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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE JACQUELINE SCOTT CORLEY, MAGISTRATE JUDGE

SYMANTEC CORP.,)
)
PLAINTIFF,)
)
VS.) NO.C 11-5310 EMC (JSC)
)
ACRONIS, INC.,)
) SAN FRANCISCO, CALIFORNIA
) SEPTEMBER 19, 2013
) 9:16 O'CLOCK A.M.

TRANSCRIPT OF PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND**RECORDINGS****APPEARANCES:**

FOR PLAINTIFF: QUINN, EMANUEL, URQUHART & OLIVER
50 CALIFORNIA STREET, 22ND FLOOR
SAN FRANCISCO, CALIFORNIA 94111
BY: KATE CASSIDY, ATTORNEY AT LAW

FOR DEFENDANT: FISH & RICHARDSON P.C.
222 DELAWARE AVENUE, 17TH FLOOR
P.O. BOX 1114
WILMINGTON, DELAWARE 19899-1114
BY: THOMAS L. HALKOWSKI, ESQUIRE

FURTHER APPEARANCES ON NEXT PAGE.

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12390 EL CAMINO REAL

SAN DIEGO, CALIFORNIA 92130

BY: JOHN W. THORNBURGH, ESQUIRE

1 **SEPTEMBER 19, 2013**

9:16 O'CLOCK A.M.

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

4 **THE CLERK:** CALLING CIVIL ACTION 11-5310, SYMANTEC
5 CORPORATION VERSUS ACRONIS, INC.

6 **THE COURT:** GOOD MORNING.

7 **MR. HALKOWSKI:** GOOD MORNING, YOUR HONOR. THOMAS
8 HALKOWSKI ON BEHALF OF ACRONIS. ALSO WITH ME TODAY IS JOHN
9 THORNBURGH AND MARK WONG OUR IN-HOUSE COUNSEL.

10 **THE COURT:** GOOD MORNING, MR. WONG.

11 **MR. WONG:** GOOD MORNING.

12 **MS. CASSIDY:** GOOD MORNING. KATE CASSIDY FROM QUINN
13 EMANUEL ON BEHALF OF SYMANTEC. ALSO WITH ME TODAY IS KEN CHEE,
14 IN-HOUSE COUNSEL AT SYMANTEC.

15 **THE COURT:** AND YOU'RE WELCOME TO SIT AT THE TABLE,
16 IF YOU PREFER, BUT IF YOU WANT TO STAY AWAY FROM THEM I
17 UNDERSTAND.

18 ALL RIGHT. SO WE'RE HERE FOR ACRONIS' MOTION FOR LEAVE TO
19 FILE AMENDED INVALIDITY CONTENTIONS.

20 SO THIS IS A NEW ONE FOR ME. I HAVEN'T SEEN THIS BEFORE.
21 AND I GUESS SORT OF -- I MEAN, DOES SOUND LIKE IT FITS SQUARELY
22 WITHIN THE JUST-A-MISTAKE-WAS-MADE. AND I DON'T KNOW I CAN SAY
23 THAT DESPITE DILIGENCE -- NO. FIRST, I'LL SAY YOU WERE
24 DILIGENT ONCE THE MISTAKE -- NOT YOU -- WHOEVER, ONCE THE
25 MISTAKE -- I KNOW YOU DISAGREE WITH THAT. BUT I'LL SAY I THINK

1 THEY WERE PRETTY DILIGENT ONCE THE MISTAKE WAS UNCOVERED.

2 BUT THE QUESTION IS: WERE YOU DILIGENT BEFORE? BUT, OF
3 COURSE, A PARTY IS REQUIRED UNDER THE LOCAL RULES TO
4 INVESTIGATE ALL POSSIBLE PRIOR ART TOWARD THE BEGINNING OF THE
5 CASE, NOT ON THE EVE OF THE CLOSE OF DISCOVERY.

6 AND I DON'T KNOW HOW FROM THIS RECORD I CAN FIND THAT.
7 BECAUSE, FOR EXAMPLE, THIS DATABASE THAT THIS PERSON SOLELY
8 RELIED UPON, WAS IT RELIABLE? WAS THAT REASONABLE? WHEN WAS
9 IT CREATED? WHAT WAS IT BASED UPON?

10 THERE ARE E-MAILS IN THE RECORD THAT SUGGEST THAT ACRONIS
11 WAS AT SOME POINT ASKING THE OLD TIMERS:

12 "WHEN WAS THIS STUFF RELEASED" AND THAT KIND OF
13 THING.

14 SO HOW CAN I FIND DILIGENCE IN THE INITIAL INVESTIGATION
15 OF PRIOR ART?

16 **MR. HALKOWSKI:** WELL, I THINK A COUPLE OF ANSWERS TO
17 THAT. ONE, CERTAINLY WE COULD PROVIDE AN ADDITIONAL
18 DECLARATION TO PROVIDE FURTHER CONTEXT FROM MR. DMITRI
19 JOUKOVSKY, WHO WAS KIND OF THE KEEPER OF THE FLAME, SO TO
20 SPEAK, IN TERMS OF THAT DATABASE.

21 I MEAN, I WILL TELL YOU THAT IT WAS SOMETHING THAT WAS
22 PASSED ON TO HIM WHEN HE FIRST JOINED THE COMPANY, AND IT WAS
23 JUST SOMETHING THAT THEY WOULD RELY UPON WHENEVER THEY NEEDED
24 TO LOOK AT WHENEVER SOMETHING WAS PUBLICLY RELEASED.

25 AND SO, YOU KNOW, IT WAS BELIEVED TO BE ACCURATE. AND SO

1 THAT'S WHAT (INAUDIBLE) COMPANY, AND WE WERE ADVISED OF PUBLIC
2 RELEASE DATES. THAT'S WHAT WE WERE ADVISED.

3 I KNOW THAT SYMANTEC HAS A LITTLE BIT OF FUN WITH, YOU
4 KNOW, LOOKING AT ALL THE DIFFERENT DOCUMENTS IN THE RECORD AND
5 LOOKING AT THE WEBSITE AND STUFF. BUT, I MEAN, THE
6 PRACTICALITY OF IT IS THAT THIS IS A HUGE CASE. IT'S ANOTHER
7 HUGE CASE. WE'VE GOT E-MAILS GOING BACK AND FORTH. MARK CAN
8 PROBABLY UNFORTUNATELY CONFIRM WE'VE GOT E-MAILS GOING BACK
9 CONSTANTLY WHERE INFORMATION IS BEING EXCHANGED BETWEEN CLIENT
10 AND ATTORNEYS. AND, YOU KNOW, IT'S JUST NOT PRACTICAL TO
11 DOUBLE-CHECK EVERY SINGLE DRAFT THAT COMES IN FROM THE CLIENT.

12 **THE COURT:** MAYBE I AGREE WITH THAT.

13 **MR. HALKOWSKI:** YES.

14 **THE COURT:** EXCEPT THAT YOU CONTEND THAT THIS PIECE
15 OF PRIOR ART USED EARLIER VERSIONS IS DISPOSITIVE.

16 **MR. HALKOWSKI:** RIGHT.

17 **THE COURT:** IT WILL KNOCK OUT TWO PATENTS.

18 **MR. HALKOWSKI:** RIGHT.

19 **THE COURT:** SO ISN'T IT THE CASE THAT WHEN -- NOT
20 WHEN YOU'RE RESPONDING TO INTERROGATORIES, BECAUSE I DON'T
21 THINK YOUR DILIGENCE IS SATISFIED BY RESPONDING TO YOUR
22 INTERROGATORIES. AS A DEFENDANT YOU HAVE AN INDEPENDENT
23 OBLIGATION TO, NOT WITHSTANDING WHETHER THERE'S INTERROGATORY
24 OR NOT, TO DO YOUR OWN DUE DILIGENCE --

25 **MR. HALKOWSKI:** RIGHT.

1 **THE COURT:** -- WITH RESPECT TO INVALIDITY CONTENTIONS
2 AND PRIOR ART. THE FIRST PLACE YOU WOULD GO IS: OKAY, THEY
3 ACCUSED THESE PRODUCTS. LET'S GO BACK. WHEN DID PRODUCTS WITH
4 THIS FUNCTIONALITY FIRST HIT THE MARKET?

5 THAT'S WHERE YOU ARE GOING TO START --

6 **MR. HALKOWSKI:** RIGHT.

7 **THE COURT:** -- YOUR PRIOR ART --

8 **MR. HALKOWSKI:** RIGHT.

9 **THE COURT:** -- RESEARCH. AND IF YOU BELIEVE THAT
10 EARLIER VERSIONS ACTUALLY INVALIDATE THE PATENT, THEN IT'S AN
11 IMPORTANT, REALLY IMPORTANT FACT. AND YOU ARE GOING TO DO MORE
12 THAN JUST RELY ON SOMETHING IN A DATABASE. YOU SEE THAT AND
13 THINK:

14 "WELL, MAYBE WE BETA TESTED IT SOMEWHERE IN THE
15 UNITED STATES AND SO THAT WE CAN" -- YOU KNOW WHAT I MEAN?

16 **MR. HALKOWSKI:** RIGHT.

17 **THE COURT:** I JUST CAN'T SEE THAT THAT IS ACTUALLY
18 DILIGENT.

19 **MR. HALKOWSKI:** AS I SAY, AGAIN, YOU NEED TO LOOK AT
20 THE PRACTICALITIES OF THIS SITUATION. SYMANTEC HAS SUED US ON
21 TEN PATENTS. THESE ARE TWO OF THEM.

22 WE OBVIOUSLY DO THE BEST WE CAN IN TERMS OF PRIORITIZING
23 THE INFORMATION THAT COMES IN. OBVIOUSLY, THIS WAS SOMETHING
24 THAT WAS ADDRESSED. WE RECEIVED AN ANSWER. YOU KNOW, WE'RE
25 CONDUCTING, YOU KNOW, LITERALLY WORLDWIDE SEARCHES FOR PRIOR

1 ART.

2 **THE COURT:** AND IT'S RIGHT UNDER YOUR NOSE.

3 **MR. HALKOWSKI:** EXACTLY. EXACTLY. EXACTLY. I KNOW.

4 I KNOW.

5 AND SO, YOU KNOW, IN TERMS OF WORKING HARD TO TRY TO FIND
6 THE PRIOR ART, THAT WAS NOT THE ISSUE. IT'S JUST OBVIOUSLY
7 THIS WAS A MISTAKE IN RELIANCE ON SOMETHING.

