

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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MAPLEBEAR INC, D/B/A INSTACART,

Petitioner

v.

CONSUMERON, LLC

Patent Owner

CASE IPR2023-00865

U.S. PATENT NO. 11,238,465

CM#70781.00007US01

DEPOSITION OF MICHAEL D. MITZENMACHER, PH.D.

WEDNESDAY, MAY 15, 2024

9:33 A.M. - 12:46 P.M.

SPACES NEWBURY STREET

361 NEWBURY STREET

BOSTON, MASSACHUSETTS

REPORTED BY: Sandra A. Deschaine, CSR, RPR

Job No. 135920

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P R O C E E D I N G S

MICHAEL D. MITZENMACHER, PH.D.,

Deponent, having first been satisfactorily
identified by the production of his
Massachusetts driver's license and duly sworn
by the Notary Public, was examined and
testified as follows:

EXAMINATION

BY MR. JARRATT:

Q. Good morning, Dr. Mitzenmacher?

A. Good morning.

Q. Can you please state your name --
full name for the record, please?

A. Michael David Mitzenmacher.

Q. Approximately how many times have
you been deposed?

A. I don't know. I don't have a
count.

Q. Can you give an approximation?

A. Probably I expect more than 50.

Q. So, generally, you know how
depositions work. Is that fair to say?

A. I think so, yes.

Q. Do you understand that you must
provide verbal answers to my questions so

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1 that the court [sic] can make an accurate
2 transcript?

3 A. Yes.

09:34 AM 4 Q. And because we're forming a record
5 here, it's important that we don't talk over
6 each other. So if you can let me finish my
7 question, I'll let you finish your questions
8 [sic].

9 Does that sound fair?

09:34 AM 10 A. Yes.

11 Q. You understand that your counsel
12 might object to a question but you still must
13 provide an answer to the question unless
14 instructed otherwise, correct?

09:34 AM 15 A. I understand that.

16 Q. If you're confused as to a
17 question I ask, I'd appreciate you let me
18 know so I can perhaps ask it in a different
19 way.

09:34 AM 20 Can we agree on that?

21 A. I will try to do so.

22 Q. Is there any reason why you can't
23 provide full and accurate, truthful testimony
24 today?

09:34 AM 25 A. No, I don't think so. I should

1 say, a few weeks ago, about a month ago I had
2 bronchitis, so I may cough at points, but,
3 you know, I'm not infectious or anything, as
4 far as I know.

09:34 AM

5 Q. Okay. So all the testimony you'll
6 give today would be an accurate
7 representation of your opinions?

8 A. Yes.

09:35 AM

9 Q. You understand that the testimony
10 you're providing today will be used in a
11 Inter Partes review proceeding IPR 2023-00865
12 challenging U.S. Patent No. 11,238,465?

13 A. I don't recall the IPR number, but
14 I understand it's been used for an IPR.

09:35 AM

15 Q. And if I say the '465 patent, will
16 you understand that that's referring to U.S.
17 Patent 11,238,465?

18 A. All right.

09:35 AM

19 Q. And if I say "this proceeding" or
20 "this IPR," will you understand that that
21 will be referring to IPR 2023-00865?

22 A. I will try and do so.

09:35 AM

23 Q. Do you recall that the four family
24 members of the '465 patent were previously
25 challenged in IPR proceedings 2022-01356,

1 01357, 01358, 01359 also filed by Instacart?

2 A. Again, I don't remember the

3 numbers. I do recall there were previous

4 IPRs.

09:36 AM 5 Q. And you provided testimony in

6 those IPRs, correct?

7 A. I believe so.

8 Q. Can we agree that if I say the

9 previous Instacart IPRs, I'm referring to

09:36 AM 10 those four IPRs that you provided testimony

11 in?

12 A. I will try and recall that as we

13 go.

14 Q. Do you understand that your

09:36 AM 15 testimony will be publicly available and

16 filed in this proceeding?

17 A. I guess. It hadn't occurred to me

18 one way or another if it will be public, but

19 I have to assume these things are, I guess.

09:36 AM 20 Q. How many IPRs have you worked on?

21 A. I don't know.

22 Q. Can you give an approximation?

23 A. I mean, probably not a good one

24 without my list of cases, and it's also hard

09:37 AM 25 for me to recall and remember, because often,

09:37 AM 1 like, you'll be doing several -- like, as we
2 discussed here, there were sort of several
3 IPRs although it was for the same family of
4 patents. So if I remember, you know, I tend
5 to count that in my head as one IPR because
6 it's, you know, one proceeding or deposition
7 from my standpoint.

8 Q. More or less than 10 IPRs you
9 worked on, would you approximate?

09:37 AM 10 A. I mean, I think if you counted
11 them separately, the way that you did here,
12 so that, you know, so that, like, for
13 instance, the previous ones in this case were
14 multiple IPRs, that would be more than 10.

09:37 AM 15 I'm not sure if that's the case otherwise.

16 Q. Of the IPRs you've worked on, how
17 many have you worked on for patent owner
18 Consumeron?

09:38 AM 19 A. I don't know. I would have to
20 look up that information. I don't recall as
21 I sit here.

22 Q. And in terms of definitions we
23 might use today, if I use the acronym POSITA,
24 will you understand that to mean a person of
09:38 AM 25 ordinary skill in the art?

1 A. I'm familiar with that acronym,
2 yes.

3 Q. When I say "your declaration,"
4 will you understand that I'm referring to
09:38 AM 5 Exhibit 2008 filed in this IPR?

6 A. I can't recall the exhibit number,
7 but if you give me my declaration, I'll be
8 able to refer to it.

9 Q. Sure. Let's look at that now.
09:38 AM 10 So I'm handing the witness what's
11 been previously marked as Exhibit 2008 in
12 this IPR.

13 Can you please confirm that this
14 is your declaration you filed in this
09:38 AM 15 proceeding?

16 A. It certainly appears to be.

17 Q. Can you confirm that that is your
18 signature in paragraph 96 of this document?

19 A. Yes, it looks like my signature.

09:39 AM 20 Q. After you signed your declaration,
21 were any changes to Exhibit 2008 made by you
22 or anyone else?

23 A. I'd have to say, I have to check
24 with counsel, I mean, if they changed a
09:39 AM 25 punctuation mark or something. I believe

09:39 AM 1 when I signed off, you know, typically, I
2 don't recall in this specific instance,
3 typically when I sign off I note that if, you
4 know, something in terms of punctuation needs
5 to be changed on, like, the front cover, they
6 have my permission to do so.

7 Q. Does counsel always need your
8 permission to make changes to your
9 declaration after you signed it?

09:39 AM 10 A. I would typically say yes or I,
11 typically, you know, inform counsel that, you
12 know, if there's any changes beyond, you
13 know, something typographical or something in
14 the formatting to let me know.

09:40 AM 15 Q. Who wrote your declaration,
16 Dr. Mitzenmacher?

17 A. I wrote my declaration. I worked
18 with counsel, but it's my declaration and my
19 set of opinions.

09:40 AM 20 Q. Were you provided with a first
21 draft?

22 A. I don't recall in this proceedings
23 one way or the other. You know, typically
24 when I work with counsel, you know, I write
09:40 AM 25 things, they write things, it gets combined,

1 put together. In this case I know we also
2 had, I think as you mentioned, previous
3 declarations as a starting point. So that
4 may have been part of the starting point.

09:40 AM 5 Q. Do you recall how much of this
6 declaration you wrote?

7 A. Yes. It's my declaration. These
8 are my opinions, you know, and it's an
9 iterative process where, you know, I write,
09:41 AM 10 the attorneys write; it goes back and forth.

11 Q. In drafting your declaration, did
12 you choose your words carefully?

13 A. I mean, I generally try and choose
14 my words carefully.

09:41 AM 15 Q. I didn't ask generally. I asked
16 with respect to this declaration.

17 A. I mean, again, generally I try and
18 choose my words carefully, including in this
19 declaration. If there's some word choice
09:41 AM 20 specifically that you wish to discuss, let me
21 know.

22 Q. Do you still stand by all the
23 opinions you provided in this declaration?

24 A. Yes.

09:41 AM 25 Q. Are there any typographical errors

1 that you would like to correct in your
2 declaration?

3 A. I don't recall as I sit here.
4 Again, I can't recall anything as I sit here.

09:41 AM 5 And reading it the last couple days, I feel
6 like I might have noticed a stray comma
7 somewhere but nothing that changed the
8 meaning.

9 Q. Are there any errors in your
09:42 AM 10 analysis that you'd like to correct?

11 A. No.

12 Q. And this declaration contains your
13 opinions only; is that correct?

14 MR. PRICE: Objection.

09:42 AM 15 A. I'm not sure what you mean by my
16 opinions only. I mean, it contains facts.
17 It's contains my CV. I'm not quite sure what
18 you mean by the question.

19 BY MR. JARRATT:

09:42 AM 20 Q. I'll rephrase.
21 Does your declaration contain the
22 opinions of any other persons?

23 MR. PRICE: Objection.

24 A. I can't speak for what the
09:42 AM 25 opinions of other people are that may or may

	1	not match my opinions. These are my opinions
	2	that's presented in the report -- or sorry,
	3	in the declaration.
	4	BY MR. JARRATT:
09:42 AM	5	Q. Did you review your declaration
	6	thoroughly before signing it?
	7	A. Yes.
	8	Q. Did you review whether quotes
	9	contained within your declaration were from
09:43 AM	10	correct sources?
	11	A. I generally try to. That's part
	12	of my process. But, again, if there's
	13	something specific you'd like me to look at,
	14	please let me know.
09:43 AM	15	Q. Are you an attorney,
	16	Dr. Mitzenmacher?
	17	A. No.
	18	Q. Are you familiar with the legal
	19	doctrine of claim construction?
09:43 AM	20	A. I mean, not in the way that an
	21	attorney might, but generally I am.
	22	Q. And do you understand that the
	23	legal doctrine of claim construction is based
	24	on statutes and case law?
09:43 AM	25	A. Again, I'm not a lawyer, so I

1 wouldn't know what statutes or case law it
2 was dependent on, but I understand it's part
3 of the legal process.

09:43 AM 4 Q. Would it be fair to say that your
5 understanding of claim construction,
6 including the case law, is based upon the
7 understanding provided by counsel?

09:44 AM 8 A. Yes. In all cases, I would depend
9 on counsel for an understanding of whatever
10 the current framework or understanding of
11 claim construction is.

12 Q. So is it correct that you're not
13 relying on any of your own legal expertise to
14 understand the doctrine of claim
09:44 AM 15 construction?

16 A. Again, not being an attorney, you
17 would have to spell out for me the contours
18 of what you mean by, like, the doctrine of
19 claim construction. I understand that as
09:44 AM 20 part of the legal process, claim terms are
21 construed. My recollection is that, you
22 know, they might take on different
23 constructions in fact in an IPR versus in a
24 District Court proceeding and that there are
09:44 AM 25 various rules and understandings of that.

1 Q. Is the claim construction in an
2 IPR the same or different from the claim
3 construction in a District Court proceeding?

09:45 AM 4 A. I mean, I would think -- my
5 understanding is that in these sorts of
6 proceedings, you know, the people running the
7 IPR will determine that claim constructions
8 are appropriate for their process.

09:45 AM 9 Q. Did you have to apply a claim
10 construction in your declaration?

11 A. So I've discussed this, I think,
12 page 4 of my report, or page 4 of my
13 declaration, that during -- the purpose of
14 Inter Partes review proceeding, the claim
09:45 AM 15 term should be giving -- given their ordinary
16 and customary meaning as would be understood
17 by a person of ordinary skill in the art in
18 question at the time of the invention, and I
19 discussed that further in paragraphs 9 and
09:46 AM 20 10.

21 Q. Now, is it correct that you
22 analyzed the '465 patent from a perspective
23 of a POSITA?

09:46 AM 24 A. That is certainly a part of my
25 analysis, yes.

1 Q. Can a POSITA's perspective change
2 over time?

09:46 AM 3 A. So I'm not quite clear what you
4 mean. But, again, I'm not an attorney. You
5 know, my understanding is, typically when one
6 is discussing a POSITA, in particular with
7 regard to a patent, if you're looking at a
8 POSITA, you know, at the time surrounding the
9 patent when it was constructed and filed.

09:47 AM 10 Q. Is a POSITA's perspective in the
11 art of remote acquisition in 2000 the same as
12 a POSITA's perspective as in the year 2024?

09:47 AM 13 A. I'm not sure that I considered
14 that specific question, or I would need a
15 setting to determine, you know, what would be
16 the differences or a context to determine if
17 there were differences that were important.

09:47 AM 18 Q. Is it important to apply the
19 correct time frame when applying the
20 perspective of a POSITA?

09:48 AM 21 A. I mean, generally in terms of --
22 again, I'm not sure if this is part of the
23 legal framework specifically with a POSITA,
24 but in terms of analyzing things like patents
25 and the claims and the specifications, you

1 know, one does that with the understanding of
2 when it was constructed, in the time period
3 it was constructed and made into a patent.

09:48 AM 4 Q. What POSITA time frame did you
5 apply in your declaration?

6 A. I believe if you look through,
7 again, my description of the background and
8 so on, you can see that I was doing it within
9 the time frame of the patent. You know, I
09:48 AM 10 think it would be relevant from, you know,
11 roughly the, you know, early to mid, you
12 know, decade of the 2000s. I don't think
13 there was a particular change that I can
14 think of during that particular time period
09:49 AM 15 that would be relevant; and, again, I give
16 background accordingly when I do the overview
17 of the patent and throughout my declaration.

18 Q. You just testified you applied the
19 time frame of the mid-2000s.

09:49 AM 20 A. The decade, like, you know,
21 between 2000 and 2010.

22 Q. What relevance does the mid-2000s
23 have to the '465 patent?

24 A. Sorry. Could you pass me -- if
09:49 AM 25 you have a copy of the patent, I'm just

1 trying to remember the specific dates.

