

BEFORE THE HONORABLE ALAN D ALBRIGHT
DISCOVERY AND MOTIONS HEARING (via Zoom)

APPEARANCES:

For the Plaintiff: Jonathan K. Waldrop, Esq.
John W. Downing, Esq.
Marcus A. Barber, Esq.
Kasowitz Benson Torres, LLP
333 Twin Dolphin Drive, Suite 200
Redwood Shores, CA 94065

Jeceaca An, Esq.
Kasowitz Benson Torres LLP
1633 Broadway
New York, NY 10019

Paul G. Williams, Esq.
Kasowitz Benson Torres LLP
1349 West Peachtree Street, NW
Suite 1500
Atlanta, GA 30309

Raymond W Mort III, Esq.
The Mort Law Firm, PLLC
100 Congress Ave, Suite 2000
Austin, TX 78701

For the Defendant: Robert N. Kang, Esq.
Winston & Strawn LLP
101 California Street, 34th Fl.
San Francisco, CA 94111

Barry K. Shelton, Esq.
Winston & Strawn LLP
2121 N. Pearl Street, Suite 900
Dallas, TX 75201

Travis Jensen, Esq.
Orrick, Herrington & Sutcliffe LLP
1000 Marsh Road
Menlo Park, CA 94025-1015

Court Reporter: Kristie M. Davis, CRR, RMR
PO Box 20994
Waco, Texas 76702-0994
(254) 340-6114

Proceedings recorded by mechanical stenography;
transcript produced by computer-aided transcription.

KRISTIE M. DAVIS, OFFICIAL COURT REPORTER
U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS (WACO)

09:29 1 (Hearing begins.)

09:29 2 DEPUTY CLERK: A civil action in Case
09:29 3 6:22-CV-288, Fintiv, Incorporated versus PayPal
09:30 4 Holdings, Incorporated. Case called for a discovery
09:30 5 and motions hearings.

09:30 6 THE COURT: Announcements from counsel,
09:30 7 please?

09:30 8 MR. WALDROP: Good morning, Your Honor.
09:30 9 It's Jonathan Waldrop with the law firm of Kasowitz
09:30 10 Benson Torres on behalf of the plaintiff. I'm joined
09:30 11 by Ray Mort, John Downing and Marcus Barber of the
09:30 12 Kasowitz firm as well as Mr. Williams and Jeceaca An.

09:30 13 THE COURT: Okay.

09:30 14 Mr. Shelton?

09:30 15 MR. SHELTON: Good morning, Your Honor.
09:30 16 Barry Shelton, Winston Strawn LLP. I'm pleased to
09:30 17 announce that we have Jeremy Jones from PayPal as a
09:30 18 client representative here. And Rob Kang from my firm
09:30 19 who will be arguing today.

09:30 20 And, Your Honor, if you would indulge me
09:30 21 for one moment, I've heard recently that Judge Yeakel
09:30 22 has retired and just wanted to ask if Your Honor
09:30 23 anticipates that there might be a sudden change in the
09:30 24 log jam of intra-district transfer motions to the
09:31 25 Austin Division, such as in this case, given that

09:31 1 change.

09:31 2 THE COURT: The judges are certainly
09:31 3 looking at that issue, and I would say that has an
09:31 4 extremely high priority.

09:31 5 MR. SHELTON: Thank you, Your Honor.

09:31 6 THE COURT: I would say it has my highest
09:31 7 priority.

09:31 8 MR. SHELTON: Thank you very much.
09:31 9 That's gratifying to hear.

09:31 10 I also wanted to say that Chris Gresalfi
09:31 11 from my firm is also on the line here.

09:31 12 Thank you, Your Honor.

09:31 13 THE COURT: You bet.

09:31 14 Anything else before we get started on
09:31 15 the hearing -- the issues we're here for?

09:31 16 Okay. My phone is not working, so I'm
09:31 17 going to switch to my e-mail on my iPad. I'll be right
09:31 18 back. Give me one second.

09:31 19 Okay. The first issue I have is the
09:32 20 reconsideration of a claim construction. I'll hear
09:32 21 argument on that, please.

09:32 22 MR. WALDROP: Thank you, Your Honor. I
09:32 23 will be arguing. This is Jonathan Waldrop. Good
09:32 24 morning, Your Honor.

09:32 25 THE COURT: Good morning.

09:32 1 MR. WALDROP: May it please the Court.

09:32 2 My name is Jonathan Waldrop. I'm with
09:32 3 the law firm of Kasowitz Benson Torres and I represent
09:32 4 Fintiv in this case.

09:32 5 Fintiv's motion for reconsideration
09:32 6 should be granted because failure to do so will lead
09:32 7 the Court to clear error regarding the construction of
09:32 8 the "payment handler" term.

09:32 9 Specifically, Your Honor, there is
09:32 10 evidence cited in the record, specifically RFC 2935
09:32 11 which I will discuss more later, which specifically
09:32 12 shows that the payment handler is known -- what's known
09:32 13 in the art, was a server specifically addressed to
09:32 14 running software that addresses and manages payments
09:33 15 and communications regarding payments from multiple --
09:33 16 from different sources, Your Honor.

09:33 17 Specifically the Court's primary inquiry
09:33 18 at the claim construction hearing was the recitation
09:33 19 and the identification of structure regarding the
09:33 20 "payment handler" term. The document that was cited in
09:33 21 the declaration of Mr. Johnson, Fintiv's expert, for
09:33 22 the support that this term should have its plain and
09:33 23 ordinary meaning more than satisfies this structure
09:33 24 requirement, Your Honor.

09:33 25 And, Your Honor, it is clear to me after

09:33 1 reading the transcript and preparing for this
09:33 2 hearing -- I was not at the claim construction hearing,
09:33 3 Your Honor -- that there was not a full understanding
09:33 4 and apprehension of the issue as it related to the
09:33 5 "payment handler" term from the Court's perspective
09:33 6 regarding the structure requirement.

09:33 7 We thought, Your Honor, that this issue
09:33 8 was settled, and we believe that it is. And so to the
09:33 9 extent, Your Honor, this issue was not joined, we
09:33 10 apologize for that.

09:33 11 But, Your Honor, we're here to, one, cite
09:34 12 that this evidence was cited in the declaration of
09:34 13 Mr. Johnson, discussed in the claim construction
09:34 14 briefing and was known for years that the payment
09:34 15 handler was a particular structure, was known in the
09:34 16 art, was not this etherial made-up construct, Your
09:34 17 Honor, that appears out of the blue in the
09:34 18 specification.

09:34 19 In fact, Your Honor, as I dig into the
09:34 20 RFC and the standards document which will discuss the
09:34 21 payment handler, it will add context and make some of
09:34 22 the statements that were made, I believe by PayPal
09:34 23 during the claim construction hearing, seem as if it
09:34 24 were two ships sailing in the night.

09:34 25 Or those statements will not be able to

09:34 1 withstand scrutiny upon delving into the record and
09:34 2 dealing with the support cited by our expert with
09:34 3 respect to the "payment handler" term being known from
09:34 4 a plain and ordinary meaning construction. Or, Your
09:34 5 Honor, whether or not if the Court is convinced that
09:34 6 it's means-plus-function, that there was sufficient
09:35 7 structure disclosed in the specification so that one of
09:35 8 ordinary skill in the art would understand what the
09:35 9 "payment handler" term was.

09:35 10 There's a bunch of other things I can and
09:35 11 will say, Your Honor, in the briefing. But if there's
09:35 12 one thing that the Court should take away from my
09:35 13 presentation today is that the "payment handler" term
09:35 14 was known in the art. Those of ordinary skill in the
09:35 15 art knew what it meant and what it did. And that the
09:35 16 claims of the patents at issue in this case claimed a
09:35 17 particular payment handler that was able to address and
09:35 18 manage payment processors from different sources, Your
09:35 19 Honor. And that was a novel inventive concept claimed
09:35 20 in the patents-in-suit.

09:35 21 Now, I have a presentation, Your Honor,
09:35 22 that I would like to present to the Court. But at
09:35 23 bottom, Your Honor, that is where I will land, Your
09:35 24 Honor. And it will make some of the discourse at the
09:35 25 claim construction hearing in some ways, Your Honor,

09:35 1 not helpful to the Court.

09:35 2 But I'm here, Your Honor, and I'm going
09:36 3 to do my very best to elucidate and make our arguments
09:36 4 clearer so that they're much more persuasive, Your
09:36 5 Honor, that we are talking about not whether or not the
09:36 6 payment handler has structure or was claimed in the
09:36 7 claims. But we'll be talking about something else
09:36 8 maybe, Your Honor.

09:36 9 If I may proceed.

09:36 10 THE COURT: Of course.

09:36 11 MR. WALDROP: If I will share my screen,
09:36 12 Your Honor, I will do so.

09:36 13 Are you seeing my screen?

09:36 14 (Thumbs up by the Court.)

09:36 15 MR. WALDROP: Can you see the slides,
09:37 16 Your Honor?

09:37 17 THE COURT: I can. Yes, sir.

09:37 18 MR. WALDROP: Oh, you can. Okay. Great.
09:37 19 You can see the slides. Thank you very much. That was
09:37 20 the question of whether or not you could see here.

09:37 21 So first, Your Honor, just to get
09:37 22 straight to it, Your Honor, so that we don't waste the
09:37 23 Court's time because we understand the posture of a
09:37 24 motion for reconsideration and the extraordinary nature
09:37 25 of it, Your Honor.

09:37 1 What I have in front of you, Your Honor,
09:37 2 RFC 2935 which is the standard that describes the
09:37 3 payment handler. As you can see, Your Honor, this
09:37 4 document --

09:37 5 THE COURT: Well, so I have a screen up
09:37 6 here, but -- from your deal, but it's just -- I don't
09:37 7 have anything -- any text up. Just so you know. I
09:37 8 have --

09:37 9 MR. WALDROP: Oh. Okay, Your Honor.
09:37 10 Thank you.

09:37 11 Let me fix that, Your Honor.

09:38 12 Do you see it now, Your Honor?

09:38 13 THE COURT: I can't. But while you're
09:38 14 fixing that, I need a minute myself. So you work on
09:38 15 that and I'll be back in a minute.

09:38 16 MR. WALDROP: All right. Thank you, Your
09:38 17 Honor.

09:38 18 (Pause in proceedings.)

09:39 19 THE COURT: And I'm back now too. It was
09:39 20 a minute well spent.

09:39 21 MR. WALDROP: Thank you, Your Honor.

09:39 22 All right. Can you see the screen now?

09:39 23 THE COURT: Yes, sir.

09:39 24 MR. WALDROP: Thank you, Your Honor.

09:39 25 So, Your Honor, what I'm showing you here

09:39 1 is RFC 2935 which is the standard describing the
09:39 2 payment handler. This particular document was cited in
09:39 3 Mr. Johnson's declaration in support of our claim
09:39 4 construction briefing.

09:39 5 And can you see it, Your Honor? You can
09:39 6 see it now, Your Honor?

09:39 7 THE COURT: I can. Yes, sir.

09:39 8 MR. WALDROP: And, Your Honor, this
09:39 9 document is the Internet open-trading protocol, HTTP
09:39 10 supplement. You'll see, Your Honor, that it's dated
09:39 11 September 2000, Your Honor.

09:39 12 And specifically the document is talking
09:39 13 about an IOTP messaging protocol regarding XML
09:39 14 documents, Your Honor. And I'm sure the Court is
09:39 15 familiar with that. And the goal of the document is to
09:39 16 talk about mapping the transport layer to ensure that
09:40 17 these documents are -- carry successfully messaging
09:40 18 between various parties.

09:40 19 And what's notable, Your Honor, here is
09:40 20 on this Slide No. 2, it talks about HTTP servers and
09:40 21 clients. And it also talks about Section 5, "starting
09:40 22 the payment handler and deliverer IOTP servers."

09:40 23 Now, Your Honor, this is 11 years before
09:40 24 the priority date of the patents. So over a decade,
09:40 25 the community, those that are skilled in the art, are

09:40 1 talking about payment handlers, Your Honor.

09:40 2 And what are they saying, Your Honor? On
09:40 3 Slide 3, Your Honor, they're talking about specifically
09:40 4 what is at issue in this case. They're talking about
09:40 5 payment handlers.

09:40 6 And on Slide 3, Your Honor, it
09:40 7 specifically says: The structure of IOTP maps on to
09:40 8 the structure of HTTP in the following way.

09:40 9 And specifically it says: The merchant,
09:40 10 the payment handler -- and this is underlined, Your
09:40 11 Honor -- the delivery handler and customer care roles
09:41 12 are all represented by HTTP servers. Each may be
09:41 13 combined by a separate server or they may be combined
09:41 14 in any combination.

09:41 15 Your Honor, it specifically talks about
09:41 16 the payment handler is represented by a server which is
09:41 17 running software, Your Honor, to effectuate these
09:41 18 messages, right, Your Honor, and this messaging
09:41 19 protocol.

09:41 20 Now, further down in the same document,
09:41 21 Your Honor, in Section 5 on Slide 3, it specifically
09:41 22 talks about "starting the payment handler and deliverer
09:41 23 IOTP servers." And it goes on to talk about: Payment
09:41 24 handler and deliverer IOTP servers are started by
09:41 25 receiving an IOTP message which contains: For payment

09:41 1 handler, a payment request block.

09:41 2 Now, Your Honor, this is in the standard.
09:41 3 This is 11 years before the priority date of the
09:41 4 patent. It is known by those of ordinary skill in the
09:42 5 art what a payment handler is and what it's
09:42 6 effectuating under the standard. As you know, Your
09:42 7 Honor, the indefiniteness or definiteness inquiry is
09:42 8 informed by what one of ordinary skill in the art
09:42 9 understands.

09:42 10 Now, Your Honor, this was not considered
09:42 11 or discussed, even though it was cited in the claim
09:42 12 construction briefing and the declaration of the
09:42 13 parties. It was not joined in the claim construction
09:42 14 hearing. And I think this is a very, very important
09:42 15 point that the Court should have as a basis as it
09:42 16 decides whether or not this term was indefinite.

