

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ACTIVISION BLIZZARD, INC.,
Petitioner

v.

MILESTONE ENTERTAINMENT, LLC,
Patent Owner.

IPR2025-00711
Patent 11,335,164 B2

Record of Oral Hearing
Oral Hearing Held: June 23, 2026

Before LINDA E. HORNER, JAMES A. TARTAL, and
SCOTT C. MOORE, Administrative Patent Judges.

APPEARANCES:

ON BEHALF OF THE PETITIONER:

LISA NGUYEN, ESQ
NAVEEN MODI
Paul Hastings LLP
lisanguyen@paulhastings.com
naveenmodi@paulhastings.com
PH-Activision-Milestone@paulhastings.com

ON BEHALF OF THE PATENT OWNER:

JOHN PIERCE, ESQ
MATTHEW D. POWERS
WILLIAM P. NELSON
Tensegrity Law Group LLP
John.pierce@tensegritylawgroup.com
Matthew.powers@tensegritylawgroup.com
William.nelson@tensegritylawgroup.com

The above-entitled matter came on for hearing Tuesday,
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and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

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

11:00 a.m.

JUDGE HORNER: Good afternoon, or good morning. We're convened for oral argument in IPR 2025-00711, Activision Blizzard Incorporated v. Milestone Entertainment LLC. This pertains to patentability challenges of claims in US Patent No. 11,335,164. I'm Judge Horner. I'm joined by Judge Tartal in the hearing room and also appearing remotely is Judge Moore. We'll begin with appearances. Petitioner?

MS. NGUYEN: Good morning, Your Honors. My name is Lisa Nguyen on behalf of Petitioner Activision Blizzard. Here with me is my colleague, Nyssa Leonardi. And also with us is Zac Buyr, inhouse counsel at Activision Blizzard.

JUDGE HORNER: Thank you. And Patent Owner?

MR. NELSON: Good morning, Your Honors. My name is Will Nelson from the Tensegrity Law Firm. With me is my colleague, John Pierce, from the Tensegrity Law Firm on behalf of the Patent Owner, Milestone Entertainment.

JUDGE HORNER: Thank you. And since we have a client in the room, I'll take this opportunity just to give a little background. Today's hearing provides an opportunity for counsel to orally advocate for the positions on the patentability of the challenge claims as raised in the petition. And we understand that in every case that comes before us, the parties, both Petitioner and Patent Owner, do have a lot at stake. And so we take our role in deciding this dispute very seriously.

We have reviewed the briefs and the evidence, and we're prepared today with questions. These questions and their answers will help us to

1 decide the issues in the case. And in the interest of fairness and due process,
2 we have to limit our considerations to the arguments and evidence that are
3 presented in the record.

4 We have the briefs and evidence available to us on the computer. We
5 also have your demonstratives on the computer. And so if we look away or
6 look down during the hearing, we're probably consulting the documents in
7 front of us on the computer. But we are paying attention closely to your
8 arguments.

9 We also have a court reporter here today who will provide a transcript
10 of the hearing, and that will become part of the record in the proceeding
11 shortly after the hearing. To ensure that the transcript is clear, we just ask
12 you to speak directly into the microphone when you're at the podium. And
13 when talking, identify specific slide numbers that you're referring to or any
14 numbering and figures, for example, or any other pertinent identifying
15 information so we have a nice, clear record.

16 And just to make everybody aware, our hearings are streamed for the
17 public. So there may be people on our public line listening.

18 Per the hearing order, each party has 60 minutes to argue. And you
19 may reserve time for rebuttal, which may not exceed more than half of your
20 argument time. I will be setting a hearing timer in the room for each party
21 with whatever time you request. Petitioner, do you wish to reserve any
22 rebuttal time?

23 MS. NGUYEN: Yes, Your Honor, 20 minutes.

24 JUDGE HORNER: Twenty minutes. Okay, great. I will go ahead
25 and set the clock for 40 minutes to start and then we can get started.

1 MS. NGUYEN: And Your Honors, I do have physical copies of the
2 slides, if either of you would like a copy.

3 JUDGE TARTAL: I do not, thank you.

4 JUDGE HORNER: No, I think we've got what we need. Thank you.

5 MS. NGUYEN: Good morning, Your Honors. Again, Lisa Nguyen
6 on behalf of Petitioner Activision Blizzard. The '164 patent is exactly the
7 type of patent that should not have issued in the first place. To point, Patent
8 Owner does not dispute that the point of novelty in all the independent
9 claims, and generally all the claims, are actually disclosed in both asserted
10 primary pieces of prior art, Kelly and Walker.

11 In fact, if you go to slide 2 of the demonstratives, there are only two
12 nominal disputed limitations, and those are for dependent claim 7 and
13 dependent claim 9. Threshold value includes information on frequency of
14 play, and threshold value includes information on the number of plays since
15 the last win.

16 Before we go into the details of the party's arguments, let's actually go
17 first and look at what the prior art discloses with respect to these limitations.
18 Let's go to slide 32 of Petitioner's demonstratives. Patent Owner is arguing
19 that despite the fact that Walker discloses predetermined criteria, including
20 thresholds that are calculated in part by all claims gameplays played during a
21 specific period of time, that is not frequency of play. That all gameplays
22 played during a specific period of time is not a frequency of play. But all
23 gameplays played during a specific period of time is a frequency of play. It
24 is telling you how often the player has played.

25 So how does Patent Owner actually try to argue that this limitation is
26 not disclosed? Patent Owner argues that frequency of play must be a

1 number -- must be a rate and not a number. And that's simply not stated
2 anywhere in the patents. But regardless of whether --

3 JUDGE HORNER: Hold for just a minute. I want to make sure we
4 have Judge Moore. Did we lose Judge Moore?

5 PARTICIPANT: Yes, I think so. I'm asking him to see back in the --

6 JUDGE MOORE: I'm here. I don't know why I'm not on the video
7 screen.

8 JUDGE HORNER: Okay. Were you able to see us?

9 JUDGE MOORE: Yeah, I can see and hear you just fine.

10 JUDGE HORNER: Okay.

11 JUDGE MOORE: And didn't realize that I wasn't there until you
12 mentioned it.

13 JUDGE HORNER: You're back. Okay, great. Thank you. Please,
14 I'm sorry to interrupt.

15 MS. NGUYEN: No problem. Thank you, Your Honors. So Patent
16 Owner argues that a frequency of play must be a rate. It can't be a number.
17 But a number, like gameplays played during a specific period of time is a
18 rate. You're talking about number of gameplays over a specific period of
19 time. So despite the fact that it doesn't actually use a rate, this is, in fact, a
20 rate. So regardless of whether or not this term is improperly narrowed to a
21 rate versus just how it should be construed, which is information on
22 frequency of play, the disclosure in Walker still discloses information on
23 frequency of play.

24 JUDGE HORNER: So are you pointing to paragraph 236 on the
25 slide?

26 MS. NGUYEN: That's correct.

1 JUDGE HORNER: Okay. And I understood Walker to be describing
2 in paragraph 236 that all games played during a specific period of time was
3 defining the set of results that would then be -- the results would then be
4 compared against a threshold. It's part of the threshold.

5 MS. NGUYEN: So Your Honor is exactly right that it does define a
6 set of results that you would use to compare to the threshold. But in order to
7 compare that to the threshold, the threshold itself also has to have a
8 frequency of play. So for example, if you're saying that it must exceed a
9 certain percentage of gameplays, let's say ten gameplays within the lifetime
10 of the game, you'd need to compare that to that same set of results, right? So
11 that's what they're talking about. The same set of results is all games, let's
12 say, played in the lifetime of the game, and you compare that to the
13 threshold.

14 And so even though, yes, Walker does disclose that you use all
15 gameplays played during a specific period of time, it's also explaining that
16 you compare that to the threshold which also must have that specific period
17 of time, that denominator must be the same. And therefore, the frequency of
18 play, particularly information on the frequency of play -- and remember that
19 the entire term, if we actually look at the claim on slide 22, says threshold
20 value includes information on frequency of play.

21 Patent Owner is trying to rewrite the claim if you go on to slide 23 to
22 say, is the frequency of play? But that is not what the claim says. Claim
23 says, threshold value includes information on the frequency of play. So the
24 fact that Walker describes this set of results that must be compared to the
25 threshold value, which must necessarily include the frequency of play, that is
26 threshold value includes information on frequency of play.

1 JUDGE HORNER: Can you point me to where in your, I don't know
2 if it would be in the petition or reply, you made that specific argument about
3 this frequency of play disclosed in paragraph 236 of Walker being part of the
4 threshold?

5 MS. NGUYEN: Part of the threshold?

6 JUDGE HORNER: Yes.

7 MS. NGUYEN: So if you look at the slide 32, we do talk about it in
8 the petition. It has a list of citations. But specifically at petition page 69,
9 that's where we actually go into all gameplays in the last week or all
10 gameplays within the last two weeks of motion. And so that's where we
11 actually discuss that in detail.

12 JUDGE HORNER: Thank you.

13 MS. NGUYEN: So if we go quickly to claim 9 -- I'll go into more
14 detail with respect to claim 7. But I wanted to go quickly to claim 9 and talk
15 about the disclosure there, and particularly on slide 40. And Kelly's
16 disclosure of claim 9, which is information on the number of plays since the
17 last one. Kelly discloses that the system can check whether the current game
18 is the 4,000th game where the goal was met since the video game console
19 was last awarded to a player on this game unit. And specifically, it uses a
20 game counter to increment that. So it is literally counting the numbers of
21 plays since the last win, since the last game console was awarded.