2 Q. I'm handing exhibit -- sorry.
3 Handing the witness Exhibit 1001 in this
4 proceeding. This is U.S. Patent 11,238,465.

09:50 AM 5 A. So, as I recall, the exact date on
6 the patent, the patent filing date was in
7 the -- or the effective date is 2011. So,
8 you know, the background or the history or
9 what led to the patent, you know, how one
09:50 AM 10 would think of the problem that was trying to
11 be solved was, again, in, roughly, the
12 middle, between 2005 and -- of the 2000 to
13 2010 time frame.

14 So approximately in that time
09:51 AM 15 frame is when I imagine the patent was being,
16 you know, thought of, developed. I don't
17 have the exact date in front of me; but,
18 again, I don't see there's any particular
19 difference in time -- in the time period in
09:51 AM 20 that range in terms of how one of ordinary
21 skill in the art would interpret the patent.

22 Q. Well, Dr. Mitzenmacher, I just
23 handed you the patent, so you do have the
24 exact date in front of you.

09:51 AM 25 A. Right, right.

1 Q. So which date did you apply to
2 your analysis of a POSITA?

3 A. So my understanding is this is a
4 continuation of application number 13/270,848
09:51 AM 5 filed on October 11, 2011.

6 So, again, when one is looking at
7 a skill in the art, one would be looking
8 around, generally prior to that day, which
9 was the time frame that I suggested to you.

09:52 AM 10 Q. Will you turn to paragraph 22 of
11 your declaration?

12 A. Sure.

13 Q. Can you read that first sentence
14 of paragraph 22?

09:52 AM 15 A. "I also understand that petitioner
16 defined a POSITA as of August 2009 as someone
17 knowledgeable and familiar with the
18 electronic commerce arts that are pertinent
19 to the '465 patent."

09:52 AM 20 Do you want me to go on?

21 Q. No, that's fine.

22 A. Okay.

23 Q. Did you apply the understanding of
24 a POSITA as of August 2009, or did you apply
09:52 AM 25 a different time frame, such as the

1 mid-2000s?

2 A. Again, that's within that range.
3 I don't see that there's any particular
4 difference of what I'm saying applies to that
09:52 AM 5 date, and, again, to the range of dates I've
6 described.

7 Q. Did you apply any other POSITA
8 time frames in your analysis of the '465
9 patent?

09:32 AM 10 A. Again, when I looked at it or
11 examined or did the analysis of a patent, as
12 I discuss throughout the patent, in
13 particular when I discussed the overview but
14 also the other background related to the
09:53 AM 15 patent, that was, you know, within this time
16 frame.

17 So I guess to answer your
18 question, like, the time frame that I looked
19 at was, again, sort of the relevant time
09:53 AM 20 frame up to and including this time of the
21 patent, or the time when the patent was, you
22 know, back to certainly 2009 or 2011, which
23 is, you know, what the continuation of the
24 '848 was referring to. Again, there's not a
09:54 AM 25 real difference in how the POSITA would

1 understand these terms or understand the
2 patent specification or claims within that
3 range.

09:54 AM 4 Q. Did you analyze the '465 Patent
5 from the perspective of a POSITA as of 2020?
6 A. I'm not quite sure what you mean
7 by that question or, you know, again,
8 understanding the claims and the patent and
9 the invention, I tried to understand the time
09:54 AM 10 that it was written and invented.
11 Q. So my question was, did you
12 analyze the '465 Patent from the perspective
13 of a POSITA as of 2020?
14 A. I don't believe I had a separate
09:54 AM 15 analysis. I'm not clear what particular
16 changes or suggestions that you have that
17 would be a difference specifically. So if
18 there's some specific difference you think
19 relates to a POSITA, I can consider it.
09:55 AM 20 Q. Can we move to paragraph 68 in
21 your declaration?
22 A. Paragraph what?
23 Q. 68.
24 A. Sure.
09:55 AM 25 Q. Can you read paragraph 68 into the

1 record, please?

2 A. Sure.

3 "I agree with Consumeron's

4 construction of the term," quote,

09:55 AM 5 'acquisition request,' unquote, as being,"

6 quote, 'a request for an agent to shop for

7 goods on a customer's behalf,' close quote,

8 with, quote, 'acquiring,' close quote,

9 "covering the agent completing the

09:56 AM 10 transaction (purchasing) the goods. I also

11 agreed with and opined on this construction

12 in IPR 2022-01356, 01357, 01358 and 01359."

13 Q. In that first sentence you read,

14 what do you mean by "I agree with

09:56 AM 15 Consumeron's construction"?

16 A. My recollection is that in

17 previous cases this term has come up and

18 Consumeron had offered a construction of this

19 term. I forget if it was, you know, both in

09:57 AM 20 the District Court's case and in the IPRs.

21 But, again, as state here, I opined with this

22 in the -- in the previous IPRs.

23 Q. Should I understand the statement

24 to mean that this is Consumeron's

09:57 AM 25 construction and not your construction?

1 A. Yes. I mean, Consumeron, I
2 believe, came up with that construction and I
3 agree with it.

09:57 AM 4 Q. Did you attempt to come up with
5 your own construction of the terms
6 "acquisition request" and "acquiring"?

09:57 AM 7 A. I mean, I believe that at the time
8 I got involved there were variable
9 constructions that were already in play. So
10 when I looked at it, it was, you know, these
11 were -- you know, this was one of the
12 constructions available, and I agreed with
13 it.

09:58 AM 14 MR. PRICE: Just before we go any
15 further, I'll just remind the witness
16 not to divulge any discussions between
17 the witness and counsel.

09:58 AM 18 A. I'm sorry. I don't recall
19 specifically one way or the other. I
20 remember, you know, this being one of the
21 possible constructions, and I agreed with it.

22 BY MR. JARRATT:

23 Q. What do you mean by "one of the
24 possible constructions"?

09:58 AM 25 A. Well, I believe in the course of

1 the IPRs, and you have to bring me back to
2 the, you know, other IPR documents, that
3 there was an alternative construction, you
4 know, given by Instacart.

09:58 AM 5 Q. So do I have it right that
6 Consumeron provides you with this
7 construction and then you attempted to
8 support that construction?

9 A. No, I don't think that's at all
09:58 AM 10 what I said or how I would characterize it.
11 Consumeron presented this
12 construction and it makes sense to me, and I
13 agree with it, after having gone through the
14 patent and done my own analysis.

09:59 AM 15 Q. So Consumeron presented you with
16 this construction and then you attempted to
17 support it?

18 MR. PRICE: Objection.

19 A. Again, I think that's what you
09:59 AM 20 just asked, and I repeat my last answer. No,
21 that's not the way I would characterize it.
22 I believe, you know, this was one of the
23 possible constructions and I agree with --
24 having read the patent and done my analysis,
09:59 AM 25 I agree with this construction.

1 BY MR. JARRATT:
2 Q. So which came first, did
3 Consumeron present you with this construction
4 or did you analyze the patent to determine
09:59 AM 5 the construction of acquisition request on
6 your own?
7 A. So, again, this dates back to the
8 previous proceedings, and I don't recall
9 specifically, you know, at what point in the
10:00 AM 10 process, you know. I don't recall if, you
11 know, during the course of it they asked me
12 specifically to help construct this. I just
13 don't recall.
14 I can say that I know that this
10:00 AM 15 was one of the constructions available and
16 that I, again, did my analysis of the patent,
17 and I agree with this construction.
18 And, again, there's details, I
19 believe in going further in this declaration,
10:01 AM 20 where I discuss the reasons for my opinion
21 that that's an appropriate construction of
22 the term.
23 Q. Is your construction based on
24 anything aside from the '465 Patent
10:01 AM 25 specification?

1 A. So if you look at, I guess,
2 paragraphs -- so if you look at paragraphs 70
3 to 77, I give a fairly detailed explanation
4 of my reasoning. Most of the discussion I
10:03 AM 5 provide is based on the specification, and my
6 recollection is that's referred to as
7 intrinsic evidence.

8 In paragraph 76 I also talk about
9 some extrinsic evidence, including, for
10:03 AM 10 example, I also make reference to Dr. Houh's
11 testimony.

12 Actually, there's also further
13 discussion, I guess, in paragraphs 78 to 87,
14 which also discusses this, and I think brings
10:03 AM 15 not just the specification, but I guess,
16 again, the knowledge that a POSITA would have
17 in looking at the specification and helping
18 to understand the term.

19 Q. For that extrinsic evidence that
10:04 AM 20 you cite, did Consumeron provide you with
21 that extrinsic evidence?

22 A. I don't recall as I sit here.

23 Q. So what specific part did you play
24 in developing the construction of acquisition
10:04 AM 25 request?

1 MR. PRICE: Objection.

2 A. Again, those from the previous
3 IPRs. I don't recall as I sit here, and, you
4 know, again, I would have to go back. I
10:04 AM 5 don't recall whether they asked me for a
6 preliminary or if they had already had a
7 possible construction. Either way, it
8 doesn't matter for my opinions in terms of
9 agreeing with this construction.

10:04 AM 10 BY MR. JARRATT:

11 Q. So am I hearing correct that you
12 just carried over the construction of
13 acquisition request from prior IPRs into
14 this IPR and did not do an independent
10:05 AM 15 analysis?

16 MR. PRICE: Objection.

17 A. I don't think that's what I said,
18 or I don't see how you come up with that
19 conclusion. I realize this was, you know,
10:05 AM 20 generally my understanding or history in
21 legal proceedings, is that when there are
22 multiple proceedings, typically you aim to
23 have a claim construction that is the same
24 across proceedings unless there is some good
10:05 AM 25 reason not to.

1 So, in particular, you know, I
2 think, again, Consumeron had previously
3 presented, and as I noted, I also agreed and
4 opined on the construction in the previous
10:05 AM 5 IPRs, you know, so it would make sense that
6 that would be the starting point.

7 And for the reasons I describe in
8 this report, or in this declaration, which is
9 focused on the '465 Patent and the '465
10:06 AM 10 specification, that claim construction, it's,
11 well, here as well, or my opinion is the
12 appropriate construction here as well.

13 BY MR. JARRATT:

14 Q. All right. So just to be clear,
10:06 AM 15 you agree that the construction of
16 acquisition request in the prior IPRs should
17 be the same construction of acquisition
18 request in this IPR?

19 MR. PRICE: Objection.

10:06 AM 20 Mischaracterizes his testimony.

21 A. I would say, as a general
22 principle, typically, you know, besides in
23 the case where they pick a construction and,
24 you know, they would want to have a
10:06 AM 25 consistent construction throughout,

10:07 AM 1 whether -- you know, again, what the
2 appropriate construction is will be
3 determined eventually by, you know, the
4 appropriate, you know, people or the deciding
5 groups in the process.

6 I believe this is the right
7 construction here. My understanding is that
8 for the purpose of these proceedings, this
9 term has not yet been construed, and so I
10:07 AM 10 apply it here. You know, if there's a reason
11 why it should not be the same across the
12 patents, you know, that would be something
13 for the, you know, the courts to decide.

14 BY MR. JARRATT:

10:07 AM 15 Q. Are you aware that courts in the
16 prior IPRs have, in fact, rendered a decision
17 on the construction of acquisition request?

18 A. I am aware that they provided a
19 decision.

10:07 AM 20 Q. Are you aware that they disagreed
21 with your construction of acquisition
22 request?

23 A. Yes. My understanding is, that is
24 on appeal and, you know, for the reasons I
10:07 AM 25 presented in the original reports and

1 additionally viewed, the reasons I presented
2 here, I believe that they're mistaken and
3 that, you know, I can expect that that might
4 change on the appeal.

10:08 AM 5 Q. Did you read those final written
6 decisions in the prior IPRs?

7 A. I'm not sure I read all of them.
8 I probably read at least one of them.

9 Q. I'm going to hand the witness an
10:08 AM 10 exhibit. It's the final written decision in
11 IPR 2022-01356.

12 MR. JARRATT: And we can mark this
13 as new Exhibit 1037.
14 (Exhibit 1037, Final Written Decision,
10:08 AM 15 Determining All Challenged Claims
16 Unpatentable, marked for identification.)

17 MR. PRICE: So just to be clear,
18 you intend to file this as Exhibit 1037
19 in conjunction with your upcoming reply,
10:09 AM 20 correct?

21 MR. JARRATT: Correct.

22 BY MR. JARRATT:

23 Q. Dr. Mitzenmacher, have you seen
24 this document?

10:10 AM 25 A. Again, I can't recall if I've seen

1 this specific one. I looked at least one of
2 the -- one of them. I can't recall if I
3 looked at this specific one.

4 Q. Can you turn to page 11?

10:11 AM 5 A. I'm there.

6 Q. Do you see the paragraph in the
7 middle starting with "for all the above
8 reasons"?

9 A. Yes.

10:11 AM 10 Q. Can you read that paragraph into
11 the record, please?

12 A. I can read it.

13 "For all the above reasons, we
14 reject Consumeron's argument that
10:11 AM 15 'acquisition request'" -- sorry --
16 acquisition request is in quotes -- "is
17 limited to a request for an agent to shop for
18 goods. Rather, we agree with Instacart that
19 'acquisition request' has its ordinary
10:11 AM 20 meaning which encompasses but is not limited
21 to purchasing or shopping and includes other
22 means of acquiring a product. Accordingly,
23 consistent with the record here and our
24 construction related '865 IPR, we construe
10:11 AM 25 'acquisition request' to include not only a

1 request for a delivery agent to shop for and
2 purchase goods, but also a request for the
3 agent to pick up or obtain prepaid goods."
4 Q. Does the fact that the board
10:12 AM 5 rejected your prior construction affect your
6 analysis in this IPR?
7 A. No. Because as I've stated right
8 there, incorrect, my understanding is that's
9 an issue that's being brought on appeal.
10:12 AM 10 Q. The board mentions in this
11 paragraph that they applied the ordinary
12 meaning.
13 Did you attempt to apply the
14 ordinary meaning of acquisition request when
10:12 AM 15 analyzing the '465 Patent?
16 A. Yes, but, in particular, the
17 ordinary meaning in the context of the
18 patent. And, particularly, I think, both for
19 this patent that is being discussed in this
10:12 AM 20 previous IPR and also for the '465 Patent, I
21 discussed the clear reasons why it does not
22 make sense, for instance, the way that they
23 describe that an acquisition request
24 corresponds to a request for the agent simply
10:13 AM 25 to pick up goods.

