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<p>1 Q. And does Hubert also disclose the 2 computer-implemented tracking component? 3 A. Yes, it does, in much the same 4 same way that I said before. Remember the bee 5 with its pollen. 6 There's a track component, that 7 processing part of the system that tracks the 8 change information associated with a user moving 9 between these user workspaces. 10 Q. And so what is your opinion 11 regarding Claim 23 vis-a-vis the prior art 12 Hubert patent? 13 A. That Hubert discloses each and 14 every element of Claim 23. 15 Q. Do you have an opinion on Claim 16 25? 17 A. Let's take a look. So here we're 18 talking about a relationship capturing a 19 relationship between the first user workspace 20 and at least one other user workspace. And I've 21 actually addressed this before. 22 But remember that bee with the 23 pollen. This is essentially -- it is capturing 24 their relationship, in this case, in the</p>	<p>1 A. That Hubert discloses Claim 31. 2 Q. And finally, do you have an 3 opinion regarding Claim 32? 4 A. Yes, I do. 5 Q. And what is that? 6 A. That Hubert discloses Claim 32. 7 Q. And why is that? 8 A. So this goes back to the 9 many-to-many functionality. And again, Hubert 10 was all about how can people access information 11 about these documents? 12 And this is -- you know, goes to 13 the heart of the Hubert system. It's all about 14 multiple people accessing information. 15 He even uses the example of people 16 trying to access ratings that people may give on 17 documents. So it's all about finding what's 18 happened. 19 Q. And so what is your opinion 20 regarding Claim 32 vis-a-vis the prior art 21 Hubert patent? 22 A. That Hubert discloses what's in 23 Claim 32. 24 Q. Could you please pull back up the</p>
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<p>1 meta-document itself. 2 Q. And so what is your opinion 3 regarding Claim 25? 4 A. That Hubert discloses Claim 25. 5 Q. Only two more. So what about 6 Claim 31, do you have an opinion? 7 A. Sure. So here it says the storage 8 component stores the data and the metadata 9 according to at least one of a relational and an 10 object storage methodology. 11 Q. And does Hubert disclose that? 12 A. Yes, he does. 13 Q. Where does he do that? 14 A. I have a call out here. Here we 15 see emerging technology such as RDF metadata and 16 DOM, document object model, will readily enable 17 implementation of meta-documents. 18 I should mention that RDF is a 19 standard that's developed for the web. So 20 again, it's, you know, another argument about 21 all this being web-based platform, web-based 22 system. 23 Q. So what is your opinion regarding 24 Claim 31?</p>	<p>1 front page of the '761 patent? And again, show 2 exactly that. 3 A. There's also that reference on the 4 bottom left and one on the very bottom left. 5 Q. It's Pickett. I think he created 6 a new page for us. So Dr. Greenberg, do you see 7 the Hubert patent cited here? 8 A. No, I do not. 9 Q. So just to wrap up, Dr. Greenberg, 10 what is your opinion regarding the Hubert prior 11 art patent vis-a-vis the asserted claims of the 12 '761 patent? 13 A. Hubert discloses each and every 14 element of the asserted claim except in Claim 15 16. And I think I'll speak about that shortly. 16 Q. I think right now. So Dr. Greenberg, 17 we've been talking about references containing each 18 and every element. Is there a word for that in 19 patent law? 20 A. Yes. That's called anticipation. 21 Q. And your opinion, what is your 22 opinion regarding anticipation of all the claims 23 that we've been talking about and the reference 24 that we have been talking about?</p>

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<p>1 A. Well, what I've talked about was 2 three references: Swartz, iManage and Hubert. 3 And that each one of them by itself anticipates 4 or discloses what's in the -- what's being 5 asserted with the exception of Claim 16, which 6 only Hubert or see -- sorry, which only iManage 7 discloses.</p>	<p>1 someone even think potentially to pull different 2 ideas from one reference or another?</p>
<p>8 Q. Is there another way besides 9 anticipation for prior art references to 10 invalidate patents?</p>	<p>3 A. Well, there's several reasons why 4 you want to look at these references together. 5 Well, the simple -- the simplest one is that two 6 of them are from Xerox. Like Xerox are the 7 assignees of them.</p>
<p>11 A. Yes, there is.</p>	<p>8 They're theirs. And Xerox is in 9 the business of document management.</p>
<p>12 Q. And what is that? 13 A. So the other way is through what's 14 called obviousness.</p>	<p>10 iManage is a -- I guess would be a 11 competitor at the time. They do document 12 management. So it's the same stuff. They're in 13 the same business. So that's one of the 14 reasons.</p>
<p>15 Q. And what does obviousness mean?</p>	<p>15 The other reason is that they all 16 deal with the same thing. As I've mentioned, 17 they're all about, you know, what is a person 18 doing in a certain context? Can we capture 19 that?</p>
<p>16 A. So obviousness has a -- there's a 17 few different ways to do obviousness. One is if 18 it's obvious to one of normal skill in the art, 19 a person would know, hey, this is how you do 20 things. This would be, you know, pretty 21 natural, pretty straight forward. To do that 22 would be one way.</p>	<p>20 Can we store that? Can we track 21 what they do when they move between context? 22 Can we capture and store that as well?</p>
<p>23 The other way is by combining 24 references. That is, instead of using a single</p>	<p>23 Can we revise that at a later 24 time? Can we access that? Can a person review</p>
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<p>1 reference to say that everything's there, you 2 can actually use two or more references together 3 to actually show that the ideas have been out 4 there.</p>	<p>1 what has happened to all these documents, all 2 this information across these contexts?</p>
<p>5 Q. And do you have an opinion 6 regarding each of the asserted claims and 7 whether or not they are obvious in light of 8 prior art?</p>	<p>3 So that's another reason it would 4 be obvious to combine in these three references.</p>
<p>9 A. Yes, I do.</p>	<p>5 Q. Let's talk about Claim 16. Can we 6 put Claim 16 on the board, please?</p>
<p>10 Q. And what is that opinion?</p>	<p>7 So what does Claim 16 add?</p>
<p>11 A. So --</p>	<p>8 A. So Claim 16 essentially says we 9 can access the user environment via portable 10 wireless device.</p>
<p>12 MR. ANDRE: Objection, Your Honor. 13 Outside the scope of his expert report.</p>	<p>11 Q. Do you have an opinion as to 12 whether or not Claim 16 would be obvious to 13 someone reading the Swartz patent?</p>
<p>14 THE COURT: The objection is 15 noted.</p>	<p>14 A. Yes, I do. Well, there's two ways 15 it can be obvious.</p>
<p>16 THE WITNESS: Okay. So my opinion 17 is that we can -- that if there's any perceived 18 weakness in my arguments, which I don't believe 19 there are about the Swartz patent, about the 20 iManage Reference Manual, about the Hubert 21 patent, we can combine all three of those 22 together to actually show that all the ideas are 23 collectively in those three prior art pieces. 24 Q. And can you explain: Why would</p>	<p>16 So, first of all, if -- for one 17 skilled in the art, so this is -- so think back. 18 We're talking about around Swartz, the late '90s 19 or any time actually during the time of this, 20 We're talking about a wireless 21 laptop amongst other things, be a wireless 22 laptop, a PDA, those type of things. You know, 23 to actually say that, Gee, I can access a user 24 environment, not only by a computer that's wired</p>

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<p>1 in, but by a wireless computer.</p> <p>2 Well, not only would that have</p> <p>3 been obvious to a computer professional, but if</p> <p>4 you had an end user who was just using their</p> <p>5 wireless computer at the time, they would just</p> <p>6 do that as a matter of consequence of using a</p> <p>7 wireless computer.</p> <p>8 There's virtually nothing added by</p> <p>9 this claim that wasn't known at the time.</p> <p>10 That's --</p> <p>11 Q. So do you have an opinion as to</p> <p>12 whether or not the Swartz patent alone would</p> <p>13 render Claim 16 obvious?</p> <p>14 A. Well, yes.</p> <p>15 Q. And do you have an opinion whether</p> <p>16 the Hubert reference alone would render the</p> <p>17 Swartz would render the Claim 16 of the '761</p> <p>18 patent obvious?</p> <p>19 A. Yes.</p> <p>20 Q. And again, why?</p> <p>21 A. For exactly the same reason. We</p> <p>22 saw Hubert -- actually saw Hubert because this</p> <p>23 would be obvious to one skilled in the art.</p> <p>24 Somebody would read Hubert and this just</p>	<p>1 assistant. So back in that time, we have</p> <p>2 wireless computers, but you know there's also</p> <p>3 PDA, essentially these little hand-helds.</p> <p>4 And he says that the PDA engine is</p> <p>5 configured to exchange data with a remote</p> <p>6 computer via the wireless telephone engine. So</p> <p>7 essentially he's saying, Gee, we can -- we can</p> <p>8 access things wirelessly and we do things that</p> <p>9 way.</p> <p>10 So this is -- again, this is</p> <p>11 something that's common to all of us today. It</p> <p>12 was certainly common. It was certainly also</p> <p>13 common that except in the context of a PDA. So</p> <p>14 if we take Ausems and combine it with any one of</p> <p>15 those other three references, we would have that</p> <p>16 information.</p> <p>17 Q. And so do you have an opinion as</p> <p>18 to whether or not a combination of the teachings</p> <p>19 of Swartz and the teachings of Ausems would</p> <p>20 render Claim 16 obvious?</p> <p>21 A. Yes, I do.</p> <p>22 Q. And what is that opinion?</p> <p>23 A. That they do render it -- sorry.</p> <p>24 Say the words again.</p>
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<p>1 wouldn't add anything. People just know that,</p> <p>2 yeah, you can access it via wireless device,</p> <p>3 Q. You mentioned there was another</p> <p>4 way that Claim 16 would be obvious in view of</p> <p>5 Swartz.</p> <p>6 A. Yes. And this goes back to</p> <p>7 combining references.</p> <p>8 So there's another patent by</p> <p>9 Ausems, which actually discloses a portable --</p> <p>10 well, exactly this concept. And maybe if we can</p> <p>11 bring that up.</p> <p>12 So here we have a patent by</p> <p>13 Ausems. And if we look at the date that's sort</p> <p>14 of below.</p> <p>15 Okay. So here's the filing date.</p> <p>16 It was filed in February 19th of 1999.</p> <p>17 And there's a couple lines in here</p> <p>18 that are worth noting. And maybe we can just</p> <p>19 bring that up and highlight them.</p> <p>20 I believe it's in the Summary of</p> <p>21 the invention. Right.</p> <p>22 So here he's talking about -- he's</p> <p>23 talking about a wireless telephone engine,</p> <p>24 smart-card engine and a personal digital</p>	<p>1 Q. Would the combination of the</p> <p>2 Swartz teachings and the teachings of Ausems</p> <p>3 together render Claim 16 obvious?</p> <p>4 A. Yes. Yes, it would.</p> <p>5 Q. Do you have an opinion as to</p> <p>6 whether or not the combination of the Hubert</p> <p>7 patent and the Ausems patent would render Claim</p> <p>8 16 obvious?</p> <p>9 A. Yes, I do, and that would be</p> <p>10 rendered obvious.</p> <p>11 Q. Do you also have an opinion as to</p> <p>12 whether or not combining Ausems with iManage</p> <p>13 would render Claim 16 obvious?</p> <p>14 A. Yes, I do, and it would render it</p> <p>15 obvious.</p> <p>16 Q. And just because I'm not sure my</p> <p>17 record is completely clean, what is your opinion</p> <p>18 regarding whether or not Claim 16 would be</p> <p>19 obvious in view of Swartz by itself with the</p> <p>20 knowledge of one of ordinary skill in the art at</p> <p>21 the time?</p> <p>22 A. That it would be obvious as well.</p> <p>23 Q. And the same question for Hubert?</p> <p>24 A. It would be obvious. And as I</p>

