

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE EASTERN DISTRICT OF TEXAS  
3 MARSHALL DIVISION

4 BRIGHT RESPONSE LLC ) (  
5 ) ( CIVIL DOCKET NO.  
6 ) ( 2:07-CV-371-CE  
7 VS. ) ( MARSHALL, TEXAS  
8 ) (  
9 GOOGLE, INC., ET AL ) ( APRIL 1, 2010  
10 ) ( 8:30 A.M.

11 CLAIM CONSTRUCTION HEARING  
12 BEFORE THE HONORABLE JUDGE CHAD EVERINGHAM  
13 UNITED STATES MAGISTRATE JUDGE

14  
15 APPEARANCES:

16  
17 FOR THE PLAINTIFF: (See attached sign-in sheet.)

18  
19 FOR THE DEFENDANTS: (See attached sign-in sheet.)

20  
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25 (Proceedings recorded by mechanical stenography,

transcript produced on a CAT system.)

I N D E X

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April 1, 2010

Page

Appearances

1

Hearing

3

Court Reporter's Certificate

110

1 COURT SECURITY OFFICER: All rise.

2 THE COURT: Please be seated. All right.  
3 Please be seated.

4 We've got a Markman hearing set in Case  
5 2:07-CV-371, Bright Response against Google.

6 What says the plaintiff?

7 MR. SPANGLER: Your Honor, Andrew Spangler  
8 on behalf of the plaintiff. We are ready to proceed.

9 THE COURT: All right. For the Defendant?

10 MR. VERHOEVEN: Morning, Your Honor.  
11 Charles Verhoeven on behalf of Google and AOL. Ready to  
12 proceed.

13 THE COURT: All right.

14 MR. ROOKLIDGE: Good morning, Your Honor.  
15 William Rooklidge on behalf of Yahoo. We're ready to  
16 proceed, as well.

17 THE COURT: All right. Good morning.

18 All right. I set aside an hour and a half a  
19 side for the Markman presentations.

20 Plaintiff, you need to use at least half of  
21 that time in your opening presentation; otherwise,  
22 you'll be limited to a like amount of time in rebuttal.  
23 The floor is yours.

24 MR. FENSTER: Morning, Your Honor. This is  
25 Marc Fenster on behalf of the plaintiff.

1                   So is it the Court's preference that we'll  
2 proceed on all terms as opposed to ping-pong  
3 term-by-term?

4                   THE COURT: Well, I'd prefer to -- to do it  
5 that way. I mean, unless y'all have an agreement  
6 otherwise, I'd prefer to do it that way.

7                   MR. FENSTER: Okay.

8                   THE COURT: If...

9                   MR. FENSTER: Your Honor, we have had some  
10 technical difficulties this morning, and I apologize for  
11 that, but we have handed the Court and your clerk a  
12 binder with our slides. Due to some dif --  
13 difficulties, I guess we're unable to display them on an  
14 other than yellow or green hue, so we'll ask you to  
15 follow along in the notebooks if that's okay.

16                   THE COURT: I apologize for the technical  
17 difficulties. I've got a suspect in mind, but I  
18 haven't...

19                   MR. FENSTER: Your Honor, the first term  
20 that I'd like to deal with is non-interactive electronic  
21 message. Non-interactive electronic message, if you go  
22 to Slide 2, has both the plaintiff's and the defendants'  
23 constructions.

24                   The plaintiffs propose that an electronic  
25 message be construed in accordance with its common

1 ordinary meaning, as one of skill in the art would read  
2 it in light of the specification.

3           The defendants take the position that it is  
4 insolubly ambiguous and therefore indefinite -- that the  
5 patent is indefinite because non-interactive electronic  
6 message is so confusing, so insolubly am -- ambiguous,  
7 that one of skill in the art could not discern what it  
8 means.

9           Your Honor, these are not difficult terms.  
10 First, a message is a common ordinary term using its  
11 common every -- every meaning. It is a communication  
12 that is sent.

13           Well, we've got a modifier, the electronic.  
14 What does it mean for a message to be electronic? It's  
15 a message that's sent by electronic means. It's  
16 consistent with the specification.

17           If you turn to Page 3 in our  
18 specification -- in our -- in the slides, we have a  
19 quote from Column 4, Lines 9 through 12, of the '947  
20 patent. It is preferred that the electronic messages  
21 are e-mail messages and are so referred to her --  
22 herein, it being understood however that other types of  
23 electronic messages are contemplated as being within the  
24 scope of the invention.

25           What they meant is any electronic messages.

1 E-mail messages are used as an example, but it's not so  
2 limited.

3           Going on to Slide 4, that same point is  
4 reiterated in the specification. This is at Column 11,  
5 Line 29: The electronic message is preferably an e-mail  
6 message in ASCII text date -- data format, it being  
7 understood that the invention is not so limited.  
8 Indeed, the electronic message may take on a variety of  
9 data forms, and it goes -- formats, and it goes on to  
10 explain what those are.

11           It goes on further, Your Honor, to explain  
12 that the electronic message can have what they call a  
13 fixed data format or a variable data format. And a  
14 fixed data format has -- is one where the fields are  
15 set, has a name field that appears here, description  
16 that appears here, and so on. Whereas variable data,  
17 the data can appear everywhere, and those are shown on  
18 Slides 5 and 6.

19           So what could be so confusing? The next  
20 modifier is non-interactive. So it must be this word  
21 that's confusing the defendants so much that they can't  
22 figure out what this means, except that the patent tells  
23 you exactly what it means.

24           Going to Slide 7 at Column 4, the patent  
25 explains what they mean by non-interactive, and they do

1 so first by distinguishing the -- the Allen reference.  
2 The Allen reference is a prior art reference. It's  
3 disclosed in the specification. And what it says is,  
4 "Unlike the help desk of the '664 patent described  
5 above, that is, the Allen reference, in the instant  
6 invention the data of the electronic message is  
7 delivered to the automatic message interpreting and  
8 routing system in a non-interactive manner."

9           Specifically, the customer transmits a  
10 non-interactive electronic message to the system. This  
11 non-interactive transmission of electronic messages  
12 prescribes that the customer need not later provide  
13 additional input to assist the system. That's what it  
14 means. It tells you exactly what we mean by  
15 non-interactive.

16           And it goes on in the very next paragraph,  
17 Your Honor -- this is at Slide 8 -- to say, "It is noted  
18 that defining an electronic message as being  
19 non-interactive prescribes only that the message content  
20 need not be supplemented. Thus, as described in more  
21 detail below, the form of the non-interactive electronic  
22 message may be altered by the system after the customer  
23 sends it; however, the customer is not required to  
24 provide supplemental information to assist -- assist the  
25 system."



1                   THE COURT: Does it have to be delivered to  
2 a particular person?

3                   MR. FENSTER: To a particular person, no,  
4 but it does have to be delivered to someone from a  
5 computer to someone.

6                   THE COURT: Well, how do you square that,  
7 then, with what you said in the reexam?

8                   MR. FENSTER: The -- in the -- in the  
9 reexam, Your Honor, what we said is we were  
10 distinguishing the Allen reference. And the Allen  
11 reference -- just for a little bit of background, an  
12 Allen reference is a help system, so if Your Honor has a  
13 problem with cable and you call up and you talk to a  
14 customer rep, you don't get to interact with their help  
15 system. You interact with the representative who's  
16 typing stuff and -- and interacting with their help  
17 system.

18                   In Allen, the person interacting with that  
19 help system, entering data, making choices, is not  
20 sending a message. They're not sending a message that's  
21 sent to someone, and so there is no electronic message  
22 that's received from a source, namely the user. You are  
23 the user in this case.

24                   So what we said in the reexam is Allen is  
25 different. It requires -- it didn't involve an

1 electronic message being sent because it -- the  
2 interact -- the entering of interactive data at a  
3 terminal is not the same thing as sending an inter -- a  
4 non-interactive message to someone.

5           Real briefly, this claim for indefiniteness  
6 borders, in my view, on -- on frivolous, and I guess  
7 it's -- but I'll -- I'll go through the standard.  
8 It's -- it's at Page 9.

9           The standard for indefiniteness is only  
10 claims not amenable to construction or insolubly --  
11 solubly ambiguous or indefinite, citing the Datamize  
12 case. And to determine whether a claim term is  
13 indefinite, the Court considers whether one of skill in  
14 the art would understand the bounds of the claim when  
15 read in light of the specification.

16           Here, Your Honor, we believe that the  
17 specification tells you what an electronic message is  
18 and exactly what it means to be non-interactive in the  
19 context of the patent. And, therefore, we -- we request  
20 that the Court construe non-interactive electronic  
21 message as an electronic message not requiring  
22 additional input or supplementation from the sender.

23           Your Honor, the next term I was going to  
24 cover is rule base, but I believe that the parties have  
25 now reached an agreement with respect to rule base

1 knowledge engine that is in the joint claim construction  
2 chart that was filed with the Court last night. And  
3 that construction, just for the record, is --

4 THE COURT: What page are you on?

5 MR. FENSTER: Looking at the -- the chart  
6 that was filed in the joint claim construction chart, I  
7 think it's at 5 carry over -- over to 6. And it's set  
8 forth as the defendants' construction, but the -- the  
9 agreed construction for rule base knowledge engine is,  
10 quote, a knowledge engine that tests whether one or more  
11 conditions are met and, comma, if so, comma, applies  
12 specified actions, end quote.

13 Your Honor, if there are no further  
14 questions on that, I'd like to turn to case base  
15 knowledge engine. You can find it in Tab 3 of our  
16 notebooks.

17 And on the first page it shows the  
18 side-by-side plaintiff's construction and defendants'  
19 construction for case base knowledge engine.

20 Plaintiff's construction, Your Honor, is a  
21 knowledge engine that processes electronic messages by  
22 comparing them to a stored set of exemplar cases. Much  
23 of plaintiff's construction is agreed and overlaps with  
24 defendants' construction.

25 The defendants' construction has one

1 significant difference that I want to point out to the  
2 Court, however. The defendants propose a knowledge  
3 engine that compares an incoming set of facts,  
4 parentheses, a problem, with a stored set of exemplar  
5 cases representing past problems to obtain a set of  
6 prior cases which are used to formulate an appropriate  
7 action.

8           The parties agree, Your Honor, that a case  
9 base engine is one that compares incoming messages to a  
10 set of stored cases. The primary dispute is to what  
11 is -- as to what those stored cases are. The  
12 defendants' construction requires and it limits that the  
13 stored cases are derived from past problems, as opposed  
14 to -- it eliminates the possibility of populating the  
15 case base with anticipated hypotheticals --

16           THE COURT: Set of seed data.

17           MR. FENSTER: Exactly. And so --

18           THE COURT: Well, does your construction  
19 require that -- the system to be able to learn? I mean,  
20 is that the -- is that part of the dispute, or is it --  
21 is it just --

22           MR. FENSTER: It's -- it's certain -- I  
23 think our construction certainly anticipates and expects  
24 and allows that the system will learn. I think that the  
25 defendants' construction --

1                   THE COURT: Well, no, does it require it to  
2 learn is my question?

3                   MR. FENSTER: Honestly, Your Honor, I don't  
4 think that either parties' construction address --  
5 addresses the requirement of it learning. That is  
6 certainly contemplated by the invention, and I wouldn't  
7 have any problem with the system -- with the claim  
8 language requiring it. Neither party has addressed that  
9 in the papers to date.

10                   THE COURT: I just didn't know if that  
11 was the dis --

12                   MR. FENSTER: No.

13                   THE COURT: You're -- you're correct, and I  
14 didn't see it addressed in the papers, but the  
15 constructions that -- I mean, proposed by the defendants  
16 would at least imply that you had to learn from past  
17 problems and yours would not require that. And I just  
18 wanted to know if that was the -- the real dispute.

19                   MR. FENSTER: Our -- ours is -- ours is  
20 intended to be inclus -- inclusive of that. The way I  
21 was viewing it, Your Honor, is that their construction  
22 would limit the set of stored problems to be only past  
23 problems, as opposed to seed problems.

24                   THE COURT: Right.

25                   MR. FENSTER: And so, one, how do you get a

1 new database? How -- how do you start the system?  
2 Chicken and the egg. I don't know that you can do that  
3 with their construction.

4           And the second, it's inconsistent with the  
5 specification which talks about being able to deal with  
6 new products and new services, for example.

7           So let's flip ahead to No. 25 on the slides.  
8 One of the applications that's disclosed for the -- for  
9 the disclosed invention is the use in a Customer Service  
10 Department where a Customer Service Department provides  
11 new products and services to current and potential  
12 customers and maintains existing products and services  
13 by interacting with current customers.

14           The automatic message reader is a tool to  
15 more efficiently process incoming mail messages in the  
16 Customer Service Department. One of skill reading this,  
17 we submit, would know that you won't have any past  
18 problems relating to new products. And, therefore, you  
19 would never be able to populate your case base based on  
20 new products without seeding it with anticipated.

21           And there isn't anything in the claims, in  
22 the specification, in the file history that would  
23 exclude -- that would say our stored case models are  
24 different. We're different than prior art because we  
25 are limited only to past problems. It just says they're

1 exemplar cases, and it doesn't place any requirements on  
2 how they get there or from where they came -- come.

3           The -- there are slight differences in the  
4 language, Your Honor, between the formulations. They  
5 use this formulation call -- talking about an incoming  
6 set of facts, and then describing that in parentheses, a  
7 problem. That language is fine. It comes from the  
8 specification describing the prior art of Allen. It's  
9 just confusing and introduces new concepts and new facts  
10 that are unnecessary. There's no need to call a message  
11 a problem. While it may be fine to call it a problem,  
12 there's no reason to. And then it's a risk of the jury  
13 getting confused as to whether this is a problem or a  
14 message or a set of facts.

15           That's why we ask the Court to give the  
16 construction that we think is clearly supported by the  
17 specification, which is a knowledge engine that  
18 processes electronic messages by comparing them to a  
19 stored set of exemplar cases.

20           THE COURT: Okay.

21           MR. FENSTER: If there are no further  
22 questions on that, Your Honor, I'll move right along to  
23 predetermined response, which is at Tab 4.

24           Your Honor, if you look -- if you look at  
25 the two constructions and if you read the briefing, I'm

1 not sure why we're here fighting about this term. Both  
2 parties agree on the first sentence that a predetermined  
3 response is responsive --

4 THE COURT: Just practicing the canons of  
5 claim construction.

6 MR. FENSTER: I guess so, Your Honor.

7 Apparently, there's been a slow down in the  
8 legal market.

9 The -- the responses may be modified and/or  
10 altered based on the interpret -- oh, I'm sorry. Both  
11 parties agree as to the first part that predetermined  
12 responses are responses prepared prior to the receipt of  
13 the electronic message. We are agreed.