22 And again, Patent Owner says that is not actually the number of plays
23 since the last win, because you're not actually counting the number of plays
24 since the last win. But that's really hard to reconcile with the fact that game
25 counter is actually being incremented, that Kelly is actually using this game
26 counter to determine whether or not the desired odds, which is part of the

1 disclosure of that threshold, the desired odds, is actually being met with this
2 specific disclosure. That the system checks whether the current game is the
3 4,000th game, the 3,000th game, or whatnot. That is being determined using
4 a game counter, which counts the number of plays since the last one.

5 JUDGE HORNER: How would you respond to the issue raised in the
6 Patent Owner's surreply? And I see on this slide 40, you're citing to your
7 reply for these passages, cited passages of Kelly. How do you respond to
8 the Patent Owner's surreply where they argued that this is a new argument
9 that shouldn't be considered because it was raised for the first time in your
10 reply?

11 MS. NGUYEN: Your Honor, it's not. So specifically, if you look at
12 case law like *Apple v. Andrea*, 949 F.3d 697, the Federal Circuit has made it
13 very clear that evidence introduced in the IPR reply is not a new argument if
14 it merely responds to the Patent Owner's response or expands on rationales
15 originally laid out in the petition.

16 And if we actually go to slide 39, which is the actual specific citations
17 that we use in the petition, to be clear, we did not, in the petition itself, cite
18 to this particular passage, but we cited to 36:63 to 37:9, which actually talks
19 about something very similar, which is the 3,000th game, when you have
20 two video consoles or whatnot.

21 What this passage does that we identified in the reply is expand on
22 that, and particularly with respect to the counter, explains how the system
23 actually does that. The fact that because we are responding to Patent
24 Owner's argument that this does not actually count the number of wins or
25 plays since the last win.

1 So this is not a new argument, clearly from Federal Circuit case law
2 and other case law. For example, *Anacor Pharm v. Iancu*, 889 F.3d 1372
3 (Fed. Cir. 2018). These are all arguments responding to Patent Owner's
4 arguments, which really does expand on the rationales that we laid out in the
5 petition.

6 So let's actually go back to the very beginning and go to slide 5 and
7 talk about what the '164 patent really talks about. And we're really talking
8 about player participation, enhancing that by using mandated and variable
9 parameters. And we go to slide 6. It shows the relationship between
10 mandated parameters and variable parameters. And what we're talking
11 about here is having many parameters, such as desired odds or
12 predetermined criteria that you want to meet by adjusting your parameters,
13 such as game structure or prize structure.

14 So if we go to slide 16, we talk about the different steps that Kelly
15 goes through in order to do that. And in Kelly, we're talking about desired
16 odds, which those desired odds are what you are trying to meet. So if you
17 look in the center at the citation 36:63–66, it says, the random determination
18 of whether a particular prize is to be awarded is also modified by statistical
19 information to create a best fit of prizes awarded according to the operator's
20 desired odds. And those are the mandated parameters. And as Kelly says,
21 you're adjusting the prizes, you're adjusting the games in order to get to
22 those desired odds.

23 Similarly, with respect to Walker, if we go to slide 17, Walker is
24 talking about using predetermined criteria and making sure that the
25 predetermined criteria is met. And if it's not, you adjust certain game
26 parameters, such as the speed of an object, the number of lives, or game

1 structure, and then also prizes if you want to change from a first game
2 experience to a second game experience.

3 So if we go to slide 18, these are disclosures in Kelly that talk about
4 how there is a threshold value. Again, in Kelly, it's the desired odds that are
5 utilized in order to change from the first gameplay experience to the second
6 game experience. So if your desired odds are not met, you adjust the
7 parameters to get your second gameplay experience.

8 Similarly, again, on slide 19, Walker discloses the same concept.
9 Processors are utilizing a threshold value to change from a first gameplay
10 experience to second gameplay experience. And that might be
11 predetermined criteria, that is a predetermined range, predetermined minimal
12 threshold, or a predetermined maximum threshold. Walker discloses various
13 ways that this predetermined criteria can be implemented.

14 So let's talk about what Patent Owner says with respect to the claim
15 language of claim 7. And again, we're back to slide 22 which shows claim 7
16 of the '164 patent. Again, the claim says, threshold value includes
17 information on frequency of play. And it does not say is -- if we go to slide
18 23, as Patent Owner implies. And specifically, Patent Owner wants to limit
19 this claim language to a rate. But we know that that cannot be the case
20 because of the numerous examples in the patent.

21 So if you go, for example, to page -- I'm sorry, slide 25, the patent
22 does not actually use the term frequency of play. The only time the patent
23 uses any sort of related term is frequent player or frequent player points.
24 And in doing so, the patent shows that frequency of play can also be a
25 qualitative term, not necessarily a quantitative term.

1 So somebody can be a frequent player, yes or no. Or you can tell
2 whether or not somebody is a frequent player by the number of points that
3 they have. So it can be qualitative. There is nothing in the patent that limits
4 information on frequency of play to something that is a rate. But again, as
5 this is with respect to slide 30, it doesn't matter.

6 JUDGE HORNER: Before we move off of slide 25, just looking at
7 the column highlighted in Figure 20D, I understood the patent to describe
8 that this column is just describing whether a person has registered as a
9 frequent player. Is it your position that just saying, yes, the person has
10 registered as a frequent player would be information on frequency of play?

11 MS. NGUYEN: So I read this as saying, is the player a frequent
12 player, a registered player who plays frequently? But even if you say, no,
13 that's actually whether or not the person is a registered frequent player, the
14 frequency of play, the frequent player points actually also confirm that it
15 does not have to be a quantitative term. It's also a qualitative term.

16 JUDGE HORNER: And I couldn't really find -- I don't know if you
17 saw anything in the patent. I couldn't find a whole lot of description about
18 these frequent player points and how they're accumulated. Did you?

19 MS. NGUYEN: No. Unfortunately, there is not a lot of disclosure in
20 the patent, or frankly, any disclosure in the patent about how those frequent
21 player points are accumulated. But the idea is that it should be indicating
22 whether or not somebody is frequently playing. Because ultimately, that is
23 the game's goal, to encourage people to play more. And so you do want to
24 track how frequent a player is playing.

25 Because if, for example, the player has zero frequent player points,
26 you know that they're not playing frequently and you want to increase their

1 frequency of play. Versus if the player has a large number of frequent
2 player points compared to, let's say, the average, then you know that that
3 player is playing a lot more. And you might want to determine why that
4 player is playing more and look at more statistical information related to that
5 player.

6 JUDGE TARTAL: So this is Judge Tartal. Is there support for that
7 understanding of what information on frequency of play means in the
8 context of frequent player points from your declarant?

9 MS. NGUYEN: From the expert?

10 JUDGE TARTAL: From the expert.

11 MS. NGUYEN: So the expert does talk about, both in his declaration
12 and in -- his declaration, I apologize, in his declaration, he does talk about
13 how frequent player programs, like Player Club, particularly in the context
14 of Paulsen, is used to encourage people to play. So you're going to give
15 them frequent player points in order to encourage them to play. Paulsen, if
16 you recall, is the reference that does talk in a lot more detail about frequent
17 player points or Player Clubs. And so in that context, he does talk about
18 how frequent player points do work.

19 JUDGE TARTAL: Okay, thank you.

20 JUDGE HORNER: Judge Moore, did you have a question?

21 JUDGE MOORE: I'll hold off. You can continue, Counsel.

22 MS. NGUYEN: Thank you, Your Honors. So again, just to be clear
23 though, Your Honors don't necessarily need to determine whether or not this
24 term is necessarily limited to rate or not. Because ultimately, as I
25 mentioned, if you go to slide 30, Walker does, in fact, disclose that there is a
26 rate with respect to frequency of play. Again, for example, all gameplays in

1 the last week, that is, in fact, a rate. And so it doesn't say a number, but the
2 representation is, in fact, a rate.

3 But let's talk about Kelly for a little bit. So what does Kelly disclose?
4 So let's go to slide 27. And Kelly discloses that there is a hit ratio with
5 respect to how often a player may win a prize. So for example, the hit ratio
6 is determined by the game developer since the game developer can adjust
7 the difficulty of the specific prize goal so that the hit occurs after a
8 predetermined average number of games, similar to adjusting average
9 awarded prize credits.

10 So we're talking about that threshold once again. That threshold can
11 be a hit ratio, meaning that we have the number of wins versus the number
12 of gameplays over, let's say, the lifetime of the patent or a specific week.
13 But regardless, the number of wins need to be in that same predetermined
14 period of time.

15 And so in that way, it must have information on the frequency of play,
16 because you need to know how many wins out of how many games during a
17 specific period of time. You can't have, for example, let's determine how
18 many wins in the lifetime of the game and put that over the number of games
19 played in the last week. You need to have the same, effectively,
20 denominator for each. You must be looking at the same set of plays within a
21 certain period of time.

22 So Kelly, in either way, again, also discloses that you have
23 information on the frequency of play under either just a plain and ordinary
24 meaning of a term or under Patent Owner's overly narrow perception which
25 requires rate.

