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2 IN THE UNITED STATES DISTRICT COURT

3 IN AND FOR THE DISTRICT OF DELAWARE

4 INTERNATIONAL BUSINESS MACHINES )  
5 CORPORATION, )  
6 Plaintiff, )  
7 v. ) C.A. No.  
8 ZYNGA INC., and CHARTBOOST, INC., ) 22-cv-590-GBW  
9 Defendant. )

10 - - - -  
11  
12 Wilmington, Delaware  
13 Thursday, September 12, 2024  
14 *Trial Transcript Volume 4*  
15 - - - -

16 BEFORE: HONORABLE GREGORY B. WILLIAMS  
17 UNITED STATES DISTRICT COURT JUDGE  
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Michele L. Rolfe, RPR, CRR

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34                   P R O C E E D I N G S

35                   (REPORTER'S NOTE:   The following trial was held in

1 Courtroom 6-B beginning at 9:07 a.m.)

2 THE COURT: Good morning. You may be seated.

3 So we're going to start with the time. So we  
4 made the adjustment for the time for the plaintiff, so -- so  
5 you got 26 minutes back. So on the 10th, you used 5 hours  
6 and 9 minutes as opposed to the five -- whatever I told you,  
7 5, 34, I believe.

8 Yesterday, you used 1 hour and 50 minutes, so  
9 you've used a total of 8 hours and 55 minutes, so you have  
10 2 hours and 5 minutes remaining.

11 Defendant, yesterday, you used 4 hours and  
12 26 minutes, so you've used a total of 7 hours and  
13 32 minutes, so you have 3 hours and 28 minutes remaining.

14 MR. PACKIN: Your Honor, I very much appreciate  
15 the correction in the discrepancy. I would like to  
16 respectfully request -- during Mr. Thompson's testimony, he  
17 spent, I would say -- I mean, we were over here probably  
18 over 30 minutes just looking through documents, to which  
19 there was actually no objection. There was no objection  
20 lodged ahead of time. They objected in court, they made him  
21 do it and then they withdraw their objection just to burn  
22 our time.

23 And at the pretrial conference, we agreed that  
24 you don't need to have foundation for experts and they never  
25 raised that objection, it's just in court as a time

1 mechanism. And what I would respectfully request in the  
2 interest of justice, not that it all get allocated to them,  
3 but that that 30 minutes or so be divided between the  
4 parties, just like sidebars would, and give us an extra  
5 15 minutes in the interest of justice so that we have time  
6 to appropriately vet their side of the case.

7 THE COURT: So essentially you're asking for an  
8 additional 15 minutes, that's what you're asking?

9 MR. PACKIN: Yes. Yes, Your Honor.

10 THE COURT: You don't care whether they get  
11 15 minutes less; you care that you get more -- 15 more  
12 minutes?

13 MR. PACKIN: Correct, Your Honor. The reason I  
14 suggested that is because I know Your Honor wants to end on  
15 time and doesn't want to go over --

16 THE COURT: Well, I'll take that under  
17 consideration.

18 MR. PACKIN: Thank you, Your Honor.

19 MS. CARIDIS: Your Honor?

20 THE COURT: Yes.

21 MS. CARIDIS: Similar to yesterday, would you  
22 mind giving a detailed breakdown for the -- how you  
23 calculated our time yesterday just because I just want to  
24 make sure that we all agree.

25 THE COURT: Yes. There was -- the defendant,

1 22 minutes on the Persechini cross; 10 minutes on the Martin  
2 cross; 24 seconds for the dep video, I guess, for the  
3 counter-designation for Martin; 27 minutes for the Terrell  
4 direct; 2 minutes for the Terrell redirect; 17 minutes for  
5 the Hall direct; 1 minute for the Hall redirect; 32 minutes  
6 for the Wilkman direct; 3 minutes for the Wilkman redirect;  
7 26 minutes for the Lemer direct; 14 minutes for the Ice  
8 direct, 2 minutes for the Ice redirect.

9 For the video depositions, the time that was  
10 given wasn't correct. We added 2 minutes on to your time,  
11 so that's 33 minutes and 9 seconds. Stips was 8 minutes,  
12 reading of the stips; and then the Almeroth on direct is  
13 1 hour and 9 minutes so far.

14 MS. CARIDIS: Thank you, Your Honor.

15 THE COURT: All right. With respect to the  
16 objections for the day, I received two.

17 With respect to DTX-0600, that objection is  
18 overruled. And --

19 MR. KENYON: Your Honor, I think the second  
20 category, Zynga, have -- those are -- have been worked  
21 between the parties, so we're good with those.

22 THE COURT: They have been resolved? Okay.

23 MR. KENYON: Yes.

24 THE COURT: So I don't have to deal with the  
25 Zynga objections.

1 MR. KENYON: Yes, thank you.

2 THE COURT: All right. That's all I have on my  
3 agenda this morning.

4 Anything else before we start with the jury?

5 MS. CARIDIS: No, Your Honor.

6 THE COURT: All right.

7 MR. PACKIN: Not from us, Your Honor.

8 THE COURT: All right. We'll adjourn until we  
9 meet with the jury.

10 With respect to the charge conference, remember  
11 that lead counsel has to participate. I encourage the  
12 parties to continue to try to resolve any disputes in them.  
13 There are plenty of jury instructions out there that have  
14 been used in other cases, and if there's an issue that I  
15 haven't specifically addressed, I'm sure one of my  
16 colleagues has. So if that's helpful to resolve disputes.

17 To the extent disputes remain, make sure that  
18 there's some citation to either some prior jury instruction  
19 or model jury instruction or case. So hopefully there will  
20 be few disputes remaining; these aren't novel issues, and --  
21 all right. That's all I have to say.

22 MR. PACKIN: Just, Your Honor, in terms of  
23 scheduling and timing for today, I think the defendant is  
24 going to put on their -- they're going finish up with the  
25 one expert and then they have two more experts and then we

1 have our responsive expert and of course, the charge  
2 conference and the Rule 50 motions.

3 In terms of planning --

4 THE COURT: Rule 50 motions and then the charge  
5 conference.

6 MR. PACKIN: Yes, right, I'm sorry.

7 And in terms of planning for our rebuttal  
8 expert, we're going to be very short on time and that's  
9 going to be, in part, dependent upon -- whether we can even  
10 do it is going to be dependent on Your Honor's decision with  
11 respect to allotting us time.

12 Would it be possible, in terms of the schedule,  
13 for our rebuttal case expert to be tomorrow morning? It  
14 will be very short, obviously.

15 THE COURT: No, no, let's get all the evidence  
16 done today.

17 MR. PACKIN: Okay.

18 THE COURT: Let's get the evidence done today so  
19 that we can do the charge conference and then we can start  
20 tomorrow. Because we'll let the jury go once all the  
21 evidence is in, and then we'll stay as late as it takes to  
22 get everything else done, and then we can just start  
23 tomorrow morning with the closings and then this jury can  
24 start its deliberations, get charged and start its  
25 deliberations. That, alone, is probably going to take us

1 into the afternoon.

2 MR. PACKIN: Understood, Your Honor.

3 So first thing tomorrow morning, we're going to  
4 start straight with closings and then you'll charge the jury  
5 and then let them out?

6 THE COURT: Yes.

7 MR. PACKIN: Okay. Just for logistics, we'll  
8 set up the screen for tomorrow. Thank you, Your Honor.

9 (Recess taken.)

10 THE COURT: Get the jury, please.

11 (Whereupon, the jury entered the room at  
12 9:32 a.m.)

13 THE COURT: All right. Good morning, ladies and  
14 gentlemen of the jury. You may be seated.

15 All right. We're going to resume with day four,  
16 the continuation of the direct examination with  
17 Dr. Almeroth.

18 MR. MELEHANI: Thank you, Your Honor.

19 May I proceed?

20 THE COURT: Yes.

21 (Cont.) DIRECT EXAMINATION

22 BY MR. MELEHANI:

23 Q. Good morning, Dr. Almeroth.

24 A. Good morning.

25 Q. So when we broke yesterday, we were in the middle of

1 going through some of the reasons you found for  
2 noninfringement, we talked about the first two. We're going  
3 to get to the rest of them, but just to reorient ourselves,  
4 could you very briefly remind us of why it was you found  
5 Zynga's games do not infringe because they are not each  
6 multiple applications?

7 A. Yes, so for that first argument, it applied to both  
8 Claims 8 and 13. It had to do with, as Mr. Thompson applied  
9 that term "applications" as it was construed by the Court, I  
10 didn't believe that there were multiple applications as the  
11 Court has construed that term in each of the games.

12 Q. And also can you briefly remind us why it was that  
13 you found Zynga's games do not pre-fetch advertisements?

14 A. Yes, so for this one, I wanted to show the  
15 construction briefly and really focus on this key aspect of  
16 they have to be pre-fetched before the user has requested  
17 the page in connection with which they are to appear.

18 And everything that was executed, all of the  
19 assets, all of the pages that Mr. Thompson pointed to, all  
20 came after a user had requested the app or requested the  
21 launch of the game and so all of those things happened after  
22 the user had requested the page.

23 Q. All right. So now let's move on to the next one on  
24 your list. And this relates to Zynga's foreign-made games  
25 and Zynga's advertising objects. What did Mr. Thompson say

1 with regards to advertising objects?

2 A. With respect to what he identified as advertising  
3 objects, he said that all of that activity happened in the  
4 United States.

5 Q. Do you agree?

6 A. I do not.

7 Q. Why not?

8 A. I don't agree because if you look at the way the  
9 games operate, the way that the page is structured with the  
10 advertisements and the applications concurrently, trying to  
11 apply that language to Zynga's games, all of that  
12 structuring, all of that formatting happens when the game is  
13 programmed.

14 And so that step -- and I'll show you this --  
15 this step, this step C, "structuring the advertising objects  
16 in a manner compatible to that of the applications so that  
17 the advertising data from an advertising object may be  
18 presented at a second portion of one or more screens of  
19 display concurrently with applications." That all design  
20 happens when the game is first programmed, and that happens  
21 overseas for many of the games.

22 Q. And does the Court have a construction that's  
23 relevant to this step?

24 A. Yes, it does.

25 THE WITNESS: Mr. Watkins, if you could help me

1 get back to slide 22. 24, sorry.

2 So with respect to this one, it is around the  
3 term "structuring" and it's formatting the advertising for  
4 potential use with a plurality of applications.

5 BY MR. MELEHANI:

6 Q. And when does that formatting step happen?

7 A. It happens when the game is programmed, when it's  
8 first designed, when that computer code is first written by  
9 a Zynga programmer.

10 Q. And where does that step happen?

11 THE WITNESS: Mr. Watkins, if you could get me  
12 back to slide 39.

13 There was significant testimony on this  
14 yesterday, so I don't have to go through the evidence, it's  
15 in the record as the testimony from the witnesses. And all  
16 of that activity happens outside of the U.S. except for the  
17 eight games that are done in the United States.

18 So all of the games, all of the 33 games run  
19 outside of the U.S. or were programmed outside of the U.S.  
20 except for Games of Thrones Slots, Harry Potter: Puzzles &  
21 Spells, Hit It Rich, Wizard of Oz Slots, Words With Friends,  
22 New Words With Friends, Words With Friends 2, and Zynga  
23 Poker.

24 BY MR. MELEHANI:

25 Q. From an infringement perspective, does it matter if

1 advertising objects are being formatted outside the United  
2 States?

3 A. It does. In order to infringe the claim, all of the  
4 steps of the claim have to be performed in the United  
5 States. And if even one element is not performed in the  
6 United States, it's like the reverse bingo, there's no  
7 infringement.

8 Q. Does it matter that Zynga is a U.S.-based company?

9 A. No, it does not.

10 Q. So has Mr. Thompson shown that these foreign Zynga  
11 games infringe this limitation of Claim 13?

12 A. No, it's -- he has not. And, therefore, this is the  
13 third reason why Claim 13 is not infringed.

14 Q. So the next limitation that you have listed here  
15 pertains to this predetermined amount of advertising data  
16 information in Claim 8. Did the Court give a construction  
17 of that claim?

18 A. Yes, it did. That construction was the plain and  
19 ordinary meaning, but that plain and ordinary meaning could  
20 not include that it was a predetermined number of  
21 advertising units.

22 Q. So the claim says, "a predetermined amount of  
23 advertising data," how do we measure data?

24 A. So the way that we measure data is usually the units  
25 of bits or in bytes. So one example here is with respect to

1 a modem, we've been talking about 1200-bit-per-second  
2 modems, so that's 1200 bits. So that's an amount of data  
3 that can be delivered each second.

4 When we talk about storage, either a hard drive  
5 or a CD-ROM, that's also in bytes. And so that's an amount  
6 of data and that's different from counting a number of  
7 items. It's an actual amount of the data itself.

8 MR. MELEHANI: Mr. Watkins, can we pull up  
9 PDX-5.88, please.

10 BY MR. MELEHANI:

11 Q. What did Mr. Thompson accuse of meeting this  
12 limitation?

13 A. Well, he wasn't very clear. I think the only  
14 testimony he ended up saying was that assets that are  
15 retrieved have a size to them. He didn't cite to any source  
16 code or any documents or any testimony. This was really the  
17 only slide that he showed where he simply concluded that the  
18 element was met. And I don't think he provided any evidence  
19 or provided any explanation.

20 MR. MELEHANI: Mr. Watkins, can we pull up the  
21 transcript at page 451, lines 12-21, please.

22 BY MR. MELEHANI:

23 Q. Does this testimony show a predetermined amount of  
24 data, as required by the claim?

25 A. No, it does not. And this was really his testimony.

1 Slide 89 is the one that I just described. It describes  
2 then these asset bundles and then: "And what do you know  
3 about the assets?"

4 And he said: "It's going to have an amount of  
5 data associated with it."

6 So aside from the object having a size -- all  
7 objects in computer science have a size to them, but that's  
8 not what's required by the claim. There has to be a  
9 predetermined amount, and then that has to be stored at the  
10 user reception system.

11 Q. Did you examine the source code in your analysis of  
12 this limitation?

13 A. Yes, I did.

14 Q. And did you find any evidence that Zynga infringes  
15 this claim limitation?

16 A. No, I did not. In fact, I found some evidence that  
17 they don't infringe.

18 Q. And what was that evidence?

19 A. That evidence was in the source code with respect to  
20 how it works. All of the source code that we've been  
21 looking at that request the asset maps and then requests the  
22 items all works on an item-by-item basis. And the only  
23 check that the game does is to see if that item is already  
24 on the device or not, it's already part of the app.

25 And so all that the source code shows is that

1 it's checking for a number of items instead of some  
2 predetermined amount of data, and not looking at the number  
3 of items -- or looking at the number of items was  
4 specifically what the Court's construction said was not to  
5 be done.

6 THE WITNESS: Mr. Watkins, if you could get back  
7 to my slide.

8 And we go back to the Court's construction, it's  
9 the plain and ordinary meaning. It does not include a  
10 predetermined number of advertising units, and that's  
11 actually what Zynga does.

12 BY MR. MELEHANI:

13 Q. Why does Zynga not use the approach of storing a  
14 predetermined amount of advertising data from the '849  
15 patent?

16 A. So think about the '849 patent and then Zynga's  
17 games. We talked about how Zynga's games work over a  
18 network that doesn't really have constraints in terms of  
19 speed. So from Zynga's perspective, it makes sense to just  
20 download everything that the game needs. There's never  
21 really a circumstance in a game where there's an asset  
22 that's needed that there isn't storage for it on a person's  
23 phone. There's billions of storage units. But in 1988 when  
24 this patent came out, there was very limited storage in  
25 personal computers at that time.

1           So Zynga's games don't need to worry about a  
2           predetermined amount of storage and trying to keep track of  
3           what's being downloaded to make sure that it doesn't exceed  
4           some threshold.

5           Q.       And so has Mr. Thompson shown that Zynga's accused  
6           games infringe this limitation?

7           A.       He has not. And so, therefore, I believe that's the  
8           second independent reason for Claim 8.

9           Q.       All right. Let's go ahead and move on to the last  
10          one, which is the selectively supplying of offers. What  
11          does that limitation require?

12          A.       This limitation requires selectively supplied to and  
13          retrieved at the user reception system. And it has to be  
14          done in accordance with the characterizations. So think  
15          about this, because I think the evidence and the way it's  
16          been applied by IBM and Mr. Thompson is a -- is a little  
17          confusing. I think what Mr. Thompson is really focused on  
18          is what's presented to the user, what's displayed. And that  
19          was the example of where you have new users, sometimes they  
20          get a different offer.

21                 But if you look at the claim language and read  
22          what it says, it says, "selectively supplied to and  
23          retrieved at the reception system." So the "supplied to,"  
24          especially in the context of these user reception systems  
25          operating over a network, would be provided to the game --

1 that's the accused reception system -- and then they're  
2 supposed to be retrieved and then displayed. The thing is,  
3 as the testimony from the witnesses shows, all of the  
4 offers, everything is provided to every user regardless of  
5 who they are.

6 Q. And what did Mr. Thompson show when he was arguing  
7 that this limitation was met?

8 A. When he went through his slides, he showed examples  
9 of where different offers were displayed to a user and  
10 didn't really address the selectively supplied requirement.

11 Q. And so what does this mean with regard to whether any  
12 of Zynga's games infringe Claim 8?

13 A. They don't, because all of the evidence that he cited  
14 to, on the one hand, showed that all offers went to all  
15 users. And there was testimony throughout the day  
16 yesterday, from all of the different Zynga witnesses, when  
17 it was made clear that it was about what was supplied to the  
18 game, all offers went to the game. What was presented to  
19 the user could vary. But because the claim isn't met, then  
20 there's no infringement of Claim 8.

21 Q. All right. Well, let's switch gears now to a  
22 different topic, and we're going to move on to invalidity.

23 Do you have any opinions concerning the validity  
24 of Claims 8 and 13 of the '849 patent?

25 A. I do.

1 Q. What are those opinions?

2 A. The first opinion is with respect to this concept of  
3 on-sale bar. You heard a little bit about it in the  
4 opening. It's essentially part of the patent law that says  
5 that if there's an offer for sale that's made more than  
6 one year before the critical date, then that is something  
7 that would invalidate the patent and the claims -- the  
8 asserted claims.

9 Q. What do you mean by "critical date"?

10 A. The critical date is that priority date for the  
11 patent, and that's what we've talked about and I think has  
12 been stipulated by the parties in this case to be July 15th,  
13 1988. So more than one year before that, if there was an  
14 offer to sell what's in the claims before July 15th, 1987,  
15 that would invalidate the claims.

16 Q. And what are the issues to analyze with regard to  
17 this on-sale bar issue?

18 A. So what I had tried to do is to take my understanding  
19 and create a technical test and then apply a methodology,  
20 just like I did for noninfringement. So my understanding of  
21 what's required is, first of all, that there has to be a  
22 commercial offer for sale prior to July 15th, 1987, and then  
23 there's a second requirement that it has to be ready for  
24 patenting prior to July 15th, 1987. And that can mean that  
25 you have prepared drawings or other descriptions of the

1 invention that were sufficiently specific to enable a person  
2 of skill in the art to practice the invention. Normally  
3 that's the specification, but if there's evidence of other  
4 documents that meet that same test, then the second  
5 requirement for on-sale bar would be met.

6 Q. And why is there a blue check next to "ready for  
7 patenting" on the your slide?

8 A. There's already a blue check because I believe IBM  
9 has stipulated that for the '849 patent, it was ready for  
10 patenting by July 15th, 1987.

11 Q. Did you apply a particular methodology in analyzing  
12 these on-sale bar issues?

13 A. Yeah. So the next thing to do was to turn that  
14 requirement into steps that I could perform. The first step  
15 was to determine whether Trintex had made before this  
16 July 15th, 1987, date a commercial offer to perform a  
17 service.

18 And then if there was a commercial offer to  
19 perform a service, what was that service that was being  
20 described and being offered, and then take the description  
21 of what that service was and then compare it to the Claims 8  
22 and 13 of the '849 patent.

23 Q. What materials did you rely on in performing this  
24 analysis?

25 A. I can go through this fairly quickly. Same set of

1 materials to try and understand what's happening. Here, you  
2 have the same patent materials. With respect to Trintex,  
3 then, there was a whole set of hundreds of documents that  
4 were produced about how Trintex was developed, how it  
5 evolved. You heard testimony about that right before I took  
6 the stand yesterday afternoon from four or five witnesses,  
7 and so those are some of the people at the bottom. So I  
8 considered all of that material in my analysis.

9 Q. Are you going to walk us through all of that evidence  
10 today?

11 A. No. I wrote a long report. My goal is to present a  
12 couple of examples and then show how that meets the  
13 requirements of the test that I had identified.

14 Q. Well, let's start with your first question: Did  
15 Trintex make offers before July 15, 1987, to perform a  
16 commercial service?

17 A. Yes, it did.

18 Q. And what were those offers?

19 A. There were two offers for which we have the contracts  
20 for, and then that's evidence that there were many other  
21 offers that were also made.

22 So the two examples that we have of contracts  
23 are DTX-474 and DTX-475. DTX-474 is a contract with  
24 Coldwell Bankers, and DTX-475 is with Dreyfus.

25 Q. And do these contracts -- were these derived from

1 offers?

2 A. Yes, these contracts provide the basis for the offer  
3 for sale, the commercial offer for sale in this instance.

4 Q. And were these offers made before the critical date  
5 of July 15, 1987?

6 A. Yes, you can see here on the demonstrative 51 that  
7 both -- one was March 13th, 1987 -- that was Coldwell  
8 Bankers -- and then May 13th, 1987, for Dreyfus.

9 Q. So let's take a closer look at the Coldwell Banker  
10 offer, DTX-474, which is already in evidence. What, if  
11 anything, did Trintex offer to do in this Coldwell Banker  
12 contract?

13 A. It actually offered to do multiple things. And so  
14 one of the first things that it tried -- that it described  
15 doing was with respect to this expert sales force package,  
16 and that was really the set of advertisements for each of  
17 the contractees, and Trintex offered to do three things. It  
18 would create and produce these ads, so it would actually  
19 create the ads that can be carried on Trintex.

20 The one that's most relevant to my analysis is  
21 the third: To carry on the service those advertisements.  
22 And so it describes on page 1 of the contract, "carry on the  
23 service" the ads. And then also in paragraph 3, it says,  
24 "Trintex will carry the service package," those ads, "on the  
25 service," and then it includes a contract date, January 1,

1 1988, through December 31st, 1988.

2 Q. And did we hear any testimony concerning that date?

3 A. Yes, we did. As Mr. Filepp testified in the trial  
4 transcript 240:9-11 and 243:14-17. He was asked if those  
5 offers would be met: Those commercial offers for service,  
6 would they be delivered in the future?

7 Yes.

8 And then he was also asked whether or not the  
9 document appears to include a commitment to display ads  
10 available to the public, and he said yes, that they would.

11 Q. So we've been talking about this term in the  
12 contract, the "service." What exactly does the contract  
13 refer to as the "service"?

14 A. The "service" here is described on page 7 of the  
15 contract, DTX-474. And the contract says that the service  
16 means "the interactive electronic service to be produced and  
17 delivered by Trintex," so essentially what became Prodigy  
18 and what launched as Prodigy.

19 MR. MELEHANI: Mr. Watkins, I would like to  
20 actually pull up DTX-474, and if we could go to page 4 of  
21 the exhibit, please.

22 BY MR. MELEHANI:

23 Q. So were you in court when IBM's counsel asked  
24 Mr. Filepp about some of the bullet points on this page?

25 A. Yes, he was asked about some of the -- the later

1 bullet points.

2 Q. I believe he was asked specifically about the final  
3 two bullet points right near the cursor there on the first  
4 set, and he zoomed right in on those final two. Do you  
5 recall that?

6 A. I do. I think Mr. Watkins --

7 Q. Need the other -- the other final two.

8 A. It was these two right here that they focused on in  
9 his testimony.

10 Q. Right.

11 MR. MELEHANI: Mr. Watkins, could you call out  
12 right there, down to the next paragraph -- yeah, right,  
13 exactly like that, yeah.

14 BY MR. MELEHANI:

15 Q. And so what is the next line right after those two  
16 bullets that IBM's counsel showed us today?

17 A. Right, so those first two bullets were about the  
18 creation of the ads, but then there was a whole paragraph  
19 and an additional set of bullets that says, "Trintex users  
20 will be directed to your screens in each of these ways," and  
21 then there's another set of bullets.

22 Q. And so what is that explaining with regard to what  
23 this offer is offering to do?

24 A. So beyond just creating the advertisements, it was to  
25 carry the advertisements on the Trintex service.

1 Q. And what, if anything, did Coldwell Banker agree to  
2 pay Trintex for the services listed in this contract?

3 And I think we should go back to the slides.

4 A. There was a provision of the contract -- this shows  
5 up on page 2 of DTX-474, and there were three sets of  
6 payments that were identified, I think the total is about  
7 \$17,000 -- actually -- yes.

8 And upon acceptance of the agreement, there was  
9 one payment and then there was additional payments  
10 throughout the period of time.

11 Q. You also mentioned this Dreyfus contract. What  
12 evidence did you find relating to that contract?

13 A. So for DTX-475, which is the Dreyfus contract, it  
14 turns out that it's a very similarly structured contract. I  
15 believe there was testimony in some of the deposition that  
16 they used the same form for all of these contracts. So for  
17 Dreyfus 475, it has all of the same elements that I've  
18 identified.

19 Q. So in your binders up there, I'd like for you to take  
20 a look at DTX-0594, and let me know if that is a document  
21 you relied on in forming your opinion.

22 A. It is.

23 MR. MELEHANI: Your Honor, we offer DTX-0594  
24 into evidence.

25 MR. PACKIN: No objection, Your Honor.

1 THE COURT: All right. DTX-0594 is admitted.

2 (Exhibit admitted.)

3 BY MR. MELEHANI:

4 Q. And what does this document show?

5 A. So June 1, 1987, it starts at the date at the top.  
6 And what's most important about this one is it's a press  
7 release that came out June 1, 1987, so that's right around  
8 the same time as these contracts. And then the next most  
9 important thing is the first paragraph after the body, it  
10 says, "Trintex, a new computer information service, to be  
11 launched early next year already has signed up 42  
12 advertising clients."

13 THE WITNESS: And then, Mr. Watkins, if you can  
14 scroll down a little bit.

15 The third paragraph says, "Among those signed up  
16 include" -- and I'm not going to read the whole list, but  
17 some of those you recognize, Buick, Walt Disney. So  
18 Trintex, Prodigy, IBM had already signed up 42 advertising  
19 contracts -- 42 advertisers with the kinds of contracts that  
20 I described for Coldwell Bankers and Dreyfus.

21 BY MR. MELEHANI:

22 Q. What, if anything, do we know about those other  
23 contracts?

24 THE WITNESS: So, Mr. Watkins, if you could go  
25 back to the slides.

1           This was the testimony that I referenced. This  
2 was for Mr. Bellmare, his December 19, 2023, deposition,  
3 page 52:3-8. And he was asked if the same specification was  
4 used for Dreyfus as in for Coldwell Bankers.

5           And he said, "This is a contract that was used  
6 for all commercial clients." That's the basis for where I  
7 said it's basically the same form contract that was used.

8 BY MR. MELEHANI:

9 Q.       So we've been talking about these documents from  
10 early 1987. Did Trintex have a working service ready to be  
11 shown to the public at that time that these offers were  
12 made?

13 A.       No, not -- it was still in testing. It was still  
14 under development as of March and May 1987.

15 Q.       Does that matter?

16 A.       No. The key test that I set forth in the slides is  
17 that it was an offer to sell, it was a commercial offer to  
18 sell. So it didn't have to exist at the time of the  
19 contract; there could be still testing and development at  
20 that point.

21 Q.       So I see we have up here a timeline, and I want to  
22 talk with you a little bit about the evidence you reviewed  
23 regarding Prodigy's development.

24           Let's go ahead and take a look at the next  
25 slide, which has a document that's already in evidence,

1 DTX-0495.

2 What is this document?

3 A. So this is the Trintex system architecture document.  
4 What I'm showing here is from page 22. And, really, what  
5 you see are a couple of things. There's kind of the  
6 description of what the system would look like, there's kind  
7 of a network in the middle, there's servers up here,  
8 (indicating), including the application subsystem.

9 And then down here, you have things like  
10 standard reception devices, like an IBM PC. You also have a  
11 low-functioning reception device, that was the Commodore 64.  
12 And then on the right side, it also shows Rs for reception  
13 systems as part of what was described in the architecture  
14 document.

15 Q. Does this document describe any other functionality?

16 A. Yes. So what you see here then on page 22 is the  
17 ability to have a frame, like a page, and it has objects in  
18 different portions. And then it also has a portion for a  
19 targeted advertisement.

20 So as part of the architecture document that  
21 existed in 1985, it set forth what the page would look like,  
22 the fact that there were ads and applications on the same  
23 page, and that also that those ads would be targeted.

24 Q. And what about the final --

25 MR. MELEHANI: Sorry, go back one slide. I'm

1       sorry.

2       BY MR. MELEHANI:

3       Q.       What about the information you have underlined on the  
4       bottom of this image?

5       A.       That's the frame composed of objects. That's the  
6       screen itself that shows both the objects or the  
7       applications, as well as the ads concurrently on the same  
8       screen.

9       Q.       And so what does this document tell us about  
10      Prodigy's development?

11      A.       Back at the timeline, I think it's useful to kind of  
12      see a timeline and have these dates in mind. Trintex really  
13      started in 1984, and by 1985, in May, they had an  
14      architecture document setting forth some of the details of  
15      what the system would be.

16      Q.       All right.

17               MR. MELEHANI: So let's go on to the next slide.

18      BY MR. MELEHANI:

19      Q.       And can you describe for us what we're seeing here?

20      A.       Yes. I believe there's been a stipulation, it was  
21      part of an interrogatory, a question that went back and  
22      forth. And it relates specifically to the '849 patent and  
23      when it was conceived; that's September of 1985.

24               So they kind of show you that on the timeline.  
25      You have this slide. And really what that means is the

1 ideas for the patent, and in particular the asserted claims,  
2 had all been conceived of, had been thought of by  
3 Mr. Filepp, and that the claims were formed in his mind as  
4 of that point.

5 Q. So on the next slide we have another document that's  
6 already been admitted into evidence, DTX-0471.

7 And can you explain to us what this document is?

8 A. Yes, so this document is now about the reception  
9 system, and there are objectives about the reception system.  
10 And, in particular, what's relevant about this document, its  
11 date is January 15, 1986, kind of in that same progression.  
12 And it looked at both storing frequently used data locally  
13 at the reception device, and then also the ability to target  
14 advertisements. That was one of the things described in  
15 this reception system objectives document at pages 1 and 6.

16 Q. And so what does this -- or sorry, is there anything  
17 else in this document that you found?

18 A. Yes, so in the Trintex system, they had actually  
19 contemplated multiple kinds of pre-fetching. And this  
20 really makes sense in the context of what Prodigy was. And  
21 now it -- you really start to understand the inventions of  
22 the Claim 8 and 13 when you think about those claims and  
23 what's required in the context of a system like Prodigy.

24 You see here this description of "at log on."  
25 Remember, Prodigy was a portal, you would log in, dial up

1 with your dial-in modem, type in your user name and password  
2 for Prodigy. It would give you a screen of different  
3 applications that you could go to.

4 And what this is saying is, before you got into  
5 any one of those applications, at the time of log-on the  
6 reception system would request from the delivery system, the  
7 server, a portion of the ad queue. And so there would be an  
8 amount of data representing advertisements that would come  
9 before the application was even started. The only thing  
10 that had happened in the Prodigy portal was the user would  
11 have logged on to the system.

12 Q. And so what did this mean with regard to Prodigy's  
13 development?

14 A. As part of Prodigy's development, they had been  
15 considering this idea of pre-fetching as part of the  
16 development.

17 Q. Okay. So I think the next document we have on your  
18 timeline has also already been admitted, that's DTX-0498.  
19 And if we could take a look at that one on the next slide.

20 What is that document showing?

21 A. Yes.

22 THE WITNESS: Mr. Watkins, could you get me to  
23 slide 69, please.

24 So this document, DTX-498, is -- the last one  
25 was the reception system's objectives, this is now the

1 functional specification for the reception systems. And now  
2 it makes much more clear the concept of pre-fetching. And  
3 this was February 20, 1986, so a little bit later.

4 And there's even flow diagrams, which was kind  
5 of a programming technique used in the '80s to script out  
6 how the source code would operate with respect to when to do  
7 pre-fetching.

8 So there was an ad manager that was described,  
9 and then that ad manager would look at its queue and then  
10 execute this pre-fetching of data objects of ads to be  
11 retrieved.

12 BY MR. MELEHANI:

13 Q. And did you review any testimony concerning this  
14 document?

15 A. Yes, I did. So then if we go back, this was  
16 testimony from Mr. Briney from January 12, 2024, his  
17 deposition, page 69:17-22. And with respect to  
18 pre-fetching, he was asked about it, and as part of what  
19 Trintex was going to do, there was also a plan to do  
20 pre-fetch.

21 Q. So the next document for your timeline is DTX-0472.  
22 If you could look at it in your binder. Is this a document  
23 that you relied on in forming your opinions in this case?

24 A. Yes, it is.

25 Q. All right. I think we have it on the next slide.

1 And can you tell us what this document is?

2 A. Yes, a little bit later, it's now a technical review  
3 document for the reception system. And on page 58, it  
4 includes some of the specific data that would be kept about  
5 particular users. And what's important about this data is  
6 it goes to the whole idea of targeted advertisements where  
7 there was specific information about the users of Prodigy,  
8 what information was collected, and then how it was used as  
9 part of the ads.

10 Q. So some of these documents that we've been reviewing  
11 have labels on them that say, for example, draft or  
12 proposal. How, if at all, does that impact your opinions?

13 A. It doesn't. The fact that these were draft  
14 documents, that they were developed over the course of  
15 years, they were refined, additional details were added,  
16 doesn't change the nature of my opinion. If you go back to  
17 the methodology, it's a commercial offer for sale. It's a  
18 commercial offer for sale of something.

19 And so what is the something? It's what's  
20 described in the contract. And it's confirmed by the  
21 documents that were being developed as part of what the  
22 Trintex system was as it was leading up to the launch.

