

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

SOVERAIN SOFTWARE)
-vs-) DOCKET NO. 6:09cv274
AVON PRODUCTS, INC.,) Tyler, Texas
ET AL) 1:10 p.m.
November 15, 2011

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

2 COURT SECURITY OFFICER: All rise.

3 (Jury in.)

4 THE COURT: All right. Please be seated.

5 All right. Mr. Nelson, did y'all resolve
6 how that last 20 minutes should be used?

7 MR. NELSON: It was only a couple of
8 minutes for them, so you can add it all to us.

9 THE COURT: All right. Very well. Thank
10 you.

11 Who will Defendants' first witness be?

12 MR. NICODEMA: If it please the Court,
13 the Defendants call Dr. Glenn Trewitt.

14 THE COURT: Have you been sworn, Dr.
15 Trewitt?

16 DR. TREWITT: I have not.

17 THE COURT: All right. If you will,
18 please, raise your right hand.

19 (Witness sworn.)

20 THE COURT: Please be seated.

21 MR. NICODEMA: May I proceed, Your Honor?

22 THE COURT: You may.

23 MR. NICODEMA: Thank you.

24 GLENN TREWITT, Ph.D., DEFENDANTS' WITNESS,

25 DIRECT EXAMINATION

1 BY MR. NICODEMA:

2 Q. Good afternoon, Dr. Trewitt?

3 A. Good afternoon.

4 Q. Please introduce yourself to the jurors.

5 A. I'm Dr. Glenn Trewitt.

6 Q. Where do you live, sir?

7 A. I live in Saratoga, California.

8 Q. Do you have a family?

9 A. Yes, I do.

10 Q. Tell us about your family.

11 A. I have two children, both boys; age 17 and 12.

12 Oh, and a wife. Sorry. We've been married about 25
13 years.

14 Q. Are you familiar with the website that was
15 once on the Internet by the name of Future Fantasy
16 Bookstore?

17 A. Yes, I have.

18 Q. How are you familiar with it?

19 A. I created it.

20 Q. All right, Dr. Trewitt. I'm going to be
21 asking you some questions about how you created the
22 website and how it functions; but before I do that, I
23 would like to get the jury to know you a little bit.

24 So what do you do for a living, sir

25 A. I am currently a software engineer -- senior

1 software engineer at Google.

2 Q. How long have you worked at Google?

3 A. I've worked there for eight-and-a-half
4 years.

5 Q. Where did you -- where did you grow up, Dr.
6 Trewitt?

7 A. I grew up in Dallas.

8 Q. You still have family there?

9 A. Yes. I have three brothers, no sisters, and
10 my mother.

11 Q. Are you able to make some time during the year
12 to see your family?

13 A. Yes, I am.

14 Q. What college degrees do you have, Dr.
15 Trewitt?

16 A. My undergraduate degree is in electrical
17 engineering from Rice University and -- excuse me -- I
18 have a master's in computer systems from Stanford and a
19 Ph.D. also from Stanford in computer systems.

20 Q. And when did you get your Ph.D. from
21 Stanford?

22 A. 1990.

23 Q. After earning your Ph.D. from Stanford, did
24 you go to work?

25 A. Yes, I did.

1 Q. Where -- where did you go to work?

2 A. Digital Equipment in Palo Alto.

3 Q. Is Palo Alto, California?

4 A. Yes, Palo Alto, California. Across the street
5 from Stanford pretty much.

6 Q. Okay. Were you located in any particular
7 facility at Digital?

8 A. Excuse me. Yes. I was in the network systems
9 lab, which was around several buildings, but...

10 Q. How long did you work at Digital?

11 A. I worked at Digital until 1999. So about --
12 I'm sorry about the math. Nine-and-a-bit years.

13 Q. Okay. Now, what was Digital's business when
14 you first joined in 1990?

15 A. Digital's business started out making smallish
16 computers. And they -- and as Digital grew, they made
17 larger and larger computers. They were still quite
18 small and affordable and were very popular. And by the
19 time I got there, they were starting to eat away at
20 IBM's business. So it was, I believe, for that class of
21 computing system, the largest company in the world.

22 Q. All right. Did Digital have a presence on the
23 Internet, when you first joined?

24 A. Yes.

25 Q. Okay. What did they do?

1 A. The Digital presence on the Internet was
2 mostly -- sorry, really, entirely managed by the
3 research laboratories. And as far as for Digital's
4 business -- is that what you're asking?

5 Q. Yes.

6 A. Okay. Two things. We were a repository of
7 what would now be called open source software that was
8 freely available, and anybody who wanted anything might
9 would very often come to our Internet gateway first.

10 Q. How so?

11 A. For the purposes of Digital's business, we
12 hosted -- we provided various information on our systems
13 really kind of informally. There wasn't a big: Here's
14 our presence on the Internet.

15 Q. Okay. Now, Dr. Trewitt, did your job at
16 Digital have anything to do with the Internet?

17 A. Yes. In fact, I was the first or second
18 employee of the network systems lab, and our -- the
19 reason we were created was to promote the use of
20 Internet technology to the rest of Digital, who
21 really -- they used their own proprietary,
22 specific-to-digital, wouldn't-work-with-anybody-else's
23 systems, and we believed that the Internet was the way
24 things were going to go, and wanted to push -- push
25 Digital into the '90s -- '80s, if you will.

1 Q. Is working with the Internet something you
2 liked to do?

3 A. Yes.

4 Q. And why is that?

5 A. Excuse me. Certainly at the time, and, by so
6 now, but definitely at the time, everything was new.
7 There were always opportunities to do new stuff.

8 Q. Now let's shift gears and talk about how you
9 created the Future Fantasy Bookstore website.

10 First of all, where did that name come from?

11 MR. NELSON: May I approach, Your Honor?

12 THE COURT: Yes, you may.

13 (Bench conference.)

14 MR. NELSON: So here's where he's going
15 to talk about the functionality and the design of the
16 website where there's no foundation for that, Your
17 Honor. It's -- he the source code that they have is
18 from 1999. He's testified --

19 THE COURT: All right. I am going the
20 excuse the jury, and I will let you take him on voir
21 dire.

22 MR. NELSON: Okay.

23 (Bench conference concluded.)

24 THE COURT: All right, Ladies and
25 Gentlemen of the Jury, we have a matter I need to take

1 up outside of your presence. It should take about five
2 or 10 minutes, so you'll get another break, and please
3 remember my instructions.

4 COURT SECURITY OFFICER: All rise.

5 (Jury out.)

6 THE COURT: All right. Please be seated.

7 All right, Mr. Nelson, you may proceed.

8 MR. NELSON: Thank you.

9 VOIR DIRE EXAMINATION

10 BY MR. NELSON:

11 Q. My name is Dave Nelson. I am representing the
12 Plaintiff in the case, and I just have a few questions
13 about the Future Fantasy Bookstore, and particularly the
14 information you currently have about that?

15 A. Yes.

16 Q. So you don't have the software from the
17 1993-94 time frame; is that right?

18 A. Not the exact software as it was in 1993-94.

19 Q. Right. So you have software that's from a
20 1999 version, correct?

21 A. It was -- it was evolved from the 1993-94
22 software.

23 Q. Right. But it's -- it's from 1999. The
24 version you have --

25 A. Yes, it was taken from the servers.

1 Q. Okay. And you don't have any version control
2 system that would tell you the changes that were made
3 between the 1994 software and the 1999 software,
4 correct?

5 A. No version control.

6 Q. Okay. And there were changes that were made,
7 correct?

8 A. There were changes.

9 Q. And the software was, in fact, modified,
10 correct?

11 A. Modified from when to when?

12 Q. Very good question. Modified between, say,
13 the beginning of 1994 and 1999, was the version that you
14 have?

15 A. Yes.

16 Q. Okay. And, in fact, most of the files that
17 are contained in that software were modified after 1994,
18 correct?

19 A. Yes.

20 Q. And without the version control system,
21 there's no way that you can go back and say what that
22 software did and what was included in that software as
23 of 1994, other than what your memory is, correct?

24 A. That is not true.

25 Q. Okay. Well, then let's talk about that.

1 Now, you were deposed in 199 -- in 2005
2 concerning this software; do you recall that, correct?

3 A. Yes.

4 Q. Okay. And let me ask you this: And you don't
5 have any version control, or anything that allows you to
6 tell what changes were made between then and earlier
7 versions?

8 A. I'm sorry. Are you reading me the deposition?

9 Q. Actually I was reading directly from the
10 deposition, but I want your answer to that question.

11 A. As far as version control and exact each line
12 of code, no.

13 Q. Okay. In fact, let's -- let's go to that
14 deposition, the 2005 deposition, Page 149, Lines 13
15 through 16.

16 QUESTION: And you don't have any version
17 control, or anything, that allows you to tell what
18 changes were made between then and earlier versions?

19 No, I do not.

20 That was your answer, correct?

21 A. Yes.

22 Q. Okay. And that was your sworn testimony in
23 2005, right?

24 A. Yes.

25 Q. Okay. And the software that you have now is

1 the same software that you had then, correct?

2 A. Yes, it is.

3 Q. Okay. And for those portions of the Future
4 Fantasy website that were modified between, let's just
5 say early 1994 and 1999, you indicated it was difficult
6 to look back into 1999 software and determine very much
7 information concerning the website as it existed in
8 early 1994, correct?

9 A. I'll take your word that's what the deposition
10 said --

11 Q. Yes?

12 A. -- and something I said.

13 Q. Okay. And that was your sworn testimony,
14 correct?

15 A. Yes.

16 Q. Okay. Now, let's look at PX Exhibit 240.

17 Now, do you recognize this first page? And if
18 we need to -- I have a copy here. If you need to have a
19 copy of the whole thing, we can -- we can find that, or
20 you can just ask him to flip through the pages.

21 But do you recognize this as a table of
22 contents, the cover page for the source code?

23 A. Yes.

24 Q. Okay. So this is a printout where you have
25 the file names in the first column, correct?

1 A. The second column; but yes.

2 Q. You have the number in the first column. Fair
3 point.

4 So the first column is table, and that's just
5 a numerical sequence, correct?

6 A. Yes.

7 Q. And then the next one -- well, actually it's
8 the table of contents; but the next column is the names
9 of the files, correct?

10 A. Yes.

11 Q. So those would be the file names that comprise
12 the source code, correct?

13 A. Correct.

14 Q. Then you have the number of pages for each of
15 those particular files. I assume that's the number of
16 pages of source code, correct?

17 A. It's the number of pages for this particular
18 formatting of the printout.

19 Q. And then, of course, the next one is the
20 number of lines which would be the individual number of
21 lines of the source code, three of those files,
22 correct?

23 A. That would be the exact number of lines in
24 each file, which wouldn't change depending on the
25 formatting.

1 Q. So then what we have in the next column is
2 that's the modified date for each of those files,
3 correct?

4 A. Yes.

5 Q. And if we look at those -- that column, the
6 vast majority of these are '98, '99, there's some '97s,
7 a couple of mid-'94s; but if I go through this, you see
8 that two-thirds, three-quarters are '97 or later,
9 modified, correct?

10 A. That is true of the page you're looking at,
11 although those are not necessarily the -- none of these
12 files, except for the last three really control the
13 behavior of the website.

14 Q. The last three you're talking about?

15 A. The ones that are in the cgi-bin, starting at
16 Line 29.

17 Q. I'm not sure -- but those all have dates of
18 '97, '95, '96, '98, correct?

19 A. I see some '94s; but, yes, they are all over
20 the place.

21 Q. Well, let's just look at the -- so the
22 earliest one in '94 is 7-10-94, correct?

23 A. I believe so.

24 Q. Okay. But everything, for the most part,
25 there's maybe two of those, one other '94, and then we

1 have '95, '96, '97, '99, correct?

2 A. Correct.

3 Q. So those files are all modified?

4 A. Yes.

5 Q. And there's no way that you can go back, just
6 as you testified earlier in your 2005 deposition, and
7 determine what that code looked like in early 1994,
8 correct?

9 A. In a literal sense, I cannot reconstruct in
10 any way the exact line by line code of 1994.

11 Q. So you have your memory of how the website
12 worked, correct?

13 A. Absolutely.

14 Q. Okay. And you have this code, correct?

15 A. Correct.

16 Q. Okay. So you can't tell from the code how the
17 website worked back in 1994, correct?

18 A. Yes, I can.

19 Q. Yes, you can?

20 A. Yes.

21 Q. Okay. So in 2005, when you testified at your
22 deposition you couldn't do that, correct?

23 A. In 2005, it did not ask about how it worked or
24 the operation of it. I believe it asked pretty much the
25 literal question, which I certainly interpreted at the

1 time, as reconstruct or recreate the exact 1994 code.

2 Q. Okay. Well, you've been deposed again and
3 then deposed, I think twice in 2005, and I gone in -- I
4 think?

5 A. Well, I'm sorry --

6 Q. There were two different subpoenas, so there
7 were two different deposition transcripts, one from each
8 side in the case; do you recall that?

9 A. I believe it was all at one sitting.

10 Q. I think it was, but it was two different
11 deposition transcripts.

12 A. I didn't -- I didn't notice.

13 Q. And then again in 20011?

14 A. Yes.

15 Q. And at no time have you indicated that you can
16 re-create the functionality of the website that existed
17 in 1994, correct?

18 A. I -- I cannot -- well, if I had been asked to
19 re-create it, I could have, based on a change log is
20 that part of the code, I could have made basically
21 massive removal of new features, but nobody offered;
22 which would reduce the functionality of the website to
23 the way it was in 1994. Nobody asked me to do that.

24 Q. Including the Defendants in the case?

25 A. Correct.

1 Q. So you -- in 2005, though, so you're talking
2 about a change log in the code?

3 A. Yes.

4 Q. So there -- this isn't in any kind of code
5 versioning system, correct?

6 A. No versioning system.

7 Q. So now you are saying there is a change log in
8 the code itself?

9 A. Yes.

10 Q. And you didn't identify that in 2005, when you
11 were asked whether you could identify the changes that
12 were made in the code between 1994 and 1995, correct?

13 A. Again, the literal -- I took that question at
14 it -- at its words of: Can I reconstruct the exact 1994
15 source code? The answer then and now is still no.

16 Q. But you can't? And it's the source code that
17 determines how something operates, correct?

18 A. Yes.

19 Q. So you can't -- and you said the answer was
20 still no, that you can't re-create that source code that
21 existed in 1994?

22 A. No, I can't.

23 Q. Okay. So, then, it's the source code that
24 says how the website operated, and you can't reconstruct
25 the source code that existed in 1994, right?

1 A. I know the differences in how it operated, but
2 I cannot reconstruct the source code. You've asked me
3 that many times.

4 Q. I understand that. But I know you know the
5 difference, and I don't dispute that. What I'm trying
6 to find out is whether there's any corroboration to
7 that. I'm not -- I'm not casting aspersions on your
8 memory and things like that, or your motivations, or
9 anything; so don't take it that way, sir, at all,
10 because it's absolutely not the case.

11 All I'm trying to figure out is what kind of
12 corroboration we have to your memory.

13 You can't reconstruct the source code, correct

14 A. Not the literal source code.

15 Q. Okay.

16 MR. NICODEMA: Your Honor, may I ask
17 questions?

18 THE COURT: Yes, you may.

19 VOIR DIRE EXAMINATION

20 BY MR. NICODEMA:

21 Q. Dr. Trewitt, that -- pardon me -- that
22 document, the source code that counsel put before you,
23 you mentioned a "what's new file." Did you mention
24 something called a "what's new file"?

25 A. I mentioned it in the last minute or two, a

1 change log.

2 Q. Okay. Do you call it a "what's new file"?

3 A. In -- in the code and in the vernacular at
4 time, yes, it's called a "what's new file."

5 Q. What is that?

6 A. At the time, when all you website were new,
7 people -- it was a very, very common custom to either
8 announce in some way, or make available, like: Here's
9 what's different about the website; you know, it's brand
10 new; now it can do this.

11 And I did that as well, and pretty slavishly
12 updated that every time I made a change.

13 Q. So the "what's new file" tells you every
14 change that you made to the website from the first time
15 it was launched on the Internet?

16 A. Yes.

17 Q. Is the "what's new file" part of that document
18 that Soverain's counsel showed you, PX240?

19 A. Yes.

20 Q. Okay. Now, that document, that code with that
21 "what's new file," did you produce that to Soverain when
22 you were deposed in the Amazon case?

23 A. Yes, I did.

24 Q. Okay. And using that "what's new file," would
25 you be able to tell whether any of the changes to the

1 website, the operation and functionality of the website,
2 were material or substantial?

3 A. Absolutely.

4 Q. So you don't need something called a revision
5 control to do that, do you?

6 A. No, I don't.

7 Q. And you could use not only your memory, but
8 the source code and the revision log, or what you call
9 the "what's new file," to determine and to tell this
10 jury how the website functioned, how someone could use
11 it to buy books, when it was first launched in 1994?

12 A. Yes.

13 MR. NELSON: Questions, Your Honor.

14 FURTHER VOIR DIRE EXAMINATION

15 BY MR. NELSON:

16 Q. So the "what's new file" --

17 MR. NELSON: If we can put it back on the
18 screen, PX 240.

19 Q. (By Mr. Nelson) So that was last modified in
20 1997, right, March 12th, '97?

21 A. Yes.

22 Q. So the "what's new file" is consistently being
23 updated, according to you?

24 A. Yes.

25 Q. Okay. But the "what's new file" doesn't tell

1 you what the code looked like as of 2000 -- or 1994,
2 correct; we've established that?

3 A. True.

4 Q. And it's the code that determines how the
5 website operates, correct?

6 A. Yes.

7 Q. Okay. So going back, the corroboration of how
8 the website operated in 1994, the contemporaneous
9 corroboration, not some after-the-fact diary, you don't
10 have anything, correct?

11 A. I'm not sure what contemporary corroboration
12 is. The "what's new file" is pretty much like a
13 diary.

14 Q. But it's an after-the-fact diary, correct?

15 A. I don't understand "after the fact." I did
16 not write it in 1997.

17 Q. Well, it's updated through 1997, correct?

18 A. Correct.

19 Q. Okay.

20 MR. NELSON: So, at this point, Your
21 Honor, I think we've established there is no foundation
22 to determine --

23 THE COURT: Well, let me ask the
24 question...

25 MR. NELSON: Okay.

1 THE COURT: Where is the "what's new
2 file" on PX 240?

3 MR. NICODEMA: I'm sorry, Your Honor.
4 The "what's new file" starts Page 213.

5 THE COURT: Can we go to that page?

6 MR. NELSON: Oh, you mean 312?

7 MR. NICODEMA: I said -- yeah. 213.

8 MR. NELSON: Okay. Thank you.

9 THE COURT: All right. Can the witness
10 walk me through that and give me some examples, going
11 all the way back to '94, of what this "what's new file"
12 contains?

13 MR. NICODEMA: Yes.

14 THE WITNESS: I can make an offer. It's
15 really hard to read on there.

16 THE COURT: Maybe I can get you another
17 copy.

18 THE WITNESS: Oh, no. This is
19 strictly -- if you're fine with that file, no problem.

20 THE COURT: I can read that.

21 THE WITNESS: This will go to -- this
22 file is written in reverse order, so the latest changes
23 are at the top.

24 So if you can go to the end of that file,
25 which -- yes. So just for reference, 1994, February

1 1st, began operations.

2 Thank you. Thank you very much.

3 Ignoring the various HTML markup, for

4 instance, you can see on July 10th that you can now

5 search for specialty items in the item type menu.

6 That's a fairly minor feature that, you know, another

7 way of searching -- another key that you can use to

8 search for things for sale.

9 And that's -- I would count that as a
10 minor difference.

11 And that one above it, July 13th, I
12 added -- I added pictures of covers of two books, which
13 is, I think you would agree, is a really, really trivial
14 change.

15 THE COURT: All right. Let's move
16 forward.

17 THE WITNESS: Do you want to go through
18 this -- right through this item-by-item or --

19 THE COURT: Well, just pick out any
20 that -- are there any that would relate to the
21 functionality that is the subject of this suit.

22 THE WITNESS: All right. I will pick out
23 the highlights.

24 Okay. I don't know if you would count
25 this, but about a third of the way down, August 10th.

1 Why don't you just enlarge the top third
2 of it over there.

3 Okay. Great.

4 I'm sorry. August 20th. I fixed a bug
5 in how -- details of searching. So that if you
6 accidentally typed punctuation and an author's name like
7 Robert C, period, it would actually work properly.

8 October 7th, another book category. And
9 I think if you go to the previous page. Okay. Let's
10 start from the bottom.

11 MR. NELSON: And, Your Honor -- can I ask
12 a question about this one --

13 THE COURT: Yes, you may.

14 MR. NELSON: -- because it's very
15 relevant.

16 FURTHER VOIR DIRE EXAMINATION

17 BY MR. NELSON:

18 Q. So March 11th, 1995, it says if you browse the
19 support name submit buttons you will get two submit
20 buttons to choose from, between select more books and
21 place order rather than the old radio buttons.

22 So that's when the select more books and place
23 order buttons were added, correct?

24 A. That's a -- I hate to say it, it's kind of a
25 misleading way to say it.

1 Q. But it's accurate nonetheless?

2 A. The functionality of selecting more books and
3 placing the order was already there.

4 Q. Okay. The buttons weren't there, correct?

5 A. There was a button and two check boxes.

6 Q. So --

7 MR. NELSON: Your Honor, let's go to
8 demonstrative exhibit -- the demonstrative exhibit from
9 Mr. Treese that they gave us -- excuse me, Trewitt.
10 There's too many TR names in this one.
11 And I'm not very good with names.

12 Slide 19.

13 TECH PERSON: Treese.

14 MR. NELSON: No, Trewitt. We can go to
15 Slide 17. Any of these.

16 In fact, let's start at Slide 15. 14.

17 Here's the examples we have, Your Honor.
18 They were going to walk through.

19 See, select more books, place order,
20 those buttons weren't there. We just heard that: They
21 weren't there in 1994, yet this is a demonstrative they
22 want to do.

23 Let's go to Slide 16.

24 Now, they want to highlight some
25 functionalities and testimony about somebody selecting

1 the select more books button. Not there in 1994.

2 Now, let's go to Slide -- we can go to
3 Slide 17, because we are -- a different page after we've
4 done that. Now we're going to the save selection.

