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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

APPLE INC., A CALIFORNIA CORPORATION,)	C-11-01846 LHK
)	
)	SAN JOSE, CALIFORNIA
PLAINTIFF,)	
)	AUGUST 7, 2012
VS.)	
)	VOLUME 5
SAMSUNG ELECTRONICS CO., LTD., A KOREAN BUSINESS ENTITY; SAMSUNG ELECTRONICS AMERICA, INC., A NEW YORK CORPORATION; SAMSUNG TELECOMMUNICATIONS AMERICA, LLC, A DELAWARE LIMITED LIABILITY COMPANY,)	PAGES 1297-1637
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DEFENDANTS.)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LUCY H. KOH
UNITED STATES DISTRICT JUDGE

APPEARANCES ON NEXT PAGE

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1 SAN JOSE, CALIFORNIA AUGUST 7, 2012

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

3 (WHEREUPON, THE FOLLOWING PROCEEDINGS
4 WERE HELD OUT OF THE PRESENCE OF THE JURY:)

5 THE COURT: ALL RIGHT. LET'S DISCUSS THE
6 THINGS THAT SAMSUNG JUST FILED. LET'S TALK ABOUT
7 THE ANDROID SOURCE CODE.

8 I STILL DON'T SEE WHY THAT'S RELEVANT FOR
9 ANYTHING OTHER THAN DESIGN AROUND, WHICH HAS BEEN
10 EXCLUDED. SO IF YOU COULD EXPLAIN?

11 MR. JOHNSON: YOUR HONOR, YES. THIS IS
12 KEVIN JOHNSON.

13 JUST BRIEFLY, IT IS SIMPLY THERE FOR
14 IMPEACHMENT BECAUSE DR. BALAKRISHNAN, AS PUT IN HIS
15 EXHIBIT BINDER THAT THEY INTEND TO USE ON DIRECT,
16 PX 31, WHICH IS SOURCE CODE FOR SOME OF THE PHONES.

17 AND I DON'T KNOW WHAT HE'S GOING TO SAY
18 ABOUT THEM. I THINK I HAVE AN IDEA. IT'S SIMPLY
19 THERE TO THE EXTENT THAT HE STARTS TO SEVER OFF THE
20 INFRINGEMENT THEORY, IT'S THERE IMPEACH HIM. I
21 DON'T INTEND TO REFER TO IT. IT DOESN'T HAVE ANY
22 DESIGN AROUNDS THAT WERE WEREN'T DISCLOSED OR
23 PROHIBITED BY JUDGE GREWAL.

24 THE COURT: BUT WHAT'S THE IMPEACHMENT,
25 YOU DON'T KNOW THE DIFFERENT VERSIONS OF ANDROID,

1 THEREFORE, YOU DON'T KNOW THAT CERTAIN VERSIONS
2 DON'T DO THAT AND CERTAIN VERSIONS DO.

3 MR. JOHNSON: ONE OF THE REAL ISSUES IN
4 THIS CASE IS YOU MAY HAVE ONE PHONE, LIKE THE
5 CAPTIVATE, WHICH RUNS DIFFERENT VERSIONS OF ANDROID
6 ON IT. AND HE'S DONE THE ANALYSIS FOR ONE VERSION
7 OF ANDROID. I'M NOT TALKING ABOUT THE DESIGN
8 AROUND.

9 THE COURT: WHY DO THE DIFFERENT VERSIONS
10 MATTER. SOME OF THEM DON'T PRACTICE THE '381 AND
11 SOME DO, RIGHT? SO THAT --

12 MR. JOHNSON: THAT'S THE POINT.

13 THE COURT: I FIND THAT TO BE THE DESIGN
14 AROUND ISSUE. THAT'S WHY I'M HAVING A LITTLE BIT
15 OF DIFFICULTY UNDERSTANDING DEVELOPMENTS.

16 MR. JOHNSON: IT'S NOT THE BLUE GLOW.
17 IT'S NOT ANY OF THE DESIGN AROUNDS. THESE PRODUCTS
18 OPERATED IN A CERTAIN WAY BEFORE -- IN EARLIER
19 VERSIONS OF ANDROID. FOR EXAMPLE, THEY DON'T
20 BOUNCE AT ALL. THEY DO A HARD STOP.

21 THE COURT: I KNOW. BUT THE JURY IS
22 GOING TO HAVE THE ACTUAL PHONES IN THE JURY ROOM.
23 THEY CAN SEE WHAT BOUNCES.

24 MR. JOHNSON: THAT'S PART OF THE ISSUE.
25 THEY'RE GOING TO HAVE ONE PHONE THAT HAS ONE

1 VERSION OF ANDROID. IN DIFFERENT INSTANCES, THERE
2 ARE DIFFERENT VERSIONS OF ANDROID THAT EXHIBIT
3 DIFFERENT BEHAVIOR AND SOME OF IT DOESN'T DO WHAT
4 DR. BALAKRISHNAN SAYS. IT HAS NOTHING TO DO WITH
5 THE DESIGN AROUND.

6 SO WE'RE ENTITLED TO BRING OUT THE FACT
7 THAT FROM HIS STANDPOINT, HE DIDN'T PUT IN THE
8 REQUISITE -- HE DIDN'T DO THE REQUISITE ANALYSIS TO
9 ESTABLISH THAT EACH VERSION OF THESE ANDROID BASED
10 PHONES OPERATE THE SAME WAY.

11 THE COURT: WELL, WE STILL RUN INTO THE
12 SAME ISSUE THAT JUDGE GREWAL RAISED, THAT SINCE YOU
13 DIDN'T PRODUCE ALL THE SOURCE CODE, THEN IT'S NOT
14 FAIR TO THEN CROSS THESE EXPERTS WHEN THEY HAD AN
15 INCOMPLETE PRODUCTION OF SOURCE CODE THAT WAS
16 UNTIMELY AND THEN TO SAY, BUT YOU DIDN'T LOOK AT
17 ALL OF IT. WHY DIDN'T THEY LOOK AT ALL OF IT
18 BECAUSE YOU DIDN'T PRODUCE ALL OF IT, EVEN THOUGH
19 THERE WAS AN ORDER.

20 MR. JOHNSON: HE SAYS HE DOESN'T NEED THE
21 SOURCE CODE. LET'S STEP BACK. HE DIDN'T NEED THE
22 SOURCE CODE TO ESTABLISH INFRINGEMENT.

23 THE COURT: SO THEN IT'S EVEN MORE, WHY
24 IS IT RELEVANT, IF HE'S SAYING YOU CAN LOOK AT IT
25 AND YOU CAN SEE IF IT BOUNCES BACK BY LOOKING AT

1 THE DEVICE, I THINK IT'S EVEN MORE --

2 MR. JOHNSON: BECAUSE HE HASN'T DONE IT
3 FOR THE DIFFERENT VERSIONS -- FORGET ABOUT THE
4 SOURCE CODE FOR A SECOND. HE HASN'T ESTABLISHED
5 THAT THE PHONES, THAT THE VERSION OF SOURCE CODE,
6 THE 2.0 OR 2.1 OR 2.3 OF THE CAPTIVATE INFRINGES.
7 HE MAY HAVE ESTABLISHED THAT THE 2.3 DOES, BUT HE
8 DIDN'T DO THE ANALYSIS ON ANY OF THE OTHER PHONES
9 THAT OPERATE DIFFERENTLY.

10 AND I'M NOT TALKING ABOUT THE SOURCE
11 CODE. I'M TALKING ABOUT THE ACTUAL PHONE. HE SAYS
12 HE DOESN'T NEED THE SOURCE CODE TO ESTABLISH
13 INFRINGEMENT. HE CAN SIMPLY LOOK AT IT AND IF IT
14 BOUNCES, IT BOUNCES.

15 THE COURT: THEN WHY HAVEN'T YOU SOUGHT
16 TO INTRODUCE THE DIFFERENCE VERSIONS OF THE
17 PRODUCTS THEN.

18 MR. JOHNSON: WE HAVE. THAT TAKES ME TO
19 A DIFFERENT POINT, YOUR HONOR. YESTERDAY WE SAW
20 SOME ISSUES ON THE STAND WITH SOME OF THE WITNESSES
21 TESTIFYING ABOUT THE HOME SCREEN VERSUS THE
22 APPLICATION SCREEN, AND IT BECAME APPARENT, WHEN A
23 JOINT EXHIBIT WAS PUT IN FRONT OF THE WITNESS,
24 WHICH THE JOINT EXHIBIT WHICH HAS REMAINED IN
25 APPLE'S CUSTODY, THE PARTIES HAVE SPLIT UP THE

1 EXHIBIT AND APPLE TAKES HOME SAMSUNG PRODUCTS THAT
2 ARE JOINT EXHIBITS, THAT THERE'S A DIFFERENCE
3 BETWEEN THE JOINT EXHIBIT THAT WAS PUT IN FRONT OF
4 THE WITNESS AND THE EXHIBIT -- AND BASICALLY THE
5 PHONES AS THEY APPEAR OUT OF THE BOX. AND I JUST
6 WANT TO SHOW YOUR HONOR --

7 THE COURT: ARE YOU TALKING ABOUT 2019,
8 HAT PHONE?

9 MR. JOHNSON: IF WE CAN PUT UP --

10 THE COURT: HOLD IT. LET'S DO ONE AT A
11 TIME BECAUSE OTHERWISE I'M GOING TO GET CONFUSED.

12 WHAT DOES APPLE WANT TO SAY ON THE
13 ANDROID SOURCE CODE? ANYTHING?

14 MR. JACOBS: I DON'T THINK THEY'VE
15 ANSWERED THE COURT'S QUESTION. THE ISSUE HERE IS
16 WHETHER -- WHETHER THE SOURCE CODE THAT THEY HAVE
17 PRODUCED AND INTEND TO USE IN CROSS-EXAMINING
18 DR. BALAKRISHNAN IS WITHIN THE SCOPE OF
19 JUDGE GREWAL'S ORDER ALLOWING THEM TO DO THAT KIND
20 OF -- TO USE ANY KIND OF SOURCE CODE FOR ANY KIND
21 OF PURPOSE, AND I STILL DON'T THINK THEY'VE
22 ANSWERED THAT QUESTION.

23 WHAT THEY'VE SAID IS THAT HE RELIES ON
24 078 FOUR VERSIONS OF SOURCE CODE BUT IS ACCUSING 21
25 PRODUCTS. THAT'S EXACTLY YOUR HONOR'S POINT.

1 HE WILL SAY THAT HE REVIEWED ALL OF THE
2 SOURCE CODE THAT SAMSUNG PRODUCED, AND HE WILL
3 TESTIFY TO THE COURT, AND HE WILL TESTIFY TO THE
4 SOURCE CODE ANALYSIS OF THE SOURCE CODE THAT
5 SAMSUNG PRODUCED, AND HE WILL SAY THAT AS BETWEEN
6 THOSE VERSIONS THAT THEY PRODUCED, NOTHING IMPACTED
7 HIS INFRINGEMENT ANALYSIS. IT WAS ALL MATERIALLY
8 THE SAME.

9 SO THEY HAVEN'T ANSWERED THE QUESTION,
10 WHY IS THIS SOURCE CODE BEING USED TO CROSS-EXAMINE
11 DR. BALAKRISHNAN?

12 MR. JOHNSON: AND WE HAVE A DIFFERENCE OF
13 OPINION IN THAT RESPECT. THE SOURCE CODE, EVEN THE
14 SOURCE CODE THAT DR. BALAKRISHNAN RELIES UPON, PX
15 31, EXHIBITS NON-INFRINGEMENT BEHAVIOR AND IT'S NOT
16 THE DESIGN AROUND. IT'S THE HOLD STILL. AND THEY
17 KNOW ABOUT THIS ISSUE. IT'S A NON-INFRINGEMENT
18 THEORY.

19 THE COURT: WELL, YOU CAN CROSS HIM ON
20 THAT.

21 MR. JOHNSON: AND I INTEND TO CROSS HIM
22 ON THAT.

23 THE COURT: ABSOLUTELY. I EXPECT YOU TO.

24 MR. JOHNSON: FROM MY STANDPOINT, HE
25 STILL HASN'T DONE THE PROPER ANALYSIS OF

1 ESTABLISHING THAT EACH VERSION OF THE PHONE, TAKING
2 THE CAPTIVATE AS AN EXAMPLE, INFRINGES.

3 NOW, HE'S GOING TO GET UP THERE AND SAY
4 THAT HE THINKS ALL OF THEM OPERATE THE SAME WAY,
5 AND I SHOULD BE ENTITLED TO CROSS HIM ON THE FACT
6 THAT IT DOESN'T, AND IT HAS NOTHING TO DO WITH THE
7 FACT THAT THERE'S A DESIGN AROUND FOR BLUE GLOW OR
8 ANYTHING ELSE. IT'S NOT THAT POINT. IT'S THE FACT
9 THAT SOME OF THE EARLIER --

10 THE COURT: ARE ALL OF -- GO AHEAD.
11 THESE ARE EARLIER PRODUCTS SOURCE CODE OR
12 SUBSEQUENT?

13 MR. JOHNSON: NO. THEY'RE -- SOMETIMES
14 IT DEPENDS ON THE VERSION. SOMETIMES IT'S EARLIER.
15 SOMETIMES IT'S SUBSEQUENT. IT WAS ALL PRODUCED BY
16 DECEMBER 30TH. I DON'T INTEND ON ASKING HIM
17 ANYTHING OTHER THAN --

18 THE COURT: NO, IT WAS NOT PRODUCED
19 BEFORE DECEMBER 30TH. THAT IS FACTUALLY INCORRECT.
20 YOU PRODUCED SOME BEFORE DECEMBER 30TH, BUT YOU DID
21 NOT PRODUCE ALL.

22 MR. JOHNSON: THE SOURCE CODE THAT I
23 INTEND TO ASK HIM ABOUT WAS PRODUCED BEFORE
24 DECEMBER 30TH.

25 THE COURT: MY RULING IS NOT GOING TO

1 CHANGE ON THAT. IT'S OVERRULED.

2 MR. JACOBS: THE SAME MEANS SUSTAINED?

3 THE COURT: WHAT?

4 MR. JACOBS: YOU'RE SUSTAINING THE
5 OBJECTION. CORRECT? I THINK YOU JUST SAID --

6 THE COURT: NO. SAMSUNG OBJECTS TO
7 PLAINTIFF'S DEMONSTRATIVE 27 ON THE BASIS THAT THE
8 PHONES ALLEGEDLY INFRINGE THE '381 WITHOUT
9 SPECIFYING WHICH VERSION OF ANDROID PHONES THAT
10 ARE USED. I DON'T KNOW WHAT EXHIBIT YOU'RE
11 REFERRING TO.

12 MR. JACOBS: I'M SORRY. THANK YOU, YOUR
13 HONOR.

14 THE COURT: NOW, I AM GOING TO -- I DO
15 FIND WITH REGARD TO MR., IS IT JACOBY, OR JACOBY?

16 MR. BEDECARRE: JACOBY, YOUR HONOR.

17 THE COURT: OKAY. WITH REGARD TO
18 MR. JACOBY AND MR. PORET, I DO FIND THAT
19 MR. JACOBY'S REBUTTAL REPORT DISCLOSES HOW HE USED
20 THE PORET SURVEY TO COME TO HIS CONSUMER
21 RECOGNITION, DATE RESTRICTION NUMBERS, AND THAT
22 MR. PORET WAS CROSSED ON IT DURING HIS DEPOSITION.

23 HE SAID HE TOOK A LOOK AT MR. JACOBY'S
24 PUBS AND WENT BACK AND REVIEWED THE DATA AND SEE IF
25 HE AGREED WITH THE CRITICISM OR NOT. SO I'M GOING

1 TO OVERRULE APPLE'S OBJECTION WITH REGARD TO THAT
2 ISSUE.

3 DO YOU WANT TO ADDRESS THIS?

4 MR. JACOBS: NO. THANK YOU, YOUR HONOR.

5 THE COURT: ALL RIGHT. SO THAT'S
6 OVERRULED.

7 MR. BEDECARRE: ONE LAST POINT ON THAT,
8 YOUR HONOR.

9 THE COURT: YES.

10 MR. BEDECARRE: WE WOULD LIKE THE
11 LIMITING INSTRUCTION, THOUGH, ON -- THAT YOU RULED
12 IN PART TO PX 23 AND SOME OF THE PDX DEMONSTRATIVE
13 SLIDES, 30.2 THROUGH 30.5, JUST THAT DR. PORET'S
14 SURVEY CANNOT BE USED TO ESTABLISH FAME.

15 THE COURT: OKAY. LET ME HIGHLIGHT THAT
16 FOR MYSELF, TO DO THAT.

17 MR. BEDECARRE: THANK YOU, YOUR HONOR.

18 THE COURT: OKAY. I THINK THAT WAS IT AS
19 FAR AS THE OBJECTIONS THAT WERE FILED LAST NIGHT.

20 BUT I THINK, MR. JOHNSON, YOU WERE GOING
21 TO RAISE SOMETHING ELSE.

22 NOW, I TRIED TO ADDRESS THE HOME SCREEN
23 VERSUS THE APPLICATION SCREEN ISSUE WITH RESPECT TO
24 WINER SDX 1317.119 IN THAT THE HOME SCREEN IS
25 RELEVANT TO TRADE DRESS.

1 MR. JOHNSON: THIS IS A LITTLE BIT
2 DIFFERENT ISSUE.

3 THE COURT: BUT I DON'T THINK IT FELL
4 INTO THE D'305.

5 MR. JOHNSON: LET ME SHOW YOU WHAT'S
6 GOING ON. IF WE COULD PUT UP 3921.

7 WHAT WE HAVE HERE, YOUR HONOR, IS AN
8 IMAGE FROM APPLE'S OPENING STATEMENT SLIDE A, WHICH
9 IS THE IPHONE AND IT SHOWS THE ICON LAYOUT.

10 AND WHAT WE HAVE IN THE MIDDLE IS JOINT
11 EXHIBIT 1034. AND WE WENT OVER LAST NIGHT, AFTER
12 THERE WAS SOME ISSUES ABOUT THE JOINT EXHIBITS AND
13 WHAT WAS -- WHAT WE WERE SEEING ON THE STAND, AND
14 WE TOOK SOME PHOTOGRAPHS OF THE HOME SCREEN JUST TO
15 COMPARE.

16 AND WE NOTICED DIFFERENCES BETWEEN JX
17 1034, WHICH HAS BEEN IN APPLE'S POSSESSION, AND --

18 THE COURT: AND WHAT IS JX 1034? IS THAT
19 THE ACTUAL PHONE? OR IS THAT THE PHOTO OF THE HOME
20 SCREEN?

21 MR. JOHNSON: IT'S THE ACTUAL -- IT'S A
22 PHOTO OF THE ACTUAL PHONE THAT WAS TAKEN LAST
23 NIGHT.

24 THE COURT: OKAY.

25 MR. JOHNSON: AND WHAT WE SEE ON THE

1 RIGHT-HAND SIDE IS AN EPIC 4G THAT COMES RIGHT OUT
2 OF THE BOX, AND I'VE GOT IT RIGHT HERE. THE SEAL
3 WAS BROKEN AND TAKEN OUT.

4 AND WHAT WE SEE IS THERE ARE DIFFERENCES
5 BETWEEN THE HOME SCREENS, AND WE SEE THAT THE JX
6 1034, THE IMAGES, THE ICONS ARE DIFFERENT FROM WHAT
7 COMES OUT -- AS THE PRODUCT COMES RIGHT OUT OF THE
8 BOX.

9 AND YOU'LL SEE ON THE LEFT-HAND SIDE THE
10 IPHONE, THE IMAGES OBVIOUSLY HAVE THREE ROWS AND
11 HAVE THIS ONE DANGLING DOWN BELOW OF SETTINGS, AND
12 THEN IT SAYS PHONE, AND YOU SEE HERE IT SAYS PHONE
13 AND YOU SEE HERE IT SAYS MAIL ON THE IPHONE,
14 MESSAGING OVER ON JX 1034, SAFARI, WHEN IS THE WEB
15 BROWSER.

16 THE COURT: SO, WAIT. ARE YOU SAYING
17 THAT JX 1034 IS A PHOTO OF THE EPIC 4G TOUCH?

18 MR. JOHNSON: YES, I AM, AND IT'S THE
19 JOINT EXHIBIT THAT APPLE'S KEPT, AND I DON'T KNOW
20 WHY THERE ARE DIFFERENCES. WE DON'T KNOW WHY THERE
21 ARE DIFFERENCES. BUT THERE ARE DIFFERENCES BETWEEN
22 WHAT'S? JX 1034 AND --

23 THE COURT: WELL, WHAT'S THE DATE OF
24 MANUFACTURE AND THE DATE OF RELEASE OF THESE TWO?
25 THERE MUST BE MULTIPLE VERSIONS AND MULTIPLE

1 RELEASES. WHY DON'T WE JUST DO A COMPARISON.

2 MR. JOHNSON: WE CAN.

3 THE COURT: HUH?

4 MR. JOHNSON: WE CAN DO THAT. BUT THE
5 POINT IS THERE ARE DIFFERENCES, AND WE'D LIKE TO
6 UNDERSTAND WHAT THOSE DIFFERENCES ARE AND WHY THERE
7 ARE DIFFERENCES, BECAUSE THEY'RE NOT HOW WE'RE
8 SEEING THEM AS THEY COME OUT OF THE BOX, AND THE
9 JURY'S ENTITLED TO SEE THEM AS THEY COME OUT OF THE
10 BOX BECAUSE THE LAYOUT OF THE IMAGE AND THE ICONS
11 HERE IS OBVIOUSLY VERY IMPORTANT, AND THAT'S THE
12 ISSUE --

13 THE COURT: SO WHAT'S YOUR ALLEGATION?
14 THAT APPLE SOMEHOW CHANGED THE HOME SCREEN ON THE
15 JOINT EXHIBIT EPIC 4G TOUCH?

16 MR. JOHNSON: WE'D LIKE YOU TO ASK
17 APPLE'S COUNSEL WHETHER ANYTHING WAS DONE --

18 THE COURT: ALL RIGHT. HAS THERE BEEN
19 ANY TAMPERING WITH ANY OF THE JOINT EXHIBIT PHONES?

20 MR. JACOBS: NO, YOUR HONOR. WE HAVE
21 BEING QUITE RIGOROUS ABOUT THIS. I WOULD NOTE,
22 JUST TO BEGIN WITH, THAT THERE'S A -- THERE'S A,
23 I'M GOING TO CHANGE THE FRUIT, THERE'S A
24 PEAR-AND-AN-APRICOT COMPARISON GOING ON HERE.

25 ON THE RIGHT, YOU'RE LOOKING AT AN

1 EPIC 4G TOUCH OUT OF THE BOX, I ASSUME THE LATEST
2 SHIPMENT OF IT WITHOUT THE GOOGLE SEARCH TOOL ON
3 THE TOP.

4 AND IN THE MIDDLE, LOOKING AT JX 1034,
5 THERE'S THE MODEL SEARCH TOOL. SO THAT'S A
6 DIFFERENT --

7 MR. JOHNSON: THIS HAS THE GOOGLE SEARCH
8 TOOL.

9 THE COURT: SO WHY DID YOU REMOVE THE
10 GOOGLE SEARCH SCREEN FROM THE HOME SCREEN IF HE
11 WANTED ME TO DO A COMPARISON OF THE TWO HOME
12 SCREENS?

13 MR. JOHNSON: IT ISN'T REMOVED.

14 THE COURT: BUT WHY ISN'T IT IN YOUR
15 PHOTO OUT OF THE BOX? WHY ISN'T THE GOOGLE SEARCH
16 BOX ON YOURS OUT OF THE BOX?

17 I MEAN, YOU'RE TELLING ME IT IS BUT YOU
18 DIDN'T CAPTURE IT IN YOUR PHOTO?

19 MR. JOHNSON: THIS WAS DONE AS WE WERE
20 WALKING OVER HERE, YOUR HONOR, AND I BROUGHT THE
21 PHONE. IF YOU LOOK AT THE PHONE --

22 THE COURT: WHY DON'T SLIGHTLY DIFFERENT
23 YOUR HOME SCREEN NOT SHOW THE GOOGLE SEARCH BOX IF
24 YOU'RE TELLING ME THAT THE HOME SCREEN WAS A GOOGLE
25 SEARCH BOX.

1 MR. JOHNSON: WHAT I'M SAYING IS IT DOES
2 HAVE A GOOGLE SEARCH BOX ON THE PHONE OUT OF THE
3 BOX. AND I'M SHOWING YOU -- IF YOU SEE DOWN BLOW,
4 THERE ARE SEVERAL PAGES HERE. SO WHAT WAS CAPTURED
5 WAS ONE PAGE.

6 AND I'M HAPPY TO HAND YOUR HONOR THE
7 PHONE TO SEE IT --

8 THE COURT: OKAY, YOU KNOW WHAT? WHY
9 DOES YOUR VERSION NOT INCLUDE A GOOGLE SEARCH BOX
10 ON THE TOP IF YOU'RE TELLING ME THAT THAT VERY
11 EPIC 4G TOUCH OUT OF THE BOX HAS A GOOGLE SEARCH
12 BOX ON THE TOP ON THE HOME SCREEN?

13 MR. JOHNSON: I'M TELLING YOU --

14 THE COURT: WHY DOESN'T THAT PHOTO HAVE
15 THAT?

16 MR. JOHNSON: BECAUSE THIS IS, THIS IS
17 THE ONE THAT THEY TOOK, YOUR HONOR, AND THAT'S,
18 THAT'S THE REASON, AND THAT'S WHY I BROUGHT THE
19 PHONE.

20 THE COURT: AND SO YOU'RE SAYING APPLE
21 TAMPERED BECAUSE ON SUNDAY WE TOOK A PHOTO OF THIS
22 AT 10:35 IN THE MORNING ON AUGUST 5TH, AND WE
23 DIDN'T HAPPEN TO TAKE ONE WHEN IT'S GOT THE GOOGLE
24 SEARCH BOX ON THE TOP.

25 MR. JOHNSON: BECAUSE, YOUR HONOR, WHEN

1 WE WENT OVER THERE LAST NIGHT AND TOOK A PHOTO,
2 THIS IS WHAT THEY CAPTURED. THIS CAPTURED THIS
3 ONE. MR. PATEL IS HERE. HE WAS INVOLVED IN THE --

4 THE COURT: OKAY. LET ME SEE YOUR
5 EPIC 4G TOUCH OUT OF THE BOX. DOES IT HAVE THE
6 GOOGLE SEARCH BOX?

7 MR. JOHNSON: YES, AND IT'S STILL
8 DIFFERENT. THAT'S THE POINT.

9 MR. JACOBS: LET ME POINT OUT ONE OTHER
10 VISUAL CUE TO WHAT MIGHT BE GOING ON HERE. IF YOU
11 LOOK AT JX 1034, YOU'LL SEE THAT IN THE -- THERE
12 MUST BE A TERM FOR THIS, THE DOTS THAT SHOW YOU
13 WHICH SCREEN YOU'RE ON, IN JX 1034, THE ONE
14 POSITION IS HIGHLIGHTED, SO WE'RE IN THE ONE
15 POSITION ON THE SCREEN.

16 IN THE EPIC 4G SUCH SLIDE ON THE RIGHT ON
17 SDX 3921.001, WE'RE LOOKING AT A SINGLE HIGHLIGHT
18 DOT.

19 MR. JOHNSON: IN NO SITUATION WHEN YOU
20 MOVE TO ANY OF THOSE PAGES WILL YOU FIND A PAGE
21 THAT LOOKS LIKE WHAT'S ON JX 1034, AND THAT'S MY
22 POINT.

23 THE GOOGLE SEARCH BAR CAN BE MOVED FROM
24 ONE SCREEN TO THE OTHER. AS ANY OF THESE ICONS
25 CAN, AND ALL WE WERE ASKING WAS THAT YOUR HONOR --

1 IF THEY -- I GUESS THE QUESTION IS, ARE THEY
2 WILLING TO REPRESENT THAT THEY DON'T MOVE ANY OF
3 THE ICONS ON ANY OF THE JOINT EXHIBITS, BECAUSE
4 THAT'S, THAT'S THE ISSUE.

5 WHEN WE COMPARE IT TO WHAT COMES OUT OF
6 THE BOX, IT LOOKS DIFFERENT FROM WHAT'S ON THE
7 JOINT EXHIBIT.

8 THE COURT: OKAY. PUT THIS IN THE
9 FIRST -- I MEAN, ALL RIGHT. GIVE ME THE TWO BOXES.
10 GIVE ME THE TWO BOXES. I WANT TO LOOK AT THE SKU
11 NUMBER. I WANT TO LOOK AT THE NUMBERS. I WANT TO
12 SEE THE RELEASE DATES. I WANT TO SEE THE
13 MANUFACTURE DATES BECAUSE THIS IS SOUNDING A LITTLE
14 BIT ABSURD TO ME.

15 I MEAN, HOW MANY VERSIONS AND REVISIONS
16 GET PRODUCED OF THESE PHONES? GIVE ME A BREAK.
17 YOU YOURSELF TELL ME THAT THERE ARE MULTIPLE
18 VERSIONS THAT GO ON WITH THE PHONES, THAT THERE ARE
19 EARLIER VERSIONS, LATER VERSIONS, YOU PROBABLY HAVE
20 APPLICATION ENGINEERS THAT ARE MAKING LITTLE KNITS
21 CONSTANTLY, FIXING BUGS CONSTANTLY. SO TO SAY
22 THAT -- ANYWAY.

23 MR. JOHNSON: WE'D LIKE TO GET TOGETHER
24 WITH APPLE AND FIGURE OUT WHICH ARE THE JOINT
25 EXHIBITS THAT GO TO THE JURY.

1 THE COURT: I MEAN, YOUR PHOTO IS
2 MISLEADING. YOU SAID THE GOOGLE INTERNET SEARCH
3 BOX IS ON THE TOP OF THE PHONE THAT YOU HAVE, THE
4 EPIC 4G TOUCH OUT OF THE BOX, AND YOU JUST CHOSE TO
5 TAKE A PICTURE WITHOUT IT ON SUNDAY BEFORE THIS
6 ISSUE EVEN CAME UP. RIGHT? I DON'T KNOW WHAT
7 YOU'RE TALKING ABOUT. YOU SAID WE FOUND OUT THAT
8 THEY WERE TAMPERING WITH THESE THINGS YESTERDAY AND
9 WE TOOK A PICTURE YESTERDAY. THAT PHOTO WAS TAKEN
10 ON SUNDAY, AUGUST 5TH, YESTERDAY WAS MONDAY,
11 AUGUST 6TH.

12 SO I DON'T BUY YOUR STORY THAT YOU
13 THOUGHT THAT APPLE WAS TAMPERING YESTERDAY AND YOU
14 HAD TO TAKE THIS PHOTO OUT OF THE BOX. THAT WAS
15 TAKEN ON SUNDAY, THE DAY BEFORE YESTERDAY.

16 MR. JOHNSON: YOUR HONOR --

17 THE COURT: ANYWAY.

18 MR. JOHNSON: AT THE END OF THE DAY, WE
19 DON'T HAVE A PHONE THAT HAS THIS ICON LAYOUT THAT'S
20 IN JX 1034.

21 THE COURT: WELL, I OPEN UP YOURS AND I
22 DON'T SEE WHAT YOU HAVE EITHER. SO YOU'RE TELLING
23 ME YOU TOOK THAT PHOTO YESTERDAY AFTER YOU FOUND
24 OUT THAT THERE WAS TAMPERING BY APPLE OF THESE
25 JOINT EXHIBITS?

1 ARE YOU TELLING ME THAT WHERE IT SAYS
2 SUNDAY, AUGUST 5TH, AT 1035 A.M. IS FALSE ON THE
3 PHONE, THAT THAT TIME IS WRONG AND THAT DATE IS
4 WRONG?

5 MR. JOHNSON: I'M TOLD THE PHONE WE HAVE
6 ON THE RIGHT IS A SOFT PHOTO OF THIS PHONE.

7 THE COURT: AND IT WAS TAKEN WHEN, SUNDAY
8 OR MONDAY.

9 MR. JOHNSON: IT WAS TAKEN ON SUNDAY.

10 THE COURT: SO WHY DID YOU REPRESENT TO
11 ME THAT THIS WAS TAKEN YESTERDAY OUT OF THE BOX
12 BECAUSE YOU WERE SO CONCERNED THAT THERE HAS BEEN
13 TAMPERING WITH THE HOME SCREENS ON THE JOINT
14 EXHIBITS, BECAUSE THAT'S NOT TRUE.

15 MR. JOHNSON: YOUR HONOR, WHAT I SAID WAS
16 THE ONE IN THE MIDDLE WAS TAKEN YESTERDAY, LAST
17 NIGHT, OUT OF THE -- AND THAT'S THE JOINT EXHIBIT.

18 THE COURT: NO. YOU SAID YOU TOOK IT OUT
19 OF THE BOX, AND THIS IS WHAT IT LOOKS LIKE.

20 MR. JOHNSON: THEN I'M SORRY, I MISSPOKE.
21 I SAID 1034 WAS TAKEN LAST NIGHT AFTER WE INSPECTED
22 THE JOINT EXHIBITS.

23 THE COURT: SO WHAT IS YOUR
24 RECOMMENDATION?

25 MR. JOHNSON: OUR RECOMMENDATION IS THAT

1 WE LOOK AT ALL THE JOINT EXHIBITS OR THE OTHER SIDE
2 AND FIGURE OUT WHAT ARE THE JOINT EXHIBITS THAT
3 ACTUALLY GO INTO THE JURY BOX, BECAUSE THAT'S -- AS
4 YOUR HONOR POINTS OUT, THAT'S WHAT THEY'RE GOING TO
5 BE COMPARING.

6 THE COURT: I THOUGHT THAT YOU ALL DID.
7 THE WHOLE POINT OF HAVING THE JOINT EXHIBITS WAS
8 THAT YOU ALL WOULD GO THROUGH THEM AND AGREE THAT
9 THEY'RE JOINT AND AGREE UPON THEM.

10 MR. JOHNSON: WE DIDN'T REALIZE THAT
11 THERE WERE GOING TO BE DIFFERENCES, DIFFERENCES IN
12 THE HOME SCREENS BETWEEN THE PHONES.

13 THE COURT: OKAY. WHO, WHO CREATED THAT
14 ONE THAT HAD 1019 ON IT YESTERDAY THAT WASN'T AN
15 OFFICIAL EXHIBIT? WHO CREATED THAT ONE? WHO PUT
16 THAT 1019 STICKER ON THE SIDE.

17 MR. JACOBS: THIS IS THE ONE WITH THE
18 LITTLE STICKER.

19 MR. JOHNSON: I THINK, AGAIN, THAT WAS ON
20 OUR SIDE. THAT WAS -- WHAT WE THOUGHT THE SAME
21 EXACT PHONE. THAT'S WHY WE GOT TO THIS POINT
22 BECAUSE SOMEONE ON OUR SIDE HAS THE SAME PHONE,
23 IT'S HANDED TO THE WITNESS AND IT LOOKS DIFFERENT
24 FROM WHAT THE JOINT EXHIBIT IS, AND THAT'S WHAT
25 RAISED THE ISSUE IN OUR MINDS .

1 THE COURT: SO HOW MANY OF THE EXHIBITS
2 HAVE YOU BEEN DUPLICATING WITH YOUR OWN COPIES OF
3 THE EXHIBITS?

4 MR. JOHNSON: WELL, THROUGHOUT THE
5 CASE --

6 THE COURT: WAS 1019 THE ONLY ONE OR WERE
7 ALL THE OTHER ONES THAT YOU ARE GOING THROUGH YOU
8 WERE WORKING ON?

9 MR. JOHNSON: NO, I BELIEVE THEY'RE ALL
10 THE JOINT EXHIBITS, EXCEPT FOR THAT ONE.

11 THE COURT: EXCEPT FOR 1019.

12 MR. JACOBS: YOUR HONOR, IT IS A SYMMETRY
13 IN INFORMATION HERE, WHICH SAMSUNG KNOWS WHEN IT IS
14 SENDING OUT PATCH AND UPDATES TO THE PHONES.
15 THERE'S BEEN NO DISCLOSURE TO US ALONG THE WAY OF
16 THOSE PATCHES AND CHANGES.

17 YOU DO HAVE TO TRY TO MAKE SURE THAT
18 PHONES ARE NOT UPDATED IN ORDER TO AVOID THE
19 PATCHES AND CHANGES.

20 BUT WE HAVE DONE EVERYTHING WE CAN TO
21 PRESERVE THE INTEGRITY OF THE EXHIBITS WE'VE USED
22 IN THE CASE, BECAUSE OBVIOUSLY, AS YOUR HONOR HAS
23 NOTED, THE SHEER NUMBER OF PHONES ITSELF HAS BEEN A
24 HUGE CHALLENGE FOR US IN MANAGING THIS CASE, AND
25 NOW WE KNOW THAT THAT'S SAMSUNG'S BUSINESS

1 STRATEGY.

2 SO I THINK ALL THE, ALL THE PRESUMPTIONS
3 TILT OUR WAY ON THIS ISSUE.

4 THE COURT: WELL, I DON'T SEE WHAT THE
5 REQUEST IS FOR TODAY.

6 MR. JOHNSON: THE REQUEST --

7 THE COURT: WHAT'S THE REQUEST FOR TODAY.

8 MR. JOHNSON: THE REQUEST IS AT THIS
9 POINT THE PARTIES GET TOGETHER, FIGURE OUT WHAT THE
10 ACTUAL PHONES SHOULD BE THAT GO BACK INTO THE JURY
11 ROOM ULTIMATELY SO THAT THERE --

12 THE COURT: LET ME ASK YOU SOMETHING. IF
13 YOU AGREED TO A JOINT EXHIBIT, WHY ARE YOU
14 INTRODUCING YOUR OWN EXHIBIT? AND I DON'T EVEN
15 KNOW IF IT'S THE SAME PHONE, RIGHT? I DON'T KNOW
16 WHAT REVERSIONS IT IS. I DON'T KNOW WHAT BUG FIXES
17 ARE IN THAT VERSION VERSUS WHAT YOU AGREED TO BE A
18 JOINT EXHIBIT.

19 MR. JOHNSON: WHEN WE AGREED TO AN
20 EPIC 4G AS BEING A JOINT EXHIBIT, THERE WASN'T A
21 BELIEF ON OUR SIDE THAT THEY WERE DIFFERENT, AND IT
22 WAS ONLY WHEN WE GOT INTO THE TESTIMONY FROM THE
23 LAYOUT OF THE ICONS THAT WE NOTICED THAT THERE ARE
24 DIFFERENCES, AND THAT BEGGED THE QUESTION ON OUR
25 SIDE, WHY DOES THIS ONE LOOK -- WHY IS THIS LATE

1 OUTLOOK LIKE THIS AND NOT LIKE THIS? THAT WAS THE
2 ISSUE FOR US.

3 MR. JACOBS: YOUR HONOR, THERE HAVE BEEN
4 INNUMERABLE INSPECTIONS OF THESE PHONES. WE'VE
5 GOTTEN E-MAIL AFTER E-MAIL AFTER E-MAIL, WE'LL
6 COLLECT THEM AND PROVIDE THEM TO YOU, WHERE SAMSUNG
7 REPRESENTATIVES CAME OVER AND INSPECTED THE JOINT
8 EXHIBITS. WE HAVE MADE THEM AVAILABLE AT A
9 MOMENT'S NOTICE ON THEIR REQUEST, AND THAT IS THE
10 SET OF THE JOINT EXHIBITS.

11 THIS WAS ALL DONE IN ADVANCE AND TO HAVE
12 THE SUDDEN DISCOVERY, MAYBE THEY HAVE COME UP NOW
13 WITH AN EPIC 4G TOUCH THAT THEY'VE PATCHED AND NOW
14 THEY'RE TRYING TO --

15 MR. JOHNSON: THERE'S NO PATCH. THERE'S
16 NO PATCH. THERE ARE DIFFERENCES HERE THAT ARE
17 IMPORTANT.

18 THE COURT: WHERE IS THAT 1019 THAT YOU
19 INTRODUCED THAT WAS NOT A JOINT EXHIBIT? WHERE IS
20 IT?

21 MR. BEDECARRE: WE'LL GET IT, YOUR HONOR.
22 JUST SO THE RECORD IS CLEAR, MS. KHAN WAS SITTING
23 THERE TO HAND DEMONSTRATIVES EITHER TO THE JURY OR
24 TO THE WITNESS. AND SHE DIDN'T KNOW THAT ALL THE
25 PHONES WERE ON THE STAND ALREADY. SO SHE JUST HAD

1 THAT 1019 ONE THAT'S OUR COPY, THE PARTIES EACH
2 HAVE LOTS OF COPIES OF THESE PHONES, SHE JUST
3 HANDED THE WRONG ONE TO THE WITNESS. THAT'S ALL.

4 IT WASN'T TRYING TO SUBMIT A DIFFERENT
5 EXHIBIT. IT WAS MERELY TO HAND HIM ONE TO LOOK AT.
6 AND SHE DIDN'T REALIZE THAT HE ALREADY HAD THE ONE
7 WITH THE EXHIBIT STICKER ON IT.

8 THE COURT: ALL RIGHT. FROM NOW ON, WITH
9 ANY PHONE, IT NEEDS TO BE SHOWN TO BOTH SIDES AND I
10 NEED TO HAVE AN AGREEMENT THAT THAT IS THE ACTUAL
11 JOINT EXHIBIT THAT WAS AGREED TO. OKAY?

12 I DON'T EVEN THINK MS. KHAN NEEDS TO SIT
13 THERE. WHY DOES SHE NEED TO SIT THERE?

14 MR. BEDECARRE: SO SHE DIDN'T HAVE TO GO
15 ALL THE WAY ACROSS THE FRONT OF THE JURY BOX.

16 THE COURT: I THINK THEY NEED TO SHOW THE
17 OTHER SIDE, JUST CONFIRM. SINCE WE'VE HAD THIS
18 HAPPEN NOW, IT'S IMPORTANT TO HAVE BOTH SIDES
19 CONFIRM THAT WHATEVER IS BEING SHOWN TO THE WITNESS
20 OR TO THE JURY IS THE JOINT EXHIBIT THAT BOTH
21 PARTIES HAVE STIPULATED TO.

22 MR. BEDECARRE: SURE, YOUR HONOR.

23 THE COURT: OKAY. BECAUSE I'M NOT GOING
24 TO HAVE THIS HAPPEN AGAIN.

25 MR. BEDECARRE: WE'LL MAKE SURE.

1 THE COURT: SO I GUESS I'M NOT CLEAR.
2 WHAT IS IT THAT YOU'RE ASKING FOR, MR. JOHNSON?
3 YOU DON'T WANT MS. KARE TO BE ABLE TO TAKE ABOUT
4 ICONS TODAY? IS THAT IT?

5 MR. JOHNSON: NO, I'M NOT ASKING THAT.

6 THE COURT: OKAY.

7 MR. JOHNSON: I'M ASKING SIMPLY THAT YOUR
8 HONOR BE -- YOUR HONOR ASK THE PARTIES TO GO
9 THROUGH AND SIT DOWN AND ESTABLISH -- LOOK AT THE
10 JOINT EXHIBITS AND AGREE UPON WHAT GOES INTO THE
11 JURY BOX, BECAUSE I THINK THERE MAY BE
12 DISAGREEMENT. 1034 REFLECTS A DISAGREEMENT AND
13 WHAT THEY'RE --

14 THE COURT: WE WILL DO THAT, BUT IT WILL
15 BE CHARGED TO YOUR TRIAL TIME, BECAUSE YOU
16 STIPULATED TO THESE EXHIBITS IN ADVANCE. OKAY.

17 IT WILL BE CHARGED TO YOUR TRIAL TIME.

18 MR. JOHNSON: UNDERSTOOD.

19 THE COURT: TAKE AS MUCH TIME AS YOU
20 WANT, BUT IT'S GETTING DEDUCTED FROM YOUR 25 HOURS.

21 I REALLY DON'T THINK THAT THIS IS -- I
22 DON'T FIND THIS TO BE A GOOD FAITH OBJECTION. IF
23 YOU HAVE STIPULATED TO THESE EXHIBITS IN ADVANCE,
24 AND YOU NOW TO COME IN AND SAY, NO, NO, HOLD, HOLD
25 IT, HOLD IT, I WANT TO REDO EVERYTHING THAT'S DONE,

1 SO WHAT ARE YOU SAYING NOW, WE'RE GOING TO HAVE TO
2 REDO EVERYTHING THAT WE'VE DONE WITH THE WITNESSES
3 BECAUSE THAT DOESN'T HAPPEN TO BE THE EXACT VERSION
4 OF THE PHONE? ARE YOU NOW SAYING WE NEED TO REDO
5 ALL OF THAT TESTIMONY?

6 MR. JOHNSON: I'M NOT SAYING THAT, YOUR
7 HONOR. WHAT I'M SAYING --

8 THE COURT: IF YOU AT THE END OF THE
9 TRIAL SUDDENLY HAVE OBJECTIONS TO JOINT EXHIBITS
10 THAT HAVE GONE TO THE JURY AND THAT THE JURY HAS
11 ALREADY BEEN SHOWN AT YOUR REQUEST AND THE
12 WITNESSES HAVE ALREADY SEEN, SO THEN WHAT'S THE
13 RESULT?

14 MR. JOHNSON: THE RESULT ULTIMATELY
15 SHOULD BE WHAT GOES INTO THE JURY BOX IS REFLECTIVE
16 OF THE PHONES AS THEY COME OUT OF THE BOX. THAT'S
17 ALL I CARE ABOUT.

18 MR. JACOBS: YOUR HONOR, THIS IS EXACTLY
19 THE PROBLEM. WE CAN'T HAVE A REDO OF THE JOINT
20 EXHIBITS AT THIS STAGE. THEY'RE IN EVIDENCE.

21 THE COURT: I FIND IT NOT CREDIBLE THAT
22 APPLE TAMPERED WITH THESE JOINTS. THOSE ARE JOINT
23 EXHIBITS THAT BOTH SIDES STIPULATED TO IN ADVANCE.

24 MR. JACOBS: YOUR HONOR, WE'RE CONFIDENT
25 THAT THE RECORD WILL SUPPORT A VERDICT IF THE JOINT

1 EXHIBITS THAT HAVE ALREADY BEEN STIPULATED TO
2 REMAIN THE JOINT EXHIBITS. TO NOW DO A REDO OF
3 THIS IN THE MIDDLE OF TRIAL WOULD CREATE THE
4 POTENTIAL FOR SERIOUS ERROR.

5 MR. JOHNSON: YOUR HONOR, IF APPLE IS
6 WILLING TO REPRESENT THAT THERE'S BEEN NO
7 MANIPULATION OF ANY OF THE ICONS IN ANY OF THE
8 JOINT EXHIBITS, WE'RE FINE.

9 MR. JACOBS: ABSOLUTELY, YOUR HONOR.

10 THE COURT: HAS THERE BEEN ANY
11 MANIPULATION BY ANYONE ON YOUR TEAM, ANYONE,
12 PARALEGAL --

13 MR. JACOBS: THERE HAS BEEN NO
14 MANIPULATION. THERE HAS BEEN USE. THERE HAS BEEN
15 USE BECAUSE, OF COURSE, WE HAVE TURNED THEM ON
16 BECAUSE THEY'VE BEEN IMAGED AND EXERCISED AND
17 TESTED AND SO THERE'S BEEN USE. BUT THERE'S BEEN
18 NO MANIPULATION DESIGNED TO CREATE ANY APPEARANCE
19 OF THE PHONES. WE'VE BEEN -- WE'VE BEEN RIGOROUS
20 ABOUT THAT IN MAINTAINING THE INTEGRITY OF THE
21 PHONES.

22 THE COURT: HAS ANYONE MOVED ANY ICONS
23 FROM ANY OF THESE PHONES?

24 MR. JACOBS: NO.

25 THE COURT: ALL RIGHT. WELL, I'M

1 SATISFIED WITH THAT. IF YOU HAVE A SPECIFIC
2 OBJECTION, YOU CAN RAISE IT AT THE TIME.

3 NOW, I THINK THIS IS THE ACTUAL JOINT
4 TRIAL EXHIBIT BECAUSE IT HAS THE JOINT TRIAL
5 EXHIBIT NUMBER.

6 MR. JACOBS: LET ME JUST SAY ONE OTHER
7 THING.

8 THE COURT: WELL, YOU ALL WILL NEED TO
9 TAKE A LOOK AT IT. THIS ONE HAS THE JOINT TRIAL
10 EXHIBIT NUMBER, WHICH I ASSUME IS A S 123. IS THAT
11 RIGHT?

12 MR. JOHNSON: YES.

13 THE COURT: I'M JUST GOING TO RETURN
14 THESE TWO.

15 MR. JACOBS: IT SHOULD BE A JX NUMBER.

16 THE COURT: I KNOW, BUT IT ALSO HAS AN
17 A S 123 NUMBER.

18 MR. JOHNSON: THAT'S THE JOINT EXHIBIT.

19 MR. JACOBS: THAT'S WHAT I WANTED TO
20 AVERT TO. AS YOU CAN SEE, THERE HAVE BEEN CONTROL
21 NUMBERS ON THESE PHONES ALL ALONG BEFORE THEY WERE
22 SUBMITTED AS JOINT EXHIBITS, AND OUR INSURANCE, IF
23 YOU WILL, AGAINST A CHARGE OF MANIPULATION WAS THE
24 REPEATED MAKING AVAILABILITY OF THESE PHONES FOR
25 SAMSUNG TO INSPECT.

1 SO HAVING INSPECTED THEM OVER AND OVER
2 AGAIN BEFORE THEY BECAME JOINT EXHIBITS, ANY
3 OBJECTION TO MANIPULATION, BASED ON MANIPULATION,
4 SHOULD HAVE SURFACED BASED ON THAT INSPECTION.

5 THE COURT: ANYWAY, I'M GOING TO RETURN
6 THESE TO YOU. WHY WAS APPLE HOLDING ON TO ALL THE
7 JOINT EXHIBITS?

8 MR. JACOBS: I THINK WE'VE BEEN HOLDING
9 SOME AND SAMSUNG HAS BEEN HOLDING SOME JUST TO
10 BRING THIS BACK AND FORTH.

11 THE COURT: I'M GOING TO GIVE THIS BACK
12 TO YOU.

13 MR. JACOBS: MAY I APPROACH, YOUR HONOR?

14 THE COURT: YOU FIGURE IT OUT IN WHICH
15 BOX. THEY DO HAVE THE A S 123 NUMBER ON THEM, SO I
16 THINK THAT SHOULD BE --

17 ALL RIGHT. WHAT ELSE?

18 MR. VERHOEVEN: GOOD MORNING, YOUR HONOR.
19 MR. VERHOEVEN.

20 AT THE END OF THE DAY YESTERDAY,
21 MS. KREVANS RAISED SEVERAL OBJECTIONS TO THE
22 DEMONSTRATIVE SLIDE, CROSS-SLIDES FOR MS. KARE, AND
23 BEFORE WE GET INTO HER TESTIMONY, I JUST WANT TO
24 ALERT THE COURT THAT WITH RESPECT TO MS. SUSAN
25 KARE'S DIRECT DEMONSTRATIVE SLIDES, WE SEE THE SAME

1 THING, EVEN MORE DISTORTED. SO --

2 THE COURT: CAN YOU GIVE ME A NUMBER,
3 PLEASE?

4 MR. VERHOEVEN: YES. FOR EXAMPLE, PX
5 14.4.

6 NOT ONLY -- YOU RECALL THE OBJECTION WAS,
7 WELL, IT'S NOT A FAIR DESCRIPTION BECAUSE OF THE
8 PHONE AROUND THE SCREEN.

9 WELL, HERE THEY'VE TAKEN SPECIFIC ICONS
10 AND PULLED THEM OUT AND TAKEN THEM OUT OF CONTEXT,
11 OUT OF HOW THEY APPEAR WITH THE OTHER SCREENS, AND
12 MANIPULATED THEM IN A WAY THAT'S TEN TIMES MORE
13 DISTORTING THAN WHAT WE HAD ON OUR SLIDES.

14 IN ADDITION, THE THEORY OF INFRINGEMENT
15 BASED ON A MIX OF ICON STYLES WAS NOT DISCLOSED AND
16 IN RESPONSE TO SAMSUNG'S TRADE SECRET DILUTION
17 CONTENTION ROG OR TRADE DRESS ROGS OR PATENT
18 INFRINGEMENT ROGS.

19 SO THIS IS OBJECTIONABLE BY THE SAME
20 TOKEN.

21 AND IF YOU GO TO THE NEXT SLIDE, YOUR
22 HONOR, PX 14.5, YOU'LL SEE THE SAME THING WHERE
23 THEY'RE MANIPULATING AND PULLING OUT ICONS INSTEAD
24 OF USING THE ACTUAL TRADE DRESS, WHICH YOUR HONOR
25 HAS DIRECTED ME TO DO ON CROSS.

1 AGAIN, I'M NOT SURE EXACTLY WHAT THEY ARE
2 GOING TO ASK HERE, BUT THEY'RE GOING TO TALK ABOUT
3 ROUNDED RECTANGLES BEING AN IMPORTANT DESIGN
4 ELEMENT, THAT WAS NOT DISCLOSED IN THEIR
5 INTERROGATORY RESPONSE -- OR THEIR RESPONSE TO A
6 CONTENTION.

7 THE COURT: OKAY. LET ME -- I'D LIKE TO
8 START AT 9:00, SO I THINK IT'S FAIR TO ALL
9 COMPARISONS BE SCREEN-TO-SCREEN SHOTS.

10 MR. VERHOEVEN: THANK YOU.

11 THE COURT: WHICH IS WHAT HAS BEEN -- IS
12 MY UNDERSTANDING OF WHAT'S COVERED.

13 MR. VERHOEVEN: WHAT YOU TOLD ME TO DO.

14 THE COURT: I THINK THAT'S WHAT'S COVERED
15 BY '305. SO 14.4, YOU'RE GOING TO HAVE TO CHANGE
16 THAT, ALL RIGHT, MS. KREVANS?

17 MS. KREVANS: YES, YOUR HONOR.

18 THE COURT: OKAY. NOW, WITH REGARD TO
19 WHATEVER WAS OR WAS NOT DISCLOSED, I CAN'T HANDLE
20 THAT RIGHT NOW.

21 MR. VERHOEVEN: I UNDERSTAND, YOUR HONOR.

22 THE COURT: BUT WHAT I WOULD LIKE IS IF
23 YOU CAN HAVE YOUR -- PROBABLY THE EASIEST THING IS
24 LET'S GO AHEAD WITH BRESSLER THIS MORNING, BUT IF
25 YOU CAN HAVE -- I SAID TWO OBJECTIONS MAX, BUT --

1 IT WASN'T BRIEFED IN WHAT WAS FILED YESTERDAY.

2 IS THERE ANY REASON WHY YOU DIDN'T
3 INCLUDE THAT IN YOUR OBJECTIONS TO MS. KARE
4 YESTERDAY?

5 MR. VERHOEVEN: I THOUGHT THAT THE
6 PROCESS WITH MS. KARE HAD ALREADY BEEN DONE,
7 ACTUALLY, BEFORE MS. KREVANS GOT UP AND RAISED
8 ADDITIONAL OBJECTIONS.

9 KARE WAS PART OF THE PROCESS BEFORE WE
10 WENT TO THE TWO OBJECTIONS. WE STARTED WITH WINER
11 WITH THE TWO OBJECTIONS, AND I'M SIMPLY -- YOUR
12 HONOR, MS. KREVANS RAISED A BUNCH OF OBJECTIONS TO
13 MY SLIDES WITHOUT NOTICE YESTERDAY AND YOUR HONOR
14 RULED ON THOSE, AND I JUST WANT A LEVEL PLAYING
15 FIELD, THAT'S ALL. AND I'M LOOKING AT HER SLIDES,
16 AND I SEE THAT THEY HAVE -- SHE'S GOT, YOU KNOW,
17 WORSE OF TAKING OUT IMAGES AND MANIPULATING THEM.

18 THE COURT: I KNOW. IT JUST WOULD HAVE
19 BEEN BETTER IF THIS HAD BEEN FILED YESTERDAY, AND I
20 COULD HAVE HANDLED IT LAST NIGHT.

21 MR. VERHOEVEN: I APOLOGIZE, YOUR HONOR.
22 I'M TRYING TO FIGURE OUT HOW TO DO THIS.

23 THE COURT: ALL RIGHT. SO 14.4, THE
24 OBJECTION IS SUSTAINED. YOU NEED TO MAKE IT A
25 SCREEN-BY-SCREEN COMPARISON.

1 AND THEN WHY DON'T YOU ALL BRIEF, WHAT,
2 THE MIX OF ICON STYLES AND THE ROUNDED RECTANGLE,
3 WAS THERE ANY OTHER --

4 MR. VERHOEVEN: IF YOU GO THROUGH THESE,
5 YOU KNOW, WHAT WE'VE GOT, FOR EXAMPLE, ARE 14.8,
6 YOUR HONOR, SAME THING HERE.

7 THE COURT: ALL RIGHT. WELL, THIS IS
8 WHAT I WANT THEN. I WANT YOU ALL TO SUBMIT THE
9 ACTUAL WHATEVER IS AT ISSUE, THE CONTENTION
10 INTERROGATORY, THE EXPERT REPORT, WHATEVER IT IS
11 THAT YOU THINK DIDN'T DISCLOSE IT. I WANT THE
12 ACTUAL DOCUMENT.

13 MR. VERHOEVEN: YES, YOUR HONOR.

14 THE COURT: OKAY. SO WHEN CAN YOU ALL
15 SUBMIT THAT?

16 MS. KREVANS: YOUR HONOR, MS. KARE IS THE
17 NEXT WITNESS. SHE'S GOING TO BE GOING ON IN ABOUT
18 TEN MINUTES. THIS IS, I THINK, THE FOURTH ROUND OF
19 THEIR OBJECTIONS TO THIS.

20 AND I WOULD JUST SAY, WE'RE GOING TO USE
21 SLIDE 14.39 RATHER THAN 14.4 IN RESPONSE TO THIS
22 OBJECTION.

23 ALL IT DOES IS SHOW A CLOSE-UP OF SOME OF
24 THE ICONS.

25 THE COURT: I DON'T HAVE .39, I DON'T

1 BELIEVE. OH, IT'S AT THE END.

2 MS. KREVANS: IT'S AT THE END.

3 MR. VERHOEVEN: AGAIN, THIS IS A
4 MANIPULATION, YOUR HONOR, BY PULLING OUT SPECIFIC
5 ICONS.

6 THE COURT: BUT THIS IS THEIR OWN PATENT.

7 MS. KREVANS: YOUR HONOR, ALL THIS IS
8 RIGHT AFTER WE SHOW THE FULL SCREEN OF D'305, IT'S
9 JUST A CLOSE-UP OF SOME OF THE ICONS.

10 MR. VERHOEVEN: THIS IS EXACTLY WHAT THEY
11 EXPLAINED ABOUT, BUT MORE EGREGIOUS. THEY'RE
12 PULLING OUT THINGS THAT THEY THINK ARE MOST
13 SIMILAR, YOUR HONOR, AND INSTEAD OF LOOKING AT THE
14 WHOLE THING IN ITS ENTIRETY AND TRYING TO DISTORT
15 THE JURORS' VIEWS ON JUST A FEW OF THE ICONS. I'M
16 SORRY TO SAY THIS, YOUR HONOR, IT'S NOT JUST --

17 THE COURT: OKAY. JUST SCREEN-TO-SCREEN
18 SHOTS. OKAY. SCREEN-TO-SCREEN SHOTS.

19 MR. VERHOEVEN: THANK YOU, YOUR HONOR.

20 MS. KREVANS: YOUR HONOR, SO WE CAN'T
21 SHOW THE JURY CLOSE-UPS OF ANYTHING. YOU PERMITTED
22 THEM YESTERDAY TO SHOW THE JURY VERY MUCH BLOWN UP
23 MAGNIFIED CLOSE-UPS OF THE SPEAKER SLOT IN PHONES.

24 THE COURT: YOU CAN SHOW IT BLOWN UP ON
25 THE SCREEN, BUT YOU NEED TO HAVE THE SCREEN UP

1 THERE. I'M NOT GOING TO LET YOU EXCISE IT OUT AND
2 SHOW IT IN ISOLATION. OKAY. SO IF YOU CAN BLOW IT
3 UP AND YOU SHOW THAT IT'S THE WHOLE SCREEN, THAT'S
4 FINE.

5 MR. VERHOEVEN: WELL, WOULD THAT APPLY --

6 THE COURT: WHAT ELSE? WHY DON'T YOU
7 TELL ME --

8 MR. VERHOEVEN: ALL RIGHT, YOUR HONOR.

9 THE COURT: LET'S HANDLE IT RIGHT NOW.
10 I'M GOING TO CHARGE SAMSUNG'S TIME. LET'S DO IT.

11 MR. VERHOEVEN: JUST ONE --

12 THE COURT: I'M CHARGING YOU TRIAL TIME
13 BECAUSE THIS KARE, KARE OBJECTIONS HAVE BEEN
14 BRIEFED SIX TIMES. ALL RIGHT? SO IF YOU WANT TO
15 DO IT NOW, WE'LL DO IT NOW, BUT I AM CHARGING YOUR
16 TIME.

17 SO IT IS NOW 9:09. I GOT THE KARE EXPERT
18 REPORT RIGHT HERE. YOU TELL ME WHAT YOUR OBJECTION
19 IS AS TO HER REPORTS. I'VE GOT THEM RIGHT HERE.

20 MR. VERHOEVEN: BEYOND WHAT I JUST SAID,
21 YOUR HONOR, I JUST HAD ONE QUESTION.

22 THE COURT: YEAH.

23 MR. VERHOEVEN: AND THAT IS, I ASSUME IF
24 COUNSEL FOR APPLE IS PERMITTED TO SHOW, FOR
25 EXAMPLE, IF WE LOOK AT SLIDE PDX 14.21 RIGHT HERE,

1 WHICH IS SCREEN-TO-SCREEN SHOTS --

2 THE COURT: WHAT ABOUT IT?

3 MR. VERHOEVEN: -- THE ONLY THING IS JUST
4 A POINT OF CLARIFICATION. IF THAT'S FAIR GAME FOR
5 THEM TO DO ON DIRECT, I WOULD JUST REQUEST THAT I
6 BE ABLE TO USE SCREEN-TO-SCREEN SHOTS EXACTLY LIKE
7 THIS, WITHOUT THE PHONE AROUND THEM, IN THE CROSS.

8 THE COURT: THAT'S FINE.

9 MR. VERHOEVEN: THANK YOU, YOUR HONOR.
10 THAT'S ALL I HAVE.

11 THE COURT: SURE. I'VE GOT THE KARE
12 REPORTS RIGHT HERE.

13 DO YOU WANT TO GO FOR IT ON ROUNDED MIX
14 OF RECTANGLES AND ROUNDED CORNERS, LET'S DO IT
15 RIGHT NOW.

16 MR. VERHOEVEN: NO.

17 THE COURT: IT'S 9:10.

18 MR. VERHOEVEN: I THINK I'VE GOT YOUR
19 GUIDANCE ON THE SCREEN.

20 THE COURT: ALL RIGHT. 9:10. THAT'S
21 ONLY TWO MINUTES.

22 NOW, ARE WE READY WITH MR. BRESSLER?

23 MS. KREVANS: WE ARE, YOUR HONOR.

24 THE COURT: ALL RIGHT.

25 MR. MCELHINNY: YOUR HONOR, ONE -- YOUR

1 HONOR --

2 THE COURT: WHAT'S THAT?

3 MR. MCELHINNY: MAY WE HAVE YOUR RUNNING
4 TIME TOTALS, PLEASE?

5 THE COURT: YES. APPLE, WITH THE 19
6 MINUTES THAT WERE DEDUCTED FOR YOUR RECONSIDERATION
7 OF DISCOVERY MOTIONS, HAS USED 6 HOURS AND 9
8 MINUTES. SAMSUNG HAS USED 6 HOURS AND 27 MINUTES.
9 WELL, LESS THE 2 TODAY. 29 MINUTES.

10 MR. MCELHINNY: THANK YOU, YOUR HONOR.

11 THE COURT: OKAY. IF WE CAN BRING IN THE
12 JURY.

13 (WHEREUPON, THE FOLLOWING PROCEEDINGS
14 WERE HELD IN THE PRESENCE OF THE JURY:)

15 THE COURT: OKAY. WELCOME BACK. IT IS
16 NOW 9:12 AND WE'RE CONTINUING WITH MR. BRESSLER'S
17 REDIRECT.

18 AND, SIR, YOU ARE STILL UNDER OATH.
19 OKAY.

20 **PETER BRESSLER,**
21 BEING RECALLED AS A WITNESS ON BEHALF OF THE
22 PLAINTIFF, HAVING BEEN PREVIOUSLY SWORN, WAS
23 FURTHER EXAMINED AND TESTIFIED AS FOLLOWS:

24 THE COURT: GO AHEAD, PLEASE.

25 **REDIRECT EXAMINATION (RESUMED)**

1 BY MS. KREVANS:

2 Q GOOD MORNING, MR. BRESSLER.

3 A GOOD MORNING.

4 Q DO YOU REMEMBER THAT YESTERDAY WHEN WE LEFT
5 OFF, I WAS JUST ASKING YOU SOME FOLLOW-UP QUESTIONS
6 ABOUT THE LEGAL STANDARDS THAT YOU APPLIED IN
7 FORMING YOUR OPINIONS.

8 A I BELIEVE SO.

9 Q AND I WANT TO ASK YOU ONE LAST QUESTION ABOUT
10 THAT.

11 IF WE COULD SEE PAGES -- PAGE 7 AND THEN
12 PAGE 8 OF MR. BRESSLER'S REPORT THAT WE WERE
13 LOOKING AT YESTERDAY AFTERNOON. SO STARTING ON
14 PAGE 7 WAS WHERE YOU STARTED TO SET OUT THE LAW, I
15 THINK YOU SAID AT PARAGRAPH 22.

16 A YES.

17 Q LET'S GO TO THE NEXT PAGE, PAGE 8, AND LOOK AT
18 PARAGRAPH 25, WHICH WAS THE PARAGRAPH MR. VERHOEVEN
19 ASKED YOU SOME QUESTIONS ABOUT.

20 I WANT TO ASK YOU ABOUT ONE SENTENCE FROM
21 PARAGRAPH 25 THAT MR. VERHOEVEN MENTIONED.

22 DO YOU SEE IN THE MIDDLE OF THE
23 PARAGRAPH, IT SAYS, "IF THE ACCUSED DESIGN HAS
24 COPIED A PARTICULAR FEATURE OF THE CLAIMED DESIGN
25 THAT PARTS CONSPICUOUSLY IDENTIFY THE PRIOR ART,

1 THE ACCUSED DESIGN IS NATURALLY MORE LIKELY TO BE
2 REGARDED AS DECEPTIVELY SIMILAR TO THE CLAIMED
3 DESIGN, AND THUS INFRINGING."

4 WAS THAT PART OF THE LEGAL TEST THAT YOU
5 APPLIED IN FORMING YOUR OPINIONS?

6 A ABSOLUTELY.

7 Q OKAY. DO YOU RECALL THAT MR. VERHOEVEN ASKED
8 YOU SOME QUESTIONS ABOUT WHETHER, ON THE SAMSUNG
9 PHONES, AND HE HAD A SLIDE ABOUT THIS WITH A BLUE
10 LINE THAT WENT ACROSS THE FACE, IF YOU RAN YOUR
11 FINGER ACROSS THE PHONE, YOU COULD FEEL THAT BEZEL
12 PROTRUDED A LITTLE BIT ABOVE THE GLASS SURFACE OF
13 THE PHONE.

14 A YES.

15 Q DO YOU RECALL THAT?

16 A I DO.

17 Q OKAY. IS THE TEST FOR DESIGN INFRINGEMENT A
18 TEST ABOUT WHAT A PRODUCT FEELS LIKE IF YOU RUN
19 YOUR FINGERS OVER IT, OR IS IT A TEST OF THE VISUAL
20 IMPRESSION THE PRODUCT MAKES.

21 MR. VERHOEVEN: OBJECTION. LEADING.

22 THE COURT: SUSTAINED.

23 BY MS. KREVANS:

24 Q WHAT IS THE TEST FOR WHETHER A DESIGN IS
25 SUBSTANTIALLY SIMILAR TO A DESIGN OF A PATENT,

1 MR. BRESSLER?

2 MR. VERHOEVEN: OBJECTION. CALLS FOR
3 LEGAL CONCLUSION.

4 THE COURT: SUSTAINED.

5 BY MS. KREVANS:

6 Q WHAT'S THE TEST THAT YOU APPLIED,
7 MR. BRESSLER, TO DETERMINE WHETHER THE DESIGN OF
8 THE SAMSUNG PHONES APPLIED -- WAS THE DESIGN OF THE
9 IPHONE PATENTS?

10 MR. VERHOEVEN: ASKED AND ANSWERED.

11 THE COURT: I'LL ALLOW IT.

12 GO AHEAD. OVERRULED.

13 THE WITNESS: COULD YOU REPEAT IT,
14 PLEASE? SORRY.

15 BY MS. KREVANS:

16 Q WHAT WAS THE TEST, BRIEFLY, THAT YOU APPLIED
17 IN DETERMINING WHETHER THE SAMSUNG PHONES INFRINGED
18 THE APPLE DESIGN PATENTS?

19 A THE TEST THAT I APPLIED, BRIEFLY, WAS THAT THE
20 APPEARANCE OF THE ACCUSED PHONES SHOULD LOOK LIKE
21 THE APPEARANCE THAT AN ORDINARY OBSERVER WOULD --
22 OR AN ORDINARY OBSERVER WOULD THINK THE APPEARANCE
23 OF THE ACCUSED PHONES LOOKED LIKE THE APPEARANCE
24 DEPICTED IN THE DESIGN PATENT.

25 Q OKAY. NOW, DO YOU RECALL THAT MR. VERHOEVEN

1 ACTUALLY SHOWED YOU, DURING YOUR CROSS-EXAMINATION,
2 THE FRONT FACES OF A NUMBER OF PHONES UP ON THE
3 SCREEN?

4 A YES.

5 Q AND ONE OF THOSE WAS THE PRADA?

6 A YES.

7 Q IS THE PRADA IN FRONT OF YOU RIGHT NOW,
8 MR. BRESSLER?

9 A YES, THERE IS ONE HERE.

10 Q IS, IS THE PRADA A PHONE THAT IS PRIOR ART TO
11 THE APPLE DESIGN PATENTS?

12 MR. VERHOEVEN: OBJECTION. CALLS FOR A
13 LEGAL CONCLUSION.

14 THE COURT: SUSTAINED.

15 BY MS. KREVANS:

16 Q MR. BRESSLER, BASED ON THE INFORMATION
17 AVAILABLE TO YOU, MR. BRESSLER, WAS THE PRADA
18 PUBLICLY DISPLAYED OR SOLD IN THE UNITED STATES
19 BEFORE THE APPLICATION DATE OF THE APPLE IPHONE
20 DESIGN PATENTS?

