

1 A. Well, in order to constitute prior  
2 art, it must be something that is publicly  
3 available. It must be something that was  
4 publicly available before the December 11th date  
5 of the filing of the provisional patent  
6 application.

7 And it must be something that is  
8 enabling, that would allow a person of ordinary  
9 skill in the art to actually make and use the  
10 invention without too much problem.

11 Q. What is your opinion regarding the  
12 references that Dr. Greenberg has cited against  
13 the asserted claims of the '761 patent?

14 A. So the -- none of those references  
15 disclose the elements of the claims of the '761  
16 patent.

17 Q. Okay. Do you understand there are  
18 two different theories out there? One is called  
19 anticipation and the other is obviousness?

20 A. Mm-hmm.

21 Q. Could you just briefly explain  
22 what is your understanding of anticipation?

23 A. Well, my understanding of  
24 anticipation is that means that one reference

1 that the '761 technology was assigned to solve  
2 and to make it much easier and more natural to  
3 share documents and keep track of users by, you  
4 know, using a technique to automatically update  
5 metadata.

6 Q. Do the references that Dr.  
7 Greenberg, that he cited, do they have anything  
8 in common?

9 A. They have something in common.  
10 That is that they are all basically document  
11 management systems.

12 They have nothing to do really  
13 with the users. They're all about documents and  
14 they all use this sort of hierarchical storage  
15 system.

16 So they disclose basically the  
17 same problem that the '761 technology was  
18 designed to solve. All these document  
19 management systems are centered around  
20 documents. They keep track of documents. They  
21 keep the histories for documents.

22 The '761 technology is all about  
23 users. It's all centered around users. It  
24 creates workspaces for users.

1 has to disclose each and every element of the  
2 patent of the invention in order to invalidate  
3 it.

4 And obviousness means that -- that  
5 several different things can be combined if  
6 there's some reason to think that they would be  
7 used together. They could be combined to render  
8 the invention just something that would be  
9 obvious.

10 Q. Well, why don't we turn to the  
11 tutorial slide that you had earlier in the case.

12 A. Okay.

13 Q. And looking at that, can you  
14 explain what problems the '761 patent sought to  
15 solve?

16 A. Right. Well, I think you recall  
17 maybe from the tutorial that we were talking  
18 about this kind of hierarchical arrangement where  
19 the user has to, you know, name a folder, you  
20 know, create a folder, decide how to name it and  
21 then to store data. The user has to then sort  
22 of figure out, you know, why each individual  
23 item should go in this hierarchy.

24 So that is one of the problems

1 And it tracks users and what users  
2 do. So it's just a some completely different  
3 basis on which to build a system.

4 Q. Why don't we take a look at the  
5 abstract of the patent.

6 A. Yes.

7 Q. Is there something in the abstract  
8 information one of ordinary skill in the art,  
9 that that's what the invention of the '761  
10 patent is?

11 A. Right. Absolutely.

12 If we start certain notes here,  
13 the highest contextual assumption is that there  
14 exists an entity that consists of one or more  
15 users. What that basically means is that there  
16 are -- everything is centered around users.  
17 Right.

18 There are -- there always has to  
19 be a user, an entity that represents one or more  
20 users as part of the system. Everything else is  
21 built around that.

22 And that's what makes this really  
23 very different from the document management,  
24 basically document management systems that are

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<p>1 cited as prior art.</p> <p>2 Q. Let's turn to the prior art.</p> <p>3 Let's go to the iManage User Reference Manual,</p> <p>4 which is DTX 1010. Now, what is your</p> <p>5 understanding of what this user reference manual</p> <p>6 is?</p> <p>7 A. Well, it's a manual intended for</p> <p>8 end users to -- you know, people who want to use</p> <p>9 the iManage DeskSite system would refer to this</p> <p>10 to figure out, you know, how to use it.</p> <p>11 Q. And does it actually tell you how</p> <p>12 to build the iManage software?</p> <p>13 A. Well, no, not at all. Actually</p> <p>14 it's as if, you know, we all have owners manuals</p> <p>15 for our cars that tell you, Here's how you</p> <p>16 operate the automatic transmission. For</p> <p>17 example, that tells me absolutely nothing about</p> <p>18 how to build an automatic transmission.</p> <p>19 It's just -- it just doesn't</p> <p>20 disclose anything about that. So in the same</p> <p>21 way a user manual might tell me how to engage</p> <p>22 the functionality of the software, but it</p> <p>23 doesn't tell me anything about how to build it.</p> <p>24 Q. All right. And within the four</p>	<p>1 A. Well, so the -- you mean the</p> <p>2 difference in nature of the technology that's</p> <p>3 described?</p> <p>4 Q. Correct.</p> <p>5 A. So the iManage DeskSite describes</p> <p>6 basically a document management system as we've</p> <p>7 been discussing. So it provides a way for an</p> <p>8 organization using a local network to kind of</p> <p>9 store documents in a central place and access</p> <p>10 those documents, have secure access. Probably</p> <p>11 has -- you know, has passwords and so on.</p> <p>12 But it's basically just a way of</p> <p>13 creating, as you see on the left here, one big</p> <p>14 document repository system that people can put</p> <p>15 their documents into. And other people, if they</p> <p>16 have the right provisions, can pull them out.</p> <p>17 So that's the basic technology that's disclosed</p> <p>18 there.</p> <p>19 Q. When you refer to one big document</p> <p>20 system and you're pointing with your pointer,</p> <p>21 just for the record, are you referring to the</p> <p>22 traditional hierarchical system?</p> <p>23 A. Yes, I am. I'm referring to the</p> <p>24 traditional hierarchical system from the slide,</p>
Page 1793	Page 1795
<p>1 corners of this document we've marked as DTX</p> <p>2 1010, does it give you any information for one</p> <p>3 of ordinary skill in the art to be able to build</p> <p>4 the software in all the components that it might</p> <p>5 reference?</p> <p>6 A. No, it doesn't. It doesn't say</p> <p>7 anything about how it's designed, what the</p> <p>8 structure looks like. It simply tells us how to</p> <p>9 use it once it's there.</p> <p>10 Q. Do you know whether this iManage</p> <p>11 manual, which is marked as DTX 1010 whether that</p> <p>12 was publicly available in 2001 or 2002?</p> <p>13 A. I have no idea.</p> <p>14 Q. Now, do you have an opinion as to</p> <p>15 whether the iManage User Reference Manual is</p> <p>16 prior art to the '761 patent?</p> <p>17 A. Yeah. Because it doesn't</p> <p>18 disclose, you know, how to make and use this</p> <p>19 invention, I would say it's not prior art. It</p> <p>20 doesn't qualify as prior art.</p> <p>21 Q. What is the difference between the</p> <p>22 iManage User Manual and the information</p> <p>23 disclosed within the four corners of that</p> <p>24 document and the invention of the '761 patent?</p>	<p>1 from the tutorial.</p> <p>2 Q. Why don't we take a look at</p> <p>3 iManage Manual and go to Page 4. So could you</p> <p>4 explain to us, Dr. Herbsleb, what are we looking</p> <p>5 at here?</p> <p>6 A. This is an example. Exactly an</p> <p>7 example of what I was talking about is that this</p> <p>8 is how iManage, you know, according to its own</p> <p>9 documentation, stores documents.</p> <p>10 We see them put into hierarchy.</p> <p>11 Someone had to decide that this folder called</p> <p>12 corporate folder, called personal pages, public</p> <p>13 pages and then people name their pages and put</p> <p>14 them into folders. So this is very much the</p> <p>15 hierarchical storage system that is, you know,</p> <p>16 part of the problem that the '761 was trying to</p> <p>17 overcome.</p> <p>18 Q. Is this just one example of the</p> <p>19 iManage Manual that provides you with this</p> <p>20 example?</p> <p>21 A. Yes. If you look through it, you</p> <p>22 find many examples that are similar showing the</p> <p>23 hierarchical storage system.</p> <p>24 Q. Why don't we take a look at</p>

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<p>1 another portion on Page 83.  2 I believe it's Figure 3.26.  3 A. Mm-hmm.  4 Q. Can you explain: What are we  5 looking at here?  6 A. Well, I mean, the caption makes  7 pretty clear what we're looking at is a document  8 history. So this is showing that for some  9 particular document, these are the things that  10 happen to that document.  11 All right. So this system is very  12 document central. So you can see here somebody  13 checks in the documents. They modified the  14 documents.  15 Someone checked it out. Somebody  16 created a different version of the document.  17 It just keeps track of everything  18 that happens to that document.  19 Q. Well, does this figure show that  20 the iManage manage system or the iManage --  21 strike that. Does this figure show that in the  22 iManage User Manual, there is tracking of  23 documents?  24 A. Yes. This sort of tracks</p>	<p>1 part of the technology. It doesn't provide, you  2 know, environments places for people to do work  3 with their tools and allow people to move from  4 one workspace to another. There is none of that  5 in the technology.  6 Q. Okay. Well, let's turn to Claim 1  7 of the '761 patent.  8 A. Okay.  9 Q. And take a look at that.  10 Unfortunately, since we  11 shorthanded, actually could we turn to the other  12 slide that we were referring to?  13 Since we shorthanded the elements  14 here, I think I can refer to them as the context  15 component of Claim 1. We know what we're  16 talking about.  17 So in your opinion, does the  18 iManage User Reference Manual disclose the  19 context component element of Claim 1?  20 A. No, not at all. We -- again, we  21 have to be very careful what we mean by context  22 here because that's a word that gets used in  23 many different ways. And what we have to use  24 here is we have to use the construction that's</p>
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<p>1 documents and it tracks what happens to  2 documents. Sure.  3 Q. Does this figure show in the  4 iManage User Manual that there's tracking of  5 users?  6 A. No, absolutely not. There's no  7 view that you can go to.  8 There's no view slots anywhere in  9 the manual where you can sort of pull up some  10 user and see what a user has done. That's not  11 part of this technology.  12 It's all completely document  13 central. And as you can see here, these are all  14 entries of here of documents.  15 So it doesn't track users at all.  16 Q. Is there anything in the entirety  17 of the iManage User Reference Manual that  18 discloses tracking of users?  19 A. No, not that I could identify. I  20 see nothing in there that tracks users.  21 Q. Is there anything in the iManage  22 User Reference Manual that talks about  23 workspace?  24 A. No, it does not have workspaces as</p>	<p>1 in the claim construction order, which says that  2 context means environment.  3 Okay. So the software to provide  4 a context and have a context component has to  5 provide an environment for a workspace for the  6 user.  7 And the technology described,  8 iManage Manual just does not do that. So it  9 does not have a context component, period.  10 Q. It doesn't have the entirety of  11 the first element?  12 A. No. It just -- that's not there.  13 There is no context component.  14 Q. Let's turn to the tracking  15 component. Does the iManage User Reference  16 Manual use -- disclose that tracking component  17 of Claim 1?  18 A. No. Again, so if you see -- if  19 you look at the tracking component, this is  20 tracking a user changing a user from one context  21 or environment or workspace to another context,  22 which has to mean an environment or workspace  23 All right. And then updating the  24 stored metadata based on that tracking</p>

