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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

APPLE, INC, ) CV-11-1846-LHK  
)  
PLAINTIFF, ) SAN JOSE, CALIFORNIA  
)  
VS. )  
) APRIL 24, 2012  
SAMSUNG ELECTRONICS, CO. )  
LTD., ET AL, )  
) PAGES 1-51  
DEFENDANT. )

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TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE PAUL S. GREWAL  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

FOR THE PLAINTIFF: MORRISON & FOERSTER, LLP  
BY: ALISON TUCHER  
RICHARD HUNG  
MARC PERNICK  
425 MARKET STREET  
SAN FRANCISCO, CA 94105

FOR THE DEFENDANT: QUINN EMANUEL  
BY: KEVIN JOHNSON  
MELISSA CHAN  
555 TWIN DOLPHIN DRIVE, STE 560  
REDWOOD SHORES, CA 94065

OFFICIAL COURT REPORTER: SUMMER FISHER, CSR, CRR  
CERTIFICATE NUMBER 13185

1 SAN JOSE, CALIFORNIA APRIL 24, 2012

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

3 (WHEREUPON, COURT CONVENEED AND THE  
4 FOLLOWING PROCEEDINGS WERE HELD:)

5 THE COURT: MR. RIVERA, WOULD YOU CALL  
6 THE NEXT MATTER ON THIS MORNING'S CALENDAR.

7 THE CLERK: YES, YOUR HONOR.

8 CALLING APPLE, INC. VERSUS SAMSUNG  
9 ELECTRONICS COMPANY, ET AL.

10 CASE CV-11-1846. MATTER ON FOR  
11 PLAINTIFF'S RULE 37 (B) (2) MOTION.

12 COUNSEL, PLEASE COME FORWARD AND STATE  
13 YOUR APPEARANCES.

14 MR. JOHNSON: GOOD MORNING, YOUR HONOR.  
15 KEVIN JOHNSON. AND WITH ME IS MELISSA  
16 CHAN FROM QUINN EMANUEL ON BEHALF OF SAMSUNG.

17 THE COURT: MR. JOHNSON, GOOD MORNING  
18 SIR.

19 MS. TUCHER: GOOD MORNING, YOUR HONOR.  
20 ALLISON TUCHER FROM MORRISON & FOERSTER.  
21 WITH ME TODAY ARE MY PARTNERS RICH HUNG AND  
22 MARC PERNICK.

23 THE COURT: MS. TUCHER, GOOD MORNING TO  
24 YOU AS WELL.

25 ALL RIGHT. THE LATEST IN THE SERIES OF

1 MOTIONS FOR SANCTIONS.

2 I TAKE IT YOU ALL SAW MY ORDER THAT I  
3 ISSUED LAST EVENING. I DON'T WANT TO RE PLOW OLD  
4 GROUND, BUT I HOPE THAT GIVES YOU AT LEAST SOME  
5 SENSE OF WHERE I'M AT GENERALLY IN THIS CASE  
6 REGARDING COMPLIANCE WITH MY ORDERS.

7 THIS IS APPLE'S MOTION SO I WILL START  
8 WITH YOU MS. TUCHER.

9 MS. TUCHER: THANK YOU, YOUR HONOR.

10 APPLE HAS ALLEGED CONTINUING INFRINGEMENT  
11 IN THIS CASE. THAT MEANS WE HAVE TO PROVE NOT ONLY  
12 THAT SAMSUNG INFRINGES OUR PATENTS ON THE DAY THAT  
13 IT RELEASES A NEW PRODUCT, BUT ALSO THAT IT  
14 CONTINUES TO INFRINGE OUR PATENTS AS IT UPDATES THE  
15 SOFTWARE OVER THE WEEKS AND MONTHS THE PRODUCTS  
16 REMAIN ON THE MARKET.

17 BECAUSE WE NEED THAT SOFTWARE WE ISSUED  
18 REQUEST FOR PRODUCTION AND THEN WE GOT AN ORDER  
19 FROM THIS COURT IN DECEMBER OF LAST YEAR REQUIRING  
20 SAMSUNG TO PRODUCE ALL VERSIONS OF SOURCE CODE ON  
21 ALL OF THE ACCUSED PRODUCTS, AT LEAST --

22 THE COURT: DID I SAY ALL VERSIONS?

23 MS. TUCHER: NO.

24 WHAT YOU SAID WAS THAT SAMSUNG WAS  
25 REQUIRED TO PRODUCE THE SOURCE CODE THAT APPLE

1 HAD -- LET ME GIVE YOU THE EXACT LANGUAGE.

2 SAMSUNG SHALL PRODUCE THE SOURCE CODE  
3 REQUESTED BY APPLE'S MOTION, WITH AN EXCEPTION, AND  
4 THE EXCEPTION WENT TO -- SORRY, IT WAS SOURCE CODE  
5 AND TECHNICAL DOCUMENTS. THEN IT WAS AN EXCEPTION  
6 THAT WENT TO TECHNICAL DOCUMENTS AS TO WHICH THERE  
7 HAD BEEN NO MEET AND CONFER.

8 BY TECHNICAL DOCUMENTS, SOME OF THESE  
9 HAVE RELATION TO SOURCE CODE.

10 SO FOR EXAMPLE, WE ASKED FOR VERSION LOGS  
11 THAT WOULD ENABLE US TO TELL WHEN DIFFERENT  
12 VERSIONS OF SOURCE CODE WERE IMPLEMENTED.

13 BUT YOUR HONOR'S ORDER WAS QUITE CLEAR  
14 INCLUDING IN A FOOTNOTE BY REQUEST NUMBER, THE  
15 REQUESTS THAT WERE EXEMPTED BECAUSE THEY DIDN'T  
16 INVOLVE MEET AND CONFER, IT LOOKS TO US AS THOUGH  
17 YOU TOOK THAT LIST STRAIGHT FROM A SAMSUNG  
18 DECLARATION PROVIDED BY MR. CHAN.

19 AND IN THAT DECLARATION, PARAGRAPH 21 OF  
20 THE DECLARATION WHERE MR. CHAN LISTS EXACTLY THAT  
21 SAME LIST OF REQUESTS FOR PRODUCTION THAT APPEAR IN  
22 THE FOOTNOTE OF YOUR ORDER, HE REFERS TO THESE  
23 REQUESTS AS NON SOURCE CODE DOCUMENTS.

24 INDEED, THEY ARE, AND THAT'S WHY NOTHING  
25 IN THE EXEMPTION WITH THE EXCEPTION OF YOUR

1 DECEMBER ORDER APPLIES TO THE SOURCE CODE.

2 HAVING SECURED THE ORDER, WE THEN GOT  
3 FROM SAMSUNG A SINGLE VERSION OF SOFTWARE FOR  
4 ALMOST EVERY ONE OF THE PHONES THAT HAD BEEN  
5 RELEASED. AND I SAY ALMOST EVERY ONE ONLY BECAUSE  
6 THERE'S A COMPLICATION WITH REGARD TO THE S2.

7 YOU WILL REMEMBER --

8 THE COURT: EXPLAIN THAT TO ME.

9 MS. TUCHER: YOU WILL REMEMBER THAT WE  
10 ACCUSED THE S2 OF INFRINGING OUR UTILITY PATENTS  
11 AND THAT SAMSUNG RELEASED THE S2 IN MANY DIFFERENT  
12 VARIANTS OR MANY DIFFERENT VERSIONS.

13 IT RELEASED IN SEPTEMBER OF 2011 A  
14 VERSION TO -- SORRY, SEPTEMBER WAS THE S2 EPIC 4G  
15 TOUCH, WHICH IS A SPRINT PHONE. AND THEN IN  
16 OCTOBER IT RELEASED THE AT&T VERSION OF THE GALAXY  
17 S2. AND THE T-MOBILE VERSION OF THE GALAXY S2.

18 THEN IT WENT ON LATER IN THE FALL TO  
19 RELEASE FURTHER VERSIONS THROUGH OTHER CARRIERS AND  
20 A SECOND AT&T VERSION.

21 SO THE REASON THIS IS IMPORTANT IS THAT  
22 IF SAMSUNG HAD DONE WHAT IT SAID IT WAS DOING IN  
23 PRODUCING ONE, IN PRODUCING THE FIRST VERSION OF  
24 SOFTWARE FOR EACH OF THE PHONES, YOU WOULD EXPECT  
25 THAT THEY EITHER HAD GIVEN US THE GALAXY S2 EPIC 4G

1 TOUCH AND EXPECTED US TO VIEW THAT AS SOFTWARE  
2 REPRESENTATIVE OF ALL THE S2'S OR THAT THEY HAVE  
3 GIVEN US SOFTWARE FOR EACH OF THE DIFFERENT  
4 VARIANTS OF EACH OF THE DIFFERENT CARRIERS SO THAT  
5 WE COULD ANALYZE EACH OF THOSE.

6 THE COURT: I TAKE IT YOUR POINT IS THEY  
7 DID NOT.

8 MS. TUCHER: THEY DIDN'T.

9 INSTEAD, THEY THOSE THE T-MOBILE VERSION  
10 OF THE S2 AND THEY GAVE US A SINGLE VERSION OF THAT  
11 ONLY.

12 SO THE REASON THAT MATTERS IS THAT WHEN  
13 WE GET TO THE APPROPRIATE SANCTION FOR THEIR  
14 VIOLATION OF YOUR ORDER, THE QUESTION IS HOW DO WE  
15 FILL IN THE GAPS?

16 AND FIRST, I WANT TO JUST ESTABLISH THE  
17 IMPORTANCE OF FILLING IN THE GAPS. IT'S NOT JUST  
18 HYPOTHETICAL THAT SOMEHOW SAMSUNG IS GOING TO  
19 ATTACK APPLE'S PROOF ON THE GROUNDS THAT WE CAN  
20 ONLY PROVE INFRINGEMENT BASED ON A SINGLE PHONE, SO  
21 HOW CAN APPLE MAINTAIN CONTINUING INFRINGEMENT.

22 ON THE RUBBER BANDING PATENT WE HAVE AN  
23 EXPERT BY THE NAME OF ROBERT BALAKRISHNAN. HE WAS  
24 CROSS-EXAMINED, ONE OF THE EXPERT DEPOSITIONS THAT  
25 TOOK PLACE JUST LAST FRIDAY.

1                   AND IN THAT DEPOSITION FOR THREE PAGES OF  
2                   TRANSCRIPT THE QUESTIONS GO ON.

3                   WELL, AS TO THE CAPTIVATE, HOW MANY DID  
4                   YOU LOOK AT?

5                   I LOOKED AT JUST ONE. I LOOKED AT ONE, I  
6                   FOUND INFRINGEMENT. I LOOKED AT THE CODE.

7                   WELL THEN, SO YOU CAN'T OPINE AS TO  
8                   WHETHER ANY OF THE OTHER MILLIONS OF CAPTIVATES WE  
9                   SOLD INFRINGE, CAN YOU?

10                  IT GOES ON PAGE AFTER PAGE, AND I HAVE  
11                  THE TRANSCRIPT IF YOU WANT TO SEE IT.

12                  THE COURT: I WOULD LIKE TO SEE IT.

13                  MS. TUCHER: OKAY. I HAVE MULTIPLE  
14                  COPIES OF THIS. LET ME HAND UP ONE FOR YOUR HONOR.

15                  AND I BELIEVE, YOUR HONOR, THE LAWYER WHO  
16                  TOOK THIS DEPOSITION IS IN THE COURTROOM, IT'S  
17                  MR. JOHNSON.