21 A I HAVE BEEN INFORMED THAT IT WAS NOT.

22 Q OKAY. DO YOU THINK, IN YOUR OPINION, THAT THE
23 DESIGN OF THE PRADA THAT YOU'RE HOLDING IN YOUR
24 HAND IS SUBSTANTIALLY SIMILAR TO THE DESIGN OF THE
25 APPLE IPHONE PATENT?

1 A I DO NOT.

2 MS. KREVANS: YOUR HONOR, MAY I PASS THE
3 PRADA AROUND TO THE JURY?

4 THE COURT: ANY OBJECTION?

5 MR. VERHOEVEN: NO OBJECTION, YOUR HONOR.

6 THE COURT: GO AHEAD, PLEASE.

7 DO YOU WANT TO SEE THIS PRADA?

8 MR. VERHOEVEN: SHE HAS SHOWED IT TO ME.

9 MS. KREVANS: I SHOWED IT TO HIM IN
10 ADVANCE.

11 AND MAY I ALSO PASS OUT THE IPHONE?

12 THE COURT: SHOW IT TO MR. VERHOEVEN.

13 MR. VERHOEVEN: NO OBJECTION.

14 MS. KREVANS: I SHOWED IT TO HIM.

15 THE COURT: GO AHEAD.

16 BY MS. KREVANS:

17 Q DO YOU RECALL WHEN MR. VERHOEVEN WAS SHOWING
18 YOU THE SLIDES OF THOSE FRONT FACES, YOU TOLD HIM
19 YOU DIDN'T THINK IT WAS PROPER JUST TO LOOK AT THE
20 FRONT VIEW.

21 WHY DID YOU SAY THAT?

22 A IT'S MY UNDERSTANDING THAT THE ANALYSIS IS
23 CONDUCTED WITH ALL OF THE VIEWS OF THE PATENT IN
24 EACH INDIVIDUAL CASE, NOT USING A SINGLE VIEW,
25 ACTUALLY VIEWING A SINGLE VIEW DISTORTS ONE'S

1 UNDERSTANDING OF THE DESIGN.

2 Q OKAY. LET'S LOOK AT ONE OF THE PHONES, ONE OF
3 THE DESIGNS THAT MR. VERHOEVEN SHOWED YOU. THIS
4 WAS DX 511.

5 COULD WE SEE THAT? IT'S ALSO IN YOUR
6 BINDER, MR. BRESSLER.

7 IF YOU START AT THE FIRST PAGE, PLEASE,
8 THOMAS, AND LET'S JUST WALK THROUGH THE VIEWS.
9 DON'T BLOW IT UP BECAUSE THEN IT'LL -- WE BEGIN
10 SEEING EXACTLY WHAT'S THERE.

11 JUST FOLLOWING ALONG ON THE SCREEN,
12 MR. BRESSLER, COULD YOU JUST BRIEFLY TELL US, AS WE
13 GO THROUGH THESE PAGES, WHAT WE'RE LOOKING AT HERE.
14 THIS IS THE JAPANESE '638 PATENT FOR THE RECORD.

15 A YES. AND THIS IS THE JAPANESE NON-TRANSLATED
16 VERSION.

17 Q IT'S PICTURES, SO WE CAN LOOK AT THEM IN
18 JAPANESE, RIGHT?

19 A EXACTLY.

20 Q OKAY.

21 A THIS IS ACTUALLY TWO THREE-QUARTER FRONT
22 VIEWS. THE UPPER ONE IS SHOWING IT IN A DEPLOYED
23 MODE BECAUSE THIS IS A SLIDER PHONE.

24 THE SECOND ONE SHOWING IT IN THE CLOSED
25 MODE.

1 Q OKAY. LET'S SEE THE NEXT PAGE, THOMAS.

2 WHAT DO WE SEE HERE?

3 A THIS IS A DEAD-ON FRONT VIEW OF THE PHONE.

4 Q OKAY.

5 A AND A DEAD-ON BACK VIEW OF THE PHONE.

6 Q UM-HUM.

7 A AND THEN IT APPEARS IT IS A DEAD-ON TOP VIEW
8 OF THE PAGE.

9 Q OKAY. NEXT PAGE, PLEASE, THOMAS.

10 WHAT DO WE HAVE HERE?

11 A THE NEXT FIGURE WOULD BE THE BOTTOM VIEW, AND
12 LET ME GET MY ORIENTATION CORRECT, BUT I BELIEVE
13 THIS IS THE LEFT-HAND VIEW, DEPENDING ON WHICH WAY
14 YOU ARE FACING. AND THE OTHER ONE IS THE
15 RIGHT-HAND VIEW.

16 Q AND WHAT DO YOU SEE IN THESE EIGHT VIEWS, IF
17 ANYTHING, THAT YOU COULD NOT SEE IN JUST THE FRONT
18 VIEW?

19 A IMMEDIATELY WHAT YOU SEE IS THE DIMENSIONALITY
20 OF THE PHONE, MEANING THAT THE PHONE CAN BE SEEN TO
21 NOT BE A DEVICE THAT'S ABSOLUTELY FLAT.

22 YOU CAN SEE THAT THE FRONT END -- AND IF
23 YOU CAN GO BACK TO THE THREE-QUARTER VIEW, I THINK
24 IT'S MOST EASILY DEMONSTRATED VIEW.

25 Q THOMAS, CAN YOU GO BACK TO THE THREE-QUARTER

1 VIEW. ONE BEFORE THAT.

2 A RIGHT. I THINK YOU CAN SEE THAT IN THESE
3 VIEWS THAT LOOKING AT IT FACE ON, ONE COULD
4 MISUNDERSTAND WHAT THIS DESIGN IS, AND NOT
5 UNDERSTAND THAT IT IS A DIMENSIONAL FACE THAT, IN
6 FACT, IS NOT CONTINUOUS FLAT ALL THE WAY ACROSS THE
7 FRONT, THAT THERE ARE NO INDICATIONS THAT IT'S
8 EITHER REFLECTIVE OR GLASSY OR TRANSPARENT; AND
9 THAT IT'S NOT BLACK OR NOT SPECIFIED TO BE BLACK.

10 AND IF YOU LOOK CLOSELY AT THE PIECE OF
11 MATERIAL AROUND IT, ONE CAN HAVE A DEBATE WHETHER
12 THAT'S, IN FACT, A BEZEL OR A FRONT COVER OF THE
13 FRONT PART OF THE PHONE.

14 Q OKAY. LET'S LOOK AT ONE MORE EXAMPLE OF THE
15 PHONE, THE PICTURES THAT MR. VERHOEVEN SHOWED YOU.

16 COULD WE SEE DX 728. AND, AGAIN, LET'S
17 WALK QUICKLY THROUGH THE VIEWS. THIS IS, FOR THE
18 RECORD, THE JAPANESE '383 PATENT.

19 BRIEFLY, COULD YOU WALK US THREE THESE
20 VIEWS, MR. BRESSLER?

21 A YES. THE FIRST PAGE HERE SHOWS THE FRONT
22 THREE-QUARTER VIEW AND THE FRONT HEAD-ON VIEW OF
23 THIS PHONE, WHICH IS ACTUALLY IN THE SPECIFICATION,
24 THIS IS DESCRIBED AS TWO SEPARATE PARTS. THERE'S
25 AN INTERNAL PHONE COMPONENT THAT THERE'S AN

1 EXTERNAL COVER COMPONENT.

2 Q OKAY.

3 A THAT'S TRANSPARENT.

4 Q LET'S SEE THE NEXT VIEW.

5 WHAT'S HERE?

6 A THIS VIEW, I BELIEVE, IS A BACK VIEW AND A TOP
7 VIEW.

8 Q OKAY. LET'S SEE THE NEXT PAGE, THOMAS.

9 WHAT IS THIS?

10 A THIS, I BELIEVE, IS A BOTTOM VIEW AND A
11 SIDE -- AND A LEFT SIDE VIEW, RIGHT SIDE VIEW.

12 Q OKAY. AND THE NEXT PAGE, THOMAS?

13 A IS THE OTHER SIDE VIEW.

14 AND THE NEXT PART IS A SECTION. NOW, A
15 SECTION IS WHERE YOU SLICE THE OBJECT IN THE PATH
16 POTENTIALLY AND YOU CAN GET TO LOOK AT WHAT IT
17 LOOKS LIKE FROM THE END OF THE SLICE OF BOLOGNA, IF
18 YOU WILL.

19 Q OKAY. SO THAT'S NOT WHAT AN ORDINARY OBSERVER
20 WOULD SEE?

21 A USUALLY, NO.

22 Q UNLESS WE CUT OUR PHONES IN HALF?

23 A RIGHT.

24 Q OKAY. LET'S LOOK AT THE NEXT PAGE. WHAT DO
25 WE SEE HERE?

1 A THIS IS A THREE-QUARTER FRONT VIEW, THE TOP IS
2 A THREE-QUARTER FRONT VIEW OF THE CORNER, AND THE
3 TOP IS THE THREE-QUARTER FRONT VIEW OF THE ACTUAL
4 ELECTRONIC DEVICE ITSELF.

5 Q OKAY. SO IN THAT ONE, THAT'S THE ONE WE'RE
6 SEEING THE ACTUAL ELECTRONIC DEVICE?

7 A CORRECT.

8 Q AND COULD YOU TELL US ABOUT THAT?

9 A YES. IN MY REVIEW OF THIS PATENT, I
10 DETERMINED THAT THE ELECTRONIC DEVICE ITSELF HAD A
11 TRANSPARENT AREA OVER THE DISPLAY WHICH RAN EDGE TO
12 EDGE ALL THE WAY ACROSS THAT WAS BALANCED IN THE
13 MIDDLE.

14 BUT IF YOU LOOK AT THE EDGE, WHICH IS AN
15 INTERESTING DEPICTION BECAUSE WHAT THOSE LINES ARE
16 ACTUALLY SHOWING -- I'M SORRY. IT'S HARD TO
17 DESCRIBE THIS WITH LOOKING WITHOUT A POINTER, BUT
18 THERE ARE LINES THAT SURROUND THE CIRCUMFERENCE OF
19 THE FACE AND THERE ARE ACTUALLY TWO LINES. THERE'S
20 AN INNER LINE AND THERE'S AN OUTER LINE.

21 ONE COULD MISTAKE THOSE FOR A BEZEL.

22 Q WHAT ARE THEY, IN FACT, IN YOUR VIEW?

23 A IN MY VIEW, THOSE ARE THE POINTS WHERE THE
24 CURVED CORNER MEETS THE FLAT SURFACE AND WHEN
25 YOU'RE CREATING A DIAGRAM LIKE THIS WITH A

1 COMPUTER, THE COMPUTER SHOWS THOSE LINES AS THE
2 TANGENCY OF WHERE THE RADIUS MEETS THE FLAT
3 SURFACE, THE TANGENCY IS THAT POINT WHERE RADIUS
4 TURNS INTO THE FLAT.

5 SO IT'S SHOWING BOTH ENDS OF THE RADIUS
6 IS BASICALLY WHAT THAT'S SHOWING, AND THAT CAN BE
7 SEEN IF YOU GO BACK TO A PRIOR VIEW.

8 Q OKAY.

9 A IF YOU WILL.

10 Q WHICH VIEW DO YOU WANT TO LOOK AT?

11 A THAT ONE IS FINE.

12 THE TOP VIEW AND/OR BOTTOM VIEW, YOU CAN
13 SEE THAT THE SHAPE OF THE INSIDE BOX ACTUALLY HAS A
14 RADIUS IN THE TOP LEFT CORNER IF YOU'RE LOOKING AT
15 THE TOP ONE OR THE TOP LEFT CORNER IF YOU'RE
16 LOOKING AT THE BOTTOM ONE. SO MY READ IS THAT'S A
17 RADIANT CORNER, NOT A BEZEL.

18 Q OKAY. LET'S GO BACK TO THE OTHER VIEW.
19 LOOKING AT THE ACTUAL DEVICE THAT'S SHOWN BY ITSELF
20 IN THE BOTTOM THERE. DOES THAT HAVE A SURFACE
21 THAT'S CONTINUOUS ACROSS THE ENTIRE FACE, EDGE TO
22 EDGE EVERYWHERE?

23 A IT HAS A FLAT FRONT SURFACE, BUT IT IS NOT
24 CONTINUOUS. THERE IS A TRANSPARENT DISPLAY AREA
25 AND AN AREA ABOVE AND BELOW THAT ARE NOT INDICATED

1 TO BE TRANSPARENT; THEREFORE, ONE WOULD EXPECT THEM
2 TO BE ANYTHING, AND IT COULD BE OPAQUE.

3 Q OKAY. ONE QUESTION ABOUT THE '889 PATENT.
4 COULD WE SEE PDX 26.6, PLEASE. IS THIS ALL OF THE
5 FIGURES SHOWN IN THE DESIGN OF THE '889 PATENT,
6 MR. BRESSLER?

7 A YES.

8 Q IN YOUR VIEW, AS A DESIGNER WHAT HAS WORKED
9 WITH CONSUMERS, WOULD ALL NINE OF THESE VIEWS OF
10 THE DEVICE, BECAUSE WE'RE IGNORING THE MAN, WOULD
11 ALL NINE OF THESE VIEWS BE EQUALLY IMPORTANT IN
12 FORMING AN OVERALL VISUAL IMPRESSION?

13 MR. VERHOEVEN: OBJECTION. LEADING.

14 THE COURT: OVERRULED.

15 THE WITNESS: ALL OF THESE VIEWS ARE
16 EQUALLY IMPORTANT IN THE DESIGNER'S ANALYSIS OF THE
17 PATENT.

18 THEY ARE, HOWEVER, IN MY OPINION NOT
19 EQUALLY IMPORTANT IN FORMING THE OVERALL IMPRESSION
20 HELD BY THE ORDINARY OBSERVER.

21 IT'S -- WOULD YOU LIKE IT BRIEF OR --
22 BY MS. KREVANS:

23 Q A BRIEF EXPLANATION OF WHY PLEASE.

24 A OKAY. I BELIEVE THAT THE DEPARTURE, THE
25 DESIGN DEPARTURE THAT'S DEPICTED IN THIS PATENT,

1 WHICH IS THE CONTINUOUS FLAT, CLEAR, EDGE-TO-EDGE
2 GLASS FRONT SURFACE, AT THE TIME OF THIS PATENT,
3 WAS SUCH A VISUAL DEPARTURE, AND I BELIEVE EVEN NOW
4 IN THE PRODUCTS THAT ARE AVAILABLE IN THE MARKET,
5 THE FACT THAT THAT'S A CONTINUOUS SHEET OF GLASS
6 ACROSS THE WHOLE FRONT OF THE SURFACE I BELIEVE IS
7 SUCH A DESIGN DEPARTURE THAT IT IS THE MAJOR DRIVER
8 OF THE OVERALL IMPRESSION, SUCH THAT THE OTHER
9 VIEWS, THOUGH THEY'RE PART OF THE IMPRESSION, I
10 BELIEVE THEY ASSUME LESS IMPORTANCE IN ONE'S MIND
11 WHEN ONE'S VIEWING THAT PRODUCT.

12 MS. KREVANS: THANK YOU, MR. BRESSLER.
13 PASS THE WITNESS.

14 THE COURT: ALL RIGHT. IT'S NOW 9:27.
15 ANY RECROSS?

16 MR. VERHOEVEN: JUST A FEW MINUTES, YOUR
17 HONOR.

18 THE COURT: OKAY. GO AHEAD, PLEASE.

19 MR. VERHOEVEN: CAN WE PUT UP DX 511,
20 PLEASE.

21 **RECROSS-EXAMINATION**

22 BY MR. VERHOEVEN:

23 Q GOOD MORNING, MR. BRESSLER.

24 A GOOD MORNING.

25 Q WE JUST LOOKED AT THIS. I THINK WE LOOK ADD,

1 OR COUNSEL FOR APPLE DIRECTED TO YOU PAGE 2; IS
2 THAT RIGHT?

3 A YES.

4 Q AND CAN WE -- MR. FISHER, CAN WE PULL UP THE
5 BOTTOM IMAGE AND BLOW IT UP AND MAKE IT BIG?

6 AND IF IT'S POSSIBLE, MR. FISHER, CAN WE
7 SHOW THE '087 PATENT, JX 1041, AND PULL OUT AN
8 IMAGE FROM THERE OF THE FRONT SCREEN? ACTUALLY,
9 LET'S GO BACK ONE, PLEASE.

10 LET'S TAKE FIGURE 1 BECAUSE THAT'S
11 SLIGHTLY ORIENTED IN THE WAY THAT IT'S SLIGHTLY
12 TILTED AS WELL.

13 I DON'T KNOW IF WE CAN PUT THOSE TWO ON
14 THE SAME SCREEN. THERE WE GO.

15 NOW, YOU JUST TESTIFIED THAT IT WAS
16 IMPORTANT TO LOOK AT OTHER ANGLES BESIDES THE FRONT
17 ANGLE; CORRECT?

18 A YES.

19 Q NOW, WE CAN SEE IN THE '087 PATENT -- AND I
20 BELIEVE YOU TESTIFIED TO THIS -- BUT THERE'S DOTTED
21 LINES AROUND THE BACK OF THE PHONE.

22 A THAT'S CORRECT.

23 Q AND SO YOU'RE NOT SAYING WE SHOULD LOOK AT
24 THE, AT ANYTHING BELOW THE BEZEL IN THE '087;
25 RIGHT?

1 A THAT'S CORRECT.

2 Q ALL THOSE DOTTED LINES WE SHOULD IGNORE;
3 RIGHT?

4 A YES.

5 Q THAT'S NOT BEING CLAIMED; RIGHT?

6 A CORRECT. THEY WERE THERE ONLY FOR REFERENCE.

7 Q SO IT'S JUST THE FRONT AND THE BEZEL
8 SURROUNDING IT THAT'S BEING CLAIMED; RIGHT?

9 A CORRECT.

10 Q AND THAT'S WHAT WE SHOULD LOOK AT?

11 A YES.

12 Q SO IF WE LOOK AT THE DX 511, THE PRIOR ART
13 DESIGN PATENT, THE FACT THAT IT'S THICKER AND HAS A
14 DIFFERENT SHAPE ON THE DOWNWARD SIDES AND BACK IS
15 IRRELEVANT; RIGHT?

16 A THAT'S CORRECT.

17 Q OKAY. SO YOUR POINT IS JUST LOOKING AT THE
18 FRONT, IF YOU LOOK AT DX 511, THE DESIGN PATENT,
19 THE PRIOR ART DESIGN PATENT, IT'S NOT ABSOLUTELY
20 FLAT ALL THE WAY ACROSS THE FRONT; RIGHT?

21 A THAT'S CORRECT.

22 Q SO WE'RE TALKING ABOUT RIGHT HERE
23 (INDICATING), RIGHT?

24 A AND BELOW.

25 Q THE TOP AND BOTTOM THERE, RIGHT?

1 A CORRECT.

2 Q SO THAT LITTLE DIFFERENCE, IN YOUR OPINION,
3 MAKES THIS JAPANESE DESIGN PATENT NOT SUBSTANTIALLY
4 SIMILAR TO THE '087; RIGHT?

5 A I BELIEVE THAT THE OVERALL IMPRESSION THAT
6 THAT CHANGE IN SURFACE WILL CREATE IN THE CONTEXT
7 OF THOSE PATENTS WILL BE SIGNIFICANT.

8 Q SUCH THAT THE ORDINARY OBSERVER WILL SAY THESE
9 TWO AREN'T SUBSTANTIALLY SIMILAR?

10 A CORRECT.

11 Q OKAY. NOW, CAN WE GO TO DX 728.

12 THIS IS THE SECOND DESIGN PATENT THAT
13 COUNSEL FOR APPLE JUST SHOWED YOU.

14 GO TO PAGE 6, PLEASE.

15 DO YOU REMEMBER LOOKING AT THIS?

16 A YES.

17 Q AND CAN WE BLOW UP THE BOTTOM IMAGE AND PUT UP
18 AN IMAGE FROM THE '087, JX 1041 NEXT TO IT.

19 WHY DON'T WE DO THIS ONE, FIGURE 9,
20 BECAUSE IT'S ORIENTED SOMEWHAT SIMILARLY.

21 OKAY. NOW, YOU SAID -- DO YOU SEE THAT
22 IN PAGE 6, THE FIGURE WE'VE BLOWN UP HERE, HAS TWO
23 LINES THAT GO ALL THE WAY AROUND THE EDGE OF THE
24 FRONT SURFACE? DO YOU SEE THAT?

25 A I DO.

1 Q AND IF YOU LOOK AT FIGURE 9, YOU ALSO SEE TWO
2 LINES THAT GO ALL THE WAY AROUND THE EDGE OF THE
3 FRONT SURFACE. DO YOU SEE THAT, SIR?

4 A I DO.

5 Q NOW, YOU'RE SAYING, WELL, I INTERPRET THESE
6 TWO LINES AS NOT BEING A BEZEL, BUT, IN FACT, THEY
7 BOTH DEPICT TWO LINES IN PARALLEL, EQUAL LENGTH
8 GOING ALL THE WAY AROUND THE FRONT SURFACE, DON'T
9 THEY, SIR?

10 A ONE DOES NOT INTERPRET THE PATENT USING SINGLE
11 VIEWS.

12 Q SIR, YES OR NO? DO THEY BOTH DEPICT TWO LINES
13 IN PARALLEL OF EQUAL DISTANCE APART GOING ALL THE
14 WAY AROUND THE EDGE OF THE FRONT SURFACE? YES OR
15 NO?

16 A IF YOU'RE ASKING ME IF THE TWO LINES ARE
17 PARALLEL AROUND THE FRONT SURFACE, THE ANSWER IS
18 YES.

19 Q NOW, YOU TESTIFIED THAT YOU INTERPRET THIS,
20 AND I'M POINTING TO PAGE 6 OF EXHIBIT 729, THE
21 FIGURE WE'VE BLOWN UP, YOU'VE INTERPRETED THIS AS
22 NOT BEING A BEZEL; RIGHT?

23 A THAT'S CORRECT.

24 Q AND IN YOUR OPINION, IF THIS ISN'T A BEZEL,
25 THAT TAKES IT OUT FROM BEING SUBSTANTIALLY SIMILAR;

1 RIGHT?

2 A CORRECT.

3 MR. VERHOEVEN: OKAY. NO FURTHER
4 QUESTIONS, YOUR HONOR.

5 THE COURT: ALL RIGHT. THE TIME IS NOW
6 9:32. MAY THIS WITNESS BE EXCUSED?

7 MR. VERHOEVEN: SUBJECT TO RECALL, YOUR
8 HONOR.

9 THE COURT: SUBJECT TO RECALL, YOU ARE
10 EXCUSED.

11 MS. KREVANS: YOUR HONOR, I HAD ONE
12 FURTHER QUESTION FOR THE WITNESS.

13 THE COURT: OKAY. GO AHEAD. IT'S NOW
14 9:32.

15 MS. KREVANS: CAN WE PUT THAT SLIDE BACK
16 UP, THE ONE THAT WE JUST HAD ON THE SCREEN.

17 **FURTHER REDIRECT EXAMINATION**

18 BY MS. KREVANS:

19 Q MR. BRESSLER, ARE YOUR VIEWS ABOUT THE BEZEL
20 IN THE PATENT THAT WE'RE LOOKING AT RIGHT NOW THE
21 ONLY REASON THAT YOU THINK IT'S NOT SUBSTANTIALLY
22 SIMILAR TO THE '087 DESIGN?

23 MR. VERHOEVEN: OBJECTION. LEADING.

24 THE COURT: SUSTAINED.

25 BY MS. KREVANS:

1 Q MR. BRESSLER, CAN YOU TELL US WHETHER THERE
2 ARE ANY REASONS, OTHER THAN THE OPINION YOU JUST
3 GAVE ABOUT THE ABSENCE OF A BEZEL, THAT YOU DO NOT
4 THINK THE PATENT WE'RE LOOKING AT RIGHT NOW ON THE
5 SCREEN IS SUBSTANTIALLY SIMILAR TO THE IPHONE '087
6 PATENT?

7 A YES. THERE ARE A COUPLE OF OTHERS.

8 Q BRIEFLY, WHAT ARE THEY?

9 A ONE IS THIS DOES NOT HAVE A LOZENGE EAR SLOT
10 AS THE '087 DOES; AND -- WHAT WAS THE OTHER ONE I
11 WAS JUST THINKING OF? OH, AND THE '087 IS NOT
12 SPECIFIED TO BE TRANSPARENT ACROSS THE DISPLAY
13 AREA.

14 Q AND IS THAT WHAT'S SPECIFIED HERE?

15 A YES.

16 MS. KREVANS: THANK YOU.

17 THE COURT: ALL RIGHT. IT'S NOW 9:33.
18 ANY FURTHER RECROSS?

19 MR. VERHOEVEN: NO, YOUR HONOR.

20 THE COURT: OKAY. SO YOU ARE EXCUSED
21 SUBJECT TO RECALL. YOU MAY STEP DOWN.

22 THE WITNESS: THANK YOU.

23 THE COURT: IF YOU WOULD, PLEASE, CALL
24 YOUR NEXT WITNESS.

25 MS. KREVANS: APPLE CALLS DR. SUSAN KARE,

1 YOUR HONOR.

2 THE CLERK: RAISE YOUR RIGHT HAND,
3 PLEASE.

4 **SUSAN KARE,**
5 BEING CALLED AS A WITNESS ON BEHALF OF THE
6 PLAINTIFF, HAVING BEEN FIRST DULY SWORN, WAS
7 EXAMINED AND TESTIFIED AS FOLLOWS:

8 THE WITNESS: YES.

9 THE CLERK: WOULD YOU HAVE A SEAT,
10 PLEASE.

11 THE COURT: IT'S 9:35.

12 THE CLERK: STATE YOUR NAME, PLEASE, AND
13 SPELL IT.

14 THE WITNESS: SUSAN KARE, S-U-S-A-N,
15 K-A-R-E.

16 **DIRECT EXAMINATION**

17 BY MS. KREVANS:

18 Q GOOD MORNING, DR. KARE.

19 A GOOD MORNING.

20 Q WHAT DO YOU DO FOR A LIVING, DR. KARE?

21 A I'M A GRAPHIC DESIGNER, AND I SPECIALIZE IN
22 USER INTERFACE SCREEN GRAPHICS AND ICONS.

23 Q AND WHAT DO YOU MEAN BY "ICONS"?

24 A I MEAN SMALL PICTORIAL ELEMENTS THAT SYMBOLIZE
25 CONCEPTS, FREQUENTLY USED ON DIFFERENT KINDS OF

1 DISPLAY SCREENS.

2 Q COULD YOU DESCRIBE YOUR EDUCATION FOR US?

3 A I HAVE AN UNDERGRADUATE DEGREE FROM MT. HOLY
4 OKE COLLEGE AND A MASTER'S AND PH.D. FROM NEW YORK
5 UNIVERSITY.

6 Q AND WHAT FIELD WAS YOUR PH.D. IN?

7 A IT WAS IN ART HISTORY IN A FINE ARTS
8 DEPARTMENT.

9 Q WHEN DID YOU START WORK IN THE FIELD OF ICONS
10 AND GRAPHICS?

11 A WHEN I WAS HIRED AT APPLE IN 1982.

12 Q AND COULD YOU TELL US ABOUT YOUR CAREER, JUST
13 BRIEFLY JUST US AN OVERVIEW, STARTING WHEN YOU
14 STARTED WITH APPLE IN 1982, 30 YEARS AGO.

15 A I STARTED AT APPLE IN '82. I LEFT IN '86. I
16 WORKED FOR A COUPLE YEARS AT NEXT COMPUTER.

17 AND THEN I STARTED MY OWN USER INTERFACE
18 GRAPHIC DESIGN PRACTICE WHERE I STILL WORK TODAY.

19 Q OKAY. WHAT DID YOU DO WHEN -- IN THE 30-SOME
20 YEARS YOU WERE AT APPLE?

21 A I WORKED IN THE MACINTOSH SOFTWARE GROUP, AND
22 MY CARD WAS MACINTOSH ARTIST.

23 Q OKAY. AND WHAT DID YOU ACTUALLY DO, WHAT
24 KINDS OF THINGS DID YOU DO IN THAT JOB?

25 A I DESIGNED MAC GRAPHICS, MADE UP OF SQUARE

1 PIXELS FOR THE FIRST MACINTOSH COMPUTER AND TYPE
2 FACES.

3 Q AND WHAT DID YOU DO AFTER YOU LEFT APPLE IN
4 1986?

5 A I WORKED AT NEXT COMPUTER AS THE CREATIVE
6 DIRECTOR. I FOCUSSED MOSTLY ON THE LOGO AND
7 MATERIALS.

8 Q OKAY. AND --

9 A PRINTED MATERIALS AND THAT KIND OF
10 COMMUNICATIONS.

11 Q AND SINCE 1986 WHEN YOU LEFT NEXT, HAVE YOU
12 BEEN SOLELY WITH YOUR OWN CONSULTING FIRM?

13 A YES.

14 Q AND WHAT KINDS OF -- I KNOW THIS IS A LONG
15 PERIOD BECAUSE '86 TO TODAY IS 20-SOME YEARS. WHAT
16 KINDS OF THINGS DOES YOUR CONSULTING FIRM DO?

17 A ALL KINDS OF SCREEN GRAPHICS. WE DO ICON
18 WORK, A LOT OF ICON WORK, SCREEN-TYPE FACES,
19 WEBSITES, WATCHES, ALL KINDS OF DIFFERENT PROJECTS
20 FOR ALL KINDS OF CLIENTS. LOGOS, TOO.

21 Q WHAT -- AGAIN, I KNOW IT'S A LONG PERIOD. CAN
22 YOU GIVE US AN EXAMPLE OF THE KINDS OF CLIENTS
23 YOU'VE WORKED FOR?

24 A I'VE WORKED FOR MANY LARGE AND SMALL CLIENTS:
25 MICROSOFT; IBM, AUTO DESK; THOMPSON ROUTERS,

1 GLAM.COM, PAYPAL, FOSSIL.

2 Q HAVE YOU DONE ANY WORK FOR APPLE?

3 A NO.

4 Q OKAY. NOW, CAN YOU TELL US WHAT KINDS OF
5 PROJECTS YOU DO FOR YOUR CLIENTS IN YOUR DESIGN
6 FIRM?

7 A TYPICALLY, BECAUSE OF OUR REPUTATION, WE DO A
8 LOT OF ICON DESIGN FOR ALL KINDS OF DIFFERENT
9 PRODUCTS, AND AS I MENTIONED, ALSO OTHER SCREEN
10 GRAPHICS, SAY, FOR WEBSITES OR DIFFERENT KINDS
11 OF -- ALL DIFFERENT KINDS OF DEVICES AND TYPE FACES
12 AND MANY ELEMENTS.

13 Q IS THERE ANY WAY TO ESTIMATE HOW MANY ICONS
14 AND -- THAT YOU'VE DESIGNED OVER THE YEARS?

15 A USUALLY, I WOULD SAY THOUSANDS OF ICONS FOR
16 HUNDREDS OF CLIENTS, BUT HAVEN'T KEPT A CAREFUL
17 LOG.

18 Q OKAY. IS THERE ANY WAY TO ESTIMATE HOW MANY
19 USER INTERFACES FOR ELECTRONIC DEVICE DISPLAY
20 SCREENS YOU'VE WORKED ON OVER THE YEARS?

21 A YOU KNOW, I DON'T KNOW EXACTLY. I MEAN, MORE
22 THAN TENS, LESS THAN HUNDREDS PROBABLY.

23 Q DID YOU BRING US SOME EXAMPLES OF ICONS YOU'VE
24 DESIGNED?

25 A I DID. I HAVE ONE SLIDE JUST OF A FEW

1 REPRESENTATIVE SAMPLES.

2 Q OKAY. COULD WE SEE PDX 14.1, PLEASE.

3 ARE THESE ALL ICONS THAT YOU HAVE
4 DESIGNED?

5 A YES. AND SOME PLAYING CARDS.

6 Q THOSE PLAYING CARDS LOOK FAMILIAR. CAN YOU
7 TELL US WHAT THOSE ARE?

8 A I DESIGNED THOSE FOR MICROSOFT IN THE '80S FOR
9 A SOLITAIRE DECK. SO I KNOW THAT SOME NUMBER OF
10 PEOPLE HAVE SPENT SOME TIME WITH MY WORK.

11 Q TOP LEFT, TOP ROW ON THE LEFT, WHAT ARE THOSE
12 ICONS?

13 A THOSE WERE -- THOSE ARE FIVE FACEBOOK GIFT
14 ICONS. I DESIGNED ABOUT A THOUSAND OF THOSE OVER
15 FOUR YEARS THAT PEOPLE SPENT A DOLLAR TO SEND TO
16 EACH OTHER.

17 Q HAVE YOU RECEIVED ANY AWARDS OR RECOGNITION
18 FOR YOUR WORK IN THE ICON OR USER INTERFACE DESIGN
19 FIELD?

20 A YES. I RECEIVED A ROCKEFELLER FELLOWSHIP; I
21 RECEIVED THE CHRYSLER DESIGN AWARD; AND I RECEIVED
22 A CONGRESSIONAL APPOINTMENT TO THE CITIZEN'S
23 COINAGE ADVISORY COMMISSION.

24 Q LET'S START WITH THE LAST ONE. WHAT'S THE
25 CITIZEN'S COINAGE ADVISORY COMMITTEE?

1 A IT MET, WHEN I WAS A MEMBER, EVERY OTHER MONTH
2 IN WASHINGTON, AND WE REVIEWED NEW DESIGNS FOR
3 COINS, INCLUDING A LOT OF THE STATE QUARTERS.

4 Q AND WHAT WAS THE CHRYSLER AWARD?

5 A THAT WAS AN AWARD GIVEN TO SIX PEOPLE ANNUALLY
6 BY THE CHRYSLER CORPORATION TO HONOR SIGNIFICANT
7 CONTRIBUTIONS TO MODERN ARTS AND CULTURE, AND IT
8 WAS AN HONOR BECAUSE A NUMBER OF MY DESIGN HEROS
9 HAD RECEIVED THAT, PEOPLE LIKE FRANK GEARY, THE
10 ARCHITECT, AND THE INDUSTRIAL DESIGNER THAT LED THE
11 MARS PATHFINDER TEAM. SO -- I KNOW, THAT WAS NICE
12 COMPANY TO BE ASSOCIATED WITH, AND I WAS GRATEFUL.

13 Q NOW, YOU -- IF CHRYSLER GIVES THIS AWARD, YOU
14 HAVEN'T DESIGNED CARS, HAVE YOU?

15 A NO, NOT YET.

16 Q FOR WHAT DID YOU GET THE AWARD?

17 A JUST FOR AN ENTIRE BODY OF WORK. I ACTUALLY
18 SUBMITTED -- I MADE A BIG BOOK AND PUT ALL KINDS OF
19 WORK IN IT AND LOTS OF ICONS.

20 Q IS YOUR DESIGN WORK FEATURES IN ANY TEXTBOOKS?

21 A PROBABLY ABOUT HALF A DOZEN PHOTOGRAPHIC
22 DESIGN COLLEGE TEXTS, AND I KNOW ONE HISTORY OF
23 TYPOGRAPHY.

24 Q OKAY. HAS YOUR WORK BEEN FEATURED IN ANY
25 OTHER KINDS OF PUBLICATIONS?

1 A MANY, MANY NEWSPAPERS AND MAGAZINES. THE
2 NEW YORK TIMES REFERRED TO ME AS THE BETSY ROSS OF
3 THE PERSONAL COMPUTER.

4 AND P.C. WORLD CALLED ME ONE OF THE TOP
5 50 TECH VISIONARIES.

6 AND THERE HAVE BEEN ARTICLES ABOUT MY
7 WORK IN TIME, NEWSWEEK, FORBES, FORTUNE, PEOPLE.
8 MANY ART PUBLICATIONS.

9 Q OVER THE --

10 A OTHER INDUSTRIAL DESIGN MAGAZINES.

11 Q SURE. OVER THE COURSE OF YOUR CAREER, HAVE
12 YOU HAD EXPERIENCES THAT HAVE HELPED YOU LEARN HOW
13 ICONS AND SCREEN GRAPHICS WILL BE PERCEIVED BY
14 USERS, CONSUMERS?

15 A YES, YES.

16 Q CAN YOU TELL US ABOUT THAT EXPERIENCE?

17 A BECAUSE I'VE WORKED WITH MANY, MANY CLIENTS,
18 I'M USUALLY PRIVY, IN THE ITERATION PROCESS, TO
19 DESIGNING A SET OF, SAY, ICONS TO WHATEVER KIND OF
20 DECISION MAKING PROCESS OR TESTING THEY DO.

21 FACEBOOK ACTUALLY WROTE A TOOL, WHEN WE
22 WERE DOING THE GIFTS, SO THAT I COULD LOOK REAL
23 TIME AT WHO WAS BUYING WHAT, YOU KNOW, STARTING --
24 BECAUSE THEY LAUNCHED A NEW ICON EVERY DAY. SO
25 THAT WAS INTERESTING.

1 Q DO YOU DO CONSUMER RESEARCH YOURSELF?

2 A NO.

3 Q SO HOW IS IT THAT YOU FIND OUT ABOUT CONSUMER
4 REACTIONS, IN ADDITION TO THE FACEBOOK EXPERIENCE?
5 HOW WOULD YOU KNOW WHAT THE CONSUMERS THINK OF
6 ICONS AND USER INTERFACES THAT YOU DESIGN FOR YOUR
7 CLIENTS?

8 A WHAT, WHAT A PERSON THINKS OF A SYMBOL IS THE
9 HEART OF WHAT I DO, TRYING TO DEVELOP GOOD SYMBOLS
10 THAT ARE EASILY UNDERSTOOD, AND I HAVE SOME
11 PRACTICAL EXPERIENCE SEEING THINGS OUT IN THE WORLD
12 THAT I'VE DONE, BUT ALSO, AS I SAID, SOME OF MY
13 CLIENTS DO FORMAL RESEARCH, FOCUS GROUPS OR
14 INTERVIEWS AND WATCH USERS AND THEY SHARE THOSE
15 RESULTS WITH ME.

16 Q AND IS THAT A REGULAR PART OF THE DESIGN
17 PROCESS?

18 A WHEN THE -- IT DEPENDS ON THE CLIENT, BUT OUT
19 OF THE HUNDREDS OF CLIENTS I'VE WORKED WITH, SOME
20 OF THEM DO THAT KIND OF TESTING AND SOME OF THEM
21 DON'T.

22 Q OKAY.

23 MS. KREVANS: YOUR HONOR, WE WOULD TENDER
24 DR. KARE AS AN EXPERT IN THE DESIGN OF ICONS AND
25 SCREEN GRAPHICS.

1 THE COURT: ANY OBJECTION?

2 MR. VERHOEVEN: NO. RESERVING OUR
3 DAUBERT OBJECTION, NO FURTHER OBJECTIONS, YOUR
4 HONOR.

5 THE COURT: ALL RIGHT. SHE'S CERTIFIED.

6 MS. KREVANS: AND YOUR HONOR, I WOULD
7 NOTE FOR THE RECORD, THERE WAS A DAUBERT MOTION
8 WHICH WAS DENIED.

9 THE COURT: WE DON'T NEED TO GO INTO
10 THAT.

11 GO AHEAD WITH YOUR NEXT QUESTION, PLEASE.

12 BY MS. KREVANS:

13 Q WHAT WERE YOU ASKED TO DO FOR THIS CASE,
14 DR. KARE?

15 A I WAS ASKED MY OPINION ABOUT FOUR THINGS.

16 Q AND WHAT WERE THOSE FOUR THINGS?

17 A APPLE'S D'305 DESIGN PATENT; APPLE'S TRADE
18 DRESS FOR THE IPHONE; WHETHER I THOUGHT THERE WERE
19 VIABLE ALTERNATIVES TO IPHONE SCREEN GRAPHICS; AND
20 WHETHER I THOUGHT SAMSUNG COPIED APPLE'S SCREEN
21 GRAPHICS.

22 Q ALL RIGHT. LET'S TURN FIRST TO THE D'305
23 PORTION OF YOUR ANALYSIS.

24 AND IF YOU COULD LOOK AT EXHIBIT JX 1042
25 IN THE BINDER IN FRONT OF YOU. WHAT IS JX 1042?

1 A IT'S A UNITED STATES DESIGN PATENT, U.S.D.
2 604,305 S, FOR A GRAPHICAL USER INTERFACE FOR A
3 DISPLAY SCREEN OR PORTION THEREOF.

4 MS. KREVANS: YOUR HONOR, WE'D MOVE JX
5 1042.

6 THE COURT: ANY OBJECTION?

7 MR. VERHOEVEN: NO OBJECTION, YOUR HONOR.

8 THE COURT: IT'S ADMITTED.

9 (WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER
10 1042, HAVING BEEN PREVIOUSLY MARKED FOR
11 IDENTIFICATION, WAS ADMITTED INTO
12 EVIDENCE.)

13 BY MS. KREVANS:

14 Q OKAY. IS THIS AN APPLE PATENT, MS. KARE?

15 A YES.

16 Q OKAY. LOOKING AT THE RIGHT-HAND SIDE, ABOUT
17 THE MIDDLE OF THE FIRST PAGE WHERE IT SAYS CLAIM,
18 WHAT IS THE CLAIM IN THE D'305 APPLE DESIGN PATENT?

19 A "THE ORNAMENTAL DESIGN FOR A GRAPHICAL USER
20 INTERFACE FOR A DISPLAY SCREEN OR PORTION THEREOF,
21 AS SHOWN AND DESCRIBED."

22 Q IS THIS CLAIM SPECIFIC TO A PARTICULAR KIND OF
23 DISPLAY SCREEN?

24 THE COURT: EXCUSE ME. DOES ANYONE NEED
25 ANY CAFFEINE? BECAUSE I NEED EVERYONE TO STAY

1 ALERT AND AWAKE. ANYONE NEED ANY CAFFEINE?

2 WE'VE GOT CAFFEINATED DRINKS IN THE
3 REFRIGERATOR. WE'RE NOT SUPPOSED TO DRINK THEM,
4 BUT I'M OKAY IF YOU NEED ONE. ANYBODY? NO. OKAY.
5 GO AHEAD.

6 BY MS. KREVANS:

7 Q LET ME STRIKE THAT AND ASK A NEW QUESTIONS SO
8 YOU HAVE IT IN MIND.

9 IS THIS CLAIM LIMITED TO ANY PARTICULAR
10 KIND OF GRAPHICAL USER INTERFACE FOR A DISPLAY
11 SCREEN?

12 A IT DOESN'T SAY. IT SAYS ORNAMENTAL DESIGN FOR
13 A DISPLAY SCREEN.

14 Q OKAY. UNDERNEATH THE CLAIM WHERE IT SAYS "AS
15 SHOWN AND DESCRIBED," IT HAS A LIST OF FIGURES.

16 DID YOU REVIEW THE FIGURES IN THIS
17 PATENT?

18 A YES.

19 Q OKAY. COULD WE LOOK AT FIGURE 1 OF THE
20 PATENT, THOMAS?

21 IS FIGURE 1A -- WELL, WHAT ARE WE SEEING
22 ON THE SCREEN HERE, DR. KARE?

23 A FIGURE 1 IS THE IMAGE THAT IS THE D'305
24 PATENT. THAT'S THE GRAPHICAL USER INTERFACE
25 ORNAMENTAL DESIGN.

1 Q OKAY. WE JUST SAW ON THE SCREEN BOTH A BLACK
2 AND WHITE AND A COLOR VERSION OF FIGURE 1. ARE
3 BOTH OF THOSE IN THE PATENT?

4 A YES.

5 Q OKAY. LOOKING AT THE COLOR VERSION OF FIGURE
6 1, COULD YOU EXPLAIN TO THE JURY WHAT ARE THE
7 FEATURES IN FIGURE 1 THAT CONTRIBUTE TO THE OVERALL
8 VISUAL IMPRESSION IT CREATES?

9 A YES. WE'RE LOOKING AT THE RECTANGULAR AREA
10 THAT'S WITHIN THE DOTTED LINE THAT GOES AROUND THE
11 OUTSIDE.

12 AND I SEE THERE'S A REGULAR GRID OF ICONS
13 THAT ARE SQUARE WITH ROUNDED CORNERS, THEY'RE ABOUT
14 THE SAME DISTANCE APART, THEY'RE COLORFUL, THERE'S
15 A MIX OF DESIGN STYLES, THERE'S A LABEL UNDERNEATH
16 EACH ICON THAT'S UPPER AND LOWER CASE, SANS SERIF,
17 LIGHT AGAINST THE DARK BACKGROUND.

18 AND AT THE BOTTOM OF THE SCREEN THERE ARE
19 FOUR ICONS AND THERE'S A GRAPHIC BEHIND THEM THAT
20 SERVES TO SEPARATE THEM FROM THE ROWS AND COLUMNS
21 OF ICONS ABOVE.

22 Q AND IN THIS DESIGN, WHAT IS THE GRAPHIC THAT
23 IS BEHIND THE BOTTOM FOUR ICONS THAT SERVES, AS YOU
24 SAID, TO SEPARATE THEM?

25 A IT LOOKS LIKE A LIGHT GRAY RECTANGLE THAT

1 LOOKS A LITTLE BIT PERFORATED.

2 Q OKAY. YOU MENTIONED A MIX OF ICON STYLES.

3 CAN YOU EXPLAIN TO THE JURY WHAT YOU MEAN BY THAT?

4 A I THINK I HAVE A SLIDE.

5 Q LET'S JUST GO AHEAD AND USE THIS FIGURE.

6 A OKAY. TYPICALLY WHEN I WOULD WORK ON AN ICON
7 JOB, I MIGHT DISCUSS WITH THE CLIENT OR DEVELOP A
8 FEW STYLES AND THEN WE'D PICK A STYLE SO THAT WE
9 COULD HAVE SOME CONSISTENCY VISUALLY BETWEEN --
10 AMONG THE ICONS IN A PROJECT.

11 SO THIS IS INTERESTING BECAUSE THERE ARE
12 A FEW DIFFERENT STYLES. YOU CAN SEE THE PHONE IN
13 THE LOWER-LEFT IS VERY PLAIN COMPARED TO, SAY, THE
14 LENS OF THE CAMERA IN THE UPPER RIGHT THAT IS MUCH
15 MORE DETAILED.

16 Q HAVE YOU LOOKED AT ANY APPLE PHONES IN FORMING
17 YOUR OPINIONS IN THIS CASE?

18 A YES.

19 Q AND DID YOU -- WELL, LET'S START WITH WHAT
20 APPLE PHONES DID YOU LOOK AT?

21 A I LOOKED AT SEVERAL IPHONES.

22 Q OKAY. DID YOU DRAW ANY CONCLUSIONS AS TO
23 WHETHER ANY OF THEM HAVE A USER INTERFACE THAT USES
24 THE DESIGN OF THE D'305 PATENT?

25 A YES.

1 Q OKAY. COULD WE SEE PDX 14.6.

2 COULD YOU EXPLAIN TO THE JURY WHAT YOU'VE
3 DEPICTED ON YOUR SLIDE 14.6?

4 A ON THE LEFT IS THE D'305 PATENT THAT WE'VE
5 JUST LOOKED AT, THAT IMAGE, AND ON THE RIGHT ARE
6 SCREEN SHOTS OF THE IPHONE, THE IPHONE 3G, THE
7 IPHONE 3GS, AND THE IPHONE 4.

8 Q AND WHAT WAS THE CONCLUSION YOU DREW AS TO
9 WHETHER THESE IPHONES HAVE USER INTERFACES, ANY
10 USER INTERFACES THAT USE THE DESIGN OF THE D'305
11 PATENT?

12 A I CONCLUDED THAT THEY ALL REFLECT A COLLECTION
13 OF DESIGN FEATURES THAT IS PRESENT IN THE D'305
14 PATENT.

15 Q OKAY. IS THE BACKGROUND COLOR OF THE USER
16 INTERFACE YOU'RE SHOWING US FROM EACH OF THESE
17 IPHONES THE SAME?

18 A NO.

19 Q HOW DID THAT ENTER INTO THE CONCLUSIONS THAT
20 YOU DREW?

21 A IT'S DEFINITELY SOMETHING THAT'S DIFFERENT
22 ABOUT THE IPHONE 3GS AND THE IPHONE 4, BUT WHEN I
23 LOOKED AT THE D'305 PATENT AND I METHODICALLY
24 COMPARED THE SET OF FEATURES, THE OVERALL GRID, THE
25 ROWS OF FOUR ICONS, THE SHAPE OF THE ICONS, THE

1 SQUARE WITH ROUNDED CORNERS, THE MIX OF ICON STYLES
2 FROM VERY SYMBOLIZED TO STYLIZED TO VERY DETAILED,
3 I COULD -- THE SEPARATE LITTLE ICONS AT THE BOTTOM
4 AND THE LIGHT TYPE REVERSED OUT, I COULD SEE ALL OF
5 THAT COLLECTION OF FEATURES THAT OVERALL VISUAL
6 IMPRESSION IN ALL THE PHONES.

7 Q OKAY. WERE YOU ASKED TO OFFER AN OPINION AS
8 TO WHETHER ANY SAMSUNG PHONE HAD ANY GRAPHICAL USER
9 INTERFACE SCREENS THAT WERE USING THE -- THAT HAD A
10 DESIGN THAT WAS THE SAME AS THE DESIGN IN THE D'305
11 PATENT?

12 A YES.

13 Q OKAY. WHAT WAS THE TEST THAT YOU USED IN
14 MAKING THAT ANALYSIS?

15 A IT WAS THE SAME KIND OF METHODOICAL, VISUAL
16 ANALYSIS BECAUSE I'M SO USED TO LOOKING AT PIXELS
17 AND WHAT I CAN DO WITH THEM, THAT I LOOKED AT THE
18 GRID, HOW CLOSE ICONS WERE TO EACH OTHER
19 PROPORTIONALLY, ROUNDED CORNERS, ICON STYLE, THE
20 FAIRLY SIGNIFICANT AREA OF THE BOTTOM OF FOUR
21 CORRALLED ICONS. THOSE WERE THE KINDS OF FEATURES
22 I LOOKED AT TO DO MY VISUAL COMPARISON FROM THE
23 SCREEN TO THE D'305 ART.

24 Q OKAY. DID YOU FORM ANY CONCLUSION AS TO
25 WHETHER ANY SAMSUNG PHONE HAD A USER INTERFACE

1 DISPLAY SCREEN THAT WAS SUBSTANTIALLY SIMILAR IN
2 DESIGN TO THE D'305 DESIGN?

3 MR. VERHOEVEN: OBJECTION, YOUR HONOR.
4 NOWHERE IN THIS WITNESS'S EXPERT REPORT IS THERE
5 ANY OPINION USING THOSE WORDS, "SUBSTANTIALLY
6 SIMILAR," AND NOW THE -- COUNSEL IS ASKING HER --

7 THE COURT: I'M SORRY. CAN YOU REPEAT
8 MY -- MY SCREEN IS NOT WORKING. REPEAT THE
9 QUESTION, PLEASE.

10 MS. KREVANS: ALL RIGHT. DID YOU FORM --

11 THE COURT: I'M SORRY. I'M ASKING
12 MS. SHORTRIDGE. ARE YOU GOING TO --

13 MS. KREVANS: I'M GOING TO REPHRASE IT.
14 I MAY HAVE MISSPOKEN.

15 THE COURT: GO AHEAD.

16 MS. KREVANS: AND I DON'T REMEMBER THE
17 QUESTION MYSELF.

18 Q DID YOU FORM ANY CONCLUSIONS AS TO WHETHER
19 THERE WERE, IN THE SAMSUNG PHONES YOU LOOKED AT,
20 ANY DISPLAY SCREENS THAT HAD A DESIGN THAT WAS
21 SUBSTANTIALLY THE SAME AS THE DESIGN OF THE D'305
22 PATENT?

23 MR. VERHOEVEN: OBJECTION, YOUR HONOR.
24 THE WITNESS NOWHERE IN HER EXPERT REPORT SUBMITS AN
25 OPINION ON "SUBSTANTIAL SIMILARITY." THE WORDS

1 "SUBSTANTIAL SIMILARITY" DO NOT APPEAR.

2 MS. KREVANS: ALL RIGHT. LET ME PAUSE
3 ONE MORE TIME, YOUR HONOR, SO WE CAN SHORTCUT THIS
4 AND MOVE THIS ALONG.

5 Q DID YOU FORM ANY CONCLUSIONS, DR. KARE, ABOUT
6 WHETHER ANY SAMSUNG PHONE HAD A DISPLAY SCREEN
7 WHICH HAD A DESIGN THAT PRODUCED THE SAME OVERALL
8 VISUAL IMPRESSION AS THE D'305 PATENT?

9 A YES.

10 Q OKAY. DID YOU FORM THAT CONCLUSION AS TO
11 EVERY SAMSUNG PHONE THAT YOU LOOKED AT?

12 A NO.

13 Q COULD YOU LOOK AT PX 21 THAT'S IN THE BINDER
14 IN FRONT OF YOU?

15 MR. VERHOEVEN: YOUR HONOR, WE HAVE AN
16 OBJECTION TO THIS EXHIBIT FOR THE SAME REASONS THAT
17 CROSS-EXHIBITS WERE OBJECTED TO YESTERDAY BECAUSE
18 IT DEPICTS NOT JUST SCREEN-TO-SCREEN SHOTS. IT'S
19 THE OVERALL PHONE.

20 THE COURT: SUSTAINED.

21 MS. KREVANS: YOUR HONOR, THERE'S NO
22 COMPARISON IN THESE PICTURES. THEY'RE ALL JUST THE
23 SAMSUNG PHONES.

24 THE COURT: YOU ASKED THAT BODY STYLE NOT
25 BE INCLUDED. THAT WAS THE RECORD. YOU NEED TO

1 TAKE THAT DOWN, PLEASE. YOU ASKED FOR THE
2 OBJECTION. IT APPLIES BOTH WAYS.

3 GO AHEAD.

4 BY MS. KREVANS:

5 Q COULD WE SEE SLIDE PDX 14.7, PLEASE. WHAT IS
6 SET OUT ON SLIDE PDX 14.7, DR. KARE?

7 A IT IS THE IMAGE FROM THE D'305 PATENT NEXT TO
8 THE FIRST OF THE APPLICATION SCREENS, A PHOTO, ON
9 THE SAMSUNG FASCINATE.

10 Q WHEN YOU SAY, "THE FIRST," WHAT DO YOU MEAN?

11 A I CAN SEE FROM THE PAGE INDICATOR THAT THERE
12 ARE THREE SCREENS FULL, OR PARTIALLY FULL, OF
13 APPLICATION ICONS, AND I CAN SEE FROM THE ONE ABOVE
14 THE ICONS THAT THIS IS THE FIRST.

15 SO WHEN YOU BRING UP APPLICATION SCREENS,
16 THIS IS WHAT YOU'D SEE FIRST.

17 Q OKAY. DID YOU DRAW ANY CONCLUSION AS TO
18 WHETHER THIS PARTICULAR PHONE, THE FASCINATE, HAD
19 AN APPLICATION SCREEN FOR WHICH THE OVERALL VISUAL
20 APPEARANCE IS SUBSTANTIALLY THE SAME AS THE OVERALL
21 VISUAL APPEARANCE AS THE DESIGNS DEPICTED IN THE
22 D'305 PATENT?

23 A YES.

24 Q AND WHAT WAS YOUR CONCLUSION?

25 A MY CONCLUSION IS THAT THIS APPLICATION SCREEN

1 SHOWN ON THE RIGHT IS SUBSTANTIALLY SIMILAR TO THE
2 D'305 PATENT.

3 MR. VERHOEVEN: OBJECTION, YOUR HONOR.
4 THIS IS NOWHERE IN HER EXPERT REPORT.

5 THE COURT: SUSTAINED UNLESS YOU CAN.

6 MS. KREVANS: YOUR HONOR, ON PAGE 42 OF
7 THE EXPERT REPORT, PARAGRAPH 66 --

8 THE COURT: OKAY. GIVE ME ONE SECOND,
9 PLEASE.

10 MS. KREVANS: THIS IS A SUMMARY IN WHICH
11 THE WITNESS SETS OUT THE TEST AND HER CONCLUSIONS.

12 THE COURT: ALL RIGHT. OVERRULED.

13 BY MS. KREVANS:

14 Q I'M SORRY. DID YOU HAVE A CHANCE TO ANSWER
15 THE QUESTION, DR. KARE?

16 A UM --

17 Q I THINK YOU DID, ACTUALLY.

18 A YES. AND I WAS TALKING -- I WAS SPEAKING TO
19 OVERALL VISUAL IMPRESSION.

20 Q OKAY.

21 A THAT'S WHAT I WAS COMPARING.

22 Q COULD YOU BRIEFLY DESCRIBE FOR US WHAT LED YOU
23 TO THE CONCLUSION THAT THE APPLICATION SCREEN THAT
24 WE'RE SEEING HERE FROM THE FASCINATE HAD
25 SUBSTANTIALLY THE SAME OVERALL VISUAL IMPRESSION,

1 APPEARANCE, AS THE OVERALL VISUAL APPEARANCE OF THE
2 D'305 PATENT DESIGN?

3 A YES. I LOOKED AT THE SIMILAR -- THE
4 SIMILARITIES I SAW WERE THE REGULAR GRID, THE ROSE
5 OF FOUR ICONS, THE COLORFUL MIX OF ICONS THAT ARE
6 SQUARE WITH ROUNDED CORNERS, THE SIMILARITY OF THE
7 MIX OF ICON STYLES, LET'S SAY CLOCK TO CLOCK IS
8 REALISTIC, BUT ALSO STYLIZED BECAUSE IT'S KIND OF A
9 SIMPLE DESIGN THAT READS EASILY, THE PHONES ARE
10 BOTH THAT SIMPLE STYLE THAT LOOKS AS IF THE WHITE
11 RETRO HANDSET COULD HAVE BEEN CUT OUT OF WHITE
12 PAPER, THE MORE MODELLED KIND OF ICON STYLES THAT
13 ARE PRESENT ON BOTH THE CAMERA AND THE SUNFLOWER ON
14 THE D'305 THAT LOOK PHOTO REALISTIC, I CAN SEE THAT
15 KIND OF ICON ON THE RIGHT AS WELL.

16 AND --

17 Q CAN YOU JUST POINT OUT FOR US, BY DESCRIBING
18 THE ROW AND THE COLUMN, WHERE THE SUNFLOWER IS THAT
19 YOU'RE TALKING ABOUT ON EACH OF THESE DESIGNS?

20 A IN THE TOP ROW ON THE D'305, THE THIRD FROM
21 THE LEFT IS A KIND OF A PHOTO REALISTIC SUNFLOWER .

22 AND ON THE FASCINATE IN THE BOTTOM ROW,
23 30 FROM THE LEFT, IS A CLOSE-UP OF WHAT APPEARS TO
24 BE SUNFLOWER PETALS, AND THEY BOTH FIGURE THE
25 USER'S COLLECTION OF PHOTOS THAT THEY TOOK.

1 Q OKAY.

2 A AND, ADDITIONALLY, THEY EACH HAVE FOUR ICONS
3 AT THE BOTTOM SET OFF WITH A GRAPHIC. ON THE LEFT
4 IS THE GRAY AREA, ON THE RIGHT, THERE'S A -- IT'S A
5 SLIGHTLY LIGHTER GRAY AREA WITH A BOUNDING LINE
6 OVER THE ICONS.

7 AND THEY BOTH HAVE LIGHT COLORED MIXED
8 CASE LABELS IN A SANS SERIF FONT.

9 Q WHEN YOU SAY MIXED CASE LABELS IN SANS SERIF,
10 ARE YOU TALKING ABOUT THE TEXT UNDER THE GRAPHICS?

11 A UNDER THE GRAPHICS. SANS SERIF IS THE NAME OF
12 A FONT. IT IS, ACTUALLY, IT MEANS THAT IT'S PLAIN,
13 AND IT DOESN'T HAVE THE LITTLE HORIZONTAL LINES
14 THAT MAKE THE FONT LOOK A LITTLE BIT LIKE IT WAS
15 CARVED IN STONE. IT'S A MORE MODERN KIND OF A
16 FONT.

17 Q OKAY. CAN WE LOOK AT YOUR SLIDE 14.12. WHAT
18 DO YOU SHOW ON 14.12, DR. KARE?

19 A THIS IS ANOTHER SAMSUNG PHONE CALLED THE
20 CAPTIVATE WHERE I FOUND SIMILARLY THAT THE OVERALL
21 VISUAL IMPRESSION WAS SUBSTANTIALLY SIMILAR TO THE
22 D'305 FOR THE SAME, USING THE SAME KIND OF
23 ANALYSIS.

24 Q OKAY. WHAT ABOUT 14.13? COULD WE SEE THAT
25 ONE?

1 WHAT'S THIS, DR. KARE?

2 A THIS IS THE CONTINUUM. THIS IS ANOTHER ONE OF
3 THE GROUP OF PHONES THAT I THOUGHT WAS
4 SUBSTANTIALLY SIMILAR TO THE D'305.

5 Q OKAY. AND 14.14?

6 A THIS IS THE DROID CHARGE, WHICH I ALSO FOUND
7 TO BE SUBSTANTIALLY SIMILAR OVERALL VISUAL
8 IMPRESSION, SAME KIND OF ANALYSIS.

9 Q OKAY. 14.15?

10 A THIS IS --

11 Q WHAT PHONE IS THIS?

12 A THIS IS THE EPIC 4G, ANOTHER SAMSUNG PHONE
13 WHERE THE PATTERN OF SIMILARITIES WAS SUBSTANTIALLY
14 THE SAME.

15 Q AND WHAT WAS THE BASIS FOR YOUR CONCLUSIONS
16 ABOUT THE EPIC 4G?

17 A IT WAS THE RESULT OF THE SAME KIND OF
18 METHODICAL VISUAL ANALYSIS OF THE FEATURE SET OF
19 THE D'305.

20 Q OKAY. LET'S LOOK AT YOUR SLIDE 14.16.

21 WHAT HAVE YOU SHOWN HERE?

22 A THIS IS THE GALAXY S 4G, AND --

23 Q DID YOU DRAW CONCLUSIONS ABOUT THE GALAXY S
24 4G?

25 A YES.

1 Q WHAT WERE THEY?

2 A THAT THE OVERALL VISUAL IMPRESSION WAS
3 SUBSTANTIALLY SIMILAR TO THE DESIGN OF THE D'305
4 PATENT.

5 Q FOR THE SAME REASONS?

6 A YES.

7 Q OKAY. 14.17? THE GALAXY S I9000.

8 WHAT CONCLUSIONS DID YOU DRAW ABOUT THIS
9 DESIGN?

10 A THAT, AGAIN, THE OVERALL VISUAL IMPRESSION WAS
11 SUBSTANTIALLY THE SAME TO THE DESIGN OF THE D'305.

12 Q OKAY. 14.18, THE SAMSUNG GEM.

13 WHAT CONCLUSIONS, IF ANY, DID YOU DRAW
14 ABOUT THIS PHONE?

15 A THAT THE SAME VISUAL FEATURES IN THE D'305 ARE
16 REFLECTED IN THE GEM AND THAT THEY LOOK
17 SUBSTANTIALLY THE SAME.

18 Q OKAY. LET'S SEE 14.19. THIS IS THE SAMSUNG
19 INDULGE.

20 WHAT CONCLUSIONS DID YOU DRAW ABOUT THIS
21 DESIGN?

22 A THAT THE OVERALL VISUAL IMPRESSION IS THE SAME
23 AS THE D'305 BY THE SAME METHOD.

24 Q OKAY. 14.20, PLEASE. THIS IS THE INFUSE 4G.
25 WHAT CONCLUSIONS DID YOU DRAW ABOUT THE DESIGN OF

1 THE APPLICATION SCREEN OF THE INFUSE 4G?

2 A THAT THE OVERALL VISUAL IMPRESSION IS LIKE THE
3 DESIGN OF THE D'305 PATENT.

4 Q DID YOU APPLY THE SAME OVERALL VISUAL
5 IMPRESSION, SUBSTANTIALLY SIMILAR TEST?

6 A I, I FOUND THAT THE OVERALL VISUAL IMPRESSION
7 WAS SUBSTANTIALLY THE SAME.

8 Q OKAY. LET'S LOOK AT 14.21. THIS IS THE
9 SAMSUNG MESMERIZE. DID YOU DRAW ANY CONCLUSIONS
10 ABOUT THIS DESIGN?

11 A YES. THAT, AGAIN, THAT THE OVERALL VISUAL
12 IMPRESSION IS SUBSTANTIALLY THE SAME AS THE DESIGN
13 OF THE D'305 PATENT.

14 Q OKAY. LET'S LOOK AT 14.22, THE SAMSUNG
15 GALAXY S SHOWCASE.

16 CAN YOU DRAW ANY CONCLUSIONS ABOUT THIS
17 DESIGN?

18 A YES. THAT -- THAT THE OVERALL VISUAL
19 IMPRESSION IS SUBSTANTIALLY SIMILAR TO THE D'305
20 PATENT FIGURE ON THE LEFT.

21 Q LET ME ASK YOU A QUESTION ABOUT THE SHOWCASE.
22 DO YOU SEE AT THE TOP THERE'S A, IT'S LIKE IT'S A
23 BLUE-ISH BAR ACROSS THE TOP.

24 DID YOU TAKE THAT INTO ACCOUNT IN YOUR
25 OPINION?

1 A YES.

2 Q IS THAT PRESENT IN THE D'305?

3 A NO.

4 Q COULD YOU EXPLAIN, THEN, WHY YOU STILL
5 CONCLUDED THAT THESE TWO ARE SUBSTANTIALLY THE
6 SAME, OVERALL VISUAL IMPRESSION?

7 A WELL, I WOULD SAY THAT FEATURE, ALONG WITH A
8 FEW OTHERS OCCASIONALLY IN THE SET OF PHONES WE
9 LOOKED AT, THERE WAS ONE ROUND ICON AT THE BOTTOM,
10 OR A BLUE BAR AT THE TOP, AND THEY'RE DIFFERENT,
11 BUT I, I FELT THAT THE OVERALL IMPRESSION CAME FROM
12 THE SALIENT SET OF FEATURES THAT WAS THE
13 PREDOMINANT OVERALL VISUAL IMPRESSION THAT MOST
14 PEOPLE AREN'T GOING TO STOP AND ANALYZE, OH, THIS
15 FEATURE IS THE SAME.

16 SO I FOUND THAT DESPITE SOME MINOR
17 DIFFERENCES, I WAS LOOKING AT OVERALL VISUAL
18 IMPRESSION. I MIGHT HAVE LOOKED -- I DIDN'T MISS
19 THAT. I LOOKED AT EVERYTHING.

20 BUT I CONCLUDED THAT THE OVERALL VISUAL
21 IMPRESSION WAS SUBSTANTIALLY THE SAME.

22 Q OKAY. ANOTHER QUESTION ABOUT THE SHOWCASE.
23 DO YOU SEE THAT AT THE TOP OF THE SCREEN THERE'S
24 THREE DOTS, ONE IS A LITTLE BIGGER AND IT HAS A 1
25 AND THERE'S TWO DOTS TO THE RIGHT?

1 A YES.

2 Q THOSE AREN'T PRESENT IN THE D'305 DESIGN?

3 A NO.

4 Q OKAY. DID THAT AFFECT YOUR ANALYSIS OF
5 WHETHER THE DESIGN OF THE SHOWCASE, OR THE OTHER
6 SAMSUNG PHONES, HAD SUBSTANTIALLY THE SAME DESIGN
7 AS THE D'305 DESIGN?

8 A YES, IT AFFECTED MY ANALYSIS IN THAT I NOTICED
9 IT, BUT, NO, IT DIDN'T AFFECT MY CONCLUSION.

10 Q AND WHY WAS THAT?

11 A BECAUSE I THOUGHT IT WAS FAIRLY MINOR COMPARED
12 TO THE KIND OF EXCITING MIX OF COLORFUL ICONS ARE
13 WHAT GRAB YOU.

14 Q OKAY.

15 A AND THE GRID AND THE SHAPE AND THE WAY THE
16 ICONS FILL THE SCREEN IS WHAT YOU REALLY NOTICE
17 PRIMARILY IN THE OVERALL IMPRESSION.

18 Q OKAY. ONE MORE PHONE.

19 SLIDE 14.23. THIS IS THE SAMSUNG
20 VIBRANT. DID YOU FORM ANY CONCLUSIONS ABOUT THIS
21 DESIGN?

22 A YES. I THOUGHT THIS APPLICATION SCREEN WAS
23 SUBSTANTIALLY SIMILAR OVERALL TO THE D'305 DESIGN.

24 Q OKAY. LET'S TURN TO ANOTHER TOPIC YOU SAID
25 YOU ADDRESSED, WHICH WAS IPHONE TRADE DRESS. WHAT

1 TOPICS WERE YOU ASKED TO LOOK AT WITH RESPECT TO
2 IPHONE TRADE DRESS?

3 A I WAS ASKED TO LOOK AT THE SCREEN, THE HOME
4 SCREEN OF THE IPHONE, AND COMPARE THAT TO THE -- TO
5 A SERIES OF APPLICATION SCREENS ON SAMSUNG PHONES
6 AND GIVE MY OPINION ABOUT WHETHER A CONSUMER WOULD
7 FIND THEM CONFUSINGLY SIMILAR.

8 Q OKAY. COULD WE LOOK AT PDX 14.26. DID YOU
9 DRAW ANY CONCLUSIONS -- ACTUALLY, FIRST, WHY DON'T
10 YOU TELL US WHAT WE'RE LOOKING AT IN 14.26.

11 A WE'RE --

12 MR. VERHOEVEN: YOUR HONOR, I'M SORRY.
13 I'M NOT FAST ENOUGH. YOUR HONOR, WE OBJECT TO THIS
14 SLIDE AND REQUEST THAT IT BE PULLED DOWN. SAME
15 REASONS.

16 MS. KREVANS: YOUR HONOR, THEY HAD A
17 PREVIOUS OBJECTION TO THIS SLIDE IN THAT --

18 MR. VERHOEVEN: IT WAS JUST -- I DON'T
19 KNOW IF YOU SAW THE SCREEN, BUT WHAT WAS ON THE
20 SCREEN WAS THE DEVICES IN THEIR ENTIRETY, NOT WHAT
21 WE'RE SEEING, YOU MAY BE SEEING ON YOUR SLIDE.
22 OKAY, THAT'S GOOD. THAT'S DIFFERENT.

23 THE COURT: ALL RIGHT.

24 MS. KREVANS: YOUR HONOR --

25 MR. VERHOEVEN: THERE'S A DIFFERENT IMAGE

1 ON THE SCREEN.

2 MS. KREVANS: WE HAVE TWO VERSIONS.
3 WE'RE HAPPY TO USE WHATEVER ONES.

4 THE COURT: THE ONES THAT ARE JUST
5 SCREEN-TO-SCREEN SHOTS COMPARISONS, GO AHEAD.

6 MS. KREVANS: OKAY.

7 Q ALL RIGHT. ARE YOU LOOKING AT 14.26?

8 A YES.

9 Q OKAY. WHAT IS DEPICTED ON -- FIRST, JUST TELL
10 US WHAT WE'RE LOOKING AT HERE ON 14.26.

11 A WE'RE LOOKING AT, ON THE LEFT, A SCREEN SHOT
12 OF THE IPHONE 3G, AND ON THE RIGHT A SERIES OF
13 SCREEN SHOTS OF THE FIRST APPLICATION SCREENS ON A
14 NUMBER OF SAMSUNG PHONES.

