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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
TEXARKANA DIVISION

ESN, L.L.C. . DOCKET NO. 5:08CV20  
V. . TEXARKANA, TEXAS  
CISCO SYSTEMS, INC., ET AL . AUGUST 26, 2008  
. 10:55 A.M.

DEFENDANT'S MOTION TO STAY

BEFORE THE HONORABLE DAVID FOLSOM,  
UNITED STATES DISTRICT JUDGE.

APPEARANCES:

FOR PLAINTIFF  
ESN, L.L.C.:

MR. PETER J. MCANDREWS  
MCANDREWS HELD & MALLOY  
500 W. MADISON STREET  
SUITE 3400  
CHICAGO, IL. 60661

MR. THOMAS JOHN WARD, JR.  
WARD & SMITH LAW FIRM  
P.O. BOX 1231  
LONGVIEW, TX. 75606-1231

FOR DEFENDANT  
CISCO SYSTEMS, INC.:

MS. VICTORIA F. MAROULIS  
QUINN EMANUEL URQUHART  
OLIVER & HEDGES - REDWOOD  
555 TWIN DOLPHIN DR.  
SUITE 560  
REDWOOD SHORES, CA. 94065

MR. IVAN WANG  
MCKOOL SMITH - DALLAS  
300 CRESCENT COURT  
SUITE 1500  
DALLAS, TX. 75201

1 COURT REPORTER:

MS. LIBBY CRAWFORD, CSR  
OFFICIAL COURT REPORTER  
500 STATE LINE AVENUE  
TEXARKANA, TX. 75501  
903/794-4067

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24 PROCEEDINGS RECORDED BY STENOMASK VERBATIM REPORTING,

25 TRANSCRIPT PRODUCED BY CAT SYSTEM.

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P R O C E E D I N G S

TEXARKANA, TEXAS

AUGUST 26, 2008

(OPEN COURT)

THE COURT: PLEASE BE SEATED. GOOD MORNING. WE ARE  
HERE ON A MOTION TO STAY PENDING REEXAMINATION. I HAVE GIVEN  
EACH SIDE FIFTEEN MINUTES. ARE YOU READY TO GO FORWARD?

MR. WANG: YES, YOUR HONOR.

THE COURT: YOU MAY RESERVE SOME TIME. ARE  
PLAINTIFFS READY TO GO FORWARD, OR PLAINTIFF?

MR. MCANDREWS: YES, SIR.

THE COURT: VERY WELL, YOU MAY PRESENT YOUR MOTION,  
AND RESERVE SOME REPLY TIME IF YOU WISH.

MR. WANG: IVAN WANG, MCKOOL SMITH ON BEHALF OF  
CISCO. WITH ME TODAY ARE VICTORIA MAROULIS WITH QUINN EMANUEL  
ALSO ON BEHALF OF CISCO, AND MARTA BECKWITH, DIRECTOR OF IP  
LITIGATION AT CISCO. VICTORIA WILL BE MAKING THE ARGUMENT.

THE COURT: WE ARE STARTING A LITTLE EARLY. I TRUST  
EVERYONE IS HERE THAT WE NEED.

MS. MAROULIS: YES, YOUR HONOR. THANK YOU. GOOD  
MORNING, YOUR HONOR. I AM VICTORIA MAROULIS WITH QUINN  
EMANUEL ON BEHALF OF CISCO AND CISCO-LINKSYS. THIS IS OUR  
MOTION TO STAY. THE MOTION TO STAY SHOULD BE GRANTED BECAUSE  
REGARDLESS OF THE OUTCOME OF THE INTER PARTES REEXAMINATION  
CURRENTLY PENDING BEFORE THE PTO, THE CASE WILL BE GREATLY

1 SIMPLIFIED. AT BEST, IT WILL BECOME MOOT IF THE PATENT IS  
2 INVALIDATED, OR IT WILL SIMPLIFY THE ISSUES BY REMOVING THE  
3 LARGE CHUNK OF CISCO'S INVALIDITY DEFENSE AND AID --

4 THE COURT: HOW LONG DO WE EXPECT THIS PROCESS WOULD  
5 TAKE?

6 MS. MAROULIS: YOUR HONOR, I HAVE NO WAY TO EXACTLY  
7 ASCERTAIN HOW LONG THE PTO WILL TAKE. THE STATISTICS THE PTO  
8 ISSUED IN MARCH OF THIS YEAR SUGGEST THAT THE MEDIAN TIME IS  
9 ABOUT 29 MONTHS FOR A REEXAM TO GO THROUGH. BUT IT COULD BE  
10 FASTER. IT COULD BE A LITTLE BIT LONGER AS WELL. SO FAR WE  
11 ARE ENCOURAGED BY HOW FAST THE PROCEEDINGS HAVE BEEN GOING  
12 THROUGH. WE FILED THE REEXAM IN FEBRUARY. THE INITIAL  
13 DETERMINATION WAS MADE IN APRIL TO PROCEED, AND IN JUNE THE  
14 OFFICE ACTION ISSUED REJECTING ALL CLAIMS THAT WE MOVED ON, ON  
15 MULTIPLE GROUNDS.

16 THE COURT: MR. WARD WAS HERE YESTERDAY AWAITING A  
17 JURY VERDICT, AND WE HAD A MOTION TO STAY FILED BY THE  
18 PLAINTIFF, OPPOSED BY THE DEFENDANT. I THOUGHT I HAD SEEN  
19 EVERYTHING, BUT YESTERDAY WAS A FIRST.

20 MS. MAROULIS: YES, YOUR HONOR, THERE ARE SOME CASES  
21 --

22 THE COURT: MORE TRADITIONAL TODAY.

23 MS. MAROULIS: THAT'S CORRECT. THERE ARE SOME CASES  
24 IN WHICH THE PLAINTIFF SEEKS THE STAY, BUT MORE TRADITIONALLY,  
25 IT'S THE PARTY WHO SOUGHT THE REEXAMINATION.

1 THE COURT: RIGHT.

2 MS. MAROULIS: IN THIS COURT AND IN OTHER COURTS IN  
3 THIS DISTRICT THERE IS BASICALLY A THREE-PART ANALYSIS THE  
4 COURT GOES THROUGH TO DETERMINE WHETHER THE STAY IS  
5 APPROPRIATE. FIRST, WHETHER THE STAGE OF THE LITIGATION  
6 FAVORS THE IMPOSITION OF THE STAY. IN OTHER WORDS, IS IT  
7 EARLY ENOUGH IN THE CASE THAT THE STAY MAKES SENSE? SECOND,  
8 WHETHER THE STAY WOULD SIMPLIFY THE CASE UPON PTO'S  
9 DETERMINATION. AND FINALLY, WHETHER THERE IS UNDUE PREJUDICE  
10 TO THE NONMOVING PARTY, IN THIS CASE, PLAINTIFF ESN.