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1 said he -- yeah, it would be obvious.	1 Dr. Greenberg with some water, please?
2 Q. So can we go back to the summary	2 MS. KEEFE: Absolutely.
3 slide?	3 MR. ANDRE: Your Honor, should I
4 Oh, sorry. Go back to the -- you	4 begin now or should we --
5 were right. Ken was right.	5 THE COURT: Yeah. Let's begin
6 Go back to the one with the	6 now, but we'll stop at 4:30.
7 references cited that you had up just a second	7 CROSS-EXAMINATION
8 ago. The front page of the patent. Just the	8 BY MR. ANDRE:
9 front page of the '761 and the References Cited	9 Q. Good afternoon Dr. Greenberg. My
10 portion, please.	10 name is Paul Andre. I'll be asking you a few
11 And Dr. Greenberg, do you see the	11 questions this afternoon. Okay?
12 Ausems patent cited here?	12 A. Absolutely.
13 A. No, I do not.	13 Q. All right. You've demonstrated to
14 Q. And finally, the summary slide,	14 the jury four references here today; correct?
15 please.	15 A. That's correct.
16 Dr. Greenberg, just once more, for	16 Q. And all those references were
17 the record, please, what is your opinion	17 given to you by counsel for Facebook; correct?
18 regarding the Swartz patent?	18 A. They were given to me for
19 A. Okay. So as written here, my	19 analysis. Correct.
20 opinion is that Swartz discloses each element of	20 Q. And your understanding of Claim 1,
21 claims of the asserted Claims 1, 4, 7, 9, 11,	21 for example, is that Claim 1 has three separate
22 21, 23, 25, 31 and 32.	22 elements; correct? You have the context
23 Q. And what is your opinion regarding	23 component, the tracking or the tracking
24 the iManage Reference Manual?	24 component and then the wherein clause is a
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1 A. That it also discloses each and	1 separate element; correct?
2 every -- each and every element of the claims of	2 A. Well, there's two elements here.
3 the same set of claims plus Claim 16.	3 The second element has the two parts to it
4 Q. And what is your opinion regarding	4 separated by a comma.
5 the Hubert patent?	5 Q. And in your analysis, you separate
6 A. That it discloses each element of	6 those out as two separate elements, the part
7 all the claims of 1, 4, 7, 9, 11, 21, 23, 25, 31	7 two; right?
8 and 32.	8 A. You're talking about in my claim
9 Q. And what is your opinion regarding	9 chart.
10 possible combinations of Swartz, iManage and	10 Q. Yes.
11 Hubert?	11 A. My claim chart -- for ease of
12 A. That it would render all those	12 understanding, I actually break out the part of
13 asserted claims obvious.	13 the -- the second element. I take the first
14 Q. And what is your opinion regarding	14 part up to the comma and then the part after the
15 the possible combination of Swartz, or iManage	15 comma.
16 or Hubert with the Ausems patent?	16 Q. So you treat them as two separate
17 A. That it would render Claim 16 as	17 elements essentially; right?
18 obvious.	18 A. Well, they're not separate
19 MS. KEEFE: Thank you very much,	19 elements. They're the same element. Just for
20 Doctor.	20 ease of comparison, I've just listed them
21 THE WITNESS: Thanks.	21 separately in my document.
22 THE COURT: Cross-examination.	22 Q. And in fact, can you go to Exhibit
23 THE WITNESS: Is there water?	23 1105, PTX 1105? This was a document that we had
24 THE COURT: Can you provide	24 claims written in your claim chart where you had

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<p>1 computer-implemented context component, tracking 2 component, and then the wherein clause; correct? 3 A. That's correct. 4 Q. And that's your handwriting here 5 on the side, isn't it, where you have the 6 preamble one, element, two, three; correct? 7 A. Well, that's not really correct. 8 If you notice, I have a one next to the first 9 element and I wrote two, three next to that 10 brace that actually collects both of them 11 together. 12 Q. Fair enough. Fair enough. 13 But you're doing this as a 14 three-step claim; correct? 15 A. I think you are misconstruing what 16 I did. So these claims are really dense, like 17 you've heard me read it out. 18 There's a lot of stuff in there. 19 And what I did for the analysis, I essentially 20 said, Here's things in Claim 1. Sorry. In the 21 first element of Claim 1. 22 And I -- 23 Q. Okay. We heard how you 24 interpreted it. I get that.</p>	<p>1 Q. You can continue. I'm sorry. 2 A. Well, you switched the slide on 3 me. 4 Q. Go back. I'm sorry. 5 A. So there's a comma there and it 6 says wherein. So it's -- so this is -- you 7 know, it's part of the second element. 8 Q. And that makes it a natural break 9 and then you treat that as a separate step in 10 the claim; correct? 11 A. No, it's associated with the 12 second element. It's -- it just -- there's just 13 a comma there. 14 As I said for ease of analysis, I 15 -- you know, when I was doing my claim chart 16 that I said, Here's things that match the first 17 part of that claim element. And here's things 18 that match the second part of the claim element. 19 They're not -- they're not 20 completely separate. They're part of the same 21 thing. That's why I put a brace around there. 22 Q. Then I guess my question is: Do 23 you believe that the metadata is updated when or 24 in which the user accesses the data from the</p>
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<p>1 A. Okay. 2 Q. My question is -- 3 MS. KEEFE: Objection, Your Honor. 4 Interrupting the witness. 5 MR. ANDRE: He was answering a 6 question I didn't ask. 7 THE COURT: You can continue. 8 Overruled. 9 MR. ANDRE: Thank you. 10 BY MR. ANDRE: 11 Q. You're treating this as separate 12 from this; correct? 13 In other words, the updating the 14 metadata right here, the stored metadata is not 15 related to accessing it from the second context; 16 correct, in your analysis? 17 A. Well, that's -- I never say that 18 in my analysis. There's a comma there. 19 You know, there's a natural -- 20 there's a natural break. All right. 21 You want me to continue. 22 Q. Go ahead. I'm sorry. 23 A. And it says -- oops. You switched 24 the slide on me.</p>	<p>1 second context? 2 A. Well, the word is not in which, 3 it's wherein. 4 So what that claim -- what that 5 element is stating is that, you know, it says 6 wherein, as a consequence, these are accessing 7 the data from the second context. 8 So -- 9 Q. I'm sorry. Where did you see as a 10 consequence? 11 A. As a consequence. 12 Q. Where is that? 13 A. It's wherein. You said in which. 14 Q. That's the definition of wherein; 15 correct, in which? 16 A. Well, wherein is -- well, wherein 17 when I'm reading this says here is things that 18 happened, and as a consequence, the user can 19 access the data. So that's wherein the user 20 accesses the data from the second context. 21 Q. That's your interpretation of 22 wherein? 23 A. That's my interpretation. Yes. 24 Q. And that's what I am trying to</p>

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<p>1 ask.</p> <p>2 A. Yeah.</p> <p>3 Q. So your interpretation is wherein</p> <p>4 means as a consequence, you can do this?</p> <p>5 A. Yes.</p> <p>6 Q. It doesn't mean in which or during</p> <p>7 which; correct?</p> <p>8 A. It means -- well, let me see this.</p> <p>9 Well, so when I say it has a consequence, it</p> <p>10 could be during or after, right, it says</p> <p>11 wherein. So --</p> <p>12 Q. I want to make sure I get your</p> <p>13 understanding. Now, you have looked at the</p> <p>14 prosecution history in this case; correct?</p> <p>15 A. Yes, I have.</p> <p>16 Q. Okay.</p> <p>17 A. It's been quite awhile now.</p> <p>18 Q. Okay. And if you go to PTX 2, and</p> <p>19 you go to Bates Number 668. Dr. Greenberg, this</p> <p>20 is the Notice of Allowance of the '761 patent;</p> <p>21 correct?</p> <p>22 A. It looks like it.</p> <p>23 Q. If you go to the next page, you'll</p> <p>24 see that the examiner of the '761 patent put in</p>	<p>1 A. That's what it looks like.</p> <p>2 Q. And because the Patent Office on</p> <p>3 the claim wanted the claims written this way,</p> <p>4 wouldn't a reasonable interpretation be that the</p> <p>5 dynamically updating happens in which user</p> <p>6 accesses data from the second context?</p> <p>7 MS. KEEFE: Objection.</p> <p>8 THE COURT: Hold on.</p> <p>9 MS. KEEFE: Objection, Your Honor.</p> <p>10 Goes to issues we discussed before.</p> <p>11 THE COURT: Sustained.</p> <p>12 BY MR. ANDRE:</p> <p>13 Q. If you go to the last page of the</p> <p>14 examiner's amendment, you see Page 683?</p> <p>15 A. Min-hmm.</p> <p>16 Q. And you see the examiner's name</p> <p>17 here?</p> <p>18 A. I do.</p> <p>19 Q. Diane Mizrahi?</p> <p>20 A. Yes.</p> <p>21 Q. Go to PTX 1 and go up here to this</p> <p>22 column here.</p> <p>23 Now, Ms. Mizrahi cited certain</p> <p>24 exhibits here, certain references against the</p>
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<p>1 an amendment. Do you see that?</p> <p>2 A. I see it.</p> <p>3 Q. Okay. Basically saying that</p> <p>4 changes and additions being unacceptable, the</p> <p>5 applicant can appeal whatever. But this is the</p> <p>6 basis for allowance; correct?</p> <p>7 A. I'm not sure what you mean.</p> <p>8 Q. Well, that's okay. It may be more</p> <p>9 of a legal question.</p> <p>10 A. Yeah.</p> <p>11 Q. Any way the examiner is going to</p> <p>12 amend the claims correct?</p> <p>13 A. Okay.</p> <p>14 Q. All right. So go to the next</p> <p>15 page.</p> <p>16 And the examiner here put in</p> <p>17 language that talks about dynamically updating</p> <p>18 the stored metadata wherein the user accesses</p> <p>19 the data from the second context; correct?</p> <p>20 A. I see that. Yes.</p> <p>21 Q. And the examiner got rid of the</p> <p>22 term and automatically updating the stored</p> <p>23 metadata. Based on the change, just by itself,</p> <p>24 she put those two elements in; correct?</p>	<p>1 '761 patent; correct?</p> <p>2 A. That's correct.</p> <p>3 Q. And you saw the fact that like the</p> <p>4 Swartz reference was not listed there; right?</p> <p>5 A. That's correct.</p> <p>6 Q. Now, the implication from you</p> <p>7 pointing that out is that Ms. Mizrahi or Mizrahi</p> <p>8 -- I'm probably butchering her name here -- she</p> <p>9 was not aware of Swartz here and didn't put it</p> <p>10 here; right? That is the implication?</p> <p>11 MS. KEEFE: Objection?</p> <p>12 THE WITNESS: Well, what I said --</p> <p>13 THE COURT: Hold on.</p> <p>14 MS. KEEFE: Objection, Your Honor.</p> <p>15 THE COURT: Sustained.</p> <p>16 BY MR. ANDRE:</p> <p>17 Q. You're aware, of course, that the</p> <p>18 examiner was aware of the Swartz patent;</p> <p>19 correct?</p> <p>20 MS. KEEFE: Objection, Your Honor.</p> <p>21 THE COURT: Sustained. Move on,</p> <p>22 if you have something else you can do in two</p> <p>23 minutes.</p> <p>24 BY MR. ANDRE:</p>

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<p>1 Q. Go to DTX 919. Blow this up right 2 here. 3 This is the Swartz patent; 4 correct? 5 A. That's correct. 6 Q. Is not Ms. Mizrahi an examiner of 7 this? 8 MS. KEEFE: Objection, Your Honor. 9 Move to strike! 10 THE COURT: Sustained. 11 MR. ANDRE: Your Honor, it's on 12 the face of the patent. 13 THE COURT: It's stricken. Let's 14 move on. 15 MR. ANDRE: Your Honor, this would 16 be a good time to stop before I get into the 17 references and substance. 18 THE COURT: All right. That 19 sounds right. 20 Ladies and gentlemen of the jury, 21 we've come to the end of -- sorry. Okay. All 22 right. 23 First things first. Thank you for 24 your service this week.</p>	<p>1 (Jury leaving the courtroom at 2 4:30 p.m.) 3 THE COURT: Doctor, you can step 4 down. The rest of you may be seated. 5 We're going to discuss jury 6 instructions and special verdict form. I 7 suppose it would may be helpful to me and maybe 8 all to us if we briefly assess where we are, so 9 I can have in mind when I'm likely to be 10 instructing the jury as I consider some of these 11 issues. 12 Mr. Rhodes, you're on your feet 13 first, so why don't you give me your sense. 14 MR. RHODES: And I apologize, Your 15 Honor, for trying to raise this at a break with 16 my zeal. I am just - my concern is really 17 simply about where we're going to be sort of 18 early Monday afternoon. 19 It looks like most of the morning 20 -- I don't know how long it will take Your Honor 21 to manually read them in. And if we assume -- I 22 think both Paul and I are relatively brief, but 23 if we assume that we're each in combination 24 going to take three hours or so for the two</p>
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<p>1 I'll remind you that -- first of 2 all remind you, don't come here tomorrow. 3 You're not due back until Monday morning in time 4 to start at nine o'clock. 5 Over the weekend, don't do any 6 deliberating, any discussion about the case. 7 Don't do any research about the case. 8 Don't look at any media about the 9 case if there is any. Don't get on Facebook. 10 And what I've just been notified 11 is that there are several other trials on Monday 12 that are going to be going on in the building, 13 and so our Court security has requested that all 14 of you, being veterans at this point, that you 15 use our private entrance on Monday, which is on 16 the 8th street side of the building. 17 You might want to find it on your 18 way out today, so you know on Monday. And 19 hopefully it will be a little easier for you to 20 get in for, because there may be quite a crowd 21 on Monday. 22 And with that, I will excuse you 23 all for the week. 24 THE CLERK: All rise.</p>	<p>1 arguments plus his rebuttal piece, I'm just 2 concerned about where that leaves us in terms of 3 how deep into Monday you want to go. That's all 4 I wanted to raise with you before. 5 THE COURT: Right. 6 MR. RHODES: I can't say I have 7 any particularly good idea. 8 THE COURT: Okay. Right. 9 MR. RHODES: I don't see I have 10 any particularly good idea -- 11 THE COURT: And my sense of 12 roughly -- I'm not the official timekeeper, but 13 we are timing everything, so there is an outer 14 limit, not that you have to use it all. 15 My understanding is together the 16 parties have about seven-and-a-half hours left. 17 We've been getting in five-and-a-half hours of 18 jury time each day, which suggests to me that if 19 you're going to use all the time -- plus it's 20 going to take me some time to read the 21 instructions -- I suggest we may not be able to 22 get the case to the jury Monday. If you're not 23 going to use all the time, then we have a shot. 24 Any sense on that point?</p>

