

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF TEXAS
3 SHERMAN DIVISION

3 WAPP TECH LIMITED PARTNERSHIP | DOCKET 4:18CV469
4 AND WAPP TECH CORP. |
5 VS. | MARCH 5, 2021
6 | 8:32 A.M.
7 SEATTLE SPINCO, INC., ET AL | SHERMAN, TEXAS

8 -----
9 VOLUME 5 OF 5, PAGES 1198 THROUGH 1380

10 REPORTER'S TRANSCRIPT OF JURY TRIAL

11 BEFORE THE HONORABLE AMOS L. MAZZANT, III
12 UNITED STATES DISTRICT JUDGE, AND A JURY
13 -----

14 APPEARANCES:

15 FOR THE PLAINTIFFS:

16 DERON R. DACUS
17 THE DACUS FIRM
18 821 ESE LOOP 323, SUITE 430
19 TYLER, TEXAS 75701

20 ROBERT F. KRAMER
21 MARGARET ELIZABETH DAY
22 DAVID L. ALBERTI
23 SAL LIM
24 RUSSELL STEVEN TONKOVICH
25 MARC C. BELLOLI
SVEN RAZ
ANDREW GRANT HAMILL
ROBERT Y. XIE
FEINBERG DAY KRAMER ALBERTI LIM
TONKOVICH & BELLOLI
577 AIRPORT BOULEVARD, SUITE 250
BIRLINGAME, CALIFORNIA 94010

1 FOR THE DEFENDANTS:

2 HARRY LEE GILLAM, JR.
3 ANDREW THOMPSON "TOM" GORHAM
4 GILLAM & SMITH
5 303 SOUTH WASHINGTON AVENUE
6 MARSHALL, TEXAS 75670

7 L. REX SEARS
8 ALEXIS K. JUERGENS
9 MASCHOFF BRENNAN - SALT LAKE CITY
10 111 SOUTH MAIN STREET, SUITE 600
11 SALT LAKE CITY, UTAH 84111

12 BARRY KENNETH SHELTON
13 BRADLEY DALTON COBURN
14 SHELTON COBURN LLP
15 311 RR 620 SOUTH, SUITE 205
16 AUSTIN, TEXAS 78734-4775

17 COURT REPORTER: CHRISTINA L. BICKHAM, CRR, RDR
18 FEDERAL OFFICIAL REPORTER
19 101 EAST PECAN
20 SHERMAN, TEXAS 75090

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1 (Open court, all parties present, jury not
2 present.)

3 THE COURT: Are we ready to begin?

4 Let's go ahead and bring the jury in, then.

5 (The jury enters the courtroom, 8:35 a.m.)

6 THE COURT: Please be seated.

7 Welcome back, ladies and gentlemen.

8 Mr. Dacus, if you want to continue.

9 MR. DACUS: Thank you, your Honor.

10 THE COURT: Oh, yes, sorry. Let's make sure the
11 witness is in the box. I forgot that one minor detail.

12 You understand you're still under oath?

13 THE WITNESS: Yes, sir.

14 THE COURT: Okay. Just pull the mic down.

15 Go ahead, Mr. Dacus.

16 MR. DACUS: Thank you, your Honor.

17 CONTINUED RECROSS-EXAMINATION OF CLARKE NELSON

18 BY MR. DACUS:

19 Q. Good morning, Mr. Nelson.

20 A. Good morning, Mr. Dacus.

21 Q. Just a few topics to finish up here and a few
22 questions, if that's okay.

23 A. Sure.

24 Q. In the course of your work, sir, that you've done, are
25 you or are you not aware that Micro Focus increased the

1 price of LoadRunner in 2018?

2 A. I've heard some assertions to that. I don't recall
3 looking at the pricing guides to ascertain one way or the
4 other.

5 What I did observe is the total revenue for
6 LoadRunner from year over year between those two time
7 periods. There's a slight bump. I don't recall it being
8 significant.

9 Q. So if, indeed, Micro Focus increased the price of
10 LoadRunner in 2018, that's not something that you've looked
11 at in detail; is that fair?

12 A. Like I said, I'm aware of some of that discussion.
13 Probably not aware of it in great detail, other than I've
14 looked at the aggregate revenues and did not observe a
15 significant bump.

16 Q. Understood.

17 Because you understand, sir, that part of the
18 dispute here is that Micro Focus says we started giving
19 away Network Virtualization for free in November of 2018.
20 That's their position, correct?

21 A. I understand it was included in a bundle, in effect,
22 yes.

23 Q. Right. And you understand we say no, although you say
24 you included it in a bundle and you gave it away for free,
25 that's really a little deceptive -- or a lot deceptive,

1 from our perspective.

2 You understand that's our position, correct?

3 A. I understand you just stated that.

4 Q. Okay.

5 MR. DACUS: Can we pull up D-82, please.

6 BY MR. DACUS:

7 Q. D-82 is this document that we were starting to look at
8 late yesterday. Do you remember that, Mr. Nelson?

9 A. I recall looking at a document that had the same, once
10 again, blue background with Micro Focus logo. If this is
11 the same one, I accept your representation.

12 MR. DACUS: Can you show the entirety of the front
13 page, please, Tom.

14 BY MR. DACUS:

15 Q. You remember, sir, that this is a document that comes
16 from Micro Focus' internal files. You remember that?

17 A. I don't know if it's from their internal files or where
18 it was obtained. It does have a Micro Focus Bates number
19 on there.

20 Q. And when you say "a Micro Focus Bates number," that's a
21 document that Micro Focus produced, according to this
22 Court's orders, in this case, correct? You know enough to
23 know that.

24 A. That would be my understanding of the procedural
25 logistics of the document coming to light.

1 Q. And you know this is a document -- or maybe you don't
2 know. You can confirm it or not -- that this is an
3 internal document that Micro Focus circulated among it and
4 its management team within Micro Focus.

5 Do you know that?

6 A. I'd have to look more into the following pages to see
7 if that's confirmed, that it was something that was
8 circulated within internal management and who it was
9 circulated among.

10 Q. Okay.

11 MR. DACUS: Can you go to the Bates number ending
12 in 29994, please, Tom.

13 And can you blow up that box so we can read it
14 better, please, sir.

15 BY MR. DACUS:

16 Q. You see this pricing proposal within this Micro Focus
17 memo, and I want to focus you on the fourth bullet point
18 there. It says, "In order to justify the price increase to
19 existing customers, Network Virtualization will be provided
20 by default."

21 Do you see that?

22 A. I do see those words.

23 Q. So the way I read that is, although Micro Focus has
24 been here telling this jury that Network Virtualization has
25 no value, what they were saying internally to themselves

1 is, hey, we can increase the price of our LoadRunner
2 product and the justification is Network Virtualization.

3 Is that how you read that?

4 A. I'm not sure. You know, I can't necessarily interpret
5 what that group of individuals that you suggest may have
6 been involved in writing these words.

7 The top of the page does say "pricing proposal."
8 I'm not aware that it was implemented.

9 And, like I said, in the actual accounting data, I
10 don't see a measurable increase in the revenue from
11 LoadRunner.

12 Q. We can at least agree that what somebody at Micro Focus
13 said is we're going to justify increasing the price of
14 LoadRunner, and we're going to use Network Virtualization
15 as the justification.

16 A. I think we can agree that the words say what they say.
17 If we interpret that as a hope or as a proposal or
18 something they considered, those are all, I think,
19 questions that remain.

20 Q. And I guess it begs the question -- since Micro Focus
21 has told this jury repeatedly that Network Virtualization
22 has no value -- it begs the question of how much of a price
23 increase would it warrant, doesn't it?

24 A. I don't know. Like I said, I can't observe an actual
25 increase in revenue, and that would be a direct

1 relationship if -- if there were a price increase, I would
2 expect to see some kind of measurable increase in the
3 revenues to coincide with that.

4 MR. DACUS: Can you turn to the next page, Tom.

5 And can you blow up the top half of that box,
6 please.

7 BY MR. DACUS:

8 Q. So this is the very next page of that document, where
9 they talk about the price increase for the LoadRunner
10 product.

11 On the left column there, sir, is the original
12 price. Let's just take the top line. \$2.46, do you see
13 that?

14 A. I do.

15 Q. And the new proposed price is \$4.92.

16 Do you see that?

17 A. That isn't -- there isn't a header that says that, but
18 I guess we can deduce that. I'm not sure.

19 Q. The next line says the old price was 5, and they're
20 going to raise it to 10.

21 Do you see that?

22 A. I see those numbers.

23 Q. I'm not the smartest guy in this courtroom, as I've
24 already proven, but that looks like they're doubling the
25 price to me.

1 Is that what it looks like to you?

2 A. Well, again, it says "proposed." It doesn't say that
3 they did.

4 And, again, what I observe in the historical
5 accounting records is consistent revenue year over year.

6 Q. So, in this courtroom, Micro Focus has said to this
7 jury Network Virtualization is worthless; but to
8 themselves, in private documents that they never thought
9 would see the light of day in this courtroom, what they
10 were saying to themselves is if we include Network
11 Virtualization that justifies doubling the price of
12 LoadRunner.

13 Isn't that where we wind up, sir?

14 A. Those words you just spoke don't appear on this page.
15 I see "current and proposed price." That's what I see.

16 Q. Beyond that, you just don't know one way or the other;
17 is that fair?

18 A. No. I don't think it's entirely fair. As I said, I've
19 looked at the actual total revenues, and I don't see an
20 increase from year over year.

21 MR. DACUS: That's all I have, your Honor. I pass
22 the witness.

23 THE COURT: Okay. Thank you.

24 Additional questions?

25 MR. SEARS: No, your Honor. Thank you.

1 THE COURT: Okay.

2 Okay. Ladies and gentlemen, if you have a
3 question, or not, please fold a piece of paper and pass it
4 over to the court security officer.

5 Can I have counsel approach?

6 (Bench conference, off the record.)

7 THE COURT: Okay. The jurors' questions have
8 already been asked, so I don't need to ask it again.

9 So -- the juror noticed that.

10 So you can step down.

11 THE WITNESS: Thank you.

12 THE COURT: Okay. What's next for the defense?

13 MR. SEARS: Defense rests, your Honor.

14 THE COURT: Very good.

15 What's next for the plaintiffs?

16 MR. ALBERTI: Your Honor, plaintiffs call Dr. Sam
17 Malek for rebuttal testimony.

18 THE COURT: Sir, you understand you're still under
19 oath that you took the other day?

20 THE WITNESS: Sorry?

21 THE COURT: You understand you're still under oath
22 from the other day?

23 THE WITNESS: Yes, your Honor.

24 THE COURT: Okay. Go ahead.

25 *

1 DIRECT EXAMINATION OF SAM MALEK
2 CALLED ON BEHALF OF THE PLAINTIFF

3 BY MR. ALBERTI:

4 Q. Good morning, Dr. Malek. I know it's been a long week,
5 and we'll try to keep this as brief as possible.

6 But do you understand we're allowed to present
7 some response to some of the arguments we've been hearing
8 from Micro Focus over the course of this trial at this
9 time?

10 A. Yes, sir.

11 Q. Are you prepared to do that today?

12 A. I am.

13 Q. I'd like to just start out by, at the very beginning,
14 how you performed your analysis.

15 I found it very interesting, yesterday, when I was
16 questioning Micro Focus' expert, and I asked why didn't he
17 look at source code, why didn't he do independent testing.
18 And his answer was that he was hired to, quote, look for
19 errors in your report.

20 What were you hired to do in this case?

21 A. I was hired as an independent expert to determine
22 whether the three patents that we've been talking have been
23 infringed by Micro Focus and its products, and also opine
24 on the validity of the patents.

25 Q. Were you asked to come up with a predetermined result

1 when you were hired?

2 A. No, sir.

3 Q. We've heard a lot, again, about how Micro Focus'
4 products operate, whether they can test applications,
5 whether they can emulate. Were you able to investigate all
6 of those issues in this case?

7 A. Yes, sir.

8 Q. And what sort of evidence did you consider when you did
9 this investigation?

10 A. So, first and foremost, I reviewed the source code of
11 the products that were made available to me. So this was
12 basically the source code of the accused products, all
13 versions of the products, during the infringement period.
14 They were provided on a computer by Micro Focus to me.

15 They were also provided to the opposing expert,
16 Dr. Shoemake. I understand he didn't review those. I
17 reviewed all the source code.

18 I reviewed the documents, all the documents
19 produced in the case. I reviewed the datasheets, the user
20 guide.

21 I confirmed the information in those documents are
22 accurate based on my analysis of the source code. So I
23 corroborated the data, different inputs to my analysis.

24 I reviewed various deposition testimonies.

25 I used the product myself. As you know, I created

1 videos, and I showed the jury that I used and tested the
2 products myself.

3 You know, and I also did my own research on
4 websites. Tried to find publicly available information
5 about the products.

6 So the data points that went into my analysis were
7 multifaceted. I looked at various data points, tried to
8 correlate source code with the document information.

9 And, yes, so that's an overview of the work that
10 I've done.

11 Q. And now that we've gotten, I guess, a little more
12 information about these products and how they work, I'd
13 like to kind of, I guess, go back to the beginning and
14 maybe you can just step the jury again through some
15 screenshots of one of your tests to just kind of hit some
16 key points that you noticed when you were testing these
17 products. Is that fair?

18 A. Yes.

19 Q. Can you explain to the jury again what this test was
20 and how you began.

21 A. Sure. So these are basically slides that I showed
22 earlier. The first -- I guess it was on Tuesday was when I
23 first testified. This is actually screenshots of the tests
24 that I've done. So these are my tests using the products.
25 These are not coming from documents.

1 And in the first step of the test when I used the
2 product, what I did here is I chose a device for testing.
3 So, in this case, I chose a Nexus 6 device. And you can
4 tell that that is the device that I've chosen because there
5 is a green highlighted lock at the bottom, so that's the
6 device that I've locked for my testing.

7 Q. And we heard a lot about the need to show resources of
8 the device. During your test, were you able to select
9 resources; and, if so, what did you select?

10 A. Yes, sir. So this is the second step that I performed
11 with the accused product. You can see on the right-hand
12 side there is a panel, collect data on.

13 So, here, you can go choose the resources of the
14 mobile device. In this case, CPU, memory, free memory or
15 consumed memory. These are the resources that you choose
16 to collect data so you can emulate them and display them
17 during the execution of the test.

18 Q. What did you do after you selected the device to test?

19 A. Sure. So the third step is I basically go to that
20 Network Virtualization panel that you see on the right-hand
21 side. I enable it by clicking the check box, and I choose
22 the specific network profile -- network characteristic that
23 I would like to simulate.

24 And as you can see there are various options
25 available. In this case I chose a 4G typical connection

1 for simulation.

2 Q. And, finally, when you run the test, what do you
3 ultimately see?

4 A. So this is ultimately -- after you have set this up,
5 this is where I am executing the test as the application is
6 running. So the application is running, as you can see on
7 the right-hand side. You see the phone with the number 2
8 in it, that's one of the screens of the application.

9 You can see, as the application is running, I'm
10 able to -- the product displays these resources of the
11 mobile device that are being simulated; in other words,
12 being emulated. You can see the word "simulation" in the
13 panel itself, in the control panel next to the phone.

14 You can see the device metrics, CPU, central
15 processing unit, memory. These are resources of the mobile
16 device that are being emulated and being displayed as
17 required by the invention.

18 On the left-hand side, we are looking at another
19 type of resource. This is the throughput of the device.
20 We know it is the throughput of the mobile device because
21 it says client, client. And client is basically, in the
22 client server model that we've been talking about, client
23 is always the mobile device. So whenever you see the word
24 "client," that's mobile device, and server is the back end.

25 So, in this case, you can see that, as I'm

1 executing the test, we are able to see various resources of
2 the mobile device being simulated and being displayed.

3 Q. Now I'd like to talk about some of the specific errors
4 that Dr. Shoemake says that he found in your analysis. If
5 we could go over each one so you could respond to the jury
6 and let them know your position on those.

7 A. Yes.

8 Q. We'll start with the first one. Dr. Shoemake said that
9 the accused products don't, quote, emulate -- or, I'm
10 sorry -- don't have a application for a mobile device.

11 Starting with the actual language of the claim,
12 why is Dr. Shoemake wrong?

13 A. Well, he's not reading the preamble of the claim
14 correctly. The preamble of the claim is the first bullet
15 here. It says: "A system for developing an application
16 for a mobile device." The preamble -- that's the preamble
17 of '192.

18 The other ones -- the other two says: "A system
19 for testing an application for a mobile device."

20 So what is claimed is a system for developing an
21 application, not an application for a mobile device. He's
22 taking a portion of the preamble for his analysis; he's not
23 taking the entirety of the preamble for his analysis.

24 Q. We also heard from Mr. Bachar.

25 Do you recall that?

1 A. Yes, sir.

2 Q. And he was discussing the types of applications that
3 their products test, and he was asked, "How many different
4 types of mobile applications are there?"

5 And he responded, "There are mainly three." And
6 then he discusses those three.

7 Can you explain to the jury what the differences
8 are between these three and how they work with the accused
9 products.

10 A. Sure. So we heard testimony from Mr. Bachar. That's
11 one of Micro Focus' engineers. He provided testimony
12 through video.

13 And the question was asked from him: How many
14 different types of mobile applications are there?

15 And he said, "There are mainly three. The first
16 one will be a native application. The second one will be a
17 Mobile Web application. And the third one will be
18 hybrid-based application."

19 And so the difference between these is that a
20 native application is an application that is native to the
21 device. So, for example, an iOS application only executes
22 on iOS, versus an Android application only executes on a
23 Android device. That's a native application.

24 Then you have a second category of mobile
25 applications, which are called Mobile Web applications.

1 These are applications that can execute on different kinds
2 of devices. They use Web technology.

3 And the third category is a hybrid, where it is
4 basically combination of native and Web technology for
5 constructing apps.

6 Now, the importance of this is that one of the
7 questions that may have come up is why there are two mobile
8 testing protocols in the case that I've pointed to, because
9 different protocols of the Micro Focus product is used for
10 testing different kinds of application.

11 So there is the native mobile testing protocol,
12 which is used for testing a native and hybrid-based
13 applications, and there is the mobile TruClient protocol
14 that is used for testing of Mobile Web applications.

15 Q. I believe Dr. Shoemake specifically took issue with
16 whether or not, in that second case, the Mobile Web
17 application, whether you actually tested a mobile
18 application or whether -- I think he called it a Firefox
19 browser.

20 How do you respond to that?

21 A. Again, you know, with all due respect to Dr. Shoemake,
22 he misrepresented my infringement analysis here.

23 My infringement analysis is not that I'm testing
24 the browser; I'm testing the Bank of America application
25 that is shown here. So this is a Mobile Web application.

1 As Mr. Bachar testified, this is one category, one
2 important category of mobile applications. It's a Mobile
3 Web application where the implementation of the application
4 is through Web technology.

5 He misrepresented my opinion that I'm opining that
6 I'm testing the browser. I'm testing the Bank of America
7 application in this experiment that I've done here.

8 Q. And how do you know that by looking at this picture?

9 A. Well, you can see Bank of America in the right-hand
10 side. That's the -- and I think the test that I actually
11 did was to put in a ZIP code. In the Bank of America
12 application, there is a place where you can search for your
13 local bank branch. And I put in a ZIP code and I searched.

14 And we have a video of that, but we didn't have
15 time to show it to the jury. But I've actually recorded
16 another video for that.

17 Q. There was also some question about whether Micro Focus'
18 products could be used to develop applications. How do you
19 respond to that?

20 A. Well, my opinions are that the products are used for
21 development. Development, as I've testified, involves
22 writing of the source code and testing of the source code.

23 And Micro Focus' own documents agree with my
24 understanding of software development. Here, you can see
25 on the right-hand side, they say, "...integrations to

1 support end-to-end mobile app development."

2 And if you look below that, the first bullet, it
3 says, "...to record and run load and performance tests for
4 mobile apps."

5 So Micro Focus' own documentation confirms my
6 opinion that testing is part of software development.

7 Q. Another theme that we've heard from some of Micro
8 Focus' witnesses are, well, this is just a datasheet. It's
9 a marketing document. We just give these two to our
10 customers.

11 How do you respond to that?

12 A. Yes. So I've heard testimony that these are marketing
13 documents, but you have to -- well, first of all, I have
14 not only relied on marketing documents, I've also relied
15 on -- in addition to source code, I've also reviewed user
16 guide, which is a technical document.

17 But some of the material that I've relied on, some
18 of it is marketing documents. There are two points to be
19 made about this.

20 One is that a marketing team is not going to
21 create a document without consulting the engineers in the
22 company, because marketing folks are going to have to know
23 what the product does. They talk to engineers, they figure
24 that out, and they write it. So there is a collaborative
25 effort that goes into producing marketing documents.

1 The second point to be made here is that you have
2 to consider who are the customers of LoadRunner? Who are
3 the customers of Micro Focus products? They are engineers,
4 right?

5 So the person that is going to go and look at
6 these marketing documents to determine if they actually
7 want to purchase that product is an engineer, is a software
8 engineer.

9 So these marketing products are written in a
10 technical way. They are technical documents because they
11 are intended for consumption by software engineers.

12 Q. So, with respect to Dr. Shoemake's first issue
13 regarding the application and ability to develop it with
14 Micro Focus' products, did you determine that limitation in
15 the preamble is infringed; and if so, for which products?

16 A. Yes. I determined that it's infringed, and it's
17 infringed by all the products.

18 Q. I'd like to move on to the next issue he raised with
19 your analysis. And I believe he said that the accused
20 products are not, quote, a software authoring interface.

21 How do you respond to that?

22 A. Well, I disagree with him.

23 Q. And why do you disagree with him?

24 A. I think we have -- yes. So a software authoring
25 interface basically means a software development

1 environment, which involves writing source code and testing
2 the source code.

3 And I've showed lots of evidence to the jury as to
4 Micro Focus' own documents that describe their tools as
5 tools for software development and for testing.

6 Q. We see an excerpt from a LoadRunner User Guide. Can
7 you explain how this supports your determination that Micro
8 Focus' products do include a software authoring interface.

9 A. Right. So this is LoadRunner User Guide that talks
10 about VuGen. VuGen is a virtual user generator. It's the
11 tool that you use to create the test script. You saw that
12 in my video, but you also saw that in Mr. Staten's video
13 that he had prepared.

14 So, as you may recall, in VuGen, that's where you
15 actually create the script, the test script. And so it
16 satisfies the notion of a software authoring interface
17 because you are developing the test script for software
18 development.

19 Q. And, for the record, I believe you are reading from
20 PX-40. That's at dash 42; is that right?

21 A. Yes, sir.

22 MR. ALBERTI: Tom, can we get the next slide?

23 BY MR. ALBERTI:

24 Q. I think we've got another document. Again, this is
25 from the LoadRunner User Guide, PX-40. It's at dash 55.

1 Can you explain how this shows that the accused
2 products do, in fact, include a software authoring
3 interface.

4 A. Yes. So, again, in addition to the videos that I
5 showed to the jury, and also Mr. Staten himself showed
6 videos of using VuGen to edit and create test scripts, here
7 is explicit statement from LoadRunner User Guide that says:
8 VuGen's editor enables you to edit recorded scripts.

9 So if you are editing these scripts, you are
10 obviously authoring the -- it meets the limitation of a
11 software authoring interface.

12 MR. ALBERTI: Can I get the next slide, Tom.

13 BY MR. ALBERTI:

14 Q. So, based on your analysis, were you able to determine
15 that the accused products infringe this limitation; and, if
16 so, which products?

17 A. Yes. They infringe, and all of the products infringe.

18 MR. ALBERTI: Next slide.

19 BY MR. ALBERTI:

20 Q. The next issue that Dr. Shoemake took with your
21 analysis was that he claims the accused products do not
22 meet the, quote, one or more profile display windows
23 limitation.

24 Do you agree with that?

25 A. I don't agree with his opinion, no.

1 Q. And to refresh everyone's recollection we know there
2 was a Court's claim construction for this term. Can you
3 explain -- or is that your understanding of the
4 Court's claim construction that we see here?

5 A. Yes. So this is -- this is Court's construction of
6 this part of the claim language. Basically, the Court has
7 provided clarification as to what is the meaning of that
8 highlighted text.

9 And the Court has construed that to mean "emulate
10 simultaneously, and display one or more windows showing
11 resources of the mobile device that are available to the
12 application."