11 THE FIRST FACTOR CLEARLY FAVORS GRANTING THE MOTION TO  
12 STAY. THIS CASE IS IN THE VERY EARLY STAGES. WE JUST HAD A  
13 STATUS CONFERENCE BEFORE YOUR HONOR IN APRIL AND THE TRIAL IS  
14 SCHEDULED ALMOST TWO YEARS FROM NOW IN APRIL 2010. THE CLAIM  
15 CONSTRUCTION HEARING STARTS IN JUNE OF NEXT YEAR, 2009, AND  
16 CRUCIALLY THE PARTIES HAVE NOT YET STARTED THE CLAIM  
17 CONSTRUCTION PROCESS UNDER THE LOCAL RULES. AND A NUMBER OF  
18 COURTS NOTED THAT THE STAY IS PARTICULARLY APPROPRIATE WHERE  
19 THE PARTIES HAVE NOT YET COMMENCED CLAIM CONSTRUCTION.

20 WE HAVE COMMENCED CERTAIN DISCOVERY BUT NO DEPOSITIONS  
21 HAVE TAKEN PLACE, AND THERE HAS BEEN MINIMAL PROCEEDINGS IN  
22 THIS CASE SINCE IT WAS FILED IN JANUARY.

23 THE SECOND FACTOR IS WHETHER THE STAY WOULD SIMPLIFY THE  
24 CASE, AND THIS IS THE CRUX OF OUR MOTION, WHICH IS WE BELIEVE  
25 THAT THE PATENT IS INVALID AND THAT THE PTO WOULD AGREE WITH

1 US AND FINALLY REJECT THE CLAIMS. IF WE ARE CORRECT AND IF  
2 THAT'S THE CASE, THIS COURT AND THE JURY IN THIS COURT AND THE  
3 PARTIES WOULD NOT NEED TO SPEND THE RESOURCES INTERPRETING THE  
4 CLAIMS AND PROCEEDING WITH A COSTLY PATENT LITIGATION THROUGH  
5 TRIAL AND POST-TRIAL PROCEEDINGS.

6 THERE ARE SOME STATISTICS SUGGESTING THAT INTER PARTES  
7 REEXAMS RESULT IN 76 PERCENT OF REJECTION. THAT'S THE  
8 STATISTICS THAT ESN ATTACHED TO THE PLEADINGS AS EXHIBIT R.  
9 BUT MORE IMPORTANTLY, WE BELIEVE THAT THE INITIAL OFFICE  
10 ACTION SHOWS THAT THE PATENT OFFICE SEES THIS PATENT AS A  
11 CANDIDATE FOR CANCELING THE CLAIMS.

12 BUT IT'S NOT -- IT WOULDN'T JUST SIMPLIFY THE CASE IF THE  
13 PATENT IS COMPLETELY CANCELED. THE REEXAMINATION PROCEEDING  
14 ALSO PROVIDES THE COURT WITH GUIDANCE ON CLAIM CONSTRUCTION  
15 BECAUSE IT'S BASICALLY THE CONTINUATION OF PROSECUTION. AND  
16 EVEN IF THE CLAIMS ARE NOT CANCELED, THERE WILL BE MORE  
17 GUIDANCE FROM THE PTO IN THE PARTIES' STATEMENTS ON THE  
18 VARIOUS ESTOPPEL ISSUES AND CLAIM TERMS.

19 ALSO IMPORTANT IS THAT THE CLAIMS TEND TO CHANGE  
20 THROUGHOUT THE REEXAMINATION. AND TO QUOTE JUDGE CRAVEN IN  
21 THE *ECHOSTAR* DECISION, IT WOULD BE EGREGIOUS WASTE OF THE  
22 COURT'S TIME TO HAVE TO CONSTRUE THE CLAIMS ONLY TO LEARN  
23 SEVERAL MONTHS LATER THAT THE CLAIMS HAVE CHANGED AS A RESULT  
24 OF AMENDMENT OR SOME OTHER PROCEEDINGS UNDER THE REEXAM  
25 PROCESSES.

1           FINALLY, IF WE ARE WRONG AND IF PTO DOES NOT AGREE WITH  
2 US AND DOES NOT CANCEL THE CLAIMS BUT IN FACT ISSUE THEM AS  
3 THEY ARE NOW, THE CASE WILL BE GREATLY SIMPLIFIED AS WELL  
4 BECAUSE CISCO AT THAT POINT WILL BE ESTOPPED FROM RELYING ON  
5 ANY PRINTED PUBLICATION THAT WAS OR COULD HAVE BEEN PRESENTED  
6 TO THE PATENT OFFICE. AND IN THEIR PAPERS ESN SEEMS TO  
7 SUGGEST A DICHOTOMY BETWEEN THIRTEEN PRINTED PUBLICATIONS THAT  
8 WE PRESENTED TO THE PTO AND THE PRODUCTS. WHAT THEY DON'T  
9 SEEM TO REALIZE IS THAT WE WILL BE BARRED FROM ANY PRINTED  
10 PUBLICATION WHETHER WE SHOW THEM TO THE PTO OR NOT.

11           FOR EXAMPLE, IF UPON THE CONCLUSION OF THE PTO  
12 PROCEEDINGS WE WERE TO FIND AN ARTICLE THAT WORD FOR WORD HAD  
13 THE SAME CONTENT AS THE PATENT AT ISSUE HERE, YOUR HONOR, WE  
14 COULD NOT PRESENT IT TO THE COURT BECAUSE WE ARE BOUND NOT  
15 ONLY BY WHAT WE PRESENTED TO THE PTO BUT WHAT WE COULD HAVE  
16 PRESENTED TO THE PTO. SO ONCE AGAIN, THAT FACTOR ALSO WEIGHS  
17 IN FAVOR OF STAYING THIS ACTION.

18           FINALLY, WE NEED TO LOOK AT WHETHER THE STAY WOULD  
19 PREJUDICE ESN OR UNDULY PREJUDICE ESN. AND A NUMBER OF COURTS  
20 HAVE CONSIDERED THE SITUATION WHERE AS HERE ESN'S MAIN  
21 BUSINESS IS THE ENFORCEMENT OF THE PATENT. IN OTHER WORDS,  
22 THEY ARE NOT A COMPETITOR IN THE MARKETPLACE WHO OTHERWISE  
23 COULD BE LOSING THE MARKET SHARE, LOSING CUSTOMERS, AND SEEING  
24 ITS PRICES DECREASE. IN THIS CASE, AS IN OTHERS, THE COURTS  
25 HAVE CONSIDERED ESN IS AN ENTITY THAT CAN BE COMPENSATED VIA



1 MONETARY DAMAGES IF THE CASE IS STAYED AND IF THERE IS A DELAY  
2 AND IF ULTIMATELY THE PTO CONFIRMS THE PATENT. FOR THAT  
3 REASON A NUMBER OF COURTS HAVE DECIDED THAT DELAY ITSELF IS  
4 NOT ENOUGH OF A PREJUDICE, ESPECIALLY IN INSTANCES WHERE THE  
5 PLAINTIFF IS A NON-PRACTICING ENTITY.

