specific number,
8 isn't it?

9 A. Very specific.

10 Q. That's phase one; right?

11 A. Of the BAA project, yes.

12 Q. Phase two says \$8,695,000 per year
13 for five years; right?

14 A. That is what it says, yes.

15 Q. Now, the next heading says
16 deliverables. Do you see that?

17 A. I do.

18 Q. That's just stuff you got to
19 deliver to somebody; right?

20 A. That's the title on their page, so
21 that's what I put down.

22 Q. That's how you understood it;
23 right?

24 A. I understood their requirement.

1 Q. To deliver something?

2 A. That was their name for what this
3 project was intended to deliver.

4 Q. And what you were going to deliver
5 to the Wright Patterson Air Force Base was
6 20,000 Leader2Leader user licenses; correct?

7 A. That is what it says, yes.

8 Q. And you were going to deliver six
9 fully documented and operational LeaderCube data
10 integration modules for use by them; right?

11 A. That was to be one of the R & D
12 projects that this project would fund and
13 develop subsequently.

14 MR. RHODES: Move into evidence
15 Exhibit DTX 852.

16 MS. KOBIALKA: No objection, Your
17 Honor.

18 THE COURT: It's admitted.

19 MR. RHODES: Let me tie up one
20 loose end, if we may, before we break.

21 THE COURT: As long as you can do
22 it shortly.

23 MR. RHODES: Very shortly.

24 BY MR. RHODES:

1 Q. Take a look at the next tab, DTX
2 179, which is already in evidence.

3 DTX 179 is a longer document dated
4 January 9, 2002 that was submitted to the Wright
5 Patterson Air Force base; correct?

6 A. No, it was not.

7 Q. Well, it's dated January 9, 2002;
8 right?

9 A. It is.

10 Q. And are the statements in it true
11 and correct?

12 A. I make a habit of making true
13 statements. I try to.

14 Q. Okay. So if you take a quick look
15 at Paragraph 7.1, Page 7 of 12, do you see
16 there's a section called Deliverables?

17 A. I do.

18 Q. And do you see that it's the
19 same -- at least with A and B, it's the same
20 things we were just looking at in the December
21 2001 document?

22 A. I do.

23 Q. Now, go to the next paragraph,
24 which is entitled Timing.

1 It says Leader2Leader platform
2 installation and training will be fully
3 implemented by the end of Q1 of 2002; right?

4 A. I see that. That's what it says.

5 Q. I ask you again: Upon your oath,
6 do you deny making an offer of sale to Wright
7 Patterson Air Force Base of the Leader2Leader
8 platform in January of 2002?

9 A. The Leader2Leader platform was
10 offered as a part of the project that DARPA
11 asked to have presented in this way.

12 THE COURT: Mr. Rhodes, let's
13 leave it there for tonight.

14 Before we let the jury go, let me
15 remind you, you've heard it enough times I know,
16 but still let me remind you the case is still
17 ongoing. You're not deliberating, not to
18 discuss it with anyone.

19 And you're not to view any media
20 coverage if there is any of the case. And I
21 don't order you, but I encourage you, hope you
22 have a good night.

23 And definitely be here tomorrow
24 morning in time to start up at nine o'clock.

1 Thank you.

2 THE CLERK: All rise.

3 (Jury leaving the courtroom at
4 4:32 p.m.)

5 THE COURT: You can step down, Mr.
6 McKibben. And the rest of you can be seated.

7 From my perspective, I'd just like
8 to get an update kind of where we are and where
9 we think we'll be at this time tomorrow.

10 MR. RHODES: I don't have probably
11 30 minutes more with this witness and then the
12 following examination is about --

13 MS. KEEFE: About an hour.

14 MR. RHODES: With our invalidity
15 expert. Then that's the end of our case.

16 THE COURT: Right. Any sense, Mr.
17 Andre?

18 MR. ANDRE: I was kind of led to
19 believe we'd be further along than we are today
20 as we sit here. I don't think we will --
21 depending on how long -- their experts seem to
22 be going longer than they have indicated, which
23 is -- it happens. No offense.

24 But I hope we can close our case

1 by 4:30 tomorrow, but you know, I don't think
2 it's going to be early afternoon like I had
3 hoped for.

4 THE COURT: Right. Okay.

5 Ms. Kobialka, have there been -- I
6 think it was you. Whoever suggested there might
7 be some ongoing efforts with respect to the
8 verdict sheet, have those yielded anything yet?

9 Are they ongoing.

10 MS. KOBIALKA: No, not yet, but
11 we'll work on it and report back to you tomorrow
12 morning.

13 THE COURT: Okay. If I could have
14 whatever is the product of those discussions by
15 the lunch break tomorrow, so I could begin to
16 take a look at it, that would be terrific.

17 Anything else that needs to be
18 raised at this time?

19 MS. KOBIALKA: Do you want that
20 filed or just presented to you? How do you want
21 to do that?

22 THE COURT: You could pass -- you
23 could file it here in open Court and then follow
24 up eventually with an email that has it in Word

1 Perfect version, so we can manipulate it.

2 Anything we need to discuss at
3 this time, Mr. Andre?

4 MR. ANDRE: Nothing, Your Honor.

5 THE COURT: Mr. Rhodes?

6 MR. RHODES: Gratefully, no.

7 THE COURT: Okay. Have a nice
8 evening.

9 MR. RHODES: You, too, Your Honor.

10 THE COURT: All rise.

11 (Court was recessed at 4:33 p.m.)

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CERTIFICATE OF REPORTER

I, Heather M. Triozzi, Registered Professional Reporter, Certified Shorthand Reporter, and Notary Public, do hereby certify that the foregoing record, Pages 945 to 1,273 inclusive, is a true and accurate transcript of my stenographic notes taken on July 22, 2010, in the above-captioned matter.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 22nd day of July, 2010, at Wilmington.

Heather M. Triozzi, RPR, CSR
Cert. No. 184-PS