IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EMBLAZE, LTD.,	)	CV-11-1079-PSG
PLAINTIFF,	)	SAN JOSE, CALIFORNIA
VS.	)	DECEMBER 9, 2014
APPLE, INC.,	)	PAGES 1-59
DEFENDANT.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PAUL S. GREWAL
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: COZEN O'CONNOR
BY: MARTIN PAVANE
LISA FERRARI
277 PARK AVENUE
NEW YORK, NY 10172

FOR THE DEFENDANT: DLA PIPER, LLP
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APPEARANCES CONTINUED ON THE NEXT PAGE

OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR
CERTIFICATE NUMBER 13185

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY
TRANSCRIPT PRODUCED WITH COMPUTER

FOR THE DEFENDANT:	DLA PIPER, LLP BY: ROBERT WILLIAMS ERIN GIBSON 401 B STREET, STE 1700 SAN DIEGO, CA 92101
ALSO PRESENT: EMBLAZE	NAFTALI SHANI
ALSO PRESENT: APPLE	RYAN MORAN DAVID MELAUGH

SAN JOSE, CALIFORNIA DECEMBER 9, 2014

P R O C E E D I N G S

(WHEREUPON, COURT CONVENED AND THE FOLLOWING PROCEEDINGS WERE HELD:)

THE CLERK: CALLING EMBLAZE, LTD. VERSUS APPLE, INC. CASE NUMBER CV-11-1079 PSG.

COUNSEL, PLEASE STATE YOUR APPEARANCES.

MR. PAVANE: GOOD AFTERNOON, YOUR HONOR.

FOR PLAINTIFF EMBLAZE, MARTIN PAVANE OF COZEN O'CONNOR, AND WITH ME IS LISA FERRARI WITH MY FIRM. AND ALSO PRESENT AT COUNSEL TABLE IS NAFTALI SHANI OF EMBLAZE.

THE COURT: GOOD AFTERNOON. WELCOME BACK.

MR. FOWLER: GOOD AFTERNOON, YOUR HONOR.

MARK FOWLER, DLA PIPER, FOR THE DEFENDANT APPLE. WITH ME IS ERIN GIBSON, ROBERT BUERGI, ROB WILLIAMS, CRISTA CELENTANO, AND FROM APPLE RYAN MORAN AND DAVID MELAUGH.

THE COURT: MR. FOWLER, GOOD AFTERNOON TO YOU AND YOUR COLLEAGUES AS WELL, IT'S GOOD TO HAVE ALL OF YOU BACK.

AND LET ME BEGIN BY SAYING I APPRECIATE THAT GETTING THIS HEARING SCHEDULED HAS BEEN CHALLENGING FOR US ALL, SO I'M GRATEFUL THAT WE WERE ABLE TO FINALLY GET EVERYTHING CALENDARED AND I'M EAGER TO HEAR YOUR ARGUMENTS THIS AFTERNOON.

I SHOULD SAY THAT AS I UNDERSTAND IT WE TECHNICALLY HAVE FOUR MOTIONS ON CALENDAR, A MOTION FOR JUDGMENT AS A MATTER OF LAW, A CONDITIONAL MOTION OF THE SAME TYPE, AND THEN A MOTION

WITH RESPECT TO THE COSTS THAT HAVE BEEN REQUESTED IN THIS CASE.

I AM FRANKLY EAGER TO FOCUS ON THE ISSUES IN THE MOTIONS FOR JUDGMENT AS A MATTER OF LAW. I THINK THE REST OF THE ISSUES ARE PROPERLY ADDRESSED AND THOROUGHLY ADDRESSED IN THE PAPERS.

SO WITH THAT, MR. PAVANE, I WOULD LIKE TO BEGIN WITH YOUR MOTION, SIR.

MR. PAVANE: OKAY. THANK YOU, YOUR HONOR.

YOU ARE ONLY GOING TO GET THE DOG TODAY, NOT THE PONY.

THE COURT: OKAY. ALL RIGHT.

MR. PAVANE: ALL RIGHT.

FIRSTLY, I JUST WANTED TO ADDRESS AT THE OUTSET IF YOUR HONOR WANTS TO HEAR IT, THE POINT THAT APPLE RAISES AS TO WHETHER WE WAIVED THE RIGHT TO ARGUE THE JMOL. I DON'T THINK WE HAVE. I THINK THE LAW IS VERY LENIENT. WE CITED THE CASES ON THAT. THE NINTH CIRCUIT HAS ARTICULATED THAT STANDARD OVER AND OVER AGAIN, IT DOESN'T HAVE TO BE ANY SPECIAL LANGUAGE.

THE POINT OF THE MOTION FOR A DIRECTED VERDICT IS, OF COURSE AS WE ALL KNOW, TO GIVE THE OTHER SIDE AN OPPORTUNITY TO BRING IN ADDITIONAL EVIDENCE, AND OBVIOUSLY THEY HAD THAT OPPORTUNITY. I'M NOT SURE WHAT MORE EVIDENCE ANYONE COULD HAVE INTRODUCED IN THAT CASE.

AND ON TOP OF THAT THE COURTS IN THE NINTH CIRCUIT HAVE ALSO MADE CLEAR THAT THE STANDARD IS MORE LENIENT AT THE CLOSE

OF ALL THE EVIDENCE AS OPPOSED TO MOTIONS THAT WOULD BE MADE AT THE CLOSE OF PLAINTIFF'S CASE, WHICH I THINK WAS THE CASE HERE IN FACT, IF I RECALL THERE WAS EXTENSIVE BRIEFING AT THE CONCLUSION OF EMBLAZE'S CASE ON BOTH SIDES.

THE COURT: I RECALL.

MR. PAVANE: AND THAT'S WHERE ALL OF THESE ISSUES WERE THOROUGHLY BRIEFED TO YOUR HONOR.

OKAY. SO TURNING TO THE MEAT OF THE MATTER, THE JUDGMENT AS A MATTER OF LAW, THE STANDARD IS CERTAINLY NOT IN DISPUTE AND THE QUESTION BOILS DOWN TO WHETHER THERE WAS OR WAS NOT SUFFICIENT EVIDENCE TO SUPPORT THE JURY VERDICT.

AND I CERTAINLY RECOGNIZE THAT THAT'S EMBLAZE'S BURDEN TO CARRY HERE, AND WE'VE GOT TO CARRY IT AS TO ALL OF THE FACTS IN DISPUTE THAT COULD HAVE LEAD TO A VERDICT OF NOT INFRINGEMENT.

ADMITTEDLY, IF APPLE IS ABLE TO ESTABLISH ONE OF THE GROUNDS THEY PUT FORTH IS A BASIS FOR NONINFRINGEMENT WOULD SATISFY THE SUFFICIENT EVIDENCE STANDARD, THEN THEY DO PREVAIL UNDER THE APPLICABLE CASE LAW.

THE COURT: MR. PAVANE, WOULD YOU AGREE IN TERMS OF THE SET OF ISSUES I HAVE TO CONSIDER, THERE ARE REALLY THREE LIMITATIONS HERE THE PREDETERMINED DATA SIZE THE REAL TIME BROAD CASTING AND THE UPLOADING OF THE SEQUENCE TERMS.

MR. PAVANE: I DO, SIR.

AND THAT WAS THE NEXT POINT I WAS GOING TO MAKE IS THAT WHEN IT COMES TO ESTABLISHING THE SUFFICIENCY OR LACK OF

SUFFICIENCY OF THE EVIDENCE, THE APPROPRIATE THINGS THAT YOU LOOK AT OR THE CORRECT THING TO LOOK AT IS THE FACTS THAT WERE IN DISPUTE.

AND I WHOLEHEARTEDLY CONCUR WITH YOUR HONOR'S POSITION OR STATEMENT A MOMENT AGO THAT THE THREE LIMITATIONS THAT WERE ARGUED EXTENSIVELY BOTH DURING THE TRIAL AND IN THE CLOSINGS WERE THOSE THREE LIMITATIONS OF THE CLAIM.

SO LET'S TURN TO THE FIRST LIMITATION WHICH IS THE ONE THAT'S EACH SOUGHT SLICE HAVING A PREDETERMINED SIZE ASSOCIATED THERE WITH.

AND LET ME SAY I'M GOING TO ADDRESS HERE FOCUS ON THE SUFFICIENCY OF THE EVIDENCE. WE PUT SOME ARGUMENTS IN OUR BRIEF ABOUT DISAGREEMENT WITH THE CLAIM CONSTRUCTION, BUT YOUR HONOR HAS RULED ON THOSE THINGS. I DON'T SEE ANY POINT IN ME BEATING THAT TO DEATH AGAIN.

THE COURT: I THINK YOU'VE PRESERVED YOUR POSITION.

MR. PAVANE: RIGHT. AND IN THE IN THE PAPERS AND YOU WILL RULE AS YOU DO ON THAT AND WE WILL PROCEED AS NECESSARY.

SO THE COURT'S CONSTRUCTION OF EACH SLICE HAVING A PREDETERMINED SIZE ASSOCIATED THERE, WAS EACH SLICE HAVING A DATA SIZE WHICH MAY BE ESTABLISHED BY SETTING A TIME DURATION OF THE SLICE ASSIGNED IN ADVANCE OF THE STREAMING BEING DIVIDED.

NOW, I READ THROUGH APPLE'S PAPERS AND I SEE TWO ARGUMENTS THAT APPLE IS MAKING REGARDING THAT LIMITATION AS TO

WHY ITS NOT MET.

AND FIRSTLY, I JUST WANT TO MAKE THE POINT THAT THE ABIDING CONVICTION I HAVE THAT INFRINGEMENT WAS ESTABLISHED HERE IS IN PART BASED ON THE FACT THAT, AND LET'S TAKE MLB BECAUSE THERE WAS THE MOST EXTENSIVE EVIDENCE AS TO THAT, AS I THINK YOU MAY RECALL.

MLB, AS I SEE IT, IS DOING EXACTLY WHAT THE PATENT TALKS ABOUT. IT'S EXACTLY WHAT EMBLAZE DID IN THE PATENT AND THEY ARE DOING THE SAME THING. AND THE DISTINCTIONS THAT CAME OUT THAT LEAD THE JURY FOR WHATEVER REASON TO FIND THEY DIDN'T INFRINGE, I DON'T BELIEVE ARE JUSTIFIED AND I CERTAINLY DON'T THINK THEY ARE SUPPORTED BY THE EVIDENCE WHEN THE CORRECT CLAIM CONSTRUCTION IS CONSIDERED.

SO TAKING YOUR HONOR'S CLAIM CONSTRUCTION, THE FIRST ARGUMENT THAT APPLE MADE IN THEIR PAPERS, AND THIS IS AT DE636 WHICH IS THEIR OPPOSITION AT PAGE 6, THEY SAY THERE'S NO MAXIMUM RATE AT ANY QUALITY LEVEL AND THAT THE ACTUAL RATES, THE ACTUAL NUMBER OF BITS EXCEED THE ATTRIBUTE RATE, WHICH WERE THOSE MULTIPLE QUALITY LEVELS, AS THEY PUT IT EVERY DAY WITH UP TO 40 TO 50 PERCENT ABOVE THAT RATE.

THAT'S A QUOTE FROM THEIR BRIEF.

SO MY ANSWER TO THAT ONE IS RELATIVELY STRAIGHTFORWARD. THERE'S NOTHING THAT I SEE IN THE CLAIM THAT SAYS THERE'S A MAXIMUM RATE. THOSE WORDS DO NOT APPEAR IN THE CLAIM. ALL IT SAYS IS THAT THERE'S A RATE THAT HAS TO BE ESTABLISHED AND IT

CAN BE ESTABLISHED BY A TIME DURATION.

THE SECOND ARGUMENT WHICH THEY MAKE WHICH THEY STRESSED SEVERAL TIMES TO THE JURY IN THE CLOSING ARGUMENT DURING THE TRIAL AND THROUGH THEIR TIME OF THEIR EXPERT WAS THAT NO SLICE ACCORDING TO THEM AS A RATE ASSIGNED IN ADVANCE OF THE STREAM BEING DIVIDED. IN OTHER WORDS, THE PREDETERMINED LIMITATION, AND THEY STRESSED THAT VERY HEAVILY.

ACCORDING TO APPLE, AND AGAIN THIS IS A QUOTE FROM THEIR BRIEF, THEY SAY "MOST IMPORTANTLY, NOTHING IS EVER DONE TO PREDETERMINE OR ASSIGN IN ADVANCE ANY DATA SIZE AS REQUIRED BY THE CLAIMS AND THE COURT'S CONSTRUCTION."

AND THEY CITE TO DE636, I'M SORRY, DE636 AT PAGE 8 CITING THE POLISH TESTIMONY AT 416 -- 1468 TO 1469. HOWEVER, POLISH'S TESTIMONY ACKNOWLEDGES THAT THE COURT'S CLAIM CONSTRUCTION DOESN'T REQUIRE THAT THE SEGMENTS HAVE THE SAME SIZE ONLY THAT THEY BE PREDETERMINED, IF YOU READ HIS TESTIMONY.

SO HE RELIES ON THE PREDETERMINED. HE ADMITS THEY DON'T HAVE TO BE OF EQUAL SIZE AND WE ALL AGREE THEY ARE NOT AND THERE WAS NO DISPUTE ABOUT THAT AT THE TRIAL.

NOW APPLE SAYS THAT, AND THIS IS A QUOTE, EMBLAZE'S ASSERTION THAT NOTHING IN THE ASSERTED CLAIMS REQUIRES THAT THE DATA SIZE OF EACH SLICE BE KNOWN IN ADVANCE, IS NOT ONLY UNSUPPORTED BY THE PATENT, BUT IT IS CONTRARY TO THE CLAIM LANGUAGE.

NOW, OUR ANSWER DO THAT IS STRAIGHTFORWARD. THEY SAY THE

REASON WHY THE SEGMENT SIZES MUST VARY IN OUR SYSTEM IS BECAUSE THE DATA STREAMS FED INTO THE TRANSMITTING COMPUTER ARE VARIABLE BITRATE STREAMS. THAT'S ON PAGE 7 OF THEIR BRIEF. THEY SAY THAT RESULTS IN NONUNIFORM AND UNPREDICTABLY SIZED DATA SEGMENTS WHEN THE STREAMS ARE SLICED ACCORDING TO A SET TIME DURATION FOR EXAMPLE EVERY TEN SECONDS.

NOW YOUR HONOR, AFTER TRIAL I THINK YOU KNOW, YOUR HONOR ISSUED A CLAIM CONSTRUCTION ORDER WHERE YOU EXPLAINED YOUR CLAIM CONSTRUCTION RULINGS. AND I JUST WANT TO READ PART OF THAT WHICH IS DIRECTED TO THIS CLAIM LIMITATION.