8 THE OTHER THING I WILL POINT OUT -- AND SO I THINK THAT
9 THAT'S ONE. THIS ISN'T THE PRACTICALITIES OF THE SITUATION.
10 THERE'S A LOT OF THINGS GOING ON, OBVIOUSLY.

11 YOU KNOW, WE BELIEVED THE INFORMATION THAT WE WERE TOLD,
12 OTHERWISE, YOU KNOW, WE HAD ALL THE INCENTIVE IN THE WORLD TO
13 DO SOMETHING ELSE. BUT THERE WAS MANY, MANY, MANY, MANY, MANY
14 IRONS IN THE FIRE IN TERMS OF TRYING TO FIND PRIOR ART FOR
15 THESE OTHER TEN DIFFERENT PATENTS, AS WELL.

16 AND, YOU KNOW, AT SOME POINT OBVIOUSLY DECISIONS HAVE TO
17 BE MADE IN TERMS OF:

18 "OKAY. HOW MANY RESOURCES ARE WE GOING TO INVEST?"

19 I MEAN, POTENTIALLY, THERE ARE LITERALLY, I DON'T KNOW,
20 ENUMERABLE NUMBER OF TIMES IN A CASE WHERE YOU THINK:

21 "IF WE FIND X, IT'S DISPOSITIVE."

22 SO, YEAH, I MEAN THAT'S TRUE. BUT THAT'S TRUE ALL THE
23 TIME. EVERY DAY SOMETHING COMES UP AND YOU SAY:

24 "GEE, YOU KNOW, THIS, THIS AND THIS IS DISPOSITIVE."

25 WELL, YOU COULD GO CRAZY, YOU KNOW, THINKING ABOUT ALL

1 THAT AND ALL THE DIFFERENT THINGS YOU COULD POSSIBLY DO FOR ALL
2 TEN DIFFERENT PATENTS.

3 SO, YES, IN ISOLATION, YOU KNOW, IF IT WAS ONE PATENT AND
4 THIS IS THE ONLY THING THAT WE, YOU KNOW, HAD TO WORRY ABOUT
5 FOR THIS CASE, YOU KNOW, MAYBE IT'S A DIFFERENT BALANCE. SO
6 THAT'S THE ONE THING.

7 THE OTHER, THOUGH, IS THAT THERE'S A NUMBER OF CASES THAT
8 ACTUALLY TAKE A MORE DISCRETIONARY VIEW OF THIS. THERE'S
9 PARTICULARLY WITH REGARD TO JUDGE ILLSTON IN POSITIVE TECH AND
10 THE SYMANTEC VERSUS VEEAM CASE.

11 AND AS I NOTICED LAST NIGHT ACTUALLY BOTH OF THOSE CASES
12 CITE A THIRD CASE, THE YOU D LEE (PHONETIC) CASE, 2007 WEST LAW
13 1454259.

14 AND IN THOSE CASES JUDGE ILLSTON KIND OF HIGHLIGHTS THE
15 FACT THAT, YOU KNOW, ONE OF THE KEY THINGS THAT SHE IS GOING TO
16 LOOK AT IS THE RELEVANCE OF THE ART, WHICH IS WHY WE, YOU KNOW,
17 EMPHASIZE THE FACT THAT THIS, INDEED, REALLY IS DISPOSITIVE.

18 AND YOUR HONOR DOES HAVE DISCRETION IN TERMS OF HOW YOU
19 ARE GOING TO RULE ON THIS. AND THAT'S REFLECTED IN THESE CASES
20 REPEATEDLY. THEY EVEN GO SO FAR AS TO SAY, YOU KNOW, DILIGENCE
21 IS SOMETHING TO BE LOOKED AT.

22 BUT, YOU KNOW, EVEN IF THE -- IF THERE WAS AN HONEST
23 MISTAKE, EVEN IF THERE WAS CARELESSNESS -- SOME OF THE LANGUAGE
24 GOES:

25 "EVEN IF THERE WAS CARELESSNESS, BUT AS LONG AS THERE

1 WAS NOT GAMESMANSHIP" --

2 **THE COURT:** NO, I DON'T THINK THERE WAS GAMESMANSHIP.

3 **MR. HALKOWSKI:** YEAH.

4 "SO WE'LL OVERLOOK THAT. AND BECAUSE OF THE
5 HARSHNESS OF THE RESULT."

6 AND HERE YOU COULD NOT HAVE A HARSHER RESULT. BECAUSE I
7 THINK IN BOTH THESE CASES LITERALLY THESE PATENTS ARE --
8 SHOULD, YOU KNOW, JUST GO AWAY. BECAUSE IT'S NOT A QUESTION OF
9 WE'RE BRINGING IN NEW TECHNOLOGY AND IT'S:

10 "OH, BOY. GOING TO BE MORE COMPLICATED."

11 IT'S NOT A CASE OF THAT. IT'S A QUESTION OF DATES. THESE
12 ARE ACTUALLY EARLIER VERSIONS OF PRODUCTS THAT ARE ALREADY IN
13 THE CASE, HAVE BEEN IN THE CASE FOR YEARS.

14 ON THE ONE HAND, IT'S THE PRODUCTS THAT SYMANTEC ITSELF
15 HAS BEEN OFFERING, AND WE WEREN'T ABLE TO UNCOVER THAT UNTIL WE
16 REALLY LITERALLY STUMBLED ACROSS THAT IN A DEPOSITION.

17 **THE COURT:** WELL, BUT I THOUGHT THE MANUALS WERE
18 PUBLICLY AVAILABLE.

19 **MR. HALKOWSKI:** THE MANUALS FOR THEIR PRODUCTS ARE,
20 YEAH. BUT THAT DOES NOT HELP YOU AT ALL, BECAUSE THE KEY
21 ELEMENT WAS THE CATALOGUE ELEMENT. AND YOU'LL NOTICE IN OUR
22 CONTENTIONS THE ONLY EVIDENCE THAT HAVE FOR THAT CATALOGUE
23 ELEMENT IS FROM THAT DEPOSITION.

24 AND THE DEPOSITION, AND THAT WAS -- AND I THINK PROBABLY
25 ONE OF THE KEY -- THERE'S A LOT OF LANGUAGE THAT WE CITE, BUT

1 SOME OF THE KEY LANGUAGE IS AT EXHIBIT B TO THE MAY
2 DECLARATION, AT PAGE 279, WHERE THE WITNESS MADE CLEAR THAT
3 IT'S A SINGLE CATALOGUE FILE WOULD CONTAIN ENTRIES FOR ALL OF
4 THE FILES THAT WERE BACKED UP IN EACH OF THE INCREMENTALS.

5 **THE COURT:** WHAT DO YOU SAY TO THE ARGUMENT:

6 "WELL, YOU WAITED UNTIL THE WEEK BEFORE DISCOVERY
7 CLOSED TO TAKE THAT 30 (B) (6) DEPOSITION"? THAT HE WAS
8 MADE AVAILABLE --

9 **MR. HALKOWSKI:** RIGHT.

10 **THE COURT:** -- IN MAY.

11 **MR. HALKOWSKI:** WELL, AGAIN, THAT'S AN INTERESTING
12 POINT. BUT IF THEY HAD BEEN DOING -- "THEY" -- IF SYMANTEC HAD
13 BEEN DOING THEIR HOMEWORK THEY WOULD HAVE SEEN THEMSELVES THAT
14 THIS EARLIER VERSION HAD THE SAME EXACT CATALOGUE FUNCTIONALITY
15 AS THE VERSIONS OF THAT PRODUCT, THAT BACKUP EXEC PRODUCT THAT
16 THEY HELD UP AND SAID:

17 "HERE'S AN EMBODIMENT OF THE PATENT. THIS DOES
18 EXACTLY WHAT THE PATENT DOES."

19 AND IF THEY HAD DONE THEIR HOMEWORK THEY WOULD HAVE SEEN
20 THAT THIS EARLIER VERSION WAS ALSO AN EMBODIMENT, AND THEY WERE
21 REQUIRED TO DISCLOSE THAT TO US.

22 AND, IN FACT, HAD THEY, YOU KNOW, FOLLOWED KIND OF THE
23 PROPER PROCEDURES, THEY SHOULD HAVE ACTUALLY DISCLOSED THAT TO
24 THE PATENT OFFICE AND NEVER GOTTEN THE PATENT IN THE FIRST
25 PLACE.

1 SO THAT'S ONE POINT. THE SECOND POINT --

2 **THE COURT:** DO YOU HAVE A CLAIM FOR OR DEFENSE OF
3 INEQUITABLE CONDUCT?

4 **MR. HALKOWSKI:** YOU KNOW, OBVIOUSLY IT WOULD REQUIRE
5 MORE DISCOVERY. WE LITERALLY GOT THIS AT THE LAST MINUTE. AND
6 THE REASON WHY -- WE WEREN'T TAKING THIS GUY'S DEPOSITION TO
7 SEE:

8 "OH, LET'S SEE IF WE CAN COME UP WITH OR MORE PRIOR
9 ART AT THE LAST MINUTE."

10 AGAIN, WE'VE GOT TEN PATENTS THAT WE'RE DEALING WITH.
11 WE'VE GOT SOME THAT WE ARE TRYING TO ASSERT IN OUR OWN DEFENSE.

12 SO THERE'S A LOT OF DIFFERENT PIECES GOING ON, A LOT OF
13 DIFFERENT DISCOVERY. THIS WAS ONE PIECE OF THAT.

14 AND, IN FACT, THE FOCUS OF THIS DEPOSITION WAS OUR CASE,
15 OUR OFFENSIVE CASE. WE WANTED TO TALK TO THIS GUY ABOUT THE
16 ACCUSED BACKUP EXEC PRODUCTS, THE THINGS THAT WE WERE ACCUSING.

17 IT JUST LITERALLY WAS HAPPENSTANCE THAT GOING THROUGH HIS
18 BACKGROUND, IT'S LIKE:

19 "OH, WAIT A MINUTE. YOU WORKED ON THIS WAY BACK
20 WHEN? WHAT WAS IT DOING WAY BACK WHEN?"

