

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

LEADER TECHNOLOGIES,)
INC.,)
)
Plaintiff,)
) C.A. No. 08-862-JJF-LPS
v.)
)
FACEBOOK, INC., a)
Delaware corporation,)
)
Defendant.)

January 20, 2010
10:00 a.m.
Markman Hearing

BEFORE: THE HONORABLE JOSEPH J. FARNAN, JR.
United States District Court Judge

APPEARANCES:

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

-and-

KING & SPAULDING
BY: PAUL ANDRE, ESQ.
BY: JAMES HANNAH, ESQ.
BY: LISA KOBIALKA, ESQ.

Counsel for Plaintiff

1 APPEARANCES CONTINUED:

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BLANK ROME, LLP
BY: STEVEN L. CAPONI, ESQ.
BY: DENIS McCOOE, ESQ.

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-and-

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COOLEY, GODWARD & KRONISH, LLP
BY: HEIDI L. KEEFE, ESQ.
BY: MARK WEINSTEIN, ESQ.
BY: JEFFREY NORBERG, ESQ.

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Counsel for Defendant

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Also Present:

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Mr. Craig Clark

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1 THE CLERK: All rise.

2 THE COURT: Good morning. Be
3 seated, please.

4 Ready to proceed?

5 MS. KEEFE: I believe so.

6 MR. ANDRE: Yes, Your Honor.

7 THE COURT: Mr. Rovner.

8 MR. ROVNER: Good morning, Your
9 Honor. Phil Rovner for the plaintiff, Leader
10 Technologies. And with me at counsel table are
11 Paul Andre, Lisa Kobialka and James Hannah from
12 King & Spalding in California.

13 THE COURT: All right. Good
14 morning to all.

15 MR. ANDRE: Good morning, Your
16 Honor.

17 MR. HANNAH: Good morning.

18 MS. KOBIALKA: Good morning, Your
19 Honor.

20 MR. CAPONI: I guess now is as
21 good a time as any.

22 THE COURT: It's as good a time as
23 any to get it all on.

24 MR. CAPONI: Good morning, Your

1 Honor. Steve Caponi from Blank Rome for
2 Facebook.

3 With me today is Ms. Heidi Keefe
4 from Cooley Godward. I will let Ms. Keefe
5 introduce the rest of her team.

6 MS. KEEFE: You could have done
7 that.

8 Good morning, Your Honor. With me
9 also is Mark Weinstein also from Cooley Godward.

10 MR. WEINSTEIN: Good morning, Your
11 Honor.

12 MS. KEEFE: Denis McCooe, also from
13 Blank Rome.

14 MR. McCOOE: Good morning, Your
15 Honor.

16 MS. KEEFE: And from Facebook,
17 we're very fortunate to have Craig Clark with
18 us.

19 THE COURT: All right. Good
20 morning.

21 Welcome to you.

22 THE COURT: All right. Mr. Andre.

23 MR. ANDRE: May it please the
24 Court, Your Honor, we have some handouts I'd

1 like to hand out to you, if that's okay.

2 THE COURT: Sure.

3 MR. ANDRE: How many copies would
4 you like, three?

5 THE CLERK: Two is fine.

6 MR. ANDRE: Two?

7 THE COURT: Thank you.

8 MR. ANDRE: Your Honor, I'd like
9 to start with a little bit of the background of
10 what we're talking about today, the technology,
11 then go into an example of one of the
12 embodiments of the patent and then get to the
13 claim terms.

14 The tutorial will be very simple
15 and very short because, as we noted to Your
16 Honor earlier, we think this is a very straight
17 forward, simple case.

18 We want to talk about the prior
19 art system, prior art in the software
20 application. It was very much like the paper
21 copies that we use today. You would make a
22 file. You put that into a folder. You put that
23 into a file cabinet.

24 That's exactly what software used

1 to do. There was not much of a difference. The
2 prior art, that's how they managed data.

3 Now, if you look at a traditional
4 system, it employed a hierarchy of the following
5 structures. So you'd have all users. You'll
6 have Paul's documents and my photo, which I
7 don't look better in the photo than I do today,
8 but my colleagues always like to use me as a
9 guinea pig for whatever reason.

10 Any way, the traditional system,
11 accessing a file was difficult and time
12 consuming, because you had to know exactly the
13 structure it was in. If it was in Paul's photo,
14 you had to know where it was in Paul's photo.

15 I could have thousands of those
16 photos. You'd have to know where it is in order
17 to find it.

18 Now, you could imagine what would
19 happen if you had multiple users. You'd have
20 multiple files.

21 And finding that one particular
22 file would take an inordinate amount of time.
23 So what the '761 patent was trying to solve was
24 some of these issues, among others. Mostly it

1 is an on-line collaboration tool.

2 That's what it's all about. It's
3 about collaborating among a lot of people and a
4 way of managing that data in a way that would be
5 useful and allow multiple people to have access
6 to it. And also it would continue to update the
7 data in a way that would be easy to find.

8 I mean, the patent itself talks
9 about it's a tool that manages data by
10 associating files generated by the applications
11 with individuals, groups and topical context.

12 Context will be something we'll
13 talk about today. That's one of the key terms
14 here.

15 Now, I will give you just a --

16 THE COURT: Let me just ask you
17 one question.

18 MR. ANDRE: Sure.

19 THE COURT: I always hate to
20 interrupt and I don't like to think too hard,
21 but in reading your papers, I was -- I got on
22 one of those extraneous missions. And what I'm
23 trying to understand is from your side, and then
24 I'll ask Facebook, you talked a lot about that,

1 what is the nature of the invention is the
2 facilitation in the context of collaboration.

3 They criticize you for that,
4 because they say nowhere in the patent do you
5 talk -- and I'm going to use another term,
6 because as I was thinking about this, I was
7 trying to figure out how to understand it
8 better. You talk about collaboration, but you
9 don't talk about social interaction.

10 Do you know what I'm saying?

11 MR. ANDRE: Yeah.

12 THE COURT: What, in your view, is
13 your response? Let me ask you this question:
14 Does your idea of collaboration on a broadly
15 drawn set of patent claims have lots of
16 applications and social interaction certainly
17 giving the searching ability that it enables as
18 one or what were you trying to tell me?

19 MR. ANDRE: Well, what we're
20 saying is this provides architecture for
21 successful social networking. I mean, one of
22 the things I found interesting -- I'm sorry. I
23 had to dig through the papers.

24 There was -- in the background of

1 the '761 patent in the brief, they say that
2 we're not concerned with social networking or
3 anything about keeping people in touch with each
4 other. That was what their criticism was that
5 you just mentioned.

6 And two sentences later, they say,
7 the patent -- told the Patent Office and they
8 give a quote, "that the alleged invention was to
9 provide new structures and methods for creating
10 relationships between users."

11 That's social networking. And
12 they quoted that from the patent.

13 It's also about creating from
14 application files and folders.

15 THE COURT: But you don't think it
16 really matters --

17 MR. ANDRE: No.

18 THE COURT: -- that you put these
19 labels on what the patent is enabling?

20 MR. ANDRE: That's exactly right.
21 Social networking is -- you know, this patent
22 was invented in 1997. The concept came up with
23 in 1997, social networking, was not a term that
24 was really in vogue. Now, it is.

1 How you use this patent, it could
2 be for social networking. It could be other
3 aspects as well, enterprise space as well.

4 So how you use the patent is
5 neither here nor there. But their very specific
6 criticism is actually in the exact same
7 paragraph of their brief. They say, creating
8 relationships between users. That's what social
9 networking is.

10 So we think that that's an unfair
11 criticism. And when we get to sort of the
12 benefits of the patent, we actually have, you
13 know, slides that actually pull this out of the
14 patent where you'll see it's actually quoted
15 about how that type of social interaction
16 networking amongst individuals is an important
17 aspect of this patent.

18 THE COURT: So if you could take
19 the word collaboration and stop using it -- and
20 I'm not telling you to do this, I'm just saying
21 and just start using the word networking, --

22 MR. ANDRE: In fact, it's
23 called --

24 THE COURT: -- it wouldn't make

1 any difference in your analysis?

2 MR. ANDRE: It's called a
3 network-based system. It's all about
4 networking. It's about having -- that's
5 absolutely right. It's about a network system
6 that allows collaboration, networking among the
7 individuals. Collaboration among the
8 individuals.

9 It could be social -- social
10 networking. It could be business networking.

11 It could be any kind of
12 networking. So, yeah, that's correct, Your
13 Honor.

14 THE COURT: Now, as I said, I was
15 thinking much too hard. So assuming that I get
16 that in the context of Facebook and what it
17 does, can you give me another one of these
18 modern networking collaborations, social
19 interaction applications that you haven't sued
20 for infringement, but it could apply, like
21 Twitter?

22 MR. ANDRE: Twitter is a little
23 bit different. It's a micro-blogging company.

24 That's a little different. It

1 doesn't allow that same type of collaboration.

2 It's a different type of network.

3 So we're not saying that the technology of the

4 '761 patent covers all types of networking.

5 This is a very unique architecture that allows

6 for the many-to-many networking that's very

7 popular in this particular site.

8 I mean, it is something that when

9 it comes to those other type of companies, there

10 are people out there that, obviously, I think

11 are --

12 THE COURT: They're coming up with

13 stuff all the time.

14 MR. ANDRE: Absolutely, largely to

15 the success of Facebook. There are people

16 copying Facebook.

17 They're using that type of system

18 and those types of social networking. I mean,

19 we'd have to really dig in the source code and

20 their technical documents to really give a

21 definitive answer. But there are a lot of

22 social networks out there that are used.

23 And there's some enterprise

24 networks that are also using this type of

1 technology. So, yeah, it is becoming -- gaining
2 popularity largely because of the architecture
3 that is in place here that allows for easy
4 access.

5 I mean, you know, Facebook wasn't
6 the first social networking company. There was
7 a company out there a long time ago called
8 Friendster. And Friendster didn't succeed.

9 And that was because it was a big
10 clunky network. It wasn't something easy to
11 use.

12 It was social networking with the
13 same goal in mind that, you know, making
14 friends. It was called Friendster for that
15 reason.

16 But the architecture was so clunky
17 and so clumsy, it just was not very good. The
18 architecture that we're going to talk about in
19 the '761 patent takes away all those issues,
20 takes away those problems. And that's really
21 the whole -- the gist of what the '761 patent is
22 about, a way of making networking, or
23 collaboration or whatever you want to call it go
24 seamlessly, very easy and not very clunky. I

1 don't know if clunky is a or word or not, but
2 that's the goal here.

3 Now, if you look at this in one
4 particular embodiment when talked about -- this
5 is how simple it is. You have a front end which
6 is, you know, your home computer. You have the
7 internet, which you log on to in order to get to
8 the back end, which is the network-based system.

9 Now, the patent talks about a
10 computer-implemented network-based system that
11 facilitates management of data using an on-line
12 collaboration tool. That's straight from the
13 patent.

14 What the claims are directed to
15 are everything on the back end. The
16 network-based system, that's where, in this
17 particular instance, like Claim 1 you find the
18 context component, the storage component, the
19 tracking component. Everything is done on the
20 back end.

21 It may be facilitated by some of
22 the user interaction on the front end, but all
23 the claims are drafted to what's happening on
24 the back end. So every one of the claims.

1 That's an important distinction,
2 because in Facebook's case, they try on many
3 occasions to make the user be the active
4 infringer, not the back end. So we'll talk
5 about that a little bit later.

6 So in this particular instance, if
7 a user wants to upload data to an on-line
8 collaboration tool, they have a photograph.
9 There's my photo again.

10 It would be on the hard drive of
11 the computer, and they would upload it to the
12 network-based system. Based on that user
13 interaction, data is created on that
14 network-based system.

15 So the data is created on the
16 network-based system is key. And this is one of
17 the key features here and one of the contrast in
18 the papers that you saw.

19 Facebook had talked about having a
20 backpack where you put all your data in a
21 backpack and you can go from site to site and
22 keep loading things to your backpack. That's
23 the antithesis of what we're talking about.

24 What the patent is directed to is

1 a system in which you have a center repository.
2 If you keep loading things to your backpack, it
3 eventually gets too heavy and too big.

4 And you can walk around with it.
5 It slows you down. That's not a good thing.

6 What you want to be able to do is
7 have mobility, have your data located in one
8 central space and have the mobility when you go
9 to different places, you can still have access
10 to it. You can still have access to that data
11 without having to carry it with you, without
12 having it tied to you to slow you down. That's
13 the reason this system works so well.

