

Fortinet-1011

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE EDWARD M. CHEN, JUDGE

FORTINET, INC.,)	
)	
Plaintiff,)	
)	
VS.)	NO. C 13-5831 EMC
)	
SOPHOS INC.,)	
)	San Francisco, California
Defendant.)	Monday
)	December 15, 2014
)	9:49 a.m.

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued, next page)

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Also Present:

TODD NELSON, ESQ.

1 **MONDAY, DECEMBER 15, 2014**

9:49 A.M.

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

3 **THE CLERK:** Calling Case C13-5381, Fortinet versus
4 Sophos.

5 Counsel, please come to the podium and state your name for
6 the Record.

7 **MR. NEWKOM:** Good morning, Your Honor, may it please
8 the Court. John Newkom on behalf of Fortinet.

9 Also with me today is my colleague, Jordan Jaffe
10 (Indicating), who at the pleasure of the Court will split
11 argument with me today, and address some terms.

12 **THE COURT:** All right.

13 **MR. NEWKOM:** And also with us today is Todd Nelson,
14 the Vice-president of Legal from Fortinet.

15 **THE COURT:** Thank you.

16 **MR. NEWKOM:** Thank you.

17 **MR. CUNNINGHAM:** Good morning, Your Honor. Sean
18 Cunningham with DLA Piper for Defendant and Counterclaimant
19 Sophos.

20 And I'm going to have a couple of other -- a few other
21 people present argument to you. And, I'll allow them to
22 introduce themselves.

23 **THE COURT:** All right.

24 **MS. GRASSO:** Good morning, Your Honor. Kathryn Riley
25 Grasso.

1 **THE COURT:** Thank you, Ms. Grasso.

2 **MR. STEIN:** Good morning, Your Honor. Andrew Stein.

3 **THE COURT:** Good morning, Mr. Stein.

4 **MR. PATTERSON:** Good morning, Your Honor; Todd
5 Patterson.

6 **THE COURT:** Thank you, Mr. Patterson. All right.

7 Well, let's go through at least the order that I have them
8 in; may or may not outline with yours. I was going to start
9 with the Fortinet patents, starting with the '430.

10 Is that all right?

11 **MR. CUNNINGHAM:** Thank you, Your Honor.

12 **THE COURT:** And "worker module" is the first term.

13 **MR. CUNNINGHAM:** Your Honor, Mr. Stein will present
14 our argument on that term.

15 **THE COURT:** All right. Let me ask -- I don't know if
16 you need to start from square one. There is an assertion by
17 Fortinet that a single port could support both inbound and
18 outbound net traffic. And therefore, to try to impose a
19 limitation of two data ports, among many other arguments, is
20 off-point.

21 Is that a disputed scientific fact? I mean, can a single
22 data port support I/O traffic?

23 **MR. JAFFE:** Well, I think that's a good place to
24 start, Your Honor, in that the addition of the switch port and
25 the data ports in the context of the '430 patent, those are

1 limitations that Sophos is seeking to add into the claim. And
2 one of the problems with adding those into the claim is that
3 it's unclear exactly what those terms mean.

4 And so, Your Honor brings up the good point of: What are
5 the bounds of the data ports that Sophos was trying to import
6 into the claim?

7 And I think it's a fair question to ask, which is to say:
8 Do the data ports, are they able to be uni-directional or
9 bi-directional in the idea of Sophos? Whereas when you just
10 look at the claim, none of those terms fall into the claim.

11 So, for Fortinet's position, to answer your question
12 directly: Data ports can be bi-directional or
13 uni-directional. It depends on the data port in question.
14 But the ambiguity that bringing a term like "data port" in
15 adds to the claim is one of the reasons why we think it's
16 improper.

17 **THE COURT:** What's the basis of trying to import
18 these limitations, which I -- I don't see it in the language
19 of the -- the plain language.

20 **MR. STEIN:** I'll take you through it, Your Honor.
21 And the simple answer to that question is that it's in the
22 specification. This is how the inventors, the applicants of
23 this patent have defined the term "worker module."

24 Fortinet's proposal -- we should call it that -- starts
25 from the, I think, flawed proposition that there's a plain and

1 ordinary meaning to the term "worker module." And, there's
2 just not. "Worker module" can mean ten different things to
3 ten different people in this art; it can mean different things
4 in different arts. There's just simply no plain and ordinary
5 meaning of what a worker module is.

6 And in the absence of a plain and ordinary meaning for a
7 term, we have to look at the specification to understand what
8 the applicants intended that term to mean.

9 And when you look at the specification, you will see that
10 they talk about the worker modules having data ports, and they
11 talk about the worker module having a switch port.

12 So, the simple answer to your question, Your Honor, is
13 that the specification is where we find the requirement that
14 these worker modules have at least two data ports and a switch
15 port.

16 And to your earlier question about whether it's a disputed
17 issue of whether the ports can be uni-directional or
18 bi-directional, I think I would respond to that by saying
19 there's just no evidence for Fortinet's position that the
20 ports that are being talked about in this patent can be either
21 uni-directional, bi-directional or both.

22 There is just no evidence for the proposition that
23 Fortinet is talking about in that that --

24 **THE COURT:** Well, is that disputed, though?

25 **MR. STEIN:** I think I would dispute that there's

1 evidence of that. But I don't think it necessarily matters.

2 And this issue of -- you know, using the word "port"
3 creating an ambiguity I think is a little bit of a red
4 herring, because the parties have agreed what a port means.
5 They've agreed that it has a plain and ordinary meaning in
6 this particular art.

7 And whether you call it a data port or a switch port, I
8 think it just defines exactly what port you're talking about.
9 A data port carries data, and a switch port carries data that
10 goes to and from a switch.

11 So, Fortinet's point that it's now making that this
12 introduces ambiguity I think is a little misguided.

13 **THE COURT:** Well, I thought the argument is that this
14 is an unfair limitation because if the worker module has
15 inbound and outbound traffic and can be handled by a single
16 port, at least as understood by one practiced in the arts or
17 familiar with the arts at the time, what's the need -- why do
18 we need to have to data ports and a switch port?

19 **MR. STEIN:** Your Honor, I'd respond to that by saying
20 that I just don't think that there is any evidence in the
21 specification that these ports can be uni-directional. And,
22 I'll take you through the specification if -- direct your
23 attention to column 3 --

24 **THE COURT:** Well, but you haven't answered my
25 question: Would one practiced in the arts understand that

1 there was such thing as a bi-directional port?

2 **MR. STEIN:** I think I will respond -- I'll respond to
3 that question by saying that I don't think that there is any
4 evidence of that.

5 **THE COURT:** Yeah, I know; you said that. You didn't
6 answer my question.

7 **MR. STEIN:** Um --

8 **THE COURT:** Is there any dispute scientifically about
9 that? Was it known in this field that you could have a
10 bi-directional data port?

11 You can admit that, yes or no.

12 **MR. STEIN:** No, I -- well --

13 **THE COURT:** Not the question of whether there was
14 evidence. I understand they haven't introduced evidence of
15 that. I'm just asking you a question. Forget the evidence.
16 I just want to know the answer.

17 **MR. STEIN:** Sure. At this time, when this patent was
18 filed, I don't know whether there were bi-directional ports.

19 **THE COURT:** When was this filed?

20 **MR. JAFFE:** 2005, Your Honor.

21 **THE COURT:** Filed in 2005, issued in 2008. So there
22 was some prosecution that probably went on, I assume, during
23 the interim. But, 2005, was there such thing as a
24 bi-directional data port?

25 **MR. STEIN:** I don't know, Your Honor.

1 **THE COURT:** Do you think there's a dispute in the
2 field, the knowledge of the field at the time?

3 **MR. JAFFE:** Fortinet would submit there was not --
4 there should not be a dispute that there were bi-directional
5 ports at that time.

6 **THE COURT:** Show me where the specifications -- and
7 not just specifications -- why the specifications would be
8 deemed exclusive and should be imported into a limitation,
9 which is generally not the case, of course.

10 **MR. STEIN:** That's correct, Your Honor. And --

11 **THE COURT:** Show me the passage in the specification
12 and tell me why that this is an exception to the general rule.

13 **MR. STEIN:** Sure. Starting with the proposition that
14 there is no plain and ordinary meaning for the term "worker
15 module," we have to look at the specification to understand
16 what that term means in this patent.

17 So, I direct your attention to column 3, lines 22 through
18 39. And here, in this column, we have the applicants talking
19 about what a worker module is. And, we have the patent
20 applicants talking about options for certain configurations,
21 whether it's an optional configuration for an I/O module, or
22 an optional configuration for a worker module.

23 The first example of this is at lines 36 through 39, where
24 the applicants say although three worker modules are shown, in
25 other embodiments the system -- and I'm paraphrasing a little

1 bit -- the system can have less than three worker modules,
2 e.g. one or two, or more than three worker modules.

3 So, this is an example of how the applicants have
4 disclosed other configurations for the number of worker
5 modules.

6 Then if we go next to line 43 through 45 of column 3, the
7 applicants say worker modules include first data ports and
8 second data ports. So the applicants here are talking about
9 the configuration where a worker module has two data ports.

10 The next thing, line 51 through 53, the applicants are
11 talking about in other embodiments, I/O module can have more
12 than one I/O port; an I/O -- the other I/O module can have
13 more than one I/O port.

14 So, here, the applicants are talking about configurations
15 for I/O module having more than one port. And they've also
16 disclosed that the I/O module can have one port.

17 Then, at line 53 through 56, the applicants say --

18 **THE COURT:** That's about I/O module.

19 **MR. STEIN:** That's correct, Your Honor. And I'm
20 building up to one particular point that I think will kind of
21 put this to a close.

22 53 through 56, again, we're talking about the I/O module.
23 And it says the I/O module can have more or less than three
24 distribution ports.

25 So, the applicants have said: Okay, we've got this I/O

1 module; it can have more or less than three distribution
2 ports.

3 So, the point I'm trying to make is when we go through
4 line 56 through 58, we go back now to worker modules.

5 And it says (As read):

6 "In further embodiments, worker modules 106 can each
7 have more than two data ports."

8 So when you read all that in context, the applicants
9 clearly knew that when they wanted to disclose a worker module
10 or an I/O module with one, two, three, four, or more ports,
11 they explicitly said that.

12 So, they said that an I/O module can have one, two, three
13 or more ports. But they said for the worker module, they say
14 right here (As read):

15 "In further embodiments, worker modules 106 can have
16 more than two data ports."

17 But they never disclose a worker module with a single data
18 port. And so, they knew how to do it, and they just showed
19 you in that entire column that they knew how to claim a module
20 in this patent with one, two, three or four or more ports, but
21 yet, with respect to "worker module," they say: Well, we
22 never say anything about a worker module having one port. All
23 we say is that it can have two or more.

24 And that's on Line 56 through 58.

25 So that, Your Honor, is why I submit to you that a worker

1 module in the context of this patent has to have at least two
2 data ports.

3 **MR. JAFFE:** Your Honor, if I may respond briefly?

4 **THE COURT:** Yeah.

5 **MR. JAFFE:** So, a couple of points that Counsel
6 raised that I want to respond to briefly.

7 Number one is: You asked the question: Why should this
8 limitation be imported. And, the question is: Why should the
9 plain and ordinary meaning be deviated from? And the answer
10 is: It shouldn't be.

11 And, Counsel went through and he gave you a number of
12 cites from the specification, but I submit to you that all of
13 those are discussing an embodiment in a specification.
14 Nowhere do you see that magic language: In the present
15 invention. And specifically, he even read out language that
16 said in one embodiment a worker module has more than two data
17 ports.

18 So, what does that tell a person of ordinary skill in the
19 art? That doesn't tell a person of ordinary skill in the art
20 that worker modules --

21 (Reporter interruption)

22 **MR. JAFFE:** Sorry -- necessarily have more than two
23 data ports. Instead, that's describing a single embodiment.

24 And another thing I would submit on top of that, which is:
25 When the specification is discussing the worker modules in the

1 citations that Counsel provided to you, what he left out is it
2 says "worker modules 106A through C."

3 And, what does that indicate? That's talking about the
4 preferred embodiment described in the specification. It is
5 not describing all worker modules, ever.

6 The '430 patent describes a flexible architecture for
7 using worker modules.

8 (Document displayed)

9 **MR. JAFFE:** I'll fast-forward through some slides
10 here.

11 (Document displayed)

12 **MR. JAFFE:** It talks about having one worker module,
13 two worker modules, three worker modules.

14 (Document displayed)

15 **MR. JAFFE:** And it additionally talks about worker
16 modules that do any number of things. And there's two things
17 to know here. One that --

18 (Reporter interruption)

19 **MR. JAFFE:** I apologize.

20 One, that it describes a flexible architecture. And
21 number two, these are all other features of the preferred
22 embodiment that Sophos' proposed construction does not
23 consider at all.

24 So, are worker modules something that merely have a couple
25 of data ports and a switch port? Is that what this patent

1 talks about as worker modules? No. It uses the term in a
2 flexible manner to do many things.

3 There's no need to cherry-pick these two specific
4 limitations that Sophos proposes, and add those into the
5 claim.

6 **MR. STEINBERG:** Your Honor, I'll just respond to that
7 very briefly by saying Fortinet's proposal is simply: I'll
8 just tell you later. I'll just tell you what the term means
9 later.

10 That's what plain and ordinary meaning is, in the context
11 of Fortinet's argument here. There is no plain and ordinary
12 meaning of the term "worker module."

13 You know, preparing for this argument, I went in and I
14 looked at patents that were filed before the '430 patent, to
15 see if I could find any patent that used the word -- the term
16 "worker module." I didn't find any patent in this -- in the
17 classification that the '430 is filed in, I didn't find one
18 patent that uses the term "worker module."

19 Just to verify that my search was correct, I expanded that
20 search to include the date that the Fortinet patent was filed.
21 And I got one result. And it was the '430 patent.

22 So, they don't cite -- Fortinet doesn't cite any expert
23 testimony, doesn't cite any treatise, doesn't cite any
24 technical dictionary, doesn't cite any evidence for the
25 proposition that this term "worker module" has a plain and

1 ordinary meaning.

2 **THE COURT:** Let's say I accept your proposition that
3 it's not plain on its face. How does this enlighten what a
4 worker module does? You describe some characteristics that
5 you want to import in limitations. But, you provided nothing
6 in terms of telling me what it does. Does it process network
7 traffic? Does it do other functions? Is it limited?

8 So, your proposal is not very helpful. If you're
9 complaining about the vagueness of this term, you haven't done
10 anything other than adding some limitations. It still doesn't
11 tell me what a worker module is.

12 **MR. STEIN:** Your Honor, what we've attempted to do is
13 to give structure to the term "worker module" to allow the
14 jury to say: What is -- am I going to find a worker module
15 here?

16 Because I will grant -- this patent, while, granted, it's
17 very open-ended in terms of what the worker module does, the
18 claims talk about all that the worker module has to do is
19 process data. It's very open-ended from a claim perspective.
20 And the specification, again, uses very open-ended things to
21 talk about the function of what a worker module does.

22 But what we're trying to do here is define what a worker
23 module is in terms of structure, rather than in terms of
24 function. And, that -- that's why we've looked at the
25 specification, and we've looked at how the specification

1 describes what the structure of a worker module is.

2 And, and, looking at the specification, we come to the
3 conclusion that it's a module that has the two data ports, at
4 least the two data ports, and the switch port.

5 **MR. JAFFE:** Your Honor, if I may respond briefly?

6 **THE COURT:** Yeah.

7 **MR. JAFFE:** Counsel mentioned a few times that the
8 term doesn't have a plain and ordinary meaning. We would
9 submit that the plain and ordinary meaning of the term is
10 clear, by looking at the claim language.

11 Here on the easel, you can see that it says that the
12 worker module is for processing the network data traffic --
13 excuse me -- the network traffic data. That's what the worker
14 module does. And this is clear from the language, itself.

15 Now, what you're not going to find here is any discussion
16 of ports, whether they be data ports or switch ports.

17 **THE COURT:** Do worker modules do anything other than
18 processing network traffic data?

19 **MR. JAFFE:** They can. As I mentioned before, it's --
20 the patent describes them in broad fashion. It even says they
21 can do any sort of -- going back to some of the discussions
22 that Dr. Nielson had at the technology tutorial, they can do
23 any sort of policy enforcement which can include virus
24 checking, firewall. And then the patent describes that they
25 can do other functionalities.

1 Now, what's important to note here is that the claim
2 language, itself, is actually not focused on the internals of
3 the worker modules. What it's focused on is how you assign
4 packets -- data -- to the individual worker modules. That's
5 what this claim is talking about, at a very high level.

6 So the idea within the claim is you parse the network
7 traffic, and you figure out how you're going to assign the
8 different network traffic to the different worker modules.

9 Now, calling back to what we were talking about before in
10 the technology tutorial, what the '430 patent was, the problem
11 it was trying to solve was the overhead in assigning network
12 traffic within a gateway. That's what this patent is about.

13 And, Sophos's proposed construction in importing these
14 two, you know, we would submit random limitations out of the
15 specification is unsupported.

16 **THE COURT:** All right. Well, let me just ask you:
17 Other than the specifications that you've cited, is there
18 anything that suggests that this -- these specs, these
19 specifications don't fall into the normal rule that using the
20 preferred embodiment in the specification or illustrated
21 embodiment does not import the limitation into the claim?

22 **MR. STEIN:** Your Honor, the reason that we're not
23 importing limitations is because that's how the inventors have
24 defined this term "worker module" in the specification.

25 The law, *Phillips*, et cetera, talk about: In the absence

1 of a plain and ordinary meaning, you have to look and see how
2 the inventors have used the term in the specification. And,
3 and *Phillips* has a cite where, you know, if the inventors use
4 the term consistently, it can be defined by implication.
5 That's what we have here. We have --

6 **THE COURT:** Why wouldn't that be true in every case?
7 Where you have some ambiguity that's not clearly defined by
8 the language of the claims, you look to the specification, you
9 see a typical embodiment; you might see two or three
10 embodiments.

11 Suddenly that becomes -- I thought the rule is unless it
12 is claimed to be the exclusive means, or something -- I don't
13 see that here. It says "in an embodiment." "In an
14 illustrated embodiment." "In a preferred embodiment." "In
15 some embodiment."

16 **MR. STEIN:** I think --

17 **THE COURT:** It also says worker modules can have more
18 than two data ports. I guess the implication is that, well,
19 that assumes you have two or more. But it doesn't say that.

20 **MR. STEIN:** Your Honor --

21 **THE COURT:** That's pretty tough language. You have a
22 pretty aggressive position, to say that suddenly now, without
23 -- simply by citing to an embodiment, an illustrated
24 embodiment, quote-unquote, from column 3, and where it --
25 wherein it says "worker modules can have more than two," which

1 does not literally preclude can't have only one, you want to
2 import that.