21 AND SO, LITERALLY, IT JUST SORT OF CAME UP. SO, YEAH,
22 AGAIN, IF WE KNEW THAT THIS GUY HAD THIS BACKGROUND AND
23 POTENTIALLY THIS WAS PRIOR ART, OBVIOUSLY IT WOULD HAVE GONE
24 MORE TOWARDS THE TOP OF THE LIST IN TERMS OF PRIORITIES FOR
25 PEOPLE TO DEPOSE.

1 **THE COURT:** ALL RIGHT. SO YOU -- SYMANTEC'S ACTUALLY
2 ACCUSED INFRINGEMENT OF FIVE PATENTS, RIGHT?

3 **MR. HALKOWSKI:** FIVE IN THIS CASE, FIVE IN ANOTHER
4 CASE, YEAH. SO THEY ARE REALLY OVERLAPPING. WE'RE RIGHT IN
5 THE MIDDLE OF AN INCREDIBLE AMOUNT OF DISCOVERY IN THAT CASE,
6 AS WELL. IT'S IN FRONT OF JUDGE TIGAR.

7 **THE COURT:** SO, MS. CASSIDY, WHAT ABOUT THAT ARGUMENT
8 THAT:

9 "WELL, YOU KNOW, YOU DID SUE US ON FIVE PATENTS AND
10 ANOTHER FIVE PATENTS. THAT'S TEN PATENTS OUT THERE.
11 JUST KIND OF SLIP SLIDE"?

12 **MS. CASSIDY:** YOUR HONOR, BY THE TIME THAT ACRONIS
13 HAD TO FILE THEIR INVALIDITY CONTENTIONS THEY HAD SIX MONTHS TO
14 DO ITS INVESTIGATION. AND WITH ALL DUE RESPECT, THE PATENT
15 LOCAL RULES, WHILE THEY DO ENCOURAGE EARLY DISCLOSURE, THEY DO
16 ENCOURAGE PARTIES TO DO THEIR HOMEWORK EARLY.

17 AND WHAT WE'VE GOT HERE IS A CASE OF ACRONIS SIMPLY NOT
18 DOING THEIR HOMEWORK ON TIME. THESE ARE THEIR OWN PRODUCTS, AS
19 YOUR HONOR POINTED OUT. AND, IN FACT, WHEN YOU READ
20 THEIR -- ACRONIS' MOTION, THE DATE ISSUE ONLY APPLIES TO ONE
21 PRODUCT THAT THEY CONTEND.

22 ALL OF THE OTHER PRODUCTS THEY HAVE NOT ASSERTED AN ISSUE
23 ABOUT DATE. BUT WITH RESPECT TO DATE, YOUR HONOR, I DON'T
24 THINK THAT THAT ISSUE HAS BEEN RESOLVED YET.

25 SO IF THESE CASES, THESE CONTENTIONS WERE TO COME IN

1 THAT'S WHERE WE'RE STARTING FROM. WE DON'T HAVE AN IDEA OF
2 WHEN THESE DOCUMENTS OR WHEN THESE PRODUCTS WERE ACTUALLY
3 RELEASED.

4 THE DATE OF THIS THAT MR. HALKOWSKI SAYS IS THE MOST
5 RELIABLE, EVERY SINGLE DATE IN THERE WITH RESPECT TO THESE NEW
6 PRODUCTS IS INCONSISTENT WITH OTHER DATES IN THE RECORD THAT
7 THEY HAVE PUT IN THEIR CONTENTIONS.

8 SO WE HAVE TO UNCOVER WHAT IS ACTUALLY THE CORRECT DATE.
9 THE DATABASE THAT THEY HAVE ATTACHED TO THE JOUKOVSKY
10 DECLARATION IS INCONSISTENT WITH THE DATES THEY PUT IN THEIR
11 CLAIM CHARTS.

12 AND WHEN YOU LOOK AT THEIR CLAIM CHARTS, IT'S APPARENT
13 THAT ACRONIS DOESN'T EVEN REALLY KNOW WHEN ITS DATES WERE
14 ACTUALLY ISSUED, BECAUSE THEY USE LANGUAGE:

15 "RELEASED AT LEAST AS EARLY AS." THERE'S NO
16 DEFINITIVE IDEA HERE ABOUT WHEN THESE PRODUCTS WERE, IN FACT,
17 ACTUALLY ISSUED. AND THERE'S ACTUALLY A NUMBER OF OTHER POINTS
18 THAT MR. HALKOWSKI RAISED.

19 **THE COURT:** WELL, ALL THEY NEED TO DO IS SHOW THAT IT
20 WAS ISSUED BEFORE THE PATENT WAS APPLIED FOR, RIGHT?

21 **MS. CASSIDY:** PRESUMABLY, YES. BUT WE DON'T HAVE
22 THAT DISCOVERY, YOUR HONOR. WE WOULD HAVE TO GO ON AND TAKE A
23 LOOK AT THAT, BECAUSE THE EVIDENCE IN THE RECORD IS NOT
24 RELIABLE.

25 **THE COURT:** WELL, EXCEPT THEY DO SAY THAT THEY

1 ACTUALLY PRODUCED TO YOU DOCUMENTS THAT SHOW THE DATES THAT
2 WERE PRE -- I GUESS IT'S PRE -- ONE, APRIL 2004, AND THE OTHER
3 SEPTEMBER, 2004.

4 **MS. CASSIDY:** RIGHT. AND THERE'S ONLY SEVEN
5 PRODUCTS, YOUR HONOR. BUT THE FACT OF THE MATTER IS THAT THEY
6 HAVE DOCUMENTS POINTING THIS WAY FOR ONE DATE AND THAT WAY FOR
7 ANOTHER DATE. AND THEY ARE SAYING THAT THIS DATABASE IS
8 RELIABLE WHEN, IN FACT, ALL OF THE DATES IN THERE SEEM TO BE
9 WRONG.

10 AND WE JUST HAVE TO KIND OF GET TO THE BOTTOM OF THIS AND
11 UNCOVER THIS. WE DON'T KNOW HOW MANY OTHER DOCUMENTS MAY HAVE
12 DIFFERENT DATES. BUT THE FACT OF THE MATTER IS THAT IF FOR THE
13 SEVEN PRODUCTS, IF THEY ARE CLAIMING THAT THE RELEASE DATE IS
14 DECEMBER, 2003, THAT INFORMATION HAS BEEN AVAILABLE TO THEM ALL
15 ALONG.

16 AND AS YOUR HONOR POINTED OUT IN THE ORDINARY COURSE OF
17 BUSINESS THEY DON'T REFER TO THIS DATABASE. THEY GO AND LOOK
18 AT THEIR PRESS RELEASES.

19 AND SO IT'S HARD TO SAY THAT THEY WERE DILIGENT WHEN FOR
20 THE LITIGATION THEY DO ONE THING WHICH PULLS OUT LIKE THEIR OWN
21 ERROR.

22 **THE COURT:** AND YOU'RE REFERRING TO THOSE EMAILS.

23 **MS. CASSIDY:** CORRECT.

24 **THE COURT:** WHAT ABOUT THE BACKUP, THE BACKUP EXEC?
25 AND ACRONIS SAYS THAT THE MANUALS THAT WERE AVAILABLE DIDN'T

1 SHOW THE CATALOGUE ELEMENTS.

2 **MS. CASSIDY:** OF COURSE THEY DID, YOUR HONOR. AND
3 THEY HAVE HAD THAT SOURCE CODE AVAILABLE TO THEM SINCE JUNE OF
4 2012. WE PRODUCED THAT TO THEM AND MADE IT AVAILABLE TO THEM
5 SINCE THE DATE OF THE FIRST INSPECTION.

6 **THE COURT:** IS THAT --

7 **MS. CASSIDY:** I HAVE CORRESPONDENCE ABOUT THAT, YOUR
8 HONOR, IF YOU WANT TO SEE.

9 **THE COURT:** HE'S CONFERRING.

10 **MS. CASSIDY:** OKAY. AND, IF I MAY PICK UP THAT
11 POINT, YOUR HONOR, THEY SAY THAT THEY WERE TALKING TO KIRK
12 SEARLS, BUT THEY HAVE NEVER -- THEY HAVE NOT DEPOSED THE
13 INVENTORS OF THE '655 PATENT. WE'VE BEEN OFFERING THEM DATES
14 FOR DEPOSITION, I THINK WE'VE OFFERED NO LESS THAN FIVE
15 DIFFERENT DATES, AND THEY STILL HAVEN'T CONFIRMED DATES THAT
16 THEY MAY WANT TO TAKE THEM.

17 BUT HAD THEY BOTHERED TO TAKE THE INVENTORS' DEPOSITION
18 THEY WOULD HAVE SEEN THAT THESE PEOPLE WERE WORKING ON THE
19 EARLIER VERSIONS OF BACKUP EXEC. AND WHAT THEY WOULD HAVE
20 UNCOVERED IS THAT, YOU KNOW, THE INVENTORS WERE WORKING ON THE
21 EARLIER VERSIONS OF BACKUP EXEC. THEY CAME ACROSS A NEW WAY TO
22 DO THE SYNTHETIC CATALOGUE, AND THEN APPLIED FOR THE '655
23 PATENT.

24 SO ALL OF THE PRODUCTS GOING FORWARD PAST THE INVENTION
25 DATE INCLUDE WERE COMMERCIAL EMBODIMENTS. BUT ALTHOUGH THE

1 BACKUP EXEC PRODUCTS BEFORE THAT DID NOT CONTAIN THE PATENTED
2 INVENTION. AND SO --

3 **THE COURT:** YOUR DISPUTE, THOUGH, IS THAT IT'S --

4 **MS. CASSIDY:** RIGHT.

5 **THE COURT:** -- INVALID.

6 **MS. CASSIDY:** ABSOLUTELY.

7 **THE COURT:** WELL, WHAT ABOUT THE SOURCE CODE?

8 **MR. HALKOWSKI:** I UNDERSTAND THAT --

9 **THE COURT:** IT'S OKAY IF YOU -- IS IT MR. THORNBURGH?

10 **MR. HALKOWSKI:** MR. THORNBURGH, YES.

11 **THE COURT:** YOU CAN DOUBLE-TEAM, IF YOU WANT.

12 **MR. HALKOWSKI:** BECAUSE WITH REGARD TO THE SOURCE
13 CODE HE PROBABLY IS THE EXPERT.

14 **THE COURT:** SURE. THAT'S ALL RIGHT.

15 **MR. HALKOWSKI:** I'D LIKE TO DEFER TO HIM.