14 Now, once you upload the data to
15 this network-based system, the context component
16 copies your environmental information associated
17 with the user's data. It does this and in a way
18 that allows -- you see here, you're in the
19 profile page in the photos.

20 So you're under profile. You
21 upload it for the profile and photos.

22 It does this by capturing the
23 metadata. So the metadata is stored on the
24 storage component. The metadata in this

1 particular case would be this photo. It was
2 from Paul's profile and Paul's photos, whatever
3 it is, profile and photos.

4 That's what the metadata would
5 capture. It would be associated with that data
6 on the network-based system.

7 And that kind -- the capturing of
8 the metadata is one of the keys to making this a
9 useable system. It allows people to be able to
10 find where my photo is by searching metadata
11 issues instead of having to know exactly where
12 it's located.

13 The next step in the patent that
14 we're talking about is the tracking. Now, if
15 I'm on my profile page and I want to go to my
16 group page, like a group, say NFL Fan Page. And
17 I go to that page.

18 I'm going to call it Group X here.
19 There's a tracking component that's on the
20 network-based system that tracks me going from
21 the first context, which is my profile page, to
22 a second context, which is the group page.

23 That tracking component then knows
24 you're there. Well, one of the great things

1 about this is when I'm at this second, the group
2 page, it gives me an opportunity to access my
3 data from my first page.

4 So the users get an opportunity to
5 access data provided in the first context from
6 the second context. So I didn't have to carry
7 it with me. I can still get all that data.

8 So the component would say, would
9 you like to access your photos from the profile
10 page? And if you say, yes, then it will access
11 that photo and put it on the group page. If the
12 user accesses the data from the second context,
13 the metadata is automatically updated.

14 So now you see you have the
15 profile and the photos page, but you also have
16 the group page. So it updates that metadata and
17 it continues doing so.

18 You have the data. It would be
19 the photograph, a document, whatever, and it
20 keeps the label metadata on that.

21 And that makes it easy to find it.
22 In a nutshell, that's how simple this patent is.

23 It's just that in a system you
24 have those three components; the method that

1 draws out, to some degree, as well. The
2 benefits about this type of system, and this is
3 straight from the patent again, is that the
4 users' data is captured automatically as the
5 users collaborate or as the users' network as
6 you may want to talk about.

7 So if you look at the quote from
8 the patent, it says user collaborates. The
9 system captures context information and
10 automatically records when and how data is
11 shared, who updates the data, how often data was
12 accessed and what additional information the
13 data was linked to. That is key in being able
14 to find the documents that you want to find very
15 easily.

16 And once you -- another benefit is
17 once files are uploaded, they can be accessed
18 from multiple locations. You don't have to keep
19 making copies.

20 This really helps with version
21 control. So you have a single copy of the data
22 itself. So if you had multiple copies, you
23 might find that different users do different
24 things to that data. You know, somebody might

1 put a mustache on my picture. Some people may
2 defame it in other ways.

3 You don't know because now you
4 have multiple copies out there. This way you
5 have a single copy that can be accessed. You
6 can have version control.

7 And you know what's going on.
8 That's just another benefit.

9 The last benefit I'm going to talk
10 about is the user can find files using the
11 context information. And this is really, as I
12 said, one of the key aspects of it.

13 By associating metadata with the
14 context or the environmental information, where
15 it was accessed, what was done with it,
16 everything you want to do with that data, that
17 makes it very easy for other people to find.
18 You don't have to know the precise location.
19 You can just do a search, find Paul's photo. It
20 would know where it would be.

21 That's -- sorry I thought somebody
22 was talking to me back there. That's the gist
23 of the background we want to talk about.

24 We think it's a very straight

1 forward and very simple patent. Like all great
2 ideas, they're usually very elegant. Simplicity
3 is what makes them elegant.

4 And in this particular case,
5 that's exactly why this invention is so
6 successful. It's elegant simplicity of the
7 invention itself.

8 Now, I want to talk about the
9 claim terms at issue in this case. And before I
10 start getting into the specific issues, I do
11 want to talk a little bit about the claim
12 construction philosophy.

13 It is our belief that the courts
14 are here to -- you know, Your Honor is here to
15 construe terms in which there is a dispute, and
16 also in which a construction is required,
17 because either, one, the inventor gave it a
18 special meaning or it's an ambiguous term.

19 Facebook has a different idea.
20 Their idea is you should construe every word in
21 the patent. It doesn't matter if there's -- you
22 know, if someone asked for the claim to be
23 construed, the Court should do so.

24 We don't agree with that. We

1 would think it would make the claims
2 incomprehensible.

3 We have a little bit of an issue
4 about what they were proposing as claim terms in
5 their opening brief. They changed before --
6 they changed about 40 percent of their
7 definitions, either dropped some claims or they
8 just changed them outright without telling us
9 about it. So really in our reply brief, we
10 tried to answer all their new constructions.

11 And if you look at Exhibits 1 and
12 2 in our reply brief, you'll see how if you
13 apply those constructions to the claims, it
14 makes them almost incomprehensible.

15 So Claim 1 we took their proposed
16 construction, just laid it into the claim,
17 showed you how -- the Court how it would read.
18 And Claim 2 we actually showed the linking
19 relationships from several of the terms and how
20 they tried to incorporate numerous other terms
21 into their definitions.

22 Finally, with respect to the
23 claims, most of these claims are self defined.
24 If you just read the claim and look at what's

1 being described, the claim terms are described
2 there. They're self defining, so there's no
3 construction necessary.

4 So that's kind of my overall --
5 our philosophy of the claim construction.

6 We've requested construction of
7 five terms in this case. Facebook has argued
8 two of these five have no construction. They
9 cannot be construed.

10 So the only dispute with regard to
11 those two -- and that's the component term and
12 the many-to-many term. The only dispute with
13 regard to those two is can it be construed,
14 because they've offered no construction. That's
15 the dispute.

16 Now, Facebook has requested
17 construction of 35 additional -- a total of 35
18 terms, about 27 additional terms, which we don't
19 think need to be construed because we think
20 they're ordinary meaning.

21 And with that, we'll start with
22 the first term, which is component.

23 Now, in the patent specification,
24 the patentee explicitly defined what component

1 was. This is one of the few instances where the
2 patentee said as used in this application,
3 component should be this, and just gives the
4 definition hardware, software, hardware and
5 software in combination.

6 Now, they argue -- Facebook argues
7 that the term cannot be construed. It was
8 construed.

9 I mean, this is about as clean as
10 it gets. And you know, they want this Court to
11 ignore, you know, years and years and hundreds
12 of cases of precedent about the patentee being
13 its own lexicographer.

14 The fact of the matter is the only
15 dispute here is whether that's a definition of
16 the term or not. That's the only dispute
17 between the parties, because it's such an
18 explicit definition.

19 I don't think there's really any
20 question. They -- not only can it be construed,
21 but it was construed.

22 Now, with respect to how component
23 is used, it's used in three terms. They say it
24 cannot be construed from the context component,

1 the storage component and the tracking component
2 which we talked about.

3 The interesting thing here was in
4 our meet and confers and our initial brief, we
5 argued about the storage component, because they
6 gave us a definition as to storage component.
7 And we provided their proposed construction of
8 it. We don't think it needs to be construed.

9 If you construe component storage,
10 there is not anything tricky about that. But
11 then when they came out with their opposition
12 brief, they suddenly said, no, it can't be
13 construed. It's indefinite.

14 They base their indefiniteness
15 argument on a means-plus-function argument
16 essentially, even though these terms are not
17 written in means-plus-function format. There's
18 nothing in them that would indicate they're
19 means plus function.

20 There's considerable structure
21 identified, including the specific definition.
22 Facebook, nonetheless, argues they are somehow
23 means plus function.

24 I think our briefs cover that very

1 well. I don't want to belabor the point here.

2 But needless to say, the
3 means-plus-function argument has absolutely no
4 support whatsoever in the specification or in
5 the law.

6 Next term that we think needs to
7 be construed is context. And there's a word
8 meaning context, and I use it all the time. I
9 tend to overuse the word context. I mean, I
10 always say it depends on the context.

11 It's kind of like if you said I
12 love you. If you say it to your dog, that means
13 one thing. If you say it to your wife, you hope
14 it means something different. It just depends
15 on the context, you know. So, and any way it
16 just depends on --

17 THE COURT: Mr. Caponi, I thought
18 you'd want to respond.

19 MR. CAPONI: In this context, I'll
20 keep my mouth shut.

21 MR. ANDRE: There you go.

22 THE COURT: That's what I was
23 thinking.

24 MR. ANDRE: And that's what it

1 means. Context, everyone knows what it means.
2 It's the environment, the surroundings you're
3 in.

4 So we've proposed the context as
5 it's used in everyday life. It is also
6 supported by the claim specification. The
7 specification and the claims actually use the
8 words context and environment interchangeably.

9 We cited in the slide here where
10 it talks about the user automatically enters
11 into a workspace or a first context or
12 environment. It says this environment can be a
13 default. So it kind of uses those words
14 interchangeably.

15 Environment is a term that's well
16 understood by those skilled -- those skilled in
17 the art. That even lay people, context should
18 be defined that way.

19 The definition of context is
20 broader than the user environment as in Claim 9
21 also because it's dependent upon. Claim 6,
22 dependent claim, also uses the context as a user
23 environment.

24 Claim 1 has to be broader. So

1 we're talking about context being a very broad
2 term meaning environment in general.

3 Now, Facebook, on the other hand,
4 has proposed a construction of context that
5 requires what I call four layers of
6 construction. So context would be a collection
7 of interrelated webs. Then web would have to be
8 defined as a collection of interrelated boards
9 or workspaces.

10 Workspace would be defined as a
11 collection of data and application functionality
12 related to a user-defined topic.

13 And, of course, application would
14 be a computer program designed to accomplish
15 that specific task.

16 So with one term context, they've
17 now read in multiple limitations and multiple
18 other terms that they want -- they're asking the
19 Court to be construed.

20 And just looking at those other
21 terms in Claim 1 where the context is used, you
22 would read in Claims 2, 3 and 4 the dependent
23 claims into Claim 1, which is improper, as Your
24 Honor knows. Because Claim 3 requires the web.

1 Claim 2 requires workspace. And Claim 4
2 requires applications as a context.

3 So they're reading all those
4 limitations into Claim 1 with their definition.
5 This linking relationship is a theme throughout.

6 If you look at Exhibit 2 to our
7 reply brief, we show where all the different
8 links were. Some of them went up to seven or
9 eight layers. Like this, they link multiple
10 layers.

11 Some are only two layers or three
12 layers. But they would only link one term to
13 the other to the other.

14 So just reading in extraneous
15 limitations creating, in a sense, the claim term
16 that was so narrow by definition, because you
17 had to construe all of these other terms in
18 order to get its construction.

19 When you put this into the claim
20 language, it makes no sense whatsoever. I mean,
21 try to read into what you're looking at here for
22 context is a collection of interrelated, a
23 collection of a collection. You've got a
24 collection of a collection of a collection.

1 I don't even know what that means,
2 but it seem to be somewhat onerous, to say the
3 least.

4 The next terms I want to talk
5 about are ordering and traversing. I'm
6 hesitant -- we're hesitant to bring this before
7 the Court, to be honest with you, because I
8 think ordering is very common. I think
9 traversing is very common.

10 I think people skilled in the art
11 understand this. We brought this because it was
12 an issue that was argued in front of Magistrate
13 Judge Stark regarding a Claim 17 we were adding
14 in. And Facebook specifically said, We don't
15 know what the ordering and traversing term
16 means.

17 They used it as a basis to say
18 that we should not be able to assert that claim,
19 this Claim 17. That's the only claim these two
20 terms are in.

21 So we had proposed we would
22 construe that, you know, with Your Honor because
23 they didn't know what it was. So we look at
24 ordering and the only thing that makes sense is

1 ordering just means organizing.

2 It's consistent with the claims.

3 It doesn't read in extraneous limitations, and
4 it is consistent with the specification as well.

5 Facebook proposes adding
6 additional limitations placing into a fixed
7 sequence. I don't know what that means. It's
8 very ambiguous, to stay the least, but it's a
9 limitation on.

10 I don't know if it's pre-ordained
11 fixed sequence or what they are talking about,
12 but I believe there will be some issues if that
13 construction was adopted.

14 What I found probably more
15 troublesome is when they use ordering
16 information, now ordering they say place in
17 fixed sequence. But with ordering information,
18 just by adding the term information, it changes
19 the definition completely.