1 Now, let's go to claim 9. And let's go to slide 35. So slide 35 shows
2 claim 9. And in a similar vein, the threshold value includes information on
3 the number of plays since the last win. And again, Patent Owner is trying to
4 narrow that term by rewriting the claim language. So it has to be the exact
5 number of plays since the last claim.

6 But when you're calculating the threshold, you're determining whether
7 -- for example, let's go back to the Kelly disclosure on slide 40. You're
8 determining whether the system is checking whether the current game is the
9 4,000th game where the goal was met since the video game console was last
10 awarded to a player on this game in time.

11 So in doing so, no matter what, there has to be the information on the
12 number of plays since the last win. If you're trying to determine is this
13 4,000th game, have we exceeded that number since the last win? Does that
14 exceed our predetermined criteria, our minimum threshold of wins? You're
15 going to be comparing that to the threshold. And in order to do so, you need
16 to know, again, information on the number of plays since the last win.

17 JUDGE HORNER: Do you agree that the other passage relied on in
18 Kelly in the petition -- let me just look for it. The example at the top of
19 column 37 of Kelly, it talks about every 8,000 games, two video consoles
20 are to be awarded. So if it's randomly determined that a third console is to
21 be awarded within, for example, the 3,000th game, then a different prize can
22 be awarded so that the desired odds are better met.

23 So in that example, would you agree that the system doesn't
24 necessarily have to know how many games have been played since the last
25 console was awarded? All the system has to know is that, okay, it's the
26 3,000th game and I've already given out two, so I can't give out a third.

1 MS. NGUYEN: So in that example that is provided at the top of
2 column 37 in Kelly, there are multiple ways you could potentially limit it.
3 One way is so that you just randomly determine, okay, I'm at the 2,500th
4 game, I have two console wins already. And in that way, you may not track
5 it. But there is an implementation where you would track it from the last
6 win. And so in that way, that does disclose it. And in particular, the passage
7 at Kelly 36:28–35 makes it clear that one way to do it is using a game
8 counter that is implemented to track the last win.

9 So even though in column 37 there are multiple ways, it also includes
10 this game counter which Kelly expressly discloses in column 36, lines 28
11 through 35.

12 So we've talked a lot about Kelly with respect to claim 9. Let's talk
13 about Walker. And so let's go to slide 41 and talk about what Walker
14 discloses. Walker discloses a prize may be awarded if a player achieves a
15 particular event or level of achievement in one or more gameplays of a
16 game. So this is essentially the same type of disclosure, not just in Kelly,
17 but actually if you go to slide 38, it's the same type of examples that are
18 provided in the '164 patent.

19 So the '164 patent provides many examples of information on the
20 number of plays since the last one. It includes the set of plays by a given
21 player to be subject to certain rules such that a player can be guaranteed a
22 certain minimum prizing over some number of plays. And that is the same
23 effective language that Walker has on slide 41. That you want to award a
24 minimum number of prizes within some number of games to ensure that
25 your player continues to be engaged and play.

1 And so, again, it kind of goes back to the construction that the Patent
2 Owner is trying to construe and contort the claim to mean something it does
3 not mean. But regardless, Patent Owner really cannot escape the fact that
4 the examples in the '164 patent are the same examples that are disclosed on
5 either the Kelly disclosures as seen on slide 40 or the Walker disclosures on
6 slide 41.

7 So this goes back to is the '164 unpatentable? All challenge claims
8 are unpatentable. Patent Owner does not dispute any other claim limitations
9 other than claims 7 and 9. And those limitations are clearly disclosed by
10 Walker and Kelly. Unless there are any questions --

11 JUDGE HORNER: I have a question about the Walker analysis as to
12 claim 9.

13 MS. NGUYEN: Sure.

14 JUDGE HORNER: I understood from your petition that this kind of
15 relied on us interpreting promotion in a particular way.

16 MS. NGUYEN: So there were actually multiple disclosures in the
17 petition, including this disclosure, actually, in petition pages 69 through 70.
18 We did include additional disclosures in Walker, including if we go to slide
19 43. Some discussion about all gameplays within two weeks of a promotion.
20 There was a lot of debate and a lot of briefing on whether or not promotion
21 is advertisement or promotion means something, advancement to another
22 level.

23 But the fact is, we don't really need to address that because ultimately
24 on slide 41, that clearly discloses that a certain minimum number of prizes
25 must be awarded within a certain number of gameplays.

26 JUDGE HORNER: Okay, thank you.

1 JUDGE TARTAL: Counsel, I have another question. It's sort of a
2 general question, but there's been no express construction of "information
3 on," correct?

4 MS. NGUYEN: Correct.

5 JUDGE TARTAL: Which I understand is not some particularly
6 technical term. However, do you have any insight into how "information
7 on" is used in the claim language?

8 MS. NGUYEN: So we don't need to exactly determine the exact
9 scope of "information on." We just need to know that "information on"
10 means that -- is actually part of the, if for example, number of plays since the
11 last win is included in threshold value, that is information on the number of
12 last wins, if you actually include that number, right? And so to that extent,
13 Walker, Kelly both disclosed that. You can turn it into includes the number
14 of gameplays, but the threshold value can include. But information still has
15 meaning, but at the minimum, it has to include the actual number of
16 gameplay itself or the frequency of gameplays.

17 JUDGE TARTAL: Thank you.

18 MR. NELSON: Bear with me one moment. Thank you, Your
19 Honors. Good morning --

20 JUDGE HORNER: Mr. Nelson, before you get started, would you
21 like to reserve any time for rebuttal?

22 MR. NELSON: Yes. I'm confident that I'll get through this in 40
23 minutes, leaving 20 for rebuttal.

24 JUDGE HORNER: Let me just set the timer. Okay, please.

25 MR. NELSON: Good morning, Your Honors. William Nelson on
26 behalf of the Patent Owner Milestone. I wanted to quickly turn to the claims

1 that are disputed here today, which are claims 7 and 9 of the '164 patent. I'm
2 going to stop briefly on slide 7, which presents independent claim 1 for
3 which 7 and 9 depend.

4 To focus just for a moment on the language which claims 7 and 9 are
5 narrowing or modifying in claim 1, and that language is that this system for
6 electronic gameplay, as recited in the preamble, includes modifying the
7 variable parameters to provide a second set of variable parameters, providing
8 a second gameplay experience where the first gameplay experience differs
9 from the second gameplay experience.

10 And as you know from reading the briefing and reading the patent
11 itself, what's being described here is that the claimed system here can, based
12 on evaluation of results of past gameplay, determine whether some change
13 to either the structure of the pricing for the game is required, or some change
14 to the structure of the game itself is required to obtain some set of mandated
15 parameters. Those mandated parameters being some set of objectives that
16 the system is intended to achieve, such as a certain number of wins over a
17 period of time.

18 And so what this is describing is the meat of the claim in which the
19 system actually does change the gameplay experience to meet those
20 parameters. And claims 7 and 9 really depend from claim 5. Claim 5
21 describes that the game processor of claim 1 utilizes a threshold value to
22 change from that first gameplay experience to a second gameplay
23 experience. So the claim itself tells you what the system is doing to make
24 that decision, as we see in claim 7, to modify the variable parameters. It's
25 comparing some data to a threshold value to make that decision.

1 And I can show you here at slide 13, the specification describes this
2 idea in which it recites at column 7, lines 6 to 16, that the allocation of prizes
3 may be defined in various ways, such as by defined numbers and values of
4 prizes for a given number of plays, a system-wide objective for every nth
5 play, meaning some number of plays, or based on the number of plays for a
6 particular player.

7 Those are all the types of threshold values that the system of this
8 patent describes are used to compare to existing gameplay data to decide,
9 okay, now it's time to change something about the way this game is being
10 played or the way its prizes are being awarded.

11 JUDGE HORNER: So that --

12 MR. NELSON: I can go back. I apologize, Your Honor.

13 JUDGE HORNER: No, that's fine. That excerpt right there, does that
14 describe frequency of plays as claimed?

15 MR. NELSON: It does, in our view. Based on the number of plays
16 for a particular player, groups of players are based on the source of the play,
17 or based on a time parameter such as a predefined number of wins of certain
18 amounts per week. So this one does not describe -- your question was
19 number of frequency of play?

20 JUDGE HORNER: Frequency of play.

21 MR. NELSON: No, this describes a frequency of wins. So that's
22 right, Your Honor.

23 JUDGE HORNER: Okay.

24 JUDGE MOORE: Counselor, before you move on, do you have --
25 what part of the specification would you say describes frequency of play? I
26 know you disagree with Petitioner's contention that the frequent player

1 disclosures relate to that. Your position is that it's the number of plays per
2 unit time, I believe.

3 MR. NELSON: Yes.

4 JUDGE MOORE: Is that disclosed in the specification?

5 MR. NELSON: Your Honor, we think it is disclosed throughout the
6 specification, and in the original claims submitted, that one of the threshold
7 values can be a frequency of play. For instance, an analogous disclosure,
8 I'm on slide 14 now, is in column 6, lines 35 to 39, in which the pricing
9 structure parameters may include the frequency of wins as 1 over x, which is
10 describing exactly what this patent means by a frequency. This is, again, not
11 frequency of play, but frequency of wins. But this idea that a frequency is
12 really a rate is throughout this patent, as we can see here.

13 JUDGE MOORE: The rate wouldn't necessarily have to be per unit of
14 time. It could be a rate for something else, correct?