18                  IF I COULD PASS ONE HERE.

19                  THE COURT: SO IF YOU COULD DIRECT ME TO  
20                  THE PORTION OF THE TESTIMONY.

21                  MS. TUCHER: YES.

22                  STARTING ON PAGE 70 AT LINE 15.

23                  YOU DO NOT HAVE AN OPINION THAT ALL  
24                  SAMSUNG CAPTIVATE PHONES USING THE GALLERY  
25                  APPLICATION INFRINGE THE '381 PATENT, RIGHT?

1 SO THE '381 PATENT IS THE RUBBER BAND  
2 PATENT. AND IT GOES ON FOR SEVERAL PAGES.

3 THEN I WOULD DIRECT YOUR ATTENTION  
4 SPECIFICALLY TO PAGE 72, LINE 16.

5 BUT IF THERE ARE, A CERTAIN NUMBER,  
6 MILLIONS OF CAPTIVATES THAT HAVE A DIFFERENT  
7 VERSION OF GALLERY ON IT, YOU ARE NOT ACCUSING  
8 THOSE MILLIONS OF OTHER PRODUCTS OF INFRINGING  
9 BECAUSE YOU HAVEN'T LOOKED AT THEM.

10 AND OF COURSE OUR EXPERT WAS HONEST IN  
11 ANSWERING THE QUESTION THAT HE CAN'T SAY ABOUT THE  
12 OTHER MILLIONS OF CAPTIVATES WHETHER THEY INFRINGE  
13 THE WAY THE ONE HE EXAMINED DOES BECAUSE HE DOESN'T  
14 HAVE THE CODE.

15 THE COURT: ALL RIGHT.

16 MS. TUCHER: SO, THE RELIEF THAT WE ARE  
17 SEEKING HERE IS, FIRST OF ALL, A FINDING THAT THEY  
18 VIOLATED YOUR HONOR'S ORDER BECAUSE WE BELIEVE IT'S  
19 PART OF A PRACTICE OF SAMSUNG DECIDING UNILATERALLY  
20 WHAT DISCOVERY APPLE IS ENTITLED TO, AND WE BELIEVE  
21 THAT'S RELEVANT FOR OTHER ISSUES IN THIS CASE.

22 SECOND, WE WOULD ASK THE COURT TO PROVIDE  
23 WHAT SAMSUNG SHOULD HAVE PROVIDED IN BY WAY OF A  
24 STIPULATION, AND THAT IS TO DEEM REPRESENTATIVE THE  
25 SOURCE CODE THAT THEY DID PROVIDE.



1                   AND THE ONE PLACE WE HAVE TO MAKE MORE  
2                   COMPLICATED WHAT SHOULD BE SIMPLE AND  
3                   STRAIGHTFORWARD IS WITH REGARD TO THE S2. BECAUSE  
4                   THE S2 SOURCE CODE THAT THEY GAVE US ON THE  
5                   T-MOBILE IS NOT REPRESENTATIVE OF THE S2 SOURCE  
6                   CODE WITH REGARD TO THE RUBBER BANDING FUNCTION  
7                   ONLY BECAUSE THE T-MOBILE VERSION, WHEN IT WAS  
8                   RELEASED, HAD A DESIGN AROUND, A BLUE GLOW DESIGN  
9                   AROUND.

10                   AND WE ARE NOT EVEN ACCUSING THE  
11                   T-MOBILE --

12                   THE COURT: AND IS THAT BECAUSE THE  
13                   T-MOBILE RELEASE OF THE PRODUCT CAME OUT AFTER THE  
14                   COMPLAINT WAS FILED?

15                   MS. TUCHER: ALL OF THE VERSIONS OF THE  
16                   S2 CAME OUT AFTER THE COMPLAINT WERE FILED.

17                   THEY CAME OUT IN SEPTEMBER, OCTOBER AND LATER  
18                   DATES IN 2011. AND OUR COMPLAINT DATES TO APRIL  
19                   AND THE INFRINGEMENT CONTENTIONS --

20                   THE COURT: SO AS TO THE S -- I THINK I'M  
21                   FINALLY CATCHING UP TO WHERE YOU WERE EIGHT MINUTES  
22                   AGO.

23                   YOU ARE TELLING ME, I THINK, THAT THE  
24                   T-MOBILE VERSION OF THE S2, IS THE ONLY VERSION FOR  
25                   WHICH CODE HAS BEEN PRODUCED.

1           AND AS BEST YOU CAN TELL, IT'S ACTUALLY A  
2           VERSION WHICH DOESN'T PRACTICE THIS PARTICULAR  
3           INVENTION BECAUSE OF DESIGN AROUND; IS THAT FAIR?

4           MS. TUCHER:    THAT'S RIGHT.

5           IT IS REPRESENTATIVE OF OTHER ASPECTS OF  
6           THE UNDERSTOOD CODE AND OUR OTHER PATENTS, BUT AS  
7           TO THE RUBBER BANDING FUNCTIONALITY EITHER WE NEED  
8           SAMSUNG TO PRODUCE THE FIRST S2 CODE, THE EPIC 4G  
9           TOUCH S2 AS IT WAS RELEASED AND HAVE THAT DEEMED  
10          REPRESENTATIVE OR WE NEED TO BE ABLE TO LOOK TO  
11          OTHER PHONES THAT USE THE SAME SOURCE CODE.

12          SO FOR EXAMPLE, THE EPIC 4G S2 PHONE AND  
13          THE AT&T S2 VERSION WERE RELEASED FROM ANDROID  
14          GINGERBREAD 2.3.

15          AND WE HAVE GINGERBREAD PHONES THAT WE  
16          HAVE LOOKED AT AND BALAKRISHNAN HAD TESTIFIED  
17          ABOUT.

18          THE COURT:    SO YOU HAPPILY TAKE THE  
19          GINGERBREAD RELEASED AS REPRESENTATIVE OF THIS  
20          PARTICULAR VERSION?

21          MS. TUCHER:    THAT'S RIGHT.

22          SO FOR EXAMPLE, THE EXHIBIT 4G, IT MUST  
23          HAVE BEEN A LAWYER WHO NAMED THAT PHONE BUT IT'S  
24          ACTUALLY CALLED THE EXHIBIT 4G.    SO THE EXHIBIT 4G  
25          OR OTHER GINGERBREAD PHONE COULD BE DEEMED

1 REPRESENTATIVE OF THE RUBBER BANDING FUNCTION OF  
2 THE S2.

3 THE COURT: IN TALKING ABOUT A  
4 STIPULATION WITH THE OTHER SIDE, DID APPLE INSIST A  
5 STIPULATION INCLUDE A FINDING OR PROVISION THAT  
6 SAMSUNG HAD VIOLATED THE DECEMBER ORDER?

7 MS. TUCHER: NO, YOUR HONOR, WE DIDN'T.

8 IN THE TIME THAT YOUR HONOR HAD ORDERED  
9 SAMSUNG TO COMPLY WITH THIS ORDER, THERE WAS NO  
10 STIPULATION NEGOTIATED.

11 WE -- APPLE'S SIDE MADE SEVERAL  
12 PROPOSALS. WE GOT NO SUBSTANTIVE FEEDBACK FROM  
13 SAMSUNG. AND IN PARTICULAR, NO PROPOSAL FROM  
14 SAMSUNG UNTIL AFTER WE HAD ALREADY FILED THIS  
15 ORDER.

16 WHEN WE GOT AN ORDER FROM SAMSUNG --  
17 SORRY, A PROPOSED STIPULATION FROM SAMSUNG, THAT  
18 WAS MARCH 15TH AFTER FILING OUR MOTION, AND IN THAT  
19 STIPULATION IT WAS A NONSTARTER FOR A COLLECTION OF  
20 REASONS.

21 AND ONE OF THE REASONS IT WAS A  
22 NONSTARTER WAS IT ASKED APPLE TO STIPULATE THAT  
23 CERTAIN DESIGN AROUND CODE WAS REPRESENTATIVE WHEN  
24 IN FACT WE KNOW IT WASN'T.

25 SOME OF THE DESIGN AROUND CODE WE HAVEN'T

1 HAD A CHANCE TO EXAM PROPERLY, AND WE DON'T KNOW  
2 WHEN AND WHERE WAS IT WAS DEPLOYED.

3 BUT AS TO THE RUBBER BANDING DESIGN  
4 AROUND CODE, WE ASKED TO STIPULATE THAT ALL THE  
5 PRODUCTS AFTER A CERTAIN DATE IN AUGUST EMPLOYED  
6 AROUND THIS DESIGN AROUND CODE, WE KNOW THAT'S NOT  
7 TRUE.

8 THE COURT: ARE YOU TALKING ABOUT THE  
9 T-MOBILE VERSION?

10 MS. TUCHER: NOT THE T-MOBILE IN THE  
11 SENSE THAT THE T-MOBILE DOES EMPLOY THE DESIGN  
12 AROUND, BUT THE AT&T S2 DID NOT AT THE DATE OF  
13 RELEASE, AND THE EPIC 4G TOUCH VERSION OF THE S2,  
14 DID NOT ON THE DAY OF THE RELEASE.

15 AND I THINK THERE ARE OTHER PHONES AS  
16 WELL, INFUSED 4G, FOR EXAMPLE.

17 SO THERE ARE A NUMBER OF PHONES THAT WE  
18 KNOW ESTABLISH THAT THE STIPULATION THAT SAMSUNG  
19 PROVIDED US IS JUST FACTUALLY INACCURATE. SO WE  
20 WERE NOT WILLING TO GO WITH THAT.

21 WE ALSO DIDN'T THINK IT MOOTED OUR MOTION  
22 BECAUSE IT CAME AFTER WE FILED THE MOTION. AND WE  
23 TOLD THEM WE THOUGHT IN ORDER TO MOOT THE MOTION  
24 THEY WOULD HAVE TO STIPULATE TO A VIOLATION OF THE  
25 ORDER. BUT WE NEVER SAID IN ORDER TO REACH AN

1 ADEQUATE STIPULATION ON WHAT SOURCE CODE IS  
2 REPRESENTATIVE THAT THEY WOULD HAVE TO STIPULATE TO  
3 HAVING VIOLATED THE ORDER.

4 THE COURT: I INTERRUPTED YOU, SO I  
5 APOLOGIZE FOR THAT.

6 COULD YOU GIVE ME AGAIN YOUR LAUNDRY LIST  
7 OF ASKS FOR THIS VIOLATION.

8 MS. TUCHER: IT'S ACTUALLY A SHORT LIST.

9 MY FIRST ASK IS FOR A FINDING OF  
10 INFRINGEMENT -- I WOULD LOVE ONE OF THOSE, BUT  
11 ACTUALLY --

12 THE COURT: I'M SURE YOU WOULD, I CAN'T  
13 HELP YOU OUT THERE.

14 MS. TUCHER: WE ARE NOT SEEKING THAT  
15 BECAUSE WE ARE ALLOWING THEM TO MAKE THE WHATEVER  
16 NON VALIDITY ARGUMENTS THEY HAVE BASED ON THE  
17 SOURCE CODE.

18 THE COURT: PROBABLY A GOOD IDEA  
19 CONSIDERING MY JURISDICTION IS LIMITED ON THIS ONE.

20 MS. TUCHER: WHAT I MEANT TO SAY IS WE  
21 ARE SEEKING A FINDING THAT THEY VIOLATED YOUR  
22 ORDER, YOUR DECEMBER ORDER, REQUIRING THEM TO  
23 PRODUCE THE SOURCE CODE.