13 The Court has also construed "emulate" to mean
14 "simulate." And so that is the Court construction that
15 I've applied in my analysis.

16 Q. And were you able to determine that the accused
17 products, in fact, do satisfy this claim limitation?

18 A. Yes.

19 Q. So with reference to your test -- this is PX-35-291 --
20 can you explain how this, in fact, does include display
21 windows that emulate and show resources of the mobile
22 device.

23 A. Yes, sir. So this, again, is a screenshot of me using
24 the product in my testing and analysis.

25 On the right-hand side, as I explained, is when

1 I'm running the test as the application is executing. As
2 I'm testing the application, I'm able to obtain these
3 displays, right? The tool shows these displays that are
4 showing resources of the mobile device that are being
5 simulated.

6 The tool itself refers to it as "simulation."

7 And as I've testified earlier, device metrics like
8 CPU, memory, and throughput, these are resources of the
9 mobile device that are being simulated and are being
10 displayed.

11 Q. And, again, we've heard from Micro Focus throughout
12 this trial and its witnesses that they don't really do an
13 emulation or a simulation; instead, it's a reflection.

14 How do you respond to that?

15 A. I have never heard of the word "reflection" in the
16 context of mobile application testing. It is not a term of
17 art. It's not clear what it really means or what they
18 really mean by that.

19 And, you know, the claims don't require
20 reflection. The claims require simulation or emulation.
21 And I don't understand how that opinion supports the
22 infringement.

23 Q. But what do their own products say, for example, when
24 you're running this test?

25 A. Their product is saying simulation. As you can see,

1 that's -- I've basically zoomed in on the text from their
2 product.

3 Q. And did your review of the source code also confirm
4 that, internally, Micro Focus calls this an emulation?

5 A. Yes.

6 So, as I've said, I've reviewed the source code
7 for my analysis; I haven't just relied on documents. And
8 when I look at the source code, I see the word "emulation,"
9 "simulation," everywhere. And I actually see the source
10 code performing emulation and simulation.

11 I have reviewed thousands of pages of source code.
12 I have printed about, you know, close to 500 of them. And,
13 you know, due to time constraints, I wasn't able to show
14 you all of it, but here's an example of source code from
15 the accused product with the function name "start
16 emulation," which I think is pretty self-explanatory what
17 it's doing.

18 Q. Moving on to your other test, I understand that there
19 was some issue that was raised regarding throughput. Can
20 you explain how throughput is a display of resources of the
21 mobile device during execution.

22 A. Yes. So this is for -- this is showing the interface
23 of -- the user interface of LoadRunner for the second --
24 one of the second tests that I did, and you can see that
25 one of the graphs that you get is average throughput.

1 And so I also presented in my testimony on Tuesday
2 what is the definition of throughput. In the field,
3 throughput is defined in terms of resources of the mobile
4 device.

5 And I think if you go to -- there's a next slide
6 here that also shows that Micro Focus also agrees that
7 throughput is a resource of the mobile device.

8 On the right-hand side you can see that the
9 average throughput graph in their own documentation -- and
10 this is a technical document, this is the LoadRunner User
11 Guide -- they define it as resource usage on the Y-axis on
12 that graph, as you can see on the legend, over time. And
13 so this confirms my own understanding of what is
14 throughput.

15 You can see that it shows the client data. And,
16 again, client machine is mobile device in this context.
17 And I've highlighted the parts of the description of the
18 throughput that talks about that as well.

19 Q. And I believe you were referencing PX-40-1339 and 1340.

20 How does that compare to the resource usage that's
21 discussed in Mr. Poulin's patents?

22 A. They are basically the same. You saw the graphs from
23 the patents where we have the bar chart. Well, here,
24 instead of a bar chart, we have, I think, some kind of -- I
25 don't know what this kind of chart is called, but it's a

1 different kind of chart that we're looking at. But it's
2 basically capturing the same information, and it has the
3 same usage.

4 This is important for developers because they can
5 understand how their application behaves when they execute
6 these tests on different types of networks and different
7 types of devices.

8 Q. I want to clear up one potential area of confusion
9 yesterday. Dr. Shoemake referred to a test that he
10 performed, and I think we're looking at it right here. Did
11 this -- does this test have anything to do with the actual
12 products that are at issue in this case?

13 A. No. So I just want to be -- I just want to make sure
14 that it's clear to the jury that this is not LoadRunner
15 product. He didn't actually perform a test with the
16 LoadRunner product.

17 This is a screenshot of a completely different
18 product called Speedtest. You know, you can go to
19 Speedtest.net, is a website basically that people use all
20 the time to test the speed of their home network. So if
21 you have -- if you're having network problems or if your
22 network is not fast, you can test to see how fast is your
23 network.

24 He had access to LoadRunner products. He could
25 have performed the test using LoadRunner products to show

1 throughput -- or, potentially, rebut my opinion that
2 throughput is not a resource of the mobile device.
3 Instead, he's doing something completely different. He's
4 testing a completely different product here.

5 Q. Okay. Now, the final issue he took -- and, to be
6 frank, I didn't quite track what his position was with this
7 last issue. Apparently, he argued that the products do not
8 meet, quote, a software authoring interface configured to
9 profile display windows...when executing the application.

10 Were you able to understand his position here?
11 And, if so, what's your response?

12 A. I couldn't quite clearly determine what is his opinion
13 here because he was throwing different arguments when he
14 was explaining this part of his opinion.

15 He mentioned reflection, which, as I said, doesn't
16 have really a particular meaning in this area of mobile
17 application testing. But, nevertheless, I have slides to
18 show that the product meets this limitation.

19 As I've showed -- I've showed this multiple times,
20 even today -- on the right-hand side where we see the 2,
21 plus, minus, that is an actual application. Actually, that
22 turns out to be Micro Focus' own application called
23 Advantage Shopping. So, basically, it's an application for
24 e-commerce, for example, purchasing -- similar to Amazon,
25 for example.

1 And I'm running a test on that application on the
2 right-hand side. And, as you can see, as I'm executing the
3 application during the test I'm able to see the resources
4 of the mobile device that are simultaneously being
5 displayed here.

6 Q. And you're referring now to PX-35-291?

7 A. Yes, sir.

8 Q. So, in summary, were you able to determine -- even
9 notwithstanding whatever argument Dr. Shoemake presented
10 yesterday -- that the accused products satisfy this
11 limitation; and, if so, which products?

12 A. Yes. They all -- all of the accused products satisfy
13 this claim limitation.

14 Q. So, as a summary, can you tell us, for both Claims 1
15 and 2 of the '192 Patent, which of the accused products did
16 you determine infringed these claims?

17 A. All of the accused products infringe the claims.

18 Q. We move now to the '864 Patent, Claims 1 and 2. Which
19 of the accused products did you determine infringed both of
20 these claims?

21 A. All of the accused products infringe the claims.

22 Q. We can move now to the '678 Patent, Claims 45 and 49.
23 Which of the accused products did you determine infringed
24 these claims?

25 A. All of the accused products infringe the claims.

1 Q. There are a couple other points I'd like you to
2 address, and they relate to the importance or the value of
3 network simulation, the types of inventions that Mr. Poulin
4 came up with.

5 And the first issue I want to address with you
6 relates to a point that Dr. Shoemake raised, that this
7 functionality is actually, quote/unquote, given away for
8 free by Apple, and they started to do this in 2012, seven
9 years after Mr. Poulin came up with this invention.

10 Does that opinion support -- or does that fact
11 support your opinion, or does it support an opinion that
12 this has no value?

13 A. I believe it supports my opinion that it has a lot of
14 value.

15 Q. Why is that?

16 A. Well, Apple is providing this for free because they
17 want developers to build and test high-quality useful
18 applications for consumers to upload to their App Store,
19 from which they make a ton of money. So for every app that
20 you purchase on App Store, Apple gets, I believe,
21 30 percent of that revenue.

22 And also, if App Store didn't have any apps on it
23 or didn't have a lot of apps on it, nobody would want to
24 buy iPhone; because iPhone, without apps, is useless.

25 So they have -- Apple has a ton of incentives to

1 provide this product to make sure developers are developing
2 high-quality applications; they can properly test the
3 applications; that the applications work on different
4 iPhones and on different networks.

5 So then the platform, as a whole, becomes more
6 successful. People buy more iPhones because it has great
7 apps on it. But also, when people purchase apps on iPhone
8 App Store, they're also paying significant portion of the
9 revenue from that to Apple.

10 Q. Is it fair to say that Apple makes billions of dollars
11 a year because people can test applications and put them on
12 their App Store?

13 A. Yes, sir.

14 Q. And I believe we saw a slide in this case from HPE that
15 talked about the fact that Network Virtualization was
16 needed to, quote/unquote, accelerate time to market. Do
17 you remember that?

18 A. Yes, sir.

19 Q. How does that allow Apple to make even more money when
20 using this network emulation software?

21 A. Well, more developers are willing to develop Apple
22 apps, or iOS iPhone apps, because it's easier for them to
23 develop it. It makes it faster for them to develop it and
24 put it on the market, so they can make money faster. Which
25 is also good for Apple, because they're going to make money

1 faster as well.

2 Q. And I believe there was also some mention of Android
3 Studio. Can you explain the similarities between Google
4 giving this stuff away for free and Apple giving this stuff
5 away for free and the benefit, monetary benefit to Google.

6 A. It's the same analysis. So Android is a competitor to
7 Google through Android. It's competing with Apple's iPhone
8 and iOS. And so they also provide the same Network
9 Virtualization testing capabilities, being Android Studio,
10 because they would like developers to develop high quality
11 applications, make it easier for them to develop more
12 applications, develop it faster, be able to put it on
13 Android play store; so, that way, they can compete with
14 iPhone.

15 Q. And do you know if Google makes in the billions of
16 dollars a year because of this software?

17 A. Yes. So when you put your app on -- to put your app --
18 to put your Android app on Google App Store, you actually
19 have to pay them a fee. And then, after that, if it's a
20 purchase, you also have to pay a certain portion of that to
21 Google. So they also make a lot of money by having a
22 successful what we call app ecosystem. That means, you
23 know, a system where there's lots of apps available for
24 consumers.

25 Q. Are you familiar with the Google search engine?

1 A. Yes, sir.

2 Q. Is that, quote/unquote, free?

3 A. Well, it is -- obviously, it's a very useful service
4 provided to people for free, but then Google is actually
5 making a lot of money from the advertising that they're
6 able to serve on Google pages.

7 It's a very effective tool. Because when you
8 search for a term -- like, for example, I can search for,
9 you know, any kind of product. For example, I'm searching
10 for Nike shoes. Right? If I put that in, Google can
11 determine my intention, which is that I'm a consumer, I'm
12 looking for buying Nike shoes. Then they are able to serve
13 advertisement that is targeted towards me. And so they
14 make their money off of that free service that they are
15 providing.

16 Q. So even though the Google search engine is,
17 quote/unquote, free, do you think it has a lot of value to
18 Google?

19 A. I would say it's the backbones. It's the core
20 functionality of what makes Google, you know,
21 billion-dollar company.

22 Q. I want to ask you a little bit about these,
23 quote/unquote, scripting protocols. And there was some
24 discussion that the damages should be limited because only
25 certain protocols are relevant.

1 Do you recall that?

2 A. Yes, sir.

3 Q. And we saw this slide in Dr. Shoemake's presentation
4 that apparently shows some protocols.

5 First of all, is this slide out of any Micro Focus
6 document?

7 A. No. This -- I understand it, is something that someone
8 from Micro Focus has created, but it's not a Micro Focus
9 document. It's for the purposes of litigation.

10 Q. And are all protocols here equal as far as value goes?

11 A. No, they are not.

12 So this slide is really misleading. And the
13 reason for -- there are several reasons for that.

14 First of all, software is not bunch of boxes,
15 right? It's not like you can -- like, this figure, this
16 picture, makes it seem like you can only choose one of
17 these boxes. But, in reality, when you use LoadRunner
18 product, you can use multiple of these protocols together.
19 Not only you can, but you often do use multiple of these
20 boxes together.

21 Second -- right -- so first is that these boxes
22 are not separate. The picture makes it sound like you can
23 choose one or the other. They are not mutually exclusive.
24 They work together. And in most testing you actually run
25 multiple -- you use multiple of these protocols.

1 The second issue is that they are not -- they are
2 not all equal size. Some of these are more valuable than
3 others. Most systems nowadays -- and we all know it,
4 intuitively -- most systems have mobile apps. Right? So
5 mobile is the way you actually access all sorts of
6 services, from the way you purchase your -- purchase things
7 on Amazon, to Facebook, to Instagram. Most people are
8 using mobile to access those resources.

9 So these mobile protocols that are shown here are
10 actually much larger in size than some of these other
11 protocols that are shown here, which are basically obsolete
12 technologies or very old technologies. It is just people
13 don't develop technologies in that way, and there is not a
14 lot of need for testing them.

15 And so, for those reasons, I think this is a
16 misleading figure to use for apportionment analysis.

17 Q. And I believe we also saw another -- an actual Micro
18 Focus document in this case that said, you know, NV, you
19 know, emulates for all protocols.

20 Do you recall that?

21 A. Yes, sir.

22 Q. And how does that relate to this analysis?

23 A. Well, NV can be used with all of these protocols,
24 because NV is Network Virtualization, and all of these
25 protocols are -- have something to do with network. And

1 so, yeah, so NV also ties in with all of these protocols
2 shown here.

3 And I think the main point here is that these
4 boxes are not independent of each other. When you look at
5 source code, it doesn't look like this. It looks
6 different. And so there is lot of dependencies. They can
7 be used together. And the boxes are not of equal size.
8 Some are just significantly more important than others.

9 Q. The other argument Dr. Shoemake made to try to
10 drastically reduce the value of Mr. Poulin's inventions is
11 he focused on, quote/unquote, available graphs.

12 Do you recall that?

13 A. Yes, sir.

14 Q. And he presented this slide.

15 First of all, is this slide from any Micro Focus
16 document in this case?

17 A. No, sir.

18 Q. So how do you respond to the fact that, you know,
19 according to him, well, you know, you only see a couple
20 graphs in your testing; and, therefore, we should only, you
21 know, divide by the number that you showed us examples,
22 versus all these possible graphs you had with the product?

23 A. Yeah. So, again, I think this figure is misleading.
24 Because there is a presumption here that without the
25 innovations, without the invention, these graphs would be

1 useful.

2 As we saw from Micro Focus' own documents and as
3 I've testified, Network Virtualization allows you to do
4 much more accurate testing of your product. And so what
5 these graphs are doing is that they are showing the result
6 of the testing that you do.

7 Now, if you take away the invention, it means that
8 the testing that you are doing is inaccurate. You are able
9 to display it using the graph, but the graph would be
10 completely useless because what it's displaying is
11 inaccurate results.

12 My opinion is that without the invention all of
13 these graphs would be useless because what they are showing
14 at that point is inaccurate testing results.

15 As a developer, I cannot rely on those graphs for
16 determining how my application performs because I'm missing
17 the core part of the product which allows me to do accurate
18 testing of my application on different types of networks.

19 Q. And speaking of -- again, I think you called it a core
20 part of the product. I'll take us way back, again, to the
21 very beginning of the case when you talked about the
22 architecture.

23 Do you recall that?

24 A. Yes, sir.

25 Q. And when you do an apportionment analysis it's

1 important to say, okay, what's -- you know, what does the
2 scope of this invention cover with respect to the
3 architecture.

4 Referring now again to the LoadRunner
5 architecture, can you explain to the jury how much of this
6 is covered by Mr. Poulin's inventions?

7 A. Yes. So the way you perform an apportionment, and the
8 way I did it, is that I started with the invention. I
9 started with the claim language.

10 The claim language doesn't talk about protocol;
11 doesn't talking about graphs. Those two words don't show
12 up anywhere in the claim. So I think just use those for
13 apportionment just is arbitrary.

14 So I start with the invention. I determine what
15 is the boundary, what is the scope of this invention. And
16 then I mapped it to the LoadRunner product.

17 And at a high level, as I testified, LoadRunner
18 product has these components: VuGen, controller, analysis,
19 and Network Virtualization. And the Poulin invention has
20 elements in all these four components.

21 So I mapped the invention to the entirety of the
22 system, not just specific arbitrary parts of the system.

23 Q. Now I want to go to one last thing. And -- were you
24 here for Dr. van der Weide's testimony regarding the
25 validity of Mr. Poulin's inventions?

1 A. Yes, sir.

2 Q. And do you know what an element-by-element analysis is
3 as it pertains to validity?

4 A. Yes. So element-by-element analysis is basically what
5 I did on Tuesday when I walked the jury through each
6 element of asserted claim. Each element of an asserted
7 claim has certain limitation.

8 For infringement analysis, I have to show that the
9 accused products have that limitation; they actually
10 practice that particular limitation that is in the
11 invention.

12 For the case of validity or invalidity analysis,
13 the expert has to do the same exact thing that I did for
14 infringement except they have to show that each limitation
15 of each claim is met in some prior art.

16 Q. Now, we didn't see that yesterday, so I don't really
17 have anything to ask you about an analysis that we never
18 saw. But I just want to hit a couple -- just a couple key
19 points, because I know you have some response to at least
20 the things that you did hear.

21 And one of the things that we heard was that the
22 primary reference that Dr. van der Weide said invalidates
23 all of these patents, right, was this J2ME toolkit.

24 Do you recall that?

25 A. Yes, sir.

1 Q. And how many documents regarding that J2ME toolkit did
2 he present to the jury yesterday?

3 A. One.

4 Q. Okay. Do you know whether the Patent Office considered
5 that in -- that toolkit in granting Mr. Poulin's
6 inventions?

7 A. Yes, sir, they did.

8 Q. Did they consider even more documents than just that
9 one document before they analyzed the patents and issued
10 them?

11 A. Yes, sir.

12 So, here, I'm showing the documents that USPTO --
13 that's the United States Patent Office -- considered in
14 granting the patents, the Poulin patents; in this case, the
15 '192.

16 And you can see that they have cited, I believe,
17 nine documents -- nine documents, including the user guide
18 that we were looking at yesterday -- they have cited nine
19 documents in the patent itself.

20 There is a section in the patent that talks about
21 references cited. These are the documents or prior art
22 that the examiner has considered in granting the patent.

23 And you can see that they have looked at or they
24 have considered nine J2ME documents in granting the
25 patents.

1 Q. And you're reading right from the patent, right? PX-3
2 and PX-2?

3 A. That's right.

4 Q. So they looked at nine documents related to J2ME,
5 right?

6 A. Yes.

7 Q. He looked at one, fair?

8 A. Yes, sir.

9 Q. So, given the fact that the Patent Office considered
10 all nine and he only considered one, who did more due
11 diligence there?

12 A. I would say the Patent Office did.

13 Q. Did Mr. Poulin also explain to the Patent Office why
14 his invention is completely different from J2ME?

15 A. Yes.

16 So, in the patent itself, in the specification of
17 the patent, Mr. Poulin describes the differences between
18 his invention and J2ME. And I've highlighted -- this is
19 actually text from the patent itself where the patent
20 itself describes how it's different from J2ME.

21 Q. And I believe you are looking at an excerpts from PX-3,
22 the '192 Patent, at Column 4, lines 12 through 20.

23 A. Yes, sir.

24 Q. So Mr. Poulin explained to the Patent Office why, look,
25 we're way better than J2ME. He gave the Patent Office nine

1 different documents about J2ME to look at, right?

2 A. Yes.

3 Q. And what did the Patent Office do?

4 A. They granted the patents. They found it to be novel
5 and innovative over the prior art.

6 Q. There was also some discussion in this case about
7 whether HP knew about these Poulin patents.

8 Do you recall that?

9 A. Yes, sir.

10 Q. And do you know whether or not that is correct?

11 A. I believe it's correct.

12 Q. And how do you know that?

13 A. Well, you can see here that the Poulin patents have
14 been -- have been documents that have been cited in some of
15 the HPE and Micro Focus' own patents.

16 Q. And I believe you are reading here from PX-363.029,
17 033, 077, 117, 157, and 200; is that correct?

18 A. Yes, sir.

19 Q. Finally, Dr. van der Weide made some discussions about
20 what's called written description and enablement.

21 Do you recall that?

22 A. Yes.

23 Q. And if I understand him correctly -- and it was a very
24 short presentation, so I'm not sure I follow 100 percent.
25 But I think what he was saying is that, for some reason,

1 the patents don't show testing on an actual mobile device.

2 Is that your understanding?

3 A. Yes, sir.

4 Q. Okay. First, can you explain to the jury what a proper
5 written description and enablement analysis would look
6 like.

7 A. Yes.

8 So it would be the same as what we talked about.
9 You have to evaluate the claim limitations and then
10 determine if those claim limitations are actually described
11 with certain level of detail in the specification itself.

12 Q. Did you hear that yesterday?

13 A. No. His analysis was basically -- you know, with all
14 due respect, was a lot of hand waving. He didn't go
15 through the claims element by element.

16 Q. Did you see even one claim yesterday when he was trying
17 to testify that six of Mr. Poulin's inventions should be
18 taken away?

19 A. He -- I don't believe he showed any claims in his
20 presentation.

21 Q. So let's just address the one point he was trying to
22 make, this point about there's no real mobile device in
23 Mr. Poulin's patents.

24 Do you agree with that?

25 A. No.

1 Q. Why not?

2 A. Well, I mean, one of the figures itself shows the
3 mobile device. I think it's pretty clear that the patent
4 is describing -- you know, in this example -- these are
5 examples, by the way, from the spec. There are two
6 embodiments that are being discussed here, right? There is
7 the testing of the mobile application in an emulated
8 setting, which is the top portion, the unhighlighted part
9 at the top. And there's the testing of it on an actual
10 mobile device.

11 And then the figure itself is accompanied with
12 text that says "Step 714 is optional and is particularly
13 suited for testing applications running on a mobile device
14 that is a mobile phone."

15 I think the spec itself is also very clear that
16 you can perform this kind of testing on a real device.

17 Q. And in the patent, just to be clear, does it -- what
18 does it describe mobile phone -- mobile device 114 to be?

19 A. That to be a physical real mobile device.

20 Q. So a person of ordinary skill in the art reading this,
21 would there be any doubt in their mind that Mr. Poulin
22 describes testing on a real mobile device?

23 A. No. So when you perform an analysis of a patent you
24 have to do it from the perspective of a person of ordinary
25 skill in the art. In this case all the experts have agreed

1 that that is someone with a bachelor's degree in computer
2 science or electrical engineering or computer engineering
3 and at least one year of experience.

4 And I believe somebody with that level of
5 expertise would know about testing and would know about
6 testing of mobile applications on a mobile device.

7 Q. I see on your final slide here you've got a couple
8 excerpts from the patent. I see PX-2 at Column 7, 11
9 through 17; PX-3 at Column 6, line 65 through Column 7,
10 line 3, and Column 10, lines 15 through 25.

11 Again, just very briefly, a person of ordinary
12 skill in the art, would they have any trouble understanding
13 or enabling the claimed inventions here?

14 A. No. I think -- so these are disclosures about testing
15 on a real mobile device from the spec itself. And I think
16 a person of ordinary skill in the art would have no trouble
17 reading this and understanding how to do it.

18 Q. One final question, sir. Are Mr. Poulin's patents
19 valuable?

20 A. Yes, they are.

21 MR. ALBERTI: No further questions.

22 THE COURT: Cross-examination?

23 MR. SHELTON: Yes. Thank you, your Honor.

24 *

25 *

1 CROSS-EXAMINATION OF SAM MALEK

2 BY MR. SHELTON:

3 Q. Good morning, Dr. Malek.

4 A. Good morning.

5 MR. SHELTON: Could I have PDX-3.32, please.

6 BY MR. SHELTON:

7 Q. Now, the first thing that you were asked about,
8 Dr. Malek, was about your testing of the combination of
9 LoadRunner, Network Virtualization, and UFT Mobile, right?

10 A. Yes, sir.

11 Q. And you were asked about your testing; and,
12 specifically, about whether UFT Mobile emulates resources
13 of the mobile device that's being tested, right?

14 A. I believe so, yes.

15 Q. And you showed the jury a little snippet of source code
16 on that blue paper, right?

17 A. I believe so, yes.

18 Q. And in that source code, if I understood it right, you
19 were telling the jury that source code is what actually
20 emulates resources on the mobile device. Is that what you
21 were saying, sir?