14 Plaintiff has asked, consistent with the  
15 specification, that the predetermined response  
16 definition, if it's to be construed at all, be clarified  
17 to say that the response may be modified and/or altered  
18 based on the interpretation of the electronic message.  
19 That comes straight from the specification.

20 If you turn to the next slide, 29, it says  
21 exactly that at Line 9 -- at Column 9, Line 32. It is  
22 understood that the predetermined response may be  
23 modified and/or altered in accordance with the  
24 interpretation of the e-mail message if required to  
25 properly respond to a customer.



1                   So the defendants in their responsive brief  
2 say, "Yeah, we agree, but we don't want it in the  
3 construction." So I don't know that I've seen a good  
4 reason for it not to be there. It seems completely  
5 consistent. I don't know that you need to construe  
6 predetermined response anyway. It has a common ordinary  
7 meaning. It's something predetermined, but we wouldn't  
8 want the jury to be confused or improperly led to  
9 believe that it's not a predetermined response if you  
10 change it later because the specification says that you  
11 can.

12                   THE COURT: By later, what do you mean?

13                   MR. FENSTER: Based on the interpretation of  
14 the electronic message.

15                   THE COURT: Well, does that include before  
16 the predetermined response is retrieved from the  
17 database?

18                   MR. FENSTER: No.

19                   THE COURT: Or the repository?

20                   MR. FENSTER: No, it would be after -- after  
21 it's retrieved -- well, there is a predetermined  
22 response that has to exist somewhere. It has to be  
23 modified in response to the interpretation of the  
24 message. So I don't know if it could -- it depends  
25 exactly what you're calling the retrieving step. If

1 it's modified there and then retrieved -- I'm a little  
2 uncomfortable specifying it has to be before or after  
3 retrieval. I know that it has to be --

4 THE COURT: It might pull something from two  
5 portions of the databases, for instance.

6 MR. FENSTER: For instance.

7 THE COURT: And -- and I -- I don't -- I  
8 mean, that's the argument, though, that's being  
9 presented, and it's not that -- it's not that they  
10 disagree with the language that you're putting in, but  
11 it's a timing issue as I appreciate the dispute.

12 And what they're saying is that the  
13 predetermined response can't be modified before it's  
14 actually retrieved from the database, and it also can't  
15 be modified once the message has already been delivered  
16 back to the customer.

17 MR. FENSTER: Well, I agree that it can't be  
18 modified after it's delivered. Once it's delivered,  
19 it's delivered. I think the window of time during which  
20 it can be modified, as I understand the specification,  
21 is based on the interpretation of the electronic message  
22 and before its delivered.

23 THE COURT: To the customer.

24 MR. FENSTER: To the customer. That's --  
25 that's the window of time that I see based on the claim

1 language and what's stated in the specification.

2           If there's nothing further on predetermined  
3 response, Your Honor, we'll move right along to  
4 repository at Tab 5 of your notebook.

5           Your Honor, the construction that's set  
6 forth in Tab 5 and in our joint claim construction  
7 statement that was filed last night is slightly  
8 different than what was proposed in the briefing.  
9 Having read through the briefing, I think this is more  
10 in keeping and does -- was an attempt to address some of  
11 the defendants' arguments in -- in their response.

12           A repository is discussed in the  
13 specification as the place where the predetermined  
14 responses are kept or the stored case models are kept.  
15 That's it.

16           There is one place in the specification  
17 where there's a parenthetical that says "or database."  
18 There is nothing in the specification that says -- that  
19 would limit the repository to a database. A repository  
20 is a common ordinary meaning. People would understand  
21 reading this specification that the repository is just  
22 the place where that electronic stuff is stored. And  
23 that is consistent with the dictionary definition. It's  
24 cited here on the next page. It was also in our  
25 briefing, Your Honor.

1                   Your Honor, the next term that I'd like to  
2 cover is the "requiring assistance" term. This is at  
3 Tab 6.

4                   So, Your Honor, just as a reminder, the  
5 requiring assistance language comes from Column 28 -- or  
6 Claim 28, rather, in Step b2. The method of 26 further  
7 comprising the steps of classifying the electronic  
8 message is at least one of, (i), being able to be  
9 responded to automatically, and, (ii), requiring  
10 assistance from a human operator.

11                   Now, here the dispute is, again, relatively  
12 limited. If you go to Page 32 in -- behind Tab 6 where  
13 we have the side-by-side constructions, both parties  
14 agree that requiring assistance can be requiring that a  
15 manual reviewer review, revise, or compose the response  
16 to be delivered to the source.

17                   The plaintiff believes, based on the  
18 specification, that requiring assistance can also  
19 include having the manual reviewer review the message to  
20 be interpreted.

21                   And the defendants seem to exclude that from  
22 their construction. So that, as best I can discern, is  
23 the -- are the battle lines for requiring assistance.  
24 And we believe that the '947 clearly supports that the  
25 requiring assistance can include review of the message

1     itself.

2                   So if you go to Page 33 in the binder, the  
3     specification states that exactly. At Column 9, Lines  
4     43 to 46, "When the automatic message reader is not  
5     capable of automatically responding to the e-mail  
6     message, the e-mail message must be transferred to the  
7     human operator for review." I believe that one of skill  
8     in the art reading that would understand that means  
9     review of the message.

10                   Next, on 34, it goes on to say that -- it  
11     describes that "After the message has been  
12     subcategorized, the message reader routes the e-mail  
13     message to the manual review inbox for retrieval by the  
14     human operator." Then it says, "If possible, one or  
15     more determine -- predetermined responses for proposed  
16     release and delivery are retrieved from the repository  
17     and route -- and routed to the manual review box along  
18     with the e-mail message."

19                   So here what it's contemplating is that  
20     you're reviewing the message and you may or may not --

21                   THE COURT: Figured out what they're asking  
22     now?

23                   MR. FENSTER: Yes.

24                   THE COURT: Response 3, right?

25                   MR. FENSTER: That's right.

1 THE COURT: Okay.

2 MR. FENSTER: So there's -- there doesn't  
3 seem to be anything that we can find in the intrinsic  
4 record that would exclude review of the message --  
5 message itself once something is classified as requiring  
6 assistance from a human operator, and the patent seems  
7 to say it explicitly. We think the claim construction  
8 should, too.

9 Your Honor, the next term that we'll go to  
10 are predetermined match weight and mismatch weight.  
11 Those are found at Tab 7.

12 So, Your Honor, this language comes from  
13 Claim 30 which depends on 28 which depends on 26 and can  
14 be seen, for example, at b6 which says, "Assigning a  
15 score to each stored case model which is compared with  
16 the case model, the score increasing when at least one  
17 of the attributes in the text match the stored case  
18 model and score not increasing when at least one of the  
19 attributes in the text do not match the score model."

20 Your Honor, I've read this specification  
21 many times, and it talks consistently about how scores  
22 can be increased or decreased. There is not once where  
23 this patent says by increased, we mean simple addition,  
24 that the predetermined mismatch -- or match weight has  
25 to be added, arithmetically added, and that's all that

1 we mean.

2           It is entirely consistent, Your Honor, to  
3 increase a score. If you have a score of 5 and you  
4 in -- and you want to increase it by a factor, you can  
5 multiply it by 1.2 and that will increase it. There is  
6 nothing in the patent that would limit it, that would  
7 exclude any kind of mathematical opera -- operation that  
8 would lead to increasing the value.

9           And yet defendants in their definition of  
10 predetermined match weight and predetermined mismatch  
11 weight try to limit their construction to something  
12 which is added or something which is subtracted. And  
13 there is just no basis for that limitation in the -- in  
14 the claims. There's nothing in the -- in the claims  
15 that would say it's limited to adding or subtracting.  
16 The claims say increasing or decreasing. There's  
17 nothing in the specification that would exclude other  
18 embodiment -- other embodiments of increasing or  
19 decreasing.

20           Unless Your Honor has any more questions on  
21 that term, I'll move to the ordering of the steps  
22 argument.

23           Your Honor, the defendants have argued that  
24 you have to impose a limitation that the steps be  
25 performed in order in this case. I have to confess, I

1 don't understand the scope -- the metes and bounds of  
2 their argument. They seem to be arguing that it only  
3 applies with respect to Claim 26 and not with respect to  
4 the dependents. If that's true, I believe that the  
5 limitation is unnecessary, but fine.

6 In order -- so generally --

7 THE COURT: Meaning that you do not contest  
8 it?

9 MR. FENSTER: I don't contest it.

10 THE COURT: Okay.

11 MR. FENSTER: And -- and I'll show you why.  
12 If you go to Column 40 -- I'm sorry, Page 40 in the  
13 tabs, which is just a picture of Claim 26, this claim  
14 can't be infringed unless it's done in order because,  
15 first, you have to receive the electronic message.  
16 Step (b) requires interpreting the electronic message,  
17 but you can't have that until you receive it. And (c)  
18 says retrieving one or more predetermined responses  
19 corresponding to the interpretation of the message. And  
20 you can't do that until you do Step (b).

21 Now, I've just made defendants' argument for  
22 them as to why it should be -- why you do need an  
23 ordering for Step 26 -- for Claim 26. Claim 26 doesn't  
24 need it. It's unnecessary. Whether you hold that these  
25 have to be performed in order or not, if a, b, and c are



1 done out of order, they have an argument that the claim  
2 terms aren't being met for exactly the reason I just  
3 walked through.

4           Now, I assume, but I'm not positive, that  
5 when they say the ordering of the steps, we're talking  
6 about a, b, and c. For example, it -- while it  
7 discusses the using a rule base and a case base  
8 knowledge, I don't think that anyone's arguing, and I  
9 want to make sure that the -- that the Court's -- that  
10 the Court doesn't unintentionally instruct -- give the  
11 jury a basis to believe that it has to be the rule base  
12 before the case base or something like that. What we're  
13 talking about are the steps in general, a, b, and c.

14           Now, this ordering argument is unnecessary,  
15 and I believe it's confusing, because it falls apart  
16 when you go to the dependent claims.

17           Now, it's my understanding that the  
18 defendants are not arguing that the dependent claims  
19 have to be performed in any kind of order. If that's  
20 true, then I'll come up on rebuttal and show you why I  
21 believe that that doesn't meet the test for ordering.

22           As it stands with Claim 26, as long as it's  
23 clear that it's a, b, and c, and not any of the subparts  
24 within those sections and it's limited to 26 without any  
25 scope on the dependents, I think it -- we're not

1 fighting about much.

2 THE COURT: Just so I understand your  
3 position, the classification, for instance, of Claim 28  
4 would not need necessarily to occur before the  
5 interpretation of the electronic message using the rule  
6 base and the case base knowledge engine, could occur  
7 before or after?

8 MR. FENSTER: That's correct.

9 THE COURT: All right.

10 MR. FENSTER: I -- there -- there are some  
11 steps that will logically occur, but they're sort of  
12 interleaved, and some don't matter. So, for example,  
13 the classifying step, Your Honor, does -- that happens  
14 before retrieving a predetermined response.

15 THE COURT: Right.

16 MR. FENSTER: But the retrieving in -- in  
17 Step 28, the retrieving step, one or more predetermined  
18 responses, I don't think there's any magic as to when  
19 that happens. There's not anything in the claim that  
20 says when that has to happen. And, similarly, when you  
21 get to Column 30 -- Claim 30 --

22 THE COURT: Well, the retrieving of Claim  
23 28?

24 MR. FENSTER: Yes.

25 THE COURT: Well, it would need to happen

1 after the interpretation, correct, consistent with what  
2 you just told me about Claim 26?

3 MR. FENSTER: Yes.

4 THE COURT: Okay.

5 MR. FENSTER: Right. It's after the  
6 interpretation, when it indicates that it can be done --  
7 responded to automatically.

8 THE COURT: Okay.

9 MR. FENSTER: So I'm happy to go through  
10 Claims 30 and 33. I don't know if they're arguing that,  
11 so I guess I'll -- unless you --

12 THE COURT: Just wait to hear. Maybe I'm  
13 just --

14 MR. FENSTER: -- have questions, I'll wait.

15 THE COURT: I don't want to raise any extra  
16 disputes for y'all.

17 MR. FENSTER: Your Honor, the last term --  
18 it's not really a term. It's an argument that  
19 defendants have made, which, honestly, it's so  
20 confusing to me, I thought it must be an April Fool's  
21 joke. The -- and -- and I think it's probably most  
22 appropriate --

23 THE COURT: It was made before today, so I  
24 don't --

25 MR. FENSTER: It -- it was, and I didn't

1 figure it out until just last night, what this was all  
2 about.

3           Your Honor, with -- with this one, I really  
4 don't understand the argument. What they seem to be  
5 arguing is that the dependent claims are indefinite  
6 because they don't explicitly incorporate the  
7 limitations from the claims from which they depend.  
8 That is done as -- both statutorily as a matter of law  
9 and in the preamble of each of those dependent claims,  
10 and I really don't understand the argument.

11           I suggest that we have defendants go first  
12 on this point and allow me to respond, unless Your Honor  
13 has questions that I'd be happy to answer.

14           THE COURT: I don't have any questions.  
15 Thank you.

16           MR. FENSTER: Thank you, Your Honor.

17           THE COURT: You've used 40 minutes.

18           MR. VERHOEVEN: Morning, Your Honor.

19           THE COURT: Morning.

20           MR. VERHOEVEN: Mr. Verhoeven. I'm going  
21 to -- excuse me. Your Honor, I'm going to speak on  
22 behalf of all defendants for several of the terms, and  
23 then Mr. Rooklidge is going to speak on behalf of all  
24 defendants on some of the other terms, just in the  
25 interest of efficiency, if that's okay with Your Honor.

1                   We've got a set of slides here, as well.  
2   Hopefully Your Honor has a copy of those.

3                   THE COURT: I've got a copy.

4                   MR. VERHOEVEN: And I have some introductory  
5   slides about the patent. I think that Your Honor is  
6   familiar with the patent, so I'm just going to go  
7   straight on to Slide 10 and the first argument, if I  
8   may, Your Honor.

9                   THE COURT: That will be fine.

10                  MR. VERHOEVEN: And this is the  
11   non-interactive electronic message term, Your Honor.

12                  THE COURT: Yeah, I need -- you need to talk  
13   to me about this, Mr. --

14                  MR. VERHOEVEN: Okay.

15                  THE COURT: -- Verhoeven, because I'm  
16   telling you, it's -- I'm -- you've not convinced me.

17                  MR. VERHOEVEN: Okay. Well, let me see --  
18   let me see if I can give it a shot, Your Honor. And  
19   let's start with the claim language itself, if I may,  
20   Your Honor.

21                  So if you could look at Claim 26, and this  
22   is from the -- this whole analysis, Your Honor, is from  
23   the standpoint of a person of ordinary skill in the art  
24   at the time. So a person of ordinary skill in the art  
25   at the time, we'll start with the claims. They're

1 looking at Claim 26.