15 Q OKAY. AND JUST SO WE'RE CLEAR, THE PARTICULAR
16 DISPLAY THAT YOU'RE SHOWING FROM THE IPHONE 3G,
17 WHAT SCREEN IS THAT FROM THE IPHONE 3G?

18 A IT IS THE HOME SCREEN.

19 Q OKAY. AND I THINK YOU SAID ON THE RIGHT YOU
20 HAVE APPLICATION SCREENS FROM SAMSUNG PHONES?

21 A YES.

22 Q OKAY. DID YOU DRAW ANY CONCLUSIONS ABOUT
23 WHETHER THE OVERALL IMPRESSION OF THE APPLICATION
24 SCREEN OF ANY SAMSUNG PHONES WOULD BE CONFUSINGLY
25 SIMILAR TO THE IPHONE HOME SCREEN TO A CONSUMER ?

1 A YES.

2 Q AND WHAT CONCLUSION DID YOU DRAW?

3 A I CONCLUDED THAT THIS SET OF SCREENS, 11, THAT
4 THE OVERALL VISUAL IMPRESSION FROM ALL OF THESE
5 SCREENS, COMPARING EACH ONE, ONE BY ONE, COMPARED
6 TO THE SCREEN SHOT FROM THE IPHONE 3G WERE
7 CONFUSINGLY SIMILAR.

8 Q AND WHAT WAS THE PROCESS YOU USED AS YOU
9 EXAMINED EACH --

10 MR. VERHOEVEN: YOUR HONOR, I'M SORRY.
11 I'M A LITTLE SLOW ON THE UPTAKE, BUT I OBJECT TO
12 THAT ANSWER AND MOVE TO STRIKE AS NOT BEING --
13 QUESTION AND ANSWER AS NOT BEING IN THE EXPERT
14 REPORT.

15 THE COURT: I'M LOOKING AT PARAGRAPH 66
16 ON PAGE 42.

17 MS. KREVANS: YES. WE'VE NOW MOVED TO
18 TRADE DRESS, YOUR HONOR, SO WE WOULD --

19 THE COURT: I'M SORRY, EXCUSE ME.

20 MS. KREVANS: SO IT WOULD BE PARAGRAPH 71
21 ON PAGE 44.

22 MR. VERHOEVEN: YOUR HONOR, I DON'T KNOW
23 ABOUT YOU, BUT MY REALTIME IS NOT WORKING.

24 THE COURT: MINE IS NOT EITHER,
25 UNFORTUNATELY.

1 MR. VERHOEVEN: SO JUST SO I CAN REMIND
2 YOUR HONOR, I BELIEVE THE QUESTION AND ANSWER WENT
3 TO LIKELIHOOD OF CONFUSION.

4 THE COURT: AND CAN I HAVE THE ANSWER,
5 THE QUESTION, PLEASE.

6 (WHEREUPON, THE RECORD WAS READ BY THE
7 COURT REPORTER.)

8 MR. VERHOEVEN: YOUR HONOR, MY
9 RECOLLECTION IS THERE'S NOTHING IN THIS EXPERT'S
10 REPORT ON THE ISSUE OF LIKELIHOOD OF CONFUSION.

11 MS. KREVANS: AND I WOULD DRAW YOUR
12 HONOR'S ATTENTION TO THE LAST SENTENCE OF
13 PHOTOGRAPH 71.

14 MR. VERHOEVEN: AND IN ADDITION TO THAT,
15 YOUR HONOR --

16 THE COURT: OKAY. HANG ON ONE SECOND,
17 PLEASE. LET ME GET ONE MINUTE TO READ THAT LAST
18 SENTENCE.

19 MR. VERHOEVEN: YES, YOUR HONOR.

20 (PAUSE IN PROCEEDINGS.)

21 THE COURT: I'M GOING TO OVERRULE THE
22 OBJECTION BASED ON THAT, LINES 11 THROUGH 14 ON
23 PAGE 44.

24 MR. VERHOEVEN: YOUR HONOR, THAT'S THE
25 DESIGN STANDARD. OVERALL VISUAL IMPRESSION.

1 THE COURT: THE QUESTION WAS CONFUSION.
2 AND THIS SPECIFICALLY SAYS USERS CAN SEE THE
3 DESIGNS AS COMING FROM THE SAME COMPANY OR HAVING
4 THE SAME BRAND.

5 GO AHEAD, PLEASE.

6 BY MS. KREVANS:

7 Q THANK YOU. I THINK THE QUESTION ON THE TABLE,
8 DR. KARE, IS ON WHAT DID YOU BASE THE CONCLUSION
9 THAT A CONSUMER, LOOKING AT THE OVERALL VISUAL
10 IMPRESSION OF THE APPLICATION SCREEN OF THE SAMSUNG
11 PHONES ON THIS SLIDE, COULD SEE THEM AS CONFUSINGLY
12 SIMILAR TO THE IPHONE HOME SCREEN?

13 MR. VERHOEVEN: YOUR HONOR, I ALSO OBJECT
14 ON THE GROUNDS THAT CERTAIN CLAIMS HAVE BEEN
15 DROPPED -- I DON'T WANT TO GO INTO IT, YOUR
16 HONOR -- BUT CERTAIN CLAIMS HAVE BEEN DROPPED WITH
17 RESPECT TO TRADE DRESS INFRINGEMENT, AND CERTAIN OF
18 OUR SLIDES ON THIS SAME ISSUE WERE STRICKEN IN THE
19 OPENING BECAUSE THOSE CLAIMS WERE DROPPED.

20 MS. KREVANS: THIS SLIDE --

21 MR. VERHOEVEN: I'D BE HAPPY TO EXPLAIN
22 FURTHER IF YOU LIKE.

23 THE COURT: YOU MEAN INFRINGEMENT VERSUS
24 THE DILUTION, RIGHT?

25 MR. VERHOEVEN: YES.

1 THE COURT: WHY DON'T YOU REPHRASE YOUR
2 QUESTION, PLEASE.

3 MR. VERHOEVEN: THANK YOU, YOUR HONOR.
4 BY MS. KREVANS:

5 Q DR. KARE, DID YOU FORM ANY CONCLUSIONS ABOUT
6 WHETHER THE SIMILARITIES BETWEEN THE OVERALL VISUAL
7 IMPRESSION OF THE SAMSUNG DESIGNS DEPICTED ON THIS
8 PAGE AND THE IPHONE 3G DESIGN WERE SUCH THAT
9 CONSUMERS WOULD ASSOCIATE THESE DESIGNS WITH THE
10 APPLE DESIGN?

11 A YES.

12 Q AND WHAT CONCLUSION DID YOU DRAW?

13 A I -- I -- IT IS MY OPINION THAT THE OVERALL
14 COLLECTION OF GRAPHIC FEATURES THAT MAKES THE
15 OVERALL VISUAL IMPRESSION CONFUSING TO A CONSUMER.

16 AND PARTLY I BASE THAT FROM MY VISUAL
17 ANALYSIS. PARTLY I REMEMBER THAT WHEN I VISITED
18 THE LAW FIRM TO SEE ABOUT BEING AN EXPERT WITNESS
19 IN THIS CASE, THERE WAS A BIG CONFERENCE TABLE AND
20 THERE WERE MANY PHONES ON IT, AND A NUMBER OF THEM
21 WERE ON, AND I REACHED FOR AN IPHONE BECAUSE I
22 COULD SEE THE SCREEN --

23 MR. VERHOEVEN: YOUR HONOR, I OBJECT TO
24 THIS AGAIN AS NOT BEING WITHIN THE REPORT AT ALL.

25 MS. KREVANS: YOUR HONOR, SHE'S GOING TO

1 EXPLAIN --

2 THE COURT: OVERRULED. GO AHEAD.

3 THE WITNESS: I COULD SEE THE SCREEN. I
4 WENT TO PICK UP THE IPHONE TO MAKE A POINT ABOUT
5 THE U/I, ABOUT THE U/I GRAPHICS, AND I WAS HOLDING
6 A SAMSUNG PHONE.

7 SO I, I WOULD USUALLY THINK OF MYSELF AS
8 SOMEONE WHO'S PRETTY GRANULAR IN LOOKING AT
9 GRAPHICS, AND I MISTOOK ONE FOR THE OTHER.

10 SO I, I GUESS IN ADDITION TO MY FORMAL
11 ANALYSIS, I HAD THE EXPERIENCE OF BEING CONFUSED.

12 BY MS. KREVANS:

13 Q OKAY. ARE EACH OF THE SAMSUNG PHONES THAT ARE
14 REPRESENTED ON YOUR SLIDE 14.26 PHONES FOR WHICH
15 YOU CAME TO THIS SAME CONCLUSION, THAT IS, THAT A
16 CONSUMER LOOKING AT THIS APPLICATION SCREEN WOULD
17 ASSOCIATE THAT DESIGN WITH THE APPLE DESIGN?

18 MR. VERHOEVEN: OBJECTION. LEADING.

19 THE WITNESS: YES.

20 BY MS. KREVANS:

21 Q COULD YOU TELL THE JURY --

22 THE COURT: CAN YOU LET ME RULE ON THE
23 QUESTION. CAN YOU READ BACK THE QUESTION.

24 (WHEREUPON, THE RECORD WAS READ BY THE
25 COURT REPORTER.)

1 THE COURT: I'M GOING TO OVERRULE THAT.
2 GO AHEAD, PLEASE.

3 BY MS. KREVANS:

4 Q COULD YOU ANSWER, DR. KARE?

5 A YES.

6 Q CAN YOU TELL THE JURY WHICH PHONES THAT IS?

7 A THE FASCINATE, THE DROID CHARGE, THE
8 MESMERIZE, THE EPIC 4G, THE VIBRANT, THE INFUSE 4G,
9 THE GALAXY S SHOWCASE, I 500, THE CAPTIVATE, THE
10 GALAXY S I9000, THE GALAXY S 4G, AND THE CONTINUUM.

11 Q OKAY. DID YOU DO THE SAME TYPE OF ANALYSIS
12 WITH RESPECT TO APPLE'S REGISTERED IPHONE TRADE
13 DRESS?

14 A YES. SIMILAR TO THE D'305, BUT ADDITIONALLY,
15 IN THE IPHONE 3G, THERE ARE -- IT'S HARD TO SEE IT
16 ON MY SCREEN, THERE ARE THREE DOTS, OR THERE'S A
17 SERIES OF DOTS, GRAY AND ONE THAT'S LIGHT ABOVE THE
18 FOUR ICONS AT THE BOTTOM.

19 Q OKAY. SO WHAT WE'RE LOOKING AT RIGHT NOW ON
20 THE SCREEN IN 14.26 IS THE IPHONE 3G TRADE DRESS.

21 I'D LIKE NOW TO TURN TO A SECOND TRADE
22 DRESS ISSUE, WHICH IS THE REGISTER IPHONE TRADE
23 DRESS.

24 COULD WE SEE -- LET ME JUST -- CAN YOU
25 FOCUS ME ON MY SCREEN, 14.27, THOMAS?

1 I'M SORRY, YOUR HONOR. I JUST HAVE AN
2 ISSUE.

3 (PAUSE IN PROCEEDINGS.)

4 BY MS. KREVANS:

5 Q OKAY. COULD WE GO TO -- COULD WE GO BACK TO
6 SLIDE -- SORRY FOR THE DELAY, YOUR HONOR, OF THE --
7 I JUST HAVE TO FIND THE SLIDE NUMBER.

8 THE COURT: NOT A PROBLEM.

9 MS. KREVANS: CAN WE HAVE THE SLIDE WITH
10 THE FOUR IPHONE HOME SCREENS?

11 (PAUSE IN PROCEEDINGS.)

12 MS. KREVANS: YES, PERFECT. CAN WE SHOW
13 THE JURY 14.6.

14 Q OKAY. LOOKING AT THE FOUR IPHONE HOME SCREENS
15 THAT ARE SHOWN ON 14.6, CAN YOU TELL US, DID YOU --
16 WHETHER YOU ANALYZED WHETHER OR NOT THERE WERE
17 CONSISTENT DESIGN ELEMENTS ACROSS THESE FOUR IPHONE
18 HOME SCREENS ON THE RIGHT-HAND SLIDE OF THIS SLIDE?

19 A YES.

20 Q AND WHAT WERE THE CONSISTENT ELEMENTS THAT YOU
21 SAW?

22 A THE REGULAR GRID; THE OVERALL SQUARE SHAPE
23 WITH ROUNDED CORNERS OF THE GRID OF ICONS; THAT THE
24 ICONS ARE BRIGHT AND COLORFUL; THAT THERE'S A MIX
25 OF STYLES; THAT THERE'S TEXT LABEL UNDER EACH ICON;

1 THAT THERE'S A SEPARATE ROW OF ICONS AT THE BOTTOM
2 INDICATED BY SOME KIND OF GRAPHIC; AND IN THE CASE
3 OF THESE FOUR, THAT THERE'S A ROW OF SMALL DOTS
4 ABOVE THE BOTTOM ROW OF ICONS.

5 Q OKAY. THOMAS, CAN YOU SHOW, JUST ME FOR A
6 MOMENT, 14.29. JUST -- GREAT.

7 CAN YOU PUT THAT UP ON THE SCREEN FOR THE
8 COURTROOM, PLEASE.

9 OKAY. DID YOU COMPARE THE ELEMENTS
10 YOU'VE JUST LISTED AS BEING CONSISTENT ACROSS THESE
11 FOUR IPHONES SHOWN ON THE LEFT SIDE OF 14.29 TO THE
12 APPLICATION SCREENS OF ANY SAMSUNG PHONES?

13 A YES.

14 Q AND DID YOU DO AN ANALYSIS TO DETERMINE
15 WHETHER CONSUMERS, LOOKING AT THE APPLICATION
16 SCREENS OF THE SAMSUNG PHONES SHOWN ON 14.29, WOULD
17 ASSOCIATE THEIR DESIGNS WITH THE ELEMENTS YOU'VE
18 JUST DESCRIBED AS BEING CONSISTENT ACROSS THE
19 DESIGNS OF THE FOUR IPHONES?

20 A YES.

21 Q WHAT CONCLUSIONS DID YOU DRAW?

22 A I FOUND THAT THE COLLECTION OF FEATURES
23 THAT -- GRAPHICAL FEATURES THAT WE HAVE JUST
24 DISCUSSED WAS PRESENT ACROSS ALL THESE PHONES TO
25 CREATE, IN THIS SET OF SCREENS, SIMILAR OVERALL

1 LOOKS THAT IS CONFUSINGLY SIMILAR TO THE IPHONES ON
2 THE LEFT.

3 HOWEVER, I DO THINK THAT THE GRAY
4 BACKGROUND, OR THE NOT BLACK BACKGROUND OF THE
5 IPHONE 3GS AND THE IPHONE 4, MAKES THOSE SLIGHTLY
6 LESS SIMILAR OVERALL, BUT I STILL FOUND THE OVERALL
7 SET OF FEATURES CONSISTENT.

8 Q OKAY. COULD YOU TELL THE JURY WHICH SAMSUNG
9 PHONES YOU FORMED THAT CONCLUSION FOR AS SET OUT
10 HERE ON 14.29. JUST TELL US THE NAMES.

11 A THE FASCINATE; THE DROID CHARGE; THE
12 MESMERIZE; THE EPIC 4G, THE VIBRANT, THE INFUSE 4G,
13 THE GALAXY S SHOWCASE, I 500, THE CAPTIVATE, THE
14 GALAXY S I9000, AND THE GALAXY S 4G AND THE
15 CONTINUUM.

16 Q OKAY. LET'S GO BACK NOW TO THE QUESTION I
17 STARTED TO ASK YOU ABOUT EARLIER, THE IPHONE
18 REGISTER TRADE DRESS.

19 COULD WE PUT UP -- THANK YOU, THOMAS,
20 14 -- WHAT'S THE SLIDE NUMBER? 14.27?

21 OKAY. DID YOU DO AN ANALYSIS AS TO
22 WHETHER THE ELEMENTS OF APPLE'S REGISTERED IPHONE
23 TRADE DRESS SHOWN ON THE LEFT-HAND SIDE OF THE
24 SCREEN --

25 MR. VERHOEVEN: I'M SORRY TO INTERRUPT,

1 BUT WE OBJECT TO THIS. THIS ISN'T THE REGISTERED
2 ICON TRADE DRESS BEING DEPICTED THERE.

3 MS. KREVANS: THOMAS, COULD YOU SHOW, NOT
4 TO THE JURY, BUT JUST TO THE COURT THE ORIGINAL
5 SLIDE THAT WE HAD, PLEASE.

6 THE COURT: IT HAD THE BODY.

7 MS. KREVANS: IT HAD THE BODY. WE TOOK
8 IT DOWN BECAUSE OF YOUR HONOR'S EARLIER RULING.

9 MR. VERHOEVEN: YOUR HONOR, IT SAYS
10 REGISTERED IPHONE TRADE DRESS. THERE IS A
11 REGISTRATION THAT IS THE REGISTERED TRADE DRESS.

12 THE COURT: WELL, DO YOU HAVE ANY
13 OBJECTION TO THEM USING THE ORIGINAL 14.27? IF
14 THAT'S THE ISSUE.

15 MR. VERHOEVEN: YOUR HONOR, WE WOULD
16 PREFER THAT THEY USE THE ACTUAL REGISTERED TRADE
17 DRESS, WHICH IS AN EXHIBIT 96, WHICH THEY COULD
18 EASILY PUT UP.

19 MS. KREVANS: YOUR HONOR, IN ORDER TO
20 SHOW THIS PICTORIALY, WE HAVE THE SLIDE THAT HAS
21 THE PICTURE FROM THE REGISTERED TRADE DRESS, THE
22 COMPLETE ONE. THAT'S THE SLIDE WE ORIGINALLY
23 INTENDED TO USE. WE'RE HAPPY TO USE THAT ONE.

24 THE COURT: OKAY. GO AHEAD.

25 MS. KREVANS: OKAY. THE ORIGINAL. THANK

1 YOU, THOMAS.

2 Q OKAY. DR. KARE, DID YOU CONSIDER, IN LOOKING
3 ON THE LEFT AT THE PICTURE FROM THE REGISTERED
4 IPHONE DRESS, TRADE DRESS, WHAT ASPECTS OF THIS
5 IMAGE DID YOU FORM OPINIONS ABOUT?

6 A I WAS ONLY ASKED TO COMPARE THE SCREEN
7 GRAPHIC, WHICH I REALIZE IS PART OF THE REGISTERED
8 TRADE DRESS, BUT THAT'S THE PART THAT I WAS ASKED
9 TO COMPARE TO THE KOREANS, APPLICATION SCREENS FROM
10 A SERIES OF SAMSUNG PHONES.

11 Q OKAY. WITH RESPECT TO THAT PORTION OF THE
12 REGISTERED IPHONE TRADE DRESS, DID YOU DRAW ANY
13 CONCLUSIONS AS TO WHETHER A CONSUMER, LOOKING AT
14 ANY SAMSUNG PHONE APPLICATION SCREENS, WOULD
15 ASSOCIATE THE SAMSUNG PHONE APPLICATION SCREENS
16 WITH THE USER INTERFACE PORTION OF THE IPHONE
17 REGISTERED TRADE DRESS?

18 A YES.

19 Q WHAT CONCLUSION DID YOU DRAW?

20 A I CONCLUDED THAT THE VISUAL IMPRESSION OVERALL
21 OF THESE 11 SCREENS WAS CONFUSINGLY SIMILAR TO JUST
22 THE SCREEN PORTION, THE DISPLAY SCREEN, HOME
23 SCREEN, IN THE ILLUSTRATION ON THE LEFT.

24 Q AND FOR WHICH SAMSUNG PHONES DID YOU DRAW THAT
25 CONCLUSION?

1 A THE FASCINATE, THE DROID CHARGE, THE
2 MESMERIZE, THE EPIC 4G, THE VIBRANT, THE INFUSE 4G,
3 THE GALAXY S SHOWCASE I500, THE CAPTIVATE, THE
4 GALAXY S I9000, THE GALAXY S 4G, AND THE CONTINUUM.

5 Q OKAY. NOW, LET'S TURN TO ANOTHER TOPIC YOU
6 SAID THAT YOU DREW SOME CONCLUSIONS ABOUT FOR THIS
7 CASE.

8 I'M SORRY, YOUR HONOR. IT'S 10:30. DO
9 YOU WANT TO -- I'M ABOUT TO DO A NEW TOPIC. DO YOU
10 WANT TO TAKE A BREAK OR SHOULD I KEEP GOING?

11 THE COURT: THAT'S FINE. THAT'S FINE.
12 WE CAN TAKE OUR BREAK NOW. AGAIN, PLEASE KEEP AN
13 OPEN MIND. DON'T DISCUSS THE CASE WITH ANYONE, AND
14 PLEASE DON'T READ OR RESEARCH THE CASE.

15 ALL RIGHT. THANK YOU. YOU CAN LEAVE
16 YOUR JUROR NOTEBOOKS ON YOUR CHAIRS DURING THE
17 BREAK. WE'LL TAKE A 15-MINUTE BREAK. THANK YOU.

18 YOU CAN STEP DOWN, BUT PLEASE WAIT UNTIL
19 OUR JURORS LEAVE THE COURTROOM.

20 (WHEREUPON, THE FOLLOWING PROCEEDINGS
21 WERE HELD OUT OF THE PRESENCE OF THE JURY:)

22 THE COURT: ALL RIGHT. YOU CAN STEP
23 DOWN. THANK YOU. WE'RE ON OUR BREAK NOW .

24 THE COURT: ACTUALLY, CAN WE GO ON THE
25 RECORD A SECOND? IN APPLE'S SLIDE, YOU COMPARED

1 HOME SCREENS TO APPLICATION SCREENS, SO I DON'T SEE
2 WHY YOU'RE OBJECTING TO SAMSUNG ALSO COMPARES HOME
3 SCREENS TO APPLICATION SCREENS.

4 YOUR OWN DEMONSTRATIVE HAS THAT
5 COMPARATIVE. SO WHY WERE YOU OBJECTING TO THAT?

6 MS. KREVANS: I'M SORRY, YOUR HONOR. MY
7 HEAD WAS IN THE FOG THERE.

8 THE COURT: YOU HAD MADE AN OBJECTION
9 THAT HOME SCREENS ARE BEING COMPARED TO APPLICATION
10 SCREENS AND THAT WHAT'S CLAIMED IN THE D'305 IS
11 JUST THE APPLICATION SCREEN, ALL RIGHT.

12 BUT THEN YOU MAKE YOUR OWN COMPARISONS OF
13 THE DIFFERENT SCREENS --

14 MS. KREVANS: MY OBJECTION YESTERDAY,
15 YOUR HONOR, WAS THEY HAD SLIDES WITH THE D'305
16 PATENT ON IT COMPARED TO THE HOME SCREEN.

17 WE'RE NOT ACCUSING THE HOME SCREEN OF
18 INFRINGEMENT OF THE D'305 PATENT. WE'RE ONLY
19 ACCUSING THE APPLICATION SCREENS.

20 AND THE D'305 PATENT ITSELF DOESN'T SAY
21 ANYTHING ABOUT HOME SCREEN, APPLICATION SCREEN,
22 ANYTHING LIKE THAT IN ITS CLAIM. IT JUST SAYS A
23 DISPLAY SCREEN, GRAPHICAL INTERFACE DISPLAY SCREEN.

24 - WE DON'T HAVE ANY ISSUES ABOUT THAT
25 RELATING TO TRADE DRESS. MY ISSUE WAS JUST WHERE

1 THEY HAD THE PATENT COMPARED TO THE HOME SCREEN
2 BECAUSE IT SUGGESTED THAT WE WERE ACCUSING THE HOME
3 SCREEN WHICH DOESN'T, IN FACT, LOOK LIKE THE
4 PATENT.

5 MR. VERHOEVEN: YOUR HONOR, IT'S NEVER
6 BEEN SUGGESTED THAT THEY'RE ACCUSING THE HOME
7 SCREEN. I THINK WE WORKED THIS OUT, THOUGH. I
8 THINK, YOUR HONOR, AS LONG AS I CLARIFY IT, THAT
9 THEY'RE NOT ACCUSING THE HOME SCREEN, IT'S OKAY FOR
10 US TO SHOW IT AND MOVE ON TO SHOW THAT THEY HAVE
11 THE HOME SCREENS AND THE APPLICATION SCREENS.

12 THAT'S FINE FOR US, YOUR HONOR.

13 MS. KREVANS: I THINK YOUR HONOR'S RULING
14 WAS THEY SHOULD USE THE ACTUAL PHONES.

15 THE COURT: YEAH. IS EVERYONE SET ON
16 THAT?

17 MR. VERHOEVEN: WELL, NO, YOUR HONOR.

18 THE COURT: OR DO YOU WANT TO JUST DO THE
19 SCREEN-TO-SCREEN SHOTS?

20 MR. VERHOEVEN: WELL, YES. YOUR HONOR,
21 YOU MAY RECALL THIS MORNING BEFORE WE STARTED OUT,
22 I POINTED OUT THEY HAVE SCREEN-TO-SCREEN SHOTS, AND
23 I SAID AS LONG AS WE'RE ABLE TO DO SCREEN-TO-SCREEN
24 SHOTS AS WELL, WE HAVE NO OBJECTION.

25 SO WE WOULD INTEND TO JUST DO

1 SCREEN-TO-SCREEN SHOTS, PROBABLY MOSTLY ON THE
2 SLIDE THEY ALREADY HAVE.

3 THE COURT: THAT'S FINE.

4 MS. KREVANS: YOUR HONOR, IF HE WANTS TO
5 SHOW THE D'305 PATENT COMPARED TO A HOME SCREEN, I
6 THINK HE WOULD HAVE TO SAY THEY'RE NOT ACCUSING
7 THIS HOME SCREEN.

8 MR. VERHOEVEN: I WILL SAY THAT.

9 THE COURT: THAT'S FINE. ALL RIGHT.

10 MR. VERHOEVEN: THANK YOU, YOUR HONOR.

11 THE COURT: ALL RIGHT. HAS YOUR,
12 MR. VERHOEVEN, IS YOUR LIVE NOTE WORKING NOW, OR
13 NOT?

14 THE COURT: MINE IS NOT EITHER.

15 (WHEREUPON, A RECESS WAS TAKEN.)

16 (WHEREUPON, THE FOLLOWING PROCEEDINGS
17 WERE HELD IN THE PRESENCE OF THE JURY:)

18 MS. KREVANS: YOUR HONOR, WHILE WE'RE
19 WAITING, THIS IS PX 21 TO RESPOND TO THE OBJECTION.

20 THE COURT: OH, OKAY, PLEASE.

21 THE CLERK: YOU MAY BE SEATED.

22 THE COURT: OKAY. IT'S 10:47. GO AHEAD,
23 PLEASE.

24 MS. KREVANS: THANK YOU, YOUR HONOR. I
25 PROVIDED COUNSEL AN AMENDED 14.21. I WOULD NOW

1 MOVE FOR ITS ADMISSION.

2 MR. VERHOEVEN: POINT OF PROCEDURE, YOUR
3 HONOR. I DON'T WANT TO HAVE ANY CONFUSION. IT'S
4 BEEN ALTERED NOW. IT HAS THE SAME EXHIBIT NUMBER,
5 SO PERHAPS WE SHOULD GIVE IT A DIFFERENT NUMBER.

6 MS. KREVANS: WE'RE HAPPY TO REPLACE IT,
7 BUT WE'RE HAPPY TO GIVE IT A DIFFERENT NUMBER.

8 THE COURT: DO YOU WANT TO SAY 21-A?

9 MS. KREVANS: 21-A WOULD BE FINE, YOUR
10 HONOR.

11 MR. VERHOEVEN: THAT'S FINE, YOUR HONOR.

12 THE COURT: OKAY. SO THIS IS IN LIEU
13 OF -- IN LIEU OF ORIGINALLY OFFERED PX 21.

14 THE COURT: OKAY.

15 MR. VERHOEVEN: AND FOR THE RECORD, WE
16 OBJECT TO THIS DEMONSTRATIVE, AGAIN, BUT YOUR HONOR
17 OVERRULED THAT. WE HAVE NO FURTHER OBJECTIONS.

18 MS. KREVANS: THE DEMONSTRATIVE WAS
19 PREVIOUSLY OVERRULED, YOUR HONOR.

20 THE COURT: GO AHEAD.

21 MS. KREVANS: OKAY.

22 Q TURNING TO A NEW TOPIC WITH YOU, DR. KARE.
23 ALTERNATIVE DESIGNS.

24 DID YOU DO ANY ANALYSIS AS TO WHETHER OR
25 NOT THERE ARE ALTERNATIVE DESIGNS, THAT IS, DESIGNS

1 THAT ARE NOT THE SAME DESIGN AS THE D'305 PATENT
2 AND THE IPHONE HOME SCREENS, THAT COULD BE USED FOR
3 APPLICATION SCREENS IN ELECTRONIC DEVICES?

4 A YES.

5 Q WHAT WAS YOUR CONCLUSION?

6 A WELL, IN GENERAL, WHEN ASKED ABOUT THIS, I
7 THINK, OF COURSE, THERE'S ALTERNATIVE DESIGNS.

8 AND I SAY THIS BECAUSE THIS IS WHAT I DO
9 ALL THE TIME IS COME UP WITH A VARIETY OF IDEAS TO
10 SOLVE A PARTICULAR SCREEN DESIGN PROBLEM. IT'S NOT
11 AN EXACT SCIENCE. YOU -- IT'S WHAT MAKES IT FUN TO
12 JUST THINK ABOUT A PROBLEM AND TRY TO SOLVE IT IN A
13 NEW AND BETTER WAY.

14 SO I DID LOOK FOR BETTER ALTERNATIVES,
15 BUT I THOUGHT, WELL, THIS WOULDN'T BE ANY DIFFERENT
16 THAN ANY OTHER, THAN ANY OTHER DESIGN, GRAPHIC
17 DESIGN PROBLEM OF, YOU KNOW, YOU WORK WITH THE
18 CLIENT, YOU FIND OUT WHAT THE GOAL IS AND THE
19 TECHNICAL INPUT IS AND THE MARKETING OBJECTIVES AND
20 THEN YOU JUST, YOU'RE ONLY LIMITED BY YOUR
21 IMAGINATION AND YOUR ABILITY TO THINK ABOUT HOW TO
22 DO IT. AND HOW TO DO IT IN A WAY -- YOU KNOW, I
23 USUALLY THINK HOW TO DO IT BETTER THAN IT'S BEEN
24 DONE BEFORE.

25 SO I -- BUT I -- YES, I FOUND SOME

1 ALTERNATIVES THAT I THOUGHT WOULD BE VALID.

2 Q OKAY. DID YOU BRING US SOME EXAMPLES OF SOME
3 ALTERNATIVE DESIGNS THAT YOU FOUND?

4 A YES.

5 Q OKAY. COULD WE LOOK AT PX 22, WHICH IS IN
6 YOUR BINDER IN FRONT OF YOU, DR. KARE.

7 WHAT IS PX 22?

8 A IT'S A PHOTO OF TWO SCREENS FROM THE
9 BLACKBERRY TORCH 9850.

10 Q IS THIS BLACKBERRY TORCH, IS THAT A DEVICE
11 THAT'S ACTUALLY SOLD?

12 A WELL, I SAW ONE, SO I ASSUME SO.

13 Q OKAY. WHAT -- ARE THERE ANY OTHER DEVICES
14 PICTURED IN PX 22?

15 A NO.

16 Q OKAY. CAN YOU LOOK AT THE SECOND PAGE?

17 A YES. SO SORRY.

18 THESE ARE TWO SCREENS FROM THE NOKIA N9.

19 MR. VERHOEVEN: YOUR HONOR, I BELIEVE
20 WE'RE GOING TO OBJECT TO THIS TESTIMONY. YOU CAN
21 SEE IT ON YOUR SCREEN, BUT NOT ON THE BIG SCREEN.
22 THIS PARTICULAR ALTERNATIVE DESIGN IS NOT DISCLOSED
23 IN TRADE DRESS RESPONSES TO INTERROG 71 AND 72,
24 CONTENTION INTERROGATORIES CONCERNING TRADE DRESS.

25 THE COURT: THE WHOLE EXHIBIT, OR JUST

1 THE --

2 MR. VERHOEVEN: WELL, THIS EXHIBIT IS
3 OBJECTIONABLE AND HASN'T BEEN OFFERED YET BECAUSE
4 OF THE OTHER REASONS WE'VE BEEN TALKING ABOUT.

5 BUT THE SUBJECT THAT THE WITNESS IS
6 TESTIFYING ABOUT, THE NOKIA N9, WAS NOT DISCLOSED.

7 MS. KREVANS: THE FIRST PHONE THAT SHE
8 DISCUSSED WAS IN THE ROG RESPONSE, THE SECOND WAS
9 NOT. BOTH ARE IN THE ROG REPORT.

10 MR. VERHOEVEN: WE DIDN'T OBJECT TO THE
11 FIRST ONE, YOUR HONOR.

12 THE COURT: ALL RIGHT. WHY DON'T YOU
13 POINT OUT WHAT PAGE AND LINE NUMBER, PLEASE.

14 MS. KREVANS: IN THE ROG RESPONSE? IT
15 IS --

16 THE COURT: IN THE EXPERT REPORT.

17 MS. KREVANS: OH. IN THE EXPERT REPORT,
18 IT IS --

19 MR. VERHOEVEN: YOUR HONOR, WE DON'T NEED
20 TO DO THAT. I'M NOT DISPUTING IT'S IN THE EXPERT
21 REPORT.

22 THE COURT: OKAY. I SEE NOKIA N9.

23 MR. VERHOEVEN: THE OBJECTION IS IT'S NOT
24 IN RESPONSE TO CONTENTION INTERROGATORIES 71 AND
25 72.

1 MS. KREVANS: THIS PARTICULAR DESIGN IS
2 NOT IN THE INTERROGATORY RESPONSE, THAT'S CORRECT.

3 YOUR HONOR, WE SAID THERE WERE MANY
4 EXAMPLES. WE GAVE SOME, BUT WE SAID THERE WERE
5 MANY. BUT IT WAS CERTAINLY IN THE EXPERT REPORT.

6 THE COURT: IT'S EXCLUDED. GO ON TO YOUR
7 NEXT EXHIBIT.

8 BY MS. KREVANS:

9 Q COULD WE LOOK AT EXHIBIT PX --

10 (PAUSE IN PROCEEDINGS.)

11 MS. KREVANS: CAN WE LOOK AT PX 158
12 PLEASE. AND, AGAIN, JUST ON OUR SCREEN, THOMAS.

13 THIS IS THE FIRST -- THIS EXHIBIT IS THE
14 SAME AS THE FIRST PAGE TO WHICH MR. VERHOEVEN SAID
15 HE DID NOT OBJECT. WE OFFER IT INTO EVIDENCE.

16 MR. VERHOEVEN: WE OBJECT TO THIS SLIDE,
17 YOUR HONOR. I DIDN'T OBJECT TO THE SUBJECT MATTER
18 ON THE OTHER SLIDE. I OBJECT TO THIS SLIDE BECAUSE
19 IT DEPICTS THE -- IT'S NOT THE SCREEN-TO-SCREEN
20 SHOTS WE TALKED ABOUT.

21 MS. KREVANS: WE WILL MAKE A REPLACEMENT
22 IN WHICH WE TAKE OUT THE PHONE AND SHOW ONLY THE
23 SCREEN AND WE'LL CALL IT 158-A.

24 THE COURT: THAT'S FINE.

25 MS. KREVANS: THEN, YOUR HONOR, WE'LL

1 MOVE THE ADMISSION OF 158-A, AND WE'LL PROVIDE IT
2 TO THE COURT AND COUNSEL.

3 THE COURT: NO, I NEED TO SEE IT FIRST.
4 I'M NOT GOING TO ADMIT IT BEFORE I'VE SEEN IT AND
5 MR. VERHOEVEN HAS SEEN IT.

6 MS. KREVANS: OKAY. CAN WE LOOK AT.

7 CAN WE LOOK AT EXHIBIT 160, PLEASE,
8 THOMAS.

9 Q WHAT IS EXHIBIT 160, DR. KARE?

10 MR. VERHOEVEN: OBJECTION, NOT DISCLOSED
11 IN RESPONSE TO CONFIDENTIAL INTERROGATORIES 71 AND
12 72.

13 MS. KREVANS: OKAY. WE'LL WITHDRAW THAT.

14 THE COURT: OKAY.

15 BY MS. KREVANS:

16 Q COULD YOU LOOK AT SLIDE 14.30. WHAT IS SHOWN
17 ON SLIDE 14.30, DR. KARE?

18 A IT'S THE, A SCREEN SHOT OF THE IPHONE HOME
19 SCREEN AND A BLACKBERRY TORCH SCREEN.

20 Q AND COULD YOU, FOR THE JURY, COMPARE THESE TWO
21 DESIGNS?

22 A I JUST WANTED TO SHOW THAT YOU COULD -- I
23 LOOKED FOR SCREENS THAT HAD ABOUT THE SAME NUMBER
24 OF THINGS ON THEM, THAT PERFORMED APPROXIMATELY THE
25 SAME FUNCTIONALITY, AND JUST SHOW THAT BY -- THAT

1 YOU COULD DO A DESIGN THAT DOESN'T LOOK CONFUSINGLY
2 SIMILAR OR THAT PROVIDES AN ALTERNATIVE THAT'S
3 DIFFERENT.

4 AND IN THIS SCREEN, YOU CAN SEE THAT JUST
5 BY HAVING THE BATCH OF ICONS NOT ON A CONSISTENT
6 SHAPE, IT JUST -- IT LOOKS DIFFERENT. YOU SEE MORE
7 BACKGROUND.

8 THERE'S ALSO A BIG RED AREA, IT LOOKS RED
9 IN THE SLIDE, BUT IT'S KIND OF A DEEP CRIMSON COLOR
10 WITH A BLUE BAND UNDERNEATH THAT.

11 IT JUST GIVES A DIFFERENT OVERALL
12 IMPRESSION.

13 Q NOW, YOU MENTIONED THAT THERE WAS A FOURTH
14 TOPIC THAT YOU WERE ASKED TO STUDY, AND THAT WAS
15 WHETHER THERE WERE THINGS THAT SUGGESTED TO YOU
16 THAT SAMSUNG MAY HAVE COPIED THE IPHONE HOME SCREEN
17 GRAPHICS.

18 WHAT DID YOU DO TO LOOK AT THAT TOPIC?

19 A I -- THERE WERE TWO, TWO PHASES TO THIS.

20 THE FIRST IS I WENT BACK AND I LOOKED AT
21 IMAGES OF EVERY SCREEN I LOOKED AT AND I THOUGHT
22 ABOUT HOW MANY SIMILARITIES RECURRED OVER AND OVER
23 AS A PATTERN THAT SEEMED TO ME THAT ALL THESE
24 SIMILARITIES FROM PHONE TO PHONE WAS BEYOND
25 COINCIDENTAL .

1 AND JUST -- YOU WOULDN'T BE LIKELY TO
2 HAVE SO MANY THINGS BE THE SAME IF ONE THING WERE
3 DEVELOPED WITHOUT USING THE OTHER AS A GUIDE.

4 SO IT SEEMED LIKELY TO ME THAT SAMSUNG
5 USED THE IPHONE SCREEN GRAPHICS AS A GUIDE.

6 Q AND YOU MENTIONED THERE WERE TWO PHASES. WHAT
7 WAS THE OTHER PHASE?

8 A THE OTHER PHASE WAS A DOCUMENT I WAS SHOWN.

9 Q OKAY. COULD YOU LOOK AT EXHIBIT PX 44 IN YOUR
10 BINDER.

11 WHAT IS EXHIBIT PX 44, JUST GENERALLY?

12 A IT'S A SAMSUNG DOCUMENT I WAS SHOWN BY APPLE
13 COUNSEL.

14 Q OKAY. DID YOU CONSIDER THIS DOCUMENT IN
15 FORMING YOUR OPINIONS?

16 A I, AS I SAID, FROM MY OWN -- BASED ON MY OWN
17 EXPERIENCE, BASED ON MY OWN ANALYSIS, I THOUGHT
18 THERE WAS A LIKELIHOOD THAT THE IPHONE COULD HAVE
19 BEEN USED AS A GUIDE FOR THE GRAPHICS IN THE
20 SAMSUNG PHONES I SAW.

21 BUT THERE WAS INFORMATION IN THIS
22 DOCUMENT THAT SUPPORTED MY OWN OPINION.

23 Q OKAY. COULD YOU LOOK SPECIFICALLY AT THE
24 FIRST PAGE, AND THEN PAGE 43, 51, 122, 127, AND 131
25 OF PX 44.

1 ARE THOSE ALL PAGES OF THIS DOCUMENT THAT
2 YOU CONSIDERED IN FORMING YOUR OPINIONS?

3 A YES.

4 MS. KREVANS: YOUR HONOR, WE WOULD --
5 THERE ARE SOME PAGES FROM THIS DOCUMENT THAT ARE
6 ALREADY IN HE HAVE. ADDITIONALLY, WE WOULD MOVE
7 THE COVER PAGE, WHICH I THINK HAS NOT BEEN MOVED IN
8 YET, AND PAGES 43, 51, 122, 127, AND 131.

9 MR. VERHOEVEN: I'M GOING TO HAVE TO
10 WRITE THIS DOWN AND LOOK AT EACH OF THE PAGES.
11 SORRY, YOUR HONOR. WE'RE GOING TO HAVE TO WRITE
12 THIS DOWN AND LOOK AT EACH OF THE PAGES.

13 I CAN TELL YOU RIGHT NOW THAT SEVERAL OF
14 THOSE PAGES ARE NOT ADDRESSED AT ALL IN HER REPORT.

15 MS. KREVANS: YOUR HONOR, I'M ON THE
16 CLOCK, AND I OBJECT TO SLOWDOWN TACTICS. THESE
17 PAGES ARE ALL EXPRESSLY DISCLOSED IN OUR REPORT BY
18 BATES NUMBER. THE ONLY BATES NUMBER THAT'S NOT IS
19 THE COVER AND THE COVER IS OBVIOUS.

20 MR. VERHOEVEN: THEN WE OBJECT, YOUR
21 HONOR.

22 THE COURT: ON WHAT BASIS?

23 MR. VERHOEVEN: THOSE PAGES ARE NOT IN
24 EVIDENCE. THERE'S NO FOUNDATION LAID FOR THOSE
25 PAGES, YOUR HONOR. AND IT'S INAPPROPRIATE TO TRY

1 TO GET IN PAGES FOR WHICH THERE'S NO FOUNDATION
2 THROUGH AN EXPERT WITNESS.

3 MS. KREVANS: YOUR HONOR, THE WITNESS HAS
4 JUST LAID A FOUNDATION FOR HOW THESE ARE RELEVANT
5 TO HER REPORT. THE DOCUMENTS HAVE PREVIOUSLY BEEN
6 ADMITTED IN PART BECAUSE IT IS A SAMSUNG ADMISSION.
7 THERE'S NO QUESTION AS TO AUTHENTICITY.

8 ACTUALLY, NOW THAT I LOOK AT THE REPORT,
9 I SEE SHE DOES REFERENCE THE TITLE PAGE.

10 THE COURT: 122 AND 131 WERE ADMITTED
11 WITH MR. DENISON BACK ON AUGUST 3RD, SO THOSE ARE
12 IN.

13 SO THE ONLY QUESTION IS 43, 51, AND 127.

14 MS. KREVANS: AND THE COVER AS WELL, YOUR
15 HONOR, AND THESE ARE EXPLICITLY DISCUSSED IN THE
16 REPORT AND THE DOCUMENT WAS IDENTIFIED IN
17 INTERROGATORY RESPONSES.

18 MR. VERHOEVEN: NO FOUNDATION HAS BEEN
19 LAID FOR ANY OF THESE PAGES, AND SO WE OBJECT ON
20 THAT GROUND. IT'S NOT APPROPRIATE TO PUT IN --

21 THE COURT: YOU'VE MADE YOUR OBJECTION.

22 MR. VERHOEVEN: THANK YOU, YOUR HONOR.

23 THE COURT: 122 AND 131 WERE ALREADY
24 ADMITTED THROUGH MR. DENISON, BUT THE REST YOU NEED
25 TO LAY A FOUNDATION.

1 MS. KREVANS: OKAY.

2 Q DID YOU LOOK AT THE FRONT COVER AND PAGES 43,
3 51, AND 127 IN FORMING YOUR OPINIONS, DR. KARE?

4 A YES.

5 Q HOW DID THOSE PAGES AND THE CONTENT OF THEM
6 RELATE TO THE OPINIONS THAT YOU FORMED?

7 A I'M TALKING ABOUT WHETHER THERE WAS EVIDENCE
8 THAT SAMSUNG MAY HAVE USED APPLE GRAPHICS FROM THE
9 IPHONE AS A GUIDE, AND ALL THESE PAGES IN THIS
10 RELATIVE EVALUATION REPORT ON THE S 1 AND THE
11 IPHONE SHOW A PICTURE OF THE IPHONE HOME SCREEN ON
12 THE LEFT AND A PICTURE --

13 MR. VERHOEVEN: YOUR HONOR, I'M GOING TO
14 OBJECT AT THIS POINT --

15 THE WITNESS: OF SAMSUNG.

16 MR. VERHOEVEN: THERE'S NO FOUNDATION
17 LAID FOR THIS DOCUMENT AND NOW THE WITNESS IS
18 DESCRIBING A DOCUMENT THAT'S NOT IN EVIDENCE FOR
19 WHICH NO FOUNDATION WAS LAID. IT'S INAPPROPRIATE
20 TO PUT IN --

21 THE COURT: ALL RIGHT. THANK YOU. PAGE
22 122, 58, AND 131 ARE ALREADY IN EVIDENCE.

23 MR. VERHOEVEN: I'M JUST REFERRING TO THE
24 THREE THAT SHE ASKED ABOUT, 43, 51, AND 127 IN THE
25 SUBSTANTIVE QUESTION, YOUR HONOR.

1 MS. KREVANS: AND, YOUR HONOR, IT'S AN
2 ADMISSION. IT'S A SAMSUNG DOCUMENT. THE WITNESS
3 REVIEWED THE DOCUMENT, AND THERE IS NO REASON WHY
4 IT IS IMPROPER FOR HER TO TESTIFY ABOUT WHAT THE
5 DOCUMENT SHOWS.

6 THE COURT: AS AN EXPERT?

7 MS. KREVANS: AS AN EXPERT.

8 THE COURT: GO AHEAD.

9 MS. KREVANS: THANK YOU.

10 Q OKAY. COULD YOU -- SO, YOUR HONOR, I THINK
11 WHAT WE NOW HAVE IN IS, JUST FOR THE RECORD, THE
12 COVER AND PAGES, IN TOTAL, 43, 51, 122, 127, AND
13 131.

14 THE COURT: NO. I DIDN'T SAY THAT THEY
15 WERE ADMITTED. AND I'M NOT GOING TO LET YOU
16 PUBLISH THEM TO THE JURY UNLESS IT'S ADMITTED. IF
17 YOU WANT TO SHOW THEM, PAGES 58, 122, AND 131, YOU
18 CAN.

19 BY MS. KREVANS:

20 Q DR. KARE, DID THE CONTENTS OF EXHIBIT 44
21 CONFIRM IN ANY WAY -- STRIKE THAT.

22 CAN YOU TELL US WHETHER -- WHAT
23 CONCLUSIONS YOU DREW FROM THE CONTENTS OF EXHIBIT
24 44, BUT REFERENCE, PLEASE, IN YOUR TESTIMONY IF YOU
25 TALK SPECIFICALLY, ONLY THE CONTENTS OF PAGES 122

1 AND 131.

2 A I'M SORRY. CAN I EXPLAIN WHAT WAS ON ANOTHER
3 PAGE AND HOW IT AFFECTED ME WITHOUT SHOWING IT?

4 MS. KREVANS: YOUR HONOR, I THINK THIS
5 WOULD BE --

6 THE COURT: I'M GOING TO ALLOW THAT. GO
7 AHEAD.

8 THE WITNESS: CAN I READ FROM IT AND
9 DESCRIBE THE ILLUSTRATION?

10 MR. VERHOEVEN: WE WOULD OBJECT TO THAT,
11 YOUR HONOR.

12 THE COURT: WHY DON'T YOU JUST DESCRIBE
13 THE ILLUSTRATION.

14 BY MS. KREVANS:

15 Q WHY DON'T YOU JUST DESCRIBE IT, DR. KARE?

16 A OKAY. I SAW, ON A SERIES OF PAGES, WHERE
17 THE -- AT THE TOP OF THE PAGE, IT TALKS ABOUT SOME
18 ASPECT OF ICON DESIGN, AND THEN ON THE LEFT,
19 THERE'S A PICTURE OF THE IPHONE HOME SCREEN, ON THE
20 RIGHT THERE'S A PICTURE OF THE GT I9000, SAME SIZE,
21 SIDE BY SIDE, AND THEN THERE'S BULLET POINTS BESIDE
22 EACH ONE.

23 AND, TYPICALLY, IN ONE OF THESE SCREENS,
24 IT TALKS ABOUT THAT THERE'S CONFUSION ABOUT THE
25 SIMILARITY OF ICONS ON THE SAMSUNG SCREEN.

1 AND THEN THE DOCUMENT TALKS ABOUT HOW
2 APPLE DOES IT BETTER, HOW THEY DIFFERENTIATE, A
3 LITTLE BIT ABOUT THE ICON STYLE.

4 AND THEN AT THE BOTTOM OF EVERY ONE OF
5 THESE PAGES, THERE'S A PINK BOX AND IT SAYS,
6 "DIRECTIONS FOR IMPROVEMENT," AND THEN IT SUGGESTS
7 WHAT SAMSUNG DESIGNERS OUGHT TO DO TO MAKE THEIR
8 PHONE BETTER, CHANGES OR, YOU KNOW, NOTE THIS AND
9 TRY TO DO THIS.

10 AND THERE ARE RED RINGS AROUND PARTICULAR
11 ICONS ON THE APPLE SCREEN AND ON THE SAMSUNG
12 SCREEN, AND I CAN SEE HOW, BY LOOKING AT WHAT
13 ULTIMATELY HAPPENED, HOW CONCRETE ASPECTS OF THE
14 APPLE ICONS AFFECTED WHAT ULTIMATELY WERE IN THE
15 PHONES THAT I LOOKED AT.

16 SO IT DID HAVE -- IT'S HARD TO -- NOT TO
17 SEE FROM WHAT WAS SHOWN TO ME AS AN INTERNAL
18 SAMSUNG DESIGN DOCUMENT, HOW -- WHAT HAPPENED.

19 MS. KREVANS: NOTHING FURTHER, YOUR
20 HONOR.

21 MR. VERHOEVEN: I'M GOING TO OBJECT AND
22 MOVE TO STRIKE THAT LAST ANSWER.

23 THE COURT: OVERRULED. OVERRULED.

24 NOW, THE TIME IS 11:06. GO AHEAD WITH
25 YOUR CROSS, PLEASE.

1 THE COURT: ARE THESE NEW KARE CROSS --
2 WHY AM I GETTING NEW CROSS-EXHIBITS RIGHT NOW? ARE
3 THESE DIFFERENT THAN THE ONES I GOT YESTERDAY? ARE
4 THESE DIFFERENT THAN THE ONES I GOT YESTERDAY?

5 MR. VERHOEVEN: THE DEMONSTRATIVES WERE
6 UPDATED TO ADDRESS THE CONCERNS THAT WERE MADE
7 ABOUT SCREEN-TO-SCREEN SHOTS.

8 THE COURT: OKAY. BUT WHY DIDN'T YOU
9 JUST GIVE ME THAT NEW EXHIBIT? ALL RIGHT.

10 MS. KREVANS: YOUR HONOR, WE HAVE NOT
11 BEEN PROVIDED WITH ANY NEW UPDATED DEMONSTRATIVES.

12 IF THEY'RE NEW DEMONSTRATIVES THAT WERE
13 CREATED LAST NIGHT, YOUR HONOR, WE HAVEN'T SEEN
14 THEM.

15 (PAUSE IN PROCEEDINGS.)

16 THE COURT: ALL RIGHT. WELL, THIS IS --
17 THIS IS COUNTING TO THE TRIAL TIME. IN THE FUTURE,
18 WE NEED THIS DONE IN ADVANCE.

19 IT'S 11:08.

20 (PAUSE IN PROCEEDINGS.)

21 MR. VERHOEVEN: MAY I PROCEED, YOUR
22 HONOR?

23 THE COURT: PLEASE.

24 **CROSS-EXAMINATION**

25 BY MR. VERHOEVEN:

1 Q GOOD MORNING, DR. KARE.

2 A GOOD MORNING.

3 Q MY NAMES IS CHARLES VERHOEVEN, COUNSEL FOR
4 SAMSUNG.

5 NOW, ON YOUR DIRECT EXAMINATION, YOU
6 PROVIDED SOME TESTIMONY WITH RESPECT TO THE DESIGN
7 '305 PATENT. DO YOU REMEMBER THAT?

8 A YES.

9 Q AND I BELIEVE YOU SAID, YOU WERE ASKED TO
10 COMPARE THAT DESIGN PATENT TO THE APPLICATION
11 SCREEN OF CERTAIN ACCUSED SAMSUNG PHONES.

12 A YES.

13 Q AND YOU CONSIDERED THOSE PHONES IN FORMING
14 YOUR OPINION; CORRECT?

15 A I CONSIDERED THE SCREEN -- THE IMAGES OF THE
16 SCREENS, JUST LOOKING AT THEM ON THE PHONE, AND
17 PHOTOS, YES.

18 Q IS IT CORRECT THAT YOU WERE NOT ASKED TO FORM
19 ANY OPINIONS ABOUT THE HOME SCREENS ON THOSE
20 ACCUSED SAMSUNG PHONES?

21 A YES.

22 Q SO YOU DIDN'T LOOK AT THE HOME SCREENS AND ASK
23 THE QUESTION OF WHETHER THOSE WERE SUBSTANTIALLY
24 SIMILAR TO THE '305?

25 A I SAW THE HOME SCREENS IN ORDER TO GET TO THE

1 APPLICATION SCREENS, BUT I CONSIDERED THE
2 APPLICATION SCREENS.

3 Q SO WHEN YOU LOOK AT THE ACCUSED PHONES, IN
4 ORDER TO GET TO THE APPLICATION SCREEN, WHICH IS
5 WHAT YOU OFFERED AN OPINION OF, FIRST YOU HAVE TO
6 TURN ON THE PHONE; RIGHT?

7 A YES.

8 Q AND THEN WHAT DO YOU SEE?

9 A YOU KNOW, FUNDAMENTALLY, I FOCUSED ON YOU SEE
10 AN ARRAY OF ICONS AND --

11 Q NO. WHEN YOU TURN ON THE PHONE, WHAT DO YOU
12 SEE?

13 A YOU SEE THE HOME SCREEN.

14 Q OKAY. AND SO A CONSUMER WHO TURNS ON THE
15 PHONE, THE FIRST THING THEY'RE GOING TO SEE IS THE
16 HOME SCREEN?

17 A YES.

18 Q OKAY. AND IS IT CORRECT THAT IN ORDER TO GET
19 TO AN APPLICATION SCREEN, THE USER WILL HAVE TO
20 ACTUALLY MANIPULATE THE PHONE IN SOME WAY?

21 A YES.

22 Q WHAT DO THEY HAVE TO DO?

23 A PRESS A BUTTON ON THE FAR RIGHT THAT HAS A
24 GRID OF SQUARES.

25 Q OKAY. AND THAT'LL BRING UP AN APPLICATIONS

1 MENU?

2 A IT BRINGS UP AN APPLICATION SCREEN.

3 Q OKAY. SO IF WE COULD PUT UP SDX 3705, LET'S
4 PUT IT ON THE LOCAL SCREEN, NOT THE BIG SCREEN TO
5 MAKE SURE THERE'S NO OBJECTION.

6 MS. KREVANS: YOUR HONOR, THAT'S STILL --
7 I'VE TURNED ON JX 1025 AND TURNED ON HOME SCREEN,
8 AND THAT STILL DOESN'T LOOK LIKE IT TO ME.

9 MR. VERHOEVEN: LET ME DO IT THIS WAY,
10 YOUR HONOR, IN THE INTEREST OF TIME. I'VE GOT AN
11 ACTUAL PHONE. WHY DON'T I TURN IT ON AND USE THAT.

12 THE COURT: THAT'S FINE.

13 MS. KREVANS: IS IT THE JX 1025.

14 MR. VERHOEVEN: IT IS THE JX 1025.

15 MS. KREVANS: YOU HAVEN'T SHOWN IT TO ME,
16 COUNSEL.

17 MR. VERHOEVEN: MAY I DO THAT, YOUR
18 HONOR.

19 THE COURT: PLEASE, GO AHEAD. SINCE
20 WE'VE HAD A PROBLEM WITH THE PHONES, LET'S DO THAT
21 WITH EVERY PHONE IN THE CASE.

22 MS. KREVANS: IS THAT THE REPLACEMENT
23 STICKER?

24 I'M SORRY. IT DOESN'T LOOK LIKE THE SAME
25 STICKERS THAT --

1 MR. VERHOEVEN: YOU CAN TELL ME WHAT YOU
2 PREFER TO USE FOR JX 1025. I'LL USE WHATEVER YOU
3 WANT.

4 THE COURT: WAIT. WHAT'S THE NUMBER?
5 HAS IT BEEN ADMITTED?

6 MS. KREVANS: THIS PHONE HAS BEEN
7 ADMITTED, AND I'M A LITTLE CONFUSED BECAUSE THE
8 LABEL ON HERE IS THAT THE EXHIBIT STICKER LABEL
9 FROM YESTERDAY BUT IT MAY HAVE BEEN THAT THEY WERE
10 RELABELED YESTERDAY WHEN THEY WERE PHOTOGRAPHED. I
11 DON'T KNOW.

12 THE COURT: WHAT IS THE NUMBER?

13 MR. VERHOEVEN: IT'S JX 1025, YOUR HONOR.

14 THE COURT: OKAY.

15 MS. KREVANS: YESTERDAY --

16 THE COURT: THAT'S THE DROID CHARGE
17 THAT'S BEEN ADMITTED SINCE AUGUST 3RD. WHERE ARE
18 ALL THE ADMITTED EXHIBITS?

19 MR. VERHOEVEN: WELL, THERE'S A BUNCH
20 HERE, YOUR HONOR, AND THIS IS WHAT I THINK IS AN
21 ADMITTED EXHIBIT. I DON'T KNOW WHAT COUNSEL'S
22 ISSUE IS.

23 MS. KREVANS: SO THERE WAS A STICKER ON
24 IT YESTERDAY THAT LOOKED JUST LIKE THE STICKER
25 THAT'S ON THE BOX AND NOW IT'S DIFFERENT.

1 IT MAY BE THAT SAMSUNG WANTED TO
2 PHOTOGRAPH THE PHONES LAST NIGHT AND MAY HAVE TAKEN
3 THE STICKER OFF AND MAY HAVE PUT A NEW LABEL ON IT.
4 I DON'T KNOW BECAUSE I WASN'T THERE.

5 AS LONG AS THEY CAN REPRESENT TO US THAT
6 IT'S THE SAME ONE THAT YESTERDAY HAD THIS EXHIBIT
7 STICKER ON IT, I'M FINE WITH IT, YOUR HONOR.

8 THE COURT: DO ALL OF THE EXHIBITS HAVE
9 THE EXHIBIT STICKER, THE NORTHERN DISTRICT OF
10 CALIFORNIA STICKER.

11 MS. KREVANS: BOTH THE BOXES AND THE
12 PHONES DID. I KNOW SAMSUNG REQUESTED THEY WANTED
13 TO TAKE MORE PICTURES, AND WE PROVIDED -- WE
14 HAPPENED TO HAVE CUSTODY OF THESE PHONES, WE
15 PROVIDED THESE TO THEM, AND I THINK THERE WAS AN
16 ISSUE OF TAKING THE STICKERS OFF SO THE BACKS WOULD
17 BE PHOTOGRAPHED PRISTINE AND THEY REPLACED THEM.

18 THE COURT: OKAY. HOW COME THE PHONES
19 DON'T HAVE THE NORTHERN DISTRICT COURT STICKER ON
20 THEM?

21 MS. KREVANS: THEY DID. I THINK IT MAY
22 HAVE BEEN A REPLACEMENT.

23 MS. ABRAMOWITZ: MY NAME IS ANNE
24 ABRAMOWITZ. I REPRESENT SAMSUNG.

25 YOUR HONOR, LAST NIGHT WE WENT TO INSPECT

1 THE PHONES AND THE EXHIBIT LABELS WERE -- COVERS
2 THE BACKS OF THE PHONES AND IN SOME CASES COVERING
3 BRANDING ON THE BACKS OF THE PHONES.

4 SO WE SPOKE WITH COUNSEL FOR APPLE AND
5 THEY AGREED THAT WE COULD REMOVE THE STICKERS FROM
6 THE BACKS OF THE PHONES AND THAT AN ALTERNATIVE
7 LABEL WOULD BE PUT IN PLACE.

8 MS. KREVANS: SO IS THIS THE SAME ONE
9 THAT USED TO HAVE THE EXHIBIT STICKER IS MY
10 QUESTION.

11 MS. ABRAMOWITZ: YES. YOU CAN SEE THE
12 GUMMY RESIDUE FROM WHERE THE EXHIBIT LABEL WAS.

13 MS. KREVANS: OKAY. I THINK THE MYSTERY
14 HAS BEEN RESOLVED YOUR HONOR. IT DOESN'T HAVE THE
15 COURT'S OFFICIAL LABEL, BUT PEOPLE HERE FROM
16 COUNSEL SAID IT IS.

17 THE COURT: SO HOW MANY EXHIBITS HAVE THE
18 COURT'S OFFICIAL LABEL BEEN REMOVED? HOW MANY?

19 MS. ABRAMOWITZ: YOUR HONOR, WE TOOK THEM
20 OFF OF ALL OF THE DROID EXHIBITS SO THAT WE CAN
21 PHOTOGRAPH THE BACKS OF THE SAMSUNG PHONES.

22 THE COURT: SO HOW MANY WOULD THAT BE?
23 ALL OF THE JOINT EXHIBITS? NOT ALL OF THE JOINT
24 EXHIBITS?

25 MS. ABRAMOWITZ: ALL OF THE SAMSUNG.

1 THE COURT: THAT'S 175 EXHIBITS.

2 MS. ABRAMOWITZ: SORRY. I BELIEVE IT'S
3 JX 1007 THROUGH, I THINK, 31. I WOULD HAVE TO
4 CONFIRM.

5 THE COURT: OKAY.

6 MS. ABRAMOWITZ: BUT COUNSEL FOR APPLE
7 REPRESENTED THAT THEY WOULD LABEL PERHAPS THE SIDE
8 OF THE PHONE. WE DIDN'T COME TO AN OFFICIAL
9 AGREEMENT ON WHERE THE LABEL WOULD GO.

10 MS. KREVANS: I THINK, YOUR HONOR, IT
11 SOUNDS LIKE THEY'RE JUST REPLACEMENT LABELS, BUT
12 IT'S STILL THE SAME PHONE, IT JUST DOESN'T HAVE THE
13 EXHIBIT STICKER ON IT.

14 MS. ABRAMOWITZ: I RECOGNIZE TRYING TO
15 SCRATCH THE GUMMY STUFF OFF THE BACK.

16 THE COURT: ALL RIGHT. NEXT TIME
17 ANYTHING IS GOING TO BE DONE WITH ACTUAL EXHIBITS
18 THAT HAVE ALREADY BEEN ADMITTED, COULD YOU ALL JUST
19 FILE A STATEMENT? JUST FILE ONE SAYING THAT'S
20 HAPPENED.

21 MR. VERHOEVEN: ABSOLUTELY, YOUR HONOR.

22 THE COURT: BECAUSE IF ONE SIDE RAISES
23 SOMETHING, THE OTHER SIDE NEEDS TO KNOW.

24 MS. KREVANS: YES, YOUR HONOR.

25 BY MR. VERHOEVEN:

1 Q OKAY. WHERE WERE WE?

2 WE WERE TALKING ABOUT YOU PROVIDED THE
3 TESTIMONY ABOUT HOW A CONSUMER MIGHT MAKE A MISTAKE
4 OR BE CONFUSED ABOUT THESE APPLICATION SCREENS
5 THINKING THAT, ONE, THAT IT'S A SAMSUNG APPLICATION
6 SCREEN AND MIGHT BE AN APPLE PHONE, RIGHT, OR AN
7 APPLE APPLICATION SCREEN. DO YOU REMEMBER THAT?

8 A THAT A SAMSUNG APPLICATION SCREEN WOULD LOOK
9 LIKE THE DESIGN OF THE D'305 PATENT.

10 Q DIDN'T YOU -- DIDN'T I HEAR YOU SAY THAT YOU
11 THOUGHT THAT A CONSUMER WOULD BE CONFUSED AS TO THE
12 SOURCE?

13 A WHEN WE TALKED ABOUT TRADE DRESS.

14 Q RIGHT?

15 A WHEN WE TALKED ABOUT -- EXCUSE ME. I THOUGHT
16 YOU WERE ASKING ME ABOUT THE D'305.

17 Q OKAY. BUT YOU DID TALK ABOUT CONSUMERS
18 BEING -- WHETHER OR NOT CONSUMERS MIGHT BE CONFUSED
19 BY THE SAMSUNG APPLICATION SCREENS.

20 DO YOU REMEMBER THAT?

21 A YES.

22 Q OKAY. AND YOU THOUGHT THAT THERE'S -- THAT
23 THEY MIGHT BE?

24 A YES.

25 Q OKAY. SO LET'S LOOK AT WHAT A CONSUMER WOULD

1 SEE WHEN THEY TURN ON THE PHONE BETWEEN THE TIME
2 THEY HAVE A PHONE LIKE THIS IN THEIR HANDS THAT'S
3 TURNED OFF AND THE TIME THAT THEY ACTUALLY GET TO
4 THE APPLICATION SCREEN.

5 I'LL TRY TO DO THIS, YOUR HONOR, ON THE
6 ELMO.

7 DO WE HAVE A MICROPHONE?

8 THE CLERK: A MICROPHONE?

9 MR. VERHOEVEN: YEAH. I THOUGHT THERE
10 WAS A LITTLE HAND MIKE. THERE WE GO.

11 DOES THIS WORK?

12 I'M GOING TO PUT THIS CLOSE TO THE PHONE
13 SO THAT -- OKAY.

14 Q SO NOW I'M THE CONSUMER, AND I'M TURNING ON
15 THE PHONE. WHAT DOES THE CONSUMER SEE?

16 A THE START-UP SCREEN WITH THE --

17 Q WHAT DOES IT SAY?

18 A IT SAYS, "SAMSUNG."

19 Q STILL SAYS SAMSUNG.

20 WHAT'S DROID? IS THAT SHORT FOR ANDROID?

21 A I DON'T KNOW I KNOW IT'S THIS, THE DROID PHONE
22 HAS THE CHIN.

23 Q AND NOW WHAT IS THE CONSUMER LOOKING AT NOW?

24 A THE UNLOCK SCREEN.

25 Q SO THE CONSUMER HAS TO DO SOMETHING HERE;

1 RIGHT?

2 A YES.

3 Q WHAT DO THEY HAVE TO DO?

4 A MOVE THE PUZZLE PIECE TO THE RIGHT TO UNLOCK
5 IT.

6 Q OKAY. NOW, WHAT IS THE CONSUMER LOOKING AT?

7 A THE HOME SCREEN OF THE SAMSUNG PHONE.

8 Q OKAY. AND SO WHAT DOES A CONSUMER NEED TO
9 DO -- THIS IS -- THIS SCREEN HERE IS NOT ACCUSED;
10 RIGHT?

11 A NO.

12 Q YOU WEREN'T EVEN ASKED TO LOOK AT THIS SCREEN;
13 RIGHT?

14 A I WOULD SAY -- I WAS NOT ASKED TO CONSIDER
15 THIS SCREEN.

16 Q OKAY. SO IT'S JUST THE APPLICATION SCREEN;
17 RIGHT?

18 A YES.

19 Q OKAY. AND REMIND US, WHAT DOES THE USER HAVE
20 TO DO -- WHAT DOES THE CONSUMER HAVE TO DO TO GET
21 TO THE APPLICATION SCREEN?

22 A TOUCH THE BLUE BUTTON ON THE LOWER RIGHT WITH
23 THE GRID OF SQUARES.

24 Q OKAY. SO IT'S ONLY AFTER ALL OF THOSE STEPS
25 THAT A CONSUMER GETS TO THE APPLICATION SCREEN.

1 FAIR?

2 A YES.

3 Q NOW, DR. KARE, WOULDN'T YOU AGREE THAT BY THE
4 TIME A CONSUMER GOES THROUGH ALL THOSE STEPS TO GET
5 TO THE APPLICATION SCREEN, THAT CONSUMER KNOWS THAT
6 THIS IS A SAMSUNG PHONE?

7 A I WAS ONLY ASKED TO CONSIDER THIS APPLICATION
8 SCREEN COMPARED TO THE APPLE HOME SCREEN.

9 Q I UNDERSTAND THAT.

10 A BECAUSE --

11 Q BUT I HAVE A DIFFERENT QUESTION FOR YOU.

12 WOULDNT YOU AGREE THAT BY THE TIME THAT
13 A CONSUMER TURNS ON THE PHONE AND GOES THROUGH
14 THOSE STEPS WE LOOKED AT, WHERE THEY SEE THE
15 SAMSUNG NAME PROMINENTLY FOR SEVERAL SECONDS, WHERE
16 THEY SEE THE GRAPHIC FOR DROID, WHERE THEY HAVE TO
17 GO PAST THE HOME SCREEN TO THE APPLICATION SCREEN,
18 BY THE TIME THEY GET TO THAT APPLICATION SCREEN,
19 WOULDNT YOU AGREE THAT A CONSUMER KNOWS THAT
20 THEY'RE USING A SAMSUNG PHONE?

21 A I'M NOT AN EXPERT IN CONSUMER BEHAVIOR AND
22 THAT KIND OF USER EXPERIENCE.

23 I'M REALLY FOCUSSED ON GRAPHIC U/I. SO I
24 DON'T KNOW THAT I'M QUALIFIED TO ANSWER THAT.

25 Q WELL, QUALIFIED OR NOT, WOULD YOU AGREE WITH

1 ME? A CONSUMER, BY THIS POINT, GOING THROUGH THE
2 START-UP AND ALL OF THAT, SEEING ALL THAT
3 ADVERTISING, THEY KNOW THEY HAVE A SAMSUNG PHONE,
4 DON'T THEY?