20 Well, first of all, in our meet
21 and confer, they said that it was information
22 retrieved in the second user environment as
23 distinct from uploading or creating it. That's
24 what they said the definition was in our meet

1 and confer process. That's what we argued in
2 our opening brief.

3 In their opposition brief, they
4 changed the definition to data that specifies
5 particular orders in which user environment must
6 be traversed. Now, they're bringing traversed
7 into the issue, for one thing.

8 But just by adding the word
9 information to ordering, it completely changed
10 the definition. I don't understand that.

11 It doesn't make sense. It reads
12 in a ton of extraneous limitations.

13 The only plausible definition or
14 construction of ordering is organizing, so
15 that's what we would suggest the Court go with.

16 With traversing, we propose it
17 means searching. It's consistent with the
18 claims, once again, and it actually talks about
19 traversing to locate the data associated with
20 the user environment.

21 So you -- traverse means to locate
22 the data. So searching means traverse. You
23 search to locate. That seems to make sense.

24 Facebook proposes -- they add

1 additional limitations and a navigation by the
2 user according to a specific path or route.
3 Well, if you know the specific path or route,
4 which is a limitation, you don't really need to
5 try to locate the data.

6 You're not trying to find that
7 data. You already know where it is.

8 If you have the specific route
9 already, you wouldn't need to locate the data.
10 You wouldn't need to try to find that data. It
11 would be there.

12 So we think that reading in the
13 specific limitation of specific path or route is
14 bringing in an extraneous limitation. There's
15 no support for it in the specification or
16 anywhere else.

17 Now, the last term that we believe
18 needs to be construed is many to many. This is
19 a term that is another one of those terms where
20 Facebook says there's no way to construe it.
21 It's indefinite. It's found in one single
22 claim.

23 They claim up -- in our meet and
24 confers, the specification we gave them one

1 example in this slide, Column 3, Lines 22 to 31
2 where we talk about many to many. This is a
3 well-known context. It's a paradigm in the
4 computer science world.

5 There's absolutely no basis for
6 saying it's an indefinite concept. This
7 construction of two or more users able to access
8 two or more data files is correct, because it's
9 consistent with the specification and how these
10 skilled in the art would understand it.

11 The only dispute is whether it can
12 be interpreted or not. And to be frank, because
13 it is something, it is such a well-known term,
14 if you go to Google and put in many to many,
15 you'll find hundreds of hits. Many to many,
16 this is something in computer science people
17 know about.

18 You could actually use the
19 ordinary meaning for this term just as easily as
20 a proposed construction. It's something that's
21 indefinite. People skilled in the art know what
22 it means.

23 That's the terms that we've
24 proposed to be construed by the Court, Your

1 Honor.

2 Now, there are a lot of ordinary
3 meanings, a lot of ordinary terms we say require
4 ordinary meanings. There are, in fact, 26 terms
5 Facebook has additionally proposed to be
6 construed by this Court, all with ordinary
7 meanings.

8 We tried to divide this up to put
9 some kind of organizational scheme. There are
10 18 everyday terms, which are terms that we use
11 in everyday language, not anything unique to the
12 computer science world. And eight that are more
13 computer-related terms.

14 It's our belief that the dispute
15 between the parties here is whether it needs to
16 be construed or ordinary meaning can be applied.

17 So we think that's the only
18 dispute Your Honor has to determine is ordinary
19 meaning or if a construction is required for
20 those terms.

21 Facebook's proposed construction
22 provides no additional insight as to the meaning
23 of the claim terms to one skilled in the art.
24 And that's the key here.

1 Do their proposed constructions
2 add anything to those skilled in the art? And
3 they don't.

4 And, in fact, some of these terms
5 are so ridiculously simple that I can't figure
6 out why they're trying to have the Court
7 interpret them. But we'll discuss those.

8 We have seven of the 18 terms,
9 everyday terms. My question is: Why construe
10 them? I mean, my favorite one is locate.

11 They're asking the Court to
12 construe locate to mean find. I don't
13 understand why they would ask the Court to do
14 that. It's something -- locate is something
15 that we use in everyday language. It is --
16 there is no need to have the Court interpret
17 that term.

18 These other six terms, generating
19 they say means create. Well, then create means
20 to bring into existence.

21 Well, that means generate and
22 create. Both terms are found in Claim 17 or --
23 yeah, Claim 17. They have two different words
24 and they say they mean the same thing. By law,

1 that can't be the fact.

2 They have capturing means
3 obtaining. First of all, I don't think that's
4 what it means.

5 I could go out and obtain a car by
6 buying it. I don't have to capture it.

7 They say they don't want people to
8 get confused about some kind of prisoners or
9 somebody taking someone captive or capturing
10 somebody, you know, I think pirates or whatever.

11 But I think that is just silly.
12 We're going to have people on the stand talking
13 about this as computer science. Everybody knows
14 what capturing is in computer science.

15 The other terms remote location
16 associated with, these are terms everyone knows.
17 Remote location, I don't know what kind of
18 clarity you could add to that. It's remote
19 location. It means remote.

20 The last term on this list, the
21 seven everyday terms is relationship.
22 Originally they said they want the Court to
23 define relationship and they gave it a proposed
24 construction. In our meet and confers, we told

1 them this was silly. It makes the claim
2 nonsensical.

3 Nonetheless, they persisted. So
4 we addressed relationship in our opening brief.

5 In their opposition brief, they
6 said, Well, the brief made the point. It does
7 make it ridiculous, so we continued to change
8 relationship to relationship data. They kept
9 the same exact definition.

10 It has the same infirmities as
11 relationship. It still makes the claim
12 ridiculous. Relationship doesn't need to be
13 defined.

14 Those seven terms are just
15 everyday terms that -- why construe them?
16 There's no need to.

17 Then we have 11 terms that are
18 once again everyday terms, which Facebook
19 proposes to read numerous additional limitations
20 into it. And we'll start with environment.

21 So you can see here environment
22 creates a funnel effect. I'm sorry about the
23 small text on the screen, but they say
24 environment is a collection of interrelated

1 contexts. Context is a collection of
2 interrelated webs.

3 Web is a collection of
4 interrelated boards or workspaces. Workspace is
5 a collection of data and application
6 functionality related to a user-defined topic.

7 Application is a computer program
8 designed to accomplish a specific task. You can
9 see how they funnel a single term environment,
10 which is a very common term. We all know this
11 is the environment we're in today.

12 They've read in four other terms.
13 These terms are from Claims 1, 2, 3 and 4.
14 Environment we're claiming is found in Claim 9.

15 So by interpreting environment the
16 way they proposed to read in context, you've now
17 incorporated Claim 1 into Claim 9, two
18 independent claims. Context is not in Claim 9,
19 but nonetheless that is their proposed
20 construction.

21 The funnels -- throughout their
22 proposed construction, as I said, Exhibit 2 of
23 our reply brief, we tried to address all those
24 funnels.

1 I'll go through some of the 11 of
2 18 terms that they propose additional
3 limitations. Arrangements, they don't -- not
4 only address this, they say specifically ordered
5 set items. I don't think anyone has any
6 misunderstanding what arrangements are. It
7 depends on how it's used in the claim. It
8 doesn't have a very limited definition as they
9 propose.

10 They use the term access. And in
11 the various terms, access the data or the data
12 is accessed, there's different tenses and it has
13 different meanings.

14 So in one tense, they use
15 workspace. In the second context, they're using
16 workspace. And the other tense, they say in the
17 second user environment.

18 They changed definitions depending
19 on the tense. But more importantly, they read
20 in a ton of extraneous limitations to the term
21 access.

22 If you access something, people
23 know what that is. There's no definition
24 required. The ordinary meaning should apply.

1 The ones that really are
2 problematic are the change terms. We change
3 this.

4 They talk about change
5 information, or change in the access or based on
6 the change. And what they, what Facebook does
7 here is they try to put a -- well, first of all,
8 the claims are self defined. It tells you what
9 based on the change is referring to.

10 Well, what Facebook does with
11 adding all these limitations in, they try to put
12 in a physical act. They try to put in this idea
13 of movement, because what they are trying to do
14 is put all the activity on the front end on the
15 user. So they keep saying the movement of a
16 user. The movement of a user.

17 And you always see that
18 throughout. That's just not what this patent is
19 about. It's not about the movement of the user.

20 But that's what they are trying to
21 do, read in those type of limitations in
22 addition to these other extraneous limitations,
23 which make no sense whatsoever.

24 The backpacking analogy is in line

1 with what they're trying to do here. As the
2 user moves, he has a backpack. And he just
3 keeps putting things in it. That's not what the
4 patent is about.

5 Now, the other terms, we are
6 almost finished with these, less than every day
7 terms. Updating, the only support they provide
8 for construing updating is from a dictionary.
9 And they give the exact dictionary definition
10 from some computer science dictionary. I guess
11 from the Micro, or Apple or Microsoft computer
12 dictionary.

13 And they say they're using that as
14 their construction. But the problem is if you
15 look at the dictionary definition and what they
16 propose, it is different. They don't even
17 follow their own dictionary definition.

18 They put in this idea of modifying
19 existing data that's nowhere in the dictionary
20 definition. So even the extraneous support
21 they're trying to cite to the Court is not
22 applicable to their construction.

23 Same with dynamically. It says
24 automatically in response to the preceding

1 event. In response to the preceding event, I'm
2 not sure what they're trying to get with that.

3 So, once again, everyone knows
4 what dynamically means. If you read it in the
5 context of the claim, it's very clear those
6 skilled in the art would know it and those lay
7 individuals as well.

8 Employs. They use a different
9 definition of employs.

10 They change the construction as
11 from the first proposed construction they gave
12 us to the second they gave us. And even there
13 depending on the tense and how it's used, they
14 use it differently.

15 So once again, everyone knows what
16 employs means. It does not need to be
17 construed.

18 Those are the everyday terms that
19 have no special meaning to even those skilled in
20 the art.

21 Then the last group of terms we
22 are going to talk about, the eight well-known
23 computer science terms. The first four:
24 metadata, web, workspace and applications, what

1 we call their funnel terms.

2 And then the other four: tagged,
3 and file storage pointer, portable wireless
4 device and relational storage methodology, we'll
5 discuss as well.

6 The reason we called them the
7 funnel terms, you see those are the four terms
8 defined. And the proposed definition metadata,
9 metadata which is one of the most common terms.
10 If you pick up a freshman textbook in computer
11 science, they will talk about metadata.
12 Everyone knows what metadata -- every computer
13 scientist knows what metadata is.

14 This is not something that is
15 overly complex. There's no reason to read in
16 these limitations.

17 What they've done here is read in
18 seven layers of limitations. You know, they
19 attach it to the associated environment context.
20 They read all of these limitations of metadata.
21 Almost every contested term or half the
22 contested terms are going to be read into
23 metadata.

24 That type of importation of

1 extraneous limitations is not warranted.

2 So the first four terms, as you
3 can see, web, workspace and application, they
4 also read limitations to those as well. Once
5 again, these are terms that are well known in
6 the field and do not need to be added with
7 extraneous limitations.

8 One of those four other than
9 metadata that I want to talk about is web. Now,
10 I call this slide Shenanigans with Web. I put a
11 little picture there of Spiderman.

12 I have a four-year-old son. I'll
13 be his hero for putting this slide in. He knows
14 what a web is. He knows exactly what a web is.

15 The term web can mean a lot of
16 different things. It can be a spiderweb. It
17 can be the world wide web. It can be a web
18 slice.

19 It can be a lot of different
20 things. But in this particular instance, the
21 only time web is ever used in the claims in the
22 way that Facebook wants to have it construed is
23 in Claim 3.

24 And Claim 3 actually defines it

1 exactly as they want to define it. So it's
2 already defined in the claims. Claim 3 says a
3 web, which web is a collection of interrelated
4 workspaces. That's how they propose the Court
5 construe it.

6 So it's already defined in Claim
7 3. And it's not used anywhere else in the
8 claims, asserted claims or any of the claims in
9 this manner. So I'm left with the question:
10 Why would they want the Court to construe it
11 that way?

12 And the only thing that makes
13 sense -- and we brought this up to them, You
14 don't need to construe it. It's already
15 construed -- is that they're going to use it in
16 a way that I call shenanigans.

17 Because there are claims that talk
18 about web based and web and video conferences.
19 Now, the specification makes it very clear when
20 it talks about web based, that's worldwide web.
21 It's a web-based system, which means you're on
22 the internet.

23 And the specification we cite
24 talks about the HTTP protocol, you know, the

1 hypertext transport protocol, which is all
2 related to the internet. They talk about web
3 based.