5 Now we go to Slide 19, and now we're
6 going to give an example of place order. Again, it
7 wasn't there. They want to represent -- what they want
8 to do is represent that this website was as it existed
9 in 1994. And just walking through the change log that
10 we went through, coupled with the witness' memory, he
11 said this is an inaccurate representation.

12 So that's what we run into. That's the
13 problem. That's why we need to have the foundation
14 before we can submit this to the jury and represent that
15 this was, in fact, the functionality; when it was not.

16 And furthermore, as you consider this,
17 Your Honor, their expert doesn't rely on any of this.
18 He doesn't rely on the source code for the Future
19 Fantasy Bookstore, and he doesn't rely on any of Mr.
20 Trewitt's testimony.

21 He relies on the Future Fantasy Bookstore
22 website based upon that the Tcl paper that was
23 submitted. That's all his citations. And then he -- he
24 cites a link to the Future Fantasy Bookstore, which
25 happens to be this reconstructive.

1 No testimony from Mr. Trewitt about the
2 functionality.

3 So, beyond the prejudice that's caused by
4 a witness without corroboration to testify about the
5 functionality of something as it purportedly existed in
6 1994, when we can see from its own demonstratives that
7 it's an inaccurate representation, based on what we just
8 went through; but in addition, we have to tie that
9 testimony back to some opinions in the case in order for
10 it to be relevant for the jury. And their expert
11 doesn't rely on any of that.

12 So what they're trying to do is fill in
13 holes from what their expert relied upon.

14 Their expert can testify to what he
15 testifies to, and I will cross-examine him on those
16 things, Your Honor. But to allow a witness, without
17 foundation and corroboration, to get up there and
18 testify: Here's how my books -- the bookstore worked in
19 1994, without tying it back to the patent, because
20 there's no reliance by the expert, and through an
21 inaccurate representation, is prejudicial.

22 THE COURT: Okay. Response.

23 MR. NICODEMA: Your Honor, may I?

24 So the best they can come up with, in
25 terms of material changes, is that where there are two

1 check marks and a button at one point, then there were
2 two buttons that said select more books and place
3 order. They did the same exact thing. They were
4 companies met the particular changes.

5 Dr. Trewitt can go through his revision
6 list and show that they -- show that they were cosmetic
7 changes. That revision list was prepared
8 contemporaneously with every change that he made.

9 And as for Dr. Keller, our
10 non-infringement and invalidity expert, he's relying on
11 what we call the Tcl paper, the Tcl paper, that Dr.
12 Trewitt offered and that Mr. Treese took with him, when
13 he went to Open Market. And that the Tcl paper says
14 right in there, that many of the examples, many of the
15 things shown in there are right from the 1994 future --
16 Future Fantasy website.

17 This -- this -- what we're going to show
18 the jury is a demonstrative, and Dr. Keller is going to
19 rely on the Tcl paper. Oh, and not only the Tcl paper,
20 but Dr. Trewitt's testimony in the Amazon case and in
21 this case, where he actually walked through the website,
22 this website in detail.

23 THE COURT: Response?

24 MR. NELSON: I think it's -- it's not
25 quite fair to call it immaterial when that's what they

1 chose to demonstrate, through their demonstratives.

2 It must be pretty material to them or
3 they would have gone to the old way, right, Your Honor?
4 I mean, that's the problem, is that we're left with a
5 demonstrative that is demonstrably inaccurate.

6 THE COURT: Well, we don't have to let
7 the demonstrative in.

8 MR. NELSON: Right. But so then the
9 question about relying on the testimony, I just heard
10 for the first time, because it's not in the expert
11 report. There's not one citation that Mr. Trewitt's
12 testimony and Mr. Keller's expert report on invalidity
13 in this case. He relies on the Tcl paper.

14 Now, counsel says, well, the Tcl -- it's
15 T-C-L, but everybody calls it Tcl.

16 The Tcl paper, and it says, well, some of
17 these examples came from the Future Fantasy Bookstore.
18 But so what? That doesn't have anything to do with Mr.
19 Trewitt's testimony on that. He's relying on the paper
20 for describing how the Future Fantasy Bookstore
21 operates. And the paper itself, as we'll get into,
22 there's some questions whether that was even published.

23 So it is -- it's very prejudicial to
24 allow Mr. Trewitt to testify about functionality, and
25 I'm not, you know, casting aspersions or anything along

1 those lines. That isn't what it is. But this
2 demonstrative we have here is inaccurate. And then on
3 top of it, it doesn't -- there's -- the expert doesn't
4 rely upon it. He's saying now that the expert will.
5 Well, that's all beyond the scope of the expert report,
6 Your Honor.

7 He has those depositions.

8 MR. NICODEMA: Your Honor, the expert is
9 relying on Mr. Trewitt's testimony from the Amazon case
10 and I believe this case, where he walked through this
11 very website in excruciating detail and said how it
12 worked.

13 And this -- this is demonstrative. It
14 will be unfair to us to have Mr. Trewitt testify, where
15 the jury couldn't see visually what this was. And based
16 on the revision history, the what's-new list, the
17 what-has-changed list, the changes -- and by the way,
18 the what's-new list is part of the code. It's HTML. It
19 is part of the code.

20 And this sounds like cross-examination to
21 me, Your Honor. If they want to come in and say: Was
22 that button there? Was that checkmark there? Is that
23 different, that's cross-examination, not
24 admissibility.

25 THE COURT: Well, did Mr. Trewitt testify

1 at any of his prior depositions or testimony that the
2 what's new list was present and that he could attempt to
3 re-create the functionality based on that?

4 MR. NICODEMA: I don't think so, but he
5 wasn't asked.

6 And, by the way, that very document was
7 produced to Soverain in the 2005 case.

8 THE COURT: But he was asked the question
9 of whether there was a -- what was the kind of library
10 that you referred to --

11 MR. NELSON: Revision system.

12 THE COURT: The what?

13 MR. NELSON: Revision system.

14 THE COURT: Revision system?

15 MR. NICODEMA: Yes, which is not -- but
16 that's what's there, the what's-new one.

17 And no one can dispute that was produced
18 to them six years ago.

19 THE COURT: Well, I know it was produced;
20 but if the witness today, in court, for the first time
21 is explaining the significance of that, why has this not
22 been, you know, put out there previously in earlier
23 testimony when he was asked questions at least relating
24 to the revision history?

25 MR. NICODEMA: We didn't have -- we

1 didn't have the source code then. What happened was, he
2 was asked in 2005 about this. He produced his source
3 code and his revision list and everything else to
4 Soverain. They destroyed it.

5 When we were looking through our
6 documents, several months ago, when we saw gaps in them,
7 we contacted them. They said they didn't have it, and
8 we had to get it from HP.

9 That exhibit was produced to them six
10 years ago. They got rid of it. I'm not saying they
11 intentionally destroyed everything. We didn't have the
12 code.

13 And when we prepared this demonstrative
14 from the code, which you can search to see all the
15 revisions, we gave that to them.

16 THE COURT: Response?

17 MR. NELSON: Let me put back up the
18 question and answer that we looked at, because it's --
19 this goes to exactly the point you just asked, Your
20 Honor.

21 Page 149, 13 -- starting at Line 13,
22 going through Line 16.

23 QUESTION: And you don't have any version
24 control, or anything, that allows you to tell what
25 changes were made between then and earlier versions?

1 No, I don't.

2 I mean, if this was really -- this should
3 have been identified in response to that, that question
4 and answer, if this was something that the witness
5 believed that he really could re-create.

6 THE COURT: All right. Here's my ruling.
7 First, I'm going to find that I think the corroboration
8 is tenuous, at best, with this what's new re-creation
9 through his mind of what each one of those means. I
10 might have let that in; but based on the earlier
11 testimony that he did not have any way to do so, I am
12 going to sustain the objection.

13 So, anything further before we bring the
14 jury back in?

15 MR. NICODEMA: So I can't ask about that?

16 THE COURT: Not if he doesn't have
17 corroboration.

18 MR. NICODEMA: I've got the Tcl paper
19 which is -- obviously that he created.

20 Any objection to the Tcl paper?

21 MR. NELSON: I mean there's -- depends on
22 what the testimony is, Your Honor. I don't want it to
23 be -- if he's going to testify about the publication,
24 which I think there's going to be some
25 cross-examination, because I think that's questionable.

1 But the -- I don't want that, because
2 just because it mentions Future Fantasy Bookstore to
3 say, oh, well, here's my website and here's what it did.
4 So if counsel is saying I want to testify
5 about the paper as paper, of course, he can't offer
6 opinions as to whether the paper meets the claims
7 because he's not an expert witness in the case.

8 THE COURT: Okay. Well, let's just go at
9 it like this: You can ask him anything you want to and
10 you can object, and I'll rule on them as they come up.

11 Bring the jury in, please.

12 COURT SECURITY OFFICER: All rise.

13 (Jury in.)

14 THE COURT: Please be seated.

15 All right. Mr. Nicodema, you may
16 proceed.

17 MR. NICODEMA: Thank you, Your Honor.

18 GLENN TREWITT, DEFENDANTS' WITNESS, PREVIOUSLY SWORN

19 DIRECT EXAMINATION (CONTINUED)

20 BY MR. NICODEMA:

21 Q. Dr. Trewitt, before the break, I asked you
22 how -- how did you come up with the name of your
23 website, the Future Fantasy Bookstore.

24 Please tell the jury.

25 A. I didn't come up with it. It was the name of

1 an actual bookstore in Palo Alto.

2 Q. Were you a customer of that bookstore?

3 A. Yes, I was.

4 Q. What kind of books were sold there?

5 A. Science fiction, fantasy, mystery, horror.

6 Q. So I take it you're a science fiction fan?

7 A. Yes, I am.

8 Q. Okay. What circumstances led you to create
9 the Future Fantasy Bookstore website?

10 A. Excuse me. In early December 1993, my boss,
11 Dr. Brian Reid of the Network Systems Laboratory, asked
12 all of us to come up with examples, ways to do commerce,
13 on the web.

14 Q. All right. And how did you respond to your
15 boss' challenge?

16 A. I fairly quickly thought about this bookstore.

17 Q. Okay. Why choose books?

18 A. Do you have a book?

19 Q. Sure.

20 MR. NICODEMA: May I approach, Your
21 Honor?

22 THE COURT: Yes, you may.

23 A. If you think about all the things you can buy
24 on the web now, a watch, it's a little bit hard -- it
25 could be hard to pin down exactly what that watch is and

1 have all the, you know, exact details.

2 And in 1993 and '94, the capabilities were
3 even more limited. However, books, once you know the
4 title and the author, you're pretty much done. And in
5 particular, the books have what's called an ISBN issued
6 by the Library of Congress, numbering the bar code that
7 absolutely identifies this particular -- not only the --
8 the author, the title, but the fact that it's paperback,
9 and which -- if it was released multiple times, which
10 one it is.

11 Q. Sir, when did you first begin working on the
12 Future Fantasy Bookstore website?

13 A. Pretty much right away.

14 Q. Would that be around December 1993?

15 A. Yes, December 1993.

16 Q. And did you need any information from the
17 bookstore to develop the website?

18 A. Yes, I did.

19 Q. What did you need?

20 A. I needed an electronic copy of the -- the
21 inventory, the list of everything it had.

22 Q. And how did you get that from the bookstore?

23 A. I walked into the bookstore and asked the
24 owner, Jean Schroeder, would you like me to put your
25 bookstore on the internet.

1 Q. What did she say?

2 A. She said yes.

3 Q. And then what?

4 A. It was surprising.

5 Q. Why is that?

6 A. Well, I would not expect in 1993 a bookstore
7 owner to know anything about the internet.

8 Q. But she did know. How did she know?

9 A. She knew because every six months, she got a
10 flurry of orders for a particular item in her bookstore,
11 and she was receiving orders from people, not local. I
12 don't know if they were faxing or calling her on the
13 phone. And she finds books; why am I getting these.

14 And the answer was about every six months
15 somebody would repeat a question: Where can I get this?
16 And then someone else, who had been around for longer
17 than six months, would send in the exact same reply, oh,
18 Jean Schroeder, Future Fantasy Bookstore; here's the
19 phone number.

20 Q. All right. After you had the information that
21 you needed from Ms. Schroeder, what did you do next to
22 create the website?

23 A. I started by examining the inventory that I
24 got and figuring out how I could categorize everything,
25 how I could present a searchable version of the

1 inventory in a web browser, and figured out what -- what
2 the bookstore needed to be able to do, in order to let
3 people do the shopping that I wanted them to be able to
4 do.

5 MR. NELSON: Objection, Your Honor. This
6 goes --

7 THE COURT: Restate your question,
8 please.

9 Q. (By Mr. Nicodema) Okay. In creating the
10 Future Fantasy website, did you write any programs?

11 A. Yes, I did.

12 Q. Did you write a program in HTML?

13 A. Yes. I wrote HTML content.

14 Q. And please tell the jury what HTML is.

15 A. HTML stands for hypertext markup language.
16 It's the programming language code that, including
17 today, people -- it is produced by a person or a
18 computer that controls what is displayed in your
19 browser.

20 HTML is the way that if something is supposed
21 to be a big heading, it's HTML. If it's going to
22 boldface or italics or a form with places to click
23 buttons, that's HTML.

24 Q. Did you also write programs for the website in
25 something called Tcl?

1 A. Yes. It's a computer programming language
2 called tool command language, which is abbreviated Tcl,
3 and always pronounced "tickle."

4 Q. Okay. What is the function of Tcl programs?

5 A. I'm sorry. These programs that I wrote?

6 Q. Yes, sir.

7 A. The function of these programs is --

8 MR. NELSON: Objection, Your Honor. He's
9 testifying about the functions of the program.

10 THE COURT: The objection is sustained.

11 Q. (By Mr. Nicodema) Were there any -- so you
12 said that you used HTML and Tcl programs in your Future
13 Fantasy Bookstore website.

14 Were there any advantages to using Tcl over
15 other programming languages available at the time?

16 A. Yes. By comparison, other programming
17 language -- languages, such as C or Fortran or Pascal,
18 were -- were comparatively low-level. And with the Tcl,
19 I could write, maybe in five lines, the equivalent of a
20 hundred or 200 lines in a conventional programming
21 language.

22 This gave me great advantages in being able to
23 produce the programs quickly and test it out
24 piece-by-piece.

25 Q. All right. Were many programmers using Tcl in

1 1993?

2 A. There was a significant following, especially
3 in the physics community -- I'm not sure why -- of Tcl;
4 however, by comparison with those mainstream languages,
5 fairly small.

6 Q. When did the Future Fantasy website go online,
7 Dr. Trewitt?

8 A. February 1st, 1994.

9 Q. So it took you about a month-and-a-half to
10 develop the website and get it on online?

11 A. Yes.

12 Q. And -- and by online, was it on the internet
13 and the World Wide Web?

14 A. Yes.

15 Q. Okay. Let me pull up the announcement.

16 Dr. Trewitt, did you -- did you prepare any
17 announcement of Future Fantasy going online?

18 A. Yes, I did.

19 Q. What did you do?

20 A. At the time, the -- the thing that everybody
21 who was on the internet or on the web paid attention to
22 was that the National Center for Supercomputing
23 Applications in Boulder, Colorado, they provided the
24 more significant software, the web browser and web
25 server that was most widely used.

1 They had a what's-new list, and people would
2 send in submissions from all over the place saying, hey,
3 new website, it does this; come take a look.

4 Q. And so --

5 A. And I sent in an announcement and sent it to
6 their what's-new page, the mailing -- the e-mail address
7 for the what's-new page.

8 Q. Doctor, in around March of 1994, did you write
9 a paper which embodied the knowledge you had gained in
10 creating the Future Fantasy website?

11 A. Yes, I did.

12 MR. NICODEMA: Your Honor, may I
13 approach?

14 THE COURT: Yes, you may.

15 MR. NELSON: Oh, you're approaching him.

16 Q. (By Mr. Nicodema) Doctor, do you recognize
17 this exhibit?

18 A. Yes, I do. It is the technical note that I
19 produced as part of my work to describe what I had done
20 so that other people could profit from the knowledge.

21 Q. Is there a page in there, near the beginning,
22 that references the Future Fantasy website?

23 A. Yes, there is.

24 Do you want me to find it?

25 Q. Let me help you, sir. If we turn to -- it's

1 the page marked with the number Trewitt 000058.

2 A. Yes.

3 Q. Okay. And in the second paragraph, is there a
4 reference to the Future Fantasy Bookstore?

5 A. Yes, there is.

6 Q. And is there also a reference to the URL for
7 the bookstore?

8 A. Yes.

9 Q. Okay. Please explain to the jury -- I'm sure
10 they know -- but just in case, what a URL is.

11 A. A URL stands for uniform research -- resource
12 locator. It's a specific address that lets you get to
13 what's a web browser to get to the web page on the
14 internet.

15 Q. So someone with a computer and access to the
16 internet and a web browser, reading this paper and
17 seeing the URL of Future Fantasy in 1994 could have
18 accessed the website?

19 A. Yes. The URL carrier is exactly the same one
20 that's in that announcement.

21 Q. Okay. And if we look at the last sentence in
22 that paragraph on Trewitt 58, you wrote: Most of the
23 examples in this report are drawn from our
24 implementation of the bookstore's web storefront.

25 Do you see that?

1 A. Yes.

2 Q. What did you mean by that?

3 A. I mean that -- I meant that -- I'm sorry.

4 What did I say?

5 That examples both in the Tcl source code and
6 in the appearance of -- of -- of the web pages to the
7 user, that most of those came directly from the
8 bookstore. And in point of fact, what I did was to take
9 the files from -- from the bookstore source code, grab
10 whatever piece of them that I wanted to use as an
11 example, and copy it exactly into the tech note.

12 Q. Now, there are some dates on this tech note,
13 and I want to make sure we have them right.

14 On the cover of the top note, the first page
15 at the top says May 1994.

16 A. Correct.

17 Q. What's that date?

18 A. Well, if you look at the cover, it looks --
19 can you get rid that have for a sec?

20 Okay. If you look at the cover, it looks all
21 smudgy, dusty. That's because this is -- this copy was
22 made from a physical printed copy which had a sort of
23 grayish with stipple pattern. This is a copy from the
24 physical document that was printed at a local Palo Alto
25 printer.

1 May 1994 is the date that we -- actually me --
2 took the electronic form of this, copied it on paper.
3 So that's the day I printed it on paper. And then that
4 paper copy was handed to the physical printer --
5 printer -- sorry -- the print shop.

6 Q. Thank you, Doctor.

7 If you turn in a couple of pages to the -- the
8 number Trewitt 000054, there's another date there, March
9 1094. What's that date?

10 A. That's the date when I finished writing the
11 report, the month.

12 Q. Now, there's -- was this technical report,
13 Defendants' Exhibit 13, was it a confidential digital
14 document?

15 A. No, it was not.

16 Q. And why do you say that?

17 A. First of all, any of our technical reports
18 that were confidential would have had a banner across
19 the front that said -- I'm not sure -- digital internal
20 use only or digital confidential. And at the -- on each
21 page, either at the top or bottom, the same thing as
22 part of a page heading, internal use only.

23 Q. Now, as one of your responsibilities at
24 Digital, were you charged with archiving or dealing with
25 internal and external Digital documents?

1 A. For the Network Systems Laboratory, I
2 maintained all of the repository of technical notes when
3 somebody wrote a paper. By paper, I mean electronic.

4 They would give me the file, and then I would
5 include it in the repository and add basically one line
6 to the file, giving the name and the other information
7 about the file so that it would be published
8 electronically and physically appropriately.

9 Q. So in March 1994, you knew which Digital
10 technical reports were confidential and which ones
11 weren't?

12 A. Yes. The file that I mentioned, the one line,
13 had a mark of some sort, like a -- you know, like an
14 internal or external. I'm not sure what it had, but it
15 had a mark that indicated whether that report should be
16 released to the public or not.

17 Q. Now, I asked you if this report distilled your
18 knowledge of the Future Fantasy Bookstore website, and
19 I'm going to ask you why you wrote this report.

20 A. I wrote the report for -- well, the big
21 overall reason is, this was all new stuff. I -- there
22 wasn't anyplace that I had found -- and I certainly
23 would have been aware of them -- where all of this sort
24 of knowledge was collected in one place about how to use
25 the forms feature and the web browsers and how to

1 process them on a server and the advantages of using Tcl
2 to do this.

3 Since I want to get -- oh, and a lot of
4 subtleties that I had learned from creating the
5 bookstore, such as -- if you think right now, there are
6 two or three different kinds of browsers that people are
7 familiar with, like Apple's browser and Chrome and
8 Internet Explorer.

9 Back then, there were also a number of
10 different varieties of browser, and they had various
11 horrible bugs that made my job difficult, so I wanted to
12 document those as well, so that anybody who got this
13 could get a leg up in trying to implement a website.

14 Q. All right. Please turn to, a few pages in,
15 Trewitt 58.

16 A. 58 again?

17 Q. Yes, sir.

18 A. Okay.

19 Q. And you see the third paragraph under the
20 heading Introduction, and the sentence that reads:

21 Please be aware that this is a real bookstore
22 and that any order you place will be treated as a real
23 order?

24 Do you see that?

25 A. Yes.

1 Q. What did you mean by that?

2 A. That the URL mentioned in the second paragraph
3 took you to a real bookstore. Do not -- you know, do
4 not get the idea that this is some sort of a
5 demonstration system that you can just play with and,
6 you know, pretends to order a bunch of books.

7 Q. Now, let's turn to Trewitt 60. There's a
8 heading on that page: Overview and Tutorial?

9 A. Yes.

10 Q. Would you explain to the jury what information
11 you included, in general the terms, under that heading,
12 Overview and Tutorial?

13 A. Some of it is what I've described to even the
14 jury already about what is HTML. I go into more detail,
15 which is really the huge point of this document, about
16 HTML forms, which are the means by which, in general,
17 you interact with the website, that you fill -- you type
18 text into boxes, you check checkmarks and select
19 things -- pull down menu items, and you click on buttons
20 that say order or search or something.

21 Q. I'm sorry.

22 A. And so Section 2.1 is an introduction to the
23 capabilities of forms. The bullet list above that is a
24 description of everything that I'm going to be
25 describing in the paper.