2 THE COURT: Roughly 1997; is that right?

3 MR. VERHOEVEN: That's about right, Your  
4 Honor.

5 They're looking at the claims, and the claim  
6 in the preamble says it's a method for automatically  
7 processing a non-interactive message. It says it's  
8 non-interactive.

9 Now, we're not saying that in the abstract  
10 the phrase "non-interactive," no one could figure out  
11 what they mean; or in the abstract the phrase  
12 "electronic message," no one could figure out what that  
13 means. What we're saying is if you look at the claims  
14 in their context and if you look at the specification  
15 and what's said in the specification, that no one can  
16 figure out what it means.

17 So let's start by looking at the claims in  
18 their context. It says for processing a non-interactive  
19 electronic message, and then if I could just step up  
20 here, Your Honor.

21 THE COURT: Of course.

22 MR. VERHOEVEN: It says that the system does  
23 three things with this message: Receives it, interprets  
24 it, and then retrieves responses for automatically --  
25 automatic delivery back to the source that sent the

1 message. That's interaction. That is -- the elements  
2 are describing interaction with that electronic message.

3           So if I'm a person of ordinary skill in the  
4 art -- and I'm just looking at the claim first. We'll  
5 go to the spec in a second. But if I'm just looking at  
6 the claim first, I got a big question mark in my head.  
7 What does it mean to be non-interactive if every one of  
8 these elements talk about the system interacting with  
9 that message, receiving it, interpreting it based on  
10 these case base and rule base, retrieving predetermined  
11 responses to it, and then sending those responses back  
12 for automatically -- automatic delivery to the source?  
13 What is it when you interact with the message?

14           Well, it's when you do things like this.  
15 You read it, you analyze it, and you respond to it.  
16 That's the -- that's the definition of interacting with  
17 the message. So from the -- just looking at the claim  
18 language, if I'm a person of ordinary skill in the art,  
19 I have no idea so far. So let's go to the  
20 specification.

21           There is a portion of the specification, we  
22 concede, Your Honor, that does refer and does use the  
23 word "defining" right here, Your Honor. It is noted  
24 that defining an electronic message as being  
25 non-interactive prescribes only that the message content

1 need not be supplemented. And then it goes on.

2                   So you might say, well, maybe that's what it  
3 means, okay? But right above that section in the very  
4 same column, Your Honor, the specification says -- or  
5 defines or describes non-interactive by distinguishing  
6 the '664 patent to Allen. So it says, "Unlike the help  
7 desk application" -- and then there's a reference to  
8 Allen -- "described above, in the instant invention, the  
9 data of the electronic message is delivered to the  
10 automatic message interpreting and routing system in a  
11 non-interactive manner."

12                   Okay. So Allen, as we all know, are the  
13 rules of claim construction. Allen's intrinsic evidence  
14 now. So we're going to look to see what Allen says  
15 because it says non-interactive is different from what  
16 Allen does, okay? And it says it in the same column  
17 where it says this, that you don't have to respond  
18 again.

19                   Well, if you go to Allen -- next slide,  
20 please -- Allen talks about situations where the system  
21 needs to ask for additional information. It's in the  
22 last parenthetical here. It says, "Typically by asking  
23 the customer for additional information."

24                   So I'm a person of ordinary skill. I'm  
25 nonplussed by the claim language itself. I looked at



1 the spec. I thought I figured it out, but then when it  
2 starts talking about Allen, I'm back to having no clue  
3 what they're talking about here.

4           What does it mean to be non-interactive in  
5 this context, in this claim language? Well, it says in  
6 one spot -- if we could go back one slide -- it says in  
7 one spot, Column 4, Line 66, to Column 5, Line 5, it  
8 suggests that -- it means that the -- the initial  
9 message need not be supplemented.

10           But then right above that it says something  
11 that's inconsistent, totally inconsistent with that by  
12 saying that -- that Allen is interactive and it's  
13 non-interactive, but Allen describes the very same  
14 situation it's describing as non-interactive.

15           So I'm the person of ordinary skill. I'm  
16 trying to design a product that doesn't -- that -- that  
17 maybe does these things, but is interactive. How am I  
18 going to have any assurance that I've designed a  
19 product? And -- and this is something that -- that is  
20 dis -- you know, distinguishing. This isn't just some  
21 word thrown in there. This is used to distinguish  
22 Allen, so it's an important word.

23           And yet I have no idea what I could do to my  
24 system to have a system like Claim 26 that uses  
25 interactive messages and -- and then not be sued for

1 infringement and have to have a fight over what the  
2 meaning of non-interactive is, because looking at the  
3 intrinsic evidence, I can't find it.

4           If you go to Slide 4 -- 14, Bright Response  
5 can't distinguish the Allen reference and distinguish  
6 that functionality as being different from  
7 non-interactive. They can't now come to the Court and  
8 say, "Well, half of what Allen was describing is what  
9 we're doing." That's inconsistent with what they've  
10 said in the -- in the intrinsic evidence, so they  
11 shouldn't be allowed to -- to broaden what they've said  
12 to distinguish it.

13           Let's go to Slide 16.

14           So the intrinsic -- so we've looked at the  
15 intrinsic evidence, Your Honor, and the -- I'm a person  
16 of ordinary skill. The intrinsic evidence is not  
17 addressing to me crit -- critical aspects -- and I'm on  
18 Slide 16, Your Honor -- of what it means for this  
19 message to be interactive versus non-interactive.

20           So we don't know whether non-interactive is  
21 determined from the sender's standpoint or recipient's  
22 standpoint, the system's point of view. We don't know  
23 if non-interactive nature of the message determined when  
24 it's sent, when it's received, or when it's interpreted.  
25 Certainly it would seem that when you're receiving and

1 interpreting and responding to a message, you're  
2 interacting with it. And the plaintiff doesn't address  
3 those ambiguities.

4 Now, if we go to the extrinsic evidence,  
5 Your Honor, Slide 17, we asked the inventor -- this is  
6 the named inventor, Rosanna Piccolo.

7 Question" "Okay. Do you know what a  
8 non-interactive message is?"

9 Answer: "No."

10 Question: "Does that phrase have any  
11 meaning to you?"

12 Answer: "Electronic message, yes, e-mail.  
13 Non-interactive, I really don't want to guess as to what  
14 I believe it is. I don't know."

15 Question: "Okay. You don't know what that  
16 means?"

17 Answer: "Non-interactive electronic  
18 message, no."

19 So the inventor has testified that she  
20 doesn't know what non-interactive electronic message is.

21 Go to the next slide.

22 The prosecuting attorney, Mr. Gregson. This  
23 is Slide 18 of the slide deck, Your Honor. This is from  
24 his deposition of July 10th, 2009, Page 96, Lines 2  
25 through 10.

1                   Question: "And just one last question on  
2 this line, can you give us the sort of parameters as to  
3 what a non-interactive message is based upon everything  
4 that we've talked about -- or is it based on everything  
5 we've talked about? Sort of give us those parameters, a  
6 non-interactive message has these attributes, these  
7 qualities, this is what it means?"

8                   And the -- and the prosecuting attorney  
9 says, no, I -- he can't give -- he can't give any  
10 parameters.

11                   Next slide, Slide 19.

12                   The other -- another named inventor, Amy  
13 Rice, Your Honor. This is -- Your Honor, this is --  
14 this -- this cite is not in the briefs because the  
15 deposition wasn't taken until later. We filed something  
16 last night requesting that some supplemental information  
17 that occurred after the briefing be in the record. Just  
18 wanted to point out, this is part of that.

19                   THE COURT: Objection to that?

20                   MR. FENSTER: Your Honor, the -- the witness  
21 is still reviewing the transcript. This is a -- it's --  
22 it's a rough. It's a rough draft.

23                   THE COURT: Well, I'll -- I'll admit it  
24 subject to the witness' review, for purposes of this  
25 hearing.

1 MR. VERHOEVEN: Thank you, Your Honor.

2 So this is the deposition of Amy Rice,  
3 another inventor. This was taken on March 19th, and  
4 I've cited to the rough transcript at Page 96, Lines 2  
5 through 10.

6 Question: "So is it your testimony that a  
7 non-interactive message is a message that does not need  
8 to be responded to?"

9 Witness: "Yes."

10 So Mrs. Rice's definition, an inventor here,  
11 is that, oh, well, I know what non-interactive means.  
12 It means it's a message that doesn't need to be  
13 responded to. Well, that's obviously wrong, Your Honor,  
14 because the claims in Claim 26 expressly describe  
15 retrieving responses to the message and automatically  
16 delivering them back to the source.

17 So the other inventor, Your Honor -- the  
18 other inventor's understanding of what a non-interactive  
19 message would be -- and by the way, in the abstract,  
20 Your Honor, that's a pretty good -- pretty normal  
21 understanding. If it's non-interactive, then it  
22 wouldn't be something that would be responded to.  
23 That's clearly wrong. That can't be what it means.  
24 So this is further evidence that this phrase is  
25 indefinite.

1                   Now, on Slide 20, the plaintiff has in their  
2 reply brief stated the defendants established neither  
3 what the rel -- relevant level of skill in the art is  
4 nor what level of skill in the art -- Ms. Piccolo is one  
5 of the inventors and Mr. Gregson who is the prosecuting  
6 attorney -- Your Honor, have. However, as Your Honor  
7 knows, inventors at least are presumed to be persons of  
8 skill in the art here.

9                   If we go to the next slide, the reexam, Your  
10 Honor. In the reexam proceedings, Bright Response has  
11 yet another definition of what non-interactive is, and  
12 this is from their remarks that they submitted on June  
13 13th, 2009, Your Honor. Exhibit 8 to our papers at Page  
14 9, they say the claim -- quote, the claim language  
15 requires a non-interactive electronic message, comma,  
16 which means that it comes from a source and is delivered  
17 to someone, instead of merely data that is interactively  
18 entered and not being delivered to any particular  
19 person.

20                   So now all it means is that it comes from  
21 someone and it's delivered to someone. Well, I mean,  
22 any -- any electronic message meets that limitation,  
23 Your Honor. That would mean that non-interactive means  
24 nothing. And so we have yet another definition in yet  
25 another context which further shows that this phrase --

1 there is no meaning to this phrase, that -- that  
2 every time you ask the plaintiffs or the inventors or  
3 the prosecuting attorney what it means, you get a  
4 different -- either you get an "I don't know" or you get  
5 a different answer.

6 If we go to Slide 22.

7 This is the -- this is also not in the  
8 record, Your Honor. I just want to highlight. This is  
9 subject to the same filing we made last night. There  
10 was a response that -- was this filed on the 29th? I  
11 thought it was filed earlier than that.

12 MR. PERLSON: It was mailed on the 22nd of  
13 March. We got it yesterday.

14 MR. VERHOEVEN: So it was -- apparently, it  
15 was mailed by the plaintiff to the PTO on the 22nd, Your  
16 Honor. We didn't see it until we saw it -- it wasn't  
17 given to us, so we didn't see it until it showed up on  
18 the PAIR system. I think we saw it for the first time  
19 last -- yesterday, Your Honor. So we also put this in  
20 the brief we filed asking for -- to supplement the  
21 record, Your Honor.

22 But this is from that response, and in their  
23 response they've amended to add a new claim, Claim 87.  
24 And this claim says the method of Claim 31, wherein the  
25 receiving receives a non-interactive message wherein the

1 interpreting and retrieving are performed without  
2 further input from the source. Well, that's what  
3 they're saying non-interactive message means, period.  
4 But yet now in front of the PTO, they're -- they're --  
5 they're further limiting it as though non-interactive  
6 message could be more than that.

7                   So by even doing this, Your Honor, we would  
8 submit that they're showing the indefiniteness of the  
9 way the claim is currently written.

10                   Why do they have -- why would they have to  
11 write a new claim that specifies this language which  
12 they now say is -- is part of the construction of just  
13 the phrase "non-interactive message"?

14                   And then, finally, Your Honor --

15                   THE COURT: Do you have a copy of the --

16                   MR. VERHOEVEN: Yes, Your Honor, we have  
17 a --

18                   THE COURT: -- this response?

19                   MR. VERHOEVEN: -- copy of what we filed  
20 that has the documents attached.

21                   THE COURT: Okay. Do you mind handing it  
22 up?

23                   MR. VERHOEVEN: No. I just want to make  
24 sure it's accurate. Oh, okay. May I approach?

25                   THE COURT: Sure.



1                   MR. VERHOEVEN: So for the record, Your  
2 Honor, on Slide 22 that I was just addressing, the Claim  
3 87 that's depicted on that slide can be found in Page 6  
4 of the remarks section, Your Honor.

5                   There's also an interesting discussion, Your  
6 Honor, of electronic message and non-interactive  
7 electronic message. I believe it's around Pages 19  
8 through 22, if my memory serves me correctly. It's  
9 actually 18 through 23, Your Honor, is the section where  
10 there's -- the latest remarks by the plaintiff's  
11 attorneys on the electronic message.

12                   THE COURT: Okay.

13                   MR. VERHOEVEN: If I can go to the -- the  
14 last slide on -- on the reexam. This is another excerpt  
15 out of there, Your Honor. I'll give you the page in a  
16 second. But this is also -- this is Slide 23 in our  
17 slide deck, Your Honor. This is from the office action  
18 I just handed up -- or the -- excuse me, the response I  
19 just handed up, Page 21.

20                   In this most recent reexamination response,  
21 Bright Response also says, quote, It is clear that Allen  
22 teaches that the user interacts with the computer  
23 processor for an application, close paren, through the  
24 terminal and further can change and supplement data  
25 relating to the customer's problem. Thus, the process

1 concerning electronically entered data relating to the  
2 customer's problem by the customer representative is  
3 interactive.

4           So here we've got yet another changed  
5 argument as to what the meaning of interactive versus  
6 non-interactive is. And now they're talking about the  
7 process. This, we would suggest, Your Honor, further  
8 highlights how ambiguous this ter -- this phrase is,  
9 this concept of interactivity, what's interactive or  
10 non-interactive in the context of claims, Your Honor,  
11 that describe interacting with the electronic message.

12           So let's go to the next slide.

13           As Your Honor knows, if the claim fails to  
14 reasonably apprise one skilled in the art of the  
15 boundaries of the claim when read in light of the  
16 specification, the claim is invalid under Section 112  
17 for indefiniteness.

18           Here, we would submit it's impossible for a  
19 competitor to determine looking at the intrinsic  
20 evidence, as well as the -- looking -- if you look at  
21 the inventor testimony and prosecuting attorney's  
22 testimony, how to design a system that does not receive,  
23 quote, unquote, non-interactive electronic messages and  
24 receives only, quote, interactive electronic messages.  
25 And for that reason, we think it's indefinite.