15 MR. NELSON: Well, there are -- so if I understand your question, the
16 claimed rate is the frequency of play. There are other frequencies that the
17 patent discloses can be the basis for a threshold to change the play value,
18 such as the frequency of wins. I don't understand this patent ever, and I
19 think the evidence is clear, to describe that a frequency can mean something
20 other than what it means in the world, which is a rate. And I'm happy to
21 walk you through that evidence, that the --

22 JUDGE MOORE: No, I understand that your position of frequency is
23 a rate. But does the denominator have to be -- does the denominator have to
24 be time? Could it be the number of frequencies? For example, the
25 frequency of plays per win. I know that's possibly the inverse of what you
26 would think of sometimes, but the frequency of plays per win, would that

1 not be a frequency of play? Fifty plays, say there's 50 plays for every one
2 win. Is that a frequency of play, 50 plays per win?

3 MR. NELSON: I don't think so, Your Honor. That's certainly not
4 something that the other side has contended, and I think it's an interesting
5 question.

6 JUDGE MOORE: And the reason I ask that, of course, is that's the --
7 I forget the exact term, but a win rate or something like that is disclosed
8 from one of the prior art references.

9 MR. NELSON: There is a hit ratio disclosed, which is --

10 JUDGE MOORE: Yeah, that's correct.

11 MR. NELSON: -- the number of wins over number of plays. That
12 doesn't tell you anything about the frequency of play. It tells you that over a
13 given number of plays, there was a certain number of wins. We don't know
14 how frequently that player engaged in play from that information.

15 JUDGE MOORE: Per unit of time, correct, but if the number of plays
16 per win is a frequency. If all it requires is number of plays with respect to
17 some other figure, then it could arguably be a frequency of play.

18 MR. NELSON: I don't think there's any disclosure in the patent at
19 issue here that accepts that the number of wins over a number of plays tells
20 you anything about how frequently the game has been played. It's a number.
21 We know a denominator, which is 50 plays. In your example, Your Honor.

22 JUDGE MOORE: No, I understand. I understand your position, but
23 it seems that your position collapses to the denominator has to be time.

24 MR. NELSON: Well, it would have to -- for it to be a rate that shows
25 something about the frequency of play, the denominator would have to be
26 some metric that allowed you to determine how frequently the player had

1 played. The example you've given of, you know, I forget the specific
2 example, 50 wins over 100 plays, for example, tells you that there are 100
3 plays and it tells you that there are 50 wins, but it does not tell you how
4 frequently play has occurred. Those 100 plays, as our expert has pointed out
5 in his --

6 JUDGE MOORE: Right. It doesn't tell you how frequently plays
7 have occurred if we assume that's per unit of time. It would if we assume it's
8 how many plays there were per win. If that were a frequency. I'm just, I'll
9 stop questioning you about this, but I just wanted to, you know, to
10 understand your position and specifically whether or not -- you're pointing to
11 this disclosure of 1 over x. It doesn't say 1 over t. It's 1 over x. And your
12 position seems to be that the frequency implies that x is time.

13 And I just wanted to give you a chance to explain if there's any basis
14 for that other than what a person of ordinary skill in the art would think,
15 reading the specifications, that would be time. Is there anything else?

16 MR. NELSON: I understand the question, Judge Moore. To be clear,
17 and then I'll move on unless you have further questions about my response.
18 This is a frequency, what's disclosed here in the patent. It is a frequency. It
19 is a frequency of wins. It is how often a player won a prize, how they won
20 something during the game. I don't deny that's a frequency. Nobody denies
21 that. But the claim language that we're discussing here is not frequency of
22 wins, but frequency of play.

23 And this information provides you nothing about the frequency of
24 play. Because all we know is x here, as our expert has described is the
25 number of plays, and 1 is the number of wins. And so we know out of
26 whatever x number of plays there were, there were one win in this example.

1 JUDGE HORNER: In your response on page 12, carried over to 13,
2 you distinguish hit ratio from frequency of play. And I think this is in your
3 expert's declaration as well. You described that hit ratio discloses a win
4 frequency, and that that simply discloses the proportion of plays over a day,
5 week, month, decade, or all time which resulted in a win.

6 So implicitly in hit ratio, it seems like there is a time component
7 because you have to create the universe of what you're going to be
8 comparing, right? The number of wins over that period of time to the
9 number of plays over that period of time. So isn't there implicitly a
10 frequency of play built into the hit ratio equation?

11 MR. NELSON: Thank you, Your Honor. There is not, and I turn to
12 slide 17 where I think we are presenting the language from our expert's
13 declaration that you're relying on here. What Mr. Szeder is saying is that
14 this hit ratio of Kelly discloses a win frequency, but that doesn't indicate
15 anything about the frequency of play. And he says instead it simply
16 discloses the proportion of plays over a day, week, month, decade, or all
17 time which resulted in a win.

18 What he's saying there is we don't know that information. It could
19 have been a month. It could have been a day. It could have been a week. It
20 could have been all time. But a hit ratio doesn't tell us what that time metric
21 was. We have no information from Kelly's hit ratio, as Mr. Szeder explains,
22 that would allow you to determine a frequency of play.

23 It's not information on frequency of play. It's not information about
24 the frequency of play. It's information about the frequency of wins, which
25 gives you no information about the frequency of play.

1 As a simple example, if I said, hey, I'm winning about 25 percent of
2 the time, that doesn't tell you whether that is referring to my wins this week,
3 my wins last month when I didn't know what I was doing at the blackjack
4 table, or when I was younger and foolish. It doesn't give you any
5 information about the frequency of play. It's just a measure of the frequency
6 of wins.

7 And I apologize if Mr. Szeder's discussion here seems to suggest that
8 that's implicit. He's saying it's not. We don't know anything about that
9 timeframe. All we know is that there was a certain number of wins over a
10 certain number of plays.

11 JUDGE HORNER: He also says at the bottom there, it measures only
12 how many games were played out of all games played. So again, that kind
13 of gets to the Petitioner's point that I think they raised in the reply that the
14 number of games played can be for the lifetime of the game, right? So it
15 could be all games played on this game unit in which a specific prize was
16 won.

17 MR. NELSON: So two responses, Your Honor. The first is that that
18 specific argument was of course not made in the petition. It was made in
19 reply. There was no, in that argument, no point in any disclosure of Kelly
20 that what was really being measured by Kelly's hit ratio was all the plays
21 over time. That was an attorney who thought of that and put it into the
22 reply. They point to no disclosure of Kelly, that what Kelly's talking about
23 in its hit ratio is all plays since the beginning of time or since the beginning
24 of the game. It is a new argument.

25 I also don't think it fairly shows anything about the frequency of play.
26 It is simply a surmise by an attorney that, well, if we just assume this means

1 all time, then it's frequency of play. That's not Kelly. That's an attorney
2 telling you what you should understand Kelly to say, but there is no such
3 disclosure there. Kelly doesn't tell you that its hit ratio is over all time. It
4 doesn't give you any information about what the frequency of this play in
5 which those wins resulted actually was.

6 JUDGE HORNER: So one more question then. In column 40 of
7 Kelly, which I think the Petitioner pointed to, around line 34, it's again
8 talking about hit ratio. And it's talking about in embodiments having skilled
9 specific prize goals, once the game unit 10 has been played one or more
10 times by actual players, e.g. after 100 times, the system can automatically
11 adjust the hit ratio to the actual win frequency determined from the player's
12 use of the game unit. So is that first 100 times the game unit is played
13 frequency of play?

14 MR. NELSON: So that is not an argument I understand was made in
15 the petition. I would have to go back and take a look at that disclosure to
16 make sure you didn't hear it today. And I don't believe that's actually in the
17 petition. I don't mind responding off the cuff. To me, what you just pointed
18 to does not sound like a frequency of play. And certainly there's no opinion
19 from their expert or an argument in the petition that I'm aware of contending
20 that that tells you there's a frequency of play that is utilized as a threshold
21 value.

22 JUDGE HORNER: Okay, thank you.

23 JUDGE TARTAL: Counsel, before you move on, I know you've been
24 answering a number of questions. I just wanted to cover a topic, something
25 similar to that, to what I asked the Petitioner, which is just looking at your
26 slide 8 with the claim language. The claim recites the value includes

1 “information on” the numbers of play for claim 9 or the threshold value
2 includes “information on” frequency of play for claim 7. How would you
3 address what the impact is of including “information on” in the claim
4 language as opposed to had the claim just recited, for example, the threshold
5 value includes the number of plays since the last win?

6 MR. NELSON: So we've heard two kinds of arguments about our
7 position here from Petitioner. The first is that we have attempted to rewrite
8 the claim from “includes information on” to is information on frequency of
9 play. The second argument is that frequency -- information on the frequency
10 of play or information on the number of plays since the last win need not
11 actually include information that represents a frequency of play or need not
12 include information that is actually the number of plays since the last win.
13 So I'll respond to both of those in turn.

14 To your question specifically, whatever that claim language means
15 includes information on the number or the frequency of play. It's clear from
16 its plain meaning that whatever else is included in the threshold value,
17 maybe other types of data, that data must include -- that threshold value
18 must also include information on the frequency of play. You can easily
19 imagine scenarios where there's different data that's also used to measure the
20 threshold value that we use to determine whether to change the gameplay
21 parameters.