1 Q. Now, Doctor, does this paper, does your Tcl
2 paper as we've -- or at least as I've affectionately
3 called it in this trial, does it tell someone in the
4 field how the website, the Future Fantasy Bookstore
5 website, functioned?

6 A. In every detail, every absolute detail, no;
7 but in general, it tells how the information flows back
8 and forth between the user's browser and the web server.

9 Q. Okay. We're going to walk through that, if
10 you don't mind, sir. But first I wanted to ask you, I
11 asked you when the website went online. How long was it
12 online?

13 A. It was online until sometime in 2001.

14 Q. So about seven years?

15 A. Yes.

16 Q. And why did it go offline?

17 A. It's the economy. The owner, who I kept in
18 continuous touch with, because I walked into her
19 bookstore all the time, said that the online traffic was
20 just fine, but the foot traffic in the physical store
21 really just dried up, and she needed to quit.

22 Q. All right. Let's -- let's look at the page we
23 have up on the screen, and that's Trewitt 60. There's a
24 heading there, 2.1 Introduction to HTML Forms, and it
25 looks like some sort of box with information under that.

1 Can you tell the jury what that is?

2 A. Other than hard to read, this is the search
3 form, the place where a user of the bookstore would go
4 and enter the criteria they wanted to use for searching
5 books.

6 THE WITNESS: So can you enlarge that? I
7 think it might be easier to read. Maybe.

8 A. So you can see there's a box for the author's
9 name where I've typed in Clarke, a place for the book
10 title, the book type, which would be like science
11 fiction or fantasy or mystery, how recently it's
12 published, like if I only wanted a book that's published
13 in the last three months, I could ask for that there and
14 sort the -- sort the results by author, and there's a
15 check box to ignore books that aren't available yet.

16 Q. (By Mr. Nicodema) Now, were these features
17 part of the Future Fantasy website when it first went
18 online?

19 A. Yes.

20 Q. All right. And how would someone use this box
21 in the original website?

22 A. I'll just --

23 Q. Does this paper tell someone how to use this
24 box?

25 A. I'd have -- I'd have to look more carefully.

1 May I?

2 Q. Sure.

3 A. Certainly says what it does. Here is an
4 example of a simple form, which is used to search the
5 Future Fantasy Bookstore's inventory.

6 Q. Okay. And you type in information like the
7 author's name, the book title, and things of that
8 nature?

9 A. Yes.

10 Q. Okay. And then there are two buttons at the
11 bottom of that form, one on the left says: Submit
12 query, and the other one says: Clear the form?

13 A. Yes.

14 Q. What -- what was the submit query button for?

15 MR. NELSON: Objection, Your Honor.

16 THE COURT: Sustained.

17 Q. (By Mr. Nicodema) Were those buttons, submit
18 query and clear the form, on the original website when
19 it was born?

20 A. Yes, they were.

21 MR. NELSON: Objection, Your Honor.

22 THE COURT: Sustained.

23 The jury will -- I'll strike the answer,
24 and the jury will disregard the question and the answer.
25 And let me just tell the members of the jury,

1 occasionally, when something has been objected to and I
2 sustain it, but it's already been said, I'll instruct
3 you to disregard it, and you should disregard that and
4 not consider it in any way.

5 All right.

6 Q. (By Mr. Nicodema) If we turn to the next page,
7 Trewitt 61, in the first paragraph under those three
8 bullets --

9 MR. NICODEMA: If you can blow that up.

10 Q. (By Mr. Nicodema) -- does that paragraph
11 describe those two buttons, the submit button and the
12 clear-the-form button?

13 A. Yes, in fair detail.

14 Q. Can you explain what's being said there?

15 MR. NELSON: Objection, Your Honor.

16 This is another way to ask him --

17 THE COURT: Counsel, approach, if you
18 would.

19 (Bench conference.)

20 THE COURT: I think you've gone about as
21 far as you need to --

22 MR. NICODEMA: Okay.

23 THE COURT: -- as far as -- you've gotten
24 him to testify about the book. The book is what you're
25 going to be relying on. I think trying to get him to

1 paraphrase what it means is not going to be productive.

2 MR. NICODEMA: Can I at least go through
3 it quickly and where he cites code, say, I have code
4 there, where he cites a form, say that's a form and
5 what's it used for? It says it right in the document.
6 I won't go into a lot of detail.

7 MR. NELSON: But the problem is, the
8 document is what the document is. It's just another way
9 to get back to his testimony --

10 THE COURT: Well, you can step him
11 through the document, but don't have him the testifying
12 about what --

13 MR. NICODEMA: I won't have him explain
14 things. Fair enough.

15 (Bench conference concluded.)

16 Q. (By Mr. Nicodema) Dr. Trewitt, let's move to
17 Trewitt 62, this document. And there's a drawing at the
18 top of the page?

19 A. Yes.

20 Q. What is that drawing?

21 A. This is a drawing of -- in fair detail of how
22 an interaction between the user -- the user and the
23 user's computer or the client on the left interacts with
24 a web server and the scripts that do whatever is needed.

25 Q. And there's a heading, 2.3, a simple example,

1 and it says: Here is an extremely simple form, and it's
2 accompanying Tcl script. This example illustrates most
3 of the features of simple form processing scripts, and
4 then there's a box under that.

5 MR. NICODEMA: Can you blow that up?

6 Q. (By Mr. Nicodema) And the box says: Type --
7 type your name and then send query?

8 A. Yes.

9 Q. What is that box?

10 MR. NELSON: Objection.

11 THE COURT: Sustained.

12 MR. NELSON: I'm sorry. I'll keep my
13 voice up.

14 Q. (By Mr. Nicodema) Do you provide source code
15 in this document at all?

16 A. I provide two pieces of source code. Right
17 underneath that box is the source code that causes that
18 box to be displayed. This is absolutely standard from
19 then. It's exactly what you would write today. And the
20 beginning -- it continues on the next page -- of what
21 all the little pieces of it are.

22 Q. Now, it looks like there's various pieces of
23 source code cited throughout the document, cited through
24 the Tcl paper. Where did that source code come from?

25 A. Sorry. I didn't finish my answer.

1 Q. I apologize. I seem to have --

2 A. You didn't interrupt. I forgot.

3 Q. -- a habit of cutting people off. I'm not
4 doing well.

5 A. So the first part is that HTML source code
6 that causes the box to be displayed. In the middle of
7 the next page is the Tcl source code to process that
8 form and do something with it. And then it prints out
9 your name is whatever you typed.

10 Q. Now, back to my other question. It looks like
11 throughout the document, there's -- there's snippets and
12 pieces of source code. Where did that source code come
13 from?

14 A. Some of it, things that are intended to be
15 small, tiny instruct -- instructives like this, I made
16 up just for the purpose of example.

17 Other pieces -- there's extensive Tcl program
18 somewhere in the middle -- did come from the Future
19 Fantasy Bookstore.

20 Q. Now, if you'll look at Trewitt 82.

21 A. Yes.

22 MR. NICODEMA: And if we can blow up --
23 if we could blow up the first paragraph under the
24 heading, 6, Building Large Applications.

25 Q. (By Mr. Nicodema) And I'll read what it says

1 there: The mechanisms described up to now are
2 sufficient for building applications that process a
3 single query. In more complex application, such as the
4 the Future Fantasy Bookstore, requires several rounds of
5 interaction with the user, such as browser catalog,
6 accumulating a list of items, and then placing an order.
7 This requires that state be kept somewhere about the
8 progress of the interaction.

9 When you wrote those statements in March of
10 1993 or 1994, were they accurate?

11 A. Yes.

12 Q. If we can turn to -- I believe it's Page 25.

13 A. Page 45 -- Page 25.

14 MR. NICODEMA: Your Honor, can I have a
15 moment?

16 THE COURT: Yes, you may.

17 MR. NICODEMA: I'm sorry.

18 Q. (By Mr. Nicodema) Can you please turn to Page
19 24.

20 MR. NICODEMA: Can you blow up that
21 drawing?

22 Q. (By Mr. Nicodema) There's a drawing on that
23 page. What is that drawing?

24 A. This is a -- an elaboration of part of the
25 drawing that you saw before, which focuses on the

1 programs that would now run on one or more server
2 computers to handle a larger, more sophisticated
3 application, or more perhaps the same sort of
4 application in a more demanding environment, where it
5 had to serve, you know, lots and lots of users rather
6 than just a few, say.

7 Q. There is a -- a cylindrical object there in
8 that drawing. It says database?

9 A. Yes.

10 Q. What is that?

11 A. Any -- a database is a term from computer
12 science that pretty much means a place you can store
13 information and manipulate it and get it back.

14 Q. The work that you did to prepare this Tcl
15 paper, was it ever used in Digital?

16 A. Yes, it was.

17 Q. For what?

18 A. Sir, you said the paper or the work that I did
19 to prepare it?

20 Q. The paper.

21 A. Paper?

22 Q. Yes, paper.

23 A. Several places. One -- well, certainly it was
24 published internally, and so people anywhere in the
25 company had access to it.

1 Our lab and our other -- there were two other
2 labs in Palo Alto -- would travel to the East Coast,
3 Massachusetts, to give presentations about all the work
4 we've done.

5 I presented this paper at that -- such a
6 conference in 19 -- early 1994. That was one. And a
7 co-worker and I traveled to Digital offices in Tokyo and
8 Bangkok, Thailand, to present workshops on how to build
9 applications like this, real hands-on. So they actually
10 were programming web applications.

11 And shortly after this was published -- I'm
12 not going to claim credit here -- but at least Digital
13 started what's called an IBG, internet business group,
14 dedicated to doing commerce on the internet.

15 Q. Was your intent in preparing this paper that
16 people in the field could use it to build interactive
17 websites?

18 A. Absolutely.

19 Q. Do you feel it contained enough information to
20 do that?

21 A. Yes.

22 Q. Was the work that you did on the Future
23 Fantasy Bookstore website separate and apart from the
24 paper ever used by Digital?

25 A. Right. So the work on the book -- so the work

1 on the bookstore in the broad sense, yes, Digital used
2 it as a -- as an example of what -- you know, we were
3 doing stuff on -- on the internet. Here's an example of
4 the sort of stuff you can do.

5 And then internally, that internet business
6 group that I mentioned took at least the fundamental
7 central code in the bookstore, not the specifics about
8 looking up books, but the parts of -- of how to handle
9 queries, they took that and used -- used it in some
10 product, product or products that they produced.

11 Q. You indicated, Dr. Trewitt, that your Tcl
12 report accumulated -- pardon me -- all the knowledge you
13 gained in developing the Future Fantasy Bookstore
14 website?

15 A. Yes.

16 Q. Were you proud of what you accomplished, sir?

17 A. Yes, I was.

18 Q. Why is that?

19 A. Well, as far -- as far as the paper, it was I
20 thought a really thorough and easily accessible so that
21 anybody could look at it. And so I thought I did a good
22 job on that. And the bookstore, as far as I know, was
23 the first time that that sort of thing, of a searchable,
24 commercial --

25 MR. NELSON: Objection, Your Honor.

1 THE COURT: Sustained.

2 A. Can I finish without talking about
3 functionality?

4 Q. (By Mr. Nicodema) In terms of your family, did
5 it make you proud?

6 A. I was proud. I liked to show it -- to show it
7 off. And, in fact, it was the very first piece of work
8 that I had ever done in my professional career that I
9 could take and I could show my parents: Here's
10 something I did, and they could understand what it was.

11 Q. Thank you, Dr. Trewitt.

12 MR. NICODEMA: I have no further
13 questions.

14 THE COURT: All right.

15 Cross-examination?

16 MR. NELSON: Yes, Your Honor. Thank you.

17 CROSS-EXAMINATION

18 BY MR. NELSON:

19 Q. I will give you a minute.

20 A. No.

21 Q. Just let me know when you're ready. No rush.
22 You feel okay? You need something? You're all right?

23 A. Yeah. I'm all right as I'm going to be in the
24 next half hour, so...

25 [Laughter]

1 Q. (By Mr. Nelson) Okay. Let's -- I want to ask
2 you some questions about the Tcl paper, as we've been
3 calling it.

4 Let's go to PX191, which is a little bit --
5 it's a different copy of the same paper, I believe.

6 MR. NELSON: So can we put up PX191 on
7 the screen?

8 Q. (By Mr. Nelson) So this one, as you see here,
9 it's marked Exhibit 15, Trewitt 1-31-11. You recall
10 this as an exhibit at your deposition in this case?

11 A. I don't see -- which deposition? Oh, yes,
12 okay.

13 Q. Right. January 13th of 2011. Is that
14 consistent with your recollection when you were deposed
15 in this case?

16 A. Yes.

17 Q. Okay. So you've seen this -- this version of
18 the Tcl paper before, correct?

19 A. There's only one version. I'm sorry.

20 Q. Okay. So -- although if we go to the third
21 page of this document, it's actually the little (i).
22 It is a little bit different than the one Counsel showed
23 you, though, isn't it?

24 A. That's because this one was produced in 2005,
25 at my request, from an ex-co-worker from Digital HP.

1 Q. Right. So this one says -- it's marked
2 external release January 2005, right?

3 A. Correct.

4 Q. Implying that before that, there was no
5 external release, correct?

6 A. No.

7 Q. Okay. Well, let's look now at DX22. It's an
8 e-mail that we've seen before.

9 MR. NELSON: And let's blow that up. We
10 don't need to see all the white there.

11 Q. (By Mr. Nelson) Okay. This is a Defendants'
12 exhibit in the case that has come up before, so I think
13 folks have seen it.

14 It's from you to Win Treese. Do you see that?

15 A. Yes.

16 Q. And you know Mr. Treese, correct?

17 A. Yes.

18 Q. It's dated March 22nd, 1995; isn't that right?

19 A. Uh-huh.

20 Q. And the -- it says here -- and I think this is
21 the part that Counsel read before. I have a copy of TN
22 14. That's the Tcl paper, right, Technical Note 14?

23 A. Correct.

24 Q. Okay. Dated March 1994. It's not marked in
25 internal use only, so I kept it.

1 Was it officially issued by NSL? What's --
2 are you involved with NSL?

3 A. That's the Network Systems Laboratory where I
4 worked.

5 Q. That's the one in Palo Alto you talked about?

6 A. Uh-huh.

7 Q. Okay. Thank you.

8 Then it says: Can we make copies of it or get
9 copies from you? It's quite good, and some of our new
10 people could learn a lot from it.

11 Do you see that?

12 A. (No response.)

13 Q. So that was an e-mail from Mr. Treese to you
14 asking you about this paper, correct?

15 A. Uh-huh.

16 Q. Can you say yes?

17 A. Oh, sorry. Yes.

18 Q. Okay. That's a little easier for the record.
19 So then you respond, right? And see this below, it
20 says: I'm perfectly happy for people at Open Market to
21 have copies. We decided that we didn't want to publish
22 it externally.

23 See that?

24 A. Yes, I do.

25 Q. And then you say: What I'd like you to do is

1 stamp across the front do not distribute outside of Open
2 Market, then make all the copies you want, right?

3 A. Yes.

4 Q. So at least as of March 22nd, 1995, you didn't
5 believe that it -- at DEC that it had been published
6 externally, correct?

7 A. No.

8 Q. Well, you said that in the e-mail, didn't you?

9 A. I didn't say when we decided, because that was
10 after the fact. That was after March 1994.

11 Q. Okay. So let's -- let's explore that a bit.
12 At least as of March 22nd, 1995, the Tcl paper,
13 Technical Note 14, was not published externally at DEC,
14 correct?

15 A. It had been withdrawn from the external
16 website.

17 Q. Okay. So let's explore that. I want to get
18 some facts out on that.

19 So you said it had been withdrawn from the
20 external website. Can you explain to me what you mean?

21 A. As I said, as part of my responsibility, I
22 maintained the repository of tech notes. And when I
23 originally produced, finished the tech note, it was
24 marked as available for external release.

25 Q. So when you originally produced it, you mean

1 in March -- it's dated March 1994, correct?

2 A. Yes.

3 Q. Okay.

4 A. March 1994, which means for this file with the
5 mark of external distribution, it was just like a bunch
6 of notes to myself. It actually drove the computer
7 programs that formatted and copied the tech notes to
8 the -- both the internal and external web servers.
9 So originally, it was published both externally and
10 internally.

11 Q. Okay. That was in March of '94?

12 A. Yes.

13 Q. But you don't know what day in March of '94,
14 correct?

15 A. For -- what day it would have appeared on the
16 server, I do not know exactly.

17 Q. So it could be as late as March 31st?

18 A. Could be.

19 Q. Then it has a May 1994 date. The May 1994
20 date, I think, you said --

21 A. That's when it went to the printer.

22 Q. Okay. That's when it went to the printer. Is
23 that also when it was taken down from the --

24 A. No.

25 Q. -- website?

1 A. No.

2 Q. Didn't you testify at your deposition before
3 that the May 1994 date came from -- came from the date
4 that it was taken down from the website?

5 A. I don't think so.

6 Q. So you don't recall that one way or the other?

7 A. I just said I do not think so. I don't think
8 I said that.

9 Q. Okay. We'll explore that in a minute.

10 So -- but you agree that sometime before March
11 22nd, 1994, it was taken down from the website, correct?

12 A. Yes.

13 Q. Do you have any idea when, as you sit here
14 right now?

15 A. No, I don't.

16 Q. Okay. So it could have been May 1994,
17 correct?

18 A. It could -- it could have been, simply
19 because, obviously, sometime in May it wasn't, and
20 sometime later it was taken down.

21 Q. Okay. So it could have been as early as May
22 1994?

23 A. Uh-huh.

24 Q. Yes?

25 A. I'm sorry. It could have been as early as

1 sometime in May that it was withdrawn.

2 Q. Okay. So at that point, you said it was on
3 the Dell (sic) external website?

4 A. That would be DEC.

5 Q. Dell, why did I say that? Must be thinking
6 about -- I've been staring at a computer a lot the last
7 couple of weeks. So I apologize. DEC. So it was on
8 the DEC external website?

9 A. Yes.

10 Q. Okay. Now, the way I understand it, at that
11 time, that website was not accessible through some kind
12 of search engine like, for example, Google, correct?

13 A. I don't believe there were any search
14 engines -- no, there weren't search engines at that
15 time.

16 Q. So then in order to access that paper, you
17 would need to be able to type the URL into your browser,
18 correct?

19 A. No.

20 Q. That's one way that you could access it,
21 correct?

22 A. That is one way you could access it.

23 Q. Okay. Well, why don't you tell me, what's
24 another way then?

25 A. I think I mentioned that there are two other

1 research labs in Palo Alto besides NSL, NSL being the
2 newest.

3 The other two, Western Research Laboratory and
4 the Systems Research Center, had been in existence for
5 quite a bit longer, and they have published and were
6 much, much larger than NSL, and they had published,
7 between them, over a hundred tech notes.

8 On our external website at Digital, all of
9 those, you would -- and, in fact, also the East Coast
10 Lab, Cambridge Research Lab, the tech notes for all of
11 those were on the same web -- on the same web page right
12 next to each other.

13 So anybody who had ever seen tech notes, tech
14 reports from the other labs would have been able to find
15 this without typing in a URL.

16 Q. Well, they would have to know that that site
17 existed, correct?

18 A. Yes.

19 Q. Again, there was no search engine, no, catalog
20 that would take them there?

21 A. No search engine. I can't speak about
22 cataloging.

23 Q. You're not aware of any, correct?

24 A. No.

25 Q. Now, you're not aware that anybody actually

1 accessed the paper during the month, maybe two months,
2 whatever that period of time was, that was available --
3 available externally -- on the external website at DEC,
4 are you?

5 A. Yes, I am.

6 Q. You are aware that somebody accessed it?

7 A. Absolutely, sir.

8 Q. Okay. Why don't you tell me how you're aware
9 of that.

10 A. So, as we established, when that paper was
11 available on the DEC website, it was available at a
12 particular URL. And there is a reference to it on a web
13 page that someone found and reported to me subsequent to
14 the 2005 deposition. And the website, it's a list -- as
15 was very common at that time, it's a list of, hey, here
16 are useful resources for this and that.

17 When I mentioned the cataloging thing, this
18 is -- this was very common, that because there were no
19 search engines, people would have -- you know, here's my
20 list of all the great resources that I know of.

21 One of the resources listed was a -- using Tcl
22 to process HTML forms, and the link that it points to is
23 the old Digital NSL URL. The only way that they could
24 have found that was to have retrieved it.

25 Q. So you're saying that there was a link to the

1 old URL?

2 A. Yes.

3 Q. And that URL doesn't exist anymore, correct?

4 A. Well, I won't say URL. There's no web server
5 that serves that URL, right.

6 Q. It's a broken link, so to speak.

7 A. That's correct. It's a broken link.

8 Q. And that was -- it was a broken link as of the
9 time the paper was taken down, correct?

10 A. Yes.

11 Q. And -- but you agree with me that at least as
12 of 2005, you had no documentation that anyone had
13 actually accessed this paper, correct?

14 A. Well, actually, I found that out -- found out
15 about this in late 2005.

16 Q. As of the time of your deposition --

17 A. No. Correct. I did not.

18 Q. Okay. Okay. So then when you gave that
19 answer to the deposition, that was an accurate answer?

20 A. Correct.

21 Q. And you don't have any printout of this
22 website or something that you've offered in this case,
23 correct?

24 A. I could show it to you.

25 Q. No. I'm only concerned with the evidence that

1 we have in the case, not some kind of speculation.

2 A. I'm sorry. It's not speculation.

3 Q. So let's now talk about, when you first
4 heard -- you're familiar, as I said, with Win Treese and
5 Andy Payne, correct?

6 A. Yes.

7 Q. And when you first heard, I think maybe
8 sometime in 2005, or maybe it was slightly before that,
9 that there was some statement that they had obtained a
10 shopping cart patent, you were a little miffed, I think
11 you said, right?

12 A. Yes. I was miffed the first time I heard
13 about it --

14 Q. Okay.

15 A. -- which was actually before 2005, well before
16 2005.

17 Q. Do you remember when that was?

18 A. No, not at all. It -- someone -- someone -- a
19 co-worker at the general center on the mail saying, hey,
20 the guys at Open Market got this patent or a shopping
21 cart patent, was the extent of the description.

22 Q. So the -- but at the time, when you initially
23 learned of it and you were a little miffed when you
24 heard that they had been granted a shopping cart patent,
25 you hadn't looked at the patent, correct?

