

IN THE UNITED STATES DISTRICT COURT  
IN AND FOR THE DISTRICT OF DELAWARE

GAN (UK) LIMITED, )  
 )  
-----Plaintiff, )  
 ) Case No.  
vs. ) 22-361-CJB  
 )  
MGM RESORTS INTERNATIONAL, et )  
al., )  
 )  
-----Defendants. )

-----  
INQUISIENT, INC., )  
 )  
-----Plaintiff, )  
 ) Case No.  
vs. ) 22-900-CJB  
 )  
SERVICE NOW, INC., )  
 )  
-----Defendant. )

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TOPIA TECHNOLOGY, INC., )  
 )  
-----Plaintiff, )  
 ) Case No.  
vs. ) 21-1821-MN-CJB  
 )  
EGNYTE, INC., )  
 )  
-----Defendant. )

TRANSCRIPT OF MOTIONS TO DISMISS

MOTIONS TO DISMISS had before the  
Honorable Christopher J. Burke, U.S.M.J., in  
Courtroom 2A on the 20th of December, 2022.

## APPEARANCES

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Now

1 THE COURT: All right. As we go on  
2 the record, let me welcome you all to our 101  
3 Day hearings today here in three different  
4 cases. And I know we have our court reporter  
5 with us today, so thank you for your service.  
6 And the parties are here with us as well.

7 Just for the record, I'll say that our  
8 first case today is *GAN UK Limited versus MGM*  
9 *Resorts International, et al.* That is Civil  
10 Action Number 22-361-CJB. We've been referring  
11 to it as GAN, but the plaintiffs can correct me  
12 if I'm wrong, if we need to use the initials.

13 Our second case today is going to be  
14 *InQuisient, Inc., versus Service Now Inc.* That  
15 is Civil Action 22-900-CJB.

16 And our third case today is -- we've been  
17 calling it Topia, but may be Topia  
18 (pronouncing). So again, I'll ask Plaintiff's  
19 counsel when we get there to correct me if I'm  
20 wrong. *Topia Technology Inc. versus Egnyte*  
21 *Inc.* That is Civil Action Number  
22 21-1821-MN-CJB.

23 Before we get started, let me go over a  
24 couple of ground rules for our hearings today,  
25 which should be familiar to the parties, but by

1 way of reminder, the schedule we'll have today  
2 is we'll have argument first in the GAN case  
3 and then InQuisient, and then the after the  
4 arguments are completed, we'll adjourn for  
5 lunch and for time for us to process what's  
6 been said by the parties, and then we'll return  
7 in the afternoon.

8 Now, the court reporter, Ms. Warner, has  
9 a change of plea hearing at 2:30 which we  
10 expect to be over no later than 3:30, so I'll  
11 ask all of our participants to return to the  
12 courtroom by 3:30, either then or shortly after  
13 then. Whenever we're ready, I'll come back  
14 out, and the goal will be to provide decisions  
15 in many if not all the cases today orally if I  
16 can. After providing the decisions, I may have  
17 a couple of questions for counsel, if you're  
18 able to stick around beyond then.

19 Secondly, we've told the parties that for  
20 each case, we'll allow 25 minutes per side for  
21 argument today.

22 Third, we've received electronic copies  
23 of folks' slides, and we've gotten hard copies  
24 of some, but if you have hard copies with you  
25 that you want to and can hand up, go ahead and

1 do that before you begin your presentations.

2 Lastly, in terms of the presentations, as  
3 I noted in a prior order, because there's  
4 25 minutes per side, and obviously I have some  
5 questions for the parties for which I'd like  
6 answers, probably a lot of the time will be  
7 focused on me asking those questions. I'll try  
8 to let you, of course, be able to make the  
9 points you really want to make. I did see some  
10 folks have quite a lot of slides, and I'm not  
11 sure I'm going to get to all the slides today.  
12 I have reviewed the slides, for what it's  
13 worth, before today's hearing.

14 So I think that's the preliminary stuff I  
15 just wanted to cover. Let's then, unless  
16 there's anything else we need to address  
17 beforehand, let's turn to our first case, the  
18 GAN or GAN case. Let's have counsel identify  
19 themselves for the record who are here for that  
20 matter, and we'll start first with counsel on  
21 the plaintiff's side and begin there with  
22 Delaware counsel.

23 Mr. Squire.

24 MR. SQUIRE: Good morning, Your  
25 Honor. And it is pronounced, the plaintiff, as

1 GAN.

2 My name is Monté Squire on behalf of  
3 Plaintiff GAN from the law firm Duane Morris,  
4 and I'm joined at counsel table with Diana  
5 Sangalli and Thomas Sankey, and Ms. Sangalli is  
6 going to be actually arguing the motion, Your  
7 Honor.

8 And behind counsel table is my colleague  
9 Gilbert Brooks, and all of us are from Duane  
10 Morris.

11 THE COURT: Okay. Thank you. Be  
12 seated.

13 We'll do the same for counsel for the  
14 defendants' side and again begin with Delaware  
15 counsel.

16 MS. FARNAN: Yes. Good morning, Your  
17 Honor. Kelly Farnan from Richards, Layton, and  
18 Finger on behalf of Defendants MGM Resorts  
19 International and MGM. I'm joined by Sara  
20 Metzler from my office and for my co-counsel at  
21 Arnold and Porter, Evan Rothstein and Patrick  
22 Hall. Mr. Rothstein is going to handle the  
23 arguments for the Court.

24 THE COURT: Thank you. Good to see  
25 you all. So obviously, it's Defendants'

1 motion, so I'll call on their counsel first.  
2 If you don't tell me otherwise, I'll let you  
3 know when you have five minutes left of  
4 argument, and I'm sure each side wants to  
5 reserve a few minutes of time.

6 MR. ROTHSTEIN: Your Honor, just one  
7 question. I think we had already provided hard  
8 copies of the presentation. I wanted to  
9 confirm Your Honor had them for this case.

10 THE COURT: One second. I can tell  
11 you we got them from your side. I'm not sure I  
12 have the hard copies from the other side. If  
13 there are, maybe Defendants' counsel has extra  
14 copies.

15 Okay.

16 MR. ROTHSTEIN: If I could reserve  
17 seven minutes for rebuttal.

18 THE COURT: We'll let you know.

19 MR. ROTHSTEIN: Good morning, Your  
20 Honor. Again, Evan Rothstein from Arnold and  
21 Porter on behalf of Defendants today. We're  
22 here today because the asserted patent against  
23 my clients, the '296 patent, failed the 101  
24 test from *Alice* and *Mayo* at both steps, and is  
25 accordingly invalid, and we ask the Court at

1           the end of our presentation to dismiss the case  
2           with prejudice, given that the plaintiff here  
3           has had multiple opportunities to amend, and  
4           there is no amendment possible at this stage of  
5           the case that would save this patent or save  
6           this case under the 101 test, so we ask for  
7           dismissal with prejudice.

8           The first thing the Court must decide on  
9           the 101 motions, as Your Honor knows, is what  
10          are the claims directed to. Before we get  
11          there, there is an issue of representativeness,  
12          and, as the Court knows, when a party or when a  
13          patentee has not meaningfully challenged  
14          representativeness, which we believe to be the  
15          case here, the Court can simply align with the  
16          defendant's assertion that Claim 1 here is the  
17          representative claim.

18          Now, I have reviewed the slide deck of  
19          the plaintiff here, and it appears that we may  
20          have some debate about representativeness, but  
21          for the purposes of the papers and the  
22          plaintiff's answering brief, they didn't  
23          meaningfully challenge representativeness.  
24          When that happens, the Court, as I said, can  
25          side with the defendants.



1           Now, the representativeness test is when  
2           the claims are substantially similar and linked  
3           to the same abstract idea. Here, in the  
4           answering brief, as GAN argued, the dependent  
5           claims, which apparently they now may argue  
6           take us out of having Claim 1 be  
7           representative, that dependent claims are all  
8           linked to the same idea. And I don't mean to  
9           use the term "link" as GAN uses it in the  
10          directed to definition, but "link" under the  
11          test for representativeness.

12          Now, we posited that Claim 1 is  
13          representative of all the claims in the single  
14          patent. There's 19 claims. There's three  
15          independent claims, Claim 1, Claim 11, and  
16          Claim 18. Claim 1 is the method claim. Claim  
17          11 is the method of -- excuse me, the storage  
18          medium, and Claim 18 is the system claim, but  
19          it's all the same method, and it's essentially  
20          all the same steps.

21          The dependent claims merely add a little  
22          bit, and I'm not talking about patentability.  
23          I'm talking about certain steps or variations  
24          of the independent claims and that, we believe,  
25          all fall under the same abstract idea, which we

1 have identified as this: Coordination of a  
2 user's loyalty credits between an online gaming  
3 service loyalty account and a casino loyalty  
4 account.

5 THE COURT: And I take it,  
6 Mr. Rothstein, you would say when it comes to  
7 what it takes to amount to a meaningful  
8 argument as to why the dependent claims should  
9 be grouped with an allegedly representative  
10 claim, you'd say you have to do something more  
11 than at least note the number of the dependent  
12 claim and point out that it has different words  
13 in it. Every dependent claim does have some  
14 different words in it. They have to do  
15 something more. I guess your argument here is  
16 the plaintiff hasn't done in the brief -- they  
17 have a paragraph where they know they have  
18 dependent claims and they have parentheses  
19 where they list some of the words in those  
20 claims, but they haven't made certain arguments  
21 as to why it's meaningful and why those should  
22 be treated differently for purposes of 101  
23 analysis. Is that your point?

24 MR. ROTHSTEIN: That's correct, Your  
25 Honor. We, in the opening brief, alleged that

1 Claim 1 was representative. Were GAN to  
2 challenge that assertion, typically with an  
3 answering brief that says something along the  
4 lines of what Your Honor is saying, "Claim 1 is  
5 net representative for the following reasons,"  
6 either independent claims add steps or  
7 dependent claims add steps, and we would  
8 respond and reply. That did not happen here.  
9 As Your Honor notes several times and Federal  
10 Circuit ordains, when that occurs, it's  
11 appropriate for the Court to simply adopt the  
12 claim posited by the plaintiff, which is  
13 Claim 1 here.

14 THE COURT: Let me try to cut to some  
15 of the issues that I think are going to be most  
16 substantial here. In their briefing, when it  
17 comes to these three claims that you say are  
18 representative, the plaintiff focused quite a  
19 lot on two particular limitations, especially  
20 at the Step 2 stage, but to some degree  
21 overall.

22 In Claim 1, that's the step of the  
23 application server determining the CMS -- that  
24 there's not a second account with the CMS, and,  
25 if not, creating one. When it comes to Claims

1           11 and 18, it's what we call PIMS, the Partner  
2           Integration Management System, that's  
3           represented in the claims and the action it  
4           takes to determine what I'll call communication  
5           preference of the particular CMS based on the  
6           identity of the user.

7           They also pointed these out. They said  
8           they exist in the claims and the limitations.  
9           They've also pointed to the fact that the  
10          examiner, during reexamination, distinguished a  
11          piece of prior art which I gather otherwise is  
12          relatively within the realm of the abstract  
13          idea at issue, knowing the prior art didn't  
14          have the limitations. Obviously, to the extent  
15          the examiner was doing that and suggesting that  
16          the claim was novel from a Section 102, 103  
17          perspective, that would have relevance to  
18          patentability. But wouldn't the fact at least  
19          that this piece of prior art -- is it Mishkin?

20                 MR. ROTHSTEIN: Mush kin.

21                 THE COURT: But it is -- you don't  
22          deny it's a piece of art that's in this realm  
23          that we're talking about. It's a solution to,  
24          I gather, to communicating between these two  
25          entities with loyalty credits, but it doesn't

1           have these particular limitations. Can't that  
2           be a piece of evidence that helps demonstrate  
3           at least that these claims certainly don't  
4           preempt the entire field of the abstract idea?  
5           And maybe, depending on what it really tells  
6           us, might be so non-preemptive, maybe they  
7           could survive, say at a Step 2 analysis later  
8           on? How come it's not at least a good piece of  
9           evidence the plaintiffs can point to for  
10          preemption purposes?

11                       MR. ROTHSTEIN: Short answer is it's  
12          not a good piece of evidence, and let me  
13          explain why. First, the preemption point Your  
14          Honor makes is viewed in the entire *Alice*  
15          analysis and not necessarily just at Step 2.  
16          And I think that preemption for eligibility --  
17          excuse me -- for ineligibility preemption  
18          doesn't necessarily mean it doesn't preempt the  
19          field; therefore, it's eligible. But if it  
20          doesn't preempt the field, then it means it is  
21          ineligible.

22                       THE COURT: Wouldn't you say  
23          though -- I know all the parties talked about  
24          this because I asked about preemption in my  
25          letters. On the one hand, we have federal

1           caselaw that says preemption is an important  
2           concept with regard to the eligibility  
3           analysis. On the other hand, I could certainly  
4           have caselaw that says just because a  
5           particular claim doesn't preempt the entire  
6           field that's described in the abstract idea,  
7           that doesn't mean it's eligible. If the former  
8           is right, if preemption has got something to do  
9           with the inquiry, then there must be claims  
10          that are so particularized, real-world  
11          "applicationy" that it's clear that they don't  
12          preempt enough of that abstract idea and all  
13          the solutions out there within the realm of the  
14          abstract idea that the claim could survive. I  
15          know total preemption is not the requirement  
16          here, but preemption has something to do with  
17          that stip in the waiver, doesn't it?

18                 MR. ROTHSTEIN: I agree. I think  
19          preemption underpins the analysis, but I don't  
20          think it's dispositive here. Let me talk about  
21          the two things you mentioned, and we'll skip  
22          right ahead to Step 2 to address these  
23          questions.

24                 You're right. Claim 1 has an application  
25          server that does the discerning step. Claim 11

1           and Claim 18 change the application server and  
2           it's now what you call PIMS or the management  
3           system. Neither of those devices or pieces of  
4           computer code or software are disclosed or  
5           described in any meaningful form in the patent  
6           specification.

7                       THE COURT: My guess is if I asked  
8           you, "What is the PIMS?" I bet you would say,  
9           "It's a black box. It's not some term that has  
10          additional, independent limitations to it that  
11          are going to add narrowness and specificity."  
12          I can't imagine you're going to say the claim  
13          is going to say my construction of this term  
14          is, and then provide five limitations that have  
15          to present for something to be PIMS. Is that  
16          your view of it?

17                      MR. ROTHSTEIN: Yes, and the reason I  
18          say that is because there's no disclosure or  
19          description of any kind in the specification to  
20          tell us what it means. So had Plaintiff wanted  
21          to challenge that, for example, as a claim  
22          construction issue that would prevent the  
23          granting of this motion, that is something they  
24          could have posited in their answering brief but  
25          didn't. So we're left with looking at the

1 specification.

2 Obviously, we look at the claims first  
3 when we see "application server" and "PIMS,"  
4 and they pointed out that's the inventive  
5 concept, so to speak, that takes these out of  
6 Step 2 and makes them inventive. We go to  
7 specification for guidance, as Your Honor and  
8 the Federal Circuit has told us, and there is  
9 no explanation for what it means. So I agree  
10 with you, yes, this is a black box piece of  
11 equipment or software that is not being infused  
12 into the claims to add any inventive concept or  
13 change that would take it out of the 101 *Alice*  
14 two-step process.

15 If you look at, as you said, the *Muskin*  
16 reference, which we don't have, so we don't  
17 know what problem *Muskin* is solving or even the  
18 way it was solving it, the challenge from the  
19 examiner during the re-exam during *Muskin* was a  
20 102, 103 challenge, so we're dealing with  
21 obviousness and anticipation and not novelty.

22 Under many cases, the *SAP* case, *Take II*  
23 case, novelty doesn't equal inventiveness. You  
24 can have an argument that you navigated a piece  
25 of prior art for the application process, but



1           you still haven't changed the patent claims in  
2           a 101 analysis to make them eligible.

3           THE COURT: On the second of the two  
4           limitations, the PIMS limitation, the  
5           limitation describes how the PIMS determined a  
6           communication preference of the CMS based on  
7           the identity of the user. Do you have a view  
8           or understanding of what it means to determine  
9           a communication preference of the CMS and how  
10          it is that one might do that based on a user's  
11          identity?

12          MR. ROTHSTEIN: I have an  
13          understanding of that but not from this patent  
14          and not from the claims.

15          THE COURT: Do you want to tell me  
16          what that is?

17          MR. ROTHSTEIN: What I would argue is  
18          the concept that we have said is what the claim  
19          is directed to, which is the coordination of  
20          loyalty credits from one account to another.  
21          If one entity is saying, "I know this user, I  
22          identify this user; therefore, I'm changing my  
23          communication preference," to me, that's just  
24          overlaying another abstract idea of user  
25          identification, and there's a slew of Federal

1 Circuit cases about how user identification is  
2 an abstract concept. We cited one in the *Boon*  
3 *Payments* case in our letter to Your Honor that  
4 it just layers over another level of  
5 abstraction on top of the coordination we have  
6 identified which the claims are directed to,  
7 which is another abstract idea.

8 So perhaps using a human analog example  
9 here for Your Honor that we have put together  
10 that I think may help me, at least, explain it  
11 is this, and I will put it up on the screen  
12 here. So what's depicted on the screen is an  
13 example, essentially, of what we believe the  
14 claims cover from a human analog perspective.  
15 And I know Your Honor has identified in  
16 numerous cases areas or examples where humans  
17 could perhaps or may have done something that  
18 is now attempting to be patented but may not  
19 have actually done. And in those instances,  
20 Your Honor typically sides with the patentee  
21 and says this really wasn't done by humans.  
22 But in this case, I believe this case falls  
23 into the category of cases where there are  
24 actual examples of the patent occurring in the  
25 human space and did happen for a very long

1 time.

2 THE COURT: By the way, we were  
3 talking about this before yesterday. The whole  
4 "human analog" piece of this, why the Courts  
5 look at it, I've always had the sense that,  
6 well, if the -- what the claim is basically  
7 about is something that humans have done for a  
8 while, it's a shorthand almost of saying that's  
9 likely something that is a broad enough concept  
10 that it is probably an abstract idea. But is  
11 that right? Why do we even care whether humans  
12 have done X before? What does it tell us about  
13 Step 1 of the 101 inquiry?

14 MR. ROTHSTEIN: I think it's the  
15 three things that have been identified by the  
16 Court as under the purview of things that can't  
17 be patented. So the 101 is very broad.  
18 Typically, it was easy to pass the 101 test,  
19 but then there were certain categories, the  
20 abstract concept, natural phenomenon, and said  
21 you're adding, in our time, a computer or more  
22 recently an internet to things people were  
23 doing for a long time. And it goes to the  
24 preemption point Your Honor was talking about  
25 earlier. You don't want to monopolize an

1           entire area or entire field by taking something  
2           people were doing, whether it's a fundamental  
3           economic practice or commerce or a business  
4           method, and say now we have a better a way of  
5           doing it because we can do it faster with  
6           computers. We can do it easier in a  
7           communications context because of networking  
8           capabilities, and now we've taken that away  
9           from what was normally in the public realm and  
10          allowing folks to patent it.

11                 THE COURT: It sounds like you're  
12          saying that if the claim is to what humans do,  
13          it helps you with the whole "is this a  
14          do-it-on-a-computer patent." Like, is the  
15          computer add really meaningful? If the claim  
16          is or sounds like something a human did or  
17          could do, that's a piece of evidence suggesting  
18          that whatever the computerization of this is,  
19          is it meaningful from a Step 1 or Step 2  
20          analysis? Is that's kind of what you're  
21          saying?

22                 MR. ROTHSTEIN: That's correct, and I  
23          think this patent is done on a computer and a  
24          do-it-on-the-internet patent more so than this  
25          is something humans have done and now we do it

1 on the computer. It's humans and then  
2 computers were doing it and now we want to do  
3 it over a network.

4 THE COURT: You were going to explain  
5 the human analog.

6 MR. ROTHSTEIN: Before we get to  
7 this, let me drill down on this point because  
8 the preamble of the claims is a method for  
9 communicating. The title of the patent  
10 nominally says "A Network Gaming and Casino  
11 Management Link." I suppose it's  
12 understandable on one level why the plaintiff  
13 wants to focus on the link, or what we're now  
14 going to hear, based on their deck, that is now  
15 a connection mechanism, which is somewhat of a  
16 pivot from their answering brief, but there is  
17 no connection mechanism or link that's actually  
18 in the claims. The claims, I believe, and the  
19 specification supports this, is there has  
20 already been a connection made between the  
21 offline server, the casino management system,  
22 and the online server. And then this explains  
23 how the communication is going to go between  
24 them.

25 THE COURT: They talked about this

1 communication mechanism piece quite a lot in  
2 their brief. I gather your point in response  
3 was if a communication mechanism is literally  
4 kind of the physical or software-based  
5 structure of communicating between these two  
6 entities, the port, the way the data comes  
7 through, there isn't much in the claim that  
8 seems to relate to that. Is that kind of what  
9 you were saying?

10 MR. ROTHSTEIN: That's correct.  
11 Whether it's -- what I struggled with when I  
12 walked in here this morning, the HDMI cable  
13 that I couldn't find to connect to the iPad to  
14 the system or whether it's the handshaking  
15 analog I'm going to go through right now or  
16 whether it's the software or the API, that  
17 connection mechanism, if it's truly what they  
18 wanted to invent, isn't claimed in any respect  
19 whatsoever.

20 THE COURT: One of the PIMS  
21 limitations talks about a communication  
22 preference that's going to be the focus. What  
23 do you think a communication preference is?  
24 What would be an example of it?

25 MR. ROTHSTEIN: Again, in my analog,

1           someone calls one casino to the other and they  
2           speak in Spanish, and the guy on the other line  
3           or the woman on the other line says, "This  
4           person speaks Spanish. I have to get a Spanish  
5           speaker. Now I'll be able to communicate."

6           THE COURT: But in the computerized  
7           claims, it might be a particular computer  
8           language.

9           MR. ROTHSTEIN: Or the API, however  
10          they want to get their data. If you walked  
11          into the saloon or casino with a pit boss  
12          50 years ago and you only spoke Portuguese, you  
13          may not be able to communicate with them, but  
14          maybe there was someone else at the casino who  
15          could.

16          THE COURT: You're at the  
17          seven-minute mark. Is there an extra point you  
18          want to make?

19          MR. ROTHSTEIN: That means I've been  
20          speaking too much, so I'm going to reserve my  
21          time.

22          THE COURT: All right. Thank you.  
23          Let's hear from Plaintiff's side.

24          Ms. Sangalli, good morning to you.

25          MS. SANGALLI: Good morning. May it

1 please the Court. Defendants today have asked  
2 the Court to invalidate 19 claims of this  
3 patent based on what they are now saying is a  
4 single representative claim that differs  
5 significantly from the other 18 that are in  
6 this patent. That they have done so reflects  
7 the problem with their entire analysis. That  
8 analysis rests on a fundamentally incorrect  
9 characterization of the subject matter of the  
10 19 claims that they have asked the Court to  
11 invalidate. That incorrect characterization of  
12 the claims are directed to coordination of a  
13 user's loyalty credit is not the focus of the  
14 specification or the claim language, and it  
15 ignores the inventive features individually and  
16 in the ordered composition.

17 That incorrect analysis -- that incorrect  
18 overgeneralization taints their entire  
19 analysis. It's why their representative claim  
20 analysis is wrong. It's why Step 1 is wrong,  
21 and it's why Step 2 is wrong.

22 THE COURT: Ms. Sangalli, in your  
23 briefing, you talked a lot about the Step 1  
24 stage about knowing it wasn't wrong because the  
25 claims are not directed to that broad abstrict



1           idea. Instead, they're directed to a  
2           communication mechanism between the online  
3           gaming casino and the CMS, the brick-and-mortar  
4           casino. If I were to ask you what is the  
5           connection mechanism in your view, and using  
6           one of our alleged representative claim,  
7           whether it's Claim 1 or Claims 11 and 18, what  
8           portion of those claims actually get to the  
9           substance of what the communication mechanism  
10          is in your view?

11                       MS. SANGALLI: And it's different in  
12          Claim 1 than it is in Claims 11 and 18. In  
13          Claim 1, the way that these two systems are  
14          connected together is by this application  
15          server that first determines if there is an  
16          account in the casino management system to  
17          communicate with. If there's not, it creates  
18          the account. Once the account is created, it  
19          accesses the account, and from then, the  
20          communication can proceed to transfer the  
21          loyalty credits.

22                       THE COURT: The work that the  
23          application server is doing there to determine  
24          whether there is a second account, if not,  
25          create one, that's key to your view of what the

1 communication mechanism is?

2 MS. SANGALLI: Correct. And I think  
3 that's supported by the specification, which  
4 talks about the account creation as being part  
5 of the linking mechanism.

6 THE COURT: If it was so important in  
7 terms of what this claim and the patents are  
8 about, why wouldn't there be more discussion  
9 about it in the spec or the abstract or the  
10 summary of the invention section? Why wouldn't  
11 we be talking there a lot about "Let me tell  
12 you about the work this application server  
13 does, and how we have problems where sometimes  
14 these CMSes, they don't have accounts, and we  
15 need to find a way to solve it." The patent  
16 doesn't give you that, I don't think, to any  
17 great degree, nor, I think, does your claim,  
18 does it?

19 MS. SANGALLI: What I would say is if  
20 you focus on the correct portions of the  
21 patent, that there is some discussion about  
22 that. In the very beginning, in both the  
23 summary and description of the patent, there is  
24 a description that there is an inability of  
25 these online gaming systems to be able to

1 connect to one or more variety of different  
2 casino management systems. By putting the  
3 application server in between, it solves that  
4 problem. Now there's no need for the online  
5 system to be aware of anything that's going on  
6 in the offline system, and the application  
7 server takes care of all those problems for it.  
8 It creates the account if it doesn't exist.

9 Likewise, the Partner Integration  
10 Management System also performs that function.  
11 By putting that piece in the middle of these  
12 two systems, it can now handle the  
13 communications between them. It can determine  
14 how they should communicate and then implement  
15 that communication.

16 THE COURT: Just to kind of circle  
17 back to the point though, in their briefing,  
18 Defendants noted that, where you want to look  
19 at when a patent should really what is this  
20 really about, often you want to go to the  
21 background section, the summary of the  
22 invention section. What is the problem?  
23 What's the solution?

24 And they noted that a lot of that the  
25 last piece of the background section, what it

1 kinds of seems to say is, "Do you know what's a  
2 big problem? This online casino can't  
3 communicate with the brick-and-mortar casino.  
4 It would be great if they could communicate."  
5 If that, at a pretty high level, was the  
6 problem and solution, and then you go to the  
7 summary section and it's not talking about an  
8 application server, it's not talking about the  
9 PIMS, it's not talking about the intricacies of  
10 figuring out whether a CMS has a new account.  
11 It's not talking about communication  
12 preferences. In other words, it's not talking  
13 about the stuff that I think now and in your  
14 briefing you say really is the heart of the  
15 patent. I guess, how come it's not doing that?

16 MS. SANGALLI: And I would agree with  
17 you, Your Honor, that the specification is  
18 broadly written. It is. It encompasses many  
19 different ways of creating the accounts as well  
20 as determining the communication preferences.  
21 What the patent does do is that it sets up the  
22 structure where, again, we have the application  
23 server. It has databases that have user  
24 account information in there. That's described  
25 in the patent. The user account information

1           that's in that database that describes the  
2           various fields that are in there, the patent  
3           also --

4           On my slide eight here, the -- says that  
5           these applications that are on the application  
6           server can include one or more modules which  
7           implement the logic that connects the systems  
8           together, and that logic can include accessing  
9           that information in the database, which is the  
10          user account information, so that it could  
11          either modify the information or create new  
12          accounts.

13          Part of that logic also is incorporated  
14          in the Partner Integration Management System.  
15          And I think that's the name. We've been  
16          short-handing it as PIMS, and it kind of  
17          glosses over what that particular module is,  
18          that Partner Integration Management System.  
19          That PIMS enables an online gaming system to  
20          communicate with any of a variety of different  
21          types of CMSes.

22                 THE COURT: In that regard, as  
23          Mr. Rothstein said, in your brief, it's not  
24          like you said, "Judge, look. This PIMS is key,  
25          and, more particularly, at claim construction

1 we're going to argue that the construction of  
2 that term is blank. And the construction of  
3 that term is going to include specificity. A  
4 PIMS is not just going to be a black box. It's  
5 not going to be any old thing that does what  
6 the claim says the PIMS does. It's going to be  
7 something more specific, more narrow, more  
8 particularized, which in some way is going to  
9 lend to our 101 argument because the more  
10 specificity, the more requirements that the  
11 claims have for what is a PIMS, presumably not  
12 every solution in this realm is going to have  
13 that."

14 I guess the question for you is, what is  
15 a PIMS? And at claim construction in this  
16 case, are you going to argue that PIMS has a  
17 narrow construction that's going to help your  
18 101 argument or no?

19 MS. SANGALLI: No -- that -- yes, we  
20 do believe that "PIMS" does raise a claim  
21 construction issue and that that would be --  
22 given the functions that are performed that are  
23 defined in the specification, that those are  
24 going to impact what the scope of a PIMS is.

25 THE COURT: In what way? In other

1 words, right now, Claims 11 and 18, they  
2 require a PIMS to determine a communication  
3 preference of a Casino Management System based  
4 on the identity of a user. At claim  
5 construction, are going to say PIMS is  
6 something that does just that, it determines a  
7 communication preference of the CMS using --  
8 based on the identity of the user, or are you  
9 going to say not only that, but the PIMS itself  
10 has certain requirements; a PIMS is actually a  
11 type of software which must utilize X or Y or  
12 whatever? Is there going to be any more  
13 particularity to what a PIMS is beyond the  
14 function that the claims require it to carry  
15 out?

16 MS. SANGALLI: Yes, Your Honor. We  
17 would propose a construction of PIMS that would  
18 include more structure on that. And I think  
19 that's supported by the specification. The  
20 specification, again, talks about this idea of  
21 this abstracted integration, which is a  
22 technical term, but anyway, at the end of the  
23 day, what we have here is this middle man in  
24 between the online service and the offline  
25 services. That middle man includes the Partner

1           Integration Management System that establishes  
2           this connection. In a certain way, it looks up  
3           and receives the request from the application  
4           server. It looks up account information. It  
5           accesses account information. That account  
6           information includes information about the user  
7           as well as some of the loyalty program  
8           information that's associated with that user,  
9           and based on the information that that PIMS  
10          accesses, it can then establish this connection  
11          between any particular CMS based on the  
12          identity of the user. So this isn't a system  
13          where you're assuming you have a connection and  
14          these two pieces already talk to each other.  
15          That would be in the *Muskin* reference.  
16          Instead, what you have now is this PIMS that  
17          sits in between them, that is abstract in  
18          integration, that provides functionality such  
19          that if the online system doesn't have to know  
20          how to talk to the offline system, the PIMS  
21          does it for it.

22                   THE COURT: You said the PIMS is  
23                   going to require more structure. I'm  
24                   struggling to hear what is this structure. I  
25                   think you said something about abstracted,



1           abstraction. I would say it's not something  
2           you talk about much in the briefs, and the  
3           other side is going to say it's news to us if  
4           there's some construction of PIMS that goes  
5           beyond the functionality the claims are  
6           required to have.

7           If you were to say, Judge, look, in  
8           addition to a PIMS, whatever it is, whatever a  
9           PIMS is besides a middle man black box thing,  
10          it's got to determine communication preference  
11          based on the user at the CMS, beyond that,  
12          we're going to say it also requires that a PIMS  
13          is blank, how would you fill in that blank?

14          MS. SANGALLI: And I think at this  
15          point, we would need expert testimony on the  
16          understanding of how this abstracted  
17          integration also functions and what a person of  
18          skill in the art at the time would understand  
19          that to be.

20          THE COURT: But it's not something  
21          you're prepared to say today, what that  
22          testimony is going to be?

23          MS. SANGALLI: Other than the PIMS is  
24          a software module that sits on the application  
25          server in between the online system and offline

1 system that is configured to provide certain  
2 functionality. That functionality is to look  
3 at account information, determine communication  
4 preferences, determine communication types, and  
5 then based on that information then send  
6 messages to, for example, a web server and tell  
7 the web server to communicate according to the  
8 preferences.

9 THE COURT: What's a communication  
10 preference that the PIMS would be determining?  
11 What's an example of that?

12 MS. SANGALLI: And the patent  
13 describes a description of different types of  
14 communication preferences. For example, it  
15 could be a VPN. It could be an XML connection.  
16 Could be SOAPConnection. Could be synchronous  
17 or asynchronous. Different examples in the  
18 specification.

19 THE COURT: Sounds like there could  
20 be lots of different communication preferences.

21 MS. SANGALLI: And the reason there  
22 could be many different ones is because these  
23 Casino Management Systems traditionally could  
24 have proprietary types of software to help how  
25 they interface with other types of systems. So

1           you want to have the flexibility in this online  
2           gaming system that GAN invented to be able to  
3           communicate with any particular one of those  
4           many different types of systems that are out  
5           there.

6                       THE COURT: And I guess lastly on  
7           this term, it has to do with based on the  
8           identity of the user. If the PIMS is saying  
9           how does the CMS prefer to communicate, maybe  
10          through a VPN, it's also got to make that  
11          determination based on the user's identity, how  
12          does the user's identity come into play in your  
13          view?

14                      MS. SANGALLI: User's identity would  
15          be information in the database that provides  
16          information about the user account, so looking  
17          up the information in the database is also  
18          going to give information about what Casino  
19          Management Systems that user is affiliated with  
20          or associated with, and based on that, based on  
21          knowing that that user is associated or has  
22          accounts associated with particular types of  
23          particular Casino Management Systems, then the  
24          Partner Integration Management System can make  
25          a determination on communication preference.

1 THE COURT: It almost seems like the  
2 term "based on the identity of the user" part  
3 is saying, where is the user's account here?  
4 I'm struggling to see how you use the user's  
5 identity to help you figure what is the  
6 communication preference. What you were  
7 describing was two separate steps. First,  
8 figure out how does the CMS prefer to talk to  
9 the online gaming system? Maybe through XML.  
10 And also we want to make sure we find that  
11 there's a user account there. Are those two  
12 steps related to each other? The claims seem  
13 to say they should be.

14 MS. SANGALLI: Yes, because the claim  
15 does talk about accessing the information about  
16 the user accounts. And, again, the  
17 specification describes user account  
18 information being stored in the database, so  
19 the user identity could be -- and again, I  
20 think this is going to be the subject of expert  
21 testimony -- could be used as an index about  
22 this other types of information about  
23 communication preferences.

24 THE COURT: If the defendant were to  
25 say, Judge, we think the claims are directed to

1 the abstract idea, basically, of just  
2 communicating, communicating writ large,  
3 between one system and another, the online  
4 gaming system and the CMS. We don't think it's  
5 much more than that. If in response, you were  
6 to say no because there's this PIMS that's a  
7 middle man or this application server, but I'm  
8 not going to tell you anything about what those  
9 things are or what they do, there just is one,  
10 the defendant will say just saying there's a  
11 thing that kind of doesn't have any  
12 understandable requirements or narrowness or  
13 particularity, that can't take you out of the  
14 abstract idea that we just asserted, which is  
15 just about communication, basically any old way  
16 of communicating, with minor tweaks, between  
17 these two things.

18 If you were to say no, I'm not just  
19 saying that the thing that takes us out of the  
20 abstract idea that these claims are directed to  
21 is that there happens to be an application  
22 server that does something or a PIMS that does  
23 something, it's more than that, it's more  
24 specific than that, there's more requirements  
25 than that, is there anything more you can say

1           today about what fills in those blanks? What's  
2           the particularity beyond the fact that there  
3           happens to exist server or a PIMS that's part  
4           of the systems? Do you know what I'm asking?

5           MS. SANGALLI: Yes, and the claims do  
6           have broad language in it, but the claims --  
7           when you're looking at the breadth of the  
8           claims, the inquiry would be is it just simply  
9           claiming a result. And these claims aren't  
10          just simply claiming the result. They're not  
11          claiming connecting an online system to another  
12          system and allowing communications to go  
13          between them. Instead, what the claims include  
14          in addition is actually how that connection is  
15          implemented. In Claim 1, it is when the  
16          application server that accesses information  
17          determines that an account does not exist and  
18          automatically creates that account for the  
19          user. In Claims 11 and 18, that connection is  
20          done by a Partner Integration Management System  
21          which, yes, it determines communication  
22          preferences based on the identity of the user  
23          and then it communicates according to that  
24          communication preference. There's other  
25          limitations in the claims, too, that add

1 further to that.

2 THE COURT: Before you move on, the  
3 Claim 1 determining step, application server  
4 determining if the CMS doesn't have an account  
5 for the user and creating one, is there  
6 anything more the determining is going to  
7 require other than the functionality that's  
8 addressed in the claims? In other words, are  
9 you going to be saying later at claim  
10 construction, what's required there by the  
11 determining step, it's going to have to  
12 determine in a more particular way, not just  
13 any old way, just determine whether there's an  
14 account, actually, what the identifier is  
15 determining by using a blank or by doing a  
16 blank. Will there be any more particularity  
17 besides that?

18 MS. SANGALLI: With respect to the  
19 determining stuff, I would say there's already  
20 particularity in the claim on that. That's  
21 part of accessing the second account  
22 information, second account in Claim 1. It's  
23 second account when you access second account  
24 information comprising determining by the  
25 application server that an account doesn't

1           exist. So the application server is -- part of  
2           that step is going to be accessing the  
3           information about the user, that there is a  
4           second account there. Either the online  
5           database associated with the online gaming  
6           system, does that indicate that the user has an  
7           account in the CMS? Does the database in the  
8           CMS, does that indicate there's an account  
9           there?

10           If there is no indication there is a  
11           second account for the user, then the  
12           application server uses that information to  
13           create the account. One way it can create an  
14           account, and this is described in the  
15           specification, that it can use the information  
16           that the user input during the online  
17           registration process. So using -- when the  
18           user registered for an online account, the user  
19           provided information like name, birth date,  
20           other type of identifying information that  
21           would be important to creating that account.  
22           That same information then can be used by the  
23           application server to create the account in the  
24           CMS.

25           THE COURT: You've got about five



1 minutes left. And one other question about  
2 these two, I think it's fair to say both in the  
3 briefing and here today, if there was something  
4 that's key to your 101 argument with regard to  
5 these, at least, assertedly representative  
6 claims, it's the work the application server is  
7 doing in Claim 1 with regard to determining  
8 whether the CMS has a second account, and it's  
9 the work the PIMS is doing in the other two  
10 claims, 11 and 18, to determine the  
11 communication preference of the CMS. Is that  
12 fair to say?

13 MS. SANGALLI: That's a fair  
14 characterization, Your Honor.

15 THE COURT: In this regard, as the  
16 other side notes, you already had a second  
17 amended complaint. You had a bunch of chances  
18 to amend. One of the things you could have  
19 done -- today you talked a lot about how many  
20 of the answers here today relate to expert  
21 testimony. One thing you could have done is  
22 either attach a declaration from an expert or  
23 reference an expert's testimony and say let me  
24 explain through the words of this expert why it  
25 is that in the realm of the abstract idea that

1 the other side has put at issue here, that is,  
2 simply coordinating loyalty credits between an  
3 online gaming service and CMS, let me explain  
4 to you why it is that a solution that has a  
5 step that requires you to see if the CMS has a  
6 second account and, if not, to create it, let  
7 me explain why it is that does not unduly  
8 preempt the field, why it is that in the field  
9 of all the possible solutions in out there in  
10 the abstract idea realm, there's only a few  
11 that take this step. It's incredibly narrow.  
12 And similarly, you could have done that with  
13 regard to Claims 11 and 18 talking about PIMS,  
14 and you didn't.

15 Why didn't you? And should that be held  
16 against you if I determine that I need some  
17 more particularity? Because the other side is  
18 going to say, "Don't let them amend. They've  
19 had their chances." Why didn't you do that  
20 kind of work in the second amended complaint?

21 MS. SANGALLI: In the second amended  
22 complaint, we attached a very important  
23 document, which was the R&D tax credit, and I  
24 know the defendants will infer that Your Honor  
25 hasn't looked at that document. The document

1 is attached as an exhibit. It doesn't  
2 necessarily establish inventiveness or what was  
3 routine and conventional, but it certainly  
4 raises issues about it.

5 That document was prepared by GAN for  
6 business purposes back in the 2015-2016 time  
7 frame, so closer in time to the time of the  
8 invention, and indicates what they perceived to  
9 be a problem at that time, was this inability  
10 of these online systems to be able to  
11 communicate with many different types of Casino  
12 Management Systems. It also reflected that  
13 there was a question -- that there was none of  
14 this automatic account creation by these  
15 systems.

16 Seeing that problem, the challenge that  
17 they undertook was to create a new system that  
18 could do this and do it in a flexible manner.  
19 That information is in that description that  
20 they provided in the R&D tax claims. The  
21 solution that they came up, with which is shown  
22 on, I believe, page 11 of the R&D tax claim, is  
23 the patented system where there is that  
24 application server that sits in between the  
25 online system and the Casino Management System.

1           It includes the Partner Integration Management  
2           System there. And importantly, what they  
3           wanted to do was they wanted to provide a  
4           system that was flexible, that could flexibly  
5           accommodate and connect to the many different  
6           types of CMSes that would be out there. The  
7           Partner Integration Management System does  
8           that. They wanted it to be able to  
9           automatically create accounts if none existed.  
10          This application server does that. They also  
11          wanted it to be resilient against  
12          unavailability of the Casino Management System.  
13          This system, as claimed in some of the  
14          dependent claims, does that by queueing  
15          information based on unavailability. So --

16                 THE COURT: I'm sorry. I was going  
17          to ask you about the tax credit allegation. I  
18          guess the big question I had there was, so, you  
19          know, in issuing the tax credit, the complaint  
20          alleges that the tax authority acknowledged  
21          that GAN had -- was developing or attempting to  
22          develop work that, as a resolution of  
23          scientific or technological uncertainty, that  
24          was not routine. Obviously, whatever it is  
25          that that tax authority is talking about or the

1 analysis that they're using, it's not going to  
2 neatly overlay. It's not as if they were  
3 looking at what does Section 101 law require in  
4 terms of unconventionality? It's sort of a  
5 blunt instrument in that respect.

6 And I guess what's the most focused way  
7 you could say, "Judge, if you look at what we  
8 alleged about what that authority had  
9 necessarily determined, the most focused link  
10 between what they had to determine and what 101  
11 law requires, say when it comes to Step 2, is  
12 blank," what would you say?

13 MS. SANGALLI: I would say that what  
14 they had to determine, that this was a solution  
15 that was not -- it's difficult because I don't  
16 want to use words that implicate 102 or 103.  
17 That's not what they were doing.

18 THE COURT: Right. That's the  
19 question.

20 MS. SANGALLI: It was a scientific  
21 advance over the technology that was then  
22 available, and it wasn't just a minor  
23 scientific advance. It's just not a simple  
24 variation on technology that was already out  
25 there. It had to represent more than that in

1           order for them to issue the tax credit. And  
2           that is what the inventors were trying to  
3           convey in their description of the problems  
4           they were facing and the solution they came up  
5           with.

6                       THE COURT: Ms. Sangalli, you're out  
7           of time. One thing I'll ask of you, we won't  
8           have surrebuttal, but after Mr. Rothstein  
9           finishes, of the allegations in the complaint  
10          that relate to the tax credit, is there a  
11          particular paragraph or paragraphs that you  
12          would say, "Judge, I want you to focus on the  
13          allegation we made in that paragraph"? I'm not  
14          putting you on the spot right now. I'm giving  
15          you a chance to say, after they finish, "Judge,  
16          please look at paragraph 22 and 23," if you  
17          would do that.

18                      MS. SANGALLI: I will do that. Thank  
19          you, Your Honor.

20                      THE COURT: We'll have defendants  
21          back for seven minutes of rebuttal.

22                      Mr. Rothstein, I'm going to try to let  
23          you speak uninterrupted because I didn't let  
24          you do that last time.

25                      MR. ROTHSTEIN: That will make me

1 nervous, Your Honor, but I'll try to go for  
2 seven minutes.

3 I'm going to start here, which is the  
4 newest Federal Circuit case on 101  
5 jurisprudence identified by the plaintiff as  
6 analogous to this case, and in reality what I  
7 think it does is it demonstrates why this case  
8 is different and why this patent should die at  
9 101. And it's because of things that Your  
10 Honor identified in your questioning of  
11 Plaintiff's counsel, which is where is the  
12 specificity or the "how" in these claims and  
13 this specification? Where is the language such  
14 as "the present invention comprises" or "this  
15 is the innovation over prior art" or "this is  
16 the most important or essential piece of my  
17 patent and why I'm applying for it"?

18 That language doesn't appear in the '296  
19 patent, but it does and did appear in the  
20 patent at issue in *Collective*. In *Collective*,  
21 that case involved content distribution  
22 networks and a new and novel and inventive idea  
23 to transmit high amounts of data over a network  
24 in a different way. The patentee there said,  
25 "Here are the prior art systems and how they

1           did it typically, but my claims do it  
2           differently." And in the *Collective* case, the  
3           Federal Circuit found two different pieces of  
4           invention, two different inventive concepts,  
5           that were so stark and stood out so much that  
6           they didn't need to get to the abstract idea.

7           The judges, and I believe it was Chief  
8           Judge Moore, found there was the peer-to-peer  
9           networking outside the CDM: Inventive. The  
10          trace networking, the trace routing, in that  
11          process: Inventive. And those things were  
12          described in the specification as inventive and  
13          solving a problem that was identified.

14          Juxtapose that against the patent we have  
15          here. This is Figure 1. The patent we have  
16          here and the description of the claims here  
17          have none of what I just said was in the  
18          *Collective* case. Instead, we have what Your  
19          Honor identified as black box devices.  
20          Standard, off-the-shelf pieces of computing  
21          that are talking to one another. The arrows on  
22          the screen there, I have big red Xes through  
23          them because there are no explanation  
24          whatsoever, either in the claims or in the  
25          specification, about how any of this is



1           supposed to happen.

2           And that's because this is an abstract  
3           concept. This is supposed to happen, in the  
4           '140 on the right side, the network. This is  
5           just the internet connecting two systems. This  
6           is a fundamental practice of commerce that's  
7           been around for a hundred years, and this is  
8           simply a communication style of how this is  
9           happening.

10          Now, if we focused on one of the black  
11          boxes, which is the PIMS, which is the question  
12          Your Honor had for myself and for opposing  
13          counsel first, as well as the application  
14          server, first, they're denoted as two different  
15          things here in the black box on the left. But  
16          if you look at the specification, they aren't  
17          described, the PIMS nor the application server,  
18          as important in any way. They're not even  
19          described at all. They're simply identified as  
20          PIMS. "The PIMS may do this" or "the  
21          application may do that." And then they're  
22          added to the claims that overcame the *Muskin*  
23          reference.

24          I think if I were to step back and say  
25          what happened here, the original application

1 was attempting to claim a method of  
2 communication, how one server was going to talk  
3 to another, whether it's an online Casino  
4 Management System and then an online server,  
5 and got an office action rejection or, excuse  
6 me, rejection by examiner because of *Muskin*,  
7 and then they added the PIMS and to Claims 11  
8 and 18 overcome the 102, 103 rejection. But  
9 they didn't describe it or disclose it in any  
10 manner in the specification.

11 THE COURT: It's talked about once or  
12 twice in a couple of paragraphs, as you said,  
13 often by describing functionally what they do.  
14 Column 3 talked about it a little bit.

15 MR. ROTHSTEIN: Paragraph column 2,  
16 it's identified, just identified. And then at  
17 column 3, lines 15 through 25, it's identified.  
18 But it doesn't say this is the most important  
19 part of the invention, here's what it's going  
20 to do. And I will say this to Your Honor's  
21 question about should they be allowed to amend  
22 again -- this is why I started here. At page  
23 two of our reply brief --

24 THE COURT: Mr. Rothstein, before you  
25 do that, because it will take you close to the

1           time, obviously, the Federal Circuit has, at  
2           times, criticized district courts for not  
3           allowing the patentee every opportunity to make  
4           that argument, knowing it's early stage and  
5           without a record, it's hard to make, so if you  
6           were to explain here why, if I agree with you  
7           that at this stage, you have made out your  
8           motion, why it is that the claims are patent  
9           ineligible, why should the patentee not get one  
10          more chance to try to amend?

11                       MR. ROTHSTEIN: That's precisely  
12          where I was going, so thank you, Your Honor.  
13          Here's why: We're talking about a second  
14          amended complaint. They had an original  
15          complaint, first amended complaint, and second  
16          amended complaint. So this would be the fourth  
17          complaint and attempt to plead a plausible case  
18          and a case that would survive 101. I don't  
19          think there is anything, are any amendments or  
20          anything that the patentee can do to create a  
21          fact issue that would allow this patent to  
22          survive 101.

23                       On August 10th, we filed our reply. On  
24          page two, we identified the fact Plaintiff had  
25          not raised at all any fact issues, any claim

1 construction issues, or anything that would  
2 take this out of a 101 context. They had the  
3 opportunity on the second amended complaint to  
4 address that assertion that we made in our  
5 reply. They didn't.

6 Your Honor said, "What happens if you  
7 have an expert come in here and say, 'Here's  
8 what the PIMS does, and here's why it's so  
9 important, and here's why I should consider  
10 what this expert says and what the tax credit  
11 document says,'" I don't think that the expert  
12 can change anything because the claims say what  
13 they say, and the specification describes what  
14 it describes, and in many cases, including the  
15 *cxLoyalty* case, which we identified for Your  
16 Honor as most the analogous because it's the  
17 abstract concept of loyalty credits, expert  
18 testimony and expert ideas may come in and may  
19 give you what the POSITA had at the time, but  
20 it still can't change what the claims say. And  
21 if there's no description in the claims or the  
22 specification and they're merely providing  
23 their own external, extrinsic thoughts on what  
24 it could do, but if the patent is in the  
25 abstract realm and they haven't identified

1 anything inventive, it can't create that issue  
2 for them.

3 THE COURT: Mr. Rothstein, you're out  
4 of time. I thank you for your arguments and  
5 opposing counsel for their arguments. I'll  
6 take them under consideration, and we'll move  
7 on.

8 But I asked Ms. Sangalli if there are  
9 particular parts of the complaint that have  
10 allegations about the tax credit that she  
11 wanted me to focus on as we review things  
12 during our break.

13 Ms. Sangalli.

14 MS. SANGALLI: Your Honor, thank you.  
15 I would direct Your Honor to paragraphs 24  
16 through 28.

17 THE COURT: All right. Thank you.

18 All right, counsel. Thank you. Let's  
19 ask counsel from our first case if they'll help  
20 us make the transition to counsel from our  
21 second. While we do that, why don't we take a  
22 five-minute break to let folks stretch their  
23 legs, transition, go to the restroom if you  
24 need to. We'll take a five-minute break and  
25 then we'll come back for argument. The Court

1 will stand in a five-minute recess.

2 (A recess was taken, after which the  
3 following proceedings were had:)

4 THE COURT: Let's move on to our  
5 second case for argument. It's the InQuisient  
6 matter. Before we get started, let's have  
7 counsel identify themselves for the record.  
8 We'll start first with counsel for Plaintiff's  
9 side and begin there with Delaware counsel.

10 MR. SUNDERMEIR: Good morning, Your  
11 Honor. Grayson Sundermeir from Fish and  
12 Richardson on behalf of Plaintiff InQuisient.  
13 Joined with me today is my colleague Jason Wolff  
14 from Fish's San Diego office. We also have  
15 with us today Mr. Randy Dewolfson who is  
16 InQuisient's chief technology officer.

17 THE COURT: Thank you.

18 We'll do the same for counsel on  
19 Defendant's side. Again, we'll begin with  
20 Delaware counsel.

21 MS. YING: Good morning, Your Honor.  
22 Jennifer Ying from Morris, Nichols, Arsht, and  
23 Tunnell on behalf of the defendant Service Now.  
24 With me at counsel table is Jodie Cheng from  
25 Quinn Emmanuel, and we also have a client

1           representative in the back, Patrick Salceda.

2           THE COURT: All right. Thank you,  
3           Counsel.

4           It's Defendant's motion, so I'm going to  
5           turn to Defendant's counsel to start. I'll  
6           have a bunch of questions, but let me do that  
7           and begin with Ms. Cheng. Thank you.

8           MS. CHENG: Good morning, Your Honor.  
9           I'd like to reserve five minutes for rebuttal.

10          THE COURT: Will do. Okay.

11          MS. CHENG: Today, I'd like to start  
12          with the claim language if we could look at  
13          slide 14, please. And the claim language here  
14          is directed to processing, receiving, and  
15          storing data and metadata using generic  
16          groupings of metadata, which the claim  
17          describes as various modules. For example, you  
18          see here a recitation of an attribute module,  
19          which, according to the claims, is a grouping  
20          and storage of attributes. Similarly, there  
21          are also element module and class module.

22          There's no dispute here that "metadata"  
23          is just information or characteristics  
24          describing other data, and that's exactly what  
25          the patents say.

1                   If we could get slide 15, please.

2                   THE COURT: Ms. Cheng, while you have  
3                   the slide up, so I get a very base and  
4                   thousand-foot-view level, the abstract idea  
5                   that you put forward that the claims, Claim 1  
6                   here of the '468 as an example, are said to be  
7                   directed to is storing, managing, indexing, and  
8                   retrieving datasets based on metadata or  
9                   descriptions of the data. If you look at the  
10                  claim, obviously, quite a lot of it, 80 percent  
11                  of its real estate, is devoted to these  
12                  particular modules that are utilized in some  
13                  way by the data repository or the database  
14                  structure at issue.

15                  I guess at a stepping-back, fundamental  
16                  level, one thing the plaintiff is going to say  
17                  rhetorically is, how can it be that this claim  
18                  is said to be directed simply to the concept of  
19                  storing and managing, indexing data or metadata  
20                  when, look, our whole claim is way more  
21                  specific than that? It's got all these modules  
22                  that have all these different requirements  
23                  about a type of data that they must contain,  
24                  and they all in some way interrelate to each  
25                  other, says the plaintiff, because the



1 different types of modules rely on each other  
2 with regard to what they track.

3 At a fundamental level, how can a claim  
4 that looks this specific be really directed to  
5 the broad abstract idea that you set out?

6 MS. CHENG: Because these modules are  
7 actually not specific. When we look at  
8 something, and I use "attribute module" as an  
9 example, the claim says that it is configured  
10 to define one or more attributes and store the  
11 attributes. It is not disclosing or reciting  
12 what an attribute is, how it would relate to  
13 other types of metadata. Instead, when we look  
14 at the specification, the patent is actually  
15 saying it's going to leave it up to the user,  
16 the human user, to fill in all the gaps. What  
17 is an attribute? How does it relate? How do  
18 we store or configure it for the module?

19 The module is essentially a conceptual  
20 way of thinking of grouping the metadata which  
21 themselves are not specified what that metadata  
22 is. If we look at slide 32, please, as an  
23 example of the specification from the patent,  
24 and here it states that "a user may create the  
25 class and its attributes by creating a table."

1           So here in this implementation, the module  
2           supposedly is represented by a table, but if we  
3           go to the next slide, please -- sorry 31. The  
4           attributes here are what the user decides them  
5           to be, and the relationship is also what the  
6           user decides them to be.

7           So this patent is actually -- while it  
8           does devote, as Your Honor said, a lot of real  
9           estate or a lot of words to different types of  
10          modules, those modules aren't specific at all,  
11          and there's no actual specific technique  
12          recited in the patent claims themselves. In  
13          that way, it's claiming only the functional  
14          result of using metadata and data and grouping.

15          THE COURT: But they can be said to  
16          be specific in that each type of module has a  
17          name and presumably a name that reflects a type  
18          of, I guess, metadata that it must store. As  
19          you said, element, module class, module  
20          attribute module. Presumably an element, an  
21          attribute, or an attribute and a class of  
22          attributes, for example, those are different  
23          types of metadata. Is that right in your  
24          understanding? What do you understand those to  
25          mean, "element," "attribute," "class," and

1 "status"?

2 MS. CHENG: It is -- the description  
3 of the patents say it is whatever the user  
4 defines them to be or whatever the user of that  
5 system finds of interest to describe. So the  
6 term "attribute" really is a generic  
7 description of just a grouping. It could be  
8 said that you could call it metadata type A.

9 THE COURT: Is what you're saying  
10 that actually, like, kind of metaphysically,  
11 the construction in your mind of "element" or  
12 "class" or "attribute" or "state" is basically  
13 all the same. It's all, like, any type of  
14 metadata that the user wants it to be. Is that  
15 what you're saying it is? Otherwise, couldn't  
16 you understand them to at least have some  
17 requirements to them, like a state machine  
18 module, whatever it is that's going to be the  
19 type of data stored in the module, isn't there  
20 something inherent in that that's a different  
21 kind of data than, say, what's stored in an  
22 element module?

23 MS. CHENG: There can be, but they  
24 all relate to data, and all that is different  
25 forms of metadata which the patents are not

1 specifying exactly what kind. If you look at  
2 slide 15, we see that the description of  
3 "metadata," which is in the patent claims, is  
4 data that's used to describe other data. And  
5 metadata can have many different layers. It  
6 can be data about data about data and so on and  
7 so forth.

8 The patent claims do not specify what  
9 layer of metadata is an attribute or what layer  
10 of metadata would a status be or an element.  
11 Instead, as mentioned, it is leaving it up to  
12 whoever is the user of this system to define  
13 those things, and the patent claims are,  
14 instead, just -- what they claim is the  
15 functional result.

16 So now we already have a system that is  
17 supposed to process, retrieve, and store data  
18 and metadata, and it goes on to list the  
19 different modules, but the modules themselves  
20 are recited to be configured to define and  
21 store a particular type of metadata that the  
22 user would configure. It doesn't tell us how  
23 to define an attribute or how to configure the  
24 module to store an attribute.

25 THE COURT: Thinking about *Enfish*,

1           the case the other side is focused on, the  
2           claim there at issue wasn't long, and it  
3           recited a data storage and retrieval system  
4           that included rows that included an object  
5           identification number and it responded to  
6           records of information, including columns that  
7           intersected those rows to define a bunch of  
8           cells. Each column included an object  
9           indication number and a means for indexing data  
10          stored in the table. And your response to  
11          *Enfish* said the claims here are distinguishable  
12          because the claimed modules are defined by  
13          generic functional language. Unspecified  
14          associations is kind of what you're saying now.  
15          But I guess as we talk about, the claims at  
16          least say what these modules must include and  
17          they describe some interrelationship between  
18          them. I guess, how is that so different than  
19          the type of data structure that was described  
20          in *Enfish*? What are the -- again, it's not a  
21          long claim. It's not like it had incredible  
22          particularity. What is different about the  
23          structure of the data structure in *Enfish*  
24          versus the one here?

25                   MS. CHENG: So *Enfish*, the *Enfish*

1 claim, which is slide 26, does disclose a  
2 specific type of database structure, a logical  
3 table, and it provides how to configure and  
4 construct that table. It tells us exactly what  
5 should be in each row and how to populate it as  
6 well as what should be in each column.

7 THE COURT: Well, what's the  
8 difference between explaining what should be in  
9 each row and what should be in each column --  
10 again, it's not like they have 17 requirements  
11 up there in *Enfish*. There's few. It could be  
12 said that Claim 1 of the '468 tells you what's  
13 got to be in this structure, what particular  
14 modules, and requires that the content of those  
15 modules in some way interrelates to the content  
16 of other modules. Why isn't the specificity  
17 there, an OID must be required, much different  
18 from the specificity here?

19 Put differently *Enfish*, the benefit of  
20 the patent was it described in real detail why  
21 it is that particular type of table was a big  
22 step forward in terms of way databases work.  
23 It did a great job explaining why those adds  
24 added something to the art. It seems like  
25 that's what the case turned on, not so much --

1 I'm not seeing, like, why is there so much more  
2 specificity in that claim versus the claims  
3 here?

4 MS. CHENG: In the claims here, we  
5 don't see a specific database structure. We  
6 see a reference to a module, which is a  
7 conceptual idea.

8 THE COURT: That doesn't count as  
9 structure? A module is not a piece of  
10 structure?

11 MS. CHENG: We would say the  
12 specification certainly does not support that.  
13 If we go back to slide 15, which we see how the  
14 patent is defining and describing "metadata,"  
15 the second sentence of that there says,  
16 "Examples of metadata include schema, tables,  
17 indices, views, column definitions, et cetera."  
18 It's an open-ended list of potential formats  
19 for metadata, which is in the claim -- patent  
20 claims could take, and table is just one of  
21 them. So when there's no -- sorry.

22 THE COURT: I was going to say to  
23 your point back at slide 17, if you could, to  
24 the *Enfish* claim, I think you said 26. Sorry.  
25 You said, well, that's got structure. Is the

1 structure you're talking about is that it's got  
2 rows and columns?

3 MS. CHENG: It specifies a logical  
4 table, and it says that there's a single  
5 logical table.

6 THE COURT: I guess I'm trying to  
7 figure out what's enough in your mind to make  
8 Claim 17 in *Enfish* about a database structure  
9 but that's not present in our claim. There, it  
10 makes reference to a logical table that has  
11 particular kinds of rows and particular kinds  
12 of columns; am I right? That are required?

13 MS. CHENG: Yes.

14 THE COURT: Whereas you would say  
15 Claim 1 of the '468, although the claim  
16 requires a data repository, and that that  
17 repository have certain modules, those modules  
18 don't count as structure or particularized  
19 structure because really this is a way of  
20 saying storing data about data, i.e. metadata;  
21 is that right?

22 MS. CHENG: Correct. Those modules  
23 are groupings, and that is why the patent  
24 specification was before us. There is no  
25 definition or no there's no real structure



1 associated with the term "module."

2 THE COURT: Do you think modules  
3 means just grouping of data?

4 MS. CHENG: That is what the patent  
5 specification would support. It is how, also,  
6 Plaintiffs have alleged infringement in the  
7 complaint against Service Now.

8 THE COURT: When you say what the  
9 specification supports, is that the prior piece  
10 of the specification we were looking at that  
11 you showed me, on slide 15?

12 MS. CHENG: Slide 15, yes, has one  
13 example.

14 THE COURT: That doesn't say the word  
15 "modules are." It says "metadata is." It  
16 sounds like you're saying "modules" is just a  
17 synonym for "pieces of metadata."

18 MS. CHENG: Correct, and that is how  
19 the specification of the patent is written.  
20 There are embodiments of modules, but they are  
21 also examples taken from possible schema,  
22 tables, from this list.

23 THE COURT: I guess another argument  
24 you made in your briefing was that the claimed  
25 modules don't save the claims because they

1 don't specify how to construct a module or  
2 database as a whole. Did the claims in *Enfish*  
3 specify how to construct the table beyond  
4 requiring that it have certain columns and rows  
5 that are described?

6 MS. CHENG: I would posit that that  
7 is in *Enfish*, Claim 17, specifying what the  
8 rows and columns need to be populated with is  
9 constructing the logical table there.

10 THE COURT: So specifying what the  
11 rows and columns need to be populated with in  
12 Claim 17 in *Enfish* amounts to describing  
13 particularized structure, but specifying what  
14 these modules need to be populated with doesn't  
15 because "module," to you, means grouping of  
16 metadata, and you don't think the words  
17 "element module" or "class module" add anything  
18 to it. Sounds like you're saying that's  
19 another word, but that just means any type of  
20 metadata that the user wants. Is that what  
21 you're saying?

22 MS. CHENG: Yes, and I would add that  
23 in the claims here -- actually, if we could go  
24 back to slide 14, put up Claim 1, this module  
25 is not only not -- the claims not only fail to

1 disclose how to construct a module, but it also  
2 just claims the functional result. It claims,  
3 already, an element -- for example, an  
4 attribute module that is already configured to  
5 define and store the attributes. So it does  
6 not provide that how, and that is what *Enfish*,  
7 in contrast, does do. It does tell us how does  
8 that table be constructed to represent the data  
9 by populating with such-and-such rows and  
10 columns here.

11 THE COURT: By populating with  
12 certain kinds of rows and columns, that's the  
13 how of how to construct the structure that's  
14 present in *Enfish*. It's not like *Enfish* says,  
15 "Let me tell you how the make the table.  
16 Create software that actually" -- in some more  
17 specific way than "we want it to have a row  
18 with an identification number and column with  
19 identification number." It's not like it went  
20 to the next level of how in *Enfish*. The  
21 structure is the particular rows and columns  
22 the claim calls for; is that right?

23 MS. CHENG: Correct.

24 THE COURT: Which you think is  
25 distinguishable from the required modules here?

1 MS. CHENG: Correct, on two levels,  
2 Your Honor, because "module" here is not even  
3 restricted to a specific structure. It could  
4 be a table. It could be schemas, but it  
5 appears Plaintiff's slides are going to  
6 suggest. And as a second layer, it does not  
7 tell us how that module, whatever that  
8 structure might be, is configured.