1 Q. Did you provide any analysis in
2 the '465 Patent under the board's
3 construction in front of you or did you limit
4 your analysis to Consumeron's construction?

10:14 AM 5 A. So my recollection is my analysis
6 is based on this construction. Although, to
7 be clear, there's other analysis that does
8 not depend on the claim construction, such as
9 things regarding, you know, the timeliness or
10:14 AM 10 whether it's actually prior art.

11 Q. If the board applied the same
12 construction of acquisition request in this
13 IPR as in the prior IPRs, would the cited
14 prior art render obvious the claims of the
10:15 AM 15 '465 Patent?

16 MR. PRICE: Objection, calls for a
17 legal conclusion.

18 A. That would be up to the patent
19 board. I haven't argued that.

10:15 AM 20 BY MR. JARRATT:

21 Q. So you have no analysis in your
22 declaration about whether the cited prior art
23 would render obvious the claims under the
24 board's construction; is that correct?

10:15 AM 25 A. I believe that's correct, under

1 the specific previous construction. Again,
2 specifically with regard to the aspects that
3 relate to the construction. Again, there are
4 other reasons, for instance, that I discuss
10:15 AM 5 that it is, you know, not according to my
6 understanding of the timeline, appropriately
7 considered prior art.

8 Q. Let's turn back to paragraph 68 in
9 your declaration.

10:16 AM 10 You state in paragraph 68 that the
11 term "acquisition request" is a request for
12 an agent to shop for goods on a customer's
13 behalf.

14 What does it mean for "an agent to
10:16 AM 15 shop"?

16 A. So the particular aspect that I
17 think is the point of disagreement that I
18 understand in terms of the construction is to
19 shop for goods involves that the agent must
10:17 AM 20 complete the transaction for the goods, that
21 is, the delivery agent is the one completing
22 the transaction. The transaction is not
23 simply between the consumer and the seller,
24 so that the delivery agent just picks up and
10:17 AM 25 then delivers goods. That's, again, based

1 on, I think, the specification and the
2 discussion of prior systems.

3 Q. What is the plain and ordinary
4 meaning of shop?

10:17 AM 5 A. To shop means to go out and
6 examine and transact for goods.

7 Q. What actions by an agent in the
8 '465 Patent would mean that the agent is
9 shopping?

10:18 AM 10 A. I think I discuss this throughout
11 the rest of the section, that -- in the terms
12 described throughout the specification where
13 it discusses an acquisition request or a
14 shopping request. The acquisition process is
10:19 AM 15 tied to the transaction, so the agent is
16 performing the transaction at the -- you
17 know, for the user.

18 So there are various things that
19 this can involve, depending on the claim, but
10:19 AM 20 such as looking for or examining for
21 substitute products.

22 But I think the key distinction is
23 that they're acting on the customer's behalf,
24 and part of that, they have to complete the
10:19 AM 25 corresponding transaction and not simply pick

1 up already purchased goods.

2 Q. Is a transaction required for an
3 agent to shop?

4 A. Some form of transaction. I mean,
10:20 AM 5 typically, the standard way would be, you
6 know, completing the purchase by providing
7 the payment, but I do understand there are
8 other forms of transactions, such as barter
9 and so on, that, you know, may not involve an
10:20 AM 10 actual monetary payment.

11 Q. Does the delivery agent need to
12 enter a retail establishment to shop?

13 MR. PRICE: Objection.

14 A. I mean, I had not considered the
10:20 AM 15 contours of, you know, like, specifically if
16 it would need to be or what would be
17 considered a retail establishment. And, I
18 guess, I'm not clear in what your intention
19 or what you mean by that term is.

10:21 AM 20 You know, if something -- what you
21 mean by retail establishment is a place where
22 the actual transaction takes place, then, as
23 I sit here, I'm not sure I see a way around
24 that, but I don't think I considered if there
10:21 AM 25 was some corner cases that might still fall

1 into that without that specific detail. And,
2 again, it may also depend on the claim. So
3 it would help if we were centered or focused
4 on a specific claim.

10:21 AM 5 BY MR. JARRATT:

6 Q. Let me change my terminology then.
7 Let's use the term "shopping location,"
8 because I believe that's used in the
9 specification of the '465 Patent.

10:21 AM 10 A. That is what I recall, yes.

11 Q. So let me rephrase my question.
12 Does the delivery agent need to
13 enter the shopping location to shop?

14 MR. PRICE: Objection.

10:21 AM 15 A. I'm not sure what you mean
16 specifically by "enter." And, again, it may
17 depend on the claim.

18 But, in particular, I do note that
19 at least the primary embodiments that I'm
10:22 AM 20 recalling; and, again, I have to look at
21 specific claims to see if it's a requirement
22 for all claims, but in describing the act of
23 shopping, the typical embodiments would be
24 that the agent travels to the shopping
10:23 AM 25 location to shop for requested products.

1 BY MR. JARRATT:
2 Q. And once the delivery agent has
3 entered the shopping location, does the agent
4 need to walk the aisles to look for a good
10:23 AM 5 shop --
6 A. So, again, maybe I should make
7 clear. I don't agree with the term "enter."
8 I mean, like, I've been to plenty of shopping
9 locations that are outside. I'm not sure
10:23 AM 10 what you mean by "enter." Or there could be
11 shopping locations maybe that don't have
12 aisles.
13 I mean, I would say a typical or a
14 usual occurrence that, yes, an agent, the
10:23 AM 15 delivery agent would walk into an
16 establishment, if that was what the shopping
17 location corresponded to, and may typically
18 walk the aisles. I don't think that's
19 necessarily a requirement.
10:24 AM 20 Again, the requirement is that,
21 you know, as opposed to previous service,
22 which are quite clearly described throughout
23 the patent specification, they do not simply
24 pick up already purchased goods.
10:24 AM 25 Q. So I'm asking specifically with

1 respect to the claims in the '465 Patent, and
2 that the claims use the term "acquisition
3 request."
4 A. Yes, sir.
10:24 AM 5 Q. And your opinion is that an
6 acquisition request is a request for an agent
7 to shop.
8 So I'm trying to determine the
9 requirements of shopping as you set forth in
10:24 AM 10 your construction of acquisition request in
11 the claims.
12 So would a delivery agent need to
13 walk the aisles in a shopping location to
14 meet your definition of the term "acquisition
10:25 AM 15 request"?
16 MR. PRICE: Objection, asked and
17 answered.
18 A. Again, to the extent I understand
19 what you mean by "walking the aisles," there
10:25 AM 20 may or may not be aisles. As I've stated
21 before, it does not involve simply picking up
22 already purchased goods. It involved, you
23 know, performing the transaction for the
24 agent.
10:25 AM 25 BY MR. JARRATT:

1 Q. Which actions by the agent are
2 required for the agent to be considered to be
3 shopping under your construction?

4 A. At the very least, as I've just
10:25 AM 5 stated, they would have to be responsible for
6 performing the transaction that leads to the
7 acquisition, or that, you know, becomes the
8 acquisition of those goods. There may be
9 other aspects of that that do occur, you
10:25 AM 10 know, again, like, such as, again, walking
11 the aisles, allowing for real-time inspection
12 and so on that are also covered as parts of
13 the claim, if we're focusing very
14 specifically on the acquisition request.

10:26 AM 15 You know, as I've stated here, you
16 know, what is meant by the acquisition
17 request -- sorry. Let me find the
18 construction. The request for an agent to
19 shop for goods on a customer's behalf, that
10:26 AM 20 involves the agent making -- completing the
21 transaction for the user or for the consumer.

22 Q. Is there a difference between
23 acquiring and shopping in the context of the
24 '465 Patent?

10:28 AM 25 A. So I think I discuss this at

1 paragraph 74, that the specification uses the
2 terms "shopping" and "acquisition" as
3 synonyms, and, in particular, with regard to
4 acquisition request. It also, I think, at
10:28 AM 5 times uses the term "shopping request" or,
6 you know, in particular "shopping" or
7 "acquisition request." And I think the point
8 is that these should be understood to be the
9 same process.

10:28 AM 10 Q. So let me see if I understand what
11 you just said.

12 So is it your opinion there is no
13 difference between shopping and acquiring?

14 A. In the context of when we're
10:29 AM 15 talking a shopping request or an acquisition
16 request, and I'd point you to paragraph 74.
17 And, in particular, what I state at the end
18 of paragraph 74 is whether we're referring to
19 a shopping request or an acquisition request,
10:29 AM 20 the agent goes to the shopping location and
21 shops for goods on the customer's behalf.
22 They do not simply pick up already purchased
23 goods.

24 Again, that corresponds to the
10:29 AM 25 previous discussion in the declaration, and

1 what I've said here that we're talking about
2 the need for or the requirement of a
3 transaction.

10:29 AM 4 Yeah, shopping and acquisition are
5 broad words. You know, if there's some other
6 context you want me to look at how it's
7 discussed in the patent, I, you know,
8 wouldn't want to speak for every possible use
9 without reading the patent, but particularly
10:30 AM 10 when we're talking about acquisition request
11 and shopping request, and in particular
12 acquisition request as, you know, being
13 shopping, I think that's clearly stated
14 several times throughout the patent.

10:30 AM 15 Q. So your construction of
16 acquisition request based on shopping and
17 acquiring being synonymous, in your opinion,
18 your definition could be a request for an
19 agent to acquire goods on a customer's
10:30 AM 20 behalf?

21 A. So, I mean, I suppose, you know,
22 that would depend on, you know, the judge is
23 deciding it. I suppose, you know, it could
24 be. I don't think that would be helpful, in
10:30 AM 25 my opinion, because I think the issue is in

1 terms of acquisition request, you know, what
2 is specifically meant by acquire seems to be
3 the dispute here.

10:31 AM 4 And, again, I would make clear, as
5 is made clear in the patent, which gives
6 several examples in the interaction of prior
7 systems that what is meant by an acquisition
8 request is more than simply picking up
9 already purchased goods. It involves a form
10 of transaction.

11 Q. When the agent is acquiring goods
12 on behalf of the customer, does the agent
13 need to pay for the goods to complete the
14 acquisition request?

10:32 AM 15 A. As I think I stated, that would be
16 a typical way. There are ways of doing
17 transactions, again, that would not require
18 payment in terms of exchanging money for the
19 goods. It might be barter or other system.

10:32 AM 20 Q. Would the agent need to pay for
21 the good if it's prepurchased by the
22 customer?

10:32 AM 23 A. Would the agent need to pay for
24 the good if it's -- I'm not clear what you
25 mean, I guess, or that sentence doesn't make

1 sense to me.

2 Q. In the example of the '465 Patent
3 in which a customer prepurchases goods --

10:32 AM 4 A. Yes, there is some discussion of
5 various places which are presented as
6 alternatives.

7 Are you looking, for instance --
8 give me a second -- like, paragraph 80, for
9 instance; or where in my report are you; or
10:33 AM 10 where in the patent are you?

11 Q. I was just referencing your last
12 couple of answers in which you reference the
13 prepurchase embodiment.

14 A. Okay.

10:33 AM 15 Q. And I was asking, to complete an
16 acquisition request, when the good is
17 prepurchased by the customer, does the agent
18 need to pay for the good in that scenario?

19 MR. PRICE: Objection.

10:33 AM 20 A. Sorry. Could you repeat that?

21 BY MR. JARRATT:

22 Q. In a situation in which the good
23 is prepurchased by a customer, to complete an
24 acquisition request, does the agent need to
10:33 AM 25 pay for the good?

1 MR. PRICE: Objection.

2 A. So I'm not sure which embodiment
3 or what your notion of payment that you're
4 talking about. It sounds to me like you're
10:34 AM 5 discussing things related to, for instance,
6 paragraph 79 to 81 of my report. So to
7 start, I will point you to there.

8 I can look at the corresponding
9 citations in the patent. I'm just not clear
10:34 AM 10 on what your meaning is of paying for the
11 goods if they're prepaid, and I believe the
12 patent discusses several specific situations,
13 so I can look to those, if you'd like.

14 BY MR. JARRATT:

10:34 AM 15 Q. Can an agent shop, under your
16 construction, without making a purchase?

17 A. I would say without making a
18 transaction, or a purchase as the typical
19 transaction, if you want for convenience to
10:34 AM 20 use the term "purchase" and will understand
21 it to mean transaction, I can try and do
22 that. Again, purchase is a typical way, not
23 the only way that you can do a -- do a
24 transaction.

10:35 AM 25 Q. Let's stick with transaction then.

1 So can an agent shop without
2 making a transaction?

3 A. I don't believe that would be
4 referred to as shopping in the context, or
10:35 AM 5 that should not be how it's understood in the
6 context of this claim construction, which,
7 again, I'm trying to make clear, involves a
8 transaction and is not simply corresponding
9 to pick up and delivery. Again, I think this
10:35 AM 10 is gone over in detail starting about
11 paragraph 79 of my declaration, which refers
12 to the corresponding discussions and the
13 patent at Column 8.

14 Q. The claims of the '465 Patent
10:36 AM 15 recite one situation in which an agent is
16 unable to locate the desired good.

17 A. Right, I recall that generally.

18 Q. Is that correct?

19 A. Can you point me to --

10:36 AM 20 Q. Claim 1 of the '465 patent.