1                   A couple more slides if Your -- Your Honor's  
2 not too tired of hearing about this to try to finally  
3 persuade Your Honor as to our point.

4                   Let's go to Slide 25.

5                   These are -- we just made these up, Your  
6 Honor, as illustratives, so this isn't coming from a  
7 source, but just to help convey to Your Honor how --  
8 what we think of as the problem here.

9                   So say you've got a help desk and you want  
10 to send a message to the help desk and -- and you're a  
11 source, you say, "I'm having trouble with my new Model K  
12 laptop -- top. It takes a full three minutes to boot  
13 up. Please call me so that I can provide you additional  
14 information about this problem," and then a phone number  
15 is given. So the source is John, and John has requested  
16 a telephone call so he can be provided additional  
17 information.

18                   Does that make this message that's sent by  
19 John an interactive message? What if the system knows  
20 that a three-minute boot time is normal and can  
21 automatically respond to this message? Does that make  
22 it suddenly a non-interactive message? What if the  
23 system doesn't and a person calls back, does that  
24 sudden -- suddenly render this claim noninfringing as a  
25 non-interactive message -- or, excuse me, as an

1 interactive message? It's very unclear.

2 Let's go to the next slide.

3 Say John sends a different message. "I'm  
4 having trouble with my Mod -- my new Model K laptop. It  
5 takes a full 20 minutes to boot up. Please tell me what  
6 is wrong and how you can fix it. And don't ask me for  
7 more information. I've already told you everything I  
8 know."

9 So John has said in his message, "I don't  
10 want any more -- to be asked for any more information."  
11 Does that make that message suddenly a non-interactive  
12 message, as opposed to the message before where he asked  
13 for them to call back? Is it the content of the message  
14 that helps determine whether it's an interactive message  
15 or not, or is it whether something happens on the system  
16 side that makes it interactive or non-interactive? What  
17 if the system needs to know more information to respond,  
18 such as the serial number of John's laptop, and so they  
19 have to ask for that? Does that suddenly make -- make  
20 the -- the whole system noninfringing?

21 THE COURT: Well, is the question, though,  
22 whether it has to ask for that before it formulates a  
23 response?

24 MR. VERHOEVEN: Yes. In this example, yes.  
25 Or what if -- what if it -- it does have a response and

1 asks for more information, as well? Does that make it  
2 both infringing and noninfringing? I mean, the -- the  
3 point is we're dealing with -- I go -- I come back, Your  
4 Honor, to Claim 26. If you look at Claim 26 without  
5 looking at the spec, you look at Claim 26, you have no  
6 idea what is meant by non-interactive. It -- it just  
7 says -- I mean, the elements all describe interacting.

8                   Go ahead, Your Honor. I'm sorry.

9                   THE COURT: Well, I mean, as I understand  
10 what -- I guess my understanding was that it didn't need  
11 additional information before sending a response to it.  
12 I mean, you might not be able to solve the entire  
13 problem, but you've solved the problem of which response  
14 to send back to the user. That's my understanding of  
15 what the patent is talking about with non-interactive.

16                   MR. VERHOEVEN: But then it's -- but then  
17 the patent itself, Your Honor, in the specification says  
18 Allen is interactive. Well, how is Allen interactive  
19 when it does the exact same thing?

20                   And by the way, Your Honor, is this entire  
21 invention -- could I -- could -- could somebody avoid  
22 this entire invention if once in a while you had to ask  
23 for more information before it could provide a response?  
24 Would that render the whole thing noninfringing because  
25 all of a sudden it's a system like Allen that sometimes

1 can be interactive, sometimes it's not?

2 Well, as Your Honor knows, if prior art  
3 sometimes meets all the claim elements and sometimes  
4 doesn't meet all the claim elements, it's still  
5 anticipatory. They distinguish Allen saying it -- that  
6 they don't do what Allen does. Allen sometimes asks for  
7 more information, sometimes automatically responds.  
8 They said Allen, period, is non-inter -- is interactive.  
9 It's totally confusing, I would submit, to one of  
10 ordinary skill in the art.

11 Just one second, Your Honor. I have to  
12 check a note, and then I'm going to move on to the next  
13 term.

14 All right. Let's go -- Your Honor -- if  
15 Your Honor doesn't have any further questions, we'll go  
16 on to the next term. Slide 29, please.

17 So next term I'd like to address, Your  
18 Honor, is the case base knowledge engine. If we go to  
19 the next slide, I think we set forth -- tried to  
20 summarize what the parties' agreements and disputes are  
21 in this one, Your Honor.

22 We -- we -- as we see it, Your Honor, the  
23 parties agree that the case base knowledge engine works  
24 by using a stored set of exemplar cases in comparison.  
25 I think both sides agree with that aspect of it.

1                   From our lights, Your Honor, it seems that  
2 there's two aspects of it where there is a dispute that  
3 may not be immediately apparent from reading the -- the  
4 constructions.

5                   The first is whether the case base is made  
6 up of past cases versus -- or whether you could populate  
7 it by trying to come up with anticipated cases that  
8 might happen in the future, hypothetically. I think  
9 the -- the plaintiffs in their brief say hypothetical or  
10 anticipated. They use both words interchangeably. Or  
11 whether it has to be past cases.

12                   And then the second issue is -- which is a  
13 little bit less significant, but is another issue, is  
14 there's a dispute, we believe, as to whether the stored  
15 set of exemplar cases are compared with the message or  
16 if features or attributes of the message are extracted  
17 out of the message and those are compared to the case  
18 model.

19                   And if we just go back one slide to the  
20 definitions, Your Honor. On the second element here, if  
21 you read the plaintiff's construction, "A knowledge  
22 engine that processes electronic messages by comparing  
23 them." The "them" is referring to the message, so we --  
24 we interpret their construction as requiring that the  
25 comparison between -- be between the message itself and

1 stored exemplar cases. And we don't think that's what  
2 the patent is talking about. It's talking about  
3 extracting features or attributes out and comparing  
4 those, so that's the second issue we have.

5 Let's go to Slide 31, please.

6 So the -- the starting point that I found  
7 most persuasive on this, Your Honor, was to start with  
8 the statement in the prosecution history. After the  
9 patent -- I'm on Slide 31 here, Your Honor. After the  
10 patent office rejected claims based on Microsoft  
11 Outlook, the applicants argued for the following, quote,  
12 well defined, close quote, meaning of case -- case base  
13 reasoning. And this is from the '947 file history, Your  
14 Honor, Exhibit 1, and we're pulling this out of Page No.  
15 BR625.

16 And in the prosecution history, the -- the  
17 patentee said, "The term "case base" has a meaning that  
18 is well defined in the art and Outlook -- Outlook does  
19 not have any features that fall within such meaning."  
20 And then it tells us what that meaning is.

21 It says, "A case base reasoning system is  
22 described in the present specification as one which,  
23 quote, compares an incoming set of facts, paren, a  
24 problem, close paren, with a stored set of exemplar  
25 cases, paren, a case base, close paren, quote, and then



1 it cites to a portion of the application, not the final  
2 patent, a portion of the application that it's referring  
3 to for that definition.

4           Your Honor, this is definitional language.  
5 So this is something that we need to pay -- pay close  
6 attention to when we're trying to figure out what  
7 this -- how to construe this phrase. And the  
8 definitional language in here, as Your Honor will note,  
9 tracks what the defendants' proposed construction is.

10           Now, if you go to the next slide, what we've  
11 put on here, Your Honor, is the cite. It's a different  
12 column and lines than what's cited in the prosecution  
13 history because the patent -- final patent has different  
14 columns and lines. But this is, I'll represent, Your  
15 Honor, what was cited to in that excerpt we just looked  
16 at.

17           And here you can see a repeat of -- a little  
18 bit longer explanation of it, but a repeat of that same  
19 definition. The case base is stored in the form of case  
20 attributes rep -- representing past problems. The case  
21 attributes are compared to the facts of the incoming  
22 problem using triga -- trigram character matching to  
23 obtain a set of prior cases which may be useful in  
24 formulating an appropriate action, close quote.

25           This is, for the record, from Column 2,

1 Lines 41 through 51, and I'll just note that the  
2 prosecuting attorney confirmed in his deposition this  
3 excerpt we're pointing to is the -- the very same as  
4 being referenced in the prosecution history.

5           And then, finally, to point out this is --  
6 this explanation or definition, if you will, of this  
7 phrase is consistent with what the defendants have  
8 proposed, not the plaintiff.

9           And then, finally, if we go to Slide 33,  
10 Your Honor -- I should point out on 32 -- going back to  
11 32 for a second, please. This discussion is all in the  
12 context of the reference to Allen. You see that, Your  
13 Honor? I didn't read that part, but it's up in the top  
14 of the -- the citation.

15           So if you go to Allen itself, and that's on  
16 Slide 33, you'll see it again. And, of course, Allen is  
17 intrinsic evidence because it's cited, as Your Honor  
18 knows. So it is something we need to look at, and Allen  
19 is -- Allen also corroborates this notion of what a -- a  
20 case base rule and knowledge engine is.

21           And it says, "One proposed method of the  
22 prior art is to build an automated reasoning system  
23 which incorporate by reference to a set of exemplar  
24 cases, paren, a case base, close paren, to which the  
25 facts of a particular situation, the problem, may be

1 matched." And then it goes on.

2           Again, because this is incorporated by  
3 reference, it's intrinsic evidence and should be per --  
4 persuasive evidence for the Court.

5           THE COURT: Well, let me ask you this. Does  
6 your construction exclude the situation where the person  
7 that's -- or persons who are populating the database try  
8 to anticipate a hypothetical set of problems and  
9 populate the database with that set of hypotheticals?

10           MR. VERHOEVEN: It would exclude that from  
11 being case base knowledge engine, but it wouldn't  
12 exclude it from this patent, Your Honor, because what  
13 you've described is a rule base knowledge engine. And  
14 I'll get to that.

15           THE COURT: Okay.

16           MR. VERHOEVEN: But -- and I have some  
17 slides on that, but just since you asked the question --  
18 actually, let me go -- let me go to those slides because  
19 they -- they really I think crystallize what I want to  
20 say and probably say it better than I could.

21           So Slide 37, Your Honor.

22           What we think is happening here on this  
23 issue is there's -- there's been -- by -- by attempting  
24 to say exemplar cases that are anticipated should be in  
25 the case base engine, what the plaintiff, Bright

1 Response, is doing is conflating what a case base engine  
2 is with what a rule base engine is.

3                   And the very notion of a rule base engine is  
4 you come up with anticipated rules. So you heard about  
5 the new product. You know, they cited to the new  
6 product -- something about a new product in the  
7 specification. How would the invention handle that --  
8 new products? Well, they would sit down and come up  
9 with a bunch of rules.

10                   So, you know, we looked at the example of,  
11 well, what if the system knows how long it takes to  
12 boot? Say, you have a new product, takes three minutes  
13 to boot, and you think, well, geez, people might be  
14 calling us because three minutes is a long time, and  
15 they may think there's -- something's wrong with their  
16 computer. So what do you do? You create a rule, and  
17 the rule says -- this is -- it's taken three minutes.

18                   THE COURT: Three -- three conditions:  
19 Model number, boot, three minutes, and fire the  
20 response.

21                   MR. VERHOEVEN: Exactly.

22                   THE COURT: Right?

23                   MR. VERHOEVEN: So we're not -- we're not  
24 changing the scope of their invention. We're just --  
25 we're saying that falls in the bucket of rule base. And

1 by the way, we've -- we've talked about the rule base  
2 and -- and tried to compromise on that because we think  
3 that the difference in wording was not so much a  
4 difference in the meaning. And so we've -- we've agreed  
5 with -- basically with what they've suggested on rule  
6 based, but that's rule base. That's not case base.

7           And by -- by making a distinction between  
8 these two, which we must because they use different  
9 words, and if different words are used in the same  
10 element of the claim, they mean different things.  
11 They -- they do mean different things. The case base is  
12 talking about applying past cases. That's what it means  
13 in the art. That's the way people understood it.  
14 That's the way it's in Allen. That's the way it's  
15 described in the spec.

16           Rule base is where you come up with your  
17 anticipation, and those are called the rules. And then  
18 as you -- as you pop -- as you go along, you could --  
19 you could populate with past cases as you go along and  
20 build a -- a larger case base engine. But it doesn't  
21 mean that a case base engine should be defined to  
22 include a rule base engine. You've got two different  
23 phrases in the same element of the claims, and they have  
24 to mean different things.

25           But in any event, on Slide 37, we pull out

1 an example from Column 6. The rule base engine is --  
2 the whole purpose is to employ rules for anticipated  
3 cases.

4 Next slide.

5 Whereas in contrast, the case base knowledge  
6 engine is created -- is to create a model of received  
7 electronic messages, and it's supposed to catch things  
8 that the rule base engine won't catch. They're supposed  
9 to compliment each other. You have one where you  
10 anticipate stuff, and you have one that shows what the  
11 past history is.

12 So we would submit that preventing  
13 hypothetical or anticipated cases would be antithetical  
14 to the entire purpose of a case base knowledge engine  
15 and what distinguishes it from a rule base knowledge  
16 engine.

17 Let's go back to Slide 35, if I may.

18 One thing, I skipped ahead to the Allen  
19 reference, but just for completeness, Your Honor, if you  
20 do look at the specification and when it's talking about  
21 case base, it's clearly talking about cases from past  
22 problems. So at Column 2, Lines 41 through 51, the  
23 specification makes clear that, quote, the case base is  
24 stored in the form of case attributes representing past  
25 problems, close quote.

1                   And then down at Column 7, Lines 40 through  
2 47, Your Honor, it -- again, it says that the stored  
3 case models are made from previously received messages,  
4 Your Honor. It says, quote, these stored case models  
5 are created from previously received e-mail messages and  
6 associated responses.

7                   So the specification, as well as the  
8 reference to Allen, we would submit -- and the  
9 prosecution history reference we looked at, Your Honor,  
10 would support the construction that the defendants are  
11 proffering.

12                   The -- the second dispute, Your Honor --  
13 this is Slide 39 if I may -- as I mentioned, was between  
14 whether you're comparing the message to the case base or  
15 you're comparing features or attributes to the case  
16 base, Your Honor.

17                   And really briefly on that, we believe that  
18 the patent requires that what's being compared here is  
19 features or attributes. The specification, we believe  
20 uses feature and attribute interchangeably. We've just  
21 cited to one place here where it says feature, i.e.,  
22 attribute as support for that, Your Honor.

23                   Next slide, Slide 40.

24                   Here, we've brought up a quote from Column  
25 6, Lines 59 through 61, Your Honor, where we believe it

1 shows that the specification requires that flag  
2 attributes are being compared to the stored set of  
3 exemplar cases. It says, quote, thus, when a search of  
4 the base case is required, the flagged attributes of the  
5 case model are used to search the stored case models of  
6 the case base.