22 So the number of wins in a given frequency of play, that's other data.
23 It includes information on that, the threshold does. But it also, I mean the
24 plain language says that this threshold includes information on the frequency
25 of play. As such, the plain language of that claim is that whatever other data

1 is part of the threshold used to determine whether to modify gameplay, it
2 must also include information that is a frequency of play.

3 JUDGE TARTAL: I would just suggest, Counsel, that would be one
4 interpretation, but isn't "information on" modifying "frequency of play" not
5 the threshold value, so that it's broader than had the claim just recited
6 includes frequency of play? It seems a little implausible to me that it's
7 modifying the threshold value as opposed to frequency of play itself in the
8 way the wording is set forth in the claim.

9 MR. NELSON: Well, as I understand, the Petitioner's argument is
10 that information on frequency of play can include information that is not
11 itself a frequency of play. I don't think that's supported by anything in the
12 intrinsic or extrinsic record. I hope that's responsive to your question.

13 Including information on frequency of play means that whatever else
14 is included, there must be information that is on, represents the frequency of
15 play. Not something from which you could say, that's a lot of plays, that's a
16 large number of plays. And in fact, the patent, as I'll show you, makes a
17 distinction between the number of plays or the number of events and the
18 frequency of events.

19 So the fact that there might be some information like yes, no, and I'll
20 address that for the registered frequent players part, that's not information on
21 the frequency of play because it tells you nothing about the frequency of
22 play.

23 JUDGE TARTAL: So is your construction of "information on the
24 frequency of play" that it must tell you something about frequency of play?

1 MR. NELSON: That is literally what it says, that the threshold value
2 including information on frequency of play is that it includes information
3 representing the frequency of play on.

4 JUDGE TARTAL: Thank you.

5 MR. NELSON: Thank you, Your Honor. So with respect to -- I'm
6 going to treat claim 7 first and then claim 9 second to try and build some
7 structure around this. As we've just been discussing, as we've described in
8 our briefing, the patent itself tells you what it means by a frequency. Here
9 it's talking about a frequency of wins, but it's clear enough that what the
10 patent says is a frequency is 1 over x, 1 over something, a rate.

11 That is exactly consistent with the extrinsic evidence which we
12 brought forward from the Microsoft Computer Dictionary, which states that
13 a frequency is the measure of how often a periodic event occurs. And that is
14 the commonly understood meaning of a frequency. And here it's applied to
15 a frequency of play.

16 As we discussed, the Petitioner appears to contend that information on
17 the frequency of play as a threshold value need not itself be a frequency.
18 They've pointed to, for instance, the table 20D disclosure, which says there,
19 yes or no, is the player a registered frequent player? And as we've pointed
20 out in our briefing, this discussion indicates nothing about the frequency of
21 play, any more than being a member of an airline frequent flyer club
22 indicates how frequently I fly.

23 I can tell you I fly United a lot, I am a frequent flyer. I also am a
24 registered member of the Delta frequent flyers club, I never fly. Being a
25 registered member of a frequent players club indicates nothing about the
26 frequency of play.

1 JUDGE HORNER: What about the frequency of points? I think that
2 might be on your next slide.

3 MR. NELSON: That is our next slide. The same is true there. There
4 is a listing of points and it describes, and the specification, as we pointed out
5 here, describes at column 9, line 55, frequent player points as the points
6 rewarded for gameplay to registered players club members. This point
7 structure does not indicate the number of plays nor the period in which they
8 occur. It indicates, at best, for the first frequent player listed here, who has
9 13,244 points. They seem to have a lot of points.

10 JUDGE TARTAL: But Counsel, Judge Tartal again. Doesn't that
11 give some information on the frequency of play if one player has 13,244
12 points and another player has zero points? What is the premise on which
13 that is not information on frequency of play?

14 MR. NELSON: Because that does not tell you anything about how
15 many plays were required or how many plays were undertaken to obtain
16 that. This player could be a fantastic player who played one time, scored all
17 the points possible.

18 JUDGE TARTAL: So then your issue is not with whether or not it's a
19 measure of frequency of play. It's how the points are tallied so that if it was
20 representative of how many games played, then that would be a frequency of
21 play.

22 MR. NELSON: No. I think, Your Honor, the point is that, first, that
23 tells you nothing about how frequently any of these players have played. It
24 only tells you the number of points they have amassed. This player could
25 have played once, they could have played 1,000 times. We don't know.

1 Nothing in the patent tells you that this represents a high frequency of play.
2 It's just they have amassed a certain number of points.

3 JUDGE MOORE: Counsel, it certainly tells me that the first player
4 has played more frequently than the second player. Certainly tells me that.

5 MR. NELSON: Does it, Your Honor? This second player could have
6 --

7 JUDGE MOORE: Yes.

8 MR. NELSON: -- played fruitlessly 1,000 times and never earned
9 any points. The first player --

10 JUDGE HORNER: We don't know how the --

11 JUDGE MOORE: That seems -- I understand that argument. That
12 seems implausible, but I understand the argument.

13 JUDGE HORNER: Do we know how the points are awarded? I
14 guess that's the question.

15 MR. NELSON: The specification provides no disclosure of that. It
16 just says here are frequent player points, which are points are rewarded for
17 gameplay. Again, it indicates that one player has amassed a certain number
18 of points. Two other players have amassed zero. Another player's amassed
19 103 points. There's no indication of how frequently they play. And again,
20 the distinction here is between a number and a frequency. Numbers can be
21 large. They do not indicate anything about frequency of play. And --
22 please.

23 JUDGE TARTAL: Sorry, Counsel. I would just say that you seem to
24 be basing this on how points are earned. And so I guess the question is, let's
25 concede that it doesn't explain how points are earned. But, hypothetically, if

1 points were earned in some way relative to games played, would you agree
2 that just a number, 13,244, compared to zero, reflects the frequency of play?

3 MR. NELSON: If I understand your question to be that if there was a
4 disclosure in our patent that this represents the points earned over, let's say,
5 50 plays --

6 JUDGE TARTAL: Not even, let me just interrupt. Not even over any
7 number of plays. If it just represents a disclosure in the patent,
8 hypothetically, again, that every time a player plays a game, he gets at least
9 one point. Would just the number, 13,244, compared to zero, be information
10 on frequency of play?

11 MR. NELSON: In your hypothetical, if the patent were to disclose
12 that every player gets a point for playing a game, that would indicate for the
13 first player that they had played 13,244 times. That's true. I concede that.
14 What I'm telling you is that that's not what our own patent discloses. It just
15 discloses there's a number of points here.

16 JUDGE TARTAL: But is that information on frequency of play?

17 MR. NELSON: In the specific example that I understood you asked
18 me about, which is one point per play, so this person has 13,244 points, and
19 there were no other way to gain points, it would indicate information about
20 the frequency of play.

21 JUDGE TARTAL: Okay, thank you.

22 MR. NELSON: Again, as we've explained though -- first of all, I
23 should point out this is a disclosure of our patent, not a disclosure of Kelly
24 or Walker, right? And I understand your question is aimed at understanding
25 what is meant by frequency of play. This, in our view, does not tell us
26 anything about what the patentees meant by frequency of play. It is clearly

1 just a description of points rewarded for gameplay without any indication
2 that it's meant to reflect a frequency of play. Where the patentee does talk
3 about the frequency of play, they may be clear. Frequency of wins, by
4 which you mean 1 over x.

5 JUDGE HORNER: But that's not frequency of play, according to
6 your position. Frequency of wins is not frequency of play. So we really, do
7 we have anything else besides the original claim that --

8 MR. NELSON: Well, I understand -- I apologize for speaking over
9 you, Your Honor. I understand your point, but what we're trying to
10 understand is really what it means to have a frequency of something,
11 whether it's the frequency of play or frequency of wins. I don't think play is
12 disputed by anybody, right? So we're here talking about what does it mean
13 to base a threshold value on a frequency of play? And so this patent tells us,
14 first of all, exactly what they mean by frequency in the context of frequency
15 of wins, 1 over x, a rate.

16 The patentee also made a clear distinction in the patent between the
17 number of winning outcomes and the frequency of winning outcomes.
18 Suggesting that they understood that a number, simply a number of points,
19 or a number of plays without some indication of a rate, is something
20 different than a frequency of plays. They use those --

21 JUDGE MOORE: Counsel, you said a rate there, but it's really a
22 ratio. What your patent says is 1 over x, and you change ratio to rate right
23 there.

24 MR. NELSON: I don't regard them as substantively different. A ratio
25 of 1 to 5 is 1 in 5, as a rate, in my view. Is there something that you're
26 driving at that I'm not responding to?

1 JUDGE MOORE: No, it's just that the question I was trying to pick at
2 earlier, because you're just, you know, we're trying to figure out what the
3 frequency of play means. And, you know, in loose speak, a frequency
4 would be a number. I understand your argument that your patent is the
5 answer between a number and a frequency, and that's all fine and well, but
6 the only disclosure that you're pointing at is 1 over x.

7 And I understand that for any electrical engineering domain, for
8 example, a frequency would be necessarily a unit of time, but we're not --
9 we're in, you know, online gaming here. And your disclosure says 1 over x.
10 And I probably belabored this too much, but it would seem like, if Petitioner
11 could point towards a ratio of plays per something else, that's a 1 over x.
12 Why would that not be a frequency? Why does the x have to be time? And,
13 you know, I'll stop belaboring that. I'd ask you that question a different way
14 instead. That's just something that I've been doing the number for a while.