4 It very, very specifically defines
5 being the internet. When you talk about web and
6 video conferencing, they're talking about
7 internet conferencing. Everyone knows that.

8 So the only thing I can conclude
9 is they're trying to get a definition of web
10 that's a very particular type of web that's
11 claimed in Claim 3 and self defined there, and
12 try to use that in web based or web
13 conferencing.

14 There's no support for that. In
15 fact, the support is just contrary to that. I
16 think this is more of a -- like I said, for lack
17 of a better word, I call it shenanigans. It is
18 something that I think it -- this will be used
19 or misused at trial to confuse the jury.

20 And then the last four computer --
21 the science terms are very well known. Portable
22 wireless device, they have asked for a
23 construction of that.

24 You know, portable wireless

1 device, like I say, we said in the brief that,
2 you know, it's a cell phone. Everybody knows
3 what a portable wireless device is.

4 It could be your PDA. It's
5 unlimited. The limited construction they are
6 trying to put in here is it has to be a
7 communication with a computer network.

8 The patent is very clear it can be
9 communication to a telephone network. It could
10 be any kind of network. We don't really care
11 what network it is. And the patent gives
12 examples of that. So that's a limitation that's
13 not needed.

14 File storage pointer, everyone in
15 computer science knows what that is. They've
16 asked -- they've done nothing to clarify what it
17 is with their proposed definition.

18 Relational storage methodology,
19 this is an interesting one. It's not a claim
20 term.

21 That term, you will not find
22 relational storage methodology in the claims.
23 There's one claim that talks about having
24 relational and object storage methodology.

1 But the term relational storage
2 methodology by itself is not there. If you want
3 to read out a couple words of the claim and have
4 it construed, I think that's improper.

5 If they want that phrase
6 construed, they need to construe the whole thing
7 that they refuse to do. So they just want
8 relational storage methodology.

9 And the last one is tagged. They
10 say it means attached. That's just against
11 common sense, and it doesn't really help.

12 Those skilled in the art wouldn't
13 necessarily know it means attached to something.
14 It doesn't have to be physically attached. And
15 that's what cannotes that type of limitation.

16 I think that will cover what I
17 wanted to talk about, unless Your Honor had any
18 questions.

19 THE COURT: No. Thank you.

20 MR. ANDRE: All right.

21 MS. KEEFE: Your Honor, I also
22 have some slides. Copies of which I'll pass up,
23 if that's okay.

24 THE COURT: Yes. Thank you.

1 MS. KEEFE: We also have -- we
2 also noticed last night, Your Honor, that
3 while --

4 THE COURT: Do you have another
5 one of these?

6 MS. KEEFE: I think so, yes.

7 THE COURT: That way you can have
8 one, too.

9 MS. KEEFE: Here you go. Sorry
10 about that.

11 THE CLERK: Thank you.

12 THE COURT: Okay.

13 MS. KEEFE: We also noticed last
14 night while we were getting ready for today that
15 Exhibit A to Mr. Weinstein's declaration
16 inadvertently left out a photocopy of one of the
17 pages that we cited. So I actually have
18 corrected Exhibit A's that I'd like to
19 distribute.

20 THE COURT: Sure.

21 MS. KEEFE: And if Your Honor
22 prefers that we file it, I'm happy to do so.
23 Otherwise --

24 THE COURT: You can consider it

1 filed.

2 MS. KEEFE: Thank you.

3 All that one does, Your Honor, is
4 it adds in a photocopy of the definition of the
5 word traverse from the Microsoft Press
6 Dictionary that was already quoted in the brief.

7 I don't know how it got left out.
8 We apologize.

9 So like Mr. Andre, I think I'll
10 start with just a little bit of, you know, what
11 this patent covers. It's no tremendous surprise
12 to Your Honor that we're not in complete
13 agreement as to what the patent covers and the
14 technology that's claimed.

15 When we look at the patent and
16 when we read the words that the patentee told
17 the Patent Office about what the technology is
18 that is at issue in this patent, one of the
19 first things that we see is that the patentee
20 says not just that this is about relationships
21 among users, because it's not, it's the notion
22 that it's a relationship between the user, the
23 application and the data. It's a data
24 management tool.

1 It's basically the back end of
2 your word processing program that figures out
3 where your document is so that you can go locate
4 it later.

5 The patent goes on very
6 specifically to talk about the fact that there
7 were problems in the past. And the problems in
8 the past were that users had kind of bad
9 memories and, in fact, they couldn't always
10 figure out where their data was after they
11 created it.

12 The recipient, he claims as a
13 problem that the recipient must do all of the
14 work of organization and categorization of the
15 communication, rather than the system itself do
16 that work. So a new method is needed which will
17 automate these functions, because
18 notwithstanding the usefulness of the idea of
19 automating this, no one's done it before.

20 So instead, the patentee goes on
21 to describe that now in his new regime, data
22 created is automatically associated with the
23 user. And then when a user moves from one
24 context to another -- that word moves is

1 actually in Column 4 right in the summary of the
2 invention. When the user moves from one context
3 to another, the data created and the application
4 used to create that data automatically follows
5 the user to the next context.

6 Now, I got a lot of criticism for
7 my backpack analogy, but unfortunately, it's the
8 easiest way to kind of understand what's
9 happening. In the past, I would sit down in my
10 office and I would create a document. I would
11 then have to figure out what I would call that
12 document.

13 I'd give it a name on the document
14 itself. So I'd call it, you know, Heidi's
15 Stuff. And when I was done with it, close the
16 document, print it out, and then put it inside
17 of a file cabinet that might be behind my
18 secretary's desk instead of right where I was.

19 Then I would go home. So I'd go
20 home and realize that, Awe, I needed that
21 document. Well, I don't have it with me. I
22 didn't bring it.

23 I can't even exactly remember
24 where it is. If I need someone else to know

1 where that document is, I have to be able to
2 remember, oh, I labeled it Heidi's stuff.
3 That's the title. And I put it in the file
4 cabinet behind my secretary.

5 If I didn't remember what I
6 labeled it or where I put it, no one could find
7 it, including me. And that's what the patentee
8 says in the background of the invention is the
9 problem.

10 We don't want users to have to do
11 all those things. And there's a good reason for
12 that, Your Honor.

13 I can think of lots of times where
14 I thought it was normal to call it Heidi's
15 Stuff, but meanwhile when you went looking for
16 it, you thought it would have been more logical
17 to call it Keefe's Stuff. And so you type in
18 Keefe, and it shows that there is no document
19 because we weren't thinking on the same page.

20 So I would have to remember where
21 it was, send somebody back there, have them find
22 it. And if they could find it, bring it back to
23 me. Or if I could find it, bring it back to me.

24 So what the patent said was, We

1 don't want to rely on Heidi's brain anymore. We
2 don't want to rely on whether or not she can
3 remember what document she created.

4 So now when I'm sitting in the
5 office and I create my document, right away when
6 my document is created, it is linked to me. And
7 instead of having to figure out what that title
8 was and me choosing a title and me doing
9 everything else, metadata is immediately
10 associated with the document, which says who I
11 was, where I was when I did it, what I did. So
12 the metadata goes right along here.

13 And it says, I am here in the
14 office right now with Heidi. So that anyone
15 else looking for it can find it, because it
16 knows I'm in the office with Heidi.

17 When Heidi goes home at night,
18 instead of the document staying back here, when
19 I try to access when I go home and go onto the
20 computer, the document came with me, because it
21 was automatically associated with me as a user.
22 And the metadata, based on the fact that I moved
23 from the office to the home, instantly changes
24 and says, Hey, now, I'm at home with Heidi, so

1 that someone else can go to find it.

2 And this is completely supported
3 by the specification in both the Summary of the
4 Invention, Columns 3 to 4 and the Detailed
5 Description of the Invention at Column 7 where
6 we hear yet again a user is first associated
7 with a first context.

8 So I was in the office. I made it
9 there by logging into a system and automatically
10 entering a workspace and creating data.

11 As the user changes from one
12 context, the office, to another, the house, the
13 data and application are automatically
14 associated with the second context. So they
15 automatically go with.

16 This occurs transparently to the
17 user. It goes on at the bottom of Column 7 at
18 Line 46, as users create and change their
19 contexts, move the data and applications,
20 automatically follow the shifts in context being
21 captured dynamically in the context data and the
22 metadata.

23 So what we have is a different
24 system. It's a system that automatically

1 associates the user with the data. So that as
2 the user moves, it moves with them.

3 And it says, Okay, now I'm at
4 home, so that if someone else is looking for it
5 they know, Oh, you're at home with Heidi. Now,
6 I can access you instead of having to think
7 about what the title might have been or anything
8 else.

9 So that's really the context, if
10 you will, that the patent comes in. Now, with
11 respect to what claim terms we asked to be
12 construed and what claim terms need to be
13 construed, throughout the course of this case,
14 we've had lots of conversations between the
15 parties. Lots of times when we've talked about
16 what might be at issue, Your Honor may remember
17 in the very beginning when we were in front of
18 you, we first asked, We need this case
19 constrained. We need to get this down to a
20 workable format.

21 We need to limit ourselves to
22 what's really at issue. What product is being
23 accused? What's the definition of the Facebook
24 website?

1 We still think that this case
2 should actually be further constrained as Your
3 Honor first suggested in March to representative
4 claims, so that we actually know, you know, the
5 version that we're in.

6 Through all of these
7 conversations, we've heard lots of discussions
8 about what our product is and how it relates.
9 And a lot of different claim terms have come up.

10 Every time that one of those claim
11 terms has come up, and maybe we have a slightly
12 different meaning or understanding, we've jotted
13 it down. And that's why we had so many terms to
14 propose.

15 We wanted to make sure that we
16 were using the same definitions so that all the
17 constructions would happen at once, so we didn't
18 have mini-Markmans from here until during the
19 trial where Your Honor would have to excuse the
20 jury, conduct another little mini-Markman in
21 order to make sure that the jury was on the same
22 page as both parties and the Court.

23 Plaintiff argues that there are 35
24 terms that require no definition. And yet the

1 briefs kind of speak for themselves and indicate
2 that, in fact, a definition is required.

3 Rather than saying, you know,
4 Facebook gave us a plain meaning. You're right,
5 like locate and find, we think it has a plain
6 meaning, but Your Honor we're not going to tell
7 you what that plain meaning is. And we just
8 know that Facebook's is wrong.

9 Well, if ours is wrong, then
10 what's right? They don't propose any
11 definitions that we could say, Oh, you're right.
12 That's kind of close, and we get that and we're
13 okay with that.

14 Because the parties clearly
15 disagree as to the meanings. On all of those
16 terms, plaintiff says, I don't agree with
17 Facebook. I'm not going to give you a proposal,
18 because I think it's plain meaning. But I can
19 tell you that theirs is wrong.

20 That means that we do not agree
21 and we will be arguing differently to the jury,
22 because we'll be arguing the terms as we've
23 proposed their constructions. The fact that
24 plaintiff disagrees means that there has to be a

1 construction, otherwise, we'll run the risk of
2 mini-Markmans over and over again.

3 So if we look at some of the
4 terms --

5 THE COURT: Let me ask you a
6 question about that.

7 MS. KEEFE: Absolutely.

8 THE COURT: If your expert takes
9 the stand and doesn't understand the assignment
10 of plain and ordinary meaning to a term such as
11 application, you would think that you have a
12 dispute before the jury.

13 I mean, do you think your expert
14 doesn't know what application means in the
15 computer world?

16 MS. KEEFE: No. I think, Your
17 Honor, what the problem is -- if we take a step
18 back, one of the purposes of claim construction
19 is to make sure that the jury sits in the shoes
20 of one of ordinary skill in the art who's read
21 the patent, so that they understand the task
22 that's given to them of comparing the claim to
23 the accused device.

24 In order to do that, they need to

1 understand that, to sit in the shoes of one of
2 ordinary skill in the art. Now, for example --

3 THE COURT: No. No.

4 But my point is that when the
5 expert is on the witness stand, those experts
6 are going to be clear on what application is
7 because they're computer experts. Otherwise,
8 there, I assume, would be some sort of a motion
9 to strike the expert, so that expert won't ever
10 be before the jury.

11 MS. KEEFE: Well, Your Honor, I'm
12 not sure that's true. And the reason I say that
13 is because their expert currently, Mr. Vigna, he
14 kept saying these terms have a plain meaning.
15 He didn't ever say what that plain meaning was.

16 He then just said, but I don't
17 agree with what Facebook is saying the plain
18 meaning is. Our expert said, I agree with
19 Facebook that the definition that they've
20 proposed is the plain meaning.