5 A I JUST CAN'T SPEAK TO THAT BECAUSE I DON'T --
6 I DON'T KNOW.

7 Q YOU'RE NOT QUALIFIED?

8 A I HAVEN'T STUDIED START-UP EXPERIENCE FROM
9 PHONE TO PHONE. I -- I COMPLETELY -- I KNOW THAT
10 THIS IS THE APPLICATION SCREEN, NOT THE HOME
11 SCREEN.

12 Q BY THE TIME THAT THE CONSUMER TURNS ON THE
13 PHONE, SEES THE SAMSUNG NAME PROMINENTLY DISPLAYED,
14 SEES THE DROID ADVERTISEMENT AND ANIMATION,
15 WOULDN'T YOU AGREE THAT NO CONSUMER WOULD BE
16 CONFUSED AS TO WHICH PHONE THEY HAVE BY THAT TIME?

17 A I CAN'T AGREE BECAUSE I HAVEN'T -- I DON'T --
18 I DON'T KNOW ABOUT CONSUMER BEHAVIOR STARTING -- I
19 DON'T KNOW ABOUT THE QUESTION YOU'RE ASKING ME.
20 THAT'S OUTSIDE MY FOCUS.

21 Q IT'S OUTSIDE YOUR EXPERTISE?

22 A YES, AS A GRAPHIC U/I DESIGNER.

23 Q NOW, THERE WAS ONE SLIDE -- I'LL TURN THIS OFF
24 NOW, YOUR HONOR, IF THAT'S OKAY.

25 THE COURT: GO AHEAD, PLEASE.

1 BY MR. VERHOEVEN:

2 Q THERE'S ONE SLIDE THAT YOU FOCUSSED ON WITH
3 RESPECT TO YOUR TESTIMONY MORE THAN OTHERS WHEN YOU
4 WERE TESTIFYING ABOUT YOUR OPINIONS WITH RESPECT TO
5 THE DESIGN '305 PATENT, AND THAT WAS PDX 14.7.

6 CAN WE PUT THAT ON THE SCREEN. THIS IS A
7 SLIDE THAT COUNSEL FOR APPLE SHOWED YOU. DO YOU
8 REMEMBER THAT?

9 A YES.

10 Q AND DO YOU REMEMBER YOU SPENT MOST OF YOUR
11 TIME EXPLAINING THIS SLIDE, AND FOR THE OTHER
12 SLIDES SHE SHOWED YOU, YOU SAID SAME REASONS?

13 A YES.

14 Q SO LET'S FOCUS ON THIS SLIDE.

15 NOW, IF WE LOOK AT THE DESIGN '305 PATENT
16 COMPARED TO THE FASCINATE, DO YOU SEE IN THE DESIGN
17 '305 PATENT THE FIRST BOX IN THE UPPER LEFT SAYS
18 SMS?

19 A YES.

20 Q WHERE IS THAT ICON IN THE FASCINATE?

21 A I BELIEVE THAT THE ANALOGOUS ICON IS IN THE
22 BOTTOM ROW ON THE RIGHT, THREE FROM THE LEFT.

23 Q I HAVE A LASER POINTER, YOUR HONOR.

24 DO YOU MIND IF I HAND THIS TO THE WITNESS
25 SO SHE CAN INDICATE ON THE BIG SCREEN?

1 A GO AHEAD, PLEASE.

2 Q DO YOU KNOW HOW TO USE THESE?

3 A I'M NOT A LASER POINTER EXPERT, EITHER.

4 Q JUST PUT THIS BUTTON. DON'T POINT IT IN
5 ANYBODY'S EYES.

6 A OKAY.

7 Q SO THE SMS IS ON THE TOP LEFT, RIGHT, IN THE
8 D'305?

9 A YES.

10 Q AND WHERE IS IT IN THE FASCINATE?

11 A (INDICATING).

12 Q RIGHT DOWN HERE?

13 A I BELIEVE THAT THOSE ARE ANALOGOUS.

14 Q OKAY. SO IT'S IN A DIFFERENT PLACE; RIGHT?

15 A YES.

16 Q IN THE '305, THERE'S A DOCK OR -- WHAT WOULD
17 YOU CALL THIS BOTTOM ROW ON THE '305?

18 A YOU KNOW, IT DOESN'T REALLY SAY IN THE '305
19 BECAUSE IT'S JUST A DESIGN, ORNAMENTAL DESIGN. SO
20 I JUST HAVE BEEN CALLING IT AN AREA AT THE BOTTOM,
21 A SEPARATED AREA AT THE BOTTOM, BECAUSE IT
22 DOESN'T -- THE '305 DOESN'T TALK ABOUT
23 FUNCTIONALITY.

24 Q OKAY. WELL, IN THE D'305, THE SMS ICON IS NOT
25 IN THE BOTTOM ROW THAT'S SET OFF SEPARATELY; RIGHT?

1 A RIGHT.

2 Q BUT IN THE FASCINATE, IT IS IN THE BOTTOM ROW.
3 IS THAT BOTTOM ROW SET OFF SEPARATELY?

4 A YES.

5 Q SO YOU WOULD AGREE THAT'S A DIFFERENCE?

6 A YES.

7 Q NOW, YOU TALKED ABOUT ROUNDED RECTANGLES FOR
8 THE IPHONES. DO YOU REMEMBER THAT?

9 A YES.

10 Q AND DO YOU REMEMBER YOU TESTIFIED WITH RESPECT
11 TO ALTERNATIVE DESIGNS THAT, GEE, SAMSUNG COULD
12 HAVE USED SOMETHING BESIDES ROUNDED RECTANGLES,
13 RIGHT? THEY COULD HAVE PICKED A DIFFERENT SHAPE?

14 A YES.

15 Q WELL, THIS ICON SHEER NOT JUST A ROUNDED
16 RECTANGLE. IT'S GOT A LITTLE -- IT'S ALMOST LIKE A
17 SPEECH BOX THAT YOU SEE IN CARTOONS; RIGHT?

18 A RIGHT.

19 Q DO YOU AGREE WITH THAT?

20 A YES. I WOULD SAY IT IS A SPEECH BALLOON THAT
21 HAS, HAS ROUNDED RECTANGULAR ELEMENTS, BUT IT'S NOT
22 A SQUARE.

23 Q IT'S A DIFFERENT SHAPE? RIGHT?

24 A IT'S NOT A SQUARE. IT HAS -- IT HAS STRAIGHT
25 EDGES ON TOP AND BOTTOM, BUT IT'S NOT -- AND

1 ROUNDED CORNERS, BUT IT'S NOT A SQUARE.

2 Q AND THE D'305 PATENT SAYS SMS, BUT THE
3 FASCINATE JUST HAS A HAPPY FACE; RIGHT?

4 A YES.

5 Q IS IT YOUR TESTIMONY -- IT'S NOT YOUR
6 TESTIMONY THAT THOSE ARE SUBSTANTIALLY SIMILAR
7 ICONS, IS IT?

8 A MY TESTIMONY DIDN'T COMPARE SPECIFICALLY
9 THOSE. THEY HAVE FEATURES IN COMMON AND THEY HAVE
10 DIFFERENCES.

11 Q DR. KARE, IS IT KARE OR KARE?

12 A KARE.

13 Q KARE, THANK YOU.

14 DR. KARE, YOU'RE NOT TESTIFYING TO THIS
15 JURY THAT THIS SMS ICON IS SUBSTANTIALLY SIMILAR TO
16 THIS OTHER ICON THAT SAYS, "MESSAGES," ARE YOU?

17 A NO.

18 Q IT'S NOT, IS IT?

19 A IT HAS SOME SIMILARITIES. IT USES THE SPEECH
20 BALLOON AS A METAPHOR AND IT HAS, AS I MENTIONED,
21 THE HORIZONTAL AND VERTICAL EDGES THAT ARE STRAIGHT
22 AND IT HAS ROUNDED CORNERS. THOSE WOULD BE WHAT IT
23 HAS IN COMMON.

24 AND IT OBVIOUSLY HAS DIFFERENCES, LIKE
25 THE FACE AND THE POINT.

1 Q IT'S NOT SUBSTANTIALLY SIMILAR, IS IT?

2 A NO.

3 Q THEN IF YOU LOOK AT THE NEXT ICON, IT SAYS
4 "CALENDAR." AND YOU SEE IT'S GOT A 6, AND IT'S --
5 IT'S GOT WHITE AND A TOP BORDER THAT'S RED?

6 A YES.

7 Q AND I BELIEVE IT'S HARD TO SEE ON THE SCREEN.
8 IT SAYS WEDNESDAY IN THE BORDER?

9 A MY EYES AREN'T THAT GOOD, BUT YES.

10 Q OKAY. WHERE IS THE CALENDAR ICON IN THE
11 FASCINATE?

12 A (INDICATING).

13 Q RIGHT THERE?

14 A YES.

15 Q OKAY. SO IT'S NOT THE SECOND ICON, SECOND
16 COLUMN IN THE TOP ROW, RIGHT?

17 A RIGHT.

18 Q IT'S IN A DIFFERENT PLACE?

19 A YES.

20 Q AND IT'S A COMPLETELY DIFFERENT PICTURE, ISN'T
21 IT?

22 A YES.

23 Q THAT CALENDAR ICON IS NOT SUBSTANTIALLY
24 SIMILAR TO THE CALENDAR ICON IN THE D'305; RIGHT?

25 A NO.

1 Q YOU AGREE WITH ME?

2 A YES.

3 Q IF YOU LOOK AT THIS SECOND ROW HERE, THE LEFT
4 ICON, IT SAYS, "YOUTUBE." DO YOU SEE THAT?

5 A YES.

6 Q YOUTUBE IS A REFERENCE TO WHAT?

7 A THE D'305 DESIGN DOESN'T INCLUDE, YOU KNOW, A
8 DEFINITION OF EVERYTHING. I ASSUME IT'S THE
9 YOUTUBE.COM APPLICATION.

10 BUT --

11 Q AND WHAT COMPANY --

12 A I DON'T KNOW THAT FROM THE D'305.

13 Q DO YOU KNOW WHAT COMPANY PROVIDES YOUTUBE?

14 A I THINK GOOGLE BOUGHT THEM.

15 Q IT'S A GOOGLE ICON, ISN'T IT?

16 A I DON'T KNOW. I DON'T KNOW THE ORIGIN OF THAT
17 ICON.

18 Q CAN YOU TELL THE JURY, WHERE IS THE YOUTUBE
19 ICON IN THE FASCINATE?

20 A IN THIS APPLICATION SCREEN, I DON'T THINK
21 THERE IS ONE.

22 Q IT'S NOT THERE, IS RIGHT?

23 A CORRECT.

24 Q THEN THIS NEXT ICON, THE NEXT ROW, SECOND
25 COLUMN, IT SAYS, "STOCKS." AND IT'S GOT A TICKER

1 SYMBOL. DO YOU SEE THAT?

2 A YES.

3 Q WHERE IS THAT IN THE FASCINATE?

4 A ON THIS APPLICATION SCREEN, THERE ISN'T ONE.

5 Q IT'S NOT THERE; RIGHT?

6 A YES.

7 Q AND THEN THIS NEXT ICON, IT SAYS, "MAPS."

8 DO YOU SEE THAT?

9 A YES.

10 Q WHO PROVIDES THE MAP FUNCTIONALITY ON APPLE'S
11 PHONES?

12 A I DON'T KNOW.

13 Q YOU DON'T KNOW THAT GOOGLE PROVIDE IT IS?

14 A I DON'T KNOW.

15 Q DO YOU KNOW WHETHER OR NOT THIS IS A GOOGLE
16 ICON?

17 A I DON'T KNOW.

18 Q WHERE IS THE MAPS ICON ON THE FASCINATE?

19 A IT -- ON THIS SCREEN, I DON'T SEE ONE.

20 Q IT'S NOT THERE; RIGHT?

21 A YES.

22 Q WHAT ABOUT WEATHER? SECOND ROW, FOURTH
23 COLUMN, A PICTURE OF THE SUN AND 73 DEGREES.

24 WHERE IS THAT IN THE FASCINATE?

25 A I DON'T SEE IT ON THIS SCREEN.

1 Q IF WE GO TO THE FOURTH ROW, SECOND COLUMN, DO
2 YOU SEE THAT ICON FOR CALCULATOR?

3 A YES.

4 Q WHERE IS THE CALCULATOR ICON IN THE FASCINATE?

5 A IN THE SECOND ROW.

6 Q RIGHT THERE? SO IT'S IN A DIFFERENT ROW;
7 RIGHT?

8 A YES.

9 Q AND IF WE LOOK AT THE CALCULATOR ICON ON THE
10 D'305, IT'S GOT A GRAY BACKGROUND, GRAY-WHITE-ISH
11 BACKGROUND; RIGHT?

12 A YES.

13 Q AND IT'S GOT THREE CIRCLES, FOUR CIRCLES,
14 RIGHT?

15 A YES.

16 Q PLUS NOTICE EACH OF THE FOUR CIRCLES
17 RESPECTIVELY ARE THE PLUS, THE MINUS, THE TIMES,
18 AND THE DIVISION SYMBOLS; RIGHT?

19 A YES.

20 Q NOW, IF YOU LOOK AT THE CALCULATOR IN THE
21 FASCINATE, IT DOESN'T HAVE A WHITE-GRAY BACKGROUND,
22 DOES IT?

23 A NO.

24 Q IT HAS A YELLOW ORANGE BACKGROUND; RIGHT?

25 A YES.

1 Q AND IT DOESN'T JUST HAVE FOUR CIRCLES, DOES
2 IT?

3 A NO.

4 Q IT HAS A PICTURE OF AN ENTIRE CALCULATOR;
5 RIGHT?

6 A YES.

7 Q DR. KARE, YOU WOULD AGREE WITH ME THAT THE
8 CALCULATOR ICON IN THE FASCINATE IS NOT
9 SUBSTANTIALLY SIMILAR TO THE CALCULATOR ICON IN THE
10 D'305?

11 A YES.

12 Q AND THE NEXT ICON ON THE FOURTH ROW, THIRD
13 COLUMN, NOTES, WHERE IS THAT FOUND IN THE
14 FASCINATE?

15 A IT'S NOT ON THIS SCREEN.

16 Q IT'S NOT THERE?

17 A NO.

18 Q WHAT ABOUT THE LAST ICON THAT SAYS SETTINGS?
19 IT'S THE FOURTH COLUMN, FOURTH ROW, BOTTOM RIGHT.
20 WHERE IS THAT FOUND IN THE FASCINATE?

21 A IT'S NOT IN THIS SCREEN.

22 Q WELL, THERE'S A GEAR UP HERE. DO YOU SEE
23 THAT?

24 A I SEE THAT.

25 Q DO YOU KNOW IF THAT'S AN ICON?

1 A I KNOW THAT THAT'S A STATUS BAR, BUT I DIDN'T
2 KNOW -- I GUESS THAT COULD BE A SETTINGS ICON.

3 Q IT COULD BE.

4 YOU WOULD AGREE WITH ME THAT THAT GEAR IN
5 THE TOP-LEFT QUADRANT OF THE FASCINATE DEPICTED ON
6 PDX 14.7 IS NOT SUBSTANTIALLY SIMILAR TO THE
7 SETTINGS ICON IN THE D'305 PATENT?

8 A NO.

9 Q YOU WOULD AGREE WITH ME?

10 A YES.

11 Q OKAY. FOR THE RECORD, THEN, YOU AGREE --
12 BECAUSE YOU SAID NO AND YES, I JUST WANT TO MAKE
13 SURE --

14 A WELL, IT'S THE SAME METAPHOR, SO I HADN'T
15 REALLY THOUGHT ABOUT THAT BEFORE. AND IT'S GOT A
16 BIT OF A SIMILAR FORM FACTOR, DIFFERENT SIZE. SO
17 IT'S NOT 100 PERCENT DIFFERENT, BUT --

18 Q IS IT YOUR TESTIMONY THAT THAT TINY LITTLE
19 GEAR IS SUBSTANTIALLY SIMILAR TO THIS LARGER ICON
20 THAT'S GOT A RECTANGLE WITH A BORDER AROUND IT,
21 THREE GEARS, AND SHADING?

22 A NO.

23 Q IT'S NOT SUBSTANTIALLY SIMILAR, IS IT?

24 A NO.

25 Q YOU DID TESTIFY ABOUT A COUPLE OF THESE ICONS

1 THAT YOU WANTED TO POINT THE JURY TO.

2 ONE WAS THE PHONE ICON ON THE BOTTOM
3 LEFT, OR LET'S CALL IT THE BOTTOM -- WELL, FOR THE
4 RECORD, WHY DON'T YOU USE YOUR WORDS. HOW WOULD
5 YOU DESCRIBE THIS, THIS GRAY AREA WITH THE FOUR
6 ICONS IN THE VERY BOTTOM OF THE D'305?

7 A JUST THE SEPARATE AREA AT THE BOTTOM.

8 Q OKAY. SO I'LL JUST USE THAT TO DESCRIBE IT.
9 OKAY?

10 A UM-HUM, THANKS.

11 Q SO THE SEPARATE AREA AT THE BOTTOM HAS, IN THE
12 D'305, HAS THE FINE ICON; RIGHT?

13 A YES.

14 Q AND YOU POINT TO THE FACT THAT THE FASCINATE
15 HAS A PHONE ICON AND IT'S ALSO GREEN AND HAS A
16 PICTURE OF A PHONE; RIGHT?

17 A YES.

18 Q NOW, THAT PICTURE OF THAT PHONE, YOU HAVEN'T
19 SEEN A PHONE RECEIVER LIKE THAT IN ABOUT 25 YEARS,
20 HAVE YOU?

21 A I KNOW THAT IT WAS DESIGNED IN 1938, AND IT
22 WAS BY HENRY DREYFUS AND IT WAS USED, YOU KNOW,
23 THROUGH THE '60S, '70S.

24 BUT I --

25 Q THOSE WERE MA BELL PHONES?

1 A I THINK OF IT AS RETRO.

2 Q SO THAT'S A PICTURE OF A MA BELL PHONE
3 RECEIVER; RIGHT?

4 A I DON'T KNOW WHETHER IT'S A MA BELL PHONE, BUT
5 I KNOW THAT IT'S RETRO.

6 Q DO YOU REMEMBER IN THE OLD DAYS WHEN THERE WAS
7 PHONE BOOTHS ON THE STREETS?

8 A YES.

9 Q BEFORE CELL PHONES?

10 A YES.

11 Q AND DO YOU REMEMBER THEY HAD THAT SAME PICTURE
12 OF THE PHONE ON THE SIDE OF A PHONE BOOTH?

13 A A LOT OF THEM HAD BLUE ONES WITH A RECEIVER
14 THAT WAS VERTICAL.

15 Q AND IT'S THE SAME RECEIVER, RIGHT?

16 A SIMILAR.

17 Q IT'S THE OLD ICONIC MA BELL RECEIVER; RIGHT?

18 A IT'S, IT'S A RETRO VERSION OF A RETRO PHONE
19 RECEIVER.

20 Q THE OLD MA BELL PHONES. DO YOU REMEMBER WHEN
21 YOU GREW UP, YOU HAD TO DIAL PHONES AND YOU PICKED
22 THE RECEIVER UP, THAT'S A PICTURE OF THAT RECEIVER,
23 RIGHT?

24 A YEAH. I JUST DON'T -- I NEVER KNEW ABOUT
25 ASSOCIATING IT WITH THE TERM MA BELL, SO --

1 Q WELL, CERTAINLY APPLE DOESN'T OWN THE IMAGE
2 AFTER THAT PHONE RECEIVER, DOES IT?

3 A I DON'T KNOW.

4 Q DO YOU BELIEVE IT DOES?

5 A I BELIEVE THAT SEEING THAT WHITE PHONE ON AN
6 ANGLE ON A SCREEN BACKGROUND --

7 Q THAT'S NOT WHAT I ASKED YOU.

8 A -- IS DISTINCTIVE.

9 Q THAT'S NOT WHAT I ASKED YOU. DO YOU BELIEVE
10 THAT APPLE OWNS THE IMAGE OF THE OLD RETRO PHONE
11 RECEIVER?

12 A I DON'T KNOW.

13 Q OKAY. WHAT ABOUT THE COLOR GREEN? WHEN
14 PEOPLE SEE THE COLOR GREEN, THAT MEANS GO; RIGHT?

15 A SOMETIMES.

16 Q APPLE DOESN'T OWN THE COLOR GREEN FOR GO, DOES
17 IT?

18 A NO. I DON'T -- I DON'T KNOW, BUT I WOULD
19 ASSUME NO.

20 Q YOU'VE WORKED WITH ICONS A LOT. YOU'VE SEEN
21 DOZENS OF ICONS THAT HAVE GREEN WITH TELEPHONE
22 RECEIVERS ON THEM IN THE PAST, HAVEN'T YOU?

23 A I -- WHEN I WAS LOOKING AT THIS DESIGN, I
24 LOOKED SPECIFICALLY AT THAT INCARNATION OF A PHONE
25 ICON, GREEN, ROUNDED CORNERS, TILTED, POINTING UP,

1 BIT OF A GRADIENT.

2 SO I SEE IT -- I SEE THE PARTS THAT MAKE
3 A WHOLE VERSUS THE INGREDIENTS THAT MAKE A COOKIE.

4 Q THAT WASN'T MY QUESTION.

5 SO MY QUESTION WAS, IN THE WORK YOU'VE
6 DONE FOR THIS CASE, YOU'VE SEEN DOZENS OF ICONS
7 THAT HAVE, FOR THE PHONE, FOR THE PHONE
8 FUNCTIONALITY --

9 A YES.

10 Q -- THAT HAVE A PICTURE OF A RECEIVER ON THEM
11 THAT ARE GREEN. THAT'S WHAT IT INDICATES TO THE
12 USER IF YOU HIT THIS, YOU'LL LAUNCH THE PHONE
13 APPLICATION; RIGHT?

14 A I DON'T KNOW THAT I'VE SEEN, IN YOUR WORDS,
15 DOZENS THAT ARE THAT COMBINATION OF ELEMENTS.

16 Q WELL, YOU'VE SEEN --

17 A THAT EXACT COMBINATION OF ELEMENTS.

18 Q OF COURSE, THAT WASN'T MY QUESTION. SO MY
19 QUESTION IS, PRIOR TO YOUR RETENTION IN THIS CASE,
20 YOU DON'T DISPUTE THAT YOU'VE SEEN GREEN -- ICONS
21 FOR THE PHONE, THE PHONE APPLICATIONS, THAT ARE
22 GREEN AND HAVE A PICTURE OF A RECEIVER ON THEM.

23 A I'VE SEEN ALL KINDS OF ICONS FOR PHONES, ALL
24 KINDS OF COLORS, ALL KINDS OF IMAGES, PHONE
25 RECEIVERS, CELL PHONES, DIFFERENT ANGLES, DIFFERENT

1 SIZES, DIFFERENT PROPORTIONS.

2 SO IT'S HARD TO CHARACTERIZE EXACTLY WHAT
3 I'VE SEEN TO ANSWER YOUR QUESTION YES OR NO.

4 Q YOU ALSO POINT TO THIS CLOCK ICON. THIS IS A
5 PICTURE OF THE FRONT FACE OF A CLOCK; RIGHT?

6 A YES.

7 Q AND WHEN YOU HIT THE CLOCK ICON, YOU LAUNCH
8 THE CLOCK APPLICATION; RIGHT?

9 A YES. YES.

10 Q APPLE DOESN'T OWN THE PICTURE OF THE CLOCK,
11 DOES IT?

12 A I DON'T KNOW.

13 Q YOU ALSO POINTED TO THIS FLOWER ICON, AND TELL
14 ME AGAIN, WHERE IS THE FLOWER ICON ON THE
15 FASCINATE?

16 A IT'S PART OF -- A VIEW OF IT IS IN THE GALLERY
17 ICON.

18 Q OKAY. RIGHT THERE (INDICATING)?

19 SO THIS ONE SAYS PHOTOS, THIS ONE DOESN'T
20 SAY PHOTOS, DOES IT?

21 A NO.

22 Q AND JUST FOR THE RECORD, IN THE D'305 PATENT
23 WE'RE LOOKING AT IS THE ICON THAT'S IN THE TOP ROW
24 AND THE THIRD COLUMN; CORRECT?

25 A YES.

1 Q AND THE ICON THAT YOU IDENTIFIED FOR THE
2 FASCINATE IS IN THE FOURTH ROW, THIRD COLUMN;
3 RIGHT?

4 A YES.

5 Q SO IN THE D'305 IT SAYS, "PHOTOS." IN THE
6 FASCINATE IT SAYS, "GALLERY," RIGHT? THOSE ARE
7 DIFFERENT WORDS; RIGHT?

8 A YES.

9 Q GALLERY, IF YOU LOOK AT THE FASCINATE, YOU SEE
10 THAT THERE'S TWO SQUARES WITHIN THE BIG, THE
11 RECTANGLE?

12 A YES.

13 Q AND THEN IN THE TOP OVERLAY SQUARE, THERE'S A
14 CIRCLE?

15 A YES.

16 Q AND IN THE MIDDLE OF THE CIRCLE, IT LOOKS LIKE
17 THERE'S AN ARROW.

18 A YES.

19 Q AND WHAT DOES THAT ARROW REPRESENT?

20 A IT'S TYPICALLY THAT ARROW MEANS VIDEO.

21 Q VIDEO. SO IN THE D'305, WE'RE TALKING ABOUT
22 PHOTOS, BUT THE FASCINATE, FOR THIS ICON, WE'RE
23 TALKING ABOUT VIDEO, AT LEAST PARTIALLY VIDEO;
24 RIGHT?

25 A GALLERY IS, AS I UNDERSTAND IT, A COLLECTION

1 OF THE USER'S IMAGES, WHETHER THEY'RE STILL OR
2 VIDEO.

3 AND SAME WITH PHOTOS. SAME SIMILAR COMBO
4 COLLECTION.

5 Q THIS ICON IN THE D'305, TOP ROW, THIRD COLUMN,
6 HAS NO INDICATION IN THE ICON THAT YOU CAN GET YOUR
7 VIDEOS THERE. THERE'S NO CIRCLE WITH A TRIANGLE,
8 IS THERE?

9 A NO.

10 Q AND IT JUST SAYS, "PHOTOS," RIGHT?

11 A YES.

12 Q SO THE FASCINATE CONVEYS DIFFERENT INFORMATION
13 IN ITS GALLERY ICON. IT TELLS THE USER THAT
14 INCLUDED WITHIN THAT, IF YOU LAUNCH THAT, YOU'RE
15 GOING TO GET TO YOUR VIDEOS; RIGHT?

16 A AND, AGAIN, THE D'305 IS AN ILLUSTRATION AND
17 THE SCREEN FOR THE FASCINATE IS A WORKING PHONE,
18 SO --

19 Q WELL, THAT'S ANOTHER THING I WANT TO TALK
20 ABOUT, SO LET'S TALK ABOUT THAT FOR A SECOND.

21 THE FASCINATE IS A WORKING PHONE, JUST
22 LIKE YOU SAID; RIGHT?

23 A YES.

24 Q AND THIS IS A LIST, WHEN YOU GO TO YOUR
25 APPLICATION MENU, THIS IS A LIST OF WHAT?

1 A DIFFERENT APPLICATIONS.

2 Q THAT'S RIGHT?

3 A A COLLECTION OF APPLICATIONS.

4 Q RIGHT. AND YOU KNOW THAT WHEN A USER BUYS A
5 PHONE, THEY CAN GO TO AN APPLICATION STORE ON-LINE
6 AND DOWNLOAD GAMES, VIDEOS, PROGRAMS, ALL KINDS OF
7 DIFFERENT APPLICATIONS; RIGHT?

8 A THAT IS SOMETHING I UNDERSTAND. BUT THAT
9 ISN'T SOMETHING THAT IS SPECIFIC TO MY EXAMINATION
10 OF THE ICONS.

11 Q AND YOU KNOW A USER CAN JUST SIMPLY DELETE ANY
12 OF THESE APPLICATIONS OFF THE PHONE; RIGHT?

13 A NO. I'M SORRY TO BE REPETITIVE. IT'S -- MY
14 CONSIDERATION WAS THE SCREEN, WHAT IT SHOWS, AND
15 FUNCTIONALITY IN TERMS OF A CERTAIN NUMBER OF
16 THINGS THAT ALLOW YOU TO DO SOMETHING.

17 BUT I WASN'T FOCUSED ON EXACTLY HOW
18 EVERYTHING BEHAVES.

19 Q WHY DON'T WE DO THIS. LET'S GET TO
20 FUNCTIONALITY IN A SECOND, AND LET ME JUST FINISH
21 OFF WITH THIS SLIDE.

22 GOING BACK TO THIS FLOWER ICON IN THE
23 D'305 PATENT, DID YOU SAY YOU USED TO DO WORK FOR
24 MICROSOFT ON THEIR ICONS?

25 A ON MICROSOFT WINDOWS 3.0.

1 Q DO YOU KNOW THAT MICROSOFT, WELL BEFORE THE
2 D'305, USED THE IMAGE OF A FLOWER TO DENOTE THAT
3 WHEN YOU HIT THAT ICON, YOU GET TO PHOTOS?

4 A NO.

5 Q YOU WEREN'T AWARE OF THAT?

6 A NO.

7 Q IN ANY EVENT, IF YOU LOOK AT THE FASCINATE AND
8 THE GALLERY ICON, THAT DOESN'T LOOK THE SAME AS THE
9 FLOWER PHOTO, DOES IT?

10 A IT HAS SIMILARITIES AND IT'S A DIFFERENT VIEW.

11 BUT IT LOOKS LIKE THE SAME KIND OF FLOWER
12 IN A CLOSE-UP.

13 Q IT LOOKS LIKE THE SAME KIND OF FLOWER? YOU
14 CAN TELL THAT IT'S THE SAME KIND OF FLOWER?

15 A WELL, YOU CAN SEE THAT THERE'S AN OBLONG
16 YELLOW PETAL THAT'S ABOUT THE SAME SHAPE AS A
17 SUNFLOWER PETAL.

18 I DON'T -- I'M NOT A BOTANY EXPERT, BUT
19 IT LOOKS -- IT'S OBVIOUSLY ISN'T A ROSE OR AN IRIS
20 OR -- IT'S A DIFFERENT KIND OF FLOWER.

21 Q IT'S OBVIOUSLY A DIFFERENT IMAGE THAN THE
22 PICTURE OF THE FLOWER IN THE D'305; RIGHT?

23 A YES.

24 Q IF YOU LOOK AT THE D'305 ON THIS BOTTOM AREA,
25 GRAY AREA THAT I THINK YOU SAY IS SEPARATED FROM

1 THE OTHERS --

2 A YES.

3 Q -- ON THE BOTTOM RIGHT, DO YOU SEE THE ICON
4 FOR THE IPOD?

5 A YES.

6 Q WHERE IS THAT ON THE FASCINATE?

7 A THERE ISN'T ONE.

8 Q WHAT DO WE FIND ON THE FASCINATE IN THE SAME
9 PLACE, THE BOTTOM ROW ON THE -- THE VERY BOTTOM ROW
10 IN THE SEPARATED PART ON THE RIGHT? WHAT DO WE
11 FIND?

12 A A HOME ICON.

13 Q A HOME ICON. THERE'S NO HOME ICON ON THE
14 D'305; RIGHT?

15 A NO.

16 Q AND THAT'S BECAUSE IN THE APPLE PRODUCTS,
17 THERE'S A HOME PHYSICAL BUTTON; RIGHT?

18 A THERE'S NOT A HOME IMAGE ON THE D'305 DESIGN.

19 MR. VERHOEVEN: YOUR HONOR, I'M GOING TO
20 TRY TO GET PX 001, THE PHYSICAL EXHIBIT OF THE
21 INITIAL IPHONE.

22 MS. KREVANS: MR. VERHOEVEN, IT MIGHT BE
23 UP THERE ALREADY.

24 MR. VERHOEVEN: MAY I APPROACH, YOUR
25 HONOR? I'M TOLD IT MIGHT BE ON THE STAND ALREADY.

1 THE COURT: OKAY.

2 THE WITNESS: I SWEAR I DIDN'T TAKE IT.

3 THE COURT: YOU MEAN THE ACTUAL IPHONE,
4 JX 1000?

5 MR. VERHOEVEN: YES. I'M SORRY, YOUR
6 HONOR. I MISSPOKE. JX 1000.

7 THE COURT: ARE WE MISSING IT?

8 MS. KREVANS: NO, YOUR HONOR. IT MAY
9 HAVE BEEN PUT BACK IN ITS PROPER BOX.

10 MR. VERHOEVEN: WE DON'T RETAIN CUSTODY
11 OF IT. COUNSEL FOR APPLE DOES, YOUR HONOR.

12 MS. KREVANS: WE'VE AGREED WHEN THEY'RE
13 IN COURT THEY'LL ALL BE HERE IN THESE RACKS.

14 MR. VERHOEVEN: CAN WE SWITCH OVER TO THE
15 ELMO FOR A SECOND, PLEASE?

16 Q I'LL DO THE SAME THING HERE WITH THE INITIAL
17 IPHONE. I'LL TURN IT ON. WHAT DO WE SEE? WHAT
18 DOES THE CONSUMER SEE WHEN THEY TURN ON THE PHONE?

19 A APPLE LOGO.

20 Q ARE WE STILL LOOKING AT IT? YES.

21 A YES.

22 Q IT'S ON THERE FOR A LONG TIME.

23 OKAY. SO THIS IS THE APPLE HOME SCREEN;
24 RIGHT?

25 A YES.

1 Q IT LOOKS SIMILAR TO D'305? THAT'S YOUR
2 TESTIMONY; RIGHT?

3 A YES.

4 Q AND AS WE SEE, HERE'S THE IPOD ICON, AND IN
5 THE FASCINATE, THAT PLACE HAS A HOME ICON; RIGHT?

6 A YES.

7 Q BUT IT'S HARD TO SEE ON THE ELMO, BUT DO YOU
8 SEE THERE'S THAT PHYSICAL BUTTON RIGHT HERE
9 (INDICATING)?

10 A YES.

11 Q THAT'S PART OF APPLE'S TRADE DRESS?

12 A I KNOW THAT THE GRAPHICS THAT I CONSIDERED ARE
13 ONLY PART OF THE TRADE DRESS.

14 BUT I CAN'T SPEAK TO THE REST OF THE
15 TRADE DRESS.

16 Q DO YOU HAVE A -- DO YOU HAVE AN OPINION ONE
17 WAY OR ANOTHER AS TO WHETHER THIS PHYSICAL HOME
18 BUTTON IS PART OF APPLE'S TRADE DRESS?

19 A NO, I DON'T HAVE AN OPINION.

20 Q BUT IN ANY EVENT, A CONSUMER WOULD KNOW THAT
21 THE APPLE PHONE HAS A PHYSICAL HOME BUTTON; RIGHT?

22 A AS I SAID, I -- MY TASK IN BEING AN EXPERT IN
23 THIS CASE WAS JUST ABOUT THE DISPLAY SCREEN, NOT
24 ABOUT THE PHYSICAL PHONE.

25 Q WELL, YOU KNOW A CONSUMER -- YOU'D AGREE WITH

1 ME THAT A CONSUMER, IF THEY'RE GOING TO BUY AN
2 EXPENSIVE ITEM LIKE AN I -- A SMARTPHONE, THEY GO
3 TO THE STORE AND THEY FIDDLE WITH IT FOR A WHILE
4 AND THEY FIGURE OUT IF THEY WANT TO BUY IT; RIGHT?

5 A I CAN'T SPEAK TO CONSUMER BEHAVIOR, YOU KNOW,
6 EXCEPT MY OWN ANECDOTALLY. BUT IT'S NOT MY AREA.

7 Q SO YOU DON'T HAVE AN OPINION AS TO WHETHER --
8 GO BACK TO THE SLIDE AGAIN -- AS TO WHETHER A
9 CONSUMER WOULD KNOW FROM ALL OF THE APPLE
10 ADVERTISING AND MARKETING THAT, WITH RESPECT TO THE
11 IPHONE, THE HOME BUTTON IS NOT AN ICON, IT'S A
12 PHYSICAL BUTTON?

13 A NO.

14 Q OKAY. NOW, DO YOU SEE UP AT THE TOP HERE
15 THERE'S THESE LITTLE DOTS?

16 A YES.

17 Q THERE'S ONE BIG CIRCLE -- OR ONE RELATIVE TO
18 THE OTHER DOTS, IT'S A BIGGER CIRCLE THAT HAS A 1
19 ON IT?

20 A YES.

21 Q AND TWO OTHER DOTS?

22 A YES.

23 Q WHERE IS THAT ON THE D'305?

24 A THERE ISN'T CORRESPONDING DOTS ON THE D'305.

25 Q THOSE DOTS INDICATE TO A CONSUMER THAT THERE'S

1 THREE PAGES WORTH OF APPLICATION; RIGHT?

2 A YES.

3 Q THERE'S NOTHING INDICATING PAGES OF
4 APPLICATIONS IN THE D'305; CORRECT?

5 A YES.

6 Q AND CAN YOU TELL, BY LOOKING AT THIS, WHETHER
7 OR NOT THE ICONS ARRANGED IN THE FASCINATE ARE IN
8 ALPHABETICAL ORDER? DO YOU SEE THE FIRST ONE IS
9 THREE, THEN A, THEN B, B-I, B-L, B-R, C-A, C-A,
10 C-A. DO YOU SEE THAT?

11 A LOOKS ALPHABETIC.

12 Q IT'S ALPHABETICAL; RIGHT?

13 A YES.

14 Q LOOK AT THE D'305. TEXT, CALENDAR. WELL, T
15 COMES AFTER C IN THE ALPHABET; RIGHT?

16 A YES.

17 Q AND THEN PHOTOS AND BACK TO CAMERA AND THEN TO
18 YOUTUBE, THAT'S WITH A Y, AND THEN STOCKS.

19 SO THE D'305, THE ICONS ARE NOT ARRANGED
20 ALPHABETICAL ORDER; RIGHT?

21 A RIGHT.

22 Q SO BEING ARRANGED IN ALPHABETICAL ORDER IS
23 KIND OF USEFUL, ISN'T IT?

24 A SOMETIMES.

25 Q YEAH, ESPECIALLY IF YOU HAVE THREE PAGES OF

1 ICONS. IT'S EASIER TO FIND THE APPLICATION PROGRAM
2 YOU WANT IF IT'S ARRANGED IN ALPHABETICAL ORDER;
3 RIGHT?

4 A I WOULD PROBABLY, IF I WERE DESIGNING IT, I
5 WOULD ARRANGE THINGS IN ORDER THAT I THOUGHT WOULD
6 BE THE MOST FREQUENTLY USED.

7 BUT I THINK IT'S A -- THAT, WHAT YOU SAY,
8 SOMETIMES ALPHABETICAL MAKES TOTAL SENSE.

9 IT OFTEN MAKES SENSE, YOU KNOW, TYPE
10 FACES, YOU'VE GOT A SUPER LONG LIST OF 50 NAMES,
11 SCREEN ELEMENTS TENDS TO DEPEND HOW MANY YOU'RE
12 TALKING ABOUT, AND HOW THEY'RE DISPLAYED.

13 SO I WOULDN'T CATEGORICALLY SAY THAT
14 ALPHABETICAL IS PREFERRED TO NOT ALPHABETICAL.

15 Q WELL, LET'S TALK ABOUT A HOME SCREEN.

16 THAT'S WHERE YOU COULD PUT -- A USER CAN
17 ACTUALLY TOUCH AND DRAG THEIR FAVORITE APPLICATIONS
18 TO THEIR HOME SCREEN WHERE THEY CAN SEE THEM FAST
19 AS SOON AS THEY PICK UP THEIR PHONE; RIGHT?

20 A YES.

21 Q WHEREAS AN APPLICATIONS SCREEN IS SIMPLY A
22 LIST OF ALL OF YOUR APPLICATIONS; RIGHT?

23 A RIGHT.

24 Q AND SO FOR AN APPLICATION SCREEN, IT MAKES
25 SENSE THAT YOUR ICONS ARE IN ALPHABETICAL ORDER SO

1 YOU CAN FIND THEM; RIGHT?

2 A I WOULDN'T -- I WOULDN'T SAY THAT BECAUSE YOU
3 MIGHT WANT YOUR GAMES TOGETHER AND YOUR ART
4 PROGRAMS TOGETHER AND YOUR CAMERA STUFF TOGETHER,
5 AND THAT MIGHT BE A BETTER SPACIAL WAY TO FIND
6 THINGS.

7 YOU KNOW, IT DEPENDS ON THE PERSON.

8 Q AND YOU MIGHT WANT A PLACE YOU CAN GO TO SEE
9 AN ENTIRE LIST OF YOUR APPLICATIONS TO SEE IF YOU
10 DOWNLOADED SOMETHING OR NOT, RIGHT?

11 A I DON'T DISPUTE ALPHABETICAL CAN BE USEFUL,
12 BUT I WOULDN'T SAY THAT IS IT FOR EASE OF USE.

13 Q NOW, YOU MENTIONED IN YOUR ANSWER A FEW
14 MINUTES AGO, YOU REFERENCED FUNCTIONALITY.

15 DO YOU REMEMBER THAT GENERALLY?

16 A YES.

17 Q WOULD YOU AGREE WITH ME THAT THE ICONS ON THE
18 D'305 DESIGN ARE AT LEAST IN PART FUNCTIONAL?

19 A ICONS IN GENERAL HAVE A PURPOSE.

20 THE D'305, AS I UNDERSTAND IT, IS AN
21 ORNAMENTAL DESIGN, SO IT'S, IT'S A PICTURE.

22 Q WHEN YOU SAY ICONS HAVE A PURPOSE, WHAT DO YOU
23 MEAN?

24 A I MEAN THAT TO GENERALIZE, YOU INTERACT WITH
25 ONE AND SOMETHING HAPPENS.

1 Q THE PURPOSE OF ICONS IS TO COMMUNICATE
2 INFORMATION TO THE USER; RIGHT?

3 A YES.

4 Q ICONS ARE SORT OF LIKE TRAFFIC SIGNS?

5 A YES.

6 Q THEY HELP USERS MAKE CHOICES AMONG OPTIONS?

7 A YES.

8 Q ICONS CAN ALSO BE USED ON TOUCHSCREENS WHERE
9 YOU DON'T HAVE A LOT OF SPACE TO SAVE SPACE; RIGHT?

10 A THAT IS AN OPTION. THERE ARE -- AGAIN,
11 THERE'S -- THERE ARE NO HARD AND FAST RULES.

12 Q ICONS ARE ALSO USEFUL BECAUSE IT CAN BE
13 UNDERSTOOD BY DIFFERENT PEOPLE WHO SPEAK DIFFERENT
14 LANGUAGES; RIGHT?

15 A AS OPPOSED TO TEXT, SOMETIMES A PICTURE IS
16 UNIVERSAL.

17 Q I CAN LOOK AT THIS CLOCK AND IT DOESN'T MATTER
18 WHAT COUNTRY I'M FROM, I DON'T HAVE TO SPEAK
19 ENGLISH, I CAN SEE THE CLOCK AND THAT WOULD
20 COMMUNICATE TO ME AS A USER THAT IF I HIT THAT
21 ICON, I'LL LAUNCH THE CLOCK APPLICATION; RIGHT?

22 A YES.

23 Q SAME THING WITH THIS ICONIC PHONE SYMBOL FROM,
24 WHAT DID YOU SAY, THE '50S, '40S?

25 A '38.

1 Q '38?

2 A BUT IT EVOLVED OVER TIME.

3 Q EVERYBODY SEEING THAT KNOWS, HEY, THAT'S
4 COMMUNICATING TO ME IF I HIT THAT BUTTON, I'LL
5 LAUNCH THE PHONE APPLICATION; RIGHT?

6 A GENERALLY, YES.

7 Q PEOPLE FROM DIFFERENT COUNTRIES WHO SPEAK
8 DIFFERENT LANGUAGES WOULD UNDERSTAND THAT?

9 A YES.

10 Q YOU AGREE THAT FAMILIAR REAL WORLD OBJECTS
11 MAKE GOOD ICONS; RIGHT?

12 A YES AND NO. SOMETIMES USING A REAL WORLD
13 OBJECT WHERE, LET'S SAY, A PRINTER, A PRINTER LOOKS
14 SO MUCH DIFFERENT TEN YEARS LATER THAT SOMETIMES WE
15 FIND VESTIGES OF THINGS THAT LOOK ODD BECAUSE THE
16 INDUSTRIAL DESIGN CHANGES. SO SOMETIMES USING --
17 SOMETIMES A METAPHOR IS STRONGER BECAUSE YOU'RE NOT
18 TIED TO A PARTICULAR WAY SOMETHING LOOKS IN TIME.

19 Q OKAY. YOU DON'T DISPUTE THAT THE ICONS USED
20 IN THE D'305 HERE WERE CHOSEN TO COMMUNICATE THE
21 VARIOUS FUNCTIONS OF THE APPLICATIONS ON THE
22 DEVICE, DO YOU?

23 A THE D'305 DOESN'T SAY ANYTHING IN THE PATENT
24 ABOUT THOSE PARTICULAR DESIGNS. I'M -- I CAN --
25 AND I WASN'T INVOLVED IN THE DESIGN OF THOSE, SO I

1 CAN SPECULATE.

2 Q ISN'T IT TRUE THAT IN YOUR OPINION, THE WAY
3 THE D'305 IS SET UP IS THE MOST EFFECTIVE VISUAL
4 WAY TO COMMUNICATE THE FUNCTIONS ON THE PHONE?

5 A ON A PHONE?

6 Q YES.

7 A WELL, NO. I MEAN, THE D'305 PATENT DOESN'T
8 SAY IT'S A PHONE. IT JUST SAYS IT'S A DEVICE.

9 Q WHEN YOU LOOK AT THE D'305, YOU DON'T DISPUTE
10 THAT THE CLOCK ICON COMMUNICATES TO A CONSUMER THAT
11 IF THEY PUSH THAT BUTTON, IT'LL LAUNCH THE CLOCK
12 APPLICATION FUNCTION?

13 A YES.

14 Q AND THE SAME IS TRUE FOR THE CALCULATOR;
15 RIGHT? IT INDICATES TO THE CONSUMER, IT
16 COMMUNICATES TO THE CONSUMER FUNCTIONAL
17 INFORMATION, I.E., IF YOU HIT THAT ICON, THE
18 CALCULATOR ICON, IT'LL LAUNCH THE CALCULATOR
19 APPLICATION; RIGHT?

20 A WELL, AGAIN, THERE ISN'T ANYTHING THAT I SAW
21 IN THE D'305 THAT TALKS ABOUT WHAT ANY OF THOSE
22 THINGS DO. YOU KNOW, YOU READ THE WORD AND I'M
23 ASSUMING THOSE ARE ALL ILLUSTRATIONS OF POSSIBLE
24 ICONS.

25 Q THAT'S THE WHOLE POINT OF AN ICON IS TO

1 COMMUNICATE TO THE USER -- WITHDRAW THE QUESTION.

2 ISN'T IT TRUE THE WHOLE POINT OF AN ICON
3 ON A SMARTPHONE IS TO COMMUNICATE TO THE CONSUMER
4 USING THAT PRODUCT, THAT IF THEY HIT THAT ICON,
5 CERTAIN FUNCTIONALITY WILL OCCUR ON THE PHONE?

6 A GENERALLY, YES.

7 BUT THAT'S NOT SPELLED OUT, IN MY
8 UNDERSTANDING, IN THE D'305 DESIGN.

9 Q OKAY. GIVEN THAT IT'S NOT SPELLED OUT, YOU
10 AGREE GENERALLY THAT, AS AN EXPERT ON ICONS --

11 A YEAH.

12 Q -- THAT THAT'S THE WAY ICONS ARE FOR, RIGHT?
13 ON SMARTPHONES AT LEAST?

14 A UM --

15 Q TO COMMUNICATE TO THE CONSUMERS, HEY, IF YOU
16 HIT THIS BUTTON, CERTAIN FUNCTIONS WILL HAPPEN. IF
17 YOU HIT THIS OTHER BUTTON, OTHER DIFFERENT
18 FUNCTIONS WILL HAPPEN; RIGHT?

19 A AGREED. VISUAL SHORTHAND FOR SOMETHING.

20 Q AND THE BEST ICONS ARE THE ONES THAT CAN
21 COMMUNICATE THAT FUNCTIONALITY THE BEST SO THE USER
22 ISN'T CONFUSED ABOUT WHICH BUTTONS WILL DO WHAT;
23 RIGHT?

24 A GOOD ICONS COMMUNICATE CLEARLY AND
25 CONSISTENTLY.

1 Q AND THEY -- ON SMARTPHONES, THEY COMMUNICATE
2 TO THE CONSUMER WHAT THE FUNCTIONALITY OF THE PHONE
3 IS? IN OTHER WORDS, IF YOU HIT THIS BUTTON, YOU'LL
4 LAUNCH THE PHONE APPLICATION. IF YOU HIT THIS
5 OTHER BUTTON, YOU'LL LAUNCH THE CAMERA APPLICATION.
6 FAIR?

7 A IF SOMEONE HAD GENERAL KNOWLEDGE THAT THEY
8 BRING TO IT, YES.

9 MR. VERHOEVEN: YOUR HONOR, I'M ABOUT TO
10 CHANGE SUBJECTS. DO YOU WANT TO TAKE THE LUNCH
11 NOW?

12 THE COURT: SURE. IT'S 1202. AGAIN,
13 PLEASE KEEP AN OPEN MIND. DON'T DISCUSS THE CASE
14 WITH ANYONE AND PLEASE DON'T DO ANY OF YOUR OWN
15 RESEARCH.

16 GO AHEAD -- ACTUALLY, IF YOU COULD JUST
17 LEAVE YOUR NOTEBOOKS IN THE JURY ROOM. THANK YOU.
18 WE'LL SEE YOU BACK AT 1:00 O'CLOCK.

19 (WHEREUPON, THE FOLLOWING PROCEEDINGS
20 WERE HELD OUT OF THE PRESENCE OF THE JURY:)

21 THE COURT: OKAY. THANK YOU ALL.

22 (WHEREUPON, THE LUNCH RECESS WAS TAKEN.)
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AFTERNOON SESSION

(WHEREUPON, THE FOLLOWING PROCEEDINGS WERE HELD OUT OF THE PRESENCE OF THE JURY:)

THE COURT: ALL RIGHT. LET ME ASK ONE QUICK QUESTION, BECAUSE THIS IS COMING UP WITH MR. DENISON AND WITH MS. KARE.

THANK YOU, PLEASE TAKE A SEAT.

EXHIBIT 44, LET ME HEAR, BECAUSE I THINK MAYBE I'VE BEEN TOO HARD WITH THE FOUNDATION, I'M ASSUMING THAT SAMSUNG IS NOT GOING TO ARGUE THAT THIS IS NOT A SAMSUNG DOCUMENT. OR ARE YOU?

ARE YOU GOING TO SAY IT WAS FABRICATED? IT'S NOT YOUR DOCUMENT OR ANYTHING ELSE WITH THE COMPARISON? I THINK IT'S HIGHLY RELEVANT. I THINK IT WAS UNFORTUNATE IF IT WASN'T PRODUCED BEFORE MR. DENISON WAS DEPOSED FOR THE PRELIMINARY INJUNCTION.

LET ME HEAR, WHAT'S YOUR POSITION ON THAT, BECAUSE THIS KEEPS COMING UP, AND I'D LIKE TO GET IT ADDRESSED.

MR. VERHOEVEN: OUR POSITION?

THE COURT: YEAH.

MR. VERHOEVEN: WE'RE NOT CHALLENGING THAT IT'S A SAMSUNG DOCUMENT, YOUR HONOR, BUT THERE'S BEEN NO FOUNDATION LAID FOR ADMISSION, FOR

1 ADMISSIBILITY.

2 THE COURT: SO WHAT IS YOUR REQUIREMENT,
3 THAT THEY BRING IN A SAMSUNG EMPLOYEE FROM KOREA
4 WHO CAN SAY THAT, YES, HE/SHE WORKED ON THAT
5 DOCUMENT?

6 MR. VERHOEVEN: IF THEY HAVE DEPOSITION
7 TESTIMONY THAT LAYS THE FOUNDATION OF THE DOCUMENT,
8 WE CAN PUT IF IN THAT WAY, YOUR HONOR.

9 BUT AS WITH ALL OF THESE EXHIBITS, YOU
10 NEED TO LAY A FOUNDATION BEFORE THEY COME IN. AND
11 THE OBJECTION I HAD THIS MORNING, YOUR HONOR, WAS
12 THAT WE DON'T BELIEVE THAT AN EXPERT WITNESS IS
13 SOMEBODY WHO CAN LAY A FOUNDATION --

14 THE COURT: I'M NOT GOING TO ALLOW THAT
15 IT COME IN THROUGH HER. I JUST WANT TO RESOLVE
16 THIS ISSUE.

17 MR. VERHOEVEN: I'M SORRY. WHAT WE'RE
18 SAYING IS THEY NEED TO DO IT THE RIGHT WAY, HAVE A
19 WITNESS WHO THEY'VE HAD OVER A ONE DEPOSITION, I
20 THINK IN THIS CASE, SAMPLE WITNESSES, AND THIS WAS
21 THEIR JOB TO SHOW THIS TO A WITNESS AND GET THE
22 FOUNDATION SO THAT THEY CAN MOVE IT INTO EVIDENCE.
23 AND --

24 THE COURT: RIGHT. BUT I DON'T THINK IT
25 SHOULD BE -- YOU KNOW, SAMSUNG SHOULD HAVE PRODUCED

1 THAT DOCUMENT FOR THE PRELIMINARY INJUNCTION.

2 MR. DENISON SHOULD HAVE COLLECTED THAT
3 DOCUMENT FOR HIS 30(B)(6) DEPOSITION.

4 SO I DON'T THINK IT'S FAIR TO REWARD
5 SAMSUNG FOR NOT DISCLOSING THAT DOCUMENT, NOT
6 HAVING THEIR CORPORATE REPRESENTATIVE AWARE OF THAT
7 DOCUMENT AND THEN USE THAT TO SAY, LOOK, OUR
8 CORPORATE REPRESENTATIVE DOESN'T KNOW ABOUT THIS
9 DOCUMENT, WHEN HE SHOULD HAVE PRODUCED IT, HE
10 SHOULD HAVE COLLECTED IT, IT SHOULD HAVE BEEN PART
11 OF HIS TESTIMONY FOR THE P.I.

12 BUT LET ME HEAR FROM APPLE ON THIS ISSUE.

13 MR. MCELHINNY: OUR VIEW, YOUR HONOR, IS
14 THAT, IN FACT, WE'RE MERGING TWO DIFFERENT ISSUES.

15 WE HAVE A DOCUMENT. THE QUESTION IS
16 WHETHER OR NOT THE DOCUMENT COMES INTO EVIDENCE.

17 IN ORDER TO GET THE DOCUMENT INTO
18 EVIDENCE, WE HAVE TO PROVE THAT IT'S AUTHENTIC,
19 THAT HAS BEEN STIPULATED; AND WE HAVE TO PROVE THAT
20 IT'S A BUSINESS RECORD.

21 AND YOUR HONOR HAS ALREADY RULED THAT IT
22 IS AN ADMISSION AGAINST INTEREST BECAUSE OF THE
23 CONTENTS AND THAT, IN OUR VIEW, SHOULD BE ENOUGH TO
24 GET THE DOCUMENT INTO EVIDENCE.

25 ONCE THE DOCUMENT COMES INTO EVIDENCE,

1 THEN THE FOUNDATIONAL ISSUE, IT DOESN'T GO TO A
2 DOCUMENT, THE FOUNDATIONAL ISSUE GOES TO THE
3 ABILITY OF ANY PARTICULAR WITNESS TO SPEAK ABOUT
4 THE DOCUMENT, WHETHER OR NOT THERE'S A FOUNDATION
5 FOR THAT WITNESS'S TESTIMONY.

6 AND YOUR HONOR RULED THAT THERE WAS
7 FOUNDATION FOR MR. DENISON BECAUSE IT SHOULD HAVE
8 COME IN, IT WAS WITHIN THE SCOPE OF HIS 30(B)(6),
9 SO HE SHOULD HAVE BEEN ABLE TO TESTIFY ABOUT IT.

10 BUT, OF COURSE, LIKE MANY OF THE SAMSUNG
11 WITNESSES, THEY'VE NEVER SEEN ANY OF THESE
12 DOCUMENTS BEFORE.

13 BUT WE DO THINK THAT ONCE THE DOCUMENT
14 COMES IN, WE THINK THE DOCUMENT SHOULD BE IN, THAT
15 IT IS APPROPRIATE FOR AN EXPERT TO BE ABLE TO SAY
16 THIS IS WHAT IT MEANS AND THIS IS WHAT IT SAYS AND
17 THIS IS WHAT IT TEACHES BECAUSE THAT IS APPLYING
18 EXPERTISE TO AN ADMISSION OF A PARTY OPPONENT.

19 WE DISAGREE THAT IN ORDER TO USE AN
20 ADMISSION, WE HAVE TO GET SOME SAMSUNG WITNESS ON
21 THE STAND AND SAY, OH, YES, THIS IS AN ADMISSION.

22 WE'RE PAST THAT. THE DOCUMENT IS 99
23 ADMISSION, AND THE DOCUMENT SHOULD BE IN EVIDENCE,
24 THE ENTIRE -- IN OUR VIEW, THE ENTIRE DOCUMENT
25 SHOULD BE IN EVIDENCE FOR ALL PURPOSES.

1 THE COURT: ALL RIGHT. WELL, I'M GOING
2 TO ADMIT THIS DOCUMENT, AND IT WILL BE THE SAME
3 POLICY FOR BOTH. APPLE WILL NOT BE ABLE TO HIDE
4 BEHIND, OH, OUR WITNESS HAS NEVER SEEN THIS
5 DOCUMENT BEFORE.

6 IF IT'S A RELEVANT DOCUMENT AND MEETS THE
7 BALANCING TEST OF 403, IT'S COMING IN.

8 MR. MCELHINNY: THANK YOU, YOUR HONOR.

9 AND TO BE CLEAR, BECAUSE I DON'T WANT TO
10 BE -- AND THEN ONCE IT IS IN EVIDENCE, THE QUESTION
11 IS WHETHER OR NOT A PARTICULAR WITNESS HAS
12 LEGITIMATE TESTIMONY THAT THEY CAN BRING TO BEAR ON
13 THAT, ON THAT DOCUMENT WHICH IS IN EVIDENCE.

14 AND SO EXPERTS SHOULD BE ABLE TO SAY,
15 THIS IS WHAT THIS DOCUMENT IS SAYING, THIS IS WHAT
16 IT'S TEACHING, AND THESE ARE THE CONCLUSIONS -- IF
17 IT'S WITHIN THE SCOPE OF THE -- IF IT'S SUBJECT TO
18 THE LIMITATIONS ON THE WITNESS'S TESTIMONY, THEN
19 THE WITNESS SHOULD BE ABLE TO TESTIFY ABOUT.

20 MR. VERHOEVEN: YOUR HONOR, WHAT --
21 SORRY.

22 THIS IS A SLIGHTLY DIFFERENT POINT,
23 BUT -- BECAUSE WE HAVE A WITNESS ON THE STAND WHO
24 IS AN EXPERT WITH RESPECT TO THE ISSUES OF DESIGN
25 INFRINGEMENT AND TRADE DRESS.

1 I WANT TO POINT OUT THAT IN RESPONSE TO
2 OUR INTERROGATORY ASKING THEM FOR THEIR BASIS, FOR
3 EXAMPLE, FOR TRADE DRESS OR TRADEMARK INFRINGEMENT,
4 INTERROGATORY NUMBER 71, THIS DOCUMENT WAS NEVER
5 IDENTIFIED.

6 AND SO THAT'S A SEPARATE BASIS FOR THIS
7 WITNESS, AND THAT'S WHY I WAS TRYING TO CONVEY,
8 WHEN I WAS OBJECTING EARLIER, IN ADDITION --

9 THE COURT: I'M GOING TO CHARGE THIS TIME
10 TO BOTH PARTIES. OKAY. IT'S 1:07. GO AHEAD.

11 MR. VERHOEVEN: THAT'S IT. I JUST WANTED
12 TO POINT OUT IT WASN'T DISCLOSED IN RESPONSE TO
13 CONTENTION INTERROGATORIES.

14 THE COURT: OKAY. AND WHAT SPECIFIC
15 ISSUE WASN'T DISCLOSED? BECAUSE UNFORTUNATELY, WE
16 HAVE A LOT GOING ON HERE. WE HAVE THE DESIGN
17 PATENT, TRADE DRESS, INFRINGEMENT AND DILUTION ON
18 THE TABLETS. WE'VE GOT JUST DILUTION ON THE
19 PHONES.

20 SO I JUST NEED A LITTLE BIT MORE
21 SPECIFICITY.

22 MS. KREVANS: IN RESPONSE TO
23 INTERROGATORY NUMBER 7 FROM SAMSUNG, YOUR HONOR,
24 WHICH ASKED US TO STATE ALL FACTS SUPPORTING ANY
25 CONTENTION BY APPLE THAT SAMSUNG HAS WILLFULLY

1 INFRINGED, DILUTED OR FALSELY DESIGNATED THE ORIGIN
2 OF ITS PRODUCTS FOR EACH PATENT, TRADE DRESS, AND
3 TRADEMARK, WE GAVE, AS PART OF OUR RESPONSE, A LIST
4 OF DOCUMENTS WHICH INCLUDE THIS DOCUMENT, AND IT'S
5 RIGHT IN THE RESPONSE.

6 AND IT'S IN THE RESPONSE AT PAGE 9 -- IS
7 THIS IT, MS. TAYLOR, ON LINE 14?

8 PAGE 9, LINE 14.

9 THE COURT: LET ME SEE THAT, PLEASE.

10 MS. KREVANS: IT'S A LONG RESPONSE, YOUR
11 HONOR, YOU HAVE TO FLIP BACK A FEW PAGES TO SEE THE
12 START OF THE INTERROGATORY.

13 THE COURT: WHAT IS THIS HIGHLIGHTED,
14 MM --

15 MS. KREVANS: THAT'S THE BEGINNING BATES
16 NUMBER OF THE DOCUMENT, EXHIBIT 44.

17 (PAUSE IN PROCEEDINGS.)

18 THE COURT: ALL RIGHT. SO WHAT'S YOUR
19 OBJECTION TO THIS?

20 MR. VERHOEVEN: THERE'S TWO THINGS, YOUR
21 HONOR.

22 THE COURT: UM-HUM.

23 MR. VERHOEVEN: THIS WITNESS WAS -- THE
24 DOCUMENT WAS SHOWN IN THE TESTIMONY IS TRYING TO BE
25 ELICITED FOR THE TRUTH OF THE MATTER AS TO

1 CONFUSION, LIKELIHOOD OF CONFUSION.

2 THAT WAS OUR INTERROGATORY 71. THAT'S A
3 DIFFERENT CONTENTION INTERROGATORY. IT WAS NOT
4 LISTED FOR THAT PURPOSE.

5 THIS INTERROGATORY THAT COUNSEL IS
6 SHOWING YOU HAS TO DO WITH THE ISSUE OF
7 WILLFULNESS, I BELIEVE. LET ME DOUBLE-CHECK.

8 THE COURT: WILLFUL INFRINGEMENT,
9 DILUTION, FALSE DESIGNATION.

10 BUT CONFUSION IS RELEVANT TO ASSOCIATION
11 FOR DILUTION, SO IT'S PROBATIVE. CONFUSION IS
12 STILL PROBATIVE FOR ASSOCIATION, WHICH YOU NEED FOR
13 DILUTION.

14 MR. VERHOEVEN: THAT'S WHAT I'M SAYING.
15 I'M SORRY. I WASN'T CLEAR.

16 THE COURT: OKAY.

17 MR. VERHOEVEN: WHAT I'M SAYING IS WE
18 PROPOUNDED AN INTERROGATORY, 71, WHERE WE SAID TELL
19 US WHAT YOUR CONTENTIONS ARE WITH RESPECT TO
20 CONFUSION, AFFILIATION. I CAN READ THE WHOLE THING
21 IN THE RECORD IF YOU'D LIKE.

22 AND IN RESPONSE TO THAT, THIS WAS NEVER
23 IDENTIFIED.

24 WHAT COUNSEL IS POINTING YOU TO IS
25 WILLFULNESS CONTENTION INTERROG, AND SHE'S ALSO

1 POINTING TO A LIST OF I DON'T KNOW HOW MANY, IT
2 LOOKS LIKE OVER 100 DOCUMENTS THAT ARE JUST ON A
3 LIST WHICH MAGISTRATE JUDGE GREWAL HAS TOLD US IS
4 INSUFFICIENT, INSUFFICIENT RESPONSE IN CONTENTION
5 INTERROGATORIES IN RESPONSE TO OUR POINTING THAT
6 OUT.

7 SO I GUESS THERE'S TWO POINTS, YOUR
8 HONOR. ONE, THAT WITH RESPECT TO THE TESTIMONY I
9 OBJECTED TO ON DIRECT FOR THIS WITNESS TODAY, THE
10 TESTIMONY THE WITNESS WAS GIVING WAS POINTING TO
11 THIS DOCUMENT FOR THE TRUTH OF THE MATTER AS TO
12 CONCLUSION, AND THAT'S OBJECTIONABLE TO US BECAUSE
13 THIS DOCUMENT WAS NEVER IDENTIFIED.

14 AND, SECONDLY, EVEN IF YOU CONSIDER THE
15 WILLFULNESS CONTENTION INTERROG, ALL WE'VE GOT IS A
16 LIST OF OVER 100 DOCUMENTS.

17 THE COURT: NO. I JUST COUNTED. THERE
18 ARE 62 DOCUMENTS. IT'S ON PAGE 9, LINES 11 THROUGH
19 26. IT'S 62 DOCUMENTS SPECIFYING THE BATES
20 NUMBERS.

21 BUT THE INTERROGATORY NUMBER 7 ASKS FOR
22 ALL FACTS SUPPORTING ANY CONTENTION BY APPLE THAT
23 SAMSUNG HAS WILLFULLY INFRINGED, DILUTED OR FALSELY
24 DESIGNATED THE ORIGIN OF ITS PRODUCTS FOR EACH
25 PATENT, TRADE DRESS, AND TRADEMARK, INCLUDING WHEN

1 AND HOW APPLE AND SAMSUNG HAD ACTUAL NOTICE OF THE
2 APPLE PATENTS-IN-SUIT, APPLE TRADE DRESS, AND APPLE
3 TRADEMARK.

4 SO I'M GOING TO OVERRULE THE OBJECTION
5 ABOUT DISCLOSURE BECAUSE I FIND THAT THIS IS
6 SUFFICIENT.

7 SO IF YOU WANT TO KEEP ARGUING IT, IT'S
8 NOW JUST GOING TO BE BILLED STRAIGHT TO SAMSUNG'S
9 TIME.

10 MR. VERHOEVEN: I THINK THAT COMPLETES
11 OUR ARGUMENT, YOUR HONOR.

12 THE COURT: OKAY. ALL RIGHT. I'M GOING
13 TO RETURN THIS -- THAT WAS FROM THE APPLE'S
14 CORRECTED AMENDED OBJECTIONS AND RESPONSES TO
15 SAMSUNG ELECTRONICS' LIMITED INTERROGATORIES NUMBER
16 4, 6, 7, 16, 17, 18 TO APPLE, INC.

17 ALL RIGHT.

18 (WHEREUPON, THE FOLLOWING PROCEEDINGS
19 WERE HELD IN THE PRESENCE OF THE JURY:)

20 THE COURT: ALL RIGHT. WELCOME BACK.

21 OH, PLEASE TAKE A SEAT. SORRY. I FORGET
22 THAT.

23 ALL RIGHT. GO AHEAD, PLEASE.

24 IT'S 1:13.

25 MR. VERHOEVEN: THANK YOU, YOUR HONOR.

1 Q GOOD AFTERNOON, DR. KARE.

2 A GOOD AFTERNOON.

3 Q I'D LIKE TO SWITCH SUBJECTS AND TALK A LITTLE
4 BIT ABOUT THE PLACEMENT OF ICONS ON THE USER
5 INTERFACE.

6 WOULD YOU AGREE THAT THERE ARE PRACTICAL
7 ENGINEERING CONSIDERATIONS INVOLVED IN THE SPACING
8 FOR THE ICONS ON A GRAPHICAL USER INTERFACE?

9 A GENERALLY, YES.

10 Q THE USER INTERFACE SHOULD BE ORGANIZED OR MUST
11 BE ORGANIZED SO THAT THERE'S ENOUGH SPACE FOR THE
12 ICON SO THE USER CAN ACTUALLY SELECT THE ICON;
13 RIGHT?

14 A YES.

15 Q SO A DESIGNER HAS TO TAKE INTO ACCOUNT THE
16 SPACE REQUIRED ON THE TOUCHSCREEN TO EFFECTIVELY
17 SELECT AN ICON IN DECIDING HOW TO POSITION ICONS ON
18 THE SCREEN?

19 A IT'S FAIR TO SAY THAT IF IT'S A TOUCHSCREEN
20 AND YOU'RE USING YOUR FINGER AND NOT A STYLUS, THEN
21 THERE'S SOME PRACTICAL CONSIDERATION OF HOW CLOSE
22 THINGS -- HOW CLOSE AREAS COULD BE TOGETHER AND HOW
23 BIG THEY ARE.

24 Q RIGHT. SO IF YOU HAD, FOR EXAMPLE, A COMPUTER
25 SCREEN AND YOU'RE USING A MOUSE, YOU CAN USE -- YOU

1 CAN HAVE SMALLER ICONS IF YOU WANTED TO AND JUST
2 CLICK ON THE POINT; RIGHT?

3 A YOU HAVE A ONE PIXEL POINTER.

4 Q RIGHT.

5 A EASY TO BE PRECISE.

6 Q NOW, IF YOU HAD ONE OF THOSE OUGHT PALM PILOTS
7 WHERE YOU HAD A STYLUS -- DO YOU REMEMBER THOSE?

8 A YES.

9 Q THAT WOULD BE A TIGHT LITTLE POINT THAT YOU
10 PUSH; RIGHT?

11 A YES.

12 Q AND THAT'S ALL THE SPACE YOU'D NEED?

13 A YOU KNOW, MAYBE THERE'S OTHER -- YOU KNOW,
14 VISUAL DESIGN.

15 Q OF COURSE.

16 A BUT, YES.

17 Q SO -- BUT IF YOU HAVE ONE OF THESE NEWER
18 SMARTPHONES THAT ARE DESIGNED TO HAVE A TOUCHSCREEN
19 WITH JUST YOUR FINGER, YOU DON'T NEED A STYLUS,
20 THEN YOU NEED A LARGER AREA BECAUSE THE FINGER
21 TOUCH IS LARGER; RIGHT?