23 MR. MELEHANI: Your Honor, I'd like to offer  
24 DTX-0472 into evidence.

25 MR. PACKIN: No objection, Your Honor.

1 THE COURT: All right. DTX-0472 is admitted.

2 (Exhibit admitted.)

3 BY MR. MELEHANI:

4 Q. What comes next on your timeline?

5 A. The next that comes on my timeline is source code  
6 that was written as part of this development effort. And  
7 that source code was also included as part of filings with  
8 the Patent Office in related patents. And that source code  
9 covers a period from August 1986 up through to August 1987.

10 And so it's important to look at what that  
11 source code was doing as further confirmation as to what  
12 Prodigy could do leading up to its launch.

13 Q. And if you look in your binder at DTX-0181, is this  
14 the source code you reviewed?

15 A. Yes, it is.

16 MR. MELEHANI: Your Honor, we move to admit  
17 DTX-0181.

18 MR. PACKIN: No objection, Your Honor.

19 THE COURT: DTX-0181 is admitted.

20 (Exhibit admitted.)

21 BY MR. MELEHANI:

22 Q. I think we have it on the next slide, what does the  
23 source code show?

24 A. This is some of the source code for the ad manager,  
25 so we've tracked this ad manager functionality for targeted

1 advertisements from the time that it was an objective, to a  
2 technical description, to a technical review, and now  
3 through to source code.

4 The particular date here for this source code  
5 and when this functionality was added was February 17th,  
6 1987. And what this source code shows on pages 2 and 23 is  
7 the log-on pre-fetch. As I mentioned, there was discussions  
8 of pre-fetching in other places, but at least with respect  
9 to the log-on pre-fetch, it identified a number of objects  
10 that it was trying to pre-fetch.

11 Now, in addition, also on JTX-0175, the object  
12 architecture document, there's a connection between those  
13 advertisements and then the size of those objects and how  
14 they would be identified. And so now this gets into the  
15 predetermined amount of data, not just the number of  
16 objects.

17 MR. MELEHANI: Your Honor, we move JTX-0175 into  
18 evidence.

19 MR. PACKIN: No objection, Your Honor.

20 THE COURT: JTX-0175 is admitted.

21 (Exhibit admitted.)

22 BY MR. MELEHANI:

23 Q. If you would look in your binder to DTX-600. Is this  
24 a document you've relied on in forming your opinions?

25 A. Yes, it is.

1 Q. And what does that document show?

2 A. That document is a news article about Videotex.

3 Q. Can we go to the next slide, and can you explain to  
4 us why you thought it was relevant to your timeline?

5 A. Yeah. So on the timeline November 1986, what's  
6 important about this is document on page 4 is the  
7 description of objects. And so now, I think if you can sort  
8 of see where I'm going, you're seeing a lot of the  
9 functionality of Claim 8 and 13 and the requirements of the  
10 claim coming out in what existed in the Prodigy system.

11 So there are discussions of objects with respect  
12 to Claim 8 and so the idea that there was a discussion of  
13 Prodigy in -- it's in the Videotex news, but it's describing  
14 Trintex's system and it says, "everything in the Trintex  
15 system is classified as an object, including pieces of  
16 frames and the programs."

17 MR. MELEHANI: Your Honor, we move DTX-0600 into  
18 evidence.

19 MR. PACKIN: And, Your Honor, we -- for the  
20 purpose of the record, maintain our objection, but  
21 understand.

22 THE COURT: All right. DTX-0600 is admitted.

23 BY MR. MELEHANI:

24 Q. If you could take a look in your binder at DTX-0596.  
25 Is that a document that you relied on in doing your

1 analysis?

2 A. It is.

3 MR. MELEHANI: Your Honor, we move DTX-0596 into  
4 evidence.

5 MR. PACKIN: No objection, Your Honor.

6 THE COURT: DTX-0596 is admitted.

7 (Exhibit admitted.)

8 BY MR. MELEHANI:

9 Q. And what does that document show?

10 A. This one is a Trintex news article. On page 2, this  
11 is June 22, 1987, it mentions, again -- Trintex mentions IBM  
12 and Sears, so it identifies the partners and it's talked a  
13 bit -- really, the thing that stands out here is that IBM  
14 and its partners had spent an estimated \$450 million in  
15 developing this system that would be launched.

16 I think you had heard testimony that there were  
17 hundreds of employees, if not almost 1,000, working on  
18 developing this system and being able to bring it to market.

19 Q. And does that amount of money reveal anything about  
20 Prodigy's development?

21 A. It shows that it is significant. \$450 million in  
22 1980 dollars is an awful lot.

23 Q. When did the Prodigy service launch?

24 A. It launched in March of 1988.

25 Q. Do we know anything about how Prodigy functioned when

1     it launched?

2     A.       Yes, as part of this case, I believe that there's  
3     been a stipulation and also -- maybe not a stipulation.  
4     There's been trial testimony that Prodigy embodied the  
5     inventions of the '849 patent when it was launched.

6     Q.       Any other testimony?

7     A.       And then from Mr. Filepp, as part of the trial  
8     transcript, at page 252, lines 5-11, and he was asked:

9               "QUESTION: The Prodigy system first practiced  
10    the claimed inventions of the '849 patent during the later  
11    testing phase prior to the general release? And he said:

12              "ANSWER: Yes."

13              So even before it officially launched,  
14    Mr. Filepp, the inventor of the '849 patent, testified that  
15    it practiced the claimed methods of the '849 patent.

16    Q.       So based on your review of the systems and  
17    functionalities described in the development documents, how  
18    does that compare to the version of Prodigy that ultimately  
19    launched?

20    A.       Those documents all support the idea of what the  
21    functionality was that existed at launch and it kind of  
22    bookends the whole process. You have the development  
23    documents on the one hand. You have the conception of the  
24    '849 patent early in the process, and then it's bookended on  
25    the other end at launch that it really practiced the

1 inventions of the '849 patent.

2 And everything in the timeline that I had shown  
3 all are documents that support the details of what that  
4 commercial service was when it was being offered for sale  
5 and then launched in 1988.

6 Q. So I want to take a closer look at the contracts  
7 themselves. And we'll just start with the Coldwell Banker  
8 offer that you mentioned.

9 Does the contract itself provide any details  
10 about this offered service?

11 A. Yes, there's multiple parts of the contract. There's  
12 kind of a cover part, and then there's some additional  
13 technical details. And, so, yes, as part of their contract  
14 there are portions that reflect the claims as well.

15 Q. So what part of the contract are you showing here?

16 A. This is for Coldwell Bankers DTX-474, page 7. This  
17 is a description of applications. There's commercial and  
18 noncommercial applications. Mentions things like shopping  
19 and banking, financial services, travel services, as one of  
20 the things.

21 Q. Is this describing multiple applications?

22 A. Yes, it says applications, plural, there.

23 Q. What else does the contract say?

24 A. On page 6, there's a section on targeted delivery.  
25 It identifies some of those criteria that I showed from the

1 earlier document and it says that those criteria will be  
2 used, that the ads can be targeted for delivery based on  
3 those criteria.

4 Q. Does the contract say anything else relevant to the  
5 claims?

6 A. Yes, on page 5, it talks about the idea of concurrent  
7 display, a screen without a leader ad or a screen with a  
8 leader ad. And so it shows the application as well as an  
9 advertisement, pretty similar to that architecture document  
10 that I described.

11 Q. Does the contract say anything about objects?

12 A. It does. So it refers to them as frame elements.  
13 That was also in that figure I described earlier that had  
14 frame elements with applications and advertising displayed  
15 concurrently.

16 Q. All right. Dr. Almeroth, so based on all the  
17 evidence that you reviewed in connection with this analysis,  
18 did you determine that Trintex offered to perform every  
19 element of the method of Claim 13?

20 A. Yes, I did.

21 Q. And can you explain how?

22 A. Yes. So what I did in the report was to take all of  
23 these documents and all of what they said, match them up  
24 through Claims 8 and 13 on an element-by-element basis, and  
25 I'm ready to go through and do that.

1           The way to short circuit this, though, is  
2 because I've identified the documents and I've tied the  
3 functionality specifically to elements of the claims, I can  
4 do it more in a summary fashion. And so the way that I've  
5 done that for that second step is to look at Claim 13.

6           So for the preamble of Claim 13, I identified  
7 DTX-474, 475, 495, 498. For Element A of Claim 13, I  
8 identified 474, 475, 495, 600 and then JTX-175.

9           For Element B -- and just to say, DTX-474 and  
10 475 were the two contracts, and then 495 was the  
11 architecture document, and then 600 was one of the other  
12 reception system documents.

13           So for claim Element 13B, it was DTX-474, 475,  
14 495, 600, and JTX-175.

15           For 13C, it was DTX-474, 475, 495, 600, and  
16 JTX-175.

17           For 13D, it was DTX-474, 475, 181, 471, and 498.

18           And so those last three, 181, 471, and 498 were  
19 the code and the documents that described the pre-fetching  
20 piece.

21 Q.       Based on all of the evidence that you reviewed, did  
22 you determine that Trintex offered to perform every element  
23 of the method of Claim 8?

24 A.       Yes, I did. And that's on the next slide, and so let  
25 me go through those documents.

1           For the preamble and element -- for the  
2 preamble, it's DTX-474, 475, 495, and 498.

3           For the limitations A, B, and C, those all  
4 relate to targeting advertising and then structuring the  
5 advertising so that it can be displayed. So I have a set of  
6 documents that kind of cover that whole process.

7           It doesn't include the wherein clause of C,  
8 there's a third set that I'll get to for that one. But for  
9 A, B, and the first part of C of Claim 8, it's DTX-471, 472,  
10 474, 475, 478, 495, 600, and JTX-175.

11           For 8C and the wherein clause, and that's the  
12 predetermined amount, so I had to look at the code and the  
13 queue and the sizes of the objects, that included some  
14 additional documents. So in total, it is DTX-471, 472, 474,  
15 475, 181, 471, 498, and JTX-175.

16 Q.       And so what does that mean for the two asserted  
17 claims of the '849 patent?

18 A.       That they would be invalid because I've gone through  
19 the two steps of my methodology and established that there  
20 was a commercial form to offer service, that service was  
21 specifically tied and practiced the claims of the '849  
22 patent, 8 and 13.

23 Q.       Now, when Mr. Filepp testified in court, I believe he  
24 explained that Prodigy was being tested around this time; do  
25 you recall that?

1 A. I do.

2 Q. Do the contracts that we've been discussing relate to  
3 that testing?

4 A. No. The contracts were the commercial offer to  
5 include the advertising in the service when it launched. So  
6 it's not -- the contracts are not with respect to the  
7 testing and the network that existed during the testing  
8 phase.

9 Q. Does it matter that Prodigy was being tested around  
10 this time?

11 A. No, I mean, all systems are tested before they're  
12 launched. The contracts talk about the commercial service  
13 that would be launched.

14 Q. Let's pull up PDX-3.8. This was one of the slides  
15 that was used with Mr. Filepp; do you recall seeing this?

16 A. Yes.

17 Q. And do you recall discussion of what's labeled here  
18 one, two, three, these different proposed implementations?

19 A. Yes.

20 Q. How many documents did IBM produce that you reviewed  
21 related to this Trintex development Prodigy?

22 A. Nothing that was part of the mainline actual product  
23 that was being developed.

24 Q. Sorry, let me clarify that. On -- regarding Trintex  
25 as a whole, how many documents did you review?

1 A. Sorry. As a whole, there were thousands of  
2 documents, all about -- I think Mr. McBride testified and  
3 said, "We keep everything," and so there were all of these  
4 documents that were kept about Trintex.

5 Q. Did you see any documents that showed that any of  
6 these one, two, three alternatives could be deployed to  
7 fulfill the contracts that we've been discussing?

8 A. No. In fact, I think there was testimony that said  
9 that even though that somebody had sort of come up with  
10 these ideas, they were never seriously being considered as  
11 part of what would be deployed and launched as the Prodigy  
12 service.

13 MR. MELEHANI: Mr. Watkins, can we pull up JTX-3  
14 at page 772. This has already been admitted.

15 BY MR. MELEHANI:

16 Q. This is part of the file history. Did you review the  
17 file history in connection with your opinions?

18 A. Yes, I did.

19 Q. All right. And so this is a portion of the file  
20 history we have up on the screen here. Can you explain to  
21 the jury what this is?

22 A. Yes. There is something interesting that happened as  
23 part of the prosecution of the patent. One of the things  
24 that happened is the Patent Office said to IBM that there  
25 were Nexis articles that were found by searching Nexis in

1 the news library that related to Trintex. And so the Patent  
2 Office was interested about whether or not there was an  
3 offer for sale or what relevance these Trintex documents  
4 would have to the patent.

5 MR. MELEHANI: And, Mr. Watkins, can we go to  
6 page 928. I want you to pull up the second paragraph of  
7 that page. Great.

8 BY MR. MELEHANI:

9 Q. What's this showing?

10 A. This is then the response from IBM that says, "The  
11 interviewees were asked, but indicated that they did not  
12 have firsthand knowledge of any relationship that might have  
13 existed between Prodigy or Trintex and any of the  
14 advertisers identified in the Trintex-related publications  
15 in the period before September 1987." So IBM was telling  
16 the Patent Office that it didn't have any knowledge about  
17 relationships between Trintex and advertisers.

18 MR. MELEHANI: And if we could go to page 1535  
19 of this file history, please.

20 BY MR. MELEHANI:

21 Q. And so what are we seeing on this slide?

22 A. So then this was back from the Patent Office that  
23 said, "For the on-sale issue, it was raised in our 2002  
24 decision, but the appellates," which was IBM, "have  
25 evidently investigated but not found any further

1 information, so we have no evidence to address these  
2 issues."

3 Q. So did the Patent Office have the Coldwell Banker and  
4 Dreyfus contracts that the jury has heard about here today?

5 A. No. Even though they came in and they were signed  
6 before 1987, those contracts were never made available to  
7 the Patent Office to consider when it considered the  
8 patentability of the claims of the '849 patent.

9 Q. And I think we heard yesterday about some prior  
10 litigations involving the '849 patent. One in particular  
11 was *Groupon*. Did the *Groupon* jury have the Dreyfus  
12 contracts and Coldwell Banker contracts that we've been  
13 talking about here today?

14 A. No, they did not.

15 Q. All right. We're going to switch gears once more and  
16 move on to another issue the jury is going to be asked to  
17 decide, which concerns this issue of whether Claim 13 is  
18 patentably distinct from claims in a different patent, the  
19 '209 patent. Did you form any opinions relating to that  
20 question?

21 A. Yes.

22 THE WITNESS: Mr. Watkins, if you could get me  
23 back to the slides.

24 Yes. So this is the question about patentably  
25 distinct. And, yes, I considered whether or not the

1 '849 patent's claims as construed by the Court were  
2 patentably distinct over the '209 patent's claim.

3 BY MR. MELEHANI:

4 Q. And how did you do that analysis?

5 A. So I did that analysis first by considering what the  
6 '209 patent was. It's part of the same family, has the same  
7 specification. But ultimately the question is to look at  
8 Claims 8 and 13 of the '849 patent and determine if it's --  
9 if those are patentably distinct over claims of the '209  
10 patent. So, really, the first step here was to use the  
11 Court's construction, as always, and then to have a  
12 methodology that I used, just like in my other analysis.

13 So I looked at the claims of the '849 patent,  
14 specifically Claim 13, and compared it to Claim 2 of the  
15 '209 patent. I just did the one claim, Claim 13. And then  
16 any differences in the language between those claims, I  
17 would analyze whether or not those differences would have  
18 been obvious to a person of skill in the art in that 1988  
19 timeframe.

20 Q. So before we dive in, what is the '209 patent?

21 A. The '209 patent is another IBM patent. It's from the  
22 same family, same specification, same figures. It's just a  
23 different set of claims.

24 Q. And can you take a look at DTX-1166 in your binder  
25 and tell me what that is?

1 A. That is the '209 patent.

2 MR. MELEHANI: Your Honor, we offer DTX-1166  
3 into evidence.

4 MR. PACKIN: No objection, Your Honor.

5 THE COURT: All right. DTX-1166 is admitted.

6 (Exhibit admitted.)

7 BY MR. MELEHANI:

8 Q. Okay. Now, why is it that we have two claims on this  
9 slide pertaining to the '209 patent?

10 A. Yes, the jury hasn't seen this before this week.  
11 Claim 2 is something called a "dependent claim," where the  
12 claims we've seen this week have been independent claims. A  
13 dependent claim is one that requires all of the elements of  
14 the independent claim and then adds something additional.  
15 And you can tell that because it says, "the method of  
16 Claim 1," and then it says -- it has another "wherein"  
17 clause, so it includes an additional element.

18 And so Claim 2 is really the entirety of what  
19 you see on the screen. It's all of Claim 1 and all of  
20 Claim 2. So what I'm showing here comes from page 38 of the  
21 '209 patent. It's all of Claim 2 of that patent.

22 Q. All right. Well, let's start talking about the  
23 limitations on -- let's begin with the preamble. Is the  
24 preamble patentably distinct -- the preamble of Claim 13 of  
25 the '849 patent, is that patentably distinct from Claim 2 of

1 the '209 patent?

2 A. It's not. And so what I've done as part of my  
3 analysis -- we've talked a lot about Claim 13 of the '849  
4 patent, all of the words: Applications, advertising  
5 objects, being able to be displayed concurrently,  
6 selectively storing. Those are all concepts we've talked  
7 about this week. The question, then, is whether or not  
8 those same kinds of concepts are in Claim 2 of the '209  
9 patent. And so what I've done is to line them up side by  
10 side, and I'll go through and sort of show that they're not  
11 patentably distinct.

12 And so what you see here for Claim 13, the first  
13 few words, "a method for presenting advertising in a  
14 computer network." For Claim 1, it's "a method for  
15 supplying additional information in a computer network." So  
16 one is presenting, the other is supplying, but in the rest  
17 of Claim 2, it talks about presenting as well. So that  
18 concept is there.

19 The other difference, then, is Claim 13 of the  
20 '849 patent talks about "advertising." Here, in Claim '209,  
21 it talks about "additional information." So advertising is  
22 an example of additional information, and I don't believe  
23 that IBM disputes that additional information would be  
24 obvious -- would obviously include advertising.

25 Q. What about the next limitation?

1 A. For the next limitation, these words are essentially  
2 identical: "The network including a multiplicity of user  
3 reception systems at which respective users can request  
4 applications that include interactive services." Almost  
5 identical.

6 Q. What about the next limitation?

7 A. The next one is "the respective reception systems  
8 including a monitor at which at least the visual portion of  
9 the applications can be presented as one or more screens of  
10 display." And there's a construction for "applications"  
11 that we've talked about throughout the week: "Information  
12 events composed of a sequence of one or more pages open at a  
13 screen."

14 The '209 patent, you see the language. It says,  
15 "So that additional information," or advertising, can "be  
16 presented in a display along with a user-requested  
17 application." So very similar language. It's the same  
18 concept between the two.

19 Q. What about step A of Claim 13?

20 A. Step A, "structuring applications so that they may be  
21 presented at a first portion of one or more screens of  
22 display." That's actually covered in a couple of different  
23 places in Claim 2 of the '209 patent. Really, you have  
24 applications that are presented in a first portion.

25 The Claim '209 talks about the idea of

1 additional information so advertising can be presented in  
2 the display, structuring the information separate from the  
3 applications so the additional information can be presented  
4 to respective users, and then it's also presented  
5 concurrently with the requested application.

6 So the words are in a little bit different order  
7 and slightly different places, but you can see in  
8 Claim '209, the same concepts we've been talking about with  
9 respect to structuring applications in the '849 patent are  
10 present in the '209 patent as well.

11 Q. What about step B?

12 A. The next is "configuring the advertising as objects  
13 that include advertising data." It's the same highlighting  
14 from Claim 2 of the '209 patent because, as I just pointed  
15 to for all of that highlighting, it's all about how to  
16 structure the additional information or advertising so that  
17 it can be displayed concurrently with the requested  
18 application.

19 '849, 13B includes the concept of the word  
20 "objects" and "advertising as objects that include  
21 advertising data."

22 The '209 patent Claim 2 doesn't use the word  
23 "objects," but in the context of what's being claimed here  
24 in the '209 patent, it has portions for applications,  
25 portions for advertising. In the computer science sense, it

1 would have been obvious that those would have been objects.  
2 It's really how computer data is stored and accessed and  
3 presented.

4 Q. What about step C?

5 A. For step C from the '849 patent, that's "structuring  
6 the advertising objects in a manner compatible to that of  
7 the applications so that the advertising data may be an  
8 advertising object may be presented at a second portion of  
9 one or more screens of display concurrently with  
10 applications."

11 So in the '849 patent, it's about structuring  
12 advertising with applications for the current display. Same  
13 concepts in the '209 patent. It talks about concurrent  
14 presentation between applications and advertising or  
15 additional information. Exact same kinds of concepts in the  
16 '209 patent Claim 2 that we talked about all week.

17 Q. Step C also mentions this idea of the objects being  
18 structured in a manner compatible to the applications. Is  
19 that present in the '209 patent?

20 A. Yes. So the compatibility between different  
21 applications means that the same ad can be shown in  
22 different applications as an example. And you see that same  
23 concept over here since there are applications. The  
24 additional information can be structured separately, and  
25 then it can still be displayed concurrently with at least

1 one application and then multiple applications are  
2 supported. So that same concept is in the '209 patent  
3 Claim 2.

4 Q. And what about the final step?

5 A. The final step is "selectively storing advertising  
6 objects at a store established at the reception system."

7 In the '209 patent, that exists at the "wherein"  
8 clause at the end and then also the additional dependent  
9 element of Claim 2. So the idea here of the reception  
10 system including a nonzero predetermined amount of  
11 additional information in a store and then where that  
12 additional information can be supplied using pre-fetching.  
13 And that's the exact concept that comes from the  
14 "selectively storing" portion of Claim 13.

15 Q. And the Court has construed "selectively storing" in  
16 Claim 13, right?

17 A. Yes, and I have applied that construction.

18 Q. And what was that construction?

19 THE WITNESS: Mr. Watkins, if you could get me  
20 back to slide 24.

21 So that selectively storing -- this is the two  
22 parts -- pre-fetching advertising objects and storing them  
23 at a store established at the reception system in  
24 anticipation of display concurrently with the applications.  
25 Those objects have to be pre-fetched in that they're

1       retrieved before the user has requested the page.

2       BY MR. MELEHANI:

3       Q.       And so based on your analysis, what did you conclude  
4       with regard to Claim 13?

5               THE WITNESS: Mr. Watkins, if you could get me  
6       back to slide 104.

7               So my conclusion, then, is having worked through  
8       all of the elements of Claim 13 and compared them to Claim 2  
9       of the '209 patent, that Claim 13 is not patentably distinct  
10      over Claim 2 of the '209 patent.

11      BY MR. MELEHANI:

12      Q.       Okay. Well, thank you, Dr. Almeroth. We're almost  
13      done. One last topic to cover. I want to ask you about  
14      some of your opinions that might be relevant to technical  
15      importance in this case.

16              Were you here when Dr. Martin testified?

17      A.       I was.

18              MR. MELEHANI: And can we pull up PDX-8.5.

19      BY MR. MELEHANI:

20      Q.       Do you recall him testifying about these two  
21      purported benefits that Zynga receives from the patent?

22      A.       Yes, I did.

23      Q.       Do you agree that these are benefits that Zynga  
24      receives?

25      A.       They are benefits but not benefits that can be

1 attributed to the '849 patent.

2 Q. Why not -- I'm sorry, go ahead.

3 A. If you look at the way that they are structured, the  
4 way that they are written, concurrent display of  
5 advertisements, I showed that back in the state-of-the-art  
6 yesterday afternoon as something that was part of Videotex,  
7 it was part of other kinds of services.

8 So the idea that you are trying to claim  
9 concurrent display of advertisements is a benefit that Zynga  
10 gets from the '849 patent I don't think is accurate.  
11 Concurrent display of advertisements is something that  
12 existed in the state-of-the-art and so that benefit cannot  
13 be tied to the '849 patent.

14 Q. What about the second alleged benefit?

15 A. So targeting of advertisements, the same thing. When  
16 I went through the state-of-the-art, the idea that ads were  
17 being targeted was something that existed in lots of  
18 different other venues; it existed in cable systems, it  
19 existed in other kinds of systems that were being developed  
20 at the time.

21 So the idea that the benefits of the '849 patent  
22 are a concurrent display of advertisements and targeting  
23 advertisements would be giving IBM credit for inventing  
24 something that it did not invent. It was already part of  
25 the state-of-the-art.

1 Q. Did you review patent licenses in connection with  
2 your analysis?

3 A. Yes, I did.

4 MR. MELEHANI: Mr. Watkins, can we pull up  
5 DDX-1.42, please.

6 BY MR. MELEHANI:

7 Q. Are these the patent licenses?

8 A. Yes, from Netflix, Verizon, and DIRECTV.

9 Q. Are you familiar with these companies and their  
10 offering?

11 A. Yes, I am.

12 Q. How do these companies compare to Zynga in relation  
13 to how much they purportedly benefit from the '849 patent?

14 A. These companies would benefit at least as much as  
15 Zynga would, from the term -- from using -- assuming that  
16 they use the '849 patent. Netflix has advertisements in the  
17 sense of when you finish watching a program, it will  
18 recommend that you keep watching, sort of binge watching,  
19 that's, you know, very much a Netflix concept.

20 And the way that IBM has applied advertisements  
21 is kind of encouraging you to buy something or see  
22 something, I think that that would be comparable. Verizon,  
23 if you've ever purchased a phone, they are always trying to  
24 get you to buy more stuff, more accessories, more charging  
25 cables, cases, the same kinds of things. And then DIRECTV

1 also has significant advertising in its offerings as well.

2 And so from that perspective, these companies  
3 would have benefited from the '849 patent at least as much  
4 as Zynga has.

5 Q. I think we heard testimony pointing out that these  
6 three companies use a subscription model. Do companies that  
7 use subscription models still present advertising?

8 A. They do, absolutely. I mean, Prodigy was a  
9 subscription service that included advertising. So I think  
10 it's very much in line with what the '849 patent was talking  
11 about.

12 Q. Thank you.

13 MR. MELEHANI: Pass the witness.

14 THE COURT: Cross-examination.

15 CROSS-EXAMINATION

16 BY MR. PACKIN:

17 Q. Good morning, Dr. Almeroth.

18 A. Good morning.

19 Q. So as you know, I'm on the clock, so I'm going to ask  
20 you yes-or-no questions; if you can answer "yes" or "no,"  
21 please do. If you can't, just say "I can't answer yes or  
22 no," and I'm going to move on because I don't have a lot of  
23 time.

24 A. Yes, sir, Mr. Packin.

25 Q. All right. So you agree with me that there are two

1 patents involved in this case, right?

2 A. Yes.

3 Q. And there's the '849 patent that you talked about,  
4 right?

5 A. Yes.

6 Q. And then there's the '719 patent, right?

7 A. Yes.

8 Q. You didn't tell the jury anything about the '719  
9 patent, right?

10 A. No, sir, I did not.

11 Q. There's going to be someone else to talk about that  
12 one, right?

13 A. That is correct.

14 Q. And one of the things that you're asking this jury to  
15 do is to invalidate the '849 patent, right?

16 A. I am.

17 Q. And one way to show a patent is invalid is to show  
18 that someone else invented the same thing first, right?

19 A. That is another way to do it.

20 Q. And -- but in this case, you're not telling this jury  
21 to invalidate the '849 patent because someone else invented  
22 the same thing as the '849 patent first, right?

23 A. Correct, I'm on the clock, too.

24 Q. You've done this before, huh?

25 A. I have.

1 Q. Okay. So what you did tell the jury is that the '849  
2 patent is invalid because Trintex sold the Prodigy system  
3 more than a year before the 1988 prior art due date, right?

4 A. No, that's not what I'm saying.

5 Q. I'm sorry, they offered it for sale?

6 A. There was a commercial offer for sale.

7 Q. Right. And so you're effectively saying that IBM and  
8 Trintex invalidated its own patent, right?

9 A. Yes, that's the law.

10 Q. And you showed the jury this timeline and you went  
11 through all these -- these various documents, right?

12 A. Yes, sir.

13 Q. Now, you would agree with me that before the Videotex  
14 news documents, all these other documents that you showed,  
15 those were internal Trintex documents, right?

16 A. Yes, they were.

17 Q. And so with respect to this external document, the  
18 Videotex news, you showed the jury this slide; it's on the  
19 screen, right?

20 A. Yes.

21 Q. All right. I want to look at what you didn't show  
22 the jury. So this is the paragraph that starts with the  
23 fundamental -- let me grab my highlighter -- the fundamental  
24 goal, so let's find it here. The fundamental goal, right,  
25 that's the same paragraph, right?

1 A. Yes, I see that.

2 Q. And then if we look just two paragraphs up, this is  
3 what you didn't show. And it says, "The launch schedule has  
4 slipped slightly with Trintex prototype tests now due to  
5 begin in about four cities in mid-1987," right?

6 A. That's what it says.

7 Q. And it says "about three months later than originally  
8 targeted," right?

9 A. That's what it says.

10 Q. And then it says, "The delay pushes commercial  
11 introduction of Trintex service later into 1988," right?

12 A. That's what it says also.

13 Q. And we know that Prodigy commercially launched, the  
14 commercial launch date was in the fall of 1988, ultimately,  
15 right?

16 A. I disagree.

17 Q. Okay. Well, let's look at what Mr. Filepp put up.  
18 You know Mr. Filepp told the jury that Prodigy commercially  
19 launched in late 1988. You were here for that, right?

20 A. Yes, I heard him say that.

21 Q. And you were also here, I think you yourself spoke  
22 about this slide, when Mr. Filepp walked the jury through  
23 everything that was going on between February 1987 and  
24 September 1987, right?

25 A. He did.

1 Q. And he told the jury that internally at Trintex they  
2 hadn't yet decided on which implementation they wanted to  
3 use, right?

4 A. I think that was his testimony. I don't agree with  
5 it, though.

6 Q. But you were here -- you were live in court for that,  
7 right? You saw it?

8 A. Yes, I did.

9 Q. And what he told the jury is that he hadn't gotten  
10 consensus yet, right?

11 A. I think he told the jury that.

12 Q. He also told -- he told the jury about the Coldwell  
13 Banker and Dreyfus contracts that you talked about, right?

14 A. Yes.

15 Q. And what he told the jury is that those contracts  
16 could have been fulfilled using other services, right?

17 A. If you're just asking me what he said --

18 Q. Right?

19 A. -- I think that was his testimony.

20 Q. Okay. Let's -- let's pull up what he said. If we  
21 can get the trial transcripts on 2024, just so that we have  
22 it exactly.

23 And we asked him -- or I asked him, "Did you  
24 have a system that you were able to sell -- does the fact  
25 that you just had a prototype code or documents, does

1       that -- did you have a system that you were able to sell  
2       before September of 1987?"

3               "No."

4               That's the first question.

5               "Why didn't you have that system?"

6               "Well, because everyone hadn't agreed on it,  
7       number one; number two, it hadn't been fully developed."

8               And then I asked him, "So was it -- was your  
9       invention ready to be offered for sale before  
10      September 1987?"

11              That's what he said, right?

12      A.       That's what he said. That's not the requirement, but  
13      that's what he said.

14      Q.       Okay. That's what he said. Now, you, sir --

15              MR. PACKIN: We can take that down.

16      BY MR. PACKIN:

17      Q.       You, sir, you weren't involved in the development of  
18      the Prodigy system in the late 1980s, right?

19      A.       I was not personally there.

20      Q.       Mr. Filepp was personally involved, right?

21      A.       Yes, he was.

22      Q.       You didn't work for Trintex, right?

23      A.       No.

24      Q.       Right?

25      A.       No, I did not work for Trintex.

1 Q. You --

2 A. Oh, sorry. I did not work for Trintex.

3 Q. And Mr. Filepp did work for Trintex, right?

4 A. He did.

5 Q. And you didn't work for Coldwell Banker, right?

6 A. I did not.

7 Q. You didn't work for Dreyfus, right?

8 A. I did not.

9 Q. But you disagree with Mr. Filepp that his invention  
10 was not offered for sale before 1987, right?

11 A. I don't know that he ever testified that it was  
12 offered for sale -- that it was not offered for sale.

13 Q. Well, he said it wasn't ready to be offered for sale,  
14 so it wasn't offered for sale.

15 A. I think he was even a little different than that in  
16 his testimony that you put up.

17 Q. Okay. Well, we'll let the jury -- so one of the  
18 things the jury has to decide is do they agree with you or  
19 do they agree with Mr. Filepp. That's for the jury to  
20 decide, right?

21 A. I don't think there is a disagreement. I don't think  
22 he was ever asked if there was a commercial offer for sale  
23 in those contracts.

24 Q. Now, you showed the jury some of Mr. Filepp's  
25 deposition testimony, right?

1 A. I did.

2 Q. And the lawyers for Zynga had a chance to ask  
3 Mr. Filepp questions live; he was right here, right?

4 A. Yes, and we're all on the clock.

5 Q. And they didn't ask him those questions, right?

6 A. They didn't.

7 Q. All right. So let's talk about patent licensing.

8 And so you mentioned something called patentably distinct,  
9 those two IBM patents, right?

10 A. Yes, sir.

11 Q. And the '209 patent, that's another patent owned by  
12 IBM, right?

13 A. Correct.

14 Q. And so for patentably distinct, the question is  
15 whether Claim 13 of the '849 patent, the one that's in this  
16 case, is that different from the '209, right?

17 A. At a high level, it's a little more than that. It's  
18 whether it would -- any differences would be obvious to a  
19 person of skill in the art.

20 Q. Exactly, whether it would be obvious. And when  
21 you're assessing -- when the jury is assessing obviousness,  
22 there's a couple of factors that they need to look at,  
23 right?

24 A. Yes.

25 Q. One of the things they need to look at is the words

1 of the claims themselves, right?

2 A. Yes.

3 Q. And another thing they need to look at is what we  
4 call secondary considerations of nonobviousness, right?

5 A. Yes.

6 Q. And one of those nonobviousness factors is whether  
7 others sought or obtained rights to the patent from the  
8 patent holder, right?

9 A. Yes.

10 Q. And basically, that means did other people pay for a  
11 license to this patent, right?

12 A. Yes, that's -- one of the considerations as to  
13 whether or not the differences of -- on the words rise to  
14 the level of being patentably distinct.

