

EXHIBIT C

1
2 IN THE UNITED STATES DISTRICT COURT
3 FOR THE DISTRICT OF DELAWARE
4 ARENDI S.A.R.L.,)
5)
6 Plaintiff,) C.A. No. 13-919-JLH
7 v.)
8 GOOGLE LLC,)
9 Defendant.)

10
11 Monday, May 1, 2023
12 8:22 a.m.
13 Jury Trial
14 Volume VI
15 * * *
16 Sealed

17 844 King Street
18 Wilmington, Delaware

19 BEFORE: THE HONORABLE JENNIFER L. HALL
20 United States Magistrate Judge

21
22 APPEARANCES:
23
24 SMITH, KATZENSTEIN & JENKINS LLP
25 BY: NEAL C. BELGAM, ESQ.
-and-

1 APPEARANCES CONTINUED:
2
3 SUSMAN GODFREY, LLP
4 BY: JOHN LAHAD, ESQ.
5 BY: KEMPER DIEHL, ESQ,
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10 BY: DAVID ELLIS MOORE, ESQ.

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12 PAUL HASTINGS
13 BY: ROBERT W. UNIKEL, ESQ.
14 BY: CHAD J. PETERMAN, ESQ.
15 BY: MATTHIAS A. KAMBER, ESQ.
16 BY: ANDREA ROBERTS, ESQ.

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18 MUNGER TOLLES & OLSON
19 BY: VINCENT LING, ESQ.

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Counsel for the Defendant

1
2 P R O C E E D I N G S

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4 (Proceedings commenced in the courtroom beginning at
5 8:22 a.m.)

6 **THE COURT:** Please be seated.
7 Good morning.

8 So we're at our fifth day of evidence
9 presentation.

10 All right. Am I correct that who we're
11 planning to put on today is Mr. -- Dr. Fox, and then
12 Dr. Kidder, or Mr. Kidder?

13 **MR. PETERMAN:** Dr. Fox and Mr. Kidder, Your
14 Honor.

15 **THE COURT:** Okay. And do you have a sense of
16 how long we're going to hear from Dr. Fox?

17 **MR. PETERMAN:** Little over an hour, Your Honor.

18 **THE COURT:** Okay. And then we'll have cross.
19 And then Mr. Kidder is --

20 **MR. PETERMAN:** Mr. Kidder will be about
21 45 minutes to 50 minutes.

22 **THE COURT:** Okay. And at that point, does
23 defendant intend to be finished with their evidence
24 presentation?

25 **MR. PETERMAN:** After Mr. Kidder, yes, Your

1 Honor.

2 **THE COURT:** Okay. All right. And we've got
3 objections to demonstratives being used by Mr. Kidder, but
4 are we good with Dr. Fox, at least, so we can get started
5 without worrying about objections in his demonstratives?

6 **MR. LAHAD:** I think we're ready to go, Your
7 Honor.

8 **THE COURT:** Okay. You're -- pardon?

9 **MR. LAHAD:** I think we're ready to go. We have
10 no objections to Mr. Fox's demonstratives.

11 **THE COURT:** Okay. All right. But Mr. Kidder,
12 you do?

13 **MR. LAHAD:** Yes, Your Honor.

14 **THE COURT:** Okay. I got a letter -- please be
15 seated. I got a letter saying there were objections, but
16 I don't have copies or anything about what the
17 objectionable material is. So we've got five minutes now.
18 We can start taking a look at that.

19 **MR. PETERMAN:** Yes, Your Honor. I have a copy
20 of the all the demonstratives and exhibits that Arendi is
21 objecting to. I think, essentially, the objections can be
22 characterized as they went outside the scope of
23 Mr. Weinstein's report and presented a new damages number.

24 **THE COURT:** Yeah. I can see exactly where this
25 is going to go. I just need to lay eyes on them.

1 **MR. PETERMAN:** They are trying to prevent
 2 Mr. Kidder from responding to that new theory that --
 3 **THE COURT:** I am on the same page. Let me just
 4 see what slides -- do you want to confer with the other
 5 side about which slides are -- should be handed up?
 6 **MR. PETERMAN:** I have a copy of everything that
 7 they objected to.
 8 May I approach?
 9 **THE COURT:** Yes. Thank you. All right. Just
 10 give me a minute to take a look at these.
 11 This is everything -- these are just the ones
 12 that are objected to?
 13 **MR. PETERMAN:** Those are the ones that are
 14 objected to, Your Honor. And then also, there's an
 15 exhibit that we would like to introduce, same issue, that
 16 they -- that they've objected to as well.
 17 **THE COURT:** An exhibit that you want to
 18 introduce into evidence?
 19 **MR. PETERMAN:** Yes.
 20 **THE COURT:** Okay. All right. Why don't you
 21 hand that up as well.
 22 So they're objecting to like 40 of your slides?
 23 **MR. PETERMAN:** Yes.
 24 **THE COURT:** All right. Well, okay, we're not
 25 going to get this done in the next five minutes.

1 calculate it this way in his report.
 2 **THE COURT:** Okay. Do you dispute the
 3 calculations, or do you just dispute the way that it is
 4 being presented to the jury?
 5 **MS. SRINIVASAN:** Well, the methodology is just
 6 not what he did in his report.
 7 **THE COURT:** It's a different methodology.
 8 **MS. SRINIVASAN:** Right.
 9 **THE COURT:** Okay.
 10 Counsel.
 11 **MR. PETERMAN:** Your Honor, we disagree. This
 12 is a methodology based off of revenues. Clearly, it's a
 13 question of, if you apply the revenues versus the
 14 settlement agreement first, or if you apply it versus the
 15 revenues for Apple. So now we're thinking that, A plus B
 16 equals C, is what Mr. Kidder initially presented in his
 17 expert report.
 18 We think for a jury -- in order to not confuse
 19 the jury, we want to essentially put in front of them B
 20 plus A equals C. So it's the same result, it's just a
 21 slightly different way of getting presentation -- way of
 22 getting to the result.
 23 And this is a result of the change that
 24 plaintiffs made with respect to the damages theory. We
 25 think it's clearer now, the way that Mr. Kidder wants to

1 **MS. SRINIVASAN:** Well, Your Honor, if I may.
 2 Some of these, I understood, that they replaced last
 3 night, so...
 4 **MR. PETERMAN:** Well, no, that's not correct.
 5 **MS. SRINIVASAN:** Pursuant to our meet and
 6 confer.
 7 **THE COURT:** Okay. Everybody, let's slow down
 8 because we're going to -- I don't want to get off with a
 9 start this morning where we're muddling up the record. So
 10 let's, everybody, sit down. We'll just go and we can talk
 11 about it while everybody is having a seat.
 12 All right. The first page is DDX-10.018.
 13 What's plaintiff's objection to this?
 14 **MS. SRINIVASAN:** Your Honor, for these and the
 15 next few slides, the calculation that's performed here was
 16 not done by Mr. Kidder in his report. He did a different
 17 extended views calculation comparing revenues basis
 18 between the different entities without doing it as a
 19 function of each license amount.
 20 And when we conferred about this last night,
 21 Google sent replacement slides doing it with a manner in
 22 which Mr. Kidder had actually disclosed in his report. We
 23 said that we didn't object to those.
 24 So I don't know if they're insisting on doing
 25 it this way, but this isn't the way in which -- he didn't

1 present it in the slides that are in front of you, versus
 2 the way that he presented it in his expert report.
 3 **THE COURT:** Okay. Where in the record is his
 4 report that opines on this issue that we're talking about
 5 right now? What page so we can take a look at it on a
 6 break?
 7 **MR. PETERMAN:** Yes, Your Honor. So do you have
 8 his reports there?
 9 **THE COURT:** No. No one has ever presented them
 10 to us, the slides. We have hunted and found most of them
 11 on the docket.
 12 **MR. PETERMAN:** Okay. Give me a moment, Your
 13 Honor.
 14 **MS. SRINIVASAN:** I have a copy for the Court,
 15 Your Honor.
 16 **MR. PETERMAN:** Your Honor, I have one copy of
 17 both of his reports. I can get a second copy.
 18 **THE COURT:** Okay. Great. That's great.
 19 So counsel just handed up the expert report of
 20 Douglas Kidder, October 20, 2020, and a supplemental
 21 expert report of Mr. Kidder, August 26, 2022.
 22 What pages should I look at to see if this has
 23 been previously disclosed?
 24 **MR. PETERMAN:** Yeah. So, Your Honor, in the
 25 second report, the 2022 report, paragraphs 152 to 160 is

1 where Mr. Kidder goes through the revenue-based
2 comparison.

3 **THE COURT:** Okay. And then -- so we'll look at
4 that on a break. And then what -- is it the same argument
5 for how many of these slides?

6 **MS. SRINIVASAN:** Through the first testimonial
7 slide. So the next eight slides, through 10.026. They're
8 all the same issue.

9 **THE COURT:** Okay.

10 **MR. PETERMAN:** And, Your Honor, I will state
11 that it doesn't appear that Arendi disagrees that
12 Mr. Kidder came up with the scale revenue number. So for
13 that we'll look at the top of Slide 25. There's a scale
14 revenue number for Apple, Samsung, Microsoft, and InNova.

15 Doesn't appear that Arendi disagrees with those
16 numbers, because I think no matter which way you do the
17 calculation, you wind up with those same numbers. It's
18 really just a question of presentation.

19 **THE COURT:** Okay. All right. We will take a
20 look at that. All right. It's 8:30 now. So we'll bring
21 the jury out and then we'll deal with this. I want to
22 make sure we get started on time because we told them all
23 to get here early today.

24 **MR. PETERMAN:** Thank you, Your Honor.

25 **THE COURT:** All right. Ms. Garfinkel, can we

1 check and see if everybody is here.

2 Sounds like we are missing one juror. So let's
3 continue on.

4 Okay. Then we've got objection to 10.032?

5 **MS. SRINIVASAN:** That's right, Your Honor. As
6 to the next three slides, 32, 33, 34, those are
7 undisclosed opinions from Mr. Kidder's report. He does
8 disclose December 2017. And I think he was instructed to
9 use that date. There's nothing in his report about
10 maintenance releases or source code being published around
11 that time. He just said he was instructed to use that
12 date.

13 And now they're using testimony -- he had the
14 opportunity to ask why that was, but now they're using
15 testimony as to the basis for using that date, which
16 Mr. Kidder didn't disclose in his report.

17 He has one line in his report that says he was
18 instructed to use December 2017 as the date when STS was
19 enabled, that's it. There's no reference to maintenance
20 releases, source code, any of the things that are being
21 added here.

22 So we don't object to him obviously relying on
23 the December 2017 date, which has always been part of his
24 analysis for the other apps, and then for Google Chrome.
25 But for him to be utilizing the reason that they selected

1 that date when he didn't opine on it, that's an
2 undisclosed opinion.

3 They have it in the record from their fact
4 witnesses, but he chose not to ask them at the time he
5 issued two reports on this.

6 **THE COURT:** All right. So stand by. Let me
7 read these slides before I hear from Google.

8 Counsel.

9 **MR. PETERMAN:** Your Honor, Mr. Kidder chose to
10 focus on different aspects of the case when there was more
11 accused products at issue and --

12 Mr. Kidder chose to focus on different aspects
13 of the case when there were additional products at issue.
14 As of April 21st when Arendi changed to narrow its theory
15 to STS only, Mr. Kidder relooked at issues and looked at
16 issues for the first time with an STS-only basis.

17 Now he feels that his testimony regarding the
18 maintenance release is important for his STS-only opinion.
19 This is the first time that he's been able to make an
20 STS-only opinion.

21 **MS. SRINIVASAN:** Your Honor, if I may on that.

22 **THE COURT:** Just give me a second.

23 **MS. SRINIVASAN:** Sure.

24 **THE COURT:** Let me just ask everyone about
25 Slide 32, 33, and 34. This appears just to be testimony

1 that we've heard at trial. So is there any particular
2 reason why we can't put this up on the screen?

3 **MS. SRINIVASAN:** Well, for Mr. -- I mean, if
4 Mr. Kidder is going to say he has understanding about why
5 STS -- why he's using that December 2017 date, that is not
6 in his opinion. He did -- in his report, paragraph 175,
7 he said he was asked to consider a date of December 2017
8 as the date of first infringement when STS was enabled
9 Android 8. That's all he says.

10 So our objection is that if he's going to get
11 up there and say, I understand it was released on that
12 date because that's when the maintenance release was,
13 that's when the source code was published -- he doesn't
14 have any basis for that. He was instructed to use the
15 date. We understand that.

16 But now they're trying to use, you know, things
17 that he didn't develop. He didn't ask why that date was
18 chosen. And it's not correct that he didn't analyze an
19 STS-only world. That's the subject of his supplemental
20 report from 2022. He specifically considered a scenario
21 in which only STS was accused. He opined on a damages
22 number, that's the damages number he's presenting today.

23 So he had the opportunity to ask why that date,
24 and he didn't. And so we object to him using testimony
25 from the proceeding to try to add detail, well, as to why

1 that date was appropriate.

2 **THE COURT:** Wait. Let me just ask you about

3 what you just said. You're saying this 2022 report,

4 there's a scenario where he analyzed that STS, but not

5 Contact Detectors and Quick Action was accused?

6 **MS. SRINIVASAN:** Yes.

7 **THE COURT:** Where is that?

8 **MS. SRINIVASAN:** That's in Paragraph 30 and

9 175. In Paragraph 30, he says, "I have also been asked to

10 consider an alternative scenario in which only STS is

11 found to be properly accused of infringement such that the

12 hypothetical negotiation would have taken place around

13 December 5, 2017."

14 **THE COURT:** Give me a minute.

15 So Counsel, did or did he not analyze what the

16 royalty would be -- or respond to Mr. Weinstein's

17 calculation? You know what I'm asking.

18 **MR. PETERMAN:** Yes, yes.

19 **THE COURT:** Tell me what I'm asking, and then

20 tell me the answer.

21 **MR. PETERMAN:** There's two issues here.

22 Mr. Kidder did put forth an STS calculation under

23 Mr. Kidder's own model. And Mr. Kidder's own model is

24 really not dependent on the number of units. He did not

25 have the opportunity to present an STS under

1 accused devices and downloads would be smaller, and would

2 therefore result in a greater downward adjustment for

3 extensive used relative to Microsoft, Samsung, and Apple."

4 And he offers a damages, a lump sum payment damages number

5 of \$500,000, which based on the slides, I understand, is

6 the number he's going to be sponsoring today.

7 And then in the Exhibit 5 to the report, you

8 can see -- in the Exhibit 5.0, to the supplemental

9 reports, he can see that he has listed all the downloads

10 for 2017 and 2018 for all of the apps.

11 And at that time, he was responding to

12 Mr. Weinstein's report that was STS only for the 12 of the

13 13 apps. That he went ahead and assumed, what if it was

14 STS only for everything.

15 The \$500,000 that he came up with in his

16 September '22 report is what he's presenting today. It's

17 the same analysis he planned for that, and that's why it's

18 already disclosed in his report. It's not something that

19 he didn't foresee coming.

20 That's -- the December 2017 date forward, for

21 all applications, that is what he opined about in 2020 --

22 in this 2022 report; assuming that there would be only STS

23 accused, no Content Data Detectors, no CQSA.

24 He's responding to and providing an opinion

25 about an STS-only scenario.

1 Mr. Weinstein's new model. And that's really the

2 distinction here.

3 Mr. Weinstein's new model depends totally on

4 units. On cross-examination he admitted if the units were

5 wrong, the numbers were wrong. And that was squarely not

6 in front of Mr. Kidder in his 2022 report.

7 **THE COURT:** Okay. That was what I was asking,

8 and I appreciate the answer.

9 Counsel?

10 **MS. SRINIVASAN:** Your Honor, Mr. Weinstein's

11 model never changed. It has always been based on units.

12 And Mr. Kidder's responsive report is -- knew exactly what

13 Mr. Weinstein was disclosing.

14 In Paragraph 175 of his supplemental report, he

15 says he's been asked to consider -- and he's always had a

16 different model. He has a revenue-based model -- now, it

17 does apportion based on a number of installed units, and

18 we'll get to that.

19 But he's always had that model. Mr. Weinstein

20 always had a download-based model. But in Paragraph 175,

21 you can see -- and in the tables -- Paragraph 175, he

22 said, "I was asked to consider a scenario in which the

23 data of first alleged infringement was no earlier than

24 December 5, 2017, when STS was enabled to Android."

25 He says, "Under this scenario, the base of

1 **MR. PETERMAN:** Your Honor, Mr. Kidder --

2 **THE COURT:** So we've got multiple things going

3 on here. So we've kind of moved on from what we were

4 talking about with respect to these three slides. So...

5 **MS. SRINIVASAN:** Your Honor, with -- yeah, with

6 respect to those three slides, I think the issue is that

7 he was instructed to look at a December 2017 hypothetical

8 negotiation date for this alternative STS-only scenario.

9 And that's fine that he was instructed to use that.

10 Well, now he wants to say this is the reason

11 that date was chosen, there was a source code release,

12 there as maintenance release. That's not in his report.

13 There's nothing about that in there, even though he does

14 say he relies on this December report.

15 **THE COURT:** Right. But we've got two things

16 going on here that he's going to testify about. He's

17 going to testify about his own opinion, and he's also

18 going to testify about his reaction to your expert's

19 opinion. And so maybe that doesn't change what his own

20 opinion is, but certainly I think he should be allowed to

21 testify about his reaction to Arendi's opinion.

22 And these three slides, I don't have a problem

23 with. Let's keep going.

24 Actually, let me ask Ms. Garfinkel, do we have

25 all the jurors here?

1 All right. Let's take a break from this, and
 2 we will take it up later.
 3 Bring the jury in.
 4 **THE CLERK:** Yes, Your Honor.
 5 (The jury enters the courtroom at 8:44 a.m.)
 6 **THE COURT:** Please have a seat.
 7 Good morning, ladies and gentlemen of the jury.
 8 Please be seated.
 9 Welcome back. I hope everyone had a restful
 10 weekend. We are going to continue today with the
 11 testimony.
 12 Let's have Google call its next witness.
 13 **MS. ROBERTS:** Your Honor, Google calls
 14 Dr. Edward Fox.
 15 **THE CLERK:** Please approach.
 16 Please state and spell your name for the
 17 record.
 18 **THE WITNESS:** Edward Fox Edward, E-D-W-A-R-D,
 19 F-O-X.
 20 EDWARD FOX, having been called as a witness, being
 21 first duly sworn under oath or affirmed, testified as
 22 follows:
 23
 24 **THE CLERK:** Thank you. Please be seated.
 25

1 DIRECT EXAMINATION.
 2 **MS. ROBERTS:** Your Honor, may I approach with
 3 binders?
 4 **THE COURT:** Yes, please.
 5 **BY MS. ROBERTS:**
 6 **Q.** Good morning.
 7 **A.** Good morning.
 8 **Q.** Would you please introduce yourself to the jury.
 9 **A.** Good morning. My name is Edward Fox. I live in
 10 Blacksburg, Virginia with my wife of 51 years, and we've
 11 raised four children and occasionally have our four
 12 grandchildren visit us.
 13 **Q.** Did you prepare some demonstratives to assist with
 14 your testimony today?
 15 **A.** I did. I have an hour-long, a little bit shorter
 16 than some of the classes I teach.
 17 **Q.** Can you please describe your educational background
 18 to the jury.
 19 **A.** In 1965, I started taking courses at Columbia
 20 University and Stevens Institute of Technology. In 1967,
 21 I started at MIT, where I began as a math major. I wanted
 22 to work with computers. They didn't have a computer
 23 science program back then. And so when the
 24 electro-engineering department decided to offer a computer
 25 science elective, I switched to electro-engineering. And

1 so I worked in IT.
 2 I was really fortunate to have a good friend, Bob
 3 Frankston, who of the one of the two inventors of
 4 spreadsheets, and as my undergraduate advisor, I had a
 5 person named J.C.R. Licklider. He is often called the
 6 grandfather of the Internet because of his work leading to
 7 funding of the first Internet activities. Also, one on
 8 the founders in the field of hemorrhage computer tracks.
 9 So I had a wonderful mentor when I was undergraduate
 10 student at MIT in the electro-engineering department.
 11 **Q.** And did you obtain a degree from MIT?
 12 **A.** I finished my bachelors of science in 1972. I spent
 13 six years in South Carolina. My wife, who then was going
 14 to Harvard, had a wonderful job there, so I went to join
 15 her. And I spent a year teaching at a two-year college,
 16 and then I spent six years in a steel joist manufacturing
 17 plant running and developing software systems.
 18 I decided at that point that I had done all I could
 19 do and I wanted to pursue the field of information
 20 retrieval -- search engines, finding things -- then I
 21 started doing my bachelors thesis at MIT. So I picked
 22 Cornell University, where the world leader of the father
 23 of information retrieval was there so I could work with
 24 him. So I start in 1978 at Cornell university. I
 25 finished my master's in 1981 and my PhD in 1983.

1 **Q.** Can you describe your professional background for the
 2 jury?
 3 **A.** So tomorrow I finish the last class of my 40th year
 4 at Virginia Tech as a faculty member in computer science,
 5 and then I proceed with grading all of their student
 6 projects. There's twenty-two teams that I'm working with
 7 this semester in a Capstone computer science course.
 8 Along the way, I've served as a volunteer on a number
 9 of different editorial boards. One of boards I was
 10 elected to is the Computing Research Association board,
 11 which represents the computer research community for the
 12 whole U.S. In addition to that, I've, over the years,
 13 participated and helped assessing submissions and so forth
 14 at hundreds of conferences and workshops.
 15 And at Virginia Tech, I won a number of awards. One
 16 for teaching innovation, one for service, and most
 17 recently one as a commercialization champion because I
 18 worked with a lot of students filing different preliminary
 19 and patent applications, including one that's been issued
 20 so far.
 21 I've also working with my students and my colleagues.
 22 I've done a lot of publications of all different types and
 23 have been fortunate to travel all around the world giving
 24 talks. If you add all the numbers that are listed there,
 25 it's well over 1100. So many different things I've been

1 involved in.

2 Because of that, the Association for Computing, IEEE,

3 one of the professional societies, has designated me as a

4 fellow, as has ACM, the other big computer society that I

5 joined in 1967. ACM has also added me to the Academy for

6 Information Retrieval, which is the leaders in the field

7 of information retrieval.

8 Q. Are you being compensated for your work on this case?

9 A. Yes. I'm being compensated on an hourly basis.

10 Q. Do you have a financial interest in the outcome of

11 this matter?

12 A. No.

13 MS. ROBERTS: Your Honor, I'd like to tender

14 Dr. Fox as an expert in the art.

15 MR. LAHAD: No objection, Your Honor.

16 THE COURT: All right. Dr. Fox is accepted as

17 an expert.

18 BY MS. ROBERTS:

19 Q. Dr. Fox, what were you asked to do in this case?

20 A. I was asked to provide my expert opinion concerning

21 the validity of the asserted claims of the '843 patent and

22 as to the possible benefit of Arendi's inventions over the

23 prior art methods that existed.

24 Q. Can you please explain to the jury what work you did

25 to reach your opinions.

1 and whose thesis I studied as well.

2 Q. What opinions did you reach?

3 A. So my opinion is that the asserted claims of the '843

4 patent are invalid. And I base this on two things.

5 First, is that they were anticipated by the CyberDesk

6 system. In other words, Anind Dey did it first. Also,

7 they were obvious in light of three prior art systems.

8 For example, Apple makes this obvious through its data

9 detectors. And the three systems I considered are

10 CyberDesk, Apple Data Detectors, and very common thing we

11 all are familiar with, Microsoft Word, but back in 1997.

12 Q. Can you give the jury a high level overview of the

13 basis for your opinion?

14 A. Yes. There were four points that I wanted to make

15 about this. The first is that Arendi admits that the

16 so-called shortcut elements of the asserted claims were

17 well known in the prior art. And we'll talk about what

18 those are. But just to quickly summarize what they are,

19 they're listed here.

20 The first is that analyzing text to find types of

21 information. The second is providing an input device for

22 a user command to act on identified information. The

23 third is receiving from it an input device, a command to

24 act on identified information. The fourth is causing a

25 search for the identified information to find the

1 A. I did a lot of work starting in 2019 up until this --

2 up until this morning. I studied the '843 patent and its

3 asserted claims. I studied what's called the file history

4 or the prosecution history, which is a big binder that I

5 have sitting in front of me, which is all of the

6 documentation from the time the patent was filed until it

7 was issued.

8 In that, I noted there's a passage that points to

9 Arendi's Petition for Accelerated Examination Support that

10 it filed during the prosecution of the '356 patent, which

11 happens to share the same specification as the '843 patent

12 that we are considering in this litigation.

13 As I do with my students, I studied the prior art up

14 to the period of 1997 because I like them to know what

15 happened years ago. I also studied specific pieces of

16 prior art describing prior art systems. I studied the

17 deposition transcripts. We've heard testimony here from

18 Anind Dey, James Miller, and Atle Hedloy.

19 I traveled to California just as COVID was getting

20 started -- just made it out in time -- and inspected two

21 PowerBook systems, which we've heard about that James

22 Miller talked about and that he purchased and put software

23 on, so that I would understand the systems as they stood

24 from Apple Data Detectors. I also interviewed Mike

25 Pinkerton, who was a student at the same time as Anind Dey

1 associated information. And the fifth is performing

2 action, at least -- using at least part of the found

3 second information. These are all the pieces of this

4 so-called shortcut.

5 Q. What is the second important point supporting your

6 opinion?

7 A. The second point is that the '843 patent's

8 requirement to put instructions all in one program was a

9 very obvious choice and one of very few available design

10 choices. This makes clear and obvious argument, which

11 makes the patent invalid. But there's more; there's two

12 more points.

13 Q. All right. Can you tell us what the third important

14 point is?

15 A. The third point is that Arendi's principal argument

16 to the Patent Office that allowed it to get the patent was

17 that the prior art used instructions to set up the input

18 device and receive the user commands that were separate

19 from the document editing program. Arendi's invention

20 required the instructions for those actions to be fully

21 inside the first computer program.

22 Q. What is the fourth important point supporting your

23 opinion?

24 A. In spite of that, Arendi is now arguing that Google's

25 products are covered by the '843 patent's claims. You

1 heard last week from the experts who built the systems
 2 that Google's products use instructions that are separate
 3 from the document editing program.

4 Arendi's arguments contradict its statements to the
 5 Patent Office. If we apply these new arguments, then the
 6 '843 patent claims cover the prior art CyberDesk and Apple
 7 Data Detectors systems, and, therefore, make the patent
 8 invalid.

9 Q. So let's delve into those specific four points. What
 10 do you mean that Arendi admitted that the shortcut
 11 elements were well known in the prior art? What are the
 12 shortcut elements?

13 A. So we've looked repeatedly at the '843 Claim 23.
 14 We've seen it organized in different ways. To make it
 15 simple for our discussion, I've decided to break it up
 16 into eight parts, and I've labeled them A through H just
 17 to make it easy to refer to those things.

18 On the right-hand side, so we can clearly go through
 19 each one of these and see what's at issue, I've identified
 20 a checklist. If you look at the checklist, we see checked
 21 off in green are six of the eight things. Those are the
 22 ones that I refer to as the shortcut elements. This is
 23 all about connecting two things with a shortcut; that's
 24 what this is all about.

25 Q. So let's talk about the first prior art system you

1 audiences over a long period of time demonstrations of the
 2 system.

3 So this is like the class that I'm grading this week.
 4 I've had them give multiple presentations. I've
 5 interviewed the teams to ask what they're doing. I've had
 6 them turn in reports, different versions of their reports,
 7 and so that's how I've learned what the systems that
 8 they're building are all about. Very similar things here.
 9 A lot of evidence.

10 Q. Did the PTO review the full scope of materials about
 11 the CyberDesk system that you reviewed before the PTO
 12 issued the '843 patent?

13 A. It's my understanding the Patent Office looks at
 14 publications of patents; they don't look at systems.
 15 You're the ones who get to look at systems. So they
 16 didn't have all this other information that I had
 17 available, we've all here heard it at this Court in this
 18 litigation.

19 Q. Did the CyberDesk system disclose the shortcut
 20 elements?

21 A. Yes. They certainly did, and we can go through lots
 22 of examples to illustrate that.

23 Q. Why don't you walk us through the examples shown on
 24 this slide, 14?

25 A. So one of things we heard was one of the first

1 mentioned in the summary of your opinions, CyberDesk.

2 What is the CyberDesk system?

3 A. I'm going to recall to what's called "critical date."
 4 Things before that clearly are prior art.

5 So the CyberDesk system was a system developed as we
 6 heard last week in the testimony from Anind Dey starting
 7 in the fall of 1996, well before the critical date. It
 8 was developed. It was improved. New features were added.
 9 By the time of the second instantiation, which was well
 10 before the critical date, it had all the features that
 11 talked to claims of the '843 patent.

12 Q. What materials did you consider to understand how the
 13 CyberDesk system operated in the relevant time period?

14 A. So there -- to me, there's a preponderance of the
 15 evidence supporting CyberDesk system. There are five
 16 publications before the critical date. We've heard more
 17 than an hour of testimony from its inventor, Anind Dey,
 18 which teaches us all kinds of things that were not clear
 19 in those publications.

20 We heard from Anind Dey that he set up a website at
 21 Georgia Tech, which you can still go to and look at and
 22 see the things that are listed there, that describes all
 23 the work with the CyberDesk system. We also heard from
 24 him that he ran what were called presentations and demo
 25 days at Georgia Tech. He gave to a large number of

1 versions of CyberDesk system, and we saw this picture on
 2 the right-hand side taken from a conference paper. The
 3 CHI conference is the big event in the world of human
 4 computer interaction. I went to the 1999 CHI conference
 5 and gave a tutorial there. It's so big, I didn't want to
 6 go back. I don't like big things like that. But it's the
 7 way to go if you're in that field.

8 So in 1997, Anind Dey gave a presentation, and in the
 9 presentation, he talked about CyberDesk. There was also a
 10 paper in the proceedings, and taken from that paper we see
 11 on the left some of the wording exactly from that paper.

12 On the right-hand side, we see one of the figures
 13 from that paper. We've been through this by way of his
 14 testimony. I don't want to take a lot of your time, but
 15 just want to remind us what is said here.

16 So just sort of in short, what happens on the
 17 right-hand side is we have a web browser that, at that
 18 point in time was Netscape. Now we have Edge and Safari
 19 and other things. But in that browser window, there are
 20 sub-windows, parts of this that we see here. The top two
 21 are about the main part of the CyberDesk system. The one
 22 on the left is a service that is lets people do things.
 23 They can write messages and so forth.

24 In this particular example, we see a message being
 25 displayed. And in the top right, we see this input device

1 that we're talking about here. In this case, it's called
2 the ActOn button. You see a number of choices that people
3 can make. So the system is making suggestions of things
4 that they might want to do with first information coming
5 from the document editing program.

6 And on the bottom side, we see a couple of actions
7 and the screens that represent those actions that deal
8 with searching and doing different things. So if we just
9 read through -- and its all color coded to match this --
10 we begin with highlighting Gregory Abowd, which the system
11 is smart enough to figure out is a name. It's converting
12 that name to Abowd, Gregory, so it knows you can switch
13 first and last names when you're putting it in a different
14 order.

15 We see in the top right a number of things that we
16 can do. And the two that are highlighted in blue and
17 green correspond to the blue and green we see in the text.
18 So that, after we've highlighted this, the system causes
19 the ActOn button bar to suggest some actions that are
20 shown with the arrow A, so if we pop up that window, we
21 have those options.

22 The green says, one suggestion is to look up the name
23 in an available contact manager, which is B. So we see in
24 the bottom left, the contact manager with his name. We
25 can look at that up and get information based on the name.

1 architecture, the structure, the way the system is built.
2 It lets us look under the hood and see what's going on.
3 And it tells us kind of the steps that are gone through:
4 First we display, then we convert. The system then makes
5 a suggestion. The system then takes from the user their
6 choice, accepts it, and does some actions with it.

7 So these are sort of the main parts of what's going
8 on. There are components inside the system that implement
9 all of this -- the locator, the Intellibutton, the ActOn
10 button, and a set of services are all parts of what's
11 going on here. We see on the left-hand side corresponding
12 to our is to story the particular service that we're
13 concerned with, a mail reader. We will learn later that
14 that is not the only kind of service we can start with.
15 We can start with services where we can do editing in the
16 particular application. We see on the right-hand side,
17 again, corresponding just to this particular story, a
18 number of applications and things we can do that
19 correspond to what we saw on the ActOn button. So lots of
20 different services. That's one of the nice things about
21 CyberDesk is it can do a lot of different things. So this
22 specific example is to corresponding to what we saw, but
23 the architecture is more general and it can do more
24 things.

25 Q. Are there any other ways that CyberDesk disclosed

1 Also, Anind decides -- discovers that he doesn't have
2 Gregory's phone number, so he decides to follow another
3 suggestion and initiates a search using the switchboard
4 web service C. So if he picks the blue option to the
5 ActOn button window, he goes off this particular system to
6 another program elsewhere in the web, the switchboard
7 service, which returns the second information that relates
8 to the first information, we see Abowd, Gregory D. We get
9 his middle name. We see his address. We see his phone
10 number. So we picked up all this extra information, and
11 the action displays this for us.

12 So this is just kind of a reminder, and if we
13 interpret this based on what we heard, that we're teaching
14 all the shortcut elements. And to make this clear, to
15 remind us of those things A through H that I pointed out
16 before, in the bottom right of the screen, you see in red
17 I ticked off A, B, C, D, F and H. So that is the six
18 shortcut elements out of the eight that we are concerned
19 with.

20 Q. Can we go to the next slide, and can you explain to
21 the jury what this shows.

22 A. Sure. So also from this CHI '97 paper, we saw on the
23 left-hand side the text that we've gone through that's
24 from that paper. Another figure in the paper, Figure 3,
25 is shown here on the right-hand side. This represents the

1 shortcut elements?
2 A. So if -- what wasn't clear from looking at that
3 particular example from the left-hand side it said mail
4 reader, and one was wondering if this actually could
5 correspond with the Court's claim construction of a
6 document and a first computer program, we can see from the
7 testimony that we heard last week from Anind Dey, the
8 question was: "So, for example, when you were talking
9 about an e-mail, when it could pull text from an e-mail,
10 was it possible that a user could be working in an e-mail
11 when the text was selected for the CyberDesk to work?"

12 And the answer is, "Absolutely."

13 So this teaches us that the first computer program
14 could be a first computer program according to the Court's
15 construction. It doesn't have to be a mail reader; you
16 can go with editing tools as he said. I wouldn't have
17 known if I just looked at the publication. I had to hear
18 from him to understand that.

19 Q. Are there any other ways that CyberDesk disclosed
20 shortcut elements?

21 A. Yes. When we looked at the '843 patent, we see that
22 one of the things it talks about is a kind of letter
23 functionality where you can also take the information and
24 put it into a letter. So here we see from testimony,
25 again, that we heard last week, a question and answer,

1 which I'll read just to make this clear: "Did you ever
2 come up with a version of CyberDesk that allowed the user
3 actually to automatically insert any of the text that was
4 found by CyberDesk?"

5 And the answer includes: "Absolutely, absolutely.
6 The example that comes to my mind is a text editor." So
7 we see that we can insert text into the working document
8 according to his testimony. Again, this wasn't clear from
9 just looking at the publication.

10 We also see that we've checked off some of the
11 elements that we see in the bottom right there in this red
12 box.

13 Q. Are there any on any other ways that CyberDesk
14 disclosed the shortcut elements?

15 A. So I mentioned that Anind Dey, he explained that he
16 set up a website, and in the web site, he described a
17 system with a lot more detail than appears in any of the
18 publications. When we look at the publications, it
19 mentions numbers of things that were services, but here we
20 actually see a list of the services that were included
21 here.

22 And we see in the highlighted section a number of
23 things that were given an address, in particular they
24 allow us to retrieve a map. Among the options we see here
25 for retrieving a map, in the bottom right there's one

1 having a service like that is very useful. A lot of
2 people aren't very good about history. My wife was a
3 history major in college. So this next one in the middle
4 is about for a given date, finding date history. So we
5 can put things in perspective, learn about interesting
6 events.

7 Q. And if we turn to the next slide can you explain why
8 you've included this slide?

9 A. So here we see, again, from Dr. Smedley's example
10 about looking at flight information. So this is another
11 type of information besides just contact information that,
12 again, was -- similar things done on the CyberDesk system.

13 Q. And the list of network services that we just looked
14 at on the prior slide and the earlier slide, is that
15 information included in the -- any of the publications and
16 articles you reviewed about CyberDesk?

17 A. So if we just look at the publications, it's hard to
18 understand all of this. We need to have this additional
19 information that we get from the website and we get from
20 the testimony, for example.

21 Q. Now, what did you mean when you said that Arendi
22 admitted that the shortcut elements were available in the
23 prior art?

24 A. So we've heard from discussion of the prior art about
25 the shortcut elements. But also, Arendi, the applicant,

1 called MapQuest, which is something I sometimes use along
2 with google Map and Apple Map.

3 Also, if we go to the very top where the first yellow
4 thing here is, and if we read the fine print, there's
5 another one about doing a search for e-mail address. So
6 lots of examples of kinds of things that you can search
7 for that were explained by way of the CyberDesk system
8 through this particular page on the website.

9 Q. If we could go to the next slide, could you explain
10 to the jury why you included this slide in the
11 presentation?

12 A. So we heard from Dr. Smedley about looking up an
13 address and finding information and going to a map. So I
14 just wanted to remind us that this is what we saw in the
15 CyberDesk system as well.

16 Q. And can we go to the next slide and can you explain
17 to the jury the network services you've identified here?

18 A. Yes. So also in this long list of services that you
19 could do with the CyberDesk system, there were a number
20 here highlight in yellow. This is the same list we saw
21 before, but I've highlighted a few others. It's very
22 small print. We see three things here. The first and the
23 third have to do with words, looking up words in
24 dictionaries. A lot of my students can't spell very well,
25 so I encourage them to pick good words and so on. So

1 Atle Hedloy, working through his attorneys, filed work
2 with the Patent Office. And in the file history, when I
3 looked through that, I saw a reference on the bottom of
4 one of the pages, and I'll read what it says here:

5 "Applicant notes" -- that's Arendi or Atle Hedloy -- "that
6 application Serial Number 12/841302, also before the
7 examiner, and the prior art references analyzed in the
8 accelerated examination support document, or AESD, of
9 July 22, 2010, are of particular interest in relation to
10 the present application."

11 So Arendi is pointing to the Patent Office that they
12 should look specifically at this document to understand
13 the '843 patent.

14 Q. All right. You mentioned the file history. Can you
15 just remind the jury of what the file history is?

16 A. I think one of these books here is that. I think
17 this big one here.

18 Q. If you look at DTX-2.

19 A. Okay. So this big thing, read through all of this
20 several times. It includes the original submission. It
21 includes interesting pages like the things that the Patent
22 Office was given but didn't look at. Lots of interesting
23 things here.

24 MR. LAHAD: Your Honor, I object to that.

25 THE WITNESS: Excuse me?

1 THE COURT: That objection is sustained. You
2 can disregard the last portion of the answer. So
3 disregard -- disregard all of answer.

4 BY MS. ROBERTS:

5 Q. If you could just hold up the binder for the jury so
6 they can see what you are referring to.

7 Thank you.

8 So what did Arendi say about the prior art references
9 in the AESD?

10 A. So in the AESD, if one looks into that, which I think
11 is another one of these binders. Yes. So this is another
12 big binder. This is the AESD document that I looked at.
13 And if I look into the table of contents, at the beginning
14 part, I see there's a reference to Page 114. And if I go
15 to Page 114, which is, I think, on the next slide, we see
16 part of what Arendi told the Patent Office.

17 So I'll read the highlighted sections on this page:
18 "The Dey reference describes a tool called CyberDesk.
19 CyberDesk is a framework that supports the automatic
20 integration of various software applications. In another
21 example, the user highlights a name in the e-mail message,
22 and CyberDesk offers various options that are specific to
23 the name, e.g., look up the name in a contact manager."

24 So if we just think about the things that are listed
25 here -- and, again, I should point out that Atle Hedloy in

1 the first day of the trial testified specifically that
2 this came from applicant to the Patent Office. If we look
3 at those things, we see in the bottom right-hand side,
4 again, I've checked off the six shortcut elements that are
5 confirmed by the statement from Arendi.

6 Q. Let's turn to another system that you mentioned
7 earlier, Apple Data Detectors. What is Apple Data
8 Detectors?

9 A. So if we go back to our timeline, we see that before
10 the critical date, there were -- we see at sort of the
11 bottom section there, there were two demonstrations to
12 very large public audiences about Apple Data Detectors.
13 We saw the videos last week. Big shows, lot of people
14 there, public disclosure of their exciting invention.

15 So this is the beginning part of our discussion with
16 regard to Apple Data Detectors.

17 Q. What materials did you consider to understand how
18 Apple Data Detectors operated in the relevant time period?

19 A. So we heard last week from Jim Miller, his testimony.
20 I went through his deposition and studied that in detail.
21 You've seen a part of that. As part of his deposition, we
22 saw the two videos: One at the Macworld conference in
23 San Francisco, and one at the Macworld conference in
24 Boston. So we saw both of those demonstrating that.

25 There were a number of publications I studied before

1 the critical date. And as I mentioned before, I went to
2 California and spent a day working with Apple devices to
3 understand Apple Data Detectors and try that myself.

4 Since he had gone to the trouble of buying a computer
5 and putting the software that he kept from years before
6 onto it. So I wanted to see how this worked.

7 Q. Did the PTO have all of the materials that you
8 considered regarding Apple Data Detectors available to it
9 before the PTO issued the '843 patent?

10 A. No. It's my understanding the Patent Office just
11 looks at publications and patents. They don't look at
12 this other kind of information.

13 Q. Did Apple Data Detectors disclose the shortcut
14 elements?

15 A. Yes. And I'll show you this in a few slides, just to
16 kind of remind us from these videos. So the first of
17 these video presentations slides shows us the Wall Street
18 Journal article, looked at in a browser on a computer
19 system. We see highlighted in yellow, the whole article.

20 And if you recall from the video, there was a flash
21 because the computer very quickly went through and
22 analyzed the entire publication in this Wall Street
23 Journal article and picked out what we now call "named
24 entities," things, names, addresses, and so forth.

25 So Frank Casanova, the person who was giving the

1 demonstration, was explaining this. And then he went on
2 to say, as we see in the next slide, that the system,
3 because of this flash of analysis, picked up those things
4 and gives the user a number of choices of things that they
5 can do with this.

6 Because its kind of fuzzy to read this at a distance,
7 on the right-hand side, I put in Jim Manzi's information
8 just so we can see this. So Jim Manzi, we have his e-mail
9 address and his phone number. So we see from the analysis
10 of this, that this pop-up menu or contextual menu is shown
11 on the screen for the user, and it gives the user five
12 choices of things to do. Browse, and it gives the web
13 address that it picked up for the Wall Street Journal
14 article and its website. You see at the bottom a phone
15 number that it picked up, the phone number as well.

16 We see second place, and then it has the block for
17 Jim Manzi and his address out of quote, "experiences," in
18 Now Contact, which is a contact book you put this and
19 store this information in.

20 We can send mail to manzi@lotus.com, so we can email
21 a message. And then highlighted in black there, a little
22 bit harder to read, is write a letter to manzi@lotus.com.
23 The post office wouldn't appreciate getting a letter
24 addressed with manzi@lotus.com on the envelope, so the
25 system goes through and does a search -- go to the next

1 slide -- looks up this e-mail address in a contact book,
2 in an address book, for the entry that we see here. And
3 it finds that information and picks up this second
4 information, additional information it learned based on
5 just using the e-mail address.

6 And given that information -- if we go to the next
7 slide -- and you can see this "write a letter"
8 functionality, very similar to what we see in the '843
9 patent, where it's popped up -- when we were processing
10 the document, and it's populated that document with text.
11 To make it clear, I put this on the right-hand side.

12 So we started off with manzi@lotus.com. It found
13 additional information. It found his company, found his
14 address, it figured out his first name, and put all this
15 stuff into the "write a letter."

16 So it did all this stuff to provide a shortcut to
17 help us do things more efficiently.

18 Q. And on the bottom of that slide, I see the letters in
19 the red box. Can you remind the jury of what that means?

20 A. Yes. So again we see the six shortcut elements are
21 ticked off: A, B, C, D, F, and H. So we've seen multiple
22 times that these things are taught.

23 Q. Did Arendi address Apple Data Detectors with the
24 Patent Office?

25 A. Yes. In this same AESD document that we talked about

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1 the six things we've gone through repeatedly from both the
2 prior art and their descriptions, as well as from Arendi's
3 own statements.

4 So we're definitely sure, lots of evidence to confirm
5 the shortcut elements are being taught.

6 Q. In light of your discussion of what was available in
7 the prior art, what was new and nonobvious in the '843
8 patent?

9 A. In order to get a patent, one must say something new.
10 That is, new and nonobvious. So Arendi has explained that
11 Elements E and G, the things shown here in green, are the
12 things that were new and nonobvious. That was how it was
13 able to get its patent.

14 Q. When you say that this is what Arendi explained, what
15 do you mean by that?

16 A. So if we go back to this AESD document that was given
17 to the Patent Office by Arendi, we see more discussion in
18 the sections about CyberDesk and ADD. So I will read the
19 description here that goes to the CyberDesk. This is what
20 Arendi told the Patent Office about CyberDesk so that they
21 would understand Arendi's view of what CyberDesk is.

22 "Among other things, the Dey reference does not
23 disclose contact information handling implemented by a
24 document editing program. For example, Dey does not
25 disclose analyzing selected textual information by the

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1 before, we go to the table of contents, we see entry on
2 Page -- referring to Page 111. And if we go to the next
3 slide, we'll see Page 111, which is a summary of the
4 discussion that Arendi gave to the Patent Office about the
5 Apple Data Detectors system.

6 Q. What did Arendi say to the Patent Office about the
7 Apple Data Detectors system in the AESD?

8 A. So I will read the highlighted section here. "ADD
9 starts when a user highlights text in a word processing
10 document. ADD then analyzes the text to determine whether
11 it recognizes some portion of that text, as for an
12 example, an e-mail address or web address. The user can
13 use a contextual menu to initiate an action that is
14 related to the recognized data."