24 WE ARE SEEKING A FINDING THAT THE SOURCE  
25 CODE THAT THEY HAVE PRODUCED BY DECEMBER 31ST IS

1 REPRESENTATIVE OF THE PRODUCTS, OF ALL THE PRODUCTS  
2 SOLD FOR THE SOURCE CODE -- I'M STATING THIS BADLY,  
3 THIS IS STATED BETTER IN OUR PAPERS.

4 BUT BASICALLY THE ONE VERSION THEY GAVE  
5 US OF EACH OF THE PRODUCTS IS REPRESENTATIVE OF ALL  
6 THE PHONES SOLD OF THAT PRODUCT.

7 THE COURT: WITH ONE EXCEPTION.

8 MS. TUCHER: I WAS JUST GOING TO SAY,  
9 WITH ONE EXCEPTION.

10 THAT AS TO THE S2 PHONES, AND AS TO THE  
11 RUBBER BANDING FEATURE ONLY, INSTEAD OF DEEMING THE  
12 T-MOBILE S2 REPRESENTATIVE, THE EXHIBIT 4G BE  
13 DEEMED REPRESENTATIVE OF HOW THE RUBBER BANDING  
14 FUNCTION OPERATES IN THOSE S2'S THAT WERE RELEASED  
15 USING ANDROID 2.3 OR GINGERBREAD.

16 THE COURT: IS EXHIBIT 4G THE VERSION OF  
17 THE PHONE AVAILABLE ON AT&T OR ANY OTHER NETWORK  
18 CARRIER?

19 MS. TUCHER: IT'S AVAILABLE THROUGH THE  
20 CARRIER. I CAN'T TELL YOU OFF HAND WHICH CARRIER.  
21 IT IS A GINGERBREAD PHONE THAT HAS BEEN THE SUBJECT  
22 OF EXPERT TESTIMONY IN THE CASE.

23 BUT WE WOULD BE SATISFIED WITH AN ORDER  
24 THAT SPECIFIED ANY GINGERBREAD PHONE THAT THE  
25 PARTIES HAD ANALYZED. I JUST NAME THAT ONE BECAUSE

1 I KNOW THAT'S THE ONE DR. BALAKRISHNAN FOCUSED ON  
2 WHEN HE REGARDED HIS TESTIMONY ABOUT HOW THE  
3 GINGERBREAD OPERATES WITH REGARD TO THE BALANCE  
4 FUNCTIONALITY.

5 THE COURT: ANYTHING ELSE ON YOUR LIST?

6 MS. TUCHER: NOT UNLESS YOU HAVE  
7 QUESTIONS, THANK YOU.

8 THE COURT: ALL RIGHT. THANK YOU.

9 MR. JOHNSON?

10 SO DID MY ORDER PERMIT SAMSUNG TO CHERRY  
11 PICK CERTAIN VERSIONS OR WAS IT FAIRLY EXPLICIT?

12 MR. JOHNSON: THERE WASN'T ANY CHERRY  
13 PICKING OF VERSIONS.

14 WITH RESPECT TO THE S2, THIS IS THE FIRST  
15 TIME HEARING OF THE ISSUE WITH RESPECT TO THE S2 IN  
16 PARTICULAR.

17 SO THIS SORT OF GOES BACK TO  
18 YOUR HONOR'S, I THINK, POINT AT THE LAST HEARING AS  
19 WELL WHICH WAS THE MEET AND CONFER PROCESS ON THE  
20 FUNCTIONALITY OF THE SOURCE CODE DIDN'T START IN  
21 MARCH, DIDN'T START IN FEBRUARY.

22 THIS STARTED IN THE FALL. AND THEY  
23 SERVED DISCOVERY ON OCTOBER ON DESIGN AROUNDS THEN  
24 THEY SERVED AN INTERROGATORY IN JANUARY ON DESIGN  
25 AROUNDS. AND WE RESPONDED FEBRUARY 3RD, AND WE

1 ARTICULATED WHAT THE DESIGN AROUNDS WERE.

2 WITH RESPECT TO THE BLUE GLOW  
3 APPLICATION, THEY'VE KNOWN ABOUT THE BLUE GLOW FOR  
4 A WHILE AND THEIR EXPERTS, INCLUDING  
5 DR. BALAKRISHNAN, HAS SAID HE DOESN'T NEED SOURCE  
6 CODE TO DETERMINE WHETHER THAT'S INFRINGEMENT OR  
7 NOT.

8 SO THIS IS A LITTLE BIT OF, I AGREE THAT  
9 WE WERE BOUND TO PRODUCE SOURCE CODE AND WE  
10 PRODUCED SOURCE CODE. BUT TO DETERMINE WHETHER  
11 THERE'S INFRINGEMENT, YOU LOOK AT THE DEVICE AND  
12 YOU SEE IF IT OPERATES ACCORDING TO THE CLAIMS IN  
13 THE PATENT.

14 AND I DID DEPOSE DR. BALAKRISHNAN ON  
15 FRIDAY AND I ASKED HIM ABOUT THE PRODUCTS BECAUSE I  
16 COULDN'T TELL FROM HIS REPORT WHAT PHONE HE HAD.  
17 HE DIDN'T BRING ANY OF THE PHONES TO HIS  
18 DEPOSITION.

19 AND I ASKED HIM WHAT VERSION OF GALLERY  
20 HE WAS LOOKING AT BECAUSE THERE ARE LOTS OF  
21 DIFFERENT ITERATIONS WITHIN THE GALLERY APPLICATION  
22 THAT THEY CLAIM ARE INFRINGING.

23 AND SOME OF THOSE WHEN YOU MOVE A PHOTO  
24 FROM ONE PHOTO TO THE NEXT, THAT'S A DIFFERENT  
25 INFRINGEMENT READING THAN WHEN YOU ZOOM IN ON A



1 PHOTOGRAPH AND YOU MOVE THE PHOTOGRAPH AROUND BY  
2 ITSELF. THERE ARE DIFFERENT THEORYS EVEN WITHIN  
3 THE GALLERY.

4 SO WHEN I WAS ASKING HIM ABOUT WHAT ARE  
5 THE DIFFERENT VERSIONS HE WAS LOOKING AT BECAUSE IT  
6 WASN'T IN HIS REPORT AND I WAS TRYING TO UNDERSTAND  
7 WHAT CAPTIVATE PHONE HE HAD LOOKED AT AND I DIDN'T  
8 HAVE ANY PROOF OF THAT.

9 SO TO GO BACK, WE WERE ORDERED TO PRODUCE  
10 SOURCE CODE, AND I DO THINK THERE'S AN IMPORTANT  
11 EXCEPTION IN YOUR HONOR'S DECEMBER 22ND ORDER THAT  
12 SAID PRODUCE THE SOURCE CODE BY DECEMBER 31ST.

13 WE PRODUCED THE AS RELEASED SOURCE CODE  
14 FOR ALL OF THE PRODUCTS THAT WERE ACCUSED.  
15 DR. BALAKRISHNAN, WHEN I DID DEPOSE HIM, I DON'T  
16 HAVE THE BENEFIT OF HAVING THE OTHER PARTS OF THE  
17 TRANSCRIPT HERE, BUT HE SAID THE AS RELEASED CODE  
18 IS WHAT'S IMPORTANT, IT'S WHAT HE'S CONSIDERED.  
19 THEY'VE HAD A PERSON, THEY HAD CODE REVIEWERS IN  
20 OUR OFFICE SINCE DECEMBER EVERY DAY, SATURDAYS AND  
21 SUNDAYS INCLUDING THIS PAST WEEKEND LOOKING AT THE  
22 SOURCE CODE.

23 WE PRODUCED SOMETHING ON THE ORDER OF 50  
24 MILLION PAGES OF CODE AS BACK IN DECEMBER 31ST.

25 THERE WAS A SUBSEQUENT ORDER, YOUR HONOR,

1 WHERE APPLE MOVED TO COMPEL DOCUMENTS RELATED TO  
2 THE EVOLUTION, THE FEATURES AND THE UPDATES OF THE  
3 SOFTWARE. AND WE THEN COLLECTED THAT INFORMATION  
4 AND PRODUCED THE INFORMATION THAT RELATES TO THE  
5 VERSION CHANGES.

6 AND IN -- YOUR HONOR, FROM JANUARY 27TH  
7 YOU ASKED, YOU PROVIDED BASICALLY AN ALTERNATIVE  
8 AND YOU SAID IN ORDER TO AVOID SOME OF THE BURDEN  
9 ASSOCIATED WITH IT, PARTIES CAN AGREE TO REACH SOME  
10 SORT OF STIPULATION.

11 AND WE SAW THAT AS A REAL RESPONSIBILITY.  
12 WE STARTED NEGOTIATING WITH THEM RIGHT AWAY.

13 THEY DID REQUIRE FROM THE VERY BEGINNING,  
14 YOUR HONOR, THAT SAMSUNG STIPULATE TO THE FACT THAT  
15 SOMEHOW SAMSUNG HAD VIOLATED THE COURT'S  
16 DECEMBER 22ND ORDER IN THE INITIAL STIP THAT THEY  
17 SENT TO US.

18 AND EVEN IN THE LETTER THAT'S ATTACHED TO  
19 EXHIBIT -- IT'S EXHIBIT 2 TO THE BRIGGS DECLARATION  
20 FROM MR. PERNICK, HE SAYS IN PARAGRAPH 2:

21 "SAMSUNG CANNOT MOOT THIS ASPECT OF APPLE'S MOTION  
22 UNLESS IT FORMALLY AGREES TO THIS IN A STIPULATION.

23  
24 WE UNDERSTAND THAT SAMSUNG DOES AGREE  
25 THAT IT HAS VIOLATED THE ORDER AND THEREFORE

1 SUGGEST ADDING THIS TO THE STIPULATION UNDER THE  
2 DISCUSSION WITHOUT SUCH A PROVISION, APPLE'S MOTION  
3 COULD NEVER BE MOOT."

4 AND HE GOES ON TO SAY, "THAT AS A GENERAL  
5 MATTER, APPLE'S PROPOSED STIPULATION WAS NEVER  
6 INTENDED TO RESOLVE ALL OF THE DISPUTES. "

7 THE COURT: AND WHEN WAS THAT  
8 COMMUNICATION SENT?

9 MR. JOHNSON: MARCH 16TH.

10 THIS IS HARDLY NEGOTIATING IN GOOD FAITH  
11 WITH RESPECT TO THE STIPULATION. IT'S CERTAINLY  
12 NOT BAD FAITH ON SAMSUNG'S PART.

13 THE COURT: SO IF YOU HAD A PROBLEM  
14 NEGOTIATING THE STIPULATION WHY DIDN'T YOU FOLLOW  
15 MY GUIDANCE IN FOOTNOTE 25 TO SEEK RELIEF?

16 IN OTHER WORDS, I THOUGHT IN MY  
17 JANUARY 27TH ORDER I WAS PRETTY EXPLICIT THAT THE  
18 STIPULATION WAS PROVIDED AS AN ALTERNATIVE TO  
19 MITIGATE THE BURDEN IN COMPLYING WITH MY ORDER AND  
20 IF THERE WAS A PROBLEM WITH APPLE'S GOOD FAITH IN  
21 REACHING THE STIPULATION, YOU SHOULD SEEK GUIDANCE  
22 FROM THE COURT.