1 A. Of course not. It was a knee-jerk reaction.

2 Q. But you have looked, at least briefly, at the
3 patents since then, correct?

4 A. I -- I tried to look at one of them. I got a
5 couple of pages into it and decided that I'm not a
6 patent lawyer. That's -- that's a completely different
7 language that I couldn't read.

8 Q. But at least as of -- based upon that review
9 as of 2005, you thought there was some overlap of your
10 ideas and some not overlap, correct?

11 A. No. Because I really wasn't able to make
12 sense of -- I know the patents, and I have
13 one-and-a-half patents. I am a co-author on one. I
14 know that there are these statements about mechanisms
15 and claims, and I didn't get far enough into it to
16 really figure out how -- you know, what the claims were,
17 and certainly not how they would overlap with the
18 bookstore.

19 Q. Okay. So let's look at your 2005 deposition,
20 Page 61, Line 4 to 10.

21 MR. NELSON: And let's blow up Lines 4 to
22 10.

23 Q. (By Mr. Nelson) So question -- this is as of
24 2005 -- are you still miffed?

25 ANSWER: No. Just -- I mean, it happened. I

1 certainly have thought better of Win and Andy than for
2 them to, quote, patent the shopping cart concept. Now,
3 since I have looked at them, there's some other stuff in
4 there. There's some overlap and some not overlap.

5 See that?

6 A. Okay.

7 Q. So was that an accurate statement at the time
8 you gave that answer?

9 A. Yes. I -- I will say I'm still not a -- I'm
10 still not a patent lawyer, so the claims -- the
11 arguments you guys have about what is and isn't and
12 claims and whatever, I don't know.

13 Q. Understood. Understood.

14 A. I mean, all I can say, you know, I know that
15 there were mentions of, you know, web server sends to --
16 I'm sorry -- browser sends to web server, et cetera, and
17 that's just true of any -- any website.

18 Q. Okay. Well, I thank you for your time, sir.
19 I appreciate you coming.

20 MR. NELSON: And I have no further
21 questions at this point.

22 THE COURT: Redirect?

23 REDIRECT EXAMINATION

24 BY MR. NICODEMA:

25 Q. Dr. Trewitt, Soverain's counsel showed you

1 this March 22, 1995, e-mail from Mr. Treese.

2 A. Yes.

3 Q. You remember that?

4 A. Yes.

5 Q. Asking you if he could distribute your Tcl
6 paper internally within Open Market.

7 A. Yes.

8 Q. And you told him he should -- that Mr. Treese
9 should stamp it Open Market in the interim.

10 A. Yes.

11 Q. Do you know if he ever did that?

12 A. I have no knowledge.

13 Q. Okay. Now, Soverain's counsel was very
14 interested in asking you if anybody had access to your
15 paper.

16 A. Correct.

17 Q. Mr. Treese had access, didn't he?

18 A. Oh, yes.

19 Q. And he took it with him from Digital, didn't
20 he?

21 A. Correct.

22 MR. NICODEMA: I have no further
23 questions.

24 MR. NELSON: Nothing further, Your Honor.

25 THE COURT: All right. Thank you. You

1 may step down.

2 All right. Who will Defendants' next
3 witness be?

4 MR. McSWANE: Rick Boyle, Your Honor.

5 THE COURT: All right.

6 How is the jury doing? Would you like to
7 take a break now, or press on for another 15 or 20
8 minutes? Break? No? Yes? No? Uh-oh, we have got a
9 deadlocked jury already.

10 [Laughter.]

11 THE COURT: All right. We will go on for
12 another 10 or 15 minutes, and then we will take a break.

13 MR. McSWANE: May I proceed, Your Honor?

14 THE COURT: No. Let's go ahead and take
15 a break now. The Judge is undecided, too. So we will
16 go ahead and take our break now. We will be in recess
17 until 10 minutes after 3:00.

18 (Recess taken.)

19 COURT SECURITY OFFICER: All rise.

20 (Jury in.)

21 THE COURT: Please be seated.

22 All right. You may proceed.

23 MR. McSWANE: Thank you, Your Honor.

24 RICK BOYLE, DEFENDANTS' WITNESS, PREVIOUSLY SWORN

25 DIRECT EXAMINATION

1 BY MR. McSWANE:

2 Q. Mr. Boyle, could you introduce yourself to us?

3 A. Good afternoon. My name is Rick Boyle.

4 Q. I can tell by the accent that you're not from
5 Texas. Where are you from?

6 A. I'm from Buchanan, New York.

7 Q. Tell us, where in New York?

8 A. Buchanan, New York, is a small town outside of
9 New York City. It's in Westchester County, and what I
10 mean by outside New York City, it's about 50 miles away
11 from New York City.

12 Q. All right. Are you married?

13 A. Yes, I am.

14 Q. And what is your wife's name?

15 A. My wife is Karen, and we've been happily
16 married for over 20 years.

17 Q. Does she work outside the home?

18 A. Yes, she does. My wife Karen is a biology
19 teacher in a local high school near us.

20 Q. Do you have any kids?

21 A. I have two.

22 Q. Okay. Boy or girl?

23 A. I've got two girls.

24 Q. All right. I bet that's exciting.

25 A. Yes. My oldest's name is Megan. She is 19

1 years old. She is in her second year of college. And
2 my little one, Cassidy -- she's not little anymore;
3 she's 15 -- and she's a sophomore in the local high
4 school.

5 Q. All right. Well, let's talk a little bit
6 about where you work.

7 Where do you work?

8 A. I work for Avon Products.

9 Q. All right. And what is your job at Avon
10 Products?

11 A. My current job at Avon Products is executive
12 director of IT.

13 Q. Okay. IT means?

14 A. IT is a term, information technology. What we
15 do for the IT Department in IT is develop software, have
16 infrastructure, stuff like that.

17 Q. You're going to have to slow down a little bit
18 for me. You're going fast. So if I can get you to slow
19 down a little bit.

20 A. Okay.

21 Q. Okay. Now, tell me about your duties and what
22 they are.

23 A. My duties as an executive director with IT is
24 I work on a daily basis with the business, and I liaison
25 between the business and IT. What I mean by that is,

1 our business partners are always up there, and I -- I
2 represent global sales.

3 So there are different -- different ways of
4 doing business and helping our representatives out. And
5 I then turn to my IT partners and we, hopefully, can
6 enable it.

7 Q. Okay. Do you have any college degrees that
8 have particularly helped you in your work as executive
9 director of IT?

10 A. Yes. I do. I have two degrees. My first
11 degree is a bachelor's degree on computer science that I
12 got in 1994. My second degree is from 1992. It's in
13 management of technology.

14 Q. Okay. And in your 25 years of working at
15 Avon, have you always worked in some field of
16 technology, including computers?

17 A. Yes, I have. Yes, I have.

18 Q. Okay. And currently, are you working with the
19 details of computers, or are you more management?

20 A. No. I'm in management. As an executive
21 director I work more with the business than I do in IT.

22 Q. Now, we're going to turn our attention to
23 Avon's business model and kind of take the jury through
24 the history of Avon.

25 First of all, what kind of business is Avon

1 in?

2 A. Avon is an American direct-selling business.

3 What it is, is we have independent contractors that sell
4 perfume. It starts with perfume and then we go into
5 different categories like makeup, skincare, and
6 handbags.

7 Q. All right.

8 MR. McSWANE: Could you give me Slide 2,
9 please.

10 Q. (By Mr. McSwane) For instance, kind of
11 describe what we see here on the screen.

12 A. These are some of our products that Avon
13 sells, like I said, with the different categories. One
14 in the top left-hand corner is one of our well-known
15 ones, Anew, a makeup. It's a skincare.

16 The second one over is probably our best known
17 product, which is Skin So Soft. It is a bath oil as it
18 says on the screen, but it's also well-known for helping
19 with mosquitoes.

20 Q. All right. We can use it around here.

21 Now, starting in 1986, did Avon develop an
22 innovative way of marketing and selling its products?

23 A. Yes, they did.

24 Q. Tell us about it.

25 A. Well, the founder decided at the time to do

1 something different, and what I mean by that is --
2 instead of, in 1886, building many stores, what he
3 decided to do is bring the store to the customer through
4 an independent sales representative, the Avon lady.

5 Q. And when you say bring the store to the
6 customer, what -- what are you talking about in terms of
7 the store?

8 A. Well, the store to Avon and to their sales --
9 to sales representatives is our brochure. Our brochure
10 is basically given out to the representatives for them
11 to be able to go meet with their customers, look and
12 market the product, and then hopefully sell the product
13 to their end consumer.

14 MR. McSWANE: Your Honor, may I approach
15 the witness?

16 THE COURT: Yes, you may.

17 Q. (By Mr. McSwane) For instance, is this a copy
18 of a brochure?

19 A. Yes, it is.

20 Q. Take me through what a representative does
21 when the representative is taking that store -- that
22 brochure to the customer.

23 A. Well, this brochure -- and we give out a
24 brochure to the representatives every two weeks. And
25 what the representative will most likely do is go to the

1 customer's house, maybe to a coffee shop, meet with
2 their customers.

3 And what I mean by the store is in different
4 parts of the book are different sections, be it
5 fragrance, be it skincare, and those are just like
6 walking them through an aisle of a retail store.

7 Q. Like going to Brookshire's and walking down
8 the aisle and picking out a product?

9 A. Yes. So the customer would go through -- the
10 representative would go through the brochure with the
11 customer and talk about the different products here and
12 then different -- on the different pages.

13 Q. Or the Avon ladies, or the sales reps, are
14 they employees of Avon?

15 A. No, they are not. Avon sales representatives
16 are independent contractors.

17 Q. What --

18 A. They are not employed by Avon.

19 Q. -- does that mean?

20 A. What it means is they're not employed by Avon.
21 And what it means to them is they're running their own
22 independent business.

23 Q. All right.

24 A. That's a big thing for the sales ladies.

25 Q. Okay. For instance, looking at this slide, I

1 want you to kind of describe, first of all, is that the
2 founder, David McConnell, on the left?

3 A. Yes. On the slide here on the left-hand side,
4 that is the founder from 1886, David H. McConnell.

5 Q. And he was the one that thought about the idea
6 of taking the brochure to the customer?

7 A. Yes, sir.

8 Q. Taking the store --

9 A. Yes, he was.

10 Q. -- through the use of independent sales reps,
11 allowing them to have their own company, and then sell
12 the product to a customer --

13 A. Yes --

14 Q. -- correct?

15 A. -- he did.

16 Q. All right. Who was the first Avon lady?

17 A. Well, as you see here on the slide, the second
18 person -- and this actually is our first ever sales
19 lady. Her name was Mrs. Persis Foster Eames Albee,
20 better known as PFE Albee, Mrs. Albee.

21 So Mrs. Albee was the very first independent
22 contractor or the one known as the Avon Lady in 1886.

23 Q. All right. And looking in the middle there, I
24 recognize the sales rep in the middle.

25 Can you identify who that was?

1 A. Yes. The sales lady in the middle of your
2 screen in the red there -- excuse me -- is probably one
3 of our most known ones from about the '60s, and that you
4 might know is the Avon lady or ding-dong, Avon calling,
5 she was used in the commercials; and I think it was in
6 the '60s, if I get that right. But she was used for a
7 lot of our advertisement.

8 Q. Keep following through. We see several
9 depictions of some reps towards the end of the
10 right-hand side.

11 What are we depicting here?

12 A. Through the years, Avon not only expanded its
13 business by means of market. So what that shows here is
14 that we are now a global company. These are different
15 representatives. And as you go all the way through,
16 like the second to the right, is one that shows that we
17 are a global company. That's the representatives or
18 models they used during the -- some advertisement.

19 And the last one on the right-hand side is an
20 example of a recent Avon representative, sales
21 representative.

22 Q. Okay. And so take me -- what's depicted at
23 the bottom of this screen?

24 A. The bottom of the screen, the key here is
25 Avon's been in business for 125 years, and one of the

1 things Avon is most proud of is it's empowering women.

2 And what it shows here is that before women
3 were able to vote, before women got a Nobel Peace
4 Prize -- sorry -- or they were elected to the Supreme
5 Court, they were already out there doing their own
6 independent business.

7 So what this shows here is that for over a
8 hundred years, 125 years, Avon has been empowering women
9 to run their own unique businesses.

10 Q. All right. Now, what else does Avon do to
11 advance the interest of women?

12 A. Couple of things that they do right now is
13 Avon's big on raising awareness and funding for
14 different women's causes, like breast cancer and
15 domestic violence.

16 And one of the big things that I know I'm
17 close to is the Avon walks. You might have heard of
18 them. They are in many countries. In the United States
19 alone, we have about four cities that do the walks.
20 And by the end of this year, 2011, we will -- we will
21 have raised over \$400 million to support breast cancer
22 through these walks.

23 Q. Is your wife Karen involved in those walks?

24 A. Yes. My wife Karen has had the experience of
25 the 39-mile walk, and she's done it three times, and

1 she's raised over \$10,000 doing those walks.

2 Q. So when we look at these independent reps, how
3 many of them are there in the United States?

4 A. In the United States, there are over 600,000
5 active representatives.

6 Q. And, in fact, it was surprising to me.
7 How many independent representatives are there
8 in East Texas?

9 A. In East Texas, there are 721 active
10 representatives.

11 Q. And if we look at Smith County, Tyler, Texas,
12 alone, how many of them are there?

13 A. There's 281 active representatives.

14 Q. Okay. Now, we're going to go a little bit
15 deeper into this selling process that goes on between
16 the independent sales rep and the customer, okay?

17 A. Yes.

18 Q. You already showed us the brochure, okay? And
19 show those through the brochure with their customer,
20 okay? Whether they do it through Starbucks or whether
21 they do it at their house, but what is the objective of
22 that independent rep?

23 A. The independent rep, there are two things
24 within the independent rep's experience with their
25 customers. And one is the social. A lot of

1 representatives do a social. But the key here is
2 obviously the representative is in it to make money.

3 So when they're sitting down with their
4 customer and they're going through the brochure, one of
5 the customers might say I would like to order this
6 product from you.

7 So what the representative will do is write
8 down on what we provide them is these customer scopes.
9 And as they're going through, the representative would
10 write down for the customer this is the time and the
11 quantity you would like us, me, to order for you.

12 Q. Okay. And you mentioned the word campaign.
13 What are the campaigns? What are you talking about
14 there?

15 A. Well, Avon's business model is over a year,
16 each -- every two weeks a brochure goes out, and we call
17 it a campaign. A campaign is basically a selling cycle.
18 If you think about it, every two weeks, Avon provides a
19 brochure to the representatives so they can go out and
20 meet with their customers. And within a campaign, we
21 have different products, different promotions, different
22 pricing.

23 So it's really about keeping energy in the
24 field and opportunities for the representative to sell
25 the different products to their customers.

1 Q. Now, are these examples here on Slide No. 5,
2 are these examples of some recent campaign brochures?

3 A. Yeah. These are two examples of the recent
4 brochures. One says Campaign 24 and Campaign 25,
5 getting ready for holidays.

6 MR. McSWANE: Your Honor, may I approach?

7 THE COURT: Yes, you may.

8 Q. (By Mr. McSwane) Now, you mentioned that a
9 representative, when she meets with her customer, is
10 trained to get the customer to order a product and is
11 going to use the customer's slip to do that.

12 A. Correct.

13 Q. Can you identify what I just gave you?

14 A. Yes. This is an example of one of the current
15 customer slips that the representatives use.

16 Q. Okay. So on Slide 6, we've got an example,
17 don't we, of these customer slips?

18 A. And as you can see here, this example we have
19 here is that a representative works with the customers
20 and put in the quantity and the item or the product
21 number of that product the customer wants.

22 Q. So the picture I get is that the customer is
23 wanting this Pink Flush, and so the representative is
24 writing down the quantity and the product number on this
25 customer slip?

1 A. Yes. That's the process. Yes.

2 Q. Okay. And then will she do that for as many
3 customers as she can get to order product?

4 A. Well, hopefully, she has a good day and she
5 comes home with many customer slips. But for each
6 customer she has, the key is, again, what is the product
7 the customer wants. She'll write down item, quantity --
8 item quantity for each of those customers.

9 Q. Has that process materially changed or that
10 form materially changed in 125 years?

11 A. No. The process itself is the representative
12 meeting with the customer taking their order and putting
13 it down, item quantity.

14 Q. All right. Let's turn to the ordering of
15 products, okay?

16 How would the rep go about ordering products
17 from Avon?

18 A. Well, what the rep would do -- a typical
19 representative, again, in a two-week cycle, I have
20 hopefully collected a number of these customer slips.

21 What they would do, when they're getting ready
22 to send their order to Avon, because it's the
23 representative to Avon, they would take these customer
24 slips; they would fill out what we call a representative
25 form.

1 And what they're doing here is identifying
2 item quantity. So they take their customer slip; they
3 write down on this -- they'd find on this form the item
4 number. And next, as you can see to the right, they
5 would fill out the quantity. So they would have to do
6 this a couple of times, because on each of their
7 customer slips, they would have to take and identify
8 those items on this form and type on -- and write in the
9 number of products or quantity of a product that -- that
10 their customers want.

11 Q. And would the sales rep use a pen or a pencil
12 when they were doing that?

13 A. Probably the first few times, a pencil
14 because, hopefully, they were erasing it to add more
15 quantity.

16 Q. All right. So they were constantly having to
17 make changes in that booklet, correct?

18 A. Yes. Yes. If I had one customer slip and I
19 identified the product, I would say, oh, okay, she wants
20 two, and I would write down a two. Then I would go down
21 through my next customer slip and I'd see that same
22 product. She would have to make that two into, let's
23 say, a five, let's say, because that other customer
24 wanted three.

25 Q. Okay. Now, how would you get -- let's talk

1 about prior to '92 or, you know, prior to then.

2 How would the rep get the order form to Avon?

3 A. She would mail it, and she would mail this
4 complete booklet. You see on your screen here as an
5 example of one page, but this booklet was multiple
6 pages. She would take that and mail it to Avon, so Avon
7 could then process the order.

8 Q. Okay. And then how long did it take for Avon
9 to get it, usually?

10 A. Well, we are dependent on the mail, but on
11 average, we said, because we are on different
12 distribution sites, where it took about two to three
13 days.

14 Q. All right. Now, first of all, did the rep
15 know at the time she sent this paper, the order form,
16 in, did she know what the actual price she was going to
17 be charged for what she was ordering?

18 A. No, she did not.

19 Q. Okay. Did she know what quantity she's going
20 to get for sure?

21 A. No, she does not, not at the time of placing
22 the order.

23 Q. Okay. When does the representative find out
24 the actual price of what she ordered and the actual
25 quantity of what she ordered?

1 A. Unfortunately, the representative will not
2 know until that box shows up at her house. She opens
3 the box, sees the product that's in there, and also
4 within that box is the invoice.

5 On that invoice, it will say what Avon sent
6 back to her, hopefully, and what the price -- actual
7 price is of those products.

8 Q. All right. So prior to 1992, until she got
9 that final invoice in the box with her product, the
10 representative would not be able to know what the price
11 of the product was or whether or not she was receiving
12 that product?

13 A. She would not know the final price, and she
14 would not know what product she was going to receive --
15 guaranteed to get delivered to her.

16 Q. Well, that would seem to me to be creating
17 some type of problem. I mean, if the rep doesn't know,
18 what did Avon do to help the rep out in this situation?

19 A. Well, what Avon did was we started thinking of
20 ways that we can help her with estimating what was going
21 to be sent to her and what -- actually what she was
22 ordering and what we were going to send her.

23 Q. All right. And did you do something like
24 extend credit to the rep?

25 A. Yeah. What we do in our model is -- let's

1 take an example of a new rep, because that's where it
2 will be -- or any representative.

3 When you submit your order to Avon -- in this
4 case we went through, I mailed my order to Avon -- Avon
5 will send you your product. And let's just say, for
6 example, my estimate was a hundred dollars. I can send
7 that order in. Avon will send that product. It will
8 show up at my doorstep.

9 The model there, or our business model, is we
10 extend credit to representatives, so then they have the
11 opportunity to deliver their product to their customers,
12 collect the money from their customers -- we don't know
13 how much they're collecting. That's their own choice --
14 but then that will help them pay down their credit with
15 Avon.

16 Q. All right. Now, again, representatives still
17 mail their orders in to Avon today?

18 A. Yes. And we still have representatives that
19 do that.

20 Q. Well, I'm sure things changed with technology
21 started advancing a little bit in the process of
22 ordering for those reps; is that true?

23 A. Yes, it did.

24 Q. All right. What was the first real change in
25 technology that occurred in terms of the ordering?

1 A. Well, the first change we -- we introduced was
2 the concept of faxing your order to Avon instead of
3 mailing it to Avon.

4 Q. So when the fax machine came in to existence,
5 how did that help the rep?

6 A. Well, it helps the representative. It only
7 helps the representative at the end of the process, not
8 in the beginning. And what I mean by that is I still
9 have to go out and meet my customers. I still have to
10 write these customers' quantity. I still have to take
11 that and put it onto a form.

12 But the big advantage was to -- I can -- I
13 don't have to mail the form. I gain that two to three
14 days selling, because I can fax it, and it would go into
15 this same systems we have in place to process the order.

16 So the biggest advantage to the representative
17 and why Avon did that was to, hopefully, save that two
18 to three days of selling. Gave the representative more
19 time maybe to meet more customers and build their
20 business.

21 Basically, hopefully, it gave the
22 representative back more time to do what they want with
23 it.

24 Q. All right. And so even when the fax machine
25 came out and even during that time, which I see the fax

1 machine is still currently used; is that correct?

2 A. It's an option for the representatives.

3 Q. Okay. Under that ordering system, is it -- is
4 the price still estimated?

5 A. Yes.

6 Q. Is the quantity still not known?

7 A. Correct.

8 Q. And it doesn't get known, neither one of them,
9 neither price nor quantity, until a final invoice comes
10 in the box?

11 A. No. Unfortunately, no. We didn't change
12 anything in the process of getting the order to them or
13 their understanding of what they had, you know, to pay
14 the extra price until the invoice comes.

15 Q. What's the next change in technology?

16 A. Well, the next change in technology is right
17 around there was the idea of a -- I call it a handheld
18 device. We called it POET, which stood for personal
19 order entry terminal, and that was the next thing we
20 made available to our representatives.