21 THE COURT: But it's not so much
22 that they're testifying about the definition as
23 to the connection of the claim term to the
24 accused product.

1 MS. KEEFE: But if they're both
2 using the term in a different way, then we'll
3 never know.

4 THE COURT: Well, no. That's what
5 I'm saying.

6 Then I expect I'm going to get
7 some sort of a motion to strike, which is what I
8 normally get when that happens. You don't get
9 off into this mini-Markmans.

10 I mean --

11 MS. KEEFE: But Your Honor --

12 THE COURT: I hate to say that
13 because it sounds -- I mean, but I've had a few
14 patent trials in my day.

15 MS. KEEFE: Yes.

16 THE COURT: And I'm trying to
17 understand what you're telling me, because I
18 want to be sure I understand what you're trying
19 to tell me. But I've done -- I don't know how
20 many I've had, but I've had, let's just say,
21 over ten patent jury trials. And I've never had
22 that experience that you're describing.

23 So I'm trying to see how it would
24 come up that it wouldn't come up pretrial. I

1 mean, I've had motions to strike.

2 MS. KEEFE: Mm-hmm.

3 THE COURT: I've had -- based on
4 when we get to the part about the expert report,
5 and then I'll get a motion to strike. And I
6 have had to strike experts or portions of their
7 testimony.

8 But what you're telling me is
9 we're going to get to the trial, we're going to
10 have -- this is my assumption. We're going to
11 have two qualified experts and they're going to
12 say something in their opinion that one of them
13 is going to have a different view of or they're
14 going to differ on a claim term such as --

15 MS. KEEFE: Such as access, for
16 example. Access is a great example.

17 We say that access means obtain
18 something that already exists. You have to get
19 something that already exists. The same way
20 that updating has to happen to something that
21 already exists.

22 From conversations that we've had
23 so far, it appears as though plaintiff may
24 attempt to say that access can happen when you

1 create data anew, or when you upload it,
2 something that already existed.

3 For example, if --

4 THE COURT: Like a new friend.

5 MS. KEEFE: I'm sorry?

6 THE COURT: Like a new friend.

7 MS. KEEFE: Like a new friend or
8 kind of a better example --

9 THE COURT: Trying to make it
10 relevant, although I'm not comparing the device.
11 I'm not doing an infringement analysis, but
12 let's just, for the sake of talking, call it a
13 new friend.

14 MS. KEEFE: A little better way to
15 think about it --

16 THE COURT: Yes.

17 MS. KEEFE: -- instead of a new
18 friend would be going ahead and using
19 Mr. Andre's photo analogy, for example.

20 THE COURT: Oh --

21 MS. KEEFE: So if a photo is
22 created.

23 THE COURT: Now, this photo has
24 never been -- I'm a Facebook participant.

1 MS. KEEFE: Exactly.

2 THE COURT: I look for Mr. Andre
3 and I see his picture. And I say that is
4 Mr. Andre I recognize. And now I say, Do you
5 have any pictures of you on your boat?

6 In other words, I write to
7 Mr. Andre and he sends me a picture that's never
8 been on the internet of his brand new boat.

9 Because I know Mr. Andre, he got
10 it as a steal.

11 MS. KEEFE: Probably, Your Honor.

12 THE COURT: Now, use that boat
13 picture, because that's what he would say access
14 means. Now, that's going to be accessed, but
15 it's never been on the Facebook system before.

16 MS. KEEFE: Well, in order for
17 Mr. Andre to send you that picture, what
18 Mr. Andre has to do is Mr. Andre has to be
19 logged on to his profile page.

20 THE COURT: Well, he can answer me
21 later on your system.

22 MS. KEEFE: He can answer later.
23 That's fine.

24 THE COURT: In other words, I can

1 ask him and he can later on respond. Right?

2 MS. KEEFE: Of course.

3 THE COURT: Okay. So he doesn't
4 have to be logged on when I ask for the picture.

5 MS. KEEFE: No. No.

6 No. That's fine.

7 But in order for Mr. Andre to send
8 you that picture so that you can look at it, I
9 mean, the first thing is -- I'll answer your
10 question first and then we need to go back and
11 make sure that we understand in the context of
12 the patent. We're talking about a single user
13 and how they change from one context to another,
14 not two users, you and one and one and the
15 other.

16 THE COURT: Right. I understand
17 that.

18 MS. KEEFE: So it is distinct and
19 different. Now, the -- but in order to answer
20 your question --

21 THE COURT: So there was no
22 picture.

23 MS. KEEFE: It still works with
24 Your Honor's question. It's just a little bit

1 different.

2 THE COURT: Try not to change my
3 question because that's not a good practice.

4 MS. KEEFE: I'm not going to
5 change it. I'm going to answer your question
6 first.

7 Now, in the patent it's a little
8 bit different. So with Mr. Andre's boat
9 picture, you say to him, I wish I had a picture
10 of your boat somewhere.

11 Mr. Andre doesn't have the picture
12 on the profile page. You can't see this.

13 THE COURT: He just got the boat
14 yesterday.

15 MS. KEEFE: So what Mr. Andre has
16 to do is he first has to upload that picture to
17 his profile so that it exists there. So the
18 first thing he has to do is upload it, because
19 it doesn't exist in his profile page.

20 Because it doesn't exist there, it
21 has to be created as a part of his profile or
22 uploaded, create and upload. Go from
23 nothingness to somethingness.

24 So then Mr. Andre has a picture of

1 his -- you know, his boat. That was really bad,
2 but so he has a picture of his boat.

3 THE COURT: It's really not large
4 enough.

5 MS. KEEFE: It's really big. It's
6 the whole island there.

7 So Mr. Andre has a picture of his
8 boat now on his profile page. In order --

9 THE COURT: Which he, by the way,
10 got from the dealer.

11 MS. KEEFE: Which he uploaded,
12 right. But when he put it --

13 THE COURT: He uploaded from the
14 dealer's website.

15 MS. KEEFE: Before it existed, it
16 had to be uploaded to his page. Right.

17 THE COURT: Well, no. It existed
18 on the dealer's website. And he got it from the
19 dealer's website and then uploaded it or
20 transferred it.

21 You know that little thing that
22 says email to a friend whenever you hit on those
23 dealer things. So he clicks it and he sends it
24 to himself on his profile.

1 MS. KEEFE: It still had to be
2 uploaded to his profile. It did not exist --

3 THE COURT: Right.

4 MS. KEEFE: -- in his profile.

5 THE COURT: So he uploads it from
6 here. He says, Okay. Here's the one I want.
7 And he uploads it.

8 Brings it into his Facebook
9 profile.

10 MS. KEEFE: Puts that on this
11 page. So you're over here on your profile page,
12 and you don't have anything on your profile
13 page.

14 So you cannot access -- when
15 you're sitting here, you can't access it because
16 it doesn't exist here. Before you can look at
17 this picture, it has to be uploaded to your
18 page, so that it can be accessed.

19 THE COURT: See, that's the part
20 I'm not understanding. Because if I Google
21 Mr. Andre and I'm not a member, or a friend or
22 anything else on Facebook, --

23 MS. KEEFE: Mm-hmm.

24 THE COURT: -- I'm just somebody

1 who knows about Mr. Andre, knows he bought this
2 book. And I get on Google. I get him.

3 He comes up on Facebook. And they
4 show me a series of pictures and I click onto
5 it.

6 MS. KEEFE: Yes.

7 THE COURT: But I don't have
8 anything with Facebook.

9 MS. KEEFE: You're still entering
10 a new context and uploading that into that
11 context.

12 THE COURT: No, but I'm going to
13 ask him to show it to me on his Facebook
14 display. I'm never going to join Facebook.

15 I'm not even going to maybe be in
16 his -- you can get into Facebook without being a
17 friend, a member or anything else. I'm just
18 fooling around on Google.

19 MS. KEEFE: Yes.

20 THE COURT: I know Mr. Andre. I
21 heard he bought a boat, and I'm going to send
22 him an email through my AOL account.

23 And he's going to put that boat so
24 I can look at it on his profile. I'm not doing

1 anything except --

2 MS. KEEFE: That's why --

3 THE COURT: -- playing on the
4 internet.

5 MS. KEEFE: Yeah. All you're
6 doing is looking right here. You're not
7 actually moving the picture anywhere. You're
8 just looking at it.

9 THE COURT: You said I was going
10 to upload it to my site.

11 MS. KEEFE: If you asked him to
12 email it to you -- you had said you wanted him
13 to show it to you.

14 THE COURT: Show it to me. That
15 was the point.

16 MS. KEEFE: If it is just to show
17 it to you, he can just log on. You can do your
18 search on Google.

19 And the thing that shows you is
20 Mr. Andre's profile where it already exists. At
21 that point, you do have access to it, because it
22 lives there and you have just been brought to
23 that page.

24 Now, that's not what the patent,

1 though, is talking about.

2 THE COURT: Right.

3 MS. KEEFE: What the patent is
4 talking about, if we actually look, for example,
5 at Claim 9, which happens to be up on our
6 screen, or I have Claim 1, the patent talks
7 about creating data, one user, one person
8 creates data in a first environment, which is a
9 file or a document. So that would be the
10 picture.

11 Mr. Andre or someone put it up
12 there. They upload it.

13 At that point exactly, metadata is
14 associated with that created file in this
15 context. Metadata includes information related
16 to the user, the guy who created it, the data
17 itself, the app used to create it and where he
18 is.

19 The claim goes on to say now,
20 tracking movement of the user. So this is not
21 the same situation where you just want to see
22 his pictures.

23 The claim says we're going to
24 follow Mr. Andre. Now, if Mr. Andre goes into

1 another page, so Mr. Andre has now moved on
2 to -- you gave him permission to be on your
3 Facebook page, so he's in a new page that he was
4 never on before.

5 Now, on that page, the picture
6 doesn't exist there. Under the patented system,
7 the minute Mr. Andre moves over here, the
8 picture comes with him. It's in his backpack.

9 So now he can access it without
10 having to go back and find it or call up, you
11 know, do a meta call that actually requires it
12 to be uploaded or recreated where he basically
13 kind of redraws the picture here.

14 The patent talks about tracking
15 that movement of the user from one place to
16 another where the user brings that picture. He
17 uses that picture in the second environment.

18 Another way to look at it with
19 just boxes, in Box A, B and C live. In Box B,
20 X, Y and Z live.

21 This is the first context. And
22 this is the second context.

23 When a user sits in Box A, sorry,
24 Box Number 1, he has access to A, B and C

1 because they live there. They're already there.

2 The user doesn't have to do
3 anything. They're right here. He can employ
4 them, use them because they exist or he can
5 access them.

6 If the user then moves over to
7 number two, he no longer has access to A, B and
8 C, without the task of uploading it by dragging
9 it from one to two or recreating it so that it
10 now exists into where he can access or use it.

11 What we want to be careful of is
12 that terms like access and use don't get
13 conflated with terms like create and upload,
14 because they are very different things. And the
15 patent, specifically because of the notion that
16 the patent is following the user with the data
17 that's already in the backpack and saying, Hey,
18 the backpack sticker went from I'm not in Number
19 1 now. Now I'm in Number 2 because the user
20 brought me over there.

21 There's a very big difference
22 between what the user can access because it came
23 with him and the movement was tracked, or what
24 was already in that context that he could access

1 or employ versus what he now has to recreate --
2 has to create anew or upload in that second
3 context.

4 THE COURT: Mr. Andre, do you
5 agree with that?

6 MR. ANDRE: No, Your Honor.

7 THE COURT: You can use the
8 boxes --

9 MR. ANDRE: No, Your Honor, not at
10 all.

11 THE COURT: -- taking the data
12 from one to the other to the other.

13 Tell us why you don't agree with
14 that.

15 MR. ANDRE: Well, I guess what --
16 I couldn't see what she was drawing here. I
17 wasn't sure I was following it.

18 The way I would use your analogy,
19 Your Honor, if you sent me an email, saying I
20 want to see your boat, I would access the
21 picture of the boat. I didn't upload it. The
22 dealer has it on their site.

23 I just access that. I say you can
24 look at it. Now, you do a search for Mr. Andre

1 and his boat. Boom, you've got it.

2 That's the idea here. This idea
3 of going, taking it from here to here to here
4 doesn't make sense, because the idea here is
5 having a central repository of the data.

6 It's not having to carry it in a
7 backpack from site to site to site to site. If
8 you do that, the backpack would get so full,
9 one, eventually you couldn't find anything in
10 it. Two, it would get so burdensome, it would
11 just slow you down. The system would just bog
12 down to nothing.