16 **MR. THORNBURGH:** YOUR HONOR, I THINK THAT IT'S MORE
17 OF THE THEME THAT MR. HALKOWSKI RAISED, WHICH IS THAT THERE
18 WERE DOZENS AND DOZENS OF PRODUCTS AVAILABLE FOR INSPECTION,
19 AND EACH SOURCE CODE IS THOUSANDS AND THOUSANDS OF PAGES LONG.

20 AND SO WITHOUT SYMANTEC REVEALING THAT THIS WAS AN
21 EMBODYING PRODUCT WHEN THEY WERE SUPPOSED TO LIST IT, OR EVEN
22 LISTING IT AS POTENTIAL PRIOR ART, GOING AND LOOKING FOR
23 ELEMENTS IN EVERY SINGLE VERSION OF EVERY SINGLE OLD PRODUCT
24 WOULD BE A HERCULEAN TASK.

25 AND SO, YES, THEY MADE THE SOURCE CODE AVAILABLE FOR

1 INSPECTION. BUT THAT DOESN'T MEAN, YOU KNOW, IN THE DAYS THAT
2 WE HAD TO LOOK AT IT THAT WE DISCOVERED THIS CATALOGUE ELEMENT.

3 AND SO I THINK WHAT MR. HALKOWSKI HAS SAID IS THAT THEY
4 HAD THEIR PERSON, MR. SEARLS, WHO ACTUALLY KNEW THIS. AND IF
5 THEY HAD INTERVIEWED HIM AND REVEALED IT TO US, THEN WE COULD
6 HAVE GONE AND DONE THE INSPECTION. AND WE WOULD STILL LIKE TO
7 DO THE INSPECTION OF THE SOURCE CODE NOW. BUT GIVEN THE LATE
8 BREAKING DEVELOPMENT WE HAVEN'T YET SCHEDULED THAT. BUT WE DO
9 HAVE HIS CLEAR TESTIMONY.

10 **THE COURT:** WELL, YES. I GUESS, MS. CASSIDY, YOU'RE
11 SAYING THAT YOU DISPUTE THAT IT'S EMBODYING. BUT THEY ARE
12 SAYING THAT MR. THEO? THEO?

13 **MR. HALKOWSKI:** SEARLS.

14 **THE COURT:** THAT HE ACTUALLY TESTIFIED ESSENTIALLY
15 THAT IT DOES CONTAIN THAT FUNCTIONALITY, THE EARLIER VERSION
16 DOES.

17 **MR. HALKOWSKI:** RIGHT. AND I THINK WE CITE SOME OF
18 THAT TESTIMONY. AS I SAID, PAGE 279 IT'S PARTICULARLY CLEAR
19 WHERE HE TALKED -- BECAUSE THE "GEE WHIZ" ABOUT THIS -- AGAIN,
20 AT A VERY HIGH LEVEL, YOUR HONOR -- ABOUT THIS '655 PATENT WAS
21 THAT THEY STARTED TO DO AN INCREMENTAL BACKUPS. "INCREMENTAL
22 BACKUP" MEANS, AGAIN, GENERALLY SPEAKING, IS THE WAY IT'S
23 TAUGHT IS THAT IF YOU HAVE SOMETHING YOU TAKE A BACKUP OF
24 WHATEVER, SIX MONTHS AGO, AND THEN YOU TAKE AND YOU HAD ANOTHER
25 BACKUP FROM, LIKE, THREE YEARS AGO, WHATEVER HAS CHANGED IN

1 THAT -- IN THE INTERVENING TIME, THAT'S WHAT YOU ACTUALLY BACK
2 UP. YOU DON'T BACK UP EVERYTHING.

3 AND THAT RAISED THE QUESTION THAT, OKAY, YOU KNOW, KIND OF
4 "WHERE IS WALDO?"

5 IT'S LIKE IF YOU WANT TO LOOK BACK AND KIND OF SEE, YOU
6 KNOW, SOME OF YOUR OLD FILES, IT KIND OF DEPENDS ON, YOU KNOW,
7 WHEN SOMETHING CHANGED AS TO WHERE THAT OLD BACKUP FILE IS.

8 IT COULD BE BACKUP NUMBER ONE. IT COULD BE BACKUP NUMBER
9 TWO, BACKUP NUMBER THREE. SO YOU WOULD WANT TO HAVE A
10 COLLECTION OF ALL THOSE THINGS TOGETHER.

11 AND SO -- AND THAT'S THE CATALOGUE ELEMENT. THAT'S THE
12 LAST ELEMENT IN THE ASSERTED CLAIM. AND MR. SEARLS COULD NOT
13 HAVE BEEN CLEARER ABOUT THAT, SAYING THAT A SINGLE CATALOGUE
14 FILE WOULD CONTAIN ENTRIES FOR ALL THE FILES THAT WERE BACKUP,
15 AND EACH OF THE INCREMENTALS.

16 AND HE WENT OVER THIS. AND THAT'S AT PAGE 279 OF EXHIBIT
17 B.

18 BUT HE WENT OVER THIS OVER AND OVER AND OVER AGAIN
19 THROUGHOUT THAT DEPOSITION BECAUSE WE, OBVIOUSLY, YOU KNOW,
20 COULD NOT BELIEVE WHAT WE WERE HEARING AT THE TIME. AND SO WE
21 REALLY TRIED TO NAIL THAT DOWN.

22 **THE COURT:** BUT USUALLY WITH INVALIDITY CONTENTIONS,
23 THE ARGUMENT IS:

24 "WELL, NOTWITHSTANDING DILIGENT SEARCH WE COULDN'T
25 FIND OUT THIS INFORMATION BECAUSE WHAT WAS PUBLICLY

1 AVAILABLE" --

2 **MR. HALKOWSKI:** RIGHT.

3 **THE COURT:** "OR AVAILABLE TO US WASN'T THERE."

4 **MR. HALKOWSKI:** RIGHT.

5 **THE COURT:** BUT HERE YOU SEEM TO BE SAYING SOMETHING
6 DIFFERENT, WHICH IS:

7 "WE DIDN'T REALLY SEARCH."

8 YOU'RE EVEN SAYING:

9 "HERE WE SORT OF CAME CROSS IT. WE WEREN'T EVEN
10 DOING THIS DEPOSITION FOR THAT REASON."

11 **MR. HALKOWSKI:** THAT'S RIGHT.

12 **THE COURT:** AND I UNDERSTAND WHY, WHICH IS BECAUSE WE
13 HAD TO MAKE CHOICES.

14 **MR. HALKOWSKI:** RIGHT.

15 **THE COURT:** AS TO WHERE -- SO --

16 **MR. HALKOWSKI:** RIGHT. WELL --

17 **THE COURT:** -- WHY SHOULDN'T -- I MEAN THAT'S ALWAYS
18 THE CASE. I MEAN, I GUESS YOU COULD SAY:

19 "WELL, THE PATENT LOCAL RULES AREN'T REASONABLE IN
20 THE SENSE THAT THEY APPLY THE SAME STANDARD WHETHER
21 THERE'S ONE PATENT OR THERE'S TEN."

22 AND MAYBE MORE TIME NEEDS TO BE PUT IN THERE. BUT THE
23 PARTIES ARE CERTAINLY ALWAYS -- WELL, DEPENDING ON YOUR
24 JUDGE -- ALMOST ALWAYS STIPULATE TO THAT AND AGREE.

25 **MR. HALKOWSKI:** AND, IN FACT, WE DID. AND AGAIN,

1 THESE, AGAIN, ARE EARLIER VERSIONS OF PRODUCTS. WHEN WE
2 STIPULATED WITH REGARD WHEN THEY WANTED TO ADD A LATER VERSIONS
3 OF OUR PRODUCTS FOR INFRINGEMENT PURPOSES, BECAUSE IT'S NOT
4 ADDING ANY NEW TECHNOLOGY TO THE CASE.

5 SAME THING HERE. WE'RE NOT ADDING ANY NEW TECHNOLOGY TO
6 THE CASE, JUST EARLIER VERSION. OBVIOUSLY, THE IMPACT SHOULD
7 BE DISPOSITIVE. I THINK IT WILL VERY MUCH HELP TO SIMPLIFY THE
8 CASE.

9 THERE'S ONE THING I WANT TO NOTE, THOUGH, ON THEIR POINT
10 ABOUT THE PUBLICLY AVAILABLE SOURCES. THE APPLE CASE THAT WE
11 CITE FROM MAGISTRATE JUDGE GREWAL, HE NOTED THERE THAT THERE
12 APPEARS TO BE, QUOTE:

13 "NO REASON FOR WHY IT DID NOT DISCOVER THIS PUBLICLY
14 AVAILABLE INFORMATION EARLIER," CLOSE QUOTE.

15 BUT HE SAID:

16 "HEY, YOU KNOW, I'M GOING TO AVOID AN UNNECESSARILY
17 HARSH RESULT. I'M GOING TO ALLOW THIS MOTION TO AMEND."

18 THAT WAS ADDING SOME PRODUCTS. AGAIN --

19 **THE COURT:** WAS DISCOVERY CLOSED?

20 **MR. HALKOWSKI:** I DON'T KNOW IF DISCOVERY WAS CLOSED
21 AT THAT POINT. AND, IN FACT, YOU KNOW, IT WASN'T CLOSED HERE,
22 EITHER. IT WAS OBVIOUSLY CLOSE TO BEING CLOSED. BUT THE KEY
23 THERE, AGAIN, WAS THAT HE SAYS IN OTHER LANGUAGES, EVEN THOUGH
24 HE -- THE OMISSION WAS CARELESS, THERE WAS NO GAMESMANSHIP.

25 AND HE'S GOING TO AVOID AN UNNECESSARILY HARSH RESULT AND

1 ALLOW THE MOTION TO AMEND.

2 THERE'S A SIMILAR THEME IN THE LELAND STANFORD CASE AND
3 THE OPEN DNS CASE.

4 OPEN DNS IS BY MAGISTRATE JUDGE LLOYD.

5 **THE COURT:** OH, YEAH. BUT I READ THAT CASE. THAT IS
6 WHAT YOU CALL A "SURFACE" --

7 **MR. HALKOWSKI:** RIGHT.

8 (SIMULTANEOUS COLLOQUY).

9 **MR. HALKOWSKI:** RIGHT.