22 A. I believe -- I don't recall the source code right now.

23 So I have source code citations for emulation of
24 resource of mobile device, and I've also have source code
25 citations for emulation of network.

1 Q. But the impression that you wanted to leave with the
2 jury is that that source code related to emulating
3 resources on a mobile device; isn't that correct?

4 A. I don't believe so. I was basically pointing out the
5 fact that I've relied on source code in addition to my
6 testing and documentation. And the source code citations
7 also support my opinions about, you know, the elements that
8 I've identified in the accused products.

9 Q. Let's go back to the claim language.

10 You certainly do agree, don't you, Dr. Malek, that
11 as Wapp's infringement expert you have to show for each of
12 the two combinations of Micro Focus software that that
13 software is actually programmed to meet all the limitations
14 of the claims?

15 A. Yes. I have to show that the system has the infringing
16 features, yes.

17 Q. Right. All of them, right?

18 A. Yes, sir.

19 Q. And would you agree that -- and I'm showing you Claim 1
20 of the '192 Patent.

21 Do you agree, sir, that this claim requires that a
22 mobile application is tested, whether real or emulated?

23 A. It requires -- it requires a system for developing and
24 testing an application for -- yeah, uh-huh.

25 Q. And so it does require that you have an actual mobile

1 device, whether real or emulated?

2 A. Yes. It requires a mobile device, either real or
3 emulated, yes.

4 Q. Okay.

5 MR. SHELTON: Now could we go to PDX-3.53.

6 Thank you.

7 BY MR. SHELTON:

8 Q. And so you testified that this screen on the right-hand
9 side -- this is from LoadRunner, right?

10 A. Yes.

11 Q. And it was your testimony today that this screen shows
12 that the resources of the mobile device are being emulated,
13 correct?

14 A. Yes, sir.

15 Q. And then --

16 MR. SHELTON: Now let's go to PDX-3.57.

17 BY MR. SHELTON:

18 Q. And you cited this this morning as evidence to the jury
19 that you found source code that shows emulation of the
20 resources, right?

21 A. This is showing -- this is showing the starting of the
22 emulation of -- I believe this is with respect to network
23 emulation, actually.

24 Q. Right, sir.

25 So that has nothing to do with emulating resources

1 of a mobile device; isn't that true?

2 A. No, that's not true. Because when you're emulating the
3 resources the resource emulation itself gets impacted by
4 network emulation. So the two are actually related.

5 MR. SHELTON: Well, let's go back to PDX-3.53.

6 BY MR. SHELTON:

7 Q. You testified that this screen shows that resources of
8 a mobile device are being emulated. And then your counsel
9 took you to the source code I just showed you, and you told
10 this jury, under oath, sir, that that source code is what
11 performs that action, did you not?

12 A. I think you're misrepresenting what I testified.

13 What I said is that, in addition to all the
14 documents that I've reviewed and also all the testing that
15 I've done, I have also reviewed the source code. And -- I
16 have reviewed thousands of pages of source code. There is
17 about 500 of them that I've printed and I've cited to in my
18 report. For the purposes of -- for time purposes I can't
19 show all the 500 source code citations that I've printed
20 that are in my report. And I'm showing excerpts of source
21 code that are relevant as examples of the evidence that
22 I've relied on to the jury.

23 Q. Now, will you even see -- this screen on the right that
24 shows that reflection of the mobile device -- will you see
25 that in LoadRunner if there are no mobile devices connected

1 to UFT Mobile server?

2 A. If you don't have mobile devices connected, no, then
3 you won't be able to do the test.

4 Q. Right. And you will never see the screen, correct?

5 A. You would -- no, you wouldn't see the right side of the
6 screen. You would still be able to see the left side of
7 the screen.

8 Q. Right. But the -- what you're saying is on the left --
9 I'm sorry -- the right side of the screen is the mobile
10 device that's being tested and the resources of the mobile
11 device, correct?

12 A. Yes.

13 Q. And do you agree, sir, that if you do not have a mobile
14 device connected to UFT Mobile you can't even start this
15 test?

16 A. If your system -- I mean, this is a system consisting
17 of these products that are intended to work with each
18 other. If they can't work with each other because they're
19 disconnected, yes, then you can't do the testing.

20 Q. And so if you have the software LoadRunner, Network
21 Virtualization, and UFT Mobile, and you don't have that
22 physical mobile device that you used in your test, you will
23 not see this screen, correct?

24 A. If the system is not set up as a system, if they're
25 disconnected from each other, yes, you wouldn't be able to

1 run a test.

2 Q. Now, you also were asked about the TruClient Mobile Web
3 theory. And, in that one, you agreed on Tuesday that that
4 TruClient browser is actually a Firefox browser. Do you
5 recall that?

6 A. Yes.

7 Q. You freely admitted it.

8 And so, today, you say that the Bank of America
9 site that is being viewed within the Firefox browser is a
10 Mobile Web application. Did I hear that right?

11 A. That has always been my opinion.

12 So what I'm testing is not the browser. I'm
13 testing the application that is loaded in that emulation of
14 the mobile device, which is, as you said, is a resized --
15 it's a browser that is sized to emulate the actual mobile
16 device.

17 A mobile application always -- because it is a
18 Mobile Web, so it's a web technology -- it is, by default,
19 always included in a browser technology.

20 Q. And would you agree, sir, that in the -- when you're
21 using TruClient Mobile Web scripting protocol with Network
22 Virtualization and LoadRunner, as in your theory, that
23 there is no mobile device that's being tested?

24 A. There is a mobile device that is being emulated.

25 There is not a physical mobile device, if that's

1 what you're asking.

2 Q. Well, what is, in your opinion, the mobile device
3 that's being emulated?

4 The browser?

5 A. Well, it's partly that. It's partly what I showed on
6 my screenshot.

7 And then part of the other emulation is what you
8 see in the throughput screenshot.

9 So there are different parts of the mobile device
10 that are being emulated.

11 Q. So there's two mobile devices? Is that your testimony
12 now?

13 A. No. No. What I'm saying is that there are different
14 parts of the mobile device that are being emulated.

15 The claims don't require to emulate the entirety
16 of the mobile device; they're required to emulate parts of
17 the mobile device. And that's exactly what the accused
18 product is doing.

19 Q. And you do agree, though, in your TruClient Mobile Web
20 theory, that there are no resources of a mobile device such
21 as CPU, correct?

22 A. Yes.

23 Q. And there's also no resources of a mobile device, such
24 as free memory, correct?

25 A. Yes. The resource that I'm pointing to there is the

1 throughput, which is an aggregate representation of various
2 resources of a mobile device.

3 Q. Just please answer my question, sir.

4 Is there or is there not any graph for free memory
5 of a mobile device when you use TruClient Mobile Web?

6 A. No, not for that protocol.

7 Q. And there is also not a graph that is shown for the
8 amount of available memory when using TruClient Mobile Web,
9 correct?

10 A. Yes, that's true.

11 MR. SHELTON: Thank you, your Honor. No further
12 questions.

13 THE COURT: Anything additional?

14 MR. ALBERTI: No, your Honor. Thank you.

15 THE COURT: Okay. Ladies and gentlemen, if you
16 have additional questions for this witness -- whether you
17 have them or not, please fold a piece of paper and pass it
18 over to the court security officer.

19 You may step down. Thank you.

20 THE WITNESS: Thank you.

21 THE COURT: What's next for the plaintiff?

22 MS. DAY: Your Honor, plaintiffs call Roy
23 Weinstein to the stand.

24 THE COURT: Sir, you understand you are still
25 under oath?

1 Sir, do you understand you are still under oath?

2 THE WITNESS: Yes, sir, I do.

3 THE COURT: Okay. Very good.

4 Ms. Day, go ahead.

5 MS. DAY: Thank you, your Honor.

6 DIRECT EXAMINATION OF ROY WEINSTEIN

7 CALLED ON BEHALF OF THE PLAINTIFF/DEFENDANT

8 BY MS. DAY:

9 Q. Mr. Weinstein, were you here yesterday for Mr. Nelson's
10 testimony?

11 A. Yes, I was.

12 Q. And what is your understanding of what Mr. Nelson did
13 in this case?

14 A. What Mr. Nelson did is he adopted the framework for
15 calculating damages that I devised. He adopted my
16 framework, but then he changed the assumptions to that
17 framework. But the framework itself that he adopted was
18 mine.

19 Q. And so he agreed with your approach; is that right?

20 A. He did. He adopted the entire framework that I
21 developed and provided.

22 Q. And I believe Mr. Nelson yesterday testified about some
23 changes he made. Do you agree with the changes he made to
24 your analysis?

25 A. I do not.

1 Q. Let's go through those quickly, if we could.

2 Let's take a look at your revenue number, the
3 \$423 million number. Did Mr. Nelson make an adjustment to
4 that number?

5 A. Yes. Mr. Nelson adjusted my revenue number. So the
6 answer to your question is yes, he made a change.

7 Q. And why is the adjustment that Mr. Nelson made to your
8 revenue number incorrect?

9 A. It's incorrect because he didn't follow the
10 interrogatory answer that Micro Focus itself provided in
11 December of last year, just three months ago.

12 And so that interrogatory answer was quite clear
13 that, as of August 2015, Network Virtualization was
14 integrated into the LoadRunner products. That's exactly
15 what the interrogatory answer said.

16 And what Mr. Nelson did is he left out a very
17 significant number of LoadRunner product sales, and thereby
18 ignored that interrogatory answer.

19 Q. How much of the revenue sales of LoadRunner integrated
20 with Network Virtualization did Mr. Nelson leave out of his
21 analysis?

22 A. He left out roughly two-thirds of the sales, which is
23 totally inconsistent with the interrogatory answer.

24 What I did is I followed the interrogatory answer
25 and took the spreadsheet of LoadRunner sales provided by

1 Micro Focus and tabulated those numbers to get the
2 \$423 million.

3 Q. What is the next area of disagreement between you and
4 Mr. Nelson?

5 A. The next area of disagreement relates to the use of
6 profit figures -- and that's the second line on my slide --
7 and which profit figures are appropriate.

8 Q. And would you please explain to the jury what analysis
9 you undertook compared to what Mr. Nelson did.

10 A. Yes. I followed both the contemporaneous business
11 records prepared by HP on this very subject as well as
12 deposition testimony by Ms. Rubenstein on how Micro Focus
13 looked at profitability with respect to ADM products.

14 And so what I did is I followed the actual way
15 that the company looked at this group of products -- both
16 companies looked at this group of products. That's what I
17 did.

18 Q. Now, did Mr. Nelson include executive compensation in
19 his costs?

20 A. Yes. What Mr. Nelson did is different from the way in
21 which both companies examined this area.

22 And so what he did is he included things like
23 executive compensation, payroll costs. And the effect of
24 the additional costs that he included, which were not
25 included in the way in which the companies looked at this

1 product group, was to reduce the profit margins from what
2 the companies themselves saw with this product group to a
3 much lower number.

4 Q. What is the next area of disagreement between you and
5 Mr. Nelson?

6 A. The next area of disagreement between me and Mr. Nelson
7 has to do with line 4 on this slide, which is the
8 appropriate way to apportion down to the value associated
9 with the patents-in-suit.

10 Q. And would you please remind the jury, what is
11 apportionment?

12 A. Well, apportionment is the way to limit payments made
13 for use of the patented technology to contributions that
14 that technology provides to the products, in other words,
15 to the sales of the products that are shown on the top line
16 of this exhibit.

17 Q. And we see that 61.6 percent number. Is that your
18 apportionment number?

19 A. Yes. That's the number that I used, and that's based
20 on the analysis done by Dr. Malek.

21 Q. Did Dr. Malek isolate the value of the patented
22 features?

23 A. He did. And he did it based on a value analysis. That
24 is, he looked at the value of the key features associated
25 with Network Virtualization relative to all the key

1 features associated with sales of the patented products.

2 And he did that based on Micro Focus' own documents.

3 And so, in doing the apportionment analysis, which
4 I relied on, Dr. Malek worked from value propositions
5 associated with Network Virtualization.

6 Q. Did Mr. Nelson isolate value?

7 A. I don't believe so. What Mr. Nelson did is he relied
8 on computer protocols, which are software instructions
9 about how data are to be transmitted.

10 And that's not a financial measure. That's not
11 the kind of measure that a financial analyst or an
12 economist would use for purposes of apportioning to value.
13 They are two different things.

14 And so I believe that Mr. -- what Dr. Malek did
15 here is appropriate, and that's what I relied on.

16 Q. And what is the final area of disagreement between you
17 and Mr. Nelson?

18 A. The final area of disagreement has to do with what I'm
19 referring to as the "bargaining split." And that's, once
20 the apportioned profits attributable to use of the patents
21 have been determined -- and that's the \$223 million on this
22 slide -- how are those profits going to be distributed as
23 between the inventor here, which is Wapp Tech, and Micro
24 Focus.

25 And so that's the final -- that's the final step.

1 And here, once again, I disagree with what Mr. Benson (*sic*)
2 did.

3 Q. And would you please remind the jury how you determined
4 your 77.3 percent?

5 A. Yes. As an economist and a financial analyst, I used a
6 financial concept: Return on invested capital.

7 That's a financial concept that companies like
8 Micro Focus and virtually every company itself use as a
9 measure of their return on investment. And that's a
10 financial concept, and that's what I did.

11 Q. What did Mr. Nelson do?

12 A. He didn't rely on a financial concept. He just said
13 there would be a 50/50 split. There were no documents that
14 he relied on. It's almost as if it came from thin air.

15 It's not a financial concept to say that there is
16 a 50/50 split. I relied on a financial concept that gives
17 Micro Focus the same return on its use of these patents as
18 it makes in other areas of its business. And at the
19 hypothetical negotiation, it would have been willing to
20 accept that return.

21 Q. Are any of Mr. Nelson's adjustments to your analysis
22 proper?

23 A. I've reviewed each of them. I do not believe they are
24 appropriate.

25 Q. And would you please remind the jury what damages Micro

1 Focus should pay to Wapp Tech for infringement of
2 Mr. Poulin's patents.

3 A. Based on my work in this case, I've concluded that
4 damages for the period January 1, 2015, through July 31,
5 2020, are \$172,554,269.

6 Q. And, Mr. Weinstein, just one more question. You've
7 been valuing patents for over 30 years. Are Mr. Poulin's
8 patents valuable?

9 A. I believe they are. I started in this area in the
10 1980s. That's when I first wrote about it and studied it
11 seriously. And I believe these are valuable patents.

12 Q. Thank you, Mr. Weinstein.

13 MS. DAY: No further questions, your Honor.

14 THE COURT: Any questions?

15 CROSS-EXAMINATION OF ROY WEINSTEIN

16 BY MR. SEARS:

17 Q. Mr. Weinstein, time is limited, so I'll be brief.

18 First, I think I heard you characterize
19 Dr. Malek's apportionment as a financial measure.

20 Did I hear that right?

21 A. It's a value measure.

22 Q. I know. I think you also referred to it as a financial
23 measure.

24 A. I'm comfortable with that, sure.

25 Q. Okay. All right. So I just want to be sure we're

1 clear.

2 So you, the economist, relied on Dr. Malek, the
3 technical expert, for a financial measure.

4 A. It is a financial value measure. It's very clear that
5 it was appropriate for me to rely on it.

6 Q. All right. And with regard to this interrogatory
7 response you referenced, did the interrogatory response say
8 anything about add-on licenses no longer being required?

9 Did those words or anything like those words
10 appear in that interrogatory response?

11 A. No.

12 Q. Okay. Thank you.

13 THE COURT: Anything else?

14 MS. DAY: No further questions, your Honor.

15 THE COURT: Okay. Ladies and gentlemen, let's --
16 you know the drill. If you have additional questions,
17 please -- and whether you do or not, please fold a piece of
18 paper and pass it over to the court security officer.

19 Okay. There are no questions.

20 You may step down. Thank you.

21 THE WITNESS: Thank you, sir.

22 THE COURT: Okay. What says the plaintiffs?

23 MR. DACUS: At this time, your Honor, the
24 plaintiff closes.

25 THE COURT: Okay. Does defense close?

1 MR. SEARS: Yes, your Honor.

2 THE COURT: Okay. Very good.

3 Okay. So, ladies and gentlemen, you have now
4 heard all of the evidence in the case. I have to meet with
5 the attorneys for a few minutes. And, when we come back,
6 we will come back with hearing the closing arguments and
7 then my final instructions.

8 Even though you've heard all the evidence, you
9 still can't start discussing among yourselves, because you
10 have to wait for the closing arguments and my final
11 instructions.

12 So, again -- I know I'm a broken record -- please
13 don't discuss it among yourselves or anybody else. And I'm
14 going to send you back to the jury room.

15 And as soon as we're ready -- this could take a
16 few minutes. This is part of every trial, this next step,
17 that you don't get to hear about.

18 But when we come back, we will continue, and then
19 the case will be yours. Again -- and then I guess we'll
20 get your lunch orders, too, during this break as well.

21 Okay. Have a good break, and then we'll call you
22 back as soon as we're ready.

23 (The jury exits the courtroom, 10:01 a.m.)

24 THE COURT: Okay. Anything further from the
25 parties?

1 MR. DACUS: I just have one procedural question,
2 your Honor. I could not remember for purposes of closing
3 whether or not the Court has any requirement on the amount
4 of time for the plaintiffs' original versus rebuttal.

5 THE COURT: Yeah. My only rule is you cannot
6 reserve more than half your time.

7 MR. DACUS: That's what I recall. Thank you, your
8 Honor.

9 THE COURT: There are no motions?

10 MR. SEARS: Oh. Excuse me. If now is the time,
11 yes, I'll turn it over to Mr. Coburn.

12 THE COURT: Well, it's now or never so...

13 MR. SEARS: I misunderstood the inquiry. Thank
14 you.

15 MS. DAY: May we be seated, your Honor?

16 THE COURT: Yes, you may be seated. Thank you.

17 I mean, if there are no motions, that's fine, too.
18 I'm not encouraging them, but both sides have indicated you
19 were going to so...

20 MR. COBURN: Your Honor, we have just a couple of
21 Rule 50 motions.

22 The first one, your Honor, relates to willfulness.
23 We believe that we're entitled to a directed verdict on no
24 willfulness.

25 The only evidence that's been presented with

1 respect to --

2 (Brief interruption.)

3 MR. COBURN: So the first issue is willfulness.

4 And based on communications with opposing counsel,
5 it sounds like there's a pre-suit and a post-suit angle to
6 both of this.

7 As far as pre-suit evidence that has come in,
8 there are only a few lines of testimony from Mr. Poulin
9 regarding some patent prosecution history for an HPE patent
10 that ultimately issued and then was subsequently acquired
11 by Micro Focus. And in that patent prosecution history
12 the -- none of the asserted patents here, but the parent
13 patent was referenced; and then, ultimately, became a cited
14 reference on the patent that issued to HPE.

15 And there is just a plethora of case law, your
16 Honor, that has been provided to chambers with respect to
17 the fact that just mere communications from the Patent
18 Office with respect to the existence of another patent are
19 insufficient for a willfulness finding. And, yet, that's
20 all we have with respect to the basis for any sort of
21 pre-suit willfulness argument. So that's the first point.

22 And then I understand from -- if I'm wrong, I'm
23 happy to be corrected -- but I understand that there is a
24 argument from the other side -- although, I haven't heard
25 it -- about post-suit willfulness.

1 And this calls to mind the tortured history, your
2 Honor, of the infringement contentions in this case and the
3 notice -- really, the lack of notice that the parties on
4 our side have been -- have had with respect to the
5 infringement theories.

6 There have been seven different versions of the
7 infringement contentions in this case. Four of those came
8 in the last four and a half months. The last one being
9 November 17th, 2020.

10 We proceeded for about six weeks, thinking we
11 finally had this nailed down. And then, in Dr. Malek's
12 deposition, we heard for the first time that all 37
13 protocols were accused. Which, of course, was different
14 from what had been in the last set of infringement
15 contentions, which were limited to the two protocols,
16 TruClient Mobile Web and TruClient Native Mobile.

17 Then we got a declaration from one of our opposing
18 counsel saying no, no, no, no; you know, Dr. Malek
19 misspoke; it really is the two protocols.

20 That ended up, as your Honor knows, mooted what
21 was a motion to supplement our invalidity contentions if
22 the theory had, indeed, changed. Everything seemed fine.

23 And then, of course, as we have come to trial --
24 and we just heard it. We just heard it from Dr. Malek, and
25 we heard it yesterday, that it's all 37 protocols.

1 And so, you know, this has been a constantly
2 moving target.

3 And so under those circumstances, between the lack
4 of pre-suit notice -- which is, just as a matter of law,
5 the Patent Office communications do not count -- and then
6 the constantly moving target which, you know, is moving
7 even as of today, as a matter of law, we believe we're
8 entitled to no willfulness and would like that instruction
9 not to go to the jury.

10 THE COURT: Thank you.

11 And a response?

12 MR. BELLOLI: This may be a combination of both me
13 and Mr. Dacus, your Honor.

14 I'll start with the post-suit because I
15 think that's -- I'm sorry -- easier.

16 THE COURT: You can just speak from there.

17 MR. BELLOLI: Okay, great. Thank you, your Honor.

18 THE COURT: Just to make it easier.

19 MR. BELLOLI: As to post-suit, there's definitely
20 case law on point. We can point to the *Caltech-Broadcom*
21 case, which allowed post-suit willfulness to go forward.
22 Actually a pretty famous case that resulted in a large
23 verdict for Caltech against Broadcom and Apple. That is
24 2019 WestLaw 88077924, talking about how post-suit
25 willfulness is okay.

1 The Court's Final Jury Instructions talk about
2 post-suit willfulness acts, including whether or not Micro
3 Focus tried to cover up its infringement as one of the
4 factors.

5 I think we've seen ample evidence of that in this
6 case: The changing of the marketing documents, the
7 stopping calling it secret sauce, saying it's free after
8 the case and not changing the product in any way.

9 I'd say one totality of the circumstance factor is
10 bringing a really thin invalidity case. They really didn't
11 even point to a single claim element in 30 minutes.

12 So when you look at the totality of the
13 circumstances, there's more than enough evidence to support
14 post-suit willfulness. And there's no dispute that,
15 post-suit, they had notice of these patents.

16 So that goes to the post-suit willfulness.

17 As to the pre-suit willfulness, HP was told about
18 Mr. Poulin's patents not once, not twice; a plethora of
19 times. And, again, we're going to look at the totality of
20 the circumstances here.

21 So if it had just been one correspondence to HP, I
22 agree, that might not make it. But we have some other
23 facts here that infer, based on the totality of the
24 circumstances, they either knew or should have known or
25 willfully stuck their head in the sand on this issue.

1 So HP is told about the patent -- Mr. Poulin's
2 patents a bunch of times, both pre-suit -- or, I'm sorry --
3 both pre-acquisition and after the acquisition. That HP
4 patent was assigned to one of the defendants in this case.
5 Their lawyer gets the file. He's going to see that this
6 happened.

7 Not only that, but there was due diligence
8 involved in this transaction. We heard there was a lot of
9 due diligence involved in the transaction whereby the Micro
10 Focus products went from HP to Micro Focus. We would
11 assume that diligence included looking through the IP
12 portfolio. It had to because Micro Focus decided to take
13 on that liability for HP. So they were looking into -- and
14 for patent infringement.

15 So they were looking at this. They would have
16 seen the files of HP -- Micro Focus would have seen the
17 files of HP; seen that Mr. Poulin's patent was cited to
18 them a bunch of times; agreed to take on that IP; agreed to
19 take on those products; and agreed to take on that
20 liability, in light of the diligence they did and they saw,
21 which includes these disclosures of Mr. Poulin and his
22 patents.

23 So we would submit that, based on the totality of
24 the circumstances, there's sufficient evidence that they
25 knew or should have known, or were willfully blind to the

1 fact, before suit, of Mr. Poulin and his patents. Thus,
2 there is substantial evidence to support pre-suit
3 willfulness in addition to post-suit willfulness, your
4 Honor.

5 And I don't know if Mr. Dacus -- do you have
6 anything else?

7 MR. DACUS: I do not.

8 MR. COBURN: Your Honor, virtually none of what
9 was just mentioned is in evidence.

10 With respect to the pre-suit communications,
11 again, they're all Patent Office communications. You know,
12 this due diligence angle, not in evidence.