15 So this is a summary of what we've talked about as
16 the shortcut elements that we see again. I've ticked
17 those off on the bottom right-hand side.

18 If you recall from the first day of this trial, Atle
19 Hedloy confirmed that this was given to the Patent Office.

20 Q. Now, how did your analysis of the shortcut elements
21 of the prior art and Arendi's discussions of it impact
22 your overall analysis?

23 A. So if we go to the next slide, we get reminded of the
24 Claim 23 elements. And we see in this particular case,
25 that the six shortcut elements are ticked off. These are

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1 document editing program as required by the claims.
2 CyberDesk itself analyzes text highlighted by the user,
3 and CyberDesk is separate from any document editing
4 programs. Indeed CyberDesk is the framework that
5 integrates various applications."

6 So it's telling us about CyberDesk, but noted here
7 with big red highlight section here is the word
8 "separate." That's the main distinction that it's given
9 with regard to the CyberDesk system, to distinguish the
10 '843 from CyberDesk.

11 And, again, we heard on day one of this litigation,
12 Atle Hedloy testified that this was given to the Patent
13 Office.

14 Q. Did Arendi make any similar statements about Apple
15 Data Detectors to the Patent Office in the AESD?

16 A. Yes. So also in this document, we go to the red
17 section, I read part of it, that continues on with more
18 about Apple Data Detectors. "Among other things, ADD does
19 not disclose analyzing selected textual information by the
20 document editing program as required by the claims. Also,
21 ADD does not disclose providing an input device configured
22 by the document editing program as required by the claims.
23 Instead, ADD itself is a part of the operating system, and
24 it analyzes the selected textual information and
25 configures any input device. As ADD is a part of the

1 operating system which is separate from the document
2 editing program, ADD does not meet the limitations of the
3 claims."

4 So again, we see the word "separate." This is the
5 big distinction that's being drawn. We also saw that --
6 it's explained that it's part of the operating system.
7 Just remind to us from last week when we talked about the
8 Android operating system.

9 We also notice that was testified to by Atle Hedloy
10 on the first day of the trial, as I show in the bottom
11 right side.

12 Q. If we can go to the next slide, can you explain to
13 the jury what this image is supposed to show?

14 A. Yes. So having started working with computers in
15 1965, I have a built lots of systems and taught my
16 students to build lots of systems. Sometimes they build
17 small things, sometimes they build big things. Some of
18 the bigger systems we build get so big it's really hard to
19 learn them, so we split them up.

20 So many of the things I built since the 1980s are
21 distributed systems.

22 So it was well known in the '80s and earlier, that
23 the two ways to build software are to make a big thing or
24 to have a lot of pieces and fit them together. So then we
25 get the approaches that were used, Approach 1 and

1 Approach 2.

2 So Approach 1 is to build something and add
3 additional features and stick it in that. And systems
4 like Microsoft Word are examples of the way that happens.
5 But nowadays, especially -- and certainly back even in the
6 '80s and the early '90s, many of us would build things
7 that ran on multiple computers and talked to each other
8 and utilized the Internet and the web and all that kind of
9 stuff. So we split things up into different pieces.

10 And when we did that, it was like in mathematics
11 where you factor something out. Something you're going to
12 use a lot, you put it off in one side, and other things
13 make use of it. This is the tool I showed you.

14 Q. And the one where you factor things out that you just
15 described, is that Approach Number 2 on this slide?

16 A. That's right. I'm calling that Approach Number 2.

17 Q. If we can turn on the next slide, can you explain
18 this image to the jury?

19 A. So what we heard from the AESD is that Arendi argued
20 that its method was Approach Number 1. In the '843
21 patent, it took Microsoft Word and put extra things into
22 that. So that shortcut capability was built into that
23 particular program. And that's what it claimed.

24 And when it distinguished in the AESD other work and
25 said that they made things separate, which is Approach

1 Number 2, we see on the right hand.

2 And Arendi has made clear that it views that both
3 CyberDesk and Apple Data Detectors took this separate
4 approach, Approach Number 2.

5 Q. How are Arendi's argument to the Patent Office
6 relevant to your analysis?

7 A. Well, there are two points that tie into this.
8 Arendi is accusing Google's apps, even though the
9 instructions that set up the input device and receive the
10 user command are separate from the apps, as we've heard in
11 testimony here.

12 If Arendi is right about that argument, then that
13 means that the patent covers CyberDesk and ADD, and
14 therefore the patent is not valid.

15 Q. If we can go to the next slide, can you explain this
16 next image for the jury?

17 A. So we've talked about Approach Number 1 and Approach
18 Number 2. They are different kind of approaches. It
19 would be obvious to do either one of them depending on the
20 circumstance. We heard from Arendi, through the AESD,
21 that it distinguished its work and said it did Approach
22 Number 1.

23 Now instead of staying with what it's talking about,
24 it's overreaching. It's claiming other things that it
25 didn't do. And so it's claiming Approach 2 as well,

1 according to Dr. Smedley we heard last week.

2 Q. Now, let's go back to the summary of your opinions.

3 Can you please explain the basis for your opinion
4 that the CyberDesk system anticipated the asserted claims?

5 A. Yes. So what I've explained is that the CyberDesk
6 system anticipates, and also later on we'll talk about the
7 obviousness argument.

8 But let's go to the next slide and talk about what
9 anticipation means. I'm not really very good at bowling.
10 It's very rare that I get a strike, but that's what
11 anticipation is like. You have one ball and you knock it
12 all down.

13 So CyberDesk taught it; did it before. It
14 anticipates. That's the terminology.

15 The other kind of thing which is more likely for me
16 if I'm lucky to do this, is to get a spare to have a few
17 balls that together knock things down.

18 So the obviousness arguments are like having a spare.

19 Q. Can we go to the next slide, and can you explain to
20 the jury why you included this slide?

21 A. So I'm using this slide as a reminder just because
22 it's good for us to keep remembering this particular thing
23 that was taught at the big CHI conference in 1997. There
24 is more that goes on besides what is described here, but
25 it helps us to just have a picture to refresh our memory

1 and to have some text to refresh our memory.

2 So keeping this in mind, then we will go to the next

3 slide and explain in detail about the anticipation case.

4 So I wanted to just remind us about that.

5 So if we go to the next slide, we can sort of walk

6 our way through how the CyberDesk system anticipates all

7 of the elements of Claim 23.

8 Q. All right. Can you go ahead and walk the jury

9 through that anticipation analysis?

10 A. So I won't go through all the same detail we heard

11 from Dr. Smedley, but I will go through each of these

12 elements.

13 The first one, A, talks about the non-transitory

14 computer readable medium. So on the website for

15 CyberDesk, there's an option for you to get a single

16 version, standalone version of the CyberDesk system.

17 So you can go there and download the whole thing.

18 And then you can load it into your browser. You put in a

19 HTML page. It brings in all these, what are called

20 "applets."

21 And so now you have your browser, as we saw in that

22 window. The browser has all these parts of it, everything

23 is running inside the browser. The browser is a program,

24 and these applets are a part of that. They're running in

25 that situation.

1 We saw before, from the website and from the

2 demonstration, lots of things can be searched for. So

3 many different things can be searched for. So this gives

4 us Element Number C.

5 It found that name, that highlighted name. So it

6 retrieved it. So that's also covered. That's Element D.

7 And then we saw it provides an input device. So part

8 of this program shows us an input device, the ActOn button

9 bar with a bunch of different options. So it's providing

10 an input device. It's configured by this browser with all

11 this stuff, CyberDesk running in it. So it is configured

12 by the first computer program.

13 And what this ActOn button does is covered in F. And

14 there's a bunch of stuff here. It can do a search to --

15 for at least using -- at least part of the first

16 information, whether it's using the name. So that's part

17 of the first information. To find second information,

18 it's calling for options to go off and find additional

19 information given that first information. Find other

20 things that relate to that name, to Gregory Abowd.

21 And it's -- the type or types of the second

22 information are dependent at least in part of the type or

23 types of first information. So we have a name and we're

24 going to find things that depend on a name. So we get

25 street addresses, and we get phone numbers, we get other

1 So this is one way to think of it, according to the

2 Court's construction, the browser with all the applets,

3 all running in it, is self-contained, set of instructions

4 to do tasks.

5 So we have our computer system. We've loaded it from

6 outside, from another place, a non-transitory medium, and

7 it's now running in a computer. And this whole thing is

8 the first computer program. So that's the first part.

9 Part B is displaying the document electronically

10 using the first computer program. Browsers display

11 things. They display programs where you can make edits,

12 as we heard from Anind Dey. So we see the -- in the top

13 left of that picture that I showed you before, document.

14 So this teaches us Element B.

15 Elements C is while the document is being displayed,

16 doing analysis of the document information and finding

17 first information, that we saw Gregory Abowd -- was the

18 first information that was highlight there. So that's the

19 first information. And it's being analyzed in a computer

20 process. That's part of what CyberDesk does behind the

21 scenes. It's doing this analysis. Very smart system to

22 do all kinds of things like that.

23 And it can recognize a lot of different kinds of

24 information. So we have the plurality of types of

25 information that can be searched for.

1 kind of things that we saw in the demonstration.

2 And then the last thing is, setting this up to take

3 an action. So F is setting up this button to do all this

4 stuff. So we clearly covered all of that.

5 G is the step that actually does something with this

6 button. So the user clicks on something, and we saw the

7 user clicking on different things, getting different

8 results and actions. One of those was going to the second

9 computer program called "Switchboard," which is running

10 somewhere else in this -- I think it's a separate program.

11 It picks up the information, picks up the street address

12 and phone number and so forth for Gregory Abowd. So it's

13 getting additional information to find the second

14 information that's related to the search term to the name.

15 So that gives us Element G.

16 And Element H, if searching finds any second

17 information related to the search term performing the

18 action using at least part of the second information. So

19 we saw in the window we popped up this Switchboard that

20 showed us all this extra information. So the action is

21 displaying all that information to us.

22 So CyberDesk anticipated the claims of the '843

23 Claim 23, as we said. We can check off all these boxes.

24 And furthermore, if we want to, we can look at Elements E

25 and G, and say that Dr. Smedley also told us that that

1 would be covered by what he said was being claimed.

2 **Q.** Did you consider Claim 30 in your anticipation

3 analysis?

4 **A.** So using Dr. Smedley's argument, we can see that

5 another way to think of the CyberDesk system teaching

6 this, is by looking at the different applets. And we see

7 in the picture on the next slide, shown off in yellow is a

8 content page which has -- if you look really in the fine

9 print, you see Andy Wood is the -- is in this to find

10 information. And there's additional information about

11 that.

12 And you see on the bottom, there's a little button

13 that says "New Contact." So to explain this, and Claim 33

14 says "Providing a prompt for updating the information

15 source to include the first information." This whole

16 display is a prompt, as is the new command button there.

17 And we have confirmation of this that was taught by Anind

18 Dey.

19 And a user could add a new contact as well. And he

20 says correct. So this also teaches us Claim 30.

21 **Q.** And so just to be clear, what's your conclusion with

22 respect to whether the CyberDesk system anticipates

23 Claim 30?

24 **A.** Yes. As we just said, it anticipates Claim 30. And

25 I went through in detail and pointed out how Claim 23 is

1 entry that says Apple Data Detectors home page. So

2 CyberDesk is pointing us to look at Apple Data Detectors.

3 So just following that, we would be motivated to make a

4 combination of those two different things.

5 The other part of the screen on the bottom right we

6 see a screen from Apple Data Detectors. And if we look in

7 the picture there, we see that this is clearly a word

8 processing document. In the top in parentheses it also

9 says WP for word processing.

10 So apple Data Detectors tells us to think about word

11 processors and clearly that would lead us to something

12 like Microsoft Word. At that time, it was Word '97.

13 **Q.** What is the first combination that, in your opinion,

14 makes the asserted claims obvious?

15 **A.** So we heard about two systems, CyberDesk and ADD.

16 We've seen CyberDesk points to ADD. So that would

17 motivate us to want to combine those things, and that's

18 one of the combinations.

19 **Q.** Can we go to the next slide and can you explain this

20 slide to the jury.

21 **A.** Yes. So we start off with CyberDesk, and we want to

22 combine and add in ADD and its functionality. So we've

23 heard before, in going through for the CyberDesk system,

24 which of the element are checked off. If there was any

25 question about element number H, then we can show that

1 also anticipated.

2 **Q.** Turning back to the summary of your opinions, let's

3 move on to obviousness.

4 Why would a person of ordinary skill in the art be

5 motivated to combine the prior art systems that you are

6 relying on for this opinion?

7 **A.** So for something to be obvious, you have to be

8 motivated to make the combination. So if we go to the

9 next slide, we'll see that in addition to many other

10 reasons for wanting to be motivated to make the

11 combinations that we're talking about, that were explicit

12 instructions in the documentation that were available that

13 would guide us to do that.

14 So if we look at the description on the left-hand

15 side of that CyberDesk, we see three different things. In

16 the top sort of center, we see a list of desktop services

17 that were supported by CyberDesk. Highlighted in yellow

18 is one that says, "Simple Notepad." Simple Notepad is a

19 word processing document.

20 So if one thinks of word processing documents, one

21 would think of Microsoft Word. So we pointed to, by way

22 of that, to think about Microsoft Word.

23 Also, we can see in the bottom left and top right, in

24 publication -- some of the publications that describe

25 CyberDesk, we see in the references there's an explicit

1 this was supported by ADD as an additional combination.

2 So if we look at the example here of the question

3 mark, just in case there's any doubt about the CyberDesk

4 teaching element H.

5 So if we go to the next slide, we get reminded of

6 Apple Data Detectors "Write a Letter" functionality.

7 Again, this is working with word processing things and

8 making insertions in them and so forth. So this reminds

9 us, and we saw this earlier, so this confirms that with

10 ADD, we also have element H.

11 **Q.** What is your conclusion, then, with respect to the

12 combination of the CyberDesk system with the Apple Data

13 Detectors system?

14 **A.** So before I had a question mark in the bottom one,

15 now I have a red check mark to show that's also checked

16 off if we added ADD.

17 I also wanted to remind us, because there's a lot of

18 important terminology in this patent. I have gone through

19 this and explained it, and we've talked about this and

20 it's been testified about, but the word "document" is a

21 very important one. So I just wanted to point out that

22 clearly we're seeing editable documents in our examples.

23 **Q.** Are there any other combinations that, in your

24 opinion, render the asserted claims obvious?

25 **A.** So we looked at CyberDesk plus ADD. We can reverse

1 it and look at ADD plus CyberDesk, to be symmetrical. So
 2 if we go to the next slide, we see -- and this reminds us
 3 that we've had the shortcut elements being taught by ADD.
 4 We checked those six things off.

5 So if we go to the next slide, we see that if we make
 6 a combination -- I tried to put checklist here to make it
 7 even more clear. ADD has the six things there, and we
 8 know that CyberDesk has all eight things there. I went
 9 through them one by one to show that. We also have
 10 Dr. Smedley's argument that those two things would have
 11 been filled in.

12 So combining these two, put the checklist together,
 13 we have all of the limitations taught by this obvious
 14 connection.

15 Q. Did you consider whether the CyberDesk system and the
 16 Apple Data Detectors system would render Claim 30 obvious?

17 A. Yes. So Claim 30 gives us the additional requirement
 18 of providing a prompt for updating the information source
 19 to include the first information.

20 So we hear two examples here, and I showed this
 21 earlier, Anind Dey, in response to the question: "And a
 22 user could add new contact as well?" He says, "Correct."
 23 And you see here, in the example in the bottom right, this
 24 window where you can click on the button that says "new
 25 contact."

1 put in Test Name One as the name to associate with this.
 2 I hit the "okay" button, and then what appears on the
 3 screen is shown on the top right here, where it says, "The
 4 e-mail address has been installed in Claris e-mailers
 5 address book." So then Claris e-mailer was also running
 6 on that laptop. And it's taken the e-mail address plus
 7 the name I've added to it and inserted that into the
 8 address book. This is another example of teaching what
 9 Claim 30 talks about.

10 Q. And just to be clear, this is an example of which
 11 system teaching Claim 30?

12 A. Apple Data Detectors.

13 Q. And can we go to the next slide and can you explain
 14 what's shown here to the jury.

15 A. So this is yet another photograph that was taken when
 16 I was working with these Apple Data Detectors running
 17 systems. This is another contact file that shows contact
 18 information and it gives us -- because of having, like,
 19 field, prompts to fill things in. So this is a prompt for
 20 updating the information source. This is another example
 21 that Apple Data Detectors gives us of teaching Claim 30.

22 Q. Are there any other combination that, in your
 23 opinion, would make the asserted claims obvious?

24 A. Yes. So the other two combinations are connecting
 25 stems with Microsoft Word. The first one we see here is

1 Q. Can we go to the next slide? What is this slide
 2 showing?

3 A. So when I was working with the PowerBooks that we see
 4 here in court, we heard about last week, there were
 5 several pictures taken, as I was working through this,
 6 just to understand how the system works.

7 So regarding Claim 30, it's very clear from these
 8 three different pictures how this would work. So the
 9 picture on the top left has a word processing document
 10 called -- in the program called Notepad, which is an
 11 editing program, or document editing program. We see in
 12 the top right of the screen there a document. And I've
 13 highlighted "testOne@apple.com." So that's the first
 14 information that's been highlighted.

15 And the system, as a result, puts up this pop-up menu
 16 which we see there, a long list of things that I can do,
 17 one of which is highlighted in red, says "Add e-mail
 18 address to e-mail address book." And then it says --
 19 repeats the first information that I've highlighted,
 20 "testone.apple.com."

21 So when I click on that, I get to another display,
 22 which I show a photograph for in the bottom center of
 23 this. And reading what it says there, "What user name
 24 should be associated with this e-mail address?" So the
 25 e-mail address is testone@apple.com. I say, Well, let's

1 CyberDesk plus Word, and the second one we see on the next
 2 slide is Apple Data Detectors plus Word.

3 Q. When was Microsoft Word '97 publicly available?

4 A. The alpha version that did all the same stuff was
 5 available 1996, became available from Microsoft early in
 6 1997. Copyright comes from 1997.

7 Q. What is the basis for your opinion that the
 8 combination of the CyberDesk system and Microsoft Word '97
 9 and a combination of Apple Data Detectors and Microsoft
 10 Word '97 would render the asserted claims obvious?

11 A. To save us time, I put them all in one slide. This
 12 goes for CyberDesk and also for Apple Data Detectors.
 13 Both of them, we've learned repeatedly, they practice the
 14 shortcut elements. They cover the six things that are
 15 checked off in green.

16 The question we've been discussing is about the other
 17 two elements, Elements E and G. So I put a question mark
 18 there to see how can we show, how do we learn, how do we
 19 understand that it's obvious that these things would have
 20 been taught by this combination.

21 So if we go to the next slide, we get reminded of
 22 this picture we've seen before. I have Approach Number 1,
 23 which is the one that we've been hearing about from
 24 Arendi. And back in the day when I used Microsoft Word
 25 '97, and I wanted to make sure that I didn't spell things

1 wrong, because that's not very good as a professor, I
 2 could use the spellcheck capabilities that was built into
 3 this.
 4 Much earlier, when I first started with computers,
 5 the computers were much smaller. We couldn't do as much
 6 in them. So I used a separate program called Spell, which
 7 did spell checking. It was much more convenient in Word
 8 '97 to have it built into the word processor.
 9 So Approach 1 is an example of Microsoft Word with
 10 something built into it. Remember this is different from
 11 Approach 2, where we have CyberDesk and Apple Data
 12 Detectors following this separation approach, factoring
 13 these out.
 14 Q. So can we go to the next slide and can you tell the
 15 jury what you are showing here?
 16 A. So obviousness combinations mean combining things and
 17 it doesn't mean that you take this bunch of software and
 18 this bunch of software and cram them together. It means
 19 that you can take functionality, the ideas, the
 20 methodology of something and put it into something else.
 21 So if we take this CyberDesk shortcut functionality,
 22 which they programmed, move it into other programming
 23 packages, add it into Word -- it's easy to put stuff into
 24 Word back in the day. So if you take the shortcut
 25 functionality, you put this into the Microsoft Word

1 CyberDesk system. In other words, Anind Dey did it first.
 2 They were also obvious, through these various
 3 combinations, including the work from Jim Miller with
 4 Apple and Microsoft Word, for example, as we've talked
 5 about.
 6 Q. What are secondary considerations of nonobviousness?
 7 A. In addition to thinking about obviousness, there are
 8 other things to consider with regard to obviousness.
 9 These are referred to as secondary considerations.
 10 There's a list of these that are shown here. I have put
 11 them and numbered them 1 through 9 for the sake of
 12 discussion.
 13 Q. Can we go to the next slide.
 14 Can you tell us how the secondary considerations of
 15 nonobviousness impacted your obviousness conclusions, if
 16 at all?
 17 A. So I considered them and I reaffirmed that the
 18 obviousness combinations that I've identified apply.
 19 These secondary considerations don't have impact on my
 20 decision and my opinion.
 21 So when I wrote my first report, I made a statement
 22 of that. And in the response report, and you will hear
 23 later today from Dr. Sacerdoti, who wrote a response
 24 report. He didn't say anything about most of the things
 25 that I talked about. So he did consider a few of those --

1 system, that combination would teach us all the elements.
 2 Q. And if we go to the next slide, can you explain that
 3 to the jury.
 4 A. The same kind of thing, we have Apple Data Detectors,
 5 and we take the key functionality, this shortcut
 6 functionality we've talked about, and we add that into
 7 Microsoft Word. And again, this combination, very much
 8 like what was done in the '843 patent, would teach us
 9 this. This was an obvious thing to do. You have two
 10 approaches, make combinations, and this would make it
 11 obvious.
 12 Q. So what is your opinion with respect to combining
 13 CyberDesk system or Apple Data Detectors, the Apple Data
 14 Detectors system with Microsoft Word '97?
 15 A. So we saw before, for both CyberDesk and ADD, that
 16 they taught us the six shortcut elements. In this
 17 combination with Word, where it's all built into that,
 18 clearly we satisfy all of these other elements, these
 19 elements checked off in blue. So we've made obvious the
 20 claim elements of the Claim 23.
 21 Q. Let's turn back to the summary of your opinions on
 22 the next slide. And can you please recap for the jury
 23 what your opinions on invalidity are.
 24 A. So my opinion is that the asserted claims of the '843
 25 patent are invalid. They were anticipated by the

1 indeed, we see a list here of the things he considered.
 2 So just to be clear about secondary considerations,
 3 it's important to understand the details of some of these.
 4 For example, Number 7 says, "Others have licenses to use
 5 the invention." It's true that there are licenses to the
 6 '843 patent, but they all came as a result of settlements.
 7 And if a license comes as a result of settlement, it
 8 doesn't count as a secondary considerations. So that one
 9 doesn't apply.
 10 The other three that are listed here talk about
 11 invention. It's important to understand the terminology.
 12 The invention --
 13 MR. LAHAD: Sorry, Your Honor. Can I have a
 14 sidebar, please.
 15 THE COURT: Yes.
 16 - - -
 17 (Whereupon, the following discussion is held at
 18 sidebar.)
 19 THE COURT: Can we go off the record one
 20 second.
 21 (Off the record.)
 22 THE COURT: Okay. Counsel.
 23 MR. LAHAD: Yes. I would object to that
 24 testimony, Your Honor. The witness said that if a license
 25 is a settlement license, you can't consider it as

secondary considerations of nonobviousness. Number 1, he is not a lawyer. I don't think that's the law. And so he's given the jury this notion that -- some kind of legal opinion that you can't consider it or that license, as a result of settlements, are entitled to less weight.

So I would object to that. I'd ask for an instruction -- or at least an instruction to the jury to strike that testimony.

THE COURT: Let me review the testimony. One minute.

Counsel?

MS. ROBERTS: Dr. Fox is explaining his understanding as he went through the secondary considerations. What he just said on the stand is in his rebuttal report. This being raised now is a bit of a surprise. Experts are allowed to get an understanding of the law so they can do their analysis.

THE COURT: Okay. Standby for a second. I'm going to grab a copy of his rebuttal report. Can you check where that is in his report.

MS. ROBERTS: It's Paragraph 514.

THE COURT: Okay. So we have testimony from the expert on the stand that licenses as part of the settlement negotiations don't count. That's a different

thing than saying that it negates their utility. So I'm going to ask the jury to strike -- I'm going to strike and ask the jury to disregard the portion of the testimony that licenses that result from settlement negotiations don't count.

MR. UNIKEL: I mean, may there be a follow-up question?

THE COURT: Yes.

MR. LAHAD: Thank you, Your Honor.

(Whereupon, the discussion at sidebar concludes.)

- - -

THE COURT: Ladies and gentlemen of the jury, I'm going to ask you to disregard the portion of the testimony that states as follows: If a license comes as a result of settlement, it doesn't have a secondary consideration. You should disregard that portion of the testimony.

BY MS. ROBERTS:

Q. Dr. Fox, in your consideration of this seventh factor, whether others have licenses to use the invention, did you consider the licenses in this case to have utility as a secondary consideration of nonobviousness?

A. I considered that. In my perspective, they don't

have utility.

Q. All right. There are other some other secondary considerations you've listed on this slide. Can you explain to the jury your consideration of those.

A. Yes. My understanding of these is that they all refer to the invention. And here the invention is what's being claimed, the '843 claim elements that we've heard about.

There's referral to this as sort of the nexus of what the invention is, is my recollection of the terminology. So from what we've heard and what I've explained is that other people had the invention first. And that other people built systems that were being used. So any long-felt need wasn't satisfied by the invention, but by other people's work. And any praise that was given, was not of this particular invention that's being claimed, but of other people's work.

And the last point here is "Products incorporating invention achieved commercial success attributable to invention."

So when I studied the deposition, of Atle Hedloy, I heard the testimony. We see on the next slide, my understanding is that there was no commercial success. The question, "You do not personally consider the one button contact manager to have been a commercial success,

do you?" And the answer is, "Not particularly."

Q. Dr. Fox, you mentioned earlier in your testimony that you were also asked to consider the benefit of the asserted claims over the prior art methods, correct?

A. That's correct.

Q. Did you reach an opinion on that issue?

A. Yes. Two things are identified here. The one element that Arendi emphasized was putting shortcut tools inside a word processing or spreadsheet program. So that's the first point.

The second point is for Google, who wanted separate instructions, Arendi's claims were of low value.

MS. ROBERTS: Thank you. I will pass the witness.

THE COURT: Thank you, Counsel.

Cross-examination.

MR. LAHAD: Yes, Your Honor. Before I begin, could I please have a sidebar.

THE COURT: Yes.

- - -

(Whereupon, the following discussion is held at sidebar.)

MR. LAHAD: Sorry, Your Honor.

THE COURT: What's on your mind?

MR. LAHAD: Yes. Thank you.

1 The witness repeatedly testified about what was
2 or was not considered by the Patent Office, what could and
3 could not be considered by the Patent Office. He's not an
4 expert in Patent Office procedure. He's not a patent
5 attorney. There's no foundation he has any familiarity
6 with the MPEP or anything like that. And so I think given
7 the testimony of what could and could not be submitted,
8 what was and was not submitted, I think he's opened the
9 door to the IPR evidence. So he's saying we could not
10 have put this -- Google could not have put -- or this art
11 was not available to the Patent Office. I think those
12 statements open the door to the IPR proceedings evidence
13 of the IPR proceedings.

14 At the very least, I think we need some kind of
15 curative instruction that this witness is not an expert in
16 patent prosecution, patent procedure, the MPEP, or the
17 like.

18 THE COURT: Counsel?

19 MS. ROBERTS: The witness -- first of all, he
20 only was asked questions about what was considered before
21 the patent was issued, only as to the CyberDesk system and
22 the Apple Data Detectors system. And there's no dispute
23 that the Patent Office does not consider systems. So he
24 didn't say anything incorrect. He didn't say anything to
25 open the door to IPR estoppel. That happened long after

1 MR. LAHAD: Correct.

2 THE COURT: Counsel?

3 MS. ROBERTS: So the testimony was: What did
4 you consider about the CyberDesk system and about the
5 Apple Data Detectors system and was all of this
6 information available to the Patent Office?

7 THE COURT: All right. Let me take a look at
8 the transcript.

9 MS. ROBERTS: Your Honor, and the testimony one
10 of the things he considered was testimony about both
11 Dr. Dey and Dr. Miller, which was not available to the
12 Patent Office.

13 THE COURT: All right. Let me take a look at
14 the transcript.

15 MR. UNIKEL: Your Honor, would you like us to
16 stay here?

17 THE COURT: Yes.

18 MR. LAHAD: Your Honor, if it's helpful, do you
19 want to make sure we are looking at the same thing? There
20 are our instances I was focusing, 9:00, 18 seconds. I
21 have it on the transcript. If you'd like, he testified:
22 Did the PTO -- let me step back.

23 Question: Did the PTO review the full scope of
24 materials about the CyberDesk system that you reviewed
25 before the PTO issued the '843 patent?

1 the time period where the question was directly targeted.
2 MR. LAHAD: He held up what was a portion of
3 the prior art and said "the prosecution history" and said
4 "Well, the Patent Office didn't look at this," or couldn't
5 look at it. He mentioned the FCE website and said he
6 couldn't submit that to the Patent Office. Number 1,
7 that's incorrect, given the nature of the publications.

8 And I think, Your Honor, that opens the door to
9 Google or anybody else could have submitted those same
10 materials to the Patent Office as part of the submission
11 in some kind of post-grant review. I think the door is
12 opened.

13 THE COURT: So to the extent this is rearguing
14 the issues we've already discussed numerous times of IPR
15 estoppel, there wasn't an objection. The request for a
16 curative instruction is overruled.

17 Was there testimony that talked about the
18 inability of prior art systems to be disclosed to the
19 Patent Office?

20 MR. LAHAD: Yes.

21 THE COURT: And that, in your view, would be an
22 incorrect statement of the law?

23 MR. LAHAD: You can --

24 THE COURT: Because you can submit systems as
25 part of the original patent prosecution?

1 Answer: It's my understanding the Patent
2 Office looks at publications of patents. They don't look
3 at systems. You're the ones who get to look at systems.
4 So they didn't have all this other information I had
5 available.

6 We all heard it at this Court in this
7 litigation.

8 MS. ROBERTS: Your Honor, there was no
9 objection, no opportunity to --

10 THE COURT: Here's what I'm going to say, there
11 was no objection at the time. So the possibilities are
12 that we can let you cross-examine this witness on this
13 issue. We could have a follow-up question from Google
14 right now to clear this up at this moment.

15 Either way, I don't think it opens the door to
16 the IPR. That's out. But we can deal with it one of
17 those other two ways.

18 MR. LAHAD: I will cross him on it, Your Honor.

19 THE COURT: All right. Great.

20 (Whereupon, the discussion at sidebar
21 concludes.)

22 - - -

23 MR. LAHAD: Your Honor, may I approach?

24 THE COURT: Yes.

25 MR. LAHAD: Thank you.

1 May I, Your Honor?

2 **THE COURT:** Please proceed.

3 CROSS EXAMINATION

4 **BY MR. LAHAD:**

5 **Q.** Good morning, Dr. Fox. How are you?

6 **A.** Good morning. Well, thanks. How are you?

7 **Q.** I'm hanging in there. My name is John Lahad. We've

8 not met before. I've got some questions for you this

9 morning. If I could direct your attention to -- it's

10 Slide 4 in the slide deck that I have. Just want to do

11 some table setting for us this morning. You are not here

12 to provide an opinion on non-infringement, correct?

13 **A.** That's correct.

14 **Q.** You are not here to explain to us how the products

15 accused of infringement work, correct?

16 **A.** That's correct.

17 **Q.** You did not speak with any of the Google engineers in

18 preparing your opinions for trial, correct?

19 **A.** Correct.

20 **Q.** You were not provided with any materials describing

21 the functionality of Google's accused products, correct?

22 **A.** Correct.

23 **Q.** So the jury should not somehow mistake your testimony

24 for evidence about why the accused products do not

25 infringe, correct?

1 **A.** I didn't testify at all about infringement issues,

2 yes.

3 **Q.** So the jury should not rely on anything you said at

4 all in determining infringement or non-infringement,

5 correct?

6 **A.** What the jury should do, and -- I have no idea. I

7 mean, they're supposed to do a good job. So I can't

8 really speak of that. That's not a thing I'm aware of.

9 **Q.** You're here for validity, correct?

10 **A.** My assignment was, as we see listed here, to do those

11 two things.

12 **Q.** And this case is not the first time you've been

13 retained by Google to present expert testimony on Google's

14 behalf, correct?

15 **A.** I've been to two trials out of four trials I've

16 attended where I was the non-infringement expert for

17 Google.

18 **Q.** But the extent of your prior retention by Google goes

19 well beyond those trials, right?

20 **A.** I have been retained on other cases, which often

21 didn't go anywhere.

22 **Q.** Google has retained you as an expert witness in no

23 less than ten cases, correct?

24 **A.** I don't remember the count, but I've worked with many

25 different defendants and plaintiffs.

1 **Q.** There is a black binder I just gave you. Let's look

2 at Exhibit C from your report.

3 Let me know when you are there?

4 **A.** I see it, yes.

5 **Q.** All right. Exhibit C to your report is something

6 that -- well, it's titled "Fox Patent Consulting Summary

7 List, 8-20 Confidential."

8 See that?

9 **A.** Yes, I try to keep a list of my different activities

10 and this looks like a fairly recent version, yes.

11 **Q.** You anticipated my next question, which was, did you

12 prepare this case list?

13 **A.** It looks like something that was part of my first

14 report.

15 **Q.** All right. So under Section A, cases with trial or

16 deposition, there's that Impact Engine versus Google case.

17 Do you see that?

18 **A.** I do.

19 **Q.** And you were retained by Google in that case, right?

20 **A.** Yes.

21 **Q.** The next case there is Uniloc 2017 LLC versus Google.

22 Do you see that?

23 **A.** So actually, I was retained by law firms that were

24 working with Google, so I wasn't actually retained

25 directly by Google.

1 **Q.** You were retained to give testimony on behalf of

2 Google, correct?

3 **A.** I was testifying to give my expert in opinion in

4 cases that related to Google, yes.

5 **Q.** On behalf of Google, right? Not on behalf of the law

6 firms, on behalf of Google. The law firms weren't the

7 parties in trial; it was Google in trial, right?

8 **A.** In the case in which Google was being accused, yes.

9 **Q.** Okay. So after Uniloc, you've got Arendi versus

10 Google, which is this case, right?

11 **A.** I'm trying to find where you are.

12 **Q.** I'm on the first page of Exhibit C about halfway

13 down. It says case: "Arendi versus Google." Would it be

14 helpful if we put it on the screen for you, sir, with Your

15 Honor's permission?

16 **A.** Which page are you on?

17 **Q.** I'm on the first page?

18 **THE COURT:** Counsel, can I have a copy of the

19 binder, please?

20 **MR. LAHAD:** Yes.

21 **THE WITNESS:** I don't think we're looking at

22 the same thing.

23 **MR. LAHAD:** I'm with opposing counsel, Your

24 Honor. Sort of highlighting.

25 **THE WITNESS:** I think the version you gave me

1 is out of order. The first page on my copy has something
 2 in the bottom that it says, Section E. If I go to the
 3 second sheet, it starts with A. So I think you gave it to
 4 me in the wrong order.

5 **MR. LAHAD:** Your Honor, may I approach to check
 6 the binder?

7 **THE COURT:** Yes.

8 **THE WITNESS:** See, this is the first page, but
 9 that's not the first page because it's E. So the pages
 10 are out of order.

11 **MR. LAHAD:** I apologize. There was one sheet
 12 that was out of order, Your Honor.

13 **BY MR. LAHAD:**

14 **Q.** All right. So there's the -- are we on the same page
 15 now?

16 **A.** I think so.

17 **Q.** Literally?

18 **A.** I think so.

19 **Q.** Okay. So we had the first case is impact engine.
 20 And then the second case was that Eolas case, right?

21 **A.** Second one was Uniloc.

22 **Q.** I'm sorry, sir, could you repeat that?

23 **A.** The first on this page was impact engine.

24 **Q.** Yeah, Impact Engine, then Uniloc, then Arendi, right?

25 **A.** Yes.

1 **Q.** Also on the page at the bottom there's a Software
 2 Rights Archive versus Google, correct?

3 **A.** Yes.

4 **Q.** Okay. And so in each of those cases, you provided
 5 expert testimony on behalf of Google as the defendant,
 6 correct?

7 **A.** I gave testimony based on what I was studying, and I
 8 was -- a case that had Google as a defendant, yes. And my
 9 opinions are my opinions. They don't necessarily have to
 10 be in support of Google. It depends on the situation. I
 11 always give an honest assessment.

12 **Q.** With each of those cases, Google or its lawyers paid
 13 your hourly rate; is that correct?

14 **A.** I'm sorry?

15 **Q.** In each of those cases, Google or its lawyers paid
 16 your hourly rate, correct?

17 **A.** Yes, that's true.

18 **Q.** And so you were either the non-infringement or
 19 invalidity expert in those cases, right?

20 **A.** Those are the two roles that I generally play, yes.

21 **Q.** Okay. So let me guess, in the cases in which you
 22 were the invalidity expert, your opinion was that the
 23 patents invalid, correct?

24 **A.** Yes.

25 **Q.** Every time?

1 **Q.** And there's the ELS at the bottom of that page right
 2 there for Case Number 4, right?

3 **A.** Yes. You skipped a few others, but, yes.

4 **Q.** Well, those others weren't Google cases, right?

5 **A.** That's right. They were among the other defendants
 6 I've worked with.

7 **Q.** Yeah. I want to focus on the Google defendant.

8 **A.** Okay.

9 **Q.** Next page, there's the Bright Response case, middle
 10 of the page.

11 Do you see that?

12 **A.** I do.

13 **Q.** All right. So that's five. And then if you go
 14 couple pages later, on some other cases, it's D.

15 Do you see that?

16 **A.** I do.

17 **Q.** Okay. There's another Impact Engine entry there.
 18 That's the same as the one before, right?

19 **A.** Yeah. I think I've cleaned this up in a newer copy.

20 **Q.** Right. On the next page, there's a Bright Smart Corp
 21 versus Google case that you were retained for, right?

22 **A.** Yes. In the middle of the page, yes.

23 **Q.** On the last page there's Rockstar Consortium versus
 24 Google, right? Do you see that, sir?

25 **A.** Yes. It's the second, third-from-the-last page, yes.

1 **A.** Because they were, yes.

2 **Q.** Not one time did you say, "Hey, you know what? This
 3 patent is valid," right?

4 **A.** I'm careful in picking cases so that I understand
 5 what the situation is, yes.

6 **Q.** Likewise, when you were the non-infringement expert
 7 on behalf of Google, in each case, you found that there
 8 was no infringement, correct?

9 **A.** Once again, I'm always careful picking my cases, yes.

10 **Q.** Not one time have you said that a patent asserted
 11 against Google was infringed, correct?

12 **A.** In the patent infringement cases, that's correct.

13 **Q.** And of course, you wouldn't mind being retained by
 14 Google or its lawyers in future cases, correct?

15 **MS. ROBERTS:** Objection; argumentative.

16 **MR. LAHAD:** Goes to bias, Your Honor.

17 **THE COURT:** Overruled.

18 **BY MR. LAHAD:**

19 **Q.** I'm sorry, sir, I didn't get your answer.

20 **A.** It depends on my health. I'm getting older, so I
 21 can't do as much.

22 **Q.** An opinion that a patent is valid and infringed or
 23 valid and/or infringed, that wouldn't help insofar as
 24 getting hired by Google again, would it?

25 **A.** I have no idea. I'm a world expert in search

Fox - Cross

Fox - Cross

1 systems, so I always give an honest opinion.

2 Q. For a certain hourly rate, right?

3 A. That's a result of my work, yes.

4 Q. And your rate for testifying today is about \$600 an

5 hour, correct?

6 A. Today it is, yes.

7 Q. If I could have Slide 8.

8 Dr. Fox, you went through this slide with your

9 lawyer.

10 Do you recall that, sir.

11 A. Yes. This was the second of the four points I was

12 making, yes.

13 Q. Right. You say, Putting -- "To put instructions all

14 in one program was an obvious choice, and one of very few

15 available design choices."

16 Those are your words, correct?

17 A. That's correct.

18 Q. That's not the Court's construction is it?

19 A. No. This is my opinion.

20 Q. Well, this notion that the -- you're describing in

21 this slide the requirement of the '843 patent, correct?

22 A. I think you are misreading this. What it says is,

23 "The '843 patent's requirement to put instructions all in

24 one program." So that's what the '843 patent says.

25 Q. Yeah, but --

1 A. My comment was that this was an obvious choice.

2 Q. Yeah. But you are using the word "requirement,"

3 right? Requirement is like a -- that's a claim

4 limitation. If a patent requires something, that's in the

5 claims, isn't it?

6 A. This is my understanding of what the patent's claim

7 elements tells us. This is what they teach.

8 Q. But your selection of words, your understanding has

9 to give way to the Court's construction, correct?

10 A. I follow the Court's construction as carefully and as

11 thoroughly as I could possibly do so.

12 Q. You followed the Court's construction thoroughly and

13 carefully, and then you just ignored it and used your own

14 words on this slide, correct?

15 A. I'm explaining my opinion. I don't understand what

16 you're --

17 Q. Yeah. You were explaining your opinion in your

18 words, right?

19 A. That's certainly something I am supposed to do, yes.

20 Q. And not the context of claims or Court's construction

21 right?

22 A. Certainly, this is all in the context of the

23 litigation.

24 Q. You talk about putting instructions in -- all in one

25 program was an obvious choice. You were in the

Fox - Cross

Fox - Cross

1 courtroom -- let me step back.

2 Were you in the courtroom last week when I was

3 chatting with Dr. Rinard?

4 A. I was here the whole time except for Mr. Weinstein's

5 discussion. So, yes, I have been here the whole week.

6 Q. And you were in the courtroom when I was asking

7 Dr. Rinard about combining computer programs, and he was

8 having trouble figuring out how you would do it.

9 Do you recall that?

10 MS. ROBERTS: Objection. Mischaracterizes

11 testimony.

12 THE COURT: That objection is sustained.

13 Please rephrase.

14 BY MR. LAHAD:

15 Q. Well, were you in the courtroom when I was asking

16 questions of Dr. Rinard about combining code from

17 different programs into one program.

18 Do you recall that?

19 A. I was here during the entire discussion.

20 Q. Yeah. And according to my colleagues, I don't

21 remember this, I made some kind of gesture about slapping

22 on the back of -- slapping one program on the back of the

23 other program.

24 Do you recall that at all?

25 A. I don't remember that, no.

1 Q. Okay. So you don't -- he and I were having trouble

2 communicating or connecting about the relative ease with

3 which you could combine two programs, but as I understand

4 it, in your view, it would be obvious, correct?

5 A. I'm not sure. I lost what you were saying would be

6 obvious, what were you referring to?

7 Q. Combining computer programs into one program.

8 A. In the examples I've given of making combinations,

9 they were obvious. Not every combination of things is

10 obvious. It depends on the situation.

11 Q. Well, that's not what you said here. You said, "The

12 requirement to put instructions all in one program was an

13 obvious choice." You didn't say, "Sometimes it's obvious;

14 sometimes it's not obvious."

15 I just want to know if we can rely on this statement.

16 A. You just told me about combining different things.

17 This statement is about putting instructions in one

18 program. Those are two different issues. So I think

19 you're confusing the two things.

20 Q. You're --

21 A. I can't answer one relative to the other without them

22 being fit together sensibly.

23 Q. Are you differentiating between instructions and

24 code?

25 A. My understanding of what you said, I mean, if you

1 want to repeat it, I'd be happy to hear that. But my
 2 understanding was that you were talking about combining
 3 two different programs. And that's not what this says
 4 here. This is saying putting instructions in a program.
 5 Q. Okay. So you're differentiating between instructions
 6 for a program and two different programs, right? Is that
 7 what I'm hearing?
 8 A. When I made the obviousness argument, I said, "to
 9 take the functionality and to put it into something." I
 10 put instructions in a program. Putting instructions in a
 11 program is a clear thing to do. When we write programs,
 12 we put them in a program. So this statement is sort of
 13 trivial kind of thing.
 14 Combining two different things is a different matter.
 15 So I think you are confusing the two issues.
 16 Q. Let's go to the next slide. This is -- well, let me
 17 step back. We agreed earlier that you are not here to
 18 opine on whether Google infringes, right?
 19 A. That was not part of my assignment, no.
 20 Q. So on this slide, when you talk about Arendi's
 21 position, right, you're talking about that's -- that this
 22 is Google's view of Arendi's argument, correct? This
 23 notion of instructions being separate from the document
 24 editing program?
 25 A. What I'm saying here is the same thing that appeared

1 products use instructions separate from the document
 2 editing program, right?
 3 A. That is what the expert who built the software
 4 systems explained last week that I heard.
 5 Q. Right. And just so we're on the same page, you
 6 understand that Arendi is disputing Google's
 7 characterization of Arendi's argument, right?
 8 A. Yes, of course.
 9 Q. Okay. So in order to get to this slide, you would
 10 have to adopt Google's view of Arendi's argument, correct?
 11 A. I'm just articulating what I heard last week.
 12 Q. Right. These are not your opinions. You're just
 13 kind of echoing what you heard last week, right?
 14 A. That particular bullet is a repetition of what I
 15 heard last week, what we all heard last week.
 16 Q. And, again, you have not performed any kind of
 17 analysis, because it wasn't your assignment, about whether
 18 or not this is true, right?
 19 A. That's not been my assignment, no.
 20 Q. Okay.
 21 A. I'm just repeating what I heard in court. We all
 22 heard it here.
 23 Q. And then you say, "Applying Arendi's argument" --
 24 again, that's Google's characterization of Arendi's
 25 argument, right?