09:42 17 Now, skipping ahead, Your Honor, so I can
09:42 18 join the issue, because I have a lot of slides. But
09:42 19 the main issue I want to make sure we address directly,
09:42 20 Your Honor, I want to move to Slide 10.

09:42 21 Now, in Slide 10, Your Honor, we have in
09:42 22 front of the Court the operative language of the
09:42 23 pertinent claim elements from the four patents at issue
09:42 24 which discuss the payment handler. And you will see,
09:42 25 Your Honor, that it discusses a payment handler

1 configured to use APIs of different payment processors,
2 including one or more APIs of banks, et cetera. And
3 specifically from the '386 patent claim element.

4 Under the '413, Your Honor, again, it
5 talks about a payment handler where it is able to hold
6 funds from the agent using the payment handler funds to
7 the subscriber account used in the payment handler,
8 this same payment handler which is discussed in the
9 standard, Your Honor, a decade before. But it's
10 claiming a particular kind of payment handler.

11 In patents '488, '196 we're talking
12 about, again, a payment handler that exposes a common
13 API for interacting with a different -- with different
14 payment processors. The context of the invention, Your
15 Honor, is the disintermediation of banks for unbanked
16 users. The ability to be liberated, Your Honor, by
17 either being able to use -- or being able to interact
18 with different payment processors and not being able
19 to -- not being locked into a particular one payment
20 processor.

21 So it's discussing a particular kind of
22 payment handler that is claimed in the actual claim
23 elements of the patent, something that was known by one
24 of those of ordinary skill in the art.

25 Now, Your Honor, on Slide 12, Your Honor,

09:44 1 this is something you've seen before, but it's -- lays
09:44 2 out, Your Honor, the exemplary system architecture for
09:44 3 the mobile wallet platform that the '386 patent and the
09:44 4 other patents at issue came up with one, Your Honor.
09:44 5 And in this Figure 1, we're talking about the
09:44 6 architecture which uses software components and
09:44 7 hardware components to communicate with each other
09:44 8 across multiple platforms and languages, Your Honor.
09:44 9 And this is cited and described in Mr. Johnson's
09:44 10 declaration which is submitted in support of our claim
09:44 11 construction position as to the payment handler term.

09:44 12 And in that figure that he discusses,
09:45 13 Your Honor, you'll see that the payment handler and
09:45 14 specifically identified within its architecture
09:45 15 consistent with what the standard was discussing in
09:45 16 2000, the ability to interact with other payment
09:45 17 processors, Your Honor. And that's in Section 105,
09:45 18 Your Honor, you'll see in Figure 1.

09:45 19 Now, why is this important, Your Honor?
09:45 20 It's important because on Slide 13, you'll see we've
09:45 21 laid out this figure and color-coded it, Your Honor,
09:45 22 and matched it with the specification in terms of what
09:45 23 the patent specification talks about in the context,
09:45 24 one, of the figures but in the context of what the
09:45 25 standard discussed as what the payment processor being

09:45 1 identified as a server.

09:45 2 Now, at the top of the page, Your Honor,
09:45 3 we have the Figure 1. You'll see in green the
09:45 4 third-party systems that we've talked about. These are
09:45 5 different payment processors, Your Honor. Each third
09:45 6 party has a payment processor system, has a different
09:45 7 API, multiple APIs, Your Honor. You'll see below that
09:46 8 there is the payment handler set forth in yellow, and
09:46 9 the payment handler wraps the different APIs and
09:46 10 exposes a common API to facilitate communication
09:46 11 interaction, Your Honor, in a mobile wallet environment
09:46 12 for an unbanked subscriber, and so it can interact with
09:46 13 different payment processors from these third parties.

09:46 14 The specification, Your Honor, talks
09:46 15 about the service connectors, Your Honor. It talks
09:46 16 about the third-party systems. It talks about their
09:46 17 business process services because you understand, Your
09:46 18 Honor, each of these third parties have their own
09:46 19 different business work flows and systems, Your Honor.
09:46 20 And then it talks specifically about the payment
09:46 21 handler.

09:46 22 In 2011, Your Honor, at the priority date
09:46 23 of this patent the idea of a payment handler is
09:46 24 discussed in the standard for over a decade. And it
09:46 25 says the payment handler, which is a term in the

09:46 1 standard, is configured, this particular payment
09:46 2 handler, the one claimed in the invention, is
09:46 3 configured to wrap APIs of different payment processors
09:47 4 such as, for example, banking accounts, credit/debit
09:47 5 cards or processor 121. It goes further and says the
09:47 6 payment handler 105 exposes a common API to facilitate
09:47 7 interactions with different kinds of payment
09:47 8 processors.

09:47 9 Again, Your Honor, the standard talked
09:47 10 about the payment handler being -- facilitating these
09:47 11 communications regarding payment requests. This patent
09:47 12 is talking about an added feature, added functionality,
09:47 13 a unique and inventive component, a new payment
09:47 14 handler, that has this capability.

09:47 15 It goes on, Your Honor, in the section on
09:47 16 Slide 13 to talk about the transaction processor, Your
09:47 17 Honor, which is configured to manage the financial
09:47 18 counseling transactions, and that it can hold load and
09:47 19 withdraw and deposit funds, Your Honor.

09:47 20 This is all in the context of
09:47 21 facilitating communications, interactions with
09:47 22 different payment processors with -- a payment
09:48 23 processor which was specifically discussed in the
09:48 24 standard and which had been developed over -- for
09:48 25 the -- at least the last decade at the time of the

09:48 1 filing of the patent, and the patent is focused on a
09:48 2 mobile wallet platform that utilizes this payment
09:48 3 handler, this new payment handler, with this new claim
09:48 4 functionality to interact across multiple platforms,
09:48 5 not just one.

09:48 6 So it is a thing. It is real, and it is
09:48 7 something that people have been working on for years,
09:48 8 and in 2011 the inventors of this patent, these
09:48 9 patents, including the '386, found and invented
09:48 10 something new to facilitate what was going to become
09:48 11 something very important for the unbanked and those who
09:48 12 wanted to make mobile payments.

09:48 13 Now, before I go on, Your Honor, I want
09:48 14 to stop there to see if the Court has any questions.

09:48 15 THE COURT: No. I'm good.

09:48 16 MR. WALDROP: So that leads us to today,
09:49 17 Your Honor, or recently, when this came to a head, Your
09:49 18 Honor, with respect to constructions of payment
09:49 19 handler, Fintiv took the position that it's plain and
09:49 20 ordinary meaning, Your Honor -- and this goes back to
09:49 21 maybe we understood that we would not be arguing over
09:49 22 whether or not the sky was blue or the sun rose in the
09:49 23 east instead of in the west, and we misapprehended
09:49 24 that, Your Honor.

09:49 25 We proposed a construction of plain and

09:49 1 ordinary meaning that was supported by our expert,
09:49 2 which I will talk about later, because the payment
09:49 3 handler term was known, it was a thing, it operated,
09:49 4 and we had invented something that was a new
09:49 5 functionality for the payment handler that can do
09:49 6 something inventive, and we think changing the world in
09:49 7 which we think what PayPal does.

09:49 8 So we advanced the plain and ordinary
09:49 9 meaning construction, but we also said to the extent
09:49 10 the Court found it to be means-plus-function -- and
09:49 11 this was in a response to PayPal's argument that this
09:50 12 was a means-plus-function limitation -- we put forth a
09:50 13 function that it was operable to interact with payment
09:50 14 processors. Then, Your Honor, that it was consistent
09:50 15 with the standard, which is how the standard would
09:50 16 allow for a payment handler to interact with a payment
09:50 17 processor, but it was consistent with the
09:50 18 specification, the claims, that we had a payment
09:50 19 handler that was able to interact with multiple payment
09:50 20 processors, plural.

09:50 21 We then cited the structure, Your Honor,
09:50 22 and the patent claims. We cited the data flows that
09:50 23 we'll discuss, the figures, but we also, Your Honor,
09:50 24 understand, Your Honor, that those of ordinary skill in
09:50 25 the art knew what we were talking about, and it had

1 been addressed for many years.

2 PayPal responded with simply a
3 means-plus-function limitation where they had longer
4 verbiage regarding use of APIs of different payment
5 processors including banks, credit cards. They took it
6 directly from an embodiment in the specification, Your
7 Honor, which we think was too limiting, but they
8 proposed a function, and then they said there was no
9 structure under 112(f).

10 Your Honor, we think that the standards
11 document is dispositive of this issue. We think that
12 the declaration of Mr. Johnson is dispositive of this
13 issue because he cited to the RFC 2935 as in support of
14 his plain and ordinary meaning construction and in
15 support of his means-plus-function construction
16 regardless of where the Court will go, and I'll talk
17 more about that.

18 On Slide 15, the Court at the preliminary
19 hearing found that it was means-plus-function, adopted
20 the function as set forth by PayPal and also identified
21 the structure though in support that we identified in
22 our construction, Your Honor. That was the
23 preliminary. After our argument the Court changed its
24 position and found the final construction to be
25 indefinite as to structure, Your Honor. So that is the

09:51 1 state of play in how we landed where we were, Your
09:52 2 Honor.

09:52 3 Now, Your Honor, on Slide 16, we believe
09:52 4 that the construction -- the Court's construction of
09:52 5 payment handler invoking 112 would constitute an error
09:52 6 of law. The payment handler term does not include the
09:52 7 word "means," Your Honor. We don't think it invokes
09:52 8 112, Paragraph 6. We don't think PayPal can rebut this
09:52 9 presumption.

09:52 10 We believe that, Your Honor, had this
09:52 11 issue been joined sufficiently, which we are doing now
09:52 12 even though it was cited in the record, Your Honor, the
09:52 13 standard disposes of this whether or not the payment
09:52 14 handler term was a thing well-known in the art, one of
09:52 15 ordinary skill in the art knew what a payment handler
09:52 16 was, one; but, two, Your Honor, even to the extent the
09:52 17 Court is loathe to revisit its means-plus-function
09:52 18 determination, we believe that the evidence in the
09:52 19 record that was cited, maybe not specifically discussed
09:52 20 until now, supports a determination that there's
09:53 21 sufficient structure. And, in fact, the protocol
09:53 22 document, RFC 2935, which I cite, was cited as the
09:53 23 basis for Mr. Johnson's positions on plain and ordinary
09:53 24 meaning and on means-plus-function, Your Honor.

09:53 25 Now, on Slide 17, Your Honor, just to

09:53 1 dispense with this, the payment handler term is not a
09:53 2 nonce word, and that argument may have been insinuated
09:53 3 in other previous proceedings of briefing, Your Honor.
09:53 4 I think that's clearly not the case, and it may be that
09:53 5 PayPal has a different view, but given the record
09:53 6 evidence that we understand and is now being presented
09:53 7 to the Court, this was not a nonce term or a nonce word
09:53 8 special situation. This was something that was known
09:53 9 by those of ordinary skill in the art as having a
09:53 10 particular meaning and a particular understanding of
09:54 11 it, Your Honor, and in terms of structure. So it's
09:54 12 specifically laid out in the document.

09:54 13 Now, on Slide 18, Your Honor, I just want
09:54 14 to ground the Court in why this is not new, why it was
09:54 15 in the record and why we're using this opportunity,
09:54 16 which we are grateful for, to give the Court full
09:54 17 information regarding its position on the construction
09:54 18 of the payment handler term.

09:54 19 In Docket 41, Your Honor, we show you the
09:54 20 declaration of Mr. Johnson, and we're talking about
09:54 21 Paragraph 51. And specifically, Your Honor,
09:54 22 Mr. Johnson's opinion was that the payment handler
09:54 23 service component would have been understood by one of
09:54 24 ordinary skill in the art to be a component of the
09:54 25 claim monetary transaction system, which is the subject

09:54 1 of the claim of the patents at issue here.

09:54 2 And, in fact, Your Honor, he cites in the
09:54 3 highlighted section, Your Honor, in his declaration on
09:54 4 Paragraph 51, and I'll read it. He says, for example,
09:54 5 the term "payment handler" was used in IETF RFC 2935,
09:55 6 which was the subject of a public standards process and
09:55 7 was published in September of 2000.

09:55 8 At the time, the term was so well
09:55 9 understood that the IETF RFC does not provide a
09:55 10 specific definition beyond the plain and ordinary
09:55 11 meaning. This is the very document, Your Honor, that
09:55 12 we talked about at the beginning of my presentation,
09:55 13 which was the standards documents, which discussed the
09:55 14 payment handler, what it did and what it was
09:55 15 represented or could be represented by which was a
09:55 16 server and which believes the server running on
09:55 17 software rendering the term "definite" not indefinite,
09:55 18 Your Honor.

09:55 19 And in fact, he goes on to say, Your
09:55 20 Honor, that the payment handler in the asserted claims
09:55 21 is described as wrapping APIs from different payment
09:55 22 processors and providing a common API, which is
09:55 23 important and useful in the context of the invention.

09:55 24 I'll go on and quote: Application
09:55 25 program interfaces are one way of defining the

1 structure of a software component.

2 And the payment handler component 105 is
3 clearly shown in Figure 1.

4 Now, Your Honor, PayPal's expert did not
5 disagree, Your Honor, and in the Slide 19, PayPal's
6 expert, Dr. Chatterjee, indicated the handler connoted
7 a class of computer program structures. And he take
8 the position that technical dictionaries are consistent
9 with his understanding that the handler does not
10 enforce structure, but he goes on to say a handler's
11 merely a computer program developed to perform one
12 particular function, and services merely means a set of
13 functions provided by a device.

14 Your Honor, that contradicts with the
15 RFC. He doesn't refer to the RFC. And the RFC, Your
16 Honor, talks about the payment handler server,
17 definitely connoting structure, Your Honor.

18 We cite on a slide the case, Your Honor,
19 the Dyfan case, which the Court's familiar with,
20 regarding that the code and application limitations
21 can't connote structures for one of ordinary skill in
22 the art.

23 Now, Your Honor, on Slide 18 -- on Slide
24 20, Your Honor -- on Slide 20, Your Honor, we go forth
25 and we talk about that there was additional context in

the patent and in the claims that provide additional structure as to what the payment handler does.