IT STARTS ON PAGE WHEN YOU START ADDRESSING THIS LIMITATION. THEN ON PAGE 19 OF YOUR HONOR'S OPINION, YOUR HONOR SAYS THE '473 PATENT SPECIFICATION DOES NOT DISCLOSE AN EMBODIMENT OF THE INVENTION IN WHICH THE ALGORITHM DEFINES THE DATA STREAM INTO SLICES BASED ON BOTH SIZE AND TIME DURATION. AS WILL BE DETAILED BELOW, THE SPECIFICATION CONSISTENTLY DESCRIBES THE DIVIDING STEP AS BEING BASED ON EITHER A BIT SIZE OR A TIME DURATION BUT NOT BOTH.

THIS OBSERVATION IS CONSISTENT WITH THE '437'S PATENT TEACHING THAT DATA RATE MAY VARY OVER THE COURSE OF THE BROAD CAST. IF THE DATA RATE VARIES OVER THE COURSE OF THE BROADCAST, DIVIDING THE DATA STREAM BASED ON BOTH A PREDETERMINED BIT SIZE AND A PREDETERMINED TIME DURATION WOULD FORCE THESE DECISION RULES TO CONFLICT.

THEREFORE, CLAIM 1 ENCOMPASSES TWO WAYS OF PREDETERMINING

DATA SIZE. SETTING A BIT SIZE AND SETTING A TIME DURATION. AND CLAIM 23 INCLUDES THE BIT SIZE EMBODIMENT OF THE INVENTION.

SO I BELIEVE I'M READING THAT CORRECTLY TO INDICATE, AS I BELIEVE THE CLAIM CONSTRUCTION INDICATES, THAT ONCE YOU SET THE TIME AS A FIXED AMOUNT, LET'S SAY 10 SECONDS OR 5 OR 2, THAT IS SETTING THE PREDETERMINED, MEETS THE PREDETERMINED LIMITATION OF THE CLAIM

THE COURT: THAT SURE SOUNDS LIKE WHAT I JUST WROTE.

MR. PAVANE: OKAY. SO ON THAT POINT WE DON'T BELIEVE THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT THAT THAT LIMITATION WAS NOT MET IN THE ACCUSED SYSTEMS.

NOW I DON'T KNOW IF YOUR HONOR WANTS TO GO BACK AND FORTH HERE OR IF YOU WANT ME TO JUST CONTINUE AND DO ALL THREE.

THE COURT: WHY DON'T YOU PRESENT YOUR ARGUMENTS, MR. PAVANE.

MR. PAVANE: I'M HAPPY TO DO THAT.

SO THE SECOND LIMITATION, AS YOUR HONOR INDICATED, IS REALTIME BROADCASTING.

NOW HERE THE COURT'S CONSTRUCTION OF REALTIME BROADCASTING WAS SIMULTANEOUS TRANSMISSION OF DATA TO ONE OR MORE CLIENTS MATCHING THE HUMAN PERCEPTION OF TIME OR PROCEEDING AT THE SAME RATE AS A PHYSICAL OR EXTERNAL PROCESS.

AND I THINK YOUR HONOR WILL RECALL THAT'S A CONSTRUCTION YOUR HONOR DEVELOPED, I DON'T BELIEVE YOU ADOPTED EITHER OF THE PARTY'S PARTICULAR CONSTRUCTIONS ON THAT CLAIM ELEMENT.

AND I SHOULD POINT OUT THAT THE CONTEXT OF THAT IN THE PATENT SPECIFICATION IS REALTIME BROADCASTING, OBVIOUSLY THOSE WORDS APPEAR, BUT THE PHRASE IN WHICH IT APPEARS IS REALTIME BROADCASTING FROM A TRANSMITTING COMPUTER TO ONE OR MORE CLIENT COMPUTERS OVER A NETWORK.

SO IT'S REALTIME BROADCASTING FROM A TRANSMITTING COMPUTER TO ONE OR MORE CLIENT COMPUTERS.

NOW AT THE TRIAL THERE WAS NO DISPUTE THAT SEGMENTS MUST GO FROM, LET'S TAKE AGAIN THE MLB EXAMPLE, FROM THE TRANSMITTING TO A SERVER. I DON'T KNOW IF YOU REMEMBER --

THE COURT: I DO.

MR. PAVANE: THE TESTIMONY WAS THERE WAS A FACILITY IN CHELSEA NEW YORK AND THEY'VE GOT ALL THOSE COMPONENTS THERE AND THEY UPLOAD FROM THE TRANSMITTING COMPUTER TO THE HTTP SERVER THEY MAINTAIN AT THAT FACILITY.

THEN IT'S STORED THERE UNTIL IT'S REQUESTED BY A USER. NOW THAT SEGMENT GOES FROM THAT TRANSMITTING COMPUTER TO THAT SERVER EXACTLY ONE TIME. IT GOES UP THERE.

NOW IT'S TRUE THE PEOPLE WHO WANT TO SEE THAT SEGMENT, THE FIRST ONE, NO DISPUTE THAT IT HAS TO COME ALL THE WAY BACK THROUGH WHATEVER CONTENT DISTRIBUTION NETWORK IS OUT THERE WHETHER IT'S AKAMAI OR SOMEBODY ELSE, THROUGH ALL THE SERVERS AND GET BACK TO THAT HTTP, TO GRAB THAT FIRST ONE. SO THAT'S GOT TO HAPPEN.

AND THE POINT IS AS WE SEE IT THERE IS A SIMULTANEOUS

TRANSMISSION TO THAT, FROM THAT TRANSMITTING COMPUTER TO THAT HTTP, SERVER. AND THAT'S AGAIN, THE CLAIM LANGUAGE SAYS REALTIME BROADCASTING FROM A TRANSMITTING COMPUTER TO ONE OR MORE CLIENTS OVER A NETWORK.

NOW WE GOT ALL BOLLOCKSED UP IN THIS ISSUE APPLE RAISED SHOWING THAT THE CLIENTS DON'T NECESSARILY REQUEST THE SEGMENT AT EXACTLY THE SAME TIME.

THE COURT: WHICH IS UNDISPUTED.

MR. PAVANE: WHICH IS UNDISPUTED. RIGHT. EXACTLY.

BUT BY THE SAME TOKEN, THE SYSTEM THAT'S DESCRIBED IN THE PATENT IS EXACTLY, WORKS THE EXACT SAME WAY. ALL THESE PEOPLE DOWNLOAD THE INDEX AND WHEN THEY REQUEST A FILE ACCORDING TO THE INDEX IT GETS DOWNLOADED. CLEARLY THAT'S NOT GOING TO HAPPEN AT EXACTLY THE SAME MOMENT EVERY SINGLE TIME. IT'S JUST NOT.

NOW THE DIFFERENCES ARE WE ARE TALKING ABOUT A FEW SECONDS.

THE COURT: BUT MY CLAIM CONSTRUCTION CONTEMPLATES SOME LATENCY.

MR. PAVANE: YES, IT DOES. YOU SAY MATCHING THE HUMAN PERCEPTION OF TIME OR PROCEEDING AT THE SAME RATE AS PHYSICAL OR EXTERNAL PROCESS, EXACTLY.

SO ON THAT POINT WE BELIEVE THAT THE SIMULTANEOUS TRANSMISSION TO ONE OR MORE CLIENTS WAS CLEARLY ESTABLISHED AND THE TYPES OF TIME DIFFERENCES THEY WERE ARGUING TO THE JURY

WERE NOT ENOUGH TO MEET THE CLAIM LIMITATION.

I JUST THINK IT WAS WRONG, ESPECIALLY IN VIEW OF THE TEACHING OF THE PATENT WHICH ALSO HAS AN INHERENT LATENCY BUILT INTO IT. IT TALKS ABOUT THE LATENCY, IT APPEARS IN THE PATENT SPECIFICATION.

THE COURT: ARE YOU SAYING THE EVIDENCE APPLE PRESENTED ON THAT POINT MAY HAVE DEMONSTRATED SOME KIND OF LATENCY BUT IT WASN'T ENOUGH TO DISRUPT THE MATCHING OF THE HUMAN PERCEPTION OF TIME IN THE TRANSMISSION.

MR. PAVANE: EXACTLY. EXACTLY WHAT I'M SAYING.

AND I JUST WANTED TO, FOR EXAMPLE IN THE IN SUIT PATENT ITSELF, I'M READING COLUMN 8, LINES 32, IT SAYS, WHEN ONE OF THE COMPUTERS, AND THOSE ARE THE CLIENTS, ONE OF THE COMPUTERS 30 READS INDEX FILE 50 AND BEGINS TO DOWNLOAD, INDICATOR 58 PREFERABLY MARKS THE MOST RECENT SLICE, THIS IS THE POINT AT WHICH THE DOWNLOAD WILL BEGIN UNLESS THE USER CHOOSES OTHERWISE.

AND THEN IT POINTS OUT HE CAN PICK A DIFFERENT SLICE THERE.

BUT EACH USER HAS TO SELECT. AND WITH EACH USER SELECTING THEY ARE NOT GOING TO ALL GRAB THAT SLICE AT THE SAME TIME NO MATTER WHERE THAT SLICE IS.

OKAY. THE SECOND POINT IS APPLE ARGUED SPECIFICALLY IN ITS BRIEF, AND THIS IS AT PAGE 11 OF THEIR OPPOSITION TO EMBLAZE'S MOTION, THEY ARGUE "THE TRANSMISSION OF DATA DOES NOT

MATCH THE HUMAN PERCEPTION OF DATA OR PROCEED AT THE SAME RATE AS PHYSICAL OR EXTERNAL PROCESS," AND IT CITES TO INHERENT LATENCY IN THE NEIGHBORHOOD OF ABOUT 30 SECONDS.

AND AGAIN, I THINK IT'S CLEAR FROM THE COURT'S CLAIM CONSTRUCTION AND THE COURT'S ANALYSIS THAT THE INSTRUCTION WAS INTENDED TO ENCOMPASS THAT TYPE OF DELAY.

WHEN WE ARE ALL SITTING THERE WATCHING A FOOTBALL GAME, FOR EXAMPLE ON HLS, I DON'T, I DEFY ANYBODY TO TELL ME THEY ARE NOT WATCHING THAT GAME LIVE. YES, HAD THE ACTION TAKEN PLACE ON THE FIELD 30 SECONDS BEFORE THAT, SURE. BUT THAT MATCHES THE HUMAN PERCEPTION PEOPLE FEEL IF YOU WATCH IT TWO DAYS LATER AND YOU HAVE READ ABOUT IT IN THE PAPER, WELL, OKAY, WE ALL AGREE THAT'S NOT LIVE. BUT THIS IS LIVE. AND AGAIN, THIS IS, OUR SYSTEM WORKS AS WELL.

THE COURT: BUT LET ME ASK YOU THIS, MR. PAVANE, AND I UNDERSTAND YOUR POINT AND I THINK IT'S A POWERFUL ONE, BUT MY QUESTION IS THE JURY HEARD ALL OF THAT AND AREN'T THEY ENTITLED TO DECIDE SUBSTANTIALLY HOW MUCH -- I WILL PUT IT THIS WAY, HOW MUCH LATENCY IS ENOUGH TO UNDERMINE THE CLAIM LIMITATION OR AVOID IT?

HOW LIVE DO YOU HAVE TO BE, IN OTHER WORDS? ISN'T THAT A QUESTION FOR THE JURY TO DECIDE?

MR. PAVANE: I DON'T BELIEVE SO BECAUSE I DON'T BELIEVE IT'S REASONABLE FOR A JURY TO CONCLUDE ON THESE FACTS THAT THIS IS NOT REALTIME STREAMING AS CONTEMPLATED BY THIS

PATENT.

I JUST DON'T SEE THAT. I DON'T SO HOW ANY REASONABLE JURY COULD DO IT. AND AGAIN, IT'S OUR SYSTEM, IT'S WHAT WE DESCRIBE IN THE PATENT. WE MENTION WE HAVE AN INHERENT LATENCY IN OUR SPECK. WE DON'T PUT A TIME LIMIT ON AT THIS TIME PER SE. BUT WE DO MENTION, AND I JUST DON'T SEE THAT 30 SECONDS IS ON THE SIDE OF REASONABLENESS.

THE COURT: AND DR. POLISH'S TESTIMONY WAS, I BELIEVE, LIMITED TO DESCRIBING A LATENCY OF SOMEWHERE BETWEEN 15 AND 30 SECONDS, RIGHT, HE WASN'T SPEAK OF ANYTHING GREATER THAN THAT.

MR. PAVANE: I DON'T BELIEVE SO. AND I'M RELYING ON WHAT IT IS IN APPLE'S BRIEF WHERE THEY MENTION THE 30 SECONDS.

THE COURT: OKAY.

MR. PAVANE: AND THEN ALSO IN YOUR HONOR'S CLAIM CONSTRUCTION ORDER WHICH AGAIN ISSUED ON I THINK OCTOBER 9TH, YOU ALSO MADE CLEAR THE SYSTEM SHOULD BE, WHEN YOU WERE CONSTRUING THIS VERY TERM YOU MADE CLEAR THE SYSTEM SHOULD BE USED, FOR EXAMPLE, FOR SPORTING EVENTS AND INTERVIEWS.

AND INDEED THAT'S EXACTLY WHAT EVERYONE USES IT FOR. THIS IS DESIGNED TO GIVE VIEWERS A LIVE EXPERIENCE OF WATCHING A GAME.

OKAY. SO THE LAST LIMITATION THEN THAT COMES INTO PLAY IS THE UPLOADING THE SEQUENCE TO A SERVER SUCH THAT ONE OR MORE COMPUTERS, LET ME START AGAIN.

UPLOADING THE SEQUENCE TO A SERVER SUCH THAT ONE OR MORE COMPUTERS COULD DOWNLOAD THE SEQUENCE OVER THE NETWORK FROM THE SERVER.

AND YOUR HONOR, CONSTRUED THAT LIMITATION TO MEAN, TRANSMITTING THE FILES FROM THE TRANSMITTING COMPUTER TO THE SERVER SUCH THAT ONE OR MORE CLIENT COMPUTERS ARE ABLE TO SELECT INDIVIDUAL FILES CORRESPONDING TO THE SLICES FOR DOWNLOAD OVER THE NETWORK.

NOW HERE THIS IS ONE THAT WE ALSO ARGUED ABOUT AND I PERSONALLY FEEL THAT THIS ARGUMENT SHOULDN'T EVEN HAVE BEEN MADE TO THE JURY BUT IT WAS, APPLE ARGUED HERE THAT THE SERVER WHICH FROM WHICH THE CLIENT COMPUTER DOWNLOADS THE SEQUENCE HAS TO BE THE SAME SERVER TO WHICH THAT SEQUENCE WAS INITIALLY UPLOADED. AND I'VE GOT MULTIPLE PROBLEMS WITH THAT AS I MENTION, BUT LET ME GO THROUGH BASICALLY THE POINT.

FIRSTLY, EVEN IF YOU ACCEPT THAT APPLE IS CORRECT ON THAT POINT, WHICH I DON'T, WITH YOU EVEN IF YOU DID, IF YOU RECALL MY ARGUMENT JUST A LITTLE WHILE AGO IN THE MLB SYSTEM, BACK IN CHELSEA THEY HAVE GOT THE HTTP SERVER AND THAT SEGMENT AND UPLOADED TO THAT HTTP SERVER.