1 in the AESD. There's a specific wording there that talks
 2 about separate. I'm just repeating Arendi's own statement
 3 to the Patent Office here.
 4 Q. Can we go to the next slide.
 5 You say, "Arendi is now arguing that Google's
 6 products are covered by the '843 patent claims," right?
 7 A. That's what I heard last week.
 8 Q. And then you say, "Google's products use instructions
 9 separate from the document editing program," right?
 10 A. That's what I heard last week.
 11 Q. This notion of Google's products using instructions
 12 that are separate from the document editing program,
 13 that's Google's view of Arendi's argument for non -- for
 14 infringement, right?
 15 A. I heard testimony that supports that statement last
 16 week. I don't quite understand what you're
 17 distinguishing.
 18 Q. Well, no, this bullet point right here, "Google's
 19 products use instructions separate from the document
 20 editing program," that's not Arendi's view of its
 21 position, right? You understand that that's -- those are
 22 Google's words being used to describe Arendi's position,
 23 right?
 24 A. As I said, I heard that last week.
 25 Q. Okay. It's Google that is saying that the infringing

1 A. No, actually, the next point is that Arendi's two
 2 statements, the statements by Dr. Smedley and the
 3 statements in the AESD, are contradicting each other.
 4 That's my understanding from studying those things.
 5 Q. Well, if the jury finds that Arendi is right and
 6 Google's characterization of its own technology is wrong,
 7 then the '843 patent claims are not invalid, correct?
 8 A. Can you say that one more time.
 9 Q. Sure.
 10 A. I didn't quite follow it.
 11 Q. If the jury finds that Arendi is right and Google's
 12 characterization of Google's technology is wrong, then the
 13 '843 patent claims are not invalid, correct?
 14 A. No. No, no. I gave clear evidence that the patent
 15 is invalid, the claims are invalid, many, many different
 16 arguments from many different sources. That's just one
 17 additional argument that one might use.
 18 Q. Well, if the jury rejects the notion -- strike that.
 19 If the jury rejects Google's and your
 20 characterization of what Arendi argued to the Patent
 21 Office, the '843 patent is not invalid, correct?
 22 A. That is one of many arguments about the patents being
 23 invalid. If that particular situation arose, then that
 24 last point wouldn't apply, but the rest of my discussion
 25 certainly applies.

1 Q. All right. So just, again, so we're on the same
 2 page, if the jury rejects the first part of your third
 3 bullet, rejects your characterization of Arendi's
 4 arguments, then the rest of it is wrong?
 5 A. Yes. This is one of the many arguments for
 6 invalidity, and the logic here says that if we apply that
 7 argument, which I've pointed out is contradictory based on
 8 the evidence from Arendi, then we reach this particular
 9 conclusion.
 10 Q. Now, I want to go back to the previous slide. Okay.
 11 I found the right question to go with this slide.
 12 At the time Arendi made these statements to the
 13 Patent Office, Arendi did not have benefit of the Court's
 14 construction, correct?
 15 A. The Court's construction came well after the patent
 16 was issued.
 17 Q. Right. So --
 18 A. So, yes.
 19 Q. Didn't have benefit of the Court's construction,
 20 right?
 21 A. Sure.
 22 Q. Now, you discussed about what was submitted, what
 23 could have been submitted to the Patent Office, and you
 24 held up the file history.
 25 Do you recall that?

1 MR. LAHAD: He didn't review the entire file
 2 history.
 3 MS. ROBERTS: Are you referring -- are you --
 4 THE COURT: Okay. So you are going to leave --
 5 he didn't review the entire file history?
 6 MR. LAHAD: No, I'm not doing that. The file
 7 history is longer than 500 pages if you don't include the
 8 IPR stuff.
 9 MS. ROBERTS: Okay. I wanted to make sure.
 10 (Whereupon, the discussion at sidebar concludes.)
 11 - - -
 12 THE COURT: That objection is overruled.
 13 BY MR. LAHAD:
 14 Q. Let me ask it again, Dr. Fox. You're aware that the
 15 actual file history for the '843 patent is upwards of
 16 31,000 pages?
 17 A. So in all of my work with patents, I have defined
 18 prosecution history and file history as this thing from
 19 the beginning of a file of a patent to the issue of the
 20 patent. I'm not aware of that terminology being used in a
 21 different way, so I don't know how to answer your
 22 question.
 23 Q. Oh, no. We're on the same page as far as what it
 24 means.
 25 MR. LAHAD: If we can put up PX-1, the patent,

1 A. Yes. There's a document sitting here that is the
 2 file history that I studied many times.
 3 Q. And you understand that that's not the entirety of
 4 the file history, right?
 5 A. My definition of file history is that it's the
 6 document from the time that a file -- that a patent is
 7 filed until it's issued. That's what I think of as file
 8 history, and that's what I referred to, and that's what
 9 this document is.
 10 Q. Well, but you understand that the file history for
 11 the '843 patent is not -- how many pages is that? 400 or
 12 so, 300?
 13 A. It's a big book certainly.
 14 Q. Yeah, it's about that thick, two and a half inches?
 15 A. Yeah. I don't think the pages -- actually, it's 488
 16 maybe.
 17 Q. So let's call it 500 pages. But you held up 500
 18 pages. You understand the actual file history in this
 19 case is over 31,000 pages, correct?
 20 MS. ROBERTS: Objection. May I have a sidebar?
 21 THE COURT: Let me see counsel at sidebar.
 22 - - -
 23 (Whereupon, the following discussion is held at
 24 sidebar.)
 25 THE COURT: Where are we going with this?

1 Mr. Boles.
 2 BY MR. LAHAD:
 3 Q. You are familiar with, of course, the layout of the
 4 patent, Dr. Fox, right?
 5 A. That's right. I've done lots of work with patents.
 6 Q. All right. There's a section called "cited
 7 references" on a patent, right?
 8 A. Yeah. It's not shown here. This is other
 9 publications.
 10 Q. It starts right here.
 11 A. References cited, yes.
 12 Q. Right.
 13 MR. LAHAD: And there's one reference here that
 14 goes onto the next page, Mr. Boles.
 15 A. There are eight more pages, right?
 16 Q. Eight more pages of references cited, right?
 17 A. That's right.
 18 Q. And you understand if you take all those pages of the
 19 references cited, it's a lot more than 500 pages, correct?
 20 A. So I'm not aware of the file history referring to all
 21 the references and their content. If you say, so, I mean,
 22 if that's part of what should be considered in the file
 23 history, but I've never seen it in any of the documents
 24 I've worked with.
 25 Q. Well, I mean, you testified a few times about what

1 the Patent Office saw and didn't see and could and could
 2 not see, but, I mean, you understand that there are eight
 3 pages of cited references on the face of the patent,
 4 right?
 5 A. Right. So when I do file patents, I'm disclosing
 6 related work. I send the Patent Office copies of those
 7 things. But I've never seen, in what I think the file
 8 history, all of the text of those things included.
 9 Q. So you're --
 10 A. Certainly, they could be. I would guess that would
 11 be...
 12 Q. Okay. So your view is that, as you understand it,
 13 the file history does not include all the references cited
 14 on the face of the patent?
 15 A. No, no. What I'm saying is the file history I have
 16 seen in cases such as this book, is this document, not
 17 the -- all the things pointed to in the references. So if
 18 that's what you said should be considered the file
 19 history, then that's fine.
 20 Q. Well, I mean, as part of your work, you have to
 21 figure out what was in front of the Patent Office, what
 22 was disclosed to the Patent Office, right?
 23 A. Yes.
 24 Q. So, you know, step one is looking at the cited
 25 references, right?

1 Office -- and the discussion between the Patent Office and
 2 Arendi constituted, where they talked about specific
 3 pieces of prior art that they considered and made
 4 different comments about. That was what I thought was
 5 relevant in this case.
 6 Q. You didn't think looking at the other art disclosed
 7 by the patentee to the Patent Office was relevant to
 8 determining whether the patent's invalid?
 9 A. If the patent examiner didn't say anything about the
 10 other works, then to me they weren't considering them.
 11 Q. Did you talk to the patent examiner in this case?
 12 A. No.
 13 Q. Are you a registered patent attorney?
 14 A. No.
 15 Q. Do you have experience prosecuting patents?
 16 A. No.
 17 Q. Do you know what an examiner looks for when reviewing
 18 prior art in prosecuting a patent?
 19 A. I see the documentation of what they actually looked
 20 at and had the discussion in this document. That's what I
 21 was going by.
 22 Q. Well, you don't know what they actually looked at;
 23 you just know what's in that paper, right? They could
 24 have actually looked at something that had not been in
 25 that paper, right?

1 A. Yes. As I went through this list, I saw there were
 2 30-some works about hypertext, which reads on this. And I
 3 looked through testimony of some friends. I looked
 4 through the long list of things. It's a very long list.
 5 Q. Did you review all of these documents?
 6 A. No. I looked through the list, and I remembered many
 7 of them because I worked in the field and I knew many of
 8 them already.
 9 Q. But you didn't review all of the documents?
 10 A. I didn't review all those documents. That would have
 11 taken months and months, no. I don't think -- I don't
 12 know of any expert who has ever done that.
 13 Q. Well, you don't know what other experts do; you know
 14 what you do, right?
 15 A. I said, I don't know of any other experts who would
 16 have done that.
 17 Q. But we're here to talk about what you did, right?
 18 A. Yes.
 19 Q. So you did not review all of these documents, right?
 20 A. That's right.
 21 Q. And you didn't ask Google or its lawyers, Well, hey,
 22 I've got this binder right here, it's about 500 pages, why
 23 don't I -- why aren't these documents -- or why isn't all
 24 this other stuff in the file history, as you understand?
 25 A. So I read this entire thing, which is what the Patent

1 A. If they didn't talk about it, then they probably
 2 didn't consider it's very relevant.
 3 Q. Well, you don't know that; that's just a guess.
 4 A. That's the assumption.
 5 Q. That is a big old assumption, isn't it?
 6 A. I have the record of what they said and what they
 7 wrote to Arendi. That's what --
 8 Q. Where did you get that record?
 9 A. The file history?
 10 Q. Yeah.
 11 A. I was given it by the attorneys.
 12 Q. You were given it by google's lawyers?
 13 A. Yes.
 14 Q. You didn't go off and get it on your own?
 15 A. I didn't see a reason to have to do that.
 16 **THE COURT:** Counsel, I think at this point in
 17 time we are going to take our morning break.
 18 Ladies and gentlemen of the jury, we have
 19 scheduled a 15-minute break. It may be a little bit
 20 longer because there are some matters that I need to talk
 21 to the attorneys about. We will take the jury out. Thank
 22 you.
 23 (The jury exits the courtroom at 10:45 a.m.)
 24 **THE COURT:** Please have a seat, ladies and
 25 gentlemen.

1 So in terms of triaging what the Court needs to
 2 deal with to make sure I dealt with everything at the
 3 appropriate time --
 4 You may step down, Doctor.
 5 It seems to me that there's a reasonable chance
 6 Mr. Kidder will be taking the stand before we go to lunch.
 7 Does that sound accurate and probable?
 8 **MR. PETERMAN:** Yes, Your Honor.
 9 **MS. SRINIVASAN:** Yes.
 10 **THE COURT:** Okay. So I need to deal with these
 11 objections to the demonstratives, and what I'd like to do
 12 before I hear any additional argument on them is to go
 13 back and read the expert reports and then that way I will
 14 be in a better position to put into context counsel's
 15 arguments about what is and isn't new. So that's what I'm
 16 going to do during this break. And it may take me some
 17 additional time, and then we'll have some arguments about
 18 that before we have Dr. Fox retake the stand and finish
 19 his cross-examination.
 20 I anticipate that Mr. Kidder's testimony and
 21 cross-examination will go past lunch. After that, does
 22 Arendi know -- you don't have to tell me if you don't know
 23 or don't want to -- how the rest of the afternoon is going
 24 to go in terms of your rebuttal case?
 25 **MS. SRINIVASAN:** We anticipate calling Dr. Earl

1 Sacerdoti as a rebuttal expert on validity. And I don't
 2 know how long his testimony will be, but he would be our
 3 expected sole rebuttal witness.
 4 **THE COURT:** So Mr. Weinstein is not retaking
 5 the stand?
 6 **MS. SRINIVASAN:** No.
 7 **THE COURT:** Okay. And then we will have
 8 cross-examination of that expert. So that puts us in an
 9 interesting position about how we get to the end of the
 10 day. Let me hear what each side's position is on that.
 11 **MS. SRINIVASAN:** Well, Your Honor, and I don't
 12 mean this to be negative to the other side or anything,
 13 but we thought we had reached kind of closure on jury
 14 instructions and we got a red line last night with
 15 additional changes in the evening. So I know there was a
 16 new joint instruction submitted late last night to the
 17 Court. And so there are open issues there that still need
 18 to be addressed as with the verdict form, some of which we
 19 are responding to or have been working on responding to
 20 overnight because there were some issues --
 21 **THE COURT:** Were there new issues with respect
 22 to the verdict form after the one that was filed
 23 yesterday? Because I think the Court will be in a
 24 position to resolve those pretty quickly today.
 25 **MS. SRINIVASAN:** I don't think for the verdict

1 form. I think that's the universe -- there were some
 2 additional issues that came up. But I think that's
 3 reflective of what we have.
 4 In the jury instructions, we would probably
 5 like the opportunity to be heard on that because there
 6 were a few material changes that came in last night.
 7 **THE COURT:** Okay. And is it correct that the
 8 main issues with respect to the jury instructions have to
 9 do with how the jury is going to be instructed on the
 10 license and how the jury should be instructed on the prior
 11 art?
 12 **MS. SRINIVASAN:** And with respect to
 13 willfulness. There is a -- there was a change there.
 14 There's disputed provisions based on the law about what
 15 instruction should be given.
 16 **THE COURT:** Okay. Those, I think I can resolve
 17 without hearing argument. Let me hear from counsel for
 18 Google. Anything that we've missed in what we are going
 19 over?
 20 **MR. UNIKEL:** No. I think there's really those
 21 three principal instructions, the verdict form, and then
 22 it's just finishing the witnesses with the
 23 cross-examination.
 24 There is -- at the close of case, there will be
 25 the need to at least preserve the Rule 50A motions. I

1 imagine we can do that briefly, as we did before. So I
 2 don't imagine that will take a lot of time, but that is
 3 something we will have to do on the record.
 4 **THE COURT:** Okay.
 5 **MR. LING:** Your Honor, may I be heard?
 6 **THE COURT:** Yes.
 7 **MR. LING:** There are some miscellaneous other
 8 issues as well in the jury instructions that the parties
 9 have flagged. Google would like the opportunity to make
 10 our objections on the record insofar as the Court would
 11 like the law.
 12 **THE COURT:** Okay. I understand.
 13 **MR. LING:** Thank you.
 14 **THE COURT:** We are not going to do that right
 15 this second though.
 16 Okay. We've got some things we need to work on
 17 then. It sounds like we can do some of this shortly after
 18 the lunch break today. I guess by my calculations --
 19 well, let me hear your best estimates based on what you've
 20 heard from the other side about when we're going to be
 21 done today if we don't spend a long time arguing about the
 22 jury instructions.
 23 **MR. UNIKEL:** Again, I don't know how long the
 24 cross-examination is planned for. So we have about, I'd
 25 say, 45 to 50 minutes with Mr. Kidder. I don't know how

1 long Mr. Sacerdoti is going to testify. I would expect
2 that my cross-examination of him would be somewhere
3 between 30 and 40 minutes, maximum. So again, assuming we
4 can work out the other things and breaks --

5 **THE COURT:** Counsel, what's your estimate? I
6 guess what I'm asking is this: Are we going to be done
7 with testimony before 3:00 today?

8 **MS. SRINIVASAN:** I think it's -- we will
9 probably be about 3:00 or after 3:00. I don't see us
10 being well ahead of 3:00 to finish the testimony, given
11 that we have the cross-examination ongoing of Dr. Fox. We
12 have Mr. Kidder's affirmative testimony. So let's say
13 that's 45 minutes, plus the remainder of the cross,
14 another hour and a half. Mr. Kidder's cross-examination
15 takes us probably in excess of two hours. And then
16 Dr. Sacerdoti's direct and cross is probably close to two
17 hours, an hour and 45 minutes. So I see us being probably
18 around the 3:00 threshold.

19 **THE COURT:** Do you agree with that?

20 **MR. UNIKEL:** It sounds about right. I suppose
21 the other issue is how long it will take for the Court to
22 read the jury instructions.

23 **THE COURT:** Right. So this is what I'm
24 thinking about. Please have a seat.

25 So if I read the jury instructions -- I'd like

1 numbers don't match the expert report because we've
2 changed the accused functionalities?

3 **MR. PETERMAN:** Yes, Your Honor, it's a
4 different -- it's a different revenue base.

5 **THE COURT:** Okay. And how about Arendi? Do
6 you have any dispute about -- I know you dispute that it's
7 the same methodology, but the mathematical calculation
8 itself, are you disputing?

9 **MS. SRINIVASAN:** No. Just that the way he did
10 it in the report, putting aside the revenue base, Google's
11 revenue, which has changed, but the actual manner in which
12 they calculated Google's royalty at the percentage above
13 is different from what he did in his report.

14 **THE COURT:** Okay. All right. I understand
15 that objection. That objection is going to be overruled.
16 These slides can all come in. I read the report closely.
17 I -- I don't think we can say that the methodology has
18 changed.

19 That should take us through 26. I already
20 ruled that 32, 33, and 34 can come in. I want to talk
21 about 35. I don't know what this 30.2 million number is.

22 Can you explain that to me?

23 **MR. PETERMAN:** Yes, Your Honor. The only
24 dispute with the slides that look like this is the text on
25 the left-hand side where we say, "No evidence of commonly

1 to read the jury instructions at the same time as closing.
2 And I don't think it benefits anyone to go ahead with that
3 today and have the closings tomorrow.

4 So if I did that starting at 3:00, for example,
5 now we're talking about almost to 4:00, and then we've got
6 the closings. That puts us to 5:00. Everybody is going
7 to have to come back tomorrow anyway. I don't think I can
8 keep the jury past 6:00, even if I thought it was a good
9 idea, which I don't.

10 So I think at this point in time, given where
11 we are today, sitting here right now, I think we're going
12 to do the jury instructions in the morning and then the
13 closings in the morning.

14 So in light of that, I'm going to proceed on
15 the break right now with that in mind. We will have to
16 get the jury instructions straightened out, but some of
17 that might be able to be done after we send the jury home
18 for the day.

19 Okay? All right. We will be in recess.

20 (Whereupon, a recess was taken.)

21 **THE COURT:** Okay. Counsel. We took a look at
22 the damages expert reports to give us some context about
23 what's going on here. Can I ask counsel for Google, so
24 these numbers on DDX slide 20 where it says, "Google's
25 royalty X percentage above," is the reason why those

1 installed devices with Android and STS." I believe that's
2 the only dispute. Just to answer Your Honor's question,
3 what the actual pie chart represents is that what damage
4 base is left under Mr. Weinstein's calculation once you
5 remove the August to December downloads.

6 And then if you saw other slides, you know,
7 that then take more off the pie chart, it's just taking
8 off the damage base, you know, as Mr. Kidder questions the
9 assumptions and methodology that Mr. Weinstein employed.

10 **THE COURT:** Okay. Counsel, any objection about
11 this text?

12 **MS. SRINIVASAN:** We objected to the text
13 because, again, even though Mr. Kidder had the opportunity
14 for virtually all the applications to raise some question
15 about lack of evidence of how Arendi installed devices
16 were on Android 8 with STS, that was never raised in his
17 reports.

18 Just to level set, every application with
19 Chrome was 2017, 2018. That was the playing field in his
20 supplemental report. He had the opportunity if he wanted
21 to raise this argument that there was a lack of evidence
22 about what applications or -- were installed on devices
23 with Android 8. He did not. Of course, he himself
24 utilized those installations.

25 So that is an opinion that, if he's intending

1 to offer today, would be new. And, again, all of the
2 other applications minus Chrome were in this world of STS
3 only at the time that he served his you supplemental
4 report. So if he was going to make that critique -- he
5 has many other critiques of Mr. Weinstein -- this is not
6 one of them. This is a new opinion that he wants to offer
7 today.

8 **THE COURT:** Okay. Well --

9 **MS. SRINIVASAN:** And counsel provided us last
10 night with modified slides -- I don't object to the
11 number -- without this text in them, but this text they
12 have in every single slide that contains this pie chart.
13 And if the idea is that he's going to testify or opine
14 that there's a lack of evidence there, that's not
15 contained in his report, and he had every opportunity to
16 make that argument.

17 **THE COURT:** All right. But in my view, that's
18 a factual argument. And we're putting that question to
19 the jury about what these numbers are based on the record
20 as I understand it, which by the way, I reviewed very
21 closely over the weekend. So that objection to that slide
22 is going to be overruled.

23 What do we have on 30(a)? What's the objection
24 there.

25 **MS. SRINIVASAN:** All right. Your Honor, we did

1 propose a suggestion that it be limited to the time
2 periods that are now at issue rather than putting all of
3 the prior numbers before the jury. I don't know for what
4 purpose that is to put something in there that there's
5 going to be a discussion about how the base was bigger
6 before. Because my understanding that was something we
7 were told not to do.

8 So I think if we're going to be using any
9 exhibits from reports on either side for the experts, we
10 should attempt to redact out anything that is not about
11 the universe that's before the jury, which is 2017, 2018.

12 **THE COURT:** So I think what I hear you saying
13 is you think that this would be prejudicial for the jury
14 to see something that's not still being argued?

15 **MS. SRINIVASAN:** Yes, Your Honor. It shows --

16 **THE COURT:** Even though this was the chart that
17 was used by your expert.

18 **MS. SRINIVASAN:** This is from his original
19 report; it's not the supplemental report chart. But
20 they're using things that goes back even prior to summary
21 judgment in this case. It's not just about something that
22 has to do with -- or the summary judgment ruling. It's
23 not just something that has to do with the narrowing with
24 respect to Chrome. Now we're talking about Nexus devices,
25 things that have long since not been part of the case.

1 So we do -- we don't object to using a slide
2 like this as long as we are not showing to the jury
3 information that suggests there are all these other
4 revenues basis we're in. We think that should at least --

5 **THE COURT:** Understood. So I think what I hear
6 you saying is, there's going to be this big number, and
7 they are going to make an argument like, sir, we've heard
8 about what you did in the Apple case, and aren't you
9 trying to do the same thing here.

10 Is that what you're worried about?

11 **MS. SRINIVASAN:** That is a concern, and also
12 that how do we explain why we're looking at 2017 and 2018
13 now without getting into issues like the Court's summary
14 judgment ruling that narrowed what was at issue. So I
15 don't know fully how they intend to use it. It was the
16 subject of our conference. I don't object to showing
17 numbers that reflect 2017, 2018 and what's at issue, but
18 the concern I have is the question the jury will have if
19 they start seeing things dating back to the 2012, and,
20 obviously, we don't want to be talking about prior orders
21 or rulings.

22 **THE COURT:** Right. Understood.

23 Counsel?

24 **MR. PETERMAN:** Your Honor, I'd like to propose
25 a solution. On April 21, counsel for Arendi produced to

1 us a new exhibit that we had marked at DTX-1148. That
2 exhibit includes the numbers that Mr. Weinstein relied on.

3 My understanding is that counsel, even though
4 they produced it on April 21, has an objection to us
5 actually using this as an exhibit in evidence here.
6 These -- you know, this exhibit that they produced is the
7 only reflection of the units that Mr. Weinstein actually
8 relied upon for his calculation. We believe it is
9 appropriately placed into evidence.

10 My understanding is that they're concerned
11 because, in what they produced to us, they still left some
12 other numbers on it. They certainly could have produced
13 an even more truncated version of this if they were
14 concerned about getting this in front of the jury.

15 So, you know, if Your Honor will allow this
16 DTX-1148 to be admitted into evidence or used as a
17 demonstrative, we could use this. And I think it takes
18 care of a lot of the concerns that counsel has raised.

19 **MS. SRINIVASAN:** We don't have an objection to
20 using it. But, again, it's not something we produced.
21 It's from his 2022 expert report. The highlighting that's
22 on there, could that be redacted? Because again, those
23 are the things that were being removed. So the remainder
24 of the exhibit, we don't have an issue with.

25 **THE COURT:** You want to take off the

1 highlighting, or you want to redact what's highlighted?

2 **MS. SRINIVASAN:** Redact what's highlighted.

3 Because again, we didn't produce this. We didn't make

4 this. This is what existed in the report as of 2022. We

5 don't have an objection to using it, but if it's going to

6 show something that's not longer at issue, that's going to

7 create the same question as to why is Chrome in there

8 prior to 2017 when we are only talking about 2017?

9 **THE COURT:** Yeah. I get it. Here's what I was

10 thinking when I saw this was, I wasn't understanding why

11 we needed to use the page that has the Pixel 1 on there.

12 Is there some reason we need to show the jury

13 that?

14 **MR. PETERMAN:** I think it's important to show

15 the jury because it also notes all the sources that

16 Mr. Weinstein used. So, you know, we can certainly show a

17 version of this that has Pixel 1 lined out. I would point

18 out that this is what Arendi produced to us on April 21.

19 They're the ones who put the highlighting in. They didn't

20 produce a version of this exhibit that excised the Pixel 1

21 line and excised different -- the Chrome and...

22 And if they had produced a different version of

23 this to us on April 21, that's something that we certainly

24 could have used. It's not up to us to amend their

25 exhibit. And so that's the position that we have here.

1 But if Your Honor is more comfortable with Pixel line

2 being taken out in order to put this into evidence, Google

3 certainly is willing to do that.

4 **THE COURT:** Well, you're going to have to

5 refresh my recollection. How did Mr. Weinstein get this?

6 We saw this evidence before. Was that admitted into

7 evidence? Or we had these numbers?

8 **MS. SRINIVASAN:** We used it as a demonstrative

9 with his testimony. We -- this is an exhibit to his

10 report. Traditionally, we don't move that into evidence,

11 the exhibits. But it is from the report that he

12 originally issued. We provided it so that it was clear

13 that he was using the same numbers minus what he was

14 removing.

15 **THE COURT:** Did the demonstrative he used have

16 the sources on there?

17 **MS. SRINIVASAN:** Yeah, it did. It had the --

18 the -- what is now DTX-581, Bates labels ending 156349.

19 **THE COURT:** So I think -- we'll get to the apps

20 in a second, because I have some different ideas about

21 that. But with respect to the page that talks about the

22 Pixel, can you just use his demonstrative?

23 **MR. PETERMAN:** Your Honor, I don't believe his

24 demonstrative actually included the sources. I believe

25 they created a demonstrative that only had the numbers and

1 not the sources. I could be mistaken.

2 **MS. SRINIVASAN:** There's one that had the

3 sources that was the comparative one with Mr. Kidder that

4 had the sources that had all of the accused app downloads

5 for 2018.

6 **THE COURT:** Which was that for the record?

7 **MS. SRINIVASAN:** Let me get the number from

8 Mr. Weinstein.

9 **MR. PETERMAN:** I believe that one had

10 Mr. Weinstein and then it had Mr. Kidder saying that

11 Mr. Kidder agreed with Mr. Weinstein. So that would not

12 be something we would be interested in using.

13 **MS. SRINIVASAN:** It's PDX-4-37 was the

14 demonstrative that used with Mr. Weinstein.

15 **THE COURT:** Do you want to take a second and

16 see what that is?

17 **MR. PETERMAN:** Yes.

18 Two things, Your Honor, that demonstrative --

19 and perhaps we can put it up -- has a comparison of

20 Mr. Weinstein and Mr. Kidder. And they used that to make

21 a point that Mr. Kidder agrees with Mr. Weinstein.

22 It also, based on what I saw, that's the just

23 the apps. It doesn't have that devices.

24 **THE COURT:** Right. I guess I'm wondering why

25 we need the -- well, as I'm talking, I understand.

1 **MR. PETERMAN:** Again --

2 **THE COURT:** Let me make sure. Let me just

3 paraphrase what I think you're saying. Is that

4 Mr. Weinstein said he relied on certain numbers, and you

5 want to be able to show the jury where those numbers came

6 from.

7 **MR. PETERMAN:** Exactly, Your Honor.

8 **THE COURT:** And this is a prior statement that

9 he made when he was on the stand.

10 **MR. PETERMAN:** Yes. And this is the last

11 exhibit -- last set of exhibits that was produced to us on

12 April 21 that Arendi used for Mr. Weinstein's testimony.

13 **THE COURT:** And can you confirm here today that

14 you're not going to be making some argument about, look at

15 this big number and now he's only asking for some small

16 number?

17 **MR. PETERMAN:** I can absolutely confirm that,

18 certainly, on direct. I would say I can't control what

19 they do on cross. But we are not intending to make

20 reference to all these other numbers in connection.

21 **THE COURT:** Okay. I'm going to rule that you

22 can use this as a demonstrative. I'm not going to admit

23 it into evidence. I think it's -- I get what you're

24 saying about how you got it with the highlighting on it,

25 but we're all just trying to do the best we can here in

1 figuring this out. So that's going to be my ruling on
2 that.

3 Any other questions about my ruling?

4 **MS. SRINIVASAN:** No, Your Honor.

5 **MR. PETERMAN:** And, Your Honor, is that ruling
6 for both the apps and for the --

7 **THE COURT:** Yes.

8 **MR. PETERMAN:** -- Pixel devices?

9 **THE COURT:** Yes.

10 **MR. PETERMAN:** All right. Just one thing that
11 we are concerned about just from an evidentiary basis, to
12 the extent that there is any further appeal work in this
13 case is actually having underlying unit value that's
14 understood and could be subject to challenge. And so
15 that's --

16 **THE COURT:** I see what you are saying. So you
17 want to have this inserted into evidence for that?

18 **MR. PETERMAN:** Correct, Your Honor. And we're
19 certainly willing to redact. If I can lean on Mr. Spence
20 here to make a redacted version of this where we take out
21 the Pixel line and take out the highlighted.

22 **THE COURT:** So the difference between these two
23 pages, because I agreed with counsel that I have some
24 concerns about the Chrome number. And we have no document
25 that's been put into evidence about the Chrome downloads

1 for 2017 to 2018 at this point?

2 **MS. SRINIVASAN:** It was presented as a
3 demonstrative. We did attempt to have an exhibit that
4 would be moved into evidence summarizing those numbers,
5 which counsel objected to, so that didn't happen before
6 his testimony. But the demonstrative that was presented
7 with Mr. Weinstein at PDX-4.

8 **THE COURT:** Okay. How's about --

9 **MS. SRINIVASAN:** PDX-4-3-31 had those app
10 installations for everything, including Chrome.

11 **THE COURT:** Here's what we're going to do.
12 This is creative thinking on the spot. We had a copy of
13 this exhibit that was going to be in evidence before the
14 changes, right? That you put in your -- that will be
15 admitted into evidence, and if you want to go through with
16 the witness and highlight to make a demonstrative that has
17 highlighting on that, you can do that.

18 Does that make sense?

19 **MR. PETERMAN:** I'm not sure I completely
20 understand Your Honor's solution.

21 **THE COURT:** So the solution is, we had an
22 exhibit that was part of the case. Before the case
23 changed, everybody was going to agree that that exhibit
24 was going to go into evidence. And it had these numbers
25 on it. It's exactly 1148 without the highlighting, right?

1 **MR. PETERMAN:** Yes. Yes.

2 **THE COURT:** Okay. And so put that up. That
3 can go in. They object to the highlighting being
4 introduced into evidence, but if you want to walk through
5 it with your witness and highlight as we go, that's okay.

6 **MR. PETERMAN:** Okay.

7 **THE COURT:** Does that make sense?

8 **MR. PETERMAN:** Yes. And then so -- and then
9 what's the ruling on whether this can be put into
10 evidence?

11 **THE COURT:** This is going to be put into
12 evidence without highlighting.

13 **MR. PETERMAN:** Okay. All right. That's fine.
14 Thank you, Your Honor.

15 **MS. SRINIVASAN:** That's fine, Your Honor.

16 **THE COURT:** What's the next objection?

17 **MR. PETERMAN:** I believe the next one would be
18 40.

19 **MS. SRINIVASAN:** Your Honor, now that we have
20 resolved that with respect to the exhibit, I think -- if I
21 understood Google counsel to say that, if they did that,
22 that would resolve the needing to use 38 and 39? I'm not
23 trying to speak for them.

24 **MR. PETERMAN:** Yeah.

25 **MS. SRINIVASAN:** That's what I heard. So is

1 that correct?

2 **MR. PETERMAN:** We would take out 38 and 39 and
3 replace with the unhighlighted exhibit.

4 **THE COURT:** Great.

5 **MS. SRINIVASAN:** All right.

6 **THE COURT:** So does that resolve 40? No, 40 is
7 something different.

8 **MR. PETERMAN:** Correct. 40, Your Honor, this
9 is, you know, this comes directly from admitted Exhibit
10 DTX-581, which was the number of app downloads. And this
11 is simply Mr. Kidder taking the number of app downloads
12 for Chrome, Calendar, Gmail, and Sheets, and, you know,
13 just a demonstrative as to how many were downloaded from
14 2015 to 2018.

15 **THE COURT:** Counsel?

16 **MS. SRINIVASAN:** Yeah. I guess I just, again,
17 we were trying to figure out what the universe of
18 information we were showing to the jury, so I don't know
19 for what purpose they want to show downloads that predated
20 2017?

21 **THE COURT:** What's the thinking?

22 **MR. PETERMAN:** I think this also helps to
23 confirm the fact that Mr. Weinstein was incorrect in the
24 units that he used. Particularly, if you look at the
25 difference between 2016 and 2017, his testimony is that he

1 only -- he believes that that data only included Android 8
2 or 9, and I think Mr. Kidder is prepared to testify that
3 this data does not lead to that conclusion. In fact, it
4 leads to the opposite conclusion, that you would expect
5 2017 to be much lower than 2016 if only Android 8 was
6 propounded 2017.

7 **THE COURT:** What do you think about what he
8 just said?

9 Counsel?

10 **MS. SRINIVASAN:** That is an undisclosed
11 opinion. If the idea is he's going to get up there now
12 and now say, "Well, can you infer from past years."

13 **THE COURT:** I agree with that. That's what
14 comes out.

15 **MR. PETERMAN:** But, Your Honor, this is in
16 response to Mr. Weinstein's new opinion that \$45 million
17 is the appropriate damage amount. This was -- we have not
18 had a chance to respond to that yet. And this is only in
19 rebuttal to Mr. Weinstein's \$45 million number, which was
20 undisputably disclosed for the first time on April 21.

21 **THE COURT:** Yeah. But I think what I'm
22 concerned about here is that this has got numbers on it,
23 and that numbers have power. And you're asking the jury
24 to make an inference about what trends show from 2015 to
25 2018. I just don't think it's borne out by the testimony

1 that we've heard.

2 And so I think I've heard Mr. Weinstein say on
3 the stand it would be overinflated. I think your expert
4 is free to say that it's overinflated. But as to putting
5 numbers and asking the jury to infer by how much it's
6 overinflated, I don't know that that's fair game at this
7 point.

8 **MR. PETERMAN:** Your Honor, this is certainly
9 not going to be used regarding the overinflation point.
10 This is going to be used solely for the point that
11 Mr. Weinstein said 2017 only included downloads of
12 Android 8 or 9.

13 And we know the data itself includes downloads
14 of all versions of Android. And if Mr. Weinstein was
15 correct that 2017 was only Android 8, and Android 8 was
16 released in August. So one would expect the number for
17 2017 to be a lot lower than the number in 2016 if you were
18 only counting downloads from August onwards.

19 And again, for 2018, if you were only counting
20 downloads from August onwards for 2017, the 2017 number
21 would be much lower than the 2018 number. And I think
22 that's borne out by the data, and that's the point that
23 Mr. Kidder is prepared to make.

24 **THE COURT:** Where are these numbers for 2015,
25 2016, 2017, for Calendar and Gmail in his report?

1 **MR. PETERMAN:** Oh, they're in his report. If
2 you look at Kidder 2022, Exhibit 5. I'm going to have to
3 take you a few places, Your Honor. If you look at 2022,
4 Exhibit 5. You'll see he has numbers for 2017, 2018, and
5 then Chrome going back to --

6 **THE COURT:** Chrome, right?

7 **MR. PETERMAN:** -- to 2012. But, Your Honor, if
8 we look at Kidder Exhibit 12, 2020, his first report, you
9 see he has numbers for the apps going back to -- in
10 various stages, going back to 2012, and so --

11 **THE COURT:** Where?

12 **MR. PETERMAN:** Sorry?

13 **THE COURT:** Where.

14 **MR. PETERMAN:** This is Exhibit 12 in Kidder's
15 2020 report, his first report.

16 **MS. SRINIVASAN:** Your Honor?

17 **THE COURT:** Just wait a second. I'm trying to
18 find -- I don't see Exhibit 12. I'm seeing A, B, C, D.

19 **MR. PETERMAN:** So, Your Honor, I don't know if
20 you are looking at the --

21 **THE COURT:** I must be looking at the wrong
22 thing. Yep.

23 **MR. PETERMAN:** So if you look at the first
24 line, you see it has Calendar, and there's data going back
25 to 2012.

1 **THE COURT:** All right. Counsel, we've got
2 numbers in here graphing out numbers.

3 **MS. SRINIVASAN:** Yeah. Yeah. So this 2020 is
4 before summary judgment in this case. What happened in
5 the supplemental report is that Mr. Kidder looked at 2017
6 and 2018 for Gmail, for Calendar, for Sheets because
7 that's what was in the case. He offered no opinion that
8 you could infer from prior download data that the numbers
9 were inflated.

10 This is totally new, and frankly, it's not
11 supported by anything their fact witnesses have said, nor
12 anything he has quoted in his report. It is very clear
13 that, after summary judgment, after this 2020 report was
14 issued, the universe for these apps, Calendar, Gmail,
15 Sheets, was 2017, 2018. If he wanted to offer the opinion
16 in 2022 that you could go back and infer something from
17 prior application data, he could have, but he didn't.

18 And this is entirely -- what counsel has
19 described is a new opinion, no support for him to now come
20 on the stand and say that. And he had a full opportunity
21 to do it, because what was at issue in his supplemental
22 report? 2017, 2018.

23 **THE COURT:** All right. Stand by for one
24 minute.

25 This document's going to be out. I'll sustain

1 the objection. Let's move on to the next one.

2 **MR. PETERMAN:** Next one, Your Honor, is I

3 believe that they, Arendi, objects to us using testimony

4 from Mr. Weinstein that Mr. Kidder was in the courtroom

5 for.

6 **THE COURT:** Yes, I've looked at these. So 41,

7 42, 43, 44. This is similar to what I ruled on earlier.

8 **MS. SRINIVASAN:** Yes. Your Honor, with respect

9 to 41, if he wants to rebut it, that's okay. 42 to 44,

10 the idea that there was a slow rollout after

11 December 2017, again, all those 12 out of 13 applications

12 were at issue for 2017 and 2018. In his '22 report, you

13 won't find any mention about a slow rollout. He said it

14 was enabled and that he was instructed to use

15 December 2017 as a date.

16 So those three slides are -- the idea that

17 there was some slow rollout or it shouldn't even be 2017,

18 it really happened later in 2018, never disclosed in his

19 2022 report, which was, again, for the 12 out of 13 apps,

20 about STS, 2017 and 2018. So if he's going to offer new

21 opinion on this now, he had a prior opportunity to do that

22 in his 2022 report.

23 **THE COURT:** I understand your argument on that.

24 The objection on those slides is overruled. I carefully

25 reviewed the reports; I think this is all fair game.

1 title?

2 **MR. PETERMAN:** Sure, Your Honor, we will revise

3 the title.

4 **THE COURT:** And then --

5 **MR. PETERMAN:** Down to the last one, Your

6 Honor.

7 **THE COURT:** 63. What's your objection?

8 **MS. SRINIVASAN:** Yeah, the objection there was

9 about the delayed release of STS for 11 months. That is

10 not an opinion that he offered in his reports. And

11 it's -- there's no opinion about a delayed release.

12 Again, he said he used December 2017 as his date for the

13 STS release. In the hypothetical negotiation, he applied

14 that for all of the apps. And there's nothing in there

15 about delayed release, quantifying that delayed release as

16 being 11 months. You're not going to find that anywhere

17 in his 2022 report, even though, if he wanted to make that

18 opinion with respect to all those apps that are solely

19 about the STS functionality, he could have done it. It is

20 not in there.

21 **THE COURT:** Counsel?

22 **MR. PETERMAN:** Your Honor, prior to April 21st,

23 apps prior to December -- December 2017 were at issue

24 here. And so if Mr. Kidder was not looking at it from the

25 perspective of Mr. Weinstein's new opinion for an 11-month

1 **MR. PETERMAN:** Your Honor, I believe 47, 48,

2 49, 53, 54, 55, 56, those all go to the same way as your

3 earlier ruling, because the only issue was the text.

4 **THE COURT:** Yep. Agreed.

5 **MS. SRINIVASAN:** Agreed.

6 **THE COURT:** And then 59 looks similar to

7 something I already ruled on?

8 **MS. SRINIVASAN:** Agreed.

9 **THE COURT:** 61?

10 **MR. PETERMAN:** Yes, Your Honor. My

11 understanding is that there is an objection to the title

12 here, possibly. I think the point here, and this is

13 covered in Mr. Kidder's report, is that if you exclude the

14 apps on the Samsung devices, the royalties go down by

15 approximately 42 percent. And Kidder raised this in

16 Paragraph 154 of his 2022 report. And so we think it's

17 disclosed, and we don't understand the objection.

18 **MS. SRINIVASAN:** Okay. We don't have an

19 objection in talking about his 42 percent calculation, but

20 he can't be talking about Samsung already giving royalties

21 that apply to Google, obviously, because that's a legal

22 opinion. He can't do that. And that's the issue and

23 concern that I raised.

24 **THE COURT:** All right. Seems like this one we

25 ought to be able to resolve. Can we just change the

1 rollout.

2 **THE COURT:** So that has to do with Chrome, but

3 she's right --

4 **MR. PETERMAN:** Yes.

5 **THE COURT:** -- about the other apps, right?

6 **MR. PETERMAN:** Yes. Yes, Your Honor.

7 **THE COURT:** All right.

8 **MR. PETERMAN:** The whole negotiation does --

9 hypothetical negotiation takes place in December 2017 as

10 opposed to 2012.

11 **THE COURT:** Right. Okay. The objection on

12 this one is going to be overruled. Of course you're free

13 to discuss with him on cross regarding the situation we're

14 in.

15 **MR. PETERMAN:** That's it, Your Honor. We

16 appreciate it.

17 **THE COURT:** Okay. Let me just see if I have

18 anything else I wanted to talk to you about before we

19 bring the jury back in.

20 Just for purposes of the record, I just wanted

21 to put on the record that my rulings on this and related

22 issues reflect my finding that Dr. Weinstein's opinion on

23 the stand was a different opinion than what he gave in his

24 supplemental report. And the way I'm looking at it is

25 this: He relied on a number of accused app installations,

1 but during trial, after the jury was selected but before
 2 we began testimony, what the accused apps were changed.
 3 And so my view is that Google gets to rebut
 4 what I view as a new opinion. Arendi has pointed out that
 5 Mr. Kidder had his own opinion about what the lump sum
 6 payment would be if only the STS functionality were
 7 accused. That was his opinion. He didn't have an
 8 opportunity to respond to testimony from Mr. Weinstein
 9 regarding a royalty base that included only Chrome units
 10 with STS functionality because that was not
 11 Mr. Weinstein's opinion at that time.
 12 I don't think that Google was required to put
 13 on a contingency expert report about what Mr. Kidder's
 14 opinion would be if Mr. Weinstein changed his opinion
 15 because Arendi dropped a chunk of accused products. We
 16 will leave it at that.
 17 Okay. Let's finish up the cross-examination.
 18 Can you put the witness back on the stand.
 19 Ms. Garfinkel, let's bring out the jury.
 20 (The jury enters the courtroom at 12:22 p.m.)
 21 **THE CLERK:** Your Honor, the jury.
 22 **THE COURT:** Please be seated. Thanks for your
 23 patience.
 24 Doctor, I will remind you, you are still under
 25 oath. Let's proceed.

1 didn't go to the documents that were pointed to.
 2 **Q.** And you said that would take months and months of
 3 work, correct?
 4 **A.** Eight pages of references, I think you gave a large
 5 number of pages, yes, that would take a while.
 6 **Q.** And that work is not worth doing when you're trying
 7 to take a man's property away from him?
 8 **MS. ROBERTS:** Objection. Argumentative.
 9 **THE COURT:** Sustained. Please disregard the
 10 question.
 11 **BY MR. LAHAD:**
 12 **Q.** Well, it's not worth doing to show invalidity by
 13 clear and convincing evidence, correct? Is that your
 14 testimony?
 15 **A.** I think I provided clear and convincing evidence.
 16 **Q.** Right. But in your view, going through all the
 17 documents that the patentee gave to the Patent Office,
 18 that's not worth doing when you're trying to prove
 19 invalidity by clear and convincing evidence?
 20 **A.** To show invalidity, one needs to show that something
 21 anticipated or something made obvious. If I had gone
 22 through more of those, I would have had even more
 23 arguments for invalidity, I believe.
 24 **Q.** Well, there are many references on the face of the
 25 patent that are related to CyberDesk, correct?

1 **MR. LAHAD:** May I?
 2 **THE COURT:** Yes. Thank you.
 3 **MR. LAHAD:** Thank you, Your Honor.
 4 **BY MR. LAHAD:**
 5 **Q.** Dr. Fox, before the break, we were talking about the
 6 file history in front of you.
 7 Do you recall that?
 8 **A.** I do.
 9 **Q.** And you mentioned that you got that file history from
 10 Google's lawyers, correct?
 11 **A.** Yes.
 12 **Q.** And I asked you whether or not you pulled a copy of
 13 it down from the PTO, the Patent Office yourself.
 14 Do you recall that?
 15 **A.** I don't know if you asked me that, but I didn't do
 16 that.
 17 **Q.** And you didn't see a reason to do that?
 18 **A.** No.
 19 **Q.** You also mentioned that you didn't review each of the
 20 documents on the face of the patent, correct?
 21 **A.** I guess you are referring to the 8-page list; is that
 22 what you are referring to?
 23 **Q.** Yes, sir.
 24 **A.** No. I didn't review all of those. I went through
 25 and looked at the list and considered each of them, but I

1 **A.** A number of those are related to CyberDesk. That's
 2 true.
 3 **Q.** Yes. And let's show you a demonstrative that
 4 Mr. Boles has prepared for us. On the right -- excuse
 5 me -- on the left is DTX-8, which you will recall is one
 6 of Dr. Dey's exhibits. I believe it's his CV, correct?
 7 **A.** Could you point specifically to what you are
 8 referring to? There's a lot of stuff on this screen.
 9 **Q.** I'm referring to the left side of the screen. This
 10 is a list of CyberDesk references, right? It says
 11 "CyberDesk and Related Papers."
 12 **A.** This looks like what's on the website. Is that what
 13 you're referring to?
 14 **Q.** Well, it's DTX -- we can't really see it on the
 15 screen, but it's Defendant's Exhibit 8. Do you see that?
 16 **A.** I see it on the screen in front of me, yes.
 17 **Q.** And that's a list of CyberDesk papers, right?
 18 **A.** It is one list of CyberDesk papers.
 19 **Q.** What I've done is match up with these numbers --
 20 sorry -- one thing that Mr. Boles has done is match up the
 21 references when using these numbers. I've got 1, 2, 3
 22 through 7 on this side, on the left side, and they
 23 correspond with the seven papers identified on the face of
 24 the patent. Do you see that?
 25 **A.** They seem to correspond. Yes, I see that.