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<p>1 information. Well, this doesn't have any part 2 of this.</p>	<p>1 is, you know, the predominant mode of operation 2 appears to be over a local network.</p>
<p>3 This doesn't have workspaces. It 4 doesn't track users. It doesn't update metadata 5 based on a change from one workspace to another. 6 It just doesn't have any of that.</p>	<p>3 There is one small reference. I 4 think we may have it here to something web 5 based.</p>
<p>7 Q. Okay. Well, let's take a look at 8 the dependent claims, which are 4 and 7. Does 9 the iManage User Reference Manual disclose the 10 other elements of Claim 4 and 7?</p>	<p>6 Q. Right. If we could turn to the 7 iManage User Manual and I believe it was AUTO 8 275.</p>
<p>11 A. Right. So this is a dependent 12 claim. So if Claim 1 is valid, I understand 13 that these are also valid.</p>	<p>9 A. Yes, if we focus in on the top 10 here. This is about the only reference that I 11 can recall in this manual to anything that's web 12 like.</p>
<p>14 But it does not disclose anything 15 about relationship of a user to context 16 information of a relationship between a user and 17 at least one of an application, application 18 data, and user environment. It does not 19 disclose data created in the first context 20 associated with data created in the second 21 context.</p>	<p>13 So it's saying up here that you 14 can -- if you're set up correctly, send a 15 document by email or you can send a link by 16 email, and then someone can access your document 17 through a URL, which would be a web-based access 18 but. What this is saying is your system must 19 include an iManage worksite web component 20 server.</p>
<p>22 Well, as I mentioned, it doesn't 23 have, you know, context in the software. So 24 this can't satisfy Claim 7.</p>	<p>21 Well, that's not described 22 anywhere in this manual. This is some other 23 product apparently that has some kind of web 24 functionality. We don't really know, you know,</p>
Page 1801	Page 1803
<p>1 Q. Is it your opinion that the 2 iManage User Reference Manual does not 3 anticipate Claims 1, 4 and 7 of the '761 patent?</p>	<p>1 what. 2 We just have this kind of very 3 oblique sort of reference. So there's some 4 mention of web, but it's for a different 5 product. It's not even disclosed in this 6 manual.</p>
<p>4 A. It's my opinion it does not 5 anticipate any of those claims.</p>	<p>7 Q. Does the iManage User Reference 8 teach a user environment?</p>
<p>6 Q. Okay. Let's take a look now at 7 Claim 9. 8 I believe we had already discussed 9 the difference with Claim 1 and Claim 9 as it 10 related to the web-based computing platform; 11 right.</p>	<p>9 A. No. There is just nothing like 10 the user environment in this system. It's just 11 all about documents.</p>
<p>12 A. Right. 13 Q. Okay. Is there anything -- I'm 14 sorry.</p>	<p>12 Q. And does it disclose anything 13 about metadata about the user environment? 14 A. Well, no. No.</p>
<p>15 Were you going to -- 16 A. Elements one and two are basically 17 the context component. Three and four are 18 basically the tracking component. And what's 19 new here is web-based computing platform.</p>	<p>15 Having no user environment, it 16 also has no metadata about user environments. 17 Q. Okay. Why don't we take a look at 18 Claims 11 and 16, which are the dependent claims 19 to Claim 9.</p>
<p>20 And it's a method of managing, 21 right, method of managing data using a web-based 22 computing platform.</p>	<p>20 A. Right. So Claim 11, as you see 21 it, it talks about plurality of users accessing 22 a content from an associated plurality of user 23 environments. And again, having no user 24 environments, you don't -- you can't have a</p>
<p>23 Well, there's no indication in 24 this manual that product is web based. There</p>	

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1 plurality of user environments.  
 2 So I don't think it discloses  
 3 Claim 11.  
 4 Q. And how about Claim 16?  
 5 A. Well, no. There's really nothing  
 6 at all in there about portable wireless devices  
 7 or even about having kinds of data like  
 8 voicemail that one typically accesses over a  
 9 portable wireless device. There's no mention of  
 10 it there.  
 11 Q. What is your opinion as to whether  
 12 or not the iManage User Reference Manual  
 13 anticipates Claim 9, 11 and 16?  
 14 A. It's my opinion it does not  
 15 anticipate Claims 9, 11 and 16.  
 16 Q. Okay. Claim 21.  
 17 Is Claim 21 valid or what is your  
 18 opinion with respect to whether or not Claim 21  
 19 is anticipated by the iManage User Reference  
 20 Manual?  
 21 A. It's my opinion it's not  
 22 anticipated by the iManage -- I'm forgetting the  
 23 name of this thing -- iManage Reference User  
 24 Manual. Sorry.

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1 I think it's not anticipated by  
 2 that.  
 3 Again, so I think each one of  
 4 these elements mentions user workspace. They're  
 5 first element user workspace in the second  
 6 element. User workspace in the third element.  
 7 User workspace in the fourth  
 8 element. User workspace in the fifth element.  
 9 There's no user workspace here.  
 10 Also, it talks about, you know,  
 11 web-based computing platform. There's nothing  
 12 in there to indicate this particular product  
 13 whose manual we have in front of us is web  
 14 based. So it doesn't disclose any of these  
 15 elements.  
 16 Q. And for the reasons that you've  
 17 already testified previously with respect to the  
 18 other claims and that also apply with respect to  
 19 Claim 1 --  
 20 A. Correct.  
 21 Q. -- those apply here?  
 22 A. Right.  
 23 Q. So what is your opinion with  
 24 respect to Claim 23 as it relates to the iManage

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1 User Reference Manual, just in case I didn't ask  
 2 earlier?  
 3 A. Claim 21 you mean?  
 4 Q. Did I say -- sorry, 11. Yes.  
 5 A. So that the iManage manual does  
 6 not disclose any of the elements, I believe, of  
 7 Claim 11.  
 8 Q. Let's turn to Claim 23.  
 9 Does the iManage User Reference  
 10 Manual disclose any of the elements in Claim 23?  
 11 A. No, it does not. Again, we have a  
 12 context component and we have a tracking  
 13 component. And for all of the reasons I've  
 14 mentioned before, it has neither of those.  
 15 And so it does not disclose any of  
 16 the elements of Claim 23.  
 17 Q. And if we look at the dependent  
 18 claims on Claim 23, which are Claim 25, 31 and  
 19 32, are those claims -- strike that.  
 20 Are Claims 25, 31 and 32  
 21 anticipated by the iManage User Reference  
 22 Manual?  
 23 A. No, they're not, because these are  
 24 claims dependent on Claim 23. And so Claim 23

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1 is not anticipated.  
 2 None of these can be anticipated.  
 3 They're simply making that claim more specific.  
 4 So, no, none of these is disclosed by the  
 5 iManage User Reference Manual.  
 6 Q. We're almost done talking about  
 7 this one, so we'll -- if you look at Claim 25,  
 8 there's a reference to the first user workspace.  
 9 Do you see that?  
 10 A. Mm-hmm.  
 11 Q. Is that disclosed anywhere in the  
 12 iManage User Manual?  
 13 A. No. There are no user workspaces  
 14 in that technology.  
 15 Q. Okay. So is it your opinion that  
 16 the asserted claims is valid over the iManage  
 17 User Reference Manual?  
 18 A. My opinion is that all these  
 19 references are valid as against the iManage User  
 20 Reference Manual.  
 21 Q. Let's turn now to the Hubert  
 22 reference --  
 23 A. Okay.  
 24 Q. -- which is DTX 922. Can you

<p style="text-align: right;">Page 1808</p> <p>1 explain to us what does Hubert disclose?  2 A. Hubert discloses something that  3 they call a meta-document. Okay. So now a  4 meta-document is like kind of like a regular  5 document with some extra stuff.  6 And the extra stuff that goes  7 along with it is kind of history of everything  8 that's happened to that document. So if the  9 document is a report, if that report gets  10 translated from English to Spanish.  11 That would be recorded in the  12 meta-document. If it gets sent from one person  13 to another, that would be reported in the  14 meta-document of the document.  15 All right. So it's basically you  16 can think of what you would usually think about,  17 a document plus some more information about, you  18 know, what's happened to that document as it's  19 moved from one place to another, been edited,  20 been shipped around, so on. That's what it is.  21 Q. If you look at the title, which I  22 believe is Line 54, enlarge that. It says  23 meta-documents and method of managing them.  24 A. Mm-hmm.</p>	<p style="text-align: right;">Page 1810</p> <p>1 application, if you can see it?  2 A. Right. So it's talking about what  3 is included in the meta-document. So we have  4 what it calls the object-conveying document  5 information. So that's just like a regular  6 document.  7 All right. That's sort of a  8 document part of the meta-document. It includes  9 processing information pertaining to processing  10 of the meta-document and metadata for indexing  11 and retrieving the processing information.  12 It includes the fact that  13 meta-document was processed by whom and any  14 relevant tool used in the result of the  15 processing. So, in other words, if the document  16 gets sent from one person to another, that gets  17 recorded in the processing information.  18 If you do something to it like I  19 suppose even spell check it, or translate it or  20 do anything like that, that gets recorded in the  21 processing information, and so on. So that's  22 the processing part.  23 Each time processing information  24 is recorded on the document, appropriate</p>
<p style="text-align: right;">Page 1809</p> <p>1 Q. Is that a good description of  2 what's in the Hubert reference here?  3 A. It is. It's -- again, it's very  4 document central meaning that's what it's about.  5 It's documents. It actually adds to the notion,  6 it's sort of a fancy document. A document plus  7 a little bit more information.  8 Q. How's that different from the  9 invention of the '761 patent?  10 A. Well, the '761 patent is based  11 around users and users' workspaces, you know,  12 having environments for users and tracking users  13 when I go from one environment to another  14 environment and so on.  15 This is just about these  16 meta-documents. It doesn't have any sense of  17 users doing anything except it's recorded in  18 history of a document. So again it's just sort  19 of keeping a document history.  20 Q. Okay. Maybe we can take a look at  21 Paragraph 11 of this reference.  22 A. Mm-hmm.  23 Q. Can you just explain what this  24 describes here in Paragraph 11 of the Hubert</p>	<p style="text-align: right;">Page 1811</p> <p>1 metadata index and retrieving the processing  2 information is also stored on the meta-document.  3 So it keeps its own history in the metadata.  4 That's basically what this is saying.  5 Q. Is there anything about the users  6 here?  7 A. There's absolutely nothing about a  8 context, or environment or moving from one  9 context to another, tracking users. I mean,  10 it's just not centered around users. It's  11 centered around these meta-documents.  12 Q. So, in your opinion, is it totally  13 different than the '761 patent?  14 A. It's completely different.  15 Q. Okay. Are there figures in this  16 application, this Hubert reference that explain  17 what the Hubert reference is about?  18 A. Yeah. I think there are two  19 figures as I recall.  20 Yeah. This is the first one.  21 This is just sort of showing what  22 we just explained a second ago that, you know,  23 there's data information. This is basically the  24 document, a regular document.</p>

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1 And down here, this sort of tells  
 2 you what processing has happened in the  
 3 document. And that's stored index to the  
 4 metadata, so that you can, you know, find that  
 5 if you want to.  
 6 So that's just, you know, storing  
 7 the history. The tool part is actually it's an  
 8 optional part. It's a little bit of code that  
 9 you can include if you want so the document  
 10 updates its own history.  
 11 Basically that's what that tool  
 12 is. It's just something that -- oh, I just --  
 13 it just notices that there was a translation  
 14 that happened, so it updates the metadata to  
 15 record that.  
 16 Q. Why don't we take a look at Figure  
 17 2, and if we can explain what that shows?  
 18 A. Yeah. Well, this is how a  
 19 meta-document would go from one person to  
 20 another.  
 21 So source one, that's a person  
 22 whose -- here's a person that has this  
 23 meta-document.  
 24 And it shows this link which says

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1 internet. The description in the patent itself  
 2 says the usual way of transmitting these would  
 3 be as an email attachment. Okay.  
 4 So you would take this  
 5 meta-document. You would attach it to an email  
 6 and you would send it via an email to some other  
 7 person who might then do something. And if they  
 8 do something, that would be recorded as part of  
 9 this document history as well.  
 10 Q. And that source two that you just  
 11 pointed to?  
 12 A. Mm-hmm. So source two -- sorry.  
 13 And they might do something to it and then  
 14 extend along to source three.  
 15 That person might also do  
 16 something to it. And as it goes through this  
 17 chain being sent along through email, it just  
 18 keeps track of what's happened to it.  
 19 Q. Is there anything in this figure  
 20 that shows a user moving from one environment to  
 21 another?  
 22 A. No. No, not at all.  
 23 I mean, it's just a document being  
 24 sent from one user to the next.