22 A YES.

23 Q SO THAT CAN AFFECT THE NUMBER OF OR HOW BIG
24 THE ICONS NEED TO BE?

25 A IT WOULD AFFECT HOW BIG THE HIT AREA NEEDS TO

1 BE, THE ICON AND THE HIT AREA THAT ARE SENSITIVE TO
2 THE FINGER DON'T NEED TO BE EXACTLY THE SAME SIZE.

3 Q WELL, THEY NEED TO BE ABOUT THE SAME SIZE,
4 DON'T THEY?

5 A YOU CAN HAVE THE ICON IS THE TARGET AND THE
6 HIT AREA COULD BE A HALO AROUND IT SO THAT YOU
7 DON'T NEED TO HAVE EVERY PIXEL THAT'S SENSITIVE TO
8 YOUR FINGER BE PART OF THE ICON.

9 Q IS ONE REASON WHY THE DOCK OR FAVORITES GROUP
10 THAT WAS AT THE BOTTOM OF THE D'305 DESIGN
11 PATENT -- D'305 DESIGN PATENT IS PUT DOWN THERE
12 BECAUSE, BY DESIGN FUNCTIONALLY, YOU WANT THE
13 USER'S THUMB TO BE ABLE TO TOUCH THE ICON WHILE
14 STILL HOLDING THE PHONE WITH THE REST OF THE HAND?

15 A I THINK OF THE D'305 PATENT AS JUST A PICTURE.
16 IT DOESN'T REALLY SAY ANYTHING ABOUT HOW ANYTHING
17 WORKS.

18 SO ALL I CAN REALLY SEE IN THAT PATENT --
19 IN THAT ORNAMENTAL DESIGN IS THAT THERE ARE FOUR
20 ICONS AT THE BOTTOM.

21 Q WELL, YOU ALSO TALKED ABOUT TRADE DRESS.

22 DO YOU REMEMBER THAT?

23 A YES.

24 Q AND DID YOU CONSIDER ANY FUNCTIONAL
25 CONSIDERATIONS WHEN YOU WERE TALKING ABOUT TRADE

1 DRESS -- WHEN YOU WERE FORMING YOUR OPINIONS ABOUT
2 TRADE DRESS?

3 A BECAUSE I WAS ASKED ABOUT THE OVERALL VISUAL
4 IMPRESSION, TO THE EXTENT THAT THE OVERALL VISUAL
5 IMPRESSION INCLUDES, YOU KNOW, ABOUT 20 THINGS, I
6 ASSUMED FROM THAT THAT YOU NEED TO HAVE AN
7 AFFORDANCE TO MAKE THOSE THINGS HAPPEN.

8 BUT I DIDN'T CONSIDER REALLY THE
9 MECHANICS OF, YOU KNOW -- IT WAS MUCH MORE FOCUSED
10 ON HOW THINGS LOOKED VERSUS HOW THINGS WORKS, MY
11 PARTICULAR ANALYSIS FOR WHAT I WAS ASKED TO DO.

12 Q IS IT FAIR TO SAY THAT YOU DIDN'T INVESTIGATE
13 THE FUNCTIONALITY OF THE ICONS AND HOW THEY WORK
14 AND HOW A USER WOULD INTERACT WITH THEM AS PART OF
15 YOUR ANALYSIS?

16 A YES.

17 Q NOW, ISN'T IT -- I THINK YOU TALKED A LITTLE
18 BIT ABOUT THE SHAPE OF THE ICON BEING A RECTANGLE.

19 DO YOU REMEMBER THAT?

20 A YES.

21 Q THERE'S A REASON PEOPLE DON'T HAVE TRIANGULAR
22 SHAPED ICONS ON SMARTPHONES, ISN'T THERE?

23 A THERE'S NO REASON YOU COULDN'T.

24 Q HAVE YOU EVER SEEN ANY?

25 A NO. BUT I WOULDN'T SAY THAT BECAUSE YOU

1 HAVEN'T SEEN SOMETHING DOESN'T MEAN IT'S NOT A
2 REASONABLY -- IT COULDN'T WORK.

3 Q WELL, YOU WOULD AGREE WITH ME THAT TRIANGULAR
4 ICONS WOULD NOT WORK AS WELL AS RECTANGULAR ICONS
5 ON A SMARTPHONE?

6 A I WOULDN'T AGREE WITH YOU THAT THAT IS A
7 TRUISM.

8 Q SO YOU THINK TRIANGULAR CONTAINERS WORK JUST
9 AS WELL AS RECTANGULAR CONTAINER S?

10 A I THINK YOU NEED TO UNDERSTAND THE DESIGN
11 PROBLEM AND, YOU KNOW, SOMETIMES IF YOU HAVE A
12 SQUARE, IT COULD BE DIVIDED INTO TWO TRIANGLES. SO
13 IF YOU NEEDED TO GET COURT THINGS ON THAT SCREEN, A
14 SCREEN, MAYBE THAT WOULD BE A GOOD WAY TO DO IT.

15 BUT IT ALSO WOULD -- IF YOU USE
16 TRIANGLES, THERE WOULD BE A LOT MORE BACKGROUND
17 SPACE BETWEEN THEM AND MAYBE THAT COULD BE A GOOD
18 DIFFERENTIATING FACTOR. I WOULDN'T RULE IT OUT.

19 Q WELL, YOU HAD YOUR DEPOSITION TAKEN IN APRIL
20 OF THIS YEAR; RIGHT?

21 A YES.

22 Q DO YOU REMEMBER THAT?

23 A YES.

24 Q AND YOUR DEPOSITION WAS TAKEN, YOU WERE UNDER
25 OATH JUST LIKE TODAY; RIGHT?

1 A YES.

2 Q I'D LIKE TO SHOW YOU AN EXCERPT FROM YOUR
3 TRANSCRIPT.

4 IF WE CAN JUST PUT UP THE WRITTEN
5 TRANSCRIPT, MR. FISHER, PAGE 117, LINE 18, AND IT
6 GOES THROUGH 118, LINE 14.

7 LOOK UP HERE, DOCTOR.

8 "QUESTION: DO YOU THINK THAT TRIANGULAR
9 CONTAINERS WOULD WORK JUST AS WELL AS RECTANGULAR
10 CONTAINERS?

11 "ANSWER: NO.

12 "QUESTION: AND WHY IS THAT?

13 "ANSWER: BECAUSE A TRIANGLE, EXCEPT
14 FOR -- IT'S HARD TO FIT A LOT OF IMAGES. IF YOU'RE
15 TRYING TO USE A TRIANGLE AS A BACKGROUND SHAPE,
16 YOU'D BE A LOT MORE LIMITED AS TO WHAT YOU COULD
17 FIT IN IT TO MODIFY IT BECAUSE YOU'D BE GIVING UP
18 ESSENTIALLY HALF OF YOUR REAL ESTATE."

19 DO YOU MEAN REMEMBER THAT TESTIMONY?

20 A I DO.

21 Q YOU AGREE WITH THAT, RIGHT?

22 MS. KREVANS: YOUR HONOR, COULD I ASK
23 THAT MR. VERHOEVEN READ THE ENTIRE QUESTION?

24 THE COURT: NO. YOU'LL HAVE AN
25 OPPORTUNITY IN REDIRECT.

1 THE WITNESS: THAT'S SOMETHING, BECAUSE I
2 REVIEWED MY DEPOSITION TESTIMONY FOR THIS EVENT,
3 THAT I WOULD SAY I THOUGHT MORE ABOUT IT, AND I
4 COULD ALSO EXPLAIN WHAT I MEANT.

5 A SQUARE DOES HAVE MORE REAL ESTATE.
6 BY MR. VERHOEVEN:

7 Q MY QUESTION IS WHETHER YOU STAND BY YOUR
8 TESTIMONY UNDER OATH AT YOUR DEPOSITION.

9 A I HAVE RETHOUGHT ABOUT THAT, AND IF I HAD THE
10 OPPORTUNITY TO ANSWER THAT QUESTION, I WOULD GIVE A
11 BIT OF A DIFFERENT ANSWER.

12 Q YOU DON'T STAND BY IT?

13 A I HAVE THOUGHT -- I HAVE HAD MORE THOUGHTS
14 ABOUT WHEN I WENT BACK AND RECONSIDERED IT.

15 Q OKAY. SO THE ANSWER TO MY QUESTION IS YOU
16 DON'T STAND BY IT? YOU WOULD RATHER HAVE A
17 DIFFERENT ANSWER?

18 A YES. OR THE REST OF MY ANSWER GOES ON TO
19 EXPLAIN WHAT I WAS TRYING TO SAY.

20 Q OKAY. LET'S LOOK AT THAT. "AND AT THE SAME
21 TIME, MAYBE THERE'S A -- HOW BIG ARE THEY? YOU
22 KNOW, HOW ARE YOU ARRANGING THEM? TRIANGLES ARE A
23 GOOD WAY TO GET MAYBE FOUR SHAPES IN A COMPACT
24 SPACE. MAYBE IF IT WAS SOMETHING THAT DIDN'T NEED
25 LABELS, IT COULD BE POSSIBLE. BUT IN GENERAL, A

1 TRIANGLE IS TOUGH. CIRCLES, EASIER. YOU DON'T
2 NEED A BACKGROUND SHAPE."

3 DO YOU STAND BY THAT TESTIMONY?

4 A YES.

5 Q OKAY. LET'S GO TO PDX 14.30, WHICH YOU WERE
6 SHOWN ON YOUR DIRECT EXAMINATION. DO YOU REMEMBER
7 YOU TALKED ABOUT THIS ON YOUR DIRECT EXAM?

8 A YES.

9 Q AND THIS IS THE BLACKBERRY TORCH SCREEN
10 CAPTURE; IS THAT RIGHT?

11 A YES.

12 Q AND YOU POINTED TO THIS AS AN EXAMPLE OF A
13 SCREEN DEPICTING ICONS THAT IS NOT SUBSTANTIALLY
14 SIMILAR TO THE D'305; RIGHT?

15 A YES.

16 Q BUT YOU SEE THERE'S A COLORFUL MATRIX OF ICONS
17 HERE; RIGHT?

18 A THEY ARE ARRANGED IN A GRID. THEY'RE NOT
19 QUITE AS COLORFUL, THESE PARTICULAR ICONS.

20 Q THEY'RE COLORFUL, AREN'T THEY? DO YOU SEE THE
21 DIFFERENT COLORS?

22 A THEY AREN'T MONOCHROME, BUT THE OVERALL EFFECT
23 OF THE WHOLE SCREEN ISN'T AS COLOR-INFUSED AS THE
24 IPHONE SCREEN, PARTLY BECAUSE THE ICONS ARE SMALLER
25 AND PARTLY BECAUSE MORE OF THEM TEND TOWARD THE

1 MONOCHROMATIC.

2 Q DO YOU SEE THIS RED ONE HERE?

3 A YES.

4 Q YOUTUBE?

5 A YES.

6 Q DO YOU SEE THIS BLUE ONE HERE, IT SAYS MEDIA,
7 THAT'S A GREEN ONE, RIGHT, IT SAYS CALENDAR? DO
8 YOU SEE THAT?

9 A YES.

10 Q AND YOU SEE THE YELLOW ONE DOWN AT THE BOTTOM
11 LEFT?

12 A YES.

13 Q AND YOU SEE, IS THAT VIOLET, THE ONE THAT SAYS
14 GAMES?

15 A YES, CLOSE ENOUGH.

16 Q THOSE ARE ALL DIFFERENT COLORS; RIGHT?

17 A YES.

18 Q AND THEY'RE COLORFUL, AREN'T THEY?

19 A I DIDN'T SAY THAT THERE WEREN'T COLORED.

20 BUT I STILL BELIEVE THE OVERALL IMPACT OF
21 THE SCREEN ON THE LEFT IS THAT MORE PIXELS
22 PROPORTIONALLY ON THAT SCREEN ARE BRIGHTLY COLORED
23 THAN ON THE SCREEN ON THE RIGHT.

24 BUT THERE DEFINITELY ARE COLORS.

25 Q YOU'RE NOT TELLING THE JURY THAT APPLE OWNS

1 THE RIGHT TO HAVE A COLORFUL MATRIX OF ICONS, ARE
2 YOU?

3 A NO.

4 Q AND YOU'RE NOT TELLING THE JURY THAT APPLE
5 OWNS THE EXCLUSIVE RIGHT TO HAVE THE ICONS ARRANGED
6 IN ROWS AND COLUMNS IN A GRID MATRIX, ARE YOU?

7 A NO.

8 Q TAKE THAT DOWN.

9 I THINK YOU TESTIFIED ON DIRECT THAT YOU
10 DID WORK FOR APPLE BEFORE; IS THAT RIGHT?

11 A YES.

12 Q AND THAT WAS BACK IN 1982?

13 A FROM 1982 THROUGH SOME POINT IN 1986, THE VERY
14 END OF 1982.

15 Q YOU WERE A GRAPHIC ARTIST IN THE MACINTOSH
16 SOFTWARE GROUP?

17 A YES.

18 Q AND THEN YOU WERE A CREATIVE DIRECTOR AT
19 APPLE?

20 A BRIEFLY, YES.

21 Q AND THEN YOU LEFT APPLE IN 1986 TO GO TO WORK
22 AT A COMPANY CALLED NEXT?

23 A YES.

24 Q IS IT CORRECT THAT A GROUP OF SENIOR
25 EXECUTIVES FROM APPLE LEFT IN 1986 AND JOINED AND

1 FORMED THE COMPANY CALLED NEXT?

2 A YES.

3 Q AND YOU WENT ALONG WITH THAT?

4 A NO. I WAS NOT IN THE -- I WASN'T A FOUNDER OF
5 NEXT.

6 Q BUT YOU LEFT APPLE TO GO JOIN NEXT WITH THAT
7 GROUP OF EXECUTIVES, RIGHT?

8 A I WAS HIRED. I WAS AN EARLY EMPLOYEE ONCE
9 NEXT WAS STARTED.

10 Q AND NEXT WAS STARTED BY A GROUP OF FORMER
11 APPLE EXECUTIVES; RIGHT?

12 A PEOPLE FROM APPLE. I DON'T KNOW IF THEY WERE
13 ALL EXECUTIVES.

14 Q AND YOU WORKED WITH THOSE PEOPLE UNTIL 1989?

15 A YEAH, I THINK I LEFT IN EARLY '89.

16 Q NOW, I DON'T KNOW IF YOU MENTIONED ON YOUR
17 DIRECT, BUT YOU'RE CHARGING APPLE FOR YOUR TIME ON
18 THIS CASE; IS THAT RIGHT?

19 A YES.

20 Q AND HOW MUCH ARE YOU CHARGING APPLE?

21 A FIVE HUNDRED FIFTY AN HOUR.

22 Q AND HOW MUCH MONEY HAS APPLE PAID YOU TO DATE?

23 A SO FAR, PROBABLY ABOUT 80K.

24 Q EIGHTY THOUSAND DOLLARS?

25 A YES.

1 MR. VERHOEVEN: THANK YOU, DR. KARE. I
2 PASS THE WITNESS, YOUR HONOR.

3 THE COURT: OKAY. THE TIME IS NOW 1:26.
4 ANY REDIRECT?

5 MS. KREVANS: YES, YOUR HONOR.

6 THE COURT: OKAY. REDIRECT.

7 MS. KREVANS: FIRST, YOUR HONOR, JUST A
8 HOUSEKEEPING MATTER, I HAVE REPLACEMENT FOR 15. I
9 HAVE 158-A. I GAVE A COPY TO COUNSEL, AND I WOULD
10 PROVIDE ONE TO THE COURT. I WOULD MOVE FOR ITS
11 ADMISSION AT THIS POINT.

12 THE COURT: ALL RIGHT. ANY OBJECTION?

13 MR. VERHOEVEN: SUBJECT TO THE
14 DEMONSTRATIVE OBJECTION, NO FURTHER OBJECTION.

15 THE COURT: THAT'S ADMITTED. AND I'M
16 SORRY, CAN YOU REPEAT.

17 MS. KREVANS: 158-A, YOUR HONOR.

18 THE COURT: ALL RIGHT. THANK YOU.

19 (WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER
20 158-A, HAVING BEEN PREVIOUSLY MARKED FOR
21 IDENTIFICATION, WAS ADMITTED INTO
22 EVIDENCE.)

23 **REDIRECT EXAMINATION**

24 BY MS. KREVANS:

25 Q DR. KARE, WERE YOU ASKED TO GIVE OPINIONS IN

1 THIS CASE ABOUT WHETHER INDIVIDUAL ICONS, TAKEN OUT
2 OF THE CONTEXT APPLICATION SCREEN OF SAMSUNG
3 PHONES, WERE SUBSTANTIALLY SIMILAR TO INDIVIDUAL
4 ICONS TAKEN OUT OF THE CONTEXT OF THE IPHONE
5 DESIGN?

6 A NO.

7 Q OKAY. LET ME ASK YOU A COUPLE OF FOLLOW-UPS
8 TO THE QUESTIONS THAT MR. VERHOEVEN DID ASK YOU
9 ABOUT INDIVIDUAL ICONS.

10 FIRST, COULD WE SEE EXHIBIT PX 44 AT PAGE
11 127.

12 ACTUALLY, LET ME STOP ON THE FIRST PAGE.
13 PX 44, THE COVER PAGE, WHAT IS THE DATE OF THIS
14 SAMSUNG DOCUMENT, DR. KARE?

15 MR. VERHOEVEN: BEYOND THE SCOPE OF
16 CROSS.

17 MS. KREVANS: YOUR HONOR, I'M JUST
18 ESTABLISHING THE DATE OF THE DOCUMENT AND THEN I'M
19 GOING TO ASK QUESTIONS ABOUT THE SPECIFIC ICONS
20 THAT MR. VERHOEVEN ASKED QUESTIONS ABOUT.

21 THE COURT: SINCE I'VE JUST ADMITTED THIS
22 DOCUMENT, GO AHEAD. OVERRULED.

23 BY MS. KREVANS:

24 Q WAS THE DATE OF EXHIBIT PX 44?

25 A MARCH 2ND, 2010.

1 Q OKAY. NOW, COULD WE SEE FIRST P -- SORRY, OUR
2 SLIDE 14.25. DO YOU RECALL THAT MR. VERHOEVEN
3 ASKED YOU SOME QUESTIONS ABOUT THE CLOCK ICON THAT
4 IS THE, IN THE THIRD ROW DOWN, THIRD FROM THE LEFT
5 IN THE FASCINATE SCREEN?

6 A YES.

7 Q OKAY. COULD WE SEE PX 44, PAGE 127.

8 FIRST, COULD YOU JUST TELL THE JURY, YOU
9 TALKED ABOUT THIS GENERALLY BEFORE. COULD YOU TELL
10 THE JURY WHAT IS SET OUT ON THIS PAGE?

11 A WELL, IT'S CALLED VISUAL INTERACTION EFFECT,
12 ICON.

13 IT SAYS, "USAGE OF INDISTINGUISHABLE
14 ICONS FOR DIFFERENT FUNCTIONS MAKES FOR DIFFERENT
15 DIFFERENTIATION," AND IT SAYS ON THE IPHONE,
16 "INSTANT RECOGNIZABILITY DUE TO HIGHLY INTUITIVE
17 ICON USAGE."

18 Q AND IS THE IPHONE SHOWN ON THIS PAGE?

19 A I'M SORRY.

20 Q IS THE IPHONE ACTUALLY SHOWN ON THIS PAGE?

21 A YES, IT IS, IT'S ON THE LEFT, THE HOME SCREEN
22 OF THE IPHONE.

23 Q OKAY. AND THEN WHAT DOES IT SAY ABOUT THE
24 SAMSUNG ICONS UP ABOVE.

25 A THERE'S AN IMAGE OF AN ICON THAT LOOKS LIKE A

1 HOME SCREEN, APPROXIMATELY.

2 Q OKAY.

3 A AND ON THE RIGHT-HAND SIDE IS A CORRESPONDING
4 APPLICATION SCREEN FROM THE SAMSUNG PHONE.

5 Q OKAY. AND WHAT DOES IT SAY UP ABOVE WHERE IT
6 SAYS S1?

7 A IT SAYS DIFFICULT DIFFERENTIATION DUE TO ICONS
8 THAT ARE DUPLICATIVE OR INTUITIVELY DEFICIENT.

9 Q OKAY. YOU TESTIFIED EARLIER THAT THE FORMAT
10 OF THIS DOCUMENT WAS COMMENTS ON EACH SCREEN AND
11 THEN A DIRECTION FOR IMPROVEMENT.

12 CAN YOU BRIEFLY SUMMARIZE FOR US WHAT
13 THOSE COMMENTS AND DIRECTIONS ARE ON THIS PAGE OF
14 PX 44?

15 A ON THE RIGHT IT SAYS CONFUSION CAN RESULT FROM
16 INDISTINGUISHABLE ICONS, AND ON THE LEFT IT SAYS
17 MINIMIZE REPLICATE ICONS, CAN FEEL ICONS WERE MADE
18 IN CONSIDERATION OF THE USER, FOR INSTANCE,
19 RECOGNITION AND EASE OF USE.

20 SO IT'S BASICALLY CONFUSING ON THE RIGHT
21 FROM A PAIR OF IPHONES, AND LESS REPLICATE SOLUTION
22 ON THE LEFT.

23 Q WHAT IS THE DIRECTION FOR IMPROVEMENT?

24 A IT SAYS CHANGE REPLICATE ICONS AND SELECT AND
25 USE HIGHLY INTUITIVE ICONS.

1 Q OKAY. LET'S LOOK AT THE INDIVIDUAL ICONS ON
2 THE SAMSUNG ICON SCREEN ON THIS PAGE THAT ARE ON
3 THE APPLICATION THAT MR. VERHOEVEN ASKED YOU ABOUT.

4 LET'S START WITH THE CLOCK.

5 COULD YOU, IN THE UPPER LEFT HAND CORNER,
6 COULD YOU BLOW UP THE CLOCK FOR US A LITTLE BIT,
7 MR. LEE. MAKE IT A LITTLE LESS BLURRY.

8 MR. VERHOEVEN: YOUR HONOR, I'VE NEVER
9 SEEN THIS BEFORE. AND WE OBJECT TO IT BEING PUT ON
10 THE SCREEN AND PULLING OUT ICONS LIKE THIS. YOU
11 DIDN'T LET US DO IT, AND --

12 THE COURT: WELL, YOU WERE ACTUALLY
13 ALLOWED TO TAKE THE LOZENGE AND BLOW IT UP AND
14 MAGNIFY IT, SO I'M NOT SURE HOW THIS IS DIFFERENT
15 FROM BLOWING UP THE LOZENGES FROM THE PHONES THAT
16 YOU SHOWED YESTERDAY. HOW IS THIS DIFFERENT?

17 MR. VERHOEVEN: WELL, MY UNDERSTANDING,
18 YOUR HONOR, FROM THE DISCUSSION THAT WE HAD LAST
19 NIGHT WITH RESPECT TO THIS WITNESS WAS IT WAS GOING
20 TO BE SCREEN-TO-SCREEN SHOTS. THERE WERE
21 OBJECTIONS TO US PULLING OUT THE ELEMENTS --

22 THE COURT: NO, IT WAS THAT YOU HAD THE
23 BODY STYLE IN THE PHOTOS.

24 BUT THAT'S FINE. JUST DO IT LIKE THIS.

25 MS. KREVANS: OKAY.

1 Q CAN YOU POINT US TO THE CLOCK ICON IN THE
2 SAMSUNG DESIGN CONCEPT APPLICATION SCREEN THAT'S
3 SHOWN ON THIS PAGE OF PX 44?

4 A YES, IT'S IN THE UPPER LEFT.

5 Q CAN WE GO BACK TO PDX 14.25, THE GRAPHIC WITH
6 THE FASCINATE. CAN WE SEE THE WHOLE GRAPHIC,
7 PLEASE.

8 OKAY. WHERE IS THE CLOCK ICON IN THE
9 FASCINATE?

10 A IT'S ON THE THIRD ROW AND THIRD COLUMN. IT'S
11 THE THIRD FROM THE LEFT IN THE THIRD ROW DOWN ON
12 THE FASCINATE.

13 Q OKAY. COULD WE LOOK AT EXHIBIT 14 -- PDX
14 14.7, PLEASE, MR. LEE.

15 OKAY. I'M SORRY. I THINK THIS IS THE
16 ONE THAT MR. VERHOEVEN SHOWED YOU.

17 COULD YOU TELL US HOW THE CLOCK ICON IN
18 THE IMAGE THAT WE JUST SAW FROM PDX 44 THAT YOU
19 STILL HAVE IN FRONT OF YOU IN YOUR BINDER, IF YOU
20 LOOK, COMPARES TO THE CLOCK ICON IN THE FASCINATE,
21 AND WE NOW SEE IT ON THE SCREEN, AND THE CLOCK ICON
22 ON THE D'305 PATENT?

23 A WELL --

24 MR. VERHOEVEN: OBJECTION, YOUR HONOR.
25 NONE OF THIS WAS IN THE EXPERT REPORT.

1 MS. KREVANS: THIS IS REDIRECT AFTER
2 CROSS ON THIS EXACT TOPIC, YOUR HONOR.

3 MR. VERHOEVEN: YOUR HONOR, I DID NOT USE
4 THIS EXHIBIT.

5 THE COURT: YOU WERE GIVEN AN OPPORTUNITY
6 TO. I PLACED YOU ON NOTICE THAT EXHIBIT 44 WAS
7 COMING IN DURING THE BREAK. IT WAS YOUR DECISION
8 NOT TO USE IT. WE'RE TALKING ABOUT 44.

9 MR. VERHOEVEN: MY OBJECTION, YOUR HONOR,
10 IS THAT THIS, THE SUBSTANCE OF THE WITNESS'S
11 TESTIMONY IS NOT DISCLOSED IN THE RULE 26 REPORT.

12 MS. KREVANS: YOUR HONOR, THIS WITNESS
13 WAS CROSSED EXTENSIVELY ON SUPPOSED DIFFERENCES
14 BETWEEN THE CLOCK ICON, THE IMAGES, THE PHOTO ICON,
15 AND THE PHONE ICON BY MR. VERHOEVEN.

16 I AM NOW GIVING THE WITNESS AN
17 OPPORTUNITY TO SHOW WHAT THE CLOCK ICON LOOKED LIKE
18 IN THE SAMSUNG DESIGN PX 44 BEFORE STEPS WERE
19 TAKEN, ACCORDING TO THE DOCUMENT, AND WHAT IT ENDED
20 UP LOOKING LIKE, WHICH IS, OF COURSE, WHAT WE CAN
21 SEE ON THE SCREEN, DIFFERENT FROM PX 44 AND CLOSER
22 TO THE --

23 THE COURT: SHOW ME WHERE EXHIBIT 44 IS
24 REFERENCED IN HER EXPERT REPORT.

25 MS. KREVANS: IT IS ON PAGE -- IT IS ON

1 PAGE 89, YOUR HONOR.

2 THE COURT: YOU MEAN PARAGRAPH 89?

3 MS. KREVANS: I'M SORRY, PARAGRAPH 89,
4 PAGE 50.

5 (PAUSE IN PROCEEDINGS.)

6 THE COURT: ALL RIGHT. GO AHEAD.

7 MS. KREVANS: OKAY.

8 Q CAN YOU COMPARE FOR US THE CLOCK ICON ON PAGE
9 44 -- LET ME KNOW IF YOU NEED TO SEE IT AGAIN --
10 AND THE CLOCK ICONS IN THE FASCINATE AND THE D'305
11 PATENT ON THE SLIDE THAT'S ON THE SCREEN?

12 A IN THE DOCUMENT FROM MARCH 2010, THE SAMSUNG
13 SCREEN SHOWN FOR APPLICATIONS USED A GREEN SQUARE,
14 ROUNDED REC'D, WITH A GREEN ALARM CLOCK, KIND OF A
15 RETRO ALARM CLOCK WITH GREEN BELLS AND FEET.

16 BUT IN THE SHIPPING PRODUCT, THE CLOCK
17 ISN'T AN ALARM CLOCK AND IT'S PRETTY CLOSE TO
18 APPLE'S CLOCK.

19 Q OKAY. LET'S GO BACK TO PX 44, PAGE 127. SHOW
20 US THE WHOLE PAGE FIRST, MR. LEE, SO THAT WE CAN BE
21 CLEAR WHAT WE'RE LOOKING AT.

22 AND NOW CAN YOU JUST BLOW UP THE SAMSUNG
23 ICON SCREEN AND SHOW THAT.

24 CAN YOU POINT US TO THE ICON IN THIS
25 SCREEN THAT CORRESPONDS TO THE GALLERY OR PHOTOS

1 APPLICATION?

2 A IT'S IN THE THIRD ROW IN THE SECOND COLUMN.
3 SO IT'S ONE FROM THE LEFT. IT LOOKS LOOK A
4 MOUNTAIN WITH A YELLOW GLOW BEHIND IT.

5 Q SO IT'S A MOUNTAIN AT EITHER SUNRISE OR
6 SUNSET?

7 A YES. AND THAT'S TYPICAL FOR PHOTO GALLERIES
8 TO HAVE LANDSCAPES.

9 Q OKAY. CAN WE LOOK AT PDX 14.7 AGAIN.

10 CAN YOU TELL US HOW THE PHOTO APPLICATION
11 ICON THAT WAS ORIGINALLY IN THE SAMSUNG
12 APPLICATIONS PAGE IN THE MARCH DOCUMENT COMPARES TO
13 THE PHOTO IMAGE, THE GALLERY, IN THE FASCINATE
14 PHONE AND THE D'305 PATENT?

15 A IT EVOLVED TO WHAT LOOKS LIKE A CLOSE-UP OF A
16 YELLOW FLOWER PETAL THAT'S ELONGATED, THAT IS
17 EVOCATIVE OF THE SUNFLOWER PETAL.

18 Q OKAY. LET'S GO TO THE PHONE, THE LAST ONE --
19 I THINK THAT WAS THE FIRST ONE THAT MR. VERHOEVEN
20 ASKED YOU ABOUT.

21 BACK TO THE PAGE IN PX 44, PAGE 1 THROUGH
22 7.

23 IF WE CAN BLOW UP THE MARCH VERSION OF
24 THE SAMSUNG APPLICATION SCREEN.

25 CAN YOU SHOW US WHERE THE PHONE IS AND

1 IT'S IN THE SAME ANCHOR POSITION IN THE LOWER LEFT.

2 OKAY. JUST SO WE'RE REALLY CLEAR, I KNOW
3 YOU DON'T REALLY LIKE --

4 A OH, THERE IT IS.

5 Q AND WHAT DOES IT LOOK LIKE?

6 A IT LOOKS LIKE, IT SAYS 1, 2, 3, 4 AND IT LOOKS
7 LIKE BUTTONS FROM A PHONE OR A CALCULATOR. I'M
8 ASSUMING A PUSH BUTTON PHONE.

9 Q OKAY.

10 A A SEGMENT.

11 Q NOW LET'S GO TO PDX 14.7.

12 CAN YOU COMPARE FOR THE JURY THAT PHONE
13 ICON WE JUST SAW IN THE MARCH VERSION OF THE
14 SAMSUNG APPLICATION SCREEN, MARCH 2010, TO THE
15 SAMSUNG PHONE ICON IN THE ACTUAL FASCINATE PHONE
16 AND THE APPLE PHONE ICON IN THE D'305 PATENT?

17 A YOU DON'T NEED ME TO EXPLAIN THIS, BUT THEY'RE
18 BOTH GREEN SQUARES, ROUNDED CORNER, ONE IS A LITTLE
19 SMALLER BUT THE SAME RETRO HANDSET AT AN ANGLE
20 FACING UP, A LITTLE BIT OF GRADIENT BEHIND IT, AND
21 A COLOR OF GRASS GREEN.

22 Q SO IN PX 44, THE DEVELOPMENT DOCUMENT, THE
23 PHONE ICON WAS LIKE A LITTLE KEY PAD?

24 A YES.

25 Q A MODERN PHONE?

1 A YES.

2 Q AND NOW WHAT IS IT IN THE FASCINATE?

3 A A HANDSET, A WHITE HANDSET ON A SCREEN,
4 REVERSED THAT AGAINST A GREEN BACKGROUND.

5 MS. KREVANS: OKAY. NOTHING FURTHER,
6 YOUR HONOR.

7 THE COURT: ALL RIGHT. ANY REDIRECT?

8 IT'S 1:40. OR RECROSS-EXAMINATION, I'M
9 SORRY.

10 MR. VERHOEVEN: JUST LIKE ONE MINUTE,
11 YOUR HONOR.

12 THE COURT: PLEASE, GO AHEAD.

13 MR. VERHOEVEN: CAN WE PUT UP THE IMAGE
14 YOU HAD EXCERPTED OUT OF EXHIBIT 44.122 JUST ON THE
15 SCREEN? NO, NO. THE ONE THAT WAS JUST ON THE
16 SCREEN. COUNSEL WAS USING IT. IT PULLED OUT THE
17 IMAGE.

18 MR. FISHER, I BELIEVE WE HAVE TO SWITCH
19 OVER TO THE OTHER SIDE BECAUSE THEY CREATED THIS
20 OVER THE BREAK, AND WE HADN'T SEEN IT.

21 MS. KREVANS: WE WERE SHOWING THE ACTUAL
22 PAGE.

23 MR. VERHOEVEN: THE IMAGE, YOU JUST
24 EXCERPTED IT OUT?

25 MS. KREVANS: YES.

1 MR. VERHOEVEN: GREAT, THANK YOU.

2 **RECROSS-EXAMINATION**

3 BY MR. VERHOEVEN:

4 Q NOW, THIS DOCUMENT, IT SAYS CONFUSION CAN
5 RESULT FROM INDISTINGUISHABLE ICONS LIKE MESSAGE
6 AND E-MAIL.

7 DO YOU SEE THAT?

8 A YES.

9 Q AND THE DOCUMENT HIGHLIGHTS THE ICONS THAT
10 THAT SENTENCE IS TALKING ABOUT. FAIR?

11 A YES.

12 Q AND IT HIGHLIGHTS AN ICON ON THE FOURTH
13 COLUMN, SECOND ROW; RIGHT?

14 A YES.

15 Q AND THAT SAYS E-MAIL; RIGHT?

16 A YES.

17 Q AND WHEN I SAY, "HIGHLIGHTS," I MEAN IT DRAWS
18 A RED, RECTANGULAR SHAPE AROUND IT WITH ROUNDED
19 CORNERS; RIGHT?

20 A YES.

21 Q AND IT ALSO HIGHLIGHTS ANOTHER ICON; RIGHT?

22 A YES.

23 Q AND THAT IS ON THE BOTTOM ROW, BOTTOM-MOST ROW
24 OF THE IMAGE, AND THE THIRD COLUMN; CORRECT?

25 A YES.

1 Q AND THAT SAYS MESSAGING?

2 A YES.

3 Q RIGHT?

4 A YES.

5 Q AND ISN'T IT TRUE, FROM READING THIS, WHAT
6 THIS DOCUMENT IS SAYING IS THIS E-MAIL ICON IS TOO
7 SIMILAR TO THIS MESSAGING ICON AND IT MAY CREATE
8 CONFUSION TO THE USER AS TO WHICH ONE THEY HIT TO
9 GET WHAT. ISN'T THAT WHAT THAT'S SAYING?

10 A YES.

11 Q AND THE DOCUMENT SAYS, LOOK, WE WANT TO MAKE
12 THESE CLEARER SO THAT WHEN THE USER IS USING THE
13 INTERFACE, THEY DON'T GET CONFUSED BY HITTING THE
14 MESSAGING ICON THINKING THEY'RE GETTING E-MAIL, OR
15 HITTING THE E-MAIL ICON THINKING THEY'RE GETTING
16 THEIR SMS MESSAGE.

17 ISN'T THAT TRUE, SIR? OR MA'AM. I'M
18 SORRY. LONG DAY?

19 A YES, BECAUSE THEY BOTH USE WHITE ENVELOPES
20 FROM THE BACK WITH SOME YELLOW INSIDE.

21 Q AND THE RECOMMENDATION IN THE DOCUMENT IS MAKE
22 IT CLEARER SO THAT THE USER DOESN'T GET CONFUSED
23 BETWEEN ICONS WITHIN THE USER INTERFACE; RIGHT?

24 A IT CHANGES REPLICATE ICONS AND SELECT AND USE
25 HIGHLY INTUITIVE ICONS.

1 Q AND BY THAT, THEY MEAN ICONS THAT A USER OR
2 CONSUMER WOULD LOOK AT AND INTUITIVELY KNOW, IF I
3 HIT THAT ICON, IT'S GOING TO PROVIDE A CERTAIN
4 APPLICATION; RIGHT?

5 A PRESUMABLY, YES.

6 Q AND THAT'S A FUNCTIONAL MESSAGE TO THE USER;
7 RIGHT? IT'S A COMMUNICATION TO THE USER IN A CLEAR
8 WAY?

9 A YES.

10 Q NOW, THIS DOCUMENT DOESN'T TALK ABOUT, DOESN'T
11 HIGHLIGHT THE ALARM CLOCK, DOES IT?

12 A NO.

13 Q IT DOESN'T HIGHLIGHT THE PHONE ICON, DOES IT?

14 A NO.

15 Q AND IT DOESN'T HIGHLIGHT ANYTHING ELSE, EXCEPT
16 THESE MESSAGES ICONS AND E-MAIL ICONS; RIGHT?

17 A YES.

18 MR. VERHOEVEN: THANK YOU, DR. KARE.

19 THE COURT: ALL RIGHT. IT'S 1:44. ANY
20 MORE REDIRECT?

21 MS. KREVANS: I DO HAVE ONE LAST
22 QUESTION.

23 I'M SORRY, DR. KARE. YOU HAVE TO SIT
24 BACK DOWN.

25 THE COURT: ALL RIGHT. 1:44. GO AHEAD.

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FURTHER REDIRECT EXAMINATION

BY MS. KREVANS:

Q OKAY. ONE MORE TIME, MR. LEE, WITH PX 44,
PAGE 127.

OKAY. MR. VERHOEVEN JUST ASKED YOU ABOUT
THE MESSAGES AND E-MAIL ICONS.

A YES.

Q DO YOU SEE THAT MESSAGES ONE DOWN THERE IN THE
BOTTOM ON THE THIRD FROM THE LEFT?

A YES.

Q OKAY. LET'S JUST KEEP THAT IN YOUR MIND, IF
YOU CAN, THAT IMAGE. AND LET'S GO TO PX -- PDX
14.7, AND THAT'S THE -- THERE WE GO.

OKAY. --

MR. VERHOEVEN: YOUR HONOR, THIS IS
BEYOND THE SCOPE OF CROSS.

MS. KREVANS: THIS IS EXACTLY -- I'M
ASKING EXACTLY WHAT HAPPENED TO THE ICON HE JUST
DREW HER ATTENTION TO.

Q WHEN, WHEN SAMSUNG CHANGED THE MESSAGES ICON
SO THAT IT NO LONGER LOOKED LIKE AN ENVELOPE, A
WHITE ENVELOPE, WHAT DID THEY CHANGE IT TO?

A A SPEECH BALLOON WITH A FACE.

Q WHAT COLOR IS IT?

A GREEN.

1 Q DOES IT HAVE A LITTLE QUESTION COMING DOWN
2 FROM IT?

3 A YES.

4 Q COULD YOU POINT US TO THE CORRESPONDING ICON
5 ON THE D'305 PATENT? MAYBE ALSO GIVE A VERBAL
6 DESCRIPTION FOR US, ROW AND POSITION?

7 A IT'S IN THE TOP ROW, UPPER LEFT.

8 Q THE GREEN ONE?

9 A YES. IT'S GREEN WITH -- IT'S GREEN AND WHITE
10 AND IT'S A SPEECH BALLOON.

11 MS. KREVANS: OKAY.

12 NOTHING FURTHER, YOUR HONOR.

13 THE COURT: ALL RIGHT. ANY RECROSS?

14 MR. VERHOEVEN: YEAH, I HAVE TWO
15 QUESTIONS, YOUR HONOR.

16 THE COURT: GO AHEAD, PLEASE.

17 MR. VERHOEVEN: PDX 14.7, PLEASE.

18 THE COURT: 1:46. GO AHEAD, PLEASE.

19 **FURTHER RECROSS-EXAMINATION**

20 BY MR. VERHOEVEN:

21 Q DOCTOR, I THOUGHT WE WERE DONE, BUT I HAVE ONE
22 MORE QUESTION. THE FASCINATE, WHICH IS IN THE
23 BOTTOM ROW, AND THE THIRD COLUMN, DO YOU SEE IT?

24 A YES.

25 Q AND THE SMS TEXT ICON IN THE D'305 DESIGN

1 PATENT, WHICH IS IN THE TOP ROW, FIRST COLUMN. DO
2 YOU SEE THAT?

3 A YES.

4 Q DO YOU REMEMBER WE TALKED ABOUT THOSE TWO
5 ICONS?

6 A YES.

7 Q AND DO YOU REMEMBER THAT YOU TESTIFIED TO THE
8 JURY THAT THEY WERE NOT SUBSTANTIALLY SIMILAR?

9 A I REMEMBER THAT I SAID THEY WERE NOT
10 SUBSTANTIALLY SIMILAR, BUT THEY HAD A NUMBER OF
11 ELEMENTS IN COMMON.

12 Q BUT YOU SAID THEY WERE NOT SUBSTANTIALLY
13 SIMILAR IN YOUR OPINION; RIGHT? YOU DON'T REMEMBER
14 THAT?

15 A IT WASN'T VERY LONG AGO. I REMEMBER TALKING
16 FEATURE BY FEATURE ABOUT WHAT THEY HAD IN COMMON,
17 AND THEN YOU ASKED ME IF THEY WERE SUBSTANTIALLY
18 SIMILAR AND I THINK THAT THEY, THEY DO HAVE A LOT
19 IN COMMON, BUT MAYBE I WOULDN'T CHARACTERIZE THEM
20 AS SUBSTANTIALLY SIMILAR BECAUSE THE OVERALL
21 FOOTPRINT IS DIFFERENT.

22 Q SO IT'S NOW YOUR TESTIMONY THEY'RE NOT
23 SUBSTANTIALLY SIMILAR?

24 A I, I ALWAYS SAID, WHEN YOU ASKED ME IF THEY
25 WERE SUBSTANTIALLY SIMILAR, I SAID NO BECAUSE THE

1 OVERALL FOOTPRINT ISN'T IDENTICAL.

2 BUT THEY HAVE MANY FEATURES IN COMMON.

3 Q OKAY. SO JUST FOR THE RECORD, DR. KARE, IS IT
4 CORRECT THAT YOUR OPINION THAT THOSE TWO ICONS ARE
5 NOT SUBSTANTIALLY SIMILAR AS YOU TESTIFIED TO
6 EARLIER TODAY?

7 A YES.

8 MR. VERHOEVEN: THANK YOU.

9 NOTHING FURTHER.

10 MS. KREVANS: NOTHING FURTHER, YOUR
11 HONOR.

12 THE COURT: ALL RIGHT. IT'S 1:47.

13 IS MS. KARE --

14 MS. KREVANS: SHE'S EXCUSED SUBJECT TO
15 RECALL ON OUR REBUTTAL CASE.

16 THE COURT: SUBJECT TO RECALL.

17 MS. KREVANS: YES.

18 THE COURT: ALL RIGHT. YOU ARE EXCUSED.

19 CALL YOUR NEXT WITNESS, PLEASE.

20 MR. JACOBS: YOUR HONOR, APPLE CALLS

21 DR. RUSSELL WINER.

22 THE COURT: OKAY.

23 (PAUSE IN PROCEEDINGS.)

24 THE CLERK: WOULD YOU RAISE YOUR RIGHT
25 HAND, PLEASE.

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RUSSELL WINER,

BEING CALLED AS A WITNESS ON BEHALF OF THE
PLAINTIFF, HAVING BEEN FIRST DULY SWORN, WAS
EXAMINED AND TESTIFIED AS FOLLOWS:

THE WITNESS: I DO.

THE CLERK: WOULD YOU STATE YOUR NAME,
PLEASE, AND SPELL IT.

THE WITNESS: MY NAME IS RUSSELL S.
WINER.

DIRECT EXAMINATION

BY MR. JACOBS:

Q AND COULD YOU SPELL IT, SIR?

A SORRY. R-U-S-S-E-L-L, W-I-N-E-R.

Q DR. WINER, WOULD YOU INTRODUCE YOURSELF TO THE
JURY, PLEASE, BY EXPLAINING WHAT YOU DO?

A YES. I'M A PROFESSOR OF MARKETING AND CHAIR
OF THE DEPARTMENT OF MARKETING AT THE STERN SCHOOL
OF BUSINESS IN NEW YORK UNIVERSITY.

Q DOES YOUR PROFESSIONAL WORK HAVE A PARTICULAR
FOCUS?

A MY PROFESSIONAL WORK HAS TWO COMPONENTS. ONE
IS I TEACH M.B.A.'S AND EXECUTIVE M.B.A. STUDENTS.

MY RESEARCH AREAS ARE IN MARKETING
STRATEGY, INTERNET MARKETING, PRICING, BRANDING, A
WHOLE RANGE OF AREAS.

1 Q HAVE YOU PUBLISHED ANY PAPERS IN THE MARKETING
2 AREA?

3 A YES. I PUBLISHED OVER 70 PEER REVIEWED
4 PAPERS, MANY OF WHICH ARE IN TOP ACADEMIC JOURNALS.

5 Q HAVE YOU WRITTEN BOOKS IN MARKETING?

6 A I PUBLISHED THREE BOOKS, ONE ON MARKETING
7 MANAGEMENT, WHICH IS USED IN MANY M.B.A. PROGRAMS
8 AROUND THE WORLD, AND A RESEARCH MONOGRAPH ON
9 PRICING.

10 Q WHAT RECOGNITION FOR YOUR WORK IN MARKETING
11 ARE YOU MOST PROUD OF?

12 A WELL, I'VE RECEIVED TWO LIFETIME ACHIEVEMENT
13 AWARDS FOR MY RESEARCH. ONE IS IN AN AREA OF
14 PRICING AND THE OTHER I RECEIVED IN 2011 FROM THE
15 AMERICAN MARKETING ASSOCIATION FOR LIFETIME
16 ACHIEVEMENT IN THE FIELD OF MARKETING.

17 Q WHAT DID WE ASK YOU TO DO IN THIS CASE?

18 A I WAS ASKED TO COMMENT FROM A MARKETING
19 PERSPECTIVE ON THE DISTINCTIVENESS AND FAME OF THE
20 APPLE TRADE DRESS ELEMENTS, AND ADDITIONALLY ON THE
21 INFRINGEMENT AND DILUTION ON THE APPLE BRANDS FROM
22 THE INFRINGED PRODUCTS.

23 Q WHAT DID YOU DO TO CONDUCT YOUR ANALYSIS IN
24 THIS CASE?

25 A WELL, I READ THE DOCUMENTS, MANY OF THE

1 DOCUMENTS THAT WERE PRODUCED DURING THE DISCOVERY
2 PHASE OF THE TRIAL.

3 I ALSO READ SOME OTHER RESEARCH REPORTS
4 THAT WERE GENERATED.

5 AND I USED MY EXPERTISE IN MARKETING TO
6 PUT ALL THAT TOGETHER, AND I WROTE A 70-ODD PAGE
7 REPORT.

8 MR. JACOBS: YOUR HONOR, WE TENDER
9 DR. WINER AS AN EXPERT IN THE FIELD OF MARKETING
10 WITH EXPERTISE SUFFICIENT TO QUALIFY HIM TO TESTIFY
11 ON THE ISSUES THAT HE'S JUST ENUMERATED.

12 THE COURT: ANY OBJECTION?

13 MR. VERHOEVEN: NO OBJECTION.

14 THE COURT: ALL RIGHT. I DON'T HAVE HIS
15 EXPERT REPORT. IS IT IN THE EXHIBITS? IT WASN'T
16 IN THE RED WELL THAT I RECEIVED. OKAY. I SEE IT.
17 IT'S IN THIS BINDER.

18 BY MR. JACOBS:

19 Q CAN YOU EXPLAIN TO THE JURY WHAT DILUTION
20 MEANS FROM THE STANDPOINT OF A MARKETING EXPERT?

21 A WELL, DILUTION MEANS, TO ME, THE BLURRING OF A
22 PRODUCT OR A BRAND NAME FROM, SAY, COPYCAT PRODUCTS
23 OR THE PRODUCTS THAT HAVE BEEN DEVELOPED THAT ARE
24 VERY SIMILAR. SO CONSUMERS CAN BE CONFUSED WHEN
25 THEY GET TO POINT OF PURCHASE WHEN MAKING A CHOICE.

1 Q ARE YOU AWARE THAT APPLE HAS ASSERTED TRADE
2 DRESSES IN THIS CASE?

3 A YES, I AM.

4 Q WHAT PRODUCTS DO THESE TRADE DRESSES COVER?

5 A THEY COVER THE IPHONE MODELS, AS WELL AS THE
6 IPAD.

7 Q LET ME SHOW YOU JOINT EXHIBIT 1039. IT SHOULD
8 BE IN YOUR BINDER, BUT IT'S ALSO ON THE SCREEN?

9 A YES, I CAN SEE IT ON THE SCREEN.

10 Q CAN YOU TELL US WHAT THIS IS, PLEASE?

11 A THIS IS THE REGISTRATION WITH THE U.S. PATENT
12 AND TRADEMARK OFFICE OF THE ORIGINAL IPHONE TRADE
13 DRESS.

14 MR. JACOBS: YOUR HONOR, WE OFFER JX
15 1039.

16 MR. VERHOEVEN: NO OBJECTION, YOUR HONOR.

17 THE COURT: ALL RIGHT. THAT'S ADMITTED.

18 (WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER
19 1039, HAVING BEEN PREVIOUSLY MARKED FOR
20 IDENTIFICATION, WAS ADMITTED INTO
21 EVIDENCE.)

22 BY MR. JACOBS:

23 Q YOU MENTIONED SOME OTHER TRADE DRESSES THAT
24 ARE ASSERTED IN THE CASE.

25 LET'S TAKE A LOOK AT PDX 28.2. AND CAN

1 YOU SCROLL THROUGH, MR. LEE.

2 WHAT IS PDX 28.2, DR. WINER?

3 A THIS IS A LISTING OF THE ELEMENTS OF THE
4 IPHONE TRADE DRESS FOR THE IPHONE 3G.

5 Q AND THE JURY HAS THESE IN ITS NOTEBOOKS, SO I
6 THINK WE'LL GO THROUGH THESE SLIDES FAIRLY QUICKLY.

7 WHAT IS -- TAKE A LOOK AT 28.3, PLEASE.
8 WHAT IS 28.3?

9 A THESE ARE THE TRADE DRESS ELEMENTS THAT ARE --
10 EXCUSE ME -- COMMON ELEMENTS TO ALL OF THE IPHONE
11 PRODUCTS.

12 Q AND 28.4?

13 A THESE ARE THE TRADE DRESS ELEMENTS FOR THE
14 IPAD AND THE IPAD 2.

15 Q NOW, AS A MARKETING PROFESSOR, DO YOU STUDY
16 HOW A COMPANY SETS ITSELF APART FROM ITS
17 COMPETITORS?

18 A YES, I DO. THAT'S AN EXTREMELY IMPORTANT
19 TOPIC IN MARKETING STRATEGY, HOW TO OBTAIN THE
20 DISTINCTIVE OR COMPETITIVE ADVANTAGE.

21 THERE ARE A NUMBER OF WAYS COMPANIES TRY
22 TO DO THIS. FOR EXAMPLE, THEY MIGHT DO IT THROUGH
23 PRICE, THEY MIGHT DO IT THROUGH TECHNOLOGICAL
24 FEATURES. SOME COMPANIES DO IT THROUGH APPEARANCE
25 OF A PRODUCT, WHAT WE CALL A LOOK AND FEEL AS THEIR

1 MAIN WAY OF DIFFERENTIATION.

2 Q AND WHAT DO YOU MEAN BY THE LOOK AND FEEL OF A
3 PRODUCT?

4 A WELL, LOOK IS FAIRLY OBVIOUS. LOOK THE
5 APPEARANCE, WHAT THE PRODUCT LOOKS LIKE TO A
6 CONSUMER.

7 FEEL IS NOT THE TACTILE DEFINITION OF
8 FEEL. IT'S SORT OF THE EMOTIONAL, EXPERIENTIALLY
9 RESPONSE THAT PEOPLE GET WHEN THEY LOOK OR USE A
10 PRODUCT.

11 Q SO WE NEED TO DO A BIT OF A TRANSLATION FROM
12 YOUR MARKETING EXPERTISE TO THE WORLD OF THIS TRADE
13 DRESS LITIGATION.

14 CAN YOU EXPLAIN HOW WHAT YOU JUST SAID
15 ABOUT LOOK AND FEEL RELATES TO A PRODUCT'S TRADE
16 DRESS?

17 A WELL, THE TRADE DRESS ELEMENTS ARE THE
18 COMPONENTS OF THE LOOK AND FEEL, OR, IN SOME CASES,
19 IT COULD BE A SUBSET OF ALL OF THE THINGS PEOPLE
20 ARE LOOKING AT, BUT CERTAINLY THEY'RE IMPORTANT
21 PARTS OF THE LOOK AND FEEL OF PRODUCTS.

22 Q NOW, AS A MARKETING PROFESSOR, HAVE YOU
23 STUDIED APPLE?

24 A WELL, APPLE IS USED IN MANY CLASSROOMS, NOT
25 ONLY MINE. I USE -- I GIVE SPECIAL STUDENT

1 ASSIGNMENTS WITH APPLE, AND I'M CERTAINLY VERY
2 FAMILIAR WITH THE COMPANY AND ITS PRODUCTS.

3 Q AND WHY IS THAT? WHY IS APPLE FEATURED SO
4 PROMINENTLY IN YOUR COURSE?

5 A I THINK THERE'S PROBABLY FEW COMPANIES IN THE
6 WORLD THAT HAVE BEEN AS SUCCESSFUL AS APPLE IN
7 DIFFERENTIATING ITSELF IN THE MARKETPLACE THROUGH
8 LOOK AND FEEL AND SELLING SO MANY PRODUCTS,
9 DEVELOPING REALLY COOL PRODUCTS THAT ARE MUST-HAVES
10 FROM CONSUMERS'S PERSPECTIVES.

11 Q SO WHAT'S THE RELATIONSHIP BETWEEN THE LOOK
12 AND FEEL AND TRADE DRESS OF APPLE PRODUCTS AND
13 APPLE AS A COMPANY?

14 A WELL, THE COMPANY IS RESPONSIBLE FOR
15 DEVELOPING, OBVIOUSLY, THE LOOK AND FEEL OF THESE
16 PRODUCTS.

17 AND ANY BENEFITS THAT ACCRUE FROM
18 CONSUMERS HAVING VERY POSITIVE FEELINGS TOWARDS
19 APPLE PRODUCTS, THEY ACCRUE TO THE APPLE COMPANY AS
20 A WHOLE.

21 SO THEY'RE VERY INTIMATELY TIED TOGETHER.

22 Q WHAT IS YOUR OPINION AS TO THE DISTINCTIVENESS
23 OF APPLE'S ASSERTED TRADE DRESSES IN THIS CASE?

24 A I THINK THAT THEY'RE HIGHLY DISTINCTIVE.

25 Q AND WHY DO YOU BELIEVE THAT?

1 A WELL, I THINK THAT WE HAVE A NUMBER OF PIECES
2 OF EVIDENCE THAT SUPPORT THAT DISTINCTIVENESS.

3 Q EXPLAIN, PLEASE.

4 A WELL, I DEVELOPED A LIST OF SOME OF THESE
5 ELEMENTS THAT, THAT I THINK CONTRIBUTE TO THE
6 DISTINCTIVENESS.

7 Q LET'S TAKE A LOOK AT PDX 28.5, PLEASE.

8 NOW, THIS IS LABELED "ACQUIRED
9 DISTINCTIVENESS FACTORS AND SECONDARY MEANING,"
10 DR. WINER.

11 CAN YOU GIVE A BIT OF AN EXPLANATION OF
12 WHAT THIS SLIDE IS SHOWING?

13 A WELL, THESE ARE PARTICULARLY IMPORTANT FOR, AS
14 YOU CAN SEE, THE SLIDE IS TITLED "SECONDARY
15 MEANING." A WAY OF INTERPRETING SECONDARY MEANING
16 IS RECOGNITION, ALL RIGHT? THESE ARE THE FACTORS
17 THAT MAKE APPLE DISTINCTIVE BY THE WAY THAT THEY'VE
18 BEEN ABLE TO CREATE A HIGH DEGREE OF RECOGNITION OF
19 THE APPLE TRADE DRESS ELEMENTS AMONG THE CONSUMER
20 POPULATION.

21 Q DID YOU EXAMINE THE PARTICULAR FACTORS LISTED
22 ON HERE TO DETERMINE, TO INFORM YOUR VIEW AS TO
23 WHETHER THE APPLE PRODUCTS WERE HIGHLY DISTINCTIVE?

24 A YES, I DID.

25 Q SO CAN YOU JUST MARCH THROUGH THESE AND

1 EXPLAIN TO THE JURY HOW THESE FACTORS RELATE TO THE
2 BODY OF EVIDENCE YOU LOOKED AT?

3 A WELL, FIRST OF ALL, AS YOU CAN SEE, THE EXTENT
4 AND APPLE'S ADVERTISING FOR THE TRADE DRESSES HAS
5 BEEN EXTREMELY IMPORTANT.

6 I'M NOT GOING TO GO INTO DETAIL ABOUT
7 THEIR PRODUCT AS HERO APPROACH. MR. SCHILLER
8 TESTIFIED ABOUT THAT THE OTHER DAY.

9 BUT IT'S CLEAR THAT THEY'VE HAD A VERY
10 FOCUSED ADVERTISING STRATEGY. THEY DO A GREAT JOB
11 INTEGRATING ALL THE ELEMENTS OF THEIR
12 COMMUNICATIONS APPROACH, WHETHER IT'S PRODUCT
13 PLACEMENTS OR BUZZ MARKETING CAMPAIGNS, PRINT
14 ADVERTISING, TV ADVERTISING. IT'S ALL VERY WELL
15 ORCHESTRATED TO CREATE A HIGH DEGREE OF
16 DISTINCTIVENESS OF THE TRADE DRESS ELEMENTS.

17 Q HOW ABOUT THE SECOND ELEMENT?

18 A WELL, OBVIOUSLY, THE PRODUCTS HAVE BEEN VERY
19 SUCCESSFUL.

20 WHAT I MEAN BY LENGTH AND MANNER OF THE
21 USE OF THE TRADE DRESSES IS THAT OVER THE PERIOD OF
22 TIME, THE SALES OF THESE PRODUCTS HAVE BEEN
23 ASTOUNDING, AND IT'S NOT ONLY THE FACT THAT THERE
24 ARE MORE PRODUCTS SOLD THAT SORT OF REPRESENT HOW
25 DISTINCTIVE AND HOW RECOGNIZED THE BRAND IS, BUT

1 THE FACT THAT MORE PEOPLE THAT BUY PRODUCTS, THE
2 MORE WORD OF MOUTH THERE IS, AND WHAT WE KNOW FROM
3 RESEARCH IS THAT WORD OF MOUTH IS THE NUMBER ONE
4 SOURCE OF INFORMATION THAT CONSUMERS USE IN MAKING
5 PRODUCT CHOICES.

6 SO THE CUMULATIVE INCREASE IN SALES TO
7 INCREASE WORD OF MOUTH INCREASES THE RECOGNITION
8 AND, IN THIS CASE, DISTINCTIVENESS OF THE
9 APPEARANCE OF THE PRODUCTS, THE LOOK AND FEEL OF
10 THE PRODUCTS.

11 Q NOW, FOR THE NEXT BULLET, YOU REVIEWED A
12 SURVEY, AND I DON'T WANT YOU TO COMMENT ON THE
13 DETAILS OF THE SURVEY, BUT CAN YOU SAY VERY BRIEFLY
14 HOW THE SURVEY INFORMED YOUR VIEW?

15 A WELL, THE SURVEY I WAS REFERRING TO WAS
16 CONDUCTED BY HAL PORET, AND BASICALLY WHAT HE DID
17 IS HE FOUND --

18 MR. VERHOEVEN: OBJECTION, YOUR HONOR.

19 MR. JACOBS: JUST EXPLAIN VERY BRIEFLY,
20 THE BOTTOM LINE --

21 THE COURT: IT'S SUSTAINED. YOU DO NEED
22 TO BRING IN MR. PORET.

23 MR. JACOBS: AND MR. PORET WILL BE HERE
24 TO EXPLAIN HIS SURVEY.

25 Q THAT'S WHY I JUST NEED YOUR TAKE AWAY FROM THE

1 SURVEY?

2 A MY TAKE AWAY FROM THE SURVEY IS THAT THE
3 DEGREE OF RECOGNITION.

4 MR. VERHOEVEN: SAME OBJECTION.

5 THE WITNESS: CAN I FINISH MY SENTENCE?

6 THE COURT: NO, PLEASE WAIT.

7 MR. JACOBS: HE'LL BE HERE AS THE NEXT
8 WITNESS, YOUR HONOR, BUT THIS WITNESS'S OPINION WAS
9 INFORMED BY THE SURVEY, AND THAT'S ALL HE'LL
10 TESTIFY TO.

11 THE COURT: ALL RIGHT. OVERRULED.

12 THE WITNESS: MY CONCLUSION FROM THE
13 SURVEY WAS THAT THERE'S A HIGH DEGREE OF
14 RECOGNITION OF THE APPLE TRADE DRESSES.

15 BY MR. JACOBS:

16 Q NOW, THE LAST FACTOR ON THIS LIST IS THE
17 QUESTION OF COPYING. AND, AGAIN, WITHOUT GOING
18 INTO DETAIL AT THIS STAGE, CAN YOU EXPLAIN TO THE
19 JURY HOW THIS QUESTION OF WHETHER SAMSUNG COPIED
20 APPLE'S TRADE DRESSES INFORMED YOUR VIEW AS TO THE
21 DISTINCTIVENESS OR SECONDARY MEANING OF APPLE'S
22 TRADE DRESSES?

23 A WELL, THERE WERE DOCUMENTS THAT I READ THAT
24 INDICATED THAT SAMSUNG HELD APPLE'S PRODUCTS UP AS,
25 AS TARGETS AND TRIED TO EMULATE THEM, AND SO THAT

1 LED ME TO BELIEVE THAT THERE WAS, IN FACT, COPYING
2 GOING ON.

3 Q AND BOTTOM LINE, SIR, HOW DID THESE FACTORS,
4 TAKEN TOGETHER, NET IN TERMS OF YOUR OPINION AS TO
5 WHETHER THE APPLE PRODUCTS, THE ASSERTED TRADE
6 DRESSES ARE DISTINCTIVE?

7 A I THINK APPLE TRADE DRESSES ARE AMONG THE MOST
8 DISTINCTIVE IN THE WORLD, AND PARTICULARLY IN THE
9 U.S., AND HAVE A VERY HIGH DEGREE OF RECOGNITION.

10 Q CAN WE SEE PDX 28.6, PLEASE, MR. LEE.

11 NOW, DR. WINER, THIS IS A SOMEWHAT
12 DIFFERENT SET OF FACTORS ASSOCIATED WITH THE
13 CONCEPT OF DILUTION. IS THERE -- CAN YOU COMMENT
14 ON THE DEGREE OF OVERLAP BETWEEN THIS SET OF FAME
15 FACTORS FOR DILUTION AND THE FACTORS YOU JUST
16 LOOKED AT FOR SECONDARY MEANING?

17 A EVEN THOUGH THE LANGUAGE IS SOMEWHAT
18 DIFFERENT, THEY'RE MOSTLY THE SAME.

19 THE FIRST ONE RELATED TO ADVERTISING THAT
20 I MENTIONED BEFORE; THE SECOND ONE IS THE SALES
21 PERFORMANCE THAT THEY'VE HAD AND SUBSEQUENT WORD OF
22 MOUTH; THE THIRD BULLET I MENTIONED ABOUT THE
23 RECOGNITION AND THEY WERE REGISTERED. SO PRETTY
24 MUCH THE SAME.

25 Q AND THE FOURTH BULLET REACHES TO THE

1 REGISTRATION WE SAW EARLIER; CORRECT?

2 A CORRECT.

3 Q AND IN YOUR OPINION, IS THE -- ARE THE
4 ASSERTED IPHONE AND IPAD TRADE DRESSES AMONG THE
5 GENERAL CONSUMING PUBLIC?

6 A THERE'S NO QUESTION IN MY MIND THAT THEY'RE
7 FAMOUS AMONG THE GENERAL CONSUMING PUBLIC, AND
8 PARTICULARLY FAMOUS AMONG SOMEWHAT YOUNGER
9 AUDIENCES THAT ARE PARTICULARLY INTERESTED IN THE
10 LOOK AND FEEL AND COOLNESS OF APPLE PRODUCTS.

11 Q AND WAS THAT FAME ESTABLISHED FOR THE IPHONE
12 AS OF JULY 2010?

13 A YES, MOST DEFINITELY.

14 Q AND HOW ABOUT FOR THE IPAD TRADE DRESS AS OF
15 JUNE OF 2010?

16 A YES, I BELIEVE SO, YES.

17 Q NOW, ARE YOU FAMILIAR WITH THE LIKELIHOOD OF
18 CONFUSION TEST IN TRADE DRESS LAW.

19 A YES. I NEVER CALLED THEM LIKELIHOOD OF
20 CONFUSION, BUT CERTAINLY THE ELEMENTS THAT WE'LL
21 LOOK AT IN A FEW MINUTES ARE THE KINDS OF THINGS
22 THAT I TALK ABOUT IN CLASS WHEN WE DISCUSSED WHAT
23 WERE THE NEW PRODUCTS AND LOOK VERY SIMILAR TO
24 OTHER COMMON PRODUCTS.

25 Q CAN WE HAVE PDX 28.17, PLEASE.

1 SO THERE'S THIS WORD UP HERE

2 "SLEEKCRAFT." WHAT IS YOUR UNDERSTANDING OF WHAT
3 THIS SLIDE IS SHOWING?

4 A WELL, AS I SAID BEFORE, I WAS ASKED TO TALK
5 ABOUT THIS, OR DEVELOP AN OPINION ON THIS
6 LIKELIHOOD OF CONFUSION, AND THESE ARE THE KINDS OF
7 THINGS THAT I CERTAINLY THINK ABOUT, AND I WAS OF
8 INFORMED THAT DUE TO A CASE CALLED THE SLEEKCRAFT
9 CASE, THAT ACTUALLY THERE IS A SET OF ELEMENTS THAT
10 YOU CAN FIND IN THE LAW, AND SO THIS IS WHAT I
11 DRAFTED IN MY REPORT.

12 MR. VERHOEVEN: YOUR HONOR, I OBJECT TO
13 THIS SLIDE. IT DOES NOT LIST -- FIRST OF ALL, IT'S
14 PURPORTING TO TALK ABOUT WHAT THE LAW IS WITH THE
15 SLEEKCRAFT CASE, AND, SECONDLY, IT DIDN'T LIST ALL
16 THE FACTORS.

17 MR. JACOBS: MR. VERHOEVEN IS RIGHT. I
18 SHOULD MAKE THAT CLEAR. IT IS A SUBSET OF THE
19 SLEEKCRAFT FACTORS.

20 THE COURT: WELL, YOU SHOULD TAKE THAT
21 SLIDE DOWN.

22 MR. JACOBS: FINE.

23 THE COURT: SUSTAINED.

24 BY MR. JACOBS:

25 Q WHAT IS YOUR OPINION ABOUT THE STRENGTH OF

1 APPLE'S ASSERTED TRADE DRESS ASSERTED?

2 A I THINK THE STRENGTH OF THE TRADE DRESS IS
3 EXTREMELY HIGH. I THINK I'VE ALREADY COMMENTED
4 ABOUT THAT BEFORE.

5 Q NOW, HOW ABOUT PROXIMITY OF THE GOODS?

6 A WELL, IN THIS CASE, PROXIMITY DOES NOT MEAN
7 PHYSICAL PROXIMITY. IT MEANS HOW MUCH THE PRODUCTS
8 COMPETE AGAINST EACH OTHER IN THE MARKETPLACE.

9 IT'S CLEAR TO ME THAT NO MATTER HOW YOU
10 DEFINE COMPETITION, THE PRODUCTS DO COMPETE AND
11 COMPETE HEAVILY IN THE MARKETPLACE.

12 Q AND HOW ABOUT SIMILARITY OF THE TRADE DRESSES?

13 A SIMILARITY OF THE TRADE DRESS I THINK HAS BEEN
14 WELL ESTABLISHED CERTAINLY BY THE NUMBER OF
15 COMMENTS THAT HAVE BEEN MADE IN THE TRADE PRESS
16 THAT CONSISTENTLY TALK ABOUT HOW THE SAMSUNG
17 PRODUCTS, BOTH THE GALAXY PAD AND THE PHONES WERE
18 VERY SIMILAR TO THE IPHONE AND THE IPAD.

19 AND, IN ADDITION, I LOOK AT PRODUCTS A
20 LOT. OBVIOUSLY IT'S PART OF MY PROFESSION.

21 AND TO ME, THE INFRINGED PRODUCTS, FROM A
22 TRADE DRESS PERSPECTIVE, DO LOOK SIMILAR TO THE
23 APPLE IPHONE AND IPAD TRADE DRESSES.

24 Q COULD YOU TAKE A LOOK AT PX 5, PLEASE, IN YOUR
25 BINDER. WHAT IS PX 5, SIR?

1 A PX 5 ARE VERY BRIEF SUMMARIES OF SOME PRESS
2 REPORTS ON THE SAMSUNG TABLET DESIGNS.

3 MR. VERHOEVEN: YOUR HONOR, WE OBJECT TO
4 THIS PX 5 AND TO THE WITNESS TALKING ABOUT ANYTHING
5 FROM PX 5. IF YOUR HONOR WILL TAKE A LOOK AT PX 5,
6 YOU'LL SEE THAT THESE ARE THIRD PARTY ARTICLES, AND
7 YOUR HONOR HAS NOT ADMITTED THOSE FOR PURPOSES OF
8 THE TRUTH.

9 THE ONLY BASIS ON WHICH THESE CAN BE USED
10 BY THIS WITNESS IS IN VIOLATION OF THAT LIMITING
11 INSTRUCTION. AND WE STRONGLY OBJECT.

12 MR. JACOBS: YOUR HONOR, WE OFFER THESE
13 FOR THE, FOR THE VIEWPOINT, THE STATE OF MIND OF
14 THE COMMENTATORS.

15 YOUR HONOR ADDRESSED THIS EXHIBIT IN THE
16 AMENDED ORDER ON SAMSUNG'S OBJECTIONS, DOCUMENT
17 1520.

18 IN THAT ORDER, YOUR HONOR WROTE, "THE
19 COURT HAS PREVIOUSLY RULED THAT MEDIA ARTICLES ARE
20 RELEVANT AT LEAST TO ISSUES OF INFRINGEMENT,
21 CONSUMER CONFUSION, WILLFULNESS, AND SECONDARY
22 CONSIDERATIONS OF NON-OBVIOUSNESS. PX 5 AND PX 6,"
23 WHICH WE'LL GET TO, "ARE COMPILATIONS," ET CETERA.
24 SAMSUNG DOES NOT DISPUTE THAT THE UNDERLYING
25 MATERIALS ARE ADMISSIBLE.