21 Q. All right.

22 MR. McSWANE: Would you give me Slide No.
23 10?

24 Q. (By Mr. McSwane) What we have here -- and I'm
25 trying to be careful with it -- but is this an example

1 of the POET device?

2 A. Yes, it is.

3 Q. Okay. Why don't you tell us how POET worked.
4 First of all, what did it stand for?

5 A. POET, it stood for personal order entry
6 terminal.

7 Q. Okay. And now tell me how POET worked.

8 A. Well, the way POET worked, I guess I'll call
9 it, it just took some of the stuff we did -- what a
10 representative did and put it onto a handheld device.
11 And what I mean by that is, the customer slips, they can
12 now do on a handheld device. What they did is, again,
13 sat down with their customers, found out what they
14 wanted to order, but they had the opportunity now to go
15 to this device and type in item quantity, item quantity,
16 then they would send to it Avon. Similar advantage as
17 the fax, because you could plug it into your phone line,
18 and you could send it in and save those two days
19 selling.

20 Q. But did the rep still have to enter item
21 quantity, item quantity?

22 A. Yes. The functionality is the same, because
23 they would take their customer slips or they could type
24 in item quantity, item quantity, item quantity.

25 Q. And I'm assuming it's still the same, even

1 during the days of POET, that the representative would
2 not know what they were going to pay or what they were
3 going to get until they get that final invoice in the
4 box.

5 A. Correct.

6 Q. Okay. What's the next change --

7 A. Next --

8 Q. -- in technology?

9 A. -- change happened when PC Avon was
10 introduced.

11 Q. Okay. And tell me what PC Avon is.

12 A. Well, PC stands for personal computer. So PC
13 Avon was a software package that we -- that a
14 representative could download to their home personal
15 computers. And what this really was, is not only the
16 ability for the representative to do their business,
17 like we've been talking about, and get their orders to
18 Avon, it also took the next step for them to help manage
19 their business, because we leveraged the power of
20 personal of a personal computer.

21 And what I mean by that is they could order
22 from Avon. They could go on and do queries about their
23 account to see what their status is on their account,
24 see how their credit limit is doing. They also were
25 able to get back and understand prior order history and

1 put in the information at a customer level.

2 Q. All right. Let me stop --

3 A. Empower the computer.

4 Q. Let me stop you there.

5 MR. McSWANE: Go to Slide No. 13, please.

6 Q. (By Mr. McSwane) Is this an example of how the
7 rep would enter her order --

8 A. Yes.

9 Q. -- with PC Avon?

10 A. Yeah. And what you see here is, again, we
11 leverage what we do with the fax. We leverage what we
12 do with POET. It's still the representative working
13 with customers, coming back, taking their customer
14 slips, and doing item quantity, item quantity, and
15 entering that information into their home computer.

16 MR. McSWANE: All right. Can I have
17 Slide No. 14, please?

18 Q. (By Mr. McSwane) Okay. That's marked down to
19 quantity. You mentioned that a PC Avon, that they do it
20 on a transaction history, if they wanted it.

21 Is this a copy of a transaction inquiry or the
22 process to start to get one?

23 A. Yeah. This is the screen that the
24 representative would go to, and basically what you see
25 here is part of the user manual that we provided. But

1 the screen there is the option that they chose to do an
2 inquiry on their account.

3 Q. All right.

4 A. So --

5 MR. McSWANE: Can you give me the next
6 slide?

7 A. -- a lot of the information came back like
8 what they would get similar to a call center, what is
9 their status with Avon.

10 Q. (By Mr. McSwane) All right. And is this an
11 example of the type of screen they would get when they
12 used PC Avon?

13 A. Yeah. Well, you can see here it talks about
14 the different transactions they have done with Avon.
15 They could see it now at their home personal computer
16 instead of having to call a call center agent.

17 Q. Okay. Now, so far, just so we're clear, all
18 the way up through PC Avon, am I correct in that the rep
19 does not know what the rep's going to pay, and the rep
20 does not know what the rep's going to get, until they
21 get that final invoice in the box with their product at
22 the end of the campaign?

23 A. That is absolutely true.

24 Q. Okay. Now, the next step was avonorder.com;
25 is that correct?

1 A. Yes.

2 Q. And PC Avon was introduced in 1993; is that
3 correct?

4 A. 1993, yes.

5 Q. Approximately when was avonorder.com created?

6 A. Well, in 1998, Avon took advantage of -- you
7 know, everybody was working on the internet, so it was
8 our time to look at what we can do to help the
9 representatives via the internet. That's what we built
10 for the representatives, this website called
11 avonorder.com.

12 Q. Okay. And so how long did AvonOrder last?

13 A. AvonOrder did not last too long. It only
14 lasted two years. The main thing we did here was take
15 this -- you saw earlier the form the representative
16 filled out. You saw the idea of a fax. We just took a
17 form and put it on the internet. They would just go to
18 do item quantity, item quantity, and send that order.

19 Q. As far as the fundamental form of how that
20 sales rep entered an order, did anything materially
21 change with AvonOrder?

22 A. Nothing changed in the process of gathering
23 orders. The only change in the process was the device
24 with which they sent the order, but the form is the
25 form; the process is the process.

1 Q. Still item quantity?

2 A. Item quantity is the quickest way for them to
3 get their customer slips to Avon.

4 Q. Did you have any -- did Avon have the ability
5 to communicate with the sales rep through avonorder.com?

6 A. No. It was just a standard form that they
7 could submit their order to Avon.

8 Q. Okay. Just so we -- before we go to YourAvon,
9 just so I'm clear, before we even get to YourAvon, what
10 means were available to the reps to place their orders
11 on Avon -- or to Avon, other than through YourAvon?
12 What are still available?

13 A. Well, a few of them are still available. You
14 still have -- representatives do still send us the paper
15 form. They just love it. I don't know why. They still
16 can fax an order to the branch or the warehouse -- I'm
17 sorry -- the branch, the warehouse.

18 They still can use -- pay Avon and we do have
19 a little under a thousand representatives today still
20 using PC Avon. Those are the --

21 Q. What about the call centers?

22 A. Call centers are always there. A
23 representative can call the Avon call center anytime to
24 talk to a call center rep about their account or place
25 an order with Avon.

1 Q. All right.

2 MR. McSWANE: Could you give me Slide 19,
3 please?

4 Q. (By Mr. McSwane) Okay. So you're Avon. Did
5 it come about the year 2000?

6 A. Yes, it did. In September of 2000, YourAvon
7 was launched.

8 Q. Okay. And is this Avon's current website for
9 its sales reps?

10 A. Yes, it is.

11 Q. Okay. Can a customer get on YourAvon?

12 A. No, they cannot. It's a representative site.

13 Q. Okay. And the site that anyone can get on is
14 avon.com?

15 A. That's correct.

16 Q. Okay. Now, what benefit to Avon is it for the
17 representatives to use youravon.com and submit their
18 orders through youravon.com?

19 A. The representatives -- the power that we put
20 out there is we put more information out there. Yes,
21 they can go place their order, and believe me, that's
22 the key thing for them to run their business.

23 But we also put out there -- because it's a
24 two-way communications now -- we can put material out
25 there to help them understand how to grow their

1 business. We can put different training material out
2 there. So we have a mechanism now that we can promote
3 to them ways that they can enhance their business.

4 Q. All right. We're going to get to that in a
5 little bit.

6 Let's talk a little bit about who developed
7 youravon.com. Who did that?

8 A. Avon was developed -- we brought in IBM. IBM
9 developed Avon.

10 Q. So --

11 A. I'm sorry. YourAvon.

12 Q. -- you contracted with IBM for them to place
13 at Avon youravon.com?

14 A. Yes. IBM brought in the platform and brought
15 in the subject matter experts on how to implement this
16 tool.

17 Q. And as far as the technical details of how IBM
18 did that, do you have any knowledge of that?

19 A. That's what we brought them in for. No, my
20 position at the time was management. I oversaw the
21 project, but gave them money to develop it for us.

22 Q. Okay.

23 MR. McSWANE: And would you give me Slide
24 20? And that's DTX289.

25 Q. (By Mr. McSwane) Looking at Slide No. 20, is

1 that an example of what you see in the first home page
2 of youravon.com?

3 A. Yes. This is the opening screen, and you can
4 see in the top left-hand corner there, that's where the
5 representative would log in. After that -- with using
6 their account number. That's way we can identify our
7 representatives, through an account number and their
8 password.

9 Q. All right. Well, let's click that and go to
10 the next screen.

11 So when I get into the site, what does
12 Slide 21 or Defendants' Exhibit 289 show?

13 A. This shows that the representative went to the
14 my orders tab, and you can see what happens when you
15 open my orders tab. This is when the representative is
16 ready to build their order that they're going to send to
17 Avon.

18 And by default, it goes to this screen that
19 you see here called the item entry form. Just like all
20 the things you have seen in the past, the representative
21 now uses this to type in the item quantity, item
22 quantity, and then to build their order that they're
23 going to send to Avon.

24 Q. Okay. Now, first of all, do the
25 representatives learn the product numbers pretty well?

1 A. You know, they'll notice some of them, but
2 because we change the brochure, like I said, every two
3 weeks, the product number changes the identity --
4 identity changes. They rely on their customer slips
5 still, and they will take them and go here and go --
6 they can do it heads down; in other words, item
7 quantity, item quantity. I can be flipping through my
8 customer slip.

9 Q. So when they're working with the customer,
10 they will have written on their customer slips what the
11 product number was and the quantity?

12 A. Yeah. The process is the same. They gather
13 the customer slips and now they come to this device to
14 submit their order to Avon.

15 Q. Okay. Now, what is this form called at Avon?

16 A. Again. Sorry.

17 Q. What's this form called at Avon now?

18 A. We call it an item entry form.

19 Q. Okay.

20 A. Because it's about the item quantity.

21 Q. Let me look at some things.

22 MR. McSWANE: And could you blow up that
23 bottom paragraph? No.

24 Q. (By Mr. McSwane) Okay. Looking at that bottom
25 paragraph, okay -- and, hopefully, the jury can see

1 it -- we've highlighted where it says: Your invoice
2 will reflect your actual price.

3 Do you see that at the bottom?

4 A. Yes, I do.

5 Q. Okay. So all of the order form -- what is
6 your invoice? What's that talking about?

7 A. Well, that is referencing, just like we talked
8 about, the invoice that comes back to you when your
9 order's completed.

10 Q. Okay. And let's understand why it might be
11 that way.

12 A. Well, you can see here there are a couple of
13 things in that note down at the bottom that, hopefully,
14 we can pull up for you. But you can see the
15 highlighted, the third to last column on the right,
16 price with an asterisk which drives that.

17 Basically, what we're telling the
18 representatives at the bottom is, while you're building
19 your order online, we cannot tell you the actual price.
20 We can only tell you an estimated price.

21 And why is that?

22 Because we don't -- we're not doing the
23 calculations of, you know, this is a buy one/get one
24 free, or because you've been with us and you have placed
25 so many orders, whatever it is, your commission is going

1 to be so much.

2 So at the time they're building this order,
3 just like the time they're building the order on any
4 mechanism that they're sending to Avon, be it the
5 purchase order form, POET, PC Avon, we can't tell them
6 how much this product is going to cost.

7 So the reasons are, as stated down below, it
8 could be buy one/get one free or some kind of promotion
9 that we can't calculate, unfortunately.

10 Secondly, we can't guarantee that that product
11 is going to show up at your door at the time you're
12 placing this order.

13 Q. Okay.

14 MR. McSWANE: And let's click and go to
15 Slide 23.

16 Q. (By Mr. McSwane) Okay. Now, we're looking
17 at -- we were looking at -- okay. We are now looking at
18 Slide No. 23.

19 That's where we've gone on to view our order
20 summary, correct?

21 A. Yes, it is.

22 Q. Okay. Again, at the bottom, do we have that
23 same disclaimer language that says it's an estimated
24 price and we can't guarantee you the quantity?

25 A. Yes, it does. It's the same thing you'll see

1 on the prior slide. We talked to the representative.

2 Again, this is only an estimate. When you receive your
3 order from Avon and you get the actual invoice, we will
4 tell you how much you owe Avon.

5 Q. Okay. Well, look at that area in green where
6 it says availability. What does that indicate?

7 A. What we try to do here is -- again, we can't
8 promise, unfortunately -- but we try to let the
9 representative know that that product will more than
10 likely be available for you.

11 And what do I mean by that?

12 I'm a representative. I'm building this order
13 today, and then I'm going to send it to Avon.

14 Well, it gets to Avon. Avon's warehouse has
15 to process this. Unfortunately, I ordered -- I can't
16 read this without my glasses -- a black mascara there.
17 I ordered two for my customer, but it's a hot product.
18 We sold a lot in our warehouse.

19 My order -- we batch the orders at Avon. They
20 come in; they get processed in the warehouse. So the
21 time I'm placing the order, Avon is telling me, at this
22 moment, we're feeling good that you're getting that
23 product. So we'll give you the green check, but it's
24 not a guarantee.

25 There have been many times that we've said

1 that or when the box shows up, unfortunately, it's not
2 there for our representatives.

3 Q. Okay. So now let's submit the order to Avon.

4 Okay. And tell me what this screen indicates.

5 That's Slide No. 24.

6 A. When they go to the screen, it's an order of
7 confirmation screen. And what that's telling the
8 representative there is that Avon has received their
9 order. You have pressed the submit button. We've
10 received your order.

11 So we give them a confirmation that we've
12 received their order. Just makes the representative
13 feel that you got it. You know, I press this button;
14 you got it.

15 What it doesn't do or what we cannot do
16 again -- and we show this in the highlights for you
17 there -- is we cannot tell how much that order is going
18 to cost. Same thing we've been talking about for the
19 last few slides. At this point in time, we still cannot
20 tell a representative what they're going to get and how
21 much it's going to cost them, because it has to be
22 processed in our warehouse.

23 MR. McSWANE: For the record, that was
24 Slide 27.

25 Q. (By Mr. McSwane) But what I really want to

1 know, is can the rep pay from this or the previous
2 screen, if she wanted to?

3 A. You cannot pay. She cannot pay for the order
4 at this point.

5 Q. So what is the purpose of giving her the
6 confirmation message?

7 A. Basic recordkeeping. And I will call it
8 recordkeeping. Now that we've got the order, so they
9 can write down this confirmation, if they ever had to
10 call that call center about where did my order go or
11 order status.

12 But, normally, it makes them feel good that we
13 got their order.

14 Q. I see a big red button there that says pay
15 Avon.

16 A. Uh-huh.

17 Q. Okay. Let's hit that button.

18 I don't think we have that, but if we hit that
19 button -- apparently, we missed a slide -- what comes
20 up?

21 A. Basically, what that means is we'll give the
22 representative the opportunity to pay Avon, right?
23 You've been ordering product. Eventually you have to
24 pay. But it really means to look at your balance with
25 Avon and pay down your credit.

1 I think I said to you earlier that Avon
2 provides the representatives at the start of their
3 business that you're buying things on credit. So if I
4 place an order, Avon will send to it me. I place
5 another one; Avon will send to it me.

6 But what that pay Avon button does is allow
7 you to go to another place on the site, see what your
8 balance is, and get your account in good standing and
9 pay down your credit balance.

10 MR. McSWANE: Would you give me Slide 24
11 again, please.

12 Q. (By Mr. McSwane) So to make something clear, I
13 see an area that says order, okay?

14 MR. McSWANE: And can you give me the
15 next slide. The one after that when we submit the
16 order.

17 Q. (By Mr. McSwane) Okay. So far, we've seen an
18 order cart.

19 A. Yes.

20 Q. We've seen submit and order.

21 A. Yes.

22 Q. Okay. Does YourAvon have a shopping cart?

23 A. No.

24 Q. Okay. And why not?

25 A. Well, the big thing is the shopping is already

1 done. And, again, the business model is the rep -- the
2 customer shops from the representative via the -- you
3 know, me walking to your house, or whatever, and talking
4 to you. The representative orders from Avon. So they
5 don't shop; they order.

6 Q. Is there any message that you've seen so far
7 that relates to how the rep can pay for her current
8 order?

9 A. She cannot pay for her current order, so
10 there's no message.

11 Q. Okay. Now, we've looked at what happens when
12 we go through the item order.

13 Is there another way in which you can order
14 product -- a rep can order product?

15 A. Yes, there is.

16 Q. And what is that way?

17 A. That way is what we'll call is the electronic
18 brochure.

19 MR. McSWANE: Could I have Slide 29,
20 please?

21 Q. (By Mr. McSwane) So looking at Slide 29, is
22 that an example of the shop brochure feature that's on
23 youravon.com?

24 A. Yes, it is.

25 Q. Okay.

1 MR. McSWANE: Thanks. I think that's
2 Slide 30. I've been reminded, DTX289.

3 And go ahead and give me Slide 31,
4 please.

5 Q. (By Mr. McSwane) So if we click on Slide 30,
6 we get Slide 31, right?

7 A. Yes.

8 Q. Let's click on Slide 31 and see what we get.

9 Okay. So now we're at this Extra Lasting
10 Eyeshadow, okay? So tell me what the rep does to order
11 Extra Lasting Eyeshadow.

12 A. What the rep does is -- the best way to
13 describe why we did this and what to do, I might have
14 given out my brochure to a few customers. And the
15 customer -- I left it with them. The customer went to
16 the brochure, went through the pages, and highlighted
17 what they wanted to order from me so I can get it from
18 Avon. But I left it at my house.

19 So the easiest way for me to take this now
20 brochure and get it -- it could be an easier way to get
21 it -- my order in, was to go through this what we call
22 electronic brochure. So as I'm flipping through this
23 brochure here that my customer ordered from, I can then
24 go to this screen and then in this example here -- I
25 forget what page we're on -- but here's the eyeshadow

1 that my customer wanted me to order for her. So I would
2 go to the screen, click on that eyeshadow, choose the --

3 Q. Rose Mist?

4 A. I don't really use eyeshadow too often these
5 days. And then I would type in the quantity number.

6 Q. Okay. If you wanted to get to ergonomic
7 tweezer, could you get that, too?

8 A. Yeah.

9 Q. Okay. So the order has been made. You've
10 clicked on that. The rep has put item quantity. Then
11 it comes to this screen, does it not?

12 A. Yes, it does.

13 Q. And the rep can view the order, or it says
14 return to shopping. I thought you told me there was no
15 shopping cart.

16 Why does it return to shopping?

17 A. Well, it's lingo, because what we're trying to
18 do here is tell them that, again, the mechanism they've
19 chosen to use, is there a problem going through a
20 brochure. So they're going to click and go back through
21 that brochure.

22 We want to drive them back to the same place
23 they came from. So, again, I think this example was
24 Page 3 I was on. I can continue to flip on my online
25 brochure, just like I flip through my customer's order

1 here, and continue to do the item quantity, and then
2 turn it in.

3 Q. And was it important to Avon to have the same
4 e-brochure for a customer as a representative might use?

5 A. Yeah, because this way we're both looking at
6 the same thing.

7 Q. Both on the same page?

8 A. Both on the same page, yes.

9 Q. All right. Now, in terms of percentage of
10 use, what percentages of the reps use that item order
11 form?

12 A. We -- we see that's probably somewhere between
13 70 and 80 percent. And the reason being is, one, the
14 process hasn't changed. They're used to collecting the
15 slips. Doing item quantity is much faster.

16 This process that we just walked through is a
17 slower process, because I'm clicking, looking, clicking,
18 looking. So 70 to 80 percent of our orders that are
19 built by a representative on YourAvon are done by the
20 item entry screen. And that's why it's our default
21 screen when they go to build their order.

22 Q. In terms of the item order -- item entry, is
23 that process of a rep ordering that way changed
24 materially for 125 years?

25 A. No. The business process has been the same

1 since 18 --

2 MR. McSWANE: Can I have Slide 37,
3 please.

4 Q. (By Mr. McSwane) So, essentially, the way
5 Ms. PFE Albee and the way current reps do things, in
6 terms of ordering, are materially the same --

7 A. Materially the same, yes.

8 Q. -- compared to technology?

9 A. It's to get them -- help them get their order
10 to Avon faster.

11 Q. Mr. Boyle, when Avon purchased the IBM system
12 to introduce YourAvon to the Avon system, did you or
13 anybody in Avon believe they would be accused of
14 infringing a patent by buying a product from IBM?

15 A. No.

16 Q. Okay. At any time YourAvon was implemented,
17 had you ever heard of Open Market?

18 A. No, I have not.

19 Q. How about Divine?

20 A. No.

21 Q. How about Soverain?

22 A. Not till --

23 Q. How about Win Treese?

24 A. No.

25 Q. All right. How about the '314 patent?

1 A. No.

2 Q. How about the '492 patent?

3 A. No.

4 Q. Are you familiar with eCommerce companies like
5 Amazon?

6 A. Yes, I am.

7 Q. Have you, in fact, used an eCommerce site,
8 like Amazon, to purchase a product?

9 A. Yes, I have.

10 Q. Okay. Is the Avon site, YourAvon site, an
11 eCommerce site like Amazon?

12 A. No, it is not.

13 MR. NELSON: He is giving an expert
14 opinion.

15 MR. McSWANE: I think he can -- he's been
16 on a shopping cart. He can compare the two.

17 THE COURT: Restate your question.

18 MR. McSWANE: All right. I will just
19 move on.

20 Q. (By Mr. McSwane) In Terms of avon.com, okay,
21 and YourAvon, do you consider them to be an eCommerce
22 company like Amazon?

23 A. No, I do not.

24 Q. Okay. And why not?

25 A. Our business model is different. When I go on

1 Amazon, when you go on Amazon, you're buying something
2 from Amazon. Avon's business model is the customer is
3 shopping through the independent contractor, the
4 representative. The representative orders on Avon.
5 It's a different model.

6 Q. Is an order cart a shopping cart?

7 A. Not to me.

8 MR. McSWANE: Pass the witness.

9 MR. NELSON: May I proceed, Your Honor?

10 THE COURT: Yes, you may.

11 CROSS-EXAMINATION

12 BY MR. NELSON:

13 Q. Thank you, Mr. Boyle. I have a few questions
14 for you.

15 You mentioned that the reps get credit, right?
16 In order -- when they order products, you said they have
17 a credit account.

