

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

EXPRESS MOBILE, INC. * August 10, 2021
*
VS. * CIVIL ACTION NO.
*
GOOGLE LLC * W-20-CV-804
ATLASSIAN CORP PLC ET AL * W-20-CV-805

BEFORE THE HONORABLE ALAN D ALBRIGHT
MARKMAN HEARING

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1 (August 10, 2021, 1:34 p.m.)

2 DEPUTY CLERK: Court calls Waco case 6:20-CV-804, Express
3 Mobile, Inc. versus Google LLC, and Waco case 6:20-CV-805,
4 Express Mobile, Inc. versus Atlassian PLC, et al, for Markman
5 hearing.

6 THE COURT: If I could have announcements from counsel,
7 starting with the plaintiff, please.

8 MR. AINSWORTH: Yes, Your Honor. This is Charley
9 Ainsworth for Express Mobile. And along with me today from
10 Feinberg Day is Robert Kramer, Jerry Tice, David Alberti, Sal
11 Lim, and from the Molo firm, Steven Molo, Ray Hashem, Jonathan
12 Barbee, Leonid Grinberg and Ben Quarmby.

13 And we're ready to proceed, Your Honor.

14 THE COURT: Welcome to all those people, as well as you,
15 Mr. Ainsworth. Pleasure to see you again.

16 And for defendant?

17 MR. AINSWORTH: Good to see you, Your Honor.

18 MR. MANN: Your Honor, how are you today?

19 THE COURT: I'm well. How are you, Mr. Mann?

20 MR. MANN: Mark Mann on behalf of Google. And my
21 colleague today with me is Ameet Modi. And from Google, from
22 general counsel's office, Marisa Williams is on to listen in.

23 And we're ready to proceed, Your Honor.

24 THE COURT: I'm ready as well.

25 MR. UNDERWOOD: Your Honor, briefly, this is Travis

1 Underwood. I'm joined by my colleagues from the Durie Tangri
2 firm, Tim Saulsbury and Adam Brausa. And we also have two
3 in-house lawyers with us today, Mr. Patrick Zhang and
4 Mr. Gaurav Asthana.

5 We're also ready to proceed, Your Honor.

6 THE COURT: Thank you, sir. And welcome to any client
7 representatives or in-house counsel. I appreciate you guys
8 taking the time to attend.

9 The first claim term I have is "virtual machine." I'll
10 hear from the defendants on this one.

11 MR. SAULSBURY: Thank you, Your Honor. This is Tim
12 Saulsbury on behalf of the defendants. I will be handling the
13 "virtual machine" term.

14 THE COURT: Mr. Saulsbury, have I had the pleasure of
15 having you in my court before?

16 MR. SAULSBURY: I don't believe so, Your Honor.

17 THE COURT: Well, welcome. It's a pleasure to have you.

18 MR. SAULSBURY: Thank you so much.

19 To kick things off, the two disputes with respect to
20 virtual machine are whether the term should be construed at all
21 and whether virtual machine executes intermediate code.

22 Regarding the first issue, we respectfully believe that
23 the term should be construed to assist the jury. Virtual
24 machine is a term of art in the field of computer science.
25 It's not a term that would be readily understood by a jury.

1 And just by one example, both parties agree that a virtual
2 machine is an abstract machine. A jury, however, will not know
3 what an abstract machine does.

4 Our construction provides some clarity. We explain that
5 an abstract machine executes an immediate code; in other words,
6 executing an immediate code is the uniform characteristic of
7 what it means to be a virtual machine, just like performing
8 computations is a uniform property of what a CPU is.

9 Now, importantly, all contemporaneous dictionaries agree.
10 What -- we start here with plaintiff's dictionaries, and we see
11 that The Dictionary of Computer & Digital Media from 1999
12 defines a virtual machine as "an abstract machine for which an
13 interpreter exists."

14 If you turn within the same dictionary, back to the A's,
15 where it defines "abstract machine," this dictionary, again
16 plaintiff's dictionary, says that an abstract machine is
17 "software that executes an intermediate language."

18 Plaintiff's next contemporaneous dictionary is in accord.
19 This is The Dictionary of Multimedia: Terms and Acronyms.
20 Again, virtual machine is defined with reference to an
21 "abstract computing machine." And an abstract machine is
22 described as "software that executes an intermediate language,
23 a compiler or interpreter."

24 Now, Mr. Weadock, Express Mobile's expert, complains that
25 the "executes intermediate language" requirement in these

1 dictionaries comes from the "abstract machine" term rather than
2 the definition of virtual machine. But this criticism,
3 frankly, makes little sense.

4 First of all, both parties' proposed constructions include
5 the term "abstract machine." And additionally, the "virtual
6 machine" definitions on which Mr. Weadock relies themselves
7 make reference to an abstract machine. So it makes perfect
8 sense to flip to the A's of those dictionaries to see how an
9 abstract machine is defined. As we see, it's defined uniformly
10 to execute intermediate code.

11 The same is true of defendants' contemporaneous
12 dictionaries. And so we see that the Microsoft Dictionary,
13 Third Edition, from 1997 defines an abstract machine as a
14 "processing" -- "a model for processing an intermediate
15 language, called abstract machine language, used by the
16 interpreter or compiler."

17 Likewise, the Fourth Edition of the Microsoft library from
18 1999 similarly defines an abstract machine as a "model for
19 processing abstract machine language."

20 Express Mobile's other dictionaries also are in accord.
21 And so here is the Blackie's Dictionary of Computer Science.
22 And it, likewise, explains that a virtual machine is an
23 "abstract machine for which an interpreter exists." And
24 importantly, it says that "the higher level language is
25 compiled into code for the virtual machine," which is described

1 as an intermediate language.

2 So again, every single contemporaneous dictionary
3 definition confirms that a virtual machine executes
4 intermediate code. The evidence is uniform on that point.

5 Now, Express Mobile's prior claim construction expert also
6 agreed. Mr. Kruezfeldt was Express Mobile's expert in the big
7 commerce case. And when he was asked: With respect to virtual
8 machines in general -- so not merely the Java script -- rather,
9 the Java virtual machine of the invention, he said, with
10 respect to visual machines in general, it's necessary to
11 translate from source code into some sort of intermediate
12 representation.

13 He was asked again: A virtual machine necessarily has an
14 intermediate representation, correct?

15 And Mr. Kruezfeldt, again, Express Mobile's own prior
16 expert, said: Yes. It does.

17 Now, it also just logically makes sense why a virtual
18 machine must execute intermediate code. And to see that, it's
19 helpful to take a look at how, in computer science, you get
20 from the higher-level programming language that a programmer
21 might write software into the machine code that a processor is
22 capable of executing.

23 The reason this translation process is necessary is
24 because the physical processor within your computer or your
25 phone is not capable of executing the higher-level programming

1 language that software engineers write.