1 Q. Okay. So the patent examiner had before it during
 2 prosecution at least seven references related to
 3 CyberDesk, correct?
 4 A. That's correct.
 5 Q. And issued the patent nonetheless, correct?
 6 A. That's correct.
 7 Q. Now, as I understand it, you are relying on the
 8 CyberDesk system, air quotes, to prove anticipation,
 9 correct?
 10 A. Yes. That's the basis for the anticipation argument,
 11 yes.
 12 Q. You are using the CyberDesk system as part of
 13 combinations to show obviousness, correct?
 14 A. That's also true.
 15 Q. You've never used the CyberDesk system, have you?
 16 A. I have not.
 17 Q. In fact, that's impossible because the CyberDesk
 18 system no longer exists, correct?
 19 A. Right. This was done more than two decades ago, yes.
 20 Q. Yes. So we saw it was done more than two decades ago
 21 with -- in part by the gentleman we heard from, Dr. Dey,
 22 right?
 23 A. He testified to his work on the system, yes.
 24 Q. He talked about going to some conferences, right, and
 25 showing it off?

1 there's no copy. You're like, okay, cool, thanks. That's
 2 what you did?
 3 A. I didn't investigate further. Once I had
 4 confirmation there wasn't a copy, I didn't think it would
 5 make sense to go searching around further for something
 6 that didn't exist.
 7 Q. You didn't try to find a copy?
 8 A. That's true.
 9 Q. I mean, you've written extensively on the idea of
 10 digital libraries and storing digital information, right?
 11 A. That's correct.
 12 Q. And, of course, this CyberDesk system was digital
 13 information, right?
 14 A. That's true.
 15 Q. You could store it on a computer, on a hard disc, on
 16 a CD or a floppy, depending on its size, correct?
 17 A. Yes. There were different media forms.
 18 Unfortunately, they tend to decay over time. So even if I
 19 saves things from that period, I'm not sure they still
 20 would work.
 21 Q. Yeah, but, you know, if you really want to hold on to
 22 something, you would understand that media decays and get
 23 a new hard drive, put it on a new CD, if you really wanted
 24 to keep it, right, if you thought it was important?
 25 A. The publication record and the other records that are

1 A. He presented papers at conferences, a big conference
 2 in the field of human computer interactions.
 3 Q. Wrote a bunch of papers on it, presented it at
 4 conferences, and didn't keep a copy of it?
 5 A. He did this as a graduate student. He did a better
 6 job than most of my students do in keeping up things. He
 7 has a website with a lot of details on it, but I don't
 8 have -- most people don't keep things for decades.
 9 Q. This was his graduate student work, right?
 10 A. It was part of his graduate work. His thesis
 11 actually was on a different topic. This was part of his
 12 research.
 13 Q. I mean, this is what -- he's getting a master's or a
 14 Ph.D., what he's trying to do as his career, right? It's
 15 not just some kind of stuff on the side, woodworking
 16 beekeeping. This was his career, intended career, right?
 17 A. He did more than most people would do at the time
 18 with regard to documenting in the system, yes.
 19 Q. But he didn't keep a copy of it, did he?
 20 A. He didn't give us evidence of keeping a copy, no.
 21 Q. He didn't keep a copy of it, did he?
 22 A. As far as I know.
 23 Q. Did you try to find a copy?
 24 A. I was told there was not a copy.
 25 Q. So you didn't try to find one. You are like, hey,

1 existing for this are sufficient evidence for most people
 2 in the field.
 3 Q. Yeah. We're not there yet.
 4 I'm just asking you about -- I mean, you are -- like
 5 I said, you've written extensively on digital libraries
 6 and storage, right?
 7 A. If you look at my house and my lab, you will see all
 8 kinds of old junk that probably still doesn't work, even
 9 though I've kept it.
 10 Q. And if you really wanted to keep a copy of something,
 11 you would take into consideration, for example, that the
 12 media would decay or -- right?
 13 A. It's enormously expensive to try to reconstruct
 14 things and move them. Unfortunately, our society has not
 15 done a very good job of financing this kind of thing.
 16 There's very little support for doing that kind of work,
 17 especially after you've left an institution.
 18 MR. LAHAD: If I could have -- I think it's
 19 Slide 13, Mr. Boles, from Dr. Fox's presentation. Yes.
 20 Thank you.
 21 BY MR. LAHAD:
 22 Q. This is your slide describing what you say you relied
 23 on to understand CyberDesk system, air quotes, right?
 24 A. It's a summary, yes.
 25 Q. You would agree that the, quote-unquote, system that

1 you're relying on is -- when the evidence of the system
 2 that you're relying on is some kind of, like,
 3 Frankenstein, a little from here, a little from there, a
 4 little bit of demonstration, some engineer testimony and
 5 some publications; is that fair?
 6 **A.** No.
 7 **Q.** Well, you're using more than one piece of information
 8 to describe a CyberDesk system, correct?
 9 **A.** Just if -- as if I took a picture of you from many
 10 different angles, those would be different parts of
 11 evidence at the moment, yes. We need lots of information
 12 to understand something as complicated as CyberDesk.
 13 **Q.** Well, let's talk about this evidence or this
 14 information. Demonstrations, those are just documents
 15 showing how they work, right?
 16 **A.** Demonstrations are not documents. They are
 17 presentations in a public audience that demonstrate public
 18 disclosure.
 19 **Q.** Well, the demonstrations we're using that you're
 20 relying on in this case, it's not -- you're not looking at
 21 videos of CyberDesk or anything like that. It's just
 22 testimony regarding demonstrations, right?
 23 **A.** I'm sorry.
 24 I'm relying on the fact that he gave public
 25 demonstrations in large numbers to public audiences as

1 did you ask when was it no longer in existence?
 2 **A.** I read Anind Dey's testimony. He explained that. I
 3 thought that was sufficient information.
 4 **Q.** He explained when it went missing?
 5 **A.** He said it went missing. He said it wasn't there.
 6 He didn't say when.
 7 **Q.** He wasn't asked when.
 8 **A.** I don't recall whether he was asked or not, but he
 9 said, from my recollection, that it wasn't there.
 10 **Q.** Well, fortunately we have a transcript of what he
 11 said. Do you recall reading that transcript?
 12 **A.** I do.
 13 **Q.** Do you recall anything about -- anything in that
 14 transcript about when CyberDesk went missing?
 15 **A.** I don't recall such, no.
 16 **Q.** And the documents that were submitted to the Patent
 17 Office regarding CyberDesk, they reference the website,
 18 right?
 19 **A.** I think so.
 20 **Q.** Okay. So the examiner could, looking at those
 21 documents, be apprised of the website containing this
 22 information, right?
 23 **A.** I guess that's possible.
 24 **Q.** It's also possible -- and the website contained some
 25 of these demonstrations, correct?

1 part of his public disclosure of the system.
 2 **Q.** The FCE website, that, too, is a collection of
 3 documents, correct?
 4 **A.** It's a web page and it has links to different things.
 5 Documents -- depends on your terminology, whether they
 6 include links or not. It is an active site. It points to
 7 different things making connections. So it's hard to
 8 flatten the web to turn into documents. The web is a
 9 linked collection of information. So it's hard to just
 10 put it -- pack it into something. It has a different kind
 11 of existence, hypertext in the web, we're all familiar
 12 with, is much more than just documents. It's a whole
 13 collection, network of connections.
 14 **Q.** It's not like there's a working version of the
 15 quote-unquote system on the website, is there?
 16 **A.** It was a pointer to a self-contained version that is
 17 mentioned on the website, which doesn't exist anymore.
 18 **Q.** Yeah. When did it go missing?
 19 **A.** I don't know.
 20 **Q.** Didn't ask?
 21 **A.** No, I didn't ask.
 22 **Q.** Was Dr. Dey -- sorry. Go ahead.
 23 **A.** I was told it was an existing system, so I didn't go
 24 investigate further, as I've already said.
 25 **Q.** Did you ask -- well, if it was an existing system,

1 **A.** The website discusses a number of scenarios which
 2 were used for demonstrations. And a demonstration's
 3 different when you give it in person than if you look at
 4 some screens, as my testimony is different from the slides
 5 that we've shown.
 6 **Q.** Your testimony is different from the slides that
 7 you've shown?
 8 **A.** Yeah. I'm saying more words than just what are on
 9 the screen.
 10 **Q.** Same concepts though, right?
 11 **A.** When I give a demonstration, I answer people's
 12 questions, I chose different kinds of things. So it's a
 13 different entity than just a presentation in terms of
 14 slides.
 15 **Q.** You agree that the capabilities disclosed in these
 16 publications on the face of the CyberDesk, on the face of
 17 the '843 patent, you agree that those publications don't
 18 anticipate the patent, correct?
 19 **A.** It's the system that I'm arguing is anticipating.
 20 **Q.** Right.
 21 **A.** Not the publications.
 22 **Q.** In your view, publications themselves do not
 23 anticipate the '843 patent, correct?
 24 **A.** My discussion is about the system and that's my
 25 argument. I didn't consider whether the publications

1 anticipate it.

2 Q. You didn't consider whether the publications

3 anticipate it?

4 A. I didn't look at publication by publication and say,

5 "Does this one cover everything?" As far as I was

6 concerned, my charge was to look at the system as a whole,

7 which is what I did.

8 Q. Okay. So you weren't asked to just look at the

9 publications and see if they anticipated?

10 A. I considered whether the system anticipated. The

11 system includes more than the publications, so it's much

12 better to look at the whole than look at the pieces.

13 Q. Well, I hear you. My question is very simple. You

14 were not asked whether the publications on CyberDesk

15 anticipate the '843 patent, correct? You were not

16 asked -- that was not part of your assignment, right?

17 A. I don't recall that being my assignment. I'm not

18 sure, but I don't recall that being my assignment.

19 I don't think it's necessary. I think the system is

20 the right way.

21 Q. I hear you. We're going to talk about the system a

22 little bit more. But your testimony to this jury is you

23 don't recall what your assignment was, or rather -- let me

24 strike that.

25 You don't recall whether or not -- looking at

1 in that regard, I used his testimony to make clear what I

2 understood from the publications.

3 So if we're using strict terminology and making sure

4 everything is specifically there, then the anticipation

5 argument is much more complicated. And I didn't think it

6 was necessary. Certainly the anticipation argument, if we

7 switch to obviousness, it would have been obvious from the

8 publications, I believe.

9 Q. You also -- hold on now. You are not relying on

10 CyberDesk publications alone to show obviousness, are you?

11 You're relying on the system, right?

12 A. You asked for my assessment now thinking of things,

13 publications. If I were to think of the publications, as

14 you just asked me to do, and try to say whether it made

15 obvious the claims of the '843 patent, I think that's the

16 case.

17 Q. Okay.

18 A. But I have to do a bit more thinking to make sure

19 about that. I believe that's the case.

20 Q. Okay. Same thing for anticipation. Go.

21 A. I think I've already answered this. I think I've

22 said that there were things in the publications that were

23 not so clear. And it was useful to have Anind Dey's

24 testimony to make those things clear, so that it was an

25 anticipation situation.

1 anticipation by the CyberDesk publications only, you don't

2 recall whether that was part of your assignment?

3 A. There might be some statement in my report that says

4 something, but I don't remember at this time.

5 Q. It wasn't part of your assignment because the

6 CyberDesk publications do not anticipate the '843 patent,

7 correct?

8 A. I didn't make that assessment. If I remember -- I

9 can't remember whether I made that assessment, but I can't

10 think at this moment whether that's the case or not. I'd

11 have to investigate more. It wasn't necessary because I

12 looked at the bigger picture.

13 Q. Well, investigate what? You have the documents,

14 right, and the patent, and Court's constructions. What

15 more do you need?

16 A. When those -- it's something bigger -- covers

17 something, I don't see a reason to be discussing why

18 whether a piece of it also is sufficient.

19 Q. Well, I know that wasn't your assignment. I get

20 that. But can you do it for me now? Can you just give me

21 an answer on whether the CyberDesk publications anticipate

22 the '843 patent? Yes or no?

23 A. There were parts of my argument that I made use of

24 Anind Dey's testimony where it was not clear from some of

25 the publications whether certain things were taught. So

1 Q. Got it. So, documents alone, not so clear.

2 Accordingly, documents alone cannot anticipate by clear

3 and convincing evidence, correct?

4 A. I'm trying to make an off-the-cuff answer to your

5 question. That sounds possible, but again, I don't think

6 it was necessary to even consider that.

7 Q. Of course because the conclusion would have been no

8 anticipation, right?

9 A. (No audible response.)

10 Q. I'm sorry. Did you answer, sir?

11 A. You didn't ask a question; you made a statement.

12 Q. No. It was a question, comma, right: Because the

13 conclusion would have been no anticipation comma right,

14 question mark?

15 A. I didn't hear the last part. So could you repeat the

16 question?

17 Q. Sure. You didn't feel that it was necessary to do

18 the analysis because the conclusion would have been that

19 there would be no anticipation, correct?

20 A. No. I didn't do the analysis because I had the

21 conclusion from looking at the system, and it wasn't

22 necessary to look at a subset of the evidence and decide

23 whether the subset of the evidence would also produce the

24 conclusion I had for the system.

25 Q. All right. So the sole basis for your anticipation

1 opinion is this phantom CyberDesk system that no longer
 2 exists, except in the memory and some writings of memory
 3 of Dr. Dey and some writings, correct?
 4 **A.** Most of the systems from prior years are documented
 5 less well than this particular system was documented. I
 6 had clear and convincing evidence that this system did
 7 what it did at the -- in the second instantiation before
 8 the critical date and anticipated the '843 claims.
 9 **Q.** So on one hand you're telling me this is a
 10 well-documented system, better than others, I had what I
 11 needed. And on the other hand you're saying, I can't tell
 12 from the documents, things aren't clear from the
 13 documents. Is that what we're hearing today?
 14 **A.** Documents that are listed here as publications are on
 15 the right-hand side of this particular screen which
 16 describes four different sources of evidence. The
 17 combination of that information from all those different
 18 sources, just like I explain with my students in class,
 19 I've done interviews of them, I've looked at reports, I've
 20 looked at presentations, that's how I understand the
 21 system and can assign them grades in the next week.
 22 So the preponderance of the evidence is the
 23 combination of all these things.
 24 **Q.** What did you learn from Dr. Dey's testimony about
 25 CyberDesk that wasn't in these documents?

1 **A.** I couldn't be sure whether the Reader was something
 2 that could be editable. When we deal with e-mail systems,
 3 a person of skill in the art would know that e-mail is
 4 something which you can forward and make edits to. It
 5 wasn't crystal clear from that particular description in
 6 this very short document and this particular screen.
 7 **Q.** And Reader is understood by a person of ordinary
 8 skill in the art at the time to be just that, Reader.
 9 Read it, read only, can't edit, right?
 10 **A.** Reader presumes that can you read something. That's
 11 right.
 12 **Q.** But not write to it, correct?
 13 **A.** Doesn't necessarily say that you can write to it, no.
 14 **Q.** I'm sorry. Say it again.
 15 **A.** It doesn't indicate that you can write to it, no.
 16 **Q.** Okay. So despite the fact that Reader does not
 17 indicate that you can write to it, you are relying on the
 18 testimony of Dr. Dey to say, oh, yeah, when I said Reader,
 19 I meant full document editing. Is that your testimony?
 20 **A.** No. That's not what he said. He was asked if the
 21 first program was something that could be edited, and he
 22 said, yes, this is something you could write to. He
 23 didn't say the figure was misstated. He talked and gave
 24 us additional information in his testimony about how the
 25 system worked.

1 **A.** I mean, if you recall, in my testimony there were a
 2 number of slides where I had Dr. Dey's testimony. And I
 3 explained that they filled in and clarified what I was
 4 concerned with. So those are examples of what I learned
 5 through Dr. Dey's testimony. It's a long, long
 6 deposition. I went through the whole thing. And we heard
 7 a section of it last week that explained lots of things
 8 and went through carefully and explained how the claims
 9 were taught by this system.
 10 **Q.** Okay. Give me an example, please, of something you
 11 learned about CyberDesk from Dr. Dey's testimony that
 12 wasn't in the documents.
 13 **A.** Okay. So one of the things that I learned was that
 14 the -- what's referred to as the document editing program
 15 in some ways or the first computer program was something
 16 where you could do editing in the CHI 97 paper, when we
 17 looked at the screen there, we saw on the screen was from
 18 an e-mail message and Figure 3 it described Mail Reader.
 19 So readers are not typically things where you're sure that
 20 you can do editing, but he explained in his testimony,
 21 described that that indeed could be edited. So that's
 22 something that was not clear from that publication.
 23 **Q.** So your testimony is that when you look at Reader,
 24 it's ambiguous as to whether or not something is editable,
 25 the document is editable?

1 So the system works by combining two different
 2 things, a first program and a second one. And there are
 3 many different first programs that can be used, as he
 4 explained.
 5 **Q.** And you have no trouble relying on the uncorroborated
 6 testimony of Dr. Dey to prove invalidity by clear and
 7 convincing evidence?
 8 **A.** He's the creator of the system, and the system has
 9 been described as handling lots of different first
 10 programs. And he gave an example, and he explained that
 11 was the case. And if we look at the FCE website, the
 12 thing that we see in the second column over there, you see
 13 there are lots of different programs that are mentioned
 14 there. I pointed out and another slide of mine pointed
 15 out said Notepad was one of the desktop services. So
 16 there's a lot of evidence that supports what he said, and
 17 I believe it. He's a highly distinguished person. He's a
 18 dean --
 19 **Q.** Dean at the University of Washington computer science
 20 school, right?
 21 **A.** No, no. There's a different department for computer
 22 science. He's in the iSchool, the Information School.
 23 It's a different part of the campus and not the one that
 24 you were talking about the other day.
 25 **Q.** And you would agree -- so let me get this straight.

1 Again, on one hand, you are saying CyberDesk, well
 2 documented, more than normal, and there's no proof, no
 3 evidence other than Dr. Dey's testimony about documents
 4 being editable?

5 **A.** I don't find that strange. I've tried in some of my
 6 older systems to get them, to bring them back to life, and
 7 it's really a hard thing to do.

8 **Q.** On one hand, you mentioned it's -- strike that.
 9 On one hand, you mentioned that CyberDesk was well
 10 documented, above average, but in the publications that
 11 we've seen, there's nothing in there about editable text
 12 so you have to go rely on Dr. Dey's uncorroborated
 13 testimony.

14 That's your position, correct?

15 **A.** I think I've already said that the website talks
 16 about a number of different services, including Notepad,
 17 so that's another bit of documentation. Not in the
 18 publications, but on the website.

19 **Q.** Well, again, as we agreed earlier the publication do
 20 refer to the website right?

21 **A.** That's true.

22 **Q.** Yeah. So a person of ordinary skill in the art
 23 person, like the patent examiner, could look at the
 24 publications, see, hey, there's a website -- in fact,
 25 actually, let's pull it up.

1 **A.** It wasn't clear from the other places that I looked
 2 at. He made it very clear.

3 **Q.** Similarly --

4 **MR. LAHAD:** You can take that down, Mr. Boles.

5 **BY MR. LAHAD:**

6 **Q.** Similarly, you're relying on a collection of
 7 materials to show what ADD did and when it did it,
 8 correct?

9 **A.** Yes. I had a similar slide to the one you showed
 10 with regard to CyberDesk pointing out the different
 11 sources of evidence that were used, including the videos
 12 that we all saw last week.

13 **Q.** I want to talk about those videos and the laptops.
 14 You understand that those laptops, those didn't come --
 15 let me step back.

16 You had a portion of your direct testimony where you
 17 purported to use the actual ADD functionality, right?

18 **A.** Yes. So there's laptops sitting on the desk over
 19 there that I referred to.

20 **Q.** Yes, you know, these --

21 **A.** And what I used -- can I finish?

22 **Q.** Yeah -- sorry. Go ahead.

23 **A.** So on the laptop, was a program called IAD. If we
 24 remember, Miller's testimony, he explained that ADD was
 25 the software system that was built, and a productized

1 **MR. LAHAD:** Mr. Boles, if you could pull up
 2 DTX-14. And just go straight to the bottom paragraph.
 3 Thank you.

4 **BY MR. LAHAD:**

5 **Q.** There's the website, the CyberDesk website in DTX-14,
 6 correct?

7 Read the title of the document, please.

8 **A.** It says, "A demo version of CyberDesk is available
 9 at," and then it gives the website.

10 **Q.** Right?

11 **A.** "Video accompanying the paper summarizes CyberDesk
 12 and shows more sample scenarios. Code samples are
 13 available at" -- and it gives another address.

14 **Q.** Okay. And so you testified earlier there's reference
 15 to Notepad in the documents, correct?

16 **A.** On the website.

17 **Q.** Okay. On the website. And so let me ask you this
 18 question: What did you get out of Dr. Dey's testimony
 19 about how CyberDesk works that's not in the documents or
 20 the website pointed to by the documents?

21 **A.** So the example I gave before is that he confirmed
 22 that one could edit in the first computer program,
 23 essentially.

24 **Q.** And there's a question about that from the documents
 25 and the website?

1 version of this was IAD. So that's what I was actually
 2 using on the system.

3 **Q.** You understand that these PowerBooks, those didn't
 4 come from Apple, right?

5 **A.** Well, they were manufactured by Apple.

6 **Q.** Well, no, you recall Mr. Miller's testimony that he
 7 found and purchased them?

8 **A.** As I said, they were manufactured by Apple.

9 **Q.** Yeah.

10 **A.** He purchased them later, yes, I understood that.

11 **Q.** Right.

12 No questioning from Google's lawyers about where and
 13 when he came to have these laptops, right? Didn't hear
 14 anything like that, did we?

15 **A.** We had his testimony where he talked about doing
 16 that, in his deposition, which we all heard last week.

17 **Q.** Well, you recall that he said that he set up these
 18 MAC Books about four or five years ago in that deposition.
 19 Do you recall that?

20 **A.** Actually, they're PowerBooks. He said he purchased
 21 them and he set them up. He had the old software, and he
 22 installed that. That's what he said if I recall in his
 23 deposition.

24 **Q.** We don't know where that software came from, do we?

25 **A.** He was under oath when he testified to that.

1 Q. We don't know where that software came from, do we?

2 A. Well, if you look on the machine and you run it, it

3 has information about that, but I don't recall the

4 details.

5 Q. He wasn't asked details during his deposition, was

6 he?

7 A. His deposition was quite long. We only heard a small

8 portion of it.

9 Q. And we didn't hear how he came to get the software,

10 did we?

11 A. I don't recall if there were other questions in his

12 deposition that was originally taken. We didn't hear that

13 last week.

14 Q. You understand that Mr. Miller put together these

15 laptops in 2013 or 2014, right? That's when he put these

16 laptops together; you understand that, right?

17 A. I haven't done the arithmetic to figure out when he

18 did the deposition and when he obtained them, how many

19 years ago. But if you say that.

20 Q. I mean, this is going to be easy, I hope. 2019 minus

21 five years is, 2014?

22 A. Sounds right, yes.

23 Q. All right. So assuming that, he put these laptops

24 together in 2014, right?

25 A. Yes. That's what the arithmetic tells us.

1 A. Jim Miller is the person that --

2 Q. Oh, I'm sorry. I get that messed up. Thank you very

3 much. Let me step back.

4 We heard deposition testimony from Dr. Dey -- again,

5 let me step back. I'm sorry.

6 One of your obviousness combinations is CyberDesk

7 plus Microsoft Word 97, correct?

8 A. Yes.

9 Q. Okay. We didn't hear any testimony from Dr. Dey

10 about combining CyberDesk with Microsoft Word 97, did we?

11 A. No, we didn't.

12 Q. Counsel for Google was asking him questions for, as

13 you said, well over an hour. We didn't hear any questions

14 about whether or not it would be appropriate to combine

15 CyberDesk with Word 97, correct?

16 A. He made clear that he was not hired as an expert

17 witness; he was hired as a fact witness. So my job is the

18 one to make the obviousness arguments. That's not the job

19 of a fact witness as far as I understand. That's my

20 interpretation.

21 Q. Yeah. But one of your opinions is that someone -- a

22 person of ordinary skill in the art would have been

23 motivated to combine CyberDesk and Word 97, right?

24 A. That's part of the argument of obviousness.

25 Q. At no point during his deposition was Dr. Dey asked,

1 Q. So the devices that you're relying on to show

2 invalidity are not from the late '90s, they're from 2013

3 and 2014, correct?

4 A. No. The machines are from the '90s and the software

5 is from the '90s.

6 Q. We don't know that, do we?

7 A. We have his testimony as far as that's concerned.

8 Q. You are -- as part of your opinions, you're combining

9 CyberDesk and ADD plus Word, right?

10 A. So my obviousness arguments were categorized. And I

11 had those three systems in four different combinations.

12 Q. Let me step back. Did you make any attempt to verify

13 the vintage of what was going on, on these laptops?

14 A. What do you mean by "vintage"?

15 Q. Did you make any effort to verify that the software

16 and programs and hardware and everything that these

17 laptops purport to be, did you make any attempt to

18 independently verify the accuracy of what they're

19 represented to be?

20 A. I looked at the machines, and I saw the date of

21 production. I looked at the running system. I looked at

22 the screens and the copyright notices and other kinds of

23 things, so I did some work about that, yes.

24 Q. Of course, the creator of ADD was deposed in this

25 case, right, Dr. Dey, right?

1 "Hey, would you have been motivated to combine CyberDesk

2 with Microsoft Word 97?"

3 A. That's a true statement as far as I know.

4 Q. Same thing with ADD. You're relying on ADD plus

5 Microsoft Word 97 to show obviousness, right?

6 A. That's one of obviousness cases, yes.

7 Q. And we heard from Mr. Miller, and at no point during

8 that deposition did we hear any questioning about whether

9 or not he would be motivated to combine ADD with Word 97,

10 correct?

11 A. I don't recall him being asked that, no.

12 Q. Nothing about that in either of those depositions,

13 correct?

14 A. I don't recall either of that, yes.

15 Q. If the jury finds that there is no motivation to

16 combine the systems you allege to be combined, then the

17 claims are not obvious, correct?

18 A. So I presented four different obviousness arguments.

19 Are you talking about all four of those?

20 Q. Well, you presented CyberDesk plus ADD, right?

21 A. Yes.

22 Q. If there's no motivation -- step back. Strike that.

23 If the jury finds there's no motivation to combine

24 CyberDesk with ADD, no obviousness, correct?

25 A. If the jury were to disregard the direct pointer from

1 CyberDesk to ADD --

2 Q. Dr. Fox, I'm on limited time could you answer my

3 question, please?

4 A. Could you repeat it?

5 Q. Sure. If the jury finds that there was no motivation

6 to combine CyberDesk plus ADD, there is no obviousness,

7 correct?

8 A. For that of the four cases, that would be the

9 situation, yes.

10 Q. And same thing for the combination of ADD plus

11 CyberDesk, right? If the jury finds there's no motivation

12 to combine in that direction, there's no obviousness,

13 correct?

14 A. If, in spite of evidence, they find there is no

15 additional motivation to combine, then that's what they

16 decide.

17 Q. And if the jury finds there is no motivation to

18 combine CyberDesk with Word 97, no obviousness, correct?

19 A. If the jury decides that, they make a decision.

20 Q. Say that again, please?

21 A. Again, if the jury makes a decision, then they make a

22 decision.

23 Q. Well, if their decision is that there is no

24 motivation to combine, then there's no obviousness, right?

25 A. If they make that decision, yes.

1 Q. Pictures are documentation of something, but it's not

2 a system, right?

3 A. No. The system is the software that is running that

4 we've heard all kind of evidence about.

5 MR. LAHAD: Thank you, Your Honor. No further

6 questions.

7 THE COURT: Thank you very much.

8 Redirect?

9 MS. ROBERTS: No redirect, Your Honor.

10 THE COURT: Okay. Please have a seat.

11 You may step down.

12 MS. ROBERTS: May Dr. Fox be excused?

13 THE COURT: Yes.

14 Okay. Ladies and gentlemen of the jury, we

15 will take our lunch break. I'm just double checking to

16 make sure that we have your lunches here, and we do. So

17 we will take you out right now.

18 (The jury exits the courtroom at 1:04 p.m.)

19 THE COURT: All right. Please be seated. I'm

20 going to take lunch as well and work on the jury

21 instructions. I can tell you this. I have a proposed

22 version of the verdict form that we'll put up and that

23 rules on disputing proposals with the jury instructions.

24 We are mostly done.

25 I did have a question that had to do with the

1 Q. If the jury finds there's no motivation to combine

2 ADD plus Word 97, there is no obviousness, correct?

3 A. Yes. The jury is empowered to make these decisions,

4 yes.

5 Q. All right. So using your bowling ball analogy, if

6 there is no motivation to combine, that's a gutter ball,

7 right?

8 A. That's the situation for the obviousness, but you

9 didn't give one for the anticipation.

10 Q. Well, there's no motivation to combine in the context

11 of anticipation, right?

12 A. That stands on its own. You don't need the

13 obviousness.

14 Q. No motivation to combine means gutter ball for

15 obviousness, right?

16 A. Yes. You don't get a second attempt if you can't

17 combine the things, certainly.

18 Q. In response to one of my questions, you said, "Well,

19 if you took a bunch of different pictures of me."

20 Do you recall that?

21 A. I recall testifying to that, I'm not sure if you

22 asked the question.

23 Q. That happens a lot. A picture of me or a set of

24 pictures of me, that's not a system, is it?

25 A. Pictures are documentation of something.

1 competing prior art proposals, understanding Arendi's

2 point that Google had already agreed to proposals. And I

3 will take that into account. But I was wondering why

4 we're disputing what the relevant date is for some of this

5 prior art. Does it even matter given the evidence we've

6 heard? We had an argument about a '97 date versus a '98

7 date. Can we get that worked out?

8 MS. SRINIVASAN: We can try to confer about it

9 maybe over lunch, but we have the '97 date, which was the

10 operative date that had been used in the jury instructions

11 until yesterday. So I think that's probably something we

12 should talk about. We got it back last night with the

13 addition of -- with the other date as well.

14 THE COURT: I don't think I was focused on

15 the -- the dates of this prior art as it was coming into

16 evidence because I didn't understand that to be a

17 particular dispute. But my recollection is that,

18 regardless of which date we used, the '97 or '98 date,

19 there wasn't really a dispute. But if you can all confer

20 on that, that would be helpful. That would streamline.

21 MR. LING: That was our understanding as well,

22 Your Honor. So we weren't really focused on that until we

23 were preparing for the -- our case in chief. And so there

24 is no evidence of an earlier invention date, so we don't

25 really think there should be a dispute.

1 THE COURT: Not having had the ten-year history
2 that you all have with this case, I don't know how we came
3 up with what we came up with. So understanding that I
4 could be opening up a can of worms with anything I do, you
5 all know better about this than I do. So why don't you
6 take a look at that and also take a look at version of the
7 Federal Circuit Bar Association Model Jury Instructions
8 where there is no dispute about dates, because I think we
9 might be able to maybe crib some language from that could
10 help with us. Okay? We will be in lunch recess.

(Whereupon, a recess was taken.)

12 THE COURT: All right. Please be seated.

13 MR. UNIKEL: Your Honor, may I ask a 10-second
14 question?

15 THE COURT: Yes.

16 MR. UNIKEL: I know both parties have to
17 reserve enough time for closings, and I was wondering if
18 we can get some count from the Court as to --

19 THE COURT: That's what I'm working on right
20 now. So for today, I'm charging as of this minute, an
21 hour 18 to Arendi, and hour 12 to Google. So the time --
22 I won't charge the time before the jury came out to either
23 side as it took a significant amount of time reviewing
24 expert reports in chambers so that I could rule on
25 Arendi's objections. I won't charge that time to Arendi,

1 but I will charge the time to Arendi after I came out and
2 took the bench but before we brought the jury back out.
3 So I think that's fair to both sides because I didn't
4 charge additional time to Arendi, which I could have spent
5 on the bench reviewing expert reports to see if they were
6 inconsistent. That's the way that worked out.

7 So based on that, by my rough calculation, it
8 looks like Google is at 12:26 -- no, sorry, Arendi is at
9 12:26. Google is at 10:41.

10 Does that sound right to everyone?

11 MR. UNIKEL: I believe so, Your Honor.

12 MS. SRINIVASAN: Sounds right, Your Honor.

13 THE COURT: All right. So that means we have
14 to reserve an hour for closings, that Arendi's got a
15 little bit over an hour left for examinations. And
16 Google's got a couple hours more than that, almost.

17 Okay. Are we ready to bring the jury out?

18 MR. PETERMAN: Your Honor, just to note, this
19 is Mr. Kidder's testimony. There will be two segments
20 within his direct where we'll need to close the courtroom
21 talking because we're talking about other settlement
22 agreements.

23 THE COURT: Okay. How about cross? Can we
24 keep it modulated?

25 MS. SRINIVASAN: We will try to do that, Your

Honor.

2 THE COURT: Okay. Very good.

3 MS. SRINIVASAN: We will have to hear direct,
4 but I suspect we will try to do that.

5 MR. PETERMAN: Thank you, Your Honor.

6 THE COURT: Understood. All right. Let's
7 bring the jury out.

8 (The jury enters the courtroom at 2:20 p.m.)

9 THE CLERK: Your Honor, the jury.

10 THE COURT: Welcome back, ladies and gentlemen.
11 Have a seat.

12 Lets have Google call its next witness.

13 MR. PETERMAN: Good afternoon, Your Honor.
14 Google calls Mr. Douglas Kidder to the stand.

15 THE COURT: Please approach, sir.

16 MR. PETERMAN: May I approach?

17 THE COURT: Yes.

18 THE CLERK: Please state and spell your name
19 for the record.

20 THE WITNESS: Douglas Kidder, D-O-U-G-L-A-S,
21 K-I-D-D-E-R.

22 DOUGLAS KIDDER, having been called as a witness,
23 being first duly sworn under oath or affirmed, testified
24 as follows:
25

Kidder - Direct

1 THE CLERK: Thank you. Please be seated.

DIRECT EXAMINATION

2 BY MR. PETERMAN:

3 Q. Good afternoon, Mr. Kidder.

4 A. Good afternoon.

5 Q. Would you please introduce yourself to the jury.

6 A. Sure. My name is Doug Kidder.

7 Q. What is your area of professional expertise?

8 A. I'm a damages expert. I calculate damages in cases
9 such as this.

10 Q. And did you prepare some slides to accompany your
11 testimony today?

12 A. Yes, I did.

13 Q. What is your professional expertise as is relevant to
14 this case?

15 A. So I'm a managing partner with a small firm that we,
16 basically, do damages calculations. I have about 25 years
17 experience working with intellectual property matters.
18 I've bought and sold my own businesses before, and I've
19 testified in over 70 cases, over 30 of which involved
20 patents.

21 Q. And what experience do you have in licensing
22 practices?

23 A. So in the course of my career, I figure I've read
24
25

1 over a thousand different licenses. It's just -- kind of
 2 comes with the territory.

3 Q. And can you give the jury a little bit of
 4 understanding of your educational background and other
 5 accomplishments?

6 A. Sure. So it's not on here that I graduated from
 7 Milford Miller High School, Baltimore County, and went to
 8 Amherst College, and then went to UC Berkeley for a
 9 master's of science.

10 Q. And what about your professional affiliations?

11 A. I was Adjunct Professor at Golden Gate University,
 12 which is a local college in the San Francisco area. And I
 13 was teaching a course on damages in their school of
 14 accounting there. And I'm also a member of a couple of
 15 societies that people like me tend to join.

16 Q. Mr. Kidder, your firm is being compensated for the
 17 time that you've spent working on this case, correct?

18 A. Yes.

19 Q. And will the outcome of this trial have any impact on
 20 your compensation?

21 A. No, it will not.

22 MR. PETERMAN: Your Honor, we tender Mr. Kidder
 23 as an expert in the valuation of intellectual property,
 24 calculation of patent damages, and licensing.

25 MS. SRINIVASAN: No objection.

1 request wrong?

2 A. Because it's completely out of scale with what
 3 they've settled for in other cases. So you can see, I
 4 just put together a quick graphic here showing that, you
 5 know, Arendi's asking for \$45 million. They settled for
 6 [REDACTED] and [REDACTED]. And as I'll
 7 describe later, the license that would be extended to
 8 Google is for a far shorter period of time for a far
 9 shorter extent of accused use. One would expect the
 10 payments to scale with the amount of accused products.

11 Q. So Mr. Weinstein is making a 45 and a half million
 12 dollar damage calculation for Google.

13 What demand did he make the Apple litigation?

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 Q. Mr. Kidder, we are going to go through your opinions
 25 in a step-by-step manner, but let's get back to some of

1 THE COURT: All right. He is so qualified.

2 BY MR. PETERMAN:

3 Q. Mr. Kidder, what were you asked to do in this case?

4 A. I was asked to calculate damages, assuming that the
 5 '843 patent is valid and infringed. So I take that as an
 6 assumption. So I was asked to calculate damages, and also
 7 reply to the opinions that were expressed by
 8 Mr. Weinstein, essentially my counterpart, on Arendi's
 9 side.

10 Q. Mr. Kidder, if the '843 patent is valid and
 11 infringed, what is your opinion on the appropriate measure
 12 of damages that Google would owe Arendi?

13 A. It is \$500,000. It is -- you know, it's not the
 14 \$45 million that Mr. Weinstein calculated.

15 Q. Now, Mr. --

16 MR. PETERMAN: Now, at this time, Your Honor,
 17 we actually do need to seal the courtroom.

18 THE COURT: All right. Ms. Garfinkel, seal the
 19 courtroom.

20 * * *

21 (The following discussion is held under seal:
 22 THE COURT: The courtroom has been sealed.
 23 MR. PETERMAN: Thank you, Your Honor.
 24 BY MR. PETERMAN:
 25 Q. Mr. Kidder, on a high level, why is Arendi's damages

1 the basics first.

2 Will you tell the jury what evidence you reviewed in
 3 order to form your opinions here?

4 A. Sure. It is very similar to what Mr. Weinstein
 5 looked at. I started by reviewing the '843 patent, and I
 6 looked at the existing licenses. And there are four up
 7 there you should probably recognize by now: Samsung,
 8 Microsoft, Microsoft Mobility, Apple. And then the fifth
 9 license with InNova, which you've heard a little bit
 10 about. I also reviewed the financial records that were
 11 produced by Google in this matter, some limited financials
 12 from Arendi, and other evidence, just e-mails, web
 13 searches, documents, kind of a catch-all.

14 Q. Mr. Kidder, what is your understanding of the
 15 products that are accused here? Start with the devices
 16 first.

17 A. So the accused devices here Pixel 2, Pixel 3 family
 18 of devices that were sold with Android 8 with STS on them.
 19 So there were some devices sold prior to that, that didn't
 20 have Android STS, but it's only those that were sold after
 21 December 5, 2017.

22 Q. And with respect to the apps, what is your
 23 understanding of the accused apps in this case?

24 A. Again, there are 12 apps here, and I think you've
 25 seen this list previously. So it's any app that was

1 downloaded from Google between December 5, 2017, when
 2 Android 8 with STS was enabled, to November 10, 2018, when
 3 the patent expired. So it's the accused apps here are all
 4 the ones downloaded from that period.

5 Q. Mr. Kidder, what were Google's revenues for the apps
 6 that are accused in this case?

7 A. So the total revenues here for the accused devices,
 8 the Pixel 2 and 3 in that time frame, is [REDACTED].
 9 And the accused apps, which is the apps that were
 10 downloaded, again, between December 5, 2017, and
 11 November 5, 2018, it's about [REDACTED], leaving you
 12 with a total of about [REDACTED] in accused revenue
 13 here.

14 Q. And what is the basic measure of damages that you
 15 applied in this patent case?

16 A. So the -- you should recognize this slide from
 17 Mr. Weinstein's. We're all doing the same thing here,
 18 which is that the measured damages is a reasonable royalty
 19 for the use made of the invention by the infringer.

20 Q. Mr. Weinstein mentioned Georgia-Pacific Factors, did
 21 you also use those?

22 A. Yes, I did.

23 Q. And in addition to the 14 factors that are listed
 24 here, is there a 15th factor that you also applied?

25 A. Yes, there is. So the 15th factor is really this

1 was asserting that Google was infringing on a patent that
 2 it had. And so inNova, Google paid inNova. So it's -- in
 3 the jargon, it's in-licensing versus out-licensing. This
 4 is Google taking a license to something.

5 Q. So how much was paid for each of these settlement and
 6 license agreements?

7 A. So again, these are numbers that I think we're
 8 generally familiar with. [REDACTED]
 9 [REDACTED] And inNova received \$625,000
 10 from Google.

11 Q. Now, in front of you in the binder, there is a tab
 12 that's marked DTX-499.

13 Do you see that?

14 A. Sorry. Yes, I do.

15 Q. Take a second to refresh yourself with the document,
 16 and the first question is, what is the document?

17 A. So this document is the license between inNova and
 18 Google.

19 Q. And is this the inNova agreement that you just
 20 referenced?

21 A. Yes, it is.

22 Q. Did you rely upon this inNova agreement as part of
 23 the opinions you are relying on in this case?

24 A. Yes.

1 notion of a hypothetical negotiation, which I thought
 2 Mr. Weinstein did a good job explaining the basic idea of
 3 the Georgia-Pacific analysis and the hypothetical
 4 negotiation, this idea that the parties sit down around
 5 the time that infringement began and negotiate the
 6 license. And the question is, what's the opinion as to
 7 what that license amount would be.

8 Q. And in general, how did you apply the Georgia-Pacific
 9 factors here?

10 A. So the Georgia-Pacific analysis is, basically, you
 11 start, it's like valuing real estate or valuing a car.
 12 The first thing you do is you look for comparable
 13 transactions. What did people actually pay for this
 14 property or similar properties. And then you adjust it up
 15 or down for various differences between comparables and
 16 the property that you're trying to evaluate.

17 Q. So what did you determine in this case were
 18 comparable licenses?

19 A. So there were four licenses I viewed as comparable.
 20 There was a settlement agreement with Apple, settlement
 21 agreement with Samsung, settlement agreement with
 22 Microsoft, and the settlement agreement with inNova.

23 Now, the inNova one is a little different. I mean,
 24 you've heard about Apple, Samsung, and Microsoft
 25 repeatedly. The inNova one was a license in which inNova

1 MR. PETERMAN: Your Honor, we move DTX-499, the
 2 inNova license, into evidence.

3 MS. SRINIVASAN: No objection.

4 THE COURT: It's admitted.

5 (Exhibit DTX-499 is admitted into evidence.)

6 BY MR. PETERMAN:

7 Q. Now, Mr. Kidder, why is it in your opinion that
 8 inNova is a comparable license?

9 A. So it's comparable in the sense -- in sort of two
 10 senses. There's economic comparability, and then this is
 11 a license for, turns out to be just three patents. There
 12 is one that was asserted against Google, an inNova
 13 license, just two other patents. So it's relatively
 14 simple.

15 There are a lot of licenses you see that are broad
 16 portfolio licenses that one company may take a license
 17 from another for a hundred different patents. And that's,
 18 in an economic sense, not comparable to what we're looking
 19 at here.

20 It's also comparable from a technology perspective in
 21 that it licensed a similar patent. The patent is similar
 22 technologically to the '843 patent.

23 Q. And how do you know its technologically comparable?

24 A. I relied on the opinion of Dr. Martin Rinard for
 25 that.

1 Q. And how comparable are the rest of the three licenses
 2 that you relied upon?
 3 A. Well, they're all very comparable in the sense that
 4 the '843 patent was licensed by every one of Apple,
 5 Samsung, and Microsoft.
 6 Q. Now, you mentioned under the Georgia-Pacific factors
 7 you need to make adjustments based on the licenses.
 8 What is the first adjustment that you made here?
 9 A. So the first adjustment I made was -- the jargonizing
 10 term for it is extend of use. In other words, what -- how
 11 much in revenue is being accused or infringing by Arendi
 12 for each of the other licensees. And so in Apple's case,
 13 the accused products were some of their big sellers -- it
 14 was phones, tablets, PCs -- over a period of, I think it's
 15 nine years.
 16 So it amounts to \$422 billion of revenue that Arendi
 17 was accusing.
 18 Similarly, for Samsung, [REDACTED] And
 19 over the period of the license, it's like [REDACTED]
 20 Excuse me. For Microsoft, it was Microsoft's Office
 21 product, and again, over the multi-year term of that
 22 [REDACTED]
 23 Microsoft.
 24 Q. Now, I understand that Mr. Weinstein looked at
 25 units -- number of apps, number of devices -- as opposed

1 Q. And I notice that there's no revenue for inNova. Why
 2 is that?
 3 A. Because there wasn't publicly available documentation
 4 on what the accused revenues were. It was all Google. So
 5 it was internal. It was Google products, and Google
 6 products, I wouldn't expect to see a difference in revenue
 7 there.
 8 Q. So, Mr. Kidder, what's the next step you took in your
 9 analysis?
 10 A. So the next thing is to understand the --
 11 essentially, how to scale that license amount. So we know
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 So it just gives you an idea of what percentage of
 20 those revenues were paid as a license amount.
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

1 to revenue.
 2 Why did you approach this as looking at revenue as
 3 opposed to units?
 4 A. Well, so the problem with units is that they're
 5 different things, right, and, you know, the Apple units
 6 and the Samsung units being phones and tablets, they're
 7 sort of the same thing. But when you move over to
 8 Microsoft and you start trying to equate one unit of
 9 Microsoft office, which, in and of itself, you wonder how
 10 to count the units there. Is that one unit, or is that --
 11 Word plus Excel plus PowerPoint plus Outlook -- is it four
 12 units?
 13 So "unit" becomes kind of this funny and sort of
 14 indeterminate number. But if you look at revenues,
 15 revenues are what the company's received from selling
 16 their products. And that's what profits are made off of.
 17 And then at the end of the day, what I'm talking about is
 18 money, so I focused on revenues.
 19 Q. And how did you determine the revenue numbers that
 20 you have here for Apple, Samsung, and Microsoft?
 21 A. It was a combination of evidence that was provided by
 22 Arendi and also just public -- you know, you go and you do
 23 searches and you try to understand to the best extent you
 24 can, you know, how much Microsoft made selling Office over
 25 those nine years.