23 TO MY KNOWLEDGE, SAMSUNG DIDN'T DO THAT;  
24 WHY NOT?

25 MR. JOHNSON: YOUR HONOR, THEY HAD FILED

1 A MOTION FOR SANCTIONS ALREADY. THEY FILED A  
2 MOTION FOR SANCTIONS ON MARCH 9TH WITHOUT EVER  
3 MEETING AND CONFERRING.

4 WE THOUGHT WE WERE STILL NEGOTIATING WITH  
5 THEM. THEY DON'T MEET AND CONFER. THE NEXT THING  
6 WE KNOW THEY FILE A MOTION FOR SANCTIONS. WE  
7 DISCUSS INTERNALLY, CONTINUE TO DISCUSS INTERNALLY  
8 THE REPRESENTATIVE PRODUCTS OR FUNCTIONALITY  
9 ISSUES.

10 WE CALL THEM BACK UP AND THIS IS THE  
11 LETTER WE GET BACK SAYING THERE'S NO WAY WE ARE  
12 GOING TO AGREE TO IT UNLESS YOU -- UNLESS YOU  
13 STIPULATE TO THE FACT THAT WE'VE, THAT SAMSUNG HAS  
14 VIOLATED THE DECEMBER 22ND ORDER.

15 AT THAT POINT WE WERE, FROM MY  
16 STANDPOINT, WE WERE IN BETWEEN. HOW WERE WE TO  
17 THEN BRING THIS TO YOUR HONOR'S ATTENTION?

18 THE COURT: I MEAN, YOU ALL HAVE SHOWN A  
19 FAIRLY EXPANSIVE CREATIVITY IN COMING UP WITH  
20 MOTIONS AND PLEADINGS TO GET MY ATTENTION AT ALL  
21 DAYS AND HOURS OF THE WEEK.

22 HERE'S WHAT I'M STRUGGLING WITH  
23 MR. JOHNSON, LET'S GO BACK TO DECEMBER 22ND.

24 I THOUGHT THIS WAS A PRETTY SPARTAN  
25 COMMAND. PRODUCE THE SOURCE CODE AND TECHNICAL

1 DOCUMENTS REQUESTED BY APPLE'S MOTION WITH ONE  
2 EXCEPTION. THE EXCEPTION DOESN'T APPLY TO  
3 VERSIONS, SO HOW AM I TO READ SAMSUNG'S PRODUCTION  
4 AS OF DECEMBER 31ST, 2011, AS ANYTHING OTHER THAN A  
5 VIOLATION OF THAT SPECIFIC COMMAND?

6 MR. JOHNSON: BECAUSE WE PRODUCED, WE  
7 PRODUCED THE SOURCE CODE IN THE TECHNICAL DOCUMENTS  
8 REQUESTED BY APPLE'S MOTION.

9 THE COURT: SO EVERY VERSION WAS PRODUCED  
10 BY THE 31ST.

11 MR. JOHNSON: NOT -- LET'S BACK UP.

12 THE COURT: BECAUSE THEIR MOTION WAS NOT  
13 LIMITED TO PARTICULAR VERSIONS, WAS IT?

14 MR. JOHNSON: NO, I THINK IT WAS.  
15 THEIR MOTION, WHEN YOU GO BACK AND YOU LOOK AT WHAT  
16 THEY WERE ASKING FOR -- AND BY THE WAY, IT'S ALSO  
17 WHEN YOU LOOK AT WHAT THEY ARE ASKING FOR IN THEIR  
18 JANUARY MOTION WHERE THEY SPECIFICALLY, AS  
19 YOUR HONOR POINTS OUT IN YOUR JANUARY ORDER TO LOOK  
20 AT THE 14 CATEGORIES OF DOCUMENTS IN THEIR PROPOSED  
21 ORDER, THEY SPECIFICALLY ASK FOR THE PROPOSED ORDER  
22 WHICH IS DOCKET NUMBER 616. THEY ASK FOR THE  
23 DESIGN AROUND DOCUMENTATION AND THEY ASK FOR THE  
24 VERSIONS OF THE CODE.

25 WHEN YOU LOOK AT CATEGORIES, FOR EXAMPLE

1 A THROUGH R, THEY'RE SPECIFICALLY ASKING FOR THE  
2 FEATURES, YOU KNOW, CHANGES MADE TO EACH VERSION OF  
3 THE SOFTWARE FIRM WEAR PROGRAM OR OTHER SYSTEMS.

4 THE COURT: WAS THIS A PROPOSED ORDER  
5 SUBMITTED IN CONNECTION WITH THE --

6 MR. JOHNSON: WITH THE JANUARY MOTION TO  
7 COMPEL.

8 THE COURT: OKAY. SO LET'S GO BACK TO  
9 DECEMBER.

10 APPLE FILES A MOTION IN ADVANCE OF  
11 DECEMBER, I SHOULD SAY ORDER. THEY INCLUDE A --  
12 PRESUMABLY THEY INCLUDE A PROPOSED ORDER. DID THAT  
13 PROPOSED ORDER INDICATE THAT THE ASK WAS FOR LESS  
14 THAN ALL VARIATIONS?

15 MR. JOHNSON: THEY SENT A NARROW SCOPE,  
16 THE MOTION POINTS OUT THE NARROWED SCOPE OF  
17 REQUESTED CATEGORIES ON DECEMBER 6TH. THEIR NARROW  
18 SCOPE DOESN'T ASK FOR EACH AND EVERY VERSION OF THE  
19 SOFTWARE.

20 IN FACT, YOU KNOW, SAMSUNG OPERATES  
21 DIFFERENTLY THAN APPLE DOES IN THE SENSE THAT THERE  
22 ARE LITERALLY HUNDREDS AND HUNDREDS OF VERSIONS OF  
23 THE CODE THAT WITH RESPECT TO EACH CARRIER  
24 SOMETIMES THEY UPDATE THE CODE, 2, 3 TIMES A DAY  
25 AND IT'S DELIVERED OVER THE AIR.

1 SO WITH RESPECT TO THE FUNCTIONALITY OF  
2 THE ACCUSED PRODUCTS OF THE ACCUSED FEATURES IN THE  
3 PATENTS, WE PROVIDED THE CODE AS IT WAS CONTAINED  
4 ON THE 27 PRODUCTS THAT WAS IN EXISTENCE.

5 WE PRODUCED IT ON DECEMBER 31ST. AND WE  
6 WERE WILLING TO STIPULATE THAT THE FUNCTIONALITY,  
7 THE ACCUSED FEATURES WAS BASICALLY THE SAME FOR  
8 EVERYTHING ELSE EXCEPT FOR THE THREE DESIGN AROUNDS  
9 FOR THE '381 PATENT THE '891 AND THE '163 PATENT.

10 AND THOSE WERE PRODUCED. THE '381 DESIGN  
11 AROUND CODE WAS PRODUCED JANUARY 23RD. AND THEY --  
12 IT SOUNDS LIKE IT MAY HAVE EVEN BEEN PRODUCED WHEN  
13 COUNSEL WAS REFERRING TO THE S2, T-MOBILE VERSION  
14 HAVING BLUE GLOW, IT SOUNDS LIKE THEY HAD THAT BY  
15 DECEMBER 31ST, SO MAYBE THEY EVEN HAD THE BLUE GLOW  
16 DESIGN AROUND BY DECEMBER 31ST FOR THE SOURCE CODE.

17 THE OTHER TWO SOURCE CODE VERSIONS WERE  
18 PRODUCED AT THE END OF DISCOVERY RIGHT AFTER, JUST  
19 AS APPLE PRODUCED 250,000 PAGES OF DOCUMENTS AFTER  
20 THE CLOSE OF DISCOVERY.

21 THERE WAS A BIG RUSH TO PRODUCE A LOT OF  
22 DOCUMENTS AT THE END OF DISCOVERY.

23 AND WHAT THEY --

24 THE COURT: SO JUST ON THOSE POINTS THEN,  
25 IS IT ACCURATE FOR ME TO UNDERSTAND THAT AT LEAST

1 AS TO THOSE TWO VERSIONS, THOSE VERSIONS WERE NOT  
2 PRODUCED BY THE 31ST?

3 MR. JOHNSON: RIGHT. THEY WERE NOT  
4 PRODUCED BY THE 31ST.

5 AND YOUR HONOR -- THEY WERE IN A PRODUCT  
6 THAT WASN'T RELEASED. WE DIDN'T HAVE THE SOURCE  
7 CODE FOR THOSE TWO VERSIONS, THE DESIGN AROUNDS FOR  
8 THE '891 AND THE '163. WE DIDN'T HAVE THEM BY  
9 DECEMBER 31ST.

10 THE COURT: AND WHY IS THAT?

11 MR. JOHNSON: BECAUSE AS BEST AS WE WERE  
12 ABLE TO TELL, IT WASN'T RELEASED UNTIL THE EARLIEST  
13 WE CAN SEE IS DECEMBER 23RD. WE DIDN'T KNOW ABOUT  
14 IT UNTIL AFTER DECEMBER 31ST.

15 AND SO WE DIDN'T HAVE THAT THE UNTIL SOME  
16 TIME AFTER DECEMBER 31ST.

17 THE COURT: WHEN YOU SAY "WE" DO YOU MEAN  
18 YOU AS OUTSIDE COUNSEL AS OPPOSED TO YOUR CLIENT?  
19 YOUR CLIENT OBVIOUSLY HAD THE CODE WELL IN ADVANCE  
20 OF THE 31ST.

21 MR. JOHNSON: I DON'T THINK THEY HAD IT  
22 WELL IN ADVANCE OF DECEMBER 31ST. I DON'T KNOW  
23 SPECIFICALLY.

24 ALL I KNOW IS THAT IT WAS RELEASED.  
25 THERE WAS A PRODUCT THAT HAD A RELEASED VERSION OF



1 THE '891 AND '163 DESIGN AROUND CODE. THAT PRODUCT  
2 WAS RELEASED DECEMBER 23RD.

3 I DON'T KNOW WHICH ENTITY HAD IT. A LOT  
4 OF THIS IS DONE OUTSIDE OF THE UNITED STATES. IT'S  
5 DONE OUTSIDE OF KOREA AS WELL.

6 THE COURT: OKAY.

7 SO -- I WANT TO MAKE SURE. I'M  
8 STRUGGLING, AS YOU CAN TELL, TO UNDERSTAND WHAT THE  
9 FACTS ARE LET ALONE THE IMPLICATIONS OF THOSE  
10 FACTS.

11 AM I ACCURATE IN UNDERSTANDING THAT AT  
12 LEAST AS OF DECEMBER 31ST, 2011, WHICH IS MY  
13 DEADLINE, THERE WERE TWO VERSIONS OF PRODUCTS AT  
14 LEAST TWO VERSIONS OF PRODUCT IN THE MARKETPLACE  
15 FOR WHICH NO SOURCE CODE WAS PRODUCED, WHETHER IT'S  
16 JUSTIFIED, WHETHER IT'S PERFECTLY REASONABLE,  
17 WHETHER YOU TRIED AS HARD AS YOU COULD, IS THAT AN  
18 ACCURATE UNDERSTANDING?

19 MR. JOHNSON: I THINK THAT'S ACCURATE.

20 THE COURT: OKAY.

21 SO AS TO ANY OTHER VERSIONS IN COMMERCIAL  
22 RELEASE AS OF THE 31ST WERE THERE ANY OTHER  
23 VERSIONS OF CODE FOR WHICH NO SOURCE WAS PRODUCED  
24 TO APPLE BY MY DEADLINE.

