

<p style="text-align: right;">778</p> <p>1 ARBITRATOR GRISSOM: I will say welcome once 2 again. You're both still welcome. The experts on both sides 3 are both welcome to be here and observing testimony. 4 As I understand it, our next witness up is Ms. 5 Mascherin, right? 6 THE WITNESS: Yes, sir. 7 ARBITRATOR GRISSOM: Ms. Mascherin, I'm Jerry 8 Grissom. I'm the arbitrator in the case. And unless there's 9 any other extracurricular motions or discussion I need to have, 10 I think we're ready to have this witness sworn, please. 11 (Witness was sworn.) 12 TERRI MASCHERIN, 13 having been first duly sworn, testified as follows: 14 DIRECT EXAMINATION 15 BY MR. PELZ: 16 Q. Please state your name. 17 A. Terri Mascherin. 18 Q. Are you employed? 19 A. Yes, I am. 20 Q. Where are you employed? 21 A. I'm a partner at Jenner & Block. 22 Q. How long have you been employed by Jenner & Block? 23 A. Since May of 1984. 24 Q. Have you worked there continuously from 1984 until 25 today?</p>	<p style="text-align: right;">780</p> <p>1 I have served as chair of the American Bar Association Death 2 Penalty Representation Project for two terms. I've served on 3 that steering committee for several years. 4 I've served as vice chair and chair of the law 5 board at Northwestern University Law School. I serve on 6 several other bar association and bar foundation groups. I've 7 been on the board of the Chicago Bar Foundation. I'm currently 8 on the board of the Lawyers Trust Fund of Illinois, which is 9 the not-for-profit organization in Illinois that administers 10 grants from the IOLTA funds that are supervised by the Illinois 11 Supreme Court in Illinois. 12 I've served on many appointed positions as a 13 result of my bar association activity. Served recently on an 14 independent commission for the CLEAR Commission, which rewrote 15 the entire Illinois Criminal Code. I'm an ordained elder in my 16 church. I'm an ordained deacon in my church, currently serving 17 as an elder. 18 Q. Have you received any honors and awards with respect 19 to your legal work? 20 A. Yes, I have. I've received several awards relating 21 to my pro bono work. I've been very active in Illinois in 22 representing clients on death row when we had a death row in 23 Illinois, and received the Outstanding Legal Services Award 24 from both the Illinois Coalition to Abolish the Death Penalty 25 and the National Coalition to Abolish the Death Penalty.</p>
<p style="text-align: right;">779</p> <p>1 A. Yes, I have. 2 Q. Can you give the arbitrator, briefly, your 3 educational background, please. 4 A. Sure. I have my undergraduate degree from Duke 5 University in public policy. After that, I graduated -- 6 attended and graduated from the Law School at Northwestern 7 University, graduating in 1984, graduated cum laude from 8 Northwestern in (inaudible). Was managing editor of "The 9 Journal of Criminal Law and Criminology" at Northwestern. I 10 joined Jenner & Block upon graduation from law school. 11 Q. Prior to joining Jenner & Block after law school, did 12 you have any other legal employment? 13 A. I had worked at a small firm the summer after my 14 first year of law school, a firm called Sanford Adams 15 McCullough & Beard, which was Terry Sanford's law firm in 16 Raleigh, North Carolina. And then, the summer after my second 17 year of law school, I worked at Jenner & Block as a summer 18 associate. 19 Q. Are you involved in any civic endeavors? 20 A. Yes, I am. 21 Q. Can you briefly describe those. 22 A. I have held several positions in the Chicago Bar 23 Association. I was president of the Chicago Bar from 2010 to 24 2011. Prior to that, I served as a member of the board, as 25 treasurer, as second vice president and first vice president.</p>	<p style="text-align: right;">781</p> <p>1 A few years ago, I was named one of the 50 most 2 influential women lawyers in the country by "The National Law 3 Journal." Most recently, this spring, I was named one of the 4 top 15 women trial lawyers in the country by a publication 5 called Law360. I've won a number of -- I've won the 6 Distinguished Service Award from the Alumni Association at 7 Northwestern University. I've won an Alumni Service Award from 8 my alma mater -- my undergraduate alma mater at Duke 9 University, and several other recognitions that, you know, in 10 the legal profession, various types of lists of "Best Lawyers" 11 and "Super Lawyers" and those sorts of things. 12 Q. What has been the nature of your legal works since 13 you -- 1984, I believe you said? 14 A. Yes. I have always practiced in litigation. Most of 15 my litigation experience has been in what I would call complex 16 commercial or business litigation. I have -- I've tried dozens 17 of cases and arbitrations of different types of business 18 disputes over the years, small and large. I've done several 19 jury trials. I have tried or arbitrated two patent 20 infringement cases in my career. I've tried a number of 21 criminal cases, including a number of homicide cases and 22 capital cases. 23 I was -- I was, when we still had the death 24 penalty in Illinois, one of two Jenner & Block lawyers 25 certified as first chair -- qualified to first chair a capital</p>

<p style="text-align: right;">782</p> <p>1 trial in the state of Illinois and one of the handful of 2 lawyers at private firms who were so certified. 3 For a period of time, I did a good deal of 4 telecommunications work in the 1990s, but in the last decade 5 and a half, most of my work has been basic commercial disputes. 6 Q. In those basic commercial disputes, have you had 7 opportunities to become involved with respect to damages issues 8 on cases? 9 A. Yes, I have. 10 Q. Is that a regular part of your practice? 11 A. It's often a part of the case that I will become 12 involved in, yes. 13 Q. In 2008, were you -- did you become involved in the 14 case -- cases on behalf of Parallel Networks? 15 A. Yes, I did. 16 Q. How did that occur? 17 A. I was asked by our chairman and managing partner in 18 August of that year to become involved in an issue with the 19 Oracle case because it was set for trial in January of 2009. 20 And the chairman and the managing partner wanted to make sure 21 the case was ready for trial and prepared well and tried well, 22 and asked me if I had time, would I be willing to join the 23 trial team and help in any way I could to get the case ready 24 for trial. 25 Q. Just so we can put names on there, the chairman is</p>	<p style="text-align: right;">784</p> <p>1 might be easier for somebody new to the case to be able to dive 2 in and get involved in, you know, without as perhaps as steep a 3 learning curve as the technical experts. So I said I'd be 4 happy to help with the damages. 5 Q. Did you then also speak with Mr. Bennett? 6 A. Yes, I did. 7 Q. Is that reflected in the second e-mail down on the 8 chain? 9 A. Yes. 10 Q. Can you describe sort of your initial communications 11 with Mr. Bennett? 12 A. Yes. David and I talked either on the phone or in 13 person -- I don't recall which -- and I explained to him -- I 14 think Harry had already -- as I recall, Harry had already let 15 David know that I'd be coming on board. And I explained to him 16 that, you know, I wanted to be of any help I could with the 17 damages and asked him if he could get me sort of a package of 18 materials so I could start reading up and getting up to speed 19 on what the issues were in the case. And I asked him what he 20 thought would be most helpful for me to look at. 21 So this is his e-mail back to me, saying, you 22 know, here are the things I think you ought to look at first. 23 And that, then led to a series of e-mail, I think, between me 24 and David Nelson, the paralegal, about getting me copies of 25 things and how I'd like to have copies and whether I wanted</p>
<p style="text-align: right;">783</p> <p>1 who? 2 A. Tony Valukas. 3 Q. And the managing partner was whom at that time? 4 A. Susan Levy. 5 Q. Let me show you what has previously been marked as 6 Respondent's Exhibit 38. We start at the bottom e-mail and 7 work to the top, Ms. Mascherin. 8 A. Yes. 9 Q. Did -- after being asked to assist by Mr. Valukas and 10 Ms. Levy, did you speak with Mr. Roper with respect to what you 11 could do to help on the -- with respect to the Oracle trial? 12 A. Yes, I did. 13 Q. Can you describe that conversation? 14 A. Yes. I called Harry and told him that I was 15 volunteering my services, that Tony and Susan had asked me if I 16 would get involved and help, and that I was happy to do so. 17 And I asked him what he thought I could be -- how he thought I 18 could be most helpful in getting the case prepared to trial and 19 potentially in helping to try the case. 20 He told me that he thought the most logical 21 place for me to get involved would be the damages case, because 22 the technical parts of the case, the infringement analysis and 23 the technical expert work, was already considerably far along. 24 And he felt that the team had that very well covered, and he 25 thought that the damages case would probably be an area that</p>	<p style="text-align: right;">785</p> <p>1 binders and such. 2 Q. Ms. Mascherin, is it unusual at Jenner & Block for an 3 experienced litigator to be added to a trial team on a matter 4 that is expected to go to trial? 5 A. No, not at all. In fact, I had had a call from Harry 6 maybe a year prior to this, perhaps a little bit longer than 7 that, that was even closer to trial, where he had a case that 8 he was getting ready to try out in San Francisco that was to be 9 a jury trial. And he called me -- I think his trial was set in 10 January or February, and he called me in the late fall and 11 said, Can you come out to San Francisco and help us try this 12 case? I'm looking for one more trial lawyer. 13 So, no, it's not unusual at all. And I think 14 all of us have probably had the experience either of calling 15 somebody, you know, a few months before trial to help or being 16 called ourselves. 17 Q. And does that occur in cases other than patent cases 18 as well? 19 A. Sure. Sure. In fact, I've been known to call people 20 in the middle of a trial and say, would you fly down, we need 21 somebody to help, we have too many witnesses to prepare, or 22 whatever the case may be. 23 Q. Let me show you what's been marked as Claimant's 24 Exhibit 242. Do you recall getting the materials relating to 25 the damages in the case on or about August 28th, as reflected</p>

<p style="text-align: right;">786</p> <p>1 in this e-mail?</p> <p>2 A. Yes, then or shortly thereafter.</p> <p>3 Q. Who would have given you those materials?</p> <p>4 A. David Nelson.</p> <p>5 Q. And what role did Mr. Nelson have?</p> <p>6 A. He was the paralegal on the case.</p> <p>7 Q. In the firm, what is -- do you know what Mr.</p> <p>8 Nelson -- does he have a specialty as a paralegal?</p> <p>9 A. Yes. He's an IP paralegal.</p> <p>10 Q. Did you interact with Mr. Nelson as you continued on</p> <p>11 with the case?</p> <p>12 A. Yes. Yes.</p> <p>13 Q. With respect to getting knowledgeable on damages,</p> <p>14 what did you do?</p> <p>15 A. I read the materials. I think I dug, first of all,</p> <p>16 into Mike Wagner's reports and the CECAS (phonetic) report. I</p> <p>17 read the Daubert motions. I talked to David Bennett about the</p> <p>18 issues, talked to Harry about the issues. Also talked to Don</p> <p>19 Harris, who's a senior partner in the firm, who had been asked</p> <p>20 to take a look at the case before I came on board to get his</p> <p>21 views of the damages issues as well, because Don is an</p> <p>22 experienced trial lawyer who has a good deal of experience in</p> <p>23 IP cases, and I thought it would be helpful to have his views.</p> <p>24 Q. And had Mr. Harris talked to Mr. Roper and Mr. Bosy</p> <p>25 with respect to the damages parts of the case?</p>	<p style="text-align: right;">788</p> <p>1 suggest that damages wasn't going to be tried in January?</p> <p>2 A. No. The first I ever heard anything about that was</p> <p>3 when the pretrial -- the early pretrial conference happened in</p> <p>4 October, and the report came back that the judge had announced</p> <p>5 that she was going to bifurcate them.</p> <p>6 Q. So you had -- did you -- did you have lots of</p> <p>7 different meetings and interaction with Mr. Bennett in August</p> <p>8 and September with respect to these damages issues?</p> <p>9 A. Not so much in August because this was the end of</p> <p>10 August, but in September, sure.</p> <p>11 Q. And at least to the best of your recollection --</p> <p>12 A. And early October.</p> <p>13 Q. To the best of your recollection, he never told --</p> <p>14 never suggested that the damages wasn't going to be tried in</p> <p>15 January?</p> <p>16 A. That's right.</p> <p>17 Q. Now, were you also trying to get just a more general</p> <p>18 understanding of the parameters of the case, what it was about,</p> <p>19 and what the chances were of success and damages with respect</p> <p>20 to the case?</p> <p>21 A. Yes.</p> <p>22 Q. And what did you do in that regard?</p> <p>23 A. I talked to Harry. I talked to the other members of</p> <p>24 the team. They were -- they were having semi-regular team</p> <p>25 meetings at the time, and I would go to the team meetings when</p>
<p style="text-align: right;">787</p> <p>1 A. That's my understanding, that he had looked at all</p> <p>2 aspects of the case, and he had particularly looked at the</p> <p>3 damages issues. And there were a couple of moving parts in the</p> <p>4 damages claim, and he had attempted to assess the relative</p> <p>5 strengths and weaknesses of the different parts of the damages</p> <p>6 claim.</p> <p>7 Q. Now, as you get these damages materials, what was</p> <p>8 your understanding, in August of 2008, as to when the damages</p> <p>9 portion of the case was going to be tried?</p> <p>10 A. My understanding, at that point in time, was the</p> <p>11 whole case was going to trial in January.</p> <p>12 Q. January of 2009?</p> <p>13 A. January of 2009. So liability, damages, and also the</p> <p>14 counterclaims on invalidity and inequitable conduct.</p> <p>15 Q. Now, if we go back to Respondent's 38, we see that,</p> <p>16 on August 28, Mr. Bennett is welcoming you to the case,</p> <p>17 correct?</p> <p>18 A. Yes.</p> <p>19 Q. He understands what your involvement is going to be;</p> <p>20 is that right?</p> <p>21 A. Yes. We talked about it.</p> <p>22 Q. And he's telling you the damages are pretty</p> <p>23 interesting, right?</p> <p>24 A. Right.</p> <p>25 Q. In August or September of 2008, did Mr. Bennett ever</p>	<p style="text-align: right;">789</p> <p>1 I was in town. I was doing some traveling at this time on</p> <p>2 depositions in another case, so I wasn't always in town. But</p> <p>3 when I was able to, I attended the team meetings.</p> <p>4 I spent a fair amount of time with Don Harris,</p> <p>5 talking to him about the review that he had done, because I</p> <p>6 think he's someone whose opinion I, you know, would put a great</p> <p>7 deal of stock in. He's had a lot of experience, and I knew</p> <p>8 that he had looked closely at the case.</p> <p>9 Q. Your involvement in reviewing the case wasn't a</p> <p>10 secret to the other members of the trial team, was it?</p> <p>11 A. No, not at all.</p> <p>12 Q. And that kind of analysis wasn't unusual, was it, Ms.</p> <p>13 Mascherin?</p> <p>14 A. I don't think so. I think, you know, what I was told</p> <p>15 when Tony and Susan contacted me was that they wanted the</p> <p>16 case -- the firm had a big investment in the case. They wanted</p> <p>17 the case tried well, and they also wanted, you know -- you</p> <p>18 know, wanted to know that it was -- they wanted an assessment</p> <p>19 of the case. They wanted to know is it a good case or what are</p> <p>20 our prospects like, we have a big investment in the case.</p> <p>21 Q. Were you on any management committee at the time in</p> <p>22 2008?</p> <p>23 A. Yes. I was on the management committee.</p> <p>24 Q. Explain briefly what the management committee is at</p> <p>25 Jenner & Block.</p>