1 MR. VERHOEVEN: YOUR HONOR, THIS WITNESS
2 IS -- HE'S ON THE FACTOR OF SIMILARITY OF THE TRADE
3 DRESSES. THAT'S THE FACTOR HE'S ON AND COUNSEL
4 TURNED TO THIS EXHIBIT FOR PURPOSES OF GETTING HIS
5 OPINION ON THAT FACTOR, WHICH IS OBVIOUSLY GOING TO
6 BE OFFERED FOR THE TRUTH WHICH YOUR HONOR HAS
7 LIMITED THESE DOCUMENTS NOT BEING ADMISSIBLE FOR
8 THAT REASON.

9 MR. JACOBS: YOUR HONOR, THIS WITNESS IS
10 USING THESE ARTICLES TO CORROBORATE THAT THE STATE
11 OF MIND OF THESE THIRD PARTY COMMENTATORS
12 CORRESPONDS TO HIS STATE OF MIND AND THAT HIS
13 VIEWPOINT IS NOT UNIQUE.

14 MR. VERHOEVEN: THE STATE OF MIND OF
15 THIRD PARTY --

16 THE COURT: WELL, OKAY. WHY DON'T YOU
17 MOVE ON TO SOMETHING ELSE. I NEED TO REVIEW MY
18 ORDER ON THE MOTION IN LIMINE WHERE THE STATE OF
19 MIND ISSUE WAS RAISED.

20 TAKE IT DOWN, PLEASE.

21 BY MR. JACOBS:

22 Q SIR, DID YOU SEE EVIDENCE IN SAMSUNG'S
23 DOCUMENTS THAT SAMSUNG RECOGNIZED THE
24 DISTINCTIVENESS OF THE IPAD TRADE DRESS?

25 MR. VERHOEVEN: OBJECTION. LEADING.

1 THE WITNESS: YES, I DID.

2 THE COURT: SUSTAINED. ASK ANOTHER
3 QUESTION, PLEASE.

4 BY MR. JACOBS:

5 Q DID THE SAMSUNG DOCUMENTS INFORM YOUR
6 VIEWPOINT WHETHER OR NOT SAMSUNG ACKNOWLEDGED THE
7 DISTINCTIVENESS OF THE IPAD TRADE DRESS?

8 MR. VERHOEVEN: THIS IS ALSO LEADING.
9 OBJECTION.

10 MR. JACOBS: WHETHER OR NOT, YOUR HONOR.

11 THE COURT: OVERRULED.

12 THE WITNESS: COULD YOU RESTATE THE
13 QUESTION, PLEASE.

14 MR. JACOBS: SINCE IT WAS OVERRULED,
15 LET'S READ IT BACK.

16 (WHEREUPON, THE RECORD WAS READ BY THE
17 COURT REPORTER.)

18 THE WITNESS: YES, THEY DID.

19 BY MR. JACOBS:

20 Q AND COULD YOU LOOK AT EXHIBIT --

21 A I'M SORRY. THE MIKE WAS OFF.

22 Q AND COULD YOU LOOK AT EXHIBIT 56, PLEASE.

23 WHAT IS EXHIBIT 56, MR. -- DR. WINER?

24 A EXHIBIT 56 IS TITLED SAMSUNG Q 42010 DEEP
25 DIVE, CONTINUOUS TRACKING FROM MAY 16TH, 2008, TO

1 JANUARY 2ND, 2011. SO IT'S INTERNAL MARKET
2 RESEARCH DOCUMENT AT SAMSUNG.

3 Q AND DID THIS DOCUMENT INFORM YOUR VIEW OR
4 CORROBORATE YOUR VIEW THAT THE IPAD HAD ACQUIRED
5 DISTINCTIVENESS?

6 MR. VERHOEVEN: OBJECTION, YOUR HONOR.
7 THIS DOCUMENT WAS NOT DISCLOSED IN RESPONSE TO
8 INTERROGATORY NUMBER 7 OR 71.

9 MR. JACOBS: THIS DOCUMENT IS CITED AND
10 DISCUSSED IN DR. WINER'S REPORT IN SEVERAL
11 PARAGRAPHS, AND IT WAS DISCLOSED IN INTERROGATORY
12 17, CONFUSION, WHICH IS THE PURPOSE FOR WHICH THIS
13 DOCUMENT IS BEING OFFERED, THE STRENGTH OF THE
14 TRADE DRESS IN QUESTION.

15 THE COURT: OVERRULED.

16 GO AHEAD.

17 THE WITNESS: COULD YOU PLEASE REPEAT THE
18 QUESTION.

19 MR. JACOBS: PLEASE READ IT BACK.

20 (WHEREUPON, THE RECORD WAS READ BY THE
21 COURT REPORTER.)

22 THE WITNESS: YES, IT DID.

23 MR. JACOBS: I OFFER PX 56 INTO EVIDENCE,
24 YOUR HONOR.

25 MR. VERHOEVEN: AGAIN, OBJECTION, YOUR

1 HONOR. IN YOUR MOTION IN LIMINE ORDER NUMBER 2,
2 YOUR HONOR, I BELIEVE, AND THIS IS MY NOTES, HELD
3 THIS DOCUMENT, THIS PARTICULAR DOCUMENT CANNOT BE
4 USED FOR THE PURPOSE OF CONFUSION ISSUE.

5 MR. JACOBS: YOUR HONOR --
6 ARE YOU DONE?

7 YOUR HONOR, THE ORDER ON MOTION IN
8 LIMINE --

9 THE COURT: SAMSUNG MOTION IN LIMINE TO
10 EXCLUDE THIRD PARTY STATEMENTS ABOUT PURPORTED
11 SIMILARITIES OR PURPORTED CONFUSION -- THAT WAS
12 DENIED.

13 MOTION IN LIMINE NUMBER 2 TO EXCLUDE
14 OUT-OF-COURT THIRD PARTY STATEMENTS ABOUT PURPORTED
15 SIMILARITIES OR PURPORTED CONFUSION WAS DENIED.

16 SO THE OBJECTION'S OVERRULED.

17 MR. JACOBS: AND IT'S ADMITTED, YOUR
18 HONOR?

19 THE COURT: YES.

20 (WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER
21 56, HAVING BEEN PREVIOUSLY MARKED FOR
22 IDENTIFICATION, WAS ADMITTED INTO
23 EVIDENCE.)

24 BY MR. JACOBS:

25 Q COULD YOU TURN -- WE HAVE AN EXCERPT FROM

1 THIS. CAN WE SEE PX 56 -- SORRY. CAN WE SEE PDX
2 28.18, WHICH IS ABOUT PAGE 30 OF EXHIBIT 56.

3 AND WHAT DID THIS PAGE INDICATE TO YOU AS
4 A MARKETING EXPERT, DR. WINER?

5 A WELL, THE CALL OUGHT, AS YOU CAN SEE, SAYS THE
6 IPAD IS BY FAR STILL THE MOST RECOGNIZED PRODUCT ON
7 THE MARKET.

8 SO THIS IS CERTAINLY JUST ONE PIECE OF A
9 NUMBER OF, OF DISPLAYS IN THE PUBLICATION THAT
10 SEEMS TO SUPPORT MY CONTENTION.

11 Q NOW, GOING BACK TO THE SLEEK -- ACTUALLY, WE
12 CAN'T GO BACK TO THAT, SORRY, WE CAN'T PUT THAT
13 SLIDE UP AGAIN.

14 BUT I DO WANT TO ASK YOU ABOUT, JUST VERY
15 BRIEFLY, DID YOU LOOK AT A SURVEY THAT INFORMED
16 YOUR VIEW AS TO THE LIKELIHOOD OF CONFUSION ON THE
17 TABS?

18 A YES, I DID.

19 Q IS THAT THE VAN LIERE SURVEY THAT THE JURY
20 WILL BE HEARING ABOUT SHORTLY?

21 A YES, THAT WAS THE VAN LIERE REPORT THAT
22 DISCUSSED CONFUSION.

23 Q NOW, ONE OF THE OTHER FACTORS THAT YOU LOOKED
24 AT WAS THE QUESTION OF RETAIL CHANNELS; CORRECT,
25 SIR?

1 A CORRECT.

2 Q AND CAN YOU COMMENT BRIEFLY ABOUT THE RETAIL
3 CHANNELS THAT ARE USED BY SAMSUNG AND APPLE WITH
4 RESPECT TO THESE PRODUCTS?

5 A WELL, EXCEPT, OF COURSE, FOR THE APPLE STORE,
6 THE PRODUCTS, THE TABLETS COMPETE AND ARE AVAILABLE
7 IN ALL THE MAJOR RETAIL ELECTRONICS CHAINS. JUST
8 TO VERIFY THAT, I VISITED A NUMBER OF BEST BUY
9 STORES, RADIO SHACKS, ET CETERA, TO SEE THAT AND,
10 IN FACT, IT'S TRUE THAT BOTH BRANDS ARE AVAILABLE
11 IN ALL THOSE STORES.

12 Q AND HOW ABOUT ADVERTISING CHANNELS? IS THAT
13 SOMETHING THAT YOU LOOKED AT?

14 A IN ADDITION, BOTH PRODUCTS HAVE A FAIRLY
15 SIMILAR ADVERTISING STRATEGY ON -- I WON'T SAY THEY
16 DON'T ADVERTISE ON THE SAME SHOW ON THE SAME NIGHT,
17 BUT THEY HAVE FAIRLY SIMILAR DEMOGRAPHICS, FAIRLY
18 SIMILAR SHOWS THAT THEY'RE USING FOR THEIR MEDIA
19 PLAN.

20 Q NOW, ONE OF THE OTHER FACTORS TO LOOK AT IS
21 THE SOPHISTICATION OF CUSTOMERS OF TABLETS; RIGHT?

22 A CORRECT.

23 Q AND WHAT DID YOU CONCLUDE ABOUT THAT QUESTION?

24 A WELL, I THINK THAT ON THE SURFACE, IT'S PRETTY
25 RATIONAL TO ASSUME THAT ANY BUYER FOR A PRODUCT

1 THAT'S, SAY, \$500 OR \$600 IS GOING TO PRESENT A LOT
2 OF TIME INTO THAT PURCHASE.

3 HOWEVER, IN OUR STUDIES OF CONSUMER
4 BEHAVIOR, THAT'S NOT ALWAYS THE CASE. THERE ARE A
5 NUMBER OF FACTORS, SUCH AS PERHAPS BUYING A GIFT
6 FOR SOMEONE, A TIME PRESSURE, INFORMATION BEING
7 GIVEN BY A SALESPERSON, THERE CAN BE A NUMBER OF
8 REASONS WHY A CONSUMER DOESN'T SPEND AS MUCH TIME
9 AS YOU WOULD EXPECT MAKING WHAT LOOKS TO BE AN
10 EXPENSIVE DECISION.

11 Q WHAT IS YOUR OPINION REGARDING SAMSUNG'S
12 INTENT IN SELECTING THE DESIGN OR TRADE DRESS FOR
13 ITS GALAXY TAB 10.1 DEVICE?

14 A WELL, AGAIN, SIMILAR TO WHAT WE MENTIONED
15 BEFORE, THAT THERE WAS SOME SAMSUNG DOCUMENTS THAT
16 I SAW THAT INDICATED THAT THEY VIEWED THE IPAD AS A
17 TARGET, A PRODUCT TO BE EMULATED AND ONE THAT THEY
18 STUDIED CAREFULLY FOR FUTURE REFINEMENTS OR
19 DEVELOPMENT IN THIS CASE OF THE PRODUCT.

20 Q AND WHAT IS YOUR OVERALL OPINION AS TO WHETHER
21 THERE'S A LIKELIHOOD OF CONFUSION BETWEEN THE
22 GALAXY TAB 10.1 AND THE IPAD TRADE DRESS?

23 A WELL, I THINK BECAUSE THE TRADE DRESSES ARE SO
24 SIMILAR, YOU HAVE TO AN IMPORTANT FACTOR HERE THAT
25 THESE PRODUCTS ARE USED OUT IN PUBLIC. THEY'RE NOT

1 ITEMS THAT ARE CONSUMED AT HOME WHERE A LOT OF
2 PEOPLE DON'T SEE THEM.

3 SO LIKE AUTOMOBILES, THESE PRODUCTS ARE
4 VISIBLE, AND, THEREFORE, IF THE TRADE DRESS IS
5 VISIBLE ON A SAMSUNG GALAXY TABLET THAT PEOPLE
6 LIKE, THEY MAY CAUSE SOMEONE ELSE TO BUY A GALAXY
7 TABLET WHEN, IN FACT, IT IS AN INFRINGEMENT ON THE
8 APPLE TRADE DRESS.

9 SO THIS IS ONE FORM OF WHAT I CALLED AN
10 IMITATIVE SCENARIO.

11 Q NOW, LET'S TALK ABOUT THE RELATED CONCEPT, BUT
12 SLIGHTLY DIFFERENT FACTORS THAT WE TALKED ABOUT,
13 DILUTION.

14 DO YOU HAVE AN OPINION AS TO WHETHER
15 SAMSUNG'S GALAXY TAB 10.1 AND SALES ARE LIKELY TO
16 DILUTE APPLE'S ASSERT IPAD TRADE DRESS?

17 A YES, I DO.

18 Q AND WHY DO YOU BELIEVE THAT, SIR?

19 A WELL, I THINK WHERE THERE'S CONFUSION, THERE'S
20 GOING TO BE DILUTION OR MAYBE A BETTER TERM FOR IT
21 IS BLURRING, THAT IS, THE TRADE DRESS OR THE
22 DISTINCTIVENESS OF THE APPLE TRADE DRESS IS GOING
23 TO BE BLURRED BY COMPETITORS THAT EMULATE AND COPY
24 THAT TRADE DRESS. THERE'S JUST NO DOUBT ABOUT IT.

25 Q NOW, YOU LOOKED AT SOME FACTORS AGAIN?

1 A YES, I DID.

2 Q LET'S LOOK AT PDX 28.28.

3 SO THESE ARE THE FACTORS YOU LOOKED AT
4 FOR WHAT YOU CALLED "DILUTION BY BLURRING"?

5 A YES, I DID.

6 Q SO LET'S TALK FIRST ABOUT THE DEGREE OF
7 SIMILARITY. IS YOUR ANALYSIS THERE THE SAME AS THE
8 ANALYSIS YOU GAVE UNDER THE CONFUSION PORTION OF
9 YOUR OPINION?

10 A YES. I DON'T HAVE A LOT TO ADD ON THAT
11 BULLET.

12 Q AND HOW ABOUT THE DEGREE OF INHERIT OR
13 ACQUIRED DISTINCTIVENESS OF THE TRADE DRESS FOR THE
14 IPAD?

15 A THE SAME. I THINK I'VE ALREADY DISCUSSED THAT
16 I BELIEVE THAT THE TRADE DRESS IS, IN FACT, BOTH
17 DISTINCTIVE AND FAMOUS.

18 Q AND HOW ABOUT THE DEGREE OF RECOGNITION OF THE
19 TRADE DRESS?

20 A AGAIN, RELYING ON MY PREVIOUS TESTIMONY, I
21 THINK THE DEGREE OF RECOGNITION IS ALSO EXTREMELY
22 HIGH.

23 Q AND WHETHER THE JUNIOR USER, MEANING THE
24 COMPANY THAT CAME AFTER THE FIRST COMPANY, HERE
25 SAMSUNG AFTER APPLE, INTENDED TO CREATE AN

1 ASSOCIATION WITH THE FAMOUS TRADE DRESS?

2 A WELL, I DON'T WANT TO USE THE WORD "INTENT,"
3 BUT I -- THERE SEEMS TO BE PLENTY OF EVIDENCE THAT
4 THEY'RE WELL AWARE OF THEIR DEFICIENCIES IN THEIR
5 PRODUCTS AND USE THAT INFORMATION TO DEVELOP
6 THEIRS.

7 Q AND THEN WITH ANY ACTUAL ASSOCIATION BETWEEN
8 THE TRADE DRESSES.

9 A IN THIS CASE, I USED THE VAN LIERE REPORT TO,
10 IN FACT, DRAW CONCLUSIONS ABOUT A HIGH DEGREE OF
11 ASSOCIATION.

12 Q AND THAT WAS YOUR CONCLUSION?

13 A THAT WAS MY CONCLUSION, YES.

14 Q NOW, DID YOU OFFER AN OPINION AS TO WHETHER
15 SAMSUNG'S SALES OF CERTAIN GALAXY S PHONES IS
16 LIKELY TO DILUTE APPLE'S ASSERTED IPHONE TRADE
17 DRESSES?

18 A YES, I DID.

19 Q AND WHAT IS THAT OPINION?

20 A VERY SIMILAR TO THE DISCUSSION OF THE IPAD AND
21 THE GALAXY TAB.

22 MY BELIEF IS THAT THERE IS A HIGH DEGREE
23 OF DILUTION, AND, THEREFORE, BLURRING BETWEEN THE
24 TRADE DRESSES.

25 Q AND IN TERMS OF THE SIMILARITY OF THE

1 PRODUCTS, ANYTHING NEW TO SAY ABOUT THAT, OTHER
2 THAN WHAT YOU SAID BEFORE WHEN YOU WERE ANALYZING
3 THE CONFUSION FACTORS?

4 A NO. I THINK IT'S THE SAME EVIDENCE. THE
5 QUOTES FROM THE BUSINESS PRESS --

6 Q I'M SORRY?

7 A THE QUOTES OR REVIEWS OF THE PRODUCTS IN THE
8 BUSINESS PRESS, AS WELL AS MY OWN OPINION.

9 MR. JACOBS: I'M SORRY. I'M GOING TOO
10 FAST.

11 YOUR HONOR, AT THIS POINT WE WOULD OFFER
12 PX 6, WHICH IS ANALOGOUS TO PX 5, BUT COVERS THE
13 PHONES AND SIMILARITY OF THE PHONES.

14 THE COURT: ALL RIGHT. NOW, I HAD RULED
15 ON THESE SUMMARIES.

16 WERE THESE EXHIBITS TO MR. WINER'S EXPERT
17 REPORT? I RECALL RULING ON A COMPILATION OF NEWS
18 STORIES FOR FAME AND OVERRULING SAMSUNG'S
19 OBJECTION.

20 I DON'T RECALL A SPECIFIC OBJECTION AS TO
21 THESE PRESS REPORTS ON CONFUSION, SO REMIND ME.

22 MR. JACOBS: SO YOU RULED ON PX 5 AND PX
23 6 IN CONNECTION WITH BRESSLER. THE SAME UNDERLYING
24 ARTICLES THAT ARE REPORTED HERE IN THE SUMMARY ARE
25 IN EXHIBITS, RESPECTIVELY, FOR PX 5 AND PX 6, IN

1 EXHIBIT 8 TO WINER AND EXHIBIT 7 TO WINER.

2 I'M NOT SURE YOU HAVE IN YOUR FOLDER UP
3 THERE ALL THE EXHIBITS TO DR. WINER'S REPORT.

4 THE COURT: WELL, ON BRESSLER, PX 5 AND
5 PX 6, I SUSTAINED IT AS TO ANY ARTICLES THAT WERE
6 NOT PART OF HIS REPORT. IT LOOKS LIKE THREE OF THE
7 NINE ARTICLES WERE NOT IN HIS REPORT.

8 SO ARE YOU SAYING PX 5 AND PX 6, THE
9 WINER EXHIBITS ARE THE SAME AS PX 5 AND PX 6 ON
10 BRESSLER?

11 MR. JACOBS: NO. THE EXHIBITS ARE
12 DIFFERENT AND ALL OF THE ARTICLES CITED ARE IN THE
13 EXHIBITS TO WINER.

14 THE COURT: I'M SORRY. SAY THAT AGAIN.

15 MR. JACOBS: ALL OF THE ARTICLES IN PX 5
16 AND PX 6, TO BE PRECISE, ALL OF THE ARTICLES
17 SUMMARIZED IN PX 5 AND PX 6 ARE REFERRED TO IN,
18 RESPECTIVELY, EXHIBITS 8 AND 7 OF WINER'S OPENING
19 REPORT.

20 MR. VERHOEVEN: YOUR HONOR, THIS IS
21 MR. VERHOEVEN. IF I MAY SAY ONE THING?

22 THE COURT: UM-HUM. YOU KNOW, I GUESS
23 I'M NOT CLEAR WHY SOME OF THIS WASN'T RAISED DURING
24 OUR 8:30 MEETING THIS MORNING. I UNDERSTAND THAT I
25 HAVE LIMITED YOUR OBJECTIONS TO TWO, BUT WHEN I

1 ASKED IN THE MORNING IF THERE ARE ANY OBJECTIONS,
2 I'D LIKE PEOPLE TO SAY THIS SO WE DON'T HAVE TO
3 WASTE THE JURY'S TIME.

4 MR. VERHOEVEN: YOUR HONOR, JUST BY WAY
5 OF EXPLANATION.

6 THE COURT: YEAH.

7 MR. VERHOEVEN: THERE'S A LIMITING
8 INSTRUCTION, I BELIEVE, ASSOCIATED WITH THESE AND
9 THEY ACTUALLY, WITH MR. BRESSLER --

10 THE COURT: BECAUSE IT'S NOT --

11 MR. VERHOEVEN: WE OBJECTED TO THE USE OF
12 THEM FOR THE TRUTH AND YOUR HONOR SUSTAINED THAT
13 DURING THE EXAMINATION.

14 THE COURT: BUT YOU'RE NOW SAYING YOU'RE
15 OBJECTING EVEN WITH THE LIMITING INSTRUCTION?

16 MR. VERHOEVEN: NO. I -- I'M ALERTING
17 THE COURT THAT, IN FACT, WHEN THESE WERE PROVIDED
18 THE FIRST TIME, THEY WERE WHILE THE WITNESS WAS
19 TALKING ABOUT SIMILARLY OF ADDRESS, AND THERE'S NO
20 OTHER USE FOR THEM BUT FOR THE TRUTH, WHICH WOULD
21 VIOLATE YOUR HONOR'S LIMITING INSTRUCTION.

22 THE COURT: OVERRULED. AS LONG AS A
23 LIMITING INSTRUCTION IS THAT THEY'RE NOT OFFERED
24 AND THEY SHOULD NOT BE CONSIDERED, THE CONTENTS
25 SHOULD NOT BE CONSIDERED FOR THE TRUTH, THEY'RE

1 ADMITTED. THE OBJECTION'S OVERRULED.

2 (WHEREUPON, PLAINTIFF'S EXHIBIT NUMBERS 5
3 AND 6, HAVING BEEN PREVIOUSLY MARKED FOR
4 IDENTIFICATION, WAS ADMITTED INTO
5 EVIDENCE.)

6 MR. JACOBS: THANK YOU, YOUR HONOR.

7 Q DID YOU LOOK AT SAMSUNG'S INTERNAL DOCUMENTS
8 WITH RESPECT TO THE PHONES TO DETERMINE WHETHER
9 SAMSUNG HAD INTENDED TO ASSOCIATE ITSELF WITH THE
10 IPHONE TRADE DRESS?

11 A YES, I DID.

12 Q AND CAN WE LOOK AT -- CAN YOU TAKE A LOOK,
13 PLEASE, AT PX 36. WHAT IS PX 36?

14 A THIS IS A REPORT BY A CONSULTING FIRM CALLED
15 GRAVITY TANK TITLED "TOUCH PORTFOLIO," ROLL OUT
16 STRATEGY, RECOMMENDATION BASED ON CONSUMER INSIGHT
17 DATED DECEMBER 17TH, 2008.

18 Q AND DID YOU LOOK AT THIS DOCUMENT IN
19 CONNECTION WITH YOUR ANALYSIS?

20 A YES, I DID.

21 MR. JACOBS: YOUR HONOR, WE WOULD OFFER
22 PX 36 INTO EVIDENCE.

23 MR. VERHOEVEN: OBJECTION, YOUR HONOR.
24 FIRST OF ALL, RELEVANCE.

25 THIS DOCUMENT CONCERNS RECOMMENDATIONS

1 RELATING TO FUNCTIONALITY OF TOUCHSCREENS, WHICH IS
2 NOT RELEVANT TO APPLE'S TRADE DRESS CLAIMS, SO IT'S
3 NOT RELEVANT TO -- TO THIS WITNESS'S SCOPE OF
4 TESTIMONY.

5 THERE'S ALSO NO FOUNDATION.

6 THE COURT: IT'S A SAMSUNG DOCUMENT.

7 OVERRULED.

8 (WHEREUPON, PLAINTIFF'S EXHIBIT NUMBER
9 5636, HAVING BEEN PREVIOUSLY MARKED FOR
10 IDENTIFICATION, WAS ADMITTED INTO
11 EVIDENCE.)

12 BY MR. JACOBS:

13 Q 5636 IS ON THE SCREEN NOW AS AN ADMITTED
14 DOCUMENT, DR. WINER.

15 AND WE SHOULD TURN TO PX -- ACTUALLY,
16 LET'S GET TO THE SLIDE PDX 2811. AND AMONG THE
17 THINGS, AMONG THE ITEMS IN THIS DOCUMENT THAT YOU
18 NOTED, WHAT JUMPED OUT AT YOU ABOUT THIS PARTICULAR
19 PAGE?

20 A WELL, I THINK THAT THIS IS A COMPARISON OF
21 DIFFERENT PRODUCTS, NOKIA, AS YOU CAN SEE, APPLE,
22 SAMSUNG, AND ON A NUMBER OF DIMENSIONS, INCLUDING
23 USER INTERFACE, ET CETERA.

24 AND THE CALL OUT SAYS APPLE SETS THE
25 STANDARD FOR SCREEN CENTRIC DESIGN.

1 AGAIN, THAT SUPPORTS MY POSITION THAT
2 SAMSUNG EXECUTIVES VIEWED APPLE, IPHONE IN THIS
3 CASE, AS A TARGET PRODUCT AGAINST WHICH THEY WERE
4 TRYING TO COMPARE THEMSELVES AND EMULATE.

5 Q AND NOW IF WE TURN -- IF WE GET TO SLIDE PDX
6 28.12 UP, PLEASE.

7 MR. VERHOEVEN: YOUR HONOR, THIS HAS GOT
8 SOME SORT OF BRACKETED INFORMATION PULLED OUT. I
9 NEED TO VERIFY, BEFORE THIS GOES UP, THIS IS THE
10 ACTUAL DOCUMENT.

11 MR. JACOBS: YOUR HONOR, THEY'VE HAD
12 THESE DEMONSTRATIVES SINCE OUR DISCLOSURE OF THE
13 DEMONSTRATIVES.

14 THE COURT: I KNOW. OVERRULED. LET'S
15 KEEP GOING.

16 BY MR. JACOBS:

17 Q SO WHAT JUMPED OUT AT YOU ABOUT THIS
18 PARTICULAR PAGE?

19 A IT SAYS, "PEOPLE DON'T THINK THAT THE
20 INDUSTRIAL DESIGN OF SAMSUNG TOUCH PHONES ARE
21 GROUNDBREAKING. NOTHING STANDS OUT AS SOMETHING
22 CONSUMERS HAVE NEVER SEEN."

23 Q AND IF YOU LOOK ON THE PORTION THAT'S NOT
24 HIGHLIGHTED, CAN YOU JUST READ, WHILE LIKED, NO
25 PHONE MAKES A DESIGN STATEMENT, UNDER THAT HEADING,

1 PLEASE?

2 A IT SAYS, "PEOPLE GENERALLY HAVE POSITIVE
3 COMMENTS ABOUT THE INDUSTRIAL DESIGN OF SAMSUNG
4 TOUCH PHONES, BUT DON'T THINK THEY ARE
5 GROUNDBREAKING. NOTHING STANDS OUT AS SOMETHING
6 CONSUMERS HAVE NEVER SEEN. CONSUMERS FEEL THEY
7 LOOK TOO PLAIN, TOO EXTREME, OR TOO MUCH LIKE OTHER
8 SAMSUNG PHONES."

9 Q AND WHAT STRUCK YOU ABOUT THIS DISCUSSION OF
10 THE INDUSTRIAL DESIGN OF SAMSUNG SMARTPHONES?

11 A SIMILARLY, THEY ARE VIEWING THE IPHONE AS A
12 TARGET AND SOMETHING TO EMULATE AND ACKNOWLEDGING
13 SOME ISSUES THEY HAD WITH THEIR OWN PHONES.

14 AND SO MY CONCLUSION IS THAT THEY ARE
15 GOING TO USE THIS KIND OF ANALYSIS TO IMPROVE THEIR
16 OWN PRODUCTS.

17 Q THE BOTTOM LINE, DR. WINER, DO YOU BELIEVE
18 THAT THE SALE OF SAMSUNG'S GALAXY S PHONES IS
19 LIKELY TO DILUTE THE DISTINCTIVENESS OF APPLE'S
20 IPHONE TRADE DRESSES?

21 A YES, I DO.

22 MR. JACOBS: THANK YOU VERY MUCH,
23 DR. WINER.

24 THE COURT: ALL RIGHT. IT'S 2:24.
25 PLEASE GO AHEAD WITH THE CROSS.

1 MR. VERHOEVEN: YOUR HONOR, IF I CAN HAVE
2 JUST TEN MINUTES, I CAN REALLY SHORTEN IT. I
3 WASN'T SURE HOW MUCH -- HOW LONG THE DIRECT WOULD
4 BE. I THINK IT WOULD BE USEFUL. SO I WOULD
5 SUGGEST WE TAKE OUR AFTERNOON BREAK NOW IF YOUR
6 HONOR IS WILLING TO. OTHERWISE I CAN GO, BUT
7 OTHERWISE --

8 THE COURT: WE'RE GOING TO GO NOW. WE'RE
9 GOING TO GO UNTIL 2:45 AND TAKE OUR BREAK.

10 MR. VERHOEVEN: YES, YOUR HONOR.

11 (PAUSE IN PROCEEDINGS.)

12 THE COURT: HOW IS THIS DIFFERENT FROM
13 THE WINER CROSS I GOT YESTERDAY? IS THAT THE SAME
14 OR DIFFERENT?

15 **CROSS-EXAMINATION**

16 BY MR. VERHOEVEN:

17 Q GOOD AFTERNOON, DR. WINER.

18 A GOOD AFTERNOON, COUNSEL.

19 Q MY NAME IS CHARLES VERHOEVEN, AND I'LL BE
20 EXAMINING YOU.

21 NOW, YOU'VE BEEN -- YOU WERE ENGAGED,
22 HIRED TO WORK ON THIS CASE FOR APPLE THROUGH A
23 COMPANY CALLED CORNERSTONE RESEARCH?

24 A THAT'S CORRECT.

25 Q AND CORNERSTONE RESEARCH IS A LITIGATION

1 SUPPORT COMPANY; RIGHT?

2 A THAT'S CORRECT.

3 Q THEY CONSULT DIRECTLY WITH ATTORNEYS ON
4 LITIGATION MATTERS?

5 A YES, THEY DO.

6 Q AND THEY HELP FACILITATE CLIENTS TO FIND
7 EXPERT WITNESSES FOR LITIGATION; RIGHT?

8 A THAT'S CORRECT.

9 Q AND THAT'S HOW YOU BECAME INVOLVED IN THIS
10 CASE?

11 A YES. I WAS CONTACTED BY SOMEONE AT
12 CORNERSTONE.

13 Q NOW, AND YOU ACCEPTED THE ASSIGNMENT?

14 A I SURE DID.

15 Q OKAY. AND WHEN YOU WERE HIRED AS AN EXPERT ON
16 THIS CASE, THERE WERE -- CORNERSTONE HAD A STAFF OF
17 FOLKS THAT ASSISTED YOU WITH THE PREPARATION OF
18 YOUR EXPERT REPORT?

19 A THAT'S CORRECT.

20 Q AND, IN FACT, CORNERSTONE -- THE FOLKS AT
21 CORNERSTONE SUBSTANTIALLY WROTE THE FIRST DRAFT OF
22 YOUR REPORT; RIGHT?

23 A I GAVE SUBSTANTIAL INPUT AND APPROVED
24 EVERYTHING IN IT, BUT THEY WROTE THE FIRST DRAFT.

25 Q OKAY. SO WHO WAS IT?

1 A THE LEAD PERSON AT CORNERSTONE. HIS NAME IS
2 SHANKAR, S-H-A-N-K-A-R, IYER, I-Y-E-R.

3 Q SINCE 2000 -- SINCE THE YEAR 2000, YOU'VE
4 SERVED AS AN EXPERT WITNESS ON AT LEAST 14 OTHER
5 LITIGATION MATTERS; RIGHT?

6 A THAT MIGHT BE CORRECT. I HAVEN'T COUNTED.

7 Q AND YOU'RE BEING PAID FOR YOUR TIME IN THIS
8 CASE; RIGHT?

9 A CORRECT.

10 Q TELL THE JURY HOW MUCH YOU'RE BEING PAID?

11 A SIX HUNDRED AND TWENTY-FIVE DOLLARS AN HOUR.

12 Q AND HOW MUCH MONEY HAS APPLE PAID YOU SO FAR?

13 A APPROXIMATELY \$50,000.

14 Q AND HOW MUCH TOTAL HAS IT PAID CORNERSTONE?

15 A I HAVE NO IDEA.

16 Q NOW, IN REACHING YOUR OPINIONS IN YOUR EXPERT
17 REPORT, YOU DID NOT DO ANY SYSTEMATIC CONSUMER
18 RESEARCH, DID YOU, SIR?

19 A I DID NOT CONDUCT ANY NEW STUDIES BEYOND WHAT
20 WAS ALREADY DONE FOR THE CASE.

21 Q YOU, YOURSELF, DID NOT PERSONALLY CONDUCT ANY
22 SYSTEMATIC CONSUMER RESEARCH; FAIR?

23 A THAT'S CORRECT.

24 Q YOU DIDN'T DO ANY FORMAL INTERVIEWS WITH
25 CONSUMERS ABOUT THEIR PURCHASING EXPERIENCES;

1 RIGHT?

2 A THAT'S CORRECT.

3 Q AND YOU HAVE NO EVIDENCE THAT CONSUMERS IN THE
4 REAL WORLD HAVE ACTUALLY BOUGHT APPLE DEVICES
5 THINKING THEY ARE SAMSUNG DEVICES; RIGHT?

6 MR. JACOBS: YOUR HONOR, OPENING THE
7 DOOR. MR. LEE'S TESTIMONY THAT YOUR HONOR EXCLUDED
8 THIS MORNING, MR. VERHOEVEN HAS JUST ASKED THIS
9 WITNESS WHETHER HE HAS ANY ACTUAL EVIDENCE OF
10 CONSUMER CONFUSION AND THIS WITNESS DOES.

11 MR. VERHOEVEN: LET ME, LET ME ASK YOU --

12 Q AT YOUR DEPOSITION -- DO YOU REMEMBER YOUR
13 DEPOSITION WAS TAKEN ON APRIL 27TH?

14 A I REMEMBER BEING DEPOSED. I DON'T REMEMBER
15 THAT DATE, BUT I'LL ASSUME YOU'RE CORRECT.

16 Q AND DO YOU REMEMBER TESTIFYING THAT YOU HAVE
17 NO EVIDENCE THAT CONSUMERS OUT THERE IN THE REAL
18 WORLD HAVE ACTUALLY BOUGHT APPLE DEVICES THINKING
19 THEY WERE SAMSUNG DEVICES?

20 A I THINK THAT MY REPLY WAS IN THE CONTEXT OF I
21 DID NOT DO ANY RESEARCH MYSELF THAT PROVED THAT.

22 Q WELL, LET'S LOOK AT WHAT YOU SAID.

23 CAN WE PLAY DR. WINER'S DEPOSITION
24 TESTIMONY FROM APRIL 27TH, 2012, PAGE 35, LINES 7
25 THROUGH 15.

1 (WHEREUPON, A VIDEOTAPE WAS PLAYED IN
2 OPEN COURT OFF THE RECORD.)

3 MR. VERHOEVEN: ALL RIGHT. LET'S PAUSE
4 IT AND GET THE VOLUME WORKING. I APOLOGIZE, YOUR
5 HONOR.

6 (WHEREUPON, A VIDEOTAPE WAS PLAYED IN
7 OPEN COURT OFF THE RECORD.)

8 BY MR. VERHOEVEN:

9 Q THAT WAS YOUR TESTIMONY YOU GAVE UNDER OATH IN
10 APRIL, SIR?

11 MR. JACOBS: YOUR HONOR, UNDER THE RULE
12 OF COMPLETENESS, I BELIEVE WE SHOULD READ A COUPLE
13 MORE PASSAGES DOWN, AND MR. VERHOEVEN HAS OPENED
14 THE DOOR.

15 THE COURT: I THINK HE'S OPENED THE DOOR,
16 BUT YOU'RE NOT GOING TO DO IT DURING HIS CROSS.

17 THE WITNESS: I BELIEVE I RESPONDED TO
18 THAT IN THE CONTEXT OF WHETHER I HAD DONE ANY
19 RESEARCH MYSELF.

20 I CERTAINLY HAD READ DOCUMENTS, AND I
21 ALLUDED TO THEM IN MY DEPOSITION, AND MY REPORT,
22 THAT THERE WERE INTERNAL SAMSUNG DOCUMENTS
23 INDICATING REAL CASES OF CONFUSION IN THE
24 MARKETPLACE.

25 BY MR. VERHOEVEN:

1 Q DO YOU STAND BY THE TESTIMONY WE JUST SAW,
2 SIR?

3 A SURE I DO.

4 Q OKAY. THANK YOU.

5 YOU HAVE NO IDEA WHETHER CONSUMERS HAVE
6 ACTUALLY BOUGHT APPLE DEVICES THINKING THEY WERE
7 SAMSUNG DEVICES, HAVE YOU?

8 MR. JACOBS: YOUR HONOR, I'M SORRY. THE
9 WITNESS HAS BEEN INSTRUCTED NOT TO -- TO FOLLOW AN
10 EARLIER ORDER OF THE COURT AND MR. VERHOEVEN IS
11 OPENING THE DOOR. THE WITNESS SHOULD BE INFORMED
12 THAT HE CAN ANSWER THAT QUESTION TRUTHFULLY.

13 MR. VERHOEVEN: I'LL MOVE ON, YOUR HONOR.

14 Q DR. WINER, YOU HAVE NO EMPIRICAL EVIDENCE TO
15 SHOW THAT SAMSUNG'S ACTIONS HAVE DILUTED APPLE'S
16 BRAND; RIGHT?

17 A CORRECT.

18 Q AND YOU HAVE NO HARD DATA TO SHOW THAT
19 SAMSUNG'S ACTIONS HAVE DILUTED APPLE'S BRAND;
20 RIGHT?

21 A I WAS NOT ASKED TO DO THAT.

22 Q YOU HAVE NEVER QUANTIFIED THE AMOUNT OF ANY
23 ALLEGED HARM FROM DILUTION OR LOSS OF ANY KIND TO
24 APPLE AS A RESULT OF SAMSUNG'S ACTIONS; RIGHT?

25 A CORRECT.

1 Q YOU HAVE NO EMPIRICAL EVIDENCE THAT SHOWS THAT
2 APPLE HAS ACTUALLY LOST ANY MARKET SHARE AS A
3 RESULT OF SAMSUNG'S SALES OF ITS DEVICES; RIGHT?

4 A NO.

5 Q THAT ANSWER IS YOU DON'T HAVE ANY EMPIRICAL
6 EVIDENCE; CORRECT?

7 A CORRECT.

8 Q AND YOU DON'T HAVE ANY EVIDENCE THAT
9 QUANTIFIES THE AMOUNT OF ANY LOST MARKET SHARE;
10 CORRECT?

11 A THAT'S CORRECT.

12 Q YOU HAVE NO EVIDENCE QUANTIFYING THE NUMBER OF
13 PURCHASERS WHO BOUGHT A SAMSUNG DEVICE IN LIEU OF
14 BUYING AN APPLE DEVICE; RIGHT?

15 A I KNOW OF AT LEAST ONE.

16 Q YOU CAN'T QUANTIFY THE NUMBER OF PURCHASERS
17 WHO BOUGHT A SAMSUNG DEVICE IN LIEU OF BUYING AN
18 APPLE DEVICE; RIGHT?

19 A AS FAR AS I KNOW, ONE IS A QUANTIFICATION,
20 COUNSELOR.

21 Q OKAY. LET'S SEE WHAT YOU SAID IN RESPONSE TO
22 THAT AT YOUR DEPOSITION, SIR. PAGE NOTE NOTE LINE
23 CITE.

24 (WHEREUPON, A VIDEOTAPE WAS PLAYED IN
25 OPEN COURT OFF THE RECORD.)

1 BY MR. VERHOEVEN:

2 Q YOU WERE ASKED THAT QUESTION AND YOU GAVE THAT
3 ANSWER AT YOUR DEPOSITION; RIGHT, SIR?

4 A APPARENTLY SO.

5 Q DO YOU STAND BY THAT TESTIMONY?

6 A YES.

7 Q WILL HE ME SWITCH SUBJECTS NOW.

8 IN YOUR MARCH 22ND, 2012 EXPERT REPORT AT
9 PAGE 160, YOU REFER TO WHAT YOU CALL A SLEEKCRAFT
10 FACTOR, NUMBER 6, DEGREE OF CARE WITH RESPECT TO
11 THE IPAD.

12 CAN WE PUT UP PARAGRAPH 160 FROM
13 DR. WINER'S EXPERT REPORT FROM MARCH 22, PLEASE.

14 CAN YOU PUSH THAT DOWN SO I CAN SEE WHERE
15 IT WAS PULLED OUT FROM, MR. FISHER? GO BACK.

16 OKAY. SO CAN WE -- THAT'S WHAT I'M
17 LOOKING FOR, 160.

18 DO YOU SEE IT SAYS SLEEK, SLEEK -- YOU
19 HAVE IT IN YOUR BINDER AS WELL, SIR?

20 A YES, I DO HAVE IT.

21 Q SLEEK -- SLEEKCRAFT FACTOR SAYS, "TYPES OF
22 GOODS AND," THIS IS WHAT I'M GOING TO FOCUS ON
23 HERE, THE REST OF THIS, "AND THE DEGREE OF CARE
24 LIKELY TO BE EXERCISED BY THE PURCHASER."

25 DO YOU SEE THAT?

1 A I DO.

2 Q AND SO THE DEGREE OF CARE, YOU'D AGREE WITH
3 ME, THAT THE HIGHER THE DEGREE OF CARE EXERCISED BY
4 THE CONSUMER, THE LESS CHANCE THERE IS GOING TO BE
5 THAT THERE'S CONFUSION OR DILUTION; RIGHT?

6 A FOR ANY INDIVIDUAL CONSUMER, THAT WOULD BE
7 TRUE.

8 Q SO IF IT'S LIKE A 50 CENTS DOODAD IN THE
9 GROCERY STORE THAT PEOPLE MIGHT PICK UP, THE DEGREE
10 OF CARE WOULD BE REALLY LOW, RIGHT?

11 A YOU WOULD BE SURPRISED, BUT I WOULD AGREE THAT
12 IT WOULD BE, OVERALL, LOWER THAN FOR A \$600 ITEM OR
13 \$300 ITEM.

14 Q OR TO GET REALLY CONTRASTING, A NEW CAR WOULD
15 BE SOMETHING THAT WOULD BE VERY EXPENSIVE FOR A LOT
16 OF PEOPLE, YOU'LL HAVE TO PAY FOR IT OVER A NUMBER
17 OF YEARS, SO THEY'LL BE REALLY CAREFUL WHEN THEY
18 BUY THAT, RIGHT?

19 A I JUST DON'T WANT TO USE GENERALITIES. I
20 WOULD SAY THAT THERE ARE ALWAYS SEGMENTS OF
21 CONSUMERS WHO TAKE MORE OR LESS CARE IN MAKING
22 PURCHASES OF PRODUCTS.

23 SOME MARKETING, WE DON'T WORK WITH THE
24 NOTION OF THERE BEING A MARKET. WE WORK WITH THE
25 IDEA THAT THERE ARE SEGMENTS AND DIFFERENT KINDS OF

1 CUSTOMERS.

2 SO WHILE THE RATIONAL -- YOU KNOW,
3 EXPLANATION OF PURCHASING WOULD BE, YES, PEOPLE
4 TAKE A LOT OF CARE EVEN IN BUYING CARS. THE FACT
5 IS THAT EVEN THAT WILL VARY OVER CONSUMERS IN TERMS
6 OF HOW MUCH INFORMATION THEY USE, HOW MANY
7 DEALERSHIPS THEY VISIT AND THE WHOLE RANGE OF
8 INFORMATION AND COLLECTION ACTIVITIES.

9 Q FAIR ENOUGH. DIFFERENT CONSUMERS EXHIBIT
10 DIFFERENT BEHAVIORS; RIGHT?

11 A THAT'S WHAT I'M SAYING.

12 Q BUT SETTING THAT ASIDE, GENERALLY SPEAKING,
13 WHEN WE'RE TALKING ABOUT THIS FACTOR HERE, IF IT'S
14 A MORE EXPENSIVE ITEM, ON AVERAGE, CONSUMER WILL
15 EXERCISE MORE CARE; RIGHT?

16 A ONE WOULD EXPECT THAT.

17 Q THAT MEANS THERE'S LESS CHANCE OF CONFUSION,
18 RIGHT?

19 A LESS, BUT NOT ZERO.

20 Q SO IF WE SWITCH TO WHAT WE'RE TALKING ABOUT
21 HERE, I'M HOLDING IN MY HAND ACCUSED SAMSUNG
22 TAB 10.1, WHICH IS EXHIBIT, TRIAL JOINT EXHIBIT
23 1037, YOU'VE SEEN THIS DOCUMENT, THIS --

24 A IT'S NOT TURNED ON, BUT I'LL ASSUME THAT
25 YOU'RE CORRECT.

1 Q DO YOU WANT TO TAKE A LOOK AT IT?

2 A NO, I BELIEVE YOU.

3 Q OKAY. SO IF A CONSUMER IF WE'RE TALKING ABOUT
4 A CONSUMER PURCHASING AN ELECTRONIC DEVICE LIKE
5 THIS TABLET, THEY'RE GOING TO EXERCISE MORE CARE
6 THAN IF THEY'RE BUYING SOME SERIAL AT THE GROCERY
7 STORE, RIGHT, ON AVERAGE?

8 A LET ME BE CLEAR. ON AVERAGE.

9 Q TABLET IS A PRETTY EXPENSIVE PRODUCT; RIGHT?

10 A DEPENDS ON WHAT'S RELATIVE TO YOU. NOT TO A
11 NEW HOUSE. BUT TO A TUBE OF TOOTHPASTE, YES.

12 Q TO AN AVERAGE CONSUMER IT'S NOT A TRIVIAL
13 PURCHASE, IS IT?

14 A IT'S A CONSUMER DURABLE GOOD THAT'S REASONABLY
15 EXPENSIVE, I'LL AGREE.

16 Q AND CONSUMERS ACTUALLY RESEARCH VARIOUS
17 TABLETS BEFORE THEY GO BUY THEM. WOULD YOU AGREE
18 WITH THAT?

19 A NO, I DON'T.

20 Q YOU DON'T AGREE THAT CONSUMERS CONSIDER THE
21 VARIOUS FUNCTION AS AVAILABLE ON ALL THE DIFFERENT
22 TABLETS AVAILABLE?

23 A IT DEPENDS ON HOW YOU DEFINE "RESEARCH." SOME
24 CONSUMERS WILL MAKE A DECISION BASED ON INFORMATION
25 THEY GET IN A RETAIL STORE, WHICH CAN BE AFFECTED

1 BY A SALESPERSON. THE QUALITY OF THE DISPLAY.

2 OTHERS WILL SEARCH TEN DIFFERENT SOURCES
3 ON THE INTERNET TO FIND OUT INFORMATION.

4 Q YOU DON'T AGREE THAT CONSUMERS WILL, IF
5 THEY'RE THINKING ABOUT BUYING A TABLET THAT HAS A
6 PHONE FUNCTIONALITY, WILL EVALUATE WHAT THE
7 DIFFERENT CARRIER PLANS THAT THE CARRIERS OFFER
8 THAT ARE AVAILABLE FOR VARIOUS DIFFERENT TABLETS?

9 A THAT'S NOT THE SAME AS EVALUATING THE PRODUCT
10 ITSELF.

11 BUT I ASSUME THAT THEY WILL TRY TO
12 UNDERSTAND WHAT THE COST IS OF THE -- ASSOCIATED
13 COST WITH USING THE PRODUCT.

14 Q THE PRODUCTS ARE BUNDLED WITH LONG-TERM
15 CONTRACTS IN SOME CASES; RIGHT?

16 A IN SOME CASES, CORRECT.

17 Q TWO YEARS LONG; RIGHT?

18 A I'M NOT AS FAMILIAR WITH THE CONTRACT NATIVE,
19 BUT, YES, MINE IS TWO YEARS, FOR EXAMPLE.

20 Q IF YOU WERE GOING TO SIGN A TWO-YEAR CONTRACT,
21 YOU'D WANT TO KNOW WHAT THE TERMS OF THE CONTRACT
22 ARE AND WHAT YOU'RE GETTING INTO FOR TWO YEARS;
23 RIGHT?

24 A YES. BUT MY FOCUS WAS ON TRADE DRESS OF THE
25 PRODUCTS, NOT ON THE DETAILS OF THE CONTRACTS THAT

1 PEOPLE ARE SIGNING WITH AT&T.

2 Q I'M ASKING YOU ABOUT THE DEGREE OF CARE FACTOR
3 HERE. RIGHT?

4 A RESTATE YOUR QUESTION, PLEASE.

5 Q WELL, CONSUMERS -- TYPICALLY A CUSTOMER
6 INTERESTED IN A TABLET WILL ACTUALLY WANT TO GO IN
7 A STORE AND PLAY AROUND WITH IT TO SEE HOW IT
8 WORKS; RIGHT?

9 A IN MOST CASES.

10 Q SO YOU'D AGREE THAT BEFORE BUYING A TABLET,
11 MOST CONSUMERS WOULD TURN IT ON AND PLAY WITH IT A
12 LITTLE BIT?

13 A I WOULD AGREE WITH THAT.

14 Q OKAY. LET'S DO THAT WITH THIS JX 103 SEARCH.

15 NOW, BEFORE I TURN THIS ON -- IS THAT
16 GOING TO AUTOMATICALLY FOCUS?

17 CAN YOU HELP ME OUT?

18 BEFORE I TURN THIS ON, THE TRADE DRESS
19 THAT YOU'RE EVALUATING INCLUDES THE APPLICATION
20 SCREEN; RIGHT?

21 A YES, YES, IT DOES.

22 Q THAT'S AN ACCUSED FEATURE THAT YOU SAY IS
23 INFRINGING ON THE TABLET; RIGHT?

24 A THAT'S PART OF THE OVERALL TRADE DRESS.

25 Q OKAY. IS THERE A WAY TO DIM THE LIGHTS?

1 THAT'S A LITTLE BETTER. SO I'M A
2 CONSUMER AND I GO INTO THE STORE TO SEE HOW THIS
3 TABLET WORKS.

4 I TURN IT ON.

5 A IF YOU'RE LUCKY, SOMETHING COMES UP ACTUALLY.
6 MOST STORES IT DOESN'T. NOT JUST FOR THE GALAXY
7 TAB.

8 Q THAT'S RIGHT. THIS IS SET UP FOR LANDSCAPE.

9 DO YOU SEE THE GALAXY TAB NAME, AND THE
10 BIG SWIRLING SAMSUNG. DO YOU SEE THAT?

11 A I DO.

12 Q AND THEN IT GLOWS A COUPLE TIMES AT YOU. DO
13 YOU SEE THAT?

14 AND THEN YOU GET A LOCKED SCREEN; RIGHT?

15 AND YOU HAVE TO MOVE YOUR FINGER OUTSIDE
16 THE CIRCLE TO UNLOCK IT.

17 AND THEN THIS IS NOT THE ACCUSED TRADE
18 DRESS; CORRECT?

19 A NO, IT'S NOT.

20 Q THIS IS THE HOME SCREEN; RIGHT?

21 A IT'S THE HOME SCREEN.

22 Q RIGHT. SO A CONSUMER HAS TO BE ABLE TO FIGURE
23 OUT, HOW DO I GET TO THE APPLICATION SCREEN?

24 AND UP HERE ON THE TOP RIGHT, IF THEY CAN
25 FIGURE IT OUT, IT SAYS APPS, AND THEY HIT THAT

1 BUTTON, AND THAT'S THE SCREEN THAT YOU SAY CAUSES
2 CONFUSION AMONG CONSUMERS; RIGHT?

3 A CORRECT.

4 Q SO IT'S YOUR TESTIMONY TO THIS JUROR THAT
5 CONSUMERS, USING THE DEGREE OF CARE THAT THEY WOULD
6 NORMALLY USE, TURNING ON THIS PHONE, SEEING THE
7 SAMSUNG, SEEING THE SWIRL THAT TURNS INTO THE
8 SAMSUNG, SEEING IT GLOW TWO TIMES, HAVING TO
9 NAVIGATE BEYOND THE HOME SCREEN TO THE APPLICATION
10 SCREEN, THAT THOSE CONSUMERS WOULD BE CONFUSED AND
11 WOULDN'T KNOW THAT THIS IS A SAMSUNG SOURCED
12 PRODUCT? IS THAT YOUR TESTIMONY?

13 A NO, I DON'T AGREE WITH THAT.

14 Q OKAY. LET'S MOVE ON TO ANOTHER SUBJECT. I'D
15 LIKE TO GO TO ANOTHER PORTION OF YOUR REPORT, SIR.

16 THIS IS WITH RELATIONSHIP -- EXCUSE ME.
17 LET ME START OVER.

18 THIS RELATES TO THE PORTION OF YOUR
19 REPORT CONCERNING WHAT YOU CALL DILUTION FACTOR 3,
20 SUBSTANTIAL EXCLUSIVE USE.

21 AND YOU CAN FIND THIS, FOR THE IPHONE, AT
22 PARAGRAPH 173 AND -- OF YOUR MARCH 22ND EXPERT
23 REPORT; AND FOR THE IPAD AT PARAGRAPH 183 OF YOUR
24 MARCH 22ND, 2012 REPORT.

25 AND, MR. FISHER, IF IT'S POSSIBLE TO TAKE

1 THOSE TWO PARAGRAPHS AND PUT THEM ONE ON THE TOP
2 AND ONE AT THE BOTTOM.

3 MR. JACOBS: YOUR HONOR, THIS IS BEYOND
4 THE SCOPE.

5 I DID NOT ASK THIS WITNESS ABOUT THIS
6 FACTOR, AND AS YOU'LL SEE IN THE REPORT, HE RELIES
7 ON DR. BRESSLER'S TESTIMONY, MR. BRESSLER'S
8 TESTIMONY.

9 THE COURT: OVERRULED.

10 GO AHEAD.

11 MR. VERHOEVEN: THANK YOU, YOUR HONOR.

12 Q AND YOU HAVE THE ACTUAL DOCUMENT IF YOU'D LIKE
13 TO LOOK AT IT, SIR.

14 SO THIS IS THE SAME FACTOR, ONE FOR THE
15 PHONE -- THE IPHONE. DO YOU SEE UP THERE, IPHONE?

16 A YES.

17 Q AND THEN YOU'VE GOT IT HERE AGAIN, DILUTION
18 FACTOR, SUBSTANTIALLY EXCLUSIVE USE OF TRADE DRESS
19 FOR THE IPAD?

20 A I SEE THAT.

21 Q AND YOU'RE RELYING ON MR. BRESSLER; IS THAT
22 RIGHT?

23 A YES. I HAVE NO OPINION ON THE DILUTION FACTOR
24 3 ON THE EXCLUSIVE USE OF THE TRADE DRESS AS MY --
25 AS COUNSEL MENTIONED, I REFERRED TO MR. BRESSLER ON

1 THIS.

2 Q OKAY. DO YOU KNOW WHAT THIS FACTOR CONCERNS,
3 EXCLUSIVE USE OF TRADE DRESS?

4 A I'M SORRY. COULD YOU RESTATE THE QUESTION?

5 Q DO YOU KNOW WHAT THIS FACTOR CONCERNS?

6 A NO, I DON'T.

7 MR. VERHOEVEN: YOUR HONOR, IT IS ONE
8 MINUTE BEFORE, BUT I'M GETTING CLOSE TO BEING DONE.

9 THE COURT: THAT'S FINE. IT'S 2:46.
10 WE'LL TAKE OUR BREAK NOW.

11 THIS IS WHAT WE'RE GOING TO DO FROM NOW
12 ON: IF THERE IS AN OBJECTION THAT REQUIRES ME TO
13 DO SOME RESEARCH, WE'RE GOING TO JUST HAVE YOU WAIT
14 PATIENTLY AND I'M GOING TO START CHARGING TIME TO
15 THE OBJECTING PARTY AND YOU WILL THEN HAVE AN
16 OPPORTUNITY TO GIVE ME WHATEVER SPECIFIC DOCUMENTS
17 YOU WANT ME TO LOOK AT, EITHER ORDERS ON MOTIONS IN
18 LIMINE, WHETHER IT'S CONTENTION INTERROGATORY
19 RESPONSES.

20 BUT THE TIME THAT IT TAKES ME TO RULE
21 WILL BE CHARGED TO THE OBJECTING PARTY, AND WE'LL
22 JUST DO IT RIGHT HERE IN COURT, AND WE'LL JUST TAKE
23 A BRIEF PAUSE SO THAT OBJECTION CAN BE DEALT WITH.

24 NOW, IF IT'S AN OBJECTION THAT CAN BE
25 DEALT WITH QUICKLY, THEN THAT WILL STILL BE CHARGED

1 TO THE TIME OF THE NON-OBJECTING PARTY. OKAY.

2 THAT'S THE PROCEDURE WE'RE GOING TO DO
3 FROM NOW ON. I'M SORRY TO OUR JURY THAT YOU'RE
4 GOING TO HAVE TO SIT AND WATCH US DO THAT, BUT I
5 DON'T SEE THAT MUCH OTHER WAY TO GET AROUND THAT.
6 OKAY?

7 ANYWAY, KEEP AN OPEN MIND AND PLEASE
8 DON'T DO ANY RESEARCH OR READ ABOUT THE CASE.
9 PLEASE DON'T DISCUSS THE CASE WITH ANYONE.

10 YOU CAN GO AHEAD AND LEAVE YOUR JURY
11 NOTEBOOKS ON YOUR CHAIR. WE'RE GOING TO TAKE A
12 15-MINUTE BREAK. IT'S 2:45 -- THIS CLOCK SAYS
13 2:47. WE'LL SEE YOU BACK HERE AT 3:00. OKAY?

14 (WHEREUPON, THE FOLLOWING PROCEEDINGS
15 WERE HELD OUT OF THE PRESENCE OF THE JURY:)

16 THE COURT: YOU CAN STEP DOWN.

17 ALL RIGHT. THE RECORD SHOULD REFLECT THE
18 JURORS HAVE LEFT THE COURTROOM.

19 SO LET'S GET A CLEAR AGREEMENT NOW AS
20 TO -- I BELIEVE THE DOOR HAS BEEN OPENED AS TO
21 MR. LEE, WHO I EXCLUDED THIS MORNING. I SUSTAINED
22 SAMSUNG'S OBJECTION, BUT OTHERWISE I THINK IT'S
23 MISLEADING TO THE JURY TO LEAVE IT OTHERWISE.

24 ANYTHING ELSE? LET'S GET -- LET'S HASH
25 THEM OUT NOW. ANY OTHER ISSUES?

1 MR. JACOBS: NOT FROM US, YOUR HONOR.

2 THE COURT: ANYTHING ELSE? I'D LIKE TO
3 JUST HASH THIS --

4 MR. VERHOEVEN: THE WITNESS HAS
5 TESTIFIED, YOUR HONOR, AS TO CONFUSION ON HIS
6 DIRECT EXAMINATION, AND I WAS SIMPLY CROSSING HIM
7 ON THAT SUBJECT.

8 MR. JACOBS: YOUR HONOR, I EXPECT --

9 THE COURT: I --

10 MR. VERHOEVEN: HE GAVE THE OPINION THAT
11 IT'S LIKELY --

12 THE COURT: I THINK THAT BY -- BY
13 OBJECTING -- I'M SORRY. EVERYONE PLEASE TAKE A
14 SEAT.

15 BY OBJECTING AND GETTING AN ORDER
16 EXCLUDING ANY BASIS FOR HIS OPINION AND THEN SAYING
17 YOU HAVE NO BASIS FOR YOUR OPINION, YOU HAVE NO
18 BASIS FOR YOUR OPINION I THINK IS MISLEADING TO THE
19 JURY. HE DOES HAVE A BASIS FOR AN OPINION.

20 YOU WERE SUCCESSFUL IN EXCLUDING IT. SO
21 I'M OVERRULING THIS. IF YOU WANT ME TO RECONSIDER,
22 I'M CHARGING YOU ON TIME. IT'S 2:14 NOW. GO
23 AHEAD. GO AHEAD ON YOUR RECONSIDERATION ARGUMENT.

24 MR. VERHOEVEN: I'M NOT GOING TO USE MY
25 TIME, YOUR HONOR. I DON'T HAVE TIME TO USE.

1 THE COURT: ALL RIGHT. WELL, THAT'S MY
2 RULING. YOU'VE OWNED THE DOOR, SO THAT'S COMING IN
3 DURING REDIRECT, BUT IT'S NOT COMING IN DURING
4 CROSS. NOTE NOTE 2:49, NOT 2:14.

5 OKAY? ALL RIGHT. THANK YOU ALL.

6 (WHEREUPON, A RECESS WAS TAKEN.)

7 (WHEREUPON, THE FOLLOWING PROCEEDINGS
8 WERE HELD OUT OF THE PRESENCE OF THE JURY:)

9 THE COURT: OKAY. PLEASE TAKE A SEAT.

10 I'M GOING TO REVERSE MYSELF, AND I'LL DO
11 THIS IN FRONT OF JURY, ON PX 5 AND PX 6.

12 THE CONFUSION WAS THAT MOTION IN LIMINE
13 NUMBER 2 HAD TO DO WITH THE BEST BUY SURVEY AND I
14 DENIED THE MOTION AS TO THE BEST BUY SURVEY BECAUSE
15 THERE IS CASE LAW THAT A CUSTOMER WHO GENERALLY
16 GETS CONFUSED, THAT THAT'S NOT HEARSAY AND THE
17 STATE OF MIND EXCEPTION DOES APPLY THERE.

18 I DON'T BELIEVE, AND THE ONLY OTHER
19 OBJECTION THAT I RULED ON THAT HAS TO DO WITH THESE
20 COMPILATIONS, I BELIEVE, WAS IN THE OPENING
21 STATEMENTS AND THOSE WERE AS TO FAME, AND I SAID
22 THAT THEY WERE NOT ADMITTED FOR THE TRUTH, AND WE
23 WENT THROUGH MULTIPLE OF THOSE EXHIBITS DURING ONE
24 OF THE WITNESSES, I THINK IT WAS, I THINK,
25 MR. SCHILLER.

1 BUT WE HAD NOT ACTUALLY RULED ON ONE
2 REGARDING CONFUSION.

3 SO I THINK IN THIS INSTANCE, SAYING THAT
4 IT'S NOT FOR THE TRUTH WHEN IT'S COMPLETE, I THINK
5 I WOULD AGREE WITH MR. VERHOEVEN.

6 MR. JACOBS: I GAVE YOUR COURT REPORTER
7 1520, YOUR HONOR.

8 THE COURT: IS THAT THE ECF NUMBER?

9 MR. JACOBS: YES.

10 THE COURT: OKAY. CAN I SEE THAT,
11 PLEASE.

12 MR. JACOBS: SURE.

13 THE COURT: ACTUALLY, I HAVE IT. IF IT'S
14 ECF 1520, I'VE GOT IT.

15 MR. JACOBS: THAT'S WHAT I WAS RELYING
16 ON.

17 THE COURT: OKAY. GIVE ME A SECOND.

18 AND WHICH -- TELL ME SPECIFICALLY --

19 MR. JACOBS: MIDDLE OF PAGE 2, YOUR
20 HONOR, BRESSLER, PX 5, PX 6.

21 THE COURT: OKAY.

22 MR. VERHOEVEN: I'M NOT SURE, YOUR HONOR,
23 I'M NOT SURE WHAT COUNSEL HANDED YOU.

24 THE COURT: IT'S DOCKET NUMBER 1520.

25 MR. VERHOEVEN: OH. OBJECTIONS?

1 THE COURT: FILED ON JULY 31ST, 2012.

2 ALL RIGHT. WELL, LET ME CHECK PX 5 AND 6.

3 I DON'T HAVE THAT IN MY BRESSLER DIRECT
4 BINDER. IT GOES FROM PX 3, PX 4, PX 7, PX 10.

5 MR. JACOBS: NO. IT SHOULD BE IN -- THE
6 EXHIBITS HAVEN'T CHANGED, YOUR HONOR, PX 5 AND PX 6
7 ARE STILL PX 5 AND PX 6. BUT THEY SHOULD BE IN
8 YOUR WINER BINDER.

9 THE COURT: WELL, BUT THIS WAS A RULING
10 AS TO BRESSLER?

11 MR. JACOBS: YES.

12 THE COURT: HOW COME PX 5 AND PX 6 AREN'T
13 IN HERE? WERE THEY IN AN EARLIER VERSION?

14 MR. JACOBS: AREN'T IN THE BRESSLER
15 BINDER.

16 THE COURT: UH-HUH.

17 MR. JACOBS: I'M SORRY, YOUR HONOR.

18 THE COURT: LET ME SEE PX 5 AND PX 6.

19 (PAUSE IN PROCEEDINGS.)

20 THE COURT: ALL RIGHT. THAT DOES LOOK
21 CORRECT. NOW, LET ME JUST DOUBLE-CHECK.

22 WAS THAT ORDER EVER REVERSED? WAS THAT
23 THE ONLY ORDER ON PX 5 AND PX 6?

24 MR. JACOBS: YOUR HONOR, WE'VE BEEN
25 TRYING TO KEEP TRACK --

1 THE COURT: THIS IS WHY I'M CONFUSED. IF
2 YOU LOOK AT DOCUMENT NUMBER 1563, WHICH WAS FILED
3 AUGUST 2ND, IT SAYS SUSTAINED AND THAT'S WHAT I WAS
4 LOOKING AT WHEN WE WERE DISCUSSING THIS EARLIER.

5 MR. JACOBS: YES. THAT WAS A BRESSLER
6 FOCUSED ISSUE, YOUR HONOR, ON WHETHER IT WAS IN
7 HIS REPORT. PX 5 AND PX 6, THE ARTICLES IN PX 5
8 AND PX 6 ARE IN THE APPENDICES, OR THE BODY, OF
9 DR. WINER'S REPORT.

10 AND, OF COURSE, THESE EXHIBITS WERE
11 DISCLOSED IN CONNECTION WITH DR. WINER'S SYSTEM.
12 SO SAMSUNG'S COUNSEL HAD AN OPPORTUNITY TO
13 DOUBLE-CHECK THAT.

14 MR. VERHOEVEN: IF I MAY MAKE A COMMENT,
15 YOUR HONOR.

16 THE COURT: GO AHEAD.

17 MR. VERHOEVEN: MY RECOLLECTION IS WITH
18 RESPECT TO MR. BRESSLER, AND YOU CAN SORT OF SEE
19 THIS IN THE ORDER, IT'S DOCUMENT 1520, YOUR HONOR,
20 PAGE 2, THE LAST TWO SENTENCES, SECOND TO LAST
21 SENTENCE IN THE CELL FOR BRESSLER PX 5, PX 6, YOU
22 SAY, THESE EXHIBITS ARE NOT OFFERED FOR THE TRUTH
23 OF THE MATTER ASSERTED, THEY ARE NOT HEARSAY.

24 AND I HAVE A RECOLLECTION, YOUR HONOR,
25 AND I'M JUST GOING OFF MY MEMORY THAT WHEN

1 MR. BRESSLER WAS PROVIDING HIS DIRECT EXAMINATION
2 TESTIMONY, ARTICLES WERE SHOWN AND I -- AND
3 QUESTIONS WERE ASKED ON THOSE ARTICLES, AND I
4 OBJECTED BECAUSE THOSE QUESTIONS WERE ASKING
5 MR. BRESSLER WHETHER, READING THE ARTICLES FOR THE
6 TRUTH, THAT THEY SUPPORTED OR CONFORMED WITH HIS
7 OPINIONS.

8 AND MY RECOLLECTION IS YOUR HONOR
9 SUSTAINED EACH OF THOSE OBJECTIONS, AND THAT WAS
10 THE SAME TYPE OF OBJECTION THAT I WAS MAKING HERE
11 BECAUSE THE -- AS I STATED EARLIER, YOUR HONOR,
12 THESE ARTICLES WERE BROUGHT UP IN THE CONTEXT OF
13 SIMILARITY OF THE TRADE DRESS, AND SO THE ONLY
14 PROBATIVE VALUE OF THOSE ARTICLES WOULD HAVE BEEN
15 IS FOR THE TRUTH, AND THAT WOULD VIOLATE THE
16 LIMITING INSTRUCTION THAT YOUR HONOR HAD INDICATED
17 EARLIER WITH MR. BRESSLER.

18 I ALSO OBJECTED BASED ON INTERROGATORY --
19 CONTENTION INTERROGATORIES.

20 BUT SETTING THAT ASIDE, MY UNDERSTANDING
21 WAS THESE ARE NOT IN FOR THE TRUTH.

22 THE COURT: BUT TELL ME THE RELATIONSHIP
23 BETWEEN SIMILARITY OF TRADE DRESS AND CONFUSION.
24 AREN'T THOSE INTERTWINED?

25 MR. VERHOEVEN: WELL, YOUR HONOR --

1 THE COURT: ISN'T THAT WHY WE LOOK AT
2 SIMILARITY? IT'S FOR THAT ISSUE, AND THEN THAT
3 WILL GO TO ASSOCIATION FOR DILUTION OR IT'LL GO TO
4 CONFUSION FOR INFRINGEMENT.

5 MR. VERHOEVEN: THE OBJECTION IS YOU'VE
6 GOT THIRD PARTIES, WHO ARE EITHER BLOGGERS OR
7 REPORTERS WITH NO QUALIFICATIONS TO PROVIDE
8 OPINIONS AS TO SIMILARITY OF TRADE DRESS. WE DON'T
9 HAVE A RELATIONSHIP OF ANY OF THESE PEOPLE TO
10 APPLE. WE DON'T KNOW WHETHER THE BLOGGERS WORK FOR
11 APPLE. WE DON'T KNOW THE RELATIONSHIPS BETWEEN THE
12 REPORTERS AND APPLE.

13 AND THERE'S NO RELIABILITY IN THESE
14 DOCUMENTS. THEY'RE THIRD PARTY HEARSAY IF YOU'RE
15 TALKING ABOUT THE TRUTH OF THE MATTER ASSERTED.

16 NOW, I THINK YOUR HONOR SAID THEY CAN
17 COME IN FOR THINGS LIKE NOTICE AND TO SHOW THAT
18 APPLE SHOULD HAVE KNOWN THAT OTHERS THOUGHT THEY
19 WERE SIMILAR AND WHATNOT.