3 You do want to import that, because it's not in the plain
4 language. You want me to construe the language of the claim
5 to include this limitation. You are importing, at least in
6 the way I use that term.

7 **MR. STEIN:** I think, in the absence of a plain
8 meaning, we have to look at the specification to see --

9 **THE COURT:** Yes.

10 **MR. STEIN:** -- what the inventors have defined the
11 term to be. And in that case -- there are plenty of cases
12 that say that the patentee can be his own lexicographer. And
13 in those situations, there's no dispute that we're looking to
14 the specification to see how the inventors define the term.

15 So in those situations, the cases aren't worried about
16 importing limitations from the specification or not. They
17 look to the specification; they say: How has the inventor
18 defined the term? They say: Here's how the inventor's
19 defined the term, and here's what the term means.

20 I submit to you, Your Honor, that's what's going on here.
21 The term "worker module" has no meaning outside the context of
22 this patent. We have to look at the specification to
23 understand what it is. And, and, that's exactly how the
24 inventors have described it here in the patent.

25 So, I -- I -- defining -- the inventors are the ones that

1 have defined this term to include these requirements, include
2 the requirements of at least two data ports and a switch port.
3 And I submit to you that we're not importing limitation beyond
4 what the inventors have already imported, themselves.

5 **THE COURT:** All right. Let's go the next one. Let's
6 go to the '125, "flow-based packet classification."

7 **MR. JAFFE:** I have some slides to walk us through
8 this one.

9 **THE COURT:** Obviously I want you to focus on the
10 amendment which has this language that describes two forms of
11 packet classification. One, flow-based, quote-unquote, using
12 various fields of the LQ header along with fields in the L3-L4
13 layers. And then two, an unnamed type that uses the upper
14 bits of the IP address or MPLS label to index a table of flow
15 indices.

16 **MR. JAFFE:** Absolutely. And I think that's -- if
17 you'll permit me, I'll get there in about a minute or two.

18 **THE COURT:** Okay.

19 **MR. JAFFE:** But what I want to do is kind of frame
20 the dispute for Your Honor, which is actually fairly narrow.
21 And what you do when you look at the parties' competing
22 proposed constructions, which I have here on Slide 13.

23 (Document displayed)

24 **MR. JAFFE:** You can see our construction, Fortinet's
25 construction is plain and ordinary meaning. And what you see

1 when you start comparing the two constructions is that
2 Sophos's proposed construction includes a lot of the words in
3 the claim already. So, you can see that it includes packet
4 classification. It says "classifying a packet." And in fact,
5 it also says "based."

6 So, what is the dispute really, here, actually? It's
7 really over the word "flow." They're taking the word "flow"
8 and saying that it means fields of an LQ header and of the
9 L3/L4 headers.

10 **THE COURT:** Well, it's flow-based because in the
11 patent prosecution, the applicant used the term -- and I think
12 it's significant -- quote, "flow-based," unquote.

13 **MR. JAFFE:** So I'll jump to there.

14 **THE COURT:** Not just "flow." Let's be --

15 **MR. NEWKOM:** I agree.

16 **THE COURT:** -- straight up on this.

17 **MR. JAFFE:** Although -- I agree, except just to note
18 that their construction includes the word "based" as well.
19 So, they're not -- the word "based" doesn't have a special
20 meaning.

21 **THE COURT:** But the key there is that they want to
22 import or read into it this limitation of the headers. Which
23 fields are used.

24 **MR. JAFFE:** That's right. And, there's two problems
25 with trying to do that. And I'll jump through the explanation

1 of what a flow is.

2 (Document displayed)

3 **THE COURT:** Okay.

4 **MR. JAFFE:** Number one is (As read):

5 "To act as its own lexicographer..."

6 And this is *Thorner versus Sony*, a 2012 Federal Circuit
7 case.

8 "...a patentee 'must clearly set forth a definition
9 of disputed claim term' other than its..."

10 (Reporter interruption)

11 **MR. JAFFE:** (As read)

12 "...other than its plain and ordinary meaning. It's
13 not enough for a patentee to simply disclose a single
14 embodiment or use a word in the same manner in all
15 embodiments, the patentee must 'clearly express an
16 intent' to redefine the term."

17 So that's what we need to look at when we look at the
18 specification amendment. And turning to the specification
19 amendment, which is column 15, lines 15 through 27 --

20 (Document displayed)

21 **MR. JAFFE:** -- what we see here is not a clear
22 intent, a clear expressed intent to narrow the term. We don't
23 see a clear intent to define the term.

24 What we see here is that same language that we talked
25 about in the context of the '430 patent, which was "According

1 to one embodiment..."

2 Now, it does say "One is flow-based," as Your Honor
3 pointed out. And then it does use some of the language that
4 is in Sophos' construction.

5 (Document displayed)

6 **THE COURT:** So the key is the predicate phrase
7 "According to one embodiment..." In one embodiment, the
8 quote, "flow-based" uses the LQ header along with L3/L4. Then
9 you have the other form. But that's just one embodiment.

10 (Document displayed)

11 **MR. JAFFE:** That's right. But there's also one other
12 more procedural point, which was if you'll recall from the
13 parties' briefing, the examiner in prosecuting the '125 patent
14 rejected the term "flow-based packet classification," based on
15 a 112 rejection.

16 **THE COURT:** Yeah.

17 **MR. JAFFE:** And in response, they added figure 12 and
18 its description, which includes the text that we found here.

19 Now, there's two points I want to make about this. Number
20 one is -- and I've depicted this here on Slide 29 -- in
21 responding to this 112 rejection, the applicant stated that
22 the limitation is supported by the original application. And
23 they cited over five different places in the specification.
24 Not just what we talked about in figure 12, and the part --
25 and associated description that Sophos focused on. And

1 there's actually a page that goes beyond what's on this page.
2 Just didn't fit on one slide.

3 But, this shows that the patentees were not trying to
4 narrow flow-based or packet -- or flow-based packet
5 classification to the one embodiment disclosed in figure 12.
6 It was their contention before the patent office that there
7 was a wide broad disclosure of flow-based packet
8 classification. And they cited many of these things.

9 **THE COURT:** These pages come from the application?

10 **MR. JAFFE:** That's right.

11 **THE COURT:** From the original application.

12 **MR. JAFFE:** That's right.

13 **THE COURT:** Which the examiner found was not
14 sufficient.

15 **MR. JAFFE:** Under 112. But what we would submit is
16 that in responding, there was no new matter added. There was
17 never a rejection for new matter. And that this, this idea,
18 the concept of flow-based packet classification was disclosed
19 in the original application.

20 **THE COURT:** Well, but sequentially. And then the
21 examiner said no, and then the applicant said: Okay, how's
22 this?

23 **MR. JAFFE:** That's true.

24 **THE COURT:** That's a typical narrowing scenario that
25 implicates estoppel, prosecutorial estoppel. I --

1 **MR. JAFFE:** So that brings me to the second point,
2 which is the -- in adding figure 12, the entire -- and I'll
3 bring up, just so we have it up here, the portion.

4 (Document displayed)

5 **MR. JAFFE:** This is Slide 27. So, this entire -- and
6 beyond this entire paragraph was actually added to the
7 specification.

8 Now, if the applicants were trying to remedy a deficit in
9 112 description for flow-based patent (sic) classification,
10 why would they add things that were not flow-based?

11 The logical conclusion is that everything in figure 12 and
12 its description is describing things as flow-based, and trying
13 to claim that. Because otherwise, why would they include
14 other types of packet classification using flow?

15 **THE COURT:** So you're saying that in figure 12,
16 what's been designated as the box 1230, where it says
17 (As read) "perform flow-based packet classification on the
18 packet and evaluate forwarding state information associated
19 with the previously-stored flow learning results based on
20 previously received packet of the packet flow," that when the
21 term there is "perform flow-based packet classification," it's
22 not necessarily tied or constricted by column 15, lines 18
23 through 23, which talks about flow-based -- calling flow base,
24 using the LQ and the L3/L4?

25 **MR. JAFFE:** That's right, Your Honor. If you look at

1 that paragraph that starts at column 15, line 15, it says, it
2 says (As read):

3 "At block 1230, flow-based packet classification is
4 performed..."

5 And then the remainder of the paragraph is describing
6 flow-based packet classification.

7 **THE COURT:** And then it goes on, but it says the
8 critical package that's been discussed is predicated on
9 according to one embodiment.

10 **MR. JAFFE:** That's right.

11 **THE COURT:** So that means that that paragraph, which
12 is tied to block 1230, is not necessarily wedded to that one
13 embodiment.

14 **MR. JAFFE:** That's correct, Your Honor. Again, we're
15 in an instance where we don't have the patentee expressing a
16 clear intent to limit the scope of his or her claim. What we
17 have is a description of an embodiment that does not describe
18 -- use those magic words "the present invention" or, you know,
19 distinguishes over the prior art. Again, we have a
20 description of the prior embodiment.

21 **THE COURT:** And figure 12, itself, is not very --
22 it's not specific, it's not very indicative of what flow-based
23 packet classification must be.

24 **MR. JAFFE:** That's right. And to go back on an
25 earlier point, the rest of the claim language describes using

1 flow and classifying packets at a broad level throughout the
2 claim. So while this one term just does say "flow-based
3 packet classification," you can see that the claim language
4 here on the board talks about establishing a flow cache,
5 you're going to be receiving a packet and having virtual
6 router flows (Indicating).

7 The claim as a whole is talking about how to classify
8 packets, and how to deal with packets, in terms of their flow.
9 This wasn't a narrow limitation that was added to the claim.
10 This was a flexible limitation that was added according to its
11 plain and ordinary meaning.

12 **THE COURT:** And, what about this argument that
13 there's an embodiment that uses layer 2?

14 **MR. JAFFE:** That's another example. That's from
15 earlier in the specification. And it describes -- I think I
16 have it right --

17 (Document displayed)

18 **THE COURT:** Column 11?

19 **MR. JAFFE:** Column 11, lines 25 through 28. This is
20 another embodiment that describes a different way of looking
21 at flow other than the very narrow way described in the one
22 embodiment in figure 12.

23 So, again, consistent with what Your Honor was just
24 saying, we have description of different embodiments,
25 describing looking at different layers in order to do packet

1 classification. There's no clear intent expressed by the
2 applicants or the patentees in this instance to limit the term
3 in the way suggested by Sophos.

4 **THE COURT:** What is described in this column 11, a
5 flow-based packet classification? Or, what is it describing?

6 **MR. JAFFE:** At a broad level, it is flow-based packet
7 classification. You are looking at the flow, which is, as we
8 talked -- as Dr. Nielsen talked about, header characteristics.
9 And you're determining how to then route or classify the
10 packets, based on that.

11 And in this instance, it's talking about using what's
12 called a "flow index" in order to do that.

13 **THE COURT:** And, your position is that the LQ header
14 is different, is layer 1, not layers 2 through 4?

15 **MR. JAFFE:** That's right. And it's expressly defined
16 in a patent that's incorporated by reference into the '125
17 patent. It's the '311 patent. It's incorporated by reference
18 in the specification at column 1, lines 24 through 30.

19 And in the '311 patent, it describes LQ as L1, which is
20 where our --

21 **THE COURT:** Which column, again?

22 **MR. JAFFE:** Of the '125 patent? It's column 1, lines
23 24 through 30. There's a large list of related applications
24 that are incorporated by reference.

25 **THE COURT:** I'm seeing reference to the '079.

1 **MR. JAFFE:** That's right. It issued as the '311
2 patent. Excuse me.

3 **THE COURT:** Oh. And within that, there's -- LQ is
4 described?

5 **MR. JAFFE:** That's right. If you look at -- it's --
6 that patent is Exhibit C to our opening claim construction
7 brief.

8 **THE COURT:** Okay.

9 **MR. JAFFE:** And at column 5, Line 67 that's where it
10 describes LQ as referring to layer 1 or L1 of the OSI model
11 that Dr. Nielson described before.

12 **THE COURT:** Let me hear your response.

13 **MR. PATTERSON:** Thank you, Your Honor. Todd
14 Patterson, for Sophos. And, I don't mean any disrespect by
15 unbuttoning my coat, but this -- put on a few pounds since I
16 got this done, so --

17 **THE COURT:** It's the holiday season.

18 **MR. PATTERSON:** Thank you.

19 Your Honor, the case really boils -- this determination
20 boils down to one thing: Are we excluding a preferred
21 embodiment? Or, did they not claim a preferred embodiment?

22 And as hopefully I'll highlight here, what they have
23 actually claimed is less than maybe what they disclosed. And
24 that's the point of "flow-based packet classification," as
25 opposed to if they would have claimed "packet classification."

1 And if you give me just a minute, I'll highlight the
2 point, using some of the same language that was just described
3 by Counsel.

4 If I can have my slides, and have control?

5 (Document displayed)

6 **MR. PATTERSON:** There we go.

7 (Document displayed)

8 **MR. PATTERSON:** Your Honor, what's actually claimed
9 in the patent -- and let me jump actually --

10 (Document displayed)

11 **MR. PATTERSON:** -- ahead to the timeline. Because
12 this puts it a little bit in perspective. So when I go back
13 to discuss the claim language, it'll make more sense. And
14 Your Honor, there's two copies of that timeline in your -- in
15 your briefing packet.

16 **THE COURT:** Am I looking at the PowerPoint? Or the
17 binder? What am I looking at here?

18 **MR. PATTERSON:** I'm sorry, sir; the binder that has
19 the -- and it's Slide 69.

20 **THE COURT:** Okay.

21 **MR. PATTERSON:** And at Slide 69, Your Honor, if
22 you're interested you can just tear that right out of the
23 packet because I'll be referring to it. And there's another
24 copy of it already in the packet.

25 **THE COURT:** Okay.

1 **MR. PATTERSON:** This timeline, Your Honor, highlights
2 really what happened in this case. They filed the patent in
3 2002, of course. The patent office rejected their first set
4 of claims in May of 2006. In the interim, the patent was
5 acquired by Fortinet -- or the patent application was acquired
6 by Fortinet from Cosine Communications.

7 Later on, the patent -- they put a reply into that office
8 action that had rejected those claims. As I'll show you in a
9 minute, it's at that point in September of 2006 that they add
10 the "flow-based packet classification" claim limitation.

11 In December of 2006, three months later, the patent office
12 issued a final office action, and rejected it for -- one of
13 the reasons they rejected it for was the lack of support for
14 flow-based packet classifications. As the Court has already
15 highlighted a moment ago in its questioning.

16 The amendment that was made in March of 2007, three months
17 later, then added figure 12, and all the discussion specific
18 to flow-based packet classification that we'll be discussing
19 in greater detail in just a moment.

20 But the important point I would like to bring out is, as
21 Counsel pointed out, they did say there was other examples of
22 packet classification in their response. But if you look at
23 the entirety of the patent specification, those other five
24 cites that he referenced, none of them say "flow-based packet
25 classification," as they then went and added in their

1 March 2007 amendment.

2 Now, had patentee believed that there was sufficient
3 support for "flow-based packet classification" as opposed to
4 just "packet classification," they would have, in their -- in
5 typical patentee practice, they would have responded to the
6 reject- -- to the office action, and simply stated: Here's
7 the support in these five places. And they would not have
8 amended the specification to add 31 lines to the specification
9 to explain what flow-based packet classification is, as
10 opposed to just packet classification.

11 So what we are really talking about is what the patentees
12 were claiming in their amended claim is not packet
13 classification in general, as may have been discussed or
14 described in other sections of the specification. They were
15 only claiming flow-based packet classification. And that is
16 what we will look at in a moment with respect to the claims.

17 Now, I do want to highlight two other points before I go
18 further, that were not probably brought out very well in our
19 briefing. The case law cited in -- in Fortinet's reply brief
20 specifically talks about the fact that if the patentee refers
21 to -- starts defining terms in terms of prior art, that is
22 usually a good indication of definitional.

23 Now, an examination of the file history shows that the
24 patentees came up with their definition of flow-based packet
25 specification -- or classification, flow-based packet

1 classification specifically from a document authored by the
2 inventors about six or seven months before they filed their
3 patent application. And they lifted it verbatim from there.
4 And that's -- that's called out in the file history in our
5 attachment -- I believe it's attachments 5 and 6 to our brief,
6 Your Honor.

7 **THE COURT:** Attachments 5 and 6?

8 **MR. PATTERSON:** I believe so, Your Honor. And if
9 not, I'll get the exact page in the file history for you
10 momentarily.

11 But in the file history, they actually reference that
12 document, and they put that document as part of what they're
13 talking about. So now, we have an example of the patentee,
14 himself, referred to "flow-based packet classification" in a
15 prior published document.

16 Secondly, Your Honor --

17 **THE COURT:** What does that prior published document
18 say?

19 **MR. PATTERSON:** It actually uses these words
20 verbatim, Your Honor, that they've added into the
21 specification.

22 **THE COURT:** Oh, that flow-based packet classification
23 is -- uses various fields of the LQ header along with fields
24 in the L3/L4?

25 **MR. PATTERSON:** Yes, Your Honor. And I will endeavor

1 to find that in the file history for you.

2 **THE COURT:** Yeah, I'd like to see that.

3 **MR. PATTERSON:** Yes, Your Honor. The second point
4 I'd like to bring out, Your Honor, is that as the patentees
5 later prosecuted this patent, later on in August of 2007 --
6 referring back to the timeline -- they added two new claims.

7 Now, they did not at that point go back and amend and take
8 out "flow-based packet classification" from the claims. They
9 just added two new claims, and continued to build on it. But
10 what they said in that amendment was that they would continue
11 to add more claims later on. Or, continuation patents. And
12 indeed, they have.

13 And I would submit, Your Honor, that in their continuing
14 patent -- continuation patents that they have generated, one
15 of them in particular, U.S. Patent No. 8,542,595, right in
16 claim 1, actually claims packet classification. Not
17 "flow-based packet classification," but actually just claims
18 "packet classification."

19 So clearly, patentee understood how to claim more broadly,
20 versus -- the language that they've added actually narrows the
21 -- narrows to what they claim, to flow-based packet
22 classification, not packet classification.

23 **MR. JAFFE:** One brief point in response, Your Honor.

24 Counsel noted that he didn't think that he brought these
25 points out well in his briefing. I would submit that I

1 haven't heard these arguments before. And they weren't in
2 their briefing, and we weren't given an opportunity to respond
3 to them.

4 **THE COURT:** Why weren't they in the briefing?
5 Because I read the briefing, and it's not in there.