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1 Q. Is there anything in the Hubert  
 2 reference at all that talks about a user moving  
 3 from one environment to another?  
 4 A. No. No, there's nothing at all  
 5 about that.  
 6 Q. Is it all about meta-documents?  
 7 A. It's completely about  
 8 meta-documents. It is where the documents  
 9 entered.  
 10 Q. In your opinion, is emailing a  
 11 document from, let's say, source one to source  
 12 two, the same thing as the on-line collaboration  
 13 tool of the '761 patent?  
 14 A. No. This is not sort of an  
 15 on-line system.  
 16 It's just a document that could be  
 17 sent over the internet. But just as a textual  
 18 document is not an on-line document, it's just a  
 19 document that you can send through email.  
 20 Again, this is just sort of a  
 21 fancier document that you could send through  
 22 email. It's not an on-line collaboration tool.  
 23 Q. Let's take a look now at the  
 24 claims and walk through these elements. So in

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1 Claim 1, does the Hubert reference disclose the  
 2 context component element of Claim 1?  
 3 A. No, not at all, for all the  
 4 reasons I've already mentioned. There just is  
 5 no context.  
 6 In the sense of an environment or  
 7 user environment, there's nothing like that in  
 8 the system. It's also not a network-based  
 9 system.  
 10 It's just a document. There's no  
 11 sense of being in a network.  
 12 As far as the tracking component,  
 13 element two is concerned, again, it doesn't  
 14 track users doing anything. It can't track  
 15 users from first context to the second context  
 16 because the technology doesn't provide user  
 17 environments, or contexts or people.  
 18 So it doesn't disclose any of  
 19 those things.  
 20 Q. For all the reasons we have  
 21 already talked about, is it your opinion that  
 22 the Hubert reference does not anticipate Claim 1  
 23 of the '761 patent?  
 24 A. The Hubert reference does not

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1 anticipate Claim 1 of the '761 patent.	1 whether or not the Hubert reference anticipates
2 Q. Let's take a look at Claims 4 and	2 Claim 11 and 16?
3 7. How about these claims, what is your opinion	3 A. Right. So once again, it talks
4 with respect to these claims?	4 about associated plurality of user environments.
5 A. Well, these claims are, you know,	5 Well, there are no user environments in a
6 dependent on Claim 1. So since I believe Claim	6 meta-document.
7 one is valid, those claims are also valid.	7 And this talks about -- Claim 16
8 But, again, there's no user	8 talks about further comprising accessing the
9 environment. Again, there's no context, you	9 user environment via a portable wireless device.
10 know.	10 There's no mention of anything like that.
11 So you can't have data created in	11 Q. So is it your opinion that Claims
12 one context associated with data in the second	12 9, 11 and 16 are valid over the Hubert
13 context. So because there is no context in the	13 reference?
14 second context.	14 A. Yes. It's my opinion that 9, 11
15 Q. When you say because Claim 1 is	15 and 16 are valid as against the Hubert
16 valid, it's also your opinion that these	16 reference.
17 dependent claims are valid, is that because they	17 Q. Let's take a look at Claim 21.
18 don't have the elements of the system of Claim 1	18 A. Mm-hmm.
19 that starts out on these dependent claims here?	19 Q. Is Claim 21 valid over the Hubert
20 A. Yes. They don't have the elements	20 reference?
21 of the system under Claim 1.	21 A. Yes, in my opinion, Claim 21 is
22 Q. Let's turn to Claim 9.	22 valid over the Hubert reference. Once again,
23 Do you have an opinion as to	23 this is the one that it pointed out, let's say,
24 whether or not the Hubert reference anticipates	24 user workspace is mentioned in each element of
Page 1817	Page 1819
1 Claim 9?	1 this claim. And the meta-document does not have
2 A. Right. Well, yes, I do. I am	2 any user workspaces in it.
3 starting to feel like a broken record up here,	3 It does not disclose any user
4 but for the same reasons that you've been	4 workspaces; therefore, it doesn't really
5 describing, there really is no context	5 anticipate any of the elements of Claim 21.
6 component. There really is no tracking	6 Q. Let's turn to Claim 23?
7 component for exactly the reasons mentioned	7 A. Okay.
8 before.	8 Q. Do you have an opinion with
9 It does not anticipate Claim 9 or	9 respect to Claim 23 as to whether or not it's
10 even any of the elements of Claim 1.	10 anticipated by the Hubert reference?
11 Q. What about the web-based computing	11 A. Well, again, you know, this is
12 platform, which I believe is one of the	12 basically -- the first element is the context
13 differences we've identified?	13 component. The second element is the tracking
14 A. Yeah. There's nothing like a	14 component.
15 web-based computing platform. A meta-document	15 And for all the same reasons that
16 as I said, is just a document. It's independent	16 I mentioned repeatedly, there is no context
17 of a network.	17 component. There is no tracking component.
18 It certainly doesn't necessarily	18 There is no web-based server
19 live on the web. It's not a platform. It	19 involved in this technology. For all of these
20 doesn't fit that at all.	20 reasons, it does not anticipate either of the
21 Q. So let's turn to the dependent	21 elements of Claim 23.
22 Claims 11 and 16.	22 Q. Are any of the elements of Claim
23 A. Mm-hmm.	23 23 present in the Hubert reference?
24 Q. And do you have an opinion as to	24 A. No. None of the elements of Claim



<p style="text-align: center;">Page 1820</p> <p>1 23 are present in the Hubert reference?  2 Q. Would that be true of the other  3 independent claims of the '761 patent?  4 A. That is true of all of the  5 independent claims of the '761 patent.  6 Q. Can we take a look at the  7 dependent claims, which are 25, 31, 32. Do you  8 have an opinion with respect to whether the  9 Hubert reference anticipates these claims?  10 A. Well, since it does not anticipate  11 Claim 23, these claims are all dependent on  12 Claim 23. To simply make it more specific, the  13 Hubert reference does not anticipate any of  14 these claims.  15 Q. Now, in the Hubert reference,  16 there's the word -- the use of the word context.  17 Is it used in the same way as the '761 patent?  18 A. No. It's not used in the same way  19 at all. If we follow the claim construction  20 order, then context means environment.  21 And in the Judge's description or  22 discussion of how that terminology was settled,  23 there's some mention of the user environment is  24 part of an environment.</p>	<p style="text-align: center;">Page 1822</p> <p>1 know, do those tests. So what this Swartz  2 invention does, the idea is that you first start  3 out by creating a very detailed kind of work  4 flow of all the steps that you need to  5 undertake, so that you will be sure that you  6 comply with regulations. Okay.  7 And then it sort of keeps track of  8 everything that gets done. So if I do a  9 statistical analysis, it sort of grabs the data  10 and the analysis and plugs it into this audit  11 trail. Right.  12 If someone writes a document, or  13 does a sign off, or does a review or whatever it  14 is that the regulations require, this second  15 technology sort of takes the results of all  16 those things, integrates them into an audit  17 trail.  18 So when it gets to the end, you  19 not only had to report, but you can establish  20 exactly where everything came from. And so you  21 can prove through that audit trail that you've  22 complied with the regulations.  23 Q. Are there some figures that show  24 what's disclosed here in this source reference?</p>
<p style="text-align: center;">Page 1821</p> <p>1 User environment is very much what  2 we would call a workspace. It's where the user  3 lives, does things, has tools for the user,  4 keeps the user's stuff.  5 And the term context is not used  6 at all in that way in the Hubert reference.  7 Q. I think we covered this. Is it  8 your opinion that Hubert doesn't anticipate any  9 of the asserted claims of the '761 patent?  10 A. Yes. It's my opinion that Hubert  11 does not anticipate any of the claims in the  12 '761 patent.  13 Q. Let's move to Swartz, which is PTX  14 919. What does the Swartz reference cover?  15 A. The Swartz reference, it discloses  16 a system that creates audit trail or regulatory  17 compliance purposes. So to give a little bit  18 more description, the idea is that if you want  19 to show that your work complies with regulatory  20 requirements, let's say, for example, you're  21 doing pharmaceutical tests. You're testing a  22 drug or something.  23 There are very detailed  24 regulations that dictate how you have to, you</p>	<p style="text-align: center;">Page 1823</p> <p>1 A. Yeah. I think we can move forward  2 and --  3 Q. Can we take a look at Figure 7?  4 A. Yeah. This is one of the figures.  5 So, again, here we're dealing with  6 documents and we're also dealing with data. And  7 what this system is doing is kind of integrating  8 them and weaving them together into an audit  9 trail.  10 As you can see, the way the data's  11 stored here is just, you know, just like the  12 other diagrams that we've seen. Again, folders  13 have to be named. Individual items have to be  14 placed into folders and that's how the data is  15 organized.  16 All right. So you have clinical  17 reports. Then you have to decide, okay, here  18 are the reports that I want to put into that  19 folder. And, you know, again, we have sort of  20 storage in the way that creates all the problems  21 that we talked about for people trying to share  22 documents.  23 All right. And this is a problem  24 that the '761 is trying to overcome.</p>

Page 1824	Page 1826
<p>1 Q. Su when you referred to the other 2 diagrams just earlier in your testimony, were 3 you referring to the hierarchial structure?</p>	<p>1 sits in the middle as middleware and collects 2 all these different operations that happen as 3 this process moves forward to create the audit</p>
<p>4 A. Yes. Surey.</p>	<p>4 trail. Su here this is just showing sitting in</p>
<p>5 I was. I was referring to the 6 hierarchial structure of files and folders.</p>	<p>5 the middle. It's a piece of middleware that 6 kind of gathers up all the stuff that is</p>
<p>7 Q. Okay. Why don't we turn to Figure 8 11 of the Swartz patent, which that's DTX 109.</p>	<p>7 stepping in the application and creates the 8 audit trail.</p>
<p>9 A. Yes.</p>	<p>9 Q. Why don't we take a look -- I</p>
<p>10 Q. So now what does this show us?</p>	<p>10 think there's a description in the patent in</p>
<p>11 A. This is, again, very much the same 12 kind of thing showing how data gets stored in 13 the system, showing files and folders that have 14 to be named. And then you sort of choose where 15 the different -- different files go in this 16 hierarchial system.</p>	<p>11 Figure 2A. Take a look at Column 9, Lines 5 12 through 8.</p>
<p>17 Q. Does what's disclosed in Swartz 18 care about the users?</p>	<p>13 Yes?</p>
<p>19 A. Nu, not at all. It doesn't care 20 about users. It's centered about all the 21 operations necessary to get, you know, improved 22 regulatory compliance. So that's what keeps 23 track of -- it keeps track of all those steps 24 that go into the creation of this report</p>	<p>14 A. Mm-hmm.</p>
<p>Page 1825</p>	<p>15 Q. So can you explain what we are 16 looking at here in Lines 5 through 8?</p>
<p>1 documenting exactly how they were taken, so that 2 you can prove at the end that you track them the 3 right way.</p>	<p>17 A. Right. So the way this works 18 actually is this middleware sits above the 19 operating system. Right.</p>
<p>4 It doesn't care about users.</p>	<p>20 And the application is run surt 21 of, if you will, on top of the middleware, so</p>
<p>5 There's no workspace.</p>	<p>22 the DataDocket kind of can intercept the data 23 that's exchanged and facilitate the exchange of 24 data between the applications so that you can</p>
<p>6 There's no moving of a user from 7 one workspace to another workspace. It doesn't 8 care about users.</p>	<p>Page 1827</p>
<p>9 Q. Why don't we take a look at Figure 10 2A?</p>	<p>1 capture them and integrate them.</p>
<p>11 A. Mm-hmm.</p>	<p>2 It has an integration component.</p>
<p>12 Q. What does this show us?</p>	<p>3 It kind of weaves them together to create this 4 trail of what happened.</p>
<p>13 A. Well, this is again showing that 14 the DataDocket Software, this is the Swartz 15 technology, is sitting in the middle and it's 16 interacting with some number of applications you 17 might have. You know, some of these -- 18 according to the wording in the patent, some of 19 these regulatory compliance cases have thousands 20 of documents and thousands of statistical 21 analyses. And you might have any number of 22 applications that you have to use to sort of 23 create that document.</p>	<p>5 Q. Is the primary idea behind the 6 Swartz reference to manage the flow of raw 7 source data to a final report?</p>
<p>24 So DataDocket Software kind of</p>	<p>8 A. Exactly. It's not at all about 9 collaboration or sharing.</p>
	<p>10 It's all about sort of pulling 11 things together into an audit trail of documents 12 and final report.</p>
	<p>13 Q. I think there's some places that 14 it's described here in the patent. If we could 15 turn to Column 8, --</p>
	<p>16 A. Mm-hmm.</p>
	<p>17 Q. -- lines 49 through 56. So could 18 you explain, you know, what is being described 19 here?</p>
	<p>20 A. I think we're starting at the line 21 at a first or basic level, it automates the 22 process of transferring data analysis reports to 23 a document management system for document 24 production.</p>