6 I WOULD LIKE TO HAVE THE COURT'S ATTENTION FOCUSED ON A  
7 COUPLE OF CASES WE CITED IN OUR PAPERS, SPECIFICALLY *ALZA V.*  
8 *WYETH AND KRAFT V. PROCTOR & GAMBLE*. BOTH OF THOSE CASES  
9 INVOLVED INTER PARTES REEXAM PROCEEDINGS AND IN BOTH OF THEM  
10 THERE WERE COMPETITORS ON EACH SIDE, WHICH MEANS THAT THE  
11 COURT DECIDED THERE WAS NO PREJUDICE EVEN WHEN THERE WAS A  
12 COMPETITIVE ENTITY ON THE OTHER END.

13 BY CONTRAST, IF THE STAY IS NOT ENTERED, CISCO WOULD BE  
14 SEVERELY PREJUDICED BECAUSE WE WOULD HAVE TO LITIGATE THIS  
15 CASE TO A CONCLUSION AND IT COULD BE AN ENORMOUS WASTE OF THE  
16 COURT AND PARTIES' RESOURCES. AND THE STAY SEEMS TO BE THE  
17 BEST WAY TO PROCEED HERE.

18 IN CONCLUSION, I WOULD LIKE TO SAY THAT ESN CANNOT REALLY  
19 POINT TO ANY CASE THAT IS SQUARELY ON POINT WITHOUT FACTS  
20 WHERE THE STAY HAS BEEN DENIED. AND BY --

21 THE COURT: I WAS READING THROUGH THE PAPERS AND  
22 PLAINTIFF'S CITE TO MR. CHANDLER'S TESTIMONY BEFORE CONGRESS  
23 ABOUT THE UNFAIRNESS OF THESE LONG DELAYS WHEN CISCO IS  
24 INVOLVED IN THE REEXAM PROCESS. WHAT IS YOUR REPLY TO THAT?

25 MS. MAROULIS: YOUR HONOR, MR. CHANDLER'S TESTIMONY

1 WAS TAKEN A BIT OUT OF CONTEXT BECAUSE IN FACT BEFORE CONGRESS  
2 HE IS PROPOSING THE POST-GRANT PROCEEDINGS AND HE IS SAYING  
3 THAT IT'S A GOOD THING TO HAVE THESE PROCEEDINGS IN THE PTO.  
4 HE IS MERELY SAYING THAT, YES, AS A PATENT HOLDER YOU DON'T  
5 WANT THIS DELAY, BUT YOU HAVE TO BALANCE THAT AGAINST OTHER  
6 FACTORS.

7 THE COURT: I TRY TO LOOK AT THESE ALL ON THE MERITS  
8 OF EACH INDIVIDUAL CASE. I HAVE YET TO SEE MR. BAXTER UP HERE  
9 IN A CASE THAT MCKOOL SMITH IS ON THE PLAINTIFF'S SIDE THAT  
10 DIDN'T OPPOSE THESE, BUT I WILL TRY TO LOOK AT IT  
11 INDIVIDUALLY.

12 MS. MAROULIS: WE APPRECIATE THAT, YOUR HONOR. IT'S  
13 AN INDIVIDUAL CASE BY CASE ANALYSIS. AND TURNING BACK TO OUR  
14 CASE, THIS IS A CASE WHERE WE HAVE INTER PARTES PROCEEDING AND  
15 ESTOPPEL THAT GOES WITH IT. WE HAVE A CASE WITH A SINGLE  
16 DEFENDANT WHICH SETS THIS CASE APART FROM CASES LIKE MP3 WHERE  
17 JUDGE WARD DECLINED THE STAY BECAUSE THERE WERE MULTIPLE  
18 DEFENDANTS, NOT ALL OF WHOM WERE BOUND BY THE ESTOPPEL. THE  
19 CASE IS IN EARLY STAGES, WOULD HAVE A NONCOMPETITOR ENTITY ON  
20 THE OTHER SIDE. AND ALL OF THE FACTORS THAT I JUST WENT  
21 THROUGH FAVOR THE STAY.

22 YOUR HONOR, I'D LIKE TO RESERVE MY REMAINING TIME FOR THE  
23 REBUTTAL.

24 THE COURT: RESPONSE.

25 MR. MCANDREWS: THANK YOU, YOUR HONOR. MY NAME IS

1 PETER MCANDREWS. I REPRESENT THE PLAINTIFF, ESN. WITH ME I  
2 HAVE JOHNNY WARD AND BRIAN HOLLANDER, THE CLIENT  
3 REPRESENTATIVE.

4 I HAVE A BRIEF POWERPOINT PRESENTATION, BEAR WITH ME  
5 HERE, TO HIGHLIGHT SOME OF THE POINTS OF OUR ARGUMENTS. ESN  
6 OBVIOUSLY OPPOSES CISCO'S MOTION FOR A STAY. AS THIS COURT  
7 HAS POINTED OUT, CISCO'S MOTIVE TO UNDULY DELAY THIS CASE IS  
8 HIGHLY RELEVANT TO THE CIRCUMSTANCES OF THE CASE. THE COURT  
9 MUST BE AWARE THAT THE REEXAMINATION CANNOT BE USED AS A  
10 TACTICAL TOOL, AND WE BELIEVE THAT THE HISTORY OF THIS CASE  
11 SHOWS THAT THAT IS EXACTLY WHAT CISCO IS USING THE  
12 REEXAMINATION FOR.

13 AS YOU POINTED OUT, YOUR HONOR, CISCO HAS RECOGNIZED THAT  
14 IT UNDERSTANDS THE IMPACT OF THE ACTIONS. IT UNDERSTANDS THAT  
15 BY SEEKING A REEXAMINATION THEY CAN UNDULY DELAY THE CASE.  
16 MARK CHANDLER, THE VICE PRESIDENT GENERAL COUNSEL OF CISCO, IN  
17 TESTIFYING BEFORE CONGRESS STATED THAT THE PRINCIPLE THAT  
18 JUSTICE DELAYED IS JUSTICE DENIED, AND IT APPLIES WITH EQUAL  
19 FORCE TO THE PATENT PROCESS.