13 Yes, there was an acquisition; but there was no
14 exploration of what kind of due diligence was done.

15 There are standard stock purchase agreements that,
16 of course, liabilities get assumed.

17 You know, the multiple inferences that are being
18 made to try and get to some kind of willfulness, I mean,
19 that's exactly what the very clear case law on these Patent
20 Office communications is designed to prevent. I mean,
21 it's -- the idea that -- well, first of all, the fact that
22 the patent issued would suggest that there's not a problem,
23 number one.

24 Number two, the impracticality of a mere cited
25 reference in -- a mere cited reference on a patent giving

1 indication to the entire company that this establishes
2 knowledge for purposes of willfulness, again, it's totally
3 impractical. And that's why, as a matter of law, it is not
4 permitted.

5 And that's all we have here in this case. It's a
6 few snippets of -- I mean, it's literally -- I emailed it
7 to your clerk this morning, your Honor. The testimony from
8 Mr. Poulin is about six to eight lines long, and that's all
9 there is on the pre-suit angle.

10 THE COURT: Okay.

11 MR. COBURN: On the post-suit angle, there's
12 certainly been no effort to cover up infringement. You
13 know, everything has been provided. The documents -- we
14 heard testimony from Christine Ewing. They are dynamic
15 marketing documents by their nature. They have been
16 provided with all the versions. I mean, that's why we have
17 them. These were publicly available documents on the
18 website to begin with.

19 So, you know, there's a lot of shading going on.
20 But when you look at the evidence, there is really nothing
21 there.

22 THE COURT: Thank you.

23 I'm going to overrule the objection.

24 First of all, the Court is only seeking an
25 advisory opinion from the jury anyways. So -- this Court

1 is not bound by their finding, but I'll let them see what
2 they have to say on the matter, so...

3 Okay. Anything else?

4 MR. COBURN: I do have one more motion, your
5 Honor.

6 THE COURT: Okay. Go ahead.

7 MR. COBURN: This one, your Honor, we believe
8 we're entitled to a directed verdict of noninfringement on
9 the theory related to TruClient Mobile Web. This is the
10 one where Dr. Malek just admitted that there is no mobile
11 device, emulated or real, involved in the infringement
12 theory.

13 And then the second theory is the TruClient Native
14 Mobile. That's the Firefox browser where Dr. Malek --
15 honestly, I'm not really clear on what he's testifying to.
16 I don't know if it's that he believes a browser is a
17 emulated mobile phone, or if we heard him conceding that
18 all their testing is the Bank of America website, and that
19 is not an emulated mobile phone.

20 So, either way, we just heard from Dr. Malek that,
21 under each theory, there is not a real or emulated mobile
22 device.

23 And going back to the TruClient Mobile Web one,
24 you know, the disconnection of the phone from the system
25 removes, you know, a critical software element of that

1 system, as he just admitted.

2 And so under either theory, you know, they're
3 lacking the critical element of the real or emulated mobile
4 device, and he just admitted that in both instances.

5 MR. ALBERTI: Your Honor, I'm not sure what
6 testimony he was listening to, but he actually testified to
7 the opposite of that.

8 First of all, as to the -- as to a real mobile
9 device, I think the argument is one that you already ruled
10 on in the MIL. You said you don't need a -- to provide the
11 hardware.

12 The fact that they don't provide the actual phone
13 hardware is irrelevant to the claim. The claim is a system
14 for testing a mobile application. They provide the
15 software.

16 The fact that they don't provide the hardware is
17 something that they're not even allowed to argue, so I'm
18 kind of shocked that I'm hearing that today.

19 Secondly, as far as the emulated mobile device, we
20 saw in their own documents, it literally says TruClient
21 Mobile Web, quote, emulates a mobile device. So I think
22 the jury heard substantial evidence here.

23 MR. DACUS: I just want to also say, your Honor,
24 as one who's about to participate in the closing, those
25 questions and this argument cause me concern, because I am

1 concerned that we're about to hear that hardware is
2 required for the claim. That's where the questions were
3 going this morning, in a very skilled and roundabout way.
4 That's where this argument lies. And the Court has said
5 very clearly that it's not.

6 So I just raise it because I don't want to have to
7 stand up in the middle of a closing.

8 THE COURT: I understand.

9 And I stand by the Court's ruling, and I'm going
10 to overrule your motion.

11 MR. COBURN: Thank you, your Honor.

12 THE COURT: Anything else?

13 MR. COBURN: That's all I have, your Honor.

14 THE COURT: Okay. Anything from the plaintiffs?

15 MR. BELLOLI: Yes, your Honor. First, the 50(a)
16 on invalidity under 102 and 103.

17 The defense expert didn't point to a single
18 limitation in any asserted claim and point to where any
19 limitation may be found in the prior art references.
20 That's insufficient.

21 Generalized and conclusory statements about prior
22 art and invalidity are not sufficient to survive a
23 Rule 50(a) motion. The *Fresenius* case is directly on point
24 here. That's 582 F.3d 1288 at 1300. That's the Federal
25 Circuit in 2009.

1 There's tons of cases on point, as we've provided
2 them to chambers.

3 But there was nothing. There was really no
4 invalidity case put on here as to 102 and 103. And the
5 *Frensenius* case says, you know, if an expert fails to
6 identify where one limitation is missing in the prior art.
7 So they do all the limitations but one and don't point to
8 that, the opinion is out; the art is out.

9 And, here, we have a complete failure on any
10 limitation to describe where they are in the prior art and
11 link it in any way. No claim was pointed to.

12 And just another point in the case law. There is
13 a lot of case law saying expert testimony is required for
14 these matters of infringement and invalidity when they are
15 of a technical nature like this. And while there is expert
16 testimony -- not on these points, so they can't just put
17 the two documents, the two prior references, before the
18 jury and say, look, we think they are invalid, that would
19 be improper.

20 So that's the motion as to 102 and 103.

21 As to 112, there was enablement and written
22 description. Same issue. Generalized and conclusory
23 testimony is not sufficient for both flavors of 112 that
24 they are proffering.

25 There is no specific reference in the transcript

1 to any claim or claim limitation. He just kind of says: I
2 don't think this concept has support. But he doesn't link
3 it to any asserted claim or claim limitation.

4 And so, under the *WBIP* case, the *Streck* case, the
5 *CytoLogix* case, the *Alcon* case, these four cases we
6 submitted to chambers, both of these defenses should go out
7 as well.

8 One more reason to get rid of the enablement
9 defense is that there is -- they never addressed the fact
10 that -- whether or not a person of ordinary skill in the
11 art could enable or, you know, use the invention without
12 undue experimentation.

13 And there's case law -- and, in fact, the *Alcon*
14 case, 745 F.3d 1180 -- I don't have the pinned cite, I'm
15 sorry -- Federal Circuit 2014, that says when you don't
16 address that issue JMOL is proper on enablement as well.

17 Sorry, a lot of concepts here this morning.

18 And, you know, finally, I think there may even be
19 an implicit admission by defendants on this because the
20 only case law they submitted was on written description,
21 not 102, 103, or enablement.

22 And the one case they cite, the *Synthes* case, is
23 not a 50(a) motion. It's where a Court found that --
24 affirmatively found, made a finding, like on summary
25 judgment or posttrial briefing, that, you know, as a matter

1 of law, the Court found that written description was
2 lacking. It's not sufficiency of evidence or argument case
3 under Rule 50.

4 And, again, we just think that it was way too
5 general, way too conclusory; and, most importantly, just
6 not directing the jury to any claim or claim limitation in
7 making the argument. So we think the whole invalidity case
8 fails as a matter of law.

9 THE COURT: Thank you.

10 Response?

11 MR. SHELTON: Thank you, your Honor.

12 I will freely admit that, as to Section 102, 103,
13 and validity, the examination was limited by our time
14 constraints. And so I want to focus your Honor on the
15 Section 112 written description aspect of the invalidity
16 case.

17 And, there, I don't think there is any question
18 that Dr. van der Weide did provide detailed analysis. And
19 it wasn't necessary, because of the nature of the written
20 description defense here, to go into the claims and go
21 element by element, because the issue there was -- and it
22 was clearly framed in each of the questions that were posed
23 to Dr. van der Weide -- was whether the asserted claims
24 were supported by the specification with regard to whether
25 the mobile device that's tested in the claims could be a

1 real mobile device.

2 So that was stated precisely as the predicate for
3 each of the questions. And Dr. van der Weide -- so there's
4 11 pages in the trial transcript, your Honor, starting on
5 page 1120 yesterday. And in each case, Dr. van der Weide
6 went through the four passages in the patents, and that
7 same language is in each of the patents that are asserted,
8 and Figures 1A and Figure 7. And Dr. van der Weide
9 explained that each passage that the parties agreed
10 constitutes the sole disclosure of testing on a physical
11 mobile device.

12 And Dr. van der Weide presented opinion testimony,
13 consistent with his expert report, that the written
14 description requirement was not met. So I can't imagine
15 what more he could have presented to the jury to allow a
16 finding that the written description requirement has not
17 been met here.

18 THE COURT: And let me ask: Are you conceding
19 anticipation and obviousness?

20 MR. SHELTON: Yes, your Honor.

21 THE COURT: Okay. So based on your conceding
22 that, I will grant the motion as to those two.

23 And then do you want to respond to the written
24 description?

25 MR. BELLOLI: Are you conceding enablement as

1 well?

2 MR. SHELTON: We'll concede enablement.

3 MR. BELLOLI: Okay. So with written description
4 again, it's just naked testimony about sections of the
5 specification and figures. It's not tied to any claim.

6 He's not asked, you know, is this claim limitation
7 lacking support. And it's just a couple of pages of the
8 trial transcript. It's page 1120 to -- 1120 for both
9 enablement and written description, so that's not all of
10 it.

11 But, again, there is just no linking, and it's
12 conclusory testimony. It's just: Does this
13 specification -- does this cite support your opinion,
14 essentially? Yes.

15 Does this figure support your opinion? Yes.

16 And then it's just conclusory. There is no
17 explanation. You have to explain why the written
18 description is lacking.

19 And, again, under the cases we submitted, such
20 high-level generalized conclusory testimony is just not
21 sufficient.

22 But I really think that where you can cut it off
23 is it is just never linked to any claim in this case. He
24 didn't give an opinion that this claim, this element,
25 lacking written description.

1 And I would really just submit that there is nine
2 pages. They are a pretty quick read. And if the Court
3 sees those nine pages, it will agree that this was cursory
4 and not sufficient and not pointing to any claim or claim
5 limitation.

6 MR. SHELTON: Your Honor, I would make the same
7 suggestion to the Court, that your Honor read the nine
8 pages. And you will see that for each of the four
9 passages, Dr. van der Weide wasn't just asked, does this
10 support your opinion, which would be cursory and
11 conclusory.

12 But, instead, he was asked, what would this teach
13 a person of ordinary skill in the art and then is that
14 sufficient, in your opinion, to show that the inventor
15 possessed the full scope of the invention, which this Court
16 has decreed involves testing on both emulated mobile
17 devices and real mobile devices.

18 So if your Honor took, you know, a moment to read
19 this testimony, I think you will see -- and, of course, you
20 were here -- that that was more than ample support for the
21 jury to find that the written description requirement has
22 not been met for any of the six claims.

23 MR. BELLOLI: Okay. Last thing, your Honor, are
24 just the slides that they showed.

25 Okay. All the slide says, was the inventor in

1 possession of the claimed invention? And it points to,
2 like, a figure. It just points to figures. They never
3 link it to any claim. They never link it to any claim in
4 any way, shape, or form or specific claim limitation.

5 You have to have a claim limitation that fails the
6 written description requirement of 112, and they just don't
7 do it.

8 I don't know -- really, other than to formally
9 brief this, I don't know how to put it out -- or to have
10 the Court review the testimony and make a determination if
11 it's too general, too conclusory, too cursory, and not
12 linked to any claim or claim limitation. I think that's --

13 MR. SHELTON: Your Honor, may I read one question?

14 THE COURT: Go ahead.

15 MR. SHELTON: And this is from the -- this is the
16 first element -- I'm sorry -- the first passage.

17 So I asked Dr. van der Weide --

18 MR. BELLOLI: What page again?

19 MR. SHELTON: I haven't said.

20 Trial transcript 1121, starting on line 18. And I
21 asked Dr. van der Weide: "And what I'm going to do, sir,
22 is I'm going to take you through each of those; and I'm
23 going to ask you if, in your opinion, the passage will
24 demonstrate to a person of ordinary skill in the art at the
25 time of the invention that the inventor, Mr. Poulin,

1 actually invented the concept of meeting all the claim
2 limitations that are asserted in this case but using a real
3 mobile device as opposed to an emulator."

4 I mean, that sets the full necessary predicate.
5 It's not conclusory, and it --

6 And then, in his answer --

7 THE COURT: Well, let me ask you: I mean, how
8 does that meet clear and convincing evidence? You have to
9 show that by clear and convincing evidence. And so how
10 does that one question get you there?

11 MR. SHELTON: How does -- I'm sorry. What?

12 THE COURT: I mean, you have to show by clear and
13 convincing evidence. And so, those nine pages and that
14 question and answer you just gave me, how does that get you
15 there?

16 MR. SHELTON: I just read the question, sir. I
17 didn't read the answer.

18 THE COURT: Well, I understand. But, I mean...

19 MR. SHELTON: Well, when you're talking about
20 written description, it supports that something is missing.
21 And the parties agree that there is only four passages. He
22 went through all four.

23 And his opinion was that it's not sufficient to
24 show.

25 And he used Figure 1A and showed, for example,

1 that the authoring environment -- the authoring tool has a
2 one-way arrow to the mobile device. It's not two-way.

3 And there's -- I mean, Dr. Malek admitted on
4 cross-examination on Tuesday that every embodiment, every
5 embodiment of all three patents, deals only with the
6 emulator. That's their expert. He admitted that.

7 So there is no embodiment that teaches testing on
8 a real mobile device that would meet the claim limitations,
9 and the only four passages that the parties agree have
10 anything to do with a real mobile device have been shown by
11 a qualified expert to not have anything to do with meeting
12 the limitations of the claims.

13 I can't imagine what more could have been done.
14 And I think, your Honor, that it more than meets the clear
15 and convincing evidence standard.

16 MR. BELLOLI: I think the question he asked and
17 read, your Honor, as his best evidence of a question just
18 says, did Mr. Poulin actually -- I mean, he's asking him
19 basically did Mr. Poulin actually invent the concept of
20 meeting all claim limitations that are asserted in this
21 case.

22 You know, might as well just put the patent in
23 front of the jury and say, hey, you figure out if a written
24 description is here.

25 THE COURT: Okay. Well, of course, the Court

1 hates pulling things away from the jury. But in this
2 situation I just don't see how the defense gets there,
3 because the written description requires potential evidence
4 that's not conclusory. And that's the problem, is the
5 evidence you have is conclusory.

6 And, of course, in the case that's been cited to
7 the Court, in *WBIP* 829 F.3d 1317, the Federal Circuit
8 affirmed the District Court's denial of JMOL that the
9 asserted claims lack written description.

10 There, the written description defense went to the
11 jury, which found for the plaintiff. Defense appealed and
12 argued the JMOL should have been granted.

13 While this is not in the same procedural stance,
14 because the Court is faced with granting plaintiffs' JMOL
15 as opposed to denying defendants' on invalidity, the
16 Federal Circuit discussed the expert's testimony and
17 explained why it was legally insufficient.

18 In *WBIP* the expert answered three questions on
19 written description. The attorney was doing more
20 testifying than the expert, as the attorney asked long,
21 leading questions; and the expert replied succinctly and
22 referred back to the slides.

23 The Federal Circuit said that the defendant never
24 presented the jury with the detailed argument required to
25 establish invalidity by written description.

1 The Federal Circuit called this general conclusory
2 testimony that does not suffice as substantial evidence of
3 invalidity. This evidence does not rise to the level of
4 clear and convincing evidence, is a quote from the Federal
5 Circuit.

6 Similarly, in this case, the defendants' expert
7 addressed written description in, really, a quick fashion.
8 While, in this case, it's more than three questions, it was
9 approximately just five minutes of his testimony, total.

10 The attorney on direct examination asked long,
11 leading questions, designed to speed things up. And the
12 defendants' expert referred back to his slides so much that
13 the transcript does not clearly state his opinions. This
14 is the type of general, conclusory testimony that is
15 legally insufficient to demonstrate invalidity.

16 And I looked at the case y'all had cited, and I've
17 looked at the testimony as well. The case you cited -- is
18 it -- I'm not -- it's S-Y-N-T-H-E-S. It was very
19 different, and it had a lot more detailed testimony than we
20 have in this case.

21 So I am going to grant the plaintiffs' motion and
22 exclude the written description defense from going to the
23 jury.

24 Anything else?

25 MR. BELLOLI: We do have kind of a four-part 50(a)

1 on infringement, your Honor. I don't think there needs to
2 be argument. I just want to read into the record to
3 preserve it, if that's okay.

4 THE COURT: Go ahead.

5 MR. BELLOLI: Okay. So pursuant to Federal Rule
6 of Civil Procedure 50(a) plaintiffs move for judgment as a
7 matter of law with respect to the issue of infringement.

8 Defendants have not presented a legally sufficient
9 evidentiary basis for a reasonable jury to find for them on
10 their defense of noninfringement.

11 Four noninfringement arguments were in this case.

12 The first was Micro Focus argued that none of the
13 accused products include, quote, an application for a
14 mobile device, as required by the preamble of the three
15 patents.

16 This argument fails as a matter of law. The
17 reason it does is as follows: The claims do not require an
18 application for a mobile device to infringe. The preamble
19 of Claim 1 of the '192 Patent requires a system for
20 developing an application for a mobile device. And the
21 preamble of Claim 1 of the '864 Patent and the Claim 45 of
22 the '678 Patent require a system for testing an application
23 for a mobile device.

24 Accordingly, developing and testing an application
25 for a mobile device is the purpose of the claimed system,

1 but the application itself is not part of the claimed
2 system.

3 Therefore, Micro Focus' first noninfringement
4 argument fails as a matter of law.

5 The second Micro Focus noninfringement argument is
6 that none of the accused products infringe either Claim 1
7 or 2 of the '192 Patent because they do not satisfy
8 independent Claim 1's requirement of a software authoring
9 device on the ground that LoadRunner -- the LoadRunner
10 products VuGen interface is for developing test scripts and
11 not for writing source code for a mobile application. This
12 argument was made in the trial transcript at pages 1036 to
13 1039.

14 This argument also fails as a matter of law.
15 Plaintiffs demonstrated that a software authoring device is
16 a software tool that a developer is using for development
17 and testing of an application. Trial transcript page 368.

18 Testing is part of the development process so
19 testing software qualifies as software for software
20 authoring.

21 Plaintiffs further showed that the LoadRunner's
22 VuGen software, which is accessible for all LoadRunner
23 products, allows for creating and editing scripts which
24 meets this limitation. And this was unrebutted. This is
25 pages 368 to 370 of the trial transcript.

1 Micro Focus' third noninfringement argument was
2 that the accused products do not display one or more
3 windows showing resources of the mobile device as required
4 by the Court's construction for each of the asserted
5 claims.

6 This argument fails as a matter of law.

7 With respect to the LoadRunner products with
8 Network Virtualization using TruClient Mobile Web,
9 plaintiffs demonstrated that the accused products show
10 throughput and page load event graphs that show resources
11 of the mobile device. This is trial transcript pages 380
12 to 382.

13 Plaintiffs also introduced PX-371 and PX-465,
14 which show additional graphs that show resources of the
15 mobile device.

16 This is unrebutted. Dr. Shoemake did not address
17 this at all.

18 With respect to the LoadRunner products with
19 Network Virtualization and UFT Mobile, TruClient Native
20 Mobile, plaintiffs also demonstrated that during a
21 TruClient Native Mobile test the accused products display
22 CPU, memory, and throughput metrics that each show
23 resources of the mobile device. This is at trial
24 transcript 371 to 374. This was unrebutted.

25 Finally, Micro Focus' noninfringement argument

1 Number 4. Here, they argue that none of the accused
2 products are programmed to execute the application for a
3 mobile device within, as required by each of the asserted
4 claims. This argument fails as a matter of law for the
5 same reasons as the -- their first argument that also fails
6 as a matter of law.

7 That's the motion.

8 THE COURT: Well, those will be denied, so...

9 MR. BELLOLI: Thank you.

10 THE COURT: Okay. Anything else?

11 MR. BELLOLI: No, your Honor.

12 MR. SEARS: Just a housekeeping question.

13 The instructions are going to be taken up --
14 objections -- record is going to be made on that after
15 the jury --

16 THE COURT: Yeah. We'll do objections to the
17 charge right after -- when the jury goes out. So there
18 will be no waiver for that.

19 Okay. So I have new copies that have the
20 invalidity taken out. And so we'll give you copies of
21 those, if you want to use those during argument in any way,
22 and the verdict as well.

23 We'll take maybe ten minutes and then get started.
24 Maybe 15. I know the jury has been waiting, but y'all can
25 get set up, and we'll get started with closing arguments.

1 Of course, those will be first. And then we'll hear my
2 instructions.

3 My plan would be to try to push through and have
4 their lunch come a little later.

5 I don't know if you talked to them about that.

6 Yeah, so we'll get the closing arguments done.
7 And if they need a break, we'll do both closing arguments,
8 I'll take a short break if they need one. If not, I'll
9 push through, do my instructions. Then they can go up and
10 have their lunch. Okay? And then we can do objections to
11 the charge and a verdict at that point.

12 Anything else before we take -- we'll take a
13 break, and then we'll start back in 15 minutes.

14 MR. BELLOLI: Thank you, your Honor.

15 THE COURT: Okay.

16 (Recess, 10:36 a.m. to 10:56 a.m.)

17 (Open court, all parties present, jury not
18 present.)

19 THE COURT: Please be seated.

20 One thing before I bring the jury in, I am going
21 to tell the jury what I've done on the issue of invalidity
22 so -- because the jury doesn't -- and the void.

23 So I am going to instruct them to disregard the
24 testimony of their expert and that invalidity is no longer
25 part of the game.

1 How do you pronounce your expert's last name?

2 MR. SHELTON: It's Dr. van der Weide.

3 THE COURT: Weide, okay. Thank you.

4 MR. SHELTON: Yes, sir.

5 THE COURT: Okay. Let's bring the jury in.

6 (The jury enters the courtroom, 10:57 a.m.)

7 THE COURT: Please be seated.

8 Okay. Ladies and gentlemen, first, let me
9 instruct you that, members of the jury, that yesterday you
10 heard testimony from the defendants' expert,
11 Dr. van der Weide, on invalidity. I have since now -- this
12 is what happened while you were gone -- I have since
13 dismissed the defendants' invalidity claims, and it is no
14 longer part of this case.

15 This means you should disregard his testimony on
16 invalidity. You will not be asked to determine if the
17 asserted claims are invalid. Instead, I'm instructing you
18 you should presume the asserted claims are valid.

19 And so now we will hear the closing arguments, and
20 the plaintiffs will go first. Mr. Dacus.

21 MR. DACUS: Thank you, your Honor.

22 May it please the Court, your Honor?

23 THE COURT: Yes.

24 MR. DACUS: Thank you.

25 Good morning. I want to start this morning where

1 we started on Monday morning. And in some ways that Monday
2 morning feels like yesterday, and in some ways it feels
3 like it was a month ago. But I want to say to you a very
4 sincere thank you.

5 I said to you on Monday morning that we would not
6 be here if this case was not important. I hope by now you
7 understand what we meant when we said that.

8 And I want to say one thing. As Donovan and I
9 talked last night about what's happened this week and
10 what's to occur today, I know one thing he wants me to make
11 sure that I say to you is this is an unconditional thank
12 you. It's not a conditional thank you based on you
13 answering these questions one way or the other; it's
14 unconditional.

15 He's asked for one thing, an opportunity to
16 present his case for what he believes, what we believe is a
17 very serious wrong.

18 Now, when we came together on Monday, I showed you
19 this timeline. Everything in this timeline, I think, has
20 proven to be accurate. But you now have a lot more facts
21 related to this timeline. You know that when, in the early
22 2000s, when Donovan was developing these apps, when he was
23 developing these testing systems for these apps, he was way
24 ahead of his time. Sort of the proof is in the pudding
25 that he was ahead of his time.

1 You remember those questions to him about the fact
2 that, boy, you sure had a hard time raising money. You had
3 a hard time getting people invested.