15 MR. NELSON: I understand the question, Your Honor. And we'd be
16 in a different place if Petitioner had pointed to something like that. They
17 haven't. I also would, again, just reiterate, and I'll do it as briefly as possible,
18 because I said it to you before.

19 JUDGE MOORE: Of course.

20 MR. NELSON: A win frequency is not a play frequency. It doesn't
21 tell you how many -- what the periodicity of play was that resulted in that
22 win rate. It doesn't. It tells you a number of wins over a number of plays.
23 And that could have occurred in a year, a month, a day. We just don't know.

24 JUDGE TARTAL: Counselor, can I ask one other question? You
25 mentioned, I think, that there's not a dispute over play, which I took to mean
26 that you were interpreting that to mean the number of times a game is

1 played. Is there any consideration given to how long a game is played in
2 relation to frequency of play? So in other words, is a person who plays for
3 six hours a day for five days in a week a more frequent player than a person
4 who plays for one hour a day, five days a week?

5 MR. NELSON: It's a case of first impression for Mr. Nelson. But I
6 could see that putatively, play for a number of hours, if expressed as a rate,
7 could be a frequency of play. That's the most I can tell you.

8 JUDGE TARTAL: Thank you.

9 MR. NELSON: Yes, Your Honor. So, oh, I've got eight minutes.
10 The Petitioners for Kelly contend that claim 7 is disclosed by Kelly because
11 Kelly discloses modifying the gaming structure based on the number of
12 times played. So this is supported by the expert declaration of Mr. Crevelt
13 for Petitioners.

14 And really, when he's talking about the number of times played and
15 the petition talks about the number of times played, it's talking about this hit
16 ratio that we've been discussing for some time. And Mr. Crevelt says Kelly
17 discloses a hit ratio, which is the fraction of games played in which a
18 specific prize goal is met, and thus, a specific prize is won.

19 So here, we are back to where we started today, which is that Kelly's
20 disclosure of a hit ratio or the number of times it is played is not a disclosure
21 of a frequency of play because it doesn't disclose anything about the
22 frequency of play. A user could have played that game 100 times over the
23 course of a day, a week, a year, or ten years. And in each case, the
24 frequency of play, which is what claim 7 requires, varies, is different each
25 time under that hit ratio.

1 I won five times out of 100 plays. That doesn't tell us anything about
2 the frequency of play because it could indicate a high frequency of play.
3 This person has nothing going on in their life and did it 100 times in a day.
4 Or, they're like me, 100 times in ten years. That's a low frequency of play.

5 JUDGE TARTAL: Counselor, how do you respond to the fact that
6 inherently there's a time period measured by either the life -- the existence of
7 the game, how long the game's been in use that necessarily translates it to a
8 rate?

9 MR. NELSON: It proves too much. I mean, there's really two things.
10 It's not an argument that was made in the petition, not an argument that their
11 inventor made --

12 JUDGE TARTAL: But isn't -- I mean, I'm going to stop you there
13 because you're saying made in the petition, but I mean, it's just a factual
14 question. It's not a, did Petitioner say this out loud, or is this a new theory?
15 It's just, to me, this is not, in that category of argument, if it's not made in the
16 petition. It's just a question of what the meaning of the language is and how
17 it's construed.

18 MR. NELSON: As I understand your point, let me first observe, there
19 is no disclosure in Kelly that that is what's being measured. There is no
20 disclosure that we're really talking about by the hit ratio or anything else.
21 It's the lifetime of the game. That's a surmise, right? That's something,
22 someone deciding, okay, maybe the specification of Kelly is saying that.

23 So if your question is, couldn't we always just say that, that it's a
24 frequency? That, to me, I mean, if I understand your question, couldn't we
25 always just say, hey, it's a frequency, because it could be the lifetime of the
26 game. That really eludes the distinction that the patent makes between

1 numbers and frequencies. What you're saying is every number is a
2 frequency, and I think that proves too much, Your Honor. There is no
3 disclosure of that in Kelly.

4 JUDGE TARTAL: Thank you.

5 MR. NELSON: And again, Kelly doesn't -- hit ratio, as we've
6 described, is really not telling us anything about the frequency of play. They
7 say something about the frequency of winning, but not the frequency of
8 playing.

9 Petitioner, I think, sums up the incomprehensibility of their argument
10 in their reply, in which they say, look, if the number of games played is low,
11 the frequency of play is low. If the number of games played is high, the
12 frequency of play is high. That is exactly the problem with their entire
13 argument. That's nonsensical, because it tells us nothing about the
14 frequency of play. It doesn't tell us how long that occurred over, how much
15 time it occurred. It just means numbers and frequencies are the same, and
16 that's an illusion that's not supported by the text or by common sense.

17 So there's a new argument presented in reply, this is the lifetime. I
18 think we've discussed that. I'm going to move on in the interest of getting
19 through my argument. There is also a complicated mathematical formula
20 presented in the reply, which purports to show that the hit ratio really does
21 resolve to frequency of plays, where you've got. I didn't remember all this
22 from high school algebra, but there's some kind of cancellation effect that's
23 occurring here on slide 24 in which you end up understanding there's a
24 frequency of play.

25 The panel may be wondering where that argument came from. Is that
26 a figure disclosed in Kelly? It is not. It is not a figure disclosed in Mr.

1 Crevelt's declaration, it's not a figure disclosed in the petition. It's whole
2 cloth. An attorney thought of that as a special way to present the idea that a
3 hit ratio presents information on frequency of play. It does not.

4 There is no disclosure of that in Kelly. Kelly's quite simple about
5 what it means by a hit ratio. Kelly says, at column 40, lines 19 to 21, that a
6 hit ratio is the fraction of games played on average in which a specific prize
7 goal is met, and thus a specific prize is won. It is simply wins over games
8 played, just as our patent says it, wins over games played. That's not
9 information on the frequency of play, and no amount of algebraic
10 manipulation by counsel for Petitioner can get us there from that. Walker --

11 JUDGE HORNER: Isn't there a sample -- I mean, I think your
12 proposed definition of rate is a number over either a period of time or a
13 sample.

14 MR. NELSON: That's right.

15 JUDGE HORNER: And I think in reply, they've provided this
16 example or this equation that says, okay, well, hit frequency is wins over
17 games played, but inherently, there's a sample from which you're pulling
18 from for each of those numbers, the numerator and the denominator. So isn't
19 there a sample from which you have to pull the number of wins and the
20 number of games played?

21 MR. NELSON: It's an interesting question. It might be a useful
22 argument that Kelly renders this limitation obvious. That's not the argument
23 that's made. The argument that's made is that this limitation is disclosed.
24 There is no disclosure in Kelly of that being the specific way in which a hit
25 ratio is calculated. In fact --

1 JUDGE HORNER: What do we make of the on average language in
2 Kelly?

3 MR. NELSON: I do not think that it makes a difference here. I have
4 seen nothing from the Petitioner to explain why it would make a difference.
5 And I'm unaware of how it would make a difference to what Kelly says is
6 pretty simply the fraction of games on average in which a specific prize goal
7 is met and thus a specific prize is won.

8 For average, I suppose, there would have to be some disclosure of
9 what the data selected was going to represent. That hasn't been pointed to
10 by Petitioners, and I'm not aware of any disclosure in Kelly of doing so.

11 For Walker-Schneier on claim 7, there are a couple of arguments
12 made. I think the first is the total time spent playing it. And I see that I have
13 30 seconds left. I would ask, given the number of questions, that I take ten
14 minutes from my rebuttal and finish my argument, if that's --

15 JUDGE HORNER: Yes, that's fine.

16 MR. NELSON: -- acceptable to the Board. Thank you. So Petitioner
17 points to disclosures in Walker of the total time spent playing or a number of
18 lives lost or a number of questions answered correctly. There was also this
19 data selection protocol argument that's made. I'm going to treat them
20 separately because I think they're presented separately by the Petitioner.
21 First, as we've explained, the total time spent playing is a number. It is not
22 information on the frequency of play.

23 As our expert, Mr. Szeder, pointed out, you could play for 100 hours
24 and you could do so over a year. You could do for 100 hours and do so over
25 four days. Those are different frequencies of play. And so just saying total
26 time played tells you something or provides a threshold value that includes

1 information on the frequency of play is wrong. It's a number, not a rate.
2 And the patent has made very clear that numbers and rates are different
3 things.

4 The same is true of the number of lives lost or the number of
5 questions answered correctly. These are numbers, not rates. We do not
6 know how many plays occurred over which these number of lives lost were
7 lost or the number of questions were answered correctly. Kelly tells us
8 nothing about that. And it does not disclose information on the frequency of
9 the play.

10 Now, Petitioner has, I think, rightly spent the most time describing
11 Walker's data selection protocol in which a selected set of results are
12 compared to some value to determine whether those results depart from a
13 threshold criteria. I think a predetermined criteria is the language used by
14 Walker. And here's what they have said. So this too, as we've explained in
15 our briefing, does not disclose claim 7's wherein the threshold value includes
16 information on the frequency of play.

17 What is described in Walker is, in these passages, is a protocol to
18 select a set of gameplay results that will be used to compare to some
19 threshold value, not that the threshold value itself will include any
20 information on the frequency of play. Walker makes this very clear. The
21 passages relied upon here are headed as determining a set of results.