7                   This is -- you know, there's -- this --  
8 there's a sole embodiment here, and that -- and that  
9 embodiment -- this is the only way it's disclosed that  
10 it's done. So we believe this is -- that we need to be  
11 careful not to permit it to be construed more broadly.

12                   THE COURT: Well, would a broader  
13 construction exclude the preferred embodiment?

14                   MR. VERHOEVEN: Well, their construction --  
15 the broader construction might not. Their construction  
16 would because their construction says expressly that  
17 what you're doing is you're comparing the message to the  
18 case base, and that would exclude what this is doing  
19 because you're not -- in this situation you're not  
20 comparing the message.

21                   The message is -- certain information from  
22 the message is extracted, and it's like, for example, I  
23 think it's Table 2, if you look -- and you'll see  
24 there's a title, there's a subject, there's this, and  
25 then there's -- then there are these attributes which



1 are also extracted. And so it's not the message that  
2 gets compared to the case base. It's the attributes.  
3 And so, yes, their proposed construction -- and maybe I  
4 was not speaking carefully enough when I said a broader  
5 construction --

6 THE COURT: Well, that was my -- that was  
7 what prompted my question. I don't know if --

8 MR. VERHOEVEN: Yeah, I need to be more  
9 careful.

10 A broader construction -- you could come up  
11 with a broader construction that would -- that would  
12 encompass it, but it's their construction that would  
13 exclude it, and that's one of the reasons why we believe  
14 that although the constructions are sim -- similar, that  
15 ours is preferable.

16 So unless Your Honor has any further  
17 questions on case base, I'm going to move on.

18 THE COURT: I don't.

19 MR. VERHOEVEN: Okay. My next item was rule  
20 base, but I think we've already put in the record our  
21 agreement on that, so I'll move on to the next one after  
22 that, Your Honor, which is predetermined response. This  
23 is Slide 46.

24 So before I go into my slides on this, based  
25 on my notes and Your Honor's questions to counsel for

1 plaintiff, I thought I heard the counsel for the  
2 plaintiff say that predetermined response, quote, has --  
3 has to be -- he said has to be -- has to be modified in  
4 response to the message.

5 Well, that's the dispute. I mean, the  
6 timing dispute here is we're concerned that this  
7 additional sentence they've added would permit them to  
8 say this predetermined response element is met because  
9 something was done outside the context of receiving,  
10 interpreting, and responding to the message.

11 THE COURT: Well, he said that it had to  
12 occur between the time that the message is interpreted  
13 and the time that the response is delivered back to the  
14 source, as I understood his argument.

15 MR. VERHOEVEN: That's -- well, that's what  
16 I heard him say in response to your questions.

17 THE COURT: Right.

18 MR. VERHOEVEN: Yes, Your Honor.

19 THE COURT: And why --

20 MR. VERHOEVEN: But that's not what that --  
21 this language says is, I guess, my -- one of our  
22 problems.

23 THE COURT: Okay.

24 MR. VERHOEVEN: So if -- one of our concerns  
25 that we've expressed in our briefs is -- you know, if

1 you did -- I drew a diagram as you were talking. You  
2 know, if it's before the message is even sent, you  
3 shouldn't be able to modify it or alter it.

4 THE COURT: The message? Which message?

5 MR. VERHOEVEN: The -- the source sending  
6 the message, right? So you've got Claim 26 that talks  
7 about receiving, interpreting, and responding. Let's  
8 just use that as our benchmark. If it's before the  
9 system receives --

10 THE COURT: I agree.

11 MR. VERHOEVEN: -- there's no modifying.

12 THE COURT: I agree, and I think he agrees.

13 MR. VERHOEVEN: Okay. So we need to come to  
14 a -- a construction that -- that clearly shows that. We  
15 think that -- we thought that the construction we  
16 proposed accomplishes that.

17 THE COURT: Well, but in your brief, though,  
18 you said that it couldn't be responded -- or it could  
19 not be modified until after the predetermined response  
20 was received from the database. And that was what  
21 prompted my question to him was that what if you have  
22 two portions of a database and you've pulled, for  
23 instance, the addressee's field and you've merged it  
24 with other data to formulate a response, you have a  
25 predetermined response on the one hand and then some

1 variable portions of it that you integrate, you know,  
2 with response -- before it's pulled -- I don't know,  
3 maybe it's pulled into a server and then sent to the  
4 source.

5 MR. VERHOEVEN: Okay. Well, I'll -- I'll  
6 probably have to confer with counsel before I can  
7 respond to that, but this brings me to another point  
8 that I'd like to just address briefly, if I may, which  
9 is all of this stuff is you're basically talking about  
10 what may or might happen in addition to simply having a  
11 predetermined response.

12 In other words, if you look at Claim 26,  
13 Your Honor -- next slide -- all Claim 26 describes is  
14 receiving one or more predetermined responses  
15 corresponding to the interpretation of the electronic  
16 message from a repository for automatically delivery to  
17 the source.

18 It doesn't talk about modifying the  
19 responses, doesn't talk about what you do after you  
20 receive them. It's very simple language. And if we  
21 could go, for example, to two slides down -- more, more,  
22 more. Look at -- if you look at 38, Your Honor, 38  
23 says, "The method of Claim 26, wherein the predetermined  
24 response is altered in accordance with the  
25 interpretation of electronic message before delivery of

1 the source."

2                   Now, what this says to me, Your Honor, is  
3 this additional sentence that the plaintiff wants to  
4 add, talking about what may or may not happen to a  
5 predetermined response, we agree -- everyone agrees,  
6 predetermined response are prepared before the -- the  
7 original message is received. That's all that matters  
8 for 26.

9                   Then this additional sentence about what may  
10 or may not be done to that message after it's received  
11 is -- is beyond the scope of the phrase "predetermined  
12 response." They're talking about additional  
13 functionality that's claimed in additional claim  
14 language, like Claim 38.

15                   THE COURT: Well, but his -- I think -- his  
16 point, though, is that a predetermined response that's  
17 altered in accordance with the interpretation of the  
18 electronic message before delivery to the source would  
19 infringe the limitation of Claim 26, as well as Claim  
20 38.

21                   MR. VERHOEVEN: Well, I guess my response to  
22 that point, Your Honor, would be, I disagree because  
23 Claim 38 has additional limitations that -- you see what  
24 I'm saying, Your Honor? What they're talking about with  
25 this -- this may language is additional limitations

1 beyond 26, and it's evidenced by the fact that they  
2 claim a subset of that in Dependent Claim 38.

3           That would be like arguing because Claim 26  
4 is a comprising claim, you could do a bunch of other  
5 things beyond these three steps with this predetermined  
6 response. And I'm just going to list every one I could  
7 think of that you may be able to do because it's  
8 comprising claims. And because it's a comprising claim  
9 and you may be able to do this stuff with it, therefore,  
10 it should be added.

11           But that's not -- that's not what claim  
12 construction is about. Claim construction is just  
13 looking at the words that are in the claim themselves  
14 and asking what those -- what those -- what the  
15 definition is of a predetermined response. Not how it's  
16 used after you receive it, not what happens to it,  
17 whether it could be modified or not. That's for other  
18 dependent claims that had more detailed limitations of  
19 what they talk exactly about, what happens with the  
20 predetermined response.

21           And so it's like -- if you were to talk  
22 about a car and you're claiming a car and you had a  
23 comprising claim and it said a car that has a windshield  
24 and four tires and two doors and it's a comprising claim  
25 and you say, well, and the car may have locks, it may

1 have windshield wipers, it may have all these other  
2 things, and maybe there's some dependent claims in the  
3 patent that say that --

4 THE COURT: That only read on a car with a  
5 lock.

6 MR. VERHOEVEN: I'm sorry?

7 THE COURT: That would only read on a car  
8 with the lock. But what -- but the --

9 MR. VERHOEVEN: On the dependent claims?

10 THE COURT: Right. But the independent  
11 claim would read on a car with or without a lock.

12 MR. VERHOEVEN: Correct. So -- but you  
13 don't need to have the sentence that the car may have a  
14 lock to determine that latter point. That's beyond the  
15 scope of the claim construction of the independent claim  
16 which is simply asking the foundational question.

17 So going back to the first slide in this  
18 section where we have the proposed claim constructions,  
19 this is all that's required for infringement. We don't  
20 need more. This is it. If -- if the response is  
21 prepared prior to the receipt of the electronic message,  
22 we're done. But, you know, why would they want to add  
23 additional language in here --

24 THE COURT: Well, I mean, I don't know that,  
25 but, I mean, I'd be inclined to agree with you --

1                   MR. VERHOEVEN: Well, we're con -- we're  
2 concerned that it has to do with the timing issue and --  
3 and all that which we've already talked about in the  
4 briefs, right? When it could be -- you know, we're --  
5 we're concerned they're trying to modify this to make it  
6 broader than what it -- what it is and so that they  
7 could argue at some point. I don't know, Your Honor.  
8 I'm just -- why do they want this sentence? I don't  
9 know.

10                   But we've agreed on what a predetermined  
11 response is. And -- and this additional language is  
12 starting to talk about things that may happen to it  
13 beyond what's required in Claim 26.

14                   And, for example, this -- if you look at  
15 Claim 38. But Claim 38, we don't -- they don't have to  
16 prove we infringe Claim 38 to prove that we infringe  
17 Claim 26. I agree with you.

18                   But my point is, then why is this additional  
19 language necessary? We have what we need to determine  
20 whether you've received a predetermined response in  
21 Element C. That's all we need, and we don't need to go  
22 on and talk about hypothetically what additional things  
23 that may or may not be done with this message -- or,  
24 excuse me, with this predetermined response. That's --  
25 that's the point, Your Honor.





1                   And what we -- what we proposed was in the  
2 interest of compromise -- even though we don't think the  
3 sec -- second sentence is part of the construction, just  
4 to get beyond that, we've proposed adding to that last  
5 sentence so the sentence is, "The responses may be  
6 modified and/or altered based on the interpretation of  
7 the electronic message." We proposed adding "After the  
8 response is retrieved from the repository before the  
9 response is delivered to a source." But the plaintiffs  
10 aren't willing to do that. But we'd be willing to do  
11 that if -- if that fixes the problem because then it  
12 puts boundaries on it.

13                   Otherwise, Your Honor, our view is that we  
14 should just cut the construction off after the first  
15 sentence because that's what predetermined response --

16                   THE COURT: Why does it have to be after the  
17 retrieval from the repository?

18                   MR. VERHOEVEN: Just one second. Because --

19                   THE COURT: From the specification.

20                   MR. VERHOEVEN: Well, I -- I guess my  
21 understanding of how this works is that the  
22 predetermined response --

23                   THE COURT: How what works?

24                   MR. VERHOEVEN: How the patent works, how  
25 the claims work. The predetermined response is

1 retrieved, and it's not modified before that. It's a  
2 predetermined response. It's sitting in the database.  
3 You're not modifying it, so that's the whole point.  
4 That's why it was prepared -- that's why it's called  
5 predetermined. It's -- it's a response prepared prior  
6 to receipt of the message.

7 THE COURT: I mean, the passage in the  
8 specification doesn't require that. It may imply that  
9 in -- in the preferred embodiment, but I don't see where  
10 it requires that.

11 MR. VERHOEVEN: Well, but I don't --

12 THE COURT: Back to my hypothetical --

13 MR. VERHOEVEN: -- expect it re -- I'm  
14 sorry, Your Honor.

15 THE COURT: Well, I mean, back to my  
16 hypothetical where you have a predetermined response  
17 with some variable fields in it, you might merge one  
18 portion of the database -- base into the predetermined  
19 response for then delivery either out of the repository  
20 or out of a server that's located slightly upstream from  
21 the repository. And if you -- if you say it can't be  
22 modified until after it's retrieved from the repository,  
23 then you've excluded that.

24 MR. VERHOEVEN: Well, I -- I'm not sure what  
25 we're proposing does -- does that, but I guess maybe

1 this just highlights the whole problem with trying to  
2 add to our construction --

3 THE COURT: Your lawyer back there looks  
4 like he wants to tell me something, but if --

5 MR. VERHOEVEN: You want to stand up?

6 MR. PERLSON: Oh, sorry. Sorry.

7 I -- I don't think that our construction  
8 would preclude what you've just said because you've  
9 actually pulled something from the repository and then  
10 you've done something with it, and so I don't think that  
11 there's an inconsistency with the construction we just  
12 proposed in the hypothetical that you just raised.

13 THE COURT: Okay. And what situation are  
14 you trying to exclude?

15 MR. PERLSON: What -- I'm just trying to do  
16 what's correct based on the specification. I actually  
17 don't know what they're trying to include. I don't know  
18 how the predetermined response --

19 THE COURT: Well, my -- my hunch is it's  
20 whatever you're trying to exclude, I'll just tell you  
21 that.

22 MR. PERLSON: I don't know -- I don't -- I  
23 can't even think of a situation where the predetermined  
24 response would be changed. The predetermined response  
25 is in the database, and it's pulled from the database

1 once you get the message. And so it doesn't make any  
2 sense that after you get the message, then something's  
3 going on in the database in which the predetermined  
4 response is changed and then it's retrieved.

5           It's just a -- a situation that just doesn't  
6 exist. It's not contemplated in the patent, and the  
7 construction that we've proposed is entirely consistent  
8 with exactly what the specification says.

9           THE COURT: Okay. All right. Thank you.

10           MR. VERHOEVEN: All right. Without further  
11 adieu, I'll move on to requiring assistance from a human  
12 operator, Your Honor. This is Slide 51.

13           So we believe that -- that the phrase here  
14 is -- should be construed as requiring that a man --  
15 manual reviewer review, revise, or compose the response  
16 to be delivered from the source. We don't intend by  
17 that proposed construction to exclude that a human can't  
18 look at a message. But as I'll show when we look at the  
19 claim language, the whole point of this phrase is  
20 whether to respond, you need a human being. That's the  
21 whole point of -- of this phrase.

22           Our principal problem with the plaintiff's  
23 construction, if I may just walk over here, Your Honor,  
24 is although they have the word "requiring" -- requiring  
25 that a manual reviewer review the electronic message,

1 but then they say or -- well, they have the word  
2 "requiring," and they have the same language that we  
3 have in the end, review, revise, or compose the response  
4 to be delivered to the source, the requiring doesn't  
5 really apply because they have disjunctive "or" in  
6 there, and so they basically don't require anything.

7           The -- all that's required under their  
8 construction is that a -- a manual reviewer review the  
9 electronic message. Then that would be infringed under  
10 their proposed construction because they use the word  
11 "or," not "and." And so this extensively broadens the  
12 meaning of this phrase beyond what was intended by the  
13 patentee as -- that the response requires assistance  
14 from the human operator. So that's the gist of what I  
15 think the dispute is, Your Honor.