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1 MR. ANDRE: Your Honor, I don't
 2 think that I'm going to have too long with their
 3 expert relatively speaking, and our expert is
 4 probably a couple hours. We don't know if we
 5 could get it closed on Monday or Tuesday morning
 6 at this point.
 7 THE COURT: Right.
 8 MR. RHODES: The only thing I
 9 would ask Your Honor to think about as you're
 10 thinking about the timing, what happens, for
 11 example, if Mr. Andre finishes his closing at
 12 3:30, and where does that leave me? I think it
 13 would be very unfair to split it.
 14 Like I said, I didn't have a
 15 particularly good idea what to suggest to you
 16 either.
 17 THE COURT: And are both parties
 18 still of the view that it's preferable for me to
 19 instruct the jury prior to the closings?
 20 MR. ANDRE: Yes, Your Honor.
 21 MR. RHODES: I share that view.
 22 THE COURT: Well, we're just going
 23 to have to see, I guess, at the moment.
 24 All I ask, say, is I'm open

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1 certainly to the possibility of possibly ending
 2 early on Monday and just starting fresh up with
 3 the all the closings on Tuesday so as to avoid
 4 any potential prejudice of splitting any
 5 argument in the middle.
 6 One thing I would welcome the
 7 parties's views on, even though it is abstract,
 8 is if I'm instructing first, what is your
 9 feeling about possibly Monday ends with me
 10 reading the instructions and then we only have
 11 closings on Tuesday morning?
 12 Mr. Andre.
 13 MR. ANDRE: That's acceptable with
 14 us, Your Honor.
 15 MR. RHODES: I would be okay with
 16 that. I wouldn't want to have the scenario of
 17 twenty minutes left, and I do twenty minutes,
 18 and it stops.
 19 Either that, or we split them. I
 20 like that idea better than the other one.
 21 THE COURT: All right.
 22 Well, again we'll deal it with on
 23 Monday when we see where we are, and the only
 24 thing I can tell you for sure is you're not

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1 going to go beyond the total of the remaining
 2 seven-and-a-half hours for argument plus
 3 evidence.
 4 Let's turn to the instructions and
 5 special verdict forms, and I'm obviously going
 6 to give both sides some time.
 7 Let me start with Leader.
 8 I do now have the official time,
 9 I might as well tell you. According to my
 10 deputy, Leader has used up eleven hours and
 11 fourteen minutes, and Facebook has used up
 12 eleven hours and eleven minutes. We're running
 13 close, but Leader is a few minutes ahead.
 14 Mr. Andre, or whoever wants to
 15 speak for Leader.
 16 MR. ANDRE: Your Honor, I'm not
 17 sure what you want to address first. We
 18 provided a special verdict form. I think it's
 19 pretty standard in the district here, ones we've
 20 seen from recent personal experience and also
 21 experiences of others. It's straightforward.
 22 THE COURT: One thing we found
 23 curious on your special verdict form, Mr. Andre,
 24 was it did not appear to be asking the jury to

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1 consider several of the defenses on validity.
 2 Was that intentional, or did I misread it?
 3 MR. ANDRE: That should have been
 4 two. Anticipation and obviousness were the only
 5 two defenses raised during the trial.
 6 THE COURT: I see. So you intend
 7 for the jury to understand what the on-sale bar?
 8 MR. ANDRE: It's an anticipation
 9 defense. If you want us to split that out, we
 10 can do that.
 11 THE COURT: I think we will split
 12 it out.
 13 MR. ANDRE: That's fine. We
 14 should have put them has a single anticipation,
 15 on-sale combination.
 16 THE COURT: At this point I'm not
 17 giving you any direction as to what to do. I
 18 may give you some direction over the next few
 19 minutes, but right now I'm not directing
 20 anything on the verdict form. That was my
 21 question there.
 22 MR. ANDRE: As far as the jury
 23 instruction, Ms. Kobialka will be leading the
 24 charge. I'll defer to her.

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<p>1 THE COURT: Let me hear from 2 Facebook on the verdict form before we dive into 3 the jury instructions. 4 MR. WEINSTEIN: Your Honor, 5 there's a couple of differences between the two 6 verdict forms that I wanted to point out for you 7 and give you our thoughts on the significance of 8 these differences. 9 One of the differences is that we 10 put in an element-by-element series of special 11 interrogatories with respect to the doctrine of 12 equivalence issue. We did that following 13 Dr. Vigna's testimony, so after Dr. Vigna's 14 testimony, it seems to us that a special 15 interrogatory regarding the specific claim 16 elements might be helpful. 17 This procedure has been adopted 18 and approved by the federal court in the Warner 19 Jenkinson case. There wasn't a place on the 20 verdict form to put authority. That's at 520 21 U.S. 17 at page thirty-eight, where the Supreme 22 Court says the special verdict and/or 23 interrogatories on each claim element would be 24 very useful in facilitating review, uniformity,</p>	<p>1 the basis of it, is and that's why ours does not 2 include that interrogatory, and theirs 3 discusses. 4 The same is true with respect to 5 number three. 6 Number five, with the prior art, 7 one, Your Honor already mentioned there's no 8 discussion of the on-sale bar or public use 9 defense. There's no separation between the 10 three different prior art references, that that 11 would be something that would provide a little 12 more clarity to make the verdict more useful. 13 We also think one of the 14 differences we think there should be in light of 15 the testimony regarding the priority date 16 issues, we think there should be an 17 interrogatory on whether or not the provisional 18 application supports the issue claims. That has 19 been a litigated issue that we think it would be 20 helpful to have a specialized interrogatory on 21 that. 22 And finally, Your Honor, our jury 23 verdict form includes an explicit series of 24 special verdict interrogatories on the question</p>
Page 1592	Page 1594
<p>1 and possibly post-verdict judgments. 2 As a matter of law, the idea is 3 it's going to provide clarity on which elements, 4 if any, the jury would find on the doctrine of 5 equivalents. That's a difference I wanted to 6 explain to Your Honor. 7 On question number two of Leader's 8 special verdict form, there's a discussion of 9 inducement, and this is something that's going 10 to come out in the jury instructions as well. 11 There's a conflating of the three very distinct 12 standards of infringement that were seen in this 13 case, which is direct infringement, infringement 14 by direction or control -- which is direct 15 infringement -- and inducement. 16 The inducement theory requires 17 that they show that some third party has 18 performed each and every element of the claim. 19 That is, we have somehow induced that activity, 20 and I don't think the trial record has shown 21 that someone other than Facebook has performed 22 each and every element of the claim. I don't 23 think they're making that argument. 24 On number two, I'm not sure what</p>	<p>1 of direction and control, and Your Honor has 2 heard testimony regarding whether Facebook can 3 control or has control over its users. That 4 goes to that issue, and that's going to be 5 important in the context of the bifurcated 6 trial. 7 THE COURT: On element-by-element 8 table, the case you cited was that a patent 9 case? 10 MR. WEINSTEIN: Yes, Your Honor, 11 that's the Warner Jenkinson Supreme Court case 12 on doctrine of equivalents. I left out Komar 13 Communications. That's 156 Federal Third 1182 14 at 1188, footnote one, and that's from the 15 federal circuit, 1998. 16 THE COURT: I would certainly have 17 a great deal of faith and confidence in the 18 jury, but it would be challenging, as we've seen 19 in court, to require them to go element by 20 element, claim by claim. 21 Of course they may do that in 22 their deliberations, and we won't know. What do 23 you say to the concern that this may just be too 24 daunting a task or might frighten them perhaps?</p>

<p style="text-align: center;">Page 1595</p> <p>1 MR. WEINSTEIN: I have two. This 2 is an analysis they'll have to go through 3 anyway. 4 To the extent it's a daunting 5 process, it's a convenience of the fact they're 6 serving eleven claims, some of which they take 7 an entire whiteboard. That's not a daunting 8 task of our choosing. It's something they did 9 by asserting eleven claims in this litigation. 10 THE COURT: Anything else on the 11 verdict form? 12 MR. WEINSTEIN: No, Your Honor, 13 that's it. 14 THE COURT: Mr. Andre. 15 MR. ANDRE: I apologize, Your 16 Honor. I didn't have their verdict form. I 17 just got handed it, and it's a doozy. 18 I think Facebook stipulates to 19 infringement. The jury cannot find it with this 20 jury form, it's so daunting, and it's one-sided 21 that -- infringement is impossible to find. 22 The same standard is not held to 23 validity. They don't do element-by-element of 24 prior art or on sale. It's obviously trying to</p>	<p style="text-align: center;">Page 1597</p> <p>1 THE COURT: Okay. Let's move on 2 to the jury instructions at this point. 3 I'll hear from Leader first on 4 these. 5 MS. KOBIALKA: I'm not sure 6 exactly how you want to proceed with it. 7 THE COURT: I'm not sure either. 8 You've all thrown a lot at me. 9 Why don't you start. If you seem 10 to be spending too long on one I think is easy, 11 I'll let you know and move you on. 12 MS. KOBIALKA: Okay. And I think 13 we divided some of this up amongst us. 14 Depending on the issue, I can start with the 15 first one that's disputed and work through it. 16 THE COURT: Why don't we go 17 through all the ones you're yourself personally 18 covering, and we'll turn it over to the 19 colleague that's addressing the rest, and then 20 I'll turn it over to Facebook. 21 MR. RHODES: Since I'm not going 22 to have a voice, may I excuse myself for a 23 minute? 24 THE COURT: You may.</p>
<p style="text-align: center;">Page 1596</p> <p>1 get some very prejudicial form into the hands of 2 the jury. 3 THE COURT: How about an 4 interrogatory on control or direction? What's 5 your view of that? 6 MR. ANDRE: Your Honor, it comes 7 under the direct infringement, and you ask every 8 possible question there is that you could put 9 out there, you would be reading the instructions 10 and asking check this one and check this one. 11 The verdict form is supposed to 12 reflect the fact that the jury did listen to and 13 appreciate the actual instructions Your Honor is 14 going to read to them and apply analysis and 15 give the final result of the analysis on the 16 form itself. 17 It's not meant for them to go 18 through and have a worksheet to figure out how 19 to cover the deliberations and make it nearly 20 impossible to decipher what we're trying to ask 21 them to come to a decision on. 22 With the direction and control, I 23 don't think it's necessary to add another layer 24 of complication to it.</p>	<p style="text-align: center;">Page 1598</p> <p>1 MS. KOBIALKA: I believe the first 2 dispute in the instruction is 1.3, and that 3 starts on page three. I'm hoping this is an 4 easy one. 5 THE COURT: That's an easy one. 6 You can move on. 7 MS. KOBIALKA: The next one is 8 1.9, and that relates to the deposition 9 testimony. 10 THE COURT: Deposition testimony. 11 MR. KOBIALKA: Correct. That 12 starts on page fourteen. The real difference 13 between our two instructions is that Facebook is 14 attempting to add a fair bit to just the 15 standard jury instruction, where it's basically 16 raising questions specifically directed at 17 Mr. Lamb, and this is frankly something that's 18 appropriate for eliciting argument but not 19 something that needs to be instructed to the 20 jury, so we object to the language proposed. 21 THE COURT: Did they actually 22 depose Mr. Lamb again after the errata sheet 23 went in? 24 MS. KOBIALKA: They moved and</p>