9 THE COURT: I guess this is a  
10 question I'm going to have repeatedly for  
11 Plaintiff's counsel, but I'll give you a chance  
12 to tell me what you think about it. Obviously,  
13 a key point of the inquiry is not just  
14 understanding what it is -- what type of  
15 structure the claims require, i.e., to have  
16 certain modules and understand what those  
17 modules are and if they are interrelate or work  
18 together, but it's helpful for this process to  
19 say, okay, I see what the claim requires. I  
20 see what the patent saying in column 1 about  
21 what was happening in the art and what problem  
22 it's meant to solve, and I can see how it is  
23 that the particular modules that are claimed  
24 and the way they work together actually solve  
25 that problem that's being talked about. I'm

1           going to be asking Plaintiff a lot of questions  
2           like how does that work and how do these  
3           modules -- how are they going to solve whatever  
4           problem it is that's being described in column  
5           1, which I think is written in pretty  
6           inscrutable language, but I'm going to give you  
7           a chance to say, what do you think the patent  
8           is trying to say about that? Maybe you think  
9           it's not saying it well enough. But in what  
10          way -- how do you link what's in the claims to  
11          what is described as the problem that needs a  
12          solution, say, in column 1?

13                 MS. CHENG: We believe that,  
14           basically, what the patent is trying to say is  
15           that it is actually taking existing database  
16           systems and structures and expanding them to  
17           incorporate, possibly incorporate, additional  
18           types of metadata, but that, we would say, is  
19           not any different -- that does not get us out  
20           of the abstract idea of essentially what we're  
21           doing is organizing data based on grouping its  
22           metadata and whether that is the first layer  
23           metadata or a tertiary layer of metadata, it's  
24           still just information about data.

25                 THE COURT: The last sentence of the

1 background section which leads into the summary  
2 says, "Accordingly, there's a need for systems  
3 and methods that store, manage, index  
4 interrelated and/or retrieved datasets in a  
5 manner independent of the data model." That  
6 phrase, "independent of the data model," I  
7 think is meant to reflect back a bit on what's  
8 been described earlier in the column. What do  
9 you understand the phrase "independent of the  
10 data model" to be or to mean? What do you  
11 understand the patent to be saying this is what  
12 was done or this is what we're trying to do  
13 different? What do you think that term means.

14 MS. CHENG: "Independent of the data  
15 model" could be what we would interpret to be  
16 referring to the storage aspect of this patent  
17 because we also have these modules and each are  
18 configured to not only -- sorry -- configured  
19 not only to define whatever type of metadata is  
20 in that module but to store it, and storing is,  
21 of course, conventional, and that is  
22 acknowledged in the patent itself, that  
23 conventional databases would store datasets  
24 locally as well as remotely.

25 THE COURT: So you're saying that you

1 think it means that we're actually not just  
2 going to identify what data needs to be  
3 utilized but store it.

4 Ms. Cheng, you have about five minutes  
5 left, and you wanted to save five minutes. Is  
6 there any other point you want to make before  
7 we turn it over to your colleague on the other  
8 side?

9 MS. CHENG: No, we'll save the rest  
10 of the time for rebuttal.

11 THE COURT: Okay. We'll call up  
12 Plaintiff's counsel, Mr. Wolff.

13 And, Mr. Wolff, maybe as you begin, I  
14 have a lot of questions for you, but they  
15 really all get to what I just kind of described  
16 as kind of my big questions from reading this  
17 patent and the briefs, which is in an ideal  
18 world, you would have a patent claim that says,  
19 "This a type of database structure or data  
20 repository. Here are all the claimed  
21 requirements. In my patent, I'm going to  
22 describe the kinds of structures that existed  
23 at certain times. I'm going to tell you stuff  
24 that was problematic with them, bad from a user  
25 perspective, it didn't allow for efficient

1 integration of data, and then I'm going to  
2 clearly explain how it is that this claimed  
3 repository with these particular modules, how  
4 it is that that actually solves the problem I'm  
5 talking about, because if you see the way these  
6 modules store data and the way it relates to  
7 each other, it's going to help in the sense  
8 that and it solves this problem that's  
9 described here."

10 We've read it a lot of times, and we just  
11 really have a difficult time making that  
12 connection. Including that last sentence that  
13 leads from the background section to the  
14 summary section, what the heck does  
15 "independent of the data model" mean? How do  
16 the modules work in a way that's independent of  
17 the data model? Et cetera, et cetera. Maybe a  
18 good place to start is helping us navigate  
19 through the difficulty we're navigating. The  
20 Federal Circuit in *Enfish* didn't have that  
21 problem. The patent there made it easy for  
22 them.

23 MR. WOLFF: May I approach?

24 THE COURT: You may.

25 MR. WOLFF: How many paper copies?



1 THE COURT: Two, please.

2 MR. WOLFF: So the background of the  
3 patent talks about conventional database  
4 systems. Our client, InQuisient, as well as  
5 the defendant in this case make what are called  
6 enterprise management systems. They are  
7 systems that look at collections of data or  
8 collections of databases and tries to build  
9 another data structure to manage those  
10 collections of data and those collections of  
11 database systems. Sometimes, in the briefing,  
12 we call them -- in the complaint, it talks  
13 about an enterprise management system.

14 The problem with the conventional  
15 database systems is that you have to write a  
16 lot of dedicated code to try to manage the data  
17 in the database system. You have to write  
18 specific kinds of procedural code. You need to  
19 write code that triggers different things to  
20 happen in the database, and are were built on a  
21 very specific data model that was defined at  
22 the time the database was written. The problem  
23 is that you had to write custom data modules,  
24 you had to write custom code to make sure the  
25 databases could work. You had to write

1       dedicated code for specific purposes within --  
2       however the database was running or however the  
3       purpose it was being used, and they were not  
4       flexible and portable. You couldn't just  
5       change something in the database or you  
6       couldn't manage the collection of databases  
7       more efficiently if you didn't have some code  
8       mechanism that you had written to manage this  
9       process.

10               THE COURT: "Specific data model" is  
11       a synonym for "dedicated code" or "a model  
12       created with dedicated code"?

13               MR. WOLFF: The data models were  
14       specified ahead of time and one of the things  
15       you had to do to manage the data model and  
16       manage the different things you wanted to do  
17       with your database was you had to write  
18       specific, dedicated code to do that.

19               THE COURT: So we have this data  
20       system, data structure that's described, say,  
21       in Claim 1 of the '468. I see it. I see that  
22       it has certain things that require -- certain  
23       things called "modules." I see the modules  
24       have names and different names, and I can see  
25       how the names of the modules in some way

1 interrelate to each other. What the heck does  
2 that have to do with avoiding the problem of a  
3 database system that's created through use of a  
4 lot of dedicated code?

5 MR. WOLFF: What it does is it takes  
6 the code away, in a sense. It allows the  
7 people managing these various collections of  
8 databases and datasets to write code that will  
9 specify how the data interacts with each other  
10 and allow the user who's going to need to get  
11 in and access a bunch of heterogeneous  
12 databases or different kinds of organization of  
13 data, it gives them a tool and resource to go  
14 in with this new data structure and pull out  
15 the information that was in the database.

16 It looks around and says, "I've got a  
17 table here with this information in it. I've  
18 got another table somewhere else with more  
19 information in it." These would be datasets in  
20 the claims. And then what I do is I've gone  
21 out and looked at each one of the tables and  
22 said, "I'm going to build a new data  
23 dictionary, a new data structure, that's going  
24 to allow me to manage across all the different  
25 tables and all the data structures in my system

1           in one place."

2           THE COURT: Still not solved. In my  
3 mind, I'm thinking, okay, old system. Problem:  
4 Required a lot of dedicated code. I'm thinking  
5 about a computer programmer having to type out  
6 code, and that it has to be very specific code  
7 that effectuated very specific ways of either  
8 storing or comparing data. I'm thinking, okay,  
9 this repository that's claimed, Plaintiff's  
10 counsel is telling me, it's going to avoid that  
11 problem. It's going to avoid the need for as  
12 much dedicated code to be used. How is it  
13 going to avoid the need for as much dedicated  
14 code to be used? Again, still not  
15 understanding the answer.

16           MR. WOLFF: The way it's going to do  
17 it is because we created a data structure, this  
18 EMR, this data repository, that has these  
19 different modules in it, and each one of those  
20 modules has specific tasks and specific  
21 requirements and relates to the other modules.  
22 Once we define that structure, then we can  
23 populate data into the structure, and the  
24 structure itself with the data in it will  
25 reduce the need for the code that was required

1           in the past that had to be dedicated,  
2           procedural-type code.

3           THE COURT:   How?   In order for the  
4           structure to work to be able to utilize the  
5           data or to make comparisons to it, wouldn't  
6           code need to be written that allows it to do  
7           that?

8           MR. WOLFF:   Code is needed in the  
9           sense that you have to, basically, take  
10          information out of the data structure, but you  
11          don't have to do it for each instantiation of a  
12          database that someone's written.   You may have  
13          a human resources database, that's an example  
14          in the patent, and it gives an example of the  
15          state machine in the patent that shows kind of  
16          how you would populate the different statuses  
17          in the state module to build this repository so  
18          that once you're running your database and  
19          you're using the ERM to manage your various  
20          database processes, it can look at the code  
21          that's in the database structure itself and  
22          say, "I cannot transition from someone who's  
23          interviewing position to somebody who's been  
24          terminated unless I first require them to be  
25          hired."

1           Could I walk you through the claim a  
2           little bit? I think maybe the claim will help  
3           a little bit in this respect.

4           THE COURT: I'm looking at it right  
5           now. Even at a base level, we have questions,  
6           like, an element module. The other side says  
7           there's nothing to that. There's no  
8           requirement. I think Ms. Cheng was saying  
9           that's another way of saying a module that has  
10          metadata in it, any kind of metadata, whatever  
11          the user wants, who cares. Is it that?

12          MR. WOLFF: It's not. It's more  
13          specific than that. This claim has a very  
14          specific data dictionary. It's got particular  
15          structures. The modules that are referred to  
16          in the claim, an example that's used in the  
17          specification is a table or a portion of a  
18          table. A table is a structure that people know  
19          how to build. A table is a structure that is  
20          known in the art. There's been no evidence  
21          that people don't know what a table is or how  
22          to build a table that a table may have a column  
23          or row or as many rows as someone wants to  
24          specify.

25          And, again, some of the damages here were

1           that you have the ability to dynamically adjust  
2           the data. It's been added an example in the  
3           patent specification that if you wanted to add  
4           a new column to a table you can do that, or new  
5           information or repository, you could do that  
6           with the data structure that's been specified  
7           in the claim, and here's the claim.

8           A good example of the claim and how it's  
9           implemented is the schema, the structural  
10          diagram that's found in Figure 1 of the patent  
11          and most of the patent figures. It shows each  
12          one of the elements. We color-coded them up  
13          with the claim limitations, and it shows that  
14          each one of the modules, there's an example in  
15          the patent specification. There's, like, a  
16          primary key. There's a foreign key. There's  
17          arrows that connect the different tables that  
18          show what their relationships are, and that's  
19          all the kind of stuff that's reflected in the  
20          claim itself. If you don't have one of these  
21          modules and it doesn't have one of the  
22          relationships that's specified in the body of  
23          the claim, you're not going to practice the  
24          claim.

25                 THE COURT: Sure, but maybe at a base

1 level, if you were describing there's an  
2 element module, what that limitation requires  
3 is that this module include elements. There's  
4 also an attribute model. That's a part of the  
5 model that includes attributes. There's a  
6 difference between those things. There are  
7 certain kinds of data that cannot be an  
8 attribute but can be an element and vice versa.

9 MR. WOLFF: Right.

10 THE COURT: Give me an example.

11 MR. WOLFF: An example is in the  
12 element module, there's got to be something  
13 that uniquely identifies the plurality of  
14 elements. So the element module would be kind  
15 of like your primary key for most of the  
16 various data structures in here. And then the  
17 other modules that kind of hang off of it are  
18 things that specify what can you have and what  
19 sort of relationships can be stored with  
20 respect to the elements that you specified.  
21 The element module is probably the single most  
22 important module of these claims with respect  
23 to its structure because it is the thing that  
24 goes in and says, "This is when I want to store  
25 my unique identifiers for all my different data



1 pieces that I'm going to store in my data  
2 dictionary." And each one of the other modules  
3 is specifying some other class or type of  
4 information that would be built into this data  
5 structure to help manage the database  
6 management systems.

7 THE COURT: I can see that these  
8 modules have some relationship to each other.  
9 They interrelate. They -- for example, an  
10 element relation model stores relationships  
11 between elements which, in turn, relies on the  
12 element module to tell you what the elements  
13 are. Is there something about the  
14 interrelationship of those different types --  
15 stepping back, are elements and attributes, are  
16 they all types of metadata?

17 MR. WOLFF: Yes, they are generally  
18 types of metadata.

19 THE COURT: Is there something about  
20 the requirement that there be some  
21 interrelationship between the types of metadata  
22 that each module stores that gets in some way  
23 at this dynamism that you're talking about  
24 that's different than the dedicated code piece  
25 of the prior art? If so, can you explain it in

1 language I can understand?

2 MR. WOLFF: I'll do my best. So  
3 there's a difference between those things. The  
4 reason the data structure is defined in the  
5 claim is to build an organization, build a tool  
6 that allows you to improve the way the database  
7 itself operates. So instead of having a bunch  
8 of procedural code that might say "If  
9 such-and-such a relationship in such-and-such a  
10 table has a certain value, then I need to go  
11 and find some other attribute or class or  
12 something else that would help me perform some  
13 function." And the example could be as simple  
14 as the hiring an employee and then having the  
15 various state transitions that are shown in the  
16 figures of the patent.

17 What it's doing is it's enforcing -- with  
18 the data structure itself, it's enforcing the  
19 constraints to the database, it's enforcing  
20 constraints on the ability of people to add  
21 data to the database, as well as to help them  
22 have a resource to take information out without  
23 writing all of this code. There is code that  
24 has to be written to do this, and this is why  
25 we've got the schema drawn in here and the

1           various relationship diagrams. These arrows  
2           are one to many. If you look at the class  
3           attribute module 112, there may be class IDs or  
4           attribute IDs and it points out the attribute  
5           table. So the attribute tables constrain the  
6           ability of some of the classes that you put in  
7           the class attribute table to be one of the  
8           things found in the table. So you're putting  
9           all that logic into the database structure  
10          itself and constraining the ability of someone  
11          to do it, so what the described modules find.

12                 THE COURT: Is there a place in the  
13          patent that you would say best explains -- that  
14          does the equivalent of the following: Say, "I  
15          told you already the limitations with the prior  
16          art, that the database structures referred to  
17          therein require tons of dedicated code and  
18          that's problematic." Is there a best sentence  
19          or sentences that you would say that I should  
20          look at this in the break that in effect does  
21          the type of following: And so the types of  
22          modules that the claims require and their  
23          interrelationship with each other solves that  
24          problem because they do X or because they allow  
25          for Y. What's the best spot in the patent that

1 spells that out in words?

2 MR. WOLFF: Two spots in the patent  
3 that I think are good are column 4 of the '468  
4 patent beginning at line 22. It goes through a  
5 series of explanations that talks about some of  
6 the advantages that are obtained by the fact  
7 that you have these different data structures  
8 or you have this particular type of data  
9 structure managing your system.

10 THE COURT: There were two parts of  
11 the patent I wanted to ask about. One was  
12 column 4, lines 23 to 25, and the other is  
13 columns 8 and 9 lines 61 through 8, so you're  
14 on the first one.

15 MR. WOLFF: And that was the second  
16 one I highlighted in here.

17 THE COURT: Not in your briefs,  
18 though; right? As far as I could tell, did you  
19 talk about these parts of the patent in your  
20 brief?

21 MR. WOLFF: I thought we did, but I  
22 have to check and see.

23 THE COURT: To step back, as I've  
24 said, I think you want these claims and this  
25 patent to be seen as analogous to *Enfish*, and a

1           huge part of *Enfish* was the Court being able to  
2           point to the parts of the specification that  
3           explain clearly why it is that what is claim  
4           solved a problem with prior art databases.  
5           They made that link, the link I'm asking you  
6           about right now, and I don't know that the  
7           briefs did it. They pointed to a couple  
8           paragraphs in the complaint that are very hard  
9           to understand language, kind of like what's in  
10          column 1. I think you're doing it now, but  
11          let's see if we understand what it says.

12                 This part of column 4: "Unlike a  
13           conventional relational database, the EMR  
14           extends the notion of available attribute text  
15           beyond the standard string number of data  
16           links," and it goes on from there. What does  
17           that mean, and how does it get to the answer  
18           I've been asking?

19                 MR. WOLFF: Well, what it means is  
20           that it allows more flexibility and  
21           extensibility to the way that you define your  
22           database, and it does it through the data  
23           structure itself. So in this particular  
24           instance, it's the type definition table 102.  
25           And then if you skip down to line 29 through

1           31, it says, "By using the type of the person's  
2           name, the attribute user can declare more than  
3           what a normal relational database may store?

4           THE COURT: What does that mean, "by  
5           using the type of the person's name for an  
6           attribute, the user can declare more than what  
7           a normal relational database may store"? What  
8           does that mean?

9           MR. WOLFF: It means that you can  
10          extend the ability of the database to specify  
11          more information or maybe even types of people  
12          in your database when the original data model  
13          that you agreed on when you built your database  
14          didn't specify that. So this is a way to  
15          extend the ability of the database to manage  
16          and --

17          THE COURT: It allows for the input  
18          of more specific kinds of data about X?

19          MR. WOLFF: It allows you to further  
20          specify the structure of the database so that  
21          you can have more information about the  
22          different things that you're managing across  
23          these different heterogeneous databases.

24          THE COURT: Once you have the more  
25          information, element types, attributes, class

1 types, whatever, how does the database use that  
2 different information to actually make a more  
3 efficient table or more efficiently process  
4 data? Or what does it do with the specificity  
5 once the claim requires that it be there?

6 MR. WOLFF: Once you have the data  
7 dictionary specified, you can use the data  
8 dictionary as your entry point to both access  
9 and retrieve and analyze data that you can pull  
10 out of the database. Instead of going back to  
11 the database itself to do it in the first  
12 instance, write a bunch of procedural code and  
13 write a bunch of specialized user interfaces,  
14 because the structure is defined the way it is,  
15 we have a way to dynamically generate the user  
16 interface that helps people go in and use the  
17 data dictionary specified as the key to get  
18 into various pieces of information in the  
19 database itself.

20 THE COURT: Let's take a look at the  
21 bottom of column 8 starting line 61. I think  
22 that's the other place we had a question about  
23 and I think you were going to direct me to.  
24 It's a place where the patent talks about  
25 several drawbacks to conventional systems.

1           That's how it starts. What is said there that  
2           helps me understand how the claimed structure  
3           solves the problem?

4                   MR. WOLFF: Well, this actually  
5           starts at 50 and it runs to the top of column  
6           9, line 2, but it's describing some of the  
7           drawbacks of the prior art and how, if you use  
8           the data model in the prior art system, you  
9           would have to write a bunch of dedicated code  
10          to build the user interface and manage the  
11          inputs.

12                   THE COURT: I guess the piece I'm  
13          not -- like, the thing I'm not quite  
14          understanding is -- I was a liberal arts major  
15          in college. I'm not quite understanding how  
16          the claimed modules and what they require  
17          eliminates the need for lots of dedicated code.  
18          There's something about -- I think you're  
19          trying to tell me there's something about the  
20          nature of these modules and the specificity  
21          they require that eliminates the need for lots  
22          of dedicated code because there is something  
23          that happens with them, and I'm not  
24          understanding. What is it that the modules  
25          have or do per the claim that eliminates that



1           need that's said to be bad?

2                   MR. WOLFF: I apologize. I'm not  
3           doing a good job of it. An analogy might work,  
4           but you can think of the modules -- you can  
5           think of the invention, the overall invention,  
6           as a machine. And you can think of the modules  
7           in the claim as a gear and each of the  
8           specificity that's required in the claim as  
9           teeth on those gears, saying this is an  
10          attribute module, and this is the  
11          information -- I'm defining what the attribute  
12          module is. And then the relationships that are  
13          defined in the claim are like where the teeth  
14          for the different gears interconnect. And when  
15          you populate the data into the system and  
16          you've got this particular organization of  
17          data, all the gears are going to turn, and it's  
18          going to help the user manage the data in their  
19          enterprise management system that could be  
20          spread out among many different databases.

21                   THE COURT: How does the way these  
22          gears connect and they turn and they  
23          interrelate, how does that get to the problem  
24          of you don't need a lot of dedicated code?

25                   MR. WOLFF: Because instead of

1 writing procedural code -- I'm probably not  
2 doing a good job of it because the question  
3 keeps coming up. Instead of writing procedural  
4 code that's analyzing, making conditional  
5 logic, or it's defining abstract data types and  
6 procedures -- I don't know how familiar you are  
7 with those things. We don't have to do all  
8 that work because now I know what the structure  
9 of the database looks like. I know how the  
10 data is organized database, and because I know  
11 that structure, I can go in and look at  
12 specific things in the structure of the data  
13 itself and the way it's organized and I can  
14 pull out that information without doing all the  
15 thing.

16 The state module is probably the best  
17 example of that. I think it's back on this  
18 particular slide. You might have to write a  
19 bunch of procedural code to implement a state  
20 machine. It would say, if you are in this  
21 particular -- you have one particular status.  
22 You're allowed to -- this is your state machine  
23 transition, so this particular instance,  
24 there's a state machine transition table 122.  
25 That's shown on the right side of the figure on

1 slide eight. And it shows -- there's various  
2 keys. Primary keys and foreign keys relate to  
3 other tables in the deal. What it's basically  
4 enforcing as a constraint in the logic of the  
5 database and the logical organization structure  
6 of it is to say if I have one status and I want  
7 to move to a different status, I cannot do that  
8 unless my State Machine transition table  
9 specifies that that transition is allowed, and  
10 I do that by just adding data in the table in  
11 the data structure. I don't have to do that by  
12 writing some conditional logic that says, "If  
13 A, not B. If C, then B."

14 THE COURT: That kind of "if A, not  
15 B" isn't required -- because of what is  
16 claimed, it's got to be in the claims. Look at  
17 the two limitations in the claim. What words  
18 in those claims does the work of "if A, then  
19 B"?

20 MR. WOLFF: The status module would  
21 be part of that, and the status module is, in  
22 this particular instance, defining what the  
23 status was for whatever the state machine that  
24 was specified in the prior element. You could  
25 have five different state machines specified in

1           this particular example and there would be a  
2           status for each of the state machines that you  
3           would specify, and that's going to help you  
4           manage these transitions. The state machine  
5           transition module is not specifically claimed  
6           in this particular example. This is an  
7           independent claim.

8           THE COURT: A couple quick questions.  
9           You're just about out of time. More than a few  
10          times in your brief, you cited to column 3,  
11          lines 37 to 41, which to us looked like a  
12          description of Figure 13. It seems important,  
13          but we didn't understand why you were citing to  
14          that.

15          MR. WOLFF: I'm sorry. What was the  
16          column?

17          THE COURT: In your briefs two or  
18          three times, you cited -- you seemed to  
19          emphasize, this is at DI 16 and 5 and 18, that  
20          we should look particularity to columns 3,  
21          lines 37 to 41 of the '468 patent. When you go  
22          there, it looks like it's the lines that  
23          describe Figure 13. We felt like you were  
24          trying to tell us something about the patent,  
25          but we didn't understand what that was meant to

1           refer to.

2                   MR. WOLFF: I wish I had an answer.

3                   THE COURT: Why don't you take that.  
4           Again, like I did in the last case, after I  
5           hear from the other side on rebuttal, if  
6           there's anything more on that that you want to  
7           share, let me know before we conclude.

8                   The last thing I want to ask you was  
9           Ms. Cheng, when I asked her what do you think  
10          is module is, I think she said it's a grouping  
11          of metadata. It's not a structure, she said.  
12          She was contrasting it to the structure in  
13          *Enfish*. What structure? Well, that database  
14          had rows and columns that had particular  
15          requirements, inputs. Module is not structure.  
16          It's a group of metadata. Is that wrong?

17                   MR. WOLFF: It is a type of  
18          structure, and the type of structure is going  
19          to be a table or portion of a table. The  
20          difference with *Enfish* and our particular  
21          claims, and I've got them here on slide 17,  
22          *Enfish* dealt with a table or a database  
23          structure that improved the operation of a  
24          database that has a single table. Our claim  
25          has eight different tables or portions of

1           tables specified in it. In each instance, it's  
2           doing the same type of work that *Enfish* did in  
3           one table. It's different, but it's looking at  
4           the -- it's looking at each of the tables and  
5           saying what the relationship is, what needs to  
6           be specified in the table, and what the  
7           relationships are. The structure is the table.  
8           The structure is the table, what the table  
9           contains, and how the tables relate to the  
10          other tables in the claim.

11                       THE COURT: Okay. Mr. Wolff, you're  
12           out of time, but I appreciate your argument.  
13           Thank you. Let me turn back to Defendant's  
14           counsel who has about five minutes left for  
15           rebuttal, and I'll try to give Ms. Cheng a  
16           chance to make whatever points she wants to  
17           make without asking too many questions.

18                       MS. CHENG: So Plaintiff's counsel  
19           used an analogy of a machine and modules are  
20           teeth and relationships being gears, but  
21           there's no explanation how, how somebody who  
22           wants to actually implement or avoid  
23           implementing the so-called machine in the  
24           database structure would be able to do that.

25                       Plaintiff's counsel said that each of the

1 modules can only be used for specific types of  
2 metadata, that somehow these modules are  
3 defined -- that them themselves define and  
4 categorize some types of metadata or that the  
5 relationships are constrained. That  
6 representation is not supported in the  
7 specification. We saw in slide 31 and 32 the  
8 portions of the '468 patent, I believe, calls  
9 for, lines 9 through 22, that dictate that a  
10 user creates and defines the class and the  
11 attributes, for example, and in the -- in that  
12 same excerpt, that the user then may be able to  
13 construct that table however he or she wants.

14 And further, there are other examples of  
15 this in the specification. If we look in the  
16 '468 patent, column 5 starting at line 66  
17 through column 6, line 8, and just one excerpt  
18 of that is "an element stored in element table  
19 implies that the user can find similarity  
20 between anything that the user would like to  
21 discuss, report, store, or manage."

22 THE COURT: I'm sorry, Ms. Cheng.  
23 What column and lines were you at?

24 MS. CHENG: So that was column 5,  
25 lines 66 through column 6, line 8, and the

1 excerpt I read is specifically column 6, line 1  
2 through 4.

3 THE COURT: "An element stored in  
4 element table 160 implies that the user can  
5 find similarity between anything that the user  
6 would like to discuss, report, store, or  
7 manage." You think that articulation speaks to  
8 what the breadth of what an element is?

9 MS. CHENG: Exactly. Plaintiff's  
10 counsel mentioned that an element -- what is an  
11 element? The element module is particularly  
12 important here, and there was a representation  
13 that these modules, in this case, the element  
14 module, is constrained to a specific type of  
15 metadata. This excerpt as well as the one we  
16 show on slide 31 and 32 and in other places  
17 throughout the specification indicate that  
18 that's not true. These modules are -- and the  
19 relationship between the modules are whatever  
20 the user determines or decides that they want  
21 to use to categorize or group the data.

22 THE COURT: In terms of whether an  
23 element module, a class module, a state module,  
24 or an attribute module are required to contain  
25 different types of metadata and what the nature



1 of that difference is, wouldn't the principle  
2 of claim construction say that different words  
3 in the claim likely have different meanings  
4 indicate there is a difference between the  
5 types of data that's stored in the modules?  
6 Wouldn't that tell us that's right?

7 MS. CHENG: Sure. So while each  
8 module can be used for different metadata,  
9 different types of metadata, that specific what  
10 type of metadata is not defined in the patent.  
11 What we're left with is just the idea of  
12 organizing data based on characteristics from  
13 the metadata of that data. So there's an  
14 illustration that we had put together on slide  
15 17. Well, we can start here.

16 THE COURT: I saw this in the slides  
17 and thought they're never going to get to this  
18 because they have 50 slides. You have a few  
19 minutes left. Why don't we make your point.

20 MS. CHENG: Sure. That is  
21 processing, retrieving, and storing data based  
22 on grouping information or characteristics  
23 about these things or data, something people  
24 have been doing forever. This is the core  
25 concept of organizing.

1           And in the next slide, we show it's  
2           really no surprise that certain things or data  
3           may have more than one characteristic or  
4           metadata. Here, we've got color and shape and  
5           the relationship between these characteristics  
6           is that any one item shown there could only  
7           have one color and one shape. And as the user,  
8           you could choose to organize these items based  
9           on whatever buckets you define.

10          And now the next slide.

11          The fact these patents --

12          One more again.

13          The fact these patents attribute or  
14          assign some generic name to each of the buckets  
15          does not take it out of the abstract idea of  
16          organizing based on characteristics, and that's  
17          all we have here.

18                 THE COURT: Okay. Thank you,  
19                 Ms. Cheng, for your time. I thank Plaintiff's  
20                 counsel for their argument.

21                 Thinking about these slides, I was once  
22                 an associate putting together slides for a  
23                 Markman hearing, spent weeks on it, and we got  
24                 to the Markman hearing in front of Judge Brown  
25                 in the District of New Jersey, and the clerk

1           came out and said, "The judge doesn't like  
2           slides." So I'm thinking whoever put this  
3           together, we got to it, so that's a good thing.  
4           I want you to know I saw it and evaluated it.  
5           I do think it was helpful, and I think I  
6           understand what the issue here is. Counsel's  
7           arguments were helpful.

8                     Let's do the same we did last time.  
9           We'll take a five-minute break, come back after  
10          that. We'll hear the last argument, and we'll  
11          end, take a couple hours for us to process what  
12          we said and more instructions about when we  
13          come back. Let's take a five-minute recess.

14                    (A recess was taken, after which the  
15          following proceedings were had:)

16                   THE COURT: Good morning once again,  
17          and we're here for our last case. Is it Topia?

18                   MR. LYTLE: Your Honor, it's Topia.

19                   THE COURT: Sorry about that. Let's  
20          have counsel for plaintiff's side first  
21          identify themselves for the record, starting  
22          with Delaware counsel.

23                   MR. SCHOENBAUM: Your Honor, Griffin  
24          Schoenbaum from Richards, Layton, and Finger.  
25          I'm here with Kelly Farnan from my office, and

1 at co-counsel table, from Sughrue Mion, the  
2 firm, we have Jay Lytle. We have Janvi Shah.  
3 We have Chid Iyer. We have Raja Saliba.

4 THE COURT: Thank you. We'll do the  
5 same for counsel for Defendant's side, again  
6 beginning with Delaware counsel.

7 MR. NEFF: Good morning, Your Honor.  
8 Carl Neff from Fisher Broyles, and I'm joined  
9 here with Heidi Keefe from the law firm of  
10 Cooley, LLP, and Ryan Beard from Fisher Broyles  
11 as well, and Ms. Keefe will be taking the  
12 presentation for defense.

13 THE COURT: All right, counsel. It's  
14 defense motion again. Let's turn to  
15 Defendant's counsel Ms. Keefe so start.

16 MS. KEEFE: Thank you, Your Honor,  
17 and I'd like to reserve seven minutes or so for  
18 rebuttal. If Your Honor has more questions,  
19 you're the reason I'm here, so I will do that  
20 instead of rebuttal. No problem.

21 This case, actually, in many ways, has  
22 some resemblance to the first argument that we  
23 heard. This is definitely one of those black  
24 box, "do it on the computer" cases. How do we  
25 know that? The first way we know that is we

1 look to the specification to figure out what  
2 are the claims directed to? What is the  
3 problem that's being solved? And the patent  
4 tells us that the problem is, essentially, file  
5 management because we all have too many  
6 devices. So we want to make sure that the  
7 document you have on one device gets updated to  
8 match a document that you have on a second  
9 device.

10 I can illustrate that, Your Honor, with  
11 something as simple as you have a document. It  
12 could be something like, perhaps, a medical  
13 record, something that has information that you  
14 need to be as current as possible. That  
15 medical record has three lines in it. All of a  
16 sudden, you want to make sure the doctor is in,  
17 say, two different offices, and you visit the  
18 doctor in the second office. You want to be  
19 sure that if there's a change in those  
20 documents, they get that information. So if  
21 the doctor adds the prescription, I'll use that  
22 as a star, somehow we need to make sure that  
23 that document is sent with a "please update it"  
24 with a star down to the second document.

25 It's no more complicated than that, and

1           this is something that's existed in document  
2           usage since documents have been in existence.  
3           Once you have more than one copy, you need to  
4           make sure that those copies are reconciled or  
5           synchronized.

6           What we have in this case is a patent  
7           that tries to simply say, "Do it on a  
8           computer." In fact, it talks about the fact  
9           that one of the problems in the prior art is  
10          that you might be able to do this process  
11          manually, where you're updating the record, but  
12          that could end up with some potential errors  
13          because of human input. Or it might take too  
14          long to take a disk drive and walk over and  
15          plug it into something else. Now we want to  
16          use the computer as a tool to do as quickly as  
17          possible, or in other words, synchronize those  
18          things, but we are never told how to do that.

19          THE COURT: The prior art disparaged  
20          solutions, as you say, they're described in  
21          significant part as manual solutions. I guess  
22          in some way they're a combination of manual,  
23          that people-focused action and computer action.

24          MS. KEEFE: That's correct.

25          THE COURT: I guess the idea would be

1 the key piece of them, the piece that's being  
2 said to be replaced by the automatic updating,  
3 is something that involves significant manual  
4 work by a human.

5 MS. KEEFE: That's exactly right,  
6 Your Honor, and that's one of the things that's  
7 disparaged in column 1 of the specification.  
8 And even when they talk about other prior art  
9 which they claim are solutions that, therefore,  
10 don't preempt the field, that's not true at  
11 all. All of those purported problem pieces of  
12 prior art were not automatic. They were things  
13 where someone had to take a thumb drive and  
14 walk over to another place. That's not the  
15 automatic updating of the files.

16 THE COURT: Or one of those doctor's  
17 office might say, "I've updated a file. I'm  
18 going to e-mail it to someone at Office 2." So  
19 that the person at Office 2 would manually open  
20 up the file and then save a new version of the  
21 file to that office's server.

22 MS. KEEFE: That's exactly right,  
23 Your Honor. Exactly.

24 What we have instead, here, is we have a  
25 patent that claims the simple abstraction of

1 "update the files." Do it automatically on a  
2 computer, but it never, ever tells us how to do  
3 it. It's all functional language of make sure  
4 the documents get to the right place and make  
5 sure they get updated.

6 What we have is Figure 2 is very helpful.  
7 Figure 2 shows us what is the system. Well,  
8 the system is two different user devices, 280  
9 and 210, connected through a network common.  
10 In fact, we're told in the specification that  
11 those devices can be any electronic device,  
12 doesn't matter what they are. Columns 3, 4,  
13 and 5 give you every single device there could  
14 listed and then it says "or others." The  
15 network can be any network. We're told that  
16 again in column 4. And then we have a server,  
17 230, which, again, can be any hardware that  
18 allows for these things to be stored.

19 Now, what do we know about what happens  
20 in the actual claims? So Figure 2, as we know,  
21 it set up the two user devices talking to a  
22 server and that's how they're going to work  
23 together. Figure 3, which is described in  
24 column 7, goes on to give us the ultimate black  
25 box system, and the specific does nothing



1 further for the that black box system.

2 I don't know why, but user devices 270  
3 and 280 got flipped from Figure 2, but they're  
4 still the exact same thing. 210 is a user  
5 device. That's here on the left. And 280 is a  
6 user device on the right. 230 is the server,  
7 so 230 is the guy in the middle who's going to  
8 make all this happen.

9 THE COURT: I should say for the  
10 record we're using the '561 patent as our  
11 exemplary specification for these purposes.

12 MS. KEEFE: That's correct, Your  
13 Honor. And in fact, the specification is  
14 identical for all of the patents.

15 THE COURT: Identical for all to a  
16 great degree, but there is some differences.  
17 Like, for example, in some of the abstracts and  
18 some of the invention sections for a couple of  
19 patents.

20 MS. KEEFE: Very minor, Your Honor,  
21 but we don't think to any extent that takes it  
22 out of the realm of abstract.

23 THE COURT: Let me let you continue.

24 MS. KEEFE: Here, again, this is all  
25 about this black box system. What we know from

1 column 7 and, frankly, the claim itself is that  
2 you have a figure in the middle that's  
3 configured to accept information from two other  
4 guys, these devices, that themselves have  
5 received applications. So the application  
6 here, we have user device 210 and on user  
7 device 210, 310 is described as an application  
8 that is sent down by the server, but that's all  
9 we know about it. It's just an application,  
10 meaning it's some form of programming that  
11 should do something to something, but we don't  
12 know what it is, and we're never told.

13 Then that application somehow, magically  
14 figures out how to take the document, the file,  
15 370, and magically it figures out when and how  
16 to send it over to the centralized server. The  
17 centralized server then has on it a  
18 synchronization application, 380, which, again,  
19 magically, we don't know what it is or how it  
20 functions. We have zero programming for it,  
21 but that application is going to magically  
22 determine whether or how it's going to send or  
23 forward that same Document 370 on to the second  
24 device.

25 Meanwhile, the second device has its own

1           black box application, which is 320, which is  
2           used magically for some unknown programming to  
3           figure out whether or not to send its own  
4           documents back over to 210, and, again, somehow  
5           the guy in the middle figures out magically, no  
6           explanation given, how that's going to happen.

7           THE COURT: In the '561, the server  
8           itself is a device.

9           MS. KEEFE: In the '561, it's  
10          ambiguous. It calls it a device.

11          THE COURT: There's three devices  
12          referenced.

13          MS. KEEFE: They call them separately  
14          devices, but the specification, all the  
15          embodiments in the specification, use that as a  
16          server that sits in the middle.

17          But even if it were something else, say  
18          it was another phone, it would still have to  
19          have the magic application on it that helps  
20          figure out how to send it to these other  
21          devices, and we never know how that works or  
22          what it does. So what we really have is the  
23          abstract concept of synchronizing data, which  
24          is just like the *Ameranth* case that we gave  
25          you. In that case, you had a situation where

1           there were handheld devices being used by  
2           waiters and then you had centralized  
3           reservations and centralized kitchen staff, and  
4           they said, "Wow. We really need to make sure  
5           there's a way for all these devices to be  
6           synchronized because if someone orders a food  
7           that's been 86ed by the kitchen, you need to  
8           know so you're not offering it." So that  
9           patent was held invalid, ineligible rather,  
10          because again it never explained how or how any  
11          of that happens.

12                 As I was preparing for today --

13                 THE COURT: Before you go on, in your  
14                 brief, you articulated the abstract slightly  
15                 differently in different pieces. Sometimes you  
16                 use the phrase "synchronizing versions of  
17                 documents. . ." Sometimes you use the phrase  
18                 "automatically transferring modified documents.  
19                 . ." Are those meant to get to the same  
20                 concept?

21                 MS. KEEFE: They absolutely are, Your  
22                 Honor, and, in fact, that is consistent with  
23                 the way that the patent itself talks about what  
24                 is being done and what's intended by the  
25                 patent. In column 7, lines 47 through 50, the

1 patent describes itself saying that the problem  
2 the invention was solving was allowing a user,  
3 not shown, who owns or otherwise controls  
4 devices 210, 280 to automatically maintain file  
5 synchronization between at least devices 210  
6 and 280.

7 That language, Your Honor, is also wildly  
8 consistent with the language used in the  
9 complaint by Plaintiffs at paragraph 12 for the  
10 '561 and paragraphs 33, 44, 55, 66 -- 67,  
11 rather, and 77 for the remaining patents with  
12 only minor modifications that are themselves  
13 abstract, such as maybe prioritizing a piece of  
14 information over others. That's a rule.  
15 *Eccentric* tells us applying rules to data is  
16 abstract in and of itself, or the possibility  
17 of perhaps displaying a little sticker to say  
18 this has been modified, which, again, abstract.  
19 And again, we're never told how to do it.

20 In *Two-Way Media*, we had far more  
21 concrete things that were said to be happening.  
22 In *Two-Way Media*, you had to control, you had  
23 to access, you had to transfer, you had to  
24 send, and there were more concrete terms being  
25 thrown around and still the Court said you're

1 never really told how to get the information  
2 from the point-cast environment down to the  
3 devices because all you're doing is saying  
4 functionally get it there. Analyze it and make  
5 sure it gets there. That's exactly the same as  
6 we have in this case here.

7 Your Honor also asked about preemption,  
8 and preemption, we explained in the letter  
9 briefing, is not the essential issue here  
10 because once an abstraction is found and there  
11 is no inventive addition -- here, absolutely  
12 nothing inventive. It's basic hardware, basic  
13 software. Columns 4, 5, and 6 reiterate that  
14 over and over. As such, total preemption is  
15 not the issue, but, truthfully, there still is  
16 preemption here of all the ways of  
17 automatically synchronizing files.

18 THE COURT: So if I were to think  
19 about it, so the abstract idea is synchronizing  
20 multiple words or files across network  
21 computers.

22 MS. KEEFE: Correct.

23 THE COURT: So from a preemption  
24 perspective, one thing I kept think about is,  
25 okay. That's this world. There's this world

1 of synchronizing -- the idea of synchronizing  
2 multiple versions of a file across different  
3 network computers. There must be a lot of  
4 possible solutions that could be within that  
5 world, a lot of possible ways to approach that.  
6 Presumably, a patent claim that was to that  
7 idea, in essence, directed to it, and that  
8 soaked up a very, very large percentage of all  
9 those possible solutions would be problematic.

10 The other side says, when it comes to at  
11 least the process of modifying versions of  
12 files across the network, the patent has a  
13 bunch of solutions it describes that involve  
14 manual work. This is different. I guess one  
15 question I had was, in terms of your  
16 articulation of the abstract idea,  
17 synchronizing multiple versions of a file  
18 across network computers, are those manual  
19 solutions? Do they fall within your abstract  
20 idea, or is your abstract idea about the  
21 automatic ways to do that?

22 MS. KEEFE: It's the automatic ways  
23 to do that, Your Honor. In fact, that's in all  
24 the claims, that it has to be automatic. In  
25 fact, the whole gist of the patent, what the

1           claims are directed to, is that automatic  
2           notion because the patent says the nonautomatic  
3           guys are the problem. They're the ones where  
4           you might have it manual, and it takes too  
5           long. You might have it manual, and it will  
6           introduce some errors. It's been automated.  
7           And we also know that simply automating  
8           something by putting it on a computer in and of  
9           itself is not eligible.

10           THE COURT: Then we have the world  
11           where if you're correct that the abstract idea  
12           is an abstract idea and if you're correct that  
13           the computer add amounts to little more than  
14           doing it automatically, then you would say that  
15           it's a claim that's directed to an abstract  
16           idea and whatever else there is in the claims  
17           doesn't get you out of abstract-idea land. In  
18           other words, it's a claim to an abstract idea.  
19           That's why preemption doesn't matter, because  
20           you end up with a claim to the abstract idea  
21           and the only addition, as the law has said, of  
22           computerization can't be enough.

23           MS. KEEFE: That's absolutely  
24           correct, Your Honor, and then we have a step  
25           further where the specification goes to painful



1 lengths to tell us that the hardware and the  
2 software don't matter. It can be any hardware,  
3 and it is a computer running -- general purpose  
4 or special purpose computer. It can be  
5 anything. We have that in the specification,  
6 Your Honor, at column -- getting old is no fun  
7 with the glasses, Your Honor.

8 So we talk all through column 4 about  
9 generic computing system environments and how  
10 many of those we can use. Column 5 we talk  
11 about any software being any program modules  
12 that can be used. Column 5, line 31,  
13 computer-readable media can be any available  
14 media, et cetera, et cetera. So we're not  
15 adding anything invented on the computer as  
16 well.

17 THE COURT: You talk about the '561,  
18 but of the six patents in suit, four of them in  
19 the assertedly representative claims utilize  
20 this concept of prioritizing metadata relating  
21 to a file and accepting that metadata to a  
22 device before the file itself is sent. And as  
23 to two of those patents, the '787 and '823, the  
24 concept of prioritizing metadata is actually  
25 referenced in the title of the patent. It's

1 actually referenced in the abstract of the  
2 patent. It's referenced in summary of the  
3 invention section of the patent, yet that  
4 concept is, at least to say as to those two  
5 patents, for example, for the prioritizing  
6 metadata piece of it, it's not specifically  
7 referenced in your articulation of the abstract  
8 idea. There must be lots of ways to  
9 synchronize files where you wouldn't have to  
10 prioritize by data, for example. So how does  
11 your abstract idea capture what the claims are  
12 directed to, say, when the claims that are the  
13 '727 and '823 patents?

14 MS. KEEFE: No problem, Your Honor.  
15 The gist of the claim is still automatically  
16 synchronizing data. That's just one step to  
17 help get you there. Because what it's saying  
18 is our end goal is still, the gist of what the  
19 claim is and what it's directed to, is the end  
20 result of synchronizing data across this  
21 network. One of the ways, one of the steps  
22 that's used to do that is to say I'll send  
23 metadata, which is just information. It's a  
24 rule, and that rule says, "Send this first and  
25 pay attention to it so you don't use the wrong

1 piece because at the end we want to make sure  
2 you're using the properly synchronized piece."

3 The way I envision that in the real world  
4 would be if we had these medical offices and we  
5 knew it would take a little too long to get the  
6 other information there, someone would pick up  
7 the phone and call and say, "Put a flag on it  
8 that there's a new prescription coming." In  
9 other words, make sure you wait to see what  
10 that update is. That's no different than the  
11 rules in *Accenture* or in *IV versus Symantec I*,  
12 and in *IV versus Symantec I*, what we had was  
13 rules about forwarding documents, e-mails in  
14 that case, where the message would come in,  
15 someone would read a rule that would be a rule  
16 like "send the metadata first," the metadata  
17 would over and basically just say, "If anyone  
18 grabs this before it's synchronized, just  
19 wait."

20 THE COURT: What if the patent told  
21 us that sending the metadata first was actually  
22 a real advance in the way computers operate,  
23 transfer, or synchronize data? In that regard,  
24 one of the problems is in the comment  
25 specification, there's very little portion of

1           it that talks about prioritizing metadata.  
2           There is a part of the patent at the bottom of  
3           column 8, and I'll ask Plaintiff's counsel  
4           about this, that maybe I think is nodding  
5           towards this issue. There's a reference there  
6           to the relationship between documents and  
7           metadata, and then there's a bunch of sentences  
8           which appear to be talking about efficiencies  
9           gained from the patented invention as compared  
10          to prior art strategies.

11                 It's a little hard to understand, is this  
12          column telling me how the prior art metadata  
13          and sending that metadata and in some cases  
14          having metadata update a file representation or  
15          some other icon on the computer, is that in  
16          some way making the process more efficient or  
17          not or what? What do you make of this part of  
18          the patent?

19                 MS. KEEFE: Absolutely not, Your  
20          Honor. It's not making it more efficient in  
21          any way. All it's doing is it's saying that if  
22          you had systems with FTPs, there might be  
23          latency, and the latency just meant someone  
24          might be using the wrong document before it's  
25          been synchronized so put a flag on it. It's

1 almost like using Westlaw and having a yellow  
2 flag. Just, caution, you might not want to use  
3 this one. That's not making the system work  
4 any differently. It's not any tremendous  
5 advantage over the prior art other than the  
6 abstract notion of putting a tape flag on that  
7 says be careful.

8 It goes on to say that an indicator  
9 signifying the document's availability may be  
10 prominently displayed adjacent to the  
11 document's representation so the customer is  
12 aware of the document's availability. That  
13 doesn't improve the way anything works. It  
14 doesn't make it faster, doesn't make it more  
15 efficient. It just shows that the user is now  
16 alerted that it might not be as automatic as we  
17 thought it was going, so maybe wait a minute.  
18 You might want to use the one that comes  
19 synchronized after.

20 Again, Your Honor, we're never told how  
21 to do that. There's not explanation of how.  
22 There's not explanation of the programming that  
23 would be required to make that happen. So  
24 we're back into a media land, even if Your  
25 Honor were to find that this is something

1           important, which it's not. It's just another  
2           piece of information.

3           THE COURT: Okay. You have about  
4           five minutes left. I know you want to save at  
5           least that. Why don't I stop you there and  
6           give you time for rebuttal, and we'll hear from  
7           Plaintiff's counsel on the motion.

8           MS. KEEFE: Thank you, Your Honor.

9           THE COURT: Thank you.

10          Mr. Lytle.

11          MR. LYTLE: Good morning, Your Honor.  
12          I'm Jay Lytle representing Topia technologies.

13          THE COURT: Mr. Lytle, I may, as I've  
14          done, just to help frame things, jump in to say  
15          I do want to spend some time talking about this  
16          concept that I was discussing with Ms. Keefe at  
17          the end that is how at least certain of the  
18          patents utilize, prioritize metadata in a way  
19          that may arguably be said to be helpful in the  
20          process of updating files across networks and  
21          multiple devices. I want to let you start  
22          where you want to start, which may be more  
23          broadly with the '561 or otherwise, but I do  
24          want to make sure we get that.

25          MR. LYTLE: Okay. And just to give

1 an overview of the patents, there's six patents  
2 in this case and different ones cover different  
3 inventive aspects, and there's four inventive  
4 aspects here. And we'll talk mostly about the  
5 file transfer and the metadata priority, but  
6 there are other features as well.

7 Your Honor, this case really is not about  
8 an abstract idea. The other side has posed  
9 this as synchronizing multiple files with  
10 users. In actuality what these patents are  
11 trying to do is go from a device-centric  
12 paradigm, which back at the time these patents  
13 were written, 2007, 2008, that was kind of the  
14 predominant paradigm at the time.

15 This figure shows a representation of  
16 that. In this figure, different users would  
17 interact with a computer system, a server,  
18 somehow. Maybe sharing a document. Maybe  
19 something like counsel mentioned with a medical  
20 record. Maybe the doctor posted the patient's  
21 report on the server and then the nurse needs  
22 to get access to it, so they go to the same  
23 device, maybe a server, to get that file.

24 What the inventors here were doing was  
25 changing the paradigm. They were going to

1           instead of a device-based paradigm to a  
2           user-based or user-centric paradigm. In this  
3           case, it was really directed to back at the  
4           time, 2007, 2008, people were starting to have  
5           a proliferation of electronic devices. Maybe  
6           you recall Palms and Blackberrys and those  
7           kinds of things. And it was a real problem if  
8           a user was working on the document, let's say  
9           at their office on the office computer and then  
10          running to the airport to get on a plane. They  
11          would have to, as the patent talks about, put  
12          it on a thumb drive or e-mail it to themselves  
13          or something, and that's because the document  
14          was all on the device. It was device-centric,  
15          not user-centric.

16                 What the inventors came up with was a  
17          network architecture that allowed this  
18          user-centric concept to be able to be  
19          implemented.

20                 THE COURT: I guess the defendant  
21          might say, if we look at the '561 for example,  
22          that someone came up with the idea, "You know  
23          what would be great? If a user modifies a  
24          document, it would be great if that document  
25          was automatically transferred to a bunch of



1 devices."

2 And someone said, "How are you going to  
3 do that."

4 "Who cares? Don't worry about it." The  
5 idea that once the user modifies a document,  
6 let's have it transfer automatically to a bunch  
7 of different devices. The defendant would say  
8 that's what's happening with the '561, that's  
9 the idea of let's automatically get this  
10 document to a bunch of places is all the claims  
11 claim.

12 You talk about, no, there's network  
13 architecture involved. You use that phrase a  
14 lot. In the '561, for example, what's a part  
15 of the particularized network architecture  
16 that's claimed?

17 MR. LYTLE: If we go back one slide,  
18 this is Figure 3. I annotated it to show  
19 different devices that might be there. What  
20 the architecture is, is placing an application  
21 so that it's executable on three different  
22 devices. What I've highlighted in green here  
23 are what are claimed are the first, second, and  
24 third applications.

25 THE COURT: Is an application just a

1 file?

2 MR. LYTLE: No, an application is a  
3 program, like an application program. Maybe on  
4 your phone, you might have apps, for example,  
5 applications. So this architecture -- and it's  
6 claimed this way.

7 And in the next slide, I'll show how we  
8 map the claim to the architecture. By having  
9 these different applications executable on the  
10 first device, which was shown in the middle,  
11 which may be a server, and on the second and  
12 third devices, each one of those has an  
13 application that's executable. So the second  
14 and third devices, maybe that's the user's  
15 office computer. Maybe the third one is the --  
16 one is a laptop, one is a cell phone. Maybe  
17 one is an office computer, maybe one is a  
18 laptop.

19 By having these applications executable  
20 on the devices themselves, that now takes away  
21 a lot of the problems that were back in the  
22 day. Back in 2007, 2008 networks just were not  
23 as reliable, as fast. They were much more  
24 intermittent, so to be able to have the file  
25 stored centrally somewhere, maybe on a remote

1 desktop or on a -- what's called in the patent  
2 a distributed file server, where the document  
3 sits on the host computer, well, if you didn't  
4 have a network connection, you couldn't get to  
5 the document.

6 So what the inventors did is they put  
7 these applications on the user's devices as  
8 well as on the server in the middle. And the  
9 application programs, why those are important,  
10 is because they are executing on the user's  
11 devices, they know what's happening on the  
12 user's devices. They can tell through  
13 application programming interfaces and other  
14 interfaces with the device what's going on with  
15 that device. So they can tell, has the user  
16 made a change to the document? Yes. Okay, now  
17 let's transfer the document, the file, up to  
18 the --

19 THE COURT: But none of the specifics  
20 about how they tell are claimed. There just  
21 has to be an application on a device that  
22 somehow knows that.

23 MR. LYTLE: So, Your Honor, I would  
24 say that patents are written for a person of  
25 ordinary skill in the art. A person of

1           ordinary skill in the art in this case would be  
2           some type of computer programmer, somebody  
3           who's a network engineer and understands that  
4           application programs have these interfaces with  
5           the devices that they're executing on.

6           THE COURT: In our world, is there  
7           any kind of electronic computer device that  
8           wouldn't have some kind of application on it?

9           MR. LYTLE: Yeah, many devices would.  
10          But in this, the claims don't say any  
11          application.

12          THE COURT: What kind of device would  
13          have no applications on it, no groupings of  
14          code that tell the device to do something or  
15          not do something?

16          MR. LYTLE: Well, there's different  
17          types of programs. There's operating  
18          system-type software. That's running the  
19          computer the way it runs. And then there's  
20          applications, which are doing something using  
21          the computer.

22          THE COURT: I guess my point is, I'm  
23          trying to understand. It sounds like what  
24          you're saying is the fact that each of these  
25          devices has a "application" on it is really

1 central to the patentability of '561, and one  
2 thought I have and question I have is I don't  
3 know how you can get too much more ubiquitous  
4 than a device or computer or file or, I think,  
5 application on a device. I'm just trying to  
6 picture a device that doesn't have an  
7 application on it such that -- in essence, the  
8 worry is the claims would be saying a computer,  
9 just about any old computer. I'm trying to  
10 understand why that's not what this is.

11 MR. LYTLE: So I would say if we put  
12 up the slide that shows the claim language,  
13 what we've tried to do is take Claim 1 of the  
14 '561 patent and highlight it with colors to  
15 match the previous slide that shows the  
16 Figure 3. In this case, we have -- it's not  
17 just any application. It's an application  
18 that, for example, in step number one, received  
19 from a cell connect application that's  
20 executable in the second electronic device a  
21 copy of the first file automatically  
22 transferred from the second application when  
23 the user modifies the content of the electronic  
24 file. That's not any application. It's an  
25 application that can transfer the file when a

1 user modifies the content of the file. So  
2 again, this is -- because the application is  
3 executing on that second device, the  
4 application can know, was there a change? Did  
5 the user modify the file? And with that  
6 information can then transfer it back to the  
7 first device.

8 THE COURT: The argument you're  
9 making now, that the fact that these devices  
10 have an application on them and what these  
11 particular applications can do and how it is  
12 that what they can do, the applications  
13 themselves are really central to understanding  
14 why the things are patentable. I know in your  
15 briefs that there was the words "application"  
16 in the '561 that you would highlight, but did  
17 you ever make this argument in this kind of  
18 detail? Does your complaint make it? Does a  
19 POSITA in the patent or application or anywhere  
20 else explain in a record way what you're  
21 articulating now?

22 MR. LYTLE: Certainly, in our  
23 response to the motion we describe that.

24 THE COURT: Other than listing out  
25 the elements of, say, the '561 and, like,

1 underscoring words, in what way did you do  
2 that?

3 MR. LYTLE: So I'm looking at DI 45,  
4 which is our answering brief.

5 THE COURT: On page six, for example,  
6 the limitations of Claim 1 of the '561 are  
7 listed and the words "first application" and  
8 "second application," "third application" are  
9 bolded. But beyond doing that, I guess I'm  
10 struggling to see how the argument you're  
11 making isn't just that, attorney argument, as  
12 opposed to something that was articulated more  
13 forcefully or specifically in the briefs or in  
14 your complaint or in the patent itself.

15 MR. LYTLE: So I believe it's in our  
16 answer in the answering brief, and I can find  
17 it in a moment.

18 THE COURT: Maybe this is one thing,  
19 Mr. Lytle, maybe I could ask after we hear  
20 rebuttal if you and your colleagues have a  
21 chance to look and say, Judge, when you go  
22 back, I want to point you to this part of our  
23 that will explain what I was saying at oral  
24 argument in detail, that would maybe use your  
25 time better.

1 I do want to talk about, obviously, there  
2 are different patents here, as you say. Four  
3 of the six patents and even the allegedly  
4 representative claims utilize the concept of  
5 prioritizing metadata over the copied file  
6 itself, sending the prioritized metadata to the  
7 device before the copy of the file is sent.  
8 And as to two of the patents, the sending of  
9 the prioritized metadata causes other things to  
10 happen on the device in which the metadata is  
11 sent to.

12 I think you talk about that concept a bit  
13 in your briefs. There are certain lines where  
14 you make reference to the prioritization of  
15 metadata, but one thing I'm trying to get a  
16 better handle on is, does this use of  
17 prioritized metadata and sending the  
18 prioritized metadata to a device before the  
19 file is sent, it would be great if the patent  
20 said, "Let me explain to you how doing that  
21 really helps to solve the problem we've been  
22 describing in the art because, you see, when  
23 the device gets the prioritized metadata, what  
24 that does is the device does blank, it makes  
25 more efficient the process of et cetera."



1 I'm having a hard time finding that in  
2 the patent or in the briefing. I thought maybe  
3 there was a nod to this in column 8, but maybe  
4 not. How would you explain, what is the  
5 prioritized metadata doing in these claims and  
6 where does that tell us the work it's doing?

7 MR. LYTLE: I think it's in column 8  
8 going into column 9, and again, putting  
9 ourselves back at the time of the patent, 2007,  
10 2008, where networks were slower or they were  
11 intermittent. There was this problem of  
12 latency. "Latency" means you send something  
13 and it takes a while to get there. So with this  
14 idea of using the metadata, prioritizing the  
15 metadata, was metadata is small, whereas  
16 computer files can be very large, big picture  
17 or video or something, and it might take a  
18 while to get through the network, for the file  
19 to get through the network.

20 What the inventors came up with was let's  
21 have this priority scheme where we prioritize  
22 metadata, and it's got a higher priority than  
23 the file. Then we're going to send the  
24 metadata first, and that way, it can get  
25 through the network and get to the user's

1 device and then somehow we can notify the user,  
2 hey, there's been a change on the file. Don't  
3 use it. Wait for the file to get there. And  
4 that may appear as a graphical indicator to the  
5 user. Some of the patents deal with displaying  
6 the graphical indicator. That's the benefit,  
7 is --

8 THE COURT: In some way doing that,  
9 the device getting the metadata relating to the  
10 file or gets the file, that does what? It then  
11 helps, what, the file to be transferred to the  
12 device thereafter faster, or does it -- is it  
13 something different?

14 MR. LYTLE: No, it informs the user.  
15 It informs the user about what happened in the  
16 file.

17 THE COURT: That there's a new copy?

18 MR. LYTLE: There's been a change to  
19 the file. Don't use it. Wait for the file to  
20 get here.

21 THE COURT: So although, just the  
22 informing the user wouldn't itself be an  
23 example of having a fully modified file on that  
24 device, you just have the metadata first, but  
25 you're saying there's a benefit to that, that

1 the user is now made aware more quickly in a  
2 way that latency might have interrupted that  
3 there is, in fact, a modified file?

4 MR. LYTLE: That's right, Your Honor.

5 THE COURT: One of the confusing  
6 things about column 8 is middle of the column  
7 in paragraph around lines 61 to 63 talks about  
8 this problem with latency. It says, "As  
9 alluded earlier, the problem with distributed  
10 file systems and FTPs is the latency between a  
11 file being put onto a file system and showing  
12 up on a remote machine." I get that now. And  
13 I know the word "metadata" was used a sentence  
14 or two before, but the next sentence says, "To  
15 prevent this problem, the embodiment directory  
16 is decoupled from the movement of the files."  
17 When I'm reading that, I'm thinking it's going  
18 to tell me about how we take metadata from this  
19 file and send it. It uses a phrase like  
20 "embodiment directory." What's an embodiment  
21 directory? Is that a reference to the metadata  
22 or something else?

23 MR. LYTLE: So think of like if  
24 you're using your computer and you might go  
25 to -- I don't know what operating system you

1 use, maybe Apple. You can find with the  
2 directory of the files. That's the kind of  
3 directory we're talking about, is being able to  
4 transfer in metadata this information about  
5 file directories. That's what it's referring  
6 to.

7 THE COURT: So the embodiment  
8 directory there is a type of metadata that  
9 relates to a file?

10 MR. LYTTLE: Right. That's really  
11 what a directory is. It's information about  
12 the file.

13 THE COURT: One question about the  
14 utilization of the prioritized metadata and  
15 what it accomplishes, there are two patents  
16 where the phrase "prioritized metadata" is used  
17 in the title and the concept of prioritizing  
18 metadata and how it works to help the  
19 synchronization process is referenced in the  
20 abstract and summary of the invention section.  
21 The other four patents, it's not. I think the  
22 only reference to this concept is really in the  
23 part of the patent we've been talking about.

24 As to the other two patents, which I  
25 think are the -- I think it's the '622 and

1           '607. So you have two patents where  
2           prioritized metadata talked about at it in the  
3           title, talked about in the abstract, talked  
4           about in the summary of invention section,  
5           shows up in the claims, and shows up with a  
6           fair amount of specificity. You have two  
7           patents, the '561 and '942, where it didn't  
8           show up at all. And then you've got the '607  
9           and '622, and in those patents, in the alleged  
10          representative claims, the prioritized metadata  
11          concept shows up in there. Little less  
12          specificity than the latter two. Not really  
13          described in the patent except in column 8. I  
14          guess as to those two patents, it couldn't be  
15          said, could it, that the claims are directed to  
16          something that includes the concept of using  
17          prioritized metadata? If they were, why would  
18          the patent hardly talk about it?

19                 MR. LYTLE: They're using -- again,  
20                 they're continuation applications, so they  
21                 would be using the same -- pretty much the same  
22                 specification other than the abstract and, as  
23                 you pointed out, summary sections. But I would  
24                 say what's described in column 8 is enough  
25                 description to be able to support this priority

1 concept.

2 THE COURT: One question there would  
3 be like, as to those two patents, for example,  
4 you all might see yourself in a bit of a  
5 problem. Like, look, on the one hand, we think  
6 these claims are directed to something that's  
7 different, maybe more specific, than what the  
8 defendant says they are. On the other hand, we  
9 have a problem that we have patents to work  
10 with that really hardly ever talk about the  
11 concept. Maybe it's because we're dealing with  
12 a continuation application.

13 One way to deal with that is when you're  
14 facing a serious 101 challenge is use your  
15 complaint to do that with. Amend it and refer  
16 to what a POSITA would know based on your  
17 discussions with your expert. You didn't do  
18 that here. How come? Is it because you think  
19 there's enough in the patent otherwise to make  
20 that claim?

21 MR. LYTLE: Quite honestly, Your  
22 Honor, when we filed the complaint, this didn't  
23 seem like the type of invention where subject  
24 matter eligibility really would come up. This  
25 is an improvement to network computers. This

1 is like *DDR* or this is like the recent Federal  
2 Circuit case *Collaborative Entertainment*. It's  
3 necessarily rooted in computer technology.

4 THE COURT: Also going back to the  
5 '561, of course, it can be said to be rooted in  
6 computer technology because the claims utilize  
7 computers, but that's not all *DDR* was about.  
8 It wasn't just that computers were being used.  
9 It was that it was fairly clear to the Court  
10 how the particular utilization of computer  
11 technology solved a problem in the computer  
12 arts, a particular technology used in the  
13 claims. Just the fact that the claims involve  
14 computers isn't enough to be rooted in computer  
15 technology, is it?

16 MR. LYTLE: No, but these claims and  
17 these patents are -- they're not directed to  
18 synchronizing paper document. They're  
19 synchronizing or the network is set up to be  
20 able to operate on electronic files. They're  
21 necessarily electronic files, and that's what  
22 this set of patents and the claims is really  
23 pretty narrowly focused on, is dealing with  
24 electronic files and transferring them between  
25 a particular user's electronic device.

1           That's another point. There's several  
2           limitations in these claims, particularly the  
3           network architecture claims, that are directed  
4           to this whole system, and it's very  
5           specifically called out in the claims.