4 That's all true. No one has ever denied that, in
5 the early 2000s.

6 Mr. Weinstein and I were talking at the hotel on
7 that Tuesday after Donovan testified. And he said to me,
8 you know, those questions are a little unfair because
9 people didn't realize in the early 2000s exactly how
10 explosive these apps and these mobile applications were
11 going to become and exactly how valuable this testing would
12 become.

13 And that's the truth. People didn't understand
14 that. And that's true with many inventors who have the
15 ability to look ahead.

16 You also know from this timeline that, indeed,
17 mobile applications and the testing of them did explode.
18 We all know how common mobile apps are, how common our
19 smartphones are, all through the middle 2000s and up to
20 today.

21 You also know an additional piece of information;
22 and that, is in 2017, Micro Focus purchased the LoadRunner
23 division of Hewlett Packard, and they paid \$8.8 billion for
24 that. \$8.8 billion.

25 Hewlett Packard had spun this division off.

1 Hewlett Packard, who was on notice of Mr. Poulin's patents,
2 had spun this division off and essentially said, we're
3 separating ourselves from it, we don't want anything to do
4 with it.

5 Micro Focus shows up and says, we think it's very
6 valuable. Our business has some issues. We have some
7 deficiencies at our business. We want to purchase this
8 software division.

9 Hewlett Packard apparently said to them, you can
10 do that, but there's potential problems with this,
11 including potential infringement.

12 And Micro Focus said, that's okay. We'll take it.
13 We'll take it.

14 That's how desperate and how in need they were for
15 this business.

16 You also know, to add to this timeline, that
17 because of the fight that these folks over here have waged
18 that Mr. Poulin had to give up 40 percent of his business.
19 He had to give up 40 percent of his business, a business
20 where these three patents are the foundation of the
21 business, where he is the sole inventor on those patents.
22 And he's been forced to give up 40 percent of it.

23 Now, what did Micro Focus tell you on Monday?
24 What did Micro Focus -- this is the very first slide they
25 showed you. This is what they told you, "Micro Focus is an

1 innovative software company."

2 You now know, at best, that is a misleading
3 statement. There is no innovation related to these
4 LoadRunner products. These folks didn't innovate these
5 products.

6 They know we're here about the LoadRunner, UFT and
7 Network Virtualization products. They didn't innovate
8 these. They bought them.

9 They also said one other thing to you, oh, we have
10 1800 patents. Okay. That may be a true fact, but none of
11 those patents cover the technology related to this
12 LoadRunner product or related to Donovan's technology.

13 You know for a fact that if they had patents that
14 covered and were related to these LoadRunner products --
15 what would they have done? They would have run to that
16 witness stand to show you and tell you, hey, we don't use
17 his patents because we have our own on this very stuff.

18 You didn't hear any of that. It's because they
19 don't. It's a little bit of a misdirection.

20 The second thing they told you is, Micro Focus'
21 software products are for testing servers.

22 Well, again, that's kind of a half-truth. They
23 are for testing servers, but what they didn't say is they
24 are also for testing mobile applications.

25 I cannot count the number of documents that we

1 have seen in the evidence in this case that say the
2 LoadRunner is for testing mobile applications.

3 So, again, if this was a completely truthful
4 statement to you, they would have said the products are for
5 testing servers and mobile applications.

6 They also said that they are very different from
7 the Wapp patents because they do test servers. You know
8 from the evidence that's not true.

9 Donovan took the stand and told you, my patents
10 cover testing of applications. That includes an
11 end-to-end, meaning when you are testing the app you
12 necessarily have to test the network that the app is on,
13 including the server. You have to test all the way from
14 the app to the server and all the way back, end-to-end.
15 Dr. Malek confirmed that, that that's what these patents
16 are about.

17 So this LoadRunner and Network Virtualization
18 product is not different than the patents; it's exactly
19 like them.

20 They also said Wapp's patents are invalid because
21 they are defective. And you remember the lawyer stood up
22 here and said, they are anticipated, they are obvious,
23 there is lack of written description, there is lack of
24 enablement; we're going to prove all that to you.

25 You know that's just not true. The judge just

1 found you two minutes ago he's found these patents are not
2 defective; they're presumed to be valid.

3 Finally, they said Wapp's damages claim grossly
4 overreaches. Nothing could be further from the truth.
5 Absolutely not. These folks paid \$8.8 billion for this
6 technology. \$8.8 billion.

7 What Mr. Poulin has said -- and we're going to
8 walk through this in detail -- what Mr. Poulin has said is,
9 hey, some of that value my patents contributed to, so I'd
10 like my fair share that the law requires.

11 Now, when we talked on Monday, I told you there
12 were going to be two questions. I think, yesterday, they
13 said somehow I misled you and told you -- and I should have
14 told you there were going to be three. Turns out there are
15 two.

16 The first one is; do these folks include in their
17 product these three patents? As you well know by now,
18 that's what we call infringement.

19 You well know what the law is. The Judge is going
20 to read you some instructions, after we sit down from
21 closing arguments, and he's going to give you detailed
22 instructions about how to go about this infringement
23 analysis. It's going to look exactly like what I think
24 I've told you previously.

25 But there are two things I want you to be aware of

1 when the Micro Focus lawyer talks. When you're judging
2 infringement, you are to look at the patent claim. That's
3 the actual language in the patent entitled claim.

4 You are not to look at the figures and you are not
5 to look at the specification.

6 The figures are simply examples. They are not the
7 full claim. They are not the full fence around your
8 property. They are just examples to show people how you
9 could do this.

10 So if they start pointing to figures when they
11 start talking to you here in a minute, or if they start
12 pointing to the specification, you need to think: Why are
13 they doing that, because that's not what I'm supposed to be
14 comparing this to.

15 And you need to ask yourself why they are asking
16 you to look there, rather than at what the Judge is going
17 to tell you to do, and that is look at the claim.

18 Now, you've heard a bunch of evidence. You heard
19 Dr. Malek take the stand for three or so hours on Tuesday.
20 He has walked through with you, including this morning, all
21 the evidence.

22 He's identified for you all the things he's looked
23 at, the source code, the technical documents, the marketing
24 documents, the depositions of the employees, on and on and
25 on, to identify specifically for you where every phrase and

1 limitation in those claims is found in the LoadRunner
2 products.

3 I'm not going to stand up here and attempt to do
4 that. If I did, I'm sure Dr. Malek would cringe at how
5 imprecise I am. There is no way, in the 40 or so minutes
6 that I have, to walk through all that evidence.

7 And I'm confident, I don't need to. I'm confident
8 you heard him; you understood what he said. And at the end
9 of the day all of these LoadRunner products with Network
10 Virtualization and/or UFT Mobile infringe Claims 1 and 2 of
11 the '192 Patent, Claims 1 and 2 of the '864 Patent, and
12 Claims 45 and 49 of the '678 Patent.

13 I do want to comment on a few things related to
14 the evidence, some things you did hear and some things you
15 didn't hear.

16 So think about who likely knows these products
17 best. Converse to what was said from the witness stand, I
18 don't think it's their customers. It's the engineers who
19 developed these products, right?

20 So what often happens in these cases is if you are
21 sued for patent infringement your engineers take the stand
22 and say: Hey, we don't use this patent. Let me explain to
23 you how this product was developed, exactly how it works.
24 Let me show you the design drawings for the development,
25 all of our notes related to the development.

1 That didn't happen at all. It didn't happen at
2 all.

3 In fact, the only engineer who knows about this
4 product, from 2014 forward, back from his days at Hewlett
5 Packard, all the way through his days at Micro Focus, was
6 the first gentleman you heard from Israel, Sharon -- I
7 think Levin or Levine. And what did he say about all of
8 this?

9 Remember all these arguments about we don't
10 emulate, there is no virtualization. So this is a guy who
11 has been with the product -- unlike Mr. Roboostoff, who
12 didn't come into the picture until 2017 -- Mr. Levin says,
13 with respect to the LoadRunner product, it fully emulates
14 this entire environment.

15 He went on to say everything is being emulated.

16 And there, at the bottom, he said, "Using this
17 technique while everything is being virtual. Literally,
18 everything is being virtualized."

19 So here is the engineer -- these folks are here
20 telling you nothing is emulated. Here is the engineer who
21 has been with this product the entire time that it's been
22 infringing on Donovan's patents, and he says: Yeah, it's
23 emulate. Of course, it's emulating. Of course, it's
24 virtualized.

25 Think about this also. Often in these cases what

1 you see are employees who are -- engineers, particularly,
2 who are familiar with the products testify -- and you may
3 have been expecting this yourself -- to say: No, we don't
4 infringe. I know this product inside and out. I've looked
5 at the patent, and we don't infringe.

6 Not a single employee, not a single employee, not
7 a single engineer from Micro Focus took the stand and said,
8 hey, I read these patents and then I looked at our
9 products, and we don't do this.

10 Think about how incredible that is. Not a single
11 one of them did that.

12 In fact, I asked Mr. Roboostoff -- remember, this
13 lawsuit has been going on for two and a half years. I
14 asked Mr. Roboostoff, I said: Have you looked at these
15 patents? I mean, you've been fighting us for two and a
16 half years. You said you've been in a bunch of meetings
17 with Wapp Tech representatives. Have you bothered to read
18 the things?

19 And he said: No, I haven't, but I've looked at
20 some excerpts. I've looked at some excerpts.

21 Not a single engineer from Micro Focus took the
22 stand and said: I've looked at the patent; and here, Mr.
23 and Mrs. Juror, here is where we don't do this.

24 Now, they did hire somebody and paid them a good
25 wage to come in here and tell you they didn't do it. But

1 that's very different than someone from this company taking
2 the stand, raising their right hand, saying, I know the
3 product and we don't do it. No one did that.

4 Mr. Staten came and testified on their behalf.
5 Flew in from Atlanta.

6 Have you read the patents, Mr. Staten?

7 No, I haven't read them.

8 Lawsuit's been going on for two and a half years,
9 Mr. Staten. When did you first get contacted about this?

10 December of 2020. December of 2020.

11 That's the gentleman they bring here to testify;
12 but, apparently, not to say they don't infringe. But he
13 hasn't even read the patents. Hasn't even bothered to read
14 the patents.

15 Now, if you find that, in fact, these products
16 include these three patents, you already know the Court is
17 going to ask you to determine what the reasonable or fair
18 value of damages are.

19 You know there is a fight about how much revenue
20 these folks made on these products. We say it's
21 \$423 million.

22 You've heard a lot of evidence from both sides --
23 or at least argument from both sides -- that that number is
24 wrong.

25 The issue turns on, as you now know well, whether

1 or not Network Virtualization was included in LoadRunner as
2 far back as 2015, because that's what Mr. Weinstein
3 counted. That's what the issue is.

4 What do the documents say?

5 This is Plaintiffs' Exhibit 63.

6 When you go back in the jury room, if you want the
7 exhibits, you can have them. For those of you who are
8 taking notes, you can write this down if you choose to.

9 Plaintiffs' Exhibit 63, what does it say on this
10 issue? Remember, this is a Hewlett Packard document,
11 sometime before March of 2017, and it says Network
12 Virtualization is integrated in LoadRunner.

13 And then that first bullet point says Network
14 Virtualization is part of LoadRunner.

15 They took the witness stand and told you it's not.

16 Again, this is one of those issues where I said at
17 the beginning of the trial you may need to draw a line down
18 the middle of your paper, compare what they say on the
19 witness stand to what the documents say.

20 This is a document that came from Hewlett Packard,
21 transferred to Micro Focus. It was their internal
22 documents. And it says exactly what they try to convince
23 you is the opposite now.

24 It's not the only document. This is the owners
25 manual from 2015. It's Plaintiffs' Exhibit 40. Again, if

1 you want to look at it, you can look at page 1364. It says
2 clearly, in 2015, "The LoadRunner setup wizard prompts you
3 to install Network Virtualization at the conclusion of the
4 installation."

5 So, again, they took the stand and tried to
6 convince you that Network Virtualization is not part of
7 LoadRunner, and the documents say just the opposite.

8 And, by the way, none of those witnesses who took
9 the stand were even at Hewlett Packard, including
10 Mr. Roboostoff. So that from 2015 through September
11 of 2017, when they purchased Hewlett Packard, that's part
12 of what they owe us for. None of these people who took
13 this stand were even at Hewlett Packard.

14 Hewlett Packard's documents say exactly what we
15 say to you: Network Virtualization was part of LoadRunner,
16 and so those revenues should be included.

17 And me saying that out loud prompts me to say one
18 other thing. From 2015 to September of 2017, these were
19 Hewlett Packard products, Hewlett Packard issues. How many
20 people from Hewlett Packard came here, raised their right
21 hand, looked you in the eye, and testified to corroborate
22 and support what they say? How many? Not a single one.
23 Not a one. Not a one.

24 I mean, when you're judging credibility, wouldn't
25 you want to hear from the people who were actually there?

1 I mean, they knew we were going to show this document. Why
2 didn't someone from Hewlett Packard come and say, "No, that
3 document's wrong. Even though it's an owner's manual, a
4 technical document, it's wrong"?

5 Because it's not. It's absolutely accurate and
6 correct.

7 When you include those revenues, you have to -- as
8 Mr. Weinstein explained, you have to apportion down to the
9 profits. The law says we're not entitled to all that
10 423 million; you have to figure out what profit these folks
11 make. And that's exactly what he did, and he used the
12 gross profit margin.

13 As he explained originally, and as he explained
14 this morning, he used the exact profit calculation that
15 these folks use in their -- in the conduct of their
16 business. He used the exact one.

17 What they came here and told you is, well, if you
18 deduct all of the expenses, we don't make any money.
19 Which, of course, begs the question: What does all of the
20 expenses mean?

21 And we now know. We now know. You've got the
22 gang of six, the six directors who make \$54 million, not
23 just in one year, but the entire time that they should be
24 paying Donovan for his invention, 2015, '16, '17, '18, '19,
25 '20, those people are -- those six, we're not even talking

1 about the other 14,900 and whatever it is that work there,
2 we're talking about six.

3 In addition to that, in 2018 alone, they're buying
4 back \$400 million of their own stock. And we know why
5 they're doing that. Mr. Robostoff told us. I gave him
6 every chance to say that this company respects property
7 rights, patent rights, constitutional rights, and small
8 inventors. Every chance. And what did he say? We care
9 about our customer, and we care about our investors and
10 shareholders.

11 THE COURTROOM DEPUTY: You've used 20 minutes.

12 MR. DACUS: Thank you.

13 That's exact -- I mean, it was astonishing, just
14 to be frank. Astonishing that he wouldn't say, "And we
15 care about inventors. We care about constitutional
16 property rights." He told you exactly what they care
17 about.

18 It's no surprise. Their own annual report that we
19 looked at told you, look, we don't judge our employees on
20 whether or not they're good corporate citizens, whether or
21 not they do the right thing. We don't judge them on that.
22 We judge them on how much money we make.

23 That's not me saying that; that's their own
24 document saying that.

25 When you apportion this to the profits and then

1 you further apportion so that you get it down to just the
2 patented invention, what you wind up are profits related
3 to, profits solely attributable to Donovan's patents, are
4 \$223 million.

5 They would have never made any of that money.
6 Those are the profits solely attributable to Donovan's
7 patents.

8 But Mr. Weinstein didn't stop there. He said,
9 look, I don't think that you would get to keep all those
10 profits. You're going to have to give Micro Focus the
11 normal amount of return -- the return on invested capital,
12 as he said -- that they normally earn, and that would allow
13 you, Donovan, to keep 77 percent. That's how this
14 negotiation would have gone.

15 Their own expert, Mr. Nelson, says, well, I think
16 it would have been 50/50. So it's somewhere between
17 50 percent and 77 percent.

18 But 50/50, how -- what math went into that? I
19 think Mr. Weinstein said this morning it's as if it just
20 fell out of thin air, and I really don't disagree.

21 So, in the end, if you find there's infringement,
22 the amount of damages that the law requires, the fair value
23 to Mr. Poulin is \$172.5 million.

24 I'm going to sit down now. These folks are going
25 to get a chance to talk for a bit. And then, when they're

1 done, I'll have a chance to revisit with you.

2 Thank you.

3 THE COURT: Thank you, Mr. Dacus.

4 Would the defense like to give their closing
5 arguments?

6 MR. SHELTON: Thank you, your Honor.

7 May it please the Court.

8 Good morning, ladies and gentlemen. It's my
9 pleasure to speak on behalf of Micro Focus and our team.

10 And this is a special day for me. I had my first
11 trial nearly 20 years ago in this courtroom before the
12 Honorable Judge Brown, and so it's very special for me to
13 have tried this case. This is the first time I've tried a
14 case in Sherman since then.

15 And it's really my pleasure to advocate on behalf
16 of my client, Micro Focus.

17 And you've heard a lot of evidence in a short
18 amount of time. We know it's been difficult. We know
19 there's been a lot of technical jargon and concepts thrown
20 at you. You've been introduced to client-server
21 architecture that you probably never thought about or cared
22 about before. And I'm sure that you're anxious, now having
23 heard all the evidence, to get to work and decide the
24 questions that have been posed before you.

25 In about an hour, Judge Mazzant will send you to

1 the jury room, and you will have a verdict form with a
2 couple of key questions that you need to decide. And don't
3 ever forget that you are the judges of the facts. You've
4 now heard all the evidence. You've seen all the witnesses.
5 Some appeared live. Some appeared by deposition. And
6 you've seen all kinds of documents, and those that have
7 been admitted will be in the jury room for you to inspect.

8 And the first question that you have to decide,
9 starting today, soon, is whether Wapp has proven by a
10 preponderance of the evidence that Micro Focus infringed
11 any of the asserted claims.

12 Now, I found it quite striking that Mr. Dacus,
13 who's a very skilled lawyer -- along with all of the
14 skilled lawyers who represent Wapp -- that he put up one
15 slide about infringement.

16 Make no mistake about it, this case is about
17 infringement. They have made a very serious charge that
18 Micro Focus has infringed the three patents, and all that
19 you heard about their infringement was a bunch of green
20 checkmarks on a slide.

21 So I'm going to spend most of my time with you
22 showing you, once again, as our experts have, why Micro
23 Focus doesn't infringe. That is the central question in
24 this case.

25 And if you answer "no" to Question 1 on

1 infringement, you're done. You're done.

2 And the -- as you know, the question asks: Has
3 Wapp proven their burden of proof by a preponderance of the
4 evidence.

5 You've heard about the feather. You saw the
6 little video of a feather floating down and landing on the
7 scale. That doesn't mean that all they have to do is say:
8 Micro Focus infringes; we're done; please go to the jury
9 room and check "yes." They have to prove their case, and
10 they have to prove that it is more likely than not that
11 Micro Focus infringes.

12 Now, we don't have a burden of proving that we
13 don't infringe. And, yet, we have proven that Micro Focus
14 software, when sold in the United States, does not
15 infringe.

16 Judge Mazzant will soon instruct you that the
17 evidence you are to consider consists of, one, the
18 testimony of the witnesses; two, the documents and other
19 exhibits admitted into evidence; and any, three, fair
20 inferences and reasonable conclusions you can draw from the
21 facts and circumstances that have been proven.

22 And let's talk about witnesses for a moment. The
23 only fact witness that Wapp presented is the inventor,
24 Mr. Poulin. He told you nothing about infringement. He
25 told you nothing about damages. But it did seem that, if

1 there was a purpose to his testimony, it was to leave the
2 firm impression in your minds that he has somehow been
3 wronged and has never been able to be successful because
4 Micro Focus infringed.

5 The reality is -- you may recall, when he was
6 introduced and started his testimony, that a list of four
7 awards was shown. Now, those had nothing to do with the
8 inventions that are at issue here, but they were awards for
9 his other businesses. The reality is that Mr. Poulin is a
10 successful, sophisticated businessman. He has enjoyed
11 success in his other ventures.

12 And the reality is, you saw his software. Every
13 bit of software that Mr. Poulin wrote when he was the only
14 member of Kiwi International, when he was working on what
15 he called myMCOM, which was to be the realization of the
16 patents at issue here, we showed you every application he
17 wrote. And I know, I can say without any doubt, any
18 hesitation, that we have shown you everything, that they
19 were produced to us. And Mr. Poulin's lawyers told us that
20 we had all the source code, and we showed you all six
21 applications.

22 Now, you saw during Mr. Poulin's cross-examination
23 that he had testified under oath that he actually
24 implemented Network Virtualization. But when we played
25 those six soccer videos, you didn't see that.

1 So if there was any purpose to Mr. Poulin's
2 testimony here, it didn't have anything to do with the
3 facts that you have to decide; it had to do with tugging at
4 your heartstrings. That is improper.

5 Judge Mazzant will also instruct you that you may
6 not be influenced by passion, prejudice, or sympathy. And
7 I ask you to follow that instruction.

8 Now I want to turn to infringement because that is
9 the central and first question that you will have to
10 resolve as jurors.

11 I think you know by now -- you've heard it many
12 times -- that there are three Micro Focus products at issue
13 here: LoadRunner, Network Virtualization, and UFT Mobile.

14 The way that the plaintiffs have put on their case
15 you would not be mistaken to think that there was only one
16 product at issue called Network Virtualization. That's the
17 product that over the damages period sold \$2 million.

18 So you've seen this \$423 million revenue number
19 over and over, but the plaintiffs are completely fixated on
20 Network Virtualization.

21 And it's quite curious because their allegations
22 of infringement are that, in one instance, selling
23 LoadRunner with Network Virtualization infringes, when that
24 software is sold in the United States. And, secondly, when
25 LoadRunner, Network Virtualization, and UFT Mobile are sold

1 in the United States, that that infringes as well. So
2 Network Virtualization has never been contended to infringe
3 by itself. It's a combination of software.

4 Now I'd like to show you a claim. So there was
5 very little closing argument from Mr. Dacus about
6 infringement, and so I thought it quite fitting that we
7 look at the claims again. And this is the claim charts
8 that Dr. Shoemake testified about.

9 And as you retire to the jury room and you begin
10 your deliberations I'll ask you to look for what Dr. Malek
11 admitted is required. And that is that -- these are the
12 three independent claims of the three patents. And
13 Dr. Malek admitted, just this morning, again, that in order
14 for the software that Micro Focus sells to infringe these
15 claims, it must be actually programmed to meet all the
16 limitations that you see before you.

17 Dr. Shoemake testified that the other three
18 claims, which are dependent claims, rise and fall with
19 these. In other words, if any or all of these three
20 independent claims are not infringed, the dependent claims
21 are automatically not infringed either.

22 And so I suggest that this is where you should
23 start in your inquiry.

24 And what's very important about all of these
25 claims is that they all require a mobile device. And it

1 can be -- as the Court has instructed the parties -- it can
2 be real or it can be emulated. But something in the
3 software has to execute an application for a mobile device.
4 And that makes perfect sense, because you're testing the
5 application to see what the resource usage is.

6 And you'll see that the claims, although
7 different, they have a lot of parallel requirements. And
8 whether the claim starts off a system for developing an
9 application for a mobile device or it says -- that was
10 Claim 1 of the '192 -- or it says a system for testing an
11 application for a mobile device -- notice that phrase,
12 "application for a mobile device." And so let me suggest
13 to you, ladies and gentlemen, that you look for an
14 application for a mobile device.

15 And so your jobs, as judges of the facts in this
16 case, is to consider and decide whether Wapp has met its
17 burden of proof of a preponderance of the evidence that the
18 accused software is actually programmed to meet all of
19 these limitations.

20 Now I'm going to step you through the reasons why
21 they do not. And this is what Dr. Matthew Shoemake, an
22 extremely accomplished engineer and the former chairperson
23 of the WiFi committees that brought WiFi to us, testified
24 about.

25 First, let's talk about the UFT -- I'm sorry --

1 the TruClient Mobile Web protocol. Now, we've heard a lot
2 about this. And you now know, because Dr. Shoemake
3 testified and Dr. Malek admits, that that Bank of America
4 website there, that's running in what's called a Firefox
5 browser. That is not a mobile device. That browser you
6 can use on your desktop at home or on your laptop. And I
7 know because I use one myself.

8 And we're going to see a video -- it's the one
9 that Mr. Bachar showed during his deposition. But you
10 heard Dr. Malek on Tuesday admit that this is just a
11 Firefox browser; and, if you click the maximize button, it
12 will go full screen.

13 So if you are at home and you use a browser and
14 you use it either full screen or you make it smaller, as
15 sometimes people do, that's not a mobile device. We know
16 what a mobile device looks like. We have real ones and
17 you've seen examples of emulated ones.