6 **MR. PATTERSON:** Your Honor, it did not make the cut
7 in the briefing, and it should have. And I --

8 **THE COURT:** Well --

9 **MR. PATTERSON:** -- figured I would bring it out now.

10 **THE COURT:** Well, there's a waiver potential here
11 because, you know, we have a briefing schedule, and I've got
12 to go with the briefing.

13 **MR. PATTERSON:** I understand, Your Honor.

14 **MR. JAFFE:** And we haven't had an opportunity to
15 consider these arguments. I just submit there's -- to the
16 extent Your Honor wants to consider any of these new
17 arguments, we want the opportunity to take a look at them, and
18 respond.

19 **THE COURT:** All right. Well, continue.

20 **MR. PATTERSON:** Thank Your Honor.

21 (Document displayed)

22 **MR. PATTERSON:** Going back to the specification,
23 Your Honor, the part of the specification that they added that
24 described all of -- the figure 12 that described the one
25 embodiment specifically makes a distinction between -- it says

1 there are two types of packet classification. There's
2 flow-based, and another unnamed type.

3 And the reason, I submit, that they did not explain or
4 claim a second form is they only intended to claim flow-based
5 packet classification in the claims as they amended them,
6 because that's what the words say.

7 And, an examination of the actual fourth claim limitation
8 as shown on the '125 patent over here on the board shows that
9 it deals with, in the fourth limitation, flow-based packet
10 classification.

11 (Document displayed)

12 **MR. PATTERSON:** And the description in the
13 specification says one of those two types is flow-based. And
14 it then explains that flow-based packet classification are
15 examining the various fields of the LQ header along with
16 fields in the L3 and L4 header to identify a particular
17 micro-flow.

18 It does not go on to explain -- it makes a distinction
19 between the other form of packet classification. And again, I
20 submit: Had the fourth claim limitation simply said "packet
21 classification," we would not be in this discussion. They
22 have acted as their own lexicographer, and then only claimed
23 "flow-based packet classification."

24 So there's -- essentially, they've limited what they were
25 trying to claim, as opposed to trying to claim every possible

1 embodiment. Which they could have done, but they did not do.

2 (Document displayed)

3 **THE COURT:** Let me ask just from a --

4 (Document displayed)

5 **THE COURT:** Just from a layperson's point of view,
6 why wouldn't it be flow-based packet classification, if you
7 also employed fields in L2?

8 **MR. PATTERSON:** Your Honor, it could, in the sense of
9 if they had not defined -- actually provided a definition for
10 flow-based packet classification, then I would submit that
11 maybe there's a plain and ordinary meaning that you could
12 conclude includes the layer 2. But, they have provided their
13 own definition.

14 And as the case law they cite -- they cite repeated says,
15 when the inventor acts as his own lexicographer, he takes away
16 his plain-and-ordinary-meaning argument and acts -- and
17 actually defines what he's talking about.

18 And, it fits right in line with what the examiner said.
19 The examiner said there's no support.

20 They could have said -- if they believed that they had
21 sufficient support for flow-based packet classification, they
22 could have said back to the patent office: We think there's
23 support in the specification; look at these five locations,
24 including the layer 2 site in column 11. And not amended
25 their specification.

1 But they didn't even bother to try that. They just simply
2 amended the specification, and provided a specific definition
3 for "flow-based packet classification," that they now want to
4 tell you was really describing all packet classification.

5 But to show that it's really not describing what they had
6 earlier said in the patent relating to layer 2, layer 3 and
7 layer 4 in column 11 of the patent, they now introduce an
8 embodiment that's specific to layer 1, 3 and 4, not layer 2,
9 3, and 4.

10 So, had they intended to have flow-based packet
11 classification include layer 2, they could have added that in
12 their definition. But they didn't. They took a specific
13 definition that their inventor had already stated, and put it
14 directly into the -- amended the specification, and put it in
15 there.

16 **MR. JAFFE:** May I respond, Your Honor?

17 **THE COURT:** Yeah.

18 **MR. JAFFE:** So, a couple of points I want to drill
19 down on. Number one is -- and counsel can correct me if I'm
20 wrong. It sounded like he agreed at one point that there
21 could be a plain and ordinary meaning of "flow-based packet
22 classification." So I think the parties are in agreement on
23 that point.

24 And, which brings me to my next point which is what's --
25 the issue here, as Sophos has posed it, is: Have the

1 patentees acted as their own lexicographer?

2 And the legal standard that we're faced with here is: Do
3 we have a clear intent to define the term different or apart
4 from its plain and ordinary meaning?

5 And if you look at the language that we've been focusing
6 on the entire time, Fortinet submits you do not see that clear
7 intent to define the term differently. What you see is the
8 same sort of description that we've seen in other parts of the
9 patent, you see in one embodiment. You see using these
10 headers.

11 It doesn't say that flow-based is. It doesn't say that in
12 the present invention, flow-based is. It says, in one
13 embodiment, there's this; it uses the following headers.

14 (Document displayed)

15 **MR. JAFFE:** Now, does that rise to a level of a clear
16 intent to redefine the term? In light of the entire intrinsic
17 record, we would submit: No.

18 The word "flow" is used in its plain and ordinary meaning.
19 Sophos doesn't contest that the word "flow" appears at least
20 nine other times in the claim. And in those nine other times,
21 it's not limited to those specific headers. It's only in this
22 one specific instance that Sophos is arguing that "flow" has
23 some different meaning.

24 **MR. PATTERSON:** Your Honor, if I may respond?

25 **THE COURT:** Yeah. I guess maybe what I should

1 understand: Is your argument the lexicographer argument? Or
2 is it an estoppel argument?

3 **MR. PATTERSON:** I'm sorry; you're talking to me,
4 Your Honor?

5 **THE COURT:** Yeah.

6 **MR. PATTERSON:** I'm sorry. Yes, Your Honor; it's
7 essentially both. One, they've acted as lexicographer by
8 defining that there's -- they say that there's two forms of
9 packet classification. One is flow-based, and the other --
10 and they provide a specific definition for what they mean by
11 "flow-based." And then, there's another form that in this
12 case relates to other parts of that IP address. Other parts
13 of the OSI --

14 **THE COURT:** All right, but do you take issue with the
15 standard that there has to be a clearly-expressed intent to
16 define or to redefine an otherwise term that maybe, doesn't
17 necessarily need definition?

18 **MR. PATTERSON:** Your Honor, I would say -- I'm not
19 sure if I'm understanding your question correctly. Because,
20 they have defined it expressly by saying there's two kinds.

21 **THE COURT:** They clearly expressed intent.

22 **MR. PATTERSON:** Yes, Your Honor.

23 **THE COURT:** It's not just more likely than not. I
24 mean, it's got to be clear.

25 **MR. PATTERSON:** Yes, Your Honor. And I would say

1 they have met the clearly expressed intent. And if you look
2 at the case law that they cite, for example, *TexEx* (Phonetic)
3 and *Home Diagnostics* and *Lynix Technology* (Phonetic), all
4 those cases stand for the proposition that there was actually
5 some disavowal of claim scope by the inventor because they did
6 provide some specific declaration that is akin to this in the
7 sense that they have defined what the term meant.

8 And in those, they did not -- in those cases as discussed
9 by those courts, they didn't say -- the patentee was not
10 saying expressly: This is the present invention. They
11 explained what the definition is that they were providing.

12 And in this case, we have the same type of thing, where it
13 says a flow-based uses various fields of the LQ and L3 and L4
14 header.

15 Now, with regard to the idea that there may be a plain and
16 ordinary meaning to flow-based, to classifying a flow, I don't
17 dispute that. There clearly could be. Because we're talking
18 about a flow of packets as it moves through the network. But,
19 we are not talking about grammatically; we're talking about
20 flow-based where it's hyphenated, and they explain what it is
21 they were trying to do.

22 **THE COURT:** Let me ask: The critical passage in the
23 specification where it talks about the other form,
24 non-flow-based uses the upper bits of the IP address or the
25 MPLS label, what is "MPLS"?

1 **MR. PATTERSON:** Trying to draw back to my networking
2 days, Your Honor. Just a second.

3 **THE COURT:** Well, "MPLS label to index a table of
4 flow indices," would that also be a form of flow-based --
5 putting aside the argument here, would one normally think
6 that's also a form of flow-based packet classification?

7 How's it fundamentally different than using the LQ header
8 and L3/L4?

9 **MR. PATTERSON:** Your Honor, it relates to -- this
10 other form relates to the other -- thank you -- multiprotocol
11 label switching. Multiprotocol label switching is what MPLS
12 stands for. And it relates to a different layer of the OSI
13 model. It does not relate to layer 1 of the OSI model where
14 the LQ header is.

15 **THE COURT:** But it is a layer.

16 **MR. PATTERSON:** It is a layer; yes, Your Honor.

17 **THE COURT:** That's also kind of flow-based.

18 **MR. PATTERSON:** Yes, Your Honor. I can't dispute
19 that it's related to the flow, as it comes through. You're
20 examining that flow as it comes through.

21 **THE COURT:** Well, that helps you. Because what I'm
22 observing is that although they both are kind of a form of
23 flow-based packet classification, the specification says
24 labels 1 -- I think that's your argument -- flow-based --
25 called it flow-based. He didn't have to call it that, but he

1 called it flow-based using LQ and L3/L4.

2 The other form, kind of nameless, or one could say
3 non-flow-based, uses this other method.

4 **MR. PATTERSON:** Yes, Your Honor.

5 **THE COURT:** So, I think that supports your argument
6 that yeah, it's sort of distinctly defined here. They didn't
7 have to use one is flow-based. They could have just said one
8 form is blah, another form is blah. Or you could have said
9 one flow-based classification uses LQ/L3, the other flow-based
10 classification uses the IP address at MPLS, et cetera,
11 et cetera.

12 **MR. PATTERSON:** Yes, Your Honor.

13 **THE COURT:** And you're arguing they didn't do that.

14 **MR. PATTERSON:** Yes, Your Honor.

15 **THE COURT:** They only labeled the first one.

16 **MR. PATTERSON:** Yes, Your Honor.

17 **THE COURT:** Of course, your argument is: well, it
18 says according to one embodiment.

19 **MR. JAFFE:** That's right. And --

20 **THE COURT:** But, but within that, you've -- the
21 patentee has kind of arguably come up with its definition of
22 "flow-based."

23 **MR. JAFFE:** Well, looking at the -- the specification
24 here, the slide that Sophos has up only gives us part of the
25 paragraph that we were looking at before.

1 If you remember when we were looking at the entire
2 paragraph, it says: At block 1230, we perform flow-based
3 packet classification. The entire paragraph is describing
4 that step.

5 Now, two points. Number one is you asked about the
6 case-law issue. And we would submit that Sophos has not
7 provided a case to you where the Court has language that says
8 according to one embodiment, and they then find that it's a
9 clear intent to disavow. So, what we -- we have a lack of
10 case law on that point. Instead, what you find is when you
11 have according to one embodiment, what you don't have is a
12 clear intent to disavow.

13 And Your Honor, us going back and forth on this, I think
14 at best what it reinforces is the ambiguity of the passage.
15 And when you have the ambiguity, does that rise to a clear
16 intent to disavow claim scope? And we would submit no. At
17 best, you have an ambiguous part of the specification, which
18 does not show a clear intent to disavow claim scope or
19 redefine the term.

20 **THE COURT:** Let me ask you: In terms of if you're
21 making a an estoppel argument, how's that -- is that distinct
22 from the own-lexicographer argument?

23 **MR. PATTERSON:** Your Honor, I wouldn't -- I don't
24 think I can characterize it as a distinct argument because
25 they are intertwined in this case, because of the order of

1 events that they practice things in. And I don't think I can
2 honestly say that it's a straight-up pure estoppel argument.

3 And Your Honor, I would like to point out, my final point
4 with regard to the passage of the specification, the section
5 1230 that he refers to or refers to block 1230 of figure 12 --

6 **THE COURT:** Yeah.

7 **MR. PATTERSON:** If you actually look at the words of
8 the actual -- the entirety of that section -- and I have it
9 here.

10 (Document displayed)

11 **MR. PATTERSON:** It does say it's describing block
12 1230, but it does say flow-based packet -- at the beginning it
13 says (As read):

14 "At block 1230 flow-based packet classification is
15 performed on the packet..."

16 That's what it says block 1230 does.

17 **THE COURT:** Yeah.

18 **MR. PATTERSON:** And then it goes on to say
19 "flow-based," and it explains what flow-based is. And then it
20 draws the distinction between flow-based, what it's defining
21 as flow-based and this other unnamed form.

22 So the embodiment is not saying that you do both of them.
23 The embodiment says clearly, all you're doing is flow-based.
24 And that's all they claimed.

25 Again, had they claimed just in their -- in their claims

1 just "packet classification," we would not be having this
2 discussion. But, they explain at block 1230 what flow-based
3 packet classification is, and that's what they're limited to.

4 It's not a question of excluding a preferred embodiment.
5 They disclosed maybe more, but they only claimed part of what
6 they disclosed. And that's not an issue that needs to be
7 fixed by anybody. Again, they've later claimed differently,
8 in later patents.

9 **THE COURT:** All right. That is helpful. Thank you.

10 Let me go on now to the next one, which is Sophos' '587.
11 The "stored for access by" or "storing for access by."

12 (Document displayed)

13 **THE COURT:** I don't see why this thing is just plain
14 meaning. I mean, "access by" is not the same as stored in or
15 stored on, or -- you know. It's just -- it's access. Stored
16 for access by.

17 **MR. CUNNINGHAM:** Your Honor, may I go sit down?

18 **THE COURT:** Pardon?

19 **MR. CUNNINGHAM:** May I go sit down now?

20 **THE COURT:** Maybe you might have something to add
21 after I hear the counter-argument, but I -- seems to me, this
22 one is -- if there's ever a rule of plain English and
23 grammatical construct ought to inform, this is it.

24 **MR. NEWKOM:** Well, thank you, Your Honor. And that's
25 what I've struggled with. Because I actually think it's not

1 -- it's not very clear. Or at least, it hasn't been to me.

2 So, if I said that pancakes are chewed for pleasure by my
3 six-year-old daughter, in that instance, "by my daughter" is
4 modifying the verb "chewed."

5 We submit that here, when you said "stored for access by
6 the first processor," the action of storing is done by the
7 first processor. So it's -- I agree with Your Honor. I think
8 this dispute is more about grammar than it is about the state
9 of the art.

10 As we read this sentence -- and I admit, Your Honor, it
11 could be read one of two ways. And that is why we're asking
12 for a construction.

13 **THE COURT:** Well, if you do it your way, it's like
14 saying: Well, it's stored by the first data processor for
15 access...what? By whom?

16 I mean, so, "by" must relate to not only proximate-wise in
17 terms of grammar; it's next to the word "access." But if you
18 moved it up and say, well, it really means stored by the first
19 data processor for access -- what? By whom? By --

20 **MR. NEWKOM:** So, the same way that if I say my
21 six-year-old daughter chews for pleasure her pancakes in the
22 morning, the "stored for access by the first processor" is
23 explaining why it's being stored at the first data processor,
24 which -- and I can -- I think I see the look on Your Honor's
25 face.

1 **THE COURT:** I'm not sure that you've answered my
2 question. Let's buy your construct, and move the word "by" in
3 front like it should have been, as you put it, "stored by the
4 first data processor," but you're ignoring the words "for
5 access," if "by the first data processor" doesn't -- doesn't
6 modify "access" and it only modifies "store," then access for
7 whom, by whom, what? What does it mean?

8 **MR. NEWKOM:** If I may, I'm going to try to answer
9 Your Honor's question by reference to the claim language.

10 **THE COURT:** All right.

11 **MR. NEWKOM:** So, and, Your Honor, if I may leave the
12 podium to approach the -- the poster board?

13 **THE COURT:** Yeah.

14 **MR. NEWKOM:** Thank you.

15 So, the question here is: There are two uses of this
16 phrase in claim 1 (Indicating). The first which I'll focus on
17 is right here in the limiting preamble: "stored for access by
18 a first data processor."

19 Now, if the debate between the parties is: Where does
20 that storage take place? Does it have to be at the first
21 processor? Or can it be elsewhere?

22 And in a hierarchy of authorities for claim
23 interpretation, the highest authority is always the claim
24 language, itself. And in this claim, we've got numerous
25 instances in which it's explained why you're storing for

1 access at the first processor.

2 For example -- and I'm sorry, I'm just not used to this
3 format.

4 **THE COURT:** Old-school.

5 **MR. NEWKOM:** Here we go. "... causing the first data
6 processor to provide the second data processor with a copy of
7 the item of data..."

8 Now, Mr. Jaffe and I had our own fun grammar debate this
9 morning. What this does not say is: The first data processor
10 causing a provision of the item of data to the second data
11 processor.

12 It uses the active voice, that it is the first data
13 processor which -- you know, anybody -- I guess anybody can
14 cause it, but however it gets caused, it is, in fact, the
15 first data processor that provides the second data processor
16 with a copy of the item of data.

17 **THE COURT:** Can it do that -- can't it accomplish it
18 by then having the first data processor direct some storage
19 bin or locker, or whatever it is, to say give it to the second
20 processor?

21 **MR. NEWKOM:** And that, Your Honor, is exactly what
22 Mr. Jaffe and I were debating at about 6:30 this morning. I
23 don't think so, given the grammar of this limitation. Because
24 that would not be an instance of the first data processor
25 providing the item of data. That would be an instance of the

1 first data processor causing any processor --

2 **THE COURT:** It could have two causes. The initiating
3 force causes the first data processor to then cause the
4 provision -- I mean what --

5 **MR. NEWKOM:** So, imagine there's the first data
6 processor, which I think is sometimes referred to as a "work
7 station" in this patent. We're talking about sending the file
8 to the file server, to check it against the -- the virus
9 indicative or the bad indicia.

10 So, the question is: Does the -- the Word file that
11 you've just received, does it have to be stored at the work
12 station? Or -- and sent from the work station to the file
13 server to be checked? Or, is it possible that that Word file
14 never hits the work station or the first data processor, and
15 instead, the work station or the first data processor somehow
16 causes some other device in some other location to provide a
17 copy of the Word document to the file server?

18 The problem with that -- if that were claimed in claim 1,
19 I think we would be -- Fortinet would be wrong. But, this
20 limitation is a serious problem for Sophos, because that's not
21 what's described. What is described, in fact, is that --
22 right -- that causing the work station to provide to the file
23 server a copy of the item of data.

24 -- more as a matter of logic and grammar to the state of
25 the art, Your Honor, that cannot happen without the first data

1 processor having -- storing -- the item of data.

2 And, there's another example later in the claim language.
3 So we are debating the phrase "store for access" both as it
4 relates to the first data processor, and also as it relates to
5 the second data processor, which stores a plurality of
6 definitions or forms of data.