6           First of all, it's -- all of these  
7           devices are associated with a user. It's the  
8           same user. It's not like counsel was talking  
9           about the doctor putting it on the server such  
10          that the nurse can get it. These claims are  
11          limited to a user's devices, and they're also  
12          talking about transferring a file. They're not  
13          talking about transferring pieces of a file or  
14          just information. I mean, there's evidence in  
15          the file record of -- that was one of the  
16          reasons the patent examiner allowed the '561  
17          patent, was the limitations in the claim were  
18          different than some other prior art that also  
19          was automatically transferring files. I guess  
20          to our point of there absolutely no preemption  
21          here, there's many other ways to automatically  
22          transfer the files.

23                 THE COURT: Does the patent itself  
24                 talk about those many other ways? It talks  
25                 about disparaged prior art solutions, but those



1           seem to be ones involving manual work which  
2           these claims are not about. These claims are  
3           about automatically doing it.

4                   MR. LYTLE: There are, Your Honor.  
5           Yes, they do talk about the problem of manually  
6           with thumb drives and e-mailing, but they also  
7           talk about two in particular, and they're at  
8           column 2. Column 2, line 10, talks about  
9           remote desktop software, and this is where the  
10          user of the device can have an image of the  
11          remote desktop on the server. In these cases,  
12          the files reside on the server. This is  
13          nothing manual about this.

14                   THE COURT: You say that, but there  
15          does need to be a human user who's on the  
16          server. I wonder if even this disparaged  
17          solution can't be said to be one of those  
18          manual solutions in the sense that the reason  
19          why remote desktop software as a solution is  
20          disparaged is because it requires that the host  
21          machine has to be turned on and connected to  
22          the internet at all times. One could say a  
23          human being has to push that button to make  
24          sure the server is on all the time. That's the  
25          old manual in part solution here. Not right to

1 look at it that way?

2 MR. LYTLE: I don't think so, Your  
3 Honor. This patent, a fair reading of it, back  
4 at that time, there was issues with  
5 communication and latency, whatever, and the  
6 problem that's described in the patent is  
7 sometimes you wouldn't have a connection to the  
8 host computer where your file resided, and that  
9 was the problem.

10 THE COURT: I say that wondering  
11 about what's really described in columns 1 and  
12 2 are really what the patent talks about are  
13 these manual solutions. The patent sure uses  
14 the word "manually" quite a lot. In the  
15 lead-in to all those disparaged solutions, the  
16 last paragraph of column 1, the customer has to  
17 manually move files around. The prior  
18 paragraphs. What's the problem here? Well,  
19 the problem is the customer has to manually  
20 handle many aspects of the connection. With  
21 regard to file management, customers must  
22 manually move files.

23 It sure looks like what the patentee is  
24 saying is, "I'm going to tell you a whole bunch  
25 of prior art solutions out there that require

1 manual work. Now I'm going to claim something  
2 that doesn't do that." Is that wrong?

3 MR. LYTLE: I would say that's not  
4 complete, Your Honor. Yes, in column 1, it's  
5 talking about the manual systems. But in  
6 column 2, line 4 at the top, problems still --  
7 after talking about the manual solutions,  
8 problems still exist with how these newer  
9 customer interfaces are implemented and not  
10 completely integrated with applications, for  
11 one thing, they suffer from performance  
12 problems and do not generally work outside the  
13 device's local system. There's several other  
14 solutions to these problems that are in one way  
15 or another inadequate to the task. That's  
16 lines 8 and 9 of column 2. And then it starts  
17 talking about these other ways that are not  
18 really user driven. They are systems for  
19 synchronizing the files, and one is the remote  
20 desktop. That begins with line 10.

21 THE COURT: You would say using  
22 remote desktop software in the way that the  
23 patent describes it is a prior art solution  
24 that involves the automatic transfer and  
25 synchronization of files across devices. It's

1           just one that has problems associated with it  
2           that the patent claim intends to solve.

3           MR. LYTLE: That's correct, and the  
4           second one would be line 23 called distributed  
5           file systems.

6           THE COURT: Mr. Lytle, you're at your  
7           time, and I forgot to say you're getting close.  
8           Let me ask, is there an extra point you want to  
9           make?

10          MR. LYTLE: Just one point. When you  
11          asked us to submit our cases that are most  
12          relevant to it, I point out that counsel's case  
13          was an unpublished decision. We were relying  
14          on precedential decisions from the Federal  
15          Circuit. I'm talking about the *Domino's Pizza*  
16          case.

17          And the last point I'd like to make is  
18          there are other ways of doing this automatic  
19          sync, over and above what's in the columns in  
20          the patent. In the file history, there's a  
21          prior art reference to *Walter*, which is another  
22          different way of synchronizing files call delta  
23          sync where you only transmit the changes to the  
24          file, not the file itself.

25          THE COURT: All right. Thank you.

1 Let me give Defendant's counsel their five  
2 minutes for rebuttal.

3 MS. KEEFE: Thank you, Your Honor.  
4 Let me briefly.

5 In terms of the concept of this metadata  
6 and prioritization, again, we have no how.  
7 There's no how that is accomplished. Even if  
8 that were to be an important part of the claim,  
9 there's literally nothing in the claim that  
10 describes how that is accomplished.

11 THE COURT: I think there, though,  
12 one of the tricks with the Federal Circuit  
13 caselaw is sometimes it's a question of how  
14 many levels of how there are. For example, one  
15 could say that a claim just to synchronization  
16 of files across networks, that captures X. But  
17 if the claim is just to that, there's no how,  
18 how are we going to do that, then one could say  
19 some of these claims, they provide a next level  
20 of how. We're going to do it because here's  
21 what we're going to do first. We're going to  
22 take a piece of metadata from the file. We're  
23 going to send it to the device, and then that  
24 metadata is going to do some work for us on  
25 that device, and then we're going to send the

1 file. That's one level of how. Now, of  
2 course, there's not a second level of how. How  
3 are you going to do that? In a lot of Federal  
4 Circuit cases, there is no second level of how.  
5 Like, there's no how the sensors are going to  
6 get put on an airplane beyond saying they're  
7 going to be put in a particular configuration,  
8 et cetera. Where does the how stop?

9 MS. KEEFE: The problem Your Honor  
10 made was you said the metadata did some of the  
11 work for you on the other end. It does  
12 nothing. It's literally just a piece of  
13 information coming into a centralized server  
14 and then being displayed somewhere else.  
15 That's it. It does not say, "Let's get the bed  
16 ready for the guy to lay in so it's happy and  
17 will be easier for the file to come in." Not  
18 at all, Your Honor. All it is, is it says,  
19 "Hey, I'm going to write down on a Post-it Note  
20 a piece of information and I'm going to send it  
21 along that's it and then send it along."  
22 That's it. And then that's displayed, which is  
23 no different from *Electric Power* or *Content*  
24 *Extraction* that says you receive information,  
25 the Post-it; you analyze it, okay, it needs to

1 go to guy number 2; and it gets displayed.

2 THE COURT: Mr. Lytle says column 8  
3 tells us that there is a benefit to it. It's a  
4 way of attacking the problem of latency by  
5 giving the user an early heads-up about  
6 modification. Isn't that piece some way that  
7 the patent is telling us this add helps make a  
8 better process?

9 MS. KEEFE: No, absolutely not, Your  
10 Honor. The *University of Florida* case tells us  
11 simply making the enduser's experience  
12 different by displaying something is not in and  
13 of itself eligible. The whole notion that all  
14 you're doing with this prioritization is you're  
15 saying "heads up," that's literally just follow  
16 the piece of information. There may or may not  
17 be a rule that says send it on. But then when  
18 it gets there, all it does is display itself.  
19 The user now just knows something else is  
20 coming. The system hasn't changed at all. We  
21 haven't made anything better, and again,  
22 there's still no how. If the system is made  
23 better, we have to know how that's happening,  
24 and we don't.

25 The problem being solved is simply "I

1 wish the user knew." And "I wish the user  
2 knew" just means send me a piece of information  
3 and that's what *Content Extraction* and *Electric*  
4 *Power* say is per se ineligible. That's just  
5 information getting from one place to another.  
6 Nothing has changed. The information didn't  
7 change. The information on the other end  
8 didn't change. The file comes over exactly  
9 like it was.

10 THE COURT: The way the information  
11 is communicated changed. The process utilized  
12 to communicate changed, but that's not enough  
13 of a claim?

14 MS. KEEFE: The claim tells us  
15 absolutely zero about that. The claim just  
16 says there is a priority. Doesn't say how or  
17 doesn't say what. The spec tells us maybe the  
18 way we do that is we separate the metadata from  
19 the directory structure. The directory  
20 structure isn't claimed at all. That's what  
21 Your Honor was looking at at column 8. And  
22 even if it were, it doesn't tell you how that  
23 happens either. So we're simply back in the  
24 realm of I've got some information that I'm  
25 going to piece out and send over so that



1           someone learns something new. That in and of  
2           itself is abstract. It does nothing to the  
3           information. It just grabs it and sends it.  
4           It doesn't change the way the computer works.  
5           It doesn't change the way the file is  
6           perceived. There's a small perception on  
7           behalf of the user that's a little bit helpful,  
8           and the *University of Florida* case cited in our  
9           briefing tells you very emphatically that  
10          simply displaying something for the benefit of  
11          the user is not in and of itself --

12                   THE COURT: The argument is it  
13           doesn't make a big difference, it's not that  
14           big a deal, it's not much more.

15                   MS. KEEFE: I say it's nothing.

16                   THE COURT: Is that the kind of thing  
17           I should hear from the experts about as opposed  
18           to attorney arguing?

19                   MS. KEEFE: Absolutely not, Your  
20           Honor. In fact, here, the specification  
21           doesn't tell you anything. The *Domino* case  
22           tells us that simply having an expert who  
23           contradicts the specification -- the  
24           specification has no information on this other  
25           than this is just information that we're going

1 to send over. You absolutely don't need an  
2 expert for that because there's nothing in the  
3 claims that then recites anything about how  
4 that functions. It just says prioritize. It  
5 doesn't tell you how.

6 THE COURT: The specs were written,  
7 this one particularly, way before *Alice*. No  
8 one is thinking about these issues in this way  
9 at the time, and the patentee, it doesn't have  
10 much to work with by way of a record. It's got  
11 its patents that are attached. Now, of course,  
12 you could amend your complaint to make more of  
13 a record.

14 MS. KEEFE: It could have. They  
15 didn't. They got our motion. They could have  
16 moved to amend after they got our motion and  
17 saw what the problems were.

18 THE COURT: But for the judge, you  
19 have a very small record, which maybe has a  
20 clue or hint about something that may be  
21 important. The question is, is it enough of a  
22 hint or clue that it creates a fact issue that  
23 might make the case not suitable for deciding  
24 at a Rule 12 stage? Or not? And who do you  
25 fault for the fact there's not much of a

1 record?

2 MS. KEEFE: Here, Your Honor, you  
3 have to fault the plaintiff because they've  
4 done nothing. They've given you no evidence.  
5 There's absolutely nothing in this record, and  
6 frankly, Your Honor, I think any amendment or  
7 any attempt to now bolster it with something  
8 else would itself be futile, just like in the  
9 *Domino's* case and in the *Ameranth* case where  
10 the expert declarations went far beyond any  
11 scope of anything that was actually disclosed  
12 in the claims or the specification.

13 Here, Your Honor, the fact that this was  
14 done way pre *Alice*, it doesn't change the fact  
15 that there is no invention here. There is  
16 nothing that takes this idea of automatic  
17 synchronization of files out of the realm of  
18 the abstract, especially when done with any  
19 computer. We even heard that somehow all of  
20 the magic was in the application and placing  
21 the application on a device, but we have  
22 absolutely zero information about those apps,  
23 so we're still in the realm of the abstract,  
24 Your Honor.

25 THE COURT: Thank you, Counsel.

1           You're out of time, and I appreciate your  
2           argument as well as Plaintiff's counsel's.

3           Those are the argument portions of the  
4           day. What I'm going to do now is take the  
5           information you've given me, consider it in  
6           light of the work I've previously done to look  
7           at the patents and briefs and the relevant  
8           record.

9           We'll take a break. Folks can grab  
10          lunch, do whatever. I'll ask everyone to be  
11          back and ready to go by 3:30. If our court  
12          reporter is finished with her other hearing and  
13          is able to be ready to go by then, we'll get  
14          started likely at 3:30. If not, we'll do it  
15          whenever as soon as we can. And my hope is to  
16          be able to provide decisions on all of these  
17          cases orally today and to do so when we return.

18          One last thing I would say is that I also  
19          realize, though, that it's beneficial to me to  
20          have had lots of able counsel here today to  
21          make good argument on these issues. It's not  
22          often I have so many different counsel in one  
23          place at one time. So I always like for my own  
24          purposes to get the benefit of that, so after I  
25          finish giving whatever decisions I have, we'll

1 go off the record, and I usually ask counsel a  
2 question or two about patent litigation.

3 So just to kind of preview that, what I  
4 would probably ask today is, is there something  
5 that you would say, I have always thought or we  
6 have always thought that patent litigation in  
7 federal courts would be much more efficient or  
8 smoother if the Courts would entertain the idea  
9 of X or do more Y in a way that would be better  
10 and more efficient, not just for a defendant or  
11 plaintiff or both. If there's anything like  
12 that you all think is something the Court  
13 should think about, utilize, or obtain that  
14 they're not doing, I'm not doing, I'm  
15 interested in hearing your thoughts about what  
16 that might be and try to take it into account.  
17 I'll ask that thought at the end of the day.

18 With that said, let's take our break.  
19 The Court will stand in recess. Thank you.

20 (A recess was taken, after which the  
21 following proceedings were had:)

22 THE COURT: All right. We have our  
23 court reporter back with us. We thank her, and  
24 I know we have at least one representative from  
25 all the parties, and I think more than that,

1           who are still with us today, so we'll go on the  
2           record. As we go back on the record, let me  
3           say for the record that we're here for the  
4           continuation of our series of 101 Day hearings  
5           in these three cases, which I'll refer to in  
6           shorthand as the *GAN* case, the *InQuisient* case  
7           and the *Topia* case.

8           As I begin this afternoon, let me first  
9           make a few introductory comments. Today, I'll  
10          be providing decisions in these three cases  
11          orally here in court. For those decisions that  
12          I announce orally today, I also intend, for  
13          purposes of clarity and convenience, to shortly  
14          issue a written opinion on the docket that  
15          simply transcribes what I said here today and  
16          that adds relevant citations where needed.

17          Although I'm issuing decisions orally  
18          today, I want to assure the parties that the  
19          process I've used to assess these motions has  
20          been a rigorous one. I personally spent  
21          somewhere between 50 and 100 hours of my time  
22          reviewing the briefs, analyzing the case and  
23          record citations, and formulating these  
24          decisions in these three cases, to say nothing  
25          of the time my law clerk spent as well. My

1 oral decisions today will be quite lengthy, and  
2 this is going to take a while, and while length  
3 is not always an indicator of rigorous  
4 analysis, I hope that you will conclude that in  
5 these cases it is.

6 Additionally, I should also note that I  
7 found there to be real efficiencies in holding  
8 argument in these various cases in which patent  
9 eligibility is challenged at one time, as we  
10 have done today. In many of the briefs across  
11 the cases, the same Federal Circuit and Supreme  
12 Court decisions have been cited, and having the  
13 experience of reading those decisions again and  
14 again over the span of the last two weeks has  
15 been helpful for me. It helps reinforce in my  
16 mind what facts of those decisions really are  
17 and what aspects of those cases made a  
18 difference in their outcomes. It also helps me  
19 to see patterns across the various cases, and  
20 I've also benefitted by being able to discuss  
21 issues regarding Section 101 law here today at  
22 oral argument with a large number of excellent  
23 representing these various parties. I thank  
24 you all for your efforts today.

25 The Court has often set out the relevant

1 legal standards for review of the Section  
2 101-related 12(b)(6) motion at the pleading  
3 stage, including in *Genedics, LLC, versus Meta*  
4 *Company*, a case in this court. The Court  
5 hereby incorporates by reference its discussion  
6 in *Genedics* of these legal standards and will  
7 follow the standards herein as to all the  
8 matters that I will discuss today, unless  
9 otherwise noted.

10 With that, let me move on to our first  
11 case.

12 The first case today is *GAN (UK) Limited*  
13 *versus MGM Resorts International, et al.*  
14 Defendants MGM Resorts International and MGM  
15 LLC, which I'll refer to as Defendants, have  
16 filed a motion to dismiss pursuant to Rule  
17 12(b)(6) arguing that the operative second  
18 amended complaint should be dismissed on  
19 Section 101-related subject matter eligibility  
20 grounds.

21 Here, the asserted relevant patent in  
22 suit is owned by Plaintiffs GAN (UK) Limited,  
23 which I'll refer to as Plaintiff. The  
24 patent-in-suit is U.S. Patent Number 8,821,296  
25 or the '296 patent. The patent is titled



1 "Network Gaming System and Casino Management  
2 System Link." The '296 patent originally had  
3 20 claims, but the patent went through  
4 reexamination, and the United States Patent and  
5 Trademark Office ultimately issued a  
6 reexamination certificate that canceled three  
7 claims, amended five claims, and added two.  
8 Claim 1, a method claim; Claim 11, a  
9 computer-readable storage medium claim; and  
10 Claim 18, a system claim, were amended, and  
11 those three claims are the only independent  
12 claims in the patent. They are also the only  
13 three claims that Plaintiff references in the  
14 count of infringement in its operative  
15 complaint.

16 In light of this, Defendants assert that  
17 Claims 1, 11, and 18, three claims that  
18 facially contain many similar requirements  
19 regarding the communication of loyalty credit  
20 information between a person's online gaming  
21 account and an account at a casino, are  
22 representative of all the claims in the patent  
23 for purposes of its Section 101 arguments. To  
24 that, Plaintiff does briefly argue that certain  
25 of the dependent claims in the patent could

1 have additional relevance to the Court's  
2 Section 101 analysis today. I'll discuss that  
3 issue as to the dependent claims later. For  
4 now, though, I'll address the eligibility of  
5 Claims 1, 11, and 18 together, pointing out  
6 their differences where necessary. For ease of  
7 reference, I'll refer to these three claims as  
8 the asserted claims.

9 At Step 1, Defendants argue that the  
10 asserted claims are directed to the abstract  
11 idea of "coordination of a customer's loyalty  
12 credits between an online gaming service  
13 loyalty account and a casino loyalty account."  
14 The plaintiff does not contest in its briefing  
15 that the purported abstract idea here is, in  
16 fact, an abstract idea, and the Court concludes  
17 that it is. A claim to an abstract idea has  
18 been described by the United States Court of  
19 Appeals for the Federal Circuit as one directed  
20 to a disembodied concept, a basic building  
21 block of human ingenuity untethered from any  
22 real-word application, and Defendant's  
23 proffered abstract idea fits that  
24 characterization.

25 Plaintiff does contend at Step 1,

1           however, that the '296 patent is not actually  
2           directed to this abstract idea. Instead,  
3           Plaintiff asserts that the claims are directed  
4           to "specific technological solutions" that  
5           "link a server providing an online gaming  
6           service with machines that provide one or more  
7           casino management systems, or CMSes, so that if  
8           possible, a patron's loyalty credits can be  
9           communicated between the online service and  
10          offline system and used regardless of whether  
11          the patron is gaming online or at a  
12          bricks-and-mortar casino."

13                 Plaintiff contends this "targeted way of  
14          linking" the online and offline systems which  
15          Plaintiffs refer to as the "connection  
16          mechanism" is the crux of the claims at issue.  
17          The directed-to inquiry applies a Stage 1  
18          filter to claims considered in light of the  
19          specification based on whether their character  
20          as a whole of their focus is directed to  
21          excluded subject matter. As to how that  
22          inquiry should proceed, the Federal Circuit has  
23          provided some guidance in cases like *Internet*  
24          *Patents Corp. v. Active Network, Inc.* There,  
25          in order to ascertain at Step 1 whether the

1           claims character as a whole was directed to an  
2           abstract idea, the *Internet Patents* Court  
3           examined the specification of the patent at  
4           issue. In doing so, it cited to what the  
5           patentee had described in the specification as  
6           the innovation over the prior art and the  
7           essential, most important aspect of the patent.  
8           The Federal Circuit has also stated, however,  
9           that reliance on the specification must always  
10          yield to the claim language in identifying what  
11          a claim is directed to because the concern that  
12          drives the judicial exceptions to patentability  
13          is one of preemption, and that claim language  
14          defines the breadth of each claim.

15                Thus, the Court begins its analysis by  
16                looking at the asserted claims themselves. The  
17                asserted claims each include a few common steps  
18                or elements. First, they require the accessing  
19                of a person's online and casino loyalty  
20                accounts.

21                Second, they require communicating  
22                loyalty credit information between those two  
23                accounts, which includes first determining  
24                whether loyalty credits are transferable from  
25                the online account to the casino account and

1           then transmitting the available credits.

2           There are also a few differences between  
3           these three claims. Claim 1, but not Claims 11  
4           and 18, includes the step wherein an  
5           application server determines that the user  
6           does not have a casino loyalty account and then  
7           creates that account. And Claims 11 and 18,  
8           but not Claim 1, include the step wherein a  
9           Partner Integration Management System, or PIMS  
10          as we referred to it here today, determines a  
11          communication preference of the CMS based on an  
12          identity of the user.

13          It's not hard to see, just by looking at  
14          these claims, why Defendants assert their focus  
15          simply on coordination of a customer's loyalty  
16          credits between two types of accounts. After  
17          all, to a great degree, the claims utilize  
18          broad functional language that seems to relate  
19          to accomplishing just this result at a high  
20          level. Even the preamble of the asserted  
21          claims seems to track this high level of focus  
22          on the coordination of loyalty credits itself.  
23          The preamble explains the method or medium or  
24          system are for "communicating loyalty credit  
25          information."

1           With that said, are the claims instead  
2           more specifically focused on a particular type  
3           of connection mechanism used to accomplish this  
4           coordination, as Plaintiff claims? It's hard  
5           to conclude that just from looking at the  
6           claims alone. As Defendants note, the concept  
7           of coordinating between two entities in order  
8           to exchange loyalty credits is necessarily  
9           going to involve some type of communication  
10          between those two entities. The real question  
11          is whether the claims are focused on and  
12          directed to the specifics or particulars of  
13          that connection mechanism as opposed to the  
14          high-level concept of communication per se.  
15          And here, the claims themselves suggest that  
16          they are directed to the latter, not the  
17          former.

18                 For example, there's surely no reference  
19                 to the claims to a "connection mechanism," and  
20                 the claims don't contain much in the way of  
21                 particularity about how such a mechanism is  
22                 required to work. That is, the claims do not  
23                 explain much about how information should be  
24                 communicated from an online gaming service to a  
25                 CMS or how in Claim 1 the application server

1 determines whether the user has a CMS account  
2 and creates such an account or how in the other  
3 two asserted claims that PIMS determines the  
4 communication preference of the CMS based on  
5 the user's identity or how the claims determine  
6 if the first loyalty credits are transferable  
7 to the CMS. If there had been additional  
8 significant detail in the claims about how the  
9 claims accomplish these steps, it might be  
10 easier to conclude that the claims are directed  
11 to those specific implementation mechanisms as  
12 opposed to to the broader concept of  
13 coordination of loyalty credits between two  
14 gaming platforms, full stop.

15 Beyond the claim language, the  
16 specification also appears to support  
17 Defendant's argument at Step 1. Specifically,  
18 the patent's background section notes that  
19 "casino loyalty programs and online gaming  
20 services are two separate entities with no way  
21 to communicate with each other." What is  
22 "needed," according to the patent, is simply  
23 "an approved matter for enjoying a combined  
24 online gaming experience and an offline casino  
25 loyalty program." That's a broad, non-concrete

1 articulation of the purported  
2 communication-based solution to the problem in  
3 the art.

4 The summary section of the patent comes  
5 next, and it summarizes what the invention is.  
6 Yet to a great degree, this section discusses  
7 only what the invention may include, and it  
8 does so at a high level of generality, similar  
9 to what's found in the asserted claims. Now,  
10 there is one portion of the summary section  
11 that does reference the "connection mechanism"  
12 that connects the network-based gaming system  
13 to the CMS, but all that section simply says is  
14 that this mechanism "may be synchronous, such  
15 as, for example, via a web service using XML  
16 over SOAP, or asynchronous, such as, for  
17 example, using a message sender/listener  
18 system, such as a system-to-system or S2S."

19 That description just seems to further  
20 underscore that the patent as a whole is not  
21 overly concerned with specific, particularized  
22 technical requirements that any connection  
23 mechanism covered in the claims must have in  
24 order for the claimed communication systems,  
25 mediums, and methods to do their jobs. In all,



1           these portions of the specification indicate  
2           that the claims are directed to the general  
3           concept of coordinating a customer's loyalty  
4           credits between an online gaming service and  
5           CMS, not to a more specific or particularized  
6           means of doing so.

7           In supporting its position to the  
8           contrary, Plaintiff had noted that the term  
9           "connection mechanism" does appear in the  
10          abstract, and that's true. It does. And that  
11          after explaining that the patent describes how  
12          an internet-based gaming system and a CMS are  
13          connected to each other, the abstract goes on  
14          to note that the "connection mechanism" may be  
15          used to connect the network. But instead of  
16          then further touting the importance of this  
17          connection mechanism or further describing some  
18          required particularity that the connection  
19          mechanism must have in order to do its job, the  
20          abstract again just simply notes that the  
21          mechanism may either be synchronous or  
22          asynchronous, in just the same way that concept  
23          is referenced in the summary section of the  
24          patent. To the Court, this, again, just  
25          underscores that the patent claims are not

1 directed to some particular form of connection.  
2 The overall end result of connection in and of  
3 itself is what seems to be celebrated instead.

4 Plaintiff also pointed to the prosecution  
5 history of the patent at Step 1. Here, it's  
6 not disputed that the Court can consider this  
7 prosecution history, which is a public record,  
8 in assessing the defendant's motion to dismiss.  
9 With regard to the asserted claims, Plaintiff  
10 noted that during the reexamination proceeding,  
11 it had emphasized, first, that Claim 1 included  
12 the step of using an allocation server to  
13 create an account with a CMS once it is  
14 determined that the user doesn't have one; and  
15 second, that Claims 11 and 18 require a step  
16 wherein a PIMS determines a communication  
17 preference of the CMS based on the identity of  
18 a user.

19 And again today at oral argument, when I  
20 asked Plaintiff's counsel what in the claims  
21 made up this connection mechanism, counsel  
22 again referenced these two claim elements.  
23 From here on out, I'll refer to these two  
24 limitations as the "creating an account"  
25 limitation and the PIMS limitation.

1           With regard to the former, perhaps it  
2           could be said that creating an account with a  
3           CMS amounts to something more or different than  
4           the abstract idea at issue. But even if it  
5           does, can Claim 1 be argued to be directed to  
6           that step? It does not seem so. The  
7           specification does reference this step a few  
8           times in columns 3 to 6, when it notes, for  
9           example, that such an account must be created.  
10          It can be created using user contact  
11          information stored in the online account. But  
12          this step is not referenced in the summary or  
13          the abstract section of the patent, and nothing  
14          that the Court has seen in the patent nor that  
15          the plaintiff has cited suggests that the focus  
16          of the claim is on the "creating an account"  
17          element.

18               As for the latter element, it's also hard  
19               to see how a PIMS, whatever it includes or  
20               requires, and its work in determining the  
21               communication preference of the CMS amounts to  
22               the focus of Claims 11 and 18. The PIMS is  
23               also mentioned only a handful of times in the  
24               specification in columns 2 and 3. But as was  
25               set out earlier, the patent in general seems to

1 be touting the higher-level concept of  
2 communication between two systems writ large.  
3 Plaintiff did not provide any further  
4 explanation as to why the PIMS' work can be  
5 said to be the heart of Claims 11 and 18, and  
6 the Court cannot see why that is. Indeed,  
7 today at oral argument, Plaintiff's counsel all  
8 but acknowledged that the patent specification  
9 doesn't really highlight or tout these two  
10 claim elements in any great detail.

11 In sum, Plaintiff has not convinced the  
12 Court that the asserted claims are directed to  
13 a coordination mechanism of some kind.  
14 Instead, for the reasons set out, the Court  
15 concludes that these claims are directed to the  
16 abstract idea of coordination of a customer's  
17 loyalty credits between an online gaming  
18 service loyalty account and a casino loyalty  
19 account.

20 I'll now turn to Step 2 of the *Alice*  
21 framework. At Step 2, Courts are required to  
22 assess what else is in the claim beyond the  
23 abstract idea in order to determine whether the  
24 additional elements transform the nature of the  
25 claim into a patent-eligible application of the

1 abstract idea.

2 With respect to  
3 computer-functionality-based claims, like those  
4 at issue here today, the Federal Circuit has  
5 stated that such claims can include an  
6 inventive concept where they provide a  
7 technological solution to a technological  
8 problem. At Step 2, for the role of the  
9 computer to be deemed meaningful in the context  
10 of the Section 101 analysis, it must involve  
11 more than the performance of well-understood,  
12 routine, and conventional activities previously  
13 known to the industry.

14 In its answering brief, in the section  
15 where it sought to explain why the patent's  
16 claims do include an inventive concept,  
17 Plaintiff focused exclusively on the two claim  
18 limitations that I've already described, the  
19 "creating an account" limitation and the PIMS  
20 limitation. It did so again today here at oral  
21 argument. Plaintiff argued these two  
22 limitations, when considered along with the  
23 other aspects of the claims, showed how the  
24 claims require a "unconventional operation of a  
25 computer-based system to link two previously

1           disparate offline and online systems so that  
2           loyalty credit information can be shared to  
3           provide a combined offline/online gaming  
4           experience for the user."

5           Ultimately, however, the Court concludes  
6           that the record does not contain enough for it  
7           to conclude that these two limitations,  
8           considered in light of the rest of the asserted  
9           claims, could plausibly amount to inventive  
10          concepts. In arguing to the contrary,  
11          Plaintiff failed to point to sufficient record  
12          support for its assertions at Step 2. For  
13          example, Plaintiff claimed in its briefing that  
14          both of these limitations, when considered  
15          along with the remaining claim language,  
16          amounted to a "unconventional approach which  
17          did not exist prior to GAN's invention," but  
18          Plaintiff provided no citation for this  
19          statement or further explanation for why  
20          precisely a POSITA would understand that the  
21          use of these solutions amounts to the  
22          unconventional use of computer technology to  
23          solve a computer-based problem. Nor did  
24          Plaintiff say that certain words in these two  
25          claim limitations, if construed, would bolster

1 its eligibility argument. Today, for example,  
2 when asked about what a PIMS requires,  
3 Plaintiff's counsel said only that this would  
4 be the subject of expert discovery.

5 Now, Plaintiff could have filled in these  
6 gaps by amending its complaint, and, indeed,  
7 Plaintiff did file a second amended complaint  
8 in an attempt to do so, but like with its  
9 briefing, the second amended complaint added  
10 little to work with. For example, in paragraph  
11 26 of the second amended complaint, Plaintiff  
12 asserted that the "connection mechanism can  
13 include a Partner Integration Management System  
14 that receives an abstract request from an  
15 online application to perform certain actions  
16 associated with an online user with respect to  
17 a land-based casino management system" and that  
18 this was an "unconventional approach." But  
19 Plaintiff never pleaded any additional facts  
20 explaining why or how the PIMS limitation  
21 amounted to an unconventional technological  
22 solution, but it could have attached or  
23 referenced a declaration from an expert  
24 explaining why it is that these limitations,  
25 considered in light of the claims, are

1 unconventional or why a POSITA would understand  
2 that their inclusion in the claims did not  
3 unduly preempt solutions in the realm of the  
4 abstract idea at issue. But Plaintiff did not  
5 do that.

6 Now, Plaintiff did point in support to  
7 one piece of evidence in its favor that could  
8 possibly be right, the prosecution history.  
9 Specifically, the plaintiff noted that during  
10 reexamination, the examiners concluded that the  
11 "creating the account" and PIMS limitation were  
12 not taught by a prior art reference known as  
13 *Muskin*. Defendant acknowledges that *Muskin*,  
14 like the asserted claims at issue, discloses an  
15 online gaming service that coordinates or  
16 communicates with a land-based casino provider.

17 Plaintiff used this portion of the  
18 prosecution history to argue that the  
19 reexamination panel relied on these two  
20 limitations to "find the claims to be inventive  
21 over the prior art." But as Defendants note,  
22 there's a difference between the concept of  
23 novelty and patent eligibility in federal  
24 patent law. The Federal Circuit has explained  
25 that whether a particular element is novel does



1 not necessarily go to whether that element is  
2 patent eligible. Put differently, "a claim for  
3 a new abstract idea is still an abstract idea,"  
4 as the Federal Circuit said in cases like  
5 *Synopsis, Inc., versus Mentor Graphics Corp.*  
6 Thus, to the extent what the Patent Office was  
7 saying here is that the existence of these two  
8 limitations meant that *Muskin* did would not  
9 anticipate or render obvious the claims at  
10 issue, that would knock it down to the  
11 plaintiff's benefit here at the Section 101  
12 analysis stage.

13 Now, there may be a way that this piece  
14 of the prosecution history could meaningfully  
15 help Plaintiff at Step 2. As it is, the Court  
16 cannot glean enough from the record to make it  
17 so. As the Supreme Court has explained, the  
18 concern that drives Section 101 law is one of  
19 preemption. If Plaintiff had provided more  
20 information, such as in its second amended  
21 complaint, supporting the decision that the  
22 panel's reference to *Muskin* helps show how it  
23 is that these claims do not unduly preempt the  
24 relevant field or amount to the unconventional  
25 use of computer technology to solve a problem

1 in the computer arts, the outcome here may have  
2 been different, but without more, the Court  
3 cannot so find.

4 Similarly, the plaintiff also sought to  
5 support its position by including a few  
6 allegations in the second amended complaint  
7 about a November 2016 research and development  
8 tax credit for what I'll call the R&D credit  
9 that it submitted to a United Kingdom tax  
10 advisor. The plaintiff asserted that the  
11 authority provides an R&D tax credit where the  
12 R&D "directly contributes to achieving an  
13 advance in the overall knowledge or capability  
14 in a field of science or technology through the  
15 resolution of scientific or technological  
16 uncertainty." In the complaint, Plaintiff  
17 relied on the grant of the tax credit as a  
18 recognition that its work was a "resolution of  
19 scientific or technological uncertainty that  
20 was not routine or that could not be readily  
21 resolved by a professional in the field at the  
22 time."

23 Again here, though, this bare citation to  
24 the R&D claim is not sufficient to demonstrate  
25 a plausible inventive concept at Step 2. That

1 the UK tax authority extended a tax credit to  
2 plaintiff because its research on the subject  
3 matter of the patent was not "routine" does not  
4 speak directly to the concept of patent  
5 eligibility under U.S. patent laws. Again, had  
6 this context been melded with declarations from  
7 an expert which helped explain why the tax  
8 authority's conclusions shed light on  
9 eligibility issues and not novelty issues, the  
10 Court's decision might have been different.  
11 Therefore, at Step 2, the Court finds that  
12 Defendants have met their burden to demonstrate  
13 that the claims do not include an inventive  
14 concept.

15 The Court will now make brief mention of  
16 the dependent claims in the patent. After  
17 Defendant articulated why the asserted claims  
18 were representative of the other claims in the  
19 patent, Plaintiff did make reference to those  
20 dependent claims in one paragraph of its  
21 answering brief, but it did not make a  
22 "meaningful argument" as to why the content of  
23 those claims was material for Section 101  
24 purposes. Instead, all it did was note the  
25 claim numbers for those claims and reproduce a

1           few words in those claims, nothing more. That  
2           cannot be enough to put these dependent claims  
3           distinctly at issue for purposes of this  
4           motion. For all these reasons, the Court  
5           grants Defendant's motion.

6           In its briefing, Plaintiff did not  
7           expressly request the opportunity to amend, and  
8           it has already done so two times, as defense  
9           counsel noted. In light of this, the Court  
10          will not automatically allow Plaintiff the  
11          chance to further amend. However, the Court is  
12          also cognizant of the Federal Circuit's  
13          admonition, as discussed in cases like *Realtime*  
14          *Data, LLC, versus Reduxio Systems, Inc.*, that  
15          when it comes to the issue of resolving the  
16          difficult question of patent eligibility, a  
17          district court should freely grant leave to  
18          amend the complaint if it's possible that  
19          additional allegations might change the  
20          calculus of such an inquiry.

21          Mindful of that, and in light of the fact  
22          that this is the first time the Court has found  
23          a relevant complaint wanting on Section 101  
24          grounds at the motion to dismiss stage, I will  
25          order that if Plaintiff believes that it can

1 amend in such a way to address the Court's  
2 concerns as articulated today, then no later  
3 than 21 days from today's date, Plaintiff shall  
4 submit a motion for leave to amend along with a  
5 letter brief of no more than four single-spaced  
6 pages in support in addition to the proposed  
7 further amended complaint. The Court will then  
8 set a further limited letter briefing schedule  
9 on any such a motion. If no such motion is  
10 filed, the Court will consider the case to need  
11 to be closed.

12 Additionally, pursuant to my comments in  
13 my October 3, 2022 oral order, the Court orders  
14 that this case is now stayed in the interim.

15 I'll now move on to the second case,  
16 *InQuisient, Inc., versus Service Now, Inc.*,  
17 Civil Action Number 22-900-CJB. In this case,  
18 we again have Defendant's Rule 12(b)(6) motion.  
19 Most, though not all, of the motion is premised  
20 on the grounds that the operative complaint  
21 should be dismissed on Section 101 eligibility  
22 grounds. I will address only those grounds  
23 now, and for reasons I'll explain, I will deny  
24 the motion as it relates to Section 101 for the  
25 reasons I will now set out today.

1           Plaintiff asserts in its complaint that  
2           Defendant infringes at least Claim 1 of each of  
3           three patents, United States Patent Number  
4           7,979,468, which I'll refer to as the '468;  
5           United States Patent Number 8,219,585, which  
6           I'll refer to as the '585 patent; and United  
7           States Patent Number 8,224,855, which I'll  
8           refer the as the '855 patent. The three  
9           asserted patents share the same title,  
10          "Database Data Dictionary." The '585 patent  
11          and the '855 patent are continuations of the  
12          '468 patent, and the three patents share the  
13          same written description.

14          Defendant asserts that Claim 1 of each of  
15          the asserted patents are representative of the  
16          remainder of the claims in each patent, and  
17          Plaintiff does not contest there. Therefore,  
18          the Court will analyze only Claim 1 of each  
19          asserted patent, and because the Court will  
20          deny the motion respect to Claim 1 of each of  
21          those patents, the Court will also deny the  
22          motion with respect to all claims in the  
23          asserted patents.

24          I'll now turn to the *Alice* analysis at  
25          Step 1. Defendant says the representative

1 claims are directed to the abstract idea of  
2 "storing, managing, indexing, and retrieving  
3 datasets based on metadata or descriptions of  
4 the data." The Court agrees that this is an  
5 abstract idea. Indeed, Plaintiff does not  
6 really dispute this. And the Federal Circuit  
7 has held, in cases like *Content Extraction and*  
8 *Transmission, LLC, versus Wells Fargo Bank,*  
9 *National Association*, that the concept of "data  
10 collection, recognition, and storage," a  
11 similar concept, was an abstract idea.

12 Plaintiff, for its part, argues that the  
13 claims, though, are not directed to this  
14 abstract idea and that Defendant has  
15 over-generalized the claims. According to the  
16 plaintiff, the claims of the asserted patents  
17 are directed to a "data repository with a  
18 specific set of interrelated data structures,  
19 the modules, defining how that structure is  
20 implemented." Thus, Plaintiff's argument goes  
21 with the claims purportedly reciting "new data  
22 structures that improve the operation and  
23 efficiency of a database system," the claims  
24 are not abstract but instead are directed  
25 toward a technological improvement in database

1 management.

2 In cases like *CardioNet, LLC, versus*  
3 *Infobionic, Inc.*, the Federal Circuit has  
4 instructed Courts to be careful to avoid  
5 oversimplifying a claim by looking at it  
6 generally and failing to account for its  
7 specific requirements in Step 1. For the  
8 reasons I'll discuss now, I think the defendant  
9 has oversimplified what the focus of the claims  
10 is. For that reason, the Court finds that  
11 Plaintiff has the better of the arguments at  
12 Step 1.

13 Looking first to the claim language  
14 itself, Claim 1 of each of the asserted patents  
15 generally claims a computerized system for  
16 manipulating datasets comprised of a processor  
17 and a data repository that processes,  
18 retrieves, and stores data contained in the  
19 datasets and one or more layers of metadata of  
20 the data in the datasets. Stopping here, that  
21 does sound a lot like Defendant's asserted  
22 abstract idea. That is, storing, managing,  
23 indexing, and retrieving datasets based on  
24 metadata or descriptions in the data.

25 But importantly, the claims do not stop



1           there. They go on to recite what it is that  
2           makes up the claimed data repositories. That  
3           is, several different modules that are  
4           configured to store, identify, define,  
5           generate, and/or transmit various types of  
6           information. These claimed modules constitute  
7           the bulk of the claims, and, as Plaintiff  
8           points out, the modules are configured such  
9           that they have relationships to one another.

10           For example, looking to Claim 1 of the  
11           '467 patent, the claimed data repository  
12           contains eight modules. First, an element  
13           module that's configured to store and uniquely  
14           identify a plurality of elements.

15           Second, an element relation module  
16           configured to store one or more relationships  
17           between the element and the element module.

18           Third, a class module configured to  
19           define at least one class of the elements and  
20           store the class.

21           Fourth, an attribute module configured to  
22           define and store one or more attributes.

23           Fifth, a class attribute module  
24           configured to define and store one or more  
25           class attribute associations between at least

1           one of the attributes in the class.

2                 Sixth, a type definition module  
3           configured to define and store one or more  
4           types of the class, the attributes related to  
5           the class, and the relationships between the  
6           elements.

7                 Seventh, a state machine module  
8           configured to store one or more state machine  
9           types associated with at least one of the  
10          elements.

11                And eighth, a status module configured to  
12          store one or more statuses of each state  
13          machine.

14                So sure, the claims certainly involve the  
15          concept of storing, managing, indexing, and  
16          retrieving datasets based on metadata or  
17          descriptions of the data, but Defendant's  
18          articulation of what the claims are directed to  
19          seems to skim over the modules themselves.  
20          That is, what appears to be the key aspect of  
21          the claims.

22                For example, on page eight of its opening  
23          brief, Defendant stated that the various  
24          recited modules "merely describe groupings of  
25          metadata." In that regard, it might be that

1 Defendant intended the "based on metadata"  
2 aspect of its articulation of the abstract idea  
3 to appropriately capture the utilization and  
4 presence of these various modules. But if so,  
5 Defendant's description of what the claims are  
6 about still seems to be selling the claim  
7 short.

8 Just simply based on the modules'  
9 prominence in the claims and the somewhat  
10 intricate way in which the modules must  
11 interrelate to one another, it seems that the  
12 particular nature of the metadata in these  
13 modules is not an afterthought in the claims,  
14 which is what it sounds like in Defendant's  
15 articulation of the abstract idea. Instead,  
16 it's the star of the claims. In other words,  
17 the claim language suggests that the claims are  
18 directed to a data repository that, as  
19 Plaintiff points out on page 18 of its  
20 answering brief, is "composed of multiple  
21 substructures configured to hold particular  
22 information which are tied to other claimed  
23 structures in a specified manner."

24 Defendant also argued at page three of  
25 its reply brief that although Plaintiff claims

1           that the "definitions and interrelationships"  
2           of the modules are key to the improvements to  
3           computer technology advanced by the claims,  
4           that, in fact, the patents are "silent" on what  
5           the relationships are among the claimed  
6           modules.

7                     But in the Court's view, that's not true.  
8           The claim limitations, on their face, do not  
9           seem to be silent about what are the  
10          relationships between the modules. Instead,  
11          the claims tell us how certain modules are  
12          related to one another. For example, the state  
13          machine module is configured to store state  
14          machine types associated with at least one of  
15          the elements, elements that are stored by the  
16          element module.

17                    The Court notes that today at oral  
18          argument, the parties appeared to have  
19          different views about what these claimed  
20          modules really are or consist of. Defendant,  
21          on the one hand, seemed to be suggesting that  
22          although the modules facially are required to  
23          contain different types of data, like elements  
24          or attributes or state machine types, in  
25          reality, they all simply require groupings of

1 merely any type of metadata, and Defendants  
2 suggested that these modules were not actually  
3 part of the data structure, just grouping of  
4 data themselves.

5 But Plaintiff's counsel argued that the  
6 modules, as their names would appear to  
7 suggest, do require utilization of different  
8 types of metadata and that a module is a  
9 portion of a data table or a data table itself.  
10 That is, a structure or type of structure. At  
11 this stage of the case, without claim  
12 construction having occurred, Plaintiff's  
13 arguments as to what the claimed modules are  
14 seem plausible, so I must credit them.

15 At page two of its reply brief, Plaintiff  
16 also suggested that the fact that each module  
17 is defined by functional language means that  
18 the claims amount simply to instructions that  
19 apply it with a computer in order to carry out  
20 the claimed functions. While it is true that  
21 the claims dictate that the modules are  
22 configured to store and identify or define  
23 certain information, Defendant's argument  
24 ignores that the claims themselves,  
25 particularly if Plaintiff is correct about the

1           previously referenced claim construction issue  
2           as to module, would be directed to a new system  
3           for manipulating datasets that includes  
4           particular modules that must store, identify,  
5           and/or define particular information and that  
6           have certain relationships to one another. The  
7           claims, therefore, would not simply amount to  
8           instructions to store, manage, index, and/or  
9           retrieve data based on metadata or descriptions  
10          of the data on a computer, full stop. Rather,  
11          they would recite specific data structures for  
12          doing so.

13                 Now, the patent specification, though not  
14          a model of clarity, also sheds some light on  
15          the "directed to" Step 1 inquiry. For example,  
16          the abstract explains that the patents claim a  
17          computerized system for "storing, managing,  
18          indexing, interrelating, and/or retrieving  
19          datasets in a manner independent of the data  
20          model." This suggests that the patents will be  
21          claiming a new system for managing, indexing,  
22          interrelating, and/or retrieving datasets.  
23          That is, one that is independent of the data  
24          model.

25                 The abstract then goes on to note how the

1 patent does this. That is by claiming a system  
2 that includes an element module that's  
3 configured to store uniquely identified  
4 elements and an element relation module  
5 configured to show relationships between the  
6 elements and the element module and then by  
7 further containing various additional types of  
8 modules. These concepts are, in turn, captured  
9 by the claims.

10 Turning to the written description of the  
11 asserted patents, column 1's background  
12 information section explains that at the time  
13 of the invention, a conventional data storage  
14 system would implement its own data model  
15 according to the system's user interface and  
16 business role specification. These prior art  
17 systems depended on a specific data model, one  
18 that the system's developers create by writing  
19 dedicated code. However, these systems were  
20 said to lack flexibility and portability. The  
21 section ends with the patent stating that there  
22 is a "need for systems and method that store,  
23 manage, index, interrelate, and/or retrieve  
24 datasets in a manner independent of the data  
25 model."

1           Then in the summary of the invention  
2           section, the patent describes the claimed  
3           systems and methods that are said to address  
4           this problem in some way. In doing so, the  
5           summary section pointedly notes that these  
6           systems and methods are ones containing various  
7           modules of the types that are found in the  
8           asserted representative claims at issue.

9           Now, candidly, the patent does not, in  
10          the Court's view, understandably articulate how  
11          it is that a claimed system, like those in the  
12          purportedly representative claims, actually  
13          solve the problems in the prior art that are  
14          called out in the background information  
15          section of the patent. Nor, in the Court's  
16          view, was that answer particularly clear after  
17          reading Plaintiff's briefing or its current  
18          operative complaint. And despite many  
19          questions here today at oral argument, the  
20          Court was left wondering about this connection  
21          between what is claimed on the one hand and how  
22          what is claimed solves the types of  
23          computer-based problems described by the patent  
24          on the other hand. This lack of clarity, if it  
25          continues, may well be harmful to the



1           plaintiff's case at some point in the future,  
2           but it does not affect my Step 1 decision here  
3           today. That's because all I'm doing at Step 1  
4           today is asking myself, first, what is the  
5           focus of these claims, and, second, is that  
6           concept captured in the abstract idea put  
7           forward by the defendant?

8           For the reasons that I've explained here  
9           today, it is not. The claim language itself  
10          and the patent specification tell us repeatedly  
11          that the focus of these patent claims is on the  
12          particular nature of the data structure at  
13          issue, including its use of particular modules  
14          that store different types of metadata that are  
15          interrelated in a particular way. Defendant's  
16          abstract idea was simply too broad. It  
17          oversimplifies the claims, so it doesn't  
18          capture this important concept.

19          Finally, the caselaw that the parties  
20          highlight as similar to the claims at issue  
21          also helps, at least in part, to demonstrate  
22          that Plaintiff's position appears to be the  
23          right one. For its part, Defendant asserted  
24          that the claims here were most analogous to  
25          those found to be patent eligible in *BSG Tech*

1        *LLC versus Buyseasons, Inc.*, a Federal Circuit  
2        case. The plaintiff says that its claims were  
3        more similar to the claims found to be patent  
4        eligible in *Enfish, LLC, versus Microsoft*  
5        *Corp.*, another Federal Circuit case. The Court  
6        finds that the claims are more like those in  
7        *Enfish* than those in *BSG Tech.*, which is  
8        another reason why the defendant's motion must  
9        be denied at Step 1.

10        In *BSG Tech.*, the Federal Circuit  
11        affirmed the district court's determination  
12        that the patents at issue were not patent  
13        eligible. Notably, there, the district court's  
14        decision was issued after the Court accepted  
15        the plaintiff's proposed claim constructions  
16        and converted the defense motion to dismiss  
17        into a motion for summary judgment. The claims  
18        at issue in that case recited methods and  
19        systems for indexing and retrieving data being  
20        posted by a plurality of users to a wide area  
21        network that entailed, as the claimed advanced  
22        over the prior art, providing the users with  
23        summary comparison usage information  
24        corresponding to previously used parameters and  
25        values for use in posting the data. The

1 Federal Circuit found that these claims were  
2 directed to the abstract idea of "considering  
3 historical usage information while inputting  
4 data." The Court noted that the patentee did  
5 not purport to have invented a new database  
6 structure. Rather, the focus of the claims was  
7 guiding users by presenting summary comparison  
8 information to them before they inputted data  
9 in order to achieve more consistent item  
10 descriptions. The Federal Circuit reiterated  
11 throughout the opinion that the claimed  
12 databases themselves were well known at the  
13 time of the invention. While the focus of the  
14 claims would improve the quality of the  
15 information added to the database, this is not  
16 the same as improving the database's  
17 functionality. Indeed, the database would  
18 serve in its ordinary capacity of storing the  
19 resulting information, and thus the claims were  
20 unrelated to how databases function.

21 One claimed issue in *BSG Tech* recited a  
22 database system, and the patentee pointed to a  
23 limitation requiring that users can add  
24 additional parameters without modifying the  
25 predefined structure of the database as

1           constituting an improvement in computer  
2           functionality. However, the Court explained  
3           that the specification said nothing about how  
4           to construct such a database structure, which  
5           suggested that this feature of the claimed  
6           system was not the focus of the claim.  
7           Moreover, the patent did not suggest that  
8           conventional databases required structural  
9           modifications to add new paramaters. At Step 2  
10          of the *Alice* test, the *BSG* Court explained that  
11          the only alleged unconventional feature of the  
12          claims was the requirement that the user be  
13          guided by the summary comparison usage  
14          information, which, again, simply restated the  
15          abstract idea at issue. As to patentee's  
16          argument there that the claims supplied an  
17          inventive concept because they required a  
18          specific database structure that did not  
19          preempt consideration of usage information  
20          while inputting data into other types of  
21          databases, the Court again explained that the  
22          claimed specific database structures were well  
23          understood and conventional, and accordingly  
24          did not supply an inventive concept.

25                 So while in *BSG Tech* the claimed advance

1           in the patents was simply having users consider  
2           certain information while inputting information  
3           into the index, here in contrast the focus of  
4           the claims seems to be on a data repository  
5           that includes particular data structures that  
6           have relationships among one another. That is,  
7           the particular claimed database structures are  
8           the focus of the claims. And unlike *BSG Tech.*,  
9           it's not clear that the recited structures were  
10          well understood and conventional. As the Court  
11          has previously noted, the patent itself seems  
12          to say they were not. Indeed, the fact that  
13          the patentee obtained a patent on these claims  
14          would appear to indicate that they were not.

15                 For this reason, the Court agrees with  
16          the plaintiff that the claims seem more similar  
17          to those found to be patent eligible in *Enfish*,  
18          which, again, not for nothing, was the case  
19          where the Section 101 issue was not decided  
20          until a more full record was made on summary  
21          judgment. In *Enfish*, the Federal Circuit  
22          deemed the claims at issue to be patent  
23          eligible because they recited "nonabstract  
24          improvements to the computer technology." The  
25          Court explained that "much of the advancement

1           made in computer technology consist of  
2           improvements to software, that, by their very  
3           nature, may not be defined by particular  
4           physical features, but rather by logical  
5           structures and processes."

6           The patent at issue in *Enfish* claimed a  
7           particular type of logical model for a computer  
8           database described as a "self-referential"  
9           table. Finding that the focus of the claims  
10          was on the specific improvement to the way  
11          computers operate, the Court emphasized that  
12          the claims did not broadly cover any form of  
13          storing tabular data, but rather specifically  
14          taught the claim's self-referential data for a  
15          computer database. This specificity was  
16          reflected in the claim language, which  
17          described in some detail the table's  
18          attributes, and also in the teaching of the  
19          specification. There, the specification  
20          emphasized how the self-referential table  
21          improved upon conventional database structures,  
22          such as by providing increased flexibility,  
23          faster search times, and smaller memory  
24          requirements. In light of what this  
25          demonstrated about the plain focus of the

1           claims, that is, that the focus was on an  
2           improvement to computer functionality itself,  
3           the *Enfish* Court found the claims passed  
4           Alice's Step 1 test.

5           As in *Enfish*, the claims here are  
6           directed to data repositories that appear to  
7           include specific sets of data structures, that  
8           is, modules, that are configured to store  
9           particular kinds of information and that have  
10          relationships with one another. For these  
11          reasons, the Court finds that the claims at  
12          issue are not directed to the abstract idea put  
13          forward by Defendant. Therefore, Defendant's  
14          motion must be denied.

15          Defendant's motion also moves to dismiss  
16          Plaintiff's claims for indirect and willful  
17          infringement. The Court will take that portion  
18          of the motion under advisement without argument  
19          and will issue a forthcoming order on that  
20          portion of the motion soon.

21          That brings us to our last case today,  
22          *Topia Technology, Inc., versus EgnYTE, Inc.*  
23          It's Civil Action Number 21-1821-CJB.

24          Defendant EgnYTE, Inc., which I'll refer  
25          to as Defendant, has filed a motion for

1 judgment on the pleadings pursuant to Federal  
2 Rule of Civil Procedure 12(c), which I'll refer  
3 to as the motion. With the motion, Defendant  
4 is asserting that the complaint should be  
5 dismissed because the patents-in-suit are  
6 subject-matter ineligible pursuant to Section  
7 101. At the outset, the Court will address a  
8 few procedural issues.

9 First, there are six patents-in-suit at  
10 issue in this case, which are all relevant to  
11 the motion. For ease of reference here today,  
12 I'll refer to each of the patents by the last  
13 three numbers of their respective Patent  
14 Numbers.

15 Second, although the motion is brought  
16 here pursuant to Rule 12(c), the nature of the  
17 Court's analysis of that motion will not differ  
18 as compared to its analysis of the other  
19 motions it addressed today. That is because  
20 although those other motions were brought  
21 pursuant to Rule 12(b)(6), not Rule 12(c), the  
22 standard of review for a Rule 12(c) for  
23 judgment on the pleadings is the same as that  
24 for deciding Rule 12(b)(6) motions.

25 Third, Defendants asserted that Claim 1



1 in each of the representative patents -- I'm  
2 sorry -- of each of the respective patents is  
3 representative of all the other claims of those  
4 patents for purposes of Section 101 analysis at  
5 issue here.

6 In its answering brief, Plaintiff Topia  
7 Technology, Inc., which I'll refer to as  
8 Plaintiff, never really contests that  
9 assertion. Although at one point in its  
10 briefing, Plaintiff makes a quick reference to  
11 the content of two dependent claims, that is,  
12 Claim 5 of the '942 patent and Claim 4 of the  
13 '607 patent, it does so only to show why the  
14 content of those claims are similar in kind to  
15 the content of Claim 1 of those respective  
16 patents.

17 The Federal Circuit has held, as I've  
18 noted, that Courts may treat a claim as  
19 representative if the patentee does not present  
20 any meaningful argument for the distinctive  
21 significance of any claim limitations not found  
22 in the representative claim. In light of this,  
23 herein, the Court will primarily only address  
24 Claim 1 of each of the respective  
25 patents-in-suit, understanding for our purposes

1 here that Claim 1 of the patent is  
2 representative of all the claims of that same  
3 patent.

4 Fourth, because each of the six patents  
5 are related, they largely share the same  
6 specification with only a few differences.  
7 Today, when I make reference to the  
8 specification, unless indicate otherwise, I'll  
9 be referring to the specification of the '561  
10 patent. When I do so, it should be understood  
11 that the specifications of all five other  
12 patents are the same in the respect, again  
13 unless I advise specifically to the contrary.

14 And fifth, for reasons that will become  
15 clearer shortly, I'm going to address the  
16 patents-in-suit in four distinct groupings, as  
17 the Court's decisions regarding the *Allice* test  
18 will differ depending on which grouping of  
19 patents is at issue.

20 The first grouping I'll address is  
21 actually a grouping of one, the '561 patent.  
22 The patent is titled "Architecture for  
23 Management of Digital Files Across a  
24 Distributed Network." In Step 1, Defendant  
25 argues that this patent, and indeed all six

1 patents-in-suit today, are directed to an  
2 abstract idea that Defendant refers to in  
3 similar, if slightly different terms,  
4 throughout the briefing. Defendant  
5 alternatively refers to this abstract idea as  
6 "storing and synchronizing versions of  
7 documents and other files" or "synchronizing  
8 multiple versions of a file across network  
9 computers" or "synchronizing document versions"  
10 or "automatically transferring modified files  
11 and information across multiple generic  
12 computer systems" or "automatically  
13 transferring modified electronic files to  
14 network devices." I understand Defendant to  
15 treat each of these slightly different  
16 articulations of the abstract idea as carrying  
17 the same basic meaning. So for ease of  
18 reference, I'll utilize "synchronizing multiple  
19 versions of the file across network computers"  
20 as the shorthand for the abstract idea at issue  
21 here.

22 Plaintiff, for its part, doesn't dispute  
23 that synchronizing multiple versions of a file  
24 across network computers is an abstract idea,  
25 and the Court agrees that it is. Again, in the

1            parlance of the Federal Circuit, it appears to  
2            be a disembodied concept or a basic building  
3            block of human ingenuity untethered from any  
4            real-world application. Plaintiff contends at  
5            Step 1, however, that the claims of the '561  
6            patent are directed not to the abstract idea  
7            but, instead, are "directed to a specific  
8            computer network architecture for a useful and  
9            improved file management system that includes a  
10           dedicated software system configured to  
11           automatically provide the user with the most  
12           recent version of the file to be accessed from  
13           any of the user's devices." Plaintiff contends  
14           that the claims of all the patents are directed  
15           to that more specific concept.

16           Plaintiff goes on to address what each  
17           patent is individually directed to more  
18           specifically in light of the specification. As  
19           I noted earlier today, in order to determine  
20           what a claim really is directed to, the Federal  
21           Circuit explained that the Court should consult  
22           both the claim language and the specification.  
23           In doing so, it becomes clear that Claim 1 of  
24           the '561 patent is directed to the abstract  
25           idea at issue.

1           Turning first to the text of Claim 1, it  
2           does seem that the focus of that claim is on a  
3           high-level concept of synchronizing multiple  
4           versions of a file across network computers.  
5           Nearly the entirety of the claim's text could  
6           be said to be devoted to this general concept.  
7           The claim explains that, first, the system  
8           requires the use of a first electronic device,  
9           a second electronic device, and a third  
10          electronic device, each associated with a user.  
11          Each of those three devices must contain an  
12          application.

13           The claim then explains how the second  
14          device's application automatically transfers a  
15          copy of the first electronic file from the  
16          second device to the first device at the point  
17          where the user modified the content of that  
18          first file and how it does so upon determining  
19          that a save operation has been performed on the  
20          file.

21           Next, the claim explains that the first  
22          device is also configured to automatically  
23          receive a copy of a second electronic file from  
24          a third device's application at the point when  
25          the user modifies the content of that file.

1           Then the claim notes that the first device's  
2           application is configured to automatically  
3           transfer the modified version of the copy of  
4           the first file to the third device in order to  
5           replace an older version of that file. And the  
6           claim also states that the first device  
7           automatically transfers a copy of the second  
8           file to the second device in order to replace  
9           an older version of that file.

10           Simply by laying out how Claim 1  
11           describes the claimed system, one can see that  
12           the focus of nearly the entire claim is on the  
13           concept of automatically transferring computer  
14           files from one electronic device to another so  
15           that the respective three devices all contain  
16           the same modified and updated versions of those  
17           files. Put differently, the claim reads as if  
18           it is all about the abstract idea at issue,  
19           synchronizing multiple versions of a file  
20           across network computers, and not on some more  
21           specific or particularized real-world  
22           application of that idea.

23           As Defendant notes, the claims uses  
24           "highly generalized, result-oriented terms."  
25           Its focus seems to be not on explaining in any

1 detail how these file transfers are to be  
2 accomplished, but instead simply conveying the  
3 "aspirational result of automatically  
4 transferring updated versions" of the file in  
5 the first place.

6 The specification only further supports  
7 this conclusion. The abstract and the summary  
8 of the invention section of the patent describe  
9 what the patent is said to be all about. In  
10 doing so, those sections simply parrot back the  
11 content of Claim 1, nothing more. The content  
12 and background of the invention section also  
13 supports Defendant's position. Therein, the  
14 patentee explained the problems in the prior  
15 art that the patent needs to solve. Here, the  
16 patent notes that conventional computing  
17 systems allow for users' various devices to be  
18 easily connected, but that such systems had  
19 drawbacks in that "they do not provide the  
20 customer a seamless environment" in that "the  
21 customer must manually handle many aspects of  
22 that connection." And then as to file  
23 management, customers must "manually move files  
24 between their devices" using various protocols.  
25 The patent further expounds on these problems,

1           which include the proliferation of redundant  
2           file copies, the proliferation of an  
3           error-prone environment, and unnecessary  
4           complexity.

5           The patent then describes a number of  
6           possible solutions in the art to this problem  
7           that, for one reason or another, are not  
8           satisfactory. These include remote desktop  
9           software, which is problematic because it does  
10          not use the utilize the local resources of a  
11          client database; distributed file systems,  
12          which have drawbacks, including that the  
13          customer always had to be connected to the  
14          system and that accessing files in the system  
15          tended to be a slow process; FTP, which in  
16          addition to sharing some of the same problems  
17          as distributed file systems also had the  
18          problem that the customer was required to  
19          manually use client software to perform the  
20          operations of a distributed file system as a  
21          separate task; e-mail, which was "even worse  
22          than FTP because the process is even more  
23          manual" and then among other reasons the  
24          customer has a find an e-mail message  
25          containing a file before it can access the



1 file; and flash drives or external disk drives  
2 which had the downside that they had to be  
3 "physically connected to the computer on which  
4 the files would be accessed."

5 In other words, in this portion of the  
6 specification, the patentee seems to be  
7 explaining that the claims are meant to allow  
8 for automatically transferring computer files  
9 between devices, which was an improvement over  
10 the art because at least certain of these prior  
11 art options heavily require the user to perform  
12 a solution manually in a more burdensome way.

13 However, the Federal Circuit has made  
14 clear that the mere automation of otherwise  
15 manual processes using generic computers does  
16 not constitute a patentable improvement in  
17 computer technology. In *The University of*  
18 *Florida Research Foundation, Inc., versus*  
19 *General Electric, Inc.*, for example, the  
20 Federal Circuit noted that when a patent's  
21 claims simply seek to automate an otherwise  
22 manual methodology in order to conserve human  
23 resources and minimize errors, this  
24 demonstrates that the patent is a  
25 "quintessential 'do it on a computer' patent."

1           These claims are directed to an abstract idea.

2           Moreover, it would seem hard for the  
3           plaintiff to contest that Claim 1 of the '561  
4           patent is directed to merely automatically  
5           synchronizing multiple versions of the file  
6           across network computers because in its  
7           complaint, Plaintiff essentially said as much.  
8           There, Plaintiff stated that the '561 patent is  
9           "generally directed to systems and methods for  
10          sharing electronic files between multiple  
11          devices, for even when a user modifies an  
12          electronic file on a device, a copy of the  
13          modified electronic file is automatically  
14          transferred to at least one other device." The  
15          Court is hard-pressed to see much daylight  
16          between that description and Defendant's  
17          articulation of the abstract idea at issue  
18          here.