10 **THE COURT:** -- IN WHICH THE OTHER SIDE WAS VERY MUCH
11 ON NOTICE OF THE TRUE NATURE OF THE --

12 **MR. HALKOWSKI:** RIGHT.

13 (SIMULTANEOUS COLLOQUY)

14 **THE COURT:** THAT'S NOT HERE.

15 **MR. HALKOWSKI:** WELL, HERE IT'S SIMILAR IN THE SENSE
16 IF YOU ARE GOING TO TALK ABOUT BEING ON NOTICE, THE TECHNOLOGY
17 HERE HAD BEEN IN THE CASE. SO THEY ARE FULLY FAMILIAR. IT'S
18 REALLY JUST A DATES ISSUE.

19 **THE COURT:** BUT A DATES ISSUE THAT YOU CLAIM IS
20 DISPOSITIVE.

21 **MR. HALKOWSKI:** WELL, EXACTLY. IT IS. IT IS. AND
22 THAT'S WHY, OBVIOUSLY, YOU KNOW, ALL THINGS BEING EQUAL, YOU
23 KNOW, WE WISH WE WOULD HAVE DONE MORE EARLIER.

24 BUT, AGAIN, WE MADE THE BEST ASSESSMENTS THAT WE COULD IN
25 TERMS OF WHAT THE INFORMATION THAT WE HAD. AND I THINK HERE

1 YOU LOOK AT THESE CASES, OPEN DNS, LELAND STANFORD, THE APPLE
2 CASE, POSITIVE TECH, SYMANTEC VERSUS VEEAM, THE YOGI (PHONETIC)
3 CASE, ALL THOSE CASES I THINK WHAT REALLY COMES ACROSS IS:

4 "HEY, WE'VE GOT DISCRETION HERE. WE'RE NOT ROBOTS."

5 AND SO WHAT WE ARE STRONGLY URGING YOUR HONOR TO DO IS IF
6 YOU ARE GOING TO MAKE A MISTAKE, ERR ON THE SIDE OF JUSTICE,
7 BECAUSE -- AND IT'S TRUE. YOU DON'T GET TO DO THAT EVERY DAY.
8 BUT --

9 **THE COURT:** NOT EVERY DAY.

10 **MR. HALKOWSKI:** EXACTLY. BUT HERE, I MEAN,
11 POTENTIALLY, AGAIN, YOU HAVE TO TAKE OUR WORD FOR IT. BUT
12 WE'VE LAID THIS OUT IN OUR CONTENTIONS. WE'VE NOW GIVEN THEM
13 AN EXPERT REPORT THAT LAYS THIS OUT IN EXCRUCIATING DETAIL ON
14 AUGUST 30TH. THAT'S WHEN THE OPENING EXPERT REPORTS WERE DUE.

15 WE'VE GOT OVER EIGHT MONTHS TILL TRIAL. WE'VE GOT PLENTY
16 OF TIME TO DO WHATEVER THEY WANT TO DO IN TERMS OF ADDITIONAL
17 DISCOVERY THAT THEY SAY THAT THEY NEED, ALTHOUGH THEY HAVEN'T
18 ASKED FOR IT.

19 WE CAN DEAL WITH ALL THIS. BUT THE POINT BEING THAT WHAT
20 SHOULD NOT HAPPEN IS TWO INVALID PATENTS CONTINUE TO BE
21 ASSERTED.

22 AND THIS SIMILAR SITUATION HAPPENED IN THE SYMANTEC/VEEAM
23 CASE. THEY FOUGHT LIKE TOOTH AND NAIL AGAINST VEEAM TO LET
24 THAT IN. BUT IT ULTIMATELY GOT IN, THANKS TO JUDGE ILLSTON
25 ERRING ON THE SIDE OF JUSTICE. AND THAT THE PATENT WAS

1 DISMISSED AS STIPULATION, ULTIMATELY.

2 **THE COURT:** WELL, WHAT ABOUT THAT ARGUMENT THAT IF
3 IT'S JUST AN EARLIER VERSION OF THE SAME PRODUCTS THAT YOU
4 ACCUSE, WHERE'S -- I MEAN, WHERE'S THE PREJUDICE?

5 I MEAN, WHY, YOU KNOW -- I MEAN, HOW IS THAT FAIR?

6 **MS. CASSIDY:** OKAY. SO THERE WAS A LOT THAT WAS JUST
7 DISCUSSED THERE, YOUR HONOR.

8 SO I THINK WHAT THIS BOILS DOWN TO, IF I MAY JUST TAKE A
9 STEP BACK AND TAKE EVERYTHING THAT MR. HALKOWSKI SAID. THEY
10 MADE A CHOICE. THEY ADMITTED THAT. THEY MADE A CHOICE EARLY
11 ON.

12 IN FACT, THEY ADMITTED IN THEIR REPLY THAT THEY LOOKED AT
13 THE EARLIER VERSIONS OF THEIR OWN PRODUCT AND FOUND THEM TO BE
14 IRRELEVANT, AND THEN MOVED ON.

15 NOW, THEY ARE COMING BACK TO THE COURT ON THE BASIS OF
16 INCORRECT DATES THAT WE STILL DON'T KNOW, REALLY, WHAT IS GOING
17 ON, PLEADING WITH YOUR HONOR TO SAY THAT, YOU KNOW, THESE ARE
18 INVALID PATENTS, WHICH IS A BIG STATEMENT TO MAKE GIVEN THAT
19 THEY HAVEN'T GIVEN CLAIM CHARTS FOR ALL OF THEIR REFERENCES
20 THAT THEY HAVE PUT IN HERE.

21 SO WE CAN'T EVEN GET TO THE MATTER OF WHETHER THEY ARE
22 DISPUTING WHETHER THERE IS ACTUALLY INVALIDATING ART HERE
23 BECAUSE WE'VE ONLY GOT A LIMITED AMOUNT OF CLAIM CHART. THEY
24 SHOULD HAVE CHARTED 28 REFERENCES, BUT THEY DIDN'T.

25 **MR. HALKOWSKI:** AND I WOULD DISPUTE THAT BECAUSE AS I

1 MENTIONED WE HAVE GIVEN THEM OUR EXPERT REPORT THAT LAYS THIS
2 OUT IN EVEN MORE DETAIL AS OF AUGUST 30TH.

3 **MS. CASSIDY:** SHIFTING SAND, YOUR HONOR. EVERYTHING
4 KEEPS MOVING. WHEN THEY SUBMITTED THEIR BRIEF -- WHEN THEY
5 SUBMITTED THEIR MOTION AND ASKED YOU TO RULE ON THIS RECORD
6 THEY PROVIDED THESE CLAIM CHARTS. AND THAT'S WHAT THEY WANTED.

7 SO NOW THEY WANT TO CORRECT THE DEFICIENCY THAT THEY
8 CREATED AND SHOVE THEM INTO THEIR EXPERT REPORTS BECAUSE THEY
9 DON'T HAVE PERMISSION TO PUT WHATEVER THEY PUT IN THEIR EXPERT
10 REPORTS IN THEIR INVALIDITY CONTENTIONS.

11 THEY NEED TO ASK PERMISSION EVERY TIME THEY WANT TO AMEND
12 THEIR INVALIDITY CONTENTION. AND WHAT HE'S SAYING IS THAT HE
13 HASN'T DONE THAT.

14 **THE COURT:** OKAY. BUT LET'S NOT TALK ABOUT FORM OVER
15 SUBSTANCE.

16 **MS. CASSIDY:** RIGHT.

17 **THE COURT:** LET'S JUST TALK ABOUT SUBSTANCE FOR THE
18 MOMENT. I MEAN, WHAT HIS REAL ARGUMENT IS IS THAT:

19 "LOOK, IT'S AN EARLIER VERSION OF THE VERY SAME
20 PRODUCTS THAT THEY ACCUSED."

21 WHY SHOULD THEY -- IN THE END THEY ARE SAYING:

22 "WHY SHOULD THEY BE ALLOWED TO GET, LET'S SAY,
23 ALTHOUGH THEY DISPUTE IT -- INFRINGEMENT, A JUDGMENT OF
24 INFRINGEMENT IF, ESSENTIALLY, THE SAME FUNCTIONALITY WAS
25 IN AN EARLIER VERSION OF THAT WOULD INVALIDATE THEIR

1 PATENT?"

2 HOW IS THAT FAIR?

3 **MS. CASSIDY:** WELL, I THINK, YOUR HONOR, THAT'S
4 ACTUALLY AN INCORRECT RULE OF LAW, AND THAT WE'RE HAPPY TO
5 SUBMIT ADDITIONAL BRIEFING ON THAT IF THAT IS WHAT YOUR
6 HONOR -- YOU TRY AND ARGUE NONINFRINGEMENT BASED ON PRIOR ART.

7 **THE COURT:** NO. NO. NO. NO. IT'S INVALIDITY BASED
8 ON PRIOR ART.

9 **MS. CASSIDY:** RIGHT. BUT THEY ARE BASICALLY SAYING
10 IF YOU PRACTICE A PRIOR ART EARLIER, THEN -- THEY ARE CLAIMING
11 THAT THEY DON'T INFRINGE, BUT IF THEY DO INFRINGE THEY REALLY
12 DON'T INFRINGE BECAUSE THEY WERE DOING IT BEFORE --

13 **THE COURT:** NO, THEY ARE NOT SAYING THEY DON'T
14 INFRINGE. THEY ARE SAYING THE PATENT IS INVALID.

15 **MS. CASSIDY:** SO GETTING BACK TO YOUR EARLIER
16 QUESTION, YOUR HONOR, WHEN THEY TALKED TO YOU ABOUT
17 HOW -- FIRST OF ALL, THE TECHNOLOGY WASN'T AT ISSUE IN THE CASE
18 FOR THESE PATENTS.

19 THE TRUE IMAGE PRODUCTS WERE AT ISSUE FOR THE '365 PATENT.
20 SO THE TECHNOLOGY, IT'S SLIGHTLY SHIFTED. SO FOR THE TRUE
21 IMAGE 7 PATENT THEY WERE NEVER AT ISSUE FOR THE '517 OR THE
22 '365.

23 **THE COURT:** YOU MEAN, THOSE AREN'T ACCUSED PRODUCTS
24 FOR THOSE PATENTS?