THE FIRST CLIENT WHO GOES TO GET THAT AND MAYBE THE SECOND OR THIRD IF THE SEGMENT DOESN'T WIND UP ON AN EDGE SERVER NEAR THEM, WHEN THEY MAKE THE REQUEST, IT MAY GO BACK THROUGH 5 OR 6 SERVERS THROUGH THE CDN, BUT ULTIMATELY IT DOES WIND UP AT THAT HTTP SERVER AND GRABS IT AT THAT SERVER.

SO EVEN IF YOU ACCEPT APPLE'S CONSTRUCTION THAT THE SERVER THAT IT'S UPLOADED TO HAS TO BE THE SAME SERVER FROM WHICH IT'S DOWNLOADED, IT STILL MEETS THAT LIMITATION.

THE COURT: AT LEAST IN THE SCENARIO WHERE YOU ARE TALKING ABOUT THE INITIAL PULL.

MR. PAVANE: YES, FROM THE INITIAL PULL.

AND APPLE WANTS US TO READ INTO THAT CLAIM CONSTRUCTION THE WORD DIRECTLY. IT HAS TO BE DIRECTLY, MEANING THERE'S NOTHING INTERVENING BETWEEN THE CLIENT COMPUTER AND THE SERVER. AND THAT'S TOTALLY CONTRARY TO BASIC CLAIM CONSTRUCTION LAW. THE LAW SAYS, IF I SAY THAT I HAVE TO OBTAIN SOMETHING FROM YOU BUT YOU HAND IT TO MR. RIVERA AND HE HANDS IT TO ME, I'VE STILL OBTAINED IT FROM YOU.

AND I BELIEVE THE LAW IS THE SAME FOR CLAIM CONSTRUCTION, ESPECIALLY WHEN THE CLAIM IS WRITTEN AS A COMPRISING, IT DOESN'T SAY CONSISTING OF ONLY THESE ELEMENTS.

NOW THAT TAKES ME THROUGH MY ARGUMENTATION ON THE THREE LIMITATIONS. I JUST HAVE A FEW OTHER POINTS ON THE JMOL.

THE COURT: I WOULD LIKE TO HEAR THEM. GO AHEAD, PLEASE.

MR. PAVANE: OKAY.

SO APPLE ALSO MAKES THE POINT THAT WE DID NOT OFFER LIMITATION BY LIMITATION TESTIMONY ON THE OTHER STREAMS APART FROM THE MLB, TALKING ABOUT ONLY THE ACCUSED STREAMS OBVIOUSLY, AND THERE WERE 6 OR 7 OTHER ACCUSED STREAMS.

AGAIN, WE THINK THAT'S CLEARLY WRONG. THE TESTIMONY APPEARS AT PAGES 454 TO 630 OF THE TRIAL TRANSCRIPT. HE WENT THROUGH EACH OF THEM IN SOME DETAIL. WE MENTIONED THAT IN OUR BRIEF.

AND HE SHOWED THAT BY HIS WIRE SHOCK ANALYSIS AND WHAT HE LOOKED AT WITH RESPECT TO THE STREAMS THAT THEY ALL HAD ATTRIBUTES SUCH AS THE MULTIPLE QUALITY LEVELS, THE EQUAL TIME DURATIONS, THAT THEY COULDN'T HAVE BEEN CREATED EXCEPT IN A WAY THAT IMPLEMENTED HLS, WHICH WE ACCUSED OF INFRINGEMENT.

APPLE ALSO ARGUES IN ITS BRIEF THAT WE HAVEN'T SHOWN -- THAT THERE WAS ONE METHOD CLAIM, IF YOU RECALL, CLAIM 23. THAT WE HAVEN'T SHOWN THAT -- BY THE WAY, DID YOU SEE THAT THE SUPREME COURT TOOK THE CERT ON THAT KAMEO CASE?

THE COURT: I DID SEE THAT. I THOUGHT YOU MIGHT BRING THAT UP.

MR. PAVANE: SO I DON'T KNOW WHAT'S GOING TO HAPPEN. IF I'M A BETTING MAN, THAT'S GETTING REVERSED, BUT THAT'S JUST ME.

IN ANY EVENT, SO THERE WAS ONE METHOD CLAIM IN THE CASE, THAT WAS CLAIM 23. AND WHILE THE CASE WAS PENDING, YOUR HONOR, I'M SURE, RECALLS THAT THE AKAMAI CASE WAS REVERSED AND THE SUPREME COURT SAID, NO, THERE'S GOT TO BE ONE PARTY CARRYING OUT ALL THE STEPS.

AND APPLE ARGUES THAT CLAIM 23 IS NOT BEING INFRINGED BY ONE PARTY BECAUSE THERE ARE AT LEAST TWO OTHER THINGS THAT ARE

GOING ON.

ONE, WHICH I'M NOT ENTIRELY CLEAR WHETHER THEY ARE ARGUING THIS IS A SECOND PARTY OR NOT, BUT THEY MAKE REFERENCE IN THEIR BRIEF TO THE CISCO MEDIA PROCESSOR. AND I THINK WE CLEARLY ESTABLISHED AT TRIAL THROUGH THE TESTIMONY OF MR. INZERILLO, MLB'S POINT PERSON AT TRIAL, THAT THE CISCO WAS OPERATED BY MLB. AND THE FACT THAT IT BEARS THE NAME CISCO ON IT IS BESIDE THE POINT. THEY ARE NOT OPERATING IT, MLB IS OPERATING IT. I'M SURE THE COMPUTERS THAT MLB HAS ON IT DON'T HAVE MLB ON THEM EITHER.

THE SECOND POINT THEY MAKE IS THE SAME ARGUMENT FROM BEFORE IN THAT THEY ARE SAYING THAT SINCE THE -- BECAUSE MLB USES AKAMAI AS A CDN OR CON TENT DISTRIBUTION NETWORK, THEN YOU ARE NOT HAVING A DIRECT DOWNLOAD FROM THAT SERVER TO THOSE CLIENTS, SO THEREFORE THOSE CLIENTS ARE -- THERE'S A SEPARATE COMPONENT, NAMELY THE CDN, WHICH IS OPERATED BY A THIRD PARTY.

BUT FOR THE REASONS I'VE INDICATED AND AS YOUR HONOR SAID, CERTAINLY ON THE FIRST GROUP OF POLE OR SERIES OF POLES, IT'S GOING TO COME FROM THAT SERVER.

SO THAT'S ALSO NOT A VALID REASON FOR ARGUING THAT THERE IS NO INFRINGEMENT OF CLAIM 23.

LASTLY, I RAISED THIS AT TRIAL AND I'M NOT GOING TO RAISE IT AGAIN IN ANY DETAIL, I JUST WANT TO POINT OUT THE SCINTILLON CASE WHICH MADE IT CLEAR THAT IF A USER PUTS SOMETHING INTO PROCESS, THAT ESTABLISHES INFRINGEMENT OF AN APPARATUS CLAIM

REGARDLESS OF WHO IS CONTROLLING THE BACK END MATERIAL.

AND WE, YOU KNOW, WE ASKED FOR MORE DETAILED CHARGE ON THAT POINT, IT WASN'T GIVEN. BUT REGARDLESS, THE POINT IS THAT I THINK THAT IN VIEW OF THE TESTIMONY, THAT THE END USER'S ARE IN FACT PUTTING A SYSTEM INTO USE BY REQUESTING THE DATA, REQUESTING THE FILES, THAT THERE IS AN INFRINGEMENT OF THE APPARATUS CLAIMS, AND THAT WOULD BE CLAIMS 28, 37 AND 40.

THE COURT: AND ON THAT POINT, MR. PAVANE, JUST TO REFRESH MY UNDERSTANDING, YOU ARE SAYING THAT EVEN THOUGH THE DATA IS COMING ESSENTIALLY AT THE DIRECTION OF THE END USER, THAT APPLE IS ON THE HOOK FOR THE APPARATUS CLAIM IN THAT SCENARIO.

MR. PAVANE: NOT DIRECTLY. I SHOULD BE CLEAR, MAYBE I WASN'T CLEAR, NONE OF THESE ALLEGATIONS THAT I'VE JUST TALKED ABOUT INVOLVE APPLE ITSELF DIRECTLY INFRINGING.

THE COURT: I THOUGHT THAT'S WHAT YOU WERE SAYING BUT I WANTED TO MAKE SURE.

MR. PAVANE: NO, I AM.

APPLE IS ON THE HOOK, IF AT ALL, AS A CONSEQUENCE OF INDUCED INFRINGEMENT.

THE COURT: ALL RIGHT. THAT'S WHAT MY UNDERSTANDING WAS. I'M GLAD YOU CLARIFIED THAT.

MR. PAVANE: YES. I'M IN COMPLETE AGREEMENT ON THAT.

SO LET ME TURN, THAT'S THE LAST POINT ON THIS MOTION, ON THE JMOL MOTION IS THE QUESTION OF INDUCED INFRINGEMENT. OKAY.

NOW THE JURY DIDN'T REACH THAT, AND PROBABLY A REASONABLE PERSON LOOKING AT THE JURY VERDICT FORM WOULD HAVE CONCLUDED MAYBE THEY WOULD HAVE GONE THE OTHER WAY, BUT THEY DID FOR WHATEVER REASON CROSS OFF WHATEVER THEY HAD WRITTEN, AND ESSENTIALLY THERE'S A NO VERDICT ON THAT ISSUE.

ON THAT POINT, AGAIN, WE ALSO FEEL THE EVIDENCE WAS WHENSOEVER WHELMING THAT NO REASONABLE JURY COULD FIND THERE WAS NO INDUCEMENT. THE FACTS WERE THAT APPLE KNEW ABOUT THE PATENT. THE FACTS WERE THAT APPLE DISTRIBUTES TONS OF LITERATURE INCLUDING THAT FAMOUS LIVE STREAMING OVERVIEW, I THINK IT WAS PLAINTIFF'S 23, THAT HAD DETAILED INSTRUCTIONS OF HOW TO IMPLEMENT, BUT THE TESTIMONY WAS THAT APPLE MET WITH THE CONTENT PROVIDERS TO HELP THEM DEVELOP THIS.

I DON'T KNOW WHAT MORE YOU COULD SHOW, I'VE NEVER SEEN A CASE WHERE YOU HAVE AS MUCH EVIDENCE OF INTENT TO INDUCE SOMEBODY TO CARRY OUT CERTAIN ACTS.

THE EVIDENCE TO THE CONTRARY WAS THE PROTESTATIONS OF INNOCENCE BY PEOPLE LIKE ROGER PANTOS, AND A COUPLE OF THE OTHER, BIDERMAN, MAYBE ONE OR TWO MORE SAYING I HAD NO INTENT TO INFRINGE THE PATENT, BUT THEY NEVER READ THE PATENT.

SO I DON'T UNDERSTAND THAT, I NEVER UNDERSTOOD THAT TESTIMONY AND I DON'T SEE HOW A JURY COULD TAKE THAT TESTIMONY AND CONCLUDE A LACK OF INTENT.

SO I THINK NOT ONLY IS IT JUSTIFIED TO FIND THAT NO REASONABLE INJURY COULD FIND A LACK OF DIRECT INFRINGEMENT BY

THE END USERS, BUT ALSO AND IN THE CASE OF MLB 23 CONTENT PROVIDER, THAT ALSO THAT APPLE INDUCED THAT INFRINGEMENT.

THE COURT: ALL RIGHT.

MR. PAVANE: THANK YOU, YOUR HONOR.

THE COURT: I THINK I HAVE IT, MR. PAVANE. THANK YOU.

MR. FOWLER, GOOD AFTERNOON.

MR. FOWLER: GOOD AFTERNOON, YOUR HONOR. I HAVE SOME SLIDES, PROBABLY NOT A SURPRISE.

SO YOUR HONOR, WHAT I WANT TO TALK ABOUT FIRST IS WAIVER, JUST BRIEFLY. AND IN PARTICULAR THERE'S ONE CASE ADDRESS INDEED THEIR REPLY BRIEF THAT I THINK WARRANTS SOME ATTENTION BY THE COURT.

I WILL GO THROUGH THE FIRST PART OF THIS VERY QUICKLY, IT'S OLD NEWS. YOU CAN'T MAKE A RULE 50(B) MOTION UNLESS YOU'VE MADE A RULE 50(A) MOTION AND YOU ARE REQUIRED TO MAKE SPECIFIC GROUNDS. I THINK THAT'S ALL WELL TRIED.

AND LET'S LOOK AT WHAT ACTUALLY HAPPENED THOUGH. MR. PAVANE -- I FORGOT ONE THING, I HAVE BEEN REMINDED I ALSO DID NOT MAKE A RULE 50 MOTION ON INFRINGEMENT WHICH I WANT TO DO. THE ARGUMENTS I THINK YOU'VE HEARD, BY THE WAY IS NOT CORRECT. I'M NOT GOING TO REPEAT THEM.

SO UNDER THE RULE 50(A)(2) STANDARD THERE WAS NO IDENTIFICATION OF THE FACTS, NO DISCUSSION OF THE LAW, NO ARGUMENT OR EXPLANATION. SO THAT I THINK THAT FAILS TO MEET

THE STANDARD AND WE SHOULD JUST STOP RIGHT THEN.

BECAUSE ON THAT POINT UNDER THE PREVAILING NINTH CIRCUIT AUTHORITY, THERE'S BEEN A WAIVER, PERIOD. CASE IS OVER.

BUT I WANT TO ADDRESS THE EEOC GODADDY SOFTWARE CASE BECAUSE THAT WAS CITED IN THE REPLY BRIEF. IT STARTS WITH THE SAME POINT, AND SO I WON'T RETRY. THIS IS BASICALLY YOU'VE GOT TO DO YOUR 50(A) TO DO YOUR 50(B), YOU'VE GOT TO MAKE YOUR ARGUMENTS. THAT'S ALL THIS IS SAYING.

THEN IT HAS THIS INARTFULLY MADE MOTION STANDARD AND IT SAYS, IT'S AN EXTREME REMEDY IF YOU KICK IT. SO UNDERSTOOD, BUT LET'S GO TO THIS NEXT POINT WHICH WASN'T ADDRESSED IN THEIR BRIEF. AND THIS IS, AGAIN, IN THE GODADDY SOFTWARE CASE, AND WHAT IT SAYS IS, OKAY, IF WE ARE GOING TO LET YOU OFF THE HOOK BECAUSE YOU DIDN'T MAKE YOUR, YOU MADE AN INARTFULLY MADE MOTION WHICH IS CHARITABLY THE BEST WE SAW ON THIS ONE, THEN THERE'S CONSEQUENCES TO THAT.

AND THAT IS, THAT IF YOU DIDN'T SPECIFY THE GROUNDS FOR YOUR MOTION WHICH UNDOUBTEDLY DID NOT HAPPEN THERE, WE DIDN'T SEE ANYTHING THERE, THEN YOU ARE NOT UNDER SUBSTANTIAL EVIDENCE ANYMORE, YOU ARE UNDER PLAIN ERROR.