And in fact, Your Honor, I have the '386 patent, the '413 and the '488 and the '196 language from the claims talking about a payment handler. And it adds in green the additional context or conditional structure that talks about the use of APIs for different processors, Your Honor, including those from banks, credit cards and other entities, Your Honor.

And then in the 38 -- '413 patent, Your Honor, we talk about the payment handler loading funds to the subscriber account using the payment handler, Your Honor.

Now, an API, as you know, Your Honor, is a application programming interface, Your Honor, which allows the application to interact with other applications. This is very much consistent with the RFC 2935 which talks about the payment handler server.

Now, in Mr. Johnson's declaration on Slide 21 he talks about wrapping APIs and exposing a common API connoted structure to what one would understand as a POSITA, Your Honor.

And on Paragraph 51 on Slide 21 he talks about the payment handler of the asserted patents as described as wrapping APIs from a different payment

09:58 1 processors and providing a common API. And he
09:58 2 discusses this, that this is one way of defining
09:58 3 structure of software.

09:58 4 This is above and beyond, Your Honor,
09:58 5 what one would have understood in the context of the
09:58 6 standard RFC 2935 as what the payment handler was and
09:58 7 what it did as a -- being represented by a server, Your
09:58 8 Honor.

09:58 9 And in fact, Your Honor, the defendant
09:59 10 had an opportunity to depose Mr. Johnson. And on Slide
09:59 11 22 we set forth why wrapping APIs and exposing a common
09:59 12 API connoted structure. And Mr. Johnson was
09:59 13 specifically asked about this.

09:59 14 What does it mean to wrap an API?

09:59 15 He responded, Your Honor, regarding what
09:59 16 that functionality meant and how it's provided.

09:59 17 He also was asked, Your Honor: As an
09:59 18 expert in the payments industry, when would you use the
09:59 19 API wrapping?

09:59 20 And his answer was: It's a common
09:59 21 technique that can be used to translate an API from one
09:59 22 form to another. So if I had a scenario where that was
09:59 23 appropriate, that's what I would do.

09:59 24 And he was asked: What does it mean to
09:59 25 expose an API?

09:59 1 And he says: Exposing an API means
09:59 2 making it available to other components or services to
09:59 3 use.

09:59 4 Your Honor, this is completely consistent
09:59 5 with what we talked about before in the standard,
09:59 6 regarding what the payment handler was, being
10:00 7 represented by a server. And that it was not
10:00 8 indefinite and it was well-known. So well-known that
10:00 9 Mr. Johnson understood that to be the case. And the
10:00 10 entire industry regarding payments understood what that
10:00 11 meant.

10:00 12 Now, Your Honor, on Slide 23 we address
10:00 13 the Personalized Media case, Your Honor. Even though
10:00 14 the term does not specifically evoke a particular
10:00 15 structure, it does convey one to -- of knowledge -- of
10:00 16 one of skill in the art as to what the structure is.

10:00 17 Your Honor, that's clearly the case here.
10:00 18 In the context of the payment handler being something
10:00 19 that was discussed, and discussed not only in the
10:00 20 standard but implemented over a decade before the
10:00 21 claims -- the claims at issue here. And that the
10:00 22 patents at issue here specifically discuss a particular
10:00 23 kind of innovative payment handler, Your Honor, that
10:00 24 was able to interact with multiple payment processors,
10:01 25 Your Honor.

1 Now, on Slide 24, Your Honor, even if the
2 Court concludes that 112, Paragraph 6 applies, and,
3 Your Honor, for the reason we talked about before, Your
4 Honor, we think that plain and ordinary meaning
5 applies, particularly in this context where it was
6 discussed in a standard. Everyone knew what it was and
7 it was supported -- the document that I've cited was
8 supported by expert testimony.

9 But putting that aside, and even if the
10 Court was convinced that this was functional claiming
11 or means-plus-function, the claims are not indefinite,
12 Your Honor. One, they're presumed valid. But the --

13 PayPal cannot meet its standard in the
14 context of the evidence, I believe, that's in front of
15 the Court today, which is, one, the RFC 2395.

16 Two, Your Honor, what's on Slide 25 which
17 talks about the architecture of a mobile wallet in
18 which the payment handler is a component of and
19 facilitates interactions and messaging between multiple
20 payment processors using different APIs, and how that's
21 accomplished and why that's important in the context of
22 a mobile wallet on a mobile device where you're
23 interacting with mobile -- with multiple different APIs
24 and payment processors.

25 And on Slide 26, that a POSITA would have

10:02 1 understood, in the context of the standard and the
10:02 2 context of how these things are accomplished with APIs
10:02 3 and with different payment processors, that the payment
10:02 4 handler isolates the business process services from the
10:02 5 differences between the payment processors. And it
10:02 6 creates or exposes a single interface through which the
10:02 7 system can interact with different payment processors.

10:02 8 We believe, just like the accused
10:02 9 functionality that will be shown that PayPal
10:02 10 implements. So that is the importance of the payment
10:03 11 handler, Your Honor.

10:03 12 Now, we've talked about this, Your Honor,
10:03 13 but I want to talk about it a little bit more. Which
10:03 14 is on Slide 27 that the patents disclose the operation
10:03 15 of the payment handler. So it's disclosing the
10:03 16 operation or the new functionality that was included in
10:03 17 something that was already known as a structure --
10:03 18 represented by an HTTP server as disclosed in the
10:03 19 RFC 2935 and opined upon by Mr. Johnson.

10:03 20 And so on Slide 27 we have the claims,
10:03 21 the relevant claim terms for -- claim elements for the
10:03 22 '386 patent, the '413 patent on the left, and at the
10:03 23 bottom the '488 patent and the '196. And the operation
10:03 24 of the payment handler is described in a series of
10:03 25 figures in the patent. And it describes in the

10:03 1 specification about what they do. We have a case, Your
10:03 2 Honor, that you're familiar with, Apple versus
10:04 3 Motorola.

10:04 4 But the point of this discussion was the
10:04 5 payment handler is known. We're talking about a new
10:04 6 payment handler that does these specific things. And
10:04 7 there are figures that walk through this new
10:04 8 functionality in terms of what it can do and how to
10:04 9 accomplish that. And it's represented by an HTTP
10:04 10 server as discussed in the RFC 2935.

10:04 11 Now, on Slide 28, Your Honor --

10:04 12 THE COURT: Mr. Waldrop, can you hold on
10:04 13 for one second? I need to check with my clerk on
10:04 14 something. I'll be back in just 30 seconds or so.

10:04 15 MR. WALDROP: Okay. Thank you, Your
10:04 16 Honor.

10:04 17 (Pause in proceedings.)

10:05 18 THE COURT: Okey dokey. Mr. Waldrop?

10:05 19 MR. WALDROP: Yes, Your Honor. And I'll
10:05 20 stop there, Your Honor. Is there anything that the
10:05 21 Court wanted to ask me that this may have brought up
10:05 22 for the Court, Your Honor, up until now? Any
10:05 23 questions, Your Honor?

10:05 24 THE COURT: I don't, no.

10:05 25 MR. WALDROP: So, Your Honor, on

10:05 1 Slide 28, Your Honor, further to -- the support for the
10:06 2 claim limitation which is beyond payment handler --

10:06 3 And I want to back up just so we're
10:06 4 clear, Your Honor. The payment handler was known. It
10:06 5 was a structure. It was discussed in the standard.
10:06 6 And it was not indefinite.

10:06 7 What you're seeing now is the language
10:06 8 that comes after the term "payment handler" in terms of
10:06 9 what it does. What does this payment handler do? This
10:06 10 new payment handler, innovative unique payment handler.

10:06 11 And on Slides 28 we talk about figures
10:06 12 which talk about -- and specification support which
10:06 13 talk about what the payment handler does. That the
10:06 14 payment handler or the system for operation of
10:06 15 depositing funds to an account, right? Which is
10:06 16 supported by the additional language that comes after
10:06 17 the "payment handler" term and cites the figures.

10:06 18 Secondly, Your Honor, it talks about the
10:06 19 system operation for withdrawing funds from an account,
10:06 20 Your Honor, which aligns with the '386 patent, Claim
10:06 21 No. 2.

10:06 22 And then Figures 22A through J talk about
10:06 23 the system transferring money between accounts, which
10:07 24 aligns with Claim 3 of the '386 patent, Your Honor.

10:07 25 And so you have on the left the

10:07 1 specification support where it talks about what this
10:07 2 new payment handler does as described in the actual
10:07 3 claims. And then on the right we talk about the
10:07 4 figures that address it.

10:07 5 Now, on Slides 29 through 32, Your
10:07 6 Honor -- 33 we talk about -- we show you the figures
10:07 7 that these particular specification cites are
10:07 8 addressing. And, Your Honor -- and I won't go
10:07 9 specifically into them, Your Honor, in detail. But
10:07 10 these are some of the figures in which we're talking
10:07 11 about the flow, or the data flow, of what the payment
10:07 12 handler is addressing.

10:07 13 So on 28 -- on Slide 29 we talk about the
10:07 14 user initiates the querying fee -- initiates the
10:07 15 deposit by querying.

10:07 16 On Slide 30, Your Honor, we talk about --
10:07 17 you see more about how the payment handler is
10:08 18 integrated into the entire system.

10:08 19 On Slide 31, Your Honor, we talk about
10:08 20 how the payment handler has wrapped APIS from different
10:08 21 payment processors and exposed this common API, this
10:08 22 common interface for interactions with multiple payment
10:08 23 processors, Your Honor. And you'll see it's
10:08 24 highlighted in yellow at the top and bottom. And
10:08 25 you're seeing the flow about holding funds, loading

10:08 1 funds from agents or different payment processors, Your
10:08 2 Honor, so that you have this common interface. And
10:08 3 this is more context of the claims, Your Honor.

10:08 4 You'll see further even more figures on
10:08 5 Slide 32. PayPal, we believe, is wrong about how the
10:08 6 data flows. Operating in Figures 20 through 22 they
10:08 7 argue that Figures 20 through 22 needed to but did not
10:08 8 depict communication between payment handler and a
10:08 9 payment processor, Your Honor.

10:08 10 Well, one, Your Honor, that's wrong.
10:09 11 First, Your Honor, there's no payment processor or API
10:09 12 communication depicted. That's what they say, Your
10:09 13 Honor.

10:09 14 But this is actually wrong in the context
10:09 15 of what the payment handler was known to be,
10:09 16 specifically stressed in the standard, Your Honor. And
10:09 17 it is rebutted by the fact that this patent talks about
10:09 18 wrapping APIs regarding multiple payment processors,
10:09 19 Your Honor.

10:09 20 Now, on Slide 33 the specification
10:09 21 discloses that the payment handler's operation of
10:09 22 wrapping APIs of the different processors. That's
10:09 23 talked about -- we told you the specification cites
10:09 24 that support it.

10:09 25 Moreover, Your Honor, the Figures 20

10:09 1 through 22 depict the handler's interactions with
10:09 2 payment processors by describing the communications
10:09 3 between the payment processor and the program operator
10:09 4 accounts and balances for these different payment
10:09 5 processor operators, Your Honor. That's all laid out
10:09 6 in the figures, Your Honor. And it's consistent with
10:10 7 the specification -- I mean, with the standard, Your
10:10 8 Honor.

10:10 9 In Slide 24 -- 34, Your Honor, PayPal
10:10 10 goes even further and says that it has to be between
10:10 11 the payment handler, that there's no -- it doesn't
10:10 12 depict communication between the payment handler and
10:10 13 MoneyGram AgentConnect.

10:10 14 Now, the MoneyGram thing, Your Honor,
10:10 15 which we'll talk about later, I think should be set
10:10 16 aside because given the discussion of what a payment
10:10 17 handler was in the standard, MoneyGram was just but one
10:10 18 example of how a payment handler would communicate with
10:10 19 a particular different payment processor. MoneyGram
10:10 20 was just but one example in the context of something
10:10 21 that was known as a payment handler in the standard,
10:10 22 Your Honor.

10:10 23 So PayPal argues that we needed to have
10:10 24 shown communications between the payment handler and
10:10 25 MoneyGram AgentConnect. This is wrong, Your Honor, for

1 purposes that we talk about on Slide 35. PayPal
2 assumes that Figure 22 can depict only a single payment
3 processor so it must be MoneyGram. But, Your Honor,
4 this is contradictory and contrary to the patent's
5 stated operation of a payment processor, payment
6 handler being able to wrap APIs of different payment
7 processors and expose a common interface to facilitate
8 interactions with many different kinds of payment
9 processors. And that's what we have here, Your Honor,
10 the specification cite on Column 13, Lines 29 through
11 34, where it talks about specifically how this payment
12 handler has to be configured to interact with different
13 kinds of payment processors, which makes sense in the
14 context of the invention in which you are having
15 unbanked or unsubscribed users being able to interact
16 with different kinds of payment processors in a mobile
17 wallet environment, Your Honor.

18 Now, on Slide 36, Your Honor, we go
19 further into showing how there's figure supports,
20 specification support, regarding how the payment
21 handler and the system is able to access the sender,
22 the recipient agent, the recipient, the agent and the
23 program operator accounts and balances to hold and load
24 funds, Your Honor, for multiple accounts that's showed
25 forth here in Figures 22D through F. And you'll see,

10:12 1 Your Honor, that there's business process services
10:12 2 which are the different services provided by the
10:12 3 payment operators and how the payment handler interacts
10:12 4 with those services, Your Honor, on Slide 36.

10:12 5 And then on Slide 37, Your Honor, the
10:12 6 specification specifically describes MoneyGram as a
10:12 7 particular international money transfer organization or
10:12 8 remittance company, but not specifically as a payment
10:12 9 processor whose APIs are the payment that the payment
10:12 10 handler wraps. And that's specifically shown here,
10:12 11 Your Honor, in the specification cites here, and
10:12 12 PayPal's attempt to make MoneyGram front and center,
10:12 13 it's inconsistent with the standard and inconsistent
10:12 14 with how the claims are written and how the payment
10:13 15 handler term was understood by one of ordinary skill in
10:13 16 the art, Your Honor.