7 And if you focus on that second -- that second phrase --
8 no, pardon me, Your Honor. I wanted to draw your attention to
9 something else.

10 Here at the end (Indicating), "...causing the first data
11 processor to prevent access to the item of data if the item of
12 data is declared as invalid."

13 Now, this second limitation -- and to be clear for the
14 record, it's not the second limitation of the claim; it's the
15 final limitation.

16 But this second limitation that I would like to bring to
17 the Court's attention is not as open-and-shut as the first
18 limitation I brought to Your Honor's attention, but it does
19 also support the read that the item of data is stored. And it
20 happens to be stored for access, but it is stored by the first
21 data processor. Otherwise, it makes less sense, that the
22 first data processor is preventing access to the item of data.

23 **THE COURT:** Can it prevent access without storing? I
24 mean, if it -- once it's told by the second data processor
25 that "No, no, no," it then executes that. Why does it have to

1 be stored?

2 **MR. NEWKOM:** So, and this is -- I think that's a fair
3 question, Your Honor, which is -- I think of these two
4 limitations, the first limitation, I think, with the proper
5 grammatical read, precludes the data being stored -- any
6 reading of the claim in which the item of data is not stored
7 at least on the first data processor.

8 For this second limitation (Indicating), even if it were
9 possible for the first data processor to remotely block
10 access, to issue an instruction that an item of data stored
11 separately should be blocked from access, even if that were
12 possible, it is a more attenuated read of the claim language
13 than the more immediate read, which is that the processor
14 which has -- which is storing the data is the most sensible
15 and the most effective place to block access to it.

16 Now, and before I test Your Honor's patience whether I'm
17 relying too much on these particular limitations, if I could
18 direct your attention to Page 67 of our booklet.

19 Mr. Jaffe, if it's possible to bring that up, please?

20 **MR. NEWKOM:** Well, I can read it for the record.

21 (Document displayed)

22 **MR. NEWKOM:** These two concepts, these limitations
23 that I've just discussed with Your Honor --

24 **THE COURT:** It's up.

25 **MR. NEWKOM:** Thank you -- were highlighted by the

1 patentee during the prosecution. And I'm reading from the
2 March 20, 1995 amendment, at pages 8 to 10.

3 Quote (As read):

4 "The key to the present invention is that by
5 providing for the first data processor to provide the
6 second data processor with a copy of an item of data
7 for validity checking, and by allowing..."

8 Now I'm going to the second limitation:

9 "...and by allowing the first data processor to
10 prevent access to the item of data depending on the
11 signal it receives from the second data processor,
12 the first data processor does not need to perform
13 validity checking, itself."

14 This same read, Your Honor, that the '587 -- which was
15 originally filed for in 1993, eons ago in the state of the
16 art -- that when the named inventors filed this patent, it was
17 crystal clear to their minds that the item of data, which is
18 to say the Word document or the Excel spreadsheet which is
19 questionable, that that item of data was stored on the first
20 data processor.

21 **THE COURT:** Well, it doesn't say that. It's
22 basically the same argument as the claim language, itself.
23 Provide, causing the first data processor to provide, which
24 begs the question: Well, can it provide it without storing
25 it?

1 **MR. NEWKOM:** And I think -- and that's a different
2 question to my mind, Your Honor. I don't think Fortinet is
3 arguing that it would be impossible in 1993 for one work
4 station to access an item of data stored at a separate work
5 station. We're certainly not arguing that.

6 What we mean to be arguing is this -- pardon the
7 expression -- somewhat funky grammatical phrase "stored for
8 access by," that -- I concede that it can be read either way.
9 Whether it's stored somewhere for access by a first data
10 processor as Sophos contends, or whether it's stored at the
11 first data processor for that processor's subsequent access
12 and use of it.

13 But, to the extent there's ambiguity there, what does
14 "stored for access by" mean? I think that Mister -- or
15 Dr. Hruska was quite clear when I asked him about this in his
16 deposition, that he had the same understanding that I did.
17 But, even -- and of course, inventor testimony is a little
18 more useful now, under *Gemalto*, than it was six months or a
19 year ago.

20 But, even putting Dr. Hruska aside, these subsequent
21 limitations clarify any ambiguity about the grammar being used
22 by the patentee.

23 **THE COURT:** Well, how about my first question? That
24 is: To read the ambiguity the way you would like to read it,
25 so "stored by," that "by the first data processor" modifies

1 "stored" and not "access," that leaves access as kind of a
2 dangling phrase.

3 **MR. NEWKOM:** I think -- I would wholeheartedly agree
4 with Your Honor that it's not great -- it's not great grammar.
5 But to my mind, that, that doesn't make the phrase "for
6 access" superfluous.

7 What it means is that you've got slightly awkward chunky
8 language which is trying to describe that the first data
9 processor stores an item of data (Indicating). It stores it,
10 right, the -- as this claim unfolds in the order, it stores it
11 initially so that it can be accessed and provided to a second
12 data processor. Namely, the more powerful file server that
13 has the ability to keep a long list of virus or malware
14 indicia.

15 **THE COURT:** What do I do with the specification that
16 says --I know it's describing claim 2 and not claim 1, but it
17 actually becomes explicit when it says "first data processor
18 stores or has access to a set of records." So number one, it
19 illustrates an understanding that that configuration is
20 possible.

21 And although it deals with a different set of records, it
22 does -- claim 2 does use the same words: "is stored for access
23 by." It's the same phrase -- ambiguous -- what you say is
24 ambiguous phraseology.

25 And to the extent the specification enlightens that same

1 phrase, although it appears in claim 2, why doesn't that
2 further illustrate this sort of off-site-storage kind of
3 notion?

4 **MR. NEWKOM:** I think -- I can answer Your Honor's
5 question, and I think I -- if I may, I can make it an even
6 tougher question before I answer it.

7 In column 2, lines 15 through 21, there's this -- this
8 phrase that I think Your Honor was referring to. Now, this is
9 not necessarily claim 2, but it's referring to a different
10 portion of claim 1, which is the storage of the characteristic
11 forms of data.

12 **THE COURT:** Yeah.

13 **MR. NEWKOM:** But we do have there on column 2, lines
14 15 onward (As read):

15 "Information defining a plurality of characteristic
16 forms of data to be tested for is stored by, or for
17 access by the second data processor."

18 I think Your Honor's question could be applied to that bit
19 of the specification. Your Honor's question, I think, quite
20 clearly goes to later in column 2, lines 55 through 57 or 58.
21 And to my mind, there's an even trickier portion in column 3,
22 lines 51 through 54, in which we have the sentence (As read):

23 "The storage means of each work station may be
24 located remotely of the rest of the work station.
25 For example, at the file server."

1 So -- and I will answer Your Honor's question, but I
2 wanted to give it its full weight --

3 **THE COURT:** Appreciate that.

4 **MR. NEWKOM:** -- before beginning the dance.

5 **THE COURT:** Yes.

6 **MR. NEWKOM:** So, a couple of thoughts, Your Honor.

7 First, because I think this boils down to a question of: How
8 would a skilled artisan read this awkward grammar?

9 As an initial matter, I don't -- the use of commas and the
10 disjunctive in the specification in the two instances in
11 column 22 distinguishes this use of language to my mind. It
12 is not the same phrase, and it's not an explanation of what
13 that specific phrase means. In fact, however much fun we may
14 poke in this courtroom today about the patent prosecutor who
15 inserted this phrase (Indicating) into the claim language, he
16 or she was careful to present different language, structured
17 differently in column 2.

18 So as an initial matter, I'm not -- it is not clear to me
19 that what's happening in column 2 is an attempt to use a
20 synonymous phrase.

21 My second thought, Your Honor, was -- and Mr. Patterson
22 previewed this argument for me -- on one hand, patent lawyers
23 are taught never to reduce claim language to a preferred
24 embodiment. On the other hand, it is also possible for -- or
25 rather, patent lawyers are taught never to exclude a preferred

1 embodiment or a disclosed embodiment.

2 On the other hand, it is possible for a patentee to
3 describe in a specification an idea or subject matter which is
4 not subsequently claimed in the claim language. But I guess
5 -- and I've got two more answers of my four, and then I'll
6 stop, Your Honor.

7 The third thought is: To whatever extent column 2 gave me
8 some confusion in recent days or weeks -- and it has, I admit
9 that -- I believe that the patent law or the Federal Circuit
10 teaches us that when you reach a state of confusion such as
11 this, you don't just pick the most persuasive argument; you go
12 through the hierarchy of claim-construction authorities.
13 Which, I believe, leads us back always to the claim language,
14 itself, as the number one authority.

15 So, to whatever extent column 2 is problematic, it can
16 only be read to define this phrase "stored for access by..."
17 which again, due to the commas and the disjunctive, is not
18 actually used in the claim language.

19 But it could -- even then, if we forgave the difference in
20 vocabulary, it could be used to give meaning to this phrase
21 (Indicating), only if it could do so consistent with the
22 remainder of the claim language (Indicating).

23 And in light of these two additional limitations, but most
24 importantly the, quote, "causing the first data processor to
25 provide" limitation, I think that's problematic.

1 **THE COURT:** All right.

2 **MR. CUNNINGHAM:** Thank you, Your Honor. Could we
3 switch over to --

4 **THE COURT:** What about Mr. Hruska's comments?

5 **MR. CUNNINGHAM:** Your Honor, the law says that an
6 inventor's testimony is legally irrelevant. The *Gemalto* case
7 referred to a specific situation where an inventor's testimony
8 was used to disprove an assertion of plain and ordinary
9 meaning.

10 (Document displayed)

11 **MR. CUNNINGHAM:** I don't think *Gemalto* was intended
12 to or did change years of black-letter law that says an
13 inventor's testimony is irrelevant to claim construction.

14 But even if it were relevant, Mr. Hruska had a claim put
15 in front of him; he was asked: What do these particular claim
16 limitations refer to? He answered, to the best of his memory.

17 He was not asked: Now, look at this piece of the
18 specification, and tell me if that's consistent with the claim
19 language or not; or look at this piece of the specification
20 and tell me if you're now disclaiming the coverage of that
21 portion of the specification in your answers.

22 And so, it's precisely why we don't rely on an inventor's
23 testimony to try and come to some clear and unmistakable --
24 and that term has been used a lot in the arguments to date --
25 a clear and unmistakable disavowal of claim scope.

1 There are portions of the specification that very clearly
2 explain and illuminate the claim language that you see on that
3 board (Indicating). And I can go into that in a little more
4 detail if you care to hear it.

5 **THE COURT:** No, I think I understand the issue well
6 enough.

7 **MR. CUNNINGHAM:** Okay. Then I will be quiet.

8 **THE COURT:** All right. Well, let's move on to the
9 next one, perhaps subtle, or maybe not, but: Forms of data.
10 And whether it's limited to constructions that are
11 characteristic of a computer virus, as opposed to other forms
12 of data.

13 And, here, it seems like a lot turns on the BPAI's opinion
14 in this matter, which I have seen. And I will say, not sure I
15 fully understand the logic, and maybe you can help me with
16 this.

17 But, it does state at Page 6 that the -- recites the
18 appellant's specification defining the limitations as follows,
19 and it's a pretty broad limitation because it says "These
20 characteristics" -- this is the appellant's specification --
21 "These characteristics" (As read):

22 "These characteristic forms may indicate whether the
23 file contains unwanted data such as a virus, or
24 whether it has been authorized or barred from use.
25 Or a virus, for example..."

1 Et cetera, et cetera. Jump instructions. And then, the
2 opinion then goes on to state:

3 "Reading the claims in light of the specification, we
4 interpret the limitation..."

5 It says --

6 "...testing for computer virus."

7 Seems like a little bit of a non-sequitur there. They've
8 just read the specification, which seemed broader than that.
9 And then they did that.

10 And then I understand that they go on to say why there's a
11 prior-art problem in distinguishing the Franc- -- Francisco's
12 electronic indicia on various grounds.

13 And, the various grounds do not necessarily -- I guess
14 that's the question: Do they include -- do they
15 necessarily -- would that distinction have fallen, had the
16 claim been interpreted to include other unwanted data? Such
17 as unauthorized use, I suppose. Just "virus," it's not clear
18 to me that that's the case.

19 So, I don't know. Maybe you can help me interpret what
20 happened here.

21 **MR. NEWKOM:** I will try, Your Honor.

22 As an initial matter on this term, I think between the
23 parties and the Court, however this phrase is construed, it
24 needs to be construed in some way which is useful to the jury.
25 Which is to say: Some sort of construction.

1 The phrase "forms of data" which is used repeatedly and
2 with some awfully specific meanings in the '587 patent, if
3 divorced from that intrinsic evidence and just presented to
4 the jury as any form of data, I -- I'm probably the least
5 technical lawyer in this room least amongst outside counsel,
6 but I think that is about as broad of a description of data as
7 we could possibly give to the jury.

8 And whatever debate Mr. Cunningham and I may have about
9 what the right substitute language is, I don't think there's
10 any good-faith debate that "forms of data" means more or
11 something much more specific than simply "any and all forms of
12 data." It's particular forms of data.

13 So the question is: What are they? And how do we -- at
14 least this is how I've approached this phrase, Your Honor.
15 How do we give some faithful meaning to "forms of data" which
16 is narrower than --

17 **THE COURT:** Let me stop you right there.

18 First of all, I don't know if it is good-faith or not, but
19 there is a debate what it means. But, you know, sometimes you
20 look at the words to -- you know, you test it for
21 indefiniteness or some other problem.

22 And here, in claim 1, it says you're storing a plurality
23 of definitions of forms of data indicative of invalidity of
24 items of data. So, it is a form of data that is indicative of
25 invalidity. So, it's just not free-flowing. It has -- it is

1 modified.

2 **MR. NEWKOM:** So the question then -- understood,
3 Your Honor. The question then being: What was claimed as the
4 kind of form of data? What kind of form of data would be
5 indicative of invalidity?

6 To avoid, quite frankly, the situation that Fortinet
7 respectfully contends happens here, which is something which
8 was conceived of and described in 1993 is, 21 years later,
9 mapped onto a wildly different -- wildly different firewall
10 market.

11 So in terms of the prosecution-history argument, we read
12 the decision to include the following: First, the board's
13 understanding that the -- the board's understanding that the
14 appellant or the patentee was asking for "forms of data" to
15 mean virus, something indicative of a virus, such as jump
16 instructions. And it's for that reason, Your Honor, that
17 we've imported that phrase verbatim into our proposed
18 construction: "such as jump instruction."

19 So I don't think what the patentee suggested to the board,
20 I don't think what the board relied on, and I don't think what
21 the jury should hear is that a form of data is a jump
22 instruction indicative of -- of a virus. It should be: "Data
23 indicative of a virus, such as a jump instruction."

24 After, after the board understood the appellant's argument
25 to be asking for the presence of instructions that are

1 characteristic of a computer virus such as jump instructions,
2 it specifically -- it granted, allowed the claims, with that
3 specific understanding in mind. And including the explanation
4 -- and I'm reading, Your Honor, from -- my goodness, that's an
5 awfully long Bates number.

6 Well, I'm reading from page 77 of our slide deck provided
7 to Your Honor. That the board was specifically looking at
8 whether the prior art -- which is to say, the issue that the
9 patentee had to surmount in this proceeding was whether the
10 prior art included a limitation of testing a computer program
11 or file not for any data indicative of invalidity, but rather,
12 specifically for the presence of instructions that are
13 characteristic of a computer virus such as jump instructions,
14 as claimed.

15 I'll just take a step back. I think I understood
16 Your Honor's question to be: Was the board's reading of
17 appellant's arguments perfectly fair in light of the materials
18 that they submitted in that proceeding?

19 And, I do think it's fair. But more importantly, it was
20 no coincidence that the appellants in that procedure or
21 process focused on instructions characteristic of a virus,
22 such as a jump. Because that was the prior art they were
23 trying to get around. And in fact, they succeeded on that
24 basis.

25 So, now, 15, 20 years later, to allow Sophos as the

1 patentee to unwind that process and to broaden "forms of data"
2 to something else would undo the board's decision to grant
3 these claims with that very specific meaning in mind.

4 **THE COURT:** Based on your reading of the board's
5 distinguishing of the Francisco prior art, would it have also
6 said -- if it construed the limitation to include not just
7 testing for viruses, but also for unauthorized use, which was
8 in the specification, but had they -- could the same thing
9 have been said about the Fran- -- distinguishing the prior
10 art?

11 Would that have created a -- in other words, read more
12 broadly, would the Francisco prior art have created a problem,
13 under its analysis?

14 **MR. NEWKOM:** I don't believe so, Your Honor. But,
15 that is based primarily on the board's almost unusually
16 explicit adoption of this verbatim -- this understanding of
17 the phrase, which is where we ran to for our proposed
18 construction.

19 **THE COURT:** The reason why I ask, and I don't know
20 where the law is on this, but I understand that the board's
21 construction is entitled to weight. It seems to me, it would
22 be entitled to even more weight if the construction were the
23 necessary and indispensable part of distinguishing prior art,
24 and therefore holding that it's valid. Because at that point,
25 you can almost imply that there was no response from the

1 applicant, an acceptance, an implied disavowal or, you know,
2 whatever you want to call it, because, you know, this was
3 essential. I mean, without it, you couldn't have gotten the
4 patent. I think it's fair to almost deem some kind of -- I
5 don't know if there's any case law that says that, but I mean,
6 viscerally, that's my gut.

7 On the other hand, if it wasn't absolutely necessary to
8 distinguish prior art, but it was part of it, then you just go
9 to the: Well, we'll give it the kind of deference that --

10 **MR. NEWKOM:** Sure. And I think, Your Honor, I
11 refrained from reading it into the record in deference to the
12 court reporter, but I should do so now, just in an attempt to
13 be helpful.

14 At Exhibit K to Fortinet's responsive brief on this
15 patent, Exhibit K is numbered with an unwieldy page-numbering
16 system, thanks to the Bates stamps. But the page number I
17 believe that we're focusing in on is 5831SOPHOS_194.

18 And I'm focusing Your Honor on a conclusory paragraph --
19 or not conclusory, but a conclusion paragraph from the board,
20 in which the board writes -- I think the board describes its
21 reasoning to be exactly what Your Honor just described.

22 Quote (As read):

23 "For the foregoing reasons, we are not persuaded that
24 the prior art would have suggested the limitation of
25 testing a computer program or file for the..."

1 And I'll stop right here. Right? What comes next? Is it
2 something indicative of invalidity? Is it unauthorized use?

3 What follows is:

4 "...testing a computer program or file for the
5 presence of instructions that are characteristic of a
6 computer virus such as jump instructions as claimed.
7 The examiner has not established a prima facie case
8 of obviousness. Therefore, we reverse the rejection
9 of claims 1, 4, 9, et cetera."