21 MR. PRICE: Counsel, we've been
22 going for about an hour. Is this a good
23 time --

24 MR. JARRATT: After he answers
10:36 AM 25 this question.

1 BY MR. JARRATT:
2 Q. Do you see that in Claim 1?
3 A. I see in Claim 1 it discusses upon
4 failing to locate and identified product of a
10:36 AM 5 set of one or more goods.
6 MR. JARRATT: Okay. Let's keep
7 that in mind, and let's take a break.
8 10 minutes or so?
9 (Recess taken at 10:37 a.m. to 10:46 a.m.)
10:47 AM 10 BY MR. JARRATT:
11 Q. You ready, Dr. Mitzenmacher?
12 A. Yes.
13 Q. Doctor, did you speak with counsel
14 about the substance of this proceeding during
10:47 AM 15 the break?
16 A. No.
17 Q. So I believe before the break we
18 were discussing the portion of Claim 1 that
19 recites, "upon failing to locate and identify
10:47 AM 20 product of the set of one or more goods."
21 A. Yes.
22 Q. If an agent fails to locate and
23 identify product of a set of one or more
24 goods, can they shop for that good?
10:47 AM 25 A. I mean, I think they would have

1 been trying to shop for that good, and then
2 they may shop for a replacement good, if I
3 understand your question. Unless am unclear,
4 that they can certainly transact for a
10:48 AM 5 possible replacement good if they cannot find
6 that good.

7 Q. Would you agree they cannot
8 transact for the identified product if it's
9 not available?

10:48 AM 10 A. I mean, if they have not found the
11 product, I can't speak for, you know, all
12 possible scenarios, but, like, I would say
13 typically they're not transacting for that
14 product.

10:48 AM 15 Q. So then they cannot shop for that
16 good, right, because under your definition
17 shopping requires transacting -- transacting?

18 MR. PRICE: Objection.

19 A. Again, they would have attempted
10:48 AM 20 to shop for that good or they would have been
21 shopping in the general sense of looking for
22 that good. The transaction would not
23 complete in that case, although they could
24 transact for a replacement good.

10:49 AM 25 BY MR. JARRATT:

1 Q. So shopping also includes looking
2 for that good; is that right?

3 A. I -- well, as discussed, I think,
4 in the patent, that could be a typical thing
10:49 AM 5 that is done in the shopping process. I
6 don't believe it's a requirement of the
7 shopping process.

8 Q. Can you attempt to shop rather
9 than perform the act of shopping itself? Is
10:49 AM 10 there a difference there?

11 A. So, again, in the context that
12 we're talking about for the claim
13 construction, the key issue or the key point
14 of dispute is that, you know, a request for
10:49 AM 15 an agent to shop for goods on a customer's
16 behalf includes completing the transaction.

17 So what we have in an acquisition
18 request is, you know, the agent is given a
19 list or the set of items. These are the
10:50 AM 20 desired items, right, so it's a request to
21 shop for goods. You're requesting that they
22 perform that transaction. They may not be
23 able to complete the transaction.

24 One of the reasons they may not be
10:50 AM 25 able to complete the transaction is that they

1 failed to locate an identified product, which
2 is, I think, part of what the problem -- the
3 patent is aiming to solve, and, in
4 particular, this claim discusses the issue
10:50 AM 5 of, in that case, finding a replacement
6 product, essentially updating this
7 acquisition request.

8 Q. You mentioned in your answer that
9 the problem that the patent is intending to
10:51 AM 10 solve. What is that problem that the patent
11 is intending to solve?

12 A. Well, in this case, in this
13 particular claim, it's discussing, you know,
14 again, in the context, the more general
10:51 AM 15 context of having a delivery agent, you know,
16 perform the remote acquisition and delivery
17 of goods. This claim is interested or, you
18 know, relates to this case when one of those
19 goods is -- cannot be identified or located.

10:51 AM 20 And then it discusses steps for determining
21 or for a replacement item and having that
22 replacement item approved. And then, in this
23 case, I guess, in particular, to approve a
24 purchase of the replacement product.

10:52 AM 25 Q. You testified that shopping

1 requires transacting. Is that the plain and
2 ordinary understanding of the term
3 "shopping"?

10:52 AM 4 A. Yes, in the context of this patent
5 or, again, you interpret the plain and
6 ordinary meaning in the context of the patent
7 as one of ordinary skill in the art would
8 understand it.

10:53 AM 9 And, again, as I discuss
10 throughout my report, and, in particular, you
11 know, starting at paragraph 68, I think, and
12 going through, you know, paragraph 87 or so,
13 I discuss, you know, that construction and,
14 in particular, how transactions are a part of
10:53 AM 15 the shopping processes, as one would
16 understand that term in the context.

17 Q. Does the plain and ordinary
18 meaning of a claim term depend upon the
19 context of a patent?

10:53 AM 20 A. I mean, I would say, generally,
21 yes. In particular, words can have a, you
22 know, variety of possible meanings. You
23 would use the meaning that is in the term of
24 the context, or how the term is used in the
10:54 AM 25 context. So, yes, there's -- a word can have

1 multiple or a variety of plain and ordinary
2 meanings. So you would have to look at it in
3 the context in which its being used.

10:54 AM 4 Q. So it's your understanding that a
5 term can have different plain and ordinary
6 meanings depending upon the patent it's used
7 in?

8 MR. PRICE: Objection.

10:54 AM 9 A. I mean, so, for instance, orange
10 can be a color or a fruit. If I wanted to
11 know what the plain and ordinary meaning of
12 orange was, clearly I would need to be
13 looking at the context to determine whether
14 orange was being used as a color or a fruit.

10:54 AM 15 So I think, in general, yes, you
16 must look at the context, you know, to
17 determine the plain and ordinary meaning.

10:55 AM 18 And, again, my understanding is
19 that the plain and ordinary meaning, you
20 know, as typically invoked as one of ordinary
21 skill in the art would understand it.

22 BY MR. JARRATT:

10:55 AM 23 Q. Turning back to paragraph 68 in
24 your declaration, am I correct that
25 Consumeron has a construction of the term

1 "acquisition request" and Consumeron
2 separately has a construction of the term
3 "acquiring"; is that correct?

10:56 AM 4 A. I mean, I'm not sure what the
5 legal framework or if one understands those
6 as separate. You know, they're clearly
7 related. I'm not sure formally if they've
8 presented these as two separate constructions
9 or what the legal framework is for that.

10:56 AM 10 Q. Did you present them as two
11 separate constructions?

12 A. I think I presented them as two --
13 you know, a construction with a further
14 explanation or discussion.

10:56 AM 15 So I think paragraph 68 is rather
16 clear, where I say the construction of the
17 term "acquisition request" as being a request
18 for an agent to shop for goods on a
19 customer's behalf, you know, with "acquiring"
10:56 AM 20 covering the agent completing the transaction
21 or that he's purchasing the goods.

22 Q. Do the terms "acquisition request"
23 and "acquiring" mean different things?

10:57 AM 24 A. Well, I mean, one is a noun and
25 one is a verb. So I'm not sure what you mean

1 they "mean different things."
2 I mean, they certainly are
3 different parts of speech. Like here they're
4 related, and I think I'm giving a clear
10:57 AM 5 explanation of the relationship and
6 understanding.
7 Q. What is the relationship between
8 acquisition request and acquiring?
9 A. So an acquisition request, as
10:58 AM 10 described in the patent, is something that is
11 sent to the delivery agent, you know. In
12 response to the acquisition request, you
13 know, the delivery agent is to acquire the
14 corresponding goods, or that is the purpose
10:59 AM 15 of the acquisition request is to give a, for
16 instance, a set of items to be acquired.
17 The acquiring in this case, to be
18 clear, covers the agent completing the
19 transaction. So, for instance, in talking
10:59 AM 20 about acquiring, it's typically said as
21 acquiring or purchasing. To be clear, that
22 the acquiring involves some sort of
23 transaction. Typically, that would be
24 purchasing. Again, I think I stated that
10:59 AM 25 there may be other ways of completing the

1 transaction, other than, you know, with an
2 exchange of money, such as through barter.

3 Q. Did you provide an explicit
4 construction of acquiring in the prior
11:00 AM 5 Instacart IPRs?

6 MR. PRICE: Objection, foundation.

7 A. Can you (inaudible) the prior IPR?
8 Yeah, I don't -- I don't have those documents
9 in front of me.

11:00 AM 10 BY MR. JARRATT:

11 Q. In this sentence you say, "with
12 acquiring covering the agent completing the
13 transaction, purchasing the goods" --

14 A. Parentheses purchasing the goods.

11:00 AM 15 Q. What do you mean by the word
16 "covering"?

17 A. I mean, that this is how acquiring
18 should be understood or includes this aspect
19 as described in the specification.

11:00 AM 20 Q. Can the acquiring cover other
21 actions?

22 A. Again, I think, you know, they
23 talk about steps that may occur through -- in
24 the process of acquiring, you know, that
11:01 AM 25 depending on the setting may or may not be

1 required. I think, again, the point here is
2 the key differentiation and understanding
3 seems to be this issue of whether the agent
4 completes the transaction.

11:01 AM 5 Q. Based on that answer, so acquiring
6 covers the agent completing the transaction
7 but it can also cover other actions as well;
8 is that correct?

11:01 AM 9 A. So to the extent that acquiring,
10 you know -- so here I'm stating that
11 acquiring is -- and from the context I hope
12 that's clear -- must include some form of
13 transaction, such as a purchase.

11:02 AM 14 If you're just using covering, it
15 could be, like, you know, could possibly
16 include, then there are certainly other
17 things that could be included within the
18 realm of acquiring.

11:02 AM 19 I don't think there are other
20 things that are specifically part of
21 acquiring, unless it's specifically called
22 out in the claims, or there are other
23 aspects, you know, such as what we're talking
24 about here. You know, we've been talking
11:02 AM 25 about Claim 1, the process of potentially

1 acquiring a substitute good. And the process
2 for that is laid out in more detail or more
3 specifically in the claim.

4 Q. Does acquiring cover shopping?

11:02 AM 5 A. I mean, again, I think the way
6 I've stated it previously is that, you know,
7 as in paragraph 74, you know, that the
8 specification uses the term "shopping" and
9 "acquisition" as the synonym.

11:03 AM 10 Q. Does "acquiring" cover picking up
11 goods in the context of the '465 Patent?

12 A. So I'd say, depending on the
13 claim, you could have acquiring if, you know,
14 what you mean, to be clear, like as stated in
11:03 AM 15 paragraph 68, here I mean from the context,
16 covering means that this is, you know,
17 acquiring requires the act of completing the
18 transaction.

19 You know, I just want to
11:03 AM 20 differentiate, simply picking up goods would
21 not be part -- would not constitute
22 acquiring. Certainly in acquiring goods, a
23 typical step would be to pick up the goods,
24 and the patent discusses picking up and
11:04 AM 25 delivering the goods. Again, I would say

1 that's a sort of a -- they're sort of
2 separate steps.

3 Give me one second. I believe I
4 discuss this more clearly in the report.

11:04 AM 5 So I think I would point you here
6 to paragraph 81, where I discuss an
7 embodiment where the agent can pick up and
8 deliver the goods without acquiring them.

9 So, again, I would sort of
11:05 AM 10 separate out that pick up and delivery are
11 separate steps. And, in particular, you
12 know, pick up and delivery can be done
13 without acquisition.

14 Q. So is it your opinion that the
11:05 AM 15 claims of the '465 Patent do not encompass
16 the prepurchase embodiment?

17 A. Can you be clear what you mean by
18 that?

19 Q. Yes. Let's go to immediately
11:05 AM 20 preceding paragraph 80.

21 What point are you trying to make
22 in paragraph 80?

23 A. Yeah. So I believe, as discussed
24 in paragraph 80, the idea that the
11:06 AM 25 acquisition request covers simple and pick up

1 and goods are based on this alternative
2 embodiment. I do not think the alternative
3 embodiment here of simply a prepurchase is
4 covered by these claims and, in particular,
11:06 AM 5 like it's presented as an alternative
6 embodiment that, you know, this is something
7 that I read, the alternatively, like this is
8 something that can be done, this is not
9 something that is being claimed as the
11:07 AM 10 invention.

11 Q. So based on this paragraph, is it
12 your opinion that the claims in the '465
13 Patent are directed to the acquisition
14 services embodiment and not the prepurchase
11:07 AM 15 embodiment?

16 A. So to the extent I understand your
17 phrasing of the question, I believe that is
18 the case when you're looking at Claims 1 and
19 14. They all start with talking about a
11:07 AM 20 method for remote acquisition, both in
21 Claim 1 and 14. And so this would be, you
22 know, corresponding to, I guess, what you're
23 calling acquisition services.

24 Q. Now, if we look at the bottom of
11:08 AM 25 paragraph 80 that we were just describing,

11:08 AM 1 you have a citation to the '465 Patent,
2 Column 5, line 63 through Column 8, line 4.
3 And you say that describes the acquisition
4 services as spanning from steps 110 to 121 of
5 Figure 3.

6 So is it accurate that those
7 portions of the '465 Patent are the
8 acquisition services embodiment?

11:08 AM 9 A. I understand your question. I
10 don't think you phrased that quite correctly.

11 I would say Figure 3 is an
12 embodiment of the acquisition services. You
13 know, so -- sorry, let me -- sorry. So on
14 Column 3 it refers to Figure 3 as a flowchart
15 depicting additional steps involved in a
16 preferred method of the present invention.

11:09 AM 17 All right. So I would view this as an
18 embodiment and describing, you know,
19 describing this embodiment, the acquisition
20 services.

21 Q. So do the claims, at least,
22 encompass the acquisition services embodiment
23 of Figure 3?

11:10 AM 24 A. I'm not sure what you mean by
25 "encompass." I think the claims, you know,

1 should have called out what the claims call
2 out.

3 In particular, you know, for
4 instance, Claim 1 is a method that talks
5 about steps that are, you know, receiving,
6 contacting and so on, and indeed, you know,
7 some descriptions of those steps are included
8 in, you know, Figure 3 as one of the
9 embodiments.

10 Q. So is it your position that
11 there's multiple embodiments in the
12 specification and the claims read on some
13 embodiments but not others, including the
14 prepurchase embodiment, as one example of
15 what -- of an embodiment the claims do not
16 read upon?