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<p>1 withdrew the morning of the hearing. They never 2 followed up with that.</p> <p>3 In early drafts of the pretrial 4 order, it indicated they were going to take 5 Mr. Lamb's deposition when he appeared at trial 6 and then they removed that issue.</p> <p>7 THE COURT: I'm not indicating 8 that I'm agreeing with you, but that is an 9 easier one, so let's move on.</p> <p>10 MS. KOBIALKA: On the burden of 11 proof, we just followed the jury instruction and 12 added in the names of the parties.</p> <p>13 THE COURT: Tell me where you are, 14 please.</p> <p>15 MS. KOBIALKA: 1.10, page twenty, 16 and so the dispute here is actually they did not 17 want to articulate who had the burden of proof 18 with respect to what issue. It was fine when 19 they had their claims in of inequitable conduct 20 and everything else, but once the claims got 21 bifurcated, they removed it and said we don't 22 want to say infringement is preponderance and 23 invalidity is clear and convincing.</p> <p>24 THE COURT: Okay. You can move</p>	<p>1 So then the next is 2.3. I'm not 2 sure why this is in dispute again, but they 3 don't like our inducing and contributory 4 infringement theory in the case. That was that.</p> <p>5 The next dispute is 3.2. I'm 6 hoping this is another easy one. We're in 7 agreement for the most part. They're having 8 problems with the language Leader proposed. Not 9 brackets.</p> <p>10 It's standard language. I believe 11 it comes from the model jury instructions. The 12 only thing we added at the end was the last two 13 sentences to clarify we have three different 14 claims -- the system claim, computer-readable 15 claim, and method claim -- so there wouldn't be 16 confusion.</p> <p>17 THE COURT: That's going to take 18 us into one of the more difficult areas, the 19 direction and control issues. Are you here to 20 talk about those too? If not, that's fine.</p> <p>21 MS. KOBIALKA: I'd have to look at 22 it. I'm trying to remember.</p> <p>23 THE COURT: Let's move on then to 24 what you have next.</p>
Page 1600	Page 1602
<p>1 on.</p> <p>2 MS. KOBIALKA: The next disputed 3 is 2.2, and this is just -- it's omitted the 4 parties' comments.</p> <p>5 The dispute here is that they 6 don't believe we should have the right to be 7 able to assert inducing infringement and 8 contributory infringement in the case. 9 Otherwise, I think we're in agreement with 10 regard to that particular --</p> <p>11 THE COURT: Do you understand that 12 dispute to some extent to be whether or not you 13 provided adequate and timely disclosure of those 14 allegations and those theories? I'm trying to 15 understand.</p> <p>16 Obviously you have alleged it at 17 trial, and I'm trying to understand the basis of 18 their belief that it's not in the case, which I 19 can direct to them, but if you have an 20 understanding of their position --</p> <p>21 MS. KOBIALKA: This might be based 22 on their motion for summary judgment, but it 23 would be best to ask them. I didn't get very 24 far.</p>	<p>1 MS. KOBIALKA: The next dispute, 2 which once again should be straightforward, is 3 3.3.</p> <p>4 We followed the model instruction. 5 Facebook wants to have the instruction include a 6 chart of the claims. We tried to compromise and 7 say this is claim one, independent, and these 8 other claims depend on it, but you can't really 9 read the chart to the jury.</p> <p>10 THE COURT: It will be awkward, 11 but I think I can do it.</p> <p>12 MS. KOBIALKA: We wrote the 13 language in our instructions.</p> <p>14 THE COURT: I think I'm going to 15 read the language and the chart.</p> <p>16 MS. KOBIALKA: The next one is 3.5 17 on page forty-six.</p> <p>18 THE COURT: They've put in a new 19 3.4 today. I don't know if you've seen it.</p> <p>20 MR. ANDRE: One moment, sir, I 21 just got handed it.</p> <p>22 THE COURT: Sure.</p> <p>23 MR. ANDRE: Your Honor, I've just 24 been handed the note. They just want the Court</p>

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1 to construe the new term "wherein" means in
 2 which, not when. I'm not sure what the basis is
 3 that is.
 4 Obviously their expert testified
 5 it doesn't mean in which. I don't mind. The
 6 definition of the term means in which, but I
 7 don't think not when. You never give a claim
 8 interpretation the negative sense. This is what
 9 it means, and everything else is what it doesn't
 10 mean. We don't object to the term wherein
 11 meaning in which.
 12 THE COURT: I think they also
 13 added that last paragraph about prosecution
 14 history.
 15 MR. ANDRE: I think that's -- can
 16 I confer? I read it, and I think it's
 17 self-apparent, but let me make sure I'm not
 18 missing something.
 19 THE COURT: Okay.
 20 MR. ANDRE: Your Honor, we don't
 21 think it's necessary. We think it's obviously
 22 an attempt to undermine the evidence we put in
 23 with our prosecution history for various other
 24 purposes. We would object to it.

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1 THE COURT: Okay. Ms. Kobialka,
 2 do you have others?
 3 MS. KOBIALKA: I know I do.
 4 3.5 was the next one. This is
 5 "comprising."
 6 This language -- this is a
 7 standard jury instruction that we have, and
 8 Facebook just doesn't believe it's necessary,
 9 but in cases where you have the word
 10 "comprising" in the claims, just so there's no
 11 confusion, this is an instruction that's given.
 12 THE COURT: I'm inclined to do
 13 some form of comprising, but address the issue
 14 that Facebook raises on page forty-nine about
 15 these claims being sequential. I'm not clear
 16 why that is a problem for the comprising
 17 language you proposed, but do you see any issue
 18 with me addressing the sequential nature of the
 19 claims?
 20 You may want to pass the baton.
 21 MR. HANNAH: This issue came up in
 22 the other case, but this is contrary to the law.
 23 The law says that unless there's a direct
 24 relationship between the steps -- for instance,

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1 if you introduced a step and then you referred
 2 back to that step to say it had performed a
 3 sequential step, then they would have to be read
 4 in order. Otherwise, for the method claimed,
 5 you can perform it in different orders.
 6 THE COURT: Even when the Court
 7 construes the dynamically language with having a
 8 timing element?
 9 MR. HANNAH: The timing element is
 10 a technical. It's not a proceeding event in the
 11 claim. It is a proceeding event that's
 12 happening.
 13 This is a computer program that
 14 interacts with a user when a user uploads data.
 15 That could be the event. When you put a -- it's
 16 functional language. That's what dynamically
 17 means. From the claim construction order, that
 18 seems to be --
 19 THE COURT: I see your point.
 20 Ms. Kobialka, let's try to finish
 21 up whatever you have.
 22 MS. KOBIALKA: Okay. The next
 23 jury instruction in this is the same issue, so
 24 this is 3.6 on the inducing.

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1 THE COURT: That just follows.
 2 MS. KOBIALKA: A lot of them are
 3 like that. They have that particular issue.
 4 Now, the next one is on direct
 5 literal infringement, and this goes to all their
 6 arguments about direction. 3.7, direction and
 7 control, and they just dispute whether or not
 8 there is direction and control, which is a
 9 factual issue. That's the center of the dispute
 10 itself.
 11 We have put all the different
 12 types of direct, literal infringement in this
 13 claim, and I think probably no one else is going
 14 to address in the other cases.
 15 To the extent we need to get into
 16 it, this is one of the issues that I don't know
 17 if you want further briefing on it. It's a fact
 18 that the jury is supposed to determine, and the
 19 question is what law do they need to be
 20 instructed in.
 21 THE COURT: What do you think of
 22 the view that there's an issue of fact that's
 23 almost logically prior? That is -- I forget
 24 what the fantasy sports case is called -- that

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<p>1 maybe we need to ask the jury as a factual 2 matter, is this the type of software computer 3 system that's like fantasy sports, in which case 4 to assess direction and control, there's things 5 you can consider along the lines of what Leader 6 suggests. If as a jury you find as a factual 7 matter this program worked more like the one in 8 Muniauction, you're limited to direction and 9 control in terms of liability and contractual 10 relations. 11 Do you have thought to approaching 12 it that way? 13 MS. KOBIALKA: I think it's going 14 to be incredibly confusing. 15 THE COURT: You're right about 16 that. 17 MS. KOBIALKA: And now we're 18 starting to parse out a claim in a manner that 19 goes to their specific defenses. If you're 20 going to do it for one, you have to do it for 21 the other. 22 They are definitely issues we want 23 instruction on with respect to the references 24 and things like that. Once we start going down</p>	<p>1 think this is going to drop out. 2 MS. KOBIALKA: And that would 3 include the vitiation? 4 THE COURT: I think so. 5 MS. KOBIALKA: That was the extent 6 of that one. 7 So the next one is 3.8(b), and 8 they just wanted another instruction on indirect 9 infringement, sort of reemphasizing all the 10 elements. 11 Our objection to this was this was 12 already covered in the previous jury 13 instruction, and no need to go over that again. 14 The next one is 3.9, and this is 15 on page eighty-one. Goes to active inducement. 16 THE COURT: Same issue. 17 MS. KOBIALKA: It is. There's 18 some dispute about how many times do they get to 19 emphasize within these jury instructions that 20 somebody else must directly infringe a claim. 21 It's fair game if you got it once, but second, 22 third, fourth time, it's too much. 23 THE COURT: I will endeavor to be 24 fair with respect to that.</p>
Page 1608	Page 1610
<p>1 this path, it's problematic. 2 I think when it comes to 3 instructing the jury, we need to provide them 4 with the law, and they can make the 5 determination. There's nothing in the cases 6 that say you need to specifically drop that 7 specific question on the verdict form itself. 8 THE COURT: Okay. Already I 9 should tell you I have a goal of getting us out 10 of here at 5:30, so as much as I enjoy this -- 11 MR. RHODES: You had such 12 credibility. 13 THE COURT: I apologize. 14 MS. KOBIALKA: Let me see if I can 15 move through. 16 The next disputed one is 3.8(a). 17 We have a dispute about who has to prove what 18 and that is really what the issue is that's on 19 page seventy, so largely the jury instruction 20 which follows the model is in there, but they're 21 asserting that Leader has the burden of showing 22 that proposed hypothetical claim. 23 THE COURT: I'm not going to ask 24 for an advisory verdict on ensnarement, so I</p>	<p>1 MS. KOBIALKA: I think that's all. 2 Contributory infringement. 3 Mr. Andre was going address that. 4 MR. ANDRE: I was? 5 MS. KOBIALKA: You were. 6 THE COURT: Is there anything else 7 that you wanted to address that you think is 8 particularly important? 9 MS. KOBIALKA: I think another big 10 one that was in dispute was the 4.2, and this 11 one starts on ninety-eight. 12 THE COURT: This is about prior 13 art, and now I think we now know it's much more 14 limited prior art that's part of the case. 15 MS. KOBIALKA: Right. So what 16 issues come into play for purposes of conception 17 the effective filing date? 18 THE COURT: We'll hear from 19 Facebook on that, and I'll try to reserve you a 20 minute or two to respond if need be. 21 MS. KOBIALKA: So I think that 22 also delves into some of the ones thereafter 23 related. 24 4.4, the invention date conception</p>

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1 and reduction to practice. They're all centered
 2 around similar disputes about how to get the
 3 right language in, and part of this goes to
 4 whether or not the provisional discloses enough
 5 of the invention so we get that priority date.
 6 THE COURT: I think I understand
 7 those issues.
 8 MS. KOBIALKA: Okay. So then we
 9 should have put chapters in this thing.
 10 Then the next dispute was 4.5 that
 11 I was going to address. They have inherency
 12 instruction that they would like. This is on
 13 page 128.
 14 Inherency has not been an issue
 15 that any expert has opined on. We kept going
 16 back and forth. Why are we giving an
 17 instruction on inherency if there isn't any
 18 evidence to it? So they didn't want to strike
 19 it. That is the core of that dispute.
 20 THE COURT: Just being mindful of
 21 the time, I'm going direct you to one issue that
 22 would be helpful to me and then let's move to
 23 Mr. Andre, to his issue.
 24 And level of ordinary skill and

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1 whether I need an instruction directing the jury
 2 as a functional matter that they're supposed to
 3 determine that. What is your position?
 4 MS. KOBIALKA: That there does
 5 need to be an instruction, and the jury makes
 6 that determination, what constitutes one of
 7 ordinary skill in the art.
 8 THE COURT: Facebook is of the
 9 view that the Court has determined what a person
 10 of ordinary skill in the art is. Do you have an
 11 idea what that is?
 12 MS. KOBIALKA: I think they're of
 13 the view that you're supposed to decide that and
 14 tell the jury what that is. I know there were
 15 issues about on-sale bar and public use. There
 16 were elements missing. Mr. Rovner was going to
 17 address that. I don't want to shortchange him
 18 on that. He's been preparing.
 19 THE COURT: Mr. Rovner. Is he
 20 here?
 21 MR. ANDRE: He stepped back, Your
 22 Honor.
 23 THE COURT: We'll come back to him
 24 if I need to.

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1 Let's hear from Mr. Andre, and
 2 then I want to give Facebook some time.
 3 MR. ANDRE: Your Honor, on the
 4 contributory infringement, it's a pretty
 5 standard instruction. I don't see anything
 6 extraordinary about the points, puts out the
 7 elements as set forth, looks like Facebook wants
 8 to insert the statute into the instruction to
 9 some degree, and I don't think that's necessary
 10 or appropriate at this point.
 11 I don't see the big issue here
 12 because the Thrasher case has come out and
 13 determined that any type of contributory
 14 infringement to the patent requires a product in
 15 the stream of commerce, and then you have three
 16 elements set for most part.
 17 THE COURT: Let me turn it over to
 18 Facebook at this point. Feel free to address
 19 any of the issues that have been raised or
 20 others if you think there are others that are
 21 important, and basically we have up to
 22 twenty minutes because I do want to leave the
 23 last five minutes to hear from Leader.
 24 MR. WEINSTEIN: There's only two

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1 issues to address. The most critical ones on
 2 jury instruction, 3.4.
 3 Your Honor, I'd like to hand up a
 4 portion of some of the transcript from the trial
 5 to illustrate why we need an instruction that
 6 "wherein" does not mean when.
 7 THE COURT: You've already cited
 8 pretty extensively in your support, which we
 9 looked at, so in the spirit of compromise,
 10 construing at this late moment the term
 11 "wherein" to mean in which, which has been
 12 agreed to by Leader, is not satisfactory to you?
 13 MR. WEINSTEIN: It isn't, Your
 14 Honor. The problem with in which, Your Honor,
 15 they're going to make the exact, same argument
 16 what I heard today, is they think this is a
 17 factual issue to go to the jury.
 18 When I read the '02 Micro case
 19 last night, I was haunted how similar that case
 20 is to this. There was a claim term only if like
 21 there. This case, they presented witnesses and
 22 cross-examined witnesses on what do you think
 23 this term means.
 24 What ultimately came down and the

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1 Court decided, he was going to send it to the
 2 jury. The federal circuit said when the parties
 3 present a fundamental dispute regarding the
 4 scope of a claim term, it is the Court's duty to
 5 resolve it.