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 Q. Now, what's the next step in your analysis, Mr.
 8 Kidder?
 9 A. Well, you compare that to Google's revenue, which we
 10 just saw before. And you can see that Google's revenue is
 11 very much smaller than the accused revenue for [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED]
 15 [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED] And if you take the -- if you scale Google's
 21 revenues to [REDACTED] you get [REDACTED]. [REDACTED]
 22 [REDACTED]
 23 [REDACTED] And I did not do any scaling for inNova
 24 because that's Google on Google. So that would leave you
 25 with \$625,000.

1 Q. So, Mr. Kidder, how do the number of patents at issue
 2 in this current litigation compare to the number of
 3 patents at issue in the other litigations?
 4 A. So what I did here -- so the short answer is, there's
 5 only one patent here; there are multiple patents in the
 6 other litigations. And what I've done here is I've just
 7 prepared a chart in which you can see -- excuse me --
 8 under -- in the columns under each of those license names
 9 is the number of patents.
 10 [REDACTED]
 11 [REDACTED] Samsung got a license to [REDACTED] patents
 12 plus the foreign patents -- and these are all Arendi
 13 patents, just to be clear. [REDACTED]
 14 [REDACTED] And in InNova,
 15 Google got a license to three patents plus seven patent
 16 applications.
 17 So they're all sort of bigger things than just the
 18 '843 patent.
 19 Q. So, Mr. Kidder, why did you feel it was important to
 20 point this out to the jury?
 21 A. Well, it's, you know, it's a comparable in the sense
 22 that, you know, all of these licenses are to the '843
 23 patent, but all of the licenses also included other stuff
 24 that has to have some value.
 25 Q. Going back to your house analogy, what effect does

1 \$45 million has got to be attributable to the other
 2 patents that Samsung, [REDACTED] received a
 3 license to.
 4 Q. Now, what about the license terms, meaning, the
 5 length of the license? How do those compare between the
 6 license matter in the Google case versus the licenses in
 7 those other cases?
 8 A. So Apple, Samsung, and Microsoft all got licenses for
 9 approximately 9.7 years. That was the amount of time they
 10 had before the patents all expired. And in the InNova
 11 license, Google got a license to patents that lasted for
 12 about 12.4 years. And in this case, Arendi is accusing
 13 Google of using its patents for an 11-month term.
 14 So in this case, the license term for Google is
 15 vastly shorter than the license terms for the other
 16 patents -- excuse me -- the other agreements.
 17 Q. And what effect does the shorter duration for the
 18 Google license have in your opinions?
 19 A. It would tend to reduce it.
 20 Q. How much of a downward effect?
 21 A. Well, it's hard to, again, put an exact number on it
 22 for a couple of reasons. There doesn't tend to be a
 23 linear relationship between the length -- the term of the
 24 license and the amount paid.
 25 And secondarily, this is partly also covered by

1 the number of patents have on your conclusions?
 2 A. It would reduce it from the starting point. So if
 3 you scale it by revenue, you get numbers in blue at the
 4 top. But you also recognize that Google is getting a
 5 license to fewer things. So you -- that suggests a
 6 downward adjustment.
 7 Q. Do you have a precise amount of downward adjustment
 8 that you are applying?
 9 A. No, I don't. And the reason for that is that patents
 10 can have widely different values. [REDACTED]
 11 [REDACTED]
 12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED] The only thing you can be sure of is that the
 15 additional patents are worth something.
 16 Q. Now, did Mr. Weinstein account for additional patents
 17 in his analysis?
 18 A. No, he did not.
 19 Q. Do you believe this failure to account for additional
 20 patents was an error?
 21 A. I do.
 22 Q. Why is that?
 23 A. Because, basically, it inflates his opinion. It
 24 accords no value to it, and yet there had to have been
 25 some value. So some part of his calculation of

1 scaling for revenue because the revenues I looked at were
 2 over the entire term. It has some downward affect, but
 3 it's not a dramatic effect.
 4 Q. So I see a lot of red arrows here.
 5 What does this mean for your opinion?
 6 A. Well, what it means is that you would start with the
 7 numbers in blue up there, which are the scaled revenue
 8 numbers, and you would adjust them downward for the number
 9 of licensed patents and the shorter term.
 10 Q. Are there any considerations that would increase the
 11 numbers upwards?
 12 A. Yes.
 13 Q. What consideration is that?
 14 A. That's the concept of known, valid, and infringed.
 15 And, again, Mr. Weinstein described this a little bit, so
 16 I won't belabor the point. But in this hypothetical
 17 negotiation between Arendi and Google around the date when
 18 Google first starts using this technology, the assumption
 19 is that the patent is valid and the patent is infringed.
 20 And this is not a situation that you see in a sort of a
 21 nonhypothetical negotiation license in the sense that in,
 22 not all, but in many negotiations, the licensee says,
 23 "Well, I'm not sure your patents are valid. I'm not sure
 24 I infringed," and that sort of gives them some leverage to
 25 negotiate downward on the amount they want to pay.

1 Q. So, Mr. Kidder, considering all these different
 2 factors, what is your opinion as to the amount of a
 3 reasonable royalty, assuming that Google is found to
 4 infringe the '843 patent and it's also found valid?
 5 A. Well, my conclusion, as I stated earlier, is
 6 \$500,000.
 7 Q. And how did you arrive at \$500,000 given all the
 8 information you presented to the jury?
 9 A. Well, what I did was that I very much followed what
 10 you're seeing on the screen here, and then sat back and
 11 thought about, well, as a damages expert, what I'm trying
 12 to do here is, I'm thinking about validity and
 13 infringement. I'm trying to be as conservative as
 14 possible. I'm trying to step back and give Arendi as much
 15 credit as I think it might be due in a hypothetical
 16 negotiation. And I think about where this might come out.
 17 And when I looked at the evidence, to me, the
 18 licenses that were most similar here to what we're dealing
 19 with Google are the Apple and Samsung licenses. Right.
 20 Microsoft is a different thing. Microsoft, they're
 21 licensing it for use in Office, which there's no sort of
 22 equivalent comparable product at Google. So the two that
 23 are clearest to me are Apple and Samsung. And I believe
 24 I've been very conservative in the \$500,000 opinion.
 25 MR. PETERMAN: Thank you. Mr. Spencer, you can

1 going to use it for demonstrative purposes rather than for
 2 admission.
 3 THE COURT: All right. Let me see counsel at
 4 sidebar briefly.
 5 - - -
 6 (Whereupon, the following discussion is held at
 7 sidebar.)
 8 THE COURT: Counsel, my recollection is that I
 9 said that this exhibit could be admitted to the extent he
 10 wants to highlight it, and he can make that into a
 11 demonstrative.
 12 MS. SRINIVASAN: Objection withdrawn.
 13 MR. PETERMAN: Thank you, Your Honor.
 14 (Whereupon, the discussion at sidebar concludes.)
 15 - - -
 16 MR. PETERMAN: We move to admit DTX-1148 into
 17 evidence.
 18 MS. SRINIVASAN: No objection.
 19 THE COURT: It's admitted.
 20 (Exhibit DTX-1148 is admitted into evidence.)
 21 BY MR. PETERMAN:
 22 Q. Mr. Kidder, what's being reflected here on the first
 23 page of this exhibit?
 24 A. So this is the total number of count of devices for
 25 Pixel 1, Pixel 2, Pixel 3. And you can see the sources

1 take that down.
 2 Your Honor, we can open the courtroom for this
 3 next section.
 4 THE COURT: Thank you. Let's unseal the
 5 courtroom.
 6 * * *
 7 (Whereupon, the sealed discussion concludes.)
 8 - - -
 9 BY MR. PETERMAN:
 10 Q. Mr. Kidder, in your binder you have Exhibit DTX-1148.
 11 A. Yes, I do.
 12 Q. What is this document?
 13 A. This was an exhibit that was attached to
 14 Mr. Weinstein's report, maybe it's two separate exhibits,
 15 but they were exhibits to Mr. Weinstein report.
 16 Q. And did you rely upon this document in forming your
 17 opinions with respect to this case?
 18 A. Yes, I did.
 19 Q. In general, what are the contents of the exhibit?
 20 A. So what's in the exhibit is, basically, it's a count
 21 by Mr. Weinstein of the total number of units of accused
 22 products and between 2012 and 2018 with a lot of blanks.
 23 MR. PETERMAN: Your Honor, we move to admit
 24 DTX-1148.
 25 MS. SRINIVASAN: My understanding was we were

1 down at the bottom come from a couple of Google documents
 2 and deposition of Sai Marri.
 3 Q. And who is Sai Marri?
 4 A. He's a Google employee that was the individual who
 5 produced these documents.
 6 Q. And did you review this deposition of Mr. Marri?
 7 A. Yes, I did.
 8 Q. And is it your understanding that some of the numbers
 9 here within this exhibit are no longer accused?
 10 A. Yes, that's correct; this is an older version.
 11 Q. And what numbers need to be removed?
 12 A. So you need to take out the entire row that says,
 13 "Pixel 1." I'm hoping that we can do that graphically.
 14 Is there a way to sort of highlight that? Oh, look at
 15 that. Okay. Great.
 16 And my memory is that the Pixel 2 started selling a
 17 little before -- I think it started selling in
 18 October 2017. So part of the Pixel 2 number, 926,349, is
 19 also -- I wouldn't erase the whole thing, but recognize
 20 not all of that is currently accused.
 21 Q. And to be clear whose exhibit is this?
 22 A. This is Mr. Weinstein's.
 23 Q. And let's go to the next page of this exhibit.
 24 What's being reflected here in the second page of
 25 DTX-1148?

1 A. So this is Mr. Weinstein's count of the accused app
 2 downloads by year. And you can see, again, there's some
 3 sources down the bottom that have GOOG-something, and
 4 those are documents that were produced by Google in this
 5 case.
 6 Q. And did you review those documents?
 7 A. Yes, I did.
 8 Q. Now, what entries did Mr. Weinstein remove from this
 9 exhibit in connection with his opinions in this case?
 10 A. Well, the current opinion, if you see Row 6 there, it
 11 says, "News," so please remove all of News because that's
 12 no longer accused. And then you remove all of the numbers
 13 for Chrome up through 2016. That's the first row.
 14 And then you would remove part of the 2017 figures
 15 for Chrome, that 105,609. Again, the accused infringement
 16 starts in December of 2017, so most of that 105 million
 17 units in 2017 occurred before December, so you remove a
 18 good chunk of that as well.
 19 Q. And in the opinions that you formed regarding
 20 Mr. Weinstein's analysis, did you use the numbers based
 21 off of the updated modifications that you just made on the
 22 stand?
 23 A. Yes. So this led me to understand what he was
 24 accusing, and I used that to calculate the revenues for
 25 the appropriate time period.

1 MR. PETERMAN: You can go back to the deck.
 2 BY MR. PETERMAN:
 3 Q. Now, were you in Court for Mr. Weinstein's testimony?
 4 A. Yes, I was.
 5 Q. And you come to a very different conclusion with
 6 respect to damages than Mr. Weinstein did; is that
 7 correct?
 8 A. Yes. I think that's a fair statement.
 9 Q. What were the major errors that you've identified in
 10 his analysis?
 11 A. So there are a number of them. And I will just, you
 12 know, without reading the cover slide, I'll take you
 13 through the six major errors that I saw in his analysis.
 14 The first one is -- I just call it the wrong number
 15 of units.
 16 Q. Explain what you mean by "the wrong number of units."
 17 A. Sure. There are a couple of parts to that. But the
 18 first thing to start with is this -- as he told you, he
 19 started his count of the number of units on August 21,
 20 2017, when Android 8 was released. But the testimony I
 21 heard was that STS was not enabled in Android 8 until
 22 December 5, 2017. And in between those two periods,
 23 there's 149 million app downloads and .9 million or
 24 900,000 devices sold that were sold or downloaded without
 25 STS enabled.

1 Q. So what does that mean for his analysis?
 2 A. It means that it's overstated. So if you -- so the
 3 entire pie here is his entire \$45 million analysis.
 4 If you take out the units I just identified between
 5 August and December 2017, you take out about a third of
 6 that pie.
 7 Q. Now, Mr. Weinstein testified regarding the launch of
 8 STS in connection with his testimony last week, correct?
 9 A. Yes.
 10 Q. And what did Mr. Weinstein say as far as you are
 11 aware, was the impact if STS did not launch before
 12 December 5, 2017, on his opinions?
 13 A. Well, he agreed. If Google is correct the date is
 14 later than August, which is the date I and Mr. Weinstein
 15 used, then the period between August and December would
 16 not include infringing devices or apps. So he agrees that
 17 if Google is right, it was December instead of August,
 18 that his figures are all overstated.
 19 Q. Is there specific testimony that you recall from last
 20 week which supports the December date as opposed to August
 21 date?
 22 A. Yes. My memory is that -- I think it was
 23 Mr. Elbouchikhi -- yes, Mr. Elbouchikhi testified
 24 December 2017 is the first time when we actually activated
 25 this feature for users who had 0-MR1, which is Android 8

1 with maintenance release 1.
 2 Q. Was there additional testimony?
 3 A. Yes. Mr. Toki, who is also a Google engineer, said
 4 that the source code would have been published around
 5 December 2017. Again, the evidence seems that while
 6 Android 8 was released in August, STS was not enabled
 7 until December.
 8 Q. Did you also consider testimony from Mr. Choc?
 9 A. Yes. Mr. Choc verified that Android 8, or O-MR1,
 10 released in December 2017.
 11 Q. Are there other errors with the unit count?
 12 A. Yes.
 13 Q. What are those errors?
 14 A. So we've been talking about particularly the apps,
 15 and the question is -- well, not the question -- but what
 16 Mr. Weinstein did was he assumed that an app that was
 17 downloaded, let's assume in middle of December,
 18 December 15, 2017. He assumed that an app downloaded in
 19 December of 2017 would be downloaded onto a device that
 20 had STS. Well, that would require that device be running
 21 not only Android 8, but it's got to be running Android 8
 22 with maintenance release 1 on it.
 23 Q. Now, what data did Mr. Weinstein rely upon for his
 24 analysis?
 25 A. So this is DTX-581, which I'm assuming is in this

1 binder?

2 Q. Yes, it is.

3 A. Good guess, huh? There it is.

4 Q. Now, did you also review DTX-581 as part of your

5 analysis?

6 A. Yes. It's the underlying data provided by Google

7 that led to the unit count that Mr. Weinstein relied upon.

8 Q. And what did Mr. Weinstein understand with respect to

9 the data in DTX-581 for the year 2017 and 2018?

10 A. Well, what he testified to was he understood them to

11 be specifically for Android 8 or 9. That that's what his

12 number was.

13 Q. Was Mr. Weinstein correct?

14 A. No, absolutely not.

15 Q. How do you know that?

16 A. Well, the most definitive source of that was a

17 deposition of Sai Marri which he reviewed, and Mr. Marri

18 was specifically asked whether downloads -- the download

19 counts in this document for the time period of 2018 were

20 just for Android 8 or 9 or whether they were from all

21 versions of Android and Mr. Marri said, no, they are from

22 all versions of Android.

23 MS. SRINIVASAN: Your Honor, can we have a

24 sidebar?

25 THE COURT: Yes.

1 devices.

2 The point here is that Mr. Weinstein, on the

3 stand, referred to the phantom interrogatory that he

4 relied upon in support of his opinion. It's very clear

5 that Mr. Weinstein was aware of the Marri deposition. He

6 cites it in his "materials considered" as part of his

7 report and this evidence regarding Mr. Marri's deposition

8 directly counters the position Mr. Weinstein took on the

9 stand.

10 THE COURT: He is talking on the stand about

11 the Pixel devices?

12 MR. PETERMAN: No, he is talking about the

13 deposition of Mr. Marri in connection with the Android

14 downloads.

15 THE COURT: All right. Stand by.

16 We're going to allow him to testify about this.

17 And we've reviewed the testimony of Mr. Weinstein over the

18 weekend, and he testified that he understood these numbers

19 to come from interrogatory response. We've had no

20 interrogatory response identified, but the jury has heard

21 evidence about where he says these numbers came from.

22 I do think that Google ought to be able to

23 rebut that, but I don't want to hear any new opinions from

24 him about those numbers beyond just the fact of where they

25 came from.

1 - - -

2 (Whereupon, the following discussion is held at

3 sidebar.)

4 MS. SRINIVASAN: Your Honor, this is

5 undisclosed opinion for Mr. Kidder. His reliance on

6 Mr. Marri's testimony -- by the way, Mr. Marri was deposed

7 in 2019. He could not have disclosed this opinion in 2022

8 if he had the opinion that somehow the units in these

9 installed downloaded numbers were overstated, but he

10 didn't because he uses those numbers himself. Never

11 disclosed an opinion like this in his prior -- we are

12 talking about a spreadsheet was available to him that he

13 cites in his report.

14 This is something that is now being raised for

15 the first time from Mr. Kidder, that he has a reason to

16 believe that those numbers are overstated because of the

17 operating system. That is not what -- he did not disclose

18 that opinion in his report.

19 THE COURT: Let me make sure we are all on the

20 same page. So does Mr. Kidder have in his expert report

21 any reliance on the testimony of Mr. Marri?

22 MR. PETERMAN: Mr. Kidder does list depositions

23 as part of "materials considered" and the deposition of

24 Sai Marri is, I think, part of -- it's cited in a couple

25 different places and his report with respect to the Pixel

1 MR. PETERMAN: Yes, Your Honor. Our point is

2 that the numbers, the data that Mr. Weinstein relied upon

3 included all versions of Android, not just 8 or 9, so

4 Mr. Weinstein's analysis is unreliable on that basis.

5 THE COURT: That's where it will end.

6 MS. SRINIVASAN: Mr. Kidder is not a technical

7 expert. He is not here to give an opinion about

8 non-infringing units. Again, not in his report. So if

9 he's talking just about the numbers, that's one thing. If

10 he is going to offer an opinion it is overstated by any

11 amount, that's not disclosed.

12 THE COURT: He is allowed to offer an opinion

13 it is overstated by some amount. That is fair and within

14 the scope of the other opinions he's rendered in his

15 expert report. And I also think it's fair, given the

16 situation that we're in right now; we had changes, as I

17 mentioned on the last break, to what Dr. Smedley's opinion

18 was. So it sounds like we will be talking in general

19 terms and that's fine.

20 MS. SRINIVASAN: For a point of clarification,

21 if we are going to be doing this, we will want to use

22 exhibits from Mr. Kidder's expert reports, which per our

23 conversation this morning, if we are going to use that as

24 a demonstrative, we only show 2017, 2018 because he's, you

25 know, using the same units we are going to demonstrate

1 that he -- to rebut his position now that they are not
 2 reliable or overstated.

3 **THE COURT:** I understand you may want to do
 4 that. If there are objections to the exhibits, we will
 5 deal with those at the time.

6 **MS. SRINIVASAN:** Thank you, Your Honor.

7 **MR. PETERMAN:** Thank you, Your Honor.

8 **THE COURT:** Let's continue.

9 (Whereupon, the discussion at sidebar
 10 concludes.)

11 - - -

12 **BY MR. PETERMAN:**

13 **Q.** Mr. Kidder, the deposition of Mr. Marri that you
 14 referred to, was that the same deposition that was cited
 15 on the face of DTX-1148, Mr. Weinstein's Supplemental
 16 Reply exhibit?

17 **A.** I am pretty sure it was. I think it was the
 18 December 2019 deposition.

19 **Q.** And did you rely on Mr. Marri's December 2019
 20 deposition as part of your opinions in this case?

21 **A.** Yes, I did.

22 **Q.** What does -- the testimony from Mr. Marri, how does
 23 that impact your opinions here?

24 **A.** It doesn't affect my affirmative opinion, but it
 25 affects my view of Mr. Weinstein's opinion in that

1 number of downloads.

2 **Q.** Is there anything about this data that leads you to
 3 the conclusion that it includes all downloads of the
 4 various apps on all versions of Android as opposed to just
 5 Android 8 or 9?

6 **A.** Yes. So for example, the first thing to know is the
 7 left-hand column here just says "Year." Okay. So that
 8 was the -- essentially the unit that they were
 9 aggregating. There's no months, there's no days, it's
 10 just "Year." So you see, for example, that top row says
 11 "2017." The package name is com.Android.Chrome. And so
 12 what that is, that's the Chrome app download. And the
 13 first column there is "Daily Device Installs." And,
 14 basically, what that means is that in 2017 -- this is
 15 something Mr. Marri testified to -- that in 2017, there
 16 were roughly 105 million downloads of the Chrome app onto
 17 some kind of an Android device. You will see, if you are
 18 familiar with spreadsheets, down at the bottom here
 19 there's a -- we're on the Android tab. They also had
 20 another tab for iOS, which we don't care about in this
 21 case. But these are downloads onto Android devices for
 22 2017.

23 So your question was why am I confident that this is
 24 all versions. And the first reason is that the
 25 105 million -- so what Mr. Weinstein had to do to get his

1 Mr. Marri confirmed that, in fact, those downloads were
 2 for more than just Android 8 or 9.

3 **Q.** What does that mean for Mr. Weinstein's analysis that
 4 he presented last week?

5 **A.** Well, it means that his counts of downloads, the many
 6 of those downloads are actually not infringing, or there
 7 is no evidence of what portion of those downloads are on a
 8 device that has STS on it.

9 **Q.** Besides Mr. Marri's deposition testimony, is there
 10 any other evidence that confirms that the data in DTX-0581
 11 for 2017 and 2018 is for all Android versions, not just
 12 Android 8 and Android 9?

13 **A.** Sure. So I don't know if you have a version -- okay.
 14 That's fine. So --

15 **Q.** I'm sorry.

16 **MR. PETERMAN:** Mr. Spence, if you can pull up
 17 the Excel spreadsheet.

18 **THE WITNESS:** Great. Okay.

19 **BY MR. PETERMAN:**

20 **Q.** First of all, can you tell the jury what we're
 21 looking at here?

22 **A.** Sure. This is DTX-581.

23 **Q.** What is this again?

24 **A.** Sorry. This is DTX-581. This is the data that was
 25 provided by Google that Mr. Weinstein used to count the

1 estimate of the number of downloads after August of 2017
 2 was he just took the number of days in the year after
 3 August 21, 2017, divided into 365, and multiplied by his
 4 number up here. So he just sort of assumed. He's
 5 prorated it, technically.

6 And recognize in 2017 that the -- and his accusation
 7 is only four months. Okay. So he took about a third of
 8 the units for Chrome in 2017.

9 Now, if the number of units -- if this was just
 10 Android 8 or 9, then you would expect to see, for example,
 11 the 2018 number, because that's 11 months. You would
 12 expect to see that as more than what he had. If you
 13 scroll down to row -- looks like 21 maybe -- you will see
 14 2018.com.Android -- yes. That one.

15 What you see is a total number of downloads in 2018
 16 is actually 80 million. So that's over 11 months. And
 17 105 million he had to prorate. He to four months. It
 18 makes no sense that the four months of data would be
 19 bigger than the eight months of data. And we can go
 20 through more examples but, basically, it's -- there's
 21 absolutely no doubt that this data is for all versions of
 22 Android.

23 **Q.** Just -- let's just do one more example.

24 **MR. PETERMAN:** If you would look at Calendar
 25 from 2017 versus 2018. I believe it's Row 46, Mr. Spence.

1 THE WITNESS: So row -- there we
 2 com.google.Android.Calendar. So that's the Calendar app.
 3 And again, Column C, you can see that there are -- without
 4 the columns, it's hard -- but it looks like it's
 5 29 million. I think that's right. So 29 million
 6 downloads in 2017. And if you -- thank you.

7 If you go down to the row for 2018, it's -- I
 8 have it right here. Sorry. It's 27 million. So you've
 9 actually got slightly less. But again, over an 11-month
 10 time period, this is all versions of Android. This isn't
 11 just Android 8 and 9.

12 BY MR. PETERMAN:
 13 Q. So what conclusions do you draw from your analysis of
 14 this document and the testimony that you also relied upon
 15 regarding Mr. Weinstein's count?
 16 A. That Mr. Weinstein has counted a number of devices
 17 that he's accused of infringing that were not infringing.
 18 They were not running on devices with Android 8 or 9 or 8
 19 with MR1 or 9.

20 MR. PETERMAN: Go to slide 41, Mr. Spence.

21 BY MR. PETERMAN:
 22 Q. And you were in the courtroom when Mr. Weinstein
 23 provided this testimony about this claim here?
 24 A. Yes. We agree. He understands that if it includes
 25 downloads on versions other than 8 or 9, then his numbers

1 A. Yes, I do.
 2 Q. And what was Mr. Choc's testimony there?
 3 A. So he said -- so Mr. Lahad asked: So he's pretty
 4 much -- he's off by pretty much the whole thing; is that
 5 what you're saying?
 6 Mr. Choc answered: Yes. This is my understanding of
 7 the slow ramp-up process for Android. And the estimate
 8 Mr. Choc gave would be probably 95 percent wrong. This is
 9 a rounding error. This isn't like a couple of ones might
 10 have gone down, hit some device other than Android 8 or 9.
 11 It's, in Mr. Choc's opinion, the vast majority of them.
 12 Q. Now, Mr. Kidder, what does all this information
 13 you've just relayed to the jury have on your ultimate
 14 opinions here?
 15 A. It means that Mr. Weinstein's opinion is just
 16 completely unreliable. It's based on an absolutely
 17 incorrect count of the number of apps. You need to recall
 18 that in his testimony the apps provided the vast majority
 19 of his damages number.
 20 Q. Now, Mr. Weinstein used, as part of his
 21 justification, that you used the same numbers that he did.
 22 How do you respond to that?
 23 A. It was -- I was surprised. So just by way of
 24 background, understand how this process works a little
 25 bit.

1 are too high.
 2 Q. Now, Mr. Kidder, you heard from a number of Google
 3 witnesses as to the length of time that it took to roll
 4 out Android 8 with STS, correct?
 5 A. Yes.
 6 Q. And what is your understanding of the length of time
 7 that that all took?
 8 A. So my understanding is that for Mr. Elbouchikhi, he
 9 testified that, you know, with a typical Android release,
 10 the rollout takes three to six months. In other words, it
 11 takes a while for it to get adopted. It's not, you know,
 12 it doesn't come out and then all of a sudden everybody has
 13 got Android 8 MR1 running on their phone.
 14 Q. What about testimony from Mr. Choc?
 15 A. Similarly, Mr. Choc testified it takes quite a long
 16 time, potentially never happening to users' phone -- I'm
 17 one of those users. I see the update and I get scared and
 18 I don't do it. Right? So I'm not running the latest
 19 version.
 20 Q. Could Arendi or Mr. Weinstein have asked Google for
 21 more detailed information if Mr. Weinstein needed it?
 22 A. I would assume so, yes.
 23 Q. Do you recall when Mr. Lahad, on cross-examination
 24 asked Mr. Choc the question regarding how far off
 25 Mr. Weinstein's numbers were?

1 In this case, or in all cases -- so here
 2 Mr. Weinstein issued a report and said: Here's what I
 3 think damages are. And I was retained to similarly offer
 4 an opinion on damages, but also reply to Mr. Weinstein's
 5 report.
 6 So my reply came about a month after I had his
 7 report. One of the things I do when I'm looking at
 8 another expert's report is I just check the math, see if
 9 there are any math errors. And so I went through and I --
 10 because the data didn't naturally fall into those buckets,
 11 he had to do some allocation and apportioning, I asked my
 12 team to check the numbers. And I did not find that he
 13 made math errors. But that's what he showed on the
 14 screen, was my check of his work.
 15 Q. So is it an incorrect assumption to say that you
 16 signed off on his work?
 17 A. Well, I signed off on his math, but I did not sign
 18 off on the underlying concept of what was accused there.
 19 Q. Now, the next error that you had identified in your
 20 slide deck was the 4X multiplier. Would you explain to
 21 the jury what you mean by this?
 22 A. Sure. So the 4X multiplier, if you recall,
 23 Mr. Weinstein testified that he had conversations with
 24 Mr. Hedloy, which Mr. Hedloy said that there was a chance
 25 of losing before trial, there's a chance of losing at

1 trial, and there was a chance of losing of appeal. So
 2 Mr. Weinstein said, well, that means that for the
 3 Microsoft case, that there was a 1-in-8 chance of winning.
 4 And so -- but he conservatively -- instead of multiplying
 5 by 8, he conservatively multiplied by 4.
 6 Q. Do you believe that was the correct thing to do,
 7 given the testimony?
 8 A. No. So I was sitting in court on the first day when
 9 Mr. Hedloy testified. And what Mr. Hedloy testified to --
 10 relative to the Microsoft agreement, was that even if we
 11 went through the litigation and won, which we thought we
 12 would of course -- so this is a very different statement
 13 from: We have a 1-in-8 chance of winning and you need to
 14 multiply that number by 4. This is Mr. Hedloy saying: We
 15 thought we were going to win that litigation.
 16 Q. So how does that statement from Mr. Hedloy contradict
 17 the analysis that Mr. Weinstein did?
 18 A. Well, what it says is that Mr. Weinstein's basis for
 19 the 4X multiplier, I mean, it's -- it contradicts the
 20 basis for the 4X multiplier.
 21 Q. Now, can you explain to the jury what impact the 4X
 22 multiplier has on Mr. Weinstein opinions?
 23 A. Sure. You know, so we've already taken out the
 24 devices and apps, it's about a third of them that are
 25 between August and December. That took about a third of

1 his damages out. If you take out the 4X multiplier, then
 2 the 30.2 million, most of that goes away as well. The
 3 next slide should show that.
 4 Yeah. So the multiplier is 22.65 million of the
 5 remaining 30. If you take out that 22.65, you are left
 6 with 7.55 million from -- again, this is Mr. Weinstein's
 7 calculation. I've just taken out a couple of what I
 8 believe to be clear errors -- you're down to
 9 \$7.55 million.
 10 Q. Do you believe that \$7.55 million is an accurate
 11 number?
 12 A. No. Because it includes Mr. Weinstein's royalty on,
 13 in particular, the apps, all of the apps that are
 14 downloaded, even the ones that are not running on devices
 15 with Android 8 with STS.
 16 MR. PETERMAN: Your Honor, for this next
 17 section, we do need to seal the courtroom again.
 18 THE COURT: All right. Let's seal the
 19 courtroom, please.
 20 * * *
 21 (The following discussion is held under seal:
 22
 23 BY MR. PETERMAN:
 24 [REDACTED]
 25 [REDACTED]

1 [REDACTED]
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3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 Q. [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 how many of these apps were downloaded onto devices

18 running Android 8 or Android 9 versus earlier versions?

19 A. No. This is just every download that happened

20 between August of 2017 and November 2018, so regardless of

21 what Android version they were downloaded to.

22 Q. If you take Mr. Choc's testimony that Mr. Weinstein

23 was 95 percent off, what impact does that have on the

24 analysis?

25 [REDACTED]

1 all -- as I said, I've read a lot of licenses. 15 percent

2 is just -- that's an unreasonably high percentage.

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 MR. PETERMAN: Your Honor, we can unseal the

16 courtroom for the remainder of Mr. Kidder's direct.

17 THE COURT: Let's unseal the courtroom.

18 * * *

19 (Whereupon, the sealed discussion concludes.)

20 - - -

21

22 BY MR. PETERMAN:

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

1 [REDACTED]

2 apps, again, just using Mr. Weinstein's calculations and

3 methodology.

4 Q. Now, the next area you mentioned was a royalty per

5 app error.

6 What do you mean here?

7 A. So again, refresher from last week, Mr. Weinstein's

8 analysis. Remember how he gets to his per app royalty.

9 He says the royalty per device is 48 cents. And then he

10 divides that by five to get to a ten cent royalty per app.

11 And there are sort of two problems with that. The first

12 one of which is that dividing by five has never made any

13 sense to me. There are 12 accused apps in this case. If

14 you divide by 12 instead of by five. Right. You get to a

15 number that's four cents and not ten cents. So that has a

16 huge impact.

17 Q. Now, what does the ten cent per app royalty that

18 Mr. Weinstein claims is appropriate mean in terms of an

19 actual percentage of royalty?

20 A. So Mr. Weinstein calculated that each app generates

21 [REDACTED] of revenue for Google. And he's applying a

22 ten cent per unit royalty. So of the [REDACTED] in revenue

23 that's generated by Google for an app, he's taking ten

24 cents of it as a royalty. So he's taking 15 percent of

25 the total. And if you look at that 15 percent, first of

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 Q. In your experience reviewing hundreds of licenses,

18 how common is it for a license agreement to cover a

19 different company without mentioning that separate company

20 by name in the agreement?

21 A. It's pretty typical.

22 Q. Can you provide examples of how this would be done?

23 A. Well, you know, typically, a licensee will want to

24 make sure that its customers can use their products

25 without being accused of patent infringement or that the

1 supplier can provide a component without being accused.
 2 So the licenses very frequently have language in them
 3 saying, "Not only do I have a license, but suppliers,
 4 customers" -- but, you know, they don't list them out,
 5 because, of course, customers and suppliers can change.
 6 **Q.** Is Google a supplier of Samsung as it pertains of
 7 operating systems and apps?
 8 **A.** Yes. It's my understanding that Google provides
 9 Samsung Android.
 10 **Q.** And do customers of Samsung use Google apps on
 11 Samsung phones?
 12 **A.** I'm sorry. Customers of?
 13 **Q.** Of Samsung use Google apps on Samsung phones?
 14 **A.** Yes. My son has a Samsung phone, and used Google
 15 Chrome on it.
 16 **Q.** Mr. Kidder, the last major error you identified was
 17 non-infringing alternatives. Will you please explain to
 18 the jury what that is.
 19 **A.** So let's put this in the context of damages because I
 20 think you've heard about it in the context of technology.
 21 So from the context of damages, you think about
 22 hypothetical negotiation. And in this hypothetical
 23 negotiation Arendi wants \$45 million. And Google can, if
 24 they want to use that technology, they absolutely have to
 25 negotiate a settlement agreement or a license. But if

1 identify non-infringing alternatives. That is different
 2 from saying the Court has determined they are
 3 non-infringing alternatives. There is no basis for him to
 4 be introducing an opinion based on Court order.
 5 **THE COURT:** All right. Let's take a look at
 6 his report and see what he says.
 7 **MR. PETERMAN:** Your Honor, it's Paragraph 147.
 8 2022 report.
 9 **THE COURT:** So the distinction here is the fact
 10 that the Court adjudged Linkify and Smart Linkify as being
 11 non-infringing. I don't think the Court adjudged they
 12 were non-infringing alternatives.
 13 **MS. SRINIVASAN:** Correct, Your Honor.
 14 **THE COURT:** I'll ask the jury to disregard --
 15 I'm going to ask the jury to disregard the last answer.
 16 We will have you ask a different question.
 17 Do you need anything else from the Court?
 18 **MS. SRINIVASAN:** No.
 19 **MR. PETERMAN:** May I ask if the Court adjudged
 20 Linkify and Smart Linkify as non-infringing?
 21 **MS. SRINIVASAN:** He shouldn't ask about the
 22 Court's opinion at all. He doesn't need to say the Court
 23 rendered a decision on it. If we go to that path, we will
 24 open the door to all kinds of prior rulings. In the
 25 ordinary course, the damages expert says: In my opinion,

1 they have something else they can do that would avoid them
 2 having to take a license, that's a non-infringing
 3 alternative and it exerts pressure on the hypothetical
 4 negotiation, like why would I pay you that much. I can
 5 just do this.
 6 **Q.** On the -- I think it was the next slide. What other
 7 areas did Mr. Weinstein fail to consider?
 8 **A.** So Mr. Weinstein failed to consider Linkify and Smart
 9 Linkify, which had been judged by the Court to be
 10 non-infringing alternatives. They're essentially similar
 11 technology. And he also failed --
 12 **MS. SRINIVASAN:** Your Honor, sidebar.
 13 **THE COURT:** Yes.
 14 - - -
 15 (Whereupon, the following discussion is held at
 16 sidebar.)
 17 **THE COURT:** I think I understand the basis for
 18 the objection.
 19 **MR. PETERMAN:** It's in his report --
 20 **THE COURT:** That the Court has adjudged those
 21 to be non-infringing alternatives.
 22 **MR. PETERMAN:** Identified as non-infringing
 23 alternative.
 24 **THE COURT:** Counsel?
 25 **MS. SRINIVASAN:** Damages experts always

1 these are non-infringing alternatives, relying on the
 2 technical opinion that's been rendered. So I don't see
 3 any need for him to be talking about any Court opinion.
 4 **THE COURT:** I tend to agree with Arendi on this
 5 one. Did we have testimony from one of the infringement
 6 folks about Linkify and Smart Linkify?
 7 **MR. PETERMAN:** They identified Linkify and
 8 Dr. Rinard identified Linkify and Smart Linkify as
 9 non-infringing alternatives.
 10 **THE COURT:** Is there any reason why he can't
 11 ask that in this way?
 12 **MS. SRINIVASAN:** No. As long as we are not
 13 talking about Court's orders or Court opinions.
 14 **THE COURT:** That's fair. That's the ruling.
 15 (Whereupon, the discussion at sidebar concludes.)
 16 - - -
 17 **THE COURT:** Ladies and gentlemen of the jury,
 18 you should disregard the last answer by the witness.
 19 **BY MR. PETERMAN:**
 20 **Q.** Mr. Kidder, did you rely upon any experts in this
 21 case regarding whether or not Linkify or Smart Linkify
 22 were non-infringing alternatives?
 23 **A.** Yes.
 24 **Q.** Which expert did you rely upon?
 25 **A.** Dr. Rinard.

1 Q. On the slide here, you have the last point being
 2 "Delay release of STS by 11 months."
 3 What does that mean?
 4 A. Well, we know that STS was -- that they decided in
 5 August 2017 that it wasn't ready to roll out. They
 6 delayed it and implemented four months later in December.
 7 And when faced with a \$45 million request, Google had the
 8 option of saying, "Well, we'll just delay this release for
 9 11 months until November, and then the patent expired and
 10 no harm, no foul."
 11 MS. SRINIVASAN: Objection, Your Honor,
 12 sidebar.
 13 - - -
 14 (Whereupon, the following discussion is held at
 15 sidebar.)
 16 THE COURT: It is pretty clearly seems to be
 17 undisclosed opinion.
 18 Do you disagree with that?
 19 MR. PETERMAN: I do have -- this was one slide,
 20 we discussed it this morning. It is only relevant now
 21 because of the change of Mr. Weinstein's opinion. Only
 22 looking at the last 11 months means this is a new
 23 hypothetical negotiation date.
 24 Mr. Kidder is not offering affirmative opinion
 25 on non-infringing alternative he said Mr. Weinstein failed

1 Can I ask him: Could Google have delayed the
 2 rolling out of STS for 11 months in a hypothetical
 3 negotiation?
 4 MS. SRINIVASAN: No, Your Honor. That is --
 5 first of all, there is no factual support -- if he is
 6 going to render an opinion about what could have been
 7 done -- hypothetical negotiation still involves book of
 8 wisdom looking at what actual facts are in the records.
 9 The clear implication they did rely on the
 10 forthcoming expiration of patent to delay rollout, he has
 11 no basis for that.
 12 THE COURT: So the reason for my ruling to not
 13 let him testify about this is I just recently rereviewed
 14 his supplemental expert report this morning during a
 15 break, and he did talk about what the negotiation would be
 16 if it had occurred in 2017 with his own damages model.
 17 And I would have thought if he wanted to say
 18 that one of the options was to wait to roll it out, that
 19 he would have done that. I didn't see that that's
 20 something he said they could have done.
 21 I understand that you are taking issue with
 22 their damages model at this point in time. But that's
 23 still something that I would have expected to be in his
 24 report. So that last answer is going to be stricken.
 25 MR. PETERMAN: May I ask a question: Did

1 to consider. So that's context of which all this comes
 2 in.
 3 MS. SRINIVASAN: His testimony that they chose
 4 to forego rolling out their STS because of having the
 5 threat of having to pay \$45 million is totally
 6 undisclosed. There is zero fact evidence that came in to
 7 support that statement. It is way beyond talking about
 8 non-infringing alternative. He is asserting Google made a
 9 conscious decision.
 10 THE COURT: All right. Let me --
 11 MS. SRINIVASAN: His reference to damages
 12 model, \$45 million implication is there was a decision to
 13 not have to do that and pay a license instead to wait
 14 11 months. There's been no testimony about a decision to
 15 wait or 11 months, frankly, on the record at all.
 16 THE COURT: Let me review the response.
 17 So my ruling is as follows: You are welcome to
 18 bring in -- the prior response will be stricken. You are
 19 welcome to bring in testimony about the rollout beginning
 20 when it began. But he can't testify that there was an
 21 option for Google to delay rolling out the STS until the
 22 patent was expired.
 23 MR. PETERMAN: Your Honor, this is in the
 24 context of hypothetical negotiation of what Google could
 25 have done.

1 Mr. Weinstein consider whether Google could have waited
 2 11 months to roll out STS?
 3 THE COURT: You can ask that question. You
 4 will take the answer that you get.
 5 (Whereupon, the discussion at sidebar concludes.)
 6 - - -
 7 THE COURT: Ladies and gentlemen of the jury,
 8 you should disregard the witness's answer to the last
 9 question.
 10 BY MR. PETERMAN:
 11 Q. Did Mr. Weinstein fail to consider Linkify and Smart
 12 Linkify as non-infringing alternatives?
 13 A. Yes, he did.
 14 Q. We've gone through the various errors that you've
 15 identified in Mr. Weinstein opinion. Will you just sum
 16 them up for the jury?
 17 A. Sure. And I won't go through this entire list, but
 18 these are the six errors we just stepped our way through,
 19 starting with wrong number of units, four times
 20 multiplier, et cetera. And my point is, when you correct
 21 these errors, what you get to is -- that \$45 million is
 22 entirely unreliable.
 23 Q. And again, what is your final opinion with respect to
 24 the appropriate measure of damages if the patent is found
 25 valid and infringed?

1 A. It is \$500,000, not the \$45 million that
 2 Mr. Weinstein calculated.

3 MR. PETERMAN: Thank you. I pass the witness.
 4 THE COURT: Thank you.
 5 Counsel.

6 MS. SRINIVASAN: Your Honor, may I approach to
 7 hand the witness the binder?
 8 THE COURT: Yes.
 9 THE WITNESS: Thank you.

10 CROSS EXAMINATION

11 BY MS. SRINIVASAN:
 12 Q. All right. Good afternoon, Mr. Kidder. My name is
 13 Kalpana Srinivasan. We have not met before.
 14 In the start of your testimony, you made a point of
 15 emphasizing that you looked at the revenue rather than
 16 focusing on units, right?
 17 A. Yes.
 18 Q. And you did your own analysis, you provided an
 19 affirmative opinion about what you think the reasonable
 20 royalty is in this case, correct?
 21 A. Yes.
 22 Q. Okay. So I want to drill down a little bit about how
 23 you got there. Let's pull up your DDX slides and go to
 24 Number 9.
 25 So you were looking at the revenue for the apps

1 installed on devices with Android 8 with STS, and your
 2 start date is December 5, 2017, to November 10, 2018,
 3 correct?
 4 A. So, yes, and what I did was I just apportioned
 5 revenue after December 5, 2017.
 6 Q. You apportioned revenue. You didn't want to include
 7 in your base all revenue that might be associated with an
 8 application. You wanted to narrow in on the revenue
 9 related to the accused applications in this case, the
 10 applications accused of using STS, correct?
 11 A. Yes. As the accusations were laid out in
 12 Mr. Weinstein's report.
 13 Q. All right. So let's look at slide Number 10. And
 14 that has your revenue numbers for the accused products and
 15 the accused --
 16 MS. SRINIVASAN: I'm sorry, Your Honor. We
 17 need to seal the courtroom.
 18 THE COURT: Let's seal the courtroom.
 19 MR. PETERMAN: Seal the courtroom, yes.
 20 * * *
 21 (The following discussion is held under seal:
 22 THE COURT: The courtroom has been sealed.
 23 BY MS. SRINIVASAN:
 24 Q. All right. Back to DDX-10.10. This is your slide of
 25 the Google revenue for the accused products. And by that,

1 you mean the accused devices and the accused apps, what's
 2 at issue in this case. That's right, Mr. Kidder, right?
 3 A. That's correct.
 4 Q. And you say -- and I'd like to talk about how you got
 5 to this [REDACTED] number for the accused apps.
 6 Now, to do that, you started by looking at all the
 7 revenue associated with the various apps at issue in this
 8 case; is that right?
 9 A. Yes, that's fair.
 10 Q. And then you took it down to a specific number to
 11 reflect the revenue for the accused applications in this
 12 case, correct?
 13 A. Well, I took it down to anything that might have been
 14 accused under Mr. Weinstein's theory with a start date of
 15 December 1st, 2017, that's correct.
 16 Q. All right. If you could look at your supplemental
 17 Exhibit 5.2. That's from your expert report in this case,
 18 from August of 2022. And you prepared that report, Mr.
 19 Kidder, correct?
 20 A. Yes, I prepared the supplemental report. I'm sorry.
 21 I'm just -- did you put a little yellow sticky on it for
 22 me?
 23 Q. I did not. But it's in the Exhibit 5.2 that's
 24 attached to the back of it.
 25 A. I'm not far off. Hang on a second.

