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1 The jury is excused for recess at this time.

2 COURT SECURITY OFFICER: All rise.

3 (Jury out.)

4 THE COURT: All right. The Court stands in recess.

5 (Recess.)

6 COURT SECURITY OFFICER: All rise.

7 THE COURT: Be seated, please.

8 Counsel, let me review with you a little bit of the  
9 history of today's portion of the trial so that I can be clear  
10 with everyone as to where we started this morning and where we  
11 are now.

12 Previously this morning, after the inventor,  
13 Mr. Martyn, testified, I met with counsel in chambers. And at  
14 that time, I raised with counsel the possibility that there  
15 might be an 02 Micro situation requiring additional  
16 construction of disputed or potentially disputed terms by the  
17 Court.

18 We discussed "unlaunched," and we discussed "reached  
19 directly," both of them coming from Claim 1 of the '020 patent  
20 and Claim 2 of the '476 patent.

21 The Plaintiff indicated to me in chambers that they  
22 did not believe an 02 Micro situation existed. Defendants  
23 indicated in chambers that they thought there might be an 02 --  
24 02 Micro issue and that they thought as late as last week that  
25 there possibly could be one in this trial, but they weren't

1 sure how to raise it.

2 Therefore, they did not bring it to the Court's  
3 attention until the Court raised it this morning in chambers  
4 after Mr. Martyn testified. The Defendants asked the Court to  
5 revisit the issue after Dr. Zeger testified. And with the  
6 agreement of the Plaintiff, the Court proceeded to let  
7 Dr. Zeger testify. He has now given his direct testimony.

8 And the Court is persuaded that an 02 Micro situation  
9 does, in fact, exist. There's no need to go through the  
10 cross-examination of Dr. Zeger to reach that conclusion, and  
11 that under 02 Micro and its progeny, the Court has an  
12 obligation to provide further claim construction with regard to  
13 these terms to the parties.

14 I intend to discharge that obligation. I'm going to  
15 afford both sides an opportunity to offer very brief and  
16 concise argument on these two terms. The time that we're  
17 spending is going to be equally chargeable to the parties as a  
18 part of the trial time.

19 I'm not -- I'm not casting fault with why this was  
20 not raised earlier; I'm merely making it very clear on the  
21 record it wasn't raised earlier, and it now must be disposed of  
22 so that we can proceed with the trial.

23 I've reviewed the treatment of these terms in the  
24 file history. I've reviewed any other materials available to  
25 me.

1           If the Plaintiff would care to offer any argument on  
2 the term "unlaunched" or the term "reached directly," I'd be  
3 happy to hear it.

4           Does Plaintiff have any argument on these terms to  
5 present to the Court?

6           MR. GIZA: Yes, Your Honor.

7           Would you like me to present some slides that show  
8 some of the evidence of the file history or --

9           THE COURT: Counsel, I'll let you present your  
10 argument. I'd ask that you do it from the podium.

11          MR. GIZA: Yes, Your Honor.

12          THE COURT: I want you to understand that the time  
13 you use is going to be charged to your trial time, but I want  
14 you to have an opportunity to present to the Court what you  
15 think is the most compelling case for your view of these terms  
16 and what is an appropriate construction for them.

17          So that -- so with that, Mr. Giza, let me hear from  
18 you.

19          MR. GIZA: Thank you, Your Honor.

20          Mr. Wietholter, could you cue up Dr. Zeger's slides,  
21 please?

22          Can we go to Slide 60, please?

23          Your Honor, the claim term "launched" and  
24 "unlaunched" show up in two places in the patent in the claims.

25          First, in Element [1e]: Each function in the list

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