18 A. Yes. We establish a credit with the
19 representative, when they become an Avon representative,
20 a credit limit.

21 Q. Oh, so there's a credit limit. So that's an
22 account that they have with Avon, correct?

23 A. When you establish -- yes. When you become an
24 Avon representative, we have an account set up for you.

25 Q. So then when the Avon representative places

1 the order, going through some of the examples you did --
2 you do on the youravon.com site, that's basically like
3 going down to the store and saying put on it my account,
4 right? That's what you're saying?

5 A. I would say yes.

6 Q. Okay. I just want to be clear.

7 So there is -- there is an account established
8 for each of these representatives, the Avon
9 representatives that has some kind of credit limit,
10 correct?

11 A. That's true.

12 Q. And they need to have that account before they
13 can get products, correct?

14 A. Yes. We establish the account, and then they
15 can order at the same time.

16 Q. Thanks.

17 So there were a couple of things you talked
18 about. You talked about the order entry page where
19 people just -- the representatives -- excuse me -- not
20 just any people, I know, but the representatives go and
21 type in product numbers, right? That was one of the
22 things you talked about?

23 A. Yes.

24 Q. And then there was that second example where
25 you go to the brochure, and you can go and click on a

1 particular product and say the quantity, and they'll add
2 that to your order, right?

3 A. The representative part, yes.

4 Q. Correct. The representatives can do that.

5 A. Yes. Yes.

6 Q. So those are two different ways. One we can
7 call -- I don't know -- typing in the order entry and
8 one shopping by the brochure; is that fair?

9 A. And they're not shopping; they're ordering.

10 Q. Ordering. Understood.

11 But, I mean, they go into the brochure; they
12 look -- I think you had the example of some eyeliner or
13 mascara. Is there a difference?

14 A. I think it was. I get your point.

15 Q. And they can click on it and say I want two,
16 and then they can go back and choose return to shopping
17 and then find some lipstick and click 3 or whatever,
18 right?

19 A. Yes.

20 Q. And then in the end, they can check out,
21 right?

22 A. Describe check out.

23 Q. Place order. I think in your little example,
24 there was a place order button; is that right?

25 A. It's called submit, because they're submitting

1 an order to Avon, yes.

2 Q. Okay. And that's where it will go, and then
3 it will go on the credit account, correct?

4 A. At that time, it just comes to Avon, and then
5 there's a whole lot of processes that happen before it
6 gets to -- I think what you're referring as credit
7 limit, right?

8 Q. Correct.

9 A. There's a whole billing process. Everything
10 has got to happen.

11 Q. Yeah. So a number --

12 A. And that's when we finally can figure out what
13 it is, right?

14 Q. Okay. Understood.

15 So then in terms of the technical details, I
16 think you said that you're not the guy, right?

17 A. No. I can tell you how PC Avon, because I was
18 a little more involved in that, but for YourAvon, no, I
19 was in management.

20 Q. So there was --

21 A. IBM is the guy.

22 Q. Oh, I'm sorry. I didn't mean to cut you off.

23 A. Sorry. IBM is the guy.

24 Q. Okay. So then there was a -- and I might get
25 his name wrong again, Michael Ciancuilli?

1 A. Michael Ciancuilli, yes.

2 Q. Okay. Ciancuilli. Is he the technical guy
3 within YourAvon that knows the technical details of the
4 operation system?

5 A. I would say Michael has a better understanding
6 than me. Is he the ultimate technical guy? I don't
7 know if I'd go there, because, again, IBM knows more
8 than we know.

9 Q. But he was the corporate representative on the
10 technical topics in this case, right?

11 A. I think what we saw on the screen you showed
12 us -- I'm sorry -- the screen is fair, yes.

13 Q. Okay. Thank you.

14 Now, just a couple of other questions.

15 You mentioned that you estimate that 70 to 80
16 percent of the representatives use the order entry form
17 and just type the products into the order entry form?

18 A. I think you said the word "made," no. Restate
19 your question, please.

20 Q. Okay. Yeah, I can. I'm not -- I'm not sure
21 what -- so 70 to 80 percent. So you gave an estimate --

22 A. Yes.

23 Q. -- on your direct testimony.

24 A. Yes.

25 Q. 70 to 80 percent, the representatives do

1 something, right?

2 A. 70 to -- what I said was 70 to 80 per -- 70 --
3 excuse me -- to 80 percent of our representatives use
4 the item entry form to fill out their order to Avon.

5 Q. And when you're saying the item entry form,
6 you're talking about just going and typing in the
7 numbers, correct?

8 A. That's that screen that we saw where they do
9 the item -- they take their customers to item quantity,
10 item quantity, yes.

11 Q. You're aware that we asked for that
12 information during discovery, aren't you?

13 A. Am I aware of that?

14 Q. Yeah.

15 A. I think I was asked the question, and I didn't
16 know the exact number.

17 Q. So you -- during discovery, you didn't know
18 the answer, right, and --

19 A. When you say discovery, give me --

20 Q. In terms of -- you're aware that Soverain, the
21 Plaintiff in the case, asked for the information there
22 in discovery about what the percentage of users are that
23 use just typing in to the order entry form versus
24 browsing through the brochure.

25 A. I think -- I think -- I'm not positive, but I

1 think that that question was possibly yes.

2 Q. So you're -- are you aware that your lawyers
3 were asked for it, and it was represented --

4 A. Oh, no. I -- no. Hold on.

5 Q. -- that that information didn't exist?

6 A. I thought you were asking me.

7 Q. Yeah. No. I'm just asking you what --

8 A. No. Lawyers -- I don't know what they're
9 aware of. I'm sorry.

10 Q. So nobody asked you this information, asked
11 you for it?

12 A. I think I was asked by -- during the
13 deposition, and I think I said at the time I wasn't
14 positive of the exact number.

15 Q. Right. So during your deposition, when you
16 were asked, you didn't know the answer, right?

17 A. I -- I didn't -- I think that my term was I
18 didn't want to guess.

19 Q. Right.

20 A. I think I said that the business would know
21 that exact number, because I felt like that person -- I
22 forgot the gentleman's name -- was asking me something
23 that he needed a direct answer at that time, and I think
24 my answer was I would be guessing. It's more of
25 something the business would know.

1 Q. So then did anybody come back and ask you for
2 that information?

3 A. Explain anybody.

4 Q. Yeah. I mean after the deposition.

5 A. I don't know if anybody asked me for that
6 information. I can't -- I can't be honest.

7 MR. McSWANE: Attorney-client
8 communication excluded.

9 THE WITNESS: Oh, oh, oh. Yeah. No, no,
10 no, no, no, no.

11 MR. NELSON: I don't want the substance
12 of any attorney-client communication.

13 MR. McSWANE: For the record, I think
14 you're going into that information.

15 MR. NELSON: My team's telling me
16 different, but you know what? That's something we'll
17 take up -- we don't need to take it up in front of the
18 jury, Your Honor.

19 So at this point, I think I'm done with
20 this witness, and if you have some redirect, I'll pass
21 and move on.

22 THE COURT: Okay. All right. Redirect?

23 MR. McSWANE: No, Your Honor. I have no
24 redirect.

25 THE COURT: All right. Thank you. You

1 may step down.

2 Who will be your next witness?

3 MR. McSWANE: Your Honor, we call Jon
4 Roman.

5 THE COURT: Jon who?

6 MR. McSWANE: Roman.

7 MR. CARTER: Excuse me, Your Honor. If
8 we might, may we confer for just a moment?

9 THE COURT: Yes.

10 (Sotto voce discussion between
11 attorneys.)

12 MR. McSWANE: Your Honor, can I take that
13 back? I believe we would call Gunnard Fredrickson to
14 the stand.

15 THE COURT: All right. Gunter (sic)
16 Fredrickson.

17 Has he been sworn, Mr. Carter?

18 MR. CARTER: No, sir, he has not.

19 And, Your Honor, I understand that
20 Mr. Fredrickson left his hearing aid at home today, so
21 we'll have to speak up a little bit louder.

22 THE COURT: All right. If you will
23 please raise your right hand to be sworn.

24 (Witness sworn.)

25 THE COURT: All right. You may proceed.

1 MR. CARTER: Thank you, Your Honor.

2 GUNNARD FREDRICKSON, SR., DEFENDANTS' WITNESS, SWORN

3 DIRECT EXAMINATION

4 BY MR. CARTER:

5 Q. Good afternoon, Mr. Fredrickson.

6 A. Good afternoon.

7 Q. Would you give us your full name, please, sir?

8 A. Yes. My name is Gunnard Arthur Fredrickson,

9 Sr.

10 Q. And where do you live, Mr. Fredrickson?

11 A. I live in Plano, Texas.

12 Q. And how are you currently employed?

13 A. I'm actually retired.

14 Q. And what company are you retired from?

15 A. I'm retired from J.C. Penney.

16 Q. And what was your position with J.C. Penney at
17 the time of your retirement?

18 A. I was a senior technical specialist in
19 information systems.

20 Q. And how long did you work for J.C. Penney at
21 the time?

22 A. I started in 1982.

23 Q. And what did you do when you first started
24 working there in 1982?

25 A. I started working in store systems in Atlanta,

1 Georgia.

2 Q. And when you say store systems, what do you
3 mean?

4 A. Well, on the store systems, when the
5 applications are ran in the back room of the store, and
6 one of the applications I had was Texas Instrument
7 terminals.

8 Q. All right, sir. And did you work with J.C.
9 Penney's computers during that time --

10 A. Yes.

11 Q. -- in the early '80s?

12 A. Yes. Mainframes and then smaller equipment
13 also.

14 Q. And were those computers networked together
15 when you were at J.C. Penney?

16 A. Yes, they were.

17 Q. How big was J.C. Penney's network back then?

18 A. Well, in -- in the mid-1980s, IBM told us that
19 we had the -- had the second largest in the United
20 States outside the Federal Government.

21 Q. And why was it so large?

22 A. Well, in the mid-1980s, we started putting
23 Series 1s into our 700 largest stores, and then if you
24 bought gasoline at a Shell station or a Citgo or a Fina
25 or any of those stations, it all went through our

1 network.

2 And then we had drug stores, and we had credit
3 processing centers, and we had seven large data centers,
4 and we had over 1500 stores that had networked in, so we
5 had a large network.

6 Q. All right, sir. And you said that that was
7 the second largest network in the United States?

8 A. Yes, it was.

9 Q. And the -- only the U.S. Government was
10 larger?

11 A. That's correct.

12 Q. Now, when did you start working in the
13 computer field?

14 A. Well, I started in -- in data processing in
15 1957 in the Air Force. I worked with the IBM tab
16 systems, and then I started working with computers in
17 1962.

18 Q. All right, sir. Now, back in 1957, in the Air
19 Force, you said data processing. Was that back when
20 there were punch cards?

21 A. Yes. All the 80-column cards.

22 Q. All right. Now, in 1962, when you first
23 started working directly with computers, had you had any
24 formal education that taught you about them?

25 A. No, not really. I had some -- you know, some

1 classes, and I read a lot of manuals.

2 Q. All right, sir. And where did you go to work
3 when you -- when you started working with these
4 computers in 1962?

5 A. Well, I was working at the State of Wisconsin
6 at that time.

7 Q. All right, sir. Now, did you have -- did you
8 have any experience with software code or languages that
9 ran the computers at this point in time?

10 A. No. I started that in 1968.

11 Q. All right, sir. And how did you learn about
12 this or learn how to write your first program?

13 A. Well, when I --

14 Q. And I'm speaking a computer program.

15 A. Okay. Well, in 1968, I was working in
16 operations, and I wanted to move into systems, so I
17 asked the manager if I could, and he said that, in fact,
18 I would have to write a program to prove that I could do
19 it.

20 And so I asked him about the program, and he
21 said, well, we needed this one program written on
22 billing material, and I asked him about the specs, and
23 he said, well, there's the input tape and the output
24 tape, and that was it.

25 So I came in on a weekend, and I dumped both

1 the tapes, and I had boxes of paper, about five or six
2 boxes of paper, and so I took them home, and at that
3 time, I had a house that was 26-feet wide, 48-feet long,
4 and I spread all the paper on the floor in the basement.

5 And my wife, Barbara, was at one end of the
6 floor, and I was at the other end, and I told her what
7 to look for, and I would ask her what was in a certain
8 column and a certain record, and she would tell me, and
9 I'd write it down. And that was kind of a long period.

10 Q. So you effectively taught yourself how to
11 program?

12 A. Right. That's correct. In those days, there
13 was no real, you know, school or anything.

14 Q. So from the time of 1962 or even 1957 when you
15 were in the Air Force until your retirement in 2010,
16 have you always been in the computer field?

17 A. Yes, I was.

18 Q. So for the past 48 years or so?

19 A. About 53, 54 years, something like that.

20 Q. All right. 54 years, you've been working with
21 computers, and I suspect you've seen a lot of changes
22 during that time.

23 A. Oh, yeah. I have a lot of stories.

24 Q. Now, I want to turn back to your time at J.C.
25 Penney, and I want to ask you about a system at J.C.

1 Penney called the online order entry system. Are you
2 familiar with that system at J.C. Penney?

3 A. Yes, I am.

4 Q. And tell us generally what this computer
5 system did.

6 A. Well, it was a way that customers could call
7 in to the phone centers and actually be looking at a
8 catalog. They could talk to the CSR and order
9 something.

10 Q. And when was it developed at J.C. Penney?

11 A. They started the development in 1980, and then
12 they actually installed it in beta in a couple of stores
13 in 1982, rolled it out in 1983.

14 Q. We'll get into some more detail in a minute,
15 but just an overview, Mr. Fredrickson. What did you do
16 with the online order entry system at J.C. Penney?

17 A. Well, in -- in 1994, I started doing coding on
18 it, okay? Prior to that, in the store, I had Texas
19 Instruments, and back at the time that they started on
20 the catalog business in 1962, 1963, something like that,
21 they would actually -- customers would come into a
22 store, or they would call in to the one phone center,
23 and then people would actually write up the order, and
24 then they would enter it into a keypunch machine, and
25 then it would generate the orders at that time.

1 And the thing we did in the store, people
2 would come into the store and order stuff, and they
3 would enter it into the Texas Instrument terminals and
4 then upload it into the mainframe.

5 Q. All right, sir. Now, in the 1980s, in the
6 1983 or '4 timeframe --

7 A. Uh-huh.

8 Q. -- with the online order entry system, could a
9 customer or a buyer place an order to buy things?

10 A. Yes, they could.

11 Q. Could a customer pay for that order?

12 A. Yes, they could.

13 Q. Could -- could that customer check on the
14 status of her order?

15 A. Yes. All she had to do is call the CSR.

16 Q. And could she learn about past orders during
17 that period of time?

18 A. Yes, they could.

19 Q. And could a buying session be saved?

20 A. Yes, it could.

21 Q. All right. And we'll get into more detail
22 about that in a moment.

23 How many computers were actually involved with
24 the OOE system, the online order entry system?

25 A. Well, we actually ran it in -- see, at one

1 time Penney's had seven large data centers, and catalog
2 used five of those.

3 So on each -- in each data center, we had two
4 large mainframes that we used. We used what was called
5 a C-frame and an A-frame. So we actually had 10 large
6 mainframes.

7 Q. All right, sir.

8 MR. CARTER: Now, if we could, let's pull
9 up Slide 1. And this is Exhibit No. -- Defendants'
10 Exhibit No. 112.

11 Q. (By Mr. Carter) Can you describe for us what
12 this document shows?

13 A. This is a catalog order system at a very high
14 level.

15 Q. All right, sir. Now, with the -- what is it
16 describing here, when you say it's the high level order
17 entry system?

18 A. Well, in the upper left-hand corner, it shows
19 the online order entry system, and then it shows the --
20 in the upper right-hand corner, it shows the item
21 reservation. And DC stands for distribution center, the
22 five distribution centers.

23 And then it shows the interface going back and
24 forth. And then in the lower left-hand corner is an
25 order summary, and it shows there a place for order

1 entry and item reservation.

2 And then in the lower right-hand corner is the
3 order output when we've finished the order, and we've
4 picked it, shipped it, and invoiced it.

5 Q. Why was this document created?

6 A. 1983.

7 Q. And why was it created?

8 A. The reason it was created is that -- in fact,
9 our system was very, very sophisticated for its time,
10 you know, because we were using all the distribution
11 centers and everything, and so a lot of people wanted to
12 see it, okay?

13 And then the other thing is, as -- as they
14 hired new people, they would always makes presentations
15 to them. And, in fact, that's how I started.

16 Q. All right, sir. So these were made -- this
17 was made for a presentation to others to describe for
18 them what the online order entry system did?

19 A. Well, the whole order processing system, yes.

20 Q. All right, sir. And do you know when this
21 document was created?

22 A. 1983.

23 MR. CARTER: Now, let's turn to Slide --
24 Slide 2. And this is Defendants' Exhibit 109.

25 Q. (By Mr. Carter) Can you tell us what

1 document -- what this is showing?

2 A. Okay. This is the OOE, order entry system, at
3 a high level, and it -- these were actually manually
4 drawn. We used -- we used to call them IBM templates,
5 okay?

6 And on the different boxes, you had different
7 types of design. One would be a screen. One would be a
8 data file. Like the bottom were data files, and then
9 the program is in the middle, and we did those in ink.

10 Q. All right, sir. Now, at the top, I see a
11 rectangular box, and it's labeled CICS. What does that
12 mean?

13 A. That's the software that we used to interface
14 between the CSR's computer and then the mainframe
15 computer.

16 Q. Now, you mentioned the CSR. You're talking
17 about customer service representative --

18 A. Yes.

19 Q. -- correct?

20 And we've colored this now to show -- we've
21 colored the top part in green, and it's got yellow --
22 yellow markings in the green part. Can you tell me what
23 that represents, what that color represents?

24 A. Okay. That's the screens that the CSRs would
25 see, and then the -- on their computer. Then in the

1 blue, that's the processing and the order database.

2 Q. All right, sir. So what we're showing in the
3 green is what would actually be on the computer -- would
4 be the screens for the computer that the CSR is seeing,
5 and those are shown in -- those screens are shown in
6 yellow.

7 And then below -- and now we've put up another
8 depiction, but that would show the communication back to
9 the mainframe or C-frame as we call it?

10 A. Right. The C-frame -- C -- in fact, the
11 online order entry ran on the C-frame. Item reservation
12 and order summary and order output ran on -- you know,
13 on the A-frame.

14 Q. All right, sir. And then you also mentioned,
15 and we had colors describing the order database, that
16 orange. What is -- what is depicting the order
17 database? What does that depict?

18 A. Well, the order database was actually where we
19 kept all the items on the customer -- you know, it's
20 kind of like the thing -- in fact, an order is like a
21 house, okay?

22 So each part of it is a separate room, you
23 know, like the customer information would be one room,
24 the items would be another room, so on and so forth.

25 Q. Now, was -- in J.C. Penney's online order

1 entry system, was the order database connected with the
2 mainframe or the C-frame computer that was involved in
3 the online order entry system?

4 A. Yes, it was.

5 Q. All right, sir.

6 MR. CARTER: Let's go to the next slide,
7 please.

8 Q. (By Mr. Carter) Now, Slide 4, as we've shown
9 the colors again, do the colors represent the same, the
10 green being the customer service representative screens?

11 A. Right.

12 Q. And then the blue representing the back end,
13 the actual computers that are -- that are interfacing
14 with her screen?

15 A. Yes, it does.

16 Q. And the orange being for the database?

17 A. Uh-huh.

18 Q. So this is just a continuation?

19 A. Right. In fact, this one here was the item
20 meant for the main program and item entry.

21 Q. All right, sir. And if we go to the next
22 screen, which is a continuation of Exhibit 109, and this
23 would show, again, the continuation of the screens that
24 the customer service representative would show and then
25 the blue being the back end and the order database?

1 A. Right. That's correct.

2 Q. All right.

3 A. This one here would be entering the routing
4 and the terms, how they're going to pay for it --

5 Q. All right, sir.

6 A. -- and the order status.

7 MR. CARTER: Let's go to the next slide,
8 please.

9 Q. (By Mr. Carter) Now, up here -- would this
10 depict the network using the customer service
11 representative being connected to J.C. Penney's C-frame
12 for the online order entry and then the order database?

13 A. In fact, the CSR here could be up to a couple
14 of thousand miles away from the C-frame.

15 Q. All right, sir. And was this the computer
16 that was used to place orders for products?

17 A. Yes.

18 Q. And how was the order database connected to
19 the C-frame again?

20 A. It was a hard cable between the C-frame and
21 the order database.

22 Q. All right, sir.

23 MR. CARTER: Let's go to the next slide,
24 please.

25 Q. (By Mr. Carter) Now, is this a depiction of

1 what -- this Slide 7 a depiction of what a customer
2 service representative -- where she would be located
3 back in the early '80s?

4 A. Yes.

5 Q. Now, what is she -- what -- and this -- I
6 think her name is -- I can see there telephone sales
7 associate -- sales -- excuse me -- telephone sales
8 associate, Kathy Walden, and is she before a -- in her
9 position as a customer service representative?

10 A. Uh-huh.

11 Q. Is that right?

12 A. Yes.

13 Q. And what did -- what is that box in front of
14 Kathy that she has her hands on?

15 A. Okay. That's the keyboard attached to her
16 computer.

17 Q. All right, sir. And then what's her computer
18 attached to?

19 A. It's attached to the mainframe. Not directly,
20 but it's attached in the phone center and then
21 indirectly to a mainframe.

22 Q. All right, sir. And I see some folks back in
23 the background that also look to be in front of
24 computers. Are they also telephone sales associates?

25 A. Yes.

1 Q. About how many?

2 A. About 16 phone centers, and each one had over
3 300 CSRs.

4 Q. I'm sorry. I didn't hear the number.

5 A. Well, altogether we had over 6,000 CSRs taking
6 orders.

7 Q. With the online order entry system?

8 A. That's correct.

9 Q. Now, did all of these customer service
10 representatives, like we've depicted Kathy here, did
11 they all have to be in their office or in their
12 workstation at the Penney's location to take orders over
13 the online order entry system?