10 This reads to me, Your Honor, to be as clear an indication
11 as possible from the board that these claims were allowed,
12 specifically based on the board's understanding of the claim
13 language to be -- to be verbatim, the proposal we have
14 provided to the Court in this matter.

15 **THE COURT:** Yeah, no; I understand that was a
16 predicate to its finding of no prima facie case of
17 obviousness, and rejecting any claim that it was rendered
18 obvious by Francisco's invention. And therefore, it is
19 entitled to some weight.

20 But, is it entitled to dispositive weight? I'm a little
21 more dubious about that. Especially given the way that they
22 distinguish the Francisco art by saying: Well, first of all,
23 the electronic indicia was not even instructions. Each
24 electronic index is a numeral that is uniquely characteristic
25 of the total number of binary 1s and binary 0s of a software

1 program.

2 Moreover, the indicia did not indicate the invalidity of
3 the data. (Reading) Didn't store form the data that are
4 indicative of invalidity. Simply electronic indicia uniquely
5 and selectively identified for the submitted program.

6 So, those bases for distinguishing Francisco's electronic
7 indicia as prior art would, seems to me, would have applied
8 with the same force if the limitation had been construed to
9 include not only checking for viruses, but checking for
10 unauthorized use. Because it's-- it's validity or invalidity
11 for various reasons.

12 So, that's why this doesn't seem to be a case where the
13 board's reasoning made its -- was -- that the construction it
14 gave in this case was indispensable to its ultimate outcome.
15 It could have reached it either way. And if that's the case,
16 then it's just entitled to normal deference, not super
17 deference, it seems to me.

18 **MR. NEWKOM:** So I think, Your Honor, if the -- I hate
19 to do this, but I'm going to present a problem, rather than a
20 solution.

21 But, if -- if Sophos is given no construction, or plain
22 and ordinary, then what we run the risk of is that the jury is
23 presented an infringement case which relies on such a broad
24 reading of "forms of data" that it would include, for example,
25 electronic indices or unique characteristics, right, based on

1 the binary composition of the code. But, of course, that --
2 that is one of the areas of concern for the board with
3 Francisco.

4 Likewise, with Sophos' lack of construction, or plain and
5 ordinary, a program's index, the contents of the computer file
6 or program other than instructions or instructions indicative
7 of a computer virus could be put before the jury.

8 I mean -- and I say at the outset, Your Honor, that I'm
9 presenting a problem rather than a solution, because I'm -- we
10 have tried to give Your Honor our best proposal for a way
11 which is faithful to the board and the history of this patent
12 to exclude the prior art that the board was concerned with,
13 and the examiner was, before that, concerned with, without
14 letting Sophos get it back into this case.

15 And our proposed solution to that is simply to adopt the
16 verbatim definition or understanding of the claim language
17 that the board used when overruling the examiner and allowing
18 the claim.

19 **THE COURT:** Let me ask, was there any response -- I
20 don't know if there's an opportunity to respond. Once the
21 board issued its decision as it did, is there any response
22 right, or period? What happens after this?

23 **MR. NEWKOM:** I do not know the answer to that
24 question.

25 **MR. CUNNINGHAM:** Not that I'm aware of, Your Honor.

1 I think that's the final word.

2 **THE COURT:** Okay. Well, I'd like you now to answer:
3 Doesn't this phrase need some interpretation for the jury?

4 And number two, why shouldn't I give deference to the
5 BPAI's construction?

6 **MR. CUNNINGHAM:** On the first question, Your Honor, I
7 don't think the claim language is self-limiting other than --
8 as Your Honor pointed out, other than by the modifiers that
9 are in the claim language, itself.

10 So in other words, it's not any form of data; it's forms
11 of data indicative of invalidity. So that's -- and maybe
12 that's the claim phrase that ought to be focused upon.

13 But the fact of the matter is the words "forms of data"
14 aren't self-limited by the claims. They aren't. They're any
15 form of digital data that's indicative of invalidity.

16 The issue with the Francisco reference was not what
17 types -- what forms of data Francisco looked at. The
18 distinguishing characteristic between the Francisco prior art
19 and our patent was the fact that Francisco stored a list of
20 data that was indicative of valid data. Not invalid data.
21 And so, that was the primary basis upon which the PTAB decided
22 to allow the Sophos patent over the prior art.

23 And, Francisco was different for a different reason. And
24 that is: Francisco was looking at these separate things
25 called IEDs, which my colleague was kind enough to tell me is

1 electronic identifying data. So, "IED." And those IEDs were
2 separate from the data, itself.

3 So in other words, the Sophos patents looks at these forms
4 of data and looks at the information within these forms of
5 data to decide whether the data is invalid. And so for those
6 I guess 1A and 1B reasons, Francisco was determined to be
7 different from the Sophos patent.

8 The other point, I think the patent office didn't directly
9 construe the term "forms of data." There's no statement in
10 the decision saying "'Forms of data' means X." There's this,
11 as you called it, a non-sequitur in here which is a little
12 difficult to explain.

13 But, the fundamental legal point, Your Honor, is: the PTO
14 can't create a disavowal of claim language. Only the
15 applicant can do that. And, that's a reference to the *3M*
16 *Innovative Properties* case that we cite at Page 6 of our reply
17 brief, 350 F.3d, 1365 (As read):

18 "Prosecution history cannot be used to limit the
19 scope of a claim unless the applicant took a position
20 before the PTO."

21 That's a quote from that case.

22 So, let's look at what the applicant -- what position the
23 applicant took in the proceedings before the PTO. And, I have
24 Slide 17 from our presentation up in front of Your Honor.

25 (Document displayed)

1 **MR. CUNNINGHAM:** This is a -- this is a quote --
2 whoa.

3 (Document displayed)

4 **MR. CUNNINGHAM:** This is a quote from the decision,
5 where they're quoting our reply brief. And we say (As read):

6 "Virus instructions, such as 'Jump' instructions..."

7 And then there's a citation.

8 "...are exemplary forms of data indicative of
9 invalidity that can appear within multiple unrelated
10 programs..."

11 And then they go on to make the distinction between the
12 '587 patent and the Francisco prior art.

13 But the point is: Sophos, the applicants, never said
14 "forms of data" means X or doesn't mean Y. It's always
15 phrased in terms of what is exemplary.

16 **THE COURT:** What about -- and it's your position that
17 no definition beyond plain and ordinary meaning need be given
18 because there are already qualifiers around it in the claim
19 language, therefore a jury won't be totally at sea?

20 **MR. CUNNINGHAM:** Your Honor, I do -- and I struggled
21 with how to -- you know, forms of data, "types of digital
22 information." That's one possibility. But I don't know that
23 those words mean anything more or less than "forms of data."
24 It is a pretty simple phrase.

25 **THE COURT:** All right. Let's go on to the next one.

1 (Reporter interruption)

2 **THE COURT:** Oh, time for a break. Well, if we're
3 going to take a break, why don't we -- let's see; how many do
4 we have left here? We've got three terms left, it appears?
5 Is that right?

6 **MR. CUNNINGHAM:** We're doing pretty good.

7 **THE COURT:** Secondary URLs, sub-deliverables, and
8 genes. Right?

9 **MR. CUNNINGHAM:** Yes.

10 **THE COURT:** Why don't we go ahead, we'll just take an
11 early lunch, like an hour or something like that.

12 **MR. CUNNINGHAM:** Sounds great.

13 **THE COURT:** And give everybody a chance to break, and
14 then we will hopefully finish up about an hour or so after
15 that.

16 **MR. CUNNINGHAM:** Thank you, Your Honor.

17 **THE COURT:** All right?

18 (Recess taken from 11:33 a.m. to 12:40 p.m.)

19 **THE COURT:** Okay. I do have a request. I want to go
20 back to "flow-based packet classification" -- and maybe I
21 missed something here -- back on the '125.

22 This embodiment that is claimed to conflict with the
23 proposed narrowing construction that's at column 11 that talks
24 about the "packet flow index" is -- in one embodiment the
25 packet's flow index is identified by extracting various L --

1 layer -- I'm sorry -- various layer 2 through 4 fields.

2 Does that conflict with -- with the proposed -- Sophos'
3 proposed construction, which would limit it to LQ and L3/L4
4 fields?

5 **MR. JAFFE:** Yes, it does, Your Honor. Because, just
6 to put it simply, this embodiment is talking about using
7 layer 2, and Sophos' proposed construction would exclude that
8 and only include 1, 3, 4 and 5.

9 **THE COURT:** Now, but this part of the specification
10 existed prior to the amendment. Is that right?

11 **MR. JAFFE:** That's correct.

12 **THE COURT:** And yet, it was rejected in the final
13 office action in December of '06?

14 **MR. JAFFE:** There was a 112 rejection, that's
15 correct, Your Honor. Although, as I mentioned before, the
16 patentee did not acquiesce that the 112 rejection was proper,
17 and cited to five different places in the specification where
18 the limitation was disclosed already.

19 **THE COURT:** After the rejection. Subsequent --

20 **MR. JAFFE:** That's right.

21 **THE COURT:** -- to the filing in -- I think it was
22 March or something?

23 **MR. JAFFE:** That's correct, Your Honor.

24 **THE COURT:** That's when -- these additional cites.
25 But, so, I guess that's one question. What am I supposed to

1 do with this? Or, do you disagree that this conflicts?

2 **MR. PATTERSON:** Your Honor, it doesn't preclude the
3 layer 2, 3, and 4 being an example of packet classification.
4 But it's not flow-based packet classification, as they defined
5 in their amendment in March of 2007, after the patent office
6 rejected their construction in December 2006.

7 **THE COURT:** So, this language, this specification
8 preceded the addition of the "flow-based" language in
9 September of 2006?

10 **MR. PATTERSON:** Your Honor, the -- the way the -- if
11 I could have Slide 69?

12 The way that it worked on that timeline is that the patent
13 office --

14 (Document displayed)

15 **MR. PATTERSON:** There we are.

16 The patent office rejected their claim term that they
17 originally filed that did not have "flow-based." They added
18 "flow-based" in September of 2006, not to the specification,
19 but just to the claims.

20 **THE COURT:** Yeah.

21 **MR. PATTERSON:** The patent office then, in December,
22 2006, rejected that, and said there's no support for it. They
23 then amended in 2007, and added that support.

24 They did not first go back to the patent office in March
25 of 2007, and say: Hey, just look at these spots, and then be

1 quiet.

2 They said: Look at these spots, but oh, by the way,
3 here's a specific definition for "flow-based packet
4 classification" in column 15, when they added the 31 new lines
5 of material.

6 **THE COURT:** But did the reference to the embodiment
7 which identified the flow index by extracting various layer 2
8 through 4 fields, did that exist prior to the September 18th
9 rejection?

10 **MR. PATTERSON:** Yes, Your Honor, it did. That was in
11 their original file.

12 **THE COURT:** So it was there, but it wasn't called a
13 "flow-based packet classification."

14 **MR. PATTERSON:** That's correct, Your Honor. It was
15 never called "flow-based." And I would add and point out the
16 obvious, that when they amended the specification in March of
17 2007, they didn't go back and amend that other portion around
18 column 11 and call that a flow-based as well. They only
19 explicitly defined "flow-based" relating to layer 1, 3 and 4
20 in column 15.

21 **THE COURT:** So, what is one supposed to do now with
22 this specification that remained -- part of the specification
23 that remained in here? It wasn't labeled "flow-based." And
24 you're saying that now that the claim requires flow-based
25 packet classification which has subsequently been defined

1 otherwise, that this kind of becomes superfluous; it's no
2 longer really operative?

3 **MR. PATTERSON:** It's not superfluous in that it's an
4 embodiment, but it's an unclaimed embodiment. So, the only
5 embodiment that they have claimed is flow-based packet
6 classification, not just packet classification in general.

7 **THE COURT:** So it's virtually useless, because if
8 they haven't claimed it in any of the claims of the '125, this
9 embodiment just sits there as background information?

10 **MR. PATTERSON:** Well, two answers to that,
11 Your Honor. First, it is dedicated to the public.
12 Technically, this other embodiment, layer 2, 3 and 4, would be
13 dedicated public.

14 However, they did in subsequent continuation patents, as I
15 mentioned on the record before, claim only packet
16 classification in general. They did not -- they had a claim
17 that did not -- that they removed "flow-based" from, and later
18 just claimed "packet classification."

19 And that claim -- that patent is not at issue in this
20 case. But that patent is Patent No. 8,542,595. And that was
21 a continuation patent of this patent.

22 Now, interestingly enough, they removed in that patent,
23 they have removed all of the column 15 new material that they
24 added that was not included in the later continuation patent.

25 **MR. JAFFE:** The material regarding the continuation

1 patent falls into the category of things that weren't briefed.

2 **THE COURT:** Well, okay. But what do I do -- because
3 one of your arguments is that: Well, you can't construe it
4 narrowly because this would essentially read out the -- one of
5 the embodiments.

6 But that embodiment, if you look at it historically, was
7 something that was presented pre-September-'06, was not called
8 "flow-based classification," and then it was rejected,
9 notwithstanding that. Apparently that wasn't good enough to
10 enable a practitioner in the arts to practice the patent. And
11 then, came back. So it's like maybe it's not claimed, but
12 that's the way it goes.

13 **MR. JAFFE:** If I can make one brief point on this,
14 which is that I think the patent, the '125 patent discloses
15 the use of flows to classify patents. Now, the question that
16 we have been talking about is the latter instance, when they
17 use the exact phrase "flow-based packet classification."

18 But if we're looking at -- and I think Counsel, himself,
19 has touched on this, there are many other instances throughout
20 the '125 patent that describe classifying packets using their
21 flow. Based on their flow. That concept is disclosed
22 throughout the '125 patent.

23 And I think the instance that you identified in column 11
24 is a great example of this, and shows why that term should not
25 be given such a narrow meaning, based on the, at best,

1 ambiguous phrasing describing figure 12.

2 **MR. PATTERSON:** Your Honor, if I might respond just
3 briefly to that?

4 **THE COURT:** Yeah.

5 **MR. PATTERSON:** I didn't -- I don't agree -- and if I
6 did, I didn't mean to -- I don't agree that the earlier
7 disclosures around column 11 and other places in the earlier
8 part of the specification are flow-based as in -- as how
9 they've defined it. It's dealing with a flow, because we're
10 dealing with packets flowing through the system. That's just
11 by the very nature of what we're talking about.

12 But, flow-based packet classification is something they
13 explicitly defined in their amendment, and after they were
14 told there was no support for what they were trying to do.
15 And they never made an attempt to simply say: Look at all
16 these other spots, and then not amend their specification.
17 They went straight to the amendment on the specification.
18 And, that's -- it's a clear acquiescence that: Look, we have
19 a problem here. And they addressed it.

20 And again, they understand how to claim it more broadly
21 later in the later claimed patent. And --

22 **THE COURT:** Well, but you've admitted that in the
23 March, 2007, submission to the office, they pointed out things
24 that were in the prior specification, in addition to the
25 additional language in column 15.

1 **MR. PATTERSON:** Yes, Your Honor. But, the -- the
2 point is that they didn't go back into that earlier part of
3 that specification where they were pointing at, and they
4 didn't bother to amend that and call that flow-based packet
5 classification. They were just describing packet
6 classification. Classifying packets in general.

7 There's no dispute that we're talking about a flow,
8 because packets flow through the system. That's what the
9 network is all about. The network traffic flows. But, they
10 define specifically flow-based packet classification in column
11 15.

12 And so, if they had believed that their disclosure was
13 adequate for flow-based packet classification in their earlier
14 -- in their original submission, they would not have needed to
15 add the column 15 reference to the new figure 12 that they
16 added to the patent. Because figure 12 was also added when
17 they added the 31 lines from column 15, line 8 through line
18 38.

19 **THE COURT:** Doesn't that indicate a lack of clear
20 intent to disavow anything but this new language, when they
21 cited supplemental language of other parts of the prior
22 specification that -- in trying to defend their position about
23 there being sufficient information about flow-based packet
24 classification?

25 **MR. PATTERSON:** I don't think it does, Your Honor,

1 for two reasons. First, they could have not submitted the new
2 column 15 and merely made an -- or --

3 **THE COURT:** Yeah. Could have. They also could have
4 just submitted column 13 (sic) and said: Forget all the other
5 stuff; we're going to just rely on this new piece of
6 information; that ought to do it.

7 **MR. PATTERSON:** Understand, Your Honor, there would
8 be nothing for you to decide if they had simply said only
9 column 15 is what you refer to. I understand that. But the
10 only thing we have that we can look at that is -- we
11 understand the patentee is trying to use various words to
12 maybe have something down the road to say about something.

13 But the clear fact here is that you have to look at their
14 actions, not just their words. And their actions indicate
15 that they made a disavowal, and they understood that "packet"
16 -- or excuse me, they understood that "flow-based" was a
17 particular kind when they wrote that.

18 And Your Honor, if I could bring up one more point, now is
19 probably the appropriate time. You mentioned the concern
20 about waiver, they had brought up.

21 The *O2 Micro* case -- took the -- took time at break. And
22 the *O2 Micro* case specifically dealt with this issue of the
23 patentee -- or the -- on appeal, of bringing up new
24 claim-construction arguments, and new support for your
25 claim-construction arguments on appeal. As long as you are

1 maintaining the same position, the Court in *O2 Micro* held that
2 that was perfectly appropriate.

3 And that particular cite is at 521 F.3d, I believe it's --
4 1321? Unless I have miswritten it down. But, it's *O2 Micro*
5 *v. Beyond Innovation Technology*.

6 And I do happen to have, then, a paper copy of the
7 functional -- or of the file history with me as well,
8 Your Honor, that shows where they incorporated from the
9 inventor's earlier-created document that they included in the
10 -- that they included in their original filing, and -- back in
11 2002.

12 And that's at -- it starts at -- specifically that cite is
13 on Page 49 of the file history, in Section 2.2.1, dealing with
14 packet classification.

15 And I can show it to Your Honor, if Your Honor would be
16 willing to accept that.

17 **THE COURT:** Well, if I'm going to do that, at the
18 very least I'd have to give the other side a chance to
19 respond, because you've come up with something post-briefing.

20 Whether that's a waiver or not, that's one question. But
21 if it's not a waiver, certainly, you know, it's not fair to
22 bring up something that could have been brought up; no reason
23 not to bring it up --

24 **MR. PATTERSON:** (Nods head)

25 **THE COURT:** -- and deprive the other side of a chance

1 to respond.

2 **MR. PATTERSON:** I understand, Your Honor. And I
3 would not mean to preclude that.