<p style="text-align: right;">790</p> <p>1 A. The management committee is a committee that's 2 appointed by the managing partner. It's approximately a dozen 3 people or so, partners. And the management committee handles 4 issues that relate to -- I don't want it to be sort of defined 5 by the name of the committee, but management of the firm in 6 sort of an operations sense as opposed to a strategic and 7 policy sense.</p> <p>8 We have a policy committee, which is a smaller 9 committee, which makes big strategic decisions, but the 10 management committee does things like overseeing billing and 11 collections, overseeing hiring, making final recommendations 12 with regard to partner compensation and associate compensation, 13 those sorts of things that are sort of more kind of COO 14 responsibilities as opposed to CEO or chairman kind of level 15 responsibilities.</p> <p>16 MR. PELZ: Arbitrator Grissom, I didn't tell her 17 I was going to ask that question. I was really hoping to learn 18 something about how the firm management works.</p> <p>19 ARBITRATOR GRISSOM: Well, you have her under 20 oath.</p> <p>21 A. Susan can probably tell you even better.</p> <p>22 MR. PELZ: I get another chance tomorrow.</p> <p>23 Q. (BY MR. PELZ) Again, with respect to the issue -- we 24 had talked about this issue of bifurcation. You indicated that 25 at some point you learned that a case was going to be</p>	<p style="text-align: right;">792</p> <p>1 Q. What was your understanding of how that affected both 2 the trial and the ultimate timetable for this matter?</p> <p>3 A. Well, for the trial, it meant that, you know, what 4 would be going to trial would only be the claims that affected 5 liability. So, you know, the infringement claims and the 6 claims that went to the validity of the patents.</p> <p>7 And, effectively, what -- we also -- we got some 8 intelligence from local counsel, Mr. Horwitz, at approximately 9 this same time that Judge Robinson's practice evidently was 10 that when she bifurcated liability and damages, it was her 11 intention to let the liability verdict go up -- if it was going 12 to be appealed, go up to the Federal Circuit and come back down 13 before she'd even try the damages.</p> <p>14 So we went from a situation where the entire 15 case would be tried in January of 2009 to a situation where 16 only liability would be tried and the invalidity claims, in 17 January of 2009. And then we'd been looking at, I was told, 18 you know, according to the sort of average time to decision in 19 the Federal Circuit, about an 18-month time stroke for an 20 appeal by either side, whoever might not be happy with the 21 result of the trial, before we would get back and then have to 22 get in queue again with Judge Robinson to try the damages 23 claims, assuming that there was still a reason to be trying 24 damages claims in the case.</p> <p>25 So the time stroke to a damages verdict went</p>
<p style="text-align: right;">791</p> <p>1 bifurcated.</p> <p>2 A. Yes.</p> <p>3 Q. And I'd ask you to look at Exhibit 245.</p> <p>4 ARBITRATOR GRISSOM: Mr. Pelz?</p> <p>5 MR. PELZ: Claimant's Exhibit 245.</p> <p>6 MR. LOWENSTEIN: Does he lose two exhibits now?</p> <p>7 MR. PELZ: I skipped two, of his choice. There 8 you go.</p> <p>9 ARBITRATOR GRISSOM: It's a blind choice. All 10 right.</p> <p>11 Q. (BY MR. PELZ) Do you recall learning about this 12 hearing that was held on -- I believe, October 3rd of 2008?</p> <p>13 A. Yes.</p> <p>14 Q. And just summarizing, what, to your understanding, 15 occurred at that hearing with respect to the trial schedule of 16 the case?</p> <p>17 A. This is the hearing at which Judge Robinson announced 18 that she was going to bifurcate damages. And it says here 19 willfulness, I had forgotten that, but certainly damages, and 20 wasn't going to try them with the rest of the case in January.</p> <p>21 And she -- there had been, as we saw from the 22 prior exhibit, there had already been Daubert motions, there 23 had been some other pretrial motions with regard to the damages 24 case, and she's announcing she's going to deny them all without 25 prejudice because she isn't going to try those issues.</p>	<p style="text-align: right;">793</p> <p>1 from something like four months or five months to, you know, 18 2 months to even get to a damages trial while three months -- 3 three to four months to the first trial plus 18 months to get 4 out of the Federal Circuit, plus however long it would take 5 them to get set for a damages trial, plus an appeal from the 6 damages trial. So it -- the timeframe was elongated 7 considerably from what the trial team and the firm had 8 understood before this hearing.</p> <p>9 Q. Were you involved in meetings and discussions with 10 the trial team to discuss this ruling?</p> <p>11 A. Oh, yes.</p> <p>12 Q. Was this a surprise to the trial team?</p> <p>13 A. Yes, at least that was my impression. They acted 14 like it was a surprise to them.</p> <p>15 Q. Now, after that, did you go again to Mr. Roper and 16 ask how you could help? And specifically, I'll refer you to 17 Claimant's Exhibit 30.</p> <p>18 A. Yes, I did, because the damages part of the case had 19 been pulled out from under me, so I didn't know how I could be 20 most helpful to them.</p> <p>21 Q. And what was your discussion with Mr. Roper in that 22 regard?</p> <p>23 A. We really didn't decide anything at this point in 24 this case. It was still Harry and George's view and Pat 25 Patras' view that they had the liability part of the case</p>

<p style="text-align: right;">794</p> <p>1 pretty well covered. We talked about me possibly becoming sort 2 of head of a pretrial briefing team to handle -- to sort of -- 3 you know, to go down to Delaware and handle any briefing on 4 motions. We -- we had some discussion about whether there 5 might be some witnesses that would make sense to peel off to 6 have me handle, who, you know, were not damages witnesses, who 7 went to the other parts of the case. But we never really came 8 up with a definitive plan between the time of this ruling and 9 the early December pretrial conference and the rulings that 10 came down then. We were still talking about that. 11 Q. Are you -- were you aware that there was a mediation 12 that took place in early October with respect to the Oracle 13 case? 14 A. Yes. 15 Q. How did you learn about that? 16 A. Well, I knew that it was coming up because I was 17 participating in the meetings with the team. And we had some 18 discussions, you know, about the strategy for the mediation 19 ahead of time. And then I received a report about it from 20 George Bosy after the mediation had happened. I did not attend 21 the mediation. 22 Q. I'm showing you what's been marked as Claimant's 23 Exhibit 66. This is short memo from Mr. Harris, who we 24 mentioned, Don Harris. 25 Did you see that memo at the time back in 2008?</p>	<p style="text-align: right;">796</p> <p>1 your first take of where the situation was after the mediation? 2 A. Yes, I did. 3 Q. And with respect to the mediation, in addition to 4 Mr. Harris' memo, from whom did you get information about the 5 mediation? 6 A. I talked to George Bosy, I talked to David Bennett, 7 both of whom have attended the mediation. And we discussed it 8 at, you know, meetings when the -- when the team on the case 9 met on other topics. I talked to some -- I remember talking to 10 Ben Bradford because Ben had been asked at some point to take 11 over for the BEA aspects of the case. 12 Q. Was it your understanding that Mr. Bosy and Mr. 13 Bennett had attended the mediation? 14 A. Yes. 15 Q. And was it your understanding that the client had 16 also attended the mediation? 17 A. Yes. 18 Q. Now, you mentioned BEA. What, at least in October of 19 2008, was your understanding of how BEA comes in to play here? 20 A. At some point in October, I learned that -- October, 21 early November, somewhere in there, I learned that there was an 22 issue that had come up at the mediation that Oracle had 23 acquired this company called BEA relatively recently, that the 24 client and the trial team believed that the -- that BEA might 25 have products that were infringing as well, and that there was</p>
<p style="text-align: right;">795</p> <p>1 A. Yes, I did. 2 Q. Was Mr. Harris a member of the contingent fee 3 committee? 4 A. I don't know. He may have been. 5 Q. Was he someone, to your knowledge, that was used by 6 management and the contingent fee committee with respect to 7 cases? 8 A. Yeah. That was my understanding, was about how he 9 had gotten involved in this case, that the -- either the 10 managing partner or the contingent fee committee had asked Don 11 to take a look at the case because the firm had a substantial 12 investment in the case and they wanted to know, you know, what 13 the prospects -- they wanted sort of an independent view on 14 what the prospects for success were in the case. 15 Q. Now, does the management committee sort of, at least 16 at the time, look occasionally to the contingent fee committee 17 to get information about both taking cases and about status of 18 cases? 19 A. Yes. 20 Q. Is that relatively standard practice at the firm? 21 A. It was at the time. I don't know if we still have a 22 contingent fee committee now, but at the time, we did. We do 23 have it. We have an alternate fee committee now. It has a 24 different name. 25 Q. In October 2008, did you prepare a memo, sort of, of</p>	<p style="text-align: right;">797</p> <p>1 some discussion at the mediation and after the mediation to the 2 effect that Oracle, if it was going to settle the dispute with 3 Parallel Networks, wanted to rack BEA into that settlement. 4 In other words, wanted assurance that there 5 wouldn't be another -- any claims against BEA released so that 6 Oracle wouldn't get sued again by virtue of its acquisition of 7 this company that had different products. And there was a lot 8 of -- there was discussion back and forth about whether that 9 made any sense and whether the team could really even make any 10 assessment, whether they had enough information to judge what 11 claims against BEA might be worth, whether those products 12 appeared to infringe or not, because there hadn't been any 13 discovery about any BEA products. They hadn't been -- the 14 company hadn't been owned by Oracle during the time period when 15 documents had been produced in the case about Oracle's 16 products. 17 Q. Now, based on your lengthy experience, despite your 18 very young age, with respect to litigation, now was -- is 19 there -- it's not unreasonable for Oracle to be insisting to 20 get -- if there's a settlement, that it would get a release 21 that would apply to BEA as well, correct? 22 A. It's -- you know, it was a wrinkle, but it's not -- I 23 guess it wasn't surprising from Oracle's perspective. It made 24 the idea of challenging -- or the idea of trying to settle this 25 case more challenging, because, all of a sudden, there's this</p>

<p style="text-align: right;">798</p> <p>1 unknown that got sort of thrown into the mix.</p> <p>2 Q. Well, the general counsel of Oracle probably wouldn't</p> <p>3 have a very friendly conversation with the CEO if it settled</p> <p>4 one part and left another entity open to suit, would it?</p> <p>5 A. I imagine not, and probably not a pleasant</p> <p>6 conversation with his general counsel either.</p> <p>7 Q. Now, did you prepare a memorandum to -- with respect</p> <p>8 to your analysis of the case, the settlement status and</p> <p>9 basically the other aspects of the case?</p> <p>10 A. Yes.</p> <p>11 Q. I'll show you what's been marked as Claimant's</p> <p>12 Exhibit 35. Now, in the first paragraph, we're talking about</p> <p>13 Harry. Who is Harry?</p> <p>14 A. Harry Roper.</p> <p>15 Q. Is Mr. Roper an experienced IP trial lawyer?</p> <p>16 A. Yes.</p> <p>17 Q. George. Who is George?</p> <p>18 A. George Bosy.</p> <p>19 Q. Is George an experienced IP lawyer?</p> <p>20 A. Yes.</p> <p>21 Q. Don Harris, that's Mr. Harris who you referred to,</p> <p>22 correct?</p> <p>23 A. Yes.</p> <p>24 Q. And there's a new name here, Ross Bricker. Who is</p> <p>25 Mr. Bricker?</p>	<p style="text-align: right;">800</p> <p>1 report, you know, back from the team that had been at the</p> <p>2 mediation, that this had been sort of the classic first day of</p> <p>3 mediation where everybody, you know, flashes sabers and nobody</p> <p>4 ever really gets down to working and trying to see if the case</p> <p>5 truly can be settled or not.</p> <p>6 Q. With respect to your second recommendation, what was</p> <p>7 the information you had about epicRealm being in breach of its</p> <p>8 contingent fee agreement?</p> <p>9 A. The information that I had was that they were in</p> <p>10 arrears approximately, at this point in time, half a million</p> <p>11 dollars. Our fee agreement with Parallel Networks required</p> <p>12 Parallel Networks to pay expenses on a current basis.</p> <p>13 When I -- when I was asked to get involved in</p> <p>14 the case, I was told, in addition to being told that we had --</p> <p>15 the firm had a large fee investment in the case, I was told</p> <p>16 that the client was in arrears in paying expenses and was asked</p> <p>17 to do what I could to get the trial team to get the client to</p> <p>18 come current with the expenses.</p> <p>19 I contacted our accounting department and asked</p> <p>20 them for a report of the outstanding both fee, you know,</p> <p>21 investment in the case and also the expenses in the case. And</p> <p>22 I -- they put together for me the chart that's attached at the</p> <p>23 end of the memo.</p> <p>24 And, you know, in -- in sum, what it showed was</p> <p>25 that there were several months' worth of outstanding invoices</p>
<p style="text-align: right;">799</p> <p>1 A. Ross is a senior litigation partner at the firm, and</p> <p>2 at the time, was chairing the contingent fee committee.</p> <p>3 Q. Had Mr. Bricker had substantial trial experience?</p> <p>4 A. Oh, yes. And Ross and I had tried at least one</p> <p>5 patent case together. I don't know think was on the second one</p> <p>6 that I did. But he's done a number of IP trials himself.</p> <p>7 Q. The work you were doing for this memo, this wasn't a</p> <p>8 secret, was it, within the firm and within the trial team?</p> <p>9 A. No, not at all. I talked to Harry and George about</p> <p>10 it several times. I ran drafts of the memo by them. They gave</p> <p>11 me comments. I incorporated their comments. We had several</p> <p>12 discussions about settlement strategy and settlement -- how to</p> <p>13 assess the settlement value of the case and whether there was</p> <p>14 any prospect for re-initiating the -- either settlement</p> <p>15 discussions without mediation or going back to mediation with a</p> <p>16 magistrate.</p> <p>17 Q. Now, before we get -- well, let's just briefly look.</p> <p>18 You had a couple of recommendations. What was your first</p> <p>19 recommendation?</p> <p>20 A. My first recommendation was to try to get the case</p> <p>21 back to a mediation and see if a -- you know, an advantageous</p> <p>22 settlement could be achieved. Because there had been this</p> <p>23 change with the -- you know, in everybody's expectations about</p> <p>24 time to judgment in the case with the judge announcing that she</p> <p>25 was going to bifurcate. And it seemed to me, based upon the</p>	<p style="text-align: right;">801</p> <p>1 for expenses that had not been paid. If you look at the</p> <p>2 accounts receivable costs, you know, there are -- there's well</p> <p>3 over \$200,000 that's over 120 days old. And as I sort of</p> <p>4 looked into what those costs were, I found that the firm had</p> <p>5 been fronting all of the expert bills, all of the court</p> <p>6 reporter fees, you know, all of the considerable costs that you</p> <p>7 incur as you prepare a case for trial.</p> <p>8 Q. Did you review the contract, the contingent fee</p> <p>9 agreement, between Jenner & Block and Parallel Networks?</p> <p>10 A. Yes, I did.</p> <p>11 Q. And is that where you obtained the information about</p> <p>12 the obligation to pay the expenses?</p> <p>13 A. Yes.</p> <p>14 Q. Did -- withdrawn.</p> <p>15 Is monitoring or being aware of clients that are</p> <p>16 behind on expenses one of the things that fall sort of under</p> <p>17 the umbrella of the management committee?</p> <p>18 A. Yes. It's -- you know, typically, it will be handled</p> <p>19 most directly by the finance or billing and collections</p> <p>20 committee.</p> <p>21 Q. And does that committee report to the management</p> <p>22 committee?</p> <p>23 A. That committee reports to the management committee.</p> <p>24 With this client in particular, when I -- when I talked to</p> <p>25 Susan Levy about what she wanted me to do, one of the things</p>