20 BUT YOUR HONOR CLEARLY SAID THEY'RE NOT
21 IN FOR THE TRUTH OF THE STATEMENTS CONTAINED
22 THEREIN.

23 AND SO THE OBJECTION, YOUR HONOR, IS TO
24 USE THESE ARTICLES AS ADDITIONAL EVIDENCE FOR THE
25 TRUTH THAT THESE TRADE DRESSES ARE CONFUSING, THAT

1 THESE TRADE DRESSES ARE COPIES, THAT THESE TRADE
2 DRESSES ARE SUBSTANTIALLY SIMILAR OR WHATNOT.

3 THAT WOULD BE FOR THE TRUTH.

4 AND IT WOULD BE INCREDIBLY IMPROPER, IN
5 OUR VIEW, TO -- FOR -- ESPECIALLY WHEN THERE'S A
6 DEARTH OF ACTUAL ANALYSIS DONE BY THESE EXPERTS ON
7 THEIR OWN TO SIMPLY RELY ON BLOGS AND TECH INDUSTRY
8 PERIODICALS WHERE PEOPLE COMPLETELY BEYOND OUR
9 CONTROL, WHO ARE REPORTERS OR BLOGGERS, JUST DECIDE
10 THEY'RE GOING TO MAKE SOME COMMENT AND THEN FUNNEL
11 THAT THROUGH AN EXPERT WITNESS TO SAY THIS IS
12 EVIDENCE OF CONFUSION, THIS IS EVIDENCE OF
13 SIMILARITY.

14 IT'S NOT -- IT'S NOT PROPER EVIDENCE AND
15 IT'S HIGHLY PREJUDICIAL FOR THE TRUTH, AND THAT'S
16 WHY WE HAVE THE OBJECTION.

17 THE COURT: ALL RIGHT. DO YOU WANT TO
18 RESPOND TO THAT?

19 MR. JACOBS: YES, YOUR HONOR. NUMBER
20 ONE, I THINK WE NEED TO DO SOMETHING ABOUT
21 OCCUPYING AIR TIME IN THESE DISCUSSIONS BECAUSE I'M
22 TRYING VERY HARD TO BE CONCISE.

23 NUMBER TWO, YOUR HONOR HAS RULED ON THIS
24 SEVERAL TIMES.

25 THE COURT: YEAH.

1 MR. JACOBS: NUMBER THREE, IT IS TRUE
2 THAT YOUR HONOR HAS SAID THESE DON'T COME IN FOR
3 THE TRUTH OF THE MATTER ASSERTED AND I ASKED THE
4 QUESTION VERY CAREFULLY OF DR. WINER, HOW HE USED
5 THESE, AND HE USED THESE TO TEST THAT HIS JUDGMENT
6 OF SIMILARITY, WHICH HE REACHED ON HIS OWN, WAS NOT
7 UNIQUE TO HIM.

8 AND I SAID DOES THIS HAVE SOMETHING TO DO
9 WITH THE STATE OF MIND OF THESE AUTHORS?

10 AND BOTH OF THOSE ARE BASES FOR THESE TO
11 COME IN.

12 I DON'T THINK THERE'S ANY NEED FOR A
13 LIMITING INSTRUCTION --

14 THE COURT: WELL, ONE HAS ALREADY BEEN
15 GIVEN.

16 MR. VERHOEVEN: REALLY BRIEFLY, YOUR
17 HONOR, TO THOSE TWO POINTS, IF I MAY.

18 THE COURT: GO AHEAD.

19 MR. VERHOEVEN: FIRST, IN CONFORMING --
20 IN CORROBORATING HIS OPINION AS TO THE TRUTH OF THE
21 MATTER IS OFFERING IT FOR THE TRUTH.

22 AND THE SECOND POINT THAT WAS MADE, THE
23 STATE OF MIND OF A THIRD PARTY BLOGGER OR REPORTER
24 IS 100 PERCENT IRRELEVANT IN THIS CASE.

25 IT COULD GO TO THE STATE OF MIND OF

1 SAMSUNG IF THEY CAN PROVE THAT SAMSUNG KNEW ABOUT
2 THESE ARTICLES.

3 THAT'S WHY YOUR HONOR LET IT IN. THERE'S
4 ABSOLUTELY NO RELEVANCE TO WHAT SOME THIRD PARTY
5 REPORTER OR BLOGGER THOUGHT.

6 I GET TEN -- 100, PROBABLY 20 E-MAILS A
7 DAY OF THIRD PARTIES THAT JUST DECIDE TO SEND ME
8 E-MAILS ABOUT THIS CASE, EXPRESSING --

9 THE COURT: I THINK WE ALL DO.

10 MR. VERHOEVEN: EXPRESSING THEIR
11 OPINIONS, AND NONE OF THAT, NONE OF THAT SHOULD
12 COME IN FOR THE TRUTH.

13 MR. JACOBS: YOUR HONOR, YOU'VE LOOKED AT
14 THIS CLOSELY TWICE, IN 1520 AND 1563, AND BOTH
15 TIMES YOU'VE COME TO THE SAME OUTCOME. THAT'S WHY
16 I REALLY WOULD LIKE MR. VERHOEVEN'S AIR TIME
17 CHARGED TO HIM AT THIS STAGE.

18 THE COURT: NO, I'M NOT GOING TO FOR
19 THIS.

20 (PAUSE IN PROCEEDINGS.)

21 THE COURT: ALL RIGHT. THE OBJECTIONS'S
22 OVERRULED. BUT I'M NOT GOING TO CHARGE
23 MR. VERHOEVEN'S TIME ON THAT.

24 MR. JACOBS: THANK YOU, YOUR HONOR.

25 MR. VERHOEVEN: YOUR HONOR, IF IT'S

1 PERMISSIBLE WITH YOU, I WOULD LIKE TO BE CHARGED A
2 MINUTE OF MY TIME JUST TO ADDRESS THE OPENING THE
3 DOOR. I'VE HAD AN OPPORTUNITY TO ORGANIZE MY
4 THOUGHTS.

5 THE COURT: SURE.

6 MR. VERHOEVEN: THANK YOU, YOUR HONOR.

7 THE COURT: WHAT WOULD YOU LIKE TO --

8 MR. VERHOEVEN: OVER THE BREAK, I GOT THE
9 TRANSCRIPT, YOUR HONOR, OF THE REALTIME FEED.

10 THE COURT: OKAY. IT'S 3:19. GO AHEAD.

11 MR. VERHOEVEN: LET ME START BY SAYING I
12 DON'T THINK THE -- THE CLAIM I'VE OPENED THE DOOR
13 IS A RELEVANT CLAIM HERE.

14 DR. WINER KNEW ABOUT MR. LEE'S TESTIMONY
15 BEFORE HIS DEPOSITION AND IT'S IN HIS REPORT, YOUR
16 HONOR. THAT WASN'T WHY IT WAS EXCLUDED. IT WAS
17 KIND OF LIKE IT'S NOT IN HIS REPORT, AND IT'S NOT
18 LIKE IT ALSO CAME OUT LATER IN TIME. SO HE KNEW
19 ABOUT IT, IT WAS IN HIS REPORT.

20 OUR OBJECTION WAS THAT, I THINK -- I
21 BELIEVE OUR OBJECTION EARLIER TODAY WAS THAT THAT
22 IS NOT -- THAT EVIDENCE WAS NOT DISCLOSED IN
23 RESPONSE TO A CONTENTION INTERROGATORY, AND THAT'S
24 WHY YOUR HONOR KEPT IT OUT. SO IT'S NOT A QUESTION
25 OF OPENING THE DOOR. IT'S A QUESTION OF WHAT

1 EVIDENCE IS AVAILABLE TO THESE -- TO BE USED EITHER
2 ON DIRECT OR CROSS AS A RESULT OF THE
3 INTERROGATORIES.

4 AND IF YOU LOOK AT THE OTHER SIDE OF THE
5 COIN, FOR EXAMPLE, SITUATIONS IN THE PAST WHERE WE
6 HAD NOT LISTED A PARTICULAR PIECE OF EVIDENCE FOR
7 ARGUMENT IN OUR RESPONSES TO THEIR CONTENTION
8 INTERROGATORIES AND WE'D ARGUED TO THE COURT THAT
9 WE STILL SHOULD BE ABLE TO PRESENT THAT, EVEN
10 THOUGH IT WASN'T DISCLOSED IN THE INTERROGATORIES,
11 BECAUSE IT WAS DISCLOSED IN A REBUTTAL REPORT IN
12 RESPONSE TO AN ARGUMENT THAT WAS MADE IN AN OPENING
13 REPORT BY THE OTHER SIDE'S EXPERT, WHICH IS THE
14 SAME THING, OPENING THE DOOR.

15 THEY ADDRESSED IT. WE RELIED ON IT.

16 THE COURT: I HEAR YOU. I HEAR YOU.

17 MR. VERHOEVEN: AND YOUR HONOR

18 SUSTAINED --

19 THE COURT: I'M GOING TO SHORT CIRCUIT.
20 I'M PERSUADED. LET ME HEAR MR. JACOBS'S RESPONSE.

21 MR. JACOBS: LET ME TRY TO UNPERSUADE
22 YOU, YOUR HONOR. I WARNED MR. VERHOEVEN THIS WAS
23 GOING TO HAPPEN. THAT WAS THE PURPOSE OF MY
24 STANDING UP.

25 HE ASKED DURING WINER ABOUT A PASSAGE AT

1 PAGE 35 OF HIS DEPOSITION, AND IT'S AT PAGE 36 IN
2 THE IMMEDIATELY FOLLOWING PASSAGE -- I CAN HAND IT
3 TO YOUR HONOR, I THINK IT'LL BE --

4 THE COURT: OKAY. GO AHEAD. I'VE GOT IT
5 AS WELL.

6 MR. JACOBS: AT PAGE 36 WHERE HE
7 SPECIFICALLY TALKS ABOUT THE, THE BEST BUY ISSUE.

8 THE COURT: OKAY.

9 MR. JACOBS: SO YOU HEARD THE TESTIMONY
10 IN CROSS ABOUT DR. WINER SAYING I HAVE NO RESPONSE,
11 I HAVE NO IDEA. THAT'S ON 35.

12 ON 36, "WHAT IS THE CLASS OF CONSUMERS
13 YOU HAVE -- YOU BELIEVE HAVE BOUGHT SOME DEVICES
14 THINKING THEY'RE APPLE DEVICES OR THEY WOULD-BE
15 APPLE PURCHASES?

16 "ANSWER: I HAVE -- THE ONLY EVIDENCE I
17 HAVE FROM TESTIMONY THAT I REVIEWED IS THAT SOME
18 INDIVIDUALS BOUGHT A SAMSUNG GALAXY TAB MISTAKENLY
19 THINKING IT WAS AN IPAD, AND SUBSEQUENTLY RETURNED
20 TO THE STORE AND GOT AN IPAD. THAT'S THE ONLY
21 DIRECT EVIDENCE I HAVE FOR ANY OF THESE QUESTIONS
22 THAT YOU ARE ASKING ON THIS PATH."

23 AND THEN THERE'S A QUESTION. SO NUMBER
24 ONE, I THINK HE OPENED THE DOOR BY HIS QUESTION,
25 BUT AT THE VERY LEAST, BY TAKING THE PASSAGE OF THE

1 DEPOSITION OUT OF CONTEXT AND NOT ALLOWING, NOT
2 PROVIDING THE COMPLETE TESTIMONY FROM DR. WINER,
3 HE'S OPENED THE DOOR TO COMPLETENESS OF THAT
4 PASSAGE. AND THAT PASSAGE DOES DISCUSS THE
5 TESTIMONY THAT YOUR HONOR HAD EXCLUDED THIS MORNING
6 ON THE GROUND THAT MR. VERHOEVEN CITED.

7 THE COURT: SO WHAT ARE YOU SEEKING TO
8 GET IN? JUST THIS LINES 8 THROUGH 9 UNDER THE RULE
9 OF COMPLETENESS? OR YOU'RE TRYING TO GET IN THAT
10 POWERPOINT THAT I EXCLUDED THIS MORNING? OR LAST
11 NIGHT?

12 MR. JACOBS: THE POWER -- THE ANSWER IS
13 THE LATTER BECAUSE THE SLIDE IS THE TESTIMONY THAT
14 HE WAS REFERRING TO IN THIS PASSAGE.

15 THAT TESTIMONY IS REFERRED TO AT GREATER
16 LENGTH, I BELIEVE, IN THE REST OF -- ELSEWHERE IN
17 THE TRANSCRIPT, AND WE CAN CONFIRM THAT.

18 BUT IN ANY CASE, I DO HAVE A QUESTION OR
19 TWO ABOUT THE BASIS FOR THIS TESTIMONY IN THE
20 DEPOSITION.

21 THE COURT: WELL, I EXCLUDED IT. I KNOW
22 THAT YOUR POSITION IS THAT IT WAS IN HIS EXPERT
23 REPORT.

24 MR. JACOBS: CORRECT, YOUR HONOR.

25 THE COURT: BUT WHAT'S YOUR RESPONSE TO

1 WHETHER IT'S IN THE CONTENTION INTERROGATORY
2 RESPONSE?

3 MR. JACOBS: WE'RE NOT REARGUING THAT
4 POINT, YOUR HONOR. WE'RE ONLY REARGUING THAT
5 MR. VERHOEVEN SHOULD HAVE, ESPECIALLY WHEN WARNED,
6 LET MATTERS LIE AND NOT ASK THIS WITNESS A QUESTION
7 WHICH, TO ANSWER TRUTHFULLY UNDER OATH, HE MIGHT --
8 AS YOUR HONOR SAID, IT'S MISLEADING TO THE JURY.

9 MR. VERHOEVEN: YOUR HONOR, IF YOU LOOK
10 AT THE ACTUAL TESTIMONY, THIS IS NOT HIM CLARIFYING
11 HIS ANSWER. THIS IS SEVERAL QUESTIONS LATER.

12 THE COURT: WELL, LET ME GO AHEAD AND SEE
13 THE QUESTIONS IN BETWEEN, PLEASE. CAN YOU SCROLL
14 IT UP TO THE PREVIOUS PAGE.

15 MR. VERHOEVEN: I CAN HAND UP THE --

16 THE COURT: OKAY. THAT WOULD BE EVEN
17 BETTER.

18 MR. VERHOEVEN: I JUST WON'T HAVE A COPY
19 MYSELF.

20 THE COURT: I'LL GIVE IT BACK TO YOU. I
21 JUST WANT TO TAKE A QUICK LOOK.

22 SO I'VE HIGHLIGHTED, FOR YOUR REFERENCE,
23 YOUR HONOR, I'VE HIGHLIGHTED THE QUESTION AND
24 ANSWER WE PLAYED.

25 THE COURT: ALL RIGHT. THANK YOU.

1 AND IT GOES TO WHAT PAGE? WHAT PAGE IS
2 THE ONE YOU JUST SHOWED, MR. JACOBS? WHAT'S THE
3 PAGE YOU JUST SHOWED?

4 MR. JACOBS: WHAT I SHOWED WAS 36, YOUR
5 HONOR.

6 THE COURT: ALL RIGHT. HANG ON. I'M ON
7 35, PAGE 35, LINE 7 THROUGH 15.

8 (PAUSE IN PROCEEDINGS.)

9 MR. JACOBS: SO ACTUALLY, NOW THAT I LOOK
10 AT IT, I SEE THE SOURCE EVEN OF WHY THIS WAS
11 COMPLETELY MISLEADING.

12 THE QUESTION WAS, ON 35, HAVE PEOPLE
13 BOUGHT APPLE DEVICES THINKING THEY'RE SAMSUNG
14 DEVICES, WHICH IS, OF COURSE, NOT A RELEVANT
15 QUESTION TO BEGIN WITH.

16 BUT IN THE NEXT PASSAGE HE IS ASKED,
17 SAMSUNG DEVICES THINKING THEY'RE APPLE DEVICES.

18 THE COURT: ALL RIGHT. WELL, I THINK THE
19 RULE OF COMPLETENESS, HAVING REVIEWED PAGES 34,
20 LINE 19, HE IS ASKED IN THAT, LINE 19 THROUGH LINE
21 25, ABOUT WHETHER CONSUMERS OUT IN THE REAL WORLD
22 HAVE BOUGHT SAMSUNG DEVICES THINKING THEY'RE APPLE
23 DEVICES.

24 BUT I THINK FOR THE RULE OF
25 COMPLETENESS --

1 MR. VERHOEVEN: CAN I LOOK AT YOUR
2 TRANSCRIPT WITH YOU?

3 THE COURT: ALL RIGHT. THIS IS WHAT I'M
4 GOING TO ALLOW I THINK FOR THE RULE OF
5 COMPLETENESS.

6 YOU HAVE PAGE 35, LINES 7 THROUGH 15 WAS
7 THE VIDEO DEPOSITION THAT WAS ALREADY SHOWN.

8 I THINK RULE OF COMPLETENESS GOES FROM
9 35, LINE 16 -- WHAT ABOUT THROUGH 37, LINE 9 AND
10 THAT'S IT? YOU DON'T GET ANYTHING ELSE IN.

11 MR. JACOBS: UNDERSTOOD, YOUR HONOR.

12 THE COURT: LET ME GIVE THIS BACK TO --
13 DO YOU HAVE ONE, MR. VERHOEVEN? I DON'T WANT TO
14 TAKE YOURS.

15 MR. VERHOEVEN: I FOUND ANOTHER ONE.

16 THE COURT: OKAY.

17 MR. VERHOEVEN: THAT ONE HAS PROBABLY GOT
18 WORK PRODUCT ON IT, YOUR HONOR.

19 THE COURT: OH, LET ME GIVE THIS BACK.

20 MR. VERHOEVEN: JUST DISREGARD IT.

21 THE COURT: THAT'S IT. YOU DON'T GET
22 INTO MR. LEE. YOU DON'T GET IN THAT POWERPOINT.
23 YOU DON'T GET IN HIS DEPOSITION -- WAS HE DEPOSED?

24 MR. JACOBS: MR. LEE WAS DEPOSED, YES.

25 THE COURT: OKAY.

1 MR. JACOBS: THAT'S WHAT THE WITNESS WAS
2 RELYING ON.

3 THE COURT: THAT'S RIGHT. THAT'S THE
4 DEPOSITION. OKAY. SO THAT'S THE RULING.

5 NOW, WHAT I'M GOING TO DO, IT'S 3:26.
6 I'M GOING TO CHARGE THIS EQUALLY TO BOTH SIDES.

7 MR. JACOBS: OH, YOUR HONOR, IF I HAD
8 KNOWN -- WE'RE BEING SO CAREFUL ABOUT TIME.

9 THE COURT: WELL, LET ME -- I AM NOT --
10 SAMSUNG SEVEN MINUTES. I'LL CHARGE YOU SIX
11 MINUTES, THREE MINUTES EACH. IT'S NOT GOING TO --

12 MR. VERHOEVEN: THANK YOU, YOUR HONOR.

13 THE COURT: IF IT DOESN'T KILL YOU, IT
14 WON'T HURT YOU, OKAY. SO SIX MINUTES, IT'S THREE
15 MINUTES EACH.

16 MR. VERHOEVEN: THANK YOU, YOUR HONOR.

17 THE COURT: ALL RIGHT. ALL RIGHT. SO
18 WHERE ARE WE? WE'RE BACK IN THE CROSS. WILL YOU
19 PLEASE BRING IN OUR JURY. WE'LL GO UNTIL 4:30
20 TODAY.

21 MR. VERHOEVEN: I HAVE NO FURTHER
22 QUESTIONS AT THIS TIME. I'LL JUST LET THE JURORS
23 KNOW THAT.

24 THE COURT: PLEASE, ALL RIGHT.

25 (WHEREUPON, THE FOLLOWING PROCEEDINGS

1 WERE HELD IN THE PRESENCE OF THE JURY:)

2 THE COURT: ALL RIGHT. WELCOME BACK.

3 ALL RIGHT. MR. VERHOEVEN. IT'S 3:28.

4 MR. VERHOEVEN: YOUR HONOR, I PASS THE
5 WITNESS AT THIS TIME.

6 THE COURT: ALL RIGHT. MR. JACOBS, YOUR
7 REDIRECT, 3:28.

8 MR. JACOBS: THANK YOU, YOUR HONOR.

9 THE COURT: GO AHEAD.

10 **REDIRECT EXAMINATION**

11 BY MR. JACOBS:

12 Q DR. WINER, DURING YOUR CROSS-EXAMINATION, YOU
13 WERE ASKED ABOUT A PORTION OF YOUR DEPOSITION, AND
14 I'D LIKE TO SHOW THE JURY SOME ADDITIONAL PORTIONS
15 OF THAT DEPOSITION.

16 MR. LEE, COULD YOU PUT UP PAGE 35, LINE 7
17 THROUGH 37, LINE 9. WE'LL JUST GO THROUGH THAT
18 CAREFULLY.

19 SO YOU'LL RECALL, DR. WINER, YOU WERE
20 ASKED ABOUT THIS TESTIMONY WHERE YOU WERE ASKED,
21 "DO YOU BELIEVE THAT CONSUMERS OUT THERE IN THE
22 REAL WORLD HAVE ACTUALLY BOUGHT APPLE DEVICES
23 THINKING THEY ARE SAMSUNG DEVICES?"

24 AND YOU SAID IN YOUR DEPOSITION, "I HAVE
25 NO EVIDENCE OF THAT THAT."

1 DO YOU RECALL GOING THROUGH THAT WITH
2 MR. VERHOEVEN?

3 A YES, I DO.

4 Q AND THEN IF WE GO A LITTLE BIT AHEAD --

5 MR. VERHOEVEN: YOUR HONOR, I THOUGHT
6 THIS WAS SUPPOSED TO BE READ IN ITS ENTIRETY FOR
7 COMPLETENESS.

8 THE COURT: YES. DO THE WHOLE THING
9 THROUGH. WHAT WAS THAT, PAGE 37?

10 MR. JACOBS: OKAY.

11 Q AND THEN YOU WERE ASKED, "DO YOU BELIEVE THAT
12 CONSUMERS OUT THERE IN THE REAL WORLD HAVE ACTUALLY
13 BOUGHT APPLE DEVICES THINKING THEY'RE SAMSUNG
14 DEVICES?"

15 YOU SAID, "I HAVE NO EVIDENCE OF THAT."

16 THEN YOU WERE ASKED, "I'M ASKING ABOUT
17 YOUR BELIEF. DO YOU BELIEVE IT?"

18 YOU SAID, "I HAVE NO RESPONSE. I HAVE NO
19 IDEA."

20 "QUESTION: SO IT'S APPLE CONSUMERS WHO
21 WOULD BE CONFUSED, IS THAT RIGHT, IN YOUR VIEW?

22 "ANSWER: I THINK THERE IS GENERAL
23 CONFUSION IN THE MARKETPLACE BETWEEN THE PRODUCTS.
24 I AM NOT READY TO STATE EXACTLY WHOSE CONSUMERS
25 HAVE BEEN CONFUSED.

1 "QUESTION: RIGHT NOW I AM ASKING ABOUT
2 PURCHASING. LET'S FOCUS ON ACTUAL PURCHASING.
3 IT'S YOUR BELIEF THAT APPLE CONSUMERS HAVE BOUGHT
4 SAMSUNG DEVICES THINKING THEY ARE APPLE DEVICES,
5 CORRECT?

6 "ANSWER: I DON'T KNOW THE ANSWER TO
7 THAT. I CAN'T RESPOND TO THAT.

8 "QUESTION: WHO -- WHAT IS THE CLASS OF
9 CONSUMERS WHO YOU BELIEVE HAVE BOUGHT SAMSUNG
10 DEVICES THINKING THEY ARE APPLE DEVICES? ARE THEY
11 WOULD-BE APPLE PURCHASERS?

12 "ANSWER: I HAVE -- THE ONLY EVIDENCE I
13 HAVE FROM TESTIMONY THAT I REVIEWED IS THAT SOME
14 INDIVIDUALS BOUGHT A SAMSUNG GALAXY TAB MISTAKENLY
15 THINKING IT WAS AN IPAD AND SUBSEQUENTLY RETURNED
16 IT TO THE STORE AND GOT AN IPAD. THAT'S THE ONLY
17 DIRECT EVIDENCE I HAVE FOR ANY OF THESE QUESTIONS
18 THAT YOU ARE ASKING ON THIS PATH.

19 "QUESTION: SO WE HAVE A CLEAR RECORD,
20 THE ONLY EVIDENCE YOU HAVE THAT IN THE REAL WORLD,
21 ANY CONSUMERS HAVE PURCHASED A SAMSUNG PRODUCT
22 BELIEVING THAT IT WAS AN APPLE PRODUCT IS BASED
23 UPON DOCUMENTS RELATING TO BEST BUY RETURNS IN NEW
24 JERSEY; IS THAT TRUE?

25 "ANSWER: CORRECT.

1 "QUESTION: AND YOU HAVE NOTHING ELSE
2 BEYOND THAT; IS THAT TRUE?

3 "ANSWER: I HAVE NOT SEEN ANY OTHER
4 REPORT THAT GIVES THAT SUCH EVIDENCE.

5 "QUESTION: DO YOU HAVE ANY EVIDENCE THAT
6 ANY CONSUMER HAS BOUGHT A SAMSUNG PHONE BELIEVING
7 THAT IT IS AN APPLE PHONE?

8 "ANSWER: NO, I DON'T."

9 MR. JACOBS: AND, YOUR HONOR, THAT
10 CONCLUDES THE PORTION THAT, FOR THE RECORD, WE'D
11 READ.

12 THE COURT: OKAY.

13 BY MR. JACOBS:

14 Q NOW, I'D LIKE TO DECONFUSE POSSIBLE CONFUSION
15 ABOUT DILUTION AND LIKELY -- AND CONFUSION, AND
16 WHAT I'D LIKE TO DO IS ASK YOU A COUPLE QUESTIONS,
17 DR. WINER, ABOUT WHAT'S REALLY GOING ON HERE.

18 DR. WINER, WHAT'S THIS?

19 A THAT'S ONE OF THE TWO TABLETS. I CAN'T TELL
20 YOU.

21 Q SO LET ME SHOW YOU THE TABLET (HANDING).

22 MAY I, YOUR HONOR? I'M SORRY?

23 THE COURT: YES. MR. VERHOEVEN, DO YOU
24 WANT TO SEE IT?

25 MR. JACOBS: HE DID.

1 MR. VERHOEVEN: I DID, YOUR HONOR, AND
2 IT'S FINE.

3 THE COURT: OKAY.

4 BY MR. JACOBS:

5 Q WHAT IS IT?

6 A IT'S AN IPAD.

7 Q AND YOU BELIEVE THAT THE IPAD HAS ACQUIRED
8 DISTINCTIVENESS IN THE MARKETPLACE; CORRECT?

9 MR. VERHOEVEN: OBJECTION, LEADING.

10 THE COURT: SUSTAINED.

11 MR. JACOBS: I'M SUMMARIZING HIS
12 TESTIMONY.

13 Q DO YOU BELIEVE THE IPAD HAS ACQUIRED
14 DISTINCTIVENESS IN THE MARKETPLACE?

15 A YES, I DO.

16 Q WHAT DOES THAT MEAN? WHEN SOMEONE SEES --
17 WHEN YOU SAY THAT A PRODUCT HAS ACQUIRED
18 DISTINCTIVENESS, WHAT DOES THAT MEAN IN TERMS OF
19 WHAT A CONSUMER WOULD THINK ABOUT THIS PRODUCT
20 BEFORE ANOTHER PRODUCT THAT THREATENED DILUTION BY
21 BLURRING ENTERED THE MARKETPLACE?

22 A I THINK THAT WHAT THAT MEANS IS THAT THE
23 CONSUMERS ASSOCIATE A PARTICULAR TRADE DRESS OR
24 LOOK AND FEEL WITH A PARTICULAR COMPANY THAT MAKES
25 THAT PRODUCT, AND IN THIS CASE THAT WAS APPLE.

1 Q NOW, MR. VERHOEVEN HAD ON THE PODIUM ALREADY
2 THIS PRODUCT, WHICH, AS YOU CAN SEE, I DON'T HAVE
3 TO PLAY THE GUESSING GAME, IS THE GALAXY TAB.

4 AND WHEN YOU TALK ABOUT DILUTION BY
5 BLURRING, WHAT ARE YOU SAYING ABOUT THE IMPACT OF
6 THIS PRODUCT BEING ON THE MARKET ON THE
7 DISTINCTIVENESS OF THE APPLE IPAD?

8 A WHAT I'M SAYING IS THAT THE IMPACT OF THAT
9 COPYING OF THE TRADE DRESS HAS A SUBSTANTIAL IMPACT
10 ON THE INVESTMENT THAT APPLE HAS MADE IN DEVELOPING
11 THE PRODUCTS AND HAS A NEGATIVE IMPACT ON THEIR
12 MARKETING STRATEGY AS A RESULT.

13 Q AND WHY IS THAT? WHAT DOES THE EXISTENCE OF
14 THIS PRODUCT, THE SALES OF THIS PRODUCT IN THE
15 MARKET DO TO THE DISTINCTIVENESS -- I'M HOLDING UP
16 THE TAB -- TO THE DISTINCTIVENESS OF THE IPAD?

17 A IT DIMINISHES IT.

18 Q NOW, MR. VERHOEVEN ASKED YOU A LOT OF
19 QUESTIONS ABOUT ACTUAL CONFUSION.

20 IS IT YOUR UNDERSTANDING THAT THE TEST
21 FOR INFRINGEMENT REQUIRES THAT THERE BE ACTUAL
22 CONFUSION AT THE POINT OF SALE AT A STORE --

23 MR. VERHOEVEN: OBJECTION. LEADING AND
24 ALSO CALLS FOR A LEGAL CONCLUSION.

25 MR. JACOBS: I DON'T THINK --

1 THE COURT: SUSTAINED.

2 BY MR. JACOBS:

3 Q WHAT IS YOUR UNDERSTANDING OF THE -- OF
4 WHETHER ACTUAL CONFUSION AT THE POINT OF SALE IS
5 REQUIRED IN ORDER FOR THERE TO BE A FINDING OF
6 LIKELIHOOD OF CONFUSION?

7 A I'M AFRAID I DON'T KNOW THE ANSWER TO THAT.

8 Q WELL, YOU DISCUSSED THE SCENARIO IN WHICH
9 SOMEONE IS WALKING DOWN THE STREET, LET'S SAY,
10 HOLDING THIS PRODUCT, MAYBE IT'S ON, MAYBE IT'S
11 OFF?

12 A YES.

13 Q AND WHAT DID YOU DESCRIBE THAT AS?

14 A I CALLED IT THE IMITATOR, IMITATIVE SCENARIO.

15 Q AND WHAT DID YOU MEAN BY THAT?

16 A I MEAN THAT SOMEBODY COULD BE WALKING DOWN THE
17 STREET WITH A SAMSUNG GALAXY TAB LOOKING AT THE
18 TRADE DRESS, IF SOMEONE IS USING IT, HAS SEEN IPADS
19 BEFORE, SAY, I LIKE THAT, I LIKE THAT TRADE DRESS,
20 OR LOOK AND FEEL, APPEARANCE, AND THEN GO AND BUY A
21 SAMSUNG GALAXY TAB.

22 Q AND IS THAT POINT-OF-SALE CONFUSION OR
23 POST-SALE CONFUSION?

24 A THAT'S POST-SALE CONFUSION.

25 MR. JACOBS: THANK YOU VERY MUCH,

1 DR. WINER. NO FURTHER QUESTIONS.

2 THE COURT: ALL RIGHT. THE TIME IS NOW
3 3:35.

4 ANY RECROSS?

5 MR. VERHOEVEN: JUST ABOUT A MINUTE, YOUR
6 HONOR.

7 THE COURT: OKAY. GO AHEAD, PLEASE.

8 MR. VERHOEVEN: CAN WE PUT UP DX
9 1317.109, PLEASE.

10 **RECROSS-EXAMINATION**

11 BY MR. VERHOEVEN:

12 Q WELL, LET'S JUST GO TO IT. I'LL PUT IT UP IN
13 A SECOND. BRING IT DOWN. BRING IT DOWN.

14 YOU WERE JUST ASKED ABOUT DILUTION IN THE
15 MARKETPLACE BY COUNSEL FOR APPLE. DO YOU REMEMBER
16 THAT?

17 A YES.

18 Q AND YOU TALKED ABOUT WHEN A PRODUCT HAS A
19 DISTINCTIVE LOOK AND FEEL, IF ANOTHER PRODUCT COMES
20 IN WITH THAT LOOK AND FEEL, IF THE FIRST PRODUCT
21 HAS GOT THAT DISTINCTIVE LOOK AND FEEL, ANOTHER
22 PRODUCT COMES IN, THAT MIGHT DILUTE IT.

23 DO YOU REMEMBER THAT GENERALLY?

24 A I DO.

25 Q ALL RIGHT. LET'S GO TO DX 3917.109.

1 HAVE YOU EVER SEEN THE FUJITSU Q550?

2 A AMONG OTHERS.

3 Q H-P TOUCHPAD?

4 A YES.

5 Q H-P OPAL?

6 A YES.

7 Q HAVE YOU SEEN THOSE?

8 A I SEE THEM ON THE SCREEN.

9 Q ACER ICONIA.

10 A I SEE THAT.

11 Q LG? G-SLATE? DO YOU SEE THAT?

12 A I SEE IT.

13 Q TOSHIBA THRIVE? DO YOU SEE THAT?

14 A YES.

15 Q THE VIEWPAD 7X? DO YOU SEE THAT?

16 A I DO.

17 Q THE VIZIO TABLET? DO YOU SEE THAT, SIR?

18 A YES, I DO.

19 Q SONY S1?

20 A I SEE THAT.

21 Q AND THEN THE ACCUSED PRODUCT, THE GALAXY TAB

22 10.1. DO YOU SEE THAT?

23 A YES, I DO.

24 Q ALL OF THESE TABLETS ARE LARGE, RECTANGULAR

25 SHAPES WITH ROUNDED CORNERS; RIGHT, SIR.

1 MR. JACOBS: OBJECTION, YOUR HONOR.

2 COMPOUND.

3 THE COURT: OVERRULED.

4 GO AHEAD.

5 THE WITNESS: I, I CAN'T SAY YES OR NO.

6 THESE ARE PICTURES OF THEM. I DON'T KNOW WHAT

7 THEIR SIZE IS FROM THESE PHOTOGRAPHS TO GET THEM

8 ALL ON ONE PAGE. SO -- I WOULD HAVE TO SAY I DON'T

9 AGREE WITH THAT.

10 BY MR. VERHOEVEN:

11 Q SEVERAL OF THEM HAVE SHINY GLASS FLAT FRONT

12 THAT GOES FROM EDGE TO -- LOOK AT THIS TOSHIBA

13 THRIVE. DO YOU SEE THAT?

14 A YES.

15 Q THEY ALL HAVE COLORFUL ROWS OF ICONS IN THERE;

16 RIGHT?

17 A NOT NECESSARILY. THE SONY S 1 PICTURE DOESN'T

18 HAVE ANY ICONS.

19 Q DID YOU DO ANY ANALYSIS OF THE SONY S1 TO SEE

20 IF ITS GOT A COLORFUL ROLL OF ICONS IN ITS

21 APPLICATION SCREEN?

22 A NO, I DID NOT.

23 Q DO YOU THINK IT DOESN'T?

24 A I HAVE NO IDEA. I DON'T THINK I'VE EVER SEEN

25 ONE.

1 Q HAVE YOU EVER SEEN AN APPLICATION MENU THAT
2 WASN'T A COLORFUL ROW OF ROWS AND COLUMNS OF ICONS,
3 SIR, AND IF SO, CAN YOU TELL ME WHAT IT WAS?

4 A I, I CAN'T ANSWER THAT. I HAVEN'T DONE AN
5 EXHAUSTIVE EXPLORATION OF ALL OF THESE TABLETS.
6 YOU MAY BE RIGHT. YOU MAY BE WRONG.

7 MR. VERHOEVEN: THANK YOU, YOUR HONOR. I
8 HAVE NO FURTHER QUESTIONS AT THIS TIME.

9 THE COURT: ALL RIGHT. TIME IS 3:38.
10 ANY REDIRECT?

11 MR. JACOBS: JUST A QUICK MOMENT, YOUR
12 HONOR.

13 THE COURT: ALL RIGHT. 3:38. GO AHEAD,
14 PLEASE.

15 (PAUSE IN PROCEEDINGS.)

16 MR. JACOBS: CAN WE HAVE THAT LAST
17 DEMONSTRATIVE UP AGAIN, PLEASE.

18 MR. LEE, CAN YOU DO A WEB SEARCH FOR THE
19 SONY S1?

20 MR. VERHOEVEN: YOUR HONOR, IF WE'RE
21 GOING TO BE PULLING UP IMAGES FROM THE WEB THAT
22 HAVEN'T BEEN DISCLOSED, I'LL OBJECT. WE HAD
23 DISCLOSURE REQUIREMENTS IN THIS CASE FOR BOTH CROSS
24 AND DIRECT.

25 THE COURT: WHERE IS THIS GOING?

1 MR. JACOBS: I BELIEVE MR. VERHOEVEN PUT
2 UP HIGHLY MISLEADING PICTURES OF THE SONY S1. IN
3 FACT, IT HAS A SURFACED AND ELABORATED DESIGN TO
4 IT. IN FACT, HERE IT IS.

5 MR. VERHOEVEN: YOUR HONOR, I PUT UP A
6 PICTURE FROM AN INTERNAL APPLE DOCUMENT.

7 **FURTHER REDIRECT EXAMINATION**

8 BY MR. JACOBS:

9 Q DR. WINER, HAVE YOU SEEN THE SONY S1 BEFORE?

10 A NO, I HAVE NOT.

11 MR. JACOBS: THANK YOU. I HAVE NO
12 FURTHER QUESTIONS, YOUR HONOR.

13 THE COURT: IT'S 3:39. ANY RECROSS?

14 MR. VERHOEVEN: NO, YOUR HONOR.

15 THE COURT: MAY THIS WITNESS BE EXCUSED,
16 AND IS IT SUBJECT TO HIS RECALL OR NOT?

17 MR. VERHOEVEN: SUBJECT TO RECALL, YOUR
18 HONOR.

19 THE COURT: ALL RIGHT. YOU'RE SUBJECT TO
20 RECALL.

21 CALL YOUR NEXT WITNESS, PLEASE.

22 MR. JACOBS: YOUR HONOR, WE CALL MR. HAL
23 PORET.

24 THE CLERK: RAISE YOUR RIGHT HAND,
25 PLEASE.

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HAL PORET,

BEING CALLED AS A WITNESS ON BEHALF OF THE
PLAINTIFF, HAVING BEEN FIRST DULY SWORN, WAS
EXAMINED AND TESTIFIED AS FOLLOWS:

THE WITNESS: YES, I DO.

THE COURT: WOULD YOU HAVE A SEAT,
PLEASE.

AND STATE YOUR NAME AND SPELL IT.

THE WITNESS: HAL, H-A-L, PORET,
P-O-R-E-T.

THE COURT: IT'S 3:40. GO AHEAD.

DIRECT EXAMINATION

BY MR. JACOBS:

Q GOOD AFTERNOON, MR. PORET. WE'RE GOING TO
TALK VERY CLEAR BECAUSE WE'RE ON THE CLOCK.

A GOOD AFTERNOON.

Q WHAT DID WE ASK YOU TO DO IN THIS CASE?

A TO DESIGN AND CONDUCT CONSUMER SURVEYS TO
DETERMINE WHETHER OR NOT THE IPHONE AND THE IPAD
TRADE DRESS HAVE ACQUIRED SECONDARY MEANING.

Q WHAT DO YOU MEAN BY THAT?

A SECONDARY MEANING WOULD MEAN THAT THE OVERALL
LOOK OF THESE PRODUCTS HAS BECOME KNOWN TO
CONSUMERS SO THAT WHEN THEY SEE THE LOOK OF THE
PRODUCT, THEY CAN TELL IT'S AN APPLE PRODUCT.

1 Q WHAT DID YOU CONCLUDE FROM YOUR SURVEYS?

2 A I CONCLUDED THAT BOTH THE IPHONE AND THE IPAD
3 TRADE DRESS HAVE ACQUIRED SECONDARY MEANING AMONG
4 CONSUMERS.

5 Q CAN YOU TELL THE JURY A LITTLE BIT ABOUT YOUR
6 BACKGROUND, PLEASE?

7 A YES. I HAVE A BACHELOR'S IN MATH FROM UNION
8 COLLEGE; A MASTER'S IN MATH FROM THE STATE
9 UNIVERSITY OF NEW YORK AT ALBANY; AND A J.D. FROM
10 HARVARD.

11 AND I AM CURRENTLY A SENIOR
12 VICE-PRESIDENT AT ORC INTERNATIONAL, WHICH IS A
13 MARKET RESEARCH FIRM.

14 Q HAVE YOU CONDUCTED SURVEYS, SURVEYS OF THIS
15 GENERAL TYPE, BEFORE?

16 A YES, I HAVE.

17 Q HOW MANY DO YOU THINK YOU'VE DONE?

18 A I'VE DONE BETWEEN 500 AND 500 CONSUMER SURVEYS
19 ACROSS A NUMBER OF AREAS, AND A LOT OF THOSE
20 SURVEYS RELATE TO TRADEMARKS OR TRADE DRESS OR
21 ADVERTISING.

22 Q LET'S TALK ABOUT YOUR PHONE-RELATED SURVEY
23 FIRST.

24 WHAT WAS YOUR GOAL IN CONDUCTING THE
25 PHONE-RELATED SURVEY?

1 23, HAVING BEEN PREVIOUSLY MARKED FOR
2 IDENTIFICATION, WAS ADMITTED INTO
3 EVIDENCE.)

4 BY MR. JACOBS:

5 Q SO I THINK YOU USED THE WORD STIMULI. IS THAT
6 CORRECT, MR. PORET?

7 A YES, WE WOULD CALL WHAT WE SHOWED THE SURVEY
8 RESPONSE STIMULI.

9 Q WHAT DO YOU MEAN BY THAT?

10 A IT MEANS THIS IS WHAT THEY ACTUALLY SAW WHEN
11 THEY WERE TAKING THE SURVEY AND WHAT THEY WERE
12 QUESTIONED ABOUT.

13 Q CAN YOU EXPLAIN THE STIMULUS HERE. IT'S NOT
14 ACTUALLY A PICTURE OF AN IPHONE AS ONE WOULD
15 ORDINARILY ENCOUNTER IT. WHY IS THAT?

16 A IN THIS INSTANCE, THIS IS AN IPHONE 3G, WHICH
17 SHOWS THE OVERALL APPEARANCE OF IT, BUT WHAT YOU
18 CAN SEE IS THAT WE BLURRED THE SPECIFIC ICONS SO
19 THAT NOBODY WOULD BE ABLE TO TELL THAT THIS IS AN
20 IPHONE JUST BY LOOKING AT A SPECIFIC ICON LIKE, FOR
21 INSTANCE, AN ITUNES ICON, AND WE'VE ALSO COVERED UP
22 THE HOME BUTTON THAT APPEARS IN THE BOTTOM CENTER
23 SO THAT WE'RE TESTING THE OVERALL APPEARANCE OF THE
24 PHONE AND NOT LETTING A SPECIFIC ICON OR THE HOME
25 BUTTON INFLUENCE THE RESULTS.

1 Q COULD WE SEE THE NEXT PAGE, PLEASE, 23.3,
2 MR. LEE.

3 AND WHAT'S THIS, WHAT'S THE DIFFERENCE
4 BETWEEN 2 AND 3, MR. PORET?

5 A ONE GROUP SAW THE PREVIOUS ONE AND ONE GROUP
6 SAW THIS ONE. THE ONLY DIFFERENCE IS THAT THE
7 ICONS HAVE BEEN RANDOMLY SCRAMBLED IN TERMS OF
8 THEIR ORDER, AND THAT WAS REALLY JUST TO CONTROL TO
9 MAKE SURE THAT THE ICONS WERE NOT IMPACTING THE
10 RESULTS.

11 Q NOW, LET'S LOOK AT THE NEXT TWO PAGES OF THIS
12 EXHIBIT, 23.4 AND 23.5.

13 WHAT ARE THESE IMAGES?

14 A THESE ARE IMAGES THAT WERE SHOWN TO TWO OTHER
15 GROUP NOTICE SURVEY, AND THE SILVER BEZEL THAT'S
16 PART OF THE IPHONE 3G TRADE DRESS HAS BEEN REMOVED.

17 SO THESE GROUPS WERE TESTING THE
18 PERCEPTION OF THE GENERAL IPHONE APPEARANCE WITHOUT
19 THE BEZEL THAT IS SPECIFICALLY PART OF THE 3G TRADE
20 DRESS.

21 Q NOW, DID YOU GIVE -- DID YOU HAVE ANY OTHER
22 STIMULI? DID YOU TEST ANY OTHER IMAGES?

23 LET'S TAKE A LOOK AT 6 AND 7?

24 A YES. THERE WERE TWO OTHER IMAGES, EACH OF
25 WHICH WAS SHOWN TO A CONTROL GROUP.

1 Q SO CAN YOU EXPLAIN WHY YOU USE CONTROLS WHEN
2 YOU DO YOUR SURVEY?

3 A YEAH. A CONTROL IS LIKE A PLACEBO IN A
4 MEDICAL EXPERIMENT. YOU'RE GOING TO HAVE ONE GROUP
5 THAT HAS SEEN AN IPHONE AND THEY'VE BEEN ASKED
6 QUESTIONS ABOUT THE IPHONE, AND IF THEY SAY THAT
7 THEY ASSOCIATE THE LOOK OF THAT WITH ONLY APPLE,
8 YOU WANT TO MAKE SURE THAT THEY'RE NOT SIMPLY
9 GUESSING APPLE BECAUSE IT'S A WELL-KNOWN BRAND OR
10 THAT THEY'RE JUST ASSUMING THAT ANY SMARTPHONE WITH
11 A BUNCH OF ICONS IS AN IPHONE.

12 AND THE WAY THAT YOU DO THAT IS THAT YOU
13 SHOW A DIFFERENT GROUP OF PEOPLE A SMARTPHONE WITH
14 A BUNCH OF ICONS LIKE THIS AND YOU ASK THEM THE
15 SAME QUESTIONS AND YOU SEE IF THEY STILL NAME
16 APPLE.

17 AND IF THEY DON'T, OR IF IT'S A MUCH
18 LOWER RATE, THEN YOU KNOW THAT YOUR RESULTS IN THE
19 OTHER GROUPS ARE RELIABLE.

20 Q AND HOW DID YOU CONDUCT THIS SURVEY?

21 A THIS WAS AN ON-LINE SURVEY, WHICH IS A VERY
22 COMMON STANDARD FORM OF SURVEY IN MARKET RESEARCH
23 TODAY.

24 SO THE RESPONSIBLE DEPARTMENTS WERE
25 SEEING AN IMAGE OF A PHONE ON A COMPUTER SCREEN AND

1 THEY WERE ANSWERING THE QUESTIONS SCREEN BY SCREEN
2 THROUGH A WEBSITE.

3 Q AND ARE THE VARIOUS WAYS TO CONTROL THE
4 QUALITY, FOR THE QUALITY OF AN ON-LINE SURVEY LIKE
5 THIS?

6 A YES, THERE ARE A NUMBER OF STANDARD PROCEDURES
7 TO ENSURE THE QUALITY OF IT.

8 Q AND WERE THOSE USED HERE?

9 A YES.

10 Q NOW, ONCE A RESPONDENT, A SURVEY RESPONDENT
11 SAW ONE OF THESE PICTURES, WHAT WERE THEY ASKED?

12 A THEY WERE FIRST ASKED, HAVE YOU EVER SEEN A
13 MOBILE PHONE WITH AN APPEARANCE LIKE THIS ONE?

14 AND IF THEY SAID YES, THEY WERE THEN
15 ASKED WHETHER OR NOT THEY ASSOCIATE THE OVERALL
16 APPEARANCE OF THE PHONE WITH ANY PARTICULAR BRAND
17 OR COMPANIES.

18 AND IF THEY SAID, YES, I DO, THEN THEY
19 WERE ASKED, DO YOU ASSOCIATE THE OVERALL APPEARANCE
20 OF THE PHONE WITH ONLY ONE BRAND OR COMPANY OR WITH
21 MORE THAN ONE, OR IF THEY HAVE NO OPINION, AND IF
22 THEY SAID I ASSOCIATE THE APPEARANCE OF THE PHONE
23 WITH ONLY ONE COMPANY OR BRAND, THEY WERE THEN
24 ASKED WHAT BRAND OR COMPANY.

25 Q BY THE WAY, WHEN WAS THIS SURVEY CONDUCTED?

1 A IN JUNE OF 2011.

2 Q NOW, LET'S TAKE A LOOK AT, MR. LEE, PDX 30.2.
3 AND YOU REFERRED TO THIS QUESTION EARLIER. CAN YOU
4 JUST AGAIN EXPLAIN TO THE JURY THE RESPONSE OF THIS
5 PARTICULAR QUESTION.

6 A FOR THE PEOPLE WHO HAVE INDICATED THAT THEY DO
7 RECOGNIZE THE LOOK OF THE PHONE AND ASSOCIATE IT
8 WITH ONLY ONE COMPANY, THIS WAS THE QUESTION WHERE
9 WE ASKED THEM, WHAT IS THAT COMPANY OR BRAND THAT
10 THEY ASSOCIATE THE APPEARANCE OF THE PHONE WITH.

11 Q NOW LET'S LOOK AT PDX 30.3.

12 AND DOES THIS SLIDE ACCOUNT FOR THE
13 RESULTS OF YOUR SURVEY?

14 A YES.

15 Q CAN YOU DESCRIBE THOSE RESULTS FOR THE JURY,
16 PLEASE?

17 A YES. AMONG THE GROUPS WHO SAW THE IPHONE 3G
18 TRADE DRESS WITH THE SILVER BEZEL, 68 PERCENT OF
19 THEM ANSWERED THAT THEY ASSOCIATE THE OVERALL
20 APPEARANCE OF THAT PHONE WITH ONLY ONE COMPANY, OR
21 BRAND, AND NAMED APPLE OR IPHONE.

22 AND IN THE CASE OF THOSE WHO SAW THE
23 IPHONE GENERAL TRADE DRESS WITHOUT THE BEZEL, IT
24 WAS 61 PERCENT.

25 Q AND THEN YOU SUBTRACTED THE, THE PLACEBO

1 RESPONDENTS, RIGHT, THE CONTROL RESPONDENTS?

2 A YES. WHAT YOU CAN SEE IS BETWEEN THE TWO
3 CONTROL GROUPS, THE AVERAGE AS ONLY 3.7 PERCENT WHO
4 SAID THEY ASSOCIATED THE LOOK OF ANY OF THOSE WITH
5 APPLE, AND WHAT THAT SHOWS YOU IS THAT SINCE THAT'S
6 THE 68 PERCENT AND THE 61 PERCENT NUMBERS ARE SO
7 MUCH HIGHER, THAT THOSE RELIABLY MEASURED
8 RECOGNITION AND ASSOCIATION WITH APPLE AND CAN'T BE
9 DISMISSED AS, AS GUESSING.

10 Q AND WHAT IS YOUR BOTTOM LINE ABOUT THE RESULTS
11 OF THIS SURVEY IN TERMS OF THE QUESTION WE ASKED
12 YOU TO LOOK AT?

13 A THESE ARE HIGH PERCENTAGES THAT INDICATE THAT
14 THE IPHONE TRADE DRESS HAS A VERY HIGH LEVEL OF
15 RECOGNITION AND ASSOCIATION WITH ONLY APPLE,
16 MEANING IT HAS ACQUIRED SECONDARY MEANING.

17 Q NOW LET'S TALK ABOUT YOUR TABLET SURVEY.

18 WHAT WAS THE GOAL OF YOUR TABLET SURVEY?

19 A IT WAS TO DETERMINE WHETHER OR NOT THE IPAD
20 TRADE DRESS HAS ACQUIRED SECONDARY MEANING.

21 Q LET'S GO BACK TO PX 23 IN YOUR BINDER. AND
22 LET'S LOOK AT 23.8 AND 23.9.

23 WHAT DO THESE REPRESENT?

24 A SO AS WITH THE PHONE SURVEY, THERE WERE
25 SEVERAL GROUPS IN THIS SURVEY, AND THESE WERE THE

1 IMAGES OF IPADS THAT WERE SHOWN TO TWO OF THE
2 SURVEY GROUPS.

3 AND, AGAIN, YOU WILL SEE THAT THE ICONS
4 HAVE BEEN BLURRED SO THAT YOU CAN'T SEE WHAT THE
5 SPECIFIC ICONS ARE, AND THAT THE HOME BUTTON THAT
6 WOULD BE IN THE BOTTOM CENTER HAS BEEN COVERED SO
7 THAT THE SURVEYS ARE TESTING THE PERCEPTION OF THE
8 OVERALL TRADE DRESS AND NOT INFLUENCED BY WHAT THE
9 SPECIFIC ICONS ARE OR THE HOME BUTTON.

10 Q AND LET'S LOOK AT 23.10 AND.11.

11 WHAT ARE THESE IMAGES?

12 A THESE ARE IMAGES THAT WERE SHOWN TO TWO OTHER
13 GROUPS. AGAIN, EACH GROUP ONLY SAW ONE IMAGE, AND
14 THESE TESTED A DIFFERENT VIEW OF THE IPAD TRADE
15 DRESS WHICH YOU CAN SEE IS SHOWN FROM AN ANGLE AND
16 ALSO HAD TO BE -- THE HOME BUTTON VISIBLE, AND IN
17 THE CASE OF THE PREVIOUS SLIDE ALSO HAD THE ICONS
18 VISIBLE.

19 Q NOW, WHAT DID YOU -- DID YOU -- I'M SORRY.
20 WHY DID YOU USE THIS SECOND SET OF IMAGES?

21 A BECAUSE WE ALREADY HAD ONE GROUP THAT WAS
22 MEASURING WHETHER THERE WAS SECONDARY MEANING EVEN
23 WHEN THE ICONS AND THE BUTTON WERE COVERED, AND IT
24 WAS OF INTEREST TO SEE WHAT THE LEVELS WOULD BE
25 WHEN YOU SHOWED IT FROM A DIFFERENT VIEW LIKE THIS.

1 Q NOW, DID YOU USE CONTROLS IN YOUR IPAD-RELATED
2 SURVEY?

3 A YES.

4 Q AND WHAT WAS YOUR CONTROL?

5 A THE CONTROL WAS THE BODY OF A NOOK TABLET WITH
6 A FIELD OF ICONS IN THE MIDDLE.

7 Q SO LET'S LOOK AT 23.12, 23.13, AND 23.14.

8 THIS WAS YOUR CONTROL, SIR?

9 A YES. THESE WERE THREE DIFFERENT GROUPS, EACH
10 OF WHICH SAW ONE OF THESE CONTROLS TO PARALLEL THE
11 TEST GROUPS THAT WE SAW WITH THE DIFFERENT VIEWS OF
12 THE IPAD.

13 Q WHY DID YOU THINK THESE WERE GOOD CONTROLS?

14 A THEY'RE GOOD CONTROLS BECAUSE THEY CLEARLY
15 LOOK LIKE A TABLET AND THEY HAVE A FIELD OF ICONS
16 VISIBLE ON THE SCREEN. SO IF THERE IS ANY TENDENCY
17 OF RESPONDENTS TO SIMPLY GUESS THAT ANY TABLET WITH
18 A BUNCH OF ICONS IS AN IPAD, THEN THESE CONTROLS
19 WOULD REVEAL THAT KIND OF GUESSING.

20 Q SINCE IT MAY NOT BE ENTIRELY VISIBLE, CAN YOU
21 DESCRIBE THE NOOK A LITTLE BIT -- MAYBE WE COULD
22 DIM THE LIGHTS FOR JUST A MOMENT.

23 CAN YOU DESCRIBE WHAT THE FRAME OF THE
24 NOOK IS LIKE AS COMPARED WITH AN IPAD?

25 A IT -- YOU KNOW, IT'S RECTANGULAR. IT'S

1 SOMEWHAT OF A DIFFERENT OVERALL SHAPE IN THAT IT'S,
2 IT'S THICKER ON THE BOTTOM THAN IT IS ON THE TOP,
3 AND THE GENERAL OVERALL LOOK OF IT IS DIFFERENT
4 FROM THE IPAD.

5 Q NOW, ONCE THE RESPONDENTS SAW ONE OF THESE
6 IMAGES, WHAT WERE THEY ASKED?

7 A THEY WERE ASKED THE SAME QUESTIONS THAT I
8 DESCRIBED ABOUT, IN THE PHONE SURVEY, ACCEPT THEY
9 WERE ASKED ABOUT TABLETS INSTEAD OF PHONES.

10 Q SO LET'S LOOK AT PDX 30.4. THAT'S THE SAME
11 QUESTION ABOUT ASSOCIATION THAT YOU ASKED IN
12 CONNECTION WITH THE PHONE SURVEY; CORRECT?

13 A YES. THIS WOULD BE THE FINAL QUESTION, OR ONE
14 OF THE FINAL QUESTIONS FOR THE PEOPLE WHO SAID THEY
15 DID ASSOCIATE THE LOOK OF THE TABLET WITH ONLY ONE
16 COMPANY OR BRAND, AND THEN WE ASKED THEM WHICH
17 COMPANY OR BRAND.

18 Q AND NOW LET'S LOOK AT THE RESULTS OF THIS
19 SURVEY.

20 AND CAN YOU DESCRIBE THOSE RESULTS FOR
21 THE JURY, PLEASE?

22 A YES. IN THE GROUPS THAT SAW THE FIRST VIEW OF
23 THE IPAD HEAD ON WITH THE ICONS BLURRED AND THE
24 HOME BUTTON COVERED, 57.3 PERCENT ANSWERED THAT
25 THEY ASSOCIATED THE LOOK OF THE TABLET ONLY WITH

1 APPLE OR IPAD.

2 AND IN THE GROUPS THAT SAW THE OTHER VIEW
3 AT AN ANGLE AND WITH THE HOME BUTTON VISIBLE, IT
4 WAS 75.2 PERCENT THAT ANSWERED THEY ASSOCIATED THE
5 LOOK OF THAT ONLY WITH APPLE OR IPAD.

6 Q AND THEN ON THE CONTROLS, CAN YOU JUST EXPLAIN
7 THE RESULTS YOU GOT THERE?

8 A YES. AGAIN, THE RESULTS WERE ONE OF THEM FOR
9 THE HEAD-ON VIEW WAS 17 PERCENT AND FOR THE OTHER
10 WAS 10.8 PERCENT.

11 SO DRAMATICALLY LOWER THAN THE GROUPS
12 THAT SAW THE IPADS.

13 Q AND WHAT WAS THE NET ASSOCIATION THERE?

14 A SO THE NET ASSOCIATION, IF YOU SUBTRACT THE 73
15 FROM THE 57.3 IS 40.3 PERCENT. AND IF YOU SUBTRACT
16 10.8 FROM THE 75.2, YOU GET 64.4 PERCENT.

17 SO THE FACT THAT THE RESULTS FOR THE IPAD
18 EXCEED THE CONTROL RESULTS BY SUCH A LARGE MARGIN
19 SHOW YOU THAT THE 57.3 AND 75.2 RESULTS DO
20 REPRESENT GENUINE ASSOCIATION OF THE SPECIFIC -- OF
21 THE IPAD AND NOT JUST SIMPLY GUESSING THAT ANY
22 TABLET WITH SOME ICONS IN AN IPAD.

23 Q AND BOTTOM LINE, AGAIN, WHAT DOES THIS SURVEY
24 CONVEY TO YOU BASED ON YOUR EXPERIENCE IN THE
25 FIELD?

1 A IT SHOWS THAT THE OVERALL APPEARANCE OF THE
2 IPAD HAS -- IS HIGHLY KNOWN BY CONSUMERS AND THEY
3 ASSOCIATE THE LOOK OF IT ONLY WITH APPLE, EVEN
4 WITHOUT BEING ABLE TO SEE THE ICONS OR THE HOME
5 BUTTON.

6 Q AND THEN DID YOU DO ANYTHING ELSE TO FIGURE
7 OUT -- SORRY. WHEN WAS THE TABLET SURVEY
8 CONDUCTED?

9 A I BELIEVE IT WAS JUNE INTO JULY OF 2011.

10 Q AND DID YOU DO ANYTHING ELSE TO ASSESS WHEN IN
11 THE TIMELINE OF THE RELEASE OF THESE PRODUCTS
12 CONSUMERS BEGAN TO ASSOCIATE THE TRADE DRESS OF THE
13 TABLET WITH APPLE?

14 A YES. YOU CAN'T EXPECT PEOPLE TO REMEMBER
15 EXACTLY THINGS LIKE THIS, BUT WE ASKED PEOPLE, TO
16 THE BEST OF THEIR, THE BEST OF THEIR RECOLLECTION,
17 OF THE PEOPLE WHO DID SAY THEY ASSOCIATED THE LOOK
18 OF ONE OF THE PRODUCTS WITH APPLE, WE ASKED THEM,
19 YOU KNOW, TO THE BEST OF THEIR MEMORY, WHEN DID
20 THEY FIRST COME TO ASSOCIATE THIS LOOK WITH APPLE,
21 AND IN BOTH THE PHONE AND THE TABLET SURVEYS, IT
22 WAS THE LARGE MAJORITY OF THOSE RESPONDENTS SAID
23 THAT THEY CAME TO ASSOCIATE THESE LOOKS WITH APPLE
24 PRIOR TO THE TIME THAT THE SAMSUNG PRODUCTS CAME ON
25 THE MARKET.

1 MR. JACOBS: THANK YOU VERY MUCH,
2 MR. PORET.

3 I HAVE NO FURTHER QUESTIONS, YOUR HONOR.

4 THE COURT: ALL RIGHT. 3:56, PLEASE GO
5 AHEAD WITH THE CROSS.

6 MR. PRICE: YOUR HONOR, BEFORE MY TIME
7 STARTS, COULD YOU READ THE LIMITING INSTRUCTION
8 CONCERNING FAME?

9 THE COURT: AH. ONE SECOND, PLEASE.

10 NOW, AS FOR PX 23, AND PX 30.2, AND 30.5,
11 THE 30.2 WAS THE QUESTION THAT WAS ASKED IN THE
12 SURVEY, 30.5 -- OH, THROUGH 30.5.

13 SO THOSE WERE ACTUALLY THE SURVEY RESULTS
14 AND THE QUESTIONS THAT WERE ASKED IN THE SURVEY, AS
15 WELL AS PX 23, WHICH IS ALL OF THOSE COPIES OF THE
16 PHONES AND THE TABLETS THAT WERE ACTUALLY USED IN
17 THE SURVEY, BOTH AS CONTROL AND OTHERWISE, YOU MAY
18 CONSIDER THIS SURVEY AS EVIDENCE THAT APPLE DESIGNS
19 HAVE ACQUIRED SECONDARY MEANING, BUT YOU MAY NOT
20 CONSIDER THE SURVEY AS EVIDENCE THAT THE APPLE
21 DESIGNS ARE FAMOUS.

22 ALL RIGHT. GO AHEAD, PLEASE.

23 MR. PRICE: THANK YOU, YOUR HONOR.

24 **CROSS-EXAMINATION**

25 BY MR. PRICE:

1 Q LET ME MAKE SURE I GET THE -- BY THE WAY, I'M
2 BILL PRICE. AND I WANT TO MAKE SURE I HAVE YOUR
3 PRONUNCIATION CORRECTLY. IS IT PORET?

4 A YES.

5 Q THANK YOU. FIRST OF ALL, LET ME CLARIFY WHAT
6 YOU ARE NOT DOING HERE.

7 THESE STUDIES ARE NOT TRYING TO STUDY
8 CONFUSION AMONG CONSUMERS; CORRECT?

9 A CORRECT.

10 Q AND BASED ON THE SURVEYS YOU DID, YOU CAN'T
11 MAKE A CONCLUSION ABOUT WHETHER OR NOT CONSUMERS
12 ARE CONFUSED; RIGHT?

13 A RIGHT.

14 Q INSTEAD, WHAT YOU'RE LOOKING AT IS SOMETHING
15 CALLED SECONDARY MEANING; RIGHT?

16 A YES.

17 Q AND THAT'S SORT OF A LEGAL TERM IN SOME WAYS
18 WHICH YOU TRIED TO EXPLAIN TO THE JURY; RIGHT?

19 A YES.

20 Q OKAY. SO -- AND YOU'RE TALKING ABOUT
21 SECONDARY MEANING ASSOCIATED WITH APPLE'S CLAIMED
22 TRADE DRESS; RIGHT?

23 A YES.

24 Q SO LET ME ASK YOU ABOUT THAT.

25 NOW, APPLE'S CLAIMED TRADE DRESS, THE

1 ELEMENTS OF THAT WERE DESCRIBED TO YOU BY SOMEONE;
2 CORRECT?

3 A YES. OR READ IN THE COMPLAINT.

4 Q SO IT WASN'T A SITUATION WHERE YOU DID A STUDY
5 TO FIND OUT WHAT IS APPLE'S TRADE DRESS; CORRECT?
6 YOU JUST ACCEPTED WHAT WAS EITHER DESCRIBED TO YOU
7 OR WHAT YOU READ IN A COMPLAINT; RIGHT?

8 A NO, THAT'S NOT REALLY RIGHT.

9 Q SO DID YOU ACTUALLY DO SOME SORT OF
10 INDEPENDENT STUDY TO SEE, YOU KNOW, WHAT ELEMENTS,
11 TOTAL ELEMENTS CONSTITUTE APPLE'S TRADE DRESS?

12 A NO. BUT THE SURVEY SHOWING THE DEVICES AS
13 THEY ARE, SO IT'S NOT AS IF I HAVE IN ANY WAY
14 DECIDED WHAT TRADE DRESS I'M SHOWING PEOPLE.

15 Q WELL, FOR EXAMPLE, YOU DID SOME STATISTICAL
16 ANALYSIS ON THE EFFECT OF THE HOME BUTTON ON THE
17 APPLE PRODUCTS; CORRECT?

18 A I WOULDN'T SAY I DID STATISTICAL ANALYSIS ON
19 THAT. I WOULD SAY THAT WE DID HAVE TWO GROUPS, ONE
20 OF WHICH DID SEE A VERSION WITH THE IPAD BUTTON AND
21 ONE WITHOUT, SO THERE'S SOME DATA ON THAT.

22 Q AND THE DATA THAT YOU FOUND SHOWED THAT THERE
23 WAS A HIGH ASSOCIATION OF PEOPLE BEING ABLE TO
24 IDENTIFY AN APPLE PRODUCT JUST BY THAT INDENTED
25 HOME BUTTON; CORRECT?

1 A NO.

2 Q YOU DIDN'T FIND A HIGH ASSOCIATION BETWEEN THE
3 HOME BUTTON AND BEING ABLE TO IDENTIFY AN APPLE
4 PRODUCT?

5 A THAT'S NOT WHAT THE RESULTS SHOWED.

6 Q DID YOU SHOW AN ASSOCIATION?

7 A YOU MEAN REGARDING THE HOME BUTTON?

8 Q YES.

9 A NO. WHAT, WHAT THE SURVEYS SHOW IS THAT IN
10 THE VERSION WHERE THE HOME BUTTON WAS VISIBLE,
11 THERE WAS A HIGHER RATE OF ASSOCIATION, BUT THAT IS
12 NOT THE ONLY THING THAT WAS DIFFERENT ABOUT THAT
13 IMAGE. IT WAS ALSO SHOWN AT AN ANGLE THAT MAY HAVE
14 GIVEN PEOPLE A BETTER SENSE OF THE SHAPE AND
15 DIMENSIONS OF THE PRODUCTS.

16 Q WELL, I'LL GO TO THE, THE DETAILS IN A SECOND,
17 BUT IF WE GO TO, I GUESS IT'S YOUR EXHIBIT, AND --
18 CAN YOU HELP ME OUT HERE.

19 I THINK IT'S 30.5. DO YOU SEE THAT ON
20 THE RIGHT-HAND SIDE, YOU'VE GOT AN IPAD AND IT'S
21 NOT CLEAR HERE, BUT IN WHAT THE, THE SURVEY PEOPLE
22 COULD SEE, THERE'S A HOME BUTTON ON THAT IPAD;
23 CORRECT?

24 A YES, THE ONE ON THE RIGHT, YES.

25 Q AND THERE'S NOT A HOME BUTTON ON THIS TEST

1 WHERE YOU GOT THE 40.3 PERCENT NET ASSOCIATION
2 COMPARED TO THE 64.4; CORRECT?

3 A YES.

4 Q AND DO YOU HAVE -- WELL, YOU UNDERSTAND THAT
5 SAMSUNG'S PRODUCTS DON'T HAVE THAT KIND OF UNIQUE,
6 DISTINCTIVE HOME BUTTON LIKE APPLE HAS; CORRECT?

7 A I BELIEVE THAT'S THE CASE.

8 Q ALL RIGHT. SO THAT'S A DISTINCTION BETWEEN
9 THE PRODUCTS; CORRECT?

10 A I DON'T -- I DON'T KNOW IF YOU'D CHARACTERIZE
11 IT LIKE THAT.

12 Q WELL, WERE YOU TOLD THAT THAT THE REASON APPLE
13 DID NOT INCLUDE THAT AS BEING AN ELEMENT OF ITS
14 TRADE DRESS IS BECAUSE SAMSUNG IS DIFFERENT FROM
15 APPLE ON THAT UNIQUE IDENTIFYING PART OF APPLE'S
16 PRODUCT?

17 A NO, I WASN'T TOLD THAT ONE WAY OR THE OTHER.

18 Q SO YOU WEREN'T GIVEN ANY REASON, IN DOING YOUR
19 SURVEYS, OF WHY APPLE WASN'T CLAIMING WHY THAT HOME
20 BUTTON WAS A DISTINCTIVE PART OF ITS TRADE DRESS
21 WHICH WOULD DISTINGUISH IT FROM OTHER COMPANIES?

22 A I WAS NOT TOLD WHAT APPLE THINKS OF THE HOME
23 BUTTON.

24 Q WELL, LET ME ASK YOU ABOUT THE NUMBERS YOU DID
25 PUT TOGETHER, AND THERE'S A -- AND WE CAN TAKE THAT

1 DOWN FOR NOW.

2 THERE'S A, A CORRECT PROCEDURE TO FOLLOW
3 TO FIND THE PERCENTAGE OF ASSOCIATION FOR SECONDARY
4 CONSIDERATION; CORRECT?

5 A SECONDARY MEANING, YES.

6 Q SECONDARY MEANING.

7 AND THE FIRST THING YOU HAVE TO DO IS
8 IDENTIFY THE RIGHT POPULATION; CORRECT?

9 A YES.

10 Q AND YOU AGREE THAT THE RIGHT POPULATION THAT
11 YOU SHOULD ASK QUESTIONS OF IS CONSUMERS WHO
12 PURCHASED IN THE LAST 12 MONTHS OR WERE LIKELY TO
13 PURCHASE IN THE NEXT 12 MONTHS THESE SORTS OF
14 PRODUCTS; CORRECT?