4 **THE COURT:** Okay.

5 **MR. JAFFE:** As you suggested, there's a lot in there
6 that we haven't had the opportunity to hear before. If that's
7 the *O2 Micro* case that I'm familiar with, I'm not aware that
8 it stands for the principle that you don't necessarily waive
9 things if you don't bring them up.

10 I know there's lots of Federal Circuit case law --
11 specifically the *E-Plus* case -- that notes that if you waive a
12 claim construction, just because there's a dispute down the
13 line does not mean that you get to undo that waiver.

14 And to the extent that Counsel's bringing up that point,
15 which I'm not sure, having not reviewed the cases he's
16 mentioned, then we would disagree with that.

17 **THE COURT:** Well, let's do this. I'm going to look
18 at what you've got a second time, and see whether I need any
19 additional -- I mean, you've made essentially a proffer of
20 what that might be, and I'll decide whether that's going to be
21 useful or not. And if it is, and I find that there's not a
22 waiver, I'll allow you to do a supplemental filing.

23 And then you (Indicating) can respond like a week
24 thereafter. But right now, I don't want anything.

25 **MR. JAFFE:** Okay. Just one last point, Your Honor.

1 On the figure 12 part that we've been arguing about so
2 much on this patent, we would submit that -- as I mentioned
3 before, that the entire paragraph is talking about flow-based
4 packet classification. It says one is flow-based, and then
5 the next one is also flow-based. And those are both
6 flow-based packet classification within the scope of the
7 claim.

8 And you can see that by the words used right there in the
9 specification. It talks about adding things to a flow index.
10 It is classifying packets, based on their flow.

11 **THE COURT:** I'm sure whoever had a chance, if you
12 could turn back the clock and redo this, it could be --
13 because it could be construed the other way, as Counsel has
14 argued, that yeah, block 1230 talks about there's a block for
15 flow-based packet classification.

16 And one could read the specification, that column 13 is
17 saying: And here's what flow-based classification is,
18 LQ/L3/L4. Now, there are other forms which we don't call
19 flow-based; that's not what we meant when we make that block
20 in 1230.

21 Or, you could construe it to say: Well, block 1230 means
22 everything in here, but we're going to -- you know, again, I
23 don't know why one -- why the phrase "one is flow-based" --
24 it's interesting. I mean, they're both flow-based, really.
25 Right?

1 **MR. JAFFE:** Yes.

2 **THE COURT:** Why do they say one is flow-based? The
3 other form does X, but flow-based is Y. It would have been
4 simpler if it had just said "one is," instead of a
5 "flow-based."

6 **MR. JAFFE:** I agree that would be simpler. One thing
7 I want to make sure is clear before I sit down on this point,
8 in terms of the timeline, we've noted about them adding
9 figure 12 to the specification in response to a 112 objection.
10 They also, at the same time, pointed to the other parts of the
11 specification and said it was disclosed.

12 So, it wasn't a case that they added figure 12 by itself,
13 and then said yes, that's sufficient.

14 **THE COURT:** Right. And that's the point that --

15 **MR. JAFFE:** So I don't think there's any --

16 **THE COURT:** -- show a clear disavowal because they
17 didn't just add figure 12 in column 15; they pointed to
18 earlier stuff.

19 **MR. JAFFE:** So to that point, to the extent that
20 Counsel was arguing that there was an acquiescence by the
21 applicants, I would argue that there wasn't any acquiescence,
22 let alone a kind of clear disavowal that the other disclosure
23 of flow-based packet classification is within the amendment to
24 the specification in figure 12.

25 **THE COURT:** Okay. All right. Thank you.

1 (Off-the-Record discussion between the Court and Clerk)

2 **THE COURT:** So, I want to talk about the '852 and the
3 secondary URL, which I don't think we need to spend a lot of
4 time on.

5 **MR. STEIN:** Good afternoon, Your Honor.

6 **THE COURT:** Good afternoon.

7 I think we all know what it is. We're just trying to
8 describe it in a way that's accurate, and helpful, and not
9 confusing to the jury. And I think both of your descriptions,
10 I think, are problematic in my view.

11 To say it's something other than the primary URL is not
12 exactly enlightening. But to say it is a sub-string of, maybe
13 that's kind of okay. And "distinct from," I'm not sure what
14 that means. It could be misleading.

15 Can we cut to the chase? Why we can't say something like
16 "a distinct URL embedded within a primary URL"? I mean, isn't
17 that sort of what it is?

18 **MR. NEWKOM:** Fortinet's fine with that, Your Honor.

19 **MR. STEIN:** I think that's accurate, Your Honor. I
20 think the only flag that that raises in my mind is that I know
21 that there is a dependent claim that uses the terminology
22 "embedded."

23 **THE COURT:** Oh, there is?

24 **MR. STEIN:** And so, the patentees have defined that
25 to be something different than what's claimed in the

1 independent claim.

2 **THE COURT:** Oh.

3 **MR. STEIN:** And I think, Your Honor, that's claim 13
4 that claims an embedded -- the secondary URL is embedded in
5 the URL. I've got a --

6 (Document displayed)

7 **MR. STEIN:** It's on this slide here, Your Honor.

8 **THE COURT:** Yeah, I see it. Then you have that
9 redundancy kind of issue.

10 **MR. STEIN:** I think the Court's intention is -- is
11 right with that. "Embedded" might not be -- it is a little
12 bit of a loaded word, in the context of this patent.

13 **MR. NEWKOM:** If I may, Your Honor?

14 **THE COURT:** Yeah.

15 **MR. NEWKOM:** This may not be the first time that a
16 patentee elucidates in a dependent claim a concept which is
17 fairly obviously present in the claim from which it depends.

18 I'm also having Mr. Jordan checking to see whether -- is
19 claim 13 still in the case?

20 **MR. JAFFE:** No.

21 **MR. NEWKOM:** Claim 13 is not in the case, from
22 Sophos. So to the extent the jury is presented with the
23 awkwardness of an "embedded," "embedded," that's not going to
24 arise because they're not going to see that claim language.

25 I understand that's a different question --

1 **THE COURT:** Right.

2 **MR. NEWKOM:** -- from whether we've faithfully done
3 claim construction while avoiding redundancy. But, insofar as
4 it's a confusing issue for the jury, they won't see that.

5 **MR. STEIN:** Your Honor, would you repeat your
6 construction?

7 **THE COURT:** I was going to suggest something like "a
8 URL embedded within a primary URL."

9 **MR. CUNNINGHAM:** Your Honor, what if we said
10 "included within" rather than "embedded within"? Then we
11 don't have the redundancy.

12 **THE COURT:** Okay. How's that?

13 **MR. STEIN:** I think we can be fine with that.

14 **MR. NEWKOM:** Fortinet's fine with that, Your Honor.

15 **THE COURT:** Excellent. Now if we can only settle the
16 case this way.

17 **MR. STEIN:** Thank you, Your Honor.

18 **THE COURT:** Thank you. All right.

19 Sub-deliverables. So, is it agreed that deliverable -- I
20 think it was -- I forget who -- I'm trying to remember who
21 said this in their brief, but they said "deliverable" is
22 content of data to be delivered or provided.

23 Is there a dispute that that's a fair definition of what a
24 deliverable is?

25 **MS. GRASSO:** That's what Sophos put in its brief.

1 **THE COURT:** Yeah. That's what I thought. I mean, is
2 that a generally-accepted concept?

3 **MR. NEWKOM:** I'm sorry, Your Honor. Can I hear that
4 again?

5 **THE COURT:** Yeah. "Deliverable" is "content of data
6 to be delivered or provided."

7 **MR. NEWKOM:** I don't have any basis to disagree with
8 that.

9 **THE COURT:** Okay. So then we get to
10 "sub-deliverable."

11 (Document displayed)

12 **THE COURT:** Does that really need -- you know, "sub"
13 means something, a smaller piece, or within, or something. I
14 don't know if it -- if it's -- if we need anything.

15 **MR. NEWKOM:** I think, Your Honor, the point that
16 Fortinet is trying to get at with the "separately-delivered"
17 portion is if we take or if the jury just takes sort of a
18 language-based approach, and they say: I understand what a
19 deliverable is or how a skilled artisan would understand that
20 term, and a sub-deliverable could be some portion of that.

21 Well, the intrinsic evidence suggests that we're not just
22 talking about some portion of a deliverable. We are instead
23 talking about, in the context of packets moving around a
24 network, a sub-deliverable -- which Dr. Nielson says is not a
25 term of art, and I don't think we've heard any contrary

1 evidence to that -- that a sub-deliverable, as this patent
2 describes it, each sub-deliverable always has its own source
3 address.

4 And, and that means to any skilled artisan that in a
5 packet routing network, if you will, that each sub-deliverable
6 is a distinct communication unit, if you will. Because it
7 must have its own source address.

8 In particular, Your Honor, if I may walk away from the
9 podium for just a moment to look at some claim language?

10 **THE COURT:** Yep.

11 **MR. NEWKOM:** And I'm sorry, Your Honor, I don't have
12 a thicker marker today. But --

13 **THE COURT:** Maybe, here, you can borrow -- Betty, do
14 you want to give him the blue one or --

15 (Request complied with by Madam Clerk)

16 **MR. NEWKOM:** That's fine, thank you.

17 In Claim 1, a source address -- "wherein the contextural
18 information includes a source address for each one of the
19 plurality of the sub-deliverables..."

20 So even for me, let alone a skilled artisan, if each one
21 of these units of data, a sub-deliverable as they're described
22 by the patentee, if each one of them must have a source
23 address, it's separately delivered.

24 Otherwise -- it's not the case that each one has a source
25 address. They may be sharing a source address.

1 **MS. GRASSO:** May I respond?

2 **THE COURT:** Yeah. What about that? I mean, if --
3 it's clear that the patent claim anticipates a source address
4 for each sub-deliverable.

5 **MS. GRASSO:** Absolutely. We agree with that. But
6 there's nothing in the intrinsic record that suggests that it
7 has to be a unique source address.

8 For example, you can have sub-deliverable 1 at source
9 address 1. Sub-deliverable 2 at source address 2.
10 Sub-deliverable 3 at source address 1. Because if you look at
11 the claim 1, you're talking about a pattern of source
12 addresses. And that's what we're focusing on.

13 So, yes, each sub-deliverable has a source address. It
14 doesn't have to be unique. It's a pattern of changing source
15 addresses. So you don't need to put separately-delivered
16 content into the definition. It just has -- it doesn't belong
17 there.

18 **THE COURT:** So if it has the same -- if
19 sub-deliverable 1 and 2 have A as their source address, they
20 don't have to be separately delivered?

21 **MS. GRASSO:** I believe that's correct.

22 **MR. NEWKOM:** Can I try -- let me supplement,
23 Your Honor, if I may.

24 **THE COURT:** Okay.

25 **MR. NEWKOM:** In the same claim limitation, there's a

1 concept that not only does each sub-deliverable have its own
2 source address, right, for each one (Indicating), not only
3 that, the -- quote (As read):

4 "...the contextual information includes a pattern of
5 changing source addresses for each one of the
6 plurality of sub-deliverables..."

7 So, a skilled artisan reading this claim, trying to
8 understand, right: What is a sub-deliverable, if it's not a
9 term of art? According to the patent, not only must each --
10 each sub-deliverable have its own source address. Part of the
11 point of this patent is, you look at patterns or changes in
12 the source addresses for each sub-deliverable.

13 If this doesn't mean --

14 **THE COURT:** What does that mean? Maybe you can go
15 back to the basics for me, and give an example of how that
16 plays out in the real world.

17 **MR. NEWKOM:** As I understand it, Your Honor -- and
18 I'm probably the worst lawyer in the room to ask. But as I
19 understand it, it means -- part of the value of this patent,
20 as the patentee described it to the PTO, is that sometime --
21 you -- you can discern a security risk to network-communicated
22 content.

23 By looking not just at the packet-related information or
24 the control information, for example, on a particular packet,
25 but rather, by collecting contextual information across

1 numerous -- numerous sub-deliverables or numerous packets that
2 when you look at those together, you might be able to discern
3 security risk, indicative --

4 **THE COURT:** So, what's an example of a
5 sub-deliverable that is looked at? Sender's address? Or --
6 what's an example of --

7 **MS. GRASSO:** If I may, Your Honor?

8 **MR. NEWKOM:** Please do.

9 **MS. GRASSO:** It could be -- let's think about a
10 website. So, it could be a picture on the website is one
11 sub-deliverable, and the, you know, header on the website
12 could be another. One could be coming from server 1 in
13 Russia; one could be coming from France. Or, pick your
14 country.

15 **THE COURT:** Is the idea that by looking at those
16 patterns, just like where it came -- if you saw a combination
17 of France plus Russia plus Bulgaria or something, the flags go
18 up?

19 **MS. GRASSO:** Correct. And it's not just looking at
20 where the sub-deliverable comes from. It could also be -- you
21 know, we're talking about contextual information. So, we're
22 trying to provide more context. Who sent -- you know, where
23 is it from? How big is the data? You know, other things like
24 that. The author of the data -- of the sub-deliverable;
25 excuse me.

1 **THE COURT:** Okay. So, back to your point.

2 **MR. NEWKOM:** So my point, Your Honor, is if you're --
3 this is -- in claim 1, if you're making this determination
4 based on a pattern -- this is not optional, this is
5 mandatory -- a pattern of changing source addresses for each
6 one of the plurality of sub-deliverables (Indicating), I -- I
7 have not been able to fathom yet a reading of this patent in
8 which each sub-deliverable was not a separate -- a
9 separately-delivered or a separate bit of communication
10 traffic. It has to be.

11 Otherwise, as was just suggested I think by Sophos, if
12 this could just mean that, you could have all sorts of
13 packets, and they all have the exact same source address. But
14 you -- and I don't mean to be -- I can see Ms. Grasso
15 responding. I don't mean to be misrepresenting the argument.
16 There's no pattern to discern.

17 The point of looking for a pattern is that you are looking
18 for a pattern between the source addresses for every single
19 one of those sub-deliverables. If those sub-deliverables are
20 grouped, if they're not independent communications, there's no
21 meaning to the pattern you can discern.

22 **THE COURT:** This pattern of changing source addresses
23 for each one, is that saying a pattern of different source
24 addresses, or various source addresses for each one? Or does
25 that mean dynamically, any one deliverable source address

1 changes over time?

2 I -- I didn't -- I've looked at that. I'm not sure I
3 understand what it means. What does it mean to be changing
4 source addresses for each one?

5 **MR. NEWKOM:** I'm not sure I do either, Your Honor.

6 **MS. GRASSO:** May I?

7 **THE COURT:** Yes.

8 **MS. GRASSO:** Thank you. It's -- each sub-deliverable
9 source addresses is changing -- keep in mind, you know, the
10 reason behind this patent is that people were trying to get
11 around the block lists. And to do that, they were breaking up
12 their data into different sub-deliverables to fool it, the
13 block list, if you will.

14 So what we're talking about, the pattern of changing
15 source addresses is just where -- where each source address is
16 coming from, because they're trying to get around, you know,
17 the block list. So, a pattern does not mean that every
18 sub-deliverable has a separate originating source address.

19 As I gave the example before, sub-deliverable 1 can come
20 from source address A, sub-deliverable 2 can come from source
21 address 2. And sub-deliverable 3 can also come from source
22 address 1. It's still a pattern of changing source addresses.

23 **THE COURT:** What's changing? What does "changing"
24 describe?

25 **MS. GRASSO:** Where they're coming from. The source

1 address. So every -- every sub-deliverable does not have the
2 same source address. They're not all coming from server 1 in
3 Russia.

4 **THE COURT:** So "changing" -- I mean, normal English,
5 you would say "differentiating" or "different" or something,
6 right? But "changing" implies a dynamic process. Changing,
7 over the dynamic of time. This is at any one point in time,
8 they're coming from different places.

9 Is that what it is?

10 **MS. GRASSO:** They're coming from different places.

11 **THE COURT:** So I guess that's the argument, they come
12 from different places, then how can you have one -- is it
13 possible to do this when you only have one source address, and
14 it's not being delivered separately?

15 How do you -- how does this thing work, if it all comes
16 from -- if it's not delivered separately from different source
17 addresses?

18 **MS. GRASSO:** It isn't that they are all being
19 delivered from the same source address, but there's nothing in
20 the intrinsic record that suggests that you can't have more
21 than one of the sub-deliverables coming from the same place.
22 Because there's other contextual information that could flag
23 the problem.

24 So, it's not -- I would agree, certainly, that all of the
25 sub-deliverables would not have the same source address. But

1 it's certainly possible that two of them could come from --

2 **THE COURT:** Well, some, but not all.

3 **MS. GRASSO:** Exactly.

4 **THE COURT:** And that's the problem with this, it says
5 separately delivered content. That precludes the "some" part.

6 **MS. GRASSO:** Correct. And certainly, the inventors
7 never made a clear and express limiting of this.

8 **THE COURT:** Okay.

9 **MR. NEWKOM:** I -- I think, Your Honor -- and I'm just
10 going to return to the claim language again. I suppose it
11 might be the case that you could have multiple independently-
12 or separately-delivered content that happened to have the same
13 source address. But that doesn't conflict with Fortinet's
14 construction.

15 When Ms. Grasso just said a moment ago that there's no
16 intrinsic evidence to support this, we're going for the gold
17 standard. We're going for the claim language, itself. Two
18 instances in the claim language. All right? Each of which
19 say that each sub-deliverable must have a source address.

20 **THE COURT:** Doesn't say "unique."

21 **MR. NEWKOM:** It doesn't say "unique," and I don't
22 think it should, because that would mean this would apply only
23 to some sort of communication in which every single
24 sub-deliverable happened to have a different source address.

25 But for a skilled artisan to say that network data has a

1 source address, they're talking about -- when each one of this
2 unit has a source address, I -- I think it takes quite a bit
3 of acrobatics to read that to mean anything other than each
4 one of these units, sub-deliverables, is something which is
5 separately delivered. That's why each one has its own source
6 address.

7 And yes, of course, some of those source addresses may be
8 the same. But the point being if you ask a skilled artisan
9 what has a source address, it's going to be an independently-
10 or separately-delivered bit of content.

11 **THE COURT:** But if two of the sub-deliverables are
12 from the same source address and the other ten are not, two of
13 them would not be separately. Those two would be delivered
14 together. And your construction would seem to preclude that.
15 It seems like you're requiring every single sub-deliverable to
16 be separately delivered.

17 **MR. NEWKOM:** We absolutely are. And I think,
18 Your Honor, in that instance, it can certainly be the case
19 that two sub-deliverables -- or the two packets could
20 originate from the same source, and subsequently get to the
21 same destination. But that doesn't mean that they were
22 delivered together, as they -- they may even get there through
23 a different path.