<p style="text-align: right;">802</p> <p>1 she specifically asked me to do was to do everything I could to</p> <p>2 try to get them to be current on the expenses because they were</p> <p>3 considerably in arrears on the expenses.</p> <p>4 Q. Can you tell us what you were saying with respect to</p> <p>5 your third recommendation?</p> <p>6 A. Yes. The contingent fee agreement was very broad.</p> <p>7 It specifically referred to the Oracle and the QuinStreet</p> <p>8 cases, which the firm had agreed to take on. But it generally</p> <p>9 said that -- it generally purported to apply to any, quote,</p> <p>10 enforcement activity that Parallel Networks asked the firm to</p> <p>11 take on and that the firm agreed to take on.</p> <p>12 And my understanding at this point in time was</p> <p>13 that the client was asking the firm to take some additional</p> <p>14 matters in addition to Oracle and QuinStreet. That was of</p> <p>15 concern to me because this was a client who was, from what I</p> <p>16 could tell, in breach of the agreement and pretty seriously in</p> <p>17 breach when you get to the point where you're half a million</p> <p>18 dollars in arrears in expenses.</p> <p>19 Q. Now, Ms. Mascherin, you personally weren't taking any</p> <p>20 position with respect to those issues at this time, were you --</p> <p>21 A. No.</p> <p>22 Q. -- with respect to the --</p> <p>23 A. No. No, I just thought --</p> <p>24 Q. -- you were suggesting that somebody needs to look at</p> <p>25 it?</p>	<p style="text-align: right;">804</p> <p>1 which, I believe, Paul Margolis had come down and monitored</p> <p>2 because it was, as I recall, the same patent.</p> <p>3 Q. You also got information about the damages in Oracle.</p> <p>4 Is that information that you obtained through the work you were</p> <p>5 doing in preparation for trial, potentially, on damages?</p> <p>6 A. Yes.</p> <p>7 Q. And was there -- was there some disagreement at least</p> <p>8 or professional discussion between -- or professional</p> <p>9 differences between Mr. Harris and the trial team with respect</p> <p>10 to some of the damages?</p> <p>11 A. Yes. There were different -- as I mentioned, there</p> <p>12 where what I called moving pieces. There was a question of</p> <p>13 royalty percentage, and there was the Wagner's report -- and in</p> <p>14 his report, Wagner was taking the position that the 3 percent</p> <p>15 royalty would apply to 57 percent of the products, that a</p> <p>16 higher royalty of 11 percent would apply to the remainder of</p> <p>17 the products.</p> <p>18 Don was considerably -- I think Don thought --</p> <p>19 Don would have attributed a considerable -- considerably lower</p> <p>20 probability of success in getting the 11 percent royalty rate</p> <p>21 than some of the members of the trial team would. He thought 3</p> <p>22 percent was a more reasonable projection.</p> <p>23 And then there was -- there was also a question</p> <p>24 about foreign sales, which were about half the damages, as I</p> <p>25 say here. And Don's view was that it was unlikely that the</p>
<p style="text-align: right;">803</p> <p>1 A. -- this agreement required attention because the</p> <p>2 client was not living up to its obligations under the</p> <p>3 agreement, and I was concerned about the prospect that the firm</p> <p>4 might be considering taking on more matters for this client</p> <p>5 when they were seriously in arrears.</p> <p>6 Q. Did you want to make sure everybody sort of knew the</p> <p>7 real lay of the land when making these decisions?</p> <p>8 A. Yes, including the trial team. You know, including</p> <p>9 Harry and George. You know, I wanted them to understand, you</p> <p>10 know, where I was coming from as a partner in the firm and a</p> <p>11 member of the management committee about the importance of</p> <p>12 making clear to the client that they needed to get current with</p> <p>13 the payments and that we were -- that this wasn't going to</p> <p>14 continue.</p> <p>15 Q. Okay. Now, then you give a discussion of these</p> <p>16 cases. When you referenced the larger case is the Oracle case</p> <p>17 and the smaller case is QuinStreet case, where did you get that</p> <p>18 information?</p> <p>19 A. From the trial team and from Don Harris and from what</p> <p>20 I had read by this point.</p> <p>21 Q. Did you -- you also, apparently, got information</p> <p>22 about a case that had gone to trial relatively recently for</p> <p>23 epicRealm, directing your attention to the bottom of Page 2 and</p> <p>24 top of Page 3?</p> <p>25 A. That's right. There had been a trial down in Texas,</p>	<p style="text-align: right;">805</p> <p>1 judge would allow the foreign sales claim to go to the jury.</p> <p>2 And there were some members of the trial team who thought that</p> <p>3 there was, you know, much greater likelihood that that claim</p> <p>4 would get to the jury.</p> <p>5 Q. Is that sort of differences of opinions between</p> <p>6 people working on a case unusual?</p> <p>7 A. Not at all.</p> <p>8 Q. Have you seen that in many, if not most, of your</p> <p>9 cases?</p> <p>10 A. Yes. And that's why you have -- that's why you send</p> <p>11 more than one person to try a case because the group,</p> <p>12 hopefully, will come up with a better collective strategy than</p> <p>13 any one individual would.</p> <p>14 Q. And Mr. Harris -- I mean, you-all chose the term "gut</p> <p>15 estimate" there? I mean, is that your understanding of what</p> <p>16 Mr. Harris's analysis here --</p> <p>17 A. Those were his words.</p> <p>18 Q. -- about "gut estimates"?</p> <p>19 A. Those were his words, yeah.</p> <p>20 Q. Now, was there also -- you also had learned</p> <p>21 information about there being a re-examination proceeding going</p> <p>22 on in the Patent and Trademark Office?</p> <p>23 A. Yes.</p> <p>24 Q. How did that potentially affect the case?</p> <p>25 A. Well, there had already been an initial office</p>

<p style="text-align: right;">806</p> <p>1 action, as I recall, rejecting all the claims in the re-exam. 2 And that -- you know, that's before the Patent and Trademark 3 Office, so that proceeds at its own pace and would continue to 4 work through the PTO while this -- you know, while the case 5 against Oracle was proceeding in the court. 6 So there was a prospect that, if you go to trial 7 in January of 2009, even if you prevail at the trial, if 8 there's an adverse office action and a disallowance of the 9 claims in the PTO when you're up on appeal, that could -- you 10 know, that could very significantly impact how the case is 11 going to proceed after that. 12 And Don -- this was another area where Don and 13 some of the members of the trial team, I think, disagreed with 14 respect to what would ultimately happen with that patent, 15 whether there would ultimately be claims that would survive the 16 PTO re-exam. 17 Q. At this time, in October of 2008, there's no firm 18 conclusion that Don's right or the trial team's wrong or vice 19 versa? 20 A. No, not at all. It's just, you know, trying to -- 21 trying to assess all of the risks and the different points of 22 view and present everything to the trial team, to firm 23 management in a way that allows people to sort of -- you know, 24 one of the things I was trying to do in this memo, when you're 25 getting ready for trial, sometimes you get -- you put on</p>	<p style="text-align: right;">808</p> <p>1 Q. Now, the information about -- withdrawn. 2 The information on expenses that's 3 referenced on Page 5, is the expenses information what you got 4 from the accounting department? 5 A. Yes. 6 Q. And you reviewed that? 7 A. Right. It's the report that's attached. 8 Q. And is the reference to the agreement that -- the 9 expenses provision in the agreement, that was from your 10 personal review of the contract? 11 A. Yes. 12 Q. Now, on the Page 6 on the top, it says -- well, it 13 says, I understand epicRealm has informed us that it currently 14 has no money? 15 A. Right. 16 Q. Who told you that? 17 A. George Bosy. 18 Q. And what did he tell you that the client had asked 19 Jenner & Block to do? 20 A. He told me that -- 21 MR. ALIBHAL: Objection; hearsay as to what one 22 Jenner partner told another Jenner partner. Mr. Bosy has been 23 deposed in this case. We can hear exactly what Mr. Bosy said 24 directly from Mr. Bosy. 25 ARBITRATOR GRISSOM: Would you mind reading back</p>
<p style="text-align: right;">807</p> <p>1 blinders or, you know, we have one former partner who used to 2 call it drinking your own bath water. And sometimes it's just 3 helpful to have somebody else come into the room and say, hey, 4 have you thought about all of these things, you know? Maybe -- 5 you know, maybe you need to take some of these issues a little 6 more seriously or you need to think about them a little more. 7 So I was trying to just sort of lay everything 8 out so that everybody could see that there were differences of 9 opinion about how this case might ultimately progress. 10 Q. So try and basically to elevate the collective 11 conversation? 12 A. Yes. 13 Q. And the risks you list, those are just -- those are 14 risks -- potential risks that are out there with respect to the 15 case? 16 A. Right. 17 Q. The trial team people were aware of those risks. 18 Well, this wasn't something they never heard of, right? 19 A. Right. 20 Q. And was it your understanding that Mr. Bosy was in 21 regular contact with the client? 22 A. That was my understanding, was that he was the -- the 23 primary contact with the client. 24 Q. And did you ever hear anything to the contrary? 25 A. No.</p>	<p style="text-align: right;">809</p> <p>1 the question for me? 2 (The reporter read the requested portion.) 3 ARBITRATOR GRISSOM: Overruled. 4 A. He -- George told me that the client was not able to 5 pay, that the client had no money, and that the client was 6 interested in discussing with us amending the contingent fee 7 agreement to remove his obligation to pay expenses on a current 8 basis and was offering, in exchange, a higher percentage 9 contingent fee recovery, some sort of adjustment, if we would 10 agree to front the expenses. 11 Q. (BY MR. PELZ) Now, with respect to all of the 12 information that's in this memo, were you making any final 13 decisions with respect to these issues, Ms. Mascherin? 14 A. No. I was just trying to lay everything out. 15 Q. You weren't making any final decision with respect to 16 trial strategy or management strategy, were you? 17 A. No. I had some opinions and I made some 18 recommendations, but they were just my views. 19 Q. You at least let your opinions and recommendations be 20 known, correct? 21 A. Right. 22 Q. Show you -- withdrawn. 23 Did you learn that there was a more formal 24 request for the contingent fee committee to consider some 25 potential new cases on behalf of Parallel Networks? And I draw</p>