19          I now turn to Step 2 of the *Alice*  
20          framework. As I noted earlier, at Step 2 the  
21          Court is required to assess what else is in the  
22          claim beyond the abstract idea and whether  
23          those additional elements can amount to an  
24          inventive concept, such that they transform the  
25          nature of the claim into a patent-eligible

1 application of the abstract idea.

2 Here, however, it's hard to see what more  
3 there is in Claim 1 of this patent beyond those  
4 things that relate to the abstract idea itself.  
5 All or nearly all of the claim's language seems  
6 to be focused on the general concept of  
7 automatically transferring modified electronic  
8 files between network devices, and Plaintiff  
9 did not add allegations to its complaint that  
10 addresses the 101 question at Step 2 in a  
11 manner that might suggest otherwise.

12 Nor is there anything about any hardware,  
13 such as the respective devices referenced by  
14 Claim 1 or the nature of the computer system  
15 itself, or any software, such as the claimed  
16 files or applications in the claims, that  
17 appear to amount to the inventive concept here.  
18 The patent, as Defendant noted, makes clear  
19 that exemplary systems for implementing the  
20 invention simply include a "general purpose  
21 computing device" and that "embodiments of the  
22 invention are operational with numerous other  
23 general purpose or special purpose computing  
24 system environments or configurations."

25 In support of its argument for patent

1 eligibility, Plaintiff argued in part that the  
2 claim does not preempt the field of  
3 synchronizing electronic files across multiple  
4 systems because the patent, as I've already  
5 discussed, distinguishes between the system in  
6 Claim 1 and other conventional approaches, at  
7 least some of which tended to rely on the  
8 user's manual work in order to update the  
9 respective files. Since there remain available  
10 alternatives, according to the plaintiff, the  
11 "claims do not preempt every application of the  
12 alleged abstract idea."

13 The problem, however, for Plaintiff here  
14 as it relates to the '561 patent particularly  
15 is that in order to survive at Step 2, a  
16 plaintiff cannot simply rely on generic  
17 computer elements to carry out an abstract idea  
18 automatically. If a claim's only inventive  
19 concept is the application of an abstract idea  
20 using conventional and well-understood  
21 techniques, the claim has simply not been  
22 transformed into a patent-eligible application  
23 of an abstract idea. As the Federal Circuit  
24 has noted, where a patent's claims are deemed  
25 only to disclose patent-ineligible subject

1 matter under the *Alice* frame work, as they are  
2 as to this patent, preemptions concerns are  
3 fully addressed and made moot.

4 Plaintiff additionally argues in Step 2  
5 that prior to 2007, there "was no computer  
6 network architecture using a server between  
7 different user devices to perform automatic  
8 file synchronization whenever a user modifies a  
9 file on a device associated with a file  
10 management system." But in the Court's view,  
11 that's simply another way of saying the claimed  
12 system was new in the relevant time frame. As  
13 the Federal Circuit has noted, eligibility and  
14 novelty are separate inquiries. Simply because  
15 the claimed system may have been novel does not  
16 mean that it will survive *Alice's* test.

17 Finally, the Court takes a moment to  
18 address some of the cases cited by both sides.  
19 First, the Court agrees with Defendant that the  
20 '561 patent is similar to the claims at issue  
21 in *Ameranth, Inc., versus Domino's Pizza*, a  
22 Federal Circuit case, a case the defendant  
23 called out as the most similar to the  
24 challenged conduct here. In that case, the  
25 Federal Circuit found that claims which were

1 directed to configuring and transmitting  
2 hospitality-menu-related information using a  
3 system that's capable of synchronous  
4 communications and automatic format were  
5 directed to an abstract idea at Step 1, in part  
6 because the claims provided only result-focused  
7 and functional language without setting out the  
8 specifics of a particular conception that it  
9 actually carried out the concept. At Step 2,  
10 the Federal Circuit concluded that the claims  
11 did not include an inventive concept because  
12 they did no more than "instruct the  
13 practitioner to implement the abstract idea,  
14 which was routine, conventional activity." As  
15 I've just described, the representative claim  
16 of the '561 patent seems just like the  
17 representative claims in *Ameranth*. It relies  
18 on routine computer elements of users to simply  
19 carry out the abstract idea at issue.

20 Plaintiff, in identifying what it thought  
21 was the most analogous case in the supplemental  
22 letter brief, actually picked the case that it  
23 had not cited in its briefing and instead cited  
24 after the briefing closed, *Cooperative*  
25 *Entertainment, Inc., versus Collective*

1           *Technology, Inc.*, another Federal Circuit case.  
2           Ironically, the Court concludes that this case  
3           is, in fact, as to the '561 patent, more  
4           helpful for Defendant than it is for Plaintiff.

5           In *Cooperative Entertainment*, the  
6           district court had ruled that the claims in the  
7           patent at issue were directed to the abstract  
8           idea of the preparation and transmission of  
9           content to peers through a computer network.  
10          The Federal Circuit reversed, concluding at  
11          Step 2 that the claims could contain inventive  
12          concepts. This is because the claims did more  
13          than merely implement the abstract idea with  
14          generic computer components using conventional  
15          technology.

16          Importantly, unlike as to the '561 patent  
17          here, there was evidence in the record in  
18          *Cooperative Entertainment* to support that  
19          conclusion. The *Cooperative Entertainment*  
20          Court found there were at least two limitations  
21          in the claims, one that required a dynamic  
22          peer-to-peer network wherein multiple nodes  
23          consume the same content and were configured to  
24          communicate outside the content distribution  
25          networks, and another that required the use of

1 trace routes in content segmentation that  
2 potentially amounted to inventive concepts, and  
3 the Court explained how the specification and  
4 the operative complaint discussed these  
5 limitations in significant detail, articulating  
6 how their inclusion of the claims amounted to  
7 an improvement to the computer technology that  
8 was in the prior art.

9 Here, while the specification does  
10 discuss how the claimed invention amounts to an  
11 improvement over the prior to art, the claimed  
12 content issue involves only the use of generic  
13 and conventional conventional computer  
14 components, it seems, to effectuate the  
15 abstract idea contained in the claims. There's  
16 no showing here in the patent or in the  
17 operative complaint that anything in Claim 1  
18 amounts to the representative inventive  
19 concept.

20 For all these reasons, the Court finds  
21 that the motion should be granted as to the  
22 claims relating to the '561 patent.

23 The Court now turns to the second  
24 grouping, again a grouping of one, the '942  
25 patent. The '942 patent, whose title is the



1 same as the '561 patent, is otherwise also very  
2 similar to the '561 patent. The only  
3 identified key difference between the two as  
4 described by Plaintiff in the answering brief  
5 on pages 4 and 11 is the fact that Claim 1 of  
6 the '942 patent additionally requires that the  
7 claimed systems determines whether the  
8 respective devices are in communication with  
9 each other before sending an electronic file  
10 from one device to the other. Claim 5, which  
11 ultimately depends from Claim 1, relatedly  
12 requires that the modified first file is stored  
13 on a memory device associated with the first  
14 electronic device responsive to a determination  
15 that the first electronic device is not in  
16 communication with the third electronic device.  
17 For ease of reference, I'll refer to these  
18 claim limitations as the determining steps for  
19 elements.

20 Claim 1 of the '942 patent does not  
21 appear materially different to the Court from a  
22 Section 101 perspective as compared to Claim 1  
23 of the '561 patent. Indeed, I note that on  
24 page 17 of Plaintiff's answering brief,  
25 Plaintiff lumped together these two patents for

1 purposes of its eligibility analysis.  
2 Plaintiff nevertheless argues that the  
3 determining steps are features that are  
4 "additional nonabstract improvements" as they  
5 "are necessarily rooted in computer technology  
6 because they focus on addressing  
7 computer-network-centric issues related to the  
8 network unavailability." The reminder of  
9 Plaintiff's Step 1 argument, however, simply  
10 restates the wording of the elements recited in  
11 Claims 1 and 5 that I've just described.

12 While the claim determining steps in the  
13 '942 patent do involve the use of computer  
14 technology, that bare fact alone does not  
15 require that the outcome of the eligibility  
16 analysis be any different. At Step 1,  
17 plaintiff has pointed to nothing in the '942  
18 patent suggesting that these determining steps  
19 are actually what the claims are directed to.  
20 The '942 patent specification, including the  
21 abstract and the summary of the invention  
22 section, are essentially the same as that of  
23 the '561 patent. And while the abstract and  
24 summary of the invention section of the patent  
25 do note that the devices in the claimed

1 invention are "in communication" with each  
2 other, they never suggest the step of  
3 determining whether such communication exists  
4 is central to the focus of the patent or its  
5 claims.

6 Moreover, the concept that two devices  
7 actually must be in communication with each  
8 other before one transfers an electronic file  
9 to the other appears to the Court to be one  
10 that is fairly considered to be part of the  
11 abstract idea itself. After all, one cannot  
12 synchronize multiple versions of a file across  
13 network computers if those computers aren't in  
14 communication with each other in the first  
15 place.

16 As for Step 2, Plaintiff did not make any  
17 arguments there that were specific to the '942  
18 patent's determining steps. There's nothing in  
19 the record to suggest that the inclusion of the  
20 steps would transform Claim 1 into one  
21 amounting to the unconventional use of  
22 technology to solve a problem in the computer  
23 arts such that the steps would help make up an  
24 inventive concept. Thus, for the same reasons  
25 as the '561 patent, the Court concludes that

1 the '942 patent is also directed to  
2 patent-ineligible subject matter. The motion  
3 should be granted as to the claims relating to  
4 that patent as well.

5 The next grouping of patents I'll discuss  
6 are the '787 and '823 patents. Claim 1 of  
7 these patents is similar to Claim 1 of the '561  
8 patent in the sense that all are claims to  
9 systems that automatically transfer files  
10 between multiple devices after a user modifies  
11 those files, but the respective claims also  
12 have some differences which, in the Court's  
13 view, will turn out to be material.

14 Specifically, Claim 1 of the '787 patent  
15 additionally requires that after a user  
16 modifies an electronic file on a device, the  
17 first metadata associated with that file must  
18 be assigned a first priority that is greater  
19 than a second priority assigned to the copy of  
20 the file itself. And the claim requires that,  
21 based on the fact that this metadata has a  
22 higher priority than a copy of the file itself,  
23 the metadata is automatically transferred from  
24 a first device to a second device before the  
25 copy of that file is transferred to the second

1 device.

2 Moreover, the claim requires that when  
3 this metadata is transferred to the second  
4 device, this causes a file representation of  
5 the file on that second device to be updated  
6 based on that metadata. And it requires that  
7 this now-updated file representation represents  
8 the updated version of the file stored on the  
9 first device that is not currently stored on  
10 the second device.

11 As for Claim 1 of the '823 patent, it has  
12 similar language to Claim 1 of the '787 patent  
13 except that the transfer of the metadata to the  
14 second device causes a graphical availability  
15 indication of the updated version of the file  
16 to be presented on the second device based on  
17 that metadata and that this graphical  
18 availability indication is presented proximate  
19 to the file icon representing that file. And  
20 the claim requires that the graphical  
21 availability indication indicates that the  
22 updated version of the file is available to be  
23 downloaded to the second device.

24 At Step 1, the Court does think it's  
25 correct as a legal matter to conclude that

1           these two patents are directed simply to the  
2           bare abstract idea that Defendant has put  
3           forward. The Court so concludes for a few  
4           reasons.

5           First, Defendant's proposed abstract  
6           idea, again, synchronizing multiple versions of  
7           the file across network computers, does not  
8           include a concept that seems key to these  
9           patents, that is, that certain metadata related  
10          to the file must get transferred to the device  
11          before the copy of the electronic file gets  
12          transferred to the device. A significant  
13          portion of Claim 1 of both the patents discuss  
14          this requirement and how this transferred  
15          metadata and this prioritization over the file  
16          copy itself otherwise impacts the  
17          synchronization process. Surely one could  
18          synchronize multiple versions of a file across  
19          network computers without utilizing this type  
20          of prioritized metadata process. So this  
21          metadata-related aspect of the claims has to be  
22          viewed as something narrower and really  
23          distinct from the broad abstract idea itself.

24          Moreover, these two patents provide a  
25          number of other clues that whatever the claims

1 are directed to, that concept has to include  
2 reference to the system's utilization of  
3 prioritized metadata. For one thing, look at  
4 the patent titles. The title of the '787  
5 patent is "Pre File Transfer Update Based on  
6 Prioritized Metadata." And the title of the  
7 '823 patent is "Pre File Transfer Availability  
8 Indication Based on Prioritized Metadata." It  
9 is permissible to look at a patent's title in  
10 assessing what a claim is directed to, and here  
11 the titles emphasize that you simply can't  
12 articulate what these patents are all about  
13 without including some reference to the claimed  
14 system and method's use of prioritized  
15 metadata. Despite this, Defendant's abstract  
16 idea does not mention this concept.

17 Additionally, the abstract and summary of  
18 the invention sections of these two patents  
19 also support Plaintiff's position at Step 1.  
20 Unlike with the other four patents-in-suit,  
21 these key sections of the '787 and '823 patents  
22 make prominent reference to the importance of  
23 the use of prioritized metadata in file  
24 synchronization. As the Court will note in a  
25 moment, what these patents and other

1 patents-in-suit are a little less clear about  
2 is exactly how it is that the use of the  
3 prioritized metadata actually helps to improve  
4 computer functionality. There is some  
5 discussion of that, as I'll explain, though not  
6 a lot. Nevertheless, the Step 1 inquiry asks  
7 what is the focus of these claims. Given that  
8 it's clear that these two patents are focused  
9 in significant part on transferring metadata  
10 prior to the transfer of electronic files, the  
11 Court cannot conclude that the claims are  
12 simply directed to the much broader abstract  
13 idea of synchronization of multiple versions of  
14 the file across network devices. So for that  
15 reason, the Court will deny Defendant's motion  
16 at Step 1 as to the '787 and '823 patents.

17 Finally, the Court turns to the last  
18 patent grouping, the '607 and '622 patents.  
19 These patents, which share the same title as  
20 the '561 patent, seem to fall somewhere between  
21 the '561 patent on the one hand and the '787  
22 and '823 patents on the other as it relates to  
23 the Section 101 calculus.

24 Like the '787 and '823 patents, the '607  
25 and '622 patents do include in their respective



1 Claim 1s, among other things, the concept that  
2 metadata about a file must be transferred to a  
3 location prior to the transfer of the  
4 electronic file itself. For example, Claim 1  
5 of the '607 is a system claim that requires  
6 after a user modifies an electronic file on a  
7 device first metadata is generated relating to  
8 the file. The system automatically transfers  
9 that metadata to a second device prior to the  
10 copy of the file being transferred to that same  
11 device. And Claim 1 of the '622 patent has a  
12 similar requirement.

13 Unlike the '787 and '823 patents,  
14 however, the title of the patent did not make  
15 reference to the claim's use of prioritized  
16 metadata with respect to file transmitting.  
17 Nor did the patent's abstract or summary of the  
18 invention section discuss this concept.  
19 Instead, the content of the '607 and '622  
20 patent specification is essentially the same as  
21 the content of the '561 patent specification.  
22 So at Alice Step 1, although the claims of the  
23 '607 and '622 patents do seem to make some  
24 prominent use of prioritized metadata, it's  
25 much more difficult to say here than it was as

1 to the '787 and '823 patents that these claims  
2 are directed to a system that must include this  
3 concept.

4 In such a circumstance, where there's a  
5 close call as to what a claim is directed to at  
6 Step 1, the Federal Circuit noted in *Enfish*  
7 that an analysis of whether there are arguably  
8 concrete improvements in the recited computer  
9 technology may better take places at Step 2, so  
10 the Court will go that route here as to these  
11 two patents.

12 At Step 2, however, the Court believes  
13 there is just enough in the record to suggest a  
14 plausible factual dispute about whether these  
15 patents in fact contain an inventive concept.  
16 Therefore, for that reason, the Court will deny  
17 Defendant's motion as to the '607 and '622  
18 patents. More specifically, there is at least  
19 one portion of the patents' common  
20 specification that appears to discuss how this  
21 use of metadata can play a helpful role in  
22 solving the problems relating to file  
23 synchronization that are discussed in the  
24 patent.

25 According to the specification, a common

1           problem experienced by distributed file systems  
2           and FTP for example, two prior art options that  
3           the patent derides, was a "latency" problem.  
4           That is, the delay "between a file being put  
5           onto a file system and its showing up on a  
6           remote machine." In explaining how the patent  
7           helps solve this problem, the specification  
8           notes that "in an embodiment the user  
9           interfaces may include a list of the customer's  
10          documents and related metadata as well as any  
11          one-to-one or one-to-many relationships between  
12          the documents and metadata" and it describes  
13          how, for example, an "embodiment directory,"  
14          which the Court understands from Plaintiff's  
15          counsel's statements at oral argument to be a  
16          particular type of metadata, can be "decoupled  
17          from the user files" such that the "directory  
18          update system updates at a higher priority than  
19          the documents can be synchronized."

20                 Although the patent's language here is  
21                 far from complete, the Court thinks it can see  
22                 how the patent here is describing how the  
23                 prioritization of metadata over the file copy  
24                 itself and the sending of that metadata to a  
25                 device before the file copy is said to help

1 overcome latency issues. Plaintiff's counsel  
2 explained today that one way that it does so is  
3 by alerting the user to a modification of a  
4 file more quickly prior to the file copy itself  
5 being received by the device.

6 Additionally, as I noted, at column 1 and  
7 2, the patent describes negatively certain  
8 prior art file synchronization options. As I  
9 noted, among those are remote desktop software  
10 and distributed file systems. Today,  
11 Plaintiff's counsel argued that it may be  
12 correct to view those solutions as a type of  
13 automated or synchronized method of updating  
14 files across network devices. In other words,  
15 that those two solutions are other unclaimed  
16 approaches that can be taken in the realm of  
17 the abstract idea at issue. I can't say that  
18 Plaintiff is wrong to characterize these  
19 solutions as automated solutions in this way,  
20 so this could be some evidence that the claimed  
21 solution does not significantly preempt the  
22 field of the abstract idea, which would also  
23 relevant evidence at Step 2.

24 Now, the Court acknowledges that the  
25 patent says little more about how the

1 prioritization of metadata and the file  
2 synchronization process can amount to an  
3 inventive concept in the computer space, but  
4 this is the pleading stage. And in the Court's  
5 view, this record information is just  
6 sufficient to at least create a fact issue as  
7 to whether the '607 and '622 patents can meet  
8 Step 2's requirement by way of their reliance  
9 on prioritized metadata in the claimed file  
10 transfer process.

11 Thus, for all the reasons that I've set  
12 out, the Court finds the '561 and '942 patents  
13 are directed to patent-ineligible subject  
14 matter based on the record before me and will  
15 grant the motion based on those patents. The  
16 Court will otherwise deny the motion as to  
17 remainder of the patents in suit. In its  
18 briefing, Plaintiff did not specifically seek  
19 the ability to further amend its complaint to  
20 attempt to address eligibility issues were the  
21 motion granted in some way. Though the Court  
22 has some doubt that the plaintiff can do so  
23 successfully with regard to the '561 and '942  
24 patents, to the extent plaintiff believes it  
25 can, and can properly amend its complaint to

1 demonstrate how these two patents are patent  
2 eligible, then for the reasons I stated in our  
3 first case today, no later than 21 days from  
4 today's date, Plaintiff shall submit a motion  
5 for leave to amend along with a letter brief of  
6 no more than four single-spaced pages in  
7 support. The Court will then set a further  
8 limited letter briefing schedule if necessary.  
9 Absent the filing of such motion or other court  
10 order, the Court will consider those two  
11 patents no longer to be a part of this case.

12 So nearly one and a half hours later, the  
13 Court has now set out its decisions with regard  
14 to the three motions at issue on the record.  
15 Before we conclude our record presentation  
16 today, I'll just give any party the chance,  
17 understanding the Court's decision, if it  
18 believes that I've been unclear in any way by  
19 way of process about the decision or the  
20 process from here, to ask for further  
21 clarification.

22 MR. SQUIRE: Yes, Your Honor. This  
23 is Monté Squire on behalf of the plaintiff,  
24 GAN, in the first case, Your Honor. We  
25 understand Your Honor's decision, and we look

1 forward to an opportunity to file a motion for  
2 leave to amend to provide some of the evidence  
3 that Your Honor had mentioned both this morning  
4 and in the decision this afternoon. However,  
5 in light of the holidays and actually trying to  
6 gather that information, we respectfully  
7 request instead of 21 days, could that time be  
8 extended to 30 days?

9 THE COURT: That seems very  
10 reasonable, especially in light of the  
11 holidays, and so I'll grant that request, and  
12 I'll grant it, as well, in the other matter in  
13 which I've allowed the potential for such a  
14 motion. So thank you for raising that.

15 MR. SQUIRE: Thank you, Your Honor.

16 THE COURT: Okay. Yes.

17 MR. LYTLE: Counsel for Topia. I  
18 think you just said we also may take --

19 THE COURT: You may. And although I  
20 do want to finally resolve, if there is to be  
21 any further argument about these 101 issues as  
22 to the aspects of the motions that I granted  
23 today, that's why I do want to set this  
24 requirement to be a quick one, and I'm only  
25 going to have very truncated letter briefing

1           about it. I understand that we are right on  
2           the cusp of the holiday season now, so the  
3           request for 30 days seems appropriate.

4           All right. With that said, the Court's  
5           decisions today, as I said, are reflected in  
6           the transcript, and I will issue written  
7           opinions that transcribe the content of today's  
8           oral decisions and provide appropriate  
9           citations where necessary.

10          With all that said, we'll end our hearing  
11          today, go off the record, allow our court  
12          reporter to end her day, and we hit 5:00.

13                 (Thereupon, a discussion was held off  
14          the record.)



C E R T I F I C A T E

STATE OF DELAWARE                     )  
  ) ss:  
COUNTY OF NEW CASTLE             )

I, Deanna L. Warner, a Certified Shorthand Reporter, do hereby certify that as such Certified Shorthand Reporter, I was present at and reported in Stenotype shorthand the above and foregoing proceedings in Case Number 22-361-CJB, *GAN (UK) LIMITED vs. MGM RESORTS INTERNATIONAL, et al.*; Case Number 22-900-CJB, *InQuisient, Inc., vs. Service Now, Inc.*, and Case Number 21-1821-MN-CJB, *Topia Tech, Inc., vs. Egnyte, Inc.*, heard on December 20, 2022.

I further certify that a transcript of my shorthand notes was typed and that the foregoing transcript, consisting of 225 typewritten pages, is a true copy of said **MOTIONS TO DISMISS.**

**SIGNED, OFFICIALLY SEALED, and FILED** with the Clerk of the District Court, NEW CASTLE County, Delaware, this 3rd day of January, 2023.

  
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<b>#</b>	217:13, 218:1	218:6, 220:6	153:17, 154:5, 157:4, 157:7, 162:15, 163:22, 164:5, 179:19	<b>225</b> <sup>[1]</sup> - 225:17
<b>#1687</b> <sup>[1]</sup> - 225:24	<b>'855</b> <sup>[2]</sup> - 174:8, 174:11	<b>1's</b> <sup>[1]</sup> - 183:11		<b>23</b> <sup>[3]</sup> - 46:16, 84:12, 140:4
<b>'</b>	<b>'942</b> <sup>[13]</sup> - 133:7, 193:12, 208:24, 208:25, 209:6, 209:20, 210:13, 210:17, 210:20, 211:17, 212:1, 221:12, 221:23	<b>10</b> <sup>[2]</sup> - 137:8, 139:20	<b>19</b> <sup>[3]</sup> - 9:14, 24:2, 24:10	<b>230</b> <sup>[3]</sup> - 104:17, 105:6, 105:7
<b>'140</b> <sup>[1]</sup> - 49:4	<b>'do</b> <sup>[1]</sup> - 201:25	<b>100</b> <sup>[1]</sup> - 150:21	<b>1s</b> <sup>[1]</sup> - 217:1	<b>24</b> <sup>[1]</sup> - 53:15
<b>'296</b> <sup>[5]</sup> - 7:23, 47:18, 152:25, 153:2, 155:1	<b>1</b>	<b>101</b> <sup>[39]</sup> - 3:2, 7:23, 8:6, 8:9, 10:22, 16:13, 17:2, 19:13, 19:17, 19:18, 30:9, 30:18, 41:4, 45:3, 45:10, 47:4, 47:9, 51:18, 51:22, 52:2, 134:14, 150:4, 151:21, 153:23, 154:2, 165:10, 169:11, 169:18, 171:23, 172:23, 173:21, 173:24, 189:19, 192:7, 193:4, 203:10, 209:22, 216:23, 223:21	<b>2</b>	<b>25</b> <sup>[4]</sup> - 4:20, 5:4, 50:17, 84:12
<b>'467</b> <sup>[1]</sup> - 177:11	<b>1</b> <sup>[106]</sup> - 8:16, 9:6, 9:12, 9:15, 9:16, 11:1, 11:4, 11:13, 11:22, 14:24, 19:13, 20:19, 24:20, 24:23, 25:7, 25:12, 25:13, 38:15, 39:3, 39:22, 41:7, 48:15, 56:5, 62:12, 64:15, 66:24, 68:20, 69:5, 69:12, 74:21, 79:10, 85:10, 96:1, 103:7, 125:13, 127:6, 138:11, 138:16, 139:4, 153:8, 153:17, 154:5, 154:9, 154:25, 155:17, 155:25, 157:3, 157:8, 158:25, 159:17, 162:5, 162:11, 163:5, 174:2, 174:14, 174:18, 174:20, 174:25, 176:7, 176:12, 176:14, 177:10, 182:15, 185:2, 185:3, 186:9, 191:4, 192:25, 193:15, 193:24, 194:1, 194:24, 196:5, 196:23, 197:1, 198:10, 199:11, 202:3, 203:3, 203:14, 204:6, 206:5, 208:17, 209:5, 209:11, 209:20, 209:22, 210:9, 210:11, 210:16, 211:20, 212:6, 212:7, 212:14, 213:11, 213:12, 213:24, 214:13, 215:19, 216:6, 216:16, 217:4, 217:11, 217:22,	<b>101-related</b> <sup>[2]</sup> - 152:2, 152:19	<b>2</b> <sup>[43]</sup> - 11:20, 13:7, 13:15, 14:22, 16:6, 20:19, 24:21, 45:11, 50:15, 88:6, 103:18, 103:19, 104:6, 104:7, 104:20, 105:3, 137:8, 138:12, 139:6, 139:16, 143:1, 163:24, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 188:9, 202:19, 202:20, 203:10, 204:15, 205:4, 206:9, 207:11, 211:16, 218:9, 218:12, 220:7, 220:23	<b>26</b> <sup>[3]</sup> - 62:1, 63:24, 167:11
<b>'468</b> <sup>[10]</sup> - 56:6, 62:12, 64:15, 74:21, 84:3, 92:21, 95:8, 95:16, 174:4, 174:12		<b>102</b> <sup>[5]</sup> - 12:16, 16:20, 45:16, 50:8, 85:24	<b>2</b> <sup>[43]</sup> - 11:20, 13:7, 13:15, 14:22, 16:6, 20:19, 24:21, 45:11, 50:15, 88:6, 103:18, 103:19, 104:6, 104:7, 104:20, 105:3, 137:8, 138:12, 139:6, 139:16, 143:1, 163:24, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 188:9, 202:19, 202:20, 203:10, 204:15, 205:4, 206:9, 207:11, 211:16, 218:9, 218:12, 220:7, 220:23	<b>270</b> <sup>[1]</sup> - 105:2
<b>'561</b> <sup>[40]</sup> - 105:10, 107:7, 107:9, 109:10, 113:17, 118:23, 120:21, 121:8, 121:14, 125:1, 125:14, 126:16, 126:25, 127:6, 133:7, 135:5, 136:16, 194:9, 194:21, 196:5, 196:24, 202:3, 202:8, 204:14, 205:20, 206:16, 207:3, 207:16, 208:22, 209:1, 209:2, 209:23, 210:23, 211:25, 212:7, 216:20, 216:21, 217:21, 221:12, 221:23		<b>103</b> <sup>[4]</sup> - 12:16, 16:20, 45:16, 50:8	<b>2</b> <sup>[43]</sup> - 11:20, 13:7, 13:15, 14:22, 16:6, 20:19, 24:21, 45:11, 50:15, 88:6, 103:18, 103:19, 104:6, 104:7, 104:20, 105:3, 137:8, 138:12, 139:6, 139:16, 143:1, 163:24, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 188:9, 202:19, 202:20, 203:10, 204:15, 205:4, 206:9, 207:11, 211:16, 218:9, 218:12, 220:7, 220:23	<b>28</b> <sup>[1]</sup> - 53:16
<b>'585</b> <sup>[2]</sup> - 174:6, 174:10		<b>10th</b> <sup>[1]</sup> - 51:23	<b>2</b> <sup>[43]</sup> - 11:20, 13:7, 13:15, 14:22, 16:6, 20:19, 24:21, 45:11, 50:15, 88:6, 103:18, 103:19, 104:6, 104:7, 104:20, 105:3, 137:8, 138:12, 139:6, 139:16, 143:1, 163:24, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 188:9, 202:19, 202:20, 203:10, 204:15, 205:4, 206:9, 207:11, 211:16, 218:9, 218:12, 220:7, 220:23	<b>280</b> <sup>[5]</sup> - 104:8, 105:3, 105:5, 109:4, 109:6
<b>'607</b> <sup>[10]</sup> - 133:1, 133:8, 193:13, 216:18, 216:24, 217:5, 217:19, 217:23, 218:17, 221:7		<b>11</b> <sup>[21]</sup> - 9:15, 9:17, 12:1, 14:25, 25:7, 25:12, 31:1, 38:19, 41:10, 42:13, 43:22, 50:7, 153:8, 153:17, 154:5, 157:3, 157:7, 162:15, 163:22, 164:5, 209:5	<b>2</b> <sup>[43]</sup> - 11:20, 13:7, 13:15, 14:22, 16:6, 20:19, 24:21, 45:11, 50:15, 88:6, 103:18, 103:19, 104:6, 104:7, 104:20, 105:3, 137:8, 138:12, 139:6, 139:16, 143:1, 163:24, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 188:9, 202:19, 202:20, 203:10, 204:15, 205:4, 206:9, 207:11, 211:16, 218:9, 218:12, 220:7, 220:23	<b>29</b> <sup>[1]</sup> - 85:25
<b>'622</b> <sup>[9]</sup> - 132:25, 133:9, 216:18, 216:25, 217:11, 217:19, 217:23, 218:17, 221:7		<b>12</b> <sup>[2]</sup> - 109:9, 146:24	<b>2</b> <sup>[43]</sup> - 11:20, 13:7, 13:15, 14:22, 16:6, 20:19, 24:21, 45:11, 50:15, 88:6, 103:18, 103:19, 104:6, 104:7, 104:20, 105:3, 137:8, 138:12, 139:6, 139:16, 143:1, 163:24, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 188:9, 202:19, 202:20, 203:10, 204:15, 205:4, 206:9, 207:11, 211:16, 218:9, 218:12, 220:7, 220:23	<b>2:30</b> <sup>[1]</sup> - 4:9
<b>'727</b> <sup>[1]</sup> - 114:13		<b>12(b)</b> <sup>[6]</sup> - 152:2, 152:17, 173:18, 192:21, 192:24	<b>2</b> <sup>[43]</sup> - 11:20, 13:7, 13:15, 14:22, 16:6, 20:19, 24:21, 45:11, 50:15, 88:6, 103:18, 103:19, 104:6, 104:7, 104:20, 105:3, 137:8, 138:12, 139:6, 139:16, 143:1, 163:24, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 188:9, 202:19, 202:20, 203:10, 204:15, 205:4, 206:9, 207:11, 211:16, 218:9, 218:12, 220:7, 220:23	<b>2A</b> <sup>[1]</sup> - 1:23
<b>'787</b> <sup>[11]</sup> - 113:23, 212:6, 212:14, 213:12, 215:4, 215:21, 216:16, 216:21, 216:24, 217:13, 218:1		<b>12(c)</b> <sup>[4]</sup> - 192:2, 192:16, 192:21, 192:22	<b>2</b> <sup>[43]</sup> - 11:20, 13:7, 13:15, 14:22, 16:6, 20:19, 24:21, 45:11, 50:15, 88:6, 103:18, 103:19, 104:6, 104:7, 104:20, 105:3, 137:8, 138:12, 139:6, 139:16, 143:1, 163:24, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 188:9, 202:19, 202:20, 203:10, 204:15, 205:4, 206:9, 207:11, 211:16, 218:9, 218:12, 220:7, 220:23	<b>3</b>
<b>'823</b> <sup>[11]</sup> - 113:23, 114:13, 212:6, 213:11, 215:7, 215:21, 216:16, 216:22, 216:24,		<b>122</b> <sup>[1]</sup> - 90:24	<b>2</b> <sup>[43]</sup> - 11:20, 13:7, 13:15, 14:22, 16:6, 20:19, 24:21, 45:11, 50:15, 88:6, 103:18, 103:19, 104:6, 104:7, 104:20, 105:3, 137:8, 138:12, 139:6, 139:16, 143:1, 163:24, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 188:9, 202:19, 202:20, 203:10, 204:15, 205:4, 206:9, 207:11, 211:16, 218:9, 218:12, 220:7, 220:23	<b>3</b> <sup>[11]</sup> - 50:14, 50:17, 92:10, 92:20, 104:12, 104:23, 121:18, 125:16, 163:8, 163:24, 173:13
		<b>13</b> <sup>[2]</sup> - 92:12, 92:23	<b>2</b> <sup>[43]</sup> - 11:20, 13:7, 13:15, 14:22, 16:6, 20:19, 24:21, 45:11, 50:15, 88:6, 103:18, 103:19, 104:6, 104:7, 104:20, 105:3, 137:8, 138:12, 139:6, 139:16, 143:1, 163:24, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 188:9, 202:19, 202:20, 203:10, 204:15, 205:4, 206:9, 207:11, 211:16, 218:9, 218:12, 220:7, 220:23	<b>30</b> <sup>[2]</sup> - 223:8, 224:3
		<b>14</b> <sup>[2]</sup> - 55:13, 66:24	<b>2</b> <sup>[43]</sup> - 11:20, 13:7, 13:15, 14:22, 16:6, 20:19, 24:21, 45:11, 50:15, 88:6, 103:18, 103:19, 104:6, 104:7, 104:20, 105:3, 137:8, 138:12, 139:6, 139:16, 143:1, 163:24, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 188:9, 202:19, 202:20, 203:10, 204:15, 205:4, 206:9, 207:11, 211:16, 218:9, 218:12, 220:7, 220:23	<b>31</b> <sup>[5]</sup> - 58:3, 86:1, 95:7, 96:16, 113:12
		<b>15</b> <sup>[6]</sup> - 50:17, 56:1, 60:2, 63:13, 65:11, 65:12	<b>2</b> <sup>[43]</sup> - 11:20, 13:7, 13:15, 14:22, 16:6, 20:19, 24:21, 45:11, 50:15, 88:6, 103:18, 103:19, 104:6, 104:7, 104:20, 105:3, 137:8, 138:12, 139:6, 139:16, 143:1, 163:24, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 188:9, 202:19, 202:20, 203:10, 204:15, 205:4, 206:9, 207:11, 211:16, 218:9, 218:12, 220:7, 220:23	<b>310</b> <sup>[1]</sup> - 106:7
		<b>16</b> <sup>[1]</sup> - 92:19	<b>2</b> <sup>[43]</sup> - 11:20, 13:7, 13:15, 14:22, 16:6, 20:19, 24:21, 45:11, 50:15, 88:6, 103:18, 103:19, 104:6, 104:7, 104:20, 105:3, 137:8, 138:12, 139:6, 139:16, 143:1, 163:24, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 188:9, 202:19, 202:20, 203:10, 204:15, 205:4, 206:9, 207:11, 211:16, 218:9, 218:12, 220:7, 220:23	<b>32</b> <sup>[3]</sup> - 57:22, 95:7, 96:16
		<b>160</b> <sup>[1]</sup> - 96:4	<b>2</b> <sup>[43]</sup> - 11:20, 13:7, 13:15, 14:22, 16:6, 20:19, 24:21, 45:11, 50:15, 88:6, 103:18, 103:19, 104:6, 104:7, 104:20, 105:3, 137:8, 138:12, 139:6, 139:16, 143:1, 163:24, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 188:9, 202:19, 202:20, 203:10, 204:15, 205:4, 206:9, 207:11, 211:16, 218:9, 218:12, 220:7, 220:23	<b>320</b> <sup>[1]</sup> - 107:1
		<b>17</b> <sup>[8]</sup> - 62:10, 63:23, 64:8, 66:7, 66:12, 93:21, 97:15, 209:24	<b>2</b> <sup>[43]</sup> - 11:20, 13:7, 13:15, 14:22, 16:6, 20:19, 24:21, 45:11, 50:15, 88:6, 103:18, 103:19, 104:6, 104:7, 104:20, 105:3, 137:8, 138:12, 139:6, 139:16, 143:1, 163:24, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 188:9, 202:19, 202:20, 203:10, 204:15, 205:4, 206:9, 207:11, 211:16, 218:9, 218:12, 220:7, 220:23	<b>33</b> <sup>[1]</sup> - 109:10
		<b>18</b> <sup>[22]</sup> - 9:16, 9:18, 12:1, 15:1, 24:5, 25:7, 25:12, 31:1, 38:19, 41:10, 42:13, 50:8, 92:19, 153:10,	<b>2</b> <sup>[43]</sup> - 11:20, 13:7, 13:15, 14:22, 16:6, 20:19, 24:21, 45:11, 50:15, 88:6, 103:18, 103:19, 104:6, 104:7, 104:20, 105:3, 137:8, 138:12, 139:6, 139:16, 143:1, 163:24, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 188:9, 202:19, 202:20, 203:10, 204:15, 205:4, 206:9, 207:11, 211:16, 218:9, 218:12, 220:7, 220:23	<b>37</b> <sup>[2]</sup> - 92:11, 92:21
			<b>2</b> <sup>[43]</sup> - 11:20, 13:7, 13:15, 14:22, 16:6, 20:19, 24:21, 45:11, 50:15, 88:6, 103:18, 103:19, 104:6, 104:7, 104:20, 105:3, 137:8, 138:12, 139:6, 139:16, 143:1, 163:24, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 188:9, 202:19, 202:20, 203:10, 204:15, 205:4, 206:9, 207:11, 211:16, 218:9, 218:12, 220:7, 220:23	<b>370</b> <sup>[2]</sup> - 106:15, 106:23
			<b>2</b> <sup>[43]</sup> - 11:20, 13:7, 13:15, 14:22, 16:6, 20:19, 24:21, 45:11, 50:15, 88:6, 103:18, 103:19, 104:6, 104:7, 104:20, 105:3, 137:8, 138:12, 139:6, 139:16, 143:1, 163:24, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 188:9, 202:19, 202:20, 203:10, 204:15, 205:4, 206:9, 207:11, 211:16, 218:9, 218:12, 220:7, 220:23	<b>380</b> <sup>[1]</sup> - 106:18
			<b>2</b> <sup>[43]</sup> - 11:20, 13:7, 13:15, 14:22, 16:6, 20:19, 24:21, 45:11, 50:15, 88:6, 103:18, 103:19, 104:6, 104:7, 104:20, 105:3, 137:8, 138:12, 139:6, 139:16, 143:1, 163:24, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 188:9, 202:19, 202:20, 203:10, 204:15, 205:4, 206:9, 207:11, 211:16, 218:9, 218:12, 220:7, 220:23	<b>3:30</b> <sup>[4]</sup> - 4:10, 4:12, 148:11, 148:14
			<b>2</b> <sup>[43]</sup> - 11:20, 13:7, 13:15, 14:22, 16:6, 20:19, 24:21, 45:11, 50:15, 88:6, 103:18, 103:19, 104:6, 104:7, 104:20, 105:3, 137:8, 138:12, 139:6, 139:16, 143:1, 163:24, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 188:9, 202:19, 202:20, 203:10, 204:15, 205:4, 206:9, 207:11, 211:16, 218:9, 218:12, 220:7, 220:23	<b>3rd</b> <sup>[1]</sup> - 225:22
			<b>2</b> <sup>[43]</sup> - 11:20, 13:7, 13:15, 14:22, 16:6, 20:19, 24:21, 45:11, 50:15, 88:6, 103:18, 103:19, 104:6, 104:7, 104:20, 105:3, 137:8, 138:12, 139:6, 139:16, 143:1, 163:24, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 188:9, 202:19, 202:20, 203:10, 204:15, 205:4, 206:9, 207:11, 211:16, 218:9, 218:12, 220:7, 220:23	<b>4</b>
			<b>2</b> <sup>[43]</sup> - 11:20, 13:7, 13:15, 14:22, 16:6, 20:19, 24:21, 45:11, 50:15, 88:6, 103:18, 103:19, 104:6, 104:7, 104:20, 105:3, 137:8, 138:12, 139:6, 139:16, 143:1, 163:24, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 188:9, 202:19, 202:20, 203:10, 204:15, 205:4, 206:	

110:13, 113:10, 113:12, 193:12, 209:10, 210:11 <b>50</b> <sup>[5]</sup> - 23:12, 88:5, 97:18, 108:25, 150:21 <b>55</b> <sup>[1]</sup> - 109:10 <b>5:00</b> <sup>[1]</sup> - 224:12	132:3, 133:25, 135:20, 148:13, 148:16, 148:20, 151:20 <b>absent</b> <sup>[1]</sup> - 222:9 <b>absolutely</b> <sup>[11]</sup> - 108:21, 110:11, 112:23, 116:19, 136:20, 143:9, 144:15, 145:19, 146:1, 147:5, 147:22 <b>abstract</b> <sup>[125]</sup> - 9:3, 9:25, 12:12, 13:4, 14:6, 14:12, 14:14, 17:24, 18:2, 18:7, 19:10, 19:20, 26:9, 32:17, 37:1, 37:14, 37:20, 41:25, 42:10, 48:6, 49:2, 52:17, 52:25, 56:4, 57:5, 69:20, 90:5, 98:15, 105:22, 107:23, 108:14, 109:13, 109:16, 109:18, 110:19, 111:16, 111:19, 111:20, 112:11, 112:12, 112:15, 112:17, 112:18, 112:20, 114:1, 114:7, 114:11, 117:6, 119:8, 132:20, 133:3, 133:22, 145:2, 147:18, 147:23, 154:10, 154:15, 154:16, 154:17, 154:23, 155:2, 156:2, 161:10, 161:13, 161:20, 163:4, 163:13, 164:16, 164:23, 165:1, 167:14, 168:4, 169:3, 175:1, 175:5, 175:11, 175:14, 175:24, 176:22, 179:2, 179:15, 182:16, 182:25, 185:6, 185:16, 187:2, 188:15, 191:12, 195:2, 195:5, 195:16, 195:20, 195:24, 196:6, 196:24, 198:18, 199:7, 202:1, 202:17, 202:22, 203:1, 203:4, 204:12, 204:17, 204:19, 204:23, 206:5, 206:13, 206:19,	207:7, 207:13, 208:15, 210:21, 210:23, 211:11, 214:2, 214:5, 214:23, 215:15, 215:17, 216:12, 217:17, 220:17, 220:22 <b>abstract-idea</b> <sup>[1]</sup> - 112:17 <b>abstracted</b> <sup>[3]</sup> - 31:21, 32:25, 33:16 <b>abstraction</b> <sup>[4]</sup> - 18:5, 33:1, 103:25, 110:10 <b>abstracts</b> <sup>[1]</sup> - 105:17 <b>abstrict</b> <sup>[1]</sup> - 24:25 <b>Accenture</b> <sup>[1]</sup> - 115:11 <b>accept</b> <sup>[1]</sup> - 106:3 <b>accepted</b> <sup>[1]</sup> - 186:14 <b>accepting</b> <sup>[1]</sup> - 113:21 <b>access</b> <sup>[6]</sup> - 39:23, 75:11, 87:8, 109:23, 119:22, 200:25 <b>accessed</b> <sup>[2]</sup> - 196:12, 201:4 <b>accesses</b> <sup>[4]</sup> - 25:19, 32:5, 32:10, 38:16 <b>accessing</b> <sup>[6]</sup> - 29:8, 36:15, 39:21, 40:2, 156:18, 200:14 <b>accommodate</b> <sup>[1]</sup> - 44:5 <b>accomplish</b> <sup>[2]</sup> - 158:3, 159:9 <b>accomplished</b> <sup>[3]</sup> - 141:7, 141:10, 199:2 <b>accomplishes</b> <sup>[1]</sup> - 132:15 <b>accomplishing</b> <sup>[1]</sup> - 157:19 <b>according</b> <sup>[8]</sup> - 34:7, 38:23, 55:19, 159:22, 175:15, 183:15, 204:10, 218:25 <b>accordingly</b> <sup>[3]</sup> - 7:25, 70:2, 188:23 <b>account</b> <sup>[66]</sup> - 10:3, 10:4, 11:24, 17:20, 25:16, 25:18, 25:19, 25:24, 26:4, 27:8, 28:10, 28:24, 28:25, 29:10, 32:4, 32:5, 34:3, 35:16, 36:3, 36:11, 36:17, 38:17, 38:18, 39:4, 39:14, 39:21, 39:22, 39:23, 39:25, 40:4, 40:7, 40:8, 40:11, 40:13, 40:14, 40:18, 40:21,	40:23, 41:8, 42:6, 43:14, 149:16, 153:21, 154:13, 156:25, 157:6, 157:7, 159:1, 159:2, 162:13, 162:24, 163:2, 163:9, 163:11, 163:16, 164:18, 164:19, 165:19, 168:11, 176:6 <b>accounts</b> <sup>[9]</sup> - 26:14, 28:19, 29:12, 35:22, 36:16, 44:9, 156:20, 156:23, 157:16 <b>achieve</b> <sup>[1]</sup> - 187:9 <b>achieving</b> <sup>[1]</sup> - 170:12 <b>acknowledged</b> <sup>[3]</sup> - 44:20, 70:22, 164:8 <b>acknowledges</b> <sup>[2]</sup> - 168:13, 220:24 <b>action</b> <sup>[7]</sup> - 3:10, 3:15, 12:3, 50:5, 102:23, 173:17 <b>Action</b> <sup>[2]</sup> - 3:21, 191:23 <b>actions</b> <sup>[1]</sup> - 167:15 <b>active</b> <sup>[1]</sup> - 155:24 <b>activities</b> <sup>[1]</sup> - 165:12 <b>activity</b> <sup>[1]</sup> - 206:14 <b>actual</b> <sup>[3]</sup> - 18:24, 58:11, 104:20 <b>actuality</b> <sup>[1]</sup> - 119:10 <b>add</b> <sup>[16]</sup> - 9:21, 11:6, 11:7, 15:11, 16:12, 20:15, 38:25, 66:17, 66:22, 79:3, 82:20, 112:13, 143:7, 187:23, 188:9, 203:9 <b>added</b> <sup>[7]</sup> - 49:22, 50:7, 62:24, 79:2, 153:7, 167:9, 187:15 <b>adding</b> <sup>[3]</sup> - 19:21, 91:10, 113:15 <b>addition</b> <sup>[6]</sup> - 33:8, 38:14, 110:11, 112:21, 173:6, 200:16 <b>additional</b> <sup>[11]</sup> - 15:10, 69:17, 154:1, 159:7, 164:24, 167:19, 172:19, 183:7, 187:24, 202:23, 210:4 <b>additionally</b> <sup>[7]</sup> - 151:6, 173:12, 205:4, 209:6, 212:15, 215:17, 220:6 <b>address</b> <sup>[14]</sup> - 5:16,	14:22, 52:4, 154:4, 173:1, 173:22, 184:3, 192:7, 193:23, 194:15, 194:20, 196:16, 205:18, 221:20 <b>addressed</b> <sup>[3]</sup> - 39:8, 192:19, 205:3 <b>addresses</b> <sup>[1]</sup> - 203:10 <b>addressing</b> <sup>[1]</sup> - 210:6 <b>adds</b> <sup>[3]</sup> - 62:23, 101:21, 150:16 <b>adjacent</b> <sup>[1]</sup> - 117:10 <b>adjourn</b> <sup>[1]</sup> - 4:4 <b>adjust</b> <sup>[1]</sup> - 79:1 <b>admonition</b> <sup>[1]</sup> - 172:13 <b>adopt</b> <sup>[1]</sup> - 11:11 <b>advance</b> <sup>[5]</sup> - 45:21, 45:23, 115:22, 170:13, 188:25 <b>advanced</b> <sup>[2]</sup> - 180:3, 186:21 <b>advancement</b> <sup>[1]</sup> - 189:25 <b>advantage</b> <sup>[1]</sup> - 117:5 <b>advantages</b> <sup>[1]</sup> - 84:6 <b>advise</b> <sup>[1]</sup> - 194:13 <b>advisement</b> <sup>[1]</sup> - 191:18 <b>advisor</b> <sup>[1]</sup> - 170:10 <b>affect</b> <sup>[1]</sup> - 185:2 <b>affiliated</b> <sup>[1]</sup> - 35:19 <b>affirmed</b> <sup>[1]</sup> - 186:11 <b>afternoon</b> <sup>[3]</sup> - 4:7, 150:8, 223:4 <b>afterthought</b> <sup>[1]</sup> - 179:13 <b>ago</b> <sup>[1]</sup> - 23:12 <b>agree</b> <sup>[4]</sup> - 14:18, 16:9, 28:16, 51:6 <b>agreed</b> <sup>[1]</sup> - 86:13 <b>agrees</b> <sup>[4]</sup> - 175:4, 189:15, 195:25, 205:19 <b>ahead</b> <sup>[3]</sup> - 4:25, 14:22, 74:14 <b>airplane</b> <sup>[1]</sup> - 142:6 <b>airport</b> <sup>[1]</sup> - 120:10 <b>al</b> <sup>[4]</sup> - 1:7, 3:9, 152:13, 225:10 <b>alerted</b> <sup>[1]</sup> - 117:16 <b>alerting</b> <sup>[1]</sup> - 220:3 <b>Alice</b> <sup>[12]</sup> - 7:24, 13:14, 16:13, 146:7, 147:14, 164:20, 174:24, 188:10, 194:17, 202:19, 205:1, 217:22
<b>6</b>				
<b>6</b> <sup>[5]</sup> - 95:17, 95:25, 96:1, 110:13, 163:8 <b>61</b> <sup>[3]</sup> - 84:13, 87:21, 131:7 <b>63</b> <sup>[1]</sup> - 131:7 <b>66</b> <sup>[3]</sup> - 95:16, 95:25, 109:10 <b>67</b> <sup>[1]</sup> - 109:10				
<b>7</b>				
<b>7</b> <sup>[3]</sup> - 104:24, 106:1, 108:25 <b>7,979,468</b> <sup>[1]</sup> - 174:4 <b>77</b> <sup>[1]</sup> - 109:11				
<b>8</b>				
<b>8</b> <sup>[14]</sup> - 84:13, 87:21, 95:17, 95:25, 116:3, 129:3, 129:7, 131:6, 133:13, 133:24, 139:16, 143:2, 144:21 <b>8,219,585</b> <sup>[1]</sup> - 174:5 <b>8,224,855</b> <sup>[1]</sup> - 174:7 <b>8,821,296</b> <sup>[1]</sup> - 152:24 <b>80</b> <sup>[1]</sup> - 56:10 <b>86ed</b> <sup>[1]</sup> - 108:7				
<b>9</b>				
<b>9</b> <sup>[5]</sup> - 84:13, 88:6, 95:9, 129:8, 139:16				
<b>A</b>				
<b>ability</b> <sup>[7]</sup> - 79:1, 82:20, 83:6, 83:10, 86:10, 86:15, 221:19 <b>able</b> <sup>[22]</sup> - 4:18, 5:8, 23:5, 23:13, 26:25, 35:2, 43:10, 44:8, 77:4, 85:1, 94:24, 95:12, 102:10, 120:18, 122:24,				

DEANNA WARNER, CSR

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<p><b>Alice's</b> [2] - 191:4, 205:16</p> <p><b>align</b> [1] - 8:15</p> <p><b>allegation</b> [2] - 44:17, 46:13</p> <p><b>allegations</b> [5] - 46:9, 53:10, 170:6, 172:19, 203:9</p> <p><b>alleged</b> [7] - 10:25, 25:6, 45:8, 65:6, 133:9, 188:11, 204:12</p> <p><b>allegedly</b> [2] - 10:9, 128:3</p> <p><b>alleges</b> [1] - 44:20</p> <p><b>allocation</b> [1] - 162:12</p> <p><b>allow</b> [10] - 4:20, 51:21, 71:25, 75:10, 75:24, 83:24, 172:10, 199:17, 201:7, 224:11</p> <p><b>allowed</b> [6] - 50:21, 90:22, 91:9, 120:17, 136:16, 223:13</p> <p><b>allowing</b> [4] - 20:10, 38:12, 51:3, 109:2</p> <p><b>allows</b> [7] - 75:6, 77:6, 82:6, 85:20, 86:17, 86:19, 104:18</p> <p><b>alluded</b> [1] - 131:9</p> <p><b>almost</b> [3] - 19:8, 36:1, 117:1</p> <p><b>alone</b> [2] - 158:6, 210:14</p> <p><b>alternatively</b> [1] - 195:5</p> <p><b>alternatives</b> [1] - 204:10</p> <p><b>ambiguous</b> [1] - 107:10</p> <p><b>amend</b> [17] - 8:3, 41:18, 42:18, 50:21, 51:10, 134:15, 146:12, 146:16, 172:7, 172:11, 172:18, 173:1, 173:4, 221:19, 221:25, 222:5, 223:2</p> <p><b>amended</b> [16] - 41:17, 42:20, 42:21, 51:14, 51:15, 51:16, 52:3, 152:18, 153:7, 153:10, 167:7, 167:9, 167:11, 169:20, 170:6, 173:7</p> <p><b>amending</b> [1] - 167:6</p> <p><b>amendment</b> [2] - 8:4, 147:6</p> <p><b>amendments</b> [1] - 51:19</p>	<p><b>Ameranth</b> [4] - 107:24, 147:9, 205:21, 206:17</p> <p><b>amount</b> [9] - 10:7, 133:6, 166:9, 169:24, 181:18, 182:7, 202:23, 203:17, 221:2</p> <p><b>amounted</b> [4] - 166:16, 167:21, 208:2, 208:6</p> <p><b>amounting</b> [1] - 211:21</p> <p><b>amounts</b> [8] - 47:23, 66:12, 112:13, 163:3, 163:21, 166:21, 208:10, 208:18</p> <p><b>analog</b> [6] - 18:8, 18:14, 19:4, 21:5, 22:15, 22:25</p> <p><b>analogous</b> [5] - 47:6, 52:16, 84:25, 185:24, 206:21</p> <p><b>analogy</b> [2] - 89:3, 94:19</p> <p><b>analysis</b> [25] - 10:23, 13:7, 13:15, 14:3, 14:19, 17:2, 20:20, 24:7, 24:8, 24:17, 24:19, 24:20, 45:1, 151:4, 154:2, 156:15, 165:10, 169:12, 174:24, 192:17, 192:18, 193:4, 210:1, 210:16, 218:7</p> <p><b>analyze</b> [4] - 87:9, 110:4, 142:25, 174:18</p> <p><b>analyzing</b> [2] - 90:4, 150:22</p> <p><b>AND</b> [1] - 1:2</p> <p><b>annotated</b> [1] - 121:18</p> <p><b>announce</b> [1] - 150:12</p> <p><b>answer</b> [6] - 13:11, 76:15, 85:17, 93:2, 127:16, 184:16</p> <p><b>answering</b> [13] - 8:22, 9:4, 11:3, 15:24, 21:16, 127:4, 127:16, 165:14, 171:21, 179:20, 193:6, 209:4, 209:24</p> <p><b>answers</b> [2] - 5:6, 41:20</p> <p><b>anticipate</b> [1] - 169:9</p> <p><b>anticipation</b> [1] - 16:21</p> <p><b>anyway</b> [1] - 31:22</p>	<p><b>API</b> [2] - 22:16, 23:9</p> <p><b>apologize</b> [1] - 89:2</p> <p><b>appeals</b> [1] - 154:19</p> <p><b>appear</b> [10] - 47:18, 47:19, 116:8, 130:4, 161:9, 181:6, 189:14, 191:6, 203:17, 209:21</p> <p><b>APPEARANCES</b> [1] - 2:1</p> <p><b>appeared</b> [1] - 180:18</p> <p><b>apple</b> [1] - 132:1</p> <p><b>application</b> [84] - 11:23, 14:24, 15:1, 16:3, 16:25, 25:14, 25:23, 26:12, 27:3, 27:6, 28:8, 28:22, 29:5, 32:3, 33:24, 37:7, 37:21, 38:16, 39:3, 39:25, 40:1, 40:12, 40:23, 41:6, 43:24, 44:10, 49:13, 49:17, 49:21, 49:25, 106:5, 106:7, 106:9, 106:13, 106:18, 106:21, 107:1, 107:19, 121:20, 121:25, 122:2, 122:3, 122:13, 123:9, 123:13, 123:21, 124:4, 124:8, 124:11, 124:25, 125:5, 125:7, 125:17, 125:19, 125:22, 125:24, 125:25, 126:2, 126:4, 126:10, 126:15, 126:19, 127:7, 127:8, 134:12, 147:20, 147:21, 154:22, 157:5, 158:25, 164:25, 167:15, 196:4, 197:12, 197:14, 197:24, 198:2, 198:22, 203:1, 204:11, 204:19, 204:22</p> <p><b>applications</b> [14] - 29:5, 106:5, 121:24, 122:5, 122:9, 122:19, 123:7, 124:13, 124:20, 126:11, 126:12, 133:20, 139:10, 203:16</p> <p><b>applicationy</b> [1] - 14:11</p> <p><b>applies</b> [1] - 155:17</p>	<p><b>apply</b> [1] - 181:19</p> <p><b>applying</b> [2] - 47:17, 109:15</p> <p><b>appreciate</b> [2] - 94:12, 148:1</p> <p><b>approach</b> [4] - 72:23, 111:5, 166:16, 167:18</p> <p><b>approaches</b> [2] - 204:6, 220:16</p> <p><b>appropriate</b> [3] - 11:11, 224:3, 224:8</p> <p><b>appropriately</b> [1] - 179:3</p> <p><b>approved</b> [1] - 159:23</p> <p><b>apps</b> [2] - 122:4, 147:22</p> <p><b>architecture</b> [10] - 120:17, 121:13, 121:15, 121:20, 122:5, 122:8, 136:3, 194:22, 196:8, 205:6</p> <p><b>area</b> [2] - 20:1, 186:20</p> <p><b>areas</b> [1] - 18:16</p> <p><b>arguably</b> [2] - 118:19, 218:7</p> <p><b>argue</b> [7] - 9:5, 17:17, 30:1, 30:16, 153:24, 154:9, 168:18</p> <p><b>argued</b> [7] - 9:4, 163:5, 165:21, 179:24, 181:5, 204:1, 220:11</p> <p><b>argues</b> [4] - 175:12, 194:25, 205:4, 210:2</p> <p><b>arguing</b> [4] - 6:6, 145:18, 152:17, 166:10</p> <p><b>argument</b> [45] - 4:2, 4:21, 7:4, 10:8, 10:15, 16:24, 30:9, 30:18, 41:4, 51:4, 53:25, 54:5, 65:23, 94:12, 98:20, 99:10, 100:22, 126:8, 126:17, 127:10, 127:11, 127:24, 145:12, 148:2, 148:3, 148:21, 151:8, 151:22, 159:17, 162:19, 164:7, 165:21, 167:1, 171:22, 175:20, 180:18, 181:23, 184:19, 188:16, 191:18, 193:20, 203:25, 210:9, 219:15, 223:21</p> <p><b>arguments</b> [10] - 4:4,</p>	<p>6:23, 10:20, 53:4, 53:5, 99:7, 153:23, 176:11, 181:13, 211:17</p> <p><b>ARNOLD</b> [1] - 2:9</p> <p><b>Arnold</b> [2] - 6:21, 7:20</p> <p><b>arrows</b> [3] - 48:21, 79:17, 83:1</p> <p><b>ARSHT</b> [1] - 2:17</p> <p><b>Arsht</b> [1] - 54:22</p> <p><b>art</b> [46] - 12:11, 12:13, 12:19, 12:22, 16:25, 33:18, 47:15, 47:25, 62:24, 68:21, 78:20, 81:25, 83:16, 85:4, 88:7, 88:8, 102:9, 102:19, 103:8, 103:12, 116:10, 116:12, 117:5, 123:25, 124:1, 128:22, 136:18, 136:25, 138:25, 139:23, 140:21, 156:6, 160:3, 168:12, 168:21, 183:16, 184:13, 186:22, 199:15, 200:6, 201:10, 201:11, 208:8, 208:11, 219:2, 220:8</p> <p><b>articulate</b> [2] - 184:10, 215:12</p> <p><b>articulated</b> [4] - 108:14, 127:12, 171:17, 173:2</p> <p><b>articulating</b> [2] - 126:21, 208:5</p> <p><b>articulation</b> [8] - 96:7, 111:16, 114:7, 160:1, 178:18, 179:2, 179:15, 202:17</p> <p><b>articulations</b> [1] - 195:16</p> <p><b>arts</b> [4] - 88:14, 135:12, 170:1, 211:23</p> <p><b>ascertain</b> [1] - 155:25</p> <p><b>aspect</b> [5] - 70:16, 156:7, 178:20, 179:2, 214:21</p> <p><b>aspects</b> [7] - 119:3, 119:4, 138:20, 151:17, 165:23, 199:21, 223:22</p> <p><b>aspirational</b> [1] - 199:3</p> <p><b>assert</b> [2] - 153:16, 157:14</p> <p><b>asserted</b> [28] - 7:22,</p>
--	---	--	---	--