25 **MS. CASSIDY:** THAT'S CORRECT. AND SO WE HAVEN'T BEEN

1 LOOKING AT THOSE PRODUCTS FOR THAT FUNCTIONALITY FOR THOSE
2 PATENTS.

3 AND, IN ADDITION, THE MIGRATEEASY PATENT, THE OSS
4 MIGRATEEASY PRODUCTS, THE OSS PRODUCTS, THE DISK DIRECTOR
5 PRODUCTS, NEVER BEEN AT ISSUE IN THE CASE, YOUR HONOR.

6 AND THEN, WITH RESPECT TO THE BACKUP EXEC PRODUCT, I THINK
7 WE WERE TALKING ABOUT THAT A BIT EARLIER, THEY ARE NOT PRIOR
8 ART PRODUCTS. AND HAD ACRONIS BOTHERED TO DO ITS HOMEWORK AND
9 TAKE THE DISCOVERY THAT WAS AVAILABLE TO IT, WHICH INCLUDES
10 DEPOSING THE INVENTORS WHO ACTUALLY CAME UP WITH THE '655
11 PATENT, THAT WOULD BE CLEAR. AND THE ANSWER WOULD BE THERE FOR
12 THEM.

13 BUT WE THINK THIS ARGUMENT ABOUT FAIRNESS, YOUR HONOR,
14 IT'S ALSO FAIR THAT PLAINTIFFS GET AN EARLY AND JUST RESOLUTION
15 OF DISPUTES BEFORE COURTS. AND THAT'S EXACTLY WHAT THE PATENT
16 LOCAL RULES ARE DESIGNED TO BALANCE.

17 THAT'S WHY THEY HAVE TO SATISFY GOOD CAUSE. THEY CAN'T
18 COME IN AND SAY:

19 "OH, GEE, SHUCKS, YOUR HONOR, WE MADE A MISTAKE WITH
20 RESPECT TO DATES BECAUSE WE MADE A CHOICE TO JUST
21 USE SOME UNDERLYING INVESTIGATION. AND NOW WE COME IN
22 HERE. WE THINK THAT WE WANT TO REDO OVER OUR ENTIRE
23 DEFENSES FOR TWO OF THESE PATENTS, AND WE THINK THAT YOU
24 SHOULD GIVE IT TO US."

25 THAT'S NOT THE STANDARD, YOUR HONOR. THEY HAVE TO SHOW

1 DILIGENCE FOR THEIR INVESTIGATION TO FIND NEW PRODUCTS IN THE
2 FIRST PLACE AND HAVE TO SHOW THAT THERE'S NO PREJUDICE TO
3 SYMANTEC IF THOSE CONTENTIONS ARE ALLOWED. AND THEY HAVEN'T
4 DONE THAT.

5 MR. HALKOWSKI SAYS -- HE SAID THAT THE MANUALS DON'T HELP
6 WITH RESPECT TO UNDERSTANDING THE UNDERLYING FUNCTIONALITY.

7 WE HAVE TESTIMONY FROM ACRONIS' WITNESSES SAYING THERE ARE
8 MISTAKES AND ERRORS IN THE MANUALS, AND THAT THEY ARE ALSO
9 DESIGNED TO EXPLAIN THINGS AT A HIGH LEVEL.

10 THEY ALSO DIDN'T PROVIDE THE SOURCE CODE FOR ALL THESE
11 PRODUCTS EVEN THOUGH THEY REPRESENTED TO THE COURT THAT THEY
12 DID.

13 SO EVEN THOUGH WE WENT DOWN AND WE INVESTIGATED THESE
14 PRODUCTS, HALF THE SOURCE CODE WAS MISSING. AND NOW, YOUR
15 HONOR, WHAT WE'RE DOING HERE IS THAT WE'RE AT THE SAME TIME
16 WE'RE SUPPOSED TO BE FINALIZING EXPERT DISCOVERY, WE HAVE TO
17 TAKE DISCOVERY ANEW. AND AS MR. HALKOWSKI SAYS HE ANTICIPATES
18 THIS GOING ON THROUGH TRIAL.

19 I MEAN, WHAT HAPPENS --

20 **MR. HALKOWSKI:** I DIDN'T.

21 **THE COURT:** I DON'T THINK THAT'S WHAT HE SAID.

22 **MS. CASSIDY:** HE'S SUGGESTING THAT THERE'S ENOUGH
23 TIME BEFORE TRIAL TO TAKE THIS DISCOVERY, RIGHT? WE'RE TRYING
24 TO NARROW THE CASE, YOUR HONOR. WE'RE TRYING TO GET READY FOR
25 SUMMARY JUDGMENT.

1 WE CAN'T GET READY FOR SUMMARY JUDGMENT ON THESE PATENTS
2 IF WE'RE STILL GETTING THESE DISCOVERY COMING IN.

3 **MR. HALKOWSKI:** IF I MAY JUST ADDRESS THAT ONE POINT.
4 WE ACTUALLY, AS I MENTIONED IN OUR PAPERS, WE GOT RID OF, LIKE,
5 WHAT, 14 REFERENCES IN AN EFFORT TO JUST FOCUS THIS.

6 **MS. CASSIDY:** AND THEY ARE REDOING IT, AGAIN, YOUR
7 HONOR.

8 **THE COURT:** ONE AT A TIME.

9 **MR. HALKOWSKI:** IN AN EFFORT FOR THIS VERY REASON TO
10 JUST FOCUS ON REALLY WHAT IS AT ISSUE. SO WE SAID, YOU KNOW --
11 AND WE LOOKED AT THAT CAREFULLY, AND WE SAID: "OKAY."

12 AND THAT WAS OBVIOUSLY BEFORE ANY RULING BY YOUR HONOR.
13 AND WE SAID:

14 "OKAY. WE'RE DROPPING THOSE. WE WANT TO THE FOCUS
15 THIS."

16 AND IN TERMS OF DISCOVERY, THERE'S BEEN A LOT OF
17 HAND-WAVING BY SYMANTEC, BECAUSE, OF COURSE, THEY WANT TO
18 CREATE A PARADE OF HORRIBLES IN TERMS OF:

19 "OH, MY GOSH. DISCOVERY. WE DON'T EVEN KNOW WHAT IS
20 GOING ON," AND DA-TA-DA-TA-DA-TA.

21 BUT BOTTOM LINE IS THEY MENTIONED THREE DEPOSITIONS IN
22 THEIR BRIEFING. THEY HAVE TAKEN ONE OF THOSE DEPOSITIONS OF
23 PEOPLE, ADDITIONAL PEOPLE THEY WANTED TO TALK TO. THEY HAVE
24 NOT FOLLOWED UP ON THE OTHER TWO. WE'RE HAPPY TO TALK WITH
25 THEM ABOUT THOSE TWO.

1 THEY MENTIONED ABOUT ADDITIONAL DOCUMENTS THAT THEY
2 WANTED. THEY HAVE NOT ASKED US WHAT ADDITIONAL OR WHAT
3 ADDITIONAL DOCUMENTS THAT THEY WANT US TO PROVIDE. WE'VE HAPPY
4 TO PROVIDE THEM.

5 **MS. CASSIDY:** YOUR HONOR, CAN I JUST --

6 **THE COURT:** EVERYBODY WILL GET A CHANCE.

7 **MR. HALKOWSKI:** SO -- AND THEN, IN TERMS OF THE
8 PREJUDICE, THERE'S JUST A COUPLE OF THINGS THAT I WANTED TO
9 NOTE. AND, AGAIN, THE IDEA THAT, WITH ALL DUE RESPECT, IT IS
10 THE SAME TECHNOLOGY.

11 **THE COURT:** RIGHT. BUT THAT'S JUST NOT THE ONLY
12 PREJUDICE. THE PREJUDICE IS THE TIMING THING, RIGHT?

13 **MR. HALKOWSKI:** WELL, EXACTLY. AND THAT'S WHY I WENT
14 INTO THE ACTUAL NITTY-GRITTY.

15 "OKAY. WHAT DO YOU ACTUALLY REALLY NEED?"

16 BECAUSE WE PROVIDED THEM THE EVIDENCE THAT WE HAVE ON THE
17 DATES THAT THEY -- IF THEY DON'T, YOU KNOW, BELIEVE THE E-MAIL
18 OR THEY DON'T BELIEVE THE --

19 **THE COURT:** NO, I MEAN MORE TIMING OF WHERE IT IS IN
20 THE CASE.

21 **MR. HALKOWSKI:** RIGHT.

22 **THE COURT:** SO WE WERE -- WHEN YOU'RE DOING -- IN THE
23 MIDDLE OF EXPERT DISCOVERY, WHEN YOU'RE PREPARING FOR SUMMARY
24 JUDGMENT, AND NOW IT TURNS OUT --

25 **MR. HALKOWSKI:** RIGHT.

1 **THE COURT:** -- NOW YOU HAVE TO DECIDE. I MEAN, YOU
2 HAVE CERTAIN --

3 **MR. HALKOWSKI:** RIGHT.

4 **THE COURT:** -- STRATEGIES GOING FORWARD THAT YOU'VE
5 BEEN PROSECUTING THE CASE AND DEFENDING THE CASE BASED ON
6 CERTAIN UNDERSTANDINGS.

7 **MR. HALKOWSKI:** RIGHT.

8 **THE COURT:** AND NOW THOSE UNDERSTANDINGS ARE CHANGED.
9 SO THERE IS SOME PREJUDICE.

10 **MR. HALKOWSKI:** THERE'S CLEARLY SOME. IT'S A
11 QUESTION OF WHETHER IT'S SUBSTANTIAL OR NOT. AND, AGAIN, IN
12 THIS SITUATION I CAN'T IMAGINE. I MEAN, IT WOULD HAVE TO BE
13 LIKE LITERALLY TRIAL THE NEXT DAY. BECAUSE IN THIS CASE, THE
14 FLIP SIDE OF THAT IS ALLOWING THEM TO PROCEED WITH TWO INVALID
15 PATENTS ON TECHNOLOGY THAT'S BEEN IN THE CASE FROM THE
16 BEGINNING.

17 MAYBE IT WASN'T NECESSARILY ASSERTED IN THESE PATENTS, BUT
18 ITS TECHNOLOGY, SAME PRODUCTS HAVE BEEN ASSERTED FROM THE
19 BEGINNING.

20 **MS. CASSIDY:** YOUR HONOR, MAY I JUST TALK TO THAT
21 POINT?

22 **THE COURT:** I'LL GIVE YOU -- EACH SIDE.

23 **MR. HALKOWSKI:** RIGHT. OKAY.