<p style="text-align: right;">810</p> <p>1 your attention to Claimant's Exhibit 67.</p> <p>2 A. Yes, they did.</p> <p>3 Q. No need to get into -- I just have a few questions</p> <p>4 with respect to this document, Ms. Mascherin.</p> <p>5 A. Uh-huh.</p> <p>6 Q. Were you the one -- did you make any personal</p> <p>7 decision with respect to whether to take these new cases?</p> <p>8 A. No.</p> <p>9 Q. And to your knowledge, did Jenner & Block take any</p> <p>10 additional cases from Parallel Networks in the fall of 2008?</p> <p>11 A. We did not.</p> <p>12 Q. Now, when you reported your information to Ms. Levy,</p> <p>13 was she troubled by the expenses sheet? And I direct your</p> <p>14 attention to Claimant's Exhibit 253.</p> <p>15 A. She was troubled by the expense issue before I</p> <p>16 reported anything to her. She continued to be troubled by the</p> <p>17 expense issue.</p> <p>18 Q. I show you Claimant's Exhibit 253 and ask if this is</p> <p>19 an e-mail you got from Ms. Levy with respect to thoughts about</p> <p>20 what to do going forward.</p> <p>21 A. Yes, this is Susan's thought.</p> <p>22 Q. Now, this -- were members of the trial team also</p> <p>23 copied on this, other members besides you?</p> <p>24 A. Yes.</p> <p>25 Q. Who else was copied?</p>	<p style="text-align: right;">812</p> <p>1 Q. And with respect to Ms. Levy's e-mail?</p> <p>2 A. Yes. We probably discussed other things as well, but</p> <p>3 we had -- we discussed possible settlement strategies and</p> <p>4 whether --</p> <p>5 MR. PELZ: Now, we're on Claimant's 68. I'm</p> <p>6 going to give you -- Mr. Arbitrator, are you with us, Mr.</p> <p>7 Arbitrator?</p> <p>8 ARBITRATOR GRISSOM: Yes.</p> <p>9 A. We talked about whether there was a way to get this</p> <p>10 back into productive settlement discussions, you know, either</p> <p>11 before the mediator or separately. And they explained to me</p> <p>12 then the issue that had come up with BEA. And the status at</p> <p>13 that point in time was that Oracle's counsel had promised to</p> <p>14 provide some information about products so that the trial team</p> <p>15 could do a preliminary assessment of whether it appeared that</p> <p>16 there was, you know, a good infringement claim with regard to</p> <p>17 these products and to get some sort of -- if so, to get some</p> <p>18 sort of idea of what the value of that claim would be.</p> <p>19 And that really -- until -- because Oracle was</p> <p>20 refusing to -- or was not interested in moving ahead without</p> <p>21 being able to deal with the BEA issues as part of a settlement,</p> <p>22 we were sort of in a holding pattern until Oracle provided the</p> <p>23 information that they said they would provide.</p> <p>24 Q. (BY MR. PELZ) So your conclusion is really set forth</p> <p>25 in that last sentence?</p>
<p style="text-align: right;">811</p> <p>1 A. Harry and George.</p> <p>2 Q. Now, Ms. Levy indicates some interest in trying to</p> <p>3 see if mediation could be reinitiated, correct?</p> <p>4 A. Yes.</p> <p>5 Q. In fact, was that able to be done, Ms. Mascherin?</p> <p>6 A. We -- ultimately, the answer is, no, we weren't able</p> <p>7 to reinitiate mediation. I had several discussions with Harry</p> <p>8 and George about it, and this is the point in time where the</p> <p>9 BEA issue really came to the fore. And as this -- as I sort of</p> <p>10 summarize in this e-mail --</p> <p>11 Q. Well, hang on a second. I didn't identify that for</p> <p>12 the record.</p> <p>13 A. Sorry.</p> <p>14 Q. Or let's back up a minute.</p> <p>15 Ms. Levy's memo is -- or e-mail -- sorry. Ms.</p> <p>16 Levy's e-mail, Claimant's Exhibit 253, is what date?</p> <p>17 A. October the 28th.</p> <p>18 Q. And you have an e-mail response to her that's</p> <p>19 Claimant's Exhibit 68?</p> <p>20 A. That's correct. November the 2nd.</p> <p>21 Q. So that's four days later?</p> <p>22 A. Right.</p> <p>23 Q. In the interim, had you met with Mr. Bosy and Mr.</p> <p>24 Roper?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">813</p> <p>1 A. Correct. Can't do anything right now.</p> <p>2 Q. Did you come to learn, in November 2008, that</p> <p>3 Parallel Networks was asking Jenner & Block to consider taking</p> <p>4 on a case filed by Microsoft?</p> <p>5 A. Yes.</p> <p>6 Q. I show you what's been marked as Claimant's 257.</p> <p>7 A. Yes.</p> <p>8 Q. And I'll show you, in conjunction with this, what's</p> <p>9 been marked as 258, which is an e-mail from Mr. Fokas.</p> <p>10 Now, in November 2008, was it your understanding</p> <p>11 that Parallel Networks was insisting that Jenner & Block had to</p> <p>12 take this case, under the contract?</p> <p>13 A. No, they were -- Mr. Fokas was trying to persuade</p> <p>14 Jenner & Block to take the case.</p> <p>15 Q. Did Jenner & Block ever agree to take the case?</p> <p>16 A. No.</p> <p>17 Q. Within a short time after this, do you become aware</p> <p>18 of a ruling that occurs in Delaware?</p> <p>19 A. Yes.</p> <p>20 Q. What is that ruling or rulings that took place?</p> <p>21 A. The judge -- in advance of pretrial conference, which</p> <p>22 was set for the first week of December, the judge had issued a</p> <p>23 series of rulings on all the various pending motions or many of</p> <p>24 the various pending motions. They included a claim</p> <p>25 construction ruling which came out first, which everybody was</p>

<p style="text-align: right;">814</p> <p>1 really excited about when it came out because it was a pretty 2 favorable claim construction ruling which essentially adopted 3 Parallel Networks' proffered claim construction, as I recall, 4 at least as to all the key parts of the claims. And then 5 shortly on the heels on that came her summary judgment 6 decisions granting Oracle's motion for summary judgment on 7 noninfringement. 8 Q. Show you what's been -- withdrawn. 9 Was there a hearing in front of the judge that 10 comes shortly after that? 11 A. Yeah. In fact, I think that the hearing was set for, 12 like, a Friday and the rulings came out on Thursday. The trial 13 team that was going out to the -- or the part of the trial team 14 that was going out to handle the pretrial conference was 15 already out in Wilmington when the decisions were coming over 16 the wire on Thursday. I was talking to them by telephone from 17 Wilmington about these rulings as they were coming out. 18 Q. Members of the trial team attended that hearing? 19 A. Yes. 20 Q. And did you get a report with respect to that 21 hearing? And I show you what's been marked as Claimant's 22 Exhibit 71. 23 A. Yes, I did. 24 Q. And do you recall from whom you got a report? 25 A. George Bosy.</p>	<p style="text-align: right;">816</p> <p>1 discussions about strategy and how to best frame the issues. I 2 got -- as soon as we decided that we were going to pursue a 3 motion to reconsider, I called the co-chair of our appellate 4 group, Paul Smith, because I wanted to get appellate -- 5 experienced appellate lawyers involved in preparing the motion 6 to reconsider in order to create the best possible record for 7 appeal if that motion wasn't successful. 8 So I got Paul Smith involved, and Paul got Marc 9 Goldman involved. I did a lot of reading. I read the whole 10 summary judgment record, went through all the issues that the 11 judge had -- that had been of concern to the judge in the 12 summary judgment motion, looked back through the record myself, 13 met with the other lawyers on the case, sent associates out 14 researching various issues to try to put together the strongest 15 motion to reconsider that we could. 16 Q. Now, Mr. Smith's involved. Can you give us a little 17 background about Mr. Smith? 18 A. Yes. Paul is a senior lawyer at the firm. He, at 19 the time, was co-chair of our firm's appellate practice, along 20 with Don Verrilli, who's now the Solicitor General of the 21 United States. Paul had been a Supreme Court clerk, I think, 22 to Potter Stewart, if I remember correctly, had been an 23 appellate lawyer all his life, had argued dozens of cases 24 before the Supreme Court. He argued Lawrence v. Texas. He's 25 argued some of the big voting rights cases that have been</p>
<p style="text-align: right;">815</p> <p>1 Q. What did he report about the hearing? 2 A. He -- prior to the hearing, the rulings -- the 3 summary judgment rulings and claim construction rulings had 4 come out, and so a big part of the discussion at the pretrial 5 conference had been, well, in light of these rulings, are we 6 still having a trial in January or not? And, if so, what are 7 the contours of that trial? 8 And the judge reported -- according to George, 9 the judge reported that she was still holding the trial dates 10 and intended to go ahead with the trial on the invalidity and 11 inequitable conduct counterclaims, but that -- or claims by 12 Oracle, but that she would prefer not to have to conduct the 13 trial if the trial could be avoided. So I think the sense that 14 the trial team got was that the judge was sort of signaling she 15 wants this case off her docket. 16 Q. One way or the other? 17 A. One way or the other. 18 Q. The -- following that, did the trial team begin work 19 on a motion to reconsider? 20 A. Yes. 21 Q. Were you involved in the work on the motion to 22 reconsider? 23 A. Yes, I was. 24 Q. In what capacity? 25 A. I was involved in editing it. We had several</p>	<p style="text-align: right;">817</p> <p>1 before the Supreme Court. He's argued some major First 2 Amendment cases before the Supreme Court. He's always on, you 3 know, the short list that -- anybody's short list of, you know, 4 Supreme Court practitioners who have the most arguments in a 5 term kind of people. He's a phenomenally brilliant and 6 effective appellate lawyer. 7 And of the people in our -- of the senior people 8 in our appellate group at that time, Paul was the one who had 9 the most experience in appeals, in patent cases in particular, 10 and had argued several cases in the Federal Circuit. 11 Q. Fair to say they got -- Parallel Networks got the 12 A-team for the -- 13 A. Absolutely. The best, I think -- I would put Paul 14 Smith up against anybody in the country as an appellate lawyer. 15 Q. Now, I'll show you Claimant's Exhibit 264. We're not 16 going to go into the brief itself. I'm going to give the 17 arbitrator a chance to get there with us. 18 ARBITRATOR GRISSOM: Which exhibit are you on? 19 MR. PELZ: 264. 20 Q. (BY MR. PELZ) I just want to ask a few questions. 21 MR. PELZ: Are you with me, Mr. Arbitrator? 22 ARBITRATOR GRISSOM: Yes. 23 MR. PELZ: Okay. 24 Q. (BY MR. PELZ) The people listed underneath your 25 e-mail of December 11, are all of those people Jenner & Block</p>

<p style="text-align: right;">818</p> <p>1 lawyers?</p> <p>2 A. Except for David Nelson, who is a paralegal, and</p> <p>3 then, obviously, Mr. Fokas.</p> <p>4 Q. In the "to's" --</p> <p>5 A. In the "to's," yes, except for David.</p> <p>6 Q. And who's the cc? The cc is Mr. Fokas --</p> <p>7 A. Mr. Fokas, Mr. Horwitz, who was local counsel, and</p> <p>8 David Moore, who was another local counsel, as I recall.</p> <p>9 Q. There are a lot of people working on this, right?</p> <p>10 A. Yes.</p> <p>11 Q. Mr. Fokas was actively involved in these discussions</p> <p>12 with respect to the motion to reconsider?</p> <p>13 A. Yes. He was reviewing all the drafts and commenting</p> <p>14 on the drafts.</p> <p>15 Q. And if we can show you Claimant's Exhibit 49, is that</p> <p>16 at least an instance where Mr. Fokas was providing comments?</p> <p>17 A. Yes. In fact, he's answering a question I've raised</p> <p>18 a question about. I commissioned some research on -- to find</p> <p>19 cases where an expert's opinion, you know, in and of itself is</p> <p>20 sufficient to create a disputed issue for summary judgment.</p> <p>21 And he, I guess, did some of his own research and found a Judge</p> <p>22 Robinson decision which he thought was helpful on that point.</p> <p>23 Q. In addition to working on the motion to reconsider,</p> <p>24 was the firm also getting ready in case it had to go to a trial</p> <p>25 in January?</p>	<p style="text-align: right;">820</p> <p>1 A. Oracle's counsel proposed that we reinitiate</p> <p>2 settlement discussions. I think they actually proposed</p> <p>3 initially that we reconvene mediation and that we try to get</p> <p>4 the magistrate to give us a day Christmas week, the week</p> <p>5 leading up to Christmas, to go back and mediate with -- you</p> <p>6 know, their statement was something to the effect of they were</p> <p>7 willing to discuss settlement for a number significantly below</p> <p>8 eight figures or something like that or -- I should say,</p> <p>9 and/or that the parties discuss possibly converting the summary</p> <p>10 judgment to a final judgment with Oracle dismissing the</p> <p>11 invalidity and inequitable conduct claims without prejudice,</p> <p>12 with an agreement that if Oracle were to succeed in -- on</p> <p>13 appeal in the federal circuit, that our client, Parallel</p> <p>14 Networks, would agree that the results in that appeal would</p> <p>15 apply equally to the BEA products.</p> <p>16 So this was Oracle's attempt to take the</p> <p>17 decision and, you know, get some sort of advantage with regard</p> <p>18 to BEA.</p> <p>19 Q. With respect to Oracle's proposals, was Mr. Fokas</p> <p>20 actively involved in discussion about those?</p> <p>21 A. Yes.</p> <p>22 Q. Now, just briefly going back to the motion to</p> <p>23 reconsider, let's just show you what's been marked as</p> <p>24 Claimant's Exhibit 273. Does that indicate that even Mr. Roper</p> <p>25 was weighing in --</p>
<p style="text-align: right;">819</p> <p>1 A. Yes.</p> <p>2 Q. What was being done in that regard?</p> <p>3 A. I most vividly remember that David Nelson was telling</p> <p>4 us every day what the amount of hours were left until we had to</p> <p>5 send the truck to Wilmington, Delaware with all the boxes.</p> <p>6 Because we were -- I mean, we -- you know, we were gearing up</p> <p>7 to try the case on invalidity and inequitable conduct. We were</p> <p>8 talking about how we could possibly squeeze in a jury study</p> <p>9 over the holidays, and people were -- people were working very</p> <p>10 hard.</p> <p>11 Q. Now, the appellate lawyers were actively involved in</p> <p>12 working on this motion to reconsider?</p> <p>13 A. Yeah, very much so. Both Paul and Marc Goldman. And</p> <p>14 Marc is a more junior partner in our appellate group who</p> <p>15 frequently gets involved in Federal Circuit patents.</p> <p>16 Q. I show you Claimant's Exhibit 268.</p> <p>17 A. All right. This is one of Marc's tomes with</p> <p>18 questions and comments, which Ben Bradford then responded to.</p> <p>19 Q. And who is Ben Bradford?</p> <p>20 A. Ben, at the time, was a relatively junior associate</p> <p>21 in our IP group. He's now a senior associate in our IP group.</p> <p>22 Q. Now, at some point around this time, was Oracle</p> <p>23 proposed some other option with respect to how to proceed?</p> <p>24 A. Yes.</p> <p>25 Q. What was your understanding of that proposal?</p>	<p style="text-align: right;">821</p> <p>1 A. Yes.</p> <p>2 Q. -- with respect to this?</p> <p>3 A. Everybody was.</p> <p>4 Q. Now, you -- in your review, I'm going to show you</p> <p>5 what's Claimant's Exhibit 274. While you were working on the</p> <p>6 motion to reconsider, did you reach some thoughts as to what</p> <p>7 the Court did wrong?</p> <p>8 A. Yes.</p> <p>9 Q. And I hand you what's been marked as Claimant's</p> <p>10 Exhibit 274. It's a memo from you on December 15, 2008.</p> <p>11 A. Right.</p> <p>12 Q. What was your thinking about where the Court erred?</p> <p>13 A. My view was -- we were having this discussion, you</p> <p>14 know, by e-mail and orally about, you know, how do we -- how do</p> <p>15 we posture the motion to reconsider. The judge isn't going to</p> <p>16 respond well if we're just telling her that she got the law</p> <p>17 wrong. What can we say -- you know, what's the best argument</p> <p>18 to make about the factual record and how she -- you know, what</p> <p>19 she did wrong with regard to reviewing the factual record in</p> <p>20 reaching her decision on summary judgment.</p> <p>21 And what I said was I think she's misapprehended</p> <p>22 the record about what the Web server is and how it's released.</p> <p>23 And part of -- the one thing that I had -- one reaction I had</p> <p>24 when I went back and read the summary judgment briefs was that</p> <p>25 perhaps the parties might have assumed that she knew too much</p>