1 Q. Okay.
 2 A. Sorry. The supplemental I labeled them side A, 5B,
 3 do you mean 5B?
 4 Q. Side two on your supplemental report. Do you have
 5 that? On your report dated August 2022.
 6 A. I apologize. I have my August 26, 2022 report. Oh,
 7 I'm sorry. Hang on a second. I was back into
 8 Mr. Weinstein's. I apologize. Okay. Now I'm at 5.2,
 9 yes.
 10 Q. Okay. And that -- you prepared that supplement to
 11 the report, correct?
 12 A. Yes, that's correct.
 13 Q. All right. Now, I want you to just focus on Gmail,
 14 Gmail in 2018. What was the total amount of revenue that
 15 you found there?
 16 A. For 2018, it was [REDACTED] -- sorry hang on a
 17 second. No, for a portion of Android was [REDACTED].
 18 [REDACTED].
 19 MS. SRINIVASAN: And, Your Honor, to aid the
 20 witness, I have a demonstrative of this exhibit that he
 21 prepared with some redactions that I'd like to be able to
 22 use and publish to use as a demonstrative.
 23 THE COURT: Any objection?
 24 MR. PETERMAN: Not as counsel has presented it
 25 to me.

1 THE COURT: Okay. Let's proceed.

2 BY MS. SRINIVASAN:

3 Q. All right.

4 MS. SRINIVASAN: If you could bring up,

5 Mr. Boles, the Kidder supplement 5.2 demonstrative. And I

6 just want you to focus on the Gmail number, Mr. Boles,

7 when you bring that up.

8 BY MS. SRINIVASAN:

9 Q. Okay. So, Mr. Kidder, you said it was [REDACTED]

10 for the Android. Let's go to the Gmail line item .but you

11 started with a bigger number?

12 A. Yes, that's correct. I started -- well, I started

13 with all of the Gmail revenues for 2018 for iOS and

14 Android.

15 Q. And to get down to that [REDACTED] number, for

16 revenue, you looked at the number of downloads that were

17 for Android versus the number of downloads that were for

18 iOS, correct?

19 A. Yeah. I guess it's -- it's funny because, since

20 they're all annual numbers, it's all based on apportioning

21 the year, but it's the same idea, yes.

22 Q. Well, it's not just based on apportioning the year.

23 You apportioned it based on the app downloads that were

24 for Android versus everything else, correct?

25 A. I'm sorry. I'm not quite understanding. I agree

1 with you that it was apportionment based on time, which is

2 how you get to the app downloads for Android for that

3 portion of the year.

4 Q. And you've relied on the app downloads for Android to

5 come up with a percentage of the total revenue that you

6 allocated for Android, correct?

7 A. Maybe we're talking past each other. There's no --

8 there's no distinction between the apportioning -- I'm

9 trying to figure out how to phrase this.

10 As we saw earlier, the number of downloads were

11 provided just for the year. So I didn't have a way to

12 say, I know exactly how many were downloaded on these

13 days, so what we did was we used a percentage of the year,

14 just like Mr. Weinstein did, to calculate the number of

15 downloads. And that's mathematically the same. It's just

16 apportioning based on time across the year. So maybe it's

17 a distinction without a difference.

18 Q. My question was a little different, but I appreciate

19 your answer. To get from -- to go from 231 to 119, to

20 take 52 percent of the total revenue to figure out the

21 revenue dedicated to Android, you looked at the downloads

22 for Android versus the downloads for other devices?

23 A. I'm sorry. I understand your point. So, yes, we

24 know that in 2018, 52 percent of all downloads were on

25 Android devices as opposed to iOS devices.

1 Q. And the way that you got there, you looked at this

2 number that is listed there, 67 million and change for the

3 Android app downloads for 2018, correct?

4 A. Yes. That's what that number is.

5 Q. And so that's how you were able to do an

6 apportionment, take all this revenue and focus in on what

7 was at issue in this case, correct?

8 A. This was divided between Android. We made making

9 sure we weren't getting iOS downloads in there, yes.

10 Q. Well, let's look at where that 67 million number that

11 you used to try to narrow the revenue came from. If you

12 could turn to your Exhibit 5 of your -- in your

13 supplemental report?

14 A. This is 5.0?

15 Q. 5.0.

16 A. Yep.

17 Q. Now, that exhibit shows the accused U.S. app device

18 installations.

19 MS. SRINIVASAN: Mr. Boles, I think you could

20 bring that up as the first -- there you go.

21 BY MS. SRINIVASAN:

22 Q. Do you see that?

23 A. Yes. Sorry. I'm good.

24 Q. And if you look at Gmail, which is what we had just

25 been looking at --

1 A. Sure.

2 Q. -- for 2018. 67 million downloads. That's what you

3 used to apportion the revenue, correct?

4 A. Yes. That's based on a -- the fraction of the year

5 that would be represented by January 1st through November,

6 I guess -- is it 5th? 8th? -- 2018.

7 Q. And that's how you were able to feel confident that

8 when you're looking at revenue, you're trying to isolate

9 what is relevant to this case by looking at the downloads

10 related to the accused applications in this case, correct?

11 A. Yes. To the Android portion of it, correct.

12 Q. Now, this list here, you see these sources at the

13 bottom? You can see the top of the exhibit, "Accused U.S.

14 App Device Installs." You're talking here about the

15 applications that are using the STS feature, correct?

16 A. This is actually the device downloads that were

17 accused by Mr. Weinstein, so we are, basically, following

18 his math there.

19 Q. You aren't just following his math. You are using it

20 to apportion revenue, Mr. Kidder.

21 A. No, I agree with that. It's all based on time and

22 prorated.

23 Q. Now, you mentioned Mr. Weinstein, but I'm looking at

24 this exhibit. I don't see a reference to Mr. Weinstein

25 here. Do you see one?

1 A. No, there's no reference to Mr. Weinstein.

2 Q. Okay. Instead, there's a reference to two sources,

3 and those are Google documents?

4 A. Yes. That's correct. And the bottom one there is

5 DTX-581.

6 Q. And that's the exhibit we looked at during your

7 direct examination?

8 A. That's correct.

9 Q. And I heard you say, I think, that this was something

10 Mr. Weinstein looked at, Mr. Weinstein relied on, I was

11 there to do a math check. But your own apportionment of

12 revenue, you relied on the same document, correct?

13 A. That's correct.

14 Q. Okay. Now, you have these figures here of the

15 downloads from 2017 and 2018 for each of the apps. And

16 you know that Mr. Weinstein also looked at downloads --

17 application downloads for all of these applications in

18 2017 and 2018, you're aware of that?

19 A. Right. Yes. He looked at the entirety of 2017,

20 2018, and prorated.

21 Q. Well, if you could look at Mr. Weinstein's

22 supplemental 4B report. I'm sorry. The supplemental

23 report, Exhibit 4B.

24 And let me know when you're there.

25 A. Yes, I'm there.

1 download installations that Mr. Weinstein relied on in

2 2017 and 2018, correct?

3 A. I believe that's correct, yes.

4 Q. All right. So I'd like to move to a demo,

5 demonstrative, that compares what you did in your

6 Exhibit 5.0 with Mr. Weinstein's supplemental 4B exhibit.

7 MS. SRINIVASAN: Mr. Boles, if you could take

8 us to slide 3.

9 BY MS. SRINIVASAN:

10 Q. For 2018. Now, I know you have a dispute with

11 Mr. Weinstein about 2017, when the first date of

12 infringement is.

13 But for 2018, if you start in January, you go through

14 the life of the patent, you both have the same time period

15 at issue; is that fair?

16 A. Yes. We used the same prorating methodology. I

17 agree with that.

18 Q. Okay. And when you use that same prorating

19 methodology, your installation counts that you use in your

20 report and that Mr. Weinstein uses in his report are

21 identical for each of those applications?

22 A. Yes.

23 Q. It's a 1-to-1 match, correct?

24 A. Yes.

25 Q. All right. Now, for 2017 it's a little bit of a

1 Q. Okay. So -- and I want you to look at that.

2 MS. SRINIVASAN: I'm going to put up his --

3 that as a demonstrative, Mr. Boles. There we go.

4 BY MS. SRINIVASAN:

5 Q. And that is Mr. Weinstein's, the downloads that he

6 presented in connection with each of the accused

7 applications, correct?

8 A. Not quite.

9 Q. Is there something there that you dispute?

10 A. Yes. You removed the Chrome line from that.

11 Q. For purposes of our -- okay. That's fair. We're

12 going to come back to Chrome. Good catch, Mr. Kidder.

13 Aside from Chrome, the other applications, those are

14 the download figures that he included in his analysis,

15 correct?

16 A. No.

17 Q. The download figures from 2017 and 2018 he, included

18 this in his report as accused app installations?

19 A. Again, the Row 6 there, News, was not part of his

20 calculation.

21 Q. All right. That's --

22 MS. SRINIVASAN: Mr. Boles, can you remove 6,

23 please.

24 BY MS. SRINIVASAN:

25 Q. So other than that, the other apps reflect the

1 different issue, as you forecasted. Mr. Weinstein begins

2 in August; you begin in December, correct?

3 A. Yes.

4 Q. All right.

5 MS. SRINIVASAN: So let's move, Mr. Boles, to

6 Slide 4.

7 BY MS. SRINIVASAN:

8 Q. So, not surprisingly, your numbers as to the

9 installation of the accused applications, the numbers are

10 not going to be the same because he has a longer time

11 period than yourself; is that fair?

12 A. Yes, it is.

13 Q. Okay. But you're both relying on the same underlying

14 data to begin with, correct?

15 A. Yes. That was the data that was produced by Google.

16 Absolutely.

17 Q. And you're not -- there's no issue about the data

18 being different. You're just -- the number of days that

19 you each used to calculate the downloads is not -- is

20 different. That's what's different?

21 A. Yes. Absolutely.

22 Q. Okay. And you were right to put a little pin in

23 Chrome, because that wasn't on the last tab we looked at.

24 So we're going to come to that now.

25 I'd like you to look at your opening report. That

1 should be in your binder, Exhibit 5.

2 **A.** The opening you said, right?

3 **Q.** Yes. Your opening report. Exhibit 5.

4 **MS. SRINIVASAN:** And, Mr. Boles, if you could

5 put that up at Slide 7.

6 **BY MS. SRINIVASAN:**

7 **Q.** In your opening report --

8 **A.** Sorry. Hang on a second.

9 **Q.** I'll wait for you to get there.

10 **A.** Thank you. I appreciate that.

11 **Q.** Sure. And your analysis in 2020 -- I'm just focusing

12 on Chrome now.

13 **A.** That's good to make that point.

14 **Q.** Yeah. In 2020, you prepared this exhibit, and you

15 didn't calculate Chrome or put in installations for Chrome

16 for any other years but 2017 and 2018; is that fair,

17 Mr. Kidder?

18 **A.** Yes. In this particular version, that's correct.

19 **Q.** Well, that's the version you served. That's the

20 version that was attached to your expert report.

21 **A.** In the opening expert report, yes.

22 **Q.** Okay. So you isolated 2017 and 2018 for Chrome.

23 **A.** Um-hmm.

24 **Q.** And those are the total -- those are the total number

25 of installations of the accused applications -- accused

1 Chrome application using STS that you relied on, correct?

2 **A.** Yes. Using the same, you know, prorating by the

3 number of days in the year methodology.

4 **Q.** All right. And Mr. Weinstein also looked at how --

5 the number of downloads for the accused Chrome

6 application, correct?

7 **A.** That's correct.

8 **Q.** And as to 2018, you would expect that his number

9 would be identical to yours, right?

10 **A.** Yes, I would expect so.

11 **Q.** Okay. And let's look at that.

12 **MS. SRINIVASAN:** We have a comparison there.

13 Mr. Boles, at PDX-7-25 -- sorry, 7-26. So for 2018, it's

14 going to be identical, and that is the number that

15 Mr. Weinstein also offered.

16 For 2017, it's not going to be identical for

17 the same reason that you started your first date of

18 infringement in December and he started his first date of

19 infringement in August.

20 So you agree with that Mr. Kidder?

21 **A.** Yeah, I'm sorry. I got caught up in trying to follow

22 the math, but yes.

23 **Q.** I mean, effectively, you're working from the same

24 number of installations and downloads for the accused

25 application, the accused Chrome application here, and you

1 just have a different number of days that are at issue,

2 correct?

3 **A.** Yes. That's where the time difference is between us.

4 That's absolutely right.

5 **Q.** All right. And -- and I can go back.

6 **MS. SRINIVASAN:** Let's go back to PDX-7-8.

7 **THE WITNESS:** I'm sorry. Is there something

8 you wanted me to look at?

9 **BY MS. SRINIVASAN:**

10 **Q.** Yeah. Sure. We are looking up here at PDX-7-8.

11 Again, for the purposes of your analysis, you looked --

12 and the way that you got to that 7,812,179 number is by

13 taking the Chrome download data you had and apportioning

14 it for December 2017 through the end of the year, correct?

15 **A.** That's correct.

16 **Q.** And the difference between you and Mr. Weinstein is

17 that he started in August, so he was apportioning for a

18 larger part of the year?

19 **A.** That's correct. That was the error I was talking

20 about with the number of units.

21 **Q.** And again, when we're looking at your exhibit, from

22 October 20, 2020 of the accused U.S. app device installs,

23 you relied on Google's data for that purpose, correct?

24 **A.** Yes. I mean, you need to recognize that in October

25 of 2020, it was a much more extensive set of accused

1 products, et cetera.

2 **Q.** That didn't change the source material that you were

3 relying on. At the end of the day, you were looking at

4 what Google provided to make your determination.

5 **A.** That's absolutely right. My point is that this

6 report was focused on a different set of accused

7 functionalities, of which STS was one.

8 **Q.** Now, Mr. Kidder, you are an expert for Google, right?

9 **A.** I have been retained by Google's attorneys in this

10 case, yes.

11 **Q.** Fair to say that you have unlimited access to Google

12 as an expert in this case?

13 **A.** No. I don't think that's fair to say.

14 **Q.** Well, you have access to anybody that you would need

15 to talk to for purposes of preparing your analysis, fair?

16 **A.** I don't think that's quite fair. It's not that easy,

17 no.

18 **Q.** Well, did you ask anybody about this download data?

19 Did you raise any questions about it when you received it?

20 **A.** No. Because we had Mr. Marri's deposition that

21 clarified what it was for us, that it was all versions of

22 Android.

23 **Q.** You didn't go to anybody within Google to ask whether

24 there was better data that existed for your purposes,

25 right?

1 A. No. That's correct. I took this data that had been
 2 produce.
 3 Q. And I think your counsel asked you on direct if
 4 Arendi could have asked for better data. Do you recall
 5 that question?
 6 A. Yes.
 7 Q. Now, as between Arendi and Google, you'd agree with
 8 me that Google has better access to its own data, correct?
 9 A. Yes. I think Google has better access to its own
 10 data than Arendi does.
 11 Q. And I heard you on direct reference Mr. Choc and his
 12 testimony last week about the download data.
 13 Were you here when he indicated that he didn't know
 14 if there was any better data available within Google? Did
 15 you hear that testimony?
 16 A. I think I read that, yes.
 17 Q. And likewise, that he didn't really go talk to
 18 anybody in the Google Play Store to find out if there was
 19 additional or different data he should be looking at or
 20 you should be looking at related to the Google Android
 21 installations for the accused applications.
 22 Do you recall that testimony?
 23 A. Not really, but I'm not debating your
 24 characterization of it.
 25 Q. Well, in fairness, you didn't go talk to anybody at

1 A. Yes. That's correct.
 2 Q. And that did not prompt you to ask questions about
 3 the source data that you relied on for your apportionment
 4 analysis?
 5 A. No. The source data -- it was clear what the source
 6 data was. It was all versions of Android.
 7 Q. Now, by the way, for this 2020 report, you were
 8 focused on Chrome as to STS only, correct? I mean, when
 9 we look looking at these numbers here for 2017, 2018?
 10 A. Sorry. In the 2020 report? I honestly don't recall
 11 why we were looking at Chrome just for 2017.
 12 Q. Well, you would agree with me that you didn't provide
 13 data for downloads prior to 2017 as to Chrome in this 2020
 14 report?
 15 A. No, I disagree with that.
 16 Q. For -- in this report?
 17 A. I'm pretty sure. I can go back and look.
 18 So if you go to Exhibit 12 of the 2020 report, it's
 19 got downloads for Chrome back to 2012.
 20 Q. And for purposes of looking at your Exhibit 5, which
 21 is the accused apps, in your 2020 report, you looked only
 22 at 2017 and 2018?
 23 A. In Exhibit 5. In Exhibit 12, which is also labeled
 24 "Accused U.S. App Device Installs," it goes back to 2012.
 25 Q. Well, at least one of your analyses was focused on a

1 Google Play to ask them about whether or not they had
 2 different data related to downloading -- download data for
 3 the accused applications in this case? You didn't do
 4 that?
 5 A. No, I did not.
 6 Q. And, in fact, you didn't go talk to Mr. Marri about
 7 it. I know you read his deposition, but you didn't go ask
 8 him to say: Is this data that's in this source document,
 9 is there other data that I should be looking at when I
 10 apportion revenue? You didn't do that?
 11 A. No, I didn't. I was just trying to figure out what
 12 that question would even look like. But, no, I didn't do
 13 that.
 14 Q. You don't know what that question would look like
 15 because you didn't have a reason to think you needed to
 16 ask it? Is it a fair way to say it, Mr. Kidder?
 17 A. Well, because at that time, it was a much more
 18 complex overlapping, sort of intertwined set of release
 19 dates. And it was a much more complicated case. And when
 20 it boiled down to STS only, then some issues sort of
 21 popped out that I hadn't caught previously.
 22 Q. Well, you issued a report in 2022 that was focused on
 23 STS. And we're looking here at a time in which you looked
 24 at Chrome data for 2017 and 2018, during the period when
 25 STS was released, correct?

1 scenario in which STS was the infringing function in the
 2 Chrome application, correct? You would agree with that?
 3 A. I honestly don't recall why we did Exhibit 5, but
 4 that sounds right. It was relatively complex back then.
 5 Q. All right. I want to go back to Slide 10 from your
 6 demonstratives. And we've talked a little bit about how
 7 you apportioned to get down to that revenue that is
 8 related to the accused applications in this case using
 9 STS. We talked about that already, correct?
 10 A. Yes.
 11 Q. All right. Now I want to talk about where you
 12 started from. The pool of revenue that you started from.
 13 You got that revenue information from Google, correct?
 14 A. That's correct.
 15 Q. All right. Well, let's look at some of those revenue
 16 numbers that you relied on in your analysis. Here's one
 17 at PX-37 for Chrome. Actually, before we do that, do you
 18 have in your binder, if you look at the back tabs, PX-37?
 19 A. Probably. Yeah. It's yellow. 37 you said?
 20 Q. Yeah.
 21 A. I may need some help. I see one that's labeled 77
 22 and I see a PX-61. Yeah.
 23 Q. Okay. If you look at the tab marked "Natives."
 24 A. I see. Yes.
 25 Q. Okay. Then you will see there -- after the second

1 yellow slip sheet, you will see --

2 **A.** You are looking for PX-37, you said?

3 **Q.** Yes.

4 **A.** Okay. Yes. I've got that.

5 **Q.** Are you with me there?

6 **A.** Yes.

7 **Q.** And is this revenue data that you relied on in the

8 course of preparing your opinions in this case?

9 **A.** I believe it is. I can't remember the Bates numbers

10 precisely.

11 **MS. SRINIVASAN:** Your Honor, we move to admit

12 PX-37.

13 **MR. PETERMAN:** Is there a citation you can

14 point us to, to make sure this is exactly what he relied

15 upon?

16 **MS. SRINIVASAN:** Do you need his report? He

17 just said that he did rely on revenue data.

18 **THE COURT:** Let me see counsel at sidebar.

19 - - -

20 (Whereupon, the following discussion is held at

21 sidebar.)

22 **THE COURT:** Do we need to take a minute to

23 confirm?

24 **MR. PETERMAN:** Your Honor, he said he wasn't

25 sure if this was the revenue number. We need to make sure

1 in coming up with your revenue apportionment, correct?

2 **A.** Yes.

3 **Q.** And you got that revenue information from Google. To

4 be clear, this is the form in which it came to you, this

5 spreadsheet?

6 **A.** That is correct.

7 **Q.** You didn't get any backup for this, right?

8 **A.** What do you mean by "backup"? I got a spreadsheet

9 with the numbers.

10 **Q.** Just this for Chrome?

11 **A.** Yes.

12 **Q.** And you don't have any understanding of how Google

13 makes money off of its accused apps, do you?

14 **A.** Not off of Chrome, no.

15 **Q.** How about the other apps?

16 **A.** Yeah. I was reviewing in the course of the last few

17 days, just reviewing things, and the Gmail revenue appears

18 to come from advertising.

19 **Q.** Okay. In the course of preparing your report for

20 this case, you didn't dig into how Google generates

21 revenue from its applications, fair?

22 **A.** That's correct, yes.

23 **Q.** You relied on these summaries that you got from

24 Google to come up with your numbers, correct?

25 **A.** That is correct.

1 this is the correct one. Obviously counsel can have him

2 look at his report.

3 **THE COURT:** Why don't you take a minute and

4 confer.

5 **MS. SRINIVASAN:** This is internal Google

6 revenue data that he used. I don't know what their

7 objection would be to their own revenue numbers.

8 **THE COURT:** I want him to confirm that whatever

9 data he relied on is the same exhibit you are trying to

10 admit. This should take 30 seconds.

11 **MS. SRINIVASAN:** Okay.

12 (Whereupon, the discussion at sidebar concludes.)

13 - - -

14 **MR. PETERMAN:** No objection.

15 **THE COURT:** It's admitted.

16 (Exhibit PX-37 is admitted into evidence.)

17 **MR. PETERMAN:** Your Honor, we want to make sure

18 that this is kept under seal. It is Google's financial

19 information.

20 **MS. SRINIVASAN:** We are presently under seal,

21 and no objection to that remaining under seal.

22 **THE COURT:** That's fine. Let's proceed.

23 **BY MS. SRINIVASAN:**

24 **Q.** All right. Okay. So, Mr. Kidder, this is the, as an

25 example, the revenue information you looked at for Chrome

1 **Q.** So if I ask you now: What is the Chrome revenue

2 number based on that we're seeing up here, you can't

3 answer that for me?

4 **A.** No, I can't.

5 **Q.** In fact, the number for 2018 is [REDACTED], but you

6 can't tell us why that is?

7 **A.** I think Mr. Marri was asked about that in his

8 deposition, and I don't actually recall. It had something

9 to do with accounting.

10 **Q.** During your direct examination -- I know it was bit

11 tongue-in-cheek, you referred to yourself as a math nerd.

12 And I'm just wondering when you get, you know, numbers

13 like this going from, you know, [REDACTED] to [REDACTED]

14 [REDACTED], did it not make you want to dig in and figure out

15 what's going on there?

16 **A.** So, first of all, these are -- these are not in

17 thousands. So it's [REDACTED]. And this looked to me like

18 a product that they were, like, [REDACTED]

19 [REDACTED] [REDACTED] [REDACTED]. I think that's what

20 Mr. Marri testified to.

21 **Q.** Okay. But you didn't ask anybody when you got this

22 spreadsheet?

23 **A.** You know, I think that's correct. We noted [REDACTED]

24 [REDACTED] and were curious about it, but I think that was

25 cleared up in Mr. Marri deposition.

1 Q. And you had three other people in your team looking
 2 at these numbers with you, auditing numbers, right?
 3 A. That's correct.
 4 Q. But none of this flagged for them such that you went
 5 back and looked at the backup to see exactly why the
 6 Chrome revenue does this?
 7 A. No. As I said, I think it was addressed in
 8 Mr. Marri's deposition. Those are questions that Arendi
 9 asked.
 10 Q. Arendi's questions about it.
 11 A. Yes.
 12 Q. Not your questions?
 13 A. That's correct.
 14 Q. Okay. Let's -- I'd like to look at one more of
 15 these, PX-37.
 16 MS. SRINIVASAN: And, Mr. Boles, just hang
 17 tight for a minute.
 18 BY MS. SRINIVASAN:
 19 Q. If you could look, Mr. Kidder, at your exhibits
 20 there.
 21 A. Sure. And I'm sorry. PX-37 is what we are looking
 22 at, it's a different one?
 23 Q. PX-36. Thank you.
 24 A. Yes, I've got that.
 25 Q. Okay. And is this revenue information that you

1 relied on in preparing your analysis in this case?
 2 A. It looks like it, yes.
 3 MS. SRINIVASAN: Arendi moves for admission of
 4 PX-36.
 5 MR. PETERMAN: One second, Your Honor.
 6 No objection.
 7 THE COURT: It's admitted.
 8 (Exhibit PX-36 is admitted into evidence.)
 9 BY MS. SRINIVASAN:
 10 Q. Okay. We can put that up now.
 11 All right. And so this is the data -- again, you got
 12 a spreadsheet from Google. You used that to come up with
 13 your revenue numbers, right?
 14 A. That's correct, yes.
 15 Q. And for some of these, [REDACTED]
 16 [REDACTED] [REDACTED] [REDACTED]. But you didn't ask any
 17 questions of Google about where this data came from, did
 18 you?
 19 A. No, I did not.
 20 Q. And you used it in coming up with that number that
 21 you showed us in your direct examination that all of the
 22 accused app-related revenue was [REDACTED], correct?
 23 A. That's correct. I relied on data that Arendi
 24 requested from Google and Google produced.
 25 MS. SRINIVASAN: Your Honor, may I approach for

1 a minute?
 2 THE COURT: Yes.
 3 MS. SRINIVASAN: Sidebar.
 4 - - -
 5 (Whereupon, the following discussion is held at
 6 sidebar.)
 7 MS. SRINIVASAN: Your Honor, Google had moved
 8 in limine to prevent -- well, I guess really to prevent
 9 Mr. Weinstein from testifying about Google app-related
 10 revenue.
 11 The witness has just said that he noted that
 12 some of the way in which they accounted for Gmail revenue
 13 was through advertising, and I would like to explore that
 14 with him. I want to make sure there is no ruling on the
 15 Court has issued on limine.
 16 One issue I would like to ask about is their
 17 public filings that show they are looking at advertising
 18 revenue when they talk about these Google properties.
 19 MR. PETERMAN: Your Honor, I think that's
 20 inappropriate. There is a MIL with respect to the larger
 21 Google advertising. There is no tie that's been made
 22 between Gmail and larger Google advertising.
 23 The testimony in the record is specifically
 24 with respect to the Gmail app and the revenue numbers that
 25 have been provided here. I don't think we have an

1 objection to the Gmail app revenue numbers. Specifically
 2 anything beyond what is the subject of the MIL.
 3 THE COURT: All right. Let's let the jury take
 4 their afternoon break, and we will take this one under
 5 advisement.
 6 In the meantime, I want to alert Arendi counsel
 7 that I won't charge you for the times we spent at sidebar,
 8 but you are running out of time to put on your validity
 9 case. I don't know how much more of this you want to get
 10 into it.
 11 MS. SRINIVASAN: He said it. I don't want to
 12 ask if it's going to violate the limine.
 13 (Whereupon, the discussion at sidebar concludes.)
 14 - - -
 15 THE COURT: Ladies and gentlemen of the jury,
 16 we are going to take the afternoon break, give you a
 17 chance to stretch, use the restroom if you need to. We
 18 will take approximately a ten-minute break.
 19 Ms. Garfinkel.
 20 (The jury exits the courtroom at 4:20 p.m.)
 21 THE COURT: All right. Counsel, we will be in
 22 recess. I will remain on the bench. Feel free to move
 23 about the cabin. But I'm going to take a look at the
 24 pending objection.
 25 (Whereupon, a recess was taken.)

1 **THE COURT:** All right. Let's go back on the
2 record. Can I see counsel at sidebar.
3 (Whereupon, the following occurred at sidebar:
4 **THE COURT:** So I went back and looked at the
5 testimony. There was an answer from the witness that he
6 had reviewed things and that the Gmail revenue appears to
7 come from advertising. There can be limited follow-up
8 questioning about that as long as it's in compliance with
9 the Court's ruling on the motion in limine.
10 **MS. SRINIVASAN:** Meaning, that if I asked him
11 about Google's own representations about advertising
12 connected to Gmail and Google properties is that in
13 bounds, out of bounds?
14 **THE COURT:** I don't know if he's reviewed
15 Google's representations about that.
16 Counsel, do you have any views on this?
17 **MR. PETERMAN:** I don't think he's reviewed
18 those. We think it gets close to asking about Google's
19 overall advertising revenue, things that are not tied to
20 the apps have the -- I believe the testimony is specific
21 to the apps.
22 We are okay with questioning on that, but
23 broader I think is really subject to sort of the
24 agreed-upon MIL, not to talk about the size of Google
25 revenues, overall wealth and the MIL with the Court. They

1 can't put any specific number on advertising.
2 **MS. SRINIVASAN:** Well, they have revenue
3 figures that are tied to Google properties, like Google
4 Chrome, Search and Google Gmail and Google Maps, so it's
5 not global advertising revenue, it's what they describe as
6 Google properties, like the apps at issue.
7 I want to know if he looked at it at least
8 because he's talking about now that he looked at one
9 application revenue figure that he thinks advertising may
10 be relevant to. But as I took it from his testimony he
11 didn't consider or doesn't know if it was reflected in the
12 revenue that he looked at for every other app.
13 **THE COURT:** It's fair. She asked him if he
14 looked into other numbers, is it not?
15 **MR. PETERMAN:** Your Honor, with respect to the
16 accused apps at issue, I don't know if the numbers counsel
17 is referring to are --
18 **MR. UNIKEL:** I argued the MIL on --
19 **THE COURT:** We will stick with the rule. You
20 are welcome to confer with counsel.
21 Why don't you take a look at what she proposes
22 to ask him.
23 **MS. SRINIVASAN:** There is specific disclosure
24 around Google property search properties revenue from
25 traffic generated by search distribution partners, that's

1 related to the browser and then other Google properties
2 like Gmail, Google Maps, and YouTube. This advertising
3 revenue feature is tied to those Google properties. It's
4 not a company-wide global corporate advertising revenue
5 figure.
6 **MR. PETERMAN:** First of all, I think YouTube is
7 not accused here. Are you intending to ask about these
8 specific numbers or any number?
9 **MS. SRINIVASAN:** To ask if he considered this
10 revenue that was related to the Google property and
11 whether he knows if it's included in the revenue that he
12 relied on for this case.
13 **MR. PETERMAN:** Google property is not
14 synonymous with the 12 apps on Android or nine at issue.
15 We think that goes beyond the bounds of what's under the
16 MIL.
17 **THE COURT:** Why don't you show me a copy of
18 what you intend to ask him. Why don't you all sit down
19 while I take this under consideration.
20 (Whereupon, the discussion at sidebar concludes.)
21 - - -
22 (Whereupon, a recess was taken.)
23 **THE COURT:** Counsel, I'm ready to see you at
24 sidebar.
25 - - -

1 (Whereupon, the following discussion is held at
2 sidebar.)
3 **MR. BELGAM:** Your Honor, Mr. Kidder is still
4 here, so we might need the noise machine or we could ask
5 him to leave.
6 **THE COURT:** You can turn on the machine. That
7 thing is very effective.
8 False alarm. Give us one more minute.
9 (Whereupon, the discussion at sidebar concludes.)
10 - - -
11 (Whereupon, a recess was taken.)
12 **THE COURT:** All right, Counsel, I'm ready.
13 - - -
14 (Whereupon, the following discussion is held at
15 sidebar.)
16 **THE COURT:** Okay. My ruling is that counsel
17 for Arendi can ask questions about this. You will not
18 show this exhibit to the jury. This exhibit will not be
19 admitted into evidence.
20 You can ask him if he took these things under
21 consideration. You have to stick with the answer that you
22 get.
23 **MR. PETERMAN:** Your Honor, we object to the
24 extent she is allowed to mention the number. This was not
25 raised in the MIL discussion. We had a very long

1 discussion about MIL. Counsel for Arendi could have
2 raised it during the argument. This was not produced
3 during discovery. This was not shown to Mr. Kidder or any
4 other witness during deposition.

5 We respect Your Honor's decision, but the
6 numbers themselves are very harmful, very, and
7 particularly at issue in the MIL we don't believe they
8 should come in. He's going to answer that he didn't
9 consider this.

10 **THE COURT:** Okay. All of your points are
11 taken. I did review the transcript of the motion in
12 limine. I believe this is fair game.

13 Your expert testified about appropriate numbers
14 based on revenues. She wants to cross him on whether his
15 revenue numbers are correct and the word "revenues" is on
16 this page. She can ask about it.

17 You have to take the answer you get from him.

18 **MR. UNIKEL:** Does that mean she can ask about
19 the numbers themselves?

20 **THE COURT:** Counsel.

21 **MR. PETERMAN:** Two things, Your Honor. This
22 document is not limited to the apps at issue in this case.
23 Numbers themselves are something that was specifically the
24 subject of the MIL the Court ruled that numbers regarding
25 overall advertising cannot be asked about included

1 Chancery Court connection with the trial.

2 **MS. SRINIVASAN:** This is a global advertising
3 number.

4 **THE COURT:** It is global.

5 **MS. SRINIVASAN:** It is not global. They didn't
6 want corporate advertising global advertising for the
7 company. He's relied on documents that are not kept in
8 the ordinary course as to revenue. He doesn't know how
9 they were prepared. He was handed them by Google. It is
10 fair game to ask. He could have gone and looked at the
11 SEC filings.

12 **THE COURT:** So the problem, Counsel, that
13 counsel just raised is that these numbers are not limited
14 to the apps in this case, so why is that appropriate?

15 **MS. SRINIVASAN:** They don't keep that in the
16 ordinary course. So they have generated a number for
17 revenues. He doesn't know how they did it. They are
18 relying on that and ignoring other relevant financial
19 information. They don't have an explanation.

20 **THE COURT:** Counsel, standby. Standby.

21 When I initially made the ruling, I had
22 understood that we were crossing. As I'm looking at this,
23 this very clearly, on its face, relates to things that are
24 not accused in this case.

25 Do you disagree with that?

1 **MS. SRINIVASAN:** It includes Google properties,
2 Your Honor, but this is the closest that they keep --

3 **THE COURT:** Okay.

4 **MS. SRINIVASAN:** But, Your Honor --

5 **THE COURT:** I usually want to make sure
6 everyone understands I am not the type of person -- you
7 realize by now this is not a situation where whoever talks
8 last wins.

9 In this particular case, the point that counsel
10 just brought up about this not being limited to the
11 accused apps, I do find persuasive on that point.

12 You can not bring up these numbers because they
13 are not tied to the apps in this case. You can ask him if
14 he considered things like the 10-K or if he explored other
15 revenue, sources for revenue, but we're not going to
16 reveal these numbers. That's the ruling. Thank you.

17 Let's bring the jury back in.

18 **MR. BELGAM:** Your Honor --

19 **MS. SRINIVASAN:** May we make a proffer on the
20 record? This is what we would have offered had we been
21 permitted to do so.

22 **THE COURT:** Okay.

23 **MS. SRINIVASAN:** This is PX-61 that we would
24 have introduced.

25 **MR. PETERMAN:** Has not been admitted.

1 **MS. SRINIVASAN:** No. It's not been admitted
2 yet.

3 PX-61 that we would have questioned Mr. Kidder
4 about Google SEC statements that talk specifically as to
5 advertising revenue related to Google properties including
6 Gmail, Google Maps, Google Play, YouTube, and as well as
7 traffic revenue from traffic generated by Google browsers
8 at Page 28.

9 **THE COURT:** Okay. Counsel, would you put on
10 the record your view about whether or not this -- what
11 these numbers correspond to.

12 **MR. PETERMAN:** Yes. Our view is the numbers
13 that are in PX-61 relate to many properties beyond the
14 specific 12 accused apps in the case and Google Pixel
15 devices that are part of this.

16 We believe it is subject to the MIL that the
17 Court ruled on regarding larger advertising numbers and
18 believe that the Court is appropriately keeping these
19 numbers out of the case.

20 **THE COURT:** All right. Let's bring the jury
21 in.

22 (Whereupon, the discussion at sidebar concludes.)

23 - - -

24 **THE COURT:** For the record. The ruling at
25 sidebar relied on Federal Rule of Evidence 403, as well as

1 the Court's prior ruling on the motion in limine.
 2 Let's get the witness back on the stand.
 3 Ms. Garfinkel, let's bring the jury back in.
 4 **THE CLERK:** Yes, Your Honor.
 5 (The jury enters the courtroom at 4:48 p.m.)
 6 **THE CLERK:** Your Honor, the jury.
 7 **THE COURT:** Please have a seat.
 8 Let's continue with cross-examination.
 9 **MS. SRINIVASAN:** Thank you.
 10 **BY MS. SRINIVASAN:**
 11 **Q.** Mr. Kidder, before the break, I had asked you about
 12 the revenue information that you relied on in preparing
 13 your opinions, and your testimony was that that was data
 14 that you got from Google, correct?
 15 **A.** Yes.
 16 **Q.** Did you make any effort to go look at Google's public
 17 securities filings or any publicly available information
 18 about how Google earns revenue?
 19 **A.** Not in the context of this case, no.
 20 **Q.** Did you make an effort to determine the different
 21 revenue streams that Google earns related to the accused
 22 applications?
 23 **A.** No.
 24 **Q.** You testified earlier that you had considered
 25 advertising in connection with Gmail.

1 Did you look at how advertising revenue might have
 2 impacted the revenue numbers you received from Google in
 3 this case?
 4 **A.** Just by understanding that the Gmail revenues
 5 included advertising revenues.
 6 **Q.** But for the remainder of the applications that you
 7 analyzed that form that [REDACTED] application revenue
 8 number, your understanding is that the rest of those did
 9 not take into account advertising, correct?
 10 **A.** No, it's not correct. I just didn't know what was in
 11 the rest of those.
 12 **Q.** And you didn't ask, to be fair?
 13 **A.** That is correct, yes.
 14 **Q.** Is you didn't ask anybody at Google, should the
 15 numbers that I get reflect the benefits from advertising
 16 revenue that Google gets in connection with those
 17 applications, correct?
 18 **MR. PETERMAN:** Objection, Your Honor.
 19 **THE COURT:** Overruled.
 20 **THE WITNESS:** I'm sorry. Can you repeat the
 21 question?
 22 **BY MS. SRINIVASAN:**
 23 **Q.** Sure. In the course of doing your analysis, you got
 24 these revenue numbers, you didn't ask anybody at Google
 25 whether those numbers reflected the benefit that Google

1 gets from advertising revenue in connection with any of
 2 the accused applications, correct?
 3 **A.** Yeah. As I said, I accepted them at face value,
 4 didn't try to understand the components.
 5 **Q.** You testified earlier that it's not so easy to get
 6 information from Google.
 7 That was your testimony?
 8 **A.** Yes.
 9 **Q.** But you, in fact, have worked with Google quite
 10 frequently, correct?
 11 **A.** I have done other cases with Google, yes.
 12 **Q.** And fair to say it's not just one or two cases where
 13 you have served as an expert testifying for Google?
 14 **A.** No. I think over 16 years, it's been more than one
 15 or two, yes.
 16 **Q.** And I know you have before you your CV. And in the
 17 interest of time, I'm not going to go through each of
 18 those engagements, but I have a demonstrative that
 19 reflects what's in your CV. You see those, those are
 20 references to the litigation experience that come from
 21 your CV, your resume, from your August 2022 report.
 22 Do you see that?
 23 **A.** Yes, I do.
 24 **Q.** And does that reflect the instances and cases in
 25 which you testified as a damages expert for Google over

1 the past few years?
 2 **A.** Over the past, I think, 16 years, I think that's
 3 correct.
 4 **Q.** And that is almost ten times that you've served for
 5 Google in that capacity, correct?
 6 **A.** I have been retained by attorneys for Google, yes.
 7 **Q.** And you've offered testimony as to damages in each of
 8 those cases, correct?
 9 **A.** That is correct.
 10 **MS. SRINIVASAN:** Pass the witness.
 11 **REDIRECT EXAMINATION**
 12 **BY MR. PETERMAN:**
 13 **Q.** Mr. Kidder, just a few follow-up questions.
 14 What date did you first understand that Arendi was
 15 accusing the STS functionality only of infringement?
 16 **A.** Whatever the late Friday night was before trial
 17 started.
 18 **Q.** And what date did you first learn that Arendi was
 19 alleging a \$45.5 million damage number in this case?
 20 **A.** At the same time frame, like, 10:00 at night or
 21 something like that on the Friday before trial started.
 22 **Q.** That was after the day the jury was impaneled?
 23 **A.** Yes.
 24 **MR. PETERMAN:** Mr. Boles, can you bring up
 25 PDX-7-3, please.

1 **BY MR. PETERMAN:**

2 **Q.** Will you explain to the jury why your numbers and

3 Mr. Weinstein's numbers in PDX-7-3 are the same?

4 **A.** Because we matched his methodology.

5 **Q.** Is it your opinion that the numbers here overstate

6 the downloads to Android 8 with STS or Android 9?

7 **MS. SRINIVASAN:** Objection. Leading.

8 **THE COURT:** Overruled.

9 **THE WITNESS:** Yes. These are all -- this is

10 just an apportionment of all downloads for -- sorry, this

11 isn't an apportionment for 2018. This is most of 2018,

12 but it doesn't -- there's no specificity as to which

13 version of Android were downloaded to. It's just

14 downloaded to Android, as we saw the tab in that prior

15 sheet.

16 **BY MR. PETERMAN:**

17 **Q.** And what is the impact of this overstatement on your

18 \$500,000 damages calculation?

19 **A.** It doesn't make too much difference, actually. So if

20 you remember, I'm looking at revenues. And most of

21 revenues come from the devices. And there's ██████████

22 out of ██████████ that came from the apps. So, you know,

23 even if I took away the entirety of the apps revenue, it

24 wouldn't make a substantive difference in my opinion.

25 **Q.** And what is the impact of this overstatement on

1 Mr. Weinstein's \$45.5 million damages calculation?

2 **A.** It's significant. Because, I mean, most of his

3 damages opinion relies on app counts and multiplying the

4 app counts by ten cents.

5 **MR. PETERMAN:** Thank you, Mr. Kidder. No

6 further questions.

7 **THE COURT:** Thank you very much.

8 You may step down, sir.

9 **MR. PETERMAN:** May Mr. Kidder be released, Your

10 Honor?

11 **THE COURT:** Yes, he may.

12 **THE COURT:** Does Google have any additional

13 witnesses to call?

14 **MR. UNIKEL:** Google rests its case, Your Honor.

15 **THE COURT:** Thank you very much.

16 **MS. SRINIVASAN:** And, Your Honor, we might have

17 some motions to raise outside the presence of the jury. I

18 think we can do that at the end of the day if the Court

19 agrees with that.

20 **THE COURT:** That's fine.

21 Would Arendi like to present a rebuttal case?

22 **MR. LAHAD:** Yes, Your Honor. We have a

23 rebuttal witness, Dr. Earl Sacerdoti, please.

24 **MR. PETERMAN:** Is the room unsealed as of yet?

25 **THE COURT:** The courtroom should be unsealed.

1 **MR. PETERMAN:** Thank you. Just checking. I

2 wasn't sure.

3 **THE COURT:** Thank you.

4 * * *

5 (Whereupon, the sealed discussion concludes.)

6 - - -

7 **THE CLERK:** Please state spell your name for

8 the record.

9 **THE WITNESS:** It's Earl Sacerdoti, E-A-R-L,

10 S-A-C-E-R-D-O-T-I.

11 **THE CLERK:** Thank you. Please be seated.

12

13 EARL SACERDOTI, having been called as a witness,

14 being first duly sworn under oath or affirmed, testified

15 as follows:

16

17 DIRECT EXAMINATION

18 **MR. LAHAD:** Your Honor, may I approach?

19 **THE COURT:** Please.

20 **BY MR. LAHAD:**

21 **Q.** Good afternoon, sir. Could you please introduce

22 yourself to the Court and the jury.

23 **A.** Yeah. Good afternoon. My name is Earl Sacerdoti.

24 **Q.** Why are you here today, sir?

25 **A.** I'm here to testify regarding the validity of the

1 '843 patent.

2 **Q.** I believe you have some slides for us today; is that

3 true?

4 **A.** I do.

5 **Q.** These are they, correct?

6 **A.** This is the first one.

7 **Q.** We are on the clock today, Doctor, so we're going to

8 be going through these pretty quickly. But before we get

9 into your -- let me ask you this: What is, generally,

10 your opinion that you are going to give today?

11 **A.** My opinion is that the currently validated '843

12 remains valid.

13 **Q.** Before we get into that, tell me about yourself.

14 Where were you from?

15 **A.** I'm from Northern California, been out there for

16 about 52 years.

17 **Q.** Where did you go to school?

18 **A.** Did my undergraduate work at Yale, my graduate work

19 in computer science at Stanford.

20 **Q.** You have an MS and a PhD from Stanford; is that

21 correct?

22 **A.** That's correct.

23 **Q.** How long have you been -- let's call it working in

24 computers or working with computers?

25 **A.** Well, a bit longer than Dr. Fox who testified this

1 morning. I wrote my first company computer program in
 2 1963.

3 Q. And can you give the jury a flavor of some of your
 4 experience involving computers and computer science since
 5 then?

6 A. Yeah, I've done a range of things. I was working at
 7 SRI, Stanford Research Institute, nonprofit research
 8 institute at Stanford for about ten years. Got the
 9 entrepreneurial itch and founded a number of companies,
 10 one called Machine Intelligence that was trying to
 11 commercialize machine vision and robotics. And we spun
 12 out of there another company that -- an initial product
 13 understanding natural language questions against a
 14 database. That product became Q and A, which was the
 15 first product of a company we spun out of Machine
 16 Intelligence called Symantec, which you may have heard of.

17 Q. What did you do for Apple?

18 A. After consulting for Apple for a while, they hired me
 19 on as a full-time employee to establish a group, basically
 20 to coordinate their R&D efforts. This was in the middle
 21 '90s, and believe it or not, they'd been around for 15
 22 years and they'd never had what's called a product
 23 roadmap, a plan of which products are going to come out
 24 which order, what software is going to be in what hardware
 25 and stuff. So that was the job I took on there.