DEANNA WARNER, CSR

202 Ashfield Court, Smyrna DE 19977

Phone: (302) 893-1158 E-mail: warnerdeanna@gmail.com

37:14, 152:21, 154:8, 154:10, 156:16, 156:17, 157:20, 159:3, 160:9, 162:9, 164:12, 166:8, 167:12, 168:14, 170:10, 171:17, 174:9, 174:15, 174:19, 174:23, 175:16, 176:14, 176:21, 183:11, 184:8, 185:23, 192:25 <b>assertedly</b> [2] - 41:5, 113:19 <b>asserting</b> [1] - 192:4 <b>assertion</b> [4] - 8:16, 11:2, 52:4, 193:9 <b>assertions</b> [1] - 166:12 <b>asserts</b> [3] - 155:3, 174:1, 174:14 <b>assess</b> [3] - 150:19, 164:22, 202:21 <b>assessing</b> [2] - 162:8, 215:10 <b>assign</b> [1] - 98:14 <b>assigned</b> [2] - 212:18, 212:19 <b>associate</b> [1] - 98:22 <b>associated</b> [15] - 32:8, 35:20, 35:21, 35:22, 40:5, 65:1, 136:7, 140:1, 167:16, 178:9, 180:14, 197:10, 205:9, 209:13, 212:17 <b>Association</b> [1] - 175:9 <b>associations</b> [2] - 61:14, 177:25 <b>assuming</b> [1] - 32:13 <b>assure</b> [1] - 150:18 <b>asynchronous</b> [3] - 34:17, 160:16, 161:22 <b>attach</b> [1] - 41:22 <b>attached</b> [4] - 42:22, 43:1, 146:11, 167:22 <b>attacking</b> [1] - 143:4 <b>attempt</b> [4] - 51:17, 147:7, 167:8, 221:20 <b>attempting</b> [3] - 18:18, 44:21, 50:1 <b>attention</b> [1] - 114:25 <b>attorney</b> [2] - 127:11, 145:18 <b>attribute</b> [32] - 55:18, 57:8, 57:12, 57:17, 58:20, 58:21, 58:25, 59:6, 59:12, 60:9, 60:23, 60:24, 67:4, 80:4, 80:8, 82:11, 83:3, 83:4, 83:5, 83:7, 85:14, 86:2, 86:6, 89:10, 89:11, 96:24, 98:13, 177:21, 177:23, 177:25 <b>attributes</b> [16] - 55:20, 57:10, 57:11, 57:25, 58:4, 58:22, 67:5, 80:5, 81:15, 86:25, 95:11, 177:22, 178:1, 178:4, 180:24, 190:18 <b>August</b> [1] - 51:23 <b>authority</b> [5] - 44:20, 44:25, 45:8, 170:11, 171:1 <b>authority's</b> [1] - 171:8 <b>automate</b> [1] - 201:21 <b>automated</b> [3] - 112:6, 220:13, 220:19 <b>automatic</b> [14] - 43:14, 103:2, 103:12, 103:15, 111:21, 111:22, 111:24, 112:1, 117:16, 139:24, 140:18, 147:16, 205:7, 206:4 <b>automatically</b> [33] - 38:18, 44:9, 104:1, 108:18, 109:4, 110:17, 112:14, 114:15, 120:25, 121:6, 121:9, 125:21, 136:19, 136:21, 137:3, 172:10, 195:10, 195:12, 196:11, 197:14, 197:22, 198:2, 198:7, 198:13, 199:3, 201:8, 202:4, 202:13, 203:7, 204:18, 212:9, 212:23, 217:8 <b>automating</b> [1] - 112:7 <b>automation</b> [1] - 201:14 <b>availability</b> [6] - 117:9, 117:12, 213:14, 213:18, 213:21, 215:7 <b>available</b> [6] - 45:22, 85:14, 113:13, 157:1, 204:9, 213:22 <b>avoid</b> [5] - 76:10, 76:11, 76:13, 94:22, 176:4 <b>avoiding</b> [1] - 75:2 <b>aware</b> [3] - 27:5, 117:12, 131:1	<b>B</b>	<b>background</b> [9] - 27:21, 27:25, 70:1, 72:13, 73:2, 159:18, 183:11, 184:14, 199:12 <b>bad</b> [2] - 71:24, 89:1 <b>Bank</b> [1] - 175:8 <b>bare</b> [3] - 170:23, 210:14, 214:2 <b>base</b> [3] - 56:3, 78:5, 79:25 <b>based</b> [54] - 12:5, 17:6, 17:10, 21:14, 22:4, 24:3, 31:3, 31:8, 32:9, 32:11, 33:11, 34:5, 35:7, 35:11, 35:20, 36:2, 38:22, 44:15, 56:8, 69:21, 97:12, 97:21, 98:8, 98:16, 120:1, 120:2, 134:16, 155:19, 157:11, 159:4, 160:2, 160:12, 161:12, 162:17, 165:3, 165:25, 166:23, 167:17, 168:16, 175:3, 176:23, 178:16, 179:1, 179:8, 182:9, 184:23, 212:21, 213:6, 213:16, 215:5, 215:8, 221:14, 221:15 <b>basic</b> [5] - 110:12, 154:20, 195:17, 196:2 <b>Beard</b> [1] - 100:10 <b>become</b> [1] - 194:14 <b>becomes</b> [1] - 196:23 <b>bed</b> [1] - 142:15 <b>beforehand</b> [1] - 5:17 <b>begin</b> [8] - 5:1, 5:21, 6:14, 54:9, 54:19, 55:7, 71:13, 150:8 <b>beginning</b> [3] - 26:22, 84:4, 100:6 <b>begins</b> [2] - 139:20, 156:15 <b>behalf</b> [7] - 6:2, 6:18, 7:21, 54:12, 54:23, 145:7, 222:23 <b>behind</b> [1] - 6:8 <b>believes</b> [4] - 172:25, 218:12, 221:24, 222:18 <b>beneficial</b> [1] - 148:19 <b>benefit</b> [7] - 62:19, 130:6, 130:25, 143:3, 145:10, 148:24, 169:11 <b>benefitted</b> [1] - 151:20 <b>best</b> [5] - 82:2, 83:13, 83:18, 83:25, 90:16 <b>bet</b> [1] - 15:8 <b>better</b> [9] - 20:4, 127:25, 128:16, 143:8, 143:21, 143:23, 149:9, 176:11, 218:9 <b>between</b> [65] - 10:2, 12:24, 21:20, 21:23, 22:5, 25:2, 27:3, 27:13, 31:24, 32:11, 32:17, 33:25, 37:3, 37:16, 38:13, 42:2, 43:24, 45:10, 61:17, 62:8, 80:6, 81:11, 81:21, 82:3, 95:20, 96:5, 96:19, 97:4, 98:5, 109:5, 116:6, 131:10, 135:24, 150:21, 153:20, 154:12, 155:9, 156:22, 157:2, 157:16, 158:7, 158:10, 159:13, 161:4, 164:2, 164:17, 168:22, 177:17, 177:25, 178:5, 180:10, 183:5, 184:21, 199:24, 201:9, 202:10, 202:16, 203:8, 204:5, 205:6, 209:3, 212:10, 216:20, 219:4, 219:11 <b>beyond</b> [14] - 4:18, 31:13, 33:5, 33:11, 38:2, 66:3, 85:15, 127:9, 142:6, 147:10, 159:15, 164:22, 202:22, 203:3 <b>big</b> [8] - 28:2, 44:18, 48:22, 62:21, 71:16, 129:16, 145:13, 145:14 <b>birth</b> [1] - 40:19 <b>bit</b> [8] - 9:22, 50:14, 70:7, 78:2, 78:3, 128:12, 134:4, 145:7 <b>black</b> [12] - 15:9, 16:10, 30:4, 33:9, 48:19, 49:10, 49:15, 100:23, 104:24, 105:1, 105:25, 107:1 <b>blackberrys</b> [1] - 120:6 <b>blank</b> [7] - 30:2, 33:13, 39:15, 39:16, 45:12, 128:24 <b>blanks</b> [1] - 38:1 <b>block</b> [2] - 154:21, 196:3 <b>blunt</b> [1] - 45:5 <b>body</b> [1] - 79:22 <b>bolded</b> [1] - 127:9 <b>bolster</b> [2] - 147:7, 166:25 <b>boon</b> [1] - 18:2 <b>boss</b> [1] - 23:11 <b>bottom</b> [2] - 87:21, 116:2 <b>box</b> [11] - 15:9, 16:10, 30:4, 33:9, 48:19, 49:15, 100:24, 104:25, 105:1, 105:25, 107:1 <b>boxes</b> [1] - 49:11 <b>breadth</b> [3] - 38:7, 96:8, 156:14 <b>break</b> [7] - 53:12, 53:22, 53:24, 83:20, 99:9, 148:9, 149:18 <b>brick</b> [2] - 25:3, 28:3 <b>brick-and-mortar</b> [2] - 25:3, 28:3 <b>bricks</b> [1] - 155:12 <b>bricks-and-mortar</b> [1] - 155:12 <b>brief</b> [28] - 8:22, 9:4, 10:16, 10:25, 11:3, 15:24, 21:16, 22:2, 29:23, 50:23, 84:20, 92:10, 108:14, 127:4, 127:16, 165:14, 171:15, 171:21, 173:5, 178:23, 179:20, 179:25, 181:15, 193:6, 206:22, 209:4, 209:24, 222:5 <b>briefing</b> [23] - 11:16, 24:23, 27:17, 28:14, 41:3, 65:24, 73:11, 110:9, 129:2, 145:9, 154:14, 166:13, 167:9, 172:6, 173:8, 184:17, 193:10,
---	----------	---

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Phone: (302) 893-1158 E-mail: warnerdeanna@gmail.com

<p>195:4, 206:23, 206:24, 221:18, 222:8, 223:25 <b>briefly</b> [2] - 141:4, 153:24 <b>briefs</b> [11] - 33:2, 71:17, 84:17, 85:7, 92:17, 126:15, 127:13, 128:13, 148:7, 150:22, 151:10 <b>brings</b> [1] - 191:21 <b>broad</b> [9] - 19:9, 19:17, 24:25, 38:6, 57:5, 157:18, 159:25, 185:16, 214:23 <b>broader</b> [2] - 159:12, 216:12 <b>broadly</b> [3] - 28:18, 118:23, 190:12 <b>Brooks</b> [1] - 6:9 <b>brought</b> [2] - 192:15, 192:20 <b>Brown</b> [1] - 98:24 <b>Broyles</b> [2] - 100:8, 100:10 <b>BSG</b> [7] - 185:25, 186:7, 186:10, 187:21, 188:10, 188:25, 189:8 <b>buckets</b> [2] - 98:9, 98:14 <b>build</b> [8] - 73:8, 75:22, 77:17, 78:19, 78:22, 82:5, 88:10 <b>building</b> [2] - 154:20, 196:2 <b>built</b> [3] - 73:20, 81:4, 86:13 <b>bulk</b> [1] - 177:7 <b>bunch</b> [15] - 41:17, 55:6, 61:7, 75:11, 82:7, 87:12, 87:13, 88:9, 90:19, 111:13, 116:7, 120:25, 121:6, 121:10, 138:24 <b>burden</b> [1] - 171:12 <b>burdensome</b> [1] - 201:12 <b>Burke</b> [1] - 1:22 <b>business</b> [3] - 20:3, 43:6, 183:16 <b>button</b> [1] - 137:23 <b>buyseasons</b> [1] - 186:1 <b>BY</b> [4] - 2:2, 2:13, 2:17, 2:20</p>	<p style="text-align: center;"><b>C</b></p> <p><b>cable</b> [1] - 22:12 <b>calculus</b> [2] - 172:20, 216:23 <b>canceled</b> [1] - 153:6 <b>candidly</b> [1] - 184:9 <b>cannot</b> [10] - 77:22, 80:7, 91:7, 164:6, 169:16, 170:3, 172:2, 204:16, 211:11, 216:11 <b>capabilities</b> [1] - 20:8 <b>capability</b> [1] - 170:13 <b>capable</b> [1] - 206:3 <b>capacity</b> [1] - 187:18 <b>capture</b> [3] - 114:11, 179:3, 185:18 <b>captured</b> [2] - 183:8, 185:6 <b>captures</b> [1] - 141:16 <b>CardioNet</b> [1] - 176:2 <b>care</b> [2] - 19:11, 27:7 <b>careful</b> [2] - 117:7, 176:4 <b>cares</b> [2] - 78:11, 121:4 <b>Carl</b> [1] - 100:8 <b>carried</b> [1] - 206:9 <b>carry</b> [4] - 31:14, 181:19, 204:17, 206:19 <b>carrying</b> [1] - 195:16 <b>Case</b> [6] - 1:5, 1:10, 1:15, 225:8, 225:10, 225:12 <b>case</b> [84] - 3:8, 3:13, 3:16, 4:2, 4:20, 5:17, 5:18, 7:9, 8:1, 8:5, 8:6, 8:15, 16:22, 16:23, 18:3, 18:22, 30:16, 47:4, 47:6, 47:7, 47:21, 48:2, 48:18, 51:17, 51:18, 52:15, 53:19, 54:5, 61:1, 62:25, 73:5, 93:4, 96:13, 99:17, 100:21, 102:6, 107:24, 107:25, 110:6, 115:14, 119:2, 119:7, 120:3, 124:1, 125:16, 135:2, 140:12, 140:16, 143:10, 145:8, 145:21, 146:23, 147:9, 150:6, 150:7, 150:22, 152:4, 152:11, 152:12,</p>	<p>173:10, 173:14, 173:15, 173:17, 181:11, 185:1, 186:2, 186:5, 186:18, 189:18, 191:21, 192:10, 205:22, 205:24, 206:21, 206:22, 207:1, 207:2, 222:3, 222:11, 222:24 <b>caselaw</b> [4] - 14:1, 14:4, 141:13, 185:19 <b>cases</b> [27] - 3:4, 4:15, 16:22, 18:1, 18:16, 18:23, 52:14, 100:24, 116:13, 137:11, 140:11, 142:4, 148:17, 150:5, 150:10, 150:24, 151:5, 151:8, 151:11, 151:17, 151:19, 155:23, 169:4, 172:13, 175:7, 176:2, 205:18 <b>casino</b> [32] - 10:3, 21:10, 21:21, 23:1, 23:11, 23:14, 25:3, 25:4, 25:16, 27:2, 28:2, 28:3, 31:3, 34:23, 35:18, 35:23, 43:11, 43:25, 50:3, 153:1, 153:21, 154:13, 155:7, 155:12, 156:19, 156:25, 157:6, 159:19, 159:24, 164:18, 167:17, 168:16 <b>Casino</b> [1] - 44:12 <b>cast</b> [1] - 110:2 <b>CASTLE</b> [2] - 225:3, 225:22 <b>categories</b> [1] - 19:19 <b>categorize</b> [2] - 95:4, 96:21 <b>category</b> [1] - 18:23 <b>causes</b> [3] - 128:9, 213:4, 213:14 <b>caution</b> [1] - 117:2 <b>CDM</b> [1] - 48:9 <b>celebrated</b> [1] - 162:3 <b>cell</b> [2] - 122:16, 125:19 <b>cells</b> [1] - 61:8 <b>central</b> [3] - 125:1, 126:13, 211:4 <b>centralized</b> [5] - 106:16, 106:17, 108:2, 108:3, 142:13</p>	<p><b>centrally</b> [1] - 122:25 <b>centric</b> [6] - 119:11, 120:2, 120:14, 120:15, 120:18, 210:7 <b>certain</b> [28] - 9:23, 10:20, 19:19, 31:10, 32:2, 34:1, 64:17, 66:4, 67:12, 68:16, 71:23, 74:22, 80:7, 82:10, 98:2, 118:17, 128:13, 153:24, 166:24, 167:15, 180:11, 181:23, 182:6, 189:2, 201:10, 214:9, 220:7 <b>certainly</b> [6] - 13:3, 14:3, 43:3, 63:12, 126:22, 178:14 <b>certificate</b> [1] - 153:6 <b>Certified</b> [2] - 225:4, 225:6 <b>certify</b> [2] - 225:5, 225:15 <b>cetera</b> [7] - 63:17, 72:17, 113:14, 128:25, 142:8 <b>challenge</b> [7] - 8:23, 11:2, 15:21, 16:18, 16:20, 43:16, 134:14 <b>challenged</b> [3] - 8:13, 151:9, 205:24 <b>chance</b> [8] - 46:15, 51:10, 68:11, 69:7, 94:16, 127:21, 172:11, 222:16 <b>chances</b> [2] - 41:17, 42:19 <b>change</b> [17] - 4:9, 15:1, 16:13, 52:12, 52:20, 74:5, 101:19, 123:16, 126:4, 130:2, 130:18, 144:7, 144:8, 145:4, 145:5, 147:14, 172:19 <b>changed</b> [5] - 17:1, 143:20, 144:6, 144:11, 144:12 <b>changes</b> [1] - 140:23 <b>changing</b> [2] - 17:22, 119:25 <b>character</b> [2] - 155:19, 156:1 <b>characteristic</b> [1] - 98:3 <b>characteristics</b> [5] - 55:23, 97:12, 97:22, 98:5, 98:16 <b>characterization</b> [4] -</p>	<p>24:9, 24:11, 41:14, 154:24 <b>characterize</b> [1] - 220:18 <b>check</b> [1] - 84:22 <b>Cheng</b> [8] - 54:24, 56:2, 71:4, 78:8, 93:9, 94:15, 95:22, 98:19 <b>CHENG</b> [27] - 2:20, 55:8, 55:11, 57:6, 59:2, 59:23, 61:25, 63:4, 63:11, 64:3, 64:13, 64:22, 65:4, 65:12, 65:18, 66:6, 66:22, 67:23, 68:1, 69:13, 70:14, 71:9, 94:18, 95:24, 96:9, 97:7, 97:20 <b>cheng</b> [1] - 55:7 <b>Chid</b> [1] - 100:3 <b>chief</b> [2] - 48:7, 54:16 <b>choose</b> [1] - 98:8 <b>Christopher</b> [1] - 1:22 <b>circle</b> [1] - 27:16 <b>circuit</b> [1] - 165:4 <b>Circuit</b> [38] - 11:10, 16:8, 18:1, 47:4, 48:3, 51:1, 72:20, 135:2, 140:15, 141:12, 142:4, 151:11, 154:19, 155:22, 156:8, 168:24, 169:4, 175:6, 176:3, 186:1, 186:5, 186:10, 187:1, 187:10, 189:21, 193:17, 196:1, 196:21, 201:13, 201:20, 204:23, 205:13, 205:22, 205:25, 206:10, 207:1, 207:10, 218:6 <b>Circuit's</b> [1] - 172:12 <b>circumstance</b> [1] - 218:4 <b>citation</b> [2] - 166:18, 170:23 <b>citations</b> [3] - 150:16, 150:23, 224:9 <b>cited</b> [10] - 18:2, 92:10, 92:18, 145:8, 151:12, 156:4, 163:15, 205:18, 206:23 <b>citing</b> [1] - 92:13 <b>civil</b> [3] - 3:9, 3:15, 173:17 <b>Civil</b> [3] - 3:21,</p>
--	--	--	---	--

DEANNA WARNER, CSR

202 Ashfield Court, Smyrna DE 19977

Phone: (302) 893-1158 E-mail: warnerdeanna@gmail.com

191:23, 192:2 <b>Claim</b> [63] - 8:16, 9:6, 9:12, 9:15, 9:16, 11:4, 11:13, 11:22, 14:24, 25:7, 25:12, 25:13, 38:15, 39:3, 39:22, 41:7, 56:5, 62:12, 64:15, 66:12, 66:24, 74:21, 125:13, 127:6, 153:8, 153:10, 157:3, 157:8, 158:25, 162:11, 163:5, 174:2, 174:14, 174:18, 174:20, 176:14, 177:10, 192:25, 193:15, 193:24, 194:1, 196:23, 197:1, 199:11, 202:3, 203:3, 203:14, 204:6, 208:17, 209:5, 209:11, 209:20, 209:22, 211:20, 212:6, 212:7, 212:14, 213:11, 213:12, 214:13, 217:4, 217:11 <b>claim</b> [172] - 8:17, 9:16, 9:18, 10:10, 10:12, 10:13, 11:1, 11:12, 12:16, 14:5, 14:14, 14:25, 15:1, 15:12, 15:21, 17:18, 19:6, 20:12, 20:15, 22:7, 24:4, 24:14, 24:19, 25:6, 26:7, 26:17, 29:25, 30:6, 30:15, 30:20, 31:4, 36:14, 39:9, 39:20, 43:22, 50:1, 51:25, 55:12, 55:13, 55:16, 56:10, 56:17, 56:20, 57:3, 57:9, 60:14, 61:2, 61:21, 62:1, 63:2, 63:19, 63:24, 64:8, 64:9, 64:15, 66:7, 67:22, 68:19, 71:18, 78:1, 78:2, 78:13, 78:16, 79:7, 79:8, 79:13, 79:20, 79:23, 79:24, 82:5, 85:3, 87:5, 88:25, 89:7, 89:8, 89:13, 91:17, 92:7, 93:24, 94:10, 97:2, 97:3, 103:9, 106:1, 111:6, 112:15, 112:18, 112:20, 114:15, 114:19, 121:11,	122:8, 125:12, 134:20, 136:17, 139:1, 140:2, 141:8, 141:9, 141:15, 141:17, 144:13, 144:14, 144:15, 153:8, 153:9, 153:10, 154:17, 156:10, 156:11, 156:13, 156:14, 159:15, 162:22, 163:16, 164:10, 164:22, 164:25, 165:17, 166:15, 166:25, 169:2, 170:24, 171:25, 176:5, 176:13, 179:6, 179:17, 180:8, 181:11, 182:1, 182:16, 185:9, 186:15, 188:6, 190:16, 193:12, 193:18, 193:21, 193:22, 196:20, 196:22, 197:2, 197:7, 197:13, 197:21, 198:1, 198:6, 198:10, 198:12, 198:17, 202:22, 202:25, 204:2, 204:21, 206:15, 209:10, 209:18, 210:12, 212:20, 213:2, 213:20, 215:10, 217:1, 217:5, 218:5 <b>claim's</b> [5] - 190:14, 197:5, 203:5, 204:18, 217:15 <b>claimed</b> [50] - 22:18, 44:13, 61:12, 65:24, 68:23, 71:20, 72:2, 76:9, 88:2, 88:16, 91:16, 92:5, 121:16, 121:23, 122:6, 123:20, 144:20, 160:24, 166:13, 177:2, 177:6, 177:11, 179:22, 180:5, 180:19, 181:13, 181:20, 184:2, 184:11, 184:21, 184:22, 186:21, 187:11, 187:21, 188:5, 188:22, 188:25, 189:7, 190:6, 198:11, 203:15, 205:11, 205:15, 208:10, 208:11,	209:7, 210:25, 215:13, 220:20, 221:9 <b>claiming</b> [6] - 38:9, 38:10, 38:11, 58:13, 182:21, 183:1 <b>Claims</b> [1] - 50:7 <b>claims</b> [289] - 8:10, 9:2, 9:5, 9:7, 9:13, 9:14, 9:15, 9:21, 9:24, 10:8, 10:18, 10:20, 11:6, 11:7, 11:17, 11:25, 12:3, 12:8, 13:3, 14:9, 16:2, 16:12, 17:1, 17:14, 18:6, 18:14, 21:8, 21:18, 23:7, 24:2, 24:10, 24:12, 24:25, 25:7, 25:8, 25:12, 30:11, 31:1, 31:14, 33:5, 36:12, 36:25, 37:20, 38:5, 38:6, 38:8, 38:9, 38:13, 38:19, 38:25, 39:8, 41:6, 41:10, 42:13, 43:20, 44:14, 47:12, 48:1, 48:16, 48:24, 49:22, 51:8, 52:12, 52:20, 52:21, 55:19, 56:5, 58:12, 60:3, 60:8, 60:13, 61:11, 61:15, 63:2, 63:4, 63:20, 65:25, 66:2, 66:23, 66:25, 67:2, 68:15, 69:10, 75:20, 80:22, 83:22, 84:24, 91:16, 91:18, 93:21, 101:2, 103:25, 104:20, 111:24, 112:1, 112:16, 113:19, 114:11, 114:12, 121:10, 124:10, 125:8, 128:4, 129:5, 133:5, 133:10, 133:15, 134:6, 135:6, 135:13, 135:16, 135:22, 136:2, 136:3, 136:5, 136:10, 137:2, 141:19, 146:3, 147:12, 153:3, 153:7, 153:11, 153:12, 153:13, 153:17, 153:22, 153:25, 154:3, 154:5, 154:7, 154:8, 154:10, 155:3, 155:16, 155:18, 156:1, 156:16, 156:17, 157:3,	157:7, 157:14, 157:17, 157:21, 158:1, 158:4, 158:6, 158:11, 158:15, 158:19, 158:20, 158:22, 159:3, 159:5, 159:8, 159:9, 159:10, 160:9, 160:23, 161:2, 161:25, 162:9, 162:15, 162:20, 163:22, 164:5, 164:12, 164:15, 165:3, 165:5, 165:16, 165:23, 165:24, 166:9, 167:25, 168:2, 168:14, 168:20, 169:9, 169:23, 171:13, 171:16, 171:17, 171:18, 171:20, 171:23, 171:25, 172:1, 172:2, 174:16, 174:22, 175:1, 175:13, 175:15, 175:16, 175:21, 175:23, 176:9, 176:15, 176:25, 177:7, 178:14, 178:18, 178:21, 179:5, 179:9, 179:13, 179:16, 179:17, 179:25, 180:3, 180:11, 181:18, 181:21, 181:24, 182:7, 183:9, 184:8, 184:12, 185:5, 185:11, 185:17, 185:20, 185:24, 186:2, 186:3, 186:6, 186:17, 187:1, 187:6, 187:14, 187:19, 188:12, 188:16, 189:4, 189:8, 189:13, 189:16, 189:22, 190:9, 190:12, 191:1, 191:3, 191:5, 191:11, 191:16, 193:3, 193:11, 193:14, 194:2, 196:5, 196:14, 198:23, 201:7, 201:21, 202:1, 203:16, 204:11, 204:24, 205:20, 205:25, 206:6, 206:10, 206:17, 207:6, 207:11,	207:12, 207:21, 208:6, 208:15, 208:22, 210:11, 210:19, 211:5, 212:3, 212:8, 212:11, 214:21, 214:25, 216:7, 216:11, 217:22, 218:1 <b>clarification</b> [1] - 222:21 <b>clarity</b> [3] - 150:13, 182:14, 184:24 <b>class</b> [23] - 55:21, 57:25, 58:19, 58:21, 58:25, 59:12, 66:17, 81:3, 82:11, 83:2, 83:3, 83:7, 86:25, 95:10, 96:23, 177:18, 177:19, 177:20, 177:23, 177:25, 178:1, 178:4, 178:5 <b>classes</b> [1] - 83:6 <b>clear</b> [9] - 14:11, 135:9, 184:16, 189:9, 196:23, 201:14, 203:18, 216:1, 216:8 <b>clearer</b> [1] - 194:15 <b>clearly</b> [2] - 72:2, 85:3 <b>Clerk</b> [1] - 225:21 <b>clerk</b> [2] - 98:25, 150:25 <b>client</b> [4] - 54:25, 73:4, 200:11, 200:19 <b>clients</b> [1] - 7:23 <b>climbs</b> [1] - 153:7 <b>close</b> [3] - 50:25, 140:7, 218:5 <b>closed</b> [2] - 173:11, 206:24 <b>closer</b> [1] - 43:7 <b>clue</b> [2] - 146:20, 146:22 <b>clues</b> [1] - 214:25 <b>CMS</b> [33] - 11:23, 11:24, 12:5, 17:6, 17:9, 25:3, 28:10, 31:7, 32:11, 33:11, 35:9, 36:8, 37:4, 39:4, 40:7, 40:8, 40:24, 41:8, 41:11, 42:3, 42:5, 157:11, 158:25, 159:1, 159:4, 159:7, 160:13, 161:5, 161:12, 162:13, 162:17, 163:3, 163:21
---	---	--	--	---

DEANNA WARNER, CSR

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<p><b>CMSES</b> [4] - 26:14, 29:21, 44:6, 155:7</p> <p><b>co</b> [2] - 6:20, 100:1</p> <p><b>co-counsel</b> [2] - 6:20, 100:1</p> <p><b>code</b> [38] - 15:4, 73:16, 73:18, 73:19, 73:24, 74:1, 74:7, 74:11, 74:12, 74:18, 75:4, 75:6, 75:8, 76:4, 76:6, 76:12, 76:14, 76:25, 77:2, 77:6, 77:8, 77:20, 81:24, 82:8, 82:23, 83:17, 87:12, 88:9, 88:17, 88:22, 89:24, 90:1, 90:4, 90:19, 124:14, 183:19</p> <p><b>coded</b> [1] - 79:12</p> <p><b>cognizant</b> [1] - 172:12</p> <p><b>collaborative</b> [1] - 135:2</p> <p><b>colleague</b> [1] - 54:13</p> <p><b>colleague</b> [2] - 6:8, 71:7</p> <p><b>colleagues</b> [1] - 127:20</p> <p><b>collection</b> [2] - 74:6, 175:10</p> <p><b>collections</b> [5] - 73:7, 73:8, 73:10, 75:7</p> <p><b>collective</b> [5] - 47:20, 48:2, 48:18, 206:25</p> <p><b>college</b> [1] - 88:15</p> <p><b>color</b> [3] - 79:12, 98:4, 98:7</p> <p><b>color-coded</b> [1] - 79:12</p> <p><b>colors</b> [1] - 125:14</p> <p><b>column</b> [56] - 50:14, 50:15, 50:17, 61:8, 62:6, 62:9, 63:17, 67:18, 68:20, 69:4, 69:12, 70:8, 78:22, 79:4, 84:3, 84:12, 85:10, 85:12, 87:21, 88:5, 92:10, 92:16, 95:16, 95:17, 95:23, 95:24, 95:25, 96:1, 103:7, 104:16, 104:24, 106:1, 108:25, 113:6, 113:8, 113:10, 113:12, 116:3, 116:12, 129:3, 129:7, 129:8, 131:6, 133:13, 133:24, 137:8, 138:16, 139:4, 139:6, 139:16, 143:2,</p>	<p>144:21, 183:11, 220:6</p> <p><b>columns</b> [18] - 61:6, 64:2, 64:12, 66:4, 66:8, 66:11, 67:10, 67:12, 67:21, 84:13, 92:20, 93:14, 104:12, 110:13, 138:11, 140:19, 163:8, 163:24</p> <p><b>combination</b> [1] - 102:22</p> <p><b>combined</b> [2] - 159:23, 166:3</p> <p><b>coming</b> [4] - 90:3, 115:8, 142:13, 143:20</p> <p><b>comment</b> [1] - 115:24</p> <p><b>comments</b> [2] - 150:9, 173:12</p> <p><b>commerce</b> [2] - 20:3, 49:6</p> <p><b>common</b> [4] - 104:9, 156:17, 218:19, 218:25</p> <p><b>communicate</b> [14] - 23:5, 23:13, 25:17, 27:14, 28:3, 28:4, 29:20, 34:7, 35:3, 35:9, 43:11, 144:12, 159:21, 207:24</p> <p><b>communicated</b> [3] - 144:11, 155:9, 158:24</p> <p><b>communicates</b> [2] - 38:23, 168:16</p> <p><b>communicating</b> [8] - 12:24, 21:9, 22:5, 37:2, 37:16, 156:21, 157:24</p> <p><b>communication</b> [50] - 12:4, 17:6, 17:9, 17:23, 21:23, 22:1, 22:3, 22:21, 22:23, 25:2, 25:9, 25:20, 26:1, 27:15, 28:11, 28:20, 31:2, 31:7, 33:10, 34:3, 34:4, 34:9, 34:14, 34:20, 35:25, 36:6, 36:23, 37:15, 38:21, 38:24, 41:11, 49:8, 50:2, 138:5, 153:19, 157:11, 158:9, 158:14, 159:4, 160:2, 160:24, 162:16, 163:21, 164:2, 209:8, 209:16, 211:1, 211:3, 211:7, 211:14</p>	<p><b>communication-based</b> [1] - 160:2</p> <p><b>communications</b> [4] - 20:7, 27:13, 38:12, 206:4</p> <p><b>Company</b> [1] - 152:4</p> <p><b>compared</b> [3] - 116:9, 192:18, 209:22</p> <p><b>comparing</b> [1] - 76:8</p> <p><b>comparison</b> [3] - 186:23, 187:7, 188:13</p> <p><b>comparisons</b> [1] - 77:5</p> <p><b>complaint</b> [43] - 41:17, 42:20, 42:22, 44:19, 46:9, 51:14, 51:15, 51:16, 51:17, 52:3, 53:9, 65:7, 73:12, 85:8, 109:9, 126:18, 127:14, 134:15, 134:22, 146:12, 152:18, 153:15, 167:6, 167:7, 167:9, 167:11, 169:21, 170:6, 170:16, 172:18, 172:23, 173:7, 173:20, 174:1, 184:18, 192:4, 202:7, 203:9, 208:4, 208:17, 221:19, 221:25</p> <p><b>complete</b> [2] - 139:4, 219:21</p> <p><b>completed</b> [1] - 4:4</p> <p><b>completely</b> [1] - 139:10</p> <p><b>complexity</b> [1] - 200:4</p> <p><b>complicated</b> [1] - 101:25</p> <p><b>components</b> [2] - 207:14, 208:14</p> <p><b>composed</b> [1] - 179:20</p> <p><b>composition</b> [1] - 24:16</p> <p><b>comprised</b> [1] - 176:16</p> <p><b>comprises</b> [1] - 47:14</p> <p><b>comprising</b> [1] - 39:24</p> <p><b>computer</b> [81] - 15:4, 19:21, 20:14, 20:15, 20:23, 21:1, 23:7, 76:5, 100:24, 102:8, 102:16, 102:23, 104:2, 112:8, 112:13, 113:3, 113:4, 113:13, 113:15, 116:15, 119:17, 120:9,</p>	<p>122:15, 122:17, 123:3, 124:2, 124:7, 124:19, 124:21, 125:4, 125:8, 125:9, 129:16, 131:24, 135:3, 135:6, 135:10, 135:11, 135:14, 138:8, 145:4, 147:19, 153:9, 165:3, 165:9, 165:25, 166:22, 166:23, 169:25, 170:1, 180:3, 181:19, 182:10, 184:23, 188:1, 189:24, 190:1, 190:7, 190:15, 191:2, 195:12, 196:8, 198:13, 201:3, 201:8, 201:17, 203:14, 204:17, 205:5, 206:18, 207:9, 207:14, 208:7, 208:13, 210:5, 210:7, 210:13, 211:22, 216:4, 218:8, 221:3</p> <p><b>computer</b> [1] - 201:25</p> <p><b>computer-based</b> [3] - 165:25, 166:23, 184:23</p> <p><b>computer-functionality-based</b> [1] - 165:3</p> <p><b>computer-network-centric</b> [1] - 210:7</p> <p><b>computer-readable</b> [2] - 113:13, 153:9</p> <p><b>computerization</b> [2] - 20:18, 112:22</p> <p><b>computerized</b> [3] - 23:6, 176:15, 182:17</p> <p><b>computers</b> [22] - 20:6, 21:2, 110:21, 111:3, 111:18, 115:22, 134:25, 135:7, 135:8, 135:14, 190:11, 195:9, 195:19, 195:24, 197:4, 198:20, 201:15, 202:6, 211:13, 214:7, 214:19</p> <p><b>computing</b> [5] - 48:20, 113:9, 199:16, 203:21, 203:23</p> <p><b>concept</b> [69] - 14:2, 16:5, 16:12, 17:18, 18:2, 19:9, 19:20,</p>	<p>49:3, 52:17, 56:18, 97:25, 107:23, 108:20, 113:20, 113:24, 114:4, 118:16, 120:18, 128:4, 128:12, 132:17, 132:22, 133:11, 133:16, 134:1, 134:11, 141:5, 154:20, 158:6, 158:14, 159:12, 161:3, 161:22, 164:1, 165:6, 165:16, 168:22, 170:25, 171:4, 171:14, 175:9, 175:11, 178:15, 185:6, 185:18, 188:17, 188:24, 196:2, 196:15, 197:3, 197:6, 198:13, 202:24, 203:6, 203:17, 204:19, 206:9, 206:11, 208:19, 211:6, 211:24, 214:8, 215:1, 215:16, 217:1, 217:18, 218:3, 218:15, 221:3</p> <p><b>conception</b> [1] - 206:8</p> <p><b>concepts</b> [5] - 48:4, 166:10, 183:8, 207:12, 208:2</p> <p><b>conceptual</b> [2] - 57:19, 63:7</p> <p><b>concern</b> [2] - 156:11, 169:18</p> <p><b>concerned</b> [1] - 160:21</p> <p><b>concerns</b> [2] - 173:2, 205:2</p> <p><b>conclude</b> [8] - 93:7, 151:4, 158:5, 159:10, 166:7, 213:25, 216:11, 222:15</p> <p><b>concluded</b> [2] - 168:10, 206:10</p> <p><b>concludes</b> [6] - 154:16, 164:15, 166:5, 207:2, 211:25, 214:3</p> <p><b>concluding</b> [1] - 207:10</p> <p><b>conclusion</b> [2] - 199:7, 207:19</p> <p><b>conclusions</b> [1] - 171:8</p> <p><b>concrete</b> [4] - 109:21,</p>
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<p>109:24, 159:25, 218:8</p> <p><b>conditional</b> [1] - 90:4</p> <p><b>conditional</b> [1] - 91:12</p> <p><b>conduct</b> [1] - 205:24</p> <p><b>configuration</b> [1] - 142:7</p> <p><b>configurations</b> [1] - 203:24</p> <p><b>configure</b> [4] - 57:18, 60:22, 60:23, 62:3</p> <p><b>configured</b> [28] - 34:1, 57:9, 60:20, 67:4, 68:8, 70:18, 106:3, 177:4, 177:8, 177:13, 177:16, 177:18, 177:21, 177:24, 178:3, 178:8, 178:11, 179:21, 180:13, 181:22, 183:3, 183:5, 191:8, 196:10, 197:22, 198:2, 207:23</p> <p><b>configuring</b> [1] - 206:1</p> <p><b>confirm</b> [1] - 7:9</p> <p><b>confusing</b> [1] - 131:5</p> <p><b>connect</b> [7] - 22:13, 27:1, 44:5, 79:17, 89:22, 125:19, 161:15</p> <p><b>connected</b> [7] - 25:14, 104:9, 137:21, 161:13, 199:18, 200:13, 201:3</p> <p><b>connecting</b> [2] - 38:11, 49:5</p> <p><b>connection</b> [31] - 21:15, 21:17, 21:20, 22:17, 25:5, 32:2, 32:10, 32:13, 34:15, 38:14, 38:19, 72:12, 123:4, 138:7, 138:20, 155:15, 158:3, 158:13, 158:19, 160:11, 160:22, 161:9, 161:14, 161:17, 161:18, 162:1, 162:2, 162:21, 167:12, 184:20, 199:22</p> <p><b>connects</b> [2] - 29:7, 160:12</p> <p><b>conserve</b> [1] - 201:22</p> <p><b>consider</b> [6] - 52:9, 148:5, 162:6, 173:10, 189:1, 222:10</p>	<p><b>consideration</b> [2] - 53:6, 188:19</p> <p><b>considered</b> [6] - 155:18, 165:22, 166:8, 166:14, 167:25, 211:10</p> <p><b>considering</b> [1] - 187:2</p> <p><b>consist</b> [2] - 180:20, 190:1</p> <p><b>consistent</b> [3] - 108:22, 109:8, 187:9</p> <p><b>consisting</b> [1] - 225:17</p> <p><b>constitute</b> [2] - 177:6, 201:16</p> <p><b>constituting</b> [1] - 188:1</p> <p><b>constrain</b> [1] - 83:5</p> <p><b>constrained</b> [2] - 95:5, 96:14</p> <p><b>constraining</b> [1] - 83:10</p> <p><b>constraint</b> [1] - 91:4</p> <p><b>constraints</b> [2] - 82:19, 82:20</p> <p><b>construct</b> [7] - 62:4, 66:1, 66:3, 67:1, 67:13, 95:13, 188:4</p> <p><b>constructed</b> [1] - 67:8</p> <p><b>constructing</b> [1] - 66:9</p> <p><b>construction</b> [17] - 15:13, 15:22, 29:25, 30:1, 30:2, 30:15, 30:17, 30:21, 31:5, 31:17, 33:4, 39:10, 52:1, 59:11, 97:2, 181:12, 182:1</p> <p><b>constructions</b> [1] - 186:15</p> <p><b>construed</b> [1] - 166:25</p> <p><b>consult</b> [1] - 196:21</p> <p><b>consume</b> [1] - 207:23</p> <p><b>contact</b> [1] - 163:10</p> <p><b>contain</b> [10] - 56:23, 96:24, 153:18, 158:20, 166:6, 180:23, 197:11, 198:15, 207:11, 218:15</p> <p><b>contained</b> [2] - 176:18, 208:15</p> <p><b>containing</b> [3] - 183:7, 184:6, 200:25</p> <p><b>contains</b> [2] - 94:9, 177:12</p> <p><b>contend</b> [1] - 154:25</p> <p><b>contends</b> [3] - 155:13, 196:4, 196:13</p>	<p><b>Content</b> [2] - 142:23, 175:7</p> <p><b>content</b> [22] - 47:21, 62:14, 62:15, 125:23, 126:1, 144:3, 171:22, 193:11, 193:14, 193:15, 197:17, 197:25, 199:11, 207:9, 207:23, 207:24, 208:1, 208:12, 217:19, 217:21, 224:7</p> <p><b>contest</b> [3] - 154:14, 174:17, 202:3</p> <p><b>contests</b> [1] - 193:8</p> <p><b>context</b> [4] - 20:7, 52:2, 165:9, 171:6</p> <p><b>continuation</b> [3] - 133:20, 134:12, 150:4</p> <p><b>continuations</b> [1] - 174:11</p> <p><b>continue</b> [1] - 105:23</p> <p><b>continues</b> [1] - 184:25</p> <p><b>contradicts</b> [1] - 145:23</p> <p><b>contrary</b> [3] - 161:8, 166:10, 194:13</p> <p><b>contrast</b> [2] - 67:7, 189:3</p> <p><b>contrasting</b> [1] - 93:12</p> <p><b>contributes</b> [1] - 170:12</p> <p><b>control</b> [1] - 109:22</p> <p><b>controls</b> [1] - 109:3</p> <p><b>convenience</b> [1] - 150:13</p> <p><b>conventional</b> [20] - 43:3, 70:21, 70:23, 73:3, 73:14, 85:13, 87:25, 165:12, 183:13, 188:8, 188:23, 189:10, 190:21, 199:16, 204:6, 204:20, 206:14, 207:14, 208:13</p> <p><b>converted</b> [1] - 186:16</p> <p><b>convey</b> [1] - 46:3</p> <p><b>conveying</b> [1] - 199:2</p> <p><b>convinced</b> [1] - 164:11</p> <p><b>Cooley</b> [1] - 100:10</p> <p><b>cooperative</b> [3] - 206:24, 207:18, 207:19</p> <p><b>Cooperative</b> [1] - 207:5</p>	<p><b>coordinates</b> [1] - 168:15</p> <p><b>coordinating</b> [3] - 42:2, 158:7, 161:3</p> <p><b>coordination</b> [11] - 10:1, 17:19, 18:5, 24:12, 154:11, 157:15, 157:22, 158:4, 159:13, 164:13, 164:16</p> <p><b>copied</b> [1] - 128:5</p> <p><b>copies</b> [9] - 4:22, 4:23, 4:24, 7:8, 7:12, 7:14, 72:25, 102:4, 200:2</p> <p><b>copy</b> [19] - 102:3, 125:21, 128:7, 130:17, 197:15, 197:23, 198:3, 198:7, 202:12, 212:19, 212:22, 212:25, 214:11, 214:16, 217:10, 219:23, 219:25, 220:4, 225:18</p> <p><b>core</b> [1] - 97:24</p> <p><b>Corp</b> [3] - 155:24, 169:5, 186:5</p> <p><b>correct</b> [21] - 3:11, 3:19, 10:24, 20:22, 22:10, 26:2, 26:20, 64:22, 65:18, 67:23, 68:1, 102:24, 105:12, 110:22, 112:11, 112:12, 112:24, 140:3, 181:25, 213:25, 220:12</p> <p><b>corresponding</b> [1] - 186:24</p> <p><b>counsel</b> [60] - 2:4, 2:11, 3:19, 4:17, 5:18, 5:20, 5:22, 6:4, 6:8, 6:13, 6:15, 6:20, 7:1, 7:13, 47:11, 49:13, 53:5, 53:18, 53:19, 53:20, 54:7, 54:8, 54:9, 54:18, 54:20, 54:24, 55:3, 55:5, 68:11, 71:12, 76:10, 94:14, 94:18, 94:25, 96:10, 98:20, 99:20, 99:22, 100:1, 100:5, 100:6, 100:13, 100:15, 116:3, 118:7, 119:19, 136:8, 141:1, 148:20, 148:22, 149:1, 162:20, 162:21, 164:7, 167:3, 172:9,</p>	<p>181:5, 220:1, 220:11, 223:17</p> <p><b>Counsel</b> [3] - 2:15, 2:21, 147:25</p> <p><b>counsel's</b> [4] - 99:6, 140:12, 148:2, 219:15</p> <p><b>count</b> [3] - 63:8, 64:18, 153:14</p> <p><b>COUNTY</b> [1] - 225:3</p> <p><b>County</b> [1] - 225:22</p> <p><b>couple</b> [7] - 3:24, 4:17, 50:12, 85:7, 92:8, 99:11, 105:18</p> <p><b>course</b> [5] - 5:8, 70:21, 135:5, 142:2, 146:11</p> <p><b>Court</b> [94] - 6:23, 7:25, 8:8, 8:12, 8:15, 8:24, 11:11, 19:16, 24:1, 24:2, 24:10, 53:25, 85:1, 109:25, 135:9, 149:19, 151:12, 151:25, 152:4, 154:16, 156:15, 161:24, 162:6, 163:14, 164:6, 164:12, 164:14, 166:5, 169:15, 169:17, 170:2, 171:11, 171:15, 172:4, 172:9, 172:11, 172:22, 173:7, 173:10, 173:13, 174:18, 174:19, 174:21, 175:4, 176:10, 180:17, 184:20, 186:5, 186:14, 187:4, 188:2, 188:10, 188:21, 189:10, 189:15, 189:25, 190:11, 191:11, 191:17, 192:7, 193:23, 195:25, 196:21, 202:15, 202:21, 205:17, 205:19, 207:2, 207:20, 208:3, 208:20, 208:23, 209:21, 211:9, 211:25, 213:24, 214:3, 215:24, 216:11, 216:15, 216:17, 218:10, 218:12, 218:16, 219:14, 219:21, 220:24, 221:12, 221:16, 221:21, 222:7,</p>
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222:10, 222:13, 225:21 <b>court</b> [14] - 3:4, 4:8, 148:11, 149:12, 149:23, 150:11, 152:4, 154:18, 156:2, 172:17, 191:3, 207:6, 222:9, 224:11 <b>COURT</b> [157] - 1:1, 3:1, 6:11, 6:24, 7:10, 7:18, 10:5, 11:14, 12:21, 13:22, 15:7, 17:3, 17:15, 19:2, 20:11, 21:4, 21:25, 22:20, 23:6, 23:16, 23:22, 24:22, 25:22, 26:6, 27:16, 29:22, 30:25, 32:22, 33:20, 34:9, 34:19, 35:6, 36:1, 36:24, 39:2, 40:25, 41:15, 44:16, 45:18, 46:6, 46:20, 50:11, 50:24, 53:3, 53:17, 54:4, 54:17, 55:2, 55:10, 56:2, 58:15, 59:9, 60:25, 62:7, 63:8, 63:22, 64:6, 64:14, 65:2, 65:8, 65:14, 65:23, 66:10, 67:11, 67:24, 68:9, 69:25, 70:25, 71:11, 72:24, 73:1, 74:10, 74:19, 76:2, 77:3, 78:4, 79:25, 80:10, 81:7, 81:19, 83:12, 84:10, 84:17, 84:23, 86:4, 86:17, 86:24, 87:20, 88:12, 89:21, 91:14, 92:8, 92:17, 93:3, 94:11, 95:22, 96:3, 96:22, 97:16, 98:18, 99:16, 99:19, 100:4, 100:13, 102:19, 102:25, 103:16, 105:9, 105:15, 105:23, 107:7, 107:11, 108:13, 110:18, 110:23, 112:10, 113:17, 115:20, 118:3, 118:9, 118:13, 120:20, 121:25, 123:19, 124:6, 124:12, 124:22, 126:8, 126:24, 127:5, 127:18, 130:8, 130:17, 130:21, 131:5, 132:7, 132:13,	134:2, 135:4, 136:23, 137:14, 138:10, 139:21, 140:6, 140:25, 141:11, 143:2, 144:10, 145:12, 145:16, 146:6, 146:18, 147:25, 149:22, 223:9, 223:16, 223:19 <b>court's</b> [2] - 186:11, 186:13 <b>Court's</b> [13] - 154:1, 171:10, 173:1, 180:7, 184:10, 184:15, 192:17, 194:17, 205:10, 212:12, 221:4, 222:17, 224:4 <b>Courtroom</b> [1] - 1:23 <b>courtroom</b> [1] - 4:12 <b>courts</b> [2] - 51:2, 149:7 <b>Courts</b> [5] - 19:4, 149:8, 164:21, 176:4, 193:18 <b>cover</b> [4] - 5:15, 18:14, 119:2, 190:12 <b>covered</b> [1] - 160:23 <b>create</b> [15] - 25:25, 29:11, 40:13, 40:23, 42:6, 43:17, 44:9, 51:20, 53:1, 57:24, 67:16, 162:13, 183:18, 221:6 <b>created</b> [6] - 25:18, 74:12, 75:3, 76:17, 163:9, 163:10 <b>creates</b> [7] - 25:17, 27:8, 38:18, 95:10, 146:22, 157:7, 159:2 <b>creating</b> [10] - 11:25, 28:19, 39:5, 40:21, 57:25, 162:24, 163:2, 163:16, 165:19, 168:11 <b>creation</b> [2] - 26:4, 43:14 <b>credit</b> [18] - 24:13, 42:23, 44:17, 44:19, 46:1, 46:10, 52:10, 53:10, 153:19, 156:22, 157:24, 166:2, 170:8, 170:11, 170:17, 171:1, 181:14 <b>credits</b> [17] - 10:2, 12:25, 17:20, 25:21, 42:2, 52:17, 154:12, 155:8, 156:24,	157:1, 157:16, 157:22, 158:8, 159:6, 159:13, 161:4, 164:17 <b>criticized</b> [1] - 51:2 <b>crux</b> [1] - 155:16 <b>CSR</b> [1] - 225:24 <b>current</b> [2] - 101:14, 184:17 <b>cusp</b> [1] - 224:2 <b>custom</b> [2] - 73:23, 73:24 <b>customer</b> [9] - 117:11, 138:16, 138:19, 139:9, 199:20, 199:21, 200:13, 200:18, 200:24 <b>customer's</b> [5] - 154:11, 157:15, 161:3, 164:16, 219:9 <b>customers</b> [2] - 138:21, 199:23 <b>cut</b> [1] - 11:14 <b>cxLoyalty</b> [1] - 52:15	97:13, 97:21, 97:23, 98:2, 107:23, 109:15, 114:10, 114:16, 114:20, 115:23, 174:10, 175:4, 175:9, 175:17, 175:18, 175:21, 176:17, 176:18, 176:20, 176:24, 177:2, 177:11, 178:17, 179:18, 180:23, 181:3, 181:4, 181:9, 182:9, 182:10, 182:11, 182:19, 182:23, 183:13, 183:14, 183:17, 183:24, 185:12, 186:19, 186:25, 187:4, 187:8, 188:20, 189:4, 189:5, 190:13, 190:14, 191:6, 191:7 <b>Data</b> [1] - 172:14 <b>database</b> [72] - 29:1, 29:9, 35:15, 35:17, 36:18, 40:5, 40:7, 56:13, 62:2, 63:5, 64:8, 66:2, 69:15, 71:19, 73:3, 73:11, 73:15, 73:17, 73:20, 73:22, 74:2, 74:5, 74:17, 75:3, 75:15, 77:12, 77:13, 77:18, 77:20, 77:21, 81:5, 82:6, 82:19, 82:21, 83:9, 83:16, 85:13, 85:22, 86:3, 86:7, 86:10, 86:12, 86:13, 86:15, 86:20, 87:1, 87:10, 87:11, 87:19, 90:9, 90:10, 91:5, 93:13, 93:22, 93:24, 94:24, 174:10, 175:23, 175:25, 187:5, 187:15, 187:17, 187:22, 187:25, 188:4, 188:18, 188:22, 189:7, 190:8, 190:15, 190:21, 200:11 <b>database's</b> [1] - 187:16 <b>databases</b> [15] - 28:23, 62:22, 70:23, 73:8, 73:25, 74:6, 75:8, 75:12, 85:4, 86:23, 89:20, 187:12, 187:20, 188:8, 188:21	<b>datasets</b> [15] - 56:8, 70:4, 70:23, 75:8, 75:19, 175:3, 176:16, 176:19, 176:20, 176:23, 178:16, 182:3, 182:19, 182:22, 183:24 <b>date</b> [3] - 40:19, 173:3, 222:4 <b>daylight</b> [1] - 202:15 <b>days</b> [5] - 173:3, 222:3, 223:7, 223:8, 224:3 <b>DDR</b> [2] - 135:1, 135:7 <b>deal</b> [4] - 91:3, 130:5, 134:13, 145:14 <b>dealing</b> [3] - 16:20, 134:11, 135:23 <b>dealt</b> [1] - 93:22 <b>Deanna</b> [2] - 225:4, 225:24 <b>debate</b> [1] - 8:20 <b>December</b> [2] - 1:23, 225:14 <b>decide</b> [1] - 8:8 <b>decided</b> [1] - 189:19 <b>decides</b> [3] - 58:4, 58:6, 96:20 <b>deciding</b> [2] - 146:23, 192:24 <b>decision</b> [9] - 140:13, 169:21, 171:10, 185:2, 186:14, 222:17, 222:19, 222:25, 223:4 <b>decisions</b> [17] - 4:14, 4:16, 140:14, 148:16, 148:25, 150:10, 150:11, 150:17, 150:24, 151:1, 151:12, 151:13, 151:16, 194:17, 222:13, 224:5, 224:8 <b>deck</b> [2] - 8:18, 21:14 <b>declaration</b> [2] - 41:22, 167:23 <b>declarations</b> [2] - 147:10, 171:6 <b>declare</b> [2] - 86:2, 86:6 <b>decoupled</b> [2] - 131:16, 219:16 <b>dedicated</b> [18] - 73:16, 74:1, 74:11, 74:12, 74:18, 75:4, 76:4, 76:12, 76:13, 77:1, 81:24, 83:17, 88:9, 88:17, 88:22, 89:24,
--	--	---	---	--

DEANNA WARNER, CSR

202 Ashfield Court, Smyrna DE 19977

Phone: (302) 893-1158 E-mail: warnerdeanna@gmail.com

183:19, 196:10 <b>deemed</b> [3] - 165:9, 189:22, 204:24 <b>defendant</b> [34] - 36:24, 37:10, 54:23, 73:5, 120:20, 121:7, 134:8, 149:10, 168:13, 171:17, 174:2, 174:14, 174:25, 175:14, 176:8, 178:23, 179:24, 180:20, 185:7, 185:23, 191:13, 191:24, 191:25, 192:3, 194:24, 195:2, 195:4, 195:14, 198:23, 203:18, 205:19, 205:22, 207:4, 214:2 <b>Defendant</b> [3] - 1:13, 1:18, 179:1 <b>defendant's</b> [26] - 8:16, 54:19, 55:4, 55:5, 94:13, 100:5, 100:15, 141:1, 154:22, 159:17, 162:8, 172:5, 173:18, 176:21, 178:17, 179:5, 179:14, 181:23, 185:15, 186:8, 191:15, 202:16, 214:5, 215:15, 216:15, 218:17 <b>Defendant's</b> [2] - 191:13, 199:13 <b>Defendants</b> [4] - 1:8, 6:18, 27:18, 152:15 <b>defendants</b> [14] - 7:21, 8:25, 24:1, 42:24, 46:20, 152:14, 153:16, 154:9, 157:14, 158:6, 168:21, 171:12, 181:1, 192:25 <b>defendants'</b> [3] - 6:14, 6:25, 7:13 <b>defense</b> [4] - 100:12, 100:14, 172:8, 186:16 <b>define</b> [18] - 57:10, 60:12, 60:20, 60:23, 61:7, 67:5, 70:19, 76:22, 85:21, 95:3, 98:9, 177:4, 177:19, 177:22, 177:24, 178:3, 181:22, 182:5 <b>defined</b> [10] - 30:23,	61:12, 73:21, 82:4, 87:14, 89:13, 95:3, 97:10, 181:17, 190:3 <b>defines</b> [3] - 59:4, 95:10, 156:14 <b>defining</b> [5] - 63:14, 89:11, 90:5, 91:22, 175:19 <b>definitely</b> [1] - 100:23 <b>definition</b> [4] - 9:10, 64:25, 85:24, 178:2 <b>definitions</b> [2] - 63:17, 180:1 <b>degree</b> [5] - 11:20, 26:17, 105:16, 157:17, 160:6 <b>DELAWARE</b> [2] - 1:2, 225:2 <b>Delaware</b> [7] - 5:22, 6:14, 54:9, 54:20, 99:22, 100:6, 225:22 <b>delay</b> [1] - 219:4 <b>delta</b> [1] - 140:22 <b>demonstrate</b> [5] - 13:2, 170:24, 171:12, 185:21, 222:1 <b>demonstrated</b> [1] - 190:25 <b>demonstrates</b> [2] - 47:7, 201:24 <b>denied</b> [2] - 186:9, 191:14 <b>denoted</b> [1] - 49:14 <b>deny</b> [7] - 12:22, 173:23, 174:20, 174:21, 216:15, 218:16, 221:16 <b>depended</b> [1] - 183:17 <b>dependent</b> [15] - 9:4, 9:7, 9:21, 10:8, 10:11, 10:13, 10:18, 11:7, 44:14, 153:25, 154:3, 171:16, 171:20, 172:2, 193:11 <b>depicted</b> [1] - 18:12 <b>derides</b> [1] - 219:3 <b>describe</b> [9] - 50:9, 59:5, 60:4, 61:17, 71:22, 92:23, 126:23, 178:24, 199:8 <b>described</b> [33] - 14:6, 15:5, 28:24, 40:14, 48:12, 49:17, 49:19, 61:19, 62:20, 66:5, 69:4, 69:11, 70:8, 71:15, 72:9, 74:20, 83:11, 102:20,	104:23, 106:7, 133:13, 133:24, 138:6, 138:11, 154:18, 156:5, 165:18, 184:23, 190:8, 190:17, 206:15, 209:4, 210:11 <b>describes</b> [17] - 17:5, 29:1, 34:13, 36:17, 52:13, 52:14, 55:17, 109:1, 111:13, 139:23, 141:10, 161:11, 184:2, 198:11, 200:5, 219:12, 220:7 <b>describing</b> [10] - 36:7, 50:13, 55:24, 63:14, 66:12, 80:1, 88:6, 128:22, 161:17, 219:22 <b>description</b> [18] - 15:19, 26:23, 26:24, 34:13, 43:19, 46:3, 48:16, 52:21, 59:2, 59:7, 60:2, 92:12, 133:25, 160:19, 174:13, 179:5, 183:10, 202:16 <b>descriptions</b> [6] - 56:9, 175:3, 176:24, 178:17, 182:9, 187:10 <b>desktop</b> [8] - 123:1, 137:9, 137:11, 137:19, 139:20, 139:22, 200:8, 220:9 <b>despite</b> [2] - 184:18, 215:15 <b>detail</b> [8] - 62:20, 126:18, 127:24, 159:8, 164:10, 190:17, 199:1, 208:5 <b>determination</b> [4] - 35:11, 35:25, 186:11, 209:14 <b>determine</b> [18] - 12:4, 17:8, 25:23, 27:13, 31:2, 33:10, 34:3, 34:4, 39:12, 39:13, 41:10, 42:16, 45:10, 45:14, 106:22, 159:5, 164:23, 196:19 <b>determined</b> [3] - 17:5, 45:9, 162:14 <b>determines</b> [11] - 25:15, 31:6, 38:17, 38:21, 96:20, 157:5, 157:10, 159:1,	159:3, 162:16, 209:7 <b>determining</b> [20] - 11:23, 28:20, 34:10, 39:3, 39:4, 39:6, 39:11, 39:15, 39:19, 39:24, 41:7, 156:23, 163:20, 197:18, 209:18, 210:3, 210:12, 210:18, 211:3, 211:18 <b>develop</b> [1] - 44:22 <b>developers</b> [1] - 183:18 <b>developing</b> [1] - 44:21 <b>development</b> [1] - 170:7 <b>device</b> [82] - 101:7, 101:9, 104:11, 104:13, 105:5, 105:6, 106:6, 106:7, 106:24, 106:25, 107:8, 107:10, 113:22, 119:11, 119:23, 120:1, 120:14, 122:10, 123:14, 123:15, 123:21, 124:7, 124:12, 124:14, 125:4, 125:5, 125:6, 125:20, 126:3, 126:7, 128:7, 128:10, 128:18, 128:23, 128:24, 130:1, 130:9, 130:12, 130:24, 135:25, 137:10, 141:23, 141:25, 147:21, 197:8, 197:9, 197:10, 197:16, 197:22, 198:4, 198:6, 198:8, 198:14, 202:12, 202:14, 203:21, 205:9, 209:10, 209:13, 209:14, 209:15, 209:16, 212:16, 212:24, 213:1, 213:4, 213:5, 213:9, 213:10, 213:14, 213:16, 213:23, 214:10, 214:12, 217:7, 217:9, 217:11, 219:25, 220:5 <b>device's</b> [4] - 139:13, 197:14, 197:24, 198:1 <b>device-based</b> [1] - 120:1 <b>device-centric</b> [2] -	119:11, 120:14 <b>devices</b> [52] - 15:3, 48:19, 101:6, 104:8, 104:11, 104:21, 105:2, 106:4, 107:11, 107:14, 107:21, 108:1, 108:5, 109:4, 109:5, 110:3, 118:21, 120:5, 121:1, 121:7, 121:19, 121:22, 122:12, 122:14, 122:20, 123:7, 123:11, 123:12, 124:5, 124:9, 124:25, 126:9, 136:7, 136:11, 139:25, 195:14, 196:13, 197:11, 198:15, 199:17, 199:24, 201:9, 202:11, 203:8, 203:13, 205:7, 209:8, 210:25, 211:6, 212:10, 216:14, 220:14 <b>devote</b> [1] - 58:8 <b>devoted</b> [2] - 56:11, 197:6 <b>Dewolfson</b> [1] - 54:15 <b>DI</b> [2] - 92:19, 127:3 <b>diagram</b> [1] - 79:10 <b>diagrams</b> [1] - 83:1 <b>DIANA</b> [1] - 2:3 <b>Diana</b> [1] - 6:4 <b>dictate</b> [2] - 95:9, 181:21 <b>dictionary</b> [7] - 75:23, 78:14, 81:2, 87:7, 87:8, 87:17, 174:10 <b>die</b> [1] - 47:8 <b>Diego</b> [1] - 54:14 <b>differ</b> [2] - 192:17, 194:18 <b>difference</b> [10] - 62:8, 80:6, 82:3, 93:20, 97:1, 97:4, 145:13, 151:18, 168:22, 209:3 <b>differences</b> [5] - 105:16, 154:6, 157:2, 194:6, 212:12 <b>different</b> [93] - 3:3, 10:12, 10:14, 25:11, 27:1, 28:19, 29:20, 34:13, 34:17, 34:20, 34:22, 35:4, 43:11, 44:5, 47:8, 47:24, 48:3, 48:4, 49:14, 56:22, 57:1, 58:9,
--	--	---	--	---