25 MR. JOHNSON: I'M SORRY, COULD YOU REPEAT

1 THAT.

2 THE COURT: SURE.

3 I WANT TO UNDERSTAND WHETHER THERE ARE  
4 ANY OTHER VERSIONS OF THE CODE WHICH WERE IN  
5 COMMERCIAL RELEASE AS OF THE 31ST FOR WHICH NO COPY  
6 WAS PRODUCED TO APPLE.

7 MR. JOHNSON: WELL, THEIR VERSIONS.

8 THAT'S WHAT I'M SAYING THERE ARE VERSIONS OF  
9 CODE THAT WERE DELIVERED AFTER DECEMBER 31ST. THEY  
10 MAY CHANGE A COLOR OF A PARTICULAR WIDGET HERE, IT  
11 HAS NOTHING TO DO WITH THE FUNCTIONALITY. SO THERE  
12 ARE HUNDREDS OF THESE VERSIONS.

13 THE COURT: SO THERE ARE HUNDREDS OF  
14 VERSIONS OF THE CODE THAT WERE IN COMMERCIAL  
15 RELEASE AS OF THE 31ST FOR WHICH NO COPY WAS  
16 PRODUCED TO APPLE.

17 MR. JOHNSON: WE GAVE THEM A LOG  
18 DESCRIBING ALL THE CHANGES THAT WERE MADE TO THE  
19 CODE.

20 THE COURT: RIGHT. BUT WAS A COPY OF  
21 THAT CODE PRODUCED BY THE 31ST?

22 MR. JOHNSON: WELL, SOME OF THAT CODE  
23 WASN'T IN EXISTENCE AT THE 31ST.

24 THE COURT: LET'S TALK ABOUT THE CODE  
25 THAT WAS IN EXISTENCE.

1           YOU AGREED WITH ME THERE ARE AT LEAST TWO  
2           VERSIONS OF CODE WHICH WERE IN COMMERCIAL RELEASE  
3           AS OF THE 31ST FOR WHICH NO COPY WAS PRODUCED TO  
4           APPLE.

5           WHAT I'M TRYING TO UNDERSTAND IS WHAT IS  
6           THE UNIVERSE OF ADDITIONAL VERSIONS OF CODE IN  
7           COMMERCIAL RELEASE OF THE 31ST FOR WHICH NO COPY  
8           WAS PRODUCED BY THAT DATE. HUNDREDS? DOZENS?

9           MR. JOHNSON: I DON'T KNOW THE ANSWER TO  
10          THAT FOR SURE.

11          NOW, WITH RESPECT TO THE ACCUSED  
12          FUNCTIONALITY OF THOSE FEATURES, FOR THE VERSIONS  
13          OF THE CODE, THEY OPERATED THE SAME WAY. AND  
14          THAT'S WHAT WE TOLD APPLE AND THAT'S WHAT APPLE'S  
15          EXPERT BELIEVES AND THAT'S WHAT SAMSUNG BELIEVES.

16          SO WITH RESPECT TO -- THE ONLY CHANGE  
17          WITH RESPECT TO THE EIGHT PATENTS THE UTILITY  
18          PATENTS THAT HAVE BEEN ACCUSED THE ONLY CHANGE THAT  
19          IS HAVE OCCURRED WITH RESPECT TO THE DESIGN AROUND  
20          FOR THE '381 WHICH THEY HAVE KNOWN ABOUT, THEIR  
21          EXPERT HAS KNOWN ABOUT, IT'S IN THE EXPERT REPORT,  
22          HE TESTIFIED ABOUT IT, THERE'S NO PREJUDICE WITH  
23          RESPECT TO THAT.

24          THE COURT: SO WE WILL GET TO PREJUDICE  
25          IN A MOMENT.

1           AGAIN, I WANT TO MAKE SURE I'M NOT  
2 MISUNDERSTANDING YOUR POSITION ON WHAT HAPPENED  
3 HERE.

4           IT SOUNDS LIKE WE ARE ALL IN AGREEMENT  
5 THAT THERE ARE AT LEAST DOZENS IF UNDERSTAND  
6 HUNDREDS OF VERSIONS OF THIS CODE THAT WERE IN  
7 COMMERCIAL RELEASE AS OF THE 31ST OF DECEMBER AND  
8 FOR WHICH NO COPY WAS PRODUCED TO APPLE BY THAT  
9 DATE.

10           ARE WE IN AGREEMENT THERE?

11           MR. JOHNSON: WE ARE IN AGREEMENT.

12           BUT I GO BACK TO YOUR HONOR'S ORDER WITH  
13 RESPECT TO THE -- WHAT WAS REQUIRED TO BE PRODUCED  
14 BY DECEMBER 31ST, AND THE HUNDREDS OF VERSIONS OF  
15 CODE THAT OR --

16           THE COURT: ARE YOU ALL MAKING THIS CODE  
17 AVAILABLE?

18           MR. JOHNSON: IT'S --

19           THE COURT: ARE COPIES AT QUINN'S OFFICES  
20 OR --

21           MR. JOHNSON: YES.

22           JUST ON BOTH SIDES THERE ARE COPIES AT  
23 EACH OTHER'S OFFICES THEY CAN COME AND LOOK AT IT.

24           THE COURT: IS IT REMOTE ACCESS AT THE  
25 OFFICES OR ARE THERE ACTUALLY LOCAL COPIES THAT ONE

1           COULD INSPECT?

2                   MR. JOHNSON:   THERE ARE LOCAL COPIES AND  
3           THEY ASKED FOR THINGS TO BE PRINTED OUT AND WE  
4           PRINT THEM OUT.   AND IT'S IT IS SAME ON BOTH SIDES  
5           PURSUANT TO THE PROTECTIVE ORDER.

6                   THE COURT:   WHAT WAS THE PROBLEM IN  
7           SIMPLY TELLING YOUR CLIENT THAT THERE WAS AN ORDER  
8           OF THIS COURT TO PRODUCE EVERYTHING SO GET IT  
9           PRODUCED BY THE 31ST.

10                   WHAT WAS THE PROBLEM WITH THAT?

11                   MR. JOHNSON:   AS I SAID, FIRST OF ALL,  
12           THERE'S CODE THAT COMES FROM THE CARRIERS THERE'S  
13           CODE THAT --

14                   THE COURT:   THE CARRIERS GET IT FROM  
15           SAMSUNG, RIGHT?

16                   MR. JOHNSON:   WELL, THE CARRIERS GET IT  
17           FROM SAMSUNG.   THEY GET IT FROM -- THERE ARE ALSO,  
18           I THINK THERE ARE OTHER ENTITIES INVOLVED.   I  
19           MEAN'S LOT OF THIS CODE COMES FROM GOOGLE, FOR  
20           EXAMPLE.

21                   THE COURT:   RIGHT.

22                   I UNDERSTAND YOU HAVE YOUR MODIFICATIONS  
23           AND ADDITIONAL APPLICATIONS WHICH ARE INCLUDED IN  
24           THE BUNDLE THAT'S DELIVERED.   BUT THE POINT IS THE  
25           CARRIERS GET THE CODE FROM SAMSUNG, RIGHT, THAT WE

1 ARE TALKING ABOUT.

2 MR. JOHNSON: RIGHT.

3 THE COURT: SO WHAT'S THE RELEVANCE OF  
4 THE FACT THAT THE CARRIERS -- WHAT WAS THE BURDEN  
5 IN PRODUCING ALL OF THIS?

6 MR. JOHNSON: THE CARRIERS ARE WHO  
7 ULTIMATELY WHO DELIVER IT OVER THE AIR POTENTIALLY  
8 TO THE ULTIMATELY TO THE SUBSCRIBERS.

9 THE COURT: THEY ARE ULTIMATELY  
10 RESPONSIBLE FOR THE INSTALLMENTS.

11 MR. JOHNSON: SO WHAT GETS DELIVERED, IT  
12 TAKES COORDINATION WITH THE CARRIERS AS WELL.  
13 THAT'S MY POINT. IT'S NOT JUST SAMSUNG.

14 THE COURT: SO IS THE CODE THAT'S  
15 AVAILABLE FOR INSPECTION IN YOUR FIRM'S OFFICE IS  
16 CODE COMING FROM THE CARRIERS?

17 MR. JOHNSON: IT'S COMING FROM SAMSUNG  
18 AND WE'VE CONFIRMED THIS IS CODE AVAILABLE OVER THE  
19 AIR THROUGH THE CARRIERS TO THE CUSTOMERS.

20 THE COURT: ALL RIGHT.

21 MR. JOHNSON: SO GOING BACK TO YOUR  
22 QUESTION ABOUT THE VERSIONS OF SOFTWARE THE  
23 VERSIONS OF THE CODE, THERE ARE VERSIONS OF CODE  
24 THAT WERE NOT PRODUCED BY DECEMBER 31ST.

25 TO THE EXTENT THAT, AS I SAID, WE READ

1 YOUR HONOR'S ORDER AND WE READ THE MOTION THAT SET  
2 UP YOUR HONOR'S ORDER. AND THROUGH THE MEET AND  
3 CONFER PROCESS BECAUSE THERE WAS NOT DONE PURELY IN  
4 THE A VACUUM WITH RESPECT TO OUR DISCUSSIONS WITH  
5 APPLE. WE WERE ALL HEADING TOWARDS AGREEING ON  
6 REPRESENTATIVE FUNCTIONALITY WITH RESPECT TO THESE  
7 FEATURES.

8 SO THERE ARE VERSIONS THAT WERE NOT MADE  
9 AVAILABLE BUT WE PRODUCED THE VERSIONS OF THE CODE  
10 THAT WERE DELIVERED ON THE PRODUCTS AS THEY WERE  
11 RELEASED FOR THE PRODUCTS THAT WERE ACCUSED.

12 NOW AS THE PRODUCTS THEN WERE, TO THE  
13 EXTENT THERE ARE ANY DESIGN AROUNDS, THOSE WERE  
14 THEN DELIVERED TO APPLE.

15 AS I SAID --

16 THE COURT: BY DECEMBER 31ST?

17 MR. JOHNSON: DECEMBER 31ST OR  
18 JANUARY 23RD IN THE CONTEXT OF THE '381, AND  
19 MARCH 10TH AND 12TH WITH RESPECT TO THE OTHER TWO  
20 PATENTS.

21 I MEAN, WHAT APPLE SEEKS WITH RESPECT TO  
22 ITS MOTION HERE, AND I HEARD COUNSEL SORT OF SECOND  
23 ASK WAS THAT THE SOURCE CODE THAT -- THEY WANT A  
24 REPRESENTATION THAT THE SOURCE CODE WE PRODUCED BY  
25 DECEMBER 31ST IS REPRESENTATIVE OF ALL PRODUCTS.

1           AND THAT'S JUST SIMPLY NOT THE CASE AND  
2           IT'S PARTICULARLY WITH RESPECT TO THE THREE DESIGN  
3           AROUNDS.

4           THEY ESSENTIALLY WANT THE COURT TO FIND  
5           THAT THE PRODUCT THAT IS HAVE THE DESIGN AROUNDS IN  
6           THEM OPERATE THE SAME DAY THE PRODUCTS THAT DON'T  
7           HAVE THE DESIGN AROUNDS IN THEM.   AND THAT'S  
8           PREJUDICIAL AND SIMPLY NOT FAIR AT THIS POINT.

9           WE PRODUCED THE SOURCE CODE FOR THE  
10          PHONES WITH RESPECT TO THE DESIGN AROUNDS IN  
11          ADVANCE OF WHEN THEY HAD THEIR EXPERT REPORTS DUE.