1 prior art references, transcripts of the depositions that
 2 we all saw last week, the videos of the various conference
 3 presentations that we heard about and saw. And I also
 4 inspected the MAC Book devices that Dr. Miller discussed
 5 in his deposition.

6 Q. You were in the courtroom today for Dr. Fox's
 7 testimony, correct?

8 A. I was.

9 Q. You read the reports he issued in this case, correct?

10 A. I did.

11 Q. Do you agree with Dr. Fox's conclusion regarding
 12 validity of the patents?

13 A. No, I don't.

14 Q. Do you agree with Dr. Fox's approach or his analysis?

15 A. I'm not sure I understand his approach for the
 16 analysis, but I certainly don't agree with how he's
 17 presented or what the results of that are. It doesn't
 18 make -- he hasn't given, in my perspective, thorough
 19 analysis.

20 Q. What do you mean by that?

21 A. Well, this is a very intricate and connected pattern
 22 of all the various claim terms there, claim elements refer
 23 to the same terms, in many of the claim elements. And
 24 it's not okay to just say, okay, I see some of these
 25 things in some prior art and some others in some other

1 Q. And you've got a few patents. Can give us a brief
 2 flavor about the technology you've invented?

3 A. Yeah. I've done a range of things. The first couple
 4 patents I did were in the area of data visualization and
 5 an interactive system for building these kind of
 6 visualizations. With some colleagues, I built a portfolio
 7 of patents around consumer-selected advertising in virtual
 8 worlds. So if you had an avatar and you put a Nike Swish
 9 on your chest, you could get paid for that as other people
 10 saw it and interacted with you.

11 And then and I also have a patent in applying machine
 12 learning to predicting which homes in a given local area
 13 are most likely to go on the market and sell in the next
 14 year.

15 MR. LAHAD: Your Honor, I'd offer Dr. Sacerdoti
 16 as an expert in computer science and programming?

17 MR. UNIKEL: No objection, Your Honor.

18 THE COURT: He's qualified.

19 MR. LAHAD: Thank you, Your Honor.

20 THE WITNESS: Thank you, Your Honor.

21 BY MR. LAHAD:

22 Q. In forming your opinions, sir, what materials did you
 23 review?

24 A. I kind of looked at all the stuff you've been talking
 25 about all week; the patent itself, it's file history,

1 prior art and paste them together and check off the things
 2 that are in the middle. All of these things in this day
 3 after New Years confetti of the floor slide are intended
 4 to indicate how the various terms in the claim elements
 5 are used over and over again.

6 And if I talk about first computer program in one of
 7 the elements, I have to be talking about the same first
 8 computer program in all the others. So what Dr. Fox
 9 didn't do, for example, this morning was when he said,
 10 "Okay, I can check off this line here," he didn't go back
 11 and see if the way he checked off that line connected
 12 using the same other elements, other terms consistently
 13 throughout all the different elements. And in my
 14 understanding of how to interpret a claim, that has to be
 15 done.

16 Q. What are you showing us here with this slide?

17 A. So the approach that I took was to kind of take the
 18 kind of analysis that's suggested by my New Year's party
 19 slide and give myself a sequence of questions that I to
 20 have to say, "yes" to for something to possibly practice
 21 the patent, that is, you know, kind of do the invention.

22 And so first question is, "Was an editable document
 23 displayed by the first computer program? If so, does
 24 analyzing the information identify multiple types meeting
 25 the Court's construction?" And so on and so on and so on.

1 There's a whole set of questions that I ask in sequence,
 2 and if I can go through that and get to the end, then I
 3 know that I have a candidate for something that might
 4 practice the patent. And I'll go back and look at it in
 5 more detail.

6 Q. And Dr. Fox provided his opinions with respect to
 7 anticipation and obviousness this morning. And is there
 8 any portion of Dr. Fox's opinion that you agree with?

9 A. Is there any portion of it that I agree with? Well,
 10 I don't agree with his bottom line conclusions. I'm sure
 11 if we looked, there would be parts of it I agree with.

12 Q. Let me ask you that. Do you agree with any of
 13 Dr. Fox's opinion on the validity of the patent?

14 A. I don't.

15 Q. And is it true with respect to anticipation and
 16 obviousness?

17 A. Yes, it is.

18 Q. Can you -- the Court will instruct the jury on the
 19 law, but can you give us just a brief recap of
 20 anticipation and obviousness?

21 A. Yeah. As I understand it. I'm not a lawyer; that's
 22 not where my expertise lies. But anticipation, as we've
 23 heard several times, is when a single prior art, a piece
 24 of prior art, a document or a system, if you can prove out
 25 that the system existed -- does everything. Practices

1 Q. Let's start talking about some of the Dr. Fox's
 2 opinions and some of the grounds for invalidity. Let's
 3 start with anticipation by CyberDesk. Of course, you
 4 disagree that CyberDesk anticipates the '843 patent,
 5 correct?

6 A. Yes.

7 Q. So tell me, what's CyberDesk missing?

8 A. Well, one thing that it's missing, we can see here
 9 from the -- this is the Chi paper that we've heard a lot
 10 about over the last week. The diagram that shows how
 11 CyberDesk works, shows as its example the input coming
 12 from a mail reader. It's a mail reader, not a full mail
 13 client. It means it's reading your mail. That means what
 14 it's reading is not an editable document under the Court's
 15 construction; therefore, it's not a document. If it's not
 16 a document, then my cascading list of questions kind of
 17 gets a "no" right at the very top. And consequently,
 18 CyberDesk cannot invalidate the '843 patent, cannot
 19 anticipate the '843 patent.

20 Q. You were in the courtroom last week when we heard the
 21 testimony of Dr. Dey, correct?

22 A. Yes.

23 Q. And you recall he gave some testimony about editable
 24 documents in CyberDesk. Do you recall that?

25 A. Yes, I do.

1 every element of the claim and does so in the way that the
 2 claim is arranged. If that is the case, if that can be
 3 proven, then it practices the claim.

4 Q. What about obviousness?

5 A. With respect to obviousness, you can combine multiple
 6 references. You can't combine them willy-nilly, though.
 7 You have to ask yourself the question, would a person of
 8 ordinary skill in the art at the time of the invention,
 9 have had the motivation to do so? You know, would they
 10 have said, "Oh, it would be a good way, a idea to put
 11 these things together," for some reason. And that has to
 12 be done, importantly, not in hindsight. The game here
 13 isn't, oh, I see this patent. So let me look around at
 14 what art was available at the time and see if I can take a
 15 piece here and there and copy what the patent did.

16 The idea is, would you see those things and be
 17 motivated to make the invention. So it's like would you
 18 be motivated to put all these things together and end up
 19 with the invention, not just see the invention and then
 20 make art that copies it.

21 So if you're trying to build the invention from
 22 reading the claims, that's hindsight. You have to imagine
 23 that somebody hasn't seen those claims yet, hasn't seen
 24 the invention, and they're motivated to build it on their
 25 own.

1 Q. And candidly, that testimony is inconsistent with
 2 your opinion. You'd agree with that?

3 A. Yes, I would.

4 Q. So are you ignoring or disagreeing with Dr. Dey's
 5 testimony?

6 A. No. I'm sure he believes what he said. And it's a
 7 question of looking at all the evidence. We have
 8 contemporaneous evidence like that picture we just showed
 9 from the CHI paper that says at that point in time, at
 10 least his best example, wasn't editable text.

11 And Dr. Dey from 20 years later, remembered that at
 12 some point in the CyberDesk project, which took years,
 13 some work was done before the CHI paper. A lot of it was
 14 done after the CHI paper. He recalled that at some point
 15 it was an editable document, but he didn't recall -- in
 16 the deposition transcripts that I've read, he didn't
 17 recall when.

18 Q. So fair to say you're putting more weight on the
 19 contemporaneous documents that we saw rather than
 20 uncorroborated testimony of Dr. Dey?

21 A. Yeah. That's a good way to put it.

22 MR. UNIKEL: Objection. Leading.

23 THE COURT: Overruled.

24 BY MR. LAHAD:

25 Q. So what are you showing us here with respect to

1 CyberDesk, sir?

2 **A.** This is demonstrating that, under my analysis, it's

3 pretty clear that CyberDesk doesn't anticipate the '843

4 patent.

5 **Q.** Because there's no document?

6 **A.** Because there's first -- there's no document, that's

7 correct.

8 **Q.** You were in the courtroom this afternoon when -- or

9 this morning, rather, when Dr. Fox testified about

10 CyberDesk's browser.

11 Do you recall that?

12 **A.** Yes, I do.

13 **Q.** And all the applets being in the browser?

14 **A.** Yes.

15 **Q.** What do you think about that opinion with respect to

16 anticipation by CyberDesk?

17 **A.** That what he showed us this morning also demonstrated

18 that CyberDesk doesn't anticipate. This was a good

19 example of him not applying the kind of approach that I'd

20 suggest. Yeah.

21 **Q.** Let's talk about Claim 30. Does CyberDesk anticipate

22 Claim 30?

23 **A.** It does not.

24 **Q.** Why not?

25 **A.** Well, as we've heard several times, the dependent

1 **A.** ADD, if you remember, was the system for dynamically

2 integrating programs that Apple Computer developed. This

3 was a multi-year project. Started in their R&D group.

4 And the papers about it discuss a kind of cheat by gel

5 collaboration between the R&D and the product group trying

6 out different things and doing what one of the authors

7 called "a dance" to try out features and put them in and

8 out and user test them, and come down with a tight system

9 that would support Apple's user's.

10 **Q.** What's ADD missing from the claims?

11 **A.** Well, ADD doesn't have a first computer program that

12 sets up the input device. ADD was created by modifying

13 the operating system so that it would watch what the

14 applications were doing and be able to provide the kind of

15 integration that they wanted without having to go in to

16 modify every application, which would be unpleasant for

17 all Apple's developers.

18 **Q.** Doctor, if I could direct your attention to your

19 notebook and have you turn to Page -- or the tab at

20 DTX-192.

21 **A.** Sorry. I'm having trouble finding it.

22 **Q.** So am I. Let's move on.

23 So remind us, what's missing from ADD?

24 **A.** So what's missing from ADD is an input device that's

25 set up by the first computer program because the only

1 claim depends on an independent claim. And if the

2 independent claim isn't practiced, then the claim that

3 depends on it will also not be practiced. So because

4 Claim 23 didn't anticipate Claim 30, which depends on

5 Claim 23, can't anticipate either.

6 **Q.** And does this apply to the obviousness argument that

7 we're going to talk about in a second?

8 **A.** It does.

9 **Q.** So if Claim 23 is not rendered obvious, then Claim 30

10 is not rendered obvious, correct?

11 **A.** Correct.

12 **Q.** All right. So we can cross that one off.

13 Let's put a bow on it. What's your independent

14 opinion on whether CyberDesk anticipates the asserted

15 claims of '843 patent?

16 **A.** CyberDesk does not anticipate the asserted claims of

17 the '843 patent.

18 **Q.** Let's move to some of the combinations. Now, you

19 understand that the CyberDesk system is the only ground of

20 invalidity that Dr. Fox asserts anticipates?

21 **A.** That's correct.

22 **Q.** Okay. And he's got a few combinations. Let's talk

23 about the combinations. First, let's talk about ADD and

24 CyberDesk. Very briefly, remind the jury what is or what

25 was ADD?

1 input device there, the menu, is set up, like I said, by

2 the operating system.

3 **Q.** What sets up ADD, then, the input device in ADD?

4 **A.** The input device is set up by the operating system,

5 by the code that was added to the operating system to

6 support ADD.

7 **Q.** Okay. Well, let's -- you're my witness, but let me

8 cross-examine you for a little bit. You were in the

9 courtroom last week when Dr. Smedley and the rest of the

10 witnesses testified about infringement?

11 **A.** I was here for some of it. I wasn't here for the

12 protected parts of the testimony.

13 **Q.** And -- but you were here for the portions that

14 discuss this notion of the application being serviced by

15 functionality provided by the Java API framework.

16 Do you recall that?

17 **A.** Yes.

18 **Q.** And the allegation was that the Java API framework

19 was part of the operating system.

20 Do you recall that?

21 **A.** I do.

22 **Q.** Okay.

23 **MR. UNIKEL:** Objection, Your Honor. Sidebar,

24 please.

25 - - -

1 (Whereupon, the following discussion is held at
 2 sidebar.)
 3 **THE COURT:** Okay. What's the basis?
 4 **MR. UNIKEL:** Your Honor, objection. This is
 5 outside the scope of the expert report. He's a validity
 6 expert. He's not an infringement expert. If he is about
 7 to give infringement opinion about how our system does or
 8 does not work, it would be infringement opinion. He can
 9 talk about how Apple Data Detectors works, talk about
 10 Dr. Fox's opinion that if Arendi's position is right what
 11 would that mean for the invalidity case. He cannot offer
 12 opinions on how our system work does or doesn't do.
 13 **THE COURT:** Counsel?
 14 **MR. LAHAD:** I agree. He is not going to talk
 15 about that.
 16 **THE COURT:** Great.
 17 **MR. UNIKEL:** Great. We are in agreement.
 18 Thank you.
 19 **THE COURT:** There wasn't a pending question,
 20 jury.
 21 Let's continue.
 22 (Whereupon, the discussion at sidebar concludes.)
 23 - - -
 24 **MR. LAHAD:** Thank you, Your Honor.
 25

1 **MR. UNIKEL:** Objection, your Honor. Leading
 2 the witness.
 3 **THE COURT:** Overruled.
 4 **BY MR. LAHAD:**
 5 **Q.** So what are you showing us here?
 6 **A.** What I'm showing us here is, if there is no input
 7 device set up by the first computer program, that fails my
 8 fourth question, and so that helps me determine that Apple
 9 Data Detectors does not practice the '843 patent claims.
 10 **Q.** Right. So but Dr. Fox is not asserting that
 11 anticipation by Apple Data Detectors is asserting the
 12 obviousness by the combination of CyberDesk and ADD,
 13 right?
 14 **A.** Correct.
 15 **Q.** Okay. So what is your opinion with respect to
 16 whether or not the combination of CyberDesk and ADD
 17 renders the claim obvious?
 18 **A.** That combination also does not render the claims
 19 obvious. If neither of the prior art systems practices
 20 one of these steps, then the combination couldn't either.
 21 **Q.** What about a motivation to combine? Would a person
 22 of ordinary skill in the art be motivated to combine
 23 Cyberdesk and ADD?
 24 **A.** I don't believe so.
 25 **Q.** Why not?

1 **BY MR. LAHAD:**
 2 **Q.** My question to you is, how is this any different than
 3 what we heard last week?
 4 **A.** Remind me back one question. What -- oh, the -- the
 5 Infringement discussion.
 6 **Q.** The Java API framework?
 7 **A.** Yeah. The Apple Data Detectors documentation clearly
 8 indicates that the communication here is done through what
 9 are call Apple Events, which are messages that are sent
 10 from one piece of system to another. The message would be
 11 a piece of a data structure that gets built up by one
 12 program and that data structure is then transmitted to
 13 another program. It's quite different from linking from
 14 one piece of code to another during execution, which is --
 15 was my understanding of what Dr. Smedley was, basically,
 16 accusing Google of doing, linking as opposed to sending
 17 messages.
 18 **Q.** Is there a call from, for example, Notepad or a text
 19 editor in the Apple product to ADD?
 20 **A.** No. There's no call in that sense. The programs
 21 aren't linked together. They don't behave in execution
 22 like one big program.
 23 **Q.** So they're not joined together temporarily like
 24 Mr. Elbouchikhi said?
 25 **A.** That's correct.

1 **A.** Well, the two systems are both trying to work on
 2 integrating computer programs dynamically as the user was
 3 doing stuff. But they were following very different
 4 objectives, and they're kind of going in opposite
 5 directions. Apple's system was designed to be something
 6 that was going to be actually added to the commercial
 7 operating system and needed to be attractive to their
 8 developer community because a lot of the value in Apple's
 9 computers was the software that would run on them. They
 10 couldn't keep their developers happy, they couldn't keep
 11 selling hardware.
 12 CyberDesk, by contrast, was a research project that
 13 was looking -- as opposed to Apple, which was trying to
 14 narrow the kinds of options they gave to users so the user
 15 wouldn't have no think about it much and could do it
 16 really quick.
 17 What CyberDesk was looking at was kind of blowing out
 18 the menu, looking at way more kinds of options over time.
 19 So they were looking at things like where am I on the
 20 campus when I'm asking this question or when I'm using
 21 this program? What does my face look like when I'm using
 22 the computer? It's a research project. So they were
 23 looking at finding other ways to determine the context and
 24 figure out what options to offer to the user.
 25 So one was a research project looking at making

1 bigger menus, if you will, or bigger kinds of choices.
 2 The other was a commercial effort, which required changing
 3 the operating system, was looking for the smallest
 4 increment to take advantage, make real value to their end
 5 users. Different motivations, different directions, they
 6 were headed altogether. It's hard to understand why you
 7 would combine them.
 8 Q. So what's your opinion regarding whether CyberDesk
 9 and ADD or ADD plus CyberDesk renders the claims obvious?
 10 A. My opinion is that the combination of those two
 11 systems would not render the '843 patent claims obvious.
 12 Q. Let's move on to the combination of CyberDesk and
 13 Microsoft Word 97.
 14 What's your opinion on whether that combination
 15 renders the claims obvious?
 16 A. My opinion is that combination, likewise, does not
 17 render the claims obvious.
 18 Q. So what's missing from the combination of CyberDesk
 19 and Microsoft Word 97?
 20 A. Well, I haven't seen anything in the documentation
 21 from Microsoft Word that would suggest that it analyzes
 22 information in the document to determine if the
 23 information is one or more types as the Court has
 24 construed, the kind of types that it's looking for,
 25 namely, contact information or identifying information.

1 me. I misread it. "One approach to integration is a
 2 tightly integrated suite of tools that take advantage of
 3 known services." This is what CyberDesk wants to say. So
 4 that is one approach. That is the Word 97 approach. It's
 5 part of Office 97, tightly integrated suite of services.
 6 If something is going to link to Microsoft Word in the
 7 Microsoft world, it's coded into the program.
 8 And what the CyberDesk folks say is, "This approach,
 9 available in many commercial personal productivity
 10 products, is unsatisfactory," and then they give you two
 11 reasons.
 12 Q. Is Microsoft Word 97 a commercial personal
 13 productivity product?
 14 A. Yes.
 15 Q. And they find the use of Microsoft -- they being the
 16 CyberDesk guys -- they find the use of a tightly
 17 integrated suite of tools like Microsoft Word 97 to be
 18 unsatisfactory?
 19 A. That's what they're saying here, yes.
 20 Q. So what does that tell you about whether or not there
 21 would be a motivation to combine the two?
 22 A. Well, if I were a person of skill in the art and I
 23 read that one approach was unsatisfactory from the point
 24 of the other, I don't believe I'd have a strong motivation
 25 as to checkout whether they could be combined.

1 So a system that, as Dr. Fox had suggested this
 2 morning, that pulls aspects from CyberDesk, wouldn't do so
 3 either.
 4 Q. Well, do you agree that there's a motivation to
 5 combine CyberDesk and Word 97?
 6 A. I pretty strongly disagree with that. There's good
 7 evidence that such a motivation does not exist.
 8 Q. You think the CyberDesk guys would agree with you?
 9 A. I do.
 10 Q. Why do you say that?
 11 A. Well, I've read their papers and they say it.
 12 Q. Let's go to DTX-10, please, which is in your
 13 notebook.
 14 A. I have that one.
 15 Q. Excellent.
 16 MR. LAHAD: If we can have DTX-10 on the
 17 screen, please, Mr. Boles.
 18 BY MR. LAHAD:
 19 Q. Can you direct us to the portion of this document on
 20 which you are relying?
 21 A. Yeah. If you go down to the second paragraph in the
 22 introduction. There we go.
 23 Let me read out that first sentence there: "Our
 24 approach to integration is a tightly integrated suite of
 25 tools that take advantage of known services" -- oh, excuse

1 Q. Are you familiar with the concept of teaching away?
 2 A. Yes.
 3 Q. What's teaching away?
 4 A. Teaching away is a lawyerly kind of term for saying
 5 that a piece of prior art suggests that you shouldn't do
 6 what the patent does.
 7 Q. Does this document teach away from the combination
 8 from CyberDesk and Microsoft Word 97?
 9 A. Yes, it does. It's saying taking Microsoft Word
 10 approach tightly integrated is not the direction that we
 11 should be going in.
 12 Q. Thank you.
 13 So let's wrap it up. What is your opinion on whether
 14 there is a motivation to combine CyberDesk and Microsoft
 15 Word?
 16 A. In my opinion, there is not a motivation to
 17 combine --
 18 Q. And does that --
 19 A. CyberDesk Microsoft Word.
 20 Q. I'm sorry, Doctor.
 21 And does that render the claims obvious?
 22 A. Yes, it does -- sorry. That does not render the
 23 claims obvious.
 24 Q. Thank you.
 25 Let's go to the last one, ADA and Microsoft Word.

1 Does that combination render claims obvious in your view?

2 **A.** It does not.

3 **Q.** Why not?

4 **A.** Generally, the same kind of argument. Apple Data

5 Detectors was very explicitly looking at a way to

6 integrate programs from the user's point of view

7 dynamically, and not -- again, not require changing the

8 individual apps, not making the developers go in and

9 change their code in order to product the integration.

10 That was kind of the whole thrust of what they were doing

11 as well.

12 **Q.** Do you think there's motivation to combine the two

13 references?

14 **A.** There isn't.

15 **Q.** Why not?

16 **A.** Well, again, as I said, they were aiming in opposite

17 directions. Microsoft Word is trying to keep a closed

18 system around the Office suite of products that call each

19 other or send messages to each other. And Apple Data

20 Detectors was trying to allow all programs to participate

21 in this integration process dynamically in run time.

22 **Q.** Let me direct your attention to your binder at

23 DTX-9-54. I think it's the last tab.

24 Do you recognize DTX-954?

25 **A.** I do.

1 LiveDoc was experimental system to look at some other ways

2 of providing user interface other than a menu that was in

3 a released Apple Doc product.

4 **Q.** Does LiveDoc include ADD functionality?

5 **A.** It does. It's built on top of ADD functionality.

6 **Q.** And one of authors on this paper is James R. Miller.

7 Do you see that?

8 **A.** That's correct.

9 **Q.** Same James Miller we heard from last week?

10 **A.** Yes, that's Jim Miller.

11 **Q.** Now if I could can have you join me at Page 8 of 11.

12 **MR. LAHAD:** And, Mr. Boles, if you could

13 highlight "A live simple text."

14 **THE WITNESS:** Yeah, so it's the second

15 paragraph there I'm interested in.

16 **BY MR. LAHAD:**

17 **Q.** Yeah. So what does this say with respect to

18 motivation to combine or the lack thereof?

19 **A.** Okay. Just a second. Live simple text was a version

20 of a text writing and weaving program, and they -- they

21 went in and changed the code of simple text to make it

22 work with this experimental system they were doing. So it

23 was a prototype. It was not something that was intended

24 for release. But -- so what they said was Live Simple

25 Text worked well as a prototype.

1 **Q.** This is one of the documents that you relied on in

2 forming your opinion regarding validity, correct?

3 **A.** It is.

4 **MR. LAHAD:** Your Honor, I offer DTX-954.

5 **MR. UNIKEL:** No objection, Your Honor.

6 **THE COURT:** It's admitted.

7 **MR. LAHAD:** Thank you, Your Honor.

8 (Exhibit DTX-954 is admitted into evidence.)

9 **BY MR. LAHAD:**

10 **Q.** I want to direct your attention to Page 8 of 11 at

11 the bottom.

12 **MR. LAHAD:** And that paragraph right there

13 Mr. Boles that starts with -- let me step back.

14 **BY MR. LAHAD:**

15 **Q.** If we go to the front of this document, it says, "An

16 overview of LiveDoc."

17 Do you see that?

18 **A.** Yes.

19 **Q.** What is LiveDoc?

20 **A.** LiveDoc was a research project that was done using

21 Apple Data Detectors kind of as a basis and standing on

22 its shoulders. One of problems that Apple was finding

23 with Apple Data Detectors was kind of the use of these

24 menus was a little clunky. And they were looking at ways

25 to make it kind of faster and easier for the user, and

1 But we were still concerned about acquiring

2 developers to change their applications to gain access to

3 LiveDoc's capabilities. Again, from Apple's perspective,

4 we don't want to make our developers have to recode

5 something just because we have a cool new feature. And

6 that's what they said and it makes sense.

7 We know from experience that developers are

8 justifiably reluctant to change their applications just to

9 implement a new feature provided by the toolbox. So we

10 experimented with some alternatives that we hoped would

11 ease this restriction.

12 **Q.** Would the -- would you have to change the

13 application, in this case Microsoft Word, to include the

14 Apple Data Detectors functionality?

15 **A.** Well, no. With respect to Apple Data Detectors, the

16 InNova system you would not. It would work with any

17 application.

18 **Q.** So what does this say about -- what does this say

19 with respect to teaching away as to ADD and Word '97?

20 **A.** Again, the ADD folks, we're looking at ways to not

21 make -- not have to make the programs explicitly link with

22 one another, in direct contrast with Microsoft Word '97's

23 approach, which was to directly link to the other

24 programs. So directly link, try to avoid directly

25 linking, teaching a way.

1 Q. And so let's wrap it up. What is your view as to
 2 whether or not the claims of the '843 patent are obvious
 3 in light of the combination of ADD and Word '97?
 4 A. My opinion is that they are not -- that combination
 5 does not render the '843 patent obvious.
 6 Q. Let's briefly touch on secondary considerations of
 7 nonobviousness. I will focus on the licensing one. Why
 8 is licensing relevant or how is licensing relevant to
 9 obviousness or nonobviousness?
 10 A. Well, these secondary considerations, ones that
 11 aren't technical, they're just other considerations.
 12 Doesn't mean they're not important. They are both
 13 secondary, which means they don't have to do with the
 14 technical stuff, per se. But if someone is paying for a
 15 license, they've got to be paying for something that they
 16 believe is valuable. And something that was obvious, you
 17 wouldn't think to pay for it, right? It's obvious.
 18 So the fact that other firms paid for licenses for
 19 the '843 patent suggests that there is something
 20 innovative there, there is something that was worth it to
 21 them to have a right to practice that patent in their
 22 products.
 23 MR. LAHAD: Pass the witness, Your Honor.
 24 THE COURT: Thank you.
 25 Cross-examination?

1 billed to Arendi in excess of \$200,000 for your work on
 2 these various cases?
 3 A. Frankly, I don't remember what I may have -- what I
 4 may have billed -- what I did bill in 2020.
 5 Q. Sir, do you recall at your deposition that you gave
 6 testimony under oath?
 7 A. I do.
 8 Q. And, sir, you were asked the following question and
 9 gave the following answer:
 10 "Question: Do you believe it's in excess of \$200,000
 11 that you've billed to Arendi in connection to your work on
 12 these various cases?
 13 "Answer: I believe so, yes." Unquote.
 14 Do you recall that testimony?
 15 A. No.
 16 Q. Do you have any reason to believe were you not
 17 telling me the truth?
 18 A. I have no reason to believe I wasn't telling you the
 19 truth.
 20 Q. Do you know three years later how much you've
 21 actually billed to Arendi in connection with your work on
 22 these cases today?
 23 A. No, I don't.
 24 Q. Your work on these cases focused on validity issues,
 25 correct?

1 MR. UNIKEL: Thank you, Your Honor.
 2 CROSS EXAMINATION
 3 BY MR. UNIKEL:
 4 Q. Good afternoon, sir.
 5 A. Good afternoon. It's nice to see you in person. You
 6 look much better than when you are a 1-inch square on my
 7 computer screen at the deposition.
 8 Q. Thank you. I will try to be brief. I know it's a
 9 late in the day.
 10 Sir, like all the experts in this case, you are being
 11 paid for your hourly service, correct?
 12 A. That's correct.
 13 Q. You are being paid at the rate of \$550 an hour; is
 14 that right?
 15 A. Yes.
 16 Q. When we spoke, you and I spoke, I think you just
 17 mentioned, in October of 2020, correct?
 18 A. I don't remember the date, but I'll take your word
 19 for it.
 20 Q. As of that date, you had told me that you had already
 21 made in excess of \$200,000 from Arendi at that point in
 22 time. Do you recall that?
 23 A. No, I don't.
 24 Q. I'll show him his --
 25 Sir, as of October 2020, do you believe that you have

1 A. That's correct.
 2 Q. And you looked at the patent in this case in
 3 connection with validity analysis, correct?
 4 A. A few times, yes.
 5 Q. And you're aware that the earlier U.S. filing date
 6 that is claimed by these patents is November 10, 1998; is
 7 that right?
 8 A. Yes, that's right.
 9 Q. Sir, if I may --
 10 MR. UNIKEL: And if I may impose on Mr. Boles
 11 to put up one of your slides, PDX-5-16, please. Sorry. I
 12 think we may be --
 13 Thank you very much.
 14 BY MR. UNIKEL:
 15 Q. Sir, am I correct that this is sort of the sequence
 16 of questions that you used to perform your analysis?
 17 A. It's not the entirety of performing my analysis.
 18 This was kind of a summary description of what I did.
 19 It's -- how do I say this? What this doesn't do, which I
 20 insist on doing to myself, is to incorporate the exact
 21 claim language and the terms as construed by the Court.
 22 I'm always -- when I'm doing this work, I have to --
 23 Q. Sir, I want to make sure we get out of this, so I'm
 24 going to ask you some specific questions. If you could
 25 give me some specific answers, it will help us to get

1 home.

2 **A.** I'm sorry. I'm happy to do so.

3 **Q.** Sir, this particular claim language that you took the

4 jury through, this is not the actual claim language of the

5 patent, correct?

6 **A.** That was the point I was trying to make.

7 **Q.** This is how you personally think about the claims, as

8 you say in the title of this slide, correct?

9 **A.** That is correct.

10 **Q.** And you've created these questions that you believe

11 correlate to the elements of the claims, but this is not

12 the actual claim language; is that right?

13 **A.** That's correct.

14 **Q.** And as I think you took us through, you went through

15 these questions and you answered yes or no, and then that

16 told you whether you could move on to the next question;

17 is that right?

18 **A.** Generally speaking, that's right.

19 When I get to the bottom, that doesn't mean, okay, I

20 don't do anymore analysis, that just means, okay, this is

21 worth analyzing. This is now looking close.

22 **Q.** And, sir, when it comes to CyberDesk, you agree that

23 Dr. Dey knows more about how the CyberDesk system works

24 than you do, correct?

25 **A.** You'd have to tell me what the CyberDesk system is

1 for me to answer that.

2 **Q.** Do you believe that Dr. Dey knows more about the work

3 that he did in connection with CyberDesk than you do?

4 **A.** Yes.

5 **Q.** And, sir, you are aware of the Future Computing

6 Environment's CyberDesk website from Georgia Tech,

7 correct?

8 **A.** Yes.

9 **Q.** In fact, as part of the work on this case, you

10 personally went to that website, clicked on some of its

11 hyperlinks to retrieve versions of some of the materials

12 that are on that website concerning CyberDesk; is that

13 right?

14 **A.** That's correct.

15 **Q.** Did you see, for example, the list of network

16 services and desktop services that CyberDesk actually

17 allowed to be used?

18 **A.** Yes, I did.

19 **Q.** And did you see Mr. Fox earlier today -- Dr. Fox --

20 included some excerpts from that referring to, for

21 example, a Notepad that was referred to in the desktop

22 services that were integrated?

23 **A.** I think we need to look at that slide. I'm not sure

24 that it was identified -- Dr. Dey, in his testimony, I

25 believe called -- said there was a Notepad at some point.

1 My recollection of what's on the website pages has

2 something like a simple Notepad or there's some adjective

3 that suggests that it's not a complete notepad program.

4 **Q.** So you recall that on the desktop services, there was

5 mention of a simple Notepad; is that correct?

6 **A.** Again, I would want to look at that document. I

7 don't -- as I say, I'm older than Dr. Fox. I don't

8 necessarily trust my memory any more than I would trust

9 Dr. Dey's memory. I would like to look at that document

10 and we can see what -- you know, we can see what the

11 contemporaneous document shows us rather than my

12 recollection --

13 **Q.** Sir, sitting here today, you don't whether or not the

14 desktop services on the CyberDesk website included a

15 reference to the simple Notepad; is that what you're

16 telling me?

17 **A.** I am saying I don't recall. I believe there was a

18 reference to a simple Notepad.

19 **Q.** And, sir, you have no reason to dispute Dr. Dey's

20 testimony concerning when he posted individual items on

21 the CyberDesk website, correct?

22 **A.** Please repeat that.

23 **Q.** Yes. You have no reason to dispute Dr. Dey's

24 testimony concerning when he posted individual items to

25 his website, correct?

1 **A.** I don't recall a whole lot of testimony regarding

2 when individual items were placed on that website, other

3 than some of the papers that he was preparing for

4 publication.

5 **Q.** And you have no reason to dispute Dr. Dey's testimony

6 about that, correct?

7 **A.** Regarding those dates for those papers, no.

8 **Q.** And sir, you -- I think you opined that the reason

9 you don't think that CyberDesk anticipates is because the

10 Mail Reader does not allow editing of documents, correct?

11 That was what you testified to a few moments ago.

12 **A.** I believe I said that was "a" reason. I didn't say

13 it was "the" reason.

14 **Q.** You provided that reason in this Court, correct, that

15 you don't believe that the Mail Reader allowed you to work

16 on editable documents; is that correct?

17 **A.** That is correct.

18 **Q.** And you concluded from the title "Mail Reader" that

19 it did not allow editing of the document, of the e-mail

20 that's shown in the CyberDesk screenshots, correct?

21 **A.** From that and other contemporaneous evidence on the

22 website as well.

23 **Q.** And so you watched the testimony of Anind Dey with

24 the jury, correct?

25 **A.** Yes.

1 Q. And I think you told your counsel that Dr. Dey's was,
 2 in fact, inconsistent with your conclusion about Mail
 3 Reader; is that right?
 4 A. No. I don't believe I said that. Maybe I did, but I
 5 don't believe I did.
 6 Q. Do you recall your counsel asked whether or not
 7 Dr. Dey's testimony about the use of a text editor was
 8 inconsistent with your view about Mail Reader?
 9 A. Again, I'm at a loss here. You're talking about a
 10 text editor or are we talking about a Mail Reader?
 11 Q. I'm just asking you, sir --
 12 A. A text editor doesn't say anything about a mail
 13 reader.
 14 Q. Sir, do you recall about 20 minutes ago that your
 15 counsel asked you expressly whether or not your opinion
 16 was inconsistent with the testimony of Dr. Dey?
 17 A. Yes, I do. I understood that as referring to the
 18 entirety of his testimony, not to any specific statement
 19 within it.
 20 Q. And you agreed that your opinion is inconsistent with
 21 the testimony of Dr. Dey, correct?
 22 A. Correct.
 23 Q. Sir, let me ask you a bit about Microsoft Word.
 24 As part of your work in this case, you looked at how
 25 Mr. Hedloy created the prototype for his products,

1 features into Microsoft Word; is that correct?
 2 A. That's correct.
 3 Q. And sir, when reviewing the '843 patent, one of the
 4 questions you tried to answer was whether a person of
 5 ordinary skill in the art reading the patent would
 6 understand that the invention could be readily implemented
 7 using the macro facility that was well known in Microsoft
 8 Word; is that right?
 9 A. I apologize. I lost the beginning of your question
 10 by the time you got to the end.
 11 Q. Yes. In reviewing the patent, one of the questions
 12 you tried to answer was whether a person of skill in the
 13 art reading the patent would understand that the invention
 14 could be readily implemented by macros in Microsoft Word?
 15 A. I would agree with that.
 16 Q. And your conclusion was that a person of ordinary
 17 skill in the art would, in fact, realize that using the
 18 macro facility of Microsoft Word was a natural and easy
 19 and direct way to implement the invention; is that
 20 correct?
 21 A. Yes.
 22 Q. And you understood that people of skill in the art
 23 were aware of Visual Basic to use with Microsoft Word,
 24 correct?
 25 A. Yes.

1 correct?
 2 A. I looked at a few instances of the prototypes of his
 3 product. I didn't see -- I didn't look at how he created
 4 it. I looked at what he created.
 5 Q. Well, in fact, didn't you state in your report that
 6 Mr. Hedloy used Microsoft's Visual Basic Scripting to
 7 create the macros that he used for the prototypes; is that
 8 correct?
 9 A. Yes.
 10 Q. And so the jury understands, a macro is a feature of
 11 Microsoft Word that lets a developer put instructions into
 12 a command inside of Microsoft Word, correct?
 13 A. I don't know that I would use the word "inside," but
 14 in general, that's correct. I don't know what it means to
 15 be inside.
 16 Q. And a Microsoft Word macro is designed to be used
 17 with Microsoft Word the program, correct?
 18 A. Yes.
 19 Q. And Visual Basic is a particular language that was
 20 developed and offered by Microsoft for people to program
 21 into their various applications, correct?
 22 A. I believe it was developed by Microsoft. It was kind
 23 of a second-generation macro language that they used with
 24 a number of their Office Suite products.
 25 Q. That allowed people like Mr. Hedloy to build program

1 Q. In fact, in your view, that was a well-known feature
 2 of Microsoft Word, correct?
 3 A. Correct.
 4 Q. Sir, I believe you expressed the opinion that one of
 5 the distinctions between the Apple Data Detectors
 6 functionality and the patented functionality was that
 7 Apple Data Detectors used the operating system to set up
 8 the input device; is that correct?
 9 A. Yes.
 10 Q. And you feel that that is a distinction that meant
 11 that the first computer program was not, in fact, setting
 12 up the input device?
 13 A. Yes.
 14 Q. Sir, let me ask you, by the way, you pointed out an
 15 article -- your DTX-10?
 16 MR. UNIKEL: Can we bring that up, please?
 17 Yes. Defense -- sorry. Apologize.
 18 BY MR. UNIKEL:
 19 Q. With your counsel -- you recall looking at this with
 20 your counsel?
 21 A. Yes.
 22 Q. You recall you've highlighted a certain -- a few
 23 sentences at the beginning of this Paragraph in CHI 97
 24 correct?
 25 A. Yes.

1 Q. So this article is from March of 1997 that you were
 2 quoting from, correct?
 3 A. That's when it was -- that's when the contents was.
 4 Q. Yes. And that's what the publication shows --
 5 A. Yes.
 6 Q. -- as far as the date?
 7 A. Yes.
 8 Q. And I believe you highlighted the first two
 9 sentences; is that right?
 10 A. Yes, I believe so.
 11 Q. And if I'm reading it correctly, you said -- you
 12 quoted, "One approach to integration is a tightly
 13 integrated suite of tools that take advantage of known
 14 services. This approach, available in many commercial
 15 personal productivity products, is unsatisfactory for two
 16 reasons."
 17 You quoted that language, correct?
 18 A. Correct.
 19 Q. And so you acknowledge that there was one approach to
 20 the integration of services to put those services inside a
 21 particular program, correct?
 22 A. Correct.
 23 Q. And it's your view that CyberDesk took a different
 24 approach; is that right?
 25 A. Yes.

1 independent -- the individual applets -- which, again, are
 2 not runnable by themselves -- were making believe, were
 3 the prototypes for the different applications that, in a
 4 regular system would have been hard coded by developers.
 5 Q. So it's your belief that the first computer program,
 6 so to speak, in CyberDesk is the web browser program; is
 7 that right?
 8 A. Yes.
 9 Q. And you're aware that in this case, Google Chrome is
 10 being accused of infringement. You are aware of that,
 11 correct?
 12 A. I am. I've heard that reference.
 13 Q. And Google Chrome is also a web browser; is that
 14 right?
 15 A. Yes.
 16 Q. And I think you just told me that it is your view
 17 that CyberDesk actually integrated its instructions into
 18 the web browser? Is that what you understood you to say?
 19 A. Well, at runtime, you are running the CyberDesk
 20 system, the applet code is linked, as Mr. Elbouchikhi
 21 described last week, temporarily joined while the program
 22 is being executed.
 23 Q. So you feel that that's what was happening in
 24 CyberDesk with the browser program, correct?
 25 A. Yes. When CyberDesk was running, all of these

1 Q. And it's your view that CyberDesk separated the
 2 instructions and did not put them inside a single computer
 3 program, correct?
 4 A. Depends -- that depends on how you view the CyberDesk
 5 architecture.
 6 Q. Do you believe that CyberDesk put all of the
 7 instructions into a single computer program under any
 8 interpretation of the architecture?
 9 A. Yes.
 10 Q. What is the interpretation of the architecture that
 11 leads you to believe that CyberDesk actually put the
 12 instructions into a single program?
 13 A. The CyberDesk documents -- this one probably does
 14 somewhere, but rather than looking through it, let me just
 15 talk about it in general.
 16 The CyberDesk documentation indicates that the
 17 CyberDesk system was implemented in a prototype fashion as
 18 a collection of what are called Java applets. Those are
 19 little chunks of code that are not actually separately
 20 runnable programs, that, when loaded into a web browser --
 21 and, as they described in the documentation, the web
 22 browser served as a model of a desktop.
 23 So they were kind of making believe that the browser
 24 screen was the desktop and exploring the integration of
 25 these various applications within that desktop. And the

1 applets were operating within the environment of the
 2 browser program.
 3 Q. Thank you, sir.
 4 MR. UNIKEL: I have no further questions.
 5 THE COURT: Any redirect?
 6 MR. LAHAD: Tiny.
 7 REDIRECT EXAMINATION
 8 BY MR. LAHAD:
 9 Q. Doctor, in that last scenario that counsel was
 10 talking to you about, when the browser is the first
 11 computer program, does that show any kind of anticipation
 12 by CyberDesk?
 13 A. No.
 14 Q. Why not?
 15 A. Well, as I have been showing with my waterfall slide
 16 and my New Year's Day party slide, you've got to see all
 17 the elements practiced within -- with one system for it to
 18 anticipate. We haven't seen that, even under the
 19 interpretation that the browser is the one first computer
 20 program.
 21 Q. That's, like as you testified earlier, because
 22 there's no second computer program, no second information;
 23 is that correct?
 24 MR. UNIKEL: Objection. Sidebar, please.
 25 - - -

1 (Whereupon, the following discussion is held at
2 sidebar.)

3 **MR. UNIKEL:** That was not his testimony
4 earlier. That would be a new opinion rendered on
5 redirect. It does not answer my question. That was only
6 about the document element, the only expression he
7 expressed on direct. It did not meet the document
8 element, not that there was lack of a second computer
9 program.

10 **THE COURT:** Counsel?

11 **MR. LAHAD:** I think he testified in the context
12 of if the browser applets running in the browser, why is
13 there no anticipation. He referenced the elements of the
14 slide that weren't met.

15 **MR. UNIKEL:** I don't believe he did offer that
16 opinion. If he did, I would have a follow-up question to
17 clarify something.

18 **MR. LAHAD:** I am happy to move to withdraw the
19 question.

20 **THE COURT:** Let's do that.

21 **MR. UNIKEL:** Thank you, Your Honor.

22 **MR. LAHAD:** Thank you, Your Honor.

23 (Whereupon, the discussion at sidebar
24 concludes.)
25 - - -

1 **THE WITNESS:** Thank you, Your Honor.

2 **THE COURT:** Ladies and gentlemen of the jury,
3 we have one more phase of this trial to go, and that's the
4 phase where I give you the jury instructions and you hear
5 the closing arguments from the attorneys. It's now almost
6 6:00 at night on Monday. So it doesn't make a lot of
7 sense for us to start that process tonight because it's
8 going to take approximately two to three hours.

9 So what I'm going to ask is for you all to
10 appear tomorrow morning at 9:30. We should be ready to go
11 with the jury instructions, and then we'll hear from
12 counsel with their closing arguments. We should have the
13 case to you for your deliberations by lunch. And I
14 understand that we will be providing you lunch tomorrow as
15 well.

16 Just to remind everyone, until you retire to
17 jury room after the closing arguments to deliberate on the
18 case, you are simply not to talk about the case with each
19 other. Do not do any research or investigate the case on
20 your own, and don't form any opinion about the case until
21 after we've heard the jury instructions and the closing
22 arguments. Okay?

23 You may be excused for the evening. We will
24 see you tomorrow at 9:30.
25 (The jury exits the courtroom at 5:53 p.m.)

1 **BY MR. LAHAD:**

2 **Q.** There were some questions about money.
3 Have you been retained by Arendi before as an expert
4 witness?

5 **A.** No, I have not.

6 **Q.** Do you hope to be retained by Arendi in the future as
7 an expert witness?

8 **A.** I'm hoping this is my last time on the stand. I'm
9 turning 75 next month. I'm done.

10 **Q.** So you don't want to be retained by anybody in the
11 future, correct?

12 **A.** That's a fair way to put it, yes.

13 **Q.** There was some talk about macros. At any point
14 during his testimony, did you hear Dr. Fox say anything
15 about macros?

16 **A.** I don't remember I don't recall anything that he said
17 about macros, no.

18 **MR. LAHAD:** No further questions, Your Honor.
19 Thank you.

20 **THE COURT:** All right. Thank you very much.
21 Does Arendi have any other rebuttal witnesses?

22 **MR. LAHAD:** No other rebuttal witnesses, Your
23 Honor.

24 May the witness be excused?

25 **THE COURT:** Yes, he may. Please step down.

1 **THE COURT:** Please have a seat. Okay, folks,
2 let's spend a little time, if we could, just talking about
3 the jury instructions before we -- let's take a
4 five-minute break. We will be in recess.
5 (Whereupon, a recess was taken.)

6 **THE COURT:** All right. Please be seated.

7 **MR. UNIKEL:** Your Honor, may I ask a quick
8 question?

9 **THE COURT:** Yes.

10 **MR. UNIKEL:** For 50A motions, how would you
11 like us to do those today? Do we just obviously want to
12 make sure we don't waive them?

13 **THE COURT:** Why don't you have everybody come
14 up and put everything on the record that you want to say.
15 So we had defendant rest, so let's hear from
16 plaintiff.