17 A. Right. So in terms -- like, I
18 always think of, you know, this is just weird
19 language, and I don't know how lawyers use
20 it, I tend to think of embodiments or things
21 as generally being, yeah, typically one
22 refers to those as things that the claims can
23 read on. I understand legally that there can
24 be embodiments given the specification that
25 do not read on the claims.

1 So if I understand your question,
2 I think, yes, these claims don't read on the
3 prepurchasing version because, yeah, to the
4 extent that this is just pick up and
11:12 AM 5 delivery. Again, if we talk about
6 prepurchasing, if what we mean by that is
7 just they're the pick up delivery steps but
8 then there's not an acquisition step, there's
9 not a transaction taking place.

11:12 AM 10 Q. So we looked at paragraph 82 of
11 your declaration, bottom of that page,
12 paragraph 82, the bottom of page 38.

13 You state that "The claims read on
14 the acquisition service embodiment."

11:12 AM 15 A. Yes.

16 Q. And is one example of that
17 Column 5, line 63 through Column 8, line 4
18 that you cite in the sentence immediately
19 previously?

11:13 AM 20 A. I mean, of course I would have to
21 go through the entirety. My understanding
22 is, to the extent as I describe here, as
23 these correspond to steps of Figure 3, that
24 those would be, you know, those would be
11:13 AM 25 included as parts of potential acquisition

1 services.

2 Q. Is the prepurchase embodiment
3 included in the embodiment of Figure 3?

4 MR. PRICE: Objection.

11:13 AM 5 A. Not to my understanding. I don't
6 see how it could be consistent with Figure 3.

7 BY MR. JARRATT:

8 Q. All right. So the claims -- it's
9 your understanding the claims read on
11:14 AM 10 Figure 3 but not the prepurchase embodiment,
11 which is separate?

12 A. I mean, the claims are the claims.
13 I believe that if we go through the steps of
14 the claims, they would correspond to, I
11:14 AM 15 believe -- you know, we'd have to look at a
16 particular specific embodiment.

17 My recollection is that Figure 3
18 meets the elements of Claims 1 and 14 as
19 described, but the prepurchasing clearly
11:14 AM 20 doesn't.

21 Q. Can we now turn to paragraph 11 in
22 your declaration?

23 A. Sure.

24 Q. Does this paragraph contain your
11:15 AM 25 understanding of the written description

1 requirement of 35 U.S.C. Section 112?
2 A. That is the understanding I've
3 been given by counsel.
4 Q. Did you apply this understanding
11:15 AM 5 in your declaration -- in the analysis
6 portion of your declaration?
7 A. Yes, I believe so.
8 Q. Can you please read the last
9 sentence of this paragraph?
11:15 AM 10 A. Sure.
11 "Given this perspective, in some
12 instances a patent owner can rely on
13 information that is well known in the art to
14 satisfy written description."
11:16 AM 15 Q. Can you give one example, or
16 provide one example of these "some instances
17 that a patent owner can rely on information
18 that is well known in the art to satisfy
19 written description"?
11:16 AM 20 A. Well, sure. All right.
21 So I believe -- I point you to
22 paragraph 55 of my report. You know, as an
23 example, specifically in this case, you know,
24 my understanding of Instacart's allegation is
11:17 AM 25 that the '848 application assumes that the

1 agent will be able to find the product
2 identified, you know, and I believe I've seen
3 a similar statement in Dr. Houh's testimony.
4 And as I attempt to point out, you know, that
11:17 AM 5 that's just lacking in common sense.

6 And, in particular, you know, with
7 relation to paragraph 11, you know, I think a
8 patent owner, during this case, the patent
9 owner could rely on the information that is
11:18 AM 10 well known that, like, you know, if you go to
11 the store, you have a product in mind, you
12 don't always find that product that -- you
13 know, that the product may not be able to be
14 found.

11:18 AM 15 You know, I think that's clear
16 from reading the patent. To the extent that,
17 you're arguing that that's not clearly
18 written in a way that satisfies written
19 description, I would certainly say that
11:18 AM 20 that's a case of where the patent owner can
21 rely on information that is well known in the
22 art.

23 Q. Can that well-known information be
24 used to show what a POSITA would have
11:19 AM 25 understood when reading this specification?

1 A. Can that -- I mean, so if
2 you're -- you know, this may be a question
3 for a lawyer, you know, you'd have to -- if
4 there's specific statutes or so on. I think
11:19 AM 5 I'm explaining this clearly from my
6 understanding and from the technical
7 understanding.
8 And, you know, again, my
9 understanding of what it means as stated in
11:19 AM 10 11, a patent owner can rely on information
11 that is well known in the art to satisfy when
12 a description, right, you know, this is
13 something that would be well known in the
14 art.
11:19 AM 15 Again, I would argue it would not
16 just be known to a POSITA, although certainly
17 it would be known to a POSITA, but that also,
18 again, it's just common sense or common
19 experience as well.
11:20 AM 20 Q. So based on this sentence, it
21 seems to imply that well-known information
22 can be used in some instances but not in
23 other instances.
24 And I'm trying to determine your
11:20 AM 25 understanding of which instances that

1 information can be used in?

2 A. To be clear, that sounds to me
3 like a legal determination, and I am not a
4 lawyer.

11:20 AM 5 I am stating, from a technical
6 standpoint, that I understand it can be used
7 in certain situations. To the extent, you
8 know, I would make an argument, I would say
9 that this seems to me to be a clear situation

11:20 AM 10 that one knows. Again, one of ordinary skill
11 in the art would certainly know when you go
12 to purchase or otherwise transact for an
13 item, the item might not be available. And,
14 again, I think even more so, it's common

11:21 AM 15 knowledge, as I've stated here, you know,
16 even beyond the POSITA, like, one does not
17 need to have a technical background
18 specifically to understand that.

11:21 AM 19 Q. So as you pointed out, you, in
20 fact, used information that's well known in
21 the art in your analysis.

22 Do you know if that was properly
23 used under the law or not?

24 MR. PRICE: Objection, calls for a
11:21 AM 25 legal conclusion.

1 A. I am not a lawyer. I would defer
2 to the attorney.

3 I'm providing a technical opinion.
4 I think my opinion here is clear.

11:21 AM 5 And to the extent I have an
6 understanding, this seems to me that would
7 clearly be a case where, you know, one knows,
8 like the idea being presented, that, like,
9 the application would assume that you're able
11:22 AM 10 to find the product is just, you know, to me,
11 sort of not believable, not comprehensible on
12 its face.

13 BY MR. JARRATT:

14 Q. So because you're not an attorney,
11:22 AM 15 you don't know if your extrinsic evidence can
16 be properly used in the written description
17 analysis in your declaration?

18 MR. PRICE: Objection, misstates
19 testimony.

11:22 AM 20 A. Again, to the extent that you're
21 asking for, you know, some sort of, you know,
22 what are the legal contours, and I would
23 leave that to the attorneys to argue.

24 You know, I am presenting the
11:22 AM 25 understanding, you know, again, from a

1 technical standpoint, although as I've tried
2 to point out here, this isn't even a
3 particularly technical matter. This is just,
4 you know, when you go to a store, the item
11:22 AM 5 you want to be there may not be there. And
6 the idea that somehow the patent assumes
7 otherwise, is just not, to me, believable.

8 BY MR. JARRATT:

9 Q. So is it your testimony that you
11:23 AM 10 do not know, under the law, when you can
11 properly apply well-known information in a
12 written description analysis?

13 MR. PRICE: Objection, asked and
14 answered.

11:23 AM 15 A. I would refer you back to my
16 previous answer. Again, I am not an
17 attorney.

18 You know, to be clear, I've been
19 in several cases where it seems like the
11:23 AM 20 lawyers aren't clear and that the judges will
21 decide, you know, what they determine to be
22 the contours of what's appropriate or not
23 appropriate information to include. And
24 often that's a fight with lawyers as well.

11:23 AM 25 To me, you know, I believe I

1 stated a very clear opinion as to what I
2 believe is an incorrect analysis given by
3 Instacart and Dr. Houh here.

4 BY MR. JARRATT:

11:24 AM 5 Q. Did you use the well-known
6 information you cited in your declaration to
7 show what a POSITA would have found obvious
8 in reading the specification?

9 MR. PRICE: Objection.

11:24 AM 10 A. So to be clear, I know obvious has
11 a variety of legal meanings, so I want to be
12 careful about using that term. You know, to
13 the extent that I understand, I would say
14 that -- you know, I wouldn't say it would be
11:24 AM 15 obvious to a POSITA. It would be -- already
16 be knowledge of a POSITA, as I've stated
17 here.

18 To the extent that I, you know,
19 might use a word for it, I might say that
11:25 AM 20 that's sort of inherent in the shopping
21 experience, right, you know, inherent in the
22 process of acquiring goods from a location,
23 that the location may not have those goods.

24 You know, to the extent you're
11:25 AM 25 saying, would it be obvious to a POSITA? I

1 mean, yes, but not just that. Again, I
2 think, you know, obvious in the colloquial
3 sense.

4 In the more legal sense, again, I
11:25 AM 5 would say this would just be knowledge that a
6 POSITA would have had.

7 BY MR. JARRATT:

8 Q. Do you understand that the word
9 "inherent" or "inherency" has a specific
11:26 AM 10 legal meaning in the context of patent law?

11 A. Much in the same way I understand
12 obvious can have certain meanings in the
13 context. Again, I would not know. I'm not a
14 lawyer, so I wouldn't be presenting a legal
11:26 AM 15 opinion.

16 To the extent that I understand
17 those terms, and your use of obvious in the
18 question, to the extent that I understand the
19 legal terms, I would say, inherent is the
11:26 AM 20 better choice of word than obvious, but that
21 sounds like something for lawyers to fight.

22 Q. So you do not know whether if
23 something is inherent in a specification that
24 would satisfy as a written description
11:27 AM 25 requirement?

1 A. I believe I've heard that term or
2 terminology before. You know, I don't have
3 on hand, you know, what would be a
4 corresponding definition of inherent as used
11:27 AM 5 in that legal sense.

6 But to the extent that I do
7 understand it from a technical standpoint,
8 again, I believe I've stated clearly, I
9 believe it is, you know, inherent in the way
11:27 AM 10 that term is typically used in the shopping
11 experience, that a person may go to an
12 establishment to purchase a good and that
13 good may not be available.

14 Q. And you also don't know whether --
11:27 AM 15 if something is legally obvious in the
16 specification, whether that would satisfy the
17 written description requirement?

18 A. My understanding, to the extent I
19 understand it, is like that alone would not
11:28 AM 20 satisfy the legal requirement. You know,
21 it's certainly something could be obvious
22 and, you know, it would meet the written
23 description requirement.

24 I guess to the extent I've heard
11:28 AM 25 that before, I guess, you know, obvious in

1 the legal and some specific legal sense may
2 not be sufficient.

3 Again, to be clear, my report
4 doesn't say it would be obvious, that this
11:28 AM 5 would simply be already known to a POSITA.
6 And, again, to the extent that I understand
7 the legal difference, I would think inherent
8 is a clearly better term of choice and that
9 it is the nature of the shopping experience
11:28 AM 10 that you may go to an establishment and not
11 find the good that you are looking for.

12 Q. Can this same well-known
13 information be used to fill a disclosure gap
14 in a specification when it comes to written
11:29 AM 15 description?

16 MR. PRICE: Objection, calls for a
17 legal conclusion.

18 A. I'm not -- I'm not sure what you
19 mean or if I've used the term in my report
11:29 AM 20 "disclosure gap." And, again, it sounds like
21 you're using legal terminology. And to be
22 clear, I am not a lawyer.

23 But from the technical
24 perspective, you know, as I stated at the end
11:29 AM 25 at paragraph 11, given this perspective, in

11:30 AM 1 some instances a patent owner can rely on
2 information that is well known in the art to
3 satisfy a written description. And, again,
4 my understanding in patents is, you know, you
5 assume your reader has also just some level
6 of common knowledge.

11:30 AM 7 I can just say, again, the idea
8 that you may go to and establishment and, you
9 know, with a desire to purchase an item and
10 that item may not be available, you know,
11 they may not have the item is, I think, a
12 well-known experience.

13 BY MR. JARRATT:

11:30 AM 14 Q. So you approached your analysis
15 from a technical perspective and not a legal
16 perspective; is that correct?

11:31 AM 17 A. I mean, I am here. My role is to
18 provide, you know, a technical understanding
19 of, you know, the patent and corresponding
20 thereto.

11:31 AM 21 So, you know, clearly there's
22 overlap between the technical aspects and
23 legal aspects. But I, as previously stated,
24 am not an attorney. So to the extent that
25 there were, you know, specific legal

1 questions or doctrines that would need to be
2 argued over, that would be the job of the
3 attorney.

11:31 AM 4 Q. So do the claims of the '465
5 Patent meet the legal requirements of written
6 description under Section 112?

7 MR. PRICE: Objection, calls for a
8 legal conclusion.

11:31 AM 9 A. I mean, to the extent that I can
10 offer an opinion on that, I would say to the
11 level I understand it, I believe that there
12 is -- you know, that there's written
13 description in the patent. Again, I
14 understand that I am not an attorney and, you
11:32 AM 15 know, the legal aspects of that argument
16 would be argued by the lawyers, yeah, and my
17 report provides technical basis or
18 understanding for that, to the extent that
19 that's needed.

11:32 AM 20 MR. JARRATT: Okay. I think we've
21 been going about another hour. Do you
22 want to take a break? 10 minutes.

23 THE WITNESS: Sure.

24 (Recess taken at 11:32 a.m. to 11:38 a.m.)

11:38 AM 25 BY MR. JARRATT:

1 Q. Dr. Mitzenmacher, did you speak
2 with counsel about the substance of this
3 proceeding during the break?
4 A. No.

11:39 AM 5 Q. Let's now turn to paragraph 46 in
6 your declaration. And this paragraph
7 references the '848 application. I'm going
8 to go ahead and give you a copy of that,
9 which was previously marked Exhibit 1011 in
10 this proceeding.

11 MR. JARRATT: For the record, this
12 is U.S. Patent Application 13/270,848.
13 BY MR. JARRATT:

14 Q. All right. So in this
11:40 AM 15 paragraph 46, at the top of the next page,
16 there's a sentence that begins, "Whether the
17 customer received."
18 Can you read that sentence?
19 A. Sure.

11:40 AM 20 "Whether the customer received the
21 wrong product because it was out of stock or
22 an order picker misidentified the desired
23 item, the specification need not spell out
24 these well-known scenarios."

11:40 AM 25 Q. And when you say "the

1 specification," are you referring to the
2 specification of the '848 application?

3 A. I believe so, yes. That's what's
4 discussed in the paragraph.

11:40 AM

5 Q. Okay. All right. Let's look at
6 this misidentified scenario. "An order
7 picker misidentified the desired item."

8 So is this sentence saying that a
9 situation of the order picker misidentifying
10 the customer's desired item, that that's
11 something that was known prior to the '848
12 application?

11:41 AM

13 A. I believe it would be a known
14 experience that people have -- you know, I'd
15 expect most people have experienced
16 themselves in one form or another.

11:41 AM

17 Q. And in the situation when the
18 order picker misidentifies the desired item,
19 the customer would receive the wrong product
20 prior to the '848 application?

11:41 AM

21 A. I believe so.

22 Q. Is an example of this -- do you
23 mean that if a customer ordered red apples
24 but the order picker instead grabbed green
25 apples, the customer would receive the wrong

11:41 AM

1 product?

2 A. I suppose that could be an example
3 of, you know --

11:42 AM

4 Q. So how does the '848 application
5 solve that problem?

6 A. I mean -- so give me a second.

11:42 AM

7 I wouldn't want to speak for all
8 the possible ways that it solves the problem,
9 but, in particular, you know, the '848 Patent
10 is directed towards processes, which would
11 allow interaction between the agent, I guess,
12 the delivery agent and the customer in order
13 to make sure the appropriate items were
14 picked.

11:43 AM

15 Q. So is one example of an agent
16 sending an image of the item they grabbed to
17 the customer?

18 A. That could be, yes.

11:43 AM

19 Q. So in the apple example, if the
20 agent grabbed the wrong product, the green
21 apples, the agent will send an image of the
22 green apples to the customer?

11:43 AM

23 A. I would have to go through it, but
24 I believe that would be at least one of the
25 scenarios possible under the '848 Patent.

11:43 AM 1 Q. Right. And because this is a
2 mistake on the part of agent, right, he
3 thinks he's taking pictures of the desired
4 item but he's really take a picture of the
5 wrong item the green apples; is that correct?

6 A. I understand your hypothetical
7 scenario.

11:44 AM 8 Q. So the agent is taking a picture
9 of the wrong item and sending it to the
10 agent in this scenario; is that correct?

11 Sorry. The agent -- strike that.

12 A. It's your scenario.

11:44 AM 13 Q. The agent is taking a picture of
14 the wrong item and sending it to the customer
15 for inspection; is that correct?

16 A. In this case, under your scenario,
17 if I understand right, they're taking a
18 picture of an item that they selected, you
19 know, for approval by the customer. And if
11:44 AM 20 they've picked the wrong item, then in that
21 case it would be the wrong item.

11:44 AM 22 Q. So in the agent's mind, the
23 desired product is available, and he grabs
24 it, takes a picture of it, he just has the
25 wrong item; is that correct?

1 MR. PRICE: Objection, incomplete
2 hypothetical.
3 A. To the extent I understand the
4 scenario you're providing, I think that's the
11:44 AM 5 case.
6 BY MR. JARRATT:
7 Q. So if the agent sends a picture of
8 the customer -- sends a picture of the
9 customer -- excuse me. Strike that.
11:44 AM 10 The agent sends a picture to the
11 customer of the wrong item, what would then
12 happen in the '848 application?
13 A. So, like, if you're asking me to
14 analyze a specific scenario that you're
11:45 AM 15 making up under the '848 Patent, I mean, I'm
16 happy to try and do so, but that's, like,
17 that may take some time, and I will have to
18 go through the patent. You know, if that's
19 what you'd like, I'm happy to do that. But
11:45 AM 20 I'm just letting you know.
21 Like the '848 Patent -- or the
22 '848 Patent application, as I recall, covers,
23 you know, a variety of situations and has,
24 you know, multiple claims. So there may be
11:46 AM 25 many ways that it handles that situation. If

1 you'd like me to do that analysis with regard
2 to these claims, I'm happy to do so.

3 Q. You testified that the '848 --
4 okay, actually, strike that.

11:46 AM

5 Let's move back to paragraph 46.
6 Later in the paragraph you state, "The '848
7 application resolves" -- sorry.

11:46 AM

8 "Further, whatever the underlying
9 reason for the wrong product being
10 identified, the '848 application resolves it
11 with the agents who provide detailed
12 information about the identified product and
13 provide real-time feedback about the
14 product."

11:47 AM

15 So I'm asking specifically about
16 how the '848 application resolves the problem
17 of the agent sending a picture of the wrong
18 item to the customer.

11:47 AM

19 A. Okay. So if we're talking about
20 that high level, like I said, that's in the
21 report, then I think we've discussed it.
22 That one of the ways that can be resolved is
23 that, you know, the agent would show the item
24 to the customer, and the customer could, you
25 know, interacting with the agent, say no,

11:47 AM

1 that's not the right item or I refuse that
2 item.

11:47 AM 3 Q. So if the customer rejects the
4 item because it's wrong, like you just said,
5 would the agent go back and grab the desired
6 product based on the customer's feedback?

11:48 AM 7 A. I would have to go back through
8 the patent, but I believe that would be one
9 of the scenarios that would be a possible
10 result.

11 Q. Once the agent has grabbed the
12 correct product, the desired product, would
13 the agent then send an image of the desired
14 product to the customer?

11:48 AM 15 A. That would be one of the possible
16 outcomes. And, again, I think there are a
17 variety of outcomes discussed throughout in
18 the '848, and I would have to go through the
19 '848 to discuss all the possible ways or
11:48 AM 20 outcomes.

21 Q. Can you go to paragraph 57 in your
22 declaration? Can you read that first
23 sentence into the record, please?

11:49 AM 24 A. "Thus, although one embodiment
25 contemplates that the agent locates the

1 product identified in the acquisition
2 request, the fact remains that when the agent
3 arrives the product may be out of stock."
4 Q. So this one embodiment you mention
11:49 AM 5 in this sentence, is it your opinion that the
6 claims in the '465 Patent do not cover this
7 one embodiment in which the agent locates the
8 product identified in the acquisition
9 request?
11:50 AM 10 A. I mean, I think you'd have to
11 point me to a specific claim.
12 Q. Claim 1 of the '465 Patent.
13 A. I mean, give me a second.
14 I mean, to the extent that I
11:51 AM 15 understand your question, that Claim 1 is
16 discussing a method and the method comprises
17 certain steps. And the steps include, upon
18 failing to locate and identify a product; and
19 similarly, there's a step that upon receiving
11:51 AM 20 approval of the purchase from the customer
21 acquiring the replacement product. So this
22 sounds like a legal question.
23 But my understanding is that, you
24 know, to infringe on, I guess, a method step,
11:51 AM 25 you know, you must complete the steps of the

11:52 AM 1 method. So I think you would -- it would be
2 upon a failing to locate an identified
3 product, that would be the situations when
4 the full method, you know, would be -- I'm
5 not sure what the right word is, when the
6 full method would occur, I guess.

11:52 AM 7 Q. So you just testified that Claim 1
8 recites the agent does not locate the
9 identified product, and the embodiment that
10 you reference in paragraph 57 contemplates
11 that the agent locates the product identified
12 in the acquisition request.

13 So does Claim 1 not encompass that
14 one embodiment you mentioned in paragraph 57?

11:52 AM 15 MR. PRICE: Objection.

16 A. I mean, to the extent that you're
17 saying, like, if there was an order that, you
18 know, where there was no failure to locate an
19 identified product, would that read on the
20 claim? I mean, I think, again, this is a
21 method. So it may depend on, you know, the
22 implementation or the understanding of the
23 method.

11:53 AM 24 I mean, typically a method,
25 statement infringement, I think, legally only

1 occurs when all the steps occur; but if you
2 had a process that, you know, upon failing to
3 locate the product would do these steps. But
4 in the cases where it found everything, it
11:53 AM 5 would obviously not need to do, for instance,
6 finding a replacements product. I guess
7 maybe that instance or occurrence wouldn't
8 infringe, but that sounds more like a legal
9 question of, you know, when you have
11:54 AM 10 something that infringes in some instances
11 and not others.

12 BY MR. JARRATT:

13 Q. So does Claim 1 -- strike that.

14 So in the first sentence of
11:54 AM 15 paragraph 57 you mention this one embodiment
16 contemplates an agent locates the product
17 identified in the acquisition request. And
18 you cite the '848 application at paragraph
19 23.

11:54 AM 20 A. Yes.

21 Q. Do you mean that embodiment is
22 described in paragraph 23?

23 A. I mean, I think paragraph 23 is
24 typically describing an experience wherein,
11:55 AM 25 you know, I would expect in most cases that

1 the product found by the agent is the one
2 that the user wants. I mean, that paragraph
3 also discusses if that is not the case. And,
4 again, it could be that is not the case
11:56 AM 5 because, as you've mentioned, either the
6 agent may have made a mistake or the product
7 was not available and the agent is attempting
8 to check or offer an alternative.

9 Q. Can you show me in that paragraph
11:56 AM 10 where it describes an item not being found by
11 an agent?

12 A. Again, I think that's, you know,
13 as I state, I'm not sure it uses those words.
14 You know, I discuss this clearly in the next
11:56 AM 15 sentence, you know, because the inventive
16 contribution was not directed to the various
17 well-known circumstances that would lead to
18 the delivery of wrong or unsatisfactory
19 products, but what to do in the case that the
11:56 AM 20 inspected product is wrong or unsatisfactory,
21 there's no requirement that the
22 specifications spell out these well-known
23 concepts in detail.

24 So, I mean, I'm not sure it uses
11:57 AM 25 those words. Again, I think, you know, the

1 whole point of having the delivery agent, you
2 know, show you, for instance, pictures is to
3 make sure that this is what you want. And,
4 again, I think it's clear that one of the
11:57 AM 5 situations you might not get what you want is
6 the specific item isn't there.

7 Q. So you said paragraph 23 doesn't
8 say the specific words, an agent doesn't find
9 an item. So which words does it use that a
11:57 AM 10 POSITA would understand to mean that?

11 A. I mean, I would say that that
12 follows, I guess, from the beginning of the
13 next paragraph 24. It says, "Next the
14 customer either approves or rejects
11:58 AM 15 acquisition of the inspected product." And
16 following, "If the product is rejected, the
17 customer has the choice of inspecting another
18 product or terminating the service."

19 So, again, this deals specifically
11:58 AM 20 with the situation where the item that you
21 would like is not found.

22 Q. In the first sentence of paragraph
23 24 you just read, it says, "the inspected
24 product."

11:59 AM 25 What product is that referring

1 to?

2 A. I suppose it's the product that

3 was selected or chosen by the agent in 23.

4 And, again, this does go on. "If

11:59 AM 5 the customer requests further shopping, the

6 delivery agent will move to other similar

7 products or may travel to another location in

8 search of a satisfactory product."

9 Q. If we go back to the top of

11:59 AM 10 paragraph 23 --

11 A. By the way, before we end, besides

12 paragraph 57, I'd also point you to

13 paragraph 58, which covers, I think, the

14 Heinz tomato ketchup example, which I

12:00 PM 15 understand appeared in some of the

16 discussions with the patent board.

17 Q. Can you specify which discussions

18 with the patent board you just referred to?

19 A. My recollection is that it's

12:00 PM 20 Exhibit 2010, but I'd have to look at the

21 exhibits.

22 Q. Are you referring to the footnote

23 on page 23 of your declaration?

24 A. Yes. Sorry. Thank you for

12:01 PM 25 pointing -- that was actually Exhibit 2012.

1 Q. Can you read that footnote into
2 the record?

3 A. Sure.

4 "I understand that during the
12:02 PM 5 examiner interview of related U.S. Patent
6 Application No. 17/585,779, the '779
7 application, the examiner indicated that the
8 Heinz ketchup example was operating in
9 accordance with the invention," Exhibit 2012
12:02 PM 10 at seven to eight. "Nonetheless, to expedite
11 prosecution, the applicant removed the
12 failing to locate language from the pending
13 claims."

14 Q. What's your understanding of the
12:02 PM 15 quote in that first sentence, "was operating
16 in accordance with the invention"?

17 A. Well, it would be helpful if we
18 had Exhibit 2012. My recollection, there was
19 a discussion of the question about Heinz
12:03 PM 20 application of the bottle where if, you know,
21 the actual product requested was not there,
22 that their -- you know, that a substitute
23 would accordingly be offered.

24 I believe the example used sort of
12:03 PM 25 regular Heinz tomato ketchup and then

1 followed with organic tomato ketchup. You
2 can imagine that that substitution may not be
3 satisfactory because of the -- you know,
4 organic may be more expensive or so on.

12:03 PM 5 And I believe in my recollection
6 of that exhibit and walking through that
7 example, the entire point was, you know, the
8 applicant was expressing the common situation
9 that, you know, the desired product might not
12:03 PM 10 be there and so an alternative product might
11 be presented in its place.

12 Q. Did the examiner agree with the
13 applicants that the Heinz ketchup example was
14 covered by the '848 application?

12:04 PM 15 MR. PRICE: Objection, foundation.

16 A. You'd have to give me the
17 document. But, again, my recollection of the
18 discussion, as presented, was that the
19 examiner had agreed, as I quote from the
12:04 PM 20 exhibit, "was operating in accordance with
21 the invention."
22 BY MR. JARRATT:

23 Q. What does "the invention" in that
24 quote refer to?

12:04 PM 25 A. I imagine it would refer to the

12:04 PM 1 '779 application. But, again, if we look at
2 the discussion, the discussion is actually
3 quite broad, as I recall, regarding the
4 issues of substitution being covered by, you
5 know, the specification and the desired goals
6 of the patent. In this case there was
7 another patent in the family.

8 Q. Okay. If we go back to your
9 paragraph 23. Excuse me. Sorry. Paragraph
10 23 in the '848 application, which is
11 Exhibit 1011.

12 A. Sorry.

13 Q. It's my fault.

14 So the first sentence says, "Once
12:05 PM 15 a store location is selected, the selected
16 delivery agent travels to the store location
17 as indicated at step 113 and finds the
18 desired product to be acquired."

19 A. Yes.

12:05 PM 20 Q. Does "the desired product to be
21 acquired" refer to the product the customer
22 identified in the acquisition request?

23 A. Yes. That would typically be --
24 that would be the understanding of what
12:05 PM 25 the -- at that point the desired product to

1 be acquired is. Again, there may be a
2 substitute or replacement offered.

3 Q. If we skip to the sentence about
4 in the middle of the paragraph that starts
12:05 PM 5 with "The delivery agent then enters."
6 Do you see that?

7 A. Okay. So this is talking about in
8 one embodiment the delivery agent arrives at
9 the selected location, and then I understand
12:06 PM 10 they enter the location and identify the
11 product of interest.

12 Q. And that product of interest,
13 again, does that refer to the product the
14 customer identified in the acquisition
12:06 PM 15 request?

16 A. Yeah. I mean, depending on how it
17 was identified, it could be a specific item
18 or one of the classic items or so on. But it
19 would typically be what the user has
12:06 PM 20 requested.

21 Q. What does this paragraph disclose
22 that the agent should do when the customer's
23 product of interest is identified by the
24 agent?

12:07 PM 25 A. The customer -- I mean, the

1 paragraph, I think, will speak for itself,
2 but some of the steps it refers to
3 subsequently are communicating to the
4 customer that the product has been identified
12:07 PM 5 and the customer has the option of inspecting
6 the product in real-time.

7 Q. Anything else?

8 A. I mean, again, the paragraph goes
9 on. Do you want me to read through to the
12:07 PM 10 end?

11 Q. Well, so the next sentence says,
12 "If a customer chooses to inspect the
13 product, the customer will communicate
14 instructions to the delivery agent at 118 and
12:07 PM 15 the delivery agent will utilize the digital
16 image capture device 46 to transmit real-time
17 data to customer computer 30."

18 Is the purpose of that so the
19 customer can inspect the product that they
12:08 PM 20 identified in the acquisition request?

21 MR. PRICE: Objection.

22 A. Yeah, I mean, again, I think one
23 of the points of this whole set of patents is
24 that for various reasons the wrong item may
12:08 PM 25 have been chosen, so this can give the

1 customer the opportunity to inspect the
2 product.
3 BY MR. JARRATT:
4 Q. To be clear, the product that was
12:08 PM 5 inspected by the agent here or grabbed by the
6 agent was the product identified by the
7 customer in the acquisition request, correct?
8 A. I mean, that was clearly the main
9 case, or the intention. But the entire point
12:09 PM 10 of the patent is that there may be wrong or
11 unsatisfactory products selected, right. So
12 I think, you know, their goal, obviously, the
13 agent is acting on behalf of the customer is
14 to find the desired product.
12:09 PM 15 There are various reasons or
16 well-known circumstances that could lead to
17 the delivery of wrong or unsatisfactory
18 products, and that's what the, you know, this
19 patent application and, you know, also the
12:09 PM 20 '456 [sic] Patent is one of the things that
21 they're focused on, one of the issues they're
22 trying to, you know, to solve.
23 Q. So according to this section of
24 the '848 application, does the agent need to
12:10 PM 25 make a judgment call about what to do when he

1 identifies the customer's desired good?

2 A. I'm not clear what you mean or

3 what is a judgment call.

4 Q. Let me rephrase.

12:10 PM 5 Does the application affirmatively

6 state what the agent is to do when they find

7 the customer's desired item?

8 A. I mean, this is discussing at

9 least one embodiment. To the extent I

12:11 PM 10 understand your question, you know, I think

11 we've already gone over, the delivery agent

12 then communicates to the customer that the

13 product has been identified, and then there

14 are steps after that. Am I clear? Is that

12:11 PM 15 to what you're referring?

16 Q. Yes.

17 So it appears that the '848

18 application tells the agent what to do if

19 they find the customer's desired item,

12:11 PM 20 correct?

21 A. And this is one of the embodiments

22 or so on discussed, or if we're focused on

23 this paragraph, I think we agreed that --

24 we've read that sentence.

12:11 PM 25 Q. So you had testified that

1 sometimes the product is not going to be
2 found by the agent, maybe it's out of stock
3 or for some other reason. So if the
4 identified product is out of stock and the
12:12 PM 5 agent can't locate it, what steps should the
6 agent take according to this portion of the
7 '848 application?

8 A. Again, you know, I think one
9 reading this would understand that the
12:12 PM 10 delivery agent would, again, contact the
11 customer, you know, potentially with a
12 replacement product or for discussion of a
13 replacement product.

14 As I say in paragraph 57, you
12:12 PM 15 know, the "'inventive contribution' was not
16 directed to the various well-known
17 circumstances that would lead to the delivery
18 of wrong or unsatisfactory product," but what
19 to do in the case that it was wrong or
12:12 PM 20 unsatisfactory, you know, there is no
21 requirement, but the specifications spell out
22 these well-known concepts in detail.

23 Again, I think, you know, the
24 paragraph is clear that the purpose is, you
12:12 PM 25 know, the customer's requested products, the

1 delivery agent will show it, the products, to
2 determine, you know, what is acceptable to
3 the user.

12:15 PM 4 Q. All right. Let's turn to
5 paragraph 4 in the '848 application.

6 A. Paragraph 4?

7 Q. Yes.

8 Does paragraph 4 describe some of
9 the known problems with internet shopping
12:15 PM 10 prior to the '848 application?

11 A. That appears to be its intention.

12 Q. Was one of the known problems with
13 internet shopping inadequate pictures?

14 A. That could potentially be a
12:16 PM 15 problem.

16 Q. Why would the picture referenced
17 in this paragraph be inadequate?

18 A. I mean, in particular, it says,
19 "often a picture may not be available for the
12:16 PM 20 item or the picture will be inadequate to
21 accurately depict the item." So it may just
22 be a not particularly a good picture.

23 Q. Is it fair to say that this
24 information about inadequate pictures was
12:16 PM 25 already known to a POSITA prior to the '848

1 application?

2 A. I'm not sure I've analyzed that
3 specific question, but it seems to me that
4 they're talking about background, and so I
12:16 PM 5 think that would be something that would be
6 known to someone with skill in the art.

7 Q. If you turn to paragraph 29 of the
8 '848 application.

9 A. Sure.

12:17 PM 10 Q. What does this paragraph generally
11 describe?

12 A. Give me a second.

13 I mean, I think, at a high level,
14 it discusses a customer, you know, generating
12:18 PM 15 a list in advance for items that it later
16 wants to provide to a delivery agent. I
17 guess one thing I noticed, as I sit here, is
18 that, you know, at the top of the paragraph
19 it refers to creating an e-shopping --

12:18 PM 20 THE REPORTER: A new?

21 A. It discusses generating an
22 e-shopping wish list, and I think that sort
23 of adds to my previous discussion when it's
24 creating, you know, a wish list of things
12:19 PM 25 that one desires. I think typically one

1 understands that you might not get all the
2 things that you desire for reasons, such as
3 they're not available when you go to purchase
4 them. But, again, at a high level, this
12:19 PM 5 seems to be the process of setting up a list
6 that could be given to a -- to a delivery
7 agent.

8 Q. About halfway down there's a
9 sentence that begins, "A customer may travel
12:19 PM 10 to a retail establishment and either
11 utilizing in-house gear provided by the
12 retail establishment or utilizing personal
13 equipment, such as a cell phone incorporating
14 a camera, barcode or QR code scanning device,
12:20 PM 15 record which products the customer may be
16 interested in obtaining at a future time.

17 For each product in the list, the customer
18 sends information regarding the products,
19 just pictures, bar codes, QR codes, video
12:20 PM 20 instructions, recipes, specifications,
21 ingredients where manufactured, et cetera, to
22 server 14."

23 Am I correct that the customer is
24 in -- himself or herself in the retail
12:20 PM 25 establishment scanning the actual goods on

1 the shelf in this situation?

12:20 PM 2 A. I mean, they're in a retail
3 establishment, I guess, gathering information
4 to create a list of desired items. I guess
5 I'm not sure how you phrased the question.
6 It's not clear from my understanding that
7 that would necessarily be the same retail
8 establishment that the delivery agent would
9 go to at a later time.

12:21 PM 10 Q. So do you understand this wish
11 list to be different from the customer's
12 acquisition request described in connection
13 with Figure 3?

12:21 PM 14 A. I mean I assume that the idea
15 here, although we'd have to go back over to
16 check, is that the wish list is, you know,
17 sort of preinformation, that a user might use
18 to construct an acquisition request.

12:21 PM 19 Q. Is it correct the acquisition
20 request identifies products the customer
21 wants immediately, and the wish list is
22 products the customer wants in the future; is
23 that accurate?

24 MR. PRICE: Objection.

12:21 PM 25 A. I mean, you know, it does discuss

12:22 PM 1 that a wish list may be interested in
2 obtaining certain items at a future time. So
3 typically I would assume, you know, that
4 the -- that in creating a wish list, it's
5 like, you know, sort of like a note or a
6 Post-It note you would keep for yourself of
7 things you'd like. And, again, that could be
8 used later to construct an acquisition
9 request.

12:22 PM 10 BY MR. JARRATT:

11 Q. Since the customer is in the
12 retail establishment, they could just buy the
13 products themselves, correct; but they're
14 doing something different, correct, they're
15 creating a wish list?

16 A. Right. So there may be a variety
17 of reasons why the customer would not want
18 that, to make the purchase immediately. You
19 know, apparently, if they are there, they
12:22 PM 20 potentially could, if they had the item
21 available.

22 Q. So in this wish list embodiment,
23 is it correct the customer sends the product
24 information to server 14?

12:23 PM 25 A. As described in the embodiment, it

1 does discuss sending information to
2 server 14. I admit, I'd have to go back to
3 the previous paragraph to see what server
4 that was or what it corresponded to.

12:23 PM 5 Q. What information could that
6 product information sent to server 14
7 include?

8 A. I mean, it gives a list of
9 examples. And right there in the sentence

12:24 PM 10 that we've read, it could be pictures,
11 barcodes, QR codes, video instructions,
12 recipe specifications, ingredients where
13 manufactured and then et cetera. So I
14 believe it would cover a large variety of

12:24 PM 15 information and information types,
16 potentially.

17 Q. So in this embodiment, the
18 customer is sending information to the
19 server, but in the embodiment of Figure 3 we

12:24 PM 20 discussed earlier, it's the agent sending
21 product information to the customer; is that
22 correct?

23 MR. PRICE: Objection.

24 A. I mean, I would have to go back to

12:24 PM 25 Figure 3. Like, again, this is sort of a

1 prestep, you know, that allows the customer
2 to create, again, this sort of wish list,
3 which would then be used to, you know, be
4 presented to a selected delivery agent as
12:25 PM 5 discussed in the rest of the paragraph.
6 BY MR. JARRATT:
7 Q. So taking a step back, is it fair
8 to say that this wish list embodiment is
9 different than the embodiment of Figure 3 we
12:25 PM 10 discussed earlier?
11 A. I mean, I guess I'm not quite
12 clear what you mean by "different." It seems
13 to be for -- you know, as I read it, that
14 this includes steps that would occur before
12:26 PM 15 the start of Figure 3 but would be consistent
16 with Figure 3.
17 Q. Based on these embodiments being
18 consistent, would a POSITA have found it
19 obvious to combine these two different
12:26 PM 20 embodiments?
21 MR. PRICE: Objection, calls for a
22 legal conclusion.
23 A. You're asking me questions outside
24 of my declaration. I haven't done that
12:26 PM 25 analysis. I would have to consider what the

1 question is and try and determine that.

2 BY MR. JARRATT:

3 Q. I'm not asking a legal conclusion.

4 I'm asking from a perspective of a POSITA.

12:27 PM 5 At the relevant time, would that POSITA find

6 it obvious to combine steps in this wish list

7 embodiment with the embodiment of Figure 3?

8 MR. PRICE: Same objection.

9 A. Sorry. I think you are asking for

12:27 PM 10 an analysis or some sort of conclusion.

11 You'll have to point me to my report. I

12 don't think I've considered that question,

13 and I don't think I'd be able to answer that

14 question without doing some form of analysis.

12:27 PM 15 BY MR. JARRATT:

16 Q. If we turn to paragraph 62 of your

17 declaration.

18 A. Sorry. Paragraph 62?

19 Q. Correct.

12:28 PM 20 Actually, you know what, let's

21 strike that and let's instead go to

22 paragraph 64.

23 A. Okay. But to be clear, I think 62

24 is sort of related to your question, in that,

12:28 PM 25 you know, as noted in 62, paragraph 29 is

1 useful for demonstrating or explaining what
2 are sorts of information that can be related
3 to a product. But, you know, go on.

12:29 PM 4 Q. In paragraph 64, it states, "In
5 fact, the application describes that the
6 image capture device include image
7 recognition software that a POSITA
8 understands is used to identify a scan bar
9 or QR codes to obtain images from links."

12:29 PM 10 What do you mean by "a POSITA
11 understands" in this sentence?

12 A. That the use of QR codes in the,
13 you know, 2000 and on time frame was all
14 understood. So a QR code would typically
15 contain a, you know, limited amount of
16 information. One of the major uses of that
17 information, particularly in products and
18 product advertising, was to use a QR code to
19 encode a link to a website. That would be
12:30 PM 20 the standard way of, you know, getting images
21 or additional information from a QR code.

22 Q. Is that described in paragraph 8
23 of the '848 application that you cite?

24 A. Yeah, so in paragraph 8, it
12:31 PM 25 specifically talks about having, you know,

1 barcodes, QR codes that can be used in
2 identifying and communicating information
3 about the product of concern.

4 You know, again, I think we've
12:31 PM 5 seen in paragraph 9 that what we would mean
6 by information about a product, it would
7 include things such as described or noted in,
8 you know, paragraph 62, would include things
9 like pictures, video instructions and so on.

12:31 PM 10 And, again, the way that that was known to be
11 done and was commonly done, well before the
12 patent, was that the QR code encode link
13 information.

14 Q. Does paragraph 8 itself state that
12:32 PM 15 the image recognition software can be used to
16 scan barcodes and obtain images?

17 A. I mean, I don't think it used
18 specifically, like, the sentence reads, "It
19 can be used -- barcodes, QR codes can be used
12:32 PM 20 in identifying and communicating information
21 about the product of concern."

22 So, again, the typical way that
23 would be done is to send information by way
24 of a link, which would include things like
12:32 PM 25 pictures, and that's consistent with, as I

1 pointed out, you know, in paragraph 62.
2 Other paragraphs in the
3 application, such as, you know, if we look at
4 paragraph 62, you know, it talks at
12:33 PM 5 paragraph 23 about getting product data;
6 paragraph 30, talking about using QR codes to
7 get information related to a product; and in
8 paragraph 29 discussing what is meant by
9 information regarding the product, including
12:33 PM 10 pictures.
11 Q. So let me see if I have it right.
12 So you stated that in paragraph 8,
13 "It doesn't explicitly say you can use image
14 recognition software to scan barcodes to
12:33 PM 15 obtain images, but it is typically done."
16 A. I'd say, and it's also consistent
17 and described, as I described in paragraphs,
18 you know, 62 and 63, elsewhere.
19 Q. Where does that understanding that
12:33 PM 20 is typically done, where does that come from,
21 that understanding?
22 A. So let me check.
23 It comes from, you know, being
24 alive in the 2000 to 2010 time period. I've
12:34 PM 25 worked on other cases that involved QR codes

12:34 PM 1 and I've looked at their history. And I know
2 that they started to be used in advertising,
3 I believe, it was in the late '90s and were
4 commonly in use for this sort of approach,
5 again, by the, you know, very early 2000s
6 time period.

12:34 PM 7 I think at paragraph 64 I have
8 several other exhibits that are related to
9 the history. So if you have Exhibit 2014,
10 2015 and 2016, I could refer to those.

11 Q. And is the point of citing to
12 those exhibits and information, is that to
13 show what a POSITA understood at the time of
14 the '848 application?

12:35 PM 15 MR. PRICE: Objection.

16 A. That's my recollection, but I'd
17 have to see the documents or the exhibits to
18 confirm that.

19 BY MR. JARRATT:

12:35 PM 20 Q. Why did you include that
21 understanding of a POSITA in paragraph 62 of
22 your declaration? Excuse me. 64 of your
23 declaration?

12:35 PM 24 A. I mean, I guess I'm responding to
25 the various arguments that were made in your

12:36 PM 1 report -- or in the -- by you reciting these
2 proceedings as noted at the heading. You
3 know, I'm describing that the '848
4 application supports, you know, the obtaining
5 and sending to the customer the information
6 determined from the barcode or QR code,
7 including at least one image of the
8 replacement product limitation.

12:36 PM 9 I believe your cite was suggesting
10 that somehow, you know, just the fact that
11 there was a QR code wouldn't have been clear
12 that that involved sending an image. And,
13 again, you know, it's -- in my opinion,
14 that's clearly incorrect but one of the
12:36 PM 15 standard ways in which images were sent at
16 the time period well before the patent.

17 THE STENOGRAPHER: Did you say
18 incorrect or correct?

12:36 PM 19 A. I think I said incorrect, that
20 their assertion is incorrect, because that
21 was a common way that information, or in
22 particular, pictures would be distributed.

23 BY MR. JARRATT:

12:36 PM 24 Q. Was it necessary to include the
25 knowledge of a POSITA to rebut a petitioner's

1 positions?

12:37 PM 2 A. I mean, in my opinion, I don't
3 think so, because that's, I think, the
4 position -- the petitioner position on this
5 is, you know, incorrect, not backed by facts,
6 you know, but it's sort of like, you know, if
7 you're going to make an argument I disagree
8 with, I always find it helpful to, you know,
9 provide additional understanding or evidence
10 in ways that I can.

11 Q. Does that evidence show that it
12 would have been obvious to use image
13 recognition software to scan barcodes and
14 obtain images?

12:37 PM 15 MR. PRICE: Objection.

16 A. I feel like we've had this
17 discussion before about your creative use of
18 the word "obvious." I mean, again, that's a
19 legal term, so I don't want to.

12:37 PM 20 I would say it's at least obvious.
21 I would again say, rather, it is something
22 that is well known to one of skill in the
23 art, and, indeed, it would have been well
24 known to people even not of ordinary skill in
12:38 PM 25 the art. By that time, you know, people with

1 cell phones would go and scan barcodes and
2 get information on their devices that would
3 include things like pictures. So, you know,
4 it would have been known. I mean, I guess,
12:38 PM 5 additionally, it would have been obvious in a
6 colloquial sense.

7 BY MR. JARRATT:

8 Q. When I say the term "obvious,"
9 I'm not using my own personal definition.
12:38 PM 10 I'm using it in the way that you had used it,
11 for example, in paragraph 12 of your
12 declaration.

13 A. Right. And that's -- I mean, if
14 your intention was to use it in a legal --
12:38 PM 15 as a legal matter in your question, I just
16 wish you would had specified that, because
17 then, again, I'd point out that I -- I don't
18 believe I stated in paragraph 64 that it's
19 obvious. I would say the idea that QR codes
12:39 PM 20 deliver pictures is obvious, but it was not
21 obvious in the legal sense of -- you know, to
22 the extent it could be derived from that
23 information, it's just, like, that would have
24 been known to people with skill in the art
12:39 PM 25 and to people not in skill in the art because

1 it was just common practice at that time.

2 Q. So did you apply a different
3 definition of obviousness than the legal
4 definition in your declaration?

12:39 PM

5 MR. PRICE: Objection.

6 A. No, I don't believe so, but in
7 particular I didn't use the term "obvious"
8 in this paragraph that we're discussing.

12:39 PM

9 So, you know, when you're talking, I'd say,
10 you know, that a POSITA understands -- is
11 used to identify and scan bar QR codes to
12 obtain images from files. So I didn't say
13 that a POSITA would find it obvious. I just
14 say, you know, a POSITA knows that you can
15 scan QR codes to obtain images from links
16 because that was a common practice at the
17 time.

12:40 PM

18 BY MR. JARRATT:

19 Q. What is a difference, in your
20 mind, of a POSITA understanding something
21 versus a POSITA finding something obvious?

12:40 PM

22 A. So, again, I would have to go to
23 the -- you know, I would discuss this with a
24 lawyer before trying to comment on that
25 aspect in the legal definition.

12:40 PM

1 My understanding of obvious is
2 something that, for instance, is readily
3 derived from the information.

4 Here, I would say, like, it's
12:41 PM 5 not -- you know, a POSITA doesn't need to
6 derive that QR codes could be used to
7 transmit a link for a picture because that
8 was already well known. People were using
9 that all the time. So it's not obvious in
12:41 PM 10 the sense of, you know, like, oh, a QR code
11 can be used to encode information. It would
12 be, you know, one could imagine, make an
13 argument, like, it would be obvious to encode
14 a URL and use that to get a picture.

12:41 PM 15 You know, that is not, I think,
16 the argument I'm making, although it's, I
17 think, a reasonable or potentially viable
18 argument. I'd have to think about it. And,
19 you know, I'm not trying to offer a legal
12:41 PM 20 opinion on that argument, because, again,
21 there are legal implications of obvious.

22 But what I can say is that
23 everyone was already doing it at that time,
24 right. That was, like, a well-known way of
12:42 PM 25 getting information, go up and scan a QR code

1 and get links to product pictures and so on.
2 Q. Does the '848 application
3 specifically say to use the image recognition
4 software to identify and scan QR codes to
12:42 PM 5 obtain images?

6 A. I mean, we can go over the
7 language. I think we have gone over the
8 language. It says it can be used to get
9 information. It then gives examples of what
12:42 PM 10 information to the product is, including
11 things like pictures, barcodes, and video
12 instructions, et cetera. You know, I discuss
13 this all at paragraph 62.

14 So, you know, if you're asking if
12:42 PM 15 I think it's explicit, I think yeah. I mean,
16 it's in different paragraphs, but, like it
17 says you can use this to get information
18 about the product, and then it gives you
19 examples of what are -- what would be
12:43 PM 20 information about the product, or what would
21 be included is information about the product,
22 so.

23 MR. JARRATT: All right. No more
24 questions.

12:43 PM 25 MR. PRICE: I just have one

1 follow-up question.

2 EXAMINATION

3 BY MR. PRICE:

12:43 PM 4 Q. Dr. Mitzenmacher, do you recall
5 earlier when you were discussing the
6 disclosure in paragraph 24 about a customer
7 requesting further shopping and the delivery
8 agent traveling to another location in search
9 of a satisfactory product?

12:43 PM 10 A. Yes, I believe that's in
11 paragraph 24. Yes, I see that sentence.

12 Q. If the agent has to travel to
13 another location in search of a satisfactory
14 product, does that mean that the products
12:43 PM 15 that was inspected and rejected was not
16 located at the original location?

17 A. Yeah, well, you could not find the
18 product that the customer desired, so that
19 product, you know, would not have been found.
12:44 PM 20 That's how I would read that as the typical
21 instance of that. If you have to go
22 somewhere else to find a satisfactory
23 product, that means that the product you were
24 looking for was not available.

12:44 PM 25 MR. PRICE: All right. I have no

1 further questions.

2 FURHTER EXAMINATION

3 BY MR. JARRATT:

4 Q. Just a couple questions on that
12:44 PM 5 specific topic.

6 If the customer identified -- or
7 if the agent found the item identified in the
8 acquisition request, sent a picture to the
9 customer, and the customer rejected that item
12:44 PM 10 as unsatisfactory, did the agent still locate
11 the item identified by the customer?

12 A. I mean, I would suspect in most
13 cases no. I mean, I suppose, you know, maybe
14 they found one that was broken or, you know,
12:45 PM 15 dinged or something, damaged, yeah. You
16 know, I would say in that case you haven't
17 found the product the customer wanted,
18 certainly, so that's why you have to go to a
19 different location.

12:45 PM 20 And, again, I think the more
21 typical instances, obviously, that you
22 wouldn't have found the product. And I've
23 stated -- you know, like we've gone over the
24 multiple places in my report, but I've sort
12:45 PM 25 of said, you know, I don't think it's

1 inappropriate to sort of ask them to outline
2 every possible instance that would have been
3 common knowledge about why you might not have
4 been able to locate a satisfactory product.

12:46 PM 5 MR. JARRATT: No more questions.

6 MR. PRICE: All set.

7 THE STENOGRAPHER: Mr. Jarratt,
8 you're getting the original, obviously.

9 MR. JARRATT: Correct.

12:46 PM 10 THE STENOGRAPHER: And did you
11 want a rough?

12 MR. JARRATT: Please, yes.

13 THE STENOGRAPHER: Mr. Price, did
14 you want a rough?

12:46 PM 15 MR. PRICE: No, we don't need a
16 rough.

17 THE STENOGRAPHER: Okay. I have a
18 expedite for Monday.

19 MR. JARRATT: Correct.

12:46 PM 20 THE STENOGRAPHER: Did you want
21 the same?

22 MR. PRICE: We don't need it
23 expedited.

24 THE STENOGRAPHER: You both had
12:47 PM 25 real-time, correct?

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MR. PRICE: Yes.

MR. JARRATT: Yes.

(Deposition concluded at 12:46 p.m.)

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DECLARATION OF PENALTY OF PERJURY

I, _____, do hereby
declare under penalty of perjury that I have
read the foregoing transcript; that I have
made any corrections as appear noted, in ink,
initialed by me, or attached hereto; that my
testimony as contained herein, as corrected,
is true and correct.

EXECUTED this _____ day of _____,
20____, at _____, _____.
(City) (State)

MICHAEL D. MITZENMACHER, PH.D.

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DEPOSITION ERRATA SHEET

JOB NO. 135920

MICHAEL D. MITZENMACHER, PH.D.

MAY 15, 2024

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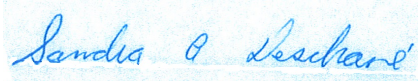
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1 **COMMONWEALTH OF MASSACHUSETTS**
2 **SUFFOLK, SS.**
3 **I, Sandra A. Deschaine, Registered**
4 **Professional Reporter and Notary Public**
5 **within and for the Commonwealth of**
6 **Massachusetts at large, do hereby certify:**
7 **That MICHAEL D. MITZENMACHER, PH.D., the**
8 **witness whose deposition is hereinbefore set**
9 **forth, was duly sworn by me and that such**
10 **deposition is a true record of the testimony**
11 **given by such witness.**
12 **That the witness is hereby reading and**
13 **signing the deposition transcript.**
14 **I further certify that I am not related**
15 **to any of the parties to this action by blood**
16 **or marriage and that I am in no way**
17 **interested in the outcome of this matter.**
18 **IN WITNESS WHEREOF, I have hereunto set**
19 **my hand this 17th day of May 2024.**
20 
21 _____
22 **Sandra A. Deschaine, CSR, RPR, CLR**
23
24 **My Commission Expires**
25 **July 5, 2024**

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