15 Q. And the reason is, because if the invention was  
16 licensed by others, that could suggest that other folks  
17 didn't think the invention was obvious, right?

18 A. It could, it is a consideration.

19 Q. And you know that the '849 patent issued in 2006,  
20 right?

21 A. Yes.

22 Q. And you've not been offered to this court as an  
23 expert in patent licensing, right?

24 A. No, sir.

25 Q. And we heard Mr. McBride testify. He was IBM's

1       licensing executive, right?

2       A.       Yes.

3       Q.       He testified by video?

4       A.       He did.

5       Q.       And you remember he showed the jury this chart of all  
6       the licenses to the '849 patent, right?

7       A.       He did.

8       Q.       For example, you heard him say that Amazon took a  
9       license to the '849 patent, right?

10      A.       Yes.

11      Q.       And Google took a license to the '849 patent?

12      A.       Yes, I heard him say that.

13      Q.       And you had some experience with Google on patent  
14      matters as an expert, right?

15      A.       I have.

16      Q.       You've worked as an expert witness for companies who  
17      have sued Google over the years, right?

18      A.       I have.

19      Q.       In fact, in this past year alone, you've testified at  
20      trial against Google three separate times, right?

21      A.       That was 2023.

22      Q.       2023. I'm sorry.

23      A.       Yes.

24      Q.       And in each of those three cases, Google contested  
25      the validity of the patents of your clients, right?

1 A. One second.

2 Yes.

3 Q. And in contrast, in this case, we heard that Google  
4 didn't even challenge the validity. They took a license  
5 without litigation, right?

6 A. Mr. McBride may have said that. I don't know that  
7 that's true, though.

8 Q. All right. Sir, we know that Amazon -- there was a  
9 litigation involving Amazon, right?

10 A. Yes.

11 Q. And it involved the '849 patent?

12 A. I believe so.

13 Q. And eventually they took a license?

14 A. They did.

15 Q. For Google, there was no litigation involving the  
16 '849 patent, right?

17 A. That's a level of detail that I don't know.

18 Q. Okay. Let's talk about infringement. Let's --  
19 sorry, let's talk about infringement --

20 MR. PACKIN: I'm sorry I'm talking fast, I  
21 just -- we're on the clock and trying to get done with all  
22 of the evidence today.

23 THE COURT: We all know that there's a clock,  
24 let's not keep repeating it.

25 MR. PACKIN: I'm sorry, Your Honor, I apologize.

1 BY MR. PACKIN:

2 Q. One of the things that we talked about is the word  
3 "applications," right?

4 A. Yes, sir.

5 Q. And the Court gave us a construction for the word  
6 applications, right?

7 A. Yes.

8 Q. This thing is more complicated than I thought so I'm  
9 going to lean this up here.

10 And I wrote it down ahead of time. Do you see  
11 that?

12 A. I do.

13 Q. Okay. So applications is, "information events  
14 composed of a sequence of one or more pages opened at a  
15 screen," right?

16 A. Yes, sir.

17 Q. And we have to use the Court's construction, not the  
18 ordinary everyday meaning of applications today, right?

19 A. That is correct.

20 Q. And in your view -- I'm sorry, in your view, under  
21 the Court's meaning of application, each game is a single  
22 application, right?

23 A. Sorry, I didn't hear that.

24 Q. Let's see, I got some help here. Thank you.

25 There you go.

1                   Let me ask the question again.

2                   In your view, under the Court's meaning of  
3 application, each of Zynga's games is a single application,  
4 right?

5           A.       Not quite.

6           Q.       All right. You wrote an expert report in this case,  
7 right?

8           A.       Yes.

9           Q.       All right. Let's take a look.

10          A.       Do you have it for me?

11          Q.       Is it in your binders already?

12                   MR. PACKIN: Can we get the rebuttal report,  
13 please?

14                   Thank you.

15                   And I want you to flip to paragraph 178.

16                   Put it on the ELMO for all of us to see.

17          BY MR. PACKIN:

18          Q.       And you start with the Court's construction, that's  
19 what we have on the flip pad, right?

20          A.       Yes.

21          Q.       And then you say you don't think Zynga infringes,  
22 right? And then you said, "Instead, a POSITA" -- that's a  
23 person having ordinary skill in the art, right?

24          A.       Yes.

25          Q.       And that's applying the Court's construction --

1 "would have understood each of the accused games to be a  
2 single application under the Court's construction," right?

3 A. That's correct. And it's in quotes for that reason.

4 Q. Okay. Now, I just want to make sure we're all on the  
5 same page in terms of what we're talking about here. Just  
6 go through a couple of screenshots of Empires & Puzzles and  
7 you can confirm that those are active.

8 So this is the home screen or landing screen  
9 once the game is launched, right?

10 A. It is.

11 Q. And if I were to click on this shop button on the  
12 bottom, then I get another screen that shows the shop,  
13 right?

14 A. You would.

15 Q. And this is the gems tab, right?

16 A. It is.

17 Q. And if I click on resources, I get another tab,  
18 that's the resources tab, right?

19 A. It is, and you would.

20 Q. And if I clicked on battle items, I get another tab,  
21 right, that's what we see on the screen?

22 A. You would.

23 Q. Now, if I go back to the home page, I can also click  
24 on this rankings app, this rankings button, right?

25 A. You slipped in the word "page," I wouldn't say this

1 is a page, we were using screen --

2 Q. I'm sorry, screen.

3 A. Yes.

4 Q. I almost said application because I knew you were  
5 going to disagree so I stopped.

6 A. Okay.

7 Q. If we click on the ranking button on the home screen,  
8 we get the leaderboard, right?

9 A. Yes.

10 Q. And then the leaderboard also has multiple tabs,  
11 right?

12 A. It does.

13 Q. And so, for example, this is global. If I click on  
14 U.S., I'd have the U.S. tab, right?

15 A. Yes.

16 Q. And then if I go back to the home screen -- we'll do  
17 just one more -- and we click on starter pass, we get  
18 another screen, right?

19 A. Yes.

20 Q. And that screen also has multiple tabs, right?

21 A. It does.

22 Q. And so if we go to screen, that's the rewards,  
23 right -- that's -- I mean, the rewards tab, right?

24 A. Yes.

25 Q. Now, you just said that you were going to disagree

1 with me on page and -- sorry, sorry, and you know, sir, that  
2 Mr. Thompson says that each of those different icons  
3 launched a different application in the game; that's what  
4 Mr. Thompson says, right?

5 A. That's the opinion I disagree with, that's correct.

6 Q. Right. And so the jury is going to have to decide  
7 whether each of those things is a different application  
8 within the game or whether everything is just one  
9 application. That's for them to decide, right?

10 A. That is for the jury to decide.

11 Q. Okay. Now, we talked about source code as well,  
12 right?

13 A. Yes.

14 Q. Take this down.

15 And -- sorry, let me start back. You talked  
16 about some other parts of the claim, too, right? Not just  
17 application, right?

18 A. Yes, sir.

19 Q. And you were here with Mr. -- when Mr. Thompson  
20 testified, right?

21 A. Yes, sir.

22 Q. And one of your first criticisms of Mr. Thompson was  
23 that his analysis was not thorough enough in terms of every  
24 single game, right?

25 A. That's correct.

1 Q. And you were here in the courtroom when Mr. Thompson  
2 was spending quite a while going through all the source code  
3 and identifying it for the jury, right?

4 A. No.

5 Q. You were not in the -- you were not in the courtroom  
6 for that?

7 A. Sorry. I was in the courtroom. I don't think that's  
8 what he did.

9 Q. Okay. But he had all of those exhibits in front of  
10 him that he spent a lot of time going through, right?

11 A. That's correct, he didn't explain those to the jury.

12 Q. And you know he told the jury that he spent hundreds  
13 of hours looking through the source code, right?

14 A. Yes.

15 Q. And you did not spend hundreds of hours looking at  
16 Zynga's code, right?

17 A. No, I really got to focus on what he was looking at.

18 Q. Right. You didn't spend anywhere close to that,  
19 right?

20 A. Certainly not hundreds. I didn't need to.

21 Q. In fact, when we asked you in March of this year,  
22 right around the time when the source code review was being  
23 finished, you could not provide us with any rough estimate  
24 of how many hours you spent reviewing Zynga's code, other  
25 than saying, "more than ten hours," right?

1 A. It was pretty rough. I didn't have a number in mind  
2 in my deposition.

3 Q. Okay. Let's talk about patent claims and how they're  
4 written and I want to pull up something that you said  
5 yesterday. It's page 887, I got 9-12 and 19-24. It's a  
6 longer answer, but I'm just trying to jog your memory here.  
7 You said:

8 "If you remember, the agreement with the Patent  
9 Office is that in exchange for disclosing an invention, you  
10 get a monopoly through the claims for a period of time."

11 Those claims have to be understandable to  
12 somebody, right?

13 A. Yes.

14 Q. And that somebody is what you'd call a person having  
15 ordinary skill in the art, right?

16 A. Correct.

17 Q. And then you go through and you explain that a person  
18 of ordinary skill in the art, for example, can have an  
19 undergraduate degree in engineering or computer science,  
20 right?

21 A. Yes.

22 Q. Now, you had done some computer work by 1988, right?

23 A. I had.

24 Q. And even -- you weren't an engineer yet, right? You  
25 didn't have a degree? I think you were still in high

1 school.

2 A. In '88, no, I was in college by then.

3 Q. You just started?

4 A. Yes.

5 Q. And even though you just started college, you could  
6 have understood the patent claims of the '849 patent in  
7 1988, right?

8 A. I could. I had quite a bit of experience by then.

9 Q. And the reason is because the patents are written so  
10 that engineers can understand them, right? That's the  
11 point?

12 A. That is generally the point of a patent.

13 Q. And we heard from several of Zynga's engineers in  
14 this case, right?

15 A. We did.

16 Q. One of them was Zynga's chief technology officer  
17 Mr. Terrell; do you remember that?

18 A. Yes.

19 Q. And let's put up what he said on page 708:18-25.

20 I asked him, "As of January this year, all the  
21 way after this lawsuit had been filed" --

22 You know this lawsuit has been pending for a  
23 couple of years, right?

24 A. It has.

25 Q. -- "you hadn't even discussed the '849 patent with

1 any engineers on Zynga's game teams, right?"

2 A. Yes, that's what --

3 Q. And none of the people who got up in the witness  
4 stand said that they talked about reading the patent, right,  
5 none of Zynga's engineers?

6 MR. MELEHANI: Objection, Your Honor. This is  
7 outside the scope of direct or any opinion he's offered.

8 MR. PACKIN: Well, he's a person of ordinary  
9 skill in the art. It's exactly what we were talking about.

10 MR. MELEHANI: This has nothing to do with what  
11 he testified about. This is about whether Zynga's engineers  
12 testified regarding issues that weren't even discussed with  
13 him.

14 MR. PACKIN: They're persons of ordinary skill  
15 in the art. I'm confirming that with him, what that is.  
16 But I can keep moving. I can keep moving.

17 THE COURT: You can ask him about --

18 MR. PACKIN: Yeah, let -- let me keep --

19 THE COURT: -- what's a person of ordinary skill  
20 in the art, but you're going through time.

21 MR. PACKIN: Yeah. All right. Let's keep --  
22 let's keep going. We can take that down for now.

23 BY MR. PACKIN:

24 Q. Well, let me ask you this. Instead of asking Zynga's  
25 own engineers, which they have hundreds of and are already

1 on the payroll, to look at the patents, Zynga hired you,  
2 sir, right?

3 A. Yes.

4 Q. And you bill Zynga \$850 an hour, right?

5 A. I do.

6 Q. And you spent hundreds of hours working on this case,  
7 right?

8 A. I have.

9 Q. And in March when we asked you the question, it was  
10 about 300 hours, right?

11 A. Yes, sir.

12 Q. And if we do the math, it's over a quarter million  
13 dollars that you charged Zynga as of March, right?

14 A. Yes, sir.

15 Q. And since then, you've been getting ready for this  
16 trial, right?

17 A. I have.

18 Q. And you've been sitting in this courtroom every day,  
19 clocking the hours this whole trial, right?

20 A. Yes, sir.

21 Q. And that number, the quarter-million-dollar number,  
22 doesn't even include all of those hours, right?

23 A. It does not.

24 MR. PACKIN: Pass the witness.

25 THE COURT: All right. Redirect?

## REDIRECT EXAMINATION - KEVIN ALMEROOTH

1 MR. MELEHANI: Yes, Your Honor.

2 REDIRECT EXAMINATION

3 BY MR. MELEHANI:

4 Q. Dr. Almeroth, we heard some discussion about this  
5 idea of the Prodigy system being ready to offer to sell  
6 during your cross. Is there any requirement in the law that  
7 a product be ready to offer to sell?

8 A. No, and it's a very subtle distinction in the  
9 questioning. It has to be a commercial offer for sale as  
10 opposed to being ready and launched at that point in time.  
11 So when you consider what's actually required, it has to be  
12 a commercial offer for sale. That's what I analyzed and  
13 that's what I found.

14 Q. And does it matter if the product itself is not yet  
15 finished?

16 A. No, no. It was a -- it was a very clever question.

17 Q. Okay. He also asked you quite a bit about  
18 Mr. Filepp's testimony.

19 A. Yes.

20 Q. He didn't ask you about any of the testimony from any  
21 of the other engineers; is that right?

22 A. That's correct.

23 Q. And those were also employees of which company?

24 A. Of IBM and Trintex.

25 Q. Okay. And do you recall when he put up several

1        screenshots of -- I believe it was Empires & Puzzles?

2        A.        Yes, sir.

3        Q.        He didn't show the screenshots from any other game,  
4        correct?

5        A.        No, he didn't.

6        Q.        And did Mr. Thompson, when he was explaining his  
7        theory of multiple applications, did he show any analysis of  
8        any other game?

9        A.        He did not.

10       Q.       And did any of those screenshots illustrate to you  
11       that Empires & Puzzles is actually multiple applications at  
12       the same time?

13       A.        No, they were just screenshots. It's the analysis  
14       you need to do behind it. Mr. Thompson used this very  
15       subjective idea of purpose, but you have to be able to try  
16       and apply that 1980s term and the Court's construction  
17       against what each game is supposed to be doing. And I don't  
18       think Mr. Thompson did that.

19       Q.        So at a general level, is there an overarching flaw  
20       with Mr. Thompson's analysis that you can summarize for the  
21       jury on infringement?

22       A.        Yes. One was with respect to not looking at each of  
23       the individual games, and then the second was really  
24       applying this 1980s patent and its terminology that, as I  
25       testified to this morning, was born out of Prodigy and that

1 portal and the challenges in 1980 and trying to apply that  
2 kind of language that a claim -- or to a game in 2024 like  
3 Zynga.

4 MR. MELEHANI: No further questions. Thank you,  
5 Dr. Almeroth.

6 THE COURT: All right. Dr. Almeroth, you may  
7 step down. Thank you, sir.

8 THE WITNESS: Thank you, Your Honor.

9 MR. BEHNAWA: We're now going to play some video  
10 of sworn testimony from one of the named inventors of the  
11 '719 patent, Mr. James Rayfield. The Court allotted time  
12 for Zynga is 1 minute, 35 seconds.

13 (Video deposition played for the jury as  
14 follows:)

15 Q. Can you please state your name for the record?

16 A. James Thomas Rayfield.

17 Q. And you understand that you're listed as an inventor  
18 in one of the patents at issue in this lawsuit, correct?

19 A. Yes.

20 Q. Who is your current employer?

21 A. IBM.

22 Q. And when did you first start working for IBM?

23 A. March 6, 1989.

24 Q. So if you look at approximately line 34 in column 1,  
25 there's a reference to "fat-clients" or "fat-client

1 applications."

2 Do you see that?

3 A. Yes.

4 Q. Can you describe what a fat-client application is as  
5 it's discussed here?

6 A. So a fat-client application is an application that  
7 runs mostly on the client side, and, you know, "fat" refers  
8 to the size of the installed application.

9 Q. And when you say it "runs mostly on the client side,"  
10 does that assume that there is some operations on a -- that  
11 are occurring on a server relating to the application?

12 A. Yes.

13 Q. You did not invent fat-client applications, correct?

14 A. Correct.

15 Q. Did IBM ever commercially release any product that  
16 uses the inventions described in the '719 patent?

17 A. Not that I'm aware.

18 (End of video deposition.)

19 MR. GANGULY: Your Honor, Zynga calls its next  
20 witness, Dr. John Bennett.

21 JOHN BENNETT, having been called on the part and  
22 behalf of the Defendant as a witness, having first affirmed  
23 to tell the truth, testified as follows:

24 DIRECT EXAMINATION

25 BY MR. MOSS:

## DIRECT EXAMINATION - JOHN BENNETT

1 Q. Good morning, sir. Can you introduce yourself to the  
2 jury?

3 A. Good morning. My name is John Bennett. I'm a  
4 professor emeritus in computer science and electrical and  
5 computer engineering at the University of Colorado. I live  
6 with my family in Colorado.

7 Q. And have you prepared any demonstratives to help the  
8 jury understand your testimony today?

9 A. I have.

10 MR. MOSS: And, Your Honor, we wish to publish  
11 DDX-12. I understand there are no objections.

12 THE COURT: You may publish.

13 BY MR. MOSS:

14 Q. Dr. Bennett, can you tell the jury a little bit about  
15 yourself, starting with your academic background?

16 A. I have a bachelor's and a master's in electrical  
17 engineering from Rice University. I have a second master's  
18 and a PhD in computer science from the University of  
19 Washington. My doctoral dissertation involved the design,  
20 implementation, and evaluation of a distributed computing  
21 system. For over 35 years, I've practiced as an academic,  
22 teaching, conducting research, and contributing to the  
23 field. For the bulk of my academic career, the focus of my  
24 research was distributed and parallel computing systems.

25 Q. Can you tell the jury a bit about your relevant work

1 experiences?

2 A. I began as a control system engineer. Subsequently,  
3 I served as an engineering duty officer in the United States  
4 Navy, rising to the rank of lieutenant commander in eight  
5 years. When I left the Navy, I founded a company that  
6 designed hardware and software products for a number of  
7 companies. Over my entire career, I contributed  
8 significantly to the development of commercial and academic  
9 computing systems used or sold by a number of companies,  
10 including those listed here on the slide.

11 Q. And, Dr. Bennett, what are you here to testify about  
12 today?

13 A. Generally, the '719 patent and my opinions that  
14 Empires & Puzzles does not infringe the '719 patent and that  
15 the '719 patent is invalid because it is obvious in light of  
16 Roy.

17 MR. MOSS: Your Honor, we offer Dr. Bennett as  
18 an expert witness in computer science and distributed  
19 software architecture.

20 MR. GANGULY: No objection.

21 THE COURT: All right. Dr. Bennett may testify  
22 as an expert in computer science and distributed software  
23 architecture.

24 MR. MOSS: Thank you, Your Honor.

25 BY MR. MOSS:

1 Q. Dr. Bennett, let's talk about the '719 patent. What  
2 materials did you consider in analyzing the patent?

3 A. The patent itself and its file history, IBM's  
4 contentions related to that patent, the reports of IBM's  
5 expert witnesses, relevant prior art, Zynga's documents,  
6 witness testimony, Zynga's source code, I played Empires &  
7 Puzzles and watched others play Empires & Puzzles, and, of  
8 course, the Court's orders, including claim construction.

9 Q. Can you give the jury an overview of what the '719  
10 patent describes?

11 A. Generally, it describes a dual model-view controller  
12 system that is designed to reduce interaction between the  
13 client and server.

14 Q. What --

15 A. It was --

16 Q. I apologize, sir. Please continue.

17 A. It was filed in February 8th of 2000.

18 Q. What problem was the patent trying to solve?

19 A. It was targeted toward the problems associated with  
20 the performance, implementation, and maintenance of  
21 web-based applications that require significant amounts of  
22 communication between the client and server.

23 Q. Are there any solutions to this problem that the '719  
24 patent disclaimed?

25 A. Yes.

1 Q. And what are those?

2 A. It disclaimed fat-clients, including those that  
3 employ applets.

4 Q. What is a fat-client?

5 A. A fat-client is one in which the entire application  
6 or the vast majority of the application is installed and  
7 maintained on the client. There may be some interaction  
8 with the server, but the client is capable of performing  
9 significant functionality without interacting with the  
10 server.

11 Q. And I believe you mentioned model-view controller in  
12 a previous answer. If I call that "MVC," will you  
13 understand what I'm referring to?

14 A. Yes.

15 Q. Can you explain what an MVC architecture is in the  
16 software development context?

17 A. It's an approach to developing interactive  
18 applications that grew to prominence in the 1980s. It has  
19 three principle components:

20 A model that contains the state and the behavior  
21 of the application, basically the data and the rules and the  
22 algorithms associated with the application.

23 The view, which creates a representation of a  
24 portion of the model that is displayed -- I apologize.

25 And the controller, which processes user input

1       for -- and then updates the model accordingly.

2       Q.       Did IBM invent the MVC architecture?

3       A.       Sorry, I have a cough.

4       Q.       I have a cough drop if you'd like it.  Would that  
5       help?

6       A.       Well, I don't think the jury wants to hear me slurp.

7       Q.       Probably true.

8       A.       So I'll -- I'll forge ahead.  Would you ask the  
9       question again?

10      Q.       Yes, did IBM invent the MVC architecture?

11      A.       It did not.  MVC predates the '719 patent by over 20  
12      years.

13      Q.       Does all interactive software use an MVC  
14      architecture?

15      A.       No, there are many other ways to do it.

16      Q.       At a high level, what approach of IBM is -- I'm  
17      sorry, let me reask that.

18               At a high level, what does the approach of IBM  
19      in the '719 patent add to the MVC architecture?

20      A.       The dual model controller aspect in which a portion  
21      or all of the model and view and controller components are  
22      executed on the client as well as on the server.

23      Q.       Are you aware of whether or not IBM has ever  
24      practiced the '719 patent?

25      A.       I don't know either way.

1 Q. And which claims is IBM asserting here?

2 A. Claim 1.

3 Q. Dr. Bennett, let's move to your noninfringement  
4 positions. Remind us which game IBM is alleging of  
5 infringement?

6 A. Empires & Puzzles.

7 Q. And what's your opinion about whether Empires &  
8 Puzzles infringes the '719?

9 A. That it does not.

10 Q. At a high level, why doesn't it infringe?

11 A. Fundamentally, Empires & Puzzles and the '719 patent  
12 are entirely different software architectures.

13 Q. And what about the architecture leave you to conclude  
14 that Empires & Puzzles does don't infringe?

15 A. Four things; first, the 71 -- sorry, the Empires &  
16 Puzzles does not practice the dual model-view-controller  
17 approach. It is not -- Empires & Puzzles is not designed to  
18 reduce client and server communication. There is no  
19 view-generation logic on the server in Empires & Puzzles.  
20 And the program code that executes on the client in Empires  
21 & Puzzles is not the same program code that executes on the  
22 server.

23 MR. MOSS: Mr. Watkins, can you bring up  
24 slide 13.

25 BY MR. MOSS:

1 Q. And, Dr. Bennett, can you give the jury an overview  
2 of the Empires & Puzzles game as it relates to your  
3 noninfringement positions?

4 A. Sure, I think the jury has seen this slide or other  
5 slides like it before. Basically, Empires & Puzzles is a  
6 Match 3 game where users line up tiles in order to perform  
7 and gain actions, like attacking enemies.

8 Q. What part of Empires & Puzzles does IBM allege  
9 infringes the '719 patent?

10 A. The cheat detection mechanism associated with a  
11 player-versus-player or PvP battle.

12 Q. And, Dr. Bennett, can you describe this cheat  
13 detection mechanism at a high level?

14 A. Sure, so on the left is the client's phone. At the  
15 end of a PvP battle, the client assembles the battle actions  
16 representing the valid moves that the player has made, as  
17 well as the battle results, and sends that information to  
18 the server.

19 The server then replays those battle actions and  
20 determines its own notion of what the results should be.  
21 The server then compares the result it computed with the  
22 result computed on the client, and if those results are  
23 different, an error code is sent back to the client.

24 Q. And what happens in the game when the server sends  
25 that error code to the client?

1 A. The client reverts to a valid game state.

2 Q. Which limitations do you believe Empires & Puzzles  
3 does not perform from Claim 1 of the '719 patent?

4 A. 1 A and 1 D.

5 Q. Let's start with limitation 1 A. What does  
6 limitation --

7 MR. MOSS: Mr. Watkins, please move to slide 9.

8 BY MR. MOSS:

9 Q. Dr. Bennett, what does limitation 1 A require?

10 A. It requires that the server be configured to store a  
11 model and that the server execute view-generating and  
12 controller logic associated with the application.

13 Q. And which of the Court's -- need some water?

14 A. I have some --

15 Q. Okay. Which of the Court's claim constructions did  
16 you analyze for this limitation?

17 A. The constructions of model associated with the  
18 application, view-generating logic, and controller logic.

19 Q. And turning your attention to the Court's  
20 construction for view-generating logic, what does the  
21 Court's construction require?

22 A. It requires that the view-generating -- that the  
23 program code that generates the screen or representation on  
24 the client be a subset of the program code that is of any  
25 view-generation logic on the server and that the application

1 chooses to display.

2 So three things, program code, a screen or  
3 window representation is created, and the application has to  
4 choose to display it.

5 The Court also recently added that the  
6 view-generation logic doesn't create new model data.

7 Q. And, Dr. Bennett, what is program code?

8 A. Program code usually refers to the software that a  
9 programmer would write in a particular programming language.  
10 In some instances, a program code refers to the compiled  
11 binary code that executes on a microprocessor.

12 Q. Did you apply these constructions when analyzing  
13 Claim 1 A?

14 A. I did.

15 Q. At a high level, why doesn't Empires & Puzzles meet  
16 this limitation?

17 A. The Empires & Puzzles server does not execute  
18 view-generation logic.

19 Q. Were you here for Mr. Thompson's testimony on  
20 Tuesday?

21 A. I was.

22 Q. And what did you understand that Mr. Thompson  
23 identified was the view-generating logic on the Empires &  
24 Puzzles server?

25 A. He identified a function called getbattleresult on

1 the server.

2 Q. And do you agree with Mr. Thompson's conclusion?

3 A. I do not.

4 Q. And why do you not -- why don't you agree with his  
5 conclusion?

6 A. Because I analyzed the getbattleresult function on  
7 the server and it does not generate -- it is not  
8 view-generation logic as defined by the Court.

9 MR. MOSS: Your Honor, at this time we want to  
10 seal the courtroom for discussion of Zynga's source code.

11 THE COURT: All right. Anyone that is not part  
12 of IBM's trial team, please leave the room.

13 (Whereupon, the testimony was sealed as  
14 follows:)

15 (Discussion held between counsel off the  
16 record.)

17 MR. MOSS: We can unseal the Court at this time,  
18 Your Honor.

19 THE COURT: All right. Unseal the courtroom.

20 (Whereupon, the courtroom was unsealed.)

21 BY MR. MOSS:

22 Q. Dr. Bennett, we just discussed that you don't believe  
23 the Empires & Puzzles infringes the '719, but did you  
24 consider any other alternate designs that Empires & Puzzles  
25 could have used when it launched in 2017 that would also not

1     infringe?

2     A.       I did.

3     Q.       And please describe the alternate design you  
4     considered.

5     A.       Well, Empires & Puzzles could have used a cheat  
6     detection mechanism similar to the ones used in Harry  
7     Potter: Puzzles & Spells, which is another Zynga game.

8     Q.       And what's your understanding of how Harry Potter  
9     does cheat detection?

10    A.       Harry Potter uses what are called heuristics,  
11    basically, that's -- those are tests for reasonable criteria  
12    in the -- in what's happening in the game.

13    Q.       And how did you learn how Harry Potter does cheat  
14    detection?

15    A.       I spoke with Mr. Ben Lemer prior to trial and he also  
16    testified about this subject here at trial.

17    Q.       What are some examples of the types of heuristics  
18    applied by Harry Potter to check for cheating?

19    A.       Well, one example mentioned by Mr. Lemer in his  
20    testimony is that ensuring that the number of moves taken to  
21    complete the puzzle was reasonable; in other words, you  
22    know, if it's a very complex puzzle, it should take more  
23    moves than a simple puzzle would take. So by applying a  
24    heuristic that looks at that, you know, a determination can  
25    be made that, you know, what happened is reasonable.

1 Q. Are you aware of whether Empires & Puzzles employs  
2 anticheating or cheat detection mechanisms that do not rely  
3 on server replay?

4 A. I am and it does.

5 Q. It does.

6 In your opinion, if Empires & Puzzles employed  
7 the cheat detection techniques you described from Harry  
8 Potter, would it infringe the '719 patent?

9 A. Well, as I've testified, I don't believe that the --  
10 that Empires & Puzzles infringes the '719 patent as is, but  
11 certainly, if it were to practice a cheat detection  
12 mechanism other than server replay, it would not infringe.

13 Q. And why not?

14 A. Because it would not be conducting or performing  
15 server replay, which I understand to be the essence of IBM's  
16 infringement argument.

17 Q. Dr. Bennett, did you analyze whether Zynga has  
18 licensed any patents that are technically comparable to the  
19 '719?

20 A. I did.

21 Q. And how many patents did you identify that were  
22 technically comparable?

23 A. Just one.

24 Q. And which patent was that?

25 A. The '172 patent that is part of the Hands-On Mobile

1       agreement.

2       Q.       Dr. Bennett, please turn to Exhibit DTX-691 in your  
3       binder.

4                       Do you recognize this document?

5       A.       I do.

6       Q.       What is this document?

7       A.       This is U.S. Patent 6,884,172-B1.

8       Q.       And did you rely on this document in forming your  
9       opinion in this case?

10      A.       I did.

11                   MR. MOSS: Your Honor, we move to admit DTX-691.

12                   MR. GANGULY: No objection.

13                   THE COURT: DTX-6911 admitted.

14                   (Exhibit admitted.)

15                   MR. MOSS: Mr. Watkins, can you move to slide  
16       45, please?

17       BY MR. MOSS:

18       Q.       In your opinion, Dr. Bennett, why is the '172 patent  
19       technically comparable to the '719?

20       A.       Several reasons. First, the two patents were filed  
21       in approximately the time -- same timeframe, meaning that  
22       the state of technology was approximately the same.

23                   Second, if we were to go to next slide, we can  
24       see that the '172 patent and the '719 patent both practice a  
25       distributed computing environment in which the client

1 accesses the server. You can see that also in figure A on  
2 the right where the user computer accesses the server  
3 computer over the network. It is a web-based application,  
4 you can see the browser there talking to the server.

5 And finally the '172 patent allowed -- sorry --  
6 the content programming to be divorced from both  
7 presentation logic and graphical assets, which is a similar  
8 concept to the model-view-controller approach taken in the  
9 '719 patent.

10 Q. How does the complexity of the '172 patent compare to  
11 that of the '719 patent?

12 A. Well, when I looked at these two patents in their  
13 entirety, and taking, you know, based on my own experience  
14 over many years, in my opinion, these two patents are of  
15 similar technical complexity.

16 Q. Dr. Bennett, let's turn to your invalidity positions.  
17 What invalidity opinion are you testifying about today?

18 A. That the -- that Roy renders the '719 patent obvious.

19 Q. Dr. Bennett, please turn to DTX-942 in the binder in  
20 front of you. And let me know if you recognize that  
21 document?

22 A. I do.

23 Q. Did you rely on this document in forming your  
24 opinions in this case?

25 A. Yes.

## DIRECT EXAMINATION - JOHN BENNETT

1 MR. MOSS: Your Honor, we move to admit DTX-943.

2 MR. GANGULY: No objection.

3 THE COURT: DTX-943 is admitted.

4 (Exhibit admitted.)

5 BY MR. MOSS:

6 Q. Dr. Bennett, what is "Roy"?

7 A. As I said, Roy is a patent, a U.S. Patent numbered  
8 5,838,909. It is titled Reducing Latency when Synchronizing  
9 Access to a Multiuser Database over a network. It was filed  
10 in May of 1996.

11 Q. And --

12 A. It was issued in November of 1998.

13 Q. And if I refer to this patent as "Roy," will you  
14 understand what I'm referring to?

15 A. I do.

16 Q. At a high level, what does Roy describe?

17 A. Roy describes a multiplayer game that allows players  
18 to concurrently play.

19 Q. Let's look at the preamble for the '719 patent and  
20 Roy.

21 MR. MOSS: Can you move to slide 33,  
22 Mr. Watkins.

23 BY MR. MOSS:

24 Q. Does Roy teach the preamble of the '719 patent?

25 A. The preamble requires the client service system,

1     which Roy has. The system is required to reduce  
2     interactions between the client server, which Roy targets.  
3     And the application, the client part of the application has  
4     to access the server, which Roy also does.

5     Q.       So is it your opinion that Roy teaches or renders  
6     obvious this limitation?

7     A.       It is.

8     Q.       Let's look at limitation 1A.

9               Dr. Bennett, first, can you describe what  
10    figure 6 is on this slide?

11    A.       Figure 6 is taken from the Roy patent, it shows three  
12    computers, each of whom have a database, that is this  
13    cylinder-like-shaped thing, which contains the model, the  
14    fictitious world of the gaming, the small rectangle on the  
15    computers represents the events server, which processes user  
16    input on computers that have user input and updates the  
17    database accordingly.

18    Q.       How does Roy teach 1A of the '719 patent?

19    A.       Limitation 1A requires the server to store a model.  
20    And if we look over here, when Roy teaches, that one  
21    computer on the network during game play contains the master  
22    database, and that that database is the authoritative world  
23    view.

24               In this case, the master database is -- puts  
25    that authoritative database as the model, and the Roy -- the

1 event server can be the master event server, which is in  
2 addition to updating the master database, also processes  
3 user input to update the database and receives communication  
4 from clients to also update the master database. The master  
5 event server also sends events back to clients to update  
6 their database.

7 If we keep looking here, you'll notice there's a  
8 fault green arrow over here that says update display, that  
9 is, Roy teaches that the master database, in fact all  
10 databases, issue rendering, domains that update display on  
11 computers that have a display. Roy -- that is the  
12 view-generating logic, Roy teaches the server, in this case  
13 the master server processes or handles input and uses that  
14 input to update the master database.