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<p>1 So the idea is that it takes data 2 from the application where the work is being 3 done and kind of funnels into a document 4 management system creating this history that 5 so that this whole package can then be used for 6 regulatory approval submission. 7 So, you know, it synchronizes 8 information flow between data and a document 9 repository. So it's weaving together these data 10 and the documents into a single stream. 11 Q. Does this have anything to do with 12 users? 13 A. No. 14 Q. Okay. Can we turn to one other 15 place here in the patent? 16 I believe it's Column 6, Lines 22 17 through 26. 18 And Dr. Herbsleb, I was hoping you 19 could explain what's being described here about 20 what the Swartz reference is about. 21 A. Sure. Okay. 22 More specifically, the middleware 23 is preferably employed to identify, including 24 tracking, monitoring, analyzing the context in</p>	<p>1 this Swartz reference that also demonstrates 2 this point that you're making? 3 A. Sure. 4 Q. Can you turn to Claim 1 and 2? 5 A. Right. So a knowledge integration 6 system for providing application 7 interoperability for data analysis between 8 heterogeneous documents and data sources. So 9 basically what this describes is it has database 10 memory. 11 It has a data source suitable for 12 interoperatively performing data analysis. That 13 basically means there's some application that's 14 doing statistical analysis out there. That's 15 the first data source. 16 And as a source of documents, all 17 right, including document database memory. And 18 then this has a knowledge integration 19 application, which then kind of weaves together 20 the documents and the data that support those 21 documents to create this audit trail, this 22 history. And that's basically what's what it's 23 about. 24 Q. And if you look at Claim 2, --</p>
Page 1829	Page 1831
<p>1 which information is employed so as to enable 2 the use of such context in the management of 3 knowledge. 4 Okay. Here's one of those 5 examples that it uses some of the terminology of 6 '61, meaning tracking and context. It's using 7 those words in a completely different way. 8 So context here is the context in 9 this regulatory compliance scheme. Right. 10 So you want to show that as you're 11 creating this document, that, you know, it's 12 based on these data, analyzed in this way. And 13 that's the kind of context it's referring to is 14 weaving together the statistical data the 15 document just talked about tracking. 16 It's talking about tracking what's 17 going on in this regulatory compliance scheme, 18 what's being done to the documents, what's being 19 done to the data. There's no sense at all of it 20 tracking people, or tracking users or having 21 even workspaces for users. 22 So this is a completely different 23 type of thing. 24 Q. Is there anything in the claims of</p>	<p>1 A. Mm-hmm. 2 Q. -- does that confirm your 3 understanding of what's been disclosed in the 4 Swartz reference? 5 A. The knowledge system wherein the 6 knowledge integration application generates an 7 audit trail to represent the flow of data. 8 Q. Okay. 9 A. So, again, how does the data flow 10 to create this report? That's what it's trying 11 to capture. 12 Q. Can we take a look at Claim 5 of 13 the Swartz reference? And can you explain, what 14 does this mean to one of ordinary skill in the 15 art? 16 A. So this is storing -- the 17 integration component is storing information 18 about the integration transaction. So what it 19 means here by integration transaction is when it 20 takes some data in a document and pulls them 21 together to sort of show that, you know, it's 22 been done correctly. So those are the 23 transactions it's talking about. 24 So it's -- so it stores those</p>

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<p>1 transactions, everything, data and documents 2 into a trail. It stores that history of 3 transactions. 4 Q. It uses the words dynamically 5 stores. Is that the same concept of dynamically 6 stores or dynamic storing as disclosed in the 7 '761 patent? 8 A. It doesn't really specify what 9 dynamically is here. Just means that if, you 10 know, something happens and then it stores the 11 information. It's not really very specific 12 about what that means. 13 Q. How is that different than what's 14 disclosed in the '761 patent? 15 A. Well, so the '761 patent, what 16 gets stored is, you know, the user takes some 17 action and that updates, you know, the metadata 18 either based on context information or the 19 tracking information. 20 This doesn't really say that it's 21 triggered necessarily by something the user 22 does. It doesn't -- it's not clear what 23 triggers it. It just says that it's, you know, 24 stored over time.</p>	<p>1 doesn't have user workspace. 2 Q. And how about the tracking 3 component element of Claim 1? 4 A. The tracking component element of 5 Claim 1 is essentially in the same story, it 6 does not track users as they move from any 7 context to any other context. It's not centered 8 around users. It doesn't track users at all. 9 Q. Do you have an opinion as to 10 whether or not the Swartz reference anticipates 11 Claim 1 of the '761 patent? 12 A. I do. It does not anticipate in 13 my opinion Claim 1 of the '761 patent. 14 Q. Let's look at Claims 4 and 7. 15 What is your opinion with respect to whether or 16 not the Swartz reference anticipates Claims 4 17 and 7 of the '761 patent? 18 A. Right. My opinion it does not 19 anticipate Claim 4. Context information, this 20 is information from a user environment in which 21 the invention doesn't have, so it doesn't 22 anticipate Claim 4. 23 Claim 7 talks about a first 24 context associated with data created in the</p>
Page 1833	Page 1835
<p>1 Q. So by using the same words, does 2 it mean the same thing from the Swartz reference 3 to the '761? 4 A. No. No. 5 These words often get used in very 6 different ways and we have a claim construction 7 order that covers some of the words that are 8 used here. We have to understand them in that 9 sense. 10 Q. Okay. Let's look at the claims 11 now. So we'll turn to Claim 1. 12 A. Mm-hmm. 13 Q. Do you have an opinion as to 14 whether or not the Swartz reference discloses 15 the context component element of Claim 1? 16 A. I have an opinion. It does not 17 disclose the context element of Claim 1 for many 18 of the same reasons we discussed. It doesn't 19 have a context component. 20 There's nothing like an 21 environment. There's nothing like a user 22 workspace. 23 And so it can't do any of the 24 things, you know, described in here because it</p>	<p>1 second context. It doesn't have context in the 2 software. 3 Q. So is it your opinion that four 4 and seven -- 5 A. It does not anticipate either 6 Claim 4 or Claim 7. 7 Q. Let's turn to Claim 9. Do you 8 have an opinion with respect to Claim 9 as to 9 whether or not the Swartz reference anticipates 10 Claim 9? 11 A. Well, as we discussed the first 12 two elements comprise the context component, the 13 section two elements comprise the tracking 14 component and for all the same reasons that I 15 have discussed, it does not anticipate any of 16 the elements of Claim 9. 17 Q. Let's turn to Claims 11 and 16. 18 What is your opinion with Claims 11 and 16 as to 19 whether or not the Swartz reference anticipates 20 those claims? 21 A. Well, again, we have indexing the 22 content of the user environment. It has no user 23 environment so it does not anticipate Claim 11. 24 Accessing the user environment via a portable</p>

1 wireless device, it has neither so it does not  
2 anticipate Claim 16.

3 Q. Is it your opinion also that since  
4 Claims 11 and 16 depend on Claim 9 that the same  
5 reasons you articulated for Claim 9 also apply  
6 to those two claims?

7 A. Right. Those same reasons apply  
8 here as well as additional reasons.

9 Q. Let's turn to Claim 21.

10 A. All right.

11 Q. Do you have an opinion as to  
12 whether or not Claim 21 is anticipated by the  
13 Swartz reference?

14 A. I do. My opinion is that Claim 21  
15 is not anticipated by the Swartz reference.  
16 Again, we see here user workspace mentioned in  
17 every element of this claim. And there is, you  
18 know, no user workspace in the technology of  
19 Swartz disclosure, so I don't think that any of  
20 these elements are anticipated by Swartz.

21 Q. Let's turn to Claim 23. Do you  
22 have an opinion as to whether or not Claim 23 is  
23 anticipated by the Swartz reference?

24 A. Well, once again, I find myself

1 reference does not anticipate of these claims.

2 Q. Do you have an opinion as to  
3 whether or not the Swartz reference affects the  
4 validity of any of the asserted claims of the  
5 '761 patent?

6 A. I think the Swartz patent does not  
7 affect the validity of any of the claims in the  
8 '761 patent.

9 Q. Do you have an opinion as to  
10 whether or not the Hubert reference affects the  
11 validity of any of the asserted claims of the  
12 '761 patent?

13 A. I do have an opinion. I think  
14 that the Hubert reference does not affect the  
15 validity of any of the claims in the '761  
16 patent.

17 Q. Do you have an opinion whether or  
18 not the iManage reference affects the validity  
19 of any of the asserted claims of the '761  
20 patent?

21 A. I do. I believe the iManage user  
22 reference manual does not affect any of the  
23 claims of the '761 patent.

24 Q. Would there be any combination of

1 saying the same thing over and over again. I  
2 apologize if it's getting repetitive. But the  
3 first element is the context component. The  
4 second element is the tracking component. And  
5 once again, for all the reasons I have  
6 mentioned, it doesn't have a context component  
7 as described here. It does not have a tracking  
8 component as described here, so it does not  
9 anticipate either of the elements of Claim 23.

10 Q. How about the dependent claims,  
11 Claims 25, 31 and 32, which depend on Claim 23?

12 A. Well, they depend on Claim 23 in  
13 the sense that they just make it more specific.  
14 It does not anticipate any of these claims,  
15 either, for the same reasons.

16 Q. And when you say any of these  
17 claims, you're referring to 25, 31 and 32; is  
18 that correct?

19 A. That's correct.

20 Q. So is it your opinion that the  
21 Swartz reference doesn't anticipate any of the  
22 asserted claims for all the reasons you have  
23 testified to today?

24 A. It is my opinion that the Swartz

1 these references that we have just talked about  
2 that would render the asserted claims of the  
3 '761 patent obvious in your opinion?

4 A. No. In the first place, I haven't  
5 seen any reference that anyone has offered as to  
6 why someone would think to combine them anyway.  
7 There has really been no reason offered as to  
8 why we should do that. But even if we did, all  
9 suffer from the same problems as we've seen. I  
10 was saying the same thing over and over again,  
11 if you can combine them all, none of them has a  
12 context. None of them has a tracking component.  
13 None of them invalidates any single element of  
14 any of the claims. If you put them all  
15 together, they still don't invalidate any of the  
16 elements of any of the claims.

17 Q. Do those references actually  
18 practice the problems that the '761 patent  
19 sought to solve?

20 A. Yes. As we say I think for all of  
21 them, there is the same hierarchical arrangement  
22 of data storage, folders, you name the folders,  
23 you put stuff in the folders, so it does not  
24 facilitate sharing in collaboration. In fact,