14 A. No, they didn't.

15 Q. Where could they be?

16 A. Well, we had some CSRs, and we called them
17 in-homers, and they actually worked out of their house
18 for various reasons. It could have been maybe a medical
19 reason, or they had a family, and they wanted to be at
20 home, got to take care of their children. So the thing
21 is, they would work part-time or on weekends or
22 something.

23 Q. All right, sir.

24 MR. CARTER: Let's go to the --

25 Q. (By Mr. Carter) And so they would be able to

1 connect over a phone line back into --

2 A. Oh, yes.

3 Q. -- J.C. Penney's network; is that right?

4 A. Yep, all the way.

5 MR. CARTER: Now let's go to the next
6 slide, and that is Exhibit No. 130.

7 Q. (By Mr. Carter) Can you identify what this
8 document is.

9 A. Okay. This shows some computers in the --
10 more or less a data center, and you'll notice that we've
11 got a B-frame and a C-frame and a D-frame, and there are
12 different types of computer terminals also.

13 MR. CARTER: Bill, can you go back one
14 slide, please?

15 Q. (By Mr. Carter) I'm sorry, Mr. Fredrickson.
16 We got a little ahead of ourselves.

17 A. Uh-huh.

18 Q. Let's talk about Exhibit 130, this Slide
19 No. 8. And what is -- what does this represent?

20 A. Okay. This one shows all seven of our data
21 centers, and it shows the frames that we had in each one
22 of the seven data centers. And then the one in the
23 center was the one in Kansas, Lenexa.

24 Q. All right. Now, I've got here a framed -- a
25 framed version of what we show on this screen.

1 A. Uh-huh.

2 Q. Is this the same drawing?

3 A. Right.

4 Q. Why is it -- why is it in a frame?

5 A. Well, the time that Tom Feuerborn joined the
6 group, by the time he drew it, he gave it to the manager
7 of the network, and he actually had it on his wall. It
8 was kind of a talking point.

9 Q. Something to be proud of?

10 A. Yeah.

11 Q. Now, in -- the date on this is July 14, 1983.
12 Is that the date that the drawing was done?

13 A. Right. That's the date that Tom did it.

14 Q. Does it -- does it reflect the J.C. Penney
15 network at that point in time?

16 A. In fact, it shows all the mainframes and, you
17 know, all the data centers we had.

18 Q. And I see the abbreviation MSNF. What does
19 that mean?

20 A. Multisystem network flow.

21 Q. All right, sir. Now, we've talked about the
22 Lenexa C-frame. You mentioned that. And if we can go
23 and expand that a little bit.

24 Now, in Lenexa, Kansas, there was -- that's
25 where one of the data centers was located?

1 A. Right.

2 Q. And what did we highlight in yellow here on
3 this drawing?

4 A. Well, we highlighted the C-frame, and that's
5 the one that we ran the online order entry on.

6 Q. And the 3081, what does that mean?

7 A. That's the type of IBM mainframe. I think on
8 IBM, you know, they had different numbers on their
9 mainframe, different sizes. You know, it's kind of like
10 airplanes. You have a 737, 747, and so on and so forth.

11 Q. All right, sir. Now -- and you mentioned --
12 how many computers did J.C. Penney have like this?

13 A. Well, we actually had -- I mean, we had a lot.
14 In each data center, we had up to five mainframes. And
15 then over 700 stores, we had smaller mainframes. And
16 then in some of the other 1500 stores, we had smaller --
17 I mean, we had -- in fact, it was so large, it was kind
18 of hard to keep track of them.

19 Q. Now, were these computers all connected
20 together?

21 A. Yes, they were.

22 Q. And how were they connected together?

23 A. Well, they went through -- well, there was --
24 into the network, and then into the packet
25 network and -- I tell you, you know, it was all -- I

1 mean, it was just a lot of -- a lot of lines and
2 everything.

3 Q. All right, sir. And then the network
4 architecture itself, was it SNA? Was it an SNA
5 architecture?

6 A. Yes. In fact, in the mid-'80s, our network
7 was growing so large that IBM started talking about
8 expanding it. And then in the late '80s, they went to
9 SNI, which made networks within networks. So that's
10 what we needed.

11 Q. So in the late '80s, you expanded beyond your
12 capacity at that point?

13 A. Yes.

14 Q. I'm sorry?

15 A. Yes, we did.

16 Q. So you had to change the network structure?

17 A. Yeah.

18 Q. And then it became, I think you said, a
19 network of networks?

20 A. That's correct.

21 MR. CARTER: Now, let's turn to Slide --
22 Slide 9.

23 Q. (By Mr. Carter) We have here a depiction of
24 what in Slide 9?

25 A. It's a -- that's an IBM 3081, and that's a

1 type of computer that we use for our C-frame in the
2 different data centers.

3 Q. All right, sir.

4 MR. CARTER: Let's go to the next slide,
5 please.

6 All right. And let's go to the next
7 slide, please.

8 Q. (By Mr. Carter) Now, I want to talk to you a
9 little bit about what the customer service
10 representatives would see and how they would interact
11 with the C-frame, okay?

12 A. Okay.

13 Q. Now, we've highlighted this screen, and we've
14 gone back to one of the earlier exhibits that we've
15 looked at, and we've got highlighted in yellow, and it
16 says sign-on menu. What does that mean?

17 A. Well, at the time that the CSRs signed on and,
18 you know, after the -- on to the system, they had to go
19 on to a sign-on menu, and they had to enter certain
20 information that was only secure to them.

21 Q. All right, sir. Now, in connection -- so this
22 would be the first sign-on menu that the customer
23 service representative would see when she logged in to
24 her terminal.

25 A. That's correct.

1 MR. CARTER: All right. Let's go to the
2 next slide, please.

3 Q. (By Mr. Carter) And would this give you the
4 instructions to the customer service representative of
5 how the online catalog order entry system would work
6 back in September of 1987?

7 A. Yes.

8 Q. All right, sir. And that is Exhibit No. 108.
9 And, in fact, I've got the online order, the original --
10 one of the original copies of that online order entry
11 system right here.

12 Do you recognize this?

13 A. Yes, I do.

14 Q. All right. And is this what would be given to
15 the customer service representative to help instruct her
16 on how to work the online order entry system?

17 A. Yes. In fact, each one got a copy.

18 Q. All right, sir.

19 MR. CARTER: Now we go to Slide No. 13.

20 Q. (By Mr. Carter) Can you tell us what this
21 represents.

22 A. Okay. Here's -- at the time they logged on,
23 they had to have their facility number. That's a phone
24 center, you know, the one they worked in. We had 16 of
25 those. And then they -- each one had a unique associate

1 number, and each one had a unique password.

2 Q. All right, sir. Now, is this the sign-on menu
3 that we referred to that was in the yellow box just a
4 few minutes ago?

5 A. Yes, it is.

6 Q. And are these slides that we're going to
7 see -- and you're going to take us through how an order
8 is fulfilled using the online order entry system in
9 communicating with the CSR. Do these slides come from
10 the customer service representative manual?

11 A. Yes, they do.

12 Q. All right.

13 MR. CARTER: So let's go to the next
14 slide, Slide 4.

15 Q. (By Mr. Carter) And now we've highlighted the
16 main menu. And effectively, would this be a progression
17 across the screen for the customer service
18 representatives?

19 A. Yes, it was.

20 Q. All right. So the next one would be main
21 menu. Then we would go to enter phone and verify
22 customer and so forth.

23 A. That's correct.

24 Q. All right.

25 MR. CARTER: Let's go to the next slide.

1 Q. (By Mr. Carter) Now, what screen is this?

2 A. This one is the main menu, and then they
3 select the function they're going to be working on, and
4 if they're going to be entering orders, they would
5 select 1, order entry.

6 Q. All right, sir. And so Kathy, your customer
7 service representative, after she logged on, would have
8 this main menu screen to look at?

9 A. Yes, she would.

10 Q. Now, we've -- obviously, in the black and
11 white here, we don't have these colors, but would this
12 be representative of the type of color screen back in
13 the 1980s?

14 A. Yes, it was.

15 Q. All right, sir.

16 MR. CARTER: Now let's go to the next
17 slide, Slide 16.

18 Q. (By Mr. Carter) Now, what are we doing here?

19 A. Okay. Now, a customer's called in on the
20 phone, and the CSR's answered. And the first thing she
21 does, she enters the first letter of the customer's last
22 name and then the last seven digits of their phone
23 number, and then she presses enter.

24 And then what happens, it takes it from the --
25 the CSR's computer sends a message up to the mainframe,

1 and then the mainframe, what it did, it read the
2 customer database, pulled up information on the customer
3 and sent it back to the CSR's computer.

4 And here it's sending back Victoria
5 Cramersmith, and it's sending her name and address, her
6 full 10-digit phone number and her zip code, and if
7 she's got a J.C. Penney charge card, sent back the
8 charge card number.

9 And we never used real customer information on
10 this. It was all test and a lot of funny addresses and
11 so on and so forth.

12 Q. And that's work from the examples from the
13 customer service representative manual you're talking
14 about?

15 A. That's correct. We always had pictures of all
16 the screens in there so they could actually see what
17 happened.

18 Q. All right. So this is when the customer first
19 calls in to the customer service representative, Kathy,
20 and she types in the phone number and pulls in the
21 information -- the information is then pulled up on to
22 Kathy's screen?

23 A. Right. Pulls it back into her computer.

24 MR. CARTER: Let's go to the next screen,
25 please. Slide 17.

1 Q. (By Mr. Carter) Now, what are these across the
2 top?

3 A. Okay. This is where the CSR would start
4 entering the first item that the customer wants. She
5 would order the item number, the size, and quantity of
6 the item.

7 Q. Where would she get that information from?

8 A. Penney's published a lot of catalogs, and so
9 the customer would be looking in the catalog.

10 Q. All right, sir. I've got here a catalog from
11 the fall and winter of 1987. Would this be the type of
12 catalog that a customer or someone calling in to Kathy,
13 the customer service representative, would be referring
14 to when she placed this order?

15 A. Yes, it is.

16 Q. Now, we have here the cover of the catalog,
17 and I think the next slide would show -- would show one
18 selection that someone could make, correct?

19 A. Right. That's correct.

20 Q. Now, if we blow this up, then we can see from
21 this slide information dealing with that particular --
22 that particular order.

23 A. Right. It's got the -- got the different
24 colors and codes that we used, put the codes in there.
25 And then it's got the sizes, small, medium, large. And

1 then it's got the item number and the price.

2 Q. Would this be where -- the number and the size
3 and the color information that the customer would
4 provide to the customer service representative?

5 A. Yes, it is.

6 Q. All right, sir.

7 MR. CARTER: Now let's go to the next
8 screen.

9 Q. (By Mr. Carter) And what are we doing here?

10 A. Okay. The CSR is entering the item number and
11 the size and color and the quantity that the customer
12 asked for. So she enters it into her computer, and then
13 what she does is, she presses enter.

14 Q. All right.

15 MR. CARTER: And let's go to the next
16 slide.

17 Q. (By Mr. Carter) What does this show?

18 A. It's showing it's going into Kathy's computer,
19 from her computer over to the C-frame computer, and then
20 it updates the order database.

21 Q. All right. So the green dot is effectively
22 the order making the -- making the trip from Kathy's
23 computer to the C-frame and residing in the order
24 database?

25 A. That's correct.

1 Q. And then what happens?

2 A. Then what happens, we take the information
3 back out to Kathy's computer, we send a message out
4 there, and then we display it so she can see the last
5 item that she's entered.

6 Q. And is this the return message back to Kathy's
7 computer?

8 A. Yes, it is.

9 Q. And what does this reflect?

10 A. What it's doing now is showing a big brown
11 sports size 50 and, you know, the item number and, you
12 know, the 50 for the size of the coat, and then the
13 color of the coat, 38, and the quantity 1 on the left
14 there.

15 Q. All right. So this is the information
16 confirming the order back to Kathy's computer --

17 A. That's correct.

18 Q. -- terminal? All right.

19 MR. CARTER: Let's go to the next screen.

20 Q. (By Mr. Carter) And what's happening here?

21 A. She's entering the second item that the
22 customer's asked for, and what she does is she presses
23 enter again.

24 Q. All right.

25 MR. CARTER: Let's go to the next screen.

1 A. And then it takes from Kathy's computer, sends
2 a message up to the C-frame again, updates the order
3 database again, and then what happens, we send it back
4 out to Kathy's computer. So now she can see the two
5 items she's entered.

6 Q. (By Mr. Carter) All right.

7 A. The second item was a men's shirt size 16.

8 Q. So this is a second item that's now been
9 ordered by the customer service representative on behalf
10 of the -- on behalf of the customer.

11 A. Right. The thing we always did, we always
12 showed the information back to the CSR so that she could
13 be talking with the customer at all times.

14 MR. CARTER: And let's go to the next
15 screen.

16 Q. (By Mr. Carter) And this is a repeat of the
17 third order, correct?

18 A. Right, when she's entering the third item.

19 MR. CARTER: Lets go to the next screen,
20 please.

21 A. Then it goes from Kathy's computer to the
22 mainframe computer again, updates the order database,
23 and then we send it back out again to Kathy's computer,
24 so she can see all three of them now.

25 Q. (By Mr. Carter) And so now we have three items

1 that have been purchased -- or excuse me -- three items
2 that have been ordered.

3 A. That's correct.

4 MR. CARTER: Now, let's go to the next
5 screen, please.

6 Q. (By Mr. Carter) Now, what does this indicate?

7 A. Okay. What this is telling us, that the
8 customer has decided that she doesn't want the third
9 item, so we enter D in there, and then what that does
10 is, after Kathy presses enter, it sends the message up
11 to the mainframe, and it deletes the third item of the
12 order database, and then we send it back out to Kathy's
13 computer again, and then it shows we only have two items
14 on the order.

15 Q. All right, sir.

16 MR. CARTER: Let's go in the next screen,
17 please.

18 Q. (By Mr. Carter) And then is this showing
19 another item being entered?

20 A. Right. That's correct. She's entering
21 another item again.

22 Q. All right.

23 MR. CARTER: Let's go to the next screen.

24 A. She presses enter again and sends it up to the
25 mainframe and updates the order database.

1 Q. (By Mr. Carter) All right, sir.

2 MR. CARTER: Let's go to the next screen.

3 Q. (By Mr. Carter) And that confirms the order?

4 A. Then it shows -- right. It shows all three
5 items that the customer requested.

6 MR. CARTER: Let's go to the next screen,
7 please.

8 Q. (By Mr. Carter) Now, what has happened here?

9 A. Okay. This is where she wants to enter the
10 terms. And you notice that she put a J out there after
11 the terms, and it says she wants to use a J.C. Penney
12 charge card. Then we enter the charge card number.

13 And then below the terms, there's a route, and
14 that's a W, so that's going to be a will-call order.
15 And that means she wants to pick it up at the store.
16 And then we have the store number, and then there's the
17 store name and the address.

18 Q. (By Mr. Carter) All right. Is the -- is this
19 the start of the customer checking out to take their
20 items?

21 A. Yes, it is.

22 Q. All right, sir.

23 MR. CARTER: Now, if we go to the next
24 screen.

25 Q. (By Mr. Carter) I see there's been some text

1 added to the three items. What is that?

2 A. Okay. Now what we're doing, we're sending
3 back item status, because we actually have a real-time
4 system, and we actually have the item's status that's in
5 the distribution centers.

6 So the first item is discontinued. The second
7 item is backorder. And then it's got a date of 11/21.
8 That's November 21st, it would be available. These are
9 in the purchase order file real-time. And then the
10 third item is reserved.

11 Q. All right.

12 A. And it's still got, you know, the terms on
13 here also.

14 Q. All right, sir.

15 MR. CARTER: Let's go to the next screen,
16 please.

17 Q. (By Mr. Carter) And what is this? What does
18 this screen depict?

19 A. Okay. What this screen is showing us now is
20 that the third item is a reserved item, and that's the
21 one that the customer's going to buy at this time.

22 The sold merchandise price is \$14.99. The tax
23 is \$1.07. Transportation charge is going to be \$1.63
24 for an actual order total of \$17.69. And that will be
25 charged against the J.C. Penney charge card that the

1 customer said she wanted to use to purchase it.

2 Then you'll notice on the -- the order was
3 placed on October 29th. And just to the right of the
4 mall name there, it says two days. In other words, she
5 should be able to pick it up two days from now after
6 3:00 o'clock p.m. in the afternoon at the store.

7 Q. All right, sir. So is this -- is this showing
8 the payment for the order by virtue of the credit card?

9 A. That's correct. That's how she's going to pay
10 for it.

11 Q. And this also shows that she will be able to
12 pick up the order in two days?

13 A. Right.

14 Q. Now, will an invoice be generated?

15 A. Yes, it will.

16 Q. And where will the customer receive the
17 invoice?

18 A. Well, at the time that she picks up the order,
19 she's going to get a copy of the invoice, and we
20 actually have an invoice on file also.

21 Q. And when does the card get charged?

22 A. The card gets charged at the time she picks up
23 the order.

24 Q. Now, is this the last screen in the process?

25 A. No, it isn't.

1 MR. CARTER: Let's go to the next slide,
2 please.

3 Q. (By Mr. Carter) And what does this show?

4 A. And now what we're doing, we're showing the
5 final order status, and it says that the order requires
6 all authorization.

7 Q. What does it mean the order requires all
8 authorization?

9 A. What we do is we verify that it's a good
10 charge card, and we actually go out and check that it's
11 open to buy. And what I mean by open to buy is that
12 there's actually enough money on the charge card to
13 cover the order.

14 Q. All right, sir. Now, we talked about Kathy
15 placing an order on behalf of a customer -- on behalf of
16 a customer. Could Kathy, the customer service
17 representative, could she use the system to place an
18 order on her own behalf?

19 A. Yes, she can.

20 Q. So rather than -- so she would actually become
21 the customer then?

22 A. Yes, she would. She would be the customer and
23 then the CSR also.

24 Q. And have you done that?

25 A. Several times.

1 Q. Okay.

2 A. I used to do it for my wife quite a bit.

3 Q. Now, how long has the online order entry
4 system been in place, Mr. Fredrickson?

5 A. Well, they actually -- like I said, they
6 installed it the first time in 1982, and the sequence of
7 events and the screens pretty much stayed the same up --
8 up until I retired in 2010, and they're still up and
9 running too.

10 Q. Since -- it's still running now in 2011?

11 A. Oh, yes.

12 Q. Now, in connection with the order entry
13 system, is how we've described it, was it in existence
14 in this way prior to 1994?

15 A. Long time before that.

16 Q. Okay. Have you -- do you -- can you tell me a
17 little bit about some other means that J.C. Penney has
18 used for selling J.C. Penney products in the late '80s
19 and early '90s?

20 A. Well, we used -- CompuServe was taking orders
21 for us. We were sending them in, and we would take
22 those orders and take care of those.

23 Q. And how did J.C. Penney work with CompuServe?
24 How did that relationship --

25 A. They sent them to our PC, and then we took

1 them off our PC and loaded them on to the mainframe.

2 Q. Now, we saw a picture of Kathy's computer back
3 in the -- in the 1980s, and it was a pretty big box at
4 that point in time.

5 As technology advanced through the mid-to-late
6 '80s, did Kathy's computer get updated?

7 A. Oh, yes. The thing we used to do is replace
8 them all about every couple of years.

9 Q. And were personal computers used during the
10 '80s and early '90s?

11 A. Yes, they were.

12 Q. All right. Mr. Fredrickson, you've been very
13 helpful. Thank you very much for coming today.

14 MR. CARTER: I pass the witness.

15 THE COURT: All right.

16 Cross-examination.

17 MS. CASSIDY: Thank you, Your Honor.

18 May I proceed?

19 THE COURT: Yes, you may.

20 CROSS-EXAMINATION

21 BY MS. CASSIDY:

22 Q. Good afternoon, Mr. Fredrickson.

23 A. Good afternoon.

24 Q. I just have a few questions for you.

25 You said a second ago that -- that the older

1 system is still running now? Is that what you said?

2 A. Pardon?

3 Q. You said a few minutes ago that the OES system
4 is still operational today?

5 A. Yes, it is.

6 MS. CASSIDY: Can I -- can you please
7 bring up PDX822?

8 Q. (By Ms. Cassidy) You're aware that J.C. Penney
9 had a corporate designee testify about the OE system in
10 the process of this litigation?

11 A. I didn't quite hear you.

12 Q. Okay. I'm sorry.

13 You're aware that J.C. Penney had a corporate
14 representative testify in a deposition about the OE
15 system? Are you aware of that?

16 A. Yes.

17 Q. Yes. And I believe you testified that you
18 have known that Mr. Feuerborn is the one who was
19 designated to testify about the OE system in this case.

20 Are you aware of that?

21 A. Yes.

22 MS. CASSIDY: Can I have the slide,
23 please?

24 A. If you could speak up a little bit, I
25 apologize. I didn't bring my hearing aid.

1 Q. (By Ms. Cassidy) It may also be the accent, so
2 I'll see what I can do.

3 A. Pardon?

4 Q. It may also to be the accent, so I'll see what
5 I can do.

6 So when we asked Mr. Feuerborn at his
7 deposition whether the online order entry system was
8 still in operation today, do you see that he says: For
9 the most part, it's been replaced by Omni?

10 Do you see that on the screen?

11 A. Omni actually is -- you know, if you look at
12 the original screen, we had, you know, the one that had
13 OE up in the left-hand corner and item reservation and
14 order summary, okay, Omni was basically order summary,
15 okay?

16 So online order entry was running underneath
17 CICS when we built it, okay? It was running under CICS
18 until -- well, 2010 when I left, okay?

19 And in the fall of 2010, they actually put in
20 Omni at that time, and they still use the screen formats
21 that we were using originally. They modified them a
22 little bit.

23 But we were still using CICS in the end of
24 2010, and then when Omni came in, we still used those
25 same screens; we still used some of the same data files.

1 Q. Right. I understand that. But Mr. Feuerborn,
2 when he testified -- when he answered that question, he
3 said that the OE system has been replaced by Omni; isn't
4 that right?

5 A. That's not correct.

6 Q. Okay. So his testimony was incorrect on that
7 point?

8 A. Well, you have to look at the -- the online
9 order entry is still the online order entry. Omni is
10 taking order summary and item reservation and part of
11 the data files and putting them all together.

12 We still use Omni on the host and on the
13 server, the same data files we were using in the '90s,
14 the same data files we were using in the '80s. The
15 order database did not change until -- they finished it
16 in November of 2010. That's when it changed.