2 And so in a standard situation in which a virtual machine
3 is not being used, the higher-level programming language that
4 we see here on the left is converted through a process of
5 compilation or interpretation into machine code.

6 And the difference, as explained by Mr. Schmandt, between
7 interpretation and compilation is that in the case of
8 interpretation, each line is translated and executed one at a
9 time; whereas, in the case of compilation, the entire program
10 for -- or a block of the program is converted all at once into
11 machine code so it can be executed by the physical machine.

12 Now, when a virtual machine is involved, we can see that
13 two levels of translation are necessary. And that's because,
14 much like the physical machine in your computer, a virtual
15 machine also is capable only of understanding and executing a
16 particular type of code.

17 And for that reason the higher-level programming language
18 needs to be converted once into the code that the virtual
19 machine can understand, and then the visual machine necessarily
20 has to sit on top of the physical machine; otherwise, that
21 virtual machine connects to anything. And so the code needs to
22 be converted one more time, down into the machine code for the
23 physical machine.

24 And as we can see, the result of that is that the code
25 executed by the virtual machine necessarily is intermediate as

1 between the higher-level programming language code on the
2 left-hand side and the machine code that's ultimately executed
3 by the physical machine.

4 Now, this illustrates the problem with --

5 (Clarification by the reporter.)

6 MR. SAULSBURY: My apologies.

7 This illustrates the problem with Mr. Weadock's reliance
8 on Ruby, Lisp, Basic and TCL.

9 What Mr. Weadock asserts in his opening declaration,
10 without any support, is that these higher-level programming
11 languages are associated with virtual machines and don't
12 include intermediate code.

13 As Mr. Schmandt, defendants' expert, explained, the
14 problem with this is that Mr. Weadock presumes that the only
15 way to convert Ruby, TCL, Basic and Lisp programming language
16 into machine code is through use of a virtual machine.

17 Mr. Schmandt demonstrates that this not true. In his
18 responsive declaration, he explains that, in some
19 implementations, you can convert those higher-level programming
20 language code directly into machine code, as illustrated here.

21 And in those cases you don't use a virtual machine. And
22 because you don't use a virtual machine, it is not surprising
23 that there's no intermediate code.

24 In contrast, Mr. Schmandt demonstrated at Paragraph 133 of
25 his declaration that there are alternative implementations that

1 do in fact use a virtual machine in conjunction with these
2 languages.

3 For example, Ruby can be implemented using a virtual
4 machine called yet another Ruby virtual machine. It's called
5 YARV for short. And when that virtual machine is used, there
6 necessarily is an intermediate representation because the Ruby
7 code has to be converted first into yet another Ruby virtual
8 machine, or a YARV byte code, which in turn is converted again
9 into machine code.

10 And Mr. Schmandt walks through each of these four
11 programming languages and demonstrates that when they are used
12 with a virtual machine, in each of those implementations, they
13 do make use of an intermediate representation. It is only when
14 they are not used with a virtual machine that you see the
15 absence of intermediate code.

16 And so the record demonstrates that all of the virtual
17 machines available at the time of the invention -- and the
18 record covers Pascal, BCPL, SNOBOL basic, TCL, Ruby and, of
19 course, Java -- make use of intermediate code.

20 Finally, Mr. Weadock also relies on undergraduate lecture
21 notes and claims that they show that a "pure interpreter" is a
22 virtual machine. The notes, however, never actually say this.
23 They say that a pure interpreter will simulate the virtual
24 machine.

25 And in claiming otherwise, Mr. Weadock fails to recognize

1 that dashed box denoting the simulated virtual machine includes
2 both the interpreter and the underlying computer on which it is
3 running. We can see that in the highlighted portion of the
4 block diagram.

5 And so a POSITA would understand that these lecture notes
6 simply mean that a programmer could treat an interpreter
7 running on a physical computer as simulating virtual machine,
8 because it takes in a "Source Program" and "Data" on the left,
9 translates them into machine codes for the underlying computer,
10 and then produces results even though no actual virtual machine
11 is used.

12 And importantly, all explicit virtual machines identified
13 in the lecture notes execute intermediate code, and that point
14 is undisputed.

15 And that concludes the initial presentation on virtual
16 machine, unless Your Honor has any questions.

17 THE COURT: I don't. If you would -- I'll be back in just
18 one second.

19 (Pause in proceedings.)

20 THE COURT: We can go back on the record.

21 The Court is going to maintain its preliminary
22 construction of plain and ordinary meaning as its final
23 construction.

24 The next claim term is "runtime engine." I'll start on
25 this one with plaintiff's counsel.

1 MR. ALBERTI: Good afternoon, Your Honor. This is David
2 Alberti on behalf of Express Mobile. And I will attempt to
3 share my screen.

4 THE COURT: Mr. Alberti, I'll take a risk and ask. I
5 don't recall you having appeared before. If you have, I
6 apologize. Have you argued before in front of me?

7 MR. ALBERTI: Oh, yes, in the Broadband iTV cases.

8 THE COURT: Okay. I wasn't sure. But welcome anyway. I
9 appreciate you being here.

10 MR. ALBERTI: Okay, Your Honor. As you can see, our
11 proposal with "runtime engine" is to make a minor clarification
12 to the Court's construction as to add the words "directly or
13 indirectly" in front of "reads information from the database."
14 And the reason that we want to do this is because --

15 THE COURT: Give me just one second. Let me make a note
16 here and I'll be right back.

17 (Pause in proceedings.)

18 THE COURT: Okay. Thank you.

19 MR. ALBERTI: No problem.

20 So the reason why we want to do this is to make clear that
21 this patent in this claim relates to a networked environment
22 where you have a client machine that's running a browser and
23 enables persons to build a website. Now, that website is later
24 generated using settings that are stored in a database.

25 In order to do that, the runtime engine has to perform

1 certain operations and go -- essentially do a download of that
2 database, which is -- you could consider that to be an indirect
3 read because you have to go through a network. It's unlike,
4 say, your computer where you have a disk drive right on your
5 computer and the processor can directly read from that disk
6 drive.

7 Because we're communicating over a network, you've got
8 things like a download, which both experts seem to agree is a
9 form of a read. But most normal people, jurors, may not
10 consider that to be a "direct read."

11 So, again, our minor clarification here is to capture the
12 concept of downloading this information from a database, which
13 doesn't seem to be in controversy. And we think this language
14 would capture that and give proper meaning and full scope to
15 the claim term.

16 If we take a look at the claim, Claim 1, as I was stating,
17 if you look at the preamble, we're talking about a method that
18 allows you just to produce websites on computers having a
19 browser.

20 So, again, on -- you're building a website on a client
21 device that has a browser. And in order to do that, you, in
22 Step C, store information, including these settings that go in
23 a database. And later if we go to Step E, you build web pages
24 using at least one runtime file. And we know from the
25 construction of the runtime file that includes this runtime

1 engine. The runtime engine is executed and that goes and
2 fetches the information from the database. In the claim it
3 says it "utilizes the information stored in the database."