6 The fundamental dispute is
 7 regarding does "wherein" mean when, or does the
 8 claim require a dynamic element, which means you
 9 look to the proceeding claim element? That's a
 10 dispute Your Honor needs to resolve as a matter
 11 of law.

12 THE COURT: Help me, though, why I
 13 haven't resolve it by construing "wherein" to
 14 mean in which, and you all make your arguments
 15 or don't. You're stuck with the Court's claim
 16 construction as a matter of law. The jury is
 17 told they have to follow my claim construction.
 18 How is that any different than all the other
 19 claim construction issues?

20 MR. WEINSTEIN: Ultimately let's
 21 say the construction comes in in which you can
 22 say at which point. There's lots of different
 23 definitions. Ultimately wherein is a connector
 24 between two clauses.

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1 The question is, does it connote a
 2 temporal sequence like something happens when
 3 the user accesses the data from the second
 4 context? That's the argument.

5 They're taking the update of
 6 method to metadata can happen when the user
 7 accesses data. That's a claim construction
 8 question. We think it's been resolved by Judge
 9 Farnam's order.

10 THE COURT: Where is it resolved
 11 in his order?

12 MR. WEINSTEIN: It's resolved in
 13 his order.

14 THE COURT: Why do I even need to
 15 define wherein if dynamically has done it?

16 MR. WEINSTEIN: The only reason we
 17 need to define it, Leader is making these
 18 arguments. They're putting prosecution history
 19 evidence before witnesses and arguing the
 20 meaning of claim terms, which is the exclusive
 21 province of Your Honor. There's going to be
 22 arguments in closing as to what ultimately the
 23 legal implication of wherein is. That's
 24 something that should not go to the jury.

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1 THE COURT: And your paragraph on
 2 prosecution history that you propose, that does
 3 not take care of your problem if I were to keep
 4 that in as well as your wherein construction?

5 MR. WEINSTEIN: The wherein
 6 construction would not do it. The prosecution
 7 history would help, but ultimately, Your Honor
 8 has to decide whether or not the claims are
 9 satisfied with dynamically updating the metadata
 10 when user accesses.

11 If that issue is not resolved,
 12 ultimately instituting "wherein" as some
 13 connector is not going to stop the arguments
 14 from being made that are legal in nature.

15 THE COURT: If I were to add line
 16 five, which claims which would I put the term
 17 "wherein" means in which. Perhaps, not when.
 18 In which claims, what number claims, would I
 19 write in?

20 MR. WEINSTEIN: Your Honor, the
 21 claims that have the wherein clause are one,
 22 nine, and four also, and --

23 MR. HANNAH: All the dependent
 24 claims have wherein as well.

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1 MR. WEINSTEIN: I don't think
 2 that's right, but I know seven has wherein in
 3 it.

4 The claims where it really matters
 5 is one, nine, and twenty-three.

6 Twenty-one, very interestingly,
 7 Your Honor doesn't use the word "wherein," it
 8 uses the term "such that," and that is something
 9 that we agreed to, is to construe "wherein" to
 10 mean "such that," which is consistent with
 11 what's in claim twenty-one. That's another
 12 synonym that we think is clearer.

13 THE COURT: Okay. Certainly this
 14 is an important issue. I agree with that, but I
 15 assume there's probably another you want to
 16 address.

17 MR. WEINSTEIN: On Mr. Lamb's
 18 testimony, the only thing we wanted was to say
 19 two points.

20 One is, a written correction to
 21 the deposition does not erase the witness's
 22 prior answer, and the jury is free to consider
 23 the changes in any way they see fit, the same
 24 way they would judge any issue of credibility.

Page 1619	Page 1621
<p>1 We don't think what happened in 2 discovery is particularly relevant. The reason 3 we proposed it, if you recall, as doing the 4 read-back of Mr. Lamb, one of the proposals was 5 let's not present the testimony in the original 6 form, just the modified testimony. Both need to 7 come in, and the jury needs to know the 8 correction does not erase the testimony.</p> <p>9 "Only comprising" claim. This is 10 again going back to the same issue about the 11 sequence of the steps in the claim. The patent 12 calls for a first context and second context. 13 That's a sequence.</p> <p>14 It calls for dynamically 15 associates methodology with user-defined data in 16 the first. That's creation of the data.</p> <p>17 Second claim element, creating the 18 user dynamically, means automatically responding 19 to the preceding event, moving from the first 20 context to the second context.</p> <p>21 The claim requires a sequential 22 step of events. We're not arguing that because 23 Facebook has a bunch of other components, it 24 doesn't infringe. The issue is, does it have</p>	<p>1 I'm not sure the instruction is 2 necessary, but that's not a position that we've 3 been taking.</p> <p>4 THE COURT: I think I have 5 trouble. I understand the argument that you're 6 making about the sequential nature, and I want 7 to know what you propose I do about that if I 8 agree with you. I don't understand the connection 9 between that and 3.5 and why you have an 10 objection to 3.5.</p> <p>11 MR. WEINSTEIN: I think, Your 12 Honor, because the claims have a very specific 13 cause and effect and because there isn't really 14 an issue of comprising versus consisting. The 15 instruction doesn't need to be given.</p> <p>16 This is not an issue. None of our 17 non-infringement positions hinge on. We do 18 everything in the claim, but we do these other 19 things. That's not an argument we're making.</p> <p>20 THE COURT: From your perspective, 21 if I eliminate 3.5, I've addressed your concern 22 about the sequential nature of the claims? 23 MR. WEINSTEIN: The sequential 24 nature of the claims goes to the wherein cause</p>
Page 1620	Page 1622
<p>1 all the claim elements in the claim? 2 We don't want a comprising claim 3 that's going to make them think, I don't have to 4 follow the sequence. As long as I think there's 5 something from or outside of that, I can find 6 infringement, and that's the problem with the 7 comprising claim.</p> <p>8 THE COURT: Tell me again the 9 number of the comprising claim or what page it's 10 on in your joint submission.</p> <p>11 So am I correct that your 12 objection is to the statements in 3.5, proposed 13 3.5, along the lines that if you find that 14 Facebook is practicing all the steps, the fact 15 that Facebook might include additional steps 16 would not avoid literal infringement? Do you 17 have an objection as well to the Court saying 18 what comprising means? That is, the other 19 portions of proposed 3.5.</p> <p>20 MR. WEINSTEIN: The statement that 21 you meet all the claim elements, you don't avoid 22 infringement because you have other stuff, we 23 don't have a problem with that part of the 24 instructions. That's not controversial.</p>	<p>1 that's addressed in 3.4. This problem goes to 2 an a number of instructions.</p> <p>3 THE COURT: Does it come up in 4 other places, or is there some language you 5 proposed elsewhere that I didn't figure out the 6 connection? If you think of that, let me know.</p> <p>7 MR. WEINSTEIN: And, Your Honor, 8 on the indirect and contributory instructions, I 9 think ultimately the question comes, who is the 10 third party who is directly infringing? In 11 other words, who is the third party, not 12 Facebook, who is performing each and every 13 element of the claims?</p> <p>14 I don't think there's been an 15 identification of the third party, let alone a 16 showing that a third party performs each claim 17 step. The apparent purpose of these 18 instructions appears to be to, sort of, muddle 19 what they are required to prove with regard to 20 direction and control, and I'll note that in a 21 minute with respect to the evidence proffered 22 and the issues in the case and the fact that 23 they haven't identified a third party direct 24 infringer.</p>

1 Their theory is it is all
2 happening on Facebook's back, and the user does
3 something under the direction and control of
4 Facebook. There's no instance in their theory
5 in which someone other than Facebook is doing
6 all the claim elements.

7 It's a confusing instruction given
8 the central issue of direction and control,
9 which I'll address.

10 We briefed the legal standard for
11 direction and control. The question is, should
12 Your Honor instruct on what it means to have
13 direction and control, and ultimately, Your
14 Honor, I think you have to.

15 What they want is you have to find
16 control or direction, and what they'll argue in
17 closing is they're directing it because they
18 have instructions on your website or they like
19 it when people log on to their site.

20 Ultimately, the Muniauction and
21 other cases we identified, they're a number of
22 cases that say here's what direction and control
23 is not. In Muniauction, direction and control
24 is not providing access to a system, controlling

1 instructing, or facilitating the other party's
2 participation in the electronic auction process?

3 That was the instruction they
4 gave, and the Federal circuit says none of the
5 questions identified by the jury instruction are
6 left to whether Thompson satisfies the direction
7 and control standard. That's 532 Federal Third
8 1318 at 1330. So I guess the point here Your,
9 Honor, is this is not a fantasy. It's not a
10 fantasy football case, Your Honor. This is a
11 Muniauction case.

12 It came eight years after all the
13 cases dealing with websites and whether or not
14 the website operator or the server operator is
15 liable for the actions of the users in the
16 context of a direct infringement claim that
17 falls under the rubric of the Muniauction
18 decision.

19 I think the other
20 distinction is in the fantasy case and some of
21 the other cases they've cited, including Judge
22 Farnan's cases, those claims didn't require a
23 step where the user is actually performing one
24 of the claim elements. They were -- they were

1 access to a web site, and instructing users on
2 its use.

3 As a matter of law, Your Honor,
4 that is not direction and control, so I think
5 the jury should be told that.

6 THE COURT: I denied a motion for
7 summary judgment on Muniauction. If I give the
8 instruction you proposed, isn't that granting
9 your summary judgment motion?

10 MR. WEINSTEIN: I don't know what
11 the basis of your summary judgment motion was.

12 THE COURT: I haven't explained
13 it.

14 MR. WEINSTEIN: If it was legal or
15 [actual], Your Honor may have found there was a
16 factual issue on direction and control, but your
17 denial could have been based on that if jury has
18 to be instructed on what is direction and
19 control and what is not direction and control.

20 This came up in the Muniauction
21 case. That was a case about a jury instruction.
22 What the district Court instructed in that case
23 was, he asked the jury to consider the following
24 question: Is there one party teaching,

1 more involving where you had an actual server
2 that was doing something and maybe something
3 gets pushed out, but you're not actually --
4 there's no actual distinct party in that sense,
5 legally distinct party that's performing the
6 other steps

7 And in this case, we
8 have a third-party end user who's performing at
9 least one, perhaps two steps of each claim
10 depending on the claim. And we have Facebook
11 providing allegedly the other elements. So they
12 are third infringement implicated end users and
13 the server.

14 Now, the reason this
15 is such an important issue, Your Honor, is
16 something that I alluded to earlier. This is a
17 bifurcated trial. The difference is in
18 implications of whether or not there's direction
19 and control are huge for a second phase trial.