17 Q. Okay. I'll just take it that there is some
18 disagreement as to that point.

19 MS. CASSIDY: Can I have the next slide,
20 please. You can actually take that down for a second.

21 Q. (By Mr. Cassidy) When J.C. Penney had the OE
22 system in place, customers could not use the network to
23 place orders, could they?

24 They had to call in to a sales representative,
25 and the order would be placed on their behalf; is that

1 right?

2 A. They had to call in to the CSR, and it would
3 be placed on their behalf.

4 Q. The customers directly did not have access to
5 the network; is that right?

6 A. Pardon?

7 Q. Customers, J.C. Penney's customers did not
8 have access to the OE network; is that correct?

9 A. At that time, they did not.

10 Q. And, in fact, customers could not place orders
11 online by themselves until the launch of jcp.com; is
12 that correct?

13 A. Well, I -- you know, I could place them.
14 Okay. CSRs could place their own orders.

15 Q. Okay. So other than J.C. Penney employees,
16 customers could not place orders online, except for when
17 jcp.com was launched?

18 A. If -- if they came to CompuServe, they could
19 place them.

20 Q. Okay.

21 MS. CASSIDY: Can I please have
22 Slide 5 -- I'm sorry. Hold on.

23 Can I have Slide 4, please.

24 Q. (By Ms. Cassidy) So when we asked
25 Mr. Feuerborn that question at his deposition, we said

1 what was the first system that allowed customers to
2 place orders directly without going through a store or
3 customer representative?

4 ANSWER: What system? I would have to say
5 that would be .com, jcpenny.com.

6 Do you see that question-and-answer series?

7 A. Yes.

8 Q. The OE system was never on the World Wide Web;
9 is that correct?

10 A. It was never on the -- on the web?

11 Q. The World Wide Web?

12 A. That's correct.

13 Q. And the OE system never had hyperlink
14 functionality, did it?

15 A. Had what?

16 Q. Hyperlink functionality?

17 A. No.

18 Q. When J.C. Penney launched its website in the
19 late 1990s, it had to establish new databases for that
20 launch, didn't they?

21 A. No, they didn't.

22 MS. CASSIDY: Can I please have DX207,
23 please?

24 Can we go to the last page? Actually, it
25 may be easier to just -- just go to Slide 1 on my

1 PowerPoint, please.

2 Q. (By Ms. Cassidy) Okay. I will draw your
3 attention to the first line there.

4 We knew it would be impossible to scale-up the
5 number of products without establishing a database,
6 correct, complete with product information, an image of
7 product pricing information, et cetera.

8 Do you see that on the screen?

9 A. Yes.

10 Q. Then it continues a little -- in fact, J.C.
11 Penney knew it would be -- had to hire a third party to
12 develop a database for the J.C. Penney website.

13 Do you see that?

14 A. Yes.

15 Q. It says: We commissioned our consulting
16 agency, Modern Media, with the job of developing a
17 database to house data not only for the J.C. Penney
18 website but also for Progeny, CompuServe, and an
19 anticipated addition of America Online.

20 Do you see that?

21 A. Uh-huh.

22 Q. And that database, as we just said and as this
23 document shows, was needed to store things like product
24 information, an image of the product, and pricing
25 information, correct? Do you see that?

1 A. I see that.

2 Q. In the first paragraph beginning with "we
3 started," I will draw your attention there.

4 But isn't it a fact that J.C. Penney had to
5 shop around for suitable software to run the jcp.com
6 website when it was launched -- when they launched the
7 website?

8 A. Well, it depends on what part of the software
9 you're talking about.

10 Q. This document here states that J.C. Penney
11 started shopping for software that would allow it to
12 provide secure online ordering to the customer.

13 Do you see that?

14 A. Yes, I do.

15 Q. And J.C. Penney needed the software that would
16 enable J.C. Penney to develop pages on-the-fly using a
17 robust database and templates.

18 Do you see that?

19 A. Yes, I do.

20 Q. None of these things were available in the
21 software for the OE system, were they?

22 A. We did not have pictures of products on OE,
23 but all the databases with all the product information
24 they used were the same ones that we used on OE. And,
25 in fact, if you look at the order database as it was

1 when they built .NET.

2 And the way it is today, all those orders are
3 on the same order database. Always have been. The only
4 way you tell the difference between them is one position
5 that tells what the entry vehicle was for that order.

6 Q. Okay. But if I can draw your attention to the
7 second to the last sentence here on this slide, it says
8 J.C. Penney signed an agreement with Netscape to license
9 the Merchant server in February of 1996.

10 Do you see that?

11 A. Yes, I do.

12 Q. Now, there are a couple of documents we
13 discussed during your direct examination.

14 Now, you understand that Soverain had an
15 opportunity to ask J.C. Penney questions about these
16 documents during discovery in this case, don't you?

17 A. Pardon?

18 Q. You understand that J.C. Penney questioned the
19 corporate designee about these very documents that we
20 discussed earlier in your testimony?

21 A. Yes.

22 Q. And Mr. Feuerborn was the person designated to
23 give that testimony; is that right?

24 A. Yes, it was.

25 Q. And before Mr. Feuerborn's deposition, he

1 spoke to you to learn about the OE system, didn't he?

2 A. He talked to me a couple of times.

3 Q. Mr. Feuerborn said he spoke to you because you
4 had a lot of knowledge about the system.

5 Would you agree with that?

6 A. Pardon?

7 Q. Mr. Feuerborn said that he spoke to you
8 because you had a lot of knowledge about the system.

9 A. I had a lot of knowledge about it. I worked
10 there a long time.

11 Q. In fact, Mr. Feuerborn testified at deposition
12 that he had many conversations with you over many days
13 about the OE system. Do you -- is that --

14 A. That's correct.

15 Q. -- consistent with your recollection?

16 And Mr. Feuerborn said that he spoke to you
17 for a long time, because the OE system is large and
18 complicated.

19 A. It is very large, very complicated. Spent a
20 lot of time.

21 Q. And yet despite these lengthy conversations
22 with you, Mr. Feuerborn could not answer Soverain's
23 questions about the documents you discussed today.

24 Did you know that?

25 MR. CARTER: Your Honor, excuse me. I

1 don't know what the relevance of these questions are on
2 what Mr. Feuerborn said in a deposition dealing with
3 J.C. Penney. It's irrelevant.

4 MS. CASSIDY: Your Honor, Mr. Feuerborn
5 was a 30(b)(6) witness designated by J.C. Penney
6 specifically to answer our questions about the OE
7 system. And just as I'm about to lay out for the Court
8 and for the witness and also for the jury, when we asked
9 the questions about the very document that was put --
10 covered in direct examination, his answers were that he
11 did not know what these documents were, and he did not
12 know when they were created.

13 MR. CARTER: J.C. Penney is not a
14 Defendant in the case.

15 THE COURT: Excuse me.

16 MR. CARTER: J.C. Penney is no longer a
17 Defendant in the case.

18 THE COURT: All right. Objection's
19 overruled.

20 Q. (By Ms. Cassidy) Let's bring out DX112 again,
21 just so we know what we're talking about.

22 Soverain asked Mr. Feuerborn questions about
23 this document. As you see, it's designated as Exhibit 2
24 Feuerborn.

25 MS. CASSIDY: Pardon me, Your Honor.

1 Sorry.

2 If I could have Slide 13, please --

3 actually, Slide 12. Sorry.

4 Q. (By Ms. Cassidy) In response to a question
5 from Soverain about this document, Mr. Feuerborn could
6 not tell Soverain when this OE flowchart was created.

7 Do you see the question-and-answer series I
8 have on the page?

9 A. Pardon?

10 Q. When we asked Mr. Feuerborn whether -- when
11 this document that we just saw a minute ago that's
12 designated Defendants' Exhibit 112 was created, he said
13 that he did not know when it was created.

14 Do you see the deposition testimony on the
15 screen?

16 A. Yes.

17 MS. CASSIDY: If I could have the next
18 slide, please.

19 Q. (By Ms. Cassidy) And then Soverain then asked
20 Mr. Feuerborn a question about the drawings contained on
21 Defendants' Exhibit 100, and Mr. Feuerborn could not
22 tell Soverain when those drawings were created either,
23 could he, if you read the transcript cite?

24 A. Yes.

25 THE COURT: Counsel, how much more do you

1 have for this witness?

2 MS. CASSIDY: I can speed it along, Your
3 Honor.

4 THE COURT: About how much longer will
5 that be?

6 MS. CASSIDY: I would say it's about five
7 minutes.

8 THE COURT: Okay. All right.

9 Q. (By Ms. Cassidy) Now, it's important -- the
10 fact that Mr. Feuerborn could not answer questions about
11 these documents is important, because J.C. Penney is
12 saying that they claim this is going before Open Market
13 invented the patents, right?

14 Do you understand that?

15 A. Yes.

16 Q. But Mr. Feuerborn couldn't identify the dates
17 of those documents that J.C. Penney is relying on, could
18 he?

19 A. Tom couldn't what?

20 Q. He could not provide dates for the creation of
21 these documents, could he?

22 A. Yes.

23 Q. And he could not answer those questions, even
24 though he had spent days talking to you about the
25 documents; isn't that right?

1 A. He didn't ask me about the time they were
2 created.

3 Q. He never asked you?

4 A. Not the dates, no.

5 Q. Mr. Feuerborn also couldn't tell you whether
6 the features discussed in the documents accurately
7 reflected the OE system either, could he?

8 A. Pardon?

9 Q. When Mr. Feuerborn at his deposition could not
10 tell whether the features discussed in the documents
11 about the OE system were -- were accurately reflected in
12 these documents, could he?

13 A. No.

14 Q. So that's significant, because if
15 Mr. Feuerborn didn't know whether the features discussed
16 in the documents had ever been implemented, those
17 documents are being relied on in this case for -- as
18 the prior art system, and that's important, right?

19 A. I don't think I understand the question.

20 Q. Okay. The fact that Mr. Feuerborn could not
21 tell when -- identify when the documents -- about the OE
22 system were implemented is important, because it's part
23 of the documents that the Defendants are using to
24 invalidate the patent in this case, aren't they?

25 A. Right.

1 MS. CASSIDY: Can I have Slide 17,
2 please.

3 Actually, put up Defendants' Exhibit 1,
4 please.

5 Q. (By Ms. Cassidy) At the deposition of
6 Mr. Feuerborn, J.C. Penney's designee, Soverain asked
7 when the specifications in this document were
8 implemented.

9 MS. CASSIDY: And if you could go back to
10 the slide, please. Page 17. Page 17 of the slide, the
11 PowerPoint.

12 Q. (By Ms. Cassidy) Let me just read the question
13 and answer for you.

14 The question was: Do you know if all of the
15 specifications in this document were implemented?

16 ANSWER: No, I do not.

17 Were you aware of that deposition testimony?

18 A. I -- well, I'd have to understand the
19 question. You know, the thing you're asking is -- was
20 in the document, was that what was implemented? Is that
21 what you said?

22 Q. That's what we asked Mr. Feuerborn, and he
23 said that he didn't know.

24 A. Well, I worked with OE. He didn't.

25 Q. That's what we thought. Thank you very much.

1 MS. CASSIDY: No further questions.

2 THE COURT: Any further redirect?

3 MR. CARTER: Just briefly, Your Honor.

4 REDIRECT EXAMINATION

5 BY MR. CARTER:

6 Q. Mr. Fredrickson, were you deposed by Soverain
7 in the Soverain case before J.C. Penney?

8 A. No, I wasn't.

9 Q. You were -- you know you were disclosed as a
10 witness, and you were going to testify.

11 A. Yes.

12 Q. Now -- so they could have asked you all of
13 these questions themselves, because I think you said you
14 know a lot about it.

15 A. Oh, yeah. I worked a lot of hours with it.

16 Q. All right. Now, with the homeworkers and --
17 and you were asked some questions about the -- about
18 using the internet with the OE. Now, with the
19 homeworkers, they connected through a telephone line?

20 A. Yes, they did.

21 Q. Into the mainframe?

22 A. No, they didn't.

23 Q. How did they connect in?

24 A. Well, the telephone line actually goes to the
25 first central office, and what I mean by a central

1 office, that's where the exchanges are.

2 And then what happens after it gets to the
3 central office, then it goes into the packet network.

4 How it gets from that exchange to our data
5 center, you know, the last central office before the
6 data center, that's up to the carrier, AT&T.

7 I mean, it's just in a big cloud someplace.
8 You know, you never go direct. It's someplace through
9 the network.

10 Q. When did you hear about the internet?

11 A. Well, when I first started -- you see, the
12 thing is, the time we started the internet, a lot of
13 those people came out of catalog systems, out of OE, in
14 fact.

15 Q. All right, sir. Now, when the -- when the
16 internet got started back in the early 1990s --

17 A. Uh-huh.

18 Q. -- was there any indication by J.C. Penney
19 that they wanted to get involved with the internet at
20 that point in time?

21 A. By J.C. Penney, that they wanted to use the
22 network?

23 Q. Yes, by using the internet.

24 A. Yeah.

25 Q. All right. Now, did you move to the internet

1 back in 1992 or 1993?

2 A. The first time I got involved in it was '96,
3 '97.

4 Q. All right, sir. Was there a delay in J.C.
5 Penney going to the internet?

6 A. Slight delay, yes.

7 Q. All right. And why was that?

8 A. Well, at first, you know, the catalog, you
9 know, we were taking millions of orders, you know. And
10 so at that time, you know, people weren't thinking that
11 much about the internet, because you had the big catalog
12 application that was running.

13 Q. Were you confident in your network and how
14 well it ran?

15 A. Oh, yeah. In fact, our network never failed.
16 I mean, it -- we took millions of orders. Like in one
17 year, during peak -- and that's from about the middle of
18 November until Christmas -- we took over 4-and-a-half
19 million calls.

20 MR. CARTER: Pass the witness, Your
21 Honor.

22 THE COURT: All right. Anything further?

23 MS. CASSIDY: Nothing.

24 THE COURT: All right. You may step
25 down.

1 All right, Ladies and Gentlemen. We've
2 gone a little over today. I apologize for that. But I
3 wanted to see us get through with this witness.

4 The good news is, it's raining. The bad
5 news is, you've got to drive home in it. So it's going
6 to be getting dark. I know some of you have a ways to
7 drive, so I'm going to let you go on and get on your way
8 and just tell you to drive carefully, and we'll see you
9 back here in the morning.

10 I do want to mention to you, though --
11 and I'm going to visit with the attorneys about it --
12 due to a commitment I have for the swearing in of the
13 new United States Attorney for the Eastern District of
14 Texas, we're not going to be able to have court Thursday
15 afternoon. I have to attend that.

16 So I'm going to visit with them, and in
17 all probability, we will -- I'm going to see if we can
18 still get through this week with that event; and if we
19 do, we may start a little early Thursday morning and go
20 until 11:00 or 11:30, and then let you go for the day
21 Thursday and then try to finish on Friday.

22 If it doesn't look like we can get
23 through by Friday, we may just take Thursday off, finish
24 the evidence on Friday and have you come back Monday for
25 argument.

1 So I'm going to visit with them
2 afterwards. I'll let you know tomorrow, but I just
3 wanted to let you know sort of what's in the mix for
4 your planning purposes.

5 Does that create -- either one of those
6 create any huge problems for any of you?

7 Okay. Very well. Thank you for your
8 attention today. The jury is excused.

9 COURT SECURITY OFFICER: All rise.
10 (Jury out.)

11 THE COURT: Please be seated.

12 MR. CARTER: Your Honor, excuse me. May
13 Mr. Fredrickson be released from the subpoena?

14 THE COURT: Any objection?

15 MR. NELSON: No objection, Your Honor.

16 THE COURT: He certainly may. Travel
17 carefully.

18 All right. Let me -- just a housekeeping
19 matter. Exhibit lists, nobody's tendered another one.
20 Do you have one today?

21 MR. SMITH: Yes, Your Honor, we do.

22 THE COURT: All right. Plaintiffs have
23 Plaintiff's Exhibit List No. 2. Is that a cumulative
24 list?

25 MR. SMITH: Yes, it is, Your Honor. It

1 covers everything through today.

2 THE COURT: All right. If you'll tender
3 that to the Courtroom Deputy.

4 Is there any objection to Plaintiff's
5 Exhibit List No. 2?

6 MR. GLENN: No, Your Honor.

7 THE COURT: They will be admitted.

8 Does Defendant have an exhibit list?

9 MR. GLENN: Yes, Your Honor. Defendants
10 have Daily Exhibit List No. 2 that is cumulative through
11 today.

12 THE COURT: All right. Any objections to
13 the exhibit list they offered?

14 MR. SMITH: No, Your Honor.

15 THE COURT: All right. Those exhibits
16 are admitted.

17 All right. Let's talk a moment about the
18 time. What witnesses do Defendants plan to call
19 tomorrow?

20 MR. CARTER: Let's see. It would be
21 Mr. Roman.

22 THE COURT: And what witness is he?

23 MR. CARTER: Avon.

24 THE COURT: Another corporate rep?

25 MR. CARTER: Yes, sir.

1 THE COURT: Okay.

2 MR. McSWANE: And I don't think he's
3 going to take very long.

4 THE COURT: How long is not very long?

5 MR. McSWANE: Fifteen minutes with my
6 direct.

7 THE COURT: Okay.

8 MR. McSWANE: At least that's what I'm
9 shooting for.

10 THE COURT: Who's next?

11 MR. CARTER: Victoria Secret.

12 THE COURT: I haven't met her, but I'm
13 looking forward to it.

14 [Laughter.]

15 MR. AINSWORTH: That's about 10 minutes.

16 THE COURT: How long will she take?

17 MR. AINSWORTH: Ten minutes, Your Honor.

18 THE COURT: Okay. All right.

19 MR. CARTER: And then there's another
20 Victoria's Secret witness, Mr. Blevins. Less than a
21 half hour, they tell me. Don't hold me to that, Judge,
22 though.

23 THE COURT: I am. Go ahead.

24 MR. CARTER: And then we have
25 Mr. Eastburn, Mr. Napper.

1 THE COURT: This Mr. Eastburn is which
2 one now?

3 MR. CARTER: He's an expert witness on
4 CompuServe.

5 THE COURT: On invalidity?

6 MR. CARTER: Yes, sir.

7 THE COURT: All right. And who's next?

8 MR. CARTER: Mr. Napper, financial.

9 THE COURT: Okay.

10 MR. CARTER: Mr. -- Dr. Keller,
11 infringement and invalidity.

12 THE COURT: And how long do you think
13 Mr. Eastburn will take?

14 MR. CARTER: An hour and 15 minutes.

15 THE COURT: And what about Mr. Napper?

16 MR. LEVY: An hour.

17 THE COURT: One hour?

18 And Mr. Keller?

19 MR. CARTER: An hour and 15 minutes.

20 THE COURT: All right. Let's -- and
21 that's all of your witnesses?

22 MR. CARTER: Yes, sir.

23 THE COURT: So you should rest then by at
24 least early afternoon tomorrow; is that correct? I
25 added up -- well, I didn't figure in cross, so I better

1 put a little something in for that.

2 MR. McSWANE: Your Honor, can I add five
3 more minutes to my witness?

4 THE COURT: No. Let's see, there's 90,
5 two hours. Well, that looks like that will pretty much
6 take us through tomorrow.

7 MR. CARTER: We didn't get as far as we
8 were hoping to this afternoon, so I would expect that it
9 will make it through tomorrow.

10 THE COURT: All right. And then what
11 will Plaintiff have as far as rebuttal?

12 MR. NELSON: I'll speak up. I think for
13 rebuttal, Your Honor -- I can confirm with the team just
14 to make sure, but I believe it will just be Dr. Shamos.

15 THE COURT: And how long do you
16 anticipate he will take?

17 MR. NELSON: I believe we've estimated
18 that right at about an hour and a half; is that right?
19 Yes. I'm getting nods, so that's correct.

20 THE COURT: Well, it looks like to me,
21 with that, that we ought to be able to finish the
22 evidence by Thursday by, say, 11:00 o'clock, especially
23 if we start a little early Thursday.

24 MR. NELSON: It seems that way. I mean,
25 it's always a little bit hard to tell with

1 cross-examination, because you have to wait and see
2 what's on direct, but how much time did you allot for
3 cross-examination?

4 THE COURT: Ten minutes per witness.

5 [Laughter.]

6 THE COURT: No. I gave you roughly half
7 of what they take on direct.

8 MR. NELSON: I think that's reasonable,
9 Your Honor.

10 THE COURT: Okay. Well, we will push to
11 then get through with the evidence by Thursday, and then
12 that should allow us to argue the case on Friday
13 morning -- and get the jury charge and argue it on
14 Friday morning, which is always better than late in the
15 day on Friday.

16 But in any event, I think we should
17 finish by Friday. I'll compliment both sides on your
18 use of your time. You've both done very well in putting
19 your case on efficiently.

20 All right. Is there anything further the
21 Court can help you with before we adjourn today?

22 MR. CARTER: Judge, we would like to make
23 an offer of proof on Mr. Trewitt.

24 THE COURT: Okay.

25 MR. CARTER: If we could make a written

1 submission, so we don't take up any time from the Court.

2 THE COURT: Okay. When will you have
3 that in?

4 MR. CARTER: Tomorrow morning.

5 MR. NICODEMA: Tomorrow, Your Honor.

6 THE COURT: Okay. All right. That will
7 be fine. If you'll submit it to me in the morning, I'll
8 take a look at it.

9 MR. CARTER: Thank you.

10 THE COURT: Thank you.

11 MR. NELSON: Thank you.

12 THE COURT: Be adjourned.

13 COURT SECURITY OFFICER: All rise.

14 (Court adjourned.)

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1 CERTIFICATION

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3 I HEREBY CERTIFY that the foregoing is a
4 true and correct transcript from the stenographic notes
5 of the proceedings in the above-entitled matter to the
6 best of our abilities.

7

8

9 /s/ Shea Sloan
SHEA SLOAN, CSR
10 Official Court Reporter
State of Texas No.: 3081
11 Expiration Date: 12/31/12

12

13

/s/ Judith Werlinger
14 JUDITH WERLINGER, CSR
Deputy Official Court Reporter
15 State of Texas No.: 731
Expiration Date 12/31/12

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