24 (SIMULTANEOUS COLLOQUY).

25 **MR. HALKOWSKI:** AND, AGAIN, THE CASES HERE MAKE CLEAR

1 TO, YOUR HONOR, I THINK, THAT THIS IS NOT SOMETHING WHERE
2 YOU'RE HANDCUFFED, AND YOU HAVE TO SAY:

3 "OH, SORRY. YOU KNOW, IT'S KIND OF LATE. THERE'S A
4 LITTLE BIT OF PREJUDICE. YOU KNOW, DILIGENCE WAS NOT
5 EXACTING."

6 THE CASES MAKE CLEAR THAT WHEN YOU'VE GOT A SITUATION
7 WHERE THERE WOULD OTHERWISE BE A HARSH RESULT, THERE'S
8 DISCRETION TO ALLOW THAT NOT TO HAPPEN. AND AS I SAID, WE'RE
9 WILLING TO DO WHATEVER WE HAVE TO IN ORDER TO PROVIDE THEM
10 WHATEVER THEY NEED AS SOON AS POSSIBLE. THEY HAVE NOT ASKED
11 FOR IT, THOUGH.

12 BUT IF THEY WANT IT, WE'RE HAPPY TO PROVIDE IT.

13 **THE COURT:** ALL RIGHT. I'LL LET MS. CASSIDY --

14 **MS. CASSIDY:** YOUR HONOR, JUDGE CHEN REJECTED SIMILAR
15 ARGUMENTS LIKE THIS IN FEBRUARY WHEN THEY WANTED TO AMEND THEIR
16 INFRINGEMENT CONTENTIONS TO BRING ONE NEW PRODUCT INTO THE
17 CASE. WHICH, AGAIN, THEY SAID WAS AT ISSUE IN THE CASE; WOULD
18 NOT RESULT IN SUBSTANTIAL ADDITIONAL DISCOVERY.

19 "TRUST US, YOUR HONOR. WE CAN DO WHAT WE NEED TO
20 DO."

21 AND JUDGE CHEN FOUND THAT ARGUMENT WANTING. HE SAID --

22 **THE COURT:** SO IT WAS JUDGE CHEN. SO I WAS READING
23 THE PAPERS.

24 **MS. CASSIDY:** YES.

25 **THE COURT:** THAT THERE WAS A MOTION TO AMEND IN

1 FEBRUARY, AND I COULDN'T REMEMBER. AND I SAID:

2 "REALLY? I DON'T REMEMBER DOING THAT."

3 IT WASN'T ME.

4 **MS. CASSIDY:** IT WASN'T YOU. IT WAS JUDGE CHEN.

5 **THE COURT:** OKAY.

6 **MS. CASSIDY:** AND WHAT HE WAS CONCERNED ABOUT WAS HIS
7 SCHEDULE, DOING THINGS IN PIECEMEAL, HAVING TO REDO CLAIM
8 CONSTRUCTION. AND ON THE BASIS OF ALL OF THAT HE SAID:

9 "I'M NOT EXPANDING THE CASE ANYMORE BY ADDING ONE
10 MORE PRODUCT."

11 HERE THEY WANT TO EXPAND THE CASE BY 28 NEW REFERENCES,
12 YOUR HONOR. AND THEY HAVEN'T PROVIDED THE DISCOVERY IN WHICH
13 TO DO IT.

14 AND JUDGE CHEN EXPLAINED THAT THE BEST LAID PLANS VERY
15 RARELY HAPPEN IN DISCOVERY, PARTICULARLY IN A CASE WHERE AS MR.
16 HALKOWSKI SAID, HE SAID THAT THEY HAVE BEEN INVESTIGATING,
17 DOING WORLDWIDE SEARCHES FOR THIS INFORMATION. AND MONTHS
18 LATER, AFTER APPARENTLY THEY DISCOVERED THIS MISTAKE, THEY
19 STILL HAVEN'T GOT A CLEAR RECORD ON IT.

20 AND IF I MAY REVISIT THE DILIGENCE ARGUMENT, YOUR HONOR,
21 WE ACTUALLY WENT AND DEPOSED MR. BELOUSSOV, WHO IS APPARENTLY
22 THIS CRITICAL WITNESS IN DECIDING THAT WHAT THE DATE WAS.

23 REMEMBER THERE'S A FOOTNOTE IN ACRONIS' BRIEFING SAYING
24 THAT THEY HAD A MEETING, EVEN THOUGH THEY DIDN'T EXPLAIN WHAT
25 IT WAS.

1 WE DEPOSED HIM AND ASKED HIM ABOUT THIS MEETING. HE
2 COULDN'T REMEMBER. HE HAD NO IDEA WHAT WE WERE TALKING ABOUT.
3 HE SAID:

4 "IT COULD HAVE HAPPENED. I DON'T REMEMBER IT. I
5 DON'T EVEN REMEMBER THE PRODUCTS."

6 SO THERE'S NO EVIDENCE IN THE RECORD, FACTUAL EVIDENCE OF
7 THEIR DILIGENCE. ALL WE HAVE IS ATTORNEY ARGUMENT, YOUR HONOR.
8 AND THAT'S -- QUITE FRANKLY, I THINK THAT THE CASES THAT WE'VE
9 CITED DEMONSTRATE THAT THAT'S NOT SUFFICIENT.

10 THEY CAN'T JUST WAVE THEIR HANDS AROUND AND SAY:

11 "GEE, WE'RE REALLY TRYING TO WORK REALLY HARD TO DO
12 THIS."

13 **MR. HALKOWSKI:** IF I COULD JUST --

14 **MS. CASSIDY:** THAT'S WHAT WE'VE BEEN DOING, TOO, YOUR
15 HONOR.

16 **MR. HALKOWSKI:** JUST TWO THINGS THAT --

17 (SIMULTANEOUS COLLOQUY).

18 **THE COURT:** LET HER FINISH.

19 **MS. CASSIDY:** AND THE OTHER THING THAT I WANTED TO
20 TALK ABOUT -- I THINK THAT WAS MY THINGS.

21 **MR. HALKOWSKI:** OKAY.

22 **THE COURT:** JUST TWO THINGS.

23 **MR. HALKOWSKI:** TWO THINGS WITH REGARD TO JUDGE
24 CHEN'S DECISION. AN ENTIRELY NEW PRODUCT. THAT WAS A BIG
25 DEAL. AGAIN, THESE ARE NOT ENTIRELY NEW PRODUCTS. THEY ARE

1 SIMPLY EARLIER VERSIONS. IT'S JUST A QUESTION OF DATES. THEY
2 DON'T HAVE TO, YOU KNOW, DO ALL THE HEAVY LIFTING OF ADDITIONAL
3 TECHNOLOGY. THAT'S ONE THING.

4 THE OTHER THING WAS: WHAT WAS THE DOWNSIDE OF THAT? THE
5 DOWNSIDE WAS, OKAY, YOU DON'T GET A PRODUCT HERE. MAYBE YOU
6 CAN FILE ANOTHER SUIT, AND THEN YOU CAN. YOU KNOW. ADD IT
7 THERE.

8 BUT AT MOST MAYBE A DAMAGES THING. HERE THE DOWNSIDE IS
9 EXTREME. IT'S A VERY, VERY HARSH RESULT. AND IN TERMS OF MR.
10 BELOUSSOV, HE'S OBVIOUSLY THE CEO. HE MAY NOT HAVE BEEN
11 OBVIOUSLY RECALLING EVERYTHING IN THE DEPOSITION. HE'S GOT A
12 GAZILLION AND ONE THINGS GOING ON.

13 THE PERSON WHO ACTUALLY PROVIDED THE DECLARATION WAS
14 DMITRI JOUKOVSKY.

15 **MS. CASSIDY:** HE DID NOT TESTIFY ABOUT THE MEETING,
16 YOUR HONOR.

17 **MR. HALKOWSKI:** THEY HAVE ASKED -- NOT ASKED TO TAKE
18 HIS DEPOSITION AGAIN. WE'RE HAPPY TO PROVIDE PEOPLE FOR A
19 DEPOSITION IF THEY WANT TO TALK WITH THEM. THEY HAVEN'T ASKED
20 FOR THEM.

21 WE HAVE ADDITIONAL DOCUMENTS. THEY HAVEN'T ASKED FOR IT.
22 THEY TALK ABOUT THE CODE THAT WAS MISSING. THEY HAVEN'T ASKED
23 FOR THAT. IF THEY WANT THAT, WE CAN PROVIDE IT. WE DON'T
24 THINK ANY OF THAT IS REALLY NECESSARY. WE THINK IT'S JUST A
25 QUESTION OF DATES.

1 BUT WE'RE HAPPY TO PROVIDE DISCOVERY ON AN EXPEDITED
2 BASIS, AND WE'VE GOT TIME.

3 **THE COURT:** OKAY. ALL RIGHT. THANK YOU. I'LL TAKE
4 THE MATTER UNDER SUBMISSION.

5 LET'S TALK ABOUT THIS, THE UNDER SEAL STUFF. SO THERE
6 WERE A FEW EXHIBITS THAT THE COURT DENIED WITHOUT PREJUDICE THE
7 REQUEST TO SEAL BECAUSE IT WAS, FOR EXAMPLE, TO SEAL AN ENTIRE
8 DEPOSITION TRANSCRIPT, WHICH I JUST CAN'T DO, BECAUSE IT'S NOT
9 ALL.

10 BUT SO I ASSUME THE PARTIES STILL WANT SOME OF THAT IN THE
11 RECORD?

12 **MS. CASSIDY:** YES, YOUR HONOR. THE PARTIES HAVE AN
13 AGREEMENT WHERE IF WE SUBMIT DEPOSITION TRANSCRIPTS THAT WE
14 ONLY DO THE SECTIONS THAT ARE ACTUALLY CITED IN THE MOTION.
15 AND THAT'S WHAT SYMANTEC DID IN ITS OPPOSITION.

16 AND I THINK ACRONIS HAS REACHED OUT TO YOUR HONOR TO SAY
17 THAT THEY WANT TO WITHDRAW THE ENTIRE SEARLS TRANSCRIPT;
18 REPLACE IT WITH JUST THE PAGES THAT THEY WANT -- THAT THEY
19 CITED IN THE MOTION.