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<p>1 it creates -- it's the same kind of system that 2 creates the problem that the '761 is trying to 3 solve. 4 Q. In Dr. Greenberg's report based on 5 your review of the it, did he provide the 6 motivation to combine any of these references 7 together that we have talked about? 8 A. No, I don't believe he provided 9 any reason why someone would try to combine 10 these references together. 11 Q. Would the fact that on the face of 12 two of these references refer to an assignment 13 to Xerox suggest a motivation to combine? 14 A. No, I believe those are Swartz and 15 Hubert. No, I don't think so. You know, Xerox 16 must have thousands or tens of thousands of 17 patents. Just the fact that it's the same 18 company doesn't suggest that you would 19 automatically think they would be combined in 20 some way. 21 Besides, I believe the Hubert 22 patent was a European patent, so I believe 23 Hubert is in Europe somewhere. And the Swartz 24 patent was patented in the U.S., so it's not</p>	<p>1 to convert a standalone software product into a 2 web-based product? 3 A. Yeah, there are a number of 4 problems, depending on the product it could be 5 quite difficult. If you're creating a 6 standalone product, you can use whatever you 7 want to use on the computer, you're just totally 8 unrestricted. If you're trying to create a 9 web-based version of it, you have to create 10 something that runs inside of a browser, that's 11 a very, very restrictive environment, so it can 12 be quite challenging to do that, let alone 13 dealing with the fact that, you know, network 14 conductivity might be there, it might not be 15 there, it might die in the middle of a session, 16 there are a number of things to deal with. It 17 does not make it a trivial undertaking at all. 18 Q. I just asked that question in 19 connection with 2002. Today would that answer 20 be any different? 21 A. It would be easier now, still not 22 trivial, but probably easier. 23 Q. How about in 2002, would it have 24 been difficult to convert an existing product</p>
Page 1841	Page 1843
<p>1 even clear -- you know, they're in different 2 continents presumably, that doesn't provide any 3 reason to think that someone would combine 4 those. 5 Q. Do you have an understanding for 6 the concept of obviousness that we had talked 7 about earlier whether an element-by-element 8 analysis combining the references is required? 9 A. Yeah, my understanding is that it 10 is required. 11 MS. KEEFE: Objection, Your Honor. 12 601, legal opinion. 13 MS. KOBIALKA: I'm asking for his 14 understanding of -- 15 THE COURT: Overruled. If he has 16 an understanding, he can testify to it. 17 THE WITNESS: My understanding was 18 that one must sort of look at each element in 19 turn and find some reason to combine the 20 references rather than saying all these things 21 should be put together and somehow they add up 22 to the invention. 23 Q. So in 2002, the time of the filing 24 of the provisional, would it have been difficult</p>	<p>1 into one that's accessible by a portable 2 wireless device? 3 A. Yes, the portable wireless devices 4 of 2002 have very small screens, for example, so 5 to create some way to interact with an 6 application on a little tiny screen is a very 7 big problem. 8 And in 2002, that was before we 9 heard much about 3G connectivity, so it was 10 very, very small bandwidth, so it's hard to get 11 something useful to run with a tiny bit of 12 bandwidth and you have problems of being 13 connected and disconnected and what to do when 14 that happens. It's not a trivial exercise. 15 MS. KOBIALKA: Your Honor, this 16 may be a good stopping point. I do have a 17 little more and it would extend into the lunch 18 break. 19 THE COURT: That's fine. I think 20 it's an appropriate time for our lunch break and 21 we'll allow our jurors to go out to get their 22 lunch. 23 THE CLERK: All rise. 24 (Jury leaving the courtroom at</p>

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1 12:28 p.m.)  
 2 THE COURT: You can step down,  
 3 Professor.  
 4 Ms. Kubialka, your estimate about  
 5 how much longer an direct?  
 6 MS. KOBIALKA: Probably fifteen  
 7 minutes.  
 8 THE COURT: We'll be in recess  
 9 until 1:30.  
 10 (A brief recess was taken.)  
 11 THE COURT: Good afternoon,  
 12 Anything we need to discuss before we bring the  
 13 jury in?  
 14 MR. ANDRE: Just one quick matter,  
 15 Your Honor, before the jury comes in. We'll be  
 16 resting our case after Dr. Herbsleb. Before we  
 17 do so, there was a stipulation early in the case  
 18 about the commercial success of Facebook and I  
 19 realize they have recently challenged that  
 20 stipulation once again and we don't know if we  
 21 should offer proof before we close our case or  
 22 how the Judge wants us to handle that.  
 23 THE COURT: Right. Mr. Rhodes, do  
 24 you want say something?

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1 MR. RHODES: Not very much. I  
 2 wanted to avoid evidence coming in on the  
 3 matter. They over my objection got evidence in  
 4 on the matter, so I told them there is no need  
 5 for a stipulation, you can argue evidence.  
 6 THE COURT: Well, my plan right  
 7 now is to have one sentence in the jury  
 8 instructions at the obviousness portion that --  
 9 which I think is language that Leader proposed,  
 10 Facebook's website is commercially successful,  
 11 so that plus the evidence that came in is as  
 12 much an commercial success as we're going to  
 13 have.  
 14 Anything else before we bring the  
 15 jury in?  
 16 MR. ANDRE: That's all, Your  
 17 Honor. Thank you.  
 18 THE COURT: Mr. Rhodes?  
 19 MR. RHODES: No.  
 20 THE COURT: No. Let's bring the  
 21 jury in.  
 22 THE CLERK: All rise.  
 23 (Jury entering the courtroom at  
 24 1:41 p.m.)

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1 THE CLERK: Please be seated.  
 2 THE COURT: Good afternoon.  
 3 Welcome back.  
 4 Ms. Kubialka, I believe you're  
 5 still on.  
 6 MS. KOBIALKA: Yes. Thank you,  
 7 Your Honor. I would like to finish up with  
 8 Dr. Herbsleb. While he's on his way up to the  
 9 stand, we would like to move PTX 1125 into  
 10 evidence.  
 11 MS. KEEFE: No objection, Your  
 12 Honor.  
 13 THE COURT: It's admitted.  
 14 BY MS. KOBIALKA:  
 15 Q. Dr. Herbsleb, in your opinion,  
 16 would any of the references that we have  
 17 discussed today used in combination in any way  
 18 render any of the asserted claims of the '761  
 19 patent obvious?  
 20 A. No, they would not. As I  
 21 mentioned they all suffer from very similar kind  
 22 of issues, so putting them together doesn't  
 23 help.  
 24 Q. And that's all based on the

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1 reasons that you have already provided today; is  
 2 that right?  
 3 A. Exactly.  
 4 Q. In your opinion, does the  
 5 invention of the '761 patent address a long-felt  
 6 but unresolved need in the industry?  
 7 A. I think it does. I mean, this  
 8 2002 time frame was right at the end of the  
 9 period where I was doing research in  
 10 collaboration technology at Bell Labs. We were  
 11 trying to introduce and develop some  
 12 technologies to help distribute teams and share  
 13 documents and it was a huge problem. And I  
 14 think others were suffering from very similar  
 15 kinds of problems trying to figure out how to  
 16 get global distributed teams to share, for  
 17 example.  
 18 And, again, in terms of  
 19 obviousness, I think if you know, a solution to  
 20 that had been obvious, someone would have come  
 21 up with it some time ago.  
 22 Q. In your opinion, based on the  
 23 techniques that were known around 2002, did  
 24 those techniques teach a way from the invention

Page 1848	Page 1850
<p>1 of the '761 patent as it related to users?</p> <p>2 A. Yeah. I think what we saw in some</p> <p>3 of the other references are the kinds of things</p> <p>4 that were, you know, typical of the day, you</p> <p>5 know, hierarchy arranged filing systems, systems</p> <p>6 built around documents, managing documents,</p> <p>7 tracing history of documents, that is what was</p> <p>8 around.</p> <p>9 So that would not lead someone to</p> <p>10 suddenly go in the other direction and build</p> <p>11 everything around users. I think that's a</p> <p>12 significant shift and I don't think that was at</p> <p>13 all obvious from the technologies that were</p> <p>14 prevalent at the time.</p> <p>15 Q. In your opinion, did these factors</p> <p>16 provide evidence that the invention of the '761</p> <p>17 patent is not obvious?</p> <p>18 A. I think they do. I think they</p> <p>19 give another good indication that it was not</p> <p>20 obvious in that time frame.</p> <p>21 MS. KOBIALKA: Thank you. No</p> <p>22 further questions at this time.</p> <p>23 THE COURT: Thank you.</p> <p>24 Cross-examination.</p>	<p>1 nonobviousness that you used were your belief</p> <p>2 that there was some long-felt but unresolved</p> <p>3 need and teaching away by others of the</p> <p>4 invention; is that right?</p> <p>5 A. No. No. Those are not my only</p> <p>6 reasons for thinking that it was not obvious.</p> <p>7 I'm also thinking about the particular things</p> <p>8 that were disclosed in the references in the</p> <p>9 Greenberg report, and the other kinds of</p> <p>10 technology that were available and prevalent at</p> <p>11 the time. And all of those things together,</p> <p>12 along with the fact that there was a long-felt</p> <p>13 unmet need as well as teaching away, all those</p> <p>14 together caused me to think that it was</p> <p>15 definitely not obvious.</p> <p>16 Q. But in your report, the only</p> <p>17 secondary considerations of nonobviousness that</p> <p>18 you listed were long-felt but unresolved need</p> <p>19 and teaching away by others from the invention;</p> <p>20 is that correct?</p> <p>21 A. I don't believe so. I think that</p> <p>22 those are the only secondary considerations that</p> <p>23 I mentioned at the time. I believe that an</p> <p>24 examination of the references also indicates</p>
Page 1849	Page 1851
<p>1 MS. KEEFE: Thank you.</p> <p>2 CROSS-EXAMINATION</p> <p>3 BY MS. KEEFE:</p> <p>4 Q. Good afternoon, Dr. Herbsleb.</p> <p>5 A. Good afternoon.</p> <p>6 Q. Dr. Herbsleb, are you being paid</p> <p>7 to be an expert in this case?</p> <p>8 A. Yes, I am.</p> <p>9 Q. How much are you being compensated</p> <p>10 at?</p> <p>11 A. They compensated my usual</p> <p>12 consultant fee which is \$300 an hour.</p> <p>13 Q. Dr. Herbsleb, you respect</p> <p>14 Dr. Greenberg, don't you?</p> <p>15 A. I do.</p> <p>16 Q. And, in fact, you would consider</p> <p>17 him to be an expert in collaboration</p> <p>18 technologies; correct?</p> <p>19 A. I would, that's correct.</p> <p>20 Q. And we've just heard you had</p> <p>21 expressed an opinion that the patent was</p> <p>22 nonobvious; right?</p> <p>23 A. That's correct.</p> <p>24 Q. And the only two considerations of</p>	<p>1 that it was not obvious. I believe I commented</p> <p>2 in the report on the fact, for example, that</p> <p>3 Dr. Greenberg did not attempt to provide any</p> <p>4 justification for combining references to</p> <p>5 indicate obviousness, so that indicates that his</p> <p>6 report did not adequately support a finding of</p> <p>7 obviousness.</p> <p>8 MS. KEEFE: Your Honor, I would</p> <p>9 like to play for the record at his deposition</p> <p>10 page 188, lines 10 through 14, please.</p> <p>11 THE COURT: Hold on a second.</p> <p>12 MS. KOBIALKA: No objection.</p> <p>13 THE COURT: No objection. You can</p> <p>14 play it.</p> <p>15 MS. KEEFE: Thank you.</p> <p>16 (Videotape.)</p> <p>17 Q. As I read your report, sir, your</p> <p>18 secondary considerations of nonobviousness are</p> <p>19 in the category of long-felt but unresolved need</p> <p>20 and teaching away by others from the invention.</p> <p>21 Is that accurate?</p> <p>22 A. Yes. That's right.</p> <p>23 BY MS. KEEFE:</p> <p>24 Q. But Dr. Herbsleb, you couldn't</p>