13 So this idea here of going from
14 carrying the data with you wherever you go from
15 one context to the next to the next defeats --
16 that's the antithesis of what this patent is
17 about. This patent is about having -- you know,
18 Ms. Keefe talked about having -- making another
19 copy. That's the last thing you want to do.

20 You don't want to have to make
21 multiple copies of the same data. You want to
22 have one copy and have access to everybody. You
23 want to have many-to-many functionality. That's
24 the idea here.

1 So this idea is not what the
2 patent is trying to cover. This is just the
3 opposite.

4 The idea here is to have a
5 back-end system, not where it can track the user
6 using user interaction. What the user does will
7 create metadata on the back-end system, make it
8 easier for you to find a picture of my boat.

9 But it's not this idea of going
10 from place to place and me carrying it with me
11 and then having to make a copy of it to give it
12 to you. So in this particular -- what the
13 dealer -- if I access the photo from the dealer,
14 and in your analogy, you would see the picture
15 of the boat without me having to upload it or
16 anything else, just by searching my name or the
17 word boat.

18 So that's the idea. And I think
19 Your Honor had it right when you were asking the
20 questions. That way you could access it if you
21 Google it or wherever, and you can see that.

22 THE COURT: So it doesn't have --
23 that's what you were saying earlier, that's why
24 you disagree with the backpack analogy from the

1 papers?

2 MR. ANDRE: Absolutely.

3 THE COURT: So --

4 MS. KEEFE: But, Your Honor, that
5 ignores the specification. If we look at the
6 patent specification, what they wrote, --

7 THE COURT: Right.

8 MS. KEEFE: -- the quote could not
9 be more clear. Column 4, Lines 1 through 7,
10 Summary of the Invention, as a user creates a
11 context or moves from one context to at least
12 one other context, the data created and
13 applications used previously by the user
14 automatically follows the user to the next
15 context.

16 THE COURT: In my analogy, am I
17 the user or is Mr. Andre the user?

18 MS. KEEFE: In your analogy,
19 Mr. Andre is the user, because you're not
20 creating data. You're just looking at something
21 that is -- that someone else had already
22 created. And there is no movement.

23 So you're actually not falling
24 within what the patent is claiming. What the

1 patent is claiming is trying to locate database
2 and tracking the change of a user from one
3 context to another. It's in every single claim.

4 Every claim talks about going from
5 one context to another. And what you do in the
6 first context when you create it, what happens
7 to that data, how the metadata is written, what
8 happens when you move to the next context, and
9 how the metadata gets overwritten, or rewritten
10 or updated.

11 So that now it says, Oh, you're
12 right. I'm no longer in Number 1. I'm now in
13 Number 2 because the user moved me there.

14 Mr. Andre keeps talking about how
15 my backpack is going to get too heavy. I'm not
16 sure how heavy the backpack would get, but it's
17 what the patentee claimed he invented.

18 It's all about associating the
19 data with the user, not with the traditional
20 file. So you had to remember where it was and
21 how you got there.

22 Another one of the terms that is a
23 good example of this, Mr. Andre says everyone
24 understands what it means, but we definitely

1 need to have construed is dynamically.

2 Dynamically appears in Claim 9.

3 For example, it talks about how
4 the system is going to dynamically associate
5 metadata with the data. So this is kind of back
6 to my first drawing how when I created the
7 document, instantly wrote the metadata kind of
8 onto the top of the document. If we go on, you
9 can see that dynamically actually has a very
10 special meaning in the file history.

11 The patentee originally tried to
12 simply use the word automatically, but was
13 rejected. And the claims were rejected when the
14 word automatically was being used because the
15 prior art did talk about automatically having
16 things happen.

17 So the patentee was saying, No,
18 it's something different than automatic. It's
19 dynamic.

20 Now, the difference between
21 dynamic and automatic can also probably best be
22 described with an analogy. We think about
23 lights that we all have at home to make burglars
24 think that we're home when we're not.

1 We have the timer. The light
2 comes on every night at five o'clock whether
3 you're there or not, whether anything happens or
4 not. The light automatically comes on.

5 Your sprinklers probably
6 automatically come on at 3:00 a.m., too. As
7 opposed to motion detection lights that many of
8 us have in the front of our garage or on a
9 walkway that only come on if they sense that
10 someone has walked by. Those are dynamic, not
11 automatic.

12 They don't always come on.
13 They'll only come on if someone walks by and
14 triggers the response. And in response to that
15 stimulus, they automatically come on.

16 The user doesn't have to do
17 anything else. The person walking by doesn't
18 have to go over and flip a switch. They walk
19 by, it automatically comes on.

20 We were teasing that perhaps
21 sprinklers could have a dynamic switch if the
22 cat ran in and you wanted to get the cat wet or
23 something. But the difference between dynamic
24 and automatic was one of the things that they

1 changed in order to obtain allowance of their
2 claims.

3 They can't now go back and say,
4 Oh, yeah, but, you know, dynamic can just mean
5 automatic or it's a synonym, because it's not.
6 It clearly means something else. And it needs
7 to be defined as it was when they changed the
8 word.

9 Go ahead. You can go to the next
10 one.

11 That's good. That's fine.

12 Mr. Andre also complains that I
13 tried too hard to overread all of these
14 definitions of application, workspace, web,
15 context and environment. But yet again, I'm not
16 sure I understand why, but plaintiff is ignoring
17 its own specification and file history.

18 Figure 9 of the specification
19 clearly shows us that the patentee considered
20 context, web, board, application,
21 database/folders and files to be interrelated in
22 some way. And they can be linked through this
23 linking protocol. That's what's in Figure 9.

24 The patent specifically defines a

1 board as a collection of data and application
2 functionality related to user-defined topic.
3 They said this not only in the specification
4 itself at Column 7, but they also specifically
5 described it in the file history, because they
6 were trying to overcome a piece of prior art
7 called McKelvie.

8 And in overcoming McKelvie, the
9 patentee told the Patent Office, unlike
10 McKelvie, which just has places where you do
11 things, we have a concept of boards, and webs
12 and things that are different. Boards are
13 collections of data and application.

14 Webs are collections of
15 interrelated boards or workspaces. Workspace is
16 the term that is in the claims, but it's used
17 synonymously with boards specifically in the
18 file history as well as in the specification.

19 If a web is a series of
20 interrelated boards and if we look at the
21 figure, the web sits above the boards. The
22 board sits above the application.

23 Webs are a series of interrelated
24 boards. Boards are applications plus data which

1 is below it. Everything builds on itself.

2 So a context is a series of
3 interrelated webs. And then the environment in
4 the specification, clearly Figure 21 indicates
5 that the environment is meant in the broadest
6 possible sense.

7 Figure 21 shows us at 2100, the
8 little number at the top with the arrow, saying
9 this whole thing. The specification says 2100
10 is the environment in which the invention
11 happens. It absolutely includes applications
12 and data, so it has to be bigger than the whole.

13 This is directly from the
14 specification and the file history where in
15 order to overcome McKelvie, the patentee told
16 the Patent Office, I'm not like those other guys
17 where there's just places to be. I have boards,
18 and webs. And boards have applications and webs
19 are a bunch of boards.

20 File history estoppel tells us if
21 you define a term or you explain yourself as
22 being different from the prior art in order to
23 obtain allowance of your claims, you have to use
24 that, because one of ordinary skill in the art

1 having read the file history, the specification
2 before they get to the claims now knows every
3 time I see the word web, I have to think series
4 of interrelated boards. Every time I see board,
5 I have to think application and associated topic
6 functionality.

7 Application is -- you know,
8 computer science dictionaries tell us is the
9 executable program, et cetera.

10 So we're not trying to create some
11 funnel. We're using the words of the patentee
12 that he used to obtain allowance of his claims.

13 So that's why our definitions are
14 what they are. Application, a computer program
15 designed to accomplish a task.

16 Microsoft Press. Workspace by the
17 patentee, collection of data and application
18 functionality related to a user-defined topic.

19 Web, by the patentee, collection
20 of interrelated boards or workspaces. Context,
21 by the patentee, because of Figure 9, collection
22 of interrelated webs.

23 Another term that the patentee
24 gave a specific definition to in order to obtain

1 his claims is metadata. We can't just give
2 metadata it's plain and ordinary vanilla meaning
3 of information about information, because the
4 patentee, in trying to obtain his claims,
5 specifically told the Patent Office, I don't
6 just have information about information.

7 I have metadata and my metadata is
8 a different kind. It's a different flavor than
9 everybody else's metadata.

10 So if we take a little walk
11 through the file history. Go back.

12 The claims used to say that you
13 would dynamically versus automatically. So it
14 used to say you would automatically associate
15 with a user of the user workspace information
16 related to the data.

17 Well, information related to the
18 data is basically metadata. But between the
19 give and take with the examiner, that wasn't
20 enough.

21 Instead, they took out information
22 related to the data and said what I have instead
23 is metadata. But it's not just any metadata.
24 It's metadata that specifically relates to a

1 user, the application and the location.

2 So that -- and we go to the last
3 part of the claim, a user can access the data
4 via the metadata. You have to be able to access
5 the data via the metadata.

6 If all you have is just some
7 random information, then it can't function.
8 Instead, the specific metadata has to have
9 information about the user and the location so
10 that you can use that metadata to locate the
11 information.

12 And if we go on in the file
13 history, Mark, in order to overcome the McKelvie
14 reference, the patentee said McKelvie does not
15 teach or suggest including in the metadata
16 information related to a user of the user
17 environment. Moreover, McKelvie does not teach
18 or suggest dynamically associating metadata with
19 the data, or associating in the metadata at
20 least one of the data and the application with
21 the second user environment.

22 So, Mr. Examiner, I don't just
23 have boring old metadata, because McKelvie did.
24 I don't just have information about information.

1 I have special metadata which includes
2 information relating to the user and to at least
3 one of the data, the application or the second
4 environment. And that's what our definition
5 captures.

6 If you simply went with metadata
7 being plain and ordinary, you would be going
8 against what the patentee had to do in order to
9 obtain allowance of its claims.

10 Similarly, the same office action
11 response in order to explain what he was doing,
12 the examiner or, sorry, the patentee said, in
13 contrast, and that's in contrast to the McKelvie
14 reference, the subject invention is much more
15 than a messaging architecture as taught in
16 McKelvie.

17 And the natural language
18 processing system of Smiga, the other piece of
19 prior art, the instant invention, unlike those
20 other ones, dynamically captures context
21 information of a workspace and stores that
22 information in the form of metadata, which is
23 further associated with the data.

24 The metadata allows the tracking

1 and capture of user interactions through one or
2 more workspaces. And he wraps up his argument
3 by saying, again, this context information of
4 the single workspace and/or shared workspaces
5 and any movement of a user, again, moving from
6 one context to another, is automatically
7 captured and stored in the metadata. The
8 special metadata.

9 And the metadata is further
10 associated with data that is created in that
11 workspace.

12 If we go back and step back and
13 say any metadata is metadata, we'd ignore what
14 the patentee had to say in order to get his
15 claim allowed. And only our definition captures
16 that.

17 With respect to component,
18 Mr. Andre says that I say component can't be
19 defined and I ignore the specification. It's
20 not true.

21 We actually do accept and
22 acknowledge that the term component is defined
23 in the specification. The problem is you can't
24 take component out of context. Component is

1 always used with a modifier.

2 And if you look at the language of
3 the claims themselves, it's always a tracking
4 component for tracking the movement of a user.
5 A context component for storing those -- for
6 accessing those kinds of information.

7 So we have to look, what was the
8 definition given to component? We have to make
9 sure that there is enough structure in the claim
10 so that the claim does not require us to invoke
11 35 U.S.C. Section 112, Paragraph 6.

12 The patentee defined component --
13 do you have the next slide -- defined component
14 to be everything as used in this application.
15 The terms component and system are intended to
16 refer to a computer-related entity, either
17 hardware, a combination of hardware and
18 software, software, or software in execution.

19 The patent goes on to say, for
20 example, a component may be, but is not limited
21 to being, a process running on a processor, a
22 processor, an object, an executable, a thread of
23 execution, a program and/or a computer. By way
24 of illustration, both the application running on

1 the server and the server can be a component.

2 One or more components may reside
3 within a process and/or thread of execution, and
4 a component may be localized on one computer
5 and/or distributed between many. So what the
6 patentee is saying is it can be anything.

7 According to MIT versus Abacus
8 Software, and MIT versus Abacus Software dealt
9 with use of circuit in a claim much in the same
10 way that the word component is used in our
11 claim. What the Court, the Federal Circuit did
12 in MIT versus Abacus is they said, Okay,
13 circuit. It's kind of a fluffy word. I'm not
14 sure if there's enough structure.