12          AND BEFORE THE CLOSE OF DISCOVERY, WITH  
13          RESPECT TO THE '381, AND RIGHT AT THE CLOSE OF  
14          DISCOVERY WITH THE OTHER TWO PATENTS.

15          THE COURT:   WERE ANY OF THE THREE DESIGN  
16          AROUNDS THAT YOU ARE REFERRING TO, WERE ANY OF THEM  
17          IN COMMERCIAL RELEASE BEFORE DECEMBER 23RD?

18          MR. JOHNSON:   YES.   THE BLUE GLOW.

19          THE COURT:   OKAY.

20          AND WAS THE BLUE GLOW CODE PRODUCED BY  
21          THE 31ST?

22          MR. JOHNSON:   I DON'T KNOW THE ANSWER TO  
23          THAT.   I'M HEARING COUNSEL'S --

24          THE COURT:   WELL, ISN'T THAT KIND OF THE  
25          OPERATIVE QUESTION HERE?



1 MR. JOHNSON: HEARING COUNSEL'S  
2 REPRESENTATION TODAY THAT WE PRODUCED CODE FOR THE  
3 S2 T-MOBILE TELLS ME, THAT WAS DONE BY  
4 DECEMBER 31ST TELLS ME IT WAS PRODUCED BY  
5 DECEMBER 31ST.

6 NOW I DON'T KNOW THE ANSWER WITH RESPECT  
7 TO THE SPECIFIC QUESTION. I WAS COMING HERE TODAY  
8 THINKING THAT THE FIRST SOURCE CODE PRODUCED FOR  
9 THE BLUE GLOW WAS PRODUCED ON JANUARY 23RD.

10 THE COURT: IF THAT'S THE CASE, WOULD YOU  
11 AGREE THAT WOULD BE A VIOLATION OF MY ORDER?

12 MR. JOHNSON: NO, YOUR HONOR, BECAUSE  
13 WITH RESPECT TO THE ORDER, I GO BACK TO YOUR ORDER,  
14 YOUR ORDER SAYS, PRODUCE SOURCE CODE AND TECHNICAL  
15 DOCUMENTS REQUESTED BY APPLE'S MOTION.

16 THE DOCUMENTS REQUESTED BY APPLE'S MOTION  
17 WERE NOT ALL VERSIONS OF THE SOURCE CODE. AND IN  
18 FACT THE -- WHAT HAPPENED AFTER THAT WITH RESPECT  
19 TO THE MOTION TO COMPEL THAT APPLE BROUGHT IN  
20 JANUARY AND THE SUBSEQUENT MEET AND CONFERS  
21 ASSOCIATED WITH THAT THROUGH THE LEAD COUNSEL  
22 ARRANGEMENTS, AND THE SUBSEQUENT DISCOVERY THAT  
23 THEY SERVED WITH RESPECT TO DESIGN AROUNDS IN  
24 JANUARY, ALL ESTABLISH THAT THEY KNEW ABOUT THE  
25 BLUE GLOW, WE KNEW ABOUT THE BLUE GLOW BUT THAT

1 WASN'T COVERED BY THE DECEMBER 31ST ORDER, THE  
2 DECEMBER 22ND ORDER.

3 NOW, THEY'VE KNOWN ABOUT IT SINCE JANUARY  
4 23RD, TWO MONTHS BEFORE THE CLOSE OF DISCOVERY WITH  
5 RESPECT TO THE BLUE GLOW.

6 AND I DO WANT TO JUST GO BACK BRIEFLY, IF  
7 YOUR HONOR WILL PERMIT, WITH RESPECT TO PREJUDICE  
8 BECAUSE WITH RESPECT TO PREJUDICE DR. BALAKRISHNAN  
9 HAS ADMITTED THAT THE BLUE GLOW DOESN'T INFRINGE,  
10 IT HAS AN IMPACT ON DAMAGES OBVIOUSLY.

11 IF THE PRODUCTS DON'T INFRINGE, THAT  
12 REDUCES THE AMOUNT THAT APPLE CAN COLLECT.

13 THEY'VE KNOWN ABOUT IT SINCE JANUARY 23RD  
14 AT THE VERY LATEST AND MAYBE DECEMBER 31ST. AND  
15 THIS IS WHAT I WAS TALKING ABOUT WITH RESPECT TO, I  
16 DO BELIEVE THAT ADDITIONAL MEETING AND CONFERRING  
17 WITH RESPECT TO THE REPRESENTATIVE FUNCTIONALITY OF  
18 THESE PRODUCTS IS ESSENTIAL BECAUSE WHEN WE HEAD TO  
19 TRIAL NOW THAT WE HAVE A 25-HOUR LIMIT FROM  
20 JUDGE KOH, WE ARE NOT GOING TO SIMPLY BE IN A  
21 POSITION TO BE ABLE TO ARGUE WITH ALL OF THESE  
22 DIFFERENT VERSIONS WE HAVE TO REACH SOME AGREEMENT  
23 WITH RESPECT TO THE FUNCTIONALITY.

24 AND I HONESTLY THOUGHT WE WERE HEADED IN  
25 THAT DIRECTION UNTIL APPLE DREW THE LINE IN THE

1 SAND SAYING THAT SAMSUNG HAD TO ADMIT THAT IT HAD  
2 VIOLATED THE DECEMBER 22ND ORDER IN ORDER TO COME  
3 TO SOME UNDERSTANDING.

4 SO WITH THAT, WE FELT THAT OUR HANDS WERE  
5 TIDE WITH RESPECT TO REACHING AGREEMENT ON THESE  
6 ISSUES.

7 NOW, I THINK IT WOULD BE, AND I DON'T  
8 MEAN TO PRESUME ANYTHING, BUT I THINK IT WOULD BE  
9 HELPFUL IF THE PARTIES WERE THEN REQUIRED NOW TO  
10 SIT DOWN AND REACH SOME AGREEMENT WITH RESPECT TO  
11 THE FUNCTIONAL REPRESENTATIVE ASPECTS OF WHAT THIS  
12 CODE DOES AND WHAT IT DOESN'T DO.

13 I STAND HERE BEFORE YOU WITH THE  
14 STIPULATION THAT WE SUBMITTED AND THE BRIGGS  
15 DECLARATION EXHIBIT NUMBER 1 AS A STIPULATION THAT  
16 SUBSTANTIVELY SAYS ALL OF THE CODE WITH RESPECT TO  
17 THE ACCUSED FEATURES OPERATES THE SAME WAY FOR THE  
18 DIFFERENT VERSIONS THAT ARE OUT THERE, EXCEPT FOR  
19 THE BLUE GLOW CODE AND THE CODE FOR THE '891 AND  
20 THE '167.

21 AT THE END OF THE DAY, RATHER THAN HAVING  
22 A FINDING THAT THE DESIGN AROUNDS OPERATE THE SAME  
23 WAY AS THE NON DESIGN AROUNDS PRODUCTS WE SHOULD  
24 JUST TAKE THE DESIGN AROUNDS OUT OF THIS CASE.

25 THAT FINDING IS SO PREJUDICIAL TO SAMSUNG

1 FOR US NOT TO BE ABLE TO ARGUE THAT PRODUCTS THAT  
2 HAVE DESIGN AROUNDS IN THEM DON'T INFRINGE THE  
3 PATENTS, IS SO INCREDIBLY DRASTIC AND IT  
4 OBVIOUSLY -- ONE OF THE REQUIREMENTS OR ONE OF THE  
5 FACTORS IN LOOKING AT SANCTIONS IS THE PUBLIC  
6 POLICY ASSOCIATED WITH FAVORING DISPOSITION OF  
7 CASES ON THE MERITS.

8 THERE'S BEEN NO REAL PREJUDICE HERE WITH  
9 RESPECT TO APPLE AND ITS CONSIDERATION OF THE  
10 DESIGN AROUNDS.

11 AND I GO BACK TO THE FACT THAT THEIR  
12 EXPERTS TOLD US BACK IN THE CONTEXT OF THE  
13 PRELIMINARY INJUNCTION HEARING AND THROUGHOUT THE  
14 FALL THAT THEY DON'T EVEN NEED THE SOURCE CODE TO  
15 SHOW WHETHER A PRODUCT INFRINGES.

16 THE COURT: ALL RIGHT.

17 WELL, WE WILL PASS THAT. I ISSUED ORDERS  
18 REQUIRING THEM PRODUCE IT.

19 AND WITH ALL DUE RESPECT, IT SEEMS LIKE  
20 IN THIS CASE OVER AND OVER AGAIN YOU SEEM TO HAVE A  
21 REVISITING OF THE MERITS OF AN ORDER.

22 ONCE THE ORDER IS OUT, IT'S OUT, AND THE  
23 ONLY QUESTION IS DID YOU COMPLY.

24 WHETHER I WAS COMPLETELY WRONG IN  
25 ORDERING THE SOURCE CODE PRODUCED OR NOT IS NO

1 LONGER A QUESTION. THE ONLY QUESTION IS DID YOU  
2 COMPLY.

3 CAN WE AGREE ON THAT AT LEAST?

4 MR. JOHNSON: I BELIEVE WE COMPLIED, YES.  
5 WE DID COMPLY.

6 AND THE ORDER WAS FRAMED SUCH THAT IT  
7 REFERRED BACK TO APPLE'S MOTION AND SPECIFICALLY  
8 CARVED OUT THE ISSUE THAT IS HAD NOT BEEN MET AND  
9 CONFERRED UPON.

10 AND THAT'S MY POINT, THE MEET AND CONFER  
11 ISSUES WERE SUBSEQUENTLY DISCUSSED IN THE CONTEXT  
12 OF THE JANUARY MEET AND CONFER AND WERE  
13 SUBSEQUENTLY DISCUSSED --

14 THE COURT: SO MR. JOHNSON, IT SOUNDS  
15 LIKE THEN YOU WOULD URGE ME IN DECIDING THIS ISSUE  
16 SIMPLY TO LOOK AT THE ORIGINAL APPLE MOTION AND TO  
17 LOOK AT WHAT ISSUES WERE THE SUBJECT OF THE  
18 APPROPRIATE MEET AND CONFER OR NOT.

19 AND IF I DO THAT, YOU ARE TELLING ME I  
20 WILL UNDERSTAND THAT ALL OF THE CODE THAT WAS NOT  
21 PRODUCED BY THE 31ST WAS NOT THE SUBJECT OF THAT  
22 MOTION? IS THAT FAIR?

23 MR. JOHNSON: AND I WOULD ONLY ADD THAT I  
24 THINK TO GIVE IT GUIDANCE, I WOULD URGE YOUR HONOR  
25 TO ALSO LOOK AT THE JANUARY MOTION AND THE MOTION

1 TO COMPEL WAS FILED THERE ALONG WITH THE PROPOSED  
2 ORDER THAT APPLE SUBMITTED.

3 BECAUSE THE JANUARY ORDER REFERS BACK TO  
4 APPLE'S PROPOSED ORDER MOTION AND SAYS, BASICALLY,  
5 THAT SAMSUNG IS COMPELLED TO PRODUCE THE 14  
6 CATEGORIES OF DOCUMENTS THAT ARE REFERENCED IN  
7 APPLE'S PROPOSED ORDER.