20 I'll give you an example. Let's
21 say, for example, that the jury comes back and
22 says, Okay. Well, I think there was
23 infringement here, because I saw Mr. Wang say on
24 the screen that he uses Facebook, you know, in

Page 1627	Page 1629
<p>1 his cubicle when he does things. 2 I mean, just to be clear, I don't 3 think there's any evidence of infringement, but 4 let's assume that they find that. Under their 5 jury verdict form, which is essentially a black 6 box form, they check yes. 7 So now the jury says, Well, we 8 don't think it was direction and control, but we 9 think there was -- you know, James Wang used it 10 So the answer to infringement is yes, because 11 somebody infringed it somewhere. 12 Now we have to go to a second 13 trial. We bring our JMOL motion and say, Okay. 14 We don't think there was, but the bottom line is 15 if the jury concludes that there was no 16 direction and control of third-party Facebook 17 end users, there shouldn't be a second phase of 18 this trial. And our jury verdict form will make 19 sure that happens. 20 Under their jury verdict form, 21 we're going to be guessing as to what the jury 22 actually concluded. And that, I think, is 23 unfair. 24 This wasn't a problem before Your</p>	<p>1 You know, we're okay with just 2 having the jury consider that fact as they 3 normally would. So I just wanted to clarify 4 that point, Your Honor. 5 THE COURT: Thank you. What about 6 anticipation, incorporation by reference? 7 MR. WEINSTEIN: I think in light 8 of the fact that the Lampin and Selger 9 references have not been the subject of 10 testimony, I don't think we need that 11 instruction anymore, Your Honor. 12 THE COURT: Okay. 13 MR. WEINSTEIN: With respect to 14 inherency, Your Honor, they don't think there 15 should be an instruction on inherency. I wasn't 16 in Court all day, but I do remember Dr. 17 Greenberg saying, for example, with respect to 18 the computer executable Claim 21, the preamble 19 he was talking about how there's a server and 20 there is -- that's inherent in the idea of a 21 server that you have computer executable 22 instructions and a processor. 23 So, I mean, the fact is there 24 certainly is inherency in his arguments. So</p>
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<p>1 Honor bifurcated the case, because we had 2 distinct damages theories on end users versus 3 internal. And really what it was, they have no 4 damages theory on internal use. 5 And their damages theory on 6 external use, when it was all in the same case, 7 that wasn't a problem. But Your Honor 8 bifurcated and that's why we need that 9 interrogatory and the instructions. 10 Your Honor, on the obviousness 11 issue, we were not asking whether or not the 12 level of ordinary skill in the art should be 13 determined by Your Honor. I think the reason 14 for the bracketed text was the definitions of 15 the ordinary skill in the art were relatively 16 close that we had put it in brackets with the 17 possibility that there might be a stipulation on 18 it. That was the reason for the brackets. 19 That is an issue that's not 20 determined by Your Honor. That's one of the 21 factors that the jury would consider is the 22 person of ordinary skill in the art for purposes 23 of obviousness. So it's because there is no 24 stipulation between them.</p>	<p>1 that's something that should -- that should stay 2 in the jury instruction. That's Instruction 3 4.5. 4 THE COURT: Mr. Weinstein, I just 5 want to make sure the Doras and Hence 6 references, are they in the case any longer? 7 MR. WEINSTEIN: Not at this time 8 any longer. 9 THE COURT: Is there any chance 10 they're still coming in? 11 MR. WEINSTEIN: No, Your Honor. 12 Sorry. Lawyers never want to be -- 13 THE COURT: I know you don't want 14 to concede anything until you have it. 15 MR. WEINSTEIN: Of course, but 16 that time has come on this. 17 Your Honor, with respect to one 18 other jury instruction, 4.2, there's this issue 19 of conception and reduction to practice, which 20 is -- this is another issue that might not be 21 relevant anymore in light of the fact that all 22 of the three prior art references that Dr. 23 Greenberg presented are undisputed prior art to 24 the claims of the '761, patent which is to say</p>

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<p>1 they were either filed before their invention 2 date or they were published more than one year 3 before their filing date for the Patent Office. 4 So the issue of conception 5 reduction to practice would only be relevant if 6 they were trying to square back some of our 7 references. And because the three references 8 aren't subject to being a square back claim, 9 based on the fact in evidence here, and just the 10 fact that Swartz, for example, was published in 11 May of 2001. 12 So there's no way they can square 13 behind it under any theory here. Hubert was 14 published one year before 2002. 15 Even if you give him the 16 provisional filing date and even if you give 17 them their August invention date, all those 18 references predate it. 19 That includes the Ausems 20 reference, which was filed in February of '98. 21 So all the references predate any combination of 22 their case. 23 THE COURT: And what about the on 24 sale bar and the demonstrations? There's been a</p>	<p>1 THE COURT: Last few minutes go to 2 Leader. 3 MR. ANDRE: I'd like to have Mr. 4 Rovner argue the on-sale bar issues, to the 5 extent there are. But there's two other issues 6 that we probably should just make you aware of 7 that D2 limiting instruction that Your Honor 8 ordered. They're not included in that, I do not 9 believe. 10 THE COURT: They're not in here. 11 MR. ANDRE: I don't believe -- 12 THE COURT: There was one on the 13 Yahoo! and eBay -- 14 MR. ANDRE: Right. 15 THE COURT: -- that was included 16 in here. Which two are you referring to? 17 MR. ANDRE: Do not consider what 18 will happen after trial. 19 THE COURT: Right. 20 MR. ANDRE: And the other one is 21 compare the Facebook website to the asserted 22 claims of the patent, essentially not the 23 product of the company. 24 And then the stipulation that the</p>
Page 1632	Page 1634
<p>1 lot of dates. 2 Is the jury still left with having 3 to decide something on the provisional 4 application? 5 MR. WEINSTEIN: Absolutely, Your 6 Honor. What I was talking about, reduction to 7 practice, I don't think it relates to the third 8 party prior art like the iManage -- the iManage, 9 Hubert and Swartz references. With respect to 10 -- the provisional is still very relevant to the 11 issue of the on-sale bar. 12 And I think, Your Honor, with 13 respect to the other instructions, there's quite 14 a bit of argument and briefing, unless Your 15 Honor has other questions, I'm okay with -- 16 THE COURT: No. 17 MR. WEINSTEIN: -- the arguments 18 in our papers. 19 THE COURT: No. Give me one 20 second. 21 No. I think you've covered all of 22 our concerns. Thank you. 23 MR. WEINSTEIN: Thank you, Your 24 Honor.</p>	<p>1 parties agree to was a commercial success 2 stipulation, but they have not reached agreement 3 on that as well. So those are the -- we can get 4 those to you as soon -- we'll keep working this 5 weekend and hopefully get them to you -- 6 THE COURT: Right. So on all of 7 those issues, the limiting instructions and 8 which I think are limited to nine topics that 9 you just mentioned. 10 MR. ANDRE: Yeah. 11 THE COURT: I do want to see what 12 the parties propose, what their positions are, 13 and let's say by noon tomorrow. We're going to 14 follow this weekend the procedures we did last 15 week where I send -- if it's not under seal, go 16 ahead and do ECF. We can pull it off of ECF. 17 But if any portion of it is under 18 seal, email it to Mr. Golden and he'll get it to 19 the rest of us. 20 MR. ANDRE: Mr. Rovner will take 21 care of the rest. 22 THE COURT: Before you sit down, 23 whoever wants to address it on the 3.4 on this, 24 you know, is it enough for me to construe</p>

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1 wherein as in which and not go the extra mile
 2 and say not when?
 3 Mr. Weinstein, not that I don't
 4 enjoy all my time with you, but I don't want to
 5 sign up automatically for redoing this trial.
 6 MR. ANDRE: Your Honor, the issue
 7 of claim construction should have been brought
 8 up a long time ago, if they want to bring it up.
 9 The fact of the matter, experts
 10 have been interpreting this how they've been
 11 interpreting it. The expert on the stand, Dr.
 12 Greenberg, has interpreted it as a consequence.
 13 That's how he termed wherein.
 14 Dr. Vigna determined it as in
 15 which. I don't think, you know, if you say not
 16 when is a negative limitation.
 17 THE COURT: Let's be clear. If I
 18 don't say not when, you're going to argue when
 19 They're going to argue not when.
 20 MR. ANDRE: Well --
 21 THE COURT: And you don't think
 22 that means we're all going to get reversed the
 23 minute we get to the Federal Circuit?
 24 MR. ANDRE: Well, I'm not going to

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1 argue when. I'm arguing which.
 2 That's been our position
 3 throughout this entire case. It is in which.
 4 That's the dictionary's definition of the word.
 5 So we think, as Mr. Hannah said,
 6 the dynamically is a functional language, not
 7 pure grammatical and temporal in that way. So
 8 we're very confident that that's not going to be
 9 an issue.
 10 But if they start arguing, you
 11 know, not thereafter, or as a consequence or
 12 something along those lines like they had been,
 13 their other expert, Dr. Kearns, did the same
 14 thing. I asked him, I said, You mean
 15 thereafter?
 16 He said, Yeah, afterwards. So
 17 everybody has had a different definition. If
 18 you want to give a proper definition, give the
 19 proper definition.
 20 If you want to interpret, say what
 21 it's not, we should also put some other things
 22 what it's not as well as what your experts have
 23 proposed. If you want to say it's not when,
 24 then it should not say it's not thereafter or

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1 it's not --
 2 THE COURT: Right.
 3 MR. ANDRE: -- as a consequence.
 4 THE COURT: I understand your
 5 point. Okay.
 6 Let's start over, Mr. Rovner.
 7 MR. ROVNER: In my minute, Your
 8 Honor, let me just address --
 9 THE COURT: It's the minute,
 10 though, of the day.
 11 MR. ROVNER: The minute. The last
 12 minute.
 13 THE COURT: The one we have all
 14 been waiting for.
 15 MR. ROVNER: I'm sure. I want to
 16 deal with instructions 4.6 through 4.8.
 17 4.6 and 4.7, Facebook doesn't
 18 state the standard, the clear and convincing
 19 standard. They do state in 4.8 now that we are
 20 bringing them out in the jury instruction.
 21 I think it's important that -- I
 22 am sorry -- in the verdict form, we need to put
 23 the standard in the instructions themselves. We
 24 have them in 4.6, 4.7 and 4.8 I think where they

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1 belong.
 2 Your Honor pointed out something
 3 that is the key point, certainly with respect to
 4 4.6. And it's prevalent throughout, you know,
 5 the three of them that it's the issue of the
 6 effective filing date.
 7 We -- in our instruction, we tell
 8 the jury that that's something that they need to
 9 decide and that's the effective filing date is
 10 going to govern their findings. And we believe
 11 that our instruction sets that out.
 12 I don't believe that Facebook's
 13 does. It basically assumes what they want it to
 14 assume.
 15 The other thing in 4.6 is that
 16 we're talking about the experimental use and we
 17 describe that in our instruction. It does not
 18 get put forward in Facebook's description.
 19 Also, in 4.6, they resort to the
 20 totality of circumstances test, which has been
 21 rejected in the Invitrogen case.
 22 In 4.7, again, it's clear and
 23 convincing standard. The other thing, the 4.7
 24 is the on-sale bar instruction.

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1 We believe, and it's, you know,
 2 Judge Faman in the Honeywell case in December
 3 set the same standard that it has to meet each
 4 of the claim limitations. We say that
 5 specifically in our instruction and we think
 6 that it belongs.
 7 The other two issues with 4.7,
 8 4.7, all of a sudden in Facebook's instruction,
 9 proposed instruction, they start talking about
 10 public policy. Now, we could talk about public
 11 policy in every instruction. It doesn't -- it
 12 doesn't belong in 4.7, for sure.
 13 And the other thing is secrecy
 14 versus non-secrecy. In terms of an on-sale bar,
 15 it's really not relevant to the on-sale bar
 16 issue. We're not claiming that the offers for
 17 sale are -- whether they're confidential or not.
 18 They are not. They more relate to public use,
 19 not the on sale.
 20 THE COURT: I thought it was you
 21 guys that showed the NDAs today.
 22 MR. ROVNER: But not for the on
 23 sale. Whether it's on sale or not is not --
 24 that wasn't an issue. They're raising the issue

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1 and basically flagging it. And I don't believe
 2 that belongs in 4.7.
 3 In 4.8, let me get there. The
 4 problem -- the biggest problem with Facebook's
 5 instruction is that right in the very first
 6 sentence, it says that, We're contending that
 7 our offers for sale weren't offers because they
 8 were experimental. We're not saying that.
 9 What we're saying is they're not
 10 offers for sale for other reasons as well.
 11 That's assuming that you have -- you take
 12 Facebook's instruction. You're assuming the
 13 first step.
 14 THE COURT: Right.
 15 MR. ROVNER: And the other thing
 16 is, again, it's the filing date issue, and
 17 that's something that really does -- the jury
 18 needs to consider.
 19 THE COURT: Okay. Great.
 20 MR. ROVNER: That's it in a
 21 nutshell.
 22 THE COURT: Thank you. Thank you
 23 very much.
 24 I appreciate everyone speaking

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1 quickly, though hopefully not too quickly for
 2 the court reporter, but you can't see the
 3 expression on her face.
 4 So all I can promise you is I'll
 5 get you the jury instructions before you begin
 6 your closings. If I have them sooner than that,
 7 I'll get them to you.
 8 But I can't promise you as to when
 9 I will have them. And we will be in recess
 10 until nine o'clock on Monday morning. Have a
 11 nice weekend.
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1 State of Delaware)
 2)
 3 New Castle County)
 4
 5 CERTIFICATE OF REPORTER
 6
 7 I, Heather M. Triozzi, Registered
 8 Professional Reporter, Certified Shorthand Reporter,
 9 and Notary Public, do hereby certify that the
 10 foregoing record, Pages 1274 to 1642 inclusive, is a
 11 true and accurate transcript of my stenographic notes
 12 taken on July 23, 2010, in the above-captioned
 13 manner.
 14
 15 IN WITNESS WHEREOF, I have hereunto set my
 16 hand and seal this 23rd day of July, 2010, at
 17 Wilmington.
 18
 19
 20
 21 Heather M. Triozzi, RPR, CSR
 22 Cert. No. 184-PS
 23
 24

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES, INC.,)	Trial Day 6
)	
)	
Plaintiff,)	
)	C.A. No. 08-862-JJF-LPS
v.)	
)	
FACEBOOK, INC., a Delaware corporation,)	
)	
Defendant.)	