<p style="text-align: right;">822</p> <p>1 about computers. I thought that was a very good explanation</p> <p>2 from our client's side to be given for the position that</p> <p>3 Parallel Networks was taking on this claim line, which</p> <p>4 released, and what the Web server is and how it relates to the</p> <p>5 parent-child processes and all that stuff.</p> <p>6 And I thought that we could -- we had made the</p> <p>7 factual record for that, but maybe the briefs hadn't laid it</p> <p>8 out sort of in a -- in a clear enough fashion for her to be</p> <p>9 able to follow it. So what I was saying is, you know, let's --</p> <p>10 why don't we argue that she misapprehended the factual record</p> <p>11 and sort of lay out piece by piece what the factual record was</p> <p>12 that we had built in the briefs in a way that gave more</p> <p>13 explanation to this part of the argument.</p> <p>14 Q. And do you think that sort of analysis was helpful to</p> <p>15 ultimately being able to get this reversed?</p> <p>16 A. I think, if you read her decision, it -- it's -- it</p> <p>17 was a significant part of -- or the Federal Circuit's decision</p> <p>18 was a significant part of what the Federal Circuit ultimately</p> <p>19 did.</p> <p>20 Q. You've read that decision?</p> <p>21 A. I have. It's been awhile, but I have read it.</p> <p>22 I wasn't the only one who had this idea, but...</p> <p>23 Q. I'll show you what's been marked as 275 -- claimant's</p> <p>24 Exhibit 275. Now, this is from Mr. Patras to Mr. Goldman, and</p> <p>25 indicating to Mr. Bosy he thought the brief was good and</p>	<p style="text-align: right;">824</p> <p>1 get Judge Robinson to vacate her decision before it became a</p> <p>2 final decision, that that might have less negative impact going</p> <p>3 forward for the client with respect to its ability to enforce</p> <p>4 this same patent against others.</p> <p>5 Q. Did you commission research on that issue?</p> <p>6 A. Yes, I did.</p> <p>7 Q. And was it done?</p> <p>8 A. Yes.</p> <p>9 Q. Now, around this time, the middle of December of</p> <p>10 2008, is there a phone call where you're on the phone with Mr.</p> <p>11 Fokas?</p> <p>12 A. Yes. I believe it was December 18th.</p> <p>13 Q. Prior to that time, had you spoken with Mr. Fokas?</p> <p>14 A. I had not spoken to him directly, but we had</p> <p>15 e-mailed, as you've -- as you've seen, we e-mailed back and</p> <p>16 forth about the motion to reconsider.</p> <p>17 Q. Who's on that phone call?</p> <p>18 A. I was in George Bosy's office with George and Paul</p> <p>19 Margolis, and Mr. Fokas was on the phone. I don't remember if</p> <p>20 anybody else was on the phone besides Mr. Fokas.</p> <p>21 Q. Tell us what you can remember with respect to that</p> <p>22 phone conversation, Ms. Mascherin.</p> <p>23 A. The phone conversation was -- was at our request,</p> <p>24 initiated by this proposal that we had received from Oracle,</p> <p>25 but also, you know, because we wanted to talk to the client</p>
<p style="text-align: right;">823</p> <p>1 talking about staying up all night.</p> <p>2 Were, in fact, people staying up, if not all</p> <p>3 night, large parts of the night to get this done?</p> <p>4 A. People were working very hard on this in both the</p> <p>5 Chicago office and the D.C. office, which is where Paul and</p> <p>6 Marc were.</p> <p>7 Q. Okay. Now, let me give you Claimant's Exhibit 36.</p> <p>8 Does this provide -- does this refer to the</p> <p>9 Oracle settlement option that we briefly discussed before?</p> <p>10 A. Yes. This is the -- I think that George had had --</p> <p>11 initially had had a phone call from Jim Gilliland, and George</p> <p>12 had asked Jim to lay out what he was proposing, and this was</p> <p>13 the written summary of what they had proposed.</p> <p>14 Q. I believe you testified that one of the things being</p> <p>15 looked into was potentially vacating the opinion?</p> <p>16 A. Yes. I was very interested in looking into that,</p> <p>17 because I knew that there was a lot of concern that the client</p> <p>18 had other claims against other parties for infringement of this</p> <p>19 same patent, and I thought perhaps if there was a way that --</p> <p>20 the Texas court seemed to be more -- a more friendly venue, and</p> <p>21 these cases were in Delaware, you know, as a consequence of the</p> <p>22 fact that -- that the original entity had been incorporated in</p> <p>23 Delaware.</p> <p>24 And I thought maybe if we -- if there was a way</p> <p>25 to settle the Oracle case and get Judge Robinson's decision --</p>	<p style="text-align: right;">825</p> <p>1 about -- we wanted to have a serious discussion with the client</p> <p>2 about where the case stood at that point in time, what the</p> <p>3 client's options were, and we wanted to make sure the client</p> <p>4 understood that their -- you know, the risks that were involved</p> <p>5 in going ahead with the trial in January, the risks that were</p> <p>6 involved with allowing Judge Robinson's decision to become</p> <p>7 final and appealing that and what might happen on appeal, what</p> <p>8 the relative, you know, likelihood or unlikelihood of success</p> <p>9 on appeal might be.</p> <p>10 And there were several different strategies that</p> <p>11 the client, you know, could -- from among which the client</p> <p>12 could choose at that point in time to try to navigate out of</p> <p>13 this situation it was in. They included trying to settle with</p> <p>14 Oracle, trying to get that decision vacated, or if a settlement</p> <p>15 couldn't be achieved that was acceptable to the client, then at</p> <p>16 least getting rid of that January trial so that more bad things</p> <p>17 could be avoided and the case could be taken up in a more</p> <p>18 simpler and cleaner way to the Federal Circuit. We talked</p> <p>19 about a whole range of different strategic alternatives.</p> <p>20 Q. Well, let me hand you also Claimant's Exhibit 281 and</p> <p>21 ask you, did you also talk about the current status of the</p> <p>22 client's payment of expenses?</p> <p>23 A. Yes, we did, because they were still half a million</p> <p>24 dollars in arrears.</p> <p>25 Q. Did you understand that in December there had been</p>

<p style="text-align: right;">826</p> <p>1 sort of representations in early December with respect to the 2 payment of those?</p> <p>3 A. Yeah. We had -- you know, I had asked George back at 4 the time that I wrote the memo in late October to get the 5 client current on expenses. And George had reported back that 6 he'd discuss this with the client. And early in December, we'd 7 gotten, you know, word that the client expected to be able to 8 be current with expenses in December.</p> <p>9 And then right about the same time that we're, 10 you know, trying to sort out all these strategic issues, we got 11 this report back from Mr. Fokas saying, you know, that he'd be 12 able to pay us if he could settle these two cases, that he 13 didn't have any money otherwise, and, you know, thanks for 14 covering for me. Essentially, the gist of this seemed to be 15 that he was -- he seemed to be moving backward from the 16 assurance that we had gotten that the expenses were going to be 17 paid.</p> <p>18 ARBITRATOR GRISSOM: Are you referring to a 19 numbered exhibit?</p> <p>20 THE WITNESS: I'm referring to Claimant's 21 Exhibit 281, his e-mail at the bottom of the page.</p> <p>22 Q. (BY MR. PELZ) Ms. Mascherin, can you point, again, 23 where you're talking?</p> <p>24 A. Yeah, Claimant's Exhibit 281, there's -- at the very 25 bottom of the first page, there's an e-mail from Terry Fokas to</p>	<p style="text-align: right;">828</p> <p>1 We talked about the impact that -- we talked 2 about the relative attractiveness of an appeal that only 3 focused on -- that only dealt with the judge's summary judgment 4 and claim construction rulings versus one that also had 5 invalidity and inequitable conduct in the mix.</p> <p>6 Q. Okay. I'm showing you what I've marked as Claimant's 7 Exhibit 288. Looking first at the bottom e-mail. Was -- and 8 this is December 22nd.</p> <p>9 Were you able to reach an agreement with Oracle 10 with respect to how to proceed?</p> <p>11 A. Yes, we were. We agreed to their second proposal 12 for -- this was their first proposal -- which was to -- that 13 they would dismiss the invalidity and inequitable conduct 14 claims without prejudice, that we would, by agreement, ask 15 Judge Robinson to convert the summary judgment to a final 16 judgment. We'd have a side agreement to the effect that if the 17 Federal Circuit affirmed, the same rulings would apply to the 18 BEA products, and that would posture the case then so that 19 Parallel Networks could take it up right away to the Federal 20 Circuit on appeal.</p> <p>21 Q. Had Mr. Fokas actively participated in the 22 discussions with respect to reaching that agreement?</p> <p>23 A. Absolutely.</p> <p>24 Q. Did he ever indicate that he didn't concur with that 25 strategy and decision?</p>
<p style="text-align: right;">827</p> <p>1 George Bosy.</p> <p>2 Q. Right at the bottom, it says, George, this is my 3 plan, and carries over to the next page?</p> <p>4 ARBITRATOR GRISSOM: Okay. All right.</p> <p>5 A. So this, we also talked about this on the call on the 6 18th.</p> <p>7 Q. (BY MR. PELZ) Do we have any recollection of Mr. 8 Fokas' discussion with respect to the strategy that was being 9 considered?</p> <p>10 A. My recollection is that Mr. Fokas was not 11 particularly interested in engaging in settlement discussions 12 given the kind of numbers that -- you know, given Oracle's 13 statement that a settlement would -- that, in its view, a 14 settlement would be <u>significantly less than eight figures</u>. He 15 was very interested in trying to get the January trial date 16 vacated and finding some way to put off having to try the 17 invalidity case.</p> <p>18 Q. If you had to go to that trial, would there be 19 significant expenses incurred that would be the burden of 20 Parallel Networks?</p> <p>21 A. Sure. Sure. We talked about how much it would cost 22 in expenses to go try the case. We also talked about the 23 potential, you know, strategic downsides of trying a case 24 that's only about invalidity and inequitable conduct without an 25 infringement claim to put before the jury.</p>	<p style="text-align: right;">829</p> <p>1 A. No, not at all.</p> <p>2 Q. In late December 2008, are there discussions with 3 respect to how to proceed with respect to representation of 4 Parallel Networks?</p> <p>5 A. Yes, several.</p> <p>6 Q. When -- to your knowledge, Ms. Mascherin, when do you 7 start getting involved in those discussions?</p> <p>8 A. About whether to continue to proceed?</p> <p>9 Q. Yes.</p> <p>10 A. I remember a series of discussions over Christmas 11 week and the week leading up to New Year's specifically about 12 terminating the contingent fee agreement. There were 13 certainly -- there were also many, many discussions before 14 that, you know, about the strategy for dealing with the impact 15 of Judge Robinson's decisions and the need to have this 16 discussion with the client about becoming -- you know, about 17 paying the amounts that were due on expenses and other issues. 18 But termination I remember coming to the fore at the end of -- 19 toward the end of December.</p> <p>20 Q. Who participated in those discussions?</p> <p>21 A. We had several internal discussions, and the group 22 generally -- it wasn't always the same people on every call, 23 but the group generally that was involved were Susan Levy, 24 Harry Roper, Paul Margolis, Paul Smith, Bob Markowski, who was 25 one of our firm counsel at the time. Ross Bricker was copied</p>

<p style="text-align: right;">830</p> <p>1 on all the e-mails, although I don't recall Ross being on any</p> <p>2 of the telephone calls.</p> <p>3 Q. Showing you what's been marked as Claimant's Exhibit</p> <p>4 293.</p> <p>5 A. I should say, also, Mr. Bosy was copied on all the</p> <p>6 e-mails, but he didn't participate in any of the phone calls.</p> <p>7 Q. Why is it that Mr. Bosy did not participate?</p> <p>8 A. I did not know at the time, but he was not responding</p> <p>9 to anything. The last I talked -- the last I remembered</p> <p>10 communicating with him was around this time, you know, the</p> <p>11 20th, 22nd, when we got the stipulation entered, you know, the</p> <p>12 agreement reached with Oracle and stipulation entered with the</p> <p>13 Court. And then I did not hear from George Bosy again.</p> <p>14 Q. Have you subsequently learned anything with respect</p> <p>15 to Mr. Bosy's being at the firm at the time?</p> <p>16 A. My under -- I subsequently learned that at some point</p> <p>17 in December he had gone on medical leave.</p> <p>18 Q. At the time, you simply knew he wasn't responding?</p> <p>19 A. Right.</p> <p>20 Q. I'm handing you Claimant's Exhibit 293.</p> <p>21 ARBITRATOR GRISSOM: I didn't hear the last</p> <p>22 exhibit.</p> <p>23 MR. PELZ: 293.</p> <p>24 ARBITRATOR GRISSOM: Okay. Thank you.</p> <p>25 Q. (BY MR. PELZ) Did you prepare this memo on or about</p>	<p style="text-align: right;">832</p> <p>1 amount of the -- the fee investment, you know, represented by</p> <p>2 the hours and at normal billing rates as of the date that the</p> <p>3 firm withdrew from the representation, minus any costs that the</p> <p>4 client incurred in transitioning the case to new counsel.</p> <p>5 Q. Now, did you ever understand that Jenner & Block had</p> <p>6 any immediate right to a recovery?</p> <p>7 A. No.</p> <p>8 Q. Did you ever understand or express to anyone that</p> <p>9 Jenner & Block had a right to any recovery if Parallel Networks</p> <p>10 didn't first recover money?</p> <p>11 A. No, that was never my understanding of the agreement.</p> <p>12 Q. To your knowledge, did anybody express the</p> <p>13 understanding or view that Jenner & Block had any right to</p> <p>14 recovery of any fee if Parallel Networks didn't first recover</p> <p>15 money?</p> <p>16 A. No. I think we all -- this whole group that was</p> <p>17 having these discussions all read the agreement the same way.</p> <p>18 Q. Did anybody ever suggest otherwise, to your</p> <p>19 knowledge, to the client in 2008, 2009?</p> <p>20 A. No.</p> <p>21 Q. Now, the second -- the bottom paragraph on the first</p> <p>22 page, you're just describing what's happened in some of the</p> <p>23 negotiations that occurred up to that time?</p> <p>24 A. Yes.</p> <p>25 Q. What did you report with respect to expenses?</p>
<p style="text-align: right;">831</p> <p>1 December 31st, 2008?</p> <p>2 A. Yes.</p> <p>3 Q. Does it summarize meetings and conversations that you</p> <p>4 had with the group you just described in the week before the</p> <p>5 end of the year?</p> <p>6 A. Yes.</p> <p>7 Q. Now, let's go specifically to the second paragraph on</p> <p>8 the page that's 49068.</p> <p>9 A. Okay.</p> <p>10 Q. Your discussion of the contingent fee agreement, is</p> <p>11 that -- what is that based on?</p> <p>12 A. It's based on my reading of the agreement, as well as</p> <p>13 my discussions with the members of the trial team and with firm</p> <p>14 counsel and with Susan Levy about what we understood the</p> <p>15 agreement to mean.</p> <p>16 Q. And with respect to termination, was it your</p> <p>17 understanding that Jenner & Block had terminated consistent</p> <p>18 with ethical obligations?</p> <p>19 A. Yes.</p> <p>20 Q. And if there was a termination, what was your</p> <p>21 understanding about the potential ability for Jenner & Block to</p> <p>22 recover any money?</p> <p>23 A. My understanding was that if there was ultimately a</p> <p>24 recovery in any of the cases that we had been handling, that</p> <p>25 Jenner & Block would be entitled to recover its fees up to the</p>	<p style="text-align: right;">833</p> <p>1 A. I reported that the client had been in breach and in</p> <p>2 arrears of the agreement essentially for the entire year, or at</p> <p>3 least for several months, up to a total dollar amount of</p> <p>4 \$550,000 and that he had finally made a payment of</p> <p>5 approximately 550,000 the week before this. I think it was --</p> <p>6 the documents reflect it was made on Christmas Eve, I believe.</p> <p>7 Q. Now, you also discuss something about the QuinStreet</p> <p>8 case and particularly --</p> <p>9 A. The impact of Microsoft.</p> <p>10 Q. Yes. What did you understand the impact of Microsoft</p> <p>11 to be?</p> <p>12 A. There had been this development in the QuinStreet</p> <p>13 case in the fall of 2008. QuinStreet was a case -- was a</p> <p>14 declaratory judgment case that was filed by QuinStreet against</p> <p>15 Parallel Networks in the district court in Delaware, and it had</p> <p>16 been assigned over to Judge Robinson who had the preexisting</p> <p>17 Oracle case.</p> <p>18 It was a relatively small case and had not been</p> <p>19 terribly active. It was still in a relatively early stage.</p> <p>20 QuinStreet, apparently, was a licensee or a customer of</p> <p>21 Microsoft, and QuinStreet brought an indemnification claim in</p> <p>22 the case against Microsoft. Microsoft then filed what's</p> <p>23 referred to as a downward-sloping Rule 14 complaint against</p> <p>24 Parallel Networks seeking a declaratory judgment that no</p> <p>25 Microsoft products infringed the patent. This had the -- this</p>