15 So let's go into the specification
16 and see how they used the term to see if it's
17 constantly used with adequate structure to avoid
18 implication of 112, Paragraph 6.

19 The Court in that case found that
20 every time the patentee used the term circuit,
21 he did it only with respect to hardware. And as
22 a result, circuit was given sufficient
23 structure, so that 112, 6 was not invoked.

24 Here, component is defined to be

1 hardware and/or software, and/or software
2 running on a computer. Not even just the
3 software, but software in the execution.

4 The MIT Court said if circuit had
5 been either hardware or software, it would have
6 invoked Section 112, Paragraph 6 because
7 software is not structure. It's function.

8 And here, not only do we have
9 software, we have less than software, which is
10 software in the execution.

11 So whenever we see component, we
12 know that it can be functional; and therefore,
13 because it can be purely functional, 112, 6 is
14 invoked. Once 112, 6 is invoked, the tracking
15 component, we go back to the specification to
16 see how the patentee used the tracking
17 component, the storage component or the context
18 component.

19 And did they in the specification
20 give us enough structure for Your Honor to come
21 up with a claim construction which shows what
22 the structure is so that the jury, when it's
23 doing its application, will compare that
24 structure or its equivalents to the accused

1 device?

2 Here, tracking component, context
3 component, and storage component are not
4 disclosed with any additional structure.
5 Instead, and we also have advice from a WSM
6 Gaming circuit, which says if you disclose that
7 software is what you're talking about, the
8 structure must actually be an algorithm or a way
9 of accomplishing that. It can be a blocked
10 diagram that shows exactly how that piece of
11 software would function or the algorithm itself.

12 If there is no algorithm, which
13 there is not anywhere in this case and no one
14 contests that, the means-plus-function element
15 for which the disclosed structure is only a
16 general purpose computer is invalid because of
17 the lack of an algorithm for performing that
18 function.

19 So instead of saying that it can't
20 be defined, the term component is defined. But
21 that definition, when you put it back in the
22 context of the claim, renders the terms tracking
23 component, storage component, and context
24 component, subject to 112, 6, they have to be

1 read as 112, 6 because there is no structure
2 associated with them because of the definition
3 of component.

4 Once 112, 6 is invoked, we have to
5 look to the specification to see if the
6 structure is disclosed in the specification
7 since it's not in the claim. And here, it
8 isn't.

9 In fact, just so Your Honor knows,
10 there's only, I think, two mentions of the
11 tracking component. And in both cases, they
12 simply -- I think Column 9 is one, and they
13 simply mention that the tracking component can
14 be used to track. They don't go forward and say
15 how you would do that or how one would execute
16 that.

17 And with respect to the storage
18 component, they simply say you can do it any way
19 that it works, which of course, is not also an
20 algorithm or a means of actually accomplishing
21 enough structure to satisfy 112, Paragraph 6.

22 With respect to context
23 information, this is another one of the terms
24 where I'm not a hundred percent certain that I

1 understand why they disagree, and yet the fact
2 that we disagree begs Your Honor to actually
3 construe the term. So we're not continuing to
4 fight about it, and so that this case is
5 actually constrained.

6 Based on the patent specification,
7 context information seems logically to be data
8 that identifies at least a specific context.
9 I'm not sure what's wrong with that.

10 They've simply said that they
11 don't agree with it, but they haven't proposed
12 an alternative construction. And we think it
13 would assist the jury.

14 With generating and create, we've
15 already talked a little about that. The biggest
16 problem with generating and create is that they
17 can't be conflated with access and upload
18 because -- and one other small point, Mr. Andre
19 said that I change the definition based on
20 whether it was accesses or accessed or employs
21 or employed.

22 If you look at the remainder of
23 the claim, I didn't change the definition of
24 access. Access is retrieves or retrieved.

1 The fact that I changed it from
2 workspace to environment was because of the
3 entire phrase and the claim in which it
4 appeared. So I wasn't changing the definition.

5 Access means retrieves as distinct
6 from uploading, adding or creating. Employs
7 means uses as distinct from uploading, adding or
8 creating. The rest of the language is to show
9 how it fits within the claim itself.

10 Go ahead.

11 And here we have the difference
12 between updating, capturing and locating. They
13 do not encompass the idea of creating or the
14 idea of generating, because you can't update
15 something that didn't previously exist.

16 And yet it appears to us from
17 conversations with plaintiff that they're going
18 to argue that something can be updated. And in
19 fact, their brief implies it, that something can
20 be updated by being created.

21 But that's not the case. You
22 can't update something that didn't previously
23 exist.

24 So in order to make it clear to

1 the jury that these terms have different
2 meanings because they're used differently in the
3 claims, we need update to be defined to be
4 modifying existing data to make it current.

5 Capturing is obtaining. I was
6 made a little bit of fun of. This isn't about
7 pirate ships. But the problem with capture is
8 that, again, a jury may have a very different
9 interpretation of capture than a computer
10 scientist.

11 Computer scientists understand
12 capture to be obtaining information, to receive
13 files for later analysis. Whereas humans might
14 think that -- and I'm sorry, Mark, I didn't mean
15 to say computer scientists weren't humans.

16 But we do have the definition of
17 capture as being to win possession or control of
18 and to not let go. And that's not the same
19 definition. So we want to make sure that those
20 are not confused in the jury's minds.

21 Locating, locating is finding.
22 One of the differences -- I know in the brief we
23 talked a little bit about the fact that there
24 are actually two analogies that are used in the

1 different claims. In claims, independent Claims
2 1, 9, 21, 23, we basically have that backpack
3 analogy. We have the information following the
4 user as the user goes from one context to
5 another.

6 In Claim 17, we have a little bit
7 different situation. In Claim 17, we have the
8 bread crumb analogy.

9 Again, we don't want the user to
10 have to think. We want the user to be able to
11 just put it out of their mind and be able to
12 find the information later.

13 And in this case, locating does
14 mean find. Hansel and Gretel located their
15 house by following the bread crumbs. They had
16 the exact path to take and they located the
17 house by following that path back exactly, so
18 that they could find or locate their house.

19 Associated, association and
20 associating mean linked. Again, we're not sure
21 why there's a dispute here.

22 But in order to make certain that
23 we're not arguing different definitions from now
24 until the time we're in front of the jury, it

1 makes more sense just to establish that it's
2 linked.

3 Leader has not said why they don't
4 like our definition, simply that they don't like
5 it because it's wrong. But they haven't said
6 what would be right.

7 So clearly we have a dispute as to
8 what it means. And so it would be helpful if
9 the Court would simply define it.

10 THE COURT: But I keep getting
11 back to this.

12 MS. KEEFE: Sure.

13 THE COURT: That is, what's a
14 little bit confusing. You're going to have
15 expert reports.

16 MS. KEEFE: Mm-hmm.

17 THE COURT: And the expert reports
18 are going to, on infringement, purportedly
19 analyze. They're going to take the claim
20 language, apply it in their infringement
21 analysis. And in that analysis, if they said
22 that captured meant using a rifle or
23 something, --

24 MS. KEEFE: Mm-hmm.

1 THE COURT: -- you're going to
2 move to strike. If they said -- if the experts
3 don't get into that, any kind of crazy defining,
4 you're both really focused on the opinion
5 ultimately of infringement.

6 And I think that's Mr. Andre's
7 point. You wouldn't necessarily at a Markman
8 hearing take all sorts of words that concern you
9 in a patent that both sides agree should have
10 plain and ordinary meaning to an expert or
11 someone skilled in the art and have a judge
12 start to define them, because there hadn't been
13 shown to be any real dispute yet.

14 And you certainly wouldn't let --
15 if someone said that in the context -- I'm just
16 putting it out there.

17 MS. KEEFE: It's hard. You can't
18 do that without that word.

19 THE COURT: Yeah. I'm trying to be
20 relevant in the context of the experts in this
21 case. Infringement analysis, if somebody said
22 that captured meant to forcibly obtain, I mean,
23 come on. I don't know what they'd come up with,
24 but something other than --

1 MS. KEEFE: Mm-hmm.

2 THE COURT: -- within the realm of
3 reasonable interpretation, that the other side
4 would move. And then I'd get into that.

5 And probably if they were using
6 something like an adverb of forcibly, I would
7 grant a motion to strike and say, Well, that
8 opinion is gone. And/or in the alternative, I
9 would, if it was truly an expert dispute, I
10 would provide the meaning.

11 But doesn't that make sense?

12 MS. KEEFE: A little bit, but --

13 THE COURT: No.

14 MS. KEEFE: -- I understand what
15 Your Honor is thinking and I understand what
16 Your Honor is saying. But Your Honor is
17 actually adding in something that you could --

18 THE COURT: Here's what I'm
19 saying: I don't think Judge Farnan telling the
20 experts in this case, the infringement experts,
21 that the word locate means find is going to
22 assist them in any way, unless they're off their
23 reservation and they need Judge Farnan to tell
24 them as computer experts what locate means.

1 MS. KEEFE: But --

2 THE COURT: Because I assume
3 they're going to do their task professionally.
4 And on those kinds of terms, there's not going
5 to be any big dispute.

6 Now, maybe in some other term or
7 maybe with relationship to some other term, they
8 might have. I'm not even sure it would be in
9 the metadata, because they probably are going to
10 wash that out in their opinion by the reference
11 to the specification just like I would do. But
12 maybe that's a word that could require some
13 construction.

14 But --

15 MS. KEEFE: Well, I think with
16 those terms, especially metadata, dynamically,
17 that's used in the prosecution history and said
18 by the patentee, I think Your Honor absolutely
19 should construe those so that we avoid having to
20 come back and talk about them again.

21 Perhaps --

22 THE COURT: See, I can see where
23 both experts would understand metadata, and
24 their real dispute would be whether the

1 metadata, as understood by someone of ordinary
2 skill in the art, in reading this patent is in
3 Facebook.

4 MS. KEEFE: But they have to
5 understand how metadata is used in this patent,
6 not just the word being used.

7 THE COURT: They're going to
8 understand it just like Judge Farnan would.
9 They are going to read the claim language.
10 They're going to look at the prosecution
11 history.

12 They're going to look at the
13 specification, and actually that's probably
14 where the dispute is.

15 MS. KEEFE: Exactly.

16 THE COURT: In the infringement
17 analysis, I mean.

18 MS. KEEFE: Part of what we
19 need -- what we can do, Your Honor, to avoid
20 coming back to you with these expert disputes,
21 if we know that the parties are interpreting the
22 term access differently, we know they are, than
23 Your Honor can avoid the unnecessary motion
24 practice.

1 THE COURT: Why would I define a
2 term rather than strike?

3 In other words, see, I hate to
4 become like involved until it's absolutely
5 necessary.

6 MS. KEEFE: Okay.

7 THE COURT: And I guess --

8 MS. KEEFE: Well, I mean --

9 THE COURT: In other words,
10 there's a number of things a party can do if
11 that starts to happen.

12 MS. KEEFE: Of course. But --

13 THE COURT: And then procedurally,
14 it's more appropriate.

15 MS. KEEFE: Given what Your Honor
16 is saying, there may be a series, given what
17 Your Honor is saying about our ability to strike
18 if the experts go off and use something contrary
19 to what we think the plain meaning is, even
20 though they've --

21 THE COURT: I've done dental cases
22 where the experts were like you thought a tooth
23 was a pew at church.

24 MS. KEEFE: It could happen.

1 THE COURT: I mean it happened.

2 It was like wild.

3 And I had to weigh in. But in
4 that instance, I weighed in in the context -- I
5 keep using that word.

6 MS. KEEFE: It just works.

7 THE COURT: It just works here, or
8 in the environment of someone --

9 MS. KEEFE: It's the bigger thing,
10 the environment.

11 THE COURT: Summary judgment,
12 that's where I use the environment.

13 MS. KEEFE: Summary judgment would
14 be fun, Your Honor.

15 THE COURT: Well, is what
16 you're -- again, I don't want to be an advocate
17 here, but the more I'm hearing here, it may be
18 the more this case is one of those one
19 percenters.

20 MS. KEEFE: We certainly think so,
21 Your Honor.

22 THE COURT: I don't know, but it
23 may not be.

24 MS. KEEFE: Of course he's nodding

1 no, but of course I'm nodding yes.

2 THE COURT: I don't know. I don't
3 know, but I have to see --

4 MS. KEEFE: Given --

5 THE COURT: -- how the experts
6 prepare the reports. But I don't think the kind
7 of terms that you're asking me to construe are
8 going to lend any assistance to the experts in
9 developing their opinions on infringement.