15 So all of the elements of Claim 1A are practiced  
16 here within Roy.

17 Q. And looking at slide 35, we see that you've labeled  
18 this blown up computer as -- why in your opinion is this  
19 computer a server?

20 A. Because it has the last event server and master  
21 server database.

22 Q. Are these servers on the highlighted computer per  
23 Roy?

24 A. No, Roy teaches that the master event server and the  
25 master database may integrate to the computer used by the

1 player who is the most active and, therefore, would be  
2 generating the largest number of events. So by moving these  
3 components to that computer, you don't have to send those  
4 events over the network and the -- and the latency is  
5 reduced.

6 Q. Do the event server and master database have to be on  
7 the computer?

8 A. They do not but Roy teaches it's preferable.

9 Q. Why is it preferable?

10 A. Having them both there reduces latency because  
11 according to Roy, those components should be on the computer  
12 with the most active user.

13 Q. Does Roy require that the disclosed system have or  
14 use a central server?

15 A. No. The central server here, which doesn't have a  
16 display or user input, is not required in Roy, that's just  
17 one embodiment taught by Roy.

18 Q. Is it your opinion that Roy teaches or renders  
19 obvious this limitation?

20 A. It is.

21 MR. MOSS: Let's look at limitation 1B,  
22 Mr. Watkins, 37, please.

23 BY MR. MOSS:

24 Q. And, Dr. Bennett, how does Roy teach limitation 1B of  
25 the '719 patent?

1 A. Well, this is very similar to what we just talked  
2 about expect in this case. The client computer does not  
3 have the master database, it has the local database, and it  
4 does not have the event server, it has a local event server.  
5 In all other aspects, the client behaves the same as the  
6 server, therefore, there's a model, there's view-generation  
7 logic, and there's controller logic.

8 Q. Please continue, Dr. Bennet.

9 A. Roy teaches the local database is a subset -- sorry,  
10 is -- a copy of the master database is there by meeting the  
11 subset criteria, and that the event server is simply  
12 designated as the local event server.

13 Q. Let's take a look at limitation 1C on slide 39. 1C  
14 of the --

15 A. If we could have that slide, please.

16 Q. The claim language should be for 1C, I apologize.

17 A. No worries, Claim 1C requires that the client be able  
18 to perform the one or more portion of application without  
19 the client having to interact with the -- and Roy describes  
20 a method by which purely local events are handled by the  
21 event server and used to update the local database without  
22 having to communicate over the network, therefore by  
23 practicing the elements of Claim 1C.

24 Q. Is your opinion that Roy teaches or renders obvious  
25 this limitation?

1 A. Yes.

2 Q. Let's look at limitation 1D. Does Roy teach this  
3 limitation?

4 A. Here, I have shown the server that we just discussed  
5 and the client we've just discussed. Claim element 1D  
6 requires that the client and server both locally maintain at  
7 least a portion of -- of the model, the master database has  
8 the entire authoritative copy or authoritative version of  
9 the model, the local database has a copy of that according  
10 to Roy.

11 The claim element 1D requires that the client  
12 and server both execute view-generating logic, as I  
13 described. The master event server handles inputs and  
14 updates the database, which is controller logic. And the  
15 computer, the server on which is master and event server on  
16 the master database are located. Both -- well, updates the  
17 display because Roy teaches that the database issues  
18 rendering commands, therefore, by performing view-generating  
19 logic to update the display.

20 The same thing happens over here on the client,  
21 except the local database is a copy of the master database  
22 seasoned the event server on the client is a nonmaster event  
23 server.

24 Q. How do we know in view-generating logic on Roy is the  
25 same or a subset of that on the server?

1 A. Well, Roy says that -- that this is a game executing  
2 on multiple computers. It says -- Roy says that there's an  
3 event server on every computer that the stated status moving  
4 from server and nonevent server is simply a substitutes  
5 change. Simply, Roy says the master database -- sorry, the  
6 local database is a copy

7 The master database base, it would be obvious  
8 that a person of skill best practice or good, you would want  
9 the view-generating to be the same between the client server  
10 because this is a single game because imagine, you have two  
11 players, they are both standing in the world, and if they  
12 are each looking at the same thing, you would want them to  
13 see the same view, you would want -- any person of ordinary  
14 skill would want to use the same code to -- same program  
15 code to perform that function.

16 The same is true of the event server. Roy  
17 teaches that the event server can change simply by a change  
18 in status. So it would make no sense from a software  
19 engineering standpoint to a person of ordinary skill that  
20 you would want different code when that status changed.

21 Q. Does the Roy patent -- and that was why, if I  
22 understand your testimony, that the controller logic on the  
23 client is the same or a subset of that on the server?

24 A. Correct. If I didn't say that, I'm sorry.

25 Q. Does Roy disclose any actual program code?

## CROSS-EXAMINATION - KEVIN ALMEROTH

1 A. It does not.

2 Q. How does that affect your opinion?

3 A. It doesn't. Roy has a detailed specification and  
4 flowcharts of what the game is supposed to do, and that's  
5 sufficient to reach the opinions I've reached.

6 Q. Now, is it ultimate conclusion and opinion that the  
7 '719 patent would be obvious in light of the teachings of  
8 Roy?

9 A. It is.

10 MR. MOSS: Pass the witness.

11 THE COURT: Cross-examination.

12 MR. GANGULY: Yes, Your Honor, may we pass out  
13 the binders?

14 THE COURT: Yes.

15 CROSS-EXAMINATION

16 BY MR. GANGULY:

17 Q. Good afternoon. My name is Tuhin Ganguly, I'm one of  
18 the lawyers for IBM. We met before, Dr. Bennett, nice to  
19 see you again. I have some questions for you, if that's  
20 okay?

21 A. Good afternoon, I guess.

22 Q. All right. Dr. Bennett, the jury in this case is  
23 being asked to determine whether there's infringement of the  
24 '719 patent. You understand that, right?

25 A. That's my understanding.

1 Q. And so one of the things the jury needs to decide is  
2 whether there's view-generating logic on the server, right?

3 A. Yes.

4 Q. Now, I just heard you tell the jury -- and I wrote it  
5 down -- that the server does not display the object, it  
6 creates, right?

7 A. To which object are you referring?

8 Q. To the battle result object.

9 A. You mean the pvpbattleresult object?

10 Q. Yes, the pvpbattleresult object, you told the jury,  
11 does not generate the pvpbattleresult logic that it creates?

12 A. No, I did not say that.

13 Q. Would you agree, sir, that Claim 1 of the '719 patent  
14 does not require a service side display, right?

15 A. No, it doesn't.

16 Q. And you talked about program code with the jury,  
17 right?

18 A. I did.

19 Q. And program code is a set of instructions that tells  
20 the computer to do something, right?

21 A. I mean, it's a particular set of instructions  
22 expressed in a particular programming language.

23 Q. And so we can agree that program code is a set of  
24 instructions that tells a computer to do something, right,  
25 generally?

1 A. I think I just answered that. Program code has a  
2 specific meaning and it means software expressed in  
3 plaintiff programming language.

4 Q. Okay. Why don't we look and see what program code in  
5 Empires & Puzzles looks like.

6 MR. GANGULY: Can I have a document camera,  
7 please.

8 BY MR. GANGULY:

9 Q. All right. Dr. Bennett, you showed this slide to the  
10 jury earlier; do you recall that?

11 A. I do.

12 Q. Okay. And here you're showing what happens if an  
13 error code is sent from the -- from the server to the  
14 client, right?

15 A. Not exactly. This slide shows the process by which  
16 that error code is created. Yes.

17 Q. Okay. But you're showing that an error code is being  
18 sent back, correct?

19 A. Under the circumstances where the server determines  
20 that its result and the client result are different.

21 Q. Okay. So let's talk about what happens if the  
22 results are not different. Now, you show here a victory  
23 screen, do you see that?

24 A. I do.

25 Q. And the victory screen, that's what the player sees

1 at the end of a raid battle, assuming they won, right?

2 A. Yes.

3 Q. And you agree that the victory screen shown here is  
4 considered pending until the server validates the victory,  
5 right?

6 A. I don't know exactly what you mean by "pending," but  
7 that's what's -- until the server validation is performed.

8 Q. And so the victory screen is pending until the  
9 validation is performed?

10 A. It's there, certainly.

11 Q. Sir, you gave an expert report in this case?

12 A. I did.

13 Q. And you have a copy of your rebuttal report in your  
14 binder, if you need to look at it, but let's take a look.

15 A. Can you refer me to the page you're about to --

16 Q. Yes. So rebuttal expert report of Dr. Bennett,  
17 March 1, 2024. And I'm looking at paragraph 150.

18 Now, on paragraph --

19 A. Just a moment, please.

20 Q. Are you there, Dr. Bennett?

21 A. Yes, I am.

22 Q. Okay, I have it on the screen. In paragraph 150, you  
23 say, "The victory screen shown in figure 10 below or the  
24 defeat not shown are considered pending until the server  
25 validates the victory." That's what you said, right?

1 A. Yes, that is what I said.

2 Q. And figure 10, below that, what you were referring to  
3 is this victory screen right here, right?

4 A. Correct. Thank you for refreshing my memory.

5 Q. You agree with Mr. Thompson that during the  
6 validation process, the client and server both generate a  
7 battleresult object, right?

8 Let me clarify. You agree with Mr. Thompson  
9 that during the validation process, the client and server  
10 both generate a pvpbattleresult object, right?

11 A. Correct.

12 Q. And when the server validates the victory, the server  
13 sends a message to the client saying, in your words, "all is  
14 well," right?

15 A. If I said that, I'll stand by it, but it's an error  
16 code sent by the server to the client.

17 Q. So if the victory is validated, the server sends a  
18 message to the client saying all is well, correct?

19 A. Actually, I am certain an error code is sent if the  
20 result of comparison are different. I haven't looked at the  
21 code recently on what happens when the server -- what  
22 happens when the server and client, when the code is the  
23 same. But I believe something is sent. I don't think it  
24 says "all is well," but something is sent.

25 Q. And when the victory is validated, the client

1 displays the result screen to the user, right?

2 A. The client, yes.

3 Q. Okay. And this is an example of the results screen?

4 A. Yes.

5 Q. Can you agree with Mr. Thompson that at the result  
6 screen, the user is shown the raid loot and trophies from  
7 the battle?

8 A. Yes.

9 Q. So I want to turn now to your opinions on validity  
10 regarding Roy.

11 Now, you're aware, Dr. Bennett, that the '719  
12 patent was filed on February 8th, 2000, and it issued  
13 April 28th, 2010?

14 A. I believe that's correct.

15 Q. So the Patent Office studied IBM's application for  
16 ten years before it issued the '719 patent, right?

17 A. The file history reflects significant interaction  
18 between the VINs and the Patent Office.

19 Q. And you agree that U.S. Patents are presumed to be  
20 valid, right?

21 A. That's my understanding.

22 Q. It's your opinion that the Roy patent makes the '719  
23 patent obvious?

24 A. That's correct.

25 Q. So let's take a look at one of the slides you showed.

1 Now, you showed this slide to the jury earlier, right?

2 A. Yes.

3 Q. And figure 6, that's from Roy, the Roy patent?

4 A. It is.

5 Q. And over here in the callout, you've labeled this  
6 Box 62 as "server."

7 Do you see that?

8 A. Correct.

9 Q. Now, Roy says 62 is a computer system.

10 Do you see that?

11 A. I do.

12 Q. Roy doesn't say that 62 is a server, it doesn't say  
13 that, right?

14 A. No, not specifically.

15 Q. Now, you didn't show the jury what Roy actually  
16 labels as the server, so let's take a look at that.

17 If you look at Roy in the actual patent  
18 specification, we can see that the patent calls 61, "a  
19 central server computer system."

20 Do you see that?

21 A. I do.

22 Q. And so in this figure, what Roy -- what Roy actually  
23 labels as 61 -- what actually labels as the server is 61,  
24 correct?

25 A. That's not quite correct, no.

1 Q. Now, Dr. Bennett, in your view, Zynga does not use  
2 the '719 patent in Empires & Puzzles cheat detection, right?

3 A. That's correct.

4 Q. But you told the jury that Empires & Puzzles doesn't  
5 need the '719 patent because it could easily switch to a  
6 different cheat detection method, right?

7 A. That's not exactly what I said, but generally, yes.

8 Q. So it's your opinion that instead of server-side  
9 validation, Empires & Puzzles could use a rules-based cheat  
10 detection similar to Harry Potter, right?

11 A. Yeah, generally.

12 Q. But it's true, isn't it, sir, that Empires & Puzzles  
13 switched to a rules-based cheat detection that alternatively  
14 could result in more cheating going undetected, right?

15 A. Not necessarily.

16 Q. Sir, you gave a deposition?

17 A. I did.

18 Q. And in that deposition in this case, you -- it was  
19 given under oath, right?

20 A. Correct.

21 Q. And you told the truth?

22 A. I did.

23 Q. So there's a transcript in your binder and I'll have  
24 you look at page 215.

25 A. Would you repeat the page number again?

## REDIRECT EXAMINATION - JOHN BENNETT

1 Q. Page 215, the little page 215 at line 10. Let me  
2 know when you're there.

3 A. Okay.

4 Q. Okay. And then at line 10, you were asked the  
5 question:

6 "QUESTION: Okay. And so here you agree that  
7 your alternative rules-based cheating detection could result  
8 in more cheating going on -- going undetected as opposed to  
9 server replay and verification, right?

10 "ANSWER: I was so informed by Mr. Lemer.

11 "QUESTION: You're also representing that that  
12 is true?

13 "ANSWER: Yes."

14 A. Yes.

15 Q. Those were the questions you were asked and those  
16 were the answers?

17 A. Those were the questions I was asked and that's the  
18 answer I gave.

19 THE COURT: Cross -- redirect?

20 MR. MOSS: Briefly, Your Honor.

21 REDIRECT EXAMINATION

22 BY MR. MOSS:

23 Q. Dr. Bennett, we just took a look at your slides  
24 showing Roy and the green blow up you considered to be the  
25 server, do you see that?

## DIRECT EXAMINATION - DOUGLAS KIDDER

1 A. Yes.

2 Q. Why do you consider the Roy system to be the server?

3 A. It has the master event server and the master  
4 database.

5 Q. And does Roy require that the master database and  
6 master event server in that capability reside on any  
7 particular computer in Roy?

8 A. It does not.

9 MR. MOSS: Nothing further, Your Honor.

10 THE COURT: All right. Dr. Bennett, you may  
11 step down. Thank you.

12 THE WITNESS: Thank you, Your Honor.

13 THE COURT: All right. Before you call your  
14 next witness, we have a computer issue that the court  
15 reporter needs to work out.

16 (Recess taken.)

17 THE COURT: Call your next witness.

18 MS. MULLINS: Zynga calls Doug Kidder to the  
19 stand.

20 DOUGLAS KIDDER, having been called on the part  
21 and behalf of the State as a witness, having first affirmed  
22 to tell the truth, testified as follows:

23 DIRECT EXAMINATION

24 BY MR. MULLINS:

25 Q. Good afternoon.

## DIRECT EXAMINATION - DOUGLAS KIDDER

1 A. Good afternoon.

2 Q. Please introduce yourself to the jury.

3 A. As you heard, my name is Doug Kidder. I was born in  
4 Philadelphia, raised in Baltimore. I'm a proud graduate of  
5 Milford Mill High School and I have two adult kids at this  
6 point in my life.

7 Q. What are you here to testify about, Mr. Kidder?

8 A. I'm here to offer an opinion on damages in the event  
9 that one or both of the IBM patents here are found to be  
10 valid and infringed by Zynga.

11 Q. Did you prepare slides to support your testimony here  
12 today?

13 A. Yes, I did.

14 Q. And are these the slides up on the screen at DDX-13?

15 A. Yes, they are.

16 MS. MULLINS: Your Honor, permission to publish  
17 DDX-13 to the jury?

18 THE COURT: No problem.

19 BY MS. MULLINS:

20 Q. What is your professional experience that's relevant  
21 to this case?

22 A. So I'm the managing partner to a firm called OSKR.  
23 We provide expert services in the area of damages. We have  
24 about 25 years valuing intellectual property, I also have  
25 industry experience consulting. I've bought and sold

1 businesses. I've run businesses that aren't consulting  
2 businesses.

3 This point, I have testified in over 100 cases,  
4 over 40 of which involve patents.

5 Q. Do you always consult for defendants about damages  
6 issues?

7 A. No, I consult for defendants and plaintiff.

8 Q. What's the focus of your damages work?

9 A. Mostly high technology companies and also medical  
10 companies.

11 Q. Please describe your educational background.

12 A. So I have a master of science from the University of  
13 California, Berkeley. I have a BA from Amherst College. I  
14 was an adjunct professor at Golden Gate University, where I  
15 was teaching a course on damages to graduate students. And  
16 I am also a member of a couple of societies that people like  
17 me tend to join.

18 MS. MULLINS: Your Honor, Zynga offers  
19 Mr. Douglas Kidder as an expert in patent damages to assist  
20 the jury.

21 MR. DANG: No objection.

22 BY MS. MULLINS:

23 Q. Mr. Kidder, what is your understanding of Zynga's  
24 belief about whether it infringes the asserted patents?

25 A. It is my opinion that Zynga does not believe it

1 infringes the asserted patents.

2 Q. And if the jury were to find the asserted patents are  
3 not infringed or that they're invalid, what should it do  
4 with your opinion?

5 A. You should ignore me and you should ignore  
6 Mr. Persechini because we both start with the assumption,  
7 the patents are valid and infringed; if they are not,  
8 there's no damages.

9 Q. And what's your ultimate opinion that you reached in  
10 this case?

11 A. So it's my belief that if the '849 patent is found to  
12 be valid and infringed, then Zynga should pay a \$2 million  
13 lump sum royalty. Similarly, if the '719 patent is found  
14 valid and infringed, then Zynga should pay IBM \$18 million  
15 lump sum royalty.

16 And in the following page, I'll give you why I  
17 think that.

18 Q. What work did you perform in this case to arrive at  
19 your opinions?

20 A. So there's a fair amount of evidence that was  
21 produced by both sides in this case. There were 135 IBM  
22 patent license agreements. There were 12 Zynga agreements,  
23 some of which were patent agreements; 35 depositions; there  
24 were financial information; and over a thousand other  
25 documents. So there was a fair amount that we could look at

1 in this case.

2 Q. And once you reviewed these materials, how did you  
3 reach your opinion on damages?

4 A. Well, I established the amount of a reasonable  
5 royalty.

6 Q. Did you follow any particular methodology to  
7 determine reasonable royalty?

8 A. Yes, I followed what's called the Georgia-Pacific  
9 methodology. You heard Mr. Persechini testify about this  
10 briefly.

11 Q. Could you please explain the Georgia-Pacific  
12 methodology.

13 A. Sure. So there actually 15 Georgia-Pacific factors,  
14 I have shown the first 14 here. And I particularly want to  
15 call attention to factors 1, 2 and 12.

16 So the Georgia-Pacific methodology asks the  
17 damages expert to look for comparable licenses, either  
18 licenses to patent in suit and/or other licenses in evidence  
19 here.

20 The remaining factors then ask the damages  
21 expert to adjust up or down for differences between the  
22 comparable licenses and what we're licensing here.

23 So by way of analogy, you know, if you buy a  
24 used car, what do you do? You go online, you look and  
25 see -- if you're buying, say, a 2007 Toyota Corolla, you go

1 online and look and see what other people have paid for 2007  
2 Toyota Corollas, and then you adjust it. And maybe there is  
3 something different, more mileage, less mileage, etc. That  
4 is absolutely the spirit of the Georgia-Pacific analysis and  
5 that's what I did here.

6 Q. And you reference "comparable licenses." Can you  
7 please explain to the jury what a comparable license is?

8 A. Sure. So comparable here means that the license  
9 that's being used is a comparable, is both technically and  
10 economically comparable to the license we're considering  
11 here.

12 So technically comparable means it is either the  
13 same patent or it's a similar patent. If you're looking for  
14 a 2007 Toyota Corolla, maybe you can't find one of those  
15 transactions online but maybe you see a 2008 Toyota Corolla,  
16 so you -- you would use that. So that's technical  
17 comparability.

18 Then there's economic comparability, which means  
19 essentially was that license negotiated, sort of in the same  
20 way that the hypothetical negotiation would be, that the --  
21 a negotiation between the parties. And, again, to the car  
22 analogy, economically comparable would mean if you were  
23 looking at buying a car from a dealer, you would look at  
24 dealer prices. You wouldn't look at private-party prices  
25 because those are not economically comparable. It's the

1 same idea with the Georgia-Pacific analysis.

2 Q. Is using comparable licenses a generally accepted  
3 method for determining a reasonable royalty?

4 A. Yeah, it's not just generally accepted. It's  
5 actually the gold standard. It's -- it is what the  
6 Georgia-Pacific analysis is designed to do.

7 Q. Why didn't IBM's damages expert, Mr. Persechini, use  
8 comparable licenses in his analysis?

9 A. Well, he claimed that there were no comparable  
10 licenses. He looked at all 135 IBM licenses and said,  
11 There's nothing in there that I can use.

12 Q. And do you agree with Mr. Persechini?

13 A. No, I don't. I believe that there are three licenses  
14 in there that are, in fact, comparable, and he gave you what  
15 I would call a not very serious reason for why they're not  
16 comparable, and we'll discuss that.

17 Q. Other than the factors that are shown on this slide  
18 here, are there any other Georgia-Pacific factors that you  
19 considered in your analysis?

20 A. Yes, there's Georgia-Pacific factor 15. And this is  
21 described as coming up -- it's a hypothetical negotiation  
22 that would result in the amount that a licensor, such as the  
23 patentee, and a licensee, such as the infringer, would have  
24 agreed upon at the time the infringement began if both had  
25 been reasonably and voluntarily trying to reach an

1 agreement.

2 So the idea is you're putting yourselves in the  
3 shoes of the people negotiating for an agreement at the time  
4 when they would have been negotiating and trying to  
5 understand what do you think the outcome would have been of  
6 that negotiation.

7 Q. How many hypothetical negotiations would there have  
8 been in this case?

9 A. There would have been two.

10 Q. What was the first one?

11 A. So the first one was in July of 2007. It would have  
12 been a negotiation between IBM and Zynga for a license to  
13 the '849 patent. And the reason it would have been in July  
14 of 2007 is that phrase from Georgia-Pacific factor 15 saying  
15 "at the time infringement began." So IBM is alleging that  
16 Zynga, when it launched its poker game in 2007, started  
17 infringing the '849 patent. So that sets the date for the  
18 hypothetical negotiation.

19 Q. What can you tell us about Zynga's business in  
20 July 2007?

21 A. They were a very young company. They were just  
22 starting out. They were just launching their first game.

23 Q. And what can you tell us about the second  
24 hypothetical negotiation in this case?

25 A. So the second hypothetical negotiation is a

1 negotiation for the '719 patent, and that occurs in March of  
2 2017. So at this negotiation, you've got IBM on the one  
3 hand and you've got Small Giant Games on the other hand.  
4 Because at this point in time, Small Giant Games had not yet  
5 been purchased by Zynga, so they're sitting at the  
6 hypothetical negotiation. In March of 2017, Small Giant had  
7 just -- was just getting ready to release Empires & Puzzles,  
8 the game that IBM accuses of infringing the '719 patent.

9 Q. And what can you tell us about Small Giant's business  
10 in March 2017?

11 A. In March 2017, Small Giant was a money-losing  
12 start-up in Finland.

13 Q. And in both of these negotiations that we just  
14 discussed, what kind of license are the parties discussing?

15 A. They're both -- in both negotiations, they're  
16 discussing a nonexclusive license to a single patent.

17 Q. And let's walk through your Georgia-Pacific analysis  
18 for each asserted patent. So for the '849 patent, where did  
19 you start your analysis?

20 A. So with the '849 patent, I started by looking for  
21 comparables, and where I looked was in the 135 IBM  
22 agreements. And 17 of those agreements explicitly license  
23 the '849 patent. So they say you may get a license to other  
24 patents, but you explicitly get a license to the '849 patent  
25 as well.

1           Most of those were not commercially comparable.  
2 They didn't pass that screen. There were only three that  
3 were economically comparable to the '849 patent.

4 Q.       Did you hear references earlier in this trial to  
5 IBM's licenses with Google, Facebook, Amazon, and Groupon?

6 A.       Yes, I did.

7 Q.       Did you use those licenses in your analysis?

8 A.       No, I did not. I didn't believe they were  
9 economically comparable. This is something that  
10 Mr. Persechini and I agreed on. He stated in court that he  
11 didn't rely on them either because he didn't believe they  
12 were economically comparable.

13 Q.       So what IBM license agreements did you use as  
14 comparables?

15 A.       So the three that were comparable were the Netflix,  
16 DIRECTV, and Verizon agreements with IBM where they licensed  
17 the '849 patent.

18 Q.       What were the terms of those agreements?

19 A.       So the -- all of these agreements licensed 95 to 103  
20 patents, including the '849 patent. So they licensed a fair  
21 number of patents, but explicitly in there was the '849.  
22 And Netflix paid \$2 million, DIRECTV paid \$1.5 million, and  
23 Verizon paid \$1.5 million.

24 Q.       And where can the jury find these agreements if they  
25 want to review them?

1 A. So if you want to review them, they are at JTX-0046,  
2 JTX-0042, and JTX-0120.

3 Q. And are these licenses structured as lump sums or  
4 running royalties?

5 A. They are all lump sum licenses. It's just \$1.5  
6 million or \$2 million lump sum.

7 Q. So how did you use the Netflix, Verizon, and DIRECTV  
8 licenses in your Georgia-Pacific analysis?

9 A. So these were the starting points. This is the  
10 beginning. These are the comparable licenses so I looked at  
11 adjustments for them.

12 Q. Were there any differences between these license  
13 agreements and the hypothetical license agreement that  
14 suggested adjustments to your starting point?

15 A. There were really sort of three things to look at.  
16 One was that the duration of the patent license was  
17 different. The second is that at the hypothetical  
18 negotiation, you assume that the patents are invalid and  
19 infringed. And lastly, you notice that this -- these all --  
20 all these licensees got a lot more patents than just one.  
21 They got, you know, 95, 97, and 103. So you would expect,  
22 given that Netflix got, for example, 95 patents and Zynga's  
23 only negotiating for one patent, that Zynga would pay less,  
24 so that would exert -- this would be this downward  
25 adjustment.

1 BY MS. MULLINS:

2 Q. And how did Georgia-Pacific factor 11, the extent of  
3 use, impact your analysis?

4 A. So this was Mr. Persechini's basic analysis. He  
5 said, Let's look at the extent of use. I looked at the  
6 extent of use quite carefully and looked at the actual  
7 evidence here. Right? The evidence is that all of the IBM  
8 agreements are for lump sums. So why does that matter?  
9 Because a lump sum inherently says it's -- that you pay a  
10 known amount regardless of how much you use the patent.

11 So in the car analogy, this is like you bought  
12 the car. Right? You decided you wanted to buy the car.  
13 You're going to pay the same amount whether that car sits in  
14 your driveway or you drive it to work for the next 15 years.  
15 Same price. So that indicates that the extent of use was  
16 not important to IBM in its licensing.

17 Secondly, with the Netflix, Verizon, and DIRECTV  
18 licenses, IBM allowed each of these big technology companies  
19 to acquire other businesses and not pay any more. So in  
20 effect, IBM is -- and, look, acquisitions aren't a surprise  
21 among big tech companies. They do it all the time.

22 So the third thing to think about is the  
23 relative size of Zynga at the hypothetical negotiation  
24 compared to these companies. So at the hypothetical  
25 negotiation, Zynga is a start-up. They just launched one

1 game. At the time of the actual negotiations with Netflix,  
2 Verizon, and DIRECTV, they're companies that are making  
3 hundreds of millions to billions of dollars in revenue;  
4 much, much bigger companies. That would suggest Zynga  
5 should pay less.

6 But the other point that struck me was if you  
7 look at the amounts paid by Netflix, Verizon, and DIRECTV,  
8 three different businesses, and particularly if you look at  
9 Verizon and DIRECTV, at the date of the hypothetical  
10 negotiation, DIRECTV's revenues were about a quarter of  
11 Verizon's revenues, so a much smaller company. They both  
12 paid \$1.5 million.

13 All this evidence indicates that in the actual  
14 negotiations for the '849 patent, that the extent of use was  
15 not a serious consideration. It might have mattered in some  
16 way, but you sort of can't see it in the results.

17 Q. Is there any evidence that any of these companies  
18 added significant new business after signing a license  
19 agreement with IBM?

20 A. Yes. In particular, Verizon, about two years after  
21 signing the agreement, they bought Yahoo! and they bought  
22 AOL; so big companies that are involved heavily in digital  
23 advertising. Now, to be fair, Yahoo! had already signed an  
24 agreement with IBM, so Verizon shouldn't have had to get a  
25 license there, but AOL was a significant addition that was

1     unlicensed and Verizon didn't have to pay anything more for  
2     acquiring AOL.

3     Q.       Were you in the courtroom when Mr. Persechini  
4     testified that these agreements are not economically  
5     comparable to the hypothetical negotiation because Netflix,  
6     Verizon, and DIRECTV are subscription-based businesses?

7     A.       Yes, I did hear that.

8     Q.       Do you agree with him?

9     A.       No, I don't. He didn't explain to you why a  
10    subscription-based business mattered, right? These are all  
11    companies -- IBM asserts that the '849 patent is useful in  
12    advertising. All these companies do advertising. We've all  
13    seen it. The point of advertising is get you, the consumer,  
14    interested in buying the product.

15           Doesn't really matter whether that product is a  
16    subscription, a physical thing, or, in the case of Zynga, an  
17    intangible thing in a game. The point is they advertise.  
18    They're all big companies that advertise, and they're trying  
19    to get you to buy something. The fact that what they're  
20    asking you to buy is a subscription doesn't change things.

21    Q.       And what evidence have you seen, if any, indicating  
22    how IBM believed Netflix, Verizon, and DIRECTV were using  
23    the '849 patent?

24    A.       So we heard Mr. McBride testify about this, and we  
25    heard Mr. McBride testify about Project Maui where IBM was

1 going around trying to sell a patent -- a portfolio of  
2 patents that included the '849.

3 And this is a page out of the presentation that  
4 IBM gave to Netflix. And what it shows -- you can see that  
5 it's the '849 patent. I'm sorry that the quality of this  
6 makes it very hard to read. This is what we got from IBM.  
7 So what I've had to do is sort of highlight some things.

8 So you can see that this is discussing the '849  
9 patent, and you can see sort of in the bottom right that  
10 they're discussing an advertisement that's being shown on  
11 Fox. And it's a little harder to see, but the advertisement  
12 they're calling out is an ad for a Fox show called New  
13 Girls. Okay? So what IBM is telling Netflix is it's  
14 suggesting that Fox is using the '849 patent just by showing  
15 an ad. So what IBM is suggesting is that if you show an ad,  
16 you're using the '849 patent.

17 Q. Did any of the other Georgia-Pacific factors  
18 materially impact your analysis for the '849 patent?

19 A. Not materially. As I said before, there were -- I  
20 looked through all the factors. Some of them didn't matter  
21 at all. Some of them suggested upward, some of them  
22 suggested a downward adjustment; in other words, pay less or  
23 pay more. But at the end, I determined that they sort of  
24 balanced each other out.

25 Q. So what was your ultimate opinion about the

1 reasonable royalty Zynga and IBM would have agreed to at the  
2 hypothetical negotiation for the '849 patent?

3 A. So this is a basis of my \$2 million number we just  
4 talked through. I believe they would have agreed to a  
5 \$2 million lump sum, that IBM would have understood what it  
6 was able to charge Netflix, DIRECTV, and Verizon.

7 Now, I also believe this is being very generous  
8 to IBM because Zynga is a small start-up that's only getting  
9 one patent. It's not getting 90-plus patents like the big  
10 technology companies it negotiated with. But still to be  
11 generous and conservative, I believe that \$2 million is the  
12 lump sum that Zynga and IBM would have agreed upon at the  
13 hypothetical negotiation in 2007.

14 Q. Let's move to your analysis for the '719 patent. Can  
15 you please remind the jury what the circumstances would have  
16 been at the hypothetical negotiation for that patent?

17 A. Yes. So the hypothetical negotiation for the '719  
18 patent happens in March of 2017, and this is IBM and Small  
19 Giant negotiating.

20 Q. And so for the '719 patent, what were the starting  
21 points for your analysis?

22 A. Well, I did the same thing. I looked at all the IBM  
23 licenses, and IBM has not -- never signed a license that  
24 explicitly says, You get a license to the '719. It might  
25 have been buried in a -- in a broad portfolio cross-license,

1 no explicit licenses. Second, I looked at Small Giant. I  
2 looked for a comparable license. You know, has Small Giant  
3 ever licensed a patent? And the answer was no. There was  
4 nothing there.

5 So then I looked at the 12 patent agreements  
6 that Zynga had signed and produced in this case. And this  
7 is under Georgia-Pacific factor 12. It says look at other  
8 industry agreements. So the 12 of these agreements, I  
9 screened them for economic comparability, and only three  
10 came out as being economically comparable: Atwater  
11 Ventures, Hands-On Mobile, and First Technology.

12 I then asked Dr. Bennett to review the patents  
13 that had been licensed in those three agreements to see if  
14 any of them were technically comparable. And you just heard  
15 him testify that the '172 patent in the Hands-On Mobile  
16 agreement was technically comparable to the '719 that --  
17 yes.

18 Q. And what are the terms of the Hands-On Mobile  
19 agreement?

20 A. So the Hands-On Mobile agreement was a purchase of a  
21 single patent for \$2 million. So Zynga bought this patent  
22 from Hands-On Mobile, and it was just the '172 patent, so  
23 there's no other patents involved in that. And this  
24 agreement has been admitted as DTX-0884, if you want to  
25 review it.

1 Q. How did you use Zynga's agreement with Hands-On  
2 Mobile in your Georgia-Pacific analysis?

3 A. So, once again, it was the starting point, it was the  
4 comparable license.

5 Q. And what adjustments, if any, did you make to that  
6 starting point?

7 A. Well, I looked at the other Georgia-Pacific factors  
8 and, again, the duration of the license was different. And  
9 we also heard from Mr. Lemer and Mr. Wilkman that there are  
10 other ways to do cheat detection, and that's Georgia-Pacific  
11 factors 9 and 10, looking at the technical utility of the  
12 patents. So both of those would suggest downward  
13 adjustments.