20 WE BELIEVE THAT MR. CHANDLER WAS SPEAKING IN TERMS OF THE  
21 PREJUDICE THAT THEY MAY SUFFER AND HE WANTED TO BALANCE THAT,  
22 OF COURSE. AS MS. MAROULIS POINTED OUT, THAT THEY NEED TO  
23 BALANCE THAT AGAINST THE VALUE THAT CAN APPLY TO THE INTER  
24 PARTES REEXAMINATION PROCESS. HOWEVER, AT THE TIME WHEN HE  
25 WAS SPEAKING, THEY WERE NOT SPEAKING IN THE CONTEXT OF THE

1 REEXAMINATION PROCESS AS IT EXISTS TODAY. AND IT IS BROKEN.  
2 THE REEXAMINATION PROCESS IS NOT WORKING THE WAY CONGRESS  
3 INTENDED. IT IS TAKING MUCH LONGER.

4 THIS IS A BRIEF TIMELINE OF CISCO'S DILATORY CONDUCT THAT  
5 LED UP TO THIS LAWSUIT. CISCO WOULD HAVE YOU BELIEVE THAT  
6 THIS LAWSUIT BEGAN ON JANUARY 31<sup>ST</sup>, OR THAT THE DISPUTE BEGAN  
7 ON JANUARY 31<sup>ST</sup> AND THEY SUGGEST THAT THIS CASE IS YOUNG.  
8 HOWEVER, IF YOU LOOK AT THE OCTOBER 16<sup>TH</sup>, 2007 DATE WHEN WE  
9 ORIGINALLY FILED OUR COMPLAINT, THIS CASE IS NEARLY A YEAR  
10 OLD. HOWEVER, ALL THE WAY BACK TO AUGUST 2006, ESN APPROACHED  
11 CISCO TO DISCUSS LICENSING OR POSSIBLE PURCHASE OF THE '519  
12 PATENT, OR THE APPLICATION THAT WAS PENDING AT THE TIME.

13 THROUGHOUT THE PERIOD BETWEEN AUGUST AND MARCH OF 2007  
14 ESN CONTINUED TO ATTEMPT TO ENGAGE CISCO IN NEGOTIATIONS. IN  
15 MARCH 2007, ESN RECEIVED AN ORIGINAL NOTICE OF ALLOWABILITY OF  
16 THE CLAIMS OF THE '519 PATENT AND INFORMED CISCO OF THAT FACT.  
17 AND IT WAS ONLY AFTER THAT TIME THAT CISCO PLACED US IN TOUCH  
18 WITH BAKER AND BOTTS FOR THE STATED PURPOSE OF GETTING DOWN TO  
19 BUSINESS AND TALKING ABOUT THE MERITS OF OUR CLAIM AGAINST  
20 CISCO.

21 ON MAY 26 BAKER AND BOTTS SENT A LETTER IDENTIFYING PRIOR  
22 ART TO US THAT SHOULD HAVE BEEN CITED TO THE PTO. IT WAS A  
23 THINLY VEILED ATTEMPT TO SET UP AN INEQUITABLE CONDUCT  
24 DEFENSE. WE RECOGNIZED THAT, AND SO IN RESPONSE TO THAT WE  
25 TURNED AROUND AND CITED THAT PRIOR ART TO THE PATENT OFFICE.

1 ON JUNE 8 WE INFORMED CISCO OF THAT FACT, THAT THE PRIOR ART  
2 HAD BEEN CITED. HOWEVER, BECAUSE A NOTICE OF ALLOWABILITY HAD  
3 ALREADY BEEN RECEIVED, WE HAD TO FILE WHAT'S CALLED A REQUEST  
4 FOR CONTINUED EXAMINATION AND THAT DELAYED THE ISSUANCE OF THE  
5 PATENT FOR AT LEAST FOUR, FIVE, POSSIBLY AS LONG AS SIX  
6 MONTHS.

7 WHAT'S IMPORTANT ABOUT THIS PERIOD OF TIME IS THAT AFTER  
8 JUNE 8<sup>TH</sup> WHEN WE NOTIFIED CISCO THAT WE HAD CITED THE PRIOR ART  
9 THAT THEY INFORMED US OUGHT TO BE CITED TO THE PATENT OFFICE,  
10 THEY WENT ESSENTIALLY RADIO SILENT ON US. THEY DID NOT  
11 PROVIDE ANY ADDITIONAL PRIOR ART DURING THE TIME THAT THE  
12 PATENT WAS PENDING BETWEEN JUNE AND OCTOBER OF 2007. IF THEY  
13 HAD PROVIDED IT TO US THEN WE COULD HAVE PROVIDED IT TO THE  
14 PATENT OFFICE THE FIRST TIME AROUND, AND IF AS THEY BELIEVE  
15 THE PRIOR ART WOULD INVALIDATE THE CLAIMS, WE DON'T BELIEVE  
16 THAT IT WOULD; HOWEVER, THE PATENT OFFICE WOULD HAVE HAD AN  
17 OPPORTUNITY TO INVESTIGATE THAT THE FIRST TIME AROUND WITHOUT  
18 HAVING TO GO THROUGH A REEXAMINATION PROCESS.

19 SO DURING THIS TIME AFTER WE SENT THEM A LETTER, THE  
20 LETTER BY THE WAY ALSO IDENTIFIED IN CLAIM CHART FORM HOW THEY  
21 INFRINGED, CISCO DID NOT RESPOND IN ANY WAY. SO ON OCTOBER  
22 16<sup>TH</sup>, WHEN THE PATENT ISSUED WE FILED SUIT IN TEXAS. THEY  
23 FILED A CORRESPONDING SUIT IN THE DISTRICT OF CONNECTICUT.  
24 AND ULTIMATELY THE PARTIES AGREED TO DISMISS THOSE SUITS.  
25 HOWEVER, CISCO HAD REPRESENTED TO US THAT THEY WANTED TO WORK

1 IN EARNEST TO SETTLE THE DISPUTE. IN FACT, THAT'S WHAT THEIR  
2 LEAD COUNSEL TOLD THE DISTRICT COURT IN CONNECTICUT. AND THE  
3 QUOTE IS THEY WANTED TO WORK IN EARNEST TO SETTLE THE DISPUTE  
4 OVER A 90-DAY STAND DOWN PERIOD. SO WE AGREED VOLUNTARILY TO  
5 DISMISS OUR CASE HERE.

6 DURING THAT 90-DAY STAND DOWN PERIOD, HOWEVER, CISCO  
7 REFUSED TO DISCLOSE ANY FINANCIAL INFORMATION TO US. THEY  
8 CONTINUED TO REFUSE TO IDENTIFY A NON-INFRINGEMENT DEFENSE.  
9 AND THEY ONLY PROVIDED TWO ITEMS OF PRIOR ART TO US AS AN  
10 ALLEGED INVALIDITY CASE. WHAT'S SIGNIFICANT ABOUT THAT IS  
11 THAT LESS THAN A WEEK AFTER WE REFILED THE SUIT ON JANUARY  
12 31<sup>ST</sup>, THEY FILED A 400-SOME-ODD PAGE REQUEST FOR INTER PARTES  
13 REEXAMINATION THAT NAMED 13 ITEMS OF PRIOR ART.