Monday, July 26, 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.

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1 in re-exam in part as a result of the PTO's
 2 finding that Swartz was not considered during
 3 prosecution of the '761.
 4 And further, I have ruled and I
 5 adhere to these rulings that the fact of the
 6 re-exam and whether there's similarities between
 7 the prior art relied on by Facebook in this
 8 case, and the prior art considered by the PTO
 9 during prosecution of the '761 patent are not
 10 relevant to this trial.
 11 Therefore, this is not a matter on
 12 which the jury should be permitted to draw what
 13 might otherwise seem to be reasonable
 14 inferences that the examiner considered Swartz
 15 since she was also the examiner of Swartz.
 16 But, however, I'm not going to
 17 permit the parties to get into the re-examine.
 18 We're not going to open up the door and get into
 19 how many patents Ms. Mizrahi may have examined
 20 or what else she was doing.
 21 Instead there's going to be no
 22 more questioning that relates in any way to what
 23 the PTO considered or did not consider.
 24 I'm denying the motion for a

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1 THE CLERK: All rise.
 2 THE COURT: Good morning,
 3 everyone.
 4 (Everyone said, Good morning.)
 5 THE CLERK: Please be seated.
 6 THE COURT: Welcome to week two.
 7 All right.
 8 Let's begin with developments over
 9 the weekend. I have seen and reviewed and am
 10 prepared to rule on Facebook's motion for a
 11 mistrial, which asks in the alternative for a
 12 limiting instruction. All of which arises from
 13 Leader's questioning of Professor Greenberg last
 14 Friday afternoon as to whether the '761 examiner
 15 considered the Swartz patent.
 16 Excuse me. I ran in too quickly.
 17 Such questioning by Mr. Andre was
 18 inappropriate due to my in limine ruling. By
 19 contrast, on direct, Facebook stayed
 20 appropriately within the narrow scope of my
 21 ruling, elicited only disputed evidence that
 22 Swartz is not mentioned on the face of the '761
 23 patent.
 24 It is also true that the '761 is

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1 mistrial because I think while there was
 2 prejudice to Facebook, I think it is curable in
 3 other ways short of the extraordinary remedy of
 4 a mistrial, and in particular through jury
 5 instructions and special interrogatories.
 6 Leader, of course, claims that
 7 it's prejudiced by Facebook's narrow questioning
 8 of Greenberg about whether Swartz is listed on
 9 the face of the '761 patent, but I absolutely
 10 reject Leader's position. Again, as I said,
 11 Facebook's questioning was entirely consistent
 12 with my prior rulings.
 13 Leader did not object during the
 14 examination of -- well, even prior Leader, did
 15 not object to Facebook giving the jury binder to
 16 the jury which contained the Swartz patent.
 17 Leader did not object to Facebook displaying the
 18 Swartz patent for the jury.
 19 Leader did not object to Facebook
 20 blowing up the portion of the -- I'm sorry, the
 21 Swartz patent that evidently shows the Swartz
 22 examiner's name.
 23 Leader did not object to
 24 Facebook's questions, objections which I would

1 have overruled since the questions were
 2 consistent with my ruling, but nonetheless
 3 Leader did not object.
 4 Leader did not seek permission to
 5 question Professor Greenberg in the way it did
 6 on cross. And Leader did not ask the Court to
 7 reconsider or modify its prior rulings.
 8 So with all this, I will be
 9 granting the alternative relief sought by
 10 Facebook of a jury instruction. In fact, what I
 11 think might be fairly characterized as a
 12 somewhat hash jury instruction, but one that I
 13 think is fully warranted by what Leader did
 14 during the cross-examination of Professor
 15 Greenberg.
 16 It will not, however, be in the
 17 specific language proposed by Facebook as that
 18 would I think improperly introduce ideas going
 19 to the re-exam and other matters going to the
 20 jury that simply don't have any place in the
 21 trial.
 22 Here is what you will see as a
 23 portion of the final jury instructions. It will
 24 be added at 4.2 and you'll see it when we get

1 all the instructions to you later today.
 2 And now I'm reading from the
 3 instruction. During Leader's cross-examination
 4 of Facebook's expert, Professor Greenberg,
 5 Leader's counsel made statements implying that
 6 the U.S. Patent Office examiner who worked on
 7 the '761 patent, Diane Mizrahi, was aware of and
 8 considered the Swartz patent. I instruct you
 9 not to draw such a connection.
 10 Because of patent office
 11 procedures, it would not be reasonable for you
 12 to draw the inference that the examiner,
 13 Ms. Mizrahi, was aware of and considered the
 14 Swartz patent during prosecution of the '761
 15 patent.
 16 With respect to Facebook's
 17 contentions that the '761 patent is invalid due
 18 to anticipation or obviousness due to prior art,
 19 the only relevant comparisons are between the
 20 claims of the '761 patent and the disclosures of
 21 the prior art references. What the PTO or the
 22 examiner of the '761 patent considered or did
 23 not consider is not relevant to your
 24 determination and should not be considered by

1 you.
 2 You'll also see in the final
 3 instructions that at Section 1.3 I guess it is,
 4 there was an additional paragraph that was in
 5 dispute with respect to evidence defined, I'm
 6 going to include the extra paragraph that
 7 Facebook wanted that said essentially ignoring
 8 comments of counsel or things that I told you
 9 are stricken.
 10 And there will also on the verdict
 11 form be special separate interrogatories with
 12 respect to each published prior art reference
 13 asking the jury whether each one anticipates the
 14 '761, so we'll know whether the Swartz patent
 15 had any impact on the jury's finding.
 16 That's my ruling on the pending
 17 motion. A couple of procedural things. We're
 18 allowing the jury to order lunch in today. We
 19 thought that would be a nice thing to do for
 20 them. And what we'll do is whatever time we
 21 finish the evidence today, we'll call it a day
 22 and send the jury home and then we'll just start
 23 fresh in the morning with me reading
 24 instructions, and then with all the argument

1 that's left to do. And so that means we'll get
 2 the final jury instructions and the verdict form
 3 to you sometime later today depending on what
 4 time we finish today.
 5 With that, let me ask Leader if
 6 there is anything we need to discuss before we
 7 bring the jury in.
 8 MR. ANDRE: Thank you, Your Honor.
 9 First of all, I would like to pose
 10 an objection to Your Honor's ruling, of course.
 11 THE COURT: Okay.
 12 MR. ANDRE: One easy matter. We
 13 had an exhibit earlier that's PTX 1058. We
 14 would like to move that into evidence. I
 15 believe it's without objection. It was noted in
 16 the examination of Mr. McKibben.
 17 MR. RHOADES: No objection.
 18 THE COURT: Okay. It's admitted.
 19 MR. ANDRE: And there is other
 20 exhibits that were put in by the defendants in
 21 binders that we would like to have the Court
 22 staff remove after the jury goes home today.
 23 They were not admitted into evidence and were
 24 not referred to. Those are DTX 740, DTX 1051,

1 DTX 1095, DTX 1213, DTX 1317, and PTX 789.
2 Those are in the jury binders. We would like to
3 have those renoted.

4 MR. RHOADES: I agree, Your Honor.

5 THE COURT: By agreement. Okay.

6 That will be date when the jury is not watching.

7 MR. ANDRE: Those are the easy

8 issues, Your Honor. A much more serious

9 implication now than just this morning

10 Facebook's counsel informed us that they wanted

11 to stretch this an exhibit that Dr. Greenberg has

12 testified to. It's the iManage manual. We

13 received this document under a confidentiality

14 designation from a subpoena Autonomy.

15 We believe it's a confidential

16 document. They said they have a copy of it

17 without the confidentiality stamp and they want

18 to substitute it out.

19 We have never been informed that

20 this is a public document at all. In fact, up

21 until probably a few minutes ago, we believe it

22 was a confidential document. How this document

23 came into the case was Facebook subpoenaed a

24 Autonomy. Autonomy produced documents in them on

1 logie for me. This goes to whether it's a basis

2 for invalidating the patent whether it's

3 publicly available or not.

4 MR. ANDRE: Prior art has to be

5 publicly available. We don't think this is

6 publicly available.

7 We have not been able to find it.

8 We have never seen a publicly available copy.

9 The only copy that was ever produced in this

10 case was marked confidential pursuant to the

11 Court's protective order.

12 They're going to substitute out --

13 we'd like to examine the witness along these

14 lines. We think it's appropriate because the

15 witness -- the exhibit that's in his binder

16 that's in front of the jury, his entire

17 testimony does have the confidential stamp on

18 every single page.

19 THE COURT: So you want to be able

20 to -- put aside for a moment whether we're

21 switching out the document or not, you want to

22 explore with him and would have, but for events

23 this morning, planned today to explore with him

24 whether he knows if the document's publicly

1 disks and when they were producing them to us,
2 they had a fener saying they should be treated
3 confidential under the protective order.

4 We saw the objections that

5 Autonomy lodged saying it was confidential

6 information, so we have been going under the

7 impression this entire case it's a confidential

8 document.

9 They produced a copy. According

10 to counsel, we haven't seen it because we don't

11 have the report here, in their expert's report

12 they didn't have the confidential stamp on it.

13 THE COURT: Did not.

14 MR. ANDRE: Did not. But their

15 expert report which only was done in prior art,

16 did have a highly confidential label in the

17 entire report. So it's our belief, as we sit

18 here today and the testimony that was provided

19 to the jury, that he's been testifying on a

20 confidential document. And this is not a

21 publicly available document. We cannot find it

22 on the internet. We have not been able to get a

23 copy of this document anywhere.

24 THE COURT: Just draw out the

1 available or not?

2 MR. ANDRE: Yeah. It was a

3 document that was provided from counsel to

4 him --

5 THE COURT: Right.

6 MR. ANDRE: -- marked confidential,

7 at least the ones he's been testifying to. So

8 we don't believe this is a proper piece of prior

9 art, and I think this is a much more serious

10 issue than the moving of the exhibits in.

11 I'm sorry to bring it to Your

12 Honor first thing this morning. We didn't

13 learn -- this entire case we have been under the

14 impression that this is a confidential document.

15 This is the first this morning that we have

16 learned it was anything otherwise.

17 THE COURT: Let me hear what they

18 have to say.

19 MS. KEEFE: I'm surprised to hear

20 this, Your Honor. In fact, the iManage DeskSite

21 Reference Manual was produced originally when

22 Autonomy first sent it under an abundance of

23 caution. Go ahead and mark everything

24 confidential.

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<p>1 So we did. We then asked Autonomie 2 if this is a, you know, public document. They 3 said, Yes. And they sent us another copy that 4 was only Bates labeled AUT 0020001 through the 5 remainder. It's in the exhibit binder at 925E. 6 It was attached to to Dr. 7 Greenberg's report with no confidentiality 8 designations whatsoever. 9 It was produced to opposing 10 counsel with -- along with a copy of the 11 re-examination materials with no confidentiality 12 designation whatsoever. 13 Publicly filed with the U.S. PTO. 14 It's been used in this case with no 15 confidentiality designations whatsoever. 16 And I was surprised when the one 17 that went up on the screen was the old one that 18 had the confidentiality designation, because it 19 has never been used in this case. So I just 20 wanted to swap it out. 21 THE COURT: And that's what 22 happened this morning was he -- 23 MS. KEEFE: I simply asked Mr. 24 Andre, given the fact that the actual copy that</p>	<p>1 in the expert report that was produced by 2 Autonomie with no designation and it was given to 3 the Patent Office is 925E. 4 THE COURT: And your proposal is 5 to just switch them out without the jury ever 6 hearing anything about it and also to preclude 7 Mr. Andre from questioning the professor if he 8 knows if the document is publicly available. 9 MS. KEEFE: That was my proposal, 10 but you know because Mr. Greenberg -- obviously 11 he knows that the one that he has had no 12 confidentiality designation on it. But I am not 13 sure he has personal information, you know, 14 beyond that. 15 But if they want to question him, 16 I'll simply ask him if the one that is attached 17 to his report was labeled confidential. He'll 18 say no. 19 Then I'll offer to move this in 20 and that will be the public document. It seems 21 like much ado about nothing. 22 THE COURT: Mr. Andre. 23 MR. ANDRE: Your Honor, it's not 24 much ado about nothing. When Facebook was</p>
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<p>1 was used in Mr. Greenberg's report and that went 2 to the Patent Office did not have the 3 designation, could I please replace it since 4 this is clearly a public document. He then 5 tells me that he wants to do something else with 6 it. 7 That's where we are. And it's in 8 the binders at 925E with no designation on it. 9 And this is the exhibit. And I 10 was just going to change it. Ask Your Honor to 11 change it. 12 THE COURT: So the jury right now 13 has a binder that includes two versions of 14 iManage? 15 MS. KEEFE: Right now it only 16 includes the old version, the very first 17 version. 18 THE COURT: The first one is the 19 one that's confidential? 20 MS. KEEFE: 925E, the number that 21 is in the binders right now is 1010. 1010 has a 22 confidentiality designation. It's an artifact. 23 It's old. 24 The one that was used in the case</p>	<p>1 subpoenaed, Autonomie lodged objections to the 2 subpoena. On category two, request number two, 3 he asked for a copy of each user manual or user 4 guides. 5 Autonomie rejected -- responded and 6 objected to it stating that the request for the 7 production of confidential commercial and 8 information are trade secrets not within the 9 permissible scope of discovery. So they put an 10 objection in as being confidential information. 11 When we received the actual 12 production from Facebook after they received it 13 from Autonomie, the correspondence to Mr. Hamah 14 from Ms. Keefe stated also included documents 15 containing Bates labels AUT 0001815 through AUT 16 0053887, which was received from Autonomie, Inc. 17 In response to Facebook's subpoena, please be 18 advised that per nonparty Autonomie's request, 19 the documents Bates numbered AUT 0001815 through 20 AUT 0053887 are to be treated as confidential 21 under the stipulated protective order. 22 Your Honor -- could you put up 23 1010? DTX 1010. DTX, not PTX. 24 If you noted the confidential</p>