16           If I can go to the next slide.

17           And this is -- I just covered this, Your  
18 Honor, so I'm not going to repeat it.

19           Let's go to Slide 53.

20           If you look at the claim language on that  
21 Slide 53 -- put up Claim 28, Your Honor. And it says a  
22 method of Claim 26, further comprising the steps of b1,  
23 classifying the electronic message as at least one of  
24 (i), being able to be responded to automatically, and  
25 (ii), requiring assistance from a human operator. But

1 it's clearly talking about assistance to provide the  
2 response. That's where this -- that's the context of  
3 where this phrase comes in. And that's what we need to  
4 get at as the requirement of this phrase. And by  
5 inserting a disjunctive "or" next to it and saying that  
6 this element could be satisfied merely by reviewing a  
7 message and nothing else, we believe that the plaintiff  
8 is greatly expanding this.

9                   Go to Slide 54.

10                   If you look at the intrinsic evidence to  
11 support this, I think the claim language itself shows --  
12 the slide we just looked at -- shows that this phrase  
13 is -- occurs in the context of deciding whether a  
14 human's required for the response, so that supports our  
15 construction.

16                   Now, if you go to the spec, Your Honor.  
17 This is column line -- 9, Lines 18 through 23, and we  
18 put in Figure 2B and highlighted up the flow chart  
19 there, Figure 2B. The specification clearly shows that  
20 what's going on is the human involvement is in  
21 connection with deciding how to respond.

22                   So it says at Step 114, "The e-mail message  
23 11 is classified into at least one of an automatic step,  
24 a referral step, and/or a detected classification. As  
25 discussed above, the classification is achieved either

1 through accessing only the rule base or accessing both  
2 the rule base 35 and the case base 34." So you can see  
3 there's a classification step that we highlighted there,  
4 Your Honor.

5                   And the next -- next slide, 55, shows an  
6 excerpt from Column 10, Lines 30 through 38, and, again,  
7 Figure 2B. And this is the next -- further down after  
8 the classification has occurred, there's the transfer to  
9 manual review inbox step. And the spec says, "After the  
10 referral type e-mail message 11 has been sub-categorized  
11 and prioritized, the automatic message reader routes the  
12 e-mail message to the manual review inbox, Step 118" --  
13 and you can see that, it's right there -- "for  
14 subsequent retrieval by human operator. If possible,  
15 one or more predetermined responses for proposed release  
16 and delivery to the source are retrieved from the  
17 repository of the automatic message reader and routed to  
18 the manual review inbox along with the e-mail message."

19                   And then the next slide talks about the next  
20 step in the flow chart in 2B, perform manual review,  
21 Step 120. And we excerpted out the associated text from  
22 the specification, Column 10, Lines 39 through 47. And  
23 it says, "At Step 120, the human operator first reviews  
24 and processes the highest priority e-mail messages  
25 followed by the lower prioritized e-mail messages. When



1 the human operator deems that a predetermined response  
2 is appropriate and may be released to the customer, the  
3 response is routed to the outbox, Step 122, for delivery  
4 to the main server. The response is then transmitted  
5 over the data communications channel to the source."

6 So the specification, Your Honor, confirms  
7 what the claims pretty clearly say already is that the  
8 human -- the requiring the human intervention is in  
9 connection with preparing a response.

10 Go to the next slide briefly, Your Honor.

11 THE COURT: Does the predetermined response  
12 get routed in that flow chart through the manual review  
13 box, or does it just go to the outbox at Step 122?

14 MR. VERHOEVEN: I'm not sure I know the  
15 answer off the top of my head, Your Honor.

16 Do you know, David?

17 MR. PERLSON: No.

18 MR. VERHOEVEN: At our next break, I can try  
19 to figure that out.

20 THE COURT: Well, I mean, predetermined  
21 response is -- looks like on the automatic line of the  
22 flow chart or up there at Step 116A.

23 MR. VERHOEVEN: It does appear to -- to say  
24 that, Your Honor. I just want to be careful I'm being  
25 accurate.

1 THE COURT: Okay.

2 MR. VERHOEVEN: It does look like that's  
3 what it's doing. I just would like to confirm it on a  
4 break.

5 THE COURT: Okay.

6 MR. VERHOEVEN: But I -- I think that's what  
7 it's doing.

8 THE COURT: Okay.

9 MR. VERHOEVEN: And you're referring, Your  
10 Honor, to the left-hand side of Figure 2B?

11 THE COURT: Yes.

12 MR. VERHOEVEN: So the message is classified  
13 as automatic, and then it doesn't have to go through  
14 these steps. It just -- you just retrieve the response  
15 and go transfer to the -- to the --

16 THE COURT: Right. And the passage that you  
17 just read said, "When the human operator 40 deems that a  
18 predetermined response is appropriate and may be  
19 released to the customer 50, the response is routed to  
20 the outbox 26, Step 122." And it doesn't say that  
21 it's routed to Step 120 for manual review of the  
22 response.

23 MR. VERHOEVEN: That's correct, Your Honor.

24 THE COURT: Okay. And so I guess in -- your  
25 construction, as I understand it, would not capture that

1 situation, or am I missing something?

2 MR. VERHOEVEN: Our construction is that --  
3 is that requiring assistance from the human operator  
4 means requiring that a manual reviewer review, revise,  
5 or compose the response to be delivered to the source.

6 THE COURT: Yes.

7 MR. VERHOEVEN: I guess I don't understand  
8 why that wouldn't encompass that.

9 THE COURT: Well, I guess because the manual  
10 review is at Step 120 and the predetermined response, if  
11 it's transmitted to 122, seems to bypass the manual  
12 review block.

13 MR. VERHOEVEN: Well, that's because -- if  
14 you go back to claim -- let's go to claim -- let's go to  
15 Slide 53, please, and maybe I'm misunderstanding this,  
16 Your Honor. I apologize if I am.

17 So the way I'm reading Claim 28 is that the  
18 step in class -- that you got the message, okay, you  
19 already have it. The system already has it. And you're  
20 classifying it as the least one of being able to be  
21 responded to automatically or -- and then the "or" is  
22 the phrase we're construing -- requiring assistance of  
23 the human operator.

24 Now, if we go to the chart again -- or the  
25 figure again, please, Todd.

1                   So this is where -- this is where the  
2                   classification occurs up here, and -- and it was little  
3                   i, it would be classified as --

4                   THE COURT:   Right.

5                   MR. VERHOEVEN:  -- being able to be  
6                   retrieved automatically and not need the human inter --  
7                   intervention.  And if it's little b, it's classified as  
8                   need -- needing this human intervention and going down  
9                   this line.

10                  THE COURT:   That's right.

11                  MR. VERHOEVEN:  And so we're only -- I guess  
12                  the way I'm reading it, we're only talking about  
13                  construing this line here.

14                  THE COURT:   I -- I understand, and -- and --

15                  MR. VERHOEVEN:  Okay.

16                  THE COURT:   -- and the spec -- it's not  
17                  clear to me from the specification whether review of a  
18                  predetermined response is necessary prior to it being  
19                  forwarded to the local server outbox.

20                  MR. VERHOEVEN:  By -- review by a human  
21                  being?

22                  THE COURT:   Yes.

23                  MR. VERHOEVEN:  Give me one second.  I think  
24                  I know the answer, but I just want to check.

25                  The answer is, no, it doesn't need to be --

1 I mean, this whole -- the whole idea here is this would  
2 be done by the system, and the system would say, okay,  
3 we're going to pop it out to a human -- at least that's  
4 the way I read it, Your Honor. And so if it goes down  
5 this path, it wouldn't be.

6 I -- I don't -- I'm having trouble  
7 understanding how that impacts our proposed construction  
8 because all -- I think all we're talking about and we  
9 believe is that the -- the intervention by the human is  
10 after you did your classification and you're down here,  
11 Your Honor.

12 THE COURT: I'm with you.

13 MR. VERHOEVEN: Okay.

14 THE COURT: I understand that's your  
15 position. I just -- maybe I'm just missing the -- the  
16 dispute here, but what I understood the plaintiff was  
17 arguing was that requiring human assistance, that  
18 language would be satisfied if a human being simply  
19 reviewed the incoming message and then for -- if  
20 whatever reason the system couldn't analyze it and  
21 formulate a response, a human being has looked at it and  
22 has said, ah, this is what is being requested or asked  
23 of us. It's Response No. 3. Push a button. A response  
24 is then pulled from the predetermined response bin and  
25 forwarded to the outbox of the server, and it never goes

1 to the human being for review prior to it being  
2 delivered to the source -- back to the source.

3 Your construction requires human -- a human  
4 being to at least review the response.

5 MR. VERHOEVEN: Exactly, Your Honor. I  
6 mean, we believe that the human intervention is needed  
7 to formulate the response, and that's the key to what  
8 the claim is talking about and what you're seeing in the  
9 middle column there.

10 We're not saying the human being can't look  
11 at the message as part of formulating the response, but  
12 that's not the key to this -- this phrase. And -- and  
13 the dispute we have is under the plaintiff's  
14 construction, I could just -- I could just be a human  
15 being and look at -- look at a message and this is met,  
16 even though I don't do anything about it. I could just  
17 look at it. I could just review it.

18 And -- and we think that that's  
19 inappropriate because the gist of this is that you are  
20 composing a response. That's the whole point of why you  
21 decide you need to go to the human being in the first  
22 place is because the -- the system can't automatically  
23 compose the response.

24 And under plaintiff's construction, this  
25 element would be met -- even if the human being didn't

1 do a single thing to compose this response or do  
2 anything in connection with the response, it would be  
3 met simply if the human being reviewed an electronic  
4 message, which we think is broader than what the claim  
5 is talking about.

6           If I could have one minute, Your Honor? I'm  
7 going to make sure that I'm not misunderstanding some of  
8 your questions.

9           Your Honor, I'm going to move on to the next  
10 term unless you have further questions.

11           THE COURT: I don't have any further  
12 questions.

13           MR. VERHOEVEN: Thank you, Your Honor.

14           So the next term is Slide 59, Your Honor,  
15 stored case model.

16           And if we go to Slide 60.

17           I believe the parties are in agreement that  
18 the stored case model contains stored text and  
19 attributes, and the dispute is whether the stored text  
20 and attributes are derived from a previously received  
21 electronic message.

22           The defendants' position is the stored case  
23 model is derived from a previously received electronic  
24 message, and the plaintiff's position is that there's no  
25 requirement that the stored case model be derived from a

1 previously received electronic message.

2 THE COURT: Can you tell me --

3 MR. VERHOEVEN: Yes, Your Honor.

4 THE COURT: Can you go back to where it was  
5 used in the claim language or put up how it's used --

6 MR. VERHOEVEN: Well, if you go to Claim 30,  
7 Your Honor --

8 THE COURT: Right.

9 MR. VERHOEVEN: I don't have a slide for  
10 Claim 30, I apologize.

11 THE COURT: I don't have a question. I just  
12 wanted to follow your argument in context.

13 MR. VERHOEVEN: Yes. So Claim 30 -- I  
14 believe that this element that's found in Claims 30, 31,  
15 and 33, Your Honor, so if you look at Claim 30 -- and I  
16 apologize for not having a slide on this. Element b1,  
17 for example, producing a case model of the electronic  
18 message is one place where it appears.

19 So the case model, by the way, Your Honor,  
20 that's being referred to in that Claim b1, the parties  
21 actually have stipulated that that means -- and this is  
22 Slide 61, please, Todd -- that that -- it means, quote,  
23 case model of the electronic message. So that's a  
24 stipulated construction.

25 In Claim 26, which is -- which -- which



1 Claim 30 depends, Claim 26 makes clear that the  
2 electronic message is something that's received from the  
3 source. So we would -- the way we read this logically,  
4 Your Honor, is that the stored case model also comes  
5 from a message received from a source, and it's based on  
6 previously received electronic messages, as did -- as we  
7 think our construction requires.

8           Go to Slide 62, please.

9           We've called out from the specification in  
10 support of that claim contextual analysis, Column 7,  
11 Lines 44 through 45, Your Honor, and we've already  
12 looked at this in connection with another term. But it  
13 says, quote, these stored case models are created from  
14 previously received e-mail messages and associated  
15 responses.

16           So the specification corroborates that  
17 with -- vis-a-vis the dispute between the parties as to  
18 where the stored case model is derived from, that it's  
19 derived from previous e-mail messages.

20           Now, Slide 60 -- I don't have a lot of  
21 slides on this in the interest of time, Your Honor, but  
22 the last slide on this -- the -- the plaintiff has  
23 asserted in their brief that it is well within the scope  
24 of the teachings of the inventors that a case model can  
25 be created using anticipated hypothetical messages and

1 associated responses. But they say that without any  
2 citation, Your Honor, and the specification says  
3 nothing -- nothing, Your Honor, about any anticipated or  
4 hypotheticals in connection with the creation of the  
5 stored case model.

6           And Bright Response, in their briefs, don't  
7 supply -- cite to any support for this. And if you look  
8 at the claims -- the context of the claims themselves,  
9 as well as the specification, it's very clear that this  
10 case model -- the stored case model is derived from  
11 previously received electronic messages and that should  
12 be a requirement of the claim.

13           And I think that's all -- the only dispute  
14 of the parties on that.

15           Really briefly, Your Honor, so I don't use  
16 up my co-counsel's time on some of these, I'm going to  
17 go on to the next term, match weight and mismatch  
18 weight, Your Honor. This is Slide 64.

19           And I -- I prepared a slide that I hope  
20 crystallizes the parties' dispute on this one, as well,  
21 Slide 65.

22           So we've basically got two phrases on this  
23 one, Your Honor. A predetermined match weight is the  
24 first phrase, and a predetermined mismatch weight is the  
25 second phrase.

1                   And the defendants' position is that when --  
2 I'll get to the claim language to look at this, but just  
3 so you know the positions. The defendants' position is  
4 that when a score is, quote, increased by a  
5 predetermined mismatch weight -- that's what the claim  
6 says -- that that match weight is added to the score.

7                   And the plaintiff's construction is that the  
8 phrase could be -- should be construed that the match  
9 weight, quote, controls the degree to which the score is  
10 increased.

11                   And then the inverse on the predetermined  
12 mismatch weight, the defendants contend that when a  
13 score -- score is, quote, decreased by a predetermined  
14 mismatch weight, that that means that the mismatch  
15 weight is subtracted from the score. And the  
16 plaintiff's contention is what that what means is that  
17 the mismatch weight controls the degree to which the  
18 score is decreased. We believe that our constructions  
19 are most appropriate.