14 YOUR HONOR, I SUGGEST THAT THEY SANDBAGGED US. THEY  
15 WANTED TO WAIT. THEY KNEW THAT THEY WERE GOING TO USE THE  
16 INTER PARTES REEXAMINATION AS A TOOL TO DELAY THE CASE.  
17 WHAT'S SIGNIFICANT ABOUT THIS IS THAT THERE WAS A 14-MONTH  
18 PERIOD AFTER WE NOTIFIED THEM ABOUT THE PENDING PATENT  
19 APPLICATION THAT THEY COULD HAVE PROVIDED PRIOR ART TO US. IT  
20 COULD HAVE BEEN SUBMITTED TO THE PATENT OFFICE. IT COULD HAVE  
21 BEEN FULLY CONSIDERED BEFORE THE PATENT ISSUED THE FIRST TIME.

22 MS. MAROULIS MENTIONED THAT THE -- THAT INTER PARTES  
23 REEXAMINATIONS ARE TAKING SOMEWHERE ON THE ORDER OF 28 MONTHS.  
24 HOWEVER, A RECENT STUDY PUBLISHED IN APRIL OF THIS YEAR SHOWS  
25 THAT THAT NUMBER IS HIGHLY MISLEADING. THE 28-MONTH PERIOD

1 APPLIES ONLY TO INTER PARTES REEXAMINATIONS WHERE EITHER THE  
2 PATENTEE DID NOT PARTICIPATE AT ALL IN THE PROCESS, AND THERE  
3 ARE 10 OF THOSE OUT OF 16 TOTAL REEXAMINATIONS THAT HAVE BEEN  
4 COMPLETED OUT OF THE NEARLY 400 THAT HAVE BEEN FILED TO DATE.  
5 SO THERE ARE ONLY 16 THAT HAVE BEEN COMPLETED. OF THOSE 16,  
6 10 OF THEM ARE A SITUATION WHERE THE PATENTEE DID NOT  
7 PARTICIPATE AT ALL. SO THEY ESSENTIALLY DEFAULTED ON THEIR  
8 RIGHTS. THE OTHER SIX REPRESENT A SITUATION WHERE THE  
9 PATENTEE PARTICIPATED INITIALLY BUT DID NOT PARTICIPATE IN ANY  
10 APPEALS PROCESS INTERNAL TO THE PATENT OFFICE. THAT'S WHERE  
11 THEY GET THE 28-MONTH FIGURE.

12 THE ACTUAL FIGURES ARE MUCH LONGER THAN THAT. IN FACT,  
13 NO INTER PARTES REEXAMINATION HAS BEEN COMPLETED TO DATE. THE  
14 NUMBERS IN THE INSTITUTE FOR PROGRESS REPORT SHOW THAT THE  
15 AVERAGE PENDENCY IS 78.4 MONTHS. HOWEVER, YOUR HONOR, THAT  
16 WAS IN APRIL. BY NOW, FOUR MONTHS LATER, THAT NUMBER IS UP TO  
17 82 MONTHS. THERE IS STILL TO DATE, AND WE UPDATED OUR  
18 RESEARCH JUST LAST WEEK, TO DATE THERE HAS STILL NOT BEEN A  
19 SINGLE INTER PARTES REEXAMINATION THAT HAS BEEN COMPLETED  
20 THROUGH THE APPEALS WHERE THE PATENTEE DECIDES TO PARTICIPATE  
21 IN ALL STAGES OF THE PROCESS.

22 THE INSTITUTE FOR PROGRESS REPORT PUTS THE CONFIDENCE  
23 INTERVAL AT 95 PERCENT ON THE INTER PARTES REEXAMINATION  
24 TAKING BETWEEN FIVE AND EIGHT YEARS. IT APPEARS THAT MAYBE  
25 EVEN THAT NEEDS TO BE UPDATED THOUGH BECAUSE THERE STILL HAS

1 NOT BEEN A SINGLE INTER PARTES REEXAMINATION COMPLETED.

2 YOUR HONOR, I PUT THIS DETAILED INFORMATION UP ON THE  
3 SCREEN HERE. THIS IS A DIRECT CUT AND PASTE OUT OF THE  
4 INSTITUTE FOR PROGRESS REPORT. THERE IS A LOT OF INFORMATION  
5 HERE. THE POINT IS THAT THIS REPORT IS HIGHLY DETAILED. THEY  
6 WENT THROUGH REEXAMINATION BY REEXAMINATION. THEY WENT  
7 THROUGH ALL OF THE FILES AND PULLED TOGETHER THIS INFORMATION.  
8 SO IT'S A HIGHLY DETAILED REPORT. WE BELIEVE IT TO BE  
9 ACCURATE.

10 THE OTHER SIGNIFICANT POINT THAT CAN BE SEEN ON THIS  
11 SLIDE IS THAT WE BELIEVE CISCO MAY HAVE UNINTENTIONALLY  
12 MISINTERPRETED THE DATA SHOWN HERE TO SUGGEST THAT OUR INTER  
13 PARTES REEXAMINATION, UNLIKE ALL OTHERS, WILL BE COMPLETED IN  
14 ONE QUARTER OF THE TIME. THEY SUGGESTED THAT THE AVERAGE TIME  
15 TO A FIRST OFFICE ACTION IN A TYPICAL INTER PARTES  
16 REEXAMINATION IS SOMEWHERE ON THE ORDER OF 16 TO 18 MONTHS.  
17 THEY MISINTERPRETED THESE SLIDES.

18 WHAT HAPPENS AT 16 TO 18 MONTHS IS NOT THE FIRST OFFICE  
19 ACTION. IT'S THE ACP. AND THE ACP IS AN ACTION CLOSING  
20 PROSECUTION. IN OTHER WORDS, IT'S THE SECOND OFFICE ACTION.  
21 AND THEY SUGGESTED BECAUSE THE FIRST OFFICE ACTION IS AT 18  
22 MONTHS AND OURS TOOK ROUGHLY FOUR AND SEVERAL WEEKS, FOUR  
23 MONTHS, JUST OVER FOUR MONTHS, THEY SUGGESTED THAT OURS WOULD  
24 BE COMPLETED IN ONE QUARTER OF THE TIME. BUT IF YOU ACCURATELY  
25 READ THESE STATISTICS, THE AVERAGE TIME TO A FIRST OFFICE



1 ACTION IS EXACTLY 4.1 MONTHS. OURS TOOK 4.2 MONTHS. SO IF  
2 YOU USE CISCO'S LOGIC, OURS WILL ACTUALLY TAKE LONGER THAN THE  
3 TYPICAL.