17 **MS. SRINIVASAN:** Yes, we have two 50A motions.

18 **MR. LAHAD:** Your Honor, we move under Rule 50A
19 for judgment as a matter of law regarding invalidity. The
20 issue on which defendant bears the burden. There is
21 legally insufficient evidence for a jury to find any
22 invalidity through anticipation of obviousness.

23 Dr. Fox did not present sufficient, legally
24 sufficient evidence of anticipation of obviousness. There
25 were significant shortcomings in his evidence of

1 anticipation with respect to CyberDesk, did not prove by
2 clear and convincing evidence that CyberDesk disclosed
3 document, as construed by the Court, among other deficient
4 claim limitations.

5 Likewise, Dr. Fox did not show obviousness by
6 any combinations that he raised, ADD and CyberDesk,
7 CyberDesk and ADD, and those two technologies or systems,
8 combined with Microsoft Word '97.

9 In particular, Dr. Fox failed to show any kind
10 of motivation to combine those references with each other.
11 And accordingly, we think there's legally insufficient
12 evidence of anticipation and obviousness.

13 Thank you, Your Honor.

14 **THE COURT:** All right. So the Court will
15 reserve decision on that, and we'll submit it to the jury
16 subject to the Court's later deciding the legal questions
17 raised by your motions.

18 Go ahead. Did you have another one?

19 **MR. ARD:** Yes, Your Honor.

20 **THE COURT:** All right. We've got another one.

21 **MS. SRINIVASAN:** And I stand corrected. I said
22 two. We have three, but we will be quick.

23 **THE COURT:** Okay.

24 **MR. ARD:** Your Honor, on the Samsung license,
25 we think the contract is unambiguously sort of in our

1 favor for the reasons we discussed previously. I think
2 it's Docket 220. I don't need to belabor the point.

3 If it's ambiguous, we don't think that they
4 have submitted any extrinsic evidence to support their
5 position, so we think that summary judgment would be sort
6 of warranted on that aspect as well.

7 The case that we would cite for that was cited
8 in our joint jury instructions.

9 **THE COURT:** What's the case? Can you just put
10 it on the record.

11 **MR. ARD:** Sorry. Need my glasses.

12 **THE COURT:** Yeah.

13 **MR. ARD:** *Weiner v. Anesthesia Associates*, it's
14 203 A.D.2d 455, New York.

15 **THE COURT:** All right. Thanks very much.

16 **MR. ARD:** That's the Samsung license.

17 Also, on estoppel, we think the only evidence
18 that they presented -- that they purport to have presented
19 that it allegedly was not in the publications was a
20 uncorroborated oral statement. So we think that they
21 should be estopped from raising CyberDesk. And for the
22 rest of them, we don't think there is anything they put in
23 the record that was noncumulative to the publications that
24 was germane to their invalidity theories. So we would
25 move on estoppel as well, for obviousness and

1 anticipation.

2 **THE COURT:** All right.

3 Did the -- in your view, did the Court not
4 already rule on the IPR estoppel issue? I know I said
5 that the Court would reconsider to the extent that
6 defendant's only evidence of the CyberDesk system
7 consisted of a prior art publication or patent. That's
8 not my recollection of the evidence that came in.

9 Are you asking for reconsideration of that or
10 this is just you're going to be preserving your ability to
11 raise this in a JMOL motion?

12 **MR. ARD:** Well, certainly the latter, I
13 suppose. But as to the former -- that we're preserving
14 it -- but as to the former, I think there are two distinct
15 questions, one is whether they can present evidence of the
16 system, and the second is whether the noncumulative aspect
17 of the evidence, the system that they've presented is
18 germane to the invalidity theory.

19 So if all of their sort of grounds for
20 invalidity are contained in the written publications they
21 presented, we think that's estopped. That's under Judge
22 Stark's summary judgment order in this case.

23 **THE COURT:** All right. Your position is noted
24 for the record.

25 Let me ask counsel for Google if somebody wants

1 to talk to me about the point about apparently under New
2 York law, they have a case that says that if you don't --
3 if the Court ultimately rules that the contract is
4 ambiguous and you don't present any extrinsic evidence
5 that you should grant judgment for the other side?

6 **MR. UNIKEL:** Your Honor, there's ample case law
7 cited in our various submissions on this that the best
8 evidence of the intent of the parties is the contract
9 agreements itself, and that actually is the most accurate,
10 most complete, and most on-point indication of what the
11 parties intended.

12 In addition, Mr. Hedloy, in cross-examination,
13 when taken through the terms did acknowledge that he
14 agreed to those terms voluntarily. When I asked him
15 whether or not he agreed to these on behalf of Arendi, he
16 acknowledged that he did. This is, in fact, evidence of
17 his intent and of what it was that he was agreeing to.

18 In addition, we pointed out to the Court the
19 integration clause of the contract itself, which actually
20 directs anybody to the terms of the contract as the
21 indication of the parties' agreement, as opposed to any
22 oral statements or anything extrinsic to the agreement.

23 So Mr. Hedloy's testimony itself is extrinsic
24 testimony that supports the intent and shows what the
25 actual positions of the parties were when they agreed to

1 the terms.

2 **THE COURT:** Okay. Your position is noted. I'm

3 going to reserve judgment on the license issue.

4 Counsel?

5 **MR. ARD:** May I respond very briefly?

6 **THE COURT:** Very briefly.

7 **MR. ARD:** Yes, Your Honor. First of all, the

8 cases they cited are not about ambiguous contracts. They

9 are all about the plain meaning of the contract.

10 Two, they have the burden of proof here. And

11 under the Wiseman case, it says explicitly if they don't

12 present any extrinsic evidence, they lose as ambiguous.

13 And three, on the parol evidence rule, under

14 ^FCHR1 one of the cases they cite, it says explicitly that

15 parol evidence rule, parol evidence is admissible if a

16 Court finds ambiguity in the contract.

17 **THE COURT:** Okay. All right. Your position is

18 noted for the record. I'm going to reserve judgment on

19 this no-license issue. I do want to talk about this again

20 in the context of the jury instructions, but we will get

21 to that in a minute.

22 Any motions to make for the record?

23 **MR. UNIKEL:** Yes, Your Honor. I assume that

24 I'm doing a quick recitation now and then we're submitting

25 the papers; is that correct?

1 **THE COURT:** All of those are renewed.

2 **MR. UNIKEL:** Thank you, Your Honor.

3 **THE COURT:** Okay. Please have a seat.

4 So I filed the Court's proposed edits to the

5 parties' jury verdict form earlier today. Does anybody

6 have anything they want to say about the form of those as

7 opposed to the substantive issues we're going to talk

8 about when we talk about the actual instructions?

9 **MR. LING:** Does Your Honor want to hear -- we

10 had objections to Question 4 and Question 6. We had

11 proposed that Your Honor did not include in the verdict

12 form -- I wasn't sure if you wanted to address those with

13 the jury instructions or now.

14 **THE COURT:** Remind me of what they are.

15 **MR. LING:** Question 4 was on the earliest

16 possible date of first infringement. And Google's

17 proposal Question 6 was whether the amount that the jury

18 determined, response to Question 5, includes damages for

19 Google apps installed on Samsung devices.

20 **THE COURT:** All right. Why don't you just put

21 your position on the record about why those are

22 appropriate.

23 **MR. LING:** So there's a clear dispute based on

24 the trial record as to the earliest possible date of first

25 infringement. There was testimony from Mr. Elbouchikhi,

1 **THE COURT:** In post-trial briefing, correct.

2 **MR. UNIKEL:** Correct.

3 So, first, Your Honor, we will be filing a

4 motion for 102(a) and (b), anticipation of the asserted

5 claims in view of CyberDesk, both on the base of public

6 knowledge and in public use before the 102(b) critical

7 date and certainly before the application filing date of

8 November 10, 1998 or September 3, 1998. We believe

9 there's clear and convincing evidence that CyberDesk

10 system discloses all the asserted elements.

11 We'll also be making a motion on 103,

12 obviousness of the asserted claims, in view of the

13 combinations of CyberDesk system plus ADD, CyberDesk

14 system plus Word '97 and ADD system plus Word '97. We

15 believe there's been clear and convincing evidence that

16 has been rebutted that each of these combinations

17 discloses all of the elements.

18 We also will be renewing, because it is a

19 affirmative defense, the patent exhaustion and implied

20 license defense based on the Samsung license agreement,

21 which the parties both seem to agree is unambiguous.

22 In addition, Your Honor, I won't go through

23 them all unless you want me to, but we will be renewing

24 our previous 50A motions which were submitted at the close

25 of plaintiff's evidence.

1 Mr. Toki, Mr. Choc, as well as both sides' infringement

2 and noninfringement experts, Dr. Smedley and Dr. Rinard,

3 and the damages experts, Mr. Weinstein, Mr. Kidder. This

4 was a dispute that we believe the jury needs to decide.

5 **THE COURT:** How is it going to help us if we

6 have an answer to that? Because we've still got a dispute

7 about the one guy that downloaded it at midnight when it

8 came out versus when everybody else downloaded it.

9 **MR. LING:** Well, we believe the record is clear

10 and the evidence is clear that there was no possible

11 infringement earlier than December 5th, 2017. As to how

12 further allocate that, I think that is a separate issue.

13 But at least the period between August 21, 2017, which is

14 Arendi's asserted earliest possible date and Google's

15 asserted first possible date, there is a several-month gap

16 that was either in or out and without this question in the

17 verdict form, we believe it would not be possible to unwind

18 the damages verdict to the extent that issue is resolved

19 in Google's favor on appeal or either way, really.

20 **THE COURT:** All right. Let me hear from the

21 other side on this.

22 **MS. SRINIVASAN:** Your Honor, it's a disputed

23 fact issue. We offered a representative product

24 stipulation that Google offered as to when the accused

25 applications -- the devices that should be used that for

1 all other applications and products to be representative.
2 The jury received an instruction on that, and they heard
3 testimony about it. So it is not an issue they should be
4 asked to determine on the verdict form. They've heard
5 extensive testimony from Mr. Kidder that he started on a
6 different date because he viewed that as the appropriate
7 date. And they heard other testimony from Mr. Weinstein
8 based on his reliance on Dr. Smedley.

9 So it is not -- you know, it's not an issue of
10 law that should be presented to the jury. It is a
11 disputed fact issue that's obviously relevant for how they
12 calculated different damages. But the jury heard evidence
13 as to why it would be appropriate to select August 2017.

14 **THE COURT:** Right. But the jury also heard
15 evidence that a later date would be appropriate as well.

16 **MS. SRINIVASAN:** Correct. And that's part of
17 their apportionment for damages they offered today a
18 methodology if -- as one of many different for reducing
19 damages on that basis. But I don't think that there's --
20 there's sort of a fact finding on that particular question
21 that's needed because Google has explained to the jury, if
22 they believe Mr. Kidder and the evidence that he relied
23 on, then they can make an allocation of how to reduce and
24 offset damages.

25 But it is a disputed fact issue, and to force

1 the jury to make a fact finding on that date, we don't
2 think is necessary for the verdict form.

3 **THE COURT:** All right. So I've let everybody
4 put their positions on the record. So we're going to go
5 with what the Court had proposed not include that
6 question.

7 Did you have another one you wanted to put
8 Google's position on the record about?

9 **MR. LING:** Yes, Your Honor. On the proposed
10 question about whether the damages include Google apps
11 installed on Samsung devices, similarly, that's clearly
12 been a dispute in this trial based on the record. And
13 again, any damages number that's presented as a lump sum
14 would be impossible to unwind or to fix depending on how
15 that question is answered if we don't know what the jury
16 was accounting for in their verdict.

17 **THE COURT:** Well, your expert opined about a
18 lump sum that would be appropriate if Samsung devices were
19 included and if they weren't included, right?

20 **MR. LING:** That's correct, Your Honor. But the
21 jury could come back with conceivably a number in between,
22 for example, the damages experts' numbers. If we don't
23 know which party's theories they went with, it would not
24 be possible to tell whether or not they thought the
25 damages included the Google apps installed on Samsung

1 devices or not.

2 If we knew that answer, if they answered "yes"
3 to that question, then we could, if it turns out to be the
4 case that those apps were covered, then we could just --
5 then we know they did include them. If the jury answered
6 "no" and it turns out later that those devices were --
7 those apps were covered, then we could do a pro rata,
8 theoretically, as one way to fix the jury verdict. So
9 it's one way --

10 **THE COURT:** I understand your position. I'm
11 not going to say this is my view, but one reasonable
12 observer watching this trial might say there's a lot we're
13 not going to know if the jury comes back in between your
14 number and their number.

15 Would you disagree with that?

16 **MR. LING:** Understood, Your Honor. I take your
17 point. It's just one way we think that we could avoid
18 error and try to streamline things on appeal. I just
19 wanted to preserve the objection.

20 **THE COURT:** I appreciate it. Thanks.

21 Let's hear Arendi's position on that.

22 **MS. SRINIVASAN:** Well, first. I think the
23 inclusion of that in the verdict form is asking the jury
24 to decide what they've characterized as a legal issue,
25 question of law. That's been Google's position. So I

1 don't think they should be advocating for the jury to do
2 that in the first instance. And I concur with the Court.
3 We went through damages, direct testimony by Google in
4 which there are probably 20 different options of potential
5 numbers that the jury could consider as offsets to a
6 damages calculation, whether it be with respect to the
7 Samsung license or taking off a certain time frame. And
8 the number that they come up with is going to reflect how
9 they weighed the evidence.

10 But in this case in particular, given what
11 Google has said repeatedly with respect to its Samsung
12 license defense, it would not be proper to ask for a
13 verdict question on that given that they've maintained
14 this question is wrong.

15 **THE COURT:** All right. In this issue, I also
16 agree with Arendi, and we are going to not have that
17 question on the verdict form. So, so far, we're sticking
18 with what the Court filed earlier today.

19 Anybody else have anything else they want to
20 say about this form of verdict?

21 **MR. LING:** Not from Google.

22 **MS. SRINIVASAN:** Not from Arendi, Your Honor.

23 **THE COURT:** Okay, great. Let's turn to the
24 jury instructions.

25 Okay. Some of these, I don't need to hear

1 argument on. We'll try to make it through this really
 2 quick. So the first dispute I see in what was filed this
 3 morning...
 4 **MR. LING:** Your Honor, before we do them in
 5 order, I was wondering if I could address a question you
 6 raised earlier about the prior art section?
 7 **THE COURT:** Let's go in order, because
 8 otherwise, it's late in the day. We're all going to get
 9 off track. Here we go.
 10 So let's, when we get to one, we'll get to that
 11 one.
 12 So I'm looking now at document 511 filed
 13 5/1/23. Does somebody want to remind me what the first
 14 dispute is here?
 15 **MR. DIEHL:** Page 19, Your Honor.
 16 **THE COURT:** Page 19. I'm just going to tell
 17 you what's going to happen here, which is this. After it
 18 says, "I will now instruct you as to the rules you must
 19 follow when deciding whether plaintiff Arendi has proven
 20 that Google infringed the '843 patent," I'm going to say,
 21 "a claim covers a product for each of the claim elements
 22 or limitations as present in that product."
 23 Does anybody have a dispute that that's an
 24 accurate summary of the all elements rule?
 25 **MR. UNIKEL:** Your Honor, forgive me. In this

1 particular case, we're dealing with a computer readable
 2 medium, not a pure product. The concern with the
 3 product -- I know computer readable medium makes it very
 4 difficult to assess and instruct on, which is why the just
 5 going on the element-by-element basis language seemed to
 6 make more sense.
 7 **THE COURT:** I guess I would tend to agree with
 8 that, except we used "product" all over the rest of jury
 9 instructions. So given it's late in the day on that.
 10 **MR. LAHAD:** Also, there is support in Federal
 11 Circuit law that CRM claims are treated as apparatus
 12 claims. There is supporting evidence.
 13 **THE COURT:** You know, if we want to start
 14 relooking at that, we're going to have to go and search
 15 and find product. I know we used it other places, so I
 16 was just trying to be consistent with what we've done
 17 other places in the jury instructions.
 18 Any other dispute as to adding that sentence
 19 there?
 20 **MS. SRINIVASAN:** Not for Arendi.
 21 **THE COURT:** All right. I'm hearing none, so
 22 that's going to get accepted.
 23 All right. Let's turn to 3.5.
 24 **MR. LING:** There's an issue on 3.4.
 25 **THE COURT:** Okay. Let's see. 3.4.

1 Okay. So Google's got a proposal in there.
 2 That's not going to be inserted there, but I'll tell you
 3 where it will be inserted. We're coming up on that. I
 4 don't think it's appropriate right there. Actually, we
 5 inserted it to the previous instruction. So do you
 6 dispute that that's good enough?
 7 **MR. LING:** That's okay, Your Honor.
 8 **THE COURT:** All right, fine. So 3.4, that's
 9 not going to be inserted.
 10 Turning to 3.5. Okay. Here's what it's going
 11 to say in the second paragraph: "To show that
 12 infringement was willful, Arendi must establish that it is
 13 more likely than not that Google knew of the '843 patent
 14 at the time of the alleged infringement, and also, that
 15 Google engaged in deliberate or intentional infringement."
 16 And then none of the rest of the parties proposed language
 17 is going to be inserted. And then the next line will
 18 start with "To decide whether Google acted willfully."
 19 **MR. DIEHL:** Your Honor, may I place an
 20 objection on the record for that one?
 21 **THE COURT:** You may.
 22 **MR. DIEHL:** Yes. I just want to say that
 23 Arendi believes that, in light of the *Ironburg* case that
 24 came down from the Federal Circuit -- *Ironburg Inventions*
 25 at 64 F.4th 1274.

1 We think it's important to clarify for the jury
 2 that deliberate or intentional includes reckless disregard
 3 for a patent owner's rights.
 4 **THE COURT:** Okay. That objection is noted for
 5 the record. It's overruled. I read the *Ironburg* case. I
 6 think Judge Stark was pretty clear there that he was
 7 dealing with a situation where the parties had agreed on
 8 that instruction. I read a lot of his opinions, and that
 9 seemed to me to be exactly what was going on.
 10 And so I'm not going to let the jury find
 11 willful infringement based upon a finding of recklessness.
 12 **MR. LING:** Can I also make an objection for the
 13 record. There's a sentence that Google proposed that said
 14 that, "Mere knowledge of the patent at the time is not
 15 sufficient," and I understand that's not going to be in
 16 the jury instruction per the Court's ruling, and if so, I
 17 wanted to lodge just the objection and state for the
 18 record that that's a particularly important sentence
 19 instruction in this case where there's little more than
 20 knowledge being alleged for willfulness. This is -- this
 21 sentence is found in the FCBA Model Patent Jury
 22 Instruction 3.10, as well as the AIPLA model patent jury
 23 instruction.
 24 **THE COURT:** All right. That's fine. I think
 25 your objection is covered by the Court's ruling that I'm

1 going to instruct the jury that Arendi must establish both
2 that it's more likely than not that Google knew of the
3 patent, and also that Google engaged in deliberate or
4 intentional infringement. I think that's covered, and I
5 don't think that what the Court's going to instruct the
6 jury is error. It doesn't leave the jury open to find
7 willful infringement based on mere knowledge.

8 All right. Prior art?

9 **MR. LING:** Your Honor, the parties reached
10 agreement on this we're happy to report. Per your
11 suggestion, we do believe FCBA Model Patent Jury
12 Instruction 4.3a-1, prior art is not in dispute, would be
13 appropriate because I understand there's no dispute over
14 the 1998 priority date. And so we think that instruction
15 would simplify things.

16 **THE COURT:** Okay, great. Stand by while I pull
17 it up.

18 Okay. So we're going to say, "In order for
19 someone to be entitled to a patent, the invention must
20 actually be new and not obvious over what came before,
21 which is referred to as the prior art. Prior art is
22 considered in determining whether Claims 23 and 30 of the
23 '843 patent are anticipated or obvious. Prior art may
24 include items that were publicly known or that have been
25 used." Do we need to say "or offered for sale"? I didn't

1 hear any evidence of that.

2 **MR. UNIKEL:** Yeah, I think, Your Honor, there
3 was an Apple Data Detectors product that was monetized.

4 **THE COURT:** Okay. "So known or have been used
5 or offered for sale."

6 Any objection on Arendi's side to saying, "or
7 offered for sale"?

8 **MR. DIEHL:** No, Your Honor.

9 **THE COURT:** Okay. And then I'd be inclined to
10 cross out "or references such as publications or patents,"
11 so it would just say, "Prior art may include items
12 publicly that were known or have been used or offered for
13 sale that disclose the claimed invention or elements of
14 the claimed invention."

15 **MR. LING:** That's okay, Your Honor.

16 **MR. DIEHL:** No objection, Your Honor.

17 **THE COURT:** Okay. Then it would say, "Arendi
18 contends the following is prior art to the '843 patent."

19 **MR. LAHAD:** I think it's going Google contends.

20 **THE COURT:** I'm sorry. I only do that like
21 half the time. Let's see here. "Google contends that the
22 following is prior art to the '843 patent," and then we
23 have --

24 **MR. LING:** CyberDesk system, Apple Data
25 Detectors system, and Word 97 system -- Microsoft Word 97

1 system.

2 **THE COURT:** Counsel?

3 **MR. DIEHL:** Your Honor, that's fine. If I may
4 respond briefly to something Google's counsel said prior
5 about no dispute about the priority date, I just want to
6 make clear that Arendi does not dispute the date for
7 102(b) purposes as November 10, 2017, and that the US
8 filing date for the '843 patent application was
9 November 10, 1998. So I just want to make clear that
10 that's what we're not disputing.

11 **THE COURT:** Does it matter for these pieces of
12 prior art?

13 **MR. DIEHL:** No, I'm just responding to their
14 assertion.

15 **THE COURT:** Okay.

16 **MR. DIEHL:** Thank you.

17 **THE COURT:** All right. And then that would be
18 the end of 4.3.

19 **MR. DIEHL:** Yes, Your Honor.

20 **MR. LING:** Yes, Your Honor.

21 **THE COURT:** Great.

22 Then we had a typo fixed on Page 34, 5.3?

23 **MR. LING:** Yes, Your Honor.

24 **THE COURT:** Any objection?

25 **MR. DIEHL:** Yes, Your Honor. That's not a

1 typo. The alleged word is not in the Federal Circuit Bar
2 Association --

3 **THE COURT:** Oh, I'm sorry. We're talking about
4 a different section here. I'm talking about 5.3 where we
5 changed "each defendant" to "Google."

6 **MR. DIEHL:** Oh, we have no objection.

7 **THE COURT:** Okay. And then we turn to the next
8 page with the "alleged," that's not going to come in. I
9 agree with you.

10 **MR. DIEHL:** Thank you, Your Honor.

11 **THE COURT:** All right. 5.5. Is that the next
12 one?

13 **MR. DIEHL:** Yes, that's next, Your Honor.

14 **THE COURT:** All right. And the last I heard,
15 Arendi was reviewing Google's proposals.

16 **MR. DIEHL:** Yes, we did, Your Honor. We noted
17 case that law that Google cites is from the 1800s here.
18 If you look at Footnote 13, they cite case law from 1915,
19 1884. We don't think this statement is accurate, and
20 federal Circuit has, you know, wasn't even in existence at
21 the time. So we think, we would say that Google's
22 proposed addition there should be stricken.

23 **THE COURT:** Well, I know you're not saying that
24 the Federal Circuit doesn't have to follow the Supreme
25 Court cases from the 1800s and early 1900s.

1 **MR. DIEHL:** No, I'm not saying that. There's
2 just been a lot of intervening law, Your Honor.
3 **THE COURT:** All right. Let me hear from
4 Google.
5 **MR. LING:** All right. We also cite the *Lucent*
6 case from 2009. I don't think this is a controversial
7 point that the plaintiff has the burden to show
8 apportionment. It's also, if Your Honor wants a more
9 recent case cite, there's *Finjan v. Blue Coat* from 2018,
10 and that's 879 F.3d 1299. That's clearly discussing the
11 burden in the context of apportionment.
12 **THE COURT:** All right. We'll take a look at
13 that.
14 **MR. DIEHL:** Your Honor, if I may respond
15 briefly.
16 **THE COURT:** You may.
17 **MR. DIEHL:** We do cover that same point in the
18 Arendi's proposal at the top of the instruction. So right
19 there it says, "Damages must be based on the value
20 attributable at the time to technology as distinct from
21 other unpatented features of the accused product." And we
22 are working from the Federal Bar Association's model.
23 **THE COURT:** All right. I'll take a look at
24 that. With respect to the debate at the top, we'll go
25 with Google's proposal that it say, "other market

1 factors," and then we'll look at the dispute at the bottom
2 and get you an answer on that.
3 **MR. LAHAD:** Your Honor, it seems like the
4 dispute at the bottom -- Google's proposed addition at the
5 bottom seems redundant in light of --
6 **THE COURT:** Yeah. We'll take a look at it.
7 **MR. LING:** Just to clarify, Your Honor, I think
8 the proposal on the bottom, the distinction is "the
9 burden."
10 **THE COURT:** I understand.
11 **MR. LING:** Thank you.
12 **THE COURT:** Okay. I don't need to hear
13 argument on 5.6. We're not going to include that
14 instruction.
15 **MR. LING:** Google preserves just its --
16 **THE COURT:** Yeah. You've made the proposal.
17 Your objection is preserved.
18 **MR. LING:** Thank you, Your Honor.
19 **THE COURT:** All right. Let's just skip 5.7 for
20 a second. Were there any other issues besides 5.7
21 remaining?
22 **MR. DIEHL:** No, Your Honor.
23 **MR. LING:** I don't believe so, Your Honor.
24 **THE COURT:** Okay. All right. Let me pull up
25 my notes.

1 I just want to refresh everyone's recollection
2 about how we got here. So the issue came up with respect
3 to the Samsung license. It first came to me when Google
4 filed a motion to strike certain portions of the
5 Dr. Weinstein's report to the extent it relied on apps
6 downloaded onto Samsung devices, which I denied as having
7 been improperly brought as a motion to strike rather than
8 a summary judgment motion.
9 And then, right before trial began, we had
10 another letter from Google, in the letter, and Arendi
11 answered that letter. And both parties maintained in
12 their letters that the Samsung license is unambiguous and
13 should be interpreted in favor of their side.
14 And we tabled it at that time so that it could
15 be worked out at the charge conference. And then I spoke
16 about it again on the first day of trial and I ruled this:
17 If Google thinks that the jury needs to be instructed on
18 the meaning of a written contract as part of the defense,
19 it's incumbent upon Google to propose a jury instruction,
20 and it has not proposed any jury instructions on that
21 issue.
22 And then I said, I don't have a proposed jury
23 instruction construing the license from either side, and
24 if I had, I'd be in a position to make a ruling that the
25 agreement was unambiguous and favored one side or the

1 other, but I don't have proposed instructions on this
2 issue.
3 And so what I was hoping to get from the
4 parties was, to the extent this agreement needed
5 interpretation, sort of like a claim of a patent sometimes
6 needs construction, that you would say which part needed
7 interpretation and then you would say what you thought it
8 meant.
9 And what I still have from the parties is, "I
10 win," "No, I win." And so I'm in a little bit of a
11 conundrum here, and so I'm -- let's just walk through this
12 license, and you can tell me what you think it means.
13 **MR. ARD:** Well, Your Honor.
14 **THE COURT:** Let's hear from defendant first.
15 **MR. UNIKEL:** Your Honor, I just have to find a
16 copy of the agreement.
17 Thank you, Your Honor. And is there a
18 particular question that you --
19 **THE COURT:** Absolutely. So let's talk about
20 this.
21 **MR. UNIKEL:** Okay.
22 **THE COURT:** Let's talk about licensed products.
23 So it says, "Means that a past, present, or future product
24 that is made, used, or sold, or offered for sale by
25 licensee and its affiliates."

1 So what is the product that you are saying is a
 2 licensed product?
 3 **MR. UNIKEL:** The devices themselves, Your
 4 Honor. And there was a clause there that the Court did
 5 not get, which is "including hardware and software and any
 6 service relating thereto."
 7 **THE COURT:** Okay. So when Samsung sells the
 8 product, it has on it what?
 9 **MR. UNIKEL:** The Android operating system,
 10 which includes Smart Text Selection feature. We all know
 11 that it's part of the operating system. When Samsung
 12 sells a device, it includes Android operating system. And
 13 it also includes the Smart Text Selection functionality
 14 that is the service related thereto. So it has both
 15 software and the service related thereto.
 16 In addition, Your Honor, the apps, to the
 17 extent they're preloaded onto a Samsung are also contained
 18 on the device. They're software. So when Samsung sells a
 19 device which includes the Android operating system and
 20 includes downloaded preinstalled Android apps, those are
 21 all licensed. That's just under this paragraph, and there
 22 are other paragraphs.
 23 **THE COURT:** Okay. So let's just talk about
 24 that for a second. And so are the numbers that were put
 25 up on the screen with respect to devices or downloads,

1 including Samsung phones or downloads post-sale onto
 2 Samsung phones?
 3 **MR. UNIKEL:** The downloads, we know from the
 4 testimony, that you must have the right Android operating
 5 system and you must have the app; otherwise, there cannot
 6 be infringement. The Samsung devices come with the
 7 Android operating system or they're pushed to the Android
 8 operating system.
 9 So even if a user -- the install numbers are
 10 just for the app. But the Android part of the
 11 infringement is part of the device. So in order for
 12 anybody to infringe, they would not just have to download
 13 an app. If you downloaded an app to the wrong Android
 14 operating system, as we know, there couldn't be any
 15 infringement. The Android operating system is part of the
 16 device that comes through Samsung, and that is what makes,
 17 purely based on the license product definition, there's no
 18 possible infringement on a licensed Samsung device.
 19 **THE COURT:** So let me just understand. So I
 20 buy a Samsung phone, and it has on it the Android
 21 operating system, and it has preloaded Chrome and Gmail.
 22 Are the Chrome and Gmail included in the
 23 numbers that were presented for downloads?
 24 **MR. UNIKEL:** No. I don't think the Chrome and
 25 Gmail are, but the app is -- I'm sorry -- the Android

1 operating system is, because --
 2 **THE COURT:** They didn't show me numbers for the
 3 Android operating system.
 4 **MR. UNIKEL:** But remember that the download
 5 numbers mean nothing unless they combine up with the right
 6 operating system.
 7 **THE COURT:** I understand that, but you have to
 8 have both, right?
 9 **MR. UNIKEL:** Correct. And the Android part is
 10 on the device, and it's licensed under the -- under 1.6.
 11 The apps by themselves are for non -- we believe from what
 12 they've told us, they believe that those are
 13 non-preloaded. So post-installed by users.
 14 So they still, though, have to go to a device
 15 that has the operating system; and, therefore, the device
 16 with the operating system is licensed.
 17 **THE COURT:** Okay. So your view is -- okay. So
 18 let's -- before we get to your final view.
 19 So your view is the licensed product include
 20 the Android device -- or sorry -- the Samsung phones that
 21 include the Android operating system on them.
 22 **MR. UNIKEL:** Correct.
 23 **THE COURT:** And some of them also have
 24 preloaded apps?
 25 **MR. UNIKEL:** Correct.

1 **THE COURT:** And then to the extent that apps
 2 are loaded onto the device by the user after they get the
 3 device, those would be licensed because they use the
 4 Android 8 operating system?
 5 **MR. UNIKEL:** Yes, because the device and the
 6 operating system is already licensed under 1.6.
 7 **THE COURT:** Okay.
 8 **MR. UNIKEL:** So the Smart Text Selection
 9 functionality that is part of the operating system is part
 10 of what's covered by the license under this paragraph.
 11 **THE COURT:** Okay. And any other paragraphs you
 12 want to point the Court to?
 13 **MR. UNIKEL:** Yes, Your Honor. In addition, 2.1
 14 defines the license rights. In the second sentence, it
 15 says, "Licensor, on behalf of itself and its affiliates,
 16 agrees that the license granted to the license and its
 17 affiliates under this section permits licensee and its
 18 affiliates, and their distributors, wholesalers,
 19 resellers, retailers, and customers" -- and this is the
 20 important part -- "and customers to sell or use any
 21 licensed product anywhere in the world under the licensed
 22 patents, regardless of the country in which the first sale
 23 took place."
 24 For anything that is a post-sale download,
 25 that's in the hand of a consumer. The customer is the one

1 who is using the device and makes the decision to download
2 an app. That customer use is expressly licensed by 2.1 of
3 the agreement. You cannot have a post-installation
4 download unless the user decides that they're going to
5 make a download and actually use their device in that way.

6 **THE COURT:** Let me just ask you, that argument
7 made a little more sense when there was an indirect
8 infringement claim. Now Arendi is only alleging that
9 Google infringed. You're not saying that Google is a
10 customer.

11 **MR. UNIKEL:** No. But first of all, that app
12 never makes it onto a device for a post-sale installation
13 unless the customer makes the decision to download it.
14 The customer use is licensed. They can use their phone
15 for whatever they want under the patents, and that
16 includes to make a download.

17 So given the license rights extends to the
18 customers' use, there's no way that that can actually
19 become infringing because it's the customer use that would
20 ultimately be the source of the download.

21 There's one more provision as well, Your Honor,
22 when you are done.

23 **THE COURT:** Okay. Let's hear the next one.

24 **MR. UNIKEL:** The next is 3.1, which indicates:
25 "That in consideration of the license and settlement fee,

1 licensor, on behalf of itself and its affiliates, hereby
2 irrevocably releases and forever discharges licensees
3 and -- licensee and its affiliates, including their
4 officers, directors, attorneys, employees, and together
5 with their suppliers" -- and the "suppliers" is
6 important -- "distributors, wholesalers, resellers,
7 retailers, and customers" -- also customers -- "from any
8 or all claims in connection with any licensed patent that
9 have been or could have been brought against any of the
10 aforementioned on or prior to the effective date."

11 First, the effective date of this agreement is
12 after the expiration of the patent. So any release would
13 cover anything under the patent.

14 Second, it is acknowledged, including by
15 Mr. Hedloy, that Google is the supplier to Samsung of the
16 Android operating system, and Google is the supplier of
17 the apps that are ultimately downloaded to the Samsung
18 devices, whether those are -- sorry.

19 **THE COURT:** Let me just ask you that question.
20 So whether there was -- I know exactly what you're going
21 to say, whether those are preloaded or loaded apps?

22 **MR. UNIKEL:** Correct.

23 **THE COURT:** All right. So for the ones that
24 are loaded after the sale, they are not Samsung suppliers.
25 Google is not Samsung's supplier.

1 **MR. UNIKEL:** They are supplying -- they are
2 supplying the apps to Samsung devices. And customers
3 themselves are also insulated from any allegation under
4 the patent.

5 So whether you look at Google as the supplier
6 or as the customer, essentially, as the supplier because
7 they're downloading it -- or sorry, just because the
8 customer is downloading it to their device by choice,
9 either way, both of those parties who are at all possibly
10 related to the downloading of apps post sale are released
11 from any possible claim under the licensed patents under
12 this agreement.

13 And, obviously, Samsung received a full
14 license, paid a full license fee for all of this
15 protection to assure that their customers could not
16 potentially be on the hook or their suppliers could not
17 potentially be on the hook for post-sale use of the
18 devices in this way. That's why all of these together are
19 essentially in the Venn diagram of protection, all dealing
20 with the extension of the license and the release to cover
21 everything that is part of the phone and everything that a
22 customer might do with the phone, including downloading
23 apps.

24 **THE COURT:** All right. I understand your
25 position.

1 Let's here from Arendi.

2 **MR. LAHAD:** Just as a threshold point, Your
3 Honor, we dispute that this infringement in this
4 context -- CRM infringes server. There's no active
5 downloading that requires infringement.

6 The way the CRM claim is written, since they're
7 on the server, so there's this notion that, well, we've
8 got to look at the downloads, and it's on the operating
9 system. That's a false premise factually.

10 Dr. Smedley testified that infringement occurs
11 both ways, the CRM claim on the server. That infringes --
12 that meets the claim elements of Claim 23. It's not a
13 method claim, as you know. So that threshold issue,
14 factually, is just incorrect.

15 **MR. ARD:** And then, Your Honor, I can address
16 the rest of the contract. The key term here -- I actually
17 have some slides on this that we prepared months ago that
18 will probably be easier for me to point to.

19 So go to the next one, please. Next one. Next
20 one. No. Sorry. Back one.

21 The key term of the contract is the one that
22 defines what the license -- sorry.

23 Can you go to the next one. I'm sorry. One
24 more. This one. Thank you.

25 So "licensed product" is the key term of this

1 agreement. And I think I heard Google's counsel just
2 concede that the only thing that they can even plausibly
3 argue is made, used, sold, offered for sale, for -- by or
4 for the licensee and its affiliates on the preinstalled
5 apps. The post-installed apps are not made for -- the
6 ones that are downloaded by consumer.

7 **THE COURT:** Well, you didn't have the --

8 **MR. ARD:** So the --

9 **THE COURT:** You didn't have the preinstalled
10 apps on your damages calculation. Right?

11 **MR. ARD:** Exactly. And that's the only thing
12 that's being licensed here. The only thing that's being
13 licensed here, as the only thing that's a licensed product
14 here are the preinstalled apps. And I think counsel just
15 conceded that, that this does not cover a

16 post-installed -- an app that a user downloads is not --
17 that's just something that Google's making available in
18 the Play Store. They are not making that for Samsung.
19 That's not something that they're selling for Samsung.
20 That's something, if anything, made for a user.

21 And that basic -- that's the basic idea of this
22 license, is that it's only licensing the licensed
23 products, which are the preinstalled downloads. And
24 again, I think counsel conceded that at the very
25 beginning.

1 And if that -- if we go from there to the next
2 one, the next slide, every single license in here, release
3 in here, is all tied to licensed products. So it's all
4 only being tied to the preinstalled apps, not apps that a
5 user downloads onto a phone. That's a separate issue.

6 If you go to the next one as to license, the
7 same think with the release. The release is only being
8 given with respect to licensed product, the preinstalled
9 apps.

10 So Google tries to talk about other provisions,
11 agreement, and thinks it supports it, but all of them are
12 tied back to the idea of a licensed product. And even
13 here, the release, it released their suppliers. The
14 release is for their suppliers. "Their" is Samsung, their
15 affiliates. So for --

16 **THE COURT:** Just to make sure I understand.

17 **MR. ARD:** Yes.

18 **THE COURT:** You agree that Google is a supplier
19 of the preinstalled apps that are --

20 **MR. ARD:** Yeah. I mean, we don't have a view
21 on that. That's not what this case is about, but yes.
22 That's fine. I mean, they haven't put any supply
23 agreement in this case. I mean, we don't dispute that.
24 That's not the issue.

25 The issue is whether, you know, they're not a

1 supplier to Samsung for a user download app. That's just
2 something that's made available in the App Store for
3 anybody. It's not for Samsung. It's for consumers.
4 That's the whole idea of this license.

5 And if I can just step back a second, Your
6 Honor, it is important to talk about specific language,
7 but I think it's also important to talk about New York
8 law.

9 If you go back to the first slide -- yeah.
10 Right there.

11 So under New York law -- let me step back --
12 one more.

13 Google is arguing that a settlement agreement
14 between two third parties, which did not involve or
15 mention Google, and where Google paid zero role in
16 negotiations, Google paid no money, intended to secretly
17 and silently release almost half the claims that Arendi's
18 asserting in a different lawsuit, and Google is not saying
19 it had any role in this, that it paid any money to Samsung
20 for Samsung -- Samsung would have to pay money to us for
21 us to release claims that we're asserting in a different
22 lawsuit against Google. Google is not saying it did that.
23 Google is not saying it had any role in negotiation. It
24 never even raised this issue until, like, three years
25 later.

1 Under New York law, it's a little bit unique in
2 that, yes, you consider -- when you're determining the
3 unambiguous meaning of a contract, you consider the words
4 of the contract, but you're also supposed to consider the
5 relationship of the parties and the circumstances under
6 which it's executed, the overall intention of the parties.

7 Go to the next slide.

8 Well, so this just explains that, you know, at
9 the time this agreement was made --

10 **THE COURT:** Yeah. I get all of this.

11 **MR. ARD:** Go to the next slide. Next slide.

12 So if you look at the "whereas" clauses, the
13 intent, the overall intent of the parties is very clear.
14 They are trying to resolve their disputes, the disputes
15 between Arendi and Samsung.

16 They then mention the following disputes that
17 have been filed in court. And there's a long list in the
18 agreement of different lawsuits that were filed between
19 Samsung and Arendi. That's what they are saying they are
20 trying to resolve. It does not list the Google case.
21 They are trying to resolve the Samsung case.

22 And, you know, it says, "Whereas, licensee
23 desires a license to grant to licensee and its affiliates
24 certain rights on a license patents," it's -- the grant is
25 to the licensee and its affiliates. That's the overall

1 intention of the parties.

2 Under New York law, that has to be considered

3 when you are evaluating the plain language of the

4 contract.

5 There's also -- in our jury instructions, we

6 cite a couple cases that sort of have two threshold

7 principles that are at play here. One is that release

8 language is strictly construed. You are not supposed to

9 extend a release beyond the explicit words in the

10 agreement. And the case that we cite in our

11 instructions -- *Bugel v. Wps*, which is 19 AD3d 1081, says:

12 "It is unreasonable to conclude that the parties as a

13 condition of the release intended that plaintiff release

14 all his existing unrelated claims against conceivably

15 hundreds of named and unnamed corporations, employees,

16 et cetera."

17 It also says in the New York Pattern Jury

18 Instructions that we cite that: "If, from recitals

19 therein, it appears that the release is to be limited to

20 only particular claims, demands, or obligations, then the

21 release will be operative as to those matters only."

22 So that's Principle Number 1, is that, under

23 New York law, when you have a release, that's strictly

24 construed and you're supposed to look at the recitals to

25 figure out what the parties were intending to do.

1 **MR. UNIKEL:** Can I make a 30-second point?

2 **THE COURT:** 30 seconds.

3 **MR. UNIKEL:** Your Honor, the one thing that was

4 ignored in that presentation is the Android operating

5 system. Google supplies the Android operating system for

6 a device upon its sale, and that contains the Smart Text

7 Selection functionality that is the source of the

8 accusation here. 1.6 completely -- specifically says that

9 the license includes the hardware, the software, and any

10 service related thereto. And Google is clearly the

11 supplier of Android. Regardless of what you think about

12 the apps, without Android, there is no infringing

13 functionality. And we are clearly the supplier, and that

14 is clearly licensed because it is sold with the device.

15 The device does not work without the operating system.

16 **THE COURT:** All right. I understand

17 everybody's point, so I think there's at least one

18 ambiguity that can go to the jury on this.

19 With respect to 3.1, I think it's ambiguous as

20 to whether the contract releases Google as a supplier from

21 claims in connection with downloads of apps after sale

22 onto Samsung phones.

23 With respect to --

24 **MR. ARD:** Your Honor --

25 **THE COURT:** Please have a seat.

1 And if you go back a slide. Another slide.

2 It also says you're not supposed to look -- you

3 shouldn't look -- you shouldn't look at particular

4 words -- should be considered not in isolation, and form

5 should not prevail over substance and a sensible meaning

6 of the words should be sought in light of the overall

7 intention of the parties. So that's one limiting

8 principle.

9 A second limiting principle, independent

10 limiting principle in New York law, is the idea of a

11 third-party beneficiary. A third-party beneficiary is

12 what Google is saying they are here. They're saying a

13 third-party beneficiary to this contract, without a

14 contract. We cite a case -- or, sorry. Again, in the

15 New York Pattern Jury Instructions, "Courts are generally

16 reluctant to construe an intent to benefit a third party

17 in the absence of clear contractual language evincing such

18 an intent."

19 So you have two limiting principles. You have

20 principle of release and you have the principle of a

21 third-party beneficiary that both require that their

22 agreement be strictly construed. And what you're trying

23 to do as an overall thing here is try to find out what the

24 intention of parties was.

25 **THE COURT:** All right. Thank you.

1 With respect to 1.6, I think it's ambiguous as

2 to whether licensed products includes Samsung phones

3 containing the Android operating system onto which apps

4 from Google are later downloaded.

5 So we are going to go to the jury on this. I

6 don't know what to make of this proposed jury instruction

7 because we have a lot of proposals that are statements of

8 the law that are really directed to the Court about the

9 agreement being unambiguous.

10 **MR. ARD:** Your Honor, that's Google's proposal.

11 Our proposal didn't do that. Our proposal, if you look at

12 Arendi's alternative proposal, we tried to do exactly what

13 the Court asked.

14 **THE COURT:** Okay. So why don't you meet and

15 confer with the other side. It's 7:00 right now. And get

16 me competing proposals by 9:00, to the extent you can, and

17 I will look at those before bed. And I will get up again

18 at 4:00 a.m. tomorrow and get the rest of it done.

19 Yes, Counsel.

20 **MR. ARD:** I thought that the instructions said

21 as a supplier, and it should be an alleged supplier.

22 That's disputed. That's part of what is being disputed.

23 **THE COURT:** Okay. So you're saying there's an

24 ambiguity as to "supplier" now?

25 **MR. ARD:** Well, so -- they're not a supplier to

1 Samsung of user-installed apps.
 2 **THE COURT:** Okay. So that's another -- that's
 3 another ambiguity. Right. So that's another question.
 4 **MR. ARD:** Yeah, throughout, yeah.
 5 **THE COURT:** Right. So why don't you have
 6 competing proposals in light of the Court's ruling that
 7 there are ambiguities in the contract that the jury can
 8 decide. And then I'll take what you get. And we'll get
 9 you something by tomorrow morning.
 10 What we might do is put up a proposed version
 11 tonight that has a placeholder for this particular part,
 12 because I think we've ruled on the rest and we have a
 13 working document.
 14 So we'll go work on that now while you all
 15 discuss the license.
 16 We're almost finished, folks.
 17 We will be in recess.
 18 (The proceedings concluded at 6:56 p.m.)
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 25

1
 2 CERTIFICATE OF COURT REPORTER
 3
 4 I hereby certify that the foregoing is a true and
 5 accurate transcript from my stenographic notes in the
 6 proceeding.
 7
 8 /s/ Bonnie R. Archer
 9 Bonnie R. Archer
 Official Court Reporter
 U.S. District Court
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