10:13 17 Now, on Slide 38, as you know, Your
10:13 18 Honor, PayPal is wrong about the Media Rights case
10:13 19 which -- because it's fundamentally different, Your
10:13 20 Honor. Here, Your Honor, we talked about before the
10:13 21 payment handler term is not a nonce term, and it
10:13 22 connotes a class of structures known of one of ordinary
10:13 23 skill in the art cited in the standard and specifically
10:13 24 addressed for over a decade before the patents, but the
10:13 25 patents came up with a particular payment handler that

1 was unique in its ability to create one interface or
2 one ring to rule them all, Your Honor. One interface
3 to be able to address any mobile wallet context, all of
4 the different payment processors so that you could
5 effectuate a mobile wallet, and that -- it's clear,
6 Your Honor, so the context of a nonce term, Your Honor,
7 that we -- is inappropriate given what was known by one
8 of ordinary skill in the art, Your Honor.

9 Now, Your Honor, there are -- factual
10 disputes remain in the case regarding what a POSITA's
11 understanding of a structure or payment handler is. We
12 don't think that is the case, Your Honor, but they may
13 create a factual dispute over it given what we've seen
14 in the briefing and what was said at the hearing. I
15 think in the context of RFC 2935, a lot of those
16 arguments I think don't withstand scrutiny given the
17 discussion and the standard about what the payment
18 handler's represented by, which is an HTTP server,
19 specifically discussed in the standard, Your Honor.

20 But, Your Honor, those are the factual
21 disputes that we think that we will hear from, from
22 our -- from the defendant, Your Honor, as they delve
23 into this term. But, Your Honor, at bottom, Your
24 Honor, we believe that the payment handler term was
25 well understood by one of ordinary skill in the art.

1 It had been discussed in public forums and settings as
2 to what it represented and what it did, and that the
3 patents at issue in this case and the claims particular
4 recite a new and innovative payment handler that was
5 able to create a common interface across multiple
6 payment APIs and payment processors. And that, we
7 believe, is sufficient for it to be accorded its plain
8 and ordinary meaning, but to the extent the Court
9 believes that this is means-plus-function, there is
10 sufficient evidence in the record for what one of
11 ordinary skill in the art would have understood to
12 be -- connote payment handler structure, and that's set
13 forth in the standard, Your Honor.

14 And with that, Your Honor, I ask if the
15 Court has any questions, and I'll be prepared to deal
16 with any rebuttal to the extent necessary, Your Honor.

17 THE COURT: A response?

18 MR. KANG: Yes, Your Honor. If I might
19 share my screen, and while I'm doing that, I did want
20 to ask Your Honor about the timing. I know you had
21 scheduled one hour for this hearing.

22 THE COURT: We've canceled our hearing at
23 10:30.

24 MR. KANG: Okay. Great. Thank you.

25 THE COURT: I say that. I think we've

10:16 1 moved it to 11:00 just so -- but we've got till 11:00.

10:16 2 MR. KANG: Okay. Thank you.

10:16 3 Now, Mr. Waldrop comes in and starts
10:16 4 talking immediately about this RFC 2935. And there was
10:16 5 a reason why this was not discussed at the claim
10:16 6 construction hearing, and it's because it's not part of
10:16 7 their briefing in terms -- in the way that they're
10:16 8 using it now.

10:16 9 As far as I could understand -- and for
10:16 10 that matter, it's not part of their briefing in their
10:16 11 motion for reconsideration. This is a brand-new
10:16 12 argument, and as far as I could understand it from
10:16 13 Mr. Waldrop's presentation, he's saying that RFC 2935
10:16 14 disclosed the claimed payment handler. It disclosed
10:17 15 the structure, and it was known in the art. They're
10:17 16 basically admitting that this is -- you know, this --
10:17 17 that the payment handler was known, and that's just not
10:17 18 in the briefing at all.

10:17 19 If you look at what I have up as -- it's
10:17 20 Docket 38-1, and it's the same thing for Docket 41.
10:17 21 This is an earlier version of the Johnson declaration.
10:17 22 The only -- the only thing he cites this RFC for is
10:17 23 that he says at the time the term was so well
10:17 24 understood, that the IETF RFC did not provide a
10:17 25 specific definition beyond the plain and ordinary

1 meaning, and that's it. That's all they've used it
2 for. And so to say that now after -- you know, after
3 we've had the whole four briefs on this and argument in
4 claim construction where we spent over half of -- an
5 hour and a half hearing argument and then three briefs
6 on Fintiv's motion for reconsideration, for this new
7 argument to come in and try and shoehorn everything
8 that this RFC is allegedly teaching is just
9 inappropriate. They had their shot to raise these
10 arguments and they didn't.

11 Now, even if you take, for instance, what
12 they're -- if you assume that the RFC is actually, you
13 know, the claimed payment handler, there's still no
14 structure. What Mr. Waldrop has said is he put up some
15 slides -- and I'll just go ahead and put up what he
16 had -- that just said it's a server. It's a server
17 running some software.

18 And under the case law, Judge Albright,
19 that's just not enough. That is the very definition of
20 a general purpose computer. And when you get into the
21 world where you're running -- you're performing a
22 function with a general purpose computer to provide an
23 algorithm.

24 Now, in terms of his -- Mr. Waldrop's
25 argument that we didn't rebut this RFC, one, there

1 wasn't really much to rebut. If you look at
2 Mr. Johnson's opinion, all he says is that the term was
3 so well understood that it did not provide a specific
4 definition.

5 And so we didn't put in an expert
6 declaration rebutting this, but what we did do was
7 respond in our claim construction response brief,
8 that's Docket 48 at Page 10, that, you know, we did
9 address this RFC 2935. And we addressed it in the
10 sense that this is simply just an HTTP supplement to
11 the larger standard. That's Docket 48-4 at 1. This is
12 a supplement to the larger standard.

13 And if you pull in the full standard,
14 which was Docket 48-3, there is a definition for
15 payment handler, right? The term was not so well-known
16 that everyone understood what structure it was. And
17 they said that the payment handler is the entity that
18 physically receives the payment from the consumer on
19 behalf of the merchant. And this is the exact same
20 argument we made in our briefing.

21 You dig a little further into this RF- --
22 and what we said is that the payment handler can refer
23 to many different entities within the payment system.
24 And in this case, when you're talking about physically
25 receiving the payment from the consumer on behalf of

10:20 1 the merchant, you're talking about the payment
10:20 2 processor. And if you dig in a little bit to this RFC
10:20 3 at, you know, 23 and 247, what it says is that, you
10:20 4 know, there are multiple payment handlers, and the
10:20 5 purpose of these payment handlers is to check that it's
10:20 6 the correct payment handlers to be used for a
10:20 7 particular payment.

10:20 8 And what does it mean to be the correct
10:20 9 payment handler? It means that you handle a particular
10:20 10 brand such as MasterCard, Visa or American Express. So
10:20 11 all this is to say is that there was no commonly
10:21 12 understood meaning here. There was no structure
10:21 13 connoted. All it said is that, yeah, in this standard
10:21 14 the term "payment handler" means something completely
10:21 15 different than what Fintiv says it meant and what it's
10:21 16 saying it now means. It's the payment processor.

10:21 17 Now, when we get to the actual
10:21 18 description of the structure in the patent itself --
10:21 19 and I'll turn to the '386 patent. This is my Slide 11,
10:21 20 '386 patent Column 6 -- Lines 6 -- 1 -- Column 6, Lines
10:21 21 1 through 10. It talks about using any different kind
10:21 22 of hardware or software. In this case, what we've
10:21 23 outlined here is pure hardware, logic components, like
10:21 24 SPGAs, SO -- or ASICs.

10:21 25 We asked Mr. Johnson, you know, what

10:22 1 is -- you know, you've pointed us to this structure in
10:22 2 the claim -- or I'm sorry -- in the patent itself, and
10:22 3 all you've pointed to is a general description of
10:22 4 computer technology, and he said that's right. It's a
10:22 5 general description of computer technology and any of
10:22 6 that could be used to implement the payment handler.

10:22 7 And, you know, when we asked him about
10:22 8 the specific function of the payment handler to -- for
10:22 9 the '488 and '196 patents to expose a common API to
10:22 10 facilitate interaction, you know, Mr. Johnson said,
10:22 11 yeah, you can use any combination of hardware or
10:22 12 software, and it could be purely hardware or purely
10:22 13 software.

10:22 14 And so that really puts you, Your Honor,
10:22 15 in this world where you're implementing the (audio
10:22 16 distortion) on a general purpose computer, right?
10:22 17 There is no -- it's not as if -- you know, I think --
10:22 18 you know, Mr. Waldrop cited the Personalized Media
10:23 19 case, and in that case they talked about a class of
10:23 20 detectors. They talked about detectors being -- they
10:23 21 could be rectifiers or they could be demodulators, but
10:23 22 as long as the -- you understood that there's a general
10:23 23 class of detectors, then that was sufficient structure
10:23 24 in that -- in the Personalized Media case. And that's
10:23 25 not what you have here.

10:23 1 What you have here is, as far as we
10:23 2 understand it, the class of structures that Mr. Waldrop
10:23 3 articulated is just a general computing -- general
10:23 4 computing device, a server. And that's the same class
10:23 5 of structures that appears throughout their briefing.

10:23 6 And there is some reliance in at least
10:23 7 Fintiv's motion for reconsideration on the Dyfan v.
10:23 8 Target case. And this is a case I know you're well --
10:23 9 very familiar with, Your Honor. There you found that
10:23 10 the terms -- these claim terms -- I think you called
10:24 11 the Group 2 terms -- required an application or
10:24 12 computer code to essentially draw a graphical user
10:24 13 interface.

10:24 14 And the Appeals Court determined that --
10:24 15 you know, they reversed the finding of indefiniteness
10:24 16 because there was this -- these admissions,
10:24 17 essentially, from Target's expert that the code and
10:24 18 applications for drawing or generating a user interface
10:24 19 were well-known, off-the-shelf commercially available
10:24 20 software libraries.

10:24 21 And so what you see is, you know, if you
10:24 22 look at the appeals docket, Docket 21, that's the joint
10:24 23 appendix at 884, -85, Dr. Goldberg says yes, if you
10:24 24 know -- if a developer knows what they want to draw on
10:24 25 a UI, then they can use off-the-shelf software, user

10:24 1 interface software, that perform those functions.

10:25 2 And there's multiple quotes on this. He
10:25 3 seems to be -- you know, he really leans into this idea
10:25 4 and says, yeah, there's standard modules of software
10:25 5 that a person that's skilled in the art would know,
10:25 6 yes.

10:25 7 So the situation in Dyfan versus Target
10:25 8 and Zeroclick are very different than the record we
10:25 9 have here. There's nothing in the record that says
10:25 10 that there's commercially available off-the-shelf
10:25 11 payment handlers.

10:25 12 And Judge Andrews out of the District of
10:25 13 Delaware, since this case -- or I'm sorry -- since the
10:25 14 briefing for the motion for reconsideration went in,
10:25 15 you know, addressed this as -- this very concept. He
10:25 16 assessed the record that he had in front of him with
10:25 17 respect to a term, "the analysis engine."

10:25 18 And he determined that "engine" is a
10:25 19 nonce term that doesn't really add any -- doesn't
10:25 20 connote any particular structure. And that "analysis"
10:25 21 didn't add anything to that understanding.

10:25 22 And he specifically contrasted Dyfan
10:26 23 v. Target and Zeroclick by saying yes, the plaintiff's
10:26 24 expert does not state that the term is used to
10:26 25 reference conventional programs that a person of

1 ordinary skill in the art would recognize as an
2 analysis engine. And that was the case Takadu versus
3 Innovyze, 2023 Westlaw 2563157 at 8.

4 So that's exactly what we have here.
5 Looking at the record, what Mr. Johnson says is just
6 that -- I'm sorry -- that the only expert opinion even
7 remotely addressing this RFC is Mr. Johnson's
8 declaration at Paragraph 51, where he just says, yeah,
9 the term was so well-known that you didn't need to
10 provide a definition.

11 He's not saying that the payment handler
12 in the RFC is providing the structure. Or that a
13 person of ordinary skill in the art would know that a
14 payment handler here -- the payment handler claimed is
15 the same as the payment handler in the RFC. I think
16 that's an important point to bring up because it's the
17 entirety of Mr. Waldrop's presentation.

18 And, you know, Mr. Waldrop is saying that
19 the payment handler in the claims is something more.
20 It's a new payment handler. And that's exactly why you
21 need to provide some sort of structure.

22 The RFC doesn't discuss APIs at all,
23 right? And so when you're talking about the function
24 of wrapping APIs of different payment processors and
25 exposing a common API to facilitate interactions with

10:27 1 different payment processors, it matters. There has to
10:27 2 be some sort of structure tied to implementing that
10:27 3 function.

10:27 4 And so, you know, if I could jump ahead
10:27 5 in my presentation a bit. My apologies.

10:28 6 So when you get to this world of where
10:28 7 the structure for a claim term to perform the recited
10:28 8 function is just a general-purpose computer, which I
10:28 9 think Mr. Waldrop admits, even if you assume that
10:28 10 RFC 2935 is the definition of a payment handler. What
10:28 11 he's saying is it's just a computer server. And what
10:28 12 you need when you get to that world, when you've made
10:28 13 the determination that the structure for performing the
10:28 14 recited function is just a general-purpose computer,
10:28 15 you must -- the specification must disclose an
10:28 16 algorithm for performing the function.

10:28 17 So in this case you have to disclose the
10:28 18 algorithm, the software algorithm, for wrapping APIs of
10:28 19 multiple payment processors or exposing a common API to
10:28 20 facilitate interactions with different payment
10:28 21 processors.

10:28 22 And that's just not okay.

10:29 23 And this is the part -- the slide we have
10:29 24 here, 24, just shows what we have in the specification.
10:29 25 And we're just kind of stuck trying to prove a negative

10:29 1 here, because we're showing all the things that aren't
10:29 2 there, right?