4 NOW THE PREJUDICE THAT WOULD RESULT IS SHOWN ON THIS  
5 SLIDE HERE. UNDER THE CURRENT SCHEDULE WHICH HAS BEEN SET, WE  
6 ARE SCHEDULED TO HAVE A MARKMAN HEARING IN JUNE OF NEXT YEAR  
7 AND WE WILL GET TO TRIAL IN APRIL OF 2010. UNDER CISCO'S  
8 DESIRED SCHEDULE, WE WOULD STOP THE CASE NOW. WE WOULD DELAY  
9 FOR SIX AND A HALF YEARS, SOMETIME INTO THE LATTER HALF OF  
10 2014. WE WOULD PICK UP THE -- WE WOULD RESUME THE PRETRIAL  
11 SCHEDULE AND WE WOULD LIKELY NOT GET TO TRIAL UNTIL AT LEAST  
12 THE LATTER HALF OF 2016 OR LATER. SUBSEQUENT TO THAT, THERE  
13 WOULD BE AN APPEAL TO THE FEDERAL CIRCUIT. WE ARE INTO 2018,  
14 POSSIBLY 2019 BEFORE WE HAVE A RESOLUTION OF THE DISPUTE  
15 BETWEEN THE PARTIES.

16 THE PREJUDICE TO OUR PLAINTIFF IF -- THE PREJUDICE TO OUR  
17 CLIENT IF THAT WERE TO TAKE PLACE IS THAT MORE THAN HALF OF  
18 THE LIFE OF THE PATENT WILL BE GONE BEFORE THERE IS ANY  
19 RESOLUTION OF THE RIGHTS. HE WOULD NOT HAVE THE ABILITY TO GO  
20 OUT AND ATTEMPT TO LICENSE OTHER PARTIES DURING THAT PENDENCY.  
21 THERE WOULD BE WITNESSES LOST. THERE WILL BE MEMORIES THAT  
22 FADE. THERE WILL BE DOCUMENTS THAT ARE LOST. THE TECHNOLOGY  
23 MAY MOVE ON BY THAT TIME. THE TECHNOLOGY COULD BE UNIMPORTANT  
24 IN THE LATTER HALF OF THE NEXT DECADE. THERE ARE A LARGE  
25 NUMBER OF CIRCUMSTANCES WHY OUR CLIENT WOULD SUFFER UNDUE

1 PREJUDICE IF WE HAD TO WAIT UNTIL THE LATTER HALF OF THE NEXT  
2 DECADE.

3 NOW, MS. MAROULIS SUGGESTED THAT THERE IS LIKELY TO BE A  
4 NARROWING OF THE ISSUES. HOWEVER, THEY HAVE PRESENTED TO THE  
5 PATENT OFFICE ONLY THIRTEEN ITEMS OF PRIOR ART. THERE ARE  
6 OVER A HUNDRED ADDITIONAL ITEMS OF PRIOR ART THAT THEY HAVE  
7 IDENTIFIED IN THEIR RULE 3-3 INVALIDITY CONTENTIONS. SHE  
8 SUGGESTED THAT -- I DON'T KNOW IF THIS WAS INTENTIONAL. I  
9 THINK IT WAS UNLIKELY THAT SHE WAS GOING TO SUGGEST THAT THOSE  
10 HUNDRED, THOSE HUNDRED PRODUCTS ARE PUBLICATIONS. THEY ARE  
11 NOT PUBLICATIONS, YOUR HONOR. THEY ARE NOT THE TYPE OF PRIOR  
12 ART THAT CAN BE PRESENTED TO THE PATENT OFFICE. THERE WILL BE  
13 NO ESTOPPEL EFFECT WITH RESPECT TO A PRODUCT THAT THEY CAN  
14 PROVE WAS ON SALE ACCORDING TO 102(B), 35 U.S.C. 102(B), OR IF  
15 THERE WAS A PRIOR INVENTION DEFENSE ACCORDING TO 102(G). SHE  
16 IS NOT -- I DON'T BELIEVE SHE IS SUGGESTING THAT THERE IS  
17 GOING TO BE AN ESTOPPEL EFFECT.

18 SO THE ADDITIONAL HUNDRED PRIOR ART REFERENCES WHICH ARE  
19 GENERALLY PRODUCTS FOR WHICH THEY ARE NOT, TO MY  
20 UNDERSTANDING, RELYING ON A PRINTED PUBLICATION THAT DESCRIBES  
21 THAT PRODUCT, INSTEAD, THEY WILL RELY ON POSSIBLY INTERNAL  
22 SPECIFICATIONS OF THESE COMPANIES THAT MADE THE PRODUCTS.  
23 THERE ARE A HUGE NUMBER OF ADDITIONAL PRIOR ART ISSUES THAT  
24 THEY ARE RESERVING IF WE SHOULD GET BACK TO TRIAL.

25 SHE ALSO SUGGESTS THAT BECAUSE ALL OF THE CLAIMS HAD BEEN

1 REJECTED TO DATE THAT IT IS LIKELY THAT THEY WILL CONTINUE TO  
2 BE THAT WAY. HOWEVER, YOUR HONOR, THE REPORT FOR PROGRESS  
3 STUDY SHOWED THAT IT IS NEARLY ALWAYS THE CASE THAT THE FIRST  
4 OFFICE ACTION WILL REJECT ALL OF THE CLAIMS. IN OTHER WORDS,  
5 THE PATENT OFFICE IS SAYING IF WHAT THE REQUESTOR OF THE  
6 DEFENDANT, THE REQUESTOR OF THE INTER PARTES REEXAMINATION, IF  
7 WHAT THEY SAY IS TRUE, THEN THIS IS THE REJECTION. IT TREATS  
8 IT -- THAT'S ONLY THE FIRST VOLLEY. SO THERE HAS BEEN A  
9 REJECTION MADE THAT ADOPTED, LITERALLY ADOPTED VERBATIM THE  
10 REQUESTOR'S POSITION. THERE IS ONLY ONE INSTANCE WHERE WE CAN  
11 EVEN IDENTIFY WHERE THE EXAMINER PIECED TOGETHER TWO PORTIONS  
12 OF AN ARGUMENT THAT THEY MADE. BUT EVEN IN THAT CASE THE  
13 EXAMINER LITERALLY CUT AND PASTED THE REQUESTOR'S ARGUMENT  
14 ONTO THE PAGE.