15 A YEAH, GENERALLY.

16 Q SO THAT'S LIKE THE TOTAL POPULATION. AND HOW
17 MANY OF THOSE PEOPLE DID YOU HAVE IN THE SURVEY?

18 A I NEED TO LOOK AT MY REPORT TO TELL YOU.

19 Q CAN YOU GIVE ME AN ESTIMATE?

20 A OFF THE TOP OF MY HEAD, I FEEL LIKE THERE WERE
21 800 PEOPLE IN ONE OF THE SURVEYS AND MAYBE 500 IN
22 ONE OF THE OTHERS. BUT THERE WERE SOME OF THOSE
23 WHO MIGHT NOT HAVE BEEN IN THE CATEGORY YOU JUST
24 DESCRIBED.

25 Q AND ALL OF THE PEOPLE IN THAT SURVEY, ALL

1 THOSE PEOPLE IN THAT POPULATION, WHAT YOU'RE TRYING
2 TO FIND OUT IS WHAT PERCENTAGE OF THE PEOPLE IN
3 THAT POPULATION ASSOCIATED THESE IMAGES WITH AN
4 APPLE PRODUCT IN A CERTAIN TIME FRAME; RIGHT?

5 A I UNDERSTAND THE TIME FRAME TO BE RELEVANT.
6 IN THE TYPICAL SECONDARY MEANING SURVEY, THE ISSUE
7 OF TIMING IS NOT ADDRESSED.

8 I DID MAKE AN ATTEMPT TO ASK ABOUT TIMING
9 IN THIS ONE, SO IT'S A RELEVANT ISSUE.

10 BUT IT'S NOT THE HEART OF WHAT A
11 SECONDARY MEANING SURVEY IS ABOUT.

12 Q NOW, WAIT A MINUTE. ISN'T A SECONDARY MEANING
13 SURVEY SUPPOSED TO FIND OUT, IN THE APPROPRIATE
14 POPULATION, WHAT PERCENTAGE IN THAT POPULATION
15 ASSOCIATED THESE IMAGES WITH APPLE BETWEEN THE TIME
16 APPLE FIRST CAME OUT WITH ITS PRODUCT AND THE TIME
17 SAMSUNG FIRST CAME OUT WITH ITS PRODUCT?

18 A I THINK THAT SOUNDS LIKE THE LEGAL DEFINITION,
19 BUT EVERY SECONDARY MEANING SURVEY IS DONE AFTER
20 THE FACT. SO IT'S BEING USED TO DEAL WITH THE
21 PERIOD OF TIME THAT HAPPENED BEFORE THE SURVEY.

22 Q OKAY. SO LET'S TALK ABOUT, THEN, LEGALLY,
23 USING THE LEGAL DEFINITION WHAT YOU'RE SUPPOSED TO
24 BE TRYING TO FIND IN THIS SURVEY, OKAY?

25 AND IF YOU'D LOOK AT -- I'M GOING TO PUT

1 UP RIGHT NOW DEMONSTRATIVE 3705.101, THAT'S
2 3705.101. DO WE HAVE THE BOOKS IN FRONT OF HIM.

3 SO LEGALLY, IF YOU'RE TRYING TO FIND
4 SECONDARY MEANING, YOU WANT TO SEE WHAT PERCENTAGE
5 OF PEOPLE IN THAT POPULATION, PEOPLE BUYING WITHIN
6 A YEAR OR AFTER A YEAR, ASSOCIATED THE ACCUSED
7 TRADE DRESS WITH APPLE BETWEEN, IN THIS CASE,
8 JANUARY 2007 WHEN THE PRODUCT CAME OUT, WAS
9 ANNOUNCED, AND JULY 2010 WHEN THE CASE OF THE
10 PHONE, THE FIRST ACCUSED SAMSUNG PHONE CAME OUT;
11 CORRECT? THAT'S THE LEGAL DEFINITION?

12 A YEAH. MY UNDERSTANDING OF THE LEGAL
13 DEFINITION WOULD BE THAT THERE NEEDS TO BE
14 SECONDARY MEANING, IN OTHER WORDS, THAT CONSUMERS
15 WOULD HAVE TO HAVE ALREADY ASSOCIATED THIS LOOK
16 WITH APPLE AS OF JULY 2010.

17 Q SO YOU ASKED THE CORRECT GROUP OF PEOPLE,
18 PEOPLE WHO HAD BOUGHT A PHONE 12 MONTHS BEFORE, OR
19 12 MONTHS AFTER, YOU ASKED THEM WHETHER OR NOT THEY
20 ASSOCIATED IMAGES YOU SHOWED THEM WITH APPLE;
21 CORRECT?

22 A YES. THAT'S A SUMMARY.

23 Q OKAY. AND YOU ALSO ASKED THEM -- AND IF WE
24 COULD LOOK AT YOUR REPORT, AND YOU'D LOOK AT PAGE,
25 I BELIEVE IT'S PARAGRAPH 91 OF YOUR REPORT. LET ME

1 SEE IF I CAN FIND THAT. I'M SORRY, PARAGRAPH 91.

2 YOU HAVE THIS THING CALLED TIMING OF
3 SECONDARY MEANING.

4 DO YOU SEE THAT?

5 A YES.

6 Q AND NOW I WANT TO SEE IF I CAN FIND THE EXACT
7 QUESTION THAT YOU USED.

8 IF WE CAN TAKE THAT DOWN.

9 AND I BELIEVE IT IS ON, LET'S SEE, PAGE
10 14, LINES 9 THROUGH 17 RIGHT HERE.

11 SO YOU ASKED, THEN, "TO THE BEST OF YOUR
12 RECOLLECTION, DID YOU FIRST COME TO ASSOCIATE THE
13 OVERALL APPEARANCE OF THE MOBILE PHONE YOU WERE
14 SHOWN WITH," WHATEVER COMPANY, AND THEN YOU GAVE
15 THE OPTIONS BEFORE JULY 2010, DURING OR AFTER
16 JULY 2010, AND DON'T KNOW.

17 RIGHT?

18 A THAT, THAT WAS ONLY A FOLLOW-UP QUESTION FOR
19 CERTAIN PEOPLE. WHAT PEOPLE WERE REALLY ASKED --
20 FIRST THEY WERE ASKED IN WHAT YEAR DID THEY COME TO
21 ASSOCIATE THE APPEARANCE WITH APPLE.

22 Q WELL, THAT -- THEY WERE ASKED, WHEN IS THE
23 FIRST YEAR YOU BECAME -- YOU ASSOCIATED THAT
24 APPEARANCE WITH APPLE; RIGHT?

25 IF THEY IDENTIFIED APPLE AS SOMETHING

1 THEY ASSOCIATED THE IMAGE WITH; RIGHT?

2 A YES. I'M JUST SAYING THIS IS NOT THE QUESTION
3 MOST PEOPLE WERE ASKED.

4 Q OKAY.

5 A THEY WERE ASKED JUST TO NAME THE YEAR.

6 Q OKAY. IN THAT CASE, LET'S GO UP ABOVE.

7 WHAT YOU'RE SAYING IS THAT, RIGHT ABOVE
8 HERE IT SAYS, YOU WERE ASKED, "IN WHAT YEAR, IF YOU
9 KNOW, DID YOU FIRST COME TO ASSOCIATE THIS OVERALL
10 APPEARANCE OF THE MOBILE PHONE YOU WERE SHOWN
11 WITH," FILL IN THE BLANK, APPLE; CORRECT?

12 A CORRECT.

13 Q OKAY. AND IF WE LOOK AT EXHIBIT 3705.101 FOR
14 IDENTIFICATION, THIS IS THE -- OKAY, AND THAT WAS
15 -- SO OF THOSE -- YOU WANTED TO FIND OUT, OF THE
16 POPULATION, WHAT PERCENTAGE OF PEOPLE ASSOCIATED
17 THOSE IMAGES WITH APPLE AND ASSOCIATED THOSE IMAGES
18 WITH APPLE IN THIS TIME FRAME, PRIOR TO JULY 2010;
19 RIGHT?

20 A I, I WOULDN'T -- I DON'T THINK THAT'S AN
21 ACCURATE DESCRIPTION OF WHAT THE QUESTION ABOUT THE
22 YEAR WAS, WAS TRYING TO DO.

23 IT WAS TRYING TO TAKE THE GROUP OF PEOPLE
24 WHO DID ASSOCIATE IT WITH APPLE AND BREAK IT UP
25 INTO THOSE THAT WERE BEFORE THAT POINT AND THOSE

1 THAT WERE AFTER TO SEE WHETHER THIS IS REALLY JUST
2 A NEW PHENOMENON THAT OCCURRED AFTER THE SAMSUNG
3 TABLETS CAME OUT OR WHETHER IT WAS ALREADY AN
4 EXISTING THING.

5 Q THE LEGAL DEFINITION, YOU SAID, OF SECONDARY
6 MEANING WHICH YOU WERE TRYING TO MEASURE IS THE
7 PERCENTAGE IN THE APPROPRIATE POPULATION WHO
8 ASSOCIATED THE ALLEGED TRADE DRESS WITH APPLE AND
9 HAD THAT AN ASSOCIATION BETWEEN JANUARY 27TH, 2007
10 AND JULY 2010.

11 THAT'S THE LEGAL DEFINITION. YOU CONCEDE
12 THAT; CORRECT?

13 A THAT SOUNDS TO ME LIKE A FAIR DESCRIPTION OF
14 HOW I UNDERSTAND STAND THE LAW.

15 Q OKAY. AND YOU GOT THE INFORMATION FROM THESE
16 FOLKS AS TO WHEN THEY FIRST ASSOCIATED THE TRADE
17 DRESS WITH APPLE BECAUSE YOU ASKED THEM THE
18 QUESTION; CORRECT?

19 A WE GOT THE INFORMATION FROM SOME PEOPLE WHO
20 COULD REMEMBER AND TO THE BEST OF THEIR, THEIR
21 RECOLLECTION.

22 Q SO THEN YOU HAD THE ABILITY TO DO A
23 CALCULATION CONSISTENT WITH THE LEGAL MEANING OF
24 SECONDARY -- LEGAL DEFINITION OF SECONDARY MEANING,
25 YOU COULD HAVE DONE A CALCULATION TO SEE HOW MANY

1 OF THAT POPULATION ASSOCIATED THE ALLEGED TRADE
2 DRESS WITH APPLE IN THE LEGALLY RELEVANT TIME?

3 YOU COULD HAVE DONE THAT CALCULATION?

4 A YOU'RE ASKING ME?

5 Q YEAH, YES.

6 A NO. YOU CAN'T DO ANYTHING OTHER THAN EXACTLY
7 WHAT I DID. YOU CAN MEASURE THE LEVEL OF SECONDARY
8 MEANING NOW AND YOU CAN ASK A QUESTION TO SEE
9 WHETHER OR NOT IT LOOKS LIKE THAT'S SOMETHING THAT
10 JUST HAS HAPPENED OVER THE PAST FEW MONTHS OR
11 WHETHER IT HAPPENED A WHILE AGO, AND THAT'S WHAT I
12 DID.

13 Q NO. THE LEVEL OF ASSOCIATION NOW IS NOT
14 RELEVANT TO SECONDARY MEANING, IS IT?

15 MR. JACOBS: YOUR HONOR, OBJECTION. I
16 DON'T WANT TO HAVE THIS IN -- THIS IS A LEGAL
17 ISSUE. I'D RATHER NOT HAVE IT IN FRONT OF THE
18 JURY.

19 I BET YOU WOULD RATHER NOT HAVE IT IN
20 FRONT OF THE JURY.

21 MR. PRICE: LET ME REPHRASE IT.

22 THE COURT: ALL RIGHT.

23 BY MR. PRICE:

24 Q ACCORDING TO THE LEGAL DEFINITION YOU GAVE US
25 OF SECONDARY MEANING, THE QUESTION IS WHAT

1 PERCENTAGE OF THOSE, THAT GENERAL POPULATION, HAD
2 AN ASSOCIATION WITH APPLE OF THIS TRADE DRESS
3 BETWEEN JANUARY 2007 AND JULY 2010; RIGHT?

4 A I AGREE WITH THAT.

5 Q OKAY. AND HAVING ASKED THESE, THIS GENERAL
6 POPULATION THE QUESTION YOU ASKED, IS THERE AN
7 ASSOCIATION, AND HAVING ASKED THEM, WHEN DID YOU
8 FIRST HAVE THAT ASSOCIATION, ALL RIGHT, YOU HAD A
9 NUMBER FOR THE GEM POPULATION; RIGHT? HOW MANY --
10 YOU HAD A CERTAIN NUMBER OF THE GENERAL POPULATION;
11 RIGHT? YOU ASKED A CERTAIN NUMBER OF PEOPLE?

12 A YES.

13 Q OKAY. THAT WOULD BE THE, THE NOMINATOR, IS
14 THAT RIGHT? THAT WOULD BE THE THING ON THE BOTTOM,
15 THAT WOULD BE THE NUMBER ON THE BOTTOM, RIGHT, FOR
16 TRYING TO FIND A PERCENTAGE, RIGHT? YOU ASKED,
17 SAY, 800 PEOPLE, YOU WANT A PERCENTAGE, AND YOU PUT
18 800 DOWN THERE, RIGHT? RIGHT?

19 A YOU'RE --

20 Q RIGHT?

21 A WELL, I CAN'T SAY "RIGHT" BECAUSE I CAN TELL
22 YOU'RE CONFUSED ABOUT WHAT YOU'RE TALKING ABOUT, SO
23 I CAN'T REALLY SAY "RIGHT."

24 I CAN SEE WHAT YOU'RE CONFUSED ABOUT AND
25 SO --

1 Q WELL, THAT'S VERY NICE OF YOU, BUT LET ME ASK
2 A QUESTION.

3 A OKAY.

4 Q AND THEN MAYBE SOMETIME OVER DRINKS YOU CAN
5 TELL ME HOW CONFUSED I AM.

6 IF YOU'RE TRYING TO FIND THE SECONDARY
7 MEANING OF A PRODUCT WITHIN A CERTAIN TIME PERIOD,
8 YOU NEED TO FIND OUT IF PEOPLE HAD THAT MEANING
9 DURING THAT TIME PERIOD; RIGHT? IS THAT CORRECT?

10 A NO. I DON'T AGREE WITH THAT.

11 Q WELL, YOU COULD LOOK AT YOUR DATA AND FIND THE
12 NUMBER OF PEOPLE WHO SAID THEY HAD AN ASSOCIATION
13 BETWEEN THESE IMAGES AND APPLE AND THEY HAD THAT
14 ASSOCIATION BETWEEN JANUARY OF 2007 AND JULY 2010?

15 YOU HAD THAT DATA; RIGHT?

16 A I HAD THE DATA TO THE QUESTION THAT WE JUST
17 TALKED ABOUT, YES.

18 Q AND THAT DATA WAS -- IF WE CAN GET BACK TO
19 PAGE 14 OF YOUR REPORT -- IN WHAT YEAR, IF YOU
20 KNOW, DID YOU FIRST COME TO ASSOCIATE THE OVERALL
21 APPEARANCE OF THE MOBILE PHONE YOU WERE SHOWN WITH,
22 AND THEY SAID APPLE.

23 THAT'S THE DATA YOU GOT; RIGHT?

24 A YES.

25 Q OKAY. SO YOU HAD BOTH THE DATA FOR WHAT

1 PERCENTAGE OF THE LARGE POPULATION ASSOCIATED THESE
2 IMAGES WITH APPLE DURING THE 2007 TO 2010 TIME
3 FRAME, YOU HAD THAT DATA BECAUSE YOU ASKED THOSE
4 QUESTIONS; RIGHT?

5 A NO. YOU'RE -- YOU ARE MISINTERPRETING WHAT
6 THE ANSWERS TO THOSE QUESTIONS MEAN.

7 Q WELL, PEOPLE EITHER FILLED IN A NUMBER, LIKE
8 2008, 2009, OR THEY SAID I DON'T KNOW TO THE
9 QUESTION; RIGHT? YOU HAD THAT DATA?

10 A YES.

11 Q AND IF YOU TOOK THAT AS THE NUMERATOR, THE
12 NUMBER OF PEOPLE WHO SAID "I HAD AN ASSOCIATION OF
13 THESE IMAGES WITH APPLE'S TRADE DRESS BETWEEN 2000
14 SEARCH AND 2010," IF THAT'S THE NUMERATOR, AND THEN
15 THE DENOMINATOR, YOU HAVE YOUR POPULATION, WHICH
16 WE'VE AGREED UPON IS THE PEOPLE WHO BOUGHT PHONES
17 12 MONTHS BEFORE OR WERE LIKELY TO 12 MONTHS LATER,
18 RIGHT, YOU'RE WITH ME SO FAR, IF YOU HAD THAT, YOU
19 WOULD BE ABLE TO MAKE A CALCULATION AND GIVE US A
20 PERCENTAGE, RIGHT?

21 A YES. IT WOULD BE AN ARBITRARY PERCENTAGE, BUT
22 YOU COULD DO WHATEVER CALCULATION YOU'RE
23 DESCRIBING.

24 Q WELL, YOU SAY "ARBITRARY ." IF WE GO TO YOUR
25 NUMBERS, IF WE CAN GO BACK TO THE TABLE YOU HAD UP,

1 WHICH IS, I GUESS, PDX 30.5 AND IF YOU LOOK AT YOUR
2 NUMBERS AND DIVIDED THE NUMBER OF PEOPLE WHO SAID
3 THEY ASSOCIATED TRADE DRESS WITH APPLE IN THE
4 LEGALLY RELEVANT TIME FRAME BY THE NUMBER OF PEOPLE
5 IN THE ENTIRE POPULATION THAT YOU SURVEYED, THIS
6 WOULD GO DOWN BY ABOUT HALF; RIGHT?

7 A I DON'T KNOW BECAUSE THAT'S, THAT IS A RANDOM,
8 ARBITRARY CALCULATION THAT YOU'RE DESCRIBING THAT'S
9 NOT BASED ON ANY PROPER ANALYSIS, SO I DIDN'T DO
10 ANYTHING LIKE THAT, AND I DON'T KNOW WHAT THE
11 ANSWER WOULD BE.

12 Q OKAY. AND THIS NUMBER HERE, THAT 64.4, THAT
13 WOULD GO DOWN BY MORE THAN HALF AS WELL; CORRECT?

14 A I DON'T KNOW.

15 Q WELL, YOU DID ANOTHER CALCULATION WHICH LOOKED
16 AT A BROADER POPULATION AND ASKED THESE SAME
17 QUESTIONS; RIGHT?

18 A I'M NOT SURE EXACTLY WHAT YOU'RE REFERRING TO.

19 Q WELL, LET ME, IF I COULD, I'LL PUT UP AND SEE
20 IF THIS HELPS.

21 YOU DID A CONSUMER RECOGNITION SORT OF
22 SURVEY WHERE YOU USED A POPULATION THAT WAS BEYOND
23 THE BUYING 12 MONTHS BEFORE OR 12 MONTHS AFTER?

24 A I WOULD SAY IT'S PART OF THE SAME SURVEY, BUT
25 IT WAS AN ADDITIONAL SET OF RESPONDENTS WHO DID NOT

1 MEET THOSE ORIGINAL QUALIFICATIONS WE TALKED ABOUT.

2 Q AND YOU REPORTED DATA ON THAT AS WELL;

3 CORRECT?

4 A YES.

5 Q AND YOU THOUGHT THAT'S NOT DIRECTLY RELATED TO
6 SECONDARY MEANING?

7 A RIGHT. I -- SOME OF THOSE PEOPLE ARE NOT
8 WITHIN THE GROUP THAT I WOULD CONSIDER RELEVANT FOR
9 ASSESSING SECONDARY MEANING.

10 Q AND, AGAIN, IN YOUR REPORT YOU DIDN'T FILTER
11 OUT THOSE WHO SAID, YOU KNOW, WE DIDN'T COME UP
12 WITH THAT ASSOCIATION UNTIL AFTER 2010?

13 A I -- WHAT DO YOU MEAN THAT I DIDN'T FILTER
14 OUT?

15 Q WELL, JUST AS BEFORE, WHEN I SAID THAT IF YOU
16 ONLY TOOK AS A POSITIVE HIT SOMEONE WHO SAID, I
17 ASSOCIATED WITH APPLE IN THE RELEVANT TIME FRAME,
18 IF YOU ONLY TOOK THOSE PEOPLE, THIS PERCENTAGE GOES
19 WAY DOWN; CORRECT?

20 A YOU'RE DESCRIBING WHAT SEEMS TO BE AN
21 ARBITRARY, INCORRECT ANALYSIS TO ME, SO THE ANSWER
22 CAN ONLY BE I DIDN'T DO THAT CALCULATION BECAUSE IT
23 DOESN'T MAKE ANY SENSE.

24 I REPORTED THE NUMBERS TO THE QUESTION
25 ABOUT WHAT YEAR PEOPLE FORMED THEIR ASSOCIATION

1 EXACTLY AS THE NUMBERS ARE.

2 Q OH, OKAY. SO LET ME MAKE SURE.

3 SO YOU REPORTED THE ANSWERS TO THE
4 QUESTIONS TO WHEN PEOPLE REPORTED THEIR
5 ASSOCIATION, YOU HAD THAT NUMBER IN YOUR REPORT?

6 A YES.

7 Q OKAY. OR YOU HAD THAT DATA ANYWAY?

8 A YES.

9 Q RIGHT?

10 A YES.

11 Q AND THAT WOULD BE, IF WE GO BACK TO 3705.105,
12 SO NOW WE'VE IDENTIFIED THE ENTIRE POPULATION OF
13 PEOPLE WHO SAY THEY HAD AN ASSOCIATION WITH THIS
14 STIMULI BETWEEN 2000 SEARCH AND 2010. AND NOW WE
15 HAVE THAT NUMBER OF PEOPLE. IT'S IN YOUR DATA
16 SOMEWHERE; RIGHT?

17 A YES.

18 Q AND THAT NUMBER OF PEOPLE WHO ACTUALLY
19 ASSOCIATED THESE STIMULI WITH APPLE IN THE RELEVANT
20 TIME FRAME, UNDER THE LEGAL DEFINITION OF SECONDARY
21 MEANING, THOSE PEOPLE WERE AN INCREDIBLY LOW
22 PERCENTAGE OF PEOPLE COMPARED TO WHAT YOU REPORTED
23 TO THE JURY?

24 A NO.

25 Q OKAY. TELL US. WHAT PERCENTAGE WERE THOSE?

1 LET'S GO BACK. YOU CAN TELL US THE CORRECTION.
2 THAT'S EXHIBIT 3005, SO IT WASN'T A MUCH LOWER
3 PERCENTAGE.

4 HOW DOES THAT CHANGE THE NUMBER IF ALL
5 YOU'RE LOOKING AT IS YOU'RE IDENTIFYING THE PEOPLE
6 WHO, IN THE RELEVANT TIME FRAME, SAY THEY HAD THAT
7 ASSOCIATION? IF YOU HAVE THAT AS YOUR NUMERATOR
8 AND THEN THE POPULATION WE AGREED ON AS YOUR
9 DENOMINATOR, IF YOU HAVE THAT, THEN TELL ME, WHAT
10 IS THIS FIGURE?

11 A I GAVE YOU THE SAME ANSWER BEFORE. YOU ARE
12 DESCRIBING A METHOD OF ANALYSIS THAT MAKES NO SENSE
13 AND IS ARBITRARY AND SO I DID NOT DO THAT AND I
14 DON'T KNOW THE ANSWER.

15 WHAT I CAN TELL YOU IS THE PROPER
16 ANALYSIS THAT OF THE PEOPLE WHO ASSOCIATED WITH THE
17 APPLE, THE LARGE MAJORITY OF THEM SAID THAT THEY
18 DID, PRIOR TO THE SAMSUNG TABLETS AND IT'S A
19 MINORITY THAT SAID THEIR ASSOCIATION CAME AFTER THE
20 SAMSUNG TABLETS CAME OUT.

21 Q IN DOING -- FIRST LET ME GET BACK.

22 YOU SAID THAT IF WE DO THAT CALCULATION,
23 IT'S NOT MUCH LOWER THAN THIS AND THEN YOU JUST
24 SAID YOU DON'T KNOW IF IT IS. DID YOU DO THE
25 CALCULATION?

1 A I DIDN'T SAY IT'S NOT MUCH LOWER THAN THAT. I
2 SAID I DIDN'T DO IT BECAUSE YOU'RE JUST INVENTING A
3 CALCULATION THAT MAKES NO SENSE.

4 Q OKAY. WELL, THEN, LET ME ASK YOU, THEN, A
5 SECOND QUESTION.

6 IN YOUR REPORT, IF WE GO TO -- IF I CAN
7 FIND YOUR CALCULATION HERE, IF WE GO TO I THINK
8 IT'S PAGE 57, PARAGRAPH 91.

9 AND DO YOU HAVE THAT IN FRONT OF YOU?

10 A YES.

11 Q AND HERE YOU HAVE SOMETHING CALLED "TIMING OF
12 SECONDARY MEANING."

13 DO YOU SEE THAT?

14 A YES.

15 Q AND THIS IS WHERE YOU ASKED -- YOU NO LONGER
16 WERE USING THE GENERAL, THE POPULATION OF PEOPLE,
17 FULL POPULATION OF PEOPLE WHO BOUGHT PHONES 12
18 MONTHS BEFORE OR 12 MONTHS AFTER, YOU'RE NARROWING
19 YOUR POPULATION DOWN; RIGHT?

20 A I'M NOT DOING ANYTHING. I'M JUST REPORTING
21 THE RESULTS AMONG THE PEOPLE WHO DID ASSOCIATE THE
22 LOOK WITH APPLE WHICH, YES, THAT IS A SUBSET OF THE
23 OVERALL SAMPLE.

24 Q AND -- BUT -- YEAH, THIS IS A SUBSET. NOW
25 YOU'RE NARROWING IT DOWN TO 270 PEOPLE WHEREAS

1 BEFORE YOU SAID YOU HAD HOW MANY?

2 A I DON'T -- I DON'T KNOW. I DON'T KNOW EXACTLY
3 WHAT THE TOTAL WAS. I AGREE WITH YOU THIS TABLE IS
4 SHOWING THE RESULTS AMONG 270 PEOPLE WHO DID
5 ASSOCIATE THE LOOK WITH APPLE AND WERE ABLE TO GIVE
6 SOME DATE.

7 Q AND THIS IS THE BREAKDOWN YOU'RE REFERRING TO
8 IN YOUR DIRECT WHERE YOU SAID, WELL, I DID LOOK TO
9 SEE WHAT PERCENTAGE OF THOSE IN THE GENERAL
10 POPULATION WHO IDENTIFIED APPLE IDENTIFIED IT
11 BEFORE 2010 OR AFTER? IS THAT WHAT YOU'RE
12 REFERRING -- IS THAT WHAT YOU WERE REFERRING TO?

13 A YES.

14 Q AND IT'S TRUE, SIR, THAT YOU CANNOT USE THIS
15 CHART TO COME TO ANY CONCLUSION AS TO WHAT THE
16 SECONDARY MEANING WAS AS OF JULY 2010; CORRECT?

17 A NO.

18 Q DO YOU RECALL YOUR DEPOSITION WAS TAKEN
19 CONCERNING YOUR REPORT IN THIS CASE SOMETIME AROUND
20 APRIL 19, 2012?

21 A YES.

22 Q AND HERE WE'RE REFERRING TO THE CHART IN
23 PARAGRAPH 91 OF YOUR REPORT?

24 A YES.

25 MR. PRICE: AND, YOUR HONOR, IF I MAY

1 READ INTO THE RECORD, THIS IS PAGE 165, LINES 9
2 THROUGH 16.

3 THE COURT: GO AHEAD, PLEASE.

4 MR. PRICE: PUT THAT UP.

5 (WHEREUPON, A VIDEOTAPE WAS PLAYED IN
6 OPEN COURT OFF THE RECORD.)

7 BY MR. PRICE:

8 Q ARE YOU A STATISTICIAN, BY THE WAY?

9 A I HAVE MATH DEGREES, AND I'VE STUDIED
10 STATISTICS. I WOULDN'T PARTICULARLY IDENTIFY
11 MYSELF AS A STATISTICIAN. I WOULD SAY I'M A SURVEY
12 RESEARCHER, BUT STATISTICS ARE RELEVANT TO WHAT I
13 DO.

14 Q YOU KNOW THE, ANYONE WHO STUDIED THIS, YOU
15 KNOW THE MARK TWAIN QUOTE, "LIES, DARN LIES AND
16 STATISTICS"?

17 A YES.

18 Q WELL, YOU STAND BY YOUR TESTIMONY THAT THAT
19 CHART, LET ME GET THE -- THAT YOU CANNOT USE THAT
20 CHART TO SAY WHAT THE SECONDARY MEANING LEVEL WAS
21 IN JULY OF 2010.

22 DO YOU STAND BY THAT TESTIMONY TODAY?

23 A I STAND BY WHAT I WAS SAYING, WHICH WAS THAT
24 YOU CANNOT TAKE THOSE NUMBERS AND ADJUST THEM TO
25 COME UP WITH A DIFFERENT NUMBER AS OF 2010.

1 I WAS NOT SAYING THOSE NUMBERS ARE NOT
2 RELEVANT TO THE LEVEL IN 2010, WHICH IS WHAT YOU
3 WERE ASKING ME ABOUT TODAY.

4 Q YOUR STATEMENT WAS THAT YOU CANNOT USE THAT
5 CHART -- THE QUESTION WAS, "SO CANNOT GET TO THE
6 CHART IN PHOTOGRAPH 91 TO SECONDARY MEANING; IS
7 THAT RIGHT?

8 "ANSWER: YOU CANNOT GET, YOU CANNOT USE
9 THAT CHART TO SAY WHAT THE SECONDARY MEANING LEVEL
10 WAS IN JULY OF 2010."

11 THAT IS THE ABSOLUTE TRUTH; CORRECT?

12 A THAT IS THE TRUTH TO WHAT THEY WERE ASKING ME
13 ABOUT IN THE DEPOSITION, WHICH IS THE SAME THING
14 YOU WERE ASKING ME ABOUT BEFORE, WHICH IS CAN YOU
15 TAKE THE NUMBERS THAT I GOT IN MY SURVEY AND
16 SOMEHOW DO SOMETHING LIKE YOU WERE DESCRIBING TODAY
17 AND COME OUT WITH A DIFFERENT NUMBER FOR JULY 2010.

18 AND I WAS SAYING, NO, YOU CANNOT DO THAT,
19 JUST LIKE TODAY I WAS TELLING YOU YOU CAN'T DO THE
20 CALCULATION YOU'RE TRYING TO DO.

21 Q BUT --

22 A BUT THE WHOLE PURPOSE OF THIS SURVEY IS TO
23 FIND OUT A NUMBER THAT IS RELEVANT.

24 Q OKAY. AND -- BUT YOU'D AGREE THAT THE
25 RELEVANCE, FOR AT LEAST THE IPHONES, WHETHER OR NOT

1 PERCEPTION OF ASSOCIATION WAS TAKING PLACE AS OF
2 JULY 2010?

3 A I AGREE THAT I BELIEVE THAT'S THE LEGAL
4 STANDARD THAT APPLE HAS TO PROVE.

5 Q AND, THEREFORE, THAT'S HOW YOU WERE TRYING TO
6 FOCUS YOUR SURVEY, TO SEE WHAT THE SECONDARY
7 MEANING WAS, IF ANY, AS OF JULY 2010 WITH THE
8 IPHONE?

9 A I DON'T THINK THAT'S AN ACCURATE DESCRIPTION
10 OF HOW THE SURVEY IS DESIGNED.

11 Q OKAY. SO LET'S JUST BE CLEAR THEN.

12 EVEN THOUGH YOU KNOW APPLE HAS TO PROVE
13 SECONDARY MEANING AS OF JULY 2010, YOU DID NOT
14 DESIGN YOUR SURVEY TO FIND OUT WHAT THE SECONDARY
15 MEANING WAS AS OF JULY 2010? THAT'S WHAT YOU JUST
16 TOLD US?

17 A NO. WHAT I'M TELLING YOU IS WHEN YOU DO A
18 SURVEY IN JUNE OF 2011, WHAT YOU CAN FIND OUT IS
19 WHAT PEOPLE THINK AT THAT TIME AND YOU CAN DO YOUR
20 BEST TO SEE, YOU KNOW, IS THIS A NEW THING OR IS
21 THIS SOMETHING THAT, THAT WAS LIKELY TO HAVE
22 OCCURRED BEFORE THEN, AND I DID THAT AND WHAT THIS
23 SHOWS IS THAT -- IS THAT THESE ASSOCIATIONS LARGELY
24 DID OCCUR BEFORE JULY 2010.

25 Q SO MY QUESTION IS DIFFERENT. WE HAVE A

1 TRANSCRIPT, SO I JUST WANT TO ASK YOU, DIDN'T YOU
2 SAY, JUST A FEW MINUTES AGO, THAT THIS SURVEY
3 WASN'T DESIGNED TO SEE IF THERE WAS SECONDARY
4 LEVEL -- SECONDARY LEVEL MEANING WAS AS OF
5 JULY 2010. DIDN'T YOU SAY THAT JUST THREE OR FOUR
6 MINUTES AGO?

7 A NO, THAT'S NOT WHAT I INTENDED TO SAY.

8 Q OKAY. SO LET ME SHOW YOU EXHIBIT 3705.109.

9 IF YOU LOOK AT YOUR DATA AND YOU DO
10 FILTER FOR, FOR TIME, THAT IS, YOU COUNT JUST THOSE
11 WHO SAY, I ASSOCIATED THESE IMAGES WITH APPLE
12 EITHER BEFORE JULY 2010 FOR THE IPHONE OR BEFORE, I
13 THINK IT'S NOVEMBER 2011 FOR THE IPAD, IF YOU DO
14 THOSE CALCULATIONS, YOUR PERCENTAGE GOES DOWN TO
15 ABOUT 21.9 PERCENT FOR THE IPHONE AND 13.2 PERCENT
16 FOR THE IPAD WITH THE HOME BUTTON VISIBLE; RIGHT?

17 A NO.

18 Q DID YOU REVIEW -- I MEAN, YOU KNOW THERE'S A
19 DR. JACOBY WHO DID CALCULATIONS USING THE SUBSETS
20 THAT YOU IDENTIFIED IN YOUR DATA?

21 A I KNOW THAT DR. JACOBY PREPARED A REPORT.

22 Q AND ACTUALLY, I HAVE THE DATE WRONG. IT'S
23 JUNE 2011 FOR THE IPAD. SO YOU KNOW THAT HE DID
24 THESE CALCULATIONS OF WHAT PERCENTAGE OF THE
25 CORRECT POPULATION HAD AN ASSOCIATION WITH APPLE

1 FROM YOUR TEST AS OF EITHER JULY 2010 OR JUNE 2011?
2 YOU KNOW HE DID THAT?

3 A I KNOW HE DID SOMETHING, BUT THE WORD
4 "CORRECT" DOES NOT BELONG IN THAT DESCRIPTION
5 BECAUSE IT IS, AS I'VE BEEN TELLING YOU, IT IS
6 ARBITRARY.

7 Q OKAY. SO LET'S SAY IT'S ARBITRARY. BUT DID
8 HE DO THE MATH RIGHT? THAT IS, IF HE TOOK THE
9 NUMBER OF PEOPLE IN YOUR SURVEY WHO SAID THEY HAD
10 THAT ASSOCIATION EITHER IN JUNE 2011 FOR THE IPAD
11 OR JULY 2010 FOR THE IPHONE, IF HE GOT THOSE
12 NUMBERS AND DIVIDED THEM BY THE POPULATION, DID HE
13 DO THE MATH RIGHT?

14 A I DON'T KNOW.

15 Q WELL, YOU LOOKED AT HIS REPORT; RIGHT?

16 A YES.

17 Q HIS CALCULATIONS WERE IN HIS REPORT?

18 A THERE WERE SOME CALCULATIONS IN HIS REPORT.

19 Q OKAY. THE CALCULATION I JUST DESCRIBED TO YOU
20 WAS IN HIS REPORT, THE ONE THAT YOU SAY IS WRONG
21 AND WE SHOULDN'T LOOK AT; RIGHT?

22 A THERE WASN'T A DESCRIPTION OF A CALCULATION.
23 THERE WAS A TABLE SHOWING A BUNCH OF NUMBERS THAT,
24 YOU KNOW, TO ME DON'T MEAN ANYTHING.

25 BUT, YES, THEY WERE IN THE REPORT.

1 Q SO DID YOU CHECK TO SEE IF HIS MATH WAS
2 CORRECT? I ASSUME, ASSUMING -- ASSUME SOMEONE WHO
3 MIGHT BE REALLY WRONG, BUT THEY DISAGREE WITH YOU,
4 ASSUMING THEY THINK THAT IS THE RIGHT THING TO LOOK
5 AT, YOU KNOW, THE PEOPLE WHO ASSOCIATED THESE
6 IMAGES WITH AN APPLE PRODUCT IN THE RIGHT TIME
7 FRAME, ASSUMING THAT'S WHAT THEY THOUGHT THEY
8 SHOULD DO AND THEY SHOULD DO THE MATH, DID YOU
9 CHECK TO SEE IF HE DID THE MATH RIGHT?

10 A NO.

11 Q OKAY. NOW, LET'S TALK ABOUT HOW THE, HOW
12 THE -- THIS SURVEY WAS STRUCTURED.

13 AND I BELIEVE YOU SAID THAT THERE HAS TO
14 BE A CONTROL BECAUSE YOU WANT TO MAKE SURE THAT
15 WHAT YOU'RE GETTING ISN'T ACTUALLY IN ASSOCIATION
16 WITH, WITH APPLE THAT'S AS A RESULT OF THESE TRADE
17 DESIGN ELEMENTS; RIGHT?

18 A YES, THAT SOUNDS BASICALLY RIGHT.

19 Q AND WHAT YOU WANT TO DO IS YOU WANT TO GET A
20 CONTROL WHICH DOESN'T INFRINGE APPLE'S TRADE DRESS,
21 BUT OTHERWISE MIGHT LOOK SIMILAR SO THAT YOU CAN
22 GET OUT THAT NOISE THAT, YOU KNOW, THOSE PEOPLE WHO
23 MIGHT SAY, OH, IT'S APPLE, EVEN THOUGH IT DOESN'T
24 HAVE THE TRADE DRESS?

25 A THAT SOUNDS LIKE A GENERALLY FAIR DESCRIPTION.

1 THE COURT: IT'S 4:32. IF YOU WANT TO
2 ASK ANOTHER QUESTION, THAT'S FINE, BUT LET'S TRY TO
3 WRAP UP IN A COUPLE MINUTES.

4 MR. PRICE: OKAY. I'LL NEVER FINISH IN A
5 COUPLE MINUTES, SO LET ME JUST COMPLETE THIS REAL
6 QUICK.

7 THE COURT: GO AHEAD, PLEASE.

8 MR. PRICE: JUST SO WE CAN SET UP THE
9 CONCEPT AND REMEMBER IT ON FRIDAY MORNING, OKAY?

10 Q SO WHAT WE'RE TRYING TO DO HERE, THEN, IS IF
11 YOU HAVE A CONTROL WHICH, LIKE, LOOKS NOTHING LIKE
12 APPLE AND IT'S AN OUTLIER, RIGHT, IT'S JUST WAY
13 OVER HERE, YOU'RE GOING TO GET A MUCH HIGHER NET
14 ASSOCIATION; RIGHT?

15 A YEAH, I -- THAT'S A VERY GENERAL STATEMENT YOU
16 MADE. I DON'T KNOW THAT I CAN SAY WHAT, HOW MUCH
17 HIGHER OR LOWER RESULTS ARE GOING TO BE BASED ON
18 SOME GENERAL DESCRIPTION.

19 Q LET'S JUST MAKE SURE WE UNDERSTAND WHAT YOU'RE
20 DOING. YOU'RE SHOWING THESE IMAGES TO PEOPLE OF
21 WHAT YOU SAY IS THE APPLE TRADE DRESS AND GETTING A
22 PERCENTAGE RESPONSE; RIGHT?

23 A YES.

24 Q AND YOU'RE SUBTRACTING FROM THAT, REDUCING
25 THAT BY THE NUMBER OF PEOPLE WHO SAY, ON THE SECOND

1 ITEM, THE CONTROL ITEM, THEY GIVE AN APPLE
2 RESPONSE; RIGHT?

3 A THAT IS HOW YOU COME OUT WITH THE NET, YES.

4 Q OKAY. AND SO THE FEWER THE PEOPLE THAT SAY
5 THAT SECOND ITEM, OR ASSOCIATE WITH APPLE, THE
6 FEWER THAT NUMBER OF PEOPLE, THEN THE HIGHER NUMBER
7 YOU'RE GOING TO GET BECAUSE YOU'RE GOING TO BE
8 SUBTRACTING LESS?

9 A THAT IS CORRECT.

10 Q SIMPLE MATH, RIGHT?

11 AND THE PRODUCT YOU USED WAS, IN THAT
12 CONTROL, WAS A BLACKBERRY; RIGHT?

13 A YOU'RE TALKING ABOUT FOR THE PHONES, THAT WAS
14 ONE OF TWO CONTROLS THAT WERE USED.

15 Q A BLACKBERRY AND THE SANYO ZIO?

16 A YES.

17 Q SO LET ME JUST ASK YOU, BEFORE THE BREAK, HOW
18 MANY CONTROLS DID YOU ACTUALLY CONSIDER IN THE
19 MARKETPLACE? THAT IS, HOW MANY OTHER PHONES DID
20 YOU CONSIDER IN THE MARKETPLACE BEFORE CHOOSING
21 THOSE TWO CONTROLS?

22 A I, I COULDN'T TELL YOU HOW MANY.

23 Q OKAY. LET -- YOU WEREN'T TRYING TO RIG THE
24 RESULTS; RIGHT?

25 A CORRECT.

1 Q SO YOU OBVIOUSLY CONSIDERED A LOT OF OTHER
2 NON-SAMSUNG PHONES FOR CONTROLS AND IF YOU COULD
3 JUST GIVE US AN ESTIMATE OF HOW MANY. I MEAN, WAS
4 IT ONE MORE THAN THE TWO?

5 A NO, I DON'T THINK SO.

6 Q I MEAN, YOU WEREN'T JUST TRYING TO CHOOSE THE
7 ONES THAT LOOKED THE LEAST LIKE APPLE BUT DIDN'T
8 INFRINGE?

9 A NO, I WAS NOT.

10 Q OKAY. SO THEN TELL US HOW MANY YOU
11 CONSIDERED, AND WE'LL GET BACK TO IT ON FRIDAY,
12 TELL US HOW MANY YOU CONSIDERED TO USE AS THE
13 CONTROL, THE NUMBER YOU SUBTRACTED FROM THE APPLE
14 NUMBER?

15 A I REALLY DON'T KNOW THAT I COULD TELL YOU, YOU
16 KNOW, THAT LONG AGO HOW MANY I LOOKED AT.

17 Q DID YOU KEEP NOTES?

18 A NO.

19 Q IS IT IN YOUR REPORT?

20 A HOW MANY CONTROLS THAT I CONSIDERED?

21 Q YEAH.

22 A I DON'T BELIEVE SO.

23 Q WAS IT MORE THAN 200?

24 A NO.

25 Q ONE HUNDRED?

1 A I DOUBT IT.

2 Q FIFTY?

3 A PROBABLY NOT.

4 Q TEN?

5 A THAT COULD BE.

6 Q WELL, WE'LL LOOK AT WHAT MIGHT HAVE BEEN USED
7 WHEN WE GET BACK ON FRIDAY. THANKS.

8 THE COURT: ALL RIGHT. IT'S 4:35. SO WE
9 ARE OFF TOMORROW AND THURSDAY, BUT WE'LL SEE YOU
10 BACK FRIDAY MORNING AT 9:00 A.M.

11 IF YOU WOULD PLEASE LEAVE YOUR JURY
12 NOTEBOOKS IN THE JURY ROOM AND SAME, SAME
13 INSTRUCTION, PLEASE KEEP AN OPEN MIND. PLEASE
14 DON'T DO ANY RESEARCH ON YOUR OWN, PLEASE DON'T
15 DISCUSS THIS CASE WITH ANYONE, PLEASE DON'T READ OR
16 HEAR ABOUT THE CASE.

17 ALL RIGHT. THANK YOU. THANK YOU FOR
18 YOUR PATIENCE AND YOUR SERVICE. WE'LL SEE YOU ON
19 FRIDAY.

20 (WHEREUPON, THE FOLLOWING PROCEEDINGS
21 WERE HELD OUT OF THE PRESENCE OF THE JURY:)

22 THE COURT: ALL RIGHT. THE RECORD SHOULD
23 REFLECT THAT THE JURORS HAVE LEFT THE COURTROOM.
24 PLEASE TAKE A SEAT.

25 YOU CAN STEP DOWN.

1 SO LET'S GO OVER, BETWEEN NOW AND FRIDAY
2 MORNING, I BELIEVE THAT WE HAVE THE DIRECT AND
3 CROSS-EXHIBITS FOR MR. VAN LIERE LATER AND
4 BALAKRISHNAN.

5 DOES THAT SOUND RIGHT?

6 MR. JACOBS: THAT SOUNDS RIGHT, YOUR
7 HONOR.

8 THE COURT: OKAY. SO UNLESS YOUR LIST
9 CHANGES, THEN WHEN WILL WE GET SINGH AND TEKSLER?

10 MR. JACOBS: I BELIEVE SINGH AND TEKSLER
11 ARE UNDERWAY IN TERMS OF THE OBJECTION PROCESS.

12 MS. MAROULIS: YOUR HONOR, THE SAME
13 OBJECTIONS HAVE BEEN FILED. YOU HAVE THE SAME
14 OBJECTIONS FOR BOTH PARTIES.

15 THE COURT: THEY MUST HAVE BEEN FILED
16 TODAY US BECAUSE I LOOKED AT THE DAR AND I DIDN'T
17 SEE IT.

18 MR. JACOBS: THAT'S CORRECT, YOUR HONOR.
19 WE'RE AHEAD OF SCHEDULE.

20 THE COURT: OKAY, GOOD. SO THAT'S SINGH
21 AND TEKSLER. I WOULD BE SURPRISED IF YOU'RE
22 CALLING VAN LIERE LATER THAT WE WOULD EVEN GET
23 THROUGH -- I WOULD ASSUME BALAKRISHNAN IS GOING TO
24 BE QUITE SOME TIME. IS THAT RIGHT?

25 MR. JACOBS: MY DIRECT, YOUR HONOR, IS --

1 I'M PLANNING TO BE SHORT AND PRECISE. I WOULD SAY
2 40 MINUTES.

3 THE COURT: OKAY. SO WE COULD
4 POTENTIALLY GET TO MR. TEKSLER BY FRIDAY?

5 MR. JACOBS: YES.

6 THE COURT: OKAY. ALL RIGHT. AND YOU'VE
7 ALREADY BRIEFED ALL THOSE OBJECTIONS AND RESPONSES?

8 MS. MAROULIS: NO, YOUR HONOR. THE
9 TEKSLER OBJECTIONS HAVE NOT BEEN BRIEFED YET
10 BECAUSE APPLE JUST GAVE US THE PROFFER THAT YOU
11 ASKED THEM FOR YESTERDAY. SO WE EXPECT TO BRIEF
12 THE TEKSLER OBJECTIONS IN THE NEXT COUPLE OF DAYS,
13 BUT WELL BEFORE FRIDAY.

14 MR. MUELLER: YOUR HONOR, WE SERVED THE
15 PROFFER THIS MORNING, ACTUALLY, AND OUR EXHIBITS
16 WERE SERVED ON SUNDAY.

17 SO WE ASK THAT SAMSUNG GIVE US THEIR
18 OBJECTIONS LATER THIS EVENING OR TOMORROW MORNING,
19 AND WE CAN COMPLETE THE BRIEFING RIGHT AWAY.

20 MS. MAROULIS: THAT WOULD BE FINE, YOUR
21 HONOR. WE CAN GIVE THEM OBJECTIONS TOMORROW.

22 THE COURT: OKAY. AND WHEN ARE YOU GOING
23 TO FILE YOUR -- WE'RE DOING THIS SORT OF JOINT
24 OBJECTION AND RESPONSE. SO WHEN CAN WE GET A
25 FILING? IS THAT THE ONLY ONE THAT'S OUTSTANDING IS

1 IF THERE'S GOING TO BE ANY OBJECTIONS, I MEAN, THE
2 TWO OBJECTIONS WORK WELL JUST BECAUSE YOU -- BOTH
3 SIDES REALLY EXPLAINED WHAT WAS AT ISSUE, WHICH WAS
4 HELPFUL IN REACHING A RULING.

5 BUT I ALSO AM CONCERNED JUST BY THE
6 NUMBER OF OBJECTIONS THAT CAME OUT THAT REQUIRE
7 RESEARCH DURING THE TRIAL ITSELF. IF WE CAN
8 MINIMIZE THAT, THAT WOULD BE HELPFUL.

9 MR. JACOBS: IF I MAY, YOUR HONOR?

10 THE COURT: YEAH.

11 MR. JACOBS: I THINK ACTUALLY YOUR
12 CURRENT PROCESS IS WORKING PRETTY WELL AND YOUR
13 ALLOCATION OF TIME IS GOING TO BE A DETERRENT. WE
14 MAY HAVE SOME DISCUSSIONS FOR YOU AS THINGS
15 DEVELOP. BUT I KNOW YOU DON'T WANT ANY OF THESE
16 THINGS IN FRONT OF THE JURY. I THINK THIS WAS
17 OKAY.

18 MR. VERHOEVEN: FROM OUR STANDPOINT, YOUR
19 HONOR, THE OLD SYSTEM WHERE WE LIST EVERY SINGLE
20 OBJECTION IN A CHART WASN'T WORKING. WE AGREE WITH
21 YOUR HONOR.

22 I AGREE WITH COUNSEL THAT THE NEW SYSTEM
23 IS MUCH BETTER.

24 WE CAN TRY AND MEET AND CONFER AMONGST
25 OURSELVES AND IF WE SEE SOMETHING THAT IS COMING UP

1 THAT WILL REQUIRE MORE THAN, YOU KNOW, LOOKING AT A
2 SLIDE TO SEE IF IT'S MISLEADING OR SOMETHING QUICK,
3 SOMETHING THAT MIGHT REQUIRE BRIEFING OR RESEARCH,
4 PERHAPS WE CAN HAVE SOME FLEXIBILITY TO RAISE THAT
5 AHEAD OF TIME AND LET YOU KNOW AND YOU CAN, AND
6 THEN MAKE YOU CAN DECIDE IF YOU WANT A BRIEF ON IT.

7 FOR EXAMPLE, WE HAVE TWO DAYS NOW AND WE
8 CAN TALK ABOUT SLIDES AND WHAT NOT.

9 THE COURT: SO IF THERE IS ANYTHING THAT
10 COMES UP, I WOULD LIKE YOU TO RAISE IT -- I MEAN,
11 I'D LIKE TO TRY TO START AT 9:00 IF WE CAN.

12 MR. VERHOEVEN: RIGHT.

13 THE COURT: SO I'D RATHER NOT LEAVE TOO
14 MUCH FOR OUR 8:30 TO 9:00 WINDOW.

15 MR. VERHOEVEN: IN MY OPINION, THE NEW
16 PROCEDURE IS WORKING A LOT BETTER, AND I THINK
17 MR. JACOBS AGREES.

18 THE COURT: I AGREE WITH THAT. I'M JUST
19 WONDERING IF THERE'S SOME WAY, IF SOMETHING COMES
20 UP DURING THE TRIAL, IF YOU CAN HAVE RIGHT
21 IMMEDIATELY AVAILABLE, WHATEVER THE DOCUMENT IS,
22 THAT SUPPORTS YOUR CONTENTION THAT EITHER SOMETHING
23 WAS OR WAS NOT DISCLOSED TIMELY, SOMETHING EITHER,
24 YOU KNOW, WAS OR WAS NOT PREVIOUSLY RULED ON, IT
25 WOULD BE HELPFUL BECAUSE THEN I COULD JUST TAKE A

1 LOOK AT THAT EXACT --

2 MR. VERHOEVEN: I THINK WE'RE GETTING
3 BETTER AT IT, YOUR HONOR, NOW THAT WE KNOW HOW IT
4 WORKS.

5 THE COURT: OKAY.

6 MR. VERHOEVEN: SO WE'LL ENDEAVOR TO HAVE
7 THAT MATERIAL AVAILABLE. I CAN'T TELL YOU 100
8 PERCENT WE'LL ALWAYS KNOW WHAT'S GOING TO TRY TO
9 COME UP. BUT WE'LL HAVE THE SUPPORTING DOC BEFORE
10 INTRODUCING IT, AND I'M SURE THE OTHER SIDE WILL
11 HAVE THE SUPPORTING DOCS AVAILABLE IF THEY HAVE AN
12 OBJECTION.

13 THE COURT: OKAY. I DON'T WANT TO OPEN
14 UP THE FLOOD GATES, BUT IF THERE'S GOING TO BE ANY
15 NEW OBJECTION -- WELL, CAN WE HOLD THE LINE ON THE
16 TWO OR DO YOU REALLY NEED MORE FOR THE FRIDAY
17 WITNESSES.

18 MR. JACOBS: I DON'T THINK WE NEED MORE
19 FOR THE FRIDAY WITNESSES, YOUR HONOR. I DO THINK,
20 BELIEVE IT OR NOT, THERE'S A DISAGREEMENT ABOUT
21 WHAT THE TWO OBJECTIONS MEANS AND WE HAD A
22 DISCUSSION WITH THE COURT ABOUT WHAT YOU HAD IN
23 MIND WITH THE TWO OBJECTIONS, AND I'M AFRAID WE'RE
24 AT LOGGERHEADS ABOUT THIS AND WE CAN USE SOME
25 GUIDANCE FROM YOUR HONOR.

1 THE COURT: WHAT'S THE ISSUE?

2 MR. VERHOEVEN: MY UNDERSTANDING, YOUR
3 HONOR, I ASKED YOU THAT, YOU SAID NO CATEGORIES,
4 PICK AN EXHIBIT, WE HAVE ONE EXHIBIT, MAKE AN
5 OBJECTION, AND WE'LL GO TO SCHOOL OFF OF YOUR
6 RULING.

7 FOR EXAMPLE, IN THE CASE OF DR. WINER, WE
8 PICKED ONE OF SEVERAL -- THERE WAS ACTUALLY MANY,
9 MANY OBJECTIONS THAT WERE OBJECTIONABLE ON THE SAME
10 PRINCIPLE. WE JUST GAVE YOU ONE AND MADE OUR
11 ARGUMENTS.

12 YOUR HONOR MADE YOUR RULING, AND COUNSEL
13 FOR APPLE WAS ABLE TO UNDERSTAND THAT RULING THAT
14 WOULD BE APPLIED CONSISTENTLY TO THE OTHER SIDE.
15 SO I THINK IT WORKING QUITE WELL.

16 MR. JACOBS: THAT'S NOT ACTUALLY THE
17 ISSUE IN DISAGREEMENT. THE ISSUE IS HOW MANY
18 OBJECTIONS PER SLIDE IS ONE OBJECTION. I'M SORRY,
19 YOUR HONOR, WE JUST WANT TO MAKE SURE WE FOLLOW THE
20 SAME RULES.

21 THE COURT: I SEE.

22 MR. JACOBS: AND SO YOU'RE GETTING A,
23 KIND OF A HIERARCHY OR MULTIPLE OBJECTIONS ON A
24 SINGLE EXHIBIT. WE'LL DO IT WHICHEVER WAY YOU
25 WANT, YOUR HONOR.

1 MR. VERHOEVEN: YOUR HONOR, WE WOULD -- I
2 WASN'T AWARE THAT WAS AN ISSUE. WE THINK IT SHOULD
3 BE TWO EXHIBITS, ACTUALLY, I WOULD PREFER THREE AS
4 I SUGGESTED, BUT IT SHOULD BE LIMITED TO A SINGLE
5 EXHIBIT, BUT IT SHOULDN'T BE LIMITED TO THE
6 ARGUMENTS WE MAKE. THERE MAY BE TWO OR THREE
7 REASONS WHY THAT EXHIBIT IS OBJECTIONABLE AND IT
8 WOULD DO THE COURT NO GOOD TO ONLY LEARN OF ONE OF
9 THEM AND THEN HAVE TO HAVE COUNSEL APPRISED IN
10 COURT OF THE OTHER TWO.

11 SO I THINK THAT LIMITING US TO, AS YOU
12 HAVE, TO TWO EXHIBITS IS THE APPROPRIATE WAY TO GO.

13 THE ONLY THING I WOULD REQUEST IS PERHAPS
14 WE CAN GET THREE, BUT YOUR HONOR HAS ALREADY DENIED
15 THAT.

16 THE COURT: WELL, IT'S JUST A MATTER OF
17 VOLUME. IF WE'RE ONLY DOING A FEW WITNESSES A
18 NIGHT, THAT'S NOT A PROBLEM.

19 BUT NEXT WEEK WHEN WE'RE GOING EVERY
20 SINGLE NIGHT AND TRYING TO DO THIS MANY EXHIBITS
21 FOR SEVEN WITNESSES EVERY SINGLE NIGHT, IT'S GOING
22 TO BE HARD, I THINK, ON OUR END. THAT'S MY ONLY
23 CONCERN.

24 WHY DON'T WE JUST SAY IT'S GOING TO KEEP
25 IT AT TWO OBJECTIONS PER EXHIBIT, BUT YOU CAN RAISE

1 TWO DIFFERENT GROUNDS UPON WHICH TO OBJECT IN EACH
2 EXHIBIT TO TAKE YOUR BEST TWO SHOTS.

3 MR. JACOBS: JUST TO RESTATE IT, YOUR
4 HONOR, BECAUSE WE'LL ALL GO BACK AND LOOK AT THE
5 RECORD, I THINK IT'S TWO EXHIBITS PER WITNESS.

6 THE COURT: YES.

7 MR. JACOBS: AND NOW THE COURT'S
8 DIRECTION IS NO MORE THAN TWO GROUNDS IN EACH OF
9 SAID OBJECTIONS.

10 THE COURT: YES. IS THAT NOT WHAT I
11 SAID?

12 MR. JACOBS: I THINK -- IF THAT'S WHAT
13 YOU MEANT, THEN WE'RE ALL IN AGREEMENT, YOUR HONOR.

14 THE COURT: ALL RIGHT. THAT'S WHAT I
15 MEANT.

16 NOW, THE OTHER THING THAT I THINK WOULD
17 BE HELPFUL IS THAT WE GIVE THE JURY AN EXHIBIT LIST
18 OF ALL OF THE ADMITTED EXHIBITS SO THAT WHEN THEY
19 START DELIBERATING, THEY CAN EASILY FIND, BECAUSE
20 THERE'S SO MUCH HERE, THEY CAN EASILY FIND WHAT
21 THEY'RE LOOKING FOR.

22 SO I DON'T KNOW IF YOU ALL ARE PLANNING,
23 I DON'T KNOW IF YOU'RE DOING RED WELLS OR BOXES FOR
24 THE JURY, AND I THINK THEY NEED A NICE CLEAN
25 EXHIBIT LIST. SO IF THEY ARE INTERESTED, THEY CAN

1 FIND IT. WHAT I WAS HOPING, SINCE YOU ALL HAVE
2 MORE PEOPLE THAN WE DO, IS IF YOU CAN CREATE A
3 JOINT LIST AND THEN I WILL COMPARE IT, I'VE BEEN
4 KEEPING MY OWN LIST OF BOTH DEMONSTRATIVES AND
5 ADMITTED EXHIBITS AND WE CAN COMPARE THEM AND THAT
6 WAY WE'RE NOT STUCK TRYING TO DO THOUSANDS NEXT --
7 AT THE END OF NEXT WEEK. WE CAN KIND OF, YOU KNOW,
8 DO IT AS WE PROGRESS.

9 WHEN DO YOU THINK -- OR MAYBE YOU'VE
10 ALREADY BEEN DOING THAT.

11 MR. VERHOEVEN: ON OUR SIDE, WE'VE BEEN
12 DOING THAT, YOUR HONOR.

13 THE COURT: OKAY. SO WHEN CAN YOU GIVE,
14 I WOULD LIKE A JOINT ONE, AND IF YOU DISPUTE
15 ANYTHING, I WOULD SAY CHECK THE TRANSCRIPT, BECAUSE
16 GENERALLY IT'S ALL IN THERE.

17 BUT IF YOU CHECK THE TRANSCRIPT AND
18 THERE'S STILL AN ISSUE BECAUSE I WAS UNCLEAR OR
19 WHATEVER, I GUESS RAISE IT IN THE JOINT LIST.

20 BUT WHEN DO YOU THINK YOU CAN PROVIDE
21 THAT.

22 MR. JACOBS: HOW ABOUT THURSDAY MORNING,
23 YOUR HONOR, AT 11:00 A.M.

24 MR. VERHOEVEN: I JUST HAVE A QUESTION.
25 I THOUGHT YOU WERE TALKING ABOUT AFTER THE JURY

1 RETIRED.

2 ARE YOU TALKING ABOUT WHILE THEY'RE --
3 THEY'RE NOT GOING TO BE DELIBERATING UNTIL THE END?

4 THE COURT: I'D LIKE TO, BECAUSE MY LIST
5 IS ALREADY SEVEN PAGES LONG. I DON'T KNOW HOW LONG
6 YOUR LIST IS.

7 MR. VERHOEVEN: YOU JUST WANT TO MAKE
8 SURE EVERYBODY IS ON THE SAME PAGE.

9 THE COURT: EXACTLY. I WANT THERE NOT TO
10 BE DISAGREEMENT AS TO WHAT'S BEEN ADMITTED.

11 MR. VERHOEVEN: THAT SHOULD BE NO
12 PROBLEM, YOUR HONOR.

13 THE COURT: BECAUSE OF THE VOLUME, I
14 THOUGHT WE COULD AT LEAST GET THE FIRST TWO WEEKS,
15 EVERYONE IN AGREEMENT, AND NEXT WEEK WHEN WE HAVE A
16 SLEW OF MORE AGREEMENTS, WE CAN DO IT AGAIN.

17 MR. VERHOEVEN: I AGREE WITH MR. JACOBS.

18 THE COURT: THURSDAY MORNING IS GOOD.

19 MR. JACOBS: AND THEN WHY DON'T WE SET
20 THE SAME TARGET FOR, AND WE WILL TRY TO MEET AND
21 CONFER AND TAKE THIS UP, TOO, OF GETTING FOR THE
22 COURT A SET OF THE DISPLAYED DEMONSTRATIVES.

23 THE COURT: ALL RIGHT. THAT WOULD BE --
24 I THINK THAT WOULD JUST BE HELPFUL FOR THE RECORD.

25 MR. JACOBS: EXACTLY.

1 THE COURT: OKAY. SO THURSDAY MORNING?

2 MR. JACOBS: AT 11:00 A.M.

3 THE COURT: OKAY. ALL RIGHT. NOW, JUST
4 SO YOU KNOW, OUR OFFICIAL TIMERS, IT LOOKS LIKE
5 IT'S ABOUT TWO MINUTES AHEAD OF THAT CLOCK. BUT
6 THIS TIMER IS TIED TO THE TRANSCRIPT, AND SO THAT'S
7 WHY I'M USING IT BECAUSE IT'S GOING TO BE CLEANER
8 FOR THE RECORD.

9 NOW, I DIDN'T GET -- WHAT WAS THE TIME
10 ON -- THE ONE TIME THAT I NEED TO CONFIRM IS, IS
11 10:30 THIS MORNING, THIS IS DURING THE KARE DIRECT,
12 IT WAS MS. KREVANS, EXACTLY WHAT TIME THAT ENDED.
13 CAN WE CHECK THAT?

14 I -- ACTUALLY, MY LIVE NOTE WASN'T
15 WORKING SO I TRIED TO REBOOT AND TURN OFF MY
16 COMPUTER. I DIDN'T GET THAT PARTICULAR TIME. IT
17 SHOULD BE IN THE TRANSCRIPT.

18 CAN WE CHECK THAT, IT SHOULD BE ABOUT
19 10:30, AND THEN I CAN CONFIRM IT. THEN I CAN AT
20 LEAST GIVE YOU WHAT YOUR TIME TOTALS ARE SO FAR
21 GOING INTO FRIDAY. IT'S ABOUT 10:32.

22 THE COURT: I THINK IT WAS ABOUT 10:32
23 THIS MORNING.

24 MR. VERHOEVEN: WE HAVE 10:30, AND YOU
25 SAID THAT ONE IS FAST.

1 MR. JACOBS: I THINK IT'S ABOUT TWO
2 MINUTES FAST.

3 MR. JACOBS: CAN WE CHECK THE TRANSCRIPT,
4 YOUR HONOR?

5 THE COURT: I'M HAVING MS. RODRIGUEZ
6 CHECK RIGHT NOW.

7 (PAUSE IN PROCEEDINGS.)

8 THE COURT: ALL RIGHT. AND THE TIME SO
9 FAR, APPLE HAS USED 9 HOURS AND 9 MINUTES, AND
10 SAMSUNG HAS USED 9 HOURS AND 1 MINUTE.

11 OKAY. WHAT ELSE? WHAT ELSE DO WE NEED
12 TO DO? ANYTHING ELSE?

13 MR. MCELHINNY: JUST ONE ISSUE THAT I'D
14 LIKE TO PUT ON YOUR RADAR. AS YOUR HONOR KNOWS,
15 ONE OF THE MATTERS THAT IS PENDING IS YOUR HONOR'S
16 REVIEW OF JUDGE GREWAL'S SPOILIATION DECISION AND
17 THE ADVERSE INFERENCE.

18 THE COURT: YES.

19 MR. MCELHINNY: AND THE REASON I WANT TO
20 MENTION THAT TO YOU IS GIVEN THE REMEDY THAT
21 JUDGE GREWAL ORDERED, HE ORDERED WHAT IS, IN
22 EFFECT, A REBUTTABLE PRESUMPTION.

23 SO I JUST DON'T WANT TO END UP IN A
24 SITUATION WHERE SAMSUNG CLAIMS THAT IT WAS DEPRIVED
25 OF THE ABILITY TO REBUT THAT BECAUSE THEY DIDN'T

1 KNOW WHAT THE PRESUMPTION WAS GOING TO BE, OR THEY
2 DIDN'T KNOW WHAT THE ORDER WAS GOING TO BE, BECAUSE
3 OBVIOUSLY IF THEY'RE GOING TO TRY TO REBUT THAT,
4 THEY NEED TO DO THAT IN THEIR CASE-IN-CHIEF.

5 THE COURT: IF IT'S POSSIBLE, I WILL
6 TRY -- I CAN'T GUARANTEE IT, BUT I'M GOING TO TRY
7 TO GET THE SEALING ORDERS, YOU KNOW, ALL THE ORDERS
8 ON THE MOTIONS TO SEAL, OR AS MANY AS POSSIBLE.
9 THERE'S SOME THAT SOME OF THE THIRD PARTIES HAVE
10 REQUESTED TO FILE REPLIES, WHICH I GRANTED LAST
11 NIGHT. SO TO THE EXTENT ONES ARE FULLY BRIEFED,
12 I'LL TRY TO GET, IF IT'S POSSIBLE, THOSE TWO ORDERS
13 OUT THIS WEEK.

14 MR. MCELHINNY: FOR THE RECORD, OUR
15 POSITION IS THAT SAMSUNG KNOWS THE ORDER'S OUT
16 THERE AND KNOWS WHAT THE REQUIREMENT IS, AND IF
17 THEY INTEND TO REBUT IT, THEY SHOULD TAKE THAT INTO
18 CONSIDERATION GOING FORWARD.

19 THE COURT: I UNDERSTAND THAT. I'M JUST
20 TRYING TO GIVE EVERYONE NOTICE.

21 MR. MCELHINNY: THANK YOU, YOUR HONOR.

22 THE COURT: TO THE EXTENT, I'LL TRY TO
23 USE -- I MEAN, I HAVE REGULAR AND CIVIL CALENDARS
24 TOMORROW AND THURSDAY, BUT I'LL TRY TO USE THIS
25 TIME TO GET SOME ORDERS OUT LIKE I DID LAST WEEK.

1 MR. JACOBS: AND JUST ON YOUR LAST POINT,
2 YOUR HONOR, LET ME FLAG FOR YOU THAT WE'VE
3 SUBMITTED A STIP AND PROPOSED ORDER, WHICH I THINK
4 WILL MOOT MANY, IF NOT ALL, OF THE THIRD PARTY
5 CONCERNS BECAUSE IT PROVIDES THAT WE WILL MANAGE
6 THIS PROCESS GOING FORWARD IN A WAY THAT MINIMIZES
7 THE REVELATION OF SUCH INFORMATION.

8 THE COURT: RIGHT. BUT THAT DOESN'T TAKE
9 CARE OF MY ISSUES WITH EVERYTHING THAT'S BEEN
10 ALREADY FILED IN THE CASE.

11 MR. JACOBS: THAT'S TRUE, YOUR HONOR.

12 THE COURT: WHICH IS WHAT I HAVE TO DEAL
13 WITH.

14 I SAW THAT THIS MORNING. I APOLOGIZE.
15 I'M NOT READY TO DISCUSS THAT, BUT I DID SEE IT.
16 I'LL LOOK AT IT. AND WE'LL JUST HAVE TO GET BACK
17 TO YOU ON THAT ONE.

18 MR. JACOBS: THANK YOU, YOUR HONOR.

19 THE COURT: OKAY. WHAT ELSE? ANYTHING
20 ELSE THAT WE NEED TO COVER TODAY?

21 MR. VERHOEVEN: NOTHING FOR SAMSUNG, YOUR
22 HONOR.

23 THE COURT: NOTHING ELSE?

24 MR. JACOBS: NOTHING FURTHER FROM APPLE,
25 YOUR HONOR.

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THE COURT: ALL RIGHT. WELL, THANK YOU.
IF THERE'S ANYTHING ELSE YOU NEED TO GIVE US BY WAY
OF EXHIBITS, ANY TIME YOU CAN JUST RING THE BUZZER
FOR OUR CHAMBERS ON THE FOURTH FLOOR BETWEEN THE
TWO ELEVATOR BANKS, OKAY, AND WE CAN GET IT.

OKAY. THANK YOU. THANK YOU VERY MUCH.

MR. VERHOEVEN: THANK YOU, YOUR HONOR.

MR. MCELHINNY: THANK YOU, YOUR HONOR.

(WHEREUPON, THE EVENING RECESS WAS
TAKEN.)

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CERTIFICATE OF REPORTERS

WE, THE UNDERSIGNED OFFICIAL COURT REPORTERS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF OUR SHORTHAND NOTES TAKEN AS SUCH OFFICIAL COURT REPORTERS OF THE PROCEEDINGS HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED TRANSCRIPTION TO THE BEST OF OUR ABILITY.

/S/

LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

/S/

IRENE RODRIGUEZ, CSR, CRR
CERTIFICATE NUMBER 8074

DATED: AUGUST 7, 2012

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