10:29 3 And so you don't really have to take our
10:29 4 word for it. The Patent Office agrees with us. If you
10:29 5 look at the other final rejections in Fintiv's patent
10:29 6 portfolio, there's a March 2, 2016 final rejection of
10:29 7 application 13/528,720. The PTO says, yeah: The
10:29 8 payment handler of Claim 13 includes no algorithms
10:29 9 which would be necessary to achieve the desired result
10:29 10 of the API wrapper and common API which facilitates
10:29 11 payments across different payment processors.

10:29 12 And so the specification being described
10:29 13 here is almost verbatim to what we have in the '845
10:29 14 patent. The examiner said: The only mention of such
10:29 15 features appears in Paragraph 47 of the applicant's
10:30 16 specification where it merely states that "the payment
10:30 17 handler is configured [to] wrap APIs of different
10:30 18 payment processors including banking accounts, credit
10:30 19 and debit cards or processors, [and] wherein the
10:30 20 payment handler exposing a common API to facilitate
10:30 21 interactions with many different kinds of payment
10:30 22 processors."

10:30 23 And that's basically very close to what
10:30 24 we have in the asserted patents here. And the Patent
10:30 25 Office agreed there's no explanation support or

10:30 1 algorithms for how this is achieved.

10:30 2 And so you get to the data flow, right?

10:30 3 And so this is really -- that's all Fintiv has left to
10:30 4 possibly justify having structure. And you have to
10:30 5 keep in mind the two functions that Your Honor
10:30 6 determined are the functions of the means-plus-function
10:30 7 terms. And there's simply nothing in any of these 22
10:30 8 data flows that describes an algorithm for implementing
10:31 9 these functions.

10:31 10 Now, Mr. Waldrop kind of waffled back --
10:31 11 oh, I'm sorry -- Mr. Waldrop kind of went back and
10:31 12 forth on whether MoneyGram is a payment processor.
10:31 13 Which is odd, because at the Markman hearing
10:31 14 Mr. Downing brought up MoneyGram as one of the reasons
10:31 15 we know that there are different payment processors.
10:31 16 And he referenced talking about MoneyGram. And that's
10:31 17 the Markman hearing at Page 30, Lines 2 through 7 and
10:31 18 44, Lines 9 through 25.

10:31 19 But it's really here nor there whether
10:31 20 MoneyGram is a payment processor or not. Because none
10:31 21 of these figures, none of these data flows show any
10:31 22 communications between the payment handler and the
10:31 23 payment processors. And they certainly don't show the
10:31 24 wrapping of any APIs or exposing a common API.

10:31 25 And so the case law is very clear that

1 structure qualifies as corresponding structure if the
2 intrinsic evidence clearly links or associates that
3 structure to the function recited in the claim. And so
4 this is Diebold v. ITC, 899 F.3d 1291, 1303.

5 And there the Fed Circuit said: If a
6 person of ordinary skill in the art would be unable to
7 recognize the structure in the specification and
8 associate it with the corresponding function in the
9 claim, a means-plus-function clause is indefinite.

10 And so you look at what is in these data
11 flow diagrams and the logical leap that Fintiv is
12 asking you to make, Your Honor. What they're saying is
13 that a data flow diagram that doesn't show a payment
14 processor whose description in the specification
15 doesn't mention payment processors and doesn't even
16 show any communications with APIs, somehow that
17 provides the structure or algorithm for wrapping APIs
18 of different payment processors and exposing a common
19 API to facilitate interactions with different payment
20 processors.

21 And that's simply implausible. There's
22 nothing there that would suggest a person of ordinary
23 skill would look at this and see an algorithm for those
24 two functions when there's no payment processor at all
25 on the figure.

1 And I don't think there's much of a
2 factual dispute here in terms of what these data flows
3 actually show. Because even if you accept what Fintiv
4 is saying -- and this is at Docket 65, the reply at
5 Page 5. What they say is that: The payment handler's
6 depicted communications (with the business process
7 services) show that it is wrapping and communicating
8 with different payment processors and exposing a common
9 API...

10 And so what they're saying here is these
11 figures show the function that the payment handler is
12 performing, not how it performs that function, not an
13 algorithm to perform that function.

14 And so under controlling case law, that's
15 just not enough. As a matter of law, that is not
16 enough to show corresponding structure.

17 Under Default Proof Credit Card versus
18 Home Depot, 412, F.3d 1291 at 1298: The corresponding
19 structure ... must include all structure that actually
20 performs the recited function.

21 It's not enough just to say what the
22 payment handler is doing. We have that from the claim
23 itself. You have to provide an algorithm that shows
24 how it performs those two functions.

25 And, again, this is, you know, Media

1 Rights is on all fours here. Media Rights had a
2 compliance mechanism that really didn't -- there was no
3 description of how the compliance mechanism worked. It
4 had descriptions of what the compliance mechanism was
5 connected to, some inputs and outputs. But it didn't
6 show how it worked. And all it said was: The claims
7 simply state that the "compliance mechanism" can
8 perform various functions...

9 And I think Mr. Waldrop tries to kind of
10 muddy the waters a little bit by focusing in on, I
11 think it was his Slide 31. Yeah, he focuses on these
12 ideas of -- he's highlighted in green here, hold funds
13 from agent balance and load funds from agent balance.

14 And those are two other separately
15 claimed functions of the payment handler. And under
16 the same Media Rights case: Where there are multiple
17 claim functions ... the patentee must disclose adequate
18 corresponding structure to perform all of the claimed
19 functions...

20 And so if you're looking at Slide 31,
21 potentially you could make the argument that these
22 green arrows show structure or an algorithm for holding
23 funds and loading funds. But there's simply just
24 nothing in this figure or any of the algorithm
25 figures -- or data flow figures, I'm sorry -- that

10:36 1 address wrapping APIs, exposing APIs or interacting
10:36 2 with payment processors at all.

10:36 3 So there's really no factual dispute
10:36 4 here. There's no need for as, you know, Fintiv
10:36 5 suggests in its brief to revive these claims and kind
10:36 6 of address these at summary judgment.

10:36 7 And I'll take a moment to digress from
10:36 8 the merits here and talk about, you know, the actual
10:36 9 burdens that Fintiv has to meet here.

10:37 10 Under your decision in Unification Techs,
10:37 11 Your Honor, reconsideration's an extraordinary remedy
10:37 12 that is, you know, granted where the initial claim
10:37 13 constructions were clearly erroneous. And they
10:37 14 really -- Fintiv has not met this burden here.

10:37 15 And nothing really has changed here since
10:37 16 December. You know, whether you apply 54(b) or 59(e),
10:37 17 Fintiv has this high burden. And Fintiv got a fair
10:37 18 shake. Three of the ten terms we briefed were
10:37 19 means-plus-function. They had oral argument for nearly
10:37 20 an hour and a half.

10:37 21 And I remember at the end of your -- that
10:37 22 argument, Your Honor, you said, Mr. Downing, is there
10:37 23 anything else you'd like to argue with respect to any
10:37 24 structure you want to point out that would keep this
10:37 25 from being indefinite?

10:37 1 And he said, no, I think I've got it
10:37 2 covered.

10:37 3 And so all arguments in the motion for
10:37 4 reconsideration were minor variations of arguments that
10:37 5 the Court had already heard and rejected.

10:38 6 And these new arguments regarding the
10:38 7 RFC, even if you're considering them, even though
10:38 8 they're not in their motion for reconsideration, they
10:38 9 don't really move the needle. If anything, they admit
10:38 10 that the structure is a general-purpose computer. And
10:38 11 then their briefing admits that there's no algorithm to
10:38 12 show how the payment handler wraps APIs or exposes a
10:38 13 common API. They just show -- you could infer, if you
10:38 14 accept what they say is true, that the payment handler
10:38 15 has those capabilities or is performing those
10:38 16 capabilities.

10:38 17 And so we appreciate Your Honor's desire
10:38 18 to confirm you got it right, and I think what I've
10:38 19 shown you today shows that you did. The claims are
10:38 20 invalid as today as they were in December, and there
10:38 21 have been no new facts or changing case law, and Fintiv
10:38 22 has not met its heavy burden to show clear error.

10:38 23 And, you know, finally, simply from a
10:39 24 logistical standpoint, there is a question of -- you
10:39 25 know, setting aside what reviving patents would do to

10:39 1 the case schedule, there is true prejudice to PayPal
10:39 2 here. We filed an IPR only on the '845 patent because
10:39 3 the other four patents had been invalidated. And, you
10:39 4 know, now the statutory bar date has (audio distortion)
10:39 5 PayPal's amends, if these patents get revived. I'm not
10:39 6 sure there's a way to cure that. But even saying this,
10:39 7 we don't think there's any factual disputes here. The
10:39 8 Court need not reach that question. We think that
10:39 9 there's no factual dispute that what Mr. Waldrop has
10:39 10 presented that it just confirms that we're talking
10:39 11 about structure being a general purpose computer, and
10:39 12 the record is clear that there's no algorithm
10:39 13 describing the recited functions for the payment
10:39 14 handler term.

10:39 15 And with that, Your Honor, I'm happy to
10:39 16 entertain any questions, move on to the other motion.

10:40 17 THE COURT: I'll hear a response from
10:40 18 Mr. Waldrop.

10:40 19 MR. WALDROP: Thank you, Your Honor.

10:40 20 First, Your Honor, before I go to a few
10:40 21 pieces of evidence just to address some things, first,
10:40 22 Your Honor, this Court was told at the claim
10:40 23 construction hearing that there was no hardware in any
10:40 24 of the claims, there was no structure in any of the
10:40 25 claims. That's pretty extraordinary, Your Honor, given

10:40 1 what the standard says about what the payment handler
10:40 2 is. So this is an extraordinary set of circumstances
10:40 3 that we want to address.

10:40 4 The Court, I think, was left with the
10:40 5 impression at the claim construction hearing that --
10:40 6 that this --

10:40 7 THE COURT: Mr. Waldrop, I'm worried
10:40 8 about getting it right. I'm not worried about --

10:40 9 MR. WALDROP: Thank you, Your Honor.

10:40 10 And two, Your Honor, this was not a
10:40 11 general purpose computer, Your Honor. This was a
10:40 12 particular implementation, a particular computer. I've
10:40 13 never heard of a situation where a structure discussed
10:41 14 in an -- in a standards document being found to be
10:41 15 indefinite or to be found to be a general purpose
10:41 16 computer or not to have any as being a special -- for a
10:41 17 special purpose, Your Honor. First, Your Honor, it is
10:41 18 a specific thing.

10:41 19 And now I just want to address in five or
10:41 20 six slides just to clarify what I said, Your Honor, so
10:41 21 the Court's clear about it. I'll share my screen, Your
10:41 22 Honor.

10:41 23 Can you see my screen, Your Honor?

10:41 24 (Thumbs up by the Court.)

10:41 25 THE COURT: Yes.

10:41 1 MR. WALDROP: So, Your Honor, first, Your
10:41 2 Honor, again Slide 3, the payment handler is
10:41 3 represented by an HTTP server, Your Honor. And just to
10:41 4 make it clear, Your Honor, if we were to replace the
10:41 5 word "payment handler" in the claims with "server," we
10:41 6 wouldn't be here. We would not be having this
10:41 7 argument. Mr. Kang would not be saying what he's
10:41 8 saying. And the standard talks about it being
10:41 9 represented by a server.

10:42 10 So first of all, Your Honor, it's in the
10:42 11 standard. It talks about structure and how the
10:42 12 structure of the IOTP maps on to the structure of HTTP
10:42 13 in the following way. It talks about what the payment
10:42 14 handler's server does on Slide 3. It is a structure.
10:42 15 It is a well-known thing, Your Honor. That's Slide 3,
10:42 16 Your Honor.

10:42 17 If I could then, Your Honor, go to
10:42 18 Slide 10, Your Honor, which I think will make -- which
10:42 19 will make what I'm saying even more clear, Your Honor,
10:42 20 on Slide 10, I have the claim elements here -- the
10:42 21 claim elements. The -- PayPal decided to only construe
10:42 22 payment handler and not the -- the more fulsome claim
10:42 23 term which has the language after describing what the
10:42 24 payment handler is. They said this was a nonce term.
10:42 25 Not the case, Your Honor.

1 It is a well-known structure. It's a
2 general -- it's not a general purpose computer. It's a
3 special purpose computer, Your Honor, server, to
4 accomplish a particular handling of payments. If this
5 payment handler was said to be a server, Your Honor, a
6 server to use APIs of different payment processors, we
7 would not be having this discussion. And that's
8 exactly what we have here, Your Honor, if we were to
9 replace the terms. Everyone knew what it was.

10 So I put that, Your Honor, here to
11 demonstrate, one, if you make payment handler server as
12 discussed in the standard, we would not be having this
13 discussion. But more importantly, Your Honor, they
14 chose not to construe the more fulsome claim term
15 elements, Your Honor, which is a payment handler, to
16 use APIs of different payment processors. And I want
17 to be clear, Your Honor, we're not saying payment
18 handler in the standards document is the payment
19 handler at issue for purposes of infringement in this
20 case. We wouldn't even be bringing this case, Your
21 Honor.

22 What we're citing it for is that this was
23 well-known so that one of ordinary skill in the art
24 would not have found it to be indefinite, Your Honor.
25 That is the point that we're making. Of course the

10:43 1 payment handler is -- in the patents-in-suit here is
10:43 2 different. It adds a functionality that had not been
10:43 3 invented. So we're not saying that's what it was, but
10:43 4 what we're saying is the payment handler is a
10:44 5 structural component, a server, that did not have the
10:44 6 functionality in 2000 that we're claiming in 2011. It
10:44 7 adds this new inventive concept, Your Honor.

10:44 8 Moving further, Your Honor, to Slide 18,
10:44 9 which I want to be clear, Your Honor, that Mr. Johnson
10:44 10 in his declaration said that it was his opinion that
10:44 11 the payment handler service component, which is the
10:44 12 same as payment handler, would be understood by a
10:44 13 POSITA to describe a component of the monetary
10:44 14 transaction system. That is his opinion. It is my
10:44 15 opinion that the claim limitation denotes sufficient
10:44 16 structure to a POSITA. They wanted to talk about other
10:44 17 things. He says, yeah. The payment handler, you would
10:44 18 understand what it means in the payment handler
10:44 19 service. And why would you understand what that means?
10:44 20 Because it's been talked about for the last decade
10:44 21 about what that structure was and how you implement it.