20 AND YESTERDAY, LAST NIGHT -- I DON'T KNOW IF IT'S COME
21 THROUGH, YET, YOUR HONOR -- WE SUBMITTED AN ADDITIONAL
22 DECLARATION TRYING TO ESTABLISH GOOD CAUSE FOR THE SECTIONS OF
23 THE REDACTED PORTIONS OF THE SEARLS TRANSCRIPT THAT WE BELIEVE
24 TO BE -- SHOULD BE SEALED AND JUSTIFICATION FOR THOSE. SO
25 THAT'S AN ADDITIONAL CONSIDERATION FOR YOUR HONOR.

1 **MR. HALKOWSKI:** AND WE OBVIOUSLY DIDN'T BELIEVE THAT
2 MUCH OF THAT SEARLS TRANSCRIPT SHOULD BE CONFIDENTIAL, BUT IN
3 KEEPING WITH KIND OF TRYING TO KEEP GOOD RELATIONS THEY
4 BELIEVED IT WAS CONFIDENTIAL. AND WHAT WE HAVE DONE IN THE
5 PAST IS WE'VE SUBMITTED TRANSCRIPTS KIND OF IN WHOLE TO GIVE
6 YOU THE CONTEXT, WHATEVER YOU WANT TO HAVE. BUT WE'RE
7 CERTAINLY HAPPY TO WORK WITH THEM.

8 I UNDERSTAND WE ARE WORKING WITH THEM TO JUST GET YOU THE
9 RELEVANT PORTIONS, AND THEN HAVE YOU TAKE A LOOK AT THOSE AND
10 MAKE A DECISION.

11 **THE COURT:** I DON'T THINK IT WILL BE A PROBLEM. AND
12 THEN WHAT YOU NEED TO SUBMIT IS A REDACTED VERSION THAT WILL BE
13 IN THE PUBLIC RECORD. SOMETHING NEEDS TO BE IN THE PUBLIC
14 RECORD, AS WELL.

15 **MR. HALKOWSKI:** UNDERSTOOD. UNDERSTOOD.

16 **THE COURT:** SO I NEED A REDACTED VERSION.

17 **MR. HALKOWSKI:** A PROPOSED REDACTED VERSION AND THE
18 ACTUAL CONFIDENTIAL --

19 **MS. CASSIDY:** THAT'S WHAT WE DID, YES.

20 **THE COURT:** IF YOU LOOK AT MY STANDING ORDER -- I
21 KNOW OUR LOCAL RULES ARE A MESS -- BUT I'M HAPPY TO SAY THAT IN
22 OCTOBER A NEW LOCAL RULE 79-5 WILL BECOME EFFECTIVE, I THINK,
23 AS OF OCTOBER 1ST --

24 **MR. HALKOWSKI:** OKAY.

25 **THE COURT:** -- WHICH LAYS OUT ACTUALLY SORT OF HOW MY

1 STANDING ORDER SAYS IT, AND ABROGATES THE GENERAL ORDER. AND
2 IT SHOULD BE, I HOPE --

3 **MR. HALKOWSKI:** GOOD.

4 **THE COURT:** -- VERY CLEAR. AND, ACTUALLY, WHAT I
5 WANT TO DO IS ACTUALLY, SO THE PARALEGALS OR WHOEVER,
6 ASSOCIATES, CAN COME LIKE WALK IT THROUGH WHAT YOU DO, BECAUSE
7 I KNOW IT'S A LOT OF WORK FOR THE PARTIES AND ALSO A LOT OF
8 WORK FOR THE COURT IN JUST TRYING TO FIGURE THIS OUT.

9 BUT IF YOU SAW MY STANDING ORDER IT TELLS YOU EXACTLY WHAT
10 YOU NEED TO DO. YOU NEED A REDACTED VERSION.

11 **MS. CASSIDY:** THAT'S WHAT WE DID.

12 **THE COURT:** UNDER SEAL, AND YOUR DECLARATION THAT
13 SAYS WHY, WHAT YOU WANT SEALED, PARTICULARLY.

14 **MS. CASSIDY:** THAT'S WHAT WE DID. WE TRIED TO
15 RECTIFY THAT, AND WE HIGHLIGHTED THE SECTIONS THAT WE WANTED.

16 **THE COURT:** I THINK WE NEED AS WELL REDACTED VERSIONS
17 OF YOUR OPPOSITION BRIEF.

18 **MS. CASSIDY:** YES, WE CAN DO THAT. YES.

19 **THE COURT:** AND SO --

20 **MS. CASSIDY:** SORRY.

21 **THE COURT:** WELL, I THINK DON'T THINK THAT'S BEEN
22 FILED YET.

23 **MS. CASSIDY:** OKAY. SORRY. WE'LL GET HOLD OF THAT
24 TODAY.

25 **THE COURT:** SO THAT THAT'S IN THE PUBLIC -- SO THERE

1 SHOULD BE SOMETHING IN THE PUBLIC RECORD THAT ONLY REDACTS
2 THAT WHICH IS CONFIDENTIAL.

3 **MR. HALKOWSKI:** RIGHT.

4 **THE COURT:** AND DO THAT.

5 **MS. CASSIDY:** AND WE ALSO SUBMITTED -- THERE WAS AN
6 ISSUE ABOUT THE TRANSLATION. YOU HAD A QUESTION ABOUT ONE OF
7 THE DOCUMENTS WE WANTED TO FILE NEEDED A TRANSLATION. WE WENT
8 TO HAVE IT TRANSLATED, BUT OUR VENDOR SAID THAT THE TEXT IS
9 ACTUALLY GIBBERISH.

10 AND SO WE HAVE SUBMITTED A DECLARATION FROM OUR CERTIFIED
11 TRANSLATION MEMBER SAYING THAT HE COULDN'T PROVIDE A
12 TRANSLATION OF THE DOCUMENT TO YOUR HONOR.

13 BUT WE DID CHECK WITH ACRONIS ABOUT WHETHER THEY STILL
14 WANTED THAT DOCUMENT FILED UNDER SEAL, AND THEY SAID THAT THEY
15 DID. SO THAT'S WHAT WE DID.

16 AND I GUESS BECAUSE IT'S THEIR DOCUMENT THEY WILL SUBMIT
17 IT.

18 **THE COURT:** BUT YOU DO HAVE TO SUBMIT A DECLARATION
19 THAT SAYS WHY THE GIBBERISH IS CONFIDENTIAL.

20 **MR. HALKOWSKI:** RIGHT. AND I THINK -- TO BE FAIR, I
21 THINK THERE'S PARTS IN THERE -- AND MAYBE I'M NOT UNDERSTANDING
22 IT -- BUT I THOUGHT THAT THERE WERE PARTS IN THERE THAT WERE
23 GIBBERISH.

24 BUT, OBVIOUSLY, SOMEONE WHO KNEW RUSSIAN COULD LOOK AT IT
25 AND KIND OF FIGURE SOMETHING OUT.

1 BUT WHATEVER THE CASE IS WE'LL TRACK IT DOWN AND --

2 **THE COURT:** WELL, CERTAINLY IF SOMEONE READS RUSSIAN
3 IF IT HAD CONFIDENTIAL INFORMATION, THAT'S EXACTLY A REASON.

4 **MR. HALKOWSKI:** EXACTLY.

5 AND A LOT OF THE ENGINEERS THAT ARE RELEVANT HERE ARE IN
6 RUSSIA, SO -- AND THIS IS ALL ELECTRONICS.

7 ANYONE CAN TAKE A LOOK AT IT.

8 **THE COURT:** I KNOW IT'S ALL COMPLICATED, ANYWAY.

9 **MS. CASSIDY:** NOT TO BELABOR THE POINT FROM THE
10 MOTION YOU JUST CLOSED, BUT THE TRANSLATION ISSUE ABOUT HAVING
11 THESE DOCUMENTS TRANSLATION JUST KIND OF GOES TO THE FACT THAT
12 THIS EXTENDS THE WHOLE PROCESS BY ADDING THESE NEW CONTENTIONS.

13 **THE COURT:** ALL RIGHT. YOU BUT SUED A RUSSIAN
14 COMPANY.

15 **MS. CASSIDY:** YES.

16 **THE COURT:** AND IF I RECALL WORKED VERY HARD --

17 **MR. HALKOWSKI:** YES. YES. YES.

18 (SIMULTANEOUS COLLOQUY)

19 **MS. CASSIDY:** THANK YOU, YOUR HONOR.

20 AND WE HAD TEN MONTHS OF DISCOVERY IN WHICH TO TAKE ALL OF
21 THIS STUFF AND GET IT TRANSLATED, BUT --

22 **MR. HALKOWSKI:** AND, AGAIN, WE'RE HAPPY TO DO
23 WHATEVER IT TAKES.

24 **THE COURT:** OKAY.

25 **MR. HALKOWSKI:** SO --

1 **THE COURT:** THANK YOU VERY MUCH.

2 **MS. CASSIDY:** THANK YOU.

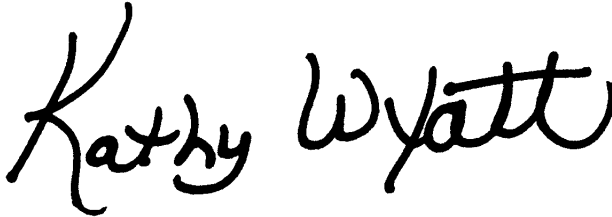
3 (THEREUPON, THIS HEARING WAS CONCLUDED.)

4 **CERTIFICATE OF TRANSCRIBER**

5
6 I CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT
7 TRANSCRIPT, TO THE BEST OF MY ABILITY, OF THE ABOVE PAGES OF
8 THE OFFICIAL ELECTRONIC SOUND RECORDING PROVIDED TO ME BY THE
9 U.S. DISTRICT COURT, NORTHERN DISTRICT OF CALIFORNIA, OF THE
10 PROCEEDINGS TAKEN ON THE DATE AND TIME PREVIOUSLY STATED IN THE
11 ABOVE MATTER.

12 I FURTHER CERTIFY THAT I AM NEITHER COUNSEL FOR, RELATED TO,
13 NOR EMPLOYED BY ANY OF THE PARTIES TO THE ACTIONS IN WHICH THIS
14 HEARING WAS TAKEN; AND, FURTHER, THAT I AM NOT FINANCIALLY NOR
15 OTHERWISE INTERESTED IN THE OUTCOME OF THE ACTION.

16 SIGNATURE OF TRANSCRIBER

17 
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9-24-13 DATE