24 But if you've got -- if -- I mean, I am -- I don't want to
25 over-sell the point, but I'm focusing on a couple of bits of

1 language in the claim. The repeat use of "each one"
2 (Indicating) with respect to sub-deliverables, "each one," and
3 the source address.

4 So, if you have multiple bits of data moving across a
5 network, right, you may discern a pattern by seeing some -- to
6 use the language we were using before, some from Russia, some
7 from France. But if you were also picking up 40 bits of data
8 from the same address in Mexico or South Dakota, that, in
9 itself, may be part of the pattern of changing, or -- as
10 Your Honor was having the exchange with opposing counsel, I
11 was thinking of changing the word "changing" to "various."

12 That, too, is part of the pattern. And just because, as
13 Fortinet readily admits, you can have multiple bits of data
14 with the same source address, that doesn't change a fair
15 reading of the claim language, itself, which is that each one
16 of these -- each one of the sub-deliverables has its own
17 source address.

18 What does it mean for a bit of data to have a source
19 address, its own, or each one to have a source address? It
20 means separately delivered.

21 **THE COURT:** Let me ask about the stored or processed
22 as a unit. What's the problem with that? How else could it
23 be processed?

24 **MS. GRASSO:** Well, there's a couple of instances in
25 the specification where it talks about just that. And it

1 doesn't require all of the sub-deliverables to be stored or
2 processed as a unit.

3 They give the example that in some instances you might
4 only need one sub-deliverable to raise the red flag and say
5 this is a problem. In other instances, there might only be --
6 you know, you need two sub-deliverables.

7 And, that's at column 19, if you want the cite. 19:66 to
8 column 20:10. Just discusses that you don't necessarily need
9 every sub-deliverable to realize there's a problem.

10 **THE COURT:** 19:66?

11 **MS. GRASSO:** Excuse me, 67, column 20, I believe it's
12 Line 11. Also again at column 25, I believe line 26 to 30.

13 **MR. NEWKOM:** I'm sorry, Counsel; I lost track of
14 where you are. Which column?

15 **THE COURT:** Go back to column 20.

16 **MS. GRASSO:** Column 20, through line 10.

17 **THE COURT:** Yeah, and then the next one was --

18 **MS. GRASSO:** Column 25.

19 **THE COURT:** Oh. Hold on. Yeah.

20 **MS. GRASSO:** Line 26.

21 **THE COURT:** Yes.

22 **MS. GRASSO:** Through 30. The end of that paragraph.

23 **THE COURT:** And was there a third?

24 **MS. GRASSO:** No, those were the only two.

25 **THE COURT:** So, what these talk about are looking at

1 the first address in the series, that's looking at one
2 sub-deliverable?

3 **MS. GRASSO:** Correct.

4 **THE COURT:** And you can do stuff with just one.

5 **MS. GRASSO:** Yes. You may know, just based on that
6 one sub-deliverable, that you have a problem and stop the
7 presses there. In other instances, you might need two. It
8 doesn't -- it clearly contemplates you don't necessarily have
9 to have all of them.

10 **THE COURT:** Well, once you get more than one, they do
11 have to be processed as a unit, do they not?

12 **MS. GRASSO:** Yes. And the claim addresses a
13 plurality of sub-deliverables, which is two or more. So, you
14 don't need to include the additional language of "as a unit."

15 I don't know what "as a unit" means. Does that mean all
16 of them? Does that mean some of them? I don't know what that
17 means. And I don't think it's necessary, because the claim is
18 saying "a plurality of sub-deliverables."

19 **THE COURT:** Well, if the claim requires a plurality,
20 and if there's more -- and "plurality" means two or more, and
21 you have that, you would agree that they would have to be
22 processed, or stored as a unit?

23 **MS. GRASSO:** Depending on what a "unit" means. I
24 don't agree that they all have to be processed and stored as a
25 unit. But I would agree that in some instances two do; in

1 other instances, more.

2 I just don't know what "unit" means, and I don't think
3 it's necessary to include that in the definition.

4 **THE COURT:** So then, you are raising a question of:
5 What is a unit.

6 **MS. GRASSO:** Correct.

7 **THE COURT:** Okay. What's your response to that?

8 **MR. NEWKOM:** One or two of them, Your Honor. The
9 first is: Let me just make clear why we came to this
10 construction. And, I'm looking again at the claim language.

11 So, this discussion of contextual information,
12 sub-deliverables, et cetera -- this discussion of contextual
13 information including sub-deliverables, there is a phrase --
14 sorry, I just sped up -- "the data" (Indicating).

15 And what is the data? Well, the data must be, at a
16 minimum, a plurality of sub-deliverables. And I won't try to
17 reignite the sub-deliverables debate. But, the data.

18 And later in the exact same claim, there is this phrase
19 (Indicating): "...authorizing delivery of the data and the
20 contextual information..." and then "...scanning the data...
21 and the contextual information on the client device that
22 receives the data and the contextual data to determine whether
23 a target data is present..."

24 So as we -- and I'm sorry, Your Honor; I've marked up this
25 poster so much I'm not sure it's useful any more. But this

1 phrase "the data" must include "a plurality of
2 sub-deliverables," that's clear. And later in the claim, in
3 limitations, "the data," the data which must include a
4 plurality of sub-deliverables is digested, if you will, as
5 "the data" by the claim system.

6 So in order for that to be the case, what's being
7 described is not, for example, a system which dribs and drabs
8 one sub-deliverable at a time, and creates a repository of
9 information to discern patterns in that way. What's described
10 here is a system which collects the data, "the data" being a
11 plurality of data points, if you will, about the
12 sub-deliverables. And then that plurality is reviewed.

13 I keep saying "digested," but scanned, in order to make a
14 determination about the presence of target data.

15 Now, that -- I'm not sure that answered Your Honor's
16 question about what a unit is. So, I don't want to disregard
17 that question.

18 **THE COURT:** What's your answer to that?

19 **MR. NEWKOM:** Saying it is a unit was simply our
20 attempt to get language which would make sense to a jury to
21 make the point which I just tried to illustrate a moment ago,
22 which is: Even if you have a plurality of sub-deliverables,
23 that -- that the -- the scanning and determination is made --
24 it's not done on a rolling or seriatim basis. That's not what
25 claim 1 describes. It describes the data as being a

1 plurality, and then it describes the data being scanned --
2 provided to and scanned in one step.

3 **THE COURT:** Okay. Your response?

4 **MS. GRASSO:** Again, it's not all of the data. It's
5 not every sub-deliverable and, you know, waiting for that all
6 to be stored and processed together. It's exactly the
7 examples that I gave you in column 19 and 25.

8 Think about loading the website again. You don't go to
9 weather.com to see if it's raining and you stare at a blank
10 screen, waiting, waiting, waiting and then poof, it all comes
11 up. It comes, at a time. And yes, it can be, you know, two
12 of the plurality, two or more, but it's not all.

13 And that's really my issue with Fortinet's proposed
14 definition.

15 **THE COURT:** So if it said "some of which is processed
16 together," that would be less objectionable to you? I'm not
17 suggesting it, but --

18 **MS. GRASSO:** It would be less objectionable to me,
19 yes.

20 **THE COURT:** So your concern is that it means all
21 processed together --

22 **MS. GRASSO:** Correct

23 **THE COURT:** -- as a, quote, unit, which I assume
24 means together or something. And you're saying not all of it
25 has to be processed together.

1 **MS. GRASSO:** Exactly.

2 **THE COURT:** Well, I'm wondering whether, you know, in
3 attempting to define all these subtleties and these
4 permutations and these possibilities, this thing just gets
5 more confusing, when in fact some of the limitations that you
6 want to read into this claim is already covered by a lot of
7 the claim language, itself.

8 So I'm not sure what -- what we advance, because there
9 would have to be some limitations, based on what I just heard,
10 on yours. And by the time we add some, could be less than
11 all, and could be processed -- you know, those could be
12 processed first and before you process the others; some
13 situations you might even -- don't even have to process more
14 than one.

15 You know, I -- there would be so many footnotes to this
16 thing, I think -- I'm not sure we get anywhere.

17 **MR. NEWKOM:** I think our concern, Your Honor, is that
18 because Dr. Nielsen has testified that "sub-deliverables" is
19 not a term of art, our concern is that without some sort of
20 construction, without some sort of guidance for the parties,
21 it's going to be the Wild West on this term, in front of the
22 jury.

23 So we are looking to Your Honor for some guidelines on
24 what the parties can present to the jury as what constitutes a
25 sub-deliverable.

1 **THE COURT:** Is there anything in -- now, you base
2 this all on kind of discerning from the claim language,
3 itself. Is there anything in the specifications or anything
4 else that supports your asserted limitations here?

5 **MR. NEWKOM:** I believe there is, Your Honor. But,
6 you know, I -- I'll give Your Honor a couple of examples.

7 **THE COURT:** Okay.

8 **MR. NEWKOM:** And I tried to pare down so much for
9 today that I don't have the complete book in front of me.

10 But, looking at column 25, lines 7 through 24 --

11 **THE COURT:** Uh-huh.

12 **MR. NEWKOM:** I'm looking in particular at the
13 following language (As read):

14 "Further, the pattern may be realized across a
15 sequence of addresses, such as breaking the delivery
16 of content into a series of sub-deliverables, each
17 with their own address. For instance, malware may be
18 configured for delivery to a client machine with a
19 unique sequence of addresses such as www.bad-alpha,
20 bad-beta, bad-charlie, and the like."

21 I believe, Your Honor -- I can pull more if you would
22 want. But I do -- it is not the case that we're playing a
23 heuristic game just on the claim language, itself.

24 The concept that each sub-deliverable has its own source
25 address and therefore is separately delivered and the concept

1 that they are looked at -- I think the basic -- the basic gist
2 here is they are delivered separately; they are considered
3 collectively. Collectively being two or more.

4 **THE COURT:** How does this address the requirement
5 that each sub-deliverable be delivered separately? This is
6 about -- as I glean from this, about how you identify this
7 changing address used to avoid blacklisting, it doesn't say
8 much to me about pluralities of sub-deliverables and how they
9 have to be delivered, and whether they have to be processed as
10 a unit. It's really giving an example of this changing
11 business, and this disguise kind of thing.

12 **MR. NEWKOM:** So, Your Honor, I was focusing first on
13 the phrase "breaking the delivery of content into a series of
14 sub-deliverables, each with their own address," which Fortinet
15 submits is consistent with not just the claim language
16 (Indicating), specifying that each sub-deliverable must always
17 have its own source address, but furthermore, that it is
18 actually delivered separately.

19 And the second point -- so if that's the first half, how
20 are they delivered in? And each sub-deliverable is delivered
21 in on its own.

22 And then the question being: How are they digested by the
23 system? And, that, Your Honor, is more to the point of the
24 claim language brought to Your Honor's attention.

25 **THE COURT:** Let me ask: What about this? It talks

1 about breaking -- for instance (As read):

2 "The pattern may be realized across a sequence of
3 addresses, such as breaking the delivery of content
4 into series of sub-deliverables, each from an
5 address..."

6 And then you look for patterns."

7 **MS. GRASSO:** Absolutely, Your Honor. That is one way
8 it's done.

9 And I would direct you just a few lines below that to -- I
10 believe it's Line 26, where it also talks about that you don't
11 need to do that. Sometimes you'll find out with just one
12 sub-deliverable. Sometimes, two. So, there's a range of ways
13 to do this that are contemplated.

14 **THE COURT:** Plus that paragraph starts off: "In
15 embodiments..."

16 **MS. GRASSO:** Yes. Right.

17 **THE COURT:** -- import specification limitation into
18 limitation of claims.

19 Okay. All right. Well, I guess -- I think that's what I
20 need to hear on that.

21 Let me go to the last one, "genes."

22 It seems to me that everyone is agreeing with the
23 inventor's first sentence, and that is (As read):

24 "A gene is a piece of functionality or property of a
25 program."

1 But then, goes on to state:

2 "Each piece of functionality is described using
3 sequences of APIs and strings when it can be matched
4 against functioning blocks."

5 And so, there's no dispute that that's accurate. Is that
6 correct? I mean, do you dispute that that's an accurate --

7 **MS. GRASSO:** Yes.

8 **MR. NEWKOM:** I think actually, Your Honor, this is
9 the heart of the dispute. Whether -- whether a gene is the
10 piece of functionality or property, or whether it is a
11 description, and a specific way of describing that
12 functionality or property.

13 (Document displayed)

14 **MR. NEWKOM:** I had the same first-blush response,
15 Your Honor. And I think even our -- our pitch-book materials
16 before Your Honor say at one point that the parties are in
17 agreement about functionality or property of a program.

18 But upon reflection, I think that misses the point. I
19 think the parties have a pretty fundamental disagreement about
20 genes. So it's not just a matter of adding the additional
21 language.

22 **THE COURT:** Maybe you can explain this distinction.
23 I'm not sure I --

24 **MR. NEWKOM:** Sure.

25 **THE COURT:** -- fully understand it.

1 **MR. NEWKOM:** Mr. Jaffe, can you please bring up page
2 112?

3 (Document displayed)

4 **MR. NEWKOM:** So on one side, each side has the phrase
5 "piece of functionality or property of a program." And there
6 are some differences between the parties, but they are
7 minimal.

8 But the difference is Sophos is asking Your Honor to
9 construe the piece of functionality or the property to be the
10 gene. And I think that's actually dead wrong, when you read
11 the patent.

12 What a gene is, is instead, something that describes that
13 piece of functionality or property. And we've used the phrase
14 "sequence of APIs and strings" that describe that piece of
15 functionality.

16 But let me just try to illustrate the point with -- as an
17 initial matter, Your Honor, for looking at the materials from
18 Sophos. I'm looking at Page 43 of Sophos' binder for today.

19 Now, on Page 43, there are some highlighted portions from
20 the abstract for the '344. In particular, the following
21 phrase (As read):

22 "The method includes identifying one or more
23 functional blocks and/or properties of software. The
24 method further includes identifying genes in the
25 functional blocks and/or properties."

1 Looking again at Page 47 of Sophos' materials, so from the
2 same book, where there's the phrase taken from the intrinsic
3 evidence, column 2:

4 "The method further includes identifying one or more
5 genes in the at least one of the functional block and
6 a property of the software."

7 So, let me try to further illustrate the point, if I may,
8 Your Honor, by reference to the claim language.

9 Looking at claim 1, in this method, one step is
10 identifying a functional block and a property (Indicating).
11 The next step is identifying one or more genes -- the genes,
12 namely, that describe one or more of the at least one
13 functional block and the at least one property of the
14 software -- as a sequence of APIs and strings.

15 So, to construe a gene to mean a functional block, you
16 know, I have yet to understand how that is logically
17 consistent with a claim which separately discusses a gene as
18 something which can describe or identify a functional block.
19 If a gene is simply a functional block or a property, claim 1
20 devolves into a nonsensical disclosure or claim.

21 **THE COURT:** If it's something that describes a
22 functional block and at least one property, then the second
23 limitation is identifying one or more genes which describes at
24 least one functional block, each describing one or more at
25 least -- then you have the redundancy issue.

1 **MR. NEWKOM:** Well, so I think -- so the -- what I
2 intended to be responding to first was Your Honor's comment
3 that: Is it the case that the parties are in agreement as to
4 the piece of functionality of a property or program?

5 And, in looking just at the language, we are. But in
6 terms of the fundamental -- what our thought objects are,
7 we're going after very different ideas here. A gene --
8 there's a separate question which we can get to in a minute,
9 which is: If a gene is not a piece of functionality or a
10 property, but it is rather, a specific way of describing
11 functionality, what does that description look like? What
12 kind of a description is being claimed?

13 And that's where we've got the sequence of APIs and
14 strings. And we've briefed our intrinsic evidence to support
15 that, and I'm happy to talk more about it today.

16 But before we get to the question of what kind of a
17 description is claimed, first I think we have to separate out
18 the issue of: Is a gene a way of referring to the functional
19 block? Or is it something different? Is it a specific way of
20 describing or identifying that functional block or property?

21 And I want to stop just for a moment, because I want to
22 make sure I'm not sounding like a freshman in philosophy
23 class.

24 **THE COURT:** I hear what you're saying. And of
25 course, I'm -- not seeing your summary-judgment motions, I

1 have no idea what the significance of all this is. I'm sure
2 it's significant in some way.

3 But before we get there, the problem there is you've got
4 two limitations. One suggests that the description approach
5 is better. The other suggests if you use the description
6 approach, it becomes kind of redundant in the second one. And
7 if you used the functional -- the actual functioning, it kind
8 of doesn't jibe with the first one.

9 I mean the problem is, frankly, you've got two limitations
10 there that kind of go in different directions as to: What is
11 a gene? Is it a descriptor? Or is it an actual thing? Is it
12 this functioning block?

13 And the way this claim 1 is written, any one of those runs
14 into some grammatical problem, it seems to me.

15 **MR. NEWKOM:** (Nods head) It's not my patent. I
16 agree, Your Honor.

17 **THE COURT:** Okay. Well, all right. Well, I
18 understand what you're saying. I don't -- like I say, I don't
19 know what the significance of it is, but I suppose I'm not
20 supposed to know, to a certain extent. But -- so, go on to
21 your next point, I guess.

22 **MR. NEWKOM:** Okay. So, beyond that, after that
23 issue, it does become a simpler debate.

24 The intrinsic evidence supports a construction that a gene
25 is a piece of functionality or property of the program.

1 However, it also couples that with the statement that each
2 piece of functionality is described using sequences of APIs
3 and strings which can then be matched against functional
4 blocks.

5 (Document displayed)

6 **MR. NEWKOM:** So, I don't think the debate between the
7 parties is about whether this patent repeatedly describes a
8 gene in the context of sequences of APIs and strings. I think
9 the question is whether that should be recited as a
10 limitation.

11 And, we're seeing and I think we've cited for Your Honor
12 consistently in the intrinsic evidence that a gene is referred
13 to, used that way, by the patentee.

14 For example, also in the prosecution history, if we could
15 go, Mr. Jaffe, please, to page 117.

16 (Document displayed)

17 **MR. NEWKOM:** And whether waiver, or whether
18 persuasive for how a skilled artisan would use it, the
19 patentee, themselves, were referring to genes as "sequences of
20 APIs and strings, referred to as 'genes,'" which genes are
21 used to describe software.

22 Now, before I turn over the microphone, I will say part of
23 what --

24 **THE COURT:** This comes from -- what is the source of
25 this? What are you quoting here?

1 **MR. NEWKOM:** This, Your Honor, is from Exhibit 3 to
2 our responsive claim construction brief which was an April 3,
3 2012, amendment.