10:44 22 And what we're talking about now is
10:44 23 something -- a new payment handler or a new component
10:45 24 that can do additional things not discussed in the
10:45 25 standard. Like I said, Your Honor, I've never heard of

10:45 1 something discussed in the standard being found to be
10:45 2 indefinite or not to have structure. I've just never
10:45 3 heard of it. I guess it could happen, but I've never
10:45 4 heard of it.

10:45 5 The other thing, Your Honor, is, two --
10:45 6 three, they admit that the declaration of Mr. Johnson
10:45 7 is unrebutted. They specifically said that they did
10:45 8 not rebut the opinions of Mr. Johnson as it relates to
10:45 9 the payment handler or the payment handler service
10:45 10 because they didn't think they needed to.

10:45 11 So this is a telling fact, Your Honor,
10:45 12 because if it's unrebutted, then we believe that that's
10:45 13 sufficient for the Court to have found structure in
10:45 14 this context as the POSITA. He also even talks about
10:45 15 why he feels that way in terms of why a POSITA would
10:45 16 understand it, and they never talk about it.

10:45 17 In fact, Your Honor, they show up here
10:45 18 and they show you yet more citations from the standard
10:46 19 that talks about the payment handler. And so it's
10:46 20 almost as if we've seen a flip-flop, which I think is
10:46 21 right, Your Honor, because we're joining the issue.
10:46 22 The payment handler was discussed in many documents.
10:46 23 It was understood to be what it was. It could be
10:46 24 implemented in different ways, but that's an
10:46 25 infringement issue. But there was no misunderstanding

1 or confusion about what the payment handler was, what
2 it did and what it could be in terms of a structure or
3 something that functioned with HTTP servers. And I'm
4 glad that we at least join that issue.

5 Fourth, Your Honor, these are not new
6 arguments, Your Honor. On Page 12, we cite the
7 standard in our response brief, and this is Docket 38
8 on Page 12, our responsive claim construction brief.

9 On November 9th, 2022 in Docket 38-1,
10 this declaration in front of you on Page 8 on Slide 18
11 was submitted and, Your Honor, on Page 5 of Docket 62,
12 which is our reconsideration brief, we specifically
13 cite this RFC 2935 for supporting Mr. Johnson's view
14 that plain and ordinary meaning applied and that the
15 plain and ordinary meaning of payment handler connoted
16 sufficient structure to a POSITA. So that -- this is
17 not new.

18 It was not cited at something -- a new
19 argument. It's being joined here because there's a --
20 we're showing you the basis for why he said that, but
21 the opinion is supported.

22 Your Honor, the other thing, it seems
23 like there's a lot of discussions about infringement
24 arguments. Of course things can be implemented as
25 hardware and software. The payment handler can be

10:47 1 hardware and software. Maybe the payment handler could
10:47 2 be a bunch of things. That's an infringement issue.
10:47 3 But whether or not it is a thing and it is definite
10:47 4 enough for one of ordinary skill in the art to
10:47 5 understand what it was, I think that issue is
10:47 6 un rebutted. It is clear, and it is equally applicable
10:47 7 to our argument that it is plain and ordinary meaning
10:47 8 or in the means-plus-function context, whether or not
10:48 9 there's sufficient structure.

10:48 10 The other thing -- two more points, Your
10:48 11 Honor -- is the prosecution history that was shown,
10:48 12 Your Honor, before about what the payment handler is or
10:48 13 isn't actually supports our argument, Your Honor, that
10:48 14 the PTO understood what the payment handler was, Your
10:48 15 Honor, and that citation to the prosecution history was
10:48 16 not to the prosecution history at issue for the patents
10:48 17 in this case.

10:48 18 And in fact, Your Honor, we overcame
10:48 19 those objections and the patents issued.

10:48 20 So, Your Honor, finally, as to the
10:48 21 factual disputes, Your Honor, I only raised that
10:48 22 because I was anticipating there would be, but if there
10:48 23 are none, that's great, Your Honor, particularly in the
10:48 24 context of an un rebutted declaration on this very issue
10:48 25 of the payment handler by Mr. Johnson.

1 Like I said before, Your Honor, I think
2 the standard is pretty clear. They even added even
3 more citations to the standard of what the payment
4 handler was. You know, apologies to the Court to the
5 extent that this was not clear in the original claim
6 construction hearing or maybe the parties just missed
7 it, Your Honor, but the payment handler is real. It is
8 definite. People of ordinary skill in the art know
9 what it means. And if the term "payment handler" was
10 replaced with "server" as indicated by the standard, we
11 wouldn't be having this discussion. And the language
12 of the claims make clear what the payment handler is,
13 and it makes clear what the payment handler has to do
14 to be -- and to -- and be covered by the claims.

15 And with that, Your Honor, I have nothing
16 else, and I hope I didn't muddy the waters. I hope I
17 made it clear as to what the real issue is.

18 MR. KANG: Yeah. Very briefly, Your
19 Honor. I think it's very, very clear what Fintiv is
20 doing here is they're trying to walk away from all of
21 the discussion of the potential structure in -- for
22 this term by citing to this RFC, which wasn't cited for
23 this purpose at all during claim construction. Wasn't
24 cited for this purpose at all even in their motion for
25 reconsideration. This is a brand-new argument that

10:50 1 they brought up today for their argument.

10:50 2 And so they keep on saying, well, if you
10:50 3 replace payment handler with the term "HTTP server," we
10:50 4 wouldn't be having this conversation and -- but
10:50 5 unfortunately that's not what the claim says. The
10:50 6 claim says payment handler. The term "handler" we put
10:50 7 in evidence that says the term "handler" and "handler
10:50 8 service" are nonce terms that don't really connote any
10:50 9 structure, and there's no structure disclosed in the
10:50 10 patent itself for implementing this.

10:50 11 And so what really Fintiv is trying to do
10:50 12 with this last-minute change is kind of walk away from
10:50 13 everything they discussed during claim construction
10:50 14 briefing. And if you look at what I have on the screen
10:50 15 here, these are the structures that Fintiv identified
10:50 16 for the payment handler during its briefing. And it's
10:50 17 Column -- '386 patent, Column 5:24 to 40. It's many
10:50 18 type of computer system configurations, including
10:51 19 personal computers, desktop computers, distributed
10:51 20 systems, cloud computing. You have '386 patent, 6:1
10:51 21 through 10. That's what I showed earlier. Hardware
10:51 22 logic components, field programmable gate arrays -- gate
10:51 23 arrays, ASICs.

10:51 24 Then '386 patent, 5:9 through 15, a
10:51 25 general-purpose computer, a special-purpose computer, a

1 special-purpose processing device.

2 And these are the things that they said
3 provided the structure for implementing the functions
4 of the payment handler, not what was disclosed in an
5 RFC.

6 And when, you know, they're -- when we're
7 talking about what their expert said, you won't find
8 anything in his declaration that says, yes, the RFC
9 provides the structure, or the RFC provides the common
10 understanding of what a POSA would understand a payment
11 handler to be.

12 The only thing he says is that the term
13 "payment handler" was so well understood -- he doesn't
14 say what the understanding was -- that the RFC says --
15 uses the term without providing an express definition.
16 And to this idea that went unrebutted, we didn't have
17 our expert put in another declaration to have ongoing
18 rounds of expert declarations and depositions.

19 But as I showed you earlier on Page 10 of
20 our reply brief, we 100 percent rebutted it and showed
21 that even the IOTP standard uses the term "payment
22 handler" in ways that are different than the current --
23 the patents at bar.

24 And so when you look at, you know, what
25 Mr. Johnson actually said about the payment handler, he

10:52 1 said that, yeah, any of the general description of
10:52 2 computing technology in Column 4:65 to 7:3 could be
10:52 3 used to implement the payment processor. And there's
10:52 4 nothing in those columns that actually describes
10:52 5 interacting the processors.

10:52 6 The (audio distortion) of the case law
10:53 7 where they (audio distortion) to be specifically tied
10:53 8 to the recited function.

10:53 9 And going back to, you know, this -- the
10:53 10 idea of this new argument, you know, it's -- I'm sorry.
10:53 11 I'm lost in my slides here.

10:53 12 And, you know, when it came to other
10:53 13 terms, Mr. Johnson gave express answers in paragraphs
10:53 14 of his declaration that said, oh no, they're commercial
10:53 15 off-the-shelf software components such as when we
10:53 16 talked about the business process servers -- the
10:53 17 business process services.

10:53 18 And this is the Johnson declaration
10:53 19 either at Docket 38-1 or 41 at Page 25.

10:53 20 He says -- here he actually gave an
10:53 21 example. He said, yeah, there's a commercial
10:53 22 off-the-shelf software called Oracle Business Process
10:53 23 Management. And he gave a link to it.

10:53 24 But you won't find anything like that
10:53 25 with respect to this RFC. And so appropriately, what

1 Fintiv is doing here, back-dooring an entirely new
2 argument the day of the hearing based off his RFC,
3 there's no law that says -- well, we won't get into the
4 procedural aspects.

5 But regardless, what they've already
6 admitted that the payment handler is just a
7 general-purpose computer. And that under the existing
8 case law you have to provide an algorithm. And they
9 have not done that.

10 And I'll go ahead and rest here unless
11 Your Honor has any questions.

12 THE COURT: Mr. Waldrop, anything else?

13 MR. WALDROP: Your Honor, only thing that
14 I -- as to the case schedule, Your Honor, we can
15 address that at a separate time. He raised the issue
16 about the case schedule. If the Court's inclined, we
17 can address that at a separate time, Your Honor.

18 I have nothing further. Unless the Court
19 has a particular question on this issue.

20 THE COURT: I'll be back in a second.

21 (Pause in proceedings.)

22 THE COURT: Okay. If we can go back on
23 the record.

24 I'm going to deny the plaintiff's motion
25 for reconsideration.

11:01 1 I'm also going to skip ahead and deny the
11:02 2 motion to dismiss on 101, which leaves, I believe, a
11:02 3 discovery issue that I'm happy to take up now.

11:02 4 MR. WALDROP: All right. Thank you, Your
11:02 5 Honor. Mr. Downing is going to address that issue,
11:02 6 Your Honor, so I'll pass the seat to Mr. Downing.

11:02 7 THE COURT: Okay.

11:02 8 MR. DOWNING: Good morning, Your Honor.

11:02 9 THE COURT: Good morning.

11:02 10 MR. DOWNING: May it please the Court.
11:02 11 Let me put up the slides.

11:03 12 Your Honor, we have a few issues in the
11:03 13 discovery dispute procedure. The first and one of the
11:03 14 more important issues is the production of technical
11:03 15 documents and source code in the case.

11:03 16 We also have an issue related to the
11:03 17 production of damages and usage data in the case.

11:03 18 And an issue on supplementing
11:03 19 interrogatory responses.

11:03 20 And unless you have any questions for me,
11:03 21 Your Honor, I'll go right to them quickly.

11:03 22 THE COURT: No. I have no questions.

11:04 23 MR. DOWNING: Okay.

11:04 24 So, Your Honor, the first issue is the
11:04 25 production of core technical documents, specifically

1 source code. Your Honor's OGP Version 4.1 discusses
2 the production of core technical documents. And it
3 says that as of August 25, 2022 in this case, PayPal
4 was required to produce technical documents, including
5 software where applicable, sufficient to show the
6 operation of the accused products.

7 And, you know, how we read this, Your
8 Honor, is that PayPal has to disclose, you know,
9 whether documents or whether source code. And those
10 documents have to show the operation of the accused
11 products.

12 And as I'll discuss, you know, with you
13 with the remaining of the slides, PayPal has basically
14 admitted that the operation of their products are in
15 their source code.

16 The -- one of the things that you'll
17 hear, probably, today from PayPal is that they could
18 not have produced source code because there was no --
19 there was no adequate protective order in place. And
20 Your Honor also has a provision in the OGP that talks
21 about data and has an intra-protective order.

22 And Your Honor also has a model
23 protective order that can resolve these types of
24 disputes where technical documents can be produced in a
25 way that allows the parties to proceed and not have a

11:05 1 six-month delay in producing, you know, critical core
11:05 2 technical documents.

11:05 3 If we go to Slide 7 -- Slide 5, Your
11:05 4 Honor, this is just a description of portions of a
11:05 5 letter from PayPal in which PayPal acknowledges that
11:05 6 "The vast majority of the details that Fintiv seeks can
11:05 7 be found in PayPal's source code."

11:05 8 And so this is information that we
11:05 9 believe should have been produced in August. This is a
11:05 10 statement from PayPal saying the details -- the letters
11:05 11 that you've been writing listing all of this
11:05 12 information, all of this stuff is in the source code,
11:06 13 which as of today, Your Honor, has not been produced.

11:06 14 And, Your Honor, the parties are
11:06 15 negotiating the protective order. The parties are
11:06 16 down, I think, to the last issue, I think. But our
11:06 17 point is that confidential information has already been
11:06 18 produced in this case. Highly confidential information
11:06 19 has been produced. And there's no reason to delay the
11:06 20 production of the source code which basically has all
11:06 21 of the information that we need according to PayPal.

11:06 22 And so to tie that last issue off, Your
11:06 23 Honor, you know, we respectfully request that you --
11:06 24 that you order PayPal to produce source code, you know,
11:06 25 without further delay. That the case has about two

11:06 1 months left for the close of fact discovery. And we
11:06 2 need this critical information as soon as possible.

11:06 3 There were three -- unless Your Honor has
11:06 4 any other questions, I'll move on to the other issues?

11:07 5 THE COURT: Let me hear from the other
11:07 6 side about the issues with the source code.

11:07 7 MR. KANG: Your Honor, (audio distortion)
11:07 8 issue on this. I think the only sticking point right
11:07 9 now is the inclusion of a prosecution bar. Which is,
11:07 10 you know, something that, actually, PayPal wants
11:07 11 because we have in-house counsel who have some
11:07 12 responsibility on the patent prosecution side.