10 MS. KEEFE: Given what Your Honor
11 is saying, I don't think -- if you wouldn't mind
12 giving me two minutes to just talk to my team a
13 little bit, I actually think we can whittle the
14 list, given what Your Honor is saying, the
15 ability to use motions to strike if the experts
16 go off the reservation, knowing that we already
17 have a dispute.

18 And it may very well come to that.
19 I still think that there are at least three or
20 four terms in our longer list that are not on
21 their five that we would request. For example,
22 metadata or dynamically because of the specific
23 usage in the file history that they are bound
24 to, and I think it would save everyone time and

1 effort if you did construe those right now.

2 I think we can whittle this list
3 down a little bit. I would just need a couple
4 of minutes to make sure I'm not giving up the
5 wrong thing.

6 THE COURT: Sure.

7 MS. KEEFE: Would Your Honor mind?

8 THE COURT: No. I'm going to get
9 the same check at the end of the month whether I
10 give you a couple minutes or somebody else.

11 MS. KEEFE: Thank you. I'll be
12 just a minute.

13 THE COURT: Well, at least I hope
14 I'm going to get the same check.

15 Actually if you want -- I think I
16 understand where both sides are.

17 MS. KEEFE: Okay.

18 THE COURT: As I said, I've read
19 the papers carefully and have a good idea of
20 what you want to have done here. Why don't
21 you -- why don't we -- why don't you wrap up
22 whatever you think you want to wrap up with.
23 And like today's Tuesday, say by Friday write me
24 a letter --

1 MS. KEEFE: Mm-hmm.

2 THE COURT: -- on what are the --
3 you have five terms or so. And if you want to,
4 for present purposes, submit four more.

5 MS. KEEFE: Okay.

6 THE COURT: I'll give you until
7 Friday to do that, and then you can put
8 something in place that answers whatever they're
9 telling me.

10 MR. ANDRE: That would be fine,
11 Your Honor.

12 MS. KEEFE: That's fine.

13 MR. ANDRE: They would submit a
14 letter on Friday. We'd send a response letter
15 on Monday or Tuesday?

16 THE COURT: Yeah.

17 MR. ANDRE: That is fine.

18 THE COURT: That way, there's no
19 rush on either side to -- I mean, five terms are
20 in the papers, so we know we have those.

21 And then we'll get -- then I'll
22 address what it is that you present with the
23 understanding that we'll then move with those
24 constructions, whatever I do to the expert

1 report stage. And then we'll see where we are.

2 MR. ANDRE: That would be great,
3 Your Honor.

4 MS. KEEFE: That sounds good, Your
5 Honor.

6 THE COURT: It might save some
7 money, too.

8 MS. KEEFE: It very well might.
9 That actually raises another point that I do
10 have a few terms that I haven't addressed,
11 including traversing and ordering that are
12 already on the list, which I'd love to get to
13 that.

14 But before I get into that, in
15 terms of saving money, Your Honor had originally
16 said that we would be narrowing this case before
17 Markman to representative claims. We actually
18 asked Your Honor --

19 THE COURT: And I gave you all a
20 chance to do that --

21 MS. KEEFE: And we gave you --

22 THE COURT: -- in December and I
23 gave you -- well, I gave you a chance to do it
24 back then. I gave you another chance by admitted

1 order, I think, December 3rd.

2 MS. KEEFE: But we gave Your Honor
3 a selection. They simply refused to participate
4 in any fashion. We shouldn't be punished for
5 that, Your Honor.

6 THE COURT: No. No.
7 No. Here's -- let me explain
8 something.

9 My point is I don't like to
10 advocate in narrowing terms. I certainly have
11 the authority to do it and I think the Federal
12 Circuit more and more is recognizing in
13 different combinations of panels that ability.
14 I try not to do that until a certain stage of
15 the case.

16 But believe me, I've got orders
17 out there. I'll drop that gauntlet, but I won't
18 do it until we're through the expert reports.

19 MS. KEEFE: Okay.

20 THE COURT: Because I think a lot
21 of judges think they're helping themselves, but
22 they're really not because you're better doing
23 it on a fuller record. But and I don't think
24 it's until you get to the point of pretrial

1 order preparation that you can really save a lot
2 of money, because you are basically just
3 throwing some stuff in for the experts, in my
4 experience.

5 But, so I'm willing to do it.

6 MS. KEEFE: Okay.

7 THE COURT: And I will do it, but
8 you all ought to try to do it yourselves,
9 because it's your case. You're going to present
10 to that jury.

11 I'm going to sit here and relax.
12 I've got the easy job here.

13 So I keep giving you the
14 opportunities. I tried to give you another one.

15 And so keep working together. But
16 feel confident that if it's not done, that I
17 would never let a 29 claim case or something go
18 to a jury.

19 MS. KEEFE: Thank you.

20 THE COURT: And Mr. Andre knows
21 that.

22 MR. ANDRE: That's correct.
23 That's great, Your Honor.

24 And I would expect by the time we

1 get through the expert discovery phase, that's
2 when we'll start, you know, preparing our case.

3 THE COURT: Then you can see if
4 you gutted your case or not.

5 MR. ANDRE: Right now we'd be
6 shooting in the dark. We haven't taken a single
7 deposition in the case yet, so it's something
8 that is premature to do at this phase.

9 THE COURT: Okay. And so that's
10 the explanation why I haven't done it --

11 MS. KEEFE: Okay.

12 THE COURT: -- on anything I've
13 been presented to date. But everybody knows
14 I'll get to that as I become confident that
15 we're going to a jury. And I think our cases
16 are pretty efficient by the time of pretrial for
17 a jury presentation.

18 I hope that helps.

19 MS. KEEFE: Thank you, Your Honor.

20 One of the other words that we
21 definitely do disagree with is traversing.
22 Leader has proposed that traversing means
23 searching, but that is not the common and
24 ordinary definition of the term traversing.

1 Traversing in Microsoft Press
2 Dictionary means to navigate according to a
3 specific path or route. The actual exact
4 definition, which I handed up to Your Honor and
5 it was inadvertently left out, is straight from
6 the dictionary in programming. So in computers.

7 To access in a particular order
8 all of the nodes of a tree or similar data
9 structure. And if Your Honor would prefer to
10 use the exact words of the one of ordinary skill
11 in the art definition, to access in a particular
12 order all of the nodes of the data structure,
13 we're okay with that, too.

14 What we meant by navigation was
15 that act of going, not the navigation like
16 navigating where you're figuring out where to
17 go, but literally the actual movement. Traverse
18 means cross. It means move.

19 And it actually fits in the claim
20 because in the claim you're traversing the data
21 structures in order to locate the information.
22 So you're crossing it.

23 It goes back to the Hansel and
24 Gretel bread crumb analogy. You traverse the

1 forest by following the ordered path that had
2 been laid out for you by those bread crumbs in
3 order to locate the thing you want, the house,
4 the document, whatever else it is.

5 Traverse does have a plain and
6 ordinary meaning and it is not searching. And
7 it doesn't even fit in the context of the claim,
8 because the claim talks about traversing the
9 data arrangements in order to locate the data.
10 So you're crossing it in order to get it to find
11 the thing that you want.

12 And don't forget that's what the
13 entire patent is about. How do I gain access to
14 the information that I was too dumb to remember
15 how to title or what file I put it in? I made
16 sure that the computer took care of figuring out
17 where we are. And traversing is used in the
18 same claim as ordering.

19 Now, plaintiff has said that
20 ordering just means organizing, I think, or
21 arranging.

22 Keep going. Find ordering.

23 There, it's on the same one. So
24 they've said that it simply means organizing.

1 But the specification clearly indicates that
2 ordering is placed into a fixed sequence.

3 Now, by fixed, I think there was
4 some confusion. And if that's the case, we can
5 modify the definition a little bit.

6 What we mean by a fixed sequence
7 is once the sequence is in place, it stays there
8 so that you know what it is. Kind of like
9 leaving the bread crumb trail. The bread crumb
10 trail doesn't magically change after it's been
11 laid down, so that you can go back along those
12 same bread crumbs. So placed into a sequence is
13 what ordered means.

14 The specification talks
15 specifically about ordering things as A to B to
16 C to D. In Column 9 of the specification,
17 Column 9 of the specification,.

18 The patent specifically talks
19 about if there were a system with two webs where
20 web one included five boards A, the starting
21 board. So it has to have a first thing.

22 So it's ordered in a sequence with
23 something being first, so A, the starting board,
24 B, C, D, E. Each -- with each subsequent board,

1 a child to the previous board.

2 The patent goes on in Line 8 to
3 actually show that order sequence A, little
4 arrow B, little arrow C, little arrow D, so that
5 you know what the sequence is so that you can
6 trace it back when you need to locate the data.

7 So ordering doesn't just mean
8 organizing. You can organize things by saying,
9 Okay. Well, it was chaos, but now that I
10 cleaned them up a little bit, they're organized.
11 That's not what ordering means.

12 Ordering means starting with
13 first, then going to second, then going to
14 third. There is an order to it. There is a
15 specific sequence.

16 If the word fixed is the problem,
17 we can eliminate that. But it's the sequence
18 part, and that's what's disclosed in the
19 specification because they always talk about
20 having a starting board and going from the
21 starting board to the ending board. And this is
22 the only part of the specification that actually
23 talks about traversing anything and going across
24 it by knowing what the order was. The sequence

1 A, B, C, D that you actually put things in, and
2 then you traverse or cross that sequence by
3 tracing it backwards.

4 That's all in Column 9.

5 So plain and ordinary meaning of
6 traversing, navigating or crossing by a specific
7 path or route makes sense that ordering is
8 putting things into that specific path or route.
9 Obviously, we disagree on those terms, but we
10 think that our definitions are supported by both
11 the plain meaning and normal usage within the
12 specification.

13 And the last term that we have
14 been talking about that we have a dispute about
15 is many-to-many functionality. Mr. Andre says
16 that many to many is so basic, you can call it
17 up and there's a million entries. I don't
18 dispute that, but each of those has a different
19 meaning.

20 They have specifically said that
21 the many to many here is two or more users. So
22 the first part of many would be users able to
23 access two or more data files, the other many.
24 But the term only appears in Claim 32. Claim 32

1 depends from Claim 23.

2 In Claim 23, there is only one
3 user creating the data, moving to different
4 locations. There are not many users discussed
5 or claimed.

6 Similarly, Claim 23 does not
7 mention multiple data files. Claim 23 talks
8 about the possibility maybe of multiple
9 applications. So it's unclear what the many to
10 many is.

11 Is it many users to many files,
12 which doesn't fit with Claim 23 from which 32
13 depends. Is it many applications to many
14 workspaces? Is it many workspaces to many
15 applications?

16 And the specification is
17 singularly unhelpful. When the specification
18 talks about one to many, it talks about, you
19 know, one user to many pieces of data, and
20 similarly sometimes does it in reverse. So the
21 definition proffered by plaintiff can't work
22 because it might be the opposite, or it might be
23 something else that was many.

24 There might have been many

1 applications or there might have been many
2 workspaces. And it's simply too confusing, and
3 the specification is of no help.

4 So that's our understanding of
5 many to many and why we think that it cannot
6 actually be construed. If you look at it in the
7 context of the claims themselves, plaintiff's
8 definition simply doesn't fit with what's
9 happening in the independent claim.

10 I think that actually concludes my
11 presentation, Your Honor, except for, of course,
12 getting you a smaller list of terms. We
13 appreciate your attention.

14 Unless you have any other
15 questions?

16 THE COURT: No. Thank you.

17 MS. KEEFE: Thank you.

18 THE COURT: Mr. Andre, do you have
19 anything you wanted to add?

20 MR. ANDRE: Your Honor, I don't
21 think we have anything to add. We will just
22 wait until we get the letter. We will respond
23 to the letter.

24 That way you can get it in

1 writing. It will be better for all parties
2 concerned.

3 THE COURT: Great. Thank you very
4 much.

5 We'll be in recess.

6 THE CLERK: All rise.

7 (Court was recessed at 12:08 p.m.)
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CERTIFICATE OF REPORTER

I, Heather M. Triozzi, Registered Professional Reporter, Certified Shorthand Reporter, and Notary Public, do hereby certify that the foregoing record, Pages 1 to 121 inclusive, is a true and accurate transcript of my stenographic notes taken on January 20, 2010, in the above-captioned matter.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 20th day of January, 2010, at Wilmington.

Heather M. Triozzi, RPR, CSR
Cert. No. 184-PS