15 SO THERE HAS BEEN VERY LITTLE INDEPENDENT ANALYSIS BY THE  
16 PATENT OFFICE AT THIS STAGE. THEY ARE JUST SAYING IF WHAT YOU  
17 SAY IS TRUE, HERE IS THE REJECTION. WE HAVE RESPONDED AND WE  
18 HAVE POINTED OUT THAT THE PRIOR ART DOES NOT INVALIDATE. WE  
19 ARE CONFIDENT THAT THE CLAIMS WILL REMAIN AS THEY ARE AND THAT  
20 THEY WILL ISSUE, REISSUE WHEN THEY DO.

21 WHAT I SHOULD POINT OUT ABOUT THE SCHEDULE HERE THOUGH,  
22 YOUR HONOR, CISCO'S DESIRED SCHEDULE, ASSUMING THE CASE IS NOT  
23 STAYED AS WE BELIEVE IT SHOULD NOT BE, WE WILL GET TO TRIAL IN  
24 2010. IT WILL BECOME A FINAL NONAPPEALABLE DECISION SOMETIME  
25 IN MID-2011 IF WE GET THROUGH THE FEDERAL CIRCUIT. AT THE

1 STAGE THAT OUR CASE BECOMES FINAL AND NONAPPEALABLE, IF THE  
2 DEFENDANT HAS NOT CARRIED ITS BURDEN TO SHOW THAT THE CLAIMS  
3 ARE INVALID, THE PATENT OFFICE MUST SUSPEND ITS PROCEEDINGS  
4 AND CAN NO LONGER MAINTAIN THE INTER PARTES REEXAMINATION. SO  
5 THERE WILL NOT BE PARALLEL TRACKS. THERE WILL NOT BE WASTED  
6 RESOURCES.

7 THE *SONY V. DUDAS* CASE THAT WE CITE IN OUR BRIEF SAYS  
8 THAT IT'S LIKE A HORSE RACE. THE DEFENDANTS CAN CHOOSE TO  
9 RIDE TWO HORSES IN PARALLEL, BUT WHEN ONE OF THEM REACHES THE  
10 FINISH LINE THE OTHER HORSE MUST STOP. 35 U.S.C. 117(B)  
11 INDICATES THAT IF WE GET TO A FINAL DECISION FIRST, THE PATENT  
12 OFFICE MUST SUSPEND ITS PROCEEDINGS.

13 YOUR HONOR, IF THE STAY IS GRANTED, WE BELIEVE THAT IT  
14 WOULD BE CONTRARY TO RULE 1 THAT ENTITLES US TO A JUST,  
15 SPEEDY, AND INEXPENSIVE DETERMINATION OF THIS MATTER. AND A  
16 FINAL POINT, YOUR HONOR. MS. MAROULIS POINTED OUT THAT  
17 BECAUSE OUR CLIENT IS AN INDIVIDUAL INVENTOR WHO DOES NOT  
18 PRACTICE THE PATENT, DOES NOT MAKE A PRODUCT, THAT HE IS NOT  
19 ENTITLED TO AN INJUNCTION AND SO THERE CAN BE NO IRREPARABLE  
20 HARM. THAT IS NOT TRUE. THE *EBAY* CASE HAS SAID THAT  
21 INDIVIDUAL INVENTORS, ESPECIALLY ALONG WITH THE UNIVERSITIES,  
22 MAY BE ENTITLED TO AN INJUNCTION. THEY ARE ENTITLED TO PROVE  
23 IRREPARABLE HARM. THEY ARE ENTITLED TO SEEK AN INJUNCTION.  
24 IF WE WERE NOT ALLOWED TO SEEK AN --

25 THE COURT: I AM TOLD YOUR TIME IS CONCLUDED IF YOU

1 WILL WRAP UP YOUR COMMENTS.

2 MR. MCANDREWS: THANK YOU, YOUR HONOR.

3 THE COURT: VERY WELL. REPLY? HOW MUCH TIME  
4 REMAINS?

5 THE CLERK: SIX MINUTES.

6 THE COURT: SIX MINUTES.

7 MS. MAROULIS: THANK YOU, YOUR HONOR. LET ME BEGIN  
8 WITH OBJECTING TO THE USE OF CONFIDENTIAL SETTLEMENT  
9 INFORMATION IN THE COUNSEL'S SLIDES AND POINT OUT THAT IT IS  
10 HIGHLY INAPPROPRIATE TO RELY ON CONFIDENTIAL SETTLEMENT DATA  
11 TO MAKE A POINT IN THESE PROCEEDINGS.

12 THAT SAID, CISCO CATEGORICALLY REJECTS AN INSINUATION  
13 THAT WE HAD ANY DILATORY MOTIVE IN FILING THE REEXAM GENERALLY  
14 OR FILING IT AT ANY TIME THAT WAS ASSERTED. IN FACT, SOME OF  
15 THE COURTS WHO GRANTED STAYS IN THE CASES FOUND THAT REEXAM  
16 NATURALLY OR CLOSELY FOLLOWS REEXAMINATION, OR THE  
17 REEXAMINATION FOLLOWS THE SETTLEMENT NEGOTIATIONS THAT FALL  
18 APART.

19 THAT SAID, ALTHOUGH THERE IS A NOTION THAT BAD FAITH  
20 SHOULD BE CONSIDERED, WE DON'T BELIEVE THAT ESN HAS  
21 ESTABLISHED AND SHOWN ANY BAD FAITH ON BEHALF OF CISCO IN  
22 BRINGING EITHER REEXAM OR THE STAY PROCEEDINGS.

23 SECONDLY, LET ME ADDRESS THE ISSUE OF PURPORTED DELAY.  
24 THE INSTITUTE FOR PROGRESS STATISTICS ARE JUST ONE WAY OF  
25 LOOKING AT THE STATISTICS. YOUR HONOR, WE WENT WITH THE PTO

1 STATISTICS THAT PTO ITSELF PUT ON ITS WEBSITES IN MARCH OF  
2 THIS YEAR. BUT REGARDLESS WHO INTERPRETS THEM, THE  
3 ASSUMPTIONS ARE HIGHLY SPECULATIVE. OUR REEXAM CAN GO TWO  
4 YEARS OR IT CAN GO A YEAR AND A HALF. IT CAN BE A LOT SHORTER  
5 THAN ESN SUGGESTS OR IT POSSIBLY COULD BE A SLIGHTLY LONGER  
6 THAN THE AVERAGE AND MEDIAN TIME.

7 HOWEVER, IN THE FACE OF THESE STATISTICS AND THE FACE OF  
8 THE INSTITUTE'S STUDY, THERE ARE THE COURTS AROUND THE COUNTRY  
9 THAT ARE ROUTINELY GRANTING STAY IN THE INTER PARTES  
10 PROCEEDING. IN OUR PAPERS WE CITED THE *TOMCO* CASE OUT OF  
11 GEORGIA AND THE *PROCTOR & GAMBLE* CASE OUT OF THE NORTHERN  
12 DISTRICT OF CALIFORNIA WHERE SIMILAR ARGUMENTS WERE MADE.