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<p>1 stamp here is a little off line with the Bates 2 number. I don't know if this designation was 3 added by Facebook counsel or Autonomie. I don't 4 know.</p>	<p>1 iManage by, you know, depriving Facebook of a 2 chance to on redirect put before the jury a 3 version of the document that apparently was 4 publicly available.</p>
<p>5 Autonomie may have produced them 6 with just the Bates numbers and the confidential 7 label that was added pursuant to their 8 instructions under the protective order. I 9 don't know.</p>	<p>5 And the jury will just have to 6 weigh the competing arguments in evidence they 7 get as to whether it was available or not. And 8 we have a special interrogatory that will tell 9 us whether -- specifically whether the jury 10 thought the iManage software anticipated, not 11 the software the manual anticipated '761. So 12 that's my ruling.</p>
<p>10 I don't know how that confidential 11 stamp got there, but we have always treated this 12 document pursuant to the correspondence we 13 received as confidential.</p>	<p>13 MR. ANDRE: Your Honor, with 14 respect to that, there is not one without a 15 confidential stamp not on the exhibit list. The 16 exhibit Ms. Keefe told you about is actually the 17 reexamination documents, it's the reexamination 18 request and all that that's attached to it. So 19 there is not a copy of just this manual by 20 itself on the current exhibit list.</p>
<p>14 THE COURT: But confidential for 15 purposes of litigation is different from -- I 16 mean, so it may be overly designated under the 17 Court's protective order, but the factual matter 18 that is important to the jury is whether or not 19 it was ever publicly available at the relevant 20 time. Right?</p>	<p>21 THE COURT: Ms. Keefe. 22 MS. KEEFE: That's not true, Your 23 Honor. Behind Tab 925E is a copy simply of the 24 reference itself.</p>
<p>21 MR. ANDRE: Right. 22 THE COURT: And you don't know 23 whether it was or it wasn't, I take it. 24 MR. ANDRE: Only thing we know is</p>	
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<p>1 we can't find it. We can't get it.</p>	<p>1 THE COURT: And there is no</p>
<p>2 When I assume that they gave it to 3 the people who bought their software, but I 4 don't know if there was a confidentiality 5 provision provided for that. The fact of the 6 matter is Facebook put this in evidence. They 7 put it in the jury binders. They put this 8 exhibit, in.</p>	<p>2 reference to re-examine or anything? 3 MS. KEEFE: None.</p>
<p>9 And that's a defense we have to 10 this exhibit. This is not a confidential 11 document.</p>	<p>4 THE COURT: It's an identical 5 document to the manual sent without the 6 confidential stamp on it?</p>
<p>12 THE COURT: Okay. Well, certainly 13 trickier than the ones you started with. 14 I think in fairness, you know, 15 weighing the circumstances on both sides, I 16 think that the jury -- I'm not going to take 17 away your ability to question Professor 18 Greenberg. Elicit whatever you can from him on 19 whether the document was confidential or not 20 confidential in terms of was it publicly 21 available or not.</p>	<p>7 MS. KEEFE: Exactly. 8 THE COURT: I'm accepting 9 counsel's representation to that fact.</p>
<p>22 But I'm also not going to do, what 23 would amount, I think, to granting summary 24 judgment to you on the weight, if any, of the</p>	<p>10 MR. ANDRE: Your Honor, to the 11 extent I questioned Dr. Greenberg, I would like 12 to be able to use the Autonomy documents and the 13 correspondence to get his understanding of this 14 document whether it's confidential or not, if 15 that's acceptable. I don't have to have a lot 16 of objections.</p>
	<p>17 THE COURT: Right. I don't want 18 to have a lot of objections, either. Ms. Keefe, 19 come forward.</p>
	<p>20 MS. KEEFE: Your Honor, I would 21 object. Those were litigation documents between 22 attorneys talking about a protective order. It 23 would be hearsay. And it's nothing that 24 Mr. Greenberg has ever looked at or considered.</p>

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<p>1 He was handed a copy of the 2 document and asked to compare it. That's what 3 is in his report. The implication that he 4 understands what was happening with two lawyers 5 talking about a protective order as Your Honor 6 noted that may have been overly cautious based 7 on litigation is prejudicial and hearsay. 8 THE COURT: All right. Again, I'm 9 going to overrule the blanket objection. I'm 10 going to allow Mr. Andre a little bit of leeway. 11 We don't know whether Professor 12 Greenberg is going to have anything at all to 13 say about whether this document was confidential 14 or not confidential. And feel free to object 15 question by question and we'll just have to see 16 how it comes out. 17 MS. KEEFE: Thank you, Your Honor. 18 THE COURT: Anything else, 19 Mr. Andre? 20 MR. ANDRE: No, Your Honor. 21 THE COURT: No. 22 And anything from Facebook? 23 MR. RHOADES: No, Your Honor. 24 THE COURT: Okay. All right.</p>	<p>1 Q. Just so we can kind of catch up to 2 where we left off on Friday, let's go over a few 3 things and make sure we're all on the same page. 4 Okay? 5 A. Sure. 6 Q. You were talking about prior art 7 in this case; correct? 8 A. That's correct. 9 Q. And in something -- in order for 10 something to be prior art, it has to be 11 published before a certain critical date; is 12 that correct? 13 A. That's correct. 14 Q. And the critical date you're 15 referring to in this case is the December 10th, 16 2003 date of when the patent was filed; is that 17 correct? 18 A. I would have to check the dates, 19 but it's -- my understanding is the year before 20 the filing of the patent and a year before the 21 filing of the provisional are two dates that are 22 often considered. 23 Q. Okay. Now, you testified to three 24 separate documents as a basis for your opinion</p>
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<p>1 Let's bring in the jury. 2 THE CLERK: All rise. 3 (Jury entering the courtroom at 4 9:28 a.m.) 5 THE CLERK: Please be seated. 6 THE COURT: Good morning, ladies 7 and gentlemen of the jury. Welcome back. I 8 hope you had a nice weekend. I hope you were 9 able to get into the building okay. I saw quite 10 a crowd on the other side of the building. I 11 was hoping you were able to all avoid that. 12 We're going to pick up with the 13 testimony of Professor Greenberg. 14 Professor, please come back to the 15 stand. 16 Good morning, Professor. 17 THE WITNESS: Good morning. 18 MR. ANDRE: May it please the 19 Court, may I begin? 20 THE COURT: I'm sorry, you may 21 begin, yes. 22 BY MR. ANDRE: 23 Q. Good morning, Professor Greenberg. 24 A. Good morning.</p>	<p>1 regarding anticipation; correct? 2 A. Three separate documents, yes, and 3 plus obviousness. 4 Q. That was for obviousness? 5 A. That's correct. 6 Q. And one of those documents was the 7 DTX 1010; correct? 8 A. Sorry, that's -- 9 Q. I'm sorry, that's the iMunage 10 manual; correct? 11 A. Yes, that's correct. 12 Q. Now, could you put DTX 1010 on the 13 screen. Thank you. 14 Now, you testified that you 15 received these documents from Facebook's 16 counsel; correct? 17 A. That's correct. 18 Q. And the numbers -- I lost my faser 19 pointer, sorry. 20 The numbers are down here on the 21 bottom of the document. Are you familiar with 22 what those numbers are called? 23 A. Sorry. 24 Q. Do you know what these numbers are</p>

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<p>1 called at the bottom?</p> <p>2 A. That is the Bates number.</p> <p>3 Q. Bates number, right. You have</p> <p>4 done this before, you have been an expert in a</p> <p>5 few cases before, right?</p> <p>6 A. Just a few cases, yes.</p> <p>7 Q. And when company's produce</p> <p>8 documents to other companies in litigation, they</p> <p>9 put Bates numbers on documents, right?</p> <p>10 A. I'm actually not -- I don't know</p> <p>11 who actually puts them on, I just know that they</p> <p>12 are numbered.</p> <p>13 Q. Okay. And are you aware that a</p> <p>14 company called Autonomy is the company that owns</p> <p>15 the iManage product at this point?</p> <p>16 A. No, I'm not aware of that.</p> <p>17 Q. Now, you notice that the iManage</p> <p>18 manual is marked confidential. Do you see that?</p> <p>19 A. I see that on that page, yes.</p> <p>20 Q. And you understand what it means</p> <p>21 when something is marked confidential in a</p> <p>22 litigation, correct?</p> <p>23 A. I'm just looking at my copy here.</p> <p>24 Q. I understand. I understand your</p>	<p>1 A. Yes.</p> <p>2 MS. KEEFE: Objection, Your Honor.</p> <p>3 402.</p> <p>4 THE COURT: I will overrule the</p> <p>5 objection, I don't know, we'll see if the</p> <p>6 professor has an answer.</p> <p>7 A. I just can't recall what was</p> <p>8 presented on Friday. If you're representing to</p> <p>9 me that this was the one presented to the jury</p> <p>10 on Friday, I'll accept that, but I really didn't</p> <p>11 look at the bottom of the page there. I was</p> <p>12 looking at the top.</p> <p>13 Q. And if the iManage manual is</p> <p>14 confidential, if it is, in fact, a confidential</p> <p>15 document, would your opinion change about its</p> <p>16 relevance in this case?</p> <p>17 A. Well, I don't really know what</p> <p>18 iManage itself means by confidential, so I can't</p> <p>19 really tell you.</p> <p>20 Q. You signed the undertaking in this</p> <p>21 case for the protective order, correct?</p> <p>22 A. Correct.</p> <p>23 Q. And you understand that</p> <p>24 confidential documents in this case are not</p>
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<p>1 company is not marked confidential.</p> <p>2 A. No, it's not marked confidential,</p> <p>3 so the copy that I have that was given to me was</p> <p>4 not marked confidential.</p> <p>5 Q. I'm talking about the one you</p> <p>6 actually testified to on Friday.</p> <p>7 A. Sorry. I'm not sure I understand.</p> <p>8 The copy I have is the one that I testified to.</p> <p>9 Q. Well, Friday, this was the exhibit</p> <p>10 that was shown to the jury, correct? D1X 1010.</p> <p>11 This is the one that Ms. Keefe kept referring</p> <p>12 you to?</p> <p>13 A. Well, if that -- I can't recall</p> <p>14 what was put on the display. If that particular</p> <p>15 version with that confidential designation on</p> <p>16 the bottom was put on there, that's one thing,</p> <p>17 but I'm of course talking -- all my comments in</p> <p>18 my expert report are on the exhibit that I</p> <p>19 actually have that I included with any report.</p> <p>20 Q. And that was given to you by</p> <p>21 counsel, correct?</p> <p>22 A. Yes.</p> <p>23 Q. And they also produced this</p> <p>24 document for the jury as confidential, correct?</p>	<p>1 public documents, correct?</p> <p>2 A. Fair enough.</p> <p>3 Q. You understand that you read the</p> <p>4 protective order, you signed it, right?</p> <p>5 A. What I'm not certain if it was</p> <p>6 designated legal confidential by counsel. This</p> <p>7 kind of goes outside the scope of what I really</p> <p>8 know in terms of how --</p> <p>9 Q. Fair enough. What I'm asking you,</p> <p>10 if this is a nonpublic document, if it was not</p> <p>11 available to the public, would it change your</p> <p>12 opinion with regard to the iManage manual?</p> <p>13 A. It depends on how iManage itself</p> <p>14 had disclosed it, so -- and I have no knowledge</p> <p>15 of that, so I can only speak to what's in the</p> <p>16 actual document itself.</p> <p>17 Q. Dr. Greenberg, I'm not trying to</p> <p>18 trick you here.</p> <p>19 A. I know.</p> <p>20 Q. It's a real simple question.</p> <p>21 A. I know.</p> <p>22 Q. If this is a nonpublic document,</p> <p>23 if this confidential document is marked right</p> <p>24 here, if this is not available to the public,</p>