Page 1852	Page 1854
<p>1 identify any products in the industry that 2 implement the claims of the '761 patent that are 3 asserted in this case, could you?</p>	<p>1 experiments or anything, no, that's correct. 2 Q. And you did not perform any 3 surveys regarding the effectiveness of the</p>
<p>4 A. I couldn't seem to identify any 5 products in the industry. Could you repeat it 6 again.</p>	<p>4 systems and methods claimed in the '761 patent 5 did you?</p>
<p>7 Q. Absolutely. You could not 8 identify any products out there in the industry 9 that implement the claims of the '761 patent 10 that are asserted in this case?</p>	<p>6 A. No. As I pointed out, I was just 7 responding to Dr. Greenberg's report, and it 8 didn't seem to require conducting any 9 experiments in surveys, I did not.</p>
<p>11 A. So as you recall during the 12 deposition, I was just responding to 13 Dr. Greenberg's report and I was sticking mostly 14 to commenting on that report. So since I was 15 not asked to prepare for that report any survey 16 of products out there in the world, I didn't do 17 that.</p>	<p>10 Q. Now, you talked about the code 11 that was attached to the back of the provisional 12 application. 13 A. That's right. 14 Q. And I think your testimony earlier 15 this morning was that you talked about it for 16 you being something like a recipe, we talked 17 about sauteing something. Do you recall that?</p>
<p>18 Q. And as a result, you did not 19 identify any products out there in the industry 20 that implement the claims of the '761 patent 21 that are asserted in this case; correct?</p>	<p>18 A. I think what I said actually was 19 that it is a concise way to convey information. 20 That it's not the complete implementation of the 21 invention disclosed, by any means, but it's 22 something which would give someone skilled in 23 the art, you know, information about how one 24 would actually make and use this invention.</p>
<p>22 A. I don't actually remember that, 23 but that could well be true, yes. 24 Q. And you had no opinion one way or</p>	
Page 1853	Page 1855
<p>1 the other as to whether anyone in the industry 2 is following the teachings of the '761 patent; 3 isn't that correct?</p>	<p>1 Q. But you also have testified before 2 that the code attached to the provisional 3 application is just pseudo code; correct?</p>
<p>4 A. So, I don't recall. I may have 5 said that.</p>	<p>4 A. Yes. Well, that goes along with 5 the idea that it's mainly a communication device 6 for other people who might want to make and use 7 this invention. It's not really a full 8 implementation as I said, but it is designed to 9 be helpful, you know, to give information and 10 hints to someone who might want to actually make 11 this invention.</p>
<p>6 Q. And you did not perform any tests 7 to test how effective the '761 patent is?</p>	<p>12 Q. To make hints, that is what you 13 just said?</p>
<p>8 MS. KOBIALKA: Objection. Outside 9 the scope of his direct.</p>	<p>14 A. For someone practicing the art, it 15 would give strong indications of how to 16 implement, make and use this invention.</p>
<p>10 MS. KEEFE: It goes directly to 11 the secondary considerations he's been 12 discussing.</p>	<p>17 Q. And pseudo code would not actually 18 function if you were to compile it into an 19 executable program; right?</p>
<p>13 THE COURT: Overruled.</p>	<p>20 A. Pseudo code would not, right.</p>
<p>14 THE WITNESS: So, no, I didn't 15 perform any tests, but I have on the other hand 16 been involved in collaboration technology in 17 sort of introducing collaboration technologies 18 to industry and I think it's pretty clear that 19 this technology is an effective approach to 20 that.</p>	<p>21 Q. And that's because it's not a real 22 programming language; right? 23 A. So pseudo code is not a real 24 programming language, but there is really kind of</p>
<p>21 Q. But you did not perform any tests 22 to test the efficacy of the systems and methods 23 claimed in the '761 patent, did you?</p>	
<p>24 A. No, I didn't perform any</p>	

1 a fine line here that I would like to clarify.  
 2 So the language that appears here  
 3 looks very much like Java, although I didn't  
 4 really try to compile it and test it and see if  
 5 it actually runs. But the purpose of that code  
 6 that looks a lot like Java is to provide  
 7 information to someone skilled in the art so you  
 8 know what kind of classes had been imported, you  
 9 would know how data was being stored, you would  
 10 know where to go to access information about  
 11 users, and so on.

12 Q. You mentioned a lot of things in  
 13 that last answer that I would like to go  
 14 through.

15 A. Okay.

16 Q. Can we actually see the import  
 17 statement section of the provisional, please.  
 18 So you mentioned these import statements quite a  
 19 few times; is that correct?

20 A. That's right.

21 Q. And, in fact, the ones that we  
 22 pointed to most frequently were the import.com,  
 23 Leader.persist.vbsf, and the very last import,  
 24 com.leader.osapplication.sessionstate; is that

1 would say that anyone skilled in the art knows,  
 2 you know, you don't know every single detail of  
 3 exactly what is within those classes, but you  
 4 know that VBSF is middleware that allows you to  
 5 store information in a database, you know, that  
 6 session statement is there to sort of capture  
 7 and hold information about a session because web  
 8 protocols are stateless and they can't catch a  
 9 state, so you know that kind of stuff from just  
 10 looking at the names of these things because  
 11 those are very common names in the industry.

12 MS. KEEFE: Your Honor, I would  
 13 like to play from the deposition at page 132,  
 14 lines 19 through 22.

15 MS. KOBIALKA: I'll object.  
 16 That's an incomplete clip. We need to continue  
 17 on to --

18 THE COURT: Which lines do you  
 19 propose in addition?

20 MS. KOBIALKA: At least page 133  
 21 through line one.

22 THE COURT: 133, one.

23 MS. KEEFE: That's fine, Your  
 24 Honor.

1 correct?

2 A. That's correct.

3 Q. You just mentioned that an import  
 4 statement imports classes that are defined  
 5 elsewhere; is that right?

6 A. That's right.

7 Q. What is a class?

8 A. It is a unit of code.

9 Q. So an import statement is used to  
 10 bring in code that lives somewhere else into the  
 11 code without having to repeat that code right  
 12 here; is that correct?

13 A. Yeah, it's used for, you know,  
 14 very common sort of utilities and boiler plate  
 15 sort of code that's used very frequently. And  
 16 every Java program and most programming language  
 17 these days import things like that.

18 Q. But with respect to the import  
 19 statements that we have highlighted here, you  
 20 can't really know what is in those classes  
 21 unless you actually have access to the  
 22 underlying source code that's being imported;  
 23 isn't that correct?

24 A. I would say that's not correct. I

1 THE COURT: Okay.  
 2 (Videotape.)

3 Q. You can't really know what's in  
 4 these classes unless you actually have access to  
 5 the underlying code. Correct?

6 A. So, that's correct -- except  
 7 someone with skill in the art would be able to  
 8 make reasonable guesses based on the names, I  
 9 would maintain.

10 BY MS. KEEFE:

11 Q. And, in fact, the best you could  
 12 do is guess as to what's in the code referred to  
 13 in an import statement; isn't that correct?

14 A. Not in the sense of a wild guess,  
 15 no. So as I said before, you don't know the  
 16 details of how each one of those is implemented  
 17 because you don't see the code. But VBSF are  
 18 very common well understood terms so that anyone  
 19 knowledgeable in the art would know basically  
 20 what they're doing and they would tell you that  
 21 if you are trying to make and use this  
 22 invention, certain kinds of information are  
 23 going to be stored in a relational database and  
 24 certain kinds of information are going to be

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<p>1 stored in a session state. That would be clear.</p> <p>2 MS. KEEFE: Your Honor, I would</p> <p>3 like to play page 133 lines, two through six.</p> <p>4 MS. KOBIALKA: I'll object as</p> <p>5 incomplete. If it goes through line 13 on page</p> <p>6 THE COURT: No objection through</p> <p>7 line 13?</p> <p>8 MS. KOBIALKA: Yes.</p> <p>9 THE COURT: Ms. Keefe.</p> <p>10 MS. KEEFE: I actually disagree, I</p> <p>11 literally asked the question directly and then</p> <p>12 the answer, but if that helps then we can go</p> <p>13 ahead and play it.</p> <p>14 THE COURT: It helps. Let's go</p> <p>15 ahead and play it then, the whole portion.</p> <p>16 (Videotape:)</p> <p>17 Q. But that's the most they could</p> <p>18 make, is reasonable guesses?</p> <p>19 A. Yes. But someone, you know,</p> <p>20 skilled in the art could make reasonable</p> <p>21 guesses, I think.</p> <p>22 Yes. But someone, you know,</p> <p>23 skilled in the art could make reasonable</p> <p>24 guesses, I think.</p>	<p>1 same for almost every application, a set of</p> <p>2 things that you're doing in web protocols, they</p> <p>3 don't know that you have logged in, they don't</p> <p>4 know that you have seen this page but not that</p> <p>5 page. But session state captures that sort of</p> <p>6 information and holds it.</p> <p>7 It is well-known that this is the</p> <p>8 purpose of session state libraries.</p> <p>9 Q. But you agree that with respect to</p> <p>10 the session state, you were speculating as to</p> <p>11 what it contained?</p> <p>12 A. I think that when something is</p> <p>13 well understood by people versed in the art it's</p> <p>14 not really quite speculation. It is a very</p> <p>15 informed inference.</p> <p>16 MS. KEEFE: Your Honor, I would</p> <p>17 like to play from page 132, line five through</p> <p>18 line 18.</p> <p>19 MS. KOBIALKA: Object, Your Honor.</p> <p>20 This isn't impeachment.</p> <p>21 THE COURT: Pass up a copy, please</p> <p>22 of the transcript. 132, line five through 18?</p> <p>23 MS. KEEFE: Yes, sir, Your Honor.</p> <p>24 THE COURT: The objection is</p>
Page 1861	Page 1863
<p>1 Q. So let's talk about VBSF for a</p> <p>2 minute. What is VBSF?</p> <p>3 A. Sort of a middleware that matches</p> <p>4 up object-oriented programs with relational</p> <p>5 databases so that it does the translation from</p> <p>6 the object model to a relational model, makes it</p> <p>7 much easier to use in a relational database.</p> <p>8 BY MS. KEEFE:</p> <p>9 Q. And, in fact, with respect to the</p> <p>10 sessions state classes, you were, in fact,</p> <p>11 speculating as to what was contained within</p> <p>12 them; isn't that correct?</p> <p>13 A. So, are you talking about this</p> <p>14 clip? This clip is talking about VBSF.</p> <p>15 Q. No, I'm talking about session</p> <p>16 state classes.</p> <p>17 A. Session state classes.</p> <p>18 Q. That were imported.</p> <p>19 A. So, as I mentioned, you can't see</p> <p>20 the details of what is session state because the</p> <p>21 source code is not here. But it is sort of</p> <p>22 boiler plate type code. Session state is</p> <p>23 something that if you're writing a web and you</p> <p>24 have to maintain session state, it's usually the</p>	<p>1 overruled. You can play it.</p> <p>2 MS. KEEFE: Thank you, Your Honor.</p> <p>3 (Videotape:)</p> <p>4 Q. So you would not know how to</p> <p>5 locate those classes. Correct?</p> <p>6 A. So there are session state classes</p> <p>7 in Java, for example, that may be very similar</p> <p>8 to this, so the functionality of these kinds of</p> <p>9 classes -- the reason -- well, I'm speculating.</p> <p>10 But the reason they're not fully reproduced here</p> <p>11 is simply because they're fairly common kinds of</p> <p>12 things that you wouldn't need to look at.</p> <p>13 Q. But you are speculating. I mean,</p> <p>14 you can't --</p> <p>15 A. I am.</p> <p>16 (End of videotape.)</p> <p>17 A. So if I may clarify what I was</p> <p>18 speculating about is the reason they don't</p> <p>19 appear here, if you go back and carefully read</p> <p>20 that, I'm not speculating about what the classes</p> <p>21 mean, I'm saying I'm speculating the reason they</p> <p>22 don't appear here is because they're very common</p> <p>23 and they don't need to appear here.</p> <p>24 Q. When you hired doctor -- you hired</p>