<p style="text-align: right;">834</p> <p>1 raised the possibility that a case that was a very small case, 2 certainly by comparison to the Oracle case, all of a sudden 3 would be expanded into a case that was at least as big as 4 Oracle, possibly bigger, because this is Microsoft, and 5 involving entirely different products than the Oracle products. 6 So if Jenner & Block was in that Microsoft case, 7 it would be Oracle all over again in terms of the investment 8 that would be required, possibly even bigger than that, at a 9 point where the firm really was not interested in taking on any 10 new engagements for Parallel Networks. 11 Q. Now, based on your review of the contract, did you 12 believe that Jenner & Block was obligated to handle the 13 Microsoft case? 14 A. I don't believe we were obligated to handle the 15 Microsoft case, but I was afraid that Judge Robinson might not 16 let us out of the case because we were -- we had filed 17 appearances in the QuinStreet case. And it -- it concerned 18 me -- you know, we had -- we have our contract with the client, 19 which is one thing, which, in my view, required the client to 20 get Jenner & Block's consent to take on that case. 21 But here's, you know, this -- all of a sudden, 22 this huge party that's been invited to the dance by somebody 23 else. We didn't choose to sue them, and yet, we are counsel of 24 record in the action in which the claim has been brought. So I 25 was -- I was concerned that, you know, while we and the client</p>	<p style="text-align: right;">836</p> <p>1 My understanding was that we were obligated to 2 give 30 days' prior written notice, that we were supposed to 3 assist in finding new counsel if the client needed assistance 4 in finding new counsel, and that we, obviously, had to, you 5 know, cooperate and help the client transition to new counsel. 6 Q. Now, in these meetings that were taking place the 7 week between Christmas and New Year's, was Jenner & Block 8 conducting -- doing this analysis to determine whether or not 9 it was in the economic interest to continue the representation 10 as it sets forth in 9b? 11 A. Yes. 12 Q. And you participated in that? 13 A. Yes. 14 Q. Did the other people in the memo that's Exhibit 293 15 also participate? 16 A. Oh, yes. 17 Q. And what was the conclusion? 18 A. Well, except for Mr. Bosy. 19 Q. What was the conclusion? 20 A. The conclusion was, ultimately -- well, first -- we 21 first made an effort to see if we could reach agreement with 22 Mr. Fokas to the effect that the firm would continue under the 23 contingent fee agreement to handle just the appeal. 24 When did that not succeed -- 25 Q. Let's take a time-out and go -- that's addressed in</p>
<p style="text-align: right;">835</p> <p>1 both understood that Jenner & Block needed to agree to take 2 that case, Judge Robinson might have a different view. 3 Q. Now, did you review the contract to determine what 4 the standard was for Jenner & Block being able to terminate? 5 A. Yes. 6 Q. I'm going to hand you -- I'm going to hand you what's 7 been marked as Exhibit 7 -- I'm going to hand you what's been 8 marked as Exhibit 7A. Ms. Mascherin, if you would keep that 9 set aside so I can get it back in the folder so Ms. Aske 10 doesn't get mad at me. 11 A. Okay. 12 Q. Did you review this contract, and particularly the 13 termination provision, with respect to what Jenner & Block's 14 rights were with regard to termination? 15 A. Yes, I did. 16 Q. And what section of the contract is that in? 17 A. 9b. 18 Q. And what was the standard that 9b imposed for when 19 Jenner & Block would be permitted to terminate the contract? 20 A. My understanding was that Jenner & Block was 21 permitted to terminate if we determined at any time that it was 22 not in the firm's economic interest to continue representation 23 under the agreement, and that in order to -- so long as that 24 termination could be accomplished in accordance with the 25 ethical rules.</p>	<p style="text-align: right;">837</p> <p>1 your memo here; is that right? 2 A. Yes, it is. 3 Q. Let's talk about that while we're here. 4 What were the efforts -- is that on Page 49069? 5 A. Yes, it is. 6 MR. PELZ: Now, I'm switching back to Exhibit 7 293, Arbitrator Grissom. Claimant's 293. 8 Q. (BY MR. PELZ) Describe the efforts that the firm 9 took to try to convince the client to allow Jenner & Block to 10 do the Oracle appeal. 11 A. We -- a day or so before the date of this memo, we 12 had had a call, and the group decided that we should make an 13 effort to see if we could reach an agreement with Mr. Fokas to 14 the point that we would continue to represent Parallel Networks 15 on the -- under the contingent fee agreement through the appeal 16 and try to get a successful result from Parallel Networks in 17 the appeal, at which point, we would like to take a run at 18 trying to settle the case and see what sort of settlement could 19 be achieved for Parallel Networks at that point, at which 20 point, if we weren't successful in reaching a settlement that 21 Parallel Networks was comfortable with, we would terminate 22 that. 23 And we wanted -- with regard to the QuinStreet 24 case, we had been trying to persuade Mr. Fokas throughout the 25 fall to settle the QuinStreet case. We thought there were a</p>

<p style="text-align: right;">838</p> <p>1 lot of strategic reasons why that made sense. And Mr. Margolis 2 had some discussions with QuinStreet's lawyers which seemed to 3 indicate that there was a significant possibility of getting at 4 least three-quarters of a million dollars from QuinStreet. We 5 thought it made a lot of sense to settle that case.</p> <p>6 As I mentioned, we didn't want -- we had not 7 agreed to take on the Microsoft part of it. We didn't want to 8 take on the Microsoft part. Plus, if the QuinStreet part could 9 be gotten dismissed by virtue of settlement in Delaware, then 10 there would be no basis for jurisdiction for the Microsoft case 11 because the client had become a Texas company and Microsoft 12 would have to sue in Texas, which is where Mr. Fokas preferred 13 to do battle with Microsoft. So we thought it made a lot of 14 sense.</p> <p>15 So there's two pieces here. We stay in the 16 appeal on the contingent fee to try to win the appeal and get a 17 good settlement for the client. And if the client didn't like 18 the settlement, then we would terminate and they could find 19 somebody else to do the ultimate trial and let us settle the 20 QuinStreet case so that we can get rid of that one.</p> <p>21 Q. Now, with respect to the Oracle appeal, was there a 22 final determination with respect to proceeding after an appeal, 23 or was it just that we had the right to be able to -- still had 24 the right to be able to terminate?</p> <p>25 A. We had the right to terminate it after the appeal.</p>	<p style="text-align: right;">840</p> <p>1 Q. What was done?</p> <p>2 A. Well, we -- we had been talking about the economics 3 of this -- of these cases throughout the fall. So the work 4 that was done goes back to, you know, my memo of October 21st 5 and the discussions that we had throughout the fall, both with 6 the trial team and with the firm management -- Susan, and Cathy 7 Steege, who was chair of the finance committee, and Ross 8 Bricker, contingent fee committee, with Paul Smith from the 9 appellate group. We ultimately concluded that it was not in 10 Jenner & Block's best economic interest to continue the 11 representation where we stood at this point in time, and there 12 were several things that factored into that.</p> <p>13 There was the size of the firm's existing 14 investment in the Oracle and QuinStreet cases, most of the 15 lion's share, which was in the Oracle case. There was the fact 16 that it would take several more rounds through the appellate 17 court and the district court to ultimately get to a resolution 18 with an enforceable damages judgment, assuming that a damages 19 judgment could be achieved. We had a client who had been in 20 arrears on expenses for several months and appeared not to take 21 seriously his obligation to pay expenses on a current basis. 22 And it was -- it was unclear to many of us whether the client's 23 failure to pay expenses on a current basis was the result of 24 him not having money or whether he simply chose not to pay us 25 because he thought he could get away with not paying Jenner &</p>
<p style="text-align: right;">839</p> <p>1 Q. Which was the same right that was in the contract?</p> <p>2 A. Which was the same right in the contract, right.</p> <p>3 Q. And what did the -- what was your understanding, at 4 least of Mr. Fokas' -- the client's reaction to the Jenner & 5 Block proposal that we stay on a contingent basis through the 6 Oracle appeal?</p> <p>7 A. He rejected that. He said that he only wanted Jenner 8 & Block to stay on the cases if we stayed on both the Oracle 9 and the QuinStreet cases, that he didn't think he could get 10 somebody to take the QuinStreet case by itself, and he didn't 11 want to settle the QuinStreet case.</p> <p>12 And he made a counterproposal that we stay in 13 the entire -- you know, that Jenner & Block should stay in both 14 the cases, try to win the Oracle appeal, but then agree to 15 some -- to some cap on our fee based upon a settlement target 16 value to be agreed upon at this point in December of 2008, you 17 know, which would then remove any ability for the firm to -- 18 you know, to recover any additional upside.</p> <p>19 Q. And did the group evaluate and consider that 20 proposal?</p> <p>21 A. We did. We were not interested in it.</p> <p>22 Q. Now, given that landscape of the options that were 23 presented, did the firm conduct an analysis with respect to 24 whether it wished to go forward with a notice of termination?</p> <p>25 A. Yes, we did.</p>	<p style="text-align: right;">841</p> <p>1 Block and could use Jenner & Block as his bank at zero percent 2 interest to fund his litigation expenses, which was not the 3 deal that we had signed up to.</p> <p>4 We looked at the prospects for success on 5 appeal. We looked at the fact that the client seemed to have 6 no discernable interest in settling the case any time in the, 7 you know, reasonably foreseeable future, and came to the 8 conclusion that this would be a very disadvantageous economic 9 prospect for the firm to continue in the representation.</p> <p>10 Q. Now, with respect to the timing, did you also look at 11 the status of the cases in evaluating whether they were in a 12 situation where it would be -- new counsel could come in and 13 take over the cases without prejudicing the client?</p> <p>14 A. Absolutely. And that's really the -- that's really 15 the ethical consideration, that -- you know, that we were 16 concerned about at the time. Certainly, when there was a trial 17 set for January, we couldn't abandon the client on the 18 courthouse steps, but the Oracle case at this point was in a -- 19 was at a stage where all that had to be done in the immediate 20 future was to file a notice of appeal, which we were fully 21 prepared to do and was a simple thing to do. There was nothing 22 more substantive that would have to be done in the appellate 23 court for some months until that appeal got docketed and the 24 record got certified and the briefing schedule was set. So 25 there was plenty of time for new counsel to come up to speed in</p>