8 SO I THINK WHEN YOU LOOK AT THE  
9 TRAJECTORY OF WHAT HAPPENED DURING THAT TIME FRAME  
10 AND YOU ALSO LOOK AT THE DISCOVERY THAT APPLE HAD  
11 SERVED AND YOU LOOK AT WHERE THE PARTIES WERE  
12 HEADED WITH RESPECT TO MEETING AND CONFERRING ON  
13 THE REPRESENTATIVE ASPECTS, BECAUSE THAT'S WHERE WE  
14 ARE REALLY GOING IS IN MY VIEW, IT'S LOOK AT EITHER  
15 THE PARTIES AGREE THAT THESE FEATURES ARE ALL  
16 REPRESENTATIVE OF EACH OTHER AND THE DESIGNS  
17 OPERATE DIFFERENTLY AND THEY ARE INCLUDED OR WE  
18 TAKE THE DESIGNS COMPLETELY OUT OF THIS CASE AND WE  
19 PUT THEM IN THIS SOME SUBSEQUENT FOLLOWING.

20 BECAUSE TO FIND THAT THE DESIGN AROUNDS  
21 ARE NOT DESIGN AROUNDS AT THIS JUNCTURE IN THE CASE  
22 --

23 THE COURT: SOMEWHAT DEFEATS THE PURPOSE.

24 MR. JOHNSON: EXACTLY.

25 THE COURT: ALL RIGHT.

1 ANYTHING ELSE YOU WANT TO ADD,  
2 MR. JOHNSON?

3 MR. JOHNSON: NO, YOUR HONOR.

4 THE COURT: ALL RIGHT.

5 THANK YOU VERY MUCH.

6 REBUTTAL?

7 MS. TUCHER: THANK YOU, YOUR HONOR.

8 SEVERAL POINTS.

9 STARTING WITH THE QUESTION AS TO WHETHER  
10 APPLE'S ORIGINAL MOTION SOUGHT ALL VERSIONS, I  
11 WOULD REFER YOU TO THE TEXT QUOTED ON PAGE 2 OF OUR  
12 REPLY BRIEF FOR A NUMBER OF REQUESTS FOR PRODUCTION  
13 THAT WERE THE SUBJECT OF THAT ORDER THAT REFER  
14 REPEATEDLY TO ALL VERSIONS AND TO MULTIPLE  
15 VERSIONS.

16 THE COURT: BEFORE YOU MOVE ON, LET ME  
17 MAKE SURE I'M FOLLOWING ALONG.

18 I'M ON PAGE 2 OF THE REPLY RFP NUMBER  
19 224, FOR EXAMPLE.

20 MS. TUCHER: EXACTLY.

21 BETTER YET, LOOK AT RFP 224, ALL SOURCE  
22 CODE FOR EACH VERSION. RFP 228, THE SOURCE CODE  
23 FOR EACH VERSION.

24 RFP232, ALL SOURCE CODE FOR EACH VERSION.

25 THE COURT: ALL RIGHT.

1 MS. TUCHER: ON THE QUESTION OF WHETHER  
2 THE JANUARY ORDER IN ANY WAY RELIEVES SAMSUNG OF  
3 THE BURDEN OF COMPLYING WITH THE DECEMBER ORDER,  
4 BESIDES THE FACT THAT THAT WOULD BE NONSENSICAL IN  
5 TERMS OF TIMELINE, THE REASON WE DON'T VIEW IT THAT  
6 WAY IS THE JANUARY ORDER WENT TO NON SOURCE CODE  
7 DOCUMENTS ADMITTEDLY RELATED TO THE SOURCE CODE IN  
8 THE SENSE THAT THIS CHANGE LOG THAT THEY GAVE US IS  
9 WHAT WE NEED WITH THE SOURCE CODE TO BE ABLE TO  
10 TELL WHAT GOT DEPLOYED WHEN.

11 SO IF WE HAD THE SOURCE CODE, WE KNOW  
12 WHAT GOT DEPLOYED. WE HAVE THE CHANGE LOG WE KNOW  
13 WHEN DID THE SOURCE CODE GET DEPLOYED IN THE MANY  
14 VERSIONS.

15 PUT THE TWO TOGETHER AND WE HAVE AN EXACT  
16 PICTURE OF WHAT SAMSUNG DID.

17 IF WE HAD THAT INFORMATION WE WOULD BE IN  
18 A POSITION TO NEGOTIATE FROM A FAIR FOOTING THE  
19 STIPULATION THAT WE SHOULD HAVE NEGOTIATED LAST  
20 FALL.

21 BUT WE NEVER GOT THE INFORMATION, SO WE  
22 COULDN'T DO THAT.

23 AS FOR WHETHER THE STIPULATION THAT  
24 SAMSUNG HAS PROVIDED THIS COURT AND PROVIDED APPLE  
25 IN MARCH AFTER WE FILED THE ORDER, AS THE QUESTION



1 OF WHETHER THAT PROVIDES SOME SORT OF FAIR BASIS  
2 FOR A MEET AND CONFER TO RESOLVE THE ISSUE NOW, I  
3 WOULD SUBMIT THAT IT DOESN'T BECAUSE WE KNOW THAT  
4 IT IS FACTUALLY MISTAKEN.

5 AND I WOULD USE AS THE EXAMPLE WE ALREADY  
6 TALKED ABOUT, THE RUBBER BANDING PATENT WHERE THE  
7 STIPULATION SAYS THAT THE RUBBER BANDING DESIGN  
8 AROUNDS CODE WAS DEPLOYED IN PRODUCTS -- ALL  
9 PRODUCTS AS OF A DATE IN AUGUST, WHEN WE KNOW  
10 THAT'S NOT TRUE.

11 THEY ALSO ASK US TO STIPULATE THAT THE  
12 DESIGN AROUNDS FOR THE '891 AND '163 PATENTS WAS  
13 DEPLOYED AS OF DECEMBER 23RD.

14 WE HAVE NO IDEA, FIRST OF ALL, WHETHER IT  
15 WAS DEPLOYED IN ANY PRODUCTS IN THE UNITED STATES  
16 AS OF DECEMBER 23RD.

17 AND SECOND OF ALL, WHETHER IT WAS  
18 DEPLOYED IN ALL PRODUCTS AS OF THAT DATE AS SAMSUNG  
19 STIPULATION SEEMS TO SUGGEST.

20 AND IT SOUNDS AS THOUGH SAMSUNG OUTSIDE  
21 COUNSEL ALSO DOESN'T KNOW THE ANSWER TO THE  
22 QUESTION BECAUSE HE STARTED TO SAY, WELL, WE KNOW  
23 THE CODE EXISTS AS OF DECEMBER 23RD BUT WE  
24 OURSELVES DIDN'T HAVE IT, SO WE DON'T KNOW THAT IT  
25 WAS COMMERCIALY RELEASED IN THE UNITED STATES AS

1 OF THAT DATE.

2 SO I SUBMIT WE HAVE NEVER, EVEN TO THIS  
3 DATE, RECEIVED THE APPROPRIATE INFORMATION FROM  
4 SAMSUNG. WE AREN'T IN A POSITION TO SIT DOWN AND  
5 MEET AND CONFER AT THIS TIME TO TRY TO THE RESOLVE  
6 THE ISSUES.

7 AS TO THE QUESTION OF HOW MANY VERSIONS  
8 OF CODE WERE IN COMMERCIAL EXISTENCE IN THE  
9 UNITED STATES AS OF DECEMBER 31ST AS TO WHICH WE  
10 NEVER GOT COPIES, THE CLOSEST INFORMATION THAT WE  
11 HAVE TO ANSWER THAT QUESTION IS EXHIBIT D TO THE  
12 PERNICK DECLARATION IN SUPPORT OF OUR REPLY, THAT  
13 IS THE CHANGE LOG INFORMATION.

14 I CAN'T CLAIM TO UNDERSTAND THIS WELL  
15 ENOUGH TO EXPLAIN EVERY ENTRY TO YOU, BUT THE  
16 VOLUME OF ENTRIES IN THAT DOCUMENT SHOWS YOU THE  
17 VOLUME OF THE DIFFERENT VERSIONS OF SOURCE CODE  
18 THAT WERE RELEASED IN THE UNITED STATES AT THE  
19 DATES INDICATED IN THAT LOG.

20 AND AS YOU KNOW, WE ONLY GOT ONE VERSION  
21 FOR EACH OF THE DOCUMENTS.

22 I WANTED TO ALSO ADD THAT WHEN YOU ASKED  
23 ME TO GO OVER THE ELEMENTS OF THE RELIEF I LEFT ONE  
24 OUT, AND THAT IS NOT JUST THAT APPLE BE ALLOWED TO  
25 ASSUME THE SOURCE CODE WAS REPRESENTATIVE, BUT THAT

1 SAMSUNG NOT BE ALLOWED TO ARGUE THAT IT'S NOT  
2 REPRESENTATIVE. BOTH PARTIES HAVE TO BE ARGUING  
3 FROM THE SAME BASE AS TO WHAT THE INFORMATION IS IN  
4 THIS CASE.

5 AND AS FOR PREJUDICE, WITH REGARD IN  
6 PARTICULAR TO THE '891 AND '163 PATENT, WHAT  
7 SAMSUNG IS ASKING YOUR HONOR TO DO, AND WHAT  
8 SAMSUNG IS ASKING APPLE TO DO IS TO ACCEPT AS  
9 SOMEHOW RELEVANT TO THE CASE AND IN FACT TO ACCEPT  
10 AS HAVING BEEN DEPLOYED IN CUTTING OFF OUR RIGHT TO  
11 DAMAGES AND INJUNCTIVE RELIEF, SOURCE CODE THAT WE  
12 NEVER SAW, NOT ONLY BY DECEMBER 31ST, BUT BY THE  
13 CLOSE OF FACT DISCOVERY IN THIS CASE.

14 THE COURT: MAY I ASK DR. BALAKRISHNAN'S  
15 ANALYSIS, DOES HE CITE TO SOURCE CODE IN HIS  
16 REPORTS?

17 MS. TUCHER: ABSOLUTELY.

18 THE COURT: AND DOES HE ADDRESS OR  
19 EXPLAIN IN HIS REPORT THE FACT THAT THERE ARE  
20 VERSIONS OF THE SAMSUNG PRODUCTS THAT HE BELIEVES  
21 ARE INFRINGING FOR WHICH HE'S RECEIVED NO SOURCE  
22 CODE?

23 HAS HE ADDRESSED THAT AT ALL ANYWHERE?

24 MS. TUCHER: WE KNOW HE PROCEEDS BY  
25 VIRTUE OF EXEMPLARY PRODUCTS. I DON'T KNOW WHETHER

1           THERE'S ANYWHERE IN HIS REPORT THAT TALKS ABOUT  
2           WHAT HE DIDN'T HAVE AND WHY. I THINK THAT'S MORE  
3           WHAT WE CONSIDERED A LAWYER ISSUE.

4                     THE COURT: ALL RIGHT.

5                     NOW, IF DR. BALAKRISHNAN IN HIS ANALYSIS  
6           HAS BEEN PREJUDICED BY SAMSUNG'S FAILURE TO PRODUCE  
7           CODE FOR ALL THE VERSIONS THAT ARE AT ISSUE IN THIS  
8           CASE, EXPLAIN TO ME WHY THE APPROPRIATE REMEDY HERE  
9           WOULDN'T BE SIMPLY TO GIVE HIM THE ACCESS THAT HE  
10          WAS DENIED TO DATE.