AND AS THE COURT NOTED THERE'S AN EXTRAORDINARILY DEFERRAL REVIEW STANDARD AT THAT POINT IN TIME. SO IF THERE'S ANY EVIDENCE NOT SUBSTANTIAL EVIDENCE, ANY EVIDENCE THAT SUPPORTS THE VERDICT THEN IT MUST BE UPHELD.

THE COURT: THAT'S INTERESTING.

SO WHAT YOU ARE SAYING THEN IF THE COURT IS INCLINED TO GIVE THE OFFENDING PARTY, I WILL USE THAT PHRASE WITHOUT PREJUDICE HERE, THE BENEFIT OF THE DOUBT, SUCH THAT THEY MAY RENEW A MOTION OR MAKE A MOTION UNDER 50(B), UNDER THESE CIRCUMSTANCES, THE BAR ESSENTIALLY GOES UP?

MR. FOWLER: UP VERY HIGH, RIGHT.

I MEAN, SUBSTANTIAL EVIDENCE IS ALREADY PRETTY HIGH, I WOULD THINK WE WOULD ALL AGREE WITH THAT. I THINK MR. PAVANE EVEN NOTICED THAT.

BUT HERE YOU ARE UNDER THE PLAIN ERROR, ANY EVIDENCE STANDARD, SO IT'S VERY HIGH. AND THE NINTH CIRCUIT SAID THAT'S AN EXTRAORDINARILY DEFERRAL REVIEW. SO THE BAR HAS GONE WAY UP. AND I DON'T THINK UNDER ANY WAY OF READING WHAT HAPPENED AT TRIAL, THAT THIS IS NOT APPLIED IF YOU DON'T, IF YOUR HONOR DOESN'T DECIDE THAT THERE WAS A WAIVER.

AND BECAUSE WE DIDN'T BRIEF THIS, BECAUSE THAT CASE WAS ONLY CITED IN THE REPLY BRIEF, I WOULD ENCOURAGE YOUR HONOR TO GO BLACK AND LOOK AT THAT CASE IN THE FULL CONTEXT

THE COURT: I WILL DO THAT.

CAN I ASK YOU MR. FOWLER, IN YOUR UNDOUBTEDLY EXHAUSTIVE RESEARCH IN THIS CASE AND CASES THAT FOLLOW, HAVE YOU IDENTIFIED ANY DISTRICT COURTS THAT HAVE APPLIED IT IN THE WAY YOU ARE PROPOSING HERE?

MR. FOWLER: YOUR HONOR, NO, I DON'T HAVE ANY CASE THAT I CAN CITE ON THAT POINT. THAT DOESN'T MEAN THERE WASN'T

ONE, I WAS LOOKING FOR THE AUTHORITATIVE NINTH CIRCUIT VIEW ON IT.

THE COURT: IT ALSO DOESN'T MEAN THERE ISN'T A FIRST TIME.

MR. FOWLER: SO WHAT I WANT TO ADDRESS NEXT IS A POINT THAT YOU ASKED, YOUR HONOR, IN THE ADVANCE OF THE SLIDE 16, YOU ASKED WELL, ARE WE REALLY TALKING JUST ABOUT THE THREE LIMITATIONS, AND I THINK THE ANSWER TO THAT IS NO.

SO UNDOUBTEDLY WHEN WE WERE HERE AT TRIAL THOSE WERE FEATURED, I WOULD USE THAT WORD FEATURED, BUT I TOLD THE JURY THOSE WERE THREE OF THE REASONS THAT APPLE DIDN'T INFRINGE AND THAT THEY BORE THE BURDEN ON INFRINGEMENT AND THAT THEY HAD TO PROVE INFRINGEMENT ON EACH POINT.

AND AS WE SEE FROM THE I FOUR I, THIS IS IN OUR BRIEF SO I WILL GO THROUGH IT QUICKLY, THE DURALAST CASE, IF THEY DIDN'T RAISE IN THEIR RULE 50(A) MOTION AND THEY DON'T REALLY EVEN DO IT IN THEIR RULE 50(B) MOTION WHY IT IS THE OTHER CLAIM LIMITATIONS WERE SATISFIED SINCE THEY BORE THE BURDEN, THERE'S AN IMPLIED FINDING THAT THE JURY FOUND IN FAVOR OF APPLE ON ALL OF THE CLAIM LIMITATIONS, AND THEY HAVEN'T MADE A SHOWING TO THE CONTRARY ON THOSE OTHER THREE, THEY HAVE JUST FOCUSED ON THE THREE.

SO THE FACT IS BECAUSE THERE WAS NO SHOWING ON 50(A) AND BAS TO THE OTHER CLAIM LIMITATIONS ESPECIALLY GIVEN THE HIGH STANDARD OF REVIEW, THAT THEY WAIVED AS TO THOSE. AND EVEN IF

THEY DIDN'T WAIVE, THERE'S BEEN NO SHOWING AND THERE'S AN IMPLIED FINDING THE JURY FOUND IN OUR FAVOR AND THEREFORE THE VERDICT MUST STAND AS TO THOSE OTHER CLAIM LIMITATIONS.

IN OTHER WORDS, IT WASN'T MY JOB IN OUR BRIEF TO SAY WHY WE WERE RIGHT, IT WAS HIS JOB -- I'M SORRY, MR. PAVANE'S JOB AND HIS CLIENT'S JOB, TO DO THAT IN RULE 50(A) AND RULE 50(B) AND THEY DIDN'T DO THAT.

THE COURT: YOU ARE SAYING THAT BECAUSE THEY DID NOT POINT THE COURT TO THE SUBSTANTIAL, THE LACK OF SUBSTANTIAL EVIDENCE AS TO EACH OF THE LIMITATIONS UNDER DURALAST AS ONE EXAMPLE, I HAVE TO ESSENTIALLY PRESUME THAT THERE WAS AN ABSENCE OF PROOF OR INSUFFICIENT PROOF PRESENTED, AND ON THAT BASIS ALONE I COULD KICK THE MOTION.

MR. FOWLER: YES. THAT'S RIGHT, YOUR HONOR, THAT'S THE LAW.

LET'S GO TO THE THREE THAT WERE FEATURED. SO PREDETERMINED DATA SIZE.

NOW YOUR HONOR, I AM GOING TO MARCH THROUGH THIS A LITTLE BIT BECAUSE I THINK ONE THING THAT WE SAW AT TRIAL AND WE SEE A LITTLE BIT HERE TODAY, AND I DON'T BLAME EMBLAZE FOR THIS, IS THEY THREW IT HIGH AND HARD AND WE WERE DOWN IN THE TRENCHES ON THE DETAILS. AND I THINK THAT MATTERS HERE.

SO ON THE PREDETERMINED DATA SIZE QUESTION, WE HEARD JUST MR. PAVANE SAY A MINUTE AGO, WELL, BASICALLY WHY DOES IT MATTER WHETHER THERE'S A MAXIMUM DATA SIZE OR MAXIMUM RATE.

WELL IT MATTERS FOR TWO REASONS. TWO DIRECTLY RELATED REASONS. WHAT WE HAVE UP HERE, YOUR HONOR, IS A PAGE FROM YOUR RULING ON THE SUMMARY JUDGEMENT MOTION WHERE WE MOVED FOR SUMMARY JUDGEMENT ON THIS ISSUE. AND THE WAY THEY ESCAPED SUMMARY JUDGEMENT ON THAT, ACCORDING TO YOUR HONOR'S RULING, WAS THAT THEY CAME IN AND SAID THERE WAS A MAXIMUM DATA RATE.

AND YOUR HONOR CONCLUDED THAT AS LONG AS THERE WAS A MAXIMUM DATA RATE, THAT ALL THE DATA SLICES WOULD BE APPROXIMATELY EQUAL. SO THOSE WERE KIND OF THE TWO MAJOR LEGS OF THE DECISION. MAXIMUM DATA RATE AND APPROXIMATELY EQUAL. THEN THAT ISSUE WAS GOOD ENOUGH TO GET TO THE JURY FOR EMBLAZE.

WELL, WE TRIED THIS ISSUE, THIS WAS THE ISSUE WE TRIED IN FRONT OF THE JURY, AND THE JURY FOUND IN OUR FAVOR.

I'M GOING TO -- THERE'S A SLIDE ON THIS AT THE END BUT THE ARGUMENT WE HEARD TODAY FROM MR. PAVANE THAT WELL, ALL I NEED TO DO IS ESTABLISH THAT THERE WERE, THERE WAS A TIME SLICE A TIME DURATION, HE DIDN'T MAKE THAT ARGUMENT TO THE JURY.

THEIR EXPERT, DR. MADISETTI, DIDN'T MAKE THAT ARGUMENT TO THE JURY. SO TO THE EXTENT THEY THINK THAT'S THEIR BEST ARGUMENT, WELL ONE, THEY WAIVED IT BECAUSE THEY DIDN'T ARGUE IT TO THE JURY AND I WILL SHOW YOU WHY THAT'S TRUE IN A MINUTE.

AND TWO, AND THIS IS THE ARGUMENT THAT THEY MADE TO THE JURY AND THEY ARE WRONG.

THE COURT: WELL, IF I COULD, JUST BEFORE WE MOVE ON MR. FOULER I WANT TO MAKE SURE I HAVE THIS POINT FIRMLY IN

HAND.

ON THIS ISSUE OF MAXIMUM DATA RATE, IF WE COULD GO BACK TO THE SLIDE. THANK YOU, I APOLOGIZE. SLIDE 20. AND WHETHER OR NOT AN ACCUSED STREAM WITH A MAXIMUM DATA RATE COULD MEET THIS LIMITATION.

I THOUGHT WHAT I WAS DOING HERE AT, I GUESS IT'S PAGE 17 OF MY SUMMARY JUDGEMENT ORDER, WAS SAYING THE JURY COULD GO ONE WAY, THE JURY COULD GO ANOTHER WAY, BUT I CAN'T GIVE YOU APPLE SUMMARY JUDGEMENT ON THIS ISSUE BECAUSE REASONABLE MINDS COULD DIFFER.

AND IT SOUNDS LIKE WHAT I'M BEING ASKED TO DO, AMONG OTHER THINGS IN THIS MOTION IS TO SAY, ACTUALLY, AS IT TURNS OUT NO, A REASONABLE JURY COULD ONLY RULE ONE WAY.

MR. FOWLER: RIGHT. WELL, I'M SORRY IF I WAS INARTFUL MYSELF IN MY ARGUMENT, BUT I THINK THAT'S EXACTLY RIGHT, YOUR HONOR.

THE ARGUMENT THEY MADE TO AVOID SUMMARY JUDGEMENT IS THE SAME ARGUMENT THEY MADE TO THE JURY. YOUR HONOR FOUND THAT THERE WAS A FACTUAL ISSUE THAT NEEDED TO BE DECIDED.

THE COURT: I REJECTED YOUR POSITION, ESSENTIALLY.

MR. FOWLER: RIGHT. AND YOUR HONOR FOUND THAT WAS A FACTUAL ISSUE THAT NEEDED TO BE DECIDED BY THE JURY. IT WENT TO THE JURY, AND UNDER THE PREVAILING LAW IT'S ASSUMED THAT THE JURY FOUND IN OUR FAVOR ON THAT BECAUSE ON ANY ARGUMENT WHERE WE HAD SUBSTANTIAL EVIDENCE IN OUR FAVOR, IT HAS TO BE ASSUMED

THAT THAT'S THE CASE.

SO AT SOME POINT I ALMOST WANT TO STOP RIGHT THERE BECAUSE IT WAS A FACTUAL ISSUE THAT NEEDED TO BE TRIED. WE TRIED IT AND WE WON.

BUT I WANT TO TALK ABOUT WHAT WAS ACTUALLY TRIED IN THE CASE, WHAT THE JURY HEARD, RIGHT.

SO THEY MADE A BUNCH OF ARGUMENTS ONE OF WHICH WAS WELL, THE BAND WIDTH ATTRIBUTE IS THE MAXIMUM RATE. YOU MAY RECALL THAT. THEY ARGUED THAT BOTH BEFORE THE TRIAL AND THAT WAS THEIR LEAD IN ARGUMENT AT TRIAL.

AND WE SHOWED THAT THAT WAS FALSE. THERE'S NO QUESTION THAT THAT'S FALSE. AND THE JURY HEARD THAT. SO WE HAD THE BANDWIDTH ATTRIBUTE, HERE WE HAVE THIS IS DTX1192, AT 28, WE HAVE THE MLB DODGERS CAME. AND THERE'S A 300 KILOBIT PER SECOND BANDWIDTH ATTRIBUTE, AND WE SEE ON THE RIGHT, THE JURY SAW THIS, THAT WAS NOT A CONSTRAINT.

AND IN FACT THE TESTIMONY FROM THE EXPERT -- OR NOT FROM THE EXPERT, BUT FROM MR. PANTOS, WHO COULD HAVE BEEN AN EXPERT I THINK, MR. PANTOS FOR APPLE AND DR. POLISH AND MR. MAY, THAT NO, THIS IS NEVER A CONSTRAINT, IT'S USED FOR ANOTHER PURPOSE, IT'S NOT A CONSTRAINT.

SO DR. MADISETTI WAS PROVED WRONG ON THAT. AND IN FACT THE JURY SAW THIS, YOU MAY RECALL, WE PUT UP ALL KINDS OF SLIDES LIKE THIS THAT CONTRARY TO THE ASSERTION MADE BY EMBLAZE AT THE TIME OF SUMMARY JUDGEMENT AND CONTRARY WHAT

DR. MADISETTI TOLD THEM IN THEIR CASE IN CHIEF, THAT IT'S NOT APPROXIMATELY EQUAL. THESE SLICES ARE NOT APPROXIMATELY -- WE SHOWED THESE EXAMPLES. AGAIN, THIS IS DTX1192, LINES 276 THROUGH 278 FOR MLB. AND THERE'S A 61 PERCENT DIFFERENCE JUST WITHIN THREE SLICES, FOR ESPN THERE'S A 24 PERCENT DIFFERENCE WITHIN FIVE SLICES.

FOR NFL THERE WAS A 43 PERCENT CHANGE WITHIN FIVE SLICES, PGA, 14 PERCENT CHANGE WITHIN FIVE SLICES.

SO IT'S NOT TRUE THAT WHATEVER HAPPENS WITH THAT BANDWIDTH ATTRIBUTE THAT THAT CAUSES THESE THINGS TO BE APPROXIMATELY EQUAL.

SOMETHING THAT'S 60 PERCENT DIFFERENT CAN'T BE APPROXIMATELY EQUAL.

AND WHY IS THAT?

THE COURT: PERHAPS TO PUT IT ANOTHER WAY, THE JURY COULD FIND THAT THAT VARIANCE WAS IN FACT NOT APPROXIMATELY EQUAL.

MR. FOWLER: YES.

AND YOUR HONOR, THAT CAVEAT WHICH IS OF COURSE IMPORTANT, WE CAN GO TO EVERYTHING I'M SAYING. WE PRESENTED THIS EVIDENCE AND IT WAS CERTAINLY EVIDENCE UPON WHICH THEY COULD RELY TO REACH TO THE CONCLUSION. AND THIS WAS A BIG ISSUE.

ON SLIDE 25 WE HAVE THIS DEMONSTRATIVE THAT WE SHOWED TO THE JURY DURING MY OPENING AND DURING MY CLOSING AND THE COURSE OF THE CASE ITSELF. AND THAT HAS TO DO WITH, WELL, IF YOU HAVE

A CONSTANT BITRATE, THEN WHAT MR. PAVANE AND WHAT DR. MADISETTI SAID WOULD BE TRUE, THAT YOU WOULD END UP WITH SIZES THAT WERE THE SAME.

BUT THE EVIDENCE, AND THERE WAS A DISPUTE ON THIS POINT, THERE WAS A DISPUTE IN THE EVIDENCE ON THIS POINT AS TO WHETHER THESE STREAMS USED A VARIABLE BITRATE OR CONSTANT BITRATE.

WE HAD EVIDENCE FROM MR. PANTOS, MR. MAY, DR. POLISH, AND THEN THE THIRD PARTY MR. INZERILLO FROM MLB, THAT THIS WAS NOT A CONSTANT BITRATE AND IT WAS A VARIABLE BITRATE. AND AS A RESULT YOU COULD NOT PREDICT IN ADVANCE WHAT THE DATA SIZE SEGMENTS WOULD BE. AND THAT MEANS THAT THERE'S NO PREDETERMINED DATA SIZE, NO ASSIGNED VALUE.

AND JUST AS AN EXAMPLE HERE, YOUR HONOR, THIS IS NOT SOMETHING THAT THE JURY SAW WITH THE QUESTION MARKS, BUT HERE WE HAVE MY GOOD FRIEND DTX1192 AGAIN SHOWING AT PAGE 2, SHOWING ONE EXAMPLE.

AND WHAT'S DEMONSTRATED HERE IS THE FIRST THREE WE HAVE 1.3 MILLION FILE LENGTH, 1.4 MILLION FILE LENGTH FOR THE SECOND SLICE, AND 1.5 MILLION FOR THE NEXT SLICE.

NOW UNDER THE PATENT, IF WHAT THE GOAL HERE IS TO PREDETERMINE OR ASSIGN IN ADVANCE WHAT THE DATA SLICE IS, WE SHOULD KNOW MORE OR LESS WHAT THOSE NEXT ONES ARE GOING TO BE. BUT THE FACT IS NOBODY KNOWS.

AND WHY IS THAT? AND THAT IS BECAUSE, USING MLB AS AN EXAMPLE, NO ONE WILL KNOW WHAT THE SLICE IS UNTIL YOU SEE WHAT

HAPPENS ON THE FIELD. WE USED THE EXAMPLE AT TRIAL WHETHER THE GUY IS SWINGING THE BAT OR THE PITCHER IS STANDING ON THE MOUND, IT'S GOING TO VARY. SO NOBODY KNOWS. THERE'S NO PREASSIGNED RATE.

AND MR. INZERILLO FROM MLB, HE, HIMSELF, SAID IN HIS VIDEOTAPE DEPOSITION THAT THEY DON'T KNOW. THEY DON'T EVEN TRY TO DO THIS. AND AS A MATTER OF FACT, THAT THEY USED TO WITH ANOTHER PRE-APPLE PRODUCT, TRIED TO PUT A CAP BUT IT DIDN'T WORK WELL, AND THAT'S ONE REASON THEY WENT TO HLS.

SO WHAT CAN DR. MADISETTI DO WHEN FACED WITH THE FACT THAT HIS CASE OR HIS THEORY WAS PROVEN WRONG? HE CAME BACK AND MADE A BUNCH OF EXCUSES, EXCUSES.

AND ONE OF HIS EXCUSES THAT THE JURY HEARD WAS WELL, THE VARIATION IN THE DATA SIZE WAS DUE TO OVER HEAD. HE JUST PULLED THAT OUT OF THIN AIR, FRANKLY. BECAUSE THE EVIDENCE WAS CLEAR FROM THE HLS SPECIFICATION WHICH IS DTX798 THAT THE BANDWIDTH ATTRIBUTE ALREADY FACTORS THAT IN. THAT WAS SHOWN TO HIM, THAT WAS SHOWN TO THE JURY.

AND MR. PANTOS AND DR. POLISH EXPLAINED THAT ONE, THAT WAS THE CASE AND YOU COULDN'T ACCOUNT FOR THE OVERHEAD. AND AGAIN, YOUR HONOR, I KNOW I'M GOING FAST, BUT THE SUGGESTION TO THE JURY FROM DR. MADISETTI WAS WELL, IF YOU TOOK OUT THE OVERHEAD, THEN ALL THOSE DATA SIZES WOULD BE ABOUT THE SAME, BUT THAT WAS PROVEN TO BE INCORRECT.

SO WHAT HAPPENED NEXT? THIS IS IN THE MOTION, NOW WE ARE

GOING TO START DEALING WITH WHAT THEY SAID IN THEIR JMOL MOTION.

THEY SAID THE PATENT DOESN'T ALWAYS TEACH ASSIGNING THE EXACT NUMBER OF BITS. UNDER UNDER'S CLAIM CONSTRUCTION, THAT'S TRUE.

MR. PAVANE SAID A MINUTE AGO IT WAS SOME BIG DEAL THAT DR. POLISH ADMITTED THAT ON THE STAND. WELL YOUR HONOR DICTATED THAT THAT WAS THE CASE, BUT THAT'S NOT THE POINT.

AND THAT WAS THE POINT WE MADE TO THE JURY. IT'S NOT THAT THEY ARE ALL NOT THE SAME, THE FACT IS THEY ARE ALMOST NEVER THE SAME, AND THEY HAVE THESE WIDE VARIATIONS. AND WHAT THAT IS INDICATIVE OF, AND WHAT WE TOLD THE JURY IS THAT BEING INDICATIVE OF IS THE FACT THAT THAT NOTHING IS BEING PREDETERMINED OR ASSIGNED IN ADVANCE. IT'S EVIDENCE OF THE FACT THAT THAT'S NOT HAPPENING.

NOW THE NEXT THING THEY SAY IN THEIR MOTION IS THAT NOTHING IN THE CLAIMS REQUIRES THE ACTUAL DATA SIZE OF EACH SLICE TO BE KNOWN IN ADVANCE.

I DON'T KNOW HOW THEY CAN SAY THAT BECAUSE THAT'S WHAT THE CLAIM SAYS. THAT'S WHAT THE CLAIM CONSTRUCTION SAYS, YOUR INITIAL CLAIM CONSTRUCTION. AND IN YOUR MOST RECENT ORDER THAT'S THE WAY YOU START FIRST.

THE COURT FINDS THE PREDETERMINED REQUIRES THAT THE DATA SIZE OF EACH SLICE MUST BE ASSIGNED IN ADVANCE OF THE STREAM BEING DIVIDED. SO THAT ARGUMENT JUST DOESN'T HAVE ANY LEGS TO

IT AT ALL.

THEN, AND THIS IS WHERE I THINK WE SPENT MOST OF THE TIME AT THE TRIAL AND I WOULD LIKE YOUR HONOR TO REMEMBER THIS WHEN WE ARE TALKING ABOUT WHAT WENT TO THE JURY, WHAT THEY DECIDED IS THIS, DR. MADISETTI, DO YOU REMEMBER THE SWIM LANES?

THE COURT: I DO.

MR. FOWLER: OKAY. HE ARGUED THE SWIM LANES, AND WE HAVE A QUOTE FROM THEIR REPLY BRIEF, IT SAYS "AND AS DR. MADISETTI ALSO EXPLAINED THE PREDETERMINED DATA SIZE ASSOCIATED THEREWITH IS A TARGET DATA SIZE ASSIGNED TO THE SLICE BEFORE IT IS DIVIDED SO YOU KNOW WHAT SORT OF DATA SIZE IT SHOULD BELONG TO."

AND SO HE WAS ARGUING, I THINK HE REALIZED THE JIG WAS UP ON HIS INITIAL THEORY AND HE HAD TO SOMEHOW POINT TO CATEGORIES OR RANGES. BUT THERE'S NO EVIDENCE, THERE WAS NEVER ANY EVIDENCE AT TRIAL THAT THAT ACTUALLY HAPPENED.

AND MORE IMPORTANTLY, IT'S BASICALLY AN ATTEMPT TO RE CONSTRUE THE CLAIMS FOR WHICH THERE'S NO SUPPORT. THE ONLY THING THAT THEY CITE IS THE '473 PATENT AT COLUMN 9, LINES 1 THROUGH 5, BUT THAT SAYS THAT IT HAS A FIXED SIZE. SO A FIXED SIZE IS NOT A RANGE OR CATEGORY, SO THEY WERE WRONG THERE TOO.

AGAIN, THIS GOES BACK TO THE POINT. THEY SAID IN THEIR MOTION, WELL, THE CLAIM LIMITATION IS SATISFIED WHEN THE SLICE DURATION IS COMBINED WITH THE TARGET DATA RATE. I WENT THROUGH THAT. THAT'S JUST NOT TRUE AS A MATTER OF FACT AND THE JURY

CERTAINLY CAN CONCLUDE THAT.

AND THEN THIS GETS TO THE POINT THAT MR. PAVANE SPENT MOST OF HIS TIME ON. AND THAT IS THAT CLAIM 23 PREDETERMINED DURATION REQUIREMENT SOMEHOW OBVIATES THE SEPARATE REQUIREMENT IN CLAIM 1 OF DETERMINING THE SLICE DATA SIZE.

YOU'VE HEARD A LOT OF ARGUMENT ON THIS, YOU'VE HEARD IT BEFORE TRIAL, YOU MAY RECALL YOUR HONOR, AND I WILL COVER THIS IN A MINUTE, IT CAME UP DURING TRIAL AND WE NOW HAVE YOUR MARKMAN ORDER ON THAT.

SO LET'S TALK ABOUT THAT FOR A SECOND. CLAIM 1 SAYS, DIVIDING THE STREAMING INTO A SEQUENCE OF SLICES, EACH SLICE HAVING A PREDETERMINED DATA SIZE. CLAIM 23 ADDS THE LIMITATION, EACH HAVE A PREDETERMINED DURATION.

BUT WHAT'S BEING MODIFIED HERE? IT SAYS IN CLAIM 1, DIVIDING THE STREAM INTO A SEQUENCE OF SLICES. CLAIM 1 IS SAYING WHEREIN DIVIDING THE STREAM INTO THE SEQUENCE OF SLICES, SO THAT'S WHAT'S BEING MODIFIED, COMPRISES THE STREAM INTO A SEQUENCE OF TIME SLICES.

IT DOESN'T PURPORT TO MODIFY THE DETERMINED DATA SIZE ASSOCIATED THEREWITH. THOSE ARE TWO LIMITATIONS THAT CONTINUE TO EXIST TOGETHER. ONE DOESN'T TRUMP THE OTHER.

AND LET'S GO THROUGH WHAT HAPPENED IN THIS CASE, BEFORE OUR FIRM WAS INVOLVED AT THE ORIGINAL CLAIM CONSTRUCTION, YOUR HONOR RULED THAT EACH SLICE -- ISSUED A CONSTRUCTION THAT SAID EACH SLICE HAVING A DATA SIZE WHICH MAY BE A TIME DURATION

ASSIGNED IN ADVANCE OF THE STREAM BEING DIVIDED.

NOW WHAT STRIKES ME AS BEING ODD, GIVEN THE ARGUMENTS WE ARE HEARING NOW, IS FIRST APPLE MOVED FOR RECONSIDERATION SAID SIZE IS NOT THE SAME AS DURATION, AND DURATION CAN'T BE A PROXY FOR SIZE, ABSENT A DEFINED RELATIONSHIP.

EMBLAZE DID NOT SAY THAT'S CRAZY, NO, THAT'S WRONG. EMBLAZE SAID, AND THERE'S A QUOTE HERE THAT "DATA SIZE AND TIME DURATION ARE NOT THE SAME THING, BUT RATHER ARE RELATED VARIABLES IN THE FOLLOWS EQUATION, DATA RATE MULTIPLIED BY TIME EQUALS DATA SIZE."

THAT'S THE THEORY THEY WENT TO THE JURY ON. THAT'S THE THEORY THEY WENT TO THE JURY ON. AND YOUR HONOR AGREED WITH THAT AT THE TIME AND CAME UP WITH A DIFFERENT CONSTRUCTION THAT TOOK AWAY WHAT APPEARED TO BE EQUATING SIZE WITH DURATION BY SAYING YOU CAN HAVE A DATA SIZE SET BY TIME DURATION.

YOU CERTAINLY CAN DO THAT. IF YOU HAVE A CONSTANT BIT RATE, THAT'S EXACTLY WHAT HAPPENED, BUT IT DOESN'T MANDATE THAT WILL ALWAYS BE THE CASE.

THIS IS THE ISSUE THAT WENT TO THE JURY, THIS IS THE CONSTRUCTION THAT WENT TO THE JURY, AND THE JURY AS A MATTER OF LAW, WE HAVE TO ASSUME FOUND IN OUR FAVOR.

THE COURT: RIGHT. TO PUT IT ANOTHER WAY, PERHAPS I SAID MAY, NOT MUST.

MR. FOWLER: RIGHT. EXACTLY.

THAT WAS THE POINT I MADE DURING MY CLOSING ARGUMENT.

AND SO THAT WAS THE ISSUE THAT WENT TO THE JURY.

NOW DURING THE TRIAL, YOU MAY RECALL, MR. PAVANE OR EMBLAZE SAID, WE WANT YOU TO ADD THIS WRITER TO THE CONSTRUCTION, "PROVIDED THE TIME DURATION IS ASSIGNED IN ADVANCE, THE DATA SIZES OF THE SLICES NEED NOT BE THE SAME."

AND YOUR HONOR SAID NO, AFTER HEARING THAT ARGUMENT HE SAID THAT'S A FACTUAL ISSUE THAT WE NEED TO SEND TO THE JURY, THE UNDERLYING ARGUMENT BEHIND THAT. AND THAT IN FACT WAS A FACTUAL ISSUE THAT WENT TO THE JURY, AND AGAIN WE HAVE EVIDENCE TO SUPPORT OUR POSITION.

IN YOUR MOST RECENT MARKMAN ORDER THAT POSTDATES THE VERDICT, I THINK THIS UNDERSCORES WHAT WENT TO THE TRIAL. HERE AT PAGES 18 AND 19 YOU RECOUNT WHAT EMBLAZE'S ARGUMENT WAS. AND EMBLAZE'S ARGUMENT SAYS THAT YOU CAN CALCULATE THE DATA SIZE IF YOU HAVE A KNOWN GIVEN DATA RATE. AND YOUR HONOR QUOTED THEM TWICE POINTING OUT THAT IT'S A GIVEN DATA RATE, AND THEN YOU POINT OUT THE EXAMPLE THAT THEY GIVE WHICH IS THE SAME FORMULA BASICALLY THAT WAS -- THAT THEY ADMITTED WAS THE CASE IN THE MOTION FOR RECONSIDERATION.

AND THAT'S WHAT WENT TO THE JURY.

NOW LET'S TALK ABOUT WHAT THEY DIDN'T ARGUE TO THE JURY. THIS IS KIND OF THE CLINCHER REALLY, IS THEY DIDN'T SAY, MR. PAVANE DID NOT STAND UP AND TELL THE JURY DURING CLOSING ARGUMENT THAT SETTING THE TIME DURATION ITSELF WAS ALL YOU NEEDED TO DO, WHICH IS WHAT I HEARD HIM SAY TODAY.

WHAT HE SAID INSTEAD, AND THIS IS THE TRIAL TRANSCRIPT AT 1913-14 AND 1995-97 WHICH I BELIEVE IS HIS OPENING AND THEN I BELIEVE THE REBUTTAL, I'M NOT A HUNDRED PERCENT SURE OF THAT, BUT I BELIEVE THAT TO BE THE CASE, IS HE PULLED OUT THE EQUATION AGAIN. DATA RATE MULTIPLIED BY THE TIME DURATION, THE SAME THING THEY ADMITTED AT THE MOTION FOR RECONSIDERATION, THE SAME THING THEY ADMITTED DURING TRIAL, ARE ABOUT THE SAME SIZE, FALL WITHIN A CERTAIN RANGE AND ARE ALL GOING TO BE VERY CLOSE.

SO IF THE ARGUMENT HERE TODAY IS YOU CAN IGNORE ALL OF THAT, WHICH IS WHAT I HEARD HIM SAY, I DON'T KNOW ABOUT THIS MAXIMUM RATE, I DON'T KNOW ABOUT THE RATE, THAT'S NOT THE ARGUMENT THEY MADE TO THE JURY. SO THEY WAIVED THAT ARGUMENT. THEY WAIVED THAT ARGUMENT.

WHAT WENT TO THE JURY WAS THE SAME THING THAT WE ARGUED FROM THE BEGINNING THE OF THE TRIAL TO END, AND THERE IS SUFFICIENT EVIDENCE FOR THE JURY TO CONCLUDE WE WERE RIGHT ON THAT.

ONE LAST THING I WANT TO SAY ON THIS POINT YOUR HONOR, AND THIS HAS TO GO TO WHETHER THERE WAS EVIDENCE, IF FOR SOME REASON THEY DIDN'T WAIVE THE ARGUMENT THAT SETTING THE TIME DURATION ITSELF IS SUFFICIENT, IS WE ARE BACK TO DTX1192. AND WHAT I HAVE UP HERE IS THE MLB DODGERS GAME, AND I HAVE PICKED THREE PARAGRAPHS, LINES 101 THROUGH 102, 177, 178, 329 AND 330. EACH OF THESE IS A FIVE SECOND DURATION.

SO IF IT WERE TRUE THAT ALL YOU NEEDED TO DO WAS TO

SATISFY THE CLAIM LIMITATION, WAS TO SET A FIVE DURATION, LOOK AT THAT, THE FIRST ITEM IS 392 THOUSAND, THAT'S TWICE AS MUCH AS THE FIRST. AND THE LAST ONE IS 900,000 WHICH IS SIX TIMES AS BIG AS THE FIRST.

SO IF THAT WERE THE CASE, IF SETTING THE DURATION SOMEHOW MEANT EQUAL DATA SIZE, THEN THAT WOULD MEAN THAT SOMETHING THAT IS SIX TIMES BIGGER THAN THE FIRST IS THE SAME. THAT CAN'T BE THE CASE. THAT CAN'T BE THE RIGHT RESULT. THAT CAN'T BE THAT JUST SETTING FIVE SECONDS DOES THE TRICK.

SO YOUR HONOR, I'M DONE WITH THAT PARTICULAR ARGUMENT AS, IN THE TRIAL THAT'S THE THING WE SPENT COLLECTIVELY THE MOST TIME ON.

IF YOU HAVE ANY QUESTIONS, I CAN ADDRESS THAT, OTHERWISE I WOULD LIKE TO MOVE ON.

THE COURT: I WOULD LIKE TO MOVE ON.

AND I WOULD SAY THE REALTIME BROADCASTING IS ACTUALLY THE LIMITATION THAT GAVE ME THE MOST PAUSE IN ALL OF THIS, SO I WOULD LIKE TO HEAR YOUR ARGUMENTS.

MR. FOWLER: OKAY. SURE.

SO THE COURT'S CLAIM CONSTRUCTION STARTS WITH THE SIMULTANEOUS TRANSMISSION OF THE DATA TO ONE OR MORE CLIENTS.

NOW ONE OF THE THINGS THAT WE HEARD A LITTLE BIT TODAY BUT WHAT WAS FEATURED BY EMBLAZE AT TRIAL WAS WE WERE ARGUING SIMULTANEOUS RECEIPT, NOT SIMULTANEOUS TRANSMISSION. AND I STOOD UP TWICE, ONCE EXAMINING DR. POLISH AND ONCE DURING MY

CLOSING ARGUMENT SAYING WE ARE NOT DOING THAT, THAT'S A RED HERRING, WE ARE ARGUING SIMULTANEOUS TRANSMISSION, NOT RECEIPT.

AND IT SOUNDS LIKE YOUR HONOR HAS THIS IN MIND SO I WON'T GO THROUGH IT IN DETAIL, BUT WE USE A REQUEST RESPONSE MODEL. AND UNDER THAT MODEL, EACH CLIENT REQUESTS THE SEGMENT SEPARATELY. THE SERVER DOESN'T SEND THE SEGMENT TO THE CLIENT UNTIL IT RECEIVES THE REQUEST AND THEY ARE NOT SYNCHRONIZED IN ANY WAY.

AND COUNSEL TALKED ABOUT WHAT THE PATENT TEACHES BUT THAT'S NOT WHAT WENT, THE SPECIFICATION DIDN'T GO TO THE JURY WHAT WENT TO THE JURY ARE WERE THE CLAIMS AND THE CLAIM CONSTRUCTIONS.

AND HERE'S THE SIMPLISTIC ANIMATION WE SHOWED NOT JURY. THIS IS WHAT SIMULTANEOUS TRANSMISSION MEANS THE SERVER SENDS EVERYTHING AT ONCE. BUT THIS IS WHAT APPLE DOES, APPLE INSTEAD, THE CLIENT MAKES A REQUEST, SENDS A SLICE, AND SO FORTH. AND IT'S DIFFERENT FOR EACH ONE OF THESE. AND THEY ARE NOT SYNCED UP.

AND THEN THE JURY ON TOP OF THAT, WELL LET ME BACK UP.

SO DR. POLISH SAID THAT, MR. PANTOS, MR. MAY, ALL OF THE APPLE WITNESSES TESTIFIED TO THIS. SO I DON'T THINK IT WAS DISPUTED THAT THERE WAS NO SIMULTANEOUS TRANSMISSION FROM THE SERVER TO THE CLIENT, THAT WAS UNDISPUTED. AND ALTHOUGH WE DID THAT, WE ALSO SHOWED THIS VIDEO. YOU MAY RECALL WE ACTUALLY PLAYED IT FOR THE JURY. AND THIS WAS ONE EXAMPLE WHERE WE HAD

AN IPHONE AND IPAD RECEIVING THE SAME STREAM, AND THIS PARTICULAR FRAME PLAYED AT A DIFFERENT TIME. AND DR. POLISH EXPLAINED THAT THE REASON FOR THAT, THE ONLY REASON FOR THAT WAS THE FACT THAT THERE WASN'T SIMULTANEOUS TRANSMISSION.

THE JURY COULD HAVE EASILY RELIED UPON THIS IN DETERMINING THIS CLAIM LIMITATION WAS NOT MET. IT'S CERTAINLY SUBSTANTIAL EVIDENCE UNDER THE ANY EVIDENCE STANDARD IT'S CERTAINLY SATISFIED.

NOW ONE OF THE THINGS THAT I THOUGHT I HEARD TODAY AND WE CERTAINLY HEARD IT AT THE TRIAL WAS, WELL, WHAT MATTERS IS THAT IT'S COMING OUT OF THE TRANSMITTING COMPUTER AT THE SAME TIME. THAT'S NOT WHAT THE CLAIM SAYS.

THE CLAIM SAYS IT DOESN'T SAY SIMULTANEOUS TRANSMISSION FROM THE TRANSMITTING COMPUTER TO THE SERVER WHICH IS WHAT THEY TRIED TO ARGUE TO THE JURY.

AND WHY DO WE KNOW THAT THAT CAN'T BE RIGHT? WELL LOOK AT CLAIM 25, CLAIM 25 TALKS ABOUT THE REALTIME BROADCASTING APPARATUS THAT CONSISTS OF A TRANSMITTING COMPUTER AND SERVER. THE CLAIM IS NOT TALKING ABOUT A REALTIME TRANSMISSION WITHIN ITSELF. IT'S NOT SAYING THAT IT SENDS IT TO ITSELF, IT SENDS IT TO THE CLIENT.

YOUR HONOR, THAT WAS -- SO THAT WAS THE FIRST ARGUMENT WE MADE TO THE JURY IS THAT THESE THINGS WERE NOT BEING SENT IN REALTIME SIMULTANEOUSLY. AND THAT WAS UNDISPUTED. THE JURY COULD HAVE RELIED UPON THAT TO REACH ITS VERDICT, THERE'S NO

DOUBT ABOUT THAT. THAT WAS SOLID EVIDENCE THAT WASN'T DISPUTED.

WE HAD A SECOND ARGUMENT AND THAT HAD TO DO WITH THE LATENCY. AND IT SOUNDS LIKE YOUR HONOR REMEMBERS THIS, SO I'LL GO THROUGH THIS QUICKLY, BUT IT WAS UNDISPUTED THAT APPLE BUILDS IN LATENCY ON PURPOSE AND THAT IT COULD BE UP TO 30 SECONDS.

THE JURY, TO ANSWER YOUR QUESTION TO MR. PAVANE, COULD HAVE DETERMINED AS A MATTER OF FACT THAT THAT WAS SUFFICIENT LATENCY TO DEFEAT THE CLAIM LIMITATION. THAT WAS A FACTUAL ISSUE THAT WENT TO THE JURY FOR THEM TO DECIDE.

THE COURT: AND AM I RIGHT, MR. FOWLER, IN REMEMBERING THAT I BELIEVE IT WAS DR. POLISH, MAYBE IT WAS SOMEBODY ELSE, HAD DONE SOME CONTESTING AND IT WASN'T ACTUALLY 30 SECONDS, IT WAS SOMEWHERE AROUND 30 SECONDS.

MR. FOWLER: RIGHT. AND I THINK IT VARIED, RIGHT, IT VARIED.

THE COURT: THE JURY HEARD ALL OF THAT.

MR. FOWLER: RIGHT. THE JURY HEARD ALL OF THAT. AND THAT'S A FACT ISSUE.

THEY HAD THE CONSTRUCTION, THEY HAD THE CLAIM, THEY HAD THE TESTIMONY WHICH WAS UN REBUTTED, SO THAT WAS A FACTUAL ISSUE FOR THEM TO DECIDE WHETHER THAT WAS SUFFICIENT FOR THEM TO MEET THE CLAIM LIMITATION.

THE LAST OF THE THREE LIMITATIONS IS THE UP LOADING THE

SEQUENCE TO A SERVE ARE. AND I DO TAKE ISSUE WITH WHAT WE HEARD FROM MR. PAVANE TODAY.

THE CLAIM ITSELF SAYS THAT THE UPLOADING TO THE SERVER, AND THEN IT REFERS TO THE DOWNLOADING FROM THE SERVER. THIS IS LIKE PATENT LAW 101. THE SECOND ONE -- OR THE FIRST IS THE ANTECEDENT BASIS FOR THE SECOND.

SO THEY HAVE TO BE THE SAME SERVER. IT HAS TO BE THE SAME SERVER. THERE'S NO DOUBT FROM THE CLAIM THAT THAT'S TRUE. AND AS A MATTER OF FACT, DR. MADISETTI, THIS IS HIS TESTIMONY AT 1873-20 THROUGH 1874-3, HE ADMITTED THAT ON THE STAND TO ME IN CROSS-EXAMINATION THAT THEY HAD TO BE THE SAME SERVER. THE JURY HEARD THAT.

AND IT DOESN'T MATTER. THEY ARGUED DURING THE TRIAL, WELL, IT'S OVER THE NETWORK, BUT THAT DOESN'T MATTER, IT STILL HAS TO BE THE SAME SERVER. SO LET'S TALK ABOUT WHAT THAT IS.

SO THE EVIDENCE THAT THE JURY HEARD WAS THAT IT'S THE EDGE SERVER FROM WHICH THERE'S A DOWNLOAD TO THE CLIENT DEVICE. THAT'S WHAT THE CLAIM TALKS ABOUT IS THE DOWNLOAD FROM THE CLAIM DEVICE. IT COMES FROM THE EDGE SERVER IT DOESN'T COME FROM SOMEWHERE ELSE.

AND IT WAS UNDISPUTED THAT THE MOVEMENT OF DATA BETWEEN THE HTTP SERVER TO THE ORIGIN SERVER AND THE ORIGIN SERVER TO THE EDGE SERVER WERE NOT UPLOADS, THEY WERE DOWNLOADS. THE CLAIM REQUIRES AN UPLOAD TO THE SERVER AND THEN A DOWNLOAD TO THAT SERVER, AND THAT NEVER HAPPENS EVER.

THE COURT: BUT IS IT TRUE IN THE SITUATION WHERE THE FILE IS FIRST REQUESTED?

MR. FOWLER: YES, ABSOLUTELY. AND THAT'S WHAT WE SAID TO THE JURY, AND THEY WERE ENTITLED TO TAKE THAT.

AND THAT'S -- THE REASON FOR THAT, YOUR HONOR, IS IT MAY WELL BE THAT THERE IS DATA HERE AND IT HAS TO CALL TO THAT SERVER IN THE FIRST INSTANCE, BUT THE DOWNLOAD TO THE CLIENT COMPUTER COMES FROM THE EDGE SERVER EVEN IN THAT INSTANCE.

SO THERE HAS TO BE AN UPLOAD TO THAT SERVER.

THE COURT: IT'S NOT THE SERVER WHICH IS DOING THE DOWNLOADING.

MR. FOWLER: RIGHT. EXACTLY. THAT WAS OUR POINT TO THE JURY.

THE JURY HEARD MR. PAVANE'S ARGUMENT ON THAT. AND AGAIN, IT HAS TO BE ASSUMED THAT THE JURY CONCLUDED WE WERE CORRECT ON THAT POINT.

AND THAT WAS JUST ON MLB. WE DIDN'T HEAR ANY ARGUMENT ON THIS OTHER ARCHITECTURE, AKAMAI, RIGHT. AND I WON'T SPEND TIME ON THIS BECAUSE MR. PAVANE DID. BUT AGAIN THERE THE SOFTWARE, THE GHOST SOFTWARE ON THE EDGE SERVER, THAT'S DOWNLOADED. THE FILES BEFORE THEY REACH THE GHOST SERVER ARE NOT THE SAME.

YOU MAY RECALL THERE'S A SUMMARY JUDGEMENT MOTION ON THIS TOO AND YOU SAID THAT WAS A FACTUAL ISSUE THAT NEEDED TO GO TO THE JURY.

THE JURY, WE HAVE TO ASSUME, FOUND IN OUR FAVOR ON THAT.

I WILL SKIP THE SLIDES ON THIS AND GO TO THE OTHER POINT WHICH IS THAT THESE WERE THE ONLY TWO ARCHITECTURES WHICH ANY EVIDENCE WAS PROVIDED. SO OTHER THAN PGA, ABC AND MLB, THEY DIDN'T PROVIDE ANY EVIDENCE ON THIS POINT. SO THERE WAS A WAIVER ON THAT AND CERTAINLY THERE WAS, WELL, THERE WAS NO EVIDENCE FOR THEM TO BE FOUND.

NOW LET ME GO TO THE NEXT ONE. THOSE ARE THE THREE MAIN ONES. I GUESS WE WILL JUST HAVE TO SAY, YOUR HONOR, HE SAYS YES, I SAY NO. MR. PAVANE SAID DR. MADISETTI TOOK THE STAND AND DID A RIGOROUS ANALYSIS OF THE OTHER STREAMS.

THAT'S JUST NOT THE CASE. AND I WILL REST ON MY PAPER, BUT WE HAVE TWO DEMONSTRATIVES THAT SHOWN TO THE JURY THAT UNDERSCORE THAT POINT. ESPN, THERE WAS A SLIDE SHOWN THAT JUST SAID SAME ANALYSIS. THAT'S NOT A CLAIM-BY-CLAIM ANALYSIS. THAT'S NOT RIGOROUS.

AND THEN WE HAVE A SLIDE FOR CLAIM 28 WHERE THERE WERE JUST CHECK MARKS PUT IN. AND HE DIDN'T MARCH THROUGH EACH ONE OF THOSE AND CHECK OFF THE THINGS, HE JUST CHECKED IT OFF.

SO THERE WAS NO SUBSTANTIAL EVIDENCE FOR ANYTHING OTHER THAN MLB.

AND THEY DID NOT DO, AS YOUR HONOR I THINK SUGGESTED THAT THEY DO EARLIER ARE IN THE CASE, SHOW THAT USING HLS NECESSARILY RESULTS IN THE PRACTICES OF THE CLAIM.

THEY COULD HAVE TRIED TO DO THAT, THAT WAS, YOU MAY RECALL YOUR HONOR, SUBJECT TO OUR SUMMARY JUDGEMENT MOTIONS,

BUT THEY DIDN'T. THEY INSTEAD RELIED ON THE CONCLUSORY OPINIONS OF DR. MADISETTI, WHICH GIVEN THE CONTRARY, EVIDENCE PROVIDED TO THE JURY CAN'T CARRY THE DAY.

ON CLAIM 23, YOUR HONOR, THIS IS THE AKAMAI ISSUE, YOU MAY RECALL, SO I WILL GO THROUGH THIS THE VERY QUICKLY.

MR. PAVANE SAID THIS TO THE JURY. WE NEVER ARGUED THAT CISCO IS CONTROLLING THIS, THIS IS JUST SOMETHING THEY BOUGHT FROM CISCO AND THEY ARE THE ONES THAT POINTED IT OUT TO THE JURY.

MLB CONTROLLED THE HTTP SERVER AND THE MEDIA PROCESSOR, THAT WAS UNDISPUTED. BUT THE SERVER WAS CONTROLLED BY AKAMAI. AND EVEN UNDER THEIR THEORY OF THE CASE, I MEAN, JUST THINK ABOUT THE WAY THEY JUST ARGUED THAT OTHER CLAIM LIMITATION, THEY WERE TALKING ABOUT THINGS BEING PULLED THROUGH THOSE SERVERS.

AND SO SINCE THERE WERE TWO ACTORS INVOLVED, AKAMAI AND MLB, IT CAN'T BE THAT THERE WAS ANY INDIRECT INFRINGEMENT OF CLAIM 23. IT JUST CAN'T BE.

ON CONTROL, THIS WAS BRIEFLY ADDRESSED TODAY, ALL I CAN SAY YOUR HONOR IS YOUR JURY INSTRUCTION COMES ALMOST DIRECTLY OUT OF THE SCINTILLON CASE. AND ALTHOUGH I THOUGHT I HEARD TODAY AN ARGUMENT AS TO WHETHER THEY MET THE JURY INSTRUCTION OR THEY SATISFIED THE JURY INSTRUCTION, THE ARGUMENT IN THE BRIEF WASN'T THAT. THE ARGUMENT IN THE BRIEF WAS THAT YOUR JURY DISTRIBUTION WAS WRONG. YOUR JURY INSTRUCTION WASN'T

WRONG.

AND THEN WITH RESPECT TO INDUCED INFRINGEMENT. I HAVE A WHOLE BUNCH OF SLIDES ON THIS, BUT THERE IS NO WAY THAT THEY ARE ENTITLED TO JMOL ON INDIRECT INFRINGEMENT. I DON'T THINK THEY TAUGHT THAT IN ADVOCACY SCHOOL, BUT NO WAY IS THE RIGHT WAY TO PUT IT. BECAUSE IT'S NOT THE CASE THAT KNOWLEDGE OF WHAT PEOPLE WERE DOING, WHICH WASN'T PROVED BY THE WAY, IS SUFFICIENT. THERE HAD TO BE A SHOWING THAT WE KNEW THE INDUCED ACTS CONSTITUTE PATENT INFRINGEMENT AND WE SPECIFICALLY INTENDED THAT THE DIRECT INFRINGER INFRINGE THE PATENT.

THAT'S GLOBALTECH. WE HAD A BIG DISCUSSION ABOUT THAT WHEN WE DID THE JURY INSTRUCTIONS. THEY HAVE A CHARGED ERROR ON THAT JURY INSTRUCTION. AND THE EVIDENCE WAS OVERWHELMING THAT THAT WAS NOT THE CASE.

AND I WON'T GO THROUGH THAT BECAUSE I DON'T THINK THIS IS EVEN A CREDIBLE ARGUMENT FOR THEM TO BE MAKING, BUT I WILL ADDRESS ONE POINT.

MR. PAVANE SAID, BECAUSE THIS IS ONE OF THE MANY PIECES OF EVIDENCE WE PUT BEFORE THE COURT, WAS WELL, WHY DID MR. FOWLER ASK THE WITNESSES WHETHER THEY THOUGHT THERE WAS INFRINGEMENT? AND THEY SAID NO. WELL, OKAY, IF MR. PANTOS DIDN'T THINK THERE WAS, FOR EXAMPLE OR MR. MAY OR MR. BIDERMAN, MR. BUY, I DON'T THINK I ASKED ALL OF THEM, BUT IF THEY DIDN'T UNDERSTAND THEY WERE INFRINGING, SINCE INTENT IS REQUIRED, INTENT IS SOMETHING A PERSON HAS --

THE COURT: SOMEBODY HAS.

MR. FOWLER: SOMEBODY HAS TO HAVE IT. IF THOSE THREE GUYS DIDN'T HAVE IT AND HE SAYS IT'S IRRELEVANT WHETHER THEY HAD IT, WELL THEN WHO HAD IT?

THE ONLY OTHER PEOPLE WE INDIRECTLY HEARD FROM WERE THE IN-HOUSE PEOPLE FROM APPLE WHO SENT THREE LETTERS TO EMBLAZE EXPLAINING WHY THEY DIDN'T INFRINGE. AND THAT WAS ANOTHER PIECE OF EVIDENCE THAT THE JURY HEARD, AND SO THERE'S NO BASIS FOR THAT.

I THINK THAT IS IT, YOUR HONOR, ON THE JMOL. I THINK MR. PAVANE WANTS TO ARGUE THE NEW TRIAL MOTION TOO, BUT IF YOU HAVE ANY QUESTIONS --

THE COURT: NO, I THINK I UNDERSTAND THE JMOL POSITIONS. LET'S TURN TO THE NEW TRIAL MOTION. THANK YOU, MR. FOWLER.

MR. PAVANE?

MR. PAVANE: MAY I RESPOND, BRIEFLY?

THE COURT: OF COURSE.

MR. PAVANE: OKAY. THANK YOU.

FIRSTLY, THE FIRST TWO POINTS ABOUT THE DIRECTED VERDICT, I JUST WANT TO BRING UP TO YOUR HONOR THERE IS A WHOLE SERIES OF NINTH CIRCUIT CASES THAT ADDRESS THIS POINT. AND THEY SEEM VERY CLEAR TO ME THAT THE STANDARD IS FAIRLY LENIENT AND WHAT WAS DONE HERE WAS SUFFICIENT.

AND LET ME TAKE THE SECOND POINT FIRST BECAUSE I THINK IT

ALL TIES IN.

MR. FOWLER ARGUED THAT IT WAS OUR BURDEN TO SHOW THAT EACH AND EVERY LIMITATION THAT WAS PRESENT IN THE CLAIM FOR EXAMPLE WAS SUPPORTED OR NOT SUPPORTED BY SUBSTANTIAL EVIDENCE. EVEN THOUGH THESE WEREN'T DISPUTED AT THE TRIAL.

I STRONGLY DISAGREE WITH THAT. IF THAT WERE CORRECT THAT WOULD MEAN I WOULD HAVE TO ARGUE THERE WAS SUBSTANTIAL EVIDENCE THAT WE OWNED THE PATENT. THERE'S ALL KINDS OF FACTS THAT GO TO ESTABLISHING THE SUFFICIENCY OF A CLAIM. THE LAW I THINK IS VERY CLEAR THAT WHAT YOU ARE ARGUING A JMOL, YOU ARE ARGUING THE DISPUTED FACTS, NOT THE FACTS THAT WERE ADDRESSED AT TRIAL. SO THAT'S THE FIRST POINT.

THE SECOND POINT WAS THAT ALL OF THESE POINTS THAT WERE DISCUSSED HERE WERE ADDRESSED IN DETAIL IN, I BELIEVE IT WAS THEIR MOTION THAT THEY MADE AT THE CONCLUSION OF THE PLAINTIFF'S CASE ON ALL THREE OF THESE POINTS, ON THE INDUCED INFRINGEMENT THEY MOVED FOR JMOL ON ALL OF THESE, WE RESPONDED WITH A DETAILED BRIEF AND WE SAID, I BELIEVE WHEN I SAID -- I SAID -- MR. FOWLER PUT IT UP ON THE SCREEN, BUT I HAD IT AS WELL, I SAID I HAVE BEEN REMINDED I DID NOT MAKE A RULE 50 MOTION ON INFRINGEMENT WHICH I WANT TO DO. THE ARGUMENTS I THINK YOU'VE HEARD, I'M NOT GOING TO REPEAT THEM.

AND MR. FOWLER SAID, I WILL INCORPORATE OUR PAPERS. NOW THE PAPERS WERE THE PAPERS ON THE ORIGINAL MOTION, I ASSUME THAT'S WHAT HE WAS REFERRING TO, THERE ARE NO OTHER PAPERS.

AND THEN YOU SAID I WILL INCORPORATE MY EARLIER RULING ON THAT.

AND I JUST WANTED TO READ TO YOU FROM ONE CASE, SORRY, I'M GOING OUT OF ORDER HERE -- AH, MY APOLOGIES.

THIS IS A NINTH CIRCUIT CASE, IT'S FARLEY IS THE LEAD PLAINTIFF, AND IT'S AT CITED IN OUR BRIEF 786 F.2D, 1342.

AND IT SAYS, IN ADDITION, COURTS ARE SOMEWHAT MORE LIBERAL ABOUT WHAT CONSTITUTES A SUFFICIENT MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF ALL THE EVIDENCE.

THAT'S WHAT WE HAVE HERE, THE CLOSE OF THE EVIDENCE.

IN SO AND SO, FOR EXAMPLE, WE HELD A REQUEST FOR JURY INSTRUCTION DIRECTING THE JURY TO RETURN A VERDICT IN FAVOR OF THE MOVING PARTY WAS THE EQUIVALENT OF A MOTION FOR DIRECTED VERDICT. LIKEWISE, AN OBJECTION TO A JURY INSTRUCTION ON THE GROUND OF INSUFFICIENT EVIDENCE ON AN ISSUE WAS ALLOWED TO BE SUBMITTED TO THE JURY WAS SIMILARLY CONSIDERED.

AND I THINK THAT IN VIEW OF WHAT TRANSPIRED HERE AND THE INFRINGEMENT ISSUES THAT WERE BEFORE THE COURT IN WHICH YOUR HONOR UNDERSTOOD WHEN I MADE THAT MOTION AND CERTAINLY MR. FOWLER UNDERSTOOD BY RELYING ON HIS PAPERS, I DON'T THINK THERE'S ANY QUESTION THAT WE SATISFIED THE RULE.

I DON'T THINK THERE WAS A REQUIREMENT WE GO THROUGH IN DETAIL AGAIN EVERYTHING WE HAD ALREADY DISCUSSED.

WITH RESPECT TO THE MAXIMUM, THE FIRST LIMITATION THAT WAS DISCUSSED WHICH WAS THE PREDETERMINED DATA SIZE, AND AGAIN,

YOU KNOW, I GO NO FURTHER THAN HOW YOU ARTICULATED THE POINT IN THE OPINION YOU ISSUED ON OCTOBER 9TH. IT WAS VERY CLEAR THAT THE -- EVERYBODY RECOGNIZES THAT THE AMOUNT OF DATA IN ANY PARTICULAR SEGMENT MAY VARY. AND YOUR HONOR ACKNOWLEDGED THAT.

AND THERE WAS -- THERE'S NOTHING IN THAT CLAIM CONSTRUCTION THAT REQUIRES ALL OF THOSE AMOUNTS OF BITS TO BE THE SAME SIZE. YOUR HONOR ARTICULATED IT CORRECTLY, I BELIEVE, THAT ONCE THE DATA SIZE IS SET, THAT'S ENOUGH, BECAUSE THAT'S ONE WAY OF SETTING THE DATA SIZE.

THE DATA SIZE MAY BE DIFFERENT FROM SEGMENT TO SEGMENT BUT IT'S GOING TO BE FIXED BY SOME AMOUNT BY SOME BOUNDARIES OF THE DURATION, THE TEN SECOND DURATION.

THE COURT: MR. PAVANE, WASN'T THE JURY'S VERDICT TELLING US, AMONG OTHER THINGS, THAT THEY HEARD YOU ALL ON THAT, THEY HEARD FROM APPLE'S EXPERT ON THAT, AND THEY DECIDED THAT EVEN THOUGH YOU DON'T HAVE TO HAVE EXACTLY THE SAME AMOUNT OF DATA IN EACH SLICE, THE SUBSTANTIAL NATURE OF THE VARIANCE AT ISSUE HERE OR PRESENTED HERE SUGGESTED THAT THERE WASN'T A SATISFACTION OF LIMITATION.

MR. PAVANE: WELL, I THINK WHERE YOUR HONOR JUST HESITATED AT THE END IS EXACTLY WHERE I HESITATE HERE. AND THAT IS, WHAT IS IT THAT THEY FOUND WAS NOT PRESENT? WHERE IS THE THAT LIMITATION IN THE CLAIM THAT SAYS THAT A VARIATION OF X OR Y BRINGS IT OUTSIDE THE CLAIM? WHERE DOES IT SAY THAT?

THERE'S NOTHING IN THE CLAIM CONSTRUCTION THAT SAYS THAT.

THAT'S WHY WE ARGUED THAT.

IF MR. FOWLER, AS HE ARGUED THE CLAIM CONSTRUCTION, HAD SAID SOMETHING LIKE, YOU KNOW, BUT IT'S GOT TO BE WITHIN A CERTAIN VARIANCE, IT CAN'T BE ALL OVER THE MAP. WELL, OKAY, THAT'S A DIFFERENT STORY AND THEN IT'S A FACT QUESTION FOR THE JURY. BUT THE CLAIM CONSTRUCTION DOESN'T SAY THAT, IT'S THE COURT'S CLAIM CONSTRUCTION THAT CONTROLS.

AND MR. FOWLER CAN POINT TO ALL THE TESTIMONY HE WANTS FROM DR. MADISETTI ABOUT THOSE ISSUES, BUT IF THOSE ISSUES ARE NOT WITHIN THE SCOPE OF THE COURT'S CLAIM CONSTRUCTION, THEY ARE NOT RELEVANT.

AND I BELIEVE, AND I'M NOT CASTING ANY ASPERSIONS, I THOUGHT THEY DID A GREAT JOB AND THEY ARE GOOD LAWYERS FOR SURE, BUT I THOUGHT A LOT OF CONFUSION WAS SHOWN IN FRONT OF THE JURY ABOUT ARGUING THINGS THAT WERE NOT IN THOSE LIMITATIONS.

I CITE AGAIN AND I'M NOT GOING TO COME BACK IN GREAT DETAIL, BUT THE ISSUE ABOUT THE SERVER. MR. FOWLER SAYS IT'S PATENT LAW 101. HEY, I AGREE, I JUST THINK HE'S DEAD WRONG ON THAT ISSUE, I JUST THINK HE'S WRONG.

AND THERE WERE A NUMBER OF THINGS LIKE THAT WHERE THEY HAD A PERCEPTION OF -- AND AGAIN, IN GOOD FAITH NO DOUBT THAT CERTAIN THINGS WERE IMPORTANT TO WHETHER THE CLAIMS WERE INFRINGED. WELL, I COMPLETELY DISAGREE, AND THEY ARE NOT LIMITATIONS FOUND IN THE CLAIMS.

BY THE WAY, HE SAYS, MR. FOWLER SAYS I WAIVE THE ARGUMENT BECAUSE I DIDN'T RAISE IT THAT THE, ABOUT TIME DURATION NOT BEING THE BASIS FOR DIVIDING. BUT I DON'T REMEMBER SEEING THAT WAIVER ARGUMENT IN THEIR PAPERS.

I DON'T SEE THAT, I'M JUST HEARING THAT FOR THE FIRST TIME HERE TODAY, SO I THINK THEY WAIVE THE RIGHT TO ARGUE I WAIVED.

THE COURT: THE WAIVER WAS WAIVED.

MR. PAVANE: THE WAIVER WAS WAIVED. EXACTLY. OKAY.

MR. FOWLER ALSO PUT UP A SLIDE, I THINK IT WAS 42 WHERE HE SHOWED YOU WHAT HE SAYS IS A SIX TIMES VARIATION. BUT HE DIDN'T POINT OUT THOSE VARIANCES THAT HE WAS SHOWING, AND AGAIN I'M NOT SURE HOW RELEVANT IT IS FOR THE REASONS I'VE ARTICULATED, BUT HE DIDN'T POINT OUT THAT THOSE WERE AT DIFFERENCE QUALITY LEVELS. THERE WERE THREE DIFFERENT QUALITY LEVELS ON THAT SCREEN.

AND AS THE COURT KNOWS, THAT'S ONE OF THE ASPECTS OF THE INVENTION. FOR EXAMPLE, IN CLAIM 40 THAT'S HOW THE BEAUTY OF HOW PART OF THIS WORKS IS THAT WHEN YOU ARE GETTING DATA TOO FAST OR TOO SLOW, YOU CAN AUTOMATICALLY SWITCH TO THE CORRECT QUALITY LEVEL.

AND OBVIOUSLY, AND IT DOESN'T, YOU KNOW, THIS WAS PRESENTED TO THE JURY AND DR. MADISETTI MADE THAT CLEAR, IF YOU MAKE THOSE QUALITY LEVELS SO CLOSE THAT THE VARIANTS IN THE NUMBER OF BITS IN EACH STREAM IS GOING TO MAKE IT JUMP ALL OVER

THE PLACE EVERY TIME TO A DIFFERENT QUALITY LEVEL, IT'S NOT GOING WORK, BUT THE VARIANCE AT EACH QUALITY LEVEL IS SUCH THAT IT KIND OF STAYS IN THE RANGE, AND THEN WHEN IT REALLY GETS OUTSIDE THAT RANGE, THAT'S WHEN --

THE COURT: THAT'S WHEN YOU MAKE THE JUMP.

MR. PAVANE: EXACTLY, UP OR DOWN. OKAY. ENOUGH SAID.

AND BY THE WAY, WOULD YOU MIND PUTTING THAT UP FOR A SECOND, SLIDE 42.

THE COURT: THANK YOU.

MR. PAVANE: I APPRECIATE THAT. THANK YOU.

SO I JUST WANTED TO POINT OUT, YOUR HONOR, IN THE MIDDLE, KIND OF TWO-THIRDS, TWO-FIFTHS OF THE WAY OVER IN THE COLUMN THAT SAYS KBPS, THOSE ARE THE QUALITY LEVELS. YOU CAN SEE THE FIRST TWO ARE 200, THE SECOND TWO ARE 500, AND THE THIRD IS 1200.

WELL, OF COURSE BETWEEN 1200 AND 200 THERE'S GOING TO BE A HUGE VARIATION, NOBODY DISPUTES THAT, BUT WITHIN EACH ONE THE VARIANCES ARE NOT OUT OF WHACK AND COMPLETELY RIDICULOUS. AND EVEN IF THEY WERE, AGAIN, I SAY THERE'S NOTHING IN THE CLAIM THAT REQUIRES THEY BE WITHIN ANY SPECIFIC AMOUNT, AS LONG AS YOU SET THE NUMBER OF BITS BY THE TARGET DURATION.

LET ME JUST TALK VERY BRIEFLY ABOUT THE SIMULTANEOUS TRANSMISSION.

MR. FOWLER PUT UP A SLIDE WHERE HE HAD I THINK ONE OR TWO

AUTOMATED SLIDES BUT HE SAID THIS IS THE SERVER-BASED MODEL WHERE IT'S SIMULTANEOUS. WELL AGAIN, OUR PATENT DEROGATES THE SERVER MODEL. THE WHOLE POINT OF OUR PATENT IS TO GET AWAY FROM THE SERVER-BASED MODEL. THE WHOLE BACKGROUND SECTION OF THE PATENT SAYS, THIS IS HOW IT WAS DONE, AND NOW HERE'S HOW WE ARE GOING DO IT.

AND THE WAY WE DO IT IS BASED ON THE CLIENT REQUESTING THE SLICES, NOT FEEDING THEM AUTOMATICALLY.

SO TO THE EXTENT THEY ARE SAYING THAT WE DO SOMETHING DIFFERENT THAN SERVER-BASED YEAH, WE AGREE YOU ARE DOING EXACTLY WHAT OUR PATENT TEACHES, A HUNDRED PERCENT.

AND ON THE ISSUE OF THE LAST, JUST BRIEFLY I TALKED ABOUT THE SERVER WHERE WE DISAGREE ON THE SERVER AND WHAT THAT MEANS, BUT ON THE LAST THING WITH THE ISSUE OF THE OTHER CONTENT PROVIDERS, DR. MADISETTI, HE PUT UP THE SLIDE WITH THE CHECK MARKS AND USED THAT AS A VISUAL FOR THE JURY, ADMITTEDLY, BUT IF YOU READ THE PAGES I CITED, FOR THE FIRST FEW HE WENT THROUGH IN DETAIL AND SHOWED WHAT THE WIRE SHARK ANALYSIS SHOWED, ESTABLISHED HOW IT SHOWED THAT THERE WAS AN IMPLEMENTATION OF HLS. AND YES, DID WE SHORTHAND IT AFTER THAT, I ASKED HIM, DID YOU FIND THE SAME THING ON THESE? I DON'T SEE ANYTHING WRONG WITH THAT. HE'S SAYING I DID DO IT, BUT I'M NOT GOING TO BORE YOU TO TEARS BY GOING THROUGH EACH AND EVERY ONE. I DON'T THINK HE WAS REQUIRED TO.

AND THEY HAD EVERY OPPORTUNITY TO CROSS-EXAMINE HIM ON

ANY ONE OF THOSE AND SAY, THIS ONE REALLY DOESN'T SHOW IT, NO, I DIDN'T HEAR ANY OF THAT.

OKAY. SO THAT'S WHAT I HAVE.

AND ON THE INDUCEMENT THEORY, THE INDUCEMENT ISSUE, I WOULD JUST POINT OUT THAT AS I UNDERSTAND OR AT LEAST AS I INTERPRETED WHAT MR. FOWLER WAS SAYING, YOU KIND OF HAVE TO HAVE A SMOKING GUN, YOU'VE GOT TO HAVE SOMEBODY YOU CAN POINT TO AND SAY, HERE'S THE GUY, HE INTENDED TO DO IT.

REMEMBER GLOBALTECH WHICH MR. FOWLER CITED. GLOBALTECH IS AN INTERESTING CASE BECAUSE IF YOU RECALL IN GLOBALTECH THEY NEVER EVEN LOOKED AT THE PATENT. WHAT HAPPENED THERE WAS THAT THE COMPANY THAT WANTED TO KNOCK OFF, I THINK IT WAS SOME KIND OF FRYING PAN IF I REMEMBER CORRECTLY, WANTED TO KNOCK OFF THE PAN, KNEW THERE WAS A PRODUCT OUT THERE WITH A PATENT NUMBER BUT DIDN'T TELL THE U.S. ATTORNEY AND FOR WHATEVER REASON HE DIDN'T FIND IT WHEN HE DID THE FREEDOM TO OPERATE SEARCH AND CONSEQUENTLY ISSUED AN OPINION SAYING HEY, IT'S ALL HUNKY DORY.

AND THE COURT BASICALLY SAID YOU ARE HIDING YOUR HEAD IN THE GROUND ON THAT IS TANTAMOUNT OF INTENT AND THEY FOUND THAT WAS INDUCEMENT OF INFRINGEMENT UNDER THE CIRCUMSTANCES.

AND I THINK THE FACTS HERE ARE EASTBOUND MORE SO BECAUSE HERE THEY HAD THE PATENT, THEY DID THE ACTS, THEY KNEW WHAT THEY WERE DOING, AND THEY SEEMED TO THINK THERE HAS TO BE SOME KIND OF GUILT ASPECT TO IT WHERE, YEAH, I KNOW IT'S INFRINGING BUT I'M GOING TO DO IT ANYWAY.

I DON'T THINK WE HAVE TO SHOW THAT. I NEVER THOUGHT THAT WAS THE LAW.

AND THEN, AND I WILL JUST TURN BRIEFLY TO THE NEW TRIAL.

THE ONLY THING I WOULD SAY ABOUT THE NEW TRIAL, AND I'M NOT GOING TO GO INTO THE DETAIL HERE, BUT I THINK THE REQUEST FOR NEW TRIAL IS REALLY PREMISED ON THE SAME ISSUE, PRIMARILY, WHEN WE TALK ABOUT THE CLAIM CONSTRUCTION, I SAID I WILL STAY CLEAR OF THAT FOR NOW AND RELY ON THE PAPERS, BUT THE SAME BASIC ISSUES THAT I'VE DISCUSSED. AND THAT IS THAT THE, I THINK THE STANDARD THAT THE COURTS ARTICULATES AGAINST THE GREAT WEIGHT OF THE EVIDENCE, I THINK.

AND I THINK HERE THAT IS WHAT HAPPENED. I THINK WHEN YOU LOOK AT THE GREAT WEIGHT OF THE EVIDENCE, THE EVIDENCE SUPPORTED EMBLAZE, NOT APPLE.

THEY AGAIN, WHEN YOU LOOK AT THAT HLS SYSTEM IT IS WHAT IS DESCRIBED IN THE PATENT. AND ADMITTEDLY, THE JURY DID NOT GO WITH US ON THAT FOR SURE. BUT I INDICATED I THINK THERE WERE A LOT OF ISSUES THAT WERE PROHIBITED TO THE JURY THAT REALLY WERE NOT RELEVANT TO THE CORRECT ISSUE OF INFRINGEMENT UNDER THE COURT'S CLAIM CONSTRUCTIONS.

THE COURT: ALL RIGHT. THANK YOU, MR. PAVANE.

MR. FOWLER, DO YOU WANT TO RESPOND BRIEFLY?

MR. FOWLER: YOUR HONOR, NO, UNLESS YOU HAVE SOME QUESTIONS ON THE NEW TRIAL MOTION, I'M WILLING TO SUBMIT ON THE PAPERS.

THE COURT: I'M HAPPY TO TAKE YOUR POSITION ON THE PAPERS.

ALL RIGHT. LET ME TAKE THESE MATTERS UNDER SUBMISSION. AS I INDICATED, I WILL ALSO TAKE UNDER SUBMISSION THE ISSUE REGARDING THE MOTION ON COSTS UNLESS THERE'S A PARTICULAR POINT OR TWO YOU WISH TO RAISE.

MS. GIBSON: YOUR HONOR, WE HAD A CONDITIONAL MOTION FOR INVALIDITY WHICH WE COULD ADDRESS OR NOT ADDRESS, IT'S UP TO YOUR HONOR.

THE COURT: NO, I DIDN'T MEAN TO SUGGEST OTHERWISE. I'M GLAD YOU CLARIFIED THE RECORD. I HAVE YOUR PAPERS ON THAT, I THINK I CAN RULE ON THAT BASIS ALONE.

ANYTHING ELSE? IF NOT, HAVE A GREAT AFTERNOON. THANK YOU

MR. PAVANE: THANK YOU, YOUR HONOR.

MS. GIBSON: THANK YOU, YOUR HONOR.

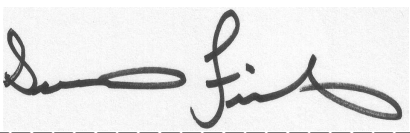
MR. FOWLER: THANK YOU, YOUR HONOR.

(WHEREUPON, THE PROCEEDINGS IN THIS MATTER WERE CONCLUDED.)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED TRANSCRIPTION TO THE BEST OF MY ABILITY.



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SUMMER A. FISHER, CSR, CRR
CERTIFICATE NUMBER 13185 DATED: 3/20/15