22 And Walker describes that the determination may involve selecting
23 the set of results and the controller may, in fact, retrieve the set of results
24 from a gameplay database. So it's describing how Walker's system will
25 retrieve some data that will then be analyzed and compared to a threshold
26 value.

1 Indeed, it does say, in Walker, that the types of data set you might
2 retrieve from the gaming database could include information such as all
3 gameplays in a specific period of time. That's a rate. That is information on
4 the frequency of play.

5 We don't dispute that. The point is, though, that what Walker does
6 with that data is just to take it and to compare it to some standard deviation
7 or predetermined criteria, some variance value, which itself is not a
8 threshold that includes information on the frequency of play. The
9 information on the frequency of play that we're seeing in this selection
10 protocol is how data is selected. It is not the threshold value itself.

11 And I've tried with my limited skills here to depict what is going on in
12 this passage of Walker. Walker's desired variance for a selected set of
13 results is not a threshold value, including information on the frequency of
14 play. There's a data selection protocol, which the Petitioner has described in
15 some detail, that can include selecting a set of data where that selection
16 protocol is based on frequency of play, how many plays over the last period
17 of time or week that they pointed to. That's true enough. But what's
18 retrieved from that protocol is just results data. It's game results data
19 selected using that protocol. There is no disclosure in Walker that those
20 results themselves reflect a frequency. Just results.

21 We have a vast pool of data. We're going to pick, as one example,
22 everything that the game results for the last two weeks. We're going to pull
23 that and then we're going to compare it to some predetermined criteria.
24 Neither the data that's pulled nor the threshold value in Walker are disclosed
25 as representing information or including information on the frequency of
26 play. There is no disclosure in Walker that what's used in this comparison to

1 predetermined criteria is information on the frequency of play. There's just
2 the game results.

3 And there is nothing pointed to by the Petitioners that the threshold
4 values, the predetermined criteria, themselves include information on the
5 frequency of play. It's just a selection protocol used to select data. And this
6 is exactly what we've explained in our briefing.

7 Now, in reply, Petitioners solved the problem with their argument.
8 They did. They came back and they said, well, look, specifically, Walker
9 discloses that the system has predetermined criteria that is used to adjust the
10 game depending on whether the criteria is met. The predetermined criteria
11 may be a minimum predetermined threshold of ten gameplays in a one-week
12 period.

13 Well, that sounds pretty good. That sounds like information on the
14 frequency of play. Your Honors, that is nowhere in Walker. That is not a
15 disclosure of Walker. That is a disclosure of Petitioner's counsel. There is
16 no discussion in Walker of there being a predetermined criteria representing
17 a minimum predetermined threshold of ten gameplays in a one-week period.
18 That is invented by counsel. There's nothing from their expert saying that's a
19 disclosure of Walker. There's nothing from their expert saying a person of
20 skill in the art would understand that that's in Walker. That's one of the
21 things. There's nothing.

22 That is presented as a turning argument only for the first time in reply.
23 It is not a disclosure of Walker. Walker never discloses that the threshold or
24 the predetermined criteria can be some frequency of play, like ten plays in a
25 one-week period. There is no such disclosure. They have not shown that
26 this limitation is disclosed by this protocol.

1 I will now turn to claim 9, which is the system for electronic
2 gameplay of game five where the threshold value includes information on
3 the number of plays since the last win. I'm just going to take a sip of water.

4 So again, we have something of a claim construction dispute, which I
5 understand Petitioner's position to be that a threshold value that includes
6 information on the number of plays since the last win need not include
7 information on the number of plays since the last win. We take the opposite
8 position, that a claim that recites that the threshold value includes
9 information on the number of plays since the last win must necessarily
10 include whatever else is in that threshold, information on the number of
11 plays since the last win.

12 So here, the Petitioner has pointed to the disclosure here of Kelly
13 purportedly tracking the number of plays since the last win. What's
14 presented in the petition is this embodiment or example of about the 3,000th
15 game. The system determines, well, I need to award a video game console.
16 Can I do that?

17 As we pointed out, and as the questioning I think reflected, this one
18 really does not disclose information that the threshold value includes
19 information on the number of plays since the last win. At most, it discloses
20 that Kelly's system knows how many video consoles have been awarded by
21 the 3,000th game. But it doesn't know and it doesn't disclose anything
22 suggesting that it knows how many gameplays have occurred since that
23 second video console was awarded.

24 JUDGE HORNER: Assuming we find that the Petitioner's argument,
25 that the other passage raised in the reply is okay under our rules, and we
26 look at that, why isn't that a disclosure of the threshold value?

1 MR. NELSON: Sure. Since I have a minute left, I'm going to spend
2 ten seconds explaining why you shouldn't consider it, then I'll answer your
3 question, if that's okay. First, I heard counsel tell us that, well, the case law
4 allows us to respond or expand upon arguments. This is not a response or an
5 expansion of an argument. This is a new ground. This information was
6 present and available to the Petitioners.

7 They cited it, they discussed it in their expert's declaration as a
8 separate ground to show you unpatentability. They attempted improperly to
9 incorporate it by reference. It's not a response. It's not an expansion. It's a
10 different argument about why Kelly discloses the limitation. You should not
11 consider it.

12 That said, Kelly's -- and there is no expert opinion explaining that it
13 does. Kelly's system still has no knowledge of the number of gameplays that
14 have occurred since the win. At most, this passage discloses that over the
15 course of 4,000 games, the system knows whether it's awarded a video
16 console or not. That's not enough to disclose this claim, which requires that
17 the threshold value include information on the number of plays since the last
18 win.

19 I am out of time. I will respond to anything I hear about Walker for
20 claim 9 as well, but it's largely the same argument. Thank you, Your Honor.

21 JUDGE HORNER: Ms. Nguyen, do you think you'll need -- you've
22 got 20 minutes of rebuttal and you had 11 minutes left from your original
23 time.

24 MS. NGUYEN: I don't think I'll need the additional 11 minutes --

25 JUDGE HORNER: Okay. I'll start at this point.

26 MS. NGUYEN: Thank you.

1 JUDGE HORNER: We'll see if we need it.

2 MS. NGUYEN: Thank you, Your Honors. And I'll just try to hit on a
3 few points of clarification and to correct certain things in the record. So,
4 one, I think, Judge Horner, you asked about a specific passage related to the
5 system can automatically adjust the hit ratio to the actual win frequency
6 determined from the player's use of the game unit 10 by, for example,
7 storing the number of games played and the number of times the specific
8 prize goal was hit. If we go to slide 28 of Petitioner's demonstratives, that
9 passage is quoted.

10 And to your question as to whether or not that was actually in the
11 petition, it was, and it was specifically on page 30, where, in fact, we
12 actually did not only cite to it, but we actually did quote to it with respect to
13 claim by prospective threshold. Related to that, Petitioner wanted to point
14 out that on slide 13 of PO's demonstratives, there is a passage from the '164
15 patent that Patent Owner says these are examples of threshold values used
16 by the '164. And noticeably, there is actually one example that says, based
17 on the number of plays for a particular player.

18 Again, there is no disclosure of frequency of play in the '164. The
19 closest is frequent player, but also this passage. We know that the '164
20 specifically contemplated that the threshold value could be based on the
21 number of plays for a particular player. And that is the same as we saw on
22 slide 28 of Petitioner's demonstratives as a disclosure in Kelly '683 at
23 column 40, lines 31 through 39, where you're storing the number of games
24 played. And that is --

25 JUDGE MOORE: Counsel, what about the 1 over x disclosure that
26 counsel --

1 MS. NGUYEN: I was just about to go to that. So we've been talking
2 about the 1 over x disclosure, and specifically, if we go to slide 14 of Patent
3 Owner's demonstratives, it says 1 over x. And that is what Kelly is
4 disclosing, right? We have the number of games played over the number of
5 wins.

6 And if you actually look on this slide of Petitioner -- I'm sorry, Patent
7 Owner's evidence of what frequency means, again, Patent Owner is using
8 interchangeably frequency and rate, but let's actually look at the language of
9 frequency. And actually, even Patent Owner's dictionary definition, the
10 measure how often a periodic event occurs.

11 And so there is no limitation with respect to time. It's just a
12 measurement with respect to how often something occurs. So it could be the
13 number of games played per hit, per win, per number of wins. That's a
14 measure of how often a periodic event occurs. And so there is no discussion
15 in the patent about limiting frequency to time. Even the dictionary definition
16 doesn't necessarily limit frequency to time. So there is no limitations
17 anywhere other than their experts say so, that it should be limited to time.

18 But let's hold on to that for a second and let's actually go to Patent
19 Owner's slide 21. And this is where we have Patent Owner's expert talk
20 about the win frequency, and specifically I am looking for -- I have the
21 wrong slide. But Patent Owner's own expert talks about the lifetime of the
22 games played. So if you look at that last highlighted portion, when we're
23 talking about the number of games played, Patent Owner's own expert says
24 it measures only how many games were played out of all of games played.
25 So we are talking about the lifetime.

1 Patent Owner repeatedly says, well, we have no expert testimony
2 saying that. But their own expert says that. So there is, in fact, expert
3 testimony that says, when you read Kelly's hit ratio, it is talking about how
4 many games are played in the lifetime of the game. And if you go back,
5 again, to slide 28 of Petitioner's demonstratives, you can see that because it
6 says, determined from the player's use of game unit time. So that is
7 explaining that that is the lifetime of the game, as understood by Patent
8 Owner's own expert saying that this is the lifetime of the game. And even if
9 he didn't, it just makes common sense.