11                    MS. TUCHER: SO THE PROBLEM IS, AS YOU'VE  
12          HEARD FROM SAMSUNG'S COUNSEL, IT TAKES A LOT OF  
13          TIME TO ANALYZE THE SOURCE CODE AND THAT'S WHY EVEN  
14          FOR THE SOURCE CODE WE ALREADY HAVE, WE'VE BEEN  
15          DAY-IN, DAY-OUT ANALYZING WHAT WE'VE GOT.

16                    IF WE GET A MASSIVE SOURCE CODE DUMP NOW  
17          AFTER THE FACT AND EXPERT DISCOVERY IS OVER, IT  
18          DEFIES MY ABILITY TO UNDERSTAND HOW WE COULD  
19          GRAPPLE WITH THAT INFORMATION AT THIS POINT IN THE  
20          CASE.

21                    THE COURT: SO IT'S A TIMING ISSUE.

22                    MS. TUCHER: YEAH. IF WE HAD HAD IT IN  
23          THE FALL, WE COULD HAVE MET AND CONFERRED IN ORDER  
24          TO GET THE PARTIES TOGETHER TO IDENTIFY WHICH  
25          SOURCE CODE ACTUALLY NEEDED ANALYZING AND WHICH

1           COULD BE DEEMED REPRESENTATIVE.

2                   BUT IT DIDN'T HAPPEN IN THE FALL, IT  
3           DIDN'T HAPPEN IN THE SPRING, AND NOW EXPERT  
4           DISCOVERY IS ALMOST OVER.

5                   THE COURT:    SO HERE WE ARE.

6                   MS. TUCHER:    YEAH.

7                   THE COURT:    ALL RIGHT.

8                   THANK YOU VERY MUCH.

9                   MR. JOHNSON:    JUST BRIEFLY, YOUR HONOR.

10                  THE COURT:    SURE.

11                  MR. JOHNSON:    I JUST WANT TO GO BACK TO  
12           THE DECEMBER MOTION TO COMPEL.

13                   YOUR HONOR, THERE WERE REQUESTS FOR  
14           PRODUCTION THAT WERE BASICALLY ENUMERATED AT THE  
15           BEGINNING OF THEIR MOTION.  AND I WOULD URGE  
16           YOUR HONOR TO LOOK AT THE MOTION TO COMPEL AS IT  
17           WAS ARGUED IN THE BRIEFING AND SUBSEQUENTLY THE  
18           REPLY BRIEFING BECAUSE THEY DID NARROW THE SCOPE OF  
19           WHAT THEY WERE ASKING FOR.

20                   AND THAT'S ALSO BOURNE OUT IN THE  
21           PROPOSED ORDER IN CONNECTION WITH THE DECEMBER  
22           MOTION TO COMPEL.

23                   THEY ASKED FOR NOT ALL VERSIONS OF THE  
24           CODE, THIS IS DOCUMENT 467-21 IN THE DOCKET, THEIR  
25           PROPOSED ORDER.

1                   AND THEN I WILL JUST GO BACK TO THE LAST  
2                   QUESTION YOU ASKED WITH RESPECT TO  
3                   DR. BALAKRISHNAN. I HAVE DEPOSED HIM SEVERAL TIMES  
4                   NOW AND HE HASN'T COME BACK AND SAID THAT, LET ME  
5                   STATE IT THIS WAY, THESE FEATURES THAT ARE ACCUSED,  
6                   WITH RESPECT TO THE APPLE PATENTS, HAVE REALLY --  
7                   BASICALLY OPERATE THE SAME WAY THROUGHOUT THE CODE  
8                   EXCEPT FOR THE DESIGN AROUNDS. AND THAT'S WHAT HE  
9                   BASICALLY TESTIFIES TO.

10                   SO THERE REALLY HASN'T BEEN ANY PREJUDICE  
11                   WHICH IS WHY HE'S TESTIFIED TO THE FACT THAT THE  
12                   BLUE GLOW DOESN'T INFRINGE. HE KNOWS THAT FROM  
13                   LOOKING AT IT. HE KNOWS IF FROM THE SOURCE CODE  
14                   BECAUSE HE'S LOOKED AT THE SOURCE CODE AND HE  
15                   REFERS TO IT IN HIS EXPERT REPORT.

16                   SO I GO BACK TO -- WE ARE WILLING TO  
17                   STIPULATE TO THE FUNCTIONALITY OF THE SOURCE CODE  
18                   FEATURES ACROSS THESE PATENTS, ACROSS THE PRODUCTS  
19                   EXCEPT FOR THE DESIGN AROUNDS.

20                   AND IT'S ALSO LAID OUT IN OUR PROPOSED  
21                   STIPULATION. AND THAT'S WHERE I THINK WE CAN GO.  
22                   IF IN FACT AT THE END OF THE DAY APPLE WANTS US TO  
23                   BASICALLY SAY THAT THE DESIGN AROUNDS OPERATE THE  
24                   SAME WAY AS THE NON DESIGN AROUNDS, OBVIOUSLY  
25                   THAT'S SOMETHING WE ARE NOT WILLING TO DO. AND IF

1 THAT'S THE CASE THEN WE PULL IT OUT OF THIS CASE AT  
2 THIS POINT.

3 BUT THE REPRESENTATIVE FUNCTIONALITY WITH  
4 RESPECT TO THESE VERSIONS -- THAT'S WHY AT THE END  
5 OF THE DAY WHEN YOU LOOK AT THE TIME COMPRESSION OF  
6 THE CASE AND YOU LOOK AT WHAT EVERYBODY WAS DOING  
7 AT THE TIME, IT MAKES SENSE TO ME APPLE NARROWED  
8 WHAT THEY WERE LOOKING FOR.

9 THEY DON'T WANT TO LOOK AT HUNDREDS AND  
10 HUNDREDS OF VERSIONS OF THE SOURCE CODE. THEY WANT  
11 TO LOOK THE AT SOURCE CODE SEE IF IT OPERATES THE  
12 SAME WAY ACROSS THE FUNCTIONALITY. THAT'S WHAT  
13 WE'VE DONE ON OUR END OF THE CASE.

14 AND SO THAT'S WHAT THE PARTIES WERE  
15 TALKING ABOUT IN THE CONNECTION WITH THE DECEMBER  
16 ORDER AND THAT'S THE WAY WE READ THE DECEMBER  
17 ORDER.

18 THE COURT: SO IF YOU ALL ARE -- AND I  
19 DON'T BEGRUDGE YOU FOR THIS, BUT IF YOU ARE ALL ARE  
20 WORKING TO ACTIVELY IMPLEMENT THE DESIGN AROUNDS IN  
21 FALL OF 2011, IT WOULD SEEM TO ME YOU WOULD HAVE A  
22 VERY SOLID POSITION IN THAT TIME PERIOD TO SAY TO  
23 APPLE, LOOK, HERE ARE THE FUNCTIONS THAT ARE AT  
24 ISSUE FOR WHICH THERE'S NO DIFFERENCES FROM VERSION  
25 TO VERSION, BUT AS TO THESE VERSIONS WHICH HAVE

1 BEEN RELEASED WHICH INCLUDE DESIGN AROUNDS FOR ONE  
2 OR MORE OF THE ACCUSED FUNCTIONALITIES, THERE ARE  
3 MATERIAL DIFFERENCES.

4 WHY NOT HAVE THAT DISCUSSION IN THE FALL?  
5 WHY DOES IT REQUIRE THE COURT TO ORDER YOU TO HAVE  
6 THAT DISCUSSION?

7 MR. JOHNSON: WE DID -- WE HAD THAT  
8 DISCUSSION WITH APPLE'S COUNSEL WITH RESPECT TO --  
9 THEY'VE KNOWN ABOUT THE BLUE GLOW, AS I SAID, FROM  
10 THE FALL.

11 SO THIS DOESN'T COME AS ANY SURPRISE WITH  
12 RESPECT TO THAT. WE WERE DISCUSSING IT WHICH IS  
13 WHY I DIDN'T UNDERSTAND WHY THEY FILED THE MOTION  
14 FOR SANCTIONS OUT OF THE BLUE WITHOUT ANY MEET AND  
15 CONFERRING IN CONNECTION WITH IT.

16 I KNOW STRATEGICALLY WHY THEY DID IT AND  
17 THIS WAS A SERIAL SORT OF REQUEST FOR SANCTIONS  
18 THAT I SAID IN THE LAST HEARING THAT THEY SET THIS  
19 UP LAST JULY WHEN THEY SAID THAT THEY WERE -- WHEN  
20 THEY POINTED OUT DEFICIENCIES IN OTHER SAMSUNG  
21 CASES, SAID THEY WERE GOING TO BE LOOKING TO FILE  
22 SANCTIONS MOTIONS.

23 AND THAT'S WHAT THEY'VE DONE IN EVERY ONE  
24 OF THE CASES BETWEEN SAMSUNG AND APPLE. IT'S NOT  
25 JUST THE NORTHERN DISTRICT CASE IT'S THE ITC CASE



1 AS WELL.

2 AND UNFORTUNATELY, IT'S TURNED INTO ITS  
3 OWN STRATEGY ON THE SIDE. AND IT'S UNFORTUNATE  
4 BECAUSE THIS IS A CASE THAT'S BIG ENOUGH AND THE  
5 TIME COMPRESSION IS SUCH THAT IT REQUIRES  
6 COOPERATION AMONG THE PARTIES.

7 AND THE -- I FRANKLY -- I DO NOT KNOW WHY  
8 WE ARE HERE WITH RESPECT TO THAT BECAUSE WITH  
9 RESPECT TO THE FUNCTIONALITY ACROSS THESE PRODUCTS,  
10 THIS IS SOMETHING THAT THE PARTIES SHOULD BE ABLE  
11 TO AGREE TO. BOTH SIDES NEED IT.

12 THE COURT: ALL RIGHT.

13 THANK YOU VERY MUCH.

14 MS. TUCHER: MAY I MAKE THREE QUICK  
15 POINTS?

16 THE COURT: I WILL LET YOU MAKE ONE QUICK  
17 POINT. WE'VE GOT A LOT OF OTHER PEOPLE THAT NEED  
18 TO BE HEARD AS WELL.

19 MS. TUCHER: OKAY.

20 WITH REGARD TO WHETHER WE SOMEHOW  
21 NARROWED OUR REQUEST BEFORE YOUR DECEMBER ORDER, I  
22 WOULD REFER YOU TO THE LANGUAGE OF OUR PROPOSED  
23 ORDER WHERE WE ASK THAT SAMSUNG SPECIFY BY ANDROID  
24 VERSION THE CODE THAT IT WAS TO PROVIDE WHICH  
25 SEEMED TO BE CLEAR EVIDENCE IN THE PROPOSED ORDER

1 ITSELF, NOT TO MENTION THAT COUNSEL HAS NO  
2 DOCUMENTARY EVIDENCE TO SUPPORT HIS ALLEGATION THAT  
3 WE SOMEHOW GAVE UP A BIG PART OF WHAT WE HAD ASKED  
4 FOR.

5 THANK YOU, YOUR HONOR

6 THE COURT: THANK YOU VERY MUCH.

7 THE MATTER IS SUBMITTED. YOU WILL HAVE  
8 AN ORDER FROM ME SHORTLY.

9 HAVE A GOOD DAY.

10 (WHEREUPON, THE PROCEEDINGS IN THIS  
11 MATTER WERE CONCLUDED.)

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT  
REPORTER OF THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH  
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY  
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,  
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND  
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS  
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS  
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED  
TRANSCRIPTION TO THE BEST OF MY ABILITY.

-----  
SUMMER A. FISHER, CSR, CRR  
CERTIFICATE NUMBER 13185