DEANNA WARNER, CSR

202 Ashfield Court, Smyrna DE 19977

Phone: (302) 893-1158 E-mail: warnerdeanna@gmail.com

58:22, 59:20, 59:24, 60:5, 60:19, 61:18, 61:22, 62:17, 69:19, 70:13, 73:19, 74:16, 74:24, 75:12, 75:24, 76:19, 77:16, 79:17, 80:25, 81:14, 81:24, 84:7, 86:22, 86:23, 87:2, 89:14, 89:20, 91:7, 91:25, 93:25, 94:3, 96:25, 97:2, 97:3, 97:8, 97:9, 101:17, 104:8, 108:15, 111:2, 111:14, 115:10, 119:2, 119:16, 121:7, 121:19, 121:21, 122:9, 124:16, 128:2, 130:13, 134:7, 136:18, 140:22, 142:23, 143:12, 148:22, 163:3, 170:2, 171:10, 177:3, 180:19, 180:23, 181:7, 185:14, 195:3, 195:15, 205:7, 209:21, 210:16 <b>differently</b> [7] - 10:22, 48:2, 62:19, 108:15, 117:4, 169:2, 198:17 <b>differs</b> [1] - 24:4 <b>difficult</b> [4] - 45:15, 72:11, 172:16, 217:25 <b>difficulty</b> [1] - 72:19 <b>digital</b> [1] - 194:23 <b>direct</b> [2] - 53:15, 87:23 <b>directed</b> [73] - 8:10, 9:10, 17:19, 18:6, 24:12, 24:25, 25:1, 36:25, 37:20, 55:14, 56:7, 56:18, 57:4, 101:2, 111:7, 112:1, 112:15, 114:12, 114:19, 120:3, 133:15, 134:6, 135:17, 136:3, 154:10, 154:19, 155:2, 155:3, 155:17, 155:20, 156:1, 156:11, 158:12, 158:16, 159:10, 161:2, 162:1, 163:5, 164:12, 164:15, 175:1, 175:13, 175:17, 175:24, 178:18, 179:18, 182:2, 182:15, 187:2, 191:6, 191:12, 195:1, 196:6, 196:7, 196:14, 196:17, 196:20, 196:24, 202:1, 202:4, 202:9, 206:1, 206:5, 207:7, 210:19, 212:1, 214:1, 215:1, 215:10, 216:12, 218:2, 218:5, 221:13 <b>directed-to</b> [1] - 155:17 <b>directly</b> [2] - 170:12, 171:4 <b>directories</b> [1] - 132:5 <b>directory</b> [11] - 131:15, 131:20, 131:21, 132:2, 132:3, 132:8, 132:11, 144:19, 219:13, 219:17 <b>discerning</b> [1] - 14:25 <b>disclose</b> [4] - 50:9, 62:1, 67:1, 204:25 <b>disclosed</b> [2] - 15:4, 147:11 <b>discloses</b> [1] - 168:14 <b>disclosing</b> [1] - 57:11 <b>disclosure</b> [1] - 15:18 <b>discovery</b> [1] - 167:4 <b>discuss</b> [11] - 95:21, 96:6, 151:20, 152:8, 154:2, 176:8, 208:10, 212:5, 214:13, 217:18, 218:20 <b>discussed</b> [4] - 172:13, 204:5, 208:4, 218:23 <b>discusses</b> [1] - 160:6 <b>discussing</b> [1] - 118:16 <b>discussion</b> [5] - 26:8, 26:21, 152:5, 216:5, 224:13 <b>discussions</b> [1] - 134:17 <b>disembodied</b> [2] - 154:20, 196:2 <b>disk</b> [2] - 102:14, 201:1 <b>DISMISS</b> [3] - 1:19, 1:21, 225:19 <b>dismiss</b> [6] - 8:1, 152:16, 162:8, 172:24, 186:16, 191:15	<b>dismissal</b> [1] - 8:7 <b>dismissed</b> [3] - 152:18, 173:21, 192:5 <b>disparaged</b> [6] - 102:19, 103:7, 136:25, 137:16, 137:20, 138:15 <b>disparate</b> [1] - 166:1 <b>display</b> [1] - 143:18 <b>displayed</b> [4] - 117:10, 142:14, 142:22, 143:1 <b>displaying</b> [4] - 109:17, 130:5, 143:12, 145:10 <b>dispositive</b> [1] - 14:20 <b>dispute</b> [4] - 55:22, 175:6, 195:22, 218:14 <b>disputed</b> [1] - 162:6 <b>distinct</b> [2] - 194:16, 214:23 <b>distinctive</b> [1] - 193:20 <b>distinctly</b> [1] - 172:3 <b>distinguishable</b> [2] - 61:11, 67:25 <b>distinguished</b> [1] - 12:10 <b>distinguishes</b> [1] - 204:5 <b>distributed</b> [9] - 123:2, 131:9, 140:4, 194:24, 200:11, 200:17, 200:20, 219:1, 220:10 <b>distribution</b> [2] - 47:21, 207:24 <b>DISTRICT</b> [2] - 1:1, 1:2 <b>district</b> [5] - 51:2, 172:17, 186:11, 186:13, 207:6 <b>District</b> [2] - 98:25, 225:21 <b>do-it-on-a-computer</b> [1] - 20:14 <b>do-it-on-the-internet</b> [1] - 20:24 <b>docket</b> [1] - 150:14 <b>doctor</b> [5] - 101:16, 101:18, 101:21, 119:20, 136:9 <b>doctor's</b> [1] - 103:16 <b>document</b> [26] - 42:23, 42:25, 43:5, 52:11, 101:7, 101:8, 101:11, 101:23, 101:24, 102:1, 106:14, 116:24, 119:18, 120:8, 120:13, 120:24, 121:5, 121:10, 123:2, 123:5, 123:16, 123:17, 135:18, 195:9 <b>Document</b> [1] - 106:23 <b>document's</b> [3] - 117:9, 117:11, 117:12 <b>documents</b> [12] - 101:20, 102:2, 104:4, 107:4, 108:17, 108:18, 115:13, 116:6, 195:7, 219:10, 219:12, 219:19 <b>Domino</b> [1] - 145:21 <b>domino's</b> [2] - 140:15, 205:21 <b>Domino's</b> [1] - 147:9 <b>done</b> [22] - 10:16, 18:17, 18:19, 18:21, 19:7, 19:12, 20:23, 20:25, 24:6, 38:20, 41:19, 41:21, 42:12, 70:12, 108:24, 118:14, 147:4, 147:14, 147:18, 148:6, 151:10, 172:8 <b>dorm</b> [1] - 162:1 <b>doubt</b> [1] - 221:22 <b>down</b> [7] - 21:7, 85:25, 101:24, 106:8, 110:2, 142:19, 169:10 <b>downloaded</b> [1] - 213:23 <b>downside</b> [1] - 201:2 <b>drawbacks</b> [4] - 87:25, 88:7, 199:19, 200:12 <b>drawn</b> [1] - 82:25 <b>drill</b> [1] - 21:7 <b>drive</b> [3] - 102:14, 103:13, 120:12 <b>driven</b> [1] - 139:18 <b>drives</b> [5] - 137:6, 156:12, 169:18, 201:1 <b>Duane</b> [2] - 6:3, 6:9 <b>DUANE</b> [1] - 2:2 <b>during</b> [7] - 12:10, 16:19, 40:16, 53:12, 162:10, 168:9 <b>dynamic</b> [1] - 207:21 <b>dynamically</b> [2] - 79:1, 87:15 <b>dynamism</b> [1] - 81:23	<b>E</b> <b>e-mail</b> [4] - 103:18, 120:12, 200:21, 200:24 <b>e-mailing</b> [1] - 137:6 <b>e-mails</b> [1] - 115:13 <b>early</b> [2] - 51:4, 143:5 <b>ease</b> [4] - 154:6, 192:11, 195:17, 209:17 <b>easier</b> [3] - 20:6, 142:17, 159:10 <b>easily</b> [1] - 199:18 <b>easy</b> [2] - 19:18, 72:21 <b>eccentric</b> [1] - 109:15 <b>economic</b> [1] - 20:3 <b>effect</b> [1] - 83:20 <b>effectuate</b> [1] - 208:14 <b>effectuated</b> [1] - 76:7 <b>efficiencies</b> [2] - 116:8, 151:7 <b>efficiency</b> [1] - 175:23 <b>efficient</b> [8] - 71:25, 87:3, 116:16, 116:20, 117:15, 128:25, 149:7, 149:10 <b>efficiently</b> [2] - 74:7, 87:3 <b>efforts</b> [1] - 151:24 <b>EGNYTE</b> [1] - 1:17 <b>Egnyte</b> [4] - 3:20, 191:22, 191:24, 225:13 <b>eight</b> [5] - 29:4, 91:1, 93:25, 177:12, 178:22 <b>eighth</b> [1] - 178:11 <b>either</b> [9] - 4:12, 11:6, 29:11, 40:4, 41:22, 48:24, 76:7, 144:23, 161:21 <b>electric</b> [2] - 142:23, 144:3 <b>Electric</b> [1] - 201:19 <b>electronic</b> [32] - 4:22, 104:11, 120:5, 124:7, 125:20, 125:23, 135:20, 135:21, 135:24, 135:25, 195:13, 197:8, 197:9, 197:10, 197:15, 197:23, 198:14, 202:10, 202:12, 202:13, 203:7, 204:3, 209:9, 209:14, 209:15,
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<p>209:16, 211:8, 212:16, 214:11, 216:10, 217:4, 217:6</p> <p><b>element</b> <sup>[41]</sup> - 55:21, 58:19, 58:20, 58:25, 59:11, 59:22, 60:10, 66:17, 67:3, 78:6, 80:2, 80:8, 80:12, 80:14, 80:21, 81:10, 81:12, 86:25, 91:24, 95:18, 96:3, 96:4, 96:8, 96:10, 96:11, 96:13, 96:23, 163:17, 163:18, 168:25, 169:1, 177:12, 177:15, 177:17, 180:16, 183:2, 183:4, 183:6</p> <p><b>elements</b> <sup>[26]</sup> - 79:12, 80:3, 80:14, 80:20, 81:11, 81:12, 81:15, 126:25, 156:18, 162:22, 164:10, 164:24, 177:14, 177:19, 178:6, 178:10, 180:15, 180:23, 183:4, 183:6, 202:23, 204:17, 206:18, 209:19, 210:10</p> <p><b>eligibility</b> <sup>[17]</sup> - 13:16, 14:2, 134:24, 151:9, 152:19, 154:4, 167:1, 168:23, 171:5, 171:9, 172:16, 173:21, 204:1, 205:13, 210:1, 210:15, 221:20</p> <p><b>eligible</b> <sup>[15]</sup> - 13:19, 14:7, 17:2, 112:9, 143:13, 164:25, 169:2, 185:25, 186:4, 186:13, 189:17, 189:23, 202:25, 204:22, 222:2</p> <p><b>eliminates</b> <sup>[3]</sup> - 88:17, 88:21, 88:25</p> <p><b>embodiment</b> <sup>[6]</sup> - 131:15, 131:20, 132:7, 219:8, 219:13</p> <p><b>embodiments</b> <sup>[3]</sup> - 65:20, 107:15, 203:21</p> <p><b>Emmanuel</b> <sup>[1]</sup> - 54:25</p> <p><b>EMMANUEL</b> <sup>[1]</sup> - 2:19</p> <p><b>emphasize</b> <sup>[2]</sup> - 92:19, 215:11</p> <p><b>emphasized</b> <sup>[3]</sup> -</p>	<p>162:11, 190:11, 190:20</p> <p><b>emphatically</b> <sup>[1]</sup> - 145:9</p> <p><b>employee</b> <sup>[1]</sup> - 82:14</p> <p><b>EMR</b> <sup>[2]</sup> - 76:18, 85:13</p> <p><b>enables</b> <sup>[1]</sup> - 29:19</p> <p><b>encompasses</b> <sup>[1]</sup> - 28:18</p> <p><b>end</b> <sup>[15]</sup> - 8:1, 31:22, 99:11, 102:12, 112:20, 114:18, 114:19, 115:1, 118:17, 142:11, 144:7, 149:17, 162:2, 224:10, 224:12</p> <p><b>ended</b> <sup>[1]</sup> - 63:18</p> <p><b>ends</b> <sup>[1]</sup> - 183:21</p> <p><b>enduser's</b> <sup>[1]</sup> - 143:11</p> <p><b>Enfish</b> <sup>[32]</sup> - 60:25, 61:11, 61:20, 61:23, 61:25, 62:11, 62:19, 63:24, 64:8, 66:2, 66:7, 66:12, 67:6, 67:14, 67:20, 72:20, 84:25, 85:1, 93:13, 93:20, 93:22, 94:2, 186:4, 186:7, 189:17, 189:21, 190:6, 191:3, 191:5, 218:6</p> <p><b>enforcing</b> <sup>[4]</sup> - 82:17, 82:18, 82:19, 91:4</p> <p><b>engineer</b> <sup>[1]</sup> - 124:3</p> <p><b>enjoying</b> <sup>[1]</sup> - 159:23</p> <p><b>entailed</b> <sup>[1]</sup> - 186:21</p> <p><b>enterprise</b> <sup>[3]</sup> - 73:6, 73:13, 89:19</p> <p><b>Enterprises</b> <sup>[1]</sup> - 225:25</p> <p><b>entertain</b> <sup>[1]</sup> - 149:8</p> <p><b>entertainment</b> <sup>[5]</sup> - 135:2, 206:25, 207:5, 207:18, 207:19</p> <p><b>entire</b> <sup>[8]</sup> - 13:4, 13:14, 14:5, 20:1, 24:7, 24:18, 198:12</p> <p><b>entirety</b> <sup>[1]</sup> - 197:5</p> <p><b>entities</b> <sup>[5]</sup> - 12:25, 22:6, 158:7, 158:10, 159:20</p> <p><b>entity</b> <sup>[1]</sup> - 17:21</p> <p><b>entry</b> <sup>[1]</sup> - 87:8</p> <p><b>environment</b> <sup>[3]</sup> - 110:2, 199:20, 200:3</p> <p><b>environments</b> <sup>[2]</sup> - 113:9, 203:24</p> <p><b>envision</b> <sup>[1]</sup> - 115:3</p>	<p><b>equal</b> <sup>[1]</sup> - 16:23</p> <p><b>equipment</b> <sup>[1]</sup> - 16:11</p> <p><b>equivalent</b> <sup>[1]</sup> - 83:14</p> <p><b>ERM</b> <sup>[1]</sup> - 77:19</p> <p><b>error</b> <sup>[1]</sup> - 200:3</p> <p><b>error-prone</b> <sup>[1]</sup> - 200:3</p> <p><b>errors</b> <sup>[3]</sup> - 102:12, 112:6, 201:23</p> <p><b>especially</b> <sup>[3]</sup> - 11:19, 147:18, 223:10</p> <p><b>ESQ</b> <sup>[10]</sup> - 2:2, 2:3, 2:3, 2:6, 2:7, 2:9, 2:10, 2:13, 2:17, 2:20</p> <p><b>essence</b> <sup>[2]</sup> - 111:7, 125:7</p> <p><b>essential</b> <sup>[3]</sup> - 47:16, 110:9, 156:7</p> <p><b>essentially</b> <sup>[8]</sup> - 9:19, 18:13, 57:19, 69:20, 101:4, 202:7, 210:22, 217:20</p> <p><b>establish</b> <sup>[2]</sup> - 32:10, 43:2</p> <p><b>establishes</b> <sup>[1]</sup> - 32:1</p> <p><b>estate</b> <sup>[2]</sup> - 56:11, 58:9</p> <p><b>et</b> <sup>[11]</sup> - 1:6, 3:9, 63:17, 72:17, 113:14, 128:25, 142:8, 152:13, 225:10</p> <p><b>evaluated</b> <sup>[1]</sup> - 99:4</p> <p><b>EVAN</b> <sup>[1]</sup> - 2:9</p> <p><b>Evan</b> <sup>[2]</sup> - 6:21, 7:20</p> <p><b>evidence</b> <sup>[12]</sup> - 13:2, 13:9, 13:12, 20:17, 78:20, 136:14, 147:4, 168:7, 207:17, 220:20, 220:23, 223:2</p> <p><b>exact</b> <sup>[1]</sup> - 105:4</p> <p><b>exactly</b> <sup>[10]</sup> - 55:24, 60:1, 62:4, 96:9, 103:5, 103:22, 103:23, 110:5, 144:8, 216:2</p> <p><b>exam</b> <sup>[1]</sup> - 16:19</p> <p><b>examined</b> <sup>[1]</sup> - 156:3</p> <p><b>examiner</b> <sup>[5]</sup> - 12:10, 12:15, 16:19, 50:6, 136:16</p> <p><b>examiners</b> <sup>[1]</sup> - 168:10</p> <p><b>example</b> <sup>[54]</sup> - 15:21, 18:8, 18:13, 22:24, 34:6, 34:11, 34:14, 55:17, 56:6, 57:9, 57:23, 58:22, 65:13, 67:3, 77:13, 77:14, 78:16, 79:2, 79:8,</p>	<p>79:14, 80:10, 80:11, 81:9, 82:13, 90:17, 92:1, 92:6, 95:11, 105:17, 114:5, 114:10, 120:21, 121:14, 122:4, 125:18, 127:5, 130:23, 134:3, 141:14, 158:18, 160:15, 160:17, 163:9, 166:13, 167:1, 167:10, 177:10, 178:22, 180:12, 182:15, 201:19, 217:4, 219:2, 219:13</p> <p><b>examples</b> <sup>[6]</sup> - 18:16, 18:24, 34:17, 63:16, 65:21, 95:14</p> <p><b>excellent</b> <sup>[1]</sup> - 151:22</p> <p><b>except</b> <sup>[2]</sup> - 133:13, 213:13</p> <p><b>exceptions</b> <sup>[1]</sup> - 156:12</p> <p><b>excerpt</b> <sup>[4]</sup> - 95:12, 95:17, 96:1, 96:15</p> <p><b>exchange</b> <sup>[1]</sup> - 158:8</p> <p><b>excluded</b> <sup>[1]</sup> - 155:21</p> <p><b>exclusively</b> <sup>[1]</sup> - 165:17</p> <p><b>excuse</b> <sup>[3]</sup> - 9:17, 13:17, 50:5</p> <p><b>executable</b> <sup>[5]</sup> - 121:21, 122:9, 122:13, 122:19, 125:20</p> <p><b>executing</b> <sup>[3]</sup> - 123:10, 124:5, 126:3</p> <p><b>exemplary</b> <sup>[2]</sup> - 105:11, 203:19</p> <p><b>exhibit</b> <sup>[1]</sup> - 43:1</p> <p><b>exist</b> <sup>[7]</sup> - 12:8, 27:8, 38:3, 38:17, 40:1, 139:8, 166:17</p> <p><b>existed</b> <sup>[3]</sup> - 44:9, 71:22, 102:1</p> <p><b>existence</b> <sup>[2]</sup> - 102:2, 169:7</p> <p><b>existing</b> <sup>[1]</sup> - 69:15</p> <p><b>exists</b> <sup>[1]</sup> - 211:3</p> <p><b>expanding</b> <sup>[1]</sup> - 69:16</p> <p><b>expect</b> <sup>[1]</sup> - 4:10</p> <p><b>experience</b> <sup>[4]</sup> - 143:11, 151:13, 159:24, 166:4</p> <p><b>experienced</b> <sup>[1]</sup> - 219:1</p> <p><b>expert</b> <sup>[17]</sup> - 33:15, 36:20, 41:20, 41:22, 41:24, 52:7, 52:10,</p>	<p>52:11, 52:17, 52:18, 134:17, 145:22, 146:2, 147:10, 167:4, 167:23, 171:7</p> <p><b>expert's</b> <sup>[1]</sup> - 41:23</p> <p><b>experts</b> <sup>[1]</sup> - 145:17</p> <p><b>explain</b> <sup>[19]</sup> - 13:13, 18:10, 21:4, 41:24, 42:3, 42:7, 51:6, 72:2, 81:25, 85:3, 126:20, 127:23, 128:20, 129:4, 158:23, 165:15, 171:7, 173:23, 216:5</p> <p><b>explained</b> <sup>[13]</sup> - 108:10, 110:8, 168:24, 169:17, 185:8, 188:2, 188:10, 188:21, 189:25, 196:21, 199:14, 208:3, 220:2</p> <p><b>explaining</b> <sup>[8]</sup> - 62:8, 62:23, 161:11, 167:20, 167:24, 198:25, 201:7, 219:6</p> <p><b>explains</b> <sup>[8]</sup> - 21:22, 83:13, 157:23, 182:16, 183:12, 197:7, 197:13, 197:21</p> <p><b>explanation</b> <sup>[8]</sup> - 16:9, 48:23, 94:21, 107:6, 117:21, 117:22, 164:4, 166:19</p> <p><b>explanations</b> <sup>[1]</sup> - 84:5</p> <p><b>expounds</b> <sup>[1]</sup> - 199:25</p> <p><b>expressly</b> <sup>[1]</sup> - 172:7</p> <p><b>extend</b> <sup>[2]</sup> - 86:10, 86:15</p> <p><b>extended</b> <sup>[2]</sup> - 171:1, 223:8</p> <p><b>extends</b> <sup>[1]</sup> - 85:14</p> <p><b>extensibility</b> <sup>[1]</sup> - 85:21</p> <p><b>extent</b> <sup>[4]</sup> - 12:14, 105:21, 169:6, 221:24</p> <p><b>external</b> <sup>[2]</sup> - 52:23, 201:1</p> <p><b>extra</b> <sup>[3]</sup> - 7:13, 23:17, 140:8</p> <p><b>Extraction</b> <sup>[2]</sup> - 142:24, 175:7</p> <p><b>extraction</b> <sup>[1]</sup> - 144:3</p> <p><b>extrinsic</b> <sup>[1]</sup> - 52:23</p>
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<b>F</b>				
<p><b>face</b> [1] - 180:8</p> <p><b>facially</b> [2] - 153:18, 180:22</p> <p><b>facing</b> [2] - 46:4, 134:14</p> <p><b>fact</b> [36] - 12:9, 12:18, 38:2, 51:21, 51:24, 51:25, 84:6, 98:11, 98:13, 102:8, 104:10, 105:13, 108:22, 111:23, 111:25, 124:24, 126:9, 131:3, 135:13, 145:20, 146:22, 146:25, 147:13, 147:14, 154:16, 172:21, 180:4, 181:16, 189:12, 207:3, 209:5, 210:14, 212:21, 218:15, 221:6</p> <p><b>facts</b> [2] - 151:16, 167:19</p> <p><b>factual</b> [1] - 218:14</p> <p><b>fail</b> [1] - 66:25</p> <p><b>failed</b> [2] - 7:23, 166:11</p> <p><b>failing</b> [1] - 176:6</p> <p><b>fair</b> [5] - 41:2, 41:12, 41:13, 133:6, 138:3</p> <p><b>fairly</b> [2] - 135:9, 211:10</p> <p><b>fall</b> [3] - 9:25, 111:19, 216:20</p> <p><b>falls</b> [1] - 18:22</p> <p><b>familiar</b> [2] - 3:25, 90:6</p> <p><b>far</b> [4] - 84:18, 109:20, 147:10, 219:21</p> <p><b>Fargo</b> [1] - 175:8</p> <p><b>Farnan</b> [2] - 6:17, 99:25</p> <p><b>FARNAN</b> [2] - 2:6, 6:16</p> <p><b>fast</b> [1] - 122:23</p> <p><b>faster</b> [4] - 20:5, 117:14, 130:12, 190:23</p> <p><b>fault</b> [2] - 146:25, 147:3</p> <p><b>favor</b> [1] - 168:7</p> <p><b>feature</b> [2] - 188:5, 188:11</p> <p><b>features</b> [4] - 24:15, 119:6, 190:4, 210:3</p> <p><b>federal</b> [9] - 13:25,</p>	<p>141:12, 149:7, 165:4, 168:23, 186:10, 192:1, 201:13, 205:13</p> <p><b>Federal</b> [35] - 11:9, 16:8, 17:25, 47:4, 48:3, 51:1, 72:20, 135:1, 140:14, 142:3, 151:11, 154:19, 155:22, 156:8, 168:24, 169:4, 172:12, 175:6, 176:3, 186:1, 186:5, 187:1, 187:10, 189:21, 193:17, 196:1, 196:20, 201:20, 204:23, 205:22, 205:25, 206:10, 207:1, 207:10, 218:6</p> <p><b>felt</b> [1] - 92:23</p> <p><b>few</b> [14] - 7:5, 42:10, 62:11, 92:9, 97:18, 150:9, 156:17, 157:2, 163:7, 170:5, 172:1, 192:8, 194:6, 214:3</p> <p><b>field</b> [13] - 13:4, 13:19, 13:20, 14:6, 20:1, 42:8, 103:10, 169:24, 170:14, 170:21, 204:2, 220:22</p> <p><b>fields</b> [1] - 29:2</p> <p><b>fifth</b> [2] - 177:23, 194:14</p> <p><b>figure</b> [13] - 36:5, 36:8, 64:7, 90:25, 92:12, 92:23, 101:1, 104:23, 106:2, 107:3, 107:20, 119:15, 119:16</p> <p><b>Figure</b> [8] - 48:15, 79:10, 104:6, 104:7, 104:20, 105:3, 121:18, 125:16</p> <p><b>figures</b> [5] - 79:11, 82:16, 106:14, 106:15, 107:5</p> <p><b>figuring</b> [1] - 28:10</p> <p><b>file</b> [135] - 101:4, 103:17, 103:20, 103:21, 106:14, 109:4, 111:2, 111:17, 113:21, 113:22, 116:14, 119:5, 119:23, 122:1, 122:24, 123:2, 123:17, 125:4, 125:21,</p>	<p>125:24, 125:25, 126:1, 126:5, 128:5, 128:7, 128:19, 129:18, 129:23, 130:2, 130:3, 130:10, 130:11, 130:16, 130:19, 130:23, 131:3, 131:10, 131:11, 131:19, 132:5, 132:9, 132:12, 136:12, 136:13, 136:15, 138:8, 138:21, 140:5, 140:20, 140:24, 141:22, 142:1, 142:17, 144:8, 145:5, 167:7, 195:8, 195:19, 195:23, 196:9, 196:12, 197:4, 197:15, 197:18, 197:20, 197:23, 197:25, 198:4, 198:5, 198:8, 198:9, 198:19, 199:1, 199:4, 199:22, 200:2, 200:11, 200:17, 200:20, 200:25, 201:1, 202:5, 202:12, 202:13, 205:8, 205:9, 209:9, 209:12, 211:8, 211:12, 212:16, 212:17, 212:20, 212:22, 212:25, 213:4, 213:5, 213:7, 213:8, 213:15, 213:19, 213:22, 214:7, 214:10, 214:11, 214:15, 214:18, 215:5, 215:23, 216:14, 217:2, 217:4, 217:6, 217:8, 217:10, 217:16, 218:22, 219:1, 219:4, 219:5, 219:23, 219:25, 220:4, 220:8, 220:10, 221:1, 221:9, 223:1</p> <p><b>File</b> [1] - 215:7</p> <p><b>filed</b> [5] - 51:23, 134:22, 152:16, 173:10, 191:25</p> <p><b>FILED</b> [1] - 225:20</p> <p><b>files</b> [44] - 103:15, 104:1, 110:17, 110:20, 111:12, 114:9, 118:20, 119:9, 129:16,</p>	<p>131:16, 132:2, 135:20, 135:21, 135:24, 136:19, 136:22, 137:12, 138:17, 138:22, 139:19, 139:25, 140:22, 141:16, 147:17, 194:23, 195:7, 195:10, 195:13, 198:14, 198:17, 199:23, 200:14, 201:4, 201:8, 202:10, 203:8, 203:16, 204:3, 204:9, 212:9, 212:11, 216:10, 219:17, 220:14</p> <p><b>filing</b> [1] - 222:9</p> <p><b>fill</b> [2] - 33:13, 57:16</p> <p><b>filled</b> [1] - 167:5</p> <p><b>fills</b> [1] - 38:1</p> <p><b>filter</b> [1] - 155:18</p> <p><b>finally</b> [4] - 185:19, 205:17, 216:17, 223:20</p> <p><b>FINGER</b> [1] - 2:6</p> <p><b>Finger</b> [2] - 6:18, 99:24</p> <p><b>finish</b> [2] - 46:15, 148:25</p> <p><b>finished</b> [1] - 148:12</p> <p><b>finishes</b> [1] - 46:9</p> <p><b>firm</b> [3] - 6:3, 100:2, 100:9</p> <p><b>First</b> [1] - 13:13</p> <p><b>first</b> [69] - 3:8, 4:2, 5:17, 5:20, 7:1, 8:8, 16:2, 25:15, 36:7, 49:13, 49:14, 51:15, 53:19, 54:8, 69:22, 77:24, 84:14, 87:11, 99:20, 100:22, 100:25, 114:24, 115:16, 115:21, 121:23, 122:10, 125:21, 126:7, 127:7, 129:24, 130:24, 136:6, 141:21, 150:8, 152:10, 152:12, 156:18, 156:23, 159:6, 162:11, 172:22, 176:13, 177:12, 185:4, 192:9, 194:20, 197:1, 197:7, 197:8, 197:15, 197:16, 197:18, 197:21, 198:1, 198:4, 199:5, 205:19, 209:12,</p>	<p>209:13, 209:15, 211:14, 212:17, 212:18, 212:24, 213:9, 214:5, 217:7, 222:3, 222:24</p> <p><b>Fish</b> [1] - 54:11</p> <p><b>FISH</b> [1] - 2:13</p> <p><b>fish's</b> [1] - 54:14</p> <p><b>Fisher</b> [2] - 100:8, 100:10</p> <p><b>fist</b> [1] - 198:6</p> <p><b>fits</b> [1] - 154:23</p> <p><b>five</b> [17] - 7:3, 15:14, 40:25, 53:22, 53:24, 54:1, 55:9, 71:4, 71:5, 91:25, 94:14, 99:9, 99:13, 118:4, 141:1, 153:7, 194:11</p> <p><b>five-minute</b> [5] - 53:22, 53:24, 54:1, 99:9, 99:13</p> <p><b>flag</b> [4] - 115:7, 116:25, 117:2, 117:6</p> <p><b>flash</b> [1] - 201:1</p> <p><b>flexibility</b> [4] - 35:1, 85:20, 183:20, 190:22</p> <p><b>flexible</b> [3] - 43:18, 44:4, 74:4</p> <p><b>flexibly</b> [1] - 44:4</p> <p><b>flipped</b> [1] - 105:3</p> <p><b>Florida</b> [3] - 143:10, 145:8, 201:18</p> <p><b>focus</b> [28] - 21:13, 22:22, 24:13, 26:20, 46:12, 53:11, 155:20, 157:14, 157:21, 163:15, 163:22, 176:9, 185:5, 185:11, 187:6, 187:13, 188:6, 189:3, 189:8, 190:9, 190:25, 191:1, 197:2, 198:12, 198:25, 210:6, 211:4, 216:7</p> <p><b>focused</b> [14] - 5:7, 11:18, 45:6, 45:9, 49:10, 61:1, 102:23, 135:23, 158:2, 158:11, 165:17, 203:6, 206:6, 216:8</p> <p><b>folks</b> [4] - 5:10, 20:10, 53:22, 148:9</p> <p><b>folks'</b> [1] - 4:23</p> <p><b>follow</b> [2] - 143:15, 152:7</p> <p><b>following</b> [6] - 11:5, 54:3, 83:14, 83:21, 99:15, 149:21</p>

DEANNA WARNER, CSR

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<p><b>highlighted</b> [2] - 84:16, 121:22</p> <p><b>highly</b> [1] - 198:24</p> <p><b>hint</b> [2] - 146:20, 146:22</p> <p><b>hired</b> [1] - 77:25</p> <p><b>hiring</b> [1] - 82:14</p> <p><b>historical</b> [1] - 187:3</p> <p><b>history</b> [6] - 140:20, 162:5, 162:7, 168:8, 168:18, 169:14</p> <p><b>hit</b> [1] - 224:12</p> <p><b>hold</b> [1] - 179:21</p> <p><b>holding</b> [1] - 151:7</p> <p><b>holiday</b> [1] - 224:2</p> <p><b>holidays</b> [2] - 223:5, 223:11</p> <p><b>honestly</b> [1] - 134:21</p> <p><b>Honor</b> [80] - 5:25, 6:7, 6:17, 7:6, 7:9, 7:20, 8:9, 10:25, 11:4, 11:9, 13:14, 16:7, 18:3, 18:9, 18:15, 18:20, 19:24, 28:17, 31:16, 41:14, 42:24, 46:19, 47:1, 47:10, 48:19, 49:12, 51:12, 52:6, 52:16, 53:14, 53:15, 54:11, 54:21, 55:8, 58:8, 68:2, 99:18, 99:23, 100:7, 100:16, 100:18, 101:10, 103:6, 103:23, 105:13, 105:20, 108:22, 109:7, 110:7, 111:23, 112:24, 113:6, 113:7, 114:14, 116:20, 117:20, 117:25, 118:8, 118:11, 119:7, 123:23, 131:4, 134:22, 137:4, 138:3, 139:4, 141:3, 142:9, 142:18, 143:10, 144:21, 145:20, 147:2, 147:6, 147:13, 147:24, 222:22, 222:24, 223:3, 223:15</p> <p><b>Honor's</b> [2] - 50:20, 222:25</p> <p><b>Honorable</b> [1] - 1:22</p> <p><b>hope</b> [2] - 148:15, 151:4</p> <p><b>hospitality</b> [1] - 206:2</p> <p><b>hospitality-menu-related</b> [1] - 206:2</p> <p><b>host</b> [3] - 123:3,</p>	<p>137:20, 138:8</p> <p><b>hours</b> [3] - 99:11, 150:21, 222:12</p> <p><b>huge</b> [1] - 85:1</p> <p><b>human</b> [15] - 18:8, 18:14, 18:25, 19:4, 20:16, 21:5, 57:16, 77:13, 102:13, 103:4, 137:15, 137:23, 154:21, 196:3, 201:22</p> <p><b>humans</b> [7] - 18:16, 18:21, 19:7, 19:11, 20:12, 20:25, 21:1</p> <p><b>hundred</b> [1] - 49:7</p>	<p>204:19, 204:23, 206:5, 206:13, 206:19, 207:8, 207:13, 208:15, 211:11, 214:2, 214:6, 214:23, 215:16, 216:13, 220:17, 220:22</p> <p><b>ideal</b> [1] - 71:17</p> <p><b>ideas</b> [1] - 52:18</p> <p><b>identical</b> [2] - 105:14, 105:15</p> <p><b>identification</b> [5] - 17:25, 18:1, 61:5, 67:18, 67:19</p> <p><b>identified</b> [17] - 10:1, 18:6, 18:15, 19:15, 47:5, 47:10, 48:13, 48:19, 49:19, 50:16, 50:17, 51:24, 52:15, 52:25, 183:3, 209:3</p> <p><b>identifier</b> [1] - 39:14</p> <p><b>identifiers</b> [1] - 80:25</p> <p><b>identifies</b> [1] - 80:13</p> <p><b>identify</b> [9] - 5:18, 17:22, 54:7, 71:2, 99:21, 177:4, 177:14, 181:22, 182:4</p> <p><b>identifying</b> [3] - 40:20, 156:10, 206:20</p> <p><b>identity</b> [17] - 12:6, 17:7, 17:11, 31:4, 31:8, 32:12, 35:8, 35:11, 35:12, 35:14, 36:2, 36:5, 36:19, 38:22, 157:12, 159:5, 162:17</p> <p><b>IDs</b> [2] - 83:3, 83:4</p> <p><b>ignores</b> [2] - 24:15, 181:24</p> <p><b>II</b> [1] - 16:22</p> <p><b>illustrate</b> [1] - 101:10</p> <p><b>illustration</b> [1] - 97:14</p> <p><b>image</b> [1] - 137:10</p> <p><b>imagine</b> [1] - 15:12</p> <p><b>impact</b> [1] - 30:24</p> <p><b>impacts</b> [1] - 214:16</p> <p><b>implement</b> [7] - 27:14, 29:7, 90:19, 94:22, 183:14, 206:13, 207:13</p> <p><b>implementation</b> [2] - 58:1, 159:11</p> <p><b>implemented</b> [5] - 38:15, 79:9, 120:19, 139:9, 175:20</p> <p><b>implementing</b> [2] - 94:23, 203:19</p> <p><b>implicate</b> [1] - 45:16</p>	<p><b>implies</b> [2] - 95:19, 96:4</p> <p><b>importance</b> [2] - 161:16, 215:22</p> <p><b>important</b> [17] - 14:1, 26:6, 40:21, 42:22, 47:16, 49:18, 50:18, 52:9, 80:22, 92:12, 96:12, 118:1, 123:9, 141:8, 146:21, 156:7, 185:18</p> <p><b>importantly</b> [3] - 44:2, 176:25, 207:16</p> <p><b>improve</b> [5] - 82:6, 117:13, 175:22, 187:14, 216:3</p> <p><b>improved</b> [3] - 93:23, 190:21, 196:9</p> <p><b>improvement</b> [9] - 134:25, 175:25, 188:1, 190:10, 191:2, 201:9, 201:16, 208:7, 208:11</p> <p><b>improvements</b> [5] - 180:2, 189:24, 190:2, 210:4, 218:8</p> <p><b>improving</b> [1] - 187:16</p> <p><b>IN</b> [2] - 1:1, 1:2</p> <p><b>inability</b> [2] - 26:24, 43:9</p> <p><b>inadequate</b> [1] - 139:15</p> <p><b>Inc</b> [24] - 3:14, 3:20, 3:21, 155:24, 169:5, 172:14, 173:16, 176:3, 186:1, 191:22, 191:24, 193:7, 201:18, 201:19, 205:21, 206:25, 207:1, 225:11, 225:12, 225:13</p> <p><b>INC</b> [4] - 1:9, 1:12, 1:14, 1:17</p> <p><b>include</b> [25] - 29:6, 29:8, 30:3, 31:18, 38:13, 61:16, 63:16, 80:3, 156:17, 157:8, 160:7, 165:5, 165:16, 167:13, 171:13, 191:7, 200:1, 200:8, 203:20, 206:11, 214:8, 215:1, 216:25, 218:2, 219:9</p> <p><b>included</b> [4] - 61:4, 61:8, 162:11</p> <p><b>includes</b> [12] - 31:25, 32:6, 44:1, 80:5,</p>	<p>133:16, 156:23, 157:4, 163:19, 182:3, 183:2, 189:5, 196:9</p> <p><b>including</b> [9] - 52:14, 61:6, 72:12, 152:3, 170:5, 185:13, 200:12, 210:20, 215:13</p> <p><b>inclusion</b> [3] - 168:2, 208:6, 211:19</p> <p><b>incorporate</b> [2] - 69:17</p> <p><b>incorporated</b> [1] - 29:13</p> <p><b>incorporates</b> [1] - 152:5</p> <p><b>incorrect</b> [4] - 24:8, 24:11, 24:17</p> <p><b>increased</b> [1] - 190:22</p> <p><b>incredible</b> [1] - 61:21</p> <p><b>incredibly</b> [1] - 42:11</p> <p><b>Indeed</b> [1] - 164:6</p> <p><b>indeed</b> [6] - 167:6, 175:5, 187:17, 189:12, 194:25, 209:23</p> <p><b>independent</b> [15] - 9:15, 9:24, 11:6, 15:10, 70:5, 70:6, 70:9, 70:14, 72:15, 72:16, 92:7, 153:11, 182:19, 182:23, 183:24</p> <p><b>index</b> [5] - 36:21, 70:3, 182:8, 183:23, 189:3</p> <p><b>indexing</b> [9] - 56:7, 56:19, 61:9, 175:2, 176:23, 178:15, 182:18, 182:21, 186:19</p> <p><b>indicate</b> [7] - 40:6, 40:8, 96:17, 97:4, 161:1, 189:14, 194:8</p> <p><b>indicates</b> [2] - 43:8, 213:21</p> <p><b>indication</b> [6] - 40:10, 61:9, 213:15, 213:18, 213:21, 215:8</p> <p><b>indicator</b> [4] - 117:8, 130:4, 130:6, 151:3</p> <p><b>indices</b> [1] - 63:17</p> <p><b>indirect</b> [1] - 191:16</p> <p><b>individually</b> [2] - 24:15, 196:17</p> <p><b>industry</b> [1] - 165:13</p> <p><b>ineligibility</b> [1] - 13:17</p> <p><b>ineligible</b> [8] - 13:21, 51:9, 108:9, 144:4,</p>
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192:6, 204:25, 212:2, 221:13 <b>infer</b> [1] - 42:24 <b>infobionic</b> [1] - 176:3 <b>information</b> [103] - 28:24, 28:25, 29:9, 29:10, 29:11, 32:4, 32:5, 32:6, 32:8, 32:9, 34:3, 34:5, 35:15, 35:16, 35:17, 35:18, 36:15, 36:18, 36:22, 38:16, 39:22, 39:24, 40:3, 40:12, 40:15, 40:19, 40:20, 40:22, 43:19, 44:15, 55:23, 61:6, 69:24, 75:15, 75:17, 75:19, 77:10, 79:5, 81:4, 82:22, 86:11, 86:21, 86:25, 87:2, 87:18, 89:11, 90:14, 97:22, 101:13, 101:20, 106:3, 109:14, 110:1, 114:23, 115:6, 118:2, 126:6, 132:4, 132:11, 136:14, 142:13, 142:20, 142:24, 143:16, 144:2, 144:5, 144:6, 144:7, 144:10, 144:24, 145:3, 145:24, 145:25, 147:22, 148:5, 153:20, 156:22, 157:25, 158:23, 163:11, 166:2, 169:20, 177:6, 179:22, 181:23, 182:5, 183:12, 184:14, 186:23, 187:3, 187:8, 187:15, 187:19, 188:14, 188:19, 189:2, 191:9, 195:11, 206:2, 221:5, 223:6 <b>informing</b> [1] - 130:22 <b>informs</b> [2] - 130:14, 130:15 <b>infringement</b> [3] - 65:6, 153:14, 191:17 <b>infringes</b> [1] - 174:2 <b>infused</b> [1] - 16:11 <b>ingenuity</b> [2] - 154:21, 196:3 <b>inherent</b> [1] - 59:20 <b>initials</b> [1] - 3:12 <b>innovation</b> [2] - 47:15, 156:6 <b>input</b> [3] - 40:16,	86:17, 102:13 <b>inputs</b> [2] - 88:11, 93:15 <b>inputted</b> [1] - 187:8 <b>inputting</b> [3] - 187:3, 188:20, 189:2 <b>inquiries</b> [1] - 205:14 <b>inquiry</b> [9] - 14:9, 19:13, 38:8, 68:13, 155:17, 155:22, 172:20, 182:15, 216:6 <b>InQuisient</b> [9] - 2:15, 3:14, 4:3, 54:5, 54:12, 73:4, 150:6, 173:16, 225:11 <b>INQUISIENT</b> [1] - 1:9 <b>InQuisient's</b> [1] - 54:16 <b>inscrutable</b> [1] - 69:6 <b>instance</b> [5] - 85:24, 87:12, 90:23, 91:22, 94:1 <b>instances</b> [1] - 18:19 <b>instantiation</b> [1] - 77:11 <b>instead</b> [28] - 25:1, 32:16, 38:13, 48:18, 57:13, 60:11, 60:14, 82:7, 87:10, 89:25, 90:3, 100:20, 103:24, 120:1, 155:2, 158:1, 161:15, 162:3, 164:14, 171:24, 175:24, 179:15, 180:10, 196:7, 199:2, 206:23, 217:19, 223:7 <b>instruct</b> [1] - 206:12 <b>instructed</b> [1] - 176:4 <b>instructions</b> [3] - 99:12, 181:18, 182:8 <b>instrument</b> [1] - 45:5 <b>integrated</b> [1] - 139:10 <b>Integration</b> [5] - 27:9, 35:24, 44:7, 157:9, 167:13 <b>integration</b> [10] - 12:2, 29:14, 29:18, 31:21, 32:1, 32:18, 33:17, 38:20, 44:1, 72:1 <b>intend</b> [1] - 150:12 <b>intended</b> [2] - 108:24, 179:1 <b>intends</b> [1] - 140:2 <b>interact</b> [1] - 119:17 <b>interacts</b> [1] - 75:9 <b>interconnect</b> [1] - 89:14	<b>interest</b> [1] - 59:5 <b>interested</b> [1] - 149:15 <b>interface</b> [4] - 34:25, 87:16, 88:10, 183:15 <b>interfaces</b> [6] - 87:13, 123:13, 123:14, 124:4, 139:9, 219:9 <b>interim</b> [1] - 173:14 <b>intermittent</b> [2] - 122:24, 129:11 <b>INTERNATIONAL</b> [2] - 1:6, 225:10 <b>international</b> [3] - 3:9, 6:19, 152:13 <b>International</b> [1] - 152:14 <b>internet</b> [7] - 19:22, 20:24, 49:5, 137:22, 155:23, 156:2, 161:12 <b>internet-based</b> [1] - 161:12 <b>interpret</b> [1] - 70:15 <b>interrelate</b> [7] - 56:24, 68:17, 75:1, 81:9, 89:23, 179:11, 183:23 <b>interrelated</b> [3] - 70:4, 175:18, 185:15 <b>interrelates</b> [1] - 62:15 <b>interrelating</b> [2] - 182:18, 182:22 <b>interrelationship</b> [4] - 61:17, 81:14, 81:21, 83:23 <b>interrelationships</b> [1] - 180:1 <b>interrupted</b> [1] - 131:2 <b>intersected</b> [1] - 61:7 <b>interviewing</b> [1] - 77:23 <b>intricacies</b> [1] - 28:9 <b>intricate</b> [1] - 179:10 <b>introduce</b> [1] - 112:6 <b>introductory</b> [1] - 150:9 <b>invalid</b> [2] - 7:25, 108:9 <b>invalidate</b> [2] - 24:2, 24:11 <b>invent</b> [1] - 22:18 <b>invented</b> [3] - 35:2, 113:15, 187:5 <b>invention</b> [32] - 26:10, 27:22, 43:8, 47:14, 48:4, 50:19, 89:5, 105:18, 109:2, 114:3, 116:9, 132:20, 133:4, 134:23, 147:15,	160:5, 160:7, 166:17, 183:13, 184:1, 187:13, 199:8, 199:12, 203:20, 203:22, 208:10, 210:21, 210:24, 211:1, 215:18, 217:18 <b>inventive</b> [32] - 16:4, 16:6, 16:12, 24:15, 47:22, 48:4, 48:9, 48:11, 48:12, 53:1, 110:11, 110:12, 119:3, 165:6, 165:16, 166:9, 168:20, 170:25, 171:13, 188:17, 188:24, 202:24, 203:17, 204:18, 206:11, 207:11, 208:2, 208:18, 211:24, 218:15, 221:3 <b>inventiveness</b> [2] - 16:23, 43:2 <b>inventors</b> [5] - 46:2, 119:24, 120:16, 123:6, 129:20 <b>involve</b> [6] - 111:13, 135:13, 158:9, 165:10, 178:14, 210:13 <b>involved</b> [2] - 47:21, 121:13 <b>involves</b> [3] - 103:3, 139:24, 208:12 <b>involving</b> [1] - 137:1 <b>iPad</b> [1] - 22:13 <b>Ironically</b> [1] - 207:2 <b>issue</b> [55] - 8:11, 12:13, 15:22, 30:21, 42:1, 46:1, 47:20, 51:21, 53:1, 56:14, 61:2, 99:6, 110:9, 110:15, 116:5, 146:22, 150:14, 154:3, 155:16, 156:4, 163:4, 165:4, 168:4, 168:14, 169:10, 172:3, 172:15, 182:1, 184:8, 185:13, 185:20, 186:12, 186:18, 187:21, 188:15, 189:19, 189:22, 190:6, 191:12, 191:19, 192:10, 193:5, 194:19, 195:20, 196:25, 198:18,	202:17, 205:20, 206:19, 207:7, 208:12, 220:17, 221:6, 222:14, 224:6 <b>issued</b> [2] - 153:5, 186:14 <b>issues</b> [15] - 11:15, 43:4, 51:25, 52:1, 138:4, 146:8, 148:21, 151:21, 171:9, 192:8, 210:7, 220:1, 221:20, 223:21 <b>issuing</b> [2] - 44:19, 150:17 <b>item</b> [2] - 98:6, 187:9 <b>items</b> [1] - 98:8 <b>itself</b> [46] - 31:9, 70:22, 76:24, 77:21, 79:20, 82:7, 82:18, 83:10, 85:23, 87:11, 87:19, 90:13, 106:1, 107:8, 108:23, 109:1, 109:16, 112:9, 113:22, 127:14, 128:6, 130:22, 136:23, 140:24, 143:13, 143:18, 145:2, 145:11, 147:8, 157:22, 162:3, 176:14, 181:9, 185:9, 189:11, 191:2, 203:4, 203:15, 211:11, 212:20, 212:22, 214:16, 214:23, 217:4, 219:24, 220:4 <b>IV</b> [2] - 115:11, 115:12 <b>Iyer</b> [1] - 100:3
<b>J</b>				
<b>January</b> [1] - 225:23 <b>Janvi</b> [1] - 100:2 <b>Jason</b> [1] - 54:13 <b>JASON</b> [1] - 2:13 <b>Jay</b> [2] - 100:2, 118:12 <b>Jennifer</b> [1] - 54:22 <b>JENNIFER</b> [1] - 2:17 <b>Jersey</b> [1] - 98:25 <b>job</b> [4] - 62:23, 89:3, 90:2, 161:19 <b>jobs</b> [1] - 160:25 <b>Jodie</b> [1] - 54:24 <b>JODIE</b> [1] - 2:20 <b>joined</b> [4] - 6:4, 6:19, 54:13, 100:8 <b>judge</b> [3] - 48:8, 99:1,				

DEANNA WARNER, CSR

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<p>146:18  <b>Judge</b> [8] - 29:24, 33:7, 36:25, 45:7, 46:12, 46:15, 98:24, 127:21  <b>judges</b> [1] - 48:7  <b>judgment</b> [4] - 186:17, 189:21, 192:1, 192:23  <b>judicial</b> [1] - 156:12  <b>jump</b> [1] - 118:14  <b>jurisprudence</b> [1] - 47:5  <b>juxtapose</b> [1] - 48:14</p>	<p>73:18, 75:12, 80:7, 86:18, 120:7, 191:9  <b>Kingdom</b> [1] - 170:9  <b>kitchen</b> [2] - 108:3, 108:7  <b>knock</b> [1] - 169:10  <b>knowing</b> [4] - 12:13, 24:24, 35:21, 51:4  <b>knowledge</b> [1] - 170:13  <b>known</b> [4] - 78:20, 165:13, 168:12, 187:12  <b>knows</b> [4] - 8:9, 8:12, 123:22, 143:19</p>	<p><b>Latency</b> [1] - 129:12  <b>latter</b> [3] - 133:12, 158:16, 163:18  <b>law</b> [9] - 6:3, 45:3, 45:11, 100:9, 112:21, 150:25, 151:21, 168:24, 169:18  <b>laws</b> [1] - 171:5  <b>lay</b> [1] - 142:16  <b>layer</b> [5] - 60:9, 68:6, 69:22, 69:23  <b>layers</b> [3] - 18:4, 60:5, 176:19  <b>laying</b> [1] - 198:10  <b>LAYTON</b> [1] - 2:6  <b>Rayton</b> [2] - 6:17, 99:24  <b>lead</b> [1] - 138:15  <b>lead-in</b> [1] - 138:15  <b>leads</b> [2] - 70:1, 72:13  <b>learns</b> [1] - 145:1  <b>least</b> [26] - 10:11, 12:18, 13:3, 13:8, 18:10, 41:5, 59:16, 61:16, 109:5, 111:11, 114:4, 118:5, 118:17, 149:24, 174:2, 177:19, 177:25, 178:9, 180:14, 185:21, 201:10, 202:14, 204:7, 207:20, 218:18, 221:6  <b>leave</b> [5] - 57:15, 172:17, 173:4, 222:5, 223:2  <b>leaving</b> [1] - 60:11  <b>left</b> [11] - 7:3, 15:25, 41:1, 49:15, 71:5, 94:14, 97:11, 97:19, 105:5, 118:4, 184:20  <b>legal</b> [3] - 152:1, 152:6, 213:25  <b>legs</b> [1] - 53:23  <b>lend</b> [1] - 30:9  <b>length</b> [1] - 151:2  <b>lengths</b> [1] - 113:1  <b>lengthy</b> [1] - 151:1  <b>less</b> [2] - 133:11, 216:1  <b>letter</b> [8] - 18:3, 110:8, 173:5, 173:8, 206:22, 222:5, 222:8, 223:25  <b>letters</b> [1] - 13:25  <b>level</b> [19] - 18:4, 21:12, 28:5, 56:4, 56:16, 57:3, 67:20, 78:5,</p>	<p>80:1, 141:19, 142:1, 142:2, 142:4, 157:20, 157:21, 158:14, 160:8, 164:1, 197:3  <b>levels</b> [2] - 68:1, 141:14  <b>liberal</b> [1] - 88:14  <b>light</b> [14] - 148:6, 153:16, 155:18, 166:8, 167:25, 171:8, 172:9, 172:21, 182:14, 190:24, 193:22, 196:18, 223:5, 223:10  <b>likely</b> [3] - 19:9, 97:3, 148:14  <b>likewise</b> [1] - 27:9  <b>limitation</b> [10] - 17:4, 17:5, 80:2, 162:25, 165:19, 165:20, 167:20, 168:11, 187:23  <b>limitations</b> [29] - 11:19, 12:8, 12:14, 13:1, 15:10, 15:14, 17:4, 22:21, 38:25, 79:13, 83:15, 91:17, 127:6, 136:2, 136:17, 162:24, 165:18, 165:22, 166:7, 166:14, 166:25, 167:24, 168:20, 169:8, 180:8, 193:21, 207:20, 208:5, 209:18  <b>LIMITED</b> [2] - 1:3, 225:9  <b>limited</b> [6] - 3:8, 136:11, 152:12, 152:22, 173:8, 222:8  <b>line</b> [15] - 23:2, 23:3, 84:4, 85:25, 87:21, 88:6, 95:16, 95:17, 95:25, 96:1, 113:12, 137:8, 139:6, 139:20, 140:4  <b>lines</b> [15] - 11:4, 50:17, 84:12, 84:13, 92:11, 92:21, 92:22, 95:9, 95:23, 95:25, 101:15, 108:25, 128:13, 131:7, 139:16  <b>link</b> [12] - 9:9, 9:10, 21:11, 21:13, 21:17, 45:9, 69:10, 85:5, 153:2, 155:5, 165:25</p>	<p><b>linked</b> [2] - 9:2, 9:8  <b>linking</b> [2] - 26:5, 155:14  <b>links</b> [1] - 85:16  <b>list</b> [5] - 10:19, 60:18, 63:18, 65:22, 219:9  <b>listed</b> [2] - 104:14, 127:7  <b>listing</b> [1] - 126:24  <b>literally</b> [4] - 22:3, 141:9, 142:12, 143:15  <b>litigation</b> [2] - 149:2, 149:6  <b>LLC</b> [8] - 152:3, 152:15, 172:14, 175:8, 176:2, 186:1, 186:4, 225:25  <b>LLP</b> [4] - 2:2, 2:9, 2:19, 100:10  <b>local</b> [2] - 139:13, 200:10  <b>locally</b> [1] - 70:24  <b>location</b> [1] - 217:3  <b>logic</b> [7] - 29:7, 29:8, 29:13, 83:9, 90:5, 91:4, 91:12  <b>logical</b> [8] - 62:2, 64:3, 64:5, 64:10, 66:9, 91:5, 190:4, 190:7  <b>look</b> [35] - 16:2, 16:15, 19:5, 27:18, 29:24, 33:7, 34:2, 45:7, 46:16, 49:16, 55:12, 56:9, 56:20, 57:7, 57:13, 57:22, 60:1, 73:7, 77:20, 83:2, 83:20, 87:20, 90:11, 91:16, 92:20, 95:15, 101:1, 120:21, 127:21, 134:5, 138:1, 148:6, 215:3, 215:9, 222:25  <b>looked</b> [3] - 42:25, 75:21, 92:11  <b>looking</b> [16] - 15:25, 35:16, 38:7, 45:3, 65:10, 78:4, 94:3, 94:4, 127:3, 144:21, 156:16, 157:13, 158:5, 176:5, 176:13, 177:10  <b>looks</b> [7] - 32:2, 32:4, 57:4, 75:16, 90:9, 92:22, 138:23  <b>loyalty</b> [32] - 10:2, 10:3, 12:25, 17:20, 24:13, 25:21, 32:7, 42:2, 52:17, 153:19, 154:11, 154:13,</p>
<b>K</b>	<b>L</b>			
<p><b>KAYE</b> [1] - 2:9  <b>Keefe</b> [4] - 100:9, 100:11, 100:15, 118:16  <b>KEEFE</b> [24] - 100:16, 102:24, 103:5, 103:22, 105:12, 105:20, 105:24, 107:9, 107:13, 108:21, 110:22, 111:22, 112:23, 114:14, 116:19, 118:8, 141:3, 142:9, 143:9, 144:14, 145:15, 145:19, 146:14, 147:2  <b>keeps</b> [1] - 90:3  <b>Kelly</b> [2] - 6:17, 99:25  <b>KELLY</b> [1] - 2:6  <b>kept</b> [1] - 110:24  <b>key</b> [14] - 25:25, 29:24, 41:4, 68:13, 79:16, 80:15, 87:17, 103:1, 178:20, 180:2, 209:3, 214:8, 215:21  <b>keys</b> [3] - 91:2  <b>kin</b> [1] - 12:20  <b>kind</b> [31] - 15:19, 20:20, 22:4, 22:8, 27:16, 29:16, 37:11, 42:20, 59:10, 59:21, 60:1, 61:14, 71:15, 71:16, 77:15, 78:10, 79:19, 80:14, 80:17, 85:9, 91:14, 119:13, 124:7, 124:8, 124:12, 126:17, 132:2, 145:16, 149:3, 164:13, 193:14  <b>kinds</b> [11] - 28:1, 64:11, 67:12, 71:22,</p>	<p><b>lack</b> [2] - 183:20, 184:24  <b>land</b> [4] - 112:17, 117:24, 167:17, 168:16  <b>land-based</b> [2] - 167:17, 168:16  <b>language</b> [30] - 23:8, 24:14, 38:6, 47:13, 47:18, 55:12, 55:13, 61:13, 69:6, 82:1, 85:9, 104:3, 109:7, 109:8, 125:12, 156:10, 156:13, 157:18, 159:15, 166:15, 176:13, 179:17, 181:17, 185:9, 190:16, 196:22, 203:5, 206:7, 213:12, 219:20  <b>laptop</b> [2] - 122:16, 122:18  <b>large</b> [5] - 37:2, 111:8, 129:16, 151:22, 164:2  <b>largely</b> [1] - 194:5  <b>last</b> [16] - 27:25, 46:24, 69:25, 72:12, 93:4, 93:8, 99:8, 99:10, 99:17, 138:16, 140:17, 148:18, 151:14, 191:21, 192:12, 216:17  <b>lastly</b> [2] - 5:2, 35:6  <b>latency</b> [10] - 116:23, 129:12, 131:2, 131:8, 131:10, 138:5, 143:4, 219:3, 220:1</p>			

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<p>155:8, 156:19, 156:22, 156:24, 157:6, 157:15, 157:22, 157:24, 158:8, 159:6, 159:13, 159:19, 159:25, 161:3, 164:17, 164:18, 166:2 <b>lumped</b> [1] - 209:25 <b>lunch</b> [2] - 4:5, 148:10 <b>lytle</b> [1] - 140:6 <b>LYTLE</b> [27] - 99:18, 118:11, 118:25, 121:17, 122:2, 123:23, 124:9, 124:16, 125:11, 126:22, 127:3, 127:15, 129:7, 130:14, 130:18, 131:4, 131:23, 132:10, 133:19, 134:21, 135:16, 137:4, 138:2, 139:3, 140:3, 140:10, 223:17 <b>Lytle</b> [6] - 100:2, 118:10, 118:12, 118:13, 127:19, 143:2</p>	<p>74:8, 74:15, 74:16, 75:24, 77:19, 81:5, 86:15, 88:10, 89:18, 92:4, 95:21, 96:7, 182:8, 183:23 <b>management</b> [33] - 12:2, 15:2, 21:11, 21:21, 25:16, 27:2, 29:14, 29:18, 31:3, 32:1, 34:23, 35:19, 35:23, 35:24, 38:20, 43:12, 43:25, 44:1, 50:4, 73:6, 73:13, 81:6, 89:19, 101:5, 138:21, 153:1, 155:7, 167:17, 176:1, 194:23, 196:9, 199:23, 205:10 <b>Management</b> [5] - 27:10, 44:7, 44:12, 157:9, 167:13 <b>managing</b> [10] - 56:7, 56:19, 75:7, 84:9, 86:22, 175:2, 176:22, 178:15, 182:17, 182:21 <b>manipulating</b> [2] - 176:16, 182:3 <b>manner</b> [7] - 43:18, 50:10, 70:5, 179:23, 182:19, 183:24, 203:11 <b>manual</b> [19] - 102:21, 102:22, 103:3, 111:14, 111:18, 112:4, 112:5, 137:1, 137:13, 137:18, 137:25, 138:13, 139:1, 139:5, 139:7, 200:23, 201:15, 201:22, 204:8 <b>manually</b> [11] - 102:11, 103:19, 137:5, 138:14, 138:17, 138:19, 138:22, 199:21, 199:23, 200:19, 201:12 <b>map</b> [1] - 122:8 <b>mark</b> [1] - 23:17 <b>Markman</b> [2] - 98:23, 98:24 <b>match</b> [2] - 101:8, 125:15 <b>material</b> [2] - 171:23, 212:13 <b>materially</b> [1] - 209:21 <b>matter</b> [17] - 5:20, 24:9, 54:6, 104:12,</p>	<p>112:19, 113:2, 134:24, 152:19, 155:21, 159:23, 171:3, 192:6, 205:1, 212:2, 213:25, 221:14, 223:12 <b>matters</b> [1] - 152:8 <b>Mayo</b> [1] - 7:24 <b>mean</b> [11] - 9:8, 13:18, 14:7, 58:25, 70:10, 72:15, 85:17, 86:4, 86:8, 136:14, 205:16 <b>meaning</b> [2] - 106:10, 195:17 <b>meaningful</b> [8] - 10:7, 10:21, 15:5, 20:15, 20:19, 165:9, 171:22, 193:20 <b>meaningfully</b> [3] - 8:13, 8:23, 169:14 <b>meanings</b> [1] - 97:3 <b>means</b> [17] - 13:20, 15:20, 16:9, 17:8, 23:19, 61:9, 65:3, 66:15, 66:19, 70:13, 71:1, 85:19, 86:9, 129:12, 144:2, 161:6, 181:17 <b>meant</b> [7] - 68:22, 70:7, 92:25, 108:19, 116:23, 169:8, 201:7 <b>meanwhile</b> [1] - 106:25 <b>mechanism</b> [27] - 21:15, 21:17, 22:1, 22:3, 22:17, 25:2, 25:5, 25:9, 26:1, 26:5, 74:8, 155:16, 158:3, 158:13, 158:19, 158:21, 160:11, 160:14, 160:23, 161:9, 161:14, 161:17, 161:19, 161:21, 162:21, 164:13, 167:12 <b>mechanisms</b> [1] - 159:11 <b>media</b> [4] - 109:20, 113:13, 113:14, 117:24 <b>Media</b> [1] - 109:22 <b>medical</b> [4] - 101:12, 101:15, 115:4, 119:19 <b>medium</b> [3] - 9:18, 153:9, 157:23 <b>mediums</b> [1] - 160:25 <b>meet</b> [1] - 221:7 <b>melled</b> [1] - 171:6</p>	<p><b>memory</b> [2] - 190:23, 209:13 <b>mention</b> [2] - 171:15, 215:16 <b>mentioned</b> [6] - 14:21, 60:11, 96:10, 119:19, 163:23, 223:3 <b>Mentor</b> [1] - 169:5 <b>menu</b> [1] - 206:2 <b>mere</b> [1] - 201:14 <b>merely</b> [6] - 9:21, 52:22, 178:24, 181:1, 202:4, 207:13 <b>message</b> [3] - 115:14, 160:17, 200:24 <b>messages</b> [1] - 34:6 <b>met</b> [1] - 171:12 <b>Meta</b> [1] - 152:3 <b>Metadata</b> [1] - 215:8 <b>metadata</b> [137] - 55:15, 55:16, 55:22, 56:8, 56:19, 57:13, 57:20, 57:21, 58:14, 58:18, 58:23, 59:8, 59:14, 59:25, 60:3, 60:5, 60:9, 60:10, 60:18, 60:21, 63:14, 63:16, 63:19, 64:20, 65:15, 65:17, 66:16, 66:20, 69:18, 69:22, 69:23, 70:19, 78:10, 81:16, 81:18, 81:21, 93:11, 93:16, 95:2, 95:4, 96:15, 96:25, 97:8, 97:9, 97:10, 97:13, 98:4, 113:20, 113:21, 113:24, 114:6, 114:23, 115:16, 115:21, 116:1, 116:7, 116:12, 116:13, 116:14, 118:18, 119:5, 128:5, 128:6, 128:9, 128:10, 128:15, 128:17, 128:18, 128:23, 129:5, 129:14, 129:15, 129:22, 129:24, 130:9, 130:24, 131:13, 131:18, 131:21, 132:4, 132:8, 132:14, 132:16, 132:18, 133:2, 133:10, 133:17, 141:5, 141:22, 141:24, 142:10, 144:18, 175:3, 176:19, 176:24,</p>	<p>178:16, 178:25, 179:1, 179:12, 181:1, 181:8, 182:9, 185:14, 212:17, 212:21, 212:23, 213:3, 213:6, 213:13, 213:17, 214:9, 214:15, 214:20, 214:21, 215:3, 215:6, 215:15, 215:23, 216:3, 216:9, 217:2, 217:7, 217:9, 217:16, 217:24, 218:21, 219:10, 219:12, 219:16, 219:23, 219:24, 221:1, 221:9 <b>metadata-related</b> [1] - 214:21 <b>metaphysically</b> [1] - 59:10 <b>method</b> [10] - 9:16, 9:17, 9:19, 20:4, 21:8, 50:1, 153:8, 157:23, 183:22, 220:13 <b>method's</b> [1] - 215:14 <b>methodology</b> [1] - 201:22 <b>methods</b> [6] - 70:3, 160:25, 184:3, 184:6, 186:18, 202:9 <b>Metzler</b> [1] - 6:20 <b>METZLER</b> [1] - 2:7 <b>MGM</b> [9] - 1:6, 2:11, 3:8, 6:18, 6:19, 152:13, 152:14, 225:9 <b>Microsoft</b> [1] - 186:4 <b>middle</b> [12] - 27:11, 31:23, 31:25, 33:9, 37:7, 105:7, 106:2, 107:5, 107:16, 122:10, 123:8, 131:6 <b>might</b> [31] - 13:6, 17:10, 23:7, 68:8, 82:8, 89:3, 90:18, 102:10, 102:13, 103:17, 112:4, 112:5, 116:22, 116:24, 117:2, 117:16, 117:18, 120:21, 121:19, 122:4, 129:17, 131:2, 131:24, 134:4, 146:23, 149:16, 159:9, 171:10, 172:19, 178:25, 203:11</p>
<b>M</b>				
<p><b>machine</b> [20] - 59:17, 77:15, 89:6, 90:20, 90:22, 90:24, 91:8, 91:23, 92:4, 94:19, 94:23, 131:12, 137:21, 178:7, 178:8, 178:13, 180:13, 180:14, 180:24, 219:6 <b>machines</b> [3] - 91:25, 92:2, 155:6 <b>magic</b> [2] - 107:19, 147:20 <b>magically</b> [6] - 106:13, 106:15, 106:19, 106:21, 107:2, 107:5 <b>mail</b> [4] - 103:18, 120:12, 200:21, 200:24 <b>mailing</b> [1] - 137:6 <b>mails</b> [1] - 115:13 <b>maintain</b> [1] - 109:4 <b>major</b> [1] - 88:14 <b>man</b> [4] - 31:23, 31:25, 33:9, 37:7 <b>manage</b> [18] - 70:3, 73:9, 73:16, 74:6,</p>				