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<p>1 Dr. Caltaldo to actually attempt an experiment, 2 is that correct, using the provisional 3 application?</p>	<p>1 Q. But when you had your deposition 2 taken in this case, you were asked the question, 3 and you, in fact, answered that you did not know 4 if Dr. Caltaldo had referenced any outside 5 materials; isn't that correct?</p>
<p>4 A. I'm not sure if hire is the 5 correct word. I'm the one that gave him the 6 task, I did not pay him, someone else paid him, 7 but yes, I gave him that task.</p>	<p>6 A. That's correct. And it was the 7 deposition that convinced me that that was a 8 pretty important question and I ran off and 9 asked Dr. Caltaldo at which point he told me he 10 had not referenced any other materials in 11 preparation.</p>
<p>8 Q. And you agree that a person of 9 ordinary skill in the art in this case can have 10 as little as a bachelor of science in computer 11 science according to your testimony; is that 12 right?</p>	<p>12 Q. You didn't know during the time of 13 your deposition whether or not Dr. Caltaldo had 14 worked with anyone else in connection with his 15 work; isn't that correct?</p>
<p>13 A. Yes, that's right.</p>	<p>16 A. At the time of the deposition, I 17 probably didn't know that.</p>
<p>14 Q. But Dr. Caltaldo actually has a 15 Ph.D.?</p>	<p>18 Q. And similarly at the time of your 19 deposition, you did not know whether anyone else 20 had contributed to the content of the pseudo 21 code that Dr. Caltaldo handed you; isn't that 22 correct?</p>
<p>16 A. He does.</p>	<p>23 A. So there is a little wrinkle here 24 that I should try to explain to make this clear</p>
<p>17 Q. And Dr. Caltaldo has more than ten 18 years of experience in the field of computer 19 science?</p>	
<p>20 A. That's correct.</p>	
<p>21 Q. And you consider him to be very 22 talented; right?</p>	
<p>23 A. He's talented, yes, but then on 24 the other hand, as I said before, having a Ph.D.</p>	
Page 1865	Page 1867
<p>1 does not necessarily enhance somebody's ability 2 to create a web application. Having a Ph.D. 3 you're doing research that takes you into an 4 extremely specialized area and since I was his 5 thesis supervisor, I can tell you it had 6 absolutely nothing to do with web applications 7 or even applications.</p>	<p>1 is that at some point in the deposition, I think 2 it was at lunchtime or perhaps a break, I called 3 Dr. Caltaldo and asked him some of these 4 questions. So I didn't know during the first 5 half, I knew some of the answers during the 6 second half. There were some things I didn't 7 think to ask him which I asked him yet later, so 8 there are several different points in time here.</p>
<p>8 I think ten years of experience 9 is, you know, probably fairly average for 10 someone in industry, so I think if you put all 11 that together, he was someone, you know, that 12 would be a representative of someone who was 13 well versed in the art.</p>	<p>9 Q. Could we pull up the pseudo code, 10 please. I think it's the new exhibit, 1125. 11 1125, please. Can you highlight just the title, 12 Dr. Herbsteleb, is this the title of 13 the report that Dr. Caltaldo gave you?</p>
<p>14 Q. And other than assigning him this 15 task, you didn't actually oversee Dr. Caltaldo 16 in any way during the project; is that right?</p>	<p>14 A. Yes, it is, 15 Q. And the terms at the end here, 16 context and tracking components. Those are 17 phrases used in the patent; isn't that correct?</p>
<p>17 A. Not in any way having to do with 18 this, no.</p>	<p>18 A. That's correct, they are used in 19 the patent. 20 Q. In fact, it's -- you testified 21 earlier that it was possible that Dr. Caltaldo 22 actually had a copy of the final patent when he 23 was performing his analysis, didn't you?</p>
<p>19 Q. And you don't know if Dr. Caltaldo 20 referenced any outside materials in coming up 21 with the pseudo code that he developed; isn't 22 that correct?</p>	<p>23 A. I believe what I said is that it's</p>
<p>23 A. All I know is what he told me, and 24 he told me he did not, when I asked him.</p>	

1 public information, that anybody can access  
2 that, so of course he had access to it as does  
3 everyone.

4 Q. Dr. Herbsleb, what Dr. Caltaldo  
5 built was actually pseudo code, wasn't it?

6 A. Well, again, it appears to be  
7 Java. It is very, very close to Java, but since  
8 I didn't compile it, I don't know if it really  
9 runs, so we could call it pseudo code. It looks  
10 just like Java.

11 Q. You testified before that  
12 Dr. Caltaldo did not build any actual working  
13 system in connection with his work with the  
14 provisional; isn't that correct?

15 A. That's correct, because it does  
16 make calls into the code, you know, provided in  
17 the provisional patent application which we  
18 didn't have in code form, so it couldn't run  
19 because it makes those calls to the code that's  
20 in the system.

21 Q. And the fact that it is pseudo  
22 code indicates to you that the code Dr. Caltaldo  
23 developed could not be used to create a working  
24 application; is that correct, by itself?

1 iManage is accessible in any way, it means you  
2 have a browser and you can go look at the web  
3 that's all it says.

4 Q. Go you pull that back up again,  
5 please. But, in fact, can you read for me the  
6 tool bar here under the address and what is the  
7 name of that website?

8 A. Tool bar under the address. It's  
9 http.www.iManage.com.

10 Q. Thank you.

11 Can you now please turn to page 83  
12 in Figure 3.26. I believe you also testified  
13 that it's your belief that iManage does not  
14 involve users, or taking care of tracking users  
15 or where users are; is that correct?

16 A. It does not track users from one  
17 context to another, that's correct.

18 Q. Can you read for me what the title  
19 is on the left-hand column of this figure in the  
20 iManage reference?

21 A. So that is the user, which in this  
22 case happens to be the same user four times in  
23 the row, it could be four different users. As  
24 the figure caption says this is a document

1 A. Not, it's not complete by itself,  
2 right, it does rely on the code in the  
3 provisional application.

4 Q. Dr. Herbsleb, with respect to the  
5 iManage reference materials, you testified that  
6 the iManage reference materials did not teach a  
7 web-based system; is that correct?

8 A. Yes, that's right.

9 Q. Can you please pull up page 41 of  
10 the iManage reference manual. This is in  
11 chapter two.

12 Dr. Herbsleb, could you please  
13 read for me the first sentence under the header  
14 web browsers out loud?

15 A. "iManage DeskSite has a web  
16 browser utility to allow you to quickly access  
17 the web directly from iManage Desktop."

18 Q. Thank you. Can you also please --

19 A. So could I comment on that. That  
20 does not mean that it's web-base system, that  
21 means it has a browser built into it. Browser  
22 simply goes out and makes the http requests and  
23 gets web pages, but iManage is not a web-based  
24 system. That is not to say the documents within

1 history in which whatever user happens to  
2 interact with the document. Those user names  
3 would show up there. In this case it happens to  
4 be the same user four times in a row, but if  
5 Bowen went to do anything else this would not  
6 track them.

7 Q. With the Hubert system, you also  
8 believe that the Hubert system has nothing to do  
9 with the web; is that correct?

10 A. The Hubert system has nothing to  
11 do with the web, that's right.

12 Q. Could you please pull up page 25  
13 of the Hubert reference. Paragraph 25, I'm  
14 sorry. Can you please read for me the first  
15 sentence of paragraph 25 of Hubert?

16 A. "Mcia-document 20 is then  
17 forwarded via the internet to source  
18 (environment) 34."

19 So the internet is not the same as  
20 the web. The Internet is the basic plumbing,  
21 the basic functionality. It's a big network  
22 that hooks computers together. The web is a set  
23 of servers built on protocols on top of the  
24 internet. So something going by Internet

<p style="text-align: right;">Page 1872</p> <p>1 doesn't necessarily mean something going by web</p> <p>2 And the illustrations in the description here</p> <p>3 are sending something as an email attachment.</p> <p>4 Q. Isn't it possible that one of</p> <p>5 ordinary skill in the art could see the word via</p> <p>6 the internet and also assume that it could be</p> <p>7 done via the worldwide web?</p> <p>8 A. Well, it could be done, you know,</p> <p>9 with paper airplanes or something. It's not</p> <p>10 here.</p> <p>11 Q. So you also said that Hubert had</p> <p>12 nothing to do with users, I believe; is that</p> <p>13 correct?</p> <p>14 A. I said Hubert has nothing to do</p> <p>15 with tracking users from one context to another.</p> <p>16 It's not centered around users.</p> <p>17 Q. Could we pull up paragraph four,</p> <p>18 please. Paragraph four was talking about what</p> <p>19 Hubert was trying to solve; is that correct?</p> <p>20 Sort of the background of what was wrong in the</p> <p>21 past?</p> <p>22 A. Excuse me, let me take just a</p> <p>23 second to read this.</p> <p>24 Q. Sure.</p>	<p style="text-align: right;">Page 1874</p> <p>1 attachment, who liked it, et cetera).</p> <p>2 So once again, that you know says</p> <p>3 that it is keeping a history of the document,</p> <p>4 everything that happens to a document.</p> <p>5 Q. Keeping track of what user touches</p> <p>6 that document?</p> <p>7 A. Exactly. So it's centered around</p> <p>8 the documents, it's not saying here is a user,</p> <p>9 here is what the user did, and here the user</p> <p>10 moving around from one context to another, it's</p> <p>11 not following users, it's following a document.</p> <p>12 Q. Can we look at paragraph 14,</p> <p>13 please. Can you please read for me the sentence</p> <p>14 that's highlighted?</p> <p>15 A. Sure.</p> <p>16 "All of the processing information</p> <p>17 in the meta-document is explicit, accessible,</p> <p>18 and reusable so that other tools or other people</p> <p>19 in different contexts can benefit from it."</p> <p>20 So this -- sorry.</p> <p>21 Q. Thank you. That's all.</p> <p>22 So with respect to the Swartz</p> <p>23 document, you also indicated that Swartz was not</p> <p>24 web based; is that correct?</p>
<p style="text-align: right;">Page 1873</p> <p>1 A. (Witness reviewing.) Yes.</p> <p>2 Q. Okay.</p> <p>3 A. So, in fact, at the end it</p> <p>4 actually says one of the problems was, in fact,</p> <p>5 most of the information about what happened to</p> <p>6 the document during its whole life, e.g., who</p> <p>7 read it, reviewed it, a user, where it was sent</p> <p>8 as an email attachment, who liked it, et cetera,</p> <p>9 is lost. So that is what it says.</p> <p>10 And this as I believe I</p> <p>11 characterized it before is a document history,</p> <p>12 it's sort of here are all the things that</p> <p>13 happened to the meta-document, somebody read it,</p> <p>14 somebody else reviewed it, it got sent around,</p> <p>15 it's just accumulated history of what happened</p> <p>16 to it.</p> <p>17 Q. Can we turn to paragraph nine,</p> <p>18 please. Here in paragraph nine, can you please</p> <p>19 read for me the highlighted sentence?</p> <p>20 A. There is also a need for a system</p> <p>21 and method of managing documents which tracks</p> <p>22 all of the information about what happened to a</p> <p>23 document during its whole life (e.g., who</p> <p>24 reviewed it, where it was sent as an email</p>	<p style="text-align: right;">Page 1875</p> <p>1 A. So Swartz does have a brief</p> <p>2 mention of the web. I don't believe I testified</p> <p>3 to whether it was web based or not, but it does</p> <p>4 have a brief sort of hand wave that in the</p> <p>5 future embodiment it would be good if we could</p> <p>6 do this on the web. I don't think it contains</p> <p>7 much more than that.</p> <p>8 Q. Can we pull up column nine, lines</p> <p>9 ten through fifteen, please. Is this what you</p> <p>10 were referred to?</p> <p>11 A. No, actually it's not. The client</p> <p>12 will run on a client server system as depicted</p> <p>13 in Figure 3 to provide web-based operability,</p> <p>14 use and users will operate PC client systems.</p> <p>15 This is the kind of thing that I was talking</p> <p>16 about, yes.</p> <p>17 Q. And I believe you also testified</p> <p>18 that Swartz didn't deal centrally with users; is</p> <p>19 that correct?</p> <p>20 A. That's right.</p> <p>21 Q. Can you please pull up column</p> <p>22 four, starting at line 55. Can you read me the</p> <p>23 first sentence starting line 55?</p> <p>24 A. Okay. "Alternative or improved</p>