11:07 13 You know, I think the parties have been
11:07 14 meeting and conferring on this since we sent them the
11:07 15 model, or our proposed PO, in late March. And we've
11:07 16 systematically rolled back every one of our proposals
11:07 17 as announced. Basically, just the Court's model PO
11:07 18 minus the prosecution bar, which I don't think should
11:07 19 be an issue. If anything, most defendants want to have
11:07 20 the prosecution bar.

11:07 21 And we've got the codes here in San
11:07 22 Francisco, ready for them to look at it.

11:07 23 THE COURT: So let me hear from the
11:07 24 plaintiff. What do you want me -- what does the
11:07 25 plaintiff want me to do?

11:07 1 MR. DOWNING: Your Honor, the prosecution
11:07 2 bar does not prevent -- if the parties have agreed upon
11:07 3 the source code provisions, the parties can use the
11:08 4 correct procedures, you know, that they have agreed
11:08 5 upon, you know, and put aside this prosecution bar
11:08 6 issue.

11:08 7 And so we don't believe that this issue
11:08 8 or any of the other issues that the parties have been
11:08 9 fighting on should have affected the production of
11:08 10 this. We think it should have been produced a long
11:08 11 time ago.

11:08 12 And, you know, based on what PayPal is
11:08 13 telling you now, there really is no dispute regarding
11:08 14 the terms. And this information should be produced,
11:08 15 you know, without delay.

11:08 16 THE COURT: Well, I think what I would
11:08 17 hear from defense counsel is it affects, you know, who
11:08 18 has access to look at it, right?

11:08 19 MR. DOWNING: Absolutely, Your Honor.
11:08 20 And in that case, you know, you know, there -- I think
11:08 21 where we are going to look at, you know, we -- we can
11:08 22 silo off anybody that's going to look at it. And the
11:08 23 people that will agree to a prosecution bar, you know,
11:08 24 for the representatives that will be looking at it,
11:08 25 those types of things are not at issue.

11:08 1 But because our client is a competitor
11:09 2 with PayPal, our client has, you know, products that
11:09 3 compete with PayPal, you know, the prosecution bar
11:09 4 issue in this case, you know, it's not a normal case
11:09 5 where, you know, those types of things don't matter.

11:09 6 THE COURT: Well, I think they matter to
11:09 7 the other side. That's what I'm hearing. Am I missing
11:09 8 something?

11:09 9 MR. DOWNING: So, yeah. I think you may
11:09 10 be missing something, Your Honor.

11:09 11 PayPal does not want a prosecution bar at
11:09 12 all. So they don't care whether there's one or not.
11:09 13 And what I'm telling Your Honor is that the people who
11:09 14 are -- who will be reviewing the code, until this issue
11:09 15 is resolved, will agree to the prosecution bar or the
11:09 16 most stringent protections under the --

11:09 17 THE COURT: I didn't hear that until you
11:09 18 just said that.

19 MR. DOWNING: Okay.

11:09 20 THE COURT: People that -- so now -- so
11:09 21 let me -- the other -- what I hear you saying is that
11:09 22 the people who would be affected by the prosecution bar
11:09 23 will act as though there's one in the protective order
11:10 24 until you all negotiate and resolve it one way or the
11:10 25 other.

11:10 1 MR. DOWNING: That's correct, Your Honor.

11:10 2 THE COURT: And so you're saying have
11:10 3 them produce it and no one who would be affected by the
11:10 4 prosecution bar will have access to it. It's just
11:10 5 for -- I'm going to use an example. It would just be
11:10 6 outside counsel?

11:10 7 MR. DOWNING: Yes, Your Honor.

11:10 8 THE COURT: And what problem does the
11:10 9 defendant have with that?

11:10 10 MR. KANG: Yeah. I think we're maybe a
11:10 11 little talking past each other. What we want is for
11:10 12 our in-house counsel to be able to view Fintiv
11:10 13 confidential information. And the prosecution bar
11:10 14 would currently prevent them from doing so, because
11:10 15 they have some responsibilities on the prosecution
11:10 16 side.

11:10 17 We really don't care one way or the other
11:10 18 if PayPal -- or I'm sorry -- if Fintiv's expert also
11:10 19 dabbles in prosecution. And so that's the issue here.

11:10 20 You know, we thought we could work this
11:10 21 out, you know, without the Court's intervention, but
11:10 22 unfortunately it's come to this, Your Honor.

11:11 23 THE COURT: Let me hear from the
11:11 24 plaintiff. Do you have -- do you oppose the
11:11 25 defendant's in-house counsel looking at this?

11:11 1 MR. DOWNING: The defendant's in-house
11:11 2 counsel, that would be their own code, Your Honor.
11:11 3 So -- and I think that they would have access to it
11:11 4 under the provisions of the protective order. So
11:11 5 that -- that would not be an issue in this case.

11:11 6 I think our position is that this should
11:11 7 have been produced, you know, quite a bit ago.

11:11 8 THE COURT: Okay. Well, then somehow I'm
11:11 9 not following. You -- plaintiff wants defendant's
11:11 10 code?

11:11 11 MR. DOWNING: Yes, Your Honor.

11:11 12 THE COURT: So, Mr. Kang, what is it that
11:11 13 you -- what is it that you want your in-house people to
11:11 14 be able to look at?

11:11 15 MR. KANG: Yeah. They want to be able to
11:11 16 look at Fintiv confidential information and to the
11:11 17 extent they produced any source code --

11:11 18 THE COURT: Oh, I'm sorry. It's not
11:11 19 Fintiv's code you care about. Your in-house people
11:11 20 want to be able to look at confidential information,
11:11 21 and you're holding up providing the code until you can
11:11 22 work out whether or not your in-house people can look
11:12 23 at other confidential information?

11:12 24 MR. KANG: That's exactly right.

11:12 25 THE COURT: Okay. I'm sorry. It was the

11:12 1 code thing that was -- and I apologize to everyone. I
11:12 2 was missing that there isn't really a -- there's a
11:12 3 parallel in what you want, but it's not the code.

11:12 4 Okay. So I'm going to order the
11:12 5 production of the code as soon as you all work out
11:12 6 physically how that's done. You all continue to work
11:12 7 on whether or not you can come to an agreement of the
11:12 8 defendant's in-house counsel being allowed to look at
11:12 9 confidential information. If you all can't resolve
11:12 10 that in the next -- by the end of the week, let me know
11:12 11 and I will -- and just submit an e-mail reminding me
11:12 12 what it is. And I have an idea of what I'll do, but
11:12 13 I'll let you guys continue to try and work that out.
11:12 14 And if you all can't work it out, then I will resolve
11:12 15 it early next week.

11:12 16 So production of the code as soon as you
11:12 17 all work out the logistics of that, and then try and
11:13 18 work -- negotiate. I would suggest that I think there
11:13 19 is a way that it can be done where in-house counsel can
11:13 20 have some access to confidential information as long as
11:13 21 the in-house counsel for the defendant is willing to
11:13 22 agree to the restrictions that other folks would have
11:13 23 to agree to. That's, generally speaking, the way I
11:13 24 lean, but you all try to work it out.

11:13 25 And I'll hear again then from plaintiff's

11:13 1 counsel about -- I think it's next supplemental --
11:13 2 supplementation of interrogatories, but if it's not,
11:13 3 let me know what you have.

11:13 4 MR. DOWNING: Yeah. Thank you, Your
11:13 5 Honor.

11:13 6 Just moving on, there -- the -- kind of
11:13 7 the three main arguments, and we've kind of discussed
11:13 8 this -- the second one already so I'll just skip past
11:13 9 that.

11:13 10 But our concern is -- so our concern
11:13 11 related to the production of source code is we need the
11:14 12 code produced, but we're also concerned that we're not
11:14 13 receiving everything that we're entitled to. And,
11:14 14 let's see, we've talked about that.

11:14 15 And I've included some interrogatories to
11:14 16 kind of illustrate the points that we're facing.
11:14 17 Interrogatory No. 3, which was part of the dispute
11:14 18 letter, you know, talks about for the accused products
11:14 19 identifying persons and entities that developed,
11:14 20 designed and planned and contributed to the patented
11:14 21 technology.

11:14 22 What we're trying to find is, you know,
11:14 23 companies that are part of this or that may play, you
11:14 24 know, part of this, you know, whether it's, you know,
11:14 25 servers or APIs or -- and that type of information.

11:14 1 And we asked them to -- you know, to identify each
11:14 2 person and describe the nature or work or services
11:14 3 performed, and so we did not -- we did not get a
11:14 4 response to that interrogatory. We got -- under 33(d),
11:14 5 we got a bunch of Bates-numbered documents, which we
11:14 6 don't believe is proper because the burden on us is not
11:14 7 the same for them. They have access to the engineers.
11:15 8 They know who these people are. They have an
11:15 9 understanding of the system, and as I explained to
11:15 10 you --

11:15 11 THE COURT: I got it. I got it. Let me
11:15 12 hear from the defendant why you can't -- that doesn't
11:15 13 seem like an unreasonable interrogatory to me.

11:15 14 MR. KANG: Well, so each one of these
11:15 15 Bates-numbered pages is what we -- what PayPal calls a
11:15 16 confluence page for a particular product.

17 THE COURT: Okay.

11:15 18 MR. KANG: And that -- those confluence
11:15 19 pages have, you know, who is the team lead, who is the
11:15 20 UI designer, who is the lead software developer, who is
11:15 21 the client point of contact for third parties such as
11:15 22 Green Dot and Incomm. And so if you pull up each one
11:15 23 of these, it has all the information that they're
11:15 24 looking for. Now --

11:15 25 THE COURT: If I were to pull up

11:15 1 PayPal -- and this is Bates number -- PayPal and Fintiv
11:15 2 9102 and I looked at it, I -- if I were on the
11:15 3 plaintiff's side, I would be getting the same
11:15 4 information that you as the defendant would need to go
11:15 5 to to answer the interrogatory, and you've given them
11:16 6 essentially the source information that you, the
11:16 7 defendant, would have to go to look at to get -- to
11:16 8 respond to the interrogatory. So it's as easy for them
11:16 9 as for you?

11:16 10 MR. KANG: That's correct.

11:16 11 THE COURT: Got it.

11:16 12 For the plaintiff, why isn't that okay?

11:16 13 MR. DOWNING: The fact is I've looked at
11:16 14 these. It's not easy and straightforward, Your Honor.
11:16 15 If you look at these pages --

11:16 16 THE COURT: Do you have one I can see?

11:16 17 I mean, I have Mr. Kang's representation
11:16 18 that he didn't say it this way, but that even I who has
11:16 19 no skill at all could look at this document and figure
11:16 20 it out, and so if you'll show me one, then we'll know.

11:16 21 MR. DOWNING: Yes. Yes. Yes. Let me --
11:16 22 this may take a bit, Your Honor, but I believe I can
11:16 23 pull one up. Unfortunately I'm not at my computer. I
11:17 24 don't have -- this computer doesn't have access to the
11:17 25 files, but I'm going to try to get one for you that we

11:17 1 can present.

11:17 2 THE COURT: Why don't -- is this the only
11:17 3 issue that's left?

11:17 4 MR. DOWNING: No. Your Honor, there's
11:17 5 some related issues, and I'll go to them while
11:17 6 somebody --

11:17 7 THE COURT: Well, here, let -- let's do
11:17 8 this. You just e-mail my clerk, Nolan, a copy of one
11:17 9 of these pages, and he and I will take a -- and he'll
11:17 10 forward it to me. We'll take a look at it, and if we
11:17 11 think it's adequate, we'll deny your relief for this,
11:17 12 and if we think they need to answer the interrogatory,
11:17 13 we'll let you know.

11:17 14 MR. DOWNING: Okay. Okay. Thank you,
11:17 15 Your Honor. We'll do that.

11:17 16 But kind of another layer issue for the
11:17 17 responses to the interrogatories, Your Honor, are the
11:17 18 objections. And if you look -- if you look on
11:17 19 Slide 10, again, they're limiting their responses to
11:18 20 Add Cash, In Store functionality, and they're also
11:18 21 limiting it to a transaction initiated by a user that
11:18 22 does not have access to a bank account on the PayPal
11:18 23 and Venmo mobile applications. Those are two claim
11:18 24 construction issues that PayPal raised during the claim
11:18 25 construction hearing and that Your Honor rejected. And

11:18 1 there's no -- there's no supplement to this that shows
11:18 2 that these -- you know, that they are providing us, you
11:18 3 know, with something outside of that scope, you know,
11:18 4 consistent with what we've alleged.

11:18 5 And it -- in fact, if you look at some of
11:18 6 the sales documents, and we'll go -- we'll go down
11:18 7 through those a bit, they seem to be only providing
11:18 8 information related to the Add Cash, In Store feature.
11:18 9 So we don't believe that -- and we're worried that when
11:18 10 they produce the source code, we're going to get a very
11:18 11 small subset of what we're entitled to. And so as part
11:18 12 of the source code production, technical document
11:18 13 production and damages and those issues that we raised,
11:18 14 you know, we want Your Honor to order them, you know,
11:19 15 to produce -- you know, to not restrict the production,
11:19 16 you know, to those specific issues.

11:19 17 THE COURT: So what I hear you saying,
11:19 18 and I could be wrong, but what I hear you saying is
11:19 19 that they haven't produced it yet, but you're worried
11:19 20 in the future you're not going to get what you want.

11:19 21 MR. DOWNING: So based on their
11:19 22 interrogatory responses, it appears that they're
11:19 23 limiting their production to just these features. And
11:19 24 so consistent with that, I think that they produced
11:19 25 their source code.

11:19 1 THE COURT: Okay. Let me hear from them.

11:19 2 MR. KANG: Yeah, Your Honor. Our
11:19 3 production and our discovery obligations are guided by
11:19 4 the infringement contentions, and these are the
11:19 5 functionalities that they've accused.