18 Whether it's one of those two, that is what has to
19 be tested to fall within the scope of these claims. And
20 Micro Focus software must be actually programmed to do
21 that, or it does not infringe.

22 So let's take a look at the Mobile Web theory. So
23 the accused software is, first, LoadRunner. And the bullet
24 list below it shows that it has been used to record
25 scripts, to run those scripts in a test, and to generate

1 graphs. This is according to Dr. Malek's infringement
2 theory.

3 Next, we have Network Virtualization. And there's
4 been an awful lot of testimony and documents about this
5 product, and it was used to emulate network conditions.

6 Does anybody see what's missing? There is no
7 mobile device. There is a Firefox browser. There is no
8 emulated mobile device. There is no real mobile device.
9 And the testimony of Mr. Bachar was that if you had
10 UFT Mobile --

11 MR. DACUS: Your Honor, I'm sorry, but I'm going
12 to have to object.

13 THE COURT: Okay. I'll sustain the objection.

14 MR. DACUS: Can we get an instruction that there
15 is not a mobile device required? We talked about this
16 before.

17 THE COURT: Yes.

18 I will instruct the jury a mobile device is not
19 required.

20 Go ahead and continue.

21 MR. SHELTON: Thank you, your Honor.

22 We do know from the claims that an application for
23 a mobile device is absolutely required because that is what
24 is being tested.

25 And I submit to you, ladies and gentlemen, that a

1 Firefox browser, which is a computer browser running on a
2 computer, is not an application for a mobile device.

3 Let's talk about the other theory of infringement.

4 Next slide, please. Thank you.

5 And before we do, let's look at what Dr. Malek
6 said about the TruClient Mobile Web protocol theory. He
7 admitted that that right-hand side was simply a Firefox
8 browser; and if someone clicked on the maximize button it
9 would go full screen.

10 And if you recall from his testimony on direct, he
11 said that it emulated a mobile device because the screen
12 size of that Firefox browser was changed to what the screen
13 size would be of a mobile device.

14 But that doesn't make it a mobile device or an
15 application for a mobile device.

16 (Video presentation to the jury.)

17 Okay. Here, we're seeing Mr. Bachar's video.
18 He's actually creating a script in VuGen for the TruClient
19 Mobile Web.

20 And you recall during his testimony he was able to
21 maximize it. This was running on a computer that he was
22 running this test on, and he's clicking around.

23 And you can see on the left-hand side that script
24 is being created by his actions. He's just made it go full
25 screen again. And you can see it's just like a browser

1 that would be on your home computer.

2 Let's talk about the second infringement theory.
3 This is a combination of LoadRunner, Network
4 Virtualization, and UFT Mobile. And you have heard
5 testimony from both Dr. Malek and Dr. Shoemake about this
6 infringement theory.

7 And you heard this morning again that Dr. Malek
8 tested physical mobile device that was connected to the
9 UFT Mobile server, and he admitted this morning that if
10 that mobile device was not connected you could not run a
11 test.

12 And so, again, you have to ask yourself this
13 question when you retire to the jury room: Can the
14 combination of LoadRunner, Network Virtualization, and
15 UFT Mobile run an application on a mobile device, emulated
16 or real, so that the resources of that application running
17 on the mobile device can be shown, as the claims require.

18 So here are the three software components:
19 LoadRunner, Network Virtualization, and UFT Mobile. And
20 you can see that they do not meet all the limitations of
21 the claim.

22 There is additional software. You may recall at
23 the end of Dr. Malek's testimony on Tuesday, I asked him:
24 Why don't you show the software necessary to run the
25 application? And he did not have an answer.

1 Next, please.

2 Now, you all heard the testimony of Dr. Shoemake.
3 He presented four independent reasons why there is no
4 infringement of any of the three patents by the accused
5 software.

6 Now, Dr. Malek, on cross-examination, freely
7 admitted that his infringement theories for both TruClient
8 Mobile Web and TruClient Native Mobile rise and fall
9 together. And what that means is if there is one
10 limitation of these claims that isn't met there is no
11 infringement and your duty is done.

12 Now, let's talk about Dr. Malek. He told you,
13 over the course of several hours, along with many documents
14 that were used, just how critical Network Virtualization
15 was to testing mobile devices. It informs the very basis
16 of their opinions on damages.

17 And you've heard over and over, including in the
18 closing argument this morning, that the most important
19 software of the three was Network Virtualization.

20 And we heard that Dr. Malek was one of the
21 country's foremost experts on mobile application
22 development and testing.

23 And after telling you, the members of this jury,
24 over and over how important it was to use virtualized
25 networks and how important it was to test mobile

1 applications using a virtualized network, it turned out
2 that he had never done it. His career of testing and
3 developing mobile applications is longer than 20 years, and
4 he had never, ever done it, not for geographically based
5 network testing and -- he gave the excuse that he is just a
6 professor. He's not in a real company. He's not creating
7 applications.

8 But this was after he testified, you may recall,
9 that he had personally written dozens of mobile
10 applications, but that his software for testing mobile
11 applications had been used for hundreds of thousands of
12 mobile applications. That was his testimony.

13 And, yet, when it came to being confronted with
14 the fact that he had not once, in over 20 years, done the
15 kind of testing that he told you was essential, he said:
16 I'm just a professor.

17 Now, I have to talk about damages. I only get one
18 opportunity to speak with you, and so I'm going to go
19 through this analysis and explain why Wapp has grossly
20 overreached in their damages claim.

21 As with its burden to prove by a preponderance of
22 the evidence that Micro Focus has infringed by selling its
23 software, Wapp has the same burden of proof, by
24 preponderance, of proving damages.

25 Let me be clear, just as clear as Mr. Robostoff

1 was on the stand the other day: Micro Focus does not
2 infringe. And I'm confident, when you retire to the jury
3 room and all of you consider the evidence, that you will
4 come to that same conclusion.

5 But Wapp hired Mr. Weinstein at \$750 per hour to
6 put up this whopper of a number, \$172 million.

7 Now, I don't know if you found it ironic that
8 during Mr. Roboostoff's vigorous cross-examination the
9 other day that Mr. Dacus suggested over and over that my
10 client has an unhealthy and abnormal fixation on profits.
11 And, yet, what have you heard about more in this trial?
12 Have you heard more about money from Wapp or have you heard
13 more about infringement?

14 Because the order is quite clear. They have to
15 prove to you that Micro Focus infringes. If they do not,
16 if you decide that Micro Focus does not infringe and you
17 answer no on Question 1 of the verdict form, you don't
18 reach damages. There are no damages. They are zero.

19 So there is nothing wrong, of course, with Micro
20 Focus and any other corporation attempting to make a
21 profit.

22 We certainly know that Mr. Poulin has been
23 successful in business and there is absolutely nothing
24 wrong with that. There is nothing wrong with any company
25 trying to make a profit. And there is, of course, nothing

1 wrong with the fact that Micro Focus has been successful.

2 So we start with the overstated accused product
3 revenue, as Mr. Nelson testified about yesterday and
4 finishing this morning. And with Mr. Nelson's adjustments,
5 that number goes down by a staggering amount and instead is
6 \$154,025,319.

7 But that's not the only adjustment that had to be
8 made because the profit margin that was calculated by
9 Mr. Weinstein is also way too high because it doesn't
10 include all the expenses that Micro Focus incurs in the
11 course of its business. It's not fair.

12 So let's see what Mr. Nelson adjusted for the
13 profit margin. That goes down from 85.5 percent to
14 37.9 percent when the expenses are properly taken into
15 account.

16 Then, next, you heard Dr. Malek testify on Tuesday
17 about technical apportionment percentage. And do you
18 recall that he said that 80 percent of the value of
19 LoadRunner and the other accused products was due to
20 virtualized network testing? It is not just for mobile but
21 in general.

22 And, again, if you recall that Dr. Shoemake
23 testified that virtualizing a network is like putting --
24 having a straw and pinching it or having a hole in the
25 straw. So you are making intentional impairments to a

1 network to make it worse to do testing.

2 And so it should strike you as ironic that if
3 80 percent of the value of the products -- which
4 Mr. Weinstein pegs at \$423 million -- if it's so important,
5 why is it that one of the country's foremost experts on
6 developing and testing mobile applications had never done
7 it himself, not once in over 20 years?

8 The other part of Dr. Malek's apportionment was
9 that 77 percent number that he plucked out of one analyst
10 report about the proportion of people going online on a
11 mobile device in one month, June of 2019.

12 One month is not indicative of the period from
13 December 2014 to the present. It's a single data point.
14 You can't draw any conclusions from that.

15 Dr. Malek simply multiplies 80 percent times
16 77 percent and he gets 61.6 percent.

17 And you might remember that Dr. Malek relied on a
18 figure of 86 percent representing the number of UFT Mobile
19 customers that also had LoadRunner, and it was proven to be
20 wrong.

21 So the real technical apportionment percentage, as
22 determined by Dr. Shoemaker, is substantially lower. And
23 one of the reasons, as Mr. Staten, who you recall traveled
24 here all the way from Atlanta. Despite his ailing
25 mother -- he testified that there is -- and we're going to

1 see a video that he showed -- that he testified that there
2 is a setting within LoadRunner that has existed there for
3 some time that allows a form of network virtualization to
4 be used and it has nothing to do with the product Network
5 Virtualization.

6 Let's see that.

7 (Video presentation to the jury.)

8 MR. SHELTON: So this, once again, is -- you may
9 even recognize it by now -- is VuGen. And he is going in,
10 and he's going to set up speed simulation, which allows him
11 to change the bandwidth -- that's one of those network
12 conditions that you've heard about in this trial -- and to
13 set it to something higher or something lower, and to use
14 that speed simulation for the network during a test.

15 You've also heard about the protocols. You've
16 heard many times that there are 37 different protocols.
17 You heard Dr. Malek this morning say that some of them
18 aren't that important, some are more important. But you
19 never heard any evidence or testimony about the relative
20 importance of these different protocols.

21 You did hear about TruClient Mobile Web and
22 TruClient Native Mobile, but you didn't hear much about the
23 others. And there is a considerable amount of value in
24 those other protocols.

25 I'm sure you have heard now from several witnesses

1 that the primary purpose of LoadRunner is not testing
2 mobile applications, not testing mobile devices, but
3 testing servers.

4 You recall that screenshot from TxDOT on
5 February 19? I took that. I took that screenshot. I went
6 to TxDOT to see what the road conditions were, and I was
7 appalled at how completely broken that website was. That
8 is an example of what happens when companies, entities,
9 state governments don't test their infrastructure. And so
10 many of the other protocols that you see on this box are
11 used to perform very large-scale testing of servers, on the
12 order of hundreds, thousands, millions of users against
13 websites.

14 So, as you see here with the yellow and the
15 orange, you recall that Dr. Shoemake testified that those
16 two protocols are the only ones that have been identified
17 by Dr. Malek in his testing. Those are the only two that
18 are possibly relevant. But he did not take into account
19 the value of the other 35. That's a critical error in his
20 analysis.

21 And there were some questions of Mr. Staten when
22 he was here live about the SMP and the SAP mobile platform
23 scripting protocols. And those are for mobile
24 applications, as he testified. And they're not valued.
25 They're not even considered by Dr. Malek in his

1 apportionment.

2 We see here that Dr. Malek has testified that the
3 only two protocols that he relies upon are TruClient Native
4 Mobile and TruClient Mobile Web.

5 We heard from Mr. Weinstein; and he understands,
6 from talking to Dr. Malek, before he worked on his expert
7 report, that the only scripting protocols relied upon in
8 this case by Dr. Malek are the two that we've been
9 discussing. And, yet, there was no apportionment that took
10 into account either of those protocols relative to the
11 other 35 by either Mr. Weinstein or by Dr. Malek.

12 So let's take a look at Dr. Shoemake's
13 apportionment theory, which was used by our damages expert,
14 Mr. Nelson.

15 First, we have VuGen. You've seen that in action
16 in the -- by the video that Mr. Bachar showed you in his
17 testimony. And this is -- relates to all those blocks.
18 So, again, there's two out of 37, and there they are.

19 Now let's talk about the controller. The
20 controller is the part of LoadRunner that coordinates those
21 massive load tests against servers, where it will have as
22 many as millions of users, virtual users, that are working
23 against servers to test them. And controller doesn't have
24 anything to do with this case because, as you saw, there is
25 nothing about load testing or stress testing in the patents

1 that are before you.

2 Now let's talk about analysis. You heard
3 testimony from Dr. Shoemake that there are 82 reports that
4 are possible; and there is only four, though, that
5 Dr. Malek relied upon.

6 And so you can see this pie chart, that there are
7 four out of 82 graphs that are contended by Dr. Malek to
8 infringe, and two out of 37 of those protocols that are
9 contended to infringe.

10 So the end result of Dr. Shoemake's apportionment
11 theory is that 2.6 percent of the value of the patented
12 inventions is found if Dr. Malek was correct, maximum. Not
13 61.6 percent; 2.6.

14 So now let's see what happens when we apply a more
15 reasonable technical apportionment percentage from
16 Dr. Shoemake. We go from 61.6 to 2.6 percent.

17 And now let's talk about the profit split. You
18 heard that, on one hand, Mr. Poulin was so disadvantaged
19 and so injured that he was -- as you heard from his
20 testimony on direct, he was not permitted to be successful.
21 Others stood in his way. Others got in his way.

22 And yet, ironically, Wapp suggests that he would
23 have had a much stronger bargaining position relative to,
24 at the time, HP.

25 So you have to ask yourself: Does that make any

1 sense. How could you have a stronger position while you
2 were the weaker party? Because that's what they argued.

3 You have to use your common sense. You have to
4 use your experience in life as people to help you decide
5 the issues in this case.

6 So you have to ask yourself what is more
7 reasonable, that Mr. Poulin would have had a 77.3 percent
8 profit split -- in other words, for every dollar that was
9 brought in to Micro Focus on these products, he would have
10 gotten 77.3 percent of the split -- or 50 percent, which is
11 the split that was testified to by our expert, Clarke
12 Nelson.

13 And the difference is quite striking when you
14 apply those adjustments. The worst case, the worst case
15 under our damages expert's analysis, would be 754,000. But
16 I submit to you, ladies and gentlemen, that the real number
17 is zero; because, again, Micro Focus does not infringe, and
18 Wapp has not proven that Micro Focus infringes.

19 Now I want to talk about another issue in the
20 case, and that's called willful infringement. And
21 willfulness, you'll hear from the Judge's instruction, uses
22 words like "callus disregard" and "a high or excessive
23 danger of infringement."

24 And I hope you'll agree that in the first
25 instance, when you're looking at Question 1, that you will

1 answer "no" as your unanimous verdict, that Micro Focus
2 does not infringe.

3 But if you consider that Micro Focus did -- you
4 heard the testimony from Mr. Roboostoff.

5 Let's see that.

6 He was asked why not get rid of it completely,
7 "it" being Network Virtualization.

8 Again, you see this singular focus on only one of
9 the accused products. He's not asking about all of them,
10 but why not get rid of Network Virtualization.

11 Because you've heard the testimony that despite
12 the best efforts of Micro Focus and its predecessors, HP,
13 that it was not selling. Customers didn't want it.

14 And it's really easy in any business, especially
15 software, to know when you have a hit product, because
16 people buy it. When people stop buying it or their sales
17 decline -- every business faces a decision: Do we just
18 stop selling this? Do we stop making it? Do we stop
19 supporting it? And that's exactly what the facts have
20 shown to be the case with this product.

21 And so there's something that's very important in
22 Mr. Roboostoff's testimony.

23 First of all, he was unequivocal on the stand that
24 Micro Focus doesn't infringe.

25 But, secondly, he said that the reason why we

1 didn't just simply eradicate that product from our lineup
2 is that we did have some customers, 140, who used it. 140
3 out of over 4,000 customers that used LoadRunner.

4 And so you heard over and over from Mr. Roboostoff
5 that a key focus of Micro Focus in its business is its
6 customers. And that should make all the sense in the
7 world, every business should have that singular focus.

8 Now, there were a lot of questions for
9 Mr. Roboostoff about executive compensation for Micro Focus
10 for its board of directors. And the suggestion was made
11 that instead of compensating those individuals Micro Focus
12 just ought to pay all that profit to Mr. Poulin. But,
13 again, this is an attempt to elicit sympathy from you. It
14 is not proper.

15 You are the judges of the facts and you must
16 answer the questions on the jury verdict form in accordance
17 with the law as the Court instructs you. You should not
18 let yourself be swayed by prejudice, bias, sympathy, or
19 maybe hate or ill will towards large companies.

20 You heard from other Micro Focus witnesses. You
21 heard from five total witnesses. We had two witnesses who
22 appeared by trial depositions. They wanted to be here;
23 they could not.

24 One, Mr. Bachar, is the product manager for
25 UFT Mobile. He's a very talented software engineer. He's

1 been with the company for 13 years. You heard him testify
2 about UFT Mobile and how it works. You saw his video about
3 TruClient Mobile Web. And he wanted very much to travel to
4 the United States, all the way from Israel; but, right now,
5 no one can leave Israel. You cannot fly here.

6 You heard from Ms. Christine Ewing, who is a
7 senior director -- a director in product marketing. She
8 also wanted to come here, but she has an immune-suppressed
9 person in her family, and she was very concerned about
10 coming here and going home with COVID.

11 We did see Mr. Mike Staten. He may not have been
12 the most polished witness. And the poor gentleman found
13 out the night before he came here that none of his suits
14 fit him. And, yet, he traveled all the way here from
15 Atlanta. Left his mother with Alzheimer's, to come here
16 and to tell you the truth about LoadRunner and to explain
17 how it works.

18 You also heard from Mr. Sharon Levin, who's
19 another engineer in Israel.

20 This case means an awful lot to Micro Focus. It's
21 a terrible thing for any person or any company, no matter
22 what size, to be accused of not only infringing patents but
23 willfully infringing patents, meaning that we knew we were
24 infringing, didn't care, continued to do it with callous
25 disregard for the patent rights of Wapp. That just did not

1 happen.

2 Micro Focus is a large company, and it has its own
3 intellectual property. You've heard it has over 1800
4 patents. But regardless of how many patents it has, it
5 respects the intellectual property rights of everyone:
6 Individuals, small companies, large companies.

7 And so I want to just simply say at the end, thank
8 you for your attention. I know it's been a challenging
9 week. And I ask that you follow the Judge's instructions
10 to the letter, and I ask you to return a verdict of no
11 infringement. Thank you.

12 THE COURT: Thank you, Mr. Shelton.

13 Mr. Dacus, if you would like to complete the
14 arguments.

15 MR. DACUS: Ms. Conrad, can you tell me how much
16 time I have, please?

17 THE COURTROOM DEPUTY: Twenty-two minutes.

18 MR. DACUS: How much?

19 THE COURTROOM DEPUTY: Twenty-two.

20 MR. DACUS: Twenty-two. Thank you very much.

21 When you retire to deliberate in just a few
22 minutes, the Court's going to give you a form that looks
23 just like this. And the first question is going to be:
24 Has Wapp proven, by a preponderance of the evidence, that
25 Micro Focus infringed any of the asserted claims.

1 And you're going to have to answer that either
2 "yes" or "no."

3 I told you at the beginning it's not my duty, it's
4 not my job here to answer this for you. It's my job to get
5 you the evidence as best as I can to the best of my
6 ability.

7 Now, Mr. Shelton is right about one thing, I
8 didn't stand up here and talk about infringement a whole
9 lot, because you've heard probably four hours of testimony
10 from Dr. Malek.

11 But I do want to say one thing about infringement.
12 And you've probably figured out, I'm not the most technical
13 lawyer in this courtroom. I'll admit that. But the
14 evidence doesn't come from lawyers. The evidence is to
15 come from the witness stand and from the experts.

16 But there is one thing I know. These claims,
17 these inventions, Donavan's inventions -- what they want
18 you to believe is that the invention was an application or
19 a device. That's what he just argued to you. And you
20 heard the Court say to you disregard that; that's not the
21 invention.

22 So you have to ask yourself -- or at least you
23 should ask yourself -- why are they arguing something to
24 you that they know is absolutely wrong? Why not pick out
25 something that's actually missing and argue that to you?

1 So, again, I'm not the most technical person; but
2 I'll say that my mother was an English teacher for -- a
3 ninth grade English teacher for 42 years, so I can read.

4 And so here's what they want you to do. They want
5 you to believe that these inventions are an application for
6 a mobile device. That's not the invention. The invention
7 is a system for developing or a system for testing an
8 application for a mobile device.

9 We didn't invent an application. We didn't invent
10 a device. We developed -- I mean, we invented a system for
11 testing and developing. It's just that simple.

12 And for them to try to make it more complex than
13 that, you have to ask yourself why they're doing that.

14 When you retire to the jury room and you consider
15 all the evidence, it's your decision, but we certainly
16 believe that the evidence says that there has been
17 infringement; that they have included these patents in
18 their LoadRunner, UFT, and Network Virtualization products.

19 And there is no fixation by us on Network
20 Virtualization. All three of those products infringe.
21 They should pay for all three of those products.

22 Now, the second question the Judge is going to ask
23 you is: Was there willful infringement.

24 And I'll admit, I did not say this to you at the
25 beginning of this case, because judges don't always submit

1 this question, and I didn't know if he would or not in this
2 case; but he has.

3 And so he's going to read to you instructions
4 about what you need to find from the evidence as to whether
5 or not there has been willful infringement. He's going to
6 read these to you. You will have these instructions with
7 you in the jury room. You can look at them.

8 But what he's going to tell you is, if you find
9 that these folks acted in bad faith, if they acted
10 deliberately, if they acted consciously wrongful or
11 flagrantly, then you can find they are willful. And that's
12 an "or." If you find any of those things, you can find
13 they are willful.

14 If you find that they acted with conscious
15 disregard -- in other words, if they should have known that
16 they were doing something bad but they stuck their head in
17 the sand -- that's willfulness.

18 You can read the instruction. You don't have to
19 trust me. You can go read what the Court's instruction is.

20 And he's going to give to you, in that
21 instruction, these five factors to look at. You don't have
22 to find all of them. You don't have to find any of them.

23 But I do think it's -- when I read these last
24 night from the Court, I think it fits very well with this
25 case. And here's why I'll say that. I'm going to take

1 them in reverse order.

2 The Judge says look to see whether or not Micro
3 Focus tried to cover up its infringement.

4 We've all heard the phrase "the cover-up is worse
5 than the crime." And I'm going to tell you, this case
6 should be the poster child for that. It should absolutely
7 be the poster child because the cover-up is worse than the
8 crime.

9 They took their marketing documents, the ones that
10 said the very thing that is accused, the very thing that
11 used Donovan's invention, the secret sauce, and as soon as
12 this lawsuit was filed, what did they do? That document
13 disappeared.

14 Think about it. That document had been in
15 existence at Hewlett Packard for a decade. Hewlett Packard
16 had been out there telling people that the thing that
17 Donovan invented was the secret sauce. This lawsuit was
18 filed, that document goes away.

19 What else went away? The datasheets. Do you
20 remember, Ms. Ewing testified; and, at the very end, she
21 was asked did you rewrite the datasheets after this
22 lawsuit? She not only said we rewrote them, we completely
23 rewrote them. Completely rewrote them.

24 What else do we know? They came to this courtroom
25 and told you that Network Virtualization is free. Network

1 Virtualization is free. They said: We're including it now
2 in LoadRunner and it's free. Don't have to pay for it.

3 Use your common sense here.

4 And I realize it was difficult to tell yesterday
5 if I knew the difference between McDonald's and Walmart;
6 but I do, believe it or not. But if McDonald's adds an
7 apple pie to their Happy Meal -- you know what -- I'll bet
8 the price goes up. If it doesn't go up, I guess you could
9 say the apple pie was free.

10 And that's what they want to try to convince you
11 here; that, in fact, that's what occurred. But you know
12 from what you heard this morning, when I questioned
13 Mr. Nelson, when they actually put Network Virtualization
14 into LoadRunner, they said -- internally, now; they didn't
15 know this was ever going to see the light of day --
16 internally, they said: We're going to double the price to
17 our customers. Just by putting Network Virtualization into
18 LoadRunner, we're going to double the price.

19 Does that sound like they're giving it away for
20 free, or does that sound like it's very valuable?

21 This document -- you can look at it when you go
22 back. It is Exhibit D-82. You don't have to trust me.
23 Pull it out. You'll see. They said: We're going to
24 increase our price. Our justification is Network
25 Virtualization, and we're going to double the price. And

1 if you believe that's free, I'm doing a poor job.