4 **THE COURT:** Okay, Exhibit P, it says, is that right?

5 **MR. NEWKOM:** Pardon me?

6 **THE COURT:** Exhibit P to your responsive
7 construction.

8 **MR. NEWKOM:** Oh, Exhibit P, yes, as in "potato."

9 **THE COURT:** Okay.

10 **MR. NEWKOM:** And my understanding, Your Honor, is
11 that within the art, the use of the word "genes," whatever
12 else we may have to say about this patent in weeks or months
13 come, to the use of the word "genes" was certainly novel.
14 That there is, outside the intrinsic evidence, a dearth of
15 guidance to the experts, to a skilled artisan, about what this
16 means.

17 So we are -- we have been hunting for what "genes" means.
18 And to simply call it the functional -- piece of functionality
19 or program without also -- as the patentee did consistently --
20 including the phrase that there's a sequence of APIs and
21 strings to describe that piece of functionality or property is
22 inconsistent with the patent.

23 **THE COURT:** What about -- I mean, you have this
24 qualifying language that is "a sequence of APIs and strings
25 that describe..." et cetera, et cetera, but the third

1 limitation of claim 1 says "identifying one or more genes,
2 each describing one or more of at least one functional block
3 and at least one property of the software as a sequence of
4 APIs and strings." So, isn't that already there?

5 **MR. NEWKOM:** Well, I guess in response to
6 Your Honor's argument, it looks like both -- both sides'
7 constructions would be entirely there within that limitation.

8 **THE COURT:** Yeah. That's what I mean.

9 All right. What's your response?

10 **MS. GRASSO:** So, this is a situation where the
11 patentees were their own lexicographer, and they define "gene"
12 to be two possible things. On the one hand it's a piece of
13 functionality. Then there's an "or," it's a property of a
14 program.

15 And, that makes perfect sense when you think about what is
16 this patent trying to do. It's trying to identify malware and
17 unwanted software by looking at the characteristics of the
18 software.

19 So, that could be a piece of functionality, like
20 collecting passwords. Or it could be a property of a program:
21 Bank site from Russia. You know, those are two different
22 things. Both are bad. You want to be able to catch both of
23 them. Or either of them.

24 The specification always refers to them as an "or." It's
25 either a piece of functionality, or it's the property of a

1 program.

2 Same with the prosecution history. If you a turn to --
3 can we get our slide up? On January 24, 2011, a gene is a
4 piece of functionality or a property of a program.

5 I'm sorry, could we switch the --

6 **THE CLERK:** (Nods head)

7 (Document displayed)

8 **THE COURT:** What page is this?

9 **MS. GRASSO:** It's 45. Yes.

10 So, the patentee's being consistent in the definition in
11 January of 2011, in June of 2011. And then -- and we're not
12 even being inconsistent with the passage that Fortinet's
13 Counsel showed you, the April, 2012, part of the file history.

14 And that's because in that instance, they were only
15 talking about the functional part, you know, the piece of
16 functionality. The functional code.

17 And we're not disagreeing that when you're talking about a
18 piece of functionality, when you're talking about the
19 functional code, that is being described by a sequence of APIs
20 and strings. But that's not everything. And they never gave
21 up property of a program. And they wouldn't, because then you
22 would be missing a ton of, you know, malware, and unwanted
23 software. This invention goes to both.

24 So yes, when you talk about the functionality, you're
25 talking about, you know, it being described by sequence of

1 APIs and strings, which is what the inventors said in the --

2 **THE COURT:** Property, property of a program is
3 different from that.

4 **MS. GRASSO:** Exactly. And that's the problem -- one
5 of my problems with Fortinet's construction is that it
6 basically reads out the "or" and makes the sequence of APIs
7 and strings apply to both. And you have to -- you know, a
8 property of a program is something different.

9 **THE COURT:** So, do you have any objection to adopting
10 the whole of what the inventors said, that a gene is a piece
11 of functionality or property of a program; each piece of
12 functionality, which is the part you're -- the first half, is
13 described by using the string of APIs, et cetera, et cetera?

14 **MS. GRASSO:** I would be fine with that.

15 **THE COURT:** It leaves "property" in play.

16 **MS. GRASSO:** Yes.

17 **THE COURT:** Whereas the way that Fortinet has it, the
18 string of APIs -- and "strings" arguably describes both
19 functionality and property, and that's the problem.

20 **MS. GRASSO:** Correct. I don't think the second
21 sentence is necessary, but I -- I would be fine having both
22 sentences.

23 **THE COURT:** What about your point about -- his bullet
24 point about describing versus being the actual functionality,
25 itself? Or description versus the description of the

1 functionality?

2 **MS. GRASSO:** If I understood it -- and that was the
3 first time I heard it. I didn't know we had that disagreement
4 until we got here.

5 So, the boundaries are very clear about what a gene is.
6 It is a piece of functionality, or it's a property of a
7 program. It's not describing it. It is.

8 We need to pay careful attention to what the inventors --
9 how the inventors defined it.

10 **THE COURT:** So, your definition is okay, because when
11 you look at like the limitations in claim 1, whether we add
12 the second sentence or not, you say piece of functionality or
13 property of program, you would say: Identifying one or more
14 genes which is a piece of functionality or property of a
15 program, each describing one or more of at least one
16 functioning block and at least one property of the software as
17 a sequence of APIs and strings.

18 **MS. GRASSO:** Well, that's why I don't think we need
19 the second sentence, because the "sequence of APIs and
20 strings" is already in the claim.

21 **THE COURT:** Well, it's interesting. This describes,
22 this says: The gene, each describing one or more of at least
23 one functioning block and one property as a sequence of APIs
24 and strings. That does suggest that even describing the
25 property is a sequence of APIs and strings, does it not?

1 How do you get around --

2 **MS. GRASSO:** Well, I think the definition of "gene"
3 is broader than the specific limitation. And it's talking
4 about one or more of the at least one. So, I agree.

5 I probably would have written the claim differently,
6 myself, but --

7 **THE COURT:** So "genes" is broader, but you may be
8 hemmed in by the limitations --

9 **MS. GRASSO:** Yes.

10 **THE COURT:** -- that's contained in the actual claim
11 language; that does not necessarily dictate that the word
12 "genes" itself be as narrow as the limitation.

13 **MS. GRASSO:** Correct.

14 **THE COURT:** Okay. What about, what about the point
15 about disregarding the "or property"?

16 **MR. NEWKOM:** Well, I was a little disappointed that
17 Your Honor went to the claim language before I got a chance to
18 do so, because you stole my thunder.

19 This (Indicating), this claim language in its relation to
20 the rest of the limitation, I think with any -- destroys the
21 possibility that there could be "sequence of APIs and strings"
22 referring to a functional block, and yet being totally
23 different from the property.

24 **THE COURT:** Well, that may be, under this third
25 limitation. That doesn't tell what you "genes" means. You

1 can have a term that's broader, and then it gets limited by
2 the claim language.

3 **MR. NEWKOM:** And I think the problem with that,
4 Your Honor, is -- and so this will be the last time I use the
5 word "hierarchy," but in the hierarchy of interpretive guides
6 of evidence that we're supposed to use for claim
7 interpretation, number one is the claim language, itself,
8 before any part of the patent.

9 And I think the argument that Counsel is making or
10 inviting here is the idea that although the claim language is
11 perfectly clear about what this term means, it could
12 nonetheless be something broader.

13 And I think that runs afoul of --

14 **THE COURT:** Well, I'm not sure it's clear what it
15 means; it's clear how it operates and how it's limited in this
16 context, under the third limitation. Doesn't necessarily tell
17 me that the word, itself, starts with something larger and
18 that once you work through to the third limitation you're
19 within a subset of that larger universe. Doesn't tell me what
20 that universe is.

21 In fact, one could argue because it is -- if it was
22 already built in, you wouldn't need that language. Then you
23 have a redundancy problem. The counterargument is that:
24 Well, if I believe you or buy your argument, that becomes
25 superfluous.

1 So, why would we have superfluous -- you know, something
2 like claim differentiation, kind of an analog to that. I
3 mean, we've got language now that's built in there. Why would
4 you put it in there if "genes" didn't already mean that?

5 **MR. NEWKOM:** Well, I think what Fortinet's interested
6 in, Your Honor, is making sure that we avoid arguments about
7 Fortinet systems looking at "genes" to mean anything other
8 than looking at the sequence of APIs and strings as way to
9 describe a piece of functionality or a property.

10 And I -- well, I'll stop there for now.

11 **THE COURT:** Okay. Well, you know, there's that
12 argument, and then there's the argument about the inventor
13 having opined, although, and that's -- that is in column 5, is
14 that right?

15 **MS. GRASSO:** Correct, Your Honor.

16 **THE COURT:** Column 5, line 32.

17 **MS. GRASSO:** And 33.

18 **THE COURT:** And that's where you contend that
19 that's -- the inventor became the lexicographer.

20 **MS. GRASSO:** Yes. And that's confirmed later in the
21 prosecution history.

22 **MR. NEWKOM:** If I may, Your Honor, in that exact same
23 paragraph?

24 **THE COURT:** Yep.

25 **MR. NEWKOM:** I'm looking at column 5, line 37.

1 **THE COURT:** Uh-huh.

2 **MR. NEWKOM:** The same paragraph includes the phrase,
3 quote (As read):

4 "The gene and the functional block do not need to
5 match exactly."

6 Now, I take that sentence from the paragraph that
7 Ms. Grasso has brought to your attention, and then take a
8 proposed construction that a "gene" means a piece of
9 functionality.

10 And at this point, we've got a proposed construction which
11 is an identity statement. That "gene" equals "piece of
12 functionality." And we've got intrinsic evidence being
13 offered to this Court which, in the exact same paragraph, says
14 that in fact, the gene and the piece of functionality may not
15 be identical.

16 **THE COURT:** And in fact, a functional block -- next
17 sentence -- may contain more than one gene, because a gene is
18 only a piece of functionality.

19 **MR. NEWKOM:** Yes. A way of describing it through a
20 sequence of APIs and strings. Again, this is -- you know,
21 going back to the initial point, I -- there is a -- there is
22 similarity of language between the parties for half of, at
23 least, our construction.

24 But, a pretty different fundamental approach about whether
25 a gene is, in fact -- is it a description, as claimed? Or is

1 it identical to, synonymous to the piece of functionality?

2 And I don't think column 5 changes other parts of the
3 intrinsic -- you know, that any portion of column 5 changes a
4 fair read of the entirety of column 5, plus claim 1, that a
5 gene is -- it's a description. It's part of what's
6 interesting about this claimed invention, is it's a very
7 particular way to splice what data you're going to look at, in
8 order to keep a network safe.

9 **THE COURT:** All right. All right. Well, this is all
10 very helpful. And I think that's the last term, right, that
11 we have?

12 **MS. GRASSO:** Yes, Your Honor.

13 **THE COURT:** Okay. So obviously the ball is in my
14 court at this point to render a decision on this, which I
15 will, as quickly as I can.

16 So let's talk about the case-management situation now.
17 It's little hard to plan exactly, until you know how quickly I
18 can move on this. But I intend to act, as I say, as quickly
19 as I can.

20 I guess the question I have is with respect to the
21 adoption of the Federal Circuit Advisory Committee model order
22 limiting patent claims, what are your thought -- how far are
23 we in this process?

24 **MR. NEWKOM:** I think -- I think, Your Honor, the
25 parties jointly proposed and the Court ordered either that --

1 either that exact Federal Circuit narrowing, or something very
2 close to it, at last. I believe that as of today, each side
3 has narrowed their asserted claims.

4 **MS. GRASSO:** (Nods head)

5 **MR. NEWKOM:** And I think the first -- the first round
6 of narrowing. And we have also, I believe, engaged the first
7 round of prior-art narrowing.

8 **MR. STEIN:** (Nods head)

9 **THE COURT:** Okay.

10 **MS. GRASSO:** Correct.

11 **MR. NEWKOM:** There's a subsequent round of narrowing
12 that --

13 **THE COURT:** Twenty-eight days after I issue my claim
14 construction?

15 **MS. GRASSO:** Correct.

16 **THE COURT:** So you're waiting for me to get to round
17 two.

18 **MS. GRASSO:** Yes.

19 **THE COURT:** And, and then, after that, while that's
20 going on, you've indicated that there's some initial discovery
21 that -- there's been discovery already.

22 **MS. GRASSO:** There has been very limited discovery so
23 far.

24 **THE COURT:** All right. So, well, I guess the
25 question is: What can I reasonably set now, if anything?

1 What are your thoughts about what we can accomplish?

2 Let's say it takes me, you know, some weeks, given the
3 holiday, to get this order out. But I'm glad we're down to
4 seven, not ten. But in any event, so, in terms of the -- the
5 stage two of federal advisory model, that's going to wait a
6 bit, so I know that one.

7 Do we need to do anything; do I need to say anything about
8 discovery at this point?

9 **MS. GRASSO:** Well, what Sophos has suggested is still
10 in tracking with the model rule, which is we've pegged
11 everything off of when we get that claim-construction order,
12 which I think makes the most sense, and will solve the problem
13 of not bothering Your Honor again to set new dates, once we
14 get that claim-construction order.

15 **THE COURT:** All right.

16 **MS. GRASSO:** As said, there's still a lot of
17 discovery to be done. And I think Sophos's schedule is still
18 aggressive, but accounts for that.

19 **THE COURT:** Your schedule of proposing a January 2016
20 trial?

21 **MS. GRASSO:** Yes, 25 months to trial. For 13
22 patents.

23 **THE COURT:** All right. There is one practical issue,
24 and that is the ability to actually get you a trial date. I
25 -- even if I were to agree to the somewhat-accelerated

1 schedule that Fortinet proposes of September, right now I have
2 a -- three-month gang case that ultimately will not be
3 resolved since there are some 17 defendants, and I'm sure some
4 are going to go, promises to go. Since it's a
5 quintuple-homicide case, it's probably going to take the last
6 three months of this year.

7 So even if I wanted to give you in September, you would
8 have to trail, and I don't know if you want to trail with, you
9 know, expenses incurred and all that, --

10 **MR. NEWKOM:** Yeah.

11 **THE COURT:** -- not knowing until days before whether
12 they're going to plead out or not. So, it seems to me to make
13 more sense to give you a certain date. And I can give you a
14 certain date, according to my trusty courtroom deputy here, of
15 January 19.

16 Right, Betty?

17 **THE CLERK:** Yes.

18 **THE COURT:** That's clear of any --

19 **THE CLERK:** Yes. We have another civil case but it's
20 -- we're trialing some cases.

21 **THE COURT:** Okay. All right. Everything's
22 double-and triple set around here, but the criminal ones are
23 more problematic, because those have to go when they go.

24 So, I can give you January 19th. You ought to pencil that
25 in. And I will -- I mean, that also tells me how quickly I've

1 got to move to get this thing out in order to get everything
2 else in sequence.

3 **MS. GRASSO:** Just so you know, Your Honor, our
4 schedule did assume a January trial date, so I think --

5 **THE COURT:** Right.

6 **MS. GRASSO:** -- it sticks pretty close.

7 **THE COURT:** Right. Right. So I'm going to give you
8 that date now, and you think -- how long of a trial? Twelve
9 court days? That's three weeks, four court days a week,
10 around here.

11 **MS. GRASSO:** I believe so, Your Honor.

12 **THE COURT:** Okay. You think you need all three
13 weeks, because of the number of patents.

14 **MS. GRASSO:** As it stands now.

15 **MR. JAFFE:** I hope to beat that, Your Honor. I think
16 the parties can work together to get to something shorter than
17 12 days.

18 **THE COURT:** Good. Well, we'll reserve it for now,
19 but that's always subject to revisiting as we go along.

20 So, between now and claim construction, I think I'll have
21 you come back immediately after I do the claim construction to
22 make sure we are on track with respect to the model order and
23 any developments in discovery. And I guess there's probably a
24 summary-judgment motion in the offing there.

25 And if I choose January, the normal-summary judgment

1 deadline is to have that heard in October, or
2 September-October. That means you have to start briefing in
3 August.

4 **MS. GRASSO:** Uh-huh.

5 **THE COURT:** So, you know, that should give you --
6 provided we can move reasonably quickly on this, should give
7 you plenty of time.

8 What about ADR? I know you tried without success, and I
9 didn't see a whole lot of optimism, based on your short
10 statement in here. But, after claim construction, can I
11 assume that we can raise that issue again and see where you're
12 at? And by then you've also -- be on the brink of narrowing
13 the claims.

14 What are your thoughts about ADR?

15 **MR. NEWKOM:** Fortinet is always open-minded about
16 participating in further ADR, Your Honor.

17 **MR. CUNNINGHAM:** And Your Honor, from our
18 perspective, I think after the claim-construction ruling comes
19 out, we would probably be interested more along the lines of a
20 private mediation.

21 **THE COURT:** Okay. All right. Do you concur in that?

22 **MR. NEWKOM:** I think I do. Yes.

23 **THE COURT:** Okay.

24 **MR. NEWKOM:** I'm sorry, Mr. Cunningham; what was the
25 timing?

1 **MR. CUNNINGHAM:** After the claim-construction ruling.

2 **THE COURT:** All right. Well, why don't we discuss
3 that.

4 I'll schedule a -- we what we should do is, just so I have
5 a control date, set a case-management-conference date to come
6 back, which hopefully I can advance, if I can get the
7 claim-construction order out.

8 And I mean, the clock will start running, I'm going to --
9 you know, you've got the 28 days, et cetera, et cetera. Maybe
10 we should set something out for 60 days from now. And
11 hopefully it'll be sooner than that, but for now.

12 **THE CLERK:** January 19 -- I'm sorry; February 19, at
13 10:30.

14 **THE COURT:** In the meantime, I will get out at least
15 a partial schedule that will have trial dates and pretrial
16 conference dates, and, you know, various other deadlines,
17 knowing that we're going to fill in some more stuff that's
18 peculiar to this case.

19 I'll give you at least the general outlines of the last
20 dates for summary judgment, et cetera, et cetera.

21 **MS. GRASSO:** Perfect.

22 **THE COURT:** All right. We'll talk about ADR.
23 Hopefully, maybe, when we get back together you will have met
24 and conferred, and talked about if you're going do private,
25 where you're going to go and how long, and that kind of thing.

1 All right? All right. Good. It's been helpful. Thank
2 you.

3 **MR. NEWKOM:** Thank you, Your Honor.

4 **MS. GRASSO:** Thank you, Your Honor.

5 **MR. CUNNINGHAM:** Thank you for your time.

6 **THE COURT:** Thank you.

7 (Conclusion of Proceedings)

CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Belle Ball 

Monday, January 19, 2015

Belle Ball, CSR 8785, CRR, RDR