11:19 6 Now, they served supplemental
11:19 7 infringement contentions that, you know, we moved to
11:19 8 strike after the date of final contentions that added
11:19 9 some more features such as QR codes and things like
11:19 10 that. And we'll go ahead and give -- you know, we can
11:19 11 find those things, and, you know, the app code is the
11:19 12 app code. It'll have all the functionalities. So I
11:20 13 don't know what they're worried about there.

11:20 14 But we also received on March 31st, and
11:20 15 which I do want to, you know, raise is the first time
11:20 16 we heard about any discovery deficiency from Fintiv was
11:20 17 on March 31st, well after the date for final
11:20 18 contentions. And this letter massively broadens the
11:20 19 scope of whatever products they're accusing and what
11:20 20 they wanted discovery of.

11:20 21 There's references in there to crypto
11:20 22 currency. You won't find that in their contentions at
11:20 23 all. And we tried to meet and confer with them in good
11:20 24 faith, and we said tell us where this is accused. And
11:20 25 their position was give us everything you -- we're

11:20 1 asking you for. We won't tell you whether it's accused
11:20 2 or not, and you'll find out whether it's accused in our
11:20 3 opening expert report.

11:20 4 And so that, Your Honor, we think is
11:20 5 improper. We think that --

11:20 6 THE COURT: I got it. So when is your --
11:20 7 when is your production due? When are you going to --
11:21 8 is your production going to be complete?

11:21 9 MR. KANG: So we're rolling documents
11:21 10 out. PayPal has lost some personnel on both -- you
11:21 11 know, and -- you know, the document collection side on
11:21 12 the engineering side. On 4/24 and 4/28, we produced
11:21 13 another nine -- or 900 documents, 965 documents. We
11:21 14 have a production in queue right now that's on the
11:21 15 order of 8600 documents. I can't really commit right
11:21 16 now to a date certain when absolutely everything's
11:21 17 going to be --

11:21 18 THE COURT: When is the majority -- when
11:21 19 is a reasonable majority of your stuff going to be
11:21 20 done?

11:21 21 MR. KANG: I think if it's limited to
11:21 22 what's in their infringement contentions --

11:21 23 THE COURT: Well, I'm -- you're going to
11:21 24 be the judge of that. So when do you -- under what you
11:21 25 think you owe, when do you estimate the majority of it

11:21 1 will be produced?

11:21 2 MR. KANG: I think this month. You know,
11:21 3 this 8600 document production is going to be --

11:22 4 THE COURT: Okay. So at the end of the
11:22 5 month, if the plaintiff feels that the defendant has
11:22 6 not provided everything they're entitled to under
11:22 7 discovery, then you can contact Judge Gilliland's
11:22 8 office and have him set a hearing, and the plaintiff
11:22 9 can articulate for Judge Gilliland and will probably do
11:22 10 it in person. You can articulate for Judge Gilliland
11:22 11 everything that the plaintiff thinks it's entitled to
11:22 12 based on its infringement contentions, and the
11:22 13 defendant can articulate why they think it's not.

11:22 14 And obviously you should meet and confer
11:22 15 in advance of that, but as soon as -- I'll give the
11:22 16 defendant until the end of the month to get the
11:22 17 majority of its production done, sufficient that the
11:23 18 plaintiff knows what it's -- the buckets of what it's
11:23 19 getting. And if the plaintiff feels like the defendant
11:23 20 is not adequately providing -- has not provided the
11:23 21 discovery production it's entitled to, then we'll --
11:23 22 Judge Gilliland can go over that with you guys.

11:23 23 And if he needs to extend the time for
11:23 24 the plaintiff -- I'm sorry -- for the -- if he needs to
11:23 25 extend the time for the defendant to produce additional

11:23 1 information because the plaintiff persuades him that
11:23 2 there was information or discovery that it should have
11:23 3 gotten, then he can deal with that.

11:23 4 Now, obviously over the course of the
11:23 5 month as the plaintiff is receiving production, if the
11:23 6 plaintiff feels that what they're getting is inadequate
11:23 7 in terms of you're not giving me something in Bucket X
11:23 8 that we think we're entitled to, and you can cite to
11:23 9 the defendant what is in your infringement contentions
11:24 10 that would give you a legitimate basis for obtaining
11:24 11 that discovery, then do it that way.

11:24 12 But if at the end of the month, if the
11:24 13 defendant hasn't produced everything that plaintiff
11:24 14 believes it should have -- should have gotten, then
11:24 15 Judge Gilliland can take this up and I'll -- I will
11:24 16 recommend to him that he do it in person and go over it
11:24 17 with you all to make sure the plaintiff gets everything
11:24 18 that they need.

11:24 19 Is there anything else we need to take up
11:24 20 today?

11:24 21 MR. DOWNING: Your Honor, if I may just
11:24 22 respond. I didn't get a chance to -- I don't believe
11:24 23 that what -- the procedure what happened was fairly
11:24 24 characterized by Mr. Kang. And so if you would just
11:24 25 allow me to kind of address that issue very, very

11:24 1 briefly.

11:24 2 THE COURT: I'm not sure how it would
11:24 3 change my mind, but if you want to say something, it's
11:24 4 your right.

11:25 5 MR. DOWNING: So we -- PayPal had told us
11:25 6 that they were unable to produce technical documents
11:25 7 because they don't understand our infringement
11:25 8 contentions. And because of that we went through an
11:25 9 arduous process of identifying the technical issues.
11:25 10 And in our contentions we also provided them with what
11:25 11 is missing.

11:25 12 So what Your Honor has asked us to do
11:25 13 about telling them what we feel is missing, we've
11:25 14 already done. They have a set of contentions. And in
11:25 15 the contentions themselves they list the discovery that
11:25 16 we think is missing.

11:25 17 And so we feel like in good faith we've
11:25 18 tried to address their issue that they don't understand
11:25 19 our contentions and so they're not able to produce
11:25 20 documents. We provided them with a supplemental set of
11:25 21 contentions. And in those contentions they
11:25 22 specifically tell them what we think are missing. And
11:25 23 so that analysis that Your Honor -- I think you're on
11:25 24 mute, Your Honor.

11:25 25 THE COURT: Did you -- okay. So it

11:25 1 sounds like you have already done what I was hoping you
11:25 2 all would do.

11:25 3 So I'll tell you what we'll do. I don't
11:26 4 know what Judge Gilliland's schedule is, but it sounds
11:26 5 like you all might be able to meet with him and confer
11:26 6 and go through all this with him. So I'll have Nolan
11:26 7 contact Judge Gilliland's office. And if you all --

11:26 8 I'll give you a week to work -- I'll give
11:26 9 you a week to work this out. Today's the 10th. You'll
11:26 10 have through the end of business Wednesday. Let us
11:26 11 know if either side is -- if the plaintiff thinks
11:26 12 they're not getting -- going to get what they want. If
11:26 13 the defendant says the plaintiff wants stuff that they
11:26 14 didn't ask for in their infringement contentions.

11:26 15 And if you all still need help, then
11:26 16 Judge Gilliland will set a hearing for you. And you
11:26 17 all can go over it request by request with him.

11:26 18 Anything else we need to take up?

11:26 19 MR. DOWNING: Thank you, Your Honor.

11:26 20 MR. KANG: Just very briefly, Your Honor.

11:26 21 I think the only thing we haven't done
11:26 22 that you asked the parties to do is for Fintiv to
11:27 23 identify where in their contentions the particular
11:27 24 functionalities they've asked for that are accused. I
11:27 25 think we can work this out over the next week. But,

11:27 1 you know, the problem is in the --

11:27 2 THE COURT: That sounds very reasonable
11:27 3 to me. And so I think they should do that. And I
11:27 4 think Judge Gilliland would expect them to have done
11:27 5 that if you all have to get together.

11:27 6 MR. DOWNING: Your Honor, the only one
11:27 7 thing I would add to that is they've admitted that they
11:27 8 have not produced source code. We've talked about the
11:27 9 fact that they've admitted that that's really the
11:27 10 jewels. That's really the things.

11:27 11 And so we're in this weird situation
11:27 12 where they haven't produced what they should have
11:27 13 produced and now we're going through, you know,
11:27 14 infringement contentions, you know, without the
11:27 15 advantage of that information which --

11:27 16 THE COURT: Okay. You're going to get
11:27 17 the source code, I would assume --

11:27 18 MR. KANG: Today or tomorrow.

11:27 19 THE COURT: I was going to say by the end
11:27 20 of the week, but that's better. Today's better.

11:27 21 MR. KANG: We have someone picking it up
11:27 22 today. It should be set up tomorrow.

11:28 23 THE COURT: Okay. Very good.

11:28 24 So let me ask the plaintiff: How long
11:28 25 does the plaintiff need to have the source code? Let

11:28 1 me revise what I've been saying. And that was a good
11:28 2 point. You technical people remember things that I
11:28 3 don't think of.

11:28 4 You get the source code today. How long
11:28 5 will it be before the plaintiff is able to amend their
11:28 6 infringement contentions based on the source code or
11:28 7 supplement the infringement contentions they have?

11:28 8 MR. DOWNING: I think 30 -- I think about
11:28 9 30 days, 30 to 45 days, Your Honor. That includes
11:28 10 reviewing the source code.

11:28 11 THE COURT: Well, if you're going to take
11:28 12 that long, then -- and, you know, then defendants --
11:28 13 it's going to be 30 to 45 days before you're going to
11:28 14 be able to persuade the defendant -- I mean -- so
11:28 15 here's what we're going to do. I know this is an
11:28 16 iterative process. I hope the court reporter has
11:29 17 gotten all this down because I've changed about ten
11:28 18 times.

11:29 19 But here's what we're going to do: The
11:29 20 defendant has represented they can get the source code
11:29 21 to you today, but let's give them till tomorrow because
11:29 22 you never know. But you'll have it in the next
11:29 23 24 hours.

11:29 24 So I'm going to stay everything until --
11:29 25 stay the deadlines until you get back to the defendant

11:29 1 any supplement of the infringement contentions that you
11:29 2 can justify on the basis of having received the source
11:29 3 code.

11:29 4 Once the defendant has the new
11:29 5 infringement contentions, they can -- I'll give them
11:29 6 whatever time they need to go through those and
11:29 7 determine what additional production the plaintiff is
11:29 8 entitled to, if any. You all meet and confer. And if
11:29 9 you come to an impasse over what the plaintiff believes
11:29 10 it's entitled to receive based on the amended
11:30 11 infringement contentions, or the defendant thinks you
11:30 12 are being too greedy -- sorry. My word, not theirs --
11:30 13 in what you want in discovery based on your amended
11:30 14 infringement contentions, you all do the best you can
11:30 15 to work it out.

11:30 16 And whenever you come to a grand
11:30 17 resolution or a grand failure in being able to work it
11:30 18 out, then let Nolan know. He will contact Judge
11:30 19 Gilliland, and Judge Gilliland will get something set
11:30 20 up for you very quickly. Okay?

11:30 21 MR. KANG: And, Your Honor, if I might
11:30 22 just ask one question for clarification.

11:30 23 THE COURT: Sure.

11:30 24 MR. KANG: Are you granting the plaintiff
11:30 25 the ability to amend its infringement contentions just

11:30 1 to add citations to source code to support its existing
11:30 2 theories in its final infringement contentions? Or --

11:30 3 THE COURT: That, or if they were to
11:30 4 find -- if they could persuade Judge Gilliland, who's
11:31 5 an engineer and I'm not, that they found something in
11:31 6 the source code -- if they need to amend an
11:31 7 infringement contention and say, based on what we had
11:31 8 on publicly-based information, we thought it was X.
11:31 9 Now that we have the source code, we believe it's Y and
11:31 10 it was the receipt of the source code that informed us
11:31 11 so that we could amend the infringement contentions.
11:31 12 If he can persuade them that that's why they have to
11:31 13 amend it, then they'll be allowed to do that.

11:31 14 Or, as you said, also of course they'll
11:31 15 be able to add citations to their current ones.

11:31 16 But to amend -- to actually amend an
11:31 17 infringement contention, they would have to show that
11:31 18 it was something that the source code provided them
11:31 19 that changed what they would have believed based on
11:31 20 their engineers' belief of what was publicly available.

11:31 21 MR. KANG: Thank you, Your Honor.

11:31 22 MR. DOWNING: And, Your Honor, just a
11:31 23 quick clarification too. What PayPal did not indicate
11:31 24 to you is that they produced a number of technical
11:31 25 documents after our final infringement contentions were

11:32 1 due. And those are cited in interrogatories that we
11:32 2 didn't quite get to --

11:32 3 THE COURT: If you have -- if you
11:32 4 received technical information, that kind as well, that
11:32 5 you can persuade the magistrate judge that because you
11:32 6 received that after the time when you had done what you
11:32 7 did under -- on public information, and it was -- that
11:32 8 was -- I assume that was confidential technical
11:32 9 information. If you received something that you didn't
11:32 10 have at the time you did your infringement contentions
11:32 11 and it was something that one wouldn't have known based
11:32 12 on public information, and you can persuade him that's
11:32 13 why you did it, that's fine with me too.

11:32 14 MR. DOWNING: Thank you, Your Honor.

11:32 15 THE COURT: Okay? Anything else?

11:32 16 MR. DOWNING: Nothing.

11:32 17 MR. KANG: No, Your Honor.

11:32 18 THE COURT: Okay. You guys have a good
11:32 19 day. Take care.

11:32 20 (Hearing adjourned.)
21
22
23
24
25

1 UNITED STATES DISTRICT COURT)
2 WESTERN DISTRICT OF TEXAS)
3
4

5 I, Kristie M. Davis, Official Court
6 Reporter for the United States District Court, Western
7 District of Texas, do certify that the foregoing is a
8 correct transcript from the record of proceedings in
9 the above-entitled matter.

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

13 Certified to by me this 12th day of May
14 2023.

15
16 /s/ Kristie M. Davis
17 KRISTIE M. DAVIS
18 Official Court Reporter
19 800 Franklin Avenue
20 Waco, Texas 76701
21 (254) 340-6114
22 kmdaviscsr@yahoo.com
23
24
25

KRISTIE M. DAVIS, OFFICIAL COURT REPORTER
U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS (WACO)