2 Now, the Judge, as part of this willfulness, he
3 says: Look at whether or not Micro Focus made a good-faith
4 effort to avoid infringing.

5 And I gave them every chance in this trial. You
6 may remember it. I said: Did y'all change anything? You
7 keep saying Network Virtualization is worthless. Did you
8 just take it out?

9 And what did they say? No, we did not and we're
10 not going to.

11 And the Judge says that's bad faith. That's
12 willful infringement.

13 What else does the Judge tell you to look at?
14 Look at Number 3, whether or not Micro Focus reasonably
15 believed it did not infringe or that the patent was
16 invalid.

17 Well, let's take it in reverse order.

18 Did they really believe this thing was invalid?
19 We fought them for two and a half years on invalidity. At
20 the end of that, they put someone on the witness stand to
21 testify for 30 minutes. That's five minutes per invention
22 here, to hand wave and say you should take these patents
23 away from Donavan.

24 I want to put this in perspective for you. The
25 burden to take away a patent is the same to take away a kid

1 in the state of Texas. And in many ways I'm confident
2 these patents are like Donovan's kids. He spent two
3 decades of his life on these things.

4 And these folks fight for two and a half years and
5 then trot somebody up there for 30 minutes to try to have
6 you take them away. If that's not bad faith, I don't know
7 what is. If that's not willfulness, I don't know what it
8 is.

9 And then it says: Did they reasonably believe
10 they did not infringe.

11 They didn't have a single person at their company
12 read the patents. They just put up Mr. Roboostoff's
13 testimony where he said: I don't believe we infringe. In
14 the second breath, he said: I didn't read the patents.

15 You know from what the Court is instructing you,
16 in order to determine infringement, you at least need to
17 read the patents.

18 Does that sound like bad faith? Does that sound
19 like people who are doing the right thing?

20 Number two says you're supposed to look at whether
21 or not Micro Focus copied Wapp's product. That's not
22 applicable to this case. We don't have a product. We
23 don't contend that they copied it.

24 The first one that the Judge tells you to also
25 look at is whether or not Micro Focus acted consistently

1 with standards of behavior.

2 I think there is a couple of things to look at
3 here and to think about. Mr. Shelton is right, we do
4 contend these folks have an unhealthy view of the world.
5 They do put too much emphasis on a dollar, to the detriment
6 of people who have constitutional patents.

7 And he's right, we do say that they should not pay
8 those executive directors \$54 million a year when they
9 don't pay Donavan a penny.

10 But let's be clear about one thing, who started
11 this fight. What they stood up here and told you on Monday
12 was they should not have to pay us anything because they
13 don't make a profit.

14 So one thing that Mr. Robostoff said to me is --
15 I don't know if he said I'm old or I'm old-fashioned. But
16 either way those are probably the truest things that he
17 said on the stand because both are true. Both are true.

18 And when you stand here on Monday and you say, we
19 don't have to pay you because we don't make a profit, we're
20 going to fight back and we're going to say, well, why
21 didn't you make a profit? Why didn't you make a profit?

22 And now we know, because you're paying these
23 people lavishly, excessively. And you're trying to trick
24 this jury to believe that these products are not profitable
25 at all, when nothing could be further from the truth.

1 We also know that related to this Hewlett Packard
2 transaction -- we're talking about whether or not these
3 people acted with the kind of code of conduct and standards
4 of behavior that we all expect. When those executives
5 bought Hewlett Packard, they got stock options, which means
6 they get options on these stocks. Millions of dollars as
7 you saw, millions of dollars worth of stock.

8 But they only get those options -- they are called
9 an option because you have to meet some contingencies or
10 requirements. You have to make a certain percentage of
11 return on that investment before you get those options.
12 And those options don't do what they call "vest," as we
13 talked about, until this year, 2021.

14 So what those executives did is, rather than pay
15 Mr. Poulin the fair value for his patents -- because every
16 dollar they paid him would come out of the profits and the
17 return -- they didn't pay him a penny, because they wanted
18 to make sure that they earned every bit of those tens of
19 millions of dollars of stock options.

20 That's not within anyone's standard of conduct, to
21 deny someone their constitutionally protected property
22 rights so that you can reap tens of millions of dollars.

23 So when you go back to the jury room -- and please
24 look at the Court's instructions closely. The question
25 will be: Did Wapp proof by a preponderance of the evidence

1 that Micro Focus willfully infringed any of the asserted
2 claims that you found were infringed? Did they willfully
3 do so?

4 It's your decision; but we certainly believe that
5 the evidence proves -- not by a preponderance of the
6 evidence, which is all that's required -- but way down here
7 (demonstrating), that these folks willfully infringed these
8 patents.

9 Now, I want to talk about the final question that
10 you're going to be asked, and that is what sum of money, if
11 any, paid in cash, has Wapp proven by a preponderance of
12 the evidence would compensate Wapp for its damages
13 resulting from infringement through July 31 of 2020.

14 There are a couple of things that I want to be
15 clear on here. You've heard several times these folks say:
16 Well, you need to apportion according to these protocols.
17 You need to apportion according to these graphs.

18 Do you remember, in opening, I said to you: If
19 you hear that word "protocol," there need to be some alarm
20 bells going off in your head, because it's like a big
21 garbage or dump truck about to back over you. And it's
22 true. It's true. And here's why I say that.

23 When you get the Court's instructions on
24 damages -- and, again, we can't read them all here. He's
25 about to read them. Pull them out when you get in there --

1 he's going to tell you that what you are to value is the
2 patented inventions. That makes sense, right? We have a
3 patent. You need to value the invention.

4 What defines the invention? The claims, right?

5 So here's what I want you to do. With all this
6 talk about protocols and graphs and apportioning based on
7 that, I want you to read every claim when you get back
8 there, and I want you to see if the word "protocol" is
9 anywhere in these inventions.

10 Why are they asking you to apportion based on
11 something that's not even in the invention?

12 I want you to see if the word "graph" is anywhere
13 in the invention.

14 You're supposed to, according to the Judge's
15 instructions, apportion based on the invention. They are
16 asking you to do something completely contrary to what the
17 Court's instructions are.

18 Now, damages can get very detailed, and I realize
19 that. And so I was thinking last night what's a good way
20 to put this in perspective.

21 You saw them -- you saw their expert say and them
22 say to you just now that they think \$750,000 is a fair
23 value for these patents, when they made \$423 million.

24 So it occurred to me last night: What percentage
25 of \$423 million is 750,000?

1 So I have a calculator, thank goodness. And the
2 answer is .0012. So one one-thousandth -- not even one
3 one-hundredth -- but one one-thousandth.

4 You know, we have so many details in all these
5 cases. I know it's like drinking water through a firehose
6 for five days. Sometimes it's good to step back and just
7 think about this at a high level.

8 So here's what these folks have the gall to
9 propose that you should say to Donovan for these
10 inventions.

11 THE COURTROOM DEPUTY: You have five minutes.

12 MR. DACUS: Thank you.

13 For every dollar that they make, for every dollar,
14 this is a penny.

15 They don't even want to give us one penny. Think
16 about one one-thousandth is. This is one one-hundredth.

17 They would say: You need to cut that penny in ten
18 pieces, and we'll give you one of those ten pieces of this
19 penny.

20 For every dollar that they make, they won't even
21 give us a penny. That takes some nerve. It really does.

22 The truth is, when you're talking about damages --
23 and, probably, the real reason we're here, in part, is
24 because these folks think about one thing, and they told
25 you what that is. They think about their investors. They

1 think about their stock price. Every eighth tick of a
2 point of that stock price, that's what they care about.
3 And every dollar they can save off of that 172 million, I
4 promise you they will walk out of this courthouse
5 high-fiving, because that's what this is about.
6 Absolutely, what it's about.

7 The law says that the rightful amount to pay for
8 these inventions is \$172.5 million. We don't ask for a
9 penny more; and, candidly, we don't ask for a penny less.

10 I'm going to sit down. I hope there's no
11 clapping. But I want to end here.

12 I know I am, I know every lawyer on this team, are
13 really, really proud of Donovan Poulin. Really proud.
14 There's no way for me to express to you what this fight has
15 been like, and there's no way for me to express to you how
16 many times along the way I could not believe he didn't
17 quit. It really is a privilege to stand here.

18 I am old-fashioned. I do believe in right and
19 wrong. And as you heard from the Court's video when you
20 came to court, I'm not the person that can stop the wrong;
21 Donovan is not the person that can stop the wrong; we have
22 to ask you to do that.

23 And this conduct needs to stop. This conduct
24 needs to stop. This day of thinking that you can step on a
25 small inventor's throat -- just like they said to you just

1 20 minutes ago, he's crazy if he thinks he could get
2 77 percent.

3 Well, he has a constitutional right. He has a
4 property right in a patent. That's why he's entitled to
5 that money. It doesn't matter how big you are, you have an
6 obligation to do what the law requires.

7 So that's what we ask you to do, is to stop this
8 kind of activity, stop this kind of conduct.

9 I appreciate very much the attention that you've
10 given to this case. It's not lost on anyone at our table
11 that you have devoted every bit of your attention to this
12 case, and we very much look forward to your verdict. Thank
13 you very much.

14 THE COURT: Thank you, Mr. Dacus.

15 Ladies and gentlemen, are you okay continuing and
16 then we'll go -- I have to do my final instructions, which
17 will take about 20, 25 minutes. Okay.

18 I'll try to read fast.

19 Is everyone okay continuing without a break?

20 Okay. I'm going to have my lawyer give you a
21 copy. I'm giving you give you a copy, one you can take
22 back to the jury room with you, of my instructions.

23 And the law requires me to read them, so you have
24 to listen to me, but you can also follow along if you so
25 desire.

1 But, either way, you'll have a copy to take back.

2 Okay. Ladies and gentlemen, thank you for paying
3 such close attention to everything. And so let's begin.

4 Members of the jury, it is my duty and
5 responsibility to instruct you on the law that you are to
6 apply in this case. The law contained in these
7 instructions is the only law you may follow. It is your
8 duty to follow what I instruct you the law is, regardless
9 of any opinion that you might have as to what the law ought
10 to be.

11 If I have given you the impression during the
12 trial that I favor either party, you must disregard that
13 impression. If I have given you the impression during the
14 trial that I have an opinion about the facts of this case,
15 you must disregard that impression.

16 Remember, you are the sole judges of the facts of
17 this case.

18 Other than my instructions to you on the law, you
19 should disregard anything that I have said or done during
20 the trial in arriving at your verdict.

21 You should consider all of the instructions about
22 the law as a whole and regard each instruction in light of
23 the others, without isolating a particular statement or
24 paragraph.

25 The testimony of the witnesses and other exhibits

1 introduced by the parties constitute the evidence. The
2 statements of counsel are not evidence; they're only
3 arguments. It is important for you to distinguish between
4 the arguments of counsel and the evidence on which those
5 arguments rest. What the lawyers say or do is not
6 evidence. You may, however, consider their arguments in
7 light of the evidence that has been admitted and determine
8 whether the evidence admitted in this trial supports the
9 arguments.

10 You must determine the facts from all the
11 testimony that you have heard and other evidence submitted.
12 You are the judges of the facts; but in finding those facts
13 you must apply the law as I instruct you.

14 You are required by law to decide this case in a
15 fair, impartial, and unbiased manner, based entirely on the
16 law and on the evidence presented to you here in the
17 courtroom. You may not be influenced by passion,
18 prejudice, or sympathy you might have for the plaintiff or
19 the defendant in arriving at your verdict.

20 Plaintiff Wapp Tech Limited Partnership and Wapp
21 Tech Corp., referred to as "Wapp," has the burden of
22 proving its case by a preponderance of the evidence.

23 To establish by a preponderance of the evidence
24 means to prove something is more likely so than not so. If
25 you find that Wapp has failed to prove any element of its

1 claim by a preponderance of the evidence, then it may not
2 recover on that claim. This standard is different from
3 what you have heard about in criminal proceedings where a
4 fact must be proven beyond a reasonable doubt.

5 The evidence you make -- you are to consider
6 consists of the testimony of the witnesses, including
7 witnesses whose testimony was provided by prior deposition,
8 the documents and other exhibits admitted into evidence,
9 and any fair inferences and reasonable conclusions you can
10 draw from the facts and circumstances that have been
11 proven.

12 Now, generally speaking, there are two types of
13 evidence. One is direct evidence, such as the testimony of
14 an eyewitness. The other is indirect or circumstantial
15 evidence.

16 Circumstantial evidence is evidence that proves a
17 fact from which you may logically conclude other facts
18 exist.

19 As a general rule, the law makes no distinction
20 between direct and circumstantial evidence but simply
21 requires that you find the facts from a preponderance of
22 all the evidence, both direct and circumstantial.

23 Certain charts and summaries have been shown to
24 you solely to help explain or summarize the facts disclosed
25 by the books, records and other documents that are in

1 evidence. These charts and summaries are not evidence or
2 proof of any facts. You should determine the facts from
3 the evidence.

4 Some exhibits have been presented to you as
5 illustrations. Demonstrative evidence can be used to
6 describe something involved in this trial, but it is not
7 itself evidence. If your recollection of the evidence
8 differs from the exhibit, rely on your recollection.

9 You alone are to determine the questions of
10 credibility or truthfulness of the witnesses. In weighing
11 the testimony of the witnesses, you may consider the
12 witness' manner and demeanor on the witness stand, any
13 feelings or interest in the case, or any prejudice or bias
14 about the case that he or she may have, and the consistency
15 or inconsistency of his or her testimony considered in the
16 light of the circumstances.

17 Has the witness been contradicted by other
18 credible evidence? Has he or she made statements at other
19 times and places contrary to those made here on the witness
20 stand? You must give the testimony of each witness the
21 credibility you think it deserves.

22 Even though a witness may be a party to the action
23 and, therefore, interested in its outcome, the testimony
24 may be accepted if it is not contradicted by direct
25 evidence or by any inference that may be drawn from the

1 evidence if you believe the testimony.

2 You are not to decide this case by counting the
3 number of witnesses who have testified on the opposing
4 sides. Witness testimony is weighed; witnesses are not
5 counted. The test is not the relative number of witnesses
6 but the relative convincing force of the evidence. The
7 testimony of a single witness is sufficient to prove any
8 fact, even if a greater number of witnesses testified to
9 the contrary, if, after considering all of the other
10 evidence, you believe that witness.

11 When knowledge of a technical subject matter may
12 be helpful to the jury a person who has special training or
13 experience in that technical field is permitted to state
14 his or her opinion on those technical matters. During the
15 trial you have heard testimony from the following
16 individuals who expressed expert opinions: Sam Malek,
17 Wapp's technical expert; and Ray (*sic*) Weinstein, Wapp's
18 damages experts; Matthew Shoemake, Micro Focus' technical
19 expert; and Clarke Nelson, Micro Focus' damages expert.
20 You are not required to accept these opinions. As with any
21 other witness, it is up to you to decide whether to rely
22 upon them.

23 Now, as I told you in my preliminary instructions,
24 I have given you the opportunity to give me written
25 questions anonymously after a witness testified when you

1 had an important question of that witness that was strictly
2 limited to the substance of the witness' testimony.
3 Remember that I asked you not to be offended if I did not
4 present your question to be asked by the witness (*sic*).
5 You should not speculate on the answer to any unasked
6 question, and you should not speculate on or consider any
7 facts or events outside the testimony and exhibits you have
8 heard and seen in this courtroom.

9 The testimony of a -- when testimony or an exhibit
10 is admitted for a limited purpose, you may consider that
11 testimony or exhibit only for the specific limited purpose
12 for which it was admitted.

13 A stipulation is an agreement. When there's no
14 dispute about certain facts, the attorneys may agree or
15 stipulate to those facts. You must accept a stipulated
16 fact as evidence and treat that fact as having been proven
17 here in the court. Here, the parties have stipulated to
18 the following:

19 One, Plaintiff Wapp Tech Limited Partnership is a
20 Delaware limited partnership organized and existed --
21 existing under the laws of the State of Delaware.

22 Two, Plaintiff Wapp Tech Corp. is a body corporate
23 organized and existing under the laws of the province of
24 Alberta, Canada.

25 Three, Defendant Seattle SpinCo, Inc., is a

1 Delaware corporation with its principal place of business
2 at 4555 Great America Parkway, Suite 400, Santa Clara,
3 California, ZIP code 95054. Seattle SpinCo is a direct
4 wholly owned subsidiary of Micro Focus (US) Group, Inc.

5 Defendant Micro Focus, LLC, is a Delaware
6 corporation with its principal place of business at 4555
7 Great America Parkway, Suite 400, in Santa Clara,
8 California -- I'm not sure what the 6 there is for -- ZIP
9 code 9 -- unless that's -- yeah -- ZIP code 75054 (*sic*).
10 Micro Focus, LLC, is a direct wholly owned subsidiary of
11 Seattle SpinCo.

12 Defendant Micro Focus Interactive Israel Limited
13 is incorporated in Israel and has offices at Rehov Avraham
14 Atalef 5 -- I'm sorry, I'm really mispronouncing those --
15 5621600 in Israel.

16 Six, Defendant Micro Focus Government Solutions,
17 LLC, is a Delaware corporation, with its principal place of
18 business at 8609 Westwood Center Drive, Suite 700 in
19 Vienna, Virginia, ZIP code 22182. Micro Focus Government
20 Solutions, LLC, is a wholly owned subsidiary of Micro
21 Focus, LLC.

22 Seven, Defendant Micro Focus (US) Inc. is a
23 Delaware corporation, with its principal place of business
24 at One Irvington Center, 700 King Farm Boulevard, Suite 400
25 in Rockville, Maryland, ZIP code 20850.

1 B, the asserted patents. Their stipulation as to
2 that is:

3 One, the asserted patents are U.S. Patent
4 Number 8,924,192, which we refer to as "the '192 Patent";
5 9,971,678, as we refer to as "the '678 Patent"; and
6 9,298,864, as we refer to as "the '864 Patent"; or,
7 collectively, referred to as the "patents-in-suit."

8 Second, the U.S. Patent Number -- I'm going to
9 refer to it as "the '192" -- was filed on November 9th,
10 2012, and issued on December 30th, 2014. It names Donavan
11 Poulin as the inventor.

12 Three, U.S. Patent -- we will refer to it as "the
13 '678 Patent" -- was filed on December 23rd, 2014, and
14 issued on May 15th, 2018. It names Donavan Poulin as the
15 inventor.

16 And, four, the U.S. patent -- the '864 Patent, was
17 filed on November 19th, 2013, and issued on March 29th,
18 2016. It, again, names Donavan Poulin as the inventor.

19 C, the accused products:

20 The products that are alleged to infringe are:

21 One, LoadRunner Professional (formerly LoadRunner)
22 Version 12.0 through 2020 SP2-SP3 with Network
23 Virtualization alone and/or in combination with
24 UFT Mobile/Mobile Center through Version 3.4 (the
25 "LoadRunner Professional Accused Systems");

1 And, two, LoadRunner Enterprise (formerly
2 Performance Center) Version 12.0 through 2020 SP2 versus
3 SP3 with Network Virtualization alone and/or in combination
4 with UFT Mobile or Mobile Center through Version 3.4 (the
5 "LoadRunner Enterprise Accused Systems"); and --

6 Isn't the third one, the Cloud, not there?

7 MR. DACUS: That's what I was about to raise, your
8 Honor.

9 THE COURT: I'm not sure how that got removed.
10 Let me find...

11 And you probably still have the preliminary
12 instructions, so if you want to see the -- I'm just going
13 to read it to you and not supplement this.

14 But in the preliminary instructions, page 13, it
15 also -- the third product of the accused products is the
16 LoadRunner Cloud (formerly StormRunner Load) Versions 1.2
17 through 2020.10, with Network Virtualization alone and in
18 combination with UFT Mobile/Mobile Center through
19 Version 3.4 (the "LoadRunner Cloud Accused Systems").

20 And so just -- that third one should be included
21 there, and I'm letting you know to include that as part of
22 this.

23 And then these may be referred to simply as the
24 "accused products" or the "accused instrumentalities."

25 Summary of contentions.

1 As I did at the start of the case, I will give you
2 a summary of each side's contentions in this case. I will
3 then provide you with detailed instructions on what each
4 side must prove to win on each of its contentions.

5 The plaintiffs, again, in this case are Wapp Tech
6 Limited Partnership and Wapp Tech Corp., often referred to
7 as "plaintiffs" or "Wapp."

8 The defendants in this case are Seattle SpinCo,
9 Inc., Micro Focus, LLC, Micro Focus Interactive Israel
10 Limited, Micro Focus Government Solutions, LLC, and Micro
11 Focus (US) Inc., often referred to as simply "defendants"
12 or as "Micro Focus."

13 The patents involved in this case are the '192
14 Patent, the '678 Patent, and the '864 Patent.

15 Wapp asserts that Micro Focus infringes Claims 1
16 and 2 of the '192 Patent, Claims 45 and 49 of the '678
17 Patent, and Claims 1 and 2 of the '864 Patent.

18 Wapp seeks damages from Micro Focus for allegedly
19 infringing these claims.

20 The products that are alleged to infringe are the
21 LoadRunner Professional (formerly LoadRunner) Versions 12.0
22 through 2020 SP2-SP3 with Network Virtualization alone or
23 in combination with UFT Mobile/Mobile Center through
24 Version 3.4, which is also referred to as the "LoadRunner
25 Professional Accused Systems"; LoadRunner Enterprise

1 (formerly Performance Center) Versions 12.0 through 2020
2 SP2-SP3 with Network Virtualization alone or in combination
3 with UFT Mobile/Mobile Center through Version 3.4, which is
4 referred to as the "LoadRunner Enterprise Accused Systems";
5 and LoadRunner Cloud (formerly StormRunner Load)
6 Versions 1.2 through 2020.10 with Network Virtualization
7 alone or in combination with UFT Mobile/Mobile Center
8 through Version 3.4 (the "LoadRunner Cloud Accused
9 Systems"), which it is referred to as that.

10 These, again, may be referred to simply as the
11 accused products or accused instrumentalities.

12 And I apologize for the repetitiveness, but at
13 least in this paragraph on page 8 you have all three
14 accused systems.

15 Micro Focus denies that it has infringed or
16 infringes the asserted claims of the patents-in-suit.

17 Those are the positions of the parties that are
18 before you today. Your job will be to decide whether or
19 not the asserted claims have been infringed.

20 If you decide that any claim of the asserted
21 patents have been infringed, you will then need to decide
22 any money damages to be awarded to Wapp to compensate it
23 for the infringement.

24 If you decide that Micro Focus does not infringe,
25 then you will not need to decide any monetary damages.

1 Claims of the patent.

2 Before you can decide many of the issues in this
3 case you will need to understand the role of the patent
4 claims.

5 The patent claims are numbered sentences at the
6 end of each patent. The claims are important because it is
7 the words of the claims that define what the patent covers.

8 The figures and the text in the rest of the patent
9 provide the description and/or examples of the invention
10 and provide a context for the claims, but it is the claims
11 that define the breadth of the patent's coverage.
12 Therefore, what a patent covers depends, in turn, on what
13 each of its claims covers.

14 The patents at issue in this case have been
15 provided to you in your juror notebooks. Remember that
16 only certain claims of the three patents are at issue. Do
17 not attempt to determine infringement with respect to any
18 other claim included in the patents-in-suit.

19 Claims are usually divided into parts called
20 limitations or elements. When a thing, such as an accused
21 product or accused instrumentality, meets all of the
22 requirements of the claim, the claim is said to "cover"
23 that thing and that thing is said as to "fall" within the
24 scope of that claim.

25 In other words, a claim covers a product or

1 process where each of the claim elements or limitations is
2 present in that product or process.

3 For example, a claim that covers the invention of
4 a table may recite the tabletop, four legs, and the glue
5 that secures the legs to the tabletop. In this example,
6 the tabletop, legs, and glue are each separate limitations
7 or elements of the claim.

8 Now, this case involves two types of patent
9 claims: Independent claims and dependent claims.

10 An independent claim sets forth all of the
11 requirements that must be met in order to be covered by
12 that claim. Thus, it is not necessary to look at any other
13 claim to determine what an independent claim covers.

14 In this case, Claim 1 of the '192 Patent, Claim 45
15 of the '678 Patent, and Claim 1 of the '864 Patent are each
16 independent claims, and the remaining claims are dependent
17 claims.