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<p>1 embodiments of the invention will enable users</p> <p>2 to define and execute multiple tasks to be</p> <p>3 performed by one or more applications from</p> <p>4 anywhere within a document."</p> <p>5 Q. And can you also turn, please, to</p> <p>6 column eight at line 55. Can you read that for</p> <p>7 me, please?</p> <p>8 A. "Such a system also preferably</p> <p>9 captures metadata associated with the</p> <p>10 information shared, stored, and accessed by the</p> <p>11 users of the data so as to characterize the</p> <p>12 context in which the information is being used."</p> <p>13 But again, this is all tracking</p> <p>14 information being integrated into an audit</p> <p>15 trail, so the word context shouldn't be confused</p> <p>16 with context component as here in the '761</p> <p>17 patent.</p> <p>18 MS. KEEFE: I have no further</p> <p>19 questions. Thank you, Dr. Herbsleb.</p> <p>20 THE COURT: Thank you.</p> <p>21 Redirect.</p> <p>22 MS. KOBIALKA: Quickly.</p> <p>23 REDIRECT EXAMINATION</p> <p>24 BY MS. KOBIALKA:</p>	<p>1 A. Not at all. I still maintain that</p> <p>2 there was not a single element of a single claim</p> <p>3 disclosed in any of those references.</p> <p>4 Q. And as an inventor of one of the</p> <p>5 prior art references actually cited during the</p> <p>6 prosecution of the '761 patent, is it still your</p> <p>7 opinion that the invention of the '761 patent is</p> <p>8 valid?</p> <p>9 A. It is still my opinion that the</p> <p>10 '761 patent is valid.</p> <p>11 MS. KOBIALKA: Thank you very</p> <p>12 much.</p> <p>13 THE COURT: Thank you. You can</p> <p>14 step down.</p> <p>15 THE WITNESS: Thank you.</p> <p>16 MR. ANDRE: Your Honor, at this</p> <p>17 point Leader Technologies rests its case.</p> <p>18 THE COURT: Okay. Thank you.</p> <p>19 Mr. Rhodes.</p> <p>20 MR. RHODES: Your Honor, I</p> <p>21 incorporate by reference the statements and</p> <p>22 motions made by Mr. Weinstein during our break</p> <p>23 this morning at this point in the proceedings.</p> <p>24 THE COURT: I will take those</p>
Page 1877	Page 1879
<p>1 Q. Dr. Herbsleb, when you were asked</p> <p>2 about whether or not the entirety of your</p> <p>3 opinion related to the long-felt need and</p> <p>4 teaching away for secondary considerations, was</p> <p>5 that just in reference to a specific paragraph</p> <p>6 in your report?</p> <p>7 A. It was. That was just a specific</p> <p>8 paragraph. The report said considerably more</p> <p>9 about obviousness.</p> <p>10 Q. And so the report provided much</p> <p>11 more background and information with respect to</p> <p>12 what your opinion was about why the invention of</p> <p>13 the '761 patent is valid?</p> <p>14 A. I had much more information than</p> <p>15 that. That was merely one --that was merely the</p> <p>16 secondary considerations about obviousness.</p> <p>17 There was all the other talk about obviousness,</p> <p>18 and so there was a couple of hundred pages of</p> <p>19 stuff in addition to that.</p> <p>20 Q. Did any of that snippets that were</p> <p>21 provided to you of the three references disclose</p> <p>22 -- indicate to you that the invention of the</p> <p>23 '761 patent was disclosed in any of those</p> <p>24 references?</p>	<p>1 under advisement.</p> <p>2 MR. RHODES: Thank you, Your</p> <p>3 Honor.</p> <p>4 MR. ANDRE: In light we renew our</p> <p>5 motions as well, Your Honor.</p> <p>6 THE COURT: I will take that under</p> <p>7 advisement as well.</p> <p>8 Mr. Rhodes is there anything in</p> <p>9 the way of rebuttal on the validity case?</p> <p>10 MR. RHODES: I'm happy to say that</p> <p>11 we have nothing further, Your Honor.</p> <p>12 THE COURT: Okay. I believe that</p> <p>13 means we're at the close of evidence and we're</p> <p>14 going to be able to let our jurors go a little</p> <p>15 bit early today. Am I right about that,</p> <p>16 counsel?</p> <p>17 MR. ANDRE: That's correct, Your</p> <p>18 Honor.</p> <p>19 MR. RHODES: Yes, Your Honor.</p> <p>20 THE COURT: We go then to agree</p> <p>21 on something.</p> <p>22 Ladies and gentlemen of the jury,</p> <p>23 we have now completed the evidentiary portion of</p> <p>24 the case. What still remains is for me to</p>

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1 question the experts in ways that implicate the  
 2 experts' understanding of the wherein term and  
 3 both sides can argue consistent with the  
 4 evidence that came in when they're discussing  
 5 what wherein means.

6 In 3.4 I have also added some  
 7 language along the lines proposed by Facebook  
 8 with respect to the idea that the jurors are not  
 9 to consider prosecution history or specification  
 10 as a basis for altering the Court's claim  
 11 construction.

12 A general point that affects a  
 13 number of the instructions is that I'm not going  
 14 to be instructing the jury on theories of  
 15 indirect infringement. I'm only instructing on  
 16 direct infringement, so I'm not including any  
 17 instruction on induced infringement or  
 18 contributory infringement.

19 I don't believe there has been  
 20 evidence from which the jury could find that any  
 21 third party other than Facebook is the direct  
 22 infringer, nor do I think there is any evidence  
 23 of Facebook's knowledge of the '761 patent at  
 24 this trial.

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1 So the instructions, the verdict  
 2 form, and argument will be limited to theories  
 3 of direct infringement, literal as well as  
 4 Doctrine of Equivalents.

5 3.7, direct literal infringement,  
 6 this is where I have addressed the issue of  
 7 control or direction with respect to method  
 8 claims, 9, 11 and 16. I'm telling the jury that  
 9 this is a factual issue for them. I'm also  
 10 identifying some of the factors that they can  
 11 consider in making that factual determination.

12 My instruction accommodates my  
 13 view that this is a factual dispute, and also  
 14 what I have put in here is in my view consistent  
 15 with the law.

16 4.10, obviousness, the only thing  
 17 I wanted to point out there is as came up  
 18 earlier today, I have added in a sentence that  
 19 the Facebook website is commercially successful.  
 20 I have also pointed out that it is for the jury  
 21 to decide if Facebook embodies all of the  
 22 asserted -- all of the claims of the '761  
 23 patent.

24 So what we will do tomorrow is I

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1 will read to the jury all of the instructions  
 2 through 5.2, so I'll stop after I read the  
 3 unanimous verdict instruction, and I'll save for  
 4 myself the duty to deliberate which tells them  
 5 go ahead and start deliberating and that the  
 6 Court has no opinion.

7 So after I read through all the  
 8 way through 5.2, turn to Leader for argument,  
 9 then Facebook, and then I'm going to let Leader  
 10 have the last word if they have any time left.  
 11 I'm not going to have a second Facebook argument  
 12 solely on validity. So Facebook will stand up  
 13 once, Leader twice, if they have got the time to  
 14 do it.

15 That is it for me. I know I have  
 16 a question about exhibits, but it was suggested  
 17 there were issues that the parties wanted to  
 18 raise, so let's go through those first.

19 Mr. Andre.

20 MR. ANDRE: The only issue we have  
 21 is about exhibits. We have particularly  
 22 cumbersome exhibits that are I believe DTX 725.

23 THE COURT: Is that thirteen  
 24 volumes?

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1 MR. ANDRE: The thirteen  
 2 three-inch binders that are an exhibit. And I  
 3 believe our paralegals have that ready to go,  
 4 but we just want to know the logistics of how to  
 5 -- people giving me death stares in the front  
 6 row here.

7 THE COURT: I have a question  
 8 about the logistics, too.

9 MR. ANDRE: How do you want us to  
 10 get that to you?

11 THE COURT: First off, is there  
 12 any objection to its admissibility?

13 MR. RHODES: I don't think we  
 14 object to the admissibility. I question the  
 15 wisdom of 3,000 documents in the room.

16 THE COURT: We don't need to argue  
 17 about it. It is admitted. And let me confer  
 18 with my deputy for a second.

19 All right. It's just going to be  
 20 with all of the other exhibits in the custody of  
 21 my deputy, so you'll just need to give it to us  
 22 as you have given us any other exhibit, but it  
 23 is admitted.

24 Anything further, Mr. Andre?



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES,	)	Trial Day 7
INC., a Delaware	)	
corporation,	)	
	)	
PLAINTIFF,	)	
	)	
v.	)	C.A. No. 08-862-JJE-LPS
	)	
FACEBOOK, INC., a	)	
Delaware corporation,	)	
	)	
DEFENDANT.	)	

Tuesday, July 27, 2010  
9:00 a.m.

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

APPEARANCES:

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

-and-

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

Counsel for Plaintiff

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<p>1 of the '761 patent.</p> <p>2 Four, the term "dynamically" means</p> <p>3 "automatically and in response to the preceding</p> <p>4 event." The term "dynamically" appears in</p> <p>5 claims 1, 9, 21, and 23 of the '761 patent.</p> <p>6 Five, the term "wherein" means "in</p> <p>7 which." The term "wherein" appears in claims 1,</p> <p>8 9, and 23.</p> <p>9 You must not take into</p> <p>10 consideration any argument that the prosecution</p> <p>11 history of the patent or the specification of</p> <p>12 the patent may suggest a different definition of</p> <p>13 the terms set forth in this instruction. You</p> <p>14 are not permitted to use any alternative or</p> <p>15 modified definition in your determination of the</p> <p>16 infringement and invalidity issues in this case.</p> <p>17 Open-ended or comprising claims.</p> <p>18 The preamble to claim 1 uses the phrase "[a]</p> <p>19 computer-implemented network-based system that</p> <p>20 facilitates management of data, comprising. . ."</p> <p>21 The preamble to claim 9 uses the</p> <p>22 phrase "[a] computer-implemented method of</p> <p>23 managing data comprising computer-executable</p> <p>24 acts of. . ."</p>	<p>1 In order to prove infringement,</p> <p>2 Leader must meet its burden of proof of a</p> <p>3 preponderance of the evidence, i.e., that it is</p> <p>4 more likely than not that all of the</p> <p>5 requirements for infringement have been proven.</p> <p>6 Direct literal infringement. In</p> <p>7 order to directly and literally infringe a</p> <p>8 patent claim, a product must include every</p> <p>9 limitation or element of the claim. If the</p> <p>10 accused Facebook system or method omits even a</p> <p>11 single element recited in a patent claim, then</p> <p>12 you must find that the accused Facebook system</p> <p>13 or method has not literally infringed that</p> <p>14 claim.</p> <p>15 Facebook can also be liable for</p> <p>16 direct infringement of a method claim -- that</p> <p>17 is, independent claim 9 of the '761 patent and</p> <p>18 its dependent claims, claims 11 and 16 -- if, by</p> <p>19 itself or in combination with a third party, it</p> <p>20 performs all the steps of the claimed method.</p> <p>21 For Facebook to be liable for the acts of third</p> <p>22 parties, Leader must have proven by a</p> <p>23 preponderance of the evidence, that Facebook</p> <p>24 controls or directs the activity of those</p>
Page 1922	Page 1924
<p>1 The preamble to claim 21 uses the</p> <p>2 phrase "[a] computer-readable medium for storing</p> <p>3 computer-executable instructions for a method of</p> <p>4 managing data, the method comprising. . ."</p> <p>5 The word "comprising" means</p> <p>6 "including the following, but not excluding</p> <p>7 others." If you find that Facebook's</p> <p>8 computer-readable medium practices all of the</p> <p>9 elements in claim 1, 9 or 21, the fact that</p> <p>10 Facebook's computer-readable medium might</p> <p>11 include additional steps would not avoid</p> <p>12 literal infringement of a claim that uses</p> <p>13 "comprising" language.</p> <p>14 Patent infringement generally. I</p> <p>15 will now instruct you how to decide whether or</p> <p>16 not Facebook has infringed the '761 patent.</p> <p>17 Infringement is assessed on a</p> <p>18 claim-by-claim basis; therefore, there may be</p> <p>19 infringement as to one claim but no infringement</p> <p>20 as to another.</p> <p>21 In this case, Leader has alleged</p> <p>22 that Facebook directly infringes claims 1, 4, 7,</p> <p>23 9, 11, 16, 21, 23, 25, 31, and 32 of the '761</p> <p>24 patent.</p>	<p>1 parties who perform the steps of the method</p> <p>2 claims.</p> <p>3 Determining whether Facebook</p> <p>4 controls or directs the activity of those</p> <p>5 parties who perform the steps of the method</p> <p>6 claims is a factual question for you alone to</p> <p>7 decide. In making this determination, factors</p> <p>8 you may consider include whether the claims at</p> <p>9 issue require those third parties to take action</p> <p>10 for the claims to be performed, or</p> <p>11 alternatively, whether the third parties merely</p> <p>12 activate functions already present in the</p> <p>13 underlying invention; whether there is a</p> <p>14 contractual relationship between Facebook and</p> <p>15 the third parties; whether users of Facebook are</p> <p>16 agents of Facebook; and whether Facebook</p> <p>17 supplies the instrumentalities, tools, and the</p> <p>18 website for the person using the website.</p> <p>19 Infringement under the doctrine of</p> <p>20 equivalents. If you decide that Facebook does</p> <p>21 not literally infringe an asserted patent claim,</p> <p>22 you must then decide if Facebook infringes the</p> <p>23 claim under what is called doctrine of</p> <p>24 equivalents.</p>

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

**CERTIFICATE OF SERVICE**

I, Philip A. Rovner, hereby certify that on September 15, 2010, the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing(s) to the following; that the document was served on the following counsel as indicated; and that the document is available for viewing and downloading from CM/ECF.

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