13 THE COURT: WELL, IT'S NOT MY PRACTICE TO ROUTINELY  
14 GRANT THEM, AS YOU HAVE EARLIER SAID. I LOOK AT THEM ON A  
15 CASE BY CASE BASIS. IF I ROUTINELY GRANTED THEM, I WOULDN'T  
16 HAVE A DOCKET IN THIS AREA. I'D STAY ALL OF THEM, WHICH IS  
17 SOMETIMES INVITING. BUT MY RESPONSIBILITY IS TO MOVE THESE  
18 CASES ALONG AND GRANT A STAY IF APPROPRIATE, AND DENY IT IF  
19 INAPPROPRIATE.

20 MS. MAROULIS: ABSOLUTELY RIGHT, YOUR HONOR. A LOT  
21 OF THE CASES WHERE STAY IS SOUGHT, HOWEVER, ARE EX PARTE  
22 REEXAM CASES. WE HAVE BEEN TRYING TO FOCUS BOTH IN OUR PAPERS  
23 AND MY ARGUMENT ON THE INTER PARTES WHICH WE BELIEVE IS VERY  
24 DIFFERENT FROM THE EX PARTE IN THE WAY THAT IT BINDS THE  
25 REQUESTOR AND POSES ESTOPPEL ON THEM. AND AS I SAID IN MY

1 EARLIER ARGUMENTS, WE WILL BE ESTOPPED FROM ASSERTING ANY  
2 PRINTED PUBLICATION WHETHER IT HAS BEEN OR HAS NOT BEEN SHOWN  
3 TO THE PATENT OFFICE.

4 I SHOULD ALSO POINT OUT THAT COUNSEL SAID THEY ARE  
5 CONFIDENT IN THEIR PATENT EMERGING FROM THE REEXAM. IF THE  
6 PATENT OFFICE AGREES WITH THEM AND ISSUES ALL CLAIMS ON THE  
7 FIRST OFFICE ACTION, IT MIGHT BE A VERY SHORT REEXAM  
8 PROCEEDING. BUT THE POINT IS THAT IT IS VERY IMPOSSIBLE TO  
9 PREDICT PRECISELY HOW MANY MONTHS IT WOULD TAKE. WE WOULD DO  
10 OUR BEST TO EXPEDITE IT, AND AS YOUR HONOR POINTED IN SOME  
11 DECISIONS, BECAUSE THE PATENT IS IN LITIGATION THE PTO WOULD  
12 TREAT IT WITH A SPECIAL DISPATCH AND MAKE AN EFFORT TO PROCESS  
13 IT EXPEDITIOUSLY AS WELL.

14 SIMILARLY, IN DISCUSSING THE ESN'S PREJUDICE, WE POINTED  
15 OUT THAT DELAY ALONE IS NOT ENOUGH TO ESTABLISH PREJUDICE. IN  
16 THE INSTANCES WHERE THE COURTS LOOKED OUT WHETHER THERE WAS A  
17 PREJUDICE TO THE PARTY THERE WAS SPECIFIC SHOWINGS THAT  
18 CERTAIN WITNESSES WOULD BE UNAVAILABLE.

19 FOR EXAMPLE, IN THE ANASCAPE CASE THE COURT FOUND  
20 SPECIFICALLY THAT ONE OF THE PARTIES WAS NOT ABLE TO LINE UP  
21 THE WITNESSES ON ONE OF THE ISSUES BECAUSE OF HOW OLD THE  
22 PATENTS WERE. IN THIS CASE NO SHOWING OF PREJUDICE HAS BEEN  
23 MADE, AND THE ONLY SHOWING OF PREJUDICE OR THE ONLY ILLUSION  
24 OF PREJUDICE WAS LINKED TO THE DELAY ARGUMENT WHICH WE ALREADY  
25 DISCUSSED.

1           FINALLY, LET ME ADDRESS THE POINT REGARDING THE FACT THAT  
2 WE ALSO ASSERTED SOME OF THE PRODUCTS. THAT IS CORRECT. WE  
3 HAVE SOME OF THE PRODUCT BASED PRIOR ART THAT WE ARE RELYING  
4 ON. HOWEVER, YOUR HONOR, BECAUSE THE PTO'S DETERMINATION  
5 WOULD ONLY ADDRESS ALL THE PRINTED PUBLICATIONS, EVEN THOUGH  
6 WE ARE ASSERTING PRODUCTS THAT WILL GREATLY SIMPLIFY THE CASE.  
7 AND BECAUSE WE CANNOT SHOW THE PRODUCTS TO THE PTO, THERE IS  
8 NO CHOICE FOR US BUT TO ASSERT THEM HERE IN THE CASE.

9           NONETHELESS, BECAUSE THE PTO WILL TAKE AWAY THE LARGE  
10 CHUNK OF THE DEFENSE, THIS IS SOMETHING THAT WILL GREATLY  
11 SIMPLIFY THE CASE BEFORE THE COURT AND THE JURY. AND OTHER  
12 COURTS WILL HAVE CONSIDERED THIS ISSUE, HAVE LOOKED AT THE  
13 OTHER INVALIDITY DEFENSES IN THE CASE AND HAVE DECIDED THAT  
14 DESPITE THE PRESENCE OF SUCH OTHER DEFENSES, SUCH AS  
15 INEQUITABLE CONDUCT OR ANTITRUST DEFENSES, IT WAS STILL  
16 APPROPRIATE TO STAY THE CASE BECAUSE THE KEY TO PATENT  
17 INFRINGEMENT CASES IS VALIDITY OF THE PATENT. AND ONCE THAT'S  
18 RESOLVED, THAT STREAMLINES THE CASE.

19           I WOULD LIKE TO ANSWER ANY QUESTIONS YOUR HONOR MIGHT  
20 HAVE.

21           THE COURT: I DON'T HAVE ANY ADDITIONAL QUESTIONS. I  
22 HAVE HAD MORE THAN A FEW OF THESE. I APPRECIATE EVERYONE'S  
23 COMMENTS, AND I'LL TAKE IT UNDER ADVISEMENT AND TRY TO HAVE A  
24 RULING WITHIN THE NEXT 30 DAYS.

25           MS. MAROULIS: THANK YOU, YOUR HONOR.



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THE COURT: WE WILL BE IN RECESS.

(ADJOURNED AT 11:24 A.M.)

REPORTER'S CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM  
THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

DATE: SEPTEMBER 7, 2008

/S/LIBBY CRAWFORD

LIBBY CRAWFORD, CSR

OFFICIAL COURT REPORTER