18 A dependent claim does not itself recite all of
19 the requirements of the claim but refers to another claim
20 for some of its requirements. In this way the claim
21 "depends" on another claim. A dependent claim incorporates
22 all of the requirements of the claim to which it refers.
23 The dependent claim then adds its own additional
24 requirements.

25 To determine what a dependent claim covers, it is

1 necessary to look back both at the dependent claim and the
2 independent claim to which it refers.

3 For example, Claim 2 of the '192 Patent is a
4 dependent claim that depends on the independent Claim 1 of
5 the '192 Patent.

6 The dependent asserted claims -- I'm sorry -- the
7 dependent asserted claims in this case are Claim 2 of the
8 '192 Patent, Claim 49 of the '678 Patent, and Claim 2 of
9 the '864 Patent.

10 A product that meets all of the requirements of
11 both the independent claim and the claim to which it refers
12 is covered by that dependent claim.

13 If you find that an independent claim is not
14 infringed, then you must also find that its dependent
15 claims are not infringed.

16 If you find that an independent claim is
17 infringed, you must further decide whether its dependent
18 claims that are also asserted in this case are also
19 infringed.

20 Now, it is my job as the judge to determine the
21 meaning of any claim language from these patents that needs
22 interpretation. You must accept the meaning that I give
23 you and use them when you decide whether any claim is
24 infringed.

25 In your notebook, you have been provided with a

1 copy of the meanings that I have adopted for certain terms.

2 You will first need to understand what each claim
3 covers in order to decide whether or not there is
4 infringement there is infringement of that claim.

5 Sometimes the words in a patent claim are
6 difficult to understand; and, therefore, it is difficult to
7 understand what requirements these words impose.

8 The law says that it is my role to define the
9 terms of the claims and it is your role to apply my
10 definitions to the issues that you are asked to decide in
11 this case.

12 Therefore, as I explained to you at the start of
13 the case, I have determined the meaning of the claims, and
14 I will provide you my definitions of certain claim terms.
15 You must accept my definitions of these words in the claims
16 as being correct.

17 By understanding the meaning of the words in a
18 claim and by understanding that the words in a claim set
19 forth the requirements that a product or process must meet
20 in order to be covered by that claim you will be able to
21 understand the scope of the coverage for each claim.

22 Once you understand what each claim covers, then
23 you are prepared to decide the issues that you will be
24 asked to decide, such as infringement.

25 For any words in the claims for which I have not

1 provided you with a definition, you should apply its
2 ordinary and accustomed meaning as understood by one of
3 ordinary skill in the art.

4 You should not take my definition of the language
5 of the claims as any indication that I have a view
6 regarding how you should decide the issues that you are
7 being asked to decide, such as infringement. These issues
8 are for you to decide.

9 My interpretation of the various claim terms and
10 phrases appears in your juror notebook, and I'm going to
11 read them to you right now.

12 For the '192 Patent, a "system for developing an
13 application for a mobile device" should be given its plain
14 meaning and it is limiting.

15 "Application" should be given its plain meaning.

16 "Simulate" means "emulate."

17 "Emulate" should be given its plain meaning.

18 "Simultaneously visually emulate, via one or more
19 profile display windows," means "emulate simultaneously and
20 display one or more windows showing resources of the mobile
21 device that are available to the application."

22 And "configured to" means "actually programmed
23 to."

24 For the '678 Patent, a "system for testing an
25 application for a mobile device" should be given its plain

1 meaning and is limiting.

2 "Application" should be given its plain meaning.

3 "Simulate," again, means to "emulate."

4 "Simultaneously visually simulate, via one or more
5 profile display windows," again, means "emulate
6 simultaneously, and display one or more windows showing the
7 resources of the mobile device that are available to the
8 application."

9 And "configured to" means, again, "actually
10 programmed to."

11 For the '864 Patent, "system for testing an
12 application for a mobile device" should be given its plain
13 meaning, and is limiting.

14 "Application" should be given its plain meaning.

15 "Simulate" means to "emulate."

16 "Emulate" should be given its plain meaning.

17 "Simulate, via one or more profile display
18 windows" means "emulate and display one or more windows
19 showing resources of the mobile device that are available
20 to the application."

21 And "configured to," again, means "actually
22 programmed to."

23 Now, I will now instruct you on how to decide
24 whether or not Micro Focus has infringed the asserted
25 patents.

1 Infringement is assessed by a claim-by-claim
2 basis. Therefore, there may be infringement of a
3 particular patent as to one claim but no infringement as to
4 the other claim in that patent.

5 In this case Wapp has alleged that Micro Focus
6 directly infringes the asserted patents by selling the
7 accused products.

8 Wapp must prove direct infringement by a
9 preponderance of the evidence.

10 I will now explain direct infringement by literal
11 infringement in more detail.

12 In order to prove direct infringement by literal
13 infringement Wapp must prove by a preponderance of the
14 evidence that Micro Focus sold an accused product that
15 meets all of the requirements of the claim and did so
16 without the permission of Wapp. You must compare each
17 accused Micro Focus product with each and every one of the
18 requirements for each asserted claim to determine whether
19 all of the requirements of that claim are met.

20 Wapp alleges that Micro Focus directly infringes
21 Claims 1 and 2 of the '192 Patent, Claims 45 and 49 of the
22 '678 Patent, and Claims 1 and 2 of the '864 Patent.

23 As I explained before, Wapp alleges that the
24 LoadRunner Professional (formerly LoadRunner) Versions 12.0
25 through 2020 SP2-SP3 with Network Virtualization alone

1 and/or in combination with the UFT Mobile/Mobile Center
2 through Version 3.4 (the "LoadRunner Professional Accused
3 Systems"); LoadRunner Enterprise (formerly Performance
4 Center) Versions 12.0 through 2020 SP2-SP3 with Network
5 Virtualization alone and/or in combination with
6 UFT Mobile/Mobile Center through Version 3.4 (the
7 "LoadRunner Enterprise Accused Systems"); and LoadRunner
8 Cloud (formerly StormRunner Load) Versions 1.2 through
9 2020.10 with Network Virtualization alone and/or in
10 combination with UFT Mobile/Mobile Center through
11 Version 3.4 (the "LoadRunner Cloud Accused Systems")
12 infringe the asserted claims.

13 You must determine, separately for each asserted
14 claim and each accused product, whether or not there is
15 infringement.

16 There is one exception to this rule. If you find
17 that a claim to which a dependent claim refers is not
18 infringed, there cannot be infringement of that dependent
19 claim.

20 On the other hand, if you find that an independent
21 claim has been infringed, you must still decide,
22 separately, whether the product meets the additional
23 requirements of any asserted claim that depend from the
24 independent claim; thus, whether those claims have also
25 been infringed.

1 A dependent claim includes all the requirements of
2 any of the claims to which it refers plus the additional
3 requirements of its own.

4 A claim limitation is met if it exists in the
5 accused product as it is described in the claim language
6 either as I have explained this language to you or, if I
7 did not explain it to you, as it would be understood by one
8 of ordinary skill in the art.

9 Direct infringement of a system claim occurs if a
10 single party sells the system as a whole.

11 Wapp contends that Micro Focus has sold the
12 accused systems. To prevail on this assertion Wapp must
13 prove that Micro Focus sold all of the claim elements in a
14 system.

15 For a system claim the claim requirement may
16 describe a certain functionality or capability that an
17 accused product must possess. In such cases, the product
18 satisfies the requirement if it is reasonably capable of
19 operating in the recited manner.

20 Now, in this case Wapp alleges that Micro Focus
21 willfully infringed Wapp's patents. If you decide that
22 Micro Focus has infringed you must go on and address the
23 additional issue of whether or not the infringement was
24 willful.

25 Willfulness requires that you determine whether

1 Wapp proved that it is more likely than not that Micro
2 Focus knew of Wapp's patents and that the infringement by
3 Micro Focus was intentional.

4 You may not determine that the infringement was
5 willful just because Micro Focus was aware of the asserted
6 patents and infringed one or more of them. Instead,
7 willful infringement is reserved for egregious behavior,
8 such as where the infringement is willful, wanton,
9 malicious, in bad faith, deliberate, consciously wrongful,
10 flagrant, or, indeed, as a characteristic of a pirate.

11 You may find that the defendants' actions were
12 egregious, willful, or wanton if they acted in a reckless
13 or callous disregard of or an indifference to the rights of
14 the plaintiffs.

15 A defendant is indifferent to the rights of
16 another when it proceeds in disregard of a high or
17 excessive danger of infringement that was known to it or
18 apparent to a reasonable person in its position.

19 To determine whether Micro Focus acted willfully
20 consider all the facts and assess Micro Focus' knowledge at
21 the time of the challenged conduct. This may include, but
22 is not limited to:

23 One, whether or not Micro Focus acted consistently
24 with the standards of behavior for its industry.

25 Second, whether or not Micro Focus intentionally

1 copied a product of Wapp that is covered by the '192
2 Patent, the '678 Patent, or the '864 Patent.

3 Three, whether or not Micro Focus reasonably
4 believed that it did not infringe.

5 Four, whether or not Micro Focus made a good-faith
6 effort to avoid infringing the '192 Patent, the '678
7 Patent, or the '864 Patent. For example, whether Micro
8 Focus attempted to design around the '192 Patent, the '678
9 Patent, or the '864 Patent.

10 And, five, whether or not Micro Focus tried to
11 cover up its infringement.

12 Damages.

13 If you find that Micro Focus infringed any valid
14 claim -- well, if you decide that Micro Focus infringed any
15 claim of the asserted patents you must then consider the
16 amount of damages to award to Wapp.

17 Wapp must prove each element of its damages,
18 including the amount of damages, by a preponderance of the
19 evidence.

20 If proven by Wapp, damages must be in an amount
21 adequate to compensate for the entire infringement. The
22 purpose of the damage award is to put Wapp in about the
23 same financial position it would have been in if the
24 infringement had not happened at all, but the damage award
25 cannot be less than a reasonable royalty. You may not add

1 anything to the amount of damages to punish an accused
2 infringer or to set an example.

3 The fact that I am instructing you on damages does
4 not mean that the Court believes that one party or the
5 other should win in this case. My instructions about
6 damages are for your guidance only in the event you find in
7 favor of Wapp.

8 You will need to decide the issue of damages only
9 if you decide that one or more of the asserted claims are
10 infringed.

11 In determining the amount of damages you must
12 determine when the damages began. The parties agree that
13 damages, if any, commenced on January, 1st 2015. This
14 trial concerns damages from January 1st, 2015, through
15 July 31st, 2020.

16 Now, a royalty is a payment made to a patent
17 holder in exchange for the right to make, use, or sell the
18 claimed invention. A reasonable royalty is the amount of
19 royalty payment that a patent holder and the alleged
20 infringer would have agreed to in a hypothetical
21 negotiation taking place at a time prior to when the
22 infringement first began.

23 In considering this hypothetical negotiation, you
24 should focus on what the expectations of the patent holder
25 and the alleged infringer would have been had they entered

1 into an agreement at that time and had they acted
2 reasonably in their negotiations.

3 In determining this you must assume that both
4 parties believed the patent was valid and infringed and
5 that both parties were willing to enter into an agreement.
6 The reasonable royalty you determine must be a royalty that
7 would have resulted from the hypothetical negotiation and
8 not simply a royalty either party would have preferred.

9 Evidence of things that happened after the
10 infringement first began can be considered in evaluating
11 the reasonable royalty only to the extent that the evidence
12 aids in assessing what royalty would have been resulted
13 from a hypothetical negotiation just prior to the first
14 infringement.

15 The amount you find as damages must be based on
16 the value attributable to the patented technology, as
17 distinct from the other unpatented features of the accused
18 products. In other words, you must determine an
19 appropriate royalty that reflects the value attributable to
20 the patented invention alone.

21 In determining the reasonable royalty you should
22 consider all of the facts known and available to the
23 parties at the time the infringement began. Some of the
24 kinds of factors that you may consider in making your
25 determination are:

1 One, the value that the claimed invention
2 contributes to the accused products;

3 Two, the value that factors other than the claimed
4 invention contribute to Micro Focus's accused products and
5 services;

6 And three, the availability of acceptable
7 non-infringing alternatives to the claimed invention.

8 No one factor is dispositive, and you can and
9 should consider the evidence that has been presented to you
10 in this case on each of these factors. You may also
11 consider any other factors which in your mind would have
12 increased or decreased the royalty the alleged infringer
13 would have been willing to pay and the patent holder would
14 have been willing to accept acting as normally prudent
15 businesspeople.

16 Now, patent damages are designed to compensate the
17 patent holder based on the infringer's use of the patented
18 technology. Reasonable royalty awards may take the duty of
19 a lump-sum payment. A lump-sum payment is equal to the
20 amount that the alleged infringer would have paid at the
21 time of the hypothetical negotiation for a license covering
22 all sales of the licensed products for the period
23 January 1st, 2015, through July 31st, 2020. When a lump
24 sum is paid the infringer pays a single price for the
25 license.

1 Now, it is your duty to deliberate and to consult
2 with one another in an effort to reach a verdict. Each of
3 you must decide the case for yourself, but only after an
4 impartial consideration of the evidence with your fellow
5 jurors.

6 During your deliberations do not hesitate to
7 reexamine your own opinions and change your mind if you are
8 convinced that you were wrong; but do not give up your
9 honest beliefs because the other jurors think differently
10 or just to finish the case.

11 Remember at all times you are the judges of the
12 facts.

13 You have been allowed to take notes during the
14 trial. Any notes that you took during the trial are only
15 aids to your memory. If your memory should differ from
16 your notes, you should rely on your memory and not on the
17 notes. The notes are not evidence. If you did not take
18 notes, rely on your own independent recollection of the
19 evidence, and do not be unduly influenced by the notes of
20 other jurors. Notes are not entitled to any greater weight
21 than the recollection or impression of each juror about the
22 testimony.

23 When you go to the jury room to deliberate you
24 must take -- you may take with you a copy of this charge,
25 the exhibits that have been admitted into evidence, and

1 your notes. You must select a jury foreperson to guide you
2 in your deliberations and to speak for you here in the
3 courtroom.

4 Your verdict must be unanimous. After you have
5 reached your unanimous verdict, the jury foreperson must
6 fill out the answers to the written questions on the
7 verdict form and sign and date it.

8 After you have concluded your service and I have
9 discharged jury, you are not required to talk with anyone
10 about the case.

11 If you need to communicate with me during your
12 deliberations, the jury foreperson should write the inquiry
13 on the piece of paper and give it to the court security
14 officer.

15 After consulting with the attorneys I will respond
16 either in writing or by meeting with you back here in the
17 courtroom. Keep in mind, however, that you must never
18 disclose to anyone, not even me, your numerical division on
19 any question.

20 Now, normally, I would say you can go back to the
21 jury room, but let me say a couple other things. Also
22 attached to the charge is a glossary of the patent and
23 technical terms. I'm not going to read those, but they're
24 being provided to you as just to be a useful guide as you
25 begin your deliberations.

1 The other thing I will say is, of course, when you
2 go back to the jury room, the first thing you will do is
3 decide who your foreperson is. And that will be Juror Note
4 Number 1, you'll send back to the Court, and it will say
5 Note Number 1, Juror Number 1 through 8 is the foreperson.
6 And that will be Note Number 1. And then any other notes
7 will be Note 2, and so on.

8 One thing just to remind you is, when you're up in
9 the jury room, all eight of you have to be present while
10 the deliberations are happening.

11 And, of course, if you want to eat your lunch and
12 talk, you can start deliberations. But if someone goes to
13 the restroom, deliberations must cease. All deliberations
14 must happen when all eight of you are present.

15 So at this time I'm going to send you to the jury
16 room to eat your lunch and to begin deliberations.

17 I want to thank you for your attentiveness all
18 week, and I hope you enjoy this next part of the process.

19 Thank you.

20 (The jury exits the courtroom, 12:55 p.m.)

21 THE COURT: You may be seated.

22 At this time -- of course, no waiver has occurred.

23 You haven't done your objections to the charge.

24 Any objections by the plaintiff to the charge or
25 verdict?

1 MR. DACUS: We do not, your Honor.

2 THE COURT: Okay. I think defense had some
3 objections to the charge and verdict. Go ahead, if you
4 would like to make those.

5 MR. SEARS: Yes, your Honor.

6 I've asked Ms. Juergens to present our objections.

7 THE COURT: Yes, go right ahead. You can do it at
8 the podium or if you have a mic.

9 (Discussion off the record.)

10 THE COURT: Go ahead. Again, identify yourself
11 again.

12 MS. JUERGENS: Yeah, Alexis Juergens for
13 defendants.

14 THE COURT: Okay. Thank you.

15 MS. JUERGENS: We just have a few objections to
16 the jury instructions.

17 So, first, turning to page 7 on the accused
18 products. It is defendants' position that these -- you
19 know, we've heard this throughout trial -- but these need
20 to be limited specifically to the two accused scripting
21 protocols, which is TruClient Mobile Web and TruClient
22 Native Mobile.

23 And as we've heard all throughout trial -- or, I'm
24 sorry -- as we saw in Docket 350-1, Mr. Kramer represented
25 that the infringement theories were limited to TruClient

1 Native Mobile and TruClient Mobile Web. But we see their
2 infringement positions changing, so we take the position
3 that the accused products should be limited to those
4 specific accused scripting protocols, which is TruClient
5 Mobile Web and TruClient Native Mobile.

6 And then we also actually have a special
7 instruction, which I recall we actually gave you last
8 night. But would you like me to provide you a new copy?

9 THE COURT: I don't need that, but you probably
10 need to read it into the record. So it's not part -- I
11 mean, it was provided to me, but...

12 MS. JUERGENS: Okay. It's a little bit lengthy,
13 but...

14 THE COURT: Well, unless you want to file it on
15 ECF, that's fine, too. And you can just --

16 MS. JUERGENS: Okay. We'll just --

17 THE COURT: I mean, I've already denied all of
18 these. It's just a matter of making your record.

19 So if you want to go ahead and file that requested
20 instruction as part of ECF, that's fine.

21 MS. JUERGENS: Okay. Yeah. We'll go forward with
22 that then.

23 And then next, if we turn --

24 THE COURT: Just identify what that's about,
25 though. Which instruction.

1 MS. JUERGENS: Oh, yeah. I'm sorry. The special
2 instructions goes hand-in-hand with these accused products.
3 So this special instruction would specifically talk about
4 how the accused products are alleged to infringe only when
5 using either the TruClient Mobile Web protocol or the
6 TruClient Native Mobile protocol.

7 THE COURT: That's fine.

8 MS. JUERGENS: Thank you.

9 And then, as you heard earlier, my co-counsel
10 addressed the issue of willful infringement, and so I'll
11 just summarize this here.

12 But it's our position that this should be removed
13 altogether because there is no evidence in the record to
14 sustain a jury finding that there is willful infringement,
15 whether pre-suit or post-suit.

16 And then our last objection is on page 26. This
17 is under the lump sum. This is a simple -- a pretty simple
18 objection. But, here, we would just like to take out the
19 through July 31, 2020, the second-to-last sentence.

20 So we would have that second-to-last sentence
21 read: A lump-sum payment is equal to an amount that the
22 alleged infringer would have paid at the time of a
23 hypothetical negotiation for a license covering all sales
24 of the licensed product commencing January 1, 2015.

25 And that's all of our objections, your Honor.

1 THE COURT: Those objections will be overruled,
2 including the one that you are going to submit in writing,
3 which it was provided to the Court last night.

4 Okay. Anything else from plaintiff at this point?

5 MR. DACUS: No, your Honor.

6 THE COURT: From defense?

7 MR. SEARS: No, your Honor. Thank you.

8 THE COURT: Okay. Thank you.

9 And then we will await the jury's verdict.

10 (Recess, 1:00 p.m. to 3:24 p.m.)

11 (Open court, all parties present, jury not
12 present.)

13 THE COURT: Okay. So the first note is just the
14 foreperson, and Juror Number 1 is the foreperson.

15 And then Juror Note Number 2 is "We have reached a
16 unanimous verdict."

17 So when I bring the jury in, I will publish the
18 verdict and then poll the jury to make sure it's unanimous.

19 So let's go ahead and bring the jury in.

20 (The jury enters the courtroom, 3:25 p.m.)

21 THE COURT: Okay. Please be seated, except for
22 Juror Number 1.

23 My understanding, y'all have reached a verdict?

24 THE FOREPERSON: Yes, we have.

25 THE COURT: It's unanimous?

1 THE FOREPERSON: Yes, sir.

2 THE COURT: If you will hand the verdict to the
3 court security officer. You can be seated now.

4 Okay. So I'm going to go ahead and publish your
5 verdict; and when I'm finished, I'm going to ask each of
6 you if it is your verdict to make sure it is unanimous.

7 In the case 4:18cv469, Wapp Tech Limited
8 Partnership and Wapp Tech Corp. versus Seattle SpinCo,
9 Inc., *et al*, we, the jury, find as follows:

10 Question 1. Has Wapp proven, by a preponderance
11 of the evidence, that Micro Focus infringed any of the
12 asserted claims?

13 Answer, yes.

14 Question 2. Willful infringement. Did Wapp
15 prove, by a preponderance of the evidence, that Micro Focus
16 willfully infringed any of the asserted claims that you
17 found were infringed?

18 As to the '192 Patent, yes.

19 As to the '687 (*sic*) Patent, yes.

20 As to the '864 Patent, yes.

21 Question 3. What sum of money, if any, paid in
22 cash today, has Wapp proven, by a preponderance of the
23 evidence, would compensate Wapp for its damages resulting
24 from infringement through July 31st, 2020?

25 Answer, \$172,554,269.

1 And then it is dated today and initialed by the
2 foreperson.

3 So, Juror Number 1, is this your verdict?

4 JUROR NUMBER 1: Yes, sir.

5 THE COURT: Juror Number 2, is this your verdict?

6 JUROR NUMBER 2: Yes, sir.

7 THE COURT: You can go ahead and be seated. Thank
8 you.

9 Juror Number 3, is this your verdict?

10 JUROR NUMBER 3: Yes, your Honor.

11 THE COURT: Juror Number 4, is this your verdict?

12 JUROR NUMBER 4: Yes, your Honor.

13 THE COURT: Juror Number 5, is this your verdict?

14 JUROR NUMBER 5: Yes, your Honor.

15 THE COURT: Juror Number 6, is this your verdict?

16 JUROR NUMBER 6: Yes, your Honor.

17 THE COURT: Juror Number 7, is this your verdict?

18 JUROR NUMBER 7: Yes, your Honor.

19 THE COURT: And, Juror Number 8, is this your
20 verdict?

21 JUROR NUMBER 8: Yes, your Honor.

22 THE COURT: Thank you very much.

23 So, ladies and gentlemen, I'm going to file your
24 verdict and make it part of the record.

25 I want to thank you for your service on behalf of

1 the Eastern District of Texas, Sherman Division.

2 I think, as I said during the *voir dire* process --
3 and there were a lot of things said, so you may not
4 remember that I said this. At least I hope I said this. I
5 usually -- I try to say it every time.

6 Our system of justice, as we know it and practice
7 it, would not exist without men and women serving as jurors
8 and settling disputes between the parties. So I hope --
9 with my heartfelt thank you, I do appreciate everything,
10 your service this week.

11 I'm going to send you back to the jury room
12 because I'm going to come up and see if you have any
13 questions -- so I can, you know, see if you have any
14 questions about anything, about the process, and I'll be up
15 there in a minute. But, again, thank you for your service.

16 (The jury exits the courtroom, 3:28 p.m.)

17 THE COURT: Okay. Anything further from
18 plaintiff?

19 MR. DACUS: No, your Honor. Thank you.

20 THE COURT: From defense?

21 MR. SEARS: No, your Honor.

22 THE COURT: And then if you all just want to wait
23 out in the hallway, I'm going to go talk to the jury. And
24 then if you would like to talk to them, I'll come down and
25 get y'all. I'm sure they will, but if not -- but either

1 way, I'll come down and talk to you.

2 And we'll be in recess. Thank you.

3 (Proceedings concluded, 3:29 p.m.)

4 COURT REPORTER'S CERTIFICATION

5 I HEREBY CERTIFY THAT ON THIS DATE, MARCH 5,
6 2021, THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD
7 OF PROCEEDINGS.

8

9 /s/
10 CHRISTINA L. BICKHAM, CRR, RDR

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