DEANNA WARNER, CSR

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<p><b>mind</b> [4] - 59:11, 64:7, 76:3, 151:16</p> <p><b>mindful</b> [1] - 172:21</p> <p><b>minimize</b> [1] - 201:23</p> <p><b>minor</b> [4] - 37:16, 45:22, 105:20, 109:12</p> <p><b>minute</b> [7] - 23:17, 53:22, 53:24, 54:1, 99:9, 99:13, 117:17</p> <p><b>minutes</b> [16] - 4:20, 5:4, 7:3, 7:5, 7:17, 41:1, 46:21, 47:2, 55:9, 71:4, 71:5, 94:14, 97:19, 100:17, 118:4, 141:2</p> <p><b>Mion</b> [1] - 100:1</p> <p><b>Mishkin</b> [1] - 12:19</p> <p><b>model</b> [22] - 70:5, 70:6, 70:10, 70:15, 72:15, 72:17, 73:21, 74:10, 74:11, 74:15, 80:4, 80:5, 81:10, 86:12, 88:8, 182:14, 182:20, 182:24, 183:14, 183:17, 183:25, 190:7</p> <p><b>models</b> [1] - 74:13</p> <p><b>modification</b> [2] - 143:6, 220:3</p> <p><b>modifications</b> [2] - 109:12, 188:9</p> <p><b>modified</b> [12] - 108:18, 109:18, 130:23, 131:3, 195:10, 195:13, 197:17, 198:3, 198:16, 202:13, 203:7, 209:12</p> <p><b>modifies</b> [10] - 120:23, 121:5, 125:23, 126:1, 197:25, 202:11, 205:8, 212:10, 212:16, 217:6</p> <p><b>modify</b> [2] - 29:11, 126:5</p> <p><b>modifying</b> [2] - 111:11, 187:24</p> <p><b>module</b> [74] - 29:17, 33:24, 55:18, 55:21, 57:8, 57:18, 57:19, 58:1, 58:16, 58:19, 58:20, 59:18, 59:19, 59:22, 60:24, 63:6, 63:9, 65:1, 66:1, 66:15, 66:17, 66:24, 67:1, 67:4, 68:2, 68:7, 70:20, 77:17, 78:6, 78:9, 80:2,</p>	<p>80:3, 80:12, 80:14, 80:21, 80:22, 81:12, 81:22, 83:3, 89:10, 89:12, 90:16, 91:20, 91:21, 92:5, 93:10, 93:15, 96:11, 96:14, 96:23, 96:24, 97:8, 177:13, 177:15, 177:17, 177:18, 177:21, 177:23, 178:2, 178:7, 178:11, 180:13, 180:16, 181:8, 181:16, 182:2, 183:2, 183:4, 183:6</p> <p><b>modules</b> [86] - 29:6, 55:17, 56:12, 56:21, 57:1, 57:6, 58:10, 60:19, 61:12, 61:16, 62:14, 62:15, 62:16, 64:17, 64:22, 65:2, 65:15, 65:16, 65:20, 65:25, 66:14, 67:25, 68:16, 68:17, 68:23, 69:3, 70:17, 72:3, 72:6, 72:16, 73:23, 74:23, 74:25, 76:19, 76:20, 76:21, 78:15, 79:14, 79:21, 80:17, 81:2, 81:8, 83:11, 83:22, 88:16, 88:20, 88:24, 89:4, 89:6, 94:19, 95:1, 95:2, 96:13, 96:18, 96:19, 97:5, 113:11, 175:19, 177:3, 177:6, 177:8, 177:12, 178:19, 178:24, 179:4, 179:10, 179:13, 180:2, 180:6, 180:10, 180:11, 180:20, 180:22, 181:2, 181:6, 181:13, 181:21, 182:4, 183:8, 184:7, 185:13, 191:8</p> <p><b>modules'</b> [1] - 179:8</p> <p><b>moment</b> [3] - 127:17, 205:17, 215:25</p> <p><b>monopolize</b> [1] - 19:25</p> <p><b>MONTÉ</b> [1] - 2:2</p> <p><b>Monté</b> [2] - 6:2, 222:23</p> <p><b>Moore</b> [1] - 48:8</p> <p><b>moot</b> [1] - 205:3</p> <p><b>Moreover</b> [1] - 214:24</p> <p><b>moreover</b> [4] - 188:7, 202:2, 211:6, 213:2</p>	<p><b>morning</b> [13] - 5:24, 6:16, 7:19, 22:12, 23:24, 23:25, 54:10, 54:21, 55:8, 99:16, 100:7, 118:11, 223:3</p> <p><b>MORRIS</b> [2] - 2:2, 2:17</p> <p><b>Morris</b> [3] - 6:3, 6:10, 54:22</p> <p><b>mortar</b> [3] - 25:3, 28:3, 155:12</p> <p><b>most</b> [16] - 11:15, 45:6, 45:9, 47:16, 50:18, 52:16, 79:11, 80:15, 80:21, 140:11, 156:7, 173:19, 185:24, 196:11, 205:23, 206:21</p> <p><b>mostly</b> [1] - 119:4</p> <p><b>motion</b> [48] - 6:6, 7:1, 15:23, 51:8, 55:4, 100:14, 118:7, 126:23, 146:15, 146:16, 152:2, 152:16, 162:8, 172:4, 172:5, 172:24, 173:4, 173:9, 173:18, 173:19, 173:24, 174:20, 174:22, 186:8, 186:16, 186:17, 191:14, 191:15, 191:18, 191:20, 191:25, 192:3, 192:11, 192:15, 192:17, 208:21, 212:2, 216:15, 218:17, 221:15, 221:16, 221:21, 222:4, 222:9, 223:1, 223:14</p> <p><b>motions</b> [7] - 8:9, 150:19, 192:19, 192:20, 192:24, 222:14, 223:22</p> <p><b>MOTIONS</b> [3] - 1:19, 1:21, 225:19</p> <p><b>move</b> [9] - 39:2, 53:6, 54:4, 91:7, 138:17, 138:22, 152:10, 173:15, 199:23</p> <p><b>moved</b> [1] - 146:16</p> <p><b>movement</b> [1] - 131:16</p> <p><b>moves</b> [1] - 191:15</p> <p><b>MR</b> [77] - 7:6, 7:19, 10:24, 12:20, 13:11, 14:18, 15:17, 17:12, 17:17, 19:14, 20:22, 21:6, 22:10, 22:25,</p>	<p>23:9, 23:19, 46:25, 50:15, 51:11, 54:10, 72:23, 72:25, 73:2, 74:13, 75:5, 76:16, 77:8, 78:12, 80:9, 80:11, 81:17, 82:2, 84:2, 84:15, 84:21, 85:19, 86:9, 86:19, 87:6, 88:4, 89:2, 89:25, 91:20, 92:15, 93:2, 93:17, 99:18, 99:23, 100:7, 118:11, 118:25, 121:17, 122:2, 123:23, 124:9, 124:16, 125:11, 126:22, 127:3, 127:15, 129:7, 130:14, 130:18, 131:4, 131:23, 132:10, 133:19, 134:21, 135:16, 137:4, 138:2, 139:3, 140:3, 140:10, 222:22, 223:15, 223:17</p> <p><b>MS</b> [73] - 6:16, 23:25, 25:11, 26:2, 26:19, 28:16, 30:19, 31:16, 33:14, 33:23, 34:12, 34:21, 35:14, 36:14, 38:5, 39:18, 41:13, 42:21, 45:13, 45:20, 46:18, 53:14, 54:21, 55:8, 55:11, 57:6, 59:2, 59:23, 61:25, 63:4, 63:11, 64:3, 64:13, 64:22, 65:4, 65:12, 65:18, 66:6, 66:22, 67:23, 68:1, 69:13, 70:14, 71:9, 94:18, 95:24, 96:9, 97:7, 97:20, 100:16, 102:24, 103:5, 103:22, 105:12, 105:20, 105:24, 107:9, 107:13, 108:21, 110:22, 111:22, 112:23, 114:14, 116:19, 118:8, 141:3, 142:9, 143:9, 144:14, 145:15, 145:19, 146:14, 147:2</p> <p><b>multiple</b> [22] - 8:3, 110:20, 111:2, 111:17, 118:21, 119:9, 179:20, 195:8, 195:11, 195:18, 195:23, 197:3, 198:19,</p>	<p>202:5, 202:10, 204:3, 207:22, 211:12, 212:10, 214:6, 214:18, 216:13</p> <p><b>mush</b> [1] - 12:20</p> <p><b>Muskin</b> [10] - 16:15, 16:17, 16:19, 32:15, 49:22, 50:6, 168:13, 169:8, 169:22</p> <p><b>must</b> [28] - 8:8, 14:9, 31:11, 56:23, 58:18, 61:16, 62:17, 111:3, 114:8, 138:21, 156:9, 160:23, 161:19, 163:9, 165:10, 179:10, 181:14, 182:4, 186:8, 191:14, 197:11, 199:21, 199:23, 211:7, 212:17, 214:10, 217:2, 218:2</p>
<b>N</b>				
<p><b>name</b> [8] - 6:2, 29:15, 40:19, 58:17, 86:2, 86:5, 98:14</p> <p><b>names</b> [4] - 74:24, 74:25, 181:6</p> <p><b>narrow</b> [3] - 30:7, 30:17, 42:11</p> <p><b>narrower</b> [1] - 214:22</p> <p><b>narrowly</b> [1] - 135:23</p> <p><b>narrowness</b> [2] - 15:11, 37:12</p> <p><b>National</b> [1] - 175:9</p> <p><b>natural</b> [1] - 19:20</p> <p><b>nature</b> [9] - 88:20, 96:25, 164:24, 179:12, 185:12, 190:3, 192:16, 202:25, 203:14</p> <p><b>navigate</b> [1] - 72:18</p> <p><b>navigated</b> [1] - 16:24</p> <p><b>navigating</b> [1] - 72:19</p> <p><b>nearily</b> [4] - 197:5, 198:12, 203:5, 222:12</p> <p><b>neatly</b> [1] - 45:2</p> <p><b>necessarily</b> [9] - 13:15, 13:18, 43:2, 45:9, 135:3, 135:21, 158:8, 169:1, 210:5</p> <p><b>necessary</b> [3] - 154:6, 222:8, 224:9</p> <p><b>need</b> [32] - 3:12, 5:16, 26:15, 27:4, 33:15,</p>				

<p>42:16, 48:6, 53:24, 66:8, 66:11, 66:14, 70:2, 73:18, 75:10, 76:11, 76:13, 76:25, 77:6, 82:10, 88:17, 88:21, 89:1, 89:24, 101:14, 101:22, 102:3, 108:4, 108:7, 137:15, 146:1, 173:10, 183:22 <b>needed</b> [3] - 77:8, 150:16, 159:22 <b>needs</b> [6] - 69:11, 71:2, 94:5, 119:21, 142:25, 199:15 <b>NEFF</b> [1] - 100:7 <b>Neff</b> [1] - 100:8 <b>negatively</b> [1] - 220:7 <b>nervous</b> [1] - 47:1 <b>net</b> [1] - 11:5 <b>network</b> [48] - 21:3, 21:10, 47:23, 49:4, 104:9, 104:15, 110:20, 111:3, 111:12, 111:18, 114:21, 120:17, 121:12, 121:15, 123:4, 124:3, 129:18, 129:19, 129:25, 134:25, 135:19, 136:3, 153:1, 155:24, 160:12, 161:15, 186:21, 194:24, 195:8, 195:14, 195:19, 195:24, 196:8, 197:4, 198:20, 202:6, 203:8, 205:6, 207:9, 207:22, 210:7, 210:8, 211:13, 214:7, 214:19, 216:14, 220:14 <b>network-based</b> [1] - 160:12 <b>networking</b> [3] - 20:7, 48:9, 48:10 <b>networks</b> [6] - 47:22, 118:20, 122:22, 129:10, 141:16, 207:25 <b>never</b> [12] - 97:17, 102:18, 104:2, 106:12, 107:21, 108:10, 109:19, 110:1, 117:20, 167:19, 193:8, 211:2 <b>nevertheless</b> [2] - 210:2, 216:6 <b>new</b> [20] - 28:10,</p>	<p>29:11, 43:17, 47:22, 75:14, 75:22, 75:23, 79:4, 103:20, 115:8, 130:17, 145:1, 169:3, 175:21, 182:2, 182:21, 187:5, 188:9, 205:12 <b>New</b> [1] - 98:25 <b>NEW</b> [2] - 225:3, 225:21 <b>newer</b> [1] - 139:8 <b>newest</b> [1] - 47:4 <b>news</b> [1] - 33:3 <b>next</b> [10] - 58:3, 67:20, 98:1, 98:10, 122:7, 131:14, 141:19, 160:5, 197:21, 212:5 <b>NICHOLS</b> [1] - 2:17 <b>Nichols</b> [1] - 54:22 <b>nodes</b> [1] - 207:22 <b>nominally</b> [1] - 21:10 <b>non</b> [2] - 13:6, 159:25 <b>non-concrete</b> [1] - 159:25 <b>non-preemptive</b> [1] - 13:6 <b>nonabstract</b> [2] - 189:23, 210:4 <b>nonautomatic</b> [1] - 112:2 <b>none</b> [4] - 43:13, 44:9, 48:17, 123:19 <b>normal</b> [2] - 86:3, 86:7 <b>normally</b> [1] - 20:9 <b>notably</b> [1] - 186:13 <b>note</b> [10] - 10:11, 151:6, 158:6, 161:14, 168:21, 171:24, 182:25, 209:23, 210:25, 215:24 <b>Note</b> [1] - 142:19 <b>noted</b> [20] - 5:3, 27:18, 27:24, 152:9, 161:8, 162:10, 168:9, 172:9, 187:4, 189:11, 193:18, 196:19, 201:20, 202:20, 203:18, 204:24, 205:13, 218:6, 220:6, 220:9 <b>notes</b> [12] - 11:9, 41:16, 159:18, 161:20, 163:8, 180:17, 184:5, 198:1, 198:23, 199:16, 219:8, 225:16 <b>nothing</b> [21] - 78:7, 104:25, 110:12,</p>	<p>137:13, 141:9, 142:12, 144:6, 145:2, 145:15, 146:2, 147:4, 147:5, 147:16, 150:24, 163:13, 172:1, 188:3, 189:18, 199:11, 210:17, 211:18 <b>notify</b> [1] - 130:1 <b>notion</b> [4] - 85:14, 112:2, 117:6, 143:13 <b>novel</b> [4] - 12:16, 47:22, 168:25, 205:15 <b>novelty</b> [5] - 16:21, 16:23, 168:23, 171:9, 205:14 <b>November</b> [1] - 170:7 <b>NOW</b> [1] - 1:12 <b>now-updated</b> [1] - 213:7 <b>Number</b> [6] - 3:21, 174:7, 191:23, 225:9, 225:10, 225:12 <b>number</b> [16] - 3:10, 10:11, 61:5, 61:9, 67:18, 67:19, 85:15, 125:18, 143:1, 151:22, 152:24, 173:17, 174:3, 174:5, 200:5, 214:25 <b>numbers</b> [3] - 171:25, 192:13, 192:14 <b>numerous</b> [2] - 18:16, 203:22 <b>nurse</b> [2] - 119:21, 136:10</p>	<p><b>off-the-shelf</b> [1] - 48:20 <b>offering</b> [1] - 108:8 <b>Office</b> [2] - 103:18, 103:19 <b>office</b> [12] - 6:20, 50:5, 54:14, 99:25, 101:18, 103:17, 120:9, 122:15, 122:17, 153:5, 169:6 <b>office's</b> [1] - 103:21 <b>officer</b> [1] - 54:16 <b>offices</b> [2] - 101:17, 115:4 <b>OFFICIALLY</b> [1] - 225:20 <b>offline</b> [9] - 21:21, 27:6, 31:24, 32:20, 33:25, 155:10, 155:14, 159:24, 166:1 <b>offline/online</b> [1] - 166:3 <b>often</b> [4] - 27:20, 50:13, 148:22, 151:25 <b>OID</b> [1] - 62:17 <b>old</b> [7] - 30:5, 37:15, 39:13, 76:3, 113:6, 125:9, 137:25 <b>older</b> [2] - 198:5, 198:9 <b>once</b> [13] - 25:18, 50:11, 76:22, 77:18, 86:24, 87:5, 87:6, 98:21, 99:16, 102:3, 110:10, 121:5, 162:13 <b>one</b> [163] - 7:6, 7:10, 11:25, 13:25, 17:10, 17:20, 17:21, 18:2, 21:12, 22:20, 23:1, 25:6, 25:25, 27:1, 29:6, 35:3, 37:3, 37:9, 39:5, 40:13, 41:1, 41:18, 41:21, 46:7, 48:21, 49:10, 50:2, 51:9, 56:16, 57:10, 61:24, 63:20, 65:12, 74:14, 75:21, 76:1, 76:19, 79:12, 79:14, 79:20, 79:21, 81:2, 83:2, 83:7, 84:11, 84:14, 84:16, 90:21, 91:6, 94:3, 95:17, 96:15, 98:3, 98:6, 98:7, 98:12, 100:23, 101:7, 102:3, 102:9, 103:6, 103:16, 110:24,</p>	<p>111:14, 114:16, 114:21, 115:24, 117:3, 117:18, 121:17, 122:12, 122:15, 122:16, 122:17, 125:1, 125:18, 127:18, 128:15, 131:5, 132:13, 134:2, 134:5, 134:13, 136:15, 137:17, 137:22, 139:11, 139:14, 139:19, 140:1, 140:4, 140:10, 141:12, 141:14, 141:18, 142:1, 144:5, 146:7, 146:8, 148:18, 148:22, 148:23, 149:24, 150:20, 151:9, 154:19, 155:6, 156:13, 160:10, 162:14, 168:7, 169:18, 171:20, 176:19, 177:9, 177:16, 177:19, 177:22, 177:24, 178:1, 178:3, 178:8, 178:9, 178:12, 179:11, 180:12, 180:14, 180:21, 182:6, 182:23, 183:17, 184:21, 185:23, 187:21, 189:6, 191:10, 193:9, 194:21, 198:11, 198:14, 200:7, 202:14, 207:21, 208:24, 209:10, 211:8, 211:9, 211:11, 211:20, 214:17, 215:3, 216:21, 218:19, 219:11, 220:2, 222:12, 223:24 <b>one-to-many</b> [1] - 219:11 <b>one-to-one</b> [1] - 219:11 <b>ones</b> [5] - 34:22, 112:3, 119:2, 137:1, 184:6 <b>online</b> [41] - 10:2, 21:22, 25:2, 26:25, 27:4, 28:2, 29:19, 31:24, 32:19, 33:25, 35:1, 36:9, 37:3, 38:11, 40:4, 40:5, 40:16, 40:18, 42:3, 43:10, 43:25, 50:3,</p>
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<p>50:4, 153:20, 154:12, 155:5, 155:9, 155:11, 155:14, 156:19, 156:25, 158:24, 159:19, 159:24, 161:4, 163:11, 164:17, 166:1, 167:15, 167:16, 168:15</p> <p><b>open</b> [2] - 63:18, 103:19</p> <p><b>open-ended</b> [1] - 63:18</p> <p><b>opening</b> [2] - 10:25, 178:22</p> <p><b>operate</b> [3] - 115:22, 135:20, 190:11</p> <p><b>operates</b> [1] - 82:7</p> <p><b>operating</b> [2] - 124:17, 131:25</p> <p><b>operation</b> [4] - 93:23, 165:24, 175:22, 197:19</p> <p><b>operational</b> [1] - 203:22</p> <p><b>operations</b> [1] - 200:20</p> <p><b>operative</b> [6] - 152:17, 153:14, 173:20, 184:18, 208:4, 208:17</p> <p><b>opinion</b> [2] - 150:14, 187:11</p> <p><b>opinions</b> [1] - 224:7</p> <p><b>opportunities</b> [1] - 8:3</p> <p><b>opportunity</b> [4] - 51:3, 52:3, 172:7, 223:1</p> <p><b>opposed</b> [4] - 127:12, 145:17, 158:13, 159:12</p> <p><b>opposing</b> [2] - 49:12, 53:5</p> <p><b>options</b> [3] - 201:11, 219:2, 220:8</p> <p><b>oral</b> [11] - 127:23, 151:1, 151:22, 162:19, 164:7, 165:20, 173:13, 180:17, 184:19, 219:15, 224:8</p> <p><b>orally</b> [5] - 4:15, 148:17, 150:11, 150:12, 150:17</p> <p><b>ordains</b> [1] - 11:10</p> <p><b>order</b> [20] - 5:3, 46:1, 77:3, 155:25, 158:7, 160:24, 161:19, 164:23, 172:25, 173:13, 181:19,</p>	<p>187:9, 191:19, 196:19, 198:4, 198:8, 201:22, 204:8, 204:15, 222:10</p> <p><b>ordered</b> [1] - 24:16</p> <p><b>orders</b> [2] - 108:6, 173:13</p> <p><b>ordinary</b> [3] - 123:25, 124:1, 187:18</p> <p><b>organization</b> [4] - 75:12, 82:5, 89:16, 91:5</p> <p><b>organize</b> [1] - 98:8</p> <p><b>organized</b> [2] - 90:10, 90:13</p> <p><b>organizing</b> [4] - 69:21, 97:12, 97:25, 98:16</p> <p><b>oriented</b> [1] - 198:24</p> <p><b>original</b> [3] - 49:25, 51:14, 86:12</p> <p><b>originally</b> [1] - 153:2</p> <p><b>otherwise</b> [14] - 7:2, 12:11, 59:15, 109:3, 118:23, 134:19, 152:9, 194:8, 201:14, 201:21, 203:11, 209:1, 214:16, 221:16</p> <p><b>ourselves</b> [1] - 129:9</p> <p><b>outcome</b> [2] - 170:1, 210:15</p> <p><b>outcomes</b> [1] - 151:18</p> <p><b>outset</b> [1] - 192:7</p> <p><b>outside</b> [3] - 48:9, 139:12, 207:24</p> <p><b>over-generalized</b> [1] - 175:15</p> <p><b>overall</b> [4] - 11:21, 89:5, 162:2, 170:13</p> <p><b>overcame</b> [1] - 49:22</p> <p><b>overcome</b> [2] - 50:8, 220:1</p> <p><b>overgeneralization</b> [1] - 24:18</p> <p><b>overlay</b> [1] - 45:2</p> <p><b>overlying</b> [1] - 17:24</p> <p><b>overly</b> [1] - 160:21</p> <p><b>oversimplified</b> [1] - 176:9</p> <p><b>oversimplifies</b> [1] - 185:17</p> <p><b>oversimplifying</b> [1] - 176:5</p> <p><b>overview</b> [1] - 119:1</p> <p><b>own</b> [5] - 52:23, 106:25, 107:3, 148:23, 183:14</p> <p><b>owned</b> [1] - 152:22</p> <p><b>owns</b> [1] - 109:3</p>	<p><b>P</b></p> <p><b>P.A</b> [1] - 2:6</p> <p><b>P.C</b> [1] - 2:13</p> <p><b>page</b> [9] - 43:22, 50:22, 51:24, 127:5, 178:22, 179:19, 179:24, 181:15, 209:24</p> <p><b>pages</b> [4] - 173:6, 209:5, 222:6, 225:18</p> <p><b>painful</b> [1] - 112:25</p> <p><b>palms</b> [1] - 120:6</p> <p><b>panel</b> [1] - 168:19</p> <p><b>panel's</b> [1] - 169:22</p> <p><b>paper</b> [2] - 72:25, 135:18</p> <p><b>papers</b> [1] - 8:21</p> <p><b>paradigm</b> [5] - 119:12, 119:14, 119:25, 120:1, 120:2</p> <p><b>paragraph</b> [10] - 10:17, 46:11, 46:13, 46:16, 50:15, 109:9, 131:7, 138:16, 167:10, 171:20</p> <p><b>paragraphs</b> [6] - 46:11, 50:12, 53:15, 85:8, 109:10, 138:18</p> <p><b>paramaters</b> [1] - 188:9</p> <p><b>parameters</b> [2] - 186:24, 187:24</p> <p><b>parentheses</b> [1] - 10:18</p> <p><b>parlance</b> [1] - 196:1</p> <p><b>parrot</b> [1] - 199:10</p> <p><b>part</b> [29] - 26:4, 29:13, 36:2, 38:3, 39:21, 40:1, 50:19, 80:4, 85:1, 85:12, 91:21, 102:21, 116:2, 116:17, 121:14, 127:22, 132:23, 137:25, 141:8, 175:12, 181:3, 185:21, 185:23, 195:22, 204:1, 206:5, 211:10, 216:9, 222:11</p> <p><b>participants</b> [1] - 4:11</p> <p><b>particular</b> [58] - 11:19, 12:5, 13:1, 14:5, 23:7, 29:17, 32:11, 35:3, 35:22, 35:23, 39:12, 46:11, 53:9, 56:12, 60:21, 62:13, 62:21, 64:11, 67:21, 68:23, 72:3, 78:14, 84:8, 85:23, 89:16,</p>	<p>90:18, 90:21, 90:23, 91:22, 92:1, 92:6, 93:14, 93:20, 126:11, 135:10, 135:12, 135:25, 137:7, 142:7, 158:2, 162:1, 168:25, 179:12, 179:21, 182:4, 182:5, 185:12, 185:13, 185:15, 189:5, 189:7, 190:3, 190:7, 191:9, 206:8, 219:16</p> <p><b>particularity</b> [10] - 31:13, 37:13, 38:2, 39:16, 39:20, 42:17, 61:22, 92:20, 158:21, 161:18</p> <p><b>particularized</b> [8] - 14:10, 30:8, 64:18, 66:13, 121:15, 160:21, 161:5, 198:21</p> <p><b>particularly</b> [7] - 29:25, 96:11, 136:2, 146:7, 181:25, 184:16, 204:14</p> <p><b>particulars</b> [1] - 158:12</p> <p><b>parties</b> [11] - 3:6, 3:25, 4:6, 4:19, 5:5, 13:23, 149:25, 150:18, 151:23, 180:18, 185:19</p> <p><b>Partner</b> [4] - 27:9, 44:7, 157:9, 167:13</p> <p><b>partner</b> [7] - 12:1, 29:14, 29:18, 31:25, 35:24, 38:20, 44:1</p> <p><b>parts</b> [4] - 53:9, 84:10, 84:19, 85:2</p> <p><b>party</b> [2] - 8:12, 222:16</p> <p><b>pass</b> [1] - 19:18</p> <p><b>passed</b> [1] - 191:3</p> <p><b>past</b> [1] - 77:1</p> <p><b>Patent</b> [1] - 174:7</p> <p><b>patent</b> [262] - 7:22, 7:23, 8:5, 9:14, 15:5, 17:1, 17:13, 18:24, 20:10, 20:14, 20:23, 20:24, 21:9, 24:3, 24:6, 26:15, 26:21, 26:23, 27:19, 28:15, 28:21, 28:25, 29:2, 34:12, 47:8, 47:17, 47:19, 47:20, 48:14, 48:15, 51:8, 51:21, 52:24, 57:14, 57:23, 58:7, 58:12, 60:3,</p>	<p>60:8, 60:13, 62:20, 63:14, 63:19, 64:23, 65:4, 65:19, 68:20, 69:7, 69:14, 70:11, 70:16, 70:22, 71:17, 71:18, 71:21, 72:21, 73:3, 77:14, 77:15, 79:3, 79:10, 79:11, 79:15, 82:16, 83:13, 83:25, 84:2, 84:4, 84:11, 84:19, 84:25, 87:24, 92:21, 92:24, 95:8, 95:16, 97:10, 101:3, 102:6, 103:25, 105:10, 108:9, 108:23, 108:25, 109:1, 111:6, 111:12, 111:25, 112:2, 113:25, 114:2, 114:3, 115:20, 116:2, 116:18, 120:11, 123:1, 125:14, 126:19, 127:14, 128:19, 129:2, 129:9, 132:23, 133:13, 133:18, 134:19, 136:16, 136:17, 136:23, 138:3, 138:6, 138:12, 138:13, 139:23, 140:2, 140:20, 143:7, 149:2, 149:6, 151:8, 152:21, 152:24, 152:25, 153:2, 153:3, 153:4, 153:12, 153:22, 153:25, 155:1, 156:3, 156:7, 159:22, 160:4, 160:20, 161:11, 161:24, 161:25, 162:5, 163:13, 163:14, 163:25, 164:8, 164:25, 168:23, 168:24, 169:2, 169:6, 171:3, 171:4, 171:5, 171:16, 171:19, 172:16, 174:3, 174:5, 174:6, 174:8, 174:10, 174:11, 174:12, 174:16, 174:19, 177:11, 182:13, 183:1, 183:21, 184:2, 184:9, 184:15, 184:23, 185:10, 185:11, 185:25, 186:3, 186:12,</p>
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<p>188:7, 189:11, 189:13, 189:17, 189:22, 190:6, 192:13, 193:12, 193:13, 194:1, 194:3, 194:10, 194:21, 194:22, 194:25, 196:6, 196:17, 196:24, 199:8, 199:9, 199:15, 199:16, 199:25, 200:5, 201:24, 201:25, 202:4, 202:8, 202:25, 203:3, 203:18, 203:25, 204:4, 204:14, 204:22, 204:25, 205:2, 205:20, 206:16, 207:3, 207:7, 207:16, 208:16, 208:22, 208:25, 209:1, 209:2, 209:6, 209:20, 209:23, 210:13, 210:18, 210:20, 210:23, 210:24, 211:4, 211:25, 212:1, 212:2, 212:4, 212:8, 212:14, 213:11, 213:12, 215:4, 215:5, 215:7, 216:18, 216:20, 216:21, 217:11, 217:14, 217:20, 217:21, 218:24, 219:3, 219:6, 219:22, 220:7, 220:25, 221:13, 222:1</p> <p><b>patent's</b> [8] - 159:18, 165:15, 201:20, 204:24, 211:18, 215:9, 217:17, 219:20</p> <p><b>patent-eligible</b> [3] - 164:25, 202:25, 204:22</p> <p><b>patent-in-suit</b> [1] - 152:24</p> <p><b>patent-ineligible</b> [3] - 204:25, 212:2, 221:13</p> <p><b>patentability</b> [4] - 9:22, 12:18, 125:1, 156:12</p> <p><b>patentable</b> [2] - 126:14, 201:16</p> <p><b>patented</b> [4] - 18:18,</p>	<p>19:17, 43:23, 116:9</p> <p><b>patentee</b> [15] - 8:13, 18:20, 47:24, 51:3, 51:9, 51:20, 138:23, 146:9, 156:5, 187:4, 187:22, 189:13, 193:19, 199:14, 201:6</p> <p><b>patentee's</b> [1] - 188:15</p> <p><b>patents</b> [100] - 26:7, 55:25, 59:3, 59:25, 98:11, 98:13, 105:14, 105:19, 109:11, 113:18, 113:23, 114:5, 114:13, 118:18, 119:1, 119:10, 119:12, 123:24, 128:2, 128:3, 128:8, 130:5, 132:15, 132:21, 132:24, 133:1, 133:7, 133:9, 133:14, 134:3, 134:9, 135:17, 135:22, 146:11, 148:7, 155:24, 156:2, 174:3, 174:9, 174:12, 174:15, 174:21, 174:23, 175:16, 176:14, 180:4, 182:16, 182:20, 183:11, 186:12, 189:1, 192:5, 192:9, 192:12, 193:1, 193:2, 193:4, 193:16, 193:25, 194:4, 194:12, 194:16, 194:19, 195:1, 196:14, 209:25, 212:5, 212:6, 212:7, 214:1, 214:9, 214:13, 214:24, 215:12, 215:18, 215:20, 215:21, 215:25, 216:1, 216:8, 216:16, 216:18, 216:19, 216:22, 216:24, 216:25, 217:13, 217:23, 218:1, 218:11, 218:15, 218:18, 221:7, 221:12, 221:15, 221:17, 221:24, 222:1, 222:11</p> <p><b>patents'</b> [1] - 218:19</p> <p><b>patents-in-suit</b> [7] -</p>	<p>192:5, 192:9, 193:25, 194:16, 195:1, 215:20, 216:1</p> <p><b>patient's</b> [1] - 119:20</p> <p><b>PATRICK</b> [1] - 2:10</p> <p><b>Patrick</b> [2] - 6:21, 55:1</p> <p><b>patron</b> [1] - 155:11</p> <p><b>patron's</b> [1] - 155:8</p> <p><b>patterns</b> [1] - 151:19</p> <p><b>pay</b> [1] - 114:25</p> <p><b>payments</b> [1] - 18:3</p> <p><b>peer</b> [4] - 48:8, 207:22</p> <p><b>peer-to-peer</b> [2] - 48:8, 207:22</p> <p><b>peers</b> [1] - 207:9</p> <p><b>people</b> [11] - 19:22, 20:2, 75:7, 78:18, 78:21, 82:20, 86:11, 87:16, 97:23, 102:23, 120:4</p> <p><b>people-focused</b> [1] - 102:23</p> <p><b>per</b> [5] - 4:20, 5:4, 88:25, 144:4, 158:14</p> <p><b>perceived</b> [2] - 43:8, 145:6</p> <p><b>percent</b> [1] - 56:10</p> <p><b>percentage</b> [1] - 111:8</p> <p><b>perception</b> [1] - 145:6</p> <p><b>perform</b> [5] - 82:12, 167:15, 200:19, 201:11, 205:7</p> <p><b>performance</b> [2] - 139:11, 165:11</p> <p><b>performed</b> [2] - 30:22, 197:19</p> <p><b>performs</b> [1] - 27:10</p> <p><b>perhaps</b> [5] - 18:8, 18:17, 101:12, 109:17, 163:1</p> <p><b>permissible</b> [1] - 215:9</p> <p><b>person</b> [5] - 23:4, 33:17, 103:19, 123:24, 123:25</p> <p><b>person's</b> [4] - 86:1, 86:5, 153:20, 156:19</p> <p><b>personally</b> [1] - 150:20</p> <p><b>perspective</b> [5] - 12:17, 18:14, 71:25, 110:24, 209:22</p> <p><b>phenomenon</b> [1] - 19:20</p> <p><b>phone</b> [4] - 107:18, 115:7, 122:4, 122:16</p> <p><b>phrase</b> [7] - 70:6, 70:9, 108:16, 108:17, 121:13, 131:19, 132:16</p>	<p><b>physical</b> [2] - 22:4, 190:4</p> <p><b>physically</b> [1] - 201:3</p> <p><b>pick</b> [1] - 115:6</p> <p><b>picked</b> [1] - 206:22</p> <p><b>picture</b> [2] - 125:6, 129:16</p> <p><b>piece</b> [34] - 12:11, 12:19, 12:22, 13:2, 13:8, 13:12, 16:10, 16:24, 19:4, 20:17, 22:1, 27:11, 27:25, 47:16, 63:9, 65:9, 81:24, 88:12, 103:1, 109:13, 114:6, 115:1, 115:2, 118:2, 141:22, 142:12, 142:20, 143:6, 143:16, 144:2, 144:25, 168:7, 169:13</p> <p><b>pieces</b> [10] - 15:3, 32:14, 48:3, 48:20, 65:17, 81:1, 87:18, 103:11, 108:15, 136:13</p> <p><b>PIMS</b> [57] - 12:1, 15:2, 15:8, 15:15, 16:3, 17:4, 17:5, 22:20, 28:9, 29:16, 29:19, 29:24, 30:4, 30:6, 30:11, 30:15, 30:16, 30:20, 30:24, 31:2, 31:5, 31:9, 31:10, 31:13, 31:17, 32:9, 32:16, 32:20, 32:22, 33:4, 33:8, 33:9, 33:12, 33:23, 34:10, 35:8, 37:6, 37:22, 38:3, 41:9, 42:13, 49:11, 49:17, 49:20, 50:7, 52:8, 157:9, 159:3, 162:16, 162:25, 163:19, 163:22, 165:19, 167:2, 167:20, 168:11</p> <p><b>PIMS'</b> [1] - 164:4</p> <p><b>pit</b> [1] - 23:11</p> <p><b>pivot</b> [1] - 21:16</p> <p><b>pizza</b> [2] - 140:15, 205:21</p> <p><b>place</b> [11] - 72:18, 76:1, 83:12, 87:22, 87:24, 103:14, 104:4, 144:5, 148:23, 199:5, 211:15</p> <p><b>places</b> [3] - 96:16, 121:10, 218:9</p>	<p><b>placing</b> [2] - 121:20, 147:20</p> <p><b>plain</b> [1] - 190:25</p> <p><b>plaintiff</b> [91] - 5:25, 6:3, 8:2, 8:19, 10:16, 11:12, 11:18, 15:20, 21:12, 47:5, 51:24, 56:16, 56:25, 147:3, 149:11, 152:23, 153:13, 153:24, 154:14, 154:25, 155:3, 155:13, 158:4, 161:8, 162:4, 162:9, 163:15, 164:3, 164:11, 165:17, 165:21, 166:11, 166:13, 166:18, 166:24, 167:5, 167:7, 167:11, 167:19, 168:4, 168:6, 168:9, 168:17, 169:15, 169:19, 170:4, 170:10, 170:16, 171:2, 171:19, 172:6, 172:10, 172:25, 173:3, 174:1, 174:17, 175:5, 175:12, 175:16, 176:11, 177:7, 179:19, 179:25, 186:2, 189:16, 193:6, 193:8, 195:22, 196:13, 196:16, 202:3, 202:7, 202:8, 203:8, 204:1, 204:10, 204:13, 204:16, 205:4, 206:20, 207:4, 209:25, 210:2, 210:17, 211:16, 220:18, 221:18, 221:22, 221:24, 222:4, 222:23</p> <p><b>Plaintiff</b> [10] - 1:4, 1:10, 1:15, 54:12, 69:1, 181:15, 181:25, 193:10, 196:4, 209:4</p> <p><b>Plaintiff's</b> [1] - 175:20</p> <p><b>plaintiff's</b> [35] - 3:18, 5:21, 8:22, 23:23, 47:11, 54:8, 68:5, 68:11, 71:12, 76:9, 94:18, 94:25, 96:9, 98:19, 99:20, 116:3, 118:7, 148:2, 162:20, 164:7, 167:3, 169:11,</p>
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DEANNA WARNER, CSR

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181:5, 181:12, 184:17, 185:1, 185:22, 186:15, 191:16, 209:24, 210:9, 215:19, 219:14, 220:1, 220:11 <b>Plaintiffs</b> [1] - 109:9 <b>plaintiffs</b> [5] - 3:11, 13:9, 65:6, 152:22, 155:15 <b>plane</b> [1] - 120:10 <b>platforms</b> [1] - 159:14 <b>plausible</b> [4] - 51:17, 170:25, 181:14, 218:14 <b>plausibly</b> [1] - 166:9 <b>play</b> [2] - 35:12, 218:21 <b>plea</b> [1] - 4:9 <b>plead</b> [1] - 51:17 <b>pleaded</b> [1] - 167:19 <b>pleading</b> [2] - 152:2, 221:4 <b>pleadings</b> [2] - 192:1, 192:23 <b>plug</b> [1] - 102:15 <b>plurality</b> [3] - 80:13, 177:14, 186:20 <b>point</b> [31] - 10:12, 10:23, 13:9, 13:13, 19:24, 21:7, 22:2, 23:17, 27:17, 33:15, 63:23, 68:13, 71:6, 85:2, 87:8, 97:19, 110:2, 124:22, 127:22, 136:1, 136:20, 140:8, 140:10, 140:12, 140:17, 166:11, 168:6, 185:1, 193:9, 197:16, 197:24 <b>point-cast</b> [1] - 110:2 <b>pointed</b> [8] - 12:7, 12:9, 16:4, 85:7, 133:23, 162:4, 187:22, 210:17 <b>pointedly</b> [1] - 184:5 <b>pointing</b> [1] - 154:5 <b>points</b> [5] - 5:9, 83:4, 94:16, 177:8, 179:19 <b>populate</b> [4] - 62:5, 76:23, 77:16, 89:15 <b>populated</b> [3] - 66:8, 66:11, 66:14 <b>populating</b> [2] - 67:9, 67:11 <b>port</b> [1] - 22:6 <b>portability</b> [1] - 183:20 <b>portable</b> [1] - 74:4	<b>Porter</b> [1] - 6:21 <b>porter</b> [1] - 7:21 <b>PORTER</b> [1] - 2:9 <b>portion</b> [12] - 25:8, 78:17, 93:19, 115:25, 160:10, 168:17, 181:9, 191:17, 191:20, 201:5, 214:13, 218:19 <b>portions</b> [5] - 26:20, 93:25, 95:8, 148:3, 161:1 <b>Portuguese</b> [1] - 23:12 <b>posed</b> [1] - 119:8 <b>posit</b> [1] - 66:6 <b>POSITA</b> [5] - 52:19, 126:19, 134:16, 166:20, 168:1 <b>posited</b> [3] - 9:12, 11:12, 15:24 <b>position</b> [6] - 77:23, 161:7, 170:5, 185:22, 199:13, 215:19 <b>possibility</b> [1] - 109:16 <b>possible</b> [11] - 8:4, 42:9, 65:21, 101:14, 102:17, 111:4, 111:5, 111:9, 155:8, 172:18, 200:6 <b>possibly</b> [2] - 69:17, 168:8 <b>Post</b> [2] - 142:19, 142:25 <b>Post-it</b> [2] - 142:19, 142:25 <b>posted</b> [2] - 119:20, 186:20 <b>posting</b> [1] - 186:25 <b>potential</b> [3] - 63:18, 102:12, 223:13 <b>potentially</b> [1] - 208:2 <b>power</b> [1] - 142:23 <b>Power</b> [1] - 144:4 <b>practice</b> [3] - 20:3, 49:6, 79:23 <b>practitioner</b> [1] - 206:13 <b>Pre</b> [1] - 215:7 <b>pre</b> [2] - 147:14, 215:5 <b>preamble</b> [3] - 21:8, 157:20, 157:23 <b>precedential</b> [1] - 140:14 <b>precisely</b> [2] - 51:11, 166:20 <b>predefined</b> [1] -	187:25 <b>predominant</b> [1] - 119:14 <b>preempt</b> [13] - 13:4, 13:18, 13:20, 14:5, 14:12, 42:8, 103:10, 168:3, 169:23, 188:19, 204:2, 204:11, 220:21 <b>preemption</b> [20] - 13:10, 13:13, 13:16, 13:17, 13:24, 14:1, 14:8, 14:15, 14:16, 14:19, 19:24, 110:7, 110:8, 110:14, 110:16, 110:23, 112:19, 136:20, 156:13, 169:19 <b>preemptions</b> [1] - 205:2 <b>preemptive</b> [1] - 13:6 <b>prefer</b> [2] - 35:9, 36:8 <b>preference</b> [18] - 12:5, 17:6, 17:9, 17:23, 22:22, 22:23, 31:3, 31:7, 33:10, 34:10, 35:25, 36:6, 38:24, 41:11, 157:11, 159:4, 162:17, 163:21 <b>preferences</b> [8] - 28:12, 28:20, 34:4, 34:8, 34:14, 34:20, 36:23, 38:22 <b>prejudice</b> [2] - 8:2, 8:7 <b>preliminary</b> [1] - 5:14 <b>premised</b> [1] - 173:19 <b>preparation</b> [1] - 207:8 <b>prepared</b> [2] - 33:21, 43:5 <b>preparing</b> [1] - 108:12 <b>prescription</b> [2] - 101:21, 115:8 <b>presence</b> [1] - 179:4 <b>present</b> [6] - 15:15, 47:14, 64:9, 67:14, 193:19, 225:7 <b>presentation</b> [4] - 7:8, 8:1, 100:12, 222:15 <b>presentations</b> [2] - 5:1, 5:2 <b>presented</b> [2] - 213:16, 213:18 <b>presenting</b> [1] - 187:7 <b>pressed</b> [1] - 202:15 <b>presumably</b> [4] - 30:11, 58:17, 58:20, 111:6 <b>pretty</b> [4] - 28:5, 69:5,	133:21, 135:23 <b>prevent</b> [2] - 15:22, 131:15 <b>preview</b> [1] - 149:3 <b>previous</b> [1] - 125:15 <b>previously</b> [6] - 148:6, 165:12, 165:25, 182:1, 186:24, 189:11 <b>primarily</b> [1] - 193:23 <b>primary</b> [3] - 79:16, 80:15, 91:2 <b>principle</b> [1] - 97:1 <b>prioritization</b> [6] - 128:14, 141:6, 143:14, 214:15, 219:23, 221:1 <b>prioritize</b> [4] - 114:10, 118:18, 129:21, 146:4 <b>prioritized</b> [21] - 128:6, 128:9, 128:17, 128:18, 128:23, 129:5, 132:14, 132:16, 133:2, 133:10, 133:17, 214:20, 215:3, 215:6, 215:8, 215:14, 215:23, 216:3, 217:15, 217:24, 221:9 <b>prioritizing</b> [8] - 109:13, 113:20, 113:24, 114:5, 116:1, 128:5, 129:14, 132:17 <b>priority</b> [9] - 119:5, 129:21, 129:22, 133:25, 144:16, 212:18, 212:19, 212:22, 219:18 <b>problem</b> [61] - 16:17, 24:7, 27:4, 27:22, 28:2, 28:6, 43:9, 43:16, 48:13, 68:21, 68:25, 69:4, 69:11, 72:4, 72:8, 72:21, 73:14, 73:22, 75:2, 76:3, 76:11, 83:24, 85:4, 88:3, 89:23, 100:20, 101:3, 101:4, 103:11, 109:1, 112:3, 114:14, 120:7, 128:21, 129:11, 131:8, 131:9, 131:15, 134:5, 134:9, 135:11, 137:5, 138:6, 138:9, 138:18, 138:19,	142:9, 143:4, 143:25, 160:2, 165:8, 166:23, 169:25, 184:4, 200:6, 200:18, 204:13, 211:22, 219:1, 219:3, 219:7 <b>problematic</b> [4] - 71:24, 83:18, 111:9, 200:9 <b>problems</b> [18] - 26:13, 27:7, 46:3, 102:9, 115:24, 122:21, 139:6, 139:8, 139:12, 139:14, 140:1, 146:17, 184:13, 184:23, 199:14, 199:25, 200:16, 218:22 <b>procedural</b> [8] - 73:18, 77:2, 82:8, 87:12, 90:1, 90:3, 90:19, 192:8 <b>procedural-type</b> [1] - 77:2 <b>Procedure</b> [1] - 192:2 <b>procedures</b> [1] - 90:6 <b>proceed</b> [2] - 25:20, 155:22 <b>proceeding</b> [1] - 162:10 <b>proceedings</b> [4] - 54:3, 99:15, 149:21, 225:8 <b>process</b> [27] - 4:5, 16:14, 16:25, 40:17, 48:11, 60:17, 68:18, 74:9, 87:3, 99:11, 102:10, 111:11, 116:16, 118:20, 128:25, 132:19, 143:8, 144:11, 150:19, 200:15, 200:22, 214:17, 214:20, 221:2, 221:10, 222:19, 222:20 <b>processer</b> [1] - 176:16 <b>processes</b> [4] - 77:20, 176:17, 190:5, 201:15 <b>processing</b> [2] - 55:14, 97:21 <b>professional</b> [1] - 170:21 <b>proffered</b> [1] - 154:23 <b>program</b> [5] - 32:7, 113:11, 122:3, 159:25 <b>programmer</b> [2] -
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DEANNA WARNER, CSR

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<p>76:5, 124:2</p> <p><b>programming</b> [5] - 106:10, 106:20, 107:2, 117:22, 123:13</p> <p><b>programs</b> [4] - 123:9, 124:4, 124:17, 159:19</p> <p><b>proliferation</b> [3] - 120:5, 200:1, 200:2</p> <p><b>prominence</b> [1] - 179:9</p> <p><b>prominent</b> [2] - 215:22, 217:24</p> <p><b>prominently</b> [1] - 117:10</p> <p><b>prone</b> [1] - 200:3</p> <p><b>pronounced</b> [1] - 5:25</p> <p><b>pronouncing</b> [1] - 3:18</p> <p><b>properly</b> [2] - 115:2, 221:25</p> <p><b>propose</b> [1] - 31:17</p> <p><b>proposed</b> [3] - 173:6, 186:15, 214:5</p> <p><b>proprietary</b> [1] - 34:24</p> <p><b>prosecution</b> [5] - 162:4, 162:7, 168:8, 168:18, 169:14</p> <p><b>protocols</b> [1] - 199:24</p> <p><b>provide</b> [16] - 4:14, 15:14, 34:1, 44:3, 67:6, 141:19, 148:16, 155:6, 164:3, 165:6, 166:3, 196:11, 199:19, 214:24, 223:2, 224:8</p> <p><b>provided</b> [7] - 7:7, 40:19, 43:20, 155:23, 166:18, 169:19, 206:6</p> <p><b>provider</b> [1] - 168:16</p> <p><b>provides</b> [4] - 32:18, 35:15, 62:3, 170:11</p> <p><b>providing</b> [6] - 4:16, 52:22, 150:10, 155:5, 186:22, 190:22</p> <p><b>proximate</b> [1] - 213:18</p> <p><b>public</b> [2] - 20:9, 162:7</p> <p><b>pull</b> [3] - 75:14, 87:9, 90:14</p> <p><b>purport</b> [1] - 187:5</p> <p><b>purported</b> [3] - 103:11, 154:15, 160:1</p> <p><b>purportedly</b> [2] - 175:21, 184:12</p> <p><b>purpose</b> [6] - 74:3,</p>	<p>113:3, 113:4, 203:20, 203:23</p> <p><b>purposes</b> [14] - 8:21, 10:22, 13:10, 43:6, 74:1, 105:11, 148:24, 150:13, 153:23, 171:24, 172:3, 193:4, 193:25, 210:1</p> <p><b>pursuant</b> [6] - 152:16, 173:12, 192:1, 192:6, 192:16, 192:21</p> <p><b>purview</b> [1] - 19:16</p> <p><b>push</b> [1] - 137:23</p> <p><b>put</b> [24] - 18:9, 18:11, 42:1, 56:5, 62:19, 66:24, 83:6, 97:14, 99:2, 115:7, 116:25, 120:11, 123:6, 125:11, 131:11, 142:6, 142:7, 169:2, 172:2, 185:6, 191:12, 198:17, 214:2, 219:4</p> <p><b>putting</b> [9] - 27:2, 27:11, 46:14, 83:8, 98:22, 112:8, 117:6, 129:8, 136:9</p>	<p>170:24</p> <p><b>raise</b> [1] - 30:20</p> <p><b>raised</b> [1] - 51:25</p> <p><b>raises</b> [1] - 43:4</p> <p><b>raising</b> [1] - 223:14</p> <p><b>Raja</b> [1] - 100:3</p> <p><b>Randy</b> [1] - 54:15</p> <p><b>rather</b> [6] - 108:9, 109:11, 182:10, 187:6, 190:4, 190:13</p> <p><b>re</b> [1] - 16:19</p> <p><b>re-exam</b> [1] - 16:19</p> <p><b>read</b> [3] - 72:10, 96:1, 115:15</p> <p><b>readable</b> [2] - 113:13, 153:9</p> <p><b>readily</b> [1] - 170:20</p> <p><b>reading</b> [5] - 71:16, 131:17, 138:3, 151:13, 184:17</p> <p><b>reads</b> [1] - 198:17</p> <p><b>ready</b> [4] - 4:13, 142:16, 148:11, 148:13</p> <p><b>real</b> [13] - 14:10, 56:11, 58:8, 62:20, 64:25, 115:3, 115:22, 120:7, 151:7, 154:22, 158:10, 196:4, 198:21</p> <p><b>real-word</b> [1] - 154:22</p> <p><b>real-world</b> [3] - 14:10, 196:4, 198:21</p> <p><b>reality</b> [2] - 47:6, 180:25</p> <p><b>realize</b> [1] - 148:19</p> <p><b>really</b> [37] - 5:9, 13:5, 18:21, 20:15, 27:19, 27:20, 28:14, 57:4, 59:6, 64:19, 71:15, 72:11, 98:2, 107:22, 108:4, 110:1, 119:7, 120:3, 124:25, 126:13, 128:21, 132:10, 132:22, 133:12, 134:10, 134:24, 135:22, 138:11, 138:12, 139:18, 151:16, 164:9, 175:6, 180:20, 193:8, 196:20, 214:22</p> <p><b>realm</b> [14] - 12:12, 12:22, 14:13, 20:9, 30:12, 41:25, 42:10, 52:25, 105:22, 144:24, 147:17, 147:23, 168:3, 220:16</p>	<p><b>Realtime</b> [1] - 172:13</p> <p><b>reason</b> [11] - 15:17, 34:21, 82:4, 100:19, 137:18, 176:10, 186:8, 189:15, 200:7, 216:15, 218:16</p> <p><b>reasonable</b> [1] - 223:10</p> <p><b>reasons</b> [16] - 11:5, 136:16, 164:14, 172:4, 173:23, 173:25, 176:8, 185:8, 191:11, 194:14, 200:23, 208:20, 211:24, 214:4, 221:11, 222:2</p> <p><b>rebuttal</b> [11] - 7:17, 46:21, 55:9, 71:10, 93:5, 94:15, 100:18, 100:20, 118:6, 127:20, 141:2</p> <p><b>receive</b> [2] - 142:24, 197:23</p> <p><b>received</b> [4] - 4:22, 106:5, 125:18, 220:5</p> <p><b>receives</b> [2] - 32:3, 167:14</p> <p><b>receiving</b> [1] - 55:14</p> <p><b>recent</b> [2] - 135:1, 196:12</p> <p><b>recently</b> [1] - 19:22</p> <p><b>recess</b> [6] - 54:1, 54:2, 99:13, 99:14, 149:19, 149:20</p> <p><b>recitation</b> [1] - 55:18</p> <p><b>recite</b> [2] - 177:1, 182:11</p> <p><b>recited</b> [10] - 58:12, 60:20, 61:3, 178:24, 186:18, 187:21, 189:9, 189:23, 210:10, 218:8</p> <p><b>recites</b> [1] - 146:3</p> <p><b>reciting</b> [2] - 57:11, 175:21</p> <p><b>recognition</b> [2] - 170:18, 175:10</p> <p><b>reconciled</b> [1] - 102:4</p> <p><b>record</b> [38] - 3:2, 3:7, 5:19, 51:5, 54:7, 99:21, 101:13, 101:15, 102:11, 105:10, 119:20, 126:20, 136:15, 146:10, 146:13, 146:19, 147:1, 147:5, 148:8, 149:1, 150:2, 150:3, 150:23, 162:7,</p>	<p>166:6, 166:11, 169:16, 189:20, 207:17, 211:19, 218:13, 221:5, 221:14, 222:14, 222:15, 224:11, 224:14</p> <p><b>records</b> [1] - 61:6</p> <p><b>red</b> [1] - 48:22</p> <p><b>reduce</b> [1] - 76:25</p> <p><b>redundant</b> [1] - 200:1</p> <p><b>Reduxio</b> [1] - 172:14</p> <p><b>reexamination</b> [6] - 12:10, 153:4, 153:6, 162:10, 168:10, 168:19</p> <p><b>refer</b> [16] - 93:1, 134:15, 150:5, 152:15, 152:23, 154:7, 155:15, 162:23, 174:4, 174:6, 174:8, 191:24, 192:2, 192:12, 193:7, 209:17</p> <p><b>reference</b> [28] - 16:16, 32:15, 41:23, 49:23, 63:6, 64:10, 116:5, 128:14, 131:21, 132:22, 140:21, 152:5, 154:7, 158:18, 160:11, 163:7, 168:12, 169:22, 171:19, 192:11, 193:10, 194:7, 195:18, 209:17, 215:2, 215:13, 215:22, 217:15</p> <p><b>referenced</b> [12] - 107:12, 113:25, 114:1, 114:2, 114:7, 132:19, 161:23, 162:22, 163:12, 167:23, 182:1, 203:13</p> <p><b>references</b> [1] - 153:13</p> <p><b>referential</b> [3] - 190:8, 190:14, 190:20</p> <p><b>referred</b> [3] - 78:15, 83:16, 157:10</p> <p><b>referring</b> [4] - 3:10, 70:16, 132:5, 194:9</p> <p><b>refers</b> [2] - 195:2, 195:5</p> <p><b>reflect</b> [1] - 70:7</p> <p><b>reflected</b> [4] - 43:12, 79:19, 190:16, 224:5</p> <p><b>reflects</b> [2] - 24:6,</p>
<p style="text-align: center;"><b>Q</b></p>				
<p><b>quality</b> [1] - 187:14</p> <p><b>questioning</b> [1] - 47:10</p> <p><b>questions</b> [13] - 4:17, 5:5, 5:7, 14:23, 55:6, 69:1, 71:14, 71:16, 78:5, 92:8, 94:17, 100:18, 184:19</p> <p><b>queueing</b> [1] - 44:14</p> <p><b>quick</b> [3] - 92:8, 193:10, 223:24</p> <p><b>quickly</b> [3] - 102:16, 131:1, 220:4</p> <p><b>Quinn</b> [1] - 54:25</p> <p><b>QUINN</b> [1] - 2:19</p> <p><b>quintessential</b> [1] - 201:25</p> <p><b>quite</b> [9] - 5:10, 11:18, 22:1, 56:10, 88:13, 88:15, 134:21, 138:14, 151:1</p>				
<p style="text-align: center;"><b>R</b></p>				
<p><b>R&amp;D</b> [7] - 42:23, 43:20, 43:22, 170:8, 170:11, 170:12,</p>				