10 With respect to -- going back to Patent Owner's argument on the, I
11 believe it's on the expansion of the declaration with respect to Kelly's
12 disclosure on -- let me go back to, let's say, Patent Owner's slide 8.
13 Apologies. So this is a claim.

14 And then, I believe the last argument that Patent Owner made with
15 respect to the aspect of 4,000 games. Patent Owner, again, says this is a new
16 argument, but admits that this was actually in Mr. Crevelt's declaration.
17 This is not incorporation by reference. Again, what Mr. Crevelt explains in
18 his declaration is how one way of doing that passage on column 37 at the top
19 of Kelly would actually work. And so he uses that 4,000th win in 4,000th
20 play and having one win as an example of how you would do that.

21 And so this is not new argument. This is not incorporation by
22 reference. It's exactly what you're supposed to do with expert testimony,
23 which is expert testimony providing context, additional context to other
24 passages in the prior art records in order to help people understand what that
25 expert is saying. And so --

1 JUDGE MOORE: Counselor, with respect to claim 9 and in the use
2 of Kelly, you've got, I think, two words describing that disclosure. You've
3 got a parenthetical on page 31 that says tracking wins.

4 MS. NGUYEN: Correct.

5 JUDGE MOORE: So you've got a citation to a declaration. You've
6 got a citation to the specification, then you've got two words. How is -- our
7 rules require you to identify and write in the particularity each claim
8 challenged in the grounds on which the challenge is based and the evidence
9 that supports it.

10 MS. NGUYEN: Understood.

11 JUDGE MOORE: You know, and also the provision must specify
12 where you tell them that the claim is found in the prior art, the printed
13 publications. And we also prohibit incorporation by reference because, for
14 example, we have word limitations, typology limitations on our briefs. We
15 don't want people to play games with those by just merging everything into
16 an expert declaration and citing it briefly in the petition. This is pretty
17 skimpy disclosure of what you're claiming this argument is in the petition.
18 How would you respond to that?

19 MS. NGUYEN: Your Honor, the disclosure is very similar. And so,
20 again, it goes back to we are saying that the disclosure at column 37 from
21 lines 1 through 7 does, in fact, disclose tracking the number of wins. And so
22 that is, again, goes back to that is what is identified in the petition. And
23 what the expert is doing is saying, hey, this passage at column 37, 1 through
24 7, is, in fact, disclosing tracking the number of wins. How does it do that?
25 Let's look at other parts of the specification to help us understand how it

1 discloses that. And so this goes back to -- it's explaining how that disclosure
2 works at column 37, lines 1 through 7.

3 And once again, for this patent, the '164 patent, if we go back to,
4 again, what the disclosures actually say. There really can be no dispute that
5 what examples are provided in the patent are actually what are disclosed in
6 both Kelly and Walker. So no matter how you construe these dependent
7 claim limitations, Patent Owner cannot give the facts. These are the same
8 disclosures in the patent that disclose information on the number of plays
9 since the last win and frequency of play.

10 JUDGE HORNER: I have one more question. On Patent Owner's
11 slide 35, the Patent Owner points out that this -- and this is relating to the
12 ground based on Walker and specifically on 7, information on frequency of
13 play. That in the reply, Petitioner states that Walker discloses the
14 predetermined criteria may be a minimum predetermined threshold of ten
15 gameplays in a one-week period. Is there support in Walker for that?

16 MS. NGUYEN: Yes, Your Honor. So it goes back to -- if we go to
17 slide 30 of Petitioner's slides.

18 JUDGE HORNER: Slide 30?

19 MS. NGUYEN: Correct. So what Kelly -- I'm sorry, Walker says
20 here in the last passage in paragraph 236 is all gameplays played in the last
21 week. And so we are providing an example of what that discloses. So all
22 gameplays played within the last week could be, for example, ten gameplays
23 within the last week. So that was the example, ten gameplays within a week.
24 So this is disclosed in Walker at 236, the specific example of all gameplays
25 played in the last week.

26 JUDGE HORNER: Okay, I understand. Thank you.

1 MS. NGUYEN: Any further questions?

2 JUDGE HORNER: No, thank you.

3 MS. NGUYEN: Thank you, Your Honors.

4 JUDGE HORNER: Mr. Nelson, before you get started, I have one
5 question I meant to ask you and I neglected to ask it, but I feel like I have to
6 ask it. Your Patent Owner response only talks about claims 7 and 9. Is
7 Patent Owner conceding that Petitioner's met their burden as to the
8 remaining challenge claims?

9 MR. NELSON: Thank you for the question, Your Honor. So it is
10 always Petitioner's burden to demonstrate disclosure or obviousness of the
11 claims by the grounds raised. We have not disputed any other ground other
12 than claims 7 or 9. We leave it to you to decide that. But it is correct, we
13 have not disputed those other showings.

14 JUDGE HORNER: Okay.

15 MR. NELSON: Okay. So I'm going to limit my surrebuttal to what I
16 actually heard on rebuttal, unless there's a question that you have that wants
17 to take me out of it. The first thing I think we heard was some discussion of
18 how perhaps, at least in Petitioner's point of view, Patent Owner's expert had
19 given away the farm and given up that, in fact, this is all information on
20 frequency of play disclosed. I think what is shown here on slide 21.

21 I would note that Mr. Szeder's expert declaration is otherwise
22 unrebutted. Here, as in every other IPR, Petitioner elected not to cross-
23 examine our expert, to ask him what he meant by these things. So what
24 you've heard is an attorney's reading of that. That said, it's still wrong. I
25 heard counsel for Petitioner say, look, all we really mean -- all frequency of
26 play really means is how often a periodic event occurs. And so, Mr. Szeder

1 here is saying, that's exactly it. It measures only how many games are
2 played out of all games played in which a specific prize was won.

3 Well, that's how often a periodic event occurs, and so it discloses
4 frequency. Frequency is not the limitation at issue here. It is information on
5 the frequency of play. We have never disputed that Kelly's hit ratio
6 describes information about the frequency of wins. And that's essentially
7 what Petitioner told you. See, it shows some kind of frequency. That
8 frequency of wins, as I explained in my earlier presentation that's in our
9 brief, does not disclose information on the frequency of play. It doesn't.

10 Those wins, as we have explained, could have occurred, as Mr. Szeder
11 says here, over a day, week, month, decade, or all time. We don't know
12 what the frequency of play was that led to these wins.

13 On the incorporation by reference point that counsel addressed in her
14 rebuttal, I don't have anything to say beyond what's already been said other
15 than you ought to take a look at, and you have, at what the petition actually
16 says. Which is, it discloses it. See this stuff, none of which is presented or
17 discussed in the petition itself. It is truly an incorporation by reference. It's
18 not for us to guess which of those disclosures are separately or together
19 meant to show demonstration or satisfaction of the limitation. It's not for us
20 to do that. It's for them to bring their evidence forward.

21 And the notion that it's simply an expansion of what they already said
22 is simply wrong. It's a separate basis. I think I heard counsel say, well, what
23 we were trying to do in the petition is say it discloses it, and here's some
24 ways why in his declaration. They are each separate bases to contend that
25 this is disclosed, and we shouldn't have to respond to something not
26 presented in the petition.

1 The last thing I'll respond to was the question about ten plays in the
2 last week and where that came from in Walker's selection protocol. The
3 slide you were shown by counsel for Petitioner had a number of paragraphs
4 on it. I think there was a paragraph 269, 267, and 268. And what counsel
5 pointed you to was a fourth paragraph from paragraph 236 of Walker in
6 which there was a discussion of all plays in the last week or a number of
7 plays over a given period of time.

8 The order of those paragraphs matters because the order of those
9 paragraphs tells you exactly what we have said, which is what Walker is
10 discussing in that paragraph 236, is a data selection protocol, not the
11 threshold criteria that is later used and described in those subsequent
12 paragraphs, 286, 287, and so on. It is disclosing how data is selected, not
13 how it's evaluated or that there is a threshold value or a predetermined
14 criteria representing that information.

15 There is, as we've said, and you didn't hear it from counsel, there is
16 nothing in Walker saying that that predetermined criteria can be the number
17 of plays in the last week, let alone ten in the last week. That is not in
18 Walker. Their expert did not identify this as disclosure. It's not there. That
19 is at most a lawyer's interpretation of what a POSA might think is obvious.
20 That's not the argument that was made. It's not there in Walker. That's all I
21 have, Your Honors. Thank you.

22 JUDGE HORNER: Thank you. Thank you all for appearing today
23 for this case. I understand you might be back for round two shortly. But
24 we'll take this case under advisement and we will issue a decision in due
25 course. And we'll go ahead and go off the record and just see if the court
26 reporter has any spellings or questions about anything before we leave.

1 (Whereupon, the above-entitled matter went off the record at 12:43
2 p.m.)

PETITIONER:

Lisa Nguyen
Naveen Modi
PAUL HASTINGS LLP
lisanguyen@paulhastings.com
naveenmodi@paulhastings.com
PH-Activision-Milestone@paulhastings.com

PATENT OWNER:

John Pierce
TENSEGRITY LAW GROUP LLP
john.pierce@tensegritylawgroup.com