20                   Let's look at the actual claim language  
21 first. If you look at the claim language, Your Honor,  
22 what's it talking about? Well, Claim 31 here says,  
23 "Method of Claim 30 wherein when at least one of the  
24 attributes and the text match the stored case model, the  
25 score is increased by a predetermined match weight."

1                   So what does a person of ordinary skill  
2 understand that to mean? Well, you got a score. What's  
3 the score? The score is a number. You've got something  
4 called a predetermined match weight. What's that?  
5 What's a predetermined match weight? It's a number.  
6 What are you doing to the score? You're increasing the  
7 number of the score by the number of the predetermined  
8 mismatch weight.

9                   Let's go to the next slide.

10                   So taking that plain language and just basic  
11 understanding of a person of skill in the art -- say  
12 your score is 4 and say your predetermined match weight  
13 is 6, what are you doing? You're saying the score 4 is  
14 increased by the predetermined match weight 6.

15                   Well, I would submit, Your Honor, that is  
16 describing what we learned in grade school as addition.  
17 It's very simple. It's not some amorphous controlling  
18 the degree of increase. It's simply saying you've got  
19 a predetermined number called a score. You've got a  
20 predetermined number which is a match weight, and you  
21 increase the score by the match weight. It's that  
22 simple.

23                   Then if you go to the next slide. If you  
24 look at the -- the other phrase, it's just the mirror  
25 image, so it says a method of Claim 30 -- I'm down at

1 the bottom, Your Honor -- a method of Claim 30 wherein  
2 when at least one of the attributes and the text does  
3 not match -- that's your mismatch -- the stored case  
4 model, the score is decreased by a predetermined  
5 mismatch weight.

6 Well, again, a score is a number. A  
7 predetermined mismatch weight is a number. It's a  
8 predetermined number. And if there's a match -- if  
9 there's a mismatch, it's saying you decrease that score  
10 number by the predetermined mismatch number.

11 So, for example, if your score was 10 and  
12 the mismatch number -- predetermined mismatch number was  
13 2, what is it saying? Take 10 minus 2. A person of  
14 ordinary skill would understand what you're describing  
15 here is subtraction. It's very simple.

16 It's certainly not controlling the degree,  
17 whatever that means. It should be construed in the  
18 simple way a jury would understand, a simple way that a  
19 person of ordinary skill would understand.

20 If we go to Slide 69.

21 If you go beyond the claims and look at the  
22 specification, they basically repeat the claim language,  
23 Your Honor. So the analysis here, again, would just be  
24 the same analysis I think that a person of ordinary  
25 skill would enter into with the claim language. It's

1 the raw score -- that's a number -- may increase by the  
2 match weight.

3                   And I got to move on, Your Honor, so I'm  
4 going to keep -- keep going.

5                   Let's go to Slide 71.

6                   So to conclude, we believe that our  
7 proposed construction, Your Honor, is describing in  
8 simple terms exactly what the claim language is talking  
9 about. When you go to controlling the degree and  
10 language like that, we don't -- you know, we get into  
11 this ambiguity again. What does that mean?

12                   That's what Bright Response's proposed  
13 construction is. It's not something that's -- that's  
14 definable and easy to determine where the boundaries  
15 are. Instead, it's an amorphous, ambiguous phrase,  
16 controlling the degree of increase or decrease. What  
17 does that mean?

18                   The word "degree," Your Honor, is not found  
19 anywhere in the '947 patent. The word "control" is only  
20 used once in the '947 patent to refer to the -- to the  
21 phrase, quote, software control program, having nothing  
22 to do with this phrase.

23                   So we would submit that -- that if you're  
24 looking at the two constructions, that ours more  
25 accurately and precisely matches what a person of

1 ordinary skill would understand the plain meaning of the  
2 terms are.

3                   And unless Your Honor has any further  
4 questions, for the remainder of our presentation, I'm  
5 going to cede my time to counsel for Yahoo.

6                   THE COURT: Mr. Rooklidge, he's left you 13  
7 minutes.

8                   MR. ROOKLIDGE: Thank you, Your Honor.

9                   Let's go ahead and move to the next slide.

10                   The issue here is whether the language of  
11 Claim 26 requires that its steps be performed in a  
12 recited order.

13                   Next slide, please.

14                   Counsel suggested that there was confusion  
15 over what the dispute is here. I think that if we take  
16 a look at Page 14 of the amended joint claim  
17 construction chart, we see there is no confusion as to  
18 which claim is being addressed here. It's Claim 26.  
19 That's the only claim we're trying to address, because  
20 if you start talking about the order in the dependent  
21 claims, it gets all bollixed up because they've used --  
22 they've used the same letter from multiple terms.

23                   So we -- we feel the Court doesn't need to  
24 get into that issue. At this point, all we're talking  
25 about here is Claim 26.

1                   Next slide, please.

2                   THE COURT: I think he's already said that  
3 he didn't contest your construction on that.

4                   MR. ROOKLIDGE: Absolutely, and he also  
5 suggested --

6                   THE COURT: Let's move on to the next one  
7 then.

8                   MR. ROOKLIDGE: Okay. Very good.

9                   Let's move on to the next issue, and that's  
10 the invalidity of Claims 28, 30, 31, and 33. Counsel  
11 introduced this one by saying that our argument was so  
12 confusing, he thought it was an April Fool's joke. And  
13 they had said in their reply brief that they described  
14 our argument as defendants' attempt to sow confusion.

15                   So let's take a look at where that confusion  
16 comes from.

17                   Next slide, please.

18                   The position is that these claims are  
19 invalid for indefiniteness, and that's the dispute.

20                   Next slide.

21                   Claim 28 adds a second step (c). So we have  
22 a step (c) in Claim 26. Claim 28 adds step (c), as  
23 well. So the question is, is step (c) intended to  
24 replace the original step (c), or is there a  
25 typographical error and that is supposed to be c1 or d



1 or something else?

2                   So let's take a look at those two  
3 alternatives. The first one would be that second Step  
4 (c), which is a second retrieving step -- let's go to  
5 the next slide.

6                   We say, well, could it be replacing the  
7 first Step (c)? Well, that would be inconsistent with  
8 the language, as they point out, "further comprising."  
9 It would also violate the statute, Section 112,  
10 Paragraph 4, which requires that claim in dependent form  
11 to include all the limitations of the preceding  
12 independent claim.

13                   So let's go on to the next slide.

14                   So if it doesn't replace, then it must add  
15 to that step. So -- but that doesn't -- although that  
16 would comport with the further comprising preamble and  
17 it would avoid invalidity under Section 112, Paragraph  
18 4, if you add this Section c, then all of a sudden you  
19 get two retrieving steps.

20                   And the problem is the specification doesn't  
21 support two retrieving steps. It only shows one, Figure  
22 2B, that's Step 116a. So we can't have on the one hand  
23 replacing, and we can't have on the other hand  
24 augmenting. So what in the world does plaintiff say?

25                   Let's go to the next step.

1                   What they say is, well -- and this is in  
2 their reply brief -- the phrase "when the classification  
3 step indicates that the electronic message can be  
4 responded to automatically is a further limitation of  
5 the Step (c) that is incorporated from Claim 26." But  
6 this interpretation would require the Court to ignore  
7 the first 23 words of the Step (c) that's introduced by  
8 Claim 28.

9                   Next slide.

10                   We know the Court can --

11                   THE COURT: Are they the same 23 words that  
12 were in Step (c) of the --

13                   MR. ROOKLIDGE: Absolutely.

14                   THE COURT: -- earlier claim?

15                   MR. ROOKLIDGE: Absolutely. But the Court  
16 can't ignore those first 23 words because all claim  
17 terms are presumed to have meaning in a claim, and the  
18 Court can't read those words out of a claim. The law is  
19 crystal clear on that.

20                   So next slide, please.

21                   The question then is what in the world do  
22 they do? If they can't -- if they can't replace and  
23 they can't augment, what are they doing? They're asking  
24 this Court to rewrite those claims, and that is  
25 confirmed not only in their -- in their reply's

1     implication, but also by the amendment that they filed  
2     just a few days ago. What have they done to Claim 28 in  
3     that amendment?

4                     Next slide, please.

5                     Let's take a look at it, and you can see --  
6     this is in your Exhibit B. The Claim 28 amendment  
7     appears at Page 3 of that amendment.

8                     What they've done, in the first line of that  
9     amendment, they've changed the word "step" to "steps."  
10    At the end of Step (b1), they've added the word "and."  
11    At the beginning of Step (c) they've added the words  
12    "wherein," and then they've added the words "step  
13    retrieves."

14                    Next slide, please.

15                    The problem is that the Court can't rewrite  
16    the claims for them. The Court's power is to correct  
17    only harmless errors that are not subject to a  
18    reasonable debate, errors that are evident on the face  
19    of the patent. Guessing at what the patentee intended  
20    is beyond this Court's authority.

21                    The Court should leave the correction to the  
22    PTO, and as the Federal Circuit explained in Southwest  
23    Software, if they're going to go to the PTO and correct  
24    their patent, they need to do it before they bring the  
25    lawsuit.

1                   Now, they did in this case file a  
2 Certificate of Correction that corrected the  
3 inventorship, but they didn't choose to come in and fix  
4 those claims. They didn't go back to the PTO and seek  
5 reissue and say, "Our patent claims are wholly or partly  
6 inoperative because we've screwed up this claim  
7 language. Fix it for us." No.

8                   What they did was they've sailed in here  
9 with the claims all screwed up, and they've asked this  
10 Court to rewrite them.

11                   Next slide.

12                   The Court cannot guess that the plaintiff  
13 intended to change the word "steps" to "step," add the  
14 word "and" at the end of Step (b), add "wherein the" at  
15 the beginning of Step (c), and then stick step retrieves  
16 after the words "step retrieving." Those are big  
17 substantive changes. They're changing the number of  
18 steps, and they're taking a substantive claim step and  
19 they're changing it to a wherein clause. These are not  
20 corrections of harmless errors that were evident on the  
21 face of the patent.

22                   Next slide, please.

23                   If plaintiff wanted to rewrite Claim 28, it  
24 should have done so in the PTO with a Certificate of  
25 Correction or with a reissue, just like it's trying to

1 do now in the reexamination. As it's written, that's  
2 how the Court has to deal with this claim, as it's  
3 written. By adding that additional Step (c), they meant  
4 to either replace or to augment. Neither of those work  
5 under the law. As a result, this claim is insolubly  
6 ambiguous, and, therefore, it's invalid under 35 U.S.C.  
7 Section 112, Paragraph 2.

8           The asserted claims that depend from Claim  
9 28, Claims 30, 31, and 33, are invalid for the same  
10 reason. So that's -- that's our argument on that point.

11           I just had wanted to return back to the  
12 human intervention point that you were discussing with  
13 counsel earlier. Human intervention requires that the  
14 human make a decision after reviewing the message.  
15 Human intervention is more than just reviewing the  
16 message. It is either pushing the button to go ahead  
17 and send the message on or it's formulating an answer.

18           So that's all I have, unless the Court has  
19 any questions.

20           THE COURT: I don't have any.

21           MR. ROOKLIDGE: Thank you.

22           THE COURT: Thank you, Mr. Rooklidge.

23           Rebuttal?

24           MR. FENSTER: And, Your Honor, can you just  
25 clarify for me what my time constraints are?

1                   THE COURT: Well, you used 40 minutes  
2 before, so you've got 40 minutes left.

3                   MR. FENSTER: Perfect.

4                   Your Honor, let me start off with  
5 non-interactive electronic message and clar -- try to  
6 clarify some of what the defendants, I think, were  
7 trying to say.

8                   Your Honor, here in Slide 12 under Tab 1  
9 of -- of plaintiff's notebook, this is a diagram showing  
10 two diagrams, the first on the left which is a diagram  
11 from Allen showing the Allen system, and the lower right  
12 is a picture from the claim system. And if I may  
13 approach.

14                   The Allen system is a user help desk. The  
15 customer, you or me, sitting at home calls with a  
16 problem to interact with the customer representative.  
17 The customer representative has a terminal in the Allen  
18 system where they deal directly with the help system.  
19 The interactive communication that's happening -- the  
20 interaction that's happening is between the rep and the  
21 terminal with that system. That's what's interactive.  
22 That's what was described as interactive in the  
23 specification and the file history, and that is what was  
24 distinguished.

25                   Why was it distinguished? Because the

1 system that is claimed by the '947 patent is completely  
2 different. In the system that's claimed, we have a  
3 knowledge engine system that's down at the bottom. And  
4 these users are out in the world interacting with that  
5 system over the Internet or some other Internet --  
6 Inter -- some other network.

7           When they send a message, an e-mail or other  
8 message to the system, there is no further interaction.  
9 The system gets that message and has to do something  
10 with it. They have to classify it, interpret it, and  
11 figure out what to do so they can provide an appropriate  
12 response.

13           So when Mr. Verhoeven put up these examples,  
14 he essen -- he said that -- this is at No. 25 of  
15 defendants' slides. He says, "Well, we've got this  
16 e-mail, and it says, 'I'm having trouble. Please call  
17 me.' Is that interactive?" Well, of course, it's not  
18 interactive.

19           This is a non-interactive electronic  
20 message, exactly, precisely the kind that's contemplated  
21 by the message. The fact that it says, "Call me back,"  
22 does it make it interactive? Of course not. The  
23 specifica -- the specification describes that one of the  
24 attributes that you can flag in interpreting such a  
25 message is, do we have to call this person back?

1           The classification happens after the message  
2 is received with no further input from the sender, and  
3 Your Honor's question to Mr. Verhoeven I think nailed it  
4 precisely.

5           And so the next example that they've  
6 provided, Page 26, saying, "I'm having trouble with my  
7 new laptop. Don't ask me any more questions," that,  
8 too, is a non-interactive message in exactly the same  
9 way. It is a message that was sent to the system, and  
10 without any further input from the user, it was  
11 classified. Is this something that I can automatically  
12 respond to, and if so, I'll automatically respond. Is  
13 this something I need to flag for further review? If  
14 so, I'll flag it, et cetera.

15           And one of the attributes that would be  
16 flagged for this one and not the prior one is, don't  
17 call this guy back. He doesn't need -- he doesn't want  
18 to provide any more information. That is a  
19 non-interactive electronic message. There is no  
20 confusion about it. The specification tells you exactly  
21 what that means.

22           THE COURT: What do you say to his argument  
23 that at least one aspect of Allen refers to the  
24 situation where the response from the input information  
25 by the customer service representative doesn't need any



1 further interaction with the customer service  
2 representative, at Column 9 of Allen? And by describing  
3 Allen as an interactive system, you've described that  
4 situation implicitly as an interactive system?