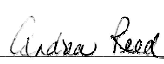
<p style="text-align: right;">842</p> <p>1 the Oracle case.</p> <p>2 In the QuinStreet case, there were some things</p> <p>3 that needed to be attended to, but the Microsoft part of that</p> <p>4 case was still in the very early stages, and there was nothing</p> <p>5 immediately pressing in the QuinStreet piece of the case other</p> <p>6 than a mediation which was then on the calendar for late -- I</p> <p>7 think it was late January in the case, and there was a</p> <p>8 scheduling conference or pretrial conference with the judge set</p> <p>9 for January, but that it -- it appeared because of the, you</p> <p>10 know, the relative new age of that case or at least early stage</p> <p>11 of that case and the fact that the whole schedule had been</p> <p>12 up-ended by the entrance of Microsoft into the case, that it</p> <p>13 was a time when -- that was opportune for new counsel to be</p> <p>14 able to come and have some time to be able to get up to speed.</p> <p>15 Q. Was a notice of termination letter sent?</p> <p>16 A. Yes.</p> <p>17 Q. I'll show you Claimant's Exhibit 15. Is that the</p> <p>18 notice of termination letter that was sent?</p> <p>19 A. Yes, it is.</p> <p>20 Q. Mr. Margolis was authorized to send that letter?</p> <p>21 A. Yes.</p> <p>22 Q. How did it happen to be that Mr. Margolis sent it?</p> <p>23 A. I think it was a combination of two things. One was</p> <p>24 that this was at the holidays and several of us were traveling</p> <p>25 and not in the office. And Mr. Margolis had been one of the</p>	<p style="text-align: right;">844</p> <p>1 that letter?</p> <p>2 A. No, we didn't. We offered to if he wanted more</p> <p>3 specific information. He, of course, had been receiving</p> <p>4 invoices all along the way in the case.</p> <p>5 Q. Now, with respect to the last sentence about where</p> <p>6 he's asking you to provide additional information, to your</p> <p>7 knowledge, did Mr. Fokas ever write any letter back asking for</p> <p>8 additional information on that question?</p> <p>9 A. No, he didn't.</p> <p>10 Q. Did any representative of Mr. Fokas ask that</p> <p>11 particular question on or about January 2nd, 2009?</p> <p>12 A. On January 2nd? No.</p> <p>13 Q. Now, during January of 2009, to your knowledge, did</p> <p>14 Mr. Fokas or any representative of Parallel Networks ever say</p> <p>15 that Jenner & Block did not have a right to terminate the</p> <p>16 contract?</p> <p>17 A. No.</p> <p>18 Q. In January of 2009, did Mr. Fokas or any</p> <p>19 representative of Parallel Networks ever say that Jenner &</p> <p>20 Block did not have a right to receive some fee if there was a</p> <p>21 recovery by Parallel Networks?</p> <p>22 A. No, no, quite to the contrary. I had several</p> <p>23 discussions with Ms. Steinberg about -- where she was asserting</p> <p>24 understanding that Jenner & Block was entitled to a fee.</p> <p>25 Q. And who is Ms. Steinberg?</p>
<p style="text-align: right;">843</p> <p>1 members of the trial team who had had the most frequent contact</p> <p>2 with Mr. Fokas, and particularly, at this point in time when</p> <p>3 George Bosy had sort of disappeared from the picture and at</p> <p>4 least -- I, at least, didn't know, you know, that he wasn't</p> <p>5 well at the time, Mr. Margolis was the person who really had</p> <p>6 the best relationship with the client and had been in the most</p> <p>7 constant contact with the client.</p> <p>8 Q. Now, in -- withdrawn.</p> <p>9 Did you learn that Mr. Margolis had --</p> <p>10 before he sent notice of termination letter, had a phone call</p> <p>11 that day -- earlier that day with Mr. Fokas?</p> <p>12 A. Yes. We had asked him to do that, and he reported</p> <p>13 back on that before we sent the letter.</p> <p>14 Q. Did you learn that in that phone call, Mr. Fokas had</p> <p>15 asked for some specific information that he wanted to receive,</p> <p>16 and particularly directing your attention to the third</p> <p>17 paragraph of the notice of termination?</p> <p>18 A. Yes. Paul reported back to us that the client had</p> <p>19 asked what the firm's -- what the amount would be that would be</p> <p>20 due to the firm under provision -- under Paragraph 9b of the</p> <p>21 agreement.</p> <p>22 Q. Did the firm provide a response to that in the notice</p> <p>23 of termination?</p> <p>24 A. Yes.</p> <p>25 Q. Did the firm indicate any specific dollar amount in</p>	<p style="text-align: right;">845</p> <p>1 A. Ms. Steinberg is a lawyer at Sullivan & Worcester, I</p> <p>2 think is the name of the firm, in Boston, who contacted me and</p> <p>3 informed me that she was representing Parallel Networks and</p> <p>4 wanted to try to work out an agreement for Jenner & Block to</p> <p>5 stay in the cases.</p> <p>6 Q. And in January of 2009, does Mr. Fokas or any</p> <p>7 representative of Parallel Networks contend that the contract</p> <p>8 is unenforceable or unconscionable?</p> <p>9 A. No.</p> <p>10 MR. PELZ: Could we at least take a break? I'm</p> <p>11 not sure how late you want to go. I'm willing to try to finish</p> <p>12 this witness, if you want, but could I at least take a short</p> <p>13 break?</p> <p>14 ARBITRATOR GRISSOM: How much longer do you</p> <p>15 think you need to finish?</p> <p>16 MR. PELZ: Realistically, I think a half hour.</p> <p>17 ARBITRATOR GRISSOM: All right. Let's take a</p> <p>18 ten-minute break.</p> <p>19 (Break was taken at 5:59 p.m. to 6:13 p.m.)</p> <p>20 ARBITRATOR GRISSOM: You can resume examination</p> <p>21 of this witness.</p> <p>22 Q. (BY MR. PELZ) Ms. Mascherin, I'm going to show you</p> <p>23 what's been marked as Exhibit 295 -- claimant's 295. I think</p> <p>24 you had testified that Mr. Margolis called the client earlier</p> <p>25 in the day on January 2nd, correct?</p>

<p style="text-align: right;">846</p> <p>1 A. Yes.</p> <p>2 Q. And Mr. Margolis reported that call. Is that what's</p> <p>3 reflected in this e-mail?</p> <p>4 A. Yes.</p> <p>5 Q. What was the client wanting to know, according to the</p> <p>6 report from Mr. Margolis?</p> <p>7 A. My understanding was that the client had asked how</p> <p>8 much he would need to pay Jenner & Block in the future because</p> <p>9 he wanted to take that into account in knowing what he could --</p> <p>10 what kind of an arrangement he could make with substitute</p> <p>11 counsel.</p> <p>12 Q. And "in the future," does in the future mean in the</p> <p>13 event of a recovery by Parallel Networks?</p> <p>14 A. Yes.</p> <p>15 Q. In fact, that's the words used in the e-mail?</p> <p>16 A. Yes.</p> <p>17 Q. And that leads to the language in the third paragraph</p> <p>18 of the notice of termination letter, which is talking about --</p> <p>19 A. Right. Uh-huh.</p> <p>20 Q. -- what would happen if Parallel Networks achieves a</p> <p>21 recovery, right?</p> <p>22 A. Yes.</p> <p>23 Q. Now, let me show you what's been marked as Claimant's</p> <p>24 Exhibit 297. And I'd like to go first in back to the e-mail</p> <p>25 that comes from Mr. Fokas on January 2nd at 5:44.</p>	<p style="text-align: right;">848</p> <p>1 know, he's saying here, tell me in writing that you're telling</p> <p>2 me I should settle these cases now, which was partially true as</p> <p>3 to QuinStreet, but not as to the Oracle case. And so Paul's</p> <p>4 e-mail really goes through all the issues that we've discussed</p> <p>5 with him and tries to explain again what our view was.</p> <p>6 Q. Did you participate in drafting the response that was</p> <p>7 going -- that was sent to Mr. Fokas ultimately on January 8th?</p> <p>8 A. Yes, I did.</p> <p>9 Q. Did you, or to your knowledge, anyone at Jenner &</p> <p>10 Block, try to force Mr. Fokas into settling his cases?</p> <p>11 A. No, we couldn't do that.</p> <p>12 Q. Did you ever -- did Jenner & Block ever not comply</p> <p>13 with what the client ultimately was told to do with respect to</p> <p>14 settlement or settlement negotiations?</p> <p>15 A. We always followed his -- you know, his ultimate</p> <p>16 decision about how he wanted to proceed with regard to the</p> <p>17 settlement discussions and getting rid of the trial and all of</p> <p>18 that.</p> <p>19 Q. With respect to, for example, Oracle, Oracle wanted</p> <p>20 to restart mediation the week before Christmas, correct?</p> <p>21 A. Right.</p> <p>22 Q. Mr. Fokas didn't want to do it, right?</p> <p>23 A. That's right.</p> <p>24 Q. And what happened?</p> <p>25 A. We didn't do it.</p>
<p style="text-align: right;">847</p> <p>1 A. Yes.</p> <p>2 Q. You're copied on that?</p> <p>3 A. Yes, I am.</p> <p>4 Q. What does Mr. Fokas ask about in that e-mail?</p> <p>5 A. He refers back to the phone call that George Bosy,</p> <p>6 Paul Margolis and I had done with him on December the 18th and</p> <p>7 refers to the -- the report that we'd given at that time, which</p> <p>8 was that our Paul Smith and Marc Goldman had predicted or</p> <p>9 ballparked a likelihood of success on appeal at 30 to 50</p> <p>10 percent. And it also refers to the discussion we had about our</p> <p>11 suggestion that it would be a wise thing to try to re-initiate</p> <p>12 settlement discussions to find out how much Oracle was willing</p> <p>13 to offer, and the fact that Paul and Harry, when they talked to</p> <p>14 Mr. Fokas in late December, had again -- and this is the call</p> <p>15 where we had offered to stay in the case on a contingent fee</p> <p>16 through the appeal and then try to achieve a settlement -- had</p> <p>17 again tried to impress upon the client that there would be</p> <p>18 advantages to trying to settle the case because of the cost the</p> <p>19 client was going to incur and the delay that would be necessary</p> <p>20 to take it through all the various realms of litigation that</p> <p>21 would be necessary to take it to a final damages judgment.</p> <p>22 And he -- Mr. Fokas is -- you know, is asking us</p> <p>23 to essentially put writing to him that we recommend settling</p> <p>24 the cases. You know, at the time, I read his e-mail to say --</p> <p>25 to sort of misinterpret what we were saying, which is -- you</p>	<p style="text-align: right;">849</p> <p>1 Q. And QuinStreet?</p> <p>2 A. We were after him for months to try to settle that</p> <p>3 case, and he didn't want to do it, so we didn't do it.</p> <p>4 Q. Did there come a time when you learned that Mr. Fokas</p> <p>5 had retained some other counsel that he wanted Jenner &</p> <p>6 Block -- with whom he wanted Jenner & Block to confer?</p> <p>7 A. Yes.</p> <p>8 Q. Who was or were those -- that counsel?</p> <p>9 A. I was contacted by Laura Steinberg, and she said that</p> <p>10 her partner, Harvey Bines, was also involved.</p> <p>11 Q. Did you have a -- withdrawn.</p> <p>12 Let me show you what's been marked as Claimant's</p> <p>13 348. Let's go first to the e-mail from Mr. Fokas on Friday,</p> <p>14 January 9th.</p> <p>15 A. Yes.</p> <p>16 Q. Are you copied on that e-mail?</p> <p>17 A. Yes.</p> <p>18 Q. Was -- were you advised -- is this where you learned</p> <p>19 about Sullivan & Worcester?</p> <p>20 A. Yes. I thought she had contacted me directly, but</p> <p>21 evidently it was Mr. Fokas saying that she was going to contact</p> <p>22 us.</p> <p>23 Q. That indicates that there's going to be a call?</p> <p>24 A. Yes.</p> <p>25 Q. And do you --</p>

<p style="text-align: right;">850</p> <p>1 A. Or that he's trying -- he's trying to get a call set 2 up. 3 Q. And did you want to participate in the call? 4 A. Yes, I did. 5 Q. Did that call occur? 6 A. Yes. 7 Q. When did it occur? 8 A. I think it was the Monday -- this was a Friday. I 9 think it was the following Monday. 10 Q. Let me show you Claimant's Exhibit 30 -- 302. 11 A. Right. January 12th, which would have been the 12 Monday following Mr. Fokas's e-mail. 13 Q. Who was on that phone call? 14 A. Paul Margolis and I and Laura Steinberg. 15 Q. And did you discuss with Ms. Steinberg the status of 16 the Oracle, QuinStreet and Microsoft cases? 17 A. Yes, we did. 18 Q. If you'll turn to the second page, what -- what did 19 you talk to Ms. Steinberg about with respect to the QuinStreet 20 case? 21 A. We talked about the schedule that was in place, the 22 fact that there was a mediation set for the end of January. We 23 discussed with Ms. Steinberg the fact that we had been -- that 24 we thought that there was a settlement that could potentially 25 be achieved with QuinStreet. We told her how much QuinStreet's</p>	<p style="text-align: right;">852</p> <p>1 based upon some agreed-upon settlement, you know, the value to 2 be determined at -- right at that time, and that we were not 3 interested in the terms that Mr. Fokas had proposed and so we 4 had sent notice of termination. 5 Q. With respect to -- go to the last paragraph, please, 6 Ms. Mascherin. 7 A. Yes. 8 Q. What did you convey to Ms. Steinberg with respect to 9 Jenner & Block's interest in assisting Parallel Networks to 10 succeed in these cases? 11 A. She expressed concern to us that because of the 12 amount that Mr. Fokas would owe us under the contingent fee 13 agreement, she didn't think it was feasible to bring in another 14 firm because she didn't think there would be enough money 15 available to interest them in a sufficient contingent recovery 16 given what Mr. Fokas expected to get out of the case himself. 17 And she was aware that Jenner & Block's, you know, hourly 18 rate-based investment in the case was in the neighborhood of 19 about \$10 million at that time. And she said, if we have to 20 pay Jenner & Block \$10 million, I'm concerned that we're not 21 going to be able to get another firm to take the case. 22 And I said that, you know, we want -- we wanted 23 Parallel Networks to succeed in the appeal and in the case and 24 that we'd be happy to have discussions with her about limiting 25 the amount that Jenner & Block would ultimately recover in the</p>
<p style="text-align: right;">851</p> <p>1 lawyer had indicated to Mr. Margolis might -- the lawyer 2 thought, you know, might be achievable. We explained that we 3 had been trying to persuade Mr. Fokas to engage in settlement 4 discussions in that case, but that he had consistently not 5 wanted to do that. And that, therefore, it might make -- 6 rather than anyone proceeding with the mediation at the end of 7 January, if Mr. Fokas was not prepared to be talking with 8 QuinStreet about settlement, it might make more sense simply to 9 try to put off that mediation date rather than for either we or 10 new counsel and Mr. Fokas to attend a mediation that Mr. Fokas 11 really wasn't interested in participating in. 12 Q. With respect to the Oracle appeal, what did Ms. 13 Steinberg tell you that Mr. Fokas had told her? 14 A. The first thing she said was that it wasn't clear to 15 her whether we wanted to handle the appeal or whether we were 16 terminating and wished to exit the case and have someone else 17 handle the appeal. And I explained to her that while it was 18 true that we had had a discussion with Mr. Fokas the week 19 before and had offered to stay in the case on a contingent fee 20 through the appeal, that Mr. Fokas wasn't interested in 21 proceeding, you know, the way that we had suggested; that he 22 had said that he would only agree to us staying in through the 23 appeal in the event we also stayed in the QuinStreet case, and 24 that he wanted to negotiate this cap on what Jenner & Block's 25 ultimate contingent recovery from the Oracle case would be</p>	<p style="text-align: right;">853</p> <p>1 event that there was a, you know, recovery in the case for 2 Parallel Networks. And she said then, well, that's a different 3 topic. We'll have to discuss that at a different time. She 4 said she wasn't prepared to discuss it that day. I said, 5 that's great, you know, and we made a date to schedule another 6 call to discuss that topic. 7 Q. Now, in this conversation, did she ever suggest that 8 Jenner & Block wasn't entitled to at least some fee? 9 A. No, she never did in any of our discussions in 2009. 10 Q. Did -- at some point, did Ms. Steinberg give you a 11 proposal with respect to how perhaps amend the arrangement to 12 allow Jenner & Block to stay in one or more of the cases? 13 A. Yes. 14 Q. Did that happen the next day, January 13th and -- 15 A. Yes, I think so. There was a whole -- 16 Q. I'll show you Claimant's Exhibit 303. 17 A. It was a whole series of proposals back and forth, 18 but that was her first one. 19 MR. ALIBHA: Arbitrator Grissom, we're going to 20 object to discussions about proposals that are now being 21 discussed to resolve or limit or compromise the amount that 22 Jenner was willing to take. That is the type of settlement 23 negotiations that I was discussing earlier that should not be 24 admissible. They're being used to show that something must be 25 due because an offer might have been made even though no</p>