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<p>58:17</p> <p><b>regard</b> [14] - 14:2, 29:22, 41:4, 41:7, 41:15, 42:13, 57:2, 115:23, 138:21, 162:9, 163:1, 178:25, 221:23, 222:13</p> <p><b>regarding</b> [3] - 151:21, 153:19, 194:17</p> <p><b>regardless</b> [1] - 155:10</p> <p><b>registered</b> [1] - 40:18</p> <p><b>registration</b> [1] - 40:17</p> <p><b>reinforce</b> [1] - 151:15</p> <p><b>reiterate</b> [1] - 110:13</p> <p><b>reiterated</b> [1] - 187:10</p> <p><b>rejection</b> [3] - 50:5, 50:6, 50:8</p> <p><b>relate</b> [10] - 22:8, 41:20, 46:10, 57:12, 57:17, 59:24, 91:2, 94:9, 157:18, 203:4</p> <p><b>related</b> [9] - 36:12, 178:4, 180:12, 194:5, 206:2, 210:7, 214:9, 214:21, 219:10</p> <p><b>relatedly</b> [1] - 209:11</p> <p><b>relates</b> [6] - 72:6, 76:21, 132:9, 173:24, 204:14, 216:22</p> <p><b>relating</b> [6] - 113:20, 130:9, 208:22, 212:3, 217:7, 218:22</p> <p><b>relation</b> [3] - 81:10, 177:15, 183:4</p> <p><b>relational</b> [3] - 85:13, 86:3, 86:7</p> <p><b>relationship</b> [8] - 58:5, 81:8, 82:9, 83:1, 94:5, 96:19, 98:5, 116:6</p> <p><b>relationships</b> [18] - 79:18, 79:22, 80:19, 81:10, 89:12, 94:7, 94:20, 95:5, 177:9, 177:16, 178:5, 180:5, 180:10, 182:6, 183:5, 189:6, 191:10, 219:11</p> <p><b>relatively</b> [1] - 12:12</p> <p><b>relevance</b> [2] - 12:17, 154:1</p> <p><b>relevant</b> [10] - 140:12, 148:7, 150:16, 151:25, 152:21,</p>	<p>169:24, 172:23, 192:10, 205:12, 220:23</p> <p><b>reliable</b> [1] - 122:23</p> <p><b>reliance</b> [2] - 156:9, 221:8</p> <p><b>relied</b> [2] - 168:19, 170:17</p> <p><b>relies</b> [2] - 81:11, 206:17</p> <p><b>rely</b> [3] - 57:1, 204:7, 204:16</p> <p><b>relying</b> [1] - 140:13</p> <p><b>remain</b> [1] - 204:9</p> <p><b>remainder</b> [2] - 174:16, 221:17</p> <p><b>remaining</b> [2] - 109:11, 166:15</p> <p><b>reminder</b> [2] - 4:1, 210:8</p> <p><b>remote</b> [10] - 122:25, 131:12, 137:9, 137:11, 137:19, 139:19, 139:22, 200:8, 219:6, 220:9</p> <p><b>remotely</b> [1] - 70:24</p> <p><b>render</b> [1] - 169:9</p> <p><b>repeatedly</b> [2] - 68:10, 185:10</p> <p><b>replace</b> [2] - 198:5, 198:8</p> <p><b>replaced</b> [1] - 103:2</p> <p><b>reply</b> [6] - 11:8, 50:23, 51:23, 52:5, 179:25, 181:15</p> <p><b>report</b> [3] - 95:21, 96:6, 119:21</p> <p><b>reported</b> [1] - 225:7</p> <p><b>reporter</b> [5] - 3:4, 4:8, 148:12, 149:23, 224:12</p> <p><b>Reporter</b> [2] - 225:5, 225:6</p> <p><b>repositories</b> [2] - 177:2, 191:6</p> <p><b>repository</b> [14] - 56:13, 64:16, 64:17, 71:20, 72:3, 76:9, 76:18, 77:17, 79:5, 175:17, 176:17, 177:11, 179:18, 189:4</p> <p><b>represent</b> [2] - 45:25, 67:8</p> <p><b>representation</b> [7] - 95:6, 96:12, 116:14, 117:11, 119:15, 213:4, 213:7</p> <p><b>representative</b> [30] - 8:17, 9:7, 9:13, 10:9,</p>	<p>11:1, 11:5, 11:18, 24:4, 24:19, 25:6, 41:5, 55:1, 113:19, 128:4, 133:10, 149:24, 153:22, 171:18, 174:15, 174:25, 184:8, 184:12, 193:1, 193:3, 193:19, 193:22, 194:2, 206:15, 206:17, 208:18</p> <p><b>representativeness</b> [6] - 8:11, 8:14, 8:20, 8:23, 9:1, 9:11</p> <p><b>represented</b> [2] - 12:3, 58:2</p> <p><b>representing</b> [3] - 118:12, 151:23, 213:19</p> <p><b>represents</b> [1] - 213:7</p> <p><b>reproduce</b> [1] - 171:25</p> <p><b>request</b> [6] - 32:3, 167:14, 172:7, 223:7, 223:11, 224:3</p> <p><b>require</b> [21] - 31:2, 31:14, 32:23, 39:7, 45:3, 68:15, 74:22, 77:24, 83:17, 83:22, 88:16, 88:21, 138:25, 156:18, 156:21, 162:15, 165:24, 180:25, 181:7, 201:11, 210:15</p> <p><b>required</b> [21] - 33:6, 39:10, 62:17, 64:12, 67:25, 76:4, 76:25, 89:8, 91:15, 96:24, 117:23, 158:22, 161:18, 164:21, 180:22, 188:8, 188:17, 200:18, 202:21, 207:21, 207:25</p> <p><b>requirement</b> [8] - 14:15, 78:8, 81:20, 188:12, 214:14, 217:12, 221:8, 223:24</p> <p><b>requirements</b> [14] - 30:10, 31:10, 37:12, 37:24, 56:22, 59:17, 62:10, 71:21, 76:21, 93:15, 153:18, 160:22, 176:7, 190:24</p> <p><b>requires</b> [20] - 33:12, 42:5, 45:11, 62:14, 64:16, 68:19, 80:2,</p>	<p>87:5, 137:20, 163:20, 167:2, 197:8, 209:6, 209:12, 212:15, 212:20, 213:2, 213:6, 213:20, 217:5</p> <p><b>requiring</b> [2] - 66:4, 187:23</p> <p><b>research</b> [2] - 170:7, 171:2</p> <p><b>Research</b> [1] - 201:18</p> <p><b>resemblance</b> [1] - 100:22</p> <p><b>reservations</b> [1] - 108:3</p> <p><b>reserve</b> [5] - 7:5, 7:16, 23:20, 55:9, 100:17</p> <p><b>reside</b> [1] - 137:12</p> <p><b>resided</b> [1] - 138:8</p> <p><b>resilient</b> [1] - 44:11</p> <p><b>resolution</b> [3] - 44:22, 170:15, 170:18</p> <p><b>resolve</b> [1] - 223:20</p> <p><b>resolved</b> [1] - 170:21</p> <p><b>resolving</b> [1] - 172:15</p> <p><b>resorts</b> [2] - 3:9, 6:18</p> <p><b>Resorts</b> [2] - 152:13, 152:14</p> <p><b>RESORTS</b> [2] - 1:6, 225:10</p> <p><b>resource</b> [2] - 75:13, 82:22</p> <p><b>resources</b> [3] - 77:13, 200:10, 201:23</p> <p><b>respect</b> [12] - 22:18, 39:18, 45:5, 78:3, 80:20, 80:22, 165:2, 167:16, 174:20, 174:22, 194:12, 217:16</p> <p><b>respectfully</b> [1] - 223:6</p> <p><b>respective</b> [10] - 192:13, 193:2, 193:15, 193:24, 198:15, 203:13, 204:9, 209:8, 212:11, 216:25</p> <p><b>respond</b> [1] - 11:8</p> <p><b>responded</b> [1] - 61:5</p> <p><b>response</b> [4] - 22:2, 37:5, 61:10, 126:23</p> <p><b>responsive</b> [1] - 209:14</p> <p><b>rest</b> [2] - 71:9, 166:8</p> <p><b>restated</b> [1] - 188:14</p> <p><b>restates</b> [1] - 210:10</p> <p><b>restricted</b> [1] - 68:3</p> <p><b>restroom</b> [1] - 53:23</p> <p><b>rests</b> [1] - 24:8</p>	<p><b>result</b> [11] - 38:9, 38:10, 58:14, 60:15, 67:2, 114:20, 157:19, 162:2, 198:24, 199:3, 206:6</p> <p><b>result-focused</b> [1] - 206:6</p> <p><b>result-oriented</b> [1] - 198:24</p> <p><b>resulting</b> [1] - 187:19</p> <p><b>retrieval</b> [1] - 61:3</p> <p><b>retrieve</b> [4] - 60:17, 87:9, 182:9, 183:23</p> <p><b>retrieved</b> [1] - 70:4</p> <p><b>retrieves</b> [1] - 176:18</p> <p><b>retrieving</b> [8] - 56:8, 97:21, 175:2, 176:23, 178:16, 182:18, 182:22, 186:19</p> <p><b>return</b> [3] - 4:6, 4:11, 148:17</p> <p><b>reversed</b> [1] - 207:10</p> <p><b>review</b> [3] - 53:11, 152:1, 192:22</p> <p><b>reviewed</b> [2] - 5:12, 8:18</p> <p><b>reviewing</b> [1] - 150:22</p> <p><b>rhetorically</b> [1] - 56:17</p> <p><b>RICHARDS</b> [1] - 2:6</p> <p><b>Richards</b> [2] - 6:17, 99:24</p> <p><b>Richardson</b> [1] - 54:12</p> <p><b>RICHARDSON</b> [1] - 2:13</p> <p><b>rigorous</b> [2] - 150:20, 151:3</p> <p><b>role</b> [3] - 165:8, 183:16, 218:21</p> <p><b>rooted</b> [4] - 135:3, 135:5, 135:14, 210:5</p> <p><b>ROTHSTEIN</b> [21] - 2:9, 7:6, 7:16, 7:19, 10:24, 12:20, 13:11, 14:18, 15:17, 17:12, 17:17, 19:14, 20:22, 21:6, 22:10, 22:25, 23:9, 23:19, 46:25, 50:15, 51:11</p> <p><b>Rothstein</b> [9] - 6:21, 6:22, 7:20, 10:6, 29:23, 46:8, 46:22, 50:24, 53:3</p> <p><b>route</b> [1] - 218:10</p> <p><b>routes</b> [1] - 208:1</p> <p><b>routine</b> [7] - 43:3, 44:24, 165:12, 170:20, 171:3, 206:14, 206:18</p>
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<b>routing</b> <sup>[1]</sup> - 48:10 <b>row</b> <sup>[4]</sup> - 62:5, 62:9, 67:17, 78:23 <b>rows</b> <sup>[12]</sup> - 61:4, 61:7, 64:2, 64:11, 66:4, 66:8, 66:11, 67:9, 67:12, 67:21, 78:23, 93:14 <b>Rule</b> <sup>[9]</sup> - 146:24, 152:16, 173:18, 192:2, 192:16, 192:21, 192:22, 192:24 <b>rule</b> <sup>[6]</sup> - 109:14, 114:24, 115:15, 143:17 <b>ruled</b> <sup>[1]</sup> - 207:6 <b>rules</b> <sup>[4]</sup> - 3:24, 109:15, 115:11, 115:13 <b>running</b> <sup>[5]</sup> - 74:2, 77:18, 113:3, 120:10, 124:18 <b>runs</b> <sup>[2]</sup> - 88:5, 124:19 <b>Ryan</b> <sup>[1]</sup> - 100:10	65:21, 79:9, 82:25 <b>schemas</b> <sup>[1]</sup> - 68:4 <b>scheme</b> <sup>[1]</sup> - 129:21 <b>SCHOENBAUM</b> <sup>[1]</sup> - 99:23 <b>Schoenbaum</b> <sup>[1]</sup> - 99:24 <b>SCHOLER</b> <sup>[1]</sup> - 2:9 <b>science</b> <sup>[1]</sup> - 170:14 <b>scientific</b> <sup>[5]</sup> - 44:23, 45:20, 45:23, 170:15, 170:19 <b>scope</b> <sup>[2]</sup> - 30:24, 147:11 <b>screen</b> <sup>[3]</sup> - 18:11, 18:12, 48:22 <b>se</b> <sup>[2]</sup> - 144:4, 158:14 <b>SEALED</b> <sup>[1]</sup> - 225:20 <b>seamless</b> <sup>[1]</sup> - 199:20 <b>search</b> <sup>[1]</sup> - 190:23 <b>season</b> <sup>[1]</sup> - 224:2 <b>seated</b> <sup>[1]</sup> - 6:12 <b>second</b> <sup>[68]</sup> - 3:13, 7:10, 11:24, 17:3, 25:24, 39:21, 39:22, 39:23, 40:4, 40:11, 41:8, 41:16, 42:6, 42:20, 42:21, 51:13, 51:15, 52:3, 53:21, 54:5, 63:15, 68:6, 84:15, 101:8, 101:18, 101:24, 106:23, 106:25, 121:23, 122:11, 122:13, 125:20, 125:22, 126:3, 127:8, 140:4, 142:2, 142:4, 152:17, 156:21, 162:15, 167:7, 167:9, 167:11, 169:20, 170:6, 173:15, 177:15, 185:5, 192:15, 197:9, 197:13, 197:16, 197:23, 198:7, 198:8, 208:23, 212:19, 212:24, 212:25, 213:3, 213:5, 213:10, 213:14, 213:16, 213:23, 217:9 <b>secondly</b> <sup>[1]</sup> - 4:19 <b>Section</b> <sup>[8]</sup> - 12:16, 151:21, 152:19, 165:10, 169:18, 173:24, 189:19, 209:22 <b>section</b> <sup>[40]</sup> - 26:10, 27:21, 27:22, 27:25,	28:7, 45:3, 70:1, 72:13, 72:14, 114:3, 132:20, 133:4, 152:1, 153:23, 154:2, 159:18, 160:4, 160:6, 160:10, 160:13, 161:23, 163:13, 165:14, 169:11, 171:23, 172:23, 173:21, 183:12, 183:21, 184:2, 184:5, 184:15, 192:6, 193:4, 199:8, 199:12, 210:22, 210:24, 216:23, 217:18 <b>sections</b> <sup>[5]</sup> - 105:18, 133:23, 199:10, 215:18, 215:21 <b>see</b> <sup>[33]</sup> - 5:9, 6:24, 16:3, 36:4, 42:5, 55:18, 60:2, 63:5, 63:6, 63:13, 68:19, 68:20, 68:22, 72:5, 74:21, 74:23, 74:24, 81:7, 84:22, 85:11, 115:9, 127:10, 128:22, 134:4, 151:19, 157:13, 163:19, 164:6, 198:11, 202:15, 203:2, 219:21 <b>seeing</b> <sup>[2]</sup> - 43:16, 63:1 <b>seek</b> <sup>[2]</sup> - 201:21, 221:18 <b>seem</b> <sup>[11]</sup> - 36:12, 134:23, 137:1, 163:6, 180:9, 181:14, 189:16, 197:2, 202:2, 216:20, 217:23 <b>segmentation</b> <sup>[1]</sup> - 208:1 <b>self</b> <sup>[3]</sup> - 190:8, 190:14, 190:20 <b>self-referential</b> <sup>[3]</sup> - 190:8, 190:14, 190:20 <b>selling</b> <sup>[1]</sup> - 179:6 <b>send</b> <sup>[20]</sup> - 34:5, 106:16, 106:22, 107:3, 107:20, 109:24, 114:22, 114:24, 115:16, 129:12, 129:23, 131:19, 141:23, 141:25, 142:20, 142:21, 143:17,	144:2, 144:25, 146:1 <b>sender/listener</b> <sup>[1]</sup> - 160:17 <b>sending</b> <sup>[7]</sup> - 115:21, 116:13, 128:6, 128:8, 128:17, 209:9, 219:24 <b>sends</b> <sup>[1]</sup> - 145:3 <b>sense</b> <sup>[6]</sup> - 19:5, 72:7, 75:6, 77:9, 137:18, 212:8 <b>sensors</b> <sup>[1]</sup> - 142:5 <b>sent</b> <sup>[6]</sup> - 101:23, 106:8, 113:22, 128:7, 128:11, 128:19 <b>sentence</b> <sup>[6]</sup> - 63:15, 69:25, 72:12, 83:18, 131:13, 131:14 <b>sentences</b> <sup>[2]</sup> - 83:19, 116:7 <b>separate</b> <sup>[5]</sup> - 36:7, 144:18, 159:20, 200:21, 205:14 <b>separately</b> <sup>[1]</sup> - 107:13 <b>series</b> <sup>[2]</sup> - 84:5, 150:4 <b>serious</b> <sup>[1]</sup> - 134:14 <b>serve</b> <sup>[1]</sup> - 187:18 <b>server</b> <sup>[60]</sup> - 11:23, 14:25, 15:1, 16:3, 21:21, 21:22, 25:15, 25:23, 26:12, 27:3, 27:7, 28:8, 28:23, 29:6, 32:4, 33:25, 34:6, 34:7, 37:7, 37:22, 38:3, 38:16, 39:3, 39:25, 40:1, 40:12, 40:23, 41:6, 43:24, 44:10, 49:14, 49:17, 50:2, 50:4, 103:21, 104:16, 104:22, 105:6, 106:8, 106:16, 106:17, 107:7, 107:16, 119:17, 119:21, 119:23, 122:11, 123:2, 123:8, 136:9, 137:11, 137:12, 137:16, 137:24, 142:13, 155:5, 157:5, 158:25, 162:12, 205:6 <b>SERVICE</b> <sup>[1]</sup> - 1:12 <b>Service</b> <sup>[6]</sup> - 2:21, 3:14, 54:23, 65:7, 173:16, 225:11 <b>service</b> <sup>[12]</sup> - 3:5, 10:3, 31:24, 42:3,	154:12, 155:6, 155:9, 158:24, 160:15, 161:4, 164:18, 168:15 <b>services</b> <sup>[2]</sup> - 31:25, 159:20 <b>set</b> <sup>[14]</sup> - 57:5, 104:21, 135:19, 135:22, 151:25, 163:25, 164:14, 173:8, 173:25, 175:18, 221:11, 222:7, 222:13, 223:23 <b>sets</b> <sup>[2]</sup> - 28:21, 191:7 <b>setting</b> <sup>[1]</sup> - 206:7 <b>seven</b> <sup>[5]</sup> - 7:17, 23:17, 46:21, 47:2, 100:17 <b>seven-minute</b> <sup>[1]</sup> - 23:17 <b>seventh</b> <sup>[1]</sup> - 178:7 <b>several</b> <sup>[5]</sup> - 11:9, 87:25, 136:1, 139:13, 177:3 <b>Shah</b> <sup>[1]</sup> - 100:2 <b>shall</b> <sup>[2]</sup> - 173:3, 222:4 <b>shape</b> <sup>[2]</sup> - 98:4, 98:7 <b>share</b> <sup>[5]</sup> - 93:7, 174:9, 174:12, 194:5, 216:19 <b>shared</b> <sup>[1]</sup> - 166:2 <b>sharing</b> <sup>[3]</sup> - 119:18, 200:16, 202:10 <b>shed</b> <sup>[1]</sup> - 171:8 <b>sheds</b> <sup>[1]</sup> - 182:14 <b>shelf</b> <sup>[1]</sup> - 48:20 <b>short</b> <sup>[3]</sup> - 13:11, 29:16, 179:7 <b>short-handing</b> <sup>[1]</sup> - 29:16 <b>shorthand</b> <sup>[5]</sup> - 19:8, 150:6, 195:20, 225:7, 225:16 <b>Shorthand</b> <sup>[2]</sup> - 225:5, 225:6 <b>shortly</b> <sup>[3]</sup> - 4:12, 150:13, 194:15 <b>show</b> <sup>[9]</sup> - 79:18, 96:16, 98:1, 121:18, 122:7, 133:8, 169:22, 183:5, 193:13 <b>showed</b> <sup>[2]</sup> - 65:11, 165:23 <b>showing</b> <sup>[3]</sup> - 131:11, 208:16, 219:5 <b>shown</b> <sup>[6]</sup> - 43:21, 82:15, 90:25, 98:6, 109:3, 122:10 <b>shows</b> <sup>[12]</sup> - 77:15,
<b>S</b>				
<b>S2S</b> <sup>[1]</sup> - 160:18 <b>Salceda</b> <sup>[1]</sup> - 55:1 <b>Saliba</b> <sup>[1]</sup> - 100:3 <b>saloon</b> <sup>[1]</sup> - 23:11 <b>san</b> <sup>[1]</sup> - 54:14 <b>Sangalli</b> <sup>[7]</sup> - 6:5, 23:24, 24:22, 46:6, 53:8, 53:13 <b>SANGALLI</b> <sup>[22]</sup> - 2:3, 23:25, 25:11, 26:2, 26:19, 28:16, 30:19, 31:16, 33:14, 33:23, 34:12, 34:21, 35:14, 36:14, 38:5, 39:18, 41:13, 42:21, 45:13, 45:20, 46:18, 53:14 <b>Sankey</b> <sup>[1]</sup> - 6:5 <b>SANKEY</b> <sup>[1]</sup> - 2:3 <b>SAP</b> <sup>[1]</sup> - 16:22 <b>SARA</b> <sup>[1]</sup> - 2:7 <b>Sara</b> <sup>[1]</sup> - 6:19 <b>satisfactory</b> <sup>[1]</sup> - 200:8 <b>save</b> <sup>[8]</sup> - 8:5, 65:25, 71:5, 71:9, 103:20, 118:4, 197:19 <b>saw</b> <sup>[4]</sup> - 95:7, 97:16, 99:4, 146:17 <b>schedule</b> <sup>[3]</sup> - 4:1, 173:8, 222:8 <b>schema</b> <sup>[4]</sup> - 63:16,				

DEANNA WARNER, CSR

202 Ashfield Court, Smyrna DE 19977

Phone: (302) 893-1158 E-mail: warnerdeanna@gmail.com

<p>79:11, 79:13, 91:1, 104:7, 117:15, 119:15, 125:12, 125:15, 133:5, 133:11</p> <p><b>side</b> [25] - 4:20, 5:4, 5:21, 6:14, 7:4, 7:11, 7:12, 8:25, 23:23, 33:3, 41:16, 42:1, 42:17, 49:4, 54:9, 54:19, 61:1, 71:8, 78:6, 90:25, 93:5, 99:20, 100:5, 111:10, 119:8</p> <p><b>sides</b> [2] - 18:20, 205:18</p> <p><b>SIGNED</b> [1] - 225:20</p> <p><b>significance</b> [1] - 193:21</p> <p><b>significant</b> [6] - 102:21, 103:3, 159:8, 208:5, 214:12, 216:9</p> <p><b>significantly</b> [2] - 24:5, 220:21</p> <p><b>signifying</b> [1] - 117:9</p> <p><b>silent</b> [2] - 180:4, 180:9</p> <p><b>similar</b> [15] - 9:2, 153:18, 160:8, 175:11, 185:20, 186:3, 189:16, 193:14, 195:3, 205:20, 205:23, 209:2, 212:7, 213:12, 217:12</p> <p><b>similarity</b> [2] - 95:19, 96:5</p> <p><b>similarly</b> [3] - 42:12, 55:20, 170:4</p> <p><b>simple</b> [4] - 45:23, 82:13, 101:11, 103:25</p> <p><b>simply</b> [41] - 8:15, 11:11, 38:8, 38:10, 42:2, 49:8, 49:19, 56:18, 102:7, 112:7, 143:11, 143:25, 144:23, 145:10, 145:22, 150:15, 157:15, 159:22, 160:13, 161:20, 179:8, 180:25, 181:18, 182:7, 185:16, 188:14, 189:1, 198:10, 199:2, 199:10, 201:21, 203:20, 204:16, 204:21, 205:11, 205:14,</p>	<p>206:18, 210:9, 214:1, 215:11, 216:12</p> <p><b>single</b> [8] - 9:13, 24:4, 64:4, 80:21, 93:24, 104:13, 173:5, 222:6</p> <p><b>single-spaced</b> [2] - 173:5, 222:6</p> <p><b>sits</b> [5] - 32:17, 33:24, 43:24, 107:16, 123:3</p> <p><b>situation</b> [1] - 107:25</p> <p><b>six</b> [7] - 113:18, 119:1, 127:5, 128:3, 192:9, 194:4, 194:25</p> <p><b>sixth</b> [1] - 178:2</p> <p><b>skill</b> [3] - 33:18, 123:25, 124:1</p> <p><b>skim</b> [1] - 178:19</p> <p><b>skip</b> [2] - 14:21, 85:25</p> <p><b>slew</b> [1] - 17:25</p> <p><b>slide</b> [26] - 8:18, 29:4, 55:13, 56:1, 56:3, 57:22, 58:3, 60:2, 62:1, 63:13, 63:23, 65:11, 65:12, 66:24, 90:18, 91:1, 93:21, 95:7, 96:16, 97:14, 98:1, 98:10, 121:17, 122:7, 125:12, 125:15</p> <p><b>slides</b> [10] - 4:23, 5:10, 5:11, 5:12, 68:5, 97:16, 97:18, 98:21, 98:22, 99:2</p> <p><b>slightly</b> [3] - 108:14, 195:3, 195:15</p> <p><b>slow</b> [1] - 200:15</p> <p><b>slower</b> [1] - 129:10</p> <p><b>small</b> [3] - 129:15, 145:6, 146:19</p> <p><b>smaller</b> [1] - 190:23</p> <p><b>smoother</b> [1] - 149:8</p> <p><b>so-called</b> [1] - 94:23</p> <p><b>soaked</b> [1] - 111:8</p> <p><b>SOAP</b> [1] - 160:16</p> <p><b>SOAPConnection</b> [1] - 34:16</p> <p><b>software</b> [21] - 15:4, 16:11, 22:4, 22:16, 31:11, 33:24, 34:24, 67:16, 110:13, 113:2, 113:11, 124:18, 137:9, 137:19, 139:22, 190:2, 196:10, 200:9, 200:19, 203:15, 220:9</p> <p><b>software-based</b> [1] - 22:4</p> <p><b>solution</b> [18] - 12:23,</p>	<p>27:23, 28:6, 30:12, 42:4, 43:21, 45:14, 46:4, 69:12, 137:17, 137:19, 137:25, 139:23, 160:2, 165:7, 167:22, 201:12, 220:21</p> <p><b>solutions</b> [24] - 14:13, 42:9, 102:20, 102:21, 103:9, 111:4, 111:9, 111:13, 111:19, 136:25, 137:18, 138:13, 138:15, 138:25, 139:7, 139:14, 155:4, 166:21, 168:3, 200:6, 220:12, 220:15, 220:19</p> <p><b>solve</b> [12] - 26:15, 68:22, 68:24, 69:3, 128:21, 140:2, 166:23, 169:25, 184:13, 199:15, 211:22, 219:7</p> <p><b>solved</b> [5] - 76:2, 85:4, 101:3, 135:11, 143:25</p> <p><b>solves</b> [6] - 27:3, 72:4, 72:8, 83:23, 88:3, 184:22</p> <p><b>solving</b> [5] - 16:17, 16:18, 48:13, 109:2, 218:22</p> <p><b>someone</b> [14] - 23:1, 23:14, 77:22, 78:23, 83:10, 103:13, 103:18, 108:6, 115:6, 115:15, 116:23, 120:22, 121:2, 145:1</p> <p><b>sometimes</b> [6] - 26:13, 73:11, 108:15, 108:17, 138:7, 141:13</p> <p><b>somewhat</b> [2] - 21:15, 179:9</p> <p><b>somewhere</b> [5] - 75:18, 122:25, 142:14, 150:21, 216:20</p> <p><b>soon</b> [2] - 148:15, 191:20</p> <p><b>sorry</b> [9] - 44:16, 58:3, 63:21, 63:24, 70:18, 92:15, 95:22, 99:19, 193:2</p> <p><b>sort</b> [2] - 45:4, 80:19</p> <p><b>sought</b> [2] - 165:15, 170:4</p>	<p><b>sound</b> [1] - 176:21</p> <p><b>sounds</b> [7] - 20:11, 20:16, 34:19, 65:16, 66:18, 124:23, 179:14</p> <p><b>space</b> [2] - 18:25, 221:3</p> <p><b>spaced</b> [2] - 173:5, 222:6</p> <p><b>span</b> [1] - 151:14</p> <p><b>Spanish</b> [3] - 23:2, 23:4</p> <p><b>speaker</b> [1] - 23:5</p> <p><b>speaking</b> [1] - 23:20</p> <p><b>speaks</b> [2] - 23:4, 96:7</p> <p><b>spec</b> [2] - 26:9, 144:17</p> <p><b>special</b> [2] - 113:4, 203:23</p> <p><b>specialized</b> [1] - 87:13</p> <p><b>specific</b> [46] - 30:7, 37:24, 56:21, 57:4, 57:7, 58:10, 58:11, 58:16, 62:2, 63:5, 67:17, 68:3, 73:18, 73:21, 74:1, 74:10, 74:18, 76:6, 76:7, 76:20, 78:13, 78:14, 86:18, 90:12, 95:1, 96:14, 97:9, 104:25, 134:7, 155:4, 159:11, 160:21, 161:5, 175:18, 176:7, 182:11, 183:17, 188:18, 188:22, 190:10, 191:7, 196:7, 196:15, 198:21, 211:17</p> <p><b>specifically</b> [14] - 92:5, 96:1, 114:6, 127:13, 136:5, 158:2, 159:17, 168:9, 190:13, 194:13, 196:18, 212:14, 218:18, 221:18</p> <p><b>specification</b> [81] - 15:6, 15:19, 16:1, 16:7, 21:19, 24:14, 26:3, 28:17, 30:23, 31:19, 31:20, 34:18, 36:17, 40:15, 47:13, 48:12, 48:25, 49:16, 50:10, 52:13, 52:22, 57:14, 57:23, 63:12, 64:24, 65:5, 65:9, 65:10, 65:19, 78:17, 79:3, 79:15, 85:2, 95:7, 95:15, 96:17, 101:1, 103:7,</p>	<p>104:10, 105:11, 105:13, 107:14, 107:15, 112:25, 113:5, 115:25, 133:22, 145:20, 145:23, 145:24, 147:12, 155:19, 156:3, 156:5, 156:9, 159:16, 161:1, 163:7, 163:24, 164:8, 182:13, 183:16, 185:10, 188:3, 190:19, 194:6, 194:8, 194:9, 196:18, 196:22, 199:6, 201:6, 208:3, 208:9, 210:20, 217:20, 217:21, 218:20, 218:25, 219:7</p> <p><b>specifications</b> [1] - 194:11</p> <p><b>specificity</b> [13] - 15:11, 30:3, 30:10, 47:12, 62:16, 62:18, 63:2, 87:4, 88:20, 89:8, 133:6, 133:12, 190:15</p> <p><b>specifics</b> [3] - 123:19, 158:12, 206:8</p> <p><b>specified</b> [12] - 57:21, 74:14, 79:6, 79:22, 80:20, 87:7, 87:17, 91:24, 91:25, 94:1, 94:6, 179:23</p> <p><b>specifies</b> [2] - 64:3, 91:9</p> <p><b>specify</b> [10] - 60:8, 66:1, 66:3, 75:9, 78:24, 80:18, 86:10, 86:14, 86:20, 92:3</p> <p><b>specifying</b> [5] - 60:1, 66:7, 66:10, 66:13, 81:3</p> <p><b>specs</b> [1] - 146:6</p> <p><b>Speedbudget</b> [1] - 225:25</p> <p><b>spells</b> [1] - 84:1</p> <p><b>spend</b> [1] - 118:15</p> <p><b>spent</b> [3] - 98:23, 150:20, 150:25</p> <p><b>spot</b> [2] - 46:14, 83:25</p> <p><b>spots</b> [1] - 84:2</p> <p><b>spread</b> [1] - 89:20</p> <p><b>SQUIRE</b> [4] - 2:2, 5:24, 222:22, 223:15</p> <p><b>squire</b> [1] - 5:23</p> <p><b>Squire</b> [2] - 6:2, 222:23</p> <p><b>ss</b> [1] - 225:2</p>
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DEANNA WARNER, CSR

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Phone: (302) 893-1158 E-mail: warnerdeanna@gmail.com

<b>staff</b> [1] - 108:3 <b>stage</b> [12] - 8:4, 11:20, 24:24, 51:4, 51:7, 146:24, 152:3, 155:17, 169:12, 172:24, 181:11, 221:4 <b>stand</b> [2] - 54:1, 149:19 <b>standard</b> [3] - 48:20, 85:15, 192:22 <b>standards</b> [3] - 152:1, 152:6, 152:7 <b>star</b> [3] - 101:22, 101:24, 179:16 <b>stark</b> [1] - 48:5 <b>start</b> [10] - 5:20, 47:3, 54:8, 55:5, 55:11, 72:18, 97:15, 100:15, 118:21, 118:22 <b>started</b> [4] - 3:23, 50:22, 54:6, 148:14 <b>starting</b> [4] - 87:21, 95:16, 99:21, 120:4 <b>starts</b> [3] - 88:1, 88:5, 139:16 <b>state</b> [21] - 59:12, 59:17, 77:15, 77:17, 82:15, 90:16, 90:19, 90:22, 90:24, 91:8, 91:23, 91:25, 92:2, 92:4, 96:23, 178:7, 178:8, 178:12, 180:12, 180:13, 180:24 <b>STATE</b> [1] - 225:2 <b>statement</b> [1] - 166:19 <b>statements</b> [1] - 219:15 <b>STATES</b> [1] - 1:1 <b>States</b> [5] - 153:4, 154:18, 174:3, 174:5, 174:7 <b>states</b> [2] - 57:24, 198:6 <b>stating</b> [1] - 183:21 <b>status</b> [10] - 59:1, 60:10, 90:21, 91:6, 91:7, 91:20, 91:21, 91:23, 92:2, 178:11 <b>statuses</b> [2] - 77:16, 178:12 <b>stayed</b> [1] - 173:14 <b>Stenotype</b> [1] - 225:7 <b>Step</b> [55] - 11:20, 13:7, 13:15, 14:22, 16:6, 19:13, 20:19, 24:20, 24:21, 24:23, 45:11, 154:9, 154:25,	155:25, 159:17, 162:5, 164:20, 164:21, 165:8, 166:12, 169:15, 170:25, 171:11, 174:25, 176:7, 176:12, 182:15, 185:2, 185:3, 186:9, 188:9, 191:4, 194:24, 196:5, 202:19, 202:20, 203:10, 204:15, 205:4, 206:5, 206:9, 207:11, 210:9, 210:16, 211:16, 213:24, 215:19, 216:6, 216:16, 217:22, 218:9, 218:12, 220:23, 221:8 <b>step</b> [23] - 11:22, 14:25, 16:14, 39:3, 39:11, 40:2, 42:5, 42:11, 49:24, 62:22, 84:23, 112:24, 114:16, 125:18, 157:4, 157:8, 162:12, 162:15, 163:6, 163:7, 163:12, 211:2, 218:6 <b>stepping</b> [2] - 56:15, 81:15 <b>stepping-back</b> [1] - 56:15 <b>steps</b> [17] - 7:24, 9:20, 9:23, 11:6, 11:7, 36:7, 36:12, 114:21, 156:17, 159:9, 209:18, 210:3, 210:12, 210:18, 211:18, 211:20, 211:23 <b>stick</b> [1] - 4:18 <b>sticker</b> [1] - 109:17 <b>still</b> [18] - 17:1, 52:20, 69:24, 76:2, 76:14, 105:4, 107:18, 109:25, 110:15, 114:15, 114:18, 139:6, 139:8, 143:22, 147:23, 150:1, 169:3, 179:6 <b>stip</b> [1] - 14:17 <b>stood</b> [1] - 48:5 <b>stop</b> [5] - 118:5, 142:8, 159:14, 176:25, 182:10 <b>stopping</b> [1] - 176:20 <b>storage</b> [7] - 9:17, 55:20, 61:3, 70:16,	153:9, 175:10, 183:13 <b>store</b> [35] - 57:10, 57:18, 58:18, 60:17, 60:21, 60:24, 67:5, 70:3, 70:20, 70:23, 71:3, 72:6, 80:24, 81:1, 86:3, 86:7, 95:21, 96:6, 177:4, 177:13, 177:16, 177:20, 177:22, 177:24, 178:3, 178:8, 178:12, 180:13, 181:22, 182:4, 182:8, 183:3, 183:22, 185:14, 191:8 <b>stored</b> [15] - 36:18, 59:19, 59:21, 61:10, 80:19, 95:18, 96:3, 97:5, 104:18, 122:25, 163:11, 180:15, 209:12, 213:8, 213:9 <b>stores</b> [3] - 81:10, 81:22, 176:18 <b>storing</b> [14] - 55:15, 56:7, 56:19, 64:20, 70:20, 76:8, 97:21, 175:2, 176:22, 178:15, 182:17, 187:18, 190:13, 195:6 <b>strategies</b> [1] - 116:10 <b>stretch</b> [1] - 53:22 <b>string</b> [1] - 85:15 <b>structural</b> [2] - 79:9, 188:8 <b>structure</b> [77] - 22:5, 28:22, 31:18, 32:23, 32:24, 56:14, 61:19, 61:23, 62:2, 62:13, 63:5, 63:9, 63:10, 63:25, 64:1, 64:8, 64:18, 64:19, 64:25, 66:13, 67:13, 67:21, 68:3, 68:8, 68:15, 71:19, 73:9, 74:20, 75:14, 75:23, 76:17, 76:22, 76:23, 76:24, 77:4, 77:10, 77:21, 78:18, 78:19, 79:6, 80:23, 81:5, 82:4, 82:18, 83:9, 84:9, 85:23, 86:20, 87:14, 88:2, 90:8, 90:11, 90:12, 91:5, 91:11, 93:11, 93:12, 93:13, 93:15, 93:18, 93:23, 94:7, 94:8, 94:24,	144:19, 144:20, 175:19, 181:3, 181:10, 185:12, 187:6, 187:25, 188:4, 188:18 <b>structures</b> [18] - 69:16, 71:22, 75:25, 78:15, 80:16, 83:16, 84:7, 175:18, 175:22, 179:23, 182:11, 188:22, 189:5, 189:7, 189:9, 190:5, 190:21, 191:7 <b>struggled</b> [1] - 22:11 <b>struggling</b> [3] - 32:24, 36:4, 127:10 <b>stuff</b> [5] - 5:14, 28:13, 39:19, 71:23, 79:19 <b>style</b> [1] - 49:8 <b>subject</b> [11] - 24:9, 36:20, 134:23, 152:19, 155:21, 167:4, 171:2, 192:6, 204:25, 212:2, 221:13 <b>subject-matter</b> [1] - 192:6 <b>submit</b> [3] - 140:11, 173:4, 222:4 <b>submitted</b> [1] - 170:9 <b>substance</b> [1] - 25:9 <b>substantial</b> [1] - 11:16 <b>substantially</b> [1] - 9:2 <b>substructures</b> [1] - 179:21 <b>successfully</b> [1] - 221:23 <b>such-and-such</b> [3] - 67:9, 82:9 <b>sudden</b> [1] - 101:16 <b>suffer</b> [1] - 139:11 <b>sufficient</b> [3] - 166:11, 170:24, 221:6 <b>suggest</b> [8] - 68:6, 158:15, 181:7, 188:7, 203:11, 211:2, 211:19, 218:13 <b>suggested</b> [3] - 181:2, 181:16, 188:5 <b>suggesting</b> [4] - 12:15, 20:17, 180:21, 210:18 <b>suggests</b> [3] - 163:15, 179:17, 182:20 <b>Sughrue</b> [1] - 100:1 <b>suit</b> [11] - 113:18, 152:22, 152:24, 192:5, 192:9, 193:25, 194:16,	195:1, 215:20, 216:1, 221:17 <b>suitable</b> [1] - 146:23 <b>SULLIVAN</b> [1] - 2:19 <b>sum</b> [1] - 164:11 <b>summarizes</b> [1] - 160:5 <b>summary</b> [26] - 26:10, 26:23, 27:21, 28:7, 70:1, 72:14, 114:2, 132:20, 133:4, 133:23, 160:4, 160:10, 161:23, 163:12, 184:1, 184:5, 186:17, 186:23, 187:7, 188:13, 189:20, 199:7, 210:21, 210:24, 215:17, 217:17 <b>Sundermeir</b> [1] - 54:11 <b>SUNDERMEIR</b> [2] - 2:14, 54:10 <b>supplemental</b> [1] - 206:21 <b>supplied</b> [1] - 188:16 <b>supply</b> [1] - 188:24 <b>support</b> [12] - 63:12, 65:5, 133:25, 159:16, 166:12, 168:6, 170:5, 173:6, 203:25, 207:18, 215:19, 222:7 <b>supported</b> [3] - 26:3, 31:19, 95:6 <b>supporting</b> [2] - 161:7, 169:21 <b>supports</b> [4] - 21:19, 65:9, 199:6, 199:13 <b>suppose</b> [1] - 21:11 <b>supposed</b> [3] - 49:1, 49:3, 60:17 <b>supposedly</b> [1] - 58:2 <b>Supreme</b> [2] - 151:11, 169:17 <b>surely</b> [2] - 158:18, 214:17 <b>surprise</b> [1] - 98:2 <b>surrebuttal</b> [1] - 46:8 <b>survive</b> [6] - 13:7, 14:14, 51:18, 51:22, 204:15, 205:16 <b>Symantec</b> [2] - 115:11, 115:12 <b>sync</b> [2] - 140:19, 140:23 <b>synchronization</b> [13] - 106:18, 109:5, 132:19, 139:25,
--	---	---	---	--

DEANNA WARNER, CSR

202 Ashfield Court, Smyrna DE 19977

Phone: (302) 893-1158 E-mail: warnerdeanna@gmail.com

<p>141:15, 147:17, 205:8, 214:17, 215:24, 216:13, 218:23, 220:8, 221:2</p> <p><b>synchronize</b> <sup>[5]</sup> - 102:17, 114:9, 115:23, 211:12, 214:18</p> <p><b>synchronized</b> <sup>[8]</sup> - 102:5, 108:6, 115:2, 115:18, 116:25, 117:19, 219:19, 220:13</p> <p><b>synchronizing</b> <sup>[24]</sup> - 107:23, 108:16, 110:17, 110:19, 111:1, 111:17, 114:16, 114:20, 119:9, 135:18, 135:19, 139:19, 140:22, 195:6, 195:7, 195:9, 195:18, 195:23, 197:3, 198:19, 202:5, 204:3, 214:6</p> <p><b>synchronous</b> <sup>[4]</sup> - 34:16, 160:14, 161:21, 206:3</p> <p><b>synonym</b> <sup>[2]</sup> - 65:17, 74:11</p> <p><b>synopsis</b> <sup>[1]</sup> - 169:5</p> <p><b>System</b> <sup>[5]</sup> - 27:10, 44:7, 44:12, 157:9, 167:13</p> <p><b>system</b> <sup>[106]</sup> - 9:18, 12:2, 15:3, 21:21, 22:14, 25:16, 27:5, 27:6, 29:14, 29:18, 29:19, 31:3, 32:1, 32:12, 32:19, 32:20, 33:25, 34:1, 35:2, 35:24, 36:9, 37:3, 37:4, 38:11, 38:12, 38:20, 40:6, 43:17, 43:23, 43:25, 44:2, 44:4, 44:13, 50:4, 59:5, 60:12, 60:16, 61:3, 73:13, 73:17, 74:20, 75:3, 75:25, 76:3, 84:9, 88:8, 89:15, 89:19, 104:7, 104:8, 104:25, 105:1, 105:25, 113:9, 117:3, 119:17, 124:18, 131:11, 131:25, 136:4, 139:13, 143:20, 143:22, 153:1, 153:2, 153:10, 155:10,</p>	<p>157:24, 160:12, 160:18, 161:12, 165:25, 167:17, 175:23, 176:15, 182:2, 182:17, 182:21, 183:1, 183:14, 184:11, 187:22, 188:6, 196:9, 196:10, 197:7, 198:11, 200:14, 200:20, 203:14, 203:24, 204:5, 205:10, 205:12, 205:15, 206:3, 215:14, 217:5, 217:8, 218:2, 219:5, 219:18</p> <p><b>system's</b> <sup>[3]</sup> - 183:15, 183:18, 215:2</p> <p><b>system-to-system</b> <sup>[1]</sup> - 160:18</p> <p><b>system-type</b> <sup>[1]</sup> - 124:18</p> <p><b>systems</b> <sup>[54]</sup> - 25:13, 26:25, 27:2, 27:12, 29:7, 34:23, 34:25, 35:4, 35:19, 35:23, 38:4, 43:10, 43:12, 43:15, 47:25, 49:5, 69:16, 70:2, 73:4, 73:6, 73:7, 73:11, 73:15, 81:6, 87:25, 116:22, 131:10, 139:5, 139:18, 140:5, 155:7, 155:14, 160:24, 164:2, 166:1, 172:14, 183:17, 183:19, 183:22, 184:3, 184:6, 186:19, 195:12, 199:17, 199:18, 200:11, 200:17, 202:9, 203:19, 204:4, 209:7, 212:9, 219:1, 220:10</p>	<p>90:24, 91:8, 91:10, 93:19, 93:22, 93:24, 94:3, 94:6, 94:7, 94:8, 95:13, 95:18, 96:4, 100:1, 181:9, 190:9, 190:20</p> <p><b>table's</b> <sup>[1]</sup> - 190:17</p> <p><b>tables</b> <sup>[12]</sup> - 63:16, 65:22, 75:21, 75:25, 79:17, 83:5, 91:3, 93:25, 94:1, 94:4, 94:9, 94:10</p> <p><b>tabular</b> <sup>[1]</sup> - 190:13</p> <p><b>taints</b> <sup>[1]</sup> - 24:18</p> <p><b>talks</b> <sup>[15]</sup> - 22:21, 26:4, 31:20, 73:3, 73:12, 84:5, 87:24, 102:8, 108:23, 116:1, 120:11, 131:7, 136:24, 137:8, 138:12</p> <p><b>tape</b> <sup>[1]</sup> - 117:6</p> <p><b>targeted</b> <sup>[1]</sup> - 155:13</p> <p><b>task</b> <sup>[2]</sup> - 139:15, 200:21</p> <p><b>tasks</b> <sup>[1]</sup> - 76:20</p> <p><b>taught</b> <sup>[2]</sup> - 168:12, 190:14</p> <p><b>tax</b> <sup>[18]</sup> - 42:23, 43:20, 43:22, 44:17, 44:19, 44:20, 44:25, 46:1, 46:10, 52:10, 53:10, 170:8, 170:9, 170:11, 170:17, 171:1, 171:7</p> <p><b>teaching</b> <sup>[1]</sup> - 190:18</p> <p><b>Tech</b> <sup>[6]</sup> - 185:25, 186:10, 187:21, 188:25, 189:8, 225:13</p> <p><b>tech</b> <sup>[1]</sup> - 186:7</p> <p><b>technical</b> <sup>[2]</sup> - 31:22, 160:22</p> <p><b>technique</b> <sup>[1]</sup> - 58:11</p> <p><b>techniques</b> <sup>[1]</sup> - 204:21</p> <p><b>technological</b> <sup>[8]</sup> - 44:23, 155:4, 165:7, 167:21, 170:15, 170:19, 175:25</p> <p><b>technologies</b> <sup>[1]</sup> - 118:12</p> <p><b>TECHNOLOGY</b> <sup>[1]</sup> - 1:14</p> <p><b>technology</b> <sup>[25]</sup> - 3:20, 45:21, 45:24, 54:16, 135:3, 135:6, 135:11, 135:12, 135:15, 166:22, 169:25, 170:14,</p>	<p>180:3, 189:24, 190:1, 191:22, 193:7, 201:17, 207:1, 207:15, 208:7, 210:5, 210:14, 211:22, 218:9</p> <p><b>teeth</b> <sup>[3]</sup> - 89:9, 89:13, 94:20</p> <p><b>tended</b> <sup>[2]</sup> - 200:15, 204:7</p> <p><b>term</b> <sup>[12]</sup> - 9:9, 15:9, 15:13, 30:2, 30:3, 31:22, 35:7, 36:2, 59:6, 65:1, 70:13, 161:8</p> <p><b>terminated</b> <sup>[1]</sup> - 77:24</p> <p><b>terms</b> <sup>[10]</sup> - 5:2, 26:7, 45:4, 62:22, 96:22, 109:24, 111:15, 141:5, 195:3, 198:24</p> <p><b>tertiary</b> <sup>[1]</sup> - 69:23</p> <p><b>test</b> <sup>[9]</sup> - 7:24, 8:6, 9:1, 9:11, 19:18, 188:10, 191:4, 194:17, 205:16</p> <p><b>testimony</b> <sup>[6]</sup> - 33:15, 33:22, 36:21, 41:21, 41:23, 52:18</p> <p><b>text</b> <sup>[3]</sup> - 85:14, 197:1, 197:5</p> <p><b>THE</b> <sup>[158]</sup> - 1:1, 1:2, 3:1, 6:11, 6:24, 7:10, 7:18, 10:5, 11:14, 12:21, 13:22, 15:7, 17:3, 17:15, 19:2, 20:11, 21:4, 21:25, 22:20, 23:6, 23:16, 23:22, 24:22, 25:22, 26:6, 27:16, 29:22, 30:25, 32:22, 33:20, 34:9, 34:19, 35:6, 36:1, 36:24, 39:2, 40:25, 41:15, 44:16, 45:18, 46:6, 46:20, 50:11, 50:24, 53:3, 53:17, 54:4, 54:17, 55:2, 55:10, 56:2, 58:15, 59:9, 60:25, 62:7, 63:8, 63:22, 64:6, 64:14, 65:2, 65:8, 65:14, 65:23, 66:10, 67:11, 67:24, 68:9, 69:25, 70:25, 71:11, 72:24, 73:1, 74:10, 74:19, 76:2, 77:3, 78:4, 79:25, 80:10, 81:7, 81:19, 83:12, 84:10, 84:17, 84:23, 86:4, 86:17,</p>	<p>86:24, 87:20, 88:12, 89:21, 91:14, 92:8, 92:17, 93:3, 94:11, 95:22, 96:3, 96:22, 97:16, 98:18, 99:16, 99:19, 100:4, 100:13, 102:19, 102:25, 103:16, 105:9, 105:15, 105:23, 107:7, 107:11, 108:13, 110:18, 110:23, 112:10, 113:17, 115:20, 118:3, 118:9, 118:13, 120:20, 121:25, 123:19, 124:6, 124:12, 124:22, 126:8, 126:24, 127:5, 127:18, 130:8, 130:17, 130:21, 131:5, 132:7, 132:13, 134:2, 135:4, 136:23, 137:14, 138:10, 139:21, 140:6, 140:25, 141:11, 143:2, 144:10, 145:12, 145:16, 146:6, 146:18, 147:25, 149:22, 223:9, 223:16, 223:19</p> <p><b>themselves</b> <sup>[18]</sup> - 5:19, 54:7, 57:21, 58:12, 60:19, 95:3, 99:21, 106:4, 109:12, 120:12, 122:20, 126:13, 156:16, 158:15, 178:19, 181:4, 181:24, 187:12</p> <p><b>thereafter</b> <sup>[1]</sup> - 130:12</p> <p><b>therefore</b> <sup>[8]</sup> - 13:19, 17:22, 103:9, 171:11, 174:17, 182:7, 191:13, 218:16</p> <p><b>therein</b> <sup>[2]</sup> - 83:17, 199:13</p> <p><b>Thereupon</b> <sup>[1]</sup> - 224:13</p> <p><b>they've</b> <sup>[4]</sup> - 12:9, 42:18, 147:3, 147:4</p> <p><b>thinking</b> <sup>[9]</sup> - 57:20, 60:25, 76:3, 76:4, 76:8, 98:21, 99:2, 131:17, 146:8</p> <p><b>thinks</b> <sup>[1]</sup> - 219:21</p> <p><b>third</b> <sup>[13]</sup> - 3:16, 4:22,</p>
---	---	---	---	--

DEANNA WARNER, CSR

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Phone: (302) 893-1158 E-mail: warnerdeanna@gmail.com

<p>121:24, 122:12, 122:14, 122:15, 127:8, 177:18, 192:25, 197:9, 197:24, 198:4, 209:16 <b>THOMAS</b><sup>[1]</sup> - 2:3 <b>Thomas</b><sup>[1]</sup> - 6:5 <b>thoughts</b><sup>[2]</sup> - 52:23, 149:15 <b>thousand</b><sup>[1]</sup> - 56:4 <b>thousand-foot-view</b> <sup>[1]</sup> - 56:4 <b>three</b><sup>[25]</sup> - 3:3, 9:14, 11:17, 19:15, 92:18, 101:15, 107:11, 121:21, 150:5, 150:10, 150:24, 153:6, 153:11, 153:13, 153:17, 154:7, 157:3, 174:3, 174:8, 174:12, 179:24, 192:13, 197:11, 198:15, 222:14 <b>throughout</b><sup>[3]</sup> - 96:17, 187:11, 195:4 <b>thrown</b><sup>[1]</sup> - 109:25 <b>thumb</b><sup>[3]</sup> - 103:13, 120:12, 137:6 <b>tied</b><sup>[1]</sup> - 179:22 <b>title</b><sup>[11]</sup> - 21:9, 113:25, 132:17, 133:3, 174:9, 208:25, 215:4, 215:6, 215:9, 216:19, 217:14 <b>titled</b><sup>[2]</sup> - 152:25, 194:22 <b>titles</b><sup>[2]</sup> - 215:4, 215:11 <b>TO</b><sup>[3]</sup> - 1:19, 1:21, 225:19 <b>today</b><sup>[63]</sup> - 3:3, 3:5, 3:8, 3:13, 3:16, 3:24, 4:1, 4:15, 4:21, 5:11, 7:21, 7:22, 24:1, 33:21, 38:1, 41:3, 41:19, 41:20, 54:13, 54:15, 55:11, 108:12, 148:17, 148:20, 149:4, 150:1, 150:9, 150:12, 150:15, 150:18, 151:1, 151:10, 151:21, 151:24, 152:8, 152:12, 154:2, 157:10, 162:19, 164:7, 165:4,</p>	<p>165:20, 167:1, 173:2, 173:25, 180:17, 184:19, 185:3, 185:4, 185:9, 191:21, 192:11, 192:19, 194:7, 195:1, 196:19, 220:2, 220:10, 222:3, 222:16, 223:23, 224:5, 224:11 <b>today's</b><sup>[4]</sup> - 5:13, 173:3, 222:4, 224:7 <b>together</b><sup>[11]</sup> - 18:9, 25:14, 29:8, 68:18, 68:24, 97:14, 98:22, 99:3, 104:23, 154:5, 209:25 <b>tons</b><sup>[1]</sup> - 83:17 <b>tool</b><sup>[3]</sup> - 75:13, 82:5, 102:16 <b>top</b><sup>[3]</sup> - 18:5, 88:5, 139:6 <b>TOPIA</b><sup>[1]</sup> - 1:14 <b>Topia</b><sup>[11]</sup> - 3:17, 3:20, 99:17, 99:18, 118:12, 150:7, 191:22, 193:6, 223:17, 225:12 <b>total</b><sup>[2]</sup> - 14:15, 110:14 <b>tout</b><sup>[1]</sup> - 164:9 <b>touting</b><sup>[2]</sup> - 161:16, 164:1 <b>toward</b><sup>[1]</sup> - 175:25 <b>towards</b><sup>[1]</sup> - 116:5 <b>trace</b><sup>[3]</sup> - 48:10, 208:1 <b>track</b><sup>[2]</sup> - 57:2, 157:21 <b>trademark</b><sup>[1]</sup> - 153:5 <b>traditionally</b><sup>[1]</sup> - 34:23 <b>transcribe</b><sup>[1]</sup> - 224:7 <b>transcribes</b><sup>[1]</sup> - 150:15 <b>TRANSCRIPT</b><sup>[1]</sup> - 1:19 <b>transcript</b><sup>[3]</sup> - 224:6, 225:15, 225:17 <b>transfer</b><sup>[19]</sup> - 25:20, 109:23, 115:23, 119:5, 121:6, 123:17, 125:25, 126:6, 132:4, 136:22, 139:24, 198:3, 212:9, 213:13, 215:5, 215:7, 216:10, 217:3, 221:10 <b>transferable</b><sup>[2]</sup> - 156:24, 159:6</p>	<p><b>transferred</b><sup>[12]</sup> - 120:25, 125:22, 130:11, 202:14, 212:23, 212:25, 213:3, 214:10, 214:12, 214:14, 217:2, 217:10 <b>transferring</b><sup>[12]</sup> - 108:18, 135:24, 136:12, 136:13, 136:19, 195:10, 195:13, 198:13, 199:4, 201:8, 203:7, 216:9 <b>transfers</b><sup>[5]</sup> - 197:14, 198:7, 199:1, 211:8, 217:8 <b>transform</b><sup>[3]</sup> - 164:24, 202:24, 211:20 <b>transformed</b><sup>[1]</sup> - 204:22 <b>transition</b><sup>[8]</sup> - 53:20, 53:23, 77:22, 90:23, 90:24, 91:8, 91:9, 92:5 <b>transitions</b><sup>[2]</sup> - 82:15, 92:4 <b>transmission</b><sup>[1]</sup> - 207:8 <b>Transmission</b><sup>[1]</sup> - 175:8 <b>transmit</b><sup>[3]</sup> - 47:23, 140:23, 177:5 <b>transmitting</b><sup>[3]</sup> - 157:1, 206:1, 217:16 <b>treat</b><sup>[2]</sup> - 193:18, 195:15 <b>treated</b><sup>[1]</sup> - 10:22 <b>tremendous</b><sup>[1]</sup> - 117:4 <b>tricks</b><sup>[1]</sup> - 141:12 <b>tried</b><sup>[1]</sup> - 125:13 <b>tries</b><sup>[2]</sup> - 73:8, 102:7 <b>triggers</b><sup>[1]</sup> - 73:19 <b>true</b><sup>[6]</sup> - 96:18, 103:10, 161:10, 180:7, 181:20, 225:18 <b>truly</b><sup>[1]</sup> - 22:17 <b>truncated</b><sup>[1]</sup> - 223:25 <b>truthfully</b><sup>[1]</sup> - 110:15 <b>try</b><sup>[8]</sup> - 5:7, 11:14, 46:22, 47:1, 51:10, 73:16, 94:15, 149:16 <b>trying</b><sup>[13]</sup> - 46:2, 64:6, 69:8, 69:14, 70:12, 88:19, 92:24, 119:11, 124:23, 125:5, 125:9,</p>	<p>128:15, 223:5 <b>Tunnell</b><sup>[1]</sup> - 54:23 <b>TUNNELL</b><sup>[1]</sup> - 2:17 <b>turn</b><sup>[13]</sup> - 5:17, 55:5, 71:7, 81:11, 89:17, 89:22, 94:13, 100:14, 164:20, 174:24, 183:8, 202:19, 212:13 <b>turned</b><sup>[2]</sup> - 62:25, 137:21 <b>turning</b><sup>[2]</sup> - 183:10, 197:1 <b>turns</b><sup>[2]</sup> - 208:23, 216:17 <b>tweaks</b><sup>[1]</sup> - 37:16 <b>twice</b><sup>[1]</sup> - 50:12 <b>Two</b><sup>[1]</sup> - 109:22 <b>two</b><sup>[80]</sup> - 11:19, 12:24, 14:21, 16:14, 17:3, 22:5, 25:13, 27:12, 32:14, 36:7, 36:11, 37:17, 41:2, 41:9, 48:3, 48:4, 49:5, 49:14, 50:23, 51:24, 68:1, 73:1, 84:2, 84:10, 91:17, 92:17, 101:17, 104:8, 104:21, 106:3, 109:20, 113:23, 114:4, 128:8, 131:14, 132:15, 132:24, 133:1, 133:6, 133:12, 133:14, 134:3, 137:7, 149:2, 151:14, 153:7, 156:22, 157:16, 158:7, 158:10, 159:3, 159:13, 159:20, 162:22, 162:23, 164:2, 164:9, 165:17, 165:21, 165:25, 166:7, 166:24, 168:19, 169:7, 172:8, 181:15, 193:11, 207:20, 209:3, 209:25, 211:6, 214:1, 214:24, 215:18, 216:8, 218:11, 219:2, 220:15, 222:1, 222:10 <b>two-step</b><sup>[1]</sup> - 16:14 <b>two-way</b><sup>[1]</sup> - 109:20 <b>Two-Way</b><sup>[1]</sup> - 109:22 <b>type</b><sup>[42]</sup> - 31:11, 40:20, 56:23, 58:16, 58:17, 59:8, 59:13,</p>	<p>59:19, 60:21, 61:19, 62:2, 62:21, 66:19, 68:14, 70:19, 71:19, 76:5, 77:2, 81:3, 83:21, 84:8, 85:24, 86:1, 86:5, 93:17, 93:18, 94:2, 96:14, 97:10, 124:2, 124:18, 132:8, 134:23, 158:2, 158:9, 178:2, 181:1, 181:10, 190:7, 214:19, 219:16, 220:12 <b>typed</b><sup>[1]</sup> - 225:16 <b>types</b><sup>[43]</sup> - 29:21, 34:4, 34:13, 34:24, 34:25, 35:4, 35:22, 36:22, 43:11, 44:6, 57:1, 57:13, 58:9, 58:23, 69:18, 81:14, 81:16, 81:18, 81:21, 83:21, 86:11, 86:25, 87:1, 90:5, 95:1, 95:4, 96:25, 97:5, 97:9, 124:17, 157:16, 177:5, 178:4, 178:9, 180:14, 180:23, 180:24, 181:8, 183:7, 184:7, 184:22, 185:14, 188:20 <b>typewritten</b><sup>[1]</sup> - 225:18 <b>typically</b><sup>[4]</sup> - 11:2, 18:20, 19:18, 48:1</p>
<b>U</b>				
<p><b>U.S</b><sup>[2]</sup> - 152:24, 171:5 <b>U.S.M.J</b><sup>[1]</sup> - 1:22 <b>ubiquitous</b><sup>[1]</sup> - 125:3 <b>UK</b><sup>[7]</sup> - 1:3, 2:4, 3:8, 152:12, 152:22, 171:1, 225:9 <b>ultimate</b><sup>[1]</sup> - 104:24 <b>ultimately</b><sup>[3]</sup> - 153:5, 166:5, 209:11 <b>unavailability</b><sup>[3]</sup> - 44:12, 44:15, 210:8 <b>uncertainty</b><sup>[3]</sup> - 44:23, 170:16, 170:19 <b>unclaimed</b><sup>[1]</sup> - 220:15 <b>unclear</b><sup>[1]</sup> - 222:18 <b>unconventional</b><sup>[9]</sup> - 165:24, 166:16, 166:22, 167:18,</p>				

DEANNA WARNER, CSR

202 Ashfield Court, Smyrna DE 19977

Phone: (302) 893-1158 E-mail: warnerdeanna@gmail.com

167:21, 168:1, 169:24, 188:11, 211:21 <b>unconventionality</b> [1] - 45:4 <b>under</b> [9] - 8:6, 9:10, 9:25, 16:22, 19:16, 53:6, 171:5, 191:18, 205:1 <b>underpins</b> [1] - 14:19 <b>underscore</b> [1] - 160:20 <b>underscores</b> [1] - 161:25 <b>underscoring</b> [1] - 127:1 <b>understandable</b> [2] - 21:12, 37:12 <b>understandably</b> [1] - 184:10 <b>understood</b> [5] - 165:11, 188:23, 189:10, 194:10, 204:20 <b>undertook</b> [1] - 43:17 <b>unduly</b> [3] - 42:7, 168:3, 169:23 <b>uninterrupted</b> [1] - 46:23 <b>unique</b> [1] - 80:25 <b>uniquely</b> [3] - 80:13, 177:13, 183:3 <b>UNITED</b> [1] - 1:1 <b>United</b> [6] - 153:4, 154:18, 170:9, 174:3, 174:5, 174:6 <b>University</b> [3] - 143:10, 145:8, 201:17 <b>unknown</b> [1] - 107:2 <b>unless</b> [6] - 5:15, 77:24, 91:8, 152:8, 194:8, 194:13 <b>unlike</b> [5] - 85:12, 189:8, 207:16, 215:20, 217:13 <b>unnecessary</b> [1] - 200:3 <b>unpublished</b> [1] - 140:13 <b>unrelated</b> [1] - 187:20 <b>unspecified</b> [1] - 61:13 <b>untethered</b> [2] - 154:21, 196:3 <b>up</b> [40] - 4:25, 18:11, 28:21, 32:2, 32:4, 35:17, 43:21, 46:4, 56:3, 57:15, 60:11, 62:11, 66:24, 71:11,	79:12, 90:3, 102:12, 103:20, 104:21, 111:8, 112:20, 115:6, 120:16, 120:22, 123:17, 125:12, 129:20, 131:12, 133:5, 133:8, 133:11, 134:24, 135:19, 143:5, 143:15, 162:21, 177:2, 211:23, 219:5 <b>update</b> [7] - 101:23, 104:1, 115:10, 116:14, 204:8, 215:5, 219:18 <b>updated</b> [10] - 101:7, 103:17, 104:5, 198:16, 199:4, 213:5, 213:7, 213:8, 213:15, 213:22 <b>updates</b> [1] - 219:18 <b>updating</b> [5] - 102:11, 103:2, 103:15, 118:20, 220:13 <b>URQUHART</b> [1] - 2:19 <b>usage</b> [5] - 102:2, 186:23, 187:3, 188:13, 188:19 <b>useful</b> [1] - 196:8 <b>user</b> [122] - 12:6, 17:7, 17:21, 17:22, 17:24, 18:1, 28:23, 28:25, 29:10, 31:4, 31:8, 32:6, 32:8, 32:12, 33:11, 35:8, 35:16, 35:19, 35:21, 36:2, 36:11, 36:16, 36:17, 36:19, 38:19, 38:22, 39:5, 40:3, 40:6, 40:11, 40:16, 40:18, 57:15, 57:16, 57:24, 58:4, 58:6, 59:3, 59:4, 59:14, 60:12, 60:22, 66:20, 71:24, 75:10, 78:11, 86:2, 86:6, 87:13, 87:15, 88:10, 89:18, 95:10, 95:12, 95:19, 95:20, 96:4, 96:5, 96:20, 98:7, 104:8, 104:21, 105:2, 105:4, 105:6, 106:6, 109:2, 117:15, 120:2, 120:8, 120:15, 120:18, 120:23, 121:5, 123:15, 125:23, 126:1, 126:5, 130:1, 130:5, 130:14, 130:15,	130:22, 131:1, 136:7, 136:8, 137:10, 137:15, 139:18, 143:5, 143:19, 144:1, 145:7, 145:11, 157:5, 157:12, 159:1, 162:14, 162:18, 163:10, 166:4, 167:16, 183:15, 188:12, 196:11, 197:10, 197:17, 197:25, 201:11, 202:11, 205:7, 205:8, 212:10, 212:15, 217:6, 219:8, 219:17, 220:3 <b>user's</b> [18] - 10:2, 17:10, 24:13, 35:11, 35:12, 35:14, 36:3, 36:4, 122:14, 123:7, 123:10, 123:12, 129:25, 135:25, 136:11, 159:5, 196:13, 204:8 <b>user-based</b> [1] - 120:2 <b>user-centric</b> [3] - 120:2, 120:15, 120:18 <b>users</b> [8] - 119:10, 119:16, 186:20, 186:22, 187:7, 187:23, 189:1, 206:18 <b>users'</b> [1] - 199:17 <b>uses</b> [5] - 9:9, 40:12, 131:19, 138:13, 198:23 <b>utilization</b> [5] - 132:14, 135:10, 179:3, 181:7, 215:2 <b>utilize</b> [10] - 31:11, 77:4, 113:19, 118:18, 128:4, 135:6, 149:13, 157:17, 195:18, 200:10 <b>utilized</b> [3] - 56:12, 71:3, 144:11 <b>utilizing</b> [1] - 214:19	<b>various</b> [19] - 29:2, 55:17, 75:7, 77:19, 80:16, 82:15, 83:1, 87:18, 91:1, 151:8, 151:19, 151:23, 177:5, 178:23, 179:4, 183:7, 184:6, 199:17, 199:24 <b>versa</b> [1] - 80:8 <b>version</b> [8] - 103:20, 196:12, 198:3, 198:5, 198:9, 213:8, 213:15, 213:22 <b>versions</b> [18] - 108:16, 111:2, 111:11, 111:17, 195:6, 195:8, 195:9, 195:19, 195:23, 197:4, 198:16, 198:19, 199:4, 202:5, 211:12, 214:6, 214:18, 216:13 <b>versus</b> [20] - 3:8, 3:14, 3:20, 61:24, 63:2, 115:11, 115:12, 152:3, 152:13, 169:5, 172:14, 173:16, 175:8, 176:2, 186:1, 186:4, 191:22, 201:18, 205:21, 206:25 <b>via</b> [1] - 160:15 <b>vice</b> [1] - 80:8 <b>video</b> [1] - 129:17 <b>view</b> [14] - 15:16, 17:7, 25:5, 25:10, 25:25, 35:13, 56:4, 180:7, 184:10, 184:16, 205:10, 212:13, 220:12, 221:5 <b>viewed</b> [2] - 13:14, 214:22 <b>views</b> [2] - 63:17, 180:19 <b>visit</b> [1] - 101:17 <b>VPN</b> [2] - 34:15, 35:10 <b>vs</b> [6] - 1:5, 1:11, 1:16, 225:9, 225:11, 225:13	102:14, 103:14 <b>walked</b> [2] - 22:12, 23:10 <b>Walter</b> [1] - 140:21 <b>wants</b> [9] - 7:4, 21:13, 59:14, 66:20, 78:11, 78:23, 94:16, 94:22, 95:13 <b>Warner</b> [1] - 225:24 <b>warner</b> [2] - 4:8, 225:4 <b>ways</b> [13] - 28:19, 76:7, 100:21, 110:16, 111:5, 111:21, 111:22, 114:8, 114:21, 136:21, 136:24, 139:17, 140:18 <b>web</b> [3] - 34:6, 34:7, 160:15 <b>weeks</b> [2] - 98:23, 151:14 <b>welcome</b> [1] - 3:2 <b>well-understood</b> [2] - 165:11, 204:20 <b>Wells</b> [1] - 175:8 <b>Westlaw</b> [1] - 117:1 <b>whatsoever</b> [2] - 22:19, 48:24 <b>whereas</b> [2] - 64:14, 129:15 <b>wherein</b> [4] - 157:4, 157:8, 162:16, 207:22 <b>whole</b> [11] - 19:3, 20:13, 56:20, 66:2, 111:25, 136:4, 138:24, 143:13, 155:20, 156:1, 160:20 <b>wide</b> [1] - 186:20 <b>wildly</b> [1] - 109:7 <b>willful</b> [1] - 191:16 <b>wish</b> [3] - 93:2, 144:1 <b>WOLFF</b> [27] - 2:13, 72:23, 72:25, 73:2, 74:13, 75:5, 76:16, 77:8, 78:12, 80:9, 80:11, 81:17, 82:2, 84:2, 84:15, 84:21, 85:19, 86:9, 86:19, 87:6, 88:4, 89:2, 89:25, 91:20, 92:15, 93:2, 93:17 <b>Wolff</b> [3] - 71:12, 71:13, 94:11 <b>wolff</b> [1] - 54:13 <b>woman</b> [1] - 23:3 <b>wonder</b> [1] - 137:16 <b>wondering</b> [2] - 138:10, 184:20
			<b>W</b>	
			<b>wait</b> [5] - 115:9, 115:19, 117:17, 130:3, 130:19 <b>waiters</b> [1] - 108:2 <b>waiver</b> [1] - 14:17 <b>walk</b> [3] - 78:1, 78:20	

DEANNA WARNER, CSR

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Phone: (302) 893-1158 E-mail: warnerdeanna@gmail.com



<p><b>word</b> <sup>[5]</sup> - 65:14, 66:19, 131:13, 138:14, 154:22</p> <p><b>wording</b> <sup>[1]</sup> - 210:10</p> <p><b>words</b> <sup>[25]</sup> - 10:12, 10:14, 10:19, 28:12, 31:1, 39:8, 41:24, 45:16, 58:9, 66:16, 84:1, 91:17, 97:2, 102:17, 110:20, 112:18, 115:9, 126:15, 127:1, 127:7, 166:24, 172:1, 179:16, 201:5, 220:14</p> <p><b>works</b> <sup>[4]</sup> - 107:21, 117:13, 132:18, 145:4</p> <p><b>world</b> <sup>[10]</sup> - 14:10, 71:18, 110:25, 111:5, 112:10, 115:3, 124:6, 196:4, 198:21</p> <p><b>worry</b> <sup>[2]</sup> - 121:4, 125:8</p> <p><b>worse</b> <sup>[1]</sup> - 200:21</p> <p><b>worth</b> <sup>[1]</sup> - 5:13</p> <p><b>Wow</b> <sup>[1]</sup> - 108:4</p> <p><b>writ</b> <sup>[2]</sup> - 37:2, 164:2</p> <p><b>write</b> <sup>[13]</sup> - 73:15, 73:17, 73:19, 73:23, 73:24, 73:25, 74:17, 75:8, 87:12, 87:13, 88:9, 90:18, 142:19</p> <p><b>writing</b> <sup>[5]</sup> - 82:23, 90:1, 90:3, 91:12, 183:18</p> <p><b>written</b> <sup>[15]</sup> - 28:18, 65:19, 69:5, 73:22, 74:8, 77:6, 77:12, 82:24, 119:13, 123:24, 146:6, 150:14, 174:13, 183:10, 224:6</p>	<p><b>yourself</b> <sup>[1]</sup> - 134:4</p> <p><b>Z</b></p> <p><b>zero</b> <sup>[3]</sup> - 106:20, 144:15, 147:22</p>
<b>X</b>	
<p><b>Xes</b> <sup>[1]</sup> - 48:22</p> <p><b>XML</b> <sup>[3]</sup> - 34:15, 36:9, 160:15</p>	
<b>Y</b>	
<p><b>years</b> <sup>[2]</sup> - 23:12, 49:7</p> <p><b>yellow</b> <sup>[1]</sup> - 117:1</p> <p><b>yesterday</b> <sup>[1]</sup> - 19:3</p> <p><b>yield</b> <sup>[1]</sup> - 156:10</p> <p><b>Ying</b> <sup>[1]</sup> - 54:22</p> <p><b>YING</b> <sup>[2]</sup> - 2:17, 54:21</p>	

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