5 MR. FENSTER: Well, first of all, I didn't  
6 find the language from Allen in Column 9 that -- that he  
7 was pointing to. What I saw in Column 9 --

8 THE COURT: It's at Line 20.

9 MR. FENSTER: So let's go to Slide, I think,  
10 11.

11 Okay. Your Honor, 11 -- this is Figure 6  
12 from the Allen patent. And what's happening is -- and  
13 what we had shown in the previous, just to clarify, was  
14 this was excerpted from the -- unless I've already  
15 showed you a comparison, between the Allen system and  
16 ours.

17 What this is saying is when the  
18 representative gets information from the customer, that  
19 may be sufficient, but the representative is still  
20 interactively entering that information and answering  
21 questions with the system.

22 And in Allen, there is no message at all  
23 that's received because the representative is not -- the  
24 message -- the representative is acting at a terminal on  
25 the system. In other -- in other words -- pardon my

1 lack of artistic -- artistic ability, but in the  
2 plain -- in the claim system, a message is sent and  
3 received by the knowledge engine, and without any  
4 further input, it's received from a source and is  
5 processed.

6                   The Allen system down below, the person  
7 interacting, the customer rep, which is this person  
8 here, that's all happening within the knowledge engine  
9 system. There is no message that's -- there is no  
10 electronic message being received at all by the Allen  
11 system.

12                   And so the fact that Allen can -- you know,  
13 describes that it can get information and not have to  
14 talk further with the customer doesn't mean it's --

15                   THE COURT: Well, the question is not  
16 whether it's an electronic message, though. It's  
17 whether it's interactive or not.

18                   MR. FENSTER: Well -- well, it's actually --  
19 it's both, I think. There's -- interactive is only  
20 talking about -- is only modifying electronic message.  
21 In Allen, there is no electronic message at all, but the  
22 non -- non-interactive part is -- there is no  
23 non-interactive message that's being received by the  
24 system.

25                   And what the patent at least is describing

1 in distinguishing Allen is saying that the interaction  
2 between the customer service rep within the system --  
3 within the Allen system is an interactive one. Mere  
4 data entry is interactive, and that's all that's  
5 happening in Allen is mere data entry. And that data  
6 entry -- even if you don't have to enter any more data,  
7 that mere data entry is not an non-interactive  
8 electronic message.

9 THE COURT: Okay.

10 MR. FENSTER: Just briefly, the reliance on  
11 the inventors, there were questions that were asked out  
12 of context many years after the invention. It's  
13 improper to rely on any extrinsic evidence, including  
14 inventor testimony, unless you cannot find the answer  
15 from the intrinsic evidence. Here, the intrinsic  
16 evidence is clear.

17 Electronic message, there's no dispute as to  
18 what that is. It's described in the specification, and  
19 what it means to be non-interactive is all but defined  
20 in the two portions of the specification that I referred  
21 Your Honor to earlier. And there's no reason to resort  
22 to anything beyond the intrinsic record.

23 Your Honor, I -- Mr. Verhoeven argued that  
24 Claim 87 had been amended in the prosecution. As Your  
25 Honor is aware and as defendants have constantly

1 reminded us with untold letters, we are not allowed to  
2 participate in the prosecution of the reexam, have not  
3 done so. This is something that I had not seen until  
4 today, this -- this amendment.

5           The fact that there's an amendment  
6 clarifying that language doesn't mean that -- I don't  
7 see it as relevant to the construction of  
8 non-interactive electronic message.

9           If you have any questions about it, I'll be  
10 happy to try to answer them.

11           THE COURT: I don't.

12           You -- you need to answer his argument that  
13 the -- the set of hypotheticals is not a rule based --

14           MR. FENSTER: Yes.

15           THE COURT: -- engine.

16           MR. FENSTER: Yes. So moving, then, to the  
17 case base knowledge engine, which is where he makes the  
18 argument that hypotheticals are rules. To me, Your  
19 Honor, as -- as I was listening to the argument, it  
20 seems literally to be a logically flawed, fallacious  
21 argument, which is because you can have new rules, he,  
22 therefore, concludes that, therefore, you cannot have  
23 new cases. And that seemed to be the logic of the  
24 argument, and it's logically flawed.

25           You can, of course, invent new rules and

1 have those be rules. The question -- and that's  
2 irrelevant to the question of can I provide stored  
3 exemp -- exemplar cases, as well, when I come up with a  
4 new product, when I anticipate new products to seed the  
5 case model, and the answer is of course you can.

6 THE COURT: Well, I don't think he disputes  
7 that you can, but I think the -- the issue is whether an  
8 assumed set of conditions falls into the rule-based  
9 engine bucket or whether it falls into the  
10 knowledge-based.

11 MR. FENSTER: Well, it depends how it's  
12 constructed.

13 THE COURT: Or case base.

14 MR. FENSTER: It depends how it's  
15 constructed. A rule base does one set of things, and a  
16 case base does a different set of things. A rule base  
17 tests only for the presence of a condition, and if that  
18 condition is met, it executes a rule.

19 So, for example, there can be an attribute  
20 setting rule, and in the example that Mr. Verhoeven  
21 gave, one of the attributes would be call back required.  
22 And if it -- if the message requires call back, flag  
23 yes. Then it would route it for call back. That is a  
24 rule.

25 Case base says we're going to create a case

1 model that is composed of text and attributes of a case.  
2 And then I'm going to compare the text and attributes of  
3 the presented case model to those in my case base to see  
4 if I've got a match. And when I come up with a new  
5 product, this product has these -- these attributes and  
6 will have this text, and I create a case model so that  
7 when my customer -- when my customers call into my  
8 Customer Service Department with a question regarding a  
9 new message, they get some -- some direction, as opposed  
10 to not having any direction because there is no past  
11 e-mail asking about a new product.

12                   There is -- there's nothing in the patent  
13 that says you can't create a new case model and that a  
14 new case model is necessarily a rule. Whether it's a  
15 rule or a case depends on how it's formulated and how  
16 it's used. If it's formulated as a rule, then it can be  
17 used as part of a rule-based -- in the rule-based  
18 engine. If it's in the form of a stored case model that  
19 looks like all the other case models that has attributes  
20 and text that can be compared to attributes and text  
21 from the presented, then it's part of your case model.

22                   So if I have a new product, I could create  
23 both, new rules and new -- I could create a new rule.  
24 Does this relate to X? Then use this one. X new  
25 product, then use this one. If the e-mail comes in and

1 it's got a bunch of text and I have -- I flag the -- all  
2 the attributes and one of the attributes is relates to  
3 this product, then the case model will come up with an  
4 e-mail response from the stored case model that matches.

5           Mr. Verhoeven pointed to a couple of  
6 examples in the specification where it talks about past  
7 cases. The patent does talk about case bases -- the  
8 case base engine comparing to exemplar cases. Exemplar  
9 cases is the language that's both throughout the  
10 specification and in both sides' proposed constructions.  
11 There are two places where the patent talks about past  
12 cases, the case model including models based on past  
13 cases. That's absolutely consistent, but not exclusive  
14 with anticipated cases or seed cases.

15           Okay. I think, Your Honor, that we are up  
16 to predetermined response.

17           Slide 28, please.

18           Your Honor understood my argument and Bright  
19 Response's position exactly. Why do we want this here?  
20 So that defendants can't argue that a predetermined  
21 response that gets modified is not a predetermined  
22 response because it was modified. The specification  
23 says it can be modified, and the definition that we all  
24 agree on says their response is prepared prior to.

25           Well, some of their responses do get

1 modified prior to delivery, and we don't want defendants  
2 to be able to argue that this predetermined response  
3 doesn't qualify as a predetermined response because it  
4 was modified based on the interpretations when the  
5 patent specifically states that that's included, that's  
6 contemplated, and that's what's meant by a predetermined  
7 response. Defendants agree in the context of claim  
8 construction. We don't want there to be any confusion  
9 with the jury.

10                   Requiring assistance -- let's go to 32.

11                   So you're -- again, Your Honor, I think that  
12 your questions to defendants' counsel show that you  
13 understand our position exactly. The specification  
14 specifically contemplates that the review can include  
15 the review of the message.

16                   The question is, does it necessarily require  
17 review of the response? And looking at Figure 2B, there  
18 are situations where -- that are disclosed in the  
19 specification where the manual review is performed so  
20 you have the assistance of a human operator, but it  
21 doesn't show them reviewing the response. They've  
22 reviewed the message. They determined, yes, it's  
23 capable of this predetermined response. And as Your  
24 Honor gave the example, they pressed -- I think it was  
25 Button 3, and they get the predetermined response that



1 corresponds without them having to review that  
2 predetermined response. They just looked at the message  
3 to classify, yes, I agree that this does get this type  
4 of predetermined response.

5           It does also contemplate that they can  
6 review the responses and modify them, if necessary, but  
7 that's not required. And plaintiffs urge the  
8 construction that we do because it allows for review of  
9 the response to meet that limitation.

10           Your Honor, briefly on predetermined match  
11 weight and mismatch weight. So Mr. Verhoeven puts this  
12 up, and he says, "Well, I learned in first grade that  
13 this is addition." I agree. 4 plus 6 equals 10 doesn't  
14 appear anywhere in the specification, and nowhere does  
15 the patent use addition versus subtraction.

16           Now, what if you had 4 times 1.2? You get  
17 4.8. It's been increased by a predetermined match  
18 weight, and I'm sure Mr. Verhoeven knows also that's  
19 multiplication, but it's still increasing the amount by  
20 a predetermined match weight.

21           And the same is true with subtraction. Ten  
22 minus 2 -- this example doesn't appear anywhere in the  
23 specification. And if you did 10 times a mismatch  
24 weight of 0.8, you'd end up with a lower number, and it  
25 would be decreased, and it would be decreased by a

1 predetermined match weight. There is just nothing in  
2 the patent that would exclude other operations for  
3 increasing or decreasing the final match score.

4           Okay. So I think we're agreed on the  
5 ordering of the steps, and now we're moving to the  
6 incorporation of the dependent claim elements. So as I  
7 understand the argument, Your Honor, they do seem to be  
8 serious. Claim 28 -- their argument seems to be that  
9 Claim 28 is somehow inconsistent with Claim 26 and the  
10 other dependent arguments are therefore invalid if Claim  
11 28 is because they depend on Claim 28.

12           So, first, there is no question that claim  
13 Step (c) is not meant to replace anything. As required  
14 by Section 142 -- 114, Claim 28 includes all of the  
15 elements of Claim 26, and it further comprises -- just  
16 like it says -- the following step.

17           So it has to retrieve one or more  
18 predetermined responses corresponding to the  
19 interpretation of the electronic message from a  
20 repository for automatic delivery to the source when the  
21 classification step indicates that the electronic  
22 message can be responded to automatically.

23           THE COURT: Is that an additional step, Step  
24 (c) in Claim 26?

25           MR. FENSTER: It is not -- it is an

1 additional requirement. There -- it does not require  
2 two retrieving steps, if -- if that's what you're  
3 asking. Do you have to retrieve two things? And the  
4 answer is no.

5           What this does is it further clarifies, just  
6 like most dependents do. What we mean by the retrieving  
7 step is this one has to be done in a specific  
8 circumstance when the classification step indicates that  
9 the electronic message can be responded to  
10 automatically.

11           Step (c) -- this is Claim 26, Your Honor,  
12 just says retrieving one or more predetermined responses  
13 corresponding to the interpretation of the electronic  
14 message from a repository for automatic delivery to the  
15 source. This doesn't further specify under what  
16 conditions, and it doesn't place any further  
17 restrictions on it.

18           Claim 28 places the further restriction that  
19 it -- that that happened when the classification step  
20 indicates that the electronic message can be responded  
21 to automatically. There is no error here.

22           Now, he says, "Well, we've admitted that  
23 there's an error because it was changed in the reexam."  
24 But the reexam, Your Honor, did modify the language and  
25 said it did so for editorial purposes. This is from

1 Page 12. This is all that's said about Claim 28 being  
2 amended. Claim 28 has been amended for editorial  
3 purposes. It has been. There are lots of different  
4 ways to say everything. This is saying this is a  
5 nonsubstantive change. It's not correcting an error.

6           When it says it's correcting an error -- for  
7 example, if you look, just by example, at the next line,  
8 it says Claims 52 and 53 have been amended to correct an  
9 obvious error, i.e., change sys -- method to system.  
10 There is no error that's offered here, and I'll further  
11 note --

12           THE COURT: Is the error of claim -- or the  
13 editorial purposes of Claim 28's amendment, is that  
14 different from the obvious error of Claims 52 and 53?

15           MR. FENSTER: Well, 52 and 53, I assume --  
16 I'm not intimately familiar with this, as I mentioned,  
17 but I assume based on that, that what we'll see is --

18           THE COURT: No, my point was he char -- the  
19 reexam, he characterized the error of 52 and 53 as an  
20 obvious error from method to system or whatever you put  
21 up there, and then he changed the language of Claim 28,  
22 quote, for editorial purposes. Is that different from  
23 having an obvious error?

24           MR. FENSTER: I -- I think -- I think it --  
25 I take it at its value on its face to say it's done for

1 editorial reasons and not to correct an error. There  
2 isn't anything that indicates that Claim 28 by itself  
3 was invalid for this reason or wasn't rejected, I don't,  
4 believe, for that reason.

5 I'll further note that Claim 33, which  
6 depends through several dependencies on Claim 28, has  
7 actually been upheld and allowed in -- in -- in the  
8 reexamination, so the reexamination couldn't have found  
9 Claim 28 invalid as written in -- in finding that Claim  
10 33 was upheld.

11 There's just not -- there's just not an  
12 error -- an error here that one of skill in the art  
13 would look at this and say, "I have no idea what's  
14 required." It's just -- it's pretty -- pretty clear  
15 that what it means is the retrieving step is clarified  
16 so that it has to happen to meet Claim 28 when the  
17 classification step indicates that the message can be  
18 responded to automatically.

19 THE COURT: Okay.

20 MR. FENSTER: Unless Your Honor has any  
21 further questions, I believe that's all I have.

22 THE COURT: All right.

23 MR. ROOKLIDGE: Your Honor, out of sheer  
24 optimism, since you allowed plaintiff to defer to us and  
25 go first on the invalidity issue, does that mean that my

1 final two minutes are rebuttal in which I can address  
2 the two new points raised?

3 THE COURT: Sheer optimism, no.

4 MR. ROOKLIDGE: Thank you, Your Honor.

5 THE COURT: That's not what that meant. But  
6 I appreciate the request, though.

7 I tell you what, take -- let's take until  
8 11:30, and the claim construction issues are under  
9 submission. I'll hear you on the motion to compel, to  
10 the extent you haven't worked it out in the next 15  
11 minutes.

12 COURT SECURITY OFFICER: All rise.

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## CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

SHELLY HOLMES  
Deputy Official Reporter  
State of Texas No.: 7804  
Expiration Date: 12/31/10

Date