<p style="text-align: right;">854</p> <p>1 agreement was ever reached. And there was no agreement ever 2 reached between Parallel Networks' outside counsel and Jenner & 3 Block on this subject.</p> <p>4 MR. PELZ: Arbitrator Grissom, there's -- there 5 is no -- as I understood the assertion that has been made from 6 time to time, there's an assertion which kind of waffles back 7 and forth that somehow these were discussions -- settlement 8 discussions, Federal Rule 408 or its Texas equivalent. As you 9 will see from all the documents that we're about to discuss, as 10 you'll hear from all the testimony, these are not settlement 11 discussions. In fact, Mr. Alibhai just introduced into 12 evidence the discussions in 2011 which are after we've already 13 gotten to the point where we are at issue. There's no threat 14 of litigation going on in 2009. We have here a brief that we 15 prepared with respect to this, and if it's going to be raised, 16 we ask that you consider this brief, and we resolve this -- we 17 talk about this issue tomorrow.</p> <p>18 So I don't want to take time with this witness 19 sitting here. If we're going to have this position raised, we 20 should -- you should consider the law. I think once you look 21 at the law and you look at the positions Parallel Networks has 22 taken here, there's absolutely no reason these discussions, 23 which are contract negotiations, are not wholly admissible even 24 in -- there's no doubt even in a court case, let alone an 25 arbitration. But we'd ask that you review our legal</p>	<p style="text-align: right;">856</p> <p>1 itself redacted. So they believe they can have privileged 2 communications, they can have inside communications, but on the 3 other side, when they're communicating with somebody's outside 4 counsel, that it's not possible that that's an offer of 5 compromise.</p> <p>6 Her testimony that we can have read back is that 7 we would be willing to discuss limiting the amount that Jenner 8 would take. And then Ms. Steinberg's response was, we'd have 9 to have a separate discussion about that. And so that's 10 exactly what they want to get into, is discussions of limiting 11 the amount that Jenner would take in an effort to prejudice you 12 into believing that somehow, because she was willing to resolve 13 it at that moment, that there's some valid claim that they have 14 now. In the letters that I introduced earlier about the 2011 15 are statements that contradict Mr. Pelz's questions and 16 testimony that he's trying to elicit that a statement was not 17 made that the agreement was unconscionable, ever. That wasn't 18 a settlement communication. It was a statement that the 19 agreement itself was unconscionable.</p> <p>20 MR. PELZ: Mr. Alibhai must not have heard the 21 prior questions and answers. Those questions dealt with 22 whether that was ever raised in 2008 and 2009. That's not a 23 surprise. That's what I talked about in my opening statement. 24 My Alibhai is simply proving exactly what I said in my opening 25 statement. None of these positions were ever raised in 2008</p>
<p style="text-align: right;">855</p> <p>1 authorities and our brief if you're even contemplating 2 considering this objection.</p> <p>3 MR. ALIBHAI: Arbitrator Grissom, number one, 4 they clearly knew we were raising this issue because we raised 5 objections to certain deposition testimony that were proffered. 6 They certainly knew we were raising this issue because they 7 went and prepared a brief that they've had sitting in a 8 notebook here that they handed to you right now and then handed 9 it to us without giving us the opportunity to see it before or 10 to prepare a response for an issue that they knew was coming 11 up. And they knew specifically that Ms. Mascherin was the 12 witness -- the person that had all the conversations. And to 13 say that a client of the firm is having all his communications 14 or the company's communications through that company's outside 15 counsel, and then try to use that to prove that there's some 16 type of claim that Jenner & Block has and that nobody's, you 17 know, disputed it and so it must be a good claim, is exactly 18 what Rule 408 discusses, the idea that you try to prove up the 19 veracity of your claim by using offers of compromise.</p> <p>20 And what Ms. Mascherin just testified to and the 21 document that she just referred to was that there was a 22 discussion about limiting the amount that Jenner would take. A 23 resolution of that amount, a reduction, a compromise. And 24 you'll see that the exhibit that they last talked about where 25 they're talking about the Laura Steinberg communications is</p>	<p style="text-align: right;">857</p> <p>1 and 2009. They're all litigation-manufactured positions that 2 were first raised in 2011. We will go through all these 3 documents. You will not see any suggestion that either side is 4 ever contending these are subject to Rule 408. None. None.</p> <p>5 You have two very experienced litigation 6 lawyers, one on one side and one on the other side. This 7 situation -- again, talking to each other, it's not the 8 internal communications with Mr. Fokas. They redacted those 9 from theirs. Those are privileged. But when they're 10 communicating with Jenner & Block, the opposite party in these 11 negotiations, these contract negotiations, these aren't 12 settlement discussions. They are contract negotiations. You 13 will see at the end of the day the document that is prepared 14 after these various communications go back and forth is called 15 an amendment to the contract. The suggestion that you -- I've 16 never heard anybody even have the audacity to suggest that 17 contract negotiations between opposing parties are somehow 18 inadmissible. It's -- it fails on so many levels. It's -- 19 again, it wouldn't survive any challenge in a court, let alone 20 an arbitration.</p> <p>21 And again, if you're going to consider it, you 22 should read the authorities, read the facts, and you'll have to 23 look at all the documents anyway because we'll be making an 24 offer of proof with respect to all the documents, and we'll 25 offer Ms. Mascherin's testimony as an offer of proof with</p>

<p style="text-align: right;">858</p> <p>1 respect to this issue.</p> <p>2 MR. ALIBHAI: And I have no problem with you</p> <p>3 looking at it. I have a problem with it being introduced into</p> <p>4 evidence right here, right now. I would like to look at the</p> <p>5 cases that they've cited. I'd like to give you the cases that</p> <p>6 support our position. I think we've talked about some of those</p> <p>7 issues.</p> <p>8 For him to say this is opposite contract</p> <p>9 negotiations, she's talking to her client's representative</p> <p>10 through legal counsel. She's still has a fiduciary duty.</p> <p>11 Parallel Networks is a client of the firm, but they can't</p> <p>12 communicate with them because they've created a conflict</p> <p>13 situation, so now there's outside counsel involved. And the</p> <p>14 discussion is about limiting the amount Jenner would take.</p> <p>15 That's what she just testified to.</p> <p>16 And they're going to introduce a number of</p> <p>17 different pieces of evidence for an agreement that never gets</p> <p>18 signed in an effort to show those discussion somehow are</p> <p>19 probative of Jenner having an actual amount or a claim to</p> <p>20 assert an amount, whether it's for the amount that they're</p> <p>21 trying to prove up or the fact that the claim exists. And</p> <p>22 that's what they're trying to show you through the entire line</p> <p>23 of testimony that they're going to get from Ms. Mascherin about</p> <p>24 her communications with Ms. Steinberg in this January-February</p> <p>25 time frame, 2009. After the letter of termination goes out,</p>	<p style="text-align: right;">860</p> <p>1 communications with Ms. Steinberg. Ms. Mascherin is the only</p> <p>2 person that had those. The only other witnesses were Mr. Roper</p> <p>3 and Mr. Margolis, who were not involved in those conversations.</p> <p>4 ARBITRATOR GRISSOM: Well, there were</p> <p>5 discussions between Mr. Fokas and Mr. Margolis, and that's --</p> <p>6 that's kind of what seemed to be prompting all that followed.</p> <p>7 So let me see what time it is. We also, I think, are very near</p> <p>8 the time that our court reporter needs to leave and go take</p> <p>9 care of her grandchild. So I think what we probably should do</p> <p>10 is -- I mean, I can kind of tell you which way I'm leaning, but</p> <p>11 in fairness, I can try to find time to read the brief tonight</p> <p>12 and give you time to file something tomorrow and then we can</p> <p>13 address this then. All right? I mean, I understand that it's</p> <p>14 not great to have to write a brief overnight, but it's better</p> <p>15 than not getting to submit one now. I don't know how else to</p> <p>16 deal with this, because we need to continue on with the</p> <p>17 testimony and hopefully finish with Ms. Mascherin in the</p> <p>18 morning. Because based on several conversations we've already</p> <p>19 had, we've got a lot to do still and a lot of witnesses to</p> <p>20 cover. I want to cover all the witnesses that the parties</p> <p>21 intend to have testify.</p> <p>22 So with that, is there anything else that we</p> <p>23 need to address tonight? I think that whether we have this</p> <p>24 issue or not, I mean, we have a logistical issue that our court</p> <p>25 reporter needs to address, and we can't impose on her any more</p>
<p style="text-align: right;">859</p> <p>1 what's the amount that Parallel Networks is willing to pay,</p> <p>2 what's the amount Jenner & Block is willing to take, and it</p> <p>3 never gets done. It would be one thing if there was an</p> <p>4 amendment to a contract, then we could talk about that. But</p> <p>5 there is no amendment. It never comes to fruition.</p> <p>6 ARBITRATOR GRISSOM: Your concern is in</p> <p>7 reference to discussion of amounts that the respective parties</p> <p>8 are willing to consider one way or the other?</p> <p>9 MR. ALIBHAI: That's part of it, yeah, and the</p> <p>10 validity of the claim, whether Jenner & Block's claim is valid.</p> <p>11 But it's twofold, yes, but one major part of it is the amounts.</p> <p>12 They're going to talk about the amounts. I've seen the</p> <p>13 exhibits on their exhibit list. They're going to introduce</p> <p>14 evidence of amounts.</p> <p>15 ARBITRATOR GRISSOM: And some of the motions and</p> <p>16 briefings that we have had before, I -- I think the parties</p> <p>17 have already made me available that there were discussions</p> <p>18 that -- not made me available, but made that information</p> <p>19 available to me and made me aware of the fact that there were</p> <p>20 discussions. And we've already had testimony in the hearing</p> <p>21 about, you know, those discussions. So I'm -- I'm just trying</p> <p>22 to figure it out. It seems like we may be a little bit late in</p> <p>23 the day to all of a sudden decide we can't discuss a topic</p> <p>24 that's already been opened.</p> <p>25 MR. ALIBHAI: There was no discussion about</p>	<p style="text-align: right;">861</p> <p>1 than we already have. So with that, is there anything else</p> <p>2 that we need to address tonight and have on the radar screen</p> <p>3 for tomorrow?</p> <p>4 MR. PELZ: No, sir.</p> <p>5 ARBITRATOR GRISSOM: All right.</p> <p>6 MR. ALIBHAI: One issue that we're going to</p> <p>7 raise is that Ms. Mascherin has testified that her</p> <p>8 understanding about the meaning of the contract was in part</p> <p>9 based upon conversations that she had with Ms. Levy and</p> <p>10 Mr. Markowski, who was firm counsel. And she's also testified</p> <p>11 that these termination discussions started at the end of</p> <p>12 December and that Mr. Markowski was involved in those</p> <p>13 conversations. And there was also a question posed by Mr. Pelz</p> <p>14 about whether these discussions with firm counsel and all these</p> <p>15 other people, there was a determination made about</p> <p>16 enforceability or the timing of payment under Paragraph 9.</p> <p>17 We had specifically raised this issue and told</p> <p>18 you that they were going to do this sword and shield thing</p> <p>19 where they withheld a number of documents and claimed that they</p> <p>20 had privilege. And now she's come in and testified that a</p> <p>21 number of her things in her understanding are based upon</p> <p>22 conversations that involve firm counsel. So we're going to</p> <p>23 move to compel those communications that we had discussed</p> <p>24 earlier, based upon her testimony today, and we'll get a rough</p> <p>25 draft of the transcript tomorrow and show you three places</p>

<p style="text-align: right;">862</p> <p>1 where she testified that Mr. Markowski, firm counsel, was 2 involved in those discussions and that her understanding was 3 based upon discussions with him. 4 MR. PELZ: Let's -- Arbitrator Grissom, let's 5 make sure the record is clear here. This is all the material 6 you've already seen. He already raised this issue before. It 7 was well aware that firm counsel was at some of these meetings. 8 You've already looked at all of those materials. You spent, 9 I'm sure, a substantial amount of time. That's why your 10 recollection is exactly correct. You've seen all of these 11 documents before, and you've even seen all the stuff that was 12 redacted. That was all sent to you. You reviewed it and you 13 made your ruling. This is nothing different than what he's 14 already presented to you a long time ago, and that ruling has 15 already been made. 16 MR. ALIBHAL: A ruling was made on the motion to 17 compel documents. But this is the first time that a witness 18 has stood up and said, based upon my discussions, the 19 agreement's enforceable, the agreement has these timing 20 provisions, and this is what the agreement means. 21 ARBITRATOR GRISSOM: Well, here's -- I mean, I'm 22 glad you brought it up, but we don't have the ability to make 23 any more record tonight. 24 MR. ALIBHAL: No, I know. And I brought it up 25 because you asked if there was something on the radar, and I</p>	<p style="text-align: right;">864</p> <p>1 STATE OF TEXAS) 2 I, Andrea L. Reed, Certified Shorthand Reporter, duly 3 qualified in and for the State of Texas, do hereby certify 4 that, pursuant to the agreement hereinbefore set forth, the 5 following proceedings were had before me; that the transcript 6 has been reduced to typewriting by me or under my supervision; 7 that the record is a true record of the proceedings had before 8 me. 9 I further certify that I am neither attorney or counsel 10 for, related to, nor employed by any of the parties to the 11 action in which this arbitration is taken, and further, that I 12 am not a relative or employee of any attorney or counsel 13 employed by the parties hereto or financially interested in the 14 action. 15 SUBSCRIBED AND SWORN TO under my hand and seal of office 16 on this the 27th day of October, 2012. 17 18 19 20 21 22 23 24 25</p> <div style="text-align: center;"><p>ANDREA L. REED, CSR TEXAS CSR NO: 7773 Expiration Date 12/31/12 Esquire Deposition Solutions Firm Registration No. 286 1700 Pacific Avenue, Suite 1000 Dallas, Texas 75201 (214)257-1436</p></div>
<p style="text-align: right;">863</p> <p>1 didn't want to wait until tomorrow morning. 2 ARBITRATOR GRISSOM: I'm grateful that you did, 3 but if you-all have things you want to bring, any authorities 4 on that, we can try to take those up tomorrow. And after we 5 recess, I do want to visit with you a little bit about whether 6 we made any progress on scheduling. So don't all try to get 7 out the door at the same microsecond. 8 Okay. We are off the record and we thank you 9 for staying. 10 (End of proceedings at 6:42 p.m.) 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	