14 In addition, the fact there was a purchase as  
15 opposed to a nonexclusive license, you -- would suggest that  
16 Zynga would pay less. On the other hand, the -- there's an  
17 assumption at the hypothetical negotiation that the patent  
18 is valid and infringed, that would suggest an increase. Put  
19 all those together, again, you come to a conclusion that  
20 there's not a strong argument to go up or down.

21 Q. What was your ultimate conclusion on what IBM and  
22 Small Giant Games would have agreed to at the hypothetical  
23 negotiation for the '719 patent?

24 A. So it's my opinion that the parties would have agreed  
25 to a \$2 million lump sum, again, based on the evidence I

1 looked at and, again, I believe that this is generous to  
2 IBM.

3 Q. Did you hear Mr. Persechini testify that it would be  
4 peculiar for a license for a patent used by 33 games to be  
5 the same amount as a license for a patent used by one game?

6 A. I did see that.

7 Q. Do you agree with him?

8 A. No, I don't. I mean, look, I just followed the  
9 evidence, right. I looked at the comparable licenses. The  
10 comparable licenses are 1.5 million and 1.5 million to 2  
11 million for the '849 patent. And 2 million for the '719  
12 patent.

13 So the fact they come out the same number just  
14 is what the evidence says. There's nothing peculiar about  
15 it.

16 MS. MULLINS: And, Your Honor, I'm about to move  
17 to a new topic so I don't know if -- do you want me to power  
18 through or is this a good time for a lunch break.

19 THE COURT: How much longer do you expect?

20 MS. MULLINS: 10, 15 minutes.

21 THE COURT: I think we can finish.

22 MS. MULLINS: Okay.

23 BY MS. MULLINS:

24 Q. All right. Let's move to your analysis of  
25 Mr. Persechini's methodology. Do you think that the way

1 that Mr. Persechini determined a reasonable royalty is  
2 reliable?

3 A. No, I do not.

4 Q. Why not?

5 A. Well, first of all, everything he's done is contrary  
6 to IBM's licensing practices. And, second of all, we'll  
7 talk in some detail about his concurrent display model and  
8 how it just doesn't work.

9 Q. And can you explain why, in your opinion,  
10 Mr. Persechini's analysis is contrary to IBM's licensing  
11 practices?

12 A. Sure, so start from the last step of Mr. Persechini's  
13 analysis, recall that he opines that IBM and Zynga would  
14 have agreed that IBM would take 47 percent of the profits as  
15 a reasonable royalty. And, remember that the basis for that  
16 47 percent, how he got there, was he looked at the ratio of  
17 Zynga's research and development expenses to its sales and  
18 marketing expenses.

19 But we also heard Mr. Persechini in court when  
20 asked, "Have you seen -- similarly, you have not seen any  
21 evidence that IBM has ever agreed to a license in which the  
22 profits of the licensee were split with IBM based on a ratio  
23 of its research and development and sales and marketing  
24 expenditures, correct?"

25 Mr. Persechini replied, "Yes, I have seen a lot

1 of IBM agreements in my day, but I don't remember that."

2 And, look, I'm getting older here, I have been  
3 in business for a long time, I have never seen it either;  
4 it's not just Mr. Persechini's opinion. This is not  
5 something that you see in license negotiations. It's not  
6 something that you see in IBM license negotiations. You  
7 know, he's applying it here, it's not something IBM ever  
8 did.

9 Q. Were there any other aspects of Mr. Persechini's  
10 analysis that were contrary to IBM's licensing practices?

11 A. Yes. So Mr. Persechini describes his result as a  
12 lump sum. It's not. It's a running royalty. You remember  
13 the board that Ms. Caridis put up, and she was going through  
14 the percentages and the dollars. The point of that board  
15 was to say, look, what Mr. Persechini has calculated is a  
16 percentage of the revenue that he believes Zynga made, okay.

17 That is the definition of a running royalty.  
18 The fact that he added it all together and called it a lump  
19 sum doesn't make it a lump sum. His methodology is a  
20 running royalty.

21 And so if we step back to the car analogy for a  
22 moment, if you buy the car, we all agree, you don't pay a  
23 different amount depending on what you're going to use it  
24 for. But if you rent a car, the economics are very  
25 different. If you rent a car, you're going to pay for the

1 miles that you use, you're going to pay for the number of  
2 days that you have it.

3 And what he's done is he's essentially valued  
4 the car by saying, well, what if you rented it for 16 years,  
5 how much would you pay? That's not the price of the car.

6 Q. Did you also hear of Mr. Persechini say that at the  
7 hypothetical negotiation, Zynga and IBM would have had all  
8 of the information that he used as inputs into to his  
9 damages analysis?

10 A. Yes, I did hear him say that.

11 Q. Would knowing that information mean that IBM and  
12 Zynga would have agreed that Mr. Persechini's calculations  
13 were correct?

14 A. No. I mean, it's a starting point. I don't think  
15 Zynga would agree that it should give up 47 percent of its  
16 profits. It wouldn't agree -- and you saw the disagreements  
17 they had with the basic documents and interpretations of  
18 those documents that Mr. Persechini used.

19 Mr. Persechini's analysis is kind of his own.  
20 IBM never did this. There's no evidence IBM ever calculated  
21 what percentage of the profits they should get. Zynga  
22 doesn't believe that those calculations were correct. This  
23 idea of knowing the future doesn't change the fact the  
24 parties wouldn't have done it or agree to it.

25 Q. Let's move to the second reason that you think

1 Mr. Persechini's opinion is unreliable related to his  
2 concurrent display model?

3 Can you explain Mr. Persechini's concurrent  
4 display model to the jury?

5 A. Yes. So Mr. Persechini kind of went over the top of  
6 this. So let's step back for a moment. Concurrent display  
7 is another term for what we would call in-app purchase.  
8 It's this idea that you can buy something while you're in  
9 the application.

10 So on the left-hand side here, I have a picture  
11 of a phone, and that's supposed to represent an in-app  
12 purchase. So that means you could tap that button, you  
13 could buy the, in this case, poker chips right there. On  
14 the right-hand side, you have the Zynga web store.

15 Now, if you're in the app and you want to buy  
16 something, you have to get -- and you want to get to the  
17 Zynga web store, you have to take another step, you have to  
18 leave the app, you have to go to browser, and you go to the  
19 web store. So it's more complicated the more steps there  
20 is.

21 So what Mr. Persechini pointed out was that in  
22 the in-app purchase, what I've shown up here is an example,  
23 for \$10 in-app you get \$8 million in poker chips. But if  
24 you go to the web store, for \$10 you get \$10 million in  
25 poker chips.

1           So those additional 2 million poker chips are  
2 what he referred to as a web bonus. In his methodology,  
3 that's what's required to get you to go out of the app and  
4 over to the web store.

5           And so why is this important? It's important  
6 because his assumption is that that web bonus is a measure,  
7 it's directly related to -- excuse me -- the value of having  
8 in-app purchasing or concurrent display. If Zynga had to  
9 pay a higher web bonus, it would do that because the  
10 concurrent display was more valuable, the in-app purchase  
11 was more available.

12           So the two go together, the value of the in-app  
13 purchase and the web bonus, they rise and fall together. If  
14 you can hang on to that for a moment, I have to go do some  
15 math with you.

16 Q.       Well, what did Mr. Persechini conclude about the  
17 average web store bonus that Zynga offers in its games?

18 A.       So he concluded that the average is 13.3 percent.  
19 And Mr. Persechini actually didn't show you this number, I'm  
20 having to unpack his analysis a little bit. So he got to  
21 the 13.3 percent by looking at the web bonus for about a  
22 dozen different offers. So they range -- they range from  
23 about 5 percent to about 20 percent in terms of the web  
24 bonus.

25           And he took the average of those and that got to

1 13.3 percent. So he said, okay, so Zynga offers an average  
2 web bonus of 13.3 percent.

3 Q. And how did Mr. Persechini use that 13.3 percent in  
4 his damages methodology?

5 A. So this just shows you behind the scenes what  
6 Mr. Persechini did. On the left-hand column here where it's  
7 labeled Concurrent Display, that's -- that's the in-app  
8 purchase. If you buy through the app store, you do an  
9 in-app purchasing, Zynga has to pay an in-app store fee of  
10 30 percent, that goes to Google and Apple. They don't have  
11 to pay anything else. So Zynga pays 30 percent which means  
12 it keeps 70 percent of the money.

13 Now, on the web store, if you buy through the  
14 web store, Zynga doesn't have to pay that app store fee, but  
15 Zynga does have to pay a 5 percent payment processing fee.  
16 And in his model they also have to pay that 13.3 percent web  
17 bonus.

18 What that means is that the total amount that  
19 Zynga pays if you go to the web store is 18.3 percent, which  
20 means that Zynga keeps 81.7 percent. And Mr. Persechini  
21 says, well, the difference there is a measure of the amount  
22 of profits that Zynga is making from in-app purchasing,  
23 okay. So it's saying 11.7 percent.

24 So the difficulty here is that his math doesn't  
25 match his assumption. So let's assume that in-app

1 purchasing is, in fact, more valuable. Let's assume that  
2 Zynga has to pay 25 percent because people really like  
3 in-app purchasing, okay.

4 In his model, in his math here, if you replace  
5 that 13.3 percent with 25 percent, his difference goes to  
6 zero. So this is the problem. Where if the in-app  
7 purchasing is more valuable and Zynga has to pay a higher  
8 web bonus for that, his damages go away, right, they're  
9 going out the way in his -- he assumes that the amount of  
10 the web bonus and in-app purchasing rise and fall together,  
11 but in his model, if you increase the web bonus, his damages  
12 fall to zero. This model simply does not work.

13 Q. And so just to summarize, under Mr. Persechini's  
14 model, if Zynga instead of having an average 13 percent web  
15 bonus had an average of a 25 percent web bonus, how much  
16 damages would Mr. Persechini say Zynga owed?

17 A. He would say Zynga owed zero, okay. And this  
18 isn't -- you know, this isn't sort of speculative and  
19 far-fetched, why 25 percent. He shows web bonuses of  
20 20 percent, okay. So this is a quite reasonable change to  
21 his model to make.

22 Q. And just to sum things up, do you think that  
23 Mr. Persechini's concurrent display model is a reliable way  
24 to calculate damages?

25 A. No, I do not -- I don't believe his model works at

1 all.

2 MS. MULLINS: Mr. Watkins, could you please go  
3 to slide 30.

4 BY MS. MULLINS:

5 Q. And, Mr. Kidder, can you remind the jury of what you  
6 think a reasonable royalty should be in this case?

7 A. Yes, I believe if you look at the actual evidence of  
8 comparable licenses, and you start from there and you make  
9 your adjustments, you get to a \$2 million lump sum for the  
10 '849 patent.

11 And similarly, if you look at the actual  
12 evidence in the case and you start from comparable licenses,  
13 you get to a \$2 million lump sum amount as a reasonable  
14 royalty for the '719 patent.

15 MS. MULLINS: Pass the witness.

16 THE COURT: All right. We're going to break  
17 there for lunch.

18 (Whereupon, the jury left the room at 1:03 p.m.)

19 THE COURT: You may be seated.

20 Before we get the jury, let me just give you an  
21 update on the time.

22 So Plaintiff, you've used 36 minutes today, so  
23 far. You started with 2 hours and 5 minutes. You have an  
24 hour and 29 minutes remaining. It doesn't include the  
25 15 minutes that I know you've asked for.

## CROSS-EXAMINATION - DOUGLAS KIDDER

1 Defendant, you've used 2 hours and 34 minutes,  
2 so far. You started with 3 hours and 28 minutes at the  
3 beginning of the day, so you have 54 minutes remaining.

4 All right. Let's get the jury.

5 And if I give Plaintiff 15 minutes, I'll give  
6 you 15 minutes as well, equal.

7 MR. PACKIN: Thank you, Your Honor.

8 MS. CARIDIS: Thank you, Your Honor.

9 (Whereupon, the jury entered the room at  
10 2:00 p.m.)

11 THE COURT: All right. You may be seated.

12 All right.

## 13 CROSS-EXAMINATION

14 BY MR. DANG:

15 Q. Good afternoon, Mr. Kidder. It's good to see you.

16 A. Good afternoon, Mr. Dang, correct.

17 Q. I want to focus on your opinions about the '849  
18 patent. You talked a lot about IBM's licenses with Verizon,  
19 Netflix and DIRECTV during your direct examination, correct?

20 A. Yes.

21 Q. But you agree that just because IBM accepted a  
22 royalty from one company, doesn't mean it would accept the  
23 same royalty from another company like Zynga, correct?

24 A. Yes, I agree, those are the other Georgia-Pacific  
25 factors.

1 Q. And you talked a lot about -- on your direct about  
2 how, when you were looking to Verizon, DIRECTV and Netflix  
3 licenses as benchmarks, you felt the extent of use by those  
4 licensees didn't matter; is that correct?

5 A. It didn't seem to materially affect the numbers,  
6 that's correct.

7 Q. But you agree that under the law, we have to look at  
8 Zynga's use of IBM's patents to assess damages, correct?

9 A. I'm sorry, you're asking me to come to a legal  
10 conclusion. I can't tell you what's under the law, I can  
11 tell you how I do damages.

12 Q. Sir, you agree that we have to assess Zynga's use of  
13 IBM's patents to assess damages, correct?

14 A. If you mean in the context of the Georgia-Pacific  
15 Factor 11, which looks at the extent of use, yes, I agree.  
16 I just don't want to try to pretend like I'm giving a legal  
17 conclusion.

18 Q. Not talking about the Georgia-Pacific factors. Why  
19 don't I do this: You gave a deposition in this case,  
20 correct?

21 A. That's correct.

22 Q. You told the truth at that deposition?

23 A. Yes, I did.

24 Q. Please go to page 30 of your deposition, lines 14-21  
25 of your deposition. And let me know when you're there.

1 A. Sorry, what lines again?

2 Q. 30:14-21.

3 A. 14-21, okay.

4 Q. You were asked these questions and you gave these  
5 answers. So my question to you is:

6 "QUESTION: You have to consider Zynga's use of  
7 the '849 patent to assess damages for the '849 patent,  
8 correct?

9 "ANSWER: Yes.

10 "QUESTION: And you have to consider Zynga's use  
11 of the '719 patent to assess damages for the '719 patent; is  
12 that correct?

13 "ANSWER: Yes, that's correct."

14 That was you, right?

15 A. That's correct, sir. And if you read the question  
16 before that, you asked me and I tell you, it's  
17 Georgia-Pacific Factor 11 and then you were following up on  
18 that question.

19 Q. Let's look at how Verizon, DIRECTV and Netflix used  
20 the patents compared to Zynga.

21 Showing you PTX-20. You understand the '849  
22 patent is an advertising patent, correct?

23 A. That's my understanding, yes.

24 Q. And the jury heard Mr. McBride testify yesterday that  
25 the '849 patent is not relevant to subscription revenue.

1 You heard that too, correct?

2 A. I do recall Mr. McBride talking about subscription  
3 revenue.

4 Q. You heard Mr. McBride testify that the '849 patent is  
5 not relevant to subscription revenue, correct?

6 A. So I can't recall his exact words. If you want to  
7 show me exactly --

8 Q. Sure.

9 A. -- what he said, I am happy to review that.

10 MR. DANG: Can we put up 563:14-18.

11 BY MR. DANG:

12 Q. Mr. McBride testified yesterday:

13 "QUESTION: When talking about Verizon, Netflix,  
14 and DIRECTV, since these companies make their money from  
15 subscriptions, how does that impact the royalty payment that  
16 IBM sought in these agreements?

17 "ANSWER: Well, the '849 patent would not be  
18 relevant to their subscription revenue."

19 You remember that, right?

20 A. I don't remember the exact words so thank you for  
21 showing it to me.

22 Q. And you also understand that Mr. McBride personally  
23 negotiated at least the Netflix license?

24 A. I do understand that, yes.

25 Q. So let's look at how those companies are making their

1 money then.

2 You agree, Verizon charges a subscription to  
3 cell phone plan, you pay your monthly fee, right?

4 A. That's one of their sources of revenue, I do agree  
5 with that.

6 Q. And you also talk --

7 A. I'm not sure I would write a "yes," there but go  
8 ahead, it's your time.

9 Q. They charge subscription fees, sir, right?

10 A. They do, that's one of their businesses. Yes.

11 Q. Okay. They also have some ads on their website like  
12 you showed the jury, correct?

13 A. On their website and other places, but, yes, Verizon  
14 does advertise.

15 Q. You didn't calculate the amount of money that Zynga  
16 made from advertising using the '849 patent, correct?

17 A. I'm sorry, you said -- you were just talking about  
18 Verizon. You just -- I want to make sure --

19 Q. Oh, right, let me rephrase it.

20 A. Okay.

21 Q. You didn't calculate the amount of money that Verizon  
22 made from any of its ads using the '849 patent, correct?

23 A. No, I did not have access to that information.

24 Q. DIRECTV charges subscriptions, right?

25 A. Yes. And I don't know much more about their business

1       than that.

2       Q.       You didn't calculate how much money DIRECTV has made  
3       from advertising using the '849 patent, correct?

4       A.       No, I didn't have access to that information, nor do  
5       I believe IBM did.

6       Q.       Netflix charges subscriptions, right?

7       A.       Yes, they do.

8       Q.       In fact, you agree that Netflix generates nearly all  
9       of its revenue from subscription fees, right?

10      A.       That is my understanding, yes.

11      Q.       And, again, you didn't calculate the amount of money  
12      that Netflix has made from advertising using the '849  
13      patent, correct?

14      A.       No, I think that's correct, I don't think either I or  
15      IBM calculated that number.

16      Q.       Let's talk about Zynga. Zynga does not make money  
17      from subscription fees, right?

18      A.       That's correct.

19      Q.       Zynga makes money from selling virtual items,  
20      correct?

21      A.       That is one of their main sources of revenue, yes.

22      Q.       And you agree that Zynga's virtual item offers are  
23      advertisements, correct?

24      A.       That, you're wanting a technical opinion but I would  
25      characterize an offer to sell as an advertisement. I

1 just -- I know there's a fight over the definition of what  
2 an advertisement is, I'm not a technical expert, I'm just  
3 giving you a lay version of this.

4 Q. I'm just asking for your understanding, sir.

5 A. That's correct, and I am just giving you my  
6 understanding, I just want to make sure it is not  
7 misinterpreted.

8 Q. So let me be clear: Your understanding, someone with  
9 a big background in economics, accounting and damages, you  
10 understand that Netflix -- or that Zynga's virtual item  
11 offerings are advertisements, correct?

12 A. That is how I think of them, they're offers, yes.

13 Q. So let's sum this up. You agree that Zynga's core  
14 business is very different, its very different than  
15 Verizon's, DIRECTVs and Netflix's core business, correct?

16 A. I do, and I also agree that Netflix's core business  
17 is very different from Verizon's, so... okay.

18 Q. Let's look at this last box, how Zynga has been using  
19 the '849 patent.

20 To start, I know you mentioned on your direct  
21 that Zynga was very small in 2007, but just to make this  
22 crystal clear for everybody, you agree that to determine  
23 damages in this case, its appropriate to consider how Zynga  
24 has used IBM's patents between 2016 and 2023 specifically,  
25 correct?

1 A. I do agree with that, that's Georgia-Pacific Factor  
2 11.

3 Q. So let's see if you did that. I'm showing you  
4 PDX-21.

5 Now, yesterday, we saw a giant board of math  
6 that Mr. Persechini did. Do you remember that?

7 A. Are you referring to Ms. Caridis' explanation of what  
8 he did?

9 Q. Exactly, yes, I am.

10 A. I did see that.

11 Q. Let's look at the math that you did. The first  
12 benefit that Mr. Persechini discussed was concurrent  
13 display, right?

14 A. Fine, we can take them in that order, I don't think  
15 of them as being an order.

16 Q. You talked about concurrent display in your direct  
17 testimony?

18 A. Absolutely.

19 Q. And you agree that Zynga does get benefits from  
20 concurrent display, correct?

21 A. If you assume that the patent is valid and infringed,  
22 then, yes, I agree with that.

23 Q. Well, you also understand that witnesses in this case  
24 have testified that Zynga does get benefits from concurrent  
25 display, correct?

1 A. I'm not thinking of any -- I mean, we have  
2 Mr. Persechini -- I'm sorry, whatever you're describing.

3 Q. Why don't we go back to your deposition, sir.

4 A. Sure.

5 Q. Let's go to 237:23 to 238:3.

6 A. Sorry, 237:23, you said?

7 Q. Mm-hmm.

8 A. Yes, okay.

9 Q. Were you asked these questions and did you give  
10 these --

11 A. Oh, I'm sorry. You're just going to show it to me on  
12 the screen. I don't need this.

13 Q. "So you understand that Zynga benefits from  
14 concurrently displaying applications with its advertisements  
15 by reducing user friction when its users view those  
16 advertisements; is that correct?

17 "ANSWER: Yes, that was Mr. Terrell's testimony.  
18 That's my understanding."

19 That was you, right?

20 A. Yes, that was -- that was what Mr. Terrell, or  
21 Terrell, said in his deposition. That's correct.

22 Q. And earlier in your testimony, you criticized  
23 Mr. Persechini's calculation of that benefit, right?

24 A. Yeah, I said that he assumed that user -- that  
25 reducing user friction was a benefit of the '849. That's

1 correct.

2 Q. You have not even attempted to quantify the benefits  
3 that Zynga gets from concurrently displaying ads with its  
4 applications, correct?

5 A. That is correct. Mr. Persechini did that, but there  
6 was no evidence that that's how IBM thought about licensing.

7 Q. You agree Zynga gets benefits from targeting ads,  
8 correct?

9 A. Yes, if you assume that the '849 patent is valid and  
10 infringed, then Zynga benefits from that.

11 Q. You haven't tried to calculate the benefits that  
12 Zynga gets from targeting ads using the '849 patent,  
13 correct?

14 A. That's correct, and I saw no evidence that that's how  
15 IBM approached the license negotiation.

16 Q. You agree that Zynga gets benefits from preventing  
17 cheating in Empires & Puzzles using the '719 patent,  
18 correct?

19 A. If you assume that the '719 patent is valid and  
20 infringed, yes.

21 Q. I think I know the answer to this one, but you  
22 haven't attempted to calculate the benefits that Zynga gets  
23 from preventing cheating using the '719 patent, correct?

24 A. That is correct. Once again, I saw no evidence that  
25 that's how IBM approached the license negotiation.

1 Q. Sir, we discussed this earlier. You agree that when  
2 we're assessing damages, we have to consider use, right?

3 A. Yes, Georgia-Pacific factor 11.

4 Q. Okay.

5 A. I carefully considered that.

6 Q. You haven't even attempted to calculate Zynga's  
7 profits from using IBM's '849 patent and '719 patents,  
8 correct?

9 A. That is correct, but that's not Georgia-Pacific  
10 factor 11. You threw in profits there.

11 Q. Earlier you talked about -- you criticized  
12 Mr. Persechini's method of splitting those profits, right?

13 A. That's correct.

14 Q. You didn't show the jury any other way that they  
15 should split the profits from IBM's patents between IBM and  
16 Zynga, correct?

17 A. No, that's correct, because I don't think that entire  
18 methodology is how you approach this.

19 Q. I'm not asking if you think it's correct. I'm just  
20 asking you, you didn't show them another way, did you?

21 A. No, because I think the whole methodology is wrong.  
22 Why would I do that?

23 MR. DANG: No further questions.

24 THE COURT: All right. Redirect?

25 MS. MULLINS: Yes, Your Honor.

## REDIRECT EXAMINATION

BY MS. MULLINS:

Q. Good afternoon, Mr. Kidder.

A. Good afternoon.

Q. Mr. Kidder, why didn't you attempt to calculate Zynga's profits from using the '849 and '719 patents?

A. Because the Georgia-Pacific methodology says you start with comparable licenses and then you make adjustments. And that's -- methodologically, it's very, very different from what Mr. Persechini did.

Q. And even if you were to consider Zynga's profits from using -- or profits from allegedly using the '849 and '719 patents, do you think that a 47 percent profit split is reasonable in this case?

A. No, I do not. I mean, that's -- if you've ever run a business, giving away 40 percent of your profits is pretty unthinkable.

Q. Does the Georgia-Pacific methodology require a damages expert to calculate how much money a licensee made using one of the patents included in a comparable license?

A. No, it does not.

Q. And can you remind the jury about the relationship that we talked about earlier between the value of concurrent display in Mr. Persechini's model and Zynga's web store bonus?

1 A. So this happened just before lunch. I think we were  
2 probably all tired and hungry.

3 My point is that the -- in Mr. Persechini's  
4 assumptions and understanding, that the amount of the web  
5 store bonus is a direct indicator of the value of in-app  
6 purchasing or concurrent display, but in his math, when you  
7 increase the web bonus, then his royalty falls. It just --  
8 it goes backwards. That model does not work.

9 MR. PACKIN: And, Mr. Watkins, could you please  
10 put up DDX-13.29 on the screen.

11 BY MR. PACKIN:

12 Q. And, Mr. Kidder, do you recall seeing this slide in  
13 Mr. Persechini's presentation yesterday?

14 A. Yes, I saw that.

15 Q. Do you think this slide is accurate?

16 A. Actually, I think it is.

17 Q. And what does this tell you about Mr. Persechini's  
18 concurrent display model?

19 A. So I actually took this slide and I sort of worked  
20 with it a little bit. So that 18.3 percent, I discussed  
21 earlier. Hopefully there's another slide coming, because I  
22 worked on this. Okay. So --

23 Q. Okay. So, yeah, I don't think we have the graphic.

24 A. Okay. So I'll describe to you what I tried to  
25 show -- oh, here we go.

1 Q. Yeah.

2 A. Okay. So the 18.3 percent. So he says, look, the  
3 left-hand one is web store fees and discounts. That's the  
4 18.3 percent, and the 30 percent is with concurrent display,  
5 so that's the in-app. I don't know if you recall that from  
6 being tired and hungry before lunch. And he says the  
7 11.7 percent amount is Zynga's willingness to pay for  
8 concurrent display, so recognize that -- that the reason the  
9 left-hand one is at 18.3 because it's the 13.3 plus the  
10 5 percent.

11 Now, watch what happens if you change that  
12 13.3 percent and you slide it up to 25 percent. Watch what  
13 happens to the willingness to display, willingness to pay,  
14 at the bottom. As that goes up, Zynga's willingness to pay  
15 goes down. So as concurrent display becomes more valuable,  
16 Mr. Persechini's percentage and royalty rate goes down. It  
17 works the opposite of what he assumes the value of  
18 concurrent display is.

19 It's this reducing user friction. It's getting  
20 people to go to the website. The harder it is that you get  
21 people to go to the website, the more valuable in-app  
22 purchasing is, and that should suggest that a higher royalty  
23 Zynga would be willing to pay. It's not the way his model  
24 works.

25 MS. MULLINS: Thank you, Mr. Kidder.

## DIRECT EXAMINATION - KEVIN JEFFAY

1                   No further questions.

2                   THE COURT: All right. Mr. Kidder, you may step  
3 down. Thank you, sir.

4                   THE WITNESS: Thank you, Your Honor.

5                   THE COURT: All right.

6                   MS. CARIDIS: Your Honor, at this point Zynga  
7 rests.

8                   THE COURT: All right. So that completes  
9 Zynga's case. Now we go back to the plaintiff for their  
10 rebuttal case on invalidity.

11                  MR. PACKIN: Thank you, Your Honor. Don't  
12 worry. It's very short.

13                  We call Professor Kevin Jeffay. He is going to  
14 be responding on invalidity to what Zynga's experts said.  
15 And my colleague Ben Rodd will be questioning Professor  
16 Jeffay.

17                  Professor?

18                  MR. RODD: Your Honor, may we approach to pass  
19 out binders?

20                  KEVIN JEFFAY, having been called on the part and  
21 behalf of the State as a witness, having first affirmed to  
22 tell the truth, testified as follows:

23                                 DIRECT EXAMINATION

24                  BY MR. RODD:

25                  Q.        Good afternoon, Professor Jeffay.

1 A. Good afternoon.

2 Q. Can you please introduce yourself to the jury?

3 A. Yes. Since you heard, I'm Kevin Jeffay. I'm a  
4 computer scientist, and I am a professor of computer science  
5 in the department of computer science at the University of  
6 North Carolina at Chapel Hill.

7 Q. Why are you here today?

8 A. I was retained by IBM to consider the '849 patent and  
9 '719 patents and the state of the art before those patents  
10 issued and to render opinions on the validity of those  
11 patents.

12 Q. You have a binder in front of you with slides marked  
13 PDX-9. Will those slides assist with your testimony today?

14 A. Yes.

15 MR. RODD: Your Honor, I offer PDX-9 as  
16 demonstratives.

17 THE COURT: All right. You may publish.

18 BY MR. RODD:

19 Q. Before we talk about your opinions, let's discuss  
20 what makes you qualified to offer them. Can you please  
21 describe your education to the jury?

22 A. Sure, it's summarized on this slide. I'm originally  
23 from Illinois, and I went to the state school for college,  
24 the University of Illinois at Urbana-Champaign and initially  
25 studied mathematics and got a bachelor degree in 1982.

## DIRECT EXAMINATION - KEVIN JEFFAY

1           While studying mathematics, I became more  
2 interested in computer science and was awarded a fellowship,  
3 which is a fancy name for a scholarship, to attend the  
4 University of Toronto graduate school where I ultimately got  
5 a master's there, computer science, in 1984.

6           I came back to the States, worked for a little  
7 bit, and then went back to graduate school a second time,  
8 this time at the University of Washington where I ultimately  
9 got a PhD in computer science in 1989.

10 Q.       Now, you told us that you're a professor. Can you  
11 tell the jury a little bit about your teaching experience?

12 A.       Sure. I've been a faculty member since I got my PhD,  
13 since 1989, so I'm in year 36 at the university. Generally,  
14 my research in teaching revolves around networking and  
15 distributed systems, computers that work together over a  
16 network. And over the years, I have been fortunate enough  
17 to win a number of awards, along with my students, for our  
18 research. I've also won some teaching awards, and so the  
19 university has given me a special type of position that's  
20 called a named professorship, so technically I'm the Gillian  
21 Cell Distinguished Professor of Computer Science. And for  
22 much of the last 10 years, I've also been doing an  
23 administrative job and I've been running the department of  
24 computer science.

25 Q.       Beyond teaching have you published any works in the

1 area of computer science?

2 A. Yes. At a research -- research institution like UNC,  
3 research is expected. I have been working with a number of  
4 really great students over the years, and we published a  
5 large number of papers. Many of these have been joint with  
6 industry collaborators, mostly in the networking industries.  
7 And in addition, I'm an author or coauthor on four  
8 textbooks.

9 Q. Now, we've heard in this case that patents are  
10 evaluated from the perspective of one of ordinary skill in  
11 the art. Were you a person of ordinary skill in the art at  
12 the time of the inventions of the '849 and '719 patents?

13 A. Well, for each of those patents, technically, I was  
14 more -- a person of more than ordinary skill because I had  
15 more experience and more education, but nonetheless, I'm  
16 able to view the patents and what's called the "prior art"  
17 through the eyes of a person of ordinary skill in the art.

18 MR. RODD: Your Honor, I offer Professor Kevin  
19 Jeffay as an expert in computer programming and networking.

20 MR. MOSS: No objection, Your Honor.

21 THE COURT: All right. Professor Jeffay may  
22 testify as an expert in computer programming and networking.

23 BY MR. RODD:

24 Q. Professor Jeffay, let's discuss your opinions. So up  
25 here on the projector is a slide that Dr. Almeroth

1 presented, DDX-11.51. Now, earlier today we heard  
2 Dr. Almeroth say that the '849 patent is invalid because  
3 Mr. Filepp's invention was offered for sale as part of  
4 Trintex's agreements with Coldwell Banker and Dreyfus in  
5 March and May of 1987. Do you agree with Dr. Almeroth's  
6 opinion?

7 A. No, I don't.

8 Q. Why not?

9 A. Because if we'd look into these contracts, what we'll  
10 see is there there's no offer to sell the actual invention.  
11 The invention, remember, is a method for presenting  
12 advertising, and there's no method for presenting  
13 advertising in these contracts, and these contracts instead  
14 are really about the creation of content that could be  
15 carried on an interactive system.

16 Q. So let's explore that using the Coldwell Banker  
17 letter, which is DTX-474, and I see that you've blown out a  
18 couple bullet points. Can you please explain to the jury  
19 what you are showing here?

20 A. Sure. So we've heard that what was being sold was  
21 something called a salesforce package, and this is a page  
22 from the contract that's describing what constitutes the  
23 salesforce package. And these two bullets that I'm  
24 highlighting here are demonstrating that this is Trintex  
25 telling Coldwell Banker, What we're going to do for you is

1 provide recommendations for how you can use this new  
2 interactive medium to work for you, and how we'll be  
3 creating essentially screens for you, screenshots, and  
4 they'll consist of text and illustrations and graphics.

5 Q. Did Trintex explain how some of that creative content  
6 would be displayed on its system?

7 A. They did.

8 Q. Now, up here on the projector is DTX-474, page 5, can  
9 you explain to the jury what is shown in this contract?

10 A. These are just two sample specifications for what  
11 these screens might look like. On the left is a screen that  
12 has a header and a body, and on the right is one that has,  
13 in addition to the header and the body, would also have a  
14 leader ad. So it's just trying to give Coldwell Banker and  
15 Dreyfus a sense of what these screens would look like  
16 structurally.

17 Q. Does the layout of these screens mean that Trintex  
18 was telling Coldwell Banker that it was going to use  
19 Mr. Filepp's invention?

20 A. No, there's nothing in here that describes how these  
21 screens are going to be presented.

22 Q. Now, earlier in this trial, Mr. Filepp explained the  
23 dumb terminal approach using some magnets. Can you please  
24 use that same magnet that Mr. Filepp showed to show us how  
25 the Coldwell Banker limitation can use the dumb terminal

1 approach?

2 A. Sure. So here is the magnet that Mr. Filepp used.  
3 So remember -- sorry, so remember, just like the figures on  
4 the screen, it has some areas labeled, there's a header on  
5 top, there's a body here. And at the bottom, you can have  
6 an ad.