4 I know Your Honor didn't accept that language, but again,
5 in this process where it's reading from the database, it's
6 going over a network. So it's not -- typically not going to be
7 something that you would consider to be a direct read. It's
8 going to be something that people would consider to be a
9 "download." There's steps that have to occur in order for that
10 to happen.

11 The prosecution history confirms that we're talking about
12 the database being "read or downloaded." This is an excerpt
13 from a January 17th amendment that discusses the runtime engine
14 and states specifically that upon execution the database is
15 "read or downloaded."

16 So we're -- again, we're talking about a network
17 environment. This not your computer where you can directly go
18 fetch something from the hard drive being used in the
19 processors.

20 The next slide -- again, this is from the defendants' own
21 expert, who says: A person of ordinary skill in the art would
22 understand "downloading" to be simply a form of reading --
23 namely, reading over the network.

24 Now, I think both experts actually agree on this, but we
25 contend that certainly downloading is not your traditional type

1 of reading. It's more of an indirect reading. So again,
2 including directly or indirectly, should -- it seems to comport
3 with what both experts say in this case and would remove any
4 possibility for confusion by the jury.

5 And finally, there have been two other courts that looked
6 at this term and, likewise, used more broader language that
7 wouldn't limit the claim to a "direct read," like something,
8 again, that would be local to your computer, that we're talking
9 about an external database here. So the other two courts, in
10 the Eastern District of Texas and the District of Delaware,
11 used the language "facilitates retrieval of information from
12 the database," which again would encompass both a direct or
13 indirect read.

14 And that's -- that is the basis for our request for that
15 minor clarification to the Court's construction.

16 THE COURT: Response?

17 MR. SAULSBURY: Yes, Your Honor. Just a moment as I load
18 up the slides.

19 Mr. Alberti, do you mind stopping your slide share? I
20 can't start mine while yours is on. Thank you so much.

21 Thank you, Your Honor.

22 So this proposed compromise is not in any substance
23 different than their original construction, but the original
24 construction by Express Mobile, that was rejected in the
25 preliminary and has been rejected by Judge Seeborg and Judge

1 Andrews, included the phrase "facilitates retrieval." That is,
2 in substance, the same thing as indirect reading because
3 indirect reading has no constraints on how the information that
4 is read by -- from the database by whatever it might be
5 ultimately arrives at the runtime engine.

6 Importantly, indirect reading also has no support in the
7 intrinsic record, and we think that, contrary to Mr. Alberti's
8 argument that this would make things easier for the jury, we
9 actually think that it would create additional confusion
10 because there simply are no constraints on what it means to
11 indirectly read.

12 Now, the intrinsic read is uniform, that the runtime
13 engine itself reads the database and no other software
14 component reads the database and somehow hands off the
15 information to the runtime engine.

16 First, we'll start with Figure 2 of the patent and its
17 accompanying descriptions. And so we see here that it
18 describes the present invention as including a "runtime engine
19 that begins to read the database and download image audio and
20 video files, while simultaneously drawing the first web page
21 for viewing or user interaction."

22 And so as we can see, we've got the runtime engine itself
23 reading from the database. There's no intermediary involved.

24 And there's more support in the discussion of Figure 29.
25 We see that the patent describes this diagram as showing the

1 "techniques employed by the runtime engine to read the external
2 database." Again, it's not using some intermediate software
3 process to read the database. The runtime engine itself is
4 reading the database.

5 And in the same paragraph, the patent, again, says: The
6 runtime engine then initiates the read operation.

7 The prosecution history is in accord. And so in
8 distinguishing Faustini, which was a basis for a rejection by
9 the examiner, the applicant explained that: In contrast to
10 Faustini, the claimed invention is an apparatus that produces
11 and generates websites without a browser.

12 And in explaining how the claimed invention does that, the
13 applicant says: The websites are generated by the runtime
14 engine reading and interpreting the external database.

15 Again, it's the runtime engine itself, no intermediary
16 involved.

17 And the same is true of the template shell process that
18 the -- that Express Mobile relies on. And so we can see here,
19 in the second block, the applicant describes the claimed
20 invention as "displaying 10 characters of text by sequentially
21 reading each of the 10, 9 attribute objects from the database
22 and then combining them individually with the draw command."

23 And in the following paragraph we see that this sequential
24 reading referenced above is performed by the runtime engine.
25 It says: At runtime, attributes for the 10 characters, each 9

1 bytes long, are sequentially read and drawn on the screen with
2 the 40 byte runtime engine.

3 Now, I want to address Mr. Alberti's slides, so I'm going
4 to switch to those for just a moment. Okay.

5 So Express Mobile relies on this portion of the
6 prosecution history to argue that somehow indirect read is
7 supported. We disagree. And in fact, this disclosure actually
8 demonstrates that it's the runtime engine that's doing the
9 reading.

10 And so the final sentence explains that upon execution the
11 database is read or downloaded and then combined with the draw
12 command of the claimed invention as often as is needed for
13 execution. Now, Mr. Alberti says that this means that the
14 database can be indirectly read from -- by the runtime engine
15 because there's a reference to downloading.

16 But, in fact, what this passage is describing is that if
17 you're dealing with a situation where the runtime engine is on
18 the client device, so the end user's device browsing to the web
19 page, and the database is on the server at least initially, at
20 execution that database has to be downloaded so that the
21 runtime engine on the client can read the database. And we
22 know that this is how the invention works, because if you look
23 at the final clause of this sentence that Express Mobile relies
24 on where it says "the database is read or downloaded and is
25 combined with the draw command of the claimed invention."

1 If you look above, we can see that the draw command is a
2 command that is present in the runtime engine. And if you take
3 a look at the indented pseudocode, this is the pseudocode for
4 the draw command. And as we can see from the second line of
5 that code, this draw command that's in runtime engine has a
6 read function directly in it.

7 And so far from showing that the invention contemplates
8 indirect reading, it, in fact, shows that the runtime engine
9 itself is what's reading the database.

10 Thank you, Your Honor.

11 MR. ALBERTI: Your Honor, may I respond?

12 THE COURT: Of course. Yes.

13 MR. ALBERTI: Okay.

14 If you could please allow me to share the screen. Thank
15 you.

16 I want to just take a look at a couple of defendants'
17 slides here that were shown, because I think this proves the
18 point. Now, what you just heard from defendants' counsel was
19 that we're talking about a direct read because somehow the
20 database is downloaded onto the client machine first, and that
21 allows it to be directly read by the runtime engine.

22 That's not what the patent says. In fact, the slides that
23 we were shown say specifically -- if we start with Slide 15 --
24 that what's being read is an external database. Not an
25 internal one that's been downloaded to the client that can be

1 directly read by the client, we're talking about an external
2 database. In order to read that, you have to go take, you
3 know, steps that can go across a network and perform a
4 download. That's not -- there's nothing in the sentence that
5 says it has to be directly read in -- you know.

6 And, in fact, the fact that we're talking about an
7 external database means that we're talking about reading over a
8 network, not locally, which suggests we're talking about an
9 indirect read. A read or a download, which their own expert
10 said downloading is a form of reading. And I think today we
11 heard maybe it's not, but their expert was very clear on that,
12 that downloading was a form of reading. And certainly that's
13 an indirect form. That's not a local direct read.

14 The next cite that we have, again, states -- and this is
15 in their own slides -- that the web states are generated by the
16 runtime engine reading and interpreting the external database.
17 So we're not talking about a direct read of an internal
18 database. We're talking about an external database.

19 And so while we're trying to -- obviously I think this
20 issue needs to be clarified, because it sounds like defendants
21 want the Court's construction to be modified in a different
22 way. They want it to be modified to say it has to only be
23 directly read, which wasn't the Court's construction. The
24 Court's construction was just "read." And as we know from the
25 patent, this can occur over a network which would include

1 indirect.

2 So I think it's important to resolve this. And I don't
3 think it should be resolved by adding the word "directly,"
4 because not one word in any of the file, in any of the
5 specification, the claim language or the file history that
6 you've been shown uses the word "directly" or considers you can
7 only have a direct local read of a database to satisfy this
8 invention. This happens over a network which would include
9 downloading which is an indirect form of reading, and therefore
10 we request the Court to add this clarification to its
11 construction.

12 THE COURT: Anything else?

13 MR. SAULSBURY: Yes, Your Honor. If I could please
14 briefly respond.

15 The patent doesn't use the term "directly" or "indirectly"
16 anywhere in connection with the reading of the database. And
17 we're not proposing to modify the Court's preliminary
18 construction. We think that it's appropriate.

19 With respect to the references to internal and external
20 database, respectfully I think that those terms are being
21 misdescribed. The patent makes clear that the internal
22 database is not a reference to a database that resides on the
23 client device or anything like that. Rather, the internal
24 database is the database that's used during the authoring
25 process when you're creating your website, whereas the external

1 database is the database that's used to render the website.

2 And so references to internal database in the context of
3 the runtime engine make no sense, because the runtime engine is
4 about the rendering process. And so "external" doesn't refer
5 to where it's located relative to the runtime engine.

6 I also want to be clear that our position is not that
7 reading the database over the network is not reading. If the
8 runtime engine itself is reading the database over the network,
9 it's still the runtime engine doing the reading.

10 What the patent does not contemplate and what is
11 inappropriate about the proposed construction is some other
12 sort of intermediate software element doing the reading. And I
13 think the reason Express Mobile's pushing for this construction
14 is because it wants the ability to be able to say, okay, this
15 claim limitation is met even if what's really happening is some
16 other independent software process on the server is what's
17 reading from the database. And then we've got sort of a Rube
18 Goldberg process where that information comes down from the
19 database into that other software process and then ultimately
20 makes its way to the runtime engine.

21 It wants to be able to argue that that's indirectly
22 reading from the database, but that's just not supported by the
23 intrinsic record at all. And so, respectfully, we believe that
24 the Court's preliminary construction should remain and does not
25 require modification.

1 THE COURT: I'll be back in a few seconds.

2 (Pause in proceedings.)

3 THE COURT: We can go back on the record.

4 The Court is going to maintain its preliminary
5 construction: A file that is executed at runtime that reads
6 information from the database and generates commands to display
7 the web page or website.

8 Next claim term to take up is "application" or --
9 "application," and I'm happy to -- let's see.

10 It appears that we've adopted the plaintiff's, so I'll
11 hear first from defense counsel with respect to their proposed
12 construction.

13 MR. SAULSBURY: Thank you, Your Honor. And if it's all
14 right with Your Honor, I'll argue both "player" and
15 "application" at the same time, because there are no disputes
16 that are unique to player -- I'm sorry -- no disputes that are
17 unique to application because they apply equally to player.

18 THE COURT: Well, you get extra credit for that. I was
19 going to suggest that. And so you get extra points.

20 I'll interrupt you to tell you this, as I write my book on
21 how to be a trial lawyer, which is just really my journal to,
22 you know, keep from going to see a counselor, I've decided if I
23 were ever in your shoes again, in every trial, at least once, I
24 would tell the judge, you know, I've got about ten more
25 minutes, but I'm just going to give it back to the jury. No

1 matter if I had ten minutes or not, I would just -- every
2 trial, I would say -- I would say something like that and, you
3 know, just to curry favor.

4 So it's always a good thing.

5 MR. SAULSBURY: Appreciate it, Your Honor. It's my first
6 time in front of you, so I'm doing my best.

7 THE COURT: Well, you've already done better than
8 95 percent of the lawyers that I've seen over the last three
9 years. So you're in great shape.

10 (Laughter.)

11 MR. SAULSBURY: Well, in addition to the efficiency
12 aspect, which I know Your Honor appreciates, I think it also
13 makes sense to discuss these terms together because that's how
14 they're discussed in the specification and throughout
15 prosecution.

16 The player and application are linked together both by
17 what they are and how they interact with one another. And at a
18 high level, that's what our proposed constructions are designed
19 to do for the jury.

20 There's no dispute between the parties that neither of
21 these terms is a term of art that has a plain and ordinary
22 meaning. These are used in the patent in a specific way. Of
23 course people have heard the term "player," heard the term
24 "application," but in the context of the claims, they're used
25 in a different fashion.

1 And we see in Express Mobile's proposed constructions,
2 which I understand correspond to Your Honor's tentative, that
3 the distinction between the player and application essentially
4 becomes blurred and rendered meaningless.

5 And that sort of absurd result at a high level is why we
6 respectfully disagree with the tentative construction and
7 maintain that the additional requirements set forth in our
8 proposed construction should be adopted, all of which reflect
9 the intrinsic evidence in both the specification and the file
10 history in which the applicant or Express Mobile repeatedly
11 characterized the player as being device-specific, separate
12 from the application and interpreting or executing the
13 application.

14 As one example of the absurd results that, I think, might
15 follow from Express Mobile's respective constructions of player
16 and application, as I understand it, Express Mobile is
17 contending that a player can be device-independent or
18 device-dependent code, and it need not be separate from the
19 application.

20 And so you could have one set of code that has entirely
21 device-independent code in it, and Express Mobile would still
22 point to something and say, well, that might be the player or
23 that might be the application.

24 Nothing in the specification, respectfully, nothing in the
25 file history, respectfully, supports blurring the line to that

1 degree. But that's what you have if you adopt Express Mobile's
2 proposed construction, which are essentially code that
3 facilitates the execution of an application on a device or
4 player. Not even the claimed application, any old application.

5 So it can have nothing to do with the claimed application
6 and still constitute the player, whether it's
7 device-independent code or not.

8 And then on the application side of the coin, you have any
9 device-independent code. Because the instructions for a
10 device, well, that's a hallmark of almost all software. And so
11 if that's all that Express Mobile had wanted to cover, these
12 general concepts of code that facilitates the execution,
13 whatever that phrase means, and independent code that has
14 instructions, well, they didn't need to go to all the trouble
15 of talking about a player and an application, defining those
16 terms in the specification.

17 And so against that backdrop, I want to just tick through,
18 hopefully quickly, with Your Honor's guidance in mind, the
19 three elements that we've advocated for and believe are well
20 supported by the intrinsic record.

21 First, the player is device-specific code. That comes
22 straight from the specification, where it refers to device- or
23 device-platform specific instructions as being "referred to
24 herein and without limitation as a 'player.'"

25 Of note this is the very same portion of the specification

1 that Express Mobile cites to in its opening brief, where it
2 agrees that an application is device-independent code.

3 And so there's no reason to accept what the specification
4 says here about the application and then ignore it entirely
5 with respect to the player.

6 One point of clarification, to the extent device-specific
7 and device-dependent are things that might have different
8 meaning to Your Honor, we'd be fine with device-dependent.

9 We used device-specific in our construction because of
10 this passage and because, in Delaware, Judge Andrews thought
11 that device-specific might provide more clarity to the jury.
12 But from our perspective, there's not a meaningful difference
13 between those two phrases.

14 This isn't the only portion in the specification that
15 talks about the player being device-dependent.

16 If we could turn to the next slide.

17 The specification talks about players for different
18 devices. And then as the disclosure goes on in Column 5, talks
19 about the advantages of packaging this device-dependent
20 programming because you only have to provide it once or, if you
21 have updates to the device-dependent programming, a few times.

22 And of note, it contrasts that device-dependent
23 programming referred to earlier in that paragraph as the player
24 with an application, which is the same for each device.

25 And so again here what we see in the specification, the

1 applicant contrasting the device-independent application. And
2 the parties agree that the device -- or, rather, the
3 application is device-independent with the device-dependent
4 programming contained in the player.

5 Now, I suspect that when Express Mobile counsel responds,
6 they will say, ah, yes. But this paragraph says "for example."
7 It's just one embodiment. The player may be device-dependent
8 programming, but it need not be.

9 Now, if this were the only portion of the prosecution --
10 or, rather, the specification or the prosecution history in
11 which the player were characterized as device-dependent code,
12 they might have a point. But I'll remind Your Honor that the
13 previous slide we saw talked about the player without
14 limitation, referred to herein, and was not limited to any
15 particular embodiment.

16 Moreover, I would suggest that you can look high and low
17 in the specification for an explicit characterization of a
18 player that does not have device-specific dependencies and you
19 won't find it. The best that Express Mobile has come up with
20 to date is shown on the next slide in a passage from Column 1
21 of the specification.

22 And in this passage it talks about a player and then has
23 some characterizing clauses, one of which is "has no
24 device-specific dependencies."

25 Express Mobile asserts that this clause "has no

1 device-specific dependencies" is referring to the player in
2 this clause, and you can see that with the highlighting shown
3 here.

4 And so according to Express Mobile, the player has the
5 requirements that follow the comma after the player, these four
6 requirements that you see below.

7 But as our expert explained, for a POSA reading this
8 passage, it would make much more sense for this "has no
9 device-specific dependency" clause to modify language in such
10 that the language being discussed has no device-specific
11 dependencies.

12 And this makes sense in terms of the thin client
13 architecture that's being discussed in this passage, where
14 you're offloading processing resources from the application --
15 or from the client device, rather, and onto the server. But if
16 you do that and you minimize the amount of processing that's
17 occurring on a user device to free up power on your iPhone or
18 your Android™ handheld, then you've got to have a way to
19 communicate with the server.

20 The way you do that most efficiently is to use a language
21 that doesn't have device-specific dependence. Otherwise,
22 you're going to have to have different languages coming from
23 the server to communicate with one device versus the other.
24 That's not going to be efficient. It's going to add
25 complexity.

1 Now, in addition to the fact that our expert has explained
2 why this makes sense, it's not a scenario where Your Honor
3 actually has to decide which expert is right. Because only one
4 of the experts' interpretation, from the perspective of a POSA,
5 is consistent with what Express Mobile itself said in the
6 priority documents.

7 And if we can add the next box here, this is a quote from
8 provisional application submitted in the file history for the
9 '755 application, where we see almost verbatim requirements,
10 managing resources efficiently, is extensible, supporting a
11 robust application model and, importantly, the "has no
12 device-specific dependencies" language.

13 And what we see from the provisional application that
14 clarifies and confirms Mr. Schmandt's interpretation of this
15 passage in the specification is that that "no specific device
16 dependencies" applies to the language, not to the player.

17 Express Mobile has also argued that even if the player in
18 the '755 and '287 claims is deemed device-dependent, which it
19 should be, based on the claim language and the definition of
20 player, that should not -- and the discussion in the file
21 history about the device dependency should not carry forward to
22 the '044 because the claims of the '044 patent do not
23 explicitly say that the player is device-dependent code.

24 That's true. But what the process history in the '044
25 patent also says is that the claims in the '044 patent are

1 patentable for the very same reasons as the claims that issued
2 in the '755 patent.

3 And so this is not a scenario that was present in the case
4 law relied upon Express Mobile which deals with disclaimer,
5 which we're not arguing, but it's talking about whether parent
6 prosecution history statements carry forward to the child.

7 The presumption is that they do, absent -- or, rather,
8 unless otherwise compelled, is the Omega Federal Circuit
9 decision held, which is cited in the Trading Techs cases cited
10 by Express Mobile.

11 Here there's nothing that compels a conclusion that player
12 in some claims means something else than player in other
13 claims. It's the same word. It's consistently and clearly
14 referred to as device-dependent code across all the patents.
15 And, therefore, there's no reason to depart from that
16 requirement or differentiate between the claims based on
17 whether the requirement is explicitly recited or not.

18 And in this regard, it's no different than application,
19 which appears in the same way in the '044 patent claims, but
20 which Express Mobile itself agrees is device-independent code
21 across all three of the patents.

22 Turning to the second requirement of the player is another
23 aspect of it that was emphasized throughout prosecution to
24 distinguish over McCain. McCain included both device-dependent
25 and device-independent code, but the key point about McCain,

1 that applicants distinguished over as a condition of allowance,
2 was that McCain doesn't teach two separate codes. The
3 device-dependent code and device-independent code in McCain was
4 packaged in a single code set referred to in McCain as a C2
5 component, and we see that on the next slide as well.

6 Here you see the applicant's own words saying McCain
7 teaches combining all the code, executable device dependent --
8 as well as parameters, device-independent code in the C2
9 components. McCain doesn't teach separating binary, non-binary
10 or executable components into different codes.

11 And then, as if that were not clear enough, the applicant
12 explicitly characterized the claimed invention as partitioning
13 the code required for functionality into device-independent
14 code and device-dependent code.

15 And so the advantages of this approach were also discussed
16 during prosecution, which we see on the next page. In contrast
17 to McCain, where you have a single set of code such that an
18 update to the device-dependent portion or a tweak to the
19 device-independent portion would require revising the entire
20 codes that -- resending to all your clients. The applicants
21 told the examiner during prosecution that partitioning the code
22 into this application and player has advantages for maintaining
23 the website. Code-device-specific maintains strictly code
24 that's web service or application-specific.

25 And so if a new device comes on the market, you have a new

1 player, you can just end that player. If there are updates to
2 application, you can make those updates to the application.
3 But importantly, by keeping the players separate from the
4 application, that enables you to only send the updated
5 application or to only send the new or updated player. You
6 don't have to send them both at the same time.

7 Now, importantly, you certainly can. If you have the
8 player and you have the application ready to go, you can send
9 those two separate codes together. There's nothing that
10 precludes that. But what you have to have, and what
11 separateness really means in this context, as was advocated for
12 by Express Mobile during prosecution, is that they can be sent
13 independently of one another, depending on the updates, and
14 that allows for ease in the authoring process, the storage
15 process and, as we see here, for maintaining websites.

16 Express Mobile makes two other comments on -- or
17 requirement of separateness. And it really doesn't address the
18 repeated emphasis throughout the specification on these
19 statements. Instead, it says that all the claims require is
20 functional distinctness between the player and the application.

21 But I'd suggest that if that were all that were required,
22 then the distinction over McCain wouldn't have made sense.
23 McCain had, as we saw, functionally distinct code. It had
24 parameters that were identified as device-independent. Those
25 were functionally distinct from the executables and the

1 binaries referred to as device-dependent code.

2 So if all that the claims required or what the applicants
3 meant by separateness was functional distinctness, that would
4 not have carried the day with the examiner.

5 I'll also note that Express Mobile criticizes our
6 construction as introducing ambiguity based on what "separate"
7 means. And I think it's clear that we've seen what "separate"
8 means in this context. But also, those aren't our words, those
9 are Express Mobile's. That's what they told the examiner. And
10 presumably they weren't intentionally using unclear language
11 with the examiner.

12 And so all we're asking is that Express Mobile be held to
13 its own statements which it used to distinguish the claimed
14 application and player over the single code set described in
15 the prior art.

16 Finally, one bit of clarification on this. It doesn't
17 preclude or require any physical separateness. A player and
18 application can be separate sets of code and reside on the same
19 server. What it does require is that they're separate sets of
20 code such that they can be set separately from one another if
21 desired.

22 And importantly, I saw in Express Mobile's slides that
23 they quote from Judge Andrews' opinion in the District of
24 Delaware, and that's DI 51-33 in the docket for the Atlassian
25 case. And a portion of Judge Andrews' quote is grayed out,

1 which actually notes that while he's not using the word
2 "partition," despite the fact that it appeared in the
3 prosecution history, he didn't like that word because it might
4 introduce confusion for jury that the -- some physical
5 separation was required. And he rejected that notion
6 correctly, I think.

7 But in doing so, there's a parenthetical where he said
8 they can be located on the same server, presumably they remain
9 separate sets of code. And that's exactly right. So the
10 critique that somehow we're using the word "separate" to read
11 in some physical separation such that the application has to be
12 on the client and the player on the server is just incorrect.

13 Lastly, I want to turn briefly to the third requirement,
14 and this really crystalizes the relationship between the player
15 and application, which is that player "interprets or executes
16 the application." That comes straight from the specification.

17 Again, this is a portion of the specification cited, with
18 approval by Express Mobile in its opening brief at Page 2, in
19 support of its agreement that the application is
20 device-independent code. We agree that it shows that.

21 It also supports the requirement that the player
22 interprets or executes the application. It's consistent with
23 the prosecution history, which we cited in our brief. I won't
24 repeat that.

25 And it's consistent with the fact, as I alluded to at the

1 outset, that player and application aren't terms of art. They
2 aren't just code that exists in the abstract, independent of
3 one another, without any relationship. In the name, you
4 realize that player is playing something. A record player
5 plays something.

6 In this instance, the player plays something. It's an
7 application, and it does so by interpreting it or executing it.
8 Even Express Mobile's construction acknowledges this to some
9 degree in that it talks about facilitating the execution of an
10 application, but we think that just injects unnecessary
11 ambiguity into the claim and isn't precise enough because we
12 don't know what "facilitates the execution" means, and that's
13 not anywhere in the intrinsic record that I'm aware of. And it
14 also doesn't even refer to the claim application. It's an
15 application, not the application.

16 And so again, under Express Mobile's construction, it
17 appears that any code that facilitates in some way the
18 execution of any application, claimed or otherwise, could
19 constitute the player. And that's just not supported by
20 anything in the intrinsic record, and it's inconsistent with
21 it.

22 Express Mobile identifies three alleged passages that talk
23 about something other than the player interpreting or executing
24 the application. And as our expert explained, none of these
25 passages do that. First, at Column 13:46 to 49, Express Mobile

1 argues that this contemplates the device executing the
2 application directly, but that passage actually says the device
3 executes it provided it has the appropriate player. The player
4 is necessary because it's the actual software that's executing
5 this device-independent code.

6 And Express Mobile never explains how a device processor,
7 which means necessarily specific to the device, could execute
8 device-independent code without the player as an intermediary.

9 The other two portions of the specification are at Column
10 8, Lines 27 through 35, where it talks about the player
11 intercepting the application. That's true. The player
12 intercepts it, and that's entirely consistent with it
13 intercepting it in order to interpret or execute it.

14 Finally, it talks about the player adapting the
15 application at 34 to 51 -- Column 34, Lines 51 to 64. It's
16 adapting it to the specific device dependencies, and that's
17 consistent with both the fact that the player is
18 device-specific code because it knows about the device-specific
19 dependencies that need to be adapted in the application, and
20 it's adapting the application for further interpretation for
21 execution by the player itself.

22 Nothing suggests that anything other than the player
23 interprets or executes the application. Mr. Weadock, Express
24 Mobile's expert, speculates that there could be scenarios in
25 which this occurred, and that's certainly true. The problem

1 and the reason that that should not carry today is because it's
2 nowhere referenced in the intrinsic record.

3 THE COURT: Are you done?

4 MR. SAULSBURY: I am, Your Honor, except for my response
5 to further argument.

6 THE COURT: Well, that was terrific. You ought to quit
7 right now. You're not going to ever do any better than that.
8 I thought you did a very good job.

9 I'll hear a response from opposing counsel.

10 MR. SAULSBURY: Thank you, Your Honor.

11 MR. LIM: Counsel, would you please unshare your screen so
12 I may share my presentation?

13 Good afternoon, Your Honor. Sal Lim appearing on behalf
14 of plaintiff.

15 THE COURT: Welcome back. Good to see you again.

16 MR. LIM: Great to see you again, Your Honor.

17 I'd like to start with the first point that counsel made
18 as to whether or not the player has to be device-specific or
19 device-dependent code. And I'd like to start with actually his
20 presentation.

21 So, Your Honor, we saw quite a bit this afternoon from
22 counsel's presentation are many, many statements from the
23 specification interpreted to the best light of defendants. And
24 you also saw some statements made in the file history, also
25 interpreted in the best light of the defendants. What you did

1 not see, Your Honor, are slides showing the claims of the
2 specification. And I'd like to -- I'd like to show you the
3 claims, as well as address some of the excerpts you just saw.

4 So starting with this Slide No. 22, where they said this
5 is where the specification says that the player must be
6 device-specific code or device-dependent code. Now, the very
7 first phrase of this excerpt says "in one embodiment." In one
8 embodiment the player device-specific code. That's true.
9 There are embodiments that talk about the player being device
10 specific.

11 However, as we saw earlier -- I'm now going to switch to
12 our presentation. On Slide 30 of our presentation there are
13 other places in the specification that describe embodiments
14 where the player does not have to be device-specific code, all
15 right? So -- and you saw this excerpt earlier, and counsel
16 advocated an interpretation that the phrase that we highlighted
17 here has no device-specific dependencies is modifying the
18 language as opposed to the player.

19 But if you can see this in plain English, there's a
20 modification for the language, right, where it says when the
21 architecture that operates in a language that manages resources
22 efficiently and extensible. So it's basically saying that the
23 language manages resources efficiently. That's what the
24 language is.

25 But now, if I read the entire sentence, it's clear that

1 this sentence start talking about embodiment where the code is
2 a player, and that player has no device-specific dependencies.
3 And it's not ambiguous as what they alleged in the brief. And
4 one skilled in the art would simply read this as the player
5 does not have to be device-specific dependencies, right?

6 And what confirms this is the claims, right? So there --
7 our position is there are multiple embodiments disclosed in the
8 specification. Some are directed to player where it's not --
9 where the player is device-specific code. And others are
10 directed to players where it's not directed to device-specific
11 code.

12 And if you look at the claim language which something that
13 Your Honor did not see during defense counsel's presentation,
14 the claims made clear what we're claiming. So in the '755
15 patent as well as the '287 patent, where we're claiming the
16 embodiments where the player is a device-dependent code, we
17 said so in the claim. There's specific limitations that says
18 the player is device-dependent code. That limitation's
19 literally in the claim.

20 But in contrast, in the '044 patent where we're claiming
21 the embodiment where the device -- where the player's not
22 device-dependent code, we didn't include that language, all
23 right? That's clear claiming of the applicant where one
24 embodiment's directed to client -- depend-specific code and the
25 other one is not. And we claim both embodiments in separate

1 claims of separate patents. And that clear claiming should be
2 honored here.

3 And I'd like to move on to the second point that counsel
4 made, where the player and application must be separate, okay?
5 And then he started his presentation by talking about the
6 statements made in the file history.

7 Now, it's true that the application -- the applicant made
8 arguments to overcome McCain. And the specific distinction
9 that was made was that McCain disclosed one set of code, one
10 code versus two.

11 And the distinction was one specific code versus two
12 specific code. And what we said there was that, you know,
13 obviously the word "separate" was used in those statements, and
14 you saw that, and we're not walking away from that. What we're
15 saying is that distinction is honored in the claim.

16 When we wrote the claim of the patent, you can see what
17 argument that was made there that's being honored in the claim.
18 It's not that we're walking away from that. No. To the
19 contrary.

20 So let me show you the claim that counsel didn't show you.
21 All right.

22 So if we look at the claim of the '755 patent, for
23 example, the claim claims an application, which has to do its
24 own specific set of functionalities, okay? And it also
25 separately claims a player that has its own functionality as

1 well that are specific to the player.

2 So we're claiming two codes as what we said in the
3 specification. The claim requires an application that --
4 including the selected symbolic name of defined UI object where
5 the application is device-independent code, okay?

6 And then it also claims later on -- as you see on the
7 bottom there, it also claims a player that received the output
8 symbolic name and corresponding one or more output value that
9 provides instructions for a display of the device to present
10 the output value in the defined UI object.

11 So as you can see in the claim, the application has its
12 own function that it must perform, and the player has its own
13 function that's different from the application that it must
14 perform.

15 So in the claim, we honor that distinction, and that's
16 what we said McCain didn't teach.

17 McCain taught one code, and here we're claiming an
18 application, as well as a player, and each has its own separate
19 functions.

20 And I could talk about the separateness that counsel
21 argued about, where the -- the word "separate" that was used in
22 the file history.

23 So what does separate mean? And then counsel says --
24 well, you know, even though it wasn't in the briefing, but
25 counsel now says, separate means not physically separate but

1 has to be separate in a way that it can be sent -- I forget the
2 exact phrasing, but has to send a separate code to the device,
3 and that's what it means. And if you can read this, that
4 limitation is not found anywhere, okay?

5 So what we have here -- and to the contrary, so the
6 specification does talk about an integrated application and
7 player. And here what I show on the screen -- this is our
8 Slide No. 22 at '755 patent, Column 7, Line 30 through 36 --
9 the patent specifically disclosed an embodiment where extending
10 the application on the player so it is efficiently integrated
11 into a comprehensive client/server application.

12 So the two is literally integrated into one, and that
13 integration can be done. And it's clearly taught in the
14 specification.

15 Now, under the construction that defense counsel just
16 advocated, that would be read out. This embodiment that's
17 described in the specification would be read out of the claim.
18 And that is consistent with the finding of the Court.

19 Let me show you where -- in the Shopify case, the court
20 there recognized that: Shopify does not argue there must be
21 physical barrier between the application and the player.
22 Although the application used -- applicant used the word
23 "partition" during the prosecution, I will not adopt that word
24 here to avoid a construction that would read as excluding an
25 embodiment described in the specification.

1 So the language there, where it says -- where the judge
2 specifically found construing the phrase, as defense counsel
3 advocates here, would read out an embodiment that's described
4 in the specification. And that is true, and I just showed
5 where the specification teaches that. And under the
6 construction advocated by defendant, that embodiment would be
7 read out, and that can't be correct.

8 And, lastly, I'd like to address the issue of the player
9 does not interpret or execute the application.

10 Contrary to what defense counsel just advocated, there are
11 disclosures in the specification where it talks about a player
12 that does not necessarily interpret or execute an application.
13 And as our expert explained here in his declaration, while
14 referring to the specification of the '755 patent, our expert
15 explained that the application -- actually that the player can
16 play a supportive role to the application. Not executing it,
17 not interpreting it, but playing a supportive role, okay?

18 And he further provided another example that player may
19 modify the frame rate of an application to the frame rate of a
20 particular device that it can handle. So there the player's
21 playing a supportive role to the application and not executing
22 it.

23 And there's a dependent claim that further makes clear
24 that the player does not need to interpret or execute the
25 application. Here's dependent Claim 12 of the '755 patent

1 which includes additional limitation that when the application
2 and the player are provided to the device and executed on the
3 device, okay?

4 So the application and the player can be provided to the
5 device, and both can be executed by the device. So that
6 basically -- that does not require the player executing the
7 application. If the requirement of the player has to execute
8 the application, this limitation would not make sense. You
9 know, then the -- that means the device can't execute the
10 application without the player, and that's not what this claim
11 limitation says.

12 So, again, the claims is what describe the claim
13 invention. Not certain embodiments of the specification, not
14 certain statements cherry-picked from the prosecution history.
15 It's the claims that define the invention. And we respectfully
16 submit that the Court's constructions are correct.

17 THE COURT: Response?

18 MR. SAULSBURY: Yes, Your Honor. I've got about ten
19 minutes, but I'll take your advice and do it quickly. Let me
20 just respond to a few high-level points.

21 First, on the language we saw, which Express Mobile
22 maintains refers to a player without any specific device
23 dependencies, I didn't hear any response to the provisional
24 language or an effort to try and harmonize their interpretation
25 of that clause with the statement in the provisional

1 application which is essentially a user guide authored by the
2 inventor himself.

3 Second, there's no dispute, I don't think, between the
4 parties that the player and application perform different
5 functions. We agree that the claims contemplate the player and
6 application doing different things with respect to additional
7 claim language. But that doesn't resolve the question of what
8 the player and application are definitionally. And this notion
9 that functional distinctness is enough, as I said, wouldn't
10 have been sufficient to overcome McCain. Because it talks
11 about functionally distinct code, and it was not characterized
12 as being separate from one another, despite the functional
13 distinctness between the device-independent code and
14 device-dependent code described in McCain.

15 Second -- or, third, with respect to this embodiment of a
16 "integrated player application," we agree that Your Honor
17 should look at the specification. And the phrase "integrated
18 player application" appears in Express Mobile's brief numerous
19 times, but that's not what the passage in Slide 22 of their
20 presentation says. It refers to a "comprehensive client/server
21 application."

22 Our construction does not read that embodiment out. As I
23 said, they can both be located on the server. And as Slide 23,
24 which includes the excerpt of Judge Andrews' order alluded to,
25 indicates Judge Andrews agreed as well. He adopted the

1 separate (inaudible) requirement in our proposed construction
2 and acknowledged that even if the application and player are
3 both on the same server, they still presumably are separate
4 sets of code based on not cherry-picked portions from the
5 prosecution history, but the repeated and consistent
6 description of the player and application as being separate
7 from one another.

8 I think plaintiff's counsel may have misspoke. Claim 12
9 is an independent claim, not a dependent claim, and there's no
10 dispute that the application is executed on the device. But of
11 note, this claim requires the player be sent to the device too.

12 And I'll note that plaintiff's counsel said the claim says
13 it's executed on the device and then paraphrased and said, that
14 means it's executed by the device. That's not what the claim
15 says.

16 The claim requires a player and an application, which we
17 agree are both provided to the device, and those are executed,
18 the player by the device and then the application by the player
19 that has also been provided to the device.

20 So once again, there's nothing inconsistent with our
21 interpretation and the proposed construction. I think the
22 dependent claim counsel meant to refer to was Claim 21, which
23 refers to the player interpreting the application. But it's
24 not just that, it's interpreting very specific values in the
25 application.

1 And so there's no claim differentiation problem here.
2 Instead, it's consistent with our interpretation and
3 construction, which requires the player generally to interpret
4 or execute the application. And then Claim 21 further
5 specifies that very specific values are present in the
6 application that must be interpreted.

7 And finally, I'll close where I started which is I also
8 didn't hear any explanation of why Express Mobile's proposed
9 constructions would not lead to the absurd results I alluded to
10 at the outset of my presentation. It blurs and almost
11 eliminates any distinction between the application and player,
12 which throughout the intrinsic record are treated as very
13 different pieces of code. And they're treated in a very
14 different way consistent with defendants' proposed
15 construction.

16 And so we would respectfully request that Your Honor adopt
17 defendants' construction or portions thereof. Thank you.

18 THE COURT: Anything else?

19 MR. LIM: Just briefly, Your Honor. Just one point.

20 The Court's construction does not blur the line that
21 separate the application and the player. The claim language
22 that are in the claim that Your Honor saw prescribe limitations
23 that's are assigned to the player as well as the application.
24 And those different limitations honor the statements that were
25 made in the prosecution history. Clearly, it does that.

1 There's no ambiguity there as to what the role of the
2 player is in the claim. And there's no ambiguity as to what
3 the player is in the claim as construed by the Court.
4 Everything that was argued in the file history is honored by
5 the claim language that's already in the claim. There's no
6 need to import any additional limitations into the claim.

7 THE COURT: Anything else?

8 MR. SAULSBURY: Nothing from me, Your Honor.

9 THE COURT: Okay. I'll be back in a few seconds.

10 (Pause in proceedings.)

11 THE COURT: If we can go back on the record, please.

12 The Court's going to give a modified -- it's going to
13 modify its preliminary construction for application. The claim
14 term is going to be interpreted as "device-independent code
15 which contains instructions for a device which is separate from
16 the player."

17 And for "player" it's going to be "device-specific code
18 that is separate from the application."

19 In other words, on both of them I've dropped off the last
20 portion of the proposal from defense counsel.

21 Is there anything else? I hate to -- hate to do this and
22 run, but I've got another Markman starting in two minutes. Is
23 there anything else we need to take up?

24 MR. MANN: Nothing from Google, Your Honor.

25 THE COURT: Very good. I very much enjoyed it. About to

1 start my third Markman of the day. It's a great day when you
2 get to do three Markmans with lawyers as good as you guys. So
3 have a wonderful afternoon. Hope to see at least some of you
4 in person soon. Take care.

5 (Hearing adjourned at 2:58 p.m.)
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1 UNITED STATES DISTRICT COURT)
2 WESTERN DISTRICT OF TEXAS)
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4 I, Kristie M. Davis, Official Court Reporter for the
5 United States District Court, Western District of Texas, do
6 certify that the foregoing is a correct transcript from the
7 record of proceedings in the above-entitled matter.

8 I certify that the transcript fees and format comply with
9 those prescribed by the Court and Judicial Conference of the
10 United States.

11 Certified to by me this 15th day of August 2021.

12
13 /s/ Kristie M. Davis
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KRISTIE M. DAVIS, OFFICIAL COURT REPORTER
U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS (WACO)