7 And in this particular case, this is a weather  
8 map and this is a weather map that shows the weather around  
9 the U.S., but the positions of these weather symbols are  
10 static, they are fixed. So this is something that would be  
11 composited on a server and sent down to a terminal for --  
12 for simple display.

13 So this would be an example of what's described  
14 in these contracts and this example could easily be  
15 displayed using a dumb terminal.

16 Q. Does a dumb terminal approach use the '849 patent's  
17 invention?

18 A. No, the '849 patent has a term in it that's called  
19 "reception system," and the Court has construed that  
20 essentially to be an intelligent device. So it needs to be  
21 some form of computer.

22 Q. Now, turning to PTX-3.9, this is the Trintex  
23 development timeline that we saw with Mr. Filepp. Professor  
24 Jeffay, can you please remind us, at what point in time were  
25 the Coldwell and Dreyfus letters signed?

1 A. So they were signed in the spring of '87, at the end  
2 of March and in May. So in Mr. Filepp's timeline, this  
3 would be in this first interval, this first phase, when  
4 Trintex was evaluating alternative approaches and trying to  
5 secure approval for the approach that ultimately became  
6 Prodigy.

7 So this is -- so the dates of these contracts  
8 are in a period where they have not yet settled on the final  
9 design for the -- what would become the Prodigy system.

10 Q. Mr. Filepp told us earlier in the trial that Trintex  
11 could have displayed the screens like those in the Coldwell  
12 Banker and Dreyfus contracts using some of the alternative  
13 approaches shown in this timeline, do you agree?

14 A. I do.

15 Q. Now, I want to talk a little bit more about  
16 Dr. Almeroth's documents that he showed. So if the Coldwell  
17 Banker and Dreyfus letters that Dr. Almeroth pointed to do  
18 not actually discuss Mr. Filepp's invention, what does  
19 Dr. Almeroth rely on?

20 A. Well, he's relying on a variety of documents, one of  
21 them is an external document, so it's a document that's not  
22 a Trintex document. And one that he relied on was this  
23 November 1986 teletext newsletter. And in particular, the  
24 fact that this newsletter said that everything in the  
25 Trintex system was supposed to be classified as an object.

## DIRECT EXAMINATION - KEVIN JEFFAY

1 Q. Now, focusing on what's excerpted in this slide,  
2 DTX-600.

3 MR. RODD: And if we could go to the next  
4 portion.

5 BY MR. RODD:

6 Q. Do you agree with Dr. Almeroth's opinion about this  
7 document?

8 A. No, I don't.

9 Q. Why not?

10 A. Well, so this is from the same -- the same document.  
11 And, again, this is an industry newsletter, this is not  
12 coming from Trintex itself. And in the same newsletter, it  
13 specifically says that "Trintex is being closed-mouthed  
14 about its activities and that they have not announced a  
15 timetable and they have not announced any other details  
16 about the plans being developed."

17 And in particular, this last line is important  
18 because it says that "Trintex declined to confirm or  
19 acknowledge most of what's been reported in this article."

20 So this article is not from Trintex and Trintex  
21 has neither confirmed nor acknowledged or denied this, so  
22 this is essentially speculation on the part of the author of  
23 this newsletter.

24 Q. So turning back to DTX-474, page 7, are there any  
25 other reasons why you disagree with Dr. Almeroth's opinion?

1 A. Yes. So here we have -- so we're now back looking at  
2 the contract, this is a page from the Coldwell Banker  
3 content -- Coldwell Banker contract where it's describing  
4 what's called a frame element. And Dr. Almeroth said, oh,  
5 frame element, oh, that's an object. But it's not an  
6 object.

7 In particular, many of the documents that  
8 Dr. Almeroth showed from Trintex used the word "object." So  
9 Trintex, when they wanted to refer to an object, they knew  
10 how to do that. In this contract, they don't refer to an  
11 object at all. They refer to something called a frame  
12 element, which is not data like a real object, instead it's  
13 a visual image. So this can't be the objects that are  
14 phrased.

15 So what this contract is selling, amongst other  
16 things, is the development of frame elements, which are not  
17 objects.

18 Q. What does the omission of objects from a Coldwell  
19 Banker letter tell you?

20 A. Well, Mr. Filepp described that the structuring  
21 advertising and objects was a key element of the '849  
22 patent. And the point is that that structuring of  
23 advertising as objects is just not present anywhere in this  
24 contract.

25 Q. Let's look at another document that Dr. Almeroth

1       showed. This is DDX-11.69, which is one of Dr. Almeroth's  
2       slides. What other documents does Dr. Almeroth rely on?

3       A.       So, again, this is Dr. Almeroth's slide, and this is  
4       a functional specification document. This is a Trintex  
5       document from 1986, and it's a document that happens to talk  
6       about pre-fetching.

7               So this document indicates that as part of the  
8       development of the system, one of the approaches they were  
9       looking at was contemplating pre-fetching. But none of the  
10      contents of this document are in the -- are in the contract,  
11      so Coldwell Banker and Dreyfus knew nothing about  
12      pre-fetching.

13      Q.       So do these internal technical documents show that  
14      the Coldwell letter and Dreyfus letters were an offer to  
15      sell the invention?

16      A.       No. As has been said several times, the state of the  
17      system had not been decided by the time of the Coldwell  
18      Banker and Dreyfus letters.

19      Q.       All right. So let's look at another slide that  
20      Dr. Almeroth showed. This is another of Dr. Almeroth's  
21      slides, DDX-11.55, which shows another portion of the  
22      Coldwell Banker letter.

23              Can you explain to the jury what Dr. Almeroth is  
24      showing here?

25      A.       He's simply showing that money is going to change

1 hands between Coldwell Banker and Trintex in the amount of  
2 \$17,000, according to the schedule, the series of three  
3 payments that are listed here.

4 Q. Now, Dr. Almeroth, he also discussed the file history  
5 of the '849 patent where IBM communicated with the Patent  
6 Office when it was applying for the patent, do you remember  
7 that?

8 A. I do.

9 Q. When IBM applied for the '849 patent, did IBM hide  
10 from the Patent Office that sponsors were paying fees to run  
11 their applications on Prodigy?

12 A. No. They were very upfront with the Patent Office  
13 and explicitly told them about the substance of contracts  
14 like this, that they were receiving payments for the  
15 development of content that would run on the service.

16 Q. Okay. So let's take a look at that part of the file  
17 history. I see here that you have an excerpt here from the  
18 '849 patent file history, which is JTX-3.

19 What are you showing here?

20 A. So this is what's called a disclosure statement, so  
21 this is a statement that is written by IBM and sent to the  
22 Patent Office as part of the process of trying to get their  
23 patent to issue. So this is IBM speaking.

24 And in particular, what we can see here is that  
25 it says that "during the test period, Prodigy received fees

1 from sponsors of applications that were running on or in the  
2 process of being created to run on the service; however,  
3 those amounts were paid for producing the applications and  
4 maintaining them on the service."

5 So IBM is telling the Patent Office that they  
6 are receiving fees for developing content and having content  
7 being maintained on their service -- on the service that  
8 would come to exist.

9 Q. During what time frame were these sponsors paying  
10 fees to Trintex?

11 A. They were paying them in -- mostly in 1988.

12 Q. Okay. And did Dr. Almeroth --

13 MR. RODD: If you go back a slide, please.

14 BY MR. RODD:

15 Q. Did Dr. Almeroth show the jury this portion of the  
16 prosecution history?

17 A. No, he did not. He implied that -- that the -- IBM  
18 never showed them the Dreyfus and Coldwell Banker contracts,  
19 but I believe this is a fair statement that they shared the  
20 substance of those contracts with the Patent Office.

21 Q. And when this communication says "the test period,"  
22 what period is that referring to?

23 A. So this is the period -- this information disclosure  
24 statement defines the test period, but it's -- goes from  
25 1980 -- it's a series of test periods but it starts in 1987.

1 Q. Okay.

2 MR. RODD: Go to the next slide.

3 BY MR. RODD:

4 Q. Now, how did the Patent Office react when IBM told  
5 the Patent Office about these commercial contracts?

6 A. The Patent Office didn't have any problems with the  
7 fact that IBM had already started selling the creation of  
8 content, and we know that the Patent Office ultimately did  
9 issue the '849 patent.

10 Q. So to sum up, based on your review of the evidence,  
11 what is your opinion regarding Zynga's on-sale theory?

12 A. I don't believe it's a valid theory, I believe the  
13 '849 patent was not sold prior to July of 1987.

14 Q. Now, I want to shift gears and talk about the '209  
15 patent. Dr. Almeroth, he gave his opinion that Claim 13 of  
16 the '849 patent is not patentably distinct from Claim 2 of  
17 the '209 patent, do you agree with Dr. Almeroth?

18 A. No.

19 Q. And why not?

20 A. Because when we look at the claims, in particular  
21 Claim 13 of the '849 patent, we see that it has elements  
22 that are not in the '209 patent and are not obvious in light  
23 of the '209 patent.

24 MR. RODD: Mr. Sanborn, can you please pull up  
25 DDX-11, slide 101.

1 BY MR. RODD:

2 Q. This is one of Dr. Almeroth's slides.

3 Dr. Jeffay, what is Dr. Almeroth comparing in  
4 this slide?

5 A. So, again, this is Dr. Almeroth's slide. On the  
6 left, he has the Claim 13 from the '849 patent, and on the  
7 right, he has Claims 1 and 2 for the '209 patent. And this  
8 is part of his process of arguing that the '209 patent is  
9 covering the same subject matter as the '849 patent or it's  
10 rendering the claim, Claim 13 obvious. And he's trying to  
11 establish this correspondence through highlighting.

12 Q. Do you agree with Dr. Almeroth's analysis in this  
13 slide?

14 A. No, I mean, if we look at the claim limitation on the  
15 left, we can see that it's configuring advertising as  
16 objects, and again, this is the key part of the '849 patent.

17 On the right, there's no mention of objects at  
18 all, I mean, it's just not there. And Dr. Almeroth said oh,  
19 well, it would be obvious given what is there, but he has no  
20 evidence that it's obvious and in particular, there is no  
21 evidence that structuring advertising as objects ever  
22 existed prior to the '849 patent.

23 MR. RODD: Mr. Sanborn, can you please pull up  
24 DDX-11, slide 102, another Dr. Almeroth slide.

25 BY MR. RODD:

1 Q. What is Dr. Almeroth showing here?

2 A. Well, this is another limitation that -- this one is  
3 talking about structuring the advertising objects in a  
4 particular way, but the point here is he's relying on the  
5 exact same support on the right-hand side, so there are  
6 different elements on the left-hand side, but he's saying  
7 it's the same disclosures on the right-hand side.

8 MR. RODD: Mr. Sanborn, can you please page back  
9 and forth between slides 1100 and 102.

10 BY MR. RODD:

11 Q. Now, Professor Jeffay, can you explain what is being  
12 shown as Mr. Sanborn flips between Dr. Almeroth's slides?

13 A. Sure. So for three of the key elements of Claim 13  
14 of the '849 patent, Dr. Almeroth is relying on the exact  
15 same disclosures. So there are three separate elements,  
16 they are very different and yet he's saying, the text on the  
17 right covers all three of them.

18 And again, when you look at the text on the  
19 right, it just does not disclose objects or suggest objects.

20 Q. Professor Jeffay, what did you conclude about whether  
21 Claim 13 is patentably distinct from the '209 patent?

22 A. In my opinion, because Claim 13 is describing  
23 structuring advertising it objects, it's patentably distinct  
24 from the claims of the '209 patent.

25 Q. So as a wrap up to the '849 patent, was the '849

1 patent invention offered for sale in 1987?

2 A. No.

3 Q. So I want to shift gears and talk about the '719  
4 patent now. Were you here when Dr. Bennett testified that  
5 Claim 1 of the '719 patent was obvious in light of the  
6 patent called Roy?

7 A. I was.

8 Q. Do you agree with Dr. Bennett's opinion?

9 A. No.

10 Q. So going to the next slide, why do you disagree with  
11 Dr. Bennett?

12 A. I disagree with Dr. Bennett because as Dr. Bennett  
13 himself said, not every system has to use a  
14 model-view-controller and that there's lots of ways to do  
15 it. And Roy is an example of a different way -- of a way to  
16 implement a system that's different from the '719 patent.

17 But as it relates to the actual claims, we have  
18 this one construction where the Court has told us that  
19 view-generating logic and controller logic that's executed  
20 on the client has to be the same as the corresponding logic  
21 that's executed on the server or some subset thereof.

22 And Dr. Bennett, for the one thing that's  
23 labeled as the server in Roy, the central server,  
24 Dr. Bennett doesn't even allege that it satisfies this  
25 construction.

## DIRECT EXAMINATION - KEVIN JEFFAY

1 Q. Now going to the next slide. This is DDX-12, slide  
2 41. This is a slide that Dr. Bennett showed.

3 Now, what does Dr. Bennett point to instead of  
4 the server?

5 A. Well, so, again, what's described as a server in Roy  
6 is this box in the middle. So he's ignoring this box in the  
7 middle and instead, he's taking the lower box and just  
8 saying oh, that's a server, but Roy does not call that a  
9 server, so he's manufacturing a server that doesn't exist in  
10 Roy.

11 Q. Now going to the next slide, does Dr. Bennett's  
12 explanation make any sense to you?

13 A. No, because, again, Roy is very different than the  
14 '719 patent. And this passage of text from the '719 patent  
15 is describing the state of affairs after we have this thing  
16 that was called the migration of the master event server,  
17 which is this little bit over here on the left.

18 And the point here is that after this migration  
19 occurs, the role these computers play doesn't change. I  
20 mean, Roy, before the migration, simply calls the top green  
21 and the bottom green computer system 62 and computer system  
22 60. Roy also refers to those two as player computers, so  
23 it's using the terms synonymous -- computer system and  
24 player computer synonymously.

25 And even after this migration, the central

## CROSS-EXAMINATION - KEVIN JEFFAY

1 server still remains the central server. So nothing in Roy  
2 gets -- the role of these computers does not get relabeled,  
3 the player computer does not become a server.

4 MR. RODD: Thank you, Professor Jeffay, I'll  
5 pass the witness.

6 THE COURT: Cross-examination?

7 MR. MARTINELLI: Good afternoon, members of the  
8 jury. My name is Rich Martinelli, another one of the  
9 lawyers working for Zynga.

10 CROSS-EXAMINATION

11 BY MR. MARTINELLI:

12 Q. Good afternoon, Mr. Jeffay.

13 A. Good afternoon.

14 Q. So if I may begin, IBM's compensating you to appear  
15 here today, right?

16 A. They are.

17 Q. And you are getting compensated at your normal hourly  
18 rate?

19 A. Correct.

20 Q. And that rate is \$800 an hour, right?

21 A. Correct.

22 Q. Okay. And IBM didn't ask you to offer any opinions  
23 on noninfringement today, right?

24 A. That's correct.

25 Q. Okay. So you understand that Mr. Filepp testified

1 earlier this week, right?

2 A. Yes.

3 Q. Were you here to hear Mr. Filepp testify?

4 A. I was not physically here when he testified.

5 Q. Okay. I'm going to pull up some of his testimony  
6 from day 1.

7 MR. MARTINELLI: Can I have page 258, line 12.

8 BY MR. MARTINELLI:

9 Q. And Mr. Filepp testified about the fact that there  
10 might have been alternative ways that Trintex could have  
11 fulfilled things like the Dreyfus contract, right?

12 A. Correct.

13 Q. And here at line 12, Mr. Filepp was asked:

14 "QUESTION: You don't recall any technical  
15 documentation, architecture documents or testing done on any  
16 of these alternative implementations?" And then after some  
17 objections, on the next page at line 2, he testified:

18 "ANSWER: I don't recall any of that, no."

19 Are you familiar with that testimony?

20 A. I am and I'm also familiar with the fact that there  
21 was some elaboration on this.

22 Q. Okay. Now, you didn't show the jury any  
23 documentation from IBM back in '97 for a CD implementation  
24 to fulfill the Dreyfus contract, right?

25 A. That's correct.

1 Q. And you didn't show them any documentation of a Forth  
2 program implementation to satisfy the Dreyfus contract,  
3 correct?

4 A. That's correct.

5 Q. And you didn't show them any documentation from IBM  
6 in '87 for a blanking interval implementation of Trintex,  
7 right?

8 A. That's correct.

9 Q. Okay. So you didn't show them anything that IBM  
10 could have used in terms of documentation to fulfill the  
11 Dreyfus contract, right?

12 A. Any documentation --

13 Q. I'll re-ask the question. You didn't show the jury  
14 any documentation for a CD implementation, a Forth  
15 implementation or a blanking interval implementation that  
16 Trintex could have used to fulfill the Dreyfus contract,  
17 right?

18 A. That's correct.

19 MR. MARTINELLI: Can I pull up JTX-3 at 126.

20 BY MR. MARTINELLI:

21 Q. Now this is the file history and you just testified  
22 about this a minute ago?

23 A. Correct.

24 Q. And this was a disclosure from IBM in 1994; is that  
25 right?

1 A. Correct, that's when it was filed.

2 Q. Okay. And if we look here, you were looking in the  
3 first paragraph about the information that IBM looked for?

4 A. I'm familiar with this paragraph.

5 Q. Okay. There's nothing in there saying anything about  
6 advertising, right?

7 A. In this paragraph that is -- appears to be correct.

8 Q. Okay. And you know, years later, the Patent Office  
9 and IBM were still having discussions about whether there  
10 was any sale of advertising in the Trintex system?

11 A. Generally, yes.

12 MR. MARTINELLI: Can we look at the same Exhibit  
13 772.

14 BY MR. MARTINELLI:

15 Q. And this is JTX-3, this is the file history. And  
16 this is 772, this is years later, in 2002.

17 MR. MOSS: 772?

18 MR. MARTINELLI: JTX-3.0772.

19 BY MR. MARTINELLI:

20 Q. Okay. So top, after the block quote, it says,  
21 "Appellants have not disclosed to the U.S. PTO the existence  
22 of any advertising clients at this date," correct?

23 A. That's what this document says.

24 Q. And you're not aware of IBM ever providing the  
25 Dreyfus or Coldwell Bankers contracts to the PTO?

1       A.       The actual contracts, no; but as I mentioned, the  
2       substance of them, yes.

3               MR. MARTINELLI: No further questions.

4               THE COURT: All right.

5               MR. RODD: No redirect, Your Honor.

6               THE COURT: No redirect. All right.

7               Dr. Jeffay, you may step down, thank you, sir.

8               THE WITNESS: Thank you, Your Honor.

9               MR. PACKIN: Your Honor, we rest.

10              THE COURT: All right.

11              Ladies and gentlemen of the jury, that completes  
12       the presentation of the evidence. So what I'm going to do  
13       now is, good news is that I'm going to let you leave early  
14       today. But a question so that we can make the most  
15       efficient use of your time tomorrow, and try to get this  
16       case to you so you have as much time as possible: Would it  
17       be possible to start tomorrow morning at 9:00 instead of  
18       9:30, which would mean you get here by like 8:50?

19              Anybody that has a problem with that? No?

20              All right. So let's do that. We'll start at  
21       9:00, so if you could be here at 8:50, between 8:50 and  
22       9:00, we'll get started at 9:00. And what'll happen  
23       tomorrow is you'll hear the closing arguments from both  
24       sides, then you'll receive the final jury instructions, and  
25       then we'll swear the jury, the officer will take you and

1 you'll begin your jury deliberations.

2 All right. So, let me just remind you of the  
3 same things that I've told you every night: Keep an open  
4 mind, don't speak with anyone about this case, including do  
5 not start speaking among yourselves about the case. Do not  
6 do any independent research, do not watch or listen to any  
7 news on this case or read any articles about this case,  
8 whether in paper or electronic form. Do not play any of the  
9 Zynga games mentioned during this case while this case is  
10 still going on.

11 Leave your notes in the jury room, do not take  
12 them with you, and we'll see you tomorrow morning between  
13 8:50 and 9:00. All right. Have a good night.

14 (Whereupon, the jury left the room at 2:49 p.m.)

15 THE COURT: All right. Counsel, you may be  
16 seated.

17 All right, so let's hear Rule 50 motions.  
18 Zynga.

19 MR. MOULTON: Which side would you like to start  
20 with?

21 THE COURT: I'll start with Zynga.

22 MS. MOULTON: Elizabeth Moulton for Zynga.

23 So we're moving for a judgment as a matter of  
24 law on infringement, willfulness, invalidity and damages. I  
25 have a number of arguments to make. There are some that I

1 want to go into detail, and some I just want to put on the  
2 record. But happy to answer any questions or go into any  
3 topics that Your Honor has questions about.

4 So I'll start with infringement of the '849  
5 patent. And the first one I want to go into detail about is  
6 that IBM has a failure of proof because they did not address  
7 every limitation of every claim for every game.

8 In this case, there are no stipulations that the  
9 games operate similarly, and so they needed to go through  
10 each game for each limitation.

11 For many of the games, Your Honor, IBM offered  
12 no evidence tied to those specific games. A lot of -- after  
13 a lot of searching through the transcript, there are a  
14 number of games where the only mention of that game has to  
15 do with what level of targeted advertising. You may  
16 remember the high, medium, and low slide. That's the only  
17 time IBM -- IBM's infringement expert addressed those games.

18 We also heard testimony and evidence that the  
19 games do not operate similarly. So what they have is  
20 Mr. Thompson saying, I reviewed all this evidence, all 33  
21 games infringe, and here's an example. But at the same  
22 time, he testified that some games did operate differently.

23 So he admitted that five games don't pre-fetch  
24 advertising asset objects using an asset map. That's at  
25 page 418 of the transcript. Yet, they rely on the asset map

1 to prove a predetermined amount limitation, at page 451 of  
2 the transcript. So for that, they actually don't even have  
3 an opinion that they've met that limitation for those five  
4 games.

5 So we should get judgment as a matter of law for  
6 every game where Mr. Thompson didn't opine that the --  
7 specifically that the game met every element of the asserted  
8 claims.

9 It's not fair for IBM to say, This is one  
10 example of an accused product, and then leave it to us to  
11 disprove infringement of the other 32 accused products.  
12 They needed to have evidence that the games work similarly,  
13 which they didn't, or some kind of stipulation that all the  
14 games acted the same, which we never provided.

15 So because of that, I don't think there is any  
16 game where they have addressed every single limitation of  
17 that game to a single claim -- or sorry -- compared that  
18 claim to every element -- compared that game to every  
19 element of the claim.

20 So that's the first one.

21 The second noninfringement argument I'd address  
22 in detail is the predetermined amount in Claim 8. So  
23 Zynga -- or IBM has to prove that Zynga's games store a  
24 predetermined amount of advertising data. And as Your Honor  
25 knows, this was an issue at summary judgment. What Zynga

1 does is store a predetermined number of ads, which Your  
2 Honor held was not the same as the amount of advertising  
3 data.

4 What Mr. Thompson pointed to was the Unity asset  
5 map which lists different objects of advertising data that  
6 are needed to display offers for virtual items. That's at  
7 transcript 451.

8 Our engineers, Mr. Erenturk, we saw a deposition  
9 from him at transcript 328, he confirmed that the asset map  
10 has a predetermined number of items, not a predetermined  
11 amount of data.

12 And then, again, as I mentioned earlier,  
13 Mr. Thompson relies on this Unity asset map for all the  
14 games but Mr. Hall testified that not all games use Unity,  
15 and at least his game, Wizard of Oz, doesn't use Unity.  
16 Meanwhile, they don't have evidence about which games use it  
17 and which games don't. Mr. Hall's testimony is at  
18 transcript 727.

19 So if you look at Mr. Thompson's testimony about  
20 this asset map issue at transcript 451, all he's testifying  
21 is that the asset map is a list of items and that Unity  
22 package will have some amount of data, but he does not  
23 testify that there's a predetermined amount of data.

24 We had a sidebar on this and we came back after  
25 the break, and then counsel asked him, Did you apply the

1 Court's claim construction, and he said yes, but he doesn't  
2 actually provide any opinion that ties a predetermined  
3 amount to the asset map.

4 So do you have any questions about those two?

5 THE COURT: So I will wait to hear from IBM in  
6 response. I understand your argument.

7 MS. MOULTON: Okay. So I've got four other  
8 noninfringement arguments that I'll just say briefly, and if  
9 you have any questions about those, happy to go into it.

10 So the first one is that Zynga's games do not  
11 have multiple applications. Mr. Persechini didn't identify  
12 multiple applications within the game. First, he said all  
13 the games have a store and a single-player mode, but then he  
14 later admitted that a pop-up store is not a separate  
15 application. That's at transcript 497. And then we heard  
16 testimony that Hit It Rich, Wizard of Oz Slots, and Black  
17 Diamond Casino all have pop-up stores.

18 So even accepting Mr. Persechini -- I'm sorry.  
19 This is Mr. Thompson. I had the wrong name. So the  
20 technical expert. So even assuming that we can accept  
21 Mr. Thompson's individualized definition of "applications,"  
22 he admits that at least some of the games don't have  
23 multiple applications, even under his theory.

24 So then the second one is that Zynga is not  
25 pre-fetching ad objects. And this is going to come into the

1 damages argument. So you'll recall that Mr. Thompson agreed  
2 that in-app purchases from pop-up screens that start on game  
3 launch are not infringing. So if you have the app on your  
4 phone, you click the icon, the app opens, and you get  
5 immediate pop-ups before you engage in any game play or  
6 engage in the home screen.

7 He agrees that those are noninfringing. That's  
8 at transcript 503. But all of those start-up pop-ups are  
9 included in their damages base, so that's going to become a  
10 problem for them on damages.

11 But even beyond that, Zynga isn't pre-fetching  
12 any ad objects because it's downloading the ad objects at  
13 the same time as it downloads the application.

14 Any questions on that one?

15 THE COURT: Isn't there competing expert  
16 testimony on that issue?

17 MS. MOULTON: So our witnesses testified that  
18 the ads are coming in the binary, which happens when you  
19 download the game on your phone, and they are not accusing  
20 that download as being a pre-fetch.

21 THE COURT: Yeah, I know, I get that, but --

22 MS. MOULTON: Okay.

23 THE COURT: -- Thompson testified that there are  
24 multiple applications, and Almeroth testified that, no,  
25 there's one application, so we got competing expert

1 testimony on that issue.

2 MS. MOULTON: I think that -- that could be true  
3 for a game like Empires & Puzzles where Mr. Thompson did go  
4 through different -- his idea of what an application is  
5 within the game, but for the games where he agrees or we  
6 heard testimony that the store is a pop-up, he admits that's  
7 not a separate application. And, again, that's transcript  
8 497:8-25.

9 THE COURT: All right. All right. I understand  
10 your argument.

11 MS. MOULTON: Okay. Thank you.

12 So the next one is for Claim 13, Zynga's foreign  
13 games don't infringe because the advertising objects are  
14 structured or configured abroad.

15 So we heard all of the testimony from  
16 Mr. Terrell about which games are made abroad or which games  
17 were moved abroad during the damages period, and for all of  
18 those games, Zynga is not performing the steps of Claim 13  
19 within the United States, which is required for infringement  
20 of a method claim.

21 So then our last noninfringement argument is  
22 that Zynga is not selectively supplying offers to the  
23 devices based on user characteristics, that's for Claim 8.  
24 Mr. Hall testified that all ads are sent to all user devices  
25 at transcript 726.

1           Mr. Thompson, Dr. Martin, and the Patent Office  
2 all agreed that the plain and ordinary meaning of the claims  
3 is that they require selectively supplying the ads to the  
4 devices based on characteristics, and that just doesn't  
5 happen in Zynga's games.

6           So I can turn to the '719 when you're ready.

7           THE COURT: Okay.

8           MS. MOULTON: Okay. On the '719 patent, IBM  
9 failed to prove that the client and server both execute the  
10 same code or a subset of the same code. The codes are  
11 written in different languages and they have different  
12 conventions and structures, and you heard Mr. Wilkman  
13 testify about how that meant the codes were different. And  
14 then they also failed to identify any view-generating logic  
15 as required by the claims.

16           So Mr. Thompson explained that this is the whole  
17 cheat detection system. So when the server executes the  
18 getbattleresult function and then produces the PvP battle  
19 result object, the only thing that's ever displayed or  
20 created for display is the PvPbattleresult object on the  
21 client device. So he doesn't have view-generating logic on  
22 the server.

23           And the relevant testimony from Mr. Thompson is  
24 at page 465 and 477. And I would also add that the  
25 getbattleresult function isn't reformatting any data for

1 display or creating a screen or window representation.

2 THE COURT: All right.

3 MS. MOULTON: Okay. So the next one is  
4 willfulness.

5 THE COURT: Okay.

6 MS. MOULTON: Okay. So they're -- they've  
7 alleged that we were willful since 2014, which is when they  
8 sent the letter that accused the Zynga.com business website  
9 of infringement. That allegation had nothing to do with the  
10 allegations we have today, and at minimum, the Court should  
11 cabin their willfulness to some later point in the case.

12 They sent us a letter then, doesn't -- didn't  
13 identify any of our games. They sent another letter in 2020  
14 that identified an entirely different infringement theory.  
15 And meanwhile, their only evidence of willfulness is that we  
16 didn't redesign our games and that the engineers, low-level  
17 engineers didn't read the patents. That's not sufficient to  
18 show intentional or deliberate infringement.

19 And the first *SRI v. Cisco* case explains that  
20 merely pointing to people not reading the patent is not  
21 enough as a matter of law.

22 THE COURT: Do you have a cite for that *SRI v.*  
23 *Cisco*?

24 MS. MOULTON: You know, I don't have it in front  
25 of me, but I'd be happy to give it.

1 THE COURT: All right.

2 MS. MOULTON: Okay. So the next one is damages.  
3 So I'm going to try to avoid repeating our *Daubert* arguments  
4 but, obviously, we preserve those for appeal.

5 And I think -- so it's 930 F.3d 1295 at 1309.

6 THE COURT: All right.

7 MS. MOULTON: Okay. So, right, I don't want to  
8 repeat the *Daubert* arguments, but based on the evidence that  
9 came in, IBM doesn't have substantial evidence of damages  
10 because they included noninfringing revenue in their damages  
11 base for the '849 patent.

12 So what's happening here is that Mr. Thompson  
13 admitted that the pop-ups that happened on start up are not  
14 accused of infringement. That's at 503.

15 But then Mr. Persechini admitted that he used  
16 all U.S. in-app revenue as his damages base. That's at 634,  
17 so -- and they have no way for the jury to back out what was  
18 a nonaccused start-up pop-up versus an accused in-app  
19 purchase from the app -- from the in-app store or from some  
20 other later request within the game.

21 So the Court should instruct the jury to  
22 disregard Mr. Persechini's damages theory for the '849  
23 patent.

24 The Federal Circuit has been very clear that you  
25 can't accuse -- you can't include unaccused revenue in a

1 damages base. And a recent case, including explaining the  
2 applicability of that rule to method claims, is *Niazi*  
3 *Licensing v. St. Jude*, that's at 30 F.4th 1339, and the  
4 pincite is 1357.

5 THE COURT: What's the name of that case? You  
6 gave me the --

7 MS. MOULTON: Yeah, *Niazi*, N-A-I-Z-I [sic],  
8 *Licensing Corporation v. St. Jude Medical*.

9 THE COURT: Okay. What's next?

10 MS. MOULTON: Okay. So these arguments tie into  
11 our *Daubert*, but he didn't -- you know, he's abusing the  
12 Book of Wisdom by saying, essentially, every fact in the  
13 future can come in to the hypothetical negotiation even if  
14 it's not tied to the parties' expectations at the time of  
15 the hypothetical negotiation. And he's opining on what  
16 amounts to a running royalty despite testifying that neither  
17 party would have accepted a running royalty.

18 As to the '719 patent in particular, his theory  
19 is based on that anticheating document from FarmVille and  
20 Potter Match, but Mr. Martin agreed -- and this is a  
21 quote -- "it was speculation to use the impact of cheating  
22 in FarmVille on Empires & Puzzles." That's at transcript  
23 659:21-24. If it's based on speculation, that can't be  
24 substantial evidence.

25 So some of the other problems with

1 Mr. Persechini's analysis is that he failed to account for  
2 any noninfringing alternatives, even though Mr. Wilkman  
3 testified about those at 761. Mr. Persechini uses a  
4 company-wide profit split that wasn't tied to any game and  
5 would assign IBM the entire proportion of Zynga's R&D  
6 expenses for just the bare patent license.

7 So our position is that any damages award  
8 applying Mr. Persechini's damages theory would not be  
9 supported by substantial evidence.

10 THE COURT: All right.

11 MS. MOULTON: So then we've got the validity  
12 arguments.

13 THE COURT: Okay. One second.

14 MS. MOULTON: So --

15 THE COURT: Hold on one second.

16 MS. MOULTON: Okay.

17 THE COURT: Okay.

18 MS. MOULTON: We move on all three on-sale bar,  
19 the patentably distinct inquiry, and then the obviousness in  
20 view of Roy for the '719 patent. And I'm happy to provide  
21 any details on those if you want, but I don't want to  
22 overstay my welcome.

23 THE COURT: Okay. I understand.

24 MS. MOULTON: Thank you.

25 THE COURT: All right. One second.

1 All right. So, Ms. Feddeler, let's start by  
2 having you sort of tell me why Zynga is -- follow their,  
3 sort of, map and tell me why Zynga is not -- why there's not  
4 a failure of proof on infringement of the '849 patent.

5 MS. FEDDELER: Yes, Your Honor.

6 Mr. Thompson extensively walked through the  
7 evidence showing that Zynga's games meet each element of  
8 Claim 13 and Claim 8 of the '849 patent and then the Empires  
9 & Puzzles meets Claim 1 of the '719 patent. He showed  
10 source code, documents, testimony, and specifically  
11 Mr. Thompson walked through each element, element by  
12 element. He explained his analysis, the materials he  
13 reviewed in coming to his opinion, including all the source  
14 code. You know, we saw the PTX-2108.A, which was the  
15 summary of source code, as well as the actual source code  
16 referenced in that, which was, I believe, PTX-2108.B through  
17 PTX-2108GG.

18 He also provided other evidence for all of the  
19 games, including the exhibits referenced in PTX-3100,  
20 PTX-3300, and PTX-3500. For each of the elements, he  
21 explained how the games met the limitation, provided  
22 specific examples and specific evidence, and also explained  
23 how he determined, as well as the evidence he relied on, to  
24 show that each of the games meet that limitation.

25 I can also provide more specifics, Your Honor.

1           THE COURT:   How about for the five games that he  
2 admitted don't pre-fetch?

3           MS. FEDDELER:   Your Honor, he did not admit that  
4 those games don't pre-fetch.   What he did is he explained  
5 that there was multiple types of advertising objects that  
6 were pre-fetch.   He explained that all of the games  
7 pre-fetched JSON advertising objects.   And I can find the  
8 slide from his deck if you would like to have that in the  
9 record as well.

10           Your Honor, on the ELMO here is PDX-5.58 where  
11 he explained that all the games that you see on the right do  
12 the advertising JSON objects.

13           THE COURT:   Okay.   All right.

14           MS. FEDDELER:   Your Honor, the ones counsel was  
15 referring to are the ones on the left, but just to be clear,  
16 all of the games do at least one kind of advertising object.

17           THE COURT:   All right.   All right.   So with  
18 respect to the first round asserted by Zynga for judgment as  
19 a matter of law under Rule 50, the Court has considered both  
20 side's arguments, and viewing the evidence in the light most  
21 favorable to IBM, as the nonmoving party, and giving IBM, as  
22 the nonmovant, the benefit of all reasonable inferences,  
23 there are material issues of fact that remain for the jury  
24 to decide, there are credibility issues to be determined,  
25 and given all of that, there is sufficient evidence of

1 record to support a jury verdict in favor of IBM as a  
2 nonmovant, if the jury so decides.

3 All right. So now let's move on to the second  
4 basis. So Zynga moves for judgment as a matter of law under  
5 Rule 50 on noninfringement based on that its games do not  
6 meet the predetermined amount of data or limitation.

7 Zynga says that the testimony pointed out that  
8 its games use a predetermined amount of items, not a  
9 predetermined amount of data. And Zynga says the testimony  
10 of Mr. Erenturk supported that, that Mr. Thompson pointed to  
11 the unit asset map but that asset map is not evidence that  
12 there's a predetermined amount of data as opposed to a  
13 predetermined amount of units.

14 So tell me why Zynga has not presented a  
15 sufficient case for JMOL on that issue.

16 MS. FEDDELER: Your Honor, the key issue here is  
17 that each asset that's in that asset map has a set of amount  
18 of data associated with it, and that's what Mr. Thompson  
19 testified to at transcript page 451.

20 But even more, Mr. -- Zynga's witnesses  
21 yesterday, I believe Mr. Hall, also testified consistent  
22 with Mr. Thompson's opinion. Specifically, Mr. Hall  
23 testified that an asset is a type of file and that an asset  
24 bundle will have certain assets that are associated with it,  
25 and that was at the transcript at page 735. And then he

1 further went on to confirm that each of those assets has a  
2 file size and then similarly confirmed that an asset bundle  
3 also has a file size.

4 Mr. Hall confirmed that the asset bundle with  
5 its corresponding assets is packaged before it is sent to  
6 the client, so all of that happens with the predetermined  
7 size in advance before the process of going and actually  
8 getting those assets. And that's what Mr. Thompson  
9 explained as well.

10 THE COURT: Okay. Given the competing testimony  
11 of Mr. Erenturk, Mr. Thompson, Mr. Hall, viewing the  
12 evidence in the light most favorable to IBM as the nonmoving  
13 party, and giving IBM as the nonmovant the benefit of all  
14 reasonable inferences, there remain material issues of fact  
15 for the jury to decide. Credibility issues, given those  
16 issues remain, there's sufficient evidence of record to  
17 support a jury verdict in favor of IBM. If the jury  
18 believes the witnesses that were IBM that testified as to  
19 those issues.

20 All right. So now, let's turn to the four other  
21 noninfringement bases on the '849 patent.

22 Zynga -- first, Zynga games are -- do not have  
23 multiple applications, but are rather one application. I  
24 know that Mr. Thompson testified that there are multiple  
25 applications. Mr. -- Dr. Almeroth testified that they are a

1 single application.

2 So let me hear from you on that.

3 MS. FEDDELER: Yes, Your Honor, it's exactly  
4 that. It's just a disagreement between the experts about  
5 how the games apply to the Court's construction. As you  
6 recognize, Mr. Thompson explained that each of the games  
7 have multiple applications. He walked through some  
8 examples, and he also explained his analysis of how he  
9 determined that each of the games have multiple  
10 applications.

11 THE COURT: All right. This issue is a battle  
12 of the experts. Viewing the evidence in the light most  
13 favorable to IBM as the nonmoving party, and giving IBM as  
14 the nonmovant the benefit of all reasonable inferences,  
15 there remain material issues of fact for the jury to decide  
16 on this issue.

17 If the jury believes IBM's witnesses or finds  
18 IBM's witnesses' testimony on the issue more credible, there  
19 is sufficient evidence of record to support a jury verdict  
20 in favor of IBM as the nonmovant on the issue, thus this  
21 issue, like those before it, will go to the jury.

22 Let's move on to Zynga's games do not pre-fetch.

23 Zynga says that its games do not meet the  
24 pre-fetch limitation. Everything that they say that -- all  
25 the information is retrieved when the app is installed --

1 well, and that all information is retrieved after the user  
2 has requested the page, including the advertising, thus  
3 there's no pre-fetching. Installing the app is the request,  
4 so everything that comes after the user launches the  
5 application is not pre-fetched. And thus, Zynga does not  
6 use the pre-fetch -- not meet the pre-fetching limitation,  
7 so let me hear from you on that.

8 MS. FEDDELER: Your Honor, this is another  
9 example of a disagreement between the experts. Dr. Almeroth  
10 gave his opinion of when the request for the relevant  
11 page -- I believe it's -- in the claim construction, it's  
12 the request for the page in connection with which the  
13 advertising will appear, and Mr. Thompson gave his opinion  
14 of when those requests happen.

15 For example, Mr. Thompson explained that the  
16 relevant request isn't till after the loading screen, and so  
17 that click on the -- you know, the icon that launches the  
18 game, at that point in time there haven't been any requests  
19 for the relevant page. So Mr. Thompson showed that all of  
20 the downloading of the advertising objects at that time is,  
21 in fact, pre-fetching under the Court's construction.

22 THE COURT: All right. Again, the Court finds  
23 that this issue is a battle of the experts viewing the  
24 evidence in the light most favorable to IBM as the nonmoving  
25 party, and giving IBM as the nonmovant the benefit of all

1 reasonable inferences, there remains material -- there  
2 remain issues of material fact for the jury to decide.  
3 There are credibility issues.

4 Thus, in the event the jury finds IBM's expert  
5 more credible on the issue and decides in that manner there  
6 is sufficient evidence of record to support a jury verdict  
7 in favor of IBM on the issue, thus the matter will go to the  
8 jury for a decision.

9 Next basis was for Claim 13 of the '849 patent.  
10 Zynga's games do not infringe because not all of the steps  
11 occur in the U.S., Dr. Almeroth testified to that effect.  
12 Let me hear from you.

13 MS. FEDDELER: Yes, Your Honor. So this is  
14 another example where Mr. Thompson explained how the games  
15 meet each limitation in the United States. I think there  
16 was testimony both that the servers were in the United  
17 States and the client computers, including the client code,  
18 is also in the United States. Mr. Thompson gave his opinion  
19 that the structuring or formatting step was performed by the  
20 client code that's on the user's device, which is running in  
21 the United States.

22 I believe Mr. Terrell also gave testimony about  
23 the game team servers being located in the United States as  
24 well, at transcript 712.

25 THE COURT: All right. Again, this is a battle

1 of the experts. Viewing the evidence in the light most  
2 favorable to the nonmoving party, and giving IBM as the  
3 nonmovant the benefit of all reasonable inferences, there's  
4 sufficient evidence of record to support a jury verdict in  
5 favor of IBM. Comes down to who the jury believes between  
6 Dr. -- Mr. Thompson and Dr. Almeroth, their credibility  
7 issues to be determined, the issue will go to the jury.

8 Last, the fourth -- other noninfringement basis  
9 on the '849 patent is that Zynga is not selectively  
10 supplying offers to devices based on user characteristics,  
11 which is in Claim 8. I -- Dr. Almeroth testified that all  
12 offers are supplied to all users; thus, there's no selective  
13 supplying.

14 Let me hear from IBM.

15 MS. FEDDELER: Your Honor, to start, the claim  
16 requires selective -- structuring the advertising so that it  
17 may be selectively supplied to and retrieved at the  
18 reception system. And then it also requires for  
19 presentation in accordance with user characterizations.

20 So, you know, counsel moved for an *02 Micro*  
21 issue on this -- on the construction of this term, the Court  
22 found that waived. Now the experts are disagreeing about  
23 how the games actually work.

24 We heard testimony from Mr. Navelkar at  
25 transcript 449, testimony from Mr. Wilkman, and Mr. Hall, I

1 believe Mr. Hall was at 737, Mr. Wilkman was at 469. Each  
2 of these witnesses were asked questions about whether Zynga  
3 selectively supplies offers, and then they agreed.

4 So I understand that Zynga's now saying that  
5 there's inconsistent witness testimony, but that's, again,  
6 an issue of credibility for the jury to decide.

7 THE COURT: All right. Okay. Given the  
8 conflicting and competing testimony of the various  
9 witnesses, including Mr. Navelkar and Mr. Wilkman, Mr. Hall,  
10 and the competing testimony of Dr. Almeroth, this is, again,  
11 an issue that -- where there remains material issues of fact  
12 for the jury to decide the credibility issues.

13 Thus, viewing the evidence in the light most  
14 favorable to IBM as the nonmoving party, and giving IBM as  
15 the nonmovant the benefit of all reasonable inferences,  
16 there's sufficient evidence in the record to support a jury  
17 verdict in favor of IBM, thus the issue -- if the jury  
18 should decide, thus the issue is going to the jury.

19 Moving on to noninfringement of the '719 patent.

20 MS. FEDDELER: Your Honor, I'm going to hand it  
21 over to one of my colleagues who's going to be addressing  
22 this issue.

23 THE COURT: All right. All right.

24 MR. GANGULY: Tuhin Ganguly for IBM.

25 THE COURT: Mr. Ganguly.

1           MR. GANGULY: Your Honor, I'll take the second  
2 motion first, which was that we haven't produced enough  
3 evidence to show that there's VGL on the server,  
4 view-generating logic on the server.

5           Mr. Thompson explained that on the client after  
6 a game is played, there is a getbattleresult function which  
7 generates a battleresultobject. Mr. Thompson testified that  
8 that battle result object is -- is a window representation.  
9 It's -- the generation of that object is not creating new  
10 model data. It's extracting values. And he also explained  
11 that that object is used to display the results on the --  
12 the user screen. Mr. Wilkman confirmed that that happens.

13           On the -- Mr. Thompson also explained that on  
14 the server side, those exact same -- the exact same function  
15 is executed, the exact same object is generated, and there's  
16 not a dispute there between, you know, what Mr. Wilkman said  
17 and what Mr. Thompson testified.

18           THE COURT: So is the point in that -- is that  
19 the function that results in the battle result -- the  
20 getbattleresult -- the battle result object is the function  
21 that's executed, is that view-generating logic?

22           MR. GANGULY: The execution of the  
23 getbattleresult function is view-generating logic, yes, Your  
24 Honor.

25           THE COURT: So that's all that means.

1 MR. GANGULY: Yes, sorry.

2 THE COURT: All right. So Mr. Thompson is  
3 saying the -- Mr. Thompson is saying the execution of the  
4 getbattleresult function is view-generating logic. And we  
5 had Dr. Almeroth say that -- or, no, that was Dr. Bennett  
6 that says that there's no view-generating logic, so all  
7 right. All right, so, again, this comes down to a battle of  
8 the experts.

9 And viewing the evidence in the light most  
10 favorable to IBM as the nonmovant, and giving IBM as the  
11 nonmovant the benefit of all reasonable inferences, there  
12 remains at the very least credibility issues for the jury to  
13 determine as to which expert who testified on this issue  
14 they believe.

15 Thus, for those reasons, the matter is going to  
16 the jury. In the event they find for IBM or for Zynga,  
17 there's sufficient evidence of record to support a jury  
18 verdict in favor.

19 MR. GANGULY: Your Honor, there was a second  
20 Rule 50 motion on whether this code on the client and the  
21 server is the same. So that's -- that is just the battle of  
22 experts, their expert says it has to be written in the same  
23 programming language to be the same program code.

24 Mr. Thompson explained that it doesn't and  
25 Mr. Wilkman, the corporate witness, actually testified that

1 the client and the server do execute the same code in the  
2 cheat detection method.

3 THE COURT: All right. So with respect to  
4 this -- all right, same thing, it's the battle of the  
5 experts, their credibility issues to be determined as to who  
6 the jury believes or who the jury finds more credible.

7 Viewing the evidence in the light most favorable  
8 to IBM as the nonmovant, and giving IBM as the nonmovant the  
9 benefit of all reasonable inferences, there's sufficient  
10 evidence of record to support a jury verdict in favor of the  
11 nonmovant, the issue is going to the jury.

12 All right. So now let's move on to willfulness.

13 MR. HABBAZ: Good afternoon, Your Honor.

14 THE COURT: Good afternoon.

15 So Mr. Habbaz, right?

16 MR. HABBAZ: Yes.

17 THE COURT: IBM -- Zynga moves for JMOL on  
18 willfulness because it alleges IBM sent the letter in 2014  
19 but now we're in 2024 and, at a minimum, you know, what they  
20 alleged in -- what IBM alleged in 2014 is not what we have  
21 before us today, and Zynga contends that the Court should,  
22 at a minimum, cabin willfulness to some more narrow period  
23 and the fact that engineers did not read the patent is not  
24 sufficient for willfulness and has given the Court the *SRI*  
25 *v. Cisco* opinion from the Federal Circuit.

1           So tell me why the Court should not at least  
2 narrow the willfulness period.

3           MR. HABBAZ: So, Your Honor, there's ample  
4 evidence in the record to support a finding of willful  
5 infringement during the entire period here. So in 2014, IBM  
6 sent the letter to Zynga identifying the '849 patent,  
7 identifying their website as infringing.

8           But then what happened right after that is the  
9 parties had, I believe, a year-plus discussions, according  
10 to Mr. McBride, in 2014, 2015, they discussed IBM's  
11 technology, and specifically discussed how Zynga could use  
12 IBM's technology for ad optimization, personalization, and  
13 fraud detection.

14           So they weren't just discussing the website,  
15 they were discussing how it would apply to all of Zynga's  
16 products. They did not come to a resolution. According to  
17 Mr. McBride, Zynga expressed interest in the technology, was  
18 not interested in Zynga's -- in obtaining a license at IBM's  
19 patents.

20           And as to all of the engineers and Zynga  
21 employees and corporate representatives who testify, that  
22 they were -- they never read the patents, they never  
23 evaluated the infringement claims. That's because Zynga  
24 didn't ask them to. Their CTO was not aware of the dispute,  
25 even when it was ongoing, until just around the time of his

1 deposition.

2 And with regard to *SRI v. Cisco*, Your Honor has  
3 already addressed that when letting in the testimony of the  
4 engineer saying they didn't read it. We cited, and I would  
5 cite again, the Packaging Intelligence case from the federal  
6 circuit that says that when you have a corporate  
7 representative who says that they did not read the patents  
8 and continue their infringing activity after notice, that  
9 can -- that is evidence of willfulness.

10 In the *SRI* case, there the allegation was that  
11 there could be willfulness simply because engineers waited  
12 until their depositions to read patents. That was the only  
13 allegation in *SRI*.

14 Here we have a situation where Zynga was on  
15 notice about infringement, was on notice about infringement  
16 for these products. And even at deposition, the engineers  
17 didn't read the patents, and so that's the difference, so  
18 there's ample evidence in the record to find willful  
19 infringement.

20 THE COURT: All right. All right. This is one  
21 that I'm going to let go to the jury, but this is something  
22 that, you know, the Court can look at more closely  
23 afterwards.

24 So for now, I'm going to find that viewing the  
25 evidence in the light most favorable to IBM and giving IBM

1 the benefit of all reasonable inferences, there's sufficient  
2 evidence of record for a jury verdict in favor of IBM on it,  
3 but this is something that the Court has to review the  
4 record more closely and the law. And in the event there is  
5 a finding of willfulness, that's what the Court will do when  
6 the JMOL is renewed.

7 MR. HABBAZ: Thank you, Your Honor.

8 THE COURT: All right.

9 All right. Damages, you handling damages as  
10 well?

11 MR. HABBAZ: I'll pass it off to my colleague.

12 THE COURT: All right.

13 MR. DANG: Good afternoon, Your Honor. Sumeet  
14 Dang from Desmarais on behalf of IBM. As to the damages  
15 JMOL, my understanding is the vast majority of them are the  
16 same as the *Daubert* issues that the Court has already ruled  
17 on.

18 From what I heard, I believe the only new issue  
19 is this apportionment challenge due to pre-fetching.  
20 Although, as my colleague Ms. Feddeler explained, that is  
21 just a fact dispute concerning the scope of infringement,  
22 and so this issue should be resolved the same way.

23 As Mr. Thompson testified, all of Zynga's games  
24 do a pre-fetch advertisements. Dr. Almeroth has testified  
25 the opposite. And the jury is free to credit that factual

1 dispute. And moreover, independent from that expert  
2 testimony, Zynga's fact witnesses have also testified that  
3 Zynga's games pre-fetch all advertisements at game launch.

4 I could point you, for example, to Wilkman on  
5 pages 771-772, it's talking about the Empires & Puzzles  
6 games. Erenturk, on page 329, gave consistent testimony.  
7 Hall, on page 732, gave consistent testimony.

8 And so all of that put together, Your Honor, is  
9 easily sufficient for the jury to find that all of Zynga's  
10 virtual item offers do infringe, and for that reason, they  
11 are entitled to credit that and find damages over those  
12 offers.

13 THE COURT: But what about the argument of  
14 failure to account for any noninfringing alternatives?

15 MR. DANG: Failed to account for non- -- there's  
16 also testimony on record on that issue too. Mr. Thompson  
17 addressed specifically the noninfringing alternatives that  
18 Zynga had proposed for the '719 patent. I believe those  
19 were the only ones that were actually even raised at trial.  
20 For instance, he discussed the alternative methods of cheat  
21 prevention that could be used, the other cheat prevention  
22 methods that are actually used in Empires & Puzzles, and all  
23 of those were found to be insufficient.

24 And moreover, Dr. Bennett was also crossed on  
25 this exact issue, and so the jury is free to credit

1 Mr. Thompson's testimony over Dr. Bennett's.

2 THE COURT: All right. On the issue of damages,  
3 with respect to Zynga's motion for judgment as a matter of  
4 law under Rule 50 on damages claiming that IBM does not have  
5 substantial evidence of damages, the Court finds that there  
6 are material issues of fact that remain on the pre-fetching  
7 issue that forms the basis of Zynga's claim on accused  
8 revenue.

9 And based upon Mr. Dang's recitation of the  
10 evidence of record on the issue of failing to account for  
11 noninfringing alternatives, the Court is satisfied that  
12 there are no issues of law only for the Court to decide and  
13 that these are factual determinations that the jury has to  
14 make.

15 For that reason, viewing the evidence in the  
16 light most favorable to IBM as the nonmoving party, and  
17 giving IBM as the nonmovant the benefit of all reasonable  
18 inferences, the issue of damages will go to the jury.  
19 There's sufficient evidence of record to support a jury  
20 verdict in favor of the nonmovant.

21 Let's move on to invalidity.

22 Zynga moves for JMOL on the on-sale bar, the  
23 issue of patentably distinct between the '849 patent, and  
24 the '209 patent and obviousness based on the '909 patent,  
25 known as "Roy."

1 MR. HILYARD: Hello, Your Honor. Michael  
2 Hilyard of Desmarais on behalf of IBM.

3 We'll go in order of Zynga's arguments.

4 Regarding the on-sale bar for the '849 patent,  
5 Zynga has failed to satisfy its burden by clear and  
6 convincing evidence to show that there was a commercial  
7 offer for sale before the critical date.

8 As IBM's witness Mr. Bob Filepp testified, the  
9 inventors of Prodigy were considering multiple alternatives  
10 to deliver advertising.

11 Zynga relies on two contracts to support its  
12 invalidity theory, the Dreyfus and the Coldwell Banker  
13 contracts, but both of those contracts are silent about the  
14 specific methodologies to deliver advertisements.

15 For example, Zynga points to a newsletter rather  
16 than the contracts in DTX-600 to argue that those contracts  
17 indicate that they practice the step of the '849 patent of  
18 delivering ads using advertising objects. But, once again,  
19 Your Honor, the contracts are silent as to the methodology  
20 for delivering those ads.

21 Regarding Zynga's patentably distinct argument,  
22 Zynga again has failed to meet it's burden --

23 THE COURT: One second.

24 MR. HILYARD: Sorry, Your Honor.

25 THE COURT: All right. Let's move on to...

1 MR. HILYARD: Your Honor, sorry, I should have  
2 stated this upfront but IBM is also moving for judgment as a  
3 matter of law validity for much of the same reasons. So our  
4 same arguments in response to Zynga's position also supports  
5 IBM's position for judgment as a matter of law.

6 THE COURT: Okay. You can go ahead.

7 MR. HILYARD: So regarding patentably distinct,  
8 Zynga has failed to meet its burden by clear and convincing  
9 evidence that Claim 13 of the '849 patent is not patentably  
10 distinct from the claims of the '209 patent. For one  
11 example, Zynga has failed to show how the advertising  
12 objects claimed in the '849 patent are disclosed or made  
13 obvious by the claims of the '209 patent.

14 THE COURT: Okay.

15 MR. HILYARD: Regarding the '719 patent, Zynga  
16 concedes that that the Roy reference does not anticipate the  
17 '719 patent because Roy does not disclose that the  
18 view-generating logic executing on the client is the same  
19 view-generating logic executing on the server.

20 Zynga, instead, relies on an obviousness theory.  
21 But after the migration event that's disclosed in Roy, the  
22 roles of the master server and the client computers do not  
23 change.

24 Dr. Bennett impermissibly relies on hindsight  
25 bias using the teachings of the '719 patent as a roadmap as

1 his only basis to support why a person of ordinary skill in  
2 the art would find it obvious to modify the Roy to meet that  
3 teaching disclosed in the '719 patent.

4 THE COURT: All right.

5 MR. HILYARD: Thank you.

6 THE COURT: All right. So with respect to  
7 the -- Zynga's motion for judgment as a matter of law on the  
8 on-sale bar, as well as IBM's motion for judgment as a  
9 matter of law on on-sale bar, on invalidity, both motions  
10 are denied.

11 Again, this is a battle of the experts, we have  
12 competing testimony of Dr. Almeroth, Mr. Filepp, and  
13 Mr. Jeffay on the issues. So viewing -- with respect to  
14 Zynga's motion, viewing the evidence in the light most  
15 favorable to IBM as the nonmoving party, and giving IBM the  
16 benefit of all reasonable inferences, there's sufficient  
17 evidence of record to support a jury verdict in favor of  
18 IBM.

19 With respect to IBM's JMOL motion, viewing the  
20 evidence in the light most favorable to Zynga as the  
21 nonmoving party, and giving Zynga as the nonmovant the  
22 benefit of all reasonable inferences, there's sufficient  
23 evidence in the record to support a jury verdict in favor of  
24 Zynga.

25 Moving on to the issue of whether Claim 13 of

1 the '849 patent is patentably distinct from the Claim 2 of  
2 the '209, that -- same thing, it comes down to a battle of  
3 the experts. Both sides' motions for judgment as a matter  
4 of law are denied.

5 With respect to Zynga's JMOL motion, viewing the  
6 evidence in the light most favorable to IBM as the nonmoving  
7 party, and given IBM as the nonmovant the benefit of all  
8 reasonable inferences, there's sufficient evidence in the  
9 record to support a jury verdict in favor of IBM.

10 With respect to IBM's motion for judgment as a  
11 matter of law on the patentably distinct issue, viewing the  
12 evidence in the light most favorable to Zynga as the  
13 nonmoving party, and giving Zynga as the nonmovant the  
14 benefit of all reasonable inferences, there's sufficient  
15 evidence of record to support a jury verdict in favor of  
16 Zynga on the issue.

17 With respect to obviousness of the '719 on  
18 patent, based on the '909 patent known as "Roy," again, this  
19 comes down to a battle of experts. We have the competing  
20 testimony of Dr. Bennett and Dr. Jeffay. Viewing the  
21 evidence in the light most favorable to IBM as the nonmoving  
22 party, and giving IBM as the nonmovant the benefit of all  
23 reasonable inferences, there's sufficient evidence in the  
24 record to support a jury verdict in favor of IBM on the  
25 issue.

1                   With respect to -- and that was with respect to  
2                   Zynga's JMOL motion.

3                   With respect to IBM's JMOL motion on the issue,  
4                   viewing the evidence in the light most favorable to Zynga as  
5                   the nonmoving party, and giving Zynga the benefit of all  
6                   reasonable inferences as the nonmovant, there is sufficient  
7                   evidence of record to support a jury verdict in favor of  
8                   Zynga.

9                   That deals with the JMOL motions. Let's --

10                  MR. PACKIN: Your Honor, just -- just for the  
11                  record, IBM also moves for JMOL on infringement on the  
12                  '849 patent on Claims 8 and 13 and willful infringement on  
13                  those, as well as on infringement of Claim 1 of the '719  
14                  patent, as well as JMOL on damages. Thank you.

15                  THE COURT: All right. For all the reciprocal  
16                  reasons that I denied Zynga's motions, I deny IBM's motions.

17                  MR. PACKIN: Thank you.

18                  THE COURT: All right. So let's -- I'm going to  
19                  give the court reporter a break. I need a break, and I need  
20                  to take a look at the issues with respect to the final jury  
21                  instructions and the verdict form. So let's break for  
22                  15 minutes, and we'll come back and we'll get into those.  
23                  Solve those issues.

24                  (Recess taken.)

25                  MR. PACKIN: Your Honor, on the verdict form --

1 we just got Your Honor's verdict form -- we had another  
2 proposal that we didn't submit because, you know, we saw  
3 that Your Honor has a practice of including all of the  
4 products, and so we have another version for consideration  
5 that makes it in a chart that's just a little bit easier, if  
6 I could hand that up. We've shared it with the other side.

7 THE COURT: A chart?

8 MR. PACKIN: Yes. Here, if I hand it up.

9 MR. PETRIE: Your Honor, Kyle Petrie on behalf  
10 of IBM. But the benefit of the chart here --

11 THE COURT: Hold on. Let me see what I'm  
12 looking at.

13 So you're combining questions 1 and 2?

14 MR. PETRIE: That's exactly right. I think we  
15 can reduce three questions off the verdict form and not have  
16 to repeat the games twice.

17 THE COURT: No, we're not going to do that.

18 MR. PETRIE: Okay. Thank you, Your Honor.

19 THE COURT: All right. So essentially the  
20 verdict form, it's a combination of both of your proposals.

21 MS. MOULTON: So on the verdict form for Zynga,  
22 we object to the damages questions saying "fairly and  
23 reasonably compensate IBM for Zynga's use of the '849  
24 patent" because that endorses IBM's damages theory. The use  
25 of the patent is just one of the Georgia-Pacific factors,

1 and this language isn't consistent with prior verdict forms,  
2 which just ask: "What is the amount of a reasonable  
3 royalty?"

4 THE COURT: All right. So -- all right. So  
5 you're asking that -- so if -- the question was: What sum  
6 of money do you find that IBM has proven by a preponderance  
7 of the evidence to be a reasonable royalty for Zynga's use  
8 of the '849 patent?

9 MS. MOULTON: It's the "for use of." You've  
10 heard a lot of testimony about how IBM thinks that we've put  
11 on a faulty damages case for not -- for not basing our  
12 damages off of use, and so putting that in the verdict form  
13 tells the jury that IBM's damages theory is correct when  
14 there's a lot of ways to calculate damages.

15 So our -- this was Zynga's question which I'll  
16 read to Your Honor.

17 THE COURT: I got it.

18 MS. MOULTON: Okay.

19 MR. PETRIE: May I respond, Your Honor?

20 THE COURT: Let me read their question.

21 That question is confusing, so we're not going  
22 to go with Zynga's question.

23 Let me hear from you.

24 MR. PETRIE: Yeah, so just quickly to respond, I  
25 think the language Your Honor chose is from 35 USC 284. We

1 think that's the correct way to present --

2 (Reporter clarification.)

3 MR. PETRIE: We think that's the appropriate way  
4 to present it to the jury. And in response to --

5 THE COURT: So am I changing the question to  
6 "what sum of money do you find IBM has proven by a  
7 preponderance of the evidence to be a reasonable royalty for  
8 Zynga's use of the '849 patent?"

9 MR. PETRIE: That's fine for IBM, Your Honor.

10 THE COURT: All right.

11 MR. PETRIE: Yeah, we do have one other thing  
12 we'd like to raise with Your Honor on the verdict form.

13 THE COURT: So questions 7 and 8 will be changed  
14 to --

15 MS. MOULTON: Can I make one more proposal on  
16 that?

17 THE COURT: -- "to be a reasonable royalty for  
18 Zynga's use."

19 Go ahead.

20 MS. MOULTON: Could we change "Zynga's use" to  
21 "Zynga's infringement"?

22 THE COURT: We can change it to "Zynga's  
23 infringement."

24 MS. MOULTON: Thank you.

25 MR. PETRIE: So we would, you know, object on

1 the basis that 284 specifically says "use of" and that's  
2 what the statute says. It's not confusing. There's really  
3 no reason why we should be changing what the statute is  
4 telling us to apply.

5 THE COURT: Okay. So section 284 says "use of"  
6 word for word?

7 MR. PETRIE: Correct, Your Honor.

8 THE COURT: All right. I'm going to track the  
9 statute and use "use of."

10 MR. PETRIE: Thank you, Your Honor.

11 IBM would like to raise one objection on the  
12 verdict form that Your Honor has handed out, and I'll show  
13 it on the document camera here.

14 So under infringement question 1, it's: "Did  
15 IBM prove by a preponderance of the evidence that Zynga  
16 presented offers of virtual items in a manner?" We think  
17 that that's a relic from the previous submission where there  
18 were third-party ads on the one hand and then virtual items  
19 on the other.

20 We think it should just say "whether Zynga  
21 infringed," and I think that's actually supported by the  
22 validity question where, Your Honor, on the question of  
23 invalidity, it doesn't say "on-sale bar for time." It just  
24 says "convincing evidence that the claims are invalid." We  
25 think infringement should track the same way as invalidity,

1 keep it simple, whether they've infringed, whether the  
2 patent's invalid. We think that's the appropriate way to  
3 proceed.

4 THE COURT: All right. Let me hear from Zynga.

5 MS. MOULTON: That's fine, Your Honor. And we  
6 maintain our objection to his putting "use" in the damages  
7 question.

8 THE COURT: But you're fine with their proposed  
9 change to questions 1 and 2?

10 MS. MOULTON: Yes.

11 THE COURT: All right. So we'll change it.

12 So the Court is going to ask the parties to  
13 resubmit the revised verdict form consistent with the  
14 changes the Court has given.

15 MR. PETRIE: Understood, Your Honor. We'll  
16 confer with counsel before we submit it.

17 THE COURT: We'll do it.

18 All right. All right. I understand Zynga  
19 maintains your objection to the language of "use of." Does  
20 Zynga contest that section 284 uses the phrase "use of"?

21 MS. MOULTON: No, but the damages theory in this  
22 case is a reasonable royalty theory and not a lost profits  
23 theory, and so we should be telling the jury to follow the  
24 theories that were put in front of them, which both experts  
25 opined on a reasonable royalty.

1           There's nothing wrong with saying "for Zynga's  
2   infringement," and that doesn't elevate one party's position  
3   over the one. It's prejudicial to use "use" in the verdict  
4   form.

5           MR. PETRIE: If I could respond, Your Honor.  
6   Their expert testified just this afternoon that he, in fact,  
7   considered use in Georgia-Pacific factor 11 when he was  
8   doing his analysis, so the jury did hear that.

9           THE COURT: All right. Fine, we'll keep it.

10          All right. So let's move on to the final jury  
11   instructions. So the first dispute was in section 1.4, the  
12   burden of proof.

13          MS. MOULTON: Your Honor, we had conferred  
14   before, as Your Honor requested, and we had agreed on what  
15   you have in the finals.

16          MR. PETRIE: That's right, Your Honor.

17          THE COURT: So -- okay. So it's IBM that's  
18   trying to get additional language?

19          MR. PETRIE: That's right, Your Honor. We  
20   conferred, and, you know, we tried to reach compromise like  
21   Your Honor suggested, and we've agreed to remove that  
22   language, as you did as well.

23          THE COURT: Okay. All right. Next is  
24   section 2.5, infringement.

25          MR. PETRIE: Yeah, and same thing here, Your

1 Honor. I haven't had a chance to review exactly what we've  
2 decided, but -- when we were meet-and-conferring earlier  
3 today, Zynga agreed that it should be "claimed methods of  
4 the asserted patents." So for the first dispute, it was  
5 both patents, not just the '719.

6 THE COURT: Okay. So you guys have reached  
7 agreement for that, on the "claimed methods of the asserted  
8 patents." Okay.

9 And then -- so that's for the first line of  
10 paragraph 2 and then also the last line of paragraph 2, "the  
11 asserted patents."

12 MR. PETRIE: That's correct, Your Honor.

13 THE COURT: The asserted claims, rather.

14 MR. PETRIE: Yes.

15 THE COURT: And, Zynga, you agree with that,  
16 right?

17 MS. MOULTON: That's right.

18 THE COURT: All right. And then looking at the  
19 last paragraph, looks like Zynga's proposing a sentence  
20 there. What's IBM's position?

21 MR. PETRIE: Yeah, Your Honor, we're --  
22 understanding that's probably from that AIPLA, you know,  
23 we're okay with Your Honor adding that.

24 THE COURT: All right. So we're going to leave  
25 that set, Zynga's proposal for that.

1 All right. 2.6, willful infringement.

2 MR. KOLKER: Joseph Kolker for Zynga, Your  
3 Honor. Your Honor, might I just say one thing about this?

4 THE COURT: Yes.

5 MR. KOLKER: So -- so I see that -- I understand  
6 that with respect to the first dispute, Your Honor has  
7 adopted IBM's proposal.

8 I would note that for the second dispute, IBM  
9 agreed to "since 2014," which from Zynga's perspective is  
10 preferable to no language at all, although we maintain our  
11 objection for both of these. So I would suggest that there  
12 would be less prejudice to Zynga if the Court adopted "since  
13 2014," as IBM proposed.

14 I also would just note that a little bit earlier  
15 Zynga moved for judgment as a matter of law on no  
16 willfulness, and in light of some issues that the Court  
17 noted, we also asked in the alternative that the Court at  
18 least narrow the period of willfulness asserted, and the  
19 Court denied that motion at the 50(a) stage.

20 So I would just note that the jury is going to  
21 be presented with this theory going all the way back to 2014  
22 and there is no legal dispute that the willfulness  
23 assessment is performed at the time of notice. The only  
24 sort of dispute here is whether IBM was on -- put us on  
25 notice in 2014 or, again, in 2015 and 2020, etc.

1           THE COURT:   So your -- Zynga wants "starting in  
2   2014" in paragraph 1 and "as of 2014" in the second  
3   paragraph.   So, IBM, during the argument on JMOL, one of the  
4   things you guys argued was, yeah, we notified them in 2014,  
5   but we had discussions after that, so starting in 2014, so  
6   why not go with Zynga's position?

7           MR. PETRIE:   Right, so the way the sentence  
8   reads, Your Honor, is as you must base your decision on  
9   Zynga's knowledge and actions, and if you go with their  
10   language, as of 2014.   That's limiting language that they're  
11   going to use to say the only time they get to evaluate is  
12   2014, when what we argued at JMOL is no, it's 2014, 2015,  
13   2022, all the way through today, so that was our issue with  
14   the language.

15          THE COURT:   Okay.

16          MR. PETRIE:   And what you're seeing, since 2014  
17   there, we add that as a compromise with them to try to reach  
18   agreement before we submitted them.   You know, we're happy  
19   with Your Honor's construction as it's currently in the jury  
20   instructions.   I note that it's actually from a previous  
21   jury instruction the Court has given, so we think that's an  
22   appropriate way to proceed here.

23          THE COURT:   So if the Court doesn't include any  
24   of the dates then you can make your arguments to the jury  
25   and they decide, you know.   So it seems to me that if I

1 include a date, then that's prejudicial to one side or the  
2 other. So the best is to just include no dates and you make  
3 your respective arguments to the jury.

4 MR. KOLKER: So, Your Honor, I understand your  
5 ruling against us and so I am not trying to change your  
6 mind, but just for the record, I am noting why we maintain  
7 our objection.

8 As recently as 2022, the Federal Circuit has  
9 reaffirmed the language we cited from the "Oded Dick's" case  
10 from 1999, which is that the proper time to assess  
11 willfulness is at the time the infringer received notice  
12 making the relevance of later developments questionable at  
13 best.

14 So I understand IBM's argument that the focus on  
15 2014 is prejudicial, but I would submit it is only  
16 prejudicial in the sense that the law is not favorable to  
17 their willfulness claim. And --

18 THE COURT: So we can -- I'll keep "starting in  
19 2014" in the first paragraph and then I won't include any --  
20 I won't include any date in the rest of it. And then you  
21 make your respective arguments to the jury.

22 MR. KOLKER: Thank you, Your Honor, we maintain  
23 our separate objection but we appreciate your ruling on  
24 this.

25 MR. PETRIE: We would prefer, Your Honor, if

1 they want a date, to keep the "since 2014" opposed to the  
2 "starting in 2014" language, that was our compromise  
3 originally. To the extent Your Honor wants to put in a date  
4 there, we think that the "since 2014" is less prejudicial to  
5 us than the "starting in 2014."

6 THE COURT: Well, so you guys can't agree on a  
7 compromise, then I'm just not going to include any dates and  
8 you make your respectful arguments to the jury.

9 MR. PETRIE: Thank you, Your Honor.

10 MR. KOLKER: Your Honor, I mentioned earlier  
11 that we would accept IBM's proposal. We maintain our  
12 objection --

13 THE COURT: Which one?

14 MR. KOLKER: "Since 2014."

15 THE COURT: In the second paragraph.

16 MR. KOLKER: Correct. I'm maintaining our  
17 objections for the record. But we do think that there is  
18 less prejudice in that than in not including the date at  
19 all.

20 THE COURT: All right. So we'll say "since  
21 2014" in the second paragraph.

22 MR. PACKIN: Yes, Your Honor, I think --

23 THE COURT: And no other dates.

24 MR. PACKIN: I think --

25 THE COURT: Seems like he wants it both ways but

1 I understand.

2 MR. PACKIN: Yeah, I think either you agree or  
3 you maintain your objection but you can't have it both ways  
4 because they are just creating appeal issues.

5 THE COURT: I understand. So we'll say "since  
6 2014" in the second paragraph and no other dates.

7 All right. What's next?

8 MS. MOULTON: Looks like the on-sale bar  
9 instruction. Is that what you have next?

10 THE COURT: So 39, page -- 2.9.

11 MS. MOULTON: Sorry. On the willfulness  
12 instruction, we maintain our objection to willful blindness  
13 being included because they didn't plead that theory, but I  
14 think the next one is 2.9.

15 Is that right?

16 THE COURT: All right.

17 MS. MOULTON: Okay. So, Your Honor, out of this  
18 first paragraph about having -- on-sale bar having to be  
19 new, that is not the law. The Federal Circuit says, To  
20 prove the on-sale bar, you must demonstrate by clear and  
21 convincing evidence that there was a definite offer --  
22 sorry -- a definite sale or offer to sell more than one year  
23 before the application for the subject patent, and the  
24 subject matter of the sale or offer to sell fully  
25 anticipated the claimed invention or would have rendered the

1 claimed invention obvious by its addition to the prior art.  
2 The case I'm reading from is 192 F.3d 1353 at 1358.

3 And then the Federal Circuit cited that case  
4 since then, including in the *Baker Hughes v. Davis-lych*  
5 case, which is 31 F.Apex 650, 656. So we should not include  
6 this first paragraph about "new."

7 THE COURT: All right. Okay.

8 MR. PETRIE: May I be heard, Your Honor?

9 THE COURT: Yes.

10 MR. PETRIE: Kyle Petrie. I think the  
11 fundamental starting point for the on-sale bar is that it's  
12 102(b), which is anticipation. And so what Your Honor added  
13 is correct, that is an anticipation theory. And I think  
14 adding that in needs to be clear because what they're going  
15 to do and what they've been doing all trial is trying to say  
16 what was sold or what was offered for sale, whether it's --  
17 it has to be anticipated, it can't be obvious, it has to be  
18 the exact invention as it was sold.

19 So that's an anticipation theory. And that's  
20 the starting point of a 102 B on-sale theory, which is what  
21 they're advancing here, so we think that's the correct way  
22 to proceed.

23 THE COURT: All right. We're not going to  
24 include it in this section.

25 MR. PETRIE: Thank you, Your Honor. IBM notes

1       its objection for the record.

2               THE COURT: All right.

3               MR. PETRIE: Just to be clear, Your Honor, what  
4       you're proposing removing is the first paragraph on page 31?

5               THE COURT: That's right. That's what Zynga is  
6       objecting to.

7               MR. PETRIE: Okay. And -- yeah, thank you, Your  
8       Honor. Note our objection.

9               THE COURT: All right. What's next?

10              MS. MOULTON: So in this same instruction, you  
11       have "to show a commercial offer for sale," in that  
12       paragraph, Your Honor, on page 31.

13              THE COURT: Okay.

14              MS. MOULTON: So there was "either a commercial  
15       offer to perform the patented method" -- and then this is  
16       the part we object to -- "such that the party making the  
17       offer must be legally bound to perform the patented method  
18       if the offer is accepted."

19              So in this case, the contracts at issue, they  
20       specifically say that Trintex will carry out the -- whatever  
21       is being sold. So there's not a dispute that Trintex is  
22       going to perform some service or carry out some method. The  
23       dispute is what was the thing they were promising to do. So  
24       this introduces an issue that's actually not in dispute.

25              THE COURT: All right. So do you agree that

1       this issue is not in dispute?

2               MR. PETRIE:  No, I think it's very much in  
3       dispute, Your Honor.  And we've cited case law in our  
4       footnote 46 from what we submitted to the Court last night,  
5       from the *Plumtree* case, 473 F.3d, which states that:  "Under  
6       this standard, it is clear that the offerer must be legally  
7       bound to perform the patented method if the offer is  
8       accepted," which is exactly what's in the instruction.

9               MS. MOULTON:  Your Honor, if I can just read you  
10      from *Plumtree*.  In *Plumtree*, the offer was to provide  
11      software/hardware package, and the claims were a method.  So  
12      the dispute was does provide hardware/software package, is  
13      that an offer to perform the method or an offer to provide a  
14      system.

15              Here, the offer is, "create, produce and carry  
16      on the service package," so we don't have this dispute about  
17      is -- are we promising to perform a method, the dispute is  
18      what was the Prodigy system promised to do, not would it do  
19      something.

20              MR. PETRIE:  Your Honor, we disagree with that  
21      characterization.

22              THE COURT:  All right.  The Court's going to  
23      keep the language.  I understand your objections.

24              MS. MOULTON:  Okay, Your Honor, the next one is  
25      that Zynga wanted to add "there's no requirement that the

1 offer specifically identify in the claim limitations that  
2 the offer is, in fact, for the claimed invention, may be  
3 established by a relevant evidence such as memoranda,  
4 drawings, correspondence, and testimony of witnesses."

5 And that comes directly from the Court's -- from  
6 the Federal Circuit's opinion in *RCA*. And that's especially  
7 relevant here because IBM is saying that basically the steps  
8 of the method had to be in the contract, and that is just  
9 not what the law requires.

10 THE COURT: So this is the dispute whether to  
11 include the instruction that the offer or contract for sale  
12 must unambiguously place the invention on sale.

13 MS. MOULTON: That's what IBM wanted. Your  
14 Honor left -- correctly left that out.

15 THE COURT: Right.

16 MS. MOULTON: But we need the second piece,  
17 which was Zynga's position, there's no requirement...

18 THE COURT: Yeah, I took both out, so I'm not  
19 going to --

20 MS. MOULTON: They are not -- Your Honor, the  
21 Federal Circuit's decision in *RCA Corporation* says exactly  
22 that, that the offered product is, in fact, the claimed  
23 invention "may be established by any relevant evidence, such  
24 as memoranda, drawings, correspondence, and the testimony of  
25 witnesses."

1           And this is a -- a dispute in this case is IBM  
2           is trying to mislead the jury about the law by telling them  
3           that the method steps have to be in the offer. And the  
4           Federal Circuit says no, that's not the requirement.

5           MR. PACKIN: Yes, Your Honor, I take issue with  
6           their accusation that we're trying to mislead the jury. But  
7           we're fine with Your Honor's approach of taking both out.  
8           And I think the objections are noted for the record. And as  
9           Your Honor has required, lead counsel is here so if we could  
10          keep moving, that would be much appreciated.

11          THE COURT: I took them both out so I think it's  
12          balanced, so I'm not going to put that part back in. So  
13          let's move to the next one.

14          MS. MOULTON: So this is the experimentation --

15          MR. ROBERTS: Your Honor, can I ask a clarifying  
16          question?

17          THE COURT: Yes.

18          MR. ROBERTS: If they make an argument during  
19          closing to say that it has to be in the contract, would Your  
20          Honor be open at that point to a potential curative  
21          instruction in line with RCA?

22          MR. PETRIE: Your Honor, what would be "it" in  
23          the contract is the patented method. That's what has to be  
24          in the contract. So it's unclear what --

25          THE COURT: Well, let's do this, why don't -- so

1       that -- why don't the two of you confer on language that's  
2       acceptable to you both so that you can argue whatever you  
3       want to argue and that they -- and that the Court complies  
4       with their understanding of *RCA*.

5               MR. PACKIN: Your Honor, I will do my best to  
6       meet and confer with the other side in good faith and  
7       understand that it -- you know, we'll try to reach an  
8       agreement whether to change Your Honor's preliminary --

9               THE COURT: Because if you don't agree and you  
10      make the argument --

11              MR. PACKIN: I'm not --

12              THE COURT: -- then I may issue a corrected --

13              MR. PACKIN: I'm not -- sorry, Your Honor, go  
14      ahead.

15              THE COURT: Go ahead.

16              MR. PACKIN: I was just going to say, the  
17      argument that I'm going to make is the argument that we've  
18      been making this whole trial, which is this contract could  
19      have been performed in any number of ways, including the  
20      prior art, or the four other or three other ways that  
21      Mr. Filepp identified, and that's not enough.

22                    It's got to be an offer for the invention and  
23      it's got to require the invention. This doesn't require the  
24      invention. So that's what I would say, in full  
25      transparency.

1           MR. ROBERTS: What he just said he was going to  
2 argue, is that it has to be in the contract.

3           MR. PACKIN: That's not what I said.

4           MR. ROBERTS: If it's not in the contract, if  
5 the contract doesn't specifically offer the invention,  
6 meaning every element of the invention and you could perform  
7 it another way, then it's not an offer for the invention.

8           And RCA specifically says, the contract itself  
9 doesn't have to contain it, the contract has to be an offer  
10 for the thing and the thing that is being sold has to embody  
11 the invention and you can prove that second step through the  
12 other documents.

13           And this is why, Your Honor, we need RCA in  
14 there, because they are telling you they are going to argue  
15 exactly opposite of RCA.

16           MR. PACKIN: No, that's not true, that's not  
17 what it says. It says, you can't say hey, the contract  
18 needs to have these steps in it of the patent, that's not  
19 what I'm going to say. I'm going to say, the contract  
20 requires you to sell -- or the law requires that you sell  
21 the invention. This is high level, like we've been saying,  
22 high-level stuff that could have been done with the  
23 invention or it could have been done with the prior art or  
24 it could have been done with the other things that they were  
25 exploring in their time and that's what we've been telling

1 the jury the whole time, which is --

2 THE COURT: So you're disputing Mr. Robert's  
3 interpretation of RCA?

4 MR. PACKIN: Yes, Your Honor and his  
5 interpretation of what I'm saying but I'm telling Your Honor  
6 what I'm going to say, so I don't think I need to --

7 MR. ROBERTS: And all I would like is -- I don't  
8 need an interpretation of RCA, I want the exact quote from  
9 RCA.

10 THE COURT: All right. We'll take a look at  
11 that issue.

12 MR. PACKIN: Thank you, Your Honor.

13 THE COURT: So I haven't read the case so I need  
14 to look at that issue.

15 MS. MOULTON: In the joint submission from last  
16 night, these are footnote 47. Or I guess from this  
17 afternoon, sorry.

18 THE COURT: I see it, but I need to read the  
19 case.

20 MS. MOULTON: I was trying to be helpful to your  
21 law clerks, sorry.

22 So on the experiment which is -- in the Court's  
23 instructions, it's on pages 31-32 and in the joint  
24 submission, it's on page 43.

25 THE COURT: Okay.

1 MS. MOULTON: If we're going to give any kind of  
2 experimental use instruction, we should use the model from  
3 the AIPLA instructions instead of, this is a long quote from  
4 a case which includes a lot of factors the jury heard  
5 absolutely nothing about.

6 THE COURT: So you have language, you said, from  
7 the AIPLA instructions?

8 MS. MOULTON: Yes.

9 MR. PETRIE: Your Honor, the AIPLA action  
10 doesn't address this experimental point which is why these  
11 factors are important here. If we need to meet and confer  
12 to pair those factors down, I'm happy to do that, but the  
13 jury does need to be aware of what they're supposed to  
14 consider for what's an experimental use versus a commercial  
15 use.

16 I don't think there's really a dispute that the  
17 Federal Circuit requires an analysis of those factors, and  
18 they should be instructed to the jury as Your Honor has  
19 included in the instructions.

20 MR. PACKIN: And --

21 MS. MOULTON: Your Honor, it's AIPLA Instruction  
22 6.4.

23 THE COURT: Do we have a copy?

24 MS. MOULTON: I don't have a printed copy but  
25 I'm happy to get one.

1 THE COURT: So you guys -- he said he'd be  
2 willing to meet and confer.

3 MS. MOULTON: And he offered to use the AIPLA  
4 instruction so I don't understand what the problem is.

5 THE COURT: No, he didn't say he would use the  
6 AIPLA. He said he would meet and confer.

7 MR. PETRIE: Specifically, Your Honor, my  
8 concern with the AIPLA is that I don't think it includes  
9 these factors which the jury actually has to have for  
10 evaluating experimental use.

11 THE COURT: So the 13 factors isn't the issue,  
12 she's objecting to the last sentence.

13 MS. MOULTON: No, I'm --

14 MR. PETRIE: I think she's objecting to the  
15 factors.

16 MS. MOULTON: I'm objecting to this whole  
17 paragraph. Where he got this from is just from the one case  
18 that talked about public use and we think the AIPLA  
19 instruction is a better summary of the complete experimental  
20 use law instead of just taking one case -- you know, their  
21 preferred quote from one case.

22 MR. PETRIE: Your Honor, I have that case handy.  
23 I'm happy to put it on the ELMO if that would be helpful.

24 THE COURT: Okay. We'll also grab the AIPLA  
25 instruction as well.

1 MR. PETRIE: Your Honor, this is from the  
2 *Electromotive Div.* case at 417 F.3d 1203, 2005, starts with,  
3 "We generally look to objective evidence to show that a  
4 precritical date sale was primarily for experimentations,"  
5 that's the first part of it.

6 And then the second part is from the Federal  
7 Circuit it says, "We recently catalogued and consolidated  
8 all these considerations into a list of 13 factors."

9 MS. MOULTON: Sorry, but isn't that from the  
10 public use part of the case?

11 (Discussion held between counsel.)

12 MR. PETRIE: So that's where the factors come  
13 from, I don't think they are actually in dispute, Your  
14 Honor. And as we are arguing that it was experimental use,  
15 they need to be armed with the factors to consider that.  
16 And that's not in the AIPLA instructions.

17 THE COURT: All right. I'll hear you.

18 MS. MOULTON: My response?

19 THE COURT: Yes.

20 MS. MOULTON: It's better to use the AIPLA  
21 instructions instead of taking one quote from one case.

22 THE COURT: But the AIPLA instruction doesn't  
23 address --

24 MS. MOULTON: It doesn't use that list of  
25 factors but it gives the law on experimental use and offer

1 for sale in 6.4. It has a more complete statement of the  
2 law.

3 THE COURT: Why do you believe that the AIPLA  
4 model instruction doesn't address the issue?

5 MR. PETRIE: I don't believe it lists the  
6 specific factors you're supposed to consider. Instead, it  
7 provides, I think, three or four full paragraphs that will  
8 add probably ten minutes to the jury instruction, when what  
9 our issue is, is giving them the factors that we're going to  
10 argue are things to consider for experimental use.

11 So if Your Honor wants to adopt four paragraphs,  
12 we think that's generally fine. But the easier, faster  
13 solution is to use the factors the jury is going to do.

14 THE COURT: All right, but we have a dispute so  
15 I'm going to go with the model jury instruction. We'll use  
16 the model.

17 All right.

18 MS. MOULTON: I believe damages is the next  
19 disagreement.

20 THE COURT: All right.

21 MS. MOULTON: Your Honor, the dispute here is,  
22 again, this use instruction, which that's just not in the  
23 model instructions and it's not in this court's prior  
24 instructions, there's no reason to deviate from that.

25 It's highly prejudicial to Zynga for the Court's

1 instructions to be endorsing one parties' damages theory  
2 over the other, Your Honor.

3 THE COURT: I'm going to leave it as is.

4 All right, 2.13.

5 MS. MOULTON: So on page 37 of the Court's  
6 instructions, the last paragraph talks about when the  
7 damages period is. This whole argument from IBM has been  
8 very confusing to the jury and I don't think we need an  
9 instruction on the damages period.

10 It's -- it just highlights the future -- we  
11 objected to the part where it says, "IBM seeks damages only  
12 for Zynga's use of the patents in those time periods," and  
13 then it emphasizes that IBM is not seeking ongoing damages,  
14 and emphasizes that IBM is still -- can still obtain  
15 damages. And IBM's only basis for including this  
16 instruction was some fear that Zynga would emphasize the  
17 asserted patents are expired, which we haven't done.

18 MR. DANG: Your Honor, they have repeatedly  
19 emphasized the age of the patents and the jury is also aware  
20 that they are expired and so this instruction remains  
21 necessary to ensure that they aren't confused that you can  
22 get damages on an expired patent.

23 It is also legally and factually correct, Your  
24 Honor, there is no dispute about that issue of law.

25 As to the damages period instruction, the jury

1 needs to be instructed on the damages period. There's no  
2 dispute on what the damages period is, and their proposal  
3 does not provide any guidance to the jury about what the  
4 damages period even means.

5 MS. MOULTON: I'm not sure why the jury needs to  
6 be instructed on the damages period.

7 THE COURT: I'm going to leave it as is.

8 What's next?

9 MS. MOULTON: The next is the Book of Wisdom.

10 THE COURT: On 2.11?

11 MS. MOULTON: We are now on 2.13.

12 THE COURT: So the sentence, "You should assume  
13 that the parties have full knowledge of the facts and  
14 circumstances surrounding the infringement at the time of  
15 hypothetical negotiation."

16 MS. MOULTON: No, I'm fine with that sentence.

17 THE COURT: All right.

18 MS. MOULTON: For the next one, "You may  
19 consider facts postdating the negotiation, even where they  
20 could not have been known or predicted by the hypothesized  
21 negotiators," and then the next paragraph, the first three  
22 sentences.

23 THE COURT: All right.

24 MS. MOULTON: So in Your Honor's past  
25 instructions in *HID Global* and *Persawvere*, you just gave the

1 last sentence of that paragraph, "evidence of things that  
2 happened after the infringement first began can be  
3 considered," that sentence and that's what Zynga would  
4 request the Court use this time is just that sentence.

5 THE COURT: So you're asking that the damages  
6 are not based upon hindsight, evaluation of what happened,  
7 and the last sentence to be deleted?

8 MS. MOULTON: And the, "You may also..."

9 THE COURT: And, "You may also..."

10 MS. MOULTON: Exactly.

11 MR. DANG: Your Honor, if I may respond.

12 The proceeding sentence says, "damages are not  
13 based on hindsight evaluation, etc.," those are also present  
14 in two prior instructions given by this court. It seems  
15 what the Court did is just combine both of the parties'  
16 proposals and IBM is fine with that.

17 MS. MOULTON: So, Your Honor, the one that they  
18 actually say is from this court, *CAO Lighting*, we went back  
19 and looked at that and that was not a disputed instruction  
20 in that case so the Court didn't actually make a ruling on  
21 this.

22 THE COURT: All right. Both of them come from  
23 past instructions so I'm going to include -- we initially  
24 did that to include them.

25 2.14.

1 MS. MOULTON: Your Honor, we're fine with this  
2 instruction.

3 THE COURT: Okay.

4 2.15.

5 MS. MOULTON: So I was looking at your claim  
6 2.14, and so now looking at your 2.15.

7 So part of this instruction, the second  
8 sentence, "A noninfringing alternative must have been  
9 available at the time of infringement, must provide the same  
10 advantages of the patented invention, must have been  
11 acceptable to the specific purchasers of the infringing  
12 products, not just the public in general."

13 At least those two middle -- sorry, three middle  
14 causes, those are for loss profits alternatives, not  
15 reasonable royalty alternatives.

16 MR. DANG: Your Honor, I believe they're still  
17 perfectly appropriate for the jury to consider in the  
18 context of a reasonable royalty alternative.

19 If they want to make arguments that there's --  
20 that for some reason the lack of noninfringing alternatives  
21 here bears on -- in a different way, they're free to do so,  
22 but I believe the instruction is still appropriate.

23 MS. MOULTON: We'd have to take out all the  
24 "must." You could say, "In considering noninfringing  
25 alternatives, you may look at these factors," but you can't

1 use the "must."

2 MR. PACKIN: Otherwise, it's not a noninfringing  
3 alternative, Your Honor.

4 MS. MOULTON: That's not true for reasonable  
5 royalty damages. That's only true for lost profits.

6 THE COURT: That instruction comes from cases in  
7 *Jacks, Persawvere, W. R. Grace*.

8 All right. We're going to leave it. 2.16.

9 MS. MOULTON: Okay. So our objection to this  
10 instruction is the addition of "broader claims do not  
11 necessarily render obvious narrower claims." So the --

12 THE COURT: Okay. I see where we're at.

13 MS. MOULTON: So Claim 13 of the '849 patent  
14 is -- sorry. So these claims don't overlap in a  
15 broader/narrower sense because the '209 patent has the  
16 targeted ad limitations and the -- Claim 13 of the '849  
17 patent does not, and Claim 13 of the '849 patent has the  
18 structuring advertising as objects limitation, whereas the  
19 '209 patent does not. So there isn't a broader/narrower  
20 relationship.

21 MR. PETRIE: If I may respond, Your Honor?

22 THE COURT: Yes.

23 MR. PETRIE: So the terms at issue here likely  
24 for closing are going to be "additional information" versus  
25 "advertising object." There is a very strong chance that

1 they're going to argue that additional information includes  
2 advertising objects when it does not. That is why the  
3 instruction is necessary.

4 THE COURT: We're going to leave that language.

5 MS. MOULTON: The additional information in  
6 advertising objects is stipulated because they conceded  
7 Claim 8 is not patentably distinct.

8 THE COURT: I'm going to leave the language.  
9 I'm going to leave that sentence.

10 MS. MOULTON: Okay. We have one more on this --

11 THE COURT: Okay.

12 MS. MOULTON: -- which is Zynga had proposed  
13 adding "any differences between the claims of the '209  
14 patent and Claim 13 in the '849 patent should not be  
15 considered in isolation for purposes of determining whether  
16 the claimed inventions are patentably distinct; rather, the  
17 claims must be considered and compared to one another as a  
18 whole."

19 And that's a direct quote from the Federal  
20 Circuit's case law in *UCB v. Accord* and *Eli Lilly v. Teva*.

21 THE COURT: And isn't that language included?

22 MS. MOULTON: Is it? I'm sorry. Maybe I missed  
23 it.

24 THE COURT: "Any differences" --

25 MS. MOULTON: You're right, Your Honor. I'm

1       sorry.   Okay.

2               MR. PETRIE:   On that one, Your Honor, we'll note  
3       our objection for the record.   The one issue that we want to  
4       raise that opposing counsel has not is on the last part of  
5       the instruction where you're referencing back to the  
6       secondary -- secondary considerations of nonobviousness,  
7       that's actually pointing back to the obviousness section,  
8       and that's extremely prejudicial in this case where you're  
9       seeking -- where Your Honor is seeking an advisory verdict  
10      that actually doesn't go to obviousness.

11              So we don't want the jury to be, okay, let's  
12      look for the secondary considerations, and then they're  
13      pointing them to the -- to a section of invalidity, but that  
14      question of invalidity with respect to the obviousness-type  
15      double patenting doesn't go to the jury.   So we would argue  
16      that's extremely prejudicial to be pointing them to --  
17      directly to a section of the jury instructions that relates  
18      to invalidity.

19              So our proposal was to list the factors that we  
20      plan on relying on in a succinct fashion here as opposed to  
21      directing the jury directly to a section of the instructions  
22      that are related to invalidity.

23              THE COURT:   So tell me where you're at.

24              MR. PETRIE:   Yeah, so this is on page 45 of what  
25      Your Honor handed up and page 65 of the joint proposed

1 instructions from last night. I'm happy to put the language  
2 on the ELMO.

3 THE COURT: Yes.

4 MR. PETRIE: So here, what IBM proposed was  
5 "such considerations of nonobviousness and then we approved  
6 long-felt need, obtained rights at IBM." And so what Your  
7 Honor has done here instead has pointed to instruction 2.11.  
8 That's an invalidity instruction, and so it's extremely  
9 prejudicial to IBM to -- in an issue that invalidity isn't  
10 going to the jury, to be directing them to that section to  
11 answer that question.

12 THE COURT: All right. Let me hear from Zynga  
13 on that.

14 MS. MOULTON: The patentably distinct  
15 instruction already talks about Claim 13 being obvious or  
16 anticipated by an invention claimed in another patent. I  
17 think the jury may already be on to us. It kind of uses the  
18 clear and convincing evidence burden. There's -- there's no  
19 reason that we need to repeat the secondary considerations  
20 again in the instructions when we can just refer the jury  
21 back to that prior instruction.

22 MR. PETRIE: Your Honor, that --

23 MS. MOULTON: And making the instructions longer  
24 and longer is not the goal here.

25 MR. PETRIE: Your Honor, that's exactly the

1 prejudice of submitting this question to the jury in the  
2 first place, and so we're trying to reduce it as much as we  
3 can.

4 MS. MOULTON: What they want to do is just  
5 highlight the secondary considerations they think favor  
6 them.

7 MR. PACKIN: Your Honor --

8 THE COURT: So what I'll do is just delete that  
9 last sentence as well.

10 MS. MOULTON: That's fine.

11 THE COURT: And then --

12 MS. MOULTON: Thank you.

13 THE COURT: -- that refers to instruction 2.11,  
14 just delete that last sentence and so that last paragraph  
15 will just be that one sentence.

16 MR. PACKIN: But, Your Honor, the jury has no  
17 idea what secondary considerations are.

18 THE COURT: Isn't secondary considerations  
19 explained elsewhere?

20 MR. PACKIN: Only in the invalidity section,  
21 which is our problem. Here -- I mean, it sounds like  
22 Ms. Moulton's problem is she doesn't want to highlight  
23 specific factors. We're happy to put them all in there, but  
24 what we don't want is for the jury to say, Oh, patentably  
25 distinct, that's invalid.

1           We've been -- I think the other side, to their  
2           credit, has been really walking the line to make sure not to  
3           suggest that the patentably distinct question has anything  
4           to do with validity. We've been doing that this whole  
5           trial, so to have them look at the instructions --

6           THE COURT: Okay. You didn't want to refer them  
7           to 2.11, so if you want to put the -- instead of just  
8           listing some of them, put them all in the instruction, then  
9           that's -- that's fair.

10          MR. PACKIN: I'm fine with that, Your Honor.

11          THE COURT: All right. So the parties...

12          All right. So we'll revise them and let the  
13          parties review them before we read them to the jury to make  
14          sure they're consistent with the rulings.

15          MS. MOULTON: Do you expect --

16          MR. PACKIN: Yes, Your Honor.

17          MS. MOULTON: -- we'll have them tonight to put  
18          in the closing slides?

19          THE COURT: Yeah, yes.

20          MS. MOULTON: Thank you. We appreciate it.

21          THE COURT: All right.

22          MR. PACKIN: I just -- I just wanted to ask Your  
23          Honor, if we're done, just to get a final check on how  
24          much --

25          THE COURT: We'll give you the time.

1 MR. PACKIN: I'm sorry. I've been told that  
2 before, that I'm just too fixated on that. I apologize,  
3 Your Honor.

4 THE COURT: So not including the time for any of  
5 this, which I haven't charged anybody for, Plaintiff had  
6 47 minutes remaining; Defendant had 44 minutes remaining.

7 I know you've requested 15 minutes --

8 MR. PACKIN: Yes, sir.

9 THE COURT: -- so what I'm going to do is give  
10 each side an hour for closings. And remember, you have to  
11 allocate some time for your rebuttal, both sides have an  
12 hour.

13 MR. ROBERTS: Thank you, Your Honor.

14 MR. PACKIN: Thank you, Your Honor.

15 MR. ROBERTS: Your Honor, I also -- I also think  
16 this is always better to do before we get the verdict back,  
17 but I just wanted to thank the court reporter and the court  
18 staff for all their time and help and assistance this week.  
19 I know opposing counsel feels the same way. The transcript  
20 has been exemplary, and we really appreciate the help of the  
21 staff.

22 THE COURT: I appreciate that. Folks work hard.  
23 You know, we're a limited staff, and I can't take any  
24 credit. All the quality of work is from the folks in my  
25 chambers. And the court reporter is the hardest-working

1 person I know.

2 THE COURT REPORTER: Thank you, Your Honor.

3 THE COURT: And I want to thank both sides.

4 Particularly, I appreciate allowing, you know, the less  
5 experienced attorneys the opportunity to present. I thought  
6 everybody on both sides did a good job. So irrespective of  
7 how it turns out, I think both clients should be pleased  
8 with the representation by both counsel.

9 Now, with respect to closings, you know,  
10 civility, no objections during closings. If something is  
11 that egregious that you need to bring it to my attention,  
12 then we'll do it at sidebar after it's done. But respect  
13 each other, and at this point, you know, the case has been  
14 presented in a professional manner, and let's maintain that.

15 MR. ROBERTS: Thank you, Your Honor.

16 MR. PACKIN: Of course, Your Honor.

17 What time -- we told the jury they're coming at  
18 9:00, so --

19 THE COURT: Yeah, we're going to start at 9:00.

20 MR. PACKIN: Okay.

21 THE COURT: We're going to start at 9:00 --

22 MR. PACKIN: Yes, Your Honor.

23 THE COURT: -- with closings and then -- I mean,  
24 yeah, we'll start at 9:00 with closings, and then we'll go  
25 into the final jury instructions.

1           So if there's anything when we send you this, if  
2           there's anything that -- you know, typos or anything  
3           inconsistent with the rulings or that you can't agree upon,  
4           indicate that. And then if there are, then we'll meet at  
5           8:30 to resolve those before we get -- before we get started  
6           with the jury.

7           This ain't the time to make additional  
8           arguments. We got the transcript. It's just whether -- if  
9           we got something wrong in terms of making those changes.  
10          All right.

11                 MR. PACKIN: Thank you, Your Honor.

12                 MR. ROBERTS: Thank you, Your Honor.

13                 (Whereupon, the following proceeding concluded  
14           at 5:17 p.m.)

15                 I hereby certify the foregoing is a true  
16           and accurate transcript from my stenographic notes in the  
17           proceeding.

18                                 /s/ Michele L. Rolfe, RPR